INSTITUTIONAL ARBITRATION : A CASE STUDY IN DELHI

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- G . Aruna

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DECLARATION

This is to declare that the dissertation titled **"INSTITUTIONAL ARBITRATION: A CASE STUDY IN DELHI"**,submitted by G. Aruna in partial fulfillment of the requirements for the award of the **Degree of Master of Philosophy of Jawaharlal Nehru University** has not been previously submitted for the award of any degree of this or any other university

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We recommended that this dissertation be placed before the examiners for evaluation.

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CHAPTER-I

INTRODUCTION

Present era is witnessing the ever increasing international commerce and ever decreasing distances between the nations of the world. The world is shrinking into a global village, the resultant effect is, the global market place dynamics is becoming vibrant. The last few decades have witnessed a considerable increase in international trade. Rapid globalization, urbanizations and industrializations resulted in a significant increase in commercial disputes. In that context, dispute resolution procedures alternative to traditional court system have came to receive much attention. Arbitration has become the pre-eminent means of dispute resolution in international commerce yet often referred to an 'alternative' form of dispute resolution in domestic front. In practice, international commercial arbitration is more appropriately considered not merely as an alternative to national court litigation, but rather as one of the primary means, along with national court litigation, for resolving disputes arising out of international commercial contracts.

Dispute resolution in India

Authoritative settlement of disputes between individuals; between the state and its instrumentalities and individuals is regarded as a sovereign functions of the state exercised by the judicial branch of the Government. Efficient and modern dispute resolution system is a must to win the confidence of investors. Judicial system in India is now facing a critical situation. Indian courts are not able to keep the pace of disposal of cases with the filing. Arrears have mounted up to alarming figures. Indeed law's delay is not a new factor. Courts are required to follow certain procedures in order to maintain the principles of natural justice and give the rural parties equal opportunity to present their respective cases. The procedures are highly time-consuming. Though there is no empirical data but it is strongly felt that lack of proper, credible and flexible dispute resolution system is posing as threat to potential investors and detracting foreign investments in India. It is in this context, Alternative Dispute Resolution (ADR) processes, especially arbitration is gaining momentum.

In India 95% of the arbitrations are adhoc, only 5% constitutes institutional arbitrations. Adhoc arbitrations due to their proximity with courts are often referred as

court-adjunct arbitrations and inherited the maximum lacunas/vices of traditional public justice system. The 'Casual fashion'[1] in which these adhoc arbitrations are conducted and awards have been challenged had made 'lawyers laugh and legal philosophers weep'.[2] In such scenario, a strong need is felt for to strengthen and support the institutional arbitration in India.

Keeping in mind the broader goal of exploring the lines between the quality of legal performance and economic growth, present study attempts to critically evaluate institutional arbitration in India as a growing/potential dispute resolution mechanism. Following are the objectives of the study:

(i) To study the present status of arbitral institutions and their management in the existing context.

(ii) Modalities for strengthening the institutional arbitration.

(iii) To assess and analyze the capacity of arbitral institutions in reducing the burden as courts.

(iv) To suggest a frame work for ensuring proper management of arbitral institutions.

To this end, this study focus on empirical inquiry into the arbitration as practiced and developed in India, the status of institutions of arbitration in India; incentive system associated there with by lightly focusing on construction industry and attitude of Government towards institutional arbitrations. This study tries to focus and find out answers to the following questions:-

1. Whether institutional arbitration has emerged as an effective legal institution in India?
2. Whether procedure followed by the arbitral institution is conducive to incentive system associated therewith?
3. Whether attitude of Judiciary and Government is towards promoting the institutional arbitration?

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[1] 176th Report of Law Commission of India, 2001, 179

[2] Thomas Ajay, Light at the end of the Tunnel,9.

Data

In order to meet out the objective need of the study both primary and secondary data have been used in the study. For this study two institutions were selected from the national capital region, Delhi, they are a) International Centre for Alternate Dispute Resolution (ICADR) and b) London Court of Institutional Arbitration (LCIA-India). These two institutions represents two different sectors, like ICADR is a government funded body associated closely with the Government. LCIA-India is on other hand a private and not-for-profit company. Apart from that ICADR is an institution established 16 years back whereas LCIA-India is a budding/emerging institution.

Source of Information

Two separate questionnaires/schedules were prepared for gathering requisite information. One of these questionnaires was meant for extracting information from the institutions and other for officials of the institutions. Informal discussions and meetings were also held with the government officials, retired legal and civil servants, advocates and other legal experts.

Frame work of the Study

In this study, the evolution of arbitration law and practice in India has been explored. Chapter I of this study lays out an introduction to the basic ADR techniques, history of arbitration in India and various forms of arbitration. Chapter II explores the law of arbitration in India and statutory frame work, while chapter III deals with institutional arbitration, specially dealing with prominent and upcoming arbitral institutions located in Delhi. Chapter IV deals with critical analysis of data collected; the incentive system associated with arbitral institutions, considerably focusing on construction industry and also offers a series of recommendations for improvement of the situation.

History of Arbitration in India

The intervention of a third party may be a private person, governmental agency or other institution can facilitate conflict resolution between disputing parties. Settlement of disputes by a private third party is not a new concept but imbibed in the dawn of human civilization. Arbitration is a form of adjudicatory mechanism through third party the

origin of which can be traced in ancient India and also among Greeks, Roman and Chinese.

In ancient India, Hindu civilization expressly encouraged the settlement of differences by tribunals chosen by the parties themselves, whose decision is to be accepted as final and conclusive between parties. Apart from the courts established by the king (where the king or chief justice appointed by the king presided) there were other tribunals recognized in the ancient texts and digests of Hindu law. According to 'Smritis', law suits were decided by three types of popular courts namely, Puga/gana, srenis and kulas. 'Smritis' speak of the authority of these agencies to decide law suits. These courts mentioned by Yagnavalka and Narada were practically arbitration tribunals. Broadly speaking, the 'Pugas' were local courts. 'Srenis' were operated by guilds of persons engaged in the same business or profession and 'kulas' were concerned with social matters of members of particular community. These were all private tribunals, not constituted by the king. They resembled arbitrators to that extent. Against the decisions of these arbitration courts, appeals were provided to the courts of judges appointed by the king and ultimately to the king himself. In some cases, there was an appeal from one arbitration court to another.[3]

Coming to the mediaeval India, there were Panchayats. The Panchayats were territorial such as village Panchayats and sectarians such as Panchayats of different castes and creeds. The Panchayats were held in great veneration. The 'panchas' were regarded as 'panch parameswar' before whom none dared to speak falsehood. The Panchayat proceeded in formal way untrammeled by technicalities of procedure and laws of evidence. The simple and informal system of arbitration through the Panchayats, though useful was ineffective to deal with complexities arising out of advancement in social and economic spheres. Traces of Panchayats can still be found among Scheduled Castes/Tribes and Backward classes where they exercise considerable influence in many social and caste related matters.[4]

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[3] Chawla S.K.,Arbitration and Conciliation: practice & procedure,34.
[4] Chawla S.K.,Arbitration and Conciliation: practice & procedure,44.

After the advent of British Rule in India Regulations were framed in the presidencies of Bengal, Madras and Bombay. Those Regulations also provided for arbitration though their provisions were not uniform nor were they drawn very elaborately. In 1834, Lord William Bentick became the first Governor General of India and the Legislative Council of India came to be established. The council's first enactment to regulate the procedure of civil courts, was passed as Act VIII of 1859. Sections 312 to 327 of that Act dealt with arbitrations without intervention of the court. That Act was repealed by Act X of 1877 which made no change in the law relating to arbitration.[5]

The code of civil procedure was again revised in 1882 which repeated the same provisions about references of arbitration with or without the intervention of court. There was yet no provisions about reference of future disputes to arbitration. The Indian Arbitration Act, 1899 on the model of English Arbitration Act, 1889 was passed which was applicable to presidency towns and was later on extended to few more commercial Towns. The second schedule to the code of civil procedure, 1908 contained similar provision about arbitration which applied to the rest of the country. A need was felt that the provisions of arbitration should be transferred into a comprehensive and separate Act. This led to the enactment of Indian Arbitration Act 1940 which repealed the provisions relating to the arbitration in code of civil procedure. Act of 1940, as its preamble showed consolidated and amended the law relating to arbitration in British India.[6]

The Arbitration Act, 1940 did not deal with foreign awards. The Geneva protocol on Arbitration and the Geneva Convention on the execution of Foreign Arbitral Awards 1927 were implemented in India by the Arbitration (protocol & convention) Act, 1937. The New York convention 1958 on the Recognition and enforcement of Foreign Arbitral Awards was implemented in India by the enactment of the Foreign Awards (Recognition and Enforcement) Act, 1961. It was felt that the 1940 Act which contained the general law of arbitration had become outdated. The Law Commission of India, several representative bodies of trade and industry and experts in the field of arbitration proposed

[5] Supra
[6] Chawla S.K.,Arbitration and Conciliation: practice & procedure,44.

amendments to the Act to make it more responsive to contemporary requirements. Like arbitration, conciliation was also getting increasing world wide recognition as an instrument for settlement of disputes but there was no general law on the subject of conciliation in India.

The United Nations Commission on International Trade Law (UNCITRAL) adopted the UNCITRAL Model Law on International Commercial Arbitration in 1985 and UNCITRAL conciliation Rules in 1980. the Model Law and Rules were recommended by the General Assembly of the United Nations to all the countries for adoption in their own laws.

Arbitration and conciliation Act, 1996 came to be passed on 16-08-1996 taking into account UNCITRAL Model Law and Rules and also vastly making amendments in the law relating to domestic arbitration contained in 1940 Act. The 1996 Act repealed the Arbitration Act, 1940, the Arbitration (protocol and convention) Act, 1937 and Foreign Awards (Recognition and Enforcement) Act, 1961. It also repealed the Arbitration and Conciliation (Third) ordinance 1996 which was in promulgation before that Act came into force. The 1996 Act seeks to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto.

What is Arbitration?

Generally speaking arbitration is the reference of a dispute or difference between two or more parties for adjudication to a person or person other than competent court of law. It is a less formal means of dispute resolution undertaken largely outside the sphere of formal public law in which two or more parties authorize a neutral third party or panel to decide their dispute. In popular parlance, arbitration is a private process set-up by the parties as a substitute for court litigation to obtain a decision on their disputes.

According to Ronald Bernstein, "where two or more persons agree that a dispute or a potential dispute between them shall be decided in a legally binding way by one or more impartial person in a judicial manner that is upon evidence put up before him or them, the agreement is called an arbitration agreement or submission to an agreement.'

The essence of arbitration is that some dispute is referred by the parties for settlement to a tribunal of their own choosing instead of court.

A definition of 'arbitrator' may well also give the meaning of 'arbitration' for unless a person is an arbitrator, the proceedings conducted by him would not amount to arbitration. According to Russel, an arbitrator is neither more nor less than a private judge of a private court (called as arbitral tribunal) who gives a private judgment (award); arbitrator is not a mere investigator but a person who gives his decision in accordance with some recognized system of law and the rules of natural justice. Arbitrators and judges are partners in the business of dispensing justice, the judges in the public sector and the arbitrator in the private sector. There exists negotiation, mediation and conciliation as a dispute resolution mechanisms. Let us discuss about these concepts in brief.

(a) Negotiation:- Negotiation consists of mutual discussion by the parties of dispute or difference with a view to find out how they can settle their dispute. The end of the process of negotiation is agreement between parties. Negotiation entails bargaining. During negotiation, each party endeavors to obtain the best possible solution in its favour. Each party puts forward the minimum it is prepared to accept in settlement of mutual claims or the maximum it is prepared to concede. Depending on the other party's response, the party modifies its minimum demand or maximum concession. If either party adheres to its demand or the concession it is prepared to make and the other party does not accept the demand/concession, negotiation breaks down. On the other hand, if the parties find mutually acceptable terms they are most likely to accept them and the dispute is resolved. In a genuine negotiation each party tries to understand the other party's demand and meet it, if it is possible even though partially. Negation is the most common mode by which parties resolve their disputes without coming to the notice of third parties.

(b) Mediation and Conciliation:- When there is absence of communication between the parties, either due to initial hostility generated by the postures adapted during negotiations, there will be a need for revival of communication to arrive at a settlement of the dispute without recourse to litigation. This can happen if a third party intervene either as a mediator or conciliator. The distinction between mediator and a conciliator is

difficult to make. In the literature on international law, a mediator is understood as one who merely serves as a conduit pipe and simply passes on what each party states to the other party without any proposals emanating from him for settlement. On the other hand, in conciliation, the third party intermediary puts forward different alternative proposals for settlement.

The intermediary's role is a difficult one. If either party feels that the intermediary is biased against it or using the process of communication in a manner disadvantageous to it, or to coerce it to accept a particular settlement not agreeable to it, it will stop communicating with the intermediary. The constructive role of intermediary lies in putting forward to the parties as many alternative bases of settlement as possible without making them feel that the intermediary is not based in favour of either or is deliberately acting adverse to its interests. It is also difficult to maintain a clear line of demarcation between mediation and conciliation. A mediator is like to make directly or indirectly some basis for settlement and what is purely mediation may slowly slide into conciliation. On the other hand, a conciliator may slowly assume the passive role of the mediator.

In negotiation, mediation and conciliation a settlement is reached by finding the terms agreeable to both the parties. Each party may find in the particular agreed settlement some advantage to be gained which outweighs the loss that might be suffered. The settlement is just consent of the parties. If it is not opposed to public policy, there can be no basis to challenge its enforceability. Arbitration involve a decision by a third party, irrespective of assent and dissent of either party. It is based upon the findings of fact by the third party and the applications of the relevant legal rules or principles to the so determined. In negotiation, a party may adopt a recalcitrant attitude and prevent settlement whereas in arbitration that is not possible. The award by arbitrator is a necessary outcome and imperative and binding upon the parties.

Varieties of Arbitration

Arbitration may be a) Domestic arbitration, b) International arbitration, c) Adhoc arbitration, d) Institutional arbitration, e) Specialized arbitration and f) statutory arbitration. Let us briefly look into these types.

(a) Domestic arbitration:- The name domestic arbitration (in the Indian context) may be given to arbitration which takes place in India, wherein parties are Indians and the dispute is decided in accordance with the substantive law of India. The expression 'Domestic arbitration' has however been studiously avoided through out the Arbitration and Conciliation Act, 1996 except that a single reference appears to it in the long title of the Act.

(b) International arbitrations:- According to the provisions of 1996 Act, it is an arbitration which may take place either within Indian or outside India, where there are ingredients of foreign origin in relation to the parties or the subject matter of the dispute. The law applicable may be India law or foreign law depending on the contract in this regard and rules of conflict of laws

(c) Adhoc arbitration:- During initial stages when a dispute used to arise between parties to a business transactions which could not be settled by conciliation or mediation, arbitration was sometimes resorted to. Since the occasion required arbitration, it was turned ad hoc arbitration. Adhoc arbitration is an arbitration agreed to and arranged by the parties themselves without recourse to an arbitral institution. Ad hoc arbitration may be either domestic or international. Russel defined ad hoc arbitration in the following manner:

"The expression 'ad hoc' as in 'ad hoc submission' is used in quiet two different senses: an agreement to refer an existing dispute, and/or an agreement to refer either future or existing disputes to arbitration without an arbitration institution being specified to supervise the proceedings, or at least to supply the procedural rules for arbitration. This second sense is more common in international arbitration."[7]

(d) Institutional arbitration:- A business contract may contain a term that disputes or differences will be determined in accordance with the rules of particular arbitral

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[7] Russel, Arbitration, 197.

institution. When arbitration is conducted by an arbitral institution it is called institutional arbitration. One or more arbitrators are appointed in such arbitrations from a pre-selected panel by the governing body of the institution or even by selection by the disputants themselves but restricted to the limited panel. Such arbitration is conducted in accordance with the prescribed rules of the institution and the arbitrator or arbitrators are ordinarily assisted by the secretariat of that institution. Indian law on arbitration facilitates that if arbitration agreement refers to rules of any arbitral institution, those rules shall become part of the arbitration agreement and parties or arbitral tribunal can also have the administrative assistance by suitable institution.

(e) Specialized arbitration:- Specialized arbitration is arbitration conducted under the auspices of arbitral institutions having framed special rules to meet specific requirements for conduct of arbitration in respect of disputes of particular types such as disputes as to commodities construction or other specific areas.

(f) Statutory arbitration:- Arbitration may be (i) Voluntary i.e. under an agreement entered into between parties; or (ii) Statutory i.e. under the provisions of enactment specifically about matters covered under the statute. When arbitration is conducted in accordance with the provisions of special enactment which specially provides for arbitration in respect of disputes arising on matters covered by that enactment, it is called statutory arbitration. The following are some of the enactments which contain provisions for arbitration.

Central Acts

S.No.	Name of the Act	Related Sections
1.	Aircraft Act, 1934	Sections 9-B to 9-D
2.	Arbitration (protocol and convention) Act, 1937	Repealed
3.	Cantonments Act, 1924	Sections 260-265
4.	Chit Funds Act, 1982	Sections 64-72
5.	Companies Act, 1956	Sections 389 (omitted)
6.	Contract Act, 1872	Section 28
7.	Cooperative Societies Act, 1912	Section 43(2)(1)
8	Damodar Valley Corporation Act, 1948	Section 49

9.	Electricity Act, 1910	Section 52
10.	Electricity (supply) Act, 1948	Section 76
11.	Industrial Disputes Act, 1947	Sections 2(aa), 2(b), 10 A.
12.	Payment of Bonus Act, 1965	Section 2(h)
13.	Provincial Insolvency Act, 1960	Section 59(h)
14.	Presidency Towns Insolvency Act, 1909	Section 68(h)
15.	Requisitioning and Acquisition of Immovable Property Act, 1952	Section 8,11,12,19 and 21
16.	Telegraph Act, 1885	Section 7-B
17.	Trusts Act, 1882	Section 43 (c)
	State Acts	
18.	A. P. Cooperative Societies Act, 1964	Sections 61,62
19.	Assam Land & Revenue Regulation, 1886	Section 143
20.	Bengal Land-Revenue Settlement Regulations, 1822	Sections 33,34
21.	Bengal Survey Act, 1875	Section 43
22.	Calcutta Survey Act, 1887	Section 12-17
23.	Estates Partition Act, 1897	Sections 51-56
24.	Bengal Land-Revenue (Settlement and Deputy collectors) Regulation, 1833	Sections 5,10
25.	West Bengal Security Act, 1950	Section 29(3)(b)
26.	Delhi Cooperative Societies Act, 1972	Sections 60,61
27.	Tamilnadu Cooperative Societies Act, 1983	Sections 90, 100(1)(b)
28.	M.P. Cooperative Societies Act, 1961	Section 64-68
29.	Maharashtra Cooperative Societies Act, 1961	Sections 91-96
30.	Punjab Land Revenue Act, 1887	Sections 127-135
31.	Punjab Cooperative Societies Act	Sections 55,56,82
32.	U. P. Cooperative Societies Act, 1960	Sections 70, 71
33.	Gujarat Public Works Contracts Disputes Arbitration Tribunal Act, 1992	

Hybrid Arbitrations

Hybrid arbitrations reflect different combinations of well established third party proceeding. Following are some of the hybrid forms of arbitrations.

Look-sniff arbitrations:- 'Look-sniff' or Quality arbitrations are hybrid kind of arbitrations which may be found in particular Commodity trades. According to Ronald Bernstein, arbitrator will be chosen for his expertise in the particular trade; will be sent copies of contract and any relevant documents and sample; who without further reference to parties (possibly in their absence) inspect the goods and decide whether they conform to contract and if so what consequences should follow.[8] According to Russel, the established practice in look-sniff arbitrations is 'for an expert in the field to examine the commodity concerned (or example of it) and to give the parties decision on its quality based on that inspection. There are no formal hearings or submissions by the parties.[9]

The London Chamber of Commerce maintains a Court of Arbitration which has great experience in settling commercial disputes. The rules of the court provide for informal arbitration, where only quality of the goods is in dispute and give the arbitrator great latitude in ascertaining the price of goods in distant markets. The rules of London Court of Arbitration allow an arbitrator or umpire to act on his own in quality disputes but require him if he does hear evidence or arguments to do so in the presence of all parties clearly a more appropriate procedure for the more formal type of arbitration to which those rules normally apply.[10]

Flip-flop arbitration:- A flip-flop arbitration is one in which when the parties have formulated their respective cases, the arbitrator must choose one or the other; his award cannot be somewhere in between. It appears to have originated in the United States where it is sometimes called 'baseball clause".[11]

In Hybrid forms of Third-Party Dispute Resolutions', William Ross and Donald Conlen propounded two other alternative, hybrid third party procedures. They are a) Mediation-Arbitration and b) Arbitration-mediation. The first hybrid form will have two

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[8] Robert Ronald Bernsteins ,Handbook of Arbitration Practice, 13.
[9] Russel , Arbitration, 215.
[10] Supra,121
[11] Bansal A.K.,Arbitration practices ,32.

phases (i) mediation followed by (ii) arbitration. The second form consists of three phases-(i) In the first phase, third party conducts a hearing of disputants and kept his decision in a sealed cover without revealing the same (ii) In the second phase, third party conducts mediation and reveals his decision. In case parties fail to come to an agreement decision of third party will be made as 'rule' in the third phase.[12]

[12] William Ross, Donald Colon, Hybrid forms of Arbitration, 416-427.

CHAPTER-II

Arbitration Law in India

Arbitration is though a brain child of private legal system but for effectiveness it highly depends upon public legal system. To bring effectiveness, specific provisions were made in the statutory law relating to arbitration for judicial empowerment of decision/award of arbitrator. Resort to legal action can be made by winning party in case of voluntary non-compliance of award or insufficient trade sanctions. By putting seal of court or by making award as rule court, the decision of arbitrator is conferred with a legal status. In modern day society, arbitration is not limited to contracts but also used as a dispute resolving mechanism in number of areas such as landlord-tenant disputes, divorce proceedings, liquidation of partnerships and employment contracts. As arbitration and conciliation is getting increasing world wide recognition as an instrument of resolving disputes, it was widely felt that existing general law of arbitration i.e. Arbitration Act, 1940 was outdated. In the meantime, United Nations Commission International Trade Law (UNCITRAL) adopted Model Law on International Commercial Arbitration. An important feature of said UNCITRAL Model Law is that they have harmonized concepts on arbitration and conciliation of different legal systems of the world and thus contain provisions which are designed for universal application. Though the said UNCITRAL Model Law and Rules are intended to deal with international commercial arbitration and conciliation, they could with appropriate modifications, serve as model for legislation on domestic arbitration. Arbitration and Conciliation Bill, 1995 was drafted with the object to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and to define law relating to conciliation, taking into account the said UNCITRAL Model Law and Rules. The main objectives of the Bill are as under:

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

(ii) to make provision for an arbitral procedure which is fair, efficient and capable of meeting the need of specific arbitration;

(iii) to provide that the arbitral tribunal gives reasons for its arbitral award;

(iv) to ensure that the arbitral tribunal remains within the limits of its jurisdiction;

(v) to minimize the supervisory role of courts in arbitral process;

(vi) to permit an arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes;

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

(viiii) to provide that a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal; and

(ix) to provide that for the purposes of enforcement of foreign awards, every arbitral award made in a country to which one of the two international conventions relating to foreign arbitral awards to which India is a party applies, will be treated as foreign award.[13]

The Bill seeks to achieve the above objects. Thus Arbitration and Conciliation Act, 1996 being a consolidating and amending Act can be treated as a complete code in itself and exhaustive of all the matters dealt with therein.

Scheme of the Act:- The Act is divided into four parts. Part I applies to all arbitration taking place in India, whether international commercial arbitration or otherwise. Barring few sections, provisions of Part I also apply to statutory arbitrations except so far as provisions of Part I may be inconsistent with the provisions of statutory arbitration. Part II deals with the enforcement of certain foreign awards. Part III deals with conciliation whether international commercial conciliation or otherwise. Part IV is of general nature and deals with supplement provisions.

Meaning and Definition of words:- The 1996 Act has attempted to define certain terms. For example,

[13] Statement of objects and Reasons contained in Arbitration and Conciliation Bill, 1955.

(a) Arbitration:- Section2(1)(a) says arbitration means any arbitration whether or not administered by permanent arbitration institution. But how arbitrations may be administered is hardly a definition of arbitration.

(b) Arbitral award:- Section 2(1)(c) says arbitral award includes interim award. This is hardly a definition. Generally speaking, an award is a final determination of a particular issue or claim in the arbitration. There is no prescribe form for an award and award must give decision. Any word expressive of a decision is award.

(c) Arbitral Tribunal:- Section 2(1)(d) says 'arbitral tribunal' means a sole arbitrator or panel of arbitrators.

(d) International Commercial Arbitration:- Section 2(1)(f) defines international commercial arbitration to be arbitration relating to disputes arising out of legal relationship whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is a national of or habitual resident in any country other than India or a body corporate incorporated in any country other than India, or a company or an association or a body of individuals whose central management and control is exercised in any Country other than India or the Government of a foreign Country. The word 'Commercial' has a restrictive meaning and excludes disputes in regard to boundaries, politics matters, employment and family disputes. Supreme Court of India has observed that expression 'Commercial' should be construed broadly having regard to manifold action which are integral parts of international trade today.[14] In the words of Supreme Court.[15]

'Trade and Commerce do not merely measure traffic in goods, i.e. exchange of commodities for money or other commodities. In the complexities of modern conditions, in their sweep are included carriage of persons and goods by road, rail, air and water ways. Contracts, banking, insurance transactions in the stock exchange and forward markets, communication of information, supply of energy, postal and telegraphic services

[14] Renusagar power Co Vs General Elective 6., AIR1985SC 1156.
[15] Atiabari Tea Co. Ltd Vs State of Assam AIR1961SC232.

and many more activities-too numerous to be exhaustively enumerated which may be called commercial inter course'.

(e) Arbitration agreement:- According to section 7(1) 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. Where two or more persons agree that a dispute between them shall be decided in legally binding way by one or more impartial persons in a judicial manner, the agreement is called an arbitration agreement.[16]

(f) Reference:- The expression 'Reference' although has not been defined in the present Act, it means the actual submission of a particular dispute under the arbitration agreement to the arbitral.

Major changes brought by 1996 Act-

The Arbitration & Conciliation Act, 1996 has brought major changes and largely deviated from the Arbitrations Act, 1940. Following are sum of the major changes-

(a) Jurisdictions:- Law relating to jurisdiction of arbitral Tribunals has been radically changed. Under 1940 Act, an arbitrator has no power to decide on his own jurisdiction. Secondly, if arbitration clause is contained in a contract, then question as to existence of and/or validity of arbitration agreement cannot be decided by the arbitrator. However, this position has completely reversed in 1996 Act. Section 16 of 1996 Act states that arbitral tribunal has power to rule on its own jurisdiction and can also decide on any objections with respect to the existence or validity of arbitration agreement.

(b) Interim measure- The present Act widens the powers of arbitral tribunal. Section 17 gives powers to arbitral tribunal to order a party to take any interim measure of protection in respect of subject matter of the dispute. This is in addition to the power of the court to grant any interims measure under section 9. Under the previous law, in the absence of

[16] Ronald Bernstein, Handbook of Arbitration practice, 9.

any power given under the arbitration agreement, the arbitrator had no power by statute to give orders about interim measures. Under the present law, the arbitral tribunal may also require a party to provide appropriate security in connections with any measure ordered by it.

(c) Appointment of arbitrator- Under the previous law, parties to approach court for appointment of arbitrator under certain circumstances power to appoint arbitrator has been given in the present Act to the Chief Justice or his designate. This is with the expectation that Chief Justice or his designate will act more promptly and in better perspective than courts of any rank/status under the old law. The Chief Justices have been empowered to frame schemes to provide for matters in connection with the appointment of arbitrators.

(d) Number of arbitrators- With regard to the number of arbitrators who may work on the arbitral tribunal, the present Act gives complete freedom to the parties to determine the number of arbitrators; but with this rider that the number determined shall not be an even number. Failing determination of the number by the parties, the arbitral tribunal shall consist of sole arbitrator. There is departure from UNCITRAL Model Law in this regard because Article 10(2) of UNCITRAL Model Law provides that failing determination, the number of arbitrators shall be three. There is good reason to prefer sole arbitrator over a body of arbitrators and, therefore, this departure is understandable. It is further provided by the present Act that in the case of arbitrations with three arbitrators, failing any agreement between the parties on the procedure, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint a third arbitrator, who shall act as the presiding arbitrator. In a similar situation under the old law, the third person so appointed was to act as an umpire and not as a third arbitrator. It was further provided under the old law that if reference was to an even number of arbitrators, the arbitrators shall appoint an umpire. It is thus seen that the present Act abolishes the institution of umpire, since, as already seen, it interdicts the parties from determining an even number of arbitrators and also provides that where there are to be three arbitrators, the third arbitrator will act as a presiding officer and not as an umpire. The abolition of the institution of umpire will cut

down delay in arbitrations, for there would be now no occasion for arbitration by an umpire at the second stage upon disagreement between arbitrators in the first stage of arbitrations.

The present Act permits parties to challenge an appointed arbitrator on specific grounds; namely, for want of qualification or because the independence and impartiality of the arbitrator became suspect. This is an important departure from the provisions of the 1940 Act, which required the parties to approach the Court for removal of the appointed arbitrator.

(e) Time limit for award- The present Act does not prescribe any time-limit for making of an arbitral award. In that respect, there is departure form the provisions of Arbitration Act 1940, under which a time-limit of four months was prescribed for making of an arbitral award and further there was a provision for extension of time by the Court. These provisions in the Act of 1940 led to considerable litigation and umpteen occasions for the Court to extend time. The non-prescription of a time-limit for making an arbitral award in the present Act does not mean that the arbitrator will be free to prolong the arbitration as much as he wants. Delay on the part of arbitrator has been made a ground for termination of the mandate of the arbitrator under section 14(1)(a) of the Act.

(f) Reasoned award- Present Act provides that an arbitral award shall contain reasons, unless parties have agreed that no reasons be given or the award is an arbitral award on agreed terms. This is a major change made by the present Act. The law has now been brought on par with English law as well as the UNCITRAL Model Law. The requirement of reasons in an arbitral award, unless so required by the arbitration agreement or any statutory provisions, was not essential under the old law.

The requirement of stating reasons in the arbitral award under the present Act should not be construed to mean that lengthy and detailed reasons, as in judgments of the courts of law should be given. With respect to speaking awards, it was explained under the old law that obligation to give reasons was discharged, if short reasons were given, if

trend of thought process was indicated or if factors were mentioned on the basis of which the arbitrator reached his conclusion.

(g) Interest- The law on the subject of award of interest has been simplified in section 31(7) of the present Act. It has also set at rest judicial conflict which existed on this point. Now, unless otherwise agreed by the parties, the arbitral tribunal is empowered to grant interest at such rate as it deems reasonable on full or part of the money for full or part of the period between the date on which the cause of action arose and the date on which the award is made. It is further provided in clause (b) of section 31(7) that the amount of arbitral award, unless the award otherwise directs, shall carry interest @ 18% p.a. from the date of the award to the date of payment.

(h) Setting aside of award- Well recognized ground of error of law apparent on the face of the award which was available to the Courts to set aside an award, is now not available under the present Act. That the arbitrator committed error of fact or of law in giving an award was never a ground to set aside an award, subject to the exception that if error of law, not specifically referred to arbitration, was apparent on the face of the award, it could be a ground to set it aside. Now error of fact or of law even when such error may be error of law, which may be apparent on the face of the award, will be no ground to set aside an arbitral award.

A combined reading of sections 5 and 34 of the present Act leads to a conclusion that Courts have now no inherent powers to set aside an arbitral award, unless there is an application by a party made for the purpose. The controversy which existed under the old law whether the Courts have *suo motu* powers to set aside an arbitral award does not now survive.

With regard to the grounds for getting aside award as contained in section 34(2) of the present Act, it must be said that they are more precise, specific and articulate than the ones contained in section 30 of Arbitration Act 1940, which used sweeping expressions like, arbitrator having 'misconducted himself' or 'misconducted the proceedings'. At the same time, it appears that grounds for setting aside arbitral award

will arise also from section 13(5) and 16(6) of the present Act which will be *dehors* of section 34.

(i) Judicial interventions- A very significant feature of the present Act is that intervention of the Court in arbitral proceedings has been minimized. There were numerous provisions in Arbitration Act 1940, which provided for Court intervention at almost every stage of the conduct of arbitral proceedings. The present law provides for only two occasions when Court interventions can be sought at the pre-arbitral award stage.

(j) Status of arbitral award- Section 36 of the present Act confers on arbitral award the status of a decree. It provides that under the following two situations, namely, (i) where an award is not challenged within the prescribed period, or (ii) where an award has been challenged but the challenge is turned down, the award shall be enforced in the same manner as if it were a decree of the Court. A party need not got to the Court for making an arbitral award a rule of the Court and to get a decree drawn, which was necessary under the Act of 1940. The arbitral award can now be enforced directly through execution proceedings, thus saving time. In few cases unstamped or deficitly stamped arbitral awards or unregistered arbitral awards, though compulsorily registrable, are likely to become enforceable as decrees, raising a further controversy in the Courts.

(k) Detailed statutory scheme- Present Act has also, for the first time in India, provided a detailed statutory framework for the conduct of independent conciliation proceedings which is given in Part-III of the Act. Arbitration is considered to be less formal and more efficacious system of dispute resolution vis-à-vis litigation in Courts. All the same, arbitration like court proceedings is adversarial in nature. Hence, arbitration is considered to be less conducive to the promotion of good will between the parties than conciliation where the parties with the assistance of a conciliator arrive at a settlement which is result of consensus rather that imposition.

(l) Place of arbitration- Section 16 authorizes parties to fix a venue of arbitration of their choice. Failing an agreement between the parties, the arbitral tribunal, keeping in view the circumstances of the case, including convenience of parties, may fix the venue. But at

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

Russell on Arbitration has observed:[17]

'In fixing the place of trial the arbitrator should take all the circumstances into consideration and decide according to the balance of convenience. The chief circumstances to be taken into consideration are the place where most of the witnesses reside, the situation of the subject-matter of the dispute, and the balance of convenience and expense'.

(m) Appointment of employee as arbitrator- In agreements with Government or Corporations, there is very often an arbitration clause providing for arbitrations, not by a stranger or a wholly unbiased person, but by an Engineer or an Architect or an Officer of the Government or the Corporation. This by itself is no ground to hold that the Engineer, Architect or Officer will not act free from bias.

It was observed in regard to such contracts that if a party with open eyes agrees to arbitration of a particular officer, it is not open to him to subsequently object to the reference of the case to him on the ground that he is a subordinate of his adversary. So, in the case of a contract between the Government and a private person, the fact that the Secretary to the Government of India, Ministry of Food or his nominee, is to be the arbitrator can be no ground for refusing the stay.

The mere fact that the arbitrator named in the Government contract with a private contractor was a Government officer, whose superior was interested in cancellation of the contract, cannot justify the revocation of the authority of such arbitrator by the court on the ground of apprehension of bias. In order to justify such an action, there must be reasonable bias.

[17] Russel , Arbitration, 264.

A general presumption cannot be drawn that merely because a named arbitrator has already worked in that Department or is working, he is having a bias. The general presumption must be that all the officers are honest and they are discharging their duties lawfully, unless contrary is proved. There is no hard and fast rule that Government officials should not be appointed as arbitrators.

It has been held in the several decisions of the courts that where the parties entered into a contract with their eyes open and knew that the nominated arbitrator is an employee of one of the parties, none of the parties to the agreement should be allowed to allege that such nominated arbitrator being an officer of one of the parties to the contract would be biased or is likely to be biased. If the arbitrator appointed is an officer of a corporate body which is one of the parties of the arbitration, there is no presumption that he would be unfair. In this country in numerous contracts with the Governments, clauses requiring the Superintending Engineer or some official of the Government to be the arbitrator are there. It cannot be said that the Superintending Engineer as such cannot be entrusted with the work of arbitration and that an apprehension, simplicitor in the mind of the contractor without any tangible ground, would be a justification for removal.

(n) Adherence to principles of Natural justice- An arbitrator must ordinarily follow the principles of natural justice, but where the parties agree that the proceedings may be conducted in any particular way, the contract prevails over what are called the principles of natural justice.

If an arbitrator has been chosen for his skill or technical for adjudication of disputes, it is incumbent upon him to arrive at a conclusion after reasonable exercise of his skill and applying the principles of natural justice. He should not resort to easy way to assuming that since the plaintiff had done something and the defendant had done some other work, it would be equitable to give half and half. The principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself

prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary.

In the absence of specific provision to the contrary in the statute or the contract of agreement, the parties to an arbitration proceeding are entitled to a reasonable notice of the time and place of the hearing and have an absolute right to be heard and to present their evidence before the arbitrators. If they are deprived of this right, the Court will not hesitate to set aside the award on the ground of misconduct even though there may have been no improper intention.

An arbitrator, though not bound by the technical web of judicial procedure and rules of evidence, must hear the parties and, if requested, their witness, unless he is absolved therefrom by the terms of submission and must apply his mind to the points in dispute and decide it according to ordinary rules of justice, equity and good conscience. The failure to hear the parties and, if necessary, their witnesses, unless absolved therefrom by the terms of submission amounts to misconduct on the part of the arbitrator.

An arbitrator is guilty of misconduct when he examines no witnesses, even though the nature of dispute is such that it could not be settled without evidence. It is well-known proposition of law that although an arbitrator is allowed considerable latitude in the procedure adopted by him at the hearing, it is essential that he should afford the parties a reasonable opportunity of being heard and of presenting their case. If he makes an award without complying with this essential requirement, he does so at the peril of his award being declared invalid and inoperative in the eye of law.

An arbitrator has normally to permit parties to adduce evidence where oral evidence is felt necessary. Arbitrary refusal to permit oral evidence will undoubtedly amount to misconduct. An arbitrator is a judge of the choice of the parties. He is not bound by the provisions of the Evidence Act. He can decide the matters as best as he thinks fit; and the award which may be given by him will be binding upon the parties. The only limitation on his powers are that he should not violate the principles of natural justice, give the parties a fair hearing and reasonable time and opportunity to substantiate their respective claims.

CHAPTER-III

Institutional Arbitration

Institutional arbitration, through out the world is recognized as the primary mode of resolution of international commercial disputes. Institutional arbitration is done under the aegis of an arbitral center usually according to the centres own rules of arbitration.[18] On international side, the most established institutions are the International Court of Arbitration (ICA) of International Chambers of Commerce, London Court of International Arbitration (LCIA), American Arbitration Association (AAA) and Arbitration Institute of Stockhalm Chamber of Commerce. In the Indian context, Kwatra has listed 23 arbitral institutions in India in Appendix-III of his book "The New Arbitration and Conciliation Law of India'. It may be of advantage to notice the names of those arbitral institutions:

(1) The Indian Council of Arbitration, New Delhi,
(2) Federation of Indian Chambers of Commerce & Industry, New Delhi,
(3) Bengal Chamber of Commerce & Industry, Calcutta,
(4) East Indian Cotton Association Ltd., Bombay,
(5) Indian Merchants' Chamber, Bombay,
(6) Bengal National Chamber of Commerce & Industry, Calcutta,
(7) Calicut Chamber of Commerce & Industry, Calicut,
(8) Cochin Chamber of Commerce & Industry, Cochin,
(9) Hyderabad Kirana Merchants' Association, Hyderabad,
(10) Iron Steel and Hardware Merchants' Manufactures Chamber of India, Bombay,
(11) Madras Chamber of Commerce & Industry, Madras,
(12) Madras Kirana Merchants' Association, Madras
(13) The Millowners' Association, Bombay,
(14) Punjab, Haryana & Delhi Chamber of Commerce and Industry, New Delhi,
(15) Southern India Chamber of Commerce and Industry, Madras,
(16) Travancore Chamber of Co0mmerce, Kerala,
(17) Tuticorin Chamber Commerce & Industry, Tuticorin,

[18] Saltarte, Essence of ADR Techniques, 199.

(18) Bombay Chamber of Commerce & Industry, Bombay,

(19) Coimbatore Chamber of Commerce, Coimbatore,

(20) Goa Chambers of Commerce & Industry, Goa,

(21) Cotton Textiles Export Promotion Council, Bombay,

(22) Indian Chamber of Commerce, Calcutta,

(23) International Centre for Alternative Dispute Resolution (ICADR), New Delhi.

Apart from these recently two world's renowned institution have opened their offices in India. They are: LCIA and Construction Industry Arbitration Council (CIAC). CIAC has been administered by CIDC Construction Industry Development Council, a council set-up by the planning commission of India in collaboration with Singapore International Arbitration Centre (SIAC) a very popular arbitration institute in Singapore.

Apart from these, there are arbitral institutions which are adjunct to regular High Courts like Delhi Arbitration Centre. Karnataka, Madras, Gujarat High Courts also have this type of arbitration centres. Besides, certain private/ not for profit arbitration centres are also came into existence; for example Nani Phalikiwala Arbitration centre. Aim of these arbitration institutions is either to provide arbitration service and/or to provide infrastructure to assist the conducting of arbitration cases.

Characteristic Features Institutional arbitration

Institutional arbitration may be best understood with reference to its counterpart ad hoc arbitration. Institutional arbitration is where parties submitting their disputes to an arbitration procedure, which is conducted under the auspices of or administered or directed by an existing intuition. Following are the features/advantages of institutional arbitration.

a) Set procedure – Parties in ad hoc arbitrations are generally empowered to prescribe the procedure to be followed or can leave the issue of procedure to their arbitrators. However, in institutional arbitrations there already exists a set procedure formulated by the institutions. Where parties agree to refer their disputes to a named arbitral institution,

they simply adopt the rules of the institutions in their arbitral agreement. Automatic adoption of set rules is the principal advantage of institutional arbitration as the rules formulated by institutions are tested by times and mostly adhered to rationality, fairness and principles of natural justice and provides remedy to meet all kinds of situations and eventualities. The incorporation of a set of rules will prevent disastrous consequences befalling the party or for that matter, the draftsman.[19]

b) Administration and Supervision of proceedings – Most of the institutions provide well trained staff who will ensure appointment of arbitral tribunal; advance payment of fees and expenses of arbitrator, following of time limits for smooth and effective running of arbitral proceedings. In ad hoc arbitrations, apart from resolving of dispute the concerned arbitrator/tribunal also has to take up the additional responsibility of administration. In such case, the possibility of detraction from primary responsibility i.e. resolution of dispute, cannot be ruled out. In addition to the providing of administrative support, certain institutions like International court of Arbitration (ICA) also scrutinizes the award to ensure whether award deals with all the claims and counter claims made by the parties and adheres to due process and principles of natural justice. However this scrutiny is only limited to procedural aspect but not on merits. ICA returns roughly 15-20% of the awards to arbitrator for revision. No such quality check appears in ad hoc arbitrations.[20]

c) Arbitration fee fixation - Availability of fixed fee patterns with institutions is another advantage in institutional arbitrations. Generally, institutions follow flat fee/fixed slab fee system. This fee fixation is aimed at preventing discomfort to parties being placed in uncomfortable position of having to negotiate issues of remuneration with those who will be responsible for deciding their case or otherwise to avoid challenges to arbitrators independence.

d) Speed – Speed and time is the essence of all institutional arbitrations. Time schedule is fixed for everything i.e from filing of claim, counter claims, adducing of evidence to

[19]Dato cecyil Abrahary Importance of institutional arbitration in International Commercial Arbitration,123.

[20] Supra

publication of final award. Parties in ad hoc arbitrations will have to set their own time frames and in case of non-compliance or non-cooperation, fine is the only way to obtain cooperation. Sometimes, parties are not intimidated by quantum of fine and in such case the ad hoc arbitration continues for years together by increasing the animosity between the parties and destroying the every purpose of resorting to the arbitration.

e) Expertise – Institutions maintain a panel of arbitrators who are experts in their respective fields to suit the requirement of the litigants.

The principle advantages of institutional arbitration over adhoc arbitration are as follows.

1. When a dispute arises between parties, cooperation is least expected. In adhoc arbitration, parties are required to cooperate for framing the procedure to be followed. Often, it becomes difficult to obtain consent of both parties on matters of arbitration procedures. Whereas in institutional arbitration everything is set (institutions already have their own Rules) nothing is left dry and no need to worry about formulating rules.

2. Increasing costs in conducting adhoc arbitration is a cause of concern. Temptations to conduct proceedings in expensive hotels are evident for want of infrastructure facilities. Getting trained staff and library also poses a problem. Whereas in institutional arbitration, professionalism can be witnessed from each angle an account of availability of trained administrative/secretarial staff and library. Costs of arbitrations are also cheap in institutional arbitration.

3. Since arbitrators in institutional arbitration are governed by the rules of institution and they fear of removal from panel (in case of not conducting the proceedings properly) will be imbibed in arbitrators. However in adhoc arbitrations, no such fear factor exists.

4. It is easy to maintain confidentiality of proceedings in institutional arbitration as the administrative and secretarial staff are subjected to disciplinary rules of the institution.

Now let us examine two types of arbitral institutions located in Delhi namely London Court of International Arbitration- India(LCIA) and International Centre for Alternative Dispute Resolution (ICADR).

LCIA

LCIA was a long standing arbitral institution set up in the year 1892 at the instance of Corporation of City of London and the London Chamber Commerce and Industry. LCIA was at first named as 'London Chamber of Arbitration' which was changed as London Court of Arbitration in the year 1903. The activities of LCIA were administered by a joint committee consisting of representatives of Corporation of city of London and the London chambers of Commerce. At one point of time even the chartered Institute of Arbitrators joined of LCA. The name of the LCA has been changed in the year 1981 as 'London Court of international Arbitration' to reflect its nature of work and its steady movement from domestic to international arbitration. Later, in 1986, LCIA has emerged as an incorporated body which consists of President, Board of Directors, four Vice-Presidents and 20 other members who are international arbitrators from major trading nations. Out of the 20 member-arbitrators, the number of arbitrators from United Kingdom is restricted to not more than one-third. A Secretariat Consisting of 5 people assists the LCIA in carrying out its activities. Involvement of LCIA with arbitration proceedings is considered as low and earlier it confined itself only to limited spheres. Unlike ICA, LCIA's main function is to select arbitrators or to confirm party-nominated arbitrator where independence, impartiality and integrity of the party-nominated arbitrators is doubtful. LCIA has got every right to select the party-nominated arbitrators. LCIA neither requires arbitrator to draft terms of reference nor scrutinizes the arbitral award but fixes the fees of arbitrator and ensures compliance of procedure by arbitrators.

Regional Centres of LCIA:-

LCIA-DUBAI

LCIA, in the first decade of the 21st Century has attempted to extend its boundaries beyond London. In the year 2008, LCIA in joint venture with Dubai International Finance Centre has set-up its office on the Middle-eastern arbitral landscape. Though office was established in 2008, but no cases were registered for a period of 2 years. Of course, interval between the foundation of new arbitration centre and time for flow of case work is inevitable. Primary and most obvious reason being the time required for legal community to be convinced of credibility of centre, and for arbitration clauses to be inserted into contracts, then for these contracts to mature to the point of a dispute. However, relatively in its short existence, the DIFC-LCIA has registered over a dozen cases and that these cases are characterized by a real diversity.

Earlier, LCIA was often stamped as an institutions with British bent, on account of the fact that until 1993 all its presidents were British and 60% court-selected arbitrators and 65% of party-nominated arbitrators are nationals from United Kingdom and most of the frequently involved cases came from United Kingdom, United States, Australia, Canada, India & Hong Kong. However, this was broken in the recent past [21] with DIFC-LCIA.

The nationalities of the parties in the cases registered so far in this regional centre include those within the UAE, as well as from elsewhere in the Middle East and beyond like Oman, Kuwait, Malaysia, Norway, the Cayman Islands, Hong Kong and the British Virgin Islands.[22]

[21] Walter Mattli, Private justice in a Global Economy: Forum litigation to Arbitration,35.
[22] www.LCIA.org

Industry sectors involved in disputes:-

The industry sectors and subjects of dispute encompass not only construction, a key industry in the region, but commodities, engineering, energy and consultancy services, among others.[23]

Sum involved in disputes:-

In Dubai Centre of LCIA, sums in dispute range from US$50k to over US$100millions, demonstrating, perhaps, that the DIFC-LCIA's costs schedule is proving effective in not precluding parties from bringing smaller disputes.[24]

Most parties are represented by law firms based in the Middle East (either local firms or local offices of foreign law firms) and in Western Europe.This diversity is consistent with the original intention underlying the foundation of the centre, which was to offer, for companies doing business in and through the Middle East and the wider region, dispute resolution facilities suitable for a wide range of international transactions.[25]

LCIA-India

Considering the potential for economic growth in India, LCIA has established its first out-country, fully owned subsidiary in India in April 2009 at Delhi.The establishment of LCIA India in April 2009 coincided with the winds of change sweeping the arbitration scene in India like introduction in parliament of a law which seeks to create commercial divisions in the various High Courts, the establishment of the Delhi High Court Arbitration Centre (DAC) and the recent consultations by the Ministry of Law on the amendment of the Arbitration and Conciliation Act, which also indicate a potential growth for the centre in India.

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[23] www.lcia.org.
[24] Supra
[25] LCIA, Arbitration and ADR worldwide Newsletter vol.15 issue 1.

Number of Cases - LCIA-India, so far dealt with only 2 cases. However the sums involved in these two cases are more than Rs.70 crores. In one case, the proceedings are already over and at any time the award is going to be pronounced. The total time taken for the proceedings is 14 months and in the second case the proceedings are going on.

The following flow chart shows the conducting of the Arbitration proceedings under LCIA Rules.

Request for arbitration

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Service of request on respondents

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Response

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Formation of Arbitral Tribunal

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Parties Filing of their statements along with supporting documents

↓

Hearing

↓

Passing of award

Overall working of LCIA during 2009 and 2010.

Turmoil in the world economy, which began with the economic meltdown of 2008, continued on its turbulent way throughout 2009, Indeed, whilst some bucked the trend, real stability is only now returning to many leading economies, at the end of 2010.All the leading providers of dispute resolution services have, therefore, experienced sustained and unprecedented demand, as commercial relationships in almost every sector have come under great strain. LCIA also affected by this economic meltdown. Now let us see the details of work for LCIA for the year 2009.

a) Case Work – At LCIA, a total of 272 disputes were referred for arbitration in the year 2009 which resulted in an increase of 26% in the number of arbitrations as between 2008-2009.[26]

b) Nature of contracts – In 2009 the LCIA was the forum for disputes arising out of the usual extensive range of contracts, including, for example, aircraft leasing, charterparties, energy, insurance, medical goods and services and ship repairs. However, as in 2008, but to a lesser degree, commodity transactions (in steel and carbon products in particular), loan or other financial agreements, including guarantee, and the broad category of joint ventures and shareholder's disputes dominated, at around 20%, 17.5% and 13% respectively.[27]

c) Sums in issue – The number of referrals in which Claimants did not Quantify their claim in the Request for Arbitration, and/or sought declaratory relief fell from 38% in 2008 to just 24% in 2009.[28]

The percentage of claims valued at US$1million or less fell slightly in 2009, at 18%, but there were increases in claims in the range US$1million-to –US$5million up from 17% to 20%; US$5million-to-US$10million up from 7% to 12%; US$10million-to-US$20million up from 6% to 10%; and US$20 million-plus up from 12% to 16%.[29]

d) Parties – The range of nationalities of the parties bringing their disputes to LCIA is one of the key defining factors to decide the truly international status of the institution. Though parties from different corners of the world has approached LCIA, but United Kingdom has occupied a large chunk with 13%. The rest are Ireland 2%; Germany 2%; Netherlands 2.75%; Switzerland 5%; Cyprus 5%; Russia 11.5%; UAE 4%; Africa 4%; India 4%; North America 7%; other West European 10%; other East European 1.5%;

[26] Director General's Report for the 2009,21.
[27] Supra
[28] Supra
[29] Supra

other CIS 3.5%; other Middle East 4.25%; other Asia-pacific 5%; other Caribbean 6.75%. [30]

e) Appointment of arbitrators:- During the course of 2009, the LCIA Court made a total of 502 individual appointments of arbitrators, to a total of 220 tribunal, of which 79 comprised of a sole arbitrator and 141 of three arbitrators. 44 of these tribunal were appointed in cases that had been referred to arbitration in 2008, and 1 in a case commenced in 2007. The remaining 175 tribunals were appointed to cases commenced in 2009.[31]

Of these 502 individual appointments, 323 were UK nationals, of whom 142 (44%) were selected by the parties. 146 (45%) by the LCIA Court and 35 (11%) by the co-arbitrators. Of the remaining 179 individuals who were not UK nationals, 57 (32%) were selected by the parties; 103 (58%) by the LCIA Court; and 19 (10%) by the co-arbitrators.[32]

The nationalities of arbitrators appointed in 2009 other than UK were Argentinean; Australian; Austrian; Belgian; Canadian; Chinese; Dutch; Egyptian; Estonian; Finnish; French; German; Greek; Indian; Iranian; Irish; Korean; Mauritian; New Zealand; Nigerian; Pakistani; Russian; Singaporean; Slovenian; South African; Spanish; Swedish; Swiss; Tanzanian; and US.

Year 2010

As the global economy has continued its sometimes-faltering recovery, so the LCIA has experienced something of a deceleration in case referrals, though it has to be said not such a sharp decline as had been anticipated, and with particularly positive signs for the coming year in the rate of referrals in the latter part of 2010, and the first weeks of 2011.

[30] Director General Report for the year 2009,21.
[31] LCIA's world wide News Letter, Vol.II 2009, 35.
[32] Supra

a) Case Work – A total of 246 disputes were referred for arbitration in 2010 (plus a further 21 for mediation or some other form of non-binding ADR); a decrease of 9.5% in the number of arbitrations, as between 2010 and 2009.[33]

b) Nature of contracts – The agreements out of which the LCIA's 2010 referrals arose included contracts for aircraft leasing; construction; insurance; loan and other financial agreements; oil exploration; management services; the sale and purchase of shares; and the supply of a variety of commodities.A shift in the economic scene might be discerned in the areas in which the most significant number of disputes arose in 2010, compared to 2009. Thus, commodity transactions (in steel and carbon products in particular) accounted for just 6% of 2010 referrals, as against around 20% in 2009; loan or other financial agreements, including guarantees, accounted for 11.5% of 2010 referrals, as against 17.5% in 2009; and joint ventures and shareholder's agreements accounted for 23% of 2010 referrals, as against 13% in 2009.[34]

c) Sums in issue – The number of referrals in which Claimants did not quantify their claim in the Request for Arbitration, and/or sought declaratory relief, increased slightly, from 24% in 2009 to 28% in 2010, as did the percentage of claims valued at US$1million or less, from 18% to 22%, and, at the other end of the spectrum, claims valued at US$20 million or more, up just 0.5% at 16.05%.[35]There were decreases in all other claims in the range US$1million-to-US$5million down from 20% to 16.05%; US$5million-to-US$10million down from 12% to 9%; and US$10million-to-US$20million down from 10% to 8%.[36]

d) Appointment of arbitrators – During the course of 2010, the LCIA Court made a total of 344 individual appointments of arbitrators, to a total of 168 (220) tribunals, of which 81 comprised of a sole arbitrator and 87 of three arbitrators 35 of these tribunals were

[33] LCIA's worldwide News letter Vol.I 2010,14.
[34] Supra
[35] LCIA's Worldwide News Letter vol.I 2010,14.
[36] Supra

appoint in cases that had been referred to arbitration in 2009. The remaining 133 tribunals were appointed to cases commenced in 2010.

ICADR

International Centre for Alternative Dispute Resolution (ICADR), a registered society and an autonomous body associated with the Government of India was established in the year 1995 at Delhi. ICADR was established as a society in May 1995 at the instance of certain legal luminaries with the following avowed objectives namely:-

a) to promote studies/research in the field of alternative dispute resolution and allied matters.
b) to undertake teaching/impart training
c) to offer guidance to researchers
d) to frame modalities for dispute resolution
e) to encourage and conduct investigations in traditional dispute resolution methods
f) to promote the settlement of domestic and international disputes by different modes of ADR
g) to provide administrative support for conducting conciliation, mediations and arbitration proceeding
h) to draw up standard clause for arbitration conciliation

Number of cases referred- the total number of arbitration cases referred to ICADR from 1997-2010 is 38. The total number of cases referred for conciliation are 4. The average number of cases per year, referred to ICADR is 3. For the current year 2011, ICADR is handling 3 domestic and 3 international commercial arbitration cases.

Time for disposal – Average time taken for disposal of case is 2 years approximately.

Nature of Contracts – The Commercial disputes referred to ICADR mainly relates to Mahanagar Telephone Nigam Ltd (MTNL) in relations to contracts for laying cables

through trench less technology. No case relating to construction industry and infrastructure projects has been resolved by ICADR.

Appointment of arbitrators – ICADR generally on receiving request from various Departments of Govt. of India for appointment of arbitrator, appoints the arbitrator from and out of its panel. So far, it has appointed 789 arbitrators from its panel.

Providing of infrastructure:- ICADR not only appoints arbitrators but also facilities private parties to conduct proceedings in its Centre on payment of nominal rent. Since 2005, in its headquarters at Delhi nearly 362 cases were heard by different Ministries. Apart from Government Departments, PSUs, 319 cases belonging to private parties were conducted in ICADRs Delhi premises. Since 1999, in Hyderabad regional centre 400 cases were conducted. ICDAR's regional centres were located in Hyderabad and Bangalore.

The data relating to the both institutions shows that LCIA as an international institution has occupied a large canvass not only in the number of cases dealt with, but also in other spheres like nature of contracts and sums involved in the disputes.

CHAPTER – IV

INSTITUTIONAL ARBITRATION AND INCENTIVE SYSTEM

Delhi is the Capital of India and eighth largest metropolis in terms of population in the world. Often Delhi is described as a 'happening city'. Not only in terms of its geographical location but also in terms of seat of power, political manifestations, political activities and cultural heterogeneity, Delhi has attained significance. Last decade has witnessed a total makeover of Delhi. Introduction of metro trains, construction of fly over bridges, renovation of international airport and several on-going infrastructural projects have been shaping Delhi as a 'city of destiny'. Apart from being a seat of political power, Delhi is also known for its vigilant public. Due to immense growth in commercial activities and advent of public-private/foreign-partnerships in infrastructural projects, economy and society of Delhi has encountered an ample of Commercial disputes. Considerably, disputes are becoming a part of one's daily life as people come across several rights and obligations during the course and conduct of their businesses. The problem does not arise because of the inevitable disputes nevertheless it arises as to resolution of such disputes. Rapid development and modernization has resulted in increased case loads for already over burdened courts, further leading to notoriously slow adjudication of commercial disputes. As a consequence of which Alternate Dispute Resolution mechanism has gained momentum in Delhi. The Table given in the Annexure-I shows the prominence of Delhi High Court in resolution of Commercial disputes through ADR system.

The table shows the number of cases disposed of in the last three years. For all the three years (except the current year), number of cases disposed of by Delhi High Court (under Arbitration and Conciliation Act, 1996 and 1940 Act) are higher than any other High Court in India. In that context, I find Delhi as quite interesting hence selected for the purpose of my study.

As said in the preceding paragraph, construction/infrastructure industry is one of the fastest growing sectors which involves huge sums of money and a high spending rate on resolving the construction related disputes. A survey conducted by the construction Industry Development Council denotes that 540,000 million rupees of capital was

blocked in construction related disputes.[37] As a trend in India, 95% of the arbitrations are adhoc, only 5% are institutional. Despite of involvement of huge sums of money, construction sector in India follows adhoc arbitrations as a norm. In that context, an attempt is made to throw light on the issues involved in constructions industry dispute resolution mechanism by relating it to the incentive system associated therewith.

Special features of Construction Industry

Construction industry is a specialized industry with its own practices by involving number of individuals, organizations and a small deviation affects large number of people concerned. Construction contract is not a single contract but typically involves bundle of contracts like site acquisition, construction and completion contract, raw material supply, operations and maintenance, finance etc. Construction project being a continuous one spread over a period of time, any small impediment/problem hampers/stalls the progress of the project. The obstacles in the way of project must be attended immediately and disputes are to be resolved speedily. Some of the problems in these projects are unforseeable, even if forseeable their magnitude is unforseeable. Resorting to regular kind of litigation leads to unwarranted tensions rather than resolving disputes. Now let us see what could be the possible reasons for arising of disputes.

a) Delay in handing over possession - Out of the 38 questionnaires and 12 interviews conducted during the study, 42 respondents opined that disputes starts between the parties on account of delay in handing over the site which leads to further disputes. Out of the total reported judgments during the period from 2008-2010 (total reported judgments including supreme court are – 1102), 432 cases are in one way or other related to construction contracts. Out of the 432 cases, in 82 cases, delay in handing over the possession is an issue involved in the dispute. In the last three years, Delhi High Court has given judgment/orders in 489 cases, out of those 489 cases, 175 cases related to construction disputes and in 37 matters, delay in handing over site is the main issue. Now the question is why delay occurs in handing over site? In construction

[37] Sarma Krishna, Working of Arbitration Law in India,12.

contracts, specifically in the case of Government contracts, often site is not made available to contractor at the time of commencement of work or within reasonable time. Even the formalities of land acquisition are not completed in 6% of cases. Though land is made available, sometimes it is either encumbered with temporary/religious structures or with crops which may compel the contractor to work in bits and pieces.

b) Delay in supplying drawing – Delay in supplying engineering drawings for carrying out works in works contract poses as a hurdle. In 2% of cases, relationship between contracting parties strains and generates further disputes for failure to supply drawings within stipulated time. Delay in issuance of drawings leads to idle labour. Machinery, tools, plants and establishment of contractor also remains idle.

Apart from the above, delay in appointing the engineers, delay in supplying stipulated material, unnecessary interference with the work of the contractor and non-finalisation of final bill are possible reasons for arising of disputes. Delays may lead to abnormal rise in prices and labour, hence either frustrates the contract or becomes ground for claiming damages.

Types of dispute Resolution

Generally speaking, the disputes in construction industry are resolved by three ways namely,

a) Resolution through litigation

b) Resolution without litigation; and

c) Resolution through arbitration

Resolution through litigation implies parties resorting to regular courts for redressal of their grievance. In 60% of the cases, parties approach the formal courts, according to the report of construction Industry Development Council. The second concept of dispute resolution does not involve litigation. Parties are often deterred by the delays, and costs associated with the regular adversarial court system, hence wants to settle their scores amicably and peacefully. According to the construction Industry Development Councils' version, 5% of the disputes are resolved by resorting to non-litigation methods. The last but not the least method of dispute resolution is through arbitration. As it has been aptly stated that 95% of arbitrations in India are adhoc and

only 5% are institutional. Before going through the details let us first examine whether all the disputes arising out of construction contracts are arbitrable or not.

Excepted matters

In construction contracts it may not be advisable to provide for arbitration of all and sundry disputes or differences. These can be so innumerable that if all of them are made arbitrable, it may virtually be impossible to have the contracts concluded to the satisfaction of all concerned in a reasonable time. Such contracts therefore often exclude certain matters in express terms from arbitration and leave them to the sole decision of an engineer or architect. No arbitration can take place in respect of such excepted matters. The law has been stated in Halsbury's 'laws of England' as follows:

'Where the arbitration clause excludes certain matters in express terms and leaves them to the sole discretion of the architect, no arbitration can arise in respect of these matters, except by agreement and in the absence of an allegation of fraud, neither the court nor the arbitrator has jurisdiction to review the determination of the architect as to those matters. On other hand where there is no express restriction of the scope of the arbitration clause, the jurisdiction of arbitrator does not apparently extended to review the correctness of measurements and valuations where they are made conclusive between the parties or conditions precedent to right to payment.'

Where arbitration clause excludes certain matters in express terms and leaves them to the sole discretion of the architect, no arbitration can arise in respect of these matters except by agreement and in absence of an allegation of fraud, neither the court nor the arbitrator has jurisdiction to review the determination of the architect to those matters. However, if the certificate to be granted by the architect is not meant to be conclusive, then the arbitrator would have power to review the certificate and the decision of the architect. Now let us see how far the certificate issued by the architect/engineer is conclusive.

Emden in 'Building Contracts and practice' has summarized law on this subject. The satisfaction recorded by the Architect/Engineer will be conclusive and binding on both the parties, if the following conditions are complied with:

a) Certificate must be intra vires:- The subject matter of the certificate, so far as the same is to be binding must be within the powers of the certifier and terms of the contract must effectively make his determination binding on both parties.

b) Certificate must not be subject to revision by the contract:- The contract should have been drafted in such manner as to prevent an arbitrator from opening up, reviewing or revising a certificate.

c) Not fraudulent:- Certificate must be the honest expression of the certifier's opinion.

d) Independent:- There must have been no improper interference with the certifier on the part of the employer as to the giving of the certificate.

e) Given in time:- The certificate must have been given during the existence of the power of architect or engineer to give a certificate.

f) Fulfilling of conditions:- If a contract makes the power to certify conditional on some previously existing state of facts, the existence of such state of facts has to be averred and proved before the certificate is claimed to be binding by the employer.

g) By proper person at proper time:- The certificate must be given by the person designated in the contract and if a particular time is fixed by the contract, then it must be given at that time.

h) Given before dispute:- Where the contract provides for arbitration, certificate of architect is conclusive and must be given before arising of dispute.

Types of claims

When disputes arises, what type of claims can be laid before the arbitrator? There are two types of claims, one that arises under the contract and the other arises for works done beyond the contract. Claims under the contract can be categorized as

a) Claims relating to execution of contract. For example claims arising due to changes in drawings; works done for extra items; differing site conditions and delays. Delays again can be classified as i) Excusable and non-excusable ii) Critical and non-critical iii) Concurrent delays.

b) Claims relating to administration of contract like payment of dues, finalization of bills and closure of contract. Arbitrator has jurisdiction to decide the dispute in regard to the

additional work done by the contractor (extra contractual items) which the contractor had to do as a part of the main contract, notwithstanding the non-obstante clause. Arbitrator also have the power to determine the rates relating to extra items in respect of which the decision of an officer has not been made final by the contract itself.

Law applicable to Construction Industry Arbitration

There is no separate set of legal rules applicable to construction contract. Generally, the Government contracts are governed by CPWD Rules (Central Public Works Department) and General Conditions of contract (GCC). Whatever law is applicable to general contracts is also applicable to construction contracts i.e. Law of Contracts, Transfer of property Act and law relating to dispute resolution.

Dispute avoidance and Dispute resolution Boards

Construction industry disputes, if not solved in a timely manner becomes very expensive in terms of finances, personnel, time and opportunity costs. Construction industry litigation expenditure in United States of America is increasing averagely 10% every year and in the year 2008 it was $10 billion annually. In India the capital blocked in 2008 was over Rs.540,000 millions, as per construction Industry Development Councils' report. Recently, in the specified industry the concept of Dispute Resolution Boards are emerging to prevent/avoid the coming up of disputes. These Boards (DRBs) will be incorporated with the express consent of both the parties (Employer and contractor) for monitoring and scrutinizing the execution of construction projects till their completion. The Board will consists of 3 members. Two members will be appointed by parties one each and the third member who will be the chairman will be choosen by the two members. The details of the contact will be placed before the Board, whose primary duty is to visit the site regularly and audit the progress of the work. In case any problem arises, the Board will record the submissions of parties and suggest a settlement. Recommending an immediate settlement will reduce the malignity and further chances of litigation between parties. In this context, words of Michael Hwang has to be recollected "a

contract is not a conclusion of deal but the beginning of a commercial relationship. Among Asians, matters such as personal good will and the need to look at the changed circumstances matters more than the words of a contract".

Institutional Arbitration and Incentive System

Generally Arbitration is considered cheaper over traditional litigation and one of the reasons for parties to resort to it. The ground reality shows otherwise, particularly adhoc arbitration in India is becoming quite expensive. However, institutional arbitration is not very popular in India. In the following paragraphs an attempt has been made to analyze the cost effectiveness of institutional arbitration and the incentive system associated therewith.

1) Costs of arbitration:- Parties greatest concern in arbitration is a) the ultimate outcome-win or lose b) Time-How long c) Costs-How much. Coming from the last concern, the costs of arbitration includes the following elements namely.

i) Arbitrator's fees

ii) Arbitrator's expenses

iii) Expenses relating to witness and expert evidence

iv) Administrative fees of institution

v) Lawyers fees

vi) Cost of facilities and support services like, hearing rooms, translators, transcripts.

The tables given in Annexure-II shows the fee schedule of some arbitral institutions like CNICA, DAC and NPAC.

Mode of fees calculation

A perusal of above tables makes it clear that there are two basic methods in calculating the fees. They are – a) Flat-fee system (pioneered by ICC and used by Singapore Institutional Arbitration Centre and a host of other institutions) b) Hourly rates (used by institutions such as the LCIA and the American Arbitration Association). In the flat fee system, the fee is calculated on the basis of amount/claims in dispute. Claim here

includes counter claim also. In the second mode, fee is determined on the basis of actual working hours spent by the institution in resolving the disputes. Sometimes, the dispute may involve huge sums but the substance/fulcrum is very simple and uncomplicated. Charging of huge sums as fees in such matters appears to be unreasonable, hence hourly – rate system appears to be more scientific and rational.

High Costs

The general perception that costs of institutional arbitration are higher side is turned down as untrue. The survey of ICC Commission on Arbitration[38] shows:

- 82% costs are borne by parties to present their case. This 82% costs include lawyer's fees, expenses, expenses relating to witnesses and expert evidence.
- 16% costs are borne by parties towards arbitrator's fee and expenses;
- 2% costs borne by parties towards administrative expenses of arbitral institution.

The finding of above survey shows that most of the costs of institutional arbitration are counsel's costs. Emphasis therefore must be made on taking measures aimed at reducing costs associated with the parties presenting their case. In institutional arbitration, each institution have their own schedules for arbitrator's fees and administrative fees based on claim amounts. There is no such regulated fee structure in adhoc arbitrators. The fees of arbitrators are decided by the arbitrators themselves with the consent of the parties which may vary anything from Rs.1,000/- to Rs.50,000/- per sitting, depending on the qualification and professional expertise. Apart from that, expenses incurred by the arbitrator has to be reimbursed. Arbitrators charge their sitting fees, if arbitrator is physically present but mater is adjourned at the behest of the party. It was observed that even for filing of documents, arbitrators fix-up hearing date and charge their hearing fees. On the other hand, in institutional arbitration documents will be filed in the office of the institutions. No amount will be charged for the sittings unless substantial work is done. Considering these aspects, it can be said that institution arbitration has its advantage with regard to costs.

[38] ICC Commission on Arbitration, Techniques for controlling time and costs in Arbitration (ICC publication 843)

b) Time:- Issues of speed and cost-efficiency are the hall-marks of the arbitration procedure and are often identified as the core reasons why arbitration very clearly surpasses litigation as a suitable choice for dispute resolution, especially with respect to commercial disputes. In adhoc arbitration time frame is not set and parties along with arbitrators have to sort out the rules/framework to be followed. In institutional arbitrations, time frame is already set. Institution's Rules prescribe the time limit for every action and corresponding reaction. Adhoc arbitration are often considered as heirs of vices of formal legal system. As arbitrators are paid on the basis of sittings, they will be in disadvantageous position if proceedings are concluded within short time. There is an incentive for the arbitrator to drag on the matter for years together, hence expeditious disposal cannot be expected. On the other hand, an analysis of 100 recent LCIA cases (from request for arbitration to final award) shows:

- Around 52% of cases are concluded within 12 months or less
- Around 78% of cases are concluded within 18 months or less

LCIA – India has taken 14 months time to conclude its 1st case.

Another arbitration institution in India i.e. ICADR has taken an average time of 2 years approximately for the disposal of cases.

Another striking feature of institutional arbitration is the possibility of settlement. A survey conducted by Price Waterhouse Coopers in 2011[39] reveals that 25% of cases are settled before an arbitral award is rendered and 7% are settled with a subsequent award by consent. The findings of the survey shows that overall 92% of the arbitration disputes are successfully resolved at some stage through the arbitration proceedings and settlement before the first hearing is more likely in institutional rather adhoc proceedings. The survey also points out to the factors influencing settlement. Desire to preserve business relationships, weak position in the case and the desire not to incur excessive time and costs were started as reasons for such settlement.

Disclosure of documents, submissions, constitution of the tribunal and hearings are the main stages of the arbitral process that contribute to delay. Since arbitral institutions exerts control and prescribes time limits, the arbitral process moves quickly.

[39]www. PWC. Co. UK.

c) Expertise:- Availability of expert in the specialized field as judge/decision maker is another incentive to resort to institutional arbitration. Judges in the formal legal system are experts only in the field of law but not in other fields. Arbitration and conciliation Act, 1996 not prescribes any qualifications for appointing a person as arbitrator. Nor adhoc arbitrations require any professional qualification. Arbitral institutes though does not prescribe any specific qualifications to be on the panel but appoints strictly experts and experienced persons in their fields as arbitrators and that too as per the specific requirement of the case. Construction industry disputes requires specific knowledge in the fields of civil engineering. Generally, the panel of any arbitral institute consists of experts in the field of engineering and technology who will be aware of the problems and their solution in their particular domain. Dispute resolution by an expert in the specified field lowers the chances of fauulty decisions, hence resorting to arbitral institutions has the incentive of expertise.

d) Low rate of judicial intervention:- In international commercial arbitrations 86% of arbitrations are institutional and 67% of arbitrations involves states or state-owned enterprises and the compliance of award was assessed as 90%.[40] On international side, the most preferred arbitral institutions are ICC, AAA and LCIA.[41] On perusal of above statistics, a question arises that why so much prominence is given to institutional arbitration in international arena. Besides the professional attitude, impartiality, expertise and fairness, the quality of awards of the arbitral institutions is so high and judicial intervention with the award is on lower side. Even in India, the judicial intervention with the foreign awards is nominal. The below given table provides the enforcement statistics of foreign awards which depicts the Indian Courts' attitude in upholding the foreign awards.

[40] www.PWC. Co. UK.

[41] International Arbitration Survey, 2010 by White & Case LLP.

Both High Courts & Supreme Courts

Foreign Awards

Total No. of Cases 25

S.No	Grounds of Challenge	No. of Cases	Allowed	Rejected	Modified
1.	Jurisdiction	9	-	9	-
2.	Public Policy	5	-	3	2
3.	Technical Grounds	4	-	4	-
4.	Requirement of separate E.P.	3	-	2	1
5.	Unreasoned award	1	-	1	-
7.	No arbitration agreement	3	2	1	-

Foreign Awards from following institutions challenged

S.No	Name of Institutions	No. of Cases	Allowed	Rejected	Modified
1.	Adhoc	11	-	11	-
2.	ICC	2	-	1	1
3.	LCIA	2	-	2	-
4.	IGPA	1	-	1	-
5.	ICA	1	-	1	-
6.	Korean Commercial Arbitration Board	1	1	-	-
7.	Total Cases	17	1	15	1

Greater transparency, professionalism, adherence to commercial practices, expertise, experienced and skilled arbitrators led to the rendering of flawless awards by

these institutions thereby warranting judicial interference in limited manner. Virtues of these international institutions if adopted, definitely a bright future is awaiting for institutions in India.

JUDICIAL INTERVENTION –ARBITRAL AWARD

Arbitration and Conciliation Act,1996 permits limited judicial intervention with the award on the basis of grounds set out in the section 34. According to OP Malhotra, there are seven grounds in all for setting aside an award.[42] An award could be set aside only if one or more of these seven grounds exist.[43] Section 34 (2) (*a*) contains the first five grounds which are largely concerned with procedural irregularities, either in the proceedings or in the award itself.[44] They are as follows:

a) Incapacity of Party

Section 34 (2) (*a*) (*i*) lays down the ground of Incapacity of Party. If a party to arbitration is not capable of looking after his own interests, and is not represented by a person who can protect his interests, the award will not be binding on him and may be set aside on his application. Thus, if a minor, or a person of unsound mind is a party, he must be properly represented by a proper guardian otherwise the award will be liable to set aside[45].

b) Invalidity of agreement

If the arbitration agreement is invalid, the reference thereunder and consequently the award on the basis of such reference would be invalid and can be set aside.[46] A priori, in the absence of an existing valid 'arbitration agreement', there can be no valid arbitration.[47] It will be a case of patent lack of jurisdiction, which cannot be conferred on

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[42] Malhotra, OP and Malhotra, Indu, The Law and Practice of Arbitration and Conciliation, 1102-1103.
[43] Ibid.
[44] Ibid.
[45] Supra, at note 19. p. 296.
[46] Supra at note 19. p. 297.
[47] Supra, at note 37. p. 1107.

the tribunal by the acquiescence or agreement of parties.[48] Also an arbitration agreement will be invalid for any one of the reasons contemplated by law to which the parties have subjected it, or, failing any indication thereon, under the law for the time being in force in India.[49] For instance, the agreement will be void, if it is not in writing,[50] or not arbitrable under the law applicable to it.[51] The objection, with respect to the existence or validity of the arbitration agreement have, in the first instance, to be decided by the arbitral tribunal.[52] But, if the arbitral tribunal rejects the objection, it shall continue with the proceedings and make an award thereof.[53]

c) Non Compliance of Due Process

Section 34 (2) (*a*) (*iii*) provides the third ground for setting aside an award. It refers to the unfair treatment of parties or one of the parties to the arbitration. Section 18 of the Act provides that the parties should receive equal treatment and they should be given full opportunity to present their cases.[54] For instance, Section 12 of the Act confers a right to challenge the appointment of an arbitrator wherein a doubt arises on his impartiality or integrity.[55] Thus, a party is deprived of his valuable right, if he is not met with the due and proper notice.[56]

Section 34 (2) (*a*) (*iii*) permits the challenge to an award on the ground that 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;[57] Therefore, it becomes essential that the parties must be given proper notice, for instance, of the proceedings, so that they may file the statements of claim or defence as required under Section 23.[58] The first requirement of the rule of *Audi Alteram Partem* is that the persons who are likely to be affected by the decision or proceedings must be given

[48] Tarapore and Co v. State of Madhya Pradesh. (1994) 3 SCC 521.
[49] See, The Arbitration and Conciliation Act, 1996, Section 34 (2) (*a*) (*ii*).
[50] Ibid. Section 7 (3).
[51] Ibid. Section 34 (2) (*a*) (*i*).
[52] Ibid, Section 16 (1).
[53] Ibid, Section 16 (5).
[54] See, The Arbitration and Conciliation Act, 1996, Section 18.
[55] Ibid. Section 12.
[56] Singh, Avtar, Law of Arbitration and Conciliation, 298.
[57] The Arbitration and Conciliation Act, 1996, Section 34 (2) (*a*) (*iii*).
[58] Ibid. Section 23.

adequate and proper notice. The prefix of '*proper*' to the word '*notice*' indicates that the notice should inform the parties to the proceedings in writing about the particulars of the reference,[59] as the law requires that every person, whose civil rights are affected, must have reasonable opportunity to meet the case[60]. The notice must be real and definite,[61] and must give ample of time to the parties,[62] and which can be in all respect suffice to 'the reasonable opportunity of being heard'.[63]

d) Awards beyond the scope of reference or jurisdiction.

Section 34 (2) (*a*) (*iv*) states that '*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 matter beyond the scope of the submission to arbitration*'.[64] Therefore, the reference of the dispute under an agreement defines the limits of the authority and jurisdiction of the arbitrator.[65] The jurisdiction of the arbitrator is limited by its reference and if the arbitrator has assumed jurisdiction not possessed by him, the award to the extent to which it is beyond the arbitrator's jurisdiction would be invalid and liable to be set aside.[66]In a landmark Judgment passed by the Bombay High Court in *RS Jiwani v. Ircon International Ltd* ("Ircon Case")[67], it was held that an arbitration award is severable and if a part of it is illegal and incapable of enforcement the other part that is valid and legal can still be enforced.[68]

e) Non- arbitrable disputes

The condition precedent for exercising of power by an arbitrator is the existence of an Arbitrable Dispute.[69] Section 34 (2) (*b*) (*i*) lays down another ground for refusal of

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[59] See; *Hari Khemu Gawali v. Deputy Commissioner of Police* [1956] 1 SCR 506.
[60] *Mukhtar Singh v. State of Uttar Pradesh.* AIR 1957 All 297 [DB].
[61] *Lakshmi Narain Gupta v. AN Puri,* AIR 1954 Cal 335.
[62] *Lalta Prasad v Inspector General of Police,* AIR 1954 All 438 [DB].
[63] Malhotra, OP and Malhotra, Indu, The Law and Practice of Arbitration and Conciliation, 1109.
[64] See, The Arbitration and Conciliation Act, 1996, Section 34 (2) (*a*) (*iv*). See also; Article 34 (2) (*a*) (*iii*) of the UNCITRAL Model Law.
[65] Singh, Avtar, Law of Arbitration and Conciliation, 299.
[66] *State of Rajasthan v Nav Bharat Construction Co,* (2006) 1 SCC 86.
[67] http://indiankanoon.org/doc/407622/
[68] http://www.nishithdesai.com
[69] *Union of India v. Popular Builders,* (2000) 8 SCC 1.

an award; when the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force.[70] Generally, the matters not being of a criminal nature may be referred to arbitration. Where the law has given jurisdiction to determine a particular matter to a specified tribunal only, determination of that matter by other tribunals is excluded.[71] Only matters indifference between the parties to litigation which affects private rights of the parties can be referred to arbitration. Therefore, the matters of insolvency, matters of public right, fundamental right, will, or revocation of probate, proceedings of winding up of a company, etc. cannot be referred to arbitration.[72] However, In a matter relating to breach of contract in *J.G. Engineers (P) Ltd v. Calcutta Improvement Trust*,[73] the Supreme Court decided on the question as to whether the breach of contract caused by the delay of any of the party, it is for the arbitrator to decide and not the engineer or the department. Hence, stating that the matter is arbitrable.The nature of the dispute or difference which the parties to an arbitration agreement agree to refer must consist of a justiciable issue triable civilly. A fair test of this is whether the differences can be compromised lawfully by way of accord and satisfaction.38

f) Public policy: fraud or corruption as a ground

Although expressly provided under the Act, these grounds are also referred as to new grounds for challenge to award through Judge made Law[74], due to a huge amount of judicial developments. The UNCITRAL Model Law Commission stated in its report that the term "public policy" comprises "fundamental principles of justice".[75] The caution intended in the J Burrough's statement[76], "Public policy is a very unruly horse, and when you get astride, you never know where it will carry you" was overlooked by the Hon'ble Supreme Court in *ONGC v. Saw Pipes Ltd*[77] and held that the phrase 'public policy in India' used in Section 34 (2) (*b*) (*ii*) of the Arbitration and conciliation Act, 1996 is

[70] The Arbitration and Conciliation Act, 1996, Section 34 (2) (*b*) (*i*).
[71] *Umer v. Dadli*, AIR 1926 Sind 128.
[72] Singh, Avtar, Law of Arbitration and Conciliation, 362.
[73] 2002(2) SCC 664.
[74] http://coporatelaws.wordpress.com/2010/04/18/enforcement-of-arbitration-awards-in-india/
[75] UNCITRAL Report on the work of its 18th session, June 3-21, 1985, para.296
[76] *Richardson v. Mellish.* (1824) 2 Bing 229 (1824-34) ALL ER Rep 258.
[77] 2003(5) SCC 705; AIR 2003 SC 2629.

required to be given a wider meaning. The result was that an award could be set aside if it is contrary to:

Fundamental policy of India; or

The interest of India; or

Justice and morality; or

In addition, if it is patently illegal.

The trend in India is similar to that in England i.e. public policy could be interpreted in a narrow sense and a broad sense. It may be taken into consideration that in *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v. Ras Al Khaimah National Oil Co.*,[78] Sir John Donaldson M.R. has said, "Consideration of public policy can never be exhaustively defined, but they should be approached with extreme caution." The Supreme Court's judgment in this case expanded the concept of public policy to add that the award would be contrary to public policy if it was "patently illegal". The Supreme Court distinguished *SAW Pipes* case[79] from that of *Renusagar*[80] on the ground that the *Renusagar* judgment[81] was in context of a foreign award, while the ratio of *SAW Pipes*[82] would be confined to domestic awards only. And in the name of public policy, the court went on to re-appreciate the question of facts, mixed question of fact and law and pure question of law, which is most undesirable in international commercial arbitration, as it would lead to uncertainty, a factor which no businessman in international business transaction would like to have.[83]

It may be correctly stated that the ratio set in *ONGC v. Saw Pipes*[84] makes a significant dent in the jurisprudence of arbitration in India and has come in for some sharp nonetheless deserving criticism. Mr. Fali S. Nariman, one of the greatest lawyers of

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[78] 1987(2) All ER 769.
[79] *ONGC v. SAW Pipes Ltd.*, AIR 2003 SC 2629.
[80] *Renusagar Power Plant Ltd. v. General Electric Co.*, AIR 1994 SC 860
[81] Ibid.
[82] *ONGC v. SAW Pipes Ltd.*, AIR 2003 SC 2629.
[83] http://www.halsburys.in
[84] AIR 2003 SC 2629.

our generation, remarks on the judgment as having "virtually set at naught the entire Arbitration and Conciliation Act of 1996...To have introduced—by judicial innovation—a fresh ground of challenge and placed it under the head of 'public policy' was first contrary to the established doctrine of precedent.[85]

The most recent decision of the Supreme Court on the subject of setting aside an award on the ground of public policy under Section 34 is *Venture Global Engineering v. Satyam Computer Services Ltd.*[86] Based on the earlier judgment in *Bhatia International*,[87] the Supreme Court held that it is open to the parties to exclude the application of the provisions of part I by express and implied agreement, failing which the whole of part I would apply. Further, it held that to apply Section 34 to a foreign award would not be inconsistent with Section 48 of the 1996 Act, or any other provision of part II and that the judgment-debtor cannot be deprived of his right under Section 34 to evoke the public policy of India, to set aside the award. Thus, the extended definition of public policy cannot be bypassed by taking the award to foreign country for enforcement. The Supreme Court's intervention in the Satyam case[88] on grounds of public policy is most unfortunate, as it does not take into account the decision of the three judges Bench in *Renusagar* case.[89] The present decision, thus exposes foreign awards to challenge on merits on the ground that it is "patently illegal", notwithstanding the enforcement proceedings in any other jurisdiction. In effect, the decision treats a foreign award as a domestic award, if the execution of the award is to be done as per the laws of India.[90]

Thus, it is easy for anyone to grasp the direction these decisions have taken the law on the subject. What should be noted is that in all such cases, the judgments depart from the spirit through judicial lawmaking and they disclose a lack of trust in the arbitral process.

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[85] http://www.halsburys.in
[86] AIR 2010 SC 3371
[87] *Bhatia International v. Bulk Trading SA*, (2003)5 SCC 105.
[88] AIR 2008 SC 1061
[89] *Renusagar Power Plant Co. v. General Electric Co.*, AIR 1994 SC 860.
[90] Justice M. Jagannadha Rao, 'Arbitration in India: Section 34, *ONGC vs. SAW* Pipes, Manifets illegality and similar approaches in UK and US' Halsbury's Law Monthly, May 2009.

ADDITIONAL GROUNDS FOR SETTING ASIDE THE AWARD

Arbitration & Conciliation Act, 1996 is modeled on the UNCITRAL Model law and the UNCITRAL Arbitration Rules with few departures. Section 13[91] of the 1996 Act provides for the challenge to an arbitrator on the ground of lack of independence or impartiality or lack of qualification. In the first instance the challenge is to be made before the arbitral tribunal itself. If the challenge is rejected, the tribunal shall continue with the arbitration proceedings and make an award. Where the arbitral tribunal overrules the challenge and proceed with the arbitration, the party challenging the arbitration may make an application for setting aside the arbitral award under Section 34 of 1996 Act. Hence the approach to the court is only at the post award stage.

The following tables shows the quantum of challenges made to the awards for the period 1996-2011:-

Supreme Court

Domestic Awards

Total No. of Cases.28

S.No.	Grounds of Challenge	Total Cases	Allowed	Rejected	Modified
1.	Jurisdiction	15	4	8	3
2.	Public Policy	5	3	2	-
3.	Limitation	3	2	1	-
4.	Non-appreciation of evidence	5	2	2	1

[91] The Arbitration and Conciliation Act, 1996, Section 13.

All High Courts

Domestic Awards

Total No. of Cases 735

S.No	Grounds of Challenge	No. of Cases	Allowed	Rejected	Modified
1.	Jurisdiction	306	63	228	15
2.	Public Policy	201	45	132	24
3.	Limitation	102	19	77	10
4.	Violation of natural justice	51	12	32	7
5.	Bias	30	4	24	2
6.	Non-appreciation of evidence	18	2	13	3
7.	Unreasoned award	12	2	9	1
8.	Unsigned/Unstamped	5	-	5	-
9.	Not a party	1	1	-	-
10.	Non-application of mind	3	1	2	-
11.	No arbitration agreement	4	1	3	-
12.	Typographical errors	1	-	1	-
13.	Withdrawn of Challenge	1	-	-	-

Both High Courts & Supreme Courts

Foreign Awards

Total No. of Cases 25

S.No	Grounds of Challenge	No. of Cases	Allowed	Rejected	Modified
1.	Jurisdiction	9	-	9	-
2.	Public Policy	5	-	3	2
3.	Technical Grounds	4	-	4	-
4.	Requirement of separate E.P.	3	-	2	1
5.	Unreasoned award	1	-	1	-
7.	No arbitration agreement	3	2	1	-

A total of 763 awards (both domestic and foreign) were challenged during the period 1997-2011(May) out of which 330 awards were challenged on the ground of jurisdiction; 211 on the ground of public policy, 105 on the ground of limitation and 51 on the basis of violation of principles of natural justice. Out of the total 763 challenge was allowed only in 163 awards; 68 awards were modified and in the rest of the matters challenges were rejected. It is observed that subsequent to Bhatia International case the flood gates to the challenge to award was opened due to the widened interpretation to the term "public policy' and the quantum of challenges to the award on ground of public policy were increased.

The scheme of the Arbitration and Conciliation Act, 1996 is clear, *i.e,* to minimize court interference in the arbitral process and to ensure speedy enforcement of arbitral awards without the intervention of courts on unlimited grounds. Ironically, insofar as the 1996 Act is concerned, the reality has been far removed from the ideals professed by the legislation. The aforementioned judgments have adopted a very strained

interpretation of the Act which raises questions regarding our very commitment to the arbitral process. In the opinion of the researcher, where parties have chosen an arbitrator it indicates a deliberate intention on their part to avoid adversarial litigation in an attempt to prevent multiplicity of litigation.

General procedure followed by Arbitral institutions.

To assess whether the procedure followed by the arbitral institutions is conducive to incentive system, at first we must know the general procedure followed by the institutions. Generally, every institution has its own set of detailed Rules and modalities on arbitration, mediation and conciliation. These rules are framed keeping in mind certain objectives like, neutrality, confidentiality, speedy decision, low costs, adherence to natural justice principles. The arbitration proceedings commences when a party approaches the institution by making a written request by enclosing the necessary documents. Time frame is set for everything from filing of response to claims, counter claims, documents, and for formation of arbitral tribunal. Wherever time length is not specified the act has to be completed within reasonable time. Adoption of modern information and technology techniques like facsimile, telex, e-mail, courier service for delivering the notices/communication to the party has considerably reduced the time. Institution's preference for appointment of single arbitrator in simple and small claims has a great effect on reducing the financial burden on the parties.

Before appointing an arbitrator, certain institutions like LCIA-India seeks a declaration from the arbitrator by confirming his ability to devote sufficient time to ensure the expeditions conduct of the arbitration. An arbitrator howsoever qualified, expert and experienced may be but if cannot spare/devote time, then it results in a prolonged proceedings. Hence, caution exercised by the institutions is welcomed. Though certain arbitral institutions like LCIA does not scrutinize the award voluntary but a provision is made in their Rules providing for correction of awards at the instance of party. This correction facilitates to rectify the errors in computation, clerical s typographical errors in the awards. An overall conspectus of the procedure followed by the arbitral institutions is conducive/encourages the incentive system associated thereto.

Attitude of Government toward institutional arbitration

Now the question is whether the approach of Government and judiciary in India is positive towards institutional arbitration. Generally, in contracts with the Government and public sector undertakings there is very often an arbitration clause providing for arbitration by an engineer or an architect or an officer of Government or public sector undertaking. Courts in several cases upheld the said arbitration clause by holding that a general presumption cannot be drawn that employee working with the Government or public sector undertakings has the bias. Such contract providing for employee-arbitrator are neither void nor unenforceable as no bar under the Act is found for such a clause. A question arises then what about the twin requirements of 'independence' and 'impartiality' under section 11 of the 1996 Act for appointment of arbitrator. By observing the overwhelming opposition for appointment of employee-arbitrator, supreme court in Denel Ltd Vs Bharat Electronics Ltd (2010) 6 SCC 394, has appointed a third person as sole arbitrator by declining to appoint managing director of the litigating party i.e. Ministry of Defence. The Government contracts in order to clear the apprehensions as to impartiality can go for institutional arbitration like ICADR instead of resorting to employee-arbitrator clause, as naming of their own officer as sole arbitrator with power to make non-speaking awards amounts to mockery. In this context, the phrase 'chief justice or any person or institution designated by him' under section 11 acquires significance. According to section 11, an arbitrator can be appointed by the chief justice or any person or institution designated by him. The plain language of section 11 means that chief justice can also designate an institution for appointing an arbitrator. However in S.B.P & Co Vs M/s Patel Engineering Ltd case (2005 (8) SCC 618), while interpreting the above phrase, majority judges of supreme court held that chief judge can only designate another judge of the court. 'Any person' has been interpreted to mean any judge and the expression 'institution' has been completely ignored. In the majority judges view institution (arbitral institution) being a non-judicial body cannot be equated with a judge of supreme court or High Court. This judgment is a blow on the institutional arbitration and depicts that judge-dominated arbitration is still persisting. Apart from this, in case of default clause in arbitration agreement, power is conferred on the chief justice

to designate suitable persons or institutions to nominate arbitrators. For example if ICA is designated by chief justice to nominate an arbitrator to deal with a dispute relating to a power project, probably an expert in that field would be nominated, not just another retired judge. The simple and clear intention of involving the arbitral institutions has been buried. Except in two cases, so far no High Court (from 2007-2010) has designated any institution to nominate an arbitrator. In the same way, none of the Ministries of Central Government, except Ministry of Statistical Planning and Implementation (MOSPI) has inserted a clause, in their contracts for reference of disputes to an arbitral institution. The above picture shows the sad state of affairs and Government/judiciary's discouraging attitude towards institutional arbitration.

Institutional arbitration as effective Legal System

In India, 95% of the arbitrations are adhoc and only 5% are institutional. Data collected from the institutions like ICADR reveals that form the period 1997-2011, only 37 cases were referred to it, an average 3 cases per year and none of these cases related to construction industry. Recently in the year 2010, with a view to provide an institutional mechanism for resolution of construction and infrastructure related disputes, Construction Industry Arbitration Council (CIAC) has been set up in Delhi in collaboration with Singapore International Arbitration Centre (SIAC). Construction Industry Development Council (CIDC) has been established as a registered society that works under the aegis of Construction Industry Development Council (CIDC) which was set-up by planning commission and construction industry. Despite of its high profile, even CIAC is not having handful of work. Though it is unreasonable to judge the budding institution on the basis of quantum of their cases but quality of awards and quantity of cases largely determines the impact of an institution. Only 37 cases were dealt by ICADR within a time span of 13 years. Out of the 37 cases, 4 cases related to conciliation of matrimonial disputes. Another budding Institution has got 2 cases in the year 2010 within a year of its establishment which involves huge sums. Whatever may be the reasons, the data in hand shows that institutional arbitration has not acquired a significant status and much work has to be done to emerge as an effective alternate dispute resolution mechanism.

CHAPTER-V

CONCLUSION

Arbitration is a form of adjudicatory mechanism developed to maintain contractual obligations between parties. Business communities see the arbitration as viable and conducive because of its flexibility in decision making, reliance on customs, rapidity and confidentiality.

India implemented the Arbitration and Conciliation Act,1996 for the following purposes, to narrow the basis of challenges of the awards; decrease judicial supervision; ensure finality of awards; and expedite the arbitration process. Parliament intended to increase party autonomy and create uniformity in the arbitration process with the minimum judicial intervention. More than a decade later, scholars and practitioners, within and outside of India, complain that despite Parliament's intent, judicial intervention and delays lead to unpredictability and frustration in the arbitration process. In fact, these critics claim that parties prefer to arbitrate outside the country or choose litigation in Indian courts rather than include arbitration as an option in contractual agreements.

There is requirement for legislative amendment to remove the anomaly which enables a defeated party to avoid execution of arbitral awards by merely filing an application for setting aside under Section 34 of the 1996 Act, without being required to deposit a part of the award amount. Ordinarily, this awarded amount would be deposited as a matter of course in case of a judgment debtor challenging a money decree before a civil court. In *NALCO Ltd. vs. Pressteel Fabrications (P) Ltd.*,[92] the Supreme Court of India has recently expressed a hope that suitable legislative action would undo this situation. The Court refused to impose any condition on the applicant pending disposal of its application for setting aside the award under Section 34, reasoning being that any such order would run counter to the letter and spirit of the Act. Nevertheless, the court did take judicial notice of the injustice that could be caused to the beneficiary of an arbitral award due to the 'automatic' stay by mere challenging of awards. Furthermore, the yet so far, proposed amendments unequivocally showed the intention of the legislature not to include "error of law" as a separate ground for setting aside domestic awards under the

[92] *NALCO Ltd. vs. Pressteel Fabrications (P) Ltd.*, (2004) 1 SCC 540.

Act. Nonetheless, it should be noted that these proposals have been in the 'proposal stage' for over seven years now, once again questioning the seriousness with which the legislature is addressing the issues.

Apart from the above, the following specified recommendations/suggestions are made to strengthen the institutional arbitration:

1. Simple and clearly drafted arbitration clause to be used to avoid disputes.
2. Appointment of single arbitrator in simple/small disputes is advisable to cut short the costs.
3. Hearings must be conducted at a location most convenient to parties, witnesses and arbitrators.
4. Time frame for hearings must be realistic.
5. Reasonable efforts to be made to conduct hearings on consecutive days.
6. Possibility of Video-Conference also to be considered.
7. Oral evidence has to be adduced only as an exception whenever necessary but not as a general rule.
8. Award to be pronounced within a reasonable time on conclusion of hearings.
9. Proceedings to be conducted and concluded expeditiously to avoid unnecessary costs attached to the protracted procedure.
10. Government contracts must bear a clause that provides for institutional arbitration. The practice of nominating employee-arbitrator has to be discouraged.
11. Independent institutions should impart training for nurturing competent professionals who are trained to delve into the crux of the dispute for its resolution.
12. To encourage institutional arbitration judiciary has to designate the institutions to nominate arbitrators.

ANNEXURE-1

Total Reported Judgments*

Supreme Court

Year	No. of cases
2008	57
2009	60
2010	35
2011	7 till (May 2011)

Delhi High Court

Year	No. of Cases
2008	197
2009	163
2010	129
2011	65

Bombay High Court

Year	No. of Cases
2008	33
2009	45
2010	55
2011	43

Allahabad High Court

Year	No. of Cases
2008	7
2009	6
2010	6
2011	Nil

Calcutta High Court

Year	No. of Cases
2008	15
2009	8
2010	12
2011	Nil

Gujarat High Court

Year	No. of Cases
2008	4
2009	6
2010	3
2011	Nil

Karnataka High Court

Year	No. of Cases
2008	3
2009	3
2010	3
2011	Nil

Haryana High Court

Year	No. of Cases
2008	14
2009	15
2010	7
2011	Nil

Madras High Court

Year	No. of Cases
2008	28
2009	26
2010	22
2011	2

Rajasthan High Court

Year	No. of Cases
2008	6
2009	1
2010	6
2011	Nil

Orissa High Court

Year	No. of Cases
2008	8
2009	7
2010	2
2011	Nil

Patna High Court

Year	No. of Cases
2008	2
2009	4
2010	2
2011	Nil

Jharkhand High Court

Year	No. of Cases
2008	1
2009	5
2010	2
2011	Nil

Andhra Pradesh High Court

Year	No. of Cases
2008	15
2009	10
2010	7
2011	0

Guwahati High Court

Year	No. of Cases
2008	6
2009	4
2010	1
2011	Nil

Himachal Pradesh High Court

Year	No. of Cases
2008	0
2009	3
2010	1
2011	Nil

Madhya Pradesh High Court

Year	No. of Cases
2008	14
2009	5
2010	10
2011	0

Jammu & Kashmir High Court

Year	No. of Cases
2008	2
2009	0
2010	4
2011	Nil

Kerala High Court

Year	No. of Cases
2008	2
2009	4
2010	2
2011	Nil

Uttarakhand High Court

Year	No. of Cases
2008	0
2009	1
2010	1
2011	Nil

* Source: Arbitration case law reporters (Arbitration Law Reporter and Recent Arbitration Judgments)

ANNEXURE-II

Council for National and International Commercial Arbitration (CNICA)

International Arbitration

Charges for facilities	Administrative Fees	Registration Fee	Fee of Arbitrator
US$ 200 for one day or part thereof Referred to in Rule 38(6) Where the facilities are provided in place other than in the CNICA's office, the charges will be determined in each case and billed separately.	Where the total amount in dispute exceeds USD 10,00,000 or the dispute cannot be expressed in terms of money, the CNICA determine the amount of administrative fees, in its discretion in each cases.	Non-refundable fee referred to in Rule 39(1)- US$ 500 (where the CNICA acts only as an appointing authority)	Where the total amount in dispute exceeds USD 10,00,000 or the dispute cannot be expressed in terms of money, the CNICA shall determine the amount of fee in each case. In the case of the arbitral tribunal consisting of more than one arbitrator the Arbitrator's fee shall be the same, in addition to that of the fees of the Sole Arbitrator.

Domestic Arbitration

Charges for facilities	Administrative Fees	Registration Fee	Fee of Arbitrator
Rs.1,000/- for one day or part thereof	Where the total amount in dispute exceeds	Non-refundable fee	Where the total amount in dispute

Referred to in Rule 38(6) Where the facilities are provided in a place other than in the CNICA offices, the charges will be determined in each case and billed separately.	Rs,10,00,000 (or) the dispute cannot be expressed in terms of money, the CNICA determine the amount of administrative fees, in its discretion in each cases.	referred to in Rule 39(1)- US$ 3000.	exceeds USD 10,00,000 or the dispute cannot be expressed in terms of money, the CNICA shall determine the amount of fee in each case. In the case of the arbitral tribunal consisting of more than one arbitrator the Arbitrator's fee shall be the same, in addition to that of the fees of the Sole Arbitrator.

Delhi High Court Arbitration Centre (DAC)

Schedule A- Administration Cost*

Sum in dispute (in Rs.)	Administrative Cost
Upto Rs.5,00,000/-	Rs.5,000/-
Above Rs.5,00,000/- and upto Rs.20,00,000/-	Rs.5,000/- +0.5% of the claim amount over and above 5,00,000/-
Above Rs.20,00,000/- and upto Rs.1,00,00,000/-	Rs.12,500/- +0.25% of the claim amount over and above 20,00,000/-
Above Rs.1,00,00,000/- and upto	Rs.32,500/- +0.15% of the claim

Rs.10,00,00,000/-	amount over and above 1,00,00,000/-
Above Rs.10,00,00,000/-	Rs.1;67,500/- +Rs.6000/-per crore or part thereof, over and above 10,00,00,000/-

In addition to the foregoing, the parties shall be required to pay a sum of Rs.2,500/- per day for use of facilities of the DAC on the days the arbitral tribunal holds its sittings.

Schedule B- Arbitrator Fees*

Sum in dispute (in Rs.)	Fees
Upto Rs.5,00,000/-	Rs.35,000/-
Above Rs.5,00,000/- and upto Rs.20,00,000/-	Rs.35,000/- +2.5% of the claim amount over and above 5,00,000/-
Above Rs.20,00,000/- and upto Rs.1,00,00,000/-	Rs.72,500/- +3% of the claim amount over and above 20,00,000/-
Above Rs.1,00,00,000/- and upto Rs.10,00,00,000/-	Rs.3,12,500/- +0.75% of the claim amount over and above 1,00,00,000/-
Above Rs.10,00,00,000/- and upto Rs.20,00,00,000/-	Rs.9,87,500/- +0.5% of the claim amount over and above 10,00,00,000/-
Above Rs.20,00,00,000/-	Rs.14,87,500/- +0.25/- of the claim amount over and above 20,00,00,000/- with a ceiling of Rs.25,00,000/-

Schedule C- Arbitrator's fees in summary arbitration*

Sum in dispute (in Rs.)	Fees
Upto Rs.10,00,000/-	Rs.25,000/-
Above Rs.10,00,000/-	As per schedule B

* Sum in dispute mentioned in the Schedule A, B and C above shall include any counter claim made by a party

Nani Phalki Vala Arbitration Centre

The Fees, Costs, Expenses relating to arbitration to arbitration proceeding are as follows:

Registration fee

Administrative fee; and

Arbitrator's fee (hearing and reading fees)

Claim	Registration Fees	Arbitrator's Fees	Administration Fees	Reading Fees
Rs.10 lakhs and less than Rs.10 lakhs	Rs.500/- (one time)	Rs.5,000/- (per day)	Rs.1,000/- (per day)	Not Applicable
Category-II				
Above Rs.10 lakhs but less than Rs.100 lakhs	Rs.1000/- (one time)	Rs.15,000/- (per day)	15% of Arbitrator's fee (per day)	Equivalent of two sittings
Category-III				
Rs.100 lakhs and above	Rs.1500/-	Rs.15,000/- for first 100 lakhs and additional Rs.5,000/- per day and	15% of Arbitrator's fee (per day)	Equivalent of two sittings

		multiples thereof for every further Rs.100 lakhs or any part thereof subject to a ceiling of Rs.50,000 per day		
Illustrations				
a) Rs.150 lakhs (Rs.1.5 crores)	Rs.1,500/- (one time)	Rs.20,000/- (per day)	Rs.3,000/- (per day)	Rs.40,000 (for entire proceedings per arbitrator
b) Rs.500 lakhs (Rs.5 crores)	Rs.1,500/- (one time)	Rs.35,000/- (per day)	Rs.5,250/- (per day)	Rs.70,000 (for entire proceedings per arbitrator)
c) Rs.1000 lakhs (Rs.10 crores)	Rs.1,500/- (one time)	Rs.50,000/- (per day)	Rs.7,500/- (per day)	Rs.1,00,000 (for entire proceedings per arbitrator)
d) Rs.1500 lakhs (Rs.15 crores)	Rs.1,500/- (one time)	Rs.50,000/- (per day)	Rs.7,500/- (per day)	Rs.1,00,000 (for entire proceedings per arbitrator)

In the case of international institutions, the administrative fee and Arbitration fees is shown in the below two tables.

Fees of Arbitral Institutions

	Approximate Administrative Fees (US$)		
	1 Million claim	10 million claim	100 million claim
ICC	21,715	57,515	99,215
SIAC-Singapore	11,146	28,115	52,725
CIETAC-China	22,898	97,368	547,368
BANI-Indonesia	5,000	50,000	500,000
KLRCA-Malaysia	10,500	24,000	30,000
HKIAC-Hong Kong	6,500	13,000	Determined by HKIAC
LCIA India – Hourly rates Registrar/Deputy Registrar/Counsel-108 (INR 5000) Other secretariat personnel-54 (INR 2500)			

Arbitration Fees

Arbitration Fees US$			
	1.5 million claim	20 million claim	100 million claim
Major ad valorem institution (mid-range fees)	47,110	120,485	607,455
LCIA	40,080	25,654	40,167
LCIA India	Calculated at Hourly rates (not exceeding INR 20,000)		

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