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Introduction to Arbitration

1. What is the essence of Arbitration, as compared with Mediation and Conciliation

1.1. Arbitration is a form of Alternate Dispute Resolution (*"ADR"*). ADR mechanisms are forms of dispute resolution other than adjudication by a Court or Tribunal. ADR could be institutional or may be conducted by direct negotiation inter se between the parties or their legal advisors. Some of the forms of ADR are Mediation, Arbitration and Conciliation. ADR is an alternative to the formal legal system of Courts established by law since Courts have always been overburdened with cases. The system of ADR emanates from the desire of the people to change the way in which disputes are traditionally resolved thereby reducing the burden on the Courts and reducing the legal costs. In many ways, the traditional Court system appears officious and formal whilst ADR is supposed to be quicker, more informal and cheaper.

1.2. Conventionally, all actions in rem were matters which the Courts were required to decide, whilst actions in personam could be adjudicated by the ADR mechanism outside the Court, unless certain Courts have exclusive jurisdiction to decide certain disputes. It is however important to bear in mind that there are certain types of disputes which are not suitable for resolution through the ADR process outside the Court or cannot be referred to Arbitration. The Hon'ble Supreme Court in ***Afcons Infrastructure Ltd. and Anr. v. Cherian Varkey Construction Co. (P) Ltd. and Ors***. ***[2010 (8) SCC 24]*** made a list of matters for which the ADR process is suitable and those for which it is not. The enumeration of "suitable" and "unsuitable" categorisation of cases, mentioned in the said judgment, is not intended to be exhaustive or rigid. The lists are indicative and illustrative, which can be subject to just exceptions or additions by the Court/Tribunal exercising its jurisdiction/discretion in referring a dispute/case to an ADR process.

1.3. Arbitration, Mediation and Conciliation, as mentioned above are all forms of ADR. However, they are distinct from each other. In order to truly understand their differences, it is important to understand what each of these methods of ADR mean.

1.4. MEDIATION

1.4.1. Mediation can be defined as a facilitative process in which disputing parties engage the assistance of a neutral mediator, who has no authority to make any decision for them, but who uses certain procedures, techniques and skills to help them to resolve their dispute by negotiated agreement without adjudication.

1.4.2. The definition of the term '*Mediation*' itself highlights that mediation has several advantages, which are as under.

a. The parties have ultimate control of the decision to settle and the terms of resolution.

b. The mediator uses a variety of skills and techniques to help the parties reach a settlement, but has no power to make a decision.

c. The parties remain the decision makers.

d. The mediator merely tries to guide the discussion in a way that optimizes parties' needs, takes feelings into account and reframes representations.

1.4.3. A Mediation Training Manual has been published by the Mediation and Conciliation Project Committee constituted by the Supreme Court of India, which is very instructive to understand the scope of Mediation and the benefits it offers. A few important points from the Mediation Training Manual are summarised below, in relation to Mediation:

a. Mediation is voluntary:

The parties retain the right to decide for themselves whether to settle a dispute and the terms of such settlement. Even if the court has referred the case for mediation or if mediation is required under a contract or a statute, the decision to settle and the terms of settlement always rest with the parties and this results in a settlement created by the parties themselves and is therefore acceptable to them. The parties have ultimate control over the outcome of mediation. Any party may withdraw from the mediation proceedings at any stage without assigning any reason.

b. Mediation is a party-centred negotiation process:

The parties, and not the neutral mediator are the focal point of the mediation process. Mediation encourages the active and direct participation of the parties in the resolution of their dispute. Though the mediator, advocates, and other participants also have active roles in mediation, the parties play the key role in the mediation process. Parties are actively encouraged to discuss the factual background of the dispute, identify issues and underlying interests, generate options for agreement and make a final decision regarding settlement.

c. Mediation process is informal:

It is not governed by the rules of evidence and the same may be conducted in an extemporaneous manner. The mediation process itself is structured and formalized, with clearly identifiable stages but each of the stages are flexible.

d. Mediation in essence is an assisted negotiation process:

Mediation addresses both the factual/ legal issues and the underlying causes of a dispute. Mediation is broadly focused on the facts, law, and underlying interests of the parties, such as personal, business/commercial, family, social and community interests.

e. Role of a Mediator:

Mediation is conducted by a neutral third party i.e., the mediator. The mediator remains impartial, independent, detached and objective throughout the mediation process. The mediator is a guide who helps the parties to find their own solution to the dispute. The mediator's personal preferences or perceptions do not have any bearing on the dispute resolution process. The mediator works together with parties to facilitate the dispute resolution process and does not adjudicate a dispute by imposing a decision upon the parties. This is the most important feature as the process of mediation is non-adjudicatory.

A mediator's role is both facilitative and evaluative. A mediator facilitates when he manages the interaction between the parties, encourages and promotes communication between them and manages interruptions and outbursts by them and motivates them to arrive at an amicable settlement. Training imparted to Mediators is valuable. A mediator evaluates when he assists each party to analyse the merits of a claim/defence, and to assess the possible outcome at trial and thereafter may guide the parties accordingly to resolve the dispute rather than go through the lengthy judicial process.

f. Mediation is confidential:

Statements made during mediation cannot be disclosed in civil proceedings or elsewhere without the written consent of all parties. This is especially useful in high stake commercial disputes.

g. In Moti Ram Vs. Ashok Kumar (2011) 1 SCC 466, the Hon'ble Supreme Court held as follows :-

"If the mediation is unsuccessful, then the mediator should only write one sentece in his report and send it to the court stating that the "mediation has been unsuccessful". Beyond that, the mediator should not write anything which was discussed, proposed or done during the mediation proceedings. This is because in mediation, very often, offers, counter offers and proposals are made by the parties but until and unless the parties reach to an agreement

signed by them, it will not amount to any concluded contract. If the happenings in the mediation proceedings are disclosed, it will destroy the confidentiality of the mediation process."

1.4.4. Realising the various benefits of the process of Mediation, Parliament promulgated the Mediation Bill, 2021, inter alia, to promote and facilitate mediation, especially institutional mediation, for resolution of disputes, commercial or otherwise, enforce mediated settlement agreements, provide for a body for registration of mediators, to encourage community mediation and to introduce online mediation as an acceptable and a cost effective process. The assent of the President was received on 15th September 2023. Certain provisions of the Mediation Act, 2023 were notified by the Ministry of Law and Justice on 9th October 2023 and these provisions i.e. Sections 1, 3, 26, 31 – 38, 45 – 47, 50 – 54, and 56 – 57 of the Mediation Act, 2023 came into force from that date.

1.4.5. Some of the key aspects of the Mediation Act, 2023 are as follows:

a. ***Comprehensive legislation:*** The Mediation Act would have an overriding effect for conducting mediation and conciliation over other laws except for the legislations specified in the Second Schedule. Additionally, Section 61 to Section 81 of the Arbitration and Conciliation Act, 1996 would stand amended and substituted to inter alia reflect that where conciliation is referred in any enactment, it would mean a reference to the Mediation Act. However, all ongoing conciliation proceedings before the Mediation Act came into force will continue under those provisions as if the Mediation Act was not on the statute book.

b. ***Disputes not fit for mediation:*** Not all disputes can be referred for mediation. The First Schedule sets out a list of disputes or matters that are not fit for mediation.

c. ***The Mediator:*** A Mediator can be appointed by the parties or by a mediation service provider, and such person may be a person registered with the Mediation Council. A person of any nationality can be appointed as a Mediator. However, a mediator of foreign nationality shall be required to have such qualification, experience, and accreditation as may be specified by the parties.

d. ***Reference by Court or Tribunal:*** A Court or Tribunal has the authority to refer the parties to undertake mediation at any stage of the legal proceedings.

e. ***Agreement to Mediate:*** An agreement to mediate must be in writing either in the form of a clause in a contract or a separate agreement. A mediation agreement is in writing if it is contained in i) any document signed by the parties, ii) an exchange of communications or letters including through

electronic form, or, iii) any pleadings in a suit or any other proceedings in which existence of mediation agreement is alleged by one party and not denied by the other.

f. ***Confidentiality and non-disclosure:*** Confidentiality is a paramount concern when it comes to mediation and the Mediation Act reinforces the confidentiality obligations of the parties and participants in mediation, the Mediation Service Provider as well as of the Mediator.

g. ***Mediator as a witness:*** A Mediator cannot act as an Arbitrator or representative or Counsel of either of the parties with respect to the disputed matter or be presented as a witness in any arbitration or judicial proceedings.

h. ***Enforceability of a mediated settlement agreement:*** A mediated settlement agreement in writing and authenticated by the Mediator, is final and binding on the parties and is enforceable in the same manner as if it were a judgment or decree of a court.

i. ***Pre-litigation mediation:*** The Mediation Act, 2023 makes pre-litigation mediation voluntary. However, pre-litigation mediation with respect to commercial disputes would continue to be governed as per the provisions of the Commercial Courts Act, 2015 and the rules framed thereunder.

j. ***Community Mediation:*** Where there is a dispute that could affect peace, harmony, and tranquility amongst the residents or families of any area or locality, and if the parties agree to mediation, such matter could be settled through community mediation by making an application to the concerned Authority constituted under the Legal Services Authorities Act, 1987 or District Magistrate or Sub-Divisional Magistrate in areas where no such Authority has been constituted, for referring the dispute to mediation. Any settlement agreement arrived at pursuant to a community mediation shall not be enforceable as a judgment or decree of a civil court.

k. ***Mediation Council of India:*** The Mediation Act provides for the establishment of a 7-member Mediation Council of India for promoting domestic and international mediation in India and provides for the procedure of registration of mediators, recognising mediation institutes and mediation service providers. (Sec 32)

l. ***Amendment of other laws:*** The Mediation Bill seeks to amend several laws including the Indian Contract Act, 1872, the Code of Civil Procedure 1908, the Legal Services Authorities Act, 1987, the Arbitration and Conciliation Act,1996, the Micro, Small and Medium Enterprises Development Act, 2006, the Companies Act, 2013, the Commercial Courts Act, 2015 and the Consumer Protection Act, 2019 in the manner appearing in the Third to the Tenth Schedules appended to the Mediation Act, 2023.

1.4.6. Pursuing the mandate under Section 89 of the CPC, to establish procedure for mediation, the Hon'ble Bombay High Court has formulated the Alternative Dispute Resolution and Mediation Rules 2006. Part I of these Rules, deal with ADR, whereas Part II deal with Mediation Rules. Part I in simple terms elucidates the forms of resolution which may be suitable to parties. The Courts are given the responsibility under Rule 4 of the Mediation Rule 2006 to advise the parties in relation to which method of ADR may be more suitable. The suitability of the method, depends upon the relation between the parties. The Rules recognise that disputes arising out of matrimonial, maintenance and custody matters among others are categorised as disputes where relationship of parties has to be preserved and the process of mediation or Lok Adalat has to be adopted. Where no relationship is to be preserved, it is considered that Arbitration may be a more suitable form.

1.4.7. The Rules explain the four methods mentioned under Section 89 of the CPC in the following terms:

a. Settlement by 'Arbitration' means the process by which an arbitrator appointed by parties or by the Court, as the case may be, adjudicates the disputes between the parties to the suit and passes an award by the application of the provisions of the Arbitration and Conciliation Act, 1996 (*"the Act"*) in so far as they refer to arbitration.

b. Settlement by 'Conciliation' means the process by which a conciliator who is appointed by parties or by the Court, as the case may be, conciliates the disputes between the parties to the suit by the application of the provisions of the Act in so far as they relate to conciliation and in particular, in exercise of his powers under Sections 67 and 72 of the Act, by making proposals for settlement of the dispute and by formulating or reformulating the terms of a possible settlement; and has a greater role than a mediator.

c. Settlement by 'Mediation' means the process by which a mediator appointed by parties or by the Court, as the case may be, mediates the dispute between the parties to the suit by the application of the provisions of the Mediation Rules, 2006 in Part II, and in particular, by facilitating discussion between the parties directly or by communicating with each other through the mediator, by assisting parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, generating options in an attempt to solve the dispute and emphasizing that it is the parties own responsibility for making decisions which affect them.

d. Settlement in 'Lok Adalat' means settlement by Lok Adalat as contemplated by the Legal Services Authority Act, 1987.

1.4.8. The Supreme Court in its judgment in ***M/S. Patil Automation Private Limited and Ors. V. Rakheja Engineers Private Limited [2022 (10) SCC 1]*** has held that Pre-institution mediation as prescribed for under Section 12A of the Commercial Courts Act is mandatory and any suit instituted which violates the mandate under Section 12A must be visited with rejection of the plaint under Order VII Rule 11. The relevant portion is produced below.

> *"113. Having regard to all these circumstances, we would dispose of the matters in the following manner:*
>
> *113.1. We declare that Section 12-A of the Act is mandatory and hold that any suit instituted violating the mandate of Section 12-A must be visited with rejection of the plaint under Order 7 Rule 11. This power can be exercised even suo motu by the Court as explained earlier in the judgment. We, however, make this declaration effective from 20-8-2022 so that stakeholders concerned become sufficiently informed.*
>
> *113.2. Still further, we however direct that in case plaints have been already rejected and no steps have been taken within the period of limitation, the matter cannot be reopened on the basis of this declaration. Still further, if the order of rejection of the plaint has been acted upon by filing a fresh suit, the declaration of prospective effect will not avail the plaintiff.*
>
> *113.3. Finally, if the plaint is filed violating Section 12-A after the jurisdictional High Court has declared Section 12-A mandatory also, the plaintiff will not be entitled to the relief."*

1.4.9. It is pertinent to mention that the right of the Plaintiff, in a commercial civil suit to seek interim relief, however is not affected by the mediation process, as the language of Section 12A of the Commercial Courts Act, 2015 itself clarifies that the procedure of exhausting the remedy of pre-institution mediation is applicable for suits which do not contemplate any urgent interim relief under the Commercial Courts Act, 2015. Section 12A of the Commercial Courts Act, 2015 is reproduced below:

> *"**12A. Pre-Institution Mediation and Settlement** (1) A suit, which does not contemplate any urgent interim relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of pre institution mediation in accordance with such manner and procedure as may be prescribed by rules made by the Central Government.*
>
> *(2) The Central Government may, by notification, authorise the Authorities constituted under the Legal Services Authorities Act, 1987 (39 of 1987), for the purposes of pre-institution mediation.*
>
> *(3) Notwithstanding anything contained in the Legal Services Authorities Act, 1987 (39 of 1987), the Authority authorised by the Central Government under*

sub-section (2) shall complete the process of mediation within a period of three months from the date of application made by the plaintiff under sub-section (1):

Provided that the period of mediation may be extended for a further period of two months with the consent of the parties:

Provided further that, the period during which the parties remained occupied with the pre-institution mediation, such period shall not be computed for the purpose of limitation under the Limitation Act, 1963 (36 of 1963).

(4) If the parties to the commercial dispute arrive at a settlement, the same shall be reduced into writing and shall be signed by the parties to the dispute and the mediator.

(5) The settlement arrived at under this section shall have the same status and effect as if it is an arbitral award on agreed terms under sub-section (4) of section 30 of the Arbitration and Conciliation Act, 1996 (26 of 1996)."

1.4.10. *The Supreme Court in* ***Yamini Manohar v. T.K.D. Keerthi (2024) 5 SCC 815*** *was to decide upon the meaning of the expression "contemplates urgent interim relief," in order to determine what disputes need not go to mediation first. It was stated that the word "contemplate" means to deliberate and consider. It was further noted that the position that a plaint could be rejected highlighted that the court must apply its mind, and not follow a merely mechanical method of admission or rejection. The court must examine and appreciate the "nature and subject matter of the suit, the cause of action and the prayer for interim relief". Simply inserting a prayer for urgent relief cannot however, paralyse the section. Camoflauging or dressing up on behalf of the Plaintiff cannot circumvent this necessary condition.*

1.4.11. Furthermore, Rule 13 under Part II of the Mediation Rules 2006 requires the attendance of the parties (either personally or through their counsel or power of attorney holders) at the mediation session as notified by the mediator. If a party fails to attend a mediation session as notified by the mediator, the other parties or the mediator himself can apply to the Court (in which the suit is filed) to issue directions to the party remaining absent to attend the mediation session. However, if the Court finds that such absence is without sufficient reasons, the Court can impose costs on such a party. Rule 13 the Mediation Rules 2006 is produced below:

"Rule 13: Non-attendance of parties at sessions or meetings on due dates:

(a) The parties shall be present personally or may be represented by their counsel or power of attorney holders at the meetings or sessions notified by the mediator.

(b) If a party fails to attend a session or a meeting notified by the mediator, other parties or the mediator can apply to the Court in which the suit is filed, to issue appropriate directions to that party to attend before the mediator and if the Court finds that a party is absenting himself before the mediator without sufficient reason, the Court may take action against the said party by imposition of costs.

(c) The parties not resident in India, may be represented by their counsel or power of attorney holders at the sessions or meetings.

(d) For the purpose of clauses (a) and (c) where the parties are represented by Counsel or power of attorney, as the case may be, such Counsel or power or attorney shall have authority to settle and compromise."

1.4.12. It must be noted that though the Supreme Court in ***M/S. Patil Automation*** (supra) has held that Pre-Institution Mediation as prescribed for under Section 12A of the Commercial Courts Act is mandatory, Rule 13 of the Mediation Rules 2006 does not impose any consequence on the absenting parties. Rule 13 merely states that the Court may impose costs on the absenting party. For a mediation to be successful, the disputing parties must be active in the mediation process, else the entire purpose of Pre-Institution Mediation will fail and the Courts would be required to adjudicate the suit without one party having attended the Pre-Institution Mediation and pendency in Courts would continue. It may be appreciated that in the absence of an adverse consequence, the object of Section 12A is defeated. It would therefore be advisable if the Legislature/Rules framed by the Hon'ble High Court of Bombay are amended suitably to provide for an adverse consequence upon the absenting party.

1.4.13. In light of the above, particularly the coming into force of the Mediation Act, 2023, albeit not in its entirety, it is very evident that mediation, as a form of ADR has gained pace in India, through statutory schemes. Mediation is being seen as an effective, speedy and cost efficient form of dispute resolution that will help the litigants reach an amicable settlement and at the same time, it will help reduce the burden of the Judiciary in the country.

1.5. CONCILIATION

1.5.1. Though the word 'Conciliation' appears in the name of the Act, itself, curiously the Act does not define the term 'Conciliation'. Conciliation can be defined as a non-adjudicative and non-binding process in which an independent and impartial third party, the conciliator, without any authority to impose a solution, facilitates communication and negotiation between the parties to a dispute arising out of or relating to a contractual or other legal relationship with the objective of reaching an amicable settlement of their dispute.

1.5.2. Conciliation is an effective method of ADR as mentioned in Section 89 of the CPC. Part III of the 1996 Act, namely Sections 61 to 81 deal with the provisions relating to Conciliation. Some of the key provisions under Part III are as follows:

a. ***Commencement of conciliation proceedings*:**

a.a. Section 62 of the Act states that Conciliation proceedings are initiated on a written invitation by either party being sent to the other after identifying the subject of dispute.

a.b. The Conciliation process shall commence after the acceptance in writing by other party of the invitation. If the other party rejects, then no Conciliation proceedings can be undertaken.

a.c. If the initiating party does not receive any reply within 30 days (or within the time mentioned in the invitation), then the invitation will be considered rejected and if the initiating party so elects, can inform the other party in writing of the same.

b. ***Number of Conciliators*:**

b.a. Section 63 of the Act states that there shall be one Conciliator unless the parties agree that there shall be two or three.

b.b. It can be noted that in a Conciliation proceeding, the parties have a right to select even the number of Conciliators, which is not possible in Arbitration proceedings.

c. ***Submission of statements to conciliator*:**

c.a. Section 65 of the Act states that the Conciliator may request each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue.

c.b. The Conciliator can ask for supplementary statements and documents and is required to assist parties in an independent and impartial manner.

c.c. The Conciliator can also, at any stage request a party to submit to him such additional information as he deems appropriate.

d. ***Role of the Conciliator:***

d.a. Section 67 of the Act states that the Conciliator shall assist the parties in an independent manner so as to help the parties to amicable settlement.

d.b. The Conciliator while assisting the parties should follow the principles of objectivity, fairness and justice and also consider, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

d.c. The Conciliator may at any stage make proposals for the settlement of the dispute and there is no requirement that such proposal be in writing or accompanied by a statement of reasons.

e. ***Conclusion of the Conciliation proceeding:***

e.a. Section 73 of the Act states that if the Conciliator feels that there are elements of settlement that are acceptable to the disputing parties, he shall formulate a possible settlement and submit to the parties for their observation.

e.b. The Conciliator shall further make changes according to the observation of the parties and upon the parties agreeing to the same, the Conciliator shall draw up and sign the written agreement.

e.c. Section 74 of the Act states that such an agreement will have the same status and effect as an Arbitral Award rendered by an Arbitral Tribunal under Section 30 of the Act.

e.d. Section 75 of the Act states that the parties to the Conciliation proceedings and the Conciliator shall keep confidential all matters relating to the Conciliation including the settlement agreement except if its disclosure is necessary for purposes of implementation and enforcement.

e.e. Section 80 of the Act states that unless otherwise agreed by the parties, a person appointed as a Conciliator in a particular Conciliation proceeding shall not act as an Arbitrator or Counsel of a party in Arbitral or Judicial

proceedings, and cannot be presented as a witness by the parties in any Arbitral or Judicial proceedings relating to the disputes.

1.5.3. Before the Mediation Act, 2023 was enacted, the crucial difference between Conciliation and Mediation was that the settlement agreement under the process of Conciliation under the 1996 Act was an Arbitral Award i.e akin to a decree, by itself, whereas, the settlement agreement recorded before a Mediator had to be placed before the Court and the Court may thereafter pass a decree thereon, in accordance with the Rules as framed by the High Court. However now after the enactment of the Mediation Act, 2023 to a large extent this difference no longer exists as Sec 27 of the Mediation Act 2023 provides that subject to the provisions of Sec 28, the mediated settlement agreement shall be enforced in the same manner as if it were a judgement or decree passed by a Court. However, Sections 27 and 28 of the Mediation Act 2023 have not yet been brought into force. But in the time to come this crucial difference will disappear.

1.6. ARBITRATION

1.6.1. Arbitration is another well-recognised method of ADR. Section 2(a) of the 1996 Act defines "arbitration" to mean any arbitration whether or not administered by permanent arbitral institution. In simple words, Arbitration is adjudication of a dispute between two or more parties in a judicious manner, by a person or tribunal chosen by the parties in an informal, impartial, inexpensive and expeditious manner. Arbitration is defined in text books as thus: -

Wharton's Law Lexicon- "The determination of a matter in dispute by the judgment of one or more persons called Arbitrators who in the case of difference usually call an Umpire to decide between them".

Mozley and Whiteley- "Arbitration is where two or more parties submit all matters in dispute to the judgment of Arbitrators who are to decide the controversy.

Halsbury defines Arbitration as "the reference of dispute or difference between not less than two parties for determination, after hearing both sides in judicial manner, by a person or persons other than a Court of competent jurisdiction".

Russell on Arbitration quotes Hirst LJ in ***O'Callaghan v Coral Racing Ltd*** *as describing arbitration as follows:*

"To my mind the hallmark of the arbitration process is that it is a procedure to determine the legal rights and obligations of the parties judicially, with binding effect, which is enforceable in law, thus reflecting in private proceedings the role of a civil court of law."

1.6.2. The 1996 Act is divided into 5 parts.

Part I of the Act, prescribes the rules governing Arbitrations which are seated in India.

Part IA deals with the Arbitration Council of India

Part II deals with Enforcement of certain foreign awards.

Part III deals with Conciliation and

Part IV contains supplementary provisions.

1.6.3. There are certain unique characteristics of Arbitration which are as follows:

a. It is a process where rights and liabilities of parties are being determined in an impartial manner by applying judicial principles of Indian law/Law .

b. The Arbitrator cannot arrive at a decision based upon his own discretion or belief but is guided by the contract between the parties and the provisions of law.

c. The Arbitrator is not bound by the strict rules and principles of evidence but would have to follow basic principles to ensure equality of treatment, natural justice and fair play to all parties before him.

d. The Arbitrator is required to arrive at his findings only on the basis of the record placed before him by the disputing parties.

e. The Arbitrator has to decide on the subject matter of the dispute based upon the evidence led by the disputing parties – be it oral or documentary.

f. The Arbitrator must afford hearing to the rival parties and afford equal treatment to both parties unless the parties have agreed for an award only on the basis of written arguments and documents /evidence without oral hearing.

g. The "Arbitral Award" i.e., the judicial order, passed by the Arbitrator is enforceable in a Court of Law – as if it were a decree of the Court.

h. The parties may also adopt fast track arbitration procedure under Section 29-B of the Act.

i. The process of arbitration is time-bound under Section 29-A of the Act.

j. An Arbitrator is a creature of contract / terms of reference. The Arbitrator being a creature of the contract, exercises its power *ex-debito justitiae*. He cannot act contrary to the contract or reference nor can he re-write the contract and force a party to perform something which was never agreed or formed part of the contract. (See ***PSA Sical Terminals Pvt. Ltd. v. Board of Trustees of Chidambranar Port Trust Tuticorin, [2021 SCC Online SC 508]***)

1.6.4. Further, it is well known that every agreement of which the object or consideration is unlawful is void. Further any agreement in restraint of legal proceedings is void as per Section 28 of the Indian Contract Act, 1872. However Arbitration is a legal exception to this general rule.

1.6.5. It is pertinent to note that not all types of matters can be referred to Arbitration.

a. Disputes where rights in rem are involved or disputes which are exclusively reserved by the legislature for adjudication by the Courts are not capable of ar bitration. (See ***Booz Allen and Hamilton Inc. v. SBI Home Finance Limited and others, [(2011) 5 SCC 532]***)

b. Indicative examples of non-arbitrable matters:

- Matrimonial matters, like divorce or restitution of conjugal rights
- Insolvency matters, such as adjudication of a person as an insolvent
- Criminal Proceedings
- Questions relating to charities or charitable trusts.
- Matters falling within the purview of the Monopolies and Restrictive Trade Practices Act, Competition Act, TRAI Act, etc.
- Dissolution or winding up of a company.

1.6.7. As regards commercial and family matters, the same can be referred to Arbitration as long as the dispute which has to decided by the Arbitral Tribunal is not expressly made non-arbitral either because it decides a question in rem or involves giving a decision on a matter in respect of which the exclusive jurisdiction is vested in some Court, Tribunal of other forum.

1.6.8. S. 2(3) of the 1996 Act mandates that the Act will not affect any other law under which certain disputes are made non-arbitrable. The 1940 Act, did not have similar provisions but various Court decisions had held so. In the UNICITRAL Model Law provisions like S. 2(3) were absent. Recently the Supreme Court has held that Rent Act disputes also can be subjected to Arbitration if there is no special law (See ***Vidya Drolia & Ors v. Durga Trading Corporation [(2021) 2 SCC 1]*).**

1.6.9. Ordinarily, no person can be denied access to a court of law for seeking his remedy. However, the existence of an arbitration agreement may, in certain cases, operate as a bar to a suit in a court of law. Thus, a party to an arbitration agreement would be compelled to seek his remedy in arbitration and not in a court of law.

1.6.10. In cases of Arbitrations other than International Commercial Arbitrations, the Arbitral Tribunals decide the dispute according to the substantive law for the time being in force in India. In cases of International Commercial Arbitrations, the Arbitral Tribunal decides the dispute in accordance with the rules of law designated by the parties, or if no such designation is made by the parties, the Tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute. [Section 28] The Arbitrator is required to consider the applicable provision of law, and adjudicate upon the dispute. Part I of the 1996 Act provides the procedural law which governs the arbitral proceedings. The provisions show that Arbitration is adjudicatory in nature. In an International Commercial Arbitration, where the place of arbitration is India, the curial law/procedural law of the arbitration proceeding would be the provisions of said Act. This is in view of the provisions of Section 2(2) of the Act. However, the law governing the arbitration proceedings [curial law], in case of an International Commercial Arbitrations held outside India is the law of the place of where the arbitral proceedings are held.

1.6.11. The main difference in the essence of Arbitration as compared to mediation and conciliation are as follows:

***a. Nature of the Proceedings*:** Mediation and Conciliation proceedings are more informal in nature as compared to Arbitral proceedings. Arbitration is more formal and is similar to the process of adjudication that can be seen in courtrooms. In arbitration, the parties may need to testify and give evidence.

b. Enforcement: Arbitrator's award is enforceable as a decree. Furthermore, the parties have no control over the award passed by the Arbitral Tribunal and the parties are bound by the award passed. On the other hand, the parties have a far greater control over the outcome of the Mediation/Conciliation proceedings.

c. Requirement of a prior agreement: Neither Mediation nor Conciliation requires the need of a pre-existing agreement between the parties to embark upon Mediation or Conciliation. However, disputing parties cannot be forced to go in for arbitration proceedings if there exists no prior agreement containing an arbitration clause between them. Arbitration agreements can be contained in writing, by means of letters, documents, telegrams etc. which shows that there is no fixed format of an arbitration agreement. Historically, "arbitration" has always been regarded as a matter of agreement between the parties and arbitrator derives his jurisdiction from the agreement between the parties. The 2003 amendment to the Civil Procedure Code for the first time introduced section 89 in the Code, which now empowers a Court to refer parties, *inter alia*, to arbitration even when there is no arbitration agreement between them, when the Court feels the need to do so. However in such cases the Court would require to formulate the terms of

reference. Even before Section 89 came onto the statute book, the Courts have been, with the consent of parties, referring the matter to Arbitration.

1.7. "Arbitration" must also be distinguished from "supervisory" proceedings. For example, in construction contracts, power is often conferred on the concerned Engineer or a Project Management Consultant to give a final and binding decision on matters that may arise in the course of the work- for example, measurements, quantities, specifications, drawings, quality of work, etc. Such clauses have been held not to be "arbitration" clauses but have been characterised as "supervisory powers" (See ***State of U.P. vs. Tipper Chand [1980 (2) SCC 341]***). Even if such decisions are given, finally they are always subject to judicial review.

1.8. The essence of arbitration, as compared to Mediation, Conciliation or such other similar process, is that in the case of an arbitration the decision must be a judicial determination of rights and liabilities as a result of a judicial enquiry and a judicial decision based on evidence, and in Mediation and Conciliation, the decision is not a judicial determination and is not based on a judicial enquiry, which seeks to prevent any dispute from arising or assists parties in settling the dispute between themselves.

1.9. While reflecting upon the essence of arbitration, it is necessary to understand that the object of arbitration is to ensure a fair resolution of the dispute between the parties by an impartial Tribunal without unnecessary delay or expenses; the parties are free to agree how their disputes are to be resolved and intervention of Courts is minimal. The parties choose a judge of their own choice and save the time and expense which is expended in approaching court. Therefore, arbitration is a flexible mode of settlement of disputes and the final judgment in the form of an award can be enforced easily.

2. Advantages of Arbitration

There are many distinct advantages of Arbitration. Some of them are enumerated below:

2.1. The parties are free to choose the person/persons who will constitute the Arbitral Tribunal e.g. Arbitrator should be an expert from a particular field or industry, or should be legal expert, or should be retired judge of a certain designation or should be of certain nationality etc.

2.2. The parties can agree to a timeframe within which the Arbitrator must render his Award.

2.3. As compared to the long pendency in civil courts in India, the adjudication of disputes could be much faster.

2.4. While a decree passed by the Court is appealable, the grounds of challenge to an Award of an Arbitral Tribunal are very limited in comparison.

2.5. The Arbitrator has power to grant interest at commercial rates from the date of cause of action.

2.6. The Arbitrator has the power to grant further interest, on the amount of interest awarded in the Award, so as to completely resolve the dispute.

2.7. In case of International Commercial Contracts, the parties can agree to a neutral venue, a neutral institution, neutral substantive law as well as a neutral Arbitration Institute.

2.8. Similarly, in a domestic situation, parties can agree to refer the disputes to Arbitration under the institutional mechanism of IIAC or other like bodies to have the advantage of availing the services of experts from their panel of Arbitrators and institutional rules governing such arbitrations.

3. Advantages of Med-Arb and Arb-Med

3.1. In an Arbitration, the Tribunal or Arbitrator is neutral and has no additional knowledge of the dispute or the respective contentions/stands of the parties beyond the facts presented in the case. By contrast, a mediation process (certainly a facilitative mediation process) requires the parties to disclose additional information, that would otherwise be private and confidential. For this reason, the position taken in most international arbitration rules (such as the ICC and SCC rules) is that any mediation process should be kept entirely separate from arbitration or litigation proceedings, in order to maintain the neutrality and fairness of the proceedings. Due to such concerns about disclosing confidential information and the potential impact on the fairness of existing arbitration or litigation proceedings med-arb is less commonly used in common law and Western jurisdictions. In Asia, however, med-arb is a relatively familiar practice. Although parties in Asian jurisdictions will still commence formal arbitration or litigation proceedings at the beginning of a dispute as a strong message of their intent, the same parties are often willing to engage in informal or formal mediation processes, since the commercial culture tends to favour a negotiated settlement. Indeed, Arbitral tribunals and courts in Asian and other jurisdictions often strongly encourage settlement, and in particular mediation, during the course of the formal proceedings.

3.2. The practice of combining the mediation and arbitration processes is known as both **"med-arb"** and "**arb-med"**, depending on which process was initiated first. This process involves two roles (i) a mediator seeking to facilitate a settlement between the parties, and (ii) an arbitrator to determine the issues in dispute and issue a final and binding award.

3.3. With reference to Med-Arb/Arb-Med, the Arbitration and Conciliation Act, 1996 makes a provision for settlement of the dispute through other methods, by the Arbitral Tribunal. Section 30 of the Arbitration and Conciliation Act, 1996 states that the Arbitral Tribunal may, on the agreement of the parties, encourage the settlement of the dispute through Mediation, Conciliation or other processes, at any time during the arbitral proceedings. If the dispute is settled, the Arbitral Tribunal may, on the party's request, record the settlement in the form of an Arbitral Award on agreed terms, and terminate the Arbitration proceedings.

3.4. In a med-arb process, parties first reach an agreement on the terms of the process itself. Typically—and unlike in most mediations—they must agree in writing that the outcome of the process will be binding. Next, they attempt to negotiate a resolution to their dispute with the help of a mediator. As in a traditional mediation, the mediator

may suggest conferring with each party individually to discuss possible proposals in addition to bringing disputants together to air their views and brainstorm solutions.

3.5. In med-arb, if the mediation ends in an impasse, or if issues remain unresolved, the process isn't over. At this point, parties can move on to arbitration. The mediator can assume the role of arbitrator (if he or she is qualified to do so) and render a binding decision quickly based on her judgments, either on the case as a whole or on the unresolved issues. Alternatively, an arbitrator can take over the case after consulting with the mediator.

3.6. Sam Kagel, a well-renowned mediator in the United States of America, was instrumental in coining the term 'Med-Arb', and the essential principle behind it. In 1968, a nurses' strike in the San Francisco Bay Area was settled by way of mediation, and in 1970 the time came to reopen their contracts. Sam Kagel was requested to offer his services for the same and mediate the dispute, which he agreed to do only if both the parties agreed to the Med-Arb procedure, and consequently waive their right to strike and lockout. On the agreement of both parties to proceed with the Med-Arb procedure, and waiver of their right to strike and lockout, Mr. Kagel proceeded with the mediation. He states that several of the proposals made by the nurses were withdrawn after the process began in the interest of stressing on the important demands for the successful outcome of the mediation. In the event this were an arbitration, Mr. Kagel states that the nurses would have put the 'whole ball of wax' into the formal arbitration to ensure the best outcome. The benefit of a Med-Arb procedure in this scenario is the shift of authority to the Mediator/Arbitrator, while also taking away the rights of the employee organization, leading to a rational and peaceful approach to resolving disputes, for which the alternative would have been collective bargaining.

3.7. One of the first known cases of Med-Arb in an International Arbitration was the case of ***IBM v. Fujitsu (American Arbitration Association, Commercial Arbitration Case No. 13T-117-0636-85 [Sept. 15, 1987 and Nov 29 1988])***. The dispute arose out of a settlement agreement, entered due to IBM's allegations that Fujitsu had used IBM programs to develop IBM-Compatible operating system software for its own mainframes. The Arbitration Clause in the Settlement Agreement was therefore invoked in 1985 under the American Arbitration Association or the 'AAA' Rules. Although the arbitration clause did not provide for mediation, but the parties, on the advice of the arbitrators, agreed to allow other dispute resolution methods, such as Mediation. In accordance with the rules, the parties first appointed arbitrators of their choice and then proceeded with the mediation.

3.8. The Panel and the parties first decided that the application of extensive adjudication and fact-finding process with respect to the programs released by Fujitsu was to be avoided. During the mediation, the parties agreed to a lump sum payment of the license fee which covered past and future use of the program by Fujitsu. The result turned out to be a win for both parties, and was done with the incentive of not having to spend resources for the dispute to continue for another year or year and a half through arbitration. The case is a positive example of a Med-Arb process used effectively to come to a win-win situation. Mediation is often perceived as the final decision in a case, but if during the mediation process both parties endeavour to come to a common ground to work out the issues for the sake of their future relationship, the dispute may be resolved.

3.9. On the other hand, Arb-Med is a hybrid dispute resolution process that combines the benefits of arbitration and mediation, including: speed, procedural flexibility, confidentiality, choice of decision maker, ease of access to the Tribunal, continuity, finality, and enforceability of the outcome. The primary objective of Arb-Med is the informed good faith negotiation and settlement of the dispute by the parties, with the initial assistance and efficiency of the Arbitral Tribunal's information gathering powers, in the context of a formal arbitration process that will immediately resume if the mediation that follows is not successful.

3.10. Typically, the med-arb process ends with a successfully negotiated agreement, and the arbitration stage is not necessary. This could be because the threat of having a third party render a decision in binding arbitration often motivates disputants to reach an agreement. For this reason, med-arb can be a wise choice when parties are facing intense pressure to reach a resolution by a deadline, as in a labor dispute. It can also be beneficial when disputants need to work effectively with one another in the future. Med-arb can also be cost-effective: when disputants hire one person to serve as mediator and arbitrator, they eliminate the need to start the arbitration from square one if mediation fails.

3.11. There are also certain pitfalls to factor in when one is considering med-arb. When disputants are aware that their mediator could ultimately make a binding decision about the case, they may feel inhibited about sharing confidential information with him or her about their interests. If the mediation moves to arbitration, it could be difficult for the mediator-turned-arbitrator to "forget" that confidential information and focus exclusively on jointly shared information. Disputants might avoid this possibility by having different individuals serve as mediator and arbitrator, though this solution requires additional time and cost.

3.12. The concern about the revelation of confidential information in med-arb is eliminated in arb-med. In arb-med a neutral third party hears disputants' evidence and testimony in an arbitration; writes an award but keeps it from the parties; attempts to mediate the parties' dispute; and unseals and issues his/her previously determined binding award if the parties fail to reach agreement *(writes Richard Fullerton in an article in the Dispute Resolution Journal).* Although this process removes the concern about misuse of confidential information, it does not remove the pressure on parties to reach agreement in mediation. It also raises a new problem: the arbitrator/mediator cannot change her previous award based on new insights gained during the mediation. As a result, he may pressure the parties to reach an agreement to avoid revealing an award he now disagrees with.

3.13. A key factor of Med-Arb or Arb-Med proceedings is that the Mediator and Arbitrator may be a dual role played by a single individual. This may serve as an advantage or a disadvantage to the parties.

3.14. The key advantages of combining Mediation and Arbitration are usually said to be the following:

- An Arbitrator or Judge will already be familiar with the case, the parties and their counsel, and so should be well-placed to help settle the matters in dispute. An Arbitrator or Judge is also often best-placed to identify the most appropriate time in the proceedings to hold a Mediation.
- It can be an efficient way of reaching an early settlement, avoiding substantive hearings and the significant legal fees these incur – either by bringing the parties closer together (under the facilitative approach) or by giving an early indication of the likely outcome of the formal proceedings, and thereby encouraging the parties to settle.
- Any settlement reached during med-arb can subsequently be recorded in the form of a final award by the tribunal, which would then benefit from the enforcement regime under the 1996 Act and the Mediation Act 2023.
- A Mediation under the facilitative approach can be particularly beneficial where there is an on-going business relationship which the parties would like to preserve. Indeed, a mediated settlement can cover issues outside the scope of the immediate dispute, and can therefore have a positive outcome on the relationship between the parties going forward.

3.15. Disadvantages of med-arb:

- There is a risk that an Arbitrator's impartiality may be affected by overseeing a facilitative mediation. It may be difficult for an Arbitrator not to be influenced by

supposedly "without prejudice" disclosures or proposals made by the parties during the course of settlement negotiations.

- Similarly, a party may be reluctant to discuss its position openly with the Mediator if that Mediator is also the Arbitrator of the dispute and may go on to issue a final award against that party's interests, influenced by such earlier mediation discussions.
- It is important to check whether the arbitrator is under any duty (pursuant to the applicable arbitration rules or legislation in the seat of the arbitration) to disclose to the other parties all information material to the arbitration, including information exchanged during the mediation on a supposedly confidential basis. For example, in jurisdictions such as Japan which do not recognise 'without prejudice' privilege, parties may be deterred from discussing their position openly, or participating at all, in Mediation.
- In an evaluative Mediation which does not lead to a settlement, there is a risk that the parties will use the mediator's comments on the strengths and weaknesses of party's positions to improve their arguments and submit additional evidence, and thereby gain an advantage they would not otherwise have had.
- If the Mediation does not lead to a settlement, it is possible that a party might seek to challenge a subsequent arbitral award on public policy grounds, on the basis of some alleged irregularity or lack of due process at the Mediation stage.

3.16. There have been only a few cases wherein the two methods of dispute resolution have failed to adequately complement one another. The main issue arises with respect to the very individual resolving the dispute who may play a dual role of both Arbitrator and Mediator. As stated above, it is common practice to appoint the Arbitrator to also serve as the Mediator in the proceedings. What generally works against the parties in such situations is the lack of procedural safeguards that protect the parties against actual and apparent bias.

3.17. In the case of ***Gao Haiyan v. Keeneye Holdings Ltd. CACV 79/2011***, the Mediator also served as the Arbitrator, as is common for the Med-Arb/Arb-Med procedure. When the Mediation was unsuccessful, the Arbitrator rendered an award for much lesser than the amount offered to the Respondents during the Mediation. The Arbitrator essentially asked the affiliate of the Respondents to "work on" an RMB 250 Million proposal with the Respondents, and later passed an award for RMB 50 million as a way to penalize the Respondent for their refusal to cooperate. Although the award was set aside in the court of first instance on account of apparent bias, the Court of Appeal upheld the Award stating there was not enough evidence to warrant a refusal to enforce the award. This possibility of the Arbitrator/Mediator having a skewed perception of the parties' position during the arbitral proceedings is extremely dangerous to the case of the parties. Further, the usage of any information

obtained during Mediation, which may be unsworn and may have also been obtained during a meeting with one party, is a gross violation of due process. Any information shared during a session with only party may violate due process since such information may be used as evidence during the arbitration proceedings, without giving the other side the opportunity to challenge the same.

3.18. Some institutions, however, have made an attempt to tackle this issue by including a confidentiality rule that bars the usage of any communication made or information disclosed during the mediation in any "judicial, arbitration or similar proceedings, unless required by applicable law".

3.19. Another issue that props up on this count is when does the arbitration end, and mediation begin? In the case of ***Ku-ring-gai Council v. Ichor Constructions Pty Ltd. [2014] NSWSC 1534***, the Arbitrator offered to act as a Mediator to the parties and put forth a settlement proposal, which was accepted by the parties. Pursuant to this, the Arbitrator obtained a written consent from the parties to act as a Mediator as required by Section 27D of the Commercial Arbitration Act, 2010. As part of the Mediation, the Arbitrator then suggested that the parties stomach the costs of the arbitration since the arbitrator would take time to render a decision owing to the complexity of the matter and certain other commitments. This was rejected by the parties and the arbitration was resumed in violation of the requirement under the legislation to give written consent for the arbitrator to continue to arbitrate after the termination of the mediation proceedings. The Ku-ring-gai Council later contended that the proceedings that took place did not amount to mediation, which was rejected by the judge. The failure of the parties as well as the arbitrator to stick to the procedure envisaged by the law, and give the second consent to continue arbitration proceedings, caused the parties to incur heavy costs and start the arbitration proceedings all over again with another arbitrator. The cases of Keeneye Holdings and Ku-ring-gai council weigh in on the coercion the parties could face by the med-arbiter, the due process violation, as well as possible partial behaviour. It is extremely important to find a middle ground of formality and procedure between these two procedures of which one is characteristically procedural and the other being characteristically informal.

4. Contractual Arbitrations and Statutory Arbitrations

4.1. The Act provides for the definition of 'arbitration agreement' under Section 7. Such Agreement has to be in writing containing an understanding between parties to go for arbitration in case of a dispute. This kind of arbitration can be termed as 'contractual arbitration' as the genesis of this arbitration is an underlying contract between the parties who refer the existing disputes or a possible dispute in future to arbitration for adjudication. As against this contractual arbitration, certain enactments provide for compulsory reference of a dispute to arbitration, which is popularly known as statutory arbitration.

4.2. Statutory arbitration has to be distinguished from the statutory remedies available to parties. In statutory arbitration a party has to compulsorily go to the Arbitral Tribunal constituted under a special enactment. However, sometimes a party can have a different statutory remedy (not arbitration) for raising its grievance.

4.3. Several Central and State enactments provide for compulsory statutory arbitration, a few examples of which are – Telegraph Act, 1885, Section 7B, Section 158, 159 of Electricity Act, 2003, Forward Contracts (Regulation) Act, 1952, Land Acquisition Act, 1894 (now Right to Fair Compensation (Transparency in Land Acquisition, Rehabilitation and Resettlement) Act, 2013, National Highways Act, 1956, Multi-State Co-operative Societies Act, 2002, Micro, Small and Medium Enterprises Development Act, 2006 (Section 18), Bombay Stock Exchange (established under the provisions of Securities Contract Regulation Act 1956) under its bye-laws.

4.4. In cases of statutory arbitration, a question arises as to whether the special constitution of Arbitral Tribunal and special procedure provided by such an enactment has to be followed or the procedure under the 1996 Act has to be followed and in case of conflict between the provisions of the 1996 Act and the provisions of the special enactment providing for statutory arbitration, which provisions shall prevail.

4.5. Section 2(4) of the 1996 Act provides that Part I of 1996 Act, shall apply to arbitrations under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that the other enactments were an arbitration agreement except insofar as the provisions of Part I are inconsistent with that other enactment or with any rules made thereunder. Therefore, in the absence of

any provisions in the special enactment, the provisions of the 1996 Act would apply to such statutory arbitrations. However, if the provisions of the special enactment conflict with the provision of the 1996 Act, the provisions of the special enactment would prevail on the well settled principle of interpretation of statutes that the provisions of a special law will prevail over the general law.

4.6. The issues arising out of statutory arbitrations provided by special enactments (both Central and State) has been a subject matter of controversies and is reflected in a series of decisions of the Supreme Court as well as the High Courts. The Supreme Court in the case of ***Registrar, Co-operative Societies, West Bengal v. Krishna Kumar Singhania & Ors. (1995) 6 SCC 482*** interpreted the provisions of West Bengal Co-operative Societies Act, 1983, which provided a reference to arbitration under the 1940 Act. The Supreme Court held that the 1983 Act is a complete code in deciding the disputes by arbitrator appointed by the Registrar and also held that the scheme of the 1983 Act was inconsistent with the 1940 Act and Section 46 of the 1940 Act was not attracted to disputes arising under that Act.

4.7. In the case of ***M.P. Rural Road Development Authority v. L.G. Chaudhary (2012) 3 SCC 495***, the issue before the Supreme Court was whether in view of a special tribunal provided by a State Act in Madhya Pradesh, it was open to a party to invoke Section 11 of 1996 Act, in relation to an arbitration clause in a works contract. The State Act provided for a constitution of a special tribunal and also provided a different procedure for adjudication of disputes by arbitration. The Supreme Court in this case overruled its earlier judgment in the case of ***Va-tech Escher Wyass Flovel Limited v. M.P.S.E.B. (2011) 13 SCC 261***, in which it held that the M.P. State Act would apply only in cases where there is no arbitration clause and the M. P. State Act was impliedly overruled by the 1996 Act. However there was a divergence of opinion between the two judges on the consequence of the termination of the works contract in that case, which had a bearing on the ultimate course which the Court ought to adopt, i.e. to refer the matter to arbitration as per the State Act or the 1996 Act. This matter was referred to a larger bench due to the dissenting views. In the later three judges bench judgment in ***M.P. Rural Road Development Authority v. L.G. Chaudhary (2018) 10 SCC 826*** this issue was resolved. The legal position therefore is that the provisions of the M. P. State Act will prevail over the provisions of Section 2(4) of the 1996 Act and Section 46 of the 1940 Act in the State of M.P. in respect of certain types of arbitration and the decision of Justice A.K. Ganguly in ***M.P. Rural Road Development Authority v. L.G. Chaudhary (2012) 3 SCC 495*** was upheld.

4.8. The Supreme Court in the case of ***Gujarat Urja Vikas Nigam Limited v. Essar Power Limited (2008) 4 SCC 755***, was considering the question whether an application under Section 11 of the 1996 Act can be made before the High Court for appointment of an arbitrator for adjudication of disputes between licensee and generating companies after failure of the machinery provided for in the Agreement in view of provisions of Electricity Act, 2003. Section 86(1)(f) of the 2003 Act provides for adjudication of disputes between licensee and generating company by the State Commission and gives an option to the State Commission to refer such disputes to arbitration. The Supreme Court held that Section 86(1)(f) is a special provision and will override Section 11 of the 1996 Act. The Supreme Court held that except Section 11, all other provisions of the 1996 Act, would apply unless there is a conflicting provision in Electricity Act, 2003 (paragraph 59 and 61).

4.9. In the case of ***State of M.P. v. Anshuman Shukla, (2008) 7 SCC 487***, the question which arose before the Supreme Court was whether for the purpose of Section 29 of the Limitation Act, 1963, a special forum / Tribunal created by a State Act in the State of Madhya Pradesh would be a 'Court'. The Supreme Court, disagreeing with the earlier view in 2004, referred this issue to a larger bench. The Supreme Court, in this case, noting the scheme of M.P. State Act, 1983, concluded that the special forum (Arbitral Tribunal) created by this Act is nothing short of 'Court'.

4.10. In ***M.P. Housing and Infrastructure Development Board v. K.P. Dwivedi 2021 SCC Online SC 1171***, the Supreme Court held that a party who participated in the arbitral proceedings and voluntarily raised an issue before the arbitrator appointed by the High Court, cannot re-agitate the same before a Tribunal constituted under a special statute. The arbitral proceedings before the arbitrator appointed by the Court would not be non-est, after the participation of the parties without any demur or objection. The doctrine of 'Issue Estoppel' would apply and the party would be precluded from raising the same issue again.

4.11. The provisions of arbitration provided under the National Highway Authority Act, 1956 also came for consideration before the Supreme Court in the case of ***National Highway Authority of India v. Sayedabad Tea Company (2019) 11 SCALE 520***. Section 3 (G)(5) of NHAI Act, provides for adjudication of a dispute as to the quantum / apportionment of compensation for acquisitions under NHAI Act, 1956 by an Arbitrator appointed by the Central Government. The question before the Supreme Court was whether the remedy provided by Section 11 under the 1996 Act would be available to a party for appointment of arbitrator in such cases. The Supreme Court held that the 1956 Act is a special enactment under Entry 23 of List of

I of Seventh Schedule of the Constitution of India and held that the 1956 Act being a special enactment which under Section 3(G) provided for an inbuilt mechanism for appointment of an arbitrator by the Central Government, those provisions would prevail. The Supreme Court held that Section 11 of the 1996 Act will have no application as the power to appoint an arbitrator vested exclusively with the Central Government under Section 3(G) of the 1956 Act.

4.12. In Gujarat Civil Supplies Corporation Limited vs. Mahakali Foods Private Limited (2023) 6 SCC 401, the issue before the Hon'ble Supreme Court was whether the Micro and Small Enterprises Facilitation Council set up under the MSME Act itself could take up the dispute for Arbitration and act as an Arbitrator when the Council itself had conducted conciliation proceedings. The Hon'ble Supreme Court held that, though it is true that Section 80 of the Arbitration Act 1996 contains a bar that the Conciliator shall not act as an Arbitrator in any arbitration proceedings in respect of a dispute that is subject of conciliation proceedings, the said bar stands superseded by the provisions contained in Section 18 read with Section 24 of the MSME Act 2006. The Hon'ble Supreme Court held that the provisions contained in Chapter V of the MSME Act 2006 have an effect of overriding the provisions of the Arbitration Act 1996.

4.13. From the above judicial pronouncements it can thus safely be concluded that in case of statutory arbitration the provisions of the 1996 Act to the extent they are inconsistent with the special enactments would not apply. However, by virtue of Section 2(4) as interpreted by the Supreme Court, the other provisions of the 1996 Act, if they are not inconsistent with the Special Act and there is no intention in the Special Act to exclude the applicability of the 1996 Act, the 1996 Act would continue to apply.

4.14. Statutory arbitration has to be distinguished from the arbitrations provided under clauses of the agreements entered into by the public authority. The statutory arbitration is the one which is compulsory for a particular nature of a dispute in a statute. Sometimes the public authorities have a standard agreement to be entered into with the citizens in tenders which has a dispute resolution clause by one of the officer of the same public authority. These kinds of arbitration clauses have been a subject matter of various Supreme Court judgments, wherein the Supreme Court has held that the party can invoke Section 11 for appointment of an independent arbitrator (not by an officer of the public authority).

4.15. Generally speaking, appointment of an Arbitral Tribunal unilaterally has been held to be inconsistent with the mandate of S. 12 of the 1996 Act ***[Perkins Eastman Architects v. HSCC, 2019 SCC Online SC 1517]***. The High Court of Delhi held that a party who has actively participated in the arbitral proceedings, cannot challenge the unilateral appointment of the arbitrator, for the first time in a Section 34 petition. Failure of the party to raise the objection at the earliest possible opportunity under Section 11, 12(5), 14, 15 and 16 of the Act, would deprive him of his right to challenge the appointment under Section 34 application. ***[See Kanodia Infratech Limited v. Dalmia Cement (Bharat) Limited 2021 SCC Online Delhi 4883]***

5. Institutional Arbitration vs. Ad-hoc Arbitration *(specific reference to the Government of Maharashtra Resolution dated 13th October 2016 emphasizing need for and mandating Institutional Arbitration for all government contracts in excess of Rs. 5 crores)*

5.1. Institutional arbitration is an arbitration which is conducted by an institution established for that purpose and which has rules laid down for the conduct of arbitral proceedings. In the arbitration agreement between the parties, the parties sometimes name the institution for resolution of their disputes under the Arbitration Act as per the Rules framed by that institution. These institutions have a panel of arbitrators who are appointed in a particular dispute depending upon the subject matter of the dispute in the arbitration. These institutions provide a set up for conduct of Arbitral proceedings from the time of entering into an Agreement till publishing the Award.

5.2. In ***Amazon.com NV Investment Holdings LLC v. Future Retail Limited, 2022 (1) SCC 209***, the Supreme Court reiterated that party autonomy is an inherent feature of the Arbitration Act. The parties are at liberty to choose Institutional Rules to get their dispute resolved which also includes the power of the Emergency Arbitrator to grant interim reliefs to the parties. An order passed by the Emergency Arbitrator would be an order within the meaning of Section 17(1), enforceable under Section 17(2).

5.3. Recent trends indicate that parties choose adhoc arbitration especially in Domestic Arbitration. The institutional arbitration approach has not gained deep roots in India till date. The law makers have time and again made several efforts to promote institutional arbitration in India to have a well - structured institutional arbitration system to attract foreign investors from different countries.

5.4. The following are the major differences between the conduct of adhoc arbitration and institutional arbitration:

Subject	What happens in adhoc arbitration	What happens in institutional arbitration
Named arbitrator	Parties can appoint only a person who is named to act as an arbitrator.	This is not possible as the institution will appoint one of its panel members as an arbitrator.
Number of arbitrators in arbitral tribunal	Parties can also choose a number of their own choice to constitute arbitral Tribunal, provided the number is odd.	Institution determines the panel of arbitrators.
Appointment of expert as an arbitrator	Parties to the contract may not be aware of any expert to be named as an arbitrator before the disputes have arisen.	Institution has usually all the experts in the field and can appoint an expert arbitrator accordingly.
Procedure	Parties can agree to a fast track or any other procedure which suits them for resolution of disputes.	Parties have to abide by the rules framed by the institution as they agreed to abide by the same.
Outer limit	Parties can provide an outer limit for conclusion of arbitral proceedings.	Parties have to abide by the rules of institution.
Infrastructure and logistical support	Parties on their own have to arrange for the necessary administrative and logistical things such as conference room, stenographer, etc.	Institution has its own infrastructure which can be used by the parties

5.5. The advantages and disadvantages of adhoc and institutional arbitration are as follows:

5.5.1. In adhoc arbitration, the parties have to make their arrangement as to the appointment of arbitrator, procedure to be followed during the arbitration. The parties themselves have to arrange for service of papers and proceedings to

arbitrator and other side, make arrangement for administrative and logistical support such as conference room, stenographer etc. As against this, in institutional arbitration, the administrative / secretarial assistance is provided to the parties on payment of fees. The parties therefore can rely upon the institution to provide the logistical things.

5.5.2. As far as the fees for administrative assistance is concerned, in adhoc arbitration, the parties have to pay the costs involved at each stage of booking conference room, arranging stenographer, computer, stationery, expert witness etc. As against this, in institutional arbitration, the fee for providing administrative assistance is fixed in the rules.

5.5.3. Sometimes the nature of the Claim and Counter-Claim involved in the dispute is technical, complex and complicated and requires expertise which may not be there in adhoc arbitration. On the other hand, the institution can provide from its panel an expert who is best suited for adjudication depending upon the nature of claim. The parties in adhoc arbitration have full flexibility for rules which will govern the conduct of arbitral proceedings and they can tweak the rules of conducting the reference to suit their matter. In Institutional arbitration, it is not possible to do so as parties have to abide by the rules of the institution. In adhoc arbitration, when one of the parties to arbitration is not cooperating for conduct of arbitral proceedings, it becomes difficult to conclude the arbitration proceedings within the outer limit provided either by agreement or by the 2019 Act. This happens because the non-cooperating party usually files an interim application for Court's intervention. A party sometimes also makes vile and reckless allegations against the conduct of an arbitrator. In institutional arbitration, rules are framed which can force a reluctant party to go ahead with the arbitration.

5.5.4. In cases where State is one of the parties to the arbitration, submitting such arbitration to an adhoc arbitration is difficult particularly in view of decision making of the Government entangled in red-tape. On the other hand, the State can agree to Institutional arbitration without having to take a decision in each matter on a case to case basis.

5.5.5. Thus, while choosing between the two arbitrations, i.e. adhoc and institutional arbitrations, the parties should consider the nature of the likely disputes which will arise under the contract, the possible stakes that may be involved in case the dispute arises or has arisen and depending upon that parties should decide as to which one is best suited for them. In case of appointing an institution as an

arbitral tribunal, the parties should consider the rules framed by the institution, its past record, conduct and reputation in legal circles.

5.6. Government of Maharashtra Resolution dated 13th October 2016 emphasising the need for and mandating Institutional Arbitration for all Government Contracts in excess of ☐5 crores

5.6.1. Taking note of the 246th report of the Law Commission of India, the Maharashtra Government on 13th December 2016 adopted a resolution aimed at promoting arbitration as the preferred method of dispute resolution ("***2016 Resolution***").

5.6.2. The Government of Maharashtra in adopting this policy, has taken cognizance of the problems of excessive judicial intervention in arbitration proceedings and is aiming to promote, propagate and patronize institutional arbitration as the preferred mode of dispute resolution.

5.6.3. The 2016 Resolution recognises the need of an Institutional Arbitration Centre in Mumbai and proposes the establishment of a Financial Centre attached to the Arbitration Institute to promote faster dispute resolution. Accordingly, the Mumbai Centre for International Arbitration (MCIA) has been established.

5.6.4. The 2016 Resolution applies to State Government Contracts as well as to Corporations, Public Sector Units under the control of Government of Maharashtra. The various departments of the State Government are now required to abide by the 2016 Resolution. In time to come, one hopes that the arbitration mechanism would assist the State Government in achieving faster resolution of disputes.

5.6.5. The following are some of the policy initiatives of the 2016 Resolution:

i. **Bringing about uniformity in Dispute Resolution:**

i.i. The resolution has noted that there is a wide disparity in dispute resolution approaches taken in Government contracts. For example: *In one case there is a method of adjudication by an officer of the Government. In another case it is arbitration by an officer of the Government. In quite a few cases, there is both adjudication and arbitration by the officers of the Government.*

i.ii. Therefore, the 2016 Resolution provides that a uniform regime of dispute resolution must be adopted in all Government contracts where the value of the contract is **☐5,00,00,000 (Rupees 5 Crore)** or above, by providing that the dispute shall be referred to a recognized Arbitral Institute in India.

ii. **Option of amending existing contracts and to move to institutional arbitration:**

ii.i. The 2016 Resolution provides that with the consent of the other parties, existing contracts and agreements may be amended to provide that the dispute be referred to a recognized Arbitral Institute in India, using the recommended clause in place of the existing clauses.

ii.ii. It further provides that even in cases where Arbitration has commenced or is about to commence, parties may, with consent, move over to the Arbitration mechanism proposed in the resolution.

iii. **Ban on certain persons to be part of an arbitral tribunal and the need to incorporate international standards:**

iii.i. The 2016 Resolution states that disputes may not be referred to Arbitral Tribunals comprising serving officials of the Government.

iii.ii. It further suggests that the Institutes to be recognized by the Government of Maharashtra should frame their rules incorporating the best practices from around the world which are conducive to cost-effective and timely dispute resolution.

iv. **Requirement of arbitrators with calibre and need for acquiring proper infrastructure:**

iv.i. The 2016 Resolution urges that appointment of arbitrators for the Arbitration Centre must be fair and transparent.

iv.ii. It provides that persons of high caliber, impeccable integrity and specialized knowledge must be appointed as arbitrators.

iv.iii. It further states that the Government of Maharashtra may facilitate the recognized Arbitral Institutes in acquiring the required infrastructure such as communication and information technology systems along with an inviting ambience.

v. **Criteria for granting recognition to an Arbitral Institute:**

The 2016 Resolution lays down certain criteria for an Arbitral Institute to get recognition, which are as follows:

- The Arbitral Institute shall be an Indian legal entity having its head office registered in Maharashtra.
- The rules of the Arbitral Institute must incorporate best practices from around the world, and must encourage just, cost effective and time bound dispute resolution.
- The Arbitrators to be appointed by the Arbitral Institute shall be persons of high caliber, impeccable integrity and specialized knowledge.
- The Arbitration Institute must have hearing facilities that are of international standards.

vi. **Role of the government in inviting applications and the right of the government to de-recognize an Arbitral Institute:**

vi.i. The 2016 Resolution lays out the role of the Government in regulating setting up of a structure to promote arbitration.

vi.ii. It allows the Government to devise an appropriate method to invite applications from Arbitral Institutes fulfilling the above criteria.

vi.iii. It also states that the Government may de-recognize an Arbitral Institute if it is satisfied that the Institute is not acting in an effective, fair and transparent manner or is abusing the privilege of recognition or for any other cause.

vii. **The Arbitral Institutes will be of international standing and they shall function independently and impartially:**

vii.i. The 2016 Resolution provides that every endeavour shall be made by the recognized Arbitration Institutes as well as the Government of Maharashtra to ensure that the Arbitration Centres appoint arbitrators of international standing and their facilities are in accordance with international standards.

vii.ii. The Government of Maharashtra, is required to ensure that the functional independence and impartiality of the Arbitration Institutes is not affected.

viii. **Model arbitration clause:**

viii.i. The resolution also provides a model Arbitration clause for all Government contracts (Annexure 'A-1' of the 2016 Resolution).

viii.ii. The clause mentions that any dispute arising from the contract must be resolved by arbitration in accordance with the Arbitration Rules of the Mumbai Centre for International Arbitration ("MCIA Rules").

6. Domestic Arbitration

6.1. Part I of the Act (Sections 2 to 43), prescribes the rules governing Arbitrations which are seated in India. Following are the highlights of a domestic arbitration:

- The arbitration takes place in India.
- The subject matter of the contract is in India and the parties are Indian.
- The merits of the dispute are governed by Indian Law.
- The procedure of the arbitration is also governed by the Indian Law.

Section 2(2) of the Act provides that Part I will apply where the place of arbitration is in India. When the seat of arbitration is in India, Part I will compulsorily apply. Apart from the arbitration proceedings themselves, if any legal course is to be adopted by any party, they may approach the Court for availing specific remedies under the 1996 Act only. Under the Act, "*Court*" means a civil court of original jurisdiction, which shall not be inferior to a principal civil court, having jurisdiction to decide the subject matter of the arbitration as if the same had been a suit.

Although party autonomy is an essential characteristic of arbitrations, the Courts can interfere in arbitration proceedings in certain situations as provided under the Act. The extent of judicial interference is however statutorily restricted by Section 5 of the Act. For example, if a party or the arbitrators fail to nominate an Arbitrator or Presiding Arbitrator of the Tribunal, the petition/application would lie before the High Court within whose local limits the principal civil court is located. Furthermore, Courts have the power to set aside an Arbitral Award under specific circumstances only.

Awards passed under the Part I are referred to as Domestic Awards when both the parties are Indian. Sections 2 to 43 of the Act pertains to Part I of the Act. Section 7 of the Act provides for what constitutes an Arbitration Agreement. Parties generally have an Arbitration Agreement, as a part of their main contract. Such a clause for arbitration contained in the main contract, is the 'Arbitration Agreement' as referred to in the Act.

The Arbitral proceedings commence on reference of a dispute to arbitration, as provided under Section 21 of the Act. These proceedings are carried out in terms of the rules of procedure as set-forth in the Act, by the procedure which the parties may agree upon or the procedure as prescribed by an Arbitration Institute, if the parties have identified such an Institute in the Arbitration Agreement.

Normally, the Arbitral proceedings terminate when the Arbitral Tribunal passes an award, (Section 31). Under the Act, the Arbitral Tribunal is also entitled to pass an interim award.

Under Section 35 of the Act, an Arbitral Award shall be final and binding on the parties and persons claiming under them, subject to the application of Part I of the Act.

The parties may have recourse to a Court against an Arbitral Award by making an application under Section 34 of the Act seeking to set-aside the same. Section 34 of the Act, permits a party to assail/challenge the Arbitral Award, in accordance with Sections 34(2) and 34(3) of the Act. The decision of the Court under Section 34 of the Act can be challenged under Section 37 of the Act in an appeal.

The Supreme Court in ***Union of India v. U.P. State Bridge Corporation Ltd***. **(2015 (2) SCC 52 as per Dr A.K. Sikri, J.**) has held that like the English Arbitration Act, the Indian enactment is based upon four pillars which are:-
(a) The First Pillar: Three General Principles.
(b) The Second Pillar: The General Duty of the Tribunal.
(c) The Third Pillar: The General Duty of the Parties.
(d) The Fourth Pillar: Mandatory and Semi Mandatory Provisions.

The three principles of Arbitration law, being (i) speedy, inexpensive and fair trial by an impartial tribunal; (ii) party autonomy; and (iii) minimum court intervention are present in the Indian enactment. In the book "O.P. Malhotra on the Law and Practice of Arbitration and Conciliation" (Third Edition revised by Ms. Indu Malhotra), it is rightly observed that Indian Arbitration Act is also based on the aforesaid four foundational pillars.

Some other aspects of the Act that are important, are enumerated below:

Party Autonomy:

This topic has already been dealt with earlier in this paper under the topic of "advantages of arbitration". To summarise, the principle of party autonomy is when the parties consensually execute the arbitration agreement. The parties are said to be truly "autonomous" when they have the freedom to choose the substantive laws that will govern such an agreement, the composition the Arbitral Tribunal, the place/seat of arbitration, etc.

b. **Arbitration Agreement is mandatory:**

b.a. Section 7 of the Act provides that an arbitration agreement ought to be in writing. Arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

b.b. The agreement must be in writing and must be signed by both parties. The arbitration agreement can be by exchange of letters, document, telex, telegram, etc.

b.c. An Arbitration Agreement is considered as an independent contract, the validity of which does not depend upon the validity of the main contract.

c. Least Judicial Intervention:

c.a. Section 5 of the Act provides that in matters governed by Part I of the Act, no judicial authority shall interfere except where so provided in this Part.

c.b. Judicial intervention is statutorily allowed in respect of the following matter to the exclusion of its residual or inherent powers. A few grounds of judicial intervention are :

Section of the Act	What the Section States
Section 8	Power to refer parties to arbitration where there is an arbitration agreement.
Section 9	Power to make interim orders as measures of protection, before commencement of arbitral proceedings, during arbitral proceedings and prior to enforcement of arbitral award.
Section 11	Power to appoint arbitrators, on an application by the parties.
Section 14(2)	Power to decide on the termination of mandate of an arbitrator.
Section 34	Power to set-aside the award.
Section 37	Power to hear appeals in certain specified matters.
Section 38(2)	Power to Order delivery of award on payment of costs to the Court.
Section 29-A(4)	Power to extend the 18 month time-limit to complete arbitral proceedings.
Section 29-A(4)	Power to reduce the fees of the arbitrator, for his causing delay in arbitral proceedings.

d. Appointment of Arbitrator under Section 11

da) Prior to the judgement of the Hon'ble Supreme Court in Interplay (2024) 6 SCC 1, the scope of interference by the Court in proceedings under Section 11 of the Act was slightly wider. However, the judgement of the Hon'ble Supreme Court in Interplay has narrowed down the scope. In Interplay, the Hon'ble Supreme Court has held that the scope of examination under section 11 (6A) should be confined to the existence of an arbitration agreement on the basis of Section 7 of the Act. Similarly, the validity of an arbitration agreement, in view of Section 7 of the Act, should be restricted to the requirement of formal validity such as the requirement that the agreement be in writing. The Hon'ble Supreme Court has held that this interpretation gives true effect to the doctrine of competence - competence by leaving the issue of substantive existence and validity of an arbitration agreement to be decided by the Arbitral Tribunal under Section 16 of the Act. The Hon'ble Supreme Court in Interplay accordingly clarified the position of law laid down in Vidya Drolia and Others in the context of Section 8 and Section 11 of the Act in the aforesaid terms. Further, in Interplay , the Hon'ble Supreme Court held that, in jurisdictions such as India, which accept the doctrine of competence - competence, only prima facie proof of the existence of an arbitration agreement must be adduced before the Referral Court. The Hon'ble Supreme Court held that the Referral Court is not the appropriate forum to conduct a mini trial by allowing the parties to adduce evidence in regard to the existence or validity of an arbitration agreement. The determination of the existence and validity of an arbitration agreement on the basis of evidence ought to be left to the Arbitral Tribunal.

db) Further, in Interplay (Supra), the Hon'ble Supreme Court held that Section 11 (6A) uses the expression "examination of the existence of an arbitration agreement". The purpose of using the word "examination" connotes that the legislature intended that the Referral Court had to inspect or scrutinize the dealings between the parties for the existence of an arbitration agreement. Moreover, the expression "examination" does not connote or imply a laborious or contested inquiry. On the other hand, Section 16 provided that the Arbitral Tribunal can 'rule' on its jurisdiction, including the existence and

validity of the arbitration agreement. The Hon'ble Supreme Court further held that a 'ruling' connotes adjudication of disputes after admitting evidence from the parties. Therefore, it is evident that the Referral Court was only required to examine the existence of arbitration agreements, whereas the Arbitral Tribunal ought to rule on its jurisdiction, including the issues pertaining to the existence and validity of an arbitration agreement.

dc) The aforesaid position in law laid down by Interplay has been confirmed by the subse quent decision of the Hon'ble Supreme Court in SBI General Insurance Co.Ltd. vs. Krish Spinning (2024) SCC Online 17554.

e. Conduct of Arbitral Proceedings:

e.a. Section 18 of the Act mandates that the Arbitral Tribunal is required to treat the parties equally and each party should be given full opportunity to present its case.

e.b. Furthermore, Section 19(1) of the Act states that the Arbitral Tribunal is not bound by CPC or the Indian Evidence Act, 1872.

e.c. Section 19(2) of the Act further states that the parties to arbitration are free to agree on the procedure to be followed by the Arbitral Tribunal. If the parties do not agree to a procedure, the procedure will be as determined by the arbitral tribunal.

f. Time-limit for Arbitrations:

As mentioned above, Sec 29-A prescribes that an arbitrator must render the award within twelve months from the date the pleadings are completed. The parties may also extend this time limit by another 6 months (maximum period of 18 months); However after 18 months, the parties will have to apply to Court to get a n extension.

g. Power given to arbitrator to rule on its Jurisdiction:

g.a. The Act recognizes the principle of Kompetenz-Kompetenz. Section 16(1) of the Act empowers an Arbitral Tribunal to "rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement".

g.b. This, along with the principle of separability operates to give primary responsibility to the tribunal to determine its own jurisdiction. In a nutshell, the principle of Kompetenz-Kompetenz recognizes the competence of an arbitral tribunal to rule on its own jurisdiction.

g.c. The principle of Kompetenz-Kompetenz is elucidated by the Hon'ble Supreme Court in the case of ***N.N.Global Mercantile Pvt. Ltd.*** **v.** ***M/s Indo***

Unique Flame Ltd. **(2021 (4) SCC 379 Per Indu Malhotra, J.)** The Court held:-

"4.3. The doctrine of kompetenz-kompetenz implies that the Arbitral Tribunal has the competence to determine and rule on its own jurisdiction, including objections with respect to the existence, validity, and scope of the arbitration agreement, in the first instance, which is subject to judicial scrutiny by the courts at a later stage of the proceedings. Under the Arbitration Act, the challenge before the Court is maintainable only after the final award is passed as provided by sub-section (6) of Section 16. The stage at which the order of the tribunal regarding its jurisdiction is amenable to judicial review, varies from jurisdiction to jurisdiction. The doctrine of kompetenz-kompetenz has evolved to minimise judicial intervention at the pre-reference stage, and reduce unmeritorious challenges raised on the issue of jurisdiction of the Arbitral Tribunal."

h. Governing Law:

h.a. Section 28(1)(a) of the Act states that in cases of arbitration other than International Commercial Arbitration, the Arbitral Tribunal decides the dispute according to the substantive law for the time being in force in India.

h.b. Section 28(1)(b) of the Act states that in cases of International Commercial Arbitrations, the tribunal decides the dispute in accordance with the rules of law designated by the parties, or if no such designation is made by the parties, the tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

h.c. The Arbitrator is required to consider the applicable provisions of law, and adjudicate upon the dispute. Part I of the Act provides the procedural law which governs the arbitration proceedings. This provision of the Act, shows that Arbitration is adjudicatory in nature.

h.d. In an International Commercial Arbitration, where the place of arbitration is India, the curial law/procedural law of the arbitration proceedings would be the provisions of Act. This is in view of the provisions of Section 2(2) of the Act.

h.e. However, the law governing Arbitration proceedings [curial law], in case of an International Commercial Arbitration held outside India is the law of the place of where the arbitral proceedings are held.

i. Assistance of Experts:

i.a. Section 26 of the Act empowers the tribunal to appoint an expert – one or more – for assistance. The expert, after giving his report shall "unless otherwise agreed by the parties" be competent to participate in an oral hearing where the parties will have the opportunity to put questions to him and to

present their own expert witness to rebut or confirm the expert's conclusions.

j. Court Assistance during the Proceedings:

j.a. Section 27 of the Act introduces a new procedure. Either the Tribunal or the party can seek assistance of the Court in taking evidence.

j.b. The Court may, thereupon, order the witness or an expert to provide evidence to the Tribunal directly. The Act, however, does not confer any power on the tribunal to summon witness or to issue process etc.

k. Nature of Award and enforcement as a Decree:

k.a. Section 30 of the Act stipulates that an Arbitral Award is required to contain reasons. An Arbitral Award is final and binding upon the parties and persons claiming under them. This is a mandatory requirement unless the parties agree to permit the Tribunal to omit giving reasons.

k.b. Section 36 of the Act states that an award rendered by an Arbitral Tribunal may be enforced in the same manner as if it were a decree of the Court. Thus, a party may file execution proceedings in order to execute the award.

l. Award of costs:

l.a. Cost of arbitration means reasonable cost relating to fees and expenses of arbitrators and witnesses, legal fees and expenses, administration fees of the institution supervising the arbitration and other expenses in connection with arbitral proceedings. The Tribunal can decide the cost and share of each party.

l.b. The general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party. However for reasons to be recorded in writing, the Court or Tribunal may make a different order.

m. Settlement during Arbitration:

m.a. It is permissible for parties to arrive at mutual settlement even when arbitration proceedings are in progress. In fact, even the Tribunal can make efforts to encourage mutual settlement.

m.b. If parties settle the dispute by mutual agreement, the arbitral proceedings shall be terminated. However, if both parties and the Arbitral Tribunal agree, the settlement can be recorded in the form of an Arbitral Award on agreed terms. Such an Arbitral Award shall have the same force as any other Arbitral Award.

n. Limited grounds of challenge to Arbitral Award:

n.a Unlike a decree of the Civil Court, which passes through two stages of Appeal viz. First Appeal [on facts and law] and Second Appeal [on law] under the CPC, an Arbitral Award can be challenged only if grounds as mentioned in Section 34 of the Act exist.

n.b. Section 34 lists out several grounds of challenge. While saying that the grounds of challenge are limited, owing to the judgments rendered by the Courts, the scope of these limited grounds has been expanded.

n.c. One of the most important grounds of challenge to an Arbitral Award is whether the Arbitral Award is in conflict with the public policy of India.

n.d. The Supreme Court in the case of ***Associate Builders* v. *Delhi Development Authority (2015 (3) SCC 49)*** has dealt with the subject of when an award is in conflict with the public policy of India. As a consequence thereof, grounds of challenge to an award on the ground that it is in conflict with public policy of India, despite the use of the words 'only if' appearing in Explanation 1 to Section 34, would mean that the Court would have to examine the following expansive parameters of 'public policy':-

(a) Fundamental Policy of Indian law contemplates:

a. Where an award is contrary to the laws of India

b. Where an award is contrary to a binding judgment of a superior court in India;

c. The Tribunal must adopt a judicial approach;

d. Rules of natural justice to be followed – including that the authority must apply its mind;

e. Decision ought not be irrational / perverse, which is to be tested on the touchstone of the Wednesbury principle. A finding is perverse if (i) it is based on no evidence or (ii) if it takes into consideration irrelevant material or (iii) if it excludes material of vital importance.

(b) Interests of India

(c) Justice or Morality, which contemplates:

a. These as two distinct and independent concepts in law.

b. Justice has been interpreted to mean something that shocks the conscience of the Court.

c. Morality:

(i) courts have consistently held morality to mean and refer to sexual morality.

(ii) agreements that are not illegal but cannot be enforced as they are against the morals of the day where such agreements shock the conscience of the Court.

(d) Patent Illegality, which in turn contemplates:

a. Where the award is in contravention of the substantive laws of India - the illegality must go to the root of the matter and must not be trivial.

b. Where the award is in contravention of the provisions of the Arbitration Act.

c. Where the award is in contravention of Section 28(3) of the Arbitration Act, i.e. which calls upon the Tribunal to consider the terms of the contract. However, if arbitrator has construed the contract in a reasonable manner, then this is sufficient.

o. The Supreme Court in **Ssangyong Engineering and Construction Co. Ltd. vs. National Highway Authority of India (2019) 15 SCC 131** has laid down the following in respect of challenge to an award under Section 34 of the 1996 Act.

(i) Section 34, as amended, will apply only to Section 34 applications that have been made to the Court on or after 23.10.2015, irrespective of the fact that the arbitration proceedings may have commenced prior to that date (paragraph 19).

(ii) Public policy of India [in Section 34(b)(ii) after the 2015 amendment] is constricted to mean that a domestic award is contrary to the fundamental policy of Indian law, as understood in paragraphs 18 and 27 of the Associate Builders or secondly, that such award is against basic notions of justice or morality as understood in paragraphs 36 to 39 of the Associate Builders case. (paragraph 36).

(iii) As far as domestic awards are concerned, an additional ground of patent illegality appearing on the face of the award is available under Section 34(2A). (paragraph 37).

(iv) If an Arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award. (paragraph 39)

(v) Patent illegality under Section 34(2A) would cover the following cases:

a) Arbitrator construes the contract in a manner that no fair-minded or reasonable person would

b) Arbitrator wanders outside the contract and deals with matters not allotted to him. (paragraph 40).

(vi) A decision which is perverse would also amount to patent illegality. Thus a finding based on no evidence at all or an award which ignores vital evidence would be perverse and liable to be set aside on the ground of patent illegality. A finding based on documents taken behind the back of the parties would also amount to patent illegality. (paragraph 41)

(vii) Section 34(2)(a) does not entail a challenge to the Arbitration award on merits. (paragraphs 43 to 48)

(viii) Sub-section 18, 24(3) and 26 are important pointers to what is contained in the ground of challenge mentioned in Section 34(2)(a)(iii). (paragraph 51)

(ix) Where an Arbitral Tribunal has rendered an award which decides matters beyond the scope of the arbitration agreement, or beyond the dispute referred to the Arbitral Tribunal as understood in the case of Praveen Enterprises, the Arbitral Award could be said to have dealt with decisions on matters beyond the scope of the submission to arbitration under Section 34(2)(a)(iv) (paragraph 68)

(x) The expression "most basic notions of morality or justice" referred to in Explanation 1 to sub-clause (iii) to section 34(2)(b) means substantively or procedurally, some fundamental principle of justice which has been breached, and which shocks the conscience of the Court.

p. Arbitrability of Disputes:

p.a. The Courts are often called upon to decide, whether the subject matter of a dispute can be arbitrated upon. This may occur in a case where a party files a civil proceeding, and the other party may file an application under Section 8 of the Act contending that in view of an arbitration clause, the civil proceeding ought not to be continued but parties be referred to arbitration.

p.b. A Court hearing an application under Section 34 may be called upon to set-aside an award, on the ground that subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force.

p.c. Section 2(3) of the Act states that Part I shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration. The Act does not make any specific provision excluding any category of disputes terming them to be non-arbitrable.

p.d. Section 34(2)(b)(i) of the Act provides that an arbitral award may be set aside if "The court finds that- The subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force.". Ordinarily every civil or commercial dispute whether based on contract or otherwise which is capable of being decided by a civil court is in principle capable of being adjudicated upon and resolved by arbitration "subject to the dispute being governed by the arbitration agreement" unless the jurisdiction of the Arbitral Tribunal is excluded either expressly or by necessary implication.

p.e. Notwithstanding the above, the Courts have held that certain kinds of disputes may not be capable of adjudication through the means of arbitration. The same has been enumerated in detail above in the section relating to arbitration. Elucidating on the question of non-arbitrability of a dispute, the Supreme Court, in ***Booz Allen and Hamilton Inc. v. SBI Home Finance Limited and others, (2011) 5 SCC 532*** held that:

"35. The Arbitral Tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of the Arbitral Tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by public fora (Courts and Tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes..

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37. It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, a judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and a judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. (Vide Black's Law Dictionary.)

38. ***Generally*** *and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to subordinate rights in personam arising from rights in rem have always been considered to be arbitrable."*

p.f. The issue of arbitrability under a Trust Deed was carved out as an additional category by the Supreme Court in the case of ***Shri Vimal Kishor Shah & Ors v. Mr. Jayesh Dinesh Shah & Ors***. **(2016 (8) SCC 788 Per A.M. Sapre, J.)** This category of non-arbitrable disputes are cases arising out of trust deeds and the Trust Act 1882 ['the Trust Act']. The Supreme Court ruled that the Trust Act being a complete code in itself, there exists an implied bar of exclusion of applicability of the Arbitration Act for deciding the disputes relating to Trust, trustees and beneficiaries through private arbitration. The Court held that

*"**51.** The principle of interpretation that where a specific remedy is given, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar, and which runs through the law, was adopted by this Court in Premier Automobiles Ltd. v. Kamlekar Shantaram Wadke [Premier Automobiles Ltd. v. Kamlekar Shantaram Wadke, (1976) 1 SCC 496 : 1976 SCC (L&S) 70 : AIR 1975 SC 2238] while examining the question of bar in filing civil suit in the context of remedies provided under the Industrial Disputes Act (see G.P. Singh, Principles of Statutory Interpretation, 12th Edn., pp. 763-64). We apply this principle here because, as held above, the Trusts Act, 1882 creates an obligation and further specifies the rights and duties of the settlor, trustees and the beneficiaries apart from several conditions specified in the trust deed*

and further provides a specific remedy for its enforcement by filing applications in civil court. It is for this reason, we are of the view that since sufficient and adequate remedy is provided under the Trusts Act, 1882 for deciding the disputes in relation to trust deed, trustees and beneficiaries, the remedy provided under the Arbitration Act for deciding such disputes is barred by implication."

p.g. In ***Olympus Superstructures Pvt. v. Meena Vijay Khetan and Ors***, **(1995 (5) SCC 651 Per M. Jagannadha Rao, J.)** the Supreme Court held that there is no prohibition in the Specific Relief Act, 1963 for referring disputes relating to specific performance of contracts to arbitration. The Supreme Court further held that an arbitrator can grant specific performance as there is no prohibition in the Specific Relief Act, 1963. The Supreme Court observed:

"34. In our opinion, the view taken by the Punjab, Bombay and Calcutta High Courts is the correct one and the view taken by the Delhi High Court is not correct. We are of the view that the right to specific performance of an agreement of sale deals with contractual rights and it is certainly open to the parties to agree — with a view to shorten litigation in regular courts — to refer the issues relating to specific performance to arbitration. There is no prohibition in the Specific Relief Act, 1963 that issues relating to specific performance of a contract relating to immovable property cannot be referred to arbitration. Nor is there such a prohibition contained in the Arbitration and Conciliation Act, 1996 as contrasted with Section 15 of the English Arbitration Act, 1950 or Section 48(5)(b) of the English Arbitration Act, 1996 which contained a prohibition relating to specific performance of contracts concerning immovable property."

p.h. D.Y.Chandrachud, J. in ***A. Ayyasamy v. A. Paramasivam and Others (2016 (10) SCC 386)***, referring to the dictum in Booz Allen & Hamilton Inc., has made two important comments:

"35...This Court held that this class of actions operates in rem, which is a right exercisable against the world at large as contrasted with a right in personam which is an interest protected against specified individuals. All disputes relating to rights in personam are considered to be amenable to arbitration while rights in rem are required to be adjudicated by courts and public tribunals...

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38. Hence, in addition to various classes of disputes which are generally considered by the courts as appropriate for decision by public fora, there are

classes of disputes which fall within the exclusive domain of special fora under legislation which confers exclusive jurisdiction to the exclusion of an ordinarily civil court. That such disputes are not arbitrable dovetails with the general principle that a dispute which is capable of adjudication by an ordinary civil court is also capable of being resolved by arbitration. However, if the jurisdiction of an ordinary civil court is excluded by the conferment of exclusive jurisdiction on a specified court or tribunal as a matter of public policy such a dispute would not then be capable of resolution by arbitration."

p.i. In ***Vidya Drolia and Others v. Durga Trading Corporation and Others (AIR 2019 SC 3498*** the Hon'ble Supreme Court whilst deciding the meaning of non-arbitrability of a dispute, held as under:

"45. In view of the above discussion, we would like to propound a four-fold test for determining when the subject matter of a dispute in an arbitration agreement is not arbitrable:

(1) when cause of action and subject matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.

(2) when cause of action and subject matter of the dispute affects third party rights; have erga omnes effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable;

(3) when cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable; and

(4) when the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

These tests are not watertight compartments; they dovetail and overlap, albeit when applied holistically and pragmatically will help and assist in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject matter is non-arbitrable. Only when the answer is affirmative that the subject matter of the dispute would be non-arbitrable."

7. Arbitration and Conciliation Act, 1996, The Preamble, Section 1, Section 2

7.1. Brief history of law of arbitration in India

7.1.1. Enactment of legislations started only after the British rule in India. The Legislative Council of India came into existence in 1834. Even before the Legislative Council came into existence, Arbitration, Conciliation or Mediation was not unknown. People approached panchayats for resolution of their disputes. The "Panch" used to arbitrate/mediate/conciliate the disputes referred to it.

7.1.2. Sections 312 To 325 of the Code of Civil Procedure, 1859, dealt with arbitrations without intervention of Courts. The Code of Civil Procedure was revised in 1882, but it did not bring much change to the law relating to arbitrations. The law of arbitration as it existed prior to 1899 provided for reference to arbitration of disputes after they had arisen. On the line of the English Arbitration Act of 1889, The Arbitration Act of 1899 was enacted. The Arbitration Act of 1899 was not applicable to the whole of India, but its operation was limited to the Presidency Towns and other areas to which it was extended by the Provincial Governments at that time. For the first time, by the Arbitration Act, 1899, reference of future disputes to arbitration, without intervention of court, was provided for.

7.1.3. The Arbitration (Protocol and Convention) Act, 1937, was enacted to make certain further provisions regarding the law of arbitration in India, as recited in its preamble. The 1937 Act applied only to the awards on references relating to matters considered commercial under the law in force in India and as between parties who were subject to the jurisdiction of two different signatory States to the Protocol.

7.1.4. In the year 1940 to consolidate and amend the law relating to arbitration, The Arbitration Act, 1940, was enacted. The 1940 Act, introduced several important changes, the most important being provisions relating to awards by majority of the arbitrators, revision correction and modification of awards by Courts, right of an appeal against an order setting aside or refusing to set aside the award and vesting of jurisdiction to deal with the reference or for an award in a Court.

7.1.5. In the year 1961, The Foreign Award (Recognition and Enforcement) Act, 1961, was enacted to give effect to the New York convention on the recognition and enforcement of foreign arbitral awards. The Arbitration Protocol and Convention Act, 1937, did not apply in relation to foreign awards to which the 1961 act applied.

7.1.6. It was widely felt that the Act of 1940, which contained the general law of arbitration, had become outdated and was not in harmony with the arbitral mechanism available to resolve disputes in most countries of the world.

7.1.7. The Supreme Court in its various judgements, expressed its concern about protracted time-consuming and expensive Court trials. The Supreme Court of India had emphasized the need for amending the Act in ***Guru Nanak Foundation v. Rattan Singh & Sons, AIR 1981 SC 2075***, in the following words:

> "*Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led them to Arbitration Act, 1940 (Act' for short). However, the way in which the proceedings under the Act are concluded and without an exception challenged in courts, had made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Informal forum chosen by the parties for expeditious disposal of their disputes has by decisions of the court been clothed with 'legalese' of unforeseeable complexity."*

7.1.8. The United Nations Commission on International Trade Law (UNCITRAL) adopted in 1985 the Model Law on International Commercial Arbitration. The General Assembly of the United Nations recommended that all countries should give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice. The UNCITRAL also adopted in 1980 a set of Conciliation Rules. The General Assembly of the United Nations recommended the use of these Rules in cases where the disputes arise in the context of international commercial relations and the parties seek amicable settlement of their disputes by recourse to Conciliation. An important feature of the UNCITRAL Model Law and Rules 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.

7.1.9. In Trustees for the ***Port of Madras v. Engineering Construction Corporation, AIR 1995 SC 2423***, the Supreme Court again expressed its concern about

protracted, time consuming and expensive Court trials. It was widely felt that the Act of 1940, which had become outdated was not in harmony with the mechanism available to resolve the disputes in most of the countries in the world.

7.2. The Meaning and Purpose of the Preamble

7.2.1. The Preamble is an introductory statement in a constitution, statute, or other document. It is a statutory recital of the inconveniences for which the statute is designed to provide a remedy. It explains the basis and objective for which the statute was enacted. The preamble throws light on the intent and design of the legislature and the indicate scope and purpose of the legislation. A preamble is a key to open the mind of the legislature but it cannot be used to control or qualify the precise and unambiguous language of the enactment ***(Tribhuvan Parkash Nayyar v. Union of India, AIR 1970 SC 540)***. It is only when there is doubt as to the meaning of a provision that recourse may be had to the preamble to ascertain the reasons for the enactment and hence the intention of the legislature. If the language of an enactment is capable of more than one meaning then that one is to be preferred which comes nearest to the purpose and scope of the preamble. In other words, preamble may assist in ascertaining the meaning but it does not affect clear words in a statute. The Courts are thus not expected to start with the preamble for construing a statutory provision nor does the mere fact that a clear and unambiguous statutory provision going beyond the preamble give rise by itself to a doubt on its meaning. No resort to the preamble would be justified in interpreting a provision if the words used in it are clear and unambiguous. It is well established that the preamble and title may legitimately be consulted to solve any ambiguity, or to fix the meaning of a word which may have more than one, or to keep the effect of the Act within the real scope whenever the enacting part is in any of these respects open to doubt.

7.2.2. In ***Poppatlal Shah vs. The State Of Madras, AIR 1953 SC 274***, the Supreme Court observed as under:

> "*7. It is a settled rule of construction that to ascertain the legislative intent all the constituent parts of a statute are to be taken together and each word phrase or sentence is to be considered in the light of the general purpose and object of the Act itself."……"The title and preamble, whatever their value might be as aids to the construction of a statute, undoubtedly throw light on the intention and design of the Legislature and indicate the scope and purpose of the legislation itself……"*

7.2.3.In ***Kavalappara Kottarathil Kochuni ... vs. The State Of Madras And Others, AIR 1960 SC 1080***, the Supreme Court observed as under:

"*37. ...The preamble of a statute is "a key to the understanding of it" and it is well established that "it may legitimately be consulted to solve any ambiguity, or to fix the meaning of words which may have more than one, or to keep the effect of the Act within its real scope, whenever the enacting part is in any of these respects open to doubt."*

7.2.4.In ***Y. A. Mamarde And Ors vs. Authority Under The Minimum Wages, AIR 1972 SC 1721***, the Supreme court observed that:

"*13. ....A preamble though a key to open the mind of the Legislature, cannot be used to control or qualify the precise and unambiguous language of the enactment. It is only in case of doubt or ambiguity that recourse may be had to the preamble to ascertain the reason for the enactment in order to discover the true legislative intendment....."*

7.2.5. The preamble to the 1996 Act states that the United Nations Commission on International Trade Law (UNCITRAL) has adopted the UNCITRAL Model Law on International Commercial Arbitration in 1985 and the General Assembly of the United Nations has recommended that all countries give due consideration to the said model law in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of International Commercial Arbitration Practise. Further, the premable states that the UNCITRAL has adopted the UNCITRAL Conciliation Rules in 1980 and the General Assembly of the United Nations has recommended the use of the said Rules in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation. The premable further states that the said Model Law and Rules make significant contribution to the establishment of a unified legal frame work for the fair and efficient settlement of disputes arising in the international commercial relations. The preamble provides that, in these circumstances, it is expedient to make law respecting arbitration and conciliation, taking into account the aforesaid model laws and rules.

7.2.6.In ***Fuerst Day Lawson Ltd vs. Jindal Exports Ltd, (2011) 8 SCC 333***, the Supreme Court held the Arbitration Act to be a self-contained code.

"*89. It is, thus, to be seen that Arbitration Act 1940, from its inception and right through 2004 (in P.S. Sathappan) was held to be a self-contained code.*

Now, if Arbitration Act, 1940 was held to be a self-contained code, on matters pertaining to arbitration the Arbitration and Conciliation Act, 1996, which consolidates, amends and designs the law relating to arbitration to bring it, as much as possible, in harmony with the UNCITRAL Model must be held only to be more so. Once it is held that the Arbitration Act is a self-contained code and exhaustive, then it must also be held, using the lucid expression of Tulzapurkar, J., that it carries with it "a negative import that only such acts as are mentioned in the Act are permissible to be done and acts or things not mentioned therein are not permissible to be done". In other words, a Letters Patent Appeal would be excluded by application of one of the general principles that where the special Act sets out a self-contained code the applicability of the general law procedure would be impliedly excluded."

7.3. Section 1 of the Arbitration and Conciliation Act, 1996

7.3.1. Prior to the enactment of the Act, three ordinances were promulgated. The first ordinance, the Arbitration and Conciliation, Ordinance 1996, was promulgated and became operative from 25th January 1996. The Act was enacted and notified on 22nd August 1996 and deemed to have come into force from 25th January 1996. Though the Arbitration (Protocol and Convention) Act, 1937, The Arbitration Act 1940 and The Foreign Arbitration (regulation and Enforcement) Act, 1961, are repealed by the Act, the provisions of the said enactments are applied in relation to arbitration proceedings which have commenced prior to the deemed commencement of the Act.

7.3.2. Prior to the removal of Article 370 of the Constitution of India, Section 1 of the Act, provided that, the Act shall extend to whole of India, but also provided that Part I, III and IV shall extend to Jammu and Kashmir only in so far as they relate to international commercial arbitration or, as the case may be, international commercial conciliation.

7.3.3. On removal of Article 370 sub-section 2 of Section 1 was deleted, therefore, the 1996 Act is now applicable to whole of India including the State of Jammu and Kashmir.

7.4. Section 2 of the Arbitration and Conciliation Act, 1996

7.4.1. The legislature has the power to define a word even artificially, so the definition of a word in the definition section may either be restrictive of its ordinary meaning or it may be extensive of the same. In other words, definition clauses are generally of two types: those using the word "means" in defining a word or expression, and the others using the word 'includes'. Where in the definition section of a statute a word is defined to 'mean' a certain thing, wherever that word

is used in that statute, it shall mean what is stated in the definition unless the context otherwise requires. But where the definition is an 'inclusive' definition, the word not only bears its meaning in the ordinary, popular and natural sense, wherever that would be applicable, but it also bears its extended statutory meaning.

7.4.2. Stroud's Judicial Dictionary (seventh Edition) defines words "mean" and "include" as under:

"MEAN" - When a statute says that a word or phrase shall "mean"- not merely that it shall "include"- certain things or acts, "the definition is a hard – and – fast definition, and no other meaning can be assigned to the expression than is put down in the definition…"

"INCLUDE" - Shall include" is a phrase of extension, and not restrictive definition; it is not equivalent to "shall mean".

7.4.3. The expression "unless the context otherwise requires" in sub-section (1) of section 2 means that where the context makes the definition of the word or expression given there inapplicable, the defined word or expression when used in the body of Part I may have to be given a meaning different from that contained in the interpretation clause. The Court has not only to look at the words but also to look at the context, the connotation and the object of such words relating to such matter and interpret the meaning intended to be conveyed by the use of the words in a particular section.

7.4.4. In S***. K. Gupta & Anr vs. K. P. Jain & Anr, AIR 1979 SC 734***, the Supreme Court observed as under;

"*24. …. Where in a definition section of a statute a word is defined to mean a certain thing, wherever that word is used in that statute, it shall mean what is stated in the definition unless the context otherwise requires. But where the definition is an inclusive definition, the word not only bears its ordinary, popular and natural sense whenever that would be applicable but it also bears its extended statutory meaning. At any rate, such expansive definition should be so construed as not cutting down the enacting provisions of an Act unless the phrase is absolutely clear in having opposite effect (see Jobbins v. Middlesex County Council). Where the definition of an expression in a definition clause is preceded by the words 'unless the context otherwise requires', normally the definition given in the section should be applied and given effect to but this normal rule may, however, be departed from if there be*

something in the context to show that the definition should not be applied (see Khanna, J. in Indira Nehru Gandhi v. Raj Narain). It would thus appear that ordinarily one has to adhere to the definition and if it is an expansive definition the same should be adhered to. The frame of any definition more often than not is capable of being made flexible but the precision and certainty in law requires that it should not be made loose and kept tight as far as possible (see Kalva Singh v. Genda Lal)."

7.4.5. Sub -section 1 of Section 2, defines the following words, viz., Arbitration, Arbitration Agreement, Arbitral Award, Arbitral Tribunal, International Commercial Arbitration, Legal Representative, Party, Prescribed and Regulation. Generally in all statutes the words defined in the definition sections are generally applicable to the whole of the statute, whereas in the 1996 Act the words defined in sub-section 1 of section 2 applies only to Part 1 and Part 1A (which has not come into force) of the Act.

7.4.6. Sub-sections 2 to 8 of Section 2, state the scope and applicability of the words defined in sub-section1. The definitions provided in sub-section 1 shall apply where the place of arbitration is in India. By the Arbitration and Conciliation Amendment Act 2015, a proviso to sub-section 2 was added to clarify the applicability of part I of the Act. By adding the proviso to sub-section 2 it was clarified that, subject to an agreement to the contrary, the provisions of sections 9, 27, sub-clause (a) of sub-section 1 and sub-section 3 of Section 37 shall also apply to International Commercial Arbitration even if the place of arbitration is outside India, if arbitral award made or to be made therein is enforceable and recognised under the provisions of part II of the Act. In other words, it was clarified that when the Arbitration Award is enforceable and recognised under the provisions of part II of the Act, Sections 9 27, clause(a) of sub section 1 and sub-section 3 of section 37 of the Act, shall apply to International Commercial Arbitration, subject to the parties having agreed to the contrary.

7.4.7. Sub- section 3 of Section 2, saves the provisions of other laws by virtue of which, certain disputes cannot be referred to arbitration. For example the disputes between landlord and tenant and matters where the award will have the effect of it being a judgement in Rem, cannot be referred to arbitration.

7.4.8. Sub-sections 4 and 5 of Section 2, provide that the provision of Part I save and except Sub-section 1 to Section 40, 41 and 43, shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if the other enactment were an

arbitration agreement, except insofar as the provisions of this Part are inconsistent with the other enactment. For example, Arbitration conducted under Institutional rules and regulations, and arbitration conducted as per rules of various stock exchanges.

7.4.9. Sub-section 6 of Section 2, gives freedom to the parties to have issues determined by any person including institution, save and except under Section 28 of the Act.

7.4.10. Sub- section 7 of Section 2, defines a Domestic Award. It provides that any award made under Part I of the Act shall be considered as a Domestic Award.

7.4.11. Court is defined in clause (e) of Sub-section 1 of Section 2 of the Act, to exercise jurisdiction to entertain Applications and Appeals provided under the Act. As per the definition so far as Domestic Arbitrations are concerned, the principal Civil Court having original jurisdiction in a District and High Courts having original civil jurisdiction shall have jurisdiction to decide the question forming the subject-matter of arbitration if the same had been the subject-matter of a suit. It further clarifies that the courts inferior to these Courts shall not have jurisdiction. In other words, in the District where a suit could have been filed for the subject matter of arbitration, the principal Civil Court in that district shall have jurisdiction to decide the question forming the subject-matter of arbitration. The High Courts of Bombay, Madras, Calcutta and Delhi having Original Civil jurisdiction over their respective districts shall have jurisdiction to decide the question forming the subject-matter of arbitration.

7.4.12. So far as, International Commercial Arbitrations are concerned the definition provides jurisdiction to the High Courts only. The High Court having Original jurisdiction and the High Courts having Appellate jurisdiction shall have jurisdiction to decide the question forming the subject-matter of arbitration if the same had been the subject-matter of a suit.

7.4.13. In ***BGS SGS Soma JV vs. NHPC Ltd., (2020) 4 SCC 234***, the Supreme Court, in paragraph 34 of the judgement observed as under;

> *"It can thus be seen that given the new concept of "juridical seat" of the arbitral proceedings, and the importance given by the Arbitration Act, 1996 to this "seat", the arbitral award is now not only to state its date, but also the place of arbitration as determined in accordance with Section 20. However, the definition of "Court" contained in Section 2(1)(c) of the Arbitration Act,*

1940, continued as such in the Arbitration Act, 1996, though narrowed to mean only principal civil court and the High Court in exercise of their original ordinary civil jurisdiction. Thus, the concept of juridical seat of the arbitral proceedings and its relationship to the jurisdiction of courts which are then to look into matters relating to the arbitral proceedings - including challenges to arbitral awards - was unclear, and had to be developed in accordance with international practice on a case by case basis by this Court."

7.4.14. When one of the parties to the arbitration is a Foreign National, a body corporate incorporated in any other country than India; an association or a body of individuals whose central management and control is exercised in any other country than India; Government of Foreign country; it is considered as an International Commercial Arbitration.

7.4.15. Arbitration Agreement is defined in Section 7 of the Act. Clause (b) to Sub-section 1 of Section 2, while defining the Arbitration Agreement refers to section 7 of the Act. Section 7(5) deals with incorporation by reference. The words "the reference is such as to make that arbitration clause part of the contract" and are of relevance. Essentially, the parties must have the intention to incorporate the arbitration clause. Sub-section (5) of Section 7 merely reiterates these well-settled principles of construction of contracts."

7.4.16. A general reference to another contract will not be sufficient to incorporate the arbitration clause from the referred contract into the contract under consideration and that there should be a special reference indicating a mutual intention to incorporate the arbitration clause from another document into the contract.

7.4.17. The exception to the requirement of special reference is where the referred document is not another contract, but a standard form of terms and conditions of Trade Associations or Regulatory Institutions, which publish or circulate such standard terms and conditions for the benefit of the members or others who want to adopt the same.

7.4.18. It is settled law that an Arbitration Clause contained in an Agreement would remain operative even if the agreement stands terminated by mutual consent of parties.

7.4.19. However, in a case where the original agreement itself is superseded/novated by another agreement, the Hon'ble Supreme Court held that arbitration clause being a component of contract, perishes with the contract if the said contract is

superseded/substituted by another. ***(Young Achievers v. IMS Learning Resources (P) Ltd. (2013) 10 SCC 535.)***

7.4.20. In ***Harmony Innovation Shipping Ltd. v. Gupta Coal India Ltd. (2015) 9 SCC 172***, the provisions of Section 2(2), 1(f), Part-I and Part-II were considered. In this case, an International Commercial Arbitration Agreement was entered into between the parties prior to the date of the decision in ***BALCO (2012) 9 SCC 552***. Subsequently, there was an addendum to the agreement after the decision in BALCO case. There was nothing in the addendum to suggest any arbitration clause therein. It was thus held that the Arbitration was controlled and governed by conditions postulated in the principal contract which predated BALCO's case and hence, the law rendered in ***Bhatia International (2002) 4 SCC 105*** was applicable.

7.4.21. In ***NTPC Vs. Reshmi Constructions, Builders & Contractors (2004) 2 SCC 663***, the following situations were considered :- **Situation (1):-** Whether accord and satisfaction under a contract leads to its termination, including the termination of any arbitration clause contained therein? It was held that even when rights and obligations of the parties are worked out, the contract does not come to an end, *inter alia*, for the purpose of determination of disputes arising thereunder, and thus arbitration could be invoked. **Situation (2):** In the case of a determined contract it was held that, if the dispute is, that the contract itself does not subsist, the question of invoking the arbitration clause may not arise; but in the event it be held that the contract survives, recourse to the arbitration clause may be taken. **Situation (3):** In the case of Novation of a contract or substitution of an old contract with a new contract, it was held that, in the event a new contract has come into being, the arbitration clause in the old contract cannot be invoked. It was further held that, these questions have to be considered and determined in each individual case having regard to the fact situation in each case.

7.4.22. In ***Ashoka Tubewell & Engg. Corpn. V. Union of India (2015) 5 SCC 702***, the Court held that when there was a Term in the agreement that no person other than Gazetted railway officer should act as arbitrator and if that is not possible, matter not to be referred to arbitration at all, only option available to parties is to approach the Civil Court by way of a suit.

7.4.23. In ***Larsen & Toubro Ltd. V. Mohan Lal Harbans Lal Bhayana (2015) 2 SCC 461***, it was held that if an arbitration clause and procedure for appointment of arbitrator in original agreement is novated, and parties acted accordingly, clause in original agreement for appointment of arbitrator cannot be invoked.

7.4.24. In ***MTNL vs. Canara Bank 2019 SCC Online SC 995***, the Supreme Court while following the ratio laid down in the matter of ***Enercon (India) Ltd. Vs. Enercon GMBH (2014) 5 SCC 1*** held thus:-

> "*9.7. In interpreting or construing an arbitration agreement or arbitration clause, it would be the duty of the court to make the same workable within the permissible limits of the law. This Court in Enercon (India) Ltd. and Ors. v. Enercon GMBH, held that a common sense approach has to be adopted to give effect to the intention of the parties to arbitrate the disputes between them. Being a commercial contract, the arbitration clause cannot be construed with a purely legalistic mindset, as in the case of a statute."*

8. Territorial application (arbitrations taking place in India (domestic) and Abroad (foreign) and *Bhatia International v/s Bulk Trading S.A & Anr*, judgment and effect of *Bharat Aluminum Co v/s Kaiser Aluminum Technical Services Inc. ('*Balco') judgement on arbitrations), applicability to International Commercial Arbitrations; types of Arbitrations to which applicable (also discuss *Union of India v/s Reliance Industries Limited & Ors* wherein Bhatia International is clarified); Effect of 2015 amendment on this aspect;

8.1. One of the hallmark features of arbitration is that it facilitates the resolution of disputes between parties by consent at such place and governed by such law as the parties may decide. However, the Arbitration and Conciliation Act 1996 ("1996 Act") provides for the intervention of courts at various stages in an arbitration including challenge to the validity of an arbitration award. One of the more controversial issues that plagues the evolution of arbitration as a dispute resolution mechanism in India is the extent of the territorial application of the 1996 Act especially in relation to foreign seated arbitration and enforceability of foreign Arbitral Awards in India. This section discusses the relevant provisions of the 1996 act in relation thereto and the scope of intervention of courts as interpreted by key Supreme Court decisions culminating into the Arbitration and Conciliation (Amendment) Act 2015 ("2015 Amendment").

8.2. Meaning of place/seat of Arbitration

8.2.1. Section 2(2) of the 1996 Act states that Part I shall apply where the place of arbitration is in India. In the case of ***Naviera Amazonica Peruana S.A. vs. Compania Internacionale De Seguros Del Peru ((1988) 1 Lloyd's Rep. 116)***, the Court of Appeal has clarified the difference between place/seat and venue of arbitration as follows:

> "*... there is only one "place" of arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the arbitration Agreement or the terms of reference or the minutes of proceedings or in some other way as the place or "seat" of the arbitration. This does not mean, however, that the arbitral tribunal must hold all its meetings or hearings at the place of arbitration. International commercial arbitration often involves people of many different nationalities, from many different countries. In these circumstances, it is by no means unusual for an arbitral tribunal to hold meetings or even hearings in a place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses.... It may be more convenient for an arbitral tribunal*

sitting in one country to conduct a hearing in another country, for instance, for the purpose of taking evidence... In fact circumstances each move of the arbitral tribunal does not of itself mean that the seat of arbitration changes. The seat of arbitration remains the place initially agreed by or on behalf of the parties".

8.2.2. The importance of the seat/place of arbitration lies in its close nexus with the proper law of arbitration. The UNCITRAL Model Law ("Model Law") on which the 1996 Act is based, provides that law of the seat or place where the arbitration is held, is normally the law to govern that arbitration. The territorial link between the place of arbitration and the law governing that arbitration is well established in the international instruments – New York Convention, 1958 and Geneva Protocol, 1923.

8.2.3. In the case of ***Bhatia International (2002) 4 SCC 105*** it was held that an application for interim reliefs is maintainable in India in respect of foreign seated International Commercial Arbitration u/s 9 of Arbitration and Conciliation Act, 1996. The position of law laid down in Bhatia International was further crystallised by the Supreme Court in the case of ***Venture Global Engineering vs. Satyam Computers Services Ltd. (2008) 4 SCC 190*** where the Supreme Court held as follows:

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

8.2.4. In the case of ***Bharat Aluminum Co. Ltd. – BALCO (2012) 9 SCC 552***, the position of law settled by Bhatia International and Venture Global was over turned by the Supreme Court in the BALCO case. The Constitution Bench of the Supreme Court has in the decision in BALCO held that the earlier decision of three learned Judges in Bhatia International does not reflect the correct position in law. Consequently, after the decision in BALCO, the position in Indian law is now authoritatively settled - Part -1 of the Act of 1996 has no application to an International Commercial Arbitration, held outside India. Consequently, in a foreign seated International Commercial Arbitration no application for interim relief under section 9 can be maintained, nor can a petition lie under Section 34 for challenging the validity of the award. The continued relevance of the decision in Bhatia International, in so far as this court is concerned, arises by reason of the fact that the Constitution Bench, while overruling the earlier decision, directed that the law declared in BALCO shall apply prospectively to all arbitration Agreements executed thereafter. As a result of this judgment the seat of arbitration has now gained paramount importance for determining the applicability of Part I of the 1996 Act.

8.2.5. In ***Union of India vs. Reliance Industries Limited and Ors. (2015 (10) SCC 213)*** an attempt was made by the Supreme Court to clarify the position of law post Bhatia International and Pre- BALCO. The decision was rendered after BALCO but the arbitration Agreement in question was executed pre-BALCO. The Supreme Court summarised the dispute as under:

> "*3. …The essential dispute between the parties is as to whether Part –I of the Arbitration Act of 1996 would be applicable to the arbitration Agreement irrespective of the fact that the seat of arbitration is outside India. To find the conclusive answer to the issue as to whether applicability of Part –I of the arbitration Act of 1996 has been excluded, it would be necessary to discover the intention of the parties.*
>
> .
>
> *20. …..-That where the Court comes to a determination that the juridical seat is outside India or where law other than Indian law governs the arbitration agreement, Part-I of the Arbitration Act, 1996 would be excluded by necessary implication. Therefore, even in the cases governed by the Bhatia principle, it is only those cases in which agreements stipulate that the seat of the arbitration is in India or on whose facts a judgment cannot be reached on the seat of the arbitration as being outside India that would continue to be governed by the Bhatia principle. Also, it is only those agreements which stipulate or can be read to stipulate that the law governing the arbitration*

agreement is Indian law which would continue to be governed by the Bhatia rule."

8.2.6. By the Amendment Act, 2015, the following proviso has been added to Section 2 of the Principal Act:

"Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognized under the provisions of Part II of this Act.".

8.2.7. Similar views were taken by various other High Courts including the Delhi High Court, the Calcutta High Court, the Bombay High Court and the Madras High Court. The Delhi High Court held that the provisions of the Arbitration & Conciliation (Amendment) Act, 2015 would apply retrospectively to all court proceedings related to arbitration proceedings instituted post the Amendment Act even if the arbitration commenced prior to the Amendment Act. The Court also recognized that the position regarding non-applicability of Part I of the Arbitration & Conciliation Act, 1996 with respect to foreign seated arbitrations stands amended by virtue of Section 2(2) of the amended Act thereby making Section 9 of the Act available to parties even in case of a foreign seated arbitration even if the arbitration commenced prior to the Amendment Act.

8.2.8. In the case of ***Enercon (India) Ltd. V. Enercon GmbH (2014) 5 SCC 1*** it was held that:

"90 .... Applying the closest and the intimate connection to arbitration, it would be seen that the parties had agreed that the provisions of the Indian Arbitration Act, 1996 would apply to the arbitral proceedings. By making such a choice, the parties have made the curial law provisions contained in Chapters II, IV, V and VI of the Indian Arbitration Act, 1996 applicable..... .....By choosing that Part I of the Indian Arbitration Act, 1996 would apply, the parties have made a choice that the seat of arbitration would be in India. Section 2 of the Indian Arbitration Act, 1996 provides that Part I "shall apply where the place of arbitration in India". In BALCO it has been categories held that part I of the Indian Arbitration Act, 1996, will have no application, if the seat of arbitration is not in India. In the present case, London is mentioned only as a "venue" of arbitration which, in the facts of this case cannot be read as the "seat" of arbitration

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93 ...It is necessary not to confuse the legal seat of arbitration with the geographically convenient place or places for holding hearings.

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98 ...In virtually all jurisdictions, it is an accepted proposition of law that the seat normally carries with it the choice of that country's arbitration/curial law. But this would arise only if the curial law is not specifically chosen by the parties....

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105 ...In the present case, all the three laws:

i. the law governing the substantive contract;

ii. the law governing the agreement to arbitrate and the performance of that agreement; and

iii. the law governing the conduct of the arbitration/curial law, are India

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124 It is accepted by most of the experts in the law relating to international arbitration that in almost all the national laws, arbitrations are anchored to the seat/place/situs of arbitration.

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125 In the present case, even though the venue of arbitration proceedings has been fixed in London, it cannot be presumed that the parties have intended the seat to be also in London. In an International Commercial Arbitration, the venue can often be different from the seat of arbitration. In such circumstances, the hearing of the arbitration will be conducted at the venue fixed by the parties, but this would not bring about a change in the seat of the arbitration."

8.2.9. In the matter of ***BGS SGS Soma JV Vs. NHPC Ltd. [2020 (4) SCC 234]*** the Supreme Court while deciding the issue of jurisdiction, to make an Application under section 34 of the Arbitration and Conciliation Act, discussed the issue of

seat and venue of the Arbitration Tribunal and settled the law as regards to the jurisdiction of the court to entertain the Application under section 34.

> "*82. On a conspectus of the aforesaid judgments, it may be concluded that whenever there is the designation of a place of arbitration in an arbitration clause as being the "venue" of the arbitration proceedings, the expression "arbitration proceedings" would make it clear that the "venue" is really the "seat" of the arbitral proceedings, as the aforesaid expression does not include just one or more individual or particular hearing, but the arbitration proceedings as a whole, including the making of an award at that place. This language has to be contrasted with language such as "tribunals are to meet or have witnesses, experts or the parties" where only hearings are to take place in the "venue", which may lead to the conclusion, other things being equal, that the venue so stated is not the "seat" of arbitral proceedings, but only a convenient place of meeting. Further, the fact that the arbitral proceedings "shall be held" at a particular venue would also indicate that the parties intended to anchor arbitral proceedings to a particular place, signifying thereby, that that place is the seat of the arbitral proceedings. This, coupled with there being no other significant contrary indicia that the stated venue is merely a "venue" and not the "seat" of the arbitral proceedings, would then conclusively show that such a clause designates a "seat" of the arbitral proceedings. In an International context, if a supranational body of rules is to govern the arbitration, this would further be an indicia that "the venue", so stated, would be the seat of the arbitral proceedings. In a national context, this would be replaced by the Arbitration Act, 1996 as applying to the "stated venue", which then becomes the "seat" for the purposes of arbitration."*

9. Arbitration Council of India – its duties and significance – Part 1A of the Act, r/w Ministry of Law and Justice (Department of Legal Affairs) Notification, New Delhi, 12 October 2023 (Govt. of India Gazette)

9.1. The Arbitration and Conciliation (Amendment) Act 2019 (the "2019 Amendment Act") makes several important amendments to the extant provisions and introduces new provisions that would further enhance the efficacy of this method of dispute resolution. Significantly, it provides for the establishment of an Arbitration Council of India tasked with the responsibility of grading arbitral institutions whom parties would approach for appointment of arbitrator(s), thereby reducing the burden on Courts. Arbitrators will now be accredited by professional institutes based on their qualifications and experience.

9.2. One of the significant amendments under the 2019 Amendment Act, by insertion of Part IA in the 1996 Act, is the establishment of Arbitration Council of India as an independent body to take measures to promote and encourage Arbitration, Conciliation, Mediation and other ADR mechanisms and maintain uniform professional standards for all such matters. The ACI will, amongst other functions, grade arbitral institutions based on criteria such as infrastructure, quality and experience of arbitrators, completion of arbitral proceedings within time limits etc., recognise professional institutes for accreditation of arbitrators, maintain an electronic repository of all arbitral awards. The qualifications, experience and norms for accreditation of arbitrators have been specified in a new Eighth Schedule.

9.3. The Department of Legal Affairs vide notification dated 12th October, 2023 has appointed 12th October, 2023 as the date on which the provisions of section 10 of the said Act shall come into force. Section 10 deals with the establishment of the Arbitration Council of India. It introduces Part 1A wherein the concept of an Arbitration Council of India ('Council') is provided, which will be established by a notification by the Central Government, and will have its headquarters in Delhi.

9.4. The Arbitration Council of India is established to fulfil the duties and functions prescribed under the Act. The Central Government can designate the Arbitration Council of India as per section 43B of the Arbitration and Conciliation Act, 1996, for executing the tasks and roles specified under the Act.

9.5. The Arbitration Council of India is a body constituted with an unchanging sequence, a standard monogram, and the same capacity to obtain, bear and dispose of both transferable and unmovable property as specified in the Act. The Arbitration Council

of India was proposed to streamline and encourage institutional arbitration and promote India's ADR mechanism. The function of the Arbitration Council of India includes framing policies for grading and rating the performances of arbitral institutions.

9.6. Some of the functions of the Arbitration Council of India include:

- Accreditation of arbitrators according to the norms and qualifications mentioned in the Eighth Schedule of the 2019 Act.
- Determination of policies for the operation of the establishment.
- To maintain uniform professional standards for everything related to arbitration and the ADR mechanism.

9.7. The body consists of eminent members, each contributing their unique expertise to the mission. The composition of the Council is carefully designed to ensure a diverse range of skills and experiences. The Chairperson of the Council is a person who has held the position of a Judge of the Supreme Court, Chief Justice of a High Court, or a Judge of a High Court. This ensures a profound understanding of the legal intricacies in arbitration and dispute resolution. The Council also includes an eminent arbitration practitioner, nominated by the Central Government, who possesses substantial knowledge of institutional arbitration, both domestic and international. In addition, an academician with experience in research and teaching in the field of arbitration and alternative dispute resolution laws is appointed in consultation with the Chairperson, further enriching the knowledge pool of the Council. To bring a governmental perspective, the Secretary to the Government of India in the Department of Legal Affairs, Ministry of Law and Justice, and the Secretary to the Government of India in the Department of Expenditure, Ministry of Finance, or their representatives, hold ex officio positions. The Council also includes a representative of commerce and industry, chosen on a rotational basis by the Central Government, and a Chief Executive Officer who serves as the Member-Secretary.

9.8. According to the Arbitration and Conciliation (Amendment) Act 2019, the Chairperson of the Arbitration Council of India and all Members must stay in office for three years from the date of joining office. Also, no Member, Ex-Officio Member, or Chairperson will be allowed to hold office after attaining the age of seventy (70) years (for Chairperson) and sixty-seven (67) years (for Members).

9.9. Among the various duties, which are cast upon the Council under Section 43-D of the Act, there is also a duty to act as a forum for exchange of views and techniques to be adopted for creating a platform to make India a robust centre for domestic and international arbitration and conciliation. The Council can also hold training,

workshops and course in the area of arbitration in collaboration with law firms, law universities and arbitral institutes.

9.10. The removal of a member of the Arbitration Council of India occurs under listed circumstances:

- If he is unable to pay debts owed, or
- If he has pledged in any paid occupation during his tenure of office (excluding part-time Member), or
- If he has been sentenced for a crime involving ethical corruption as per Central Government opinion, or
- If he has obtained some economic or other interest that is likely to impact the discrimination of his roles as a member, or
- If he has maltreated his position
- If he has become unfit to maintain his functions physically or mentally.

9.11. Prior to the insertion of PART I-A, the Supreme Court or the High Court, as the case may be, had the jurisdiction to appoint an Arbitrator. However after the insertion of PART I-A the appointment will be done by arbitral institutions designated by the Supreme Court or High Court. In case where no graded arbitral institutions are available the Chief Justice of the concerned High Court may maintain a panel of arbitrators for discharging the functions and duties of arbitral institutions. Section 43-J of the Act spoke of the qualifications, experience and norms for accreditation of arbitrators as set out in the Eighth Schedule to the Act. However, by an Ordinance dated 4th November 2020 the Eight Schedule is omitted. Section 43-J of the Act now uses the word "regulations" in place of the words "the eight schedule". The regulations are yet to be framed.

9.12. Though arbitral institutions have been working in India, they have not been preferred by parties, who have leaned in favour of ad hoc arbitration or arbitral institutions located abroad. Therefore, in order to identify the roadblocks to the development of institutional arbitration, examine specific issues affecting the India arbitration landscape and also to prepare a road map for making India a robust centre for institutional arbitration both domestic and international, the Central Government constituted a High Level Committee under the Chairmanship of Justice *B.N. Srikrishna,* former Judge of the Supreme Court of India. The insertion of PART I-A in the 1996 Act is on the basis of the recommendations of the Justice *Srikrishna* Committee Report. The Arbitration Council of India is a statutory body constituted for the growth and standardisation of arbitral institution in India. It should not be perceived as a regulatory body.

10. Effect of Guidelines for Arbitration and Mediation in Contracts of Domestic Public Procurement dated 3rd June 2024 issued by the Ministry of Finance Department of Expenditure Procurement Policy Division.

10.1 The Ministry of Finance (Department of Expenditure Procurement Policy Division) has issued a Office Memorandum dated 3rd June 2024. In the said Office Memorandum, it is stated that Government (or a Government entity or agency) as a disputant has certain pecularities. It is further stated that, notwithstanding the expected benefits of arbitration, the actual experience of arbitration in respect of contracts where the Government (or a Government entity or agency, such as a public sector enterprise) is a party have been, in many cases, unsatisfactory in meeting the expectations.

10.2 Keeping all these factors in view, the following guidelines are issued for contracts of domestic procurement by the Government and by its entities and agencies (including Central Public Sector Enterprises [CPSEs], Public Sector Banks [PSBs] etc. and Government companies):

(i) Arbitration as a method of dispute resolution should not be routinely or automatically included in procurement contracts/ tenders, especially in large contracts.

(ii) As a norm, arbitration (if included in contracts) may be restricted to disputes with a value less than Rs. 10 crore. This figure is with reference to the value of the dispute (not the value of the contract, which may be much higher). It may be specifically mentioned in the bid conditions/conditions of contract that in all other cases, arbitration will not be a method of dispute resolution in the contract.

(iii) Inclusion of arbitration clauses covering disputes with a value exceeding the norm specified in sub-para (ii) above, should be based on careful application of mind and recording of reasons and with the approval of:

a. In respect of Government Ministries/ Departments, attached/subordinate offices and autonomous bodies, the Secretary concerned or an officer (not below the level of Joint Secretary), to whom authority is delegated by the Secretary.

b. In respect of CPSEs/ PSBs/ Financial Institutions etc., the Managing Director.

(iv) in matters where arbitration is to be resorted to, institutional arbitration may be given preference (where appropriate, after considering reasonableness of the cost of arbitration relative to the value involved).

(v) In matters covered by arbitration/ court decisions, the guidance contained in General Instructions on Procurement and Project Management dated 29.10.2021 should be kept in mind. In cases where there is a decision against the government/ public sector enterprise, the decision to challenge/ appeal should not be taken in a routine manner, but only when the case genuinely merits going for challenge/ appeal and there are high chances of winning in the court/ higher court.

(vi) Government departments/ entities/ agencies should avoid and/ or amicably settle as many disputes as possible using mechanisms available in the contract. Decisions should be taken in a pragmatic manner in overall long-term public interest, keeping legal and practical realities in view, without shirking or avoiding responsibility or denying genuine claims of the other party.

(vii) Government departments/ entities/ agencies are encouraged to adopt mediation under the Mediation Act, 2023 and/ or negotiated amicable settlements for resolution of disputes. Where necessary, e.g. matters of high value, they may proceed in the manner discussed below:

a. Government departments/ undertakings may, where they consider appropriate e.g. in high value matters, constitute a High-Level Committee (HLC) for dispute resolution which may include:

i. A retired judge.

ii. A retired high-ranking officer and/or technical expert.

This composition is purely indicative and not prescriptive.

b. In cases where a HLC is constituted, the Government department/entity/ agency may either

i. negotiate directly with the other party and place a tentative proposed solution before the HLC; or

ii. conduct mediation through a mediator and then place the tentative mediated agreement before the HLC; or

iii. use the HLC itself as the mediator.

c. This will enable decisions taken for resolving disputes in appropriate matters to be scrutinized by a high-ranking body at arms-length from the regular decision-making structure, thereby promoting fair and sound decisions in public interest, with probity.

(viii) There may be rare situations in long duration works contracts where, due to unforeseen major events, public interest may be best served by a re-negotiation of the terms. In such circumstances, the terms of the tentative re-negotiated contract may be placed before a suitably constituted High Level Committee before approval.

(ix) Approval of the appropriate authority will need to be obtained for the final accepted solution. Section 49 of the Mediation Act, 2023 is also relevant in this regard.

(x) Mediation agreements need not be routinely or automatically included in procurement contracts/ tenders. The absence of a mediation agreement in the contract does not preclude pre-litigation mediation. Such a clause may be incorporated where it is consciously decided to do so.

(xi) Disputes not covered in an arbitration clause and where the methods outlined above are not successful, should be adjudicated by the courts.