Wednesday, October 21
11:00 am–12:30 pm

910 International Arbitration – Enforcing Rights in Difficult Jurisdictions

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Faculty Biographies

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Stuart Dutson

Stuart Dutson is an international arbitration and litigation partner at Eversheds LLP, London. Mr. Dutson has conducted international arbitrations in London, China/Hong Kong, Dubai, Stockholm, Africa, Belgium and Switzerland under the ICC, LCIA, UNCITRAL, Swiss, CIETAC, DIAC, IATA and LME arbitration rules, and international litigation in London, China, the Middle East, Continental Europe and Africa. Mr. Dutson has also represented clients in many international negotiations and mediations.

Prior to joining Eversheds Mr. Dutson practiced in international arbitration and litigation at Herbert Smith and Linklaters.

Mr. Dutson is a member of the ICC International Court of Arbitration, and a fellow of the London School of Economics (LSE), lecturing in international arbitration.

Mr. Dutson has a doctorate from Cambridge University, England; bachelors degrees from Queensland University, Australia and the University Medal in Law.

Louis Epstein

Louis Epstein is vice president and deputy general counsel of Transammonia, Inc., an international commodities trading company and one of the largest privately held companies in the United States. Among other things, Mr. Epstein is responsible for managing litigation and arbitration for the company around the world.

Prior to joining Transammonia, Mr. Epstein worked at the law firm Reid & Priest, where he specialized in international commercial litigation and arbitration.

Mr. Epstein is a member of the International Commercial Disputes Committee (ICDC) of the Association of the Bar of the City of New York. He is the author of an article entitled "Arbitrator Independence and Bias: The View of a Corporate In-House Counsel" that appeared in the ICC International Court of Arbitration Bulletin, 2007 Special Supplement. He was also a principal author, with Robert H. Smit, of an April 2005 report of the ICDC entitled "Lack of Jurisdiction and Forum Non Conveniens as Defenses to the Enforcement of Foreign Arbitral Awards", which also appeared in *The American Review of International Arbitration*.

Mr. Epstein is a graduate of Columbia University and the University of Pennsylvania Law School.

Juan Pablo Tovar
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Perceived Advantages of International Arbitration

- Cost
- Speed
- Confidentiality

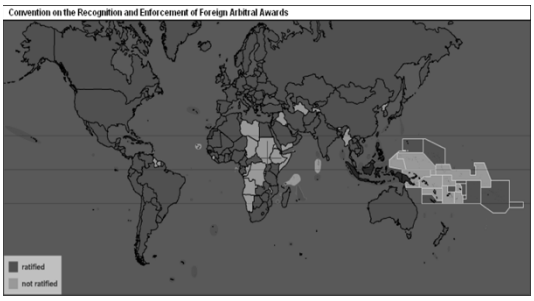
Actual Advantages

- Relative ease of enforcement of international commercial arbitral awards
- Neutral venue
- Confidentiality/Privacy
- Expert decision-maker
- No appeal on the merits
- Procedural flexibility
- Choice of applicable law

1st Advantage: Relative ease of enforcement of international commercial arbitral awards

- 1958 New York Convention
  - May be limited to awards made in other New York Convention countries
  - Limited grounds available to resist enforcement of award (e.g. "public policy"; "procedural irregularity")
- Other bilateral and multilateral conventions, e.g. 1983 Riyadh Convention, 1975 Panama Convention
- Difficulty of enforcing court judgments internationally

New York Convention Countries



Special Considerations for Enforcement of Foreign Awards in "Difficult" Jurisdictions

- Ultimately, the assistance of a local court in the country of the award debtor may be required for enforcement of an arbitral award.
- Enforcement of awards may not be that easy when the local courts are "difficult" (e.g. India, Italy, Argentina, Malaysia).
- Indian courts may claim jurisdiction to hear challenges to any award made anywhere in the world where there is a "material" Indian element and may subject such awards to scrutiny under Indian domestic arbitration law.
- Russian courts have often re-examined cases on their merits when foreign arbitration awards are brought to Russian courts for enforcement.

2nd Advantage -- Neutral Venue

- Situs of Arbitration is crucial for an international arbitration because:
  - It often determines the location of some or all hearings and proximity to other evidence.
  - It determines procedural law of arbitration (unless parties provide otherwise or default rules apply such as those established by IACAC).
  - It is the place for all challenges to the arbitration award.
- Things to check:
  - Whether the country is a signatory to New York Convention or any other regional convention such as the Panama Convention
  - Whether law of arbitration seat favors enforcement of arbitral awards
- Preferred seats e.g. London, New York, Paris, Belgium, Sweden, Hong Kong, Singapore, DIFC

Special Considerations for Venue in "Difficult" Jurisdictions

- Jurisdictions to avoid:
  - India
  - Venezuela
  - "home town" of other party
  - countries which do not have well developed arbitration practices
  - countries in which corruption / criminal elements are endemic
  - countries (e.g. China) where arbitrators may be under intense pressure (including threat of arrest) to decide in favor of the local party

3rd Advantage -- Confidentiality/ Privacy

- Inherently more confidential than open court.
- Generally, the proceedings themselves will be private.
  - Concerns exist about privacy in arbitrations in Argentina and Bolivia.
- Confidentiality is supported in national arbitration laws of some countries and in some institutional arbitration rules.
  - If your seat is in London, Hong Kong, Bermuda or New Zealand or if your arbitration agreement specifies either the LCIA Rules or the Swiss Rules, then materials generated in the course of the arbitration will be confidential. Note that there may be exceptions to this (e.g. if the award is challenged).
- Supported in treaties on international arbitration.
- But no guarantee of confidentiality.
  - Few arbitral rules expressly provide for confidentiality.
- Alternative: expressly provide for confidentiality in the arbitration agreement.

Special Considerations in "Difficult" Jurisdictions -- Confidentiality

- Close relationships between ruling elites (governmental, commercial, judicial) in many countries

4th Advantage – Expert Decision Maker

- Choice of arbitrators
  - Common law v. civil law
  - Civil law jurisdiction arbitrators may only ask expert questions within scope of his/her report vs. common law jurisdiction arbitrators who tend to allow cross examination
  - Experienced arbitrators
  - Can specify required qualifications/ experience for arbitrator (e.g. technical telecoms/IT expert could decide a technical telecoms/IT dispute)
- Impact of tribunal (especially chair) on
  - Discovery (how much/little)
  - Pleadings (content, tone, how many rounds)
  - Procedure at hearing
  - Language

Special Considerations in "Difficult" Jurisdictions – Expert Decision Maker

- How to identify a good arbitrator for your jurisdiction
  - Technical and legal experience
  - Do your research on potential arbitrators
    - Local Chamber of Commerce
  - Consult with people experienced with potential arbitrators
    - Local law firms
  - Select as a party-appointed arbitrator someone who will be able to persuade the neutral arbitrator

5th Advantage -- Appeals

- Generally no appeal on the merits.
- Swiss law permits two foreign parties to agree that they will have no recourse to Swiss courts and thus to exclude all ability to challenge / appeal.
- Could be a disadvantage if you lose for "wrong" reasons.
- In England a party can appeal on the merits if applicable law is English law and appeal is not otherwise proscribed.

Special Considerations in "Difficult" Jurisdictions -- Appeals

- In some jurisdictions (e.g. India) resistance to enforcement of awards, even on spurious grounds, can result in further lengthy proceedings which sometimes go on for years.

6th Advantage -- Procedural flexibility

- Parties and/or Tribunal can more easily adapt the procedure to suit the case/parties.
- Parties can include a bespoke arbitration clause or an institutional expedited clause to reduce time and costs significantly.
- Parties can provide for language of arbitration.
- Parties can chose arbitral institution/rules:
  - Some institutions administer arbitrations (e.g., serve papers, resolve preliminary issues, appoint arbitrators) and can significantly expedite the arbitration in its initial stages.
  - Rules provide needed structure for proceedings.
  - Multiparty arbitrations can be unwieldy in the absence of specific rules (e.g. ICC, LCIA, Swiss Rules and SCC).
  - Inability to consolidate related arbitrations/join related parties (Exceptions: LCIA Rules and Swiss Rules); U.S. Supreme Court to decide availability of consolidation/class action in *Stolt-Nielsen v. Animal Feeds, cert granted 129 S. Ct. 2793 (U.S. 2009)*).

6th Advantage -- Procedural flexibility (continued)

- In some civil law countries (and in some U.S. states) the courts of the seat of arbitration cannot grant any interim relief in support of an arbitration once the arbitration has started.
- Arbitrators can be empowered to provide interim or conservatory (injunctive) relief by arbitral rules (e.g. ICC) or by the arbitration agreement itself
  - "Carve out" in arbitration agreement for relief by courts
  - Crucial before the panel can be selected (e.g. TROs enforcing confidentiality or non-competes)
  - May address judicial concerns about interference with arbitral process
- *But* arbitrators are unable to make expedited default or summary awards.
- Limits on availability of discovery from parties and non-parties.

Special Considerations in "Difficult" Jurisdictions – Procedural Flexibility

- Arbitral Institution/Rules
  - Why the choice is important:
    - No *ad hoc* arbitration (i.e. arbitration under that is not conducted under the auspices of a recognized arbitral institution) is permitted in China.
    - In ad hoc arbitration courts could end getting involve in the appointment of arbitrators
    - A foreign award rendered under the auspices of a recognized arbitral institution may aid in enforcement in difficult jurisdictions

7th Advantage – Selection of Governing Law

- Governing Substantive Law
  - What to look for in a governing law:
    - Arbitrability – is subject matter of contract arbitrable under law?
    - Buyer/Seller issues – is law favorable to client?
    - Accessibility – is law established and are texts of it available in translation?
    - Development of law in subject matter – is law developed in the particular area that will be subject of dispute?
- Parties can specify a non-State law or no law at all
  - Sharia
  - Country "X" supplemented by principles of international law
  - Country "X" insofar as its law accords with principles of public international law or, if lacking such conformity, with general principles of law
  - Anational law (UNIDROIT)
  - Lex mercatoria
  - Fair and equitable, amiable compositur, ex aequo et bono, honourable engagement

Special Considerations in "Difficult" Jurisdictions – Governing Law

- Preferable to obtain agreement to "neutral" governing law. However, this is secondary to having arbitration in a neutral "preferred" venue with well established arbitration law and institutions (e.g. can agree to Kenyan law in exchange for London arbitration).
- Effect of identity of parties to arbitration proceeding
  - Special characteristics of arbitration with state government customers.
  - BIT/MIT Arbitration -- If your transaction involves a foreign investment and it could be subject to expropriation or unwanted interference by the host State, Government (national or local), Regulators, Authorities or other local government bodies, then consider structuring the transaction to allow access to BIT/MIT arbitration.

CASE NO.:
Appeal (civil) 309 of 2008

PETITIONER:
Venture Global Engineering

RESPONDENT:
Satyam Computer Services Ltd. & Anr.

DATE OF JUDGMENT: 10/01/2008

BENCH:
Tarun Chatterjee & P. Sathasivam

JUDGMENT:
JUDGMENT

(Arising out of SLP (C) No.8491 OF 2007)

P. Sathasivam, J.

1) Leave granted.

2) Appellant - Venture Global Engineering (in short \021VGE\022), a company incorporated in the United States of America with its principal office at 33662, James J Pampo Drive, Fraser, Michigan, USA 48026 through its Constituted Attorney, Mr. Pradeep Yadav filed this appeal challenging the final order and judgment dated 27.2.2007 passed by the High Court of Judicature, Andhra Pradesh at Hyderabad in City Civil Court Appeal No. 26 of 2007 whereby the Division Bench of the High Court dismissed their appeal.

3) The facts, which are necessary for the disposal of this appeal, are as under:

On 20.10.1999, Appellant-Company and respondent No.1-Satyam Computer Services Limited (in short \023SCSL\024), a registered company having its office at Mayfair Centre, S.P. Road, Secunderabad entered into a Joint Venture Agreement to constitute a company named Satyam Venture Engineering Services Ltd. respondent No.2 herein (in short \023SVES\024) in which both the appellant and respondent No.1 have 50 per cent equity shareholding. Another agreement was also executed between the parties on the same day being the Shareholders Agreement (in short \023SHA\024) which provides that disputes have to be resolved amicably between the parties and failing such resolution, the disputes are to be referred to arbitration. Section 11.05 of the SHA provides for certain terms and conditions as regards the resolution of the disputes. In February, 2005, disputes arose between the parties. Respondent No.1 alleged that the appellant had committed an event of default under the SHA owing to several venture companies becoming insolvent and they had exercised its option to purchase the appellant-company\022s shares in SVES at its book value. On 25.07.2005, respondent No.1 filed a request for arbitration with the London Court of International Arbitration which appointed Mr. Paul B Hannon as sole arbitrator on 10.9.2005. The sole Arbitrator on 3.4.2006 passed an award directing the appellant \026 VGE to transfer the shares to respondent No.1. On 14.4.2006, respondent No.1 filed a petition to recognize and enforce the award before the United States District Court, Eastern District Court of Michigan (US Court). The appellant entered appearance to defend this proceeding before the US Court by filing a cross petition. In the said petition, it objected to the enforcement of the Award which ordered transfer of shares which was in

violation of Indian Laws and Regulations specifically the Foreign Exchange Management Act, 1999 (in short \023FEMA\024) and its notifications. The appellant filed a suit being O.S. No. 80 of 2006 before the Ist Additional Chief Judge, City Civil Court, Secunderabad on 28.4.2006 seeking declaration to set aside the award and permanent injunction on the transfer of shares under the Award. On 15.6.2006, the District Court passed an ad-interim ex parte order of injunction, inter alia, restraining respondent No.1 from seeking or effecting the transfer of shares either under the terms of the Award or otherwise. Challenging the said order, respondent No.1 filed an appeal before the High Court of Andhra Pradesh. The High Court admitted respondent\022s appeal and directed interim suspension of the order of the District Court but made it clear that respondent No.1 would not effect the transfer of shares until further orders. On 13.07.2006, in response to the summons served upon the respondents, respondent No.1 appeared in the Court and filed a petition under Order VII Rule 11 C.P.C. for rejection of the plaint. The appellant filed objection to the application. The trial Court, by its order dated 28.12.2006, allowed the said application and rejected the plaint of the appellant. Challenging the said order, the appellant filed an appeal before the High Court. On 27.2.2007, the High Court dismissed the appeal holding that the award cannot be challenged even if it is against the public policy and in contravention of statutory provisions. Against the said order, the appellant preferred the above appeal by way of special leave petition.

4) Heard Mr. K.K. Venugopal, learned senior counsel, appearing for the appellant and Mr. R.F. Nariman, learned senior counsel, appearing for respondent No.1.

5) After taking us through agreements entered into by both the parties, subsequent developments such as alleged violations, Award by an Arbitrator at U.K., proceedings before the District Court, Michigan, USA and the impugned proceedings of the Ist Additional Chief Judge-City Civil Court, Secunderabad as well as the order of the High Court, Mr. K.K. Venugopal learned senior counsel appearing for the appellant has raised the following contentions:

(i) The claim that Part I of the Arbitration and Conciliation Act, 1996 (in short \023the Act\024) applies to foreign awards is covered by the judgment of this Court in Bhatia International vs. Bulk Trading S.A. & Anr., (2002) 4 SCC 105.

ii) The first respondent - Satyam Computer Services Ltd. could not have pursued the enforcement proceedings in the District Court in Michigan, USA in the teeth of the injunction granted by the Courts in India which also, on the basis of the Comity of Courts should have been respected by the District Court in Michigan.

iii) The overriding Section 11.5 (c) of the SHA would exclude respondent No.1- Satyam Computer Services Ltd. approaching the US Court in regard to the enforcement of the Award.

6) On the other hand, Mr. R.F. Nariman, learned senior counsel, appearing for the first respondent, submitted that,

(i) In view of Section 44 of the Act and the terms of the agreement, no suit would lie in India to set aside the Award, which is a foreign Award.

(ii) No application under Section 34 of the Act would lie to set aside the Award.

(iii) In view of the provisions of the Act and the terms of the agreement, the first respondent rightly sought enforcement of the Award in Michigan, USA, hence the civil suit filed at Secunderabad is not maintainable.

(iv) Section 11.5(c) of the SHA only deals with the rights and obligations of the appellant and the first respondent while acting as shareholders of the 2nd respondent it has nothing to do with the enforcement of foreign Award.
(v) In terms of the agreement, having participated in the arbitration proceedings in UK, filed cross-suit/objection in the District Court, Michigan opposing the Award, the appellant cannot agitate the very same issue in the Indian Courts namely, District Court, Secunderabad. In other words, the appellant, VGE, cannot ride two horses at the same time.
7) We perused all the relevant materials, Annexures and considered the rival contentions.
8) Since both Mr. K.K. Venugopal, learned senior counsel for the appellant and Mr. R. F. Nariman, learned senior counsel, for respondent No.1 heavily relied on a judgment of this Court in Bhatia International (supra), in support of their respective stand, let us consider the facts in that case and ultimate conclusion arrived at therein.
9) Bhatia International filed an Appeal before this Court against the judgment of the M.P. High Court in W.P. No. 453 of 2000. The appellant-Bhatia International entered into a contract with the first respondent \026 Bulk Trading on 9.5.1997. This contract contained an arbitration clause which provided that arbitration was to be as per the Rules of the International Chamber of Commerce (for short \023ICC\024). On 23.10.1997, the Ist respondent made a request for arbitration with ICC. Parties had agreed that the arbitration be held in Paris, France. ICC has appointed a sole arbitrator. The first respondent filed an application under Section 9 of the Act before the 3rd Additional District Judge, Indore, M.P. against the appellant and the 2nd respondent. One of the interim reliefs sought for was an order of injunction restraining these parties from alienating, transferring and/or creating third-party rights, disposing of, dealing with and/or selling their business assets and properties. The appellant raised the plea of maintainability of such an application. The appellant contended that Part I of the Act would not apply to arbitrations where the place of arbitration was not in India. The application was rejected by the 3rd Additional District Judge on 1-2-2000. It was held that the court at Indore (M.P.) had jurisdiction and the application was maintainable. The appellant filed a writ petition before the High Court of Madhya Pradesh, Indore Bench and the same was dismissed by the impugned judgment dated 10-10-2000. Several contentions have been raised on behalf of the appellant, namely, Part I of the Act only applies to arbitrations where the place of arbitration is in India and if the place of arbitration is not in India then Part II of the said Act would apply. Sub-section (2) of Section 2 of the Act makes it clear that the provisions of Part I do not apply where the place of arbitration is not in India. The Court at Indore could not have entertained the application under Section 9 of the Act as Part I did not apply to arbitrations which had taken place outside India. On the other hand, on behalf of respondent No.1, it was submitted that a conjoint reading of the provisions shows that Part I is to be applied to all arbitrations. It was further submitted that unless the parties by their agreement exclude its provisions, Part I would also apply to all International Commercial arbitrations including those that take place out of India.
10) The above contentions were considered in detail. In view of the assertion of both the senior counsel, the decision in Bhatia International (supra) has very much bearing on the issue raised in this case. The relevant paragraphs are reproduced hereunder:

\02314. At first blush the arguments of Mr. Sen appear very attractive. Undoubtedly sub-section (2) of Section 2 states that Part I is to apply where the place of arbitration is in India. Undoubtedly, Part II applies to foreign awards. Whilst the submissions of Mr. Sen are attractive, one has to keep in mind the consequence which would follow if they are accepted. The result would:
(a) Amount to holding that the legislature has left a lacuna in the said Act. There would be a lacuna as neither Part I or II would apply to arbitrations held in a country which is not a signatory to the New York Convention or the Geneva Convention (hereinafter called \023a non-convention country\024). It would mean that there is no law, in India, governing such arbitrations.

(b) Lead to an anomalous situation, inasmuch as Part I would apply to Jammu and Kashmir in all international commercial arbitrations but Part I would not apply to the rest of India if the arbitration takes place out of India.

(c) Lead to a conflict between sub-section (2) of Section 2 on one hand and sub-sections (4) and (5) of Section 2 on the other. Further, sub-section (2) of Section 2 would also be in conflict with Section 1 which provides that the Act extends to the whole of India.
(d) Leave a party remediless inasmuch as in international commercial arbitrations which take place out of India the party would not be able to apply for interim relief in India even though the properties and assets are in India. Thus a party may not be able to get any interim relief at all.\024
\02316. A reading of the provisions shows that the said Act applies to arbitrations which are held in India between Indian nationals and to international commercial arbitrations whether held in India or out of India. Section 2(1)(f) defines an international commercial arbitration. The definition makes no distinction between international commercial arbitrations held in India or outside India. An international commercial arbitration may be held in a country which is a signatory to either the New York Convention or the Geneva Convention (hereinafter called \023the convention country\024). An international commercial arbitration may be held in a non-convention country. The said Act nowhere provides that its provisions are not to apply to international commercial arbitrations which take place in a non-convention country. Admittedly, Part II only applies to arbitrations which take place in a convention country. Mr. Sen fairly admitted that Part II would not apply to an international commercial arbitration which takes place in a non-convention country. He also fairly admitted that there would be countries which are not signatories either to the New York Convention or to the Geneva Convention. It is not possible to accept the submission that the said Act makes no provision for international commercial arbitrations which take place in a non-convention country.\024
\02317. Section 1 of the said Act reads as follows:
\0231. Short title, extent and commencement .\027(1) This Act may be called the Arbitration and Conciliation Act, 1996.
(2) It extends to the whole of India:
Provided that Parts I, III and IV shall extend to the State of Jammu and Kashmir only insofar as they relate to international commercial arbitration or, as the case may be, international commercial conciliation.\024
The words \023this Act\024 mean the entire Act. This shows that the entire Act, including Part I, applies to the whole of India. The fact that all Parts apply to the whole of India is clear

from the proviso which provides that Parts I, III and IV will apply to the State of Jammu and Kashmir only so far as international commercial arbitrations/conciliations are concerned. Significantly, the proviso does not state that Part I would apply to Jammu and Kashmir only if the place of the international commercial arbitration is in Jammu and Kashmir. Thus if sub-section (2) of Section 2 is read in the manner suggested by Mr. Sen there would be a conflict between Section 1 and Section 2(2). There would also be an anomaly inasmuch as even if an international commercial arbitration takes place outside India, Part I would continue to apply in Jammu and Kashmir, but it would not apply to the rest of India. The legislature could not have so intended.\024

\02321. Now let us look at sub-sections (2), (3), (4) and (5) of Section 2. Sub-section (2) of Section 2 provides that Part I would apply where the place of arbitration is in India. To be immediately noted, that it is not providing that Part I shall not apply where the place of arbitration is not in India. It is also not providing that Part I will \023 only \024 apply where the place of arbitration is in India (emphasis supplied). Thus the legislature has not provided that Part I is not to apply to arbitrations which take place outside India. The use of the language is significant and important. The legislature is emphasizing that the provisions of Part I would apply to arbitrations which take place in India, but not providing that the provisions of Part I will not apply to arbitrations which take place out of India. The wording of sub-section (2) of Section 2 suggests that the intention of the legislature was to make provisions of Part I compulsorily applicable to an arbitration, including an international commercial arbitration, which takes place in India. Parties cannot, by agreement, override or exclude the non-derogable provisions of Part I in such arbitrations. By omitting to provide that Part I will not apply to international commercial arbitrations which take place outside India the effect would be that Part I would also apply to international commercial arbitrations held out of India. But by not specifically providing that the provisions of Part I apply to international commercial arbitrations held out of India, the intention of the legislature appears to be to ally (sic allow) parties to provide by agreement that Part I or any provision therein will not apply. Thus in respect of arbitrations which take place outside India even the non-derogable provisions of Part I can be excluded. Such an agreement may be express or implied. \023

\02326. Mr. Sen had also submitted that Part II, which deals with enforcement of foreign awards does not contain any provision similar to Section 9 or Section 17. As indicated earlier, Mr. Sen had submitted that this indicated the intention of the legislature not to apply Sections 9 and 17 to arbitrations, like the present, which are taking place in a foreign country. The said Act is one consolidated and integrated Act. General provisions applicable to all arbitrations will not be repeated in all Chapters or Parts. The general provisions will apply to all Chapters or Parts unless the statute expressly states that they are not to apply or where, in respect of a matter, there is a separate provision in a separate Chapter or Part. Part II deals with enforcement of foreign awards. Thus Section 44 (in Chapter I) and Section 53 (in Chapter II) define foreign awards, as being awards covered by arbitrations under the New York Convention and the Geneva Convention respectively. Part II then contains provisions for enforcement of \023foreign awards\024 which necessarily would be different. For that reason special provisions for enforcement of foreign awards are made in

Part II. To the extent that Part II provides a separate definition of an arbitral award and separate provisions for enforcement of foreign awards, the provisions in Part I dealing with these aspects will not apply to such foreign awards. It must immediately be clarified that the arbitration not having taken place in India, all or some of the provisions of Part I may also get excluded by an express or implied agreement of parties. But if not so excluded the provisions of Part I will also apply to \023foreign awards\024. The opening words of Sections 45 and 54, which are in Part II, read \023notwithstanding anything contained in Part I\024. Such a non obstante clause had to be put in because the provisions of Part I apply to Part II. \023

\02332. To conclude, we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply.\024

\02335. Lastly, it must be stated that the said Act does not appear to be a well-drafted legislation. Therefore the High Courts of Orissa, Bombay, Madras, Delhi and Calcutta cannot be faulted for interpreting it in the manner indicated above. However, in our view a proper and conjoint reading of all the provisions indicates that Part I is to apply also to international commercial arbitrations which take place out of India, unless the parties by agreement, express or implied, exclude it or any of its provisions. Such an interpretation does not lead to any conflict between any of the provisions of the said Act. On this interpretation there are no lacunae in the said Act. This interpretation also does not leave a party remediless. Thus such an interpretation has to be preferred to the one adopted by the High Courts of Orissa, Bombay, Madras, Delhi and Calcutta. It will therefore have to be held that the contrary view taken by these High Courts is not good law.\024

11) Mr. K.K. Venugopal, learned senior counsel, has pointed out that paragraph 14 of the judgment of Bhatia International (supra) sets out four independent reasons for arriving at the conclusion that Part I would apply to foreign Awards that are as follows:

i) to hold to the contrary would result in a lacunae as Non-Convention country awards cannot be enforced in India.

ii) Section 1(2) expressly extends Part I to the State of Jammu and Kashmir so far as it relates to international commercial arbitration giving rise to an anomaly so far as the rest of India is concerned unless Part I applies to international commercial arbitrations in the other States as well.

iii) If the word \023only\024 is read into Section 2(2), it would then render the sub-section inconsistent with sub-sections (4) and (5) of Section 2 which apply Part I to all arbitrations, meaning thereby, including foreign international arbitrations.

iv) As otherwise, no relief can be sought in India even though the properties and assets are situated in India,

merely because the arbitration is an international commercial arbitration.

Further, by drawing our attention to the specific conclusion arrived in paragraphs 32 and 35, he reiterated that the issue has been very well concluded and the argument based on paragraph 26 is not acceptable.

12) Mr. Nariman heavily relied on paragraph 26 of the judgment in Bhatia International which we have extracted supra. According to him, the said paragraph contains not only the submissions of Mr. Sen, who appeared for Bhatia International therein but also the ultimate conclusion of the Bench. He reiterated that the Court concluded \023Thus Section 44 (in Chapter I) and Section 53 (in Chapter II) define foreign Awards, as being awards covered by arbitrations under the New York Convention and the Geneva Convention respectively. Part II then contains provisions for enforcement of \023foreign awards\024 which necessarily would be different. For that reason, special provisions for enforcement of foreign awards are made in Part II. To the extent that Part II provides a separate definition of an arbitral award and separate provisions for enforcement of foreign awards, the provisions in Part I dealing with these aspects will not apply to such foreign awards. It must immediately be clarified that the arbitration not having taken place in India, all or some of the provisions of Part I may also get excluded by an express or implied agreement of parties. But if not so excluded, the provisions of Part I will also apply to \023foreign awards\024. The opening words of Sections 45 and 54, which are in Part II, read \023notwithstanding anything contained in Part I\024. Such a non obstante clause had to be put in because the provisions of Part I apply to Part II.

13) According to Mr. K.K. Venugopal, paragraphs 26 and 27 start by dealing with the arguments of Mr. Sen who argued that Part I is not applicable to foreign awards. He further pointed out that it is only in the sentence starting at the bottom of para 26 that the phrase \023it must immediately be clarified\024 that the finding of the Court is rendered. That finding is to the effect that an express or implied agreement of parties can exclude the applicability of Part I. He further pointed out that the finding specifically states that, \023But if not so excluded, the provisions of Part I will also apply to all \023foreign awards\024. This exception which is carved out, based on agreement of the parties. By omitting to provide that Part I will not apply to international commercial arbitrations which take place outside India the effect would be that Part I would also apply to international commercial arbitrations held out of India. But by not specifically providing that the provisions of Part I apply to international commercial arbitrations held out of India, the intention of the legislature appears to be to allow parties to provide by agreement that Part I or any provision therein will not apply. Thus in respect of arbitrations which take place outside India even the non-derogable provisions of Part I can be excluded. Such an agreement may be express or implied. He further pointed out 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, according to him, 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. He very much relied on the judgment of this Court in Oil & Natural Gas Corporation Ltd. vs. Saw Pipes Ltd. (2003) 5 SCC 705 wherein particularly, in paragraphs 30 and 31, the public policy of India has been defined to include-

(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.

He pointed out that this extended definition of public policy can be by-passed by taking the award to a foreign country for enforcement. In such circumstances, according to him, there is nothing inconsistent between Section 48 which deals with enforcement and Section 34 which deals with a challenge to the Award. He also relied on a decision of the Division Bench of the Calcutta High Court in Pratabmull Rameshwar vs. K.C. Sethia Ltd., AIR 1960 Calcutta 702. In paragraphs 45 and 63, the Calcutta High Court while dealing with Arbitration Act of 1940 sets out the reasoning in support of a challenge being permissible in India to a foreign award.

14) In order to find out an answer to the first and prime issue and whether the decision in Bhatia International (supra) is an answer to the same, let us go into the details regarding the suit filed by the appellant as well as the relevant provisions of the Act. The appellant \026VGE filed O.S. No. 80 of 2006 on the file of the Ist Additional District Court, Secunderabad, for a declaration that the Award dated 3.4.2006 is invalid, unenforceable and to set aside the same. Section 5 of the Act makes it clear that in matters governed by Part I, no judicial authority shall intervene except where so provided. Section 5 which falls in Part I, specifies that no judicial authority shall intervene except where so provided. The Scheme of the Act is such that the general provisions of Part I, including Section 5, will apply to all Chapters or Parts of the Act. Section 2(5) which falls in Part I, specifies that \023this part shall apply to all arbitrations and to all proceedings relating thereto.\024 It is useful to refer Section 45 which is in part II of the Act which starts with non obstante clause namely, \023Notwithstanding anything contained in Part I or in Code of Civil Procedure\005\005\005\005\024 Section 52 in Chapter I of Part II of the Act provides that \023Chapter II of this Part shall not apply in relation to foreign awards to which this Chapter applies.\024 As rightly pointed out, the said section does not exclude the applicability of Part I of the Act to such awards.

15) Part II of the Act speaks about the enforcement of certain foreign awards. Section 48 speaks about conditions for enforcement of foreign awards. Section 48(1) (e) read with Section 48(3) of the Act specify that an action to set aside the Award would lie to the competent authority. Mr. Nariman, after taking us through the relevant provisions of Chapter I Part II submitted that Section 48(1)(e) read with Section 48(3) of the Act specifies that an action to set aside a foreign award within the meaning of Section 44 of the Act would lie to the \023competent authority of the country in which, or under the law of which, that award was made\024. According to him, the phrase \023the country\005\005under the law of which, that award was made\024 refers to the country of the curial law of arbitration, in the extremely rare situation where the parties choose a curial law other than the law of the country of the seat of arbitration. He further pointed out that therefore such a challenge would lie only to the competent Court of the country in which the foreign award was made. He also submitted that the said

principle is recognized internationally by Courts in US and UK as well as by several High Courts in India. The US decisions which support/recognize the above principle are :

(1) International Standard Electric Corp. vs. Bridas Sociedad Anonima Petrolera, Industrial Y Comercial, 745 F.supp.172

(2) M & C Corporation vs. ERWIN BEHR GmbH & Co., KG, a foreign corporation, 87 F.3d 844

(3) Yusuf Ahmed Alghanim & Sons vs. Toys \023R\024 US. INC. Thr. (HK) Ltd. 126 F.3d 15

(4) Karaha Bodas Co. L.L.C. vs. Perusahaan Pertambangan Minyakdan Gas Bumi Negara 364 F.3d 274

(5) C v. D (2007) EWHC 1541

16) Apart from the above US decisions, Mr. R.F. Nariman, pointed out that all the Indian High Courts except the Gujarat High Court in Nirma Ltd. vs. Lurgi Energie Und Entsorgung GMBH, Germany, AIR 2003 Gujarat 145 have taken this consistent view in the following judgments:

(a) Bombay Gas Company Limited vs. Mark Victor Mascarenhas & Ors., 1998 1 LJ 977

(b) Inventa Fischer Gmbh & Co., K.G. vs. Polygenta Technologies Ltd., 2005 (2) Bom C.R. 364

(c) Trusuns Chemical Industry Ltd. vs. Tata International Ltd. AIR 2004 Gujarat. 274

(d) Bharat Aluminium Co. Ltd. vs. Kaiser Aluminium Technical Services, AIR 2005 Chhatisgarh 21

(e) Bulk Trading SA vs. Dalmia Cement (Bharat) Limited, (2006) 1 Arb.LR 38(Delhi)

17) On close scrutiny of the materials and the dictum laid down in three-Judge Bench decision in Bhatia International (supra), we agree with the contention of Mr. K.K.Venugopal and hold that paragraphs 32 and 35 of the Bhatia International (supra) make it clear that the provisions of Part I of the Act would apply to all arbitrations including international commercial arbitrations and to all proceedings relating thereto. We further hold that where such arbitration is held in India, the provisions of Part-I would compulsorily apply and parties are free to deviate to the extent permitted by the provisions of Part-I. It is also clear that even in the case of international commercial arbitrations held out of India provisions of Part-I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. We are also of the view that such an interpretation does not lead to any conflict between any of the provisions of the Act and there is no lacuna as such. The matter, therefore, is concluded by the three-Judge Bench decision in Bhatia International (supra).

18) Learned senior counsel for the respondent based on para 26 submitted that in the case of foreign award which was passed outside India is not enforceable in India by invoking the provisions of the Act or the CPC. However, after critical analysis of para 26, we are unable to accept the argument of learned senior counsel for the respondent. Paras 26 and 27 start by dealing with the arguments of Mr. Sen who argued that Part I is not applicable to foreign awards. It is only in the sentence starting at the bottom of para 26 that the phrase \023it must immediately be clarified\024 that the finding of the Court is rendered. That finding is to the effect that an express or implied agreement of parties can exclude the applicability of Part I. The finding specifically states: \023But if not so excluded, the provisions of Part I will also apply to all \023foreign awards\024. This exception which is carved out, based on agreement of the parties, in para 21 (placitum (e) to (f) is extracted below:

\023By omitting to provide that Part I will not apply to international commercial arbitrations which take place

outside India the effect would be that Part I would also apply to international commercial arbitrations held out of India. But by not specifically providing that the provisions of Part I apply to international commercial arbitrations held out of India, the intention of the legislature appears to be to allow parties to provide by agreement that Part I or any provision therein will not apply. Thus in respect of arbitrations which take place outside India even the non-derogable provisions of Part I can be excluded. Such an agreement may be express or implied.\024

19) 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.

20) Mr. K.K.Venugopal also highlighted that in Company Law, the word \021transfer\022 has a definite connotation which would require the ownership of the shares to be transferred to the transferee, which would involve the following steps being taken under the Companies Act and the rules and regulations thereunder, as well as the Foreign Exchange Management Act, 1999 (FEMA):

i) Obtaining a Share Transfer Form 7-B and having it endorsed by the prescribed authority under the Companies Act, 1956 in compliance with Section 108.

ii) Execution of Share Transfer Form 7-B by the appellant and respondent.

iii) Payment of stamp duty on the transfer of shares.

iv) Sending duly executed Share Transfer Form 7-B and the share Certificates to SVES, the respondent No.2 herein under Section 110 of Companies Act.

v) Respondent No.2 approving the transfer of shares and causing alternation in its Register of Members under Section 111A.

vi) Compliance with Rules and Regulations, completing prescribed forms, giving relevant undertakings in accordance with Indian foreign exchange laws and Regulations such as the Foreign Exchange Management Act, 1999 and its notifications, given that the transaction involved transfer of shares from a non-resident to a resident.

By pointing out, he submitted that respondent No.1, in enforcing the Award in the US District Court instead of Indian Courts was motivated by the intention of evading the legal and regulatory scrutiny to which this transaction would have been subject to had it been enforced in India. In the light of the statutory provisions as provided in the Companies Act and FEMA, we agree with the submission of Mr. K.K.Venugopal.

21) As rightly pointed out the effort of respondent No.1 was

to avoid enforcement of the Award under Section 48 of the 1996 Act which would have given the appellant herein the benefit of the Indian Public Policy rule based on the judgment in the Saw Pipes case (supra) and for avoiding the jurisdiction of the Courts in India though the award had an intimate and close nexus to India in view of the fact that, (a) the company was situated in India; (b) the transfer of the \021ownership interests\022 shall be made in India under the laws of India as set out above; (c) all the steps necessary have to be taken in India before the ownership interests stood transferred. If, therefore, respondent No.1 was not prepared to enforce the Award in spite of this intimate and close nexus to India and its laws, the appellant herein would certainly not be deprived of the right to challenge the award in Indian Courts.

22) Mr. R.F. Nariman by placing the factual details, namely, filing of petition before the Michigan Court for execution of the Award the objection petition filed by the first respondent herein as well as the orders passed by the Court of Michigan, US submitted that the appellant having participated and consented in those proceedings is precluded from re-opening the very same issue by filing a suit in a court at Secunderabad which is not permissible either under law or in terms of their conduct. In view of the legal position derived from Bhatia International (supra), we are unable to accept Mr. Nariman\022s argument. It is relevant to point out that in this proceeding, we are not deciding the merits of the claim of both parties, particularly, the stand taken in the suit filed by the appellant-herein for setting aside the award. It is for the concerned court to decide the issue on merits and we are not expressing anything on the same. The present conclusion is only with regard to the main issue whether the aggrieved party is entitled to challenge the foreign award which was passed outside India in terms of Section 9/34 of the Act. Inasmuch as the three-Judge Bench decision is an answer to the main issue raised, we are unable to accept the contra view taken in various decisions relied on by Mr. Nariman. Though in Bhatia International (supra) the issue relates to filing a petition under Section 9 of the Act for interim orders the ultimate conclusion that Part I would apply even for foreign awards is an answer to the main issue raised in this case.

23) Mr. K.K. Venugopal, learned senior counsel, next contended that the overriding section 11.05 (c) of the Shareholders Agreement would exclude respondent No.1 approaching the US Courts in regard to enforcement of the Award. Section 11.05 (b) and (c) of the Shareholders Agreement between the parties read as follows:

\023(b) This Agreement shall be construed in accordance with and governed by the laws of the State of Michigan, United States, without regard to the conflicts of law rules of such jurisdiction. Disputes between the parties that cannot be resolved via negotiations shall be submitted for final, binding arbitration to the London Court of Arbitration.

(c) Notwithstanding anything to the contrary in this agreement, the Shareholders shall at all times act in accordance with the Companies Act and other applicable Acts/Rules being in force, in India at any time.\024

It was pointed out that the non-obstante clause would override the entirety of the agreement including sub-section (b) which deals with settlement of the dispute by arbitration. It was further pointed out that sub-section (c), therefore, would apply to the enforcement of the Award which declares that, notwithstanding that the proper law or the governing law of the contract is the law of the State of Michigan, their shareholders shall at all times act in accordance with the Companies Act and other applicable Acts/Rules being in force

in India at any time. In such circumstances, it is the claim of the appellant that necessarily enforcement has to be in India, as mentioned in sub-section (c) which overrides every other section in the Shareholders Agreement. Mr. K.K. Venugopal further pointed out that respondent No.1 totally violated the agreement between the parties by seeking enforcement of the transfer of the shares in the Indian company by approaching the District Court in the United States. On the other hand, Mr. Nariman pointed out that Section 11.05 (b) of the Shareholders agreement alone governs the rights and obligations between the appellant and the first respondent inter se and dispute resolution thereof. In view of our discussion supra, we agree with the stand of the learned senior counsel for the appellant.

24) Coming to the other contentions particularly the fact that the suit has been filed before the trial Court which is a court of competent jurisdiction under Section 2(e) of the Act and not an application under Section 34 of the Act, Mr. K.K. Venugopal pointed out that it would not affect the issue of jurisdiction as this Court has upheld the conversion of a suit into a Section 9 petition under the Act. (vide Sameer Barar and Ors. Vs. Ratan Bhushan Jain & Ors. (2006) 1 SCC 419) and in another instance, converted a writ petition into a first appeal under the Civil Procedure Code. (vide Ajay Bansal vs. Anup Mehta & Ors. (2007) 2 SCC 275). Even otherwise, if the Court in question is not having jurisdiction in the interest of justice the suit/proceeding has to be transferred to the court having competent jurisdiction.

25) Learned senior counsel for the appellant submitted that the first respondent - Satyam Computer Services Ltd. could not have pursued the enforcement proceedings in the District Court in Michigan, USA in the teeth of the injunction granted by the Courts in India which also, on the basis of the Comity of Courts, should have been respected by the District Courts in Michigan, USA. Elaborating the same, he further submitted that the injunction of the trial court restraining the respondents from seeking or effecting the transfer of shares either under the terms of the Award or otherwise was in force between 15.06.2006 and 27.06.2006. The injunction of the High Court in the following terms \023appellant (i.e. respondent No.1) shall not effect the transfer of shares of the respondents pending further orders\024 was in effect from 27.06.2006 till 28.12.2006. The judgment of the US District Court was on 13.07.2006 and 31.07.2006 when the Award was directed to be enforced as sought by respondent No.1, notwithstanding the injunction to the effect that the appellant (respondent No.1 herein) \023shall not effect the transfer of shares of the respondents pending further orders.\024 The first respondent pursued his enforcement suit in Michigan District Courts to have a decree passed directing \026 \023\005 VGE shall deliver to Satyam or its designee, share certificates in a form suitable for immediate transfer to Satyam evidencing all of the appellant\022s ownership interest in Satyam Ventures Engineering Services (SVES), the party\022s joint venture company.\024 Further, the \023VGE (appellant herein) shall do all that may otherwise be necessary to effect the transfer of its ownership interest in SVES to Satyam (or its designee)\024. It is pointed out that obtaining this order by pursuing the case in the US District Courts, in the teeth of the prohibition contained in the order of the High Court, would not only be a contempt of the High Court but would render all proceedings before the US courts a brutum fulmen, and liable to be ignored. Though Mr. R.F.Nariman has pointed out that the High Court only restrained the respondent from effecting transfer of the shares pending further orders by the City Civil Court, Secunderabad, after the

orders of the trial Court as well as limited order of the High Court, the first respondent ought not to have proceeded the issue before the District Court, Michigan without getting the interim orders/directions vacated.

26) Finally, the overriding section 11.5 (c) of the SHA cannot be ignored lightly. As pointed out, the said section would exclude respondent No.1- Satyam Computer Services Ltd. approaching the US Courts in regard to the enforcement of the Award. Section 11.05 (b) and (c) of the Shareholders Agreement between the parties which is relevant has already been extracted in para 23.

The non-obstante clause would override the entirety of the agreement including sub-section (b) which deals with settlement of the dispute by arbitration. Sub-section (c), therefore, would apply to the enforcement of the Award which declares that, notwithstanding that the proper law or the governing law of the contract is the law of the State of Michigan, their shareholders shall at all times act in accordance with the Companies Act and other applicable Acts/Rules being in force in India at any time. Necessarily, enforcement has to be in India, as declared by this very section which overrides every other section in the Shareholders Agreement. Respondent No.1, therefore, totally violated the agreement between the parties by seeking enforcement of the transfer of the shares in the Indian company by approaching the District Courts in the United States.

27) The claim of the first respondent that the section, namely, 11.05 (c) of the SHA cannot be construed to mean that Indian law is a substantive law of the contract or that Indian law would govern the dispute resolution clause in Section 11.05(b) are not acceptable. As rightly pointed out and observed earlier, the non obstante clause would over ride the entirety of the agreement including sub-section (b) which deals with the settlement of the dispute by arbitration and, therefore, section 3 would apply to the enforcement of the award. In such event, necessarily enforcement has to be in India as declared by the very section which over rides every other section.

28) The above-mentioned relevant aspects, the legal position as set out in three-Judge Bench decision in Bhatia International (supra), specific clause in the Shareholders Agreement (SHA), conduct of the parties have not been properly adverted to and considered by the trial Court as well as the High Court. Accordingly, both the orders passed by the City Civil Court and of the High Court are set aside.

29) In terms of the decision in Bhatia International (supra), we hold that Part I of the Act is applicable to the Award in question even though it is a foreign Award. We have not expressed anything on the merits of claim of both the parties. It is further made clear that if it is found that the Court in which the appellant has filed a petition challenging the Award is not competent and having jurisdiction, the same shall be transferred to the appropriate Court. Since from the inception of ordering notice in the special leave petition both parties were directed to maintain status quo with regard to transfer of shares in issue, the same shall be maintained till the disposal of the suit. Considering the nature of dispute which relates to an arbitration Award, we request the concerned Court to dispose of the suit on merits one way or the other within a period of six months from the date of receipt of copy of this judgment. Civil appeal is allowed to this extent. No costs.

THE ARBITRATION AND CONCILIATION ACT, 1996

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THE ARBITRATION AND CONCILIATION ACT, 1996

(No. 26 of 1996)

[16th August 1996]

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

PREAMBLE

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

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

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

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

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

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

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

PRELIMINARY

1. Short title, extent and-commencement. –

(1) This Act maybe called the Arbitration and Conciliation Act, 1996.

(2) It extends to the whole of India:

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

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

(3) It shall come be deemed come into force on the 25th day of January 1996.

PART I
ARBITRATION
CHAPTER I
GENERAL PROVISIONS

2. Definitions. -

(1) In this Part, unless the context otherwise requires, -

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

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

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

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

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

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

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

(ii) A body corporate which is in corporate in any on n try other than India; or

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

(iv). The Government of a foreign country;

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

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

Scope

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

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

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

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

Construction of references

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

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

(8) Where this Part-

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

(b) In any other way refers to an agreement of the parties,

That agreement shall include any arbitration rules referred to in that agreement.

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

3. Receipt of written communications. –

(1) Unless otherwise agreed by the parties, -

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

(b) If none of the places referred to in clause (a) can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee’s last known place of business, habitual residence or mailing address by registered letter or by any other means which provides a record of the attempt to deliver it.

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

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

4. Waiver of right to object. -A party who knows that-

(a) Any provision of this Part from which the parties may derogate, or

(b) Any requirement under the arbitration agreement,

Has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a the limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object

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

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

CHAPTER II
ARBITRATION AGREEMENT

7. Arbitration agreement. –

(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in-

(a) A document signed by the parties;

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

(c) An exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) There reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

8. Power to refer parties to arbitration where there is an arbitration agreement. -

(1) A judicial authority before which an action is brought in a matter, which is the subject of an arbitration agreement, shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitrat award made.

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

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

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

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

(b) Securing the amount in dispute in the arbitration;

(c) The detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples

to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) Interim injunction or the appointment of a receiver;

(e) Such other interim measure of protection as may appear to the court to be just and convenient,

And the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

CHAPTER III
COMPOSITION OF ARBITRAL TRIBUNAL

10. Number of arbitrators. –

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

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

11. Appointment of arbitrators. –

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

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

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

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

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

(b) The two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment,

The appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

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

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

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

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

(c) A person, including an institution, fails to perform any function entrusted to him or it under that procedure,

A party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

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

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

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

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

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

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

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

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

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

12. Grounds for challenge. -

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

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if-

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

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

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

13. Challenge procedure. –

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

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

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

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

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

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

14. Failure or impossibility to act. –

(1) The mandate of an arbitrator shall terminate if-

(a) He becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

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

(2) If a controversy remains concerning any of the grounds refer-red to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the court to decide on the termination of the mandate.

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

15. Termination of mandate and substitution of arbitrator. -

(1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate-

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

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

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

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

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

CHAPTER IV

JURISDICTION OF ARBITRAL TRIBUNALS

16. Competence of arbitral tribunal to rule on its jurisdictional. -

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

(a) An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raise as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

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

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

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

17. Interim measures ordered by arbitral tribunal. –

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

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

CHAPTER V
CONDUCT OF ARBITRAL PROCEEDINGS

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

19. Determination of rules of procedure. –

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

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

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

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

20. Place of arbitration. –

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

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

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

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

22. Language. -

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

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

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

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

23. Statements of claim and defence. -

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

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

(3) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral

proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.

24. Hearings and written proceedings. –

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

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

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

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

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

(a) The claimant fails to communicate his statement of claim in accordance with subsection (1) of section (2), the arbitral tribunal shall terminate the proceedings;

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

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

26. Expert appointment by arbitral tribunal. –

(1) Unless otherwise agreed by the parties, the arbitral tribunal may-

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

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

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

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

27. Court assistance in taking evidence. –

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

(2) The application shall specify-

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

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

(c) The evidence to be obtained, in particular, -

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

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

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

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

(5) Persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings, shall be

subject to the like disadvantages, penalties and punishments by order of the court on the representation of the arbitral tribunal as they would incur for the like offences in suits tried before the court.

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

CHAPTER-VI
MAKING OF ARBITRAL AWARD AND TERMINATION OF PROCEEDINGS

28. Rules applicable to substance of dispute. –

(1) Where the place of arbitration is situate in India, -

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

(b) In international commercial arbitration, -

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

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

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

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

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

29. Decision making by panel of arbitrators. -

(1) Unless otherwise a-reed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the arbitrat tribunal shall be made by a majority of all its members.

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

30. Settlement. –

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

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

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

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

31. Form and contents of arbitral award. –

(1) An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.

(2) For the purposes of sub-section (1), in arbitrat proceeding with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated.

(3) The arbitral award shall state the reasons upon which it is based, unless-

(a) The parties have agreed that no reasons are to be given, or

(b) The award is an arbitral award on a-reed terms under section 30.

(4) The arbitral award shall state its date and the place of arbitration as determined in accordance with section 20 and the award shall be deemed to have been made at that place.

(5) After the arbitral award is made, a signed copy shall be delivered to each party.

(6) The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award.

(7) (a) Unless otherwise a reed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

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

(8) Unless otherwise agreed by the parties, -

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

(b) The arbitral tribunal shall specify-

(i) The party entitled to costs,

(ii) The party who shall pay the costs,

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

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

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

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

(ii) Legal fees and expenses,

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

(iv) Any other expenses incurred in connection with the arbitral proceeding and the arbitral award.

32. Termination of proceedings. –

(1) The arbitral proceeding shall be terminated by the final arbitral award or by all order of the arbitral tribunal under subsection (2).

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

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

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

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

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

33. Correction and interpretation of award; additional award. –

(1) Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties-

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

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

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

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

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

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

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

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

CHAPTER VII
RECOURSE AGAINST ARBITRAL AWARD

34. Application for setting aside arbitral award. –

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

(2) An arbitral award may be set aside by the court only if-

(a) The party making the application furnishes proof that-

(i) A party was under some incapacity, or

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

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

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

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

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

(b) The court finds that-

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

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

Explanation. -Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

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

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

CHAPTER VIII
FINALITY AND ENFORCEMENT OF ARBITRAL AWARDS

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

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

CHAPTER IX
APPEALS

37. Appealable orders. –

(1) An appeal shall lie from the following orders (and from no others) to the court authorised by law to hear appeals from original decrees of the court passing the order, namely: -

(a) Granting or refusing to grant any measure under section 9;

(b) Setting aside or refusing to set aside an arbitral award under section 34.

(2) An appeal shall also lie to a court from an order of the arbitral tribunal--

(a) Accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b) Granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

CHAPTER X
MISCELLANEOUS

38. Deposits. –

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

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

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

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

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

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

39. Lien on arbitral award and deposits as to costs. –

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

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

(3) An application under sub-section (2) may be made by any party unless the fees demanded have been fixed by written agreement between him and the arbitral tribunal, and the arbitral tribunal shall be entitled to appear and be heard on any such application.

(4) The court may make such orders as it thinks fit respecting the costs of the arbitration where any question arises respecting such costs and the arbitral award contains no sufficient provision concerning them.

40. Arbitration agreement not to be discharged by death of party thereto. –

(1) An arbitration agreement shall not be discharged by the death of any party thereto either as respects the deceased or as respects any other party, but shall in such event be enforceable by or against the legal representative of the deceased.

(2) The mandate of an arbitrator shall not be terminated by the death of any party by whom he was appointed.

(3) Nothing in this section shall affect the operation of any law by virtue of which any right of action is extinguished by the death of a person.

41. Provisions in case of insolvency. –

(1) Where it is provided by a term in a contract to which an insolvent is a party that any dispute arising there out or in connection therewith shall be submitted to arbitration, the said term shall, if the receiver adopts the contract, be enforceable by or against him so far as it relates to any such dispute.

(2) Where a person who has been adjudged an insolvent had, before the commencement of the insolvency proceedings, become a party to an arbitration agreement, and any matter to which the agreement applies is required to be determined in connection with, or for the purposes of, the insolvency proceedings, then, if the case is one to which sub-section (1) does not apply, any other party or the receiver may apply to the judicial authority having jurisdiction in the insolvency proceedings for an order directing that the matter in question shall be submitted to arbitration in accordance with the arbitration agreement, and the judicial authority may, if it is of opinion that, having regard to all the circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly.

(3) In this section the expression "receiver" includes an Official Assignee.

42. Jurisdiction. -Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a court, that court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that court and in no other court.

43. Limitations. –

(1) The Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in court.

(2) For the purposes of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred in section 21.

(3) Where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.

(4) Where the court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (3 6 of 1963), for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted.

PART II
ENFORCEMENT OF CERTAIN FOREIGN AWARDS

CHAPTER I
NEW YORK CONVENTION AWARDS

44. Definition. -In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960-

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

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

45. Power of judicial authority to refer parties to arbitration. -Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908) a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

46. When foreign award binding. - Any foreign award which would be, enforceable under this Chapter shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India

and any references in this Chapter to enforcing a foreign award shall be construed as including references to relying on; an award.

47. Evidence. –

(1) The party applying for the enforcement of a foreign award shall, at the time of the application, produces before the court-

(a) The original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;

(b) The original agreement for arbitration or a duly certified copy thereof, and

(c) Such evidence as may be necessary to prove that the award is a foreign award.

(2) If the award or agreement to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

Explanation. -In this section and all the following sections of this Chapter, "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction over the subject-matter of the award if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to) such principal Civil Court, or any Court of Small, Causes.

48. Conditions for enforcement of foreign awards. –

(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that-

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

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

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

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

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

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

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

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

(b) The enforcement of the award would be contrary to the public policy of India.

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

(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of sub-section (1) the court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

49. Enforcement of foreign awards. -Where the court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that court.

50. Appealable orders. –

(1) An appeal shall lie from the order refusing to-

(a) Refer the parties to arbitration under section 45;

(b) Enforce a foreign award under section 48, to the court authorised by law to hear appeals from such order.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

51. Saving. –Nothing in this Chapter shall prejudice any rights, which any person would have had of enforcing in India of any award or of availing himself in India of any award if this Chapter had not been enacted.

52. Chapter II not to apply. -Chapter II of this Part shall not apply in relation to foreign awards to which this Chapter applies.

CHAPTER II
GENEVA CONVENTION AWARDS

53. Interpretation. -In this Chapter "foreign award" means an arbitral award on differences relating to matters considered as commercial under the law in force in India made after the 28th day of July, 1924, -

(a) In pursuance of an agreement for arbitration to which the Protocol set forth in the Second Schedule applies, and

(b) Between persons of whom one is subject to the jurisdiction of some one of such Powers as the Central Government, being satisfied that reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be parties to the Convention set forth in the Third Schedule, and of whom the other is subject to the jurisdiction of some other of the Powers aforesaid, and

(c) In one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, may, by like notification, declare to be territories, to which the said Convention applies, And for the purposes of this Chapter an award shall not be deemed to be final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made

54. Power of judicial authority to refer parties to arbitration. -Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, on being seized of a dispute regarding a contract made between persons to whom section 53 applies and including an arbitration agreement,

whether referring to present or future differences, which is valid under that section and capable of being carried into effect, shall refer the parties on the application, of either of them or any person claiming through or under him to the decision of the arbitrators and such reference shall not prejudice the competence of the judicial authority in case the agreement or the arbitration cannot proceed or becomes inoperative.

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

56. Evidence. –

(1) The party applying for the enforcement of a foreign award shall, at the time of application, produces before the court-

(a) The original award or a copy thereof duly authenticated in the manner required by the law of the country in which it was made;

(b) Evidence proving that the award has become final; and

(c) Such evidence as may be necessary to prove that the conditions mentioned in clauses (a) and (c) of sub-section (1) of section 57 are satisfied.

(2) Where any document requiring to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

Explanation. –In this section and all the following sections of this Chapter, "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction over the subject-matter of the award if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal 'Civil Court, or any Court of Small Causes.

57. Conditions for enforcement of foreign awards. –

(1) In order that a foreign award may be enforceable under this Chapter, it shall be necessary that-

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

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

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

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

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

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

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

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

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

(c) The award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that if the award has not covered all the differences submitted to the arbitral tribunal, the court may, if it thinks fit, postpone such enforcement or grant it subject to such guarantee as the court may decide.

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

58. Enforcement of foreign awards. -Where the court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of the court.

59. Appealable orders. –

(1) An appeal shall lie from the order refusing-

(a) To refer the parties to arbitration under section 54; and

(b) To enforce a foreign award under section 57, to the court authorised by law to hear appeals from such order.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court. .

60. Saving-Nothing in this Chapter shall prejudice any right, which any person would have had of enforcing in India of any award or of availing himself in India of any award if this Chapter had not been enacted.

PART III
CONCILIATION

61. Application and scope. -

(1) Save as otherwise provided by any law for the time being in force and unless the parties have otherwise agreed, this Part shall apply to conciliation of disputes arising out of legal relationship, whether contractual or not and to all proceedings relating thereto.

(2) This Part shall not apply where by virtue of any law for the time being in force certain disputes may not be submitted to conciliation.

62. Commencement of conciliation proceedings. –

(1) The party initiating conciliation shall send to the other party a written invitation to conciliate under this Part, briefly identifying the subject of the dispute.

(2) Conciliation proceedings shall commence when the other party accepts in writing the invitation to conciliate.

(3) If the other party rejects the invitation, there will be no conciliation proceedings.

(4) If the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate and if he so elects, he shall inform in writing the other party accordingly.

63. Number of conciliators. –

(1) There shall be one conciliator unless the parties agree that there shall be two or three conciliators.

(2) Where there is more than one conciliator, they ought, as a general rule, to act jointly.

64. Appointment of conciliators. –

(1) Subject to sub-section (2), -

(a) In conciliation proceedings with one conciliator, the parties may agree on the name of a sole conciliator;

(b) In conciliation proceedings with two conciliators, each party may appoint one conciliator;

(c) In conciliation proceedings with three conciliators, each party may appoint one conciliator and the parties may agree on the name of the third conciliator who shall act as the presiding conciliator.

(2) Parties may enlist the assistance of a suitable institution or person in connection with the appointment of conciliators, and in particular, -

(a) A party may request such an institution or person to recommend the names of suitable individuals to act as conciliator; or

(b) The parties may agree that the appointment of one or more conciliators be made directly by such an institution or person:

Provided that in recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such

considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to sole or third conciliator, shall take into account the advisability of appointing conciliators of a nationality other than the nationalities of the parties.

65. Submission of statements to conciliator. -

(1) The conciliator, upon his appointment, may request each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party shall send a copy of such statement to the other party.

(2) The conciliator may request each party to submit to him a further written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party shall send a copy of such statement, documents and other evidence to the other party.

(3) At any stage of the conciliation proceedings, the conciliator may request a party to submit to him such additional information, as he deems appropriate.

Explanation. -In this section and all the following sections of this Part, the term "conciliator" applies to a sole conciliator, two or three conciliators as the case may be.

66. Conciliator not bound by certain enactments. -The conciliator is not bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).

67. Role of conciliator. -

(1) The conciliator shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

(2) The conciliator shall be guided by principles of objectivity, fairness and justice, giving consideration to, 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.

(3) The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.

(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor.

68. Administrative assistance. -In order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

69. Communication between conciliator and parties. –

(1) The conciliator may invite the parties to meet him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately.

(2) Unless the parties have agreed upon the place where meetings with the conciliator are to be held, such place shall be determined by the conciliator, after consultation with the parties, having regard to the circumstances of the conciliation proceedings.

70. Disclosure of information. -When the conciliator receives factual information concerning the dispute from a party, he shall disclose the substance of that information to the other party in order that the other party may have the opportunity to present any explanation, which he considers appropriate:

Provided that when a party gives any information to the conciliator subject to a specific condition that it be kept confidential, the conciliator shall not disclose that information to the other party.

71. Co-operation of parties with conciliator. -The parties shall in good faith cooperate with the conciliator and, in particular, shall endeavor to comply with requests by the conciliator to submit written materials, provide evidence and attend meetings.

72. Suggestions by parties for settlement of dispute. -Each party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute.

73. Settlement agreements, -

(1) When it appears to the conciliator that there exist elements of a settlement, which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the conciliator may

reformulate the terms of a possible settlement in the light of such observations.

(2) If the parties reach agreement on a settlement of the dispute, they may draw up and sign a written settlement agreement. If requested by the parties, the conciliator may draw up, or assist the parties in drawing up, the settlement agreement.

(3) When the parties sign the settlement agreement, it shall be final and binding on the parties and persons claiming under them respectively.

(4) The conciliator shall authenticate the settlement agreement and furnish a copy thereof to each of the parties.

74. Status and effect of settlement agreement. -The settlement agreement shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under section 30.

75. Confidentiality. -Notwithstanding anything contained in any other law for the time being in force, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. Confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

76. Termination of conciliation proceedings. -The conciliation proceedings shall be terminated--

(a) By the signing of the settlement agreement by the parties on the date of the agreement; or

(b) By a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or

(c) By a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) By a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

77. Resort to arbitral or judicial proceedings. -The parties shall not initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject-matter of the conciliation proceedings except that a

party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.

78. Costs. –

(1) Upon termination of the conciliation proceedings, the conciliator shall fix the costs of the conciliation and give written notice thereof to the parties.

(2) For the purpose of sub-section (1), "costs" means reasonable costs relating to-

(a) The fee and expenses of the conciliator and witnesses requested by the conciliator with the consent of the parties;

(b) Any expert advice requested by the conciliator with the consent of the parties;

(c) Any assistance provided pursuant to clause (b) of sub-section (2) of section 64 and section 68;

(d) Any other expenses incurred in connection with the conciliation proceedings and the settlement agreement.

(3) The costs shall be home equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party shall be home by that party.

79. Deposits. -

(1) The conciliator may direct each party to deposit an equal amount as an advance for the costs referred to in sub-section (2) of section 78 which he expects will be incurred.

(2) During the course of the conciliation proceedings, the conciliator may direct supplementary deposits in an equal amount from each party.

(3) If the required deposits under sub-sections (1) and (2) are not paid in full by both parties within thirty days, the conciliator may suspend the proceedings or may make a written declaration of termination of the proceedings to the parties, effective on the date of that declaration.

(4) Upon termination of the conciliation proceedings, the conciliator shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the parties.

80. Role of conciliator in other proceedings. -Unless otherwise agreed by the parties, -

(a) The conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute that is the subject of the conciliation proceedings;

(b) The conciliator shall not be presented by the parties as a witness in any arbitral or judicial proceedings.

81. Admissibility of evidence in other proceedings. -The parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings, -

(a) Views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;

(b) Admissions made by the other party in the course of the conciliation proceedings;

(c) Proposals made by the conciliator;

(d) The fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.

PART IV
SUPPLEMENTARY PROVISIONS

82. Power of High Court to make rules. -The High Court may make rules consistent with this Act as to all proceedings before the court under this Act.

83. Removal of difficulties. –

(1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act as appear to it to be necessary or expedient for removing the difficulty:

Provided that no such order shall be made after the expiry of a period of two years from the date of commencement of this Act.

(2) Every order made under this section shall, as soon as may be after it is made, be laid before each House of Parliament.

84. Power to make rules. –

(1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the provisions of this Act.

(2) Every rule made by the Central Government under this Act shall be laid, as soon as may be, after it is made before each House of Parliament while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

85. Repeal and saving. –

(1) The Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), the Arbitration Act, 1940 (10 of 1940) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) are hereby repealed.

(2) Notwithstanding such repeal, -

(a) The provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force;

(b) All rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act.

86. Repeal of Ordinance 27 of 1996 and Saving. –

(1) The Arbitration and Conciliation (Third) Ordinance, 1996 (27 of 1996) is hereby repealed.

(2) Notwithstanding such repeal, any order, rule, notification or scheme made or anything done or any action taken is pursuance of any provision of the said Ordinance shall be deemed to have been made, done or taken under the corresponding provisions of this Act

THE FIRST SCHEDULE

(See section 44)

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

ARTICLE I

1. This Convention shall apply to the recognition and enforcement or arbitral awards made in the territory of a State other than the State where the recognition and enforcement of' such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term “arbitral awards” shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

ARTICLE II

1. Each Contracting State shall recognise an agreement in writing under which the parties under take to submit to arbitration all or any differences which have arisen or which may arise between them in respect of defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration.

2. The term “agreement in writing” shall include all arbitral clauses in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The Court of a Contracting State when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative and incapable of being performed.

ARTICLE III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance down in the following articles. There shall not be imposed substantially more onerous conditions a with the rules of procedure of the territory where the award is relied upon, under the condition and or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

ARTICLE IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply: -

   (a) The duly authenticated original award or a duly certified copy thereof,

   (b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

ARTICLE V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that--

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

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

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

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

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

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is Sought finds that-

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

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

ARTICLE VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

ARTICLE VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitrat award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound by this Convention.

ARTICLE VIII

1. This Convention shall be open until 31st December, 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

ARTICLE IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

ARTICLE X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

ARTICLE XI

In the case of a federal or non-unitary State, the following provisions shall apply:-

(a) With respect of those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent States or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favorable recommendation to the notice of the appropriate authorities of constituent States or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

ARTICLE XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

ARTICLE XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

ARTICLE XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

ARTICLE XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following: -

(a) Signatures and ratifications in accordance with article VIII;

(b) Accessions in accordance with article IX;

(c) Declarations and notifications under articles 1, X and XI;

(d) The date upon which this Convention enters into force in accordance with article XII;

(e) Denunciations and notifications in accordance with article XIII.

ARTICLE XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article XIII.

THE SECOND SCHEDULE

(See section 53)
PROTOCOL ON ARBITRATION CLAUSES

The undersigned, being duly authorised, declare that they accept, on behalf for the countries which they represent, the following provisions:-

1. Each of the Contracting States recognises the validity of an agreement whether relating to existing or future differences between parties subject

respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.

Each Contracting State reserves the right to limit the obligation mentioned above to contracts which arc considered as commercial under its national law. Any Contracting State which avails itself of this right will notify the Secretary-General of the League of Nations in order that the other Contracting States may be so informed.

2. The arbitral procedure, including the constitution of the Arbitral Tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.

   The Contracting States agree to facilitate all steps in the procedure, which require to be taken in their own territories, in accordance with the provisions of their law governing arbitral procedure applicable to existing differences.

3. Each Contracting State undertakes to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory under the preceding articles.

4. The Tribunals of the Contracting Parties, on being seized of a dispute regarding a contract made between persons to whom Article I applies and including an Arbitration Agreement whether referring to present or future differences which is valid in virtue of the said article and capable of being carried into effect, shall refer the parties on the application of either of them to the decision of the Arbitrators.

   Such reference shall not prejudice the competence of the judicial tribunals in case the agreement or the arbitration cannot proceed or becomes inoperative.

5. The present Protocol, which shall remain open for signature by all States, shall be ratified. The ratification shall be deposited as soon as possible with the Secretary-General of the League of Nations, who shall notify such deposit to all the Signatory States.

6. The present Protocol will come into force as soon as two ratifications have been deposited. Thereafter it will take effect, in the case of each Contracting State, one month after the notification by the Secretary-General of the deposit of its ratification.

7. The present Protocol may be denounced by any Contracting State on giving one year's notice. Denunciation shall be effected by a notification addressed to the Secretary-General of the League, who will immediately transmit copies of such notification to all the other Signatory States and inform them of the date on which it was received. The denunciation shall take effect one year after the date on which it was notified lo the Secretary-General, and shall operate only in respect of the notifying State.

8. The Contracting States may declare that their acceptance of the present Protocol does not include any or all of the under-mentioned territories: that is to say, their colonies, overseas possessions or territories, protectorates or the territories over which they exercise a man date.

The said States may subsequently adhere separately on behalf of any territory thus excluded. The Secretary-General of the League of Nations shall be informed as soon as possible of such adhesions. He shall notify such adhesions to all Signatory States. They will take effect one month after the notification by the Secretary-General to all Signatory States.

The Contracting States may also denounce the Protocol separately on behalf of any of the territories referred to above. Article 7 applies to such denunciation.

THE THIRD SCHEDULE

(See section 53)
CONVENTION ON THE EXECUTION OF FOREIGN ARBITRAL AWARDS

Article 1. (1) In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement, whether relating to existing or future differences (hereinafter called “a submission to arbitration”) covered by the Protocol on Arbitration Clauses opened at Geneva on September 24th, 1923, shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.

(2) To obtain such recognition or enforcement it shall, further, be necessary: -

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

(b) That the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon;

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

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

(e) That the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.

Article 2. -Even if the conditions laid down in Article I hereof are fulfilled, recognition and enforcement of the award shall be refused if the court is satisfied: -

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

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

(c) That the award does not with the differences contemplated by or failing with in the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration.

If the award has not covered all the questions submitted to the arbitral tribunal, the competent authority of the country where recognition or enforcement of the award is sought can, if it thinks for postpone such recognition or enforcement or grant it subject to such guarantee as that authority may decide.

Article 3. -If the party against whom the award has been made proves that, under the law governing the arbitration procedure, there is a ground, other than the grounds reefed to in Article I (a) and (c), and Article 2(b) and (c), entitling him to contest the validity of the award in a Court of Law, the

court may, if it thinks fit, either refuse recognition or enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

Article 4. -The party relying upon an award or claiming its enforcement must supply, in particular: -

(1) The original award or a copy thereof duly authenticated, according to the requirements of the law of the country in which it was made;

(2) Documentary or other evidence to prove that the award has become final, in the sense defined in Article I (d), in the country in which it was made;

(3) When necessary, documentary or other evidence to prove that the conditions laid down in Article 1, paragraph (1) and paragraph (2) (a) and (c), have been fulfilled.

A translation of the award and of the other documents mentioned in this Article into the official language of the country where the award is sought to be relied upon may be demanded. Such translations must be certified correct by a diplomatic or consular agent of the country to which the party who seeks to rely upon the award belongs or by a sworn translator of the country where the award is sought to be relied upon.

Article 5. -The provisions of the above articles shall not deprive any interested party of the right of availing himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

Article 6-The present Convention applies only to arbitral awards made after the coming into force of the Protocol on Arbitration Clauses opened at Geneva on September 24th, 1923.

Article 7. -The present Convention, which will remain open to the signature of all the signatories of the Protocol of 1923 on Arbitration Clauses, shall be ratified.

It may be ratified only on behalf of those Members of the League of Nations and Non-Member States on whose behalf the Protocol of 1923 shall have been ratified.

Ratification shall be deposited as soon as possible with the Secretary-General of the League of Nations, who will notify such deposit to all the signatories.

Article 8. -The present Convention shall come into force three months after it shall have been ratified on behalf of two High Contracting Parties. Thereafter, it shall take effect, in the case of each High Contracting Party, three months after the deposit of the ratification on its behalf with the Secretary-General of the League of Nations.

Article 9. -The present Convention may be denounced on behalf of any Member of the League or Non-Member State. Denunciation shall be notified in writing to the Secretary-General of the League of Nations, who will immediately send a copy thereof, certified to be in conformity with the notifications, to all the other Contracting Parties, at the same time informing them of the date on which he received it.

The denunciation shall come into force only in respect of the High Contracting Party, which shall have notified it, and one year after such notification shall have reached the Secretary-General of the League of Nations.

The denunciation of the Protocol on Arbitration Clauses shall entail, ipso facto, the denunciation of the present Convention.

Article 10. -The present Convention does not apply to the colonies, protectorates or territories under suzerainty or mandate of any High Contracting Party unless they are specially mentioned.

The application of this Convention to one or more of such colonies, protectorates or territories to which the Protocol on Arbitration Clauses opened at Geneva on September 24th, 1923, applies, can be effected at any time by means of a declaration addressed to the Secretary-General of the League of Nations by one of the High Contracting Parties.

Such declaration shall take effect three months after the deposit thereof.

The High Contracting Parties can at any time denounce the Convention for all or any of the Colonies, Protectorates or territories referred to above. Article 9 hereof applied to such denunciation.

Article 11. -A certified copy of the present Convention shall be transmitted by the Secretary General of the League of Nations to every Member of the League of Nations and to every Non-Member State, which signs the same.

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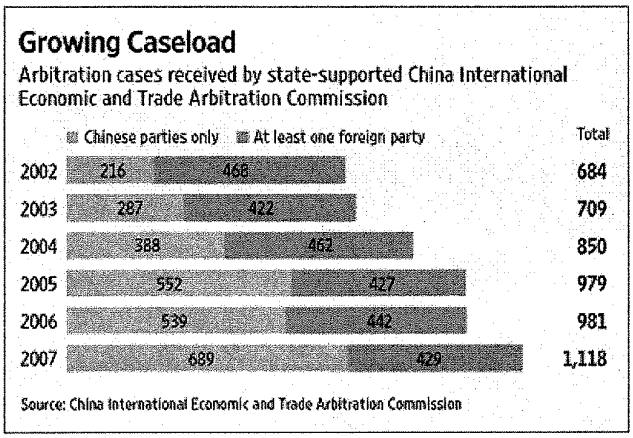
Concerns About China Arbitration Rise

By ASHBY JONES and ANDREW BATSON

Western companies doing business in China are increasingly being asked to agree to what they consider a risky proposition -- to resolve disputes through arbitration in China in the event a deal goes sour.

Private arbitrations have proliferated internationally as the method of choice for resolving cross-border disputes. They are often cheaper and more efficient than court litigation. Plus, arbitrations are private, so companies can keep their dust-ups out of the public eye.



They typically take place in neutral territory, a country foreign to both companies. But some Chinese companies, especially the state-owned, are pushing for their business contracts with western companies to stipulate that conflicts go to arbitration in mainland China.

"There's a queue of investors waiting to get into china, so in lots of instances, the Chinese companies have the bargaining power" to insist on China-based arbitrations, says Andrew Aglionby of law firm Baker & McKenzie in Hong Kong.

In 1985, China's most prominent arbitration organization, the state-sponsored CIETAC, handled only a few cases; in 2007, according to the group, it handled 1118 arbitrations, nearly 40% involving foreign parties.

Among issues worrying to Western companies are how the arbitrators are chosen and paid under the Chinese system. Raising different concerns is a particular case in which an arbitrator -- at that time the head of CIETAC -- who sided with PepsiCo Inc. against a Chinese bottler was later detained by the Chinese authorities.

Jerome Cohen, a professor of law at New York University who studies the Chinese legal system, a few years ago served on an arbitration panel in China alongside two Chinese arbitrators. A U.S.-based power company claimed its Chinese joint-venture partner had breached a contract to build a power plant, leading to a $35 million loss. The arbitrators ruled 2-1 in favor of the Chinese company, with Mr. Cohen the dissenter. "I was astounded," recalls Mr. Cohen. "I saw some of the most blatant contract violations I'd ever seen, but it was like the others had been watching a different case."

Nevertheless, many western lawyers say arbitrating in China under CIETAC is preferable to litigating in China's still-developing court system. And some note that arbitration in China has improved significantly, in large part

due to CIETAC's efforts. "When I started working in Beijing in the 1980s, nobody had any idea how to resolve disputes," says Michael Moser, a lawyer at O'Melveny & Myers LLP there. "Over the last 20 years, we've seen quite a complete and comprehensive framework having been put into place in China."

Still, many western lawyers remain wary of certain practices that they fear can undermine fairness. "Arbitration is still very new" for the Chinese, says Andrew Spacone, the executive counsel at Textron Inc., maker of Cessna Aircraft and other products, which maintains manufacturing plants in China. "Things are getting better, but ... they need more time and more experience." Mr. Spacone says that several disputes his company has had with Chinese parties have been resolved prior to reaching arbitration.

"We push for neutrality," says John Tecklenburg, Alcoa Inc.'s general counsel for Asia, of his strategy on negotiating venue. "We don't always get Sweden or Switzerland or Singapore, but sometimes we do."

CIETAC's arbitrations are similar to those in the west, in that panels generally consist of three arbitrators, two of which are hand-picked by the parties in dispute. But there are differences. In the west, if the parties can't agree on a third, or lead, arbitrator, they generally let the arbitrators they have chosen make the pick. But in China, if the parties can't agree, CIETAC chooses the third. "That's an extraordinarily risky proposition," says Frances Kao, a lawyer at Skadden, Arps, Slate, Meagher & Flom LLP. Ms. Kao advises her clients to cut down the risk by putting a requirement in their business contract that a CIETAC-appointed arbitrator meet certain qualifications. But the strategy isn't foolproof. "You still really don't know what you're going to get," she says.

The method for paying arbitrators is less transparent under CIETAC than it is under the predominant western systems, lawyers say. In arbitrations handled by the Paris-based International Chamber of Commerce, parties pay an equal amount at the outset -- largely based on the amount at stake in the dispute. A pool then reserved for arbitrators is divided among the three, often with the lead arbitrator, who handles many administrative duties, getting a bit more than the others. However, under CIETAC pay among arbitrators on a case can vary widely, often with western arbitrators making more. This can cause suspicion and resentment.

Wang Chengjie, CIETAC's deputy secretary-general, acknowledges that there can be pay differences among arbitrators, but says he resents any implication that that would make Chinese arbitrators less fair in their decisions. "Chinese salary levels are lower. But that does not mean we are irresponsible in our work."

Mr. Wang also emphasizes that parties are free to choose arbitrators and that there is no evidence that CIETAC is biased toward Chinese companies. "We've done our own surveys of cases," he says. "Foreign parties who apply for arbitration win the case about 80% to 90% of the time," and the same goes for Chinese parties, he says. "It's basically balanced."

One case that has caused anxiety among western lawyers, though the arbitrations themselves were conducted on neutral ground, concerns two linked disputes between PepsiCo and a Chinese bottler in which PepsiCo alleged several breaches of various contracts and sought an order terminating the joint venture. PepsiCo had agreed to resolve disputes with the partner through arbitration in Stockholm. The two arbitrations, which wrapped up in 2005, attracted publicity, partly because they were seen by some as the first major arbitrations involving a multinational corporation and a Chinese state-owned company since China's entrance into the World Trade Organization in 2001.

One of the three arbitrators, selected by PepsiCo, was at the time the head of CIETAC, Wang Shengchang. The Chinese company picked a Chinese arbitrator. The lead arbitrator was Swedish. Dr. Wang and the Swedish arbitrator voted for PepsiCo in both cases; the Chinese arbitrator sided with the Chinese party in both.

In March 2006, Dr. Wang was apprehended outside CIETAC's Beijing headquarters. He has been detained ever since, and is currently awaiting trial in a Tianjin court, according to an official there. The charges against him allege financial impropriety within CIETAC, but people in the arbitration community have feared something else was at work. "It would be . . . more than disappointing if Dr. Wang were arrested and detained in prison for not deciding these two awards in favor of the Chinese parties," said V.V. Veeder, a prominent British arbitrator, in a 2006 speech at a Dallas workshop presented by the Institute for Transnational Arbitration. "It would strike a malign blow to international arbitration everywhere."

Wang Chengjie of CIETAC said he doubts Wang Shengchang was detained because of his decision in the PepsiCo case. "There are so many arbitration cases where the Chinese side loses," he says.

Meanwhile, PepsiCo has yet to recover on the judgment -- a figure a PepsiCo spokesman puts in the low millions of dollars and other individuals familiar with the case say approaches $100 million.

-- Kersten Zhang in Beijing contributed to this article.

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ACC Extras

Supplemental resources available on www.acc.com

Drafting The International Arbitration Clause.
Quick Reference. December 2007
http://www.acc.com/legalresources/resource.cfm?show=16517

Tools That Create Successful Resolutions in International Arbitration.
ACC Docket. May 2007
http://www.acc.com/legalresources/resource.cfm?show=14510

Doing Business Abroad but Resolving Disputes on Neutral Turf: A Practical Guide to International Arbitration.
Program Material. March 2006
http://www.acc.com/legalresources/resource.cfm?show=20278

Sample International Arbitration Clauses.
Sample Form & Policy. March 2006
http://www.acc.com/legalresources/resource.cfm?show=12994

Please note, these additional resources are provided by the Association of Corporate Counsel and not by the faculty of this session.