depends on the construction of the clause in the contract and on this point the finding of the arbitrator is not conclusive and that ultimately it is the court that decides the controversy, Section 16 of the 1996 Act empowers the arbitrators to decide such questions. The decision of the arbitrator in this respect being appealable, ultimately the matter goes for the decision of the court.

The decision in T.N. Electricity Board v. Bridge Tunnel Constructions (1997) 4 SCC 121, was followed by the Supreme Court in Premier Fabricators v. heavy Engineering Corporation Ltd. (1997) 4 SCC 319. In this case, the question whether certain items of claim were or not referable to arbitration in the terms of the contract was raised as a preliminary issue before the arbitrators. The arbitrators were unanimous in their view that the items were referable, but the differed on the merits of the points. An umpire was appointed who ordered a lump sum amount without giving reasons which was three times less than the party's claim. The Supreme Court judges also happened to differ. The majority of two as against one was of the view that the entire dispute, including the preliminary question, was referred. There was no interim award by the arbitrator as to the arbitrability of the claims. The umpire was, therefore, required to decide the preliminary issue first and then to decide on merits. His non-speaking award of an amount was not showing whether he had considered the arbitrability of the matter. That being a jurisdictional issue, the umpire committed a jurisdictional error. The award was returned for de novo consideration. The dissenting judge was of the opinion that the circumstances of the case were creating a presumption - at the umpire must have considered everything and hence there was no jurisdictional error.

Specific Performance of Contract: One of the points raised in a case before the Supreme Court was that the grant of specific performance is discretionary and the discretion to order or not to order specific performance has been conferred by the Specific Relief Act, 1963 on -the Civil Court and, therefore, an arbitrator cannot be deemed to be competent to grant such relief. The court noted the decisions of the Punjab, Bombay and the Calcutta High Courts in which the view taken is that the arbitrator can grant the relief of specific performance of a contract relating to immovable' property under an award. The Delhi High Court, however, held in PNB Finance Ltd. v. Shital Prasad Jain, AIR 1991 that such relief cannot be granted in an arbitration proceeding. The Supreme Court did not approve the view point of the High Court of Delhi.

"We are of the view that the right to specific performance of an agreement of sale deals with contractual rights and it is certainly open to the parties to agree with a view to shorten litigation in regular courts to refer the issues relating to specific performance to arbitration. There is no provision in the Specific Relief Act, 1963 that issue relating to specific performance of contract relating to immovable property cannot be referred to arbitration. Nor is there any such prohibition it the Arbitration and Conciliation Act, 1996 as contrasted with ,Section 15 of the English Arbitrator Act, 1950 or Section 48(5) (b) of the English Arbitration Act, 1996 which contains a prohibitor relating to specific performance of contracts' concerning immovable property."

Public Policy: Fraud and Corruption [Section 34 (2) (b) (ii)]: Section 34(2) (b) (ii) provides that an application for setting aside an arbitral award can be made if the arbitral award is in conflict with the public policy of India. The Explanation to clause (b) clarifies that an award obtained by fraud or corruption would also be an award against the public policy of India. Thus, an award obtained by suppressing facts, by misleading or deceiving the arbitrator, by bribing the arbitrator, by exerting pressure on the arbitrator, et., would be liable to be set aside.

Improperly procedure or otherwise invalid or opposed to public policy: An award may be set aside if it has been improperly procedured or is otherwise invalid. Where as award has been obtained by fraud or by corrupt inducements, it is improper. The expression "otherwise improper" would include cases where the

award is suffering from an apparent mark of invalidity such as an error of law apparent on the face of it. An award is liable to be set aside if it is opposed to public policy of India. Though it is a general ground. Section 34 says in particular that an award shall be deemed to be opposed to public policy if it was induced or affected by fraud or corruption.

Bias and Misconduct: Doubts about impartiality and lack of independence : This is not one of the grounds specified in Section 34 for setting aside an arbitral award by the court. Section12 (3) (a) provides that an arbitrator may be challenged if there are justificable doubts as to his independence or impartiality. If the challenge is rejected by the Arbitral Tribunal and an award is made, an application for setting aside the award can be made on the ground that the challenge was wrongly rejected and the question of bias can be agitated in that proceeding. But if no challenge was made under Section 12(3) (a), the question of bias cannot be raised before the court under Section 34.

Misconduct on the part of the arbitrator or misconduct of proceedings is not a direct ground for setting aside the award under the 1996 Act. The scheme of provisions is somewhat different. Misconduct is a ground for disqualifying an arbitrator. Misconduct creates a doubt about his independence or impartiality and is a ground for challenging the arbitrator under Section 12 (3). Thereafter, Section 13 says that if the challenge is not successful and the award is made, the party challenging the arbitrator may apply to the court under Section 34 for setting aside the award. Misconduct of proceedings would fall under Section 34(2) (a) (v), because this provision says that it would be a ground for setting aside where either the agreed or prescribed procedure was not observed. Thus, not following such procedure is a misconduct of the proceedings. It would also fall under Section 34 (1) (b) (ii) explanation to the extent to which misconduct lies in fraud or corruption.

An example of misconduct was before the Supreme Court in Payyavula v. Payyavula Kesanna 1953 SCR 119: AIR 1953 SC 21.

The arbitrator took statements from each of the parties in the absence of the other and made an award.

Bhagwati, J., set aside the award and cited the following passage from the judgment of Lor LANGDALE, M.R., in Harvey v. Shelton (1844), where an award was set aside on the ground of interview having taken place between the arbitrator and one party in the absence of the other.

It is so ordinary a principle in the administration of justice, that no party to a cause can be allowed to use any means whatsoever to influence the mind of the judge, which means are not known to and capable of being met and resisted by the other party, that it is impossible, for a moment, not to see that this was an extremely indiscreet mode of proceeding.... In every case in which matters are litigated, you must attend to representations made on both sides, and you must not in the administration of justice, in whatever form, whether in the regularly constituted courts or in arbitrations, whether before lawyers or merchants, permit on side to use means of influencing the conduct and decision of the judge.

It has been held by the Supreme Court in Dewan Singh v. Champat Singh (1969) 3 SCC 447 : (1970) 2 SCR 903 : AIR 1970 SC 967, that it is a legal misconduct on the part of an arbitrator to use personal knowledge for deciding the dispute before him unless so authorised by the reference.

Limitation for fifing application for setting aside [Section 34 (3)]: Sub-section (3) prescribes the limitations of three months for filing an application for setting aside an award. The application cannot be made after the expiry of three months -

1. from the date on which the party received the arbitral award, or
2. from the date of the disposal of the application under Section 33, if made, for the correction, interpretation or making of additional award.

The proviso to sub-section (3) empowers the Court to extend, for sufficient cause, the time by a further maximum period of thirty days.

FINALITY AND ENFORCEMENT OF ARBITRAL AWARDS

Finality of Arbitral Awards: Subject to this Part an arbitral award shall be final and binding on the parties and person claiming under them respectively.

This provision makes the award binding on the parties and those claiming under them. The award is final in the sense that there can neither be a further award on the same subject, nor an appeal against e finality of the award. The aggrieved party may apply to the court, if there is a ground, for setting aside - e award, but the court cannot be called upon to decide the matter.

Must be Legal: The award must be in accordance with the principles of the relevant law, otherwise it '11 be illegal, being against the law. Thus, where an arbitrator awarded ownership in perpetuity, it was held to be void as offending the rule against perpetuity.

Must be reasonable and possible: An award requiring a party to do an act which is unreasonable or not possible, is bad. An award that one of the parties should do a thing which is out of his power to do, to deliver up a thing which is in the custody of another person, is void, as it requires the party to do an possible act.

Must dispose of matter: An award should be a complete decision on matters requiring determination. award which leaves some of the questions undecided cannot be enforced.

Finality, effect and enforcement of award: The arbitrator's power over the matter submitted to him is complete and final. he has the power to do what the court could have done if the matter had been before e court. His award puts an end to the proceedings. The 'court will not interfere with the findings of the arbitrator even if the court feels on merits that the arbitrator should have come to a different conclusion.

His award on both fact and law is final. There is no appeal from his verdict. The court cannot review his award and correct any mistake in his adjudication unless an objection to the validity of the award is apparent on the face of it." Section 35 of the Arbitration and Conciliation Act, 1996 expressly declares' at an arbitrate award shall be final and binding on the parties and persons claiming under them respectively Section 36 makes the award enforceable in the manner of a court decree. In the case of Union of India v. Bungo Steel Furniture (P) Ltd. (1967) 1 SCR 324 : AIR 1967 SC 1032 : (1967) 2 SCJ 440. RAMASWAMI, J., quoted WILLIAM, J., in Hodgkinson v. Fernie, 3 CB NS 189:

The law has for many years been settled, and remains so at this day, that where a cause or matters in difference are referred to an arbitrator, whether a lawyer or layman, he is constituted the sole and final judge of all questions, both of law and of fact .... The only exceptions to that rule are, cases where the award is the result of corruption or fraud.

Enforcement: Section 36 of the Arbitration and Conciliation Act, 1996 provides for direct enforcement f

awards without having to get them converted into a rule of the court. The section says:

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 e court.

Enforcement of award in part: The import of the words "pronounce judgment according to the award" as they appeared in Section 17 of the repealed 1940 Act) was explained by the Supreme Court in Mattapalli Chelamayya vs. Mattapalli Venkatratnam, AIR 1972 SC 1121. In this case, the award was not "Registered, though a portion of the award related to immovable property and was thus compulsorily "Registrable. It was held that a decree could be passed in terms of that part of the award which was severable from the other part of it which was invalid for any reason. Where a severable part of a award cannot be given effect to for a lawful reason, there is no bar to enforce the part to which effect could be justly given.

IMPORTANT QUESTION S

Q.1. On what grounds the appointment of an arbitrator can be challanged? What is the procedure to be adopted for it?

Q.2. Which court has the power to set aside an arbitral award or order and what is its procedure?

Q.3. To what extent courts can interfer in the matters of arbitration.

Q.4. Enumerate briefly the grounds on which an award can be set-aside.

Q.5. Trace the provisions of the Act relating to removal of an arbitrator and filling of the vacancy.

Q.6. Describe the circumstances in which the court may modify or correct the award.

Q.7. What are the essentials of an arbitral award? When arbitral proceedings shall be deemed to be terminated? Discuss.

Q.8. State the matters connected with the enforcement of an arbitral award including the jurisdiction of court?

Q.9. What provisions exist in the Act for making any correction, interpretation and amendment of an award?

UNIT - III

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 if this section shall affect or take away any right to appeal to the Supreme Court.

Appeal against interim measures and Setting aside [Section 37(1)]: An appeal lies under this sub section against an order of the court granting or refusing to grant any measure under Section 9 and also against setting aside or refusing to set aside an award.

Appeals against orders of court [Section 37(1)]: The following orders of the court under the Arbitration Act are appealable : An order –

1. under Section 9 granting or refusing to grant an interim measure of protection, and
2. an order under Section 34 setting aside or refusing to set aside an arbitral award.

Appeal against orders of Arbitral Tribunal [Section 37(2)]: Sub-section (2) provides for an appeal against the order of the Arbitral Tribunal made under Section 17 granting or refusing to grant an interim measure of protection.

There is no provision for appeal against orders under Section 11 appointing or refusing to appoint an arbitrator.

Second Appeal [Section 37(3)]: This sub-section provides that no second appeal shall lie from an order in appeal. In view of the bar created by sub-section (2) [now Section 37 (3) of 1996 Act] against second appeal

from an order passed in appeal under sub-section (1), the conclusion is inevitable that the bar was brought to confine appeals to strict limits. This was followed in **State of West Bengal v. Gourangalal. Chatterjee,** (1993) 3 SCC 1: (1993) 2 Arb LR 95. In this case, there was an order of a Single Judge revoking the authority of the chief engineer as an arbitrator because of his failure to act and directing a retired chief engineer to act as an arbitrator. The order was not covered by any of the clauses of Section 39(1) of 1940 Act. It was held that no appeal would lie to a Division Bench either under sub section (2) or under the Letters Patent against the order of the Single Judge even if it was passed in the exercise of original jurisdiction. Even otherwise, the person who was appointed was technically qualified and no allegation was there against him, the order of the Single Judge appointing him did not suffer from any infirmity.

New Point in Appeal: Where the State Government did not raise any specific ground before the trial court that the award of interest was not in terms of the contract or was without the authority of law and permitted the award, as it was, to be made a rule of the court and converted into a decree, the Government was not permitted to raise this point for the first time in appeal. The appeal was not maintainable. Where the appeal was at the final stage of hearing, an attempt to introduce for the first time a new technical point that the document produced in the court as award was only a copy of the award engrossed on stamp-paper was not allowed.

Lien

Lien on Arbitral Award and Deposits as to costs

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

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

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

Lien on award for costs: The matters of costs of arbitration can be decided by the parties by their agreement. Subject to any such agreement, the Tribunal would have a lien (the right to retain the award) on the award for unpaid costs of arbitration. An application can be made to the court over this matter. The court may ask the applicant to deposit the amount of the unpaid costs and order the Tribunal to deliver the award. The court may then enquire into the matter and may award costs to the Tribunal and order the balance amount to be refunded to the applicant. The arbitral Tribunal is entitled to be heard in the disposal of the application. Where the award does not contain sufficient provision as to costs, the court may make such

order as to costs as it thinks fit.

Where an arbitrator refuses to deliver his award except on payment of fee demanded by him, the aggrieved party may apply to the court. The court may ask the party to deposit the requisite amount in the court and then ask the arbitrator to deliver his award. The court may then enquire into the matter to ascertain whether the fee demanded is reasonable. If it is not so, the court may authorise the payment of a reasonable amount to the arbitrator and the balance to be refunded to the party.

An application under the section can be made by any party but not by a party who has made a written agreement with the arbitrator as to fees. The arbitrator is also entitled to appear whenever any application about his fee is under consideration.

Where the award does not contain any sufficient provision about costs, the court may make any appropriate order about the costs of arbitration.

There was no provision like Section 39(1) in the Arbitration Act, 1940, giving the arbitrator a lien over the award for fees and charges, but Section 14(2) of the 1940 Act provided that an arbitrator could be asked to file an award in court only "upon payment of fees and charges due in respect of the arbitration". This was held to give him a lien on the award.

Section 38 of the Arbitration Act, 1940, [repealed] was exactly in the same terms as Section 39 Sub-section (2), (3) and (4) of the present Act except that the words "costs demanded" are used while in the 1940 Act the words "fees demanded" were used. The word "costs" includes "fee".

Lien on award: Sub-section (1) gives to the arbitral tribunal a lien on the award for the p1yment of its costs. This means that the Tribunal can withhold the award and refuse to give copies to the parties until all its costs are paid. This is subject to any provision to the contrary in the arbitration agreement.

Order by Court to Deliver Award: If the Arbitral Tribunal exercises its lien, a party may apply to the court and the court may order the Tribunal to deliver the award to the party on payment into court. of the costs demanded by the Tribunal. After inquiring into the matter the court may order that out of the money so paid an amount which the court considers reasonable be paid to the Tribunal, and the balance, if any, be refunded to the applicant.

At the hearing of the application the Tribunal will be entitled to appear and to be heard.

Fees of Tribunal fixed by agreement: If the fees demanded by the Tribunal have been fixed by a written agreement between the applicant and the Tribunal, no application to the court will lie to compel the Tribunal to deliver the award. It is contrary to the quasi-judicial status of an arbitrator that he should bargain unilaterally for his fee with one party.

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 any other party, but shall in such event be enforceable by against the legal representatives 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.

Effect of death of party: This section lays down a few points about the effect of death of a party upon the arbitration proceedings. Sub-section (1) makes the simple declaration that an arbitration agreement shall not be discharged by the death of any party, and sub-section (2) supplements the same by saying that the authority of an arbitrator shall not be revoked by the death of any party. Thus the death of a party neither discharges the arbitration agreement nor revokes the authority of the arbitrator. His legal representatives are entitled, and are also bound, to be brought on record. But all this is subject to the provision of sub-section (3) that where the right of action is extinguished by the death of a party the arbitration proceedings would abate in the same manner as a suit would have abated. The principle of law is enshrined in the maxim action personalise moritur cum persona. Certain rights of action die with the man. But this applies only to actions of personal nature, such as the contract to marry, sing or paint. Where an action is capable of surviving beyond the life of the person concerned, it may be enforced by as well as against his legal representatives. This is also true of arbitration proceedings.

Where on the death of a party, legal representatives, including those already a party to the arbitration proceedings, were brought on record and there was contention from the side of the respondents that upon death of a party the agreement was to become extinguished, the court held that the parties could be referred to arbitration.

Effect of Insolvency [Section 41]: Section 41 deals with the effect of insolvency of a party upon the proceedings.

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 thereabout 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 judged 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 if 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.

Effect of Insolvency: One of the effects of the insolvency of a party is that if the receiver or official assignee adopts the contract (since he has the power to disown certain contracts), which contains the arbitration clause he will become bound by the clause and the matter will have to be decided by arbitration.

The second rule laid down is that if the matter in dispute has to be decided for the purpose of carrying out the

insolvency proceedings and the dispute has arisen by virtue of a contract which provided for arbitration, the receiver or the other party may apply to the court for an order. The order shall pass an order only if it appears to the court that having regard to all the circumstances of the case the matter should be decided by arbitration.

REVISION

Where a party to an award, who was given an opportunity to file objections to the award, did not avail itself of the opportunity and a decree was passed in terms of the award, it was held that the party was debarred from subsequently challenging the award in revision unless it could be shown that the court had acted without jurisdiction in passing a decree in terms of the award.

It is within the competency of the High Court to entertain a petition in revision against an order dismissing an application for filing an award and passing a decree thereon.

Section 115 of the Code of Civil Procedure (as amended by U.P. Civil Laws (Amendment) Act of 1963) is confined to cases arising out of original suits and proceedings under sections 14 to 17, 20, 21 and 32 to 34 of the Act are not in the nature of suits hence, a revision petition against revisional orders setting aside an arbitration award is not maintainable.
Where a party seeks to set aside the award on the ground that it is delivered after the time fixed, it is not open to the other party to plead that the first party is estopped from challenging the award on that ground, as there can be no estoppel against statute.

When an order granting stay of suit under section 34 is passed by the trial court in the exercise of its discretion, it will not be interfered with readily. The fact that the appellate court would have taken a different view if the decision had rested with it, would not justify interference with the trial court's exercise of discretion.

No appeal lies from the opinion 0 the court upon a special case stated by the arbitrator with regard to a question of law arising in the course of the reference. The opinion of the Judge in the special case on a point of law not being a judgment, the jurisdiction of the court in revision to correct errors in the opinion, can not be invoked.

Limitation

The limitation for appeals under this section of the Arbitration Act is governed by Article 116, Limitation Act, 1963 which is as under :

"116. Under the Code of Civil Procedure, 1908 :

a) to a High Court fromany decree or order - Ninety days - The date of the decree or order
b) To any other court from any decree or order - Thirty days - The date of the decree or order

The Limitation Act and the Code of Civil Procedure have to be read together because both are statutes relating to procedure and they are in para material and, therefore, to be taken together as one system as explanatory of each other.

ENFORCEMENT OF FOREIGN AWARD

Types of International Commercial Arbitration: International Commercial Arbitration may be broadly classified as:

1. General and specialised arbitration;
2. Institutional and ad hoc arbitration;
3. Arbitration in law, amiable composition, and
4. Arbitration in equity or ex aequo et bono.

1. **General and Specialised Arbitration:** The difference between these two types of arbitration can be understood from the very words themselves. Specialised arbitration is that which is carried in certain specific industries or commercial activities, as for example marine arbitration, commodities, trade etc. General arbitration refers to that branch of ICA that is apart from specialised arbitration, dealing with non-specific areas that govern a large part of international trade and commerce. Specialised arbitration generally tends to be ad hoc or under the auspices of a particular trade association or mercantile exchange. An interesting facet of this form of arbitration is the relative absence of lawyers as the parties generally prefer experts in the trade to be involved in the disputes as against lawyers.

2. **Institutional and Ad hoc Arbitration**: Historically, the parties used to spell out the procedures and arbitration agreement, and when the dispute arises, they would jointly select the arbitrator(s) and work out the details of the procedure together with the tribunal. The Tribunal is also empowered to devise its own procedure. This type of customised procedure is called "ad hoc" arbitration. By default, the way in which arbitrations are conducted is "ad hoc" unless the parties agree to employ the services of an arbitration institution.

   Perhaps the most important advantage of institutional arbitration is a certain measure of convenience and security. Before a dispute has arisen, it is generally very difficult to ascertain what the exact nature of the dispute will be, what kind of procedure will be most appropriate, what contingencies will have to be taken into account and whether both sides will cooperate to get the matter resolved. Negotiating the drafting an arbitration clause that covers all these considerations is a difficult, time-consuming and costly exercise. The use of recognised arbitration rules ensures that the process will take place, it will be reasonably fair and efficient that will lead to decision, and that this decision will be enforceable.

   One of the most important advantages of institutional arbitration is that the stage of the institution strengthens the credibility of awards and task facilitates both voluntary compliance and enforcement. Furthermore, institutional arbitration is conducted according to set procedural rules and supervised, to a greater or lesser extent, by professional staff. This reduces the risks of procedural breakdowns, particularly of the beginning of the arbitral process, and of the technical defects in the arbitral award. The institution's involvement can be particularly constructive on issues relating to the appointment of arbitrators, the resolution of challenges to arbitrators and the arbitrators' fees. Less directly, the institution lends standing to any award that is rendered, which may enhance the likelihood of voluntary compliance and judicial enforcement.

   On the other hand, ad hoc arbitration is typically more flexible, less expensive and II lure confidential than institutional arbitration. Despite the growing size and sophistication of international arbitration bar, and the efficacy of the international legal framework for commercial arbitration, having been reduced

many experienced international practitioners prefer a most structured, predictable character of institutional arbitration, at least in the absence of unusual circumstances arguing for an ad hoc approach.

3. **Arbitration in Law, Amiable Composition:** Normally the arbitration procedures will be held according to the rules of law, unless otherwise specified in the arbitration agreement. Most national laws and many arbitration rules, however, explore the possibility for the parties to grant the arbitrators the power to decide as amiable compositeurs or according to the principles of equity. Amiable composition is a frequently misunderstood institution of French law that has been adopted by many other civil law systems. Amiable compositeurs are authorised to disregard certain non-mandatory rules of law. What is important to note is that the arbitrators while acting as amiable compositeurs cannot simply ignore laws. They are required to follow provisions of the substantive law and are permitted to ignore only certain non-mandatory provisions of the law.

4. **Arbitration in equity or ex aequo et bono:** It is sometimes defined synonymously amiable composition but in reality and to be exact the two are not really the same. What really sets them apart is the fact that in arbitration in equity, the arbitrators are provided the additional leeway of disregarding even the mandatory provisions of law. The only restriction to their powers is that they are required to respect international public policy. The point that ought to be realised is that there is no clear-cut understanding of the international public policy, therefore there is no real restriction on the powers of the arbitrators. The only restriction on their powers is the fact that in most cases the parties are unwilling to go completely against established public policy.

Advantages of International Commercial Arbitration: The popularity of International Commercial Arbitration as a method of dispute resolution is primarily due to its inherent advantages which are as follows:

1. International commercial arbitration, thoretically at least, assures a genuinely neutral and competent decision maker, who mayor may not be appointed by the parties themselves. The appointment or non-appointment of the arbitrator depends on the mode of arbitration adopted i.e. institutional or ad hoc. Competence of the decision-maker or arbitrators, is one of the foremost factors herding parties towards arbitration. Very often the judges of the national judiciaries are unaware of the complexities and intricacies involved in the commercial transactions, and therefore the judgment may be borne out of logic rather than clear understanding of the precepts involved in such transactions. The most important factor though is the possibility of bias which is negatived through the process of international commercial arbitration.

2. A well constructed arbitration agreement of course normally permits resolution of most disputes between parties in a single forum, whereas the possibility of multiple judicial proceedings is very much in reality in the case of courts. This also insures cost effectiveness and mitigates unnecessary and avoidable expenditure. More importantly though, the possibility of multiple judicial proceedings means that the parties to the litigation have to waste inordinately long periods of time waiting for the courts to give a decision which is then appealable several times over.

3. Arbitration agreement and awards are generally easier to enforce in foreign states, compared to the judgments of courts. This is primarily due to the presence of a clutch of international conventions, most importantly the New York Convention, 1958.

4. Arbitration proceedings tend to be less formal and involve lesser procedural requirements than litigation in National courts. Often, the parties themselves lay down the procedure to be followed and thereby there is less acrimony in following it. Furthermore, the possibility of cutting down 0 procedural requirements also ensures that the time consumed by the process is much less that what would have been wasted in the national judicial system.

5. International arbitration is a tendency to be more secretive and confidential than judicial proceedings, with respect to most aspects of litigation. This ensures that the matters which should not be made public stay away from the public eye. Furthermore, since most of the arbitration is between commercial organisations or individual involved in commercial activity, the need to maintain a low profile with regard to disputes and their resolution need not be highlighted.

6. The presence of impartial independent and competent arbitrators would act as a deterent against those who wish to engage in frivolous litigation.

7. International commercial arbitration is theoretically faster, technically more equipped, definitely more efficacious and more often than not less expensive method of dispute resolution.

Disadvantages of International Commercial Arbitration :

1. An ill drafted but effective arbitration clause for lawyers can itself be the subject matter of litigation, thereby nullifying the advantages.

2. The absence of procedural requirements in the agreement or insufficient procedures may throw a spanner in the works, as parties may raise a number of procedural issues to thwart the completion of the process. A recalcitrant party is not a rarity in international commercial arbitration and there are many who would wish that the process would go on for as long as it can be stretched.

3. While it is true, that independent arbitrators tend to be unbaised, there is a possibility, a definite possibility that the private arbitrators may have financial, personal or professional relations with one party or its counsels. This, in the views of those few, poses a greater risk than the favouritism or prochialims of local courts. How far the other party will permit a person who has relationships with the opposing party is the question that begs an answer.

4. A number of developing nations still regard international commercial arbitration with deep suspicion and are unwilling to enforce the awards through their national courts.

5. While popular notion is that all international commercial arbitration proceedings are cost-effective, there have been a number of arbitration proceedings dragging on for years. This has in many ways been the strongest and most recurring of criticisms. Critics have questioned the need to go through an arbitration process that does not ensure either speed or cost effectiveness.

6. The need for certain amount of cooperation between parties involved in arbitration procedures is a prerequisite for the successful conducting of arbitration. Therefore, where the relations between the parties have soured beyond repair, the absence of any penalties for misdemeanour or misconduct of the parties, may act as an incentive to those parties who are unwilling to settle the disputed issues. In this respect stricter and more stringent rules of judiciary may seem essential.

Enforcement of Foreign Awards

A foreign award, as defined under the Foreign Awards Act, 1961 (repealed) (now Section 44 of the Arbitration and Conciliation Act, 1996) means an award made on or after October 11, 1960 on differences arising between persons out of legal relationships, whether contractual or not, which are considered to be commercial under the law in force in India. The qualify as a foreign award under the Act, the award should have been made in pursuance of an agreement in writing for arbitration to be governed by the New York Convention on the recognition and enforcement of Foreign Award, 1958, and not to be governed by the law of India. Furthermore, an award should have been made outside India in t e territory of a foreign State notified by the Government of India as having made reciprocal provisions for enforcement of the Convention. These are the conditions which must be satisfied to qualify an award as a 'foreign award'.

Power of judicial authority to refer parties to New York Convention Awards : Section 45 operates notwithstanding anything contained in Part I of the Arbitration and Conciliation Act, 1996 or in the Code of Civil Procedure, 1908. The section says that when any matter covered by Section 44 (above) comes before the court in respect of which the parties have made an arbitration agreement, and if a party of the agreement makes a request, the court shall require the parties to refer the matter to arbitration within the terms of their agreement, such request can be made by O(1e of the parties or any person claiming through or under a party. The court may not order such reference if it finds the agreement to be null and void, inoperative or incapable of being enforced.

Stay of International Commercial Arbitration: The Supreme Court has suggested that where questions of amenability of a dispute to international arbitration arise, interim injunctions against such reference should not be allowed to continue for a long period and domestic courts should be circumspect in granting such interlocutory injunctions.

Binding force of foreign Award

Section 46 - When Foreign award building: 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.

In order to make the above provisions really effective, Section 46 declares that any foreign award which would be enforceable under the Act shall be treated as binding for all purpose on the parties to the agreement. It can be relied on by any of those parties by way of defence, set-off or otherwise in any legal proceedings in India. A reference to enforcing a foreign award would include a reference to relying on an award.

Refusal of enforcement of foreign award (Section 48)

Section 48(1) and (2) lay down that enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if -

1) proof is furnished by the party in respect of any of the grounds specified in clauses (a) to (e) of sub-section (1), (as detailed below) or

2) the court finds either that the subject-matter of difference is not arbitrable or that enforcement of award would be against the public policy of India.

(a) On furnishing of proof by party [Section 48(1)]

i. Incapacity of parties [clause (a)]

ii. Invalidity of Agreement [clause (a)]

iii. Reconsideration of Validity by Arbitrator

iv. Lack of Proper Notice [clause (b)]

v. Award beyond the Scope of Reference [clause (c)]

vi. Illegality in Composition of Arbitral Tribunal or in Arbitral Procedure [clause (d)]

vii. Award not yet Binding [clause (e)]

(b) On findings of Court [Section 48(2)]

1. Difference not Arbitrable [clause (a)]
2. Enforcement of Award against Public Policy [clause (b)]

Enforcement of Foreign Awards [Section 49]

If the court is satisfied that the foreign award is enforceable, the award shall be deemed to be a decree of the court.

In connection with the enforcement of a foreign award, the Supreme Court held that the Act has to be taken to come into force from the moment when the first of the Ordinances replacing the old Act came into force. A petition for enforcement of a foreign award can be filed in any part of the country where an answerable party to the claim may have money or where a suit for recovery can be filed. A Single Judge, in this case, recognised the award as enforceable and passed orders for its execution. The award-debtor applied for cancellation of the order on the ground that the enforcement application was filed at Bombay only because filing it in Delhi would have meant more court fee, there being no ceiling on court fee in Delhi. The court said that such a motive could not be taken as affecting the validity of the order of enforcement. The notice of petition was properly served. The notice was served on a company which was associated with the debtor company and received by affixing the rubber stamp of the latter.

Section 49 empowers the court only to declare that the award is enforceable. It would then be enforced as a decree under the Civil Procedure Code.

Appealable Orders [Section 50]

Section 50 deals with orders which are appealable.

1. Section 50(1) provides that an appeal shall lie -

a) from a judicial authority's order refusing to refer the parties to arbitration under Section 45, and

b) from the court's order refusing to enforce a foreign award under Section 48.

Appeals lie to the court Authorised by law to hear appeals from such orders.

1. Section 50(2) bars a second appeal against the appellate order passed under this section. However, the right to appeal to the Supreme Court is not affected.

Geneva Convention Awards

Foreign Award for Purposes of this convention: Section 53 defines "foreign award" for the purposes of Chapter 2 of Part II which deals with enforcement of Geneva Convention Award. IN terms of Section 53 of the Act:

"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, -

in pursuance of an agreement for arbitration to which the Protocol set forth in the Second Schedule applies, and between persons of whom one is subject to the jurisdiction of someone 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 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.

Power of Judicial Authority to refer parties to arbitration: Section 54 makes it mandatory for any judicial authority when seized of a dispute regarding a contract made between parties to whom Section 53 [Geneva Convention] applies, to refer the parties to arbitration. This can be done on the application of either party.

Foreign award when binding: Section 55 provides that a foreign award which is enforceable under the Act [Par. II, Chap 2] shall be binding for all purposes. A foreign award which would be enforceable shall be treated as binding 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 to enforcing a foreign award shall be construed as including references to relying on an award.

Conditions for enforcement of foreign award: Section 57(1) lays down the conditions that the required to be satisfied for enforcement of a foreign award. These conditions are five in number:

1) The award has been made in pursuance of a submission to arbitration which is valid under the law applicable to it [Section 57(1) (a)].

2) The subject-matter of the award is capable of settlement by arbitration under the law in India [Section 57(1) (b)].

3) 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 [Section 57(1) (c)].

4) 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 opposite or appeal or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending [Section 57(1) (d)].

5) The enforcement of the award is not contrary to the public policy or the law of India. The Explanation to this provision clarifies that an award would be in conflict with public policy of India if the making of the award was induced or affected by fraud or corruption. Thus, enforcement of an award may be refused if it was obtained by suppressing facts, by misleading or deceiving the arbitrator, by bribing the arbitrator, by exerting pressure on the arbitrator, etc. [Section 57(1) (e)].

Refusal of enforcement of foreign award: Sub-sections (2) and (3) of Section 57 enumerate the grounds on which the court may refuse to enforce the foreign award. These grounds are as under:

1. The award has been annulled in the country in which it was made [Section 57 (2) (a)].
2. 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 [Section 57(2) (b)].
3. Being under a legal incapacity, the party was not properly represented [Section 57(2) (b)].
4. 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 in matters beyond the scope of the submission to arbitration [Section 57(2) (c)].
5. Enforcement of the award may also be refused if the party against whom the award has been made successfully contests the validity of the award on the grounds mentioned in clauses (b), (d) and (e) of Section 57 (1) [Section 57(3)].

Enforcement of Foreign Award : If the court is satisfied that the foreign award is enforceable, the award will be deemed to be a decree of the court and will be enforced as such.

Appealable Orders: Section 59 deals with orders which are appealable.

a) Section 59(1) provides that an appeal shall lie –
   a. from a judicial authority's order refusing to refer the parties to arbitration under Section 54, and
   b. from the court's order refusing to enforce a foreign award under Section 57.

b) Section 59(2) bars a second appeal against the appellate order passed under this Section. However, the right to appeal to the Supreme Court is not affected.

IMPORTANT QUESTIONS

Q.1. In which case does an appeal lie against an order passed under arbitration and under Arbitration and Conciliation Act? Explain the provisions regarding appeals.

Q.2. When does an foreign award have binding force? Discuss the rules relating to enforcement of a

foreign award under the New York Convention.

Q.3. Explain the scope of the provision of the Act relating to appeals.

Q.4. What is the meaning of foreign award under the New York Convention? When does a foreign award have binding force? Explain the conditions for enforcement of foreign award.

UNIT - IV

CONCILIATION

Meaning: Part III of the Arbitration and Conciliation Act, 1996 deals with conciliation. Conciliation means the settling of disputes without litigation." Conciliation is a process by which discussion between parties is kept going through the participation of a conciliator. The main difference between arbitration and conciliation is that in arbitration proceedings the award is the decision of the Arbitral Tribunal while in the case of conciliation the decision is that of the parties arrived at with the assistance of the conciliator.

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.

Section 61 points out that the process of conciliation extends, in the first place, to disputes whether contractual or not. But the disputes must arise out of legal relationship. It means that the dispute must be such as to give one party the right to sue and other party the liability to be sued. The process of conciliation extends, in the second place, to all proceedings relating to it. But Part III of the Act does not apply to such disputes as cannot be submitted to conciliation by virtue of any law for the time being in force.

Number and qualifications of conciliators (Section 63): Section 63 fixes the number of conciliators. There shall be one conciliator. But the parties may by their agreement provide for two or three conciliators. Where the number of conciliators is more than one, they should as a general rule act jointly.

Appointment of conciliators (Section 64): Sub-section (1) of Section 64 provides three rules for the appointment of conciliators:

a) If there is one conciliator in a conciliation proceedings, the parties may agree on the name of a sole conciliator.

b) If there are two conciliators in a conciliation proceedings, each party may appoint one conciliator.

c) If there are three conciliators in a conciliation proceedings, 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.

Sub-section (2) of Section 64 provides for the assistance of a suitable institution or person in the appointment of conciliators. Either a party may request such institution or person to recommend the names of suitable individuals to act as conciliator, or the parties may agree that the appointment of one or more conciliators be made directly by such institution or person.

The proviso to Section 64 requires that in recommending or appointing individuals to act as conciliators, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator with respect to a sole or third conciliator the advisability of appointing a conciliator of a nationality other than the nationalities of the parties should be taken into account.

Principles of Procedure: Independence and Impartiality [Section 67(1)]: The conciliator should be independent and impartial. He should assist the parties in an independent and impartial manner while he is attempting to reach an amicable settlement of their dispute.

Fairness and Justice [Section 67(2)]: The conciliator should be guided by principles of objectivity, fairness and justice. He should take into consideration, 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.

Confidentiality [Section 75, 70, proviso]: The conciliator and the parties are duly bound to keep confidential all matters relating to the conciliation proceedings. Similarly, when a party gives an information to the conciliator on the condition that it be kept confidential, the conciliator should not disclose that information to the other party.

Disclosure of information [Section 70] : When the conciliator receives an information about any fact relating to the dispute from a party he should disclose the substance of that information to the other party. The purpose of this provision is to enable the other party to present an explanation which he might consider appropriate.

Cooperation of parties with conciliator [Section 71]: The parties should in good faith cooperate with the conciliator. They should submit the written materials, provide evidence and attend meetings when the conciliator requests them for this purpose.

Rules of Procedure (Section 66): The conciliator is not bound by the rules contained in the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872. Though the conciliator is not bound by the technical rules of procedure, he, it seems, should not ignore the principles of natural justice. Thread of natural justice should run through the entire conciliation proceedings. The principles of natural justice require that both parties must be heard each in the presence of the other.

Admissibility of Evidence in other proceedings (Section 81): The parties cannot rely on or introduce as evidence in arbitral or judicial proceedings in respect of the following matters:

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

2. Admissions made by the other party in the course of the conciliation proceedings;

3. Proposals made by the conciliator, and

4. The fact that the other party had indicated his willingness to accept- a proposal for settle me made by the conciliator.

It is immaterial whether or not the arbitral or judicial proceedings are related to the dispute that is the subject of the conciliation proceedings.

Place of Meeting [Section 69 (2)]: The parties have freedom to fix by their agreement the place where meetings with the conciliator are to be held. Where there is no such agreement, the place of meeting will be fixed by the conciliator after consultation with the parties. In doing so the circumstances of the conciliation proceedings will have to be considered.

Communication between Conciliator and Parties [Section 69 (1)]: The conciliator may invite the parties to meet him or may communicate with them orally or in writing. He may do so with the parties together or with each of them separately.

1. **Commencements of conciliation proceedings [Section 62]:** The conciliation proceedings are initiated by one party sending a written invitation to the other party to conciliate. The invitation should identify the subject of the dispute. Conciliation proceedings are commenced when the other party accepts the invitation to conciliate in writing. If the other party inviting conciliation does not receive a reply within thirty days from the date he sends the invitation or within such period of time as is specified in the invitation, he may elect to treat this as rejection of the invitation to conciliate. If he so elects he should inform the other party in writing accordingly.

2. **Submission of statement to conciliation [Section 65):** The conciliator may request each party to submit to him a brief written statement. The statement should describe the general nature of the dispute and the points at issue. Each party should send a copy of such statement to the other party. The conciliator may require each party to submit to him a further written statement of his position and the facts and grounds in its support. It may be supplemented by appropriate documents and evidence. The party should send a copy of such statements, documents and evidence to the other party. At any stage of the conciliation proceedings, the conciliator may request a party to submit to him any additional information which he may deem appropriate.

3. **Conduct of conciliation proceedings [Section 69 (1), 67 (3)]:** The conciliator' may invite the parties to meet him. He may communicate with the parties orally or in writing. He may meet or communicate with the parties together or separately.

   In the conduct of conciliation proceedings, the conciliator has some freedom. He may conduct them in such manner as he may consider appropriate. But he should take into account the circumstances of the case, the express wishes of the parties, a party's request to be heard orally and the need of speedy settlement of the dispute.

4. **Administrative Assistance [Section 68]:** Section 68 facilitates administrative assistance for the conduct of conciliation proceedings. Accordingly, the parties and the conciliator may seek administrative assistance by a suitable institution or the person with the consent of the parties.