ARBITRATION AND CONCILIATION ACT, 1996 - A CRITICAL ANALYSIS

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An analysis of the Arbitration and Conciliation Act, 1996 necessarily entails an analysis of the source on which it is based, i.e. the UNCITRAL Model Law, the changes made thereto by the Indian Parliament and the actual working of the said Act in Indian conditions. The various categories in which the Act can be analyzed are as under:

(A) Appointment of arbitrators
(B) Control of proceedings by arbitrators
(C) Supervisory role of courts
(D) Execution of awards
(E) Effects of Delays

(A) Appointment of arbitrators

Generally speaking, any new enactment is subject to various interpretations, which may sometimes be of an extremely divergent nature. The fate of the 1996 Act is no different. Various High Courts have taken different views of the Act. Even the Hon'ble Supreme Court has often taken conflicting views leaving the legal fraternity in a state of uncertainty and confusion. In respect of appointment of arbitrators, the earlier view of the Hon'ble Supreme Court was that the objective of the Act would not be achieved if delay is allowed to occur in appointment of the Arbitrators and, therefore, a 3-Judge Bench in *Konkan Railway Corporation Ltd. Vs M/s Mehul Construction Co.*, 2000(7) SCC 201, held as under:

> "…it is imperative for the Chief Justice or his nominee to bear in mind the legislative intent that the arbitral process should be set in mind without any delay whatsoever and all contentious issues are left to be raised before the arbitral tribunal itself. At this stage, it would not be appropriate for the Chief Justice or his nominee to entertain any contentious issue between the parties and decide the same."

In *M/s Konkan Railway Corpn. Ltd. Vs M/s Rani Construction Pvt. Ltd.*, 2002(2) SCC 388, the Hon'ble Supreme Court went a step further and held that it was not necessary for the Chief Justice or his nominee to even issue notice to the respondents.

However, subsequently, a 7-judge Bench of the Supreme Court in *S.B.P. Ltd. v. Patel Engineering Ltd.*, (2005)8 SCC 618, over-ruled the aforesaid two judgments. As per the majority view in the said case, when a party approaches the Chief Justice of the High

Court or the Chief Justice of India, as the case may be, the order to be passed shall be a judicial order and not an administrative one.

In a span of 8 years, i.e. from the date of first *Konkan* judgment till the *SBP case*, the Hon'ble Supreme Court has taken divergent views on the powers of the Court to appoint an arbitrator under Section 11 of the Act. Even after the *SBP case*, it has been observed that various High Courts in the country are still referring all contentious issues to the arbitrators and not deciding the same while appointing an arbitrator. Thus, even till date, we are not yet clear as to how an arbitrator is to be appointed.

Appointment of a qualified and independent arbitrator:

In technical disputes and sometimes even in commercial contracts, it is preferable to appoint a technical or commercial arbitrator, who is well versed in the trade. In such cases, a lay person or even a legally qualified arbitrator may not always be the best option as they would not be able to appreciate the intricacies of the trade. For example, for resolving a dispute concerning measurements in a works contract, settlement of extra rates, fixing responsibility for defective construction, settlement of stock prices, for carrying out valuations etc., it is always desirable that an expert in the field should be appointed and as such, parties should take care and provide for the desired qualification in the arbitration agreement itself.

Section 11(8) of the Act stipulates that while making an appointment, the Court has to take into consideration the qualification of the arbitrator as prescribed in the agreement. In recent years, the Hon'ble Supreme Court has appreciated the above fact and held that if an agreement provides for appointment of an engineer arbitrator, then the Court is bound to appoint an engineer (See *You One Engg. & Construction Co. Ltd. v. National Highways Authority of India (NHAI)*, (2006)4 SCC 372 and *National Highways Authority of India v. Bumihiway DDB Ltd. (JV)*, (2006)10 SCC 763). This is a welcome development.

(B) Control of proceedings by arbitrators

While making an appointment, it should also be ensured by the Court or the designated authority or Institution that the person being appointed is **independent and impartial**. In this connection, see the observations of the Hon'ble Supreme Court in *Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd*., (2002)2 SCC 388 and *SBP & Co. v. Patel Engg. Ltd.*, (2005)8 SCC 618, wherein the duty to select an independent and qualified arbitrator was reiterated.

Duty to act fairly is the first and foremost function of an arbitrator. He must act in a fair and reasonable manner to both the parties and in the arbitration hearings he must not show or exhibit favour towards any party and must refrain from doing for one party which he cannot do for the other. Showing undue favours to one party at the cost of the other in matters handled by him would be looked upon with suspicion by the Courts. It

was in this context that Donaldson J. in *the Myron*, (1969)1 Lloyd's Rep. 411 (at page 415) observed that "Mr._____ had, indeed, been the arbitrator appointed by them on several occasions and was described before me as their first choice arbitrator, language more usually heard in the context of Smithfield or Covent Garden market produce than of a well known arbitrator, but the meaning is clear enough." The position of the arbitrator is like that of Ceaser's wife, who should always be above all suspicion. The Courts have continually held that rules of natural justice must be followed by the arbitrators including the principles incorporated in the maxim *audi alterem partem*. Ignorance of the rules of natural justice cannot be defended on the plea that the evidence was inconsequential or had not affected the mind of the arbitrator or was of a trifling nature.

Need for Training arbitrators:

To ensure that proceedings are properly conducted, it is extremely necessary that persons aspiring to act as arbitrators should be properly trained. It is felt that this is the pressing need of the times and calls for serious and deep consideration from all. This is moreso in view of the practical experience whereby it has been observed that some arbitrators feel that they have unfettered powers. While conducting the proceedings, such arbitrators assume powers similar to a judge of the High Courts or Supreme Court. On the other hand, there are arbitrators who are so weak that they allow proceedings to be dictated by the advocates appearing for the parties. Such proceedings are extended interminably and make a mockery of the objectives for which arbitration was conceived.

To ensure that the objectives of the Act are met, it is imperative that the arbitrators should be made aware of their rights and duties under the Act. It is the duty of Institutions like ICA, IITA etc. to impart such training to the arbitrators. These Institutions should take care to empanel arbitrators only after thorough screening and testing. They should also ensure that the arbitrators once empanelled are made aware of the latest trends in law and procedure. This training can be imparted through Seminars, Conferences, Workshops and formal training sessions. However, judicial officers can be excluded from such training.

Briefly speaking, the powers and duties of the arbitrators, as defined by the Act, are as under:-

1.	To arrange for administrative assistance	S.6
2.	To appoint presiding arbitrator	S.11(3)
3.	To disclose circumstances likely to give rise to justifiable doubts as to his impartiality etc.	S.12(1)
4.	To disclose any fresh circumstances during proceedings which are likely to raise doubts about impartiality etc.	S.12(2)
5.	To possess qualifications as agreed between parties	S.12(3)(b)
6.	To act fairly and impartially	S.14(1)(a)
7.	To rule on his own jurisdiction	S.16(1)

8.	To give ruling about existence or validity of an arbitration agreement.	S.16(1)
9.	To afford opportunity to parties to argue on challenge to arbitral tribunal	S.16(1)
10.	To condone delay for raising objections to authority of arbitral tribunal	S.16(4)
11.	To continue with proceedings after rejecting plea to authority of arbitral tribunal	S.16(5)
12.	To order interim measures of protection	S.17(1)
13.	To order tendering of security by a party in whose favour order for interim measure of protection is given	S.17(2)
14.	To treat parties with equality	S.18
15.	To give full opportunity to parties to present their case	S.18
16.	To discard applicability of CPC or Evidence Act if insisted for adoption by a party	S.19(1)
17.	To conduct the proceedings properly	S.19(3)
18.	To determine the admissibility, relevance, materiality and weight of evidence	S.19(4)
19.	To determine venue for arbitration hearings	S.20(2)
20.	To prescribe language for conducting of documentary evidence	S.20(3)
21.	To direct translation in language determined for conducting proceedings.	S.22(2)
22.	To fix time schedule for completing pleadings	S.23(1)
23.	To permit amendment or supplementing of claim/defence by concerned party	S.23(3)
24.	To decide whether to hold oral hearings or for oral arguments	S.24(1)
25.	To give sufficient notice for holding meeting	S.24(2)
26.	To give sufficient notice for inspection of documents, goods or other property	S.24(1)
27.	To appoint one or more experts for reporting on specific issues	S.26(1)(a)
28.	To direct a party to give the expert relevant information and inspection of documents, goods or property	S.26(1)(b)

29.	To permit parties to put questions to experts on the points at issue	S.26(2)
30.	To apply to court for taking assistance in taking evidence	S.27(1)
31.	To decide dispute in accordance with substantive law	S.28(1)(a)
32.	To conduct proceedings fairly and justly	S.28(2)
33.	To decide dispute according to terms of contract and usage of trade	S28(3)
34.	To act jointly with arbitrators and abide by majority decision	S.29(1)
35.	Third arbitrator to devise procedure for conducting arbitration hearing	S.29(2)
36.	To encourage settlement of disputes and use mediation, conciliation or other procedures	S.30(1)
37.	To terminate proceedings on settlement	S.30(2)
38.	To record settlement between parties in the form of an award	S.30(3)
39.	To sign arbitral award	S.31(1)
40.	To assign reasons in support of arbitral award	S.31(3)
41.	To deliver signed copy of award to each party	S.31(5)
42.	To pass interim award	S.31(6)
43.	To determine rate of pre-suit and pendente lite interest	S.31(7)(a)
44.	To allow future interest on award	S.31(7)(b)
45.	To determine costs of arbitration and its apportionment	S.31(8)
46.	To terminate proceedings when claimant withdraws claim or parties agree or when continuation would be futile	S.32(2)
47.	To correct computation, clerical or typo graphical errors in award within 30 days on request by a party or on own initiative	S.33(1)(a) & S.33(2), S.33(3)
48.	To give interpretation of a specific point or part of award	S.33(1)(b)
49.	To make additional award on such claims which got skipped in award	S.33(5)
50	To extend time beyond 30 days for effecting corrections, or giving interpretation, or additional award etc.	S.33(6)

51.	To fix amount of deposits in respect of claims and counter claims	S.38(1)
52.	To suspend proceedings in respect of claim or counter claim where concerned party does not pay	S.38(2)
53.	To render accounts on deposits received and return unexpended balance	S.38(3)
54.	To retain lien on award for an unpaid cost of arbitration	S.39(1)
55.	To deliver copy of award if directed by court on payment of costs demanded	S.39(2)
56.	To continue with arbitration even after death of party nominating him	S.39(2)

Adherence to the principles of natural justice

Section 1 of the Evidence Act excludes its application in any arbitration matter which should not at all be taken to mean that he can act in the manner he likes or can act arbitrarily. He must act in accordance with the principles of natural justice. It is now well-settled that an arbitrator is not bound by the technical and strict rules of evidence which are founded on fundamental principles of justice and public policy. In proceedings of arbitration, there must be adherence to justice, equity, law and fair play in action. The proceedings must adhere to the principles of natural justice and must be in consonance with practice and procedure which will lead to proper resolution of dispute.

The rule of natural justice requires that parties should be given an opportunity to be heard by the arbitrators, which means whatever material they want to place before the arbitrators should be allowed to be placed [See *Oil & Natural Gas Commission Ltd. v. New India Civil Erectors Pvt. Ltd*., 1996 (Suppl) Arb LR 426 (DB)].

Where the arbitrator refuses to consider the contentions of the contractor and refuses permission to produce evidence, inasmuch as directions were not given to the Government to produce the record which had been withheld on the ground of privilege, without even indirectly or incidentally mentioning the nature and volume of the record said to be privileged, it was held that these lacunas are the violations of the principle of natural justice and denial of opportunity to the contractor to press and prove his case. (*President of India v. Kesar Singh*, AIR 1966 J&K 113 : 1966 Kash LJ 287).

In *Mustill and Boyd's Law and Practice of Commercial Arbitration in England*, 1982 Ed., p. 261, the following cardinal rules have been suggested for being followed by the arbitral tribunal in order to ensure fairness in conducting arbitration between the litigant parties:

1. Each party must have a full opportunity to present his own case to the tribunal.

2. Each party must be aware of his opponent's case, and must be given a full opportunity to test and rebut it.

3. The parties must be treated alike. Each must have the same opportunity to put forward his own case, and to test that of the opponent.

The above principles (Sr. Nos. 1 and 3) are in consonance with Section 18 of the Act and the principle stated at Sr. No. 2 conforms to Section 23(1) of the Act. The principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice. It ill comes from a person who has denied justice that the person who has been denied justice is not prejudiced (*S.L. Kapur v. Jagmohan*, AIR 1981 SC 136: (1980)4 SCC 379).

Hearing in absence of one party

An arbitrator would be guilty of misconduct if he is charged with any information having been obtained from one side which was not disclosed to the other. Such an information may be oral or in writing. It is with this aspect in mind that the Legislature provided in Section 24(3) of the Act that "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".

The principles of natural justice mandate that the person who is to be prejudiced by the evidence must be given an opportunity to suggest cross-examination and to enable him to produce evidence to counter. However, an exception to the rule is that where an arbitrator took evidence at the back of one party, but decided the matter in favour of the absent party [*Black vs John Williams & Co*., 1924 S.C. (H.L.) 22].

When the arbitrator accepts documents from one party in the absence of the other party, the arbitrator would be guilty of misconducting the proceedings because no arbitrator can accept document from one party at the back of the other [*Padam Chand Jain v. Hukam Chand Jain*, AIR 1999 Del 61].

The thread of natural justice should run through the entire arbitration proceedings and the principles of natural justice require that the person who is to be prejudiced by the evidence ought to be present to hear it taken to suggest cross-examination and to be able to find evidence, if he can, that shall meet and answer it [*Wazir Chand Karan Chand v. Union of India*, AIR 1989 Del 175].

During the conduct of a reference the arbitrator required the attendance of a witness whom neither side proposed to call. After this witness had given evidence the proceedings terminated, and the arbitrator said that he required nothing further from either of the parties. Subsequently, however, the plaintiff found the arbitrator closeted with the witness and a special pleader who was acting for the defendants, the three

persons being engaged in considering the papers and plans connected with the arbitration. The arbitrator explained that the witness was explaining to him information in connection with the case, by which, however, his opinion would not be biased. It was held by the Court that as there had been an opportunity for the mind of the arbitrator to have been biased by information given on behalf of one side without the other having had an opportunity of meeting it, the award eventually made by the arbitrator must be set aside [(1844) 14 L.J.Q.B. 17]

An arbitrator ought not to proceed *ex parte* against a party if he has not appeared at one of the sittings. The arbitrator should give another notice fixing date, time and venue and intimate that he would proceed with the matter *ex parte* if either party fails to attend. Even after notice if the defaulting party does not attend, the arbitrator may proceed in his absence [*Lovely Benefit Chit Fund & Finance Pvt. Ltd. v. Puran Dutt Sood*, AIR 1983 Del 413 ; *Hemkunt Builders P. Ltd. v. Panjabi University, Patiala*, 1993(1) Arb LR 348].

IN *RUSSELL ON ARBITRATION*, 20th Ed., p. 263 it has been held as under:

> "In general, an arbitrator is not justified in proceeding *ex parte* without giving the party absenting himself due notice. It is advisable to give the notice in writing to each of the parties or their solicitors. It should express the arbitrator's intention clearly, otherwise the award may be set aside. An ordinary appointment for a meeting with the addition of the word 'peremptory' marked on it is, however, sufficient".

If the arbitrator declines to proceed on the first failure to attend a peremptory appointment, and gives another appointment, he is not authorized to proceed *ex parte* at the second meeting, unless the appointment for it was also marked 'peremptory' or contained a similar intimation of his intention. On this aspect of the matter, *RUSSELL ON ARBITRATION*, 20th Ed., p. 264 states:

> "If a party says: 'I will not attend, because you (the arbitrator) are receiving illegal evidence, and no award which you can make will be good, ' the arbitrator may go on with the reference in his absence; and it seems that it is not necessary in such a case to give the recusant any notice of the subsequent meetings. But, though it may not always be necessary, it is certainly advisable that notice of every meeting should be given to the party who absents himself, so that he may have the opportunity of changing his mind, and of being present if he pleases."

If the arbitrator did not allow adjournment of just one day, as the counsel of the party was busy in another arbitration proceedings and proceeded to pass an *ex parte* award, without giving notice of his intention to do so, the award would be invalid. [*Executive Engineer, Prachi Division v. Gangaram Chhapolia*, AIR 1983 NOC 205 (Ori)].

Failure to consider vital documents

The well-settled rule of law is that an arbitrator misconducts the proceedings if he ignores very material documents to arrive at a just decision to resolve the controversy. Even if the department did not produce those documents before the arbitrator, it was incumbent upon him to get hold of all the relevant documents for arriving at a just decision. In *K.P. Poulose vs State of Kerala*, AIR 1975 SC 1259, it had been held by the Hon'ble Supreme Court that even if the department did not produce some documents before the Arbitrator, it was incumbent upon him to get hold of all the relevant documents for the purpose of arriving at a just and fair decision.

The making of an award without the basic documents, namely, the arbitration agreement before the arbitrators at the time of application of mind, i.e. at the time of considering the rival contentions of the parties is not permissible. The arbitrator has to insist on the production of the agreement, even if not presented by the parties, as without such agreement being on record, the respective contentions of the parties cannot be adjudicated upon. [*Hooghly River Bridge, Commissioner v. Bhagirathi Bridge Construction Co. Ltd.*, AIR 1995 Cal 274].

Arbitrator must act within submission

The aim of arbitration is to settle all disputes between the parties and to avoid further litigation. Hence, where the contractor claimed amounts for work done after arbitration proceedings had begun and the claim statement filed with the arbitrator also included this claim, the arbitrator had jurisdiction to make an award on the said claim also. [*Shyama Charan Agarwala & Sons v. Union of India*, (2002)6 SCC 201].

In order to determine whether the arbitrator has acted in excess of jurisdiction what has to be seen is whether the claimants could raise a particular dispute or claim before the arbitrator. If the answer is in affirmative, then it is clear that arbitrator would have the jurisdiction to deal with such a claim. On the other hand, if the arbitration clause or a specific term in the contract or the law does not permit or give the arbitrator the power to decide or to adjudicate on a dispute raised by the claimant or there is a specific bar to the raising of a particular dispute or claim, then any decision given by the arbitrator in respect thereof would clearly be in excess of jurisdiction. In order to find whether the arbitrator has acted in excess of jurisdiction the court may have to look into some documents including the contract as well as the reference of the dispute made to the arbitrators limited for the purpose of seeing whether the arbitrator has the jurisdiction to decide the claim made. [*Himachal Pradesh State Electricity Board v. R.J. Shah*, (1999)4 SCC 214; *Rajasthan State Mines & Minerals Ltd. v. Eastern Engg. Enterprises*, 1999(3) RAJ 326 (SC); and *Arosan Enterprises Ltd. v. Union of India*, AIR 1999 SC 3804].

An arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Arbitration Act which embodies principles derived from a specialized branch of the law of agency (*Mustill and Boyd's Commercial Arbitration*, 2nd Ed., p.641). He commits misconduct if by his award he decides matters excluded by the agreement (HALSBURY'S LAWS OF ENGLAND, Vol. II, 4th Ed., para 622). As an arbitrator derives his jurisdiction only from the agreement fro

his appointment, it is never open to him to reject any part of that agreement, or to disregard any limitation placed on his authority (HALSBURY'S LAWS OF ENGLAND, Vol. II, 4th Ed., para 577). A deliberate departure from contract amounts to not only manifest disregard of his authority or misconduct on his part, but it may tantamount to a *mala fide* action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award [*Associated Engg. Co. v. Government of Andhra Pradesh*, AIR 1999 SC 322; *V.G. George v. Indian Rare Earths Ltd*., AIR 1999 SC 1409; *Grid Corp. of Orissa Ltd. v. Balasore Technical School*, AIR 1999 SC 2262. *Shyama Charan Agarwala & Sons v. Union of India*, (2002)6 SCC 201].

It has been stated in the *HALSBURY'S LAWS OF ENGLAND*, 4th Ed., Vol.2, paragraph 577 as follows:

> "As an arbitrator obtains his jurisdiction solely from the agreement for his appointment, it is never open to him to reject any part of that agreement, or to disregard any limitation placed on his authority ....."

In the bid documents, it was clearly stated that the intending tenderers must inspect the site of the work, make necessary investigation for correctly evaluating the work, to satisfy themselves as to the nature and location of the work, general and local conditions before arriving at his rates. It was also stipulated therein that no extra payment shall be made to the successful tenderer if he makes any misjudgment. Thus the claim of the contractor on the ground of excess flourine in drinking water due to which the contractor suffered could not have been allowed by the arbitrator. [*Ramalinga Reddy v. Superintending Engineer*, (1999)9 SCC 610].

It is an integral part of the duties of the arbitrator to adhere to the conditions of the contract agreed to between the parties and must always be within the terms of reference in accordance with which the parties desire him to make and publish the award. Thus, it is mandatory and obligatory on his part to act strictly in accordance with the law laid down by the Courts and not to act whimsically and arbitrarily and in the manner which he thinks is just and reasonable.

Where in a works contract a contractor demands extra costs due to price escalation, which had been barred specifically under the terms of the agreement, the award of such extra costs by the arbitrator was held to be bad in law on the ground that the arbitrator acted in excess of the jurisdiction conferred on him. [*Continental Construction Co. Ltd. v. State of Madhya Pradesh*, AIR 1988 SC 1166]

The arbitrator is not permitted in law to enlarge the scope of reference. Any decision or award on an item(s) which is beyond the scope of reference shall not have the sanction of law. If the award on an item not referred for adjudication in arbitration had been decided by the arbitrator and is not severable from the rest of the award, then the whole of the award shall be set aside by the Court [*Jivrajbhai Ujamshi Sheth and others v. Chintamanrao Balaji and others*, AIR 1965 SC 214]

Arbitrator to decide on his skill and knowledge

Lord Goddard, CJ in *Mediterranean & Eastern Export Co. Ltd.* vs *Fortress Fabrics Ltd.*, [1948]2 All ER 186, held as under:

> "A man in the trade who is selected for his experience would be likely to know and indeed be expected to know the fluctuations of the market and would have plenty of means of informing himself or refreshing his memory on any point on which he might find it necessary so to do. ..... It must be taken I think that in fixing the amount that he has, he has acted on his own knowledge and experience. The day has long gone by when the Courts looked with jealousy on the jurisdiction of the Arbitrators. The modern tendency is in my opinion more especially in commercial arbitrations, to endeavour to uphold awards of the skilled persons that the parties themselves have selected to decide the questions at issue between them.....".

Arbitrator cannot delegate his functions

In *Russell on Arbitration*, 20th Ed., page 228, it has been stated as under:

> "One who has an authority to do an act for another must execute it himself, and cannot transfer it to another; for this, being a trust and confidence reposed in the party, cannot be assigned to a stranger, whose ability and integrity were not so well thought of by him for whom the act was to be done".

> "Arbitrators cannot refer their arbitrements to others, nor to an umpire; if the submission be not so; neither can they make their arbitrement in the names of themselves and of a third person to whom no submission was made; nor alter it after it is once made."

Failure to act without unreasonable delay

Section 14(1)(a) of the Act provides that the mandate of an arbitrator shall terminate if he becomes *de jure* or *de facto* unable to perform his functions or for other reasons *fails to act without undue delay*. Thus, where the named arbitrator does not act for three months despite repeated reminders, it can be clearly said that the mandate of the named arbitrator shall be deemed to have been terminated as he failed to act without undue delay as contemplated under section 14(1)(a) and the court gets the power to appoint a new arbitrator under section 11(5). [*Deepa Galvanising Engg. Industries Pvt. Ltd. v. Govt. of India*, 1998(1) ICC 410 (AP)].

Where the parties stipulated by consent that if the arbitrator does not complete the arbitral proceedings on or before a particular date his mandate shall stand terminated, then the mandate automatically terminates on the expiry of that date. Consent order is nothing but an agreement between the parties with super imposed seal of the court. [*Kifayatullah Haji Gulam Rasool v. Bilkish Ismail Mehsania*, AIR 2000 Bom 424].

What is reasonable dispatch depends upon the type of arbitration and the size and complexity of the dispute. The question of reasonableness should be determined by reference to the nature of arbitration and the interests of the parties and not individual circumstances of the arbitrator. Thus, if the arbitrators were delayed in proceeding by illness or unexpected absence abroad, they would be open to removal, even though they had not personally flawed. Conversely, fault is not sufficient to amount to a failure to use all reasonable dispatch: an arbitrator may be incompetent or guilty of misconduct and yet not be guilty of such delay. [*MUSTIL AND BOYD'S Commercial Arbitration, p. 474]*.

A Division Bench of the Karnataka High Court in a judgment reported as *Rudramani Devaru vs Shrimad Maharaj Niranjan Jagadguru*, AIR 2005 Kant 313 summarized the principles to be followed by an arbitral tribunal as under:

> "The minimum requirements of a proper hearing should include: (i) each party must have notice that the hearing is to take place and of the date, time and place of holding such hearing; (ii) each party must have a reasonable opportunity to be present at the hearing along with his witnesses and legal advisers, if any, if allowed; (iii) each party must have an opportunity to be present throughout the hearing; (iv) each party must have a reasonable opportunity to present statements, documents, evidence and arguments in support of his own case; (v) each party must be supplied with the statements, documents and evidence adduced by the other side; (vi) each party must have a reasonable opportunity to cross-examine his opponent's witnesses and reply to the arguments advanced in support of his opponent's case. It is expected of an arbitral tribunal that it should ensure that the date of the hearing is not so close that the case cannot be properly prepared. Equally, an arbitral tribunal, while fixing the date of hearing, should try to accommodate any party who is placed in difficulty by his absence due to unavoidable circumstances such as illness or compelling engagements of himself elsewhere etc. Each party is also entitled to know any statements, documents, evidence or information collected by the arbitral tribunal itself which are adverse to his interest, if they are not contested. The arbitral tribunal is neither to hear evidence nor arguments of one party in the absence of the other party, unless despite opportunity, the other party chooses to remain absent. So also, the arbitral tribunal is not to hear evidence in the absence of both the parties unless both the parties choose to remain absent despite proper notice. Each party to arbitration reference is entitled to advance notice of any hearing and of any meeting of the arbitral tribunal as provided under S.24 of the Act".

The arbitrators and conciliators should also ensure that they follow a procedure that is fair and founded on the principles of natural justice. They should adopt a procedure which is fair to both parties and the arbitral award should also reflect that attitude. The arbitrators, by their actions, should not bring disrepute to the process and institution of arbitration. In *State of J&K and another vs Dev Dutt Pandit*, (1999)7 SCC 339, the Supreme Court was compelled to observe as under:

> "Arbitration is considered to be an important alternative disputes redressal process which is to be encouraged because of high pendency of cases in the courts and cost of litigation. Arbitration has to be looked up to with all earnestness so that the litigant public has faith in the speedy process of resolving their disputes by this process. What happened in the present case is certainly a paradoxical situation which should be avoided. Total contract is for Rs. 12,23,500. When the contractor has done less than 50% of the work the contract is terminated. He has been paid Rs. 5,71,900. In a Section 20 petition he makes a claim of Rs. 39,47,000 and before the arbitrator the claim is inflated to Rs. 63,61,000. He gets away with Rs. 20,08,000 with interest at the rate of 10% per annum and penal interest at the rate of 18% per annum. Such type of arbitration becomes subject of witticism and do not help the institution of arbitration. Rather it brings a bad name to the arbitration process as a whole."

The very purpose of discarding the 1940 Act and replacing it by the 1996 Act was to infuse confidence amongst the business community that as and when disputes crop us, the same would be resolved expeditiously in a forum of their choice. Proper conduct of arbitration proceedings by a well-respected and trained arbitrator would go a long way in bringing a fair name to the arbitration process in the country.

(C) Supervisory role of Courts

Various provisions have been introduced in the 1996 Act to limit the supervisory role of the courts in the arbitral process. Clause 4(v) of the Statement of Objects and Reasons of the 1996 Act states that the main objective of the Act is to "minimize the supervisory role of the courts in arbitral process". Section 5 of the Act further elucidates this objective and provides that "..no judicial authority shall intervene except where so provided in this Part.". In short, the new Act makes a departure from the old Act which provided, at each step, intervention of Courts in the arbitral process. Section 8 of the Act obligates a court to stay a suit that is brought before it and refer the parties to arbitration where an arbitration agreement exists between the parties. Realizing the limited supervisory role of courts in arbitral proceedings, the Hon'ble Supreme Court in *Bhatia International vs Bulk Trading S.A.*, (2002)4 SCC 105 (para 29) held that arbitral proceedings cannot be stayed in proceedings under Section 9 of the Act.

A party can challenge the arbitrator on the grounds mentioned in Sections 12 and 13 of the Act, irrespective of the fact whether the appointment has been made by the Chief Justice or directly by the *persona designata*. However, a challenge under Section 16 of the Act is now restricted by the case of *S.B.P. Ltd. vs Patel Engineering Ltd.*, (2005)8 SCC 618 wherein it has been held that where an appointment has been made by the Chief Justice, a party cannot challenge the same under Section 16 before the Arbitrator. The Draft Model Law framed by UNCITRAL provides for remedy to the Court against decision by the arbitral tribunal on any application filed under Sections 12, 13 and 16 of the Act. Obviously, therefore, time taken for settlement of the issue as per the UNCITRAL Model Law is much more. Our Parliament did not adopt this procedure

prescribed by the UNCITRAL Model law. The New Act does not make any provision for challenging the order under the aforesaid sections in a Court of law at any time before the publication of the award. This was done to minimize the supervisory role of courts.

Over the years, attempts have been made to overcome the bar placed by Sections 13(5) and 16(6) of the Act. In *Anuptech Equipments (P) Ltd v. Ganpati Co. Group Housing Society Ltd.*, AIR 1999 Bom 219, *Union of India v. East Coast Boat Builders and Engineers Ltd.*, 1998(2) Arb LR 702 and *United India Assurance Co. Ltd. v. Kumar Texturisers*, 1999(2) RAJ 255 (Bom) one such attempt was frustrated when the courts held that the decision of the arbitral tribunal on Sections 12, 13 and 16 does not amount to an interim award and was hence, could not be challenged immediately under Section 34 thereof. To overcome the strict terms of the said sections, parties started challenging the same through writ proceedings. But the same was not successful as would be evident from a reading of *Harike Rice Mills v. State of Punjab*, 1997(Suppl) Arb LR 342 (P&H), *Satish Chander Gupta and Sons v. Union of India*, 2003(1) Arb LR 589 (P&H), *Assam Urban Water Supply and Sewerage Board v. Subhas Projects and Marketing Ltd.*, 2003(2) Arb LR 301 (Gau) and *National Building Construction Co. v. Antia Electricals Pvt. Ltd.*, 2003(2) RAJ 258 (Del), wherein the Courts have held that interim orders of the arbitral tribunals are not amenable to correction in writ proceedings and the aggrieved party has to wait till the passing of the arbitral award to challenge the jurisdiction of the arbitral tribunals. Recently, however, a Division Bench of the Gauhati High Court in *Subhash Projects & Marketing Ltd. v. State of Arunachal Pradesh*, [2007] 1 Arb LR 564 (Gauhati) has opened a window of opportunity for litigants to challenge the arbitrator under Section 14 of the Act without invoking Sections 12 and 13.

To challenge an award, the Act provides various grounds in Section 34. The Supreme in *Olympus Superstructures (Pvt.) Ltd. v. Meena Vijay Khaitan*, (1999)5 SCC 651: AIR 1999 SC 2102 has held that Section 34 of the Act is based on Article 34 of the UNCITRAL Model Law and it would be noticed that under the 1996 Act the scope of provisions for setting aside the award is far less the same under Sections 30 or 33 of the 1940 Act.

The Legislature, in its wisdom, while enacting Arbitration and Conciliation Act, 1996, made a provision for setting aside of awards on very limited grounds. Repeatedly, the Supreme Court has mandated that the award could be set aside only if the grounds set out in Section 34 were attracted. Briefly, the grounds for setting aside award are:

- Incapacitation of a party;
- Arbitration agreement is invalid; or
- Lack of notice of appointment of arbitrator/arbitration proceedings or the party was unable to present the case; or
- Excess of jurisdiction on the part of the arbitrator; or
- Arbitration tribunal not properly constituted; or
- Subject-matter of dispute not capable of settlement by arbitration; or
- Award was in conflict with the public policy of India

The Legislature broadly defined public policy to mean 'The making of the award was induced or affected by fraud or corruption.' It would, therefore, leave no manner of doubt that such awards which had been made on the basis of fraud or corruption could be set aside. The Legislature had thus, confined setting aside of awards on the basis of fraud or corruption under the category of public policy of India.

The concept of "public policy of India" was considerably broadened by the Supreme Court in *Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd.*, (2003)5 SCC 705. It was held that the phrase "public policy of India" was required to be given a wider meaning and an award which is patently illegal deserved to be set aside if it is contrary to: -

(a) fundamental policy of Indian Law; or
(b) the interest of India; or
(c) justice or morality; or
(d) in addition, if it is patently illegal.

It was also laid down in the aforesaid judgment that "an award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court". This expression, respectfully stating, is quite subjective. An award may shock the conscience of one court, but it may not shock the conscience of another court. There can be no water-tight or compartmentalized definition of "shocking the conscience of the court". This could lead to increased interference in awards by the courts, which was not the avowed object of the Act of 1996.

The old practice of honouring the award must be revived. The very spirit of resorting to arbitration is to have quick, efficacious and inexpensive decision on controversies between the parties. There can be no doubt that an arbitrator cannot do what he thinks is right; he must follow the substantive law of India, as laid down in Section 28 of the Act. Any award which is against the express terms of the agreement between the parties or which is against the substantive law of India cannot be upheld.

In *M. Anasuya Devi and another v. M. Manik Reddy and another*, (2003)8 SCC 565, the earlier decisions have been reiterated and it has been clearly stated that the award can be challenged only on the limited grounds mentioned in Section 34 of the Act.

In a recent decision, the Supreme Court in *McDermott International Inc. v. Burn Standard Ltd.*, (2006)11 SCC 181, has recognized the supremacy of the arbitrator. Whereas, in earlier cases, the claimant was required to prove losses, particularly in case of prolongation of contracts, now the position is totally reversed. It was held in the aforesaid case that the arbitrators can base their awards for compensation for prolongation of the contract period even on theoretical formulas, evolved over a period of time and universally recognized. The *Emden* formula was held to be most realistic in so far as computation of compensation was concerned. Other formulas were also held to be reasonable. The *Eichleay formula* was evolved in America and derived its name from a case heard by Armed Services Board of Contract Appeals. This formula is used where it

is not possible to prove loss of opportunity and the claim is based on actual cost. Even the *Hudson formula* got recognition in the said decision. However, it was noted that though the *Hudson formula* received judicial support in many cases, it has been criticized principally because it adopts head office overhead percentage from the contract as the factor for calculating the costs and this may bear little or no relation to actual head office costs of contractor. In fact, it had been observed that parties would file evidence in the form of vouchers to prove their losses. Most of the vouchers were challenged by the opposite party as being false and fabricated. It thus, fell to the lot of the arbitrator to determine the authenticity of the same, which also consumed ample time, thereby delaying the adjudication process. This time wastage would, hopefully, be eradicated with the latest judgment.

The above view is correct and gives due honour to arbitral awards, especially awards rendered by experts. In *Mediterranean & Eastern Export Co. Ltd v. Fortress Fabrics Ltd.*, (1948-2 All ER 186), Goddard, C.J., observed:

> "The modern tendency is in my opinion more especially in commercial arbitrations, to endeavor to uphold awards of the skilled persons that the parties have themselves selected to decide the questions at issue between them, if the arbitrator has acted within the terms of his submission and has not violated any rules the courts should be slow indeed to set aside the award."

(D) Execution of awards

The intention of the Legislature as evidenced by the Act had been to put an end to the disputes between the parties in as short a span of time as possible. When after toiling hard before the arbitrator and before the court a litigant finally succeeds in getting the challenge rejected, he feels that this is the end of his miseries, while, in fact, his miseries start from the time when he takes steps to enforce the award. The respondent still has a right to appeal against the decision of the lower court and along with the appeal an application is always filed for staying enforcement of the arbitral award. Surprisingly, such stays are often granted. It is submitted that Courts should be reluctant to grant stay of such money decrees unless very strong reasons exist for doing so. The High Courts at Himachal Pradesh, Allahabad, Rajasthan and a few other High Courts, while admitting the appeal require the appellant to deposit the decreetal amount in the court. These High Courts also invariably allow the decree-holder to withdraw 50% of the said money against personal surety and the balance 50% against adequate security. It is submitted that the same procedure should be followed throughout the country.

(E) Effect of Delays

Reasons for delay in arbitration:

Reasons which contribute towards delay in resolution of disputes are innumerable. However, some of these are:

(1) Non-fixation of time for filing claims;
(2) Failure to appoint arbitrator early
(3) Appointing arbitrator from non-related field;
(4) Lack of proper training of arbitrators;
(5) Late completion of pleadings;
(6) Holding arbitration hearings for short durations;
(7) Liberal grant of adjournments;
(8) Payment of fees to arbitrators on daily basis;
(9) Ignoring stipulations of agreement; and
(10) Challenging award in routine

Delay after delay, on one or the other count, frustrates the parties. Not only time but a substantial amount of money goes down the drain. Greed on the part of the arbitrators and the advocates has brought the institution of arbitration in disrepute. In *State of Kerala v. C. Abraham* AIR 1989 Ker 61 (FB), a Full Bench of Kerala High Court observed:

> "The engineering profession enjoyed a unique reputation by the acceptance of their status as decision makers, even while in the employment of the one party or the other. An objectivity and impartiality could rightly be attributed to them. Things have now changed much, regrettably indeed. The pattern of function of some of the arbitrators (who could pass non-speaking awards) tended to forfeit the credibility of the very system itself".

It is a matter of common knowledge that where the arbitrators and lawyers are paid on daily basis, the proceedings drag on for years together. The very purpose for going to arbitrator is to see that disputes are resolved not only economically but expeditiously as well. It is a matter of serious concern that arbitration is taken as a part-time assignment, both by arbitrators and lawyers. Actually, it is not. It has often been observed that lawyers insist on hearings for short durations and that too only in the evenings and on holidays or weekends. Though court work is very important, however, arbitration work too is equally important. Time has come when we hold arbitration hearings for entire days and that too on a continuous basis, i.e. for a week at a time as is being done in some foreign countries.

A cautionary note must, however, be sounded here. Though the endeavour is to expedite hearings, however, this does not mean that the proceedings should be steamrolled. Request for oral hearing made by a party must not be rejected by an arbitrator because no party can be denied the right to prove his case. In *Rakesh Kumar v. State of H.P*, 2005(3) Arb LR 187 (HP) the arbitrator rejected the request of the petitioner for oral hearing on the ground that it cannot be allowed unless the other party consents to the said request. The award was made without permitting the petitioner to advance oral arguments. The High Court set aside the award on account of denial by the arbitrator to one party to prove his case.

In Government organizations, it has been observed that it is customary to challenge awards. This is due to the fact that no Government/PSU officer wants to take responsibility of accepting an award without a court putting its stamp of approval on the same. Due to fear of audit objections and/or motivated criticism and/or to save oneself of allegations of corruption, officers prefer to challenge awards rather than to accept them. It is recommended that to avoid such a situation, the Government/PSUs should constitute permanent committees of upright officers, which could make binding recommendations on whether to accept an award or to challenge the same on few claims only which are totally unacceptable to the department.

Interest – Effect of delay

A grave effect of delay in enforcement of arbitration awards is that the interest burden keeps on increasing. The power of the Arbitral Tribunal to award interest has been given statutory recognition by the Arbitration and Conciliation Act, 1996. Section 31(7) of the said Act empowers the Arbitral Tribunal to award pre-suit, pendentelite and future interest. It is further stated by Section 31(7)(b) that the Arbitral Tribunal can award future interest @ 18% p.a.

Before the enactment of the above-said Legislation, the power of the Arbitrator to award interest was subject to divergent judgments from the Supreme Court. In *Executive Engineer (Irrigation), Balimala v. Abhaduta Jena*, (1988)1 SCC 418, it had been held that the Arbitrator had no power to award interest – whether pre-suit, pendentelite or future interest. This judgment was overturned in stages by the following judgments:

In *Secretary, Irrigation Department, Government of Orissa v. G.C. Roy*, AIR 1992 SC 732, it was held that the Arbitrator had the power to award pendentelite interest. In *Hindustan Construction Co. Ltd. v. State of Jammu and Kashmir*, AIR 1992 SC 2192, the power of the Arbitrator to award future interest was recognized. In *Executive Engineer, Dhankanal Minor Irrigation Division, Orissa v. N.C. Budhiraj*, (1999)9 SCC 514, the Arbitrator's power to award pre-suit interest was also restored.

As award of interest is seen as compensation for deprivation of money lawfully due and payable to a person, courts in India have upheld award of high rates of interest. In a number of reported cases, award of 18% interest has been held to be reasonable [See *Rajasthan State Electricity Board v. Narmada Industries*, 1995(1) Arb LR 306 (SC); *Krishan Kumar Madhok v. Union of India*, AIR 1982 Delhi 332 (DB); *Tarun Traders & Partnership Firm v. Auchtel Products Ltd.*, 2001(1) Arb LR 105 (Bom); *Madun Lal Maggon v. DDA* 2001(1) RAJ 571 (Del); *M.S.J. Consultants Ltd. v. DDA*, 2001(3) RAJ 545 (Del); *Channa Brothers and Co. v. Union of India*, 2003(1) Arb LR 157 (SC)].

It has been held that the rate of interest awarded by an Arbitrator cannot be challenged in any Court of law [*Superintending Engineer, TNUDP, Madras Circle v. AV Rangaraju*, AIR 1994 Madras 217; and *BL Gupta Construction (P) Ltd. v. Bharat Cooperative Group Housing Society Ltd.*, (2004)1 SCC 110].

Courts in India have also held that an Arbitrator can award compound interest [*Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1) SCC 644; *Executive Engineer v. Amar Nath Aggarwal*, 1993(3) Pun LR 1]. It has also been held that interest awarded on certain claims can become a part of the principal, and the entire amount would then carry interest [*ONGC v. M.C. Clelland Engineers, SA*, AIR 1999 SC 1614].

Where a particular rate of interest is mentioned in the agreement, i.e. the rate at which the employer gives advances to the contractor, it has been held that it was the agreed rate of interest between the parties and the Arbitrators were empowered to award the same rate of interest [*Gautam Construction and Fisheries Ltd. v. National Bank for Agricultural and Rural Development*, (2000)6 SCC 519 and *Bhagwati Oxygen Ltd. v. Hindustan Copper Ltd.*, (2005) 6 SCC 462.]

The following cases demonstrate how delays in the adjudication process increase the liability of a party by way of interest:

RSEB v. Narmada Industries, 1994 Supp (3) SCC 458

Principal Amount	:	Rs. 4,56,741/-
Interest payable from (at varying rates)	:	13.1.1981
Date of judgment	:	24.9.1994
Assuming that payment was made on the said date, interest payable	:	Rs. 10,69,047/-

ONGC Ltd. v. M.C. Celland Engineers, SA, (1999)4 SCC 327

Principal Amount	:	$ 412,701/-
Interest payable from (at varying rates)	:	5.11.84
Date of judgment	:	23.4.1999
Assuming that payment was made on the said date, interest payable	:	$ 709,363/-

Suresh Kumar Jain v. DDA, 2003(1) Arb LR 157 (SC)

Principal Amount	:	Rs. 3,37,732/-
Interest payable from (at varying rates)	:	25.3.1991
Date of final judgment	:	14.2.2002
Assuming that payment was made on the said date, interest payable	:	Rs. 4,15,410/-

Hindustan Construction Co. v. TNEB, 2005(1) Arb LR 41 (Mad) (DB)

Principal Amount	:	Rs. 1,00,09,105/-
Interest payable from (at varying rates)	:	22.11.1989
Date of judgment	:	4.8.2004
Assuming that payment was made on		

the said date, interest payable	:	Rs. 1,61,84,722

Union of India v. Roshni Devi, 2005(1) Arb LR 363 (J&K)

Principal Amount	:	Rs. 24,44,500/-
Interest payable from (at varying rates)	:	24.7.1991
Date of judgment	:	1.12.1999
Assuming that payment was made on the said date, interest payable	:	Rs. 30,55,625/-

M.L. Mahajan v. DDA, 2005(1) Arb LR 561 (Del)

Principal Amount	:	Rs. 3,43,799/-
Interest payable from (at varying rates)	:	18.12.1986
Date of judgment	:	4.4.2005
Assuming that payment was made on the said date, interest payable	:	Rs. 7,52,358/-

Bhagwati Oxygen v. Hindustan Copper Ltd., (2005)6 SCC 462

Principal Amount	:	Rs. 74,84,521/-
Interest payable from (at varying rates)	:	August 1993
Date of judgment	:	5.4.2005
Assuming that payment was made on the said date, interest payable	:	Rs. 1,57,17,494/-

Delhi Jal Board v. Subhash Pipes Ltd, 2005(2) Arb LR 213 (Del)

Principal Amount	:	Rs. 34,91,313/-
Interest payable from (at varying rates)	:	1.4.96 & 12.4.02
Date of judgment	:	15.2.2005
Assuming that payment was made on the said date, interest payable	:	Rs. 48,00,724/-

ONGC Ltd. v. Garware Shipping Corp. Ltd., 2005(2) Arb LR 279 (Bom)

Principal Amount	:	Rs. 4,66,15,828/-
Interest payable from (@ 9% p.a.)	:	5.2.2002
Date of judgment	:	7.12.2004
Assuming that payment was made on the said date, interest payable	:	Rs. 1,19,15,006/-

Mohd. Ummar Nizami v. State, 2005(2) Arb LR 295 (J&K)

Principal Amount	:	Rs. 10,86,072/-

Interest payable from (at varying rates)	:	April 1983
Date of judgment	:	19.5.2004
Assuming that payment was made on the said date, interest payable	:	Rs. 27,47,762/-

The above compilation is only illustrative and the cases have been picked up at random. However, each one of the above illustrates the fact that delay in resolution of disputes compounds considerably the amount which ultimately has to be paid by the party against whom the award is passed.

Suggestions:

There can be no doubt whatsoever that appointment of an arbitrator at High Court level ensures better talent. The practice is welcome but the problem is that in some High Courts inordinately long time is taken in appointing an Arbitrator.

The appointed arbitrators, particularly engineers, have hardly any exposure of law. They start considering themselves to be having same powers as that of serving Judges. They need to be given training as to how to conduct arbitral proceedings.

Challenge made under Sections 12, 13 and 16 of the Act must not be allowed to be decided by arbitrators. There is hardly any reported case where any arbitrator had accepted challenge to his jurisdiction and when the award is set aside on account of lack of jurisdiction on the part of arbitrator, arbitration has to start *de novo*. Courts need to be given powers to decide applications under Sections 12, 13 and 16 of the Act within a limited period of time.

Objections filed by a party under Section 34 must be decided by the Court within a short span of time, say between 6-9 months, and if aggrieved party wishes to make an appeal, it must be asked to deposit the decreetal amount before appeal is admitted.

An amendment needs to be made in the Act to the effect that no evidence is to be led while dealing with application under Section 34 of the Act. It is seen that in many Courts, the application under Section 34 is treated at par with an ordinary Civil Suit, which results in the matter prolonging for years together.