LAW COMMISSION OF INDIA
SEVENTY : SIXTH REPORT
ON
ARBITRATION ACT, 1940

November, 1978

D.O. No. F. 2(8)/77-L.C.
CHAIRMAN
LAW COMMISSION
GOVERNMENT OF INDIA,
NEW DELHI-110001

Dated the 9th November, 1978.

My dear Minister,

I forward herewith the Seventy-Sixth Report of the Law Commission of India relating to Arbitration Act, 1940.

As mentioned in the first paragraph of the Report, the subject was taken up for consideration by the Law Commission at the instance of the Government.

I place on record my appreciation of the valuable assistance received from Shri P. M. Bakshi, Member Secretary of the Commission in the preparation of the Report.

With kind regards,

Yours sincerely,

Sd.

(H. R. KHANNA)

Hon'ble Shri Shanti Bhushan,
Minister of Law, Justice & Company Affairs,
New Delhi-110001

MGIPCBE—S1—7 M of LJ&CA/ND/78—5-2-80—2,000 Bks.

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APPENDIX

CHAPTER 1

INTRODUCTORY

Reasons for taking up the subject.

1.1. This Report deals with revision of the Arbitration Act, 1940, forming an important part of adjective law. The Commission has received a reference from the Government of India requesting it to undertake revision of the Act[1]. Besides this, a number of subjects dealing with adjective law have already been dealt with by the Law Commission,—subjects covering civil and criminal procedure, evidence and limitation. To complete revision of the major portion of the adjective law, the Commission has reviewed in this Report the entire Act.

Essence of the law of arbitration.

1.2. The law of arbitration is integrally connected with the question how far parties should choose their own forum rather than that consituted by the law. It is not uncommon for parties to choose a tribunal that is intended to resolve disputes between them. The tribunal might be stipulated in the contract itself or in a collateral agreement, or the tribunal might be agreed upon after the contract has been made and a dispute has arisen. It is the concern of the law of arbitration to decide how far such agreements should operate, and to what extent they should be supplemented by provisions designed to meet points on which the agreement may be silent.

Delay and expense.

1.3. Practical experience of the working of the Act has shown that though, by and large, the scheme of the Act is sound, some provisions have in actual working caused difficulties and have resulted in delay and needless expense. Although we have come across criticism of the Act in one or two judicial pronouncements,[2] we do not think that the Act suffers from any radical defect or that on that score it should be thrown out lock, stock and barrel.

Approach

1.4. The Commission on a study of the various materials and case law on the subject is of the view that there is need to improve certain provisions of the Act that cause delay or hardship to the parties, or unnecessarily introduced clogs which hinder, the smooth course of the proceedings. Although we had an initial inclination to re-number some of the sections[3] because of our feeling that the subjects dealt with in those sections could be more appropriately dealt with at a different place, we realised the importance of adhering to the present numbering. A change in the numbering would have caused inconvenience to lawyers and businessmen who have become familiar with it and would, to a certain extent, have caused confusion.

In the formulation of a law on arbitration two conflicting considerations present themselves; on the one hand due weight has to be given to the arrangement made by the parties themselves relating to the personnel and machinery for the settlement of their dispute; on the other hand, unfair or impracticable arrangements have to be modified in the interests of justice.

The desirability of maintaining a certain amount of uniformity of interpretation of the law has also to be borne in mind. In making our recommendations on the subject, we have been mindful of these considerations.

Before we proceed to make our recommendations on each section, we would like to deal in brief with the history of arbitration in general and history of the statutory law in India on the subject in particular.

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1. D. O. No. F. 8(15)/76—L.C., dated 27th July, 1977 of the Secretary, Department of Legal Affairs addressed to the Member-Secretary, Law Commission (see Appendix).
2. e.g. *Saha & Co. v Ishar Singh*, A.I.R. 1956 Cal. 321, 341.
3. e.g. section 30, which was proposed to be transferred earlier, in the group sections 15-17.

Roman law.

1.5. In the Western world, arbitration has been known for centuries. An ancient authority on arbitration stated[1]:

> "It is commendable at the outset of a trial to inquire of the litigants whether they desire adjudication according to law or settlement by arbitration. If they prefer arbitration, their will is granted. A court that always resorts to arbitration is praiseworthy, concerning such a court, it is said, 'Execute the justice of peace in your gates' (zech. 8:16)."

> "What is the kind of justice that carries peace with it? Undoubtedly, it is arbitration: So too, with David, it is said, "And David executed justice and charity unto all his people" (II Sam, 8:15). What is the kind of justice which carries charity with it? Undoubtedly, it is arbitration, i.e., compromise (thus), even if the judge has already heard the arguments of the litigants and knows in whose favour the verdict will be, it is commendable to effect an arbitration..... ... The (moral) power of arbitration is greater than that of adjudication."

In the Western world, some form of aribtration has been in existence for a long period; but two rival trends have clamoured for supremacy in this field in the course of history—the supremacy of the Courts and the supremacy of private tribunals. In Roman law, there was no struggle to establish the jurisdiction of the ordinary courts as against rival tribunals. Accordingly, contracts for the submission of disputes to the decision of persons were recognised, and there were rules as to their effect and enforcement. This was further developed in the civil law, and in Continental Codes of Civil Procedure.[2]

Arbitration, called "compromise (compromissum)", was a mode of terminating controversies much favoured in the civil law.[3]

Amongst the Greeks, international arbitration was a recognised practice. It is mentioned as such by Herodotus and Thucydides.[4] The Roman Senate, and later the Roman emperor, arbitrated between subject peoples.

In the city-states in Greece back in the sixth, fifth and fourth centuries B.C., disputes were settled by arbitration. The nature of the disputes included "boundary delimitation, ownership of colonies, ownership of particular pieces of territory, assessment of damages suffered through a hostile invasion, (and) in recovery of money owned by one state to another, and in all sorts of religious matters.[5]

Common law policy against ouster of jurisdiction.

1.6. This approach of the ancient world and Roman law may be contrasted with the common law. At common law, there was said to be a policy against agreements ousting the courts jurisdiction. In the beginning[6] it was necessary to establish the jurisdiction of the courts of politically organised society to replace the instituions of kin-organised society, self-help and the help of one's kinsmen, self-redress, and private war. In the Middle Ages, there was a contest for jurisdiction between the courts of the king and the courts of the Church. In England, after the Conquest, the King's courts acquired jurisdiction at the expense of the old customary and feudal local tribunals. The common law grew up in the King's courts in and after the thirteenth century. Not unnaturally, the common law courts looked jealously at agreements to submit private disputes to extra-judicial determination instead of to the appointed tribunals of politically organised society.[7] A doctrine that a contract to arbitrate on existing dispute or such

1. The Book of Judges—Code of Maimonides (1949), 66, quoted in Tiewul and Tsegah, "Arbitration and settlement of commercial disputes" (July 1975) 24 I.C.L.Q. 93, 394.
2. Pound, Jurisprudence (1959), Vol. 5, page 360.
3. Story, Equity Jurisprudence, 2nd Edn., page 1001, cited in *Chandabassappa Baslingayaya*, A.I.R. 1927 Bom. 565, 567.
4. International Encyclopaedia of Social Sciences, Vol. 1, page 50.
5. Wehringer, Arbitration : Precepts and Principles (1969), page 5.
6. Pound, Jurisprudence (1959), Vol. 5, pages 357, 358.
7. Pound, Jurisprudence (1959), Vol. 5, page 358.

disputes as might thereafter arise, either generally or under a particular transaction, was void as against public policy, was taken to be well settled.

But the exigencies of business brought about an increasing demand for commercial arbitration. In 1856, the House of Lords limited the common-law bars on arbitration agreements, by distinguishing an arbitration clause which made a condition precedent in a contract, so that there could be no claim to enforce judicially until after performance of the condition, from a contrast to submit an existing claim to arbitration.[1]

History of control by courts.

1.7. Though arbitration was recognised by the common law in England, from the very nature of an arbitration, some degree of control by the King's courts has been inevitable from Stuart times onwards. The growth of British overseas trade, and the expansion of the Empire from the time of the Treaty of Paris (1763), enlarged greatly the work of merchants and traders. Consequently, matters in dispute between such persons became increasingly frequent, and of major importance in the mercantile affairs of the realm. At first, these disputes were, in practice, decided under the common law, and related originally to chattels personal, or torts to the person. In more recent times, disputes were referred to arbitration in questions on real property, and more frequently, questions in the law of contract.[2]

Thus, from the passing of the Arbitration Act 1897, the legislature in England became aware of the necessity of provisions which would aid the common law. A number of enactments were added to the Statute Book, culminating in the Common Law Procedure Act, 1854. The advent of railways, tramways and other mechanical means of transport led to an enormous increase of cases held in arbitrations in the second half of the nineteenth century, and as a result, Parliament passed the Arbitration Act of 1889. This statute has been the bedrock of statutory arbitration ever since, and codified the general law as it then stood.[3]

The English Act of 1889 was mainly declaratory of previous legislation, or of commercial and conveyancing practice. Many substantial changes in the previous law were made by the Arbitration Act, 1934. On September 1, 1950, there came into force the Arbitration Act, 1950, which purports to consolidate without amendment all the earlier Acts on Arbitration. We shall have occasion to refer to its various provisions when we discuss the corresponding provisions of our law.

U.S.A.

1.8. In the United States, arbitration began in 1887 when the Chamber of Commerce of the State of New York set up the first privately administered tribunal of businessmen and became the first administrator of arbitrations.[4] Arbitration in the U.S.A. generally followed the pattern of the English common law until 1920, when New York adopted the first modern arbitration statute. Previously, agreements to refer to arbitration disputes that might arise in the future could be revoked at any time prior to an actual settlement.[5] Such agreements were held unenforceable, although not illegal, on the theory that they would deprive the courts of jurisdiction.[6] Following the adoption of the New York statute, the federal government (in 1925) and 15 states enacted similar statutes relating to arbitration. The federal Act does not prescribe the rule of decision for all cases in the federal courts, but is confined to subjects within federal legislative control, namely, maritime transactions and those involving interstate commerce. In other cases that may be litigated in the federal courts,—e.g., in suits between citizens of different states,—the law of the state in which the federal court sits either provides the controlling law on arbitration or points to the law of the appropriate state.[7]

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1. *Scott v Avery*, (1856) 5 H.L.C. 811.
2. Gill, Law of Arbitration (1975), page 1.
3. Gill, Law of Arbitration (1975), page 2.
4. Wehringer, Arbitration : Precepts and Principles (1969), page 5.
5. Encycl. Britannica, Vol. 2, page 214.
6. Encycl. Britannica, Vol. 2, page 214.
7. Encycl. Britannica, Vol. 2, page 214.

A Uniform Arbitration Law was adopted by the National Conference[1] of the Commissioners on Uniform State Laws in 1955, and amended in 1956.

In the early 1960s, all states in the U.S.A. (with the exception of Oklahoma and South Dakota) had some statutory provisions for arbitration.[2] Not all, however, provided for enforcing an agreement to arbitrate future disputes; many followed the rule that none but existing controversies could be made the subject of an agreement for arbitration. In contrast, the Uniform Arbitration Act recognises agreements regarding both existing and future disputes.

Institutional arbitration in the U.S.A.

1.9. Although individuals frequently agree, either by contract or after a dispute has arisen, that a dispute will be arbitrated by some specific procedures, the majority of arbitrations in the U.S.A. are held under the auspices of organisations that have procedures for arbitration as an explicit part of their trading rules, bylaws or constitutions.

Such "institutional arbitration" has a long history in the U.S.A. The New York Chamber of Commerce had arbitration facilities from the year 1761 to 1920, and the New York Stock Exchange provided for arbitration of member's disputes in its 1817 constitution. Trade associations frequently provide the machinery for settling disputes among members, and occasionally such facilities are available to non-members as well. In some instances an association has joined several others to provide joint arbitration machinery. Additional facilities for handling disputes by arbitration were made available through the auspices of the American Arbitration Association, a non-profit making organisation that maintained a panel of arbitrators and provided administrative services for judging both labour and commercial disputes.

History in India --Regulation.

1.10. India has a long tradition of arbitration. The settlement of differences by tribunals chosen by the parties themselves, whose decision is to be accepted as final and conclusive between themselves,—which is the basic idea of arbitration,—was well known to Hindus in ancient India. There were in fact, different grades of arbitrators with provisions for appeals in certain cases from the award of a lower grade of arbitrators to arbitrators of the higher grade. The practice seems to have been in vogue immediately before the advent of the British. Sircar[3] refers to an interesting article on the subject[4] published in 1828.

Apart from the courts statutorily established by the king, where the king or the chief justice appointed by him presided, other tribunals were recognised in the ancient smritis (legal texts) and digests.[5]

Yajnavalkya and Narada

1.11. Yajnavalkya[6] refers to three types of popular courts (Puga, Sreni, Kula), and Narada[7] states that law-suits may be decided by village councils (Kulani), corporations (sreni), assemblies (puga in Yag., gana in Nar.)[8]

It is remarkable that, having recognised the relevance and validity of arbitration proceedings before judges not statutorily appointed who were almost in the position of arbitrators, appeals were provided against the decisions of these arbitration courts to the courts of judges appointed by the

1. Wehringer. Arbitration : Precepts and Principles (1969), page 5.
2. Encycl. Britannica, Vol. 2, page 214.
3. Sircar on Law of Arbitration in British India (1942), page 5.
4. Transactions of the Royal Asiatic Society (1828), Vol. 2.
5. Dr. P.B. Gajendragadkar, Address to the Fifth International Arbitration Congress, Proceedings of the Fifth International Arbitration Congress (7-10 Jan. 1975, New Delhi), pages BI-3 to BI-4.
6. Yajnavalkya II. 30.
7. Jolly, S.B.E. 33 (Narada), page 6.
8. Kane, History of Dharamsastra (1946), Vol. 3, page 280, cited by Dr. P.B. Ganjendragadkar in his address to the Fifth International Arbitration Congress, Proceedings of the Fifth International Arbitration Congress (7-10 January, 1975), pages BI-3 to BI-4.

King and ultimately to the King himself. As Dr. Kane observes,[1] the three courts mentioned by Yajnavalkya and Narada were practically arbitration tribunals like the modern panchayats. Thus, it is clear that ancient Hindu Jurisprudence recognised two methods by which disputes between citizens could be decided; one was by judicial process in the courts established by the King, and the other by the different categories of arbitration institutions.

Villages in India.

1.12. We have it on the authority of a well-known writer on historical jurisprudence,[2] that the villagers had a judicial system of their own, which was familiar and respected by them; the various traders and guilds has a similar system.

The *puga* courts were comprised of persons dwelling in the same place, irrespective of their caste or employment, and were competent to decide cases in which the local public were interested.[3]

The *srenis* (guilds) were associations of persons engaged in similar pursuits, of which the merchant's guilds were the most important. They were competent to decide matters relating to their special calling for traders.[4]

Social matters concerning the members of a particular community could be investigated and decided at the level of the kulas,[5]

The three arbitration courts (Kula, Sreni and Puga or Gana), were private tribunals, in the sense that they were not constituted by a royal authority and they resembled arbitrators to that extent.[6] According to Sir Henry Maine:

> "In those parts of India, in which village community was most perfect, the authority, exercised elsewhere by the headman, was lodged with what was called the village council or the panchayat.
>
> It was always considered a representative body and whatever was its real number, it always bore the name which recalled its constitution of five persons or 'Panchayat'. Traces of this method of setling disputes can still be found in certain communities in the country."[7]

Dr. P. N. Sen's view.

1.13. The great Hindu jurist, Priyanath Sen, thinks that "the three arbitration courts could only decide disputes which came within their special province, being disputes relating to matters which, from their very nature, fell within their special knowledge, for instance, disputes regarding trade and other local concerns. These local courts had a sort of delegated authority within their limited spheres, but their decisions were subject to appeal in the following order; a case having been decided by a family, an appeal lay to the corporation, by a corporation to the community, and by a community to the officers appointed by the King, or in other words, to the court properly constituted to try all disputes. According to Narada, a decision arrived at by the king's court from which the king is absent is appealable to the king himself."[8]

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1. Kane, History of Dharmasastra (1946), Vol. 3, page 230.
2. Lee, Historical Jurisprudence, page 141, cited by M.K.Sharan, Court Procedure in Ancient India (1978), pages 24, 25.
3. M.K. Sharan, Court Procedure in Ancient India (1978), page 26.
4. M. K. Sharan, Courts Procedure in Ancient India, (1978), page 26.
5. M.K. Sharan, Court Procedure in Ancient India (1978), page 27.
6. S.Varadachariar, The Hindu Judicial System (Radha Kumud Mookharjee Endowment Lectures), (1945), page 98.
7. Maine, Ancient Village Communities, quoted in Indian Council of Arbitration, "Law of Arbitration in India" issued by the Indian Council of Arbitration (August 1972), pages 1-2.
8. Dr. Priyanath Sen's Tagore Law Lectures, 1909 on "The General Principles of Hindu Jurisprudence", page 363, cited by Dr. P.B. Gajendragadkar in his address to the Fifth International Arbitration Congress, Proceedings of the Fifth International Arbitration Congress (7-10 January, 1975), pages BI-3 to BI-4.

British period—The Regulations.

1.14. In the British period, the initial Bengal Regulations did not try to abolish the system of panchayats.[1] The Bengal Regulations of 1772, 1780 and 1781 were designed to encourage arbitration.[1] We find in a Bengal Regulation of 1781 an interesting provision recommending arbitration, and also another interesting provision to the effect[1] that no award of any arbitrator or arbitrators shall be set aside, except upon full proof, made by the oath of two credible witnesses, that the arbitrators had been guilty of gross corruption or partiality, in the cause in which they had made their award.

The Regulations made by Lord Cornwallis in 1787 included a provision for arbitration with the consent of parties, but, there were no provisions for the consequences of the award not being made in time, nor for the situation, when arbitrators differed in their opinions.[1]

Regulations in Bengal and Madras.

1.15. Much more comprehensive was the set of provisions in Bengal Regulation 16 of 1793, which, *inter alia*,[1] provided for the reference by the court to arbitration with the consent of the parties in suits for accounts, partnership debts, breach of contract, where the valuation exceeded 200 sicca rupees and the like. Procedural provisions this time were very elaborate, and, after the extension of this Regulation by subsequent Regulation in 1803 to Banaras and to the ceded Provinces, the territorial application of the Bengal Regulation of 1793 covered a pretty large portion of so much of Northern and Eastern India as had, by the time, come under the British Rule. Regulation 6 of 1813 extended the Regulation of 1793 to disputes relating to land.

In the meantime, Madras Regulation 4 of 1816 gave certain powers for calling in Panchayats for settling disputes; Madras Regulation 5 of 1816 was intended to encourage awards by village panchayats and provided machinery for working out the scheme. The scheme contemplated awards by village panchayats with compulsory service for a villager on a panchayat and was administered through the village Munsiff,—later by the District Munsif.

Bombay Regulations.

1.16. In Bombay, the famous Regulation 4 of 1827 and Regulation 7 of 1827 provided for arbitration.

Bombay Regulation 7 of 1827 (repealed by Act 1 of 1861) in its preamble expressly provided for arbitration through the intervention of the court.[2] Section 1 of the Regulation gave express power to resort to arbitration notwithstanding a pending suit. Section 9, clause 1 of the Regulation provided that awards (when filed under the Regulation) have the force of decreases. Section 9, clause 2, of the Regulation provided that "arbitration awards or other adjustments not so filed shall not be entitled to any other consideration in a court other than as evidence, or agreements, to be adduced or proceeded on by ordinary course of law."[2]

Act of 1859 and later Acts.

1.17. (a) This position continued in substance till 1859, when Act 8 of 1859 which codified the procedure of Civil Courts (except those established by Royal Charter) provided for arbitration. Arbitration in the course of a suit was dealt with in sections 312 to 325 of that Act.

(b) In 1862, when the Supreme Courts and the courts of Sudder Diwany Adalat in the Presidency towns were abolished, the Act was extended to courts in the Presidency towns.

(c) Act 8 of 1859 was followed by later Codes relating to Civil Procedure, viz., Act 10 of 1877 and Act 14 of 1882, but no notable change relating to the law of Arbitration was introduced by these two later codes of Civil Procedure. The two Codes were confined to arbitration in the course of a suit.

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1. Sircar, Law of Arbitration in British India (1942), page 6.
2. *Chanabassappa* v. *Baslingayyaya*, A.I.R. 1927 Bom. 565, 568.

1.18. The next step was the Indian Arbitration Act, 1899. The Act did not apply to disputes which were the subject-matter of suits.[1] The Act applied[2] in cases where, if the subject-matter submitted to arbitration were the subject of a suit, the suit could, whether with leave or otherwise, be instituted *in a Presidency town*. By section 23 of the Act, a similar provision was made for Rangoon. The Local Government was given power by the provisions of section 2 to extend the Act to other areas, but this power was never exercised. Act of 1899

1.19. The Indian Act of 1899 thus dealt with arbitration by agreement without the intervention of the court, and was limited to Presidency towns and to such other areas to which it may be applied by local Government notification.[3] The Second Schedule to the Code of Civil Procedure, 1908, extended to all places to which the Act of 1899 did not extend, and contained (i) provisions for arbitration in respect of the subject-matter of suits[4], and (ii) provisions whereunder parties to a dispute might file their arbitration agreements before the court, which would then refer the matter to arbitration,[5] and (iii) provisions for arbitration without the intervention of court.[6] The main provisions on arbitration in the Code of Civil Procedure, 1908, were section 89 and the Second Schedule. Act of 1899 and Code of 1908.

1.20. Before the Code of 1908, the provisions relating to arbitration were, as already stated,[7] contained in the Civil Procedure Code, 1882, sections 506 to 526. The Special Committee[8] which was presided over by Sir Erle Richards recorded in 1907 its opinion that in due course the provisions regarding arbitration should find a place in a new and comprehensive Arbitration Act; but since there were difficulties in doing so at that time, they decided to leave the arbitration provisions in the Code, placing them, however, in a Schedule in the hope that they would be transferred to a comprehensive Act. Code of 1908 Genesis.

1.21. It was in this background that the Code of 1908 was enacted. Code of 1908.

1.22. In the twenties of the present century, the Civil Justice Committee was appointed to report on the machinery of Civil Justice. The Report of the Committee contains, *inter alia*, suggestions for modification of the law of arbitration. Some time passed before action could be taken on the recommendations of the Civil Justice Committee. This was primarily due to the fact that the Government proposed to wait till the expected new English Act was placed on the Statute book after consideration of the Mackinnon Committee on the law of arbitration. That Committee made its report in 1927, which was followed by the English Act of 1934, and thereafter the way was cleared for action in India. In 1938, the Government of India appointed Shri Ratan Mohan Chatterjee, Attorney-at-Law, as a special officer, for revision of the Law of arbitration, and the revised Act was passed in 1940. Civil Justice Committee.

1.23. Thus, before the passing of the arbitration Act of 1940, the law on the subject of arbitration in India was contained in two separate enactments—the Indian Arbitration Act, 1899 and the Second Schedule to the Code of Civil Procedure, 1908. The two have been consolidated in the Act of 1940. Position immediately before 1940.

1.24. The framers of the Act, while re-enacting the provisions of the Act of 1899, or of the Code of Civil Procedure, 1908, relevant to arbitration, took the opportunity of drawing upon the (English) Arbitration Act of Act of 1940.

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1. *Amar Chand* v *Banwari Lall*, I.L.R. 49 Cal. 608.
2. Section 2, Indian Arbitration Act (10 of 1899).
3. Section 2, Act of 1899, para 1·18, *supra*.
4. Second Schedule, Code of 1908, para 1-16.
5. Second Schedule, Code of 1908, paras 17-19.
6. Second Schedule, Code of 1908, paras 20-21.
7. Para 1·17, *supra*.
8. Quoted in Civil Justice Committee (1924-25) Report, page 208, Chapter 13, paragraph 1.

1934. The Act of 1940 is an Act to consolidate and amend the law relating to arbitration. It is, therefore, primarily intended to be a complete code of the law.

Scheme.

1.25. The scheme of the Act is, to deal first with arbitration without intervention of a Court (Chapter II) then to deal with arbitration with intervention of a court where there is no suit pending (Chapter III), and then to cover arbitration in suits (Chapter IV). Provisions which are common to all the three kinds of arbitration constitute the remaining portion of the Act (Chapters V to VII and the Schedules).

Basic concept-Arbitration agreement.

1.26. The basic concept at the root of arbitration under the Act is an "arbitration agreement". As defined in section 2(a), it means a "written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not". Such an agreement is thus the foundation of every proceeding under the Act, and where there is no such agreement, or no differences between the parties, an arbitration cannot arise.

Working of the agreement.

1.27. An arbitration agreement is primarily an *agreement* and, therefore, to be construed as any other agreement. But, by virtue of section 3, certain provisions are deemed to be included in the agreement (if the agreement is silent on these points). These provisions are of a practical and detailed nature, intended to ensure the smooth working of the agreement. Further, sometimes the machinery for appointment of an arbitrator, as provided by the agreement, may not be complete, and the law, therefore, steps in by making suitable provisions to ensure that the agreement does not fail by reason of a lacuna on this subject (sections 4 to 10). Again, in order that the arbitration may not fail by reason of want of diligence or misconduct on the part of the arbitrators or umpire, the Act gives certain powers to *the court* for removal and appointment of arbitrators etc. (Sections 11 and 12). And, to facilitate the effective discharge by the *arbitrators* of their functions, the Act confers certain powers on them (section 13).

Award and its filling and confirmation.

1.28. When the arbitrators or umpire have made their award, it is filed in court (section 14), and the action to be taken by the court (thereon is dealt with in detail in a group of sections (sections 16 to 19 and 30), which may be said to constitute perhaps the most important part of the Act. Under the scheme of the Act, an award itself cannot be enforced; the parties must obtain the stamp of approval of the court, by securing a judgment in terms thereof. The court may *pass* such judgment, or *modify* the award, or *remit* the award, or *set aside* the award, on the grounds stated in the respective sections.

Arbitration with intervention of court or in suit.

1.29. These provisions[1] primarily apply to arbitration without intervention of the court. Section 20 then deals with arbitration with such intervention where there is no suit pending; and (after making certain detailed provisions as to the form and manner of making the application to the court for filing the agreement and as to an order of reference to the arbitrator appointed by the parties etc.) the section provides that the arbitration shall proceed in accordance with the other provisions of the Act, so far as they can be made applicable.

Where a suit is actually pending in a court, all the parties interested may agree to refer any matter in dispute to arbitration under section 21. Detailed provisions as to the appointment of the arbitrator and the order of reference in such a case are contained in sections 22 to 24. Under section 25, the provisions of the other Chapters shall, so far as they may be made applicable, apply to such arbitrations also.

General provisions.

1.30. General provisions applicable to *all* arbitrations then follow (sections 26 to 38). These also include a group of sections (sections 31 to 33) which unmistakeably indicate the intention of the framers of the Act that awards should not possess any sanctity by themselves, that they

1. Section 30, is however, a general section.

must be approved by the court by obtaining a judgment in terms thereof, and that the validity, effect or existence of the award of arbitration agreement between the parties to the agreement or persons claiming under them must be decided in the court in which the award has been filed for obtaining such judgment. It is only that court which is seized of all questions connected with the conduct of arbitration proceedings or otherwise arising out of such proceedings. In other words, both the forum and the manner of asserting or denying the benefits of arbitration are emphatically sought to be regulated by these sections. The Legislature thus "intended to make only one court as the venue for all matters connected with arbitration agreement or award and also to make applications (not suits) as the vehicle to approach the court".[1]

Acts of 1937 and 1961.

1.31. This, in brief, is the scheme of the Act of 1940. In respect of arbitration agreements entered into outside India and foreign awards, there is a special law, the Arbitration (Protocol and Convention) Act, 1937.[2] It mainly relates to matters considered as commercial under the law in force in India.[3] The operation of the Act is based on reciprocal arrangements.[4] The Act mainly concerns itself with the procedure for filing foreign awards and their enforcement, and the conditions of such enforcement.[5]

Detailed matters in respect of proceedings under the Act are left to be governed by the rules of the High Court.[6]

In 1961, a special Act for the enforcement of certain foreign awards was passed.[7]

Other provisions in Central enactments.

1.32. Apart from the Arbitration Act, 1940, there are provisions regarding arbitration in other Central enactments in force in India, listed below:[8]

1. The Religious Endowments Act, 1863. (20 of 1863)	Section 16	Reference to arbitration.
	Section 17	Reference under section 312 of the Code of Civil Procedure, 1859.
2. The Indian Trusts Act, 1882 (2 of 1882)	Section 43(c).	Two or more trustees if they think fit may compromise, compound, abandon, *submit to arbitration* or otherwise settle any debt, account claim etc. relating to the trust.
3. The Presidency Towns Insolvency Act, 1909.	Section 68(h)	The official assignee may refer any dispute to arbitration.
4. The Indian Electricity Act, 1910 (9 of 1910).	Section 52	Any matter directed to be determined by arbitration under this Act unless otherwise provided, shall be determined by persons nominated by the State Government and subject to provisions of the Arbitration Act, 1940.

1. *Nathu Lal v. Bahari Lal*, A.I.R. 1952 Nag. 65, 67 (Hidayatulla and Kaushalendra Rao JJ.)
2. The Act is still extant. See *M/s. Franceso v. M/s. Gorakharana*, A.I.R. 1960 Bom. 91.
3. Section 2 of the 1937 Act.
4. Section 2(b) of the 1937 Act.
5. Sections 2 to 8 of the 1937 Act.
6. Section 10 of the 1937 Act.
7. The Foreign Awards (Recognition and Enforcement) Act (45 of 1961).
8. The list is not intended to be exhaustive.

5. The Co-operative Societies Act, 1912 (2 of 1912).	Section 43(2)(l)	The State Government may make rules to provide for any dispute to be referred to the Registrar, or if he so directs, to arbitration and the procedure for arbitration.
6. The Aircraft Act, 1934. (as amended in 1972).	Section 9B	Where no agreement as to compensation can be reached, an arbitrator may be appointed by the Central Government, who after hearing the dispute, makes an award.
	Section 9D	Arbitrator to have certain powers of civil courts.
7. The Damodar Valley Corporation Act, 1948 (14 of 1948).	Section 49.	Disputes between the Corporation and the Government under the Act are to be referred to an arbitrator, to be appointed by the Chief Justice of India. The decision of the arbitrator is to be final.
8. The Electricity (Supply) Act, 1948 (54 of 1948)	Section 76	All questions arising between the State Government or the Board and a licensee or other person shall be determined by arbitration. The provisions of the Arbitration Act 1940 are to apply.
9. The Viswa Bharati Act, 1951 (29 of 1951).	Section 38	Every dispute arising out of a contract between the University and any of its officers or teachers is to be referred to a Tribunal of Arbitration, and the decision of the Tribunal is final.
10. The River Boards Act, 1956 (49 of 1956).	Section 22	Section 22 provides that the Arbitration Act, 1940 shall not apply to arbitrations under the Act.
11. The Defence of India Act, 1971.	Section 24	Payment of compensation for immovable property.
12. The Defence of India Act, 1971.	Section 31	Compensation for acquisition of requisitioned property.
13. The Defence of India Act, 1971.	Section 32	Power to make rules.
14. The Emergency Risks (Undertakings) Insurance Act, 1971.	Section 11	Determination of premiums unpaid.
15. The Delhi Road Transport Laws (Amendment) Act, 1971.	Section 5	Payment of value of assets and liabilities.
16. The Aircraft (Amendment) Act, 1972	Sections 9B, 9C and 9D of the principal Act of 1934 as inserted in 1972.	Payment of compensation. Arbitration to have powers of civil courts.
17. The Delhi Co-operative Societies Act, 1972.	Section 60	Disputes which may be referred to arbitration.
18. The Delhi Co-operative Societies Act, 1972.	Section 61	Reference of disputes to to arbitration.
19. The Antiquities and Art Treasures Act, 1972.	Section 20	Payment of compensation for antiquities and art treasures compulsorily acquired under Section 19.

20. (a) The North-Eastern Hill University Act, 1973.	Section 31	Procedure of appeal and arbitration in disciplinary cases against students.
(b) The North Eastern Hill University Act, 1973.	Section 30	Conditions of service of employees.
21. (a) The University of Hyderabad Act, 1974.	Section 30	Conditions of service of employees.
(b) University of Hyderabad Act, 1974.	Section 31	Disciplinary cases against students.
22. The Betwa River Board Act, 1976	Section 18	Disputes between the Board and the State Government.
23. The Delhi Agricultural Produce Marketing (Regulation) Act, 1976.	Section 31	Disputes regarding construction of rules etc. to be decided by the Controller of Weights and Measures.
24. Delhi Agricultural Produce Marketing (Regulation) Act, 1976.	Section 37	Provision for settlement of disputes.

Local Acts.

1.33. It may be mentioned that provisions for arbitration are contained in some local Acts also, e.g., the Co-operative Societies Acts of several states, or in bye-laws framed under local Acts, e.g., bye-laws made by the East India Cotton Association under the Bombay Cotton Contracts Act.[1-2]

In this connection, it is relevant to quote sections 46 and 47, which are relevant in as much as they make the Act applicable to statutory arbitrations under other laws.

Application of Act to statutory arbitration.

> "46. The provisions of this Act except sub-section (1) of section 6 and sections 7, 12, 36 and 37, shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as this Act is inconsistent with that other enactment or with any rules made thereunder.

Act to apply to all arbitrations.

> 47. Subject to the provisions of section 46, and save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder:
>
> Provided that an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by any court before which the suit is pending."

Impacts of amendments limited.

1.34. Before proceeding to discuss various sections of the Act, we would like to state that the impact of legislation on the prompt, effective and just disposal of arbitration proceedings is limited. Efforts should, no doubt, be made to improve the procedure for the resolution of disputes, but, in the ultimate analysis, there is much truth in the saying that "an arbitration is as good as an arbitrator".

1.35. After this general discussion, we now proceed to consider the changes needed in the provisions of the Act.

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1. See *Serichand Rai V. Panno*, A. I. R. 1943 Bom. 197.
2. See *Nanda Kishore V. Ballev etc. Society*, A. I. R. 1943 Cal. 255.

CHAPTER 2

DEFINITIONS

Section 2(a)—Arbitration agreement.

2.1. Section 2 contains certain definitions. We begin with the definition of "arbitration agreement" contained in section 2(a). The definition reads—

> "2(a). 'arbitration agreement' means a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not."[1]

The definition itself is simple and clear enough; but certain points of detail need to be discussed.

Validity of oral agreement—case law on the old Act.

2.2. The first question that arises is this. If parties do not enter into a written agreement and there is an oral agreement of arbitration, is such parole submission legally valid, and what is its effect? The position in this respect under the old Act was not very certain. One view was[2] that in such case there can be no valid submission, no valid award, no valid agreement, while the other view was[3] that even an oral submission is valid.[4-5].

The case law in the latter category construed the definition of 'submission' in the 1899 Act (which defined a submission as a 'submission in writing') narrowly, as not excluding an oral submission, on the ground that the Act did not contain any express provision that a submission other than in writing is invalid. According to these cases, an award passed on an oral agreement would be enforceable by suit.

Doubt as to position under section 47.

2.3. It is not, however, clear whether this position survives in India after the enactment of section 47 of the Arbitration Act, 1940. Under that section, subject to certain exceptions, the provisions of the Act shall apply to "all arbitrations" and to all proceedings thereunder. This shows a clear intention to make the Act exhaustive.[6] If so, oral agreements do not fall within the scheme of the Act. If the contrary is the position, and if oral agreements are still regarded as permissible, the situation would not be very satisfactory. In the first place, such agreements would not be governed by the Act, and a parallel law for the operation of such agreements and for the enforcement of awards passed thereon would co-exist with the Act. Secondly, such a parallel law cannot draw upon the various provisions of the Act (like the filling of vacancies, powers of arbitrators, powers of courts and so on), which are intended to fill up gaps left by the parties. There will, therefore, arise many uncertainties. In the third place, such a construction might defeat the object of the Act of 'consolidating' the law relating to 'arbitration'.

History of section 47

2.4. It may be stated that section 47, as drafted in the original Bill, rendered unenforceable an arbitration award obtained otherwise than under the Act. The Select committee re-drafted it as it stands now, observing, "This clause has been re-drafted in order to remove the dangers of the

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1. Compare section 32, English Act of 1950.
2. *Bukhan Bai v. Adamji*, I.L.R. 33 Bom. 69 (Beaman J.) (case under 1899 Act.)
3. *Mathuradas v. Madanlal*, I.L.R. 58 Bom. 369; A.I.R. 1934 Bom. 79 (case under 1899 Act.)
4. *Ramautar Sah v. Langat Singh*, A.I.R. 1931 Pat. 92 (case under which Act, not clear).
5. *Pannamma v. Kottamma*, A.I.R. 56 Mad. 85; A.I.R. 1932 Mad. 754 (case under 1899 Act).
6. *Vithal Das v. Shrinath*, I.L.R. (1948) All. 10.

provision that an arbitration award obtained otherwise than in accordance with the provisions of the Bill should be unenforceable *for any purpose*. The effect which this section, as re-drafted, is designed to produce is that arbitrations shall not be conducted in any way repugnant to the Act and that any arbitration award may, with the consent of the parties, be used for the purposes of rule 3 of Order 23 of the Code of Civil Procedure."[1]

The case law discussed above shows that the position cannot be regarded as beyond doubt.[2] A clarification seems to be required. The object of the Act would be defeated if awards made in pursuance of oral arbitration agreements are regarded as enforceable.[3]

Object of requirement of writing—Madras case on oral submission.

2.5. The object of requiring a matter to be in writing is, in general, to prevent the parties from contradicting each other as to what was agreed and understood. As has been observed, the object in requiring "writing" in section 4(b) of the Indian Act of 1899 was to "provide clear and unmistakable evidence of the submission to which the parties agreed".[4] Consistently with this object, oral agreement to refer differences to arbitration should *not* now be recognised. Award on such agreements can be operative if accepted by the parties *as an agreement*. But that is not the same thing as recognising their validity *as awards*.

Dealing with the point discussed above, Viswanatha Sastri J. referred to the case law which had held that an award obtained on a parole submission was enforceable by suit, though not by the special procedure under the Second Schedule. He offered his own coments in these words[5]—

> "The question is whether the Arbitration Act of 1940 has superseded the law as laid down in these cases. The answer is not free from difficulty in view of the uncertain nature of the statutory provision".

After discussing the various statutory provisions, he held the Act of 1940 to be exhaustive, and "an award passed on oral submission can neither be filed and made a rule of court under the Act, nor enforced apart from the Act."

Recommendation to amend section 47.

2.6. In our view, it is necessary to save the operation of the award to a *limited extent*, and we are recommending the insertion of a suitable proviso to section 47 to deal with the matter.[6]

Section 2(a) and rules of Association enjoining arbitration by members.

2.7. At this stage, it may be convenient to deal with another question which arises out of that part of section 2(a) which requires a "written agreement". Very often, rules framed by mercantile associations contain provisions for arbitration. Members of the Association are required to sign an application form agreeing to abide by its Rules.

Now, the question arises whether the signature on such application constitutes "a written agreement to submit" the differences to arbitration. On one view, when both the plaintiff and the defendant are members of the association and have signed the application form, it would amount to a written agreement to submit differences to arbitration.[7-8].

According to another view,

> "Application for membership and the acceptance thereof gave rise to a contract between the applicant and the company. There is no contract between members *inter se* by such application."[9]

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1. N.D. Basu, Arbitration Act (1977), page 849, quoting the Report of the Select Committee.
2. See also the Madras case, para 2·6, *infra*.
3. Para 2·3 *supra*.
4. *John Batt Co. v. Kunoolal*, I.L.R. 53 Cal. 65; A.I.R. 1926 Cal. 938, 940, right hand (Page J.)
5. *Belli Gowder v. Joghi Gowder*, A.I.R. 1951 Mad. 683, para 2.
6. See recommendation as to section 47, Chapter 10, *infra*.
7. *Mohan Lal v. Bissesar Lal*, A.I.R. 1947 Bom. 268, 270 (Bhagwati J.)
8. *Gordhan Das v. Natwar Lal*, A.I.R. 1952 Bom. 349, 354 (Shah J.)
9. *Hanutmal v. Khushi Ram*. I.L.R. (1949), 1 Cal. 199, 230, 231 (Das J.)

Recommendation to insert an Explanation below section 2(a).

2.8. In our opinion, it would be advisable to clarify the position in view of the conflict discussed above. Practical considerations require the adoption of the first view.[1] Of course, the initial agreement must, in any case, be in writing, and not oral.[2] In the light of what we have stated above,[3] we recommend the insertion of the following Explanation below section 2(a):—

> *"Explanation 1.—Where the members of any association agree in writing to abide by the rules or by-laws of the association, and those rules or by-laws contain a provision whereunder present or future differences between the members* inter se *or between a member and the association are required to be submitted to arbitration, they shall be deemed to have entered into a written agreement with each other within the meaning of this clause."*

Section 2(a) and arbitration at the option of party.

2.9. The question has arisen whether an agreement whereunder arbitration is to be resorted to *at the option* of a party would be valid. There are observations[4-5] to the effect that such a provision would not constitute a valid submission, but there are also decisions to the contrary.[6-7] In England, such an agreement seems to have been regarded as a valid submission.[8] The matter is, in our opinion, of such a nature as can be left to the courts rather than made the subject of express legislative provision.

Section 2(a)— Signatures not necessary.

2.10. As to signature, the Arbitration Act does not require that the arbitration agreement must be signed by the parties. Only a writing is required. It may be that one of the reasons why signature is not insisted upon is that the arbitration clause may be found in commercial documents, such as "bought and sold" notes,[9] or in the articles of private company,[10-11] some of which are not signed by the parties who agree to be bound by arbitration.

Whether fresh consent required.

2.11. There is yet another question relating to section 2(a). The definition of "arbitration agreement" in this clause may be said to comprise two branches:

(i) an agrement to submit *present* differences to arbitration, and

(ii) an agreement to submit *future* differences to arbitration

Thus, it covers both (i) an actual submission of a particular dispute *which has already arisen* to the authority of a particular arbitrator, and (ii) a arbitration clause by which the parties agree *that if disputes* of the *specified nature* arise, those disputes shall be referred to arbitration. In both the cases, the arbitration is *consensual,* being based on an agreement between the parties. Nevertheless, some controversy has arisen on the question whether it is enough that there should be an arbitration clause to refer future differences to arbitration, or whether, after the differences have arisen, there must again be consent to the actual reference—described in the definition by the word "submit"—in the absence of which consent the arbitration would not be legally valid. The fundamental question to be considered is this. Where, after the arbitration agreement as defined in section 2(a) has been entered into, a dispute arises between the parties, is

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1. Para 2.7, *supra.*
2. (Firm) *Narain Das v. Bhagwan Das,* A.I.R. 1951 All 860.
3. See para 2.7, *supra.*
4. *Burjor v. Ellerman City Lines Ltd.* I.L.R. 49 Bom. 854; A.I.R. 1925 Bom. 449.
5. *Maritima Italiana Steamship Co. v. Burjor* I.L.R. 54 Bom. 278, A.I.R. 1930, Bom. 185.
6. *Brindaban Chandra v.Bisheshwar Lal* I.L.R. (1937) 1 Cal. 606; A.I.R. 1938 Cal. 100.
7. *Kedar Nath v. Kesho Ram Cotton Mills Ltd.,* I.L.R. (1950) 1 Cal. 553.
8. *Woodall v. Pearl Insurance Co.* (1919) 1 K.B. 593, (1918-19) All E.R.p. 544.
9. *Ram Narain v. Lila Dhar* (1906) I.L.R. 33 Cal. 1237.
10. *Hickman v. Kent* (1915) 1 Ch. 881.
11. A collection of some of the rules of association will be found in Paruck, Arbitration Act (1955), page 429 *et seq.*

it necessary to obtain the consent of parties again to the reference to arbitration, or is it legally permissible to rely only on the arbitration agreement? Where the arbitration agreement combines an agreement for resort to arbitration with a reference of the dispute to *arbitration by that very agreement*, no particular difficulty arises. But where there is merely an agreement that the disputes arising between the parties shall be decided by arbitration—what may be called a "bare arbitration agreement"—is it necessary that when a dispute actually arises, the consent of the various parties to the reference should be again obtained? There exists a conflict of judicial opinion on the subject.

In *Thawardas Pherumal's* case,[1] it was observed by the Supreme Court as follows:—

> "A reference requires the assent of 'both' sides. If one side is not prepared to submit a given matter to arbitration when there is an agreement between them that it should be referred, then recourse must be had to the Court under section 20 of the Act and the recalcitrant party can then be compelled to submit the matter under sub-section (4).
>
> "In the absence of either agreement by 'both' sides about the terms of reference or an order of the court under section 20(4) compelling a reference, arbitrator is not vested with the necessary exclusive jurisdiction".

Controversy has arisen because High Courts have differed as to the precise effect of these observations.

Conflict of decisions.

2.12. According to one view,[2] consent of the parties to the actual reference cannot be given in advance.

2.13. According to another view,[3] consent to the actual reference can be given in advance.

2.14. Even in the same High Court, opinion has fluctuated[4-5] on the same subject.

Foreign Award Act, 1961.

2.15. At this stage, mention may also be made of the fact that the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) section 3, relating to stay of proceedings in respect of matters to be referred to arbitration, makes a distinction between a 'submission' made in pursuance of an agreement and the initial 'agreement'. The Supreme Court has pointed this out in a decision dealing with that Act.[6]

Contrast between 1961 Act and 1940 Act.

2.16. In contrast with the Act of 1961 which, as mentioned above[7] makes a dichotomy between "arbitration agreement" and "submission", the Act of 1940 makes no such dichotomy.

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1. *Thawardas Pherumal v. Union of India*, A.I.R. 1955 S.C. 468, 474, 475; (1255) 2 S. C. R. 48, 58.
2. *Union of India v. Hari Kishan Joshi*, A.I.R. 1972 P & H 207, 208, para 5-6 (D. K. Mahajan J.) following *Punjab Province v. Lakshmi Das*, A. I. R. 1944 Lah. 140.
3. *M/s. Vallabh Pitte v. Narsinghdas*, A.I.R. 1963 Bom. 157, 161, paragraph 11 (Patel & Palekar JJ.)
4. (a) *Om Parkash v. Union of India*, A.I.R. 1963 All 242, para 6 (B.Dayal & S.N. Katju JJ.)
   (b) *Jagannath v. P.C. & I. Corporation*, A.I.R. 1973 All 49, 51, para 5-6 (Gyanendra Kumar J.)
   (c) *Mangal Prasad v. Laxman Prasad*, A.I.R. 1964 All. 108 (F.B.)
5. (a) *M/s. Security & Finance Ltd. v. Bachitar Singh* A.I.R. 1973 Delhi 140 (Ansari J) (11 May, 1972).
   (b) *Madhubala Private Ltd. Naaz Cinema*, A.I.R. 1972 Delhi 263 (Jagjit Singh & Safeer JJ.)
   (c) *P.C. Aggarwal v. Banwari Lal Kotiya, I.L.R.* (1972) 1 Delhi 279, 284 (F.B.) (10 November, 1971).
   (d) *P.C. Aggarwal v. K.N. Khosla*, A.I.R. 1975 Delhi 54, 60, para 9 (Tatachari and Deshpande JJ) (22 May, 1974).
6. *Vo Tractor export v. Tarapore Co.* A.I.R. 1971 S.C. 1, para 21,
7. para 2·15, *Supra*.

The judicial decisions on the Act of 1940 which seem to take the view that a reference to arbitration could be made only through section 20 unless both the parties join in the reference, are traceable to the observations of the Supreme Court in *Thawardas Pherumal* v. *Union of India*,[1] already quoted.[2]

Later Supreme Court Judgment.

2.17. In this connection a subsequent decision of the Supreme Court[3] is of interest. In that case, the Supreme Court was called upon to construe, *inter-alia*, the following proviso in the Surcharge Order:—

> "Provided further that no War Costs Surcharge shall be effective upon the charges for the supply of energy under any contract entered into after the 1st May, 1942, unless such contract provides for the same charges for energy as have been contained in similar previous contracts for similar supply by the licensee or sanction-holder concerned (*as to which,*[4] *in the event of dispute by any party interested, the decision of the provincial Government shall be final*) or unless and to such extent as such application may be expressly ordered by the provincial Government".

The Supreme Court held—

"The second proviso to clause 5 of the Surcharge Order does not require *that the dispute has to be referred by both the parties.*[5] Such a dispute can be referred by one of the parties as is clear from the language of the proviso which says 'in the event of dispute by any party interested' the decision of the provincial government shall be final."

It further observed:

"Then Mr. Pathak said that under the Surcharge Order itself the dispute *had to be* referred by both the parties and not by only one of them. This contention is, however, untenable in view of the clear language of the proviso which says: "In the event of dispute by any party interested" the decision of the Provincial Government shall be final.

Position in other countries.

2.18. So much as regards the case law on the Indian Acts. There are compelling reasons of logic why a fresh consent should not be required at the time of actual submission of the dispute. Before making our recommendation on the subject, however, it may be desirable to have a brief comparative discussion. It would appear that some time ago[6] an enquiry was made by the Indian Council of Arbitration, New Delhi from several foreign experts as to the true position in their countries in regard to the question whether, after an arbitration clause in a contract provides for the settlement of future disputes arising under the contract by arbitration either by an arbitral institution or by an arbitrator appointed *ad hoc*, it is necessary that the consent of both the parties to the contract should be obtained at the time of referring the dispute (after it has arisen) to the named institution or arbitrator.

The following was the precise question formulated for opinion:—

"Whether under the arbitration legislation in your country, where there is an arbitration clause in a contract between the parties providing "for settlement of future disputes arising under the contract by arbitration either by an arbitral institution or by an arbitrator appointed *ad hoc*, the consent of both the parties to the contract is necessary at the time of referring the dispute after it has arisen to the named institution or arbitrator. In other words, could the aggrieved party

1. *Thawardas Pherumal* v. *Union of India*, (1955.) 2 S.C.R. 48, 58, A.I.R. 1955 S.C. 468, 474-475.
2. See para 2·11, *supra*.
3. *Bhusawal Borough Municipality* v. *Amalgamated Electricity Co. Ltd.* (1964) 5 S.C.R. 905, 906, A.I.R. 1966 S.C. 1654.
4. Emphasis added.
5. Emphasis added.
6. No. 14(37)/72-Legislative II, Vol. I, Serial No. 2, Annexure (File of the Legislative Department).

make a unilateral reference to the dispute to arbitration after the dispute has arisen irrespective of the consent of the other party to the contract at that time?"

Position in other countries according to replies received by the Indian Council of Arbitration.

2.19. The opinions received by the Indian Council of Arbitration in reply to the query mention above,[1] from the various countries--U.K., U.S.A. France, West Germany, the Netherlands, German Democratic Republic and Poland—were all in substance, to the effect that once such clause exists in the contract, further consent is not necessary at the time of the reference and a unilateral reference is possible. In other words, an arbitration agreement with a clause of the nature referred to above is sufficient, and the parties can be compelled to submit the dispute to the arbitrators (arbitral institution or *ad hoc* arbitrator). The existence of a valid arbitration clause in the contract suffices for the plaintiff to institute the arbitration proceedings.

The following is a reproduction of the replies received by the Indian Council of Arbitration to its query referred to above.

FRANCE:

Reply negative. When in a business contract an arbitration clause has been inserted at the time of the signature, the clause remains in full value as long as the contract develops its effects, regardless of the fact that at the time the dispute has arisen, the parties disagree. They are compelled to submit the dispute to the arbitrators (arbitral institution or *ad hoc* arbitrators).

(Mr. Jean Robert, Paris)

GERMAN DEMOCRATIC REPUBLIC:

The pre-requisite for the competence of the arbitration court or arbitrators is an agreement among the parties, either by way of a separate contract or a clause as part of a contract. There are no rules on the time at which such a contract is to be concluded nor any formal requirements. Consequently an aggrieved Party may make a unilateral reference of the dispute to the arbitrators. This reference must be juridically qualified as an offer to the other party to conclude a contract on the competence of the arbitration court or arbitrators. The other party is free to accept the offer explicitly or tacitly by implying a certain intention. Such a conduct implying a certain intention is assumed when a meritorious attitude towards the petition (statement of defence) is expressed, but the other party may also decline the offer, so that no contract ensues and consequently no competence for the arbitration court or the arbitrators.

(Professor Strotibach, Berlin).

JAPAN:

For the purpose of invoking arbitration procedure, the arbitration agreement (clause compromissoire) is sufficient. There is no need in Japan that submission (compromise) is drawn up, once a dispute has arisen, upon the basis of that arbitration agreement which was incorporated in e.g., the contract of sale, whether the arbitral clause is prescribed within the contract, or in the anticipation of eventual disputes. That is different (in) kind from the French clause compromissoire.

(Professor T. Kitagawa, Japan).

NETHERLANDS:

Fortunately, we don't have the system that, when the dispute has arisen, again an 'acte de compromis' would be required and a new consent of the parties would be necessary to submit the dispute to arbitrators. The answer to your question therefore is plainly yes.

(Professor Pieter Sanders, Netherlands)

1. Para 2.18, *supra*.

POLAND.

In the case of an arbitration clause in a contract, a subsequent "acte de mission" of the dispute to arbitration after the dispute has arisen is superfluous. The existence of a valid arbitration clause in a contract is sufficient for the plaintiff to institute the arbitration proceedings.

(Mr. J. Jakubowski, Warszawa)

U.K.

If there is an arbitration clause providing for settlement of future disputes there is no need for consent of both parties at the time of referring the dispute. A unilateral reference is possible.

(Mr. Niel Pearson, Manchester)

U.S.A.

No consent is necessary at all.

(Professor Martin Domke, New York).

WEST GERMANY:

I see the problem like Article V of the European Convention of 1961. This disposition corresponds of our municipal legislation and practice.

(Professor A. Bulow, Bonn).

Amendment needed.

2.20 One would have thought that in India also, on a simple analysis of the definition of arbitration agreement,[1] the answer can be said to be fairly clear and that the definition does not leave any serious room for argument that in the case of an agreement providing for the submission to the arbitration of future difference, consent should be again sought when the differences actually arise.

Recommendation to amend Section 2(a)

2.21. However, an amendment of the law is necessary, since there is a certain amount of conflict on the subject, as is revealed by case law.[2] We therefore, recommend the insertion of an Explanation below section 2(a), on the following lines[3]:—

Explanation 2—Where an arbitration agreement provides for the submission of future difference to arbitration, and a difference subsequently arises which it is proposed to refer to arbitration thereunder it shall not be necessary that fresh consent of both the parties or all the parties, as the case may be, to the reference should be obtained at the time of referring the dispute to such arbitration.

Section 2—other clauses.

2.22 This disposes of section 2(a), Section 2(b) provides that "award" means an arbitration award, and needs no comments.

Section 2, clause (c), defines a 'court'. There is a definition of the expression 'legal representative' in clause (d), the definition being substantially the same as in the Code of Civil Procedure, 1908.

Finally, clause (e) provides that "reference" means a reference to arbitration.

These clauses need no change.

Section 2—Frustration of the contract.

2.23. Before proceeding to deal with the next section, we would like to deal with certain matters of a general nature. First is the question of frustration.

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1. Section (2a).
2. Para 2.12 to 2.18 *supra.*
3. For Explanation 1, see para 2.10 *supra.*

When a contract containing an arbitration clause is alleged to have been frustrated by reason of change of circumstances or otherwise terminated, two questions may arise; first whether the contract has become frustrated, and secondly, whether the question of frustration or termination itself can be adjudicated upon by the arbitrator.

2.24. It would appear[1] that even where by frustration the principal contract is alleged to have come to an end, the contract could still be in existence for certain purposes, such as the resolution of disputes arising under or in connection with it. The question whether the contract becomes impossible of performance and was discharged under the doctrine of frustration would still have to be decided under the arbitration clause, which operates in respect of such purposes.

Privy Council Case.

2.25. Recent Indian decisions on the subject present a contrast to the earlier Privy Council ruling in *Hirji Mulji' case.*[2] A later case decided by the House of Lords,[3]—*Heyman* v. *Darwins Ltd.*, also holds that widely drawn arbitration clause could embrace a dispute as to whether a party is discharged from future performance by frustration.

English cases of 1953 and 1956.

2.26. Later English cases[4-5] take a similar wider view.

2.27. It would appear that English cases would definitely construe the jurisdiction of the arbitrator in a much wider sense than the Privy Council did. Since the matter might depend upon the wording of the arbitration clause, an express provision in the Act would not be appropriate.

Section 2—Question of substitution of agreement

2.28. Generally, on the whole question of jurisdiction of the arbitrators in such cases, the exhaustive discussion by S.R. Das J., in the undermentioned case[6] may be seen.

Section 2—Presiding Judge as arbitrator.

2.29. Sometimes, a party refers the matters to the Judge himself as arbitiator.[7-10] There are several Indian rulings dealing with the subject.[11-13]

The following are other rullings and authorities on the subject.[14-17]

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1. (a) *Damodar Valley Corporation v. K.K.Kar*, A.I.R. 1974 S.C. 158.
   (b) *Naihati Jute Mills v. Khyab Ram*, A.I.R. 1968 S.C.525, 528.
2. *Hirji Mulji v. Cheongyue Steemship Co.*, (1926) A.C. 97 (P.C.).
3. *Heyman, v. Darwins Ltd.*, (1942) A.C. 356; 1942 1 All E.R.337 (H.L.).
4. *Kruse v. Questier & Co.*, (1953) 1 All E.R. 954 (Unexecuted contract) (Pilcher J.)
5. *Government of Gibralter v. Kenney*, (1956) 3 W.L.R. 466; (1956) 3 All E.R. 22 (Sellers J.)
6. *Rungta Sons v. J.T. Republike*, A.I.R. 1959 Cal. 423,
7. As to parole submission to the Judge, see Russell on Arbitration (1970) page 47; and *Harrison v. Wright*, (1845) 13 M & W 86.
8. Under section 6(b) of the Country Courts Act, 1959, a Judge cannot act as an arbitrator for remuneration. Russell on Arbitration (1970) page 85.
9. Russell on Arbitration (1970), page 84.
10. See discussion in *Sankaranarayana v. Rama Swamiah*, A.I.R. 1923 Mad. 444.
11. *Arati Paul V. Registrar*, A.I.R. 1965, Cal. 3 on appeal A.I.R. 1969 S.C. 1133.
12. *Dalal* v. *Jamadar*, A. I. R. 1945 Bom. 478 (Divatia J.)
13. *M/s Kapoor Nilokheri Co-operative Daily Farm Society Ltd. v. Union of India*, A.I.R. 1973 S.C. 1238.
14. *Baij Nath v. Dhani Ram*, I.L.R. 51 All. 903, A.I.R. 1929 All. 747 (Mukerjee & Niamatulla JJ.)
15. Sircar, Law of Arbitration in British India (1942), page 329.
16. *Baikuntha Nath Goswami v. Seets Nath Goswami*, (1911) I.L.R. 38 Cal. 421.
17. *Bengal Silk Mills Co. v. Aishe Aref*, A.I.R. 1947 Cal. 106, 109, Decided on 27-2-1946 (Gentle and Grmond JJ.) on appeal from A.I.R 1949 Cal. 350, decided on 17th January, 1945 (S.R. Das J.)

English law.

2.30. The law in England before 1970, as stated by Russell, in his edition of 1963, was as follows[1]:

> "The subject-matter of an action may be referred to a Judge as arbitrator. The Judge in such a case will, if such is the intention of the parties, be merely an arbitrator and will have no special powers by virtue of the fact that he is a Judge and his award will not be subject to appeal".

Provision in Administration of Justice Act, 1970 (Commercial Court).

2.31. The position has now been laid down in statute. Under the Administration of Justice Act, 1970, a Judge of the commercial court may,[2] if, in all the circumstances he thinks fit, accept appointment as sole arbitrator or as umpire or by virtue of an arbitration agreement within the meaning of the Arbitration Act, 1950, where the dispute appears to him to be of a commercial character. Consent of the Lord Chief Justice is required. The fees payable for the services of a judge as arbitrator or umpire are to be taken in the High Court. The Third Schedule to the Act of 1970 contains provisions modifying or replacing provisions of the Arbitration Act, 1950, in relation to arbitration by judges. In particular, any jurisdiction which is exercisable by the High Court in relation to arbitrators and umpires shall, in relation to a judge of the commercial court appointed as arbitrator or umpire, be exercisable, instead, by the court of appeal.

The commercial Court is created under section 3 of the Administration of Justice Act, 1970, as a part of the Queen's Bench Division of the High Court to try such causes and matters as may, in accordance with the rules of court, be entered in the Commercial list. Broadly speaking, "commercial causes" are actions arising out of the ordinary transactions of merchants and traders.

2.32. We have carefully considered the English scheme which,[3] it should be noted, is confined to the commercial court. We are not, however, convinced that the English scheme would be suitable to India.

As no recent Indian cases have raised this problem, we do not consider an amendment of the Act to be necessary.

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1. Russell on Arbitration (1963), page 117, for the old law.
2. Section 4 and Third Schedule, Administration of Justice Act, 1970 (Chapter 31).
3. Para 2.30 and 2.31, *supra*.

CHAPTER 3

ARBITRATION WITHOUT INTERVENTION OF A COURT

Section 3.

3.1. Section 3 provides that an arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule in so far as they are applicable to the reference.

The section needs no change.

Section 4.

3.2. Under section 4, the parties to an arbitration agreement may agree that any reference under the arbitration agreement shall be to an arbitrator or arbitrators to be appointed by a person designated in the agreement either by name or as a holder for the time being of any office or appointment. There is no express provision in the English Act for such an appointment, but it appears that the law applicable in England is the same.

Associations.

3.3. When arbitrators are to be appointed by an association, some interesting questions may arise. Where the parties agree to a reference to arbitrators to be appointed by a Chamber of Commerce, the contention may be raised that the appointment must be made by an assembly of all the members of the Chamber. This contention has been rejected.[2] In such an arbitration agreement, the rules of the Association concerned are imported into the contract and bind the parties.

Foreign Court may be an arbitrator.

3.4. Another important question is, who may be an arbitrator. It may be noted that the dispute may even be referred to a foreign court as the arbitrator.[3]

3.5. The points discussed above do not necessitate any change in section 4.

Section 5.

3.6. Section 5 provides that the authority of an appointed arbitrator or umpire shall not be revocable except with the leave of the court, unless a contrary intention is expressed in the arbitration agreement. While on this section, it is relevant to refer to the question whether the authority of the arbitrators comes to an end on the making of the award. The view taken is that[4] if the award had been set aside, it means that there is no award, and the authority of the arbitrator does not come to an end.[5] In fact, as has been pointed out by Sircar,[6] there may be cases where the arbitrator can make successive awards.[7]

Section 5—Discretion how to be exercised.

3.7. The grounds on which leave to revoke the authority of an appointed arbitrator or umpire may be granted are not specified in section 5. They were put under five heads in a judgment of the Supreme Court[8]:—

(1) Excess or refusal of jurisdiction by the arbitrator.

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1. Sircar, Law of Arbitration in British India (1942), page 89.
2. *Ganges Manufacturing Co.*,v. *Indrachandra*, (1906) I.L.R. 33 Cal. 1169.
3. *Austrian Lloyd Steeamship Co.* v. *Gresham Life Ins.*, (1903) 1 Kings Bench 249.
4. Sircar, Law of Arbitration in British India (1942), page 98.
5. *Rikhab v. Trivedi & Co.*, I.L.R. 51 All. 874.
6. Sircar, Law of Arbitration in British India (1942), pages 98, 241, 242 and 281.
7. See section 27.
8. *M/s Amarchand* V. *Ambica Jute Mill*, A.I.R. 1966 S.C. 1036, 1042, para 13 (S.K. Das, J).

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(2) Misconduct of the arbitrator.

(3) Disqualification of the arbitrator.

(4) Fraud.

(5) Exceptional cases.

Section 5—Effect of revocation of authority—Recommendations.

3.8. It remains now to refer to the position as to the effect of revocation of authority under section 5. Does such revocation put an end to the reference?[1] If not, can fresh arbitrators be appointed in respect of the same matter? In our view, revocation does not put an end to the reference, and fresh arbitrators can be appointed in respect of the same matter.[2] Reference may also be made to a judgment of the Supreme Court[3] holding that where the award *is set aside*, but the reference was not superseded by the court, fresh appointment could be made.

All that section 5 deals with, is the authority of the particular arbitrator or umpire, and not the arbitration *agreement as such.*

Supersession[4] is governed by section 12(2)(b) which leaves the matter to the discretion of the court. The revocation of the authority of an appointed arbitrator or umpire does not in itself amount to a supersession of the reference.

We do not consider an amendment on the point to be necessary.

Section 6(1)—Recommendation to rectify grammatical inaccuracy.

3.9. Sub-section (1) of section 6 in terms provides that an arbitration agreement shall not be discharged by the death of the party thereto, either as respects the deceased, or (as respects) any other party, but shall, in that event, be enforceable by or against the legal representative of the deceased.[5] A grammatical inaccuracy in the sub-section requires to be rectified by revising the present phrase as "either as respects the deceased or *as respects* any other party". We recommend accordingly.

Section 6(2)—Recommendation.

3.10. Sub-section (2) of section 6 provides that the authority of arbitrator shall not be revoked by the death of any party by whom he was appointed.

A vital question relates to the words "by death of any party *by whom he was appointed*". The present phraseology would give the impression that death of a party to the agreement is a matter on which the legislature has to say nothing if that party is not one by whom the arbitrator was appointed. At common law, the position was that the authority of an arbitrator or umpire was terminated by the death of a party *to the agreement.*[6] This position needs to be modified for practical reasons.

Section 6(2)—Recommendation.

3.11. In order to improve the language of the section on these points, we recommend that section 6(2) should be revised as follows:—

"The authority of an arbitrator shall not be *terminated* by the death of any party *to the agreement*."[7]

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1. Para 3.48 to 3.50, *infra*.
2. Compare *Arbu Hindustan Steel* v. *Appejay Pvt. Ltd.*, A.I.R. 1967 Cal. 291, 293, para 10 (S. Datta J.)
3. *Juggilal Kamlapat* v. *General Fire Dealers*, A.I.R. 1962 S.C. 1123, 1127, 1128, para 10; (1962) Supp. 2 S.C.R. 101.
4. As to supersession of the arbitration agreement, see section 12(2) (b).
5. Compare section 2(1), English Act of 1950.
6. Sircar (1942), page 100.
7. Para 3·10, *supra*.

3.11A. Sub-section (3) of section 6 provides that nothing in the section shall affect the operation of any law by vitue of which any *"right of action"* is extinguished by the death of a person.[1] The application of this sub-section obviously requires a knowledge of the rules of law relating to the survival of causes of action—a matter primarily dealt with in the Succession Act.[2-3] Comparable to section 6(3) is Order 22, Rule 1 of the Code of Civil Procedure, 1908, under which death does not in itself affect the life of a suit if the "right to sue" survives. No changes are required in this sub-section. Section 6(3).

3.12. The effect of insolvency on arbitration is dealt with in section 7. Sub-section (1) provides that where it is provided by a term in a contract to which an insolvent is a party that any difference arising thereof or in connection therewith, shall be referred to arbitration, the said term shall, *if the* Receiver adopts the contract, be enforceable by or against him (the Receiver) so far as it relates to any such differences. Section 7—Provisions in case of insolvency.

The common law rule was that insolvency did not itself cause a revocation of the submission nor did it give the trustee in bankruptcy an authority[4] to revoke it. But insolvency was a ground to be taken into consideration for granting leave to the other party for revocation of the submission.[5]

3.13. Under sub-section (1) of section 7,[6] the matter depends on the adoption by the Receiver of the substantive agreement. The subject of adoption of agreement by the Receiver properly pertains to insolvency law.[7] Position under section 7.

Where the Receiver has not adopted the contract, the question how far effect should be given to the arbitration clause is, in substance, left by sub-section (2) of section 7 to the discretion of the court having jurisdiction in the insolvency proceedings. Any other party aggrieved or the Receiver is enabled by that sub-section to make an application for the purpose to the insolvency court. Of course, where the matter to which the arbitration agreement applies is required to be determined in connection with, or for the purposes of, the insolvency proceedings, then only this procedure is permissible.

Finally, sub-section (3) of section 7 provides that the expression "Receiver" includes an official assignee. Need for such a definition arises by reason of the fact that the Presidency Towns Insolvency Act, 1909, uses the expression "official assignee" and not the expression "receiver" used in the Provincial Insolvency Act, 1920.

No changes are required in the section.

3.14. Section 8(1)(a) empowers a party to serve a notice on another party etc. to concur in the appointment of an arbitrator etc., where the arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and the parties do not, after differences have arisen, concur in the appointment or appointments. Section 8(1)(a)—Comparison with English Act.

The section differs from the English Act in two respects; first, the English section[8] is confined to the appointment of a *single arbitrator* while the Indian Act provides for *one or more arbitrators*. Secondly, the English

1. See *Dutta* v. *Khedu*, (1911) I.L.R. 33 All. 645.
2. Section 306, Indian Succession Act, 1925.
3. Compare sections 2 and 3, Arbitration Act, 1950 (Eng.)
4. *Andrews* v. *Palmer*, (1821) 4B & L 250; Sircar, Law of Arbitration in British India (1942), page 103.
5. *Marsh* v. *Wood*, (1829) 9B & C 659.
6. Compare section 3, Arbitration Act, 1950 (Eng.), read with section 54(4), Bankruptcy Act, 1914,
7. Sections 62 and 64, Presidency Towns Insolvency Act (Act 3 of 1909).
8. Section 10, English Act of 1950.

Act is not confined to cases where the arbitrator is to be appointed by consent of the parties, while the Indian section is so cofined.

Difference between English and Indian Act —Genesis.

3.15. It may not be out of place to explain how differences between the two Acts arose. As regards the the first point,[1] section 8(1) of the Indian Act of 1899 was, by its terms, confined to the case of a single arbitrator. Since clause (a) was so confined, consequentially clause (b), applicable to a case of the arbitrator *declining to proceed* further, would also be so confined. There was, however, a conflict of decisions on the point, one view being that in a case of submission of dispute to three arbitractors all of whom had, after acting, declined to proceed further, the Court could not appoint new arbitrators, while the contrary view was taken in some cases.[2-3]

The 1940 Act has now clarified the position.[4] In the notes on clauses to the Bill of 1939, the matter has been dealt with under clause 8 by stating that it reproduces, with some verbal changes, section 8 of the 1899 Act.

3.16. It may be noted, that the court has no power to make an appointment in cases not falling within the section.

Appointment by consent.

3.17. As regards the second point (appointment by consent), it may be noted, that it is regarded as "inherent in every arbitration agreement",[5] that the appointment of the arbitrator or arbitrators must be by consent of all parties (unless there is any provision to the contrary).

Section 8(1)(a) and three arbitrators.

3.18. An arbitration agreement may contemplate three arbitrators. The situation is dealt with in several sections of the Act.

(a) If the three arbitrators are to be appointed by *consent* of the parties. section 8(1)(a) applies.

(b) If one arbitrator is to be appointed by each party and the third by the two appointed arbitrators, then section 10(1) comes into play, whereunder the agreement shall have effect as if it provided for an *umpire.*

(c) Lastly, where a agreement provides for a reference to three arbitrators in any *other* manner, then, under section 10(2) the award of the majority prevails (unless the agreement provides to the contrary).

These provisions are somewhat different from, and wider than, section 7 and section 9 of the English Act, which do not separately deal with the case of three arbitrators to be appointed by consent.

Section 8(1)(b).

3.19. This takes us to the next clause of section 8(1). Under section 8(1)(b), if any appointed arbitrator or umpire etc. neglects or refuses to act or is incapable of acting or dies, and the agreement does not show that the vacancy is not to be supplied, and the parties etc. do not supply the vacancy, then a notice may be served by any party on the other party for concurring in supplying the vacancy. This provision differs from section 10(b) of the English Act of 1950 in certain respects. First, the word used in the indian Act is 'any', because in that Act, section 10(a) is confined to a *single* arbitrator in this context. Further, the Indian Act specifically covers the case of 'neglect'. This is not dealt with in section 10(b) of the English Act.

1. Para 3·14, *supra.*
2. *Kuthiammal* v. *Sarangapani*, A.I.R. 1931 Mad. 170.
3. *Ramji* v. *Hari* A.I.R. 1939 Sind 81 (case law discussed)l
4. Notes on Clauses, published under notification dated 22-7-1939; Government of India Gazette, Part V. 22-7-1939, page 129 *et seq.*
5. *India Hosiery Works* v. *Bharat Woollen Mills*, A.I.R. 1953 Cal. 488 (Chakravart C.J.).

The case of an umpire refusing to act in similar situations is dealt with in the English Act in section 10(d).

Section 8(1)(b) and named arbitrators

3.20. Where the arbitration agreement names a particular arbitrator and the named arbitrator refuses to act or dies, etc., can another arbitrator be substituted in accordance with the provisions of section 8?

Judicial decisions under section 8 as to named arbitrators.

3.21. Sometimes doubts have been expressed as to whether section 8(1)(b) at all applies to a case where a *named arbitrator,* obviously chosen for the possession of qualifications special to him, has become unavailable or refuses to act. It would appear that however individual the choice may be, if the agreement contains sufficient indication that the parties, nevertheless, *intended* that in default of their original nominee they would be prepared to fill up the vacancy by choosing the other arbitrator, then the section would apply, and a new appointment may be made either by the parties or by the court, as the case may be.[1]

Cases under second Schedule.

3.22. Cases under paragraphs 17 to 19 of the Second Schedule of the Code of Civil Procedure, 1908 (to which section 20 now corresponds) may be mentioned. If a *named arbitrator* died or refused to act, the situation would be one covered by the words "if there is no such provision and the parties cannot agree" under paragraph 17(4).[2] But a contrary view had been taken by some High Courts.[3-4].

There was thus a conflict of views.[5-9]

Recent cases as to named arbitrator.

3.23. It would appear from the trend of comparatively recent decisions,[10] that in the absence of a positive intention to the contrary, courts would be inclined to allow the vacancy to be filled up in accordance with the procedure provided by section 8, *even in the case of a named arbitrator.* This view is preferable from the practical point of view also.

Interpretation of section 8(1)(b).

3.24. Whether or not the section would apply in a particualr case must be determined by the test laid down in the section itself, namely, that the arbitration agreement must not show that it was intended that the vacancy should not be supplied.[11]

No change.

3.25. We do not think that the position discussed above discloses any need for amendment.

Section 8(1)(c).

3.26. Section 8(1)(c) deals with the case where the parties or the arbitrators are required to appoint an Umpire and do not appoint him.

3.27. This clause needs no change.

Section 8(2).

3.28. Section 8(2) deals with the power of the Court to fill up the vacancy after notice under section 8(1). It is linked with section 8(1), and does not need independent discussion.

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1. Compare *Karam Chand* v. *M/s Sant Ram Tara Chand,* A.I.R. 1958 Punjab 418, 419, para 4 (Gurnam Singh J.)
2. *Fazal Illahi* v. *Prag Narain,* I.L.R. 44 All. 523; A.I.R. 1922 All. 133 (Walsh and Ryves JJ.)
3. *Rajani Kant* v. *Panchanan,* A.I.R. 1937 Cal. 388.
4. *Vishwas v. Bhalchandra,* A.I.R. 1931 Bom. 529(2).
5. *Satyanarayan Murthi* v. *Venkataramana Murthi,* A.I.R. 1948 Mad. 312 (Full Bench).
6. The case law has been reviewed in *Narayanappa* v. *Ramchandrappa,* I.L.R. 54 Mad. 469; *A.I.R.* 1913 Mad. 28.
7. *Governor-General* v. *Associated Livestock Farm,* A.I.R. 1948 Cal. 230, 232 (S.R. Das J.)
8. *Ladha Singh* v. *Jyoti Prasad,* I.L.R. (1935) 2 Cal, 181; A.I.R. 1940 Cal. 105.
9. *Tara Prasad* v. *Baij Nath,* I.L.R. 19 Pat. 927.
10. For example, *Bharat Construction Co. Ltd.* v. *Union of India,* A.I.R. 1954 Cal. 606, 611, paragraph 18.
11. *Bharat Construction Co. Ltd.* v. *Union of India* A.I.R. 1954 Cal. 606, 611, paragraph 18.

Section 8A (New)—Death of arbitrator appointed by court or incapacity etc.

3.29. When *the court* appoints an arbitrator under section 8, and the arbitrator dies, there is no provision in the Act for the appointment of another arbitrator by the court in his place. This has been described[1] as a *lacuna in the Act*. Neither section 8(1)(b) nor section 9 nor section 12 would cover such a situation, and the court has no inherent power to appoint an arbitrator.[2] In our opinion, the position would improve if a clarification is made on the subject. The cases of incapacity, neglect and refusal to act should also be covered. We, therefore, recommend the insertion of a new section as follows:—

Neglect by or death of arbitrator or umpire appointed by court.

"8A. *Where the court has a power to appoint an arbitrator or umpire under any provision of this Act or of any arbitration agreement, and the arbitrator or umpire so appointed by the court neglects or refuses to act, or is incapable of acting or dies, the court may supply the vacancy.*"

Section 9.

3.30. Section 9 deals with the case where the agreement provides for two arbitrators, one to be appointed by each party, and makes certain provisions regarding the appointment of a new arbitrator or sole arbitrator in case of a vacancy or failure to appoint respectively. This section does not apply where a different intention is expressed in the agreement. How a different intention can be expressed, may be ascertained by referring to reported cases.[3-4]

The section needs no change.

Section 10(1) and difference between arbitrators as to choice of umpire.

3.31. Section 10 contains provisions as to cases where the agreement contemplates three or more arbitrators. Under sub-section (1), where the agreement provides that the reference shall be to three arbitrators, one to be appointed by each party and the third by the two appointed arbitrators, then, it shall have effect as if it provided for appointment of an umpire. If the arbitrators fail to appoint an umpire, any party may avail himself of the procedure allowed by section 8(1)(c) for filling up the vacancy. But if the two arbitrators *differ* as to the person to be appointed as the third arbitrator, the question may arise whether the court can appoint the third arbitrator in exercise of the power conferred by section 8(1)(c). Apparently, the matter is left uncovered, on the principle that the umpire will be *acceptable* to the parties only if both the arbitrators concur in the appointment.

Section 10(2).

3.32. Sub-section (2) of section 10 deals with an agreement providing for three arbitrators, to be appointed in any *other* manner.

Section 10(3).

3.33. Sub-section (3) of section 10 deals with the case of more than three arbitrators. There is no such provision in the English Act. But the provision is needed in India, as there have been a few cases[5-8] where matters have been referred to the arbitration of more than three persons.[9]

Section 11.

3.34. Certain considerations of public policy do arise in the field of arbitration. Even where a particular award has been made pursuant to the agreed procedure, the question may yet arise whether as a matter of public policy, the award should be enforceable. An award entitles the beneficiary to call on the power of the State to enforce it, and it is the function of the court to see that this power is not abused. Similar principles apply where the stage of award has not yet been reached, but one of the parties has

1. *Hindustan Flashlight Manufacturing Co. Ltd.* v. *Great American Insurance Co. Ltd.* A.I.R. 1963 Cal. 149, 151, para 2 (P.C. Mallick J.)
2. See also *Bharat Construction Co. Ltd.* v. *Union of India*, A.I.R. 1954 Cal. 606.
3. *Shaw Wallace & Co.* v. *Subbien & Sons*, I.L.R. 44 Mad. 406; A.I.R. 1921 Mad. 58.
4. *Sasoon & Co.* v. *Ram Dutt*. 49 I.A. 366; A.I.R. 1922 P.C. 374 (P.C.) I.L.R. 50 Cal.1.
5. *Amar Nath* v. *Uggar Sain*, A.I.R. 1949 All. 399.
6. *Raghubir* v. *Kuleswar*, I.L.R. 23 Pat. 719; A.I.R. 1945 Pat. 140.
7. *Y.L. Paul* v. *G.C. Joseph*, A.I.R. 1948 Mad. 512.
8. *Sri Charan* v. *Makhan Lal*, A.I.R. 1919 Cal. 42.
9. See also discussion relating to section 8, *supra*.

a grievance that the arbitrator is guilty of a particular default. If the grievance is genuine, the law ought not to lend its aid to the continuance of the arbitration proceedings before the particular arbitrator, because that would, in substance, mean that the power of the State is being resorted to where, as a matter of public policy, it ought not to be utilised. This, speaking broadly, is the rationale underlying the provision in section 11, under which the court can remove the arbitrator in certain circumstances. The expression used—the expression of importance—is "misconduct"; this expression has various shades of meaning, which, of course, need not be dealt with in this introductory paragraph. The ultimate end of the statutory provision in section 11,—as indeed, of all provisions of the Act,—is to secure justice.

Section 11—Power of the Court of remove arbitrators, umpires in certain circumstances.

3.35. By section 11, the court is empowered to remove an arbitrator or umpire in certain circumstances. Under sub-section (1), the court may, on the application of any party to a reference, remove an arbitrator or umpire who fails to use all reasonable despatch in entering on or proceeding with the reference and making an award. Jurisdiction under this sub-section—in contrast with the next sub-section—is exercisable only on the application of any party to a reference. We do not think that this position requires to be changed.

It is often stated that arbitrators unduly prolong the proceedings so that the primary object of the law in providing for arbitration—the quick disposal of cases by a person chosen by the parties—is frustrated. There may be truth in this complaint, but it appears to us that the solution lies in the increased use of section 11(1) by a party to the reference who is aggrieved by such delay. No doubt, the relief under sub-section (1) is discretionary, but still it cannot be said that the law is, in substance, defective in this regard. Therefore, sub-section (1) relating to this situation may be left undisturbed.

Time limits.

3.36. We shall deal later[1] with the position regarding time-limits for giving awards. Our recommendations in that regard are intended to expedite the disposal of arbitrations.

Section 11(2).

3.37. More comprehensive and fundamental is the power of the court under sub-section (2) to remove an arbitrator or umpire for misconduct. It is well-established that the scope of "misconduct" in this sub-section extends far beyond what a layman would regard as immoral.[2] By its very nature, the expression "misconduct" as employed in this context cannot be defined. Apart from breach of express provisions of the arbitration agreement or the Arbitration Act, and apart from the all-embracing category of denial of natural justice, there will be other cases where misconduct is constituted for the purposes of this sub-section. Authorities as to the scope and meaning of the express "misconduct" are numerous. But it is hardly of any use to refer to them, since each case depends on its own facts, and no more concrete propositions than have been laid down in the existing sub-section can be deduced from them.

Section 11(3)

3.38. According to section 11(3), where an arbitrator or umpire is removed under this section, he shall not be entitled to receive any remuneration in respect of his services. This sub-section does not need any change.

Section 11(4) and the aspect of notice.

3.39. Sub-section (4) of section 11 provides that for the purposes of this section the expression "proceeding with the reference" includes, in a case where reference to the umpire becomes necessary, giving notice of that fact to the parties and to the umpire. This sub-section is intended to explain, in a limited area, the meaning of the expression "proceeding with the reference" as used in sub-section (1).

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1. See discussion as to First Schedule, paragraphs 3 and 5 (Chapter 11), *infra*.

2. Halsbury, 4th Edition (1973), Vol. 2, para 622.

Section 12.

3.40. Section 12, dealing with the powers of the court in cases where an arbitrator is removed or his authority is revoked, divides itself into two portions: sub-section (1) deals with the case where an umpire who has not entered on the reference is removed or "one or more arbitrators (not being all the arbitrators)" are removed: while sub-section (2) concerns itself with the case where the authority of an arbitrator or arbitrators or umpire is revoked, or an umpire who has entered on the reference, is removed or a *sole* arbitrator or *all* the arbitrators are removed. In the former case, the court can fill up the vancancy. In the latter case, it can either fill up the vacancy or order that the arbitration agreement shall cease to have effect with respect to the dispute referred to. The section is subject to certain modifications in the case of arbitrations in suits (section 25) and is not applicable to statutory arbitrations (section 46).

Section 12(1)—Controversy as to case of single arbitrator.

3.41. In sub-section (1) of section 12, the portion consisting of the words "one or more arbitrators (not being all the arbitrators)" creates overlapping with sub-section (2) in regard *to a sole arbitrator*. Such a case should fall exclusively under sub-section (2). The problem does not arise under the English Act,[1] which uses the phrase "an arbitrator (not being a sole arbitrator) or two or more arbitrators (not being all the arbitrators)".

Recommendation to amend section 12(1).

3.42. The case where a sole arbitrator is removed by the court is not intended to fall within sub-section (1)—it falls within sub-section (2). On this point, sub-section (2) is more specific, since it specifically mentions "sole arbitrator". Symmetry between the two sub-sections, as far as possible, would, in our opinion, be desirable.

Accordingly, our recommendation is that section 12(1) should be revised as under:—

> "(1) Where the court removes an umpire who has not entered on the reference or one or more arbitrators (*not being a sole arbitrator* and not being all the arbitrators), the court may, on the application of any party to the arbitration agreement, appoint persons to fill the vacancy."

Section 12(2).

3.43. Under section 12(2), where the authority of an arbitrator or arbitrators or an umpire is revoked by leave of the court or where the court removes an umpire who has entered on the reference or a sole arbitrator or all the arbitrators, the court may , on the application of any party to the arbitration agreement, either—

(a) appoint a person to act as sole arbitrator in the place of the person or persons displaced, or

(b) order that the arbitration agreement shall cease to have effect with respect to the difference referred.

No changes are required in this sub-section.

Section 12(3).

3.44. Section 12(3) provides that a person appointed under this section as an arbitrator or umpire shall have the like power to act in the reference to make an award as if he had been appointed in accordance with the arbitration agreement.

It needs no comments.

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1. Section 25(1), Arbitration Act, 1950 (Eng.)

CHAPTER 4

POWERS OF THE ARBITRATOR
SECTIONS 13-14

4.1. The powers of the arbitrator or umpire are dealt with in section 13, which applies unless a different intention is expressed in the agreement. Clause (a) confers on the arbitrator power to administer oath to the parties and witnesses. **Section 13(a) —Power to administer oath.**

4.2. Section 4 of the Oaths Act, 1969 requires oaths or affirmations to be made by all witnesses, that is to say, all persons lawfully examined or required to give evidence, *inter alia, by or* before *any person, having by law or consent of parties authority to examine* such persons or to receive evidence. Section 6 of the Oaths Act read with the Schedule prescribed certain forms of oaths. It would follow that oaths have to be in the prescribed manner before the arbitrator, since he is, by consent of parties, authorised to receive evidence. **Section 13(a).**

4.3. The ordinary rule is that arbitrators must give due notice before proceeding *ex parte*.[1-4] **Power to proceed ex parte— Recommendation to insert section 13(aa).**

The power to proceed *ex parte* is recognised in England by case law.[5-6] The same is the position in India.

In our opinion, it would be desirable to put the matter on a statutory footing, so as to make the Act comprehensive. We, therefore, recommend the insertion in section 13 of a new clause as follows:

"*Section* 13(*aa*)

> *proceed ex-parte against any party who, without sufficient cause and after due notice, fails to attend personally or through agent*".

4.4. Under section 13(b), the arbitrators or umpire have a power to state a special case for the opinion of the court on any question of law involved, or state an award, wholly or in part, in the form of special case for the opinion of the court. Being an important provision, this requires some discussion. **Section 13(b).**

4.5. This clause contemplates two kinds of "special cases". The arbitrators may state a *special case* on any question of law involved, or they may state the *award* (wholly or in part) in the form of a special case. In the former case, the arbitration does not come to an end, but is merely suspended until the court pronounces its 'opinion'. This opinion forms part of the award, under section 14(3). In the latter case, i.e., where the 'award' is stated for the opinion of the court, the award is final.[7] **Section 13(b) and two kinds of special cases.**

4.6. In view of the provision now made for interim award (section 27 of the Indian Act, and section 14 of the English Act of 1950), the distinction is somewhat blurred. If care is taken by the arbitrators (while making their award or otherwise recording their decision) to make it clear whether they are (i) making an interim award, or (ii) making a final award, but stating a special case in respect of a question of law, or (iii) without intending

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1. *Louis Dreyfus & Co.* v. *Purshottum*, I.L.R. 47 Cal. 29.
2. *Dipti Bikash Sen* v. *India Automobiles*, 82 C.W.N. 838 (July 3, 1978).
3. *Prem Chand* v. *Fort Glouster*, A.I.R. 1959 Cal. 620.
4. *Juggi Lal* v. *General Fire & Dealers*, A.I.R. 1955, Cal. 354.
5. Russell (1970), pages 22, 23, citing *Wood* v. *Leake*, (1806) 12 Ves. 412.
6. *Cf.* Rule 5, Uniform Arbitration Act; Wehringer, Arbitration, Principles and Percepts (1961), pages 80.
7. The distinction is maintained in section 21 of the English Act of 1950.

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to conclude the proceedings, stating a special case *in the course of the reference*, no practical difficulties would arise. It is only when the exact provision under which they are acting is not indicated, that some uncertainty may arise.

Section 13(b) and discretion of arbitrator.

4.7. Under section 13(b), it is discretionary for the arbitrator to state a special case for the opinion of the court on any question of law involved, or to state the award in the form of a special case on such questions for the opinion of the court.

English law.

4.8. The corresponding provision in the English Act of 1950 is different, because section 21(1) of that Act provides that an arbitrator or umpire may, and shall, if so directed by the High Court, state such question of law etc.[1] This difference between the two Acts has been noticed more than once in judicial decisions.[2-4]

Section 13(b)—Statement of case

4.9. So far as is material, section 21 of the English Act of 1950 provides as follows:—

> "An arbitrator or umpire may, and shall, if so directed by the High Court, state—(a) any question of law arising in the course of the reference; or (b) any award or any part of an award, in the form of a special case for the decision of the High Court."

English case as to "special case".

4.10. The well-known decision of the Court of Appeal—*Czarinakow* v. *Roth Schmidt & Co*[5].—contains classic passages on the importance of maintaining the "special case machinery" as part of the English legal system. Even though arbitrators in modern times are more often lawyers than in the past, the utility of this provision empowering the courts to require the arbitrator to state the case for the opinion of the court has been-re-asserted in later English cases.[6] In one of his judgments[7] Lord Denning M.R. dealt with the matter at great length. He laid down that three requirements had to be fulfilled; first, there had to be a real and substantial point of law suitable for decision by the court, as distinct from a point dependent on the special expertise of the arbitrator or umpire; secondly, the point had to be clear-cut and capable of being accurately stated as a point of law; it must not be merely a matter of fact disguised; and thirdly, the point must be necessary for the proper determination of the case. In other words, it must not be a mere side issue. On the other hand, the fact that the question was not of general application or was a question of construction or was a question relating to implication or inference from proved facts did not bar a reference.

In connection with an insurance policy the High Court of Australia has held that a question of construction could be a question of law.[7]

Recommendation of Civil Justice Committee.

4.11. The question whether arbitrators should be compellable to state a case was considered by the Civil Justice Committee,[8] which observed:

> "We are also against the suggestion that the arbitrators should be compellable by the court to state a case, as this would, in India, be sure to lead to wide and gross abuse."

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1. See para 4·9, *supra*.
2. *Union of India* v. *Din Dayal*, A.I.R. 1952 Punjab 368, 371, para 10 (Kapur J.).
3. *Adamji Lukmanji* v. *Lohis Dreyfus* & A.I.R. 1925 Sind 82, 85 (Lobo A.J.C.).
4. *Bombay Fire Insurance Co.* v. *Ahmed Bhai*, I.L.R. 34 Bom. 1 (Davar J.).
5. *Czarinakow* v. *Roth Schmidt & Co.*, (1920) 2 K.B. 478; (1922) All England Report Reprint 45 (C.A.).
6. *Halfdan Greig* v. *Sterling Corporation*, (1973) 2 All E.R. 1073, 1080.
7. *New South Wales Rutile Mining Co. Proprietory Ltd.* v. *Hard Ford Fire Ins. Co.*, (1972) 46 Australian Law Journal Reports 391.
8. Civil Justice Committee (1924-25) Report, page 216, para 17; N.D. Basu, Arbitration Act (1977), page 951.

Perhaps, the danger anticipated by the Civil Justice Committee may not be unreal. The matter should, therefore, be left as it is.

4.12. Under section 13(c), the arbitrator can make an award conditional or in the alternative. Under section 13(d), the arbitrator may correct in an award any clerical mistake or error arising from any accidental slip or omission. Section 13(b), (c), (d) & (e).

Under section 13(e), the arbitrator or umpire may administer to any party to the arbitration such interrogatories as may, in the opinion of the arbitrators or umpire, be necessary.

These clauses need no change.

4.13. The Arbitration Act is silent as to the power of the arbitrator to award interest on a sum of money awarded by the arbitrator. There is, in the Act, a section[1]—section 29—dealing with the power of the Court. But this section cannot be availed of by the arbitrator. Section 13A—New section to deal with power of the arbitrator to award interest.

4.14. In England, the first Arbitration Act of 1889 did not contain any provision for interest on awards.[2] In the (English) Arbitration Act, 1934, section 11 was incorporated, providing for payment of interest on awards "as from the date of the award". The present provision on the subject is section 20 of the Arbitration Act, 1950, to which we shall refer later[3]. History of the law in England.

4.15. For the first time, a provision as to interest on awards was made by enacting section 29 in the Arbitration Act, 1940. In the original Bill[4] clause 30, which dealt with interest on awards, had been drafted on the lines similar to section 11 of the English Act of 1934, that is to say it provided for interest *on awards as from the date of the award*. Section 11 of the English Act of 1934 read as follows: History of the law in India.

> "11. A sum directed to be paid by an award shall, unless the award otherwise directs, carry interest, as from the date of the award and at the same rate as judgement debt."

But when the Bill was referred to the Select Committee, the Select Committee suggested a deliberate change and a departure from the English law.

The recommendation of the Select Committee on this aspect of the matter runs as follows:—

> "Clause 29 (*clause 30 in the Bill as introduced*).
>
> Instead of fixing by the Act the rate of interest which an award shall bear and enacting that interest shall run from the date of the award, we have provided in accordance with the analogous provision in the Code of Civil Procedure that the court may fix the rate of interest, but we have made the date from which the interest shall run *the date of the decree*."

The recommendation of the Select Committee was accepted. Accordingly, section 29, as enacted, operates only from the date of the decree.

4.16. So much as regards the history of the provision. It is to be noted that there are four separate chronological stages to be considered in connection with the award of interest, as follows:— Four stages relevant to the award of interest.

(i) the period before the institution of the proceedings;

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1. Section 29.
2. *Chandris* v. *Isbrandt Sen Moller Co.*, (1950) 2 All E.R. 618 (C.A.). Also see *Timber Shipping Co. S.A.* v. *London Overseas Freighters Ltd.*, (1971) 2 W.L.R. 1360 (H.L.) holding that the arbitrator cannot alter the rate of interest prescribed for judgement debts.
3. See para 4·25, *infra*.
4. L.A. Bill No. 34 of 1939.

(ii) the period between the institution of the proceedings and the date of the award;

(iii) the period between the date of the award and the date of the decree; and

(iv) the period after the date of the decree.

Law applicable to each stage.

4.17. The first period is governed by the substantive law, including, in particular, the Interest Act, 1839. The second period is governed by section 34 of the Code of Civil Procedure, 1908; and where the matter has been referred to arbitration, the general understanding[1] is that the arbitrator, being a private tribunal substituted for the court under the authority of law, can exercise this power of the court also, at least where the reference includes a claim for interest.

The third period,[2] was the subject-matter of some controversy, but the matter has now been settled by the Supreme Court.

The fourth period is expressly covered by section 29 of the Arbitration Act.

We propose to discuss in detail the case law relevant to each period.

First period.

4.18. The first period, as already stated,[3] is governed by the substantive law, including the Interest Act, 1839. The arbitrators' power to determine the substantive question in dispute must include this power also. Of course, section 29 of the Arbitration Act carries with it the negative *import*[4] that it shall not be permissible *for the court* to award interest on the principal sum adjudged by an award for any period prior to the date of the passing of the decree. But the arbitrator's power is as stated above.

Second period.

4.19. As to the second period (period of pendency of the arbitration proceeding), there are several decisions of the High Courts, recognising such a power.[5]

Some doubt was created as to the power to award interest for this period by certain observations of Bose J. in a decision of the Supreme Court.[6] In that decision, after holding that the conditions for the award of interest under the Interest Act, 1839 were not satisfied in that case, the Supreme Court also repelled the argument under section 34, Code of Civil Procedure, 1908, on the ground that the arbitrator is not a 'court' within the meaning of that Code. In a later case,[7] however, the Supreme Court itself expressed a doubt whether these observations were intended to lay down a broad proposition that, *in no case*, the arbitrator can award interest. Power to award interest on a sum certain is, in fact, a part of the power to decide differences[8] between the parties.

Third period—High Court decision.

4.20. As to the third period,—interest between the award and the decree—the principal question that has arisen is this. Can the *arbitrator* award interest for the period after the date of the award and before the date of the decree of the Court? It may be noted that this period is not governed by section 29 of the Arbitration Act, nor by section 34 of the Code of Civil Procedure, 1908. For this reason some uncertainty prevailed on the subject, until the position was settled by a decision of the Supreme Court, to the referred to in due course.[9]

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1. Para 4·19, *infra*.
2. Para 4·20, *infra*.
3. Para 4·17, *supra*.
4. *Srikantia & Co.* v. *Union of India*, A.I.R. 1967 Bom. 350, 351 para 6, 7, 9 (Tulzapurkar J.).
5. See *Union of India* v. *Bungo Steel Furniture Pvt. Ltd.*, A.I.R. 1963 Cal. 70, 74, para 14 (reviews case law).
6. *Thawardas* v. *Union of India*, (1955) 2 S.C.R. 48; A.I.R. 1955 S.C. 468.
7. *Nachiappa* v. *Subramanian*, A.I.R. 1960 S.C. 307, 320.
8. *Union of India* v. *Salween Timber & Construction Co.* (Ind (*India*) *and another*, A.R.I. 1964 Cal. 240, 241, para 6.
9. Para 4.32, *infra*.

4.20A. Amongst the High Courts, there arose a conflict as regards the power to award interest for the period after the award. According to one view,[1] power to award interest for this period (date of award to date of decree) can be derived from the arbitration agreement. It has been pointed out that such a power was recognised before the passing of the Arbitration Act, 1940 and arbitrators continue to retain the power after the passing of that Act, there being nothing in section 29 which takes away this power. It was also pointed out that the observations of the Supreme Court as to the power to award interest made in the case[2] reported in 1955 were limited to the question of interest on unliquidated damages, and the court did not hold that the arbitrator had no power or award interest on *a debt* for the period from the award to the date of the decree.

4.21. It may be mentioned that power of the arbitrators to award interest on the principal sum awarded from the date of the award to the date of the decree was recognised before the Act.[3] Position under the Act.

4.22. However, in a Punjab case,[4] a different view was taken. Punjab view.

4.23. The Supreme Court judgement[5] in *Union of India* v. *Bungo Steel Furniture*[5] recognised the power of the arbitrator to award interest for this stage. The Court rejected the argument of the appellant that the arbitrator had no authority to award interest *from the date of the award*, (dated September 2, 1959) *to the date of the decree* (granted by Mallick J., i.e. August 2, 1960). Supreme Court judgment of 1967.

In support of this argument, counsel had relied upon the following observations of Bose J. in *Thawardas Phermaj* v. *Union of India*:[7]

> "It was suggested that at least interest from the date of 'suit' could be awarded on the analogy of section 34 of the Civil Procedure Code, 1908. But section 34 does not apply because an arbitrator is not a 'court' within the meaning of the Code nor does the Code apply to arbitrators, and, but for section 34, even a court would not have the power to give interest after the suit. This was, therefore, also rightly struck out from the award."

Commenting on this passage, the Supreme Court observed:—

> "This passage supports the argument of the appellant that interest cannot be awarded by the arbitrator after the date of the award, but in *later cases it has been pointed out* by this court that the *observations* of Bose J. in 1955; 2 S.C.R. 48 (A.I.R. 1955 S.C. 468), *supra* were not intended to lay down such a broad and unqualified proposition. See *Nachiappa Chettiar* v. *Subramaniam Chettiar*[8] and *Satinder Singh*.[9]

The Supreme Court also distinguished the earlier case of 1955 as follows:—

> "In *Thawardas* (1955) 2 S.C.R. 48; A.I.R. 1955 S.C. 468, *supra*, the material facts were that the Arbitrator had awarded interest on unliquidated damages for a period before *the reference to arbitration* and

1. (a) *Union of India* v. *Bungo Steel Furniture Pvt. Ltd.*, A.I.R. 1963 Cal. 73, 74, paragraph 12-14 (R.S. Bachwat and K.N. Laik JJ.).
   (b) *Chidambaram* v. *Subramaniam*, A.I.R. 1953 Mad. 492.
2. *Thawardas* v. *Union of India* (1955) 2 S.C.R. 48; A.I.R. 1955 S.C. 468, para 4·23, *infra*.
3. *Bhowani Das Ram Govind* v. *Harsukh Das Bal Kishan Das*, A.I.R. 1924 Cal. 534.
4. *State of Punjab* v. *Surinder Nath*, A.I.R. 1960 Punj. 623, 625.
5. *Union of India* v. *Bungo Steel Furniture Pvt. Ltd.*, A.I.R. 1967 S.C. 1032.
6. *Union of India* v. *Bungo Steel Furniture Pvt. Ltd.*, A.I.R. 1967 S.C. 1032.
7. *Thawardas Pherumat* v. *Union of India*, (1955) 2 S.C.S.C.R. 48, 65; A.I.R. 1955 S.C. 468, 478.
8. *Nachiappa Chettiar* v. *Subramaniam Chettiar*, (1960) 2 S.C.R. 209, 238, A.I.R. 1960 S.C. 207, 220.
9. *Satinder Singh* v. *Umrao Singh*, (1961) 3 S.C.R. 676; A.I.R. 1961 S.C. 908, 916.

also for a period subsequent to the "reference. The High Court set aside the award regarding interest *on the ground that claim for interest was not referred to*".

Present position.

4.24. It can therefore be stated that the judgement of the Supreme Court supports the view that the arbitrator can award interest for the period from the date of award to the date of decree.

English law—section 20 of the Act, 1950.

4.25. In England, section 20 of the Arbitration Act of 1950 provides that[1-2]—"a sum directed to be paid by an award shall, unless the award otherwise directs, carry interest as *from the date of the award* and at the same rate as *judgment debt*". Further, section 44 of the Administration of Justice Act, 1970, enables the rate of interest on judgment-debts to be raised from 4 per cent provided by the Judgments Act, 1838 (Chapter 110) by an order of the Lord Chancellor in the form of a statutory instrument.

Difference between English and Indian law.

4.26. The difference between the English and Indian provisions lies primarily in this, that there is no power in an arbitrator in India to direct payment of interest for the post-decree period. This was laid down in two Calcutta cases[3-4]. In the general scheme of Indian law, it could not be otherwise, since, under section 29, *the court* takes charge of the matter as from the stage of the decree.

Fourth period.

4.27. The fourth period (period after the decree) falls within section 29 and raises no problems as to the arbitrator's powers.

Position. summed up.

4.28. To revert to the present section, the case law discussed above justifies a statement that the present position in India is as follows:—

(a) Period before the institution of legal proceedings is governed by the substantive law of intrest,[5] including the Interest Act, 1839. It may be assumed that the reference of money claim to arbitration includes a reference as to interest on the money claim.

(b) (i) Where a claim for interest during *the pendency of the arbitration is* specifically referred to the arbitrator, he can award such interest just as a court could do so under section 34 of the Code of Civil Procedure, 7908.[6]

(ii) Where a claim for interest during such pendency *is not specifically* referred to *the arbitrator*, the arbitrator has no power to award interest.[7] Nor does the court have this power, since section 29 operates only from the date of the decree.

(c) As to the period *after* the date of the award and before the decree, the *arbitrator* has such a power, if the question of interest for this period has been referred to arbitration.[8]

(d) The period after the date of the decree is governed by section 29, empowering the Court to award interest.

Recommendation to insert new section.

4.29. So much as regards the present law. It appears to us that in the cases (b) and (c) mentioned above,[9] the arbitrators should, *ipso facto*, have a power to award interest unless the agreement provides to the contrary,

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1. Section 20, Arbitration Act, 1950.
2. See also section 44, Administration of Justice Act, 1970.
3. *Pratima Swarup* v. *Diwan Chand*, A.I.R. 1963 Cal. 583, 586.
4. *Union of India* v. *Bungo Steel Furniture Pvt.* Ltd., A.I.R. 1963 Cal. 70.
5. Para 4·16, *supra*.
6. *M.R. Mahajan* v. *Huka.ohand Mills Ltd.*, (1967) 1 S.C.J. 472-474 (case of interest *pendente lite*) and also para 4·18 *supra*.
7. *Seth Thawar Das Pherumal* v. *Union of India*, A.I.R. 1955 S.C. 468; (1955) 2 S.C.R. 48, 64.
8. Para 4·20 *supra*.
9. Para 4·28

and there should be a specific provision on the subject. In the case (a) mentioned above[1], they should have this power if the terms of the reference so warrant. As to the rate of interest, we would introduce certain guidelines, which will be apparent from the draft that we give below.[2]

Recommendation to insert new section as section 13A.

4.30. In the light of the above discussion,[3] we recommend that in order to deal with the power of the arbitrator or umpire to ward interest for the first three periods mentioned above, the following new section should be inserted in the Act:—

Power to award interest.

"13A. (1) *Where and in so far as the award is for the payment of money, the arbitrators or umpire may, if the terms of the reference so warrant, award interest on the principal sum adjudged, from the date on which such sum has become due to the date of entering on the reference, at such rate not exceeding the rate agreed and, in the absence of agreement, at such rate not exceeding twelve per cent per annum, as the arbitrators or umpire may consider proper.*

"Explanation.—Nothing in this sub-section shall empower the arbitrators or umpire to award interest for which no claim is made by a party.

13A. (2) *Where and in so far as the award is for the payment of money, the arbitrators or umpire may, unless a different intention is expressed in the arbitration agreement, award interest on the principal sum adjudged from the date of entering on the reference to the date of the award, at such rate not exceeding the rate agreed and, in the absence of agreement, at such rate not exceeding twelve per cent annum, as the arbitrators or umpire may consider proper.*

"13A. (3) *Where and in so far as the award is for the payment of money, the arbitrators or umpire may, unless a different intention is expressed in the arbitration agreement, award interest on the principal sum adjudged from the date of "the award to the date on which the judgement is pronounced by the court according to the award. at such rate not exceeding the rate agreed and, in the absence of agreement, at such rate not exceeding twelve per cent per annum, as the arbitrators or umpire may consider proper."*

Section 14.

4.31. Section 14(1) provides that when the arbitrators or umpire have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and award.

Section 14(2) deals with the filing of the award in court. The arbitrators or umpire shall, on the request of any party to the arbitration agreement or any person claiming under them or, if so directed by the court and upon payment of the fees and charges due in respect of the arbitration and award of the costs and charges of filing the award, cause the award or signed copy of it together with any depositions and documents which may have been taken and proved before them to be filed in the court and the court shall thereupon give notice to the parties of the filing of the award.

Section 14(3) provides that when the arbitrators and umpire state a special case under section 13, clause (b), the court, after giving notice to the parties and hearing them, shall pronounce its opinion thereon and such opinion shall be added to and shall form part of the award.

A few points of detail may now be adverted to.

Appeal.

4.32. Section 14(1) speaks of an award being made by "arbitrators" or by an "umpire". Sometimes, rules of commercial associations provide for an appeal to a Committee from the decision of the umpire appointed in accordance with such rules.

It would appear that the award of the appellate committee could be filed in court.[4]

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1. Para 4·28. *supra*.
2. Para 4·30, *infra*.
3. Para 4·29, *supra*.
4. *Heera Lal & Co.* v. *Joakim & Co.*, I.L.R. 55 Cal. 180; A.I.R. 1927 Cal. 677; 31 C.W .N. 730 (C.C. Ghosh and Buckland JJ.) (reviews English cases)..

4.33. In several English cases, where the arbitration proceedings involved a further consideration of the award of an arbitrator by the Appeal Committee of the particular commercial association, the Court held that the final award contemplated by the parties was that of the Appellate authority. The validity of such a provision in the rules of an association seems to have been assumed in India.[1-2]

4.34. The position seems to be this. If, from the substance of the contract, it is clear that parties contemplate a fresh set of arbitrators to be the final deciding authority, then such a Committee is to be regarded as a body of arbitrators or an umpire.[3]

We shall revert to this point later.[4]

Section 14(1) and giving of notice.

4.35. There are two kinds of notices contemplated by section 14. Section 14(1) provides, that after signatures on the award, the *arbitrators* shall give notice in writing to the parties of the making and signing thereof and of the amount of fee etc. Sub-section (2) provides that after the award is filed, the court shall give notice to the parties of filing of the award. These provisions do not require any change.

Section 14(1) and registered awards.

4.36. A question has arisen how far an award relating to immovable property requires registration before it can be filed before the court.[5] But the question need not be considered under section 14, since non-registration of an award does not come in the way of filing of an award; it only prohibits its being taken in evidence, as held by the Supreme Court[6-7].

Fees.

4.37. More important is the question of fees. Ordinarily, the fees of the arbitrator or umpire must be fixed by an agreement between the parties and the arbitrator or umpire. There is, it has been held,[8] nothing illegal in the arbitrator or umpire demanding fees before the award, provided the amount demanded is reasonable and not extravagant, and is demanded from both parties equitably within the knowledge of both the parties.

Difficulties, however, arise where there is no agreement as to the amount or no agreement as to the time of payment of the fees.

In order to settle the position in this regard, we consider it desirable[9] to add certain provisions to section 38. The salient features of the proposed provisions are—

(i) In the absence of agreement, any party or arbitrator or umpire may apply to the Court (after entering on reference) to fix the fees. It shall also be open to any party, arbitrator or umpire to apply for variation of the fees so fixed, by showing proper cause.

(ii) where the fees have been fixed by agreement or by an order of the court, the court may compel the party or parties concerned to deposit fees.

Section 14(2)—The requirement of filing.

4.38. Section 14(2) requires the arbitrator or umpire to cause the award or signed copy of it to be 'filed in court', if certain conditions are satisfied. The arbitrators need not *personally file the award*, and it is sufficient if *they cause the award to be filed*.[10] Sending by post is, therefore, enough. The arbitrators can file the award,[11] or they may be directed by the Court to file it.[12]

1. *Suraj Mull* v. *Chand Mull*, A.I.R. 1927 Cal. 601.
2. *Fazul Ally* v. *Khimji*, A.I.R. 1934 Bom. 476.
3. Sircar, Law of Arbitration in British India (1942), page 191.
4. See discussion as to First Schedule.
5. Mulla, Registration Act (1963) page 95.
6. *Champa Lal* v. *Samrathpai*, A.I.R. 1960 S.C. 629, 631 (Kapur J.).
7. For earlier cases, see *Anant Lal* v. *Keshar Deo*, A.I.R. 1949 Cal. 549.
8. *Teja Singh* v. *Union of India*, A.I.R. 1955 All. 666.
9. Section 38 to be amended. See para 8·59 *infra*.
10. *Kumbha Mawji* v. *Dominion of India*, A.I.R. 1953 S.C. 313.
11. *Narayan* v. *Dewaji*, A.I.R. 1945 Nag. 117.
12. See section 14 (2), the words "if so directed by the court".

Section 14(2) and case of death of arbitrator—Proposed section 14(2A).

4.39. Under section 14(2), an award has to be filed by the arbitrator or by the umpire. The case where the arbitrator or umpire dies without filing an award or without authorising any person to file it, is not covered by the section. This was described as a "lacuna" in the Act in a Calcutta case.[1] In that case, the court acted under its inherent jurisdiction under section 151, Code of Civil Procedure, 1908, and made an order for filing the award within a month, from the date of judgment against the respondent.

4.40. It was not disputed in that case that the umpire had made an award; he, however, did not file the award or authorise anyone to do so, and instead made it over to the respondent.

The appellant took out a notice of motion under section 14(2), but before the date for the notice of motion arrived, the umpire died. Hence the difficulty that arose.

English law.

4.41. It may be noted that this problem does not arise in England, as there is no section in the English Act dealing with filing of the award by the arbitrator. The reason is, that under that Act, the award is enforceable as a judgment[2] by leave of the High Court or any Judge thereof.

Recommendation as to section 14 to cover cases of death of the arbitrator or without filing the award and similar situation—Sub-sections (2A) and (2B) to be inserted.

4.42. It appears to us that in the scheme of the Act, this question must be dealt with by a specific provision. The want of a specific provision —which is a lacuna[3]—may sometimes create avoidable problems. The same applies to cases other than death, such as the arbitrator not being traceable or neglect on his part to file the award. To make the section comprehensive on the subject, it is desirable to amend it in a suitable manner. The gist of our recommendation will be apparent from the following draft of the sub-sections which, according to us, should be inserted in section 14:—

"Section 14(2A)

If, because of the death of the arbitrator or for any other reason, the award is in the possession of a person other than the arbitrators or umpire, as the case may be, any party to the arbitration agreement may apply to the court for directing the said person to file the award along with the depositions and documents referred to in sub-section (2) if also in the possession of the said person."

"Section 14(2B)

The Court shall, on an application being made under sub-section (2A), after giving notice to the said person and to the parties, cause the award together with the depositions and documents to be filed in court and shall thereafter proceed to deal with the award in accordance with the provisions of this Act."

Suggestion to require arbitrator to give reasons for the award.

4.42A. Before leaving section 14, it is necessary to deal with one suggestion that has been made to the effect that an arbitrator must be required to give reasons for the award. This suggestion was made by the Public Accounts Committee (1977-78), Sixth Lok Sabha, Ninth Report, dealing with the Forest Department, Andaman. The suggestion has been brought to our notice by the Ministry of Law.[4] The Committee, after expressing its unhappiness over the manner in which certain arbitration cases which formed the subject-matter of the Report had been pursued, and after noting the delay that took place in the disposal of cases, made the following observations:—

"In this distressing story, Government has repeatedly suffered loss. In the first arbitration case, Government's claim for royalty on shortfall

1. *Panchanan Dev* v. *Union of India*, A.I.R. 1959 Cal. 84, 87, para 14 (Chakravarty C.J. and S.C. Lahiri J.)

2. Section 26, English Act of 1950.

3. Para 4·39 *supra*.

4. Public Accounts Committee, Ninth Report, Sixth Lok Sabha (September, 1977), (P.A.C. No. 548,) page 201, paragraph 3·272.

of extraction was not upheld. As the arbitrator's award gave no reasons, Government could not even find out why their claim was rejected. It will be strange if Government really find itself so helpless in such cases. The Committee would like Government to make up its mind and amend the law in such a manner that it would be obligatory on the arbitrator to give reasons for his award. Meanwhile, it should be ascertained whether in an award which sets out no reasons the aggrieved party have no remedy whatever."

4.43. We have also been informed that the Public Accounts Committee (1975-76), in its 210th Report, has observed as follows:—

"Incidentally, the Committee also find that under the Arbitration Act, the Arbitrator is not bound to give any reason for the award. The result is that often it becomes difficult to challenge such non-speaking awards on any particular ground. The Committee are of the view that it should be made obligatory on arbitrators to give detailed reasons for their awards so that they may, if necessary, stand the test of objective judicial scrutiny. The Committee desire that this aspect should be examined and the necessary provision brought soon on the statute book."

Suggestion not accepted.

4.44. We have given careful consideration to the suggestion that the arbitrator should be required to give reasons. And we appreciate the embarrassment that must be caused to the Government by such awards in the cases referred to by the Public Accounts Committee in its Report referred to above. We are also not unmindful of the fact that the public interest might sometimes suffer by awards which are not supported by reasons. But we regret that we are unable to persuade ourselves to accept the suggestion for amending the law. Our reasons for this conclusion will be set out presently. These reasons are, in our view, weighty enough to override other considerations.

Relevant considerations— Burden on the arbitrator.

4.45. There are, it seems to us, several considerations that are relevant in determining the question whether an arbitrator should be required by law to give reasons for the award.

The scheme of the Arbitration Act is to provide a domestic forum for speedy and substantial justice, untrammelled by legal technicalities, by getting the dispute resolved by a person in whom the parties have full faith and confidence. The award given by such a person under the scheme of the Act can be assailed only on very limited ground like those mentioned in section 30 of the Act. The result is that most of the awards at present are made rule of the court despite objections to their validity by the party against whom those awards operate. To have a provision making it obligatory for the arbitrator to give reasons for the award would be asking for the introduction of an infirmity in the award which in most cases is likely to prove fatal. Many honest awards would thus be set aside.

Once the arbitrators are compelled to give reasons in support of the award, the inevitable effect of that would be that the validity of most of the awards would be challenged on the ground that the reasons, or at least some of them, are bad and not germane to the controversy. Sometimes, if four reasons are given in support of the award and one of the reasons is shown to be not correct or not germane, the award would be challenged on the ground that it is difficult to predicate as to how far the bad reason which is not germane has influenced the decision of the arbitrator. Many awards would not survive court scrutiny in such circumstances.

Laymen as arbitrators.

4.46. It is also noteworthy that in a large number of cases the arbitrators would be laymen. Although their final award may be an honest and conscientious adjudication of the controversy and dispute, they may not be able to insert reasons in the award as may satisfy the legal requirements and the scrutiny of the court. The arbitrators having been chosen by the parties, it would, in our opinion, be not correct to put extra burden on

1. Public Accounts Committee (1975-76), 210th Report, page 136, para 5·17.

them of also giving reasons which are strictly rational and germane in the eye of law in support of their award. Once the parties have voluntarily chosen the arbitrators, presumably because they have faith in their impartiality, the law should not insist upon the recording of reasons by them in their award.

Likelihood of awards being challenged.

4.47. The previous experience, in fact, points out that it is awards incorporating reasons which have generally been quashed in court. The awards not giving reasons have survived the attack on their validity, unless the arbitrator is otherwise shown to have misconducted himself or his award suffers from some other technical defect.

Once we have the compulsion for the incorporation of reasons in the award given by the arbitrators, validity of most of the awards, in our opinion, would not be able to survive in court. As such, the object of the Arbitration Act would be substantially defeated.

Nature of reasons.

4.48. Once Parliament provides that reasons shall be given, that must clearly be read as meaning that proper, adequate, reasons must be given; the reasons that are set out, whether they are right or wrong, must be reasons which not only will be intelligible, but also can reasonably be said to deal with the substantial points that have been raised. If the award in any way fails to comply with the statutory provisions, then it would be a ground for saying that the award was bad on the face of it, as Parliament has required that reasons shall be incorporated.[1]

It is well established that where the arbitrator gives reasons for a conclusion of law, courts can go into those reasons.[2-3].

Voluntary character and the cosideration of speed.

4.49. It is sometimes stated that since an arbitrator is bound to apply the law, there should be some means of ensuring that he applied the law correctly. However, it is also to be remembered that parties resort to an arbitration voluntarily and select or agree to a particular arbitrator, because, *inter alia,*—

(i) they have faith in him, and

(ii) the proceedings will be more speedy and free from technicalities than in the courts.

The object of achieving speed and informality is likely to be largely frustrated if a statutory provision makes it compulsory to give reasons for the award. The general rule is that the parties cannot object to the decision given by their own judge, except in case of misconduct and the like.[4] This general principle should not be departed from unless weighty reasons exist for such departure.

No doubt, it is desirable that the award should be correct in law. But the fundamental question is, how far should the finality of the award yield to the desirability of legal correctness, and what procedural requirements should be insisted upon to ensure that the award is sound in law? In this connection, reference may be made to the observations of Barwick C.J. (of the High Court of Australia), made in 1972[5]. He observed that "finality in arbitration in the award of the lay arbitrator is more significant than legal propriety in all his processes in reaching that award."

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1. *Of. Re Poyser & Mills Arbitration,* (1964) 2 Q.B. 467; (1963) 1 All E.R. 612, 616 (Megaw J.)

2. *Champsey Bhars & Co.,* v. *J.B. Spinning & Weaving Co. Ltd.,* A.I.R. 1923 P.C. 66.

3. *S. Dutt* v. *University of Delhi* A.I.R. 1958 S.C. 1050.

4. *Government of Kelantan* v. *Duff Development Co. Ltd.,* (1923) A.C. 395; Russell (1970), pages 359, 360.

5. *Tuta Products Pvt. Ltd.,* v. *Hutcheson Bros. Pvt. Ltd.,* (1972) 127 C. L R 253, 258: (1972) Australian Law Journal Reports 119 (Australia).

The importance which the law attaches to the finality of arbitration goes against the suggestion now put forth for giving reasons for an award. A requirement that the reasons for an award should be given would open too wide a door for challenging the award, even if the grounds for setting aside are, by statute, restricted in other respects.

No change.

4.50. For these reasons, we are not inclined to recommend a provision requiring the arbitrator to give reasons for the award.

CHAPTER 5

Proceedings in the Court on an Award
(Sections 15-19)

Sections 15 to 17 and 30—Scheme.

5.1. After an arbitrator has made his award, one of the parties must obtain a judgment in terms of the award. Indian law, as enacted in the Arbitration Act, does not allow a party to enforce the award as such. This position, therefore, necessarily raises the question—What are the possible alternatives open to the court when its aid is sought for the purpose of making a decree in terms of the award? The law on the subject is scattered in several sections. Their inter-relationship would be better understood if they are viewed as constituting a set of alternatives available to the court on an application made for the purpose mentioned above.

In the scheme of the Act, the court may—

(a) pass judgment in terms of the award (section 17), or

(b) modify or correct the award (section 15), or

(c) remit the award on any matter referred to arbitration for reconsideration by the arbitrator or umpire (section 16), or

(d) set aside the award (section 30).

In short, the court may totally accept the award, or totally reject it, or take the intermediate course of modifying it or remitting it with the implication that the arbitrator may modify it. Whether these alternatives are mutually exclusive is not a matter which needs to be considered at this stage.

Section 15.

5.2. Coming to the power to modify an award—which is first dealt with,—section 15 confers that power in three situations. The first is where it appears to the court that a part of an award is upon a matter not referred to arbitration, and such part can be separated from the other part and does not affect the decision on the matter referred. The second is where the award is imperfect in form or contains any obvious error which can be amended without affecting such decision. The third applies where the award contains a clerical mistake or an error arising from an accidental slip or omission.

The first situation hardly needs any comment, because the authority of an arbitrator cannot go beyond the matters referred to arbitration.

The second situation is equally unobjectionable, since the power to modify or correct the award is, in this case, linked up with an imperfection of form or an obvious error, and can be exercised without affecting the decision on the matter referred. The situation where an award contains an obvious error is illustrated by a series of cases where the award was erroneously passed against the President of India, while it should have been passed against the Union of India.[1]

The third situation becomes necessary by reason of the fact that the award, because of clerical mistake or accidental slip or omission, does not reflect the true intention of the arbitrator.

The common link underlying the three situations is the legislative policy of giving effect to *the substance of* the arbitration and the award

1. (a) *Union of India* v. *Salween Timber Construction Co.*, A.I.R. 1963 Cal. 307, 309, para 9.

(b) *Union of India* v. *Himatsingka Timber Co.*, *A.I.R.* 1964 Cal. 91, 92, 93 para 5 to 8.

History and position in England.

5.3. It may be noted that section 15 corresponds to the Code of Civil Procedure, 1908, Second Schedule, para 12. There was no such provision in the Indian Act of 1899. Nor is there any such provision in the English Act. Under the English Act, the court has no power to alter or amend an award.[1] It may be noted, that even in India, no such provision was contained in the Code of 1882 in relation to *arbitration without intervention of the court* (*Section* 525 *of the* 1882 *Code*), and, therefore, the court had no power to amend the award or remit it. It could either file the award or reject the application.[2] In the absence of such a provision, the court had either to set aside the award or to remit it.[3] Hence the need for a provision conferring power to modify the award.

No change.

5.4. The present provision is a salutary one and we have no change to recommend in section 15.

Section 16 and grounds for remitting the award.

5.5. The grounds on which an award or any matter referred to arbitration can be remitted to the arbitrator or umpire for re-consideration are enumerated in section 16(1), clauses (a), (b) and (c). In the corresponding section 22 of the English Act of 1950, there is no such limitation, and the High Court or a Judge thereof is authorised to remit the matters referred, or any of them, "In all cases of reference to arbitration".[4] Though, in England, the power to remit is generally exercised on certain recognised grounds, those grounds are merely guides to the exercise of discretion, and are not exhaustive.[5] The usual grounds for remission in England are:—

(i) where the award is bad on the face of it;[6]

(ii) where there has been an admitted mistake and the arbitrator himself asks that the matter may be remitted;[7]

(iii) where there has been misconduct on the part of the arbitrator;[8]

(iv) where additional evidence has been discovered after the making of the award.[9-10]

But these are not exhaustive.[11]

Scope of section 16.

5.6. In our Act, under section 16(1), the court may from time to time remit the award or any matter referred to arbitration to the arbitrators or umpire for reconsideration upon such terms as it thinks fit. The sub-section applies in three situations. We shall come to the precise terms of the three situations in which the section applies in due course, but it may be useful to point out that the common thread linking the three situations is incompleteness in point of quantity, intelligibility and legality.

History. (1899 Act and Code of Civil Procedure).

5.7. It may be noted that in the Indian Arbitration Act of 1899, there was no limitation of the grounds for remission.[12] Section 13(1) of that Act was as follows:—

"The Court may, from time to time, remit the award to the reconsideration of the arbitrators or an umpire."

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1. Russell on Arbitration (1970), page 314, citing *Hall* v. *Alderson*, (1825), 2 Bing 476 and *Moore* v. *Buklin*, (1837) 7 L.J.Q.B. 20.
2. See *Mohammad Afzal* v. *Abdul Hamid*, A.I.R. 1925 Lah. 570.
3. *Shyam Lal* v. *Purshotam Das*, I.L.R. 42 All. 277 (Case under the old Code).
4. Section 22, Arbitration Act, 1950.
5. Russell on Arbitration (1970), page 395 and illustrations at pages 396-398.
6. Russell (1970), page 357.
7. Russell (1970), page 370.
8. Russell (1970), page 376.
9. Russell (1970), page 392.
10. *Montogomery Jones & Co.* v. *Liebenthal*, (1898) 78 Law Times 406.
11. For examples of other grounds, see Russell (1970), page 344.
12. See also chart in para 5.12, *infra*.

5.8. Such a limitation was, however, contained in the Second Schedule to the Code of Civil Procedure, 1908, paragraph 14 (now repealed). Under that paragraph, the court could remit the award or any matter referred to arbitration—

"(a) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration, unless such matter can be separated without affecting the determination of the matters referred;

(b) where the award is so indefinite as to be incapable of execution;

(c) where an objection to the legality of the award is apparent upon the face of it."

Present section narrower than English law.

5.9. It would thus appear, that the provision as to remission in the Civil Procedure Code was narrow as is the present section, while in the Arbitration Act, 1899,[1] the provision was wide as in the English Act.[2] The notes to clause 16 to the Bill of 1939 merely state that clause 16 deals with the court's powers to remit an award for re-consideration, and sub-clause (1) repeats (without change) paragraph 14 of the Second Schedule to the Code, and the remaining sub-clauses reproduce the substance of the first sentence of paragraph 15(1) of the Code. The notes do not contain any discussion as to why the wider provision in the Indian Arbitration Act of 1899 was not adopted. The difference between the Act of 1899 and the Code of Civil Procedure, 1908, has been judicially noted.[3] Under the wider provision in the Indian Arbitration Act, 1899, courts generally exercised their discretion on the same grounds as in England.[4]

Remission on other grounds not permissible.

5.10. As the section stands now, it is not possible for the courts to remit an award on any ground not mentioned in the section.[5-6] A remission ordered in the absence of the specified would be invalid.[7]

Question of amendment considered Change in the law.

5.11. It is an important question for consideration whether the law on the subject should be altered by removing or modifying the restrictions as to remission. There may be cases where the situation does not fall under section 16, and yet remission of the award would be desirable.[8] Again, where legislation has been enacted subsequent to the making of the award and changed the law, the award may require re-consideration on that score.

Such a situation arose in one case before the Patna High Court.[9] After an award was made with regard to the partition of certain properties, a notification was issued under section 3 of the Bihar Land Reforms Act, vesting the "milkiat interest" in the State of Bihar. The Court held, that the award was not a nullity because of such vesting, and that the proper course would be to refer the matter back to the arbitration under section 16 for making a fresh partition of the properties which are left to the members after the vesting of the said interest.

Cases of mistake.

5.12. Again, there may be cases where there is a mistake in the award. Thus, if "Daniel" is referred to in the award as "David", then on that ground the award can be remitted. (Of course, there are other provisions also regarding mistake).[10]

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1. Para 5·8, *supra*.
2. Section 22, Arbitration Act, 1950 (Eng.).
3. *Aboobaker* v. *Congress Reception Committee*, A.I.R. 1937 Bom. 410, 416.
4. See *U.M. Choudhary & Co.* v. *Jivan Krishna*, I.L.R. 49 Cal. 646; A.I.R. 1922 Cal. 447.
5. *Sree Minakshee Mills Ltd.* v. *Patel Brothers*, A.I.R. 1944 P.C. 76.
6. *Vengu Ayyar* v. *Yegyam Ayyar*, A.I.R. 1951 Mad. 414.
7. *Sheo Karan* v. *Kanhaya*, A.I.R. 1935 Lah. 113.
8. See cases cited in Russell on Arbitration (1970), page 392.
9. *Shalingram Singh* v. *Sheo Sati Prasad*, A.I.R. 1963 Pat. 168 (Ramaswami C.J. and Untwalia J.).
10. See section 13(d) and 15(c), Indian Act, and section 17, English Act.

Then, there may be cases where a specific statutory provision constituting the substantive law applicable to the case has been overlooked by the arbitrators.

There may be many other cases where remission would be appropriate. Most of these cases would not fall under section 16, unless the language of section 16(1)(c)—"where an objection to the legality of the award is *apparent* upon the face of it"—is stretched beyond its legitimate limits. It is clear that remission can, at present, be ordered only on the specified grounds.[1] The present provision follows the narrower one in the Civil Procedure Code, Second Schedule, paragraph 14, instead of the wider one in section 13, Act of 1899. The notes on clauses relating to the Bill which led to the Act of 1940 merely state that the clause follows the Second Schedule, clause 14. No other reasons are given as already stated.[2]

The following chart will show the relevant provisions:—

(English) Arbitration *Act* 1889	Indian Arbitration *Act*, 1899	C.P. Code, 198, *Second Schedule*	(Indian) Arbitration *Act*, 1940
Section 10	*Section* 13	*Paragraph* 14	*Section* 16
(1) In all cases of reference to arbitration the Court or a Judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrator or umpire.	(1) The Court may, from time to time, remit the award to the re consideration of the arbitrators, or umpire.	The court may remit the award or any matter referred to arbitration to the reconsideration of the same arbitrator or umpire, upon such terms as it thinks fit—	The court may from time to time remit the award or any matter referred to arbitration to the arbitrators or umpire for reconsideration upon such terms as it thinks fit—
(2) Where an award is remitted, the arbitrators or umpire shall, unless the order otherwise directs, make their award within three months after the date of the order.	(2) Where an award is remitted under sub-section (1), the arbitrators or umpire shall, unless the court otherwise directs, make a fresh award within three months after the date of the order remitting the award.	(a) Where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration, unless such matter can be separated without affecting the determination of the matters referred;	(a), (b), (c) same as (a), (b), (c) in the preceding column (i.e. C.P. Code).
		(b) Where the award is so indefinite as to be incapable of execution;	(2) Where an award is remitted under sub-section (1), the Court shall fix the time within which the arbitrator or umpire shall submit his decision to the Court: Provided that any time so fixed may be extended by subsequent order of the Court.
		(c) Where an objection to the legality of the award is apparent on the face of it. *Paragraph* 15 (1) An award remitted under paragraph 14 becomes void on the failure of the arbitrator or umpire to re-consider it. But no award shall be set aside except on one of the following grounds, namely:— etc.	(3) An award remitted under sub-section (1) shall become void on the failure of the arbitrator or umpire to reconsider it and submit his decision within the time fixed.

Recommendation to amplify section 16.

5.13. In our opinion, it is advisable to substitute in section 16 a more ample provision. Necessary amendment is recommended.[3]

1. See Sircar, Law of Arbitration in British India (1942), page 201.
2. Para 5·9, *supra*.
3. See para 5·19, *infra*.

Section 16(1)—and partial remission.

5.14. The re-consideration under section 16 may be of the whole award, or it may be of a particular question only. If the whole award is remitted, the effective award is the second one; but if only some of the matters are remitted, it becomes somewhat difficult to decide how *far the first award remains effective*. The question was discussed in a Calcutta case. The view was taken that unless the court gave a direction under section 16(1) to the effect that the award of the arbitrator should be limited to the matters remitted to him, the arbitrator can, in his second award, confirm or repeat what he had said in the first award.

Obscurity as to the position of the first award.

5.15. This is, of course, a question of form, and not of much importance. But what happens to the first award in the meantime? The position on the subject is rather obscure. The view taken in England is that the award is apparently suspended.[2] It is stated, however, in Halsbury,[3] that the first award remains valid and enforceable, but in the Calcutta case,[4] this proposition was regarded as 'too broad'. Since, in India, the award has to be made rule of the Court, the obscurity of the position is not likely to lead to any practical difficulties. No change is, therefore, recommended on this point.

Remission to new arbitrator.

5.16. In England,[5] the question whether, after an arbitrator dies, the award can be remitted to a new arbitrator, has arisen. The view there taken seems to be, that if, by the agreement to refer, the court has power to appoint an arbitrator in place of the one who had died, and the arbitrator dies after making an award, the award may be remitted to a new arbitrator appointed by the court in accordance with the provisions in the agreement, but not otherwise. The problem does not seem to have arisen in India. In the Code of Civil Procedure, 1908, Second Schedule, paragraph 14, the words used were "same arbitrator", but the word "same" does not occur in the 1940 Act, and did not occur in the 1899 Act.[6] The matter may be left as it is, as such a situation may not be frequent.

Section 16 Scope for improvement.

5.17. We may now revert to the need for widening the scope of section 16—a matter which we have already discussed.[7] It is to be noted that at present when an award which is defective in matters of substance is received by a court, then the only alternatives open to the court are to remit the award or to set it aside. Power to set aside the award (in contrast with the power of remission),[8] is a drastic one, because the court may[9] then supersede the reference, and direct that the agreement ceases to have effect with respect to the difference refered. Such a drastic action may not always be in conformity with the intentions of the parties. It may lead to unnecessary litigation and, in some cases, to injustice. If this approach is correct, the power to remit should be worded widely rather than narrowly. In fact, this power in the earlier Act—Indian Arbitration Act, 1899, section 13—was very wide, because section 13(1) of that Act provided that "the court may, from time to time, remit the award to the reconsideration of the arbitrators or an umpire". There was no further limitation as to the grounds of remission. In the English Act also, the power is expressed as a power "to remit the matters referred or any of them" without any restriction as to grounds.

In illustration of the utility of a wide power of remission, it may be useful to refer to the situation of such "misconduct" on the part of the arbitrator as does not irresistibly lead to the conclusion that there has been any act involving moral turpitude. In fact, under the Act of 1899, judicial

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1. *Brahma Sarup* v. *Diwan Chand*, A.I.R. 1963 Cal. 583, 586.
2. *Johnson v. Latham*, (1851) 20 L.J.Q.B. 236, 238 (Earl J.) (Observations).
3. Halsbury, 3rd Edition , Vol.2, page 57, para 122.
4. *Brahma Sarup v. Biwan Chand*. A.I.R. 1963 Cal. 583.
5. See Russell on Arbitration (1963), page 306.
6. See Sircar (1952), page 207.
7. Para 5·10 to 5·13, *supra*.
8. Para 5·6, *supra*
9. Section 19.

decisions accepted the proposition that where there has been misconduct on the part of the arbitrator, the court could remit the matter for re-consideration.[1]

Position in England.

5.18. In England, the Courts have refused to limit the power of remission to the specified grounds.[2] It may be stated[3] in broad terms that where the award or any part thereof if grossly wrong, the award may be remitted. As was observed in an Australian case,[4]—"Arbitrators are not selected to act despotically or illegally if that can be reasonably prevented".

A well-known English case[5] may be referred to in the context of technical misconduct. In that case, an arbitrator with whom a letter book was left, read letters other than those put in evidence and his award was materially influenced thereby. The award was remitted on that ground. If such a situation arose in India under section 16, the power of remission would not be exercisable and the only course left open would be to set aside the award.

It would, then, appear that there is everything to be said for a wide jurisdiction in regard to remission of the award. This would not strictly be an innovation, because the Act of 1899 did provide for a wide jurisdiction in this regard. Moreover, it would be consistent with justice and convenience. At the same time, care has to be taken that scope is not created for unnecessary interference by the court.

Recommendation as to section 16.

5.19. In the light of the above discussion,[6] we recommend that in section 16(1), the following clause should be added at the end[7]:—

> "(d) where for any other reason the court considers that in the interests of justice it should, instead of setting aside the award, order such remission."

Section 30.

5.20. At this stage, we should refer to section 30 which confers on the court power to set aside an award. Section 30 represents a stage between the submission by the arbitrator of the award under section 14 and the pronouncement of judgment in terms of the award under section 17. Modification of an award and its remission are dealt with in sections 15 and 16, already dealt with.

Section 17.

5.21. We now proceed to section 17. Under section 17, where the court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award and upon the judgment so pronounced a decree shall follow and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accodance with, the award.

That part of section 17 which bars an appeal except on the specified grounds has led to a conflict of decisions which can be best understood in the light of the historical evolution of the law.

5.22. The scheme of section 17, which provides that no appeal shall lie from a decree in accordance with the judgment based upon an award

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1. *U.M. Choudhury & Co.* v. *Jivan Krishna Ghose & Son*, (1922) I.L.R. 49 Cal. 646.
2. *Margulies Brothers Ltd.* v. *Dafins Thomaides &Co. Ltd.* (1958) 1, W.L.R. 983 400, 401.
3. Russell (1970), pages 377, 378.
4. *Carr* v. *Wodomga'Shira*, (1924) 34 C.L.R. 234.
5. *Devenport* v. *Vickery*, (1861) 9 W.R. 701; Sircar, Law of Arbitration in British India (1942), page 20,
6. Para 5·10 to 5·13 and 5·17, 5·18.
7. In present clause (c) of section 16 (1), the word "or" should be added at the end, as a consequential change.

except on the ground that the decree is in excess of, or not otherwise in accordance with, the award is that the parties having themselves chosen the arbitrator, the award given by such an arbitrator should constitute final adjudication of the dispute and it should not be open to the court of appeal to substitute its own opinion for that of the arbitrator, in the same way as a trial court could not do so. The right of appeal is consequently confined only to that part of the decree which is stated to be in excess of, or not in accordance with, the award.

Conflict of views and its solution.

5.23. There is a conflict of views on the point as to whether, where a court passes a decree in terms of the award, an appeal would be maintainable on the ground that there was no valid reference to arbitration. It is not possible to reconcile the two conflicting views held in the matter. One view is that the appeal is maintainable.[1]

The other view is that the appeal is not maintainable.[2-5]

To set this controversy at rest, we are recommending amendment in section 30 of the Act. As a result of that amendment, an appeal would be maintainable under section 39(1)(vi) against an order which also disposes of the objection that the award is invalid because there was no valid reference to arbitration. Such objection, according to the amendment suggested by us[6], would fall within the ambit of section 30.

Section 18.

5.24. This takes us to section 18, which deals with power of the court to pass certain interim orders. The section needs no change.

Section 19.

5.25. Under section 19, where an award has become void under sub-section (3) of section 16 or has been set aside, the court may, by order, supersede the reference and shall thereupon order that the arbitration agreement shall cease to have effect with respect to the difference referred. The section needs no change.

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1. *Durga Charan* v. *Gnaga Dhar*, A.I.R. 1931 Cal. 109.
2. *Golnur Bibi* v. *Sheikh Abdus Samad*, A.I.R. 1931 Cal. 211.
3. (a) *Mohammad* v. *Valli*, A.I.R. 1924 Bom, 324 (Pratt and Fawcett, JJ.).
   (b) *Batcha Sahib* v. *Abdul Gunny*, A.I.R. 1914 Mad. 675.
4. The case law on the subject is collected in *U. Sein Win* v. *Central Plumbring Co.*, A.I.R. 1935 Rang, 94 and in *Golnur Bibi* v. *Sheikg Abdus Samad*, A.I.R. 1931 Cal. 211.
5. See discussion in *Saha & Co.* v. *Ishar Singh*, A.I.R. 1956 Cal. 321, page 323, para 24 (Chakravarti C.J.). page 33, para 43 (S.R. Das Gupts J.), page 342, para 86 (P.B. Mukharji, J.) and page 347, pura 130 (Bachawat, J.).
6. Para 8·12, *infra*.

CHAPTER 6

ARBITRATION WITH INTERVENTION OF THE COURT

Section 20.

6.1. Where no suit is pending, arbitration with intervention of the court can still be resorted to under section 20. Sub-section (1) provides that where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject matter of the agreement, or any part of it, and where a difference has arisen with respect to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in court.

Section 20(2) Recommendation.

6.2. Sub-section (2) of section 20 requires that the application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or, if, otherwise, between the applicant as plaintiff and other parties as defendants.

It appears that the language of this sub-section is slightly involved, though, of course, the intention is quite clear. In the latter half of the sub-section there are really two situations intended to be dealt with and it would be conducive to clarity if the two situations are dealt with separately.

Accordingly, we recommend that sub-section (2) of section 20 should be revised as under:

> "(2) The application shall be in writing and shall be numbered and registered—
>
> (a) if the application has been presented by all the parties, as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the rest of them as defendant or defendants, or
>
> "(b) if the application has not been presented by all the parties, as a suit between the applicant as plaintiff and the other parties as defendants."

Section 20(3) and 20(4) and section 20(5).

6.3. Under sub-section (3) of section 20, the court shall direct notice of the application to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed.

Sub-section (4) of section 20 provides that where no sufficient cause is shown, the court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether under the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the court.

Where the agreement names the arbitrator, and the named arbitrator refuses to act, the question may arise whether the court can appoint another arbitrator. This question is discussed separately.[1]

Finally, sub-section (5) provides that thereafter the arbitration shall proceed in accordance with and shall be governed by the other provisions of the Act so far as they can be made applicable.

These sub-sections need no change.

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1. See discussion relating to section 8(1) (b), *supra*.

CHAPTER 7

ARBITRATION IN SUITS

(*SECTION 21-25*)

7.1. Arbitration in suits forms the subject-matter of five sections contained in Chapter IV of the Act. Under section 21, where, in any suit, all the parties interested agree that any matter in difference between them in the suit shall be referred to arbitration, they may at any time before judgment is pronounced, apply in writing to the court for an order of reference. The situation where only some of the parties apply is dealt with later under section 24. Section 21.

Difficulties sometimes arise where, without obtaining a formal order of the court under this section, parties, for the settlement of their mutual differences, appoint an arbitrator who makes an award. This question really falls within section 47, and will be discussed thereunder.[1]

7.2. Previously, there was some controversy as to the question whether *an appellate court* could refer a matter under dispute to arbitration for decision. That has been settled by a decision of the Supreme Court,[2] which answers the question in the affirmative, and holds that "court" includes an appellate court, and "suit" includes an appeal. We think that this proposition should be codified and recommend that in sections 21 and 24 and in the heading of the Chapter, wherever the word "suit" occurs, the words "or appeal" be added. Section 21 and Appellate Court.

7.3 We, therefore, recommend that section 21 should be revised as under:— Recommendation as to section 21.

> "21. Where in any suit *or appeal pending in any court*, all the parties interested agree that any matter in difference between them in the suit *or appeal* shall be referred to arbitration, they may, at any time before judgment is pronounced, apply in writing to that Court for an order of reference."

7.4. Section 22 provides that the arbitrator (in an arbitration in a suit) shall be appointed in such manner as may be agreed upon between the parties. It follows, therefore, that the initial appointment must be by agreement, though, as regards the filling up of the vacancies arising subsequently, the provisions of sections 8, 10, 11 and 12 apply by virtue of section 25, subject to the proviso to section 25. Section 22.

No further comments are required on this section.

7.5. Sub-section (1) of section 23 provides that the court shall, by order, refer to the arbitrator the matter in difference which he is required to determine and shall in the order specify such time as it thinks reasonable for the making of the award. Section 23.

Under sub-section (2), where a matter is referred to arbitration, the court shall not, save in the manner and to the extent provided in this Act, deal with such matter in the suit. This is really the crucial provision in this Chapter, because it is by virtue of this sub-section that the result is established that once the parties agree to refer a pending dispute to arbitration, the jurisdiction of the court is barred except as expressly provided in the Act.

No changes are needed in this section.

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1. See discussion relating to section 47, Chapter 10.

2. *Nachiappa* v. *Subramaniam*, A.I.R. 1960 S.C. 307, 317 para 36.

Section 24 Recommendation to amend.

7.6. The situation where some only of the parties to the suit apply to have the matters in difference between them referred to arbitration under section 21, is dealt with in section 24.

To put the matter in broad terms, the criterion adopted is that of separability. In the first place, the section provides that the court may, if it thinks fit, so refer such matters to arbitration provided that the same can be separated from the rest of the subject matter of the suit, in the manner provided in section 21; but the suit shall continue so far as it relates to the parties who have not joined in the said application and to matters not contained in the said reference as if no such application had been made, and an award made in pursuance of such a reference shall be binding only on the parties who have joined in the application.

The only change required in section 24 is the addition of the word "appeal".[1] After such addition, the section will read as under:—

Revised section 24

"24. Where some only of the parties to a suit *or appeal* apply to have the matters in difference between them referred to arbitration in accordance with, and in the manner provided by, section 21, the Court may, if it thinks fit, so refer such matters to arbitration (provided that the same can be separated from the rest of the subject matter of the suit *or appeal*) in the manner provided in that section, but the suit *or appeal* shall continue so far as it relates to the parties who have not jointed in the said application and to matters not contained in the said reference as if no such application had been made, and an award made in pursuance of such a reference shall be binding only on the parties who have joined in the application."

Section 25.

7.7. Section 25 provides that the provisions of the other chapters shall, so far as they can be made applicable, apply to arbitrations under this chapter. Under the proviso to the section, the court may, in any of the circumstances mentioned in sections 8, 10, 11 and 12, instead of filling up the vacancy or making the appointments, make an order superseding the arbitration and proceed with the suit and when the court makes an order superseding the arbitration under section 19, it shall proceed with the suit.

The language of this section appears to be clear enough. It is, therefore, surprising that attempts were made in the past to argue that section 14 would not apply to arbitrations in ordinary suits.[2-3] None of the attempts succeeded.

We have no changes to recommend in the section.

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1. See discussion as to section 21, *supra*
2. *Ram Bharosey* v. *Pearey Lal*, A.I.R. 1957 All. 265, para 4.
3. *Ramkrishnamma* v. *Lakshmibayamma*, A.I.R. 1958 A.P. 497, 501, para 5.

CHAPTER 8

PROVISIONS APPLICABLE TO ALL ARBITRATIONS

Section 26.

8.1. With section 26 begins a group of provisions which are common to all arbitrations. That section provides that save as otherwise provided in this Act, the provisions of this Chapter (sections 26 to 38) shall apply to all arbitrations. The section needs no change.

Section 27.

8.2. Section 27(1) provides that unless a different intention appears in the arbitration agreement, the arbitrators or umpire may, if they think fit, make an interim award, and sub-section (2) of the same section provides that references in the other provisions to an award include an interim award.

No changes of substance are required in this section.* But it may be useful to elaborate several aspects of *interim* awards. Interim awards, as understood in English case-law on the corresponding provision[1] of the Arbitration Act, 1950, have a wide scope. The award may be a direction analogus to an interlocutory injunction which it to be operative during the pendency of the arbitration proceedings,[2] or the award may direct payment which is to be adjusted in part satisfaction of a large claim—the larger claim being left to be quantified by the final award.[3]

Then, there is a third example of *interim* award, a determination of some matter in a suit, leaving other matters in issue to be determined by a later ward. An example is furnished by an English case,[4] in which there was a claim for damages for breach of two contractors, and the interim award determined the claim in regard to the first contract only. The arbitrator in that case was empowered to make one or more awards at his discretion.

Section 28 Amendment recommended.

8.3. Section 28 deals with extension of the time for making the award. As the section stands at present, there is no restriction as to the period of extension. In our view, it is necessary that indefinite extension of the time for making the award should be guarded against. It is desirable to provide that no extension should be granted so as to allow the making of the award more than one year after the arbitrator's or umpire's entering on the reference, unless the court, for special and adequate reasons to be recorded in writing, is satisfied that such extension is necessary.

Accordingly, we recommend the insertion of the following proviso below section 28:

> *"Provided that no extension shall be granted so as to allow the making of the award more than one year after entering on the reference, unless the court, for special and adequate reasons to be recorded in writing, is satisfied that such extension is necessary."*

Section 29.

8.4. Under section 29, "where and in so far as an award is for the payment of money the court may, in the decree, order interest, from the date of the decree at such rate as the court deems reasonable to be paid on the principal sum as adjudged by the award and confirmed by the decree."

The section needs no change.

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1. Compara section 14, Arbitration Act, 1960 (English).
2. *Wringtson* v. *Bywater*, (1838) 150 English Reports 1114.
3. *Woodrow* v. *Trawler* (*Whitesh and Crinsby*) *Ltd.*, (1930) K.B. 176.
4. *Wrightson v. Bywater*, (1838) 150 English Reports 1114, Halsbury, 4th Edition, Vol. 2, 2, page 609 footnote 6.

We have already discussed the question of the arbitrators' power to award interest.[1]

Section 30.

8.5. We now proceed to a consideration of section 30, which reads—

"30. An award shall not be set aside except on one or more of the following grounds, namely:—

(a) that an arbitrator or umpire has misconducted himself or the proceedings;

(b) that an award has been made after the issue of an order by the court superseding the arbitration or after arbitration proceedings have become invalid under section 35;

(c) that an award has been improperly procured or is otherwise invalid."

Clauses (a) and (b) need no comments.

Section 30(c).

8.6. The question whether, in section 30(c), the words "that an award... is otherwise invalid" are to be read *ejusdem generis* with what precedes them, or whether they cover all grounds of invalidity of awards has come up before the courts. The nature of the controversy cannot be fully understood without a brief study of the history of the provision.

These words did not occur in the Act of 1899, section 14. Nor they did occur in the Code of Civil Procedure of 1882, section 521. They were added for the first time in the Code of Civil Procedure, 1908, Second Schedule, paragraph 15. The Privy Council had held[2] in 1902 that the legislature intended to give finality to awards and to decrees passed in accordance therewith. Since, under the Code of 1882, an award could be set aside only on the grounds mentioned in section 521 of that Code, the grievance arose that as its validity could not be contested on any other ground, it became final.[3] The addition of these words in the Code of 1908 was thus intended to widen the scope of interference by the courts.

Position under the Code of 1908.

8.7. But the question arose whether the words "otherwise invalid" in the Code of 1908 were or were not to be construed *ejusdem generis* with the words occurring in the preceding portion of paragraph 15 of the second Schedule to the Code.

On this point, there has been a conflict of judicial view.[4-6]

The undermentioned cases took the wide view,[7-9] while a few decisions took the narrower view[1] with reference to the Code of 1908.

Conflict under 1940 Act.

8.8. There has been a conflict of judicial view on the scope of the words "is otherwise invalid" in section 30 of the Arbitration Act, 1940 also.

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1. See section 13 A, *supra*
2. *Ghulam Khan* v. *Muhammed Hasan*, (1902) 20 Indian Appeals 51; I.L.R. 29 Cal. 167 (P.C.).
3. See discussion in *Lutawan Kubar* v. *Lachiva*, A.I.R. 1914 All. 447, 449 (Banerjee J.)
4. See review of case law in *Dooly Chand* v. *Mamuji*, A.I.R. 1917 Cal 481 (reviews cases).
5. *Durga Charan* v. *Ganga Dhar*, A.I.R. 1931 Cal. 108
6. *Golnur Bibi* v. *Abdus Samad*, A.I.R. 1931 Cal 211.
7. *Mahomad* v. *Valli*, A.I.R. 1924 Bom 324.
8. *Suryanarayana* v. *Sarabhaiah*, 21 Madras Law Journal 263, 278; Paruck, Arbitration Act, 1955, page 241.
9. *Mariam* v. *Amina*, I.L.R. (1937) All. 371, A.I.R. 1937 All. 65, 59, 74 (Majority of the Full Bench).
10. See case law reviewed in *Kishan Chand* v. *Takhit Ram*, A.I.R. 1939 Sind 241 (F.B.) (reviews case law)

One view which has been taken is that these words should receive a narrow construction and be taken *ejusdem generis* with the words occurring in the preceding portion of the section.[1-4]

8.9 The other view is that these words are to be construed widely[5-6] and not to be taken *ejusdem generis* with the preceding words in the section.

In a case arising under paragraph 15 of the Second Schedule to the Code of Civil Procedure, 1908, before the enactment of Arbitration Act of 1940, the Allahabad High Court[7] by majority held that the above words should not be construed *ejusdem generis* with the preceding words. Iqbal Ahmed J. in his dissenting judgment, however, took the view that these words should be construed *ejusdem generis* with the preceding words.

Privy Council view and the altered structure of the 1940 Act.

8.10. The Privy Council in a subsequent case[8] approved of the view of Iqbal Ahmed J. Iqbal Ahmed J., in arriving at the conclusion that the words "otherwise invalid" should be construed *ejusdem generis* with the preceding words, high-lighted the fact that the words "otherwise invalid" were not contained in a separate clause. The Arbitration Act of 1940 to some extent departed from the scheme of paragraph 15 of the Second Schedule to the Code of Civil Procedure, by putting the words "or is otherwise invalid" along with the words "that an award has been improperly pronounced" in a separate clause. A view can consequently be taken[9] that the reasoning which weighed with Iqbal Ahmed J. does not hold good in the face of the provisions of section 30 of the Arbitration Act, 1940, wherein the words in question have been put in a separate clause.

Importance of the question.

8.11. The importance of the question as to whether the words "is otherwise invalid" should be construed *ejusdem generis* has arisen in those cases wherein the validity of the award has been challenged on the ground that there was no valid reference to arbitration. The consequences which flowed from taking one view or the other were crucial, as they impinged upon the right of appeal against an order dealing with the objections to an award on the ground that there was no valid reference to arbitration. One view was that such objections fell only within the ambit of section 33 and not that of section 30 and therefore there was no right of appeal under section 39 of the Arbitration Act. The other view was that such objections also fell under section 30, being covered by the expression "is otherwise invalid" and, as such, an appeal against such an order would be maintainable under section 39(1)(vi) of the Act.

Recommendation as to section 30.

8.12. To resolve this controversy and to put the matter beyond any pale of uncertainty, we are suggesting the insertion of an Explanation to section 30. The Explanation would read:

> *"Explanation.*—The expression 'or is otherwise invalid' includes the ground that there was no valid arbitration agreement or no valid reference to arbitration."

Section 30A (proposed)—Arbitrator not to be compelled to disclose the reasons for the award.

8.13. At this stage, we would like to deal with the question how far an arbitrator can be compelled to give evidence. While there is, in general, no legal bar to summoning an arbitrator as a witness,[10] it is also a dictum

1. *Basantal* v. *Surendra Parasad*, A.I.R. 1957 Pat, 417, 421, para 26, 37 and 45.
2. *Mangal Singh* v. *Nawab Singh*, A.I.R. 1962 All, 219
3. *Prem Sagar* v. *Security and Finance Ltd.*, A.I.R. 1968 Delhi, 21, 24 para 4-5 (F.B.)
4. See case law reviewed in *Saha & Co.* v. *Ishar Singh*. A.I.R. 1956 Cal 321 (F.B.)
5. A.R. *Savkur* v. *Amrital Kalidas*, A.I.R. 1954 Bom 293.
6. *Saha & Co.* v. *Ishar Singh Krispal Singh & Co.*, A.I.R. 1956 Cal 321.
7. *Mariam* v. *Amina*, A.I.R. 1937 All. 65, 74 (F.B.)
8. *Chhaba Lal* v. *Kalu Mal*, A.I.R. 1946 P.C. 72.
9. Compara *Om prakash* v. *Union of India*, A.I.R. 1963 All. 242
10. *Amir Begum* v. *Badruddin*, I.L.R. 36 All. 336 (P.C.)

laid down by high authority that evidence admitted as relevant on a charge of dishonesty or partiality is not to be used for a different purpose, namely, to scrutinise the decision of the arbitrator on matters which are within his jurisdiction and on which his decision is final.[1]

8.14. We find that the matter has been discussed in a recent judgment of the Supreme Court,[2] were it has been pointed out that on broad principle and public policy, it is highly obnoxious to summon an arbitrator to give evidence in vindication of his award. The following observations made in the judgment are pertinent:—

> "If arbitrators are summoned mindlessly whenever applications for setting aside the award are inquired into, there will be few to undertake the job. The same principle holds good even if the prayer is for modification or for remission of the award. The short point is that the Court must realise that its process should be used sparingly and after careful deliberation, if the arbitrator should be brought into the witness box. *in no case can he be summoned merely to show how he arrived at the conclusions he did.*[3] In the present case, we have been told that the arbitrator had gone wrong in his calculation and this had to be extracted from his mouth by being examined or cross-examined. We do not think that every Munsif and every judge, every Commissioner and every arbitrator has to undergo a cross-examination before his judgment or award can be upheld by the appellate Court. How vicious such an approach would be is apparent on the slightest reflection."

The principle emphasised by the Supreme Court is that an arbitrator cannot be compelled to disclose the reasons of his award.

Recommendation to insert section 30A.

8.15. We have set out our reasons ealier[4] why it should not be obligatory for an arbitrator to give reasons in support of his award. If an arbitrator cannot, under the scheme of the Act, be compelled to give reasons in support of his award, there appears to be no justification for compelling him to disclose them by calling him as a witness in Court.

We are, therfore, of the view that it would be convenient if legislative effect is given to this principle which, of course, applies to umpires also. Accordingly, we recommend the insertion of a new section—section 30A—as follows in the Arbitration Act:—

> "30A. *No arbitrator or umpire shall be compelled, whether in a proceeding before a Court or otherwise, to answer any question relating to the reasons of his award.*"

Sections 31, 32 and 33—Scheme.

8.16. This takes us to the next group of sections—sections 31 to 33. These sections are parts of an integrated scheme designed to expedite the disposal of objections to arbitration agreements or awards. The provisions inserted are both positive and negative. They are positive, in the sense that a party desiring to challenge the existence or validity of an arbitration agreement or award or to have its effect determined must apply to the court, which will decide the question on affidavits.[5] Further, all questions regarding the validity, effect or existence of the award or agreement shall be decided by the court in which the award has been or may be filed[6]. Applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings should also be made to such court.[7]

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1. *Buccluch* v. *Metropolitan Board*, (1972) Law Reports 5 House of Lords 418.
2. *Union of India* v. *Orient Engineering and Commercial Co. Ltd.*, (1978.) 2 Supreme Court Journal 83 (Issue dated 15th July, 1978).
3. Emphasis added.
4. Chapter 4, *supra*.
5. Section 33.
6. Section 31(2), earlier half.
7. Section 31(3), earlier half.

The provisions are *negative,* in the sense that *only* the court in which the award has been or may be filed, can decide such questions and applications.[1] And, further, even if the competent courts are more than one, once an application in any reference has been made in a competent court, that court *alone* has jurisdiction over the arbitration proceedings and over all subsequent applications arising out of that reference and the arbitration procedings.[2] Lastly, *no suit* shall lie on any ground whatsoever for a decision upon the existence or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected, otherwise than as provided in the Act.[3]

These provisions were inserted for the first time in 1940. Speaking briefly, the main impact of these provisions is in (i) the prohibition of a suit, (ii) the bringing of all questions relating to awards and arbitration agreement in one court, thereby avoiding conflicting adjudications,[4] and (iii) the provision of a speedy remedy to a party objecting to a reference or award, under section 33.

Civil Justice Committee.

8.17. These sections were inserted as a result of the recommendations made by the Civil Justice Committee.[5] The Civil Justice Committee pointed out, that under the Arbitration Act of 1899, if a question arose as to the validity of the submission or jurisdiction of the arbitrators or as to regularity of the proceedings, the party objecting had various courses open. He could obtain an injunction to prevent the arbitration proceedings from taking place or from being brought into a conclusion. He could wait until the award was made, and apply to the court to have it set aside or declared to be void. If he desired to defeat the reference, he could file a suit for a declaration of some sort, about the matter in dispute, the object being that by thus bringing the matter in difference before the court of law, the *arbitration* would become fruitless or would at least result in delay. Again, he could wait until the award was put in execution, and then launch a suit asking for an injunction to restrain its *execution,* or could seek a declaration that the submission was obtained by *fraud* or that the arbitrator had misconducted himself and that the award was *not binding upon him.*

8.18. It was in view of these delaying tactics that the Civil Justice Committee felt, that what seemed to be most required—"In the case of every arbitration one court and one only should be the forum in which all questions relating to the validity of the award should be finally determined".

Further, after noting that suits were filed or could be filed at more than one place in relation to the arbitration proceedings, the Committee considered it necessary to require all persons, who desired to challenge awards made by arbitrators in Presidency Towns and other commercial centres, to bring their proceedings in the court of the town. The agreement could contain a clause about the place where the proceedings could be taken. When the arbitration had been held or was being held under such a clause, the law should, in the opinion of the Committee, require all questions to be determined by the court of the town, whether the factum and validity of the arbitration be challenged or not. The Committee also wanted a *total prohibition* of the practice of granting injunctions to restrain arbitration proceedings. Finally, the Committee felt that an amendment of the law would be beneficial to the trade unless a summary method for disposing of objections to awards was provided, and a provision effective to prevent interference of any other court was made.

Object of sections 31—33

8.19. In short, the object of the legislature in introducing sections 31, 32 and 33 was thus to entrust the decision of the relevant disputes to the

1. Section 31(2), latter half; and section 37(3), latter half.
2. Section 31(4).
3. Section 32.
4. See para 8·20 and 8·23, *infra.*
5. Civil Justice Committee (1924-25) Report, pages 210 to 216, paragraphs 5, 6, 13 and 18. N.D. Basu, Arbitration Act (1977), pages 948 to 950.

specified court, and to require the parties to bring that dispute in the form of a petition, as has been explained by the Supreme Court.[1]

With these introductory observations, we proceed to an examination of each section in this group.

Section 31.

8.20. Section 31(1) provides that subject to the provisions of the Act, an award may be filed in any court having jurisdiction in the matter to which the reference relates. The principal object of the section is to avoid conflict[2] between different forums in respect of arbitration proceedings after the award,[3] by defining the jurisdiction of the court.[4].

Sub-section (2) of section 31 is equally mandatory; notwithstanding anything contained in any other law for the time being in force and save as otherwise provided in this Act, all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement or persons claiming under them shall be decided by the court in which the award under the agreement has been, or may be filed, and by no other court. While sub-section (1) is primarily *intended to define* which is a competent court, sub-section (2) is *intended to exclude* the jurisdiction of the other courts.

Under section 31(3), all applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings, shall be made to the court where the award has been, or may be, filed and to no other court. This sub-section assumes that applications regarding the conduct of arbitration proceedings can be made; such applications, it may be noted, arise under several provisions of the Arbitration Act.

Section 31(4) is intended to deal with those situations where even after compliance with three sub-sections of the section, there may be two or more courts wherein proceedings under those sub-sections may be taken. It lays down that notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force, where "in any reference" any application under this Act has been made in a court competent to entertain it, that court alone shall have jurisdiction over the arbitration proceedings and all subsequent applications arising out of that reference and the arbitration proceedings shall be made in that court, and in no other court.

The expression "in any reference", has been construed as meaning "in the matter of a reference to arbitration".[5]

Section 31(1) and jurisdiction over a part of subject matter.

8.21. The expression "court" in section 31(1) must be read with the definition. The definition of "court" in section 2(c), so far as is material, states that "court" means a civil court "having jurisdiction to decide the questions forming the subject-matter of the *reference* if the same had been the subject-matter of a suit".

Section 31(4) and meaning of "in any reference".

8.22. The expression "in any reference" in section 31(4) is significant. Both sections 31 and 34 were enacted "to avoid conflict and scramble";[6] but the nature of the conflict and scramble intended to be avoided is different in the two sections. Section 34 avoids conflict between the private tribunal and the public tribunal. By the grant of stay under section 34, conflict is avoided. The conflict avoided by section 31 is, on the other hand, the conflict between different courts in respect of arbitration proceedings, held pursuant *to the reference*. Only one court will control such proceedings, and that is why it is provided that the court in which the first application is made "in the reference", shall have control over the subject-matter.

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1. *Jawahar Lal Barman* v. *Union of India*, A.I.R. 1962 S.C. 378.
2. *Harbans Singh* v. *Union of India*, A.I.R. 1962 Cal. 659, 661, para 4.
3. See also para 8·23, *infra*.
4. *Bengal Jute Mills* v. *Jewraj Hiralal*, A.I.R. 1944 Cal. 304, 305.
5. *Harbans Singh* v. *Union of India*, A.I.R. 1961 Cal. 659.
6. *Harbans Singh* v. *Union of India*, A.I.R. 1961 Cal, 659, 661, para 4.

8.23. The theory of the Act is that in the case of every arbitration, one court, and only one, should be the forum in which all questions relating to the validity of the award should be finally determined. Correct position.

8.24. While conflicting judicial proceedings are solved by sections 31 and 34, the finality of arbitration agreements and awards is secured by section 32, which may be described as the pivotal section in the Act. It begins with the words "Notwithstanding any law for the time being in force" and provides that no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award nor shall an arbitration agreement or award be enforced, set aside, amended, modified or in any way affected otherwise than as provided in the Act. This section must be read with the next section—section 33—under which the existence or validity of an arbitration agreement or award can be challenged or the effect of either determined by the court on an application. Section 32.

It may incidentally be mentioned that in section 32, the prohibition against *enforcing* an arbitration agreement or award was expressly inserted by the Amendment Act of 1963[1] in view of the conflict of decisions on the subject.[2]

8.25. The principle of section 32 is sound enough. But certain questions of detail have arisen, which we shall deal with presently. Where a substantive agreement contains an arbitration clause, and the validity of the *substantive agreement* itself is attacked, the question may arise whether the suit is barred under section 32. In certain cases, section 33 may, of course, be invoked and the procedure of application utilised. Thus, according to one view,[3] sections 32 and 33 do not apply to suit for a declaration that there never was a contract or that the contract was void,[4] and that such a suit was maintainable, notwithstanding the ban in section 32. Section 32 and validity of substantive agreements.

According to another view,[5] the case falls under section 33.

We do not express any opinion as to which view is correct, because neither view necessitates any amendment.

8.26. The bar imposed by section 32 on a "suit on an award" naturally raises the question how far a defence on the basis of an award is barred. Whether a party can set up an award by way of defence, when the award has not been filed, is a question which has arisen in the courts. There seems to be a conflict of decisions on the point.[6] One view is that the prohibition in section 32 is confined merely to *a suit* by which a decision upon the existence etc. of the agreement or award is sought, and does not extend[7] to a defence based on a private award. Section 32 and use of award as a defence.

A contrary view is that section 32 is wide enough to bar such a defence.[9]-[11]

8.27. The conflict of decisions on the subject was noted by the Supreme Court also in one of its judgments.[12] But the Court did not think it necessary to express a considered opinion on that disputed question. It merely observed, that the defendant in that case was not relying on the award as such, but on the fact that after the award the parties had, by mutual agreement, settled the dispute and a *division of property* had been effected. Judgment of Supreme Court.

1. Amendment Act 47 of 1963.
2. *Dharma Ganda* v. *Ganapari Ganda*, A.I.R. 1964 Orissa 21, 24 Paras 16 and 18 (reviews case law).
3. *State of Bombay* v. *Adamjee*, I.L.R. (1952) 2 Cal. 49; A.I.R. 1951 Cal. 147.
4. See also *Banwari Lal* v. *Board of Trustees, Hindu College, Delhi*, A.I.R. 1948 E.P. 165, 174, paras 33&34 (commenting on *Deokinandan* v. Basantlal, A.I.R. 1941 Cal 52).
5. *Municipal Board* v. *Eastern U.P. Electric Supply Co. Ltd.*, A.I.R. 1958 All. 506.
6. The case law is discussed in detail in *Srinivasa Rao* v. *Narasimha Rao*, A.I.R. 1963 A.P. 193, 197, para 12, and *Mohamed Yusuf* v. *Mohamed Hussain*, A.I.R. 1964 Mad. 1(F.B.).
7. *Kedar Nath* v. *Ambika*, A.I.R. 1974 All. 37.
8. *Lachman* v. *Makar*, A.I.R. 1954 Pat. 27.
9. *Seonarain Lal* v. *Prabhu Chand*, A.I.R. 1958 Pat. 252, 258.
10. *Panamdass Suganram* v. *Hanikyam Pillai*, A.I.R. 1960 A.P. 59 (F.B.).
11. *Mohamad Yusuf* v. *Mohamed Hussain*, A.I.R. 1964 Mad. 6, 7, Para 18, 20.
12. *Kashinathsa* v. *Narsingasa*, A.I.R. 1961 S.C. 1077, 1083, para 22.

However, the Supreme Court observed:

"It may be sufficient to observe that where an award made in arbitration out of court is accepted by the parties and it is acted upon voluntarily and a suit is thereafter sought to be filed by one of the parties *ignoring the acts done* in pursuance of the *acceptance of the award*, the defence that the suit is not maintainable is not founded on the plea that there is an award which *bars the suit* but that the parties have by *mutual agreement* settled the dispute, and that the agreement and the subsequent *actings* of the parties are binding."[1]

Recommendation to prohibit defence.

8.28. The question then arises whether a provision should be inserted and, if so, in what form. Cases where an award has been followed by overt acts of the parties, may not present much difficulty in view of the observations of the Supreme Court;[2] but the position regarding other cases is uncertain. In our opinion, it is desirable to clarify the position. We recommend necessary amendment[3] by providing that an award shall not be pleaded as a defence, except in certain specified cases.

Section 32 and challenge on award in defence

8.29. The question whether the validity of an award can be attacked *in defence* is one which has been discussed in several cases. It has been held that its validity cannot be so challenged.[4]

Recommendation as to section 32.

8.30. After giving the matter our careful consideration, we recommend that section 32 should be re-numbered as sub-section (1) thereof, and, after sub-section (1) as so re-numbered, the following sub-sections should be inserted:

(To be added in section 32)[5]

"(2) *An award shall not be pleaded in defence to any suit, on the ground that the award has determined any matter in issue in the suit: but nothing in this sub-section shall—*

(a) *affect any decree passed under section* 17, *or*

(b) *prejudice any right of a person to apply for a stay of the suit on the ground that there has been made an award which determines the matter in issue and that he proposes to obtain a judgment under section* 17 *in terms of the award.*

"(3) *Nothing in sub-section* (2) *shall preclude any person from pleading any award in defence—*

(a) *where the award has been accepted by the parties, so as to constitute an agreement, or*

(b) *where the award has been acted upon, so as to constitute estoppel.*"

Section 33.

8.31. Section 33 constitutes a qualification of section 32. The general rule in section 32 is that an arbitration agreement or award cannot be challenged by a suit and it cannot, in any way, be affected otherwise than as provided in the Act. The procedure for contesting the agreement or award in certain circumstances is laid down in section 33. In its main paragraph, that section provides that any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the court and the court shall decide the question on affidavits. There is, however, a proviso whereunder, where the court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit.

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1. See also *Satish Kumar* v. *Surinder Kumar*, A.I.R. 1970 S.C. 833, 837, para 8.
2. Para 8·27, *supra*.
3. See draft, para 8·30, *infra*.
4. *Harda Municipality* v. *H. Electric Supply Co.* A.I.R. 1964 M.P. 101, 104, para 7, 8, 9.
5. Para 8.26 to 8.28, *supra*.

8.32. The words "any party to an arbitration agreement", in section 33, have raised some controversy as to whether they include a person who is alleged to be a party to the agreement, but who denies its existence. It has been held[1] that these words include a person who is alleged to be a party to the agreement.[2] Section 33 and denial of factnal existence of agreement by alleged party.

In a Supreme Court case,[3] it had been held that a party affirming the existence of a contract was entitled to file an application under the Act.

8.33. The various possible alternative courses which a party may adopt when the factual existence of an agreement is denied, have been elaborated in a Bombay case.[4] Various alternatives.

8.34. There is, however, a conflict of decisions on this point. According to one view, the word "existence" in section 33 connotes legal existence and not factual existence, and section 33 is available only to a party to an arbitration agreement and would apply only when the party admitted the *factual* existence of the arbitration agreement, but challenged its legality.[5-6] A contrary view has, however,[7-8] been expressed in another decision of the same High Court. Conflict of decision as to the scope of expression "existence" and recommendation to amend section 33.

The Madras High Court has taken the view[9] that the expression "any party" in section 33 must include a person who is put forward as being a party to an arbitration agreement, but who does not admit its existence.

To set the controversy at rest and to clarify the position, we recommend that in section 33, the words *"including one alleged to be a party"* should be added after the words "Any party".

8.35. To preserve a right to arbitration, it is essential that no step should be taken in the suit before an application is made to stay it. Based on this principle, section 34 confers on the court a power to stay legal proceedings where there is an arbitration agreement. There are certain procedural requisites in this regard and stay is to be granted only if the court is satisfied, as to the following two essential ingredients—[10] Section 34.

"(i) that there is no sufficient reason why the matter should not be referred in accordance with the agreement, and

(ii) that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration."

8.36. The first requirement obviously confers on the court a discretion not to grant stay if there is sufficient reason why the matter should not be referred to arbitration. The second requirement is based on the principle that the applicant who invokes the arbitration clause and claims stay of judicial proceedings on that account must show his readiness and willingness at all material times for the proper conduct of the arbitration proceedings.

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1. *M/s Vallabh Pitte* v. *Narsinghdas*, A.I.R. 1963 Bom. 157, 161, 162.
2. For previous Bombay cases, see—
   (i) *Bhagwan* v. *Atma*, A.I.R. 1945 Bom. 494;
   (ii) *Umadat* v. *Chandra*, A.I.R. 1947 Bom 94.
3. *Jawaharlal Barman* v. *Union of India*, A.I.R. 1962 S.C. 378.
4. *M/s Vallabh Pitte* v. *Narsinghdas*, A.I.R. 1963 Bom 157.
5. *Maniklal* v. *Shiv Jute Balling Co. Ltd.*, 52 C.W.N. 389 (Das J.) referred to in A.I.R. 1951 Cal, 147, 148, para 16.
6. *Baijnath* v. *Chhotu Lal*, 52 C.W.N. 397 (Clough J.), referred to in A.I.R. 1951 Cal 147, 148, para 16.
7. *Chatturbhuj* v. *Bhiam Chand Choria and Sons*, 53 C.W.N. 410 (Sinha J.), referred to in A.I.R. 1961 Cal. 147, 148, para 16.
8. The point was discussed in *Bajrang* v. *Agarwal*, A.I.R. 1950 Cal. 267, 268, paras 11-12 (ChatterjiJ.). The point decided there was that a party *affirming* the award could not apply.
9. *Muthu Kutty* v. *Varee Kutty*, A.I.R. 1950 Mad. 64.
10. The numerals indicating the two requirements do not appear in the text of the section but have been added by us for facility of discussion.

Expression "Judicial authority".

8.37. The expression "judicial authority" was substituted (in section 19 of the Indian Arbitration Act of 1899) by Act 21 of 1933, because, before that amendment, there was a conflict of decisions as to whether the expression "court" which was used in that section included a Court of Small Causes. Since the expression now used is a "judicial authority", a Court of Small Causes can stay the suit under this section, if the suit is pending in that Court.[1]

Section 34 and foreign awards.

8.38. The section applies to foreign awards also, as has been held by the Supreme Court.[2]

The expression "step in the proceedings".

8.39. The expression "steps in the proceedings" in section 34 has led to considerable controversy as would appear from the case law.[3] The expression has been construed as including even a step in an interlocutory proceeding.[4] Even an application for adjournment to file the written statement has been regarded as a step in the proceeding.[5-6]

An oral application for extension of the time to file an affidavit in an interlocutory application for injunction has been held to amount to taking a step in the proceeding.[7] It would thus appear that while the general principle[8-9] that the step in proceeding should display an unequivocal intention to proceed with the suit is well established, its application in actual practice leads to difficulties.

This position causes hardship, and unnecessarily deprives a party of taking advantage of the arbitration clause.

Recommendation to amend section 34.

8.40. We recommend that to avoid such difficulties, the words "or taking other steps in the proceedings" should be deleted from section 34. The result will be that an application can be made by the defendant under the section before filling the written statement. This would not, however, take away the discretion of the court so that if the defendant is guilty of delay, the court can in its discretion, take note thereof.

Amendment as to suits brought under summary procedure.

8.41. To make the provisions of section 34 applicable to suits brought under Order 37 of the Code of Civil Procedure, 1908 (summary procedure), we recommend that the words *"or in a suit instituted under Order XXXVII of the First Schedule to the Code of Civil Procedure,* 1908 *before filing an application for leave to defend under sub-rule* (5) *of rule* 3 *of that Order"* should be substituted in place of the words to be deleted.[10]

Section 35 Effect of legal proceedings on arbitration.

8.42. Section 35 provides that a reference or award shall not become invalid by reason only of the commencement of legal proceedings upon the subject-matter of the reference; but after such legal proceedings have been commenced between all the parties to the reference and a notice given to the arbitrators or umpire, all further proceedings in a pending reference shall (unless stay of the suit is granted under section 34) be invalid.

Previous to the enactment of this section, the law was in an unsatisfactory condition. In the English case of Doleman,[11] it was held, that an award made in an arbitration proceeding after an action was brought (in respect of the difference to which the arbitration clause applies) was *bad,*

1. *Basant Cotton Mills* v. *Dhingra Bros.*, I.L.R. (1950) 1 Cal. 546; A.I.R. Cal 1949 684.
2. *Machael Golodetz* v. *Serajuddin*, A.I.R. 1963 S.C. 1044.
3. *Duni Chand Sons and Company* v. *F.G. Industries Ltd.*, A.I.R. 1962 Cal 541 (reviews history and case law).
4. *Amrit Raj* v. *Dolichia Finnanshiah*, A.I.R. 1966 Cal 315.
5. *Radhakrishna* v. *State of Jammu & Kashmir*, A.I.R. 1964 J & K 75.
6. *Union of India* v. *Girish Chandra*, A.I.R. 1953 All. 149.
7. *Delux Film Distributors Ltd.* v. *Sukumar*, A.I.R. 1960 Cal 206.
8. *Nur-ud-din* v. *Abu Ahmed*, A.I.R. 1951 Bom 357.
9. *Subal Chandra* v. *Mohamed Ibrahim*, A.I.R. 1943 Cal. 484.
10. Para 8·40, *supra.*
11. *Doleman* v. *Ossett Corporation*,(1912) 3 K.B. 257.

where the defendant had not applied for stay. This decision had been followed by most High Courts in India.[1-3]

Report of Civil Justice Committee.

8.43. The Civil Justice Committee noticed the difficulty caused by this decision, particularly in cases where the arbitration was going on at a place far distant from the court in which the suit was instituted. It recommended that the mere filing of a suit should not interrupt the arbitration proceedings. Accordingly, in the Bill of 1939, the necessary clause was drafted. The Select Committee made certain changes in the Bill, and the law now under section 35 is that it is only after notice is given that the arbitration proceedings become invalid.[6]

Section 35, difficulty caused by the words "whole of the subject matter" and "all parties".

8.44. In order that section 35 may apply, three conditions are required to be fulfilled, namely:—

(i) Notice must be given of the institution of the proceedings to the arbitrators or umpire.

(ii) The legal proceedings must be upon the whole of the subject-matter *of the reference.*

(iii) The proceedings must be between all the parties to the reference.

Some difficulty has been pointed out[7] as likely to be caused by the section. We may, however, state that no reported decision has come to our notice adverting to any difficulty in the actual operation of the section. In our opinion, the section incorporates a wholesome principle, and needs no modification.

Section 36.

8.45. Section 36 deals with the power of the Court where the arbitration agreement is ordered not to apply to a particular difference, to order that a provision making an award a condition precedent to an action shall not apply to such difference. The section needs no change.

Section 37(1) and section 37(2) Recommendation to amend section 37(1).

8.46. Section 37(1) provides that all the provisions of the Indian Limitation Act, 1908 shall apply to arbitrations as they apply to proceedings in court. In view of the passing of the new Limitation Act, 1963, necessary change wil halve to be made in this sub-section.[8] We have no comments on section 37(2).

Section 37(3) and section 37(4) Recommendation to amend section 37(3).

8.47. In section 37, in sub-section (3), reference to the Limitation Act, 1963, should be substituted.

We have no comments on section 37(4).

Section 37(5) Limitation.

8.48. Section 37(5) reads:

"(5) Where the Court orders that an award be set aside or orders, after the commencement of an arbitration, that the arbitration agreement shall cease to have effect with respect to the difference referred, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Indian Limitation Act, 1908, for the commencement of the proceedings (including arbitration) with respect to the difference referred."

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1. *Ram Prosad* v. *Mohan Lal*, I.L.R. 47 Cal. 752; A.I.R. 1921 Cal 770
2. *Appavu* v. *Seeni*, I.L.R. 41 Mad. 115; A.I.R. 1918 Mad 719
3. *Jowahar Singh* v. *Flemming Shaw*, A.I.R. 1937 Lah. 851
4. *Jai Narain* v. *Narain Dass*, I.L.R. 3 Lah. 296; A.I.R. 1922 Lah 369.
5. *Civil Justice Committee* Report (1924-25), page 213, para 9 and page 217, para 19; N.D. Basu (1977), pages 950, 951
1. For the old law, see *In re All India Groundnut Syndicate*, A.I.R. 1945 Bom. 497, 502, 503 (Blagden J.).
2. Sircar, Law of Arbitration in British India (1942), page 332.
1. See *infra*.

The relevance of this sub-section to the law of limitation is obvious. for reasons which will become evident later,[1] it is desirable to deal with this aspect at some length.

General principle as to limitation.

8.49. Ordinarily, limitation runs from the earliest time at which a suit could be brought, and once time has started running, its running is continuous. Arbitration would not, for example, stop it from running unless statute provides to the contrary. To this principle, section 37(5) constitutes such an exception.

Scope as to infructuous arbitration effect on suits.

8.50. The difficulty, however, arises from the narrow scope of section 37(5). Section 37(5) allows relaxation of limitation only where the award is set aside or the court orders that the arbitration agreement shall "cease to have effect with respect to the difference referred."[2] Other cases of infructuous arbitration proceedings[3] are not covered by it. A fresh cause of action would not also arise on the termination of arbitration proceedings. Hence, where an arbitration becomes infructuous by reason of circumstances not mentioned in section 37(5), there is no extension of limitation for a suit on the same cause of action.

Effect on fresh arbitration.

8.51. Another important question that arises is whether the benefit of relaxation of limitation is available for arbitration in such cases. Section 14 of the Limitation Act, 1963 (previously section 14 of the Indian Limitation Act, 1908), so far as is relevant, provides,[4] that in computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding in a court against the defendant shall be excluded where the proceeding relates to the same cause of action and is prosecuted in good faith in a court which, from defect of jurisdiction or other causes of a like nature, is unable to entertain it.

Whether arbitration a civil proceeding case law on section 14.

8.52. Now, the question to be considered is, whether an arbitration is a 'civil proceeding' in a 'court' within the meaning of section 14, Limitation Act.

In some cases, it was held[5-6] that section 14 applies to the proceedings previously taken before the arbitrator, as a contrary view would operate very harshly on a litigant who has been guilty of no laches and has been prosecuting his case with due diligence and in good faith before the arbitrator. The court also considered the definition of 'court' as given in the Evidence Act.

Comment in Bombay case.

8.53. The decisions, however, relate to the period before the Arbitration Act of 1940 was enacted. After the enactment of section 37(1) and section 37(5) of the Arbitration Act, 1940, no further question, it has been held[7], arises as to application of the principles of the Limitation Act merely by analogy to procedings before arbitrators. The court observed:

> "*It may seem rather curious, and it may also in certain cases result in hard ship as to*[8] why the Legislature should not have excluded all time taken up in good faith before an arbitrator just as the time taken up in prosecuting a suit or an appeal in good faith is excluded. But *obviously the Legislature did not* intend that parties should waste time in infructuous proceedings before arbitrators."

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1. Para 8·49 to 8·57, *infra*.
2. As to orders of the court directing that the agreement shall "cease to have effect", see section 12(2)(b) and section 19.
3. For example of other infructuous arbitration proceedings, see para 8·56, *infra*.
4. This point was not dealt with in the 3rd Report of the Law Commission (Limitation Act) while discussing section 14 at pages 18 to 20, paragraphs 41 to 43.
5. *Firm Behari Lal* v. *Punjab Sugar Mills*, A.I.R. 1943 All. 162.
6. *Fatehchand* v. *Wasudeo*, I.L.R. (1947) Nag. 477; A.I.R. 1948 Nag. 334.
7. *Purshottamdas* v. *Impex (India) Ltd.*, A.I.R. 1954 Bom. 309, 311, para 7 (Chagla C.J. and Dixit J.).
8. Emphasis added.

8.54. The notes on clauses to the Bill which led to the Act of 1940 merely state that clause 37 makes provisions as to limitation in arbitration matters and follows closely section 16 of the (English) Arbitration Act, 1934. Section 16(7) of the English Act of 1934 gave power *to the court* to order that the period between the commencement of the arbitration and the date of the order of the court shall be excluded etc. (where the court ordered that the award be set aside or that the arbitration agreement should cease to have effect etc.). No guidance available in Notes on clauses.

The present section 27(5) of the (English) Limitation Act, 1939, is, in substance, the same as section 16(7) of the Arbitration Act of 1934. The Select Committee reporting on the Bill omitted the words that left the power *to the court,* as it felt that a mere order of the court would not affect the law of limitation. There is, however, no discussion as to why the analogy of section 14, Limitation Act was not fully adopted.

8.55. In a Privy Council case[1] decided under the old Act, the analogy of section 14 was applied in determining the question whether time taken in one arbitration proceeding could be excluded for the purpose of *another arbitration proceeding.* But, as has been pointed out by the Bombay High Court,[2] the Legislature, having the decision of the Privy Council before it, instead of leaving it to the Court to apply the provisions of the Limitation Act by analogy, expressly by a statutory enactment applied the provisions of section 37(1) and also dealt with the exclusion of time taken up in arbitration by section 37(5). Therefore, it is no longer open to the court to rely on section 14 as applicable, by analogy, to arbitration proceedings. Case law.

8.56. If this is the present position, we venture to suggest that it is not very satisfactory. There may be cases where an arbitration becomes infructuous by *reason of an order not mentioned in section* 37(5). For example, an application challenging the validity of the agreement may be made under section 31(2) read with section 33, and the application may succeed. Whether this would be a case of the court "ordering that the arbitration agreement shall cease to have effect" is doubtful, as those words are appropriate only for section 12(2)(b) or section 19. Conversely, the application may fail, but some time is taken up in its prosecution. Present position not satisfactory. insertion of new sub-sections (6) and (7) recommended.

In such cases, while a party is engaged *bona fide* in another proceeding, we cannot expect him to have an eye at the same time on an ordinary court also and file a suit. Such a course would lead to a half-hearted participation in the other application, and defeat the very object of the law of arbitration. Mere cases where a party remains supine and does not go on diligently with the arbitration may not deserve sympathy. But serious hardship is likely to be caused in cases of the nature illustrated above. It would, therefore, be advisable to insert an express exemption, in addition to that given by section 37(5). We are recommending the insertion of two new sub-sections in section 37, for the purpose.[3]

8.57. In sub-section (5) of section 37, a reference to the Limitation Act, 1963, should be substituted in place of the present reference to the old Act. Section 37(5).

8.58. In the light of the above discussion, the following amendments commended in section 37:— Recommendation as to section 37.

(a) in sub-section (1), for the words and figures "The Indian Limitation Act, 1908", the words and figures "*The Limitation Act,* 1963" should be substituted;

(b) in sub-section (3), for the words and figures "The Indian Limitation Act, 1908", the words and figures "*The Limitation Act,* 1963" should be substituted;

1. *Ramdutt* v. *E.D. Dasson & co.*, 56 I.A. 128; A.I.R. 1929 P.C. 103.
2. *Purshottamdas* v. *Impex (India) Ltd.*, A.I.R. 1954 Bom. 309, 311, para 5·6.
3. See para 8·58, *infra*, suggested section 37(6) and 37(7).

(c) in sub-section (5), for the words and figures "The Indian Limitation Act, 1908", the words and figures "*The Limitation Act*, 1963" should be substituted;

(d) after sub-section (5), the following sub-sections should be inserted:[1]

"*Section* 37(6):

Where in a proceeding under section 33 *the Court decides that no arbitration agreement exist between the parties and that such an arbitration agreement is invalid, the time during which the application under that section remained pending, shall be excluded in computing the period of limitation prescribed by the Limitation Act*, 1963, *for the commencement of a proceeding relating to a matter which was alleged to be the subject-matter of the arbitration agreement.*"

"*Section* 37(7):

Where in a proceeding under section 33 *the Court decides that an arbitration agreement exists between the Parties and that such an arbitration agreement is valid, the time during which the application under that section remained pending, shall be excluded in computing the period of limitation prescribed by the Limitation Act*, 1963, *for the commencement of a proceeding for arbitration in pursuance of such arbitration agreement.*"

Section 38 Recommendation.

8.59. For reasons already stated,[2] the scope of section 38 should be extended to an earlier stage, so as to prevent disputes as to the rate of fees of the arbitrator. Following new sub-sections in section 38 should be added:—

"38(4) *If in any case an arbitrator or umpire refuses to proceed with the arbitration except on payment of the fees demanded by him, the court may, on an application in this behalf, order that the arbitrator or umpire shall proceed with the arbitration on payment into court by the applicant of the fees 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, at the time specified in sub-section* (6), *be paid to the arbitrator or umpire by way of fees such sum as the court may consider reasonable and that the balance of the money, if any, shall be refunded to the applicant.*

"38(5) *An application under sub-section* (4) *may be made by any party to the reference unless the fees demanded have been fixed by written agreement between him and the arbitrator or umpire, and the arbitrator or umpire shall be entitled to appear and be heard on any such application.*

"38(6) *Payment to the arbitrator or umpire of the sum specified in sub-section* (4) *shall be made at such time as may be specified in the arbitration agreement, or failing such specification, as may be decided by the court*:

"*Provided that pending completion of the arbitration, the court may direct interim payment of fees*[3] *to the arbitrator or umpire.*

"38(7) *Where the court has, under sub-section* (4), *determined the amount of fees, it may, for reasons to be recorded and after giving the arbitrator or the umpire and the parties an opportunity of being heard, revise such determination on completion of the arbitration.*

"38(8) *If the arbitrator or umpire refuses to accept the determination of the court under sub-section* (4), *the court may supersede the arbitration agreement.*"

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1. Para 8·56, *supra.*
2. See discussion as to section 14, paragraph 4·37, *supra.*
3. As to the expression "interim", compare section 27(2).

CHAPTER 9

APPEAL : SECTION 39

9.1. Section 39 allows an appeal against certain orders passed under the Act. Section 39.

The orders are enumerated in sub-section (1), in these terms:

"39(1) An appeal shall lie from the following orders passed under this Act (and from no others) to the Court authorised by law to hear appeals from original decrees of the court passing the order:—

An order—

(i) superseding an arbitration;

(ii) on an award stated in the form of a special case;

(iii) modifying or correcting an award;

(iv) filing or refusing to file an arbitration agreement;

(v) staying or refusing to stay legal proceedings where there is an arbitration agreement;

"(vi) setting aside or refusing to set aside an award;

Provided that the provisions of this section shall not apply to any order passed by a Small Cause Court."

Sub-section (2) provides that second appeal shall not lie from an order passed under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

9.2. The list of orders given in the section appears to be fairly adequate. We have considered the question whether an appeal should be allowed from an *order refusing* to modify or correct an award. At present, while an order modifying an award is appealable, an order refusing to modify is not. However, after careful consideration, we do not suggest a change in this regard as we think that the present position is sound in principle. No change required in section 39(1).

9.3. We have no further comments on this section. No change.

CHAPTER 10

MISCELLANEOUS : SECTIONS 40-48

Scope of the Chapter.

10.1. We now proceed to a consideration of the remaining sections of the Act containing certain miscellaneous provisions.

Section 40.

10.2. Section 40 provides that a court of small causes shall have no jurisdiction over any arbitration proceedings or over any application arising thereout, save on application made under section 21. This section does not require any change.

Section 41.

10.3 The subject of procedure and powers of the court is dealt with in section 41. Subject to the provisions of the Act and rules made thereunder,[1] the provisions of the Code of Civil Procedure, 1908, shall apply to all proceedings before the court, and to all appeals under the Act. This is provided in clause (a): Clause (b) provides that subject to the provisions of the Act and all rules made thereunder, the court shall have, for the purpose of, and in relation to arbitration proceedings, the same power of making orders in respect of any of the matters set out in the second schedule as it has for the purpose of, and in relation to, any proceedings before the court. Under the proviso, however, this clause shall not be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any of such matters.

It has been represented to the Law Commission[2] that the power of the court under section 41 in the matter of grant of injunction in cases where the amount claimed by the Government to be due to it under a contract with a private party is still under adjudication, may be modified with a view to safeguarding the government interests. We have given the matter our consideration and are of the view that no amendment of the law in this respect is called for, and no exception need be carved out in section 41 for cases arising out of contracts to which the Government is a party. The question of issue or non-issue of injunction depends upon the facts of each case and it is for the courts concerned to decide the matter in the light of those facts, keeping in view the general principles for the grant of injunctions which are fairly well-settled. The fact that the government is aggrieved by a particular order is no ground for amendment of the law. The existing provisions, in our opinion, are adequate to empower the courts to safeguard the interests of all parties, including the government, in appropriate cases.

The section therefore needs no change.

Section 42.

10.4. Several provisions of the Act require the giving of a notice; the procedure for giving a notice is laid down in section 42, which provides that any notice required by the Act to be served otherwise than through the court by a party to an arbitration agreement or by an arbitrator or umpire shall be served in the manner provided in the arbitration agreement, or if there is no such provision either by delivering it to the person on whom it is to be served, or by sending it by post in a letter addressed to that person or his usual or last known place of abode or business in India and registered under Chapter VI of the Indian Post Office Act, 1898, section 9(b), section 11(4) and section 14(1).

Recommendation as to section 42, clause (a).

10.5. No changes of substance appear to be needed in section 42, but it may be useful to provide in clause (a) that the notice could be delivered to the agent of the person to be served who is empowered to accept service. The reasons for making this amendment hardly need be elaborated. In order to avoid abuse, we would confine the amendment to the Government, local authorities and corporations.

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1. For the power to make rules, see section 44.
2. Papers forwarded by the Ministry of Law, Department of Legal Affairs.

Accordingly, we recommend that in section 42(a), the words *"in the case of a Government, local authority or corporation, to a person duly empowered to accept service on its behalf,* or" should be added at the end.

10.6. Section 43 confers powers on the court to issue processes for appearance before the arbitrator or umpire. The power is co-extensive with the corresponding power of the court in suits tried before it. There are consequential provisions in regard to persons who fail to attend, and there is a definition of the expression "processes". No amendment is required in the section. Section 43.

10.7. Section 44 provides that the High Court may make rules consistent with the Act as to the various matters enumerated in the section. The section needs no change. Section 44.

10.8. Section 45 provides that the provisions of the Act shall be binding on the Government. Section 45.

It needs no change.

10.9. Section 46 provides for the application of the Arbitration Act to what may be conveniently called 'statutory arbitrations' (see the marginal note to the section). With certain exceptions, the provisions of the Act are declared to apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and (as) if that other enactment were an arbitration agreement, except in so far as this Act is inconsistent with that other enactment or with any rules made thereunder. Section 46 Statutory arbitrations.

10.10. Certain sections of that Act have, however, been excluded from the operation of section 46. These are—section 6(1), section 7, section 12, section 36 and section 37. Exceptions in section 46.

10.11. The operation of section 46 is illustrated by judicial decisions dealing with questions that have arisen in regard to arbitrations under the Co-operative Societies Act, before the Supreme Court.[1] It is also illustrated by cases under that Act before the High Courts, in proceedings in the Punjab[2] and the erstwhile State of Bombay.[3] It may be of interest to note that the section would apply to arbitrations under an Act relating to Universities.[4] Section 46 operation of.

Of course, the Arbitration Act will apply to a statutory arbitration only in so far as the statute does not contain a provision on the particular subject[5] which is inconsistent with the Act.

10.12. Section 47 provides that, subject to the provisions of section 46, and save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitration and to all proceedings thereunder. The proviso enacts that an arbitration award otherwise obtained may, with the consent of all the parties interested, be taken into consideration as a compromise or adjustment of a suit by any Court before which the suit is pending. Section 47.

10.13. In our discussion relating to section 2(a)[1], we have already recommended an amendment regarding awards obtained without following the procedure laid down in the Act. The recommendation should be carried out by substituting the following proviso for the present proviso to section 47: Recommendation as to section 47.

"Provided that where an award otherwise obtained has been agreed to by the parties concerned, nothing in this section shall be construed as preventing any party from relying upon it in a suit or other legal proceeding (whether instituted by him or not) as an agreement or as compromise or adjustment of the dispute."

1. *M/s. D. Gobindram* v. *M/s Shamji & Co.*, A.I.R. 1961 S.C. 1285, 1293, paras 24-25.
2. *Harnam Singh* v. *Man Singh*, A.I.R. 161 Punjab 133.
3. *Savitra Khandu* v. *A.S. & P. Co-operative Society Ltd.*, A.I.R. 1957 Bom. 178.
4. *Brij Mohan* v. *Lucknow University*, AIR. 1961 All. 331, 332, 333 para 4.
5. See discussion regarding section 2(a), *supra* (awards obtained on oral arbitration agreement).

Section 47, Arbitration Act and Order 23, Rule 3.

10.14. The question whether an award made by an arbitrator (otherwise than on a formal reference by the court) can be recorded as a 'compromise' under Order 23, Rule 3, Code of Civil Procedure, 1908, has been discussed in several cases[1-3], and there appears to have arisen controversy on the subject in the past. The controversy owed its origin to the application of section 89 of the Code of Civil Procedure, 1908; that section has since been repealed. The matter now seems to have been settled by the proviso to section 47 of the Arbitration Act, 1940. The old cases before 1940 are not, therefore, of much importance now. The view subsequently taken is that such award can be accepted as a compromise only if, subsequent to its making[4-5], the parties agree to abide by it.

Section 48.

10.15. Section 48 contains a saving for pending references, and does not need any comment.

1. *Dular Koeri* v. *Payag Koeri*, A.I.R. 1942 All. 145, 147 (F.B.) (reviews case-law).
2. *Chanbassappa* v. *Basalingayya*, A.I.R. 1927 Bom. 585 (F.B.) (Award can be regarded as compromise).
3. *Jugaldas* v. *Pur otam*, I.L.R. (1955) 1 Cal. 12; A.I.R. 1953 Cal. 690 (reviews case law).
4. *Sitaramji* v. *Ramnath Singh*, A.I.R. 1961 Pat. 448.
5. *Abdul Rahman* v. *Mohammad Siddiqui*, A.I.R. 1953 Mad. 781 (F.B.)

CHAPTER 11

PROCEDURAL PROVISIONS : THE FIRST SCHEDULE

First Schedule, paragraph 1.

11.1. Certain provisions of a procedural nature intended to fill up the gaps left advertently or inadvertently by the parties are contained in the First Schedule.

The first paragraph of the Schedule provides that unless otherwise expressly provided, the reference shall be to a sole arbitrator. The paragraph needs no change.

First Schedule, paragraph 2.

11.2. Paragraph 2 of the First Schedule provides that if the reference is to an even number of arbitrators, the arbitrators shall appoint an umpire not later than one month from the latest date of their respective appointment.

It needs no change.

First Schedule, paragraph 2A (proposed) Re-hearing of evidence by the umpire.

11.3. The Arbitration Act does not contain any specific provision on the question whether an umpire can act on the evidence recorded by the arbitrators. The position, in English law, it is well-settled, is that the umpire has to hear the evidence *de novo*, if an application is made to him to do so by either party, notwithstanding that the same evidence has already been adduced before the arbitrators. The result is that an umpire can make his award on the evidence taken by the arbitrators only if no party objects. It was observed by Littledale J., agreeing with Denman C.J.,[2] that "the general rule is that an umpire to whom a case is referred by arbitrators must hear the evidence over again."[3]

Indian case law on the subject is scanty; but it would appear that, in general, an umpire is bound to re-hear the evidence if either party applies, unless there are special provisions in the arbitration agreement permitting him to do so.[4] This is on the principle that the umpire has the rights and duties of an arbitrator. If he has not heard the evidence himself, he is generally bound to re-hear it.

Recommendation.

11.4. We are of the opinion that in the interest of expeditious disposal of arbitration proceedings, this position requires modification to a certain extent. It may be mentioned that under the Code of Civil Procedure,[5] where a judge is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the rules contained in the Code as if such evidence or memorandum had been taken down or made by him, and may proceed with the suit from the stage at which his predecessor left it. This statutory provision modifies the rule otherwise applicable[6] that the successor must hear the whole case afresh. In our opinion, there should be no objection to permitting the umpire to act on the evidence recorded by the arbitrators, leaving it to the discretion of the umpire to take such additional evidence as he may think fit. The same principle should apply to a change in arbitrators or umpire.

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1. *In re Jenkins*, (1841) 11 L.J.Q.B. 71, 72; 61 Revised Reports 837 (Patterson J.).
2. *In re Salked and Slater*, (1841) 12 A & E 767; 113 E.R. 1005, 1006, 1007.
3. See also Halsbury, 4th Edition, Vol. 2, page 307, paragraph 591.
4. *Dhanna Singh* v. *Ram Chand*, A.I.R. 1924 Sind 27, 28, reversing in part *E. Miller* v. *The Firm of Dhanna Singh*, A.I.R. 1921 Sind 27.
5. Order 18, rule 15, Code of Civil Procedure, 1908.
6. *R.S. Mahmood* v. *Syed Ahmed*, A.I.R. 1963 A.P. 65.

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We recommend insertion of the following new paragraph in the First Schedule, on the subject discussed above:

First Schedule, paragraph 2A

Compare O.18, r. 15, Code of Civil Procedure, 1908.

"2A. (1) *Where an arbitrator or umpire is prevented by any cause from completing the proceedings, his successor may deal with any evidence taken down by his predecessor as if such evidence had been taken down by him, and may proceed with the arbitration from the stage at which his predecessor left it.*

(2) *Where there are more than one arbitrator, and there is a change in the arbitrators, then, notwithstanding such change, the arbitrators may deal with any evidence taken down in the arbitration before such change as if such evidence had been taken down by them, and may proceed with the arbitration from the stage at which it stood immediately before the change.*

(3) *Where, owing to a difference of opinion between the arbitrators, the matter is referred to an umpire, the proceedings before the arbitrators shall be taken as proceedings before the umpire.*

(4) *Nothing in sub-paragraphs (1), (2) or (3)* shall *preclude the arbitrator or umpire from taking additional evidence, in case he considers it necessary to do so.*"

First Schedule, Paragraph 3.

11.5. Paragraph 3 provides that the arbitrators shall make their award within four months after "entering on the reference" or after having been called upon to act by a notice in writing from any party to the arbitration agreement, or within such extended time as the court may allow. There are thus, three methods of determining the period within which the award must be made. First is the primary period of four months, counted from "Entering on the reference"; the second is the period of four months, but counted from the date on which the arbitrators are called upon to act by a written *notice* of either party and the third is the extended time allowed by the court. The extended time may be allowed by the court before or after the expiry of the original time.[1] This paragraph is mandatory[2] and imposes a duty on the arbitrators to make their award, within one or the other of the three alternative periods. Consent of any party to the arbitrator proceding with the reference, without an order of extension being obtained from the court, cannot thus have the effect of giving the arbitrator such jurisdiction.[3]

Effect of failure to make award in time.

11.6. A contravention of the time limit prescribed by rule 3 may not only cast doubts on the validity of the award, *if made;* it has certain other consequences, *if the award is not made* within the time limit. If the arbitrators do not make the award within the time limit, and the reference is to an even number of arbitrators, the umpire can enter on the reference under the First Schedule, paragraph 4. If the reference is to a sole arbitrator or to an odd number of arbitrators, the court can supersede the reference, if the reference was in a suit (section 25), or the parties may treat the case as one of neglect or refusal etc. [Section 8(1)(b)], and have a fresh arbitrator appointed. The parties can also move the court for removing the arbitrators for failure to "use all reasonable dispatch" in the reference [Section 11(1)] and then have a fresh arbitrator appointed (section 12).

Importance of paragraph 3.

11.7. It has been very often found that the time limit in paragraph 3 is exceeded; and this is the most important problem which we have to deal with. Apart from the fact that the pronouncement of an award after the expiry of the time limit raises legal problems, an important matter of which notice has to be taken is that the period of four months has been found to be unrealistic, and is hardly observed in practice. We have before

1. Section 28.
2. *Harishankar Lal* v. *Shambhu Lal*, (1962) 2 S.C.R. 720; A.I.R. 1962 S.C. 78, 80, paragraph
3. *Sowarn Singh* v. *Municipal Committee, Pathankot*, A.I.R. 1963 Punjab 427, 429.

us the instance of the Andaman contracts, referred to by the Public Accounts Committee. The following is an extract from the report of the Committee[1]:—

> "3.271. The Committee are also unhappy over the manner in which the arbitration cases have been pursued. It is distressing to see that the proceedings in the first Arbitration started as far back as in July, 1961 in the case of the contracts with the North Andaman Licensee and dragged on for over 5 years before reaching anything like finality, in spite of the time limit of 4 months provided in law for the completion of arbitration. The other three arbitration cases still pending settlement have taken as such as 6 years to 12 years, the Fifth Arbitration case was disposed of after 4 years. The Committee fail to understand the rationale behind the provision in the law of a limit of 4 months for the completion of arbitration when the actual time taken could be as long as 12 years. The Committee would like the Ministry of Law to examine this aspect thoroughly in consultation with other Ministries who actually have to go in for arbitrations or have to face arbitration proceedings in cases of agreements with private firms in order to amend the law suitably. The Committee repeat that the mere provision in law of something which cannot be enforced in practice hardly carries any meaning. This present case assumes importance because although the agreement was cancelled in February 1968, the disputes which had already arisen appear paradoxically to be capable of being settled only by arbitration."

11.8. At the same time, we have to guard against undue prolongation of arbitration proceedings because of a longer time limit. Already there is a feeling that arbitrations are unduly delayed. It has, for example, been stated by the Secretary, Department of Legal Affairs, as follows[2]:—

> "It is a fact that on quite a few occasions the public Accounts Committee has commented adversely on the working of the Arbitration Act. Their comments include, *inter alia*, the long delays that take place in the completion of the arbitration proceedings, the number of extensions that are obtained either by consent of the parties and through the intervention of the court and the enormous expenses incurred by way of "fees payable both to the arbitrators and the counsel. In some cases the arbitration proceedings were pending for a number of years—as long as 8 to 10 years."

Two alternatives.

11.9. For dealing with the problem created by the present provisions, there are two alternatives that could be considered. The first alternative is total deletion of the time limit, that is to say, there should be no *statutory* time limit. This is the position, in substance, in England. The second alternative is an increase of the time limit (within reasonable boundaries).

Merits of the first alternative.

11.10. The first alternative would avoid questions as to validity of an award pronounced beyond the prescribed time limit. In support of this alternative, it could be stated that there is no reason why the parties should suffer for the delay caused by action of the arbitrator. No doubt, where the arbitrator does not use reasonable dispatch in the arbitration proceedings,[3] the court may, on the application of any party to a reference, remove the arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference in making the award. Further, the court may, when it removes the umpire who has entered on the reference or a sole arbitrator or all the arbitrators, on the application of any party to the arbitration agreement, either appoint a person to act as sole arbitrator in place of the person or persons displaced, or order that the arbitration shall cease to have effect with respect to the difference referred.

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1. Public Accounts Committee (Sixth Lok Sabha, Ninth Report) (September 1977), pages 200-201, para 3.271.

2. D.O. No. F. 8(15)/76-I.C. dated 27th July 1977 from the Secretary, Department of Legal Affairs, Ministry of Law, Justice and Company Affairs, to the Member-Secretary, Law Commission of India (see Appendix).

3. Section 11(1), read with section 12(2)(b).

But, this is only *a right* of the party and if, for some reason, the party does not pursue the remedy afforded by the relevant provisions, then the proceedings might drag on.

At the same time, it can be argued *against the first alternative* that the total deletion of a time limit might encourage lethargy and indifference on the part of arbitrators and umpires.

Merits of the second alternative.

11.11. The second alternative (increase of the time limit) has this merit, namely, that it does not introduce a radical change in the structure of the Act. At the same time, it takes note of the practical difficulties caused by the present unrealistic provision. It may appear to be a more satisfactory solution.

Recommendation to increase the time limit in paragraph 3 to six months.

11.12 On a careful consideration of the various aspects of the matter, we recommend that the time limit of four months should be replaced by six months in the First Schedule, paragraph 3. In appropriate cases, the power of the court to extend the limit could be exercised, as at present. The extension should not, however, be given beyond one year, except for special and adequate reasons.

As regards the period within which the award should be given, it may be pointed out that the period should not be too short as to prove unrealistic; at the same time, it should not be too long as to lead to undue delay or complacency on the part of arbitrators.

An unrealistic period—such as the present period of four months—serves no purpose. Some increase therein is required. We are therefore recommending that the period should be six months, subject to extension by the court in accordance with section 28 as proposed to be amended.

Reasons for the recommendation as to time limit.

11.13. In suggesting substitution of the period of six months instead of the existing period of four months as the time during which arbitration proceedings should normally be completed,[2] we are influenced by two considerations. We feel that the present period of four months is in most cases unrealistic, because it is not normally possible to complete arbitration proceedings within four months. At the same time, we do not want to fix a much longer period, lest it should give rise to an attitude of complacency on the part of the arbitrators and the parties. The underlying object of all arbitration proceedings is that such proceedings should be completed as speedily and expeditiously as possible.

11.14. At the same time, we are conscious of the fact that there may be quite a large number of cases in which it may not be possible to complete the arbitration proceedings within a period of six months. For such cases we have provided for the extension of the time for completing arbitration proceedings upto one year by the court under section 28 of the Act. A period of one year, in our opinion, should normally be the outside limit within which arbitration proceedings should be completed in most of the cases. The power of the court to grant extension of time in most of the cases would thus be up to a period of one year. There may, however, be cases wherein voluminous evidence is required to be recorded. There may also be some special and adequate reasons which may be brought to the notice of the court, justifying the extension of time beyond a period of one year. To have a rigid rule of allowing no extension of time beyond a period of one year would be in such cases cause undue hardship to the parties. For such exceptional cases we are empowering the court to extend the time beyond a period of one year. The underlying object of section 28 of the Act and paragraphs 3 and 5 of the First Schedule is to ensure due expedition and speed in the completion of arbitration proceedings and, at the same time, to ensure that the entire proceedings are not set at naught in those cases wherein because of voluminous evidence or other special and adequate reasons, the proceedings cannot be finished within the prescribed time.

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1. See recommendation as to section 28, para 8·3, *supra*.
2. Para 11.12 *supra*.

11.15. The unusual delay in completing arbitration proceedings in some cases referred to by the Public Accounts Committee[1] can well be taken care of by the changes suggested by us.

Quality of personnel important.

11.16. We must, however, state here that in the ultimate analysis, the expeditious disposal of proceedings in arbitration depends not so much on legislative provisions as to time limit, as on the quality of the personnel selected by the parties as arbitrators or umpires. This is a matter which can hardly be dealt with by legislation.

First Schedule, paragraph 3, "entering on the reference".

11.17. The next point concerning this paragraph (paragraph 3) relates to the words "entering on the reference"—words which have caused a lost of difficulty in their application.[2-4]

English law.

11.18. The counting of the period of time from "entering on the reference" was the provision contained in the English Act of 1889. First Schedule, paragraph 3(c). But the provision was altered in 1934. The present law[5] is contained in section 13 of the Act of 1950.

Case law on paragraph 3.

11.19. Under paragraph 3, the starting point is not necessarily "the commencement of the arbitration" mentioned in section 37(3). It is always a question of fact, on what date the arbitrator or the umpire (as the case may be), actually entered on the reference for the purpose of paragraph 3. The determination of the date often turns out to be a difficult matter, and one can discern from the case law considerable divergence of views.

Various tests.

11.20. Of the numerous tests adumbrated by the various High Courts in this regard, a few may be mentioned.

According to one view,[6] "entering on the reference" means acceptance of office by the arbitrators and communication with each other.

According to another view[7]—

> "An arbitrator enters upon a reference when, after having accepted the reference, he applies his mind and does something in furtherance and execution of the work of arbitration. The *exact date as to when an arbitrator enters on a reference in a particular case, however, has to be determined on the facts and circumstances of the case*".

Some other rulings suggest a still different test, e.g. date of entering upon the hearing of a particular claim by the arbitrators.[8]

Supreme Court case as to notice.

11.21. The matter, in so far as it relates to the notice referred to in paragraph 3 of the First Schedule has been considered in a Supreme Court ruling.[9] However, interpretation of the expression is not dealt with in the Supreme Court judgment.

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1. Para 11·7 and 11·8, *supra*.
2. See the case law discussed in *Ram Sahai* v. *Harish Chandra*, A.I.R. 1963 M.P. 143, 146, 147, paras 13-14.
3. See *Bajrang Lal* v. *Ganesh Commerciai Co.*, A I.R. 1951 Cal. 78, 82, para 31 to 34 (Harries C.J.).
4. See *Dr. B.V. Mehta* v. *P.P. Joshi*, A.I.R. 1956 Bom. 146, 147, para 5.
5. For history of Enlgish law, see *Bokaro & Ramgur Ltd.* v. *Prasun Kumar*, A.I.R. 1968 Pat. 150, 155, para 13 (F.B.).
6. *Bajrang Lal* v. *Ganesh Commercial Co.*, A.I.R. 1951 Cal. 78, 82, 83 and 85, para 34-35 and 52 (Harries C.J. & Chatterjee J.).
7. *Sarayki Thakur* v. *Lachhminarain Thakur*, A.I.R. 1957 Pat. 395, 397, para 5.
8. (a) *Sardar Mal* v. *Sheo Baksh*, A.I.R. 1922 All 106.
   (b) *Ranganathan* v. *Krishnayya*, A.I.R. 1946 Mad. 504 (per Leach C.J.).
9. *Hari Shankar Lal* v. *Shambhu Nath*, A.I.R. 1962 S.C. 78-82 (confirming A.I.R. 1954 All, 673).

Provision in Electricity (Supply) Act, 1948.

11.22. It would be of interest to note one statutory precedent which strikes a departure from the general rule. The Electricity (Supply) Act, 1948, section 76(3A), contains the following provision applicable to arbitrations thereunder:—

> "(3A) Where any question or matter is referred to the Authority for arbitration under this section, the Authority shall be deemed to enter on the reference for the purposes of paragraph 3 of the First Schedule to the Arbitration Act, 1940, on the date on which the parties appear before the Authority for the first time:
>
> Provided that where the parties or any of them fail to appear before the Authority on the date fixed for the first hearing of the case and the Authority decides either on that date or any subsequent date to proceed with the case in the absence of the parties or any of them, as the case may be, the Authority shall be deemed to enter on the reference on the date of such decision."

Amendments to be made in paragraph 3.

11.23. On a consideration of all aspects of the matter, we have come to the conclusion that the arbitrators should be deemed to enter on the reference on the first date fixed by the arbitrators for the appearance of the parties before them for the purposes of the arbitration. This would be a realistic test, since it is only after fixing the date for appearance that concrete progress can be made in the arbitration. The proposed test would also be a precise and fairly workable test.

Recommendation as to paragraph 3.

11.24. Accordingly, we recommend that paragraph 3 should be revised as under:

> "3. The arbitrators shall make their award within *six months*[1] after entering on the reference or after having been called upon to act by notice in writing by any party to the arbitration agreement, or within such extended time as the court may allow.
>
> *"Explanation.—For the purposes of this paragraph, the arbitrators shall be deemed "to enter on the reference on the first date fixed by the arbitrators for the appearance of the parties before them for the purposes of the arbitration."*[2]

Paragraph 4.

11.25. This takes us to paragraph 4 of the First Schedule, which deals with the time at which the umpire should enter on the reference in lieu of the arbitrators. This paragraph needs no change.

Paragraph 5.

11.26. Paragraph 5 provides that the umpire shall make his award within two months of entering on the reference or within such extended time as the court may allow.

Amendments to be made in regard to time limits for umpires.

11.27. We have recommended certain amendments to the First Schedule, third paragraph,[3] in regard to the time limits for awards by arbitrators. The reasons stated by us for those amendments apply to the time limit for awards by umpires also. In the case of umpires, we recommend an increase of the period to four months from the present two months. This will be subject to extension under section 28.

Recommendation to revise paragraph.

11.28. Accordingly, we recommend that the First Schedule, paragraph 5, should be revised as under:—

> "5. The umpire shall make his award within *four* months after entering on the reference or after having been called upto to act by notice in writing by any party to the arbitration agreement, or within such extended time as the court may allow.
>
> *"Explanation.—For the purposes of this paragraph, the umpire shall be deemed to enter on the reference on the first date fixed by him for the appearance of the parties before him for the purposes of the arbitration."*

Cf. section 76 (3A) (a), Electricity (supply) Act, 1948.

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1. See para 11·12, *supra*.
2. See para 11·23, *supra*.
3. See para 11·24, *supra*.

11.29. Paragraph 6 deals with the examination of parties and production of documents etc. by the parties. First Schedule, paragraph 6 Recommendation to restructure.

11.30. This paragraph needs no change of substance. The structure should, however, be simplified, by revising it as under:— Recommendation to revise paragraph 6.

"6. The parties to the reference and all persons claiming under them shall, subject to the provisions of any law for the time being in force.

(a) submit to be examined by the arbitrators or umpire on both or affirmation in relation to the matters in difference,

(b) produce before the arbitrators or umpire all books, deeds, papers, accounts, writings and documents within their possession or power respectively, which may be required or called for, and

(c) do all other things which, during the proceedings on the reference, the arbitrators or umpire may require."

11.31. Paragraph 7 provides that the award shall be final and binding on the parties and persons claiming under them respectively. In one special situation, the paragraph requires to be qualified, namely, wher either the arbitration agreement, or the bye-laws of any association which are expressly on impliedly adopted by the arbitration agreement,[1] provide for an appeal *from an arbitrator* to a higher arbitrator. In such cases, the intention of the parties is that *it is the award made by the appellate authority* (as contemplated by the agreement or the bye-laws) whose award is to become the final award. It has specifically been held[2] that a provision for appeal in any bye-law is not ultra vires the provision of the First Schedule, paragraph 7. First Schedule paragraph 7 Recommendation.

11.32. We consider it desirable to make the paragraph subject to a provision to cover a situation of the nature mentioned above. We therefore recommend that the following Explanation should be inserted below paragraph 7:— Recommendation to insert an Explanation below paragraph 7.

"Explanation.—Where either the arbitration agreement, or the bye-laws of any association which are expressly or impliedly adopted by the arbitration agreement, provide for an appeal from the award of an arbitrator to another person or body, the award made by such appellate authority shall, if the appeal be filed in accordance with the agreement or bye-laws, be the award for the purposes of this paragraph."

11.33. Paragraph 8 provides that the costs of the reference and the award shall be in the discretion of the arbitrators or umpire. The paragraph needs no change. Paragraph 8.

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1. *Heeralal & Co.* v. *Joakim & Co.*, A.I.R. 1927 Cal. 647, 649, 251.

2. *M.A. & Sons* v. *Madras Oil & Seeds Exchange Ltd.*, A.I.R. 1965 Mad. 392, 394, paragraphs 8 to 11.

CHAPTER 12

POWER OF THE COURT

THE SECOND SCHEDULE

The second schedule deals with powers of the court on various miscellaneous matters, mostly of an interim character, and we have no comments thereon.

CHAPTER 13

SUMMARY OF RECOMMENDATIONS

The recommendations made in this Report for amendment of the Arbitration Act, 1940, may be briefly summarised as follows:--

(1) In section 2(a), an Explanation should be inserted to the effect that where the members of any association agree to abide by the rules of the association which contain provisions for arbitration, the members shall be deemed to agree with each other for arbitration.[1]

(2) Another Explanation may be added[2] to the same clause to the effect that where an arbitration agreement provides for the submission of future differences to arbitration, fresh consent of the parties to the arbitration should not be required when differences actually arise.

(3) Section 6, sub-section (1), should be revised by replacing the present phrase "either as respects the deceased or any other party" with the words "either as respects the deceased or *as respects* any other party".[3]

(4) Section 6(2) should be revised as follows:—

"the authority of an arbitrator shall not be *terminated* by the death of any party *to the agreement.*"[4]

(5) A new section—section 8A—should be inserted to provide for the power of the court to supply the vacancy in case of arbitrator or umpire appointed by the court itself.[5]

(6) Section 12(1) should be verbally amended, as recommended.[6]

(7) In section 13, a new clause should be inserted as follows[7]:—

"Section 13(aa)

proceed ex parte against any party who, without sufficient cause and after due notice, fails to attend personally or through agent."

(8) A new section 13A should be inserted to deal with the powers of the arbitrators or umpire to award interest, as recommended.[8]

(9) In section 14, two new sub-sections—section 14(2A) and 14(2B)—should be inserted as recommended,[9] to cover cases of death of the arbitrator after making the award but before filing it and similar situations.

(10) In section 16(1), a new clause (d) should be added as follows[10]:—

"(d) where for any other reason the court considers that in the interests of justice it should, instead of setting aside the award, order such remission."

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1. Para 2·8, *supra.*
2. Para 2·21, *supra.*
3. Para 3·9, *supra.*
4. Para 3·11, *supra.*
5. Para 3·29, *supra.*
6. Para 3·42, *supra.*
7. Para 4·3, *supra.*
8. Para 4·30, *supra.*
9. Para 4·42, *supra.*
10. Para 5·19, *supra.*

(11) Section 20(2) should be revised as recommended,[1] so that two situations in regard to filing an application are dealt with separately.

(12) Section 21 and the Heading of the Chapter should be revised as recommended,[2] to include appeals within its scope.

(13) Section 24 should be revised as recommended[3], by the addition of the word "appeal".

(14) In section 28, a proviso should be inserted[4] forbidding in respect of the time for making the award an extension beyond one year, except for special and adequate reasons to be recorded.

(15) In section 30, an Explanation should be inserted as recommended,[5] to provide that the expression "or is otherwise invalid" includes the ground that there was no valid agreement or no valid reference to arbitration.

(16) New section 30A, should be inserted[6] to provide that no arbitrator or umpire can be compelled to give evidence as to the reasons for his award.

(17) Section 32 should be re-numbered as sub-section (1), and thereafter sub-sections (2) and (3) should be inserted as recommended,[7] to provide that an award shall not be pleaded in defence except in certain specified cases.

(18) In section 33, after the words "any party", the word "including one alleged to be a party" should be added.[8]

(19) From section 34, the words "or taking other steps in the proceedings" should be deleted.[9]

(20) In section 34, an amendment should be made as to suits brought under Order 37 of the Code of Civil Procedure, by substituting the word recommended.[10]

(21) In section 37(1), reference to the Limitation Act, 1963 should be substituted.[11]

(22) In section 37, sub-sections (3) and (5), reference to the Limitation Act, 1963, should be substituted in place of the old Act.[12] Further, new sub-sections (6) and (7) should be inserted as recommended.[12]

(23) In section 38, new sub-sections (4), (5), (6), (7) and (8) should be inserted,[13] so as to prevent disputes about the amount of fees of the arbitrator and as to the time of payment.

(24) Section 42(a) should be amended[14] to provide for the delivery of notice to duly empowered agent, in certain situations.

(25) In section 47, the proviso should be replaced as recommended,[15] to deal with the effect of arbitrations entered into otherwise than under the Act.

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1. Para 6·2, *supra.*
2. Para 7·3, *supra.*
3. Para 7·6, *supra.*
4. Para 8·3, *supra.*
5. Para 5·23 and 8·12, *supra.*
6. Para 8·15, *supra.*
7. Para 8·30, *supra.*
8. Para 8·34, *supra.*
9. Para 8·40, *supra.*
10. Para 8·41, *supra.*
11. Para 8·47 *supra.*
12. Para 8·58, *supra.*
13. Para 8·59, *supra.*
14. Para 10·5, *supra.*
15. Para 2.6 and 10.13, *supra.*

(26) In the First Schedule, a new paragraph 2A should be added[1] to deal with the powers of arbitrators or umpire to act on evidence recorded by their predecessors, and also to provide that proceedings held before arbitrators shall be deemed to be proceedings before the umpire.

(27) In the First Schedule, paragraph 3, the period[2] should be extended to six months and an Explanation be added defining the expression "entering on reference".

(28) In the First Schedule, paragraph 5, a similar amendment should be made,[3] defining the above expression and the period be increased to four months.

(29) In the First Schedule, paragraph 6 should be recast as recommended.[4]

(30) In the First Schedule, paragraph 7 should be amended by adding an Explanation[5] to deal with cases where rules of an association provide for appeal.

H. R. Khanna ..... *Chairman*

S. N. Shankar ..... *Member*

T. S. Krishnamoorthy Iyer ..... *Member*

P. M. Bakshi ..... *Member-Secretary*

NEW DELHI,
Dated the 9th November, 1978.

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1. Para 11·4, *supra.*
2. Para 11·24, *supra.*
3. Para 11·28, *supra.*
4. Para 11·30, *supra.*
5. Para 11·32, *supra.*

APPENDIX

Copy of the letter received from the Secretary, Department of Legal Affairs.

P. G. GOKHALE
SECRETARY.

D.O. No. F. 8(15)/76-L.C.
GOVERNMENT OF INDIA,
MINISTRY OF LAW, JUSTICE & CO. AFFAIRS,
(DEPTT. OF LEGAL AFFAIRS)

Dated 27th July, 1977.

My dear Sri Bakshi,

It is a fact that on quite a few occasions the public Accounts Committee has commented adversely on the working of the Arbitration Act. Their comments include, inter alia, the long delays that take place in the completion of the arbitration proceedings, the number of extensions that are obtained either by consent of the parties or through the intervention of the court and the enormous expenses incurred by way of fees payable both to the arbitrators and the counsel. In some cases the arbitration proceedings were pending for a number of years—as long as 8 to 10 years. The amount spent on the arbitrator and the Counsel by way of fees exceeded the amount of claim that was ultimately awarded in favour of the Government. The Government is therefore desirous to have a second look at the provisions of the Arbitration Act with a view to see whether the enormous delays occurring in the arbitration proceedings and the disproportionate costs incurred therein could be avoided. It is also the Government's intention to see whether any more powers could be conferred on the arbitrators to ensure effective, just and speedy conclusion of the proceedings.

2. In view of the facts stated above the Government has decided to refer this question for examination by the Law Commission on a priority basis. I shall be grateful if the matter is examined in detail by the Law Commission and a report submitted to the Government as early as possible. It appears that the present Commission may not have time to take up the matter and complete it. This may therefore be placed before the new Commission as may be reconstituted with effect from 1-9-77 so that it can be taken up on a top priority basis.

With kind regards.

Yours sincerely,

SD/- P. G. GOKHALE

Shri P. M. Bakshi,
Member-Secretary,
Law Commission,
New Delhi.

MGIPCBE—S1—7 M of LJ&CA/ND/78—9-11-79—2,000 Bks.