Nishith Desai Associates
Legal & Tax Counseling Worldwide
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Dispute Resolution in India

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Nishith Desai Associates (NDA) is a research based international law firm with offices in Mumbai, Bangalore, Silicon Valley, Singapore and Basel. We specialize in strategic legal, regulatory and tax advice coupled with industry expertise in an integrated manner. We focus on niche areas in which we provide significant value and are invariably involved in select highly complex, innovative transactions. Our key clients include marquee repeat Fortune 500 clientele, of which over 60 per cent are US corporations.

Core practice areas include International Tax, International Tax Litigation, Litigation & Dispute Resolution, Fund Formation, Fund Investments, Capital Markets, Employment and HR, Intellectual Property, Corporate & Securities Law, Competition Law, Mergers & Acquisitions, JVs & Restructuring, General Commercial Law and Succession and Estate Planning. Our specialized industry niches include financial services, IT and telecom, education, pharma and life sciences, media and entertainment, real estate and infrastructure.

We have recently won the prestigious "Asian-Counsel's Social Responsible Deals of the Year 2009" by Pacific Business Press, in addition to being Asian-Counsel Firm of the Year 2009 for the practice areas of Private Equity and Taxation in India Indian Business Law Journal listed our Tax, PE & VC and Technology-Media-Telecom (TMT) practices in the India Law Firm Awards 2009 as also Legal 500 (Asia-Pacific) that has ranked us #1 in these practices for 2009-2010. We have been ranked the highest for 'Quality' in the Financial Times – RSG Consulting ranking of Indian law firms in 2009. The Tax Directors Handbook, 2009 lauded us for our constant and innovative out-of-the-box ideas. Other past recognitions include being named the Indian Law Firm of the Year 2000 and Asian Law Firm of the Year (Pro Bono) 2001 by the International Financial Law Review, a Euromoney publication. In an Asia survey by International Tax Review (September 2003), we were voted as a top-ranking law firm and recognized for our cross-border structuring work.

Our research oriented approach has also led to the team members being recognized and felicitated for thought leadership. Consecutively for the fourth year in 2009, NDAites have won the global competition for dissertations at the International Bar Association. Nishith Desai, Founder of Nishith Desai Associates, has been voted 'External Counsel of the Year 2009' by Asian-Counsel and Pacific Business Press and the 'Most In Demand Practitioners' by Chambers Asia 2009. He has also been ranked No. 28 in a global Top 50 "Gold List" by Tax Business, a UK-based journal for the international tax community.

We believe strongly in constant knowledge expansion and have developed dynamic Knowledge Management ('KM') and Continuing Education ('CE') programs, conducted both in-house and for select invitees. KM and CE programs cover key events, global and national trends as they unfold and examine case studies, debate and analyze emerging legal, regulatory and tax issues, serving as an effective forum for cross pollination of ideas.

Our trust-based, non-hierarchical, democratically managed organization that leverages research and knowledge to deliver premium services, high value, and a unique employer proposition has now been developed into a global case study and published by John Wiley & Sons, USA in a feature titled 'Management by Trust in a Democratic Enterprise: A Law Firm Shapes Organizational Behavior to Create Competitive Advantage' in the September 2009 issue of Global Business and Organizational Excellence (GBOE).

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I. INTRODUCTION

With India opening up its markets in the early 1990's the Indian legal and judicial system has had to come to terms with the reality of globalization as well. Being a very large country both by population and by area, there is tremendous pressure on India's resources and its institutions. The legal and judicial system is no exception.

There has however been a slow and steady pace of reform in the legal and judicial system as well. India still has a long way to go but will undoubtedly get there. The backlog of cases in courts across the country is reducing slowly and the acceptance of alternate dispute resolution is increasing.

This report attempts to provide an introduction to the Indian legal and judicial system. How it originated and where it is headed. Whilst we have covered all the important provisions in this report, we have not gone into minute detail. Applicability of certain provisions could defer based on the surrounding facts and circumstances of each case.

II. THE CONSTITUTION OF INDIA

The Constitution is the supreme law of the land. It constitutes India into a Sovereign, Socialist, Secular, and Democratic Republic and secures to the people of the country the right to Justice, Liberty, Equality and Fraternity.

The Constitution provides for a Parliamentary form of Government which is partly Federal in structure with unitary characteristics.

The Constitution of India provides the distribution of legislative powers between the Centre and the State. The Parliament has the power to make laws for the whole or any part of India and the State Legislature has the power to make laws for the whole or any part of the State. The legislative powers of the Parliament and State Legislatures are enumerated in three lists that are annexed as the Seventh Schedule to the Constitution: Union List, State List and Concurrent List.

In case of a conflict between the two legislatures over a matter in the Concurrent list the will of the Parliament prevails. Neither the Central government nor the State Governments can override or contravene the provisions of the Constitution.

The Constitution provides for three organs for the Governance of the country- a Legislature, an Executive and the Judiciary. The Judiciary is the interpreter and guardian of the Constitution.

The Constitution, has clearly demarcated the power given to each organ and has enabled each organ to provide a check on the other. The basic idea being that the three principal organs work in harmony, and restrict themselves to their own spheres of authority. For instance the Legislature has to function within the limitations of the Constitution with its law-making powers subject to the condition of being in consonance with the provisions of the Constitution. The Judiciary is empowered to keep this in check.

1. SEPARATION OF POWERS

Article 50 of the Constitution provides that there must be a separation of the Judiciary from the Executive. However, this Article falls under the Chapter of Directive Principles of State Policy and according to Article 37 is therefore not enforceable in a Court of Law. However, Article 37 also provides that it shall be the duty of the State to apply these Directive principles of State Policy while making laws.

In reality there is a fusion of powers, where a symbiotic relationship between the organs is unavoidable and is mentioned in the constitutional scheme as well. Thus, each organ is dependant on the other organ which checks and balances it.

The Courts have however tried to adhere to the Doctrine of Separation and enforce it in the following cases:

In the case of ***Keshavananda Bharati***[1] it has been held by Justice Beg that:

> *"Separation of powers is a part of the basic structure of the constitution. None of the three separate organs of the republic can take over the functions assigned to the other"*

[1] ***Keshavananda Bharti v State of Kerala***, AIR 1973 SC 1461

In the case of ***Indira Gandhi Nehru v. Raj Narain***[2], the doctrine was upheld by the Supreme Court which stated that "adjudication of a specific dispute is a judicial function which the parliament, even under constitutional amending power, cannot exercise". In this case there was a dispute regarding elections and the declaration by the constituent body that the elections would not be void, was actually a judicial power which in accordance with the doctrine of separation of powers, it did not possess.

To a great extent, the Legislature and the Judiciary have well defined areas of activities and they are supreme in their own spheres. The roles of the three organs are supplementary and complementary to each other. Nevertheless in reality the Parliament has been accorded a more important position in the political set-up. It has the necessary authority for enacting new laws and for amending the existing ones to suit the changing needs of the people with the changing times.

The Executive can pass an ordinance, which can only remain effective beyond its limited period (usually 6 months) only if the Parliament passes a law or a statute confirming it, in the absence of which it shall become inapplicable.

The Judiciary, independent and impartial, has been made the custodian of the rights of the citizens. All the legislations (Union, State or delegated) have been made subject to judicial review and can be declared ultra vires if they are not in consonance with the provisions of the Constitution.

"The court is bound by its oath to uphold the constitution[3]".

The Judiciary has the power to interpret the Constitution and the laws made by the Legislatures (Union and State). "The judiciary has been made the interpreter of the constitution and has been assigned the delicate task to determine as to what is the power conferred on each branch of the government and to see that it does not transgress such limits. It is for the judiciary to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law[4]".

Although the scope of judiciary remains limited to considering whether the impugned legislation falls within the ambit of the Constitution or otherwise is inconsistent with any existing laws, it is for all practical purposes, a Quasi Legislative body.

Normally, the power of the Courts is limited to interpreting laws. In a strict sense, they are law-interpreters and not law-makers, as they can not prescribe how the Legislatures or the Executive should function in their respective areas. However, it has been seen that the Courts are allowed to formulate or make law where there is none, i.e. where the law is silent or ambiguous. They have been given the power to fill in the loop-holes that exist in the legal system.

2. BASIC STRUCTURE OF THE CONSTITUTION

The Constitution is the Supreme and Sovereign authority of the Country. However, in order to keep up with the changing times and changing needs of the people, the Constitution cannot be rigid. It must be flexible enough to be able to adapt itself to the present times.

The Parliament is vested with the constituent power to amend any of the provisions of the

[2] AIR 1975 SC 2299
[3] ***A.K. Gopalan v. State of Madras***, AIR 1950 S.C. 27
[4] ***Minerva Mills Ltd. v. Union of India***, (1980) 3 SCC 625.

Constitution. However amendments have to be made keeping in mind the Basic Structure or the framework of the Constitution. The authority to decide what the 'Basic Structure' of the Constitution is lies with the Supreme Court.

In the ***Keshavananda Bharati case***[5], a full bench constituting 13 judges of the Supreme Court, including the Chief Justice declared that "Parliament's constituent power was subject to inherent limitations. The Parliament could not use its amending powers to 'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure' or framework of the Constitution".

In this landmark judgment, the judges also laid down their interpretations of what the 'Basic Structure' of the Constitution would constitute:

- power of judicial review is an essential feature,
- supremacy of the Constitution,
- republican and democratic form of government,
- separation of powers between the legislature, executive and the judiciary,
- federal character of the Constitution,
- the mandate to build a welfare state contained in the Directive Principles of State Policy,
- unity, integrity and sovereignty of India,
- essential features of the individual freedoms secured to the citizens,
- the States, the High Courts in the States and Union Territories, representation of States in Parliament and the Constitution,
- the sovereign, democratic and secular character of the polity,
- rule of law,
- independence of the judiciary and
- fundamental rights of citizens

The other landmark judgments, which upheld the importance of keeping the 'Basic Structure' of the Constitution intact were set out in the cases of: Indira Gandhi Election case, Minerva Mills case and Waman Rao case. Thus the Parliament has the power to amend the Constitution without altering any of the Basic Features of the Constitution.

[5] AIR 1973 SC 1461

III. THE JUDICIARY

The Indian legal system has grown and evolved with the lives and aspiration of its diverse people and cultures. The Indian Legal System is inspired and strengthened by age-old concepts and precepts of justice, equity and good conscience, which are, indeed, the hallmarks of common law.

The Constitution of India is the fundamental source of law in India. The Constitution gives due recognition to statutes, case law and customary law consistent with its dispensations. A single unified judicial system is a unique feature of the Indian judicial system. The Supreme Court is at the apex of the entire judicial system followed by High Courts in each State or group of States. Below the High Courts lies a hierarchy of Subordinate Courts. Panchayat Courts also function in some States under various names like Nyaya Panchayat, Panchayat Adalat, Gram Kachheri, etc. to decide civil and criminal disputes of petty and local nature.

Each State is divided into judicial districts presided over by a District and Sessions Judge, which is the principal civil court of original jurisdiction. The Sessions Judge is the highest judicial authority in a district. Below him, there are Courts of civil jurisdiction, known in different States as Munsifs, Sub-Judges, Civil Judges and the like. Similarly, the criminal justice system comprises the Chief Judicial Magistrates and Judicial Magistrates of First and Second Class.

In such a hierarchical system, it is very crucial to decide the appropriate jurisdiction required to entertain and try a dispute.

1. SUPREME COURT

The Supreme Court of India is the highest court of appeal and is the final interpreter of the Constitution and the laws of the land. The court has the original and exclusive jurisdiction to resolve disputes between the central government and one or more states and union territories as well as disputes between different states and union territories. In addition, Article 32 of the Constitution gives an extensive original jurisdiction to the Supreme Court in regard to enforcement of Fundamental Rights. It is empowered to issue directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari.[6] The Supreme Court has been conferred with a wide array of powers including the power to direct transfer of any civil or criminal case from one State High Court to another State High Court or from a Court subordinate to another State High Court. The Supreme Court, if satisfied that cases involving the same or substantially the same questions of law are pending before it and one or more High Courts or before two or more High Courts and that such questions are of substantial importance, may dispose of all such cases itself.

The Supreme Court has also a very wide appellate jurisdiction over all Courts and Tribunals in India in as much as it may, in its discretion, grant special leave to appeal under Article 136 of the Constitution from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any Court or Tribunal in the territory of India. The appellate jurisdiction of the Supreme Court can usually be invoked by a certificate granted by the High Court concerned under Article 132(1), 133(1) or 134 of the Constitution in respect of any judgment, decree or final order of a

[6] V.N Shukla , "*Constitution of India*", 9th edition (Lucknow: Eastern Book Company, 1998)

High Court in both civil and criminal cases, involving substantial questions of law as to the interpretation of the Constitution[7].

The Supreme Court is further empowered to issue advisory rulings on issues referred to it by the President of India under Article 143 of the Constitution .The Supreme Court has wide discretionary powers to hear special appeals on any matter from any court except those of the armed services. It also functions as a court of record and supervises every high court and subordinate courts.

- **Public Interest Litigation**

The Supreme Court of India also entertains matters in which interest of the public at large is involved. This concept is unique to the Supreme Court and High Courts of India and perhaps no other Court in the world has been exercising this extraordinary jurisdiction[8]. A PIL can be instituted by any individual or group of persons either by filing a Writ Petition or by addressing a letter to the Hon'ble Chief Justice of India or alternatively the Chief Justice of the relevant High Court highlighting the question of public importance for invoking the jurisdiction. This concept is popularly known as 'Public Interest Litigation' and several issues of public importance have turned out to be the subject matter of landmark judgments.

- **Legal Aid**

In order to provide easy and inexpensive access to the Supreme Court and giving legal advice to the poor section of the society having annual income of less than Rs. 18,000/- or belongs to Scheduled Caste or Scheduled Tribe, a victim of natural calamity, is a woman or a child or a mentally ill or otherwise disabled person or an industrial workman, or is in custody including custody in protective home, the Supreme Court Legal Services Committee has been constituted under the Legal Services Authorities Act, 1987[9]. Any person desirous of availing legal service through the Committee has to make an application to the Secretary and hand over all necessary documents concerning his case to it. The Committee after ascertaining the eligibility of the person provides necessary legal aid to him/her.

2. HIGH COURTS

As part of a single integrated hierarchical Judicial System, the High courts are placed directly under the Supreme Courts. Each High Court consists of a Chief Justice and a number of puisne judges. A High Court judge is appointed by the President of India after consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of the State. Every High court is a court of record which has all the powers of such a court including the power to punish for its contempt. The High Court entertains appeals from the subordinate courts and tribunals. It also acts as a court of revision for the subordinate courts and tribunals. Some High Courts also exercise original jurisdiction in civil and admiralty matters.

Apart from the original and appellate jurisdiction, the Constitution vests in the High Court some

[7] http://www.indianlawyersforum.com/452/index.php?option=com_content&task=view&id=16&Itemid=35 visited on December 12, 2007
[8] http://www.supremecourtofindia.nic.in/new_s/juris.htm visited on December 12, 2007
[9] http://www.jansamachar.net/display.php3?id=&num=1107&lang=English visited on December 12, 2007

additional powers[10]:

- Under Article 226 of the Constitution, the High Court has the powers to issue writs or orders for the enforcement of Fundamental Rights or for any other specified purpose such as public interest litigation;
- under Article 227 of the Constitution, the High Court has the power of superintendence, judicial and administrative, over all courts and tribunals in the State, except those dealing with armed forces;
- under Article 228 of the Constitution, the High Court has the power to transfer cases to itself from subordinate courts concerning the interpretation of the constitution.

3. SUBORDINATE COURTS

Next in the hierarchy of the courts are the subordinate courts and tribunals. The highest court in each district is that of the District and Sessions Judge. This is the principal court of civil jurisdiction. This is also a court of Sessions. It has the power to impose any sentence including capital punishment.

There are many other courts subordinate to the court of District and Sessions Judge. On the civil side, at the lowest level is the Court of Civil Judge (Junior Division) deciding civil cases of small pecuniary limits. At the middle of the hierarchy there is the Court of Civil Judge (Senior Division) on the Civil side which usually decides civil cases of any valuation, subject to certain exceptions. There are many additional courts like that of an Additional Civil Judge (Senior Division). The Jurisdiction of these additional courts is the same as that of the Principal Court of Civil Judge (Senior Division). Appeals normally lie from these courts to the District Court and then to the High Court. A litigant is normally entitled to two appeals-one appeal both on facts and law, called a 'First Appeal' and a second appeal on law alone, called a 'Second Appeal'[11].

On the criminal side the lowest court is that of the Judicial Magistrate and they decide criminal cases, which are punishable with imprisonment of up to five years[12]. On the middle level there is the Court of the Chief Judicial Magistrate, which can try cases, which are punishable with imprisonment for a term up to seven years. In the metropolitan regions such as Mumbai the court of the Chief Judicial Magistrate is called the Court of the Chief Metropolitan Magistrate. Usually there are many additional courts of Additional Chief Judicial Magistrates. At the top level there may be one or more Courts of Additional District Magistrates and Sessions Judge with the same judicial power as that of the District and Sessions judge. Appeals from the Magistrates' courts lie to the Court of Session and then to the High Court of that State.

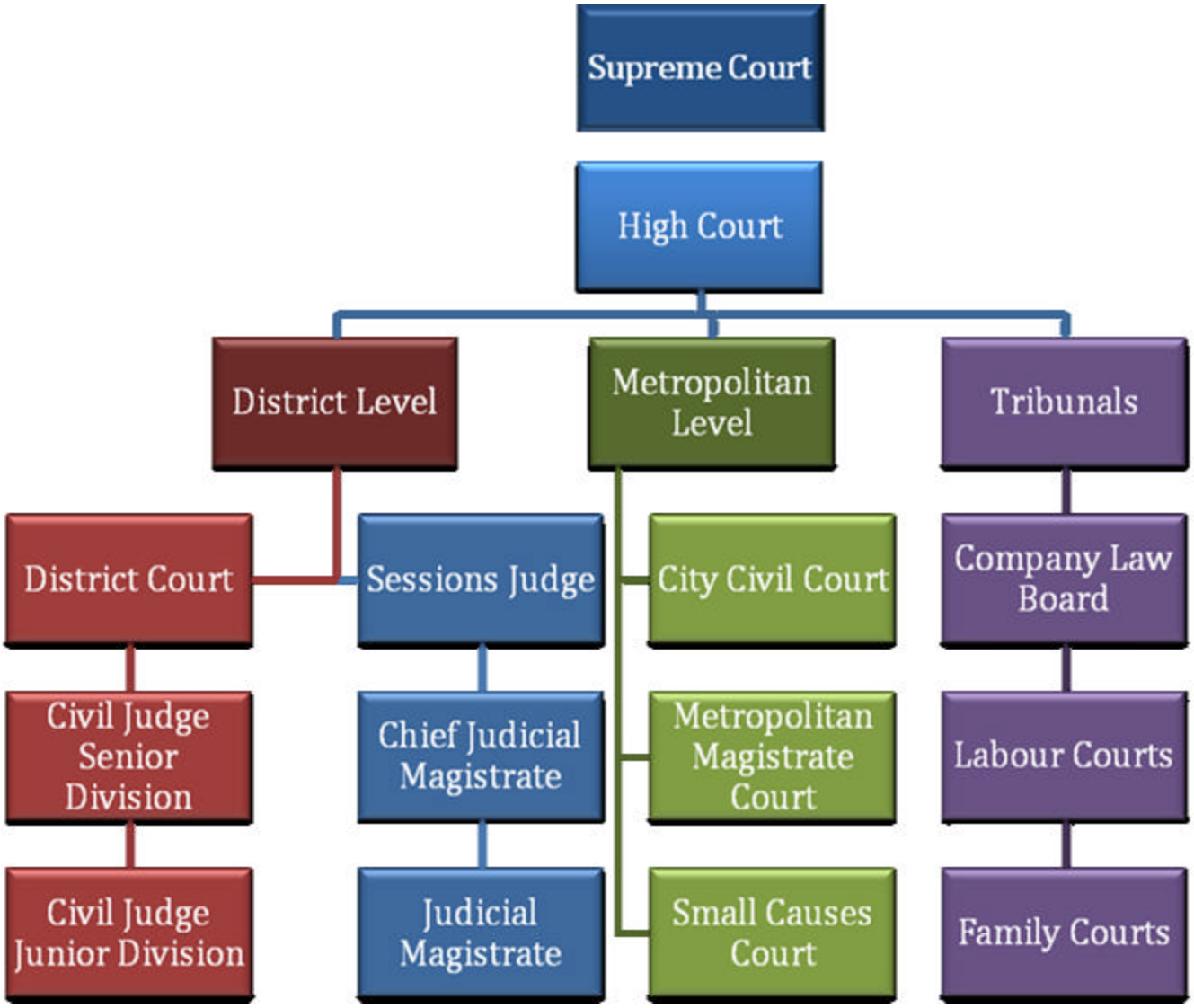
4. TRIBUNALS

Specialized tribunals are established under various enactments such as the Income Tax Appellate Tribunal, the Company Law Board, the Sales Tax Appellate Tribunal, the Consumer Forum, the Central and State Administrative Tribunals, the Debt Recovery Tribunal and the Intellectual Property

[10] Durga Das Basu, "Shorter Constitution of India" 13th edition (Nagpur; Wadhwa and Company, 2002)
[11] C.K Takwani , "*Civil Procedure*", 5th edition (Lucknow: Eastern Book Company, 2003)
[12] http://www.samarthbharat.com/judiciary.htm visited on December 20, 2007

Appellate Tribunal. All these tribunals are under the superintendence of the High Court within whose territorial jurisdiction they function.

The organization of the subordinate courts and tribunals varies slightly from state to state. The flow chart hereunder depicts the general hierarchy of the courts.



IV. JURISDICTION

Jurisdiction may be defined to be the power or authority of a court to hear and determine a cause, to adjudicate and exercise any judicial power in relation to it. The jurisdiction of a court, tribunal or authority may depend upon fulfillment of certain conditions or upon the existence of a particular fact[13]. If such a condition precedent is satisfied then only does the authority or Court, as the case may be, have the jurisdiction to entertain and try the matter. Jurisdiction of the courts may be classified under the following categories:

1. TERRITORIAL OR LOCAL JURISDICTION

Every court has its own local or territorial limits beyond which it cannot exercise its jurisdiction. The Government fixes these limits.

a. Pecuniary Jurisdiction

The Code of Civil Procedure provides that a court will have jurisdiction only over those suits the amount or value of the subject matter of which does not exceed the pecuniary limits of its jurisdiction[14]. Some courts have unlimited pecuniary jurisdiction like the High Courts and District Courts (in certain states) which have no pecuniary limitations, however there are certain other courts which have jurisdiction to try suits only up to a particular amount.

b. Jurisdiction as to subject matter

Different courts have been empowered to decide different types of suits. Certain courts are precluded from entertaining certain suits. For example, the Presidency Small Causes Courts has no jurisdiction to try suits for specific performance of contract, partition of immovable property etc. Similarly, matters pertaining to the laws relating to tenancy are assigned to the Presidency Small Causes Court and therefore, no other Court would have jurisdiction to entertain and try such matters.

c. Original and appellate jurisdiction

The jurisdiction of a court may be classified as original and appellate. In the exercise of original jurisdiction, a court entertains and decides suits and its appellate jurisdiction it entertains and decides appeals. Munsif's Courts, Courts of Civil Judge and Small Cause Courts possess original jurisdiction only, while District Courts and High Courts have original as well as appellate jurisdictions, subject to certain exceptions.

[13] ***Ujjam Bai v. State of U.P.,*** AIR 1962 SC 1621
[14] Section 6 o the Civil Procedure Code

V. RELIEFS

1. INTERIM RELIEF

The plaintiff may apply for urgent relief to seek an injunction restraining the opposite party from disturbing the status quo. Interim orders are those orders passed by the court during the pendency of a suit or proceeding which do not determine finally the substantive rights and liabilities of the parties in respect of the subject matter of the suit or proceeding. Interim orders are necessary to deal with and protect rights of the parties in the interval between the commencement of the proceedings and final adjudication. They enable the court to grant such relief or pass such order as may be necessary, just or equitable. Hence, interim proceedings play a crucial role in the conduct of litigation between the parties[15]. Interim reliefs or injunctions are issued during the pendency of the proceedings. Injunctions are a popular form of interim relief.

Types:

Injunctions are of two kinds

- **Temporary Injunction:** A temporary or interim injunction restrains a party temporarily from doing the specified act and can be granted only until the disposal of the suit or until the further orders of the court. It is regulated by the provisions of Order 39 of the Code of Civil Procedure, 1908 and may be granted at any stage of the suit.
- **Permanent Injunction:** A permanent injunction restrains a party forever from doing the specified act and can be granted only on merits at the conclusion of the trial after hearing both the parties to the suit. It is governed by Sections 38 to 42 of the Specific Relief Act, 1963.

The grant of injunction is a discretionary remedy and in the exercise of judicial discretion in granting or refusing to grant, the court will take into consideration the following guidelines:

a. Prime facie case

The applicant must make out a prime facie case in support of the right claimed by him and should be able to the court that there is a bona fide dispute raised by the applicant, that there is a strong case for trial which, needs investigation and a decision on merits and on the facts before the court there is a probability of the applicant being entitled to the relief claimed by him. While determining whether a prima facie case had been made out the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not that was the only conclusion which could be arrived at on that evidence[16].

[15] Hallsbury's Law of England, (4th Edn.) para 326
[16] ***Martin Burn Ltd. v. Banerjee*** AIR 1958 SC 79

b. Irreparable injury

The applicant must further satisfy the court that he will suffer irreparable injury if the injunction as prayed is not granted, and that there is no other remedy open to him by which he can be protected from the consequences of apprehended injury. The principle was elaborated in the celebrated judgment of **American Cyanamid Co. v. Ethicon Ltd**[17]:

> *"The governing principle is that, the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages' for the loss he would have sustained as a result of the defendant continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiffs undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction."*

c. Balance of convenience

In addition to the above two conditions the court must also be satisfied that the balance of convenience must be in favour of the applicant. in order to determine the same the court needs to look into the factors such as[18]

- whether it could cause greater inconvenience to the plaintiff if the injunction was not granted.
- whether the party seeking injunction could be adequately compensated by awarding damages and the defendant would be in a financial position to pay them.

2. SPECIFIC RELIEF

Specific Relief Act, 1963 provides for specific relief for the purpose of enforcing individual civil rights and not for the mere purpose of enforcing civil law and includes all the cases where the Court can order specific performance of an enforceable contract.

Specific performance[19] is an order of the court which requires a party to perform a specific act, usually what is stated in a contract. While specific performance can be in the form of any type of forced action, it is usually used to complete a previously established transaction, thus being the most

[17] (1975) 1 All ER 504
[18] ***Gujarat Bottling Co. Ltd. v Coca Cola Co***. (1995) 5 SCC 545
[19] http://en.wikipedia.org/wiki/Specific_performance

effective remedy in protecting the expectation interest of the innocent party to a contract'. The aggrieved party may approach a Court for specific performance of a contract. The Court will direct the offending party to fulfill his part of obligations as per the enforceable contract.

a. Applicability

The Act applies to movable and immovable properties. The Act is enforceable in the following cases:

i. Recovering possession of immovable property:

- A person who is entitled to possession of a specific immovable property may recover it in the manner provided in Code of Civil Procedure[20].
- If any person is dispossessed of his immovable property without his consent otherwise than by course of law, he can recover possession of the same by way of a summary suit. Such suit shall be instituted within 6 months. No suit can be filed against Government for recovery of possession.[21]

ii. Recovering possession of specific movable property

- A person who is entitled to possession of a specific movable property may recover it in the manner provided in Code of Civil Procedure[22].
- If any person is in possession or control of a specific movable property of which he is not owner, he can be compelled to specifically deliver it to the person entitled to immediate possession[23].

iii. Specific performance of contract

As per Section 10 of the Specific Relief Act 1963, specific performance of contract can be ordered, at discretion of Court, in the following cases:

- Where there is no prescribed standard for ascertaining the actual damages caused by the non-performance of the contract; and
- Where monetary compensation would not be an adequate relief in the prevalent conditions.

As per explanation (ii) to section 10, breach of contract in respect of movable property can be relieved (by paying damages) unless the property is not an ordinary article of commerce or is of specific value or interest to the tariff, or consists of goods which are not easily available in the market. In other words, Court may order to deliver specific article only if it is special or unique article, not available in market. In other cases, Court will order damages but not order specific performance of contract. In case of immovable property, normally, specific performance will be ordered, as such property is usually unique[24].

[20] Section 5
[21] Section 6
[22] Section 7
[23] Section 8
[24] ***Uttar Pradesh State Electricity Board v Ram Barai Prasad,*** AIR 1985 All 26

b. Contracts which cannot be specifically enforced

The following contracts cannot be specifically enforced[25]-

- Where compensation is adequate relief;
- Contract runs into such minute or numerous details or depends on personal qualifications of parties or is such that the Courts cannot enforce specific performance of its material terms;
- Contract which in its nature is determinable;
- Contract, the performance of which involves a continuous duty which the Courts cannot supervise.

c. Powers of the Courts:

The Courts however can exercise discretionary powers while granting specific performance and can impose any reasonable condition including payment of an additional amount by one party to the other. Also, the Act stipulates the fulfillment of certain necessary ingredients/conditions and provides that the Courts shall not direct the specific performance unless those necessary ingredients have been complied with to the satisfaction of the Court.

3. DAMAGES

Under the Common Law, the primary remedy upon breach of contract is that of damages. The goal of damages in tort actions is to make the injured party whole through the substitutionary remedy of money to compensate for tangible and intangible losses caused by the tort.

In general, a tort consists of some act done by a person who causes injury to another, for which damages are claimed by the latter against the former. The word *'damage'* is used in the ordinary sense of injury or loss or deprivation of some kind, whereas the word *'damages'* refers to the compensation claimed by the injured party and awarded by the court. Damages are claimed and awarded by the court to the parties. The word *'injury'* is strictly limited to an actionable wrong, while damage means loss or harm occurring in fact, whether actionable as an injury or not. In the case of *Rajendralal Maneklal v Surat City Municipality* **[26],** the court granted damages to the plaintiff as he suffered losses due to negligence by the Municipality

Under the Indian Contract Act 1872, the remedy of damages is laid down in Section 73 and 74. Section 73 states that where there has been a breach of contract, the party suffering from the breach thereof is entitled to receive compensation from the party who is responsible for the breach. However, no compensation is payable for any remote or indirect loss or damage so caused. The issue of remoteness which was expounded in ***Hadley v. Baxendale***[27] has been followed by the Indian courts as well.

Section 74 deals with liquidated damages and provides for the measure of damages in two classes: (i) where the contract names a sum to be paid in case of breach; and (ii) where the contract contains any

[25] Section 14
[26] (1908)10 BOMLR 498
[27] (1854) 9 Exch 341

other stipulation by way of penalty. In both the cases the measure of damages is by Section 74, reasonable compensation not exceeding the amount or penalty stipulated for. In ***Fateh Chand v Balkishan Das*** [28], the Supreme Court stated:

> *"Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of parties predetermined or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The section does not confer a special benefit upon any party. It merely declares the law that notwithstanding any term in the contract for determining the damages or providing for forfeiture of any property by way of penalty, the Court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated."*

The aforementioned Sections give an assurance to the contracting party that he may safely rely on the fulfillment of the promise and upon breach of any terms and conditions he will have the right to claim damages from the defaulting party. However it should also be noted that Indian courts have not been known to grant substantial damages even if the amount claimed is the actual loss. This seems to now be changing and hopefully we will see the courts becoming more modern in their outlook to grant of damages.

[28] (1964) 1 SCR 515

VI. PROCEDURE FOR FILING A SUIT

Litigation consists of the following stages, broadly categorised as pre-trial and trial proceedings.

1. PRE-TRIAL PROCEEDINGS

a. Institution of Plaint

Order 6 of the Code of Civil Procedure, 1908 ("CPC") deals with pleadings. "Pleading" as defined is a plaint or a written statement[29].

The object of pleadings is to bring parties to disclose the specific issues (i.e., to ascertain real disputes, to narrow down the area of conflict and to determine where the two sides differ, to preclude one party from taking the other by surprise and to prevent miscarriage of justice).

Principles of pleadings as stated in Order 6 Rule 2(1) are:

- Pleadings should state facts and not law;
- the facts stated therein should be material facts;
- pleadings should not state the evidence;
- the facts stated therein should be in a concise form.

The plaint is the document that is required to be filed to institute a civil proceeding in a court of law. The plaint is the plaintiff's pleading, a statement of claims in which he/she sets out his/her cause of action with all necessary particulars. Every plaint, under Order 7 of the CPC, should contain the following particulars;

- Name of the court (including the relevant Jurisdiction);
- Name, description and full address of the plaintiff;
- Name description and full address of the defendant;
- Cause of action and when it arose;
- Facts to show that the court has jurisdiction;
- The relief(s) sought, mentioning the value of the subject matter.

b. Remitting the Court Fees

A Court fee is calculated as per the Court Fees Act of each state. Depending on the subject matter of the litigation, the court fee prescribed may be-

[29] Mulla, "*Code of Civil Procedure*", 13th edition, (New Delhi; Butterworths, 2000)

1. A percentage of the value of the compensation claimed or the value of the property in dispute; or

2. A fixed amount for certain categories of cases, such as partition cases.

The court fees vary from State to State and therefore tone needs to check the "fee schedule" of the Court Fees Act passed in different State. Generally, for cases involving recovery of money, the Court Fees court range from 5 - 10% of the claim. Certain States have capped the Court Fees payable by the Plaintiffs.

c. Notifying the Defendant

To inform a defendant that he/she his been made a party to a civil suit and to requisition the appearance of the defendant in court, the court registry, under Order 5 of the CPC, issues and serves a formal document called a Writ of Summons upon the defendant. Every Writ of Summons should be served upon the Defendant(s) in the manner prescribed alongwith a copy of the plaint. If the suit is a summary suit (a special category of claims, where the claim falls into a specified category, in the nature of a liquidated demand, or on a negotiable instrument) the defendant is required to file his/her appearance within ten days of the service of Writ of Summons [30].

Procedure for filing a Summary Suit: Rule 2 provides that after the summons of the suit has been issued to the defendant, the defendant must appear and the plaintiff will serve a summons for judgment on the defendant. The defendant is not entitled to defend a summary suit unless he enters an appearance. In default of this, the plaintiff will be entitled to a decree which will be executed forthwith. Rule 3 prescribes the mode of service of summons and leave to defend by the defendant. The leave to defend should be given unconditionally if the defendant shows a prima facie case or raises a triable issue and the same should not be refused unless the court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defense to raise or that the defense intended to be put by him is frivolous or vexatious [31].

d. Filing of Defendants Written Statement

The defendant's written statement is then required to be filed in the court within a specified period and a copy must be handed over to the plaintiff. Should the plaintiff wish to deny any of the statements in the written statement, or respond to any allegation made by the defendant by adding further material facts, he/she may file a rejoinder. However the defendant may file an additional written statement only with the leave of the court.

Order 8 deals with the written statement, which is the defendant's response the plaint, admitting or specifically denying each material fact alleged by plaintiff in the plaint [32]. The defendant may set out any additional facts may be relevant to the case. Any legal objections to the claim of the plaintiff may also be set out in the written statement.

The defendant may also claim a set off or make a counterclaim in the written statement. A set-off is

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[30] Order 37
[31] ***Sunderam v Valli Ammal,*** (1935) 58 Mad 116
[32] Suranjan Chakraverti and Bholeshwar Nath, "*Cases and materials on Code of Civil Procedure*" 4th edition, (Lucknow: Eastern Book Company, 2006)

any ascertained sum of money legally recoverable by the defendant against the plaintiff, which would be "set off" against the plaintiffs claim, effectively reducing the value of the plaintiffs claim to the extent of the value of the set off. A counterclaim is any right or claim of the defendant against the plaintiff in respect of a cause of action accruing to the defendant against the plaintiff at a point in time before the defendant has delivered his defense in the current suit.

In the event of a setoff or counterclaim being alleged by the defendant in written statement, the plaintiff in turn responds with a written statement, either admitting or making specific denial of each material fact.

2. TRIAL PROCEEDINGS

a. Framing of Issues by the Court

After the plaint has been filed by the plaintiff and the written statement filed by the defendant in court, the court then frames the issues [33]. Framing of issue involves identifying issues that raise specific questions of law and separating those issues from irrelevant facts of the case. After framing of the issues by the court, the parties to the suit decide which relevant documents are to be provided to the court. The parties would have to submit these documents and prove their originality to the court.

b. Filing Documents & Leading Evidence

Without exceeding fifteen days after the framing of issues, the parties expected to present a list of witnesses. For this purpose, any party to the suit may apply to the court for the issuance of summons to persons whom they propose to call as witnesses.

Sections 30 to 32 and Orders 16 to 18 of the CPC contain the necessary provisions for summoning, attendance, and examination of witnesses [34]. The parties to the suit are provided reasonable opportunity to lead evidence. After the parties have cross-examined the witnesses on both sides (including reexamination), the next stage of trial is the arguments put forward by the opposing parties.

c. Posting for Final Arguments

The right to begin or the privilege of opening the case is determined by the rules of evidence. The general rule is that the party on whom the burden of proof lies should begin first. But where there are several issues to be proved and the burden of proving some of which lies on either party, the plaintiff may at his/her option either go into the whole case in the first instance or may merely adduce evidence on those issues which lie upon him/her, reserving his/her right to rebutting the evidence, should his/her opponent make out a prima facie case.

Arguments by both sides are intended to brief the judge with a summary and gist of the evidences

[33] Order 14
[34] Sarkar, "*Code of Civil Procedure*", 10th edition (Nagpur; Wadhwa and Company, 2002)

produced by each side. At this stage there are examinations and submissions by the parties in order to prove their point or substantiate their argument, this involves three steps:

- Examination in Chief- The examination of a witness by the party who calls him shall be called his examination in-chief[35]. It is a province of a party by whom the witness is called to examine him in chief for the purpose of eliciting from the witness all the material facts within his knowledge which tend to prove the party's case. Examination in Chief is also known as Direct Examination.
- Cross-examination- The examination of a witness by the adverse party shall be called his cross-examination.
- Re-examination- The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.

This is an important stage in a case, since the judge may not be able to read and assimilate lengthy documents covering evidences on both sides, but he is capable of perceiving and assimilating what is stated in the arguments.

d. Judgment and Decree

After the conclusion of arguments the judge pronounces the judgment[36] or passes a decree[37] in favor of either the plaintiff or the defendant. Due to the large number of cases pending in Indian courts, the stage of final hearing of the suit easily takes up to five to ten years from the date of filing the suit, if not longer. After the judgment becomes final (i.e, appeals are dismissed, or no appeal is filed within the prescribed period of Limitation, the judgment is required to be transformed into a decree). Order 20 Rule 6 lays down, that the decree shall agree with the judgment. It is in the form of a decree that a judgment can be enforced.

e. Execution of the Decree

The party in whose favour the decree is passed is called the decree holder. The other party is called the judgment debtor. The judgment debtor has to abide by and honor the decree. If one fails to honor the decree passed against it, the decree holder can seek execution of the decree by filing an Execution Petition in the court. The execution petition has to be filed in the court at the place where the judgment debtor resides. If immovable property is to be attached it should be filed in the court at the place, where the property is located. For this purpose the judgment-decree has to be transferred to the concerned court in the first instance.

[35] Section 137 of the Indian Evidence Act
[36] Order 20 Rules 1 to 5
[37] Order 20 Rules 6 to 19

VII. APPEAL

Any person who is aggrieved by any decree or order passed by the court may prefer an appeal in a superior court if an appeal is provided against that decree or order or may make an application for review or revision. In certain cases, a subordinate court may make a reference to a High Court. The provisions relating to Appeals, Reference, Review and Revision may be summarised thus:

1. ESSENTIALS OF AN APPEAL

The, expression "appeal" has not been defined in the Code, but it may be defined as "the judicial examination of the decision by a higher court of the decision of an inferior court[38]" Every appeal has three basic elements:

- A decision (usually a judgment of a court or the ruling of an administrative authority);
- A person aggrieved who is often, though not necessarily, a party to the original proceeding); and
- A reviewing body ready and willing to entertain an appeal.
- A right of appeal is not a natural or inherent right. It is well settled that an appeal is a creature of statute and there is no right of appeal unless it is given clearly and in express terms by a statute. Again, the right of appeal is a substantive right and not merely a matter of procedure. It is a vested right and accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced, such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal. This vested right of appeal can be taken away only by a subsequent enactment if it so provides either expressly or by necessary implication, and not otherwise.

Thus, if an appeal lies against an order passed by a Single Judge of the High Court under Sections 397 and 398 of the Companies Act, 1956, to the Division Bench, the said right cannot be taken away on the ground that the High Court has not framed the necessary rules for filing such an appeal. Substitution of a new forum of appeal should not be readily inferred. The right being a creature of statute, conditions can always be imposed by the statute for the exercise of such right[39].

2. WHO MAY APPEAL

Section 96 of the Code recognizes the right of appeal from every decree passed by any court exercising original jurisdiction. It does not refer to or enumerate the persons who may file an appeal. But before an appeal can be filed under this section, two conditions must be satisfied:

a) The subject-matter of the appeal must be a "decree", that is, a conclusive determination of "the rights of the parties with regard to all or any of the matters in controversy in the

[38] ***Lakshmiratan Engg. Works v. Asstt. Commr. Of Sales Tax***, AIR 1968 SCV 488
[39] ***A R Antulay v. R.S. Nayak*** (1988) 2 SCC602

suit"; and

b) The party appealing must have been adversely affected by such determination.

Under the general principles of section 92, the following persons are entitled to appeal:

- A party to the suit, who is aggrieved or adversely affected by the decree, or if such party is dead, his legal representative;
- a person claiming under a party to the suit or a transferee of the interests of such a party, who, so far as such interest is concerned, is bound by the decree, provided his name is entered on the record of the suit;
- a guardian ad litem appointed by the court in a suit by or against a minor;
- any other person, with the leave of the court, if he is adversely affected by the decree.

3. FIRST APPEAL AND SECOND APPEAL

a. First Appeal

Section 96 to 112 and Order 41-45 of the Civil Procedure Code deals with first appeal. A first appeal lies against a decree passed by a court exercising original jurisdiction, Whereas a first appeal can be filed in a superior court which may or may not be a High Court, a second appeal can be filed only in the High Court A first appeal is maintainable on a question of fact or on a question of law or on a mixed question of fact and law. In *Dayawati* v. *Inderjit*[40] , speaking for the Supreme Court, Hidayatullah, J. stated:

> *"An appeal has been said to be "the right of entering a superior court, and invoking its aid and interposition to redress the error of the court below." (Per Lord Westbury in Attorney General v. Sillem (63 I.A. 47.). The only difference between a suit and an appeal is this that an appeal "only reviews and corrects a proceeding in a cause already constituted but does not create a cause."*

b. Second Appeal

Section 100 to 103, 107-108 and Order 42 of the Civil Procedure Code deals with second appeals. A second appeal lies against a decree passed by a first appellate court. As per Section 100, a second appeal can be filed, if the High Court is satisfied that "the case involves a substantial question of law". Though the expression substantial question of law has not been defined in the Code, in *Chunilal Mehta* v. *Century Spinning & Manufacturing Co. Ltd*.[41], the Supreme Court observed:

> *"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by*

[40] AIR 1966 SC 1423
[41] AIR 1962 SC 1314

the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."

c. Appeals from Orders

Section 104 to 108 and Order 43 deal with appeals from orders. These provisions provide for certain appealable orders. And no appeal shall lie in case of any other orders not provided therein, however such orders can be attacked in an appeal from the final decree. They also provide for the forum of an appeal.

VIII. ALTERNATIVE DISPUTE RESOLUTION

Due to the huge pendency of cases in courts in India, there was a dire need for effective means of alternative dispute resolution. India's first arbitration enactment was The Arbitration Act, 1940. Other complementary legislations were formed in the Arbitration [Protocol and Convention] Act of 1937 and the Foreign Awards Act of 1961. Arbitration under these laws was never effective and led to further litigation as a result of rampant challenge of awards. The legislature enacted the current Arbitration & Conciliation Act, 1996 ("**Act**") to make arbitration, domestic and international, more effective in India. The Act is based on the UNCITRAL Model Law (as recommended by the U.N. General Assembly) and facilitates International Commercial Arbitration as well as domestic arbitration and conciliation[42]. Under the said Act, an arbitral award can be challenged only on limited grounds and in the manner prescribed. India is party to the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. As the name of the Act suggests, it also covers conciliation, which is a form of mediation. Some of the main provision of the Act are discussed below.

1. ARBITRATION

Section 2(1)(f) of the Act defines an international commercial arbitration to mean one arising from a legal relationship which must be considered commercial where either of the parties is a foreign national or resident or is a foreign body corporate or is a company, association or body of individuals whose central management or control is in foreign hands. The question as to what is commercial was answered by the Supreme Court where it prescribed that the work 'commercial' should be construed broadly having regard to the manifold activities which are an integral part of international trade today.[43] Section 5 of the Act provides that notwithstanding anything contained in any other law for the time being in force, in matters governed by Part I (Sections 2 to 43), no judicial authority shall intervene except where so provided in the said part[44]. This clearly indicates the legislative intent to minimise supervisory role of courts to ensure that the intervention of the court is minimal. Section 4 is a deeming provision, which lays down that when a party proceeds with the arbitration without stating his objection to either a non-compliance of any derogable provision of Part I or any requirement under arbitration agreement, then such a party shall be deemed to have waived its right to object to the above.

Section 7 provides that the arbitration agreement shall be in writing and such an agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Sub-section (4) of Section 7 provides the conditions under which a document or exchange of letter or exchange of statement of claim and defense may amount to an arbitration agreement. As per recent judgments an arbitration clause in an agreement is construed as an Arbitration Agreement and even if the contract in which the clause is incorporated is terminated, the arbitration clause / agreement shall still be valid. Section 9 of the Act, based on Article 9 of the UNCITRAL Model Law, lays down certain cases where parties may approach the Court for certain interim measures. It has been held that this power

[42] www.nishithdesai.com/other-sites/Litigation_GuideOct0802.htm - 11k - visited on November 10, 2007
[43] ***R.M. Investments & Trading Co. Pvt. Ltd v. Boeing Co.*** AIR 1994 SC 1136
[44] http://www.naavi.org/praveen_dalal/arbitration_may_11.htm visited on December 20, 2007

of the Court may be exercised even before an arbitrator has been appointed,[45] overruling the earlier position that the power may only be exercised if a request for arbitration has been made. Section 11 of the Act, based on Article 11 of the UNCITRAL Model Law, provides for appointment of arbitrators granting to parties the power to appoint arbitrators or to agree on procedures for such appointment. In any event that an arbitrator cannot be appointed sub-section (6) empowers the Chief Justice of the High Court or any person or institution designated by him to make such an appointment on the happening of certain conditions enumerated in clauses (a), (b) or (c). This position was changed from the earlier Act which designated the Court with this power rather than the Chief Justice.[46] Interestingly, in the case of international commercial arbitrations the Chief Justice of India must be approached whereas in other cases it is the Chief Justice of the High Court under whom the principal civil court having jurisdiction over the subject matter of the dispute lies. Interestingly, in ***TDM Infrastructure Pvt. Ltd. Vs. UE Development India Pvt. Ltd.***[47], it was argued that as the petitioner company was incorporated in India but had its central management and control in Malaysia, application for appointment of an arbitrator would lie before the Hon'ble Chief Justice of India, as this would be a case of international commercial arbitration under section 2(f)(iii) of the Act. The Court held that as the company was incorporated in India, there was no question of the arbitration being an international commercial arbitration as defined under the Act and proceeded to dismiss the application with costs.

Section 16 of the Act, again based on Article 16 of the Model Law, is very important in its effect as it incorporates the doctrines of Competence-Competence and Severability. In essence the doctrine of Competence-Competence allows the arbitral tribunal to rule on matters regarding its own competence. The doctrine of severability entails that the arbitral clause would not be vitiated if the contract itself is invalid or defective. The position was also considerably changed from that espoused by the 1940 Act. Earlier, disputes regarding the validity and existence of the contract had to be dealt with by the courts and not arbitrators. The only remedy to a party aggrieved by the Tribunal's ruling on its own jurisdiction is to apply for setting aside the award in consonance with the section 34 of the Act .Section 34 deals with a party making an application for setting aside arbitral awards. The reason it assumes great significance is because the Act actively seeks to limit court interference at all stages, however this section is to ensure that certain safeguards are in place. The grounds on which an award can be set aside are- firstly if a party can prove that either party was under some incapacity, secondly if the agreement is proved to be invalid under the applicable law, thirdly if proper notice was not served or if the party was otherwise unable to present his case, fourthly if the award deals with issues falling outside the arbitration agreement (in which case only those issues that fall outside its scope will be set aside), fifthly if the composition of the tribunal or arbitral procedure agreed upon was not adhered to. Lastly if the court is of the opinion that the subject matter of the dispute was not capable of settlement or that the award was in conflict with the public policy of India. It is noteworthy that there has been no well-defined head of 'public policy'. What constitutes 'public policy of India' has been extensively expounded by the Supreme Court in ***Oil and Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd.***[48]

The judgment of the Supreme Court of India in ***Bhatia International v. Bulk Trading S.A.***[49] (**"Bhatia International"**) is of great importance. The facts were that a foreign company and an Indian

45 ***Sundaram Finance v. NEPC India Ltd*** (1999) 1 SLT 179 (SC)
46 R.S, Bachawat, "Law of Arbitration and Conciliation," 3rd edition (Nagpur; Wadhwa and Company, 1999)
47 Arbitration Application No 2 of 2008 and decided on May 14, 2008
48 ***ONGC Ltd. v Saw Pipes Ltd.*** (2003) 5 SCC 705
49 AIR 2002 SC 1432

company had submitted their dispute to the ICC in Paris in pursuance of an arbitral clause within their contract. In order to ensure that any award rendered could eventually be enforced, the foreign company approached the appropriate court in India and asked for an interim injunction against the Indian company to prevent it from alienating its properties in any way. It was argued that Part 1 of the Arbitration and Conciliation Act, 1996 modeled as it is on the UNCITRAL Model Law applies only to domestic arbitrations and hence the court could not grant interim relief. The Supreme Court held that the definition of an "international commercial arbitration" does not differentiate between an international commercial arbitration taking place in India and one that takes place outside India. The only difference is for Part II which would apply only to international commercial arbitrations taking place in countries signatory to the New York and Geneva Conventions. The Supreme Court also held that the parties to an International Commercial Arbitration taking place outside India had the right to expressly derogate from the applicability of Part 1 of the Act.

The reason this ruling is considered to be a landmark is because the Supreme Court has granted foreign parties the right to ask for interim relief so that the efficacy of international commercial arbitration is not vitiated by allowing domestic parties to dispose of their properties thereby rendering the award redundant.

This decision was later followed in the case of ***Venture Global Engineering v. Satyam Computer Services***[50] ("**Venture Global**") which reiterated the principle that Part I would be applicable to all international commercial arbitrations regardless of whether the place of arbitration is situated in India or elsewhere. In this case the Supreme Court held that a foreign award was open to challenge under Section 34 of the Act.

KIND OF ARBITRATION

a. Ad-hoc Arbitration:

Ad-hoc arbitration is one in which there is no institution to administer the arbitration. The parties agree to appoint the arbitrators and either set out the rules which will govern the arbitration or leave it to the arbitrators to frame the rules. Ad-hoc arbitration is quite common in domestic arbitration proceedings in India. While only recently the London Court of International Arbitration (LCIA) has inaugurated the India center historically, the lack of reputed arbitral institution in India has allowed ad-hoc arbitration to continue to be popular. In cross border transactions it is quite common for parties to spend time negotiating the arbitration clause, since the Indian party would be more comfortable with ad-hoc arbitration whereas the foreign party would insist on institutional arbitration.

b. Institutional Arbitration:

This kind of arbitration is usually administered by an arbitral institution.

[50] MANU/SC/0333/2008

Institutions such as the International Court of Arbitration attached to the International Chamber of Commerce in Paris (ICC), the London Court of International Arbitration (LCIA) and the American Arbitration Association (AAA) are well known world over and often selected as institutions by parties from completely different countries. The LCIA has inaugurated the India center with its office in Delhi and is expected to provide that much needed boost to institutional arbitration within India under the auspices of a reputed institution like the LCIA. Elsewhere in Asia, greater impetus has been imparted to institutions such as the Singapore International Arbitration Centre (SIAC), the Hong Kong International Arbitration Centre (HKIAC) and China International Economic and Trade Arbitration Commission (CIETAC). The Dubai International Arbitration Centre is also evolving into a good centre for arbitration.

While Indian institutions such as the Indian Council of Arbitration attached to the Federation of Indian Chambers of Commerce and Industry (FICCI), the International Centre for Alternative Dispute Resolution under the Ministry of Law & Justice (ICADR), and the Court of Arbitration attached to the Indian Merchants' Chamber (IMC) are in the process of spreading awareness and encouraging institutional arbitration it would still take time for them to achieve the popularity enjoyed by international institutions.

c. Statutory Arbitration:

It is a kind of mandatory arbitration which is imposed on the parties by operation of law. In such a case the parties have no option as such but to abide by the law of the land. It is apparent that statutory arbitration differs from the above two types of arbitration because (i) The consent of parties is not necessary; (ii) It is compulsory Arbitration; (iii) It is binding on the parties as the law of land. For Example: Section 24, 31 and 32 of the Defence of India Act, 1971, Section 43(c) of The Indian Trusts Act, 1882 and Section 7A of the Indian Telegraph Act, 1885 are the statutory provisions dealing with statutory arbitration.

d. Foreign Arbitration:

Where arbitration proceedings are conducted in a place outside India and the Award is required to be enforced in India, it is termed as Foreign Arbitration. The Foreign award can be enforced either by the Geneva Convention or the New York Convention and which is made in one of such territories where reciprocal provisions have been made for enforcement of awards. Reciprocity is only in relation to the place where the award is made and does not bear any real relation to the nationality of the parties or whether the nations to which each of the parties belong have signed or ratified the Conventions. So long as the award is made in a territory where reciprocal provision exists as in India, the award is automatically enforceable. [51]

2. CONCILIATION

Conciliation has been inserted in Part III of "The Arbitration and Conciliation Act, 1996" and it has been adopted as one of the efficient means of settlement of disputes. The Arbitration and Conciliation

[51] http://www.ebc-india.com/lawyer/articles/2002v8a3.htm visited on January 3, 2008

Act, 1996 is drafted on the lines of the UNCITRAL Model Arbitration Law and the UNCITRAL Conciliation Rules and it is for the first time that the process of Conciliation has been given statutory recognition by providing elaborate rules of engagement[52]. It is a non binding procedure in which a neutral conciliator assists the parties to a dispute in reaching a mutually agreed settlement. Section 61 of the Act reads that conciliation shall apply in disputes arising out of a legal relationship whether contractual or not and to all proceedings relating thereto.

While the Act first introduced mediation in Section 30 as a form of alternative dispute resolution, the Act, does not draw up the rules for mediation as it does for conciliation. However, in 1999, the Government enacted the Code of Civil Procedure (Amendment) Act, 1999 (CPC Amendment Act) where a new Section 89 was introduced into the Code of Civil Procedure. The new Section introduces the concept of what is known as `judicial mediation', as opposed to `voluntary mediation'. A court can now identify cases where an amicable settlement is possible, formulate the terms of such a settlement and invite the observations thereon of the parties to the dispute.

[52] http://www.ficci-arbitration.com/htm/about.htm visited on December 20, 2007

IX. ENFORCEMENT OF FOREIGN AWARDS AND JUDGMENTS

1. ENFORCEMENT OF FOREIGN AWARDS IN INDIA

A Foreign Award is defined in Section 44[53] and Section 53[54] of the Act 1996. India is a signatory to the New York Convention on The Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("**NYC**") as well as the Convention on the Execution of Foreign Awards, 1923 ("**Geneva Convention**"). Thus, if a party receives a binding award from another country which is a signatory to the NYC or the Geneva Convention and is notified as a reciprocating country by India, the award would be automatically enforceable in India. The condition of reciprocity would only apply to the country where the award is made. This condition is only applicable for enforcement in India and a U.S Court may still enforce an award rendered in India although India would not extend the same privilege back.[55] Section 48 of the 1996 Act deals with the conditions to be met for the enforcement of foreign awards made in countries party to the New York Convention. It stipulates that the only cases where enforcement can be refused is where one party satisfactorily proves that:

the parties were under some incapacity as per the applicable law or that the agreement was not valid under the law of the country where the award was made or under the law which the parties have elected to abide with;

i. the party against whom the award has been made was not given adequate notice of appointment of arbitrators, arbitration proceedings or was otherwise unable to present his case;

ii. the award addresses issues which are outside the scope of the arbitration agreement. However if the award pertaining to matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced.

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

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

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

[54] **Section 53**: In this Chapter "foreign award" means an arbitral award on differences relating to matters considered as commercial under the law in force in India made after the 28th day of July, 1924,—

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

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

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

and for the purposes of this Chapter an award shall not be deemed to be final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made.

[55] ***Fertilizer Corp of India v. IDI Management Inc.*** 517 F. Supp. 948 (SD of Ohio 1981)

iii. the composition of the tribunal or the procedure followed was not in accordance with the agreement of the parties or if there was no such agreement with the law of the country where the arbitration took place; and

iv. the award has been set aside or suspended by a competent authority in the country in which it was made or has otherwise not yet become binding on the parties.

Additionally, enforcement may also be refused if the subject matter of the award is not capable of settlement by arbitration under the laws of India or if the enforcement of the award would be contrary to the public policy of India. Most of the protections afforded to awards which are made in countries party to the NYC are also applicable to those made in countries party to the Geneva Convention. The Act also provides one appeal from any decision where a court has refused to enforce an award, and while no provision for second appeal has been provided, a party retains the right to approach the Supreme Court.

Recently, the Supreme Court in **Venture Global**[56] held that Part I of the Act would apply to international commercial arbitration unless the parties to such arbitration chose otherwise.

Importantly, the Act is silent on how to treat an arbitral award passed in a country which is not a signatory to either the Geneva or the New York Conventions as also a country which is a signatory but has not been notified as a reciprocating country. The Supreme Court, in **Bhatia International**[57] has briefly touched upon the issue and has *inter alia* said *"…….The definition indicates that an award made in an international commercial arbitration held in a non-convention country is also considered to be a "domestic award"*. Needless to say, considering an award passed in a non-convention country as a domestic award in itself brings out certain issues, one of them being that if that were so, then awards passed in non-convention countries would be treated on a better footing than awards passed in convention countries.

2. ENFORCEMENT OF FOREIGN JUDGMENTS

The definition of judgment as given in Section 2(9) of Code of Civil Procedure, 1908 ("CPC") is inapplicable to foreign judgments'[58]. A foreign judgment must be understood to mean *"an adjudication by a foreign court upon a matter before it"* [59]. The foreign Court must be competent to try the suit, not only as regards pecuniary limits of its jurisdiction and the subject matter of the suit, but also with reference to its territorial jurisdiction and, the competency of the jurisdiction of the foreign court is not be judged by the territorial law of the foreign state, but by the rule of Private International Law.

The enforceability of a foreign judgment in India depends upon whether the judgment has been passed by a court in a "reciprocating territory" or whether it has been passed by a court from a non-reciprocating territory. A "reciprocating territory" is one, which is notified by the Government of India as a "reciprocating territory" under section 44A of the CPC. For instance, U.K. has been notified by the Government of India as a "reciprocating territory" whereas the U.S. has not been so recognized. The judgment of a foreign court is enforced on the principle that where a court of

[56] (2008) 4 SCC 190
[57] (2002) 4 SCC 105
[58] Section 2(9): 'Judgment' means the statement given by the judge of the grounds of a decree or order.
[59] ***Brijalal Ramjidas v. Govindram Gobordhanda*** AIR 1947 PC 192

competent jurisdiction has adjudicated upon a claim, a legal obligation arises to satisfy the claim. Judgments of specified courts in reciprocating countries can be enforced directly by execution proceedings as if these foreign judgments are decrees of the Indian courts. Foreign judgments of non-reciprocating countries can be enforced in India only by filing a suit based on the judgment and has to be proved as evidence under the provisions of the Indian Evidence Act of 1872.

A foreign judgment would be recognized by Indian courts unless it is proved that[60]:

- it was pronounced by a court which did not have jurisdiction;
- it was not given on the merits of the case;
- it appeared on the face of the proceedings, to be founded on an incorrect view of international law or a refusal to recognize Indian law (where applicable);
- principles of natural justice were ignored by the foreign court;
- the judgment was obtained by fraud; or
- the judgment sustained a claim founded on a breach of Indian law.

The jurisdiction of foreign courts is decided by applying rules of conflict of laws.[61] Even if the court did not have jurisdiction over the defendant its judgment can be enforced if the defendant has appeared before the foreign court and not disputed its jurisdiction. While a decision of a foreign court must be based on the merits of a case, the mere fact that it was *ex-parte* would not preclude enforcement. The test is whether it was passed as a mere formality or penalty or was it based on a consideration of the truth vested in the claims or defenses raised by parties'. For applying the third exception the mistake or incorrectness must be apparent on the face of the proceedings. Merely because a particular judgment does not conform to Indian law when it is under no obligation to take cognizance of the same would not preclude enforcement. The term 'natural justice' in the fourth exception to enforcement refers to the procedure than to the merits of the case. There must be something which is repugnant to natural justice in the procedure prior to the judgment. The fifth exception of a judgment being obtained by fraud applies as much to domestic judgements as to foreign judgments. The last exception for instance would ensure that a judgment regarding a gambling debt cannot be enforced in India.

Where any judgment from a 'reciprocating' territory is in question, a party may directly apply for execution under S. 44A. A judgment from a non-reciprocating country cannot be enforced under this section.[62] The party approaching the Indian court must supply a certified copy of the decree together with a certificate from the foreign court stating the extent to which the decree has been satisfied or adjusted, this being treated as conclusive proof of the satisfaction or adjustment. Execution of the foreign judgment is then treated as if it was passed by a District Court in India, however, the parties may still challenge the enforcement under the provisions of S. 13 of the CPC.

The courts could refuse enforcement of the foreign awards in India on the grounds mentioned above. Further the claims may be barred under the Limitation Act, 1963, if the suit is instituted after the expiry of the limitation period, in general the limitation period is of 3 years. The Limitation Act will be applicable if the suit is instituted in India on the contracts entered in a foreign country.

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[60] www.nishithdesai.com/other-sites/Litigation_GuideOct0802.htm - 11k - visited on November 10, 2007
[61] ***Raj Rajendra v. Shankar Saran*** AIR 1962 SC 1737
[62] ***Punjab Co-operative Bank v. Naranjan Das***, AIR 1961 Punj. 369

3. THE ARBITRATION AGREEMENT

As India's business needs grow global, an increasing number of commercial contracts select arbitration as their preferred mechanism for dispute resolution. Given the high stakes involved and the international nature of these commercial contracts, the dispute resolution clause plays a crucial role in negotiations between the parties and often the dispute resolution clauses become the bone of contention between parties. With more international business transactions having an India connection, parties often prefer to choose institutional arbitration for resolving their disputes due to the issues posed by increased interference in the arbitration proceedings by the courts in India. As discussed earlier, recent case laws such as Bhatia International[63] and Venture Global[64] have provided the leeway for parties to come to India for interim reliefs although the parties had chosen an institutional arbitration to resolve their disputes. Thus, as per the law laid down in these judgments, unless there is a specific exclusion of Part I of the Act, the same becomes applicable even to international commercial arbitrations as defined in the Act. It is, thus, crucial for parties to carefully draft the arbitration agreement. Parties should clearly spell out their intention to arbitrate, the choice of seat and venue of arbitration, the method of arbitration (institutional or ad-hoc) and the language and binding effect of the arbitral award. Further, depending on the method of arbitration, the method of appointment of the arbitrators should be clarified. The parties should also spell out in the arbitration agreement, their unequivocal intention to exclude all or part of the derogable provisions of Part I of the Act, if they so desire which must be decided based on several commercial and legal factors. Other crucial provisions are the governing law of the contract and the choice of courts that would have jurisdiction over those issues that would have to be brought before a court. The importance of the jurisdiction provision was emphasized in a recent judgment passed by the Hon'ble Delhi High Court in ***Max India Limited v. General Binding Corporation***[65], where the parties had agreed that all disputes under the contract was to be referred to the SIAC and resolved under the laws of Singapore as per SIAC Rules and jurisdiction was granted to the courts in Singapore, the Court held that the contract between the parties clearly implied the exclusion of the jurisdiction of Indian Courts and excluded the applicability of Part I of the Act. Thus, from the analysis of the extant laws in India, it is imperative that parties carefully negotiate the arbitration agreement evaluating every aspect of their contract and the effect of the dispute resolution clause on the same.

[63] (2002) 4 SCC 105
[64] (2008) 4 SCC 190
[65] OMP 136/2009

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