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# **ARBITRATION IN INDIA: FORCED COMPROMISE OR SUGGESTED RESOLUTION?**

AUTHORED BY - SHIVANGI MEHTA

## **Abstract**

India's judiciary is currently burdened with an overwhelming 52.8 million pending cases, highlighting a pressing need for alternative mechanisms to resolve disputes efficiently and economically. Arbitration, as a key method of Alternative Dispute Resolution (ADR), offers a potential solution by enabling parties to settle disputes outside traditional courts through a binding and neutral third-party decision. However, the Indian arbitration regime, despite its evolution through the Arbitration and Conciliation Act, 1996 and subsequent amendments, most notably in 2015, continues to face criticism regarding inefficiency, judicial interference, and implementation gaps.

This research paper explores whether arbitration in India is a genuine resolution tool or merely a forced compromise for litigants weary of systemic delays. It critically examines the legislative framework, historical evolution, and practical challenges of arbitration, including ambiguities in interim relief, inconsistent judicial interpretations, absence of institutional support and lack of arbitrator accountability. Furthermore, it assesses the impact of the 246th Law Commission Report and the effectiveness of the 2015 Amendment in addressing key issues such as enforcement of awards, cost regulation, time-bound proceedings, and institutional arbitration.

Through detailed analysis, the paper identifies structural shortcomings impeding arbitration's growth and acceptance in India. It proposes actionable recommendations including the establishment of an autonomous regulatory body for arbitral institutions, accreditation of arbitrators, creation of a specialist arbitration bar, and legislative reforms aligned with international best practices. Additionally, it emphasizes the need to promote a pro-arbitration mindset among stakeholders and ensure impartiality in arbitral appointments.

Ultimately, the study underscores that while recent reforms mark progress, arbitration in India still faces significant challenges in becoming a robust, reliable, and preferred dispute resolution mechanism. Achieving this goal demands persistent legislative clarity, institutional capacity

building, and a cultural shift towards embracing arbitration not as a last resort, but as a legitimate path to justice.

### **Keywords**

Arbitration, Alternative Dispute Resolution (ADR), Arbitration and Conciliation Act, 1996, Arbitration Amendment Act, 2015, Institutional Arbitration, Ad-hoc Arbitration, Judicial Intervention, Law Commission of India, Enforcement of Arbitral Awards, Fast Track Arbitration, Cost-effective Dispute Resolution, Time-bound Proceedings, Commercial Arbitration, Arbitral Tribunal, Public Policy Challenge, Arbitrator Impartiality, Arbitration Culture in India, Legal Reforms, Commercial Dispute Resolution, Arbitration Institutions, Delays in Indian Judiciary, Dispute Resolution Mechanism.

### **Introduction**

India has an estimated 52.8 million cases pending in various courts. As of April 2025, there are approximately 81,800 cases pending in the Supreme Court of India<sup>1</sup>, about 6.35 million cases are pending in the High Courts and 46.13 million cases are pending before the subordinate judiciary<sup>2</sup>. In 2010, Justice VV Rao of the Andhra Pradesh high court said it would take 320 years for the Indian judiciary to clear the millions of pending cases. The dispute resolution process has a huge impact on the Indian economy and global perception on “doing business” in India.

The above statistics reiterate the need for reforms not only in speeding up dispute resolution, but also having a strong in-country mechanism for out of court dispute resolution. Legally, this process is known and is practiced in the forms of arbitration, negotiation, conciliation and mediation. In the present paper, the researcher focuses on the first and internationally the largest mode of dispute resolution, i.e., Arbitration, a dispute-resolving method in which the disputing parties mutually choose a neutral third party or agency to resolve the dispute by rendering a decision which is binding upon the parties.

In devising a system of alternative dispute resolution, popularly known as ADR, certain principles must be adhered to. It must be thoroughly understood that ADR is not intended to

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<sup>1</sup> Summary: Types of Matters in Supreme Court of India, *available at:* [http://supremecourtfindia.nic.in/p\\_stat/pm01042017.pdf](http://supremecourtfindia.nic.in/p_stat/pm01042017.pdf)

<sup>2</sup> [Ecourts.gov.in](http://ecourts.gov.in)

replace nor supplant the courts of the land. It is not an 'alternative' in such a restrictive sense. The objective of ADR is the provision of an outlet where petty and non-contentious disputes can be disposed of, in a simple and speedy manner. Thus, a system of ADR has certain instrumental and intrinsic functions. It is instrumental insofar as it enables the amicable settlement of disputes through means which are not available to courts. It is intrinsic because it enables the parties themselves to settle their disputes. Not that Arbitration is an empty promise, but lack of success with Arbitration at so many instances has prompted us to take a closer look at the implementing process of the Arbitration and Conciliation Act, 1996.

Arbitration has a long history in India. In ancient times, people often voluntarily submitted their disputes to a group of wise men of a community—called the panchayat—for a binding resolution.<sup>3</sup>

Until 1996, the law governing arbitration in India consisted mainly of three statutes: (i) the 1937 Arbitration (Protocol and Convention) Act, (ii) the 1940 Indian Arbitration Act, and (iii) the 1961 Foreign Awards (Recognition and Enforcement) Act.<sup>4</sup> The 1940 Act was the general law governing arbitration in India along the lines of the English Arbitration Act of 1934, and both the 1937 and the 1961 Acts were designed to enforce foreign arbitral awards (the 1961 Act implemented the New York Convention of 1958).<sup>5</sup>

The government enacted the Arbitration and Conciliation Act, 1996 (the 1996 Act) in an effort to modernize the outdated 1940 Act (which dealt with only domestic arbitration). The 1996 Act is a comprehensive piece of legislation modeled on the lines of the UNCITRAL Model Law. This Act repealed all the three previous statutes (the 1937 Act, the 1961 Act and the 1940 Act).<sup>6</sup> Its primary purpose was to encourage arbitration as a cost-effective and quick mechanism for the settlement of commercial disputes.<sup>7</sup> The 1996 Act covers both domestic arbitration and international commercial arbitration.

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<sup>3</sup> K Ravi Kumar, 'Alternative Dispute Resolution in Construction Industry', International Council of Consultants (ICC) papers, www.iccindia.org. at p 2

<sup>4</sup> Ibid

<sup>5</sup> The New York Convention of 1958, i.e. the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, is one of the most widely used conventions for recognition and enforcement of foreign awards. It sets forth the procedures to be used by all signatories to the Convention. This Convention was first in the series of major steps taken by the United Nation since its inception, to aid the development of international commercial arbitration. The Convention became effective on June 7, 1959.

<sup>6</sup> The 1996 Act, Section 85.

<sup>7</sup> Justice Ashok Bhan in his inaugural speech delivered at the conference on 'Dispute Prevention and Dispute Resolution' held at Ludhiana, India, October 8, 2005.

Though the 1996 Act was brought on the statute book, did not live up to the aspirations of the people of India in general and the business community in particular.<sup>8</sup> The main purpose of the Act was to provide a speedy and efficacious dispute resolution mechanism to the existing judicial system, marred with inordinate delays and backlog of cases. But an analysis of the arbitration system, as practiced under the 1996 Act reveals that it failed to achieve its desired objectives.

The Law Commission of India, under the chairmanship of Justice AP Shah, had constituted an expert committee to work on the 246th Report on “Amendment to the Arbitration and Conciliation Act, 1996”. It suggested some major changes to Arbitration and Conciliation Act, 1996. The report seeks to find an appropriate path and balance between judicial intervention and judicial restraint. Some of the recommendations are as follows:

1. Speedy Justice
2. Cost Effectiveness
3. Efficient Award Enforcement Regime
4. Tackling Delay in Courts and Arbitral Tribunals
5. Encouraging Institutional Arbitration
6. Better Conduct of Arbitral Proceedings
7. No Automatic Stay of Enforcement of the Award upon Admission of Challenge
8. Fraud Issues to be made Arbitrable
9. Courts and Tribunals Empowered to Impose Costs
10. Controlling Arbitrators’ Fees

Hence, based on the recommendations of the 246th Report of the Law Commission of India, the Amendment sought to minimize interference of courts in arbitration proceedings, expedite the process, introduce safeguards to ensure greater fairness in the conduct of arbitration proceedings, bring the 1996 Act in conformity with international best practices, and thereby, enhance the overall effectiveness and efficiency of arbitration as the method for the resolution of disputes. Therefore, the advent of the year 2016 witnessed the passing of the Arbitration and Conciliation (Amendment) Act, 2015, amending the arbitration law, the Arbitration and Conciliation Act, 1996, in India.

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<sup>8</sup> Professor Anurag Agarwal, resolving Business Disputes in India by Arbitration: Problems due to Definition of ‘Court’ at Pg.10, Indian Institute of Management, Ahmedabad, 2008

## Will 2015 Amendments to the Arbitration and Conciliation Act, 1996 bring “Acche Din”?

The Amendment Act is most certainly a welcome move and has been hailed for providing the much needed impetus to the growth of the Indian arbitration regime. Despite some deviations, the Amendment Act is largely in consonance with the Law Commission Report and the Arbitration Ordinance. However, there have been lapses in drafting the new law, and some more steps could have been taken by the law makers to ensure that India does indeed become the next arbitration hub. An effort has been made to provide insights and critically analyze the Amendment Act with suggestions to make the Arbitration Act more effective.

### 1.1 Interim Relief

#### a) From Court

After the judgment of the Supreme Court in, *Bharat Aluminium and Co. v. Kaiser Aluminium and Co.*<sup>9</sup> ("BALCO"), the Indian courts have no jurisdiction to intervene in arbitrations which are seated outside India. Since the interim orders made by arbitral tribunals outside India could not be enforced in India, it created major hurdles for parties who had chosen to arbitrate outside India. This anomaly has been addressed in the Amendment Act with the insertion of Section 2(2), which makes the provision for interim reliefs also applicable in cases where the place of arbitration is outside India, subject to an agreement to the contrary. However, there are few concerns. This option is only applicable to parties to an "international commercial arbitration" with a seat outside India. This means that the protection will not be available to two Indian parties who choose to arbitrate outside India. The Amendment Act provides that in case the court passes an interim order, arbitration proceedings must commence within a period of 90 days from the date of such order or within such time as prescribed by the court. This amendment was brought in to ensure that the practice of the parties of misusing this provision, by strategically obtaining ex-parte or ad interim orders and not proceeding with arbitration, is checked.

However, there is no clarity on whether the 90 days period would commence from the date of the ex-parte or ad interim order or the final order in the proceedings under Section 9. The better approach perhaps would have been to specify that the 90 days period commences from the date of filing of the petition, in order to drive the parties to arbitration.<sup>10</sup>

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<sup>9</sup> (2012) 9 SCC 552

<sup>10</sup> Pramod nair; When good Intentions are not good enough: The Arbitration ordinance in India, Bar and Bench, published on November 4, 2015

### ***b) Arbitral Tribunal***

The amendments to Section 17 empower the arbitral tribunal with the same powers as that of a court under Section 9. In order to facilitate the parties to approach the arbitral tribunal and reduce the intervention of courts, the Amendment Act provides that once the arbitral tribunal has been constituted, courts cannot entertain application for interim measures, unless there are circumstances which may not render the remedy of obtaining interim orders from the arbitral tribunal efficacious. The Amendment Act also clarifies that such interim measures granted by the arbitral tribunal would have the same effect as that of a civil court order under the Civil Procedure Code, 1908 (popularly known as CPC). This is a significant development as the interim orders of the arbitral tribunal under the earlier arbitration regime could not be statutorily enforced, virtually rendering them meaningless.

### **1.2 Limited Scope to Refuse Arbitration Request**

The amended Section 8 of the Act, empowers the judicial authority to refer the parties to arbitration when there is an arbitration agreement, unless it finds prima facie evidence that no valid arbitration agreement exists. While Section 8(1) refers to "judicial authority", inexplicably, in Section 8(2) the word "Court" has been used instead of "judicial authority" which appears to be an oversight.<sup>11</sup> While the scope under amended Section 11 is limited to the examination of the existence of an arbitration agreement; scope under amended Section 8 appears to be broader in as much as the judicial authority can also examine the validity of the arbitration clause. There appears to be different standards set for examination of an arbitration agreement under Sections 8 and 11, which ought to have been avoided. The standards consistent with the proposals made in the Law Commission Report ought to have been made uniformly applicable to both provisions.

### **1.3 Amendments to grounds for challenging Arbitral Award**

The scope of "public policy" in Section 34 has been narrowed and the award can be set aside only if the arbitral award (i) was induced or affected by fraud or corruption; or (ii) is in contravention with the fundamental policy of India; or (iii) conflicts with the most basic notions of morality or justice. In terms of this amended provision, an award cannot be set aside merely on the ground of erroneous application of the law or by re-appreciation of evidence.

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<sup>11</sup> Supra, Note 77

However, interestingly, the test of "patent illegality appearing on the face of the award" has not been made applicable to international commercial arbitrations. This provision may be subjected to challenge by Indian parties, who may contend that different standards ought not to be set for international commercial arbitrations. The test of "patent illegality" could perhaps have been deleted all together to avoid this anomaly.

#### **1.4 No automatic stay of Arbitral Award upon filing of a challenge to Arbitral Award**

Prior to the Amendment Act, mere filing of a challenge petition to the arbitral award would result in an automatic stay of the arbitral award. The court would take several years to decide the petition, making the process of arbitration time consuming and ineffective. In a welcome move, the Amendment Act provides that there would be no automatic stay of the arbitral award and a separate application will have to be filed seeking stay of the arbitral award. The court is now required to record reasons for the grant of stay and the provisions of the CPC for the grant of stay of a money decree have been made applicable.

#### **1.5 Time Bound Proceedings**

The Amended Act provides for faster timelines to make the arbitration process more effective. Proviso to Section 24 of the Act has been added providing for the arbitral tribunal to hold oral hearings for evidence and oral arguments on day-to-day basis and not to grant any adjournments unless sufficient cause is made out. The arbitral tribunal has been vested with the power to impose heavy costs for adjournments without sufficient cause. Also, every arbitral award must be made within 12 months from the date when the arbitrator(s) receives a written notice of appointment. The parties may mutually decide to extend the time limit by not more than 6 months. If the award is not made within 18 months, the mandate of the arbitrator(s) will terminate unless the court extends the period upon an application filed by any of the parties. However, there is no time period fixed for approaching the court seeking extension of time which may again contribute to delays.

#### **1.6 Fast Track Procedure**

Section 29B of the Act has been introduced which gives an option to the parties to agree on a fast-track mechanism under which the award will have to be made within a period of 6 months from the date the arbitrator(s) receives written notice of appointment. The dispute would be decided based on written pleadings, documents and submissions filed by the parties without any oral hearing. There may not be too many occasions where the parties to an on-going dispute

agree on anything, let alone agree on a fast-track procedure.

### 1.7 Introduction of New Expansive Cost Regime

Section 31A has been introduced in the Act which gives wide powers to the arbitral tribunal to award costs. The expansive regime to award costs based on rational and realistic criterion rule, as recommended in the Law Commission Report, has been accepted. The arbitral tribunal can decide whether the costs are payable, the amount of costs to be paid and when they need to be paid. The costs may include fees and expenses of the arbitrators, courts and witnesses, legal fees and expenses, administrative costs of the institution and any other costs incurred in relation to the arbitral tribunal or court proceedings and the arbitral award.

### 1.8 Cap on Fees to Arbitrators

The Fourth Schedule has been introduced which provides the model fees in case of arbitrations other than international commercial arbitrations and in cases where parties have agreed to the rules of an arbitral institution, with a view to ensure that the arbitration process does not become very expensive. Section 11A (2) has been introduced which details the procedure for Central Government to amend the Fourth Schedule. However, since the High Court of each State is required to frame rules after taking into consideration the rates mentioned in the Fourth Schedule, this may lead to a disharmonised fee regime<sup>12</sup> across the country.

### 1.9 Other Misses

1. The Amendment Act does not clarify if Indian parties can choose foreign law to resolve disputes through arbitration. While some argue that this is possible since the choice of the party to determine the choice of law must be recognised; the more conservative argument has been that Indian parties cannot agree to resolve disputes choosing a foreign law, as that would mean contracting out of Indian Law, and therefore opposed to public policy.<sup>13</sup> The Bombay High Court in the case of, *Addhar Mercantile Private Limited v. Shree Jagdamba Agrico Exports Private Limited*<sup>14</sup> while dealing with this issue, relied on some observations of the Supreme Court in, *TDM Infrastructure Private Limited v. UE Development India Private Limited*<sup>15</sup> and held that since both the parties

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<sup>12</sup> Supra, Note 77

<sup>13</sup> Lomesh K. Nidumuri; India: Whether Indian Parties Can Choose Foreign Law To Settle Disputes?, Indus Law, October 9, 2015

<sup>14</sup> Arbitration Application No. 197 of 2014 along with Arbitration Petition No. 910 of 2013

<sup>15</sup> (2008) 14 SCC 271

are Indian, they cannot derogate from Indian Law and the choice of two Indian parties to choose foreign law in a foreign seated arbitration was not recognised.

2. In order to provide statutory recognition to the "emergency arbitrator", the Law Commission Report had recommended the addition of "emergency arbitrator" to the definition of "arbitral tribunal" under Section 2(d) of the Arbitration and Conciliation Act, 1996. The recommendations made by the Law Commission Report in this regard have not been accepted and this is a significant omission that is likely to impact arbitrations in India.
3. Though the Law Commission Report suggested using the expressions "seat" and "venue" instead of "place" of arbitration keeping it consistent with international usage of a "seat of arbitration" to denote the legal home of the arbitration, the proposal has not been accepted.
4. While a time limit has been fixed for challenge to a domestic arbitral award, no such time limit is prescribed for the enforcement of foreign arbitral awards, despite the recommendations in the Law Commission Report. There cannot be any rationale for this considering the amendments that have been made to make India more arbitration friendly.
5. The Amendment Act does not address the issue of confidentiality in arbitrations.
6. The Law Commission Report had recommended changes to Section 16 of the Arbitration and Conciliation Act, 1996 to empower the arbitral tribunal to decide disputes that involve serious questions of law, complicated questions of fact or allegations of fraud, corruption etc.

While the provisions of Sections 8 and 11 have been amended to the effect that the parties will be referred to arbitration, the recommended changes to Section 16 of the Act ought to have been accepted, to make this position clear and provide more teeth to the powers of the arbitral tribunal.

7. Section 44(b) of the Act requires that the foreign award not only be made in a reciprocating territory, but also that the reciprocating territory be notified by the Central Government in Official Gazette. With only about fifty countries having been notified as reciprocating territory, the scope of enforcing foreign arbitral awards is significantly reduced. The Government should either notify most countries in the Official Gazette,

or do away with the requirement of Section 44(b) that provides for notifying reciprocating territories in the Official Gazette.<sup>16</sup>

8. Though the Law Commission Report recommended inserting clauses 3A and 3B to Section 7 of the Act, to provide greater clarity and meaning to the definition of "arbitration agreement", the same has not been accepted. The Law Commission Report had further recommended adding an explanation to define "electronic means" which has also not been accepted.
9. The Arbitration Amendment Act has created confusion as to whether the amendments will have a retrospective or prospective effect for court actions concerning arbitration and the arbitration proceedings. Section 26 of the Amended Act provides that "*Nothing contained in this Act shall apply to the arbitral proceedings commenced in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act*". The Madras High Court in, *New Tirpur Area Development Corporation Limited v. M/s Hindustan Construction Company Limited & Ors.*, has ruled that Section 26 of the Amended Act is not applicable to post arbitral proceedings including court proceedings, since the words "*in relation to*" has been deleted. Therefore, the court held that a separate application under the amended law had to be filed for seeking a stay on the arbitral award even in respect of arbitral awards passed prior to October 23, 2015. However, the Calcutta High Court in, *Electrosteel Casting Limited v. Reacon Engineers (India) Private Limited*<sup>17</sup>, has taken a contrary view and held that the enforcement of arbitral award, borne out of arbitration proceedings commenced before October 23, 2015, would be stayed automatically upon the filing of application for setting aside the same. This is a critical issue and needs to be decided by the Supreme Court at the earliest since the courts are unsure about which law to follow.

The Arbitration Amendment is a significant step forward in overcoming the systemic malaise of delays, high costs and ineffective resolution of disputes, which had plagued the arbitration regime in India. Most of these amendments are welcome, since many would agree that the earlier arbitration regime was a failure, and did not result in cultivating the culture of arbitration in India. These amendments will also have to withstand the scrutiny of Indian courts that have often been criticised for their interventionist approach. Further amendments are needed to iron

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<sup>16</sup> Supra, Note 77

<sup>17</sup> AIR 2016 (NOC 764) 349

out the flaws in the Amendment Act to make it more effective. The new arbitration regime promises to herald a new era for resolution of disputes in India. But only time will tell whether or not India becomes the next arbitration hub, as aspired.

### **Travails of the Litigative System**

**Warren E. Burger had once stated<sup>18</sup>-**

*“The entire legal profession - lawyers, judges, law teachers - has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers - healers of conflicts. Doctors, in spite of astronomical medical costs, still retain a high degree of public confidence, because they are perceived as healers. Should lawyers not be healers? Healers, not warriors? Healers, not procurers? Healers, not hired guns?”*

As healers of human conflicts, the obligation of the legal profession is to provide mechanisms that can produce an acceptable result in the shortest possible time, with the shortest possible expense and the minimum of stress on the participants. That is what justice is all about.

The rationale behind the adoption of a system of ADR is undoubtedly the need to find a method of circumventing and eventually effacing the tremendous problems which beset the litigative system. Succinctly put, the traditional court system of dispute resolution suffers from the following cons:

- 1) delay;
- 2) expense;
- 3) rigidity of procedures; and
- 4) a reduction in the participatory role of parties.

### **Ad-hoc Arbitration<sup>19</sup>**

An ad-hoc arbitration is the one which is not administered by a recognized institution. The parties then have to determine all aspects of the arbitration like the selection and manner of appointment of the arbitral tribunal, applicable law, procedure for conducting the arbitration and administrative support without assistance from or recourse to an arbitral institution.

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<sup>18</sup> Annual address to the American Bar Association winter convention, Las Vegas on February 12, 1984.

<sup>19</sup> Bibek Debroy and Suparna Jain: Strengthening Arbitration and its Enforcement in India – Resolve in India, available at: [http://niti.gov.in/writereaddata/files/document\\_publication/Arbitration.pdf](http://niti.gov.in/writereaddata/files/document_publication/Arbitration.pdf) , (last visited on March 23, 2018).

## **Institutional Arbitration<sup>20</sup>**

Institutional arbitration has been defined as a legal process where the arbitration is conducted or administered and supervised by an established arbitral organization and the proceedings based on a set of rules and fixed fee schedule. The institution generally serves as a buffer between the parties and the arbitrator which helps to preserve neutrality, uniformity as well as efficiency. Institutional arbitration is undertaken contractually with the arbitration clause inserted to determine the arbitral organization. These institutions have popularized arbitration as an alternate dispute resolution method to such an extent that institutional arbitration clauses have been incorporated as a part of standard forms of contract.

### **Process of Arbitration**

Arbitration works as stated: While entering into a contract, parties agree that in case of a conflict the matter would be sought to be resolved by an arbitrator. Often the name of the potential arbitrator, agreed upon by both the parties, is mentioned in the contract itself. In case a dispute arises, the first step is issuing of an arbitration notice by either of the parties. This is followed by response by the other party and subsequently appointment of an arbitrator, decision on rules and procedures, place of arbitration and language. Once the arbitration proceedings commence, there are formal hearings and written proceedings. The arbitrator, if the matter so requires, issues interim reliefs followed by a final award which is binding on both parties. The tricky part arises if either of the parties, unhappy with the award, challenges it before the court. This can be before the appellate court or the Supreme Court depending upon the matter.

### **Conclusion and Recommendations**

*‘A lot still needs to be done in India to fulfil its Arbitration Ambitions.’*

It is well settled that the globalization of the Indian economy in the early nineties and the consequent economic reforms necessitated the existence of effective dispute resolution mechanisms to quickly settle commercial disputes. The 1996 Act was enacted to achieve this purpose of quick and cost-effective dispute resolution. Arbitration occupies a prime position in commercial dispute resolution in India. An examination of the working of arbitration in India reveals that arbitration as an institution is still evolving, and has not yet reached the stage to effectively fulfil the needs accentuated with commercial growth. Notwithstanding the interventionist instincts and expanded judicial review, Indian courts do restrain themselves

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<sup>20</sup> Edlira Aliaj: Dispute resolution through ad hoc and institutional arbitration, Vol.2 No. 2, July 2016

from interfering with arbitral awards.<sup>21</sup> However, there are still inherent problems that hinder in the working of successful arbitration in India which are multi-fold – starting from requirement for amendment of certain provision of law to changing the mindset of the stakeholders who are judges, arbitrators, lawyers and parties involved.

The following are some suggestions for the way forward in encouraging and strengthening arbitration practices and in particular, institutional arbitration in India:

**(a) Creation of an Autonomous Regulatory Body for evolving Common Standards for Arbitral Institutions**

While there are over 30 arbitral institutions in India, the quality of these institutions vary greatly. This has directly impacted the efficiency and speed of the arbitration process as well as the quality of the arbitral awards made in arbitrations administered by them. Therefore, the creation of a regulatory body at the national level, which shall evolve certain minimum standards for arbitral institutions in India, may be considered. The regulatory body may consider minimum standards for accrediting arbitral institutions on the basis of criteria governing:

- (i) governance structure;
- (ii) arbitration rules;
- (iii) rules concerning conflicts of interests by arbitrators;
- (iv) oversight by the arbitral institution over the arbitration proceedings;
- (v) expedited procedures for arbitration;
- (vi) data management;
- (vii) infrastructure, etc.

The nature, composition, organizational structure and financing of the regulatory body and the method of accreditation followed by it needs to be considered.

**(b) Creation of a Body for Accreditation of Arbitrators**

The accreditation of arbitrators provides a reliable and objective benchmark for arbitrators and is perceived as an assurance of their competence, professionalism and experience. It is critical to the creation of a pool of skilled arbitrators in India who have substantive knowledge of arbitration law and practice, and sector-specific expertise.

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<sup>21</sup> McDermott International Inc. vs. Burn Standard Co. Ltd, 2006(11)SCC 181 at p 81-82

**(c) Creation of a Specialist Arbitration Bar and Bench**

The creation of a specialist arbitration bar is critical to improve the quality of the existing arbitral institutions, and arbitration practices in India, in general. This would also ensure that these lawyers can dedicate more time and resources to arbitration alone, which would promote its use as a dispute resolution mechanism. Therefore, there is a need to consider measures that can encourage the creation of an arbitration bar in India.

**(d) Further Amendments to the Arbitration and Conciliation Act, 1996**

The 2015 Amendment Act made substantive changes to the Arbitration and Conciliation Act, 1996 with a view to make arbitration more speedy and efficacious and improving India's reputation as a seat of arbitration. However, more work needs to be done in this regard such as:

- i. clarifying ambiguities brought about by the 2015 Amendments which have led to conflicting judicial interpretations, such as the prospective applicability of the 2015 Amendments;
- ii. addressing concerns that the 2015 Amendments have thrown up, particularly related to the provision imposing strict timelines for the conduct of arbitration proceedings;<sup>22</sup> and
- iii. bringing Indian legislation in line with the international practices, by inclusion of legal provisions concerning the following:
  1. Third party funding
  2. Immunity to arbitrators
  3. Confidentiality of arbitration proceedings and related court proceedings
  4. Indian parties having a foreign seat of arbitration
  5. Indemnity costs for court proceedings intended to frustrate arbitration proceedings
  6. Tightening grounds for challenge to enforcement of foreign arbitral awards

**(e) Changes in Arbitration Culture**

In order to strengthen institutional arbitration, there also needs to be changes in the way arbitration is viewed in India. At the same time, steps may need to be taken to change existing mindset towards alternative dispute resolution mechanisms. Measures that can promote the use of these mechanisms institutionally, may need to be considered.

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<sup>22</sup> Section 29A, ACA (Amendments), 2015

All stakeholders - arbitrators, judges and lawyers, should make efforts to change general attitude towards arbitration. Therefore, it is necessary for the players in arbitration proceedings to know and to understand the direction of the new law, respect the will of the parties set out in arbitration clauses, and observe the dichotomy between arbitration and litigation. This change in the mindset must focus on the need to make the system more effective, attractive and functional.<sup>23</sup>

**(f) Legitimate Use of Authority**

Power vested in the Chief Justice of a High Court (or any person or institution designated by him) for appointment of an arbitrator under Section 11 of the 1996 Act is not being used properly. The practice of appointing retired judges has recently come under strong criticism from the proponents of the alternate dispute resolution mechanism. This practice should be corrected. Unless this is corrected, the legitimacy of Section 11 is bound to be seriously undermined.

**(g) Lack of Impartiality and Procedural Defects**

Questions relating to lack of impartiality of arbitrators and procedural defects in the conduct of arbitration proceedings are the subject-matter of frequent litigation and hence add to the caseload before an already overburdened judiciary. In fact, judicial interventions with arbitral proceedings and awards in India have come to constitute a distinct branch of law, i.e. the 'law of arbitration'. This trend clearly frustrates the foundational aim of providing for arbitration clauses - which is to ensure speedy and efficient dispute-resolution in the commercial context.

**(h) Dissemination of Knowledge about ADR Benefits**

The government should disseminate knowledge about the benefits of alternate dispute resolution mechanisms to foster growth of an international arbitration culture amongst lawyers, judges and national courts.

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<sup>23</sup> Excerpt from the article 'Arbitrating Commercial and Construction Contracts' published in ICA's Arbitration Quarterly and webcasted in ICA's official website.