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ARBITRATION UNDER INTERNATIONAL TRADE LAW PRINCIPLE AND PROCEDURE

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DECLARATION

I GARGEE CHUTIA declare that the dissertation titled "**ARBITRATION UNDER INTERNATIONAL TRADE LAW PRINCIPLE AND PROCEDURE**" is the outcome of my own work conducted under the supervision of Dr. Saltanat Sherwani, Professor at AmityLaw School, Amity University, Noida (Uttar Pradesh). I declare that the content of this dissertation is an original piece of work prepared by me and due acknowledgement has beenmade in the text to all other material used and that the same has not been submitted in any university or college or any other program for any other purpose.

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I wish her success in life. Dr. Saltanat Sherwani Amity Law School, NoidaDate:

PREFACE

This dissertation is aimed to analyse the impact of Arbitration under International trade law. A brief introduction has been laid down to establish the aim and objectives of this research. An in-depth analysis of the history of Arbitration in India and around the world is also conducted to trace the origins of Arbitration. The aim of this paper is to establish the significance of Arbitration as an effective method of solving disputes in the arena of international trade and commerce.. To analyse this impact, an in-depth analysis of the In depth analysis of The Indian Arbitration and conciliation act,1996 along with other international arbitration laws and rules. The paper seeks to shed light into various international instrument dealing with arbitration under international trade law. For this purpose the paper examines the different approaches- legislative and judicial of numorous countries including India towards transitional arbitration. The innovative methods adopted bythe different countries for becoming a global hub for trade and business have also been highlighted. A comparative analysis in this regard has been done of countries like India, Hong-kong and Singapore. Further, the paper deals with the present issues and lacunas faced by the Indian arbitration regime and the need for an effective and robust legislative framework based on international standards to deal with the same. Thus, this research is under taken with a view to study not only the international arbitration commercial laws but also to determine their effectiveness in the present context. Arbitration, being one of the mostrenowned method of solving international trade disputes, it has become extremely essential to ractify and fixed the current lacunas existing in the field if international commercial arbitration. In this regard numorous recommendation and suggestions has been drawn from the research study.

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ABBREVIATIONS

❖ AAA	American Arbitration Association
❖ ACCI	Associated Chambers of Commerce and Industry
❖ ACI	Arbitration Council of India
❖ ADR	Alternative Dispute Resolution
❖ AIR	All India Reporter
❖ Alta. L. Rev.	Alberta Law Review
❖ Anr.	Another
❖ Arb.	Arbitration
❖ Art.	Article
❖ Arts.	Articles
❖ Arb. L. R.	Arbitration Law Review
❖ Aug.	August
❖ Bom.	Bombay
❖ Bus. L. J.	Business Law Journal
❖ CII	Confederation of Indian Industries
❖ COVID 19	Coronavirus Disease of 2019
❖ Cal.	Calcutta
❖ Can.	Canada
❖ Del.	Delhi
❖ Disp.	Dispute
❖ EWCA Civ.	England and Wales Court of Appeal Civil Division
❖ Ed.	Edition
❖ Eds.	Editions
❖ Etc.,	et cetera
❖ FICCI	Federation of Indian Chambers of Commerce and Industry

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- GLR — Gujarat Law Reporter
- Geo. Wash. Intl. L. Rev. — George Washington Law Review
- HKCFI — Hong Kong Court of First Instance
- HKIAC — Hong Kong International Arbitration Centre
- HKLR — Hong Kong Law Review
- Hon'ble — Honourable
- IA — International Arbitration
- IAA — International Arbitration Act
- ICA — Indian Council of Arbitration
- ICA — International Commercial Arbitration
- ICC — International Chamber of Commerce
- ICSID — International Centre for Settlement of Investment Disputes
- Int'l. L. Rev. — International Law Review
- ISA — Indian Society of Arbitrators
- *Ibid.*, — ibidem
- i.e., — that is
- Jan. — January
- LPG — Liberalization, Privatisation and Globalisation
- L. Rev. — Law Review
- MSMEs — Micro, Small and Medium Sized Enterprises
- Mar. — March
- Mad. L. J. — Madras Law Journal
- NYC — New York Convention
- No. — Number
- Nov. — November

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- ODR Online Dispute Resolution
- Oct. October
- Ori. Orissa
- Ors. Others
- PRC People's Republic of China
- Para. Paragraph
- pp. Pages
- Pvt. Ltd. Private Limited
- Retd. Retired
- SC Supreme Court
- SCC Supreme Court Cases
- SGCA Singapore Court of Appeal
- SGHC Singapore High Court
- SIAC Singapore International Arbitration Centre
- SIMC Singapore International Mediation Centre
- SLR Singapore Law Review
- Sch. Schedule
- Sec. Section
- Sept. September
- Ss. Sections
- TPF Third Party Funding
- UNCITRAL United Nations Conference on International Trade Law
- UNTS United Nations Treaty Series
- Unif. L. Rev. Uniform Law Review
- Vol. Volume
- WTO World Trade Organisation

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CHAPTER 1 INTRODUCTION

I. *INTRODUCTION*

"Discourage litigation, persuade your neighbours to compromise whenever you can pointout to them how the normal winner is often a loser in fees, cost and time. As a peacemaker, the lawyer has a superior opportunity of being a good man".

- Abraham Lincoln[1]

Human conflicts are an inseparable part of society because where there are two minds, there will be three opinions. Furthermore, where there is no *consensus ad idem*, there willbe conflicts. Disputes are a result of these human conflicts. With the growth of society, the number of disputes is also on an alarming rise. As human relations become more complex, so do the disputes that arise in a civilised society.[2] However, these disputes need not remain unresolved and that the resolution is to be judicious, and indeed such resolution of disputes is essential for societal peace, amity, comity and harmony and easy access to justice.[3] It is also vital for society's smooth functioning to resolve these inevitable disputes at the earliest. Nevertheless, a civilised and welfare society must find an effective dispute resolution mechanism. Since resolving these matters was vested on the judiciary alone, it caused an overburden on it. Another method of dispute resolution to supplement and supplant the traditional court system will definitely reduce the same. Moreover, years of litigation were costly and time-consuming, which made litigants become frustrated. So for these reasons, people started to find out ways to resolve their matter outside the court amicably.

Practically, there are various dispute resolution modes (infamously known as the Alternative Dispute Resolution mechanisms), including arbitration, conciliation, mediation, and negotiation. Of this arbitration was found to be the most adequate and effective mode of dispute resolution mechanism. Le Roy has defined the term "arbitration" in his book as the application of legal principles to a controversy within the limits previously agreed upon by the disputing parties.[4] It further states that "a committee or panel of arbiters or judges is created either by special agreement

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[1] Notes for a Law Lecture"-Home Book of American Quotations by Dodd, New York, 1967, p.226.

[2] Borba, Igor M. "International Arbitration: A comparative study of the AAA and ICC rules", Master's Theses, Marquette University, (2009), 1

[3] Jitendra N. Bhatt, "Round Table Justice through Lok Adalat (People's Court) – A Vibrant ADR in India", 1SCC (Journal) 11 (2002).

[4] A.Le Roy Bennett. "International Organizations: Principles and Issues", 3 rd Ed, Prentice Hall, EnglewoodCliffs (1991), 99. A.Le Roy Bennett. "International Organizations: Principles and Issues", 3 rd Ed, Prentice Hall, EnglewoodCliffs (1991), 99.

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of the parties or by an existing arbitral treaty.[5] However, this definition failed to refer to a sole arbitrator. There have been many instances where the parties have appointed such arbiters. According to Sutton, arbitration is an optional agreement to submit present or future disputes to private persons for resolution, whether they are contractual or not.[6] But this definition does not cover jurisdictional considerations, which is an essential element of arbitration. Clause (a) of Article 2 of the Model Law, 1958 has defined the expression "arbitration" as a means by which the parties to dispute get the matter settled through the intervention of an agreed third person".[7] Thus, to put it in simple words, arbitration is an optional private process that is carried out pursuant to an agreement to arbitrate the disputed matter.[8]

Arbitration is an adjudicatory form of alternative dispute resolution mechanism whereby, the parties entrust the dispute resolution process and the result of which to a private neutral third party (i.e., the arbitrator or the arbitral tribunal) and decision (i.e., the arbitral award) rendered after hearing and considering the merits of the dispute will be of binding nature.[9] The parties are free to agree as to how their disputes are to be resolved and interventions by the courts are restricted.[10] Most popular kinds of arbitration include ad-hoc, domestic, and international arbitration. International Arbitration is the kind of arbitration where one of the parties belongs to a foreign country or where the subject matter of arbitration is situated or registered or regulated by an authority of a foreign national. The laws applicable in International Arbitration are governed by the contracting parties. At international levels, a lot of institutions were created to provide a framework for the conduct of international arbitration.[11] The most notable is the International Court of Arbitration of the international Chamber of Commerce (Paris, France). Hong Kong International Arbitration centre is another leading arbitral institution and is one of the most prominent arbitral institutions in Asia.

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[5] Ibid.

[6] David St Jhon Sutton, Judith Gill, and Matthew Gearing. "Russel on Arbitration", 21st Ed, London: Sweet & Maxwell Thomson Reuters, (2007), 230.

[7] Clause (a) of Article 2 of the Model Law (1985).

[8] S.C.Tripathi. "Law of Arbitration & Conciliation in India with Alternative Means of Settlement of Disputes Resolution", Sixth Ed. Allahabad: Central Law Publications, (2012), 28.

[9] See Joanne Goss, "An Introduction to Alternative Dispute Resolution", 34 (1) Alta. L. Rev. 1 (1995) (Can.).

[10] P. C. Rao, "Alternatives to Litigation to India", in P.C. Rao and William Sheffield (Eds.), Alternative Dispute Resolution 24 (Universal Law Publishing Company Pvt. Ltd., Delhi, 1997); K. Jayachandran Reddy, "Alternative Dispute Resolution", in P.C. Rao and William Sheffield (Eds.), Alternative Dispute Resolution 79 (Universal Law Publishing Company Pvt. Ltd., Delhi, 1997).

[11] Adhipati, Sandeep. "Interim Measures in International Commercial Arbitration: Past, Present and Future",Master Dissertation, University of Georgia, (20003), 3.

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With the advent of globalisation, there has been a tremendous increase in international trade and investment, which has led to an increase in cross-border commercial disputes. International Arbitration emerged as an efficient dispute resolution mechanism for resolving such cross-border commercial disputes and preserving international trade relationships as well.[12] Such a kind of international arbitration is known as the trans- national arbitration or the international commercial arbitration. It is utilised as an option in contrast to time consuming litigation and is controlled fundamentally by the terms which are settled upon by the contracting parties, instead of by any national enactment/ statutes or by any other procedural guidelines.[13] International Commercial Arbitration, ICA, which is a sprout of arbitration,[14] has grown out as a transnational system of solvingcommercial disputes involving national arbitrational laws and policies, bilateral treaties, multinational conventions and norms of arbitral institutions.[15] International Commercial Arbitration has garnered much importance with the commencement of the World Trade Organization (WTO) as it has accelerated the pace of globalization thereby leading to the integration of countries. With the integration of the markets in different economies international arbitration has become the established method of dispute resolution.

There are many international conventions and protocols governing the realm of international commercial arbitration. Of these, the most notable and important are the Geneva Convention, Geneva Protocol, the New York Convention, 1958, European Convention, 1961, Washington

MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL

ARBITRATION 1 (CAMBRIDGE University press, 2008).

Convention, 1965 and the Model law 1985, UNCITRAL. Various States, including India,have become parties to these instruments to sync the rules governing international commercial arbitration. Being the parties, they have also enacted various legislation governing international commercial arbitration law and have thereby restricted the negative interference of national courts

[12] Pallab Das, Arbitration: An Alternative to Litigation THE LIBERTATEM MAGAZINE (Dec. 27, 2016) http://mylibertatem.com/arbitration-an-alternate-to-litigation-2/.

[13] Hynning, Clifford J., and George W. Haight. "International Commercial Arbitration." American BarAssociation Journal, Vol. 48, no. 3, 962, pp. 236-239.

[14] P.T.Kamala Priya and S.Karpaga Priya, International Commercial Arbitration-A New Dimension (Mad.LJVol. 203 13).

[15] Neeraj Tiwari, Critical Issues in International Commercial Arbitration, Vol.4 Arb. LR 2012, pp.1824;

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into the international arbitration proceedings.

The Arbitration Act 1940 was the first and foremost consolidated law governing arbitration inIndia. This Act was based mainly on the English and Welsh Arbitration Act 1934. In 1992, with the introduction of LPG (Liberalization, Privatisation and Globalisation), India opened its market for the first time to foreign players. It has led to a surge of MNCs and a drastic increment in foreign investments in India. This was also accompanied by a huge growth of cross-border commercial disputes. Therefore, it was apparent that India would never be a hubfor foreign nations unless it had implemented a proper and effective cross border dispute resolution mechanism. Moreover, the 1940 Act was ineffective in dealing with the post 1990s disputes[16] raised due to drastic changes brought out by the LPG policy. And also this Act was primarily designed to deal with cases of domestic commercial arbitration in mind and therefore it was only of limited assistance in India.

Thus, taking into consideration the discrepancies and lacunae found in the then Arbitration law in India i.e., the 1940 Act, the Indian Parliament passed the Arbitration and Conciliation Act, 1996 (Act 26 of 1996). The Act was mainly based on the UNCITRAL Model Laws, The Arbitration (Protocol and Convention) Act, 1937, the Indian Arbitration Act, 1940, and the Foreign Awards (Recognition and Enforcement) Act, 1961. The Act's main objective was to ensure that the judiciary's role is the minimal and maximum scope of freedom vests with the parties. However, the Courts started to intervene too much into the arbitral proceedings, which has destroyed the spirit of the Act. This has resulted in the reluctance of parties to choose the Indian law.[17] Later, there were issues while interpreting the provisions of Ss. 812, 17, 24, 29A, 34, 36 and 42 of the 1996 Act, which led to the amendments in 2015 and 2019.[18]

Very recently in 2021, the Lok Sabha passed the Arbitration and Conciliation (Amendment) Bill, 2021 to check misuse by “fly-by-night” operators who take advantageof the law to get favourable awards by fraud. It also does away with qualifications of the arbitrators under 8th Schedule of the 1996 Act. The qualifications for accreditation of arbitrators are proposed to be prescribed by regulations to be framed by an Arbitration Council to be set up. Checking misuse of the provisions

[16] The Law Commission of India also examined the working of the 1940 Act in its 176th Report; Vide M/sFuerest Day Lawson Ltd v. Jindal Exports Ltd., 2001 (3) SCALED 708(India).
[17] Justice B.P Saraf Committee Report, 2005.
[18] Nikhil Suresh Pareek, International Commercial Arbitration in India: Governing Law Issues, 18 Unif. L. Rev.154 (2019). pp.154-165.

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under the Act would save the taxpayers money by holding those accountable who siphoned off to them unlawfully. The Bill of 2021 also seeks to amend Sec. 36 of the 1996 Act and raises several concerns as it provides for an unconditional stay on the operation of the award in case fraud or corruption is involved. This will take us back to theera of the automatic stay of arbitral awards as it would make it convenient for the judgment debtor to avoid their obligations under the award. There is still an ambiguity as to what constitutes fraud or corruption as it has not been defined under the 1996 Act. Thus in every case, a judgment debtor may allege fraud and corruption for getting an unconditional stay on the operation of the award. As a result, the enforcement of awards will get more difficult and the ease of doing business will be adversely affected. This is just one issue that is there in the 2021 Amendment.

There are many other drawbacks too. So through the implementation of these legislative changes, resolution of commercial disputes could take a longer duration from now onwards. It can also hamper the spirit of the "Make in India" campaign and deteriorate rankings in "Ease of Doing Business India". This will make India's "dream" of becoming a hub for business to remain a "dream" alone and not a "reality". For making this dream a reality, Indiashould follow some international "best practices" (as is there in Singapore and Hong Kong), and a good 'copycat' in the Indian context is essential, which in future will act as a magnet and would attract users and stakeholders, making India a global hub.

With a convergence of foreign investments, transnational commercial transactions, foreign business exchanges, aided with open-ended economic reforms and fiscal policies going about as an impetus, international commercial disputes involving India had started to rise consistently.[19] So this has made it necessary for the international community to examine India's International arbitration regime closely. The Government has recently brought in amendments after amendments which show that issues were not adequately addressed and theamendments were not properly drafted. Much judicial time will also get wasted to give clarityto these amendments. (This happened with the 2015 Amendment; interpretation of Sec. 34). Despite several amendments, the seat versus venue conundrum has not been addressed in any of the Amendment Acts. Sec 29A is contrary to the idea of minimal judicial interference. This research study primarily focuses on the current issues with the present Act and what all "best practices" can be brought into it with a particular reference to Singapore and Hong Kong.'

[19] Harishankar KS Contemporary International Arbitration in Asia: A Stock Take IJAL Vol 3 no. 1 2001, pp.29-34 retrieved from http://www.ijal.in/sites/default/files/IJAL%20Volume%203_Issue%201_Harisankar%20KS.pdf .

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II. STATEMENT OF RESEARCH PROBLEM

India to become a global hub for international commercial arbitration, the international stakeholders should not feel reluctance in choosing the Indian Law.[20] So for this, the three (i.e., the legislative, the executive and the judiciary) should create the right turf and on-field conditions, much like cricket, for achieving its dream of becoming "an arbitration hub". A cost effective and time saving dispute resolution mechanism guaranteed along with minimal court intervention will build up the confidence in potential foreign investors. In an era of globalisation, it is so crucial for a developing nation like India to remain active in international trade. For that, transnational commercial disputes are to be resolved most effectively with minimal court intervention. India also needs to have a separate legislation forICA for this.

Undoubtedly the tone has been set right and a step in the right direction (via amendments) hasbeen taken by our government. However, much more spadework has to be done for India to hold the "arbitration trophy" and become a Singapore-or-London- esque-hub.

This research primarily deals with the issues that India is facing in the area of International Commercial Arbitration. Our arbitration regime is still not able to anser the demands of the global world. It then analyses the legislative and judicial approach towards this area by the so-called "global hub of ICA" and India (the to-be global hub of ICA). The key concern lies in understanding the approaches of the judiciary and legislative of Singapore and Hong Kong toward the International Commercial Arbitration proceedings. The research also focuses on the drawbacks that the 1996 Act and its Amendments are having. It also deals with the need of having a robust legislative and institutional framework to deal with International Commercial disputes.

Hence the research problem for the present study is entitled –

"Whether the Arbitration and Conciliation Act, 1996 provides a facilitatinglegalenvironment for efficient settlement of international commercial disputes?"

[20] Loukas A. Mistelis, "Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform – Some Fundamental Observations", International Lawyer, vol. 34, no. 3 (2000), 1056.

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III. RESEARCH QUESTIONS OF THE STUDY

- What are the issues that India is facing in facilitating InternationalCommercialArbitration?
- Has arbitration grown in India as a preferred mode of AlternativeDisputeResolution for the settlement of International Commercialdisputes?
- How far has the 1996 Act and its amendments helped India in achieving itsstatus as a "global hub" for International CommercialArbitration?
- What are the International "BEST PRACTICES" that can be adopted byIndiain the international arbitration regime from Singapore and Hong Kong?

IV. OBJECTIVES OF THE RESEARCH

This research study has the following objectives –

- To compare the legislative and judicial approach of Singapore and Hong Kong (arbitration) towards transnational commercial disputes with Indian Arbitrationregime
- To discuss the key changes brought by the various amendments to the 1996legislation
- To analyse the various problems in the present arbitration law in India
- To analyse the problems which the parties may face while enforcing theaward
- To discuss about the international best practices in the area of InternationalCommercial Arbitration (Singapore and Hong Kong)
- To draw conclusions and suggestions on the basis of the research study

V. RESEARCH HYPOTHESIS

Based on the aforementioned objectives, the following hypothesis is formulated: The present arbitration law is not sufficient to make India a global hub of ICA. There is no proper law to govern the same in India.

VI. RESEARCH METHODOLOGY

This research study analyses the current issues with the Indian Commercial Arbitration legal framework and what all "best practices" can be brought into it with a special reference to Singapore and Hong Kong.

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The methodology adopted for conducting this research is Doctrinal.

The doctrinal study is based on the collection of data from primary and secondary sources.

- The primary sources of data used in this study include treaties, arbitral awards, andCourt's decisions both at national or international level and arbitration rules.
- The secondary sources of data used are books, dictionaries, encyclopedias, journals,newspapers and websites.

VII. SOURCES OF THE RESEARCH

- **National sources**: includes the –

Various national arbitration legislations –

The Indian Arbitration Act, 1940;

- The Arbitration Act, 1996;
- The Arbitration Amendment Act, 2015; and
- The Arbitration Amendment Act, 2019.

2. Various reports –

- 76th Law Commission Report;
- 176th Law Commission Report; and
- 246th Law Commission Report.

- **International sources**: includes the Singapore and Hong Kong ArbitrationLaws and the following international instruments –

- UNCITRAL Model Law;
- The Geneva Protocol on Arbitration Clauses of 1923;
- Geneva Convention of 1927;

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- The New York Convention 1958; and
- The New York Convention on the Recognition andEnforcement of Foreign Awards, 1961.

➢ Judicial Decisions / Arbitral Awards

➢ **Expert opinions in the field as exhibited from textbooks, researchpapers, articles, blogs etc.**

VIII. LIMITATIONS OF THE STUDY

The following are the limitations of this research study–

- The scope is limited as the study only considers the theme in regard to International Commercial Arbitration because there are different security and protective measures to be taken into consideration regarding Consumer Arbitration also.
- The landmark judgments include analysing approximately all court decisions in relevant countries and international cases related to the topic. However, since all judicial decisions are not available because arbitration awards are often confidential and the published awards are often heavily edited or summarised, the research study's focus is limited to that number ofdecisions which is accessible.

IX. REVIEW OF THE RELATED LITERATURE

SONAKSHI SHARMA, (2014) This article,Jurisdiction Of Arbitral Tribunal To Direct Production Of Evidence, focuses on the power of the arbitral tribunal to call for documentary evidence. Section-19 of the Arbitration Act shows that the Arbitral Tribunal is not bound to follow the CPC and the Evidence Act. Furthermore, as per Section-19(4), the Arbitral Tribunal has only the power to determine the admissibility, relevance and materiality of a document. Additionally, section27 lays down specific power to seek assistance from the court in getting evidence by way of production of documents. This paper aims to identify the difference between the 1940 and 1996 Acts read with the UNCITRAL Model Law,Code of Civil Procedure and the Evidence Act and ventures to find out whether theArbitral Tribunal does in fact have the jurisdiction to direct the production of documentary evidence.

PREET SINGH OBEROI, (2014) This article, Moral Damages And Investment Arbitration: A Transitional Analysis, examines moral damages in investment treaty arbitration. It traces the

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origins of the concept of moral damages in French law and general public international law and assesses how moral damages differ from other awards of monetary relief. It identifies two conceptions of moral damages and using these conceptions, examines whether the tests applied and conclusions reached by investment treaty tribunals can be justified. It concludes that moral damages are unlikely to become a pervasive and uncontroversial feature of the investment treaty arbitration landscape.

HARSHIT MALIK, (2014) the author in this article, The New Era Of Adjudication: International Commercial Arbitration, presents that the proposition that Arbitration is not a forum of alternative dispute resolution, but forms the primary form of dispute resolution in case of trans border commercial dispute. The article highlights the problems that occur in dispute resolution due to difference in legal cultures and tradition. It elaborates the difference between Civil and common law jurisdictions with a hypothetical case study and presents the arguments in favour of arbitration and brings forth the inability of the judiciary to accommodate the diversity.

WASIQ ABASS DAR, (2014) This article Enforcement Of Annulled Arbitral Awards: A Dichotomy Of Approaches, points out that,in international trade and commerce, parties belonging to different geographical jurisdiction with varied legal systems are involved. To avoid potential legal complications, international commercial arbitration is the favored system of dispute resolution. One of the mostimportant reasons for this is the universal enforcement of arbitral awards. There could also be circumstances where the award passed is flawed. The author analyses the norms or practices where an international arbitral award can be annulled and also looks at situations where an annulled award could also be enforced.

ADITYAPRATAP SINGH & SAURABH SHARMA,(2014) This article, Role Of Arbitration In Infrastructure Contracts points out that, Infrastructure facilities include any form of facility that is provided with an objective to be used by public or the society. There are different kinds of disputes arising in infrastructure contracts. Since the state is the major bid holder in these contracts, the state does not favor Alternative dispute Resolution Mechanism. But with the recent developments, Arbitration is being accepted as the ADR in the infrastructure contracts. In the first part, the authors analyzed how Arbitration is effective in dispute resolution in infrastructure contracts. In this second part the authors also discuss in detail aspects on Awards, Equity clauses etc.

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PANKHURI AGARWAL, (2013) 'Arbitability' is the capability of a dispute being adjudicated by an arbitral tribunal. The author in this article, Arbitrability Of Disputes In India: Still Grappling In The Dark? Examines the scope of arbitrabilityand the contractual limitations of arbitration, based on the philosophical and legal underpinnings of this concept as understood in India, with the aid of various judgments and current judicial trend. The author also analyzes the feasibility of matrimonial disputes to be arbitared.

TANYA NAYYAR & SAUMITRA CHATURVEDI,(2013) The article,

Arbitration Clause- A Judicial Interpretation, analyses the gradually changed outlook of the arbitration clause with the other terms of the agreement as well as the judicial power exercised by the Chief justice in appointing the arbitrator. The author focuses on the chronological development of the scope of the arbitration clause and the powers of the Chief Justice by exploring the various decisions of the supreme court of India.

DR. UJWALA SHINDE, (2012) The article Challenges Faced By ADR System In India, It is apparent that those who are economically and socially disadvantaged find that the entire legal system is irrelevant to them as tool of empowerment and survival. ADR may not be able to overcome power imbalances or fundamental disagreements over norms among disputants. On the other hand, in situations where there is no established legal process for dispute resolution, ADR may be the best possible alternative to violence. According to author, an audit of the existing ADR Mechanisms from the point of view of 'customer satisfaction' would help to shape the program for the future in order to maximize the success.

ARPINDER SINGH & YOGEN VAIDYA,(2012): The article, Is India A

Preferred Destination For Arbitration? Points out that, with the new liberal policiesand continuous efforts made by the Government, India has opened doors to foreigninvestment leading to a spurt in the number of commercial disputes. In spite of amending the Arbitration Act, there are still few challenges which need to be addressed with respect to preference for selection of arbitration institutes, Indian regulations, interference by the courts, enforcement of foreign award of the arbitrator and involvement of the experts in the arbitration proceedings. The authoranalyses the key challenges faced in establishing arbitration as an alternate dispute resolution method in India.

AMIT KUMAR PATHAK, (2012) This article, Anti Arbitration Injunctions Under International Commercial Arbitration-An Analysis, points out that Arbitration is a fundamental feature of

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international commerce, and provides manyadvantages over traditional transnational litigation to the parties involved in the international disputes. Anti-suit injunctions are remedy employed especially by common law courts to prevent parallel proceedings that are considered vexatious or oppressive, and that present a threat to the jurisdiction of the enjoining court. Supporters of the International arbitration fiercely criticizes the issuance of anti- arbitration injunctions, the author looks at the basis and legal principles for issuing anti- suit injunctions.

RUSTAM SINGH THAKUR & DIVYA SONI, (2012) The author in this article, Delay In Pronouncement Of Award: Not Against Public Policy Of India, analyses the judgment of The Delhi High Court in "Peak Chemical corporation case, held that in-ordinate delay in rendering the award would not by itself result in the awardbeing set aside on the ground of being in conflict with the public policy of India. The factors which the courts would consider would include as to whether the award is a reasoned and comprehensive award and also whether setting aside an award would result in further hardships upon the parties in terms of time and money.

X. CHAPTERIZATION

This dissertation work consists of the following chapters –

- CHAPTER 1 – INTRODUCTION

  This chapter provides for a general overview with regard to international commercial arbitration. It outlines the research problem and the research questionsinvolved in the study. Different objectives with respect to which the study shall beconducted are also provided in this chapter. Further, it provides for the research hypothesis and the methodology which shall be adopted by the author in her dissertation. Lastly, the literature review and the limitations of thestudy are also listed out in this chapter. The present law is inadequate to turn India's dream of becoming a global arbitration hub into a reality.

- CHAPTER 2 – BACKGROUND ON ADR WITH SPECIAL REFERENCETOARBITRATION IN INDIAN AND INTERNATIONAL SCENARIOS

  The second chapter traces the evolution of the concept of international arbitration in the Indian and International scenario and also sheds light into various international instruments dealing with this field.

- CHAPTER 3 – LEGISLATIVE APPROACH AND JUDICIAL APPROACHTOWARDS ICA –

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INDIA, HONG KONG AND SINGAPORE

This chapter looks into the different approaches (both legislative and judicial) of the countries namely, India, Hong Kong and Singapore toward transnational arbitration. It also focuses on the innovative methods which these two foreign nations adopted to sync with the needs of the hour and how these techniques helped it to reach the status of being a global hub for businesses.

- CHAPTER 4 – ISSUES WITH THE PRESENT INDIAN ARBITRATIONREGIME – NEED FOR A ROBUST LEGISLATIVE FRAMEWORK

  This chapter delves into the lacunas which the Indian arbitration regime is currently facing and the need for enacting a novel effective legislation based oninternational standards to deal with the same.

- CHAPTER 5 – INTERNATIONAL BEST PRACTICES – LESSONS FROMSIAC AND HKIAC

  The fifth chapter looks at the way in which the arbitral institutions in both Singapore and Hong Kong are working. It also provides the salient features of the rules adopted by both the institutions.

CHAPTER 6 – FINDINGS, IMPLICATIONS AND RECOMMENDATIONSOFTHE STUDY

The final chapter deals with the recommendations and suggestions drawn from the research study to fix the current lacunas existing in India in the field of International Commercial Arbitration.

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CHAPTER 2

BACKGROUND ON ADR WITH SPECIAL REFERENCE TOARBITRATION IN INDIAN & INTERNATIONAL SCENARIO

"Differences we shall always have but we must settle them all, whetherreligiousor other, by arbitration."

- *Mahatma Gandhi*

I. INTRODUCTION

To study an on-going issue in any field of law, we need to have a clear understanding of the concept, its history and its process of evolution. It also requires having a clear idea about the characteristics which differentiates it from other similar legal issues. Most significantly, one also needs to understand the definitions of the relevant elements within the field of study. Since the main issue in question in this research work is the current problems in the international commercial arbitration law in India and the solutions therein, a better and complete understanding of the evolution and development of arbitration law, in general, is much needed. Only by digging into the past a little, we will be able to understand the present scenario and the correlated issues in detail. Therefore, this chapter mainly focuses on the development of arbitration as a mechanism of ADR in India.

II. ALTERNATIVE DISPUTE RESOLUTION (ADR)

Alternate Dispute Resolution[21] is a mechanism of resolving a dispute between two parties with the help of a neutral and independent third party. It is a dispute resolution mechanism alternative to the traditional litigation process. All the ADR procedures have emerged as distinct alternatives to the courts established under the writ of the state and hence the epithet 'alternative' has been coined.[22] But it is not an alternative 'court' system, rather it was developed with an aim to supplement and supplant the traditional court system. According to the Black's Law Dictionary ADR is a procedure for settling a dispute by means other than litigation.[23] The National

[21] Hereinafter referred to as ADR.

[22] Sarvesh Chandra, "ADR: Is Conciliation the Best Choice" in P. C. Rao and William Sheffield.

[23] Bryan A. Garner (Ed.), Black's Law Dictionary 112-113 (West Publishing Company, St. Paul, Minnesota, 8th Edn.,

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Alternative Dispute Resolution Advisory Council, Australia defines ADR as "an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them."[24] ADR processes are conducted with the assistance of a neutral, unbiased, independent and impartial third party in no way connected with the dispute. She/he helps the disputant parties to resolve their disputes by the use of the various well established dispute resolution processes.[25]

ADR processes can be classified into the following three broad categories –

1. Adjudicatory processes

- Here, the neutral third party gives a final and binding decision on the issues involved in the dispute (both legal and factual). It is consensual and derives its sanctity from the parties' will. Examples include binding expert determination andarbitration.

2. Non Adjudicatory processes

- The non-adjudicatory ADR processes involve a method of reaching a mutually acceptable solution with both the disputants' cooperation and assistance of a neutral third party. Examples include mediation, resolving disputes through Lok Adalats, conciliation etc.,
- The general approach in ADR (non-adjudicatory) can be illustrated by the story oftwo cooks fighting over an orange. The judge selects some reason for giving it to the first cook. The arbitrator divides it into half. The mediator askseach cook why they want it – to learn that the first wants the peel for marmalade and the other wants the flesh for the juice. The mediator gives the peel to the first and the flesh to the other. The result is optimization for both parties. The cooks and the mediator have looked at the problem from the point of view of interest togetherrather than rights and positions.[26]
- This approach was advocated by the Father of our Nation, Mahatma Gandhi,which is evident in his opinion given below –

"I realized that the true function of a lawyer was to unite parties riven asunder. The lesson was no indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing out private compromises of hundreds of cases. I lost nothing

2004).

[24] Available at http://www.nadrac.gov.au.
[25] Ashwanie Kumar Bansal, Arbitration and ADR (Universal Law Publishing Co. Pvt. Ltd., Delhi, 2005).
[26] Alexander Bevan, Alternative Dispute Resolution 2 (Sweet and Maxwell, London, 1992).

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thereby

– not even money; certainly not my soul."[27]

3. Hybrid ADR methods are those methods which are created by amalgamating the adjudicatory and non-adjudicatory ADR processes. Examples include Con-Arb, Med- Arb etc.

HISTORICAL BACKGROUND OF ADR

The first event listed on ADR was in 1800 B.C., when the Kingdoms in ancient Middle East used arbitration and mediation to settle disputes between them.[28] In the early era of modern civilization ADR started to be used in business and land disputes and in international relations.[29] ADR was also used to settle the disputes between employees and employers. Disputes of political nature were also resolved through ADR mechanisms. So these were the earlier instances where ADR mechanisms were applied. When there was a revolution among the black civilians in the 1960s, the issues were resolved through ADR.[30] But it started to grow and flourish only in the 1960s during the civil and political times in the United States of America. In the early 1970s, an ADR movement was initiated as a –

- social movement to use mediation as a means of settling community-wise disputes (involving the civil rights); and legal movement to reduce the judiciary's overburden.

Since then, ADR has rapidly grown in the USA from being a mere experimentation to institutionalization. Congress has recognized ADR as a cost efficient alternative to the age old methods of dispute resolution in the late 1980s.[31] In the year 1988, Judicial Improvement and Access to Justice Act was enacted by the Congress with an aim to permit the US District Courts to submit the disputes for resolution to 'arbitration'. Later,it was extended to various other issues such as prisoners' rights, environmental problems,foreign relations matters and Native American

[27] Mahatma Gandhi, An Autobiography: The Story of My Experiments with Truth 134 (Beacon Press, Boston,1993).

[28] Prein, H. 1984. "A Contingency Approach for Conflict Intervention." Group and Organization Studies, 9: 81 -102.

[29] Ross, M. H. 1993. The Culture of Conflict: Interpretations and Interests in Comparative Perspective.NewHaven, CT: Yale University Press.

[30] Deutsch, M. and P. T. Coleman, eds. 2000. The Handbook of ConflictResolution: Theory and Practice. SanFrancisco, CA: Jossey-Bass.

[31] Prein, H. 1984. "A Contingency Approach for Conflict Intervention." Group and Organization Studies, 9: 81 -102.

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issues.[32] Congress took ADR to another level when it enacted the Alternative Dispute Resolution Act, 1998. This Act was later amended and needed the districtcourt to require, through local rule, in all civil litigations that the parties involved consider ADR at the proper (or appropriate) state of litigation to resolve their matter.

In the early 2000s, ADR gained momentum among the people and many preferred ADR approaches because they saw these methods as being more creative and more focused on problem solving than litigation, which has always been based on an adversarial model.[33] Inthe 21st century, many people from different parts of the world have accepted ADR as amodeof resolving disputes instead of adhering to the procedural wrangles. Though ADR has grownfirstly in the USA, many other countries (both developing and developed) are now successfully engaging ADR as a means of dispute settlement. ADR is a successful method in resolving disputes amicably and efficiently. Supporters of ADR argue that such methods decrease the cost and time of litigation, improving access to justice and reducing court backlog, while at the same time preserving important social relationships for disputants.[34]

DIFFERENT MODES OF ADR

Practically, there are various alternative dispute resolution modes including –

1. Arbitration is a mode of resolving disputes with the help of a neutral third party,whois appointed as per the will of the parties, and reaching an amicable settlement.
2. Conciliation is mostly applied in matrimonial matters, disputes of commercialnatureetc.
3. Mediation provides a forum in which parties can resolve their own disputes,with thehelp of a neutral third party.[35]
4. Negotiation is a verbal technique of resolving disputes among the parties byreachinga non-binding outcome.

Of this arbitration was found to be the most adequate and effective mode of dispute resolution mechanism.

[32] Lynch, J. "ADR and Beyond: A Systems Approach to Conflict Management", Negotiation Journal, Volume17, Number 3, July 2001, Volume, p. 213.

[33] Avruch, K. 1998 "Culture and Conflict Resolution", Washington, DC: United States Institute of Peace.

[34] Available at http://www1.worldbank.org/publicsector/legal/ADR%20Workshop.pdf.

[35] Kressel, K., D. Pruitt and Associates, eds. 1989. Mediation Research: The Process and Effectiveness of Third-Party Intervention. San Francisco, CA:Jossey-Bass.

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III. ARBITRATION

The only female founder of the American Arbitration Association Frances Kellor in her book,'American Arbitration: Its History, Functions and Achievements' has put it pithily when she said,

"*Of all mankind's adventures in search of peace and justice, arbitration is amongst the earliest. Long before laws were established, or courts were organized, or judges formulated principles of law, men had resorted to arbitration for the resolving of discord, the adjustment of differences, and the settlement of disputes.*"[36]

King Solomon is considered to be the first arbitrator as per the Biblical theory.[37] Arbitration was used as a mode of settling the territorial disputes by Philip the Second, the father of Alexander the Great as far back as 337 B.C.[38] Arbitration is a consensual process whereby a dispute is settled amicably between the parties by an independent and impartial third party. Black's Law Dictionary defines it as a mechanism to solve the dispute amicably in presence of a third party who is commonly known as an arbitrator, delivering a judgment (Award) afterhearing both the parties.[39] Arbitration is an optional private process that is carried out pursuant to an agreement to arbitrate the disputed matter.[40] Dispute Settlement by an arbitral tribunal is preferred over the litigation mechanism of the national courts since comparatively the former provides for a more neutral forum, an award which can be easily enforced, quick and more economica.[41]

After the world became globalised (mainly after World War II), the international trade and investment has also increased tremendously. This in turn resulted in an increase in transnational disputes of commercial nature. This led the global community to tout an efficient and effective mode of dispute resolution. Moreover, the industrial revolution bringing into existence international commercial transactions led to a search for finding a forum outside the municipal law courts involving protracted and dilatory legal process for simple, uninhibited by intricate

[36] Frances Kellor, "American Arbitration: Its History, Functions and Achievements, New York: Harper andBrothers", (1948), p.3.

[37] The King James Bible 1 3:p. 16-28; "Judgment of Soloman" Biblical story.

[38] {2008} 7 M.L.J. { "Putrajaya Holdings"}.

[39] Black's Law Dictionary, 6th edn. (1990), West Publishing Co., p.105.

[40] S.C.Tripathi. "Law of Arbitration & Conciliation in India with Alternative Means of Settlement of Disputes Resolution", Sixth Ed. Allahabad: Central Law Publications, (2012), 28.

[41] Margaret Wang, "Are Alternative Dispute Resolution Methods Superior to Litigation in Resolving Disputes in International Commerce?", 16 Arbitration International 189 (2000).

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rules of evidence and legal grammar.[42] International arbitration[43] was found to be an effective mode of resolving disputes of such nature.

The date of international arbitration in the modern sense extends to 1794 "Jay Treaty", an agreement signed between the United States and the United Kingdom, which is seen as the beginning point of modern international arbitration.[44] The evolution of the concept of "international arbitration" is mainly embedded in the roots of the United Kingdom. In fact, the London Court of International Arbitration is the world's oldest arbitral institution. According to Serge Lazareff,

"International arbitration, it is said, has its roots in history. Modern commercialarbitration is a true product of the city, even though there were precedents in the late XVIIIth century. It is well known that the first contracts to be submitted to arbitration dealt with commodities. As the disputes involved in most cases perishable goods, they had to be settled rapidly and confidentially. London became, in the sixth century, the centre for maritime and financial matters, insurance, commodities and then metals. This is still the case today"[45]

International arbitration when deals specifically with the cross border disputes of commercial nature, it is called the transnational or international commercial arbitration[46]. International arbitration has enjoyed the reputation of being the most preferred method of resolution of a dispute over a long period of time between the transnational contracting parties.[47] Sir Michael John in his famous work, Transnational Arbitration in English Law[48], stated –

"The essence of the theory of 'transnational arbitration' is that the institution of international commercial arbitration is an autonomous juristic entity which isindependent of all national courts and all national systems of law. One of the primary purposes of trans- nationalist movement is to

[42] L.M. Sharma, "International Commercial Arbitration", 3 Company Law Journal 55 (1994).
[43] Various forms of arbitration also exist such as domestic, institutional and ad hoc arbitration.
[44] Alford, R. "The American Influence on International Arbitration", J. On Dısp. Resolutıon. 19 Ohıo St.69,(2003), p. 72.
[45] Lazareff, M.S. in Chapman M J Commercial and Consumer Arbitration. Statutes & Rules,(London:BlackstonePress Limited; 1997), p v.
[46] Hereinafter referred to as ICA.
[47] Michael F. Hoellering, "Managing International Commercial Arbitration: The Institution's Role", 49 Dispute Resolution Law Journal 12 (1994); L. Yves Frontier, "International Arbitration on the Eye of the New Millennium", 1 I International Arbitration Law Review 1 (1997).
[48] Sir Michael John, Transnational Arbitration in English Law, 133, CURRENT LEGAL PROBLEMS, 1984.

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break the links between the arbitral processand the courts of the country in which the arbitration takes place."

For the first time in history, in a Resolution passed by the United Nations Conference on the International Commercial Arbitration (1958), international commercial arbitration was emphasized. Indeed the era of the 1920s witnessed a rapid growth in the field of international commercial arbitration since many protocols and treaties were introduced to deal with the subject of ICA. When international trade has also become globalised, the importance of International Commercial arbitration as a mode of commercial dispute resolution also increased. Other factors which favoured ICA were the advent of liberalisation, consumerism and privatisation. It was considered as an excellent means of settling commercial disputes.[49]

IV. INTERNATIONAL INSTRUMENTS GOVERNING INTERNATIONAL COMMERCIAL ARBITRATION

Various international conventions and protocols were introduced to govern the realm of ICA. Among these, the most notable are the New York Convention, 1958, European Convention, 1961, Washington Convention, 1965 and the Model law 1985, UNCITRAL. Most of the nations (both developed and developing), including India, have become signatories to these instruments so as to sync the rules governing ICA. Being signatories, they have also enacted various legislations to govern ICA law and have thereby restricted the negative interference of national courts into the international arbitral proceedings. A chronological order of various treaties and protocols dealing with international arbitration are as follows –

1. Geneva Protocol on Arbitration Clauses, 1923;[50]
2. Geneva Convention on the Execution of Foreign Arbitral Awards, 1927;[51]

[49] P.T. Kamala Priya and S. Karpaga, "International Commercial Arbitration- A New Dimension", 13 MadrasLaw Journal 203 (2001).

[50] Available at https://www.arbitrationindia.com/geneva_protocol_1923.html#:~:text=Geneva%20Protocol%201923%20PROTOCOL%20 ON%20 ARBITRATION%20CLAUSES%20 SIGNED,countries%20which%20they%20 represent%2C%20the%20following%20 provisions%3A%E2%80%94%201.

[51] Available at https://www.newyorkconvention.org/11165/web/files/document/1/6/16020.pdf.

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3. Convention on the Recognition and Enforcement of Foreign Arbitral Awards,1958;[52]
4. European Convention on International Commercial Arbitration, 1961;[53]
5. Agreement Relating on Application of the European Convention on InternationalCommercial Arbitration, 1962;[54]
6. Convention on the Settlement of Investment Disputes between States andNationals ofother States, 1965;[55]
7. Convention providing a Uniform Law on Arbitration, 1966;[56]
8. Convention on the Settlement by Arbitration of Civil Law Disputes resultingfromRelations of Economic And Scientific Technical Cooperation, 1972;[57]
9. Inter-American Convention on International Commercial Arbitration, 1975;[58]
10. UNCITRAL Arbitration Rules, 1976;[59]
11. UNCITRAL Model Law of International Commercial Arbitration, 1985;[60]
12. UNCITRAL Model Law on International Commercial Conciliation withGuide toEnactment and Use, 2002;[61]
13. Recommendation Regarding Interpretation of Art. II (2) and Art. VII (1) of theNewYork Convention, 2006.[62]

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[52] Infamously known as the 1958 New York Convention, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf.

[53] 1961 Geneva Convention, available at https://www.disarb.org/fileadmin/user_upload/Wissen/Europaeisches_UEbereinkommen_ueber_die_internationale_Handelsschiedsgerichtsbarkeit_61_-_English.pdf.\

[54] Paris Agreement, 1962, available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168006b6 49.

[55] Washington or ICSID Convention, 1965, available at https://icsid.worldbank.org/sites/default/files/documents/ICSID%20Convention%20English.pdf.

[56] Strasbourg Convention 1966, available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168006ff 61.

[57] Moscow Convention 1972, available at https://www.newyorkconvention.org/11165/web/files/document/1/6/16024.pdf.

[58] Panama Convention 1975, available at https://www.aaaeducation.org/media/5043/inter-american%20convention%20on%20international%20commercial%20arbitration.pdf.

[59] Available at https://docs.pca-cpa.org/2016/01/UNCITRAL-1976-English.pdf.

[60] Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/model-law-arbitration-commonwealth.pdf.

[61] Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/03-90953_ebook.pdf.

[62] Available at https://uncitral.un.org/en/texts/arbitration/explanatorytexts/recommendations/foreign_arbitral_awards.

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V. ARBITRATION LAW IN INDIA – A BRIEF HISTORY

In India, the concept of "Arbitration" has a very long history[63] and needs no introduction in the modern era of the system of dispute resolution. In ancient times, people often voluntarily submitted their disputes to a group of wise men of a community—called the panchayat[64]—for a binding resolution.[65] While describing the concept of arbitration, Chief Justice A. Marten in the case, Chanbasappa Gurushantappa v. Baslinagayya Gokurnaya Hiremath[66] observed as.

"*It is indeed a striking feature of ordinary Indian life. And I would go further and say that it prevails in all ranks of life to a much greater extent than is the case in England. To refer matters to a panch is one of the natural ways of deciding many a dispute in India. It may be that in some cases the panch more resembles a judicial Court because the panch may intervene on the complaint of one party and not necessarily on the agreement of both, e.g., in a caste matter. But there are many cases where the decision is given by agreement between the parties."*[67]

During the British rule, it was the Bengal Regulations of 1772[68] created the modern arbitration law.[69] The Bengal Regulations provided for reference by a court to arbitration, with the consent of the parties, in lawsuits for accounts, partnership deeds, and breach of contract, amongst others.[70] The development of the law of arbitration in India can be broadlyclassified into the following 4 phases –

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[63] The Law Commission of India in its Seventy Sixth Report on Arbitration Act of 1940 stated that Indian Arbitration practices dated back to the time of ancient smritis (legal texts) and digests. Apart from the decisionstaken by the King Courts, other tribunals were recognized for dispute resolution, available at https://lawcommissionofin-dia.nic.in/51-100/Report76.pdf.

[64] The Panchayati Raj System is recognised as the earliest form of arbitration in India.

[65] K Ravi Kumar, 'Alternative Dispute Resolution in Construction Industry', International Council ofConsultants (ICC) papers, www.iccindia.org. at p 2.

[66] AIR 1927 Bom. 565 (FB).

[67] The Privy Council in the case Vytla Sitanna v. Marivada Viranna AIR 1934 PC 105 has observed that thedisputes which were referred to the Panchas and the courts have been dulyrecognised and have received credence to the awards passed by them, available at https://www.mondaq.com/india/arbitration-dispute- resolution/537190/evolution-of-arbitration-in-india.

[68] The 1772 Regulation was later promulgated to the other presidency towns such as Bombay (BombayRegulation Act, 1799) and Madras (Madras Regulation Act, 1802).

[69] S.K. Dholakia, Analytical Appraisal of the Arbitration and Conciliation (Amendment) Bill, 2003, INDIANCOUNCIL OF ARB. Q., Jan.-Mar. 2005, at 3, available at www.ficci.com/icanet.

[70] K Ravi Kumar, 'Alternative Dispute Resolution in Construction Industry', International Council ofConsultants (ICC) papers, www.iccindia.org. at p 2.

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1. Pre 1940 Phase – the Epoch of Scattered Laws

For the first time in the history of India, the Indian Arbitration Act of 1899 was enacted statutorily recognizing Arbitration as a form of dispute resolution, but it was confined to only three presidency towns namely Madras, Calcutta and Bombay. It was modelled on the British Arbitration Act of 1899. The Act stipulated that the agreement should mention the names of the arbitrators. During those times, even a sitting judge can also become an arbitrator.[71] The Hon'ble Bombay High Court in the case Dinkarrai Lakshmiprasad v. Yeshwantrai Hariprasad[72] had observed that since the 1899 Act is bulky and complex, it needs to be amended. Some provisions relating to arbitration could also be found scattered in different other statutes.[73] All these provisions were found to be more technical, inadequate and inexpedient. The main issue that existed in the pre-1940 phase was the lack of a consolidated law to govern the arbitration regime. Several committees were formed for dealing with the same, which resulted in the enactment of the ArbitrationAct, 1940.[74] It was largely based onthe English Arbitration Act of 1934 and dealt with domestic arbitrations only.[75]

2. Post 1940 Phase – Two Landmark Legislations

The 1940 Act[76] failed in achieving its desired purpose mainly because of its ineffectiveworking. It therefore attracted adverse remarks and severe criticism fromthe side of the judiciary. Hon'ble Justice D A Desai in the case Guru Nanak Foundation v. Rattan Singh & Sons,[77] remarked,

"The way in which the proceedings under the 1940 Act are conducted and without an exception challenged in the Courts, has made lawyers laugh and legal philosophers weep."

[71] Nusserwanjee Pestonjee and Ors. v. Meer Mynoodeen Khan Wullud Meer Sudroodeen Khan Bahadoor(1855) 6 MIA 134.

[72] AIR 1930 Bom 98.

[73] Sec. 89 and Sch. II of the Code of Civil Procedure, 1908, Ss. 10 and 28 of the Indian Contract Act, 1872, andSec. 21 of the Specific Relief Act, 1877 respectively provides for arbitration.

[74] Available at http://www.wipo.int/edocs/lexdocs/laws/en/pk/pk066en.pdf.

[75] In India, the Foreign awards were enforced via separate legislations, namely –

(i) For the New York Convention Awards, the 'Foreign Awards (Recognition and Enforcement) Act, 1961'; and

(ii) For the Geneva Convention Awards, the 'Arbitration (Protocol and Convention) Act, 1937'.

[76] Arbitration Act, No.10 of 1940, https://indiankanoon.org/doc/1052228 (repealed 1996).

[77] (1981) 4 S C C 634.

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The 1940 Act was not strong enough or compact enough to deal with the post 1990's disputes[78] that rose due to a hype in the International trade and the investments that flowed in and out of the country.[79] Though the 1940 Act was born with mistrust in arbitration and hardly a success,[80] it was not amended in order to improve itsworking. But, post-independence, it was modified by passing an ordinance.

Later considering the tremendous growth that India had witnessed post economic liberalisation, the Government had enacted the Arbitration and Conciliation Act of 1996[81] with an aim to provide for an efficient robust legal framework for arbitrationsin India.[82] It mainly focused on ending the unending litigation and delayed delivery of justice. Ensuring minimal judicial interference and speedy justice were the coreobjects of the said Act. It was largely based on the UNCITRAL Model Law on International Commercial Arbitration, 1985. The Hon'ble Supreme Court in the case Sundaram Finance Ltd. v. NEPC India Ltd.[83] had observed and confirmed that the 1996 Act and the Model Law have a close relationship to each other and therefore it had envisaged the Model Law as the interpretative guide to the Act of 1996.[84]

3. Post 1996 Phase – An Era of Amendments (2015 to 2021)

The 1996 Act also did not work well since it had resulted in rigmaroles and long delays indelivering justice. Moreover the procedural wrangles in the arbitration were extravagantly expensive. The Hon'ble Supreme Court of India took a regressive approach by misinterpreting the provisions of the 1996 Act.[85] This attitude of the judiciary towards thearbitration regime was widely criticised. Later the Court settled these issues by passing the infamous BALCO judgment.[86]

[78] The Law Commission of India also examined the working of the 1940 Act in its 176th Report.

[79] Vide M/s Fuerest Day Lawson Ltd v. Jindal Exports Ltd., 2001 (3) SCALED 708.

[80] Harpreet Kaur, The 1996 Arbitration and Conciliation Act: A Step Toward Improving Arbitration in India, 6 HASTINGS BUS. L.J. 261, 262 (2010).

[81] The Arbitration and Conciliation Act of 1996, No. 26, Acts of Parliament, 1996, available at: http://indiacode.nic.in/.

[82] It was also explicitly provided in the Statement of Objects and Reasons of the Bill that the economic reforms introduced by India will be ineffective if the law dealing with the arbitration regime i.e., the 1940 Act remains stagnant and outdated.

[83] (1999) 2 SCC 483, 497.

[84] Akash Pierre Rebello, Of Impossible Dreams and Recurring Nightmares: The Set Aside of Foreign Awards in

[85] In Bhatia International v. Bulk Trading S.A. and Another (2002) 4 SCC 105, the Hon'ble Supreme Court hasheld that Part I of 1996 Act will also apply to arbitrations which are seated outside India except where it was impliedly or expressly excluded. This decision was later followed by the Court in Venture Global Engineering vSatyam Computer Services td (2008) 4 SCC 190.

[86] The Hon'ble Supreme Court had in the case Bharat Aluminium and Co. v. Kaiser Aluminium and Co., (2012)9 SCC 552 held that Part I of the 1996 Act will not apply to Part II of the same Act. According to the said judgment, no

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Major issues faced by the 1996 Act were as follows –

1. The practice of granting automatic stay on the execution of arbitral awards;
2. Challenging the suits under Sec. 34[87] often made awards inexecutable;
3. No time limit was prescribed for making an arbitral award;
4. Arbitral proceedings were atrociously expensive since exorbitant fees were chargedby the arbitrators, etc.

So, in order to deal with all the aforesaid difficulties, the Law Commission of India prepared a report on the experience of the 1996 Act and suggested a number of amendments.[88] The Arbitration and Conciliation (Amendment) Bill, 2003 was the first attempt to amend the said Act. But, this Bill was later withdrawn from the Parliament since various concerns were raised about the same. Later, a Committee was set up under the Chairmanship of Hon'ble Justice A P Shah (Retd.) to study the 1996 Act and propose amendments to the same. Based on these recommendations of this Committee, the Indian government has introduced the Arbitration and Conciliation (Amendment) Act, 2015 and amended certain provisions of the 1996 Act. This Act has brought in many changes to the principal Act which had completely changed the old public perception which existed towards the arbitration regime in India.

MAJOR CHANGES BROUGHT BY THE 2015 AMENDMENT

1. Provisions of Ss. 9, 27, sub sections (1) and (3) of Sec. 37 of the 1996 Act were made applicable to international commercial arbitration also, if no agreement to the contraryis entered into by the parties.[89]
2. For minimizing the judicial interference, now the court is not allowed to entertainan application once the arbitration tribunal is constituted. However, the court can allow itif the circumstance demands so.
3. Tribunals were given all the powers of the Court u/Sec. 9 of the Act.[90]
4. Strict time limits for concluding an arbitral process was also included.[91]

interim applications u/Sec. 9 of the 1996 Act could be entertained in foreign seated arbitrations solely governed by Part II of the Act.

[87] Sec. 34 of the Arbitration and Conciliation Act, 1996, Application for setting aside arbitral awards.

[88] 176th Report of the Law Commission of India, available at http://www.lawcommissionofindia.nic.in/.

[89] Proviso to Sec 2 (2) of the Arbitration and Conciliation Act, 1996.

[90] Sec 17 of the Arbitration and Conciliation Act, 1996.

[91] Sec 29 A of the Arbitration and Conciliation Act, 1996.

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5. The grounds provided for setting aside an arbitral award has been modified and it now includes the following also in addition to the ones which are already mentioned in the Act –

- If the award is in contravention to the fundamental policy of Indian law; or
- If it is in conflict with the notions of justice or morality.

6. The power to appoint an arbitrator was conferred to the High Court or SupremeCourt.
7. An application to appoint an arbitrator should be disposed expediently within 60daysof such an application.
8. Sec 31 A was inserted which provided for a complete cost framework.

Various judgments were also passed to give more clarifications to the amended provisions.[92] The 2015 Amendment Act was a watershed moment in the history of theIndian arbitration regime since it addressed some major issues that were prevailing at that time. But certain lacunas were ignored by the same. So for dealing with those issues, a "High-Level Committee to Review the Institutionalizations of Arbitration Mechanism in India" was set up by the Government of India in the year 2017. It was constituted under the Chairmanship of Hon'ble (Retd.) Justice B N Srikrishna. Based on the recommendations of this Committee, the Arbitration and Conciliation (Amendment) Act, 2019 was enacted. It was another watershed moment for the arbitration framework in India since it introduced the "institutional" arbitration system along with ad hoc arbitrations. Arbitration Council of India[93] was established with an aim to promote the ADR mechanisms and to develop an institutional arbitration culture in India. Some major changes introduced by the 2019 Amendment Act are as follows –

1. The Supreme Court and High Court is given the power to designate the arbitral institutions graded by the ACI u/Sec. 43 I.[94]
2. In case of international commercial arbitrations, the Supreme Court is allowed to delegate the power of appointment of arbitrators to the arbitral institutions gradedby ACI. In case of domestic arbitrations, the High Court will do the same. This is the same method which has been in practice in Hong Kong and Singapore.

[92] Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd. (2018) 6 SCC 287; Bgs Sgs Soma Jv vs Nhpc Ltd. Civil Appeal No. 9307 of 2019 decided on 10.12.2019; Hardy Exploration and Production (India) Civil Appeal no. 4628 of 2018 decided on 25.09.2018; Perkins Eastman Architects DPC & Anr. V. HSCC (India) Ltd Arbitration Application No. 32 of 2019 decided on 26.11.2019.

[93] Hereinafter referred to as ACI.

[94] Sec 11 (3A) of the Arbitration and Conciliation Act, 1996.

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3. The words "An appeal" in Sec 37 (1) were substituted by the words "Notwithstandinganything contained in any other law for the time being in force, an appeal".
4. The words "or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36" were omitted.
5. A new 8th Schedule was also inserted providing for the qualifications of an arbitrator. However, it does not apply to international commercial arbitrations.
6. Sec 87 was introduced and made it clear that the 2015 Amendment will apply even to those arbitral proceedings which had been filed after the commencement of the same. So this was completely against the decision given by the Hon'ble Supreme Court of India in the case Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd.[95] Later, the Court had put to rest the above lacunae when it struck down insertion of Sec. 87 to the 2019 Amendment Act as manifestly arbitrary.[96]

While the 2015 Amendment introduced some significant changes to the 1996 Act, the 2019 Amendment Act had brought about a high level of clarity to these changes. So both these Amendments can be described undoubtedly as the Indian Government's step forward to make India an arbitration hub. However, with the introduction of the latest 2021 Amendment, we had moved two steps backwards in the development process of the arbitration regime. It has put all the subsequent amendments on a back-burner by being contrary to the very spirit of the arbitration process. These issues willbe dealt in detail in the Chapter 4 of this dissertation work.

VI. CONCLUSION

This chapter has clearly traced the historical development of the concept of international arbitration in the Indian and International scenario. The concept of "transnational arbitration" has undergone a drastic change in recent times with the advancement of technology. A new concept of Online Dispute Resolution (ODR) has been introduced and new techniques were evolved to deal with the pandemic, which the world is now witnessing. This has beenreflected in the legislative and judicial approaches of various nations. The different approaches adopted by India, Hong Kong and Singapore will be discussed in the subsequent chapter.

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[95] (2018) 6 SCC 287.

[96] Hindustan Construction Company Limited v. Union of India, (2019) SCC OnLine SC 1520.

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CHAPTER 3

LEGISLATIVE APPROACH AND JUDICIAL APPROACH TOWARDS ICA – INDIA, HONG KONG AND SINGAPORE

I. INTRODUCTION

The core of this Chapter consists of the analysis of the approaches, both legislative and judicial, adopted by India towards international commercial arbitration. For comparative purposes, the approaches adopted by other international for i.e., Singapore and Hong Kong, will also be examined. Various dispute settlement provisions in ICAs and plethora of notable case laws are also discussed in detail.

II. INDIA

"Arbitration in India is not for the faint-hearted."[97]

1. LEGISLATIVE APPROACH

India was the first to start much early and was among those first few countries that adopted the 1960 New York Convention[98]. Lord Mustill has rightly observed that "the New York Convention was the most effective instance of International legislation in the entire history of commercial law" in which India was a signatory to it. It was only much later, i.e., in 1986, Singapore adopted the same. Notwithstanding that, Lion City stands out as one of the prominent centres for International Commercial Arbitration since most of the parties chose it as a neutral venue for Arbitration. In a brief period, Singapore has emerged as a hub of International Arbitration, accompanying by popular Arbitration hubs like Geneva, London and Paris. The Supreme Court of Singapore has played a vital role in this development of ICA in Singapore. It has upheld arbitration agreements, construed public policy narrowly, and enforced foreign awards. Furthermore, the Singapore Government has always ensured world-class infrastructure and is known for its integrity and competence, guaranteeing business ease. So the investors are not confused while making investments in Singapore, giving a positive signal to the international community.

[97] Javed Gaya, *Judicial Ambush of Arbitration in India*, 120 L. Q. R. 571, 571 (2004).
[98] Malhotra, Om Prakash, and Indu Malhotra., 2006, op.cit., 13.

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Till 1940, the Arbitration Act of 1899 governed the arbitration law in India, which was a replica of the English Act[99]. So it was in 1940[100], India passed its first and foremost consolidated law governing the law of arbitration, namely The Arbitration Act 1940, based mainly on the English and Welsh Arbitration Act 1934. Initially, India was a closed economy until 1990, and hence, there was no need for "International Arbitration". The 1940 Arbitration Act governed the same along with the Foreign Awards (Recognition and Enforcement) Act, 1961 and the Arbitration (Protocol and Convention) Act, 1937. For the first time, India opened its market with the introduction of Liberalization, Privatization and Globalization[101]. Due to this, global investors started to invest in India, leading to a surge of various enterprises and MNCs. This has led to huge growth of foreign investments in India accompanied by drastic increment in cross border disputes.

In 1992, with the introduction of LPG (Liberalization, Privatisation and Globalisation), India opened its market for the first time. LPG policies were adopted to cope with the consequences of 1991 BoP (Balance of Payments) deficits. It has led to a surge of MNCs and a drastic increment in foreign investments in India. Domestic industries had to compete with the outside world. All these developments gradually led to an alarming growth of cross- border commercial disputes. Therefore, it was apparent that India would never be a hub for foreign nations unless it had implemented a proper and effective cross border dispute mechanism. Moreover, the 1940 Act was ineffective in dealing with the post 1990s disputes[102] raised due to drastic changes brought out by the LPG policy. Furthermore, after the 1947 Independence, since the industrial world started receiving a tremendous goad, they preferred "arbitration" as the mode of settling their disputes especially at the global level. Courtlitigation were time consuming and costly and also causes inordinate delays. And also, this Act was primarily designed to deal with cases of domestic commercial arbitration in mind and therefore it was only of limited assistance in India. No remedies were provided under the Act against the non-speaking awards and the arbiters were not required to state any reasons for sustaining awards. The Act also did not spoke of the situation where the arbitrator appointed by the Court dies during the arbitration proceedings. There was

[99] This 1899 Act has incorporated many provisions of English Act into the Indian law since India was under the British rule.

[100] In Medieval India, the case of the State of Orissa and Ors. v. Gangaram Chhapolia AIR 1982 Ori. 277: (1982) 54 CLT 214, traces the series of legal developments leading to codifying the arbitration law. It was for the first time, a step was taken to codifying a law for governing the submission of a dispute before an arbitrator.

[101] Vijay Joshi and I.M.D. Little, "Macroeconomic Stabilization in India, 1991-1993 and Beyond", Economic and Political Weekly, December 4, 1993, page 2659.

[102] The Law Commission of India also examined the working of the 1940 Act in its 176th Report; Vide M/sFuerest Day Lawson Ltd v. Jindal Exports Ltd., 2001 (3) SCALED 708 (India).

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no provision for the appointment of a new arbitrator. The marginal notes provided in the Act were also not considered as a part of this Act. This was another major flaw which this Act had faced.

Since the working of this Act was unsatisfactory, it has also faced adverse comments fromthe side of the judiciary in several cases. It is here noteworthy to mention about the case of Food Corporation of India v. Joginder Pal[103]. In this case the Court observed that

"Law of arbitration must be simple with lesser technicality and more responsible to the actual reality of the situations, responsive to the canons of justice and fair play."

And on September 29, 1981, the Supreme Court in the infamous Guru Nanak's case observed,

"Interminable, time-consuming, complex and expensive Court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedyfor resolution of disputes avoiding procedural claptrap and this led them to arbitration Act, 1940('Act' for short). However, the way in which the proceedings under the Act are conductedand without an exception challenged in Courts, has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Informal forum chosen by the disputant parties for expeditious disposal of their disputes has, by the decisions of the Courts been clothed with 'legalese' of unforeseeable complexity."[104]

The Law Commission of India has also suggested extensive amendments in the said Act considering the commercial realities and the inadequacies and discrepancies in the Act and also to settle the conflicting decisions.[105] Many legal experts suggested that the 1940 Act was out dated and it is not an appropriate legislation to meet the needs of the then world community's economic reforms. There was no comprehensive enactment in India to meet the present requirements to settle domestic and international commercial disputesamicably through arbitration machinery[106].

[103] AIR 1981 S C 2075: (1989) 2 SCC 347, at paragraph no. 7.

[104] AIR 1981 S C 2075 at 2076.

[105] [9] The 8th Law Commission under the Chairmanship of Hon'ble Justice Mr. H.R. Khanna, in its report no 76 dated 9th November 1978. There were around 10 reports (report no. 71 to 80) submitted between the years 1978till 1979.

[106] S.C.Tripathi. "Law of Arbitration & Conciliation in India with Alternative Means of Settlement of Disputes

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So it was high time to amend the said Act with extensive modifications so as to internationalize the Arbitration regime in India.

Apart from the 76th Report, various recommendations from the Indian Society of Arbitrators (ISA), Indian Council of Arbitration (ICA), the Confederation of Indian Industries (CII), the Associated Chambers of Commerce and Industry (ACCI) and the Federation of Indian Chambers of Commerce and Industry (FICCI), also made proposals for amendments in the said Act. On December 4 1993, a historic conference of Chief justices and Chief Ministers was conducted under the Chairmanship of the then Prime Minister, Shri P V Narasimha Rao to decide upon the question as to whether the 1940 Act should be subjected to amendments or a completely new Act is to be enacted by discarding the old one. The prime objective of the Conference was to deal with the issue of ever increasing number of cases. It was identified bythem that the economic reforms will be ineffective if it fails to be in tune with the international community standards like UNCITRAL Rules on Arbitration & Conciliation, UNCITRAL Model Law on International Commercial Arbitration and the International Commercial Arbitration Act, 1986 of British Columbia. Thus, it was concluded that a new Act which is in harmony with the Model Law is advantageous and was thus decided to enact a new piece of legislation to govern the arbitration regime in India containing provisions which is designed for an universal application.

Thus, taking into consideration the discrepancies and lacunas found in the then Arbitration law in India i.e., the 1940 Act, the Indian Government passed the Arbitration and Conciliation Act, 1996 (Act 26 of 1996).

Arbitration and Conciliation Act, 1996 (Act 26 of 1996):- It came into force on 25th January 1996. This Act was mainly based on the UNCITRAL[107] Model Law, The Arbitration (Protocol and Convention) Act, 1937, the Indian Arbitration Act, 1940, and the Foreign Awards (Recognition and Enforcement) Act, 1961[108]. Model Law was designed to deal with the ICA only[109], while the 1996 Act deals with both domestic and international laws. The Act's main objective was to ensure that the judiciary's role is the minimal and maximum scope of freedom vests with the parties. This

Resolution", Sixth Ed. Allahabad: Central Law Publications,(2012) , 1.

[107] UNCITRAL- United Nations Commission on International Trade Law

[108] This Act gave effect to the UNCITRAL Model Laws as adopted by the United Nations Commission onInternational Trade Law on 21 June 1985.

[109] Article 1 of the UNICITRAL Model Law, 1985.

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Act also goes beyond the Model Law in minimising the Court's intervention[110]. The Preambleof the Act reads as follows –

"An Act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards and also to define the law relating to conciliation and for matters connected therewith or incidental thereto."

It was intended to give effect to various international commitments to which India is asignatory namely,

- New York Convention 1958
- 1985 MODEL LAW and the like.

STATEMENT OF OBJECTS AND REASONS

The main objectives of the Arbitration and Conciliation Bill, 1995 as stated in thestatement of objects and reasons[111] are as follows:

i) To comprehensively cover international and commercial arbitration andconciliation as also domestic arbitration and conciliation;

ii) To make provision for an arbitral procedure this is fair, efficient andcapableof meeting the needs of the specific arbitration;

iii) To provide that the arbitral tribunal gives reasons for its arbitral award;

iv) To ensure that the arbitral tribunal remains within the limits of its jurisdiction;

v) To minimize the supervisory role of courts in the arbitral process;

vi) To permit an arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes;

vii) To provide that every final arbitral award is enforced in the same manner as if it were a decree of the court;

viii) To provide that a settlement agreement reached by the disputants as a result of conciliation proceedings will have the same status and effect as an 123 arbitral award on agreed terms on the

[110] S.K.Dholakia. "Analytical Appraisal of the Arbitration and Conciliation (Amendment) Bill, 2003", ICA'sArbitration Quarterly, ICA, New Delhi, vol. XXXIX/No.4, (2005), 3. (S K Dholakia is a Member of ICC International Court of Arbitration and Senior Advocate, Supreme Court of India).

[111] Sumeet Kachwaha , Dharmendra Rautray, Kachwaha & Partners. "Arbitration in India: An Overview", https://www.cvs.edu.in/upload/Arbitration%20in%20India%20httpsipba.org.pdf.pdf.pdf site visited on August 16 2021.

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substance of the dispute rendered by an arbitral tribunal; and,

ix) to provide that, for purposes of enforcement of foreign awards, every arbitral award made in a country to which one of the two International Conventions relating to foreign arbitral awards to which India is a party applies, will be treated as a foreign award.

Though the provisions contained in the Act intend to achieve the above mentioned objects, it along with a Bill does not form a part of the Act and therefore, should notbe used while interpreting the provisions of the Act. In the case State of Haryana v. Chanan Mal[112], the Supreme Court emphasise that the objects and reasons give an insight into the background as to why a particular provision was introduced. Though objects and reasons cannot be the ultimate guide in interpretation of statues, it often times aids in finding out what really persuaded the legislature to enact a particular provision. The SC observed in Narain Khamman v. Parduman Kumar[113]

"It is now well settled that though the statement of objects and reasons accompanying a legislative Bill cannot be used to determine the true meaning and effect of the substantive provisions of a statute, it is permissible to refer to the statement of objects and reasons accompanying a Bill, for the purpose of understanding the background ,the antecedent state of affairs ,the surrounding circumstances in relation to the statute, and the evil which the statute sough to remedy."

The SC has observed in P Anand Gajapati Raju v. PCG Raju[114], the legislative intention of the Act has been provided in Sections 5&8 and such these Sections have been interpreted. In Everest Lasson Ltd. v. Jindal Exports Ltd[115], the SC while underlining the object of the Act, 1996, has held that through alternative dispute resolution system, the dispute should be resolved quickly and with lesser costs.

In Furest Day Lawson Ltd v. Jindal Exports Ltd[116]**,** the Court observed that the object of the Act is to provide a speedy and alternative solution to the dispute and to avoid protraction of litigation. The provision of the Act has to be interpreted accordingly. The Court further held that though objects and reasons of an enactment cannot be the ultimate guide in interpretation of statutes but

[112] (1977) 1 SCC 340,355.
[113] (1985) 1 SCC 8 (para 12).
[114] AIR 2000 SC 539.
[115] AIR 2001 SC 356.
[116] AIR 2001 SC 2293.

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they do help in finding out the true legislative intent behind enacting a particular provision of the Act.

SALIENT FEATURES OF 1996 ACT

The salient features of the 1996 Act is as follows[117] –

1. Party Autonomy

The central theme of the Act is the idea of "party autonomy" and isstrengthenedby the following expressions –

- Unless otherwise agreed by the parties
- If the disputant parties has expressly authorized
- With the agreement of parties and the like.

2. Arbitral Award

- Arbitral tribunal's award is termed as an arbitral award.
- The arbitrator can decide the dispute in good faith and justice (ex aequo etbono) if the parties expressly authorized him to do so.
- The decision of the arbitral tribunal will be by majority.
- The arbitral award shall be in writing and signed by members of thearbitral tribunal.
- The award should be dated and the place, where it is made, should bementioned.
- Copy of award should be given to each party.

3. Reasoned Award

- The arbitral award must be in writing and signed by the Arbitral Tribunalmembers.
- The reasons for the award must be stated except the parties have agreedthat no reasons are to be given. Earlier the reasoning was notmandatory.

4. Necessity of Arbitration Agreement

- As per the Act, without an arbitration agreement, no arbitralproceedingscan be instituted.

[117] https://thefactfactor.com/facts/law/civil_law/alternate-dispute-resolution/arbitration-and-conciliation-act-1996/16477/ site visited on August 26 2021.

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5. Procedural Advantage

- Arbitral Tribunal has full powers to decide the procedure to be followed unless parties agree on the procedure to be followed.
- The tribunal also has powers to determine the admissibility,materiality relevance and weight of any evidence.
- The place of arbitration is decided by mutual agreement. However, if the parties do not agree to the place, the tribunal will decide the same.
- Similarly, language to be used in the arbitral proceedings can bemutually agreed upon. Otherwise the tribunal can decide.
- The Act allows parties to choose substantive law to be applied by the arbitration tribunal and this must also be mentioned in the arbitration agreement.

6. Minimal judicial interference

- One of the major defects of earlier arbitration law was that the party could access court almost at every stage of arbitration – right from the appointment of an arbitrator to the implementation of the final award. Thus the defending party could approach the court at various stages and stall the proceedings.
- Now the approach to court has been drastically curtailed.
- In some cases if an objection is raised by the party the decision on thatobjection can be given by arbitral tribunal itself. After the decision, the arbitration proceedings are continued and the aggrieved party can approach court only after arbitral award is made.

7. Application to domestic and international commercial arbitration

- The Act provides the procedure for both the international commercial arbitration and domestic arbitration.
- The Act of 1996 is a law that relates to the enforcement of foreign arbitration awards and ensures greater autonomy in the process of arbitration and puts a limit on the intervention of judiciary.

8. Overriding effect of the Act

- Section 5 of the Act clarifies that notwithstanding anything contained in any other law for the time being in force in matters governed by the Act the judicial authority can intervene only as provided in this Act and not under any other Act.

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9. Applicability of the Limitation Act

- For this purpose, the date on which the aggrieved party requests anotherparty to refer the matter to arbitration shall be considered.
- If on that date, the claim is barred under Limitation Act, thearbitrationcannot continue.
- If the arbitration award is set aside by Court, time spent in arbitrationwillbe excluded for purpose of the Limitation Act.

10. Aligning Procedure with the UNCITRAL Model Law

- The Act has been enacted taking into account the UNCITRAL Model Law and UNCITRAL Conciliation Rules.
- This promotes unification and harmonization of International trade law by harmonizing concepts of arbitration and conciliation of the legal system of the world.

11. Clear distinction between Arbitration and Conciliation

- The provisions that relate to the process of arbitration are contained in PartI which includes Chapters I to IX, while the provisions that relate to the process of Conciliation are dealt with in Part III that includes Sec 61 to 81.

12. Enforceability of Award

- Under this Act, every final arbitral award is enforceable as a decreeof thecourt of law and not required to be made a "rule of court".

13. Conciliation

- Conciliation is the amicable settlement of disputes between the parties, with the help of a conciliator.
- Part III of the Act provides for the conciliation proceedings
- There is no agreement for arbitration in a conciliation proceeding. In fact, conciliation can be done even if there is an agreement for arbitration.
- The conciliator only brings parties together and tries to solve the dispute using his good offices.
- The conciliator has no authority to give an award. He only helps parties in arriving at a mutually

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acceptable settlement.

- After such an agreement they may draw and sign a written settlement agreement. However after the settlement agreement is signed by both the parties and the conciliator, it has the same status and effect as if it is an arbitral award.

In Centrotrade Minerals & Metals Inc v. Hindustan Copper Ltd[118], the Court gavebeneficial features of the 1996 Act as follows:

1. Fair resolution of a dispute by an international dispute by an impartial tribunal without any unnecessary delay or expense;
2. Party autonomy is paramount subject only to such safeguards as arenecessary in public interest; and
3. The arbitral tribunal is enjoined with a duty to act fairly andimpartially.

The Court also gave some of the Act's shortcomings also –

1. No provision is made for expediting awards or the subsequent proceedings in the court where applications are filed for setting asideawards; and
2. An aggrieved party has to start again from the District Court for challenging the award.

The 176th Law Commission Report entailed a review of the functioning of the said Act on account of the various flaws remarked in its provisions, and specific representations received. The Commission analysed various representations and pointed out that the UNCITRALModel mainly planned to facilitate various countries with a standard model for international commercial arbitration.

However, the Court started to wrongly interpret the provisions of this Act, which has destroyed the spirit of the Act, which actually made the autonomy of the parties in question.[119] This has resulted in the causing of reluctance of parties to choose the Indian law.[120] Later,there were

[118] (2006) 11 SCC 245.

[119] Available at http://pib.nic.in/release/release.asp?relid=17020 site visited on 15 August 2021.

[120] Justice B.P SARAF Committee Report., 2005. This Committee is infamously known as the "Justice Saraf Committee on Arbitration". It was constituted to study the seriousness of suggestions made by the recommendations contained in the 176th Law Commission Report and the Arbitration and Conciliation (Amendment) Bill, 2003. It was headed by Justice Dr. B. P. Saraf, Retired Chief Justice of the High Court of Jammu & Kashmir. The Committee presented its final report in January 2005. The Report made a detailed evaluation of the recommendations of the Law Commission and suggested suitable lines on which the 1996 Actcould be amended for improving the system of arbitration in India. In April 2006 the Government made a decision to 'withdraw' the Bill from Rajya Sabha, where

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issues while interpreting the provisions of Ss. 8, 12, 17, 24, 29A, 34, 36 and 42 of the 1996 Act respectively, which led to the amendments in 2015 and 2019 respectively.[121]

Very recently in 2021, the Lok Sabha has passed the Arbitration and Conciliation (Amendment) Bill, 2021 to check misuse by "fly-by-night" operators who take advantage of the law to get favourable awards by fraud. It also does away with qualifications of the arbitrators under 8th Schedule of the 1996 Act. The qualifications foraccreditation of arbitrators are proposed to be prescribed by regulations to be framed by an Arbitration Council to be set up. Checking misuse of the provisions under the Act would save the taxpayers' money by holding these accountable who siphoned off to themunlawfully. The Bill of 2021 also seeks to amend Sec. 36 of the 1996 Act and raises several concerns as it provides for an unconditional stay on the operation of the award in case fraud or corruption is involved. This will take us back to the era of the automatic stay of arbitral awards as it would make it convenient for the judgment debtor to avoid their obligations under the award. There is still an ambiguity as to what constitutes fraud or corruption as it has not been defined under the 1996 Act. Thus in every case, a judgment debtor may allege fraud and corruption for getting an unconditional stay on the operation of the award. As a result, the enforcement of awards will get more difficult and the ease of doing business will be adversely affected. This is just one issue that is there inthe 2021 Amendment. In fact, the 2021 Amendment had undone the work that 2015 had done and its implementation will result in excessive judicial interference defeating the very purpose of arbitration.

2. JUDICIAL APPROACH

The Arbitration and Conciliation Act, 1996[122] is an attempt in implementing the UNCITRAL Model Law[123] and to create a pro-arbitration legal framework in India, something which was a"mere illusion" under the Arbitration Act, 1940, upon which Hon.Desai, J., said:

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it was introduced. www.parinda.com/news_archieves/jan2005/justice-b.p.-saraf-submits-report-on-arbitration.shtml site visited on 15 August 2021.

[121] Nikhil Suresh Pareek, International Commercial Arbitration in India: Governing Law Issues, 18 Unif. L. Rev.154 (2019). pp.154-165.

[122] Hereinafter referred to as the Act.

[123] Malaysian Airlines Systems Bhd (II) v. STIC Travels (P) Ltd. 2000 (7) SCALE 724; India Household and Healthcare Ltd. v. LG Household and Healthcare Ltd. (2007) 5 SCC 510; R.M. Investment & Trading Co. Pvt. Ltd. v. Boeing Co., (1994) 4 SCC 541; Rashtriya Ispat Nigam Ltd. v. Verma Transport Company, (2006) 7 SCC275; Sundaram Finance Ltd. v. NEPC India Ltd. (1999) 2 SCC 479; Gas Authority of India Ltd. v. Keti Construction (I) Ltd., (2007) 5 SCC 38.

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"The way in which the proceedings under the Act are conducted andwithout exception challenged in courts, has made lawyers laugh and legal philosophersweep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical, accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Informal forum chosen by the parties for the expeditious disposal of their disputes has by the decisions of the Courts been clothed with 'legalese' of unforeseen complexity."[124]

The main purpose of the Act[125] was to minimise judicial intervention so as to make India arbitration-friendly. But a close scrutiny of the judicial pronouncements in the area of international commercial arbitration will reveal the fact that this purpose is not truly fulfilled. These decisions were also criticised by the practitioners worldwide because of itbeing in direct conflict with the objectives of the Act[126] and this interventionism of the Indian Judiciaryhas been regarded as the greatest hindrance to India's development into arbitration hub.[127] To overcome the grave trepidation of the obstacle of judicial interference, this Act came into force. It is lamentable that through these judicial interpretations, the very purpose of this Act has been demoted to a regrettable nullity. Unless the Indian judiciary resists the appeal to intervene in arbitrations, it will always make the potential foreign investors having trade relations with India distrust while incorporating an arbitration clause. Some of the landmark decisions in the realm of international commercial arbitration in India is discussed below:

1. Bhatia International v. Bulk Trading SA[128]

The decision, in this case, was a misadventure in the area of international commercial arbitration, and it continued for a long time. It had set out a severe setback to the reputation of the Indian arbitration regime. This decision was severely criticized as grossly erroneous by many experts worldwide.[129]

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[124] Guru Nanak Foundation v. Rattan Singh & Sons, AIR 1981 SC 2075, 2076-77, per Desai J.

[125] Sec 5 of the Act provides as follows –

"Notwithstanding anything contained in any other law for the time being in force, in matters governed by thisPart, no judicial authority shall intervene except where so provided in this Part."

[126] Tom Birch Reynardson and Rupert Talbot Garman, "The Consultation Paper on Amendments to the Indian Arbitration and Conciliation Act, 1996- Does it go far enough?" 14(3) International Arbitration Law Review 90-98 (2011).

[127] Devika Khanna, "Arbitrator's recent adventures and misadventures in India" 15(6) International Arbirationlaw Review 203 (2012).

[128] (2012) 9 SCC 552.

[129] Vasudha Sharma & Pankhuri Agarwal, "Rendering India into an Arbitration Friendly Jurisdiction- Analysisof the Proposed Amendments to the Arbitration and Conciliation Act, 1996", 3 NUJS L. REV. 535 (2010);

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The arbitration proceedings, in this case, were held in Paris as per the ICC Rules of Arbitration. Under Section 9 of the 1996 Act, an application was moved for an injunctionorder restraining the transfer, creation or alienation of third-party rights on property. It was held that the application was maintainable.

The court held Part I of the 1996 Act to apply to arbitrations though the place of arbitration is outside India. The parties are free to exclude either expressly or impliedly the applicability of Part I of the Act. The Court reasoned that the following anomalies would arise where Part 1 isheld to be applicable to such arbitrations:

1. Part 1 would apply to J&K in all cross border commercial arbitrations (including arbitrations held outside) but for the rest of India, Part I would not apply to arbitrations of such nature;
2. A party to an arbitration held outside would have no remedy to obtain interim relief even if the assets (which are a subject matter oftheapplication for interim measure) are in India;
3. Ss. 2 (4) and (5) would be in conflict with Sec 2(2) of the Act;
4. There would be no law governing arbitrations held in non- conventioncountries.[130]

The court also opined that remedies provided under Section 9 of the 1996 Act would not be excluded just because the ICC Rules of Arbitration were applied.

The Hon. Supreme Court of India held that –

"To conclude, we hold that the provisions of Part I of the 1996 Act would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India, the provisions of Part I would compulsorily apply and parties are free to deviate onlyto the extent permitted by the derogatory provisions of Part I. In cases of International Commercial Arbitrations, held out of India, provisions of PartI would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would

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http://practicalacademic.blogspot.com/2010/05/review -of-consulation-paper-on.html ,site visited on Sept 24,

[130] [130] Non convention countries are those countries which are not signatories to any of the following conventionsor protocols –

1. Geneva Convention on the Execution of Foreign Arbitral Awards, 1927
2. Geneva Protocol on Arbitration Clauses, 1923
3. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
4. Geneva Protocol on Arbitration Clauses, 1923

Examples: Belize, East Timor, Ethiopia, Yemen, Comoros, Eritrea etc.

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prevail. Provisions in Part I of the Act which are contrary to or excluded by that law or rules shall not apply."

One of the justifications that the Court gave was that Part I did not provided for interim measures in those arbitrations which were held outside India. This one was one of the major issues which confronted the Court. Prior to this case also, many conflicting decisions were given by different High Courts on court's power to order interim measures to protect arbitrations held outside India. When some held that such a power is not vested to the courtby the statute[131], others stood by the opinion that since Part I is equally applicable to arbitrations held outside India, a Court do have the power to order interim measures[132] (to be taken under Sec 9 of the 1996 Act).

2. Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.,[133]

All legal speculations which have arisen because of Bhatia case[134] was put to rest by the Hon'ble Supreme Court of India by overruling the same. It affirmatively held the following:

1. Part I is applicable only to such arbitrations which take place within the Indian Territory.
2. Section 2(2) makes a declaration that Part I shall apply to all arbitrations which take place within India. Part I, therefore, has no application to cross border Commercial Arbitrations which are held outside India. Provisions contained in Section 2(2) are not in conflict with any of the provisions contained in Part I or Part II.
3. The 1996 Act has accepted the territoriality principle.[135]
4. No application for interim relief in a foreign seated international commercial arbitration is maintainable; neither under Section 9 of the 1996Act nor under any other provision of Part I of the 1996 Act.

The law applied by Bhatia case with regard to the applicability of Part I to international commercial arbitrations was prospectively repealed by this case. But it still holds ground and applies prospectively with respect to agreements entered into between the parties prior to 6

[131] East Coast Shipping v. M. J. Scrap. (1997) 1 Cal HN 444; Kitechnology N V v. Unicor GmBH Rahn Plastmaschinen, 1999 (1) Arb LR 452 (Delhi); Marriot Hotels v. AnsalInternational, 2000(3) Arb LR 369(Delhi).

[132] Olex Focas Pty. Ltd. v. Skodaexport Co. Ltd., 1999 (Suppl.) Arb LR 533 (Delhi).X

[133] (2012) 9 SCC 552.

[134] Bhatia International v. Bulk Trading S A (2002) 4 SCC 105.

[135] The territoriality principle has been adopted in the UNCITRAL Model Law.

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September 2012 (the date when the judgment in the BALCO case was rendered).[136]

3. Hardy Oil and Gas Limited v. Hindustan Oil Exploration Company Limited andOrs.,[137]

The Gujarat High Court in this case stated that the Courts in India do not have jurisdiction to entertain the petition filed under Section 9 of the Act, in matters involving international commercial arbitration, once the parties had agreed to be governed by any law, other than Indian law. It held that since the parties had "expressly" chosen English law to be the law governing the arbitration, Part-I was impliedly excluded.

4. Videocon Industries Ltd. v. Union of India[138]

The Court held that Part I was excluded by virtue of English Law being chosen as the law governing the arbitration.

5. Reliance Industries *v.* Union of India[139]

In this case, the parties had consciously and expressly agreed that the juridical seat of arbitration would be London and the Arbitration agreement would be governed by the English Law. So the Court held that it was no longer open to them to contend that Part Iwould also be applicable or as to its corollary Section 9 which is included in Part I.

6. Chloro Controls (I) P. Ltd. v. Seven Trent Water Purification Inc. & Ors[140]

The Hon. Supreme Court had interpreted that in an exceptional situation a non-signatory to an arbitration agreement can be referred, to settle the dispute through the Arbitration mechanism, and to put a defined scope for the complex concept of Public Policy[141] especially in case of foreign seated arbitration.

7. Swiss Timing Limited v. Organising Committee, Commonwealth Games2010,Delhi[142]

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[136] Available at https://www.mondaq.com/india/arbitration-dispute-resolution/977830/overview-five-landmark-judgements-on-cross-border-arbitration-in-india .

[137] (2006) 1 GLR 658.

[138] (2011) 6 SCC 161 : 2011(5) SCALE 678.

[139] (2014) 4 CTC 75.

[140] AIR 1994 SC 1136.

[141] Shri Lal Mahal Ltd. v. Progetto Grano Spa, 2003(2) ARB LR 5 (SC).

[142] AIR 2014 SC 3723.

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The Hon. Supreme Court held that even fraud is considered as arbitrable, and regarding the appointment[143] and impartiality of the Arbitrators[144] etc.

8. Max India Ltd. *v.* General Binding Corporation[145]

It was held by a Division Bench of the Delhi High Court that since the parties have expressly chosen foreign law to apply to the main contract, foreign law governing the arbitration agreement and seat of arbitration in a foreign country, it had led to an unmistakable intention and inescapable conclusion of the parties to exclude Part I of the Act and its corollary Section9 which is included in Part I of the Act 1996.

9. Enercon (India) Ltd & Ors. v. Enercon GmbH & Anr.[146]

The Court held that the venue of arbitration is the geographical location chosen based on the convenience of the parties. It is different from the seat of the arbitration, which decides the appropriate jurisdiction. While courts of "seat" of arbitration have got the exclusive jurisdiction to exercise supervisory powers on the process of arbitration, the courts of venueof arbitration is only vested with concurrent jurisdiction.

10. Kvaerner Cementation India Limited v. Bajranglal Agarwal[147]

In 2001, the Hon'ble Supreme Court of India delivered this most relied and legendary judgement, which was later followed in a plethora of cases[148] in matters of anti- arbitration injuctions. In this case the Court confirmed the position that no dispute can be referred to arbitration in the absence of any arbitration clause. It further held that keeping in mind the very purpose of the Act, the arbitral tribunal has the power to decide as a preliminary issue onthe following matters –

- its own jurisdiction; and
- on the existence and validity of an arbitration agreement.

[143] Antrix Corp. Ltd v. Devas Multimedia P. Ltd., 2013 (7) SCALE 216.
[144] Reliance Industries Ltd. & Ors. v. Union of India, AIR 2014 SC 2342
[145] 2009 (3) ARB LR 162 (Delhi).
[146] (2014) 5 SCC 1.
[147] (2012) 5 SCC 214.
[148] The observations and principles set out in the Kvaerner judgment were distinctly departed by various decisions such as McDonald's India Private Limited v. Vikram Bakshi and Ors 2016 SCC OnLine Del 3949 and The Board of Trustees of Port of Kolkata v. Louis Dreyfus Armatures SAS and Ors., 2019 SCC OnLine Bom 251.

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On such ground, the Court has dismissed the anti-arbitration injunction suit.

11. SBP & Co v. Patel Engineering Limited[149]

It was held that it cannot be said that the arbitrator has the absolute right to decide on its own jurisdiction to the exclusion of the Civil Courts' jurisdiction. The Court has observed that the Civil Courts retains its jurisdiction to grant injunction under Sec 9 of the Civil Procedure Code, 1908.

12. World Sport Group (Mauritius) Ltd v. MSM Satellite Singapore Ltd[150]

It was held that the scope of enquiry under Sec 45 of the Act is only to examine whether the arbitration agreement is null and void or inoperative or incapable of being performed, the Civil Court cannot venture into examining the validity or legality of the substantive contract. This, once again, mandated the Civil Court to entertain these anti-arbitration injunction suits to at least examine the arbitration agreement, as opposed to the approach followed in Kvaerner Judgement where the Civil Courts were to simplicitor refer the issue to the arbitrator to rule in its own jurisdiction. This decision has further limited the role of an arbitrator to rule its own jurisdiction.

Despite the common observations in the various judgements abovementioned, the Indian courts made a sudden and abrupt return to the observations and principles set out in Kvaerner judgement.[151]

13. Himachal Sorang Power Private Limited v. NCC Infrastructure Holdings Limited[152]

In this case, the Court laid down the following parameters:

"The principles governing anti-suit injunction are not identical to those that govern an anti-arbitration injunction. Courts are slow in granting an anti- arbitration injunction unless it concludes that the proceeding initiated is vexatious and/or oppressive. The fact that in the assessment of the Court a trial would be required would be a factor that would weigh against the

[149] (2005) 8 SCC 618.
[150] (2014) 11 SCC 639.
[151] Ravi Arya v. Palmview Investments Overseas 2019 SCC OnLine Bom 251; Lafarge India Pvt Ltd. v. EmamiRealty and Anr.,(2016) SCC OnLine Cal 4964; National Aluminum Company Ltd. v. Subhash Infra Engineering Pvt. Ltd., 2019 SCC OnLine SC 1091; A. Ayyasamy v. A. Paramasivam and Ors., (2016) 10 SCC 386; Chatterjee Petrochem Company and Anr. v. Haldia Petrochemicals Ltd., (2014) 14 SCC 574; Himachal Sarang Power Pvt Ltd. v. NCC Infrastructure 2019 SCC OnLine DEL 7575.
[152] 2019 SCC OnLine DEL 7575.

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grant of anti-arbitration injunction. The aggrieved should be encouraged to approach either the Arbitral Tribunal or the Court which has the supervisory jurisdiction in the matter. An endeavour should be made to support and aid arbitration rather than allow parties to move away from the chosen adjudicatory process."

14. Bina Modi & Ors v. Lalit Modi & Ors[153]

The Delhi High Court, in this case, held that an arbitral injunction suit is not maintainable.

15. Balasore Alloys Limited v. Medima LLC[154]

The Calcutta High Court had, in this case, held that "*courts in India do have the power togrant anti-arbitration injunctions*", even against foreign seated arbitrations. This decisioncame just months after the Bina Modi decision was passed by the Delhi High Court.

III. HONG KONG

1. LEGISLATIVE APPROACH

The Hong Kong city serves as a gateway to investment in mainland China, along with Beijing, which has long been committed to making Hong Kong the paradise of dispute resolutions relating to the multi-billion-dollar BRI (Belt and Road Initiative) and the GBA (Greater Bay Area) development. Due to a rapid rise in cross-border transactions and the rapid economic growth in the markets, arbitration users across the globe are demanding both a pro-arbitration and pro-enforcement judicial climate and a robust advanced regulatoryframework. Hong Kong has been thriving in sanctioning thesedemands both in practice and in principle.

In 1985, the Hong Kong Law Reform Commission was asked to consider whether the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") should be adopted as part of the law in Hong Kong, and to make recommendations on modifications to the Arbitration Ordinance accordingly.[155] The Commission held the opinion that the adoption of the Model Law as part of Hong Kong law, subject to a few minor changes (including merely one deletion and four

[153] 2020 SCC OnLine Del 901.
[154] (2020) 9 SCC 136.
[155] The Law Reform Commission of Hong Kong, Report on the Adoption of the UNCITRAL Model Law ofArbitration 1 (1987).

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additions to the Model Law), would bring Hong Kong a great benefit.[156] Their proposal was fully implemented by Arbitration (Amendment) (No. 2) Ordinance in 1989.[157]

ARBITRATION ORDINANCE – The legislative framework that regulates all the arbitrations seated in Hong Kong is the Arbitration Ordinance[158] (Cap 609 of the Laws ofHong Kong). It replaced the previous arbitration legislation, i.e., the Arbitration Ordinance Cap. 341. It came into effect on June 1, 2011, and is based on the 2006 version[159] of the UNCITRAL (United Nations Commission on International Trade Law) Model Law – a set of legislative text promulgated by a body of the United Nations reflecting the global arbitration practice. Thus, allowing both the courts and tribunals to grant arbitration friendly interim measures. It is the first jurisdiction[160] in the world to do so, and this had further strengthened the Hong Kong judiciary's ability to enforce interim measures granted outside. The Model Law is largely integrated into the new Arbitration Ordinance, in the hope of "[facilitating] the 'fair and speed' resolution of disputes, providing for maximum party autonomy and minimal court intervention".[161] Hong Kong is treated as a Contracting State to New York Convention, 1958[162] and is provided with the two reservations same as the People's Republic of China (PRC), namely the commercial and reciprocity reservation. The Ordinance also contains some Hong Kong specific provisions[163] and certain optional provisions that can be inserted in the agreement.[164]

The new Ordinance has distinguished features, including: (1) abolishing the distinction between "domestic" and "international" arbitration; (2) availing interim measures (by both the court and the arbitral tribunal); (3) codifying the new obligation of confidentiality; (4) promoting alternative

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[156] *Id.*, at 5, 12, 18-26.

[157] The Law Reform Commission of Hong Kong, Implementation, The Law Reform Commission of HongKong, available at http://www.hkreform.gov.hk/en/implementation/#a.

[158] Hereinafter referred to as 'The Ordinance'.

[159] As amended on 7 July 2006, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf.

[160] Hong Kong is the first ever jurisdiction to adopt UNCITRAL Model Law as their procedural law forarbitration.

[161] Justin D'Agostino, Simon Chapman & Ula Cartwright-Finch for Herbert Smith Freehills, New Hong Kong Arbitration Ordinance comes into effect, Kluwer Arbitration Blog (1 June 2011), http://kluwerarbitrationblog.com/blog/2011/06/01/new-hong-kong-arbitration-ordinance-comes-intoeffect/.

[162] The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New YorkConvention"), 330 U.N.T.S. 38.

[163] This includes provisions for confidentiality and consolidation. Articles 27, 28 and 29 of the HKIAC Administered Arbitration Rules (Rules), 2013 governs the "consolidation" portion. Schedule 2 the Ordinance also that the Court has the power to order consolidation of arbitration proceedings. Hong Kong is one among thefew jurisdictions to embody (an express duty of) confidentiality in arbitral proceedings. Others are Singapore, Japan, Indonesia, India etc. These are not available under the Model Law.

[164] These are the provisions that permit appeal either on some serious irregularity or on a point of law and on consolidation.

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dispute resolution; and (5) including provisions in regard of the enforcement of arbitral awards.[165]

The Ordinance provides for a clear and comprehensive legal regime for arbitration in Hong Kong. There are no distinctions between domestic and international arbitrations. The Ordinance is a living document that is rapidly evolving and updated regularly to include amendments to improve the arbitration process in Hong Kong. Some of the latest amendments include –

- The use of third party funding in arbitrations and associated proceedings based in Hong Kong;
- The enforceability of relief issued by emergency arbitrators in oroutside Hong Kong; and
- The ability to submit disputes over IPRs (Intellectual PropertyRights)to arbitrations in Hong Kong.

The Ordinance is a user-friendly piece of legislation for both domestic and foreign arbitrationusers. It has also enhanced the confidentiality of international arbitration. No arbitration- related court proceedings are to be heard or conducted in open court. Also, the publication, communication or disclosure of any information regarding the arbitral awards and proceedings is prohibited by the Ordinance unless it is provided under any exceptions in the Ordinance or if agreed to by the parties involved in the arbitration. The Ordinance follows a minimal judicial interventionist approach in arbitral proceedings. The court can intervene in the arbitral proceedings only under specific circumstances. Power of appeal to proceedings is also restricted under the Ordinance to ensure just and speedy resolution of disputes via arbitration. Foreign practitioners and law firms are also allowed to advise on and engage in arbitration in Hong Kong. Parties may also retain advisers regardless of their professional qualifications and nationalities. The Ordinance retains the status quo of the domestic subcontracting agreements in the construction industry, applying the domestic regime by opt- in provisions. It is this well updated, modern and sophisticated Ordinance along with the judiciary and HKIAC that have cemented Hong Kong as the arbitration venue.

On 19 May 2021, the **Arbitration (Amendment) Ordinance 2021 (Amended Arbitration Ordinance)** was passed with the aim of ensuring timely enforcement against parties who have assets in both Hong Kong and Mainland, provided the recovered amount not exceeding the

[165] Justin D'Agostino, Simon Chapman & Ula Cartwright-Finch for Herbert Smith Freehills, New Hong Kong Arbitration Ordinance comes into effect, Kluwer Arbitration Blog (1 June 2011), http://kluwerarbitrationblog.com/blog/2011/06/01/new-hong-kong-arbitration-ordinance-comes-intoeffect/.

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amount determined in the arbitral award. It came into effect to implement the following articles:

- **Article 2 extends coverage to all Mainland awards**: Under the original Arrangement, only those arbitral awards which were made by a specified listof "recognised" Mainland arbitral authorities were made enforceable in Hong Kong. The amended Arbitration Ordinance had now removed this concept of "recognised" Mainland arbitral authorities, pursuant to Article 2, Supplemental Arrangement. All Mainland awards are now enforceable in HongKong under theSupplemental Arrangement, provided they are rendered pursuant to the PRC Arbitration Law.

- **Article 3 allows parallel enforcement in Hong Kong and Mainland China**: Sec 93 of the Ordinance originally prohibited "parallel enforcement", namely applying to enforce an award in Mainland and Hong Kong simultaneously. The Amended Arbitration Ordinance has now repealed Sec 93 pursuant to Article 3 of the Supplemental Arrangement, allowing simultaneous enforcement of arbitral awards in Mainland and Hong Kong.

Following the onset of the COVID-19 pandemic, in anticipation of an upsurge of disputes arising from or relating to COVID-19, the Government announced on 8 April 2020 the establishment of the **COVID-19 Online Dispute Resolution Scheme**[166] under the Anti- epidemic Fund to provide speedy and cost effective ODR services to the general public and businesses, in particular MSMEs. It was launched on 29 June 2020. The eBRAM Centre (eBRAM International Online Dispute Resolution Centre Limited) has been engaged toprovide ODR and the related services under the Scheme. It operates the Scheme independently.

Under the Scheme, a dispute can be submitted to the online platform for resolution if it

(i) involves one party from Hong Kong (a resident of Hong Kongor acompany registered in Hong Kong);

(ii) involves a dispute amount of not more than HK$500,000; and

(i) is COVID-19 related.

2. JUDICIAL APPROACH

The infamously known vertical city, Xiāng Gǎng or Hong Kong, is home to a boaster of an independent judiciary and a deep pool of highly skilled legal talent. Its courts have long been

[166] Hereinafter referred to as the Scheme.

famous for their pro-enforcement[167] and pro-arbitration approach[168]. It always had taken the utmost care in ensuring a "hands-off" approach in arbitration. A key attribute that underpins its position as one of the most attractive arbitration venues in the field of commercial dispute resolution is the presence of this approach. In the case Re Petro China International (Hong Kong) Corp Ltd,[169] the Court of Appeal has said that enforcement of arbitral awards should be "almost a matter of administrative procedure" and the court's task in this regard should be "as mechanistic as possible" in that it was not entitled to go behind the award by exploring the reasoning of the arbitral tribunal, or second-guessing its intention.[170]

Hong Kong has emerged triumphant in recognising the global demands of having an arbitration-friendly judicial climate and a robust legislative framework in principle and practice. The Hong Kong judiciary is a well-known, globally respected legal system that has been built on years of long-established jurisprudentially valuable precedents. In the first instance, a specialist judge (a judge with relevant expertise in arbitration matters) alwayshears the arbitration-related cases.

Moreover, the Courts act independently on par with the provisions contained in the Ordinance, such as arbitral awards' enforcement and interim measures' issuance. In fact, Hong Kong is ranked number 4 among the 148 countries on the index of judicialindependence in the — the global competitiveness report 2013-2014 — published by the World Economic Forum right after New Zealand, Finland, and Ireland.[171] As per the HKIAC (Hong Kong International Arbitration Centre) website[172], the Hong Kong courts have maintained an exceptional track record in enforcing arbitral awards. Between the years 2011 and 2014, the courts have not refused to enforce an arbitral award. However,if we take the years from 2009 to 2017, the courts only refused to enforce seven awards out of the received 249 applications, i.e., it has got an enforcement rate of 97.2%. The Hong Kong judiciary has always maintained a minimal intervention policy in the arbitral regime and has supported itby upholding its finality and enforcement. The Hong Kong judiciary has long

[167] Grand Pacific Holdings Ltd v. Pacific China Holdings Ltd (in liq) (No.1), [2012] 4 H.K.L.R.D.I.
[168] Paquito Lima Buton v. Rainbow Joy Shipping Ltd Inc., [2008‖]4 H.K.C 14,55.
[169] [2011] 4 HKLRD 604.
[170] https://law.asia/pro-enforcement-policy-for-awards-in-hk-courts/#:~:text=H%20ong%20Kong%20courts%20have%20always%20adopted%20a,to%20enforce%20any%20award%20between%202011%20and%202014 site visited on Aug 31 2021.
[171] The Global Competitiveness Report 2013-2014, available at https://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf site visited on August 26,2021
[172] https://www.hkiac.org/arbitration/why-hong-kong site visited on August 26 2021.

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been a beacon in the region, upholding the rule of law and representing a truly independence judiciary freeof any influence.[173] In terms of how the discretion of the Court is to be applied, Hong Kong is holding a far more developed position. Furthermore, the courts have also developed an indemnity costs rule.[174]

The judgment passed by Justice Mimmie Chan in the case KB v. S and Others[175] strengthens the principles of judicial support in arbitration proceedings. The judgment sets out "ten commandments", which underpins the court's attitude concerning the enforcement of the arbitral awards. It also sanctifies the minimal judicial interventionist approach. Justice Chan began her judgment by succinctly summarising the key principlesbehind the Hong Kong judiciary's attitude and approach to enforcement of arbitral agreements and awards. In view of their importance and application to the case, these principles are set out below verbatim:

- The primary aim of the court is to facilitate the arbitral process and to assist with enforcement of arbitral awards.
- Under the Arbitration Ordinance (Ordinance), the court should only interfere in the arbitration of the dispute as expressly provided for in the Ordinance.
- Subject to the observance of the safeguards that are necessary in the public interest, the parties to a dispute should be free to agree on how their dispute should be resolved.
- Enforcement of arbitral awards should be "almost a matter of administrative procedure" and the courts should be "as mechanistic as possible".[176]
- The courts are prepared to enforce awards except where complaints of substance can be made good. The party opposing enforcement has to show a real risk of prejudice and that its rights are shown to have been violated in a material way.[177]
- In dealing with applications to set aside an arbitral award, or to refuse enforcement of an award, whether on the ground of not having been given notice of the arbitral proceedings, inability to present one's case, or that the composition of the tribunal or the arbitral procedure was not in accordance with the parties' agreement, the court is concerned with the structural integrity of the arbitration proceedings. In this regard, the conduct complained of "must be serious, even egregious", before the court would find that there was an error sufficiently serious so as to have

[173] Teresa Y.W. Cheng. Michael J, Moser, Hong Kong Arbitration: A User's Guide 17 (2nd ed., 2008).
[174] As per this rule the parties are deterred from resisting arbitral awards or proceedings on unmeritoriousgrounds.
[175] HCCT 13/2015.
[176] Re PetroChina International (Hong Kong) Corp Ltd [2011] 4 HKLRD 604.
[177] Grand Pacific Holdings v. China Holdings Ltd [2012] 4 HKLRD 1 (CA).

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undermined due process.[178]

- In considering whether or not to refuse the enforcement of the award, the court does not look into the merits or at the underlying transaction.[179]
- Failure to make prompt objection to the Tribunal or the supervisory court may constitute estoppel or want of *bona fide*.[180]
- Even if sufficient grounds are made out either to refuse enforcement or to set aside an arbitral award, the court has a residual discretion and may nevertheless enforce the award despite the proven existence of a valid ground.[181]
- The Court of Final Appeal clearly recognised in *Hebei Import & Export Corp v Polytek Engineering Co Ltd*[182] that parties to the arbitration have a duty of good faith, or to act *bona fide*.[183]

Hong Kong judiciary has produced a plenitude of non-interventionist case laws that demonstrates its support for the arbitral regime. Some of the landmark decisions are discussed below –

❖ Hebei Import & Export Corp v. Polytek Engineering Co Ltd[184]

The Court of Final Appeal held that the public policy exception to the enforcement of an award must be construed narrowly. And further held, enforcement would only be denied where such enforcement would be **"contrary to the fundamental conceptions of morality and justice"** of the forum.[185]

❖ Lin Ming v. Chen Shu Quan[186]

The Hong Kong Court of First Instance, in this case, granted a stay of a court proceeding in favour of a Hong Kong International Arbitration Centre's arbitration. It took a restrained approach and refused to grant an anti-arbitration injunction in parallel proceedings.

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[178] Grand Pacific Holdings v. China Holdings Ltd [2012] 4 HKLRD 1 (CA).

[179] Xiamen Xingjingdi Group Ltd v. Eton Properties Limited [2009] 4 HKLRD 353 (CA).
[180] Hebei Import & Export Corp v. Polytek Engineering Co Ltd *(1999) 2 HKCFAR 111*.
[181] Hebei Import & Export Corp v. Polytek Engineering Co Ltd (1999) 2 HKCFAR 111.
[182] Hebei Import & Export Corp v. Polytek Engineering Co Ltd (1999) 2 HKCFAR 111.
[183] Hebei Import & Export Corp v. Polytek Engineering Co Ltd (1999) 2 HKCFAR 111.

[184] Latest nominations are Lord Sumption, Madam Justice McLachlin and Lord Hodge.

[185] Aditya Kurian, "Arbitration Reform in India: A Look at the Hong Kong Model", *International Arbitration Asia* (21 July 2015) http://www.internationalarbitrationasia.com/articles/arbitration-reform-in-india-a-look-at-the-hong-kong-model/ site visited on Sept 20 2021.
[186] H.C.A. 1900/201.

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❖ Grand Pacific Holdings v. Pacific China Holdings[187]

The Hong Kong Court of Appeal has held, in this case, that an award could be set aside on procedural grounds only if the violation was sufficiently egregious or serious so that one could say a party has been denied due process" refusing to set aside an ICC arbitration award made in Hong Kong. On 19 February, 2013, the Court of Final Appeal refused leave to appeal refused leave to appeal against the judgment of the Hong Kong Court of Appeal, underlining once again what has been deemed –

"the jurisdictions' arbitration friendly credentials and the reluctance of its courts to interfere with the arbitral process and the awards."[188]

❖ Gao Haiyan v. Keeneye Holdings Ltd.[189]

The Hong Kong Court of Appeal's decision in 2011 overturned the lower court's order refusing to enforce a PRC arbitral award on the ground of public policy. The lower court's order was on the basis of alleged bias arising from the way a "med-arb" process wasconducted. The Court held that just because the procedure adopted would give rise to a fearof bias if that proceeding is carried out in Hong Kong, that did not necessarily amount to a breach of public policy. If the procedure is acceptable as a practice in the jurisdiction in which it took place, it will not amount to a breach of public policy in Hong Kong unless it is so severe as to contradict the very fundamental conceptions of justice and morality. The judgment emphasizes that the Hong Kong courts will not readily refuse to enforce arbitral awards, whether rendered in China or elsewhere. It will interpret the public policy ground for refusal of enforcement only narrowly. It also noted that, while determining whether to denyan award's enforcement, more weightage will be given to the decisions rendered by the courtsof the seat as to whether to set aside the award.

[187] (2012) 4 H.K.L.R.D. 1.

[188] Justin D' Agostino and Herbert Smith Freehils, Hong-Kong Court of Final Appeal refuses leave to appeal inthe Grand Pacific v. Pacific China case, Kluwer Arbitration Blog. February 20, 2013, http://kluwerarbitrationblog.com/blog/2013/02/20/hong-kong-court-of-final-appeal-refuses-leave-to-appeal-in-thegrand-pacific-v-pacific-china-case/- site visited on September 22, 2021.

[189] [2012] IH.K.L.R.D. 627 (C.A.C.V.79/2011).

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❖ **T** v. **T S**[190]

In this case, the Hong Kong Court of First Instance held that –if a party unsuccessfully,

- resists enforcement of or challenges an award; or
- seeks to reopen through court proceedings an issue dealt with in anarbitration,

It will pay costs on an indemnity basis unless special circumstances exist.[191]

❖ **C** v. **D**[192]

Escalation clauses are those clauses in an agreement that requires the parties to take steps before the starting of the formal arbitration such as prerequisites like "negotiating in good faith". Many commercial contracts insert clauses of such nature in their agreements. And if there arise a failure in the compliance of these escalation mechanism, the arbitrators' decisions becomes vulnerable to challenge in the domestic courts. This has been in practice for a long time. But now, the Hong Kong High Court held that this is a wrong approach. The questions in relation to escalation mechanism are to be resolved by the arbitrators and not thelocal courts. The defendant was also awarded costs on an indemnity basis.

❖ **W** v. **AW**[193]

In this case it was held that if the award was manifestly valid, the court shouldeither –

- make a substantial security order; or
- grant an immediate enforcement order.

❖ **G** v. **S**[194]

The Court in this case made it clear that if the mischief alleged ought to resolved and decided as

[190] 2014 WL 7311 (CFI).
[191] Aditya Kurian, "Arbitration Reform in India: A Look at the Hong Kong Model", *International Arbitration Asia* (21 July 2015) http://www.internationalarbitrationasia.com/articles/arbitration-reform-in-india-a-look-at-the-hong-kong-model/ site visited on Sept 20 2021.
[192] [2021] HKCFI 1474.
[193] [2021] HKCFI 1707.
[194] [2021] HKCU 2493.

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per the dispute resolution mechanism stipulated in the agreement, then it would not readilyintervene in the award's enforcement. The court was also circumspect to set aside theenforcement order for being contrary to public policy. In this case, the court held that sincethe plaintiff was not prevented from exercising their lawful rights provided under the agreement, it was not contrary to the public policy standards. And so, the court did not refused to enforce the arbitration award.

It also held that if any part of an arbitral award were defective, then the other unaffected parts could be carved out or severed from and made enforceable on their own.[195] The Court followed an earlier decision.[196]

- Fenn Kar Bak Lily v. So Shiu Tsung Thomas[197]

In this case, the plaintiff filed a complaint alleging that the arbitrator had acted in conflictof interest and in bad faith. And the court set out the applicable legal principles regarding the exercise of its power to restrain the arbitrator from acting. Simply put, the standard for the court to do so is very high. The Court must be satisfied beyond reasonable doubt that the arbitrator should discontinue to act.

- Capital Wealth Holdings Ltd[198]

In this case, the court considered that the presumption of "one-stop adjudication" was notsufficient to displace the purposive and broad construction of careful selection of a palette of clauses of dispute resolution inserted in the agreement by the parties. The presumption of "one-stop adjudication" states that the commercial parties intend that all the disputes arising out of their relationship is to be resolved in the same forum except where there is a clear wording in the agreement to the contrary.

- A Consortium Comprising TPL and ICB v. AE Limited[199] and v. SunFung Timber Company

[195] Sec 84, Arbitration Ordinance.
[196] JJ Agro Industries (P) Ltd v. Texuna International Ltd [1992] 2 HKLR 391.
[197] [2021] HKCU 2835.
[198] [2021] HKCU 533.
[199] [2021] HKCFI 2341.

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Limited[200]

Though, the Hong Kong courts usually take a pro arbitration and a pro enforcement stance, these two decisions shows that, if the circumstances otherwise requires, the courtswould not hesitate to intervene in the arbitral proceedings or even set aside arbitral awards. This is done so with the object of ensuring justice and fairness.

IV. SINGAPORE

1. LEGISLATIVE APPROACH

Arbitration in Singapore has developed so remarkably and now it is one of the top centres for international commercial arbitration both in Asia and the world. Singapore has maintained its prominence both regionally and internationally. It is a one go dispute resolution hub since it is now home to three top-notch international dispute resolution institutions, namely, Singapore International Mediation Centre (SIMC), Singapore International Arbitration Centre (SIAC) and the Singapore International Commercial Court (SICC). By signing the Singapore Convention on Mediation, additional weight has now been lent to Singapore as a preeminent venue for dispute resolution. Recently in a Survey[201] Report, Singapore had, for the first time, clinched the top spot along with London.

The firstly enacted law in Singapore to establish a legal regime to govern the proceedingsof arbitration and the arbitral awards' enforcement was the Arbitration Act, 1953.[202] It did not make any distinction between domestic and international arbitration. To deal withawards and disputes which involve a foreign element was governed by both the Arbitration (International Investment Disputes) Act, 1985 and Arbitration (Foreign Awards) Act, 1986. The Arbitration Act of 1985 dealt specifically with the domestic arbitrations.

Currently in Singapore, there are three (separate) parallel legal regimes to govern the conductof arbitrations namely,

(i) The Arbitration (International Investment Disputes) Act (1985): It governs therecognition and

[200] [2021] HKCFI 2407.

[201] 2021 International Arbitration Survey: Adapting Arbitration to a changing World, School of International Arbitration, Queen Mary University of London and White & Case, available at http://www.arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf site visited on September 20, 2021.

[202] Mohan R. Pillay, The Singapore Arbitration Regime and the UNCITRAL Model Law, *ArbitrationInternational*, Volume 20, Issue 4, 1 December 2004, Pages 355– 386, https://doi.org/10.1093/arbitration/20.4.355.

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enforcement of awards in those investment disputes which involve a State party.

(ii) The International Arbitration Act (1994)[203]: The Arbitration (Foreign Awards) Act, 1986 was the predecessor to this Act. It mainly governs the international commercial arbitration.

(iii) The Arbitration Act (Cap 10) 2002 Edition: This Act came into force on March 1 2002 repealing the previous law (i.e., the Arbitration Act, Cap 10, 2001) in its entirety. It mainly governs the domestic arbitrations in Singapore. It is based on both the 1985 Model Law and UK Arbitration Act, 1996.

IAA (CAP 143 A) – International Commercial Arbitrations are governed by IAA, which incorporates both 1985 Model Law and the New York Convention. Parties are also free to opt in the provisions of this Act into an arbitration which is not international, provided it isclearly stipulated in the arbitration agreement.

AMENDMENTS TO SINGAPORE'S IAA – HIGHLIGHTS

The Singapore Ministry of Law, for introducing two features to IAA, has proposedtheInternational Arbitration (Amendment) Bill in September, 2020. The same was on October 5, 2020 and came into force on December 1, 2020. The new features which were introducedthrough the Act is discussed below –

A. Default mode of arbitrator's appointment

A new provision Sec 9 B was introduced via this amendment which provides for the default procedure that needs to be followed when appointing an arbitral tribunal consisting of 3 members. This is applicable only in situations where there are more than two disputants and no other appointment procedure is specifically stipulated in the arbitration agreement. This amendment will ensure an increase in the efficiency in the process of arbitration for Singapore seated arbitrations.

B. Powers of High Court & Arbitral Tribunal to enforce confidentialityobligations[204]

By introducing this amendment, Singapore has once again showed its commitment towards ensuring obligations as to party confidentiality in the arbitration proceedings. It had statutorily

[203] Hereinafter referred to as IAA.

[204] Ss. 12(1)(j) and 12A(2) of IAA.

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recognised the power of the High Court and the tribunal to enforce confidentiality obligations when –

- The parties to the arbitration agreement have agreed to the same in writing, whether in the arbitration agreement or any other document;
- It is specified under

- any written law or rule of law; or
- the rules of arbitration (of an arbitral institution or otherwise) agreed or adopted by the parties.[205]

2. JUDICIAL APPROACH

The Singapore Judiciary is famous for its pro-arbitration stance and practice of minimal curial intervention. The Singapore Courts have in numerous instances respected the tribunal's findings both on law and facts. The Singapore Court of Appeal in the case Tjong Very Sumito v. Antig Investments[206] has observed that, *"an unequivocal judicial policy of facilitating and promoting arbitration has firmly taken root in Singapore."* It also further stated that the role of Courts in matters where the parties have already decided to resolve through arbitration is to render support and not in any way displace the arbitral process. In such matters, the Courts should be very slow and cautious to find reasons to assume jurisdiction.[207] However in certain circumstances the judiciary has alsointervened by setting aside the award. Recently, in the case Convexity Ltd. v. Phoenixfin Pte Ltd., Mek Global Ltd.and Phoenixfin Ltd.,[208] the Singapore High Court had set aside the decision of the arbitral tribunal in dismissing the claims of the applicant by labouring under the misapprehension that the parties agreed to include into the submission an unpleaded issue. The Tribunal did not taken into consideration the repeated objection from the side of the applicant. The Singapore High Court held that there has been a breach of natural justice as the award was passed by dealing with issues that were outsidethe scope of submission. This decision was in fact a warning to the tribunal not to act upon its erroneous beliefs. Instead it must act in consonance with the agreed arbitral procedure. The tribunal simple cannot act according to its whims and fancies in contrary to the well accept principles. So, in Singapore, if we have a close look, the judiciary has taken a balanced approach when matters of arbitration come before it. It will not strictly interfere in the arbitral matters and at the same time, it will not refrain itself from

[205] *Supra* 138.

[206] [2009] 4 SLR(R) 732 at [28].

[207] *Ibid*, at [29].

[208] [2021] SGHC 88.

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intervening in those situations where such an interference is much needed. The Singaporejudiciary has equally contributed to the development of Singapore as a renowned neutral arbitration hub along with the government and the arbitral institution by always being *in tandem* with the objectives of the IAA.

A series of some notable judgments of Singapore judiciary is discussed below –

❖ P T Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA[209]

In this case, P T Asuransi placed on reliance the controversial Saw Pipes judgment[210] before the Singapore Court of Appeal. However, the Court refused to apply the same in the case in hand. It viewed that public policy implications do not arise just because the arbitral decisions passed on the same dispute were conflictory. It was also observed by the Court that the publicpolicy of Singapore encompasses only a narrow scope and errors of fact or law per se will come under the purview of Singapore public policy under Art. 34(2)(b)(ii) of the 1985 ModelLaw. It operates only when the award either –

- shocks the conscience; or
- wholly offensive to the ordinary reasonable and fully informedmember ofthe public; or
- clearly injurious to the public good; or
- violates the forum's most basic notion of morality and justice.

This judgment was later followed in a number of cases[211] and clearly showed to the world as to what approach Singapore holds with regard to the exception of public policy under Art 34 of the Model Law.

❖ SohBeng Tee & Co Pte Ltd. v. Fairmount Development Pte Ltd.[212]

In this case the Singapore Court of Appeal laid down the points which the party alleginga contravention of the rules of natural justice in an arbitral award should establish. It is asfollows –

- which rule of natural justice was breached;

[209] (2007) 1 SLR (R) 597.
[210] ONGC v. Saw Pipes (2003) 5 SCC 705.
[211] VV v. VW (2008) 2 SLR (R) 929; Swiss Singapore Overseas Enterprises Pte Ltd v. Exim Rajathi India PvtLtd, (2010) 1 SLR 573.
[212] (2007) 3 SLR (R) 86.

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- how it was breached;
- in what way the breach was connected to the making of the award; and
- how the breach prejudiced the party's rights.

The Court also observed that it will not subvert or frustrate the process of arbitration. Instead it will seek to support the same and promote the objectives[213] of IAA. It further went on tosay that

"it was not the function of the court to assiduously comb an arbitral award microscopically in attempting to determine if there was any blame or fault in the arbitral process; rather, an award should be read generously such that only meaningful breaches of the rules of natural justice that had actually caused prejudice were ultimately remedied"[214]

❖ VV & Anor v. VW[215]

The Singapore court has held that it will not interfere when a tribunal exercises itsdiscretionin awarding costs on the grounds of public policy or proportionality.

❖ Insigma Technology Co Ltd v. Alstom Technology Ltd[216]

The court had upheld the "pathological clauses"[217] by checking whether there existed an intention on the side of the parties to arbitrate their disputes.[218]

[213] The two primary objectives of the IAA includes the following –

(i) to respect and preserve party autonomy; and

(ii) to ensure procedural fairness.

[214] This decision was subsequently echoed in the case CRW joint Operation v. PT Perusahaan Gas Negara(Persero) TBK, (2011) SGCA 33.

[215] [2008] 2 SLR(R) 929).

[216] [2009] 3 SLR(R)(R) 936.

[217] Pathological clauses are those which are unclearly or uncertainly made.

[218] HKL Group Co Ltd v. Rizq International Holdings Pte Ltd [2013] SGHCR 5.

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❖ **AJU** v. **AJT**[219]

The Singapore Court of Appeal in this cased had overturned the decision of the High Court toset aside an interim award stating that the same was contrary to the State's publicpolicy. It further noted that when considering whether to set aside an arbitral award on grounds of public policy, the objection in question must involve either "exceptional circumstances … which would justify the court in refusing to enforce the award" or a violation of "the most basic notions of morality and justice", such as where a tribunal's "decision or decision making process is tainted by fraud, breach of natural justice or any other vitiating factor …".

In considering divergent UK authorities on this point[220] the Court of Appeal chose to adopt an approach preserving the primacy and autonomy given to arbitral proceedings and upholding the finality of arbitral awards.[221]

❖ Larsen Oil and Gas Pte Ltd v. Petroprod Ltd.[222]

This is another decision which affirmed the pro arbitration stance of Singapore judiciary. In this case, the Court of Appeal broadly construed the arbitration clauses in a way to include most kinds of disputes. It also confirmed that those matters which are purely related to statutory insolvency framework are non-arbitrable.

❖ **AKN** v. **ALC**[223]

This case affirmed Singapore's pro-arbitration stance by reiterating that the grounds availablefor challenging arbitral awards are to be construed narrowly. It is also narrowly interpreted aswhat constitutes a breach of justice or an excess of arbitral tribunal's to set aside an award. This case is also notable for the principles that it had set out as a guideline for the Courts to follow in an application for setting aside an arbitral award. Some of these principles were already been

[219] [2010] 4 SLR 649.

[220] Westacre Investments Inc v. Jugoimport-SPDR Holding Co Ltd and Others [1999] QB 740 and Soleimany v. Soleimany [1999] QB 785.

[221] Available at https://www.hfw.com/Singapore-Courts-continue# site visited on September 20, 2021.

[222] [2011] 3 SLR 414.

[223] [2015] SGCA 18.

discussed in the past decisions.

The principles[224] espoused in this case are as follows –

- Courts should and cannot interfere in the merits of an award, even ifit is bad and erroneous reasoning.[225] In the case Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd, it was held that an arbitral award cannot be challenged even if it contains an egregious or manifest error of fact or law.[226]
- If there is a failure on the part of the Tribunal to –

(i) consider submissions raised by a party, it may amount to a breach of natural justice. However, such a "breach" is defined narrowly; or[227]

(ii) give a party the opportunity to address a material issue mayamount to a breach of natural justice.

- In cases where the tribunal has acted *ultra vires*, an award may be setaside.[228]
- An arbitral award may not be set aside in its entirety. It may be done so inwhole or in part.

❖ Bloomberry Resorts & Hotel Inc. v. Global Gambling & Ors.[229]

In this case, the applicant sought to set aside an arbitral award and resist its enforcement that the award was induced and affected by fraud and was thus contrary to the Singapore public policy. The Singapore Court of Appeal, relying upon the dictum of Swiss Singapore Overseas Enterprise Pts v. Exim Rajathi Pvt Ltd,[230] ascertained the guiding principles to assuage the fraudulent conduct of a party for concealing any document from the arbitral tribunal and committing perjury. The Court observed that the matter of concealment of documents and perjury must have three core principles:

(a) Dishonest Intention or Bad Faith;

(b) Materiality of the new evidence to the decision of the tribunal;and

[224] Fong Wei Li, "Singapore Court of Appeal Espouses Standards to be Met When Setting Aside an Arbitral Award and Reinforces Singapore's Pro-Arbitration Policy", Singapore Law Blog (28 May 2015), available at https://www.singaporelawblog.sg/blog/article/114 site visited on September 20, 2021.
[225] Quarella SpA v. Scelta Marble Australia Pty Ltd. [2012] SGHC 166.
[226] [2010] 3 SLR 1.
[227] Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd [2010] SGHC 20.
[228] PT Prima International Development v Kempinski Hotels SA and other appeals [2012] 4 SLR 98; CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK [2011] 4 SLR 305; AQZ v ARA [2015] SGHC 49.
[229] [2021] SGCA 9.
[230] [2009] SGHC 231.

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(c) Non-availability of the evidence during thearbitrationproceedings.[231]

❖ BZV v. BZW and another[232]

The Singapore High Court recently allowed a party's application to set aside an arbitral award on the basis that the tribunal had failed entirely to appreciate the correct questions it had to pose to itself, let alone apply its mind to determining those questions.[233] The Courtsaid that this was a breach of the principles of natural justice and fair hearing rule.

❖ BTN and Anr. v. BTP and Anr.[234]

In this case, the default position of awarding costs on standard basis in unsuccessful applications filed for setting aside awards under the Singapore law was again reaffirmed. It was also stated that awarding costs on an indemnity basis under such cases will only be done in exceptional circumstances.

V. CONCLUSION

In this chapter, the author tried to understand how both judiciary and Legislature of countries like India, Hong Kong, and Singapore approached the International Commercial Arbitration. Both Hong Kong and Singapore had attained the status of "leading" arbitration centres by the pro-arbitration stance these two 'wings' took. Singapore started its journey only in the early 90s, and even then also it had achieved its recognition as a top-notch arbitration hub alongside London. Furthermore, Hong Kong, on the other side, has always tried its best to bring innovative pro-arbitration provisions into its international arbitration regime. Thoughwe started our journey way earlier than in Singapore, we are still trying to figure out why we are lagging. Judicial pro-arbitration stances are often disturbed by wrong legislative intervention. Sometimes, pro-arbitration provisions included by the Legislature get disrupted by the judiciary through its flawed interventionist approach. Therefore, it is good to take these two as role models alongside other globally recognised best practices when we start our journey to become a global hub shortly.

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[231] Available at https://www.barandbench.com/view-point/how-courts-ought-to-deal-with-allegations-of-fraud-after-passing-of-an-arbitral-award site visited on September 20, 2021.

[232] [2021] SGHC 60.

[233] O S Agarwal, "SGHC sets aside arbitral award for breach of fair hearing rule and natural justice" (July 8,2021), available at https://singaporeinternationalarbitration.com/ site visited on September 20,2021.

[234] [2021] SGHC 38.

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CHAPTER 4

ISSUES WITH THE PRESENT INDIAN ARBITRATIONREGIME – NEED FOR A ROBUSTLEGISLATIVE FRAMEWORK

I. INTRODUCTION

A perfect example of a progressive approach in India will be indisputably the Arbitration and Conciliation Act, 1996. The government had introduced a plethora of gradual and piecemeal amendments to make India a pro-arbitration pivot and a compelling business destination by providing an effective dispute resolution mechanism that enhances the ease of doing business in India. A step intended in a similar direction is the recent amendment made to the 1996 Act[235]. It was an attempt to revamp the Act instituted by a peremptorily promulgated Arbitration and Conciliation (Amendment) Ordinance,2020.[236] However, the Act proved to be a perfect example for India's "a step forward and two step backward" approach. This had made India's dream of becoming a global hub remain a dream only. This Chapter will focus on the issues existing in the Indian Arbitration regime by highlighting the lacunas in the recently introduced Arbitration and Conciliation (Amendment) Act, 2021. It further discussesthe need for introducing a new robust legislative framework to govern the same.

II. ARBITRATION AND CONCILIATION (AMENDMENT) ACT2021 – FRIEND OR FOE TO INVESTORS

India has always aimed to attain the pro-arbitration status among the global stakeholders, which is evident in its successively amending the 1996 Act. However, the very recent Amendment, i.e., the Arbitration and Conciliation (Amendment) Act 2021, had become aretrogression to this aim.

[235] The Arbitration and Conciliation Act, 1996.

[236] The President of India has promulgated the Arbitration and Conciliation (Amendment) Ordinance, 2020, in November 2020. It was introduced without conducting consultations with the experts or discussing the same in the Parliament. So, it was a big surprise for both the stakeholders and practitioners. It was stated in its Preamblethat the amendment is necessary to ensure all stakeholders get an unconditional stay on the arbitral award if the making of the award or the method of securing the contract or arbitration agreement is affected by either fraud or corruption. However, this will result in the opening of floodgates to litigation and make India a litigation hub. Earlier, this power of granting the unconditional stay was discretionary. Nevertheless, with the introduction of the Ordinance, the same has turned out to be a mandatory provision. So this will, in the long run, affect the verypurpose of Arbitration bycausing unreasonable delays to the stakeholders and parties.

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The Statement of Objects and Reasons reflects that it aimed at making India a hub of international commercial arbitration by openly inviting foreign arbitrators to India and eliminating routine corrupt practices in obtaining arbitral awards. That was done by amending Sec 36[237] and eliminating the 8th Schedule of the 1996 Act.[238] A new section was also substituted for Sec 43J[239] of the 1996 Act. However, these changes had seriously altered what the previous amendments had introduced.

The significant changes brought by the Amendment Act of 2021 and also its aftermath and implications on India's pro-arbitration outlook will be discussed below in detail.

1. DELAYED JUSTICE IS DENIED JUSTICE

Earlier, the 1996 Act empowered the Courts to grant an unconditional stay on enforcement proceedings. Nevertheless, this resulted in an onrush of challenges to delay the same. However, the Amendment Act of 2015 had envisioned and satisfactorily addressed this issue by scrapping such a power. Instead, the Act empowered the Court to impose conditions on stay of the enforcement proceedings. This had prevented the losing parties from filing unwarranted, frivolous and groundless challenges. **Interestingly, the Amendment Act of 2021 had undone what was done by the 2015 amendmentthereby nullifying the same.** It added a clause to the proviso to subsection 3 of Sec 36. It stated that if there is prima facie evidence to the Court that the party had indulged in fraudulent or corrupt practices while obtaining the award or in the underlying arbitration agreement or contract, then it can grantan automatic and unconditional stay on its enforcement. This will open the floodgates to challenges to cause delay to the enforcement of the awards, which will seriously affect one of the core purposes of the 1996 Act, i.e., to render speedy justice by preventing unnecessary delays. Causing unnecessary delays in rendering justice is a clear denial of justice.

Furthermore, the Amendment Act of 2021 also gives the parties an ample opportunity toplead the grounds of corruption and fraud at the time of the enforcement proceedings. This is available even if they had not invoked the same before the arbitral tribunal or at any time before filing the application for setting aside the arbitral award. This also will be misused by the parties and causes unnecessary delays.

[237] Vide Sec 2 of the Arbitration and Conciliation (Amendment) Act, 2021, No. 3, Acts of Parliament, 2021(India).
[238] Vide Sec 4 of the Arbitration and Conciliation (Amendment) Act, 2021, No. 3, Acts of Parliament, 2021(India).
[239] Vide Sec 3 of the Arbitration and Conciliation (Amendment) Act, 2021, No. 3, Acts of Parliament, 2021(India).

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2. VAGUE GROUNDS

With the introduction of the 2021 Amendment, the Courts are empowered to grant automatic and unconditional stay on vague grounds of fraud and corruption. The Act prescribes no clearcriterion or standard which the Court needs to follow while assessing these grounds. It depends mainly on time extensions[240] and judicial intervention. This creates doubts in theminds of investors as to whether they need to subject themselves to an uncertain and vague dispute resolution mechanism. No specific of the terms "fraud" and "corruption" is provided under the Amendment Act. So it is again the judiciary who need to interpret these terms while considering applications under Sec 36. And if those definitions and interpretations are contradictory and conflicting, then it opens floodgates of litigation. That will result in destroying the very objectives of arbitration – cost effective, user friendly and speedy dispute resolution mechanism.

3. OTHER ALTERNATIVE OPTIONS (REMEDIES) AVAILABLE

The 1996 Act provides for two alternative options for the parties to invoke if fraudorcorruption exists in their arbitral process or proceedings and they are as follows –

(i) The appropriate forum to raise allegations of fraud or corruption in the underlying arbitration agreement or contract is the Arbitral Tribunal. The parties can plead such a contention at the stage of reference also. They are competent to evaluate the evidence and to check whether the same is vitiated by corruption or fraud. And in case of any grievances with respect to the findings of the arbitral tribunal, the parties have an option to set aside the award by filing an application under Sec 34 of the Act. An order so passed underSec 34 is appealable under Sec 37 (1) (c) of the Act.

(ii) Further, it is provided under Sec 34 (2) (b) (Explanation 1) (i) an award would be considered contrary to the public policy if the "making" of the sameis induced by corruption or fraud.
When these two alternatives were already available to the parties, there was no need to amendSec 36 and institute an additional layer of judicial scrutiny. This has widened the scope of judicial intervention, and the consequences of the same will be cataclysmal. Moreover, it will overburden the Courts, which are not sufficiently efficient to dispose of the cases. Commercial cases require

[240] Time extensions are provided under the Limitation Act, 1963. For instance, Sec 17 of the Limitation Act, 1963 provides for the postponement of the limitation period in cases where fraud is discovered on the part of a party. However, the Hon'ble Supreme Court in the case P Radha Bai & Ors. v. P Ashok Kumar and Anr. has held that this provision will not apply to the time limit provided under Sec 34 (3) of the Act (3 months which can be extended to 30 days whenever it deemed fit) due to the phrase "but not thereafter" present in the said provision.

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speedy disposal. Nevertheless, since the Indian Courts are overburdened with work, it is not able to dispose of such cases with the required speed and dispatch.[241] This will eventually result in causing unnecessary delays in enforcing arbitral awards. Also, a bare reading of the text shows that both the sections (i.e., Ss. 34 and 36) are not in consonance with each other and will create ambiguities.

4. MAXIMISED JUDICIAL INTERFERENCE

The very objective of both the 1996 Act and the alternative dispute resolution mechanism is to ensure minimal judicial interference. The implementation of 2021 Amendment will result in excessive judicial intervention in an arbitral proceeding, which will destroy the verypurpose[242] of the Act. If the powers conferred to an arbitral tribunal are to be increased, judicialinterference must be minimum. Moreover, there is noclear guidance as to how the judges should (i.e., the level of enquiry that he/she should undertake) reach a prima facie opinion. This had widened the scope of the judicial intervention. It also did not provide any clarity concerning the additional evidence that a party needed to produce other than the tribunal's record to prove the existence of corruption or fraud. But a party can challenge an award under a Sec 34 proceeding only by relying upon the tribunal's record. This is practically illogical and will increase the complexity of the arbitral process, which will in turn result in prolonging the enforcement of the arbitral award. It will be difficult for the courts to reach a justifiable and satisfactory prima facie evidence without going into the merits of the case.

5. ARBITRATOR'S REPUTATION AT RISK

If the Court's without any proper scrutiny automatically and unconditionally stay the awards on the grounds of fraud and corruption and that took on a prima facie view, then the arbitrator's reputation will be put at risk. It will result in tarnishing their reputation, which in turn will affect their functioning. It will make eminent arbitrators reluctant to work as a partof the arbitration regime in India. Though by omitting the 8th Schedule, the Act had openly invited the foreign arbitrators to India, they will hesitate to get appointed here as arbitrators if their reputation is at high risk.

[241] Law Commission Report No. 246 on Amendments to the Arbitration and Conciliation Act, 1996.

[242] Sec 5 of the Arbitration and Conciliation Act, 1996 provides a bar for judicial interference. It derives itsexistence from Art. 5 of the Model Law.

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6. UNNECESSARY COSTS, DELAYS AND INCONVENIENCE

In every application filed under Sec 34 of the Act, parties raise an allegation of violation of "public policy. Similarly, the losing parties will plead corruption or fraud in every arbitration proceeding by filing applications under Sec 36, which will result in unnecessary delays in the enforcement of awards. It will also make the process more costly and cause inconvenience to the parties involved. The main object behind passing the 1996 Act was to provide arbitration as a cost-effective alternative to traditional litigation so that the parties need not have to fear unnecessary delays and costly court processes. Sec 36 had seriously altered this purpose by subjecting the parties to the difficulties of the Court for seeking reliefs.

Furthermore, the losing parties may also misuse this to delay enforcement proceedings and as a tool for harassing the opposite parties. Unconditional stay will thwart the execution of awards for many years. It will discourage the parties from choosing the Indian arbitration regime for arbitrating their disputes. It will also bring down the confidence in investors as it tarnishes the pro-arbitration outlook of India.

7. INEXPLICABLE DISCRIMINATION BETWEEN CIVIL ANDARBITRALPROCEEDINGS

The Civil Procedure Code, 1906 does not explicitly contemplate fraud and corruption as grounds for staying a decree. So the additional grounds provided under Sec 36 relates exclusively to arbitration proceedings. As a result, inexplicable discrimination was created between the arbitral and civil proceedings that the Hon'ble Supreme Court already decried in the case, Hindustan Construction Company Limited and Ors. v. Union of India[243], wherein the Court observed as follows

"The anomaly, therefore, of Order XLI Rule 5 of the CPC applying in the case of full- blown appeals, and not being applicable by reason of Section 36 of the Arbitration Act, 1996 when it comes to review of arbitral awards, is itself a circumstance which militates against the enactment of Section 87 [paragraph 50]."

8. APPLICATION OF "RETROSPECTIVITY" – FLOODGATES TOLITIGATION,REOPENED

The grounds of challenge provided under Sec 36 can be invoked in *"all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings*

[243] Civil Appeal Nos. 2621-2625 / 2019.

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were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015".[244] So the 2021 amendment has made this provision applicable to all the court proceedings arising out of the arbitration proceedings retrospectively irrespective of the fact whether the proceedings commenced before or afterthe 2015 Amendment. The parties can misuse this provision in many creative and crooked ways. One such scenario is where a party who had not raised any allegations of fraud in an application filed under Sec 36(2) may invoke the fresh grounds of fraud by way of an amendment application while the initial application is pending. Furthermore, there might be a flurry of challenges since there are no checks and balances for eliminating frivolous and false applications.

9. DELETION OF MUCH-DEBATED EIGHTH SCHEDULE ANDSUBSTITUTIONOF SEC 43 J - INTERLINKED

The 2021 Amendment had omitted the much-debated Eighth Schedule[245], which provided for the qualifications, experiences, and norms for the accreditation of arbitrators. It had faced severe criticism for being biased against foreign arbitrators and in favour of Indian arbitrators. The Schedule also disqualified young arbitrators by giving more emphasis to seniority while appointing arbitrators. Nevertheless, to fulfil its dream of becoming a hub for international commercial arbitration, India should need to increase the number of foreign and young arbitrators across various fields. Moreover, the qualifications provided under the Act also cannot filter out the eminent arbitrators.

Instead of introducing unbiased qualifications in the Eighth Schedule, the Parliament had omitted the same altogether. So now, in the present situation, there are no specific qualifications for a person to become an arbitrator in India. As a result, any person can now become an arbitrator. It will create a conundrum in the present arbitration regime. If incompetent or inefficient arbitrators are appointed, it might lead to various issues, including mismanagement of arbitration proceedings and passing unjust or incorrect arbitral awards. That will hamper India's "pro-arbitration" image and will act as a hindrance in its path to becoming a hub for international commercial arbitration. It will also affect the ease of doing business in India.

Further, the 2021 Amendment also introduced Sec 43 J, which explicitly provides that the arbitrator's qualifications will be based on "regulations", including those made by theArbitration

[244] Explanation to proviso to Sec 36(3) of the Arbitration and Conciliation Act, 1996.

[245] Vide Sec 4 of the Arbitration and Conciliation (Amendment) Act, 2021, No. 3, Acts of Parliament, 2021(India).

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Council of India (ACI).[246] Without enlisting the qualifications, empowering the said Council had widened the scope of appointing the arbitrators from various fields. Art 12 of the 1985 Model Law[247] provides that in some cases, a person's nationality has to be considered while determining whether he is qualified as an arbitrator. Though this amendment is a welcoming step, the Council should be more cautious while preparing the "regulations".

10. SUBSTANTIVE RIGHTS OF AWARD HOLDER AT RISK

By making the award "unenforceable" and that too without the need for providing any security, the 2021 Amendment has negatively affected the substantive rights of the awardholder. It is well accepted that one of the core objectives of any dispute resolution mechanismis that the award holder or the winning party should be able to enjoy the fruitsof his/her victory. Here the award holder will need to wait till the disposal of the challenge to enjoy the fruits of the arbitral award.

III. NEED FOR A ROBUST LEGISLATIVE FRAMEWORK

Having discussed the problems or lacunas associated with the latest amendment, theauthor now would like to delve into the need of introducing a new and separate piece of legislationto govern international commercial arbitration. Presently we have a single unified piece of legislation to govern both the domestic and international commercial arbitration. However, it contains specific provisions that treat the two fields differently with regard to particular subjects. The author is of the opinion that a robust legislative framework to govern the two regimes differently is the need of the hour.

Over the past fifty years, if we have a close look at the major developed States, they haveeither revised their arbitration statute or had come up with a new legislation by entirely replacing the old one. For instance, Hong Kong had replaced its old one and unified its separate legislations in 2011. As far as India is concerned, it has always refined its arbitration statute through amendments. In the past six years, India had introduced 3 amendments to the 1996 Act. The 2015 and 2019 Amendments can be termed as a perfect example for "two steps forward and one step backward" approach. But with the introduction of 2021 Amendment, India had potentially hampered its "pro arbitration image" by reinstituting the regressive position that prevailed from 1996 till 2015. It had undone the progressive actions the previous amendments had done and

[246] Sec 2 (1) (j) of the Arbitration and Conciliation Act, 1996.
[247] UNCITRAL MODEL LAW 1985.

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became a perfect example for "two steps forward andseveral steps backward" approach. The practice of introducing a new provision and bringing material changes to the same consecutively shows the absence of "legislative wisdom" to stand by its own laws. Re-introducing a provision which was subjected to heavy criticism earlier also brings down the confidence in investors. The 2021 Amendment, though intended to cure certain issues, instead had turned the condition of issues more worse by introducing labyrinthine provisions.

So the author is of the opinion that by entirely replacing the old statute with a new robust and separate legislative framework for international commercial arbitration brings some amount of clarity to the present regime. This idea was discussed earlier also in a Consultation Paper[248] in 2010. Last year, former Hon'ble Justice Indu Malhotra had, while speaking in a Conference, opined that

"there should have been two Acts, one for domestic arbitration and one for imposing foreign awards, because the regimes are entirely different, and sometimes in the interpretation of one part, one tends to look at the other part which may create confusion"[249]

Therefore, introducing separate statutes will help India become a hub for international commercial arbitration and reach a notable position in world rankings in the ease of doing business reports. Also, by entirely replacing the statute, we could also get the global attention, as all the global stakeholders and international entities are closely watching our steps towardsachieving the status of becoming a "hub".

[248] Recommendations on the Consultation Paper released by the Ministry of Law and Justice, Government of India on the Arbitration and Conciliation Act, 1996, July, 2010, available at https://www.nishithdesai.com/fileadmin/user_upload/pdfs/NDA%20Think%20Tanks/Arbitration%20Think%20Tank.pdf.

[249] Available at https://timesofindia.indiatimes.com/india/there-should-have-been-separate-acts-for-domestic-arbitration-and-foreign-awards-sc-judge/articleshow/74151955.cms.

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IV. CONCLUSION

Along with these issues India also faces some other issues such as lack of full time arbitration lawyers. Moreover, there are no specific rules as to regulate the ethics of theses arbitrators. We also lack an arbitral institution that can be put at par with the global arbitral institutions. The author had tried to suggest some solutions for this issue also.

In conclusion, the author believes that by introducing a new legislative framework adhering strictly to the international standards and practices will help India resolve the current issues present in the arbitration regime. Taking regressive steps will tarnish the "arbitration friendly" image of India. No other pro arbitration legislations and UNCITRAL Model Law, 1985 contains provisions offering "unconditional stay" of arbitral awards at the enforcement stage. If India starts to amend and introduce provisions of regressive nature, then it will defeat the very purpose of alternative dispute resolution mechanism. In the final chapter of this dissertation work, the suggestions to resolve these issues will be discussed in detail.

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CHAPTER 5

INTERNATIONAL BEST PRACTICES - LESSONS FROM SIAC &HKIAC

I. INTRODUCTION

This chapter briefly analyses the important provisions which the arbitral institutions of the countries, Hong Kong and Singapore had introduced in order to attract arbitration users from across the globe. It will also discuss some of the key innovations brought by them into the arbitration regime. It is important to understand these because arbitral institutions play a key role in determining the positioning of a particular jurisdiction as a global hub for arbitration. Investors' confidence will get boosted only if the arbitral institution is of high class.

II. INTERNATIONAL COMMERCIAL ARBITRATION INSINGAPORE

Singapore – the Garden City or the Lion City – A dynamic, vibrant, cosmopolitan city- state (hub) has become one of the pre-eminent destinations for business magnets by providing excellent communications and infrastructure. It also emerged as a fast-growing market of the Asia Pacific region and beyond with excellent global connectivity. Situated at the heart of South-East Asia, it is now home to many MNCs and various enterprises. Globally, both Singapore and London stands ranked as the most popular seats. Moreover,in the whole Asia- Pacific region, Singapore is the most preferred seat. Being a party to the 1958 New York Convention On Enforcement of Arbitration Awards, its arbitral awards are enforceable in over 160 countries worldwide. The Singapore International Arbitration Centre (SIAC) is one of the finest arbitral institutions in Singapore which is specialized to deal with international commercial disputes. It has a panel of specialist intellectual property arbitrators. According to a 2021 survey[250], SIAC is the second-most preferred arbitral institution in the world and the most preferred arbitration institution in the Asia Pacific. In 2020, it has set a new record inthe caseloads[251] by crossing the 1000 case

[250] Queen Mary University of London and White & Case International Arbitration Survey: Adapting Arbitrationto a Changing World, available at www.arbitration.qmul.ac.uk/research/2021-international-arbitration-survey.

[251] Almost 1080 new case filings were reported, where the parties from sixty different jurisdictions chose to conduct their arbitrations in SIAC. Of the 1,080 cases, only 17 cases were *ad hoc* appointments. All else were cases administered by SIAC, which is another record out there.

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threshold, which is a tremendous growth.[252]

III. SINGAPORE INTERNATIONAL ARBITRATION CENTRE

Singapore International Arbitration Centre (SIAC) started its journey from July 1991 as an independent, neutral and not-for--profit organisation[253] and is housed at the Maxwell Chambers in Singapore. It has established a track record for affording best in class arbitration services to the international business community. Its arbitration awards have been enforced in various jurisdictions, including China, India, Vietnam, Hong Kong SAR, Jordan, Indonesia, USA, Thailand, UK, USA, and Australia, among other New York Convention signatories. It also provides efficient and cost-competitive case management services to all the parties globally. SIAC has always come up with innovative provisions to deal with arbitral disputes in line with the global needs. It has also by revising its arbitration rules ensured that new parties are enticed to opt for arbitration. On September 30, 2021, SIAC has successfully and remarkably completed its30 years.

Recently, SIAC has expanded its horizon beyond Asia by launching a representative office in New York. It is SIAC's 5th office overseas and the first outside of Asia. This appears to be a timely move as 2020 saw the biggest leap in foreign users coming from US parties, with 545 parties from the US – a 738 per cent increase from 65 in 2019. Now, the United States is the 2nd highest foreign user of the SIAC after the long-time top user, India (690) and before third-ranked foreign user, China (165).[254]

SIAC consists of the following bodies –

1. **Board of Directors** – It consists of eminent professional and leading arbitration expertise lawyers from all over the world. Presently, there are 8 directors. The functions of the Board is to oversee SIAC's –

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[252] This arbitral institution started only in 1991 and has a very short history compared to the other institutions. Since then, its caseload has expanded to match some of the preeminent institutions in the world such as Stockholm, ICC, CIETAC etc., and thus has shown a remarkable growth in the international arbitration regime.Recently, while giving a keynote speech in a before an international audience at the Singapore International Arbitration Centre (SIAC) Congress, the Hon'ble Chief Justice of the Supreme Court of Singapore, Mr Sundaresh Menon opined that,

"Singapore today has become one of the most open arbitration venues in the world, reflecting its remarkablegrowth in the field."

[253] Tulika Kaul, Singapore International Arbitration Centre, 6 CT. UNCOURT 5 (2019).

[254] SIAC Annual Report, 2020, available at https://singaporeinternationalarbitration.com/.

- ❖ Development and business strategy;
- ❖ Matters of corporate governance;
- ❖ Operations etc.

2. **Secretariat** – It consists of over 20 employees (full-time) both recruited from the region and beyond and they –

- ❖ Attend SIAC'S business
- ❖ Administer the cases handled by the SIAC

3. **Court of Arbitration –** Its main function is to appoint arbitrators on the basis of his/her experience, expertise and track record. It also removes the arbitrators, if needed. Applications for Emergency Arbitrator and Expedited Procedure are also determined by the Court.

4. **Panel of Accredited Arbitrators** – It consists of both a domestic and an internationalpanel of experts.[62255] More than 100 arbitrators experienced in variousfields (such as Construction, energy, engineering and procurement) are available in the panel from around 25 jurisdictions including India. Parties can choose their arbitrator and if they cannot, SIAC will make the appointment.

5. **Arbitration Rules** – SIAC administers its cases under its own Arbitration Rules.[256] It was first introduced in the year 1991 and it is about to release its latestrevised version in the third quarter of 2021. The current Rules are of the 2016 version.[257]

REVISION OF SIAC RULES, 2021

SIAC is about to release its revised version of Arbitration Rules in the third quarter of 2021.[258] Its

[255] Lawrence G. S. Boo, SIAC and Singapore Arbitration, 1 Asian Bus. LAW. 32 (2008).

[256] Gary Born, President of the SIAC Court of Arbitration has said,

"SIAC's Arbitration Rules are the most progressive and user-friendly in the world. The Rules revision processwill ensure that SIAC remains at the forefront of developments in the law and practice of international arbitration. We will be consulting widely with SIAC users, arbitration practitioners and arbitrators during theRules revision. We also invite comments from all those interested in SIAC's work." Available at https://siac.org.sg/component/content/article/69-siac-news/669-siac-announces-commencement-of- revisions- for-siac-arbitration-rules.

[257] SIAC Rules 2016 was the 6th edition of the SIAC's Rules, which was released on August 1, 2016. It aimed at engendering greater efficiency, certainty and cost effectiveness.

[258] Available at https://siac.org.sg/component/content/article/69-siac-news/669-siac-announces-commencement-of-

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court of Arbitration and Secretariat will work jointly on the same. It is this practice of revision that helped SIAC to keep in line with the best practices in the field of international arbitration. The Rules revision will take into account recent developments in international arbitration practice and procedure, and is aimed at better serving the needs of businesses, financial institutions and governments that use SIAC.[259]

SIAC's INVESTMENT ARBITRATION (IA) RULES, 2017[260]

SIAC introduced a separate set of specialised investment arbitration rules on January 1, 2017. It is a hybrid of both commercial arbitration rules and specialised investment arbitration rules. It aimed at addressing the unique issues faced by the investment arbitration regime in Singapore.

IV. INTERNATIONAL COMMERCIAL ARBITRATION IN HONGKONG

The unexampled positioning of Hong Kong as a financial and business hub of Asia, availability of excellent legal services and the use of English as one of the official languages allowed Hong Kong to become a globally renowned dispute resolution venue. It is the first Asian jurisdiction to adopt the latest version of UNCITRAL Model Law on International Commercial Arbitration. The most famous and well regulated arbitral institution in Hong Kong is the Hong Kong International Arbitration Centre. It has always tried to keep in line with the global trends and needs in the international business community. Very recently, withthe global outbreak of the COVID 19 pandemic, it has immediately swivelled to virtual hearing work.[261] It had adapted its infrastructure by –

- Building a dedicated suite for virtual hearing;
- Recruiting expert IT dispute resolution experienced staff;

revisions-for-siac-arbitration-rules.

[259] Available at https://siac.org.sg/component/content/article/69-siac-news/669-siac-announces-commencement-of-revisions-for-siac-arbitration-rules.

[260] Available at http://www.siac.org.sg/images/stories/articles/rules/IA/SIAC%20Investment%20Arbitration%20Rules%20-%20Final.pdf.

[261] A total of 119 virtual hearings have been handled by HKIAC so far. The feedback on the virtual hearingservices provided by HKIAC is available at https://www.hkiac.org/our-services/testimonials.

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- Arranging a 24*7 support for all time zones; and
- Issuing guidelines also.

V. HONG KONG INTERNATIONAL COMMERCIALARBITRATION CENTRE

The Hong Kong International Arbitration Centre (HKIAC) is one of the most frequently used arbitral institutions in Hong Kong. It was established in the year 1985 as a neutral and independent non-profit organisation by a group of professionals and businessmen. The aim behind the establishment of HKIAC was to promote the use of different ADR mechanisms, especially Arbitration, in Asia. Though it was established as a non-profit Company, which is limited by guarantee under the Hong Kong law, presently, it is independent of both the government and business community. It operates with its own funds and budgets.

Under the Ordinance[262] has been designated as the default statutory body for appointing arbitrators in cases where the parties fail to agree with regard to the appointment of their respective arbitrators. It also determines the number of arbitrators to be appointed. According to a recent International Arbitration Survey,[263] HKIAC is the 4th most preferred international arbitral institution in the world. It is also one of the longest- standing institutions in the field of International arbitration in the Asia-Pacific region. In 2013, HKIAC opened offices in Seoul, Korea to further promote its dispute resolution services in the region[264] and, in 2015, HKIAC became the first international arbitration institution to open a representative office in Mainland China by establishing a representative office in the Shanghai Free Trade Zone.[265]

HKIAC's popularity is reflected by its caseload statistics[266] since its establishment.According to

[262] Ss. 13 and 24 of the Hong Kong Arbitration Ordinance.
[263] Queen Mary University of London and White & Case International Arbitration Survey: Adapting Arbitrationto a Changing World, available at www.arbitration.qmul.ac.uk/research/2021-international-arbitration-survey.
[264] HKIAC Press Release, The HKIAC Celebrates the Opening of Its First Overseas Office in Korea at the Inauguration of the Seoul International Dispute Resolution Centre (May 30, 2013), available *at* http://www.hkiac.org/news/hkiac-celebrates-opening-its-first-overseas-office-korea-inauguration-seoul- international.
[265] HKIAC Press Release, HKIAC Achieves Breakthrough by Launching Office in Mainland China (Nov. 20,2015), *at* http://www.hkiac.org/news/hkiac-achieves-breakthrough-launching-office-mainland-china.
[266] HKIAC Statistics, available at https://www.hkiac.org/about-us/statistics.

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a recently published statistics report[267], a total of 483 fresh cases[268] have been filed. Having received Global Arbitration Review's innovation award of 2014, HKIAC is constantly at the forefront of innovative arbitration practice.ORGANIZATIONAL STRUCTURE

1. HKIAC Council

- It governs HKIAC and consists of leading arbitration experts, professionals, lawyers and businessmen.

2. International Advisory Board

- It provides advice and guidance to HKIAC on a policy level.

3. Executive Committee

- It is the principal body which directs the HKIAC's activities.
- It has 3 Standing committees, namely Appointments Committee, Proceedings Committee and Financial and Administration Committee. These committees deal with the matters concerning those functions which are entrusted to the HKIAC under the HongKong Arbitration Rules. It also deals with the HKIAC's business operations.

4. Secretariat

- It mainly conducts the daily administration of different services of dispute resolution such as arbitration, adjudication, mediation and domain name disputes.
- It comprises a Secretary General, and administrative and legal staff of diverse nationalities.

PROCEDURES FOR THE ADMINISTRATION UNDER THE UNCITRALARBITRATION RULES

It was first issued in 1986 and was later updated in the years 2005 and 2015. It representsa separate rule which is designed for use by the parties who seek the advantages of an administered arbitration. It also maintains the flexibility that is afforded by the 1976 or 2010 version of UNCITRAL Arbitration Rules. A party may adopt the 2015 version for any HKIAC administered investor-State arbitration.

[267] HKIAC Statistics for 2020, available at https://www.hkiac.org/about-us/statistics.
[268] Out of this, 318 cases were arbitrations, 149 were domain name disputes and the remaining 16 were formediations.

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VI. CONCLUSION

This chapter clearly shows the importance of institutional arbitration in the modern world of arbitration. These arbitral institutions have also contributed a lot in the growth of both Hong Kong and Singapore as world class global hubs. They have tried to maintain their positions by constantly bringing innovative provisions into their governing law and rules. India, on the other hand, is still in its neophyte stage as far as practice of institutional arbitration is concerned. In the concluding portion of this dissertation work, the author had tried to suggest some ways to improve this condition.

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CHAPTER 6

SUGGESTIONS AND CONCLUSION

I. INTRODUCTION

The 21st century has witnessed a distinct paradigm shift in the attitude of Courts on a global perspective by accepting arbitration as a parallel system of dispute resolution mechanism and respecting it by leaving it to deal with through its own devices. Moreover, the popularity of arbitration as a preferred choice among the various dispute resolution mechanisms present has also increased tremendously in the recent past. The reason for its rising popularity is tangled with the immense support it is pouringtowards the 'globalisation' of trade. As the drivers of the industry increasingly come to share a common vocabulary, it seems likely that the importance of arbitration can only grow.[269] It is therefore called the "Golden Age of Arbitration". One of the most renowned philosophers of modern international commercial arbitration, the then- Attorney General and now Hon'ble Chief Justice of Singapore, Mr. Sundaresh Menon, inhis keynote address delivered at the ICCA Congress held at Singapore in 2012, has rightly put it,

"I venture to begin by suggesting that this new age of arbitration is, in fact, itsgolden age. Those among us who practice it are extraordinarily privileged to be able to do soat this time."[270]

In India, one of the core reasons why arbitration is to be adapted as a parallel mode of disputeresolution system is the huge judicial backlog conundrum. This will slow down the pace at which the wheels of justice are moving. Senior Advocate Fali S Nariman in his keynote address deliered at a seminar in 2018, had stated that the *"future of arbitration is bright, because the future of litigation, perhaps, is not."*[271] Former Hon'ble Chief Justice of India, Thakur while giving a speech in a Global Conference held at Delhi, articulated his concerns for the need of

[269] The Growth of International Arbitration by Michael Pryles, MEL4_492420_1 (W97).

[270] Available at https://cdn.arbitration-icca.org/s3fs-public/document/media_document/ags_opening_speech_icca_congress_2012.pdf site visited on October 22,2021.

[271] Keynote address at a Seminar on "Ethics in Arbitration" organized by DIAC (Delhi international ArbitrationCentre) and Delhi High Court at the India International Centre, New Delhi on September, 2018, available at https://www.barandbench.com/news/future-arbitration-bright-litigation-not-fali-nariman site visited on October 22, 2021.

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strengthening the Indian judiciary by stating that "The avalanche of cases constantly puts the judiciary under great stress. Courts from the apex court to the Munsiff are overburdened. Judges are over-worked".[272] In India the latest data shows that there were more than 4.5 crore of cases pending in different courts.[273] Data collected by PRS Legislative Research, a Delhi based non-profit organization, reveals that India shows an annual growth of 2.8% in the number of cases pending before different courts.[274] So, developing an arbitration culture can help in reducing this overburdening of cases. Another reason is the fact that India has emerged as one of the fastest growing economies in the world. So popularizing arbitration is a sine qua non to facilitate international trade and ease of doing business in India.

Even though India is one of the fastest-growing economies globally, it could not still be able to become a hub for arbitration by tackling its issues. There are many reasons behind this lagging. If "arbitration unfriendly" judicial decisions were once the core reason for this lagging, then now it would undeniably be the "arbitration unfriendly" amendments. In any of these introduced amendments, the seat v/s venue conundrum is nowhere addressed. The present law is not adequate to help India become a global hub for international commercial arbitration. These issues have been discussed in detail in the preceding chapters. Presence ofa proper law clearly and strictly adhering to those internationally accepted principles is the need of the hour. So in the opinion of the author this period of golden age of arbitration is the right time for India to emerge as a hub for international commercial arbitration (ICA) by launching a novel robust legislative framework for the same to replace the old one. It willhelp India to grab the attention of various foreign stakeholders, and investors etc., and bring a change in their age-old perception about India both as a venue and a seat of arbitration. Drafting a legislation adhering itself to the internationally accepted principles of ICA will help India to change its image of being a jurisdiction "unfriendly" towards arbitration to an "arbitration- friendly jurisdiction" status.

There are many reasons why we should adopt a separate statute to deal with ICA. Firstly, a separate statute to deal with ICA will bring more clarity and effectiveness while interpreting the provisions related to the foreign arbitral award. It will indeed help in regaining the eroded faith in arbitration in India among the investor community. It is also submitted that India's legislation on

[272] Available at https://www.thehindu.com/news/national/Justice-delay-keeps-investors-away-CJI/article16079771.ece site visited on October 23, 2021.
[273] Available at https://njdg.ecourts.gov.in/njdgnew/index.php site visited on October 22, 2021.
[274] Available at https://www.outlookindia.com/website/story/pendency-in-indian-courts-rising-by-28-annually-claims-report-by-delhi-based-non-profit/398219 site visited on October 22, 2021.

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international commercial arbitration will also be readily available in a single statute for the users. A consultation paper released by the Ministry of Law and Justice in 2010 has also recommended a separate statute to deal with ICA to ensure its independence.[275] Last year, former Hon'ble Justice Indu Malhotra had also stressed the relevance of the same while delivering a speech at a Conference.[276] The Court often gets confused while distinguishing both the regimes. In the case BGS SGS Soma JV v. NHPC Ltd.,[277] wherein the litigating parties were Indians and no foreign element was present, the Court still meticulously delved into both the Indian and English cases involving parties from different nations. It may be seen to be an approach to clear certain confusion. Even so, Such an approach by the court was totally unnecessary and suffering from a technical glitch and hencethe same would not amount to a binding *ratio decidendi* as international commercial arbitration was not something that the court was confronted with and hence could not be said to be binding.[278]

Secondly, certain specific characteristics make domestic and international commercial arbitration distinctive from each other. These two being distinct regimes, it needs to be treated differently. The extent to which the judiciary can interfere is also different for the two. In international commercial arbitration, judicial intervention should be narrowed to resolvethe disputes expeditiously and build up confidence on a global level. Thirdly, a separate single statute to deal with ICA will be user friendly as it brings harmonisation and clarity to the users since they have to look at one specific Act applicable to their dispute at a time. There will be more clarity as to which Act would apply in certain circumstances. Furthermore, since India has travelled a long distance from being a developing country to a "developing developed country" and because of its current ranking in the ease of doing business reports,[279] it is advisable for it to update its law and

[275] Recommendations on the Consultation Paper released by the Ministry of Law and Justice, Government of India on the Arbitration and Conciliation Act, 1996, July, 2010, available at https://www.nishithdesai.com/fileadmin/user_upload/pdfs/NDA%20Think%20Tanks/Arbitration%20Think%20Tank.pdf site visited on October 22, 2021.

[276] Available at https://timesofindia.indiatimes.com/india/there-should-have-been-separate-acts-for-domestic-arbitration-and-foreign-awards-sc-judge/articleshow/74151955.cms, site visited on October 22, 2021.

[277] 2019 (6) Arb LR 393 (SC).

[278] Available at https://legaldesire.com/seat-venue-place-of-arbitration-a-detailed-analysis/ site visited onOctober 23, 2021.

[279] The Ease of Doing Business Report released on Oct, 2020 shows India being ranked at 63rd position. It wasearlier positioned at 100 in 2017 and 77 in 2018 respectively, available at https://www.doingbusiness.org/content/dam/doingBusiness/pdf/db2020/Doing-Business-2020_rankings.pdf

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keep abreast with the modern tendencies of international trade law. If India waits too long in upgrading its international commercial arbitration law, it might fall behind the other countries and not be considered one of the leading internationally advanced countries. To be considered as a competitive contender in the international commercial arbitration sphere, "reform" is considered to be a necessity.[280]

In the preceding chapters, the author in this dissertation had made out an in-depth analysis of the historical development of the Indian arbitration law and chalked out the legal lacunas existing in the present arbitration regime. The different approaches adopted by both the legislature and judiciary of renowned arbitration hubs like Singapore and Hong Kong were compared with that of India's in the ICA field. The author had also tried to mention the best "practices" adopted by the internationally recognised institutions like SIAC and HKIAC in international commercial arbitration. The need for replacing the 'now' arbitration law with a 'new' one to deal with domestic and international commercial arbitration separately was also discussed. Now, at this stage, itis pertinent to draw conclusions based on the research study site visited on October 22, 2021.

conducted. This chapter is the final one in the dissertation work and will deal with conclusions and suggestions based on the said research topic. In the first part, the author had proved the hypothesis by drawing conclusions from studying the preceding chapters of this dissertation work. In the final part of this chapter, the author would like to suggest certain ways in which India's wish of becoming a global hub for international commercial arbitrationinto a reality.

II. FINDINGS & SUGGESTIONS

Based on the research study conducted, the findings reached and their respective solutions aregiven as below –

- FINDING 1 - There is no proper legislative framework to help Indiabecome aglobal hub for International Commercial Arbitration.

  Suggestion: Domestic and International Commercial Arbitration being two distinct regimes must be kept separately. ***So it is suggested that the Legislature should come up with two separate Acts to deal with these areas.*** *This will ensure clarity and effectiveness for the users of these Acts. Both*

[280] Jones "Adopting the UNCITRAL Model Law" 1.

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the arbitrators and the arbitral tribunal will be able to give proper awards if such a measure is taken. Moreover, judicial interference can also be tackled if the law is properly drafted. While drafting such a piece of legislation, the following points may be considered –

- *It should contain provisions which are familiar to the foreign users also. This can be done by ensuring that these provisions adhere to the internationally accepted principles and practices. It will also ensure harmonization, clarity, universality and uniformity to the transnational trade law.*
- *It should also meet the global expectations with respect to ICA.*
- *It should offer good quality, just, fair and effective solutions to theforeign parties. This will build up the confidence in foreign investors.*
- *It should not leave any confusing or vague terms undefined. This will make sure that Courts will have a minimal role in interpreting arbitralmatters.*
- *Domestic and International Public Policy should be clearly distinguished.*
- *It should be clearly mentioned in the Act that high standards of proofis to be met when attempting to set aside arbitral award on the basisof a breach of public policy. As to what constitutes high standard should also be mentioned to avoid confusion.*
- *Party Autonomy and minimal judicial interference should be core objectives of the newAct.*
- *Everything should be done in the interest of the parties involved except in limited and exceptional circumstances. Thosecircumstances should be precisely enlisted in the newAct.*
- *Arbitral tribunal should be given adequate powers to deal with arbitral disputes.*
- *A time bound mechanism should be adopted by the tribunal, judiciary and the arbitral institutions. No unnecessary delays should be caused to any party.*
- *It should also have provisions to ensure that courts will have only a limited or somewhat balanced role in arbitration disputes.*
- *It should also adopt the best innovative practices which are globally recognised.*
- *ODR mechanisms should also be given prior importance.*
- *Emergency Arbitrations should also be included under the Act*
- *The new law should also be refined regularly to meet the demandsof the international investor community. This can be done withthe helpof amending the provisions with great caution.*

- FINDING 2 – India lacks certain cardinal features which are necessary for ajurisdiction to become a global hub.

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Suggestion: For becoming a global hub, India should focus on improving thefollowingareas –

- *Minimal `Judicial Interference - The soul of arbitration is the presence of "limited or minimal" judicial interference or intervention. As is rightly pointed out by Lord Mustill that "Ideally, the handling ofarbitral disputes should resemble a relay race. In the initial stages, before the arbitrators are seized of the dispute, the baton is in the grasp of the court; for at that stage there is no other organisation which could take steps to prevent the arbitration agreement from being ineffectual. When the arbitrators take charge they take over the baton and retain it until they have made an award. At this point, having no longer a function to fulfil, the arbitrators hand back the baton so that the court can, in case of need, lend its coercive powers to the enforcement of the award."*[281] *There should not be any tension between the relationship between arbitration and courts. Lack of requisite court support will lead to problem of unnecessary judicial delays and also results in bad jurisprudence. Bad jurisprudence will give India the brand name of "anti-arbitration" jurisdiction. It will take years to unravel it. The nightmares that the judgments like Bhatia, Venture Global, Saw Pipes, Renusagar etc., have created to the investors and theextent to which it had tarnished the image of India as an arbitration friendly jurisdiction cannot be neglected. The Court should instead of being anti-arbitration, should accept it as a parallel dispute resolution mechanism. Both should work concurrently in delivering justice expeditiously without causing any unnecessary delays. Because delayed justice is denied justice.* ***It is therefore highly recommended that India, if wants to become a global hub for ICA, should focus on ensuring this aspect of minimal judicial interference. It is also suggested that there should be a robust judicial framework to deal with arbitral matters by adopting a pro- enforcement approach.Jurisprudential certainty shall be met at any cost.***
- *No Governmental interference – It is also suggested* ***that there should not be any government control on these arbitralinstitutions so as to ensure independence and neutrality.***
- *An arbitral institution to stand at par with SIAC, HKIAC, LCIA, ICC etc – In India, currently there is no arbitral institution which can standat par with the globally renowned arbitral institutions. The present Attorney General of India, Mr K K Venugopal has said during aspeech in the 10th Annual International Conference conducted by Nani Palkhivala Arbitration Centre that "unfortunately India has no institution that can come anywhere near the efficiency and competency of international arbitral institutions."*[282] *We had in fact, almost 23 years ago,*

[281] Lord Mustill, "*Comments and Conclusions in Conservatory Provisional Measures in InternationalArbitration*", 9th Joint Colloquium (ICC Publication, 1993).

[282] Available at https://www.bloombergquint.com/law-and-policy/india-has-no-institution-to-compete-with-

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established the International Centre for Alternative DisputeResolution System and it was a complete failure. ***It is suggested that the present Indian arbitral institution should have to select a renowned personality as the Chairman (for instance globally renowned modern philosopher of international commercial arbitration Mr Gary Born leads SIAC) along with a pool of qualified and accredited arbitrators (both foreign and domestic, as per thechoice of the party) and use of a time bound and other innovative internationally recognised mechanisms can help India become aglobal hub.***

- *A special court to be established to deal with ICA matters* ***– It is also suggested that a separate court specifically to deal withmatters involving International Commercial Arbitration should also be established and the judge to be appointed should be skilled to deal with highly sophisticated commercial disputes.Decisions of this court should be allowed to be challenged only in exceptional andrare circumstances and that too in the Supreme Court. The power to enforce awards of such a court should also be vested in the Supreme Court.***

- FINDING 3 – India lacks mannerism and professionalism in arbitration. Andalso unavailability of full time arbitration lawyers is another hurdle forIndia.

  Suggestion: Since most of the lawyers opt for arbitration after the litigation or court hours, they are exhausted, both physically and mentally. So, they would not be in a position to arbitrate properly and effectively. When lawyers opt forarbitration as a part time job, time constraints will arise as a problem for them. When they fail to reach the place where arbitration is conducted, the arbitration might get adjourned. Unnecessary delays will be the end result. This will completely destroy the spirit of arbitration i.e., an expeditious resolution. ***It is suggested that an establishment of the Arbitration Bar will help resolve this issue. It must consist of a pool of arbitrators, arbitration lawyers and sectoral ordomain experts.*** *Presence of sectoral experts will be of great use in high technicalities involving disputes. They will be competent and skilled enough to reach high quality decisions.* ***Also, when a Bar of this nature comes into play, the problems or issues that these arbitrators are facing will also be adequately addressed.*** *Their rights should also be given importance. Being talked about the rights, one cannot deny the duties that these arbitrators should follow.* ***So, it is also suggested that it is the need of the hour to introduce duties and ethics for the arbitrators to follow, which the Bar can take care of. Law students should also be encouraged to opt for arbitration as a full time career, so that we would lack full time arbitrators in future.***

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international-arbitration-tribunals-says-attorney-general site visited on October 24, 2021.

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- FINDING 4 – Practice of not appointing young lawyers as arbitrators isanothermajor issue that India is facing.

  Suggestion: ***The practice of appointing retired judges only instead of young lawyers should be done away with****. It is interesting to note that other countries are following such a practice. This is reason why this practice was criticised in the Srikrishna Committee Report that "it is a grim reality that several stakeholders of international commercial arbitration perceived domestic arbitrators of India to be lacking in both, quality as well as professionalism, which happens to be a major reason why the growth of arbitration in India has suffered significantly"*[283] ***It is suggested that appointing young lawyers will enhance the quality of the awards.***

- FINDING 5 – Not much focus is given to improve the status of domesticarbitrations.

  Suggestion: In India, not much focus is given to improve the status of domestic arbitrations conducted every year. ***It is recommended that for becoming an international arbitration hub, India should improve its domestic arbitration.*** *So, the number of domestic arbitrations reaching the global arbitral institutions can invariably be reduced. This will help India reach its status as a regional hub and gradually become an International hub for arbitration.*

- FINDING 6 – India lacks an arbitration culture.

  Suggestion: In India, we have a culture of filing numerous petitions across different courts and going for "luxurious" litigation, instead of opting "arbitration" or any other ADR mechanism. People should be made aware of the benefits of choosing arbitration over litigation. ***To resolve this issue, awareness campaigns, seminars, webinars and conferences should be conducted frequentlyby the Indian arbitral institutions.***

III. TESTING THE HYPOTHESIS

In India, the present law of arbitration i.e., the Arbitration and Conciliation Act, 1996 along with the amendments has proved to be insufficient to help India become a global hub for International Commercial Arbitration. The Indian arbitration regime was already facing many issues and with the introduction of the latest 2021 Amendment, though initially intended to cure these lacunas,

[283] *Report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India* (July 30, 2017), available at https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf site visited onOctober 24, 2021.

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has come up with disastrous provisions. Unconditional stay provision had seriously altered the twin purposes of 1996 Act i.e., minimum judicial intervention and expeditious resolution of disputes. If an Act contains provisions which will fail its very purpose, then such a law cannot be termed asa proper law. Hence, the researcher accepts the only hypothesis put forward in this research study formulated as "The present arbitration law is not sufficient to make India a global hub of ICA. There is no proper law to govern the samein India."

IV. CONCLUSION

The researcher would like to conclude the dissertation work by once again stressing the relevance of passing a separate legislation to deal with the ICA. The efforts taken by the Government to make India a global hub cannot be denied. However, frequently amendingand materially changing the already amended provisions is not going to send a positive signalto the investor community. So, instead of amending the 1996 Act again, the government shallconsider the proposal of introducing a robust legislative framework to treat domestic and international commercial arbitration separately. It is not the first time such a proposal is made. Notable Indian Jurist Fali S Nariman in his study[284] criticised the 1996 Act by stating that it has not met the purpose for which it was initially passed. He also pointed out ten valuable measures which can be considered to salvage the Indian arbitration regime. One among those was the need of formulating a new law by giving emphasis that the courts should play only a supportive role. So, it is highly recommended that the Legislature shall pass a new robust framework to govern ICA by strictly adhering to the internationally recognised principles and globally renowned innovative best practices such as those followedby global arbitration hubs like Singapore, Hong Kong, London, Dubai etc. One cannot forget the remarkable words found in Shakespeare's Merchant of Venice, which picturizes the importance of having a robust, fair and just dispute resolution mechanism in a globalised world. It is as follows –

"Venice's reputation as a global hub of trade was built on its robust and fair dispute resolution mechanism where commercial contracts between merchants of all races, ethnicities and nationalities were enforced at all costs. Fair, efficient and certain dispute resolution, as it was understood even then, is a sine qua non for trade and commerce toflourish in any region."[285]

[284] Fali Nariman, Ten Steps to Salvage Arbitration in India: The First LGIA-India Arbitration Lecture, *Arbitration International,* Volume 27, Issue 2, 1 June 2011, Pages 115–128.

[285] Available at https://ficci.in/spdocument/20707/arbitration-Background-Paper.pdf site visited on October 24,2021

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