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**“INTERNATIONAL COMMERCIAL ARBITRATION AND INDIAN LAW  
– NEED FOR REFORMS”**

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## **CERTIFICATE**

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## **DECLARATION**

I do hereby declare that the dissertation titled, “**INTERNATIONAL COMMERCIAL ARBITRATION AND INDIAN LAW – NEED FOR REFORMS**” researched and submitted by me to the National University of Advanced Legal Studies, Kochi in a partial fulfilment of the requirement for the award of Degree of Master of Law in International Trade Law, under the guidance and supervision of **Dr. ANIL R. NAIR**, is an original, bonafide and legitimate work and it has been pursued for an academic interest. This work or any type thereof has not been submitted by me or anyone else for the award of another degree of either this University or any other University.

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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
❖ 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
❖ <i>Ibid.</i> ,	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
❖ 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

### International Commercial Arbitration and Indian Law

#### - Need for Reforms

### I. INTRODUCTION

“Discourage litigation, persuade your neighbours to compromise whenever you can point out 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<sup>1</sup>

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 will be 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.<sup>2</sup> 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.<sup>3</sup> 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.

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<sup>1</sup> Notes for a Law Lecture“-Home Book of American Quotations by Dodd, New York, 1967, p.226.

<sup>2</sup> Borba, Igor M. “*International Arbitration: A comparative study of the AAA and ICC rules*”, Master’s Theses, Marquette University, (2009), 1.

<sup>3</sup> Jitendra N. Bhatt, “Round Table Justice through Lok Adalat (People’s Court) – A Vibrant ADR in India”, 1 SCC (Journal) 11 (2002).

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.<sup>4</sup> It further states that “a committee or panel of arbiters or judges is created either by special agreement of the parties or by an existing arbitral treaty.”<sup>5</sup> 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.<sup>6</sup> 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”.<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup> The parties are free to agree as to how their disputes are to be resolved and interventions by the courts are restricted.<sup>10</sup> 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

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<sup>4</sup> A. Le Roy Bennett. “International Organizations: Principles and Issues”, 3rd Ed, Prentice Hall, Englewood Cliffs (1991), 99.

<sup>5</sup> *Ibid.*

<sup>6</sup> David St John Sutton, Judith Gill, and Matthew Gearing. “Russell on Arbitration”, 21<sup>st</sup> Ed, London: Sweet & Maxwell Thomson Reuters, (2007), 230.

<sup>7</sup> Clause (a) of Article 2 of the Model Law (1985).

<sup>8</sup> 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.

<sup>9</sup> See Joanne Goss, “An Introduction to Alternative Dispute Resolution”, 34 (1) *Alta. L. Rev.* 1 (1995) (Can.).

<sup>10</sup> P. C. Rao, “Alternatives to Litigation in 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).

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.<sup>11</sup> 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.

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.<sup>12</sup> 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.<sup>13</sup> International Commercial Arbitration, ICA, which is a sprout of arbitration,<sup>14</sup> has grown out as a transnational system of solving commercial disputes involving national arbitrational laws and policies, bilateral treaties, multinational conventions and norms of arbitral institutions.<sup>15</sup> 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

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<sup>11</sup> Adhipati, Sandeep. "Interim Measures in International Commercial Arbitration: Past, Present and Future", Master Dissertation, University of Georgia, (2003), 3.

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

<sup>13</sup> Hynning, Clifford J., and George W. Haight. "International Commercial Arbitration." American Bar Association Journal, Vol. 48, no. 3, 962, pp. 236-239.

<sup>14</sup> Neeraj Tiwari, Critical Issues in International Commercial Arbitration, Vol.4 Arb. LR 2012, pp.1824; P.T.Kamala Priya and S.Karpaga Priya, International Commercial Arbitration-A New Dimension ( Mad.LJ Vol. 203 13).

<sup>15</sup> 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 into the international arbitration proceedings.

The Arbitration Act 1940 was the first and foremost consolidated law governing arbitration in India. 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 hub for 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<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup>

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<sup>16</sup> The Law Commission of India also examined the working of the 1940 Act in its 176<sup>th</sup> Report; Vide *M/s Fuerest Day Lawson Ltd v. Jindal Exports Ltd.*, 2001 (3) SCALED 708(India).

<sup>17</sup> Justice B.P Saraf Committee Report, 2005.

<sup>18</sup> Nikhil Suresh Pareek, *International Commercial Arbitration in India: Governing Law Issues*, 18 *Unif. L. Rev.* 154 (2019). pp.154-165.



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 advantage of the law to get favourable awards by fraud. It also does away with qualifications of the arbitrators under 8<sup>th</sup> 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 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 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 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, India should 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.<sup>19</sup> So this has made it necessary for the international community to examine India’s International arbitration regime closely. The Government has recently brought in

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<sup>19</sup> 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](http://www.ijal.in/sites/default/files/IJAL%20Volume%203_Issue%201_Harisankar%20KS.pdf) .

amendments after amendments which show that issues were not adequately addressed and the amendments were not properly drafted. Much judicial time will also get wasted to give clarity to 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.

## **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.<sup>20</sup> 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 for ICA for this.

Undoubtedly the tone has been set right and a step in the right direction (via amendments) has been 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 answer 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

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<sup>20</sup> Loukas A. Mistelis, “Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform – Some Fundamental Observations”, *International Lawyer*, vol. 34, no. 3 (2000), 1056.

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 facilitating legal environment for efficient settlement of international commercial disputes?”

### **III. RESEARCH QUESTIONS OF THE STUDY**

- What are the issues that India is facing in facilitating International Commercial Arbitration?
- Has arbitration grown in India as a preferred mode of Alternative Dispute Resolution for the settlement of International Commercial disputes?
- How far has the 1996 Act and its amendments helped India in achieving its status as a “global hub” for International Commercial Arbitration?
- What are the International “BEST PRACTICES” that can be adopted by India in 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 Arbitration regime
- To discuss the key changes brought by the various amendments to the 1996 legislation
- To analyse the various problems in the present arbitration law in India
- To analyse the problems which the parties may face while enforcing the award
- To discuss about the international best practices in the area of International Commercial 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.

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, Court’s decisions both at national or international level and arbitration rules.
- The secondary sources of data used are books, dictionaries, encyclopaedias, journals, newspapers and websites.

## VII. SOURCES OF THE RESEARCH

- **National sources**: includes the –

1. **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 –

- 76<sup>th</sup> Law Commission Report;
- 176<sup>th</sup> Law Commission Report; and
- 246<sup>th</sup> Law Commission Report.

➤ **International sources**: includes the Singapore and Hong Kong Arbitration Laws and the following international instruments –

- UNCITRAL Model Law;
- The Geneva Protocol on Arbitration Clauses of 1923;
- Geneva Convention of 1927;
- The New York Convention 1958; and
- The New York Convention on the Recognition and Enforcement of Foreign Awards, 1961.

➤ **Judicial Decisions / Arbitral Awards**

➤ **Expert opinions in the field as exhibited from textbooks, research papers, 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 of decisions which is accessible.

## **IX. 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 questions involved in the study. Different objectives with respect to which the study shall be conducted 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 the study 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 REFERENCE TO ARBITRATION 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 APPROACH TOWARDS ICA – 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 ARBITRATION REGIME – 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 on international standards to deal with the same.

➤ CHAPTER 5 – INTERNATIONAL BEST PRACTICES – LESSONS FROM SIAC 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 RECOMMENDATIONS OF THE 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 TO ARBITRATION IN INDIAN & INTERNATIONAL SCENARIO

*"Differences we shall always have but we must settle them all, whether religious or 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<sup>1</sup> 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.<sup>2</sup> But it is not an alternative 'court' system, rather it was

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<sup>1</sup> Hereinafter referred to as ADR.

<sup>2</sup> Sarvesh Chandra, "ADR: Is Conciliation the Best Choice" in P. C. Rao and William Sheffield.



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.<sup>3</sup> The National 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.”<sup>4</sup> 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.<sup>5</sup>

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 and arbitration.

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 of two 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 asks each 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

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<sup>3</sup> Bryan A. Garner (Ed.), Black's Law Dictionary 112-113 (West Publishing Company, St. Paul, Minnesota, 8th Edn., 2004).

<sup>4</sup> Available at <http://www.nadrac.gov.au>.

<sup>5</sup> Ashwanie Kumar Bansal, Arbitration and ADR (Universal Law Publishing Co. Pvt. Ltd., Delhi, 2005).

mediator have looked at the problem from the point of view of interest together rather than rights and positions.<sup>6</sup>

- 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 thereby – not even money; certainly not my soul.”<sup>7</sup>*

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.<sup>8</sup> In the early era of modern civilization ADR started to be used in business and land disputes and in international relations.<sup>9</sup> 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.<sup>10</sup> 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

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<sup>6</sup> Alexander Bevan, *Alternative Dispute Resolution 2* (Sweet and Maxwell, London, 1992).

<sup>7</sup> Mahatma Gandhi, *An Autobiography: The Story of My Experiments with Truth* 134 (Beacon Press, Boston, 1993).

<sup>8</sup> Prein, H. 1984. “A Contingency Approach for Conflict Intervention.” *Group and Organization Studies*, 9: 81-102.

<sup>9</sup> Ross, M. H. 1993. *The Culture of Conflict: Interpretations and Interests in Comparative Perspective*. NewHaven, CT: Yale University Press.

<sup>10</sup> Deutsch, M. and P. T. Coleman, eds. 2000. *The Handbook of ConflictResolution: Theory and Practice*. SanFrancisco, CA: Jossey-Bass.

- 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.<sup>11</sup> 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 issues.<sup>12</sup> Congress took ADR to another level when it enacted the Alternative Dispute Resolution Act, 1998. This Act was later amended and needed the district court 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.<sup>13</sup> In the 21<sup>st</sup> century, many people from different parts of the world have accepted ADR as a mode of resolving disputes instead of adhering to the procedural wrangles. Though ADR has grown firstly 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.<sup>14</sup>

#### 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, who is appointed as per the will of the parties, and reaching an amicable settlement.

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<sup>11</sup> Prein, H. 1984. "A Contingency Approach for Conflict Intervention." *Group and Organization Studies*, 9: 81-102.

<sup>12</sup> Lynch, J. "ADR and Beyond: A Systems Approach to Conflict Management", *Negotiation Journal*, Volume 17, Number 3, July 2001, Volume, p. 213.

<sup>13</sup> Avruch, K. 1998 "Culture and Conflict Resolution", Washington, DC: United States Institute of Peace.

<sup>14</sup> Available at <http://www1.worldbank.org/publicsector/legal/ADR%20Workshop.pdf>.

2. Conciliation is mostly applied in matrimonial matters, disputes of commercial nature etc.
3. Mediation provides a forum in which parties can resolve their own disputes, with the help of a neutral third party.<sup>15</sup>
4. Negotiation is a verbal technique of resolving disputes among the parties by reaching a non-binding outcome.

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

### **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.”*<sup>16</sup>

King Solomon is considered to be the first arbitrator as per the Biblical theory.<sup>17</sup> 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.<sup>18</sup> 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) after hearing both the parties.<sup>19</sup> Arbitration is an optional private process that is carried out pursuant to an agreement to arbitrate the disputed matter.<sup>20</sup> Dispute Settlement by an arbitral tribunal is preferred over the litigation mechanism of the national courts since comparatively

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<sup>15</sup> Kressel, K., D. Pruitt and Associates, eds. 1989. *Mediation Research: The Process and Effectiveness of Third-Party Intervention*. San Francisco, CA: Jossey-Bass.

<sup>16</sup> Frances Kellor, “American Arbitration: Its History, Functions and Achievements, New York: Harper and Brothers”, (1948), p.3.

<sup>17</sup> The King James Bible 1 3:p. 16-28; “Judgment of Soloman” Biblical story.

<sup>18</sup> {2008} 7 M.L.J. { “Putrajaya Holdings”}.

<sup>19</sup> Black’s Law Dictionary, 6th edn. (1990), West Publishing Co., p.105.

<sup>20</sup> 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.

the former provides for a more neutral forum, an award which can be easily enforced, quick and more economical.<sup>21</sup>

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 rules of evidence and legal grammar.<sup>22</sup> International arbitration<sup>23</sup> 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.<sup>24</sup> 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 commercial arbitration is a true product of the city, even though there were precedents in the late XVIII<sup>th</sup> 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"*<sup>25</sup>

International arbitration when deals specifically with the cross border disputes of commercial nature, it is called the transnational or international commercial arbitration<sup>26</sup>. International

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<sup>21</sup> Margaret Wang, "Are Alternative Dispute Resolution Methods Superior to Litigation in Resolving Disputes in International Commerce?", 16 *Arbitration International* 189 (2000).

<sup>22</sup> L.M. Sharma, "International Commercial Arbitration", 3 *Company Law Journal* 55 (1994).

<sup>23</sup> Various forms of arbitration also exist such as domestic, institutional and ad hoc arbitration.

<sup>24</sup> Alford, R. "The American Influence on International Arbitration", *J. On Disp. Resolution*. 19 *Ohio St.*69, (2003), p. 72.

<sup>25</sup> Lazareff, M.S. in Chapman M J *Commercial and Consumer Arbitration. Statutes & Rules*, (London: Blackstone Press Limited; 1997), p v.

<sup>26</sup> Hereinafter referred to as ICA.

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.<sup>27</sup> Sir Michael John in his famous work, *Transnational Arbitration in English Law*<sup>28</sup>, stated –

*“The essence of the theory of ‘transnational arbitration’ is that the institution of international commercial arbitration is an autonomous juristic entity which is independent of all national courts and all national systems of law. One of the primary purposes of transnationalist movement is to break the links between the arbitral process and 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.<sup>29</sup>

#### **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

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<sup>27</sup> 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”, 11 *International Arbitration Law Review* 1 (1997).

<sup>28</sup> Sir Michael John, *Transnational Arbitration in English Law*, 133, *CURRENT LEGAL PROBLEMS*, 1984.

<sup>29</sup> P.T. Kamala Priya and S. Karpaga, “International Commercial Arbitration- A New Dimension”, 13 *Madras Law Journal* 203 (2001).

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;<sup>30</sup>
2. Geneva Convention on the Execution of Foreign Arbitral Awards, 1927;<sup>31</sup>
3. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958;<sup>32</sup>
4. European Convention on International Commercial Arbitration, 1961;<sup>33</sup>
5. Agreement Relating on Application of the European Convention on International Commercial Arbitration, 1962;<sup>34</sup>
6. Convention on the Settlement of Investment Disputes between States and Nationals of other States, 1965;<sup>35</sup>
7. Convention providing a Uniform Law on Arbitration, 1966;<sup>36</sup>
8. Convention on the Settlement by Arbitration of Civil Law Disputes resulting from Relations of Economic And Scientific Technical Cooperation, 1972;<sup>37</sup>
9. Inter-American Convention on International Commercial Arbitration, 1975;<sup>38</sup>
10. UNCITRAL Arbitration Rules, 1976;<sup>39</sup>
11. UNCITRAL Model Law of International Commercial Arbitration, 1985;<sup>40</sup>
12. UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use, 2002;<sup>41</sup>

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<sup>30</sup> Available at

[https://www.arbitrationindia.com/geneva\\_protocol\\_1923.html#:~:text=Geneva%20Protocol%201923%20PROTOCOL%20ON%20ARBITRATION%20CLAUSES%20SIGNED,countries%20which%20they%20represent%2C%20the%20following%20provisions%3A%E2%80%94%201.](https://www.arbitrationindia.com/geneva_protocol_1923.html#:~:text=Geneva%20Protocol%201923%20PROTOCOL%20ON%20ARBITRATION%20CLAUSES%20SIGNED,countries%20which%20they%20represent%2C%20the%20following%20provisions%3A%E2%80%94%201.)

<sup>31</sup> Available at <https://www.newyorkconvention.org/11165/web/files/document/1/6/16020.pdf>.

<sup>32</sup> 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>.

<sup>33</sup> 1961 Geneva Convention, available at

[https://www.disarb.org/fileadmin/user\\_upload/Wissen/Europaeisches\\_UEbereinkommen\\_ueber\\_die\\_internationale\\_Handelsschiedsgerichtsbarkeit\\_61\\_-\\_English.pdf](https://www.disarb.org/fileadmin/user_upload/Wissen/Europaeisches_UEbereinkommen_ueber_die_internationale_Handelsschiedsgerichtsbarkeit_61_-_English.pdf).

<sup>34</sup> Paris Agreement, 1962, available at

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168006b649>.

<sup>35</sup> Washington or ICSID Convention, 1965, available at

<https://icsid.worldbank.org/sites/default/files/documents/ICSID%20Convention%20English.pdf>.

<sup>36</sup> Strasbourg Convention 1966, available at

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168006ff61>.

<sup>37</sup> Moscow Convention 1972, available at

<https://www.newyorkconvention.org/11165/web/files/document/1/6/16024.pdf>.

<sup>38</sup> Panama Convention 1975, available at <https://www.aaaeducation.org/media/5043/inter-american%20convention%20on%20international%20commercial%20arbitration.pdf>.

<sup>39</sup> Available at <https://docs.pca-cpa.org/2016/01/UNCITRAL-1976-English.pdf>.

<sup>40</sup> Available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/model-law-arbitration-commonwealth.pdf>.

13. Recommendation Regarding Interpretation of Art. II (2) and Art. VII (1) of the New York Convention, 2006.<sup>42</sup>

## V. ARBITRATION LAW IN INDIA – A BRIEF HISTORY

In India, the concept of “Arbitration” has a very long history<sup>43</sup> 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<sup>44</sup>—for a binding resolution.<sup>45</sup> While describing the concept of arbitration, Chief Justice A. Marten in the case, *Chanbasappa Gurushantappa v. Baslinagayya Gokurnaya Hiremath*<sup>46</sup> 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.”*<sup>47</sup>

During the British rule, it was the Bengal Regulations of 1772<sup>48</sup> created the modern arbitration law.<sup>49</sup> 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

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<sup>41</sup> Available at [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/03-90953\\_ebook.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/03-90953_ebook.pdf).

<sup>42</sup> Available at

[https://uncitral.un.org/en/texts/arbitration/explanatorytexts/recommendations/foreign\\_arbitral\\_awards](https://uncitral.un.org/en/texts/arbitration/explanatorytexts/recommendations/foreign_arbitral_awards).

<sup>43</sup> 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 decisions taken by the King Courts, other tribunals were recognized for dispute resolution, available at <https://lawcommissionofindia.nic.in/51-100/Report76.pdf>.

<sup>44</sup> The Panchayati Raj System is recognised as the earliest form of arbitration in India.

<sup>45</sup> K Ravi Kumar, ‘Alternative Dispute Resolution in Construction Industry’, International Council of Consultants (ICC) papers, [www.iccindia.org](http://www.iccindia.org). at p 2.

<sup>46</sup> AIR 1927 Bom. 565 (FB).

<sup>47</sup> The Privy Council in the case *Vytla Sitanna v. Marivada Viranna* AIR 1934 PC 105 has observed that the disputes which were referred to the Panchas and the courts have been duly recognised 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>.

<sup>48</sup> The 1772 Regulation was later promulgated to the other presidency towns such as Bombay (Bombay Regulation Act, 1799) and Madras (Madras Regulation Act, 1802).

<sup>49</sup> S.K. Dholakia, Analytical Appraisal of the Arbitration and Conciliation (Amendment) Bill, 2003, INDIAN COUNCIL OF ARB. Q., Jan.-Mar. 2005, at 3, available at [www.ficci.com/icanet](http://www.ficci.com/icanet).



contract, amongst others.<sup>50</sup> The development of the law of arbitration in India can be broadly classified into the following 4 phases –

### 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.<sup>51</sup> The Hon'ble Bombay High Court in the case *Dinkarraai Lakshmi Prasad v. Yeshwantraai Hari Prasad*<sup>52</sup> 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.<sup>53</sup> 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 Arbitration Act, 1940.<sup>54</sup> It was largely based on the English Arbitration Act of 1934 and dealt with domestic arbitrations only.<sup>55</sup>

### 2. Post 1940 Phase – Two Landmark Legislations

The 1940 Act<sup>56</sup> failed in achieving its desired purpose mainly because of its ineffective working. It therefore attracted adverse remarks and severe criticism from the side of the

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<sup>50</sup> K Ravi Kumar, 'Alternative Dispute Resolution in Construction Industry', International Council of Consultants (ICC) papers, [www.iccindia.org](http://www.iccindia.org). at p 2.

<sup>51</sup> *Nusserwanjee Pestonjee and Ors. v. Meer Mynodeen Khan Wullud Meer Sudroodeen Khan Bahadoor* (1855) 6 MIA 134.

<sup>52</sup> AIR 1930 Bom 98.

<sup>53</sup> Sec. 89 and Sch. II of the Code of Civil Procedure, 1908, Ss. 10 and 28 of the Indian Contract Act, 1872, and Sec. 21 of the Specific Relief Act, 1877 respectively provides for arbitration.

<sup>54</sup> Available at <http://www.wipo.int/edocs/lexdocs/laws/en/pk/pk066en.pdf>.

<sup>55</sup> 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'.

<sup>56</sup> Arbitration Act, No.10 of 1940, <https://indiankanoon.org/doc/1052228> (repealed 1996).

judiciary. Hon'ble Justice D A Desai in the case *Guru Nanak Foundation v. Rattan Singh & Sons*,<sup>57</sup> 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.”*

The 1940 Act was not strong enough or compact enough to deal with the post 1990's disputes<sup>58</sup> that rose due to a hype in the International trade and the investments that flowed in and out of the country.<sup>59</sup> Though the 1940 Act was born with mistrust in arbitration and hardly a success,<sup>60</sup> it was not amended in order to improve its working. 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<sup>61</sup> with an aim to provide for an efficient robust legal framework for arbitrations in India.<sup>62</sup> It mainly focused on ending the unending litigation and delayed delivery of justice. Ensuring minimal judicial interference and speedy justice were the core objects 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.*<sup>63</sup> 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.<sup>64</sup>

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<sup>57</sup> (1981) 4 S C C 634.

<sup>58</sup> The Law Commission of India also examined the working of the 1940 Act in its 176th Report.

<sup>59</sup> *Vide M/s Fuerest Day Lawson Ltd v. Jindal Exports Ltd.*, 2001 (3) SCALED 708.

<sup>60</sup> Harpreet Kaur, *The 1996 Arbitration and Conciliation Act: A Step Toward Improving Arbitration in India*, 6 HASTINGS BUS. L.J. 261, 262 (2010).

<sup>61</sup> *The Arbitration and Conciliation Act of 1996*, No. 26, Acts of Parliament, 1996, available at: <http://indiacode.nic.in/>.

<sup>62</sup> 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.

<sup>63</sup> (1999) 2 SCC 483, 497.

<sup>64</sup> Akash Pierre Rebello, *Of Impossible Dreams and Recurring Nightmares: The Set Aside of Foreign Awards in India*, 6 CAMBRIDGE STUDENT L. REV. 274, 277 (2010).

### 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 in delivering 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.<sup>65</sup> This attitude of the judiciary towards the arbitration regime was widely criticised. Later the Court settled this issue by passing the infamous BALCO judgment.<sup>66</sup> 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<sup>67</sup> 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 charged by 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.<sup>68</sup> 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.

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<sup>65</sup> In *Bhatia International v. Bulk Trading S.A. and Another* (2002) 4 SCC 105, the Hon'ble Supreme Court has held 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 v Satyam Computer Services td* (2008) 4 SCC 190.

<sup>66</sup> 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 interim applications u/Sec. 9 of the 1996 Act could be entertained in foreign seated arbitrations solely governed by Part II of the Act.

<sup>67</sup> Sec. 34 of the Arbitration and Conciliation Act, 1996, Application for setting aside arbitral awards.

<sup>68</sup> 176<sup>th</sup> Report of the Law Commission of India, available at <http://www.lawcommissionofindia.nic.in/>.

## 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 contrary is entered into by the parties.<sup>69</sup>
2. For minimizing the judicial interference, now the court is not allowed to entertain an application once the arbitration tribunal is constituted. However, the court can allow it if the circumstance demands so.
3. Tribunals were given all the powers of the Court u/Sec. 9 of the Act.<sup>70</sup>
4. Strict time limits for concluding an arbitral process was also included.<sup>71</sup>
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 Supreme Court.
7. An application to appoint an arbitrator should be disposed expeditiously within 60 days of 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.<sup>72</sup> The 2015 Amendment Act was a watershed moment in the history of the Indian 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 Institutionalisation 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

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<sup>69</sup> Proviso to Sec 2 (2) of the Arbitration and Conciliation Act, 1996.

<sup>70</sup> Sec 17 of the Arbitration and Conciliation Act, 1996.

<sup>71</sup> Sec 29 A of the Arbitration and Conciliation Act, 1996.

<sup>72</sup> 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.

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<sup>73</sup> 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.<sup>74</sup>
2. In case of international commercial arbitrations, the Supreme Court is allowed to delegate the power of appointment of arbitrators to the arbitral institutions graded by 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.
3. The words “An appeal” in Sec 37 (1) were substituted by the words “Notwithstanding anything 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 8<sup>th</sup> 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.<sup>75</sup> 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.<sup>76</sup>

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

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<sup>73</sup> Hereinafter referred to as ACI.

<sup>74</sup> Sec 11 (3A) of the Arbitration and Conciliation Act, 1996.

<sup>75</sup> (2018) 6 SCC 287.

<sup>76</sup> Hindustan Construction Company Limited v. Union of India, (2019) SCC OnLine SC 1520.

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 will be 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 been reflected 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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## 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 fore 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.”<sup>1</sup>

##### 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<sup>2</sup>. 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

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<sup>1</sup> Javed Gaya, *Judicial Ambush of Arbitration in India*, 120 L. Q. R. 571, 571 (2004).

<sup>2</sup> Malhotra, Om Prakash, and Indu Malhotra., 2006, op.cit., 13.

business ease. So the investors are not confused while making investments in Singapore, giving a positive signal to the international community.

Till 1940, the Arbitration Act of 1899 governed the arbitration law in India, which was a replica of the English Act<sup>3</sup>. So it was in 1940<sup>4</sup>, 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<sup>5</sup>. 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<sup>6</sup> 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. Court litigation 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

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<sup>3</sup> This 1899 Act has incorporated many provisions of English Act into the Indian law since India was under the British rule.

<sup>4</sup> 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.

<sup>5</sup> Vijay Joshi and I.M.D. Little, “Macroeconomic Stabilization in India, 1991-1993 and Beyond”, Economic and Political Weekly, December 4, 1993, page 2659.

<sup>6</sup> The Law Commission of India also examined the working of the 1940 Act in its 176<sup>th</sup> Report; Vide M/s Fuerest Day Lawson Ltd v. Jindal Exports Ltd., 2001 (3) SCALED 708 (India).



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 speak of the situation where the arbitrator appointed by the Court dies during the arbitration proceedings. There was 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 from the side of the judiciary in several cases. It is here noteworthy to mention about the case of Food Corporation of India v. Joginder Pal<sup>7</sup>. In this case the Court observed that

*“law of arbitration must be simple with lesser technicality and more responsive 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 speedy for 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 conducted and 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.”<sup>8</sup>*

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

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<sup>7</sup> AIR 1981 S C 2075: (1989) 2 SCC 347, at paragraph no. 7.

<sup>8</sup> AIR 1981 S C 2075 at 2076.

also to settle the conflicting decisions.<sup>9</sup> 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 disputes amicably through arbitration machinery<sup>10</sup>. 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 76<sup>th</sup> 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 by them 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).

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<sup>9</sup> The 8<sup>th</sup> 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 1978 till 1979.

<sup>10</sup> S.C.Tripathi. "Law of Arbitration & Conciliation in India with Alternative Means of Settlement of Disputes Resolution", Sixth Ed. Allahabad: Central Law Publications,( 2012) , 1.

- a) 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<sup>11</sup> Model Law, The Arbitration (Protocol and Convention) Act, 1937, the Indian Arbitration Act, 1940, and the Foreign Awards (Recognition and Enforcement) Act, 1961<sup>12</sup>. Model Law was designed to deal with the ICA only<sup>13</sup>, 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 Act also goes beyond the Model Law in minimising the Court's intervention<sup>14</sup>. The Preamble of 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 a signatory 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 the statement of objects and reasons<sup>15</sup> are as follows:

- To comprehensively cover international and commercial arbitration and conciliation as also domestic arbitration and conciliation;
- To make provision for an arbitral procedure this is fair, efficient and capable of meeting the needs of the specific arbitration;

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<sup>11</sup> UNCITRAL- United Nations Commission on International Trade Law

<sup>12</sup> This Act gave effect to the UNCITRAL Model Laws as adopted by the United Nations Commission on International Trade Law on 21 June 1985.

<sup>13</sup> Article 1 of the UNCITRAL Model Law, 1985.

<sup>14</sup> S.K.Dholakia. “Analytical Appraisal of the Arbitration and Conciliation (Amendment) Bill, 2003”, ICA's Arbitration 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).

<sup>15</sup> Sumeet Kachwaha , Dharmendra Rautray, Kachwaha & Partners. “Arbitration in India: An Overview”, <https://www.cvs.edu.in/upload/Arbitration%20in%20India%20httpsipba.org.pdf.pdf> site visited on August 16 2021.

- 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 arbitral award on agreed terms on the 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 not be used while interpreting the provisions of the Act. In the case *State of Haryana v. Chanan Mal*<sup>16</sup>, 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 statutes, 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*<sup>17</sup>,

*“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 sought to remedy.”*

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<sup>16</sup> (1977) 1 SCC 340,355.

<sup>17</sup> (1985) 1 SCC 8 (para 12).

The SC has observed in P Anand Gajapati Raju v. PCG Raju<sup>18</sup>, the legislative intention of the Act has been provided in Sections 5&8 and such these Sections have been interpreted. In Everest Lasso Ltd. v. Jindal Exports Ltd.<sup>19</sup>, 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<sup>20</sup>, 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 provisions 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 they do help in finding out the true legislative intent behind enacting a particular provision of the Act.

**Broadly speaking, the Act has three main parts –**

- (i) Part one and two specifically deals with the arbitration
  - Part 1 is more comprehensive and it provides for, irrespective of the nationalities of the disputants, the enforcement of arbitral awards of any arbitration, whether domestic or international, conducted in India.
  - Part 2 is a restricted one. It provides for the enforcement of any foreign arbitral awards to which 1927 GC or 1958 NYC applies.
- (ii) Part three deals with conciliation and it is based on the UNCITRAL Conciliation Rules 1980.

**SALIENT FEATURES OF 1996 ACT**

The salient features of the 1996 Act is as follows<sup>21</sup> –

1. Replacement of 3 old statutes

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<sup>18</sup> AIR 2000 SC 539.

<sup>19</sup> AIR 2001 SC 356.

<sup>20</sup> AIR 2001 SC 2293.

<sup>21</sup> [https://thefactfactor.com/facts/law/civil\\_law/alternate-dispute-resolution/arbitration-and-conciliation-act-1996/16477/](https://thefactfactor.com/facts/law/civil_law/alternate-dispute-resolution/arbitration-and-conciliation-act-1996/16477/) site visited on August 26 2021.

The 1996 Act is a consolidation of three old statutes namely, the The Arbitration (Protocol and Convention) Act, 1937, the Indian Arbitration Act, 1940, and the Foreign Awards (Recognition and Enforcement) Act, 1961. The provisions regarding each are kept distinct within the 1996 Act.

## 2. Party Autonomy

The central theme of the Act is the idea of “party autonomy” and is strengthened by the following expressions –

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

## 3. 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 et bono) 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 the arbitral tribunal.
- The award should be dated and the place, where it is made, should be mentioned.
- Copy of award should be given to each party.

## 4. Reasoned Award

- The arbitral award must be in writing and signed by the Arbitral Tribunal members.
- The reasons for the award must be stated except the parties have agreed that no reasons are to be given. Earlier the reasoning was not mandatory.

## 5. Necessity of Arbitration Agreement

- As per the Act, without an arbitration agreement, no arbitral proceedings can be instituted.

## 6. 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 be mutually 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.

## 7. 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 that objection 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.

#### 8. 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.

#### 9. 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.

#### 10. Applicability of the Limitation Act

- For this purpose, the date on which the aggrieved party requests another party to refer the matter to arbitration shall be considered.
- If on that date, the claim is barred under Limitation Act, the arbitration cannot continue.
- If the arbitration award is set aside by Court, time spent in arbitration will be excluded for purpose of the Limitation Act.

#### 11. 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.



## 12. Clear distinction between Arbitration and Conciliation

- The provisions that relate to the process of arbitration are contained in Part I 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.

## 13. Enforceability of Award

- Under this Act, every final arbitral award is enforceable as a decree of the court of law and not required to be made a “rule of court”.

## 14. 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 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*<sup>22</sup>, the Court gave beneficial 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;

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<sup>22</sup> (2006) 11 SCC 245.

2. Party autonomy is paramount subject only to such safeguards as are necessary in public interest; and
3. The arbitral tribunal is enjoined with a duty to act fairly and impartially.

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 aside awards; and
2. An aggrieved party has to start again from the District Court for challenging the award.

The 176<sup>th</sup> 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 UNCITRAL Model 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.<sup>23</sup> This has resulted in the causing of reluctance of parties to choose the Indian law.<sup>24</sup> Later, there were 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.<sup>25</sup>

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

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<sup>23</sup> Available at <http://pib.nic.in/release/release.asp?relid=17020> site visited on 15 August 2021.

<sup>24</sup> 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 176<sup>th</sup> 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 Act could 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 it was introduced. [www.parinda.com/news\\_archieves/jan2005/justice-b.p.-saraf-submits-report-on-arbitration.shtml](http://www.parinda.com/news_archieves/jan2005/justice-b.p.-saraf-submits-report-on-arbitration.shtml) site visited on 15 August 2021.

<sup>25</sup> Nikhil Suresh Pareek, International Commercial Arbitration in India: Governing Law Issues, 18 Unif. L. Rev. 154 (2019). pp.154-165.

the law to get favourable awards by fraud. It also does away with qualifications of the arbitrators under 8<sup>th</sup> 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 under the Act would save the taxpayers money by holding these 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 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 in the 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<sup>26</sup> is an attempt in implementing the UNCITRAL Model Law<sup>27</sup> 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:

*“The way in which the proceedings under the Act are conducted and without 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 parties for the expeditious*

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<sup>26</sup> Hereinafter referred to as the Act.

<sup>27</sup> 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 SCC 275; Sundaram Finance Ltd. v. NEPC India Ltd. (1999) 2 SCC 479; Gas Authority of India Ltd. v. Ket Construction (I) Ltd., (2007) 5 SCC 38.

*disposal of their disputes has by the decisions of the Courts been clothed with 'legalese' of unforeseen complexity.*"<sup>28</sup>

The main purpose of the Act<sup>29</sup> 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 it being in direct conflict with the objectives of the Act<sup>30</sup> and this interventionism of the Indian Judiciary has been regarded as the greatest hindrance to India's development into arbitration hub.<sup>31</sup> 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**<sup>32</sup>

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.<sup>33</sup>

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<sup>28</sup> Guru Nanak Foundation v. Rattan Singh & Sons, AIR 1981 SC 2075, 2076-77, per Desai J.

<sup>29</sup> 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 this Part, no judicial authority shall intervene except where so provided in this Part."*

<sup>30</sup> 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).

<sup>31</sup> Devika Khanna, "Arbitrator's recent adventures and misadventures in India" 15(6) International Arbitration Law Review 203 (2012).

<sup>32</sup> (2012) 9 SCC 552.

<sup>33</sup> Vasudha Sharma & Pankhuri Agarwal, "Rendering India into an Arbitration Friendly Jurisdiction- Analysis of the Proposed Amendments to the Arbitration and Conciliation Act, 1996", 3 NUJS L. REV. 535 (2010); Rukmini Das & Anisha Keyal, "Judicial Intervention in International Arbitration", 2 NUJS L. REV 585 (2009); Fali S Nariman, "India and International Arbitration", 41 GEO. WASH. INT'L. L. REV. 367, 374-376 (2009); Badrinath Srinivasan, "Review of the Consultation Paper on Proposed Amendments to the Arbitration and Conciliation Act, 1996 – Part I", May 6, 2010, available at <http://practicalacademic.blogspot.com/2010/05/review-of-consultation-paper-on.html>, site visited on Sept 24,

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 injunction order 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 is held 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 of the application 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-convention countries.<sup>34</sup>

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 only to the extent permitted by the derogatory provisions of Part I. In cases of International Commercial Arbitrations, held out of India, provisions of Part I would apply unless the

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2021; SK Dholakia, "Bhatia International v. Bulk Trading S. A., (2003) 5 SCC J-22", also available at <http://www.ebc-india.com/lawyer/articles/2003v5a6.htm> , site visited on Sept 24, 2021.

<sup>34</sup> Non convention countries are those countries which are not signatories to any of the following conventions or 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.

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 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 court by the statute<sup>35</sup>, 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<sup>36</sup> (to be taken under Sec 9 of the 1996 Act).

## **2. Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.,<sup>37</sup>**

All legal speculations which have arisen because of Bhatia case<sup>38</sup> 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.<sup>39</sup>
4. No application for interim relief in a foreign seated international commercial arbitration is maintainable; neither under Section 9 of the 1996 Act nor under any other provision of Part I of the 1996 Act.

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<sup>35</sup> 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).

<sup>36</sup> Olex Focas Pty. Ltd. v. Skodaexport Co. Ltd., 1999 (Suppl.) Arb LR 533 (Delhi).

<sup>37</sup> (2012) 9 SCC 552.

<sup>38</sup> Bhatia International v. Bulk Trading S A (2002) 4 SCC 105.

<sup>39</sup> The territoriality principle has been adopted in the UNCITRAL Model Law.

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 September 2012 (the date when the judgment in the BALCO case was rendered).<sup>40</sup>

**3. Hardy Oil and Gas Limited v. Hindustan Oil Exploration Company Limited and Ors.,<sup>41</sup>**

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<sup>42</sup>**

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<sup>43</sup>**

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 I would 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<sup>44</sup>**

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

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<sup>40</sup> Available at <https://www.mondaq.com/india/arbitration-dispute-resolution/977830/overview-five-landmark-judgements-on-cross-border-arbitration-in-india> .

<sup>41</sup> (2006) 1 GLR 658.

<sup>42</sup> (2011) 6 SCC 161 : 2011(5) SCALE 678.

<sup>43</sup> (2014) 4 CTC 75.

<sup>44</sup> AIR 1994 SC 1136.

mechanism, and to put a defined scope for the complex concept of Public Policy<sup>45</sup> especially in case of foreign seated arbitration.

**7. Swiss Timing Limited v. Organising Committee, Commonwealth Games 2010, Delhi<sup>46</sup>**

The Hon. Supreme Court held that even fraud is considered as arbitrable, and regarding the appointment<sup>47</sup> and impartiality of the Arbitrators<sup>48</sup> etc.

**8. Max India Ltd. v. General Binding Corporation<sup>49</sup>**

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 Section 9 which is included in Part I of the Act 1996.

**9. Enercon (India) Ltd & Ors. v. Enercon GmbH & Anr.<sup>50</sup>**

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 venue of arbitration is only vested with concurrent jurisdiction.

**10. Kvaerner Cementation India Limited v. Bajranglal Agarwal<sup>51</sup>**

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<sup>52</sup> in matters of anti-arbitration

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<sup>45</sup> Shri Lal Mahal Ltd. v. Progetto Grano Spa, 2003(2) ARB LR 5 (SC).

<sup>46</sup> AIR 2014 SC 3723.

<sup>47</sup> Antrix Corp. Ltd v. Devas Multimedia P. Ltd., 2013 (7) SCALE 216.

<sup>48</sup> Reliance Industries Ltd. & Ors. v. Union of India, AIR 2014 SC 2342.

<sup>49</sup> 2009 (3) ARB LR 162 (Delhi).

<sup>50</sup> (2014) 5 SCC 1.

<sup>51</sup> (2012) 5 SCC 214.



injunctions. 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 on the following matters –

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

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

### **11. SBP & Co v. Patel Engineering Limited<sup>53</sup>**

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<sup>54</sup>**

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.

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<sup>52</sup> 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.

<sup>53</sup> (2005) 8 SCC 618.

<sup>54</sup> (2014) 11 SCC 639.

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.<sup>55</sup>

**13. Himachal Sorang Power Private Limited v. NCC Infrastructure Holdings Limited<sup>56</sup>**

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 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<sup>57</sup>**

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

**15. Balasore Alloys Limited v. Medima LLC<sup>58</sup>**

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

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<sup>55</sup> Ravi Arya v. Palmview Investments Overseas 2019 SCC OnLine Bom 251; Lafarge India Pvt Ltd. v. Emami Realty 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.

<sup>56</sup> 2019 SCC OnLine DEL 7575.

<sup>57</sup> 2020 SCC OnLine Del 901.

<sup>58</sup> (2020) 9 SCC 136.

### 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 regulatory framework. Hong Kong has been thriving in sanctioning these demands 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.<sup>59</sup> 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 additions to the Model Law), would bring Hong Kong a great benefit.<sup>60</sup> Their proposal was fully implemented by Arbitration (Amendment) (No. 2) Ordinance in 1989.<sup>61</sup>

ARBITRATION ORDINANCE – The legislative framework that regulates all the arbitrations seated in Hong Kong is the Arbitration Ordinance<sup>62</sup> (Cap 609 of the Laws of Hong 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<sup>63</sup> 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

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<sup>59</sup> The Law Reform Commission of Hong Kong, Report on the Adoption of the UNCITRAL Model Law of Arbitration 1 (1987).

<sup>60</sup> *Id.*, at 5, 12, 18-26.

<sup>61</sup> The Law Reform Commission of Hong Kong, Implementation, The Law Reform Commission of Hong Kong, available at <http://www.hkreform.gov.hk/en/implementation/#a>.

<sup>62</sup> Hereinafter referred to as ‘The Ordinance’.

<sup>63</sup> 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](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf).

first jurisdiction<sup>64</sup> 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”.<sup>65</sup> Hong Kong is treated as a Contracting State to New York Convention, 1958<sup>66</sup> 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<sup>67</sup> and certain optional provisions that can be inserted in the agreement.<sup>68</sup>

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 dispute resolution; and (5) including provisions in regard of the enforcement of arbitral awards.<sup>69</sup>

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;

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<sup>64</sup> Hong Kong is the first ever jurisdiction to adopt UNCITRAL Model Law as their procedural law for arbitration.

<sup>65</sup> 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/>.

<sup>66</sup> The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”), 330 U.N.T.S. 38.

<sup>67</sup> 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 the few 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.

<sup>68</sup> These are the provisions that permit appeal either on some serious irregularity or on a point of law and on consolidation.

<sup>69</sup> 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/>.

- The enforceability of relief issued by emergency arbitrators in or outside Hong Kong; and
- The ability to submit disputes over IPRs (Intellectual Property Rights) to arbitrations in Hong Kong.

The Ordinance is a user-friendly piece of legislation for both domestic and foreign arbitration users. 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.

#### KEY PROVISIONS OF THE ORDINANCE

##### **A. Mandatory provisions under the Ordinance**

Certain provisions which have been adopted from the UNCITRAL Model Law are made mandatory and the parties are not free to contract out of these provisions. It is discussed below –

- The High Court has got the power to grant interim measures of protection.<sup>70</sup>
- Arbitrators are obliged to disclose circumstances that cast doubt on or prejudice their impartiality and independence. An arbitrator can be challenged

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<sup>70</sup> Sec 21 of the Ordinance.

if there exist any circumstances that might give rise to prejudice or justifiable doubts as to their independence or impartiality or if they do not possess qualifications as agreed to by the parties involved.<sup>71</sup>

- Arbitration agreements must be in writing.<sup>72</sup>
- The arbitral tribunal also has got the competence to rule on its own jurisdiction.<sup>73</sup>
- An arbitral award's form and content requirements must be strictly adhered to.<sup>74</sup>
- The Court has the power to pass an order of stay against the court proceedings in favour of arbitration.<sup>75</sup>
- The Court also has got the power to set aside an arbitral award.<sup>76</sup>
- The parties must be treated equally, and the arbitral tribunal must be independent and act impartially and fairly as between the parties.<sup>77</sup>

## **B. Requirements for an arbitral agreement to be valid and enforceable**

- Sec 19 of the Ordinance adopts Option I of Art 7 of the UNCITRAL Model Law and provides that an arbitration agreement “may be in writing and the form of a separate agreement or an arbitration clause in an arbitration agreement or contract”.
- An arbitration agreement is in writing if –
  - (i) “the content of the same is recorded in any form, whether or not the arbitration contract or agreement has been concluded by conduct, orally, or by other means”<sup>78</sup>; and
  - (ii) it is contained in an exchange of statements of defence and claim in which the existence of an agreement alleged by one party is not denied by the other.<sup>79</sup>

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<sup>71</sup> Sec 25 of the Ordinance.

<sup>72</sup> Sec 19 of the Ordinance.

<sup>73</sup> Sec 34 of the Ordinance.

<sup>74</sup> Sec 67 of the Ordinance.

<sup>75</sup> Sec 20 of the Ordinance.

<sup>76</sup> Sec 81 of the Ordinance.

<sup>77</sup> Sec 46 of the Ordinance.

<sup>78</sup> Sec 19(1) (3) of the Ordinance.

<sup>79</sup> Sec 19(1) (5) of the Ordinance.

- Electronic communications meet the requirement “in writing” for Sec 19, where qualifying electronic communications include email (Section 19(1) (4) of the Ordinance).

### **C. Future disputes can also be covered under an arbitration agreement.**

### **D. Arbitrability**

Arbitrability is important because if the matter in dispute is non-arbitrable, then it is treated as a ground for setting aside the matter.<sup>80</sup> All kinds of IPR disputes are arbitrable.<sup>81</sup> The following is a non-exhaustive list of certain matters<sup>82</sup> which cannot be resolved by arbitration:

- action in rem against vessels.
- criminal matters;
- employment or labour grievances;
- consumer claims;
- winding up claims;
- bankruptcy claims;
- family law matters;
- divorce proceedings; and
- competition disputes;

### **E. Arbitral Award**

- Requirements under Sec 67 of the Ordinance

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<sup>80</sup> Sec 81 of the Ordinance.

<sup>81</sup> Part 11 A of the Ordinance, which came into effect on 1 January 2018. Section 103J is an exception, which came into effect on 19 December 2019. It confirmed that the disputes relating to IPRs are arbitrable. Ss. 103C and 103D of the Ordinance are the two main provisions dealing with the same.

<sup>82</sup> Since there is no prescribed list for non arbitrable claims or matters, the Hong Kong judiciary have considered and cited the following UK authorities –

1. Fulham Football Club (1987) Limited v. Sir David Richards, The Football Association Premier League Limited [2011] EWCA Civ 855.

The award shall -

- (i) be in writing;
  - (ii) be signed by the arbitrator(s);
  - (iii) state the place and date of its arbitration;
  - (iv) state the reasons upon which it is based;
  - (v) delivered by each party after the passing of the award.
- As per Sec 84 of the Ordinance, with the leave of the Court, the arbitral award can be enforced in the same way a judgment is enforced. An application can be filed to the Court for recognition and enforcement of an award by the party. This can be done by originating summons with supporting affidavit/affirmation and draft order.
  - According to Section 85 of the Ordinance, the following documents must be submitted to the Court :
    - (i) The original arbitration agreement and the authenticated original award. A certified copy of both can also be submitted;
    - (ii) If the award is not in English or Chinese, its Chinese or English translation is certified by a sworn or official translator or a consular or diplomatic agent.

**F. Law of Limitation** also applies to the arbitrations in the same way it does to court proceedings.<sup>83</sup> It is governed by the Limitation Ordinance (Cap. 347). Parties can also agree to a shorter limitation period than those prescribed under the Limitation Ordinance. However, the Court (where a tribunal has not been constituted) or the arbitral tribunal can extend the limitation period prescribed if the:

- Conduct of any party involved makes it unjust to hold the other party to the strict terms of the agreement.<sup>84</sup>

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<sup>83</sup> Sec 14 of the Ordinance.

<sup>84</sup> Section 58 (4) (b) of the Ordinance



- Circumstances are such as to be outside the reasonable contemplation of the parties when they entered into the arbitration agreement, and it would be just to extend the time period.<sup>85</sup>

**G. Parties may expressly opt-in the right to appeal an arbitral award either challenging it on the ground of some serious irregularity or a question of a point of law or by implication in certain situations.**

Notwithstanding the pro-arbitration framework of the Ordinance, Sec 3 sets out the following as one of the Ordinance's objectives –

"Subject to the observance of the necessary safeguards for the public interest, the parties to a dispute should be free to agree on the mode of resolution of their dispute".

Thus, if the parties prefer having a higher degree of supervision of the Court over the arbitration, they may expressly opt-in to the provisions provided under Sch. 2<sup>86</sup> of the Ordinance. It provides for, amongst others, the right to challenge an arbitral award<sup>87</sup> on the grounds of serious irregularities and the right to appeal<sup>88</sup> against it on a question of law with the Court's leave. The provisions contained in Sch. 2 will apply automatically unless the parties expressly opt-out from them, where the arbitration agreement provides that their arbitration is a "domestic arbitration" and the arbitration agreement was entered into:

1. within six years after commencement of the Ordinance (i.e. from 1 June 2011 to 31 May 2017); or

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<sup>85</sup> Section 58 (4) (a) of the Ordinance.

<sup>86</sup> Schedule 2 of the Ordinance allows for a greater intervention of the Court. Its provisions mainly relates to the following –

- (i) decisions of preliminary questions of law by the court;
- (ii) consolidation of arbitrations;
- (iii) arbitration by a sole arbitrator;
- (iv) appeals against an arbitral award on a point of law; and
- (v) Challenging an arbitral award on grounds of serious irregularity.

<sup>87</sup> An arbitral award can be challenged also on procedural grounds under the provisions of Sec 81 of the Ordinance.

<sup>88</sup> As per Sec 99 of the Ordinance, the scope of this right can be limited by the parties by expressly excluding it in the arbitration agreement.

2. before the commencement of the Ordinance, i.e. before 1 June 2011.

**H. Setting-aside application is the only recourse against arbitral awards** - The Ordinance provides that (save for the application of opt-in provisions under the Ordinance), the only recourse to a court against an arbitral award is by way of an application to set aside the same under Article 34 of the UNCITRAL Model Law.<sup>89</sup>

**I. The right of appeal against the court's refusal to set aside is limited** - Section 81(4) of the Ordinance provides that for any appeal from a decision (given under Article 34) of the Court of First instance, the leave of same Court is required. This provision intends to reinforce the pro-enforcement approach.

**J. An arbitral tribunal is allowed to order security for costs. It also has the power to make award at any time, unless agreed by the parties.**<sup>90</sup>

#### **K. Reliefs**

Under Section 35 of the Ordinance, an arbitral tribunal can grant the following interim measures of binding nature –

- (i) Preserve relevant and material evidence.
- (ii) Restore or maintain the status quo pending determination of the dispute;
- (iii) provide a means or preserving assets from which a subsequent award may be satisfied;
- (iv) Take action that would refrain from or prevent taking action, likely to cause prejudice or imminent harm to the arbitral process itself.

Sec 70 of the Ordinance provides that unless agreed by parties, an arbitral tribunal can award any relief or remedy which could have been ordered by the Court if the dispute had been a subject of civil proceedings in the Court. Furthermore, only reasonable

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<sup>89</sup> As implemented by Sec 81 of the Ordinance.

<sup>90</sup> Sec 72 of the Ordinance.

legal costs can be recovered,<sup>91</sup> if not limited by the applicable rules or otherwise agreed to by the parties. Arbitral tribunal can award interests and also has the discretion to decide on the rests, rates and dates of interest but no later than the date of payment. The arbitral tribunal can also award interest unless agreed by the parties or limited by the applicable rules.<sup>92</sup>

## OTHER REFORMS

Innovative provisions are introduced to address arbitrability of intellectual property disputes, enforcement of emergency arbitrator relief and third-party funding. A recent Consultation Paper from the Law Reform Commission of Hong Kong proposes further reforms to allow arbitrating parties to use conditional fee and damages-based agreements, which would provide additional flexibility in respect of funding arbitrations in Hong Kong.<sup>93</sup>

**Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the HKSAR** is a special arrangement which allows parties to arbitrations seated in Hong Kong and administered by arbitral institutions designated to seek interim measures from the Courts of Mainland. Hong Kong is only foreign jurisdiction to avail these rights to the parties. This has further enhanced the position of Hong Kong as an attractive dispute resolution centre not only in Asia but also across the globe, especially when it comes to Mainland entities involved disputes. **The Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region**<sup>94</sup> was a welcome development that clarified and removed certain restrictions in the mutual enforcement regime between Hong Kong and Mainland China.<sup>95</sup>

On February 1, 2019, the **Hong Kong Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017** ('TPF Ordinance') came into force. The Third Party Funding<sup>96</sup> Ordinance provides that the common law offences and torts of

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<sup>91</sup> Sec 74 of the Ordinance.

<sup>92</sup> Post award interest can be awarded at the judgment rate under Sec 80 of the Ordinance. The current judgment rate is 8% per annum (July 1, 2021).

<sup>93</sup> Available at <http://www.hk-lawyer.org/content/strong-foundations-which-hong-kong%E2%80%99s-status-leading-seat-international-arbitration-rests>.

<sup>94</sup> Hereinafter referred to as the Supplemental Arrangement.

<sup>95</sup> Available at <https://hsfnotes.com/arbitration/2021/06/15/hong-kong-enacts-supplemental-arrangement-in-full/>.

<sup>96</sup> Hereinafter referred to as TPF.

maintenance and champerty do not apply in relation to third-party funding of arbitration.<sup>97</sup> Together with the Code of Practice for Third Party Funding of Arbitration ('Code of Practice'), that was issued by the Secretary for Justice earlier on 7 December 2018,<sup>98</sup> the TPF Ordinance sets out a modern framework of TPF in international arbitration. Importantly, significant safeguards are included which seek to address concerns that may arise in TPF, particularly with regards to the integrity of the arbitral process.<sup>99</sup> Where Hong Kong is the seat of an international arbitration, the above framework lends confidence to both the parties to arbitration as well as to the judiciary in relation to the integrity of arbitral proceedings involving TPF. With regards to the judiciary, such confidence is especially important given that modern seats of arbitration strive to minimise the intervention of its courts and instead seek that its courts exercise a supervisory function in relation to matters in arbitration.<sup>100</sup>

By drawing reference from the UNCITRAL ODR (Online Dispute Resolution) Technical Notes, APEC developed a Collaborative Framework on ODR of Cross-Border Business to Business Disputes (“**APEC ODR Framework**”) and model procedural rules in 2019, with MSMEs (micro, small and medium-sized enterprises) as the major beneficiary. The APEC ODR Framework promotes the use of ODR by global enterprises (MSMEs in particular) to resolve low-value cross-border disputes. Both Hong Kong and China has opted into the said framework in April 2020.<sup>101</sup>

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 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 list of “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

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<sup>97</sup> Hong Kong Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017, Ss. 98K and 98L respectively.

<sup>98</sup> Available at [https://gia.info.gov.hk/general/201812/07/P2018120700601\\_299064\\_1\\_1544169372716.pdf](https://gia.info.gov.hk/general/201812/07/P2018120700601_299064_1_1544169372716.pdf).

<sup>99</sup> Available at [https://www.mondaq.com/hongkong/arbitration-dispute-resolution/1089150/lessons-learnt-from-hong-kong-the-potential-for-third-party-funding-in-malaysia39s-international-arbitration-landscape#\\_edn6](https://www.mondaq.com/hongkong/arbitration-dispute-resolution/1089150/lessons-learnt-from-hong-kong-the-potential-for-third-party-funding-in-malaysia39s-international-arbitration-landscape#_edn6).

<sup>100</sup> *Ibid.*

<sup>101</sup> Available at <https://www.legco.gov.hk/yr20-21/english/panels/ajls/papers/ajls20210531cb4-1014-3-e.pdf>.

Arrangement. All Mainland awards are now enforceable in Hong Kong under the Supplemental 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**<sup>102</sup> 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 to provide 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 Kong or a company 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 famous for their pro-enforcement<sup>103</sup> and pro-arbitration approach<sup>104</sup>. 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

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<sup>102</sup> Hereinafter referred to as the Scheme.

<sup>103</sup> Grand Pacific Holdings Ltd v. Pacific China Holdings Ltd (in liq) (No.1), [2012] 4 H.K.L.R.D.I.

<sup>104</sup> Paquito Lima Buton v. Rainbow Joy Shipping Ltd Inc., [2008]4 H.K.C 14,55.

resolution is the presence of this approach. In the case *Re Petro China International (Hong Kong) Corp Ltd*,<sup>105</sup> 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.<sup>106</sup>

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) always hears 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 judicial independence in the — the global competitiveness report 2013-2014 — published by the World Economic Forum right after New Zealand, Finland, and Ireland.<sup>107</sup> As per the HKIAC (Hong Kong International Arbitration Centre) website<sup>108</sup>, 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 it by upholding its finality and enforcement. The Hong Kong judiciary has long been a beacon in the region, upholding the rule of law and representing a truly independence judiciary free of any influence.<sup>109</sup> In terms of how the discretion of the Court is to be applied, Hong Kong is

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<sup>105</sup> [2011] 4 HKLRD 604.

<sup>106</sup> <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.

<sup>107</sup> The Global Competitiveness Report 2013-2014, available at [https://www3.weforum.org/docs/WEF\\_GlobalCompetitivenessReport\\_2013-14.pdf](https://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf) site visited on August 26, 2021.

<sup>108</sup> <https://www.hkiac.org/arbitration/why-hong-kong> site visited on August 26 2021.

<sup>109</sup> Teresa Y.W. Cheng. Michael J, Moser, *Hong Kong Arbitration: A User’s Guide* 17 (2nd ed., 2008).

holding a far more developed position. Furthermore, the courts have also developed an indemnity costs rule.<sup>110</sup>

The judgment passed by Justice Mimmie Chan in the case *KB v. S and Others*<sup>111</sup> 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 principles behind 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".<sup>112</sup>
- 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.<sup>113</sup>
- 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

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<sup>110</sup> As per this rule the parties are deterred from resisting arbitral awards or proceedings on unmeritorious grounds.

<sup>111</sup> HCCT 13/2015.

<sup>112</sup> *Re PetroChina International (Hong Kong) Corp Ltd* [2011] 4 HKLRD 604.

<sup>113</sup> *Grand Pacific Holdings v. China Holdings Ltd* [2012] 4 HKLRD 1 (CA).

find that there was an error sufficiently serious so as to have undermined due process.<sup>114</sup>

- 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.<sup>115</sup>
- Failure to make prompt objection to the Tribunal or the supervisory court may constitute estoppel or want of *bona fide*.<sup>116</sup>
- 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.<sup>117</sup>
- The Court of Final Appeal clearly recognised in *Hebei Import & Export Corp v Polytek Engineering Co Ltd*<sup>118</sup> that parties to the arbitration have a duty of good faith, or to act *bona fide*.<sup>119</sup>

Under Article 92 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, judges may also be recruited from other common law jurisdictions, especially from UK and Australia.<sup>120</sup> These foreign judges act as a connecting link between the legal system of other common law jurisdictions and that of Hong Kong. They all pass judgments impartially, subject to appeal as provided by law.

Hong Kong judiciary have 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**<sup>121</sup>

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

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<sup>114</sup> Grand Pacific Holdings v. China Holdings Ltd [2012] 4 HKLRD 1 (CA).

<sup>115</sup> Xiamen Xingjingdi Group Ltd v. Eton Properties Limited [2009] 4 HKLRD 353 (CA).

<sup>116</sup> Hebei Import & Export Corp v. Polytek Engineering Co Ltd (1999) 2 HKCFAR 111.

<sup>117</sup> Hebei Import & Export Corp v. Polytek Engineering Co Ltd (1999) 2 HKCFAR 111.

<sup>118</sup> Hebei Import & Export Corp v. Polytek Engineering Co Ltd (1999) 2 HKCFAR 111.

<sup>119</sup> Hebei Import & Export Corp v. Polytek Engineering Co Ltd (1999) 2 HKCFAR 111.

<sup>120</sup> Presently the Court of Final Appeal consists of 13 eminent foreign judges from Canada, UK and Australia. Latest nominations are Lord Sumption, Madam Justice McLachlin and Lord Hodge.

<sup>121</sup> [1999] 2 HKCFAR 111, 139F.



where such enforcement would be “**contrary to the fundamental conceptions of morality and justice**” of the forum.<sup>122</sup>

❖ **Lin Ming v. Chen Shu Quan**<sup>123</sup>

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.

❖ **Grand Pacific Holdings v. Pacific China Holdings**<sup>124</sup>

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.”*<sup>125</sup>

❖ **Gao Haiyan v. Keeneye Holdings Ltd.**<sup>126</sup>

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 was conducted. The Court held that just because the procedure adopted would give rise to a fear of bias if that proceeding is carried out in Hong Kong, that did not necessarily amount to a

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<sup>122</sup> 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.

<sup>123</sup> H.C.A. 1900/201.

<sup>124</sup> (2012) 4 H.K.L.R.D. 1.

<sup>125</sup> Justin D’ Agostino and Herbert Smith Freehills, Hong-Kong Court of Final Appeal refuses leave to appeal in the 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-the-grand-pacific-v-pacific-china-case/> site visited on September 22, 2021.

<sup>126</sup> [2012] IH.K.L.R.D. 627 (C.A.C.V.79/2011).

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 deny an award's enforcement, more weightage will be given to the decisions rendered by the courts of the seat as to whether to set aside the award.

❖ **T v. T S**<sup>127</sup>

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 an arbitration,

it will pay costs on an indemnity basis unless special circumstances exist.<sup>128</sup>

❖ **C v. D**<sup>129</sup>

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

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<sup>127</sup> 2014 WL 7311 (CFI).

<sup>128</sup> 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.

<sup>129</sup> [2021] HKCFI 1474.

questions in relation to escalation mechanism are to be resolved by the arbitrators and not the local courts. The defendant was also awarded costs on an indemnity basis.

❖ **W v. AW**<sup>130</sup>

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

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

❖ **G v. S**<sup>131</sup>

The Court in this case made it clear that if the mischief alleged ought to be resolved and decided as per the dispute resolution mechanism stipulated in the agreement, then it would not readily intervene in the award's enforcement. The court was also circumspect to set aside the enforcement order for being contrary to public policy. In this case, the court held that since the 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 refuse 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.<sup>132</sup> The Court followed an earlier decision.<sup>133</sup>

❖ **Fenn Kar Bak Lily v. So Shiu Tsung Thomas**<sup>134</sup>

In this case, the plaintiff filed a complaint alleging that the arbitrator had acted in conflict of 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

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<sup>130</sup> [2021] HKCFI 1707.

<sup>131</sup> [2021] HKCU 2493.

<sup>132</sup> Sec 84, Arbitration Ordinance.

<sup>133</sup> JJ Agro Industries (P) Ltd v. Texuna International Ltd [1992] 2 HKLR 391.

<sup>134</sup> [2021] HKCU 2835.

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 (資富控股有限公司) And Ors v. 南通嘉禾科技  
投资开发有限公司**<sup>135</sup>

In this case, the court considered that the presumption of “one-stop adjudication” was not sufficient 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**<sup>136</sup> and **广东顺德展炜  
商贸有限公司 v. Sun Fung Timber Company Limited**<sup>137</sup>

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 courts would 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.

In the former case,

- Hong Kong Court intervened in the arbitration proceedings in order to cure the defect or irregularity as to the capacity of the applicant. Only if material irregularities are present, the Court will question the arbitral awards or intervene in the arbitration proceedings.
- In favour of the applicant, the Hong Kong court granted an *ex parte* enforcement order against the respondent.
- The respondent, aggrieved by this order, applied to set aside the enforcement order on the ground that it was irregular.

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<sup>135</sup> [2021] HKCU 533.

<sup>136</sup> [2021] HKCFI 2341.

<sup>137</sup> [2021] HKCFI 2407.

- It was argued by the respondent that the applicant was not a legal entity under the laws of Hong Kong and therefore did not have the capability of suing and being sued. It was Hon. Mimmie Chan J., who heard the respondent's application.
- In the underlying agreement, "Joint Venture" (JV) was given as the name of the applicant. But, in the arbitration and enforcement proceedings, it was named the "Consortium comprising TPL and ICB" (Consortium).
- The Judge agreed that award enforcement proceedings in Hong Kong needed to be properly constituted and brought by a recognised legal entity.
- Moreover, the Judge also accepted that there was no evidence of any corporation or partnership carrying on business in the name of "A Consortium comprising TPL and ICB" in Hong Kong. Therefore, neither the Consortium nor JV was a legal entity that could be sued or sue in its name.
- However, the Judge found the fact that the respondent did not even doubted or got confused about the applicant's identity. Without pointing out any complaint about the applicant's legal identity, the respondent referred to the applicant as the "Consortium" in the answer and counterclaim which the respondent served. The awards also made the applicant's identity beyond confusion, stating it was "a consortium comprising TPL of the ICB of Lebanon United Arab Emirates".
- The Judge, therefore, in the light of the observations mentioned above, held, applying the procedural law of Hong Kong which governs the enforcement proceedings' constitution, the two parties named as the "Consortium" should be the parties jointly entitled to leave to enforce the awards in favour of the Consortium, i.e., ICB and TPL.
- For curing the irregularity of the original applicant (i.e., the Consortium) as to its capacity to commence the arbitration proceedings, the Judge decided to grant leave to join both ICB and TPL as additional applicants to the enforcement proceedings, following which the Judge also granted leave to ICB and TPL as additional applicants to enforce the awards.

While in the latter case,

- An application for security pending enforcement of an arbitral award was dismissed by the Hong Kong Court with indemnity costs.
- An application for security, which is to be put up by the respondent company (Company) until enforcement of an arbitral award passed in its favour was pending, was filed by the applicant.
- A Corporate Shareholder (NI) and an individual (ST) jointly owned the Company on a 50/50 basis. Prior to the enforcement, the applicant filed a petition for the Company's winding up.
- The Judge of the Company dismissed the petition stating that "there was a bona fide case that the Company had entered into a fake transaction with ST, to harm the Company by depriving the Company of its valuable assets".
- Hon. Mimmie Chan J heard the application for security and dismissed it for the following reasons –
  1. The Judge found that the applicant had misled the court concerning the service of the *inter partes* summons for the enforcement proceedings. The Summons was did served at the registered office address of the Company's Property. However, the Company had sold the property to the applicant's knowledge. The applicant did not serve any proper notice of the enforcement proceedings and Summons to the Company. Despite contrary indications in the applicant's affirmation, the applicant also did not serve the enforcement order on NI.
  2. The Judge held that the failure on the applicant's side to bring the above facts to the court's attention was a deliberate and material non-disclosure. And, this had amounted, in fact, to "misleading the court".
  3. The highly unusual features of the transaction in question were "all too obvious to be dismissed by this Court with ease". The companies Judge also did highlight the same as causing him concern. The Judge accepted that "fraud, collusion, dishonesty and misappropriation are all serious allegations made, and must be proved by cogent evidence" and therefore did not concluded

the award as manifestly invalid. The Judge, however, held that there was an argument with realistic probabilities of success that the Company had not authorised the transaction and the transaction was a fake.

4. The Judge was not satisfied with the evidence that NI would be in a position to procure or cause the Company to dissipate its assets or to act to defeat the award until the application to set aside the enforcement order is heard.
  - Accordingly, the Judge dismissed the security application.
  - The Judge also heard the arguments on costs. The Judge further observes that it was unreasonable for the applicant to insist still that the security application must be heard in light of the merits, the evidence filed, and the case's circumstances. Therefore, the Judge ordered indemnity costs against the applicant along with a certificate for two counsels.

## **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<sup>138</sup> Report, Singapore had, for the first time, clinched the top spot along with London.

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<sup>138</sup> 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](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf) site visited on September 20, 2021.

The firstly enacted law in Singapore to establish a legal regime to govern the proceedings of arbitration and the arbitral awards' enforcement was the Arbitration Act, 1953.<sup>139</sup> It did not make any distinction between domestic and international arbitration. To deal with awards 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 conduct of arbitrations namely,

- (i) The Arbitration (International Investment Disputes) Act (1985): It governs the recognition and enforcement of awards in those investment disputes which involve a State party.
- (ii) The International Arbitration Act (1994)<sup>140</sup>: 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 is clearly stipulated in the arbitration agreement.

#### AMENDMENTS TO SINGAPORE'S IAA – HIGHLIGHTS

The Singapore Ministry of Law, for introducing two features to IAA, has proposed the International Arbitration (Amendment) Bill in September, 2020. The same was on October 5,

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<sup>139</sup> Mohan R. Pillay, The Singapore Arbitration Regime and the UNCITRAL Model Law, *Arbitration International*, Volume 20, Issue 4, 1 December 2004, Pages 355–386, <https://doi.org/10.1093/arbitration/20.4.355>.

<sup>140</sup> Hereinafter referred to as IAA.



2020 and came into force on December 1, 2020. The new features which were introduced through 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. It will also

It will operate in the following manner<sup>141</sup> –

- The claimants will be required to jointly appoint an arbitrator and state their choice in the request for the dispute to be referred to arbitration, or the Notice of Arbitration (“NOA”).
- The respondents must jointly appoint an arbitrator and inform the claimants of the appointment within 30 days from the date of receipt of the request for dispute to be referred to arbitration, or NOA.
- The 1<sup>st</sup> and 2<sup>nd</sup> arbitrators must then nominate a 3<sup>rd</sup> arbitrator within 60 days from date of receipt of the request for dispute to be referred to arbitration by the last respondent. The 3<sup>rd</sup> arbitrator shall be the presiding arbitrator.
- Where the 1<sup>st</sup> and 2<sup>nd</sup> arbitrators are unable to agree on the appointment of the 3<sup>rd</sup> arbitrator within the specified period of time, the appointing authority must, upon the request of any party and having regard to all relevant circumstances, appoint the 3<sup>rd</sup> arbitrator.
- If either the claimants or the respondents are unable to appoint their arbitrator within the specified period, the appointing authority must, upon the request of any party, appoint all three arbitrators. In doing so the appointing authority may re-appoint or revoke any appointment already made and designate one of the three arbitrators as the presiding arbitrator.

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<sup>141</sup> Wei Ming Tan, “Amendments to Singapore’s International Arbitration Act to Enhance Statutory Regime” (December, 2020), available at <https://singaporeinternationalarbitration.com/> site visited on September 20, 2021.

## **B. Powers of High Court & Arbitral Tribunal to enforce confidentiality obligations<sup>142</sup>**

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 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.<sup>143</sup>

### **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*<sup>144</sup> 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.<sup>145</sup> However in certain circumstances the judiciary has also intervened by setting aside the award. Recently, in the case *Convexity Ltd. v. Phoenixfin Pte Ltd., Mek Global Ltd. and Phoenixfin Ltd.*,<sup>146</sup> 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

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<sup>142</sup> Ss. 12(1)(j) and 12A(2) of IAA.

<sup>143</sup> *Supra* 138.

<sup>144</sup> [2009] 4 SLR(R) 732 at [28].

<sup>145</sup> *Ibid.*, at [29].

<sup>146</sup> [2021] SGHC 88.

High Court held that there has been a breach of natural justice as the award was passed by dealing with issues that were outside the 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 intervening in those situations where such an interference is much needed. The Singapore judiciary 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**<sup>147</sup>

In this case, P T Asuransi placed on reliance the controversial Saw Pipes judgment<sup>148</sup> 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 public policy 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 Model Law. It operates only when the award either –

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

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<sup>147</sup> (2007) 1 SLR (R) 597.

<sup>148</sup> ONGC v. Saw Pipes (2003) 5 SCC 705.

This judgment was later followed in a number of cases<sup>149</sup> 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.**<sup>150</sup>

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

- which rule of natural justice was breached;
- 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<sup>151</sup> of IAA. It further went on to say 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"*<sup>152</sup>

❖ **VV & Anor v. VW**<sup>153</sup>

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

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<sup>149</sup> VV v. VW (2008) 2 SLR (R) 929; Swiss Singapore Overseas Enterprises Pte Ltd v. Exim Rajathi India Pvt Ltd, (2010) 1 SLR 573.

<sup>150</sup> (2007) 3 SLR (R) 86.

<sup>151</sup> The two primary objectives of the IAA includes the following –

- (i) to respect and preserve party autonomy; and
- (ii) to ensure procedural fairness.

<sup>152</sup> This decision was subsequently echoed in the case CRW joint Operation v. PT Perusahaan Gas Negara (Persero) TBK, (2011) SGCA 33.

<sup>153</sup> [2008] 2 SLR(R) 929).

❖ **Insignia Technology Co Ltd v. Alstom Technology Ltd**<sup>154</sup>

The court had upheld the “pathological clauses”<sup>155</sup> by checking whether there existed an intention on the side of the parties to arbitrate their disputes.<sup>156</sup>

❖ **AJU v. AJT**<sup>157</sup>

The Singapore Court of Appeal in this case had overturned the decision of the High Court to set aside an interim award stating that the same was contrary to the State’s public policy. 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,<sup>158</sup> 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.<sup>159</sup>

❖ **Larsen Oil and Gas Pte Ltd v. Petroprod Ltd**<sup>160</sup>

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.

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<sup>154</sup> [2009] 3 SLR(R)(R) 936.

<sup>155</sup> Pathological clauses are those which are unclearly or uncertainly made.

<sup>156</sup> HKL Group Co Ltd v. Rizq International Holdings Pte Ltd [2013] SGHCR 5.

<sup>157</sup> [2010] 4 SLR 649.

<sup>158</sup> Westacre Investments Inc v. Jugimport-SPDR Holding Co Ltd and Others [1999] QB 740 and Soleimany v. Soleimany [1999] QB 785.

<sup>159</sup> Available at <https://www.hfw.com/Singapore-Courts-continue#> site visited on September 20, 2021.

<sup>160</sup> [2011] 3 SLR 414.

❖ **AKN v. ALC**<sup>161</sup>

This case affirmed Singapore’s pro-arbitration stance by reiterating that the grounds available for challenging arbitral awards are to be construed narrowly. It is also narrowly interpreted as what 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 discussed in the past decisions.

The principles<sup>162</sup> espoused in this case are as follows –

- Courts should and cannot interfere in the merits of an award, even if it is bad and erroneous reasoning.<sup>163</sup> 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.<sup>164</sup>
- 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<sup>165</sup>
  - (ii) give a party the opportunity to address a material issue may amount to a breach of natural justice.
- In cases where the tribunal has acted *ultra vires*, an award may be set aside.<sup>166</sup>
- An arbitral award may not be set aside in its entirety. It may be done so in whole or in part.

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<sup>161</sup> [2015] SGCA 18.

<sup>162</sup> 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.

<sup>163</sup> *Quarella SpA v. Scelta Marble Australia Pty Ltd*. [2012] SGHC 166.

<sup>164</sup> [2010] 3 SLR 1.

<sup>165</sup> *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 20.

<sup>166</sup> *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.

❖ **Bloomberry Resorts & Hotel Inc. v. Global Gambling & Ors.**<sup>167</sup>

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*,<sup>168</sup> 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
- (c) Non-availability of the evidence during the arbitration proceedings.<sup>169</sup>

❖ **BZV v. BZW and another**<sup>170</sup>

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.<sup>171</sup> The Court said that this was a breach of the principles of natural justice and fair hearing rule.

❖ **BTN and Anr. v. BTP and Anr.**<sup>172</sup>

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.

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<sup>167</sup> [2021] SGCA 9.

<sup>168</sup> [2009] SGHC 231.

<sup>169</sup> 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.

<sup>170</sup> [2021] SGHC 60.

<sup>171</sup> 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.

<sup>172</sup> [2021] SGHC 38.

## **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. Though we 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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## **CHAPTER 4**

# **ISSUES WITH THE PRESENT INDIAN ARBITRATION REGIME – NEED FOR A ROBUST LEGISLATIVE 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<sup>1</sup>. It was an attempt to revamp the Act instituted by a peremptorily promulgated Arbitration and Conciliation (Amendment) Ordinance, 2020.<sup>2</sup> 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 discusses the need for introducing a new robust legislative framework to govern the same.

### **II. ARBITRATION AND CONCILIATION (AMENDMENT) ACT 2021 – 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

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<sup>1</sup> The Arbitration and Conciliation Act, 1996.

<sup>2</sup> 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 Preamble that 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 very purpose of Arbitration by causing unreasonable delays to the stakeholders and parties.

Amendment, i.e., the Arbitration and Conciliation (Amendment) Act 2021, had become a retrogression to this aim. 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<sup>3</sup> and eliminating the 8th Schedule<sup>4</sup> of the 1996 Act. A new section was also substituted for Sec 43J<sup>5</sup> 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 amendment thereby 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 grant an 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 to plead the grounds of corruption and fraud at the time of the enforcement proceedings. This is

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<sup>3</sup> Vide Sec 2 of the Arbitration and Conciliation (Amendment) Act, 2021, No. 3, Acts of Parliament, 2021 (India).

<sup>4</sup> Vide Sec 4 of the Arbitration and Conciliation (Amendment) Act, 2021, No. 3, Acts of Parliament, 2021 (India).

<sup>5</sup> Vide Sec 3 of the Arbitration and Conciliation (Amendment) Act, 2021, No. 3, Acts of Parliament, 2021 (India).

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.

## 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 clear criterion or standard which the Court needs to follow while assessing these grounds. It depends mainly on time extensions<sup>6</sup> and judicial intervention. This creates doubts in the minds 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 fraud or corruption 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

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<sup>6</sup> 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.

of the Act. An order so passed under Sec 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 same is induced by corruption or fraud.

When these two alternatives were already available to the parties, there was no need to amend Sec 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 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.<sup>7</sup> 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 very purpose<sup>8</sup> of the Act. If the powers conferred to an arbitral tribunal are to be increased, judicial interference must be minimum. Moreover, there is no clear 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.

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<sup>7</sup> Law Commission Report No. 246 on Amendments to the Arbitration and Conciliation Act, 1996.

<sup>8</sup> Sec 5 of the Arbitration and Conciliation Act, 1996 provides a bar for judicial interference. It derives its existence from Art. 5 of the Model Law.

#### 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 too 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 part of the arbitration regime in India. Though by omitting the 8<sup>th</sup> 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.

#### 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 AND ARBITRAL PROCEEDINGS

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<sup>9</sup>, 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 TO LITIGATION, 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 were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015”*.<sup>10</sup> 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 after the 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 AND SUBSTITUTION OF SEC 43 J - INTERLINKED

The 2021 Amendment had omitted the much-debated Eighth Schedule<sup>11</sup>, 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

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<sup>9</sup> Civil Appeal Nos. 2621-2625 / 2019.

<sup>10</sup> Explanation to proviso to Sec 36(3) of the Arbitration and Conciliation Act, 1996.

<sup>11</sup> Vide Sec 4 of the Arbitration and Conciliation (Amendment) Act, 2021, No. 3, Acts of Parliament, 2021 (India).

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 the Arbitration Council of India (ACI).<sup>12</sup> 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<sup>13</sup> 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. REINSTITUTING WHAT SEC 87 HAD DONE AWAY

Earlier, Sec 87 introduced by the 2019 Amendment Act provided for an "automatic stay" on arbitral awards on certain grounds. Courts were given the discretion to set aside an arbitral award. But this provision was struck down by the Hon'ble Supreme Court of India,<sup>14</sup> with heavy criticism and a categorical observation that:

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<sup>12</sup> Sec 2 (1) (j) of the Arbitration and Conciliation Act, 1996.

<sup>13</sup> UNCITRAL MODEL LAW 1985.

<sup>14</sup> Hindustan Construction Company Limited and Ors. v. Union of India (Civil Appeal Nos. 2621-2625 / 2019).

*"The retrospective resurrection of an automatic-stay not only turns the clock backwards contrary to the object of the Arbitration Act, 1996 and the 2015 Amendment Act, but also results in payments already made under the amended Section 36 to award-holders in a situation of no-stay or conditional-stay now being reversed (paragraph 14)."*

Now with the introduction of Sec 36, this "automatic stay" jurisprudence has again been reinstated into the arbitration regime in the name of "unconditional stay". From the bare reading of the text, one could clearly understand that "unconditional stay" has now become a guaranteed right available to the parties. Also the granting of the same has become mandatory and a high level of discretionary power is now vested in the hands of the Courts, which is completely in contrast to the soul of arbitration i.e., "minimal judicial intervention".

#### **11. 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 award holder. It is well accepted that one of the core objectives of any dispute resolution mechanism is that the award holder or the winning party should be able to enjoy the fruits of 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, the author now would like to delve into the need of introducing a new and separate piece of legislation to 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 have either 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 reinstating the regressive position that prevailed from 1996 till 2015. It had undone the progressive actions the previous amendments had done and became a perfect example for “two steps forward and several 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<sup>15</sup> 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”*<sup>16</sup>

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 towards achieving the status of becoming a “hub”.

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<sup>15</sup> 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](https://www.nishithdesai.com/fileadmin/user_upload/pdfs/NDA%20Think%20Tanks/Arbitration%20Think%20Tank.pdf).

<sup>16</sup> Available at <https://timesofindia.indiatimes.com/india/there-should-have-been-separate-acts-for-domestic-arbitration-and-foreign-awards-sc-judge/articleshow/74151955.cms>.

#### **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 these 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 IN SINGAPORE

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 specialised to deal with international commercial disputes. It has a panel of specialist intellectual property arbitrators. According to a 2021 survey<sup>1</sup>, 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 in the caseloads<sup>2</sup> by crossing the 1000 case threshold, which is a tremendous growth.<sup>3</sup>

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<sup>1</sup> Queen Mary University of London and White & Case International Arbitration Survey: Adapting Arbitration to a Changing World, available at [www.arbitration.qmul.ac.uk/research/2021-international-arbitration-survey](http://www.arbitration.qmul.ac.uk/research/2021-international-arbitration-survey).

<sup>2</sup> 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.

### 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<sup>4</sup> 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 its 30 years.

Recently, SIAC has expanded its horizon beyond Asia by launching a representative office in New York. It is SIAC's 5<sup>th</sup> 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 2<sup>nd</sup> highest foreign user of the SIAC after the long-time top user, India (690) and before third-ranked foreign user, China (165).<sup>5</sup>

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 –

❖ Development and business strategy;

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<sup>3</sup> 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 remarkable growth in the field.”*

<sup>4</sup> Tulika Kaul, Singapore International Arbitration Centre, 6 CT. UNCOURT 5 (2019).

<sup>5</sup> SIAC Annual Report, 2020, available at <https://singaporeinternationalarbitration.com/>.

- ❖ 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 international panel of experts.<sup>6</sup> More than 100 arbitrators experienced in various fields (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.<sup>7</sup> It was first introduced in the year 1991 and it is about to release its latest revised version in the third quarter of 2021. The current Rules are of the 2016 version.<sup>8</sup>

#### HIGHLIGHTS OF THE 2016 ARBITRATION RULES

1. By virtue of the 2016 Rules, Singapore is no more the default seat of arbitration. As per Rule 21, parties are allowed to agree on a seat of arbitration. If the parties fail to

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<sup>6</sup> Lawrence G. S. Boo, *SIAC and Singapore Arbitration*, 1 *Asian Bus. LAW*. 32 (2008).

<sup>7</sup> 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 process will 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 the Rules 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>.

<sup>8</sup> SIAC Rules 2016 was the 6<sup>th</sup> edition of the SIAC’s Rules, which was released on August 1, 2016. It aimed at engendering greater efficiency, certainty and cost effectiveness

do so, then the Tribunal can determine the same. According to SIAC's press release, the removal of a default seat (Singapore under Rule 18.1 of the 2013 Rules) is to adapt to "the increasingly international nature of SIAC cases and diverse cultures of users".<sup>9</sup>

2. The SIAC's Court of Arbitration will now provide the parties with reasoned decisions on challenges which are brought against the arbitrators. This has increased the transparency in how the Court has considered and addressed the points which the parties raise in relation to the impartiality or independence of arbitrators. The administrative fees prescribed for arbitrator challenges have also been fixed at SGD 8000 for parties overseas and SGD 8560 for Singapore parties (inclusive of 7% GST).<sup>10</sup>

### COST AND TIME SAVING MECHANISMS UNDER 2016 SIAC RULES

#### 1. Emergency Arbitration<sup>11</sup>

- ❖ Appointment of Emergency Arbitrator within 1 calendar day; and
- ❖ Issuance of award or order of interim relief is to be made within 14 days from the appointment of the Emergency Arbitrator.
- ❖ The fees of the Arbitrator are also fixed now (at \$25,000).
- ❖ SIAC accepted all the received applications (20 in numbers) to appoint an Emergency Arbitrator in the year 2020, bringing the total no: of applications accepted since the introduction of the provisions regarding Emergency Arbitrator in 2010 to 114.

#### 2. Expedited Procedure

- ❖ It is a fast track 6 months procedure which is introduced to deal with less complex lower value claims or disputes. The monetary threshold set in the Rules is 6 million SGD.

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<sup>9</sup> Highlights of the 2016 SIAC Rules, available at [http://siac.org.sg/images/stories/articles/rules/SIAC%20Rules%202016\\_Cheat%20Sheet\\_30June2016.pdf](http://siac.org.sg/images/stories/articles/rules/SIAC%20Rules%202016_Cheat%20Sheet_30June2016.pdf).

<sup>10</sup> Rr. 15 and 16 and the Schedule of Fees of the SIAC Rules, 2016.

<sup>11</sup> Rule 3 read together with Schedule 1 of the SIAC Rules, 2016.

- ❖ Parties may apply for an expedited procedure
  - when the sum in dispute does not exceed 6,000,000 SGD; or
  - through the agreement of the parties; or
  - In cases of exceptional emergency.
  
- ❖ The President of the SIAC Court of Arbitration<sup>12</sup> determines on whether the application goes ahead or not and sends the matter to be decided to a sole arbitrator. And the award is to be passed within a compressed timeline of 6 months.

### 3. Early Dismissal of Claims and Defences<sup>13</sup>

- ❖ Globally, SIAC was the first commercial arbitral institution to introduce this concept of early disposal of unmeritorious defences and claims.<sup>14</sup> This rule can be used by combining it with any of the other time and cost saving measures provided under the Rules.
  
- ❖ This robust procedure of early disposal has got the potential to provide the parties with significant savings of costs and time. It is similar to the ICSID<sup>15</sup> and SCC<sup>16</sup> Rules.
  
- ❖ For safeguarding against the abuse of this provision, the Tribunal is given the discretion to decide on whether an application for early disposal is to be granted or not. If it decides so, then within 60 days of the date of application,

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<sup>12</sup> Gary Born is now serving as the President of the SIAC Court of Arbitration. He is well known for his works in the field of International Commercial Arbitration. He has also served as a Counsel in more than 675 arbitrations.

<sup>13</sup> Rule 29 of the SIAC Rules, 2016.

<sup>14</sup> It was introduced in August, 2016 and as of July, 2020, out of the received 32 applications; almost 19 were allowed to proceed under Rule 29. Out of that only 10 were granted and 7 got rejected. In the remaining, one was withdrawn and one is still pending.

<sup>15</sup> Rr. 41 (5) and 41 (6) of the Rules of Procedure for Arbitration Proceedings of the International Centre for Settlement of Investment Disputes (ICSID Rules).

<sup>16</sup> Art. 39 of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

the Tribunal needs to pass an order with regard to their decision taken. So this also ensures for an early dismissal of the application.

- ❖ A party may apply for the same to the Tribunal if the claim or defence raised to in the matter is manifestly –
  - Outside the Tribunal’s jurisdiction<sup>17</sup>; or
  - Without any legal merit.<sup>18</sup>

#### 4. Consolidation<sup>19</sup> and Joinder<sup>20</sup>

- ❖ If the disputes and the agreements are related to each other, then a party is allowed to make an application for the consolidation of the multiple arbitrations. Joinder, on the other hand, allows both parties and non-parties to be joined in pending proceedings of arbitration.
- ❖ Both these applications can be made to the SIAC Court of Arbitration or the Tribunal directly.<sup>21</sup>
- ❖ These provisions save a party’s time and costs because he/she needs to pay for only “one set” of arbitrators of the Tribunal instead of multiple sets. Moreover, consistency in the decisions can also be ensured through these provisions, since it prevents inconsistent findings.

#### 5. SIAC – SIMC Arb-Med-Arb Protocol

- ❖ SIAC teamed up with its sister organisation, SIMC<sup>22</sup> in 2014 to offer parties with a one-stop hybrid ADR process i.e., Arb-Med-Arb Service.

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<sup>17</sup> Rule 29.1 (b) of the SIAC Rules, 2016.

<sup>18</sup> Rule 29.1 (a) of the SIAC Rules, 2016.

<sup>19</sup> Rule 8 of the SIAC Rules, 2016.

<sup>20</sup> Rule 7 of the SIAC Rules, 2016.

<sup>21</sup> Prior to the constitution of the Tribunal, an application for consolidation needed to be made to the Court of Arbitration. But if the Tribunal has been constituted, then it can be filed directly to the Tribunal.

<sup>22</sup> Singapore International Mediation Centre (SIMC) was set up in November, 2014 with an aim to conduct mediation of International Commercial Disputes.



- ❖ Here, after filing the Notice of Arbitration, a party is allowed to suspend the arbitration proceedings and then attempt mediation. A party can either appoint the arbitrator as the mediator or another person from the SIMC's expert panel of mediators. Mediation can be conducted for a period of 8 weeks.<sup>23</sup>
- ❖ If mediation is successful, then the parties have the option of requesting to make their mediated settlement agreement into a consent arbitral award (which gives the advantages of enforceability under the New York Convention). But, if mediation turns out to be unsuccessful, the parties may proceed with the arbitration proceedings.

#### 6. Multiple Contracts<sup>24</sup>

- ❖ Provides flexibility to file either a single<sup>25</sup> or multiple<sup>26</sup> Notices of Arbitration in multi-contracted agreements and disputes.

#### 7. Remedy against non-Paying Party<sup>27</sup>

- ❖ Allows a party to apply to the Tribunal seeking reimbursement for paying other party's share of the deposits.

### REVISION OF SIAC RULES, 2021

SIAC is about to release its revised version of Arbitration Rules in the third quarter of 2021.<sup>28</sup> Its 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

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<sup>23</sup> The timeline prescribed for mediation is flexible since the same can be extended or shortened as per the parties' agreement.

<sup>24</sup> Rule 6 of the SIAC Rules, 2016.

<sup>25</sup> A single Notice of Arbitration is deemed to be a consolidation application.

<sup>26</sup> Multiple Notices of Arbitration need to be submitted along with an application for consolidation.

<sup>27</sup> Rule 27 of the SIAC Rules, 2016.

<sup>28</sup> Available at <https://siac.org.sg/component/content/article/69-siac-news/669-siac-announces-commencement-of-revisions-for-siac-arbitration-rules>.

arbitration practice and procedure, and is aimed at better serving the needs of businesses, financial institutions and governments that use SIAC.<sup>29</sup>

#### SIAC's INVESTMENT ARBITRATION (IA) RULES, 2017<sup>30</sup>

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.

Key highlights<sup>31</sup> of the Rules are discussed below –

- ❖ Opt-in mechanism for the appointment of Emergency Arbitrator<sup>32</sup>; parties may apply for emergency interim relief only if they expressly agree on the Emergency Arbitrator provisions;
- ❖ The SIAC Court is able to adopt a “default list procedure”<sup>33</sup> where parties fail to appoint their arbitrators;
- ❖ Rule 29 speaks of Third Party submissions. Rule 29.1 allows a Non-disputing Contracting Party to make written submissions to the tribunal, provided that it gives notice to the Registrar and the parties. The tribunal may also, on its own initiative, invite a Non-disputing Contracting Party to provide written submissions. However, this is only on a question of treaty interpretation directly relevant to the dispute. Secondly, Rule 29.2 allows this to be extended to submissions regarding a matter within the scope of the dispute, provided that the Tribunal considers the non-exhaustive list in Rule 29.3 alongside the views of the parties<sup>34</sup>;

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<sup>29</sup> Available at <https://siac.org.sg/component/content/article/69-siac-news/669-siac-announces-commencement-of-revisions-for-siac-arbitration-rules>.

<sup>30</sup> Available at <http://www.siac.org.sg/images/stories/articles/rules/IA/SIAC%20Investment%20Arbitration%20Rules%20-%20Final.pdf>.

<sup>31</sup> Available at <http://arbitrationblog.kluwerarbitration.com/2017/02/04/siacs-2017-investment-arbitration-rules-an-overview-and-key-changes/>.

<sup>32</sup> Rule 27.3 of the IA Rules, 2017.

<sup>33</sup> Rule 8 of the IA Rules, 2017.

<sup>34</sup> Available at <http://arbitrationblog.kluwerarbitration.com/2017/02/04/siacs-2017-investment-arbitration-rules-an-overview-and-key-changes/>.

- ❖ Provisions to enable the Tribunal to order disclosure of third party funding arrangements<sup>35</sup> and also to take such arrangements into account while apportioning costs;
- ❖ Strict timeline (28 days) on challenges to arbitrators along with built-in discretion for proceeding with arbitration during the challenge<sup>36</sup>;
- ❖ Procedure for an early dismissal of defences and claims<sup>37</sup>; and
- ❖ Rule 38<sup>38</sup> provides for the publication of information on the proceedings.

#### **IV. INTERNATIONAL COMMERCIAL ARBITRATION IN HONG KONG**

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, with the global outbreak of the COVID 19 pandemic, it has immediately swivelled to virtual hearing work.<sup>39</sup> It had adapted its infrastructure by –

- ❖ Building a dedicated suite for virtual hearing;
- ❖ Recruiting expert IT dispute resolution experienced staff;
- ❖ Arranging a 24\*7 support for all time zones; and
- ❖ Issuing guidelines also.

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<sup>35</sup> Rr 24(1) and 33.1 of the IA Rules, 2017.

<sup>36</sup> Rr. 12.1 and 13.1 of the IA Rules, 2017.

<sup>37</sup> Rule 26 of the IA Rules, 2017.

<sup>38</sup> It states that once the parties have agreed to use IA Rules, the parties shall be deemed to have allowed the SIAC to publish information on the proceedings. However, the information to be published is limited to several details such as the nationality of the parties and the tribunal and also the date of commencement of the proceedings, and whether proceedings are terminated or on-going. Redacted excerpts may also be published with regard to the tribunal's reasoning, as well as the decisions by the Court on challenges to arbitrators. Other information may be published only with the express consent of parties to the arbitration.

<sup>39</sup> A total of 119 virtual hearings have been handled by HKIAC so far. The feedback on the virtual hearing services provided by HKIAC is available at <https://www.hkiac.org/our-services/testimonials>.

## V. HONG KONG INTERNATIONAL COMMERCIAL ARBITRATION 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<sup>40</sup> 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,<sup>41</sup> HKIAC is the 4<sup>th</sup> 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<sup>42</sup> 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.<sup>43</sup>

HKIAC's popularity is reflected by its caseload statistics<sup>44</sup> since its establishment. According to a recently published statistics report<sup>45</sup>, a total of 483 fresh cases<sup>46</sup> have been filed. Having received Global Arbitration Review's innovation award of 2014, HKIAC is constantly at the forefront of innovative arbitration practice.

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<sup>40</sup> Ss. 13 and 24 of the Hong Kong Arbitration Ordinance.

<sup>41</sup> Queen Mary University of London and White & Case International Arbitration Survey: Adapting Arbitration to a Changing World, available at [www.arbitration.qmul.ac.uk/research/2021-international-arbitration-survey](http://www.arbitration.qmul.ac.uk/research/2021-international-arbitration-survey).

<sup>42</sup> 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>.

<sup>43</sup> 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>.

<sup>44</sup> HKIAC Statistics, available at <https://www.hkiac.org/about-us/statistics>.

<sup>45</sup> HKIAC Statistics for 2020, available at <https://www.hkiac.org/about-us/statistics>.

<sup>46</sup> Out of this, 318 cases were arbitrations, 149 were domain name disputes and the remaining 16 were for mediations.

## 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 Hong Kong 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.

## HKIAC ARBITRATION RULES

HKIAC has always been at the forefront of developing effective provisions for dispute resolutions. The HKIAC Rules 2018 came into effect on November 1 2018 and are now currently in force. Revising and Amending the Rules had, in fact, helped HKIAC to stay at the cutting edge of the global best practices in the field of transnational arbitration.

It is divided into the following chapters –

- ❖ Sec. I – GENERAL RULES<sup>47</sup>
- ❖ Sec II – COMMENCEMENT OF THE ARBITRATION<sup>48</sup>
- ❖ Sec III – ARBITRAL TRIBUNAL<sup>49</sup>
- ❖ Sec IV – CONDUCT OF ARBITRATION<sup>50</sup>
- ❖ Sec V – AWARD, DECISIONS AND ORDERS OF THE ARBITRAL TRIBUNAL<sup>51</sup>
- ❖ Sec VI – OTHER PROVISIONS<sup>52</sup>
- ❖ Sch. 1 – REGISTRATION AND ADMINISTRATIVE FEES
- ❖ Sch. 2 – ARBITRAL TRIBUNAL’S FEES, EXPENSES, TERMS AND CONDITIONS – BASED ON HOURLY RATES
- ❖ Sch. 3 – ARBITRAL TRIBUNAL’S FEES, EXPENSES, TERMS AND CONDITIONS – BASED ON SUM IN DISPUTE
- ❖ Sch. 4 – EMERGENCY ARBITRATOR PROCEDURES

#### HIGHLIGHTS OF 2018 HKIAC ADMINISTERED ARBITRATION RULES

1. Facilitate the submissions of documents in electronic form on to secured online repositories<sup>53</sup>;
2. The scope for single arbitration under multiple contracts has been now broadened<sup>54</sup>;
3. A party is now allowed to commence the Emergency Arbitration prior to filing of Notice of Arbitration<sup>55</sup>;
4. An early determination procedure<sup>56</sup> was also introduced;
5. A default time limit (3 months after relevant stage of proceedings or closure of proceedings) for the rendering of an award was introduced for the first time<sup>57</sup>;

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<sup>47</sup> Arts. 1-3 of the HKIAC Rules, 2018.

<sup>48</sup> Arts. 4 and 5 of the HKIAC Rules, 2018.

<sup>49</sup> Arts. 6-12 of the HKIAC Rules, 2018.

<sup>50</sup> Arts. 13-32 of the HKIAC Rules, 2018.

<sup>51</sup> Arts. 33-41 of the HKIAC Administered Arbitration Rules, 2018.

<sup>52</sup> Arts. 42-46 of the HKIAC Administered Arbitration Rules, 2018.

<sup>53</sup> Arts. 3.1 (e), 3.3, 3.4, and 13.1 of the HKIAC Administered Arbitration Rules, 2018.

<sup>54</sup> Art. 29 of the HKIAC Administered Arbitration Rules, 2018.

<sup>55</sup> Arts. 23.1 and Sch. 4 of the HKIAC Administered Arbitration Rules, 2018.

<sup>56</sup> Art. 43 of the HKIAC Administered Arbitration Rules, 2018.

6. The time frame for the process of Emergency Arbitration was reduced;<sup>58</sup>

THE ARRANGEMENT CONCERNING MUTUAL ASSISTANCE IN COURT ORDERED INTERIM MEASURES IN AID OF ARBITRAL PROCEEDINGS BY THE COURTS OF THE MAINLAND AND THE HONG KONG SPECIAL ADMINISTRATIVE REGION<sup>59</sup>

The Arrangement is one of the most remarkable developments for the HKIAC. It allows for any party to the Hong Kong seated arbitral proceedings administered by qualified arbitral institutions (such as HKIAC) to obtain interim measures in accordance with the Arbitration Law, Civil Procedure Law and any other relevant judicial interpretations from PRC Court in aid of offshore arbitration. Being a game-changer for the UK companies with interests in Hong Kong, the Arrangement has proven to be a popular tool for the parties in disputes given the 34 applications and approximately USD 1.47 billion worth of assets involved so far.<sup>60</sup> This Arrangement was later supplemented on November 27 2020 to make it align with the New York Convention. The Supplemental Arrangement made the following changes<sup>61</sup> –

- expressly included the term ‘recognition’ when referring to enforcement of arbitral awards in the Arrangement for greater certainty (using the word ‘recognition’ for the first time in acknowledgment that enforcement is a two-stage process, as under the New York Convention);
- added an express provision to the existing Arrangement to confirm that courts considering the enforcement of an award may impose post-award interim measures;
- aligned the definition of the scope of arbitral awards with the prevalent international approach of ‘seat of arbitration’ under the New York Convention; and
- removed the current restriction of the Arrangement to allow parties to make simultaneous application to both the courts of the mainland and Hong Kong for enforcement of an arbitral award.

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<sup>57</sup> Art. 31.2 of the HKIAC Administered Arbitration Rules, 2018.

<sup>58</sup> Art. 23.1 and Sch. 4 of the HKIAC Administered Arbitration Rules, 2018.

<sup>59</sup> Hereinafter referred to as the Arrangement.

<sup>60</sup> Available at <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2020/12/One-year-anniversary-of-the-Mainland-China-Hong-Kong-Interim-Measures-Arrangement-and-how-it-is-working-in-practice.pdf>.

<sup>61</sup> Available at <https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2022/article/hong-kong>.

## OTHER SETS OF HKIAC RULES

HKIAC also provides other sets of rules for specific forms of disputes –

1. HKIAC Small Claims and Documents Only Procedures which provides cost effective ways of resolving the disputes in a relatively small sum.
2. HKIAC Securities Arbitration Rules (w.e.f July 1, 1993)
3. HKIAC Short Form Arbitration Rules (shortened procedure) (w.e.f August 1, 1992)
4. HKIAC Electronic Transaction Arbitration Rules (w.e.f January, 2002)

## PROCEDURES FOR THE ADMINISTRATION UNDER THE UNCITRAL ARBITRATION RULES

It was first issued in 1986 and was later updated in the years 2005 and 2015. It represents a 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.

## **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

*“If I were appointed the dictator of a country, in the short period between my appointment and my assassination, I would definitely impose a law-making international arbitration practices compulsory. Arbitration would help to transform character, towards less confrontation and more consensus, less litigiousness and more understanding and above all else finality to the dispute”.*

- Nani Palkhivala<sup>62</sup>

#### I. INTRODUCTION

The 21<sup>st</sup> 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 pouring towards 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.<sup>63</sup> 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, in his keynote address delivered at the ICCA Congress held at Singapore in 2012, has rightly put it,

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<sup>62</sup> The infamously known ‘Courtroom Genius’ has said this stressing the importance of arbitration while arguing before the then Hon’ble Chief Justice Gajendragadkar, available at <https://www.barandbench.com/columns/insurance-companies-arbitration-avoid> site visited on October 22, 2021.

<sup>63</sup> The Growth of International Arbitration by Michael Pryles, MEL4\_492420\_1 (W97).

*“I venture to begin by suggesting that this new age of arbitration is, in fact, its golden age. Those among us who practice it are extraordinarily privileged to be able to do so at this time.”*<sup>64</sup>

In India, one of the core reasons why arbitration is to be adapted as a parallel mode of dispute resolution 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 delivered at a seminar in 2018, had stated that the *“future of arbitration is bright, because the future of litigation, perhaps, is not.”*<sup>65</sup> 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 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”*.<sup>66</sup> In India the latest data shows that there were more than 4.5 crore of cases pending in different courts.<sup>67</sup> 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.<sup>68</sup> 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

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<sup>64</sup> Available at [https://cdn.arbitration-icca.org/s3fs-public/document/media\\_document/ags\\_opening\\_speech\\_icca\\_congress\\_2012.pdf](https://cdn.arbitration-icca.org/s3fs-public/document/media_document/ags_opening_speech_icca_congress_2012.pdf) site visited on October 22, 2021.

<sup>65</sup> Keynote address at a Seminar on *“Ethics in Arbitration”* organized by DIAC (Delhi international Arbitration Centre) 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.

<sup>66</sup> Available at <https://www.thehindu.com/news/national/Justice-delay-keeps-investors-away-CJI/article16079771.ece> site visited on October 23, 2021.

<sup>67</sup> Available at <https://njdg.ecourts.gov.in/njdgnew/index.php> site visited on October 22, 2021.

<sup>68</sup> 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.

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 of a 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 will help 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 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.<sup>69</sup> Last year, former Hon’ble Justice Indu Malhotra had also stressed the relevance of the same while delivering a speech at a Conference.<sup>70</sup> The Court often gets confused while distinguishing both the regimes. In the case *BGS SGS Soma JV v. NHPC Ltd.*,<sup>71</sup> 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 hence the same would not amount to a binding *ratio decidendi* as international commercial

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<sup>69</sup> 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](https://www.nishithdesai.com/fileadmin/user_upload/pdfs/NDA%20Think%20Tanks/Arbitration%20Think%20Tank.pdf) site visited on October 22, 2021.

<sup>70</sup> 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.

<sup>71</sup> 2019 (6) Arb LR 393 (SC).

arbitration was not something that the court was confronted with and hence could not be said to be binding.<sup>72</sup>

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 resolve the 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,<sup>73</sup> it is advisable for it to update its law and 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.<sup>74</sup>

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, it is pertinent to draw conclusions based on the research study

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<sup>72</sup> Available at <https://legaldesire.com/seat-venue-place-of-arbitration-a-detailed-analysis/> site visited on October 23, 2021.

<sup>73</sup> The Ease of Doing Business Report released on Oct, 2020 shows India being ranked at 63<sup>rd</sup> position. It was earlier 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](https://www.doingbusiness.org/content/dam/doingBusiness/pdf/db2020/Doing-Business-2020_rankings.pdf) site visited on October 22, 2021.

<sup>74</sup> Jones “Adopting the UNCITRAL Model Law” 1.

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 arbitration into a reality.

## II. FINDINGS & SUGGESTIONS

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

- **FINDING 1 - There is no proper legislative framework to help India become a global 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 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 harmonisation, 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 the foreign 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 arbitral matters.*
- ❖ *Domestic and International Public Policy should be clearly distinguished.*
- ❖ *It should be clearly mentioned in the Act that high standards of proof is to be met when attempting to set aside arbitral award on the basis of 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 new Act.*
- ❖ *Everything should be done in the interest of the parties involved except in limited and exceptional circumstances. Those circumstances should be precisely enlisted in the new Act.*
- ❖ *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 demands of the international investor community. This can be done with the help of amending the provisions with great caution.*

➤ **FINDING 2 – India lacks certain cardinal features which are necessary for a jurisdiction to become a global hub.**

*Suggestion: For becoming a global hub, India should focus on improving the following areas –*

❖ 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 of arbitral 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.”<sup>75</sup> 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 the extent 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.**

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<sup>75</sup> Lord Mustill, “Comments and Conclusions in Conservatory Provisional Measures in International Arbitration”, 9th Joint Colloquium (ICC Publication, 1993).

- ❖ *No Governmental interference – It is also suggested that there should not be any government control on these arbitral institutions 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 stand at par with the globally renowned arbitral institutions. The present Attorney General of India, Mr K K Venugopal has said during a speech in the 10<sup>th</sup> 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.”<sup>76</sup> We had in fact, almost 23 years ago, established the International Centre for Alternative Dispute Resolution 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 the choice of the party) and use of a time bound and other innovative internationally recognised mechanisms can help India become a global hub.***
  
- ❖ *A special court to be established to deal with ICA matters – It is also suggested that a separate court specifically to deal with matters 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 and rare 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.*

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<sup>76</sup> Available at <https://www.bloomberquint.com/law-and-policy/india-has-no-institution-to-compete-with-international-arbitration-tribunals-says-attorney-general> site visited on October 24, 2021.



- **FINDING 3 – India lacks mannerism and professionalism in arbitration. And also unavailability of full time arbitration lawyers is another hurdle for India.**

*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 for arbitration 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 or domain 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.***

- **FINDING 4 – Practice of not appointing young lawyers as arbitrators is another major 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.”<sup>77</sup> 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 domestic arbitrations.**

*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 frequently by 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, has come up with disastrous provisions. Unconditional stay provision had seriously altered the twin purposes of 1996 Act i.e., minimum judicial intervention and

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<sup>77</sup> 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 on October 24, 2021.

expeditious resolution of disputes. If an Act contains provisions which will fail its very purpose, then such a law cannot be termed as a 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 same in 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 amending and materially changing the already amended provisions is not going to send a positive signal to the investor community. So, instead of amending the 1996 Act again, the government shall consider 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<sup>78</sup> 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 followed by 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*

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<sup>78</sup> 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.

*resolution, as it was understood even then, is a sine qua non for trade and commerce to flourish in any region.*"<sup>79</sup>

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<sup>79</sup> Available at <https://ficci.in/spdocument/20707/arbitration-Background-Paper.pdf> site visited on October 24, 2021.

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## APPENDIX

### THE NATIONAL UNIVERSITY OF ADVANCED LEGAL STUDIES Kalamassery, Kochi – 683 503, Kerala, India

#### CERTIFICATE ON PLAGIARISM CHECK

1.	Name of the Candidate	Ms. Anuja B.S.
2.	Title of thesis/dissertation	International Commercial Arbitration and Indian Law – Need for Reforms
3.	Name of the supervisor	Dr. Anil R. Nair
4.	Similar content (%) identified	4%
5.	Acceptable maximum limit (%)	10%
6.	Software used	OURGINAL (URKUND)
7.	Date of verification	26 October 2021

*\*Report on plagiarism check, specifying included/excluded items with % of similarity to be attached in the Appendix*

Checked By (with name, designation & signature)	Dr. Anil R. Nair, Associate Professor	
Name and Signature of the Candidate	Ms. Anuja B.S.	
Name & Signature of the Supervisor	Dr. Anil R. Nair, Associate Professor	