JUDICIALIZATION OF ARBITRATION: THE NEW TREND IN INDIA

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Mahatma Gandhi, in 1927 wrote, *"Differences we shall always have but we must settle them all, whether religious or other, by Arbitration."*

1. INTRODUCTION:

In present day business, transactions and globalization is taking place simultaneously around the world at a very fast pace. The general problems faced by the corporations and countries in different transactions are very common in their policies and economies. To overcome these problems a new and modern technique used by them is Arbitration.

Arbitration is a form of alternative dispute resolution method which is a technique used legally for the resolution of disputes between parties outside the courts in private, wherein the parties to a dispute refer it to one or more than person as they prefer called 'Arbitrators' to give the disputes an suitable ending through a decision they agree themselves to be bound known as an award.[1]

In that sense, International Commercial Arbitration (ICA) is a private method of dispute resolution, though legal, which is chosen by the parties to the dispute as a way of solving the disputes between them, without going to the courts. It is conducted in various countries and with different legal and commercial backgrounds.

(a) Importance of Arbitration in today's business environment process:

***One*:** Arbitration allows the parties to choose an arbitrator with the requisite technical knowledge and experience enhancing the quality of decision-making in many cases. [2]

***Two*:** Unlike the traditional method of litigation process it provides enough privacy to the parties in dispute to protect their reputation in the business market.

***Three*:** Comparing to the old litigation process, it is considered as a very fast method of solving disputes and with less formality.

[1] http://dic.academic.ru/dic.nsf/enwili/3587812

[2] Sandeep S Sood: "finding harmony with uncitral model law: contemporary issues in international commercial arbitration in india after the arbitration and conciliation act of 1996

(b) The principal characteristics of Arbitration are:[3]

- Arbitration is consensual:
- Arbitration is neutral:
- Arbitration is a confidential procedure:
- The decision of the arbitral tribunal is final and easy to enforce:

(c) The Main disadvantages of Arbitration:

The following have often been said to constitute the **disadvantages** of arbitration:

- There is no right of appeal even if the arbitrator makes a mistake of fact or law. However, there are some limitations on that rule, the exact limitations are difficult to define, except in general terms, and are fact driven.[4]
- There is no right of discovery unless the arbitration agreement so provides or the parties stipulate to allow discovery or the arbitrator permits discovery.
- The arbitration process may not be fast and it may not be inexpensive, particularly when there is a panel of arbitrators.
- Unknown bias and competency of the arbitrator unless the arbitration agreement set up the qualifications or the organization that administers the arbitration, has pre-qualified the arbitrator.
- There is no jury and from the claimant's point of view that may be a serious drawback.
- An arbitrator may make an award based upon broad principles of "justice" and "equity" and not necessarily on rules of law or evidence.[5]
- An arbitration award cannot be the basis of a claim for malicious prosecution.

(d) Arbitration in India:

The increasing use of arbitration in the dispute resolution in the commercial matters tends to a fast growth of the international commercial arbitration all over the world. After the New York Convention and post-1970 era there is a major growth in the international commercial arbitration. Procedure of working and principles adopted universally in arbitrational

[3] http://www.wipo.int/amc/en/arbitration/what-is-arb.html
[4] www.allenandallen.com/.../**arbitration**-advantages-and-**disadvantages**.
[5] www.corpcounsel.com/.../Big-Risks-and-**Disadvantages-of-Arbitration**-vs

proceedings in between the borders and the growth of the international commercial arbitration passed through the different phases.

Developments abroad had an impact on our country which has been making enormous efforts for the promotion of Alternate Dispute Settlement Mechanisms, e.g., arbitration.[6] The lock in of cases in the Indian courts and long delays in the decisions in the cases increased the popularity of arbitration as one of the most effective methods of the dispute settlement in India these days.

2. Statement of problem:

In the light of the above introductory remark it is claimed that the following problems are encountered:

Firstly, The Arbitration and Conciliation Act, 1996 does not clearly specify power of judiciary to intervene in an Arbitration Proceeding.

Secondly, the conflict regarding the enforceability of Foreign Arbitral Awards and judicial intervention in arbitral proceeding still exists.

3. Objectives of the Research Paper:

Firstly, the research aims at studying the Attributes of Arbitral Awards in India.

Secondly, the research paper aims at studying the circumstances and powers of Indian Courts to intervene in any Arbitral Proceeding.

And ***thirdly***, to research on, the degree of enforceability of Foreign Arbitral Awards under Arbitration and conciliation act,1996.

4. Methodology:

This section of the paper has been developed to explain the logic and rationale behind the research methods used. The idea is to demonstrate that the chosen approach has been appropriate and the findings of the research are both applicable and dependable. From the perspective of time horizon, this research will be classified as *Doctrinal research*. This is because the research will be studying the changes to be brought in the Arbitration method of dispute resolution.

5. Arbitration and role of judiciary:

[6] http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2546&context=lcp

Arbitration is generally intended to provide speedy, economic and fair resolution of disputes. But traditional arbitration takes its own time to reach settlement. A traditional arbitration may take generally one to three years to be completed. Many a time, it is felt that the arbitral process has become complicated and lengthy like judicial process in courts. [7] The Indian judiciary and arbitration process is still in conflict and many a times judiciary is blamed by the experts as a hindrance in arbitration success rates in India.

(a) Judicial intervention in domestic Arbitration:

Introduction:

The increasing use of arbitration in the dispute resolution in the commercial matters tends to a fast growth of the international commercial arbitration all over the world. After the New York Convention and post-1970 era there is a major growth in the international commercial arbitration. Procedure of working and principles adopted universally in arbitrational proceedings in between the borders and the growth of the international commercial arbitration passed through the different phases.

Developments abroad had an impact on our country which has been making enormous efforts for the promotion of Alternate Dispute Settlement Mechanisms, e.g., arbitration.[8] The lock in of cases in the Indian courts and long delays in the decisions in the cases increased the popularity of arbitration as one of the most effective methods of the dispute settlement in India these days.

(b) Enactment of the Arbitration and conciliation Act, 1996:

The object of the enactment of the1940 Act was to cut-short delay and to provide speedy and less expensive justice. But it was not accomplished. Adverse remarks and comments were made against the working of the 1940 Act in the 210th Report of the Public Accounts Committee of the Fifth Lok Sabha and also in the 9th Report of the Public Accounts Committee

[7] http://lawcommissionofindia.nic.in/arb.pdf
[8] http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2546&context=lcp

of the Sixth Lok Sabha. The Government of India, therefore, referred the matter to the Law Commission of India for its examination and report in 1977.

The 76th Report of the Law Commission under the Chairmanship of Hon'ble Mr. Justice **H.R.Khanna** was submitted to the Government on November 9, 1978, which had recommended the necessity to amend the 1940 Act for developing economy of the country.[9] Many public service oriented institutions of trade, industry, commerce and eminent jurists and scholars also pressed hard the need for drastic changes in the arbitration law.

Again the 13th Law Commission of India undertook further examination of its recommendations. The **Malimath Committee** constituted by the Government of India on the recommendations of the Chief Justices Conference, had recommended number of alternative modes and reforms in the1940 Act.[10]

UNCITRAL also recommended changes in arbitration law for the purpose of the promotion of the progressive harmonization and unification of the arbitration law of international trade as one of its main objectives. Consequently, the 1996 Act came into existence which is more progressive than the repealed the1940 Act. It has provided unified law for both international commercial arbitration and domestic arbitration and consolidated the entire law on arbitration. Parliament enacted the 1996 Act, with a view to make arbitration less technical and more effective and useful, which not only removes the defects of the earlier arbitration law but also incorporates modern concepts of arbitration which are internationally accepted. The 1996 Act aims at introducing basic and qualitative change in the process of arbitration in India.

Reforms brought by the 1996 act:

The object of the 1996 Act was to establish a uniform legal framework for the fair and efficient settlement of disputes arising in international commercial arbitration.1 The whole object and scheme of the 1996 Act is to secure an expeditious resolution of disputes.

(c) Important features of the 1996 act in regards to judicial intervention:

Principle of Non-Intervention:

[9] http://www.icaindia.co.in/icanet/quterli/oct-dec2001/OCT4.htm
[10] http://www.icaindia.co.in/jan-march2011.pdf

The fundamental principal underlying the 1996 Act is that the courts shall not interfere in arbitral proceedings.[11] However, the 1996 Act contemplates only three situations where judicial authority is involved in arbitration. **These are:**

- **Section 11** provides for appointment of arbitrator by the Chief Justice.
- **Section 14(2)** provides for ruling on whether the mandate of the arbitrator stands terminated due to inability to perform his functions or failure to proceed without undue delay.
- **Section 27** which provides assistance in taking evidence.

As compared to the Model Law, the Indian law is far more restrictive in allowing court intervention.

Section 5 of the 1996 Act, through a non-obstante clause, provides that in Part I, no judicial authority shall interfere except where so provided for. [12]

Section 8 states that a judicial authority before which an action is brought in a matter which is the subject matter of an arbitration agreement should refer the parties to arbitration. The only condition being that the party objecting to the court proceedings must do so no later than his first statement on the substance of the dispute. In the meanwhile, the arbitration proceedings may be commenced and continued with and an award rendered.

(d) Scope of judicial intervention under the 1996 act:

Recourse against Arbitral Awards:

Section 34 under Part I of the 1996 Act lays down the provisions under which applications could be filed to set aside arbitral awards.

Application for setting aside arbitral award:[13]

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside such award in accordance with subsection (2) and subsection (3).

[11] www.mondaq.com/.../Arbitration.../International+Arbitral+Awards+Judic...
[12] www.ficci-arbitration.com/htm/acts.pdf
[13] http://keralamediation.gov.in/AC%20Act.pdf

(2) An arbitral award may be set aside by the court only if:

(a) The party making the application furnishes proof that,

(i) A party was under some incapacity, or

(ii) The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) The arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside.

(b) The court finds that

(i) The subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) The arbitral award is in conflict with the public policy of India.

(e) Review of Arbitral Awards in India: Scope of Judicial Intervention Broadened:

The efficacy of any legislation must be judged by its implementation rather than its intentions. Unfortunately, in practice, the Indian courts have vastly enlarged the scope of challenge of awards to much more than what is available under the 1996 Act. In **Oil & Natural Gas Corp. Ltd. v. SAW Pipes Ltd**[14] the Supreme Court of India adopted a broad interpretation of the term "public policy" by essentially including "error of law" as a new ground for setting aside an arbitral award.

[14] http://indiankanoon.org/doc/919241/

This "error of law" ground was not provided for under the 1996 Act. The Court then effectively used this new ground as a basis to review the merits of the case. While the Saw Pipes decision is, at first glance, only relevant to proceedings to set aside awards with seat of arbitration in India, the ramifications of this decision may potentially extend to recognition and enforcement proceedings of foreign awards in India.

(f) Judicial Intervention on the grounds of '*error of fact or law*':

The 1996 Act was brought into existence mainly to achieve, among other objectives, the Minimization of the supervisory role of courts in the arbitral process and to provide that every final arbitral award is enforced in the same manner as if it were a decree of the court.

Courts in India have given varied opinions from time to time as regards judicial intervention and

review of arbitral awards. The courts have held that, "as the parties choose their own arbitrator, they cannot, when the award is good on the face of it, object to the decision either on law or on facts and the award will neither be remitted nor set aside.'" The mere fact that the arbitrators have erred in law or facts can be no ground for interference by the court and the award will be binding on the parties. However, courts have not been always consistent in their views with regard to reviewing of arbitral awards.

6. International commercial Arbitration and the role of Judiciary.

In this chapter judicial intervention in foreign arbitral awards, law relating to enforcement of foreign awards in India, interpretation of provisions of the 1937 Act, the 1961 Act and the 1996 Act by Indian courts and amendments there in by the legislature, the controversy regarding the enforceability and the grounds for challenging **foreign arbitral awards** have been discussed.

Example of incidents which has conflict between International commercial arbitration and Indian judiciary:

***National Thermal Power Corporation*[15] *case*:** This case involved an award made in London under the ICC arbitration between an Indian and a US company. The award was a foreign award but the Supreme Court while interpreting section 9 of the 1961 Act held that the New York Convention did not apply to an award made on an arbitration agreement governed by the law of India. This decision of the Supreme Court was a milestone in the international commercial arbitration in India and it resulted into objections by the international bodies interested in investments in India and wanted a fair system of adjudication of disputes. Govt. of India finally decided to reform the arbitration law by amending section 9 of the 1961 Act which was interpreted by the Supreme Court in this case. A thorough examination of this case is necessary to understand the reasons leading to criticism at the international level resulting in to amendment of arbitration law in 1996.

In this case the award was made in London as an interim award in arbitration between the National Thermal Power Corporation and a foreign contractor on a contract governed by the law of India and made in India for its performance solely in India. The fundamental question was whether the arbitration agreement contained in the contract was governed by the law of India so as to save it from the ambit of the 1961 Act, and attract the provisions of the1940 Act, which is the law which governs the agreement on which the award has been made? The National Thermal Power Corporation had submitted that admittedly the proper law of the contract was the law in force in India. The arbitration agreement was contained in a clause of that contract. In the absence of any stipulation to the contrary, the contract has to be seen as a whole and the parties must be deemed to have intended that the substantive law applicable to the arbitration agreement is exclusively the law which governs the main contract, although, in respect of procedural matters, the competent courts in England will also be, concurrently with the Indian courts, entitled to exercise jurisdiction over the conduct of arbitration.

But occasions for interference by the courts in England would indeed be rare and probably unnecessary in view of the elaborate provisions contained in the ICC Rules by which the parties have agreed to abide. The substantive law governing arbitration, which concerns questions like capacity, validity, effect and interpretation of the contract, etc., is the Indian law and the

[15] National Thermal Power Corporation v. Singer Company, AIR 1993 SC 998.

competent Courts in such matters are the Indian courts. Even in respect of procedural matters, the concurrent jurisdiction of the courts of the place of arbitration does not exclude the jurisdiction of the Indian courts.

The last submission is that this being an arbitration agreement to refer a dispute to a foreign arbitral tribunal, section 34 of the Arbitration Act would not be applicable and hence the application of the respondent for stay of the suit is not maintainable. It is not necessary to examine this contention on its merits because we have assumed for the purpose of this appeal that section 34 of the1940 Act would be attracted even where the agreement is to refer a dispute to a foreign arbitral tribunal.

7. Steps taken by Govt and Legislature to reduce Judicial Intervention:

(a) Report of the Law commission of India:[16]

After the 1996 Act, came into force, concerns were raised for its amendments. **The Law Commission in 1998** recommended that it would not be appropriate to take up amendments of the Act of 1996 in haste and that it would be desirable to wait and see how the courts would grapple with the situations that might arise.

Later on after making an in-depth study of the law relating to arbitration as well as the position of the law of arbitration in foreign jurisdictions, the Law Commission of India made various recommendations for bringing amendments.[17]

The laws of arbitration for international and domestic arbitration are governed by different statutes in various countries. But while enacting the 1996 Act, the Model Law which was meant for international commercial arbitration only was adopted also for domestic arbitration in India. In the year 2001, the Law Commission of India undertook a comprehensive review of the working of the 1996 Act and prepared a report on the experience of the 1996 Act and recommended a number of amendments to the 1996 Act in its 176th Report submitted to the Government.

[16] http://lawcommissionofindia.nic.in/reports/Report246.pdf
[17] practicalacademic.blogspot.com/.../comments-on-law-commissions-246

The additions, substitutions and modifications in the 1996 Act recommended by the Law Commission of India are important to understand lacunae and to find the way in which they can be rectified. The Law Commission of India has made many recommendations. These proposals were criticized by experts who raised various objections against the proposals. Some of important recommendations by the Law Commission are discussed in succeeding paragraphs:

Section 5:

In section 5 an explanation has been recommended to be added to explain the meaning of the words any other law for the time being in force, which occur in the non-obstante clause. This is needed to exclude remedies of appeal or revision under the Code of Civil Procedure or appeals under the Letters Patent or under the High Court Acts and all other remedies under special statutes against orders of judicial authorities. Section 37 of the 1996 Act has clearly provided the orders from which an appeal lies and further it has provided that no second appeal lies from an order passed in appeal. Hence the suggestion of the Law Commission of India does not bring material change in the context.

Section 7:

The Law Commission has suggested that section 7 some words in clause (b) of sub-section (4) be amended, to include within the definition of arbitration 'agreement' an agreement by implication such as where one party sends a communication to another party, even though the party who receives the communication does not send a reply, his silence will be treated as amounting to acceptance of the arbitration clause and cover cases like brokers notes.[18] But this proposal of the Law Commission is controversial as silence cannot amount to arbitration agreement, which has serious implication that it excludes right to invoke jurisdiction of civil courts existing law.

Section 8:

The Law Commission has suggested to amend section 8(1) by permitting, as under the Model Law, judicial authority to decide certain preliminary questions which are raised by the respondent before filing the defence statement, so that the said issues can be decided before making a reference to arbitration.

[18]www.legislation.gov.uk/ukpga/1996/23/data.pdf

Section 8(1A) was proposed to be added to require the judicial authority to stay the action pending a decision on the preliminary issues of jurisdiction and subject to the outcome of a decision on those preliminary issues. It was further suggested that **section 8(3)** be amended that, the arbitral tribunal, if already appointed by the respondent, the arbitral tribunal can proceed with the arbitral proceedings, while the court is still dealing with the earlier application of the respondent seeking reference.

The continuance of such an arbitration proceeding will depend upon the decision of the judicial authority on the preliminary issues. In case it is decided by the judicial authority to reject the preliminary issues of jurisdiction and make a reference to another arbitral tribunal, the mandate of the earlier arbitral tribunal appointed by the respondent, should cease.

Section 9:

Section 9 was proposed to be amended by restructuring it and bringing the latter part of the section which deals with the wider powers of the Court to the forefront and for relegating the enumerated powers of the Court to the latter part of the section. The section 9 states an impression that the powers of the court which are referred to in the latter part of the section are as limited as those in the earlier part of the section. It is proposed to clarify the present section by dividing it into sub-sections (1) to (3).

Section 34:

It was suggested that section 34 dealing with applications to set aside the award be amended to fill up certain omissions and also to provide for some consequential amendments arising out of the proposed section 34A. Sub-section (1) of section 34 was proposed to be amended by permitting the parties to include, in their application to set aside the award, the additional grounds proposed in section 34 A in the case of purely domestic arbitration awards relating to Indian nationals.[19]

Section 34 does not enable the parties to question the decision of the arbitral tribunal made under section 13 (2) rejecting a plea of bias or to question the decision of the said tribunal made under section 16 (2) or (3) rejecting a plea of want of jurisdiction on the part of the arbitral tribunal.

Though the existence of these remedies was referred to in sections 13 and 16, these remedies were not included in section 34 and further the use of the word only‘ in section 34 (1)

[19] https://arbitrationandconciliation.wordpress.com/arbitration

contradicted what was stated in sections 13 and 16. It was suggested that second explanation be added below sub-section 2 of section 34, making it clear that the above decisions can be challenged before the court in the application under section 34(1). It was further suggested that sub-section (1A) be introduced in section 34 so that while filing an application to set aside the award, the parties could annex a photocopy of the award in case the original award has not been supplied to the applicant.

It was recommended in the case of purely domestic arbitrations, where an award is passed between Indian nationals, the parties were proposed to be given two more additional grounds of attack to be included in the application under sub-section (1) of section 34. These two additional grounds are (i) that there is an error which is apparent on the face of the arbitral award giving rise to a substantial question of law, and (ii) that the award has not given reasons though it was an award which was required to contain reasons, not being one by way of settlement or one where the agreement provided that reasons need not be given.

(b) Arbitration and Conciliation (Amendment) bill, 2003:

The Government of India had brought the Arbitration and Conciliation (Amendment) Bill, 2003 (hereinafter referred to as the 2003 Bill) for amending the 1996 Act. It was also proposed that a new legislation be brought in the Parliament after undertaking in-depth examination of the various recommendations of the Committee.

Proposals in the 2003 Bill:[20]

The amendment of the following provisions of the 1996 Act was considered as necessary to reform the law of arbitration:

1) Section 2 (2) - Scope of application of Part I of the Act.

2) Section 11- Appointment of arbitrators.

3) Section 12- Disclosure by an arbitrator regarding any interest in the matter.

4) Section 28 (3) - Taking into account terms of the agreement and trade usage.

[20] lawmin.nic.in/legislative/arbc1.pdf

5) Section 31 (7) - Rate of interest.

6) Section 34- Providing meaning of ―public policy of India‖ and for harmonizing it with sections 13 and 16.

7) Section 36- Enforcement of arbitral award

It was also proposed that once these amendments are implemented, it would result in minimal court intervention in the matter of arbitration and also enhance institutional arbitration and disclosure of any interest by the arbitrator. Moreover, these amendments would also help India in becoming a hub of international commercial arbitration. Some of the major objectives of the 2003 Bill were as under:

1) To resolve the conflict between some judgments of the High Court under the Act.

2) To bring it in conformity with the Model Law in certain respects.

3) To speed up the pending was well as future arbitrations by providing for a time limit within which proceedings will have to be concluded which will be an improvement upon UNCITRAL model. [21]

4) To rectify certain mistakes which have crept into some provisions of the Act.

5) To provide for the establishment of a new arbitration Division within each High Court where awards can be challenged under section 34,34A or 36.

6) To provide for Fast Track Arbitration following a special procedure

(c) Reference of the bill to the Committee:

[21] www.pib.nic.in/release/release.asp?relid=60108

The 2003 Bill was referred to the **Departmental Related Standing Committee on Personnel, Public Grievances, Law and Justice (the Committee)** for examination and report. The said committee received valuable comments and suggestions from eminent organizations and individuals in the country and abroad. It also heard prominent arbitrators, lawyers and representatives of public sector corporations.

(d) Proposals made by the Committee:

Clause 9 of the 2003 Bill sought to amend section 8 of the 1996 Act. The Committee was recommended that the proposed amendments enabling the judicial authority to decide on preliminary issues like the non-existence of any dispute, arbitration agreement being null and void, and arbitration agreement being incapable of performance will give rise to prolonged litigation in Courts.

This concern was also voiced by **Dr. Robert Briner,** Chairman, International Court of Arbitration, ICC, Paris, while deposing before the Committee. It will also effectively introduce court intervention at pre-arbitration stage and retard the arbitration process. This would defeat the main purpose of the 1996 Act which is minimization of court intervention.

With respect to clause 12 of the 2003 Bill[22], the Committee had opinion to confer the power of appointment of arbitrator, in default of the parties or the agreed procedure, on the court, for determination of the issues arising in that connection on the judicial side is not a welcome step. In the present scenario of huge pendency of cases in the courts, it may take years to get the arbitrator appointed. The Committee suggested that if the parties are unable to appoint an arbitrator within the stipulated time, the power of appointment should not automatically devolve on the courts.

But, if the parties apply for the appointment of an arbitrator, then the court can do so. The Committee further suggested that 30 days time stipulated in the 1996 Act is more than sufficient for appointment of an arbitrator by the parties and there is no need to extend the same

In respect of clause 13 of the 2003 Bill[23], the Committee was in agreement with the view of Justice Saraf Committee that any attempt to elucidate the 'circumstances' is likely to provoke

[22] lawmin.nic.in/legislative/arbc1.pdf
[23] indiacorplaw.blogspot.com/.../guest-post-proposed-**amendments**-

unnecessary time consuming challenge to the impartiality of the arbitrator on the ground that he had some relation of the type set out in the illustration with the parties or their lawyers. There is a high chance of abuse of such a provision by a party who wants to delay or derail the arbitration proceeding.

Clause 17 of the 2003 Bill provided that if the parties to arbitration are Indian nationals or companies, then the arbitration venue has to be in India. This proposed amendment is squarely against the principle of 'comity of nations' and 'curial law'. Also, its effect is to ignore the common law principle that parties are free to contract as they deem fit provided no provision is against public policy or in violation of any applicable law or procures a breach of any applicable law.

Also, the argument that arbitration between domestic parties should be conducted only in India is diametrically opposite to the rationale for adopting the New York Convention. If arbitration outside India was acceptable at the time of adoption of the New York Convention, then it should be all the more acceptable now, given that India has come so far in the international arena.

The Committee while going through all the observations and recommendations in the 2003 Bill was of the considered view that the 2003 Bill would lead not only to greater interference by Courts in the process of arbitration but also end up having arbitration being conducted under the supervision of the Courts and also have the Courts sitting in judgment over the arbitrators before arbitration, during arbitration and after arbitration.

(e) Withdrawal of the 2003 bill:

There was a broad consensus that the provisions in the 2003 Bill if accepted, will make the arbitral tribunal an organ of the court rather than a party-structured dispute resolution mechanism.

Also, many amending provisions were considered to create confusion and unnecessary litigation. Bringing back court control and supervision in arbitration and the choice of the arbitrator subject to the High Court rules, supervision and control of the court, was considered

not in the interest of growth of arbitration in India and also not in tune with the best international practices.

It was suggested that they are contrary to the best international practices in the field of arbitration. Hence the Committee recommended that the adoption of the 2003 Bill may hamper further development of international trade relations and diminish the confidence of the international community in the Indian system of arbitration.

The Union Cabinet of Govt. of India on April 5, 2006 gave its approval for withdrawal of the 2003 Bill pending in Rajya Sabha to facilitate for introduction of a new Bill on arbitration after obtaining the recommendations of the Department related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice in view of the large number of amendments recommended by the Committee and because many provisions of the Bill were contentious. Consequently the 2003 Bill was withdrawn from the Rajya Sabha during second part of Budget session held in May 2006.

Enactment of the Arbitration and onciliation Act, 1996 and Principle of Non-Intervention:

The fundamental principal underlying the 1996 Act is that the courts shall not interfere in arbitral proceedings. However, the 1996 Act contemplates only three situations where judicial authority is involved in arbitration. **These are:**

1)Section 11 provides for appointment of arbitrator by the Chief Justice;

2) Section 14 (2) provides for ruling on whether the mandate of the arbitrator stands terminated due to inability to perform his functions or failure to proceed without undue delay;

3) Section 27 which provides assistance in taking evidence.

As compared to the Model Law, the Indian law is far more restrictive in allowing court intervention. Section 5 of the 1996 Act, through a non-obstante clause, provides that in Part I, no judicial authority shall interfere except where so provided for. Section 8 states that a judicial authority before which an action is brought in a matter which is the subject matter of an arbitration agreement should refer the parties to arbitration. The only condition being that the

party objecting to the court proceedings must do so no later than his first statement on the substance of the dispute. In the meanwhile, the arbitration proceedings may be commenced and continued with and an award rendered.

By and large the Indian courts have well understood the spirit and intent behind the principle of non-intervention under the 1996 Act. Thus, in ***CDC Financial Services (Mauritius) Ltd***[24] the respondent obtained an anti-arbitration injunction from the High Court on the ground that the pledge of shares which was sought to be enforced through arbitration would enable the claimants to take control of a telecom company which (as it was a foreign company) would be contrary to Indian law. On appeal, the Supreme Court rejected this contention, stating that this was a plea on merits and thus within the sole jurisdiction of the arbitrators. Interestingly, the Supreme Court not only vacated the injunction, it also restrained the respondent from moving any further applications _which would have the effect of interfering with the continuance and conclusion of the arbitration proceedings.

In ***Sukanaya Holdings***[25] however, the Supreme Court refused to stay the court action on the ground that the subject matter of the arbitration agreement was not the same as the subject matter of the civil suit. Besides, the parties in the two actions were not identical. The court held that the entire subject matter of the suit should be the subject matter of the arbitration agreement in order for the mandatory provisions of section 8 to apply.

8. Conclusions And Suggestions:

The problems, difficulties and challenges due to defects, lacunae and gaps in the 1996 Act and law resulting in resistance to its acceptance of Indian law as law applicable in international commercial arbitration shall be discussed in this chapter.

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[24]CDC Financial Services (Mauritius) Ltd. v. BPL Communications Ltd. and ors., (2003) 12 SCC 140.

[25] Sukanaya Holdings v. Jayesh Pandya (2003) 5 SCC 531.

(a) Recommendation for Reformation:

The flooding of the courts with suits, in pendency and arrears, and litigation being a time-consuming and costly mechanism for dispute resolution, Alternate dispute resolution techniques have developed. Arbitration is the next best alternative to litigation as it is deemed to be *private litigation* conducted under the control and supervision of an arbitral tribunal.

The cost-benefit analysis of *ad hoc* and *institutional* arbitration highlighted the superiority of the latter over the former in terms of *expediency, efficiency and hassle-free mechanism for dispute resolution.* In India, with the importance of alternative dispute resolution growing, *ad hoc* arbitration was accepted rather than *institutional* arbitration due to its accessibility. This tendency is counter-productive since it is believed that a considerable extent of litigation in lower courts' deals with the challenges to awards by *ad hoc* arbitration tribunals. These judicial interventions in the arbitral proceedings have given rise to a trend which is antithetical to the objectives of arbitration.

Therefore, on consideration of the benefits that can be derived from the promotion and adoption of *institutional* arbitration, recommendations for reforms in India for the development of arbitration as a whole and *institutional* arbitration to replace *ad hoc* arbitration and *litigation* have been propounded.

(b) Scaling Down Institutional Arbitration:

Ad hoc arbitration gained prominence in India due to its easy accessibility and mass appeal. On the other hand, *institutional* arbitration was an unknown phenomenon to the people of the country. However, the values of *institutional* arbitration far outweigh those of *ad hoc* in terms of efficiency, expediency and cost- effectiveness. Therefore, it is necessary that the **values and culture** behind the concept of *institutional* arbitration are maintained for propagation.

In India, the consumer protection forum gained prominence in the minds of the public due to its suitability and free availability for the masses. Similarly, there is a need to institutionalize

arbitration to bring in the recognition and acceptance granted to the consumer protection forums through **institutionalization** of dispute resolution.

Those involved in domestic disputes are the usual parties who engage in *ad hoc* arbitration while corporate firms, the state are parties to institutional arbitration. In order to promote, the disposal of suits in an expeditious and efficient manner, *fast track arbitration* centres ought to be set up. With the existence of *fast track* arbitral tribunals which form a part of the institutional arbitration, the objectives of arbitration are fulfilled.

(c) Reforming the Existing Institutions:

The existing arbitral institutions in India include the *Indian Council of Arbitration, International Centre for Alternative Dispute Resolution and Federation of Chambers of Commerce* among others. These institutions usually deal with the disputes intending to invoke international commercial arbitration.

It is necessary that these institutions be made more **vibrant**, reputed and accessible to the masses. **Uniformity** in the rules and procedure governing these institutions ought to be introduced. Due to the expenses involved in *institutional* arbitration, there is a necessity to put a **cost- ceiling on the maximum fee** as a percentage of the value of the subject matter that can be charged. In addition, there is a need for bringing in more administrative and bureaucratic changes such as **division of the functions** in accordance to the specialty of the arbitrators to deal in a specific subject matter or even distinguishing on the lines of pecuniary jurisdiction. The separation of the functions of the institutions will ensure that there are no hindrances due to excessive and unnecessary bureaucratic procedures. Therefore, reforms to the prevalent system in India, to introduce a greater use of *institutional* arbitration, requires changes right from the existent organisations to the formation of the newer organisations.

(d) Creation of New Institutions:

The rules of **supply and demand** seem to apply to the success of *institutional* arbitration. The demand for a mechanism of alternative dispute resolution can be captured by *arbitration institutions* if they are supplied and created for the availability and access to the masses. The

existence of a number of institutions will guarantee that there is **no exclusion of the poor** and vulnerable as well as prevent the use of extra-legal methods. The new arbitral institutions suggested ought to be dealing with specialised aspects of law. **Expertise and specialisation** will ensure efficiency and that right awards are passed.

The objective for reformation is to encourage the disposal of domestic disputes through the mechanism of ***institutional*** **arbitration** which can be achieved through the setting up of institutions which deal exclusively in domestic disputes. The existence of specialised arbitration institutions will ensure that a capable arbitrator is handling the transaction and prevent the need for judicial review of the same.

(e) Institutional Arbitrations and the Courts:

The only way that arbitration can develop in India is if it shares a **symbiotic relationship** with the judiciary of the nation. A competitive method would be detrimental to the interests of the parties in the arbitration. A symbiotic relationship would entail that the courts encourage the use of arbitration by referring a certain number of cases to be settled through arbitration. These arbitral tribunals must ensure that the case ought not to return to the courts thereby adding to the cases in arrears and pendency. This would achieve the two goals of dispute resolution and unburdening the judiciary through the encouragement of arbitration.

It is believed that one of the reasons for the slow growth of institutional arbitration is the incessant interference of the courts on the freedom of the arbitral institution. Therefore, the secret to a relationship that is beneficial to both arbitral tribunals and people would be to *encourage but not to interfere.* It is time to appoint specialised and trained arbitrators instead of the retired judges who believe in enforcing the Code of Civil Procedure to the hilt. It is the need of the hour that the '**judicialization of arbitration'** ought to come to an end.

(f) Amendment of the Arbitration and Conciliation Act 1996:

In the colonial period, The Arbitration Act, 1940 to meet the demands of the Geneva Conference, 1924 was enacted. Post- independence the insufficiency of the Arbitration Act, 1940 was realised and following much deliberation the Arbitration and Conciliation Act, 1996 was enacted in conformity to the Convention on the Recognition and Enforcement of Foreign

Arbitral Awards. The 1996 enactment only acknowledges the existence of *institutional arbitration*, but lays down no rules for its governance. Therefore, it is necessary that similar to the procedure for *ad hoc* arbitration laid down as a default measure and guideline to draft arbitration

clauses, the same is necessary for *institutional arbitration.* The need of a legislation dealing with the standardized role of the *institutional arbitration* ought to be fulfilled for the development of the arbitration.

Various countries in the world have **separate laws** for *institutional* arbitration, the least India needs is to ensure that the Arbitration and Conciliation Act maintains separate rules governing the administration of *ad hoc* and *institutional* arbitration.

(g) Institutionalising the Panchayat System:

The Panchayat system is India is unique to its native land and its nature compares to that of arbitration. The **Panchayats** in India have strong historical foundations commanding respect from both the administration and the villagers at the grass-root levels. The Panchayats made up of 5 elderly men apply the rule of equity to decide the disputes put forth before them in the village.

One of the most effective ways to promote *institutional* arbitration is through **decentralisation** and adaptation to the needs of the grass-root and village levels. Similar to the concept of Nyaya-Panchayat, institutional arbitration can be promoted through the creation of an organisation functioning as a **parallel system**. This arbitral institute would deal solely in specialised matters like land disputes and caste- disputes.

This arbitration institute could be *mobile* which means that a district will have an **institution on wheels** discharging arbitration services. The parties could be given a choice to select their arbitrators either from the list provided by the mobile institute to defeat any allegations of bias. In addition, the fee could be paid over a period of time so

that the villagers are not over-burdened along with the administration of the arbitration process through a set of fixed rules. This method will benefit the poor who cannot approach the courts for the settlement of their disputes and who also fear that the Panchayat is biased against their cause.

(h) Creation of Awareness

The creation of awareness and spread of knowledge with respect to the options available and the manner of availing it are the best possible solution to popularise a product or service. The same applies here. Even though the institutions might exist and are governed in the manner prescribed above, unless the consumer is aware of its availability and the conditions for accessibility, the task is only half complete.

According to the researcher, certain steps with respect to **creation of awareness** about *institutional* arbitration should be taken:

1. There must be training of lawyers to boost the cause of arbitration in order to create expertise.
2. Procedural aspect of arbitration should be made easier especially in rural areas where there exist illiteracy and land barriers.
3. *Institutional* arbitration needs to be promoted in consonance with legal aid and Lok Adalats which will ensure the development of alternative dispute resolution mechanisms.
4. The International Chamber of Commerce should ensure that all young members of the arbitration profession will be given a chance to prove themselves. It is necessary that the awareness to be created must be for the consumers on one hand and the institutions on the other. **Incentive based transactions** are a necessity to ensure that not only the reputation of the institution increases but also the quality of the arbitrators.

The above mentioned reforms aim at expanding the scope and use of *institutional* arbitration which is superior not only in terms of fulfilling the objectives of arbitration and alternative dispute resolution but also ensuring the most efficient outcome to the dispute. Contemporary India is reeling under the effect of an overburdened judiciary and a rather complacent and under developed mechanism for alternative dispute resolution. It can be concluded that co-existence of both *ad hoc* and *institutional* arbitration might be the safest bet in the 21st century as long as the process for developing *institutional* arbitration is ongoing.

Finally, India forms as a strategically sound model for study as not only is it the world's largest democracy but also a developing nation facing immense repercussions of docket explosion. This only enunciates the need to develop an alternative mode for dispute resolution through

arbitration. The reforms mentioned with respect to the Indian model can be applied to the developing countries reeling under similar problems.

The prevalent arrangement of *institutional* arbitration is not favourable for developing countries and it can be concluded that *one size that is used even in other countries does not fit all.* The biggest problem in developing with respect to institutional arbitration is the lack of availability and accessibility to the masses as well as the lack of awareness of the existence of that media. The aim of the reforms is to expand the adoption of institutional arbitration from international commercial disputes to domestic disputes in developing countries. Keeping these objectives in mind as well as the constraints faced by a normal litigant which include poverty, illiteracy and unawareness, a number of suggestions have been furthered.

So even though it is true that *institutional* arbitration is the ideal situation aimed at, the contemporary burden on the courts and the lowering trust of the people on legal method necessitates the coexistence of *ad hoc* and *institutional* arbitration for domestic and international commercial disputes in developing countries with India as a model proposed. As institutional arbitration develops, there will be a shift among the people preferring the same over ad hoc arbitration following the rule of supply and demand.

9. Literature Review:

(a) 176th Report of the Law Commission of India: Proposed changes to the Arbitration and Conciliation act 1996:

This report is based on the changes that law commission of India proposed to bring into the arbitration and conciliation act of 1996. The Law Commission of India was entrusted with the task of reviewing the provisions of the Arbitration and Conciliation Act, 1996 ('the Act') in 2001 in view of the several inadequacies observed in the functioning of the Act. The Commission considered the representations which pointed out that the UNCITRAL Model (on the basis of which the Arbitration and Conciliation Act, 1996 was enacted) was mainly intended to enable various countries to have a common model for 'International Commercial Arbitration' but the Act of 1996 had made provisions of such a Model law applicable also to cases of purely domestic arbitration between Indian nationals. This did give rise to some difficulties relating to subject, looking into the position of the law in foreign jurisdictions, the

Commission has made various recommendations for bringing amendments in the Arbitration and Conciliation Act, 1996. The summary of the recommendations regarding judicial intervention has been explained in the paper. Also a Bill entitled **'The Arbitration and Conciliation (Amendment) Bill, 2001'** has also been prepared by the Commission bringing out various provisions through which the Arbitration and Conciliation Act, 1996 is proposed to be amended.

(b) 246th Report of the law commission: Proposed changes to the Arbitration Act:

On August 5, 2014, the Law Commission submitted to the Law Minister its 246th report on "Amendment to the Arbitration and Conciliation Act, 1996".

There has been much back and forth with respect to the proposed amendments to be carried out in the existing Arbitration and Conciliation Act, 1996 ("**Act**"). The Government had earlier accepted the recommendations made by the Law Commission in its 176th Report on the same subject and had introduced the '*Arbitration and Conciliation (Amendment) Bill, 2003*'('**Bill**") in the Rajya Sabha in December 2003.

Subsequently the Ministry of Law and Justice constituted the **Justice Saraf Committee** on Arbitration to study in depth the implications of the recommendations of the Law Commission of India contained in its 176th report. In the wake of the Saraf Committee recommendations, it was suggested that the Bill in its present form should be withdrawn and reintroduced since the provisions of the Bill were insufficient and contentious. One of the most important reason for this suggestion was, that the proposed amendments will bring more scope of judicial intervention in arbitration process in India. The Bill was consequently withdrawn from Rajya Sabha and the Ministry of Law and Justice issued a consultation paper in April, 2010 inviting suggestions from eminent lawyers, judges, industry members, institutions and various other stakeholders.

On the basis of various comments and suggestions received, the Ministry prepared a "Draft Note from Cabinet" and the Law Commission was asked to review the said draft notes. Following an extensive study of the draft note, the Law Commission submitted its latest **246th report**.

Part III of the report contains the proposed amendments to the Act. The brief highlights have been provided for understanding the intent behind the amendments.

Brief Highlights of the Proposed Amendments:

Institutionalization of Arbitration Proceedings: Institutional arbitration as the name suggests refers to arbitrations conducted in accordance with the rules and procedure of an arbitration institution, this being opposed to ad-hoc arbitration that includes arbitration where the parties may choose on their own to devise and agree upon a tailored arbitral process or alternatively to incorporate existing rules of procedure. The institutions provide arbitration services as well as other general business functions and in some cases assist in the administration of the arbitration through its infrastructure. Some examples of institutional arbitration are the ICC based in Paris; the London Court of International Arbitration, the Dubai International Arbitration Centre (DIAC) created in 1994; and the Bahrain Chamber for Dispute Resolution (BCDR) created on 10 January 2010. In India, however the concept of institutional arbitration is limited to the Delhi High Court International Arbitration Centre; The Punjab & Haryana High Court Arbitration Centre; Indian Council of Arbitration (ICA).

Fees for Arbitrators: One of the major constraints for effective ad-hoc arbitration in India is high cost associated with arbitrary, unilateral and disproportionate fixation of fees by several arbitrators. The Commission suggested that rationalization of fees for arbitrators would prove beneficial in achieving a cost effective solution for dispute resolution. The Commission has thus suggested a model schedule of fees empowering the High Court to frame appropriate rules for fixation of fees for arbitrators.

Conduct of Arbitral Proceedings: Chapter V of the Act deals with provisions relating to conduct of arbitral proceedings. However, despite existing provisions in the Act, arbitration in India has been largely inadequate and disappointing for all stakeholders. The proceedings primarily have become replica of court proceedings, rooted with unnecessary and frequent adjournments. There have been numerous rulings by the High Courts and the Supreme Court wherein the arbitrators have been nudged to hear and decide matters expeditiously, and within a reasonable period of time. Similarly, counsel for parties must refrain from seeking repeated

adjournments or insisting upon frivolous hearings or leading long-winded and irrelevant evidence. The Commission thus recommended the following:

- Addition of the second proviso to section 24 (1) to the Act, discouraging the practice of frequent and baseless adjournments, and to ensure continuous sittings of the arbitral tribunal for the purposes of recording evidence and for arguments.

- Addition to the preamble of the Act, which does not directly affect the substantive rights and liabilities of parties, but however does serve as guidance for arbitral tribunals and courts to interpret and work the provisions of the Act.

Judiciary and Arbitration: The judicial machinery was intended to provide essential support to arbitration process. However, time and again the arbitration proceedings have been frustrated in the ambush of judicial machinery. There is strikingly an imbalance between the judicial machinery and arbitration proceedings. The Commission has strived to adopt a middle path to find an appropriate balance between judicial intervention and judicial restraint. In order to combat delays due to intervention of judicial machinery the Commission has suggested the following:

- The existing scheme of the power of appointment being vested in the "Chief Justice" to be changed that to the "High Court" and the "Supreme Court" and has expressly clarified that delegation of the power of "appointment" shall not be regarded as a judicial act.

- Amendment to section 11 (7) of the Act, so that decisions of the High Court (regarding existence/nullity of the arbitration agreement) are final and non-appealable where an arbitrator has been appointed.

- Addition of section 11 (13) to the Act, so that the Court endeavors to dispose of the matter within sixty days from the service of notice on the opposite party.

- Addition of sections 34 (5) and 48 (4) to the Act, that would help an application under such sections be disposed off expeditiously and in any event within a period of one year from the date of service of notice.

- A time limit under section 48 (3) of the Act has been introduced, which is aimed at ensuring that parties take their remedies under this section seriously and approach a judicial forum expeditiously and not by way of an afterthought.

Scope and nature of pre-arbitral judicial intervention: The Act recognizes situations where the intervention of the Court is envisaged at the pre-arbitral stage, i.e. prior to the constitution of the arbitral tribunal, which includes sections 8, 9, 11 in the case of Part I arbitrations and section 45 in the case of Part II arbitrations. Such sections directly affect reference to arbitration and thereafter constitution of arbitral tribunals. There have also been many deliberations over scope and nature of permissible pre-arbitral judicial intervention and whether such power constitutes a "judicial" or "administrative" power. The Commission has suggested amendments to sections 8 and 11 of the Act. With respect to the **scope of the judicial intervention**, it has suggested that the same be restricted to situations where the Court/Judicial Authority finds that the arbitration agreement does not exist or is null and void. In so far as the nature of intervention is concerned, it is recommended that in the event the Court/Judicial Authority is prima facie satisfied against the argument challenging the arbitration agreement, it shall appoint the arbitrator and/or refer the parties to arbitration, as the case may be.

Judicial Intervention in foreign- seated arbitrations: Part I of the Act, states that "*This Part shall apply where the place of arbitration is in India".* The Supreme Court in this regard has held that Part I mandatorily applied to all arbitrations held in India, however, Part I also applied to arbitrations conducted outside India unless it was expressly or impliedly excluded. Further, there have been many deliberations with regard to seat and venue of arbitration. The Commission has therefore, has suggested amendments to sections 2(2), 2(2A), 20, 28 and 31 of the Act.

(c) Justice Saraf Committes report on Arbitration: Law Commission of India

On July 30, 2004, The Ministry of Law and Justice of India constituted a committee known as the **"Justice Saraf Committee on Arbitration"**, to study the implications of the

recommendations of the Law Commission of India contained in its 176th Report of the 16th Law Commission of India on the Arbitration and Conciliation Act of 1996.

The Committee is to study all aspects relating to the Arbitration and Conciliation (Amendment) Bill, 2003, and submit its report to the Government. As part of the procedure adopted by the Committee, views and suggestions of the public are being invited on the implications of the recommendations of the Law Commission of India contained in its 176th Report. The important suggestion given by the committee has been discussed in detail in the paper.

(c) IBA Guidelines on Conflicts of Interest in International Arbitration: IBA

(Approved on 22 May 2004 by the Council of the International Bar Association)

These Guidelines are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties. However, the Working Group of IBA hopes that these Guidelines will find general acceptance within the international arbitration community (as was the case with the IBA Rules on the Taking of Evidence in International Commercial Arbitration) and that they thus will help parties, practitioners, arbitrators, institutions and the courts in their decision-making process on these very important questions of impartiality, independence, disclosure, objections and challenges made in that connection.

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