# CHAPTER 5

# CHALLENGES AND OPPORTUNITIES FOR INTERNATIONAL ARBITRATION IN INDIA

## 5.1 Developments from 2016

In a discussion in 2016 in the 8th BRICS summit at Goa, a creation of BRICS-Centric arbitration centre was deliberated, with the aim of offering services on arbitrating international commercial disputes between BRICS countries.[188] In December 2016, a High-Level Committee to review the institutionalisation of the arbitration infrastructure in India was created under the chairmanship of Justice (Retd.) B.N. Srikrishna. It was the duty of the Committee to identify problems in the arbitration in India and to find solutions to the challenges faced in the development of institutional arbitration.[189] A report titled *"Report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India"* was submitted by the Committee on August 3, 2017 suggesting reforms to the arbitration mechanism in India. The Indian Prime Minister, Shri Narendra Modi, made it amply clear, that the intention of the Indian Government was to encourage as many foreign investors to invest in India as possible and to not worry about enforcement and recognition of international arbitral awards. While the Prime Minister also assured the community of an effective and transparent dispute resolution through arbitration in India at the conference organised by the NITI Aayog on 'National Initiative towards Strengthening Arbitration and Enforcement in India,

[188] *BRICS dispute resolution mechanism: Challenges ahead, but promises much* Financial Express, Oct. 25, 2016, (Feb. 12, 2018) http://www.financialexpress.com/opinion/brics-dispute-resolution-mechanism-challenges-ahead-but-promises-much/428845/, Retrieved on April 23, 2019

[189] Press Information Bureau Press Release, 'Constitution of High Level Committee to review Institutionalization of Arbitration Mechanism in India', Dec. 29, 2016, (Feb. 9, 2018) http://pib.nic.in/newsite/PrintRelease .aspx?relid=155959.

through his valedictory speech, the Union minister of law and justice, Shri Ravi Shankar Prasad had reiterated the same thoughts, although, at an international forum – the 8th BRICS summit at Goa in 2016. The New Delhi International Arbitration Centre Ordinance, 2019 was promulgated on March 2, 2019 by the Government of India. It came to be known as the New Delhi International Arbitration Centre Act, 2019. The Act seeks to establish an autonomous and independent body for the growth and development of arbitration in India, which is recognised by the Government and has a legislative force.

Following these developments, India is all poised to compete with other arbitration friendly jurisdictions like Singapore, London and Hong Kong and is ready to declare to the international legal community, that it is now a favourable hub for International Commercial Arbitration. However, the question that arises for consideration is whether all these developments will actually pave the way for bringing India to the forefront when it comes to choosing a jurisdiction for dispute resolution or whether they will be reduced to merely promises on paper.

In the wake of these developments, is it enough to merely set up more centres for institutional arbitration? What about the existing centres for arbitration, like the Indian Council of Arbitration (ICA) that have been operating for more than 50 years? Is it going to be enough to merely have infrastructure while not focusing on the rules of arbitration to attract litigants to India for dispute resolution through arbitration? Such questions, amongst many others will arise, concerns of which are discussed herein below.

Another thing to be noted is that Part I of the Act does not apply to international commercial arbitrations and only Part II of the Act deals with enforcement of foreign awards. However, in case foreign parties wish to have an Indian seated arbitration, and choose Indian substantive law to be applicable to the dispute, Part I of the Arbitration Act automatically becomes applicable to the dispute. Hence, it is imperative to also focus on Part I of the Act and the lacunae therein.

## 5.2 Challenges and Opportunities

### 5.2.1 Costs incurred in Arbitration in India

Law Commission Chairman BS Chauhan, speaking at a seminar in September 2017, said: *"I retired as a Supreme Court judge. If I have a case, I cannot afford them (lawyers). They are so expensive nowadays and they charge per hour, per day, like taxis.*[190]*"*

One of the primary reasons why litigants are encouraged by courts to opt for mediation or arbitration is the rising litigation costs. Litigation in courts of law has proven to be one of the biggest expenses in a company's daily affairs. It may come as a surprise to many that the total legal expenses incurred during the famous gas dispute between the Ambani brothers, which was contested all the way up till the Hon'ble Supreme Court, came to about Rs. 700 crore. [191] These figures are legal expenses of the fiscal year 2007-2008. The impact of this figure may be even more relevant when double of this could have saved India's most popular airlines company, Jet Airways[192]. Compare this with India's biggest names in the field of medicine. The estimated cost of a bypass surgery by the best cardiac surgeon in India would range anywhere between Rs. 3 lakhs to Rs. 25 lakhs, if his patient were to be Mr. Mukesh Ambani. Mr. Ram Jethmalani, top lawyer and politician, racked up a bill amounting to Rs. 3.8 crore for defending Delhi Chief Minister, Shri Arvind Kejriwal.[193]

In the year 2017-2018, the total legal expenses incurred by Indian corporates in legal fees and compliances tallied to a whopping Rs. 22,705 crore.[194] This is by no means a

[190] http://www.indialegallive.com/special-story/litigation-expenses-the-long-quest-and-high-cost-of-justice-40245; Retrieved on March 4, 2018
[191] http://business.rediff.com/report/2009/aug/20/reliance-legal-expenses-multiply-for-ambanis-group-firms.htm, Retrieved on April 22, 2019
[192] https://www.moneycontrol.com/news/business/how-much-will-rs-1500-crore-from-lenders-help-jet-airways-3827271.html, Retrieved on April 22, 2019
[193] https://www.deccanherald.com/content/604717/delhi-cm-fee-jethmalani-creates.html, Retrieved on April 22, 2019
[194] https://www.livemint.com/Companies/yEe7kYyRPaLT8kHyIevKVN/Legal-costs-of-firms-rose-5673-in-last-five-years.html, Retrieved on April 23, 2019

small figure, even if we include stamp duty and consultation costs.

President Ram Nath Kovind, on National Law Day on November 25, 2017 has said, "India has acquired a reputation of an expensive legal system. In part, this is because of delays but there is also a question of affordability of fees. The idea is that a relatively poor person cannot reach the doors of justice for a fair hearing only because of financial or similar constraints while it's in our constitutional values and republic ethics. It is a burden on our collective conscience." [195]

A survey conducted by Daksh, an NGO, reveals that 90 percent of the litigants have an annual income below Rs. 3 lakh.[196] The study, conducted in 2015-16, found that civil litigants spent a daily average of Rs. 497 on attending court hearings and incurred a daily loss of Rs. 844 on account of wages and work hours lost while marking their appearance in court—totaling Rs. 1,341 for every single day spent in the attending to litigation. In criminal cases, the litigants spent a daily average of Rs. 542 to attend hearings in court and incurred a daily loss to the tune of Rs. 902 due to loss of pay and income, totaling to Rs. 1,444. At the end, litigants lost wages totaling to Rs. 50,000 crore in a year at a daily average of Rs. 1,746 per case for attending court hearings. Adding to this legal expenses, the litigants' costs crossed Rs. 80,000 crore annually, which was 0.70 percent of India's GDP (in 2015-16).[197]

This was one of the shortcomings amongst others, for which the Arbitration and Conciliation Act, 1996 was amended and provisions for costs were introduced. Parties began opting for arbitration in place of litigation, all in the hope that arbitration would, as promised, be a lot less time consuming than the traditional method of litigation in court, and a lot less costly than fighting out a long drawn legal battle in court. What was not foreseen was that the top lawyers arguing the cases in court would be the ones

[195] Address by the Hon'ble President of India Shri Ram Nath Kovind on the Occasion of Inauguration of the National Law Day Conference accessible at:
https://presidentofindia.nic.in/writereaddata/Portal/Speech/Document/387/1_National_Law_Day251117.pdf ; Retrieved on March 4, 2018
[196] https://dakshindia.org/wp-content/uploads/2016/05/Daksh-access-to-justice-survey.pdf, Retrieved on September 22, 2020
[197] *Ibid*

arguing before an arbitrator. Lawyers engaged for arbitrations tend to charge more than what they would for a hearing in court, since they would usually have to step out of court for the arbitration. Arbitration proceedings usually take place in five star hotels or fancy conference rooms, the rent for which is by no means reasonable, which adds to the total tally of costs. Lawyers engaged for arbitrations skip their other matters in court for the day, and then end up charging almost three times the amount they'd charge for an in-court appearance before the judge. Another cost in the seemingly cost-effective arbitration process is the fees to be paid to the arbitrator. Parties opting for arbitration as an out-of-court dispute resolution mechanism would naturally want someone with legal acumen to decide their dispute and someone unbiased and neutral, and who better than a retired judge of the High Court or the Supreme Court. But, they don't come cheap and arbitrator fees for each sitting range anywhere between Rs. 40,000 to Rs. 1,50,000. While the concept of arbitration evolved as an alternative to expensive and time-consuming litigation, so as to be speedier and more cost effective, it is now proving to be the exact opposite with liberal adjournments, exorbitant arbitral fees and unreasonable delays and its very own objective is being defeated. This is a crucial factor that is crippling the development of a cost effective arbitral regime in India that can invite international parties to conduct and participate in arbitrations in India. The Queen Mary Arbitration Survey in 2015 has particularly noted how "cost is seen as arbitration's worst feature".[198]

The Arbitration and Conciliation Act, 2015 was enacted with a view to change the dynamics of the Act of 1996. While containing a few seemingly progressive provisions, the Act of 2015 still failed to live up to the hype it created. Despite the provisions contained therein for a ceiling on costs, multiple loopholes still pave the way for parties to keep extending arbitral proceedings and thereby resulting in higher costs. The fee schedule under the Act of 2015 is not as effective as was promised, since it now depends upon the claim amount at stake. For example, earlier arbitrators could charge a sum of Rs. 25,000 per sitting whether the claim was for Rs. 1 lakh or 1 crore. Now, if

[198] The 2015 *Survey* 'Improvements and Innovations in International *Arbitration*', Queen Mary, University of London, available at http://www.arbitration.qmul.ac.uk/docs/164761.pdf, Retrieved on September 17, 2016

the claim is to the tune of Rs. 100 crores, arbitrators have a statutory right to charge more. The discretion of the arbitrator as to his/her fees now has statutory backing as well.

The insertion of the Fourth Schedule containing the model fees of arbitrators subsequently gave the High Court its discretion to determine the fees of the tribunal while taking into consideration the Model fees, as reproduced in the table below - [199]

**Model fees chart as provided in the Fourth Schedule**

| **Sum in dispute** | **Model fee** |
|---|---|
| Up to Rs. 5,00,000 | Rs. 45,000 |
| Above Rs. 5,00,000 and up to Rs. 20,00,000 | Rs, 45,000 plus 3.5 per cent of the claim amount over and above Rs. 5,00,000 |
| Above Rs. 20,00,000 and up to Rs. 1,00,00,000 | Rs. 97,500 plus 3 per cent of the claim amount over and above Rs. 20,00,000 |
| Above Rs. 1,00,00,000 and up to Rs. 10,00,00,000 | Rs. 3,37,500 plus 1 per cent of the claim amount over and above Rs. 1,00,00,000 |
| Above Rs. 10,00,00,000 and up to Rs. 20,00,00,000 | Rs. 12,37,500 plus 0.75 per cent of the claim amount over and above Rs. 10,00,00,000 |
| Above Rs. 20,00,00,000 | Rs. 19,87,500 plus 0.5 per cent of the claim amount over and above Rs. 20,00,00,000 with a ceiling of Rs. 30,00,000 |

The Fourth Schedule also mentions that a sole arbitrator shall be entitled to an

[199] Section 11(14) of the Act

additional 25 per cent on the fee payable. However, the Commission recommended for this to be indicative and not mandatory.

Now, with the amended provisions and the schedule of fees contained in the Act of 2015, arbitrators can charge more depending on the claim amount. This has, in a way, resulted in higher arbitral fees. Another drawback is that not many arbitrators will be eager to take up ad-hoc arbitrations that have a lower claim amount, since if the claim amount ranges somewhere between 5-10 lakhs, arbitrators might not find it worth their time.

Another avenue for rising arbitration costs would be the arbitral panel. Arbitrations that are decided by a panel of three arbitrators are immensely susceptible to exorbitant costs in arbitration fee. Assuming an event where one of the arbitrators in unable to continue with the arbitration, the parties would have to decide another arbitrator to complete the panel, which would further increase the financial burden on the parties.

The researcher, from personal experience can also state that it is not just arbitrator fees, but as discussed earlier, lawyers' fees for arbitrations tend to be even higher than the amount they would usually charge for an appearance in court. Arbitrations are seated in different jurisdictions, which might lead to multiple expenses in terms of travel for lawyers, hotel suites and conference hall bookings. Parties also have to incur per appearance expenses of their respective law firms/counsels who often are roped in from the metro cities or even abroad.

Another issue for the rising costs is that there is no bar on the number of arbitrations, if the arbitral award is quashed and set aside by the court. If an award is challenged by a party to arbitration and is consequentially quashed in an application filed under Section 34 of the Act, the losing party in the application has every right to initiate a fresh arbitration all over again. The Delhi High Court, in the matter of *Steel Authority of India v. Indian Council of Arbitration*[200] while dealing with the issue, followed the judgment of the Hon'ble Supreme Court in the case of *McDermott International Inc. v. Burn*

[200] (2015) SCC Online Del 13394

*Standard Corporation Limited,*[201] and held that the order of the lower court quashing the award does not amount to a determination of issues between the parties and therefore the principles of *res judicata* cannot be made applicable.

This means that if the claimant fails in the Section 34 application filed by the original respondents to the arbitration proceedings, the claimant can initiate a fresh arbitration. It goes without saying that this can be done as many times and that there is no bar to the number of arbitrations that can be initiated.

It is because of these factors that merely adding a schedule on costs will not solve the problems of expensive arbitration proceedings in India. Timelines in arbitration and finality of awards might in fact help more in mitigating costs than a schedule. Also, these provisions are not applicable to foreign arbitrations or to institutional arbitrations. The legislature ought to consider making these provisions applicable to international commercial arbitrations as well.

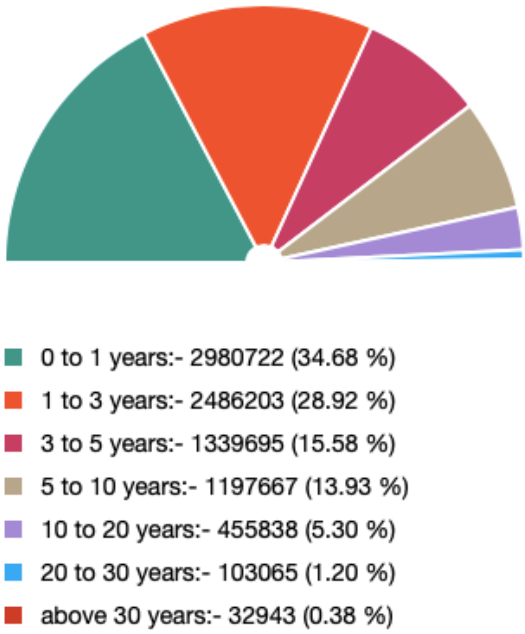
### 5.2.2 Time consumed in Arbitration in India

The Indian economy is expected to grow faster than other major emerging economies, projecting a growth rate faster than that of China. As it continues to prosper, the country is seeing increasing levels of inbound and outbound merger and acquisition activity. Similarly, the number of commercial disputes in India has also risen. This is evident from the fact that the Indian legislature thought it fit to enact the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 because of the large pendency of cases in courts.[202] While in the US and the UK even the most complicated contractual disputes can be litigated and resolved within three years, either through the courts or by alternative dispute resolution, the court system in India can seem archaic by comparison. There are habitual litigation delays of up to 15

[201] (2006) 11 SCC 181

[202] https://www.financialexpress.com/opinion/3-crore-plus-cases-pending-heres-why-commercial-courts-and-arbitration-bills-are-just-a-start/1094841/

years – by which point corporate adversaries may have ceased to exist and business environments may have changed substantially, rendering the initial motivation for commencing litigation redundant in some cases.[203] In fact, more than 30,000 cases have been pending for more than 30 years, as reflected in the chart below.[204]




In *Dolphin Drilling Ltd. v. Oil and Natural Gas Corporation Ltd.*[205], the Supreme Court of India observed in para 7 of the judgement as follows –

*"7. The issue of financial burden caused by the arbitration proceedings is indeed a legitimate concern but the problem can only be remedied by suitably amending the arbitration clause. In future agreements, the arbitration clause can be recast making it clear that the remedy of arbitration can be taken recourse to only once at the conclusion of the work under the agreement or at the termination/cancellation of the agreement and at the same time expressly saving any disputes/claims from becoming stale or time-barred etc. and for that reason alone being rendered non-arbitrable."*

Justice Aftab Alam, in para 5 of the same judgment expressed his concern over arbitration in India. He said,

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203 R. Ghosh, "*Commercial Disputes in India*", Kroll Vol. 9 Issue 3, 2011
204 http://njdg.ecourts.gov.in/njdgnew/?p=main/pend_dashboard, Retrieved on June 12, 2019
205 Order dated February 17, 2010 in Arbitration Petition No. 21 of 2009

*"5. The plea raised by the respondent voices a real problem. It is unfortunate that arbitration in this country has proved to be a highly expensive and time consuming means for resolution of disputes. But on that basis it is difficult to read the arbitration clause in the agreement as suggested by the respondent*[206]*."*

The Act of 2015 brought about sweeping changes in the way arbitrations are to be conducted in India. The amendments also brought about changes in the time limits for resolving disputes through arbitration. One of the most controversial amendments is the one-year time limit for disposing of arbitration matters under Section 29(A). [207] This timeline may be extended by a further period of six months, however, with the consent of the parties. One of the interesting changes that is brought about due to the amendment is that timely disposal, i.e., within six months is incentivized. The tribunal will be entitled to increased fees as agreed by the parties if the dispute is resolved within six months. If there is a delay, the tribunal will be subject to a penalty of 5% for each month. There is also a provision for a fast track procedure under which the litigating parties can give their consent for resolving their disputes within six months and do away with other formalities like written submissions and even without oral hearings[208]. Also, the appointment of an arbitrator has to be within six months. The time provided for challenging an arbitral award is 12 months.

Unfortunately these amendments are not sufficient to give that booster shot to the arbitration proceedings in India. One of the primary concerns for delay is the multiple stages at which parties have to approach the court for arbitration related issues. Arbitration was a choice over litigation because of the immense backlog of court cases. However, even when the parties have opted for arbitration, there are still multiple occasions on which parties might have to approach the courts.

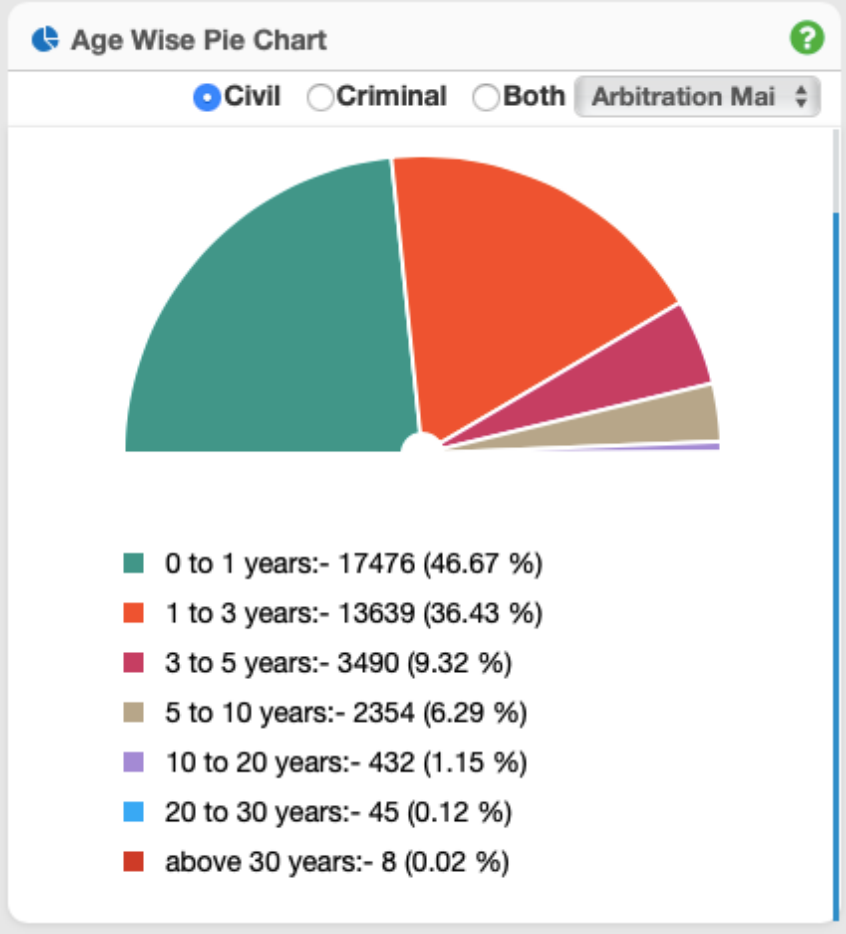
The provisions of the Arbitration and Conciliation Act, 1996 listed below deal with

[206] *Ibid*
[207] Section 29(A)
[208] Section 29(B)

situations when parties would have to approach the court under arbitration –

- Section 8 – Power of the court to refer parties to arbitration
- Section 9 – Interim measures by court
- Section 11 – Appointment of arbitrators
- Section 27 – Court assistance in taking evidence
- Section 34 – Application for setting aside arbitral award
- Section 37 – Appealable orders

The unfortunate reality of the legal system in India is such that even for an application under Section 11 of the Arbitration Act, it takes a long time for the court to pass an order for appointment of an arbitrator.



The data collected from the National Judicial Data Grid[209] pertains to the number of arbitration matters pending in Indian courts.

However, the root cause of the problem is the time taken to dispose of applications filed for challenging arbitral awards under Section 34. A study conducted under the aegis of the Government of India shows that for deciding applications filed under Section 34, lower courts take approximately 24 months from the date on which such application is filed. The High Court takes 12 months while the Supreme Court takes almost 48 months to finally decide the appeal. Overall, it takes approximately 2508 days on an average to decide applications filed for setting aside arbitral awards.[210]

### 5.2.3 No power to remove a biased arbitrator

The absence of either a judicial remedial step or some institutional mechanism in the amended Indian Arbitration Act, 1996 for the removal of a partial arbitrator at the very beginning of an arbitration proceeding or at the earliest after the discovery of a likelihood of partiality by a litigating party is a matter of high importance. It does not bode well for the fair and impartial conduct of arbitrations in India.

The mere presence and the threat of use of such an action has operated in most arbitral jurisdictions in the world as an important checks and balances mechanism and has safeguarded against the evils of bias and partiality entering the conduct of arbitral proceedings. It has acted as a tough warning and helped in keeping potentially opinionated arbitrators at bay from the arbitral proceedings right from the commencement of such proceedings or has operated as a successful tool for eliminating the few adventurers errant from the arbitral process at the threshold after the detection of their links with any of the parties.

The presence of a judicial or institutional mechanism at the very onset instead of at the

[209] National Juridical Data Grid available at http://njdg.ecourts.gov.in/njdgnew/?p=main/pend_dashboard
[210] http://niti.gov.in/writereaddata/files/document_publication/Arbitration.pdf

post-award phase in most international arbitration jurisdictions of repute has also facilitated in avoiding much unwarranted waste of time and capital over fresh and/or frustrated sittings of arbitration. After all, lesser time consumption and cost effectiveness are the main features of arbitration in comparison to other modes of dispute resolution.

It is only in arbitrations where the persons deciding the dispute are chosen by the will of the parties. Thus, it becomes imperative that such persons are impartial, fair and unbiased. Schedule V and Schedule VII were added with the amendment of the Arbitration and Conciliation Act 1996, in the year 2015, to ensure that arbitrators do not have a conflict of interest with either the subject matter of the dispute or with the parties to the dispute. These grounds are along the lines of the guidelines provided under the International Bar Association Guidelines on Conflict of Interest in International Arbitration ("**IBA Guidelines**") and are enumerated in the Fifth Schedule and the Seventh Schedule of the Act. [211]

### 5.2.4 Third party funding in Arbitration

Something that is increasingly gaining popularity is Third Party Funding ('TPF'). Despite being known as the Gambler's Nirvana due to its 'heads I win, tails, I do not lose' principle, TPF is becoming increasingly attractive in international commercial arbitrations[212].

Third party funding basically means that the dispute is funded by another party who is not related to the dispute and depending upon a successful outcome, would get a share in the spoils. Majority of the litigants in India do not pursue litigation till the highest courts of law owing to immense expenses and paucity of funds. Third-party funding is a

[211] Bhavani Navaneedhan, *Termination of Arbitrators: Judiciary Sets the Bar,* May 29, 2018*,* Retrieved from : *http*://www.mondaq.com/india/x/705576/Arbitration+Dispute+Resolution/Termination+of+Arbitrators+Judiciary+Sets+the+Bar

[212] Umakanth Varottil, *Arbitration in India: The Merits of Third Party Funding*, September 16, 2016; Retrieved from: https://indiacorplaw.in/2016/09/arbitration-in-india-merits-of-third.html

boon for those that wouldn't have to worry about finances since the dispute is financed by a third party. The Mumbai International Arbitration Centre has no rules of procedure that are in place for third-party funding at the moment. In case rules for TPF are drafted by an international arbitration centre in India, one can imagine the growth and boost it can give to the international arbitration fraternity in India. At the moment, TPF is neither expressly recognized nor is it prohibited in India. But the prohibitory measures that exist to prevent lawyers charging fees dependent upon the outcome of a dispute might indicate that TPF is frowned upon and is not encouraged.[213]

This is the approach that is taken while considering third-party funding in litigation. However, the same approach might not be taken while considering third-party funding in arbitration.

### 5.2.5 Anti-Arbitration Injunctions in India

The law concerning anti-arbitration injunctions is not yet fully developed in India. Anti-arbitration injunctions have to be differentiated from the anti-suit injunctions. While the former comprises injunction orders directing a party to an arbitration to not commence or continue an ongoing arbitration proceeding, the latter is in the nature of an injunction order passed by a judicial authority, directing a party to the dispute not to commence or pursue legal action in a court in a foreign jurisdiction.

An anti-arbitration injunction puts a halt to the arbitration proceedings and restores the status of the parties to a position where the claim does not become infructuous. As held by the High Court of Delhi in the *McDonalds India Pvt. Ltd. v. Vikram Bakshi*[214] case, the principles that apply to anti-suit injunctions under the Code of Civil Procedure, 1908 will not necessarily apply to an anti-arbitration injunction. Interestingly, in appeal, the Division Bench of the Delhi High Court overruled the decision of the Learned Single

[213] *Ganga Ram v. Devi Das*, 61 P.R. (1907); Rule 20 Part VI, Chapter II, Section II (Rules Governing Advocates) Bar Council of India Rules.

[214] http://lobis.nic.in/ddir/dhc/BDA/judgement/21-07-2016/BDA21072016FAOOS92015.pdf

Judge decision in *Vikram Bakshi and Another v. McDonalds India Pvt. Ltd. and Others*[215], which allowed granting of anti-arbitration injunctions in domestic arbitrations held in India. Some of the major concerns of this verdict are that the court granted an anti-arbitration injunction on the ground that the arbitration agreement is illegal. The court could have instead left it to the wisdom of the arbitral tribunal since the arbitral tribunal has jurisdiction to decide upon the validity of the arbitration agreement anyway. Even if the underlying contract is illegal, the doctrine of separability would leave the arbitration agreement to be decided on its own. By deciding that the arbitration agreement is illegal and granting an anti-arbitration injunction, the court encroached upon the jurisdiction of the arbitral tribunal, thereby setting a negative example. The court further held that the arbitration agreement was incapable of being performed owing to the fact that another application was pending before the Company Law Board in respect of the same subject matter. This was in complete disregard to the judgement of the apex court in the case of *World Sport Group*[216] wherein it was clarified by the Apex Court that just because of the pendency of another application before another judicial authority, the court cannot decline to refer the parties to arbitration. The reference to arbitration has to be made if the requirements under Section 8 of the Arbitration Act are satisfied.

Further, it is also a matter of surprise that the High Court took the view that an award by an arbitral tribunal might be in conflict with the order of the CLB pertaining to certain rights under the Companies Act, when it held that those rights were not arbitrable and would therefore not be interfering with the jurisdiction of the arbitral tribunal anyway. The comment that an anti-arbitration injunction would not amount to exceeding its jurisdiction since there are no further rights remaining under the arbitration agreement is also surprising given the fact that India recognises the principle of *kompetenz – kompetenz.* The judgement also observed that arbitration proceedings at London would be at a *forum non-conveniens.* This seems to deviate from the principle of party autonomy in arbitrations and the freedom of the parties to select the forum for deciding

[215] http://lobis.nic.in/ddir/dhc/VKS/judgement/22-12-2014/VKS22122014S9622014.pdf
[216] (2014) 11 SC 639

their disputes.[217]

In a verdict of the Delhi High Court delivered by the Single Judge in October 2018 in *Delhi Airport Metro Express Private Ltd. ("DAMEPL") v. Construcciones Y. Auxiliar De Ferrocarriles & Anr.*[218], where the nature of the agreement between the parties was similar to that in the Hon'ble Apex Court's verdict in *Roger Shashoua & Ors. v. Mukesh Sharma & Ors.*[219], the Supreme Court denied an anti-arbitration injunction to the DAMEPL by holding that Part I of the Act of 1996 was not applicable to the said case.

While Indian courts are gradually adopting a pro-arbitration attitude when faced with questions on anti-arbitration injunctions in the realm of international arbitration, there is indeed a want of understanding in the international investment arbitration regime. If uniformity is not maintained in verdicts across various High Courts, and in the Supreme Court, this could be a challenge to international commercial arbitration in India.

### 5.2.6 Res Judicata in International Arbitration

The doctrine of *res judicata* essentially means that whenever a dispute has been decided by a court, it would act as a bar on subsequent similar disputes and would have a preclusive effect on a dispute with similar issues. While some countries have a codified law on *res judicata*, some countries don't. In India, the Code of Civil Procedure 1908, has a provision pertaining to *res judicata*. This principle is commonly applied in litigation in the courts of law. A prior judgement would have a conclusive and binding effect on a similar issue that is raised before either the same court or the lower courts. However, the question that arises for consideration is whether in international commercial arbitrations, an award would have a preclusive effect on a subsequent award on the same issue in a dispute. Expanding the scope of this doctrine, would the

[217] Ben Giaretta, Akshay Kishore, *Anti-arbitration Injunctions: Mixed Signals From India,* January 1, 2015, Retrieved from:
https://www.ashurst.com/en/news-and-insights/legal-updates/anti-arbitration-injunctions-mixed-signals-from-india/ on January 31, 2020.
[218] http://lobis.nic.in/ddir/dhc/JAN/judgement/01-11-2018/JAN25102018OMPCOMM72017.pdf
[219] https://www.sci.gov.in/supremecourt/2016/23718/23718_2016_Judgement_04-Jul-2017.pdf

arbitral tribunal be bound by judgements delivered by courts of law? Conversely, would courts of law be bound by the award of an arbitral tribunal in case a similar issue was raised subsequently? [220]

Upon examination of these factors, the researcher is of the opinion that since arbitral awards are delivered after following the process of law they would also create the same binding and preclusive effect in international commercial arbitration.

For the purposes of this study, the primary concerns that arise are whether a binding effect would be created with a prior arbitration award on any subsequent arbitral awards. In the case of *IDS Life Ins. Co.* v. *Royal Alliance Association*[221], where the United States Court of Appeals clarified on the extent of a preclusive effect of a previous arbitral award, it was held that: "*Although res judicata usually attaches to arbitration awards, it does so as a matter of contract rather than as a matter of law. The preclusive effect of the award is as much a creature of the arbitration contract as any other aspect of the legal-dispute machinery established by such a contract*"[222]. Therefore, it is open to parties to limit the preclusive effect of a previous arbitral award on any consequent arbitral proceedings between them by way of an agreement.

Since it is party autonomy that is of primary importance in arbitrations, if the parties decide to have a dispute settled by arbitration, there is flexibility in subsequent arbitral proceedings. However, it is to be clarified that it would not mean that the arbitral tribunal should not give due consideration to prior judgements or arbitral awards.[223]

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[220] Prabhakar Yadav, *Preclusive Effect of Res-Judicata in International Commercial Arbitration: A Baffling Syndrome,* April 20, 2019,
Retrieved from: https://indiacorplaw.in/2019/04/preclusive-effect-res-judicata-international-commercial-arbitration-baffling-syndrome.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+IndiaCorpLaw+%28IndiaCorpLaw%29 on January 12, 2020

[221] *Ibid*

[222] *Ibid;* pg. 651

[223] *John Morrell & Co. v. United Food & Commercial Workers*, 913 F.2d 544, 563 (8th Cir. 1990) Retrieved from:
https://openjurist.org/913/f2d/544/john-morrell-company-v-local-union-304a-of-united-food-and-commercial-workers

This might occur due to the nonexistence of any agreement between the parties. In such circumstances, the power to give preclusive/binding effect to previous arbitral awards is deemed to be vested with the tribunal[224], which then ought to follow the same, in the interest of justice.

### 5.2.7 Finality of Arbitral Awards in India

Arbitration proceedings in India are governed by the Arbitration and Conciliation Act, 1996 (and subsequent amendments). Under Section 36 of the Act, it is provided that when the time for preferring an application to set aside the arbitral award lapses, or when such application has been preferred and not granted, the award will be enforced under the Code of Civil Procedure, 1908 as if it were a decree of the Civil Court. Section 35 of the Act also states that all arbitral awards will be final and binding on the parties, and on those claiming under them. A significant point to be noted is that the award is enforceable only if the time limit for making a Section 34 application to the court for setting aside the award has expired, or if such application has been made and denied by the court. Therefore, it is vital to examine the provisions for setting aside the award under the Act.

Section 34 states that no application for setting aside an arbitral award can be made after 3 months have lapsed from the date of receipt of the award by the aggrieved party, subject to a 30-day 'abeyance' period that may be permitted by the court in its discretion. The Act also states that the application may be made by an aggrieved party only if it can establish the grounds laid down in Section 34(2)(*a*) of the Act or if it is found by the court that the subject-matter of the dispute is not arbitrable or if the arbitral award was against India's public policy.

It is also relevant to discuss the way courts in India have interpreted the powers under

[224] *United Industrial Workers v. Government of Virgin Island.*, 987 F.2d 162, 169 (3d Cir. 1993). Retrieved from: https://casetext.com/case/united-indus-workers-v-government-of-vi

Section 34 and under various other provisions of the Act. This is important to ascertain the stance taken by Indian courts when it comes to encouraging arbitration in India. This can only be done with minimal judicial interference and having a pro-arbitration outlook while respecting party autonomy to decide their disputes by ousting the jurisdiction of the courts.

The decision of the Hon'ble Supreme Court in the *Saw Pipes* case was perhaps the most debated verdict. In this case, it was held that in addition to the grounds provided under Section 34 for setting aside an arbitral award, an award could also be set aside if there was a contravention of the Arbitration Act, or "any other substantive law governing the parties". The scope of the words 'public policy' was also expanded to include within its ambit, 'patent illegality', which became an additional ground to set aside an arbitral award. This was amended later in a series of judgements, the most famous one being the case of *Renusagar*[225].

Realizing the importance of a more effective arbitration system so as to instill faith in foreign contracting parties, an amendment was sought to be brought in 2015. These amendments have largely addressed the challenges faced under the 1996 act. However, the legislature has missed a few opportunities to make Indian arbitral laws as one of the finest legislations like the Indian constitution.

### 5.2.8 Judicial Interference

On 22nd April 2020, the Hon'ble Supreme Court in the case of *National Agricultural Cooperative Marketing Federation of India v. Alimenta S.A.* rejected the enforcement of a foreign award on the ground that it was passed in violation of the public policy of India. The Supreme Court while deciding the appeal held that the award was illegal and also in contravention of the fundamental policy of India and as such the enforcement of the award would be contrary to the provisions of law and its enforcement would lead to

[225] 1994 Supp (1) SCC 644

a violation of public policy. Despite challenges on the grounds of violation of public policy being discussed and addressed by a coordinate bench of the Hon'ble Supreme Court in the case of *Vijay Karia v. Prysmian Cavi E Sistemi SRL*,[226] the court revisited the same without considering the judgement of the coordinate bench.

Brief facts of the matter are relevant for understanding the findings given by the Supreme Court. NAFED entered into a supply agreement with Alimenta, which could not be fulfilled by NAFED due to a natural calamity because of damage of crops. A second supply agreement was entered into to fulfil the first supply agreement. Unfortunately, the supply was stopped because of restrictions that were imposed on exports by the government of India. This led to a dispute since there was a breach of agreement and Alimenta filed an arbitration claim before the Federation of Oils, Seeds and Fats Associations Ltd. (FOSFA), London. The arbitral proceedings before FOSFA were stayed by the Delhi High Court and subsequently by the Supreme Court on an averment raised by NAFED that there was no arbitration clause in the second supply agreement. FOSFA did not consider the judgement of the Supreme Court of India on the ground that the Apex Court in India did not have jurisdiction in the matter. An arbitral award was passed in favour of the claimant. NAFED filed an appeal before the Board of Appeal which was dismissed and the rate of interest that was awarded in the initial award was increased without any such appeal by the claimant. Subsequently the claimant approached the Delhi High Court seeking enforcement of both the awards. The Learned Single Judge of Delhi High Court held in favour of the claimant and granted enforcement of the award while the Division Bench of the Delhi High Court rejected the appeal filed by NAFED. NAFED filed an appeal before the Supreme Court on the grounds that the award was against the public policy of the country and that there was non-compliance with the provisions of the Foreign Awards Act, 1961.

While dealing with the issue of whether NAFED could have supplied the goods when there was an express order of the Government of India restricting such supply, the court held that NAFED was a catalysing agency and needed the permission and express

[226] Civil Appeal No. 1544 OF 2020

consent of the Government of India for exporting such goods. NAFED was justified in not carrying forward the exports to the next year. The court held that the contract had become unenforceable due to the prohibitory order by the Government as per clause 14 of the agreement which provided that if there would be a prohibitory order by a legislative action or by executive authority by the Government of origin, such a restriction shall be applicable to the terms of the contract. The court held that the contract was void and hit by Section 32 of the Indian Contract Act. The court also held that both parties were aware that any government restriction on exports would render the agreement impossible to be executed.

While considering the issue of violation of public policy, the court held the award to be unenforceable under section 7(1)(b)(ii) of the Foreign Awards Act. The court held that, "*As per the test laid down in Renusagar, its enforcement would be against the fundamental policy of Indian Law and the basic concept of justice. Thus, we hold that award is unenforceable, and the High Court erred in law in holding otherwise in a perfunctory manner*."[227]

The problems of the judgement-

The Indian executive, the legislature as well as the judiciary and the entire arbitration ecosystem has been trying to establish and portray India as a favourable destination for arbitration and the NAFED judgement of the Apex Court seems to be an undesirable and a backward step in this direction. Indian courts generally refuse to interfere with foreign awards and have held on numerous occasions that while dealing with enforceability of an arbitral award, the court cannot go into the merits of the case and the award cannot be reviewed by the court. While not considering a number of judgements, the Supreme Court did not consider its most recent judgement on the same subject in February 2020 in the case of *Vijay Karia v. Prysmian Cavi E Sistemi SRL*, in which the concept of the fundamental policy versus violation of statutory law was discussed and it was held that a violation of the provisions of the Foreign Exchange

[227] 2020 SCC Online SC 381

Management Act would not be considered as a violation of the fundamental policy of Indian law and would merely be a statutory breach of law. It was further held that for a challenge to an arbitral award to succeed on the grounds of violation of public policy, a much greater breach which is so basic to Indian law that it is not susceptible of being compromised must take place.[228]

The Hon'ble Supreme Court overlooked a number of precedents on this issue and incorrectly applied the *Renusagar* test. Courts in India need to follow the approach laid down in the cases of *Vijay Karia, Ssangyong* and *Renusagar*, and should refrain from interfering in the merits of the dispute and narrow down the scope of review of foreign arbitral awards.

### 5.2.9 The Seat v. Venue Debate

The seat of arbitration is not merely a place where the arbitration is conducted and where the parties, the counsels and the arbitrators are physically seated during the conduct of the proceedings. There is much more than that and the seat of arbitration is of vital importance to arbitration proceedings. This is so because the seat of arbitration is the country, the laws of which govern the arbitration proceedings between disputing parties. This means that the country that is the seat of arbitration has supervisory power over the arbitration. The courts of that country also have supervisory powers for miscellaneous applications to be filed with respect to the arbitration proceedings. The governing law of the agreement between the parties might specify a particular law which may or may not be of the nationality of one or both of the parties, but what is crucial is the seat of arbitration since the laws of the seat of arbitration govern the enforceability of the arbitral award and its protection. The law of the seat of arbitration is also known as *Lex Arbitri.*

In the judgement of the Hon'ble Supreme Court in the case of *BALCO*, the court settled

[228] Civil Appeal No. 1544 OF 2020

the law on seat, territorial jurisdiction and supervisory jurisdiction. In brief, the court having supervisory jurisdiction would be the court at the seat of arbitration. The court having territorial jurisdiction, would be the court where the subject matter of arbitration is situated. Thus, the judgement in *BALCO* expanded the definition of 'court' as mentioned under section 2(i)(e) of the Act. This was done to promote party autonomy in arbitrations. The parties to an arbitration agreement now had the freedom to choose a court having either territorial jurisdiction or having supervisory jurisdiction. Thus, both the courts would have concurrent and parallel jurisdiction.

Despite these principles having been reiterated in a number of judgements, the Supreme Court seems to have deviated from the law that was laid down while coming to a conclusion in the matter of *BGS SGS Soma JV v. NHPC Ltd*. in Civil Appeal No. 9307 of 2019. The decision and the reasoning behind the decision seems to be contrary to the settled position of law.

The reasoning of the Supreme Court is based on two approaches, the first approach being that the seat of arbitration shall decide the supervisory court for the purpose of arbitration, which is the settled position of law. It is the second approach that is a little problematic, where the Supreme Court has altered the definition of 'seat' for determining the supervisory jurisdiction of the courts. The Supreme Court seems to have proceeded on the basis that the seat of arbitration means the venue of arbitral proceedings or the location of the conduct of arbitral proceedings instead of the country which is the seat of arbitration. In adopting such an approach, the Supreme Court has fused together two entirely different concepts. One being the country, the governing law of which shall regulate the arbitration proceedings, by virtue of it being the seat of arbitration and two, the location or the physical venue of arbitration within the country, which is different from the 'seat' of arbitration. The venue of the arbitration is only relevant when the question of supervisory courts arises under Section 2(1)(e) of the act as per the *BALCO* judgement. By way of this judgement, the Supreme Court has completely altered the principles of territorial jurisdiction as per settled law. Now, as a result of this judgement, till the time the issue is reopened and decided by a larger bench, which might take years, there is a gaping loophole in the Indian arbitration law,

with respect to the determination of the jurisdiction of supervisory courts when parties fail to mention a specific venue for arbitration but merely specify the seat of arbitration as being India.

The decision of the Supreme Court might open a Pandora's box that could potentially lead to future litigation, since it has, in a way, overturned the judgement of the Apex Court in *BALCO*, which was by a larger bench.

This issue was further complicated in *Mankastu Impex Private Limited v. Airvisual Limited*.[229] By coming to a conclusion that the mention of the words 'the venue of arbitration' in the arbitration agreement does not tantamount to deciding the seat of arbitration, the Supreme Court has not considered the judgement in *BGS SGS*. Now, since all three verdicts are by coordinate benches of the Hon'ble Supreme Court, the issue will have to be decided by a five-judge Constitution bench.

### 5.2.10 Foreign seat of Arbitration

Pursuant to the Apex Court's judgement in *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc*[230] ("*Kaiser")*, interim relief couldn't be granted to parties involved in foreign-seated arbitrations. The objective was to not interfere with the arbitrator's discretion and to allow the arbitrator to function smoothly without having to worry about an injunction order from a court of different jurisdiction. Subsequently, after the Act came into effect, the law now allows Indian Courts to grant interim relief by way of the provisions contained in Section 9 of the Act and assist in the taking of evidence as per Section 27. However, it is to be noted that the powers under Section 9 are different and independent of the relief sought under Section 17. The new proviso to Section 2(2) makes granting this relief possible despite the seat of arbitration being foreign. But, Indian courts have time and again reiterated that such power has to be exercised sparingly and shall not be used by parties as a '*bhrahmastra'* to frustrate the

[229] (2020) SCCOnline SC 301
[230] (2012) 9 SCC 552

objective of the Act. The judgement of the Hon'ble Supreme Court in the case of *Bhatia International v. Bulk Trading S.A.*[231] was therefore required to be looked into again with fresh consideration keeping in mind the true spirit and objective of the Act.

This provision can be excluded by an agreement in writing. It was often seen in arbitration contracts between Indian parties that the parties would agree to exclude Part I from the agreement. Therefore, the resulting consequence would be of such a nature as to unwittingly deny the parties access to courts in the Indian jurisdiction on the grounds of interim relief.

However, we are now faced with the question as to whether two consenting Indian parties can mutually decide to seat an arbitration beyond Indian jurisdiction. This question is yet to attain finality. However, a recent decision of the Madhya Pradesh High Court in *Sasan Power Ltd. v. North American Coal Corporation India Pvt. Ltd.* [232] has thrown some light on the issue after deciding that two Indian parties can agree to arbitration outside India. It must be noted that two Indian parties cannot take recourse to interim relief from Indian courts if it is agreed to seat an arbitration outside India.

### 5.2.11 Intervention limited to higher courts

In the case of international commercial arbitrations involving at least one foreign party, all petitions pertaining to arbitral proceedings can be made directly to High Courts, which would result in a quicker disposal rate.

By virtue of Section 10 of the Commercial Courts Act 2015 in India, all litigation pertaining to arbitral proceedings involving commercial disputes amounting to a value of more than Rs. 1 crore shall be heard by specially-designated Commercial Courts.

[231] (2002) 4 SCC 105
[232] *Sasan Power Limited v. North American Coal Corporation India Private Limited* (FA 310 of 2015); http://indiankanoon.org/doc/88948563/

This should ensure that the arbitration applications under Section 34 of the Arbitration Act requiring speedy disposal would be heard only by special judges appointed by the High Court to the commercial bench.

However, this would not be enough to deal with the outstanding backlog of arbitral petitions and frivolous petitions under Section 34. The possibility of limiting all applications under Section 34 to be decided only by the High Courts must be considered in the light of the practicality of Indian arbitrations. Most commercial arbitrations are often presided over by an arbitrator who is a retired judge of either the High Court or the Supreme Court. An arbitral award passed by the arbitrator would be scrutinised in an application under Section 34 by the district judge, or a commercial court judge. It is embarrassing to think that such an award may either be modified or completely quashed and set aside by a district judge. Hence, in order to encourage more people to opt for arbitration, applications under Section 34 must only be decided by the High Courts.

### 5.2.12 Time-lines

The Act imposes strict timelines for conduct of the arbitration, which are as follows-

a) 12 months from the date the arbitral tribunal enters upon reference under section 29A to disposal of challenges to an award in Court

b) 12 months from serving of notice under section 34(6), as well as for other applications made to the Court.

The parties can mutually agree to extend the fixed timeline of 12 months. However, such extension may not in any case be beyond a further period of 6 months. In order to make arbitration a speedier process than what is the practical reality, it is provided that if the award is not made within the 12-month period or the extended 18-month period, the mandate of the arbitral tribunal would end. However, another roadblock curbing the 'speed' of this dispute resolution mechanism is that the Court has the power to extend

the time period upon an application by the parties to the arbitration. If the parties are able to show sufficient cause, then the Court may extend the time prescribed in the statute. This time limit shall not only apply to ad hoc arbitrations, but shall also extend to institutional arbitrations.

It is not clear as to who would bear the cost if the arbitral tribunal expires before the expiry of the time period specified for arbitration. Also, it is still unclear whether the time consumed in judicial proceedings after the commencement of arbitration would be counted towards the time taken for arbitration since court intervention is quite common in the Indian arbitration system. Section 29A is silent on the same.

Unfortunately, the time limits prescribed under the Act are too good to be true. The Indian judiciary is neither equipped with enough judges nor does it have the requisite infrastructure to dispose of challenges to arbitral awards within a year.

### 5.2.13 Powers of the tribunal under S.17 widened

Earlier, in most cases, a party to an arbitral proceeding would grab the opportunity and file an application under Section 9 of the Arbitration and Conciliation Act, 1996 the moment the tribunal was constituted, whether in an attempt to secure that much needed injunction, or whether to drag the opponent to court so that they might bear the additional costs involved in litigation. In the amended Act, the powers of the tribunal to grant interim relief are much wider and much more enforceable. In this regard, the introduction of Section 9(3) is an indication to courts to refrain from interfering in arbitral proceedings and to exercise powers under Section 9 when and only when the remedy under Section 17 would not be an efficacious remedy or would be beyond the power of the tribunal. However, even with the widening of the powers under Section 17, a party would still need to approach the court for assistance in taking evidence. Despite the presence of Section 17, most parties prefer applications under Section 9 in order to drag the opponent to a court of law. Even if the court declines to interfere in an application under Section 9, it consumes considerable time and resources.

### 5.2.14 Grounds to challenge awards limited

In what was the initial legislative intent, however unnoticed, the grounds to challenge an arbitral award in arbitrations seated in India should have never included within its ambit, the ground to set aside an award on merits. Now, subsequent to the amendment, the meaning and definition of the words 'public policy' has been narrowed down to a great extent so as to further narrow the scope for setting aside an arbitral award, thus rendering an award more effective and more enforceable in law.

Also, the issue of patent illegality being one of the grounds for setting aside an arbitral award in India, when the seat of arbitration is in India, gives the courts in India too much power as was not the intention of the legislature while enacting the Act. It also gives the courts in India jurisdiction to examine the validity of an arbitral award on their substance. In a country like India, where there is an absence of a specialist arbitration bar or an association of professional arbitrators set up under some legislation, it would be difficult to completely eliminate the role of courts from arbitrations as happens in jurisdictions with a more pragmatic and experienced approach to arbitration.

However, for international commercial arbitrations, since Section 34 does not apply to arbitrations that don't take place within India, there is no change in the current legal position. It must be noted that foreign parties can still choose to apply Indian substantive law and conduct arbitrations in India, which will in turn make Part 1 and all its provisions applicable to foreign parties.

### 5.2.15 No automatic stay of award

The amended Act does not provide for an automatic stay of the arbitral award as and when the aggrieved party files an application under Section 34. Hence, the resultant effect is that the aggrieved party will now need to apply for a stay of the arbitral award, and the Court will need to provide reasons for grant of stay if at all a stay is granted. Further, in an attempt to reduce and minimize frivolous applications under Section 34,

the Court, in an application for injunction of an arbitral award under which a sum has to be paid by the losing party, the court would give due consideration to procedural law, in this case, the provisions of the Code of Civil Procedure, 1908 and would be imposing conditions of pre-deposit before such application is heard or entertained. In the absence of such security, the stay may not be granted. However, the introduction of Section 36(3) in the 2020 Amendment can be seen as a challenge to international commercial arbitration in India given that on a finding of prima facie case that the making of the award or the arbitration agreement was vitiated by fraud, there would be an unconditional stay on the award. These two new grounds have been for stay of the arbitral award. This could lead to trouble given the interpretation of 'prima facie' case by the Supreme Court in *Dalpat Kumar v. Prahlad Singh*[233] wherein the Supreme Court said that a substantial question that is raised which needs some investigation and a decision on merits is also a 'prima facie' case. This would give courts an appellate power when deciding an application for setting aside an arbitral award and might invite a review on merits. Also, this provision finds place in Part 1 of the act and there is no automatic stay of the award prescribed under Section 48 which deals with enforcement of foreign awards. However, it is up to the courts to decide whether to take a restrictive view when dealing with challenges to arbitral awards and such applications might only delay enforcement. This could potentially meddle with India's aspirations of being known as a favourable arbitration destination in the world.

### 5.2.16 Awarding Costs

There is a detailed provision for awarding costs. The Act provides that as a general rule, an unsuccessful party must pay the costs of the successful party. Various things can be taken into account by the arbitral tribunal while awarding costs like the conduct of the parties, filing frivolous claims/counterclaims, accepting or rejecting reasonable settlement offers, delaying tactics or seeking unnecessary adjournments. An arbitration agreement that provides for costs to be shared by both the parties would not be binding

[233] (1992) 1 SCC 719

unless executed after the dispute has arisen, as is provided in the Act itself.

However, the Act is silent on whether the arbitral tribunal can award costs that are incurred in arbitration related court proceedings under Section 8, Section 9 or Section 11. Courts in India have interpreted the definition of "reasonable" cost to not mean actual expenses as incurred by the parties, as provided under the amended statute.[234]

### 5.2.17 Bias in Arbitration

It has not been uncommon to see that in agreements where the government is a party, the arbitration clause would most likely have named an arbitrator, who would most likely be a government appointed arbitrator. It has been the norm that whenever the government resorts to arbitration as a dispute settlement mechanism, government nominated persons would be given the role to decide the disputes as arbitrators. Such arbitration proceedings would undoubtedly be looked at with an apprehension of prejudice and bias.

Bias is not as easy to prove. It would have to be seen from an angle of reasonableness and it would have to be determined differently on a case to case basis[235]. Mere suspicion of bias is not enough to render an award invalid. A number of judgements have held that in order to render the award vulnerable, there has to be a real likelihood of bias and not merely an apprehension of bias[236]. Cogent evidence is required in order to prove bias[237]. However, in the event of the bias being actually proved by cogent evidence, it would lead to automatic disqualification of the arbitrator.

In *Denel Proprietary Ltd. v. Govt. of India, Ministry of Defence*[238], the Supreme Court

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[234] Section 31(8)

[235] Halsbury's Law of England, 4th Edition, vol.2, p. 282, para 551
[236] *Mineral Development Ltd. v. State of Bihar*; AIR 1960 SC 468
[237] *Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant*; (2001) 1 SCC 182
[238] (2012) 2 SCC 759

was called upon to decide the issue of whether an apprehension of bias could arise with the appointment of a Government nominated arbitrator. It was held by the Apex Court that *"it is true that in normal circumstances while exercising jurisdiction under Section 11(6), the Court would adhere to the terms of the agreement as closely as possible. But if the circumstances warrant, the Chief Justice or the nominee of the Chief Justice is not debarred from appointing an independent arbitrator other than the named arbitrator"*. Thereafter, an independent arbitrator was appointed by the Hon'ble Supreme Court, while holding that *"I have examined the facts pleaded in this case. I am of the opinion that in the peculiar facts and circumstances of this case, it would be necessary and advisable to appoint an independent arbitrator. In this case, the contract is with Ministry of Defence. The arbitrator Mr. Satyanarayana has been nominated by DGOF, who is bound to accept the directions issued by the Union of India. Mr. Satyanarayana is an employee within the same organization. The attitude of the Respondents towards the proceeding is not indicative of an impartial approach. In fact, the mandate of the earlier arbitrator was terminated on the material produced before the Court, which indicated that the arbitrator was biased in favour of the Union of India. In the present case also, Mr. Naphade has made a reference to various notices issued by the arbitrator, none of which were received by the Petitioner within time. Therefore, the Petitioner was effectively denied the opportunity to present his case before the Sole Arbitrator. Therefore, the apprehensions of the Petitioner cannot be said to be without any basis"*.

It has also been observed by the Law Commission that, "the concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent adjudicators for resolution of disputes. In fact, when the party appointing an adjudicator is the State, the duty to appoint an impartial and independent adjudicator is that much more onerous – and the right to natural justice cannot be said to have been waived only on the basis of a "prior" agreement between the parties at the time of the contract and before arising of the disputes".[239] In agreements that are executed with a state authority or with a central authority, it is common to see that the arbitrator that is

[239] Report No. 246; Amendments to the Arbitration and Conciliation Act 1996, Available at - https://indiankanoon.org/doc/194486288/

mentioned in the agreement is or has been a government official.

In fact, the very issue of the validity of appointment of an arbitrator by an ineligible person is referred to the larger bench by the Hon'ble Supreme Court of India in *Union of India v. Tantia Constructions Ltd*. on January 11, 2021. [240] There was a conflicting judgement by another bench of the Apex Court in *Central Organisation for Railway Electrification v. M/s. ECI-SPIC-SMO-MCML (JV)* (Civil Appeal Nos. 9486-9487 of 2019), that held that such appointments might not be void *ab initio* and will depend on the facts of the case. Such conflicting decisions by the Apex Court only lead to confusion.

### 5.2.18 Arbitral Immunity

Arbitral immunity is the protection that is given to an arbitrator to indemnify the arbitrator from civil liabilities for actions done during the conduct of arbitral proceedings. There is no separate law on arbitral immunity in India. However, a section on arbitral immunity is added in the Act by virtue of the 2019 Amendment. The section is as below –

"Section 42B - *No suit or other legal proceedings shall lie against the arbitrator for anything which is in good faith done or intended to be done under this Act or the rules or regulations made thereunder.*"

This was a much needed step and goes in the direction of bringing the Indian arbitration system at par with other developed arbitration regimes. It was one of the recommendations of the high-level committee that a provision that takes care of immunity for any kind of act or omission by an arbitrator which is not done in bad faith

[240] Mehal Jain, Is Appointment Of Arbitrator By Ineligible Person Valid? Supreme Court Refers Issue To Larger Bench, January 15, 2021, Accessible at: https://www.livelaw.in/top-stories/supreme-court-arbitration-and-conciliation-act-appointment-arbitrator-168441, Retrieved on February 2, 2021.

be inserted in the Indian Arbitration Act.[241]

Though it might have seemed unnecessary since immunity was assumed by Indian courts even before the provision was inserted in the 2019 Amendment, certain judgements necessitated such an amendment. The case of *Rajesh Batra v. Ranbeer Singh Ahlawat*[242]is of significance while examining how Indian courts have dealt with the subject of arbitral immunity. In this case the High Court of Delhi imposed a penalty on the arbitrator for exceeding his jurisdiction. The court in its verdict stated that the arbitrator assumed jurisdiction even without going into the fact that the appointment was not with the mutual consent of both the parties. In this case, the appellant before the court had not prayed for a penalty to be imposed on the arbitrator. Such a penalty was imposed on the arbitrator solely upon the whims and fancy of the court.

Such judgements would instil fear in the minds of the arbitrator and it would create an environment of uncertainty which would disable the arbitrator from exercising his jurisdiction, even where the tribunal would have the power to do so. However, after addition of Section 42B in the Act, which grants immunity to the arbitrator as long as his actions are undertaken in 'good faith', there have not been any cases in order to understand how courts interpret 'good faith'. Since the law on arbitration does not specify what actions fall within the purview of 'good faith', some clarity can be obtained from the General Clauses Act, 1987 wherein 'good faith' is described as actions done in honesty, irrespective of whether due care wasn't exercised or even if done in negligence. This means that even if an arbitrator does not exercise reasonable care or duty and acts in total want of skill, as long as the actions are done in good faith, immunity shall be granted. The provision pertaining to arbitral immunity is also silent on criminal liability and mentions only civil liability. India would do well to enact provisions that define the yardstick of good faith and incorporate provisions for immunity from civil and criminal liability.

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[241] Prerona Banerjee, *Combatting Frivolous Claims: Arbitral Immunity in India,* IndiaCorpLaw, April 20, 2020;
Available at: https://indiacorplaw.in/2020/04/combatting-frivolous-claims-arbitral-immunity-in-india.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+IndiaCorpLaw+%28IndiaCorpLaw%29

[242] https://indiankanoon.org/doc/121036482/

Thus, arbitral immunity is a must if India wants to encourage foreign parties to arbitrate in India and to encourage arbitrators with specific skills and technical knowledge to preside over Indian arbitrations.

### 5.2.19 The Stamp Duty Conundrum

Article 12 of the Schedule to the Stamp Act provides for the stamp duty that can be charged on an arbitral award. However, the catch is that this varies from one state to another. For awards that deal with immovable property, the registration of those is another complex procedure. As held by the Hon'ble Supreme Court in the case of *Satish Kumar & Ors. v. Surinder Kumar & Ors.*[243], an award that came under the ambit of Section 17(1) of the Registration Act was to be compulsorily registered. Also, there does not exist proper infrastructure, nor is there any provision in the Act for custody of the original award and the entire record of the arbitration proceedings. This leads to confusion in the minds of the arbitrator as well as the parties, as to for how long and where should the arbitral proceedings and the records be kept after the arbitrator's office becomes *functus officio*.

### 5.2.20 Entry of Foreign Lawyers

Schedule 8 that was inserted by the 2019 Amendment proved to be an outright disqualification for foreign lawyers to being an arbitrator under the Act. Earlier, as per the Eighth Schedule, the qualifications for being appointed as an arbitrator were largely in favour of Indian lawyers, chartered accountants, judges and government officers. The 2020 Amendment by removing Schedule 8 from the Act somewhat addressed the concerns of the international arbitral community. However, Schedule 8 is now replaced by the word 'regulations' which would be governing the accreditation of arbitrators

[243] AIR 1970 SC 833

under the Act. The problem lies in the absence of clarity as to who will be framing these regulations, when will they be framed and what will these regulations contain. The regulations would have to be such so as to not bar foreign persons from being appointed as arbitrators in India.

### 5.2.21 Challenges in Confidentiality

The language of Section 42A is a little departure from what was suggested originally by the High Level Committee chaired by Justice B.N. Shrikrishna.[244] It also does away with the choice of the parties which is a primary feature of arbitrations by beginning with a non-obstante clause. Because of the limited and confusion disclosure provisions as provided for under the Act, disclosure of arbitration proceedings, pleadings, evidence, arguments by the counsel of the parties in the arbitration, none can be relied upon in the court. This could be problematic given that the disclosure of such information would be required in various instances before the court when the parties file applications under Section 9, Section 14, Section 17, Section 27 and Section 34. Also, the Act is silent on consequences of non-compliance with this provision. In order to plug this loophole, there could be intervention by the court. Such a blanket cover of confidentiality might end up with parties violating the provisions of the Arbitration Act along with other regulatory requirements.

### 5.2.22 The Government – A friend or foe?

The problem since the 90s was that there were hardly any corporates in arbitration. Arbitration was just something that existed between government departments and contractors. In such arbitrations usually what would happen was that the head of the department would himself be the arbitrator in the dispute. The contractor had no say or choice in the appointment of the arbitrator because to secure the contract, the terms of

[244] Report of the High Level Committee - http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf

the contract would have to be abided in toto. Eventually, when the matter went to court and the award was in favour of the department, the court would inadvertently begin second guessing the award and going into the merits of the award. Over a period of time, this mindset gradually became the prescribed mindset when it came to arbitrations. Instead of meeting the award with a more hands-off approach, which was required, the courts would scrutinize the award looking for reasons to quash and set it aside. Arbitration was merely reduced to being a first step in litigation. The respondent in the arbitration would not want the matter to be resolved quickly and would resort to delaying tactics by seeking adjournments before the arbitrator, challenging interim orders of the arbitrator before the courts and this goes on in an endless loop. By the time the award is passed, the jurisdiction of the trial court has been exercised, the jurisdiction of the first appellate court has been exercised, the appellate jurisdiction of the High Court has been exercised, the revisional jurisdiction of the High Court has been exercised, the appellate jurisdiction of the Supreme Court is exercised, where the Supreme Court is even likely to second-guess the award, it has probably taken longer, if not as long as a full-fledged litigation with the additional cost of an expensive and time-consuming arbitration.

A senior lawyer who has also represented the Government, in an interview spoke about his experience of the approach of the Government when they were opposing in another matter. He said, "*I accepted the brief in the Vodafone Arbitration in 2012, the Jadhav incident happened in 2017. The hearing before the International Court of Justice on merits in the Jadhav case and the Vodafone BIT arbitration were back to back. The dates were going to clash. Fortunately, the arbitral tribunal, when the Government of India who instructed me in Jadhav was opposing the dates, a week after Jadhav for Vodafone, a week before Jadhav for Vodafone, the Arbitral Tribunal came down hard and said Mr Salve has far more important public duties appearing for you in the ICJ, so we will not listen to you and fix the cases one week apart."*[245]

When the 1996 Act came into force after a crackdown on the existing arbitration

[245] Harish Salve, QC (during a webinar at the MCIA) Transcript available at: https://mcia.org.in/wp-content/uploads/2017/11/Transcript-Harish-Salve.pdf

legislation at the time, India mindlessly copied the UNCITRAL Model Law. The UNCITRAL Model Law, while it was meant for international arbitrations, was applied to domestic arbitrations in India. There could not have been zero recourse from an arbitral award, but that is what India did while enacting its arbitration law.

### 5.2.23 Investment Treaty Arbitrations in India

Investment treaty arbitrations arise out of a dispute between the investor and a state created department/government by a treaty that is entered into by the parties and not by an agreement between two private citizens/companies. Thus, investment arbitrations would involve claims against the State for a breach of its obligations under an international treaty and not for a breach of the terms of some commercial agreement. In India, the applicability of the New York Convention to investment arbitrations is still unclear. The unpredictability of courts in India when it comes to dealing with investment arbitrations is problematic in this regard. With multiple courts holding in different ways on the applicability of the convention, it becomes extremely difficult for other courts to follow the judgements of other High Courts based on the strength of their reasoning. The High Court of Gujarat in its decision in *Union of India v. Lief Hoegh Co*.[246] interpreted the scope of the New York Convention and discussed the limited applicability of the Convention on its relationship between individuals. It was held that 'commercial relationships' would include "*all business and trade transactions in any of their forms, including the transportation, purchase, sale and exchange of commodities between the citizens of different countries"*. However, the downside of this interpretation is that the Convention would cease to apply on relationships that are not commercial relationships which is the case in international investment treaty arbitrations, which are essentially disputes arising out of breach of the obligations of the State under a treaty. At this stage it is imperative to discuss the reasoning of the Calcutta High Court as well as the Delhi High Court in disputes pertaining to investment arbitrations. The Calcutta High Court in *Board of Trustees of the Port of Kolkata v.*

[246] 1982 SCC OnLine Guj 57

*Louis Dreyfus Armatures*[247] granted an anti-arbitration injunction to the Kolkata Port Trust. This put a halt to the proceedings that had been initiated under a bilateral investment treaty between India and France. The Calcutta High Court in its judgement observed that it was only the Republic of India that was a party to the arbitration agreement in the bilateral investment treaty and the Kolkata Port Trust had incorrectly been impleaded as a party respondent in the arbitration. Ruling upon its power to issue such an injunction against the arbitration under Section 45 of the Act, the High Court held that the Act applies to investment arbitrations, just like it did to international commercial arbitrations that were seated in India. The Calcutta High Court ended up applying the same standard as it would under commercial arbitrations to investment arbitrations. On the contrary, the Delhi High Court in the case of *Union of India v. Vodafone Group plc*[248] rejected the request for an anti-arbitration injunction which arose under a bilateral treaty between India and the UK on the grounds that Indian courts could not intervene in an investment arbitration just like it could in a commercial arbitration. While rejecting the anti-arbitration injunction, the Delhi High Court came to its own conclusion and created its own standard that Indian courts could intervene in international investment arbitrations and grant such an injunction if the arbitration was found to be *"oppressive, vexatious, inequitable or constitutes an abuse of the legal process".*[249]

Such unpredictability in the decisions of Indian courts might deter foreign investors from investing in India and might also have an impact which would be more far reaching in terms of India's economic relationships with other countries. Courts increasingly seeming to deny enforcement of arbitral awards under investment treaty arbitrations, having suddenly realized India's sovereignty and the misguided fact that an arbitral tribunal can hold a government responsible for breach of its claims under an investment treaty. In order to change such an approach by Indian courts, an amendment of Section 44 of the Act is necessary which can explicitly include investment arbitral

[247] Decision of the Hon'ble High Court of Calcutta delivered in G.A. 1997 of 2014 on September 29, 2014
[248] Judgement of the Delhi High Court in CS(OS) 383/2017 & I.A.No.9460/2017 delivered on May 7, 2018
[249] Siddharth S. Aatreya, Can Investment Arbitral Awards be Enforced in India?, Kluwer, April 4, 2019; Retrieved from: http://arbitrationblog.kluwerarbitration.com/2019/04/04/can-investment-arbitral-awards-be-enforced-in-india/

awards within the scope of the act and bring it under the purview of the New York convention despite there not being a commercial relationship between the parties. Because, as of today the unfortunate reality is that a party seeking enforcement of an investment arbitral award is bound to face a long drawn battle before Indian courts, which are ultimately likely to rule in favour of the government.

### 5.2.24 Expanding the arbitrator pool

Most of the arbitrators in India tend to be retired Supreme Court or High Court judges who are so used to following court procedure that it is difficult for them to make a shift after so many years on the bench from tedious court procedures to speedy dispute resolution. Retired judges may have an excellent knowledge of the subject on law, but they might not necessarily possess the industrial expertise and pro-business outlook that is required to oversee sensitive commercial disputes.[250]

Appointment of a retired High Court judge or a Supreme Court judge as an arbitrator is seen by most as a benefit conferred on them by their currently sitting brethren. Under Section 34 of the Act, any party wishing to challenge an arbitral award (that is usually made by a retired judge of the High Court or Supreme Court) would have to prefer an application that is to be made before the District Judge, in the principal civil court of original jurisdiction. Looking at this power conferred upon the district judge under section 34 of the 1996 Act, it seems to be a discretionary power merely on paper. The ground reality is something different. The District judge would think twice while sitting in appeal over an arbitration award that is passed most likely by a High Court judge or a Supreme Court judge. It is ironical to even think that the wisdom of a former High Court/Supreme Court judge will be scrutinized by a district court judge. In most cases even if the grounds for challenging the validity of an arbitral award are met, and are valid, the chances of such award being set aside by a District Judge are extremely thin. While the Indian arbitration legislation does provide for appeals that can be preferred to

[250] https://www.legallyindia.com/home/the-emerging-landscape-of-arbitration-in-india-2017-and-beyond-20170719-8667

the High Court and eventually to the Supreme Court, these proceedings take years and decades for disposal and are extremely expensive alternatives, especially after having already incurred huge expenses for arbitration proceedings. Even while such appeals are pending, getting any interim relief against the execution/enforcement of the award has its own set of difficulties.

### 5.2.25 Opportunities for virtual hearings

A visit to any of the High Courts in India, about 5 to 10 years ago, would have left any foreign party astonished by the sheer quantity of papers scattered around. With the arrival of international arbitral institutions on the scene, the need for going virtual is felt and promoted. This, along with the onset of a global pandemic by the name of COVID-19, might act as the catalyst to effect this change. It is the need of the hour to embrace new technology and move away from the old paper-based system and with technological hubs in the country like Bangalore and Hyderabad, India can grab this opportunity and follow the lead. Instances of switching to digital technology are also being noticed in some High Courts in India. Filings in the registry are also increasingly becoming digital along with paper filings. There are screens in the courtroom for the judges to look at judgements that were cited by counsels while arguing a case. Time is not wasted in looking up a book just to see and read a judgement since it is now available on a big screen. Today in the Indian litigation practice, the entire system of case management is so faulty that lawyers wouldn't even know when a case is going to come up suddenly and the lawyers would end up rushing from one court to another. A senior advocate would be arguing not less than 7 to 8 cases in a day in different court rooms. It is not possible to do justice to this kind of work since it ends up being more about quantity rather than quality.[251] However, such a change cannot happen overnight, and it will be some time before that degree of proficiency is achieved in case disposal. In order to kickstart the change, a step in this direction can be taken by circulating submissions in advance, preparing a cause list well in advance, circulating citations in

[251] Harish Salve, QC (during a webinar at the MCIA) Transcript available at: https://mcia.org.in/wp-content/uploads/2017/11/Transcript-Harish-Salve.pdf

advance, conducting basic hearings except cross examinations and final hearings through videoconferencing. The logical step, especially when there are limitations on physical appearances during the times of COVID-19, is to hear cases and conduct hearings through videoconferencing.

### 5.3 Conclusion

India has witnessed a rapid economic growth over the past few years with the GDP growing at 7.4% in 2018 but falling to 5.6% in 2019.[252] Moody Investor Services said in a report that, "consumption demand has cooled notably, with slow employment growth weighing on consumption." It said, "We expect economic growth to pick up in 2020 and 2021 to 6.6 per cent and 6.7 per cent, respectively, but the pace of growth will remain lower than in the recent past."[253] A shift has been witnessed in the economic setup of the country from rural agricultural production to urban economic activities. In an interconnected international economy, the expansion of global trade will be driven by liberal legal policies and will help economies to merge into a global production system than being left beyond the epicentre of world trade. The legal structure of an economy that encourages speedy and effective resolution of disputes is what pushes commerce and trade in that country to achieve greater heights. It is common knowledge that one of the main ingredients in the recipe for the growth of commerce and international trade in a country is a sound legal system that protects parties and provides security to commercial transactions and business agreements. Major players across the wide spectrum of global trade expect from India an open, responsive and effective dispute mechanism system. The growth of global trade and international services is now becoming increasingly important to boost the Indian economy.

A major area of concern for Indian legislators is how international treaties and agreements can inject funds into the economy and promote foreign direct investment in

[252] https://economictimes.indiatimes.com/news/economy/indicators/moodys-cuts-indias-gdp-growth-forecast-to-5-6-for-2019/articleshow/72520706.cms?from=mdr
[253] Ibid

India. Research suggests that multilateral arbitration conventions could be more effective in promoting FDI than bilateral treaties.[254] According to Wagle, if the arbitration system is a developed system, it will automatically lead to an increase in foreign direct investment in the country.[255] What is important is that there is more foreign investment than the number of foreign investors. Multiple foreign investors investing peanuts does not seem as attractive as a few investors investing billions in the economy.[256] One of the benefits of an effective arbitration system in place is that it reduces the changes/variations in the expected return on investment (ROI), and thus motivates the investors who might be running short on capital or might have financial constraints to invariably place larger bets. The liberalisation of the legal sector in India is bound to play a major role in boosting the growth of the Indian arbitration regime and to secure foreign investment in India. The entry of foreign lawyers in India is bound to encourage foreign investors to come to India and enter into agreements with Indian parties, thus raising the bar and promoting the growth of international commercial arbitration in India and enhancing employment opportunities by granting local businesses the access to global legal services.

In most developed economies arbitration and litigation might co-exist happily with each other and with other forms of dispute settlement like mediation and conciliation. Unfortunately, litigating before courts of law in India is something that most litigants would want to avoid. Foreign investors are extremely wary of the uncertain nature of judgements and the time consumed to decide a dispute. India does not provide the assurance of legal security for a foreign investor as would be provided by the arbitration system in a developed and arbitration-friendly country. Foreign investors face quite a few issues like delays in the judicial system, corruption, red-tapism, unfamiliarity with domestic laws and procedures, risk of bias along-with the apprehension of a virtually never ending appeal procedure. If India wishes to be on the same level as other

[254] https://www.lexology.com/library/detail.aspx?g=7094436c-d694-46e3-bedf-657c69f275ff
[255] Wagle, S. (2011), *Investing across borders with heterogeneous firms: do FDI-specific regulations matter?* World Bank Policy Research Working Paper 5914
[256] Hammurabi and Solomon, *The Emerging Landscape of Arbitration in India: 2017 and Beyond,* July 19, 2017
Retrieved from: https://www.legallyindia.com/home/the-emerging-landscape-of-arbitration-in-india-2017-and-beyond-20170719-8667 on February 1, 2020.

countries when it comes to the efficiency of its dispute resolution system, it must have a solid framework in place which ensures the growth and promotion of international arbitration within India. As the attention of other major economic players shifts towards India, the liberalisation of the legal sector is a must which would attract FDI and promote growth and knowledge within the country. Markets which are soon turning into borderless markets and international trade have completely changed the scope and character of the legal services sector of the country. India's legal services system is now on an international scale and India cannot afford to make mistakes that might shake the faith of foreign investors in its legal system.

Understanding the importance of an efficient dispute resolution system and the importance of honouring international agreements and contracts to facilitate the growth of commerce in the country, the government has adopted a number of measures to revamp its dispute resolution mechanism. The government has created a High Level Committee that would review the institutional framework for dispute resolution in the country.[257]

The struggle to refine India's arbitration sentiment with the setting up of the Mumbai International Arbitration Centre was met with appreciation. The MIAC has been gaining traction, and is getting increasing popularity, because of well-known lawyers like Mr. Fali Nariman, Senior Advocate and Mr. Harish Salve, QC, playing a major role in the formation of the rules for the MIAC, and lawyers like Mr. Nakul Diwan, John Beechey, Justice Nijjar, Cyril Shroff amongst other stalwarts of the arbitral fraternity, who are a part of the Council. The rules seem to be well-designed and effective, but somehow do not manage to bring about a sweeping change that was required in order for the international community to sit up and take notice. Even the NDIAC that has been set up by an Act of Parliament in 2019, shall take time to come at par with other well-recognised arbitral institutions.

The amendments in the Arbitration Act that have been taking place from time to time

[257] Ibid

have made a significant impact on the existing legislation. However, there is always scope for improvement. One of the major concerns in arbitration proceedings in India is the nature of successive amendments and the lack of consistency in arbitral procedure. The act does not prescribe any fixed procedure but leaves it open to the parties to decide for themselves, what procedure is to be adopted for the purpose of arbitral proceedings. Despite a number of arbitration centres being set up across the country, there is some disparity in procedural framework and infrastructure. Also, most arbitrations are conducted from the offices of arbitrators or from hotels which adds uncertainty to the conduct of arbitral proceedings. Some provisions that are headed by virtue of the 2015 amendment have now ceased to exist by virtue of the 2019 amendment. This inconsistency shows the inability of the legislature to deliberate upon the law that is being amended and it indicates that a few provisions might have been amended in haste.

India is poised to be a superpower. Once known as the country of elephants and snake charmers, today it is astounding the world with one of the fastest growing economies amongst the developing countries. Undisputedly, when the country is emerging as a major player on the international scene, there will be more international agreements and treaties, which may lead to disputes amongst the signatories. At present, foreign contracting parties do not prefer to get their disputes adjudicated in India because of the present shortcomings of the arbitration system, but prefer other jurisdictions like London, Singapore and Hong Kong. The time has come to convert these challenges into opportunities and make our country an arbitration hub for international arbitrations, along with making it a manufacturing hub.