CHAPTER 7

CONCLUSION AND SUGGESTIONS

As discussed in the previous chapters, even the recent amendments to the Act are riddled with many ambiguities thereby providing the opportunity for further judicial interference. It is only when the Indian arbitration culture has changed and these persisting problems have been addressed that arbitration will finally become the preferred mode of dispute resolution in India for Indian as well as foreign parties.

The judgements discussed in the previous chapters point towards a positive change that is underway on all fronts. Courts are increasingly holding back from intervening in the arbitral process when the parties to a dispute have made their intent to settle their disputes amicably through the arbitral mechanism amply clear, and are giving effect to the intent and choice of the parties. These efforts of all the three wings of the Government testify that India is taking all possible measures to make India investor friendly which may lead India one of the prominent hubs of arbitration on par with other leading centres.

Another thing to be noted is that Part 1 of the Act does not apply to international commercial arbitrations and only Part 2 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 1 of the Arbitration Act automatically becomes applicable to the dispute. Hence, it is imperative to also focus on Part 1 of the Act and the lacunae therein.

The importance of drafting arbitration agreements by incorporating an arbitration clause

that provides for the settlement of disputes by an arbitral institution cannot be emphasised further. India has been promoting institutional arbitration,[258] and statements made by senior officials in the Indian Government suggest that the boost to arbitration institutions is much required and remains a priority.[259]

Fortunately, the Indian government has taken the first step and has acknowledged the importance of institution arbitration and has also taken the view that institution arbitration should be preferred over ad hoc arbitration. The government believes that this is the only way to attract foreign investors to India and choose India as a seat for international commercial arbitrations. [260]

The amendments to the Act, though laudable, is only a step towards making arbitration the preferred mode of dispute resolution in India. Increased efficiency in arbitration is unlikely to come solely from the imposition of legislative change, especially one that is incomplete as this one.

What is required is a change in the very culture of arbitration. There needs to be a change in the perspective with which arbitration is viewed. The pool of legal practitioners who specialize in the practice of arbitration has to grow, with arbitration viewed as the priority rather than playing second fiddle to Indian court litigation work. What is needed is the growth of a community of arbitrators unfettered by the traditions of Indian Courts and focused on growing arbitration in its own right.

7.1 Findings of the Study

To understand the challenges to international commercial arbitration in India, the researcher conducted the present study. The research was done with the following

[258] *See Government of India Law Commission Report No. 246, Amendments to the Arbitration and Conciliation Act 1996, August 2014, at pp. 9-10.*

[259] *Federation of India Chambers of Commerce and Industry, Press Release dated 22 December 2014, "Need to promote institutional arbitration to place India amongst top 50 countries in World Bank's ease of doing business ranking – Legal Affairs Secy."*

[260] *Ibid*

objectives –

1. To analyse the history of arbitral laws in India and how it has progressed over the years to take its present form.

2. To examine the main concerns in the 1996 Act, the changes suggested by the 246th Report of the Law Commission and whether the 2015, 2019 and 2020 amendments have managed to address and incorporate all of them.

3. To understand the rationale behind arbitration as an alternative method of adjudication.

4. To examine the effect of the 2015, 2019 and 2020 amendments on international agreements and on India as a favourable arbitration destination.

5. To study the UNCITRAL model law with reference to the Arbitration and Conciliation Act, 1996 as amended from time to time.

6. To compare the Singapore and English arbitration law and the Indian arbitration law and to examine the approach taken by courts in favourable arbitration destinations.

7. To analyse the decisions of Indian Courts in matters pertaining to Arbitration.

8. To study the challenges and opportunities in India with respect to International Commercial Arbitration.

9. To take into account the opinions of lawyers practising in arbitrations, senior counsels, arbitrators and academicians as to what still lacks in the amended arbitration law and their suggestions in conducting party-friendly arbitrations with least judicial interference.

In order to examine these objectives, the entire study has been divided into seven

chapters. The second chapter is titled **"Tracing Arbitration Through the Times"** and discusses the growth of arbitration law in India over the years. It also examines how the law was developed over time and the salient features of the laws in order to better understand the intention of the legislature behind their enactment.

The third chapter deals with existing arbitration laws in developed arbitration regimes like Singapore and the UK. It analyses the differences between the laws in Singapore and the UK with those of India, in order to understand whether India lacks behind in terms of legislation or there are other factors behind India not being a favourable arbitration destination. The title of the third chapter is **"An Analysis of International Arbitration Laws"**.

The fourth chapter of the study deals with judgements of courts of law in India pertaining to arbitration. Legislations are always subject to the interpretation of the courts, and the high courts and the Hon'ble Supreme Court being courts of record, their judgements act as precedent. Often, the lacunae in legislation are either rectified with an explanation by virtue of a judgement or by a subsequent amendment. In the sense of international commercial arbitration in India, judgements indicate the general sentiment of the courts when it comes to enforcement of foreign awards and interference in arbitration proceedings. The restraint that is exercised by courts when dealing with enforcement of foreign awards or when dealing with challenges to awards and grant of interim relief is examined in this chapter that is titled **"An Analysis of Judicial Decisions"**.

The fifth chapter is one of the main chapters of the study that deals with what it is exactly that plagues the Indian arbitration regime and it further examines the areas where there is scope for improvement either by way of an amendment, by way of a judgement or by way of a change in attitude. The fifth chapter is titled **"Challenges and Opportunities for International Arbitration in India"**. Most of the potential areas for improvement in international arbitration in India are examined in order to understand what the challenges are in each of the areas.

Chapter six is one of the most important chapters that analyses the data that is collected by the researcher through a questionnaire that was put to 100 respondents comprising of lawyers practising in arbitrations, senior counsels, arbitrators and academicians. The hypothesis of the researcher is partially proved by way of this chapter that is titled **"Data Analysis"**.

Chapter seven is the concluding chapter that deals with the suggestions of the researcher and contains the draft of a new law pertaining to international commercial arbitration in India that is proposed by the researcher.

Objective No. 1 has been dealt with in Chapter 2 of the study. The laws pertaining to arbitration in India have been examined and their development with subsequent amendments over a period of more than eight decades has been studied by the researcher.

Objective No. 2 deals with the recommendations of the Law Commission for amending the Arbitration and Conciliation Act, 1996 and finds place in the study conducted in Chapter 2, Chapter 3 and Chapter 5.

Objective No. 3 was to understand the rationale behind arbitration as an alternative method of adjudication and this has been dealt with in Chapter 1 and Chapter 2 of the study.

Objective No. 4 was to examine the effect of amendments in arbitration law in India and their effect on making India a favourable arbitration destination for the global arbitration community. This finds place in Chapter 5 and Chapter 7 of the study.

Objective No. 5 sought to study the UNCITRAL model law and its application on international commercial arbitration in India. This aims to analyse the impact of the Model Law on the existing arbitration legislation and the deviations from the Model Law if any. This is dealt with in Chapter 3 of the study.

Objective No. 6 pertains to the comparison of the arbitration laws of Singapore and the UK with the Indian arbitration law in order to understand the differences between the three legislations and to understand the approach that is taken by courts while deciding disputes arising out of arbitration. This is covered in Chapter 3 and Chapter 4 of the study.

Objective No. 7 aims to analyse the attitude of Indian courts while deciding disputes arising out of arbitration including applications that are filed for enforcement of foreign awards. The rationale that is applied by the courts when enforcement of a foreign award is denied on some ground is also examined in detail. The study also compares that rationale with the scheme of the arbitration legislation to see whether it is in consonance with the intention of the legislature. This finds place in Chapter 4 of the study.

Objective No. 8 pertains to examining the challenges that exist for international arbitrations in India, along with the opportunities that are present but not yet tapped to realise their potential. This is dealt with in Chapter 5 of the study in detail.

Objective No. 9 aims at collecting data from lawyers practising in arbitrations, senior counsels, arbitrators and academicians through a questionnaire that was formulated by the researcher in order to take their opinions and comments on the existing arbitral framework in the country and suggestions on how to make it better. Chapter 6 of the study deals with this objective.

7.2 Conclusions drawn on the basis of the Hypothesis

Hypothesis 1 - Arbitration has emerged as the most preferred alternative mechanism for dispute resolution in India as well as around the world.
Outcome – The answer of this question is in the affirmative, and is based on the findings in Chapter 1 and Chapter 2 of the study.

Hypothesis 2 - The need for arbitration will only increase with time, requiring the

law to be continually brought at par with the then requirements.

Outcome – The answer of this question is in the affirmative and is based on the findings in Chapter 2 and Chapter 3 of the study. A part of the question is also answered in Chapter 5 and Chapter 7.

Hypothesis 3 - Despite arbitration being conducted since decades, the law relating to arbitration is in dire need of an overhaul.

Outcome – The answer of this question is confirmed and is based on the inferences drawn in Chapter 3, Chapter 4 and Chapter 7 of the study.

Hypothesis 4 - The Arbitration and Conciliation Act, 1996, though based on sound premises, has failed to deliver the expected results.

Outcome – The answer of this question is in the affirmative and is based on the comments that are received from the respondents of the survey in Chapter 6 of the study. Inference can also be drawn from the findings in Chapter 3 and Chapter 5.

Hypothesis 5 - Despite having provisions relating to international commercial arbitration, India is not a preferred place for international arbitration.

Outcome – The answer of this question is also in the affirmative and is based on the findings in Chapter 5 and Chapter 6.

Hypothesis 6 - The amendments to the Arbitration and Conciliation Act, 1996, will bolster several inept provisions of the law.

Outcome – The answer to this question is partly in the affirmative. This is based not only on the findings in Chapter 6 of the study but is also based on the analysis that is conducted in Chapter 3, Chapter 4 and Chapter 5.

Hypothesis 7 - India has the potential to be the venue for international arbitration and can stand on the same footing as Singapore and London in terms of party-friendly jurisdictions.

Outcome – The answer to this question is in the affirmative. This is based on

the suggestions that are given in Chapter 5 and Chapter 7 along with the draft of a proposed legislation for conducting international arbitration in India.

7.3 Suggestions for a change

7.3.1 Timelines in International Commercial Arbitration – Why not?

One of the changes in the 2019 Amendment is perhaps the 12 month deadline for arbitrations which is a step in the right direction to making India a favourable arbitration destination globally. Section 29A introduces the 12 month deadline for making an award commencing from the date on which the arbitral tribunal receives the notice of appointment. The amendment also provides for an extension for a further period of six months after the deadline with the mutual consent of the parties or through an order passed by the court. The statistics that are collected by renowned arbitral institutions around the world, reveal that it will take roughly about 12 months to 18 months before an arbitration is completed.[261] In cases of arbitrations that have complex facts and law which require a longer process of taking evidence, the timeline would have to be extended in order to do justice to such arbitrations. Even though these timelines have, to a large extent, made sure that arbitrations are completed in a time bound manner, such deadline limitations when not made applicable to international commercial arbitrations, might have a counter-productive effect. Foreign investors and other international disputing parties would be sceptical before they agree to an arbitration that is seated in India as there would no longer be a statutory assurance that the arbitration would be completed in a given time period. The legislature would do well to draft timelines for international commercial arbitrations as well, in order to provide foreign parties the security that they are looking for in an otherwise infamous Indian judicial system that is known to be plagued with delays.[262] 57% of the respondents, in the survey that was conducted by the researcher are of the view that delays and unnecessary adjournments

[261] https://www.business-standard.com/article/opinion/experts-wary-of-govt-influence-over-proposed-arbitration-council-of-india-118121600579_1.html

[262] Klaus Peter Berger, '*The Need for Speed in International Arbitration'* (2008) 25 J Intl Arb 595

are one of the primary reasons behind India not being a favourable arbitration destination. If the legislature were to draft timelines for international commercial arbitration as well, then even the lawyers would refrain from seeking adjournments and would try to complete the pleadings and submissions within the time frame prescribed. In one of the instances, the court indicated that in case of a gross delay in passing an arbitral award, it could potentially lead to the award being set aside.[263] Paragraph 16 of the 246th report reproduced below-

"*Counsel for parties must similarly refrain from seeking frivolous adjournments or insisting upon frivolous hearings or leading long winded and irrelevant evidence. The Commission further notes that a conscious use of technology, like tele-conferencing, video-conferencing etc., should also be encouraged and the same can easily replace the need for purely formal sittings and thereby aid in a smoother and more efficient conduct of arbitral proceedings*."[264]

7.3.2 Suggestions for Third Party Funding

Despite a number of revolutionary changes in the arbitration law in India, third-party funding still remains an unexplored area. With new developments taking place in international commercial arbitrations in India and in TPF provisions in jurisdictions around the world, it might be worthwhile to frame rules for TPF like how it has been done in Singapore and Hong Kong. Hong Kong enacted a new law specifically for third party funding which came into force on February 1, 2019.[265] Setting an example, even the Hong Kong International Arbitration Centre (HKIAC) introduced provisions for third party funding in its rules that were amended in 2018. But the SIAC was the first

[263] Delhi High Court judgement in *Oil India Ltd v Essar Oil Ltd*, OMP No 416/2004 dt 17.8.2012 at paras 30-40.

[264] *See Government of India Law Commission Report No. 246, Amendments to the Arbitration and Conciliation Act 1996, August 2014*

[265] Debevoise and Plimpton, *Hong Kong's New Law on Third Party Funding for Arbitration: Opportunities and Risks*, February 19, 2019; Retrieved from: www.debevoise.com on January 31,2020.

arbitral institution in Asia to enact rules for TPF by way of Rule 24(I).[266] In Singapore, TPF in litigation is prohibited, but in the case of *Re Vanguard Energy PTE Ltd.*[267] TPF was permitted. International commercial arbitration has become quite an expensive affair. In India where arbitration is usually the beginning to an unending series of litigation, this could be a major concern.[268]

Many problems can arise in the realization of such a radical change. There may be apprehensions concerning capital adequacy of a funder, the necessity of formal Arbitration Funding Arrangements ("AFA") that would have to be entered into, issues of conflict of interest between the funder and the recipient of the funds, and more importantly the degree of control employed by the funder over the arbitration proceedings which, on a scrutiny of common law, has seen ever-changing interpretations.[269] For example, if a funder exercises a slightly more keen influence on the arbitration process than would otherwise be normally accepted in an arm's length setting, the court will hold it as champerty and maintenance, which will render the funding agreement invalid, as has happened in the UK.[270] But, jurisdictions like Australia permit more control to third party funders than the UK. At the same time, if a TPF does not carry out a cost-benefit evaluation of funding the arbitration by using its own counsel, then a likely funder will find it difficult to identify a good dispute to place its bet on. While there exists an English Association of Litigation Funders' Code of Conduct, and despite the MIAC wanting to be a strong contender along the lines of the London, Hong Kong and the Singapore International Arbitration Centre, the MIAC has no rules or provisions regarding third-party funding. While the rest of the world is having debates on agreements regarding third-party funding and its disclosure, India is far behind in even understanding the concept of third-party funding, let alone admitting

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[266] Ashurst Quickguide to *Third Party Funding in International Arbitration*, February 21, 2020; Retrieved from:
https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third-party-funding-in-international-arbitration/ on January 31, 2020

[267] *Re Vanguard Energy* Pte Ltd [*2015*] SGHC 156, Retrieved from: http://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/re-vanguard-energy-pte-ltd.pdf on August 20, 2018

[268] 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

[269] Ibid

[270] *Hughes v. Kingston Upon Hull City Council* [1998]EWCA Civ 1731.

its existence. India would do well to have a basic framework governing third party funding and see whether the reception it gets is favourable, before proceeding to develop a full-fledged law and disclosures as well as extending the arbitration agreement to third-parties.

7.3.3 A need to resolve the Seat v. Venue perplexity

The Hon'ble Supreme Court held that the law that was settled in the case of *Hardy Exploration* was bad law.[271] This reopened the seat versus venue debate. The arbitration clause in the case of *BGS SGS Soma v. NHPC* stipulated for the arbitration to be held in New Delhi/Faridabad. The court went on to give a finding that whenever there is an express mention of seat, and there is no other indication whatsoever to suggest otherwise, the venue becomes the seat by default. Therefore, in that particular case, the seat was, *ipso facto* held to be New Delhi. While this finding is an extension of the principle that was laid down in the case of *Brahmani River*, the researcher believes that the reliance on the ratio settled in the case of *Roger Shahshoua* is not well founded due to the fact that in *Roger*, London was meant to be the seat of arbitration after reading the clause in consonance with the ICC rules that were governing the arbitration. There was no designation of London as the venue of arbitration by default. Even otherwise, the Supreme Court could not have overruled the judgement in the case of *Hardy Exploration*, that being a judgement by a bench of similar strength. Subsequently in the case of *Mankastu Impex v. Airvisual Limited*, the Supreme Court again went on to say that just because a place of arbitration is mention it does not ipso facto become the seat of arbitration unless there is another condition in the agreement that shows that it was the intention of the parties to make the place the seat of arbitration. This ruling smacks the ratio laid down in the case of *BGS Soma* in the face. However, *BGS Soma* is not yet overruled and still continues to be good law since it could be argued that *Mankastu* is *per incuriam.* However, until this conundrum surrounding the seat versus venue perplexity is cleared, the need of the hour is to draft arbitration clauses in such a way where there is little scope for judicial interpretation and both seat and venue are clearly

[271] (2019) SCC Online Supreme Court 1585

and explicitly mentioned by the parties. It is usually the litigant that suffers due to such ambiguity in law pertaining to arbitrations in India. What is required is an immediate correction of such ambiguity in the interest of promoting arbitration and bringing it at par with the global mechanisms of dispute resolution.

7.3.4 Lesser intervention by the judiciary

Jurisprudence like in the matter of *NAFED*, which takes a stringent approach is a step back and seems to defeat the legislative intent, the objective of which was to not interfere in the merits of a foreign arbitral award. The *NAFED* award might be seen as encouragement for disputing parties to challenge the enforcement of foreign awards on the grounds of violation of public policy more frequently than ever before. The judgement in the case of *ONGC v. Saw pipes*, is a classic example of how even the smallest of ambiguities in arbitration law, can give birth to maximum judicial interference and that too, to such an extent that an amendment in the entire legislation is required to rectify it. It is a well-established principle in international commercial arbitration that courts, while sitting over a challenge to an arbitral award, ought not to interfere with the subject matter of the award or the merits of the award.

The Singapore High Court in *Government of the Republic of the Philippines v. Philippine International Air Terminals Co, Inc* (2007) has held that an arbitral award cannot be quashed and set aside merely because of a statutory breach of law or because of an incorrect interpretation of law. The reasoning behind this finding came from the interpretation of Section 34 which is in *pari materia* with the Indian arbitration law which does not give the court any power to decide the merits of an arbitral award while sitting in an appeal over the award. This view also finds support in one of the authorities on international arbitration by Greenberg, Kee and Weeramantry.[272] In their book, they agree that Article 34 of the Model Law, from which is incorporated Section 34 in the Indian arbitration law, does not give the court the liberty to reconsider the merits of the

[272] Simon Greenberg, Christopher Kee, J. Romesh Weeramantry; *International Commercial Arbitration: An Asia-Pacific Perspective*, Cambridge University Press, 2011

award. This view is further supported by the Supreme Court of the United States in the matter of *Hall Street v Mattel* (2008), where the court did not agree to a review on the merits of the award even though it was finding place in the contract agreed to between the parties. Even the Indian Supreme Court in *Enercon v Enercon GmBH* (February, 2014) has reiterated the principle of minimal court intervention, which finds place in Section 5 of the Arbitration and Conciliation Act 1996.

The decision of the court in the case of *Western GECO*[273], was contrary not only to the practice adopted in international arbitrations but also ran contrary to the Act. Eventually, arbitration practice was plummeted in a sea of uncertainty and outcomes became unpredictable.

7.3.5 Arbitral Immunity – just on paper?

Granting civil immunity to arbitrators by way of the 2019 Amendment to the Arbitration Act would go a long way in instilling faith in the minds of arbitrators about exercising their powers and carrying out their functions without fear. This would further encourage bright minds and experts in the respective fields to reside as arbitrators in disputes involving complex legal and technical issues without worrying about a sword hanging over their head. Most of the arbitrators in India as well as globally are individuals who are either practising lawyers, retired judges or experts in the field. It is difficult to expect such individuals to defend themselves against a dissatisfied party who wishes to file a claim against an arbitrator because of being aggrieved by an award against his interests. The absence of a well-established law on arbitral immunity in a country like India with maximum pending litigation, can have disastrous effects when the country is trying to encourage Indian seated foreign arbitrations. It can also dissuade a number of arbitrators from taking up appointments while under constant fear of incurring personal civil liability and the wrath of a dissatisfied litigant. The arbitrator would also not be able to apply his mind to the merits of the matter and might not be able to deliver justice while under impending threat of personal liability. Also, personal attacks on arbitrators

[273] *Western GECO Case* (2014) 9 SCC 263

would also lead to an increase in attacks on arbitral awards passed by them which would in turn shake the very foundation of the act and its objective, which is to provide speedy dispute resolution system with a sense of finality. In such a scenario, it is equally important to protect arbitral immunity and to ensure its fairness, transparency, impartiality and independence, as is to protect judges and give them the immunity while they are sitting on the bench. Immunity for arbitrators is undoubtedly necessary for the effective and smooth functioning of the arbitration system in India, but the scope and the standard of care must be carefully scrutinised by Indian courts while dealing with such issues. The courts must be cognizant of the fact that giving arbitrators a free rein might be problematic but at the same time independence and freedom of the arbitral tribunal would ensure transparency and competence. Specific instances like procedural irregularities have to be distinguished from actions taken in bad faith. India needs to adopt a balanced approach while dealing with arbitral immunity. An approach like that would not only be beneficial to disputing parties and arbitrators but it would also greatly benefit the Indian international arbitration system. Foreign parties would not continue to be on tenterhooks while choosing India as a seat for international commercial arbitrations.

7.3.6 Arbitration – Does one size fit all?

On 18th May 2020, Senior Advocate Harish Salve, QC, during a webinar organized by the Mumbai Centre for International Arbitration (MCIA), while speaking of arbitration in India, said that, *"things are definitely better. But when you say that, it is a very relative term of what you mean by better"*. Arbitration in India gathered momentum in the 90s. It was during this time, that the need for a new act was felt, and the Arbitration Act, 1996 came into force. But does 'better' mean that it is enough to achieve the dream of being a favourable arbitration destination on a global platform? Just because the Model Law is applied as the guiding basis behind drafting most of the arbitration acts in the world, it doesn't mean that simply by applying the same in Indian legislation, India can become a favourable destination for international arbitration. One size does definitely not fit all. India needs a legislation keeping in mind the huge population, that

in turn contributes to the extremely high burden of cases in courts. The legislators should not only keep in mind the UNCITRAL Model Law, but also consider other factors that may be relevant to only the Indian scenario.

7.3.7 The long arm of the Government

Given the efforts of Prime Minister Narendra Modi, India has become an attractive destination for foreign investors to park their money. However, due to the uncertainty and roadblocks in the Indian arbitration system, foreign parties are extremely skeptical of choosing India as the seat of arbitration for their disputes. In fact, taking just one example of the MCIA, only 4 international arbitrations were administered by the MCIA in 2020.[274] The amendments in 2015 and in 2019 went a long way in addressing the glaring loopholes in the Indian arbitration system but what remains to be seen is whether that will be enough to put India at par with Singapore and London when it comes to being a favourable arbitration destination. These amendments have certainly given the arbitration regime a facelift, but various other factors like cost, delays, judicial interference, lack of clarity on certain issues, still plague the Indian arbitration ecosystem. The apprehension in the minds of people is whether the Indian arbitration system after these amendments is going two steps backward while trying to go a step forward. Even when the Arbitration and Conciliation (Amendment) Bill 2018 was passed, they had kept loopholes in the bill. The 2019 Amendment Act established an independent body known as the Arbitration Council of India the role of which was similar to that of a regulator. Though it was supposed to be an independent body, the constitution of the Council is such that most of the members are nominated by the Central Government and secretaries from other departments of the government.[275] Such an overreaching approach taken by the Indian government seems to defeat the purpose of passing the bill, the main objective of which was to give a much-needed booster shot to the Indian arbitration system. Such interference by the government in the Arbitration Council of India is undesirable and would shake the faith of foreign parties especially in

[274] Annual Report 2020; Available at: https://mcia.org.in/wp-content/uploads/2016/05/Annual-Report_2020.pdf
[275] Section 43C - Arbitration and Conciliation Act 2019

international investment treaty arbitrations. No other arbitration friendly country in the world has a regulatory body like the Arbitration Council of India which could be one of the reasons why they are arbitration friendly countries.[276] The government is the biggest litigant in India and the government itself having a controlling arm over the Council, strikes at the very root of fairness, transparency and impartiality, which are the pillars of arbitration. Though the intention of the government might have been to regulate and bolster the arbitration system, the composition of the Council raises a few eyebrows. The legislators might do well to change the composition of the ACI or delegate the powers of the ACI to the NDIAC that is set up pursuant to an Act of Parliament.

7.3.8 Change in attitude of the government

The irony is that the governments in India have tried their best to develop a pro-arbitration culture in the country, while the government departments have done their best to destroy the sanctity of arbitrations. It has been experienced by the researcher while arguing cases before the District Courts, High Courts and the Supreme Court that the courts have taken strong views when two major corporate players are fighting in an arbitration and the matter comes to court, but, replacing one of those corporates with a public sector unit suddenly changes the entire scenario and the mindset of the courts. The moment there is a government department or a PSU on the receiving end of a judgement, the sovereignty of the nation would be called into question. Instantly the judgement would dilute the strictness of arbitration because of the government on a probable losing side. This needs to stop. Judges need to decide that if the government, on a policy level, wants to make India a pro-arbitration country, and wants to encourage foreign parties to arbitrate in India, the judges need to have an extremely hands-off approach. In such cases, even if government departments are one of the litigants, the Court needs to point them to the law that is made by the Parliament instead of encouraging such kinds of adventurous tactics. Instances like *Western GECO*[277], where the Hon'ble Supreme Court came up with strange ideas of when an arbitral award could

[276] http://www.nishithdesai.com/fileadmin/user_upload/pdfs/NDA%20In%20The%20Media/Quotes/190110_Q_Experts-wary-of-govt-influence.pdf

[277] (2014) 9 SCC 263

be interfered with, though overruled subsequently, might make the goodwill of Indian-seated arbitrations plummet down several rungs and would plunge arbitrations in India in a sea of uncertainty and vulnerability.

7.3.9 A Move on from Retired Judges

Arbitrators in India typically consist of former judges of the higher judiciary. However, the arrival of international arbitration institutions like the MCIA ensures one thing, which is that the judges would now feel a lot more comfortable dealing with an award which is passed by an institutional arbitration centre of international acclaim, knowing that there would be a certain rigour which would have been applied to the conduct of arbitral proceedings including overseeing the award. However, it has been the norm since decades to have judges appointed as arbitrators and there have been multiple instances where judges appointed by the government are appointed over and over again, which is completely contrary to the spirit of the arbitration legislation and its independent and transparent procedures. In fact, as seen from the results of the survey conducted in Chapter 6 of this study, 80% of the respondents had voted for not being in favour of retired judges as arbitrators for all disputes. By some of the respondents, experienced lawyers were preferred as arbitrators.

On the one hand there is the Parliament coming up with the red, blue and green sections and lists and putting it into the statute, which is not done by any other country, whereas on the other hand, there are the government departments appointing the same person as an arbitrator over and over again. Retired judges are not as familiar with technical laws. The Chief Justice of a Court decides the roster which will be the business before a particular judge. Hence, if a judge is familiar with criminal law, that judge will be mostly deciding bail applications and criminal appeals. However, after retirement, they might be appointed by the High Court in an application under Section 11 in an arbitration that pertains to admiralty law and charter party contracts. It is not the case that none of the judges would be aware of the provisions of admiralty law, but it definitely helps if the arbitrator is well aware of the nuances of the subject matter of arbitration. Therefore, it is all the more important to have an arbitrator who is well

versed with the laws pertaining to the subject matter, so that parties have a greater degree of fairness and complete representation.

Generally, one of the other major reasons for appointment of retired judges as arbitrators in the private sector is that Indian lawyers do not typically prefer appointments as arbitrators. In India, it is observed that there is much more money in advocacy than in sitting as an arbitrator. There is a particular kind of practice that Indian lawyers are used to. In a pool of arbitrators, which gets narrower as preferred arbitrators are appointed, there is naturally going to be a shift towards retired judges, which is one of the structural problems of the Indian arbitration system. It is important that young lawyers take up small arbitrations as arbitrators and things might, over a period of time, change for the better.

Another major factor that can bring about a change in this regard is streamlining the fees that can be charged. However, this seems like a fantasy especially with the entry of foreign lawyers in the Indian arbitration ecosystem. With the arrival of arbitral institutions in India, and inputs of senior lawyers and arbitrators, a shift might take place even though it might take a while. It was observed in the Supreme Court during a hearing dealing with enforcement of an award against a PSU, the bench saying that they would reconsider the *BALCO* judgement. Just because a judgement is too harsh on Indian public sector companies or it takes away too much from the jurisdiction of the courts, does not mean that the law is bad and needs an overhaul. The law is settled, it is well understood and that is the way the system should work in a utopian setting. It needs to be reiterated and clarified that parties are generally disinclined towards Indian-seated arbitrations because of what judges do in the courts and not because of an ill-drafted arbitration legislation that has got loopholes in it. Time and again, Indian lawyers have advised their international clients never to agree to an Indian seated arbitration since there is a huge risk that they run if they get a wrong judge, which is the first step in a very long drawn litigation.

7.3.10 Arbitration in times of Covid – 19

The concept of virtual hearings and the possibility of going digital instead of bulky records has to be debated widely. When asked as to whether bulky records pose a challenge to international commercial arbitration in India, about 44% of the respondents to the questionnaire voted in the affirmative. Virtual hearings would help lawyers sitting in any part of the world conduct cases and arbitrations in India, if such systems and technologies are adopted by the new international arbitration centres on the scene. Even if this is effective in some cases, it would go a long way in promoting virtual hearings especially where merely documents are to be exchanged or judgements or evidence is to be read. It is understandable that not all hearings can proceed entirely through video conferencing. Cross examinations cannot be conducted on a video link and lawyers as well as arbitrators would prefer having the witness in the room while the cross-examination is going on. COVID-19 might as well be the push that comes to shove India towards more cost-effective and speedier arbitrations. Due to the severe economic downturn, there is going to be a lot of expectation from tribunals for swift proceedings and from counsels to offer the most cost-effective options for dispute resolution. Even if virtual arbitral procedure is adopted partially, it can significantly reduce the costs involved in arbitration especially in travel, logistics and physical hearings. In the survey conducted by the researcher, when the respondents were asked a question as to whether they have participated in virtual hearings whether in courts or in arbitrations, 76.2% of the respondents responded in the affirmative. This shows that the Indian legal fraternity is ready to make the shift from paper to digital. If there exists a legal provision within the legislation that encourages parties to opt for virtual hearings, like rules on virtual hearings, it might go a long way in making this transition.

7.3.11 Suggestions for Creating Awareness about Institutional Arbitrations

Arbitral institutions do exist, and that is a fact. The unfortunate part is that unless the litigant is aware of the benefits of the arbitral institutions, the fact that they exist is just a job half done. It can be seen from the results of the survey in Chapter 6 that almost 50% of the respondents have not participated in institution arbitrations ever in their lives.

Certain measures need to be taken for creating awareness about arbitral institutions. Lawyers need to be trained in arbitration and need to be made aware about the benefits of institutional arbitration centres and about the framework that is available to the parties. India has a large number of its population living in rural areas where illiteracy and logistics are a barrier to effective and speedy dispute settlement. In such areas, arbitration can be made more accessible and the procedural aspects of institutional arbitration can be simplified so that it is made available to those for whom accessibility to urban centres would be a problem. Along with promoting Lok Adalats and legal aid clinics, institutional arbitration needs to be given that boost so that all the methods of dispute settlement can work in consonance with each other.[278] It goes without saying that awareness about institutional arbitration does not need to be only for the consumers but also for lawyers and the institutions. Transactions that are based on an incentive can go a long way to make sure that the institution increases its reputation along with the quality of the arbitrators on the panel of the tribunal. The limited judiciary in India is reeling under the pressure of a huge backlog of cases in courts and a complacent system of arbitration that is yet underdeveloped. The coexistence of institutional arbitration and ad hoc arbitration is necessary if India wants to come to par with other international institutional arbitration centres. Even simple availability and accessibility to the masses along with a bit of awareness of the existence of institutional arbitration centres can go a long way in increasing dispute settlement by institutional arbitration thus reducing the burden on courts. Once the framework for institutional arbitration in India develops and is at par with the international standards, a shift might be seen amongst the people preferring institutional arbitration over ad hoc arbitration due to a number of reasons.

The Singapore International Arbitration Centre, on 2nd July 2018, in collaboration with the Faculty of Law (National University of Singapore), launched a module known as "SIAC and Institutional Arbitration".[279] This course is an introduction to the functions of an arbitral institution and gives an overview of the practice of international

[278] Shah and Gandhi, *Arbitration: One Size Does Not Fit All: Necessity of Developing Institutional Arbitration in Developing Countries*, Journal of International Commercial Law and Technology, Vol 6, Issue 4, 2011

[279] https://siac.org.sg/component/registrationpro/event/276/SIAC-and-Institutional-Arbitration-module-at-NUS?Itemid=552

commercial arbitration in Singapore. It also covers other issues such as appointment of arbitrators, the rules governing arbitration proceedings and practice notes that are issued from time to time. This is an example of how an example is to be set, when it comes to educating and creating awareness about the conduct of arbitral proceedings even before students of law have graduated from law school. This module would encompass the practical aspects of international commercial arbitration and students would get a first-hand view of how arbitral proceedings are to be conducted. The SIAC, being one of the premier arbitral institutions in the world, gives by way of this module an insight into the workings of arbitral institutions.

7.3.12 A Dedicated Court for Arbitration

As seen in the preceding chapters, India has a huge backlog of cases and the courts are overburdened with fresh filings every single day. With the pandemic hitting the world in its face, the Indian legal system was one of the worst hit institutions. Courts remained shut throughout despite other businesses and even schools reopening. After the first few months into the pandemic, virtual hearings for urgent cases started. However, the old cases remained in cold storage and kept gathering dust. None of the arbitration matters proceeded for the first few months. However, even before the pandemic hit, the pendency of cases in District Courts was huge, as in seen in the previous chapters. Also, District Courts might often not be able to justify the technical expertise that might be required to deal with specialised arbitration cases. In order to relieve some of the burden on the High Courts and the lower courts, the researcher proposes a dedicated court for deciding arbitral disputes.

In the survey conducted by the researcher, results of which are in Chapter 6 of this study, more than 89% of the respondents are in favour of a special court for deciding arbitral disputes.

With the setting up of a dedicated and exclusive court for arbitration, the role of the lower courts and high courts would be totally eliminated. The parties would then only

have to concern themselves with the special court and the Supreme Court.

7.3.13 The need for two separate legislations

Arbitrations in India are provided for under the act under two different parts. Part 1 deals with domestic arbitrations while part 2 deals with international arbitrations. The researcher believes that it is much more preferable to have two separate enactments, one for domestic arbitrations, which is in a completely different regime and one for international arbitrations instead of clubbing both together under one arbitration act. In fact, it seems that it is because of this reason that both these parts, that are entirely different as per the scheme of things, are provided for under one legislation, that the confusion in the case of *Bhatia International* took place, which was subsequently unravelled in the case of *BALCO*. The Hon'ble Supreme Court in the case of *BALCO* said that both these parts are entirely distinct because it is based on the principle of territoriality, and it caused enormous harm to the reputation of India as not being an arbitration friendly jurisdiction. It was only after the clarification in *BALCO*, that things took a turn for the better. However, even today, odious comparisons are made between Part 1 and Part 2, which has led to confusion. Favourable arbitration destinations like Singapore and other common law countries have completely separate legislations for domestic and international arbitrations. India also would do better by having one act specifically for domestic arbitrations and one separate legislation for the enforcement of foreign awards. These thoughts were also echoed by Justice Indu Malhotra, Judge of the Supreme Court of India, in her talk on 'Recognition, Enforcement and Execution of Foreign Awards' on April 24, 2020. Further in a study that was conducted, 65% of the respondents to the questionnaire in Chapter 6 are of the view that a separate legislation is required for international commercial arbitration in India.

7.4 A proposed solution – a ray of hope

The following are the suggestions of the researcher for revamping the arbitration framework in India-

1. There is a requirement of a separate law for international commercial arbitration in India.

2. Institutional arbitration has to be encouraged for it to find a place in arbitration agreements between parties.

3. Rules pertaining to arbitral immunity and third-party funding need to be formed to bring Indian arbitral institutions at par with SIAC and LCIA.

4. There needs to be a move on from retired judges as arbitrators for all disputes and a specialised pool of arbitrators needs to be formulated.

5. Indian courts need to restrict themselves to a narrow interpretation of 'public policy' when it comes to enforcement of foreign awards under Section 48 of the Arbitration and Conciliation Act, 1996.

6. Timelines need to be introduced for international commercial arbitrations in India.

7. A dedicated and exclusive court for deciding disputes arising out of arbitral proceedings needs to be set up in order to deal with the huge pendency of cases in regular courts.

In order to achieve these objectives and bring about these changes, a model **'International Commercial Arbitration Act, 2021'** is proposed by the researcher.

7.5 The International Arbitration Act 2021

ARRANGEMENT OF SECTIONS

CHAPTER 1

PRELIMINARY

Sections

CHAPTER 2

INTERNATIONAL COMMERCIAL ARBITRATION

CHAPTER 3

THE COURT FOR ARBITRATION

CHAPTER 4

PRE-MEDIATION AND APPEALS

CHAPTER 5

MISCELLANEOUS

THE INTERNATIONAL ARBITRATION ACT 2021

ACT NO. 1 OF 2021

[January 1, 2021]

An Act providing for the conduct of international commercial arbitration and enforcement of foreign arbitral awards and for matters connected therewith.

PREAMBLE

WHEREAS the United Nations Commission on International Trade Law (UNCITRAL) has adopted the UNCITRAL Model Law on International Commercial Arbitration in 1985:

AND WHEREAS the General Assembly of the United Nations has recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice;

AND WHEREAS the General Assembly of the United Nations has recommended the use of the said Rules in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation;

AND WHEREAS the said Model Law and Rules make significant contribution to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations;

AND WHEREAS it is expedient to make law respecting arbitration taking into account the aforesaid Model Law;

AND WHEREAS the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, also known as the New York Convention, has laid down

guidelines for enforcement of foreign awards to encourage recognition and enforcement of awards in the greatest number of cases as possible;

Be it enacted by the Parliament in the Seventy-second year of the Republic of India as follows –

CHAPTER 1
PRELIMINARY

1. **Title, extent and commencement** – (1) This Act may be called International Arbitration Act 2021.

   (2) It extends to the whole of India.

   (3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. **Definitions** – (1) In this act, unless the context otherwise requires,

   (a) "international commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is—

   (i) an individual who is a national of, or habitually resident in, any country other than India; or

   (ii) a body corporate which is incorporated in any country other than India; or

   (iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or

   (iv) the Government of a foreign country;

   (b) 'Court' means the Court of Arbitration as constituted under Section 14 of the Act

   (c) 'arbitral award' includes an interim award;

(d) ‘arbitral tribunal’ means a sole arbitrator or a panel of arbitrators;

(e) ‘party’ means a party to an arbitration agreement.

(f) ‘foreign award’ means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960—
(a) in pursuance of an agreement in writing for arbitration to which the New York Convention set forth in the First Schedule applies, and
(b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

(g) ‘New Delhi International Arbitration Centre’ means the arbitration institution set up by the New Delhi International Arbitration Centre Act 2019.

3. **Appointment of Arbitrator** - (1) In cases of ad-hoc arbitration, the Court of Arbitration in the respective State in which the claim is brought, shall be taken to have been specified in Section 14 and shall appoint an arbitrator within 30 days of the filing of the claim.

(2) In cases of institutional arbitrations, the President of the New Delhi International Arbitration Centre shall appoint an arbitrator within 30 days of the filing of the claim.

(3) The Chief Justice of India, may, if he thinks fit, by notification published in the Gazette, appoint any other person to exercise the powers of the President of the Court of Arbitration of the New Delhi International Arbitration Centre under subsection (2).

(4) Notwithstanding anything contained in Chapter 3, in arbitrations with even

number of parties, and where the arbitrator and number of arbitrators are not specified in the arbitration agreement, each party shall appoint one arbitrator, and the arbitrators shall by agreement appoint one presiding arbitrator.

(5)Notwithstanding anything contained in Chapter 3, in arbitrations with odd number of parties, and where the arbitrator and number of arbitrators are not specified in the arbitration agreement, the appointment of the tribunal shall be by the appointing authority under sub-section (1) or (2) of this Section as may be applicable.

(6) Where the arbitrators fail to agree on the appointment of the presiding arbitrator, within 30 days after the receipt of the first request by either party to do so, the appointment shall be made, upon the request of a party, by the appointing authority as specified in sub-section (1) or (2).

4. **Powers of the Tribunal** – (1) The arbitral tribunal shall have all the powers that are ordinary vested with the Civil Court of the district having territorial jurisdiction over the subject matter. This includes but is not limited to make orders or give directions to any party for —

(a) security for costs;

(b) discovery of documents and interrogatories;

(c) giving of evidence by affidavit;

(d) the preservation, interim custody or sale of any property which is or forms part of the subject-matter of the dispute;

(e) samples to be taken from or any observation to be made of or experiment conducted upon, any property which is or forms part of the subject-matter of the dispute;

(f) the preservation and interim custody of any evidence for the purposes of the proceedings;

(g) securing the amount in dispute;

(h) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party;

(i) an interim injunction or any other interim measures

(j) enforcing any obligation of confidentiality —

(i) that the parties to an arbitration agreement have agreed to in writing, whether in the arbitration agreement or in any other document;

(ii) under any written law or rule of law; or

(iii) under the rules of arbitration (including the rules of arbitration of an institution or organisation) agreed to or adopted by the parties.

(2) An arbitral tribunal shall, unless the parties to an arbitration agreement have (whether in the arbitration agreement or in any other document in writing) agreed to the contrary, have power to administer oaths to or take affirmations of the parties and witnesses.

(3) An arbitral tribunal shall, unless the parties to an arbitration agreement have (whether in the arbitration agreement or in any other document in writing) agreed to the contrary, have power to adopt if it thinks fit inquisitorial processes.

(4) The power of the arbitral tribunal to order a claimant to provide security for costs as referred to in subsection (1)(a) shall not be exercised by reason only that the claimant is —

(a) an individual ordinarily resident outside India; or

(b) a corporation or an association incorporated or formed under the law of a country outside India, or whose central management and control is exercised outside India.

(5) Any order made under this section by the arbitral tribunal shall be ordinarily enforceable as a decree of the Civil Court.

5. **Public policy and arbitrability** – For the purposes of this Act, all disputes that are referred to in the arbitration agreement shall be deemed to be arbitral disputes unless contrary to public policy.

6. **Contents of arbitral award** – (1) The arbitral award shall be in writing.

(2) The arbitral award shall bear the signatures of all the arbitrators.

(3) The arbitral award shall state reasons for the decision in detail.

(4) The arbitral award shall be handed over to the parties on the same day on which it is made.

(5) If the arbitral award suffers from any of these defects, it shall not render the award invalid or null. The defects have to be cured within a period of 45 days of the making of the award after which it will be enforceable as a decree of the civil court.

(a) Nothing in this Section shall prevent the claimant from filing for enforcement in the court of law. However, such application shall be decided only after the requirements in sub-sections (1) to (4) have been complied with.

7. **Preliminary Award** – (1) The arbitral tribunal shall have the power to pass any preliminary award for issuing directions to any of the parties that do not decide the rights of the parties.

(2) An order passed under sub-section (1) shall be final and no appeal from such order shall lie to the Court.

8. **Interim Award** – (1) A party may, during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced, apply to the arbitral tribunal—

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:—

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid

purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient, and the arbitral tribunal shall have the same power for making orders, as the Court has for the purpose of, and in relation to, any proceedings before it.

(2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be an interim award and shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were an order of the Court.

9. **Enforcement of Award** – (1) Notwithstanding anything contained in any other law for the time being in force, the Court shall enforce the arbitral award as a decree of the civil court unless—

(a) the making of the award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced; or

(c) the parties were under some incapacity under the law governing the arbitration agreement; or

(d) the arbitration agreement is not valid under the law governing the arbitration agreement; or

(e) the award is violative of the public policy of India; or

(f) the award is beyond the scope of the arbitration agreement

10. **Arbitral Immunity** – (1) The appointing authority, or an arbitral or other institution or person designated or requested by the parties to appoint or nominate an arbitrator, shall not be liable for anything done or omitted in the

discharge or purported discharge of that function unless the act or omission is shown to have been in bad faith.

(2) The appointing authority, or an arbitral or other institution or person by whom an arbitrator is appointed or nominated, shall not be liable, by reason only of having appointed or nominated him, for anything done or omitted by the arbitrator, his employees or agents in the discharge or purported discharge of his functions as arbitrator.

(3) This section shall apply to an employee or agent of the appointing authority or of an arbitral or other institution or person as it applies to the appointing authority, institution or person himself.

11. Timelines – (1) The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference.

Explanation.— For the purpose of this sub-section, an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment.

(2) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.

(3) The parties may, by consent, extend the period specified in sub- section (1) for making award for a further period not exceeding six months.

(4) If the award is not made within the period specified in sub- section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period:

Provided that while extending the period under this sub-section, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s)

(5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.

(6) While extending the period referred to in sub-section (4), it shall be open to the Court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.

(7) In the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.

(8) It shall be open to the Court to impose actual or exemplary costs upon any of the parties under this section.

(9) An application filed under sub-section (5) shall be disposed of by the Court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of 30 days from the date of service of notice on the opposite party.

12. **Res Judicata** – If the subject matter of the arbitration agreement between the parties has already been decided by a court of law or by any other arbitral tribunal, the claimant shall be estopped from raising the same dispute again.

13. **Rules on Virtual Hearings** – (1) The arbitral tribunal shall endeavour to reduce the use of paper and shall give an option to the parties to submit pleadings in electronic form.

(2) The arbitral tribunal shall only conduct physical hearings for examination of witnesses and final submission of arguments or if it deems necessary or in any other case.

(3) In case the arbitration is to be conducted virtually by mutual consent of parties, the arbitral tribunal shall record the proceedings and make them available to the parties along with a copy of the arbitral award.

(4) For all virtual hearings, exchange of documents has to take place between the parties and the tribunal not less than 48 hours prior to the date of hearing so fixed by the arbitral tribunal. Each document so exchanged shall bear the digital

signature of the receiving party.

14. Confidentiality of Proceedings – (1) Notwithstanding anything contained in any other law for the time being in force, the arbitral tribunal and the parties shall keep confidential all matters relating to the arbitral proceedings. Confidentiality shall extend also to the award, except where its disclosure is necessary for purposes of implementation and enforcement.

(2) The disclosure of arbitral proceedings can be permitted for legal duties, for protection of a legal right, or in furtherance of actions in arbitral proceedings.

(3) The obligation of confidentiality in sub-section (1) also extends to all those persons privy to such information in arbitral proceedings including but not limited to experts and witnesses appearing before the tribunal.

CHAPTER 3
THE COURT OF ARBITRATION

15. Constitution of the Court – (1) In all High Courts, having ordinary original civil jurisdiction, the Chief Justice of the High Court may, by order, constitute a Court of Arbitration having one or more Benches consisting of a division bench for the purpose of exercising the jurisdiction and powers conferred on it under this Act.

(*2*) The Chief Justice of the High Court shall nominate such Judges of the High Court who have experience in dealing with commercial disputes to be Judges of the Court of Arbitration.

16. Jurisdiction of the Court – (1) The Court of Arbitration shall have jurisdiction to try all suits and applications relating arbitral proceedings arising out of the entire territory of the State over which it has been vested territorial jurisdiction.

17. Limited powers of the Court – Notwithstanding anything contained in any other law for the time being in force, the Court shall not entertain an application filed by a party unless -

(a) the arbitral tribunal has no power to grant such relief;

(b) the application arises out of an appeal against an award of the arbitral tribunal

CHAPTER 4
PRE-MEDIATION AND APPEALS

18. Mandatory Pre-Mediation - (1) A claim, which does not contemplate any urgent interim relief under this Act, shall not be instituted unless the claimant exhausts the remedy of pre- institution mediation in accordance with such manner and procedure as may be prescribed by rules made by the Central Government.

(*2*) The Central Government may, by notification, authorise the Authorities constituted under the Legal Services Authorities Act, 1987 (39 of 1987), for the purposes of pre-institution mediation.

(*3*) Notwithstanding anything contained in the Legal Services Authorities Act, 1987 (39 of 1987), the Authority authorised by the Central Government under sub-section (*2*) shall complete the process of mediation within a period of 2 months from the date of application made by the plaintiff under sub-section (*1*):

Provided that the period of mediation may be extended for a further period of one month with the consent of the parties:

Provided further that, the period during which the parties remained occupied with the pre-institution mediation, such period shall not be computed for the purpose of limitation under the Limitation Act, 1963 (36 of 1963).

(*4*) If the parties to the arbitration arrive at a settlement, the same shall be reduced into writing and shall be signed by the parties to the dispute and the mediator.

(*5*) The settlement arrived at under this section shall have the same status and effect as if it is an arbitral award on agreed terms under Section 8.

19. Appeals – (1)An appeal from any order passed by the arbitral tribunal (except awards under section 7) shall lie only to the Court of Arbitration.

(2)An appeal from any order passed by the Court of Arbitration shall lie only to the Supreme Court.

(3) Such appeal shall be filed in the registry of the Court of Arbitration or the Supreme Court as the case may be, in not less than 30 days from the date of notice of the order that is sought to be challenged after supplying an advance copy of the appeal to the other party.

CHAPTER 5
MISCELLANEOUS

20. Power of the Central Government to issue directions - The Central Government may, by notification, issue practice directions to supplement the provisions of Chapter 2, 3 and 4 of this Act insofar as such provisions apply to the conduct or arbitral proceedings or the constitution or powers of the Court of Arbitration.

21. Repeal and Savings - (1) Part 2 of the Arbitration and Conciliation Act 1996 is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the said Act, shall be deemed to have been done or taken under the corresponding provisions of this Act.