A study on

"International Commercial Arbitration in India: Challenges and Opportunities"

A synopsis submitted to
The Maharaja Sayajirao University of Baroda
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Contents: **Page No.**

1. Introduction

Arbitration, a form of alternative dispute resolution (ADR), is a technique for the resolution of disputes outside the courts, where the parties to a dispute refer it to one or more persons (the "arbitrators", "arbiters" or "arbitral tribunal"), by whose decision (the "award") they agree to be bound. It is a resolution technique in which a third party reviews the evidence in the case and imposes a decision that is legally binding for both sides and enforceable. Other forms of ADR include mediation (a form of settlement negotiation facilitated by a neutral third party) and non-binding resolution by experts. Arbitration is often used for the resolution of commercial disputes, particularly in the context of international commercial transactions. The use of arbitration is also frequently employed in consumer and employment matters, where arbitration may be mandated by the terms of employment or commercial contracts[1].

Indian economy is expected to grow faster than other major emerging economies, projecting a growth rate of 7.5 per cent for India in 2016 as against China's 6.3 per cent[2]. As it continues to prosper, the country is seeing increasing levels of inbound and outbound M&A activity. Similarly, the number of commercial disputes in India has also risen. While in the US and 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 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.[3]

Another way in which many Indian corporates are acting in order to avoid being entrenched in the legal system in India is to look overseas. Indian entities are more frequently looking to other jurisdictions for a remedy when an investment or contract

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1 O'Sullivan, Arthur; Sheffrin, Steven M. (2003). *Economics: Principles in Action*. Upper Saddle River, New Jersey: Pearson Prentice Hall. p. 324

2 IMF, World Economic Outlook Update, July 2015

3 R. Ghosh, "*Commercial Disputes in India*", Kroll Vol. 9 Issue 3, 2011

encounters difficulty and often opt to have an arbitration clause in their contract to hold proceedings on foreign shores – the preferred venue being the Singapore International Arbitration Centre.

Arbitration, though seemingly a fancy new term for adjudication of disputes, it has existed since time immemorial. Though not in its present form, arbitration has found place even in the Aesop's Fables.

As children, we have all grown up listening to stories by our grandmothers of how two cats fighting over a piece of cheese, referred the matter to a neutral arbitrator in the form of a monkey. However, in that case, the 'arbitrator' devoured the entire subject matter of the dispute for his own benefit, which led to the framing of present arbitral laws over a period of time that lay down the principles governing the code of conduct for arbitrators.

Regulation of the conduct of arbitration has a long history in India. The first direct law on the subject of arbitration was the Indian Arbitration Act, 1899; but, its application was limited to the Presidency towns of Calcutta, Bombay and Madras. This was followed by the Code of Civil Procedure, 1908 where the Second Schedule was completely devoted to arbitration.

The first major consolidated legislation to govern the conduct of arbitrations across the country was the Arbitration Act, 1940 which was based on the (English) Arbitration Act, 1934. The Act repealed the Arbitration Act, 1899 and the relevant provisions in the Code of Civil Procedure, 1908, including the Second Schedule thereof. The 1940 Act, however, did not deal with enforcement of foreign awards, and for which purpose, the legislature had passed the Arbitration (Protocol and Convention) Act, 1937 to deal with Geneva Convention Awards and the Foreign Awards (Recognition and Enforcement) Act, 1961 to deal with New York Convention Awards. The working of the 1940 Act, which dealt with domestic arbitrations, was far from satisfactory. The arbitral regime at that point of time was premised largely on a mistrust of the arbitral process, and the

same was the subject of much adverse comment by the courts.

The Supreme Court in *F.C.I. v. Joginderpal Mohinderpal*[4], at para 7 observed –

"We should make the law of arbitration simple, less technical and more responsible to the actual realities of the situation, but must be responsive to the canons of justice and fair play and make the arbitrator adhere to such process and norms which will create confidence, not only by doing justice between the parties, but by creating a sense that justice appears to have been done."

Several other cases adversely commented upon the working of the 1940 Act. The anguish of the Supreme Court is evident from the observations of D.A. Desai J. in *Guru Nanak Foundation v Rattan Singh*[5] :

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

The working of the 1940 Act was also the subject of the 210th Report of the Public Accounts Committee of the Fifth Lok Sabha. The Law Commission of India also examined the working of the 1940 Act in its 76th Report.

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4 (1989) 2 SCC 347

5 (1981) 4 SCC 634

The problem became more acute and pronounced after the liberalisation of the economy in 1991. Foreign investors required a stable business environment and a strong commitment to the rule of law, based on a predictable and efficient system of resolution of disputes. Thus, alternative systems like arbitration were seen as a prerequisite to attract and sustain foreign investment.

In order to address these problems, the earlier regime was sought to be replaced by the Arbitration and Conciliation Bill, 1995, which was introduced in Parliament. Since the requisite legislative sanction could not be accorded to the 1995 Bill, the President of India promulgated the Arbitration and Conciliation Ordinance, 1996 on the same lines as the 1995 Bill. Interestingly, the Ordinance had to be promulgated twice because Parliament could not enact the law in the required time period. Finally, Parliament passed the Bill in terms of the Arbitration and Conciliation Act, 1996 (hereinafter "the Act") which received the assent of the President of India on 16.08.1996 and came into force on 22.08.1996. However, it was made applicable to cases where the arbitral proceedings commenced as of 25.01.1996.

The 1996 Act is based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 and the UNCITRAL Conciliation Rules, 1980. The 1996 Act repealed all three earlier laws (the 1937 Act, the 1940 Act and the 1961 Act as set out above) and applied to (i) domestic arbitrations; (ii) enforcement of foreign awards; and (iii) conciliations. Although the UNCITRAL Model Law was intended to provide a model law to deal with international commercial arbitrations; in the 1996 Act, the UNCITRAL Model Law provisions, with some minor modifications, are made applicable to both domestic and international commercial arbitrations.

The UNCITRAL Model Law (a set of 36 Articles) was drafted to govern all international arbitrations by a working group of the United Nations and finally adopted by the U.N. Commission on International Trade Law (UNCITRAL) on June 21st, 1985. The Resolution of the UN General Assembly envisages that all countries should give due consideration to the Model Law, in view of the desirability of uniformity of the law on arbitral procedures and the specific needs of international commercial practice. This

is also duly reflected in the Preamble of the Act of 1996 saying that: "it is expedient to make law respecting arbitration and conciliation, taking into account the aforesaid Model Law...".[6]

Before the Arbitration and Conciliation (Amendment) Act, 2015 came into force, the Supreme Court had, on numerous occasions, dealt with cases pertaining to arbitration and in *ONGC vs. Saw Pipes*[7], the court added "patent illegality" as a separate head under the public policy exception, which led to eventually allowing courts to revisit the merits of an already decided dispute by the tribunal. Further, in the judgment rendered in the case of *Bharat Aluminum Company*[8], though appreciated widely since it was a pro-arbitration judgment and it helped streamline Indian arbitral jurisprudence, the previous judgment of the court in the case of *Bhatia International*[9], was overruled by the court and the applicability of Part 1 of the Arbitration and Conciliation Act, 1996 was limited in the context of the power to grant interim relief in foreign arbitrations seated outside India by courts in India. The Arbitration and Conciliation (Amendment) Act 2015 is largely based on the recommendations of the 246th Report of the Law Commission of India. The President has promulgated the Ordinance and it then became the Arbitration and Concoliation Amendment Act 2015, and subsequently the Arbitration and Concoliation Amendment Act 2019. Many of the changes are welcome and can provide a significant impetus to improving the culture of arbitration in India. If implemented purposively, these amendments will serve to make arbitration in India more efficient and better aligned with international standards.

Subsequently, on August 9, 2019, the President of India gave his assent to the amendments to the Arbitration and Conciliation Act, 1996 and the same have been published in the Official Gazette of India. One of the key amendments to the Act was to the effect of the 2015 Act on arbitral proceedings having commenced before the commencement of the Act. It had been clarified that unless the parties to the arbitral proceedings otherwise agree, the amendments made to the Act by the Arbitration and

[6] 246th Report of the Law Commission of India
[7] https://indiankanoon.org/doc/919241/
[8] https://indiankanoon.org/doc/173015163/
[9] https://indiankanoon.org/doc/110552/

Conciliation (Amendment) Act, 2015 will not be applicable to the proceedings having commenced prior to the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 i.e., October 23, 2015. This annulled the position of law laid down by the Hon'ble Supreme Court in BCCI v. Kochi Cricket Private Limited. However, the Hon'ble Supreme Court struck down Section 87 and restored the position as it was in the judgment delivered in the case of 'BCCI'[10]. The 2019 Amendment also introduced Part 1A to the Act, which is titled as 'Arbitration Council of India' and which empower the Government to establish a Council by a notification in the official gazette. One of the main flaws of this scheme is that it curtails party autonomy in international commercial arbitration through interference by both, the government as well as the court. The Council is a government body that controls the institutionalization of arbitration in India and frames the policy for grading such institutions. Undisputedly, the court's choice in designating an arbitral institution will be limited to the options that are put to it by the Council. Hence, the choice of a foreign party appearing before the Supreme Court and seeking appointment of an arbitrator will be limited to institutions which have the accreditation of the Council and to such arbitrators who find themselves on the panel of such institutions.

To make India a hub of international commercial arbitration, the government needs to make concentrated efforts. Some efforts are also required on the part of the legal fraternity and the business community in India. Multinational companies/foreign companies will only pick India as a preferred destination for arbitration if the environment for conducting international arbitrations in India is corporate-friendly. Mere amendments to the law governing international commercial arbitration in India, is not going to help. Corporates in India and the full support of the legal fraternity is required, which cannot only be achieved on the basis of nationalist sentiments or patriotism but on the basis of practical criteria and the efficiency of the Indian justice delivery system. These and many other problems have led to this study.

[10] Hindustan Construction Company Limited & anr. v. Union of India; Writ Petition (Civil) No. 1074 of 2019

Hence, the title of this research is as follows:

A Study on International Commercial Arbitration in India: Challenges and Opportunities

2. Rationale of the study

The Rationale of the Study is as below -

In an economically liberalising regime, there is an underlying need to have a commercial dispute resolution law, which brings about cross- border uniformity in dispute resolution procedure. As judicial systems in different countries are dissimilar and fraught with their own peculiarities, it is a complex matter to imbibe within the judicial system a cross-border uniform procedural code for adjudication of commercial disputes.

This impediment can be overcome by adopting an alternate forum for commercial dispute resolution. Enacting a standardised arbitral procedural code is one such mechanism whereby a foreign investor is not thrown into unfamiliar territory when a legal dispute arises. However, the uniformity only continues so long as the law is interpreted in accordance with its international meaning and interpretation of the law is in consonance with accepted international norms and understandings. Since adroitness is a known devil of advocacy, very often brilliant and baffling legal defences are taken up to throw the arbitration mechanism into a tailspin.

The law governing arbitration needs to be revamped to bring about major changes pertaining to speedier and more cost-effective adjudication of disputes. The Arbitration and Conciliation (Amendment) Act 2015 aimed to amend the Arbitration and Conciliation Act 1996 which was further amended by the 2019 Amendment Act. The effect of the 2019 Act is necessary to be examined keeping in mind the rise of international arbitration amongst Indian multinationals. The approach taken by international parties towards choosing India as the seat of arbitration depending largely on the level of interference by the courts in matters that are the subject matter of an

arbitration agreement.

The Arbitration and Conciliation Act 1996, being amended by the Arbitration and Conciliation (Amendment) Act 2015 and then the Arbitration and Conciliation (Amendment) Act 2019, has not been the subject of any comprehensive research till date. With an increase in the presence of arbitration clauses in commercial contracts, it is important to examine whether the existing statute is sufficient to address the concerns of the international community. The absence of effective and popular national level arbitration institutions in India along the lines of SIAC, CIETAC and LCIA is felt more than ever. However, though arbitration seems all gold, the fact that increasing costs and consumption of time are leading parties to incline away from the ADR methods, cannot be denied.

Thus, the researcher has taken this topic mainly because of the following:-

1. What is the reason behind India not being a favorable arbitration destination?

2. What will be the significance of the Arbitration and Conciliation (Amendment) Act 2015 and the Arbitration and Conciliation (Amendment) Act 2019, in the light of India not being a favourable arbitration destination?

3. Does the Arbitration and Conciliation (Amendment) Act 2019 still suffer from lacunae that can harm the main object behind its framing?

4. Do the Indian Courts continue to instill faith in foreign parties by creating a trust-worthy enforcement regime?

5. What are the measures that can be taken apart from legislative reforms to make India a favourable destination for international arbitration like Singapore and London?

6. What is the perception of lawyers and arbitrators as regards the amended arbitral law of 2019 and what are their opinons on the Act of 2019?

3. Object of the study

The object of the study is as below -

Length of arbitration is 569 days in India and recognition and enforcement proceedings take 1,654 days.[11]

The main purpose of this research is to examine the existing arbitral framework in India with respect to International Commercial Arbitration and to analyse the challenges faced by India in attracting investors and parties to a commercial contract to settle disputes in India. This requires a solid faith in the Indian arbitral framework, which in turn requires a solid legal base to adjudicate such disputes. The Arbitration and Conciliation Act 1996 was a much needed law that was brought into force at that time. However, changing attitudes and changing contractual terms require a dynamic law that can supplement the existing framework. An evolution in the form of the Arbitration and Conciliation (Amendment) Act 2015 further amended by the Act of 2019, came into the picture with a promise to strengthen the diminishing faith of international parties in Indian arbitral laws and Indian courts.

The researcher has conducted the study with the following objectives:

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

6.2 To examine the main concerns in the 1996 Act the changes suggested by the

11 FDI Regulations Database, 2012

246th Report of the Law Commission and whether the 2015 and 2019 Acts have managed to address and incorporate all of them.

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

6.4 To examine the effect of the 2015 Act and the 2019 Act on international agreements and India as a favourable arbitration destination.

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

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

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

6.8 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.

6.9 To examine judicial pronouncements by Indian courts while interpreting the Act of 2019.

6.10 To take into account the opinions of lawyers and arbitrators as to what still lacks in the amended arbitration act and their suggesstions in conducting party-friendly arbitrations with least judicial interference.

4. Scope and Delimitation of the study

The scope of the study extends to determination of the fact as to whether the Arbitration

and Conciliation (Amendment) Act 2019 will be enough to plug the loopholes in the existing Arbitration regime. The focus of the study will be on intervention of the courts in cases that are the subject matter of an arbitration agreement.

The study will include an analysis of the existing law and compare it with the Arbitration and Conciliation (Amendment) Act 2019 to ensure that sufficient measures have been taken to reduce interference by the Courts.

The research has been limited to the effect and signification of the Act of 2015 and then the Act of 2019, in India, but will take into account the efficiency of Arbitral laws around the world vis-à-vis India. Arbitration practice in party friendly jurisdictions like Singapore and London forms a part of the study. The study is hence limited by the numerous amendments that are implemented on the basis of recommendations of the 246th report of the Law Commission.

5. Hypothesis of the Study

The research was conducted on the basis of the following hypotheses:

8.1 Arbitration has emerged as the most preferred alternative mechanism for dispute resolution in India as well as around the world.

8.2 The need for arbitration will only increase with time, requiring the law to be continually brought at par with the then requirements.

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

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

8.5 Despite having provisions relating to international commercial arbitration, India

is not a preferred place for international arbitration.

8.6 The amendment in the form of the Arbitration and Conciliation (Amendment) Act 2015 and the subsequent amendment of 2019 will hopefully bolster several inept provisions of the earlier law.

8.7 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.

6. Research Methodology

The present study is a doctrinal as well as non-doctrinal study. The foundation of the study rests on amendments in the Arbitration and Conciliation Act 1996. Hence, an analysis of certain statutory provisions is necessary. Judicial precedents back these statutory provisions, and in certain cases, by way of judicial activism, fill a gap in the statute as regards interpretation.

Not only this, but research conducted by various international scholars and legal luminaries will be examined in detail while conducting the study. International opinion and approach towards arbitration plays a major role in forming a sovereign nation's own laws, as is the case in the Act of 1996 being based on the UNCITRAL Model Law.

For the vast amount of qualitative and quantitative data that is collected during the course of the research, graphs and tabular images will be used to analyse how to paint a bigger picture of the arbitral scenario in India and the developed countries. Such techniques are useful for reducing and/or guiding analysis of large amounts of text, although these approaches result in a lot of detail and require piecing together interpretations from multiple, distinct reports.

Sources for the research will be in the form of international journals on arbitration,

books, articles by scholars and eminent legal minds, judicial precedents and the 246th Report of the Law Commission, which was the driving force behind the instant Act.

Sources will also include opinions of arbitrators in India and lawyers practising arbitration in India which will be collected in the form of responses to questionnaires.

The non-doctrinal part of the study would involve the preparation of a questionnaire and collecting responses from the target individuals in the field. The questionnaire uses a sampling method known as purposive sampling since the target audience comprises only of lawyers and judges involved in arbitration. This would not only help give an insight into the current trends in arbitration but also help with formulating a solution taking into account multiple suggestions and criticisms concerning the existing framework for arbitration in India.

7. Review of Related Literature

The researcher has gone through several books, articles, regulations, legislation, Acts and journals, etc.

The researcher has also taken the aid of the full online database of the National University of Singapore. This includes journals, articles and papers by eminent jurists and academicians.

2.1 Gaurav Mohanty (2019), in an article titled "Bombay High Court on the Rights Available under the Arbitration and Conciliation Act if the seat of Arbitration is London" has critically analysed the judgment of the Bombay High Court in *Prysmian Cavi E Sisteni S.r.l. v. Viiay Karia* and has examined whether pursuing a London seated arbitration would deprive an award debtor of its right to resist an award on jurisdictional grounds under Section 48 of the Arbitration and Conciliation Act. It also examines the English Law since in English Law, the number of challenges that are provided to an arbitral process are more than those provided under any other jurisdiction having adopted the New York Convention, 1958.

2.2 Krishan Singhania, Alok Vajpeyi (2019), in "Assignment in Arbitration: Scope and Issues in India" has discussed the question as to whether the right to arbitrate can be transferred through assignment to some other party. In this context, the author has discussed the judgment in *DLF Power Limited v. Mangalore Refinery & Petrochemicals Ltd. & Ors.* The judgment weighs on the conclusion that the arbitration clause does not take away the right of assignment of a party to a contract if it is otherwise assignable.

The researcher has also gone through various enactments for comparative study and their impact on arbitration Law in India as well as variations from arbitration law in India.

The literature review points towards an indication that though India is witnessing an increase in commercial disputes being adjudicated through arbitration, much needs to be done in order to create a solid framework to strengthen the faith of disputing parties in the Indian legal system. Judicial decisions need to be reviewed with time and amendments in legislature are necessary to effect such change. None of the existing literature does much to highight what exactly is the solution to bring India to the forefront when it comes to being a favourable arbitration destination. Hence this study proposes to analyse the laws and judicial decision on arbitration laws and to suggest changes to make our arbitration system in tune with the present global requirements.

2.3 Kunal Kumar (2018), in "Impact of Assignment and Novation on Arbitration Agreements" discusses the attitude of Indian Courts post the judgment in *BALCO* and the applicability of Part 1 of the Act to foreign seated arbitrations, when faced with an action in a matter in respect of which the parties have made an agreement referred to in Section 44 and the reference to arbitration unless the said agreement is null and void, inoperative, or incapable of being performed.

2.4 Anchal Jain (2018), in "Resolving the Issues Arising from Emergency Arbitration" discusses the new concept of emergency arbitration in India and the provisions

pertaining to emergency arbitration under the International Chamber of Commerce (ICC) rules, UNCITRAL Model Law and the rules thereunder and the provisions laid down in the Singapore International Arbitration Centre Rules 2016. The author considers the impact of the enforceability of an emergency arbitral award in a hypothetical situation wherein the above mentioned provisions in the rules would have been made a part of the Arbitration Act, thereby limiting the jurisdiction of the Court to deal with the matter of interim measures in detail.

2.5 Soham Banerjee (2018), in "Breaking New Ground: The Impact of BCCI v. Kochi Cricket Pvt. Ltd. on the Arbitral Regime in India" has dissected the decision of the division bench of the Hon'ble Supreme Court regards to nature of the amended Act holding it to be prospective in operation and holding its applicability to both arbitral proceedings initiated on or after the commencement of the Amendment Act and even to court proceedings in relation to arbitral proceedings initiated on or after the Amendment Act having come into force.

2.6 Sneha Bhawnani and Swatilekha Chakraborty (2017), in "Supreme Court on the Independence and Impartiality of Arbitrators" speak about the wherein the Hon'ble Supreme Court's judgment in the case of *Voestalpine Scheinen GmBH v. Delhi Metro Rail Corporation Limited* was discussed and key aspects of the independence and impartiality of arbitrators to make arbitration more effective and efficacious were delved into.

2.7 Gursharan Virk (2017), in "The McDermott – the Scope of Interference under Section 34 of the Arbitration Act" discusses the decision of the Hon'ble Supreme Court in *McDermott International Inc. v. Burn Standard Co. Ltd. & Ors.* Wherein it was held that the court cannot correct errors of the arbitrator, but it can only quash the award leaving the parties free to begin the arbitration again if desired. The author also discusses about the judgment of the Gujarat High Court in cross appeals filed by Simplex Industries Ltd. and Gujarat Mineral Development Corporation Limited under Section 37 of the Arbitration and Conciliation Act.

2.8 Agnish Aditya (2017), in “Additional Concerns raised by TRF v. Energo” discusses the Hon'ble Supreme Court’s ruling in *TRF v. Energo Engineering Projects* and the concerns it raises with regards to unilateral appointments of arbitrators. It deals with the inaccuracies in the judgment and how it goes a long way in shaking the faith of the international arbitral community in the Indian judiciary.

2.9 Aishwarya Singh (2017), in “Revisiting Arbitrability of Claims of Oppression and Mismanagement: A Singapore Perspective” discusses a judgment by the Bombay High Court and another judgment by the Singapore Court of Appeals on the issue of minority oppression claims and how the reasonings behind the two judgments are different. The author points out why the approach taken by the Singapore Court of Appeals seems to be the more sound and pragmatic approach.

2.10 Aditya Swarup (2016), in “Arbitrability of Copyright Disputes”, analyses the consequences of a Bombay High Court judgment wherein it was held that a copyright dispute is not a dispute in rem but instead a dispute in personam. This would mean that copyright disputes could be arbitrable. party autonomy in relation to the field of international commercial arbitration. The author notes that he will only discuss the issue of procedural autonomy and will not focus on substantive party autonomy.

2.11 Shreyangshi Gupta (2016), in “Arbitrability of Securities Law in India”, identified the nature of rights pertaining to securities law and whether they can be resolved by an arbitrator. The article revolves around the popular debate about whether public law issues that involve public interest can be settled through the ADR mechanism. Such issues boil down to the arbitrability of the subject matter.

2.12 Gunjan Chabra and Prabhat R.V. (2016), in “To be or not to be.. Two Indian Parties Having a Foreign Seat of Arbitration: Supreme Court’s verdict on Sasan Power” wherein the decision of the division bench of the Madhya Pradesh High Court, holding that two Indian parties could have a foreign seat of arbitration, was under challenge before the Hon'ble Supreme Court.

2.13 Gaurav Mohanty (2016), in "Arbitration in India: The Merits of Third Party Funding", discusses how despite the creation of the Mumbai International Arbitration Centre (MIAC), it has failed to make a revolutionary change in the tardy arbitration processes in India. The author further goes on to discuss about the merits of third party funding in jurisdictions like Hong Kong and Singapore analyses the consequences of a Bombay High Court judgment wherein it was held that a copyright dispute is not a dispute in rem but instead a dispute in personam. This would mean that copyright disputes could be arbitrable.

2.14 Blackaby, Partasides, Redfern and Hunter (2015) have examined various case laws and judicial decisions of different courts across borders in " Redfern and Hunter on International Commercial Arbitration". The book provides comprehensive cross-referenced Tables of Cases, Arbitration Awards and Legislation as well as a comprehensive index and list of abbreviations.

The authors have explained the basic principles in the main text and provided citations to more detailed papers, analyses and legal authorities in the footnotes. The researcher has drawn ideas from the section dealing with challenges of arbitrators which has extensive footnotes referring to important papers on the topic. This is not a book where the length of the footnotes is greater than the main text. The footnotes are generally no more than 25 per cent of each page. Given the proliferation of papers that are written on arbitration topics, the authors have taken care to select only those papers and cases that are of real value.

The author provides an interesting and helpful comparative law analysis. On the nature of the relationship between an arbitrator and the parties the book explains that there are two schools of thought: the first that the relationship is established by contract; and the second, the 'status school'. The authors then refer to the jurisdictions that have adopted the different approaches and summarize the key provisions or principles of law adopted in those jurisdictions.

The author gives more than a commentary on the relevant national arbitration laws and

arbitration rules. Practical information and an explanation of the 'lore' of international arbitration is provided. To take one of many examples, the topic of interviewing prospective arbitrators, for which there is no law or rule, the book provides guidance as to what should not be objectionable. It does not simply refer to guidelines issued by the Chartered Institute and the IBA. It refers also to guidelines applied by an unnamed distinguished US arbitrator. The authors are not afraid to express their own views or to offer advice. For example, 'the best advice for an arbitrator who is challenged is to say nothing'. The practice of interviewing prospective arbitrators 'should not be objectionable in principle, provided that it is engaged in openly and that the scope of the discussion is appropriately restricted'.

2.15 Canfield (2014), in "Growing Pains and Coming-of-Age: The State of International Arbitration in India", has examined the changes in arbitration law that can provide India with the potential to become an international hub for arbitration, fostering economic growth and launching a new era for international arbitration in the region. The author, after examining various judicial decisions, has come to the conclusions that -

- the judgment in *BALCO* demonstrates that India wants to follow best practices in international arbitration and is willing to make changes in furtherance of that goal

- although *BALCO* did not fix everything and there are still problems that need addressing, the decision signals a willingness to break from past attitudes and find solutions to the problems that are keeping India from being a hub of international commercial arbitration.

2.16 Senior Advocate, **Mr. F. Nariman (2011)** has examined the ten steps that can reinforce India as a universally accepted arbitration destination in "Ten Steps to Salvage Arbitration in India". The author examined the effect of three decisions of the Supreme Court that have distorted the provisions of the Arbitration and Conciliation Act 1996. The three decisions being-

- *Bhatia International judgment (2002)*

- *Saw Pipes judgment (2003)*
- *Venture Global judgment (2008)*

wherein the Court not only made Part 1 of the Act applicable to arbitrations seated outside India, but also expanded the scope of public policy which led to numerous challenges to arbitral awards.

The Constitutional Bench of the Supreme Court on September 6, 2012 in its decision in Bharat Aluminum Co. v Kaiser Aluminum Technical Service, Inc., after laudable consideration of jurisprudence laid down by various Indian & foreign judgments and writings of renowned international commercial arbitration authors, ruled that findings by the Court in its judgment in Bhatia International v Bulk Trading S.A & Anr. and Venture Global Engineering v Satyam Computer Services Ltd and Anr. were incorrect. It concluded that Part I of the Arbitration and Conciliation Act, 1996 had no application to arbitrations which were seated outside India, irrespective of the fact whether parties chose to apply the Act or not. Hence getting Indian law in line, with the well-settled principle recognized internationally that "the seat of arbitration is intended to be its center of gravity".

The author found that such decisions rendered by the Apex Court led to the international commercial community losing faith in the Indian legal system.

2.17 Franz Schwarz (2010), in “Limits of Party Autonomy in International Commercial Arbitration, in Investment and Commercial Arbitration – Similarities and Divergences”, describes party autonomy in relation to the field of international commercial arbitration. The author notes that he will only discuss the issue of procedural autonomy and will not focus on substantive party autonomy.

The author begins by generally discussing what purpose party autonomy serves in international commercial arbitration (ICA). First, ICA recognizes that parties are in the best position to determine what procedures will suit their claim and in exchange the parties agree to limit review of the awards rendered.86 Secondly, the author states that all commercial arbitration conventions fully support the concept of party autonomy. Specifically, Article II of the New York Convention allows the parties’ agreement to

control, and, if the agreement is not followed the award can be vacated under Article V(1)(d). Another notable convention provision which recognizes party autonomy in commercial arbitration is the European Convention Article IV(1)(b)(iii). Also, the UNCITRAL Model Rules, Austria, Germany, and neighboring jurisdictions also have rules or laws recognizing party autonomy in commercial arbitration.

Next, the author discusses what procedural discretion the arbitral tribunal has as compared to traditional judges. Judges are given great discretion and control to ensure efficiency and equality while arbitrators control is limited by party autonomy because it is a basic principle that that agreement of the parties overrides the arbitrator. The ICC Rules, Vienna Rules, Austrian ZPO, and German Rules all place the arbitrator's discretion at the bottom of the hierarchical structure when compared to the parties' agreed-upon procedures.

The author explains that problems arise when the arbitrator finds the selected procedures of the parties inappropriate. In the majority of these situations the arbitrator is still bound by the parties' agreement, but can choose to resign if the parties entered into the procedural agreements after the arbitrator was appointed. When the agreed-upon procedures are unfair or adversely affect due process then the arbitrator can refuse to implement them and may even impose their own procedures to ensure fundamental procedural safeguards.

2.18 Shah and Gandhi (2011), studied the probability of a shift among the people preferring institutional arbitration over ad-hoc arbitration following the rule of supply and demand in "Arbitration: One size does not fit all: The necessity of developing institution arbitration in developing countries". The authors advocated-

- A symbiotic relation between the courts and the arbitration institutions to ensure that the court is not over burdened by the suits which can be disposed of through arbitration.

- Institutional support of supervision, time limit and scrutiny to be inculcated in a mechanism analogous to the informal arbitration bodies like the Panchayat at the grass root level.

The authors concluded that with the development of institutional arbitration, there would be a shift among the people preferring the same over ad-hoc arbitration.

2.19 Zaiwalla (2010) has examined the presence of an international institutional arbitration center in India in "LCIA India: Will It Change the International Arbitration Scene in India?" and has concluded that such a presence can encourage the Indian Courts to have confidence in the awards passed under the aegis of such an institution. The author has found that –

- LCIA India has a golden opportunity to prove itself as a leading institution for international arbitrations in India, provided it is able to deal with some of the unwelcome traits which one often sees in India.

- For LCIA India to be truly respected, it is vital that it displays complete transparency in its working. It must adopt a strict merit-based approach towards the appointment of arbitrators, and court members must ensure that there is no development of a small inner circle monopolizing this task.

- Young potential arbitration practitioners and arbitrators must be encouraged.

2.20 Noussia (2009) has set out the modern function and role of anti-suit injunctions in light of the efforts to harmonize private international law in "Anti-suit Injunctions and Arbitration Proceedings: What Does the Future Hold?" The author came to the conclusion that –

- In the common law systems, antisuit injunctions are positively perceived. Both in the United Kingdom and the United States, their granting in support of arbitration proceedings is a measure employed to halt judicial proceedings brought in breach of a valid agreement to arbitrate.

- In England, the trend is to favour the prevalence of individual justice and grant antisuit injunctions in support of arbitration proceedings, not least because they are largely seen as a basic element of the supervisory jurisdiction of the courts.

- In the United States, the mere existence of a judicial split among the Circuits, and the taking into account of comity principles and other considerations,

underscore the general presumption in favour of antisuit injunctions and compelling defendants to obey them, whilst accepting that they should only be permitted where res judicata bars the foreign proceeding, or where foreign litigation threatens public policy or the court's jurisdiction.

2.21 Born (2009) has commented on the Indian arbitral system in "International Commercial Arbitration". In the words of Born, "many users of international arbitration remain cautious about seeking arbitrations in India, noting the attitude of Indian courts." The author's conclusions rest on the premise that the treatments of international commercial arbitration in different national legal systems are not diverse, unrelated phenomena, but rather form a common corpus of international arbitration law which has a global application.'

2.22 Kachwaha (2008) has examined and tested the award enforcement regime in India vis-à-vis developed arbitration destinations in "Enforcement of Arbitration Awards in India". The author concluded that –

- Viewed in its totality, India does not come across as a jurisdiction which carries an anti arbitration bias or more significantly which carries an anti foreigner bias.
- Notwithstanding the interventionist instincts and expanded judicial review, Indian courts do restrain themselves from interfering with arbitral awards.
- Judged on this touchstone, India has been trying to come across as an arbitration friendly jurisdiction, but not enough has been done in this aspect.

2.23 Eminent jurist **Mr. Fali Nariman (2008)**, in "Application of the New York Convention in India", has spoken about how issues arising under statutory provisions implementing Article V have been dealt with by courts in India. He concluded that the provisions in the 1996 Act prescribe uniform criteria (or grounds) for the setting aside of domestic arbitral awards and for the non- enforcement (in India) of foreign arbitral awards.

In the earliest discussion on the proposal to draft a Model Law on arbitral procedure, the United Nations Commission on International Trade (UNCITRAL) decided that the scope of the law should be limited to international commercial arbitration.

2.24 Dewan (2007), has studied the existing loopholes in the arbitration law in India in "Arbitration in India: An Unenjoyable Litigating Jamboree!"

- This articles lays emphasis on how despite arbitration, litigation is an inevitable 'evil'.

- It has been found out how, for a country looking for economic growth, imbibing an internationally acceptable arbitral culture is necessary in order to avoid sending a hapless party, seeking to effectively arbitrate a dispute, mirthlessly into a conundrum of delay.

The author has also examined the three stages where an arbitration proceeding usually gets intertwined with litigation in court, being:
(1) appointment and jurisdiction of arbitrators;
(2) grant of interim measures of protection; and
(3) after the pronouncement of the award.

2.25 Nair (2007) delves deep into the causes of dissatisfaction with arbitral tribunals and arbitral procedures in India in "Surveying a Decade of the 'New' Law of Arbitration In India". He concluded that –

- The need of the hour is for the inculcation of a culture of arbitration among the key stakeholders - the bar, the bench, the arbitrators, arbitral institutions and the consumers of arbitration - and for them to display a sincere commitment to prevent the 'banalisation' of arbitration.

- Indian lawyers and judges will do well to be aware of and absorb some of the best arbitration practices from jurisdictions that have a more developed culture of arbitration, if arbitration is to provide the benefits it is capable of delivering.

- Ten years on, arbitration in India under the 1996 Act is far from having fulfilled its potential and continues to be on probation.

2.26 Mr. K.R. Narayanan(2000), the Former President of India, at the Inauguration of the International Council for Commercial Arbitration Conference at New Delhi in March 2000 spoke about arbitration being a saving grace of the judicial mind to adjudicate commercial disputes.

8. Implications of the literature reviewed

One the basis of the review of the related literature the researcher has come to the conclusion that there is a need to know whether the existing laws, enactments and regulations dealing with international commercial arbitration in India are effective and well developed to provide the much needed impetus to propel India to be a hub for international arbitrations on a global level. Moreover, the researcher has not come across any comprehensive study related to how India can be an attractive destination for International Commercial Arbitration and how parties can be convinced to choose India as a venue and seat for arbitrations. Therefore, the researcher through the present study, shall attempt to highlight and bring forth the lacunae in the present Indian arbitration system when compared with the more sought after arbitration destinations like London and Singapore.

9. Chapter Scheme

In order to fulfill the above objectives, the proposed study will be divided into the following chapters-

CHAPTER 1: INTRODUCTION

This chapter will discuss about the introduction or the synopsis for the research to be carried out. This will include General introduction to the research topic, object, scope, significance and utility and hypotheses.

CHAPTER 2: TRACING THE LACUNAE IN INDIAN ARBITRATION THROUGH THE TIMES

This chapter traces out the arbitral law and its evolution in India. This chapter

will also focus on how civil and commercial disputes were resolved before the arbitration system was evolved and why it was decided to amend the law.

CHAPTER 3: AN ANALYSIS OF INTERNATIONAL ARBITRATION LAWS

This chapter will study the various enactments, provisions, Laws and Bills in favourable arbitration destinations like Singapore and London and will provide an insight into why these destinations are the more-preferred destinations over India. This chapter will also study the UNCITRAL Model Law.

CHAPTER 4: AN ANALYSIS OF JUDICIAL DECISIONS PERTAINING TO ARBITRATION IN INDIA

This Chapter deals with important case laws and various judicial decisions given in arbitration cases by Indian Courts. Case laws are important to discuss because they show the actual face and implication of the prevailing law of the land.

CHAPTER 5: CHALLENGES AND OPPORTUNITIES FOR INTERNATIONAL ARBITRATION IN INDIA

This Chapter will focus on international commercial arbitration and the challenges faced by India, keeping in mind the existing legal framework and possible amendments. India has the potential to be a much sought after destination for international arbitration given its excellent legal fraternity and a huge legal population. Accesibility to inexpensive labour leads to more industries being set up in India. Foreign corporates have shown a willingness to try out the Prime Minister's 'Make in India' model and opportunities to turn the tide of international arbitration in India will be examined in the subsequent chapters.

CHAPTER 6: DATA ANALYSIS

This chapter will deal with a summary of all the data that is collected in the form of responses to questionnaires and also the interviews conducted by the author.

CHAPTER 7: CONCLUSION AND SUGGESTIONS

This chapter will deal with a summary of all that is mentioned in the various chapters. An attempt will be made to reach to conclusions to the hypotheses made in the introductory chapter. The later portion of the chapter will deal with all possible suggestions to provide a better arbitral framework in India.

10. Major Findings of the Study

The findings of the study can be summed up as under:

The changes made by the amendments seem to be only cosmetic. Basic problems of arbitral proceedings like huge expenses and wide scope for judicial interference robbing the award of its finality continue to remain unsolved. Fixing time limits for making the award and for disposal of objections under Section 34 do not solve the problem because the appeal against the order passed by the District Judge on such objections takes more than a few years in their being decided finally by the High Court and then the Supreme Court. There are some basic problems like payment of stamp duty, registration and custody of award and of arbitral proceedings to which no solution is available even after the amendment. There are also problems with accreditation and grading by the Arbitration Council of India as proposed to be set up under the 2019 Amendment Act.

There is neither any provision nor sufficient infrastructure for the custody of the original arbitral award and the record of arbitral proceedings. It is problematic for the arbitrator and parties both. For how long and where the record containing the arbitration proceedings and arbitral documents should be kept after the arbitrator becomes *functus officio,* the Act is silent and so are the rules.

Recourse to arbitration has unfortunately seen a decline over the years in terms of growth rate. Now every single smart and capable advocate takes care to exclude the arbitration clause whenever he/she is consulted for settling the draft of any contract or deed. Over the years, arbitration has proved to be a booby trap for unwary litigants on account of its longevity, complexity, uncertainty and ruinous costs.

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