CHAPTER 2

TRACING ARBITRATION THROUGH THE TIMES

2.1 Origins of Arbitration

Mahatma Gandhi had once said, "*Differences we shall always have but we must settle them all, whether religious or other, by arbitration."*

Talking about religion, the origins of arbitration can be found in three major religions in India. Arbitration finds place in one form or another in Hinduism, Islam and Christianity.

2.1.1 Christian References to Arbitration

In Christianity, the bible emphasizes on resolving disputes without going to court. In fact, references to arbitration in Christian law indicate that men are advised not to go to court, and instead be okay with getting cheated and accepting wrong. One of the verses is produced below –

1 Corinthians 6:7, NIV: *"The very fact that you have lawsuits among you means you have been completely defeated already. Why not rather be wronged? Why not rather be cheated?"*

The concept of arbitration in Christianity directs the aggrieved person to not go to court and instead try to resolve it with the person who has apparently committed the wrong. There are references provided in different places in the bible that emphasize on solving conflicts amicably instead of dragging them to court which might lead to bitter and unhealthy relations.

The concept of arbitration was probably not something that could be understood then but, when we as children, would read Aesop's Fables, Panchatantra, Amar Chitra Katha, we would have inadvertently come across numerous instances of arbitration. A popular story is the story of King Solomon who used arbitration to settle a dispute between two mothers fighting over a baby boy, each asserting that the boy was her own baby and that the other woman would have no right over the baby. In an attempt to uncover the truth as to who was the real mother, King Solomon decided to threaten to split the baby in half so as to make sure that each woman claiming the baby would get an equal share. Upon hearing this, the real mother instantly went into panic and gave up claim over the baby, lest the baby lose his life. King Solomon knew that such love could only be the love of a mother and 'awarded' the baby to the real mother. However, King Solomon's decision to split the baby might not always be what the arbitrator decides to do, but the arbitrator might decide to split the relief based on the submissions of the parties.[7]

Probably taking a leaf out of King Solomon's book, kings used arbitration to sort out their own disputes. Historical references indicate that even before the birth of Christ, arbitration was still taking place.[8] The Hittite archives were discovered around about 400 BC, from which it was found that there was a dispute between two Sumerian cities that were situated close to each other on a canal, and were at war after they failed to decide the frontier between the two states. The king of Kish was called in to arbitrate, to define the boundary and to put an end to the war. This can be substantiated from the fact that a record of the treaty that was signed has now been discovered.[9] The first English law for arbitration came into force sometime around 1698.[10]

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[7] Claudia T. Salomon, *'Splitting the Baby in International Arbitration',* The National Law Journal, January 19, 2015, Accessible at: https://www.lw.com/mediacoverage/splitting-the-baby-in-international-arbitration, Retrieved on January 12, 2016

[8] Jackson Harvey Ralston, *International Arbitration from Athens to Locarno,* 153, United States: Lawbook Exchange, 2004.

[9] Ibid

[10] Oldham/Kim*, Arbitration In America: The Early History*, 31 Law & Hist. Rev. 241, 246

2.1.2 Islamic References to Arbitration

The Islamic governing law is called the *Sharia*. In 622 AD, the Treaty of Medina was entered into to bring peace between two communities, i.e. the Aws and the Khazraj, who were often at war. The people of Medina wanted to invite the Prophet to Medina in order to bring peace to the region. The treaty was entered into between Muslims, non-Muslim Arabs and Jews. Even this agreement had an arbitration clause incorporated in it. Clause 45 of the treaty is reproduced below for ready reference-

"45. If there is any occurrence or difference of opinion amongst the treaty makers, which might result in a breach of peace, the matter shall be referred, for a decision, to Allah and Muhammad, the Prophet of Allah (S.A.W.). Allah shall be with him, who abides most by the treaty.[11]"

Even after 622 AD, the *Sharia* contained references to arbitration. A verse in the Quran is reproduced below for reference-

"And if you fear a breach between them (the man and wife), appoint an arbitrator from his folk and an arbitrator from her folk.[12]"

2.1.3 Hindu References to Arbitration

References to arbitration can be found in Hindu law in the *"Brhadaranayaka Upanishad".*[13] It mentions about the existence of courts, the people who were together in one profession, and the elders who were concerned with community welfare. These together formed a Panchayat. The Panchas, or the members of the Panchayat as they were referred, would settle the disputes between the parties and were playing the role of

[11] The Treaty of Medinah, Accessible at: https://lettersofprophetmuhammad.wordpress.com/2007/09/18/the-treaty-of-medinah/ Retrieved on January 12, 2020

[12] (4:35) The Holy Quran

[13] Thesis on 'Arbitration in Christianity, Hinduism and Islam', Accessible at: https://shodhganga.inflibnet.ac.in/bitstream/10603/205670/8/07%20chapter%202.pdf, Retrieved on December 21, 2019

an arbitrator. The 'awards' passed by these arbitrators had credibility and had some sort of a binding effect. [14] Subsequently in the year 1772, India got its first codified arbitration law.[15] The law was initially applicable only to Bengal, but was later extended and also applied to Madras and Bombay.

2.2 Development of Arbitration Law in India

In 1834, the 1st Legislative Council for India was formed. The Code of Civil Procedure was passed in 1859. Sections 312 to Section 327 were concerned with arbitration.[16] In 1882, it was repealed. However, the provisions pertaining to arbitration remained identical and there was no change. The sections concerning arbitration were copied exactly as they were from the first legislation of 1859. Subsequently, it was felt that arbitration law needed a specific legislation and in 1899, this was followed by the first Indian Arbitration Act[17]. Some of the salient features of this Act are listed below-

- The arbitrator had to be specifically mentioned in the arbitration agreement
- A sitting judge of any court could also be an arbitrator who would have to be named in the arbitration agreement[18]
- The Act did not recognize conciliation as a statutory method for resolution of disputes
- The award was not considered to be a decree of the court and had to be taken to the court for pronouncing final judgement

[14] *Vytla Sitanna v. Marivada Viranna*; AIR 1934 PC 105
[15] Bengal Regulation Act, 1772
[16] George Smoult Fagan, *Unrepealed and Unexpired Acts of the Legislative Council of India*, from 1834-[1871/72] Inclusive: With Abstracts, Harvard University, 1871, Digitized on May 20, 2008
[17] http://jkarchives.nic.in/Record_Holdings_PDF/Acc.%20No.%201149.pdf, Retrieved on June 29, 2019
[18] *Nusserwanjee Pestonjee and Ors. v. Meer Mynoodeen Khan Wullud Meer Sudroodeen Khan Bahadoor*; (1855) 6 MIA 134

- No agreement to refer present or future disputes to arbitration could be specifically enforced
- The grounds for setting aside an arbitral award were very wide and the award could also be set aside if the arbitrator refused to adjourn the hearing because one party wanted to appoint a counsel

- The award could also be set aside if the arbitrator did not appoint a time and place for the hearing of the reference

- Challenges to the validity of an arbitral award could be made on the grounds that there was no arbitration agreement or that the arbitral tribunal had been incorrectly constituted even after the final award had been passed
- The award to be enforceable as a decree of the court had to be filed in court prior to it becoming enforceable as a decree of the court[19]

- The power of the court to stay arbitral proceedings was wide and proceedings could be stayed even if the applicant stated that they were ready to do all things necessary for the proper conduct of the arbitral proceedings

- The award had to be made within a fixed time period, failing which the court could supersede the arbitration proceedings. Any award made after such supersession, would be invalid and void

- The Bombay High Court also expressed its displeasure with this legislation saying that it's quite complicated[20]

In order to boost arbitration in India, India became a signatory to the Geneva Protocol on Arbitration Clauses 1923 and the Geneva Convention of 1927, in the year 1937. In order to give effect to these conventions, the legislature came up with the Arbitration (Protocol and Convention) Act 1937. In 1960 India became a signatory to the New York

[19] *Gajendra Singh v. Durga Kunwar;* (1925) ILR 47All637
[20] *Dinkarrai Lakshmiprasad v. Yeshwantrai Hariprasad;* AIR 1930 Bom 98

Convention, subsequent to which the Foreign Awards (Recognition and Enforcement) Act of 1961 came to be passed. Since the Convention was not a piece of Indian legislation, it is not discussed in detail. However, a few salient features of the New York Convention are listed below before the study deals with Indian laws through the times.

- The Convention required the courts of member states to give recognition and effect to the awards passed by arbitral tribunals in other countries or to orders in international arbitration disputes passed in other jurisdictions.

- The procedure is very easy to follow and thus does not add to the complications faced by courts in understanding foreign laws while dealing with enforcement or arbitration petitions.

There are limited grounds on which a member state can refuse enforcement of the award and an entry into the merits of the award is not permissible.

2.2.1 The Arbitration Act, 1940

The Arbitration Act, 1940 was made applicable to the whole of India (which included Pakistan and Balochistan at the time).[21] The salient features of the 1940 Act were –

- There were separate provisions for arbitration without the intervention of the court, for arbitration with the intervention of the court in already pending suits, and for arbitration with the intervention of the court even where there was no suit pending

- The court had the power to remove an arbitrator in case of misconduct or mala fide behavior on the part of the arbitrator and to appoint a new arbitrator in his/her place

[21] http://www.wipo.int/edocs/lexdocs/laws/en/pk/pk066en.pdf, Retrieved on April 13, 2020

- The power of the court was not just to remove or substitute an arbitrator but also to modify, set aside or remit the award back to the arbitrator

- The definition of a 'written arbitration agreement' was specifically mentioned in the Act

- There was no need to name a specific arbitrator in the arbitration agreement
- There were provisions in the Act in order to make arbitration happen despite there being flaws in the arbitration agreement

- There were general provisions pertaining to how an arbitral award would be deemed valid and approved by a court by way of a judgement of the court

After the end of the second world and with trade and commerce flourishing, arbitration witnessed a spike with an increase in expenses and delays in litigation. Despite the problems and lacunae in the 1940 Arbitration Act, it was widely used to resolve disputes since there was no alternative available. Section 30 of the Act provided for setting aside an arbitral award. Section 33 of the Act provided for declaring an award null and void. Thus, it is clear that the scope of interference with an arbitral award was quite wide. Further, there was no such provision in the Act that recognized the primary importance of the choice of the parties to arbitrate and that arbitration would be rendered invalid and a failure in cases of non-existence of the arbitration agreement or invalidity of an arbitration agreement.[22] The Act also permitted interference by the courts at every juncture of the arbitral proceedings, beginning with appointment of arbitrator, grant of interim measures and all the way to the final award being passed. This meant that arbitration was not seen as an 'alternative' dispute mechanism system since the courts would intervene at every stage, taking away from its core, the primary objective of the Act. Given the huge pendency of cases in Indian courts even then, the resolution of arbitration disputes that went to court took a long time and eventually delayed the arbitral process. This gave a lot of power to a party against whom a claim was filed,

[22] *Saha & Co. v. Ishar Singh Kripal Singh & Co;* AIR 1956 Cal 321

since that party would only have to approach the court by filing a miscellaneous application during any stage of the proceedings and take advantage of the huge pendency of cases in courts. Apart from the multiple grounds on which the award of the arbitrator could be challenged, one of the main grounds that ought not to have been, was a challenge on the merits of the award. It was because of these factors mainly that foreign investors were hesitant to invest in India and carry on business with their Indian counterparts since they did not have faith in the Indian arbitration laws due to increasing intervention by the courts. The problematic approach of the Indian arbitration setup could be observed when a foreign investor would invest in India through its Indian subsidiary and such awards would then be treated as domestic awards and not foreign awards.[23]

In fact, the Hon'ble Supreme Court, while it referred to the Act of 1940, went so far as to say that "the way in which proceedings under the Act are conducted and without an exception challenged, has made lawyers laugh and legal philosophers weep" in view of "unending prolixity at every stage providing a legal trap to the unwary".[24]

Some more drawbacks in the Arbitration Act of 1940 are as under-

- No clarity in individual private contracts
- Arbitrators could resign and recuse themselves from the arbitration at any time, thus resulting in huge losses to the parties and a waste of time since the parties would then have to approach the court, the court would appoint a new arbitrator and the arbitration proceeding would start afresh
- The procedure that was laid down for filing arbitral awards was different for various High Courts
- No provision in the entire Act for arbitrator's or umpires' misconduct

[23] *National Thermal Power Corporation v. Singer Company*
[24] *Guru Nanak Foundation v. Rattan Singh*

- In the event of the court appointed arbitrator passing away during the pendency of arbitral proceedings, no provisions for appointment of a new arbitrator[25]

- No remedy available to the parties against an award that was essentially non-speaking

The Law Commission of India was tasked with the job of revamping the Arbitration Act of 1940 and coming up with suggestions for a new arbitration law that plugged the loopholes in the previous legislation and would have the strength to boost India's arbitration infrastructure and put it on the global arbitration map.

2.2.2 The Arbitration and Conciliation Act, 1996

The 1940 arbitration law faced a lot of criticism and had a lot of drawbacks when it came to actual implementation on a practical aspect. It was not the case that the Act was good on paper and did not have the desired effect when put into practice. It had a number of loopholes as discussed above and needed a complete and comprehensive overhaul. Thus, came into existence the Arbitration and Conciliation Act, 1996. The new legislation came into force on 22nd August 1996. It included the wide-ranging amendments suggested by the Law Commission in its report dated 09.11.1978.

The Arbitration Act, 1996 was based on the Model Law formulated by the United Nations Commission on International Trade Law (UNCITRAL). The General Assembly of the UNCITRAL recognized the need for a model law on arbitration given the increasing commercial disputes around the world, and the need for a uniform law on international arbitration that can be followed by states in resolving international commercial disputes, and it was adopted on June 21, 1985 by the UNCITRAL.[26] The Model Law lays down the entire arbitral process from start to finish. It has been widely

[25] *Barada Kanta Adhikary v. The State of West Bengal And Ors.;* AIR 1963 Cal 149
[26] UNCITRAL Model Law on International Commercial Arbitration. See here: https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf

adopted and it seems to be approved by all its member States. There has not been a single instance of a State adopting the Model Law and thereafter deviating from it. The moment a State adopts the Model Law, it begins to be recognised as a territory that is arbitration-friendly and that has arbitration laws that are in consistency with global arbitration practice.[27]

The primary objective of the new legislation was to enhance the speed of the arbitral process and to achieve a quick settlement of disputes between the parties. The role of courts and judicial intervention was also limited so that the arbitral process could carry on speedily and unhindered. Under the new legislation both international as well as domestic arbitration and conciliation were covered. One of the most important changes that was brought about by the Arbitration and Conciliation Act, 1996 was that the award of the arbitrator was given binding effect and was treated as a decree of the civil court. The provisions governing domestic arbitration were enshrined under Part 1 of the Act while the provisions governing enforcement of foreign awards were provided for under Part 2. The new legislation also provided for enforcement of foreign arbitral awards within its scheme. Some of the salient features of the 1996 Act as originally enacted, are as below-

- The definition of what constitutes an arbitration agreement is specifically laid down. Even the reference to a document that contains an arbitration clause is said to be a valid arbitration agreement.

- The Act covers both international arbitration as well as domestic arbitration.

- Court intervention is provided for under various sections like appointment of arbitrator, referring the parties to an arbitrator, ruling on the mandate of an arbitrator, assistance in taking evidence, interim measures for protection of the subject matter, setting aside the award, or appealing orders under Section 37.

[27] Gary B. Born, *International Commercial Arbitration*, Wolters Kluwer (Volume II, Second Edition, 2014), Page 139

- Section 5 of the Act calls for non-interference by courts in order to minimize court intervention in arbitration proceedings

- Interim measures can be obtained any time from the court, i.e., before commencement of arbitration, during arbitration, or even after the pronouncement of an arbitral award. The presence of Section 17 in the Act also gives limited powers[28] to an arbitrator for granting interim measures during the pendency of the arbitration.

- A party seeking to invoke an international commercial arbitration in India would have to approach the Chief Justice of India or his designate for appointment of the arbitral tribunal.

- The Act provides for challenge to the constitution of an arbitral tribunal before the arbitral tribunal itself. In the event the challenge fails, and the mandate of the arbitral tribunal is upheld, the tribunal shall proceed with arbitration and the aggrieved party can subsequently raise the contentions while challenging the award.

- Section 16 of the Act gives the power to the arbitral tribunal to rule on its own jurisdiction.

- If an award is made by the arbitral tribunal for payment of money, a rate of interest at 18% is applicable to such awards from the date of the award till the payment is made.

- Grounds for setting aside an arbitral award are very limited as provided for under Section 34 of the Act. However, the Supreme Court in its decision in the case of *ONGC v. Saw Pipes Ltd*.[29], expanded the scope of Section 34 to include patent illegality, which was restricted only to domestic arbitrations.

[28] *MD Army Welfare Housing Organisation v. Sumangal Services*; 2004 (9) SCC 619
[29] 2003 (2) Arb.LR 5 (SC)

- For foreign awards, a notification by the central government stating that the country in which the award is passed, is a territory to which the New York Convention applies, is mandatory and it is not enough that the country is a signatory to the New York Convention.

- There is no provision to set aside a foreign arbitral award. Indian courts can only refuse enforcement of an award, but the award can still be enforced in any other jurisdiction.

- Once the court is satisfied that the award is enforceable, it is to be treated as a decree of the court. This is in line with what is provided under the New York Convention.

- Once the court comes to the conclusion that a foreign award is enforceable, no appeal can lie against such order.

- The arbitral tribunal had to give reasons in writing for the award.

While the Arbitration Act of 1996 was based on the Model Law, there were a couple of deviations from the Model Law.

- Section 5 of the Arbitration Act is different from what is envisaged in the Model Law. It states that provisions that are covered by part 1, shall not be interfered with by any court. It tries to eliminate court interference to a greater extent than what is prescribed in the Model Law.

  Section 5 reads as –

  "5. Extent of judicial intervention.—Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

  The corresponding provision in the Model Law is as below for ready reference –

"Article 5. Extent of court intervention

In matters governed by this Law, no court shall intervene except where so provided in this Law."

- Section 8 of the Arbitration Act deals with reference to arbitration. It states that whenever a dispute is brought before a judicial authority containing an arbitration clause, the dispute shall be referred to an arbitrator. In the Model Law, Article 8 gives power to the judicial authority to decide upon the validity of the arbitration agreement and if the agreement is found to be null and void, reference to arbitration will be rejected.

  Section 8 of the Arbitration Act, 1996 reads as –

  "8. Power to refer parties to arbitration where there is an arbitration agreement.— [(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.]

  (2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof:

  [Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.]

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

The corresponding Article 8 of the Model Law reads as –

"Article 8. Arbitration agreement and substantive claim before court
(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court."

It can be seen that there is a slight deviation from Article 8 of the Model Law in Section 8 of the Act in so far as the words used are 'court' and 'judicial authority' respectively.

- Section 9 of the Arbitration Act lays down the provisions pertaining to interim measures, either before or during an arbitration or even after an arbitral award is passed. The corresponding article in the Model Law does not envisage the grant of interim measures after pronouncement of an arbitral award.

Section 9 of the Arbitration Act, 1996 reads as –
"9. Interim measures etc. by Court.
A party may, before, or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court-
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 Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it."

The corresponding Article 9 in the Model Law is as below-

"Article 9. Arbitration agreement and interim measures by court

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure."

- As per Section 16 of the Arbitration Act, the tribunal can decide whether it has jurisdiction to entertain the statement of claim. The doctrine of separability is also an integral part of Section 16 and the arbitration agreement is a separate and independent agreement from the main contract. If the arbitral tribunal comes to the conclusion that it has jurisdiction, then no further challenge can lie to the court on the issue of jurisdiction and the aggrieved party will only be able to raise such contentions while challenging the final award. In distinction, under the Model Law, a challenge will lie to the court against an order passed by the arbitral tribunal on the issue of jurisdiction.

Section 16 of the Arbitration Act, 1996 reads as –

"16. Competence of arbitral tribunal to rule on its jurisdiction.

1. The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,-

a. an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

b. a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

2. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because he has appointed, or participated in the appointment of, an arbitrator.

3. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

4. The arbitral tribunal may, in either of the cases referred to it, in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

5. The arbitral tribunal shall decide on a plea referred to in sub section (2) or subsection (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

6. A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34."

The corresponding Article 16 in the Model Law is as below-

"Article 16. Competence of arbitral tribunal to rule on its jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the con- tract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.
(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award."

- Section 27 deals with court assistance in taking evidence. Under Section 27, a witness can be compelled to appear before the arbitral tribunal and give evidence. But, Section 27 of the Indian Arbitration Act goes a step further and makes default of the witness by failing to appear before the tribunal and giving evidence despite an order of the court, punishable with either contempt or as per the provisions of law as applicable to suits.

  Section 27 of the Arbitration Act, 1996 reads as –

  "27. Court assistance in taking evidence.
  1. The arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the Court for assistance in taking evidence.
  2. The application shall specify-
  a. the names and addresses of the parties and the arbitrators,
  b. the general nature of the claim and the relief sought,-
  c. the evidence to be obtained, in particular,-
  i. the name and address of any person to be heard as witness or expert witness

and a statement of the subject-matter of the testimony required;

ii. the description of any document to be produced or property to be inspected.

3. The Court may, within its competence and according to its rules on taking evidence, execute the request by ordering that the evidence be provided directly to the arbitral tribunal.

4. The Court may, while making an order under sub-section (3), issue the same processes to witnesses as it may issue in suits tried before it.

5. Persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitral tribunal as they would for the like offences in suits tried before the Court.

6. In this section the expression "Processes" includes summonses and commissions for the examination of witnesses and summonses to produce documents."

The corresponding Article 27 in the Model Law is as below-

"Article 27. Court assistance in taking evidence

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence."

- Section 34 deals with the grounds to set aside an arbitral award. A slight difference from the Model Law is that an extra explanation is provided for the ground of 'public policy' to state that if the award was obtained by fraud or corruption, it would be against the public policy of India and be liable to be set aside.

Section 34 of the Arbitration Act, 1996 reads as –

"34. Application for setting aside arbitral award.

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

2. An arbitral award may be set aside by the Court only if-

a. the party making the application furnishes proof that-

i. a party was under some incapacity, or

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

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

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

v. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

b. the Court finds that-

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

ii. the arbitral award is in conflict with the public policy of India. Explanation.-Without prejudice to the generality of sub-clause (ii), it is hereby

declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

3. An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal: Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

4. On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

The corresponding Article 34 in the Model Law is as below-

"Article 34. Application for setting aside as exclusive recourse against arbitral award
(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
(2) An arbitral award may be set aside by the court specified in article 6 only if:
(a) the party making the application furnishes proof that:
(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

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

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

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside."

However, despite all the efforts, the Act of 1996 still had its own shortcomings. These shortcomings were not defects in the provisions in the Act, but were rather items that were omitted but ought to have found a place in the Act. The main loopholes are listed below -

- As already stated above, the powers of the arbitrator were quite limited, not only under Section 17 but also when it came to taking evidence or summoning a witness. The Act was silent about the scope or even the availability of such powers.

- In government contracts and in the public sector, it is common practice in India that the arbitrator is an employee of the party to the arbitration. This is a prevalent practice and continues till date. Such appointments not only give rise to an apprehension of bias and partiality but also shake the faith of the common man in the arbitration setup. Despite such possibilities, provisions pertaining to arbitral appointments in the public sector were not a part of the legislation or schedules thereto.

- Courts are still intervening at quite a few stages in the arbitral process starting from appointment of the arbitrator to enforcement of an award.

- Despite India being a signatory to the New York Convention and having a specific Part 2 for international arbitrations in the 1996 Act, foreign investors still choose to conduct arbitration outside India. This is not because of a defect in the provisions of the legislation but because of the absence of certain clarifications which leads to courts interpreting the legislation and applying their own wisdom which often was not the original intention of the legislature.

- Arbitration continued to be an expensive affair because of multiple adjournments in arbitration proceedings as well as rising counsel and arbitrator fees. The Arbitration Act was silent about time-frames or the number of adjournments that could be sought. There was no schedule of fees that could potentially put a cap on the high expenses of arbitration.

- The arbitrator had very limited power under Section 17 to grant interim protection during arbitration. This was also observed by the Hon'ble Apex Court

in the case of *MD Army Welfare Housing Organisation v. Sumangal Services*.[30] The Arbitrator could not issue any direction which would go beyond the scope of the arbitration agreement. This would result in parties approaching courts for interim measures despite the arbitral tribunal being seized of the matter. This would only lead to further delays since the arbitration would more often than not get stayed or the arbitrator would choose not to proceed because of the absence of specific provisions in the legislation permitting the arbitrator to conduct arbitral proceedings despite pendency of court proceedings in interim applications.

- Once the arbitration ended, the directions issued under Section 17 would cease to have effect. Again, parties would have to approach the court for continued protection after the termination of arbitral proceedings. This would result in further delay and expense to the parties, thus defeating the purpose of the Act.

- Most of the arbitrators that would be appointed in petitions filed under Section 11(6) of the Act, would be retired judges of the High Court or the Supreme Court, which, to some extent would bring a litigation mindset even to arbitration. This would defeat the purpose behind enacting the legislation since these judges, despite being experts in the field, are used to adjudicating matters over a period of a few years whereas arbitration is supposed to be quick and efficient. Despite a number of subsequent amendments, this problem continues to persist. This is explained in a study conducted by the researcher in the following chapters.

Coupled with the shortcomings in the legislation, the interpretation of various courts when it came to deciding matters pertaining to arbitration led to the passing of certain judgements that defeated the very purpose of the Act.

A few cases that marked the changing course of arbitration in India are listed below.

[30] *Supra note 28*

However, the cases are dealt with in detail in the subsequent chapters. The following cases are important because it was in these cases that the courts interpreted the Act in a different manner than it was supposed to, and it was subsequent to these cases that the need for an amendment was felt.

- *Bhatia International v. Bulk Trading SA*[31]

- *ONGC v. Saw Pipes*[32]

- *Venture Global Engineering v. Satyam Computer Services Ltd*.[33]

In the case of *Bhatia International*, it was held that Part 1 of the Arbitration Act applied not only to domestic arbitrations but also to foreign arbitrations. This gave the courts unbridled power to interfere in even foreign seated arbitrations as they would in domestic arbitrations.

In the case of *ONGC v. Saw Pipes*, the court followed the ruling in *Bhatia International* that Part 1 would apply even to foreign arbitrations and further held that a foreign award could be set aside by an Indian court if it was patently illegal, thus contravening the public policy of India.

Subsequently, this ratio was followed in the case of *Venture Global Engineering*. This meant that an Indian party to a foreign arbitration could avoid enforcement of an award against itself in India by applying for setting aside the award in an Indian court. The award would be examined on merits and could be set aside if it was deemed to be 'unfair' or 'unreasonable'.

The case of *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services*[34](BALCO), witnessed multiple rounds of litigation before the Hon'ble Supreme Court of India

[31] (2002) 4 SCC 105
[32] *Supra note 29*
[33] (2008) 4 SCC 190
[34] Civil Appeal No. 7019 of 2005; AIR 2008 SC 1061

starting 2001. Subsequently, the Apex Court held that Part 1 of the Arbitration and Conciliation Act, 1996 would only apply to arbitrations seated in India. The judgement in the case of *Bhatia International* had also observed that the 1996 Act was not a well drafted legislation and did have some lacunae.[35] In the BALCO case, the Supreme Court revisited the law that was laid down in the case of Bhatia International and overruled that judgement. The relevant provision was compared by the Apex Court to the provision of the UNCITRAL Model Law, that states that, "the provisions of this Law... apply only if the place of arbitration is in the territory of this State."

The Hon'ble Supreme held as under:
"In our opinion, the provision contained in Section 2 (2) of the Arbitration & Conciliation Act, 1996 is not in conflict with any of the provisions either in Part I or in Part II of the Arbitration Act, 1996. In a foreign seated international commercial arbitration, no application for interim relief would be maintainable under Section 9 or any other provision, as applicability of Part I of the Arbitration & Conciliation Act, 1996 is limited to all arbitrations which take place in India".[36]

The diverging views of various High Courts on this aspect are observed in para 35 of the judgment in *Bhatia International* with the observation that the Act seems to have a few flaws in drafting.

Para 35 of the judgement is reproduced below –

"35. Lastly it must be stated that the said Act does not appear to be a well drafted legislation. Therefore the High Courts of Orissa, Bombay, Madras, Delhi and Calcutta cannot be faulted for interpreting it in the manner indicated above. However, in our view a proper and conjoint reading of all the provisions indicates that Part I is to apply also to international commercial arbitrations which take place out of India, unless the parties by agreement, express or implied exclude it or any of its provisions. Such an interpretation does not lead to any conflict between any of the provisions of the said Act.

[35] *Supra note 31*
[36] (2012) 9 SCC 649

On this interpretation there is no lacunae in the said Act. This interpretation also does not leave a party remedyless. Thus such an interpretation has to be preferred to the one adopted by the High Courts of Orissa, Bombay, Madras, Delhi and Calcutta. It will therefore have to be held that the contrary view taken by these High Courts is not good law."

While there were judgements that went against the scheme of the Act, there were also judgements that took a pro-arbitration stance. In focus, is the Indus Water Treaty dispute. Two prominent players in the Asian markets, (India and Pakistan) had referred the Indus Water Treaty 1960[37] dispute to The Permanent Court of Arbitration[38]. With an increase in economic activity foreign companies began investing in India through their wholly-owned subsidiaries. Soon the Hon'ble Supreme Court was called upon to give its ruling on the issue of whether two Indian companies could resolve their disputes through arbitration at a place outside Indian territory with the law governing the contract being English law. The Supreme Court had to decide whether this was permissible under the 1996 Act. The Supreme Court, in a much celebrated verdict, held that as per the provision of Section 28 of the 1996 Act, the parties were free to choose the *'lex arbitri'* or the substantive law that governed the contract, and that such a clause mandating the substantive law to be English law, would be a valid clause[39].

Despite these arbitration-friendly judgements by the courts, the purpose of the Act was still not being achieved, and arbitration was not able to succeed in its true and proper spirit. This was partly due to the huge pendency of cases in courts and partly because of a number of provisions still finding place in the 1996 Act, which gave the parties an opportunity to approach the court at every instance and delay the arbitral proceedings. Also, not all disputes/matters could be referred to arbitration.[40]

Also, due to such a huge volume of pending cases, these applications filed under the

[37] https://pca-cpa.org/en/search/?q=THE+INDUS+WATERS, February 23, 2018
[38] Award in the Arbitration regarding the Indus Waters Kishenganga between Pakistan and India dated December 20, 2013; Accessible at – https://legal.un.org/riaa/cases/vol_XXXI/1-358.pdf
[39] 2016 (8) SCALE 225
[40] *Vimal Kishor Shah & Ors v. Jayesh Dinesh Shah & Ors***;** 2016 (8) SCALE 116

arbitration Act could not be disposed of expeditiously, which significantly slowed down proceedings and hampered the progress of arbitral proceedings.

Another problem was that amongst different judgements of different High Courts, there was a diversity in judicial opinion. A diversity was also seen in various judgements of the Apex Court itself. A seven judge bench in the case of *S.B.P. & Co. v. Patel Engineering*[41], overruled the law laid down in the case of *M/s Konkan Railway Corporation Limited v. Rani Construction Pvt. Ltd.* (Konkan Railways)[42], and it was decided that the power under Section 11(5) for appointment of an arbitrator, was a judicial power and not an administrative power.

Under Section 11(6), it was only the Chief Justice or his designate of the Supreme Court or of the High Court, who had the power to appoint an arbitrator. Naturally, in most of the cases the courts appointed their retired judge brothers and sisters as arbitrators. It did not help that these retired Supreme Court and High Court judges who were appointed as arbitrators, had the liberty and authority to fix their own remuneration.

In a study[43] conducted in order to understand the appointment of arbitrators by courts while exercising their powers under Section 11(6), it was found that –

(1) the judiciary has virtually created a monopoly by institutionalising appointment of retired judges as arbitrators;

(2) courts have eliminated competition from other potentially capable professionals for appointment as arbitrators; and

(3) there is lack of transparency in the process of appointment of arbitrators.

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[41] (2005) 8 SCC 618
[42] (2002) 2 SCC 388
[43] Srinivasan, Badrinath, Appointment of Arbitrators by the Designate Under the Arbitration and Conciliation Act: A Critique (April 3, 2014). Economic and Political Weekly, Vol. XLIX, No. 18, May 2014. Available at SSRN: https://ssrn.com/abstract=2429622, Retrieved on March 13, 2018

The author in that study had collected data from 10 different High Courts and the Supreme Court by filing applications under the Right to Information Act, 2005. The research shows that while alternative dispute mechanism systems ideally ought not to be influenced by the court, arbitrations in India still continue to be so. This has led to arbitration being a far more expensive dispute resolution mechanism than sometimes even litigation in the court. While the object of the Act was to provide a much more cost-effective and speedier dispute resolution system, the lacunae present in the 1996 Act do not instill any faith or confidence in contesting parties. In this context, the observations that are made by the Hon'ble Supreme Court in the case of *Union of India v. Singh Builders*[44] in paras 21 to 23 are relevant:

"There is no doubt a prevalent opinion that the cost of arbitration becomes very high in many cases where retired Judge/s are Arbitrators. The large number of sittings and charging of very high fees per sitting, with several add-ons, without any ceiling, have many a time resulted in the cost of arbitration approaching or even exceeding the amount involved in the dispute or the amount of the award. When an arbitrator is appointed by a court without indicating fees, either both parties or at least one party is at a disadvantage. Firstly, the parties feel constrained to agree to whatever fees is suggested by the Arbitrator, even if it is high or beyond their capacity. Secondly, if a high fee is claimed by the Arbitrator and one party agrees to pay such fee, the other party, who is unable to afford such fee or reluctant to pay such high fee, is put to an embarrassing position. He will not be in a position to express his reservation or objection to the high fee, owing to an apprehension that refusal by him to agree for the fee suggested by the arbitrator, may prejudice his case or create a bias in favour of the other party who readily agreed to pay the high fee……. What is found to be objectionable is parties being forced to go to an arbitrator appointed by the court and then being forced to agree for a fee fixed by such Arbitrator. It is unfortunate that delays, high cost, frequent and sometimes unwarranted judicial interruptions at different stages are seriously hampering the growth of arbitration as an effective dispute resolution process."

[44] (2009) 4 SCC 523

Late Justice V. R. Krishna Iyer in his article[45] titled, '*Justice, Justices, and Justicing: Dialectic Look at the Problem in Indian Setting'* has said,

"It is alarming to note that arbitration, meant to simplify matters, is now the victim of a terrorism syndrome. For instance, the longevity of arbitration is anfractuous. Moreover, unpardonable cupidity, phenomenal prolixity and expenses have been woven into the innocent arbitration process. And what an outrage it is that judicial arbitrators supplement their incomes by means of reading fee, writing fee, conference fee and other such obnoxious money-making inventions in every dimension of arbitration. This horror of procedure must suffer seppuku. It is the opium of arbitral justice, indeed."

While the legislature, through amendments to the arbitration law in India, is trying to minimize the scope of judicial interference when it comes to dealing with arbitral awards, the same has failed miserably. The grounds for challenge are still quite wide despite the legislature making an effort to narrow them down. One of the most important, and at the same time notorious grounds for challenge, is that the award is in conflict with the public policy of India. While it is up to the courts in India to interpret and decide how narrow of an approach to give 'public policy', conflicting decisions by higher courts are creating confusion in the minds of advocates as well as judges alike. The expression 'public policy of India', has been described by most as an unruly horse. The Hon'ble Supreme Court in *ONGC Ltd. v. Saw Pipes Ltd.*[46] came to the conclusion that an award could also be set aside if it is against and perverse to Wednesbury's principles of reasonableness. This invited a critical comment from none other than eminent Senior Advocate Shri Fali S. Nariman who in his speech delivered on 02.05.2003 said that this judgment:

"……. virtually sets at naught the entire Arbitration and Conciliation Act of 1996. If Courts continue to hold that they have the last word on facts and on law – notwithstanding consensual agreements to refer matters necessarily involving facts and

[45] V.R. Krishna Iyer, *Justice, Justices, and Justicing: Dialectic Look at the Problem in Indian Setting*, Gokhale Institute of Public Affairs, 1980
[46] *Supra note 29*

law to adjudication by arbitration – the 1996 Act might as well be scrapped. ……. The Division bench decision of the two Judges of the Court has altered the entire road-map of Arbitration Law and put the clock back to where we started under the old 1940 Act.[47]"

The damage was further intensified when the Hon'ble Supreme Court while deciding the case of *Associate Builders v. Delhi Development Authority*[48] upheld the judgment in the case of Saw Pipes and declared it to be good law. Soon after the 1996 Act was enacted, criticisms and objections to its working were raised by a number of legal and commercial organisations. On 05.08.2014, the Law Commission submitted a comprehensive report to the government. On 06.02.2015, a supplementary report was also submitted. Thereafter the 1996 Act was significantly amended by The Arbitration and Conciliation (Amendment) Act, 2015 with effect from 23.10.2015.

2.2.3 The Arbitration and Conciliation (Amendment) Act, 2015

The Arbitration and Conciliation (Amendment) Ordinance, 2015 received the assent of the President of India on October 23, 2015 and became the Arbitration and Conciliation (Amendment) Act, 2015. The Law Commission of India, under the chairmanship of Justice A.P. Shah, retired Chief Justice of Delhi High Court, was tasked with reviewing the Arbitration Act of 1996 because of the inadequacies of the Act. Suggestions from various people like lawyers, judges and others were invited and considered to prepare the recommendations to the Arbitration and Conciliation Act, 1996. A draft note was prepared for the cabinet for its consideration and the Commission was asked to study the proposed amendments.

Salient features of the recommendations of the Commission and the amendments that came to be effected are as below-

[47] Sumeet Kachwaha, *The Arbitration Law of India: A Critical Analysis,* Asia International Arbitrational Journal, 2017, Volume 1, Number 2, Pages 105-126
[48] (2015) 3 SCC 49

- In Clause 7 of the 'Introduction to the Proposed Amendments' by the Commission[49], the Commission expressed its opinion on encouraging parties to get their disputes resolved through institutional arbitration instead of ad hoc arbitration.

- The Commission also noticed and took cognizance of the arbitration centres that are established by various High Courts and their functioning.

- Trade bodies and commerce chambers are encouraged to start their own arbitration centres with their own rules that are drafted along the lines of the rules of already established arbitration centres.

- The government was asked to consider the formation of an arbitration commission that can work towards the promotion of arbitration in the country.

- A model schedule of fees is proposed so that there is a ceiling on Arbitrator fees. This is along the lines of the schedule formulated by the Arbitration Centre in the Delhi High Court. The Commission also expressed its desire and inclination to amend provisions pertaining to damages and costs. This draws inspiration from the UK regime of awarding actual cost. The schedule of fees finds place in the Fourth Schedule of the Act. However, the Commission recommended for this to be indicative and not mandatory.

- The Commission took cognizance of the fact that a lot of arbitrary delays are because of multiple settings that are not actually required and are merely formal in nature. Delays are also attributed to unnecessary adjournments granted to parties/counsels. The Commission proposed an addition to Section 24(1), in the following form –

  "Provided further that the arbitral tribunal shall, as far as possible, hold oral

[49] Report No. 246 of the Law Commission of India accessible at – http://lawcommissionofindia.nic.in/reports/Report246.pdf

hearings for the presentation of evidence or for oral argument on day-to-day basis, and not grant any adjournments unless sufficient cause is made out, and may impose costs including exemplary costs on the party seeking adjournment without any sufficient cause."

- The Commission expressed its opinion on the need to achieve a balance between judicial intervention and judicial restraint.

- The Commission expressed its opinion on dedicated and specialized benches in various High Courts for disposing of arbitration matters taking the example of Delhi High Court.

- One of the most important amendments was the amendment of Section 9 which enabled the party to approach the court for grant of interim measures, before, during or even after arbitral proceedings. The amendment by virtue of the insertion of Section 9(2) and Section 9(3), mandated a party to commence arbitration within a period of 90 days so as to not let the party enjoy interim protection indefinitely without commencing arbitration. This would mean that the party seeking interim measures before the Court would have to rush to the tribunal immediately (within 90 days) upon obtaining interim relief.

  Section 9(2) reads as –

  "9(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine."

- Also, the amendment in Section 9 restricted the court from passing an order under Section 9 if the party could obtain the same relief from the tribunal under Section 17. This found place in Section 9(3) –

  "9(3) Once the arbitral tribunal has been constituted, the Court shall not

entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious."

- Importantly, Section 9 and Section 27 were also made applicable to international commercial arbitrations unless the parties agreed to the contrary. This helped foreign parties to seek interim measures from courts and to approach the courts for taking evidence.

- The Commission thought it fit to bring about an amendment to the provisions relating to appointment of an arbitrator. The power of appointment was earlier vested with the Chief Justice of the High Court or the Supreme Court. The Commission was of the opinion that appointment of an arbitrator would not be a judicial action and hence could be delegated to other specialized institutions so that time is not wasted in appointment of an arbitrator. The Commission was also of the opinion that orders of the courts pertaining to appointment be given more finality and be made non-appealable. Section 11 was amended so as to give the power of designating arbitral institutions to High Courts and the Supreme Court. Section 11(7) reads as –

  "11(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court is final and no appeal including Letters Patent Appeal shall lie against such decision."

- It was for this purpose that the definition of 'court' in Section 2(e) was amended. Subsequent to the amendment, for international commercial arbitrations in India, foreign parties would not have to approach the district courts and they could directly approach the High Court, thus cutting down the time spent in litigation before lower courts.

- In order to give a boost to international arbitrations, the Commission recommended the High Court to be the competent court for such proceedings

arising out of international arbitrations, despite the High Court not having original jurisdiction. Section 2(e) reads as -

"2(e) Court means—
(i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court."

- The Commission recommended applications challenging arbitral awards or for enforcement of arbitral awards be disposed of within a fixed time period. This finds place in Section 34(6) of the Arbitration and Conciliation Amendment Act, 2015, where an application under Section 34 is directed to be disposed of expeditiously, and in any event, within a period of one year from the date on which the other side is served a notice about the Section 34 proceedings.

- The Commission recommended an amendment in Section 36 so that an award does not get stayed merely on the filing of an application under Section 34. Earlier, challenging the award would mean an automatic stay on the award thus rendering the entire arbitral proceeding meaningless and relegating the parties to fight it out before the court for enforcement. By virtue of Section 36, a separate application for stay of the award would have to be filed which would be decided upon its own merits irrespective of the grounds raised in the application under Section 34.

Section 36(2) reads as –

"36(2) Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose."

- The Commission has recommended for restricted judicial intervention under Section 8 and Section 11 of the Act. This was done by restricting the judicial authority only to the 'existence of a valid arbitration agreement' under Section 8 and by designating arbitral institutions under Section 11 for appointment of arbitrators.

- The Commission proposed an amendment to Section 34 and is of the opinion that mere erroneous application of law is not a ground to set aside an arbitral award. Because of the recommendations of the Commission, Section 34 was amended and a proviso 2A was added, by virtue of which 'patent illegality' ceased to be a ground for setting aside awards in international commercial arbitrations.

- The Commission recommended wide powers under Section 17 to the arbitrator, and this has been done as discussed in Chapter 5. This was done so as to enable the arbitral tribunal to grant the party some relief for which the party would not have to waste time in approaching the court.

- The Commission recommended issues of fraud to be arbitrable and capable of being adjudicated by an arbitral tribunal. This seeks to rectify the judgement of the Hon'ble Supreme Court in *N. Radhakrishnan v. Maestro Engineers*.[50]

[50] (2010) 1 SCC 72

- The Commission has recommended for certain disclosures to be made by an arbitrator at the time of appointment about facts that can give rise to justifiable doubts about impartiality or bias. This finds place in the Fifth Schedule which lists down basic examples where there can be said to be a likelihood of bias or impartiality on the part of the arbitrator.

- The Commission has proposed an amendment to the definition of 'party' under Section 2(h) of the Act so as to cure the anomaly about persons claiming through a party to an arbitration agreement.

- The Commission has recommended for wider powers to be given to the arbitral tribunal to award interest. This finds place in Section 31, by virtue of which the rate of interest applicable to an award, where no rate has been mentioned by the tribunal, shall stand at 2% higher than the prevailing rate of interest on the date of the award.

- Under Section 31(7b), the tribunal also has power to award any other rate of interest.

- The Commission has proposed an amendment to clarify that an arbitration agreement can be entered into even by way of an electronic communication. This has been done by way of an amendment to Section 7 of the Act.

- The Commission also proposed for the amendments to be applicable prospectively and not retrospectively.

- A fast track procedure is provided for under Section 29A and Section 29B for speedy arbitrations.

Recommendations of the commission were taken into consideration and the amendments were brought into force. Unfortunately, most of the amendments that are made as suggested by the report of the Law Commission are only cosmetic in nature. The fundamental problems pertaining to huge expenses in arbitral proceedings and the

still not–so–narrow scope for interference by courts, defeats the whole purpose of the amendments. Though the Act of 2015 has fixed time limits for the arbitrator for passing an award and for disposing and deciding challenges filed under Section 34, these are not of much use when during the high pendency of cases in courts, the appeal against an order of the district court will carry on for another few years in the High Court and then will take a few more years for disposal by the Supreme Court. For some other fundamental problems like registration of awards, custody of awards and stamp duty there is still no solution that is available even in the amended Act of 2015.

2.2.4 Amendments in 2019

The need for another amendment in the Arbitration and Conciliation (Amendment) Act, 2015, stemmed from the need to strengthen institutional arbitration in India. In order to achieve this purpose, a committee was constituted by the government of India under the chairmanship of Justice B. N. Srikrishna.

Salient features of the amended Act are summarised below and subsequently discussed in detail –

- Section 11 of the Act which deals with appointment of arbitrators was amended to insert a sub section (6A) by way of the 2015 amendment. This section is deleted in the 2019 amendment. While the insertion of Section 6A in the 2015 amendment was so that the arbitration agreement could be examined on its existence and validity, the actual provision did not reflect so. For a better understanding, Section (6A) is reproduced below-

  "(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement."

- Giving a boost to institutional arbitration was the main focus and objective behind the 2019 amendment and as per the recommendation of the high-level committee, the Act had to be amended in order to give the powers of appointment of arbitrators to arbitral institutions designated by the courts.

The Arbitration & Conciliation (Amendment) Act, 2019 , amended the Indian Arbitration & Conciliation Act, 1996 and came into force with effect from 9th August 2019. In a press release, the Law Minister of India was quoted as saying that it was the intention of the Government of India to convert India into a favourable hub of domestic and international arbitration[51], by making suitable amendments in law that would lead to a faster dispute resolution mechanism and a speedier process for resolving commercial disputes. With the 2019 Amendment Act finally in force, it becomes imperative to discuss and analyse whether the objective is actually fulfilled or has still merely remained a formality on paper.

- One of the new provisions that is introduced by the 2019 amendment is Section 11(3A), which gives the power to designate arbitral institutions to the High Courts and the Supreme Court of India. These designated institutions would be those institutions that have been graded by the Arbitration Council of India (ACI) under Section 43-I, which is another provision that is introduced by the 2019 amendment. The primary objective of these provisions was that instead of the court intervening under Section 11 for appointment of an arbitrator, in cases where the parties are not mutually able to decide upon an arbitrator, now the court would designate graded arbitral institutions to do the needful and appoint an arbitrator as per Sections 11(4)–(6). One of the fundamental problems behind this idea is that it curtails party autonomy in international commercial arbitration because of the interference of the executive and the judiciary. It needs to be clarified that the arbitral institution that would be designated as per the choice of the court would only be one amongst the limited options that are graded by the ACI. This is going to result in a limited number of institutions that have ACI

[51] https://www.financialexpress.com/india-news/changes-in-law-needed-to-make-india-hub-of-arbitration-ravi-shankar-prasad/1648775/, Retrieved on April 12, 2017

accreditation and a limited number of arbitrators who might feature on the panels of these institutions. Invariably, the courts would have to choose one only from amongst these. Now, an institution that is not yet graded but has an international reputation for its quality of services would have to go through the entire set of administrative hurdles in order to get accreditation from the ACI, before being eligible to be designated by the court as an arbitral institution.

- While one of the major concerns when the 2019 amendments were being analysed and discussed, was giving an impetus to institutional arbitration in India, the amendments leave a lot of discretion in the hands of the judiciary and the executive who eventually will end up deciding who gets the largest slice of cake. This would inadvertently be because half of the ACI consists of the judiciary and the other half comprises of the executive.

- As provided for under the amended Section 23(4), the claimant would have to file its statement of claim and the defendant would have to file the statement of defence and these pleadings are to be completed within a period of six months from the date when the arbitrator is appointed. It was also provided under the amended Act that in matters of international commercial arbitration, the award would be made as expeditiously as possible and preferably within a period of 12 months from when the pleadings are complete. While the intent behind this seems to be in line with the objective of the Act, it might lead to trouble for the arbitral tribunal since it would restrict the tribunal from being in control of the proceedings. International commercial arbitrations are complex and involve massive documents and multiple parties and it would be challenging to complete pleadings within a period of six months. The arbitral tribunal in an endeavour to adhere to the time limits, might not be able to frame its own procedural timetable and might overlook the procedural aspects that are essential to an international arbitration proceeding[52]. This time limit shall not only apply to ad hoc arbitrations but shall also extend to institutional arbitrations. It is unclear

[52] https://iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf; Rule 24

who is to bear costs if the mandate of the arbitral tribunal ends due to the expiry of the time-period.

- Earlier, in most cases, a party to an arbitral proceeding would grab the opportunity and file an application under Section 9 of the Arbitration and Conciliation Act, 1996 the moment the tribunal was constituted, whether in an attempt to secure that much needed injunction, or whether to drag the opponent to court so that they might bear the additional costs involved in litigation. In the new Act, the powers of the tribunal to grant interim relief are much wider and much more enforceable. In this regard, the introduction of Section 9(3) is an indication to courts to refrain from interfering in arbitral proceedings and to exercise powers under Section 9 when and only when the remedy under Section 17 would not be an efficacious remedy or would be beyond the power of the tribunal.

- There is a detailed provision for awarding costs. The Act provides that as a general rule, an unsuccessful party must pay the costs of the successful party. The Court or arbitral tribunal awarding costs is to take into account the conduct of parties, subversive tactics such as filing of a frivolous counter claim, and reasonable offers to settle. This should discourage delay tactics and frivolous applications/pleas during arbitral proceedings. Arbitration clauses that stipulate that parties will share costs will not have any effect, as the Act provides that agreements assigning costs of proceedings to a party, will be valid only if executed after the commencement of the dispute.

- However, it is unclear from the provision as to whether an arbitral tribunal can award costs incurred by a party in arbitration-related litigation (especially applications under Sections 8, 9 and 11). Also, the retention of the word "reasonable" in the provision is problematic if the intention was to award costs on an indemnity basis. Indian Courts have interpreted "*reasonable*" costs to mean that "*actual*" expenditure is not awardable under the un-amended Section 31(8) of the 1996 Act.

- Under the new Act, the fees to be charged by the arbitral tribunal have been provided for in a separate schedule. Even though at the time of the enforcement of the Arbitration and Conciliation Act, 1996, it was the legislative intent that arbitration should be a more cost effective and speedier option than litigation, it was merely wishful thinking. Yes, it is not incorrect to say that it was in most cases speedier than litigation.

- The ICC also updated its 'Note to Parties and Arbitral Tribunals on the Conduct of Arbitration[53]' under the ICC Rules of Arbitration. This came into effect from 1st January 2019, it stated that all awards since the day it came into effect may be published within a period of two years after the notification, based on an opt-out procedure. Contrastingly, as per Section 42A of the amended Act, confidentiality of the entire proceedings of arbitration except the award would have to be maintained by both the arbitral institution as well as the parties, and only in cases where for the purposes of enforcement, disclosure is necessary, it shall be disclosed. One of the misses in the amended legislation is that it does not have a provision for an opt-out procedure.

- Another job of the Arbitration Council of India is grading of arbitrators and reviewing them.[54] The Eighth Schedule as brought in by the 2019 amendment, lists the qualifications, experience and the procedure for accreditation of arbitrators. The Eighth Schedule, there are nine categories of persons and only those are eligible to be appointed as an arbitrator. This means that a foreign lawyer or a retired judge of a foreign court is straightaway ineligible to be appointed as an arbitrator as per the 2019 amendment. It goes without saying that international parties will not be too inclined to opt for institutional arbitration in India when the list of eligible arbitrators is limited by nationality, or lack of specialisation and experience in handling international arbitrations.

[53] https://iccwbo.org/media-wall/news-speeches/icc-issues-updated-note-providing-guidance-parties/; Paras 40-46, Retrieved on October 12, 2020
[54] Section 43D(2)(c)

- Section 42A and Section 42B are inserted in order to clarify on confidentiality of arbitral proceedings and to indemnify the arbitrator, respectively. These sections are reproduced below-

  "42A. Notwithstanding anything contained in any other law for the time being in force, the arbitrator, the arbitral institution and the parties to the arbitration agreement shall maintain confidentiality of all arbitral proceedings except award where its disclosure is necessary for the purpose of implementation and enforcement of award.

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

Major shortcomings of the 2019 Amendment -

- A major lacuna that is left after the omission of Section 6A in the Act is whether the order of appointment under Section 11 of the Act passed by arbitral institutions for appointment of an arbitrator would be challengeable in court.

- Another loophole that isn't clarified is whether the arbitral institution exercising powers under Section 11 for appointment of arbitrators is limited only to determining the existence of the arbitration agreement or whether the power extends to examining the validity of the arbitration agreement between the parties.

- Court intervention in arbitration proceedings is fairly common in India and Section 29A does not clarify whether the time spent in litigation would be included in computing the time limits. Unfortunately, the time limits prescribed under the Act are too good to be true. The Indian judiciary is neither equipped with enough judges nor does it have the requisite infrastructure to dispose of challenges to arbitral awards within a year.

Section 29A as was amended by the 2015 Amendment is reproduced below for ready reference-

"29A.Time limit for arbitral award.—(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) by not exceeding five per cent. for each month of such delay.

(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 sixty days from the date of service of notice on the opposite party."

This was further amended so as to bring within itself the scope of extending the time limits to international commercial arbitrations as well.

After the 2019 Amendment, Section 29A(1) reads as –

"(1) The award in matters other than international commercial arbitration shall be made by the arbitral tribunal within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23:

Provided that the award in the matter of international commercial arbitration may be made as expeditiously as possible and endeavour may be made to dispose of the matter within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23".

- There is no clarity on whether arbitration related litigation is to be considered and included while awarding cost under the amended Act.

- There was an embargo on foreign lawyers or judges being appointed as arbitrators under the amended Act. This finds place in the Eighth Schedule to the Act. However, this schedule has not been notified yet by the Central Government. The basic wordings of the schedule are that a person would not be eligible to be an arbitrator unless that person is an advocate within the meaning of the Advocates Act, 1961 with 10 years' work experience. For better clarity,

Section 24 of the Advocates Act states that only a person of Indian citizenship can be an advocate under the Advocates Act. This indirectly created an embargo on foreign lawyers being appointed as arbitrators under the amended Act.

2.2.5. The Arbitration and Conciliation (Amendment) Ordinance, 2020

The President of India has promulgated the Arbitration and Conciliation (Amendment) Ordinance of 2020. There are two major changes brought about by this amendment. They are discussed below –

a) Section 36 has been amended by adding a proviso to the effect that where a case for fraud or corruption is prima facie made out, an unconditional stay will be granted.

b) Schedule 8, which dealt with qualifications of an arbitrator, which effectively prevented foreign arbitrators or lawyers from practising arbitration in India, is omitted. However, there is no clarity on the regulations governing appointment of an arbitrator now.

What remains to be seen is whether parties use the proviso to Section 36 by alleging fraud and corruption in applications for execution of award, thus defeating the very purpose of the Act. In all such applications, an unconditional stay will be granted and execution will be stalled.

2.3. Conclusion

The international community has criticised India as a ‘not-so-friendly’ arbitration jurisdiction. The 2019 amendments are an attempt by the Government of India to rectify and to change this perception. However, it seems that these amendments have more misses than hits. Although it is an attempt in the correct direction, it is going to take

more than this to make India a globally favourable destination for arbitration. International trade and commerce have witnessed a rapid boom, thanks to the industrial revolution. With increased economic activity, a rise in the number of disputes between parties is inevitable. In order to avoid the prolonged delays caused in litigation, parties are now resorting to arbitration as a much more favourable choice of dispute resolution. This mode of dispute resolution has not only found favour with players in the Indian market, but also amongst global parties and world economies. With the increase in the number of cross border transactions and bilateral/multilateral investment treaties, trade relations between countries are being forged which has led to a number of contracts being drawn up every day with more and more legal intricacies. It would go without saying that disputes would arise and a method or a solid system to deal with such disputes is in demand so as to accelerate the dispute resolution process.