ENFORCEABILITY OF INTERNATIONAL COMMERCIAL ARBITRATION AWARDS UNDER REGULATORY FRAMEWORK OF INDIA: AN ANALYSIS

Dissertation submitted to National Law University, Assam

In partial fulfilment for award of the degree of

ONE YEAR MASTER DEGREE PROGRAMME

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August, 2020

DECLARATION

I, **Smriti Singh**, do hereby declare that the dissertation titled **"Enforceability of International Commercial Arbitration Awards under Regulatory Framework of India: An Analysis"** submitted by me for the award of the degree of One Year LL.M Degree Programme of National Law University, Assam. This is a bonafide work and has not been submitted, either in part or full anywhere else for any purpose, academic or otherwise and I hereby solemnly affirm that the present work is entirely my own and completed under the supervision of **Dr. S. C. Singh** sir**.**

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CERTIFICATE

This is to certify that **Smriti Singh** has completed her dissertation titled **"Enforceability of International Commercial Arbitration Awards under Regulatory Framework of India: An Analysis"** under my supervision for the award of degree of Master of Laws (One Year Degree LL.M. Programme). To the best of my knowledge this dissertation is the result of her own learning and research.

I wish her all success in her future endeavours.

Date - 17/08/2020
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PREFACE

Human conflicts are inevitable. Disputes may arise between the people in relation to their personal, professional, economic and political lives. Since disputes are inevitable, there is an urgent need to find a quick and easy method for their resolution. Disputes must be resolved at minimum possible cost both in terms of time and money, so that more time resources and energy can be utilized for constructive pursuits. The rationale and purpose of International Commercial Arbitration (ICA) are generally to provide a convenient, neutral, fair, expeditious and efficacious forum for resolving disputes relating to international commerce.

The Basic features which are uniform in the legal framework for resolution of international commercial disputes can be broken down into three major stages viz. jurisdiction, choice of law and the recognition and enforcement of arbitral awards. In International Commercial Arbitration, when the parties are of different legal systems, there automatically arises a conflict of laws, and a choice of the substantive law to be applied in a given dispute has to be made. Many a time, the substantive law to be applied in arbitration may be specified by the parties in their original agreement. But problems arise in determining the applicable law in situations when the parties fail to agree upon a choice of law for the settlement of their dispute. The trend towards growing judicial intervention which tends to interfere with arbitral autonomy as also finality is a significant factor to be kept in view. The need is to reconcile and harmonize arbitral autonomy and finality with judicial review of the arbitral process. The National laws differ on this issue. UNCITRAL Model Law attempts to promote harmony and uniformity in this sphere.

The idea for this research problem came into researcher's mind after analyzing BALCO judgment dated 6th September, 2012 which made the people to think of suitable amendments in the Indian Arbitration & Conciliation Act, 1996 in terms of inter alia applicability of its Part I in International commercial arbitration, enforcement of foreign Awards, recourse against foreign Awards as well as appeal against foreign Awards, hence this research work is an effort to search for a solution for the conflicting issues involving

in enforcement of awards under ICA in Indian legal system. Furthermore, the researcher wanted to research on above mentioned issues involving in International commercial arbitration and tried to find out solutions of the same. These legal issues are needed to be resolved to make India a hub for International commercial arbitration.

This research work has been divided into six chapters wherein, First chapter deals with the introductory part including the essential details of the research work. The second chapter gives the details about the concept of arbitration, its types, different attributes of the arbitral process involved and the concept of arbitrability under the Indian laws. The third chapter includes the legal provisions (both national and international), that governs the arbitration mechanism. In the fourth chapter the researcher tried to mention the meaning and concepts of International Commercial Arbitration including the various interpretations of the expression 'commercial', 'seat', 'venue' and 'place'. Furthermore, this chapter includes the different conditions of International Commercial Arbitration viz. ICA when seated in India, ICA when seated outside India, ICA with reciprocating territory, the various theories of commercial arbitration, Awards under ICA and its recognition & enforcement under both New York Convention & Geneva Convention, lastly all the provisions relating to enforcement of awards under ICA. In chapter five the researcher analyzed the existing regulatory framework of ICA in India as to check its efficiency and concluded the whole research work in the last chapter i.e. chapter six with a list of major findings and the suggestions as per the research. Thus this work aimed to stress on the regulatory framework of India with respect to the enforcement and recognition of arbitral awards under ICA and to suggest some methods to get rid of the same.

TABLE OF CASES

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TABLE OF ABBREVIATIONS

&	And
A.I.R.	All India Reporter
ADR	Alternate Dispute Resolutions
Anr.	Another
Art.	Article
Bom.	Bombay
CPC	Civil Procedure Code
ECOSOC	Economic and Social Council
Edn.	Edition
Etc.	Et cetera
FARE	Foreign Awards (Recognition & Enforcement)
Govt.	Government
HC	High Court
Ibid	Ibidem (Latin) (in the same place)
ICA	International Commercial Arbitration
ICC	International Chamber of Commerce
IPC	Indian Penal Code
Ltd.	Limited
MNC	Multi National Company
NYC	New York Convention
Ors.	Others
p.	Page
Para	Paragraph
Pvt.	Private
r/w	read with

S.C.	Supreme Court
S.C.C.	Supreme Court Cases
Sch.	Schedule
SCR	Supreme Court Report
Sec.	Section
Supra	Above
Vol.	Volume
w.e.f.	with effect from
w.r.e.f.	with retrospective effect from
wrt	with respect to

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CHAPTER 1

INTRODUCTION

"Every man lives by exchanging"

- Adam Smith

The event of globalization impacted almost every field in human society and made the whole world a platform for exchanging their culture, language, traditions, there way of trade and commerce. This also enhanced the ways and techniques of trading which includes national trading and even overseas trading that now became the most common phenomena in business and commercial fields. In the era of globalization every country needs to cope up with the recent trends of the market. It appreciates a good trade relation between the two states. The global changes in the world not only developed technology, economical and business activities, but it also has a great emphasis on political activities, transport and communications, etc. It also inflicted the need for some organizations to change their strategies according to the present requirement and even to adopt cross borders strategies for better business transactions. With the emergence of globalization and new trade regimes, the world has become a global village. Business organizations have expanded themselves beyond their borders that resulted into increased cross-border transactions. For the purpose of making competitive advantages the business leaders are forced to change their center of attention i.e. from traditional mechanisms to alternative measures of the existing techniques or even some new techniques for successful business results and to enter the global markets. It involves many factors to rely upon i.e. "limited market, competitive pressure, demand for cheaper resources and the dynamics of the postmodern era, etc."[1] There has been a rapid growth in the fields of science, engineering and technology that expanded of markets worldwide which changed the limited approach of doing work. "If globalization is understood as a process that leads to greater economic integration of national economies, as a process of fragmentation of the world economy and the international economy, then the globalization is a process of opening of national

[1]Katerina Ristovska & Aneta Ristovska, *The Impact of Globalization on the Business,* ECONOMIC ANALYSIS, (Oct. 24, 2014, 10:00 AM), https://econpapers.repec.org/article/ibgeajour/v_3a47_3ay_3a2014_3ai_3a3-4_3ap_3a83-89.htm.

economies through the removal of economic and financial boundaries of national economies and thus their transformation into an international economic and financial market. Globalization encourages companies to internationalize and to substantially increase the volume and types of cross-border transactions in goods, services and capital."[2] When the companies turned "international" there was a systematic enlargement in the scope of the commercial events of making profit universally. Presently cross border commercial transactions is pretty common among different states or parties along with domestic business to enhance its scope. This helps to analyze all those transactions that take place cross borders.

Since everything has its pros and cons, similarly when such kind of transactions are executed through agreements and contracts between the commercial organizations many times it goes ugly or wrong which give rise to the disputes among such corporations. This goes more drastic because these transactions are not confined within the municipal law of a particular country, because the transactions are 'cross-border' in nature. These disputes may be due to different mindsets and thoughts. Due to increase in globalization, liberalization and international commercial connections, it is progressively relevant to adapt speedy dispute redressal techniques that result in less amount of time. To resolve the disputes one can have two solutions viz. "Litigation" or "Court system" and "Alternative dispute mechanisms" that includes negotiation, arbitration, conciliation, mediations, Judicial Settlements, Lok Adalats. The court system is a well-known procedure for those whose rights have been infringed or facing some of the other problems, but since it is readily available to everyone to approach it have a huge number of case running under it or can say pending before it. The reason behind this may be large number of cases, less judges, slow procedure, little bit costly and difficult procedure, etc. Thus, if one wants to have redressal they can go for other legal procedure which can solve their issues outside the court easily in comparison to the court system. The only thing which may restrict one is 'principle of arbitrability'. "In case of *Brij Mohan Lal v. UOI & Others,* it was held that an independent and efficient judicial system is one of the

[2] *Id.* at 1.

basic structures of our constitution and it is our constitutional obligation to ensure that the backlog of cases is decreased and efforts are made to increase the disposal of cases."[3]

Usually, as a matter of practice, all agreements executed between corporations inter-se, to bring to fore a common purpose, have three covenants, worth stressing, in particular; one is that of the 'governing law', second is the 'jurisdiction clause', and third is the 'arbitration clause'. The 'governing law' stipulation states, as to law of which country shall be taken recourse to, if and when deals between the international corporations go sour. The 'jurisdiction clause' states, as to courts of which country shall have the 'say' in the matter in dispute, at hand. The 'arbitration clause' states, how the disputes are to be resolved between the corporations before they are formally brought before the court of law for adjudication. "It also speaks about the mechanisms which are in the nature of out of the court settlement, such as: mediation, conciliation and arbitration."[4] Among all, Arbitration is a favorable procedure chosen by the parties for settling the disputes between them, wherein parties willfully consent to present the issue to an impartial party and consent will be mandated by law of choice.

Arbitration is a means to 'minimize the imbalance' among the parties which is accepted both nationally and internationally. The entire legal profession is under an obligation to resolve the human conflicts or to heal them and to provide a mechanism that can resolve their disputes in the least possible time and at the same time with less expense than that of litigation process and without any stress to the parties. Reasons, as to why, parties opt for arbitral mechanism for settlement of disputes in cross-border sphere of transactions is three-fold. Firstly, unfamiliarity with the 'inter-se' local laws of the countries of the transacting organizations, makes it convenient for the organizations to get disputes resolved without getting into the nuances, like which legal regime is to govern the dispute settlement, in other words the courts of which country will have precedence and laws (procedural and substantive) of which country will apply to the disputed issues. Secondly, arbitral mechanism is time effective and cost effective. Also, keeping the basic legal principles in mind, it is the transacting parties who set the rules of the game. Thirdly, the

[3] (2002) 4 Scale 433 (India).
[4] Shivam Goel, *International Commercial Arbitration - India*, SSRN, (2015).

dispute resolution mechanisms[5] do not 'side-track' but rather 'pull-center' the element of neutrality and non-arbitrariness in the dispute settlement procedure, making it convenient for parties to arrive at unbiased outcomes so that commercial relations between parties can be taken forward, healthily. The parties under international commercial transactions most probably choose that seat for arbitration which has no relation with the commercial transactions of the parties to agreement just to ensure that there is no 'actual' and 'anticipatory' biasness and secondly they most likely opt one's own court or court which is favorable to oneself. "Even if the courts are not biased the situation is not free from any problems. There may be some issues like one of the parties can freely litigate through the lawyers familiar to him/her by following a known procedure and language that suit to him, this can be said to be very easy procedure to get rid of dispute but on the other hand the opposite party may suffer unlike the former one due to unfamiliar laws and procedure to overcome the dispute and thus this does not strike a balance between the parties. The inconvenience can be measured on the basis of 'parties' which maybe national and even international or foreign parties who majorly suffer in understanding the laws and language of other country."[6] Thus, it can be said that justice should be delivered to the parties either inside the court room or through the procedures outside the court room i.e. litigations or alternative dispute resolution because the main motto of this stream is to deliver justice in the best possible way it can without any delay this is what justice is all about.

Arbitration can be performed in arbitral institution of the native country of any of the parties, or in any third country on mutual consent. Furthermore the scenario of such organizations is changed because now-a-days many arbitration organizations are administering arbitrations without restricting it to some countries. This often leads to increase in competition among various arbitration organizations so that they can offer their services worldwide. Indian judiciary's controversial decisions regarding the matters involving foreign parties have drawn more attention towards the need of up gradation of Indian laws of Arbitration. There is another concern about the biased act of the court especially in those matters where state is one of the parties to dispute. This is because it

[5] Arbitration, Mediation and Conciliation, Negotiation, Mini Trial, Med-Arb, Lok Adalats, etc.
[6] *supra* note, at 2.

may be possible that state may influence the decisions in favor of foreign parties to make them feel congenial.

There are two notable things here, namely; "Arbitration" and "International Commercial Arbitration". Arbitration is the most satisfactory procedure of ADR which basically is carried on by the persons appointed or agreed to by with a purpose to overcome the disputes outside the court. Whereas ICA means an "arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is an individual who is a national of, or habitually resident in, any country other than India or a body corporate which is incorporated in any country other than India or an association or a body of individuals whose central management and control is exercised in any country other than India or the Government of a foreign country."[7]

In India arbitration mechanism is regulated under the "Arbitration and Conciliation Act of 1996" which was framed relying upon the "UNCITRAL Model Law" and the same is read along with the connecting or referable statutory provisions given under "CPC, 1908". The Act of 1996 has four major divisions in it i.e. "Part I" that relates to "Domestic Arbitrations and Enforcement of its awards," "Part II" narrates the provisions of "Enforcement of awards under International Commercial Arbitrations". "Part III" of the act narrates the provisions regarding "Conciliation and its related proceedings" and lastly "Part IV" is having "Supplementary provisions". Because, the "Arbitration Act of 1996" was not considered as exhaustive legislation, there held many amendments from time to time as per the need of an hour, majorly in the year of 2015 then later on in 2019 to amend the existing provisions of arbitration relying on the different drawbacks and loopholes in the Act of 1996. Therefore, award's implementation by enforcing the same in both the circumstances i.e. "Domestic" as well as "International" is basically dealt with by the "Arbitration Act, 1996" which again must be r/w the major Indian civil procedural law namely "C.P.C, 1908". Relating to the arbitration, on the one hand the earlier one deals with the law of substantive importance which basically lays down the norms of "enforceability" and "execution" of awards and

[7] Section 2(1)(f), the Arbitration and Conciliation Act, 1996.

on the other hand the later one deals with the procedural norms which is essential for the implementation of the awards. "Here it will be worth mentioning the provisions laid down by sec. 34 and sec. 35 of the said Act; where "sec. 35" dealt with by provisions which requires that an arbitral award to be "final" and "binding" on to the parties subject to the proceedings initiated under Sec. 34."[8] The thing on which one must take imperative is that enacting a good arbitration law with a proper jurisdiction which even confirms the model law is not enough but what important is its application by the parties and the courts during enforcement or any challenging procedures to deal with the matter.

Although "Indian Judiciary" was panned for its involvement in the affairs of arbitration especially ICA and also while implicating the domestic laws in foreign seated arbitrations, still the apex court never failed to overcome the disputed issues relating to matters of arbitration. In simple terms Indian Judiciary gave many landmark judgments regarding the issues of arbitration laws, enforcement of arbitral award in India, etc. If we try to sum up those judgments we will get to know that the Indian judiciary showed the intention to adopt better International practices especially in case of arbitrations because India is becoming a hub for foreign investors and which requires a flexible and unambiguous arbitration laws in India.

Since 2012, many notable judgments were given by the Supreme Court relating to the issues of arbitration's "seat" or "place" as these were the hottest topic or can say the focused issue in commercial field. Since the position of arbitration is not constant and is developing with the good pace with time but at the same time there are so many issues arising out of it which requires a proper treatment that too backed by the law. Indian Parliament is also working for the development of arbitration rules by doing proper amendments but it needs a regular or quick development of laws as we can see that after "Arbitration Act of 1996", the amendment was done in the year of 2015 and later on in 2019, thus it needs the proper efficiency in it. The courts have adopted a "pro-arbitration approach" by declaring a series of decisions that encouraged the notion of arbitration which definitely impacted the arbitration scenario of India in a positive manner. After the

[8]Nitish desai, *International Commercial Arbitration* (Feb. 02, 2020, 11:40 AM), http://www.nishithdesai.com/file admin/user_upload/pdfs/Research_Papers/International_Commercial_Arbitration.pdf.

amendment of 2019 and some landmark judgments present situation of Indian arbitration law is that it is seat centric. The author in this research tries to focus on the enforceability of arbitral awards of ICA having seat "inside India" or "outside India" and to examine different issues, challenges in enforceability of such awards in India.

1.1 STATEMENT OF PROBLEM

The world has gone through major changes in the recent past. The international markets has grown so well in such a way that they are the focal point for most of the people who are engaged in trade and commerce, this is because of the rapid growth in the trade regime both national and international. With the increase in the international trade system there is also an increase in cross border disputes. To resolve such disputes the parties under arbitration agreement have the liberty to choose their law of procedure, place of arbitration or seat of arbitration, etc. This shows the flexibility in the arbitral procedure unlike the court room procedure which is very rigid and time consuming too. The laws are rigid in case of domestic awards than that of foreign arbitral awards. Till now there have been notable amendments in the basic act of arbitration i.e. Arbitration and Conciliation Act, 1996 to meet the need of that time. Also extensive international efforts have been made since the beginning so that the international regime of arbitration works well. But it has been observed that the existing laws are not sufficient to deal with the emerging issues in field of arbitration. For Example, it leaves Indian parties to decide that what will be the arbitral procedure if they will choose foreign seat of arbitration or; if there arise a matter relating to oppression and mismanagement, the same would be arbitrable or not; or the flexibility and independency of arbitration regime be maintained further, etc. The major issue other than such issue is in this regime is the enforcement and recognition of arbitral awards under international commercial arbitration from a very long time. So, the researcher has sought to know in this study that whether the present regulatory framework of arbitration is appropriate and exhaustive in such a way that the same would be able to heal the 'known' conflicts and also those which may arise in future and secondly to evaluate the drawbacks of the same. Lastly, whether the present international conventions provide for an appropriate framework through which the arbitral award under ICA can be duly recognized and enforced?

1.2 OBJECTIVES OF THE STUDY

i. To comprehensively perceive the intended meaning and concept of "Arbitration" and the types of arbitration including the types under "Domestic" as well as "International Commercial Arbitration".

ii. To comprehend the characteristics and elements of Arbitral Process.

iii. To examine the concept of 'Objective Arbitrability'.

iv. To understand the technicalities of "Recognition" and "Enforcement" of "International Commercial Arbitration" awards in Indian arbitration laws.

v. To summarize the current position of "International Commercial Arbitrations" under the Indian regime of Arbitration.

vi. To study the significance and drawbacks of "International Commercial Arbitrations".

vii. To study about the legal regime governing "International Commercial Arbitrations".

viii. To enquire into the soundness of theories in the sphere of Commercial Arbitrations.

ix. To understand the regulatory framework of the Arbitration of India in detail and to analyze the issues and challenges parties majorly face during the enforcement of International Commercial Arbitration awards.

x. To put a stress on the issues that left undealt under the Arbitration laws of India.

1.3 LIMITATION OF THE STUDY

As far as this research is concerned it has potential limitations as study on such topic requires a rich and detailed data and diverse viewpoints to dig out the essence of the topic. Although this research is conducted with due care and utmost sincerity but the researcher could not escape some limitations while representing the findings on the issue chosen. The issues of foreign arbitration award relating to its "enforcement" and "recognition" requires a detailed discussion and unlimited amount of analysis to get into the roots of issues. However, this study is limited in space, time (including the period of pandemic which does not gave me an opportunity to have a good knowledge from the books) and the methodology used in the work which does not

allow for an extensive research on the provisions dealing with "enforcement" and "recognition" of arbitration awards under ICA. The whole research on this issue is based on two important conventions which India signed for the purpose of regulation of arbitration but this does not mean that it is restricted to these two conventions only as there has been an inclusion of necessary provisions of laws and mechanisms of arbitration when and where required. An overview of such research revolves around the following-

- The research is based only on Indian legal framework and not any other country except for providing some examples and some relating International Conventions.
- The researcher tries to analyze the provisions of "Domestic" as well as "International Commercial Arbitrations" to suggest a better path to overcome the relating issues, keeping it more specific towards the laws under Indian statutes.
- All those limitations what secondary data consists may be possible.

1.4 RATIONALE

This research work has been carried out in order to ascertain the efficacy of the legal provisions pertaining to enforceability of awards under International Commercial Arbitrations in India. This study has been conducted in order to analyze various legal provisions relating to International Commercial Arbitrations and its emerging issues and challenges in enforceability of arbitral awards in India coupled with certain suggestions of the same.

1.5 LITERATURE REVIEW

To work on the dissertation, few books (mostly is electronic format due to the vulnerable time of spread of COVID-19 disease), online available reports in related blogs, research papers, articles from journal and internet sources has been referred in order to understand the regime of International Commercial Arbitration under the head of "Enforcement of foreign arbitral awards in India". The descriptions of same are as follows-

1. BOOKS

In the book of "*Dr. N.V. Paranjape, Law Relating To Arbitration & Conciliation In India"*[9], the author has described the Arbitration and Conciliation laws as per the "Arbitration Act of 1996" and its interpretations by the appropriate courts. The researcher focused on the arbitration laws and procedures which have been described comprehensively in the book including evolution, different aspects of arbitration, laws and the related mechanisms which helped to understand the notion of arbitration thoroughly. Secondly in book of "*J. L. Kapoor, An Easy Approach To The Arbitration And Conciliation Act, 1996"*[10], there was a swift description of the Act which included salient features of Act, section wise notes, all relevant case laws and appendices, Powers of Arbitral Tribunal, Requisites for an Arbitrator, Scheme for Appointment of Arbitrator, etc. In "*M. P. Jain, Indian Constitutional Law"*[11] the related provision for International Commercial arbitration for instance under the Article 51 (d) of DPSP, etc. was reviewd to grasp the constitutional validity of Arbitration. In, work of "*Alan Redfern* and *Martin Hunter, Law and Practice of International Commercial Arbitration"*[12] the authors comprehensively explained that International Commercial Arbitration is a private process with a public effect. The notable virtue of this work is that it manages skillfully to combine exploration of the diversity of the private process with succinct exposition of the public context created by the national laws and international conventions which permit room for imagination within the limits of law. Also its new student edition was published in 2004 by "*Sweet & Maxwell* titled *Law & Practice of International Commercial Arbitration"*[13] which provides a comprehensive review of the process of International Commercial Arbitration from beginning to end ranging from the drafting of the arbitration

[9] N. V. PARANJAPE, LAW RELATING TO ARBITRATION & CONCILIATION IN INDIA, (1st ed., 2016).
[10] J. L. KAPOOR, AN EASY APPROACH TO THE ARBITRATION AND CONCILIATION ACT, 1996, (1st ed., 2017).
[11] M. P. JAIN, INDIAN CONSTITUTIONAL LAW, (5th ed., 2003).
[12]ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, (1986)
[13]SWEET & MAXWEL, LAW & PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, (4th ed., 2004).

agreement to the enforcement of the arbitral tribunal's award accurately. In treatise of "*Gary B. Born, International Commercial Arbitration: Commentary And Materials"*[14] has a wide ranging arrangement with a detailed description of International Arbitration laws including its legal framework of International arbitration agreement and arbitral awards, International arbitration Agreement, its formation and validity and its various interpretations, selection and removal of arbitrators, Multiparty issues, Procedural issues and its provisional measures, Choice of substantive laws, recognition and enforcement of arbitral awards, etc. Similarly, some e-books relating to the topic has also visited by the researcher for preparation of this report.

2. JOURNALS

In work of "*Balakrishna Jayanth, Enforcement of Foreign Arbitral Awards: Issues and Challenge"* the author exhaustively explained the different notions of international commercial arbitration and the related procedures. In work of "*Goel Shivam, namely International Commercial Arbitration – India"* the researcher did a thorough work on international commercial arbitration, the awards under ICA, its conditions and requirements of enforcement which is a dominion in the concerned field. The author, "*Olszewski Wojciech"* in his research work titled *"Welfare Analysis of Arbitration*", briefly explained the essence of arbitration and its roots in the different fields dealing with it. Secondly the paper has the comparison between conventional and final-offer arbitration.

3. REPORTS/ REVIEWS

The researcher has referred some reports and reviews of the national and international institutions to grasp a thorough knowledge about the research topic. The major sources which has been reviewed are the Report of Indian Council of Arbitration which keep the updates of every aspect of arbitration regime, the Asia- Pacific Arbitration Review 2020- A Global Arbitration Review special

[14]GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS, (2nd ed., 2001).

Report that has keenly observed the concerned topic, the Dispute Settlement under International Commercial Arbitration- United Nation Conference on Trade and Development which has almost every aspect of ICA in detail with a large question bank on the existing issues, challenges, and the related laws which gave the researcher a different vision to work on this research. Lastly, the "International Arbitration Review", drafted by "James H. Carter" which consists of a comprehensive review on ICA.

4. ARTICLES

The article by "*Bergsten Eric E.* on *International Commercial Arbitration"* dealt with by basic concepts of International Commercial Arbitration. It is a comprehensive resource featuring the laws, rules, international treaties, and agreements that dictate arbitration procedures as it gives the complete overview of the same. The article titled "*Comparative International Commercial Arbitration* of *Alarcon Ronald Brian Martin"* helped the author of the instant work to briefly understand and analyze the arbitration and related laws in few principal legal systems. Also this article has dealt with very comprehensively by specific legal provisions in their domestic law for the international commercial arbitration. Then, it is worth mentioning an article by *Desai Nitish* on *International Commercial Arbitration* which has the exhaustive approach of explanation of international commercial arbitration domain. It has dealt a wide range of topics relating to both domestic and ICA matters which is conceptually very clear and is unambiguous that helped to reach a fair conclusion on the concerned topic. Next is an article by *"Mehra Dikshat & Kapoor Vibhor* on *Evolution of Arbitration Regime Through 2019 – A Recap"* which gave an overview on the Arbitration Amendment Act of 2019 by explaining all new horizons of new regime of arbitration.

5. WEBSITES

The researcher has visited the various websites relating to Arbitration and enforcement of its awards (specifically under ICA) to go through the related information with this report. All those websites are mentioned under the bibliography.

6. MAGAZINES AND MISCELLANEOUS

Since, the knowledge on selected topic of research cannot be restricted to books and journals, the researcher have reviewed various blogs of arbitration firms and their different view points, For example, some information from Kluwer blog of arbitration that specifically deals with it, also the information on portals of arbitration centres of India.

1.6 RESEARCH QUESTIONS

i. What is "International Commercial Arbitration" and available legal arrangements relating the same in India?

ii. What is the legitimacy of the "Recognition" and "Enforcement" of "International Commercial Arbitration" Awards pronounced outside the territory of India?

iii. Does the current regime provide effective modes of enforcement by which the winning party can enforce the arbitral award with minimal procedural delay?

iv. Whether the current regime restricts the enforcement of awards under ICA on the basis of principle of "Public Policy"?

v. What are the emerging issues and challenges in path of enforceability of arbitral awards in India?

1.7 HYPOTHESIS OF THE STUDY

In India various matters relating to arbitration is regulated through the "Arbitration and Conciliation Act, 1996" and its amended versions of 2015 and 2019 but still this legislation is inadequate and insufficient to deal with the emerging issues of arbitration this maybe because the present scenario of arbitration i.e. much more complex than that of prior one which led to a significant growth of issues under both domestic and international regime of arbitration. It can be said that the provisions of international commercial arbitration is somehow effective to resolve the international commercial disputes to some extent. But despite the cooperation of international organizations and different legal jurisdictions of various nations with the purpose of harmonizing and encouraging the enforcement and recognition of foreign arbitral

award, there are yet some difficulties to enforce the same. So, such provisions that deals with arbitral awards under ICA needs to be properly updated because the diversity in nature of arbitral awards in the context of modern business pattern and the emerging new dimensions make it difficult for the "Arbitration and Conciliation Act, 1996" to enforce the arbitral awards in uniform and efficient manner.

1.8 RESERCH METHODOLOGY

The researcher used a descriptive and analytical method for this research. Thus it is a Doctrinal work. Keeping in mind the broader goal of exploring links between the quality of legal performance and economic growth an attempt has been made to evaluate the working of law of arbitration, and to do theoretical examination of the modern approach and practice of arbitration in India. For said purpose the researcher uses facts and information already available or secondary data and analyses them to make a critical appreciable evaluation of the research problem. Thus this work depends on the existing literature and relevant research papers and journals. During this research the researcher faced many difficulties in gathering the relevant data for the research topic because of the COVID-19 situations which give a huge drawback of books which are the major source of research. However, extensive efforts have been made to overcome such difficulties by utilizing the VPN provided by the University and electronic data basis to make this research productive. Researcher has followed Bluebook 19th version for citation and footnoting all through the researcher paper.

1.9 NATURE OF THE STUDY

Selection of adequate research method for conducting the effective research is as much important as the selection of research area. There are mainly two majorly used research approaches i.e. Doctrinal and Non-Doctrinal Research. In this particular research the researcher applied only Doctrinal Research approach to complete the work.

1.10 SOURCES OF DATA

Research is based on various types of information. It is not possible to conduct and complete research without obtaining and considering different kinds of information. The more reliable and valid a source of information is the more reliable are the

conclusions. The data collected for this study are mainly through primary and secondary sources which includes as follows-

- Primary Sources- Primary sources involves statutes, enactment, conventions (national and international), rules and Courts designs, International treaties, Official Government publications, Government Websites.
- Secondary Sources- Secondary sources includes data collected from books, monographs, articles from various journals, magazines, newspapers articles, Digital repositories, legal newsletters, commentaries, case laws, Reports from official sites and some views different law firms dealing with arbitration, etc.

METHODS OF DATA COLLECTION

While conducting doctrinal research, the researcher has accessed data from NLUJAA library through OPAC and mainly relied on the secondary database but has also supported and complimented the research by primary materials. Secondary data have been collected through various propositions advocated and professed by scholars and social theorists, commentaries of social thinkers and eminent personalities, E-Books or textbooks written by renowned scholars and social activists, case reports and their analysis, personal opinion of the judges associated with the cases, various international journals and magazines publishing recent trend in cases, newspaper articles, online materials from the multiple websites dealing with the research topic. The researcher accessed the data available on the different online database using VPN provided by the University during the pandemic lockdown.

1.11 RESEARCH DESIGN/ CHAPTERIZATION

The whole research is divided into five chapters through which researcher tried well to explain the research question. The following are the divisions of such research data-

- **CHAPTER 1 – "INTRODUCTION"**

  This chapter deals with the introduction to the regime of trade and commerce and also the framework that deals with the redressal mechanism if any conflict occurs between the parties. This also includes the objective of the study, limitation, rationale, research questions of the research topic

which gives the path to the research and also to restrict within its limitation.

- **CHAPTER 2 – "ARBITRATION: A CONCEPTUAL DIMENSION"**

  This chapter deals with the basic concepts of "Arbitration", its types and a detailed description of its process and elements specifically involved in arbitral proceedings. It also includes the concept of 'Arbitrability' which plays a great role in determining as to what matters can be dealt or resolved under the Indian arbitration regime.

- **CHAPTER 3- "LEGAL REGIME GOVERNING INTERNATIONAL COMMERCIAL ARBITRATION"**

  This chapter deals with the legal regime that deals with the arbitration of both kinds viz. Domestic and International. This will give a clear vision as to what laws and rules will apply in cases of arbitration especially in case of "enforcement" of arbitral awards.

- **CHAPTER4- "INTERNATIONAL COMMERCIAL ARBITRATION AND ENFORCEABILITY OF ITS AWARDS IN INDIA"**

  This chapter deals with the detailed description of the International Commercial Arbitrations and the enforceability of its arbitral awards in India. This includes various provisions relating to international commercial arbitration seated inside and outside India.

- **CHAPTER 5 – "ANALYSIS OF REGULATORY FRAMEWORK OF INTERNATIONAL COMMERCIAL ARBITRATION IN INDIA"**

  This chapter deals with the issues and challenges of enforceability of arbitral awards in India and also a detailed analysis of regulatory framework of the International Commercial Arbitrations in India. This chapter aims to analyze the law, practice and policies of international commercial arbitration and endeavors to identify the solutions for the conceptual and practical challenges that confront the international arbitral process in India.

- **CHAPTER 6 – "CONCLUSION AND SUGGESTIONS"**

  This chapter has conclusion and suggestions as the end of journey. Through concluding remarks the researcher tries to sum-up the whole story of ICA and the advantages and disadvantages of the legal framework that deals with it. The researcher here tried to dig out the major findings of the research and also to give suggestions of the same.

CHAPTER 2

ARBITRATION: A CONCEPTUAL DIMENSION

2.1 ARBITRATION: MEANING AND DEFINITION

The term 'Arbitration' is derived from the nomenclature of Roman law. Normally this term means to refer a dispute for adjudication to a neutral person chosen by the parties in dispute. As a means of resolving disputes it has been described as a proven, useful and well-understood method whose social and commercial utility are obvious. The disputed matters are referred to arbitration for redressal instead of carrying it to the established Courts of justice. Arbitration is a form of alternative dispute resolution to resolve the disputes between the parties outside the courts. It provides for an award to the parties that can be either binding or non-binding. The parties to a dispute refer the disputed matter for arbitration by one or more persons and agree to be bound by the arbitral award given by the Arbitrator. It is often used to resolve the commercial disputes, particularly in the context of international commercial transactions. In some countries like the United States, this is the most opted method for the persons employed in consumer and employment matters, where arbitration is followed by the terms of commercial contracts. In other terms it is a proceeding in which a dispute is resolved by an impartial adjudicator whose decision have been agreed by the parties to dispute, or legislation has decreed. This provides for the limited rights of review and appeal of arbitration awards.

Arbitration can be either voluntary or mandatory. In case of 'Mandatory Arbitration' parties are bound to hold all existing or future disputes to arbitration as per the agreed terms of the contract because the basis of such arbitration is from a statute or from a contract that is voluntarily entered into. Coming to 'Non-binding arbitration', in this case a decision cannot be imposed or binding on the parties. This is similar to mediation where a mediator will try to help the parties to find a middle ground to compromise. They only can guide them to get rid of the dispute or can give a determination

of liability to the parties and if necessary, an indication of the quantum of damages payable, meaning thereby, they remain totally apart from the settlement process. This is often termed as non-judicial trial procedure for adjudicating disputes because the arbitrator while acting judicially does not possess judicial control of the court. One must refer the proper interpretations of the definitions under the legislations of arbitration for understanding its legal nuances. There are some well settled definitions that might make the concept broader.

"Arbitration and Conciliation Act, 1996": The Act of 1996 defines the periphery of issues that can be resolved under the arbitration regime. "It covers any arbitration whether it is administered by any permanent arbitral institution or not".[15] This definition clarifies that there is no necessity of any permanent institution for regulation of arbitration proceedings i.e. it can be performed in any proper place.

"Black Law Dictionary": According to this dictionary Arbitration means "a process of dispute resolution in which a neutral third party called 'arbitrator', renders a decision after a hearing at which both parties have an opportunity to be heard".

"Martin Donke": In his view "Arbitration is a process by which parties voluntarily refer their disputes to an impartial third person, 'an arbitrator', selected by them for a decision based on the evidence and arguments to be presented before the arbitration tribunal."[16]

"World Intellectual Property Organization (WIPO)": According to WIPO, "Arbitration is a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute. In choosing arbitration, the parties opt for a private dispute resolution

[15] Section 2(1)(a), Arbitration and Conciliation Act, 1996.
[16] *International Commercial Arbitration,* (July 12, 2020, 05:00 PM), https://www.lawteacher.net/free-law-essays/commercial-law/international-commercial-arbitration.php.

procedure instead of going to court."[17] WIPO laid down some principal characteristics of arbitration i.e. it is a neutral, consensual and confidential procedure. Here the parties can choose the arbitrator(s) for the purpose of resolving the disputes and last but not the least it is easy to enforce the awards and the decisions of the arbitral tribunal will be final.

2.2 CONCEPT OF ARBITRATION

From the early stages, India has been arbitration friendly because this used to be practiced in India even when there was no codified legislation to acknowledge the same. It is the ancient form of ADR mechanism among others in queue. 'Arbitration' is said to be Consensual. This means that arbitration is possible for the parties to the agreement who gave their assent to refer the dispute(s) for arbitration that has already raised or to be arisen between them. The tribunal renders an award to sort out the dispute only which is referred to it and must not include any other issues by its own. Sometimes it is 'semi-consensual' also because most of the arbitration agreements are on the basis of clause added to agreement which they have agreed upon before entering into contract. "If dispute arises, the parties may no longer be in agreement that they should follow up to arbitration, the party may wish to turn to the courts."[18]

Secondly, "Arbitration is a private procedure and not a part of the State system of the Courts."[19] But it may not be in the strict sense as the end result of arbitration is that an award i.e. enforceable in the courts which consecutively provides the state an interest in the working of arbitration that rise above the other procedures of resolving disputes that are also alternatives to the litigation. All the important attributes of arbitration including enforcement, recognition, refusal or setting aside of an award and its procedure is keenly observed and assured by the national courts as to when and where apply in particular cases. Subject to all such procedures the

[17] *What is Arbitration?* WIPO, (July15, 2020), https://www.wipo.int/amc/en/arbitration/what-is-arb.html.
[18]Mr. Eric E. Bergsten, *International Commercial Arbitration*, United Nations, (July 20, 2020, 02:00 PM), www.unctad.org.
[19] *supra* note, at 15.

principal objective of arbitration is to provide just and equitable solutions as an "award" to the parties under mutual agreement through the impartial mediator called as "arbitrator" under "arbitral tribunal". The award may be called as just and equitable if it is impartial or unbiased, awarded within minimum time and with no inessential delays. There are some features that make it efficient and different from others, i.e. it is alternate to national courts system which involves a very long and slow process, it is a private mechanism unlike litigation, it is framed as well as supervised by the parties to agreement, it has final and binding effect.

2.3 TYPES OF ARBITRATION

Arbitration regime has two major divisions i.e. "Domestic Arbitration" and "International Arbitration". Former deals with the matter occurred within the territory of India or inside India whereas the latter one deals with the matters of cross borders. They are also further divided as per the need of regime.

2.3.1 "Domestic Arbitration"

Domestic Arbitration is one that is purely national or domestic in nature. There is a well settled modern concept that arbitration is regulated by the legal provisions of that particular state where it takes place. Therefore considering such view it can be said that every arbitration which occurs inside the state is a "domestic arbitration" within that particular nation state and is considered to be an "international arbitration" for another state. The two kinds of arbitrations i.e. "domestic" & "international" are different with each other in view of matters of dispute that may be submitted under them respectively are different in nature. Here, "the parties are free to choose the place of arbitration thereby choosing the applicable law of arbitration but in view of this concept NYC recognizes the possibility of change that the law of arbitration might be other than that of the place of arbitration."[20] Thus, it

[20] *supra* note, at 17.

refers to only those arbitration which occur in a particular state, between the parties which are residing in that state, which is restricted to the boundaries of a particular country and the dispute is to be resolved by the substantive law of that particular country or is governed by the national or the Municipal laws of that particular state. The award under domestic arbitration is called domestic awards and is dealt under Part I of Act.

2.3.2 "International Arbitration"

The expression 'International' is not expressly interpreted in the "Arbitration and Conciliation Act, 1996". Nevertheless, the Indian laws give importance to 'international' dispute as it is of utmost importance for the parties who seek to have privilege of "International Commercial Arbitration" in India where there is determination of particular dispute that whether it is arbitrable under "International Commercial Arbitration" rules or not. The term 'international' demarcates the concept of domestic/national arbitration and it includes arbitration that goes beyond such national or domestic boundaries. If the dispute is not recognized as 'international' then the enforcement of awards under ICA provided under "Part II of 1996 Act" and certain relating sections from "Part I" cannot be made applicable to arbitral proceedings.

The "Arbitration" is said to be an "International Arbitration" only when any such arbitration comes within the territory of India or outside India, but it must necessarily contain the ingredients/elements which is not from India wrt parties or the contents of the differences between them. The parties can by their own determine in their contract or arbitration agreement, the favorable "Indian" or "foreign" laws that fits in their case or *status quo* and hence we can in other words utter that even if one or more

parties resides in foreign state or issues have some foreign element, it is considered as International Arbitration.

"Article 1, clause 3 of the UNCITRAL Model Law" lays down few determining factors to call arbitration as "International", they are as follows-

i. When the parties are signing there final arbitration agreement there place of business must not be in the same country. "This was a basic rule which was modified to deal with the case of a party having more than one place of business. Here rules dress out for the place of business for determining whether the arbitration is international or not. This can be done by considering the closest relationship of it to the arbitration agreement."[21]

ii. "If the place of arbitration is determined in or pursuant to the arbitration agreement and is situated outside the state in which the parties have their places of business, the arbitration would be an international arbitration."

iii. "If at any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected it is situated outside the state in which the parties have their places of business would be an international arbitration."

iv. "When the parties have expressly agreed to a part that the subject matter of the arbitration agreement relates to more than one country, it will be termed as international arbitration."[22]

The "UNCITRAL Model Law" provides for very broad connotation of international arbitration which must be considered

[21] Article 1(4), UNCITRAL Model Law.
[22] s*upra* note, at 19.

while ascertaining the same. "The above mentioned situations is relevant for country who is signatory to the UNCITRAL Model Law for purpose of regulation of ICA matters rather than for domestic arbitration. Thus it is to be noted that such country should implement the UNCITRAL Model Law based national law for ICA instead of that of domestic practices of that state because it leads to problematic situations when the signatory state adopts the UNCITRAL Model Law for both the situations i.e. domestic arbitration practices as well as international arbitrations. If the state does so there is no need to define the word 'international' in their domestic arbitration related laws as it will be worthless."[23]

2.3.3 "International Commercial Arbitration"

Sub clause (f) of clause (1) of section 2 of "Arbitration and Conciliation Act, 1996" defines an "International Commercial Arbitration (ICA)" as "an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is—

i. an individual who is a national of, or habitually resident in, any country other than India; or
ii. a body corporate which is incorporated in any country other than India; or
iii. an association or a body of individuals whose central management and control is exercised in any country other than India; or
iv. the Government of a foreign country."[24]

While dealing with the ICA matters, the preferred arbitration tribunal has liberty to apply all those laws agreed by the parties, whether substantive or procedural to the instant issue before it.

[23] *supra* note, at 21.
[24] The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).

There are mainly two types of ICA that depends upon the terms of arbitration agreement, subject matter of the dispute and the laws governing such matters, these are as follows-

i. **Adhoc Arbitration-**

In this kind of arbitration the party concludes an agreement to deal with the later contingency, because of non performance of the agreed terms, without relying upon external resources like the arbitral institutions. It means that Adhoc arbitration is independent of all institutions. In other words, it is a process or mechanism that is managed by the parties and not others. Here, the parties have to ascertain the different aspects of arbitration for example, arbitrators, procedure to follow, fixing seat, time of meetings, etc. This kind of arbitration is very crucial so as to achieve the basic objectives of referring a dispute to arbitration i.e. justified decisions in best of the satisfaction of the parties and without adversely affecting the commercial relations of the parties.

According to Russell, "it may be either International or Domestic arbitration. The arbitration system selected or provided for in the agreement does not exist except in the context of the dispute between the parties. It is generally favored where the parties are unable to agree on the arbitration institution or where they wish to have control of the procedure and the mechanism rather than to be subjected to institutional administration or control."[25]

In this the parties are under discretion to choose rules applicable to the particular dispute, appropriate laws and administration support which make the procedure user friendly. Parties mostly

[25] Ronald Brian Martin Alarcón, *Comparative International Commercial Arbitration*, (July 22, 2020, 12:30 PM), https://www.scribd.com/doc/221918763/Comparative-International-Commercial-Arbitration.

favors ad hoc arbitration, when they require actual control on the procedure rather than to be burdened under the institutional administration. This is because it is more flexible, affordable or cheaper and faster than the administrative proceeding.

ii. "Institutional Arbitration"

In this kind of arbitration, the matters are dealt with by the prevailing rules and regulations of the institution, laws in force and related procedures of arbitration and hence the same is termed to as 'Institutional Arbitration'. This arbitration requires the parties to have a prior agreement to settle a dispute that may arise in future according to the rules of that particular arbitral institution. Institutional arbitration thus is conducted by an established arbitral institution. Here, the parties necessarily have to mention that if in case any dispute arises between them the same will be resolved through the appointed arbitral institution which is already mentioned in their arbitration agreement. A good example of this was the case of *Nandan Biomatrix Ltd. v. V D 1 Oils Ltd.*[26] The Arbitration Act of 1996 also recognizes such agreement of the parties to arbitrate.

"Most of the international business communities prefer to go for institutional arbitration because it has many advantages including 'pre-determined' arbitration procedure which helps the parties to solve their disputes easily without wasting much of the time in ascertaining the proper laws, then the updated rules and laws with latest developments. This is because the institutions majorly focus on regular updates of the arbitration practices ensuring unambiguity in it. The other reasons of choosing institutional arbitration may include an efficient panel of arbitrators and a good professional support which helps the parties with huge amount of data bases of arbitrators that helps

[26] (2009) 4 S.C.C. 495 (India).

the parties to resolve their disputes as they have good knowledge of trade, commerce, commodities, etc. Last but not the least a good infrastructure which provides a sound work ethics and well-structured or infrastructural facilities to the parties. This gives the parties a luxury and risk free environment which is efficient to work swiftly on their objectives."[27] This is more formal than that of Ad Hoc Arbitration because it is backed up by the laws and procedures provided by the Legislature. Thus in simple terms, in case of institutional arbitration there is a special institution which works through arbitrators according to the rules of the institution. It requires pre-established rules to proceed towards conclusion, list of qualifies arbitrators and their appointment, an established format to work upon, but it is little costly and convenient for those who can afford it for their dispute resolution.

2.4 ATTRIBUTES OF ARBITRAL PROCESS

Arbitration is a 'mechanism' which involves various attributes to make it successful. It can come into existence only when parties choose arbitration as a method of dispute redressal in their arbitration agreement. This agreement is having details of the laws to be applied in the redressal mechanism. For this purpose an Arbitral Tribunal is there to provide award to the parties in which arbitrators play a great role as a mediator. This is less formal than that of rigid court procedure. The important elements of arbitration are as follows-

i. Arbitration Agreement-

The foremost element for any valid Arbitration is Arbitral agreement. It is the basis or a foundation stone on which two parties agree to work with each other. A valid agreement is the basic and necessary

[27] Himanshu Mene, *Promoting Institutional ADR to make India a hub of arbitration,* (July, 21 2020, 01:40 PM), https://blog.ipleaders.in/promoting-institutional-adr-to-make-india-a-hub-of-arbitration/#_ftn19.

requirement to arbitrate under both national and international laws and treaties. It may be an essential ground of refusal of "recognition and enforcement of the arbitral awards". It is advantageous for the parties because the arbitration agreement provides for an evidence of the mutual consent of the parties that they will refer their disputes for arbitration as per the terms they have consented to by the arbitrators. It must be in writing.

It is basically of two types viz., 'Arbitration clause' for the purpose of resolving disputes if in case arises in future. In practice, the arbitration clause is mentioned at the end of the 'primary agreement' so as to maintain its importance for further use and another one is the 'submission agreement' for submitting the existing disputes which may arise between the parties to contract at any phase or time of arbitration. This is usually long in comparison to arbitration clause. In a submission agreement the parties are already aware of the matter of dispute and the current circumstances, therefore there is some scope to adjust to satisfy the needs of the parties.

ii. Laws applicable to Arbitration-

In case of ICA, there are parties from more than one country, so different laws are applicable favorable to the respective parties for purpose of arbitration. The arbitration agreement contains all those details which is required in series of activities involving a set procedure of arbitration. For instance, 'place of choice' that is helpful for identifying the law of what place is applicable to parties. This is termed as "*curial law"*[28] or *"lex arbitri"*[29] too. The parties to agreement are required to mention the place of agreement either during the making of clause of arbitration or in arbitration agreement if in case the same has not been mentioned earlier. The rules to be

[28] *Curial law* means that law which governs the arbitration proceedings between the parties to the dispute.
[29] *Lex arbitri* is a latin term which means the law of that place where arbitration takes place in the conflicts of laws. It is simply an element in the choice of law rules applied to cases to test the validity of a contract.

applied in arbitration must be backed by the law for their effective implementation.

The NYC provides that an award provided under arbitration must be according to the arbitration laws of that particular country where the same has been occurred and as on pre-determined terms of an agreement of the parties. But here the Arbitral Tribunal or any designated Institution may provide a 'place' for the arbitral proceedings if in case parties are incapable of ascertaining the same. Here the meaning of 'place' of arbitration is not merely geographical but it means the essential attributes of arbitration which will be considered while working on it wrt the regulations of that specific country.

iii. Arbitral Tribunal-

To conduct an arbitration proceeding between the disputed parties there should be an "Arbitral Tribunal". The main aim of tribunal is redressal of the disputes between the parties impartially and with no delays. For the purpose of arbitrating the disputes, arbitrators (one or more) are appointed to hear the parties and here 'arbitrator' is said to be *sine qua non* of the arbitral proceedings. Only when arbitral Tribunal is appointed, the procedural orders or any necessary actions or directions can be made for the purpose of arbitration.

The award provided must be favorable to the arbitration agreement and is valid for the enforcement and utilization to overcome the disputes. "There are different methods to appoint the Arbitration Tribunal such as, by agreement of the parties, by a trade or other association, by a professional institution, by an arbitral institution, by a list system, by existing arbitrators, submission to a trade or any other association, by a national Court."[30]

[30] Michael Ramirez & Martha Hoskins, *The Arbitration Clause: An Investment In The Future*, (June 28, 2020, 03:00 PM), https://www.mondaq.com/arbitration-dispute-resolution/139160/the-arbitration-clause-an-investment-in-the-future.

iv. Arbitrators-

"The word 'Arbiter' was originally used as a non-technical designation of a person to whom controversies were referred for decision irrespective of any law."[31] "The Arbitration Act of 1996" incorporates the two main sections viz. Sec. 10 and Sec.11 that deals with the provisions relating to 'Arbitrators'. "It provides that the parties have liberty to ascertain the 'number of arbitrators' as per their needs with a sole purpose to resolve their disputes but such number should be an 'odd' number and not an 'even' number so as to avoid unwanted results."[32] The arbitrator is the most important attribute for the purpose of arbitration because only the arbitrators will perform certain legal functions which lead to the result of arbitration.

An Arbitrator may belong to any particular nation until unless anything otherwise has been acknowledged by the parties with respect to the 'nationality' of that neutral person (arbitrator). Here, the parties have liberty to concur the procedure for the purpose of appointment of an arbitrator(s) for dispute resolution. "However, if the parties are unable to do the same then arbitrator shall be appointed by each of the parties (in case of an arbitration having 3 arbitrators) and the 2 appointed arbitrators shall appoint the 3rd arbitrator who shall be the 'Presiding Arbitrator' among all other arbitrators." "The parties have to perform the appointment of arbitrators, which should be done within a duration of '30 days' but when they are unable to do so or if the 2 appointed arbitrators were not able to give their assent on the views of 3rd arbitrator within the specified duration of '30 days' from the time of their appointment then, on the party's request the new appointment is made by the Apex Court or the High Court or

[31] *Need for Arbitration in India*, (July 14, 2020, 11:00 AM), https://alexis.org.in/.
[32] James H Carter, The International Arbitration Review, (9th ed. 2018).

any other entity or any institution designed by these Courts for the purpose of appointment of arbitrators."[33]

"In case of an ICA, only the Chief Justice of India (or his designate) will have the power to make the appointment and not the Chief Justice of the High Court."[34] It is to be noted that an arbitrator must act solitarily i.e. without depending on others and in an unprejudiced manner and lastly with an objective approach while performing their functions attributed to them by the Act so that the award delivered must be just and unbiased.

v. Awards of Tribunal-

Award is the most essential element in Arbitration which is awarded to the party. It is a decision made under the arbitration agreement by a non-state tribunal to which the parties have granted to task to decide a dispute in an unbiased manner. Model Law recognizes that there can be more than one award in an arbitration proceeding. It is domestic or foreign in nature. It must be impartial and must resolve the specified dispute. It is binding on respective parties only. This refers to 'win-win' or 'win-lose' situation among the parties to dispute which totally depends upon the particular case. According to ICC rules, "every award shall be binding on the parties and shall be carried out without any delays."[35]

"The awards usually contains the basis for jurisdiction of the tribunal, factual background of the arbitration, relation of parties, the essential terms of the agreement on the basis of which all such proceedings are performed, the nature of dispute and respective position of the parties, place & date of arbitration, major issues for the purpose of determination by the arbitral tribunal, relief sought by the parties in unambiguous manner, the analysis of the tribunal & conclusions on every issue raised or reasons for the award and lastly the award of the

[33] Section 11(6), Arbitration and Concilliation Act, 1996.
[34] Indian Council of Arbitration.
[35] Article 28, International Chamber of Commerce Arbitration Rules, 1998.

tribunal with declaration and order, decisions on damages, interests, costs. There are some types of awards i.e." [36]

a. **Final award**- The award that usually ends the proceeding, which cannot be revoked further or cannot be appealed unless the award has a ground of challenge under reasonable circumstances. In other words it disposes all the issues and dispute raised between the parties in arbitration. For example, biasness in award.

   The final award must be in writing and signed by all the arbitrators involved in that particular matter. The awards must necessarily include place of arbitration, the rationale behind the decision taken, etc. It will have the effect of res judicata and other preclusive effects as soon as it has been made and is capable of enforcement and recognition.

b. **Partial award**- The award is said to be partial when some of the issues of party's claim is already acknowledged and determined also but the rest part of the claim is left to be solved until the final award is declared. Hear the parties are free to arbitrate in the remaining issues.

c. **Interim award**- This is basically provided for a limited period of time until the final award is being provided to them by an Arbitral Tribunal. According to sec. 39, "a provisional award can be made to the parties if they have agreed that the tribunal may have the power to order on a provisional basis any relief which it would have power to grant in a final award. This includes any professional order relating to payment of money or the disposition of property between the parties or an order

[36] *Types of Award in Arbitration*, Expert Evidence, (July 09, 2016, 10:30 AM), https://expert-evidence.com/types-of-award-in-arbitration/.

that can make an interim payment on account of cost of arbitration."[37]

d. **Consent and Agreed award**- Generally parties reach to stage of settlement when they agree to the terms of contract which when incorporated and results as an award, then the same can be enforced just like a judgment by a court but only when the parties give their consent for the same. But on condition that the opposite party is unable to comply with the terms and conditions of the pre-decided settlement procedure, the parties have a liberty to perform the enforcement mechanism. Consent awards, somehow helps to promote the conclusion of arbitration proceeding even if the other party is not able to perform his part.

e. **Default award**- Awards are said to be default award when one of the parties fail to perform his part which he agreed to.

f. **Draft award**- an award which is not legally binding on to the parties until it has been mandated by the arbitral tribunal. In other words it is for the 'time being' which is prepared during the working on the issues to get the final decision on the matter.

g. **Additional award-** As a general rule after giving the final award arbitral tribunal has no further authority to make changes unless there exist any reasonable conditions. However, the parties may ask for an "additional award" on the issues which are still pending for its decision and not the decided ones. Through this the tribunal can look and examine the particular issues with keen observation which were failed to be determined efficiently i.e. to counter the issues of the parties with a satisfactory conclusion.

[37] *supra* note, at 20.

vi. "Recognition and Enforcement of Awards"

"Recognition and Enforcement is the prerequisite for the parties to arbitration who desires to enjoy the fruits of the tribunal." As soon as the tribunal gives award to the parties the next and final step is to enforce the same to enjoy the benefits of it. The successful party has to take necessary steps in order to enforce such awards as per the procedure prescribed by the act of that particular country where they have agreed to. It differs in case of "domestic" and "foreign" awards because of the nature of the arbitration involved. There are certain requirements and conditions which are to be fulfilled to get the awards enforced legally. This step ensures the effectiveness of the arbitration mechanism for the investors of commercial field and also serves as the key factor for them to prefer arbitration as the most propitious mode of dispute resolution amid other forms of ADR.

2.5 ARBITRABILITY UNDER INDIAN LAWS

When the two facets of ICA i.e. jurisdictional and contractual facets meet each other, the Arbitrability comes into being. Arbitrability is nothing but the determination of the subject matters/issues which can or cannot be submitted to or resolved by arbitration. In some cases an arbitral award may be set aside due to the reason of non-arbitrability of the subject matter of dispute. "Article 52 of New York Convention" states that the recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that the subject matter of the difference is not capable of settlement by arbitration under the law of that country. This shows that the court can rule on arbitrability of dispute by considering this article even before the award has been passed as it would be totally worthless to recognize the jurisdiction of the arbitrator if the award at the outset cannot be in force in the legal system of the court which has jurisdiction. It is to be noted that the Arbitrability of the dispute under law of the forum must be taken into consideration only at the stage of recognition

and enforcement of the award and not while examining the validity of arbitration agreement.

Different International conventions deals with the concept of arbitrability for example, the Model Law regarding this states that dispute which has arisen or which may arise in future between the parties in respect of a defined legal relationship weather contractual or not. It can be observed that this definition does not contain any clarification that which kinds of disputes are arbitrable. On the other hand Article 1(5) of the Model Law provides that this law shall not affect any other law of the state by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to the provisions other than those of this law. So it can be said that national legislation and courts are free to determine which disputes are arbitrable and which are not. Geneva Convention under Article 1 put forth that "any differences that may arise in connection with such contract relating to commercial matters or any other matters is capable of settlement by arbitration. The New York convention under Article II goes a step further while stating this. It provided that a dispute arising between the parties in respect of a defined legal relationship whether contractual or not concerning a subject matter is capable of settlement by arbitration. Arbitrability is majorly of type subjective and objective arbitrability. Subjective arbitrability refers to the condition where the individuals or entities are unable to submit their disputes to arbitration, the reason behind that is their status of functions for example states, local authorities and other public entities. Objective Arbitrability is when the subject matter of dispute is specifically precluded from the arbitration."

Now on considering the arbitrability under Indian laws there are various disputes which cannot be brought before arbitration for their resolution and must be referred to litigation process. "These are as follows:

i. matters pertaining to rights and liabilities arises from criminal offenses;

ii. matters relating to marital disputes (For instance, child custody, divorce, restitution of matrimonial rights, judicial separation);
iii. all issues relating to guardianship;
iv. matters relating to indebtedness and winding up issues;
v. matters relating to the public charities or public trusts under the Public Trusts Act;
vi. "disputes arising out of Trust Deeds and the Indian Trusts Act, 1882;"[38]
vii. testamentary issues (For instance, matters relating to probate, succession certificates, administrative letters i.e. authority to administer of deceased estate who died without making a will); and
viii. matters relating to eviction or tenancy disputes."[39]

The Apex Court in a case discussed the concept of arbitrability and held its meaning in different context.[40] "It was held that arbitrability involves the disputes capable of being adjudicated through arbitration or matters covered by the arbitration agreement or the matters that have been have referred to arbitration by the parties and any of those disputes that can be decided by a civil court and all these matters are held to be resolved through arbitration."[41] In "*Maestro Engineers* case Supreme Court provided that the matters which are alleged to have been under 'fraud' and 'any serious malpractices' should be resolved through litigation according to the appropriate criminal laws and cannot be referred to arbitration which is referred as out of court practices."[42] This is because the fraud, financial malpractices and Collusion are offences under criminal law or these are the allegations under criminal repercussions and arbitration proceedings do not deal with such allegations because arbitrator has the limited jurisdiction. "But these assertions of fraud does not

[38] Vimal Shah & Ors. v Jayesh Shah & Ors., (2016) 8 S.C.C. 788 (India).
[39]Dipen Sabarwal, Aditya Singh, Arbitration in India, https://www.lexology.com/library/detail.aspx?g=72bcbbe3-c139-46f2-b9ce-086394161f41.
[40] Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd., 2011 (5) S.C.C. 532 (India).
[41] *supra* note, at 8.
[42] N. Radhakrishnan v. M/S Maestro Engineers, 2010 (I) S.C.C. 72 (India).

restrict to refer such matters to the arbitrations seated outside India"[43] except in some cases.[44]

"The 1996 act of arbitration also provides for some cases, where the arbitration agreement is null, void, inoperative or is incapable of being performed."[45] Thus it can be said that the allegations of fraud are allowed under ICA with seat outside India but the same is barred for ICA with seat in India. But the same issue was further clarified by stating that matters relating to of fraud can be referred to arbitration only if it is not linked to any serious and complex fraud. This means that the arbitration would deal with the matters in simplest form and not with serious form.[46] This is a clear instance where we can understand and differentiate the concept of arbitrability that what matters can be e dealt under arbitration and what not.

[43] Swiss Timing Limited v Organizing Committee, Commonwealth Games 2010, Delhi, (2014) 6 S.C.C. 677 (India).
[44] World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd., A.I.R. 2014 S.C. 968 (India).
[45] Section 45, Arbitration and Conciliation Act, 1996.
[46] A Ayyasamy v A Paramasivam & Ors., (2016) 10 S.C.C. 386 (India).

CHAPTER 3

LEGAL REGIME GOVERNING INTERNATIONAL COMMERCIAL ARBITRATION

3.1 INDIAN REGIME OF ARBITRATION

Dispute resolution through the arbitration is not a novel concept but has been in existence from the time immemorial to help the parties resolving their disputes. The Government of India has been trying to make the Indian arbitration regime more flexible and to attract the MNCs to invest in India in order to maintain the position of seat of Indian arbitration as the most preferred one. Before 1996, there were three main statutes to deal with Arbitration in India i.e. The Arbitration (Protocol and Convention) Act, 1937, The Indian Arbitration Act, 1940 and The Foreign Awards (Recognition and Enforcement) Act, 1961. Thereafter to address the rising issues and to overcome defects of existing statutes, India adopted a new legislation, The Arbitration and Conciliation Act, 1996. The main object of 1996 Act is to encourage arbitration because it is cost-efficient, time-efficient mechanism and suitable for everyone for settling their disputes in both national and international sphere. The Act promotes a speedy and efficacious dispute resolution mechanism which would give parties finality in the matter of dispute. The Act deals with general provisions of domestic Arbitration and International Commercial Arbitration under Part I, under Part II it addresses the Foreign awards and their enforcement under New York Convention (Convention on Recognition and Enforcement of Foreign Arbitral Awards) and with awards under the 1927 Geneva Convention. Part III deals with another ADR mechanism i.e. Conciliation. Part IV sets out certain supplementary provisions. The Act is based on 'UNICITRAL Model Law' and New York Convention.

Since there were some issues and the parties were facing difficulties to overcome their dispute due to complexity of laws, there were demands of new provisions to deal with the obstacles in free arbitral process. The first ever substantive law on Arbitration in India was "Indian Arbitration Act, 1899" which was substantially based on "British Arbitration Act, 1899". Its implementation presented many complexities and cumbersome problems and judicial opinion started showing its displeasure and

dissatisfaction with the arbitration law of the particular state. Later on, in 1940, an act was passed to consolidate and amend the existing legislations. It deals with domestic arbitration only. In 2001 the government tried to amend the Indian arbitration clause but did not succeeded, later on in 2010 again a good attempt was made but was aborted. Finally, in 2015, the existing act was amended by the new legislation, "The Arbitration and Conciliation (Amendment) Act, 2015" to make some significant changes in the object of the act or to add specific provisions to meet the needs of the time specifically with those existing acts lacks. Thereafter to review the institutionalizing of arbitration mechanism a committee was set up under the chairmanship of retired Justice B N Srikrishna. The main purpose of this committee is to identify the lacunas in the development of institutional arbitration, examine the issues which are affecting the working of arbitration in India and also to make India a robust Centre for both International and Domestic arbitration. Subsequently to overcome the lacuna relating to Indian arbitration the parliament passed the new legislation in 2019 i.e. "Arbitration and Conciliation (Amendment) Act, 2019". This act mainly aims to make India a hub of institutional arbitration for both domestic and international arbitration which will somehow ease the burden of national courts. After all such amendments it can be said that regime of arbitrability has taken a sharp turn and has made the future prospects look brighter for the arbitration in India. We will discuss the different legislations that dealt with arbitration before "1996 Arbitration Act" came into force to understand the precondition of the arbitration legislations.

i. **"The Indian Arbitration Act, 1899"**

The Legislative Council of India has enacted the very first substantive legislation namely the "Indian Arbitration Act, 1899" that got enforced on the first day of July 1899. The basis (origin of the concept) of this act was the British Arbitration Act, 1889. Its scope and applicability both are very narrow in the sense that it was applicable only in Calcutta, Bombay and Madras. The parameters of this act was very restricted as it includes only 'existing' disputes and not the future one but later on the scope of arbitration was improved through interpreting the term 'submission'

which includes 'an agreement in writing' to submit the 'subsisting' and also the future disputes to arbitration and for the same the determination of arbitrator is not an essential prerequisite. Since there was lack of proper legislations before this period, a matter of dispute was generally referred to the three main statutes named "the Indian Contract Act, 1872", "the Code of Civil Procedure, 1908" and "the Specific Relief Act, 1963" which was obviously not a good option to resolve the arbitral disputes.

"The Arbitration Act of 1899" was very complex, slow and complicated thereby inefficient to deal with arbitral disputes the parties were facing many difficulties to carry with this legislation. In case of *Dinkar Rai Lakshmiprasad v. Yashwantrai Hariprasad*,[47] the Bombay High Court while giving a judgment observe that:

"*It is the high time for those who are responsible for legislation in this country should seriously consider the advisability of taking early steps to revise the law of arbitration so that it works properly rather than giving displeasure and dissatisfaction to the parties*".

ii. The Schedules to the "CPC, 1908"

The Arbitration Act, 1899 was having many lacunas and defects too, for example it has very narrow scope, not having rules regarding the appeals, etc. Therefore, there was a need to opt any other legislation to overcome the issues regarding the arbitration. For this purpose, some provisions which are applicable to the arbitration and its applicability were included in the 'Schedule II of the CPC 1882'. 'Schedule I' includes the laws of arbitration which extends to other part of India whereas 'Schedule II' deals with those matters of arbitration which are beyond the scope of 1899 Act. According to this schedule the court may not intervene in the matters of arbitration and second notable thing was that, it provides alternate method to the parties in which either of the

[47] A.I.R. 1930 Bom 98 (India).

parties can put their arbitration agreement in court of appropriate jurisdiction for reference to arbitration as per the prescribed procedure. This schedule was added to the Act of 1899 to enhance its usage but still it was not that satisfactory. Also, in CPC, 1908, section 89 and Rule 1A, 1B and 1C in Order X was added to provide backup for settlement of disputes. Section 89 shows that some of the disputes may be decided out of the court through ADR mechanism with one of the views of avoiding delays in number of cases.

iii. "The Arbitration (Protocol and Convention) Act, 1937"

This Act, which was enacted with appropriate authority on 4th day of March, 1937 have prescribed the rules mandating the provisions of various Protocols and Conventions. "India was a signatory to the Protocol on arbitration clauses which was set forth in the First Schedule and also to the Convention on Execution of Foreign Arbitral Awards which was set forth in Second Schedule of this act."[48] Through this act 1923 Protocol[49] and through this Act the "Geneva Convention of 1927"[50] was implemented in Indian legal regime. Hence it can be said the basic objectives with which the act was to given effect is to recognize and implement such protocols and the conventions in India.[51] The act exclusively provides for the rules relating to the foreign awards which includes right from 'the procedures of filing' to enforcement and recognition with the essential conditions of such enforcement. The Act gave stress on effect of foreign awards by providing that the foreign awards which fulfills certain specified conditions can be made enforceable in in the domestic jurisdiction of India in the same manner as the award of the domestic arbitration in India is made applicable. "Such award which would be under the criteria and hence enforceable

[48] *Arbitration in India*, (July 7, 2020, 07:30 PM), https://www.lexology.com/library/detail.aspx?g=72bcbbe3-c139-46f2-b9ce-086394161f4.
[49] Geneva Protocol on Arbitration Clauses, 1923.
[50] Geneva Convention on the execution of Foreign Arbitral Awards, 1927.
[51] *Arbitration (Protocol and Convention) Act, 1937*, LATEST LAWS.COM, https://www.latestlaws.com/bare-acts/central-acts-rules/alternative-dispute-resolution-laws/arbitration-protocol-and-convention-act-1937-repealed/.

was to be considered as binding for all the purposes either by way of defense, setting off or else in the legal proceeding within India."[52] But the instant act was very narrow and similar to the present Act of 1996 in its scope of applicability as the Section 2 provided that it applies only to commercial matters under the Indian laws.

iv. "The Arbitration Act of 1940"

We have discussed few downsides of the existing "Arbitration Act of 1899" and the "Second Schedule of CPC, 1908", these resulted in judicial reprimand of various provisions and because of feeling of inefficiency of the existing act, the enactment of a new legislation on arbitration was made and named as the "Arbitration Act of 1940" that got enforced on the "1st day of July 1940". The instant legislation traced its origin majorly on the "English Arbitration Act of 1934". The objective of the "Arbitration Act, 1940" was to "consolidate" and "amend" the existing legislations arbitration so that the matters relating to arbitration must be dealt under it rather than on other defected legislations. This act applies only to matters of 'domestic arbitration' and has extreme intervention of the courts in every stage of arbitration whether prior, present or after the award has been decided on the matter by the arbitration tribunal of appropriate jurisdiction. For instance, while dealing of arbitral disputes, the interference of court was necessary to set the proceedings of arbitration in motion, etc.

Thus, it is easily observable that there is unnecessary and excessive intervention of court in matters of arbitration not only at one stage but in all the three stages of arbitration which needs to be reduced or removed as it does not go with the purpose of arbitration. Though it worked in some areas but is not permanent panacea to the problems. However, it must be noted that the instant Act was replaced by "the Arbitration and Conciliation Act, 1996" with the object of

[52] Section 4, The Arbitration (Protocol and Convention) Act, 1937.

"consolidating" and "amending" the Indian laws pertaining to arbitration of both kinds i.e. "domestic" as well as "international commercial arbitration".[53]

v. "The Arbitration and Conciliation Act, 1996"

The instant Act (Act of 1996) was enacted by the 'Parliament of India' on 16th day of August, 1996. The legislators had the intention, while enacting this new act[54], "to consolidate and amend the laws on domestic arbitration as well as 'the international commercial arbitration and enforcement of foreign arbitral awards"[55]. As well as, the act aimed to reduce the challenges to the recognition of an arbitral award . The act was enforced by publication of official gazette on 25 day of January, 1996. It also aims to explain the laws relating to conciliation and of related matters. Another notable reason was to curb delays in arbitration and ensure speedy redressal mechanism. However, this act was also not appropriate as it suffered a great controversy in matter of applicability of act in arbitration seated inside India and outside India. Bhatia and BALCO case played a great role in developing the arbitration regime of India. Later on, to address the issues in this act a new legislation "Arbitration and Conciliation (Amendment) Act, 2015" was passed. "The instant Act has the constitutional validity under Article 51(d) of the Constitution of India which provides that 'the state has power to encourage settlement of International disputes by arbitration."[56]

Arbitration and Conciliation (Amendment) Act, 2015 added a new proviso to section 2(2) which provided that 'subject to an agreement to the contrary, the provisions of sections 9, 27 and 37(1)(a) shall also apply to international commercial arbitrations. This Amendment Act tried to addressed the all recognized issues which were noticed existent

[53] The Preamble of the Arbitration and Conciliation Act, 1996.
[54] *supra* note, at 24.
[55] Long Title of the Arbitration and Conciliation Act, 1996.
[56] 1 M P JAIN, INDIAN CONSTITUTIONAL LAW 1394 (5th ed. 2003).

in the arbitration proceedings. For example, less recognition of institutional arbitration culture in the country than the most of the arbitrations such as ad hoc arbitration etc. Consequently, after this a new amendment act was passed on 9 August, 2019 which is the prevailing law of arbitration of India.

"Arbitration and Conciliation (Amendment) Act, 2019" established, by addition of new sections, Arbitration Council of India, inserted Schedule 8 'which dealt with by the qualification and appointment of the arbitrators', improved on appeal provisions, etc. In simple terms this act took a progressive approach to heal the lacunas of the last amendment act and make a strong arbitration legislation of India.

As we have already mentioned that the amending Act of 2019 has provided for the new concept of establishment of the 'Arbitration Council of India'. The 'Arbitration Council of India', through this amending act, is made authorized to grade the various existing as well as newly formed arbitration institutions. The ACI has a duty to promote the idea of 'institutional arbitration'. The ACI is also made authorized to review and suggest for updates in existing norms relating to arbitration which, in the eyes of the council, would enhance the quality and level of the arbitration in India.

The new amendment act emphasized for (i) maintenance of confidentiality of proceedings and disputes, (ii) maximum time limit under which the award must be made so as to fulfill the objective of rapid resolution of disputes and (iii) privileges of the arbitrator (person as well as institution) for their acts driven by legal and authorized acts with good faith. some duties are also imposed for performance in the part of the parties, such as, now the parties in the dispute are mandated to finish up their pleadings before appropriate arbitrating authority within the time frame of 'six months'. The same time frame would be reckoned from such date on which arbitrator get the notice in writing. The objective of the provision of the maximum time period for

conclusion of the proceeding is to avoid the malicious attempts by either party to unnecessarily stretch the proceedings and hence to safeguard one of the best features of arbitration that is 'speedy disposal of the dispute'. It also remains to be seen, that is there any scope for the parties to file pleadings even after the expiry of period of 6 months under any flexible procedure if arbitrators will allow for the same or on account of natural justice.[57]

Thus, it can be said that these amendments would be welcome step but the focus must be on its proper implementations. To deal with such situation we can refer the views of *Justice Sabyasachi Mukjarji* which he has elucidated while delivering a judgment, i.e. *"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."*[58]

3.2 CONVENTIONS ON INTERNATIONAL ARBITRATION

Some significant International conventions has taken place that deals with arbitration; namely "New York Convention", secondly "Geneva Convention", "UNCITRAL Model Law", etc. The basic and in force arbitration law of India i.e. "the Arbitration and Conciliation Act, 1996" is majorly based on "UNCITRAL Model Law". "India is a signatory state 'the New York convention' held on 10th day of June, 1958 and legally ratified the same on13th day of July, 1960, The NYC was made enforceable on 11th day of October, 1960." India has made this convention applicable in its regime for the purpose of granting recognition and adopting the newest concept

[57]Dikshat Mehra & Vibhor Kapoor, *Evolution of Arbitration Regime Through 2019 – A Recap*, (July 30, 2020, 11:00 AM), http://www.lawstreetindia.com/experts/column?sid=328#:~:text=The%20Amendment%20Act%202019%20now,can%20only%20approach%20the%20courts.&text=It%20also%20remains%20to%20be,in%20view%20of%20natural%20justice.

[58] F.C.I. v Joginderpal Mohinderpal, (1989) 2 S.C.C. 347 (India).

prevailing in other Signatory States of the convention. The convention has also given notice as to applicability of the arbitration laws only to the differences or disagreement which arise out of the legal relationship (whether the nature of dispute is contractual or not) between the parties that are considered "commercial" under the national law.

i. **"Geneva Convention, 1923"**

This was a multilateral treaty which came into being after the First World War. It comprises of "the Geneva Protocol on Arbitration Clauses of 1923" and the "Geneva Convention on the Execution of Foreign Arbitral Awards of 1927". Both, 1923 Protocol and 1927 Convention were supplementary to each other, so as to enforce an arbitral award in signatory states other than the state where the award was exhibited. For the "execution and enforcement" of the award under the convention, it was required for both the contracting states to be a party to the convention and must be recognized as final. That is to say there must be no pendency in the award for example appeal, any kind of opposition and lastly should not be against the "public policy" and "principle of Law" of India.

ii. **"The New York Convention, 1958"**

Though there was "Geneva Convention" from the very beginning but with the passage of time, it was observed that the same cannot be considered final or conclusive for the rapid "enforcement" of "international arbitration awards" or "foreign awards" which was the essential requirement of International Trade of that time. Even some lacunas were traced in the convention; one of them is that before the enforcement of the award, the matter could be considered as concluded or final in domestic territory if the state where it would have been rendered. Therefore, it can be said that the NYC of 1958 prevents execution of awards on considering the same issue as a subject matter before court of law for litigation and this acts as a hindrance in the arbitration process. Some Articles of the NYC expressly provides for

the provisions relating to enforcement and enforcement of foreign arbitral award which has been adopted by the various countries to include them in their municipal laws. So, there was a need to develop International trade and for that it was considered significant to add more to the existing means of procuring, recognizing and enforcing the awards in one country of other country.

The "ICC (International Chamber of Commerce)" in 1954 proposed a draft convention which was later on adopted by "the United Nation Economic and Social Council" (ECOSOC) in 1955. Finally, after considering the recommendations of number of governmental and non-governmental organizations, ECOSOC in 923rd Plenary Meeting, 1958 adopted a new convention with a purpose of acknowledging and executing the arbitral award i.e. "the New York Convention" (NYC). "It emphasized for recognition and execution of foreign arbitration award or of the award not made in the territory of a contracting state."[59] In the NYC, the acknowledgment as well as execution of the award can be sought even if the state is not a contracting state, where the "recognition and enforcement" of award is rendered. This principle is known as "principle of reciprocity" that was followed in most of the cases under the "Geneva Convention", according to this award made in the territory must be a jurisdiction of any one of contracting state. This concept has been discussed in case of *Gas Authority of India Ltd. v. SPIE CAPAG, S.A. and Others*. [60] Thus, it can be said that NYC has widened its area of operation in comparison to Geneva Convention. However, there are some restricting provisions also if there are certain conditions present as per the provisions of the NYC. "The Convention permits the contracting state to limit the jurisdiction

[59] Article 1(1), New York Convention.
[60] A.I.R. 1994 (1) Arbi LR 429 (India).

states to recognize and enforce the award."[61] The Articles of NYC that expressly deals with the enforcement and recognition of arbitral awards are as follows-

- ***Article I***–

  "It states the objectives of the Convention, amongst which one is stated thereunder:

  This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought."

- ***Article III-***

  "It states that each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down."

- ***Article IV-***

  1. "To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

  (a) The duly authenticated original award or a duly certified copy thereof;

  (b) The original agreement referred to in article II or a duly certified copy thereof.

  2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent."

[61] Article 1(3), New York Convention.

- ***Article V-***

  "It states the conditions of enforcement of foreign arbitral award which are as follows-

  1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

  (a) The parties to the agreement referred to in article II were, under the law applicable to them, 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 the country where the award was made; or

  (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

  (c) The award deals with a difference 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, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

  (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

  (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of

the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country."

iii. "The Foreign Awards (Recognition and Enforcement) Act, 1961" or "FARE"

India signed the Convention on 10th June, 1958 and ratified it on 13th July, 1960. The Act aims to make 'NYC' enforceable and to reinforce the dispute settlement machinery emanating from agreements having a transnational character. The objective behind the enactment of FARE was "to facilitate and promote international trade by providing for speedy settlement of disputes between the parties to contract arising in trade through arbitration"[62] and it also put stress to remove the existing deficiencies in the existing treaties. And on the other hand, it also put stress on speedy enforcement of the awards. It applies on arbitration having foreign component or involves cross-border trade transactions and commercial activities.

iv. The United Nations Commission on International Trade Law (UNCITRAL Model Law)

It is the most significant international instrument on Arbitration. In 1985, "the United Nations Commission on International Trade Law" adopted the "UNCITRAL Model Law" on ICA. The UN "General Assembly" recommended that to make the uniform arbitration proceedings across the nations, all states need consider and enforce the

[62] Renusagar Power Co. Ltd. v. General Electric, A.I.R. 1985 S.C. 1156 (India).

"Model Law". The UN "General Assembly" also emphasized the of enhanced arbitration practices to promote international business transactions. Since it was observed that the regulations available for resolving international commercial dispute are inappropriate, it was felt important to improve and to harmonize of domestic laws with international prevailing norms and to cope up with the situations. Many countries have signed and adopted the "UNCITRAL Model Law", including India with necessary variations and exceptions adopted the "UNCITRAL Model Law" which is organized as a statute, namely "the Arbitration and Conciliation Act, 1996".

The scheme the act is to harmonize and promote the laws pertaining to international trade, to coordinate legal activities in order to avoid duplication of effort and to promote efficiency and consistency to trade law.

In 1982, few guidelines were adopted by the "UNCITRAL" which basically intended to guide the arbitral institutions and all related arbitral bodies under the "UNCITRAL Arbitration Rules, 1976". The aim of the Model Law was to maintain uniformity among different national laws by adopting it wholly or partly so that no external law of arbitration would depend exclusively on the choice of venue and parties must not suffer in context of applicability of laws. "The act has many fundamental principles but some of it make it more attractive that is it maintains the principle of party autonomy, protect public interest, the parties are free to determine their arbitral process, etc."

On analyzing all these Conventions and Statutes, we can see that there are so many provisions that deal with the different things relating to arbitration either domestic or International. There have been legislations that deal with the certain matters and if not, new legislation has been enacted or some amendments have been done to deal with the issues. Though foreign awards face difficulties to get enforced in India due to their foreign character but this is not in a condition of 'impossible' as the statue binds its enforceability

unless it has any element that obstruct its enforceability as per the act. The present scenario of the Acts shows that it deals with most of the matter of arbitration but there must be amendments as per the need of the time to cope with the current scenarios of global world.

CHAPTER 4

INTERNATIONAL COMMERCIAL ARBITRATION AND ENFORCEABILITY OF ITS AWARDS IN INDIA

4.1 "INTERNATIONAL COMMERCIAL ARBITRATION: MEANING AND CONCEPT"

International Commercial Arbitration in simple terms is "a dispute solving mechanism which helps to get rid of the disputes and determine the rights and obligations of the parties. It covers the disputes mainly with that of "commercial" nature. Hence, the award also determines the rights and obligations of the parties which directly affects the "economies" of connecting parties."[63] The Arbitration and Conciliation Act, 1996 defines "International commercial arbitration" as, "an arbitration which relates to the disputes arising out of legal relationship whether contractual or not which are considered as commercial under the law in force in India where one or more of the parties are entities (personal or impersonal) which reside outside India."[64] In other words we can say that ICA deals only with commercial disputes and here at least a party must belongs or resides to a state outside India or is a foreign body corporate or a company or association or body of individuals who is central management or whose control is in foreign hands.

But here a very important question arises that **whether a party under the Arbitration and Conciliation Act would mean 'parties to arbitration proceedings' or 'parties to arbitration agreement'?** The first answer can be derived by referring to section 2(1)(f) of the Act of 1996, which says that 'party' means a 'party to an arbitration agreement'. But the Supreme Court has interpreted the term 'party' as to be a person directly connected with and involved in the proceedings and who is in control of the proceedings before

[63] *supra* note, at 18.
[64] Section 2(1)(f), The Arbitration and Conciliation Act, 1996.

the Arbitrator, and not the person who, or on whose name, the agreement is executed.[65]

One more important question arises that **whether the legal relationship referred to in section 2(1)(f) includes every kind of contractual relationship?** The answer for that question is no. The legal relationship referred to in section 2(1)(f) must be considered commercial and commercial should be construed broadly having regard to the manifold activities which are an integral part of international trade today.[66] 'Part II' of the Arbitration and Conciliation Act, 1996 deals with International Commercial Arbitration and especially with the foreign awards under New York Convention and Geneva Convention with their enforceability provisions under Section 49 and Section 58 respectively.

SEAT OF ARBITRATION

The international commercial arbitration involves the parties of different nationalities who perform their commercial contracts according to their terms and conditions which also include a special clause in it i.e. 'arbitration clause' which is useful to resolve their dispute if occurs in future. But while resolving such disputes there is always an issue of conflict regarding the laws between two or more jurisdictions. The best part to avoid such conflict is the 'doctrine of party autonomy' which permits the parties to choose the seat of the arbitration venue of the arbitration and the law which is to be applicable to the parties to contract.

In case of *ABC Laminart (P) Ltd. v. A.P. Agencies*[67] it was held that the well settled position of law in India is that the parties to contract cannot set aside the jurisdiction of court absolutely because such clauses are contrary to the public policy and also are void. Nowadays to refer the disputes to the Arbitral Tribunal instead of court for the purpose of resolving the dispute is praised allot because it does not entirely set aside the jurisdiction of court and the

[65] Union of India v Tecco Trichy Engineers & Contractors, (2005) 4 S.C.C. 239 (India).
[66] R.M. Investments & Trading Co. Pvt. Ltd. v. Boeing Co., A.I.R. 1994 S.C. 1136 (India).
[67] (1989) 2 S.C.C. 163 (India).

adjudication done by the Arbitral Tribunal is finally a subject to Court's approval. Lord Denning's observes that[68]-

"…*parties cannot by contract oust the ordinary courts from their jurisdiction. They can, of course, agree to leave questions of law, as well as questions of fact, to the decision of the domestic tribunal. They can, indeed, make the tribunal the final arbiter on questions of fact, but they cannot make it the final arbiter on questions of law. They cannot prevent its decisions being examined by the courts. If parties should seek, by agreement, to take the law out of the hands of the courts and put it into the hands of a private tribunal, without any recourse at all to courts in case of error of law, then the agreement to that extent is contrary to public policy and void."*

The Contract Act, 1872 legally protects the party to contract when the disputes are referred for arbitration from being void. The 'doctrine of party autonomy' is the milestone to the law of arbitration because it not only gives liberty to the parties to decide the law applicable to the contract but it also allows them to decide the law which is to be applicable in arbitration agreement *(Lex arbitri)* and also the procedural law which governs the arbitration *(curial law)*. Here the relevant laws which are applicable to arbitration agreement are-

- "law governing the substantive contract (applicable law);"[69]
- "law governing the agreement to arbitrate, and the performance of that agreement (juridical seat or *lex arbitri*); and"[70]
- "law governing the procedure of the arbitration (*curial law*)."[71]

In arbitration agreement coming under the purview of ICA, mentioning the clauses that clarifies the applicable law or the law governing the arbitration

[68] Lee v. Showmen's Guild of Great Britain, (1952) 2 QB 329, 342 (CA).
[69] Vaibhav S. Charalwar, Concept of Seat and Venue under the Arbitration and Conciliation Act, 1996, https://www.scconline.com/blog/post/2018/06/04/concept-of-seat-and-venue-under-the-arbitration-and-conciliation-act-2015/.
[70] *Id*. at 69.
[71] Naviera Amazonica Peruana SA v. Compania International de Seguros del Peru, (1988) 1 Lloyd's Rep 116 (CA).

agreement all the performance of that agreement clearly and distinctly is of utmost importance because it helps the tribunal to resolve the dispute easily. The 1996 Act does not provide for the clear concepts of 'seat' and 'venue' but these two terms have been largely developed by the court by giving several judicial interpretations as and when required. There were some recognized weaknesses of terms which were used in the existing arbitration related laws in India and to overcome the same 246th report was submitted by the Law Commission which suggested many amendments or we can say recommended the comprehensive changes but only few suggestions were taken into consideration and the result of such suggestions was enactment of "Arbitration and Conciliation (Amendment) Act, 2015".

In ICA the conflicts between two jurisdictions is very common due to parties from different nationalities and two different laws. The two sections namely Sec. 2(2) and Sec. 20 provides for the provisions relating to 'seat' and 'venue' under the 1996 Act but these two terms are in misconceptions and even sometimes misused by the parties for their own benefits. "Clause (2) of sec. 2 of the Arbitration act of 1996 clarifies that Part I will be dealing with those kinds of arbitration where place of arbitration is within India." Now, a question may arise that whether the term 'place' means 'seat' or merely the 'venue'. This is ambiguous in nature which needs a strict judicial interpretation. Section 20 talks about the place of arbitration. Here the Clause 1 provides that "the parties are free to agree on the place of arbitration" secondly under Clause 2 it provides that "failing any agreement referred to in Clause 1 the place of arbitration shall be determined by the arbitral Tribunal having regard to the circumstances of the case including the convenience of the parties". Clause 3 provides that "notwithstanding anything provided under subsection 1 or subsection 2 to Arbitration Tribunal may unless otherwise agreed by the parties may meet at any place it considers appropriate for consultation among its members or for hearing witnesses' expert on the parties for inspection of documents goods or other property".

So, here we can note that the expression 'place' connotes "different meanings in different sections", the only thing one can assume here is that the parties have the liberty under which they can choose only the "place of arbitration" which exclusively means "venue of arbitration". It thereby restricts the autonomous power of the parties under which they were authorized to choose the favorable legal system as well as the law of procedure which determines the manner of conducting arbitration.[72] Because there was a need of proper interpretations of the doctrine of party autonomy, the Supreme Court interpreted it under *Bhatia* and *BALCO* case.

In *Bhatia* case the party raised the contention on the basis of section 2(2) that Part I of the 1996 Act will not apply to ICA unless it takes place within India. The Apex Court gave its interpretation that -

"in an international commercial arbitration involving Indian party being processed with in any part of the world would confer jurisdiction on Indian Courts to exercise power under Part I of the Arbitration and Conciliation Act, 1996. The main intent of the court is to grant remedy to the party and also to secure the asset(s) claimed by the party."[73]

Further in *BALCO* case, the Supreme Court tried to provide the conceptual clarity to the legislation by interpreting the word 'place' such that it means 'seat' or 'venue' and that will depend on the section or any other place under the act it was used. This strictly overruled the interpretation given in *Bhatia* Case. It was held that in case of ICA if "seated outside India" then the "Part I" of "Arbitration Act of 1996" does not apply as it applies to all other arbitrations which take place within India. The doctrine of "seat" and "venue" used in the "Arbitration and Conciliation Act, 1996" was clarified in a decision of the supreme court stating that the term 'place' used in sec. 2(1) and sec. 2(2) refers to "seat" whereas the term "place" used under "sec. 20(3)" means and refers "venue" of arbitration. Subsequently on analyzing the issues

[72] Vaibhav S. Charalwar, *Concept of Seat and Venue under the Arbitration and Conciliation Act, 1996*, (Aug 01, 2020, 11:45 AM), https://www.scconline.com/blog/post/2018/06/04/concept-of-seat-and-venue-under-the-arbitration-and-conciliation-act-2015/.

[73] Bhatia International v Bulk Trading SA, (2002) 4 S.C.C. 105 (India).

regarding ICA the court in a famous case[74], further interpreted the position of existing law relating to arbitration, "if the parties failed to mention the law or if the party applies improper laws in their agreement then in this case to overcome the issue the closest and most intimate connection test applies."[75]

4.1.1 WHAT IS 'COMMERCIAL' UNDER ICA?

In ICA, the term "commercial" has its utmost importance as to which matters is considerable as commercial for the purpose of arbitration. The meaning of the term 'commercial' is different in different legal systems; somewhere it has great legal significance and somewhere it has no particular legal connotation. In spite of such different connotations, it is considered under the national laws for the purpose of applicability of matters. Though there was no clear concept of the term 'commercial' in arbitration, but if we consider "Geneva Protocol of 1923" to understand the 'arbitration clauses' we can recognize the 'validity' of arbitration clause which states that the parties to contract agree to submit to arbitration all or any of the differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of being settled by the arbitration. Here the protocol also mentions that "each contracting State Reserve the right to limit the obligation mentioned above to contract which are considered as commercial under its national law"[76] Many states used such arbitration clauses of the protocol to limit its applicability to the contracts which are commercial in nature under its national law. These clauses were uplifted to "1927 Convention" for the execution of foreign arbitral awards and also to "New York Convention of 1958" since only the arbitration agreement were covered by the convention at that time[77].

[74] Enercon (India) Ltd. v Enercon GmbH, (2014) 5 S.C.C. 1 (India).
[75] (1988) 1 Lloyd's Rep 116 (CA).
[76] *supra* note, at 49.
[77] Article I (3), New York Convention, 1958.

Tracing the existence of term "commercial" and its usage under "New York Convention" it can be said that its applicability was not restricted to commercial disputes unless expressly limited or restricted by the state. Out of 135 contracting states only 44 states have declared its limitation,[78] depending upon the matter to be considered as "commercial" under their respective national laws. This would be a serious issue for the party who wish to implement this convention in one of these limited states. Then the first ever initiation was made by the "1961 European Convention" on "International Commercial Arbitration" which referred ICA by its name under the Convention. But did not defined the same and its applicability was limited to arbitration agreements concluded for the purpose of settling disputes arising from international trade. In 1985, while adopting the Model Law, there was a necessity to fix the scope of its applicability and especially what was to be included under the periphery of 'commercial' disputes because once adopted it has to co-exist with the national arbitration law foe all other arbitration (both domestic and international non- commercial arbitration). The "UNCITRAL Model Law" expressly connotes that-

"The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other

[78] The official list of Contracting States to the New York Convention with any declarations or reservations they may have made can be found on the web site of the United Nations Treaty Section, (Aug. 02, 2020, 10:00 PM), http://untreaty.un.org/ENGLISH /bible/englishinternetbible/partI/chapterXXII/treaty1.asp.

forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road."[79]

The Arbitration and Conciliation Act, 1996 also, does not provide any proper definition of 'commercial' but the Supreme Court interpreted its meaning in different cases as per the need of the time considering the disputes. In the case of *Atiabari Tea Company Ltd. v. State of Assam*[80], the Supreme Court held that, "the trade and commerce do not mean merely traffic in goods, i.e. exchange of commodities for money or other commodities. In the complexities of modern conditions, in their sweep are included carriage of persons and goods by road, air and water ways, contract, banking and insurance transactions. In stock exchanges and forward communications of information, supply of energy, postal and telegraphic services and many more activities too numerous to be exhaustively set forth, which may be called "commercial intercourse." Furthermore, it also provided that what are "commercial" under the modern complexities of business by determining the factors involved in it. They are any such service or activity which may be contemplated to be a lubricant for the wheel of commerce for smooth functioning of buisness.[81] Thus, the expression "commercial" needs to be given wider connotation to encompass, not only the exchange of commodities but also the exchange of services. With the maturation and expansion in "international trade and commerce" and its upcoming new avenues; the term "commerce" has to be given widest amplitude as the restrictive definition shall hinder its progress. Also the liberal construction of the word 'commerce' shall facilitate the foreign trade qua India and this will open the doors for technological aspects of trade in India.[82]

[79] UNCITRAL Model Law, 1985.
[80] A.I.R. 1961 S.C. 232 (India).
[81] Fateh Chand v. State of Maharashtra, A.I.R. 1977 S.C. 1825 (India).
[82] *supra* note, at 63.

4.1.2 "INTERNATIONAL COMMERCIAL ARBITRATION WITH SEAT INSIDE INDIA"

As we have already discussed the "international commercial arbitration" with the point of view of its meaning and introduction in the above paragraphs, here we will discuss its procedural point of view when it seats in India. We will discuss the provisions under the specific heads to have a clear understanding on the following matters-

i. Notice of Arbitration

In every arbitration proceeding the "notice" is the very first step to commence towards dispute resolution. Now on the part of the other party, once the notice is delivered it is needed to take appropriate steps relating to arbitration. Relating to the notice, sec. 21 provides that the same should be served to the opposite party with a request to refer the dispute for arbitration. The notice relating to arbitration, as soon as served to the appropriate party the proceeding is considered to be commenced lawfully and within the purview of the Act. "When we talk about the contents of the notice it mainly contains two things viz. the 'intention' of the serving party to refer the dispute for an arbitration and secondly the 'reason' why he is referring the matter to the arbitration which mainly includes the points in issues which can also include any demand or requirements to the other party in that regard."[83]

ii. Referral the dispute to an Arbitration

The court has given the power under "Part I of the Act", to refer the parties to the dispute for "arbitration" with a precondition that the issue of dispute must be governed by the arbitration agreement. If there is a pre-existing arbitration agreement which the parties have concluded lawfully and if after the emergence of the dispute

[83] *supra* note, at 41.

any of the party refers the dispute before a court by an application then, the judicial authority of that court have to refer it back to the arbitration as agreed by the parties and for that the court is authorized to issue an order mentioning the same in it. The parties have both options available i.e. "settlement of dispute by arbitration or by court subject to the agreement between them."[84]

"But there is one condition which must be fulfilled to refer the matter to the arbitration i.e. the party who has referred the matter to the court must make an application for purpose of referring the dispute to the arbitration before or at the time of making his first statement on the substance of the dispute and which must be certified or submitted with the original copy of the arbitration agreement."[85] It must also be noted that it is not needed to file an application or to mention specifically in the prayer of the same application. For referring the matters to arbitration if the party objecting the maintainability of the matter brings in knowledge of the court the pre-existing arbitration agreement.[86] The arbitration agreement must be well stamped, it is the prerequisite without which court cannot appoint an arbitrator.[87]

"The party either could refer the separate arbitration agreement (if any) or bring into the knowledge of the court, arbitration clause of the standard contract."[88] And both, the arbitration agreement or the arbitration clause in the standard form of the contract must be considered valid by the court.[89] Hence, the validity of the arbitration agreement or clause must not be in question. Intention

[84] Zhejiang Bonly Elevator Guide Rail Manufacture Co. Ltd. v Jade Elevator, (2018) 9 S.C.C. 774 (India).
[85] M/s. Caravel Shipping Services Pvt. Ltd. v M/s. Premier Sea Foods Exim Pvt. Ltd., (2018) S.C.C OnLine S.C. 2417 (India).
[86] Parasramka Holding Pvt. Ltd. & Ors. v Ambience Pvt. Ltd. & Anr., (2018) S.C.C. OnLine Del 6573 (India).
[87] Civil Appeal No. 3631 of 2019 arising out of SLP(C) No. 9213 of 2018.
[88] Elite Engineering v Techtrans Construction India, (2018) 4 S.C.C. 281 (India).
[89] M/s Inox Wind Ltd. v M/S. Thermocables Ltd., (2018) 2 S.C.C. 519 (India).

and consensus *ad idem* of the parties are relevant before reaching to the conclusion of anything.[90] "On dissatisfaction with the order of the court when it refuses to refer the matter for arbitration of the respective parties, they can approach to the higher court of appeal against the order of the court which decided the matter."[91]

iii. Interim Relief

The parties to the dispute can seek interim relief from "courts" as per sec. 9 whereas from 'arbitral tribunals' as per "sec. 17 of the 1996 Act". The court with appropriate jurisdiction can grant the interim relief available to the parties. The court is empowered to grant this kind of relief while the arbitral proceeding is taking place or even at the time of making the award or just before the pronouncement of the arbitral award but the precondition is that the award must not be enforceable. This is not acceptable after the completion of the enforcement. Any interim measures and protections or any interim injunction is included under interim relief awarded to the parties.[92]

"The arbitral tribunals have power to provide interim measures of protection or it can ask any party to provide securities in connection with the matter of the dispute, whatever it thinks to be appropriate."[93] But the power of arbitral tribunals under section 17 is narrower than the powers conferred to the court of appropriate jurisdictions as per section 9. It must also be noted that the court will not grant any interim relief if it finds any reason that the party can get any sufficient remedy under section 17.

[90] OK Play Auto Pvt. Ltd. v Indian Commerce and Industries, (2018) S.C.C. OnLine Del 8525 (India).
[91] Emaar MGF Land Limited & Anr. v Aftab Singh, (2017) S.C.C. OnLine Del 11437 (India).
[92] Section 9, Arbitration and Conciliation Act, 1996.
[93] *supra* note, at 83.

"If the court grants interim relief under 'section 9' then the arbitral proceedings must commence within the period of '90 days' from the date of entry and protection is provided or within any such other time which court has determined and interim relief granted by the arbitration tribunal will be deemed to have been an order of the court and will be enforced under the CPC, 1908 in the same way as the order of court is made enforced."[94]

iv. Appointment of Arbitrators

The parties to the dispute can with consent of each other decide the procedure for appointing the arbitrator(s). They can refer the dispute to a tribunal consisting of three arbitrators, amongst those three arbitrators each party will appoint one arbitrator and rest one arbitrator will be appointed by two appointed arbitrators who will be a "presiding arbitrator for that purpose".[95]

"If either party fails to appoint an arbitrator within 30 days, or if two appointed arbitrators could not appoint the presiding arbitrator within 30 days, the party can request the Supreme Court or the High Court of appropriate jurisdiction to appoint an arbitrator."[96] The court to which the matter has been referred can authorize a person or institution to appoint the arbitrator.[97] But particularly in case of international commercial arbitration, the application for appointment of arbitrator has to be made before the Supreme Court only. The "Arbitration and Conciliation (Amendment) Act, 2015" empowered the Supreme Court to deal with international

[94] *supra* note, at 93
[95] Section 11(6), Arbitration and Conciliation Act, 1996.
[96] Nitish Desai, *International Commercial Arbitration,* (Aug. 16, 2020, 04:35 PM), http://docplayer.net/51997583-International-commercial-arbitration.html.
[97] Section 11(6) (b), Arbitration and Conciliation Act, 1996.

commercial arbitration and in case of "domestic arbitration" the High Court has the jurisdiction to deal with the matters.[98]

Section 11 empowers the court dealing with the matter that, is there any *prima facie* existence of arbitration agreement or not. And the court will confine their enquiry to the arbitration agreement only."[99] The question of arbitrability of the issue would be decided by the arbitral tribunal and not the court. After the amendment of 1996 Act in 2015, Section 11(6)(a) was brought into the force and according to that section the act would limit itself to the existence of an arbitration agreement.[100]

The application for appointment of an arbitrator to the Supreme Court or High Court of appropriate jurisdiction should be disposed as soon as possible and in any case within 60 days of making that application. That order of the court should be treated as an administrative decision.

v. Challenges in appointing an Arbitrator

"Independence and impartiality of the arbitrator are sine quo none of any arbitration proceedings. If in any way his independence or impartiality can be challenged, this fact must be disclosed before his appointment."[101] "Appointment of an arbitrator can be challenged only if first, circumstances exist that give rise to justifiable doubts regarding to independence or impartiality of the arbitrator and secondly if the arbitrator does not possess the qualifications agreed on the parties."[102] "Under schedule 5 of the Arbitration and Conciliation Act, 1996, a disclosure form is given

[98] Section 11 (6) (a), Arbitration and Conciliation Act, 1996.
[99] Picasso Digital Media Pvt. Ltd. v Pick-A-Cent Consultancy Service Pvt. Ltd., (2016) S.C.C. Online Del 5581 (India).
[100] Mayavti Trading Pvt. Ltd. v Pradyuat Deb Burman, (2019) 8 S.C.C. 714 (India).
[101] Section 12(1), Arbitration and Conciliation Act, 1996.
[102] Section 12(3)(b), Arbitration and Conciliation Act, 1996.

which is in accordance with the internationally accepted practices. Non-disclosure under that form may lead to consequences such as termination of arbitrator's mandate etc."[103]

If any challenge is made regarding the appointment of the arbitrator, the same is decided by the arbitrator himself. When the challenge is discarded, the arbitrator can make the arbitral award and if, still the party is not satisfied with the qualification of the arbitrator, the party can approach to appropriate court and plead the statutory disqualification of an arbitrator under the provisions of the Arbitration Act, 1996 and then it is not necessary to approach the arbitrator for obtaining such relief."[104] If the challenge is based on the fifth schedule, the same can be decided on the basis of the facts of the case. The challenge can also be made before the court post pronouncement of the award.[105]

However, in alike cases, "Section 34 of the Act of 1996 can be applied which says that the application for setting aside the arbitral award can be made to the court and if court is satisfied with the challenge, the arbitral award can be set aside."[106]

vi. Challenge on Grounds of Jurisdiction

"Section 16" says that the "arbitral tribunal which is constituted by the parties without any judicial intervention has the competence to rule on its own jurisdiction. This includes to rule over any objections relating to arbitration agreement." "This was clarified by the Supreme Court in case of *S.B.P. and Co. v. Patel Engineering Ltd. and Another*."[107]

[103] C & C Construction Ltd. v Ircon International Ltd., (2018) S.C.C. OnLine Del 9240 (India).
[104] TRF Ltd. v Energo Engineering Projects Ltd, (2017) 8 S.C.C. 377 (India).
[105] HRD Corporation v GAIL (India) Limited, 2017 (10) SCALE 371 (India).
[106] Section 13(5), Arbitration and Conciliation Act, 1996.
[107] (2005) 8 S.C.C. 618 (India).

vii. Conduct of Arbitral Proceedings

Firstly we will look after at the flexibility with respect to arbitration mechanism, seat/place and language of arbitration. "The arbitral tribunal should treat the parties to the dispute with equality and each party should be given full opportunity to present its case."[108] The "Code of Civil Procedure, 1908" and Indian penal code are not applicable to the arbitral tribunal and hence the arbitral tribunal is not bound by the "CPC, 1908" or the "Indian Evidence Act, 1872".[109] "The parties to arbitration can agree as to what procedure to be followed by the arbitral tribunal. If the parties cannot come to an agreement as to the choice of procedural law the arbitral tribunal will determine the same. The arbitral tribunal is empowered to decide the arbitration procedure for solving the dispute of the concerned parties if the parties are unable to agree and decide the same."[110]

"The arbitral tribunal also has power to decide the admissibility, relevancy, materiality and the weight of any evidence." [111] The place of arbitration will be decided by the mutual agreement of the parties to dispute. However, if the party could not come to any conclusion regarding the place of dispute the same will be decided by the arbitral tribunals[112] and in the same way the language would also be decided.[113] "Recently in a case Supreme Court in its judgment stated that the jurisdiction of the court will be specified by the contract and the court which is having the appropriate

[108] Section 18, Arbitration and Conciliation Act, 1996.
[109] Section 19(1), Arbitration and Conciliation Act, 1996.
[110] Section 19(3), Arbitration and Conciliation Act, 1996.
[111] Section 19(4), Arbitration and Conciliation Act, 1996.
[112] Section 20, Arbitration and Conciliation Act, 1996.
[113] Section 22, Arbitration and Conciliation Act, 1996.

jurisdiction to deal with such case or matter to the exclusion of all other courts can adjudicate on the instant issue."[114]

Secondly, it requires a focus on submission of statement of claim and defense. For this there is a general rule that the person claiming have to submit the statement of claims, issue involved and relief looked for and in response of which the respondent state his defense sentence. The Amended Act of 2019 provides for a '6 months' time frame to complete the same. The statement of claim or defense can be "amended" or "supplemented" at any time by the virtue of section 23, subject to the conditions provided by the 1996 Act.

viii. Hearing and Written Proceedings

Submission of documents are required to be regulated through the proper proceedings therefore after the parties are done with the submitting of pleadings, "the arbitral tribunal has to decide the proceedings to be involved in the instant case i.e. whether the matter is to be conducted on the basis of documents and the related material submitted by the parties or an oral hearing is needed." The same thing will be decided with the relevancy of the documents submitted as evidence and the issues raised by the parties in dispute. However, if either party requests the arbitral Tribunal for a hearing, sufficient and advance notice should be given to the opposite party[115]. Thus, unless either party requests for oral hearing, the same is not mandatory. [116]

On account of "Arbitration and Conciliation Amendment Act, 2015", a timeline for conducting the arbitration proceedings has been given according to which every arbitration proceeding should

[114] Brahmani River Pellets Ltd. v Kamachi Industries Ltd., (2019) S.C.C. OnLine S.C. 929 (India).
[115] Section 24, Arbitration and Conciliation Act, 1996.
[116] *supra* note, at 94.

be completed within 12 months from the date of commencement of Arbitral proceedings. [117] However, on the mutual consent of the parties, a six-month extension may be granted to the arbitrator.[118] Any further extension needs the intervention of the court and without courts grant, there cannot be any extension of time.[119] If the court doesn't grant any time, the arbitration proceeding gets terminated[120]. If an application is made before the court of appropriate jurisdiction for the extension of time limit of completion of arbitration proceedings, the same must be disposed of expeditiously.[121]

"The Arbitration and Conciliation (Amendment) Act, 2019", has exempted the ICA from these time limits. But a guiding and non-binding provision has been introduced in 2019 Amendment Act which provides that the ICA has to be made fast, swift and efficient as much as possible and all the efforts should be made to settle of the dispute of the concerned parties within a period of "12 months from the date of completion of pleadings".

ix. Fast-track Proceedings

"The Amendment Act has provided for in Fast track settlement procedure of disputes under which on the basis of the party's arbitration agreement, the dispute will be disposed of solely on the basis of documents and written pleadings submitted by the parties.[122] For this purpose, the arbitral tribunal is given the 6

[117] Section 29A(1), Arbitration and Conciliation Act, 1996.
[118] Section 29A(5), Arbitration and Conciliation Act, 1996.
[119] *supra* note, at 116.
[120] Section 29A(4), Arbitration and Conciliation Act, 1996.
[121] Section 29A(9), Arbitration and Conciliation Act, 1996.
[122] Section 29B (2), Arbitration and Conciliation Act, 1996.

months time period from the date of arbitral tribunal enters upon the reference."[123]

x. The Mutual Settlement during Arbitral Proceeding

The parties are allowed to have a mutual settlement between them to settle their matter during the arbitration proceedings so as to avoid the legal proceedings in the middle of their business works. If this happens the arbitral tribunal and all the arbitration proceedings shall be terminated. And if both the parties agree for a settlement, the same can be recognized and recorded in the form of arbitral award which will have the same force as any other arbitral award provided generally on following the complete procedure.[124] Section 30 provides that, if there is no provision regarding the arbitration agreement, the other way can be referred to sort out the pending issue referred under arbitration i.e. the arbitral tribunal will mediate or can perform conciliation to resolve such disputes.

xi. **Provision relating to Law of limitation**

The "Limitation Act of 1963" describes the time limit to approach the court for any suit, appeal or application for redress or justice. It applies to Part I of "Arbitration and Conciliation Act, 1996". Here, "the date on which aggrieved party request another to refer the dispute to arbitration is considered and if not done in correct time, the claim shall be barred under the Limitation Act." Thus, according to section 43(2) of the act the arbitration cannot be further continued. "But if the Court set aside the arbitral award, the time spent in arbitration shall be excluded from the limitation period thus giving the opportunity to the parties to initiate a fresh

[123] Section 29B (4), Arbitration and Conciliation Act, 1996.
[124] Section 30, Arbitration and Conciliation Act, 1996.

action in court or new proceeding of arbitration without any previous bar of limitation."[125]

xii. The Award

"Arbitral award" is the decision given by the "arbitral tribunal" through Arbitrators. It includes every awards except and interim award passed under section 17 of the act. "An arbitrator can decide the dispute on the "consent" of both the parties and the award will be made on the decision of the majority of arbitrators[126]. It must be in writing and signed by all the members of the tribunal."[127] It must include in it the date and place where it has been made. The award should be back by reasons just like any judgment of the court is based by the reason of the same; unless the parties have disagreed to it. Parties in dispute can also agree that Arbitration can pass the award without stating any reason[128]. " Each of the parties is provided with the duplicate copy of the award, awarded to the parties to dispute."

xiii. Interest and Cost of arbitration

Unless there is any prescribed interest rate to be "payable on damages and cost awarded by the arbitral award it shall be 18% per annum which is to be calculated from the date of the award to the date of payment." "Section 31(7)(b) of 2015 Amendment Act prescribes that it shall be 2% higher than the current rate of interest prevalent on the date of award which is to be calculated from the date of award to the date of payment." Recently, "the Supreme Court laid down the guidelines to implement Section 31(7)(b) and stated that the award-debtor cannot be subjected to a penal rate of interest, either during the period when he is entitled to exercise the statutory right to challenge the award, before a court of law, or

[125] *supra* note, at 119.
[126] Section 29, Arbitration and Conciliation Act, 1996.
[127] Section 31(1), Arbitration and Conciliation Act, 1996.
[128] Section 31(3), Arbitration and Conciliation Act, 1996.

thereafter."[129] The "2015 Amendment Act" introduced the Regime for Costs of Arbitration.

"Cost of arbitration means and includes the reasonable cost relating to fees and expenses of Arbitrators and witnesses, legal fees and expenses, administration fees of the institution supervising the arbitration and other related expenses in connection with arbitral proceedings and is applicable to both kind of dispute redressal mechanism viz. arbitration proceedings and the litigations arising out of arbitration".

"If the parties refuse to or fails to pay the appropriate costs, the Arbitral Tribunal is empowered to refuse to delivery of award. However, in such a case, any of the party can approach the court against such step of the tribunal. Moreover, the court will ask the parties to deposit certain amount and only after such deposit, the tribunal delivers the award and finally the court will decide the cost of arbitration and shall pay the same to arbitrators."[130] If there will be any balance amount then it will be refunded to the party.[131]

xiv. The Provision of Challenge against the Awards

"Section 34 lays down the procedure for challenging an arbitral award in a way that either party can challenge the award by the tribunal before expiry of 3 months from the date of receipt of arbitral award". And if sufficient cause is shown further period of 30 days can be granted for condo nation of delay. Section 34 provides some specific grounds under which an award can be challenged. They are as follows-

i. "The parties to the agreement or under some incapacity.
ii. The agreement is void.

[129] Vedanta Ltd. v Shenzen Shandong Nuclear Power Construction Co. Ltd., (2018) S.C.C. OnLine S.C. 1922 (India).
[130] *supra* note, at 125.
[131] Section 39, Arbitration and Conciliation Act, 1996.

iii. The award contains decision on matters beyond the scope of arbitration agreement,

iv. Composition of arbitral authority or the arbitral procedure was not in accordance with the arbitration agreement,

v. The award has been set aside or suspended by competent authority of the country in which it was made,

vi. The subject matter of dispute cannot be settled by arbitration under Indian law, or,

vii. The enforcement of the award would be contrary to Indian public policy."[132]

Some amendments have been done in the existing provisions of the act for example, "Public Policy of India has been explained clearly to mean only if the award is induced or affected by fraud or corruption or if it violates sec. 75 or sec. 81 or; if it contravenes the fundamental policy of Indian laws or; if it contravenes the basic notions of the justice or morality."[133] "Also a new provision has was inserted in Arbitration Act which provides that the award if vitiated by 'patent illegality' may be set aside by the court but not merely on the basis of inaccurate application of law or by any re-appreciation of the evidence.[134] But when the seat of arbitration is in India under ICA, the doctrine of patent illegality is outside the purview of the arbitral challenge."

xv. Appeals

For the purpose of "appeals, only in the exceptional circumstances the courts can be approached under the Act." Only after the pronouncement of arbitral award, the aggrieved party can approach

[132] *supra* note, at 130.
[133] Section 34, Arbitration and Conciliation Act, 1996.
[134] *supra* note, at 132.

the court. In case of an order passed under sec. 17 of the Act, after the order is passed the parties in dispute or the third party if he is directly or indirectly affected by interim measures granted by the arbitral tribunal, can approach the court under sec 37 of the "Arbitration Act, 1996".[135] The appeal lies from the following orders and from no others.[136]

i. Granting of refusal to grant any measure under section 9.
ii. Setting aside or refusing to set aside an arbitral award under section 34.

However, "the Supreme Court has recently held that the parties may provide for an appeal to lie from the award to an appellate tribunal. But the same must not be contrary to the laws of the country[137] but no second appeal shall lie from an order passed in appeal under this section." The provisions under the Amendment Act has widened the ambit of appeal. An appeal can also lie to a court from an order of the arbitral tribunal:

i. Excepting the player referred to in sub-section 2 or sub-section 3 of section 16.
ii. Granting or refusing to grant an interim measure under section 17.

xvi. "Enforcement and Execution of the Award"

In India the arbitral awards, both domestic and foreign, are enforced and executed by the "Arbitration and Conciliation Act, 1996" to be read with the "CPC, 1908" as it prescribes the procedure to be followed while executing an award. "The Act provides that an award would be final and binding on the parties to

[135] Prabhat Steel Traders v. Excel Metal Processors, 2018 SCC OnLine Bom 2347.
[136] Section 37, Arbitration and Conciliation Act, 1996.
[137] Centrotrade Minerals & Metal v. Hindustan Copper, 2016 (12) SCALE 1015.

dispute and any person claiming under them."[138] The arbitral award unless challenged under sec. 34 of the Act, is immediately enforceable. When the period to file objections has expired or the objection made has been rejected, the award is made executed as if it were a decree passed by a court of law, under the code of civil procedure, 1908.[139]

"Order XXI of the Code of Civil Procedure, 1908 laid down the procedure for the execution of arbitral award. The execution proceedings of an award can be filed before any court with sufficient jurisdiction in the country, and there is no requirement for obtaining a transfer of the decree from the court who has exercised the jurisdiction over the arbitral proceedings."[140]

As soon as an application for execution of the award is made, it is considered that the proceedings for execution for an award has commenced[141]. The execution of a decree against property of the judgment debtor can be affected in two ways –

i. Attachment of property, and
ii. Sale of property of the judgment debtor.

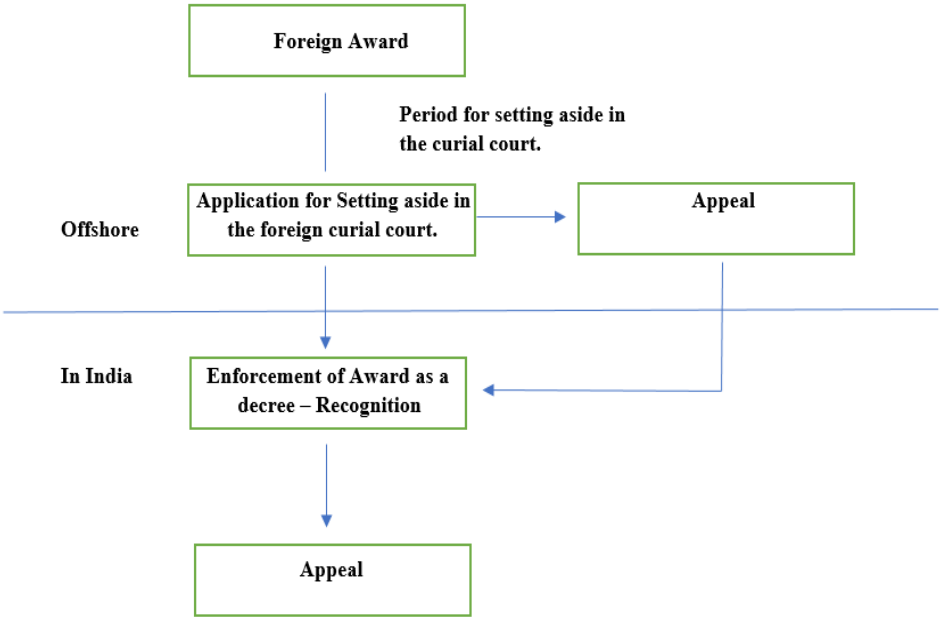
xvii. Representation by Arbitral Tribunal for contempt

The Supreme Court has held that, under section 27(5) of the Arbitration and Conciliation Act, 1996, if any person or party doesn't comply with the order of arbitral tribunal or that party or person's conduct amounted to contempt during the course of arbitration proceedings, The proceedings can be referred to the appropriate court to be tried under a contempt of courts Act, 1971. The object behind the insertion of the proceedings of

[138] Section 35, Arbitration and Conciliation Act, 1996.
[139] N. Poongodi v. Tata Finance Ltd., 2005 (3) Arb LR 423 (Madras) (India).
[140] Sundaram Finance Ltd. v Abdul Samad, (2018) 3 S.C.C. 622 (India).
[141] Rule 10, Civil Procedure Code, 1908.

contempt of court for arbitral proceedings is to make the orders of arbitral tribunal enforceable.

"Process of challenge and Enforcement of arbitral awards"



4.1.3 "INTERNATIONAL COMMERCIAL ARBITRATION WITH SEAT OUTSIDE INDIA"

"There is no generally applicable procedural code that applies globally for the matters coming under the domain of International Commercial Arbitration which have its seat outside India as it can be unfair to generalize the law for the said issue as the party and the law belongs to different territories." "Each and every procedure is customized for specific cases but that are definitely different from that of procedure of litigation practices which clarifies that the institutional rules of a specific country apply to specific issue only." This can be seen in the *Bhatia* case in which it was held that, "even if the actual law of the contract is not made within India, the Indian courts have the jurisdiction to test the significance of an

arbitral award made in India."[142] "The court recognized that Part I of the Arbitration and Conciliation Act, 1996 gives effect to UNCITRAL Model Law allowing courts to grant interim relief even when the seat of ICA is outside India."[143]

"JURISDICTION OF INDIAN COURTS OVER ARBITRATIONS SEATED OUTSIDE INDIA"

To understand this we should refer the judgment[144] of Apex Court given in 2014 where it was held that the Indian courts had no jurisdiction to set aside an award made in London which can be said to be correct. But can this be considered as a development for cases of ICA situated outside India. "Section 34" of Part I provides for the application for setting aside an arbitral award under which the proceedings were filed in this case. Although the seat of arbitration was outside India still Delhi High Court accepted to hear to set aside the proceedings on the basis of applicability of Part I of 1996 Act and it had not been excluded, secondly the English procedural law does not extend to the matters of arbitrability or to challenge an award and thirdly it considered that since the dispute raised by the Union of India considerations of the "public policy" of India. Thus, the jurisdiction of Indian Courts could not be excluded anyhow but the national courts have the exclusive jurisdiction to hear and set aside the proceedings.

In 2002 to Supreme Court expressly held in *Bhatia* case that matters of ICA which is held outside India, the provisions of Part I of 1996 act would apply unless it is excluded (expressly or impliedly) by the parties wholly or in part but later on in *BALCO* case Supreme Court of India held that Part I of the 1996 act does not apply to the arbitration situated outside India and therefore Indian Court has no jurisdiction to hear and set aside

[142] Rahul Dev, *International Commercial Arbitration in India*, (Aug, 05, 2020, 06:05 PM), https://patentbusinesslawyer.com/international-commercial-arbitration-in-india/.
[143] *Id.* at 142.
[144] Reliance Industries Ltd & Anr. v Union of India, (2014) 7 S.C.C. 603 (India).

proceedings in such matters but the *BALCO* decision has its prospective application only.

4.1.4 "INTERNATIONAL COMMERCIAL ARBITRATION WITH RECIPROCATING TERRITORY"

The judiciary plays a significant role to develop the laws relating to arbitration in India. After the decision of Supreme Court in *Bharat Aluminium Co. v. Kaiser Aluminium Technical Service Inc.*[145], the laws relating to arbitration is made seat centric. The Amendment Act of 2015 has clarified that Part I of the Act will not be applicable to foreign seated arbitration, subject to some provisions under the Act. The following table will clarify the same:

Pre-Balco (Bhatia Regime)	Post-Balco	Amendment Act
Unless impliedly or expressly excluded by the parties, Part I of the Act will apply even to a foreign seated arbitration.	Part I of the Act will not apply in case of foreign seated arbitration. The decision was given prospective effect and therefore applied to only arbitration agreements executed on or after September 6, 2012. If the arbitration agreement was executed prior to September 6, 2012, necessary modifications would have to be made in the arbitration agreement in order to be governed by the ruling in *BALCO*.	Part I of the Act will not apply in case of foreign seated arbitration except Sections 9, 27 and 37 unless a contrary intention appears in the arbitration agreement. The Amendment Act is applicable prospectively with effect from October 23, 2015 (i.e. the commencement of the arbitral proceedings, or the court proceeding should be on or after October 23, 2015).

In one more significant judgment of the Supreme Court in "*IMAX Corporation v. E-city entertainment Pvt. Ltd.*[146] It was held that the choice of foreign seat by an arbitral institution as an exclusion of Part I of Arbitration and Conciliation Act, 1996 and before the *BALCO* case." Hence, to enforce the award of any foreign seated arbitration in India, Part II of the Arbitration and Conciliation Act, 1996, is relevant. Part II is divided into two chapters. Chapter 1 deals with foreign awards delivered

[145] Bharat Aluminum Co. v Kaiser Aluminum Technical Service, Inc., (2012) 9 S.C.C. 552 (India).
[146] (2017) S.C.C. OnLine S.C. 239 (India).

by the signatory territories to the New York convention which has reciprocity with India and Chapter 2 deals with foreign awards delivered under the Geneva Convention. A foreign award under Part II is defined as an arbitral award on differences between persons arising out of legal relationships, whether contractual or not considered as commercial under law in force in India.

Reciprocating territories are often termed as the second reservation under the NYC. "A reciprocity reservation allows a member state to declare that it will recognize and enforce awards that apply to NYC but only if the awards are made in another member state." "Section 44(b) of the Act requires the Central Government of India to issue a notification in the Official Gazette recognizing a reciprocating territory." "In pursuance of an agreement in writing for arbitration to which this convention applies and in one of such territories the central government, being satisfied that reciprocal provisions made, by notification in official gazette, declared to be territories to which the said convention applies. Thus, here we can say that even if a country is a signatory to the NYC it doesn't mean that the award passed in such country would be enforceable in India. The award will be enforceable in India only if there is further notification by the central government declaring that country to be a territory to which New York convention applies." The central govt. has notified about 49 countries as reciprocating country for the purpose of enforcement of foreign awards in India.[147] In an another matter the Supreme Court has held that an arbitration award cannot be considered as a foreign award if the same is not made in a convention country. Therefore, an award made in a non-notified Convention country will not be considered as a 'foreign

[147]Australia, Austria, Belgium, Botswana, Bulgaria, Canada, Central African Republic, Chile, Cuba, Czechoslovakia Socialist Republic, Denmark, Ecuador, The Arab Republic of Egypt, Finland, France, Germany, Ghana, Greece, Hungary, Italy, Republic of Ireland, Japan, Republic of Korea, Kuwait, Malagasy Republic, Malaysia, Mexico, Morocco, The Netherlands, Nigeria, Norway, People's Republic of China (including the Special Administrative Regions of Hong Kong and Macao), Philippines, Poland, Romania, San Marino, Singapore, Spain, Sweden, Switzerland, Syrian Arab Republic, United Republic of Tanzania, Thailand, Trinidad and Tobago, Tunisia, United Kingdom, United States of America and U.S.S.R .

award' within the meaning of section 44 of the Act and shall not be recognized and enforceable under the Act.

WHO ARE THE REFERRING PARTIES UNDER PART II OF THE ARBITRATION ACT OF 1996?

The parties, who have been entered into an arbitration agreement under section 44 of the 1996 act, would be referred to arbitration by a judicial authority under section 45. Action is based on Article II (3) of New York convention. The validity of arbitration agreement is a prerequisite condition for the courts to specifically enforce the same. Other than that, the arbitration agreement must be capable of being performed and operative in the eyes of the court.[148] To understand the concept of ICA under reciprocating territory we will go through the same under different heads that will explain it thoroughly.

I. Enforcement and Execution of Foreign Awards

"Section 48 of the Arbitration and Conciliation Act, 1996", empowers the Indian court to refuse the enforcement of foreign award under certain grounds on a condition that it falls within the "following grounds:

i. The parties to the agreement or under some incapacity,
ii. The agreement is void,
iii. The award contains decisions on matters beyond the scope of arbitration agreement,
iv. The composition of the arbitral authority or the arbitral procedure was not in accordance with the arbitration agreement,
v. The award has been set aside or suspended by a competent authority of the country in which it was made,

[148] Shin-Etsu Chemical Co. Ltd. v Aksh Optifibre, (2005) 7 S.C.C. 234 (India); Korp Gems (India) Pvt. Ltd. v Precious Diamond Ltd., (2007) 3 ArbLR 32 (India).

vi. The subject matter of dispute cannot be settled by arbitration under Indian law,

vii. The enforcement of the award would be contrary to Indian public policy."[149]

Section 48 provides for an important factor in path of recognition and enforcement of award. It maintains that the public policy is one of the conditions which is to be satisfied before enforcing a foreign award.[150] "Supreme Court has also held in *Renusagar* case that if the foreign award is contrary to the Indian public policy viz. Fundamental policy of India, or the interest of India, or Justice or morality the awards under arbitration cannot be enforced."[151]

II. Appealable Orders

Section 50 of the Arbitration and Conciliation Act, 1996 provides that an appeal can be filed by a party if the order has been passed under section 45 and section 48 of the Act. And no second appeal can be filed against the order passed under this section. But these orders are appealable under Article 136 of the Constitution of India, 1950, before the Supreme Court of India. However, "Article 136 does not provide a party a right to appeal. It is a discretion which the Supreme Court may choose to exercise. Thus, if any alternative remedy exists in the form of a revision under Section 115 of the Civil Procedure Code or under Article 227 of the Constitution before the High Court, the Supreme Court refused to hear an appeal under Article 136 even though special leave had initially been granted."[152]

[149] *supra* note, at 134.
[150] Section 48(2)(b), Arbitration and Conciliation Act, 1996.
[151] Renusagar Power Co. Ltd. v. General Electric Co., 1994 A.I.R. 860 (India).
[152] Shin-Etsu Chemical Co. Ltd. v Aksh Optifibre Ltd., (2005) 7 S.C.C. 234 (India).

Here the question arises that, **Can it be appealable under any special law other than Constitution of India?** For this we can refer the Commercial Court Act of 2015 which provides for the general provision of arbitration relating to appeals for commercial matters. But the Supreme Court explained the law relating to appeals of matters of enforceability of foreign awards very clearly. It was held that section 13(1) of the said act would not apply to the cases until unless they are expressly covered under section 50 of the act, which deals with the conditions to be fulfilled to file an appeal against the foreign award.[153] Thus, the only remedy left to the parties for enforcing the foreign awards is to approach the Supreme Court only if there are no such objections. Therefore it can be said that order given under section 45 is only appealable under the Indian Constitution under Art. 136 and the party cannot file any such appeal under Commercial Appellate Division under current framework.

4.2 THEORIES OF COMMERCIAL ARBITRATION

There are different ways to explain the nature of arbitration among various national courts. They may have difference in their interpretations which can be easily understood by the different theories on arbitration. There are mainly four theories namely jurisdictional theory, contractual theory, hybrid theory and autonomous theory. Each theory tries to explain the concept and related relation between arbitration and national courts under ICA in specific manner.

The basic notion of the jurisdictional theory is that it is based on the complete supervisory powers of states to regulate any matter of ICA within their jurisdiction, whereas the contractual theory puts a view that the origin of ICA is from a valid arbitration agreement between the parties and also clarifies that arbitration should be conducted prima facie by the will of parties. The hybrid theory explains this as a compromise between the jurisdictional and contractual

[153] Kandla Export Corporation & Anr. v M/s. OCI Corporation & Anr., (2018) 14 S.C.C. 715 (India).

theories also it provides that ICA has character of both a contractual and jurisdictional theory. The autonomous theory does not witness the traditional approach and it gives prominence on the 'purpose' of ICA. Unlike other theories, it refrains to fit into the existing legal framework this is because it has been developed recently with latest arbitration trends and tries to deal with the present scenarios of the ICA. It defines arbitration as an autonomous institution, which should not be restrained by the law of the place of arbitration. In a simple way it shows the 'party autonomy' should be adopted to decide the arbitral proceedings.

i. **The Jurisdictional Theory**-

This theory gives importance to the supervisory powers of states, especially on 'place of arbitration'. "Although this view does not have any conflict with a opinion that the origin of any kind of arbitration is from the arbitration agreement of the parties. This theory lays down a principle that the national laws of the state regulate arbitration agreement as well as its proceedings and also provides the validity to it. Besides this, the theory also clarifies that the arbitration award is validated under the laws of the seat of arbitration and the country where the recognition & enforcement or execution of the awards is on the lookout for."[154] This shows the supremacy of laws and legal principles involved in the arbitration mechanism. The followers of the jurisdictional theory gave emphasis on "seat of the arbitration".

For example, "Dr. Mann gave stress on the laws of those states where the law of place of arbitration takes place i.e. the *lex fori*." He even argues that for the purpose of arbitration, "a sovereign state is entitled to approve or disapprove the activities carried out within its territory because every arbitration is subject to the law where it takes place (state). Moreover, an arbitrator has more obligations to carry out the arbitration proceedings as per the parties but it must be to the extent that the *lex fori*

[154] Hong-lin Yu, *A Theoretical Overview of the Foundations Of International Commercial Arbitration*, (Aug. 10, 2020, O4:30 PM), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.555.2751&rep=rep1&type=pdf.

allows for the same." Their acts must not be in conflict with the mandatory rules and public policy of the place of arbitration and if so done they will be considered as 'judicially unjustified'. "Also all those issues that arise from ICA, such as the validity of the arbitration agreement, the arbitral procedures, the arbitrator's power, the scope of submission and the enforceability of arbitral awards must be decided within the mandatory rules and public policy of the *lex fori*. And if it conflicts such laws, then the awards may be set aside by the court of that place of arbitration and consecutively the recognition or enforcement of the awards may be refused by the courts of the enforcing state."

This theory gives "a strong basis to the national courts that exercise supervisory powers over the arbitration." This provision is strongly witnessed by the "New York Convention, 1958". "The supervisory powers relating to the validity of arbitral awards can be exercised by the courts where recognition or enforcement is to be performed, if the subject matter of the dispute is not arbitrable under the law,[155] or the enforcement of such an award is against its public policy.[156] In addition to this, the courts in the country where recognition or enforcement is sought also have a supervisory power over the issue of arbitrability at the stage of recognition or enforcement.

In relation to the status of arbitrators, "the theory follows the approach of the delegation theory to settle disputes between parties whish asserts that an arbitrator must possess a delegated authority given by a state. An award made by an arbitrator lacking this authority will be void and can be challenged. Jurisdictional theory strictly denies that the arbitrator's power is originated from the parties' arbitration agreement and provides that the arbitrator's power is drawn from the state by means of the local law on the ground that it is in the public interest to permit private individuals to decide disputes when the parties have agreed upon it."

[155] Article V 2 (a), New York Convention, 1958.
[156] Article V 2 (b), New York Convention, 1958.

"The theory also requires that an arbitral award should be granted the same status and effect as a judgment made by the national court judges. In case of absence of the voluntary performance of the award by the losing party, the awards will have to be enforced in the same way as that of a judgment by the court where the recognition or enforcement is sought."

Generally to deal with international commercial disputes the law of the own country or the national laws of other states are applied when chosen by the will of the parties. Based on the territoriality principle the arbitrators who follows the jurisdictional theory are only allowed to choose the proper law of the contract with respect to the procedural law chosen by the parties and are required to decide the issues arising from ICA as per the municipal laws, which also include the choice of law of that place where the arbitration is to be held.

ii. **The Contractual Theory-**

Contractual Theory is the basis of most of the international commercial arbitration mechanisms. "The followers of the contractual theory assert that arbitration is purely based on the agreement between the parties." They give no importance to *lex fori* nor do they accept any link between the arbitration proceedings and the law of the place of arbitration. The theory provides that parties have the liberty to decide the law, arbitral proceedings and this must not be interfered by the states to maintain their autonomy. Unlike jurisdictional theory it deals with the core nature of the arbitration with a contractual point of view. "It originates from the parties arbitration agreement (basis through which disputes are resolved), which may be influenced by the national laws of the state where the actual proceeding is to be performed." But it binds the parties according to the terms of the contract. This theory does not regard the interference of the power of the state for dispute redressal under arbitration and follows the "principle of *pacta sunt servanda"*.

The arbitration agreement can be interpreted by the parties as per their convenience or choice, they voluntarily decides the time and place or seat of arbitration, select appropriate arbitrators and even can choose the procedure as well as substantive law. Although, the *lex fori* that deals with the disputed issue is applied by the arbitrators to fill the gap in procedure when parties fails to provide the appropriate law expressly. If they fail to find the proper law to deal with the disputed matter, the parties have to follow the laws of the *lex fori* to determine the proper law that deals with the matter according to the parties as this theory gives freedom to choose national principles or any law to be the substantive law for arbitration.

iii. **The Hybrid Theory-**

"The hybrid theory was created by Professor Surville and was later on developed by Professor Sauser-Hall." The developers of this theory are of the view that, the perfect operation of ICA relies on both jurisdictional and contractual elements. The hybrid theory is said to be a mixed theory of both contractual theory and jurisdictional theory, thus having a dual character. According to Professor Sauser-Hall believes that it has a contractual element because "arbitration has its origin in a contract whereby the parties have the liberty to choose the arbitrators, the law governing the arbitration procedures and substantive matters regarding the arbitration." On the other hand, he was also of the view that the concept of jurisdictional theory is also correct because arbitration is required to be conducted within national legal regimes in order to determine powers of the parties, the validity of the arbitration agreement and the enforceability of the arbitral awards." Thus "arbitration must be considered to be a mixed juridical institution (*sui generis*) which has its origin in the arbitration agreement of parties and draws its jurisdictional effects from the civil law."

"Messrs Redfern and Hunter also explained that International commercial arbitration is hybrid. It begins as a private agreement

between the parties and continues by way of private proceedings, as per the wishes of the parties." This ends up with an award which has binding effect on parties to agreement and which lastly subjected to recognition and enforcement where it is sought to be performed.

In hybrid theory, "the parties are free to contract an arbitration agreement, choose arbitrators and the governing laws that suit the contractual nature of arbitration. On the equal note the jurisdictional character of arbitration requires the issues relating to arbitral proceedings and the validity of arbitration agreements to be subject to the mandatory rules and public policy of the *lex fori*." For the purpose of recognition and enforcement of arbitral awards, the validity of arbitral awards will be scrutinised according to the mandatory rules and public policy of the country in which the recognition or enforcement is to be performed." "The relationship between the arbitrators and the parties is regarded as contractual in nature because they are linked with each other on the basis of arbitration agreement made between the parties. Here, the arbitrators obtain their powers from the parties' authority and they are allowed to act on behalf of the parties within the scope of authorization. Nevertheless, unlike the contractual theory, the extent of the arbitrator's power is analyzed on the basis of mandatory rules of the *lex fori* and the public policy rules of the states where enforcement of award is to done. The theory considers arbitral awards as half way between a judgment and a contract.

The theory also recognizes the importance of the "supervisory powers of the national courts of the place of arbitration and the enforcing states. It maintains that, in the absence of any express agreement between the parties, the law of the seat will be applied to govern the arbitration. Arbitrators are required to decide the proper law of the contract in accordance with the conflict of laws of the lex fori. Since the conflict of laws of the lex fori are important to decide the proper law of the contract under the hybrid theory, therefore, the validity of a choice of a-national

principles and the application of a national principles as the proper law of the contract will have to be decided by the mandatory rules of the *lex fori* and those of the countries where the recognition or enforcement is sought."

iv. **The Autonomous Theory**

This theory looked up into "the practical aspects of arbitration". 'Rubellin-Devichi' developed the concepts of the autonomous theory. The followers of this theory believe that the speedy and flexible character of international commercial arbitration was the attractive element for the investors. Rubellin even argued that an appropriate theory should be established by examining the use and purpose of arbitration to create a friendly atmosphere for arbitration in the international commercial community and praises the autonomous character of ICA. They totally refuse to accept the traditional approach of arbitration because such theories fail to correspond with reality and practicality of issues. Along with jurisdictional and contractual theory she also rejected the hybrid theory because of its indefinite scope of application. They are of the view that the real character of arbitration had to be decided on the basis of its utility and purpose by placing arbitration on a "supra-national" level and recognizing its autonomous nature rather than blindly following the traditional regimes. The nature of this theory is neither contractual, nor jurisdictional, nor hybrid, but autonomous.

She also observed the necessity of having an international dispute settlement institution established with a purpose to provide appropriate functional arbitrations for the international business community. Therefore, it can be concluded that "only an original system that is free from both the traditional notions, would permit the necessary speed and guarantees which the parties legally claim to be brought together. While acknowledging full party autonomy to determine gist of arbitration, the proponents of the autonomous theory deny the controlling or supervisory powers of the *lex fori* over arbitration. They invoke the idea of

'delocalization theory' and supra-national arbitration which sometimes observed in the validity of arbitration agreements, arbitral awards and in choice of the proper law."

4.3 "AWARDS UNDER INTERNATIONAL COMMERCIAL ARBITRATION"

The award under ICA is a foreign award which is different from domestic award but it may be regarded as a domestic one in the country in which it is made. It can be distinguished here on the basis of place of award given i.e. award made in India or made outside India. Thus domestic award is different from that of International and foreign award. So in easy language what a foreign arbitral award is that which is made in the territory of some other state other than that state where there is a question of recognition and enforcement of the award. Part II of 1996 Act includes foreign award both under New York Convention and Geneva Convention.

'Section 44'[157] of the "New York convention, 1958" provides for the definition of foreign award which simply includes the awards that arises out of legal relationships whether contractual or not. On the other hand Section 53 of the "Geneva Convention, 1927" relates to foreign award which involves the matters which are considered as commercial for this purpose. The noticeable point under foreign award is that there is no challenge proceeding that can be contemplated in India on merits in Indian courts.

Here the 'foreign award' means an "arbitral award on differences relating to matters considered as commercial under the law in force in India which is made

[157] Section 44 of Arbitration and Conciliation Act, 1996, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960—
(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and
(b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

after 28 July 1924. This also includes that in pursuance of an agreement for arbitration to which the protocol set forth in the second schedule applies and between persons of whom one is subject to jurisdiction of someone of such powers as the central government being satisfied that reciprocal provisions have been made may by the notification in the official gazette, declared to be the parties to the Convention set forth in the third Schedule, and of whom the other is subject to the jurisdiction of some other of the Powers aforesaid, and in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, may, by like notification, declare to be territories to which the said Convention applies. But under this an award shall not be deemed to be final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made."[158]

In a famous case of *Serajuddin v. Michael Golodetz*[159] essential elements of a foreign arbitration or what the foreign arbitral award includes was pointed out. It was held that arbitration should have been performed in any foreign land by foreign arbiters applying foreign laws and in case of a party the foreign national must be involved necessarily. Later on Supreme Court in case of *N.T.P.C. v. Singer Company*[160], observe that an interim award was made in London under an arbitration agreement governed by the Indian arbitration law therefore the award under this arbitration cannot be treated as foreign award as it is purely a domestic award on the basis of both arbitration agreement and its award.

4.4 "LEGAL PROVISIONS FOR ENFORCEMENT AND RECOGNITION OF ITS AWARDS IN INDIA"

Over the past decades the different communities of the world has witnessed that there is an increase in cross border transaction but along with that there is also a rise in cross border business disputes or commercial disputes. Despite of good national laws which can resolve the dispute in national courts the party sometimes are unwilling to resolve their disputes for many reasons like

[158] Section 53, Arbitration and Conciliation Act, 1996.
[159] A.I.R. 1960 Cal.49 (India).
[160] A.I.R. 1993 S.C. 998 (India) .

unfamiliar laws, language and culture, they prefer International commercial arbitration for the same. The parties to such kind of transactions mostly favors ICA for resolving their disputes but the main thing to stress upon is that do they have enough proper laws to provide justice or does the dispute resolve amicably under the international commercial arbitration proceedings.

The main aim of arbitration is settling the disputes and providing arbitral award to the parties but the most important step after this is to enforce the same. Its effective enforcement shows the 'success' in arbitral process. The awards under domestic arbitration and ICA, differs with each other in the sense that the foreign awards are not capable of enforcement by itself like that of domestic one. For active enforcement there must be accurate laws for the same in that particular state. Since India is a signatory to the New York Convention and the Geneva Convention, the award under these conventions are subject to enforceability unless they are subject to any grounds of refusal under the Indian arbitration laws. If a party receives an award from a country which is a signatory to these convention or any territory which has been notified as a convention country by the India then such award would be enforceable in India.

For enforcement of foreign awards (under New York Convention or Geneva Convention) in India, Part II of the Arbitration and Conciliation Act, 1996 would apply. Here, enforcement is a two-stage process. Firstly the party has to file an execution petition and the court would determine whether the award is as per the requirements of the Act. Once an award is found to be enforceable it may be enforced like a decree of that court. When the decree is passed, execution proceeding is initiated for the purpose of enforcement as per the provisions provided under section 36 to 74 and Order XXI of the CPC. The person in whose favour a decree has been passed or an order capable of execution has been made is known as a "decree-holder" while the person against whom a decree has been passed or an order capable of execution has been made is known as a 'judgment-debtor'. An award holder can initiate the execution proceedings before any court of India, where the assets are located.[161] However, at this stage parties may face

[161] Sundaram Finance Ltd. v Abdul Samad and Anr., (2018) 3 S.C.C. 622 (India).

various challenges such as objections taken by the opposite party, and requirements such as filing original or authenticated copy of the award and the underlying agreement before the court.

RECOGNITION OF ARBITRAL AWARDS

It is to be noted that enforced award is to be recognized also. Here enforcement involves the execution of the award and recognition of the award gives effect to it, either in the State in which it was made or in some other state(s). It is deemed to be the defensive process which the winning party adopts for the fruits of the award. Recognition involves a process in which the court in which the award has been made is required to declare that the award is valid and binding on the parties to agreement. It is considered as *res judicata* i.e. there is no scope for any new proceedings having same subject-matter.

4.4.1 "ENFORCEMENT OF ARBITRAL AWARD UNDER THE NEW YORK CONVENTION"

The legal regime of "enforcement of foreign awards" is regulated as per the "Arbitration and Conciliation Act, 1996". The statute of 1996 provides for the sections ranging from sec.44 to sec.52 which specifically deals with the provisions relating to enforcement of arbitration awards under the NYC. For the purpose of enforcing the awards under the NYC, there are two main pre-requisites i.e.

i. The state must be a signatory to the "New York Convention" of 1958 or "Geneva Convention" of 1927.
ii. The award made must be in another contracting state i.e. a reciprocating territory and must be notified by the central govt.

Requirements for "Enforcement" of Awards

"The most important requirement of the enforcement of award is to be 'foreign award." "Section 47 provides for the essential documents which are required while applying for the enforcement of a foreign award i.e.

the original award or duly authenticated copy thereof, secondly the original arbitration agreement or duly certified copy thereof and thirdly any evidence which is required to established the award is a foreign award." "After 2015, amendments for the purpose of enforcement of foreign award the application will lie only to the High Court and when the court is satisfied that the foreign award should be enforceable under this chapter the award shall be deemed to be the decree of that Court."[162] "2015 Amendment Act" also stressed out on the public policy and even try to restrict the ambit of violation of public policy in case of ICA this includes those awards which are affected by the fraud or corruption or; "if it contravene the fundamental policy of Indian law or; in conflict with the notions of morality of justice. If the court get any application by the parties for setting aside or suspension of the award under the competent authority then the court if considered it as accurate or proper may adjourn the decision of enforcement and on the basis of the application of the party who is claiming enforcement of the award order the other party to give the suitable security."

4.4.2 ENFORCEMENT OF ARBITRAL AWARDS UNDER GENEVA CONVENTION

Now we will discuss about the "enforcement of foreign awards under Geneva Convention". The 1996 Act provides the specific provisions of the same under Sections 53-60 of Part II.

Under Geneva Convention for "enforcement" of an award, "the party shall at the time of application have to strictly produce the prescribed documents before the court. It includes the original award or a duly authenticated copy thereof, and evidence to prove that the award has become final and an evidence to prove that the award has been made in pursuance of a submission to arbitration is valid under the applicable law, also as per the procedure agreed upon by the parties."[163]

[162] Section 49, Arbitration and Conciliation Act, 1996.
[163] Section 56, Arbitration and Conciliation Act, 1996.

CONDITIONS FOR ENFORCEMENT

The legislature under "section 57 of the Arbitration Act, 1996"[164] incorporated the indispensable conditions for "enforcement of foreign awards" provided under the "Geneva Convention". They are as follows-

i. The award must be considered as valid under the purview of law chosen for the arbitration;[165]

ii. The arbitrability of the subject matter must not be beyond the laws relating to arbitration in India.[166]

iii. The award which is delivered to the parties should be made by by the Tribunal in response to the submission of of arguments and reasons made by the parties. Also it must be in conformity to the procedural law chosen by the parties.[167]

iv. The country in which the award has been made must consider the same as final and binding. In other words there must not be any opportunity left for the award debtor for or opposition or appeal. No question which determines the validity of the award passed by the Tribunal must be left an answer by any of the authority in the same country and hence there should be a certainty in the validity of the award.[168]

v. The public policy of the in forcing country II here the India must not be compromised by enforcing the same.[169]

Hence we can say that these are a few conditions, fulfillment of which main clear the road of obtaining the degree of enforceability by the court.

[164] Chapter II of Part II, Arbitration and Conciliation Act, 1996.
[165] Section 57(1)(a), Arbitration and Conciliation Act, 1996.
[166] Section 57(1)(b), Arbitration and Conciliation Act, 1996.
[167] Section 57(1)(c), Arbitration and Conciliation Act, 1996.
[168] Section 57(1)(d), Arbitration and Conciliation Act, 1996.
[169] Section 57(1)(e), Arbitration and Conciliation Act, 1996.

On the contrary if these conditions have not been fulfilled the same will emerge as hurdles on the enforceability of the award and court on the grounds of non-fulfillment of these conditions can refuse to pass the degree of enforceability of the award.

"Stamping" and "Registration" of Arbitral Awards

Now after discussing the essential requisites for the award to make the same enforceable the question next arises on the requirement of "stamping" as well as "registration" of the award to be enforced. As we know that all the norms relating to the stamps and connecting issues has already been dealt with by in the "Indian stamp Act, 1899".

Stamping is done with specific stamp duties and if not so done, it will be inadmissible for any purpose.[170] If at the time of enforcement the issue relating to non-compliance with the "Stamp Act of 1899" is raised or is notified by the court it may be refused by the court of appropriate jurisdiction to make the award enforceable. Also in case of domestic award for the purpose of enforcement there is no cession on stamping i.e. it stood always necessary. On the other hand the "CPC, 1908" deals with the norms for registration.[171]

"In *M. Anasuya Devi* case, it was held that issues relating to this can be bring up by the parties during the enforcement procedure, if the award is subject to such lacuna."[172] Also, the Registration Act, 1908 provides that an award has to be compulsorily registered if it affects immovable property,[173] failing which, it shall be rendered invalid. In case of foreign awards, there is no need of stamping.[174] It was also observed that a foreign award need not be registered and can be enforced as a decree, irrespective of any issue regarding stamp duty.[175] This approach had been

[170] Section 35, Arbitration and Conciliation Act, 1996.
[171] Section 47, Code of Civil Procedure, 1908.
[172] M. Anasuya Devi and Anr. v M. Manik Reddy and Ors., (2003) 8 S.C.C. 565 (India).
[173] Section 17(1)(e), The Registration Act, 1908.
[174] M/S. Shri Ram EPC Limited v Rioglass Solar SA, (2018) S.C.C. Online 147 (India).
[175] Naval Gent Maritime Ltd. v Shivnath Rai Harnarain (I) Ltd., (2009) S.C.C. OnLine Del 2961 (India).

adopted further in many like cases viz. *Vitol S.A v. Bhatia International Limited,*[176] etc.

4.5 APPROPRIATE FORUM

Coming to the 'Appropriate Forum' required for the enforcement of foreign arbitral awards. This is important to understand that the forum should be approached efficiently by the parties in order to execute their awards. Here the 'Appropriate Forum' means the 'court' which is defined under Section 47 of the 1996 Act wherein the Part II of the Act deals with the enforcement of certain foreign awards in the following words, *"Court" means the High Court having original jurisdiction to decide the questions forming the subject-matter of the arbitral award if the same had been the subject-matter of a suit on its original civil jurisdiction and in other cases, in the High Court having jurisdiction to hear appeals from decrees of courts subordinate to such High Court.*

But this court could be 'Supreme Court' in case of appeal.[177] This section explains the term 'court' as a court which is having jurisdiction over the subject matter of the award which means the court within whose jurisdiction the assets or the person is located against whom the enforcement of the foreign arbitral award is sought.

In case the subject matter of the award is 'money' then the application for the purpose of enforcement can be filed in the court within whose jurisdiction the bank account of the opposite party is located. However if in case the applicant does not get the money in the account specified by the other party then he can file another application for enforcement of the award in that Court within whose jurisdiction respondents assets are located. Therefore a party has the liberty to file the application or can initiate the proceedings in any court in India as long as the assets or the money is located within the jurisdiction of the court in which he intends to file the application for the purpose of enforcing a foreign award. In

[176] (2014) S.C.C. OnLine Bom 1058 (India).
[177] Section 50(2), Arbitration and Conciliation Act, 1996.

case of *Sundaram Finance Ltd. v. Abdul Samad and Anr.*,[178] the Supreme Court have clarified that the party(being an award holder) can initiate the execution proceedings in any court of India where there are assets of other party.

As per the general rules, the provision for enforcement of awards is different in case of domestic award and foreign award therefore the term 'subject matter' provided under Section 2(e) and that of provided under Section 47 is totally different on the basis of subject matter therefore to enforce and execute a foreign arbitral award the party has to initiate the legal proceeding as per Section 47 of the 1996 Act. The Supreme Court of India in *Brace Transport Corporation* case has also approved the same and while delivering the judgment quoted some lines from the book which states that-[179]

"A party seeking to enforce an award in an international commercial arbitration may have a choice of country in which to do so; as it is sometimes expressed, the party may be able to go forum shopping. This depends upon the location of the assets of the losing party. Since the purpose of enforcement proceedings is to try to ensure compliance with an award by the legal attachment or seizure of the defaulting party's assets. Legal proceedings of some kind are necessary to obtain title to the assets seized or their proceeds of sale. These legal proceedings must be taken in the State or States in which the property or other assets of the losing party are located."[180]

This might be because an international arbitration fix the neutral seat of arbitration i.e. neither of the parties have any assets of them is there and therefore such enforcement procedure in the neutral forum would be of no consequence and the enforcement of such award must be in that country where the properties of the judgment debtor are located. The court thus held that the foreign award must be recognized and enforceable at such place where the enforcement was sought and must not be chosen by the parties but it must

[178] (2018) 3 S.C.C. 622 (India).

[179] REDFERN AND HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 337-338 (1986).

[180] *Enforcement of Foreign Awards in India*, HG.ORG, (Aug. 10, 2020, 07:05 PM), https://www.hg.org/legal-articles/enforcement-of-foreign-awards-in-india-32348#:~:text=Thus%2C%20 no%20'challenge'%20proceedings,on%20merit s%20 in%20Indian%20 courts.

depend on circumstances of particular case. However, The Commercial Courts Act, 2015 have the jurisdiction to deal with such matters. “To understand explicitly that what would be the appropriate forum where the subject matter is money or some specified value,” it can be categorized in three different situations viz.

i. **Awards under ICA made by the arbitration held within India**

According to relevant provisions under the “Commercial Courts Act of 2015” along with the Arbitration Act of India which latest amendments, the High Court will have the jurisdiction in the matter “within whose territorial jurisdiction the subject matter of the award debtor is situated.” In other words the High Court of the state where the award debtor lives or carries on his business would be having the jurisdiction.

ii. **In case of award passed in Domestic Arbitration**

Subject to “Commercial Court Act of 2015” and the “Amendment Act of Arbitration”, here again for “the enforcement of the award both the courts i.e. District Court and the High Court who exercises their jurisdiction at the place where the subject matter all the assets of the award debtor is situated has the jurisdiction for this purpose.”

iii. **Foreign Awards**

In this case, if the award Debtor belongs to India the party willing to enforce the award should make an application to the high court Under whose jurisdiction the subject matter of the award for Assets of the award debtor lies. The High Court having appropriate jurisdiction shall entertain the application for the enforcement of

the award in the same manner it entertains the civil suit of its jurisdiction."[181]

Note- in the above three situations the "High Court" meant the "Commercial Division of the High Court".

4.6 PERIOD OF LIMITATION FOR ENFORCEMENT

Arbitral awards are deemed to as decree for the purpose of the enforcement. Twelve years is the limitation period for enforcement of the domestic award. In case of foreign awards to be enforceable, it is needed to be a decree of that court. But prior to that certain conditions have to be fulfilled and the Court must be satisfied that such can be enforced. Its limitation period for enforcement would be limitation period of execution of decrees i.e. 12 years.[182] The same has been clarified in a case of *Compania Naviera 'Sodnoc' v. Bharat Refineries Ltd.*[183] and of *Imax Corporation v. E-City Entertainment (I) Pvt. Ltd. and Ors.*[184]

4.7 EFFECTIVE MODES FOR ENFORCING ARBITRAL AWARDS IN CURRENT REGIME

For the purpose of execution of the arbitral awards there are some modes which is common to the mode of execution of a decree as the arbitral awards both domestic and foreign are executed same as in the form of decree in an Indian Court. "The different modes for the same are as follows-

i. by delivery of any property specifically decreed;
ii. by attachment and sale or by sale without attachment of any property;
iii. by arrest and detention in prison;
iv. by appointing a receiver;
v. by any other manner as the nature of the relief granted may require."

[181] Jayanth Balakrishna, *Enforcement of Foreign Arbitral Awards: Issues and Challenge*, NJA (2018).
[182] Schedule (item no. 136), Limitation Act, 1963.
[183] A.I.R. 2007 Mad 251 (India).
[184] (2017) 5 S.C.C. 331 (India).

4.8 "GROUNDS FOR REFUSAL OF RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS"

In the sense of enforcement of arbitral awards it is not exactly alike the judgments or order of the court because there is a special procedure of enforcing the awards rather than suddenly entitling the party for the same. In conformity with the rules of the Indian arbitration regime, the awards are primarily required to be recognized as the decree or judgment of the court and only then the successful party can levy execution against the assets of the other party. Execution can be performed in many ways such as, seizure or sale of goods, sequestration of assets, receiverships, charging orders, etc.

There are some grounds, relying on which the awards may be refused to get enforced only when the party requests to do so. Section 48 of the Act provides for the different grounds which ensure the refusal of arbitral awards under NYC on certain conditions. "They are as follows-

i. Parties to the agreement were under some incapacity under any law applicable to them;
ii. Invalidity of arbitration agreement, under the applicable law to which the parties have subjected themselves to;
iii. When there is lack of indication or where the party fails to show any indication of the law applicable to the agreement, the agreement was not valid under the law of the country where the award was made;
iv. When the party against whom the award is enforced, had no notice of the appointment of the arbitrator or arbitral proceedings, or was otherwise unable to present its case;
v. The award deals with differences not contemplated by or falling within the terms of submission, or contains decisions on matters beyond the scope of arbitration;
vi. The composition of the arbitral tribunal or the arbitral procedure followed was not in accordance with the agreement obtaining between the parties;

vii. If there is no agreement in regards to the above, the composition or the procedure followed was not in accordance with the law of the country, in which the arbitration took place;

viii. The award has not yet become binding or was set aside or suspended in the country or under the law in which the award was made;

ix. The subject matter of dispute is incapable of settlement by arbitration under the arbitration laws of India;

x. When the award is contrary to the public policy of India, and one such ground which would attract public policy is an award which is induced or affected by fraud or corruption."[185]

The awards under Geneva Convention may also be refused on some grounds if not appropriately performed, "these are as follows-

i. Award made under arbitration must be valid under the law applicable to it.

ii. Subject- matter of award must be capable of settlement by Indian arbitration laws.

iii. Award made by the Arbitral tribunal must be in a manner agreed upon by the parties and must conform to the law that governs the arbitration procedure.

iv. Award to be final in the country in which it was made means it must not be open to opposition or appeal or any pending proceeding to prove the validity of the award must not be there.

v. Enforcement of the award must not be contrary to the public policy or Indian laws. It can be considered as contrary if it is affected by fraud or corruption or if it violates section 75 or section 81; or if it contravenes the fundamental policy of Indian Law; or if it conflicts the basic notions of morality or justice.

vi. If the award has been annulled in that country where it has been awarded.

[185] Section 48, Arbitration and Conciliation Act, 1996.

vii. The other party had no notice of the award against whom the arbitral proceedings and the award have been delivered. He didn't have enough time to present his case or under any legal capacity he was not properly represented.

viii. If award does not deal with the disputed matter between the parties or does not come under the purview of terms of the submission to arbitration or if the award contains the decision on the disputed matter which is extremely beyond the scope of the submission to arbitration."[186]

These grounds under Geneva Convention having close resemblance to the grounds mentioned above under NYC. These grounds are also to the greater extent identical to the Article V of the "NYC of 1958". It can be said that this provision provides remedy to the losing party if he has such justified reasons to revoke the enforcement of award. Though there is no specific provision in the 1996 Act to resist the award but on filing an application by the other party with a purpose of "enforcement of an award" it can be done under the legal regime.

After appropriate hearings, the final say is in the hands of the court to decide it as enforceable or un-enforceable. The award must be executed as provided by the court because there is no scope for any changes or addition or review in it on the basis of merits of the dispute. Subject to the grounds of refusal, the arbitral award is binding as a "decree" on being enforceable under the appropriate court.

4.9 PUBLIC POLICY: A CONUNDRUM?

In India, "Public Policy" is a key element for the enforcement of arbitral awards . The courts are empowered to refuse the enforcement of the award on condition that the same is not compatible with that of the public policy of India. Article V(2)(b) of the NYC specifies public policy as a ground for the recognition and enforcement of arbitration award.[187]

[186] Section 57, Arbitration and Conciliation Act, 1996.

[187] Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

The expression "public policy" is not restricted to international public policy, it comes under the purview of that country where the award has been enforced. Prof Berg in a commentary on "International Arbitration" mentioned that-

"…In fact, the grounds for refusal of enforcement are restricted to causes which may be considered as serious defects in the arbitration and award: the invalidity of the arbitration agreement, the violation of due process, the award extra or ultra petita, the irregularity in the composition of the arbitral tribunal or the arbitral procedure, the nonbinding force of the award, the setting aside of the award in the country of origin, and the violation of public policy."[188]

This commentary also shows us that, this is the important aspect or unique or crucial characteristic in the domain of enforcement and execution of awards as it is the gateway through which the courts can interfere or in other words there may be a judicial intervention in the enforcement proceedings. It is often called as a vague concept as it is difficult to define it in exhaustive words.

'Justice Burrough' tried to explain public policy while giving a judgment in a case by stating that, *"Public Policy is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from sound law. It is never argued at all, but only when other points fail."*[189]

"Section 34(2)(b)(ii)" and "Section 48(2)(b)" of the "Arbitration and Conciliation Act, 1996" provides for the provisions relating to 'public policy' which gives the power to the courts to set aside the arbitral awards if it conflicts the public policy of India. It was said that both these sections have difference in their scope i.e. section 34 has wider scope than what is provided under section 48.[190] Supreme Court for the very first time interpreted section 48 in the sense that the award is not enforceable, "which is in contravention to the fundamental

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a. The subject matter of the difference is not capable of settlement by arbitration under the law of that country or;

b. The recognition or enforcement of the award would be contrary to the public policy of that country.

[188] The New York Convention, 1958.

[189] Richardson v. Mellish, (1824) 2 Bing 229.

[190] Shri Lal Mahal v. Progetto Gano SPA, (2014) 2 S.C.C. 433 (India).

policy of Indian law or; the interests of India or; Justice or morality."[191] But later on, the need to upgrade the scope was observed because it was a matter of public interest and public benefits.

In case of "*Oil & Natural Gas Corporation Ltd v. Saw Pipes Ltd.*,[192] Supreme Court applied the idea of patent illegality". This principle generally seek for determining the nature of the act that is it against the "public policy" of the state and the court has to dig upto the roots of the matter and the act should not be "so unfair and unreasonable that it shock the conscience of the court". Though this principle was criticized badly, as it aims to find errors in law for which court is under an obligation to go into the merits of the case which is never a ground to challenge an award under the Indian Arbitration laws .

This judgment was not proved beneficial as Court did not exclude its applicability in the foreign award i.e. the said principle will apply to all arbitral awards[193] and majorly after the *Bhatia* case. "By the virtue of *Bhatia* judgment, Part I of the Arbitration and Conciliation Act of 1996 has legally authorized the application for all the arbitral awards unless expressly denied in whole or in part."[194] This judgment was upheld in case of *Venture Global Engineering v. Satyam Computer Services*[195]. Thus, it can be concluded from above judgments that, Part I of the 1996 Act is applicable to the awards under ICA and therefore challenge or "enforcement" of such awards can be done under "Part I of the Arbitration Act of 1996".

Such decisions created problems in international trade regime especially in enforcement procedure because of the ambiguous and complex concepts of public law. The increase in the scope of public law have on one hand created to larger field area to avoid miscarriage of justice and of law but on other hand it

[191]Nitish Desai, Enforcement of Arbitral Awards and Decrees in India, (Jan. 17, 2020), http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Enforcement_of_Arbitral_Awards.pdf.
[192] (2003) 5 S.C.C. 705 (India).
[193] Domestic Awards and Foreign Awards
[194] (2002) 4 S.C.C. 105 (India).
[195] (2017) S.C.C. Online S.C. 1272 (India).

created problem for international trade while enforcing arbitral awards. The excess intervention of court even follows up to lengthy procedures which are against the speedy trial concept of arbitration.

CHAPTER 5

ANALYSIS OF REGULATORY FRAMEWORK OF INTERNATIONAL COMMERCIAL ARBITRATION IN INDIA

Now-a-days Arbitration is the most popular mechanism to resolve the commercial matters. But the party gets actual relief only when the award is enforced and not only on wrapping of dispute. In ICA, there are plenty of issues relating to "enforcement" of awards in India because of the foreign character of the awards. Award from the international tribunal does not prove to be beneficial as it depends upon its recognition and enforceability in India under proper Court with proper jurisdiction. There are many issues regarding this. "Some of the problems arise when one of the parties decides not to participate in the arbitral proceedings to the other situations where the party has challenged the award on the ground of cost awarded or the jurisdiction of the arbitral tribunal."[196] The role of litigation in enforcing the foreign awards discourages the purpose of settlement of disputes. The grundnorm i.e. Constitution of India advocates the redressal of matters relating to arbitration, but still it is a matter of great challenge in India which requires a keen observation. The researcher is trying to make a list of issues and challenges that parties face in the process of enforcement; this will even help to dig out the solutions of the same and at the same time to analyze that the existing regulatory framework is sufficient or not.

5.1 EMERGING ISSUES AND CHALLENGES

i. **Whether the two Indian parties for resolving their disputes can choose a seat of Arbitration out of India (foreign seat)?**

There are so many issues which were resolved by the Indian Arbitration Act for which we can refer cases like *Bhatia* case, *Venture Global* case, *BALCO* case, *Renusagar* case etc. All these examples manifests that the issues dealt efficiently to address the lacunas in statute. Nevertheless there are still some issues which are left undealt, one of such issues is that weather the two Indian

[196]Varun Sharma, *Challenges of Executing Foreign Arbitration Awards in India*, (Aug. 11, 2018, 09:40 AM), https://blog.ipleaders.in/arbitrationaward/#:~:text=Problems%20of%20executing%20Foreign%20Arbitral%20Awards%20in%20India&text=The%20problem%20occurs%20when%20one,a%20competent%20court%20in%20India.

parties have the liberty to choose the seat of arbitration situated outside India for purpose of resolving their disputes. This issue is not expressly clarified by the Indian Arbitration Act, although it is provided under the act that when the two parties involving an Indian and foreign party wants to resolve their disputes they can refer the foreign loss to be governed under them and also can choose a foreign seat of arbitration subject to the pre-decided arbitration agreement between them. But the present condition on considering a foreign seat of arbitration by the Indian parties is not expressly stated under the Arbitration Act.

"In *Aadhar Mercantile* case, the Bombay High Court after hearing lots of arguments in behalf of the respective parties came to the conclusion for this issue. The court declared that the 'seat' for arbitration procedure where the two parties are Indian

two Indian parties cannot choose a foreign seat for arbitration by stating that the parties cannot derogate the Indian laws as it would be against the public policy and arbitration has to be conducted in India in case of two Indian parties."[197] The court also relied on a case of *TDM Infrastructure v. UE development*[198] to arrive at this conclusion where it was held that the Indian nationals should not be permitted to derogate the Indian law and if Indian parties choose the foreign law for their contract this would be against the public policy of India.

Whereas in *BALCO* case it was clearly explained that "sec.28 of the 1996 Act" is restricted to substantive law and it has nothing to do with choosing the law and the seat for arbitration. This shows that parties who belong to India can freely choose or opt foreign governing law & a foreign seat in an arbitration contract but with only limitation that in the arbitration agreement the substantial law has to be 'Indian Law' as per the provisions of sec. 28 of the 1996 Act.

[197] Aadhar Mercantile Private Limited v. Shree Jagdamba Agrico Exports Pvt. Ltd., (2015) S.C.C. OnLine Bom 7752 (India).
[198] (2008) 14 S.C.C. 271 (India).

Later on in 2015, "Madhya Pradesh Court reached an opposite judgment holding that Indian parties are free to choose a foreign seat for arbitration."[199] Moreover, "In *Reliance Industries Limited v. Union of India* case, Supreme Court dismissed the challenge arising from selecting foreign seat among two Indian parties." Here we can see that Supreme Court absolutely recognized the 'party's autonomy' to select a foreign seat for the purpose of arbitral proceedings. This simply shows the parties autonomy principle. Recently, "the Delhi HC held that there is no prohibition in two Indian parties opting for a foreign seat of arbitration, for which the court relied on the *Sasan Power* case."[200] Thus it can be said that, the court tried to resolve the issue by giving judgment in number of cases but still there is no clear provision or concept for the same. One can only rely on the series of cases to know the current position of this issue. The Indian courts showed the 'pro-arbitration' approach of arbitration which attracts the parties to opt for dispute redressal.

ii. **Whether the court can arbitrate a matter of dispute arising out of oppression and mismanagement?**

Oppression is when power is used in a wrongful manner against another party without his consent. According to Black Law Dictionary, "the term 'oppression' is an 'act or an instance of unjustly exercising power."[201] "In the case of *Dale and Carrington Investment Pvt. Ltd. v. P. K. Prathapan*, it was held that increasing the capital of a company with the sole purpose of gaining control over can be termed as oppression."[202] Section 241 of the Companies Act, 2013 deals with oppression. Now-a-days in field of commercial

[199] Sasan Power Limited v North American Coal Corporation India Pvt. Ltd., (2016) 10 S.C.C. 813 (India) .
[200] GMR Energy Limited v Doosan Power Systems India Private Limited & Ors., (2017) S.C.C. OnLine Del 11625 (India).
[201] Naina Agarwal, *Oppression And Mismanagement- Is Law Enough?* (Aug. 13, 2020, 12:45 PM), https://www.law nomy.com/post/oppression-and-mismanagement-is-law-enough.
[202] Sonal Srivastava, *Prevention Of Oppression And Mismanagement Of A Company*, (Mar. 21, 2016, 02:05 PM), https://blog.ipleaders.in/prevention-of-oppression-andmismanagement/#:~:text=%20Prevention%20of%20Oppression%20and%20Mismanagement%20Under%20the,Company%20is%20based%20on%20the%20majority%20More%20.

arbitration there are number of matters relating to oppression and management. But since there is no specific provision for the same under the arbitration laws, the court gave the judgment relying on particular case and held that such issues cannot be arbitrated and can only be resolved by the judicial authorities of proper jurisdiction. However, the same can be referred to arbitration, if the judicial authorities finds that the petition is not credible or is an attempt of the party to avoid obligations as per their arbitration clause. This may impact aura of provision of section 8 of the 1996 Act.

iii. **What are the challenges in enforcement of the arbitral award ICA in India?**

Now-a-days there are various problems that may arise while executing the arbitral awards under ICA in India. As we already know that getting an arbitral award from an international tribunal does not always prove to be good or beneficial until unless the same is executed accurately. Most of the problems arise at the stage of enforcement because it requires the proper co-ordination of Indian laws. This stage of enforcement is of utmost importance because the foreign arbitral awards does not automatically enforced and hence they are required to be enforced properly to overcome the dispute, only then the purpose of the act will be served. The provisions of section 48 make the foreign award face many challenges which includes various grounds that forbids the party from enforcing such award. Grounds include the incapacity of a party or; when either party has not given proper notice in proper time or; when the arbitral award does not come under the arbitrability or; when legality of composition is not appropriate or inaccurate procedure of the arbitral tribunal then the award is liable to be quashed or; when award is set aside by the authorities of the country in whose jurisdiction it was awarded before its enforcement or; if the nature of the dispute is such that it is unable to be resolved under Indian Arbitration laws or; when the arbitral award issued violates or contradicts the public policy of India, etc.

Also sometimes the local governments have a pressure on judiciary which has resulted as a challenge in front of the enforcement procedure. A local party to an administration sometimes suffers more of the political pressure in comparison to the foreign party. Such external pressure and power of such entities try to set aside or annul the fruits of the award or sometimes it may result in decrease of the quantum of the award which may lead to the frustration of the award issued by the foreign arbitral tribunal. When international seat of arbitration is decided by the parties to resolve their disputes it can be said that there is a lack of an authority to supervise the substantive as well as the procedural functions of arbitral laws relating to enforcement of these awards. The reason that defers the enforcement of award is the 'inconsistency' in the application of laws. The foreign arbitral awards is enforceable in those jurisdictions where there are assets of the opposite party situated but there is a possibility that the courts that belong to different jurisdiction will interpret the arbitral award in different manner which may not prove to be good. Also there is a restriction in enforceability of award in case when the award issued by the arbitration seated in India to be enforceable in the jurisdiction of some other country.

Moreover, Multi Party Arbitrations also has a bad impact in field of arbitration. International Commercial Contracts are having a unique feature of arbitration clause. It gives the parties liberty to choose the law governing the contract, seat of arbitration, arbitration agreement and gives freedom to set the procedure of their own choice which is beneficial to resolve the dispute at hand.[203] These multiparty contracts arise between two or more parties that create a difficult situation. The more complex contracts, the more will be arbitration dispute because of its complex nature. The basic arbitration things (like two parties; claimant & respondent) have been changed allot with the passage of time and presently we are facing the new paradigm of arbitration when international transactions have more complexities.

[203] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 8-9 (2nd ed., 2001).

iv. **Whether Multi Party Arbitrations are sign of development or is a troublesome mechanism?**

International Commercial Contracts are having a unique feature of arbitration clause. It gives the parties liberty to choose the law governing the contract, seat of arbitration, arbitration agreement and gives freedom to set the procedure of their own choice which is beneficial to resolve the dispute at hand. These multiparty contracts arise between two or more parties that create a difficult situation. The more complex contracts, the more will be arbitration dispute because of its complex nature. The basic arbitration things (like two parties; claimant & respondent) have changed alot with the passage of time and presently we are facing the new paradigm of arbitration when international transactions have more complexities. Arbitration is based on contract and only the common will of the contracting parties can entitle a person to start a proceeding before the tribunal against the opposite party and oblige that person for the appearance.

The Supreme Court however took a clarifying step in a case where it held that if A has a claim against both B and C and there is an arbitration agreement only between A and B, then in such a situation A cannot raise a claim against B in an arbitration against B. However, if A has a claim both against B and C and A has entered into separate arbitration agreements with both B and C, then in such a situation there is no legal impediment which prevents A to have a joint arbitration both against B and C. If the prayer of joint arbitration is denied, then it will lead to an unwelcoming situation where there would be multiplicity of proceedings and conflicting decisions thereby leading to injustice.[204]

In case of International commercial arbitrations, non- signatories can become party to arbitrations on basis of section 45.[205] Section 45 provides that "if an arbitration agreement has been entered into between parties as required under Section 44 and one of the parties approaches the national Court for

[204] P.R. Shah Shares and Stock Brokers v B.H.H. Securities, (2012) 1 S.C.C. 594 (India).
[205] Chloro Controls Pvt. Ltd. v Severn Trent Water Purification Inc. & Ors., (2013) 1 S.C.C. 641 (India).

adjudication of dispute, in respect of which an agreement to arbitrate has been entered into, on an application being filed by the other party or any person claiming through or under him the judicial authority shall refer the dispute for arbitration." On comparing Section 45 with Section 8 the court found that the Legislature chose the expression 'any person' in the former case of ICA but not in the latter one of domestic arbitration and therefore held that Section 45 have wide scope and include within its ambit persons other than the parties who claim through or under the party to the arbitration agreement.

5.2 AMENDMENTS: BOON OR BANE?

Over the last few years, a lot of hustle was there in the Indian Arbitration laws which led to major amendments in the year of 2015 and 2019 to overcome the lacunas in basic law of Indian arbitration i.e. Arbitration and Conciliation Act, 1996 and also the matters or issues which were creating problems in proceedings of arbitration and the recognition and enforcement of arbitral awards (especially awards under ICA) in India. The steps which are taken in 2019 Amendment Act made India more arbitration friendly by strengthening and making arbitration process user-friendly and also cost effective. Majorly it worked to reduce the court involvement in arbitration procedures as prior to these amendments the courts used to nominate the arbitrators for the purpose of adjudication of dispute between the parties. After the amendment arbitrators will be appointed by the arbitral institutions. It can be said that the government took such step to make the Indian arbitration laws in conformity to as many international jurisdictions. This has many benefits like the foreign investors will be attracted towards such jurisdictions which in result make the India more robust market for the foreign investors and also the preferred seat for arbitration could be India. Another step was taken to set up Arbitration Council of India with the purpose of improving and setting up a sound standard for arbitration regime of India. Prior to the amendment of 2019, there was an overlap between the arbitral tribunal and court because a party had right to approach both of these forum for having interim relief. But the act waved off this issue by providing that, the party can approach the court who seeks interim reliefs post the arbitral award and when there is awaited

enforcement. Though the government tried to cover the running problems but still there are some of the issues in the amendment act of 2019. These emerging issues are because of the amendment act, 2015 has its prospective applicability (i.e. after October 23, 2015)[206] and not the retrospective. Also there was bulk of the cases where the question aroused before the court was that whether two Indian parties can choose a seat of arbitration outside India (foreign seat) and can matters relating to oppression and mismanagement is possible for arbitration for a dispute redressal. Some of the issues are as follows-

i. **Applicability of the Amendment Act-** It was provided that the act of 2015 will apply to only those arbitral proceedings that were initiated after the prescribed date i.e. October 23, 2015. According to section 87 this includes all those court proceedings that arise out of such proceeding. This new added provision overruled the existing regime that used to apply in relating matters. This overruled the judgment of Supreme court, which held that "both pending petitions to set aside an award filed before 23 Oct. 2015 and all those fresh matters to set aside an award, there would be no automatic stay of an arbitral award, unless a separate application is made for the same, for which the court would have the discretion to grant or refuse coupled with deposit of money or security (if any)."[207] Thus this provision changed the prior position and clarified that unless the parties otherwise agreed, the amendment act of 2015 would apply prospectively to all the arbitral and court proceedings running or filed after said date.

ii. **Independence of Arbitration** - By the amendment act of 2019 the Arbitration Council of India (Part IA) came into being, with a purpose to promote and encourage alternative dispute resolution mechanisms (arbitration, mediation, conciliation or other). The act aims to provide the certificates to the arbitral institutions and also to the arbitrators through grades and accreditation by the

[206] Section 87, Arbitration and Conciliation (Amendment) Act, 2019.
[207] Apex Court in BCCI v Kochi Cricket Private Limited., (2018) 6 S.C.C. 287 (India).

Arbitration Council of India.[208] This is largely governmental dominated step which somehow risks the independence of Indian arbitration.

iii. **Confidentiality of Information** - The act failed to provide adequate exceptions to the obligation of confidentiality which may give rise to various issues between the parties. The act provides that *"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."*[209]
There are some circumstances which would require disclosure i.e. "when it is necessary to implement or to enforce an award and would not strictly fall within the scope of the exception proposed in the amendment act. For example, proceedings under section 9, 11, 14, 27, 34 of the act or; where one party wishes to initiate criminal proceeding along with the arbitration or; when a party files for an anti-arbitration injunction before the civil court or; where a party approaches a government regulator on facts which also gives rise to a contractual dispute or; where information is proposed to be shared with the third party experts (such as forensic, accounting, delay or quantum experts); or where information is required to be shared with a third-party funder to obtain funding for a claim."[210] So, in such cases there is a need of high confidentiality which seems lacked in the act.

iv. **Inconsistency in the Statute** – The Act of 2019 added a new schedule i.e. Eighth Schedule to the 1996 act of arbitration, which provides the qualifications and experience of the arbitrators.[211] But if we interpret the provisions of the eighth schedule, it can be said that the "foreign legal professionals cannot act as arbitrators in India because of the inconsistencies and ambiguity in the present statute as it provides for the minimum qualifications for a 'person' to act as an arbitrator." This can even be

[208] Section 43 I, Arbitration and Conciliation (Amendment) Act, 2019.
[209] Section 42A, Arbitration and Conciliation (Amendment) Act, 2019.
[210] *supra* note, at 149.
[211] Section 43J, Arbitration and Conciliation (Amendment) Act, 2019.

interpreted in the sense that 'no foreign legal professional' could act as arbitrators in India as it requires the qualifications to be fulfilled which even include that "the 'person needs to be an advocate within the meaning of the Advocates Act, 1961 having ten years of practice experience as an advocate".[212]

v. **Additional time frame** – On recommendation of Srikrishna Committee Report, an additional 'six month' period time frame is introduced for completion of pleadings.[213] Parties generally take most of the '12 month' time frame to complete the procedure of pleadings which leaves only limited time to complete the whole process. It has been observed that since there is a concept of 'due process' the arbitrators are restrained to take strict actions or decisions regarding that. However, the legislature tried to resolve the issue by providing additional time frame to the parties. But, this may give rise to more jurisdictional or liability relating issues. In case of International arbitrations the Amendment Act of 2019 gives a relaxation to the mandatory time period of one year of passing the award.

For this it is correct to state that *"…Generalized law can never be a panacea to the problem".* Since every case has not same circumstances and mandating a fixed time frame for filing of claim and defense may hamper the flexibility in the arbitral proceedings. Further, it is difficult to ascertain the correct stage of filing a claim and defense so that the same is considered as complete proceeding. And when can parties amend their statements? Also, it is not clear from the amendment that the permission to extend the time limit of six months for completion of pleading is with the courts or the arbitral tribunal.

vi. **Definition of 'Court' for International Commercial Arbitration (ICA)**

The term 'Court' under the 1996 Act, was referred to the 'Principal Civil Court' of original jurisdiction in a district. After the 2015 Amendment Act, the definition of 'Court' has been changed for the purposes ICA, which provides that as of now it means the "High Court in exercise of its original civil

[212] Eighth Schedule, Arbitration and Conciliation (Amendment) Act, 2019.
[213] Section 23, Arbitration and Conciliation (Amendment) Act, 2019.

jurisdiction or which is having the 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."[214] Also for the purpose of filling application for enforcement of foreign arbitral award under section 47 and 56 of the 1996 Act, the 'Court' for ICA would be the High Court in exercise of its original civil jurisdiction. Thus it gave the exclusive jurisdiction to High Court.

5.3 ANALYSIS OF REGULATORY FRAMEWORK

Thus, on analyzing the provisions relating to ICA, we came to know that there are some areas which needs a look as such issues can be the ground of losing the foreign investors which will definitely put a bad impact on Indian commercial markets. Some of the reasons are mentioned here. Firstly in the appointment procedure of arbitrators in case of International Commercial Arbitration there is a huge intervention of the Supreme Court which could be a lacuna in the arbitral procedure. Secondly there is no challenging provision in sake of foreign arbitral awards. Thirdly there is no specific procedure for appeal except before the Supreme Court which is nothing extraordinary for it. Fourthly there are number of grounds for the refusal of award under section 48 which is similar to that of Article V of NYC. However, the concept of 'patent illegality' which came as an outcome of 2015 Amendment Act under section 34(2A), cannot be the ground of refusal for foreign arbitral awards.

The provision of designation and grading of arbitral institutions which was introduced by 2019 Amendment Act under section 11(3A) and introduction of Part 1A to the Act which included Arbitration Council of India (ACI) gives the major drawback in the scheme of arbitration. As we already know that ACI is the governmental body having the power to regulate the institutionalization of arbitration in India and can frame the policy for grading of arbitral Institutions. This is because these provisions gave immense powers to the central government to establish the ACI which even

[214] Section2(1)(e), Arbitration and Conciliation (Amendment) Act, 2015.

comprised of the entities which have some or the other connections with the central government. The result of such step was that it limited the party autonomy in international commercial arbitration through direct intervention of Government and court. Another problem which peeped out of this governmental control on institutionalization mechanism is the lack of objectivity, lack of transparency in the grading process and nepotism if in case it occurs. However as a whole it is a welcome step of the government to acknowledge institutional arbitration as in my view it is the only left way at this moment to attract the foreigner investors to opt "Indian seat of arbitration".

Now coming towards the provisions relating to timely conduct of proceedings. Obviously, this was a good step in one way but if we see it may lead to conflicts with the rules of arbitral institutions because it somehow overlooks the procedural aspects inherent to a complex international arbitration. As we know the international arbitration has been developed much which includes for example multiparty arbitrations if we apply section 23(4) which if restricts a tribunal from being in control of its proceeding then it may not be possible for the parties to complete their pleadings within 6 months. Also the flexibility in deciding the procedural law will be limited. It is also possible that the parties will always be wary of the fate of an award if the time prescribed under the newly added sections is not properly implemented. Last but not the least the provisions relating to qualification of arbitrators may be called as derogatory for the arbitrators from outside India. This is because "2019 Amendment Act" introduced eighth schedule in which there are "different qualifications, experience and norms for accreditation of arbitrators".[215] All the nine categories of person does not include a "foreign scholar" or a "foreign registered lawyer" or a "registered and retired foreign officer" that means they are not qualified to be an arbitrator as per the 2019 Amendment Act or even if yes it is not clarified in the latest legislation. Thus, for foreign parties this could be an obvious reason to avoid seat of arbitration of Indian this is because India has a very limited choice of candidates to be called as potential arbitrators to deal with international arbitration.

[215] Section 43(J), Arbitration and Conciliation Act, 1996.

CHAPTER 6

CONCLUSION AND SUGGESTIONS

"The virtue of justice consists in moderation, as regulated by wisdom"

-Aristotle

Globalization led to strong trade relations between the states which advanced the industrial relations, global markets, trade and commerce mainly due to the incorporation of cross-border transactions. International trade is on the rapid pace of development or promotion among different countries. The increase in cross-border transactions or international trade resulted in hike of global markets as a whole. With the advancement in the commercial trade regime or due to the different mindsets of the parties there is an increase in cross border disputes between the parties. Now-a-days the "arbitration" is the most favored mechanism for settling the commercial disputes . Almost every agreement has the arbitration clause because it provides privatization of justice to the parties in respect of disputes which may arise between them. It has essence of privatization because here the parties can choose the law (procedural and substantial both), arbitrators, seat of arbitration, etc. "By and large, parties to international transactions choose to arbitrate eventual disputes not because arbitration is simpler than litigation, not because it is cheaper, not because arbitrators may have greater relevant expertise than national judges, although any one of those factors maybe of interest, they arbitrate simply because neither will suffer its rights and obligations to be determined by the courts of the other party's state of nationality." From the above discussion of chapters it was observed that the resolution system of commercial disputes in India was facing some of the daunting challenges which included inordinate delays, spiraling cost, an undue interference of the national court, the vague interpretation of the terms used in the statutes which led to different meanings that even resulted in number of cases, the matters of confidentiality and most important the problem relating to enforcement of foreign arbitral awards, etc. This caused a great hindrance in attracting foreign investors and also had put India at a very low international ranking for the ease of doing businesses. This led to a need of major amendments to the regulatory framework of arbitration to deal with the existing

situations. In pursuance of the international trade relation the main focal point was to strengthen substantial laws of arbitration rather than procedural aspects as it is the core dispute resolution system for such commercial disputes or international trade law as a whole. Since enforcement of awards is the most important stage in arbitration it requires great importance than other stages as most of the dispute and the amendments are concerned with the "enforcement" and "recognition of arbitral awards" in India.

"The Arbitration and Conciliation Act, 1996" has been amended many times just to include the running, upcoming and untouched issues and to amend the existing provisions on arbitration, so that it can resolve the differences between the parties who opted arbitration as their dispute redressal mechanism. These amendments are through the legislature and judiciary as and when required. Every steps of Government of India is with the aim to make India a robust centre of "International Commercial Arbitrations" by attracting more of a foreign investors and giving a flexible path to Indian nationals to upgrade the trade relations with them. With every amendment there was an intention to enhance the defected framework with respect to the domestic and international commercial arbitration practices and to attract majorly international arbitration in India. Like everything has its pros and cons, the regulatory framework also has some defects in it. Despite of so many amendments still there are some disparities in the existing laws of arbitration which needs to be curbed in a short span of time. The 2019 Amendment Act is the latest amendment done in the basis act of arbitration which although tried to cover most of the issues but still there are some issues that cannot be resolved properly on implementing the provisions of the existing act. For example, enforcement of arbitral awards under ICA. We can observe from the above chapters that the ICA does not have a smooth path in India and it is still on the stage of problems as it has notable loopholes that affect the smooth functioning of the act. The problem ranges from defects in the Act of 1996 which requires modifications in the existing provisions to changing the mindset of the parties to agreement. Since 1889 there has been many amendments in the Act of Indian arbitration which laid deep changes in the regime that even improve the regulation relating to enforcement of arbitral awards under ICA but some issues raised with time and development of commercial field as it is a developing field and cannot be constant for a long duration. The loopholes in the legislations directly or indirectly affect the

international trade relation of India this is because the foreign investors are doubtful about the recourse or the remedies in case of any future disputes. There is a need to create credence among the parties that the dispute will be resolved on the basis of 'principle of justice' irrespective of variance in enforcement laws of arbitral awards i.e. in domestic awards or awards under ICA. The parties in international trade practices are from different countries having different domestic laws, which showed a need of a uniform law that could be followed by each and every Country to make the procedures easier. Therefore, "Geneva Convention" was passed in 1927 confirming uniformity in laws especially for the enforcement of the foreign award. "New York Convention of 1958" was also emerged as the convention of vital importance as it provided best services for the issues relating to enforcement of foreign awards and the parties do not suffer while having the judicial remedy. India signed the above conventions and adopted its rules. But if we try to analyze the laws as well as the ongoing situations, the current laws are not appropriate for the emerging issues as it does not suit to each and every case. With the development of commercial field there is an increase in the problems stemming from it and not every issue comes under single head.

For instance, among various issues if we take the issue of judicial intervention in arbitration proceedings it has bad impact on the participation of parties in arbitration as the excess judicial intervention results in consequential slow down in the proceedings of arbitration and eventually (sooner or later) nullifies the benefits of arbitration or abrogate the essence of the same. It is to be noted that the efficacy of any legislation must be judged by its implementation rather than its mere intentions for improvement. Unfortunately, the Indian courts through its interpretations have vastly enlarged the scope of challenge of awards to much more than what is available under the 1996 Act. This may be due to the 'burdensome of Judiciary'. We are aware of the fact that the courts are flooded with work since years and therefore is not sufficient to dispose the number of cases, especially commercial cases which are increasing with rapid speed as the cases requires speed and also proper justice with that speed. This is because it is a matter of detailed analysis and which definitely cannot be solved within a day or two. However, it has been observed that the matters of arbitration remained pending for so long by various ambiguities. Among all of them, the lack of "dedicated benches" for matters of

arbitration would be called as major cause for the pendency of large number of cases. So we must focus on such reasons or factors by adopting proper practices to overcome the issues. The instant issue can be resolved by ensuring "separate" and "dedicated benches" for cases relating to arbitration which will have better and quicker results and will also increase the confidence of the parties to choose arbitration. The decisions must be done in minimum possible time as *justice delayed is justice denied* and it is possible with a good set of legislation.

By the virtue of "Arbitration and Conciliation (Amendment) Act, 2019", the arbitration regime stepped up to new domain backed by notable fundamental laws that aimed to solve the drawbacks in the existing act and making it a rigorous one to deal further with upcoming issues. This will definitely promote and stimulate the economic growth of India. We can say that it will facilitate the Indian jurisdiction by making it "arbitration-friendly", by adopting "user friendly" & "cost-effective" arbitration process, and more importantly must be completed within specified time frame and further to strengthen legal provisions on arbitration. To understand the present scenarios of arbitration regime both under domestic and international commercial arbitration we must rely on different amended statutes and recent judgments given by the courts. Through the *BALCO* case court somewhat tried to restore the confidence of the international traders in Indian Judiciary system for enforcing or challenging of awards which was losing with time. This case amended the old arbitration regime by declaring that Part I of the 1996 Act cannot be applicable to those cases where seat of arbitration is outside India. However this was not the end of problems because the new issue of 'Public Policy' was emerged which was seen in two major cases namely *Sawpipes* case and *Venture Global* case. Although the concept of 'Public Policy' was defined in *Renusagar* case but was not fond of traders. It was highly criticized by the traders by arguing that it is unnecessary challenging process in path of enforcement of awards and because of that they are unable to enforce their awards easily in India. Likewise many such issues are there which requires proper attention to avoid future mishappenings. Currently there are so many arbitral organizations in India that specifically work to resolve the disputes of parties under arbitration either domestic or international. They are majorly based in states of New Delhi, Bombay, Calcutta, Calicut, Cochin, Hyderabad, Madras, Kerala, Coimbatore,

Tuticoirin-1, Goa, which shows the pro-arbitration approach of India that must definitely be praised. So, it is not wrong if we say that sound steps has been taken to improve the situations of arbitration but these are not the permanent solutions nor are sufficient. Therefore proper exhaustive acts must be enacted adhering to the objectives of arbitration to deal with the pending issues but at the same time some flexibility must be provided for laws of those issues which may not be resolved under general rules. Thus there is a necessity to check on the laws otherwise such laws would become the dead law.

Finally on a concluding note it is to be noted that it's a high time to reform the regulatory framework of Indian arbitration with respect to the international arbitral practices so as to remove the difficulties in the Act. This will definitely provide a smooth functioning of the current legislation on arbitration. This could be done by amending the legislation or introducing the new legislation with respect to both domestic and international commercial arbitration so that no provision will affect the enforcement of awards to the parties. While doing so the legislature must focus on maintaining the coordination among the two important pillars i.e. the "domestic" and "international laws of arbitration" and also the terminologies used under such laws so that there will be no contradictions in view of the terms used under the act. This is important because such non-coordination of provisions results in confusion and also undermines the notion of arbitration. The provisions of ICA will be proved as beneficial if they are in coordination with the domestic laws of India and if not, then the parties will suffer instead of having justice. Therefore, there must be a separate legislation for international commercial arbitration where the concept of 'international', the term 'commercial', etc. must be interpreted in a broad manner so as to avoid conflicts in views, to maintain the pro-arbitration approach and to make India a robust place of arbitration. This will definitely reduce the complexities in understanding the act and also provide a clear path for enforcing of arbitration awards under ICA which is a great challenge now-a-days. Also the only 'formulation' of laws are not sufficient there must be equal' implementation' of the same so that the parties do not suffer difficulties during arbitration proceeding and especially in the last stage of enforcement and that would be considered a proper justice. Also there is a need of proper checkup on the existing laws with respect to the issues because *"An unjust law, is no law at all"* this was said by Martin Luther King.

MAJOR FINDINGS & SUGGESTIONS

Check and Balance - As we analyzed in the instant work that there is Court's intervention in some of the provisions of arbitration which is considered to be a drawback in ICA but there must be some interference of Court to see whether the arbitration proceedings are working well or not i.e. as per the objectives of arbitration and majorly to have a check on delivery of justice to the parties. Since arbitration is a mechanism conducted outside the court it can be called as a separate body which has its own laws but if there will be no external check there could be the misuse of such separate procedure which will definitely affect the parties who opted arbitration for dispute redressal. Thus it is suggested to have a minimum intervention of court (by maintaining basic notion of arbitration) so that there would be no interruptions in justice delivery systems under arbitration and on other hand the court will have no excess burden of work from that of arbitration proceedings.

Timely Amendments – In this era of globalization there is an increase in interstate trade practices which has also increased the interstate commercial disputes. There are various national and international norms and mechanism to resolve the disputes through arbitration in a speedy manner but there are several new developments taking place around the globe. So, the constant law cannot fulfill the requirement when and where required. To cope with such situations the timely updation of both national and international norms and mechanisms is a necessity. We are aware of the fact that the major amendments were done in the year 1899, 1940 then in 1996, then in 2015 and latest by year 2019. This shows long gaps in arbitration acts which must be taken care of. There must be proper evaluation of issues and the laws for the respective issues and if there is no specific provision for it or the provision is having some lacuna in it then it must be removed with proper legislation or otherwise.

Proper Interpretations of terms – From the above discussion we came to know that there were cases on basis of proper interpretation of terms in the statute for example, 'seat' or 'venue' or 'place'. And also the definition of arbitrators which does not clarifies that it includes arbitrators from outside India or not. This shows that the terms should be properly interpreted so as to avoid unnecessary cases relating to it and at the same time

such the interpretations must have same meaning internationally so that in case of ICA there will be no chances of interpretations otherwise. Secondly there should be an updation in definition clause of the act according to the internationally accepted interpretations and that must also be in conformity to the law of nation.

Define parameters of Arbitrability- The Act does not define the parameters of arbitrability. This may include number of issues or may not include some issues. One has to rely on the number of cases in chronology to determine as to which issues that comes under the purview of arbitrability. So, there is a need to clarify the issues that may or may not be arbitrable to avoid the miseries and series of cases enquiring the applicability of issues under arbitration regime.

Maintenance of Objectivity – The foremost step of legislators is to draft such laws that suits to basic objects of the arbitration to meet the need of the issues. But if any such provisions are added or removed or altered which hinders the basic notion of arbitration then such law would become vague and null also. For example intervention of court for enforcement and appointment of arbitrators are not compatible with the basic principles of arbitration i.e. flexibility, less formal, less time taking, etc. Thus, the objectivity of arbitration regime must be maintained.

Separate Statute for ICA in India- The laws must be prescribed in such a way that it can be understood by everyone or it must have atleast that ease, which one can read systematically. If we thoroughly go through the arbitration acts one suffers difficulty in determining as to which provision is dealing with “domestic arbitration” and which provision with ICA. Therefore it is suggested that there must be two different statute books by describing it as “Part I” and “Part II” of arbitration and which will purely deal with “Domestic” and “International Commercial Arbitration” as signed on the basis of Model Law.

Now on this point a very important question can be raised i.e. weather having two sets of arbitration laws is advantages or not? Or in other words, whether by doing such kind of amendments in Indian laws of arbitration will provide some advantage to the parties and to the Global market as a whole? Although all these amendments if done under the light

of experiences gained could be a welcome step but cannot warrant it to be a panacea to the problem. Lastly, on wrapping the research work it is worth mentioning a saying of Mahatma Gandhi which is mentioned in the work of R.S Lodha namely "International Arbitration and National Courts: The Never-Ending Story" where it is mentioned that, *"Differences we shall always have but we must settle them all, whether religious or other, by arbitration".* Perhaps needs to be looked at this to resolve the issues and challenges in enforcement of arbitral awards under ICA in India with a view of upgradation in regime of trade and commerce of India.

BIBLIOGRAPHY

A. BOOKS

Paranjape N. V., Law Relating To Arbitration & Conciliation in India, Central Law Agency, 1st ed., 2016.

Kapoor J. L., An Easy Approach To The Arbitration And Conciliation Act, 1996, 1st ed., 2017.

Jain M. P., Indian Constitutional Law, Wadhwa and Company- Nagpur, 5th ed., 2003.

Redfern Alan & Hunter Martin, Law and Practice of International Commercial Arbitration (1986).

Born Gary B, International Commercial Arbitration: Commentary And Materials, 2nd ed., 2001.

Sweet & Maxwell, Law & Practice of International Commercial Arbitration, ed. 4, (2004).

Markanda P. C., Law relating to Arbitration and Conciliation (LexisNexis Butterworths Wadhwa, Nagpur, 7th ed., 2009.

UNCITRAL Model Law on International Commercial Arbitration, 1994.

B. JOURNALS

Balakrishna Jayanth, Enforcement of Foreign Arbitral Awards: Issues and Challenge, NJA.

Goel Shivam, International Commercial Arbitration - India, SSRN Electronic Journal, (Jan. 2015).

Olszewski Wojciech, Welfare Analysis of Arbitration, American Economic Journal: Microeconomics, 3 (February 2011).

C. ARTICLES

Ristovska Katerina & Ristovska Aneta, The Impact of Globalization on the Business, Economic Analysis, (Oct. 24, 2014).

Bergsten Eric E., International Commercial Arbitration, United Nations, (Feb. 2020).

Alarcón Ronald Brian Martin, Comparative International Commercial Arbitration, (May 04, 2014).

Desai Nitish, International Commercial Arbitration, (Feb. 02, 2020).

Mene Himanshu, Promoting Institutional ADR to make India a hub of Arbitration (Feb. 27, 2018).

Ramirez Michael and Hoskins Martha, Thailand: The Arbitration Clause: An Investment in the Future, (July 27, 2011).

Sabarwal Dipen & Singh Aditya, Arbitration in India, (Mar. 07, 2019).

Mehra Dikshat, Kapoor Vibhor, Evolution of Arbitration Regime Through 2019 – A Recap, (Mar. 09, 2020).

Charalwar Vaibhav S., Concept of Seat and Venue under the Arbitration and Conciliation Act, 1996, (Jun. 04, 2018).

Dev Rahul, International Commercial Arbitration in India, (Mar. 26, 2020).

Sharma Varun, Challenges of Executing Foreign Arbitration Awards in India, (Aug. 11, 2018).

Chugh Ashish, The Bharat Aluminium Case: The Indian Supreme Court Ushers In a New Era, (Sept. 26, 2012).

Naina Agarwal, Oppression And Mismanagement- Is Law Enough?

Srivastava Sonal, Prevention of Oppression and Mismanagement of a Company, (Mar. 21, 2016).

Jain Sankalp, Enforcement of Foreign Arbitral Awards: International Conventions and Legal Regime in India.

D. REPORTS AND RESOLUTIONS

Report of Indian Council of Arbitration.

The Asia- Pacific Arbitration Review 2020- A Global Arbitration Review special Report.

Dispute Settlement under International Commercial Arbitration- United Nation Conference on Trade and Development.

James H. Carter, The International Arbitration Review, The Law Review, 9th ed.

E. INTERNATIONAL & NATIONAL STATUTES

The Geneva Protocol on Arbitration Clauses, 1923

The Geneva Convention on the Execution of Foreign Arbitral Awards, 1927

The English Arbitration Act, 1934

The New York Convention, 1958

The European Convention, 1961

The Foreign Awards (Recognition and Enforcement) Act, 1961

The United Nations Commission on International Trade Law (UNCITRAL), 1985

The Indian Contract Act, 1872

The Indian Arbitration Act, 1899

The Indian Stamp Act, 1899

The Civil Procedure Code, 1908

The Arbitration (Protocol and Convention) Act, 1937

The Arbitration Act, 1940

The Constitution of India, 1950

The Limitation Act, 1963

The Specific Relief Act, 1963

The Arbitration and Conciliation Act, 1996

The Companies Act, 2013

The Commercial Courts Act, 2015

The Arbitration and Conciliation (Amendment) Act, 2015

The Arbitration and Conciliation (Amendment) Act, 2019

F. WEBSITES

Varun Sharma, "Challenges of Executing Foreign Arbitration Awards in India", https://blog.ipleaders.in/arbitrationaward/#:~:text=Problems%20of%20executing%20Foreign%20Arbitral%20Awards%20in%20India&text=The%20problem%20occurs%20when%20one,a%20competent%20court%20in%20India.

"International Commercial Arbitration in India", https://patentbusinesslawyer.com/international-commercial-arbitration-in-india/.

Vaibhav S. Charalwar, "Concept of seat and venue under Arbitration and Conciliation Act, 1996", https://www.scconline.com/blog/post/2018/06/04/concept -of- seat-and-venue-under-the-arbitration-and-conciliation-act-2015/.

Concepts of Lex Arbitri and Curial Law, http://arbitrationblog.kluwerarbitration com/2014/02/26/the-ghost-of-the-governing-law-returns-lex-arbitri-v-curial-law-in-india/?doing_wp_cron=1596635759.97 789788246154 78515625.

Nitish Desai, "Arbitration in India", http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/International_Commercial_Arbitration.pdf.

Ashish Chugh, "The Bharat Aluminium Case: The Indian Supreme Court Ushers In a New Era", http://arbitrationblog.kluwerarbitration.com/2012/09/26/the-bharat-aluminium-case-the-indian-supreme-court-ushers-in-a-new-era/?doing_wp_cron= 15932754 53723689079284 6679687500.

Dikshat Mehra & Vibhor Kapoor, "Evolution of Arbitration Regime Through 2019 – A Recap", http://www.lawstreetindia.com/experts/column?sid=328#:~:text=The%20Amendment%20Act%202019%20now,can%20only%20approach%20the%20courts.&text=It%20also%20remains%20to%20be,in%20view%20of% 20natural%20justice.

"Need for Arbitration in India", https://alexis.org.in/.

"What is Arbitration?", https://www.wipo.int/amc/en/arbit ration/what-is-arb.html.

"International Commercial Arbitration", https://www.lawteacher.net/ free- law-essays/commercial-law/international-commercial-arbitration.php.

Rahul Dev, "International Commercial Arbitration in India", https://patentbusinesslawyer.com/international-commercial-arbitration-in-india/.

Dipen Sabarwal & Aditya Singh, "Arbitration in India", https://www.lexology.com/library/detail.aspx?g=72bcbbe3-c139-46f2-b9ce-086394161f41.

Himanshu Mene, "Promoting Institutional ADR to make India a hub of arbitration", https://blog.ipleaders.in/promoting-institutional-adr-to-make-india-a-hub-of-arbitration/#_ftn19.

Naina Agarwal, "Oppression And Mismanagement- Is Law Enough?", https://www.lawnomy.com/post/oppression-and-mismanagement-is-law-enough.