

## CHAPTER- 7

### CONCLUSION AND RECOMMENDATIONS

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#### 7.1 Findings and Suggestions

Practically, the road for International Commercial Arbitration (ICA) in India is not smooth. It is still in neophyte stage with many loopholes that obstructed in working of successful of this method in India which are multifold- starting from emergent needs to modify or amendment of certain provisions of the Arbitration Act, 1996 to changing the mindset of all potential parties who are involved.

Based on the identified lacuna, the following suggestions can be made:

**Finding 1: The Arbitration Act, 1996 applies both to international and domestic arbitrations unlike the Model Law, which was designed to apply only to International Commercial Arbitration.**

*Suggestion: Domestic arbitration and International Commercial Arbitration should be kept separate. This will bring about effectiveness and clarity for users of the said legislation. Hence, Indian legislature by an emergent legislative action should adoption a separate Act for International Commercial Arbitration.*

**Finding 2: Expression ‘Arbitration’ has not been defined under the Arbitration Act, 1996. Like other legal regimes, India has avoided defining the arbitration and has instead attempted to distinguish it from other methods of alternative dispute resolution. The definition in Section 2(1)(a) of the Act, 1996 based on clause (a) of Article 2 of Model Law is merely a clarification that the Act covers Ad hoc and Institution arbitration.**

*Suggestion: For solve of this serious problem, Indian legislature should confines the scope of definitions, perhaps to mitigate the disputes of interpretation, and them without enlarging the scope of confusion.*

**Finding 3: The ambiguous and uncertainty definition of the term Court has created a serious difficulty for the legal fraternity and also the business community.**

*Suggestion: There are four vital options for Indian legislature:*

*i) Insert a new definition of the term Court;*

*ii) Set up a separate Court for settling arbitration specially for International Commercial Arbitration;*

*iii) Supreme Court should be the exclusive forum for enforcing foreign awards in India; or*

*iv) Permit to transfer of all issues pending in District Court to the Courts of the Additional District Court.*

**Finding 4: Definition of International Commercial Arbitration;**

**Finding 4.1) Section 2(1) (f) of the Arbitration Act, 1996 define the term “International Commercial Arbitration”, which derives guidelines from the footnote annexed to Article 1 of the Model law. It appears from this Section that the nationalities of the disputants are the only determinants to constitute an International Commercial Arbitration and not the issue of arbitration. Therefore, if the disputants to particular international and commercial intercourse are Indian nationals, in such a case international commercial arbitration under the Arbitration Act, 1996 will not be invoked. Additionally, the Section 2(1)(f) of the Arbitration Act, 1996 define the word “International Commercial Arbitration” but makes no distinction between International Commercial Arbitrations which take place in India with outside of India.**

*Suggestion: New definition of the define the term “International Commercial Arbitration” must be inserted in the Act.*

**Finding 4.2) The Arbitration Act, 1996 does not define the term “International Arbitration”. The Indian legislature used the phrase**

**“International Commercial Arbitration” in Section 2(1)(f) of The Arbitration Act, 1996.**

*Suggestion: It is proposed to be modified by defining “International Commercial Arbitration” which is commercial in nature as “International Arbitration” because all cases are not commercial in nature.*

**Finding 4.3) The Arbitration Act, 1996 does not provide exhaustive definition of expression “Commercial”. While the Model Law provides for the definition of the term “Commercial” in a footnote for Article 2 of the Arbitration Act, 1996, that is alien to the above drafting technique, defines the term extensively in a separate Article.**

*Suggestion: The expression commercial as occurring in Section (2)(f) of Act, 1996 and in Section (2) of the Foreign Awards (Recognition and Enforcement) Act, 1961 should be construed broadly having regard to manifold activities which are integral parts of international trade today and the aid can also be taken from footnote Annexed to Article 1 of the Model Law for this purpose.*

**Finding 5: The term “Online Dispute Resolution” as a flexible, swift, cost effective, trustable method has escaped its place in the definition clause of the Arbitration Act, 1996.**

*Suggestion: It is ideal to be added a new Section in the Act, in order to define the term “Online dispute Resolution” because there are just two vital options for future of Indian judiciary system; 1) To respect-to select modern dispute settlement methods. Or 2) To continue slow moving in practice with inexplicable and inordinate delays.*

**Finding 6: Multi-party arbitration, whether they involve one contract with multiple disputants or multiple contracts as well as multiple disputants, has complexities that need to be attended to. There is no particular rule for Multi-party arbitration, such arbitration is allowed, under Indian law, as Article 7(1) of the Act, 1996.**

*Suggestion: It is time for the Indian law of arbitration to develop a rule that could determine when a third party wants to participate in an ongoing arbitration. There are many international rules that determine when a third party could party could participate in an arbitration. The Arbitration Act, 1996 should be influenced by these rules if the legislature decide to include when a third party wants to participate in an arbitration. Therefore, It is proposed to be added a new Section in the Act, in order to define a particular rule for Multi-party arbitration. This subject can be addressed by the future research.*

**Finding 7: in subject of Public Policy;**

**Finding 7.1) Like the Arbitration Act, 1940, there is no provision defining or enumerating matters considered as public policy issues in the Arbitration Act, 1996.**

*Suggestion: Due to ambiguous and uncertainty of public policy, the judicial interference of Indian courts are hyper active. It clearly runs the big risk of impinging upon Indian arbitration as an effective method of dispute resolution.*

*It is proposed to be modified by using the new definition of public policy which introduce by researcher as follow: “The public policy as an inconsistent, unpredictable and dynamic political tool is against the enforcement of awards in judicial activity’s framework.”*

**Finding 7.2) There is no distinction between domestic public policy, which is applied to domestic awards, and international public policy, which in certain circumstances is applied to international awards issued under the Arbitration Act, 1996.**

*Suggestion: Indian legislature as an emergent action should be made a crystal distinction between domestic and international public policy.*

**Finding 7.3) The SC not met the purpose for which the Arbitration Act of 1996 was passed because in practice, it have vastly enlarged the scope of**

**public policy too much more than what is available under the Arbitration Act, 1996. The SC, unlike the Arbitration Act of 1996, either Model Law introduces “Patent illegality” and “rules of morality” as grounds for setting an arbitral award on public policy.**

*Suggestion: Due to this fact, Indian legislature should dispel many of doubts with regard to the scope of public policy and a transparent distinction should be made among all types of public policy. Probably, it would have been safer if the phrase “rules of morality” and “Patent illegality” had not been in the Indian legal system, in order to avoid any controversy over its interpretation.*

**Finding 8: The major lacunas in Section 8 of the Arbitration Act, 1996 are as follows;-**

- **There is no provision in the Act, 1996 for bifurcating the suit into two parts, one to be referred to arbitration for adjudication and the other to be decided by the Civil Court.<sup>1</sup>**
- **Sub-section (3) of Section 8 of the Arbitration Act, 1996 is against the Code of Civil Procedure. Although Sub-section (3) of Section 8 does not prohibit commencement or continuance of arbitration proceeding even when a suit and an application for stay are pending hearing in a Court of law. It means that this sub-section permit both arbitration proceedings and legal proceeding to be continued concurrently but the Code of Civil Procedure does not permit two Courts concurrently proceeding with same cause action between same disputants.**

*Suggestion: There is an emergent need of reformulating Indian law in this regard.*

**Finding 9: The Arbitration Act, 1996, like the Model Law, does not explicitly mentions whether the irrelevancy of the arbitration agreement to the dispute as one of the issues to be decided by the arbitral tribunal or not.**

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<sup>1</sup>This lacuna has found by the SC in case *Sukanya Holding (P) Ltd. v. Jayesh H. Pandya & Other*, (AIR 2003 SC 2252).

*Suggestion: This serious lacuna can be addressed by modification of the law.*

**Finding 10: in subject of Interim Measures Order;**

**Finding 10.1) The framers of the Arbitration Act, 1996 has not provided for any particular mechanism for enforceability of direction of arbitral tribunal order regarding interim measures under Section 17 of the Arbitration Act, 1996. Thereof, the provision contained in Section 17 appears to be a “toothless tiger” and totally depends upon the morality of the disputants.**

*Suggestion: It is proposed to be added two new Section 24(A)<sup>2</sup> and 24(B)<sup>3</sup> in the Act, which is proposed by Arbitration (Amendment) Bill, 2003 in order to provide on efficacious mechanism of imparting interim measures. Also the aid can take from Canada and Scotland Arbitration Acts which have specifically provided in their arbitration law that an order of the arbitral tribunal regarding interim measures shall take the form of an arbitral award which would be enforceable just like an award made by the arbitral tribunal.*

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<sup>2</sup> Section 24(A) the Arbitration (Amendment) Bill, 2003 reads as;- “24A. (1) If a party fails, without showing sufficient cause, to comply with a directions made under section 17, or time schedule determined under section 23 or orders passed under section 24, as the case may be, the arbitral tribunal may make a peremptory order to the same effect, prescribing such time for compliance as it considers appropriate.

(2) If a claimant fails to comply with a peremptory order made under sub-section (1) in relation to a direction specified in clause (c) of section 17, the arbitral tribunal may dismiss his claim and make an award accordingly.

(3) If a party fails to comply with any peremptory order made under sub-section (1), other than the peremptory order in relation to a direction specified in clause (c) of section 17, then the arbitral tribunal may—

(a) make such order as it thinks fit as to payment of costs of the arbitral proceedings incurred in consequence of the non-compliance;

(b) direct that the party in default shall not be entitled to rely upon any allegations in his pleadings or upon any material which was the subject-matter of the order;

(c) draw such adverse inference from the act of non-compliance as the circumstances may justify;

(d) proceed to make an award on the basis of such materials as have been provided to it, without prejudice to any action that may be taken under section 25.

<sup>3</sup> Section 24(B) the Arbitration (Amendment) Bill, 2003 reads as;- “24 B. (1) Without prejudice to the power of the Court under section 9, the Court may, on an application made to it by a party, make an order requiring the party to whom the order of the arbitral tribunal was directed, to comply with the peremptory orders of the arbitral tribunal made under sub-section (1) of section 24A.

(2) An application under sub-section (1) may be made by—

(a) the arbitral tribunal, after giving notice to the parties; or

(b) a party to the arbitral proceedings with the permission of the arbitral tribunal, after giving notice to the other parties.

**Finding 10.2) the Arbitration Act, 1996 have been ready to order interim measure in disputes referred to domestic not international arbitration.**

*Suggestion: It is ideal to added order interim measure in disputes referred to international and foreign arbitration. Although, it is very difficult but is possible.*

**Finding 11: The party may chose to be represented by his lawyer or any professional who may be an Indian or a foreign national. No specific qualification is legally required for being an arbiter, legal training and experience, as well as professional expertise, may be regarded as a plus in being appointed as an arbiter. As a result of this serious lacuna, there is no restriction on Indian even foreigner gang appointed as arbiters.**

*Suggestion: This is a serious lacuna which has escaped attention of the framers of the Arbitration Act, 1996. It is ideal to add the requirement qualifications for appointment of arbiters.*

**Finding 12: The grounds listed in Section 12(3)(a) of the Arbitration Act, 1996 for challenging of appointment of arbiter is not sufficient because the Act merely emphasized independency and impartiality.**

*Suggestion: It is ideal to add new grounds for challenging of appointment of arbiter. Recommended grounds may be:*

*i) Accorded Authority misused by arbiter;*

*ii ) Accorded Authority not use by arbiter; or*

*iii) Any in-criminative information such as misbehavior, non-integrity about the arbiter comes.*

**Finding 13: According to Arbitration Act, 1996 an arbitral tribunal has no mechanism to enforce its own direction.**

*Suggestion: The arbitral tribunal must get the required power in this regard.*

**Finding 14: An Ad hoc arbitration in India is becoming very costly in compare to litigation because there is no regulated fee structure for arbiter in**

**an Ad hoc arbitration. Practically, this is a crucial factor which weights against developing cost effective quality arbitration practice in India.**

*Suggestion: The Indian legislature in an emergent act should regulate fee structure for arbiter in Ad hoc arbitration.*

**Finding 15: Neither the Model Law and various international conventions or institutions to which India follow them, nor does Indian Law provide a time schedule for different stages of arbitration, such as arbitration process, submitting statements of claim and defence, or notifying a party of such statements.**

*Suggestion: The primary benefit of time schedule is mainly to preclude any dilatory tactics used by a violating party or even by the arbiters and it is vital for a judicial system like India which suffered from the fatal disease of sluggish moving in practice. For modification of this serious lacuna, Indian legislature should provide a time schedule for different stages of arbitration. For example, the Arbitral Tribunal must deliver a copy of the award duly signed to each party. The shortcoming of Indian Law even the Model Law is that is not the deadline set by the former to deliver a copy of the award to the disputants. Indian legislature should add a deadline set for deliver a copy of the arbitral award to the disputants.*

**Finding 16: The Arbitration Act, 1996 is less specific about the authorities and powers of an arbitration tribunal in relation to witnesses, evidence, etc.**

*Suggestion: The aid can be taken from Sections 43<sup>4</sup> & 44<sup>5</sup> the English Arbitration Act, 1996 for this purpose.*

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<sup>4</sup>Article 43 of the English Arbitration Act read as: Securing the attendance of witnesses. (1) A party to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence.

(2) This may only be done with the permission of the tribunal or the agreement of the other parties.

(3) The court procedures may only be used if—(a) the witness is in the United Kingdom, and (b) the arbitral proceedings are being conducted in England and Wales or, as the case may be, Northern Ireland.

**Finding 17: Section 28 (2) of the Arbitration Act, 1996 authorizing the arbiters to settle a dispute as amiable compositeur. An important misgiving about arbitration by amiable composition is that, in some jurisdictions, it is sometimes confused with mediation or conciliation by a nominated third party. It states that if the disputants expressly authorize the tribunal to reach conciliation between the disputants, the arbitration tribunal may resolve the dispute on the basis of equity and fairness, without being restricted to the applicable law. This makes arbitration similar to a conciliation process. But, there are fundamental differences between arbitration and conciliation. The least is that the award of arbiters acting as amiable compositeur is binding, whereas conciliators can only recommend a solution.**

*Suggestion:* the Western concept of arbitration by amiable composition has not yet fully assimilated into Indian legal systems; and that the concept of equity, in Indian legal thinking, is not linked to adjudication but to mutual concessions. The aforementioned difficulties can be addressed by modification of the law and the expansion of doctrinal works.

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(4) A person shall not be compelled by virtue of this section to produce any document or other material evidence which he could not be compelled to produce in legal proceedings.

<sup>5</sup> Article 44 of the English Arbitration Act read as : Court powers exercisable in support of arbitral proceedings. (1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings. (2) Those matters are— (a) the taking of the evidence of witnesses; (b) the preservation of evidence; (c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings— (i) for the inspection, photographing, preservation, custody or detention of the property, or (ii) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property; and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration; (d) the sale of any goods the subject of the proceedings; (e) the granting of an interim injunction or the appointment of a receiver. (3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets. (4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties. (5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively. (6) If the court so orders, an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal or of any such arbitral or other institution or person having power to act in relation to the subject-matter of the order. (7) The leave of the court is required for any appeal from a decision of the court under this section.

**Finding 18: There is no provision for review of;-**

- **There is no provision for review of appointment of arbiter by the Court where the court has passed order appointing an arbiter due to failure on disputants to appoint their arbiter.**
- **The order made by the competent court under Section 8 of the Arbitration Act, 1996 for staying or refusing to stay legal proceedings cannot be challenged in appeal because such an order is not included as “appealable Order” under Section 37 of the Arbitration Act, 1996. Therefore, the Court has no other discretion but to refer the matter to arbitration.**

*Suggestion: It is proposed to be added this order to list of the ground of appealable order.*

**Finding 19: There is no right of appeal against;**

- **An arbitral award.**
- **The finding and recording of satisfactory proceeding by the Court, under Section 49 of the Arbitration Act, 1996.**

*Suggestion: These serious lacunas which have escaped attention of the framers of Arbitration Act, 1996 can be addressed by modification of the law.*

**Finding 20: The Arbitration Act, 1996 does not make a distinction between recognition and enforcement of arbitral award. This is a disadvantage of the Arbitration Act, 1996, as a winning respondent may wish to request recognition of an award, in order to block new actions by the losing claimant, or a winning party may have to delay the enforcement of an award, and recognition of the award would guarantee such a future action. It seems to be a chronic problem with most arbitration legal regimes that they rarely stipulate the issue of recognition as distinct from enforcement.**

*Suggestion: Indian legislature by an emergent legislative action should adopt the Recognition Act as a separate part of the Arbitration Act.*

**Finding 21:** Aggrieved party can avoid execution of awards by only filing an application for setting aside under Sections 34 and 48 of the Arbitration Act 1996, without being required to deposit a certain part of the arbitral award amount.

*Suggestion: It is ideal to be added a new Section in order the deposit referred to the Sections 34 and 48 of the Arbitration Act, 1996.*

**Finding 22:** Like the Model Law, the Arbitration Act, 1996 has problem of definition of regard to arbitrability. That means that the scope of arbitrability remains textually undefined. Compared to arbitrable subject matters, numbers of non- arbitrable subjects are more in India.

*Suggestion: It is ideal to be added a new provision for defining or enumerating matters considered as arbitrability issues in the Arbitration Act, 1996. And also, Indian arbitration legislation should allow a wider range of disputes to be capable of a reference to arbitration than it is permitted now. Limitation of arbitration to those disputes that can be subject to compromise is no longer in tune with new developments in arbitration globally. More and more areas that have traditionally been considered as non-arbitrable are now gradually opened to arbitration. Certain stock market, bankruptcy, anti-trust and public law as well as patent and intellectual property law disputes have been allowed settlement through arbitration in the jurisprudence of some Western countries.*

## **7.2 Testing the Hypotheses**

***Hypothesis One: “The Arbitration and Conciliation Act of 1996 has not met the purpose for which it was passed.”***

Its primary objectives of the Act were to achieve twin goals in arbitration as a cost effective and quick mechanism with the minimum Court intervention for the settlement of commercial disputes. The Arbitration and Conciliation Act of 1996 is barely 18 years old and what is the Indian experience is obvious by the fact the Act not met the purpose for which the Act was passed.

Practically, Indian arbitration system has many loopholes and the quality of arbitration has not adequately developed as a quick and cost effective mechanism for settlement of commercial disputes. The working of the Arbitration Act of 1996 over the years has shown that it does not sufficiently fulfill the requirements of international arbitrations in certain specific areas such as minimizing judicial interference, the recognition and enforcement of arbitral award, etc. Therefore, the researcher accepts the hypothesis formulated as *“The Arbitration and Conciliation Act of 1996 is not met the purpose for which it was passed.”*

***Hypothesis Two: “The Arbitration and Conciliation Act of 1996 does not appear to be a well drafted legislation.”***

The present context of the draft Articles provisionally adopted by the Arbitration Act, 1996 do not provide clear guidance and it is not expressed in more crystal clear terms. For example, The Arbitration Act, 1996 does not provide exhaustive definition of expression “Commercial”. While the Model Law provides for the definition of the term “Commercial” in a footnote for Article 2 of the Arbitration Act, 1996, that is alien to the above drafting technique, defines the term extensively in a separate Article. Therefore, the researcher accepts the hypothesis formulated as *“The Arbitration and Conciliation Act of 1996 does not appear to be a well drafted legislation.”*

***Hypothesis Three: “Indian law of arbitration is now less in line with universally accepted standards and practice.”***

Although, India has highly developed rules and principles governing all aspects of arbitration in recent years but practically, it faced many serious procedural problems with international arbitration which cannot be overlooked in the present day of international trade transactions. The implication is that Indian law of arbitration is now less in line with universally accepted standards and practice, which is one of the main reasons why a country like India with rich background in arbitration, close copied foreign arbitration law even modern international standard, still is not a world centre for arbitration. Therefore, the researcher accepts the hypothesis formulated as *“Indian law of arbitration is now less in line with universally accepted standards and practice.”*

***Hypothesis Four: “The problems of enforcement of foreign award in India are not connected with international mechanism of arbitral awards.”***

Although, the present international conventions and legal institutions are not adequate for dealing with the problem of enforcement award but the real problem is the lack of proper international mechanism for enforcement and implementation of arbitral awards.

The problems of enforcement award in a country like India which is famous as problematic State in enforcement of award are not connected with international mechanism, but with complication of its implementation. The research shows that the main problem is inside the administrative routines, interpretation and settlement of the existing international rules in national law. Therefore, the researcher accepts the hypothesis formulated as *“The problems of enforcement of foreign award in India are not connected with international mechanism of arbitral awards.”*

***Hypothesis Five: “The Model Law, 1985 and international conventions like the New York Convention, 1958 are positively effective in developing and facilitating the international arbitration in India.”***

There is a positive relationship between development of Indian law of arbitration and accession to the Model Law and international Conventions by Indian government. Recent modifications of the international Conventions and the Model Law in India introduced by the Arbitration and Conciliation Act, 1996 and the Courts practice in India clearly show how the international Conventions and the Model Law can contribute to the development of international business.

It is undoubtedly true that adoption of the Model Law and international Conventions encouraged the development of arbitration in India, but that the adoption itself could not overcome all of the problems and deficiencies in the legal framework which surrounds International Commercial Arbitration. Therefore, the researcher accept the hypothesis formulated as *“The Model Law, 1985 and international conventions like the New York Convention, 1958 are positively effective in developing and facilitating the international arbitration in India”*.

### 7.3 Conclusion

The Law of arbitration in India has gone through deep changes in recent decades. Regulations on enforcement of foreign awards have significantly improved in recent years. This has been achieved through adoption of new legislations as well as accession to international and regional conventions. India became a party to the New York Convention of 1958, as the single most important convention on the recognition and enforcement of foreign awards with effect from October 11, 1960. It has been a breakthrough that erased the uncertainties and suspicions that marred an interest to resort to arbitration with Indian parties. At the regional level, India did not join any convention. India should, however, accelerate the process of considering accession to, and ratification of, international and regional conventions on enforcement of international arbitration awards in order of their priority for its commercial relationships with the outside world. At the international level, it has been said the convergence of legal systems or harmonization of commercial law will, in the long run, stabilize and strengthen national economies and will create a healthy competitive environment.

As to arbitration legislation, alongside the modernization of the Indian legal system, its law of arbitration has also been significantly improved since 1940. While arbitration practice used to be regulated according to the New York Convention of 1958, since then there has been a trend towards codification and institutionalization of the practice. It can be said that the legal structure required for modern arbitration is now in place in the country. The diversity of religious and custom, have not been major impediments on the way towards modernization of arbitration, save for foreign arbitration. Nevertheless, the existing Indian law of arbitration law has departed, to a large extent, from traditional law. It can be said that the Indian law of arbitration is primarily influenced by modern internationally accepted patterns of arbitration, such as the Model Law. Such influence is mainly conveyed through western legal systems, particularly that of the United Kingdom. This is an advantage of the type of legal transplant experienced with regard to the Indian law of arbitration that it has been made possible through the English legal system, whose rich background in arbitration is very much similar to that of India. The United Kingdom has been the pioneers of western countries to adopt modern laws. The long

history of its legal system, the magnitude of the cases brought before its courts, and the insightfulness of many of its legal writers have made it into a relatively reliable authority for the adoption new laws. As touched upon before, many other pieces of legislation in India have been inspired by the English model. Hence, the adoption of an arbitration law identical to the English Arbitration Law guarantees some degrees of compatibility with the rest of the legal body in India. The modernization of the Indian arbitration law can be better understood within the wider context of the Asian region, where most of countries, in recent decades, have adopted present arbitration laws conforming to international standards, and established modern arbitration centers. They have intended to enhance their domestic arbitration practice, as demanded by their business communities, and to attract international arbitration.

Present Indian law of arbitration is an achievement realized in a relatively short period of time. Nevertheless, there are some difficulties and lacunae that need to be dealt with. The Indian legal system provides for a comprehensive set of rules governing commercial arbitration. Most of these rules are provided for in a statute, separate from other sets of laws, that is, Law of Arbitration 1940, while the rest are integrated in other statutes such as the Arbitration Act, 1996 for civil and commercial disputes. The Indian legislature has intended to encourage and facilitate arbitration. Under the law, arbitration is a regulated and reliable method of dispute resolution, with binding and enforceable outcomes. Present Indian law of arbitration allows both institutional and Ad hoc types of arbitration. There are several bodies engaged in international arbitration in India, such as such as Indian Council of Arbitration, Federation of Indian Chamber of Commerce and Industry, etc. The law is, however, particularly in favour of Ad hoc arbitration, where the parties can freely choose arbiters as well as procedural and substantive rules of arbitration.

The process of the development of the Indian law of arbitration indicates a move towards strengthening the contractual features of arbitration, at the expense of its judicial features. Such a move can bolster the confidence of foreign businesses. The extent of court intervention in the arbitration process is now limited. Nevertheless, safeguarding arrangements are stipulated to guarantee a healthy arbitration process and, more importantly, compliance with its outcome. For instance, an arbitration tribunal decides on its own jurisdiction; and only after the

issuance of the award, the competence of the tribunal can be challenged at a court. On the other hand, dilatory tactics such as a challenge to the appointment of an arbitrator cannot obstruct the proceedings, unless either the tribunal or the court grants such a challenge. The move towards emphasize on the contractual feature of arbitration has, however, been undermined by giving too much power to the court, in case of disagreement between the parties. Under Article 34 the Arbitration Act, 1996, the competent court has the power to set aside an award made under the Act, if the applicable law has not been applied. This may be interpreted as allowing the substantive review of awards, which is contrary to what is accepted in many advanced legal systems. Moreover, specifying too many formal requirements for an arbitral agreement or award, in order to be valid, might frighten foreign parties from resort to arbitration in India.

An important issue, in this regard, is the power of the court to set aside an award, which is to secure a just and rightful solution for the dispute. Internationally, however, the tendency is towards restricting the power, in order to prevent its abuse by a reluctant party. Indian law, too, should move in this direction, without compromising the rights of the parties to have an effective judicial control. This can be achieved by limiting the grounds for setting aside an award. Particularly, the ground of failure to apply the applicable law to the dispute<sup>6</sup> should be removed, as it unnecessarily opens the way for the substantive review of awards. Similarly, the provision allowing the court to set aside an award, if there is a defect or indicates of them in the arbitration award or in the proceedings to the extent that it affects the terms of the award, should be removed, as it does not provide a clear definition of such defects. Moreover, Indian law should allow the parties to agree on a waiver of their right to bring before the court a request for vacating the award, what is not permitted under the current law.

Unlike the Arbitration Act, 1940, the Arbitration Act, 1996 recognizes International Commercial Arbitration, but somehow treats it similarly from domestic arbitration, as same Courts have jurisdiction to deal with the issues relating to the two types of arbitration. Nevertheless, the distinction between domestic and international arbitration is not sufficiently taken into consideration, as international

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<sup>6</sup> Article 48 (a), the Arbitration Act, 1996.

arbitration should be subject to less restrictions and scrutiny, and be provided with a more favourable treatment. The grounds for vacating a domestic award can be more than those leading to setting aside a foreign award. For instance, a crystal distinction should be made between domestic public policy, which is applied to domestic awards, and international public policy, which in certain circumstances is applied to international awards issued under Indian law. More importantly, the Arbitration Act, 1996 recognizes recourse to foreign arbitration. It also contains a definition of foreign arbitral awards, and makes a distinction between domestic and foreign awards. Under the Arbitration Act 1940, it was assumed that foreign awards must be treated as if they were domestic ones, that is, they were subject to the legal procedure and scrutiny applicable to domestic awards and, more importantly, subject to judicial review. This is no longer the case. However, again, lack of a definition of international public policy applicable to foreign awards is a deficiency of Indian law that needs to be addressed.

The Arbitration Act, 1940 addressed the issue of enforcement very briefly; and the Indian court was assumed to have the power to examine meticulously an award, when considering its enforcement. Since there was no rule on the enforcement of foreign awards, they, too, were assumed to be subject to retrial and to the similar extent of legal scrutiny.

By enacting the Arbitration Act, 1996, the Indian arbitration law has shifted towards a pro-enforcement position, to the extent that it can also be said that the law is generally more than the Model Law facilitative of enforcement of arbitral awards. It is relatively straightforward to apply for the enforcement of awards made under the Act, 1996, whether in or outside of India. Since it has already been possible to challenge such awards at the Indian court by drawing upon the relatively extensive grounds for vacating them, the grounds for refusing enforcement of an award are restricted. Awards can be refused enforcement, only if they are: (a) against a decision already made by Arbitral Tribunal and Courts, (b) contrary to the public policy of India, or (c) if the requirements of due process have not been observed in making them. A feature of the Act, 1996 is that while a request for enforcing an award can only be made after the expiry of the ninety day period for challenging the

award, the suspension of enforcing the award is also permitted, if the award is being challenged in the court.

Making a distinction between domestic and foreign awards, the Act, 1996 even more facilitates the enforcement of foreign and international awards. Also, the Supreme Court decision allows enforcement of foreign arbitral awards, without requiring a review of their merit. While Indian law of arbitration recognizes the effect of multilateral conventions or bilateral treaties, if they are applicable to a foreign award, under the New York Convention (1958) or Geneva Convention (1927), the most favourable law or conventions can be applied, when enforcing a foreign award. Hence, it is possible to go for the “most favourable regime” of enforcement available within the Indian legal system and treaties joined by India. As a matter of fact, in many aspects, the current Indian law is more than the New York Convention facilitative of enforcement of foreign and international awards. In certain aspects, however, the Indian law lags behinds the Convention and universally accepted standards. For instance, while the grounds expressed in Article V of the Convention *may* result in the non-enforcement of an award, Indian law obliges the court to refuse enforcement of an award, if such grounds exist. The latter also mentions non-compliance with the rules of morality as a ground for the refusal of enforcement of an award, whereas no such a ground is recognized under the Convention. Such a requirement may lead to broad or conflicting interpretations, undermining the required Uniformity.

Finality, It is an ideal time for a reform of Indian’s arbitration legislation. By acknowledging globally accepted practices and rules, the Indian law of arbitration should be amended with a view to removing the serious lacuna and difficulties mentioned above and to improve its arbitration landscape on a domestic as well as international level. Adoption of various legislations regulating arbitration, including international arbitration, setting up several bodies engaged in arbitration, whether domestic or international, and accession to international and regional conventions and treaties should be accomplished while an attempt is made at co-ordination between them. Lack of such co-ordination leads to confusion, and undermines the very rationale of resort to arbitration, which is simplicity and saving of time. Careful regional or international convergence and legal transplants in the area of

International Commercial Arbitration may be useful, if they are compatible with the rest of legal body in India.