CHAPTER-VII
IMPACT OF GLOBALIZATION ON ARBITRATION LAW IN INDIA

India is a democratic country and it is emphasized in the preamble of the constitution of India that India is a sovereign, socialistic, secular, democratic, republic and providing fundamental rights and liberties to the citizens and ensuring justice- social, economic and political. The constitution has been the touch stone for all subsequent legislation that have been adopted by parliament of India.

In 1991, the economy came under the currency crisis. The best way out was thought to be the introduction of reforms in order to marketize the economy. Since than industries have been De-licensed, approval of foreign direct investment (FDI) has been made automatic in a number of industries, import of capital goods, raw material and components are no longer subject to the approval of the government. Fiscal reforms were made and a process of privatization of public sector undertaking is under way. With economic liberalization and opening of the market there is growth of international trade, commerce, investment, transfer of technology, developmental and construction work and banking activities. To cope with the changing scenario, India has updated its arbitration legislation in order to provide a level playing field for both domestic and foreign entrepreneurs. Indian Arbitration Law ensures fairness and justice to all the concerned parties. With the increase in business transactions both international and
domestic contracting activities are rising. The potential for commercial arbitration accordingly has also shown a significant rising trend. This trend was not only so after 1991 but before 1991 there are several instances when we saw that various conventions played an important role to the growth of arbitration Law in India like -


After the end of first World war, commensurate with importances of international trade and the increased use of international commercial arbitration, a need was felt for providing proper arbitral machinery for the resolution of disputes between the contracting parties subject to the jurisdiction of different states. In this regard International chamber of commerce promoted an international convention for removal of impediments to the enforceability of the arbitral clause. The first serious effort in this direction, was made under the auspices of The League of Nation, which fructified in the conclusion of a treaty on September 24, 1923 called protocol on Arbitration Clause (hereinafter” the Geneva Protocol”) which was ratified by 30 states. The protocol thought baptized as” protocol on Arbitration Clauses” also catered for arbitral procedure and execution of arbitral awards. The Protocol comprised of eight Articles.

The Geneva protocol had two objectives first, it sought to make arbitration agreements, and arbitration Clauses in particular, enforceable

1. RenuSagar Power Co. Ltd v General Electric Co. AIR 1994 SC 859
internationally; and secondly it sought to ensure that made pursuant to such arbitration agreements would be enforced in the territory of the state in which they were made\(^2\).

The Geneva protocol (Article 1) inter alia, provided that each of the Contracting states recognise the validity of an agreements, whether relating to existing or future difference contracting States by which the parties to a contract agree to submit to arbitration all or any difference that may arise in connection with the contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the parties are subject to the jurisdiction of a country in which arbitration was to take place. Each contracting State, however, was given a right to limit the aforesaid obligations to contracts relating to commercial matters. This Article established the international validity and enforceability of the arbitration agreements contained in the international commercial agreements.

The Geneva Protocol (Articles 2) dealt with the arbitral procedure and provided for the procedure, including the constitution of the Arbitration Tribunal, to be governed by the will of the parties and by the law of the country in whose territory the arbitration takes places. The Geneva protocol required each contracting state to undertake to ensure the execution by its authorities and its accordance with the provisions of its national laws of

\(^2\) Gas authority of India V SPIE CAPAGE, S.A AIR 1994 Del 75
arbitral awards made in its own territory two conditions were required to be fulfilled before the contracting state could be saddled with the responsibility to ensure the execution the award -

1. The Arbitral award should have been rendered in accordance with provisions of national law of executing state; and

2. The arbitral award should have been rendered in the territory of executing state.

**International Convention on the execution of foreign arbitral awards 1927 (Geneva Convention)**

Under the Geneva protocol only domestic awards could be enforced by the courts of the member states but this shortcoming was eliminated in the international convention on the execution of foreign arbitral awards 1927 (Geneva Convention). The League of Nation was instrumental in the conclusion of another treaty for securing recognition and enforcement of the international arbitral awards arising out of arbitration agreements following under the Geneva protocol. This treaty was concluded on September 26, 1927 Geneva. Undoubtedly the Geneva convention supplemented the Geneva protocol by making it possible to enforce a award in a contracting state other than where the award was rendered. As per the Geneva convention each high contracting state was required to recognize as binding and to enforce, in accordance with the rules of the procedure of its territory, arbitration awards made in another contracting state pursuant to an agreement covered
by the Geneva protocol\(^3\). but still this convention was not conducive to the speedy enforcement of foreign arbitral awards and requirements of international trade as the beneficiary of the award was required to show to the court, before which the matter came for enforcement, that the award had become final the country in which it was made. Thus the party opposing the enforcement of the award could effectively prevent its execution on the ground that the award was subject matter of litigation in the country where it was rendered. The Geneva convention also laid too much emphasis to the remedies that were open to the parties to invoke the law of the country where the award was made for the purposes of setting aside of the same.


Realizing that in the interest of international developing trade it was important to further the means of obtaining the enforcement in one country of international arbitral awards rendered in another country, relating to commercial disputes, the International Chamber of Commerce issued a draft convention in 1953 on International arbitral awards, which inter alia, targeted essentially to achieving an international commercial arbitration which was to be free of a national Law. The United Nations Economics and Social Council (ECOSOC) to whom ICC draft was presented prepared another draft in 1955. ECOSOC by its resolution No. 520(XVII) dated May

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\(^3\) Gas authority of India V SPIE CAPAGE, S.A AIR 1994 Del 75
6, 1954 established an ad hoc committee of eight Members States to study the matter raised by the International Chamber of Commerce in the light of all the relevant considerations and to report its conclusions to the former submitting such proposals as latter deemed appropriate, including a draft convention. The Committee held 13 public meeting from March 1 to 15, 1955 at New York and on the last day, viz., March 15, 1955 adopted a draft convention on the Recognition and Enforcement of Foreign Arbitral Awards alone with its recommendations and submitted the same to the ECOSOC. Thereupon ECOSOC at its 853rd meeting vide its Resolution 570 (XIX) dated May 20, 1995 requested the Secretary General to transmit the Draft Convention and the report of the Committee to the States, Members and Non-members of the United Nations, for their consideration and comments and the desirability of convening a conference to conclude a convention. Upon receipt of the comments of number of government and inter-and non-governmental organizations.

ECOSOC at its 923rd plenary meeting dated May 3, 1956 decided to convene a “Conference to conclude a convention on the recognition and enforcement of the foreign arbitral awards”. Consequently the conference was held at New York from May 20 to June 10, 1958 and the new International Convention on the Recognition and Enforcement of Arbitral Awards was adopted by the conference on the last day viz., June 10, 1958. (hereinafter the “The New York Convention”). The New York Convention
makes provision for the recognition and enforcement of an arbitral agreement subject to certain conditions being satisfied. Beside it also provides for the recognition and enforcement of an arbitral agreement subject to certain conditions being satisfied. Beside it also provides for the recognition and enforcement of an award resulting from an arbitration agreement to which the Convention applies.

The New York Convention (Article 1) defines the scope of the Convention in relation to the recognition and enforcement to arbitral awards. It provides of the recognition and enforcement of foreign arbitral awards whether or not they were made in the territory of a Contracting States. At the same by implication it excludes domestic award from its purview. Article 1 (1) of the New York Convention deals with awards made in any state other than the State where their recognition and enforcement it sought; it does not require that parties be subject to jurisdiction of different Contracting States. New York Convention marks a clear departure from the Geneva Convention as the latter was based strictly upon the principles of reciprocity and it applied to arbitral awards made in the territory of Contracting States and between the persons subject to the jurisdiction of one of the Contracting States. Therefore the area of operation of the New York Convention is wider than that of the Geneva Treaties. Articles 1 (3) of the New York Convention, however, permits any Contracting state to limit the field of application of the said Convention by declaring that it would apply
the Convention to arbitral awards rendered in the territory of other Contracting States only. In other words, though the said para does not establish strict requirement of reciprocity, at the same time it allows any Contracting state to declare that it would limit the applicability of the Convention only to arbitral awards made in the territories of the other Contracting States. Negatively a Contracting State not making such a declaration would be bound to apply the convention to arbitral awards rendered in any other country, whether or not such a Country, where the awards has been rendered, is a party to the convention or not. The New York Convention enables the Contracting States also to declare that they would apply the Convention to dispute arising out of legal relationships whether stricto sensu contractual or not provided they are considered as commercial under the domestic law of the State making such a declaration.

The New York Convention depicts an equilibrium in spite of assimilating two different concepts. This was achieved by widening its field of application, embodying the principle of universality by refraining from the principles of strict reciprocity embodied in the Geneva Convention and at the same time enabling a State to make a reservation in respect of reciprocity, making the applicability of the Convention to awards rendered in the territory of another Contracting State which might otherwise be discouraged from ratifying it. The New York Convention (Article 1) gives an inclusive definition to the expression “arbitral awards”. It includes
arbitral awards either made by appointed arbitrators for each case or arbitral bodies to which the parties have submitted⁴.

Article II of the New York Convention deals with the question of recognition and enforcement of an agreement to submit to arbitration differences which have arisen or may arise between the Contracting parties. If the New York Convention (Article II) is read in isolation, it would appear to apply to all arbitration agreements. But having regard to the international origin of the Convention, purpose and object thereof it must be construed as applying to arbitration agreements between the parties, one of whom must be a foreigner, engaged in international trade with each other. The mechanism is meant for the resolution of disputes/differences in the context of international commercial arbitration agreements under the aforesaid provision. Each Contracting State is under an obligation to recognize and enforce an arbitration agreement having a foreign element. The agreement, whether in the form of an arbitral clause or arbitration agreement, should be in writing signed by the parties. The agreement envisaged may not necessarily be contained in the comprehensive document but may be found in several documents. It can also be spelt out from exchange of letters or telegrams. The New York Convention [Article II(3)] specifies the effect of an arbitration agreement in Court proceedings. A Court of the Contracting State dealing with a matter in respect of which the parties have entered into

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⁴. Gas authority of India V SPIE CAPAGE, S.A AIR 1994 Del 75
an arbitration agreement of the kind covered by paras 1 and 2 of Article II, is mandatorily, required to refer the matter to arbitration at the request of one of the parties to the agreement unless the Court finds the agreement to be null and void, inoperative or incapable of being performed. Except in the contingency mentioned in this para the parties must abide by the chosen method of resolution of disputes by arbitral mechanism in the manner laid down in the arbitration agreement or arbitral clause5.

The New York Convention deals with the recognition and enforcement of arbitral awards, lays down the procedure for applying to the Court for recognition and enforcement of the award, provides for the contingencies in which the Court of a Contracting State may refuse recognition and enforcement of the award at the instance of an aggrieved party against whom the award is invoked. A party, who has applied for setting aside suspension of the award to a Competent Authority, before whom the award is relied upon by the other party claiming enforcement of the same, the former party may be required by the authority to give suitable security, if it feels inclined, to accede to his request for adjourning the decision on the questions of enforcement of the awards.

The provisions of the New York Convention do not affect the validity of multilateral or bilateral agreement confirming the recognition and enforcement of arbitral award entered into by the Contracting States nor

4. Gas authority of India v SPIE CAPAGE, S.A AIR 1994 Del 75
deprive any interested party of any right it may have under an arbitral award in the manner and to the extent allowed by the law or treaties of the country where such an award is sought to be relied upon. Para 2 of Article VII of the New York Convention repeals the Geneva Protocol and the Geneva Convention.

The New York Convention was kept open up to December 31, 1958 for signature on behalf of the members of the United Nations and also on behalf of any other State which became member of any specialized agency of the United Nations or became a party to the Statues of the International Court of Justice, or any other State to which an invitation was addressed by the General Assembly of the United Nations. The instrument of ratification was required to be deposited with the Secretary General of the United Nations. A contracting State is permitted to denounce the Convention as per the prescribed procedure.

The Geneva Protocol, Geneva Convention and the New York Convention was followed by the parliament of India to match the requirement of international scenario. That’s why India Law have the proviso regarding the written arbitration agreement in the form of Arbitration clauses in the contracts between the parties and have the provision regaling the recognition and enforcements of the awards and have India and become the signatory of the Geneva Convention as well as the New York Convention before the enactment of 1996 Act, India also boron
and follow the provisions from the arbitrator (protocol and convention) Act, 1937.


India was a signatory to both the Geneva Protocol and the Geneva Convention subject to the reservation of limiting India’s obligations in respect therefore to contracts which were considered as commercial under the laws of India. For implementing and giving effect to the Geneva Protocol and the Geneva Convention, the Arbitration (Protocol and Convention) Act, 1937 (hereinatter “the 1937 Act”) was enacted. The objects and reasons of the 1937 Act were as follows-

After consulting local Governments, High Courts and commercial bodies, a majority of whom where found to be in favour of India’s accession to these instruments, the case was placed before the Commerce Department. Standing Advisory Committee of the Legislature who recommended the India should adhere to the instruments. These have accordingly been signed at Geneva on behalf of India, subject to reservations limiting India’s obligations under the instrument to commercial and excluding the Indian States from the scope of the instrument.

After above mentioned protocol and convention, the foreign awards (Recognition and Enforcement) Act, 1961 Came into existence.
The Foreign Awards (Recognition and Enforcement) Act, 1961 (45 Of 1961)

For implementing and giving effect to the New York Convention, the Foreign Award (Recognition and Enforcement) Act, 1961 (hereinafter “the 1961 Act”) was enacted. By virtue of the provisions of section 10 of the 1961 Act, the 1937 Act stands repealed in relation to foreign awards to which the 1961 Act applied.

The 1961 Act was aimed at providing a mechanism for speedy referral of disputes to arbitration between the contracting parties and for speedy enforcement of resultant foreign arbitral awards made in the territory of a State other than the State where the recognition domestic arbitral awards, that is to say, awards shaped on the basis of arbitration agreements governed by the internal system of laws of the State in which recognition and enforcement is sought.

India follow the objects of the foreign awards (Recognition and Enforcement) Act, 1961 and the resent of it that short coming of 1940 set was elixinated by adhering the provision regarding the recognition and enforcement of foreign awards as well as the High Court and Supreme Court of India Plonped a grate role important the atovementioned protocol and Convention, in the awards of arbitration law of India. India also followed the recommendation of GATT and awards WTO to resolve the
regasing the recognition enforcement of the foreign awards. Artrstration Act, 1940 was consolidated and amended the Law relating.

**The Arbitration Act, 1940 (10 of 1940)**

The arbitration Act, 1940 (hereinafter “the 1940 Act”) consolidated and amended the law relating to arbitration as contained in the Indian Arbitration Act, 1899 and the Second Schedule to the Code of Civil Procedure 1908. It was also largely based on the English Arbitration Act of 1934 and came into force on 1 July 1940. It extended to the whole of India except the State of Jammu and Kashmir.

The 1940 Act Contemplates three kinds of arbitration: (i) arbitration without intervention of a Court dealt with in chapter II of the Act which includes section 3 to section 19 (ii) arbitration with intervention of a Court where there is no suit pending dealt with in chapter III which consists of only one section, viz. section 20; and (iii) arbitration in suits, which is covered by chapter IV. It is clear from the provisions of chapter II that after the appointment of arbitrator, the proceedings are to be outside Court, and up to the stage of filling the award intervention of Court is not contemplated unless any occasion arises requiring the Court to remove the arbitrator under section 11. An agreement to submit difference to arbitration implies an agreement to refere the difference to the arbitrator. Section 8 only empowers the Court to appoint an arbitrator where the parties do not concur in the
appointment. Section 20 occurring in chapter III contains provisions for arbitration with the intervention of a Court where there is not suit pending⁵.

Before the impartment of 1996, Act, there was a need to adopt a new law because the 1940 Act, was not according the requirement of the international trade and there were several shortcoming in the Act of 1940, about which the Law commission of India also gave its recommendation in its 76th reports as the commission has received a reference from the Government of India requesting it to undertake revision of the Act⁶. Besides this, a number of subject dealing with adjective law have already been dealt with by the Law Commission subjects covering civil and criminal procedure, evidence and limitation. To complete revision of the major portion of the adjective law, the Commission has reviewed in the Report the entire Act.

The law of arbitration is integrally connected with the question how far parties should choose their own forum rather that that constituted by the law. It is not uncommon or parties to choose a tribunal that is intended to resolve disputes between them. The tribunal might be stipulated in the contract itself or in a collateral agreement, or the tribunal might be agreed upon after the contract has been made and a dispute has arisen. It is the concern of the law of arbitration to decide how far such agreement should

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5. Union of India v. Om Prakash, AIR 1976 SC 1745 (1948)
6. D.O. No. F.8(15)/76-L.C., date 27th July 1977 of the Secretary, Department of Legal Affairs addressed to the Member-Secretary, Law Commission.
operate, and to what extent they should be supplemented by provisions designed to meet points on which the agreement may be silent.

Practical experience of the working of the Act has shown that though, by and large, the scheme of the Act is sound, some provisions have in actual working caused difficulties and have resulted in delay and needless expense. Although we have come across criticism of the Act in one or two judicial pronouncements7, we do not think that the Act suffers from any radical defect or that on that score it should be thrown out lock stock and barrel.

The Commission on a study of the various materials and case law on the subject is of the vies that there is need to improve certain provisions of the Act that cause delay or hardship to the parties, or unnecessarily introduced clogs which hinder the smooth course of the proceedings. Although we had an initial inclination to re-number some of the sections8 because of our feeling that the subjects dealt with in those sections could be more appropriately dealt with at a different place, we realized the importance of adhering to the present numbering. A change in the numbering would have caused inconvenience to lawyers and businessmen who have become familiar with it and would, to a certain extent, have caused confusion.

7. Saha & Co. v Ishar Singh, AIR 1956 Cal 321 (341)
8. Section 30, which was proposed to be transferred earlier, in the group of section 15-17.
In the formulation of a law on arbitration tow conflicting considerations present themselves; on the one hand due weight has to be given to the arrangement made by the parties themselves elating to the personnel and machinery for the settlement of their dispute; on the other hand, unfair or impracticable arrangements have to be modified in the interests of justice.

The desirability of maintaining a certain amount of uniformity of interpretation of the law has also to be borne in mind.

In the Western world arbitration has been known for centuries. An ancient authority on arbitration stated:\textsuperscript{9}

\textquotedblleft It is commendable at the outset of a trial to inquire of the litigants whether they desire adjudication according to law or settlement by arbitration. If they prefer arbitration, their will is granted. A court that always resorts to arbitration is praiseworthy, concerning such a court, it is said, \textquoteleft Execute the justice of peace in your gates\textquoteright.\textsuperscript{9}

What is the kind of justice that carries peace with it? Undoubtedly, it is arbitration: So too, with David, it is said, \textquoteleft And David executed justice and charity unto all his people\textquoteright. What is the kind of justice which carries charity with it? Undoubtedly, it is arbitration, i.e. compromise (thus) even if the judge has already heard the arguments of the litigants and known in whose favour the verdict will be, it is commendable to effect an arbitration….\textsuperscript{9}

\textsuperscript{9} The Book of Judges—Code of Maimonides (1949),66, quoted in Tiwul and Tsegha Arbitration and Settlement of Commercial Disputes, (July 1975) 24 ICLQ93,394.
The (moral) power of arbitration is greater than that or adjudication”.

Therefore on the basis of discussion in preceding chapters and this chapter it be concluded that Indian Arbitration law has an impact of globalisation in the enactment of the Arbitration and Conciliation Act, 1996.