3.1. International Commercial Arbitration in India: Legislative Approach

3.1.1. The Arbitration and Conciliation Act, 1996:

In the field of arbitration it was felt that the Act of 1940 comprises a number of inadequacies in law as well as in practice. In this regard a proposal was made on 27th July, 1977 by Secretary, Department of Legal Affairs stating that as Public Accounts Committee had commented adversely on working of the Arbitration Act due to its delay, enormous expenses and long time spent government was keen to have another look on the provisions of Arbitration Act, 1940 having a view to look whether the enormous delay occurring in arbitration proceedings and disproportionate costs incurred therein could be avoided. Matter was referred to the Law Commission of India to examine it in 1977. Consequently, Law Commission of India in November, 1978 prepared its 76th report.

In case of food Corporation of India v. Joginderpal\(^1\), the Apex Court observed that, “law of arbitration” must be simple with lesser technicality and more responsible to the actual reality of the situations, responsive to the canons of justice and fair play, “That being the command of law pronounced by the highest court of the land it made the Law Commission as well as legislature and thinkers think over the issues rather seriously to consider amending the law.

\(^1\) AIR 1981 SC 2075
An effort was made to promote uniform national arbitration laws across the globe under United Nations Commission on International Trade Law, observed it good, in 1985 to recommend the UNICITRAL Model Law in respect of International Arbitration.

Now it becomes necessary and vital to introduce reform in the existing law related to arbitration. Here a question was aroused that whether the aforesaid 1940 Act ought to be amended or a new law be enacted. Apart from 76th Report, various recommendations from the Indian Council of Arbitration (ICA), the Indian Society of Arbitrators (ISA), the Confederation of Indian Industries (CII), the Federation of Indian Chambers of Commerce and Industry (FICCI), the Associated Chambers of Commerce and Industry (ACCI), were proposed to introduce amendments in 1940 Act.

3.1.2

The Act of 1996 according to 176th Report of Law Commission and its analysis

The 176th report of the commission required a review of the functioning of the aforesaid Act regarding various flaws noticed in its provisions and certain representations received. The Commission considered various representations to point out that the UNCITRAL Model was mainly planned to enable various countries for having a common model for international commercial arbitration. The Indian Act of 1996 has made provisions similar to the model law and made applicable to cases of purely domestic arbitration between Indian nationals and that this has given rise to some difficulties in the implementation of the Act.

Grounds available for objection against an award under section 34 and Section 37 have been made common for domestic and international arbitration awards as well. It was also suggested that the principle of least court interference may be a good principle for international arbitral
awards and in respect to Indian conditions as well and the fact that several awards are passed in India for Indian nationals is sometimes by laymen not well acquainted with the law applicable, the interference with such awards should not be as restricted as they are in the matter of international arbitrations.

The perusal of above passage ropes the vision that in case of domestic arbitrations among Indian nationals, the State can wish from courts to have greater or firmer control on the arbitrations. It is not meant that the Commission was suggesting to excessively increasing court interference in cases of purely domestic arbitration cases. In fact, the Commission had suggested restricting court interference in certain respects than what is permitted by the Model Law and the Act of 1996. It was proposed that all the matters before the court against the award are to be listed for initial hearing and could be disallowed at first sight. A provision similar to Section 99 of Civil Procedure Code was also proposed to introduce to focus that awards should not be interfered with lightly unless substantial prejudice is shown. It was also proposed to eradicate the difficulty created by Section 36 preventing enforcement of award only for an application to set aside the award is filed and is pending and only moving an application should not amount to automatic stay of the award. Further, the commission had proposed to enable the court to impose conditions for compliance with the award, partly or wholly, pending disposal of objections.

Suggestions were made to include in the definition of the word “Court” under section 2(1) (e), the ‘Court of the Principal Judge, City Civil Court in a city exercising original jurisdiction’. An another clause was also proposed to be introduced to permit the Principal Courts referred to in Section 2(1)(e) for transferring the matters before them to Courts of direct jurisdiction. The same clause was considered to get over some judgment of the High Courts that have stated that the
Principal Court in Section 2(1) (e) and restrict the transfer of matters to other Courts. The congestion in the Principal Courts would be reduced as this proposal suggests.

Provisions contained in Sections 8, 9, 27, 35 and 36 were projected to make the availability of arbitration proceedings outside India. In order to enabling the judicial authority Section 8(4) was proposed to be added to decide the subject to the proposed sub-section (5), the preliminary issues as to whether (a) there is no dispute in existence (b) the arbitration agreement is null and void or inoperative (c) the arbitration agreement is incapable of being performed (d) the arbitration agreement is not an existence. Section 8(5) was proposed to be added to say that the judicial authority may not decide the above issues referred to in the proposed sub-section (4), if (a) the relevant facts or documents are in dispute or (b) oral evidence is necessary to be adduced or (c) enquiry into the preliminary questions is likely to delay reference to arbitration or (d) the request for a decision is unduly delayed or (e) the decision on the questions is not likely to produce substantial savings in costs of arbitration or (f) there is no good reason as to why these questions should be decided at that stage.

Trusting upon the above issues, the judicial authority shall either decide the matters or make reference to arbitration. The abovementioned settings were compulsory to see that frivolous jurisdictional matters are not elevated at the initial stage so as to delay the orientation. At the same stage, if the said issues can be decided easily and without oral evidence being adduced, they can be decided and will certainly save costs of arbitration.

Various amendments were wished-for in Section 11 and at the same time care was taken to see that reference to arbitration is not delayed. In sub-sections 11(4) to (12), the suggestion was to replace the words “Chief Justice of India” and the word “Chief Justice” by the words,
“Supreme Court” and “High Court”, so that the appointment of the arbitral tribunal is made on the judicial side. In addition Section 24B was proposed to introduce to enable the parties and the arbitral tribunal when required to approach the Court for the purpose of execution of the interim orders passed by the arbitral tribunal contained under Sections 17, 23 and 24.

It was also proposals to keep delays before the arbitral tribunal under control totally, by amending sections 23, 24 and 82 as also by inserting new sections 24A, 29A, 37A. Proposal was also made regarding time limits for passing awards subjected to extension by courts, however, providing that, the pending disposal of the application by the Court, the arbitration shall continue.

Temporarily there were also contradictory judgments of the High Courts in respect of certain provisions contained under the 1996 Act. Different other aspects regarding the difficulties in functioning of the said Act were also brought to the notice of the Commission. The Commission primarily prepared a Consultation Paper (Annexure II of the Report) and held two seminars, one at Mumbai and another at Delhi in the months of February and March, 2001 and gave wide publicity to the paper by putting it on the website. Retired judges and leading lawyers were invited for the seminars. Various luminaries also contributed in the seminars and submitted their written notes putting forth their suggestions. Suggestions that were not contained in the Consultation Paper were also made and were exhaustively discussed. An in-depth study of the law relating to subject focusing on the position of the law in foreign jurisdictions, the Commission had made various recommendations for bringing amendments in the Arbitration and Conciliation Act, 1996.
Another Committee, popularly known as “Justice Saraf Committee on Arbitration” was constituted to study the seriousness of suggestion of the recommendations of Law Commission of India contained in its 176th Report and the Arbitration and Conciliation (Amendment) Bill, 2003. The Committee was headed by Justice Dr. B. P. Saraf, Retired Chief Justice of the High Court of Jammu & Kashmir. The Committee presented its final report in January 2005\(^2\). The Report made a detailed evaluation of the recommendations of the Law Commission apart from suggesting suitable lines on which the 1996 Act could be amended for improving the system of arbitration in India. In April 2006 the Government made a decision to ‘withdraw’ the Bill from Rajya Sabha, where it was introduced.\(^3\)

3.1.3. **Foreign Awards under Arbitration and Conciliation Act, 1996**

Arbitration and Conciliation Act, 1996 delivers a statutory support for the application of foreign arbitral awards given in countries signatories to either the Geneva Convention of 1927 or the New York Convention of 1958. For the enforcement of a foreign arbitral award in India’s courts, it should be a foreign award under the Geneva Convention or the New York Convention.

In *Bhatia International v. Bulk Trading* the Supreme Court held that “An arbitral award not made in a convention, country will not be considered a foreign award and as such, a separate action will have to be filed on the basis of the award. The New York Convention delivers a common yardstick on the benchmark of which these agreements and awards are recognized and enforced in the countries which have accepted it. Thus, generating confidence in the parties, who


\(^3\) [http://pib.nic.in/release/release.asp?relid=17020](http://pib.nic.in/release/release.asp?relid=17020) site visited on 10 June 2015
may be unfamiliar with the diverse laws prevailing in different countries with which they are trading, the arbitral agreements and awards flowing from it will be respected and enforced by the courts of the states where the enforcement is sought.⁴

In *Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.*,⁵ the Supreme Court considered a question whether the award could be set aside, if the Arbitral Tribunal has not followed the mandatory procedure prescribed under Sections 28, which affects the rights of the parties. Sub Section (1)(a) of Section 28 provides a mandate for Arbitral Tribunal to decide the dispute in accordance with the substantive law for the time being in force in India. Definitely, substantive law would include the Indian Contract Act, the Transfer of Property Act and other such laws in force. For instance, if the award is passed in violation of the provisions of the Transfer of Property Act or in violation of the Indian Contract Act, the question would be—whether such award could be set aside. Correspondingly, under sub section (3), the Arbitral Tribunal is directed to resolve the dispute according to the terms & conditions to the contract and also after taking into account the usage of the trade applicable to the transaction. In cases where Arbitral Tribunal ignores the terms of the contract or usage of the trade applicable to the transaction, whether the said award could be interfered? The Supreme Court opined that interpretation of Section 34 conjointly with other provisions of the Act, it appears that the legislative intent could not be that if the award is in contravention of the provisions of the Act, still however, it couldn’t be set aside by the court. If it is held that such award could not be interfered, it would be contrary to the basic concept of justice. If the Arbitral Tribunal has not followed the mandatory procedure prescribed under the Act, it would mean that it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be set aside under Section 34. Further, the Supreme

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⁴ Gas Authority of India Ltd. v. SPIE CAPAG, S.A. AIR 1994 Del. 75
⁵ (2003) 5 SCC 705
Court held that if the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be patently illegal, which could be interfered under Section 34.

In conditions where the court is satisfied that the foreign award is enforceable, the award shall be deemed to be a decree of that court. An appeal is available against the order refusing to enforce a foreign award under section 48 to the court authorized by law to hear appeals from such order. However, no second appeal shall lie from an order passed in appeal but shall not affect or take away any right of appeal to the Supreme Court, but no appeal lies if the foreign award is enforced.

3.2. Judicial Approach towards International Commercial Arbitration in India

3.2.1. Challenges to the Foreign Awards:

Arbitration law stands on two plinths: - Party autonomy and Finality of award. If these two plinths are misleading by judicial intervention, arbitration law will fail to realise its ultimate objectivity and will lose its spirit. Indian law on arbitration has evolved from undiscriminating judicial interventions, established in the Colonial Act and the succeeding 1961 legislation, to a more advanced Act based on the Model Law; this signifies the importance of minimal judicial interference. Public policy, as a general concept and as a ground for setting aside an arbitral award, is difficult to define. Judicial decisions, regarding the scope of the public policy, that permit near limitless judicial review of the arbitral award serve as a lethal blow to international commercial arbitration.
3.2.2. Intervention by Courts

Speedy arbitration and least court intervention are considered as the main objectives of the 1996 Act. The intervention by the judicial authority is also bar Under Section 5 of the Act. This basic provision is contained in the laws of all other countries that have adopted the UNCITRAL Model. The key objectives set out in the Statement of Objects and Reasons of the 1996 Act are “to minimize the supervisory role of courts in the arbitral process” and “to provide that every final arbitral award is enforced in the same manner equaling to decree of a civil court.” Section 5 under the Act sets a comprehensive bar on the interference of the courts in matters where there exists an arbitration clause. Under the new Arbitration Act, the interference of the Court in all matters connected with the conduct of Arbitration, decision of the Arbitrator and the award has been very much minimized as compared to that under the 1940 Act.

3.2.3. Post Bhatia Case Mystery

Agreed that an India court could pass interim orders before the start of arbitral proceedings, the decision in Bhatia case led to scores of Section 9 applications for interim relief being filed in courts across the country in relation to arbitrations, whether seated in India or outside.

The only carve out that the Court provided for was the parties express or implied exclusion of Part I. There was no guidance on what constituted an implied exclusion of Part I. This only served to complicate matters further since Part I also included important provisions for appointment of arbitrators and setting aside of awards, amongst others. Unclear with whether Part I had been implied excluded or not in specific instances, Indian courts began to appoint

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6 Supra Note 25, Para 4 (v) and (vii) of the Statement of Objects and Reasons
arbitrators in arbitrations seated outside India, for instance in National Agricultural (2007) and Indtel (2008) and permit setting aside of foreign awards, for instance in Venture Global (2008).

3.2.4. BALCO & White Industries

On the day of 6th September 2012, a Five Judge Constitution Bench of the Indian Supreme Court laid down its decision in BALCO v. Kaiser Technical Services Inc. The decision in BALCO came about in the context of several related cases that were referred to a larger bench of the Supreme Court by a 2-judge Bench which was unable to agree on the correctness of the Bhatia decision. A connected case which also came to be heard by the Court along with BALCO and raised the same legal issues is the famous White Industries Case, which as many will know resulted in the first ever BIT award against India.

In BALCO, the Court was of the opinion that it disagreed with the decisions in Bhatia and Venture Global, and that the power to grant interim measures in respect of foreign seated arbitrations or to deal with challenges to foreign awards did not flow from the provisions of the 1996 Act. In doing so, the Court took the view that the ‘board’ interpretation of Bhatia that all of Part I applied to arbitrations seated outside India did not find proper basis in the provisions of the 1996 Act.

A significant take-away from the conclusion is that the Court firmly endorsed the seat of arbitration as the ‘centre of gravity’ of an arbitration particularly to decide jurisdiction of courts in relation to that arbitration. Another is that is clarifies the hitherto murky distinction in India between the substantive governing law of a contract and the law governing the arbitration agreement. Perhaps, most important, is its elucidation of the interpretation of the phrase ‘of the

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7 2012 (9) SCC 552
country in which, or under the guidelines of the New York Convention. While the phrase has been the subject of discussion worldwide, the Court took view that there cannot be concurrent jurisdiction of two separate courts in the seat and the jurisdiction, the law of which governs the arbitrations- it can only be the court at the seat of arbitration who can exercise such jurisdiction to deal with a challenge. Prior to the hearings in BALCO, the Court also invited interested parties to place their views on the issues that arose before the Court. The SIAC was one such intervener and shared the Singapore position on these issues by sharing Singapore decisions on these issues such as Swift Fortune (2007), Sui Southern Gas (2010) and PT Asuransi Jasa (2007) apart from the legislative amendments made to the Singapore International Arbitration Act in 2009 particularly in relation to the power of courts to grant interim measures of protection in respect of foreign seated arbitrations.

India has remained a principally vital jurisdiction for the SIAC. Indian parties have remained the single largest contingent of nationalities arbitrating at the SIAC for the past 3 years with a near 200% growth in the number of cases involving Indian parties in the past three years with cases in various sectors such as trade, construction, joint ventures, energy and natural resources, international trade, shipping and maritime and general commercial disputes, amongst others. Not to be buoyed by the number of cases, it is of some importance that the monetary quantum of disputes involving at least one Indian party has similarly gone up by more than 140% for the same period.

In BALCO case, significantly though, the Supreme Court defines the applicability of its interpretations by postulating that its view of the law only applies to arbitration agreements executed after its decision i.e. post 6 September 2012. In doing so, the Court appears to have been guided by practical considerations and unavoidable issues that may have resulted from
applying its views retrospectively. This promotes exciting issues on the position that Indian courts may to take on pending arbitrations and related litigations as well as future litigations on agreements currently in force, but dated prior to the Court’s decision. It is also of some interest to see if parties re-execute arbitration agreements alone in respect of their commercial contracts in order to fall within the BALCO net.

An interrogation that arises as a result of the gar on Indian courts yielding interim measures of protection in respect of foreign seated arbitrations is the availability of options for parties looking to seek such protective measures against an Indian party or assets located in India.

In this context, the emergency arbitrator provisions under the SIAC Rules present a viable option in as much they have found frequent use in respect of arbitrations involving Indian parties. Of the ten applications that SIAC has received and accepted thus far, involved Indian parties. Interim injunctive and other forms of reliefs granted in these proceedings were either complied with or led to settlements between those parties. Also apt in this context is an observation by the Madras High Court noting the availability of the emergency arbitrator provisions under the SIAC Rules in Unknown (2011) for securing interim reliefs. However, legal debate on the enforceability of the orders of an emergency arbitrator continues. Singapore amended the IAA in 2012 to respectively recognise that an emergency arbitrator would also fall within the definition of an ‘arbitral tribunal’, thereby ensuring the enforceability of such orders, directions or awards in Singapore under Section 12 (6) of the IAA. The decision is a huge positive development for India as it brings in the contour the Indian position with international arbitration jurisprudence and undertaking. This decision is bound to create greater confidence in the Indian legal system and courts. Similarly, it is bound to create greater investor confidence in India, uniformity and
consistency in the judicial approach will only serve well to create a more efficient dispute resolution process for Indian and Non-Indian parties equally.