CHAPTER 6

CONCLUSION AND SUGGESTIONS

When will mankind be convinced and agree to settle their difficulties by arbitration?\(^1\)

Benjamin Franklin\(^2\)

Conclusion

This quote by Benjamin Franklin brings to the forefront, the need for settling disputes with cooperation, negotiation and discussion in an ever shrinking world of the 21\(^{st}\) century. Human interaction over long distances has existed for thousands of years. Philosophies, religions, language, arts, and cultures amalgamate, leading to the exchange of products and ideas. Global movement of people, goods, and ideas expanded significantly in the recent centuries. The development of new forms of transportation (such as the steamship and railroads) and telecommunications have in early 19\(^{th}\) century “compressed” time and space allowing for increasingly rapid rates of global interchange.\(^3\) In the 20\(^{th}\) century, it was road vehicles, steamships and airlines that made communication faster, in 21\(^{st}\) century, it is the advent of electronic communications, most notably mobile phones and the Internet, which have connected billions of


\(^2\) Benjamin Franklin was one of the founding fathers of the United States. A noted polymath, Franklin was a leading author, printer, political theorist, politician, postmaster, scientist, musician, inventor, satirist, civic activist, statesman, and diplomat. As a scientist, he was better known for his discovery and theories regarding electricity. Available at [http://en.wikipedia.org/wiki/Benjamin_Franklin](http://en.wikipedia.org/wiki/Benjamin_Franklin) (accessed on November 20, 2012).

people in new ways. World in the 21st century has shrunk into a global village. Globalization has lead to the unification of the world leading to increased dependence of the countries on each other, in order to provide essential amenities to its people. It has resulted in the tremendous increase in international trade across international borders or territories. Industrialization, advanced means of transportation, globalization, multinational corporations, and outsourcing are the factors, which have contributed greatly to the growth of the international trading system. International trade though has number of advantages for the countries across the globe, but, at the same time different cultures and different philosophies have also generated lot of conflict between the trading nations.

Today the countries have devised the alternate means and ways of resolving their disputes. Traditional method is to get the matter resolved with the help of the judicial settlement in the Court of law by litigating, where one party files suit against another. The proceedings are very formal in nature and are governed by such rules and procedure, which are established by the legislature. The decision is given by the judges taking into account the facts and the concerned applicable laws. The verdict of the Court is binding and not merely advisory, but at the same time, however, both parties have the right to appeal to a higher Court. Major drawback, however is, it takes a numbers of years before the aggrieved party is redressed, as there is a long procedure of appeals and re appeals.

Alternate, to this is the new forms of resolution of disputes in form of mediation, conciliation and arbitration etc, popularly known as Alternate Dispute Resolution (ADR’s) methods. ADR are usually preferred by the parties to resolve their disputes because they are perceived to be greatly flexible, considered to have costs below those of traditional litigation, and speedy resolution of disputes, as among some of the added advantages. However, the involvement of the third
party is preferred more and more by the people where large sum of money is involved, and people want effective remedy in the shortest possible span of time. Ending up in the national Courts of other countries is the worst fear which traders have in mind, as it lead to the apprehension of bias and long delays before the real and effective remedy for these people can be thought of.

Consequently, arbitration emerged as is one of the most effective methods of dispute resolution today. However, it is submitted that from its nascent stage, in which only neutral persons were involved to solve the dispute, today, it has become increasingly complicated with the of emergence of number of institutions, conventions and rules regulating the process of arbitration. It is a dynamic process of providing remedy to the aggrieved parties and has changed with the change in time. One of the most imperative advantages of the arbitration is that it is not rigid. As the people can have difference within the same house, same country and also between those who live thousands of miles away from each other, arbitration can be used for settling differences which arise within the country and it can also be used to settling disputes where some foreign element is involved. However, the only difference is the application of different set of rules.

Further, arbitration can be used to solve the issues which are of international significance, such as the dispute relating to the demarcation of the boundary between two countries or for ascertaining the liability of the parties, for example as in the case of a war, but nowadays it is used more fervently for settling the commercial disputes between the parties. Even the international conventions which deal with arbitration exclusively state that, they will be concerned only with the settling of the commercial disputes. As stated above, there is no bar in using arbitration for the resolution of disputes other
than those which are commercial, but the primary focus of the conventions is on the resolution of the commercial issues.

The term 'commercial' is a wide term which is capable of varied interpretations, but looking at the kind of the transactions that take place, ranging from the supply of the food items, to the supply of the aircrafts, to the transfer of the services and technologies, the word commercial should not be confined to the doctrinal traps of the literal meaning of the term. International conventions relating to the arbitration are silent about the meaning of the word and it should best be left open to include every small transaction that encompasses the buying and selling and where profit in terms of money is generated. In the international conventions on arbitration, parties are given liberty to make their own decision in interpreting the meaning of the term commercial according to the rules and notions prevalent in their countries.

Beside, conventions, there are number of institutions that have appeared in the recent times and which have well developed rules relating to arbitration. There is no special procedure for their incorporation in the contracts between the parties. Simple reference to them in the arbitration agreement will suffice the application of the rules laid there under. Practice of international commercial arbitration suggests that these rules have been very effective as they are constantly updated, contain detailed provisions where arbitration can run into difficulties, have trained staff helping the parties and they are most apt for the commercial and fast paced world of toady. However, the institutional rules being already framed, the parties cannot pick and choose from the provisions. These rules act as complete code if there name is mentioned in the arbitration agreement. But still, it can be concluded that the parties which enter commercial relationships, should mention the name of one of the established institution taking into account the above mentioned advantages.
Today, as has been seen in the course of this study that arbitration has developed as very successful mode of resolving disputes, but at the same time it is also observed that the process requires certain essential characteristics to make the machinery of arbitration going. Arbitration agreement is the most important agreement on which the entire arbitral process is dependant. It is the central and the focal point of the entire arbitral process which is required for the setting the arbitration process into motion in the beginning and at the end, for the enforcement of the award. It is a document which ascertains the rights of the parties according to the rules and the laws which are mentioned and which impinge upon the arbitration. International conventions and the national laws on arbitration require some degree of the formality while drafting the same, as this agreement is vital, which will give the powers to arbitrators and at the same time relief to the parties, in consonance with laws which are there to regulate the process of arbitration.

It can further, be concluded that, apart from the arbitration agreement, the laws, which are applicable to the arbitration are very important and they will have bearing on the outcome of the disputes. International trade is subjected to the laws, which knowingly or unknowingly, endure reflection on the transactions, moment they cross the various national boundaries on its journey to the final destination. In international trade, with the every change of the country there is different set of rules that becomes applicable. Each and every country in the world has it social, economic and political setup, which provides the grounds for the countries to frame legislations which are best suited for the growth of their people and the country as a whole. To regulate their transaction, the parties have numerous choices which are available, and they can range from the choosing the national law of a particular country or general principles which are applied in the well developed countries or rules which are prevalent in the trade
associations. Some countries have narrow outlook, where as other might have the broader stance on the private process of resolution of disputes, but since, the choice laws, lie with the parties, they ultimately have to accept the final verdict which is made pursuant to their choice and there is every possibility of the different out come on the same issue in two different jurisdictions whose laws are applicable.

It can further be stated that, every process be it an administrative, executive or legislative, it requires efficient and learned personnel to use them and apply them for the benefit of the people. In the similar vein, the justice delivery system is dependent on the judge or juror who is sitting and deciding the issues, and contrary to it, in arbitration, it is the arbitrator who has the steering wheel to push and carry the process of arbitration further. Right and the liabilities of the parties are dependent on the arbitrator, so, it is required that he should apply his mental faculties and give reasonable and sound judgment which ultimately rests the dispute between the parties. In contrast to the Courts, the numbers of the arbitrators that will decide the dispute will be dependent on the choice made by the parties, and in case the parties have not mentioned about the number, the same will be decided according to the rules that are applicable. But important point to be stressed is that, all the arbitrators should deliberate, discuss and then reach any conclusion by stating their reasons for the same.

Further, the parties should accept the decision of the arbitrator which in arbitration is known as ‘award’. To be an effective remedy, which decides for the parties’, award should be made after thorough analysis of the matter, taking relevant rules into account, stating the reasons for reaching to that particular conclusion and expressing separate, dissenting or concurring opinion which is formed by the arbitrators in the course of the arbitral proceedings.
But, relief provided to the parties by a way of award, does not automatically come into operation, since, international commercial arbitration is not confined to the territory of one particular country. Hence, in international atmosphere in order to give effect to the award, international conventions have come to the rescue of the parties. A number of conventions have been formulated to streamline the process of arbitration. Initial conventions, only focused on first hurdle, to bring the countries out of the clutches of an idea, that justice can be rendered out of the traditional Courts. These conventions only stressed the countries to give effect to the arbitration agreement where the parties have chosen it to resolve the matters which have arisen between them, and to enforce the awards made pursuant to it in the signatory countries. But the strongest anchoring point between the awards and their enforcement is the New York Convention, 1958.4 It is the strongest pillar and thumb hold of the entire arbitral process. It can be concluded that it one of the most triumphant convention which has synchronized and coordinated the rules relating to the effectual granting of remedy to the parties. However, it can be concluded that New York Convention although, has played its part in laying down a very limited number of grounds on which the enforcement of the awards which has been validly made can be refused enforcement, but it is further, time and again emphasized that a narrow interpretation should be given to the grounds stated in the New York Convention. But the experience which has been gathered from the practice of international commercial arbitration illustrate that still countries have given different interpretation to the same provisions of the Convention, which has resulted in the conflicting decisions and consequently, award made pursuant to it have been refused enforcement. Further, it can be concluded that one the shortcomings of the Convention is that, it was formulated during

4 For details see Supra chapter 2 and chapter 3.
the time when the means and ways of communication were limited, and the traditional and safe way of entering into contracts was the written and the signed agreement between the parties. But, the changes which the world has witnessed today in the modes of communication are beyond imagination and which indeed have changed the paradigm of the trade. Stringent requirement of the contract to be in writing under the said Convention has resulted in the refusal in quite a few numbers of cases. It can be concluded that, considering the changes which have taken place, the Convention should be amended to make it more effective and to obtain the uniformity between Convention and the domestic laws, who have incorporated the much needed changes as has been recommended by the UNCITRAL\textsuperscript{5} Model law.\textsuperscript{6}

In case of our country in the work it has been studied, that a number of legislations have been passed both during the time India was subjected to the control of the British and after India got its independence. Presently, the legal regime relating to arbitration is contained in the Arbitration and the Conciliation Act, 1996.\textsuperscript{7} It is one of the most detailed, comprehensive and wide ranging law on the subject in India. This Act has brought the practice of arbitration in India in unison with the rest of the world. It is one of the most notable laws on the subject which has clearly demarcated between the domestic and international commercial arbitration. The Act is more responsive and contemporary in its outlook and has laid down least possible requirements for the enforcement of the foreign awards.

But the said statute suffers from the following drawbacks:

(i) Under Part II of the Act which deals with the enforcement of foreign awards, review of the award on merit is not possible as this part does not specify the procedure for

\textsuperscript{5} Ibid.
\textsuperscript{6} Ibid.
\textsuperscript{7} For detail see Supra Chapters 2 and 5.
challenging the awards in India. It can be concluded that
if the awards does not fall foul of the provisions which
are laid down in the Act\(^8\), which are the only grounds on
which refusal is possible, the award which has been
validly made will be enforced in India. However, it can
further be construed from the practice of the Indian
Courts that judges have gone wrong in their interpretation
of the law which has been clearly laid down, leading to
the confusion and apprehension in the minds of the
foreign investors that, India can never come out its
parochial outlook toward the foreigners and the foreign
companies trading in India.

(ii) Provisions of Section 44\(^9\), have been wrongly interpreted
by the Courts and they have concentrated more on the
applicable law than on the international character of the
parties to deny enforcement of such awards or subjecting
them to review under the Part I which is distinctively
designed to deal with the domestic matters. By applying
the close-minded approach the Courts have considered the
awards as Indian awards, where the law dealing with the
substantive issues is the Indian law, and consequently,
award made pursuant to it as domestic award. As a result,
of this insular attitude, the foreign awards have been set
aside under Section 34\(^{10}\) of the Act, practice which has
greatly harmed the reputation and have reflected badly
upon the justice delivery system of India.

(iii) Further, another grey area is the concept of the public
policy which has time and again been used by the judges

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\(^8\) Ibid.
\(^9\) Ibid.
\(^{10}\) Ibid.
to reject the enforcement of the foreign awards in India, since, the term is not capable of any precise definition. Court have used it in widest possible manner to reject the awards which violate only certain provisions, to be construed as the awards, in conflict with the most fundamental policy India, or not in the interest of India and lastly against justice and the morality of India. It can be concluded that, this blinkered approach of the Indian judiciary is not in the tune with the current international practice, as foreign investment and the foreign investors play a very important role in the upgrading the economy of the country. But, it can be further be stated that, the scenario is not so appalling, as the recent decision of the Supreme Court in which the Court stressed upon giving narrow interpretation to public policy and not to subject the international award to challenge under part I, an approach which definitely has brought new beam of sunlight in the sky filled the dark grey clouds.

Suggestions in regard to International Commercial Arbitration

To make arbitration an effective mode, leading to the streamlined and harmonized approach there are certain indispensable changes which are required to be made. The following suggestions, if implemented will try to achieve the uniformity in the process of international commercial arbitration as a dispute resolution method.

(i) Since, one thing which is very pertinent in the present times is that, international trade today is the backbone of the commercial world. Countries in the world cannot survive without dealing each other for their needs and existence. International trade helps in generating revenue for the country, and in order to attract foreign investment
sound domestic as well as foreign policies are required. However, it can also not be negated that, in the era of globalization, where transactions worth millions take place every day and with equally large participation of the people, differences are bound to happen. Disputes are, but a, natural phenomenon in the international scenario. In international trade, time being the essence of the contract, it is submitted that parties should settle their disputes in shortest possible span with help of one of the extrajudicial methods as they are relatively quick and less time consuming in providing relief to the parties. Consequently, a number of extra judicial methods are available which parties can opt for inorder to solve the issues which might arise in the course of the international commerce. Parties can have the option of choosing mediation, conciliations, expert determination or arbitration etc, which are also known as the Alternative Dispute Resolution methods (ADR’s). Moreover, disputes can also arise where one of the parties to the transaction is country or its agency which is acting on its behalf. In case of the dispute with the country, it is difficult to compel the Country to subject itself to the jurisdiction of the national Courts. Since, there is invariably massive involvement of the countries in the international trade; alternative dispute resolution methods are the best option as they help in keeping the integrity and the sovereignty of the nations intact, by not subjecting them to the jurisdiction of other Courts. Therefore, it is suggested that in the present world comprising of the varied, modern and quick methods of communication in which the contracts are executed with the blink of eye, the
dispute resolution with the aid of ADR should be promoted and strengthened.

(ii) Secondly out of various dispute resolution methods, which parties can opt for, arbitration being the preeminent due to the binding nature of its decision, it is submitted that Parties who enter into contract should incorporate arbitral clause in the contract in order to avoid any confusion later.

(iii) Arbitration can be used for settling disputes which arise within the country and for the disputes that arise out of the national boundaries. To ascertain, if the dispute is ‘domestic’ or not is relatively easy, as the parties are from the same country. But, same is not true in case where subject matter of dispute is associated with more than one country. At present, one approach that is used to decide the international character of the arbitration is to concentrate on the place of the residence of the parties or their usual place of business whereas other approach is to concentrate on the subject matter of the dispute. But, it is suggested to the countries that, rather than concentrating on one approach they should consider the arbitration as international if the parties involved are from the different countries or the subject matter of the dispute has foreign element involved, or where the parties are from the same country but the part of their transaction has to performed in other country and lastly where the parties declare that subject matter relates to more than one country. This interpretation of the term ‘international’ will widen the scope of the enforcement of the awards which have resolved the issues between the parties staying in the
same country but they have their contract to be performed in other country.

(iv) International arbitration can be used for settling non-commercial matters as well as commercial matters. Certain problems have been encountered in regard to interpretation of the commercial transactions. Being sovereign countries, there is liberty which each country has in order to decide as what it considers to be a commercial matter. However, the freedom given to the countries has been misinterpreted, and as a result thereof in some of the countries like India, narrow interpretation to the word ‘commercial’ has lead to refusal of the awards. Even international treaties have not attempted to define the term ‘commercial’. UNCITRAL Model law though, has not provided the definition of the word commercial but it has with the aid examples try to enlist various transactions which can be considered as commercial. But it cannot be inferred from the suggestions made by the drafters of Model Law to take those examples to be exhaustive. It is suggested that in order to resolve the matter through arbitration in an effective manner, countries should come out of their conservative approach and considered every matter where there is normal selling and buying of the goods as a commercial transaction capable of being resolved through arbitration. It is also suggested that no attempt should be made to define the word ‘commercial’, it should be kept open ended with focus on the liberal interpretation in the interest of promotion of international trade and commerce.
Arbitration like any other process, determining the right and the obligation of the parties require the support of some legal regime to progress. In international commercial arbitration parties can either frame their own rules or can simply specify the name one of the established institution in the arbitral clause, rules of which will then become automatically applicable to decide about the liabilities of the parties. Where parties frame their own rules they have greater degree of freedom to decide the procedure according to their wishes. Seeing the gravity of the issue at hand, parties can deliberate and choose the number of the arbitrators, the country in which the arbitration is to be conducted, proper law that will apply to their situation etc, however, with only disadvantage that as the parties are in dissonance with each other, the assistance and cooperation which is needed at the various stages of arbitration might not come, which in turn may leads to uncertainty. It is therefore, suggested that parties should opt for institutional arbitration as rules are laid down there are carefully drafted, taking into account the practice on international commercial arbitration. It is also proposed that, before incorporating the name of the institution, the parties should make sure that the institution is in existence. Further, the provisions regarding the conduct of the arbitration are updated from time to time and the rules laid down are in conformity with the present international commercial practice. Rules relating to the validity of the arbitration agreement, rules relating to the choice of the arbitral tribunal in case the parties have not mentioned about the number and the way the arbitrators are to be chosen, rules relating to the granting of interim
measures, rules relating to the power of the arbitrator in regard to the decision on its own jurisdiction, rules relating to the time limits, to the way the award is to made, etc should be clearly mentioned in the rule book of the arbitral tribunal. Another grey area of concern in regard to institutional arbitration is that sometimes, time limit is laid down in the institution rules within which the decision is to be given. It is submitted that these time limits which have been laid down should be removed, as in order to follow the time line, sometimes, the arbitrators may not give equal chance to other party to present its case. However, though institutional arbitration can be little expensive, but still, it is effective and can save considerable money in case parties initially opting for the adhoc arbitration later see the process of resolution being stuck because of the lack of the cooperation.

(vi) As arbitration is genesis of arbitration agreement, in order to make it more effective, it is suggested that arbitration agreement should be drafted in a very clear and unambiguous manners. It also suggested that, there should be valid agreement to arbitrate, irrespective of whether it is incorporated in the main contract as arbitral clause or has been entered into after the dispute has arisen in the form of submission to arbitration. The countries should also consider, the arbitral clause separate and distinct from the main contract because in some of the countries, main contract and the arbitral clause are considered to be part of one contract in which the repudiation the main contract will also lead to refutation of the other. Main contract lays down the terms
and condition of the contract and the arbitral clause the mode of ascertaining the liabilities in case of breach, so, they are separate. Hence, it is suggested that, the countries should regard the two contracts as separate from each other as only then it will act as a bar for the parties who wish to renounce the contract and shy away from its responsibility.

(vii) National laws on arbitration and International treaties on the commercial arbitrations press on requirement of certain formal features in the arbitration agreement which should be there in order to regard it as valid agreement. Invariably it has been seen one the most important requirement for the agreement to be valid is that it should be in writing and signed. It is submitted that, this has proved to be stumbling block in the enforcement of the award which though are validly made but are not signed or written in the technical sense of the term as in the present times it is possible to execute contracts without actually writing or signing the contracts. It is therefore, suggested, that countries should amend their laws in order to remove the strict requirement of writing and signature and should bring it in consonance with the modern digital online agreements and signatures.

(viii) Since, one of the other requirements of the valid agreement is that the parties must have the capacity to enter into contract with each other, and it is essential that capacity is to be seen from the point of the view of the relevant law that will be applicable to the parties, to the disputes, as well as according to the law of the place of the enforcement. The parties should also check the relevant laws before mentioning them in their contract, as
these laws play an important role in enforcement of the award ultimately. If one of the parties to the contract is the state or the agency of the state then it should be checked whether it is allowed to resolve matter through the private mode rather than through the Courts which are constituted to provide relief to the aggrieved. If they are not allowed by the concerned government or the constitution of the state agency or they require authorization from the appropriate authorities in this contest, it is suggested that the parties should enter into contract with the state only on receiving appropriate authorization, otherwise, it will be a ground for the refusal of the enforcement of the award on the ground that contract was void or inoperative or not capable of being performed.

(ix) Further, the subject matter of the dispute should be arbitrable, in other words it should be capable of being resolved through arbitration. As the present research has revealed that many times relief through arbitration is refused in many countries on the ground of subject matter of the dispute being incapable of settlement through arbitration. Whether some issue is arbitrable or not is ultimately to be decided according to place of the enforcement but it is suggested that the parties before entering into contract should keep in mind that the issues relating to granting of the intellectual property rights, anticompetitive practices, bribery, corruption and criminal matters are considered not arbitrable and they accordingly should avoid referring such matters to arbitration.
(x) It is also stated that a number of the laws are relevant in the conduct of the arbitral proceedings. As is seen in the course of study that the law that will deal with the arbitration agreement is important from the point of view of adjudging the validity of the agreement. So it is proposed that, parties should clearly mention it in their agreement, as later if nothing is expressed, then there is no clear answer as to which law is applicable and the arbitral tribunal will generally assume that the parties want the arbitration agreement to be regulated by the proper law. It is suggested that parties should either mention about the law or if not mentioned, then tribunal should take into consideration the law of the place and the proper law into account while ascertaining the validity of the contract.

(xi) The law of the place of the arbitration has very important role to play in the conduct of the entire arbitral process. It is suggested that before choosing any particular place or country as a place of arbitration, parties should thoroughly go through the requirement of the laws of that country. If law of the place of arbitration has some of the mandatory provisions, they should be followed, otherwise, the award will not be enforced as award has to valid according to the law of the place of the arbitration. Therefore, it is suggested that parties should choose the law of only one country to regulate the arbitration. In case they choose law of two countries that will complicate the matters unnecessarily and arbitral tribunal has to go and compare the two which will add more to the expense and to complications.
(xii) The parties have to choose the governing law that will decide the core issues in the dispute. It is further, proposed, that the parties before making the choice should check the law which they are incorporating as the proper law. The main thing to be kept in mind is that the law should be detailed and should be abreast with the modern practices of international commercial arbitration. Out of the varied choices that are available to the parties in form of a choice of a domestic law of a particular country, public international law, and general principles of the law or the combination of two systems of law or law of the business communities, known as the law of the *lex mercatoria*, it is suggested that, the parties should choose domestic law of the particular country along with the general principles of the law that may be applicable. In this way the parties will have definite set of rules of the well developed legal system of the country along with the general principles which can be used by the tribunal to decide on the grounds fair, reasonableness and according to the principles of equity. As the study has indicated, that this choice works well when one of the parties to the transaction is the state and as it can always change its law to the detriment of the other party but the choice of a national law along with the general principles will rescue the party hence, it is proposed that the parties should make such a choice.

(xiii) Number of the arbitrators should be mentioned by the parties in the arbitration agreement. It is suggested that, although number can be mentioned, but parties should not mention about the qualification and this is mainly because the arbitration laws and institutional rules are
silent as to the qualification of the arbitrators and parties should not stipulate the qualification requirement, as it is difficult sometimes to find the arbitrators with the same qualification.

(xiv) The award means the decision which is given by the arbitrators when they finally decide all the issues between parties. Final award means the last award, in the sense that it will dispose of all the issues which had arisen between the parties. Sometimes the arbitral tribunal has to decide certain issues at the onset like the issue of the jurisdiction or the question of the liability or the question of the applicable law. Decisions given by them in these situations though are known as partial award, but it is suggested that even if they are termed as partial awards, they are considered as final in the sense that the tribunal has decided in regard to one aspect of the dispute which is final and can be subjected to the annulment proceedings. It is suggested that, procedural order and the decision of the tribunal are two different things. Procedural orders, such as the production of the documents, only help in moving the arbitral process forward but the partial award decides finally on one aspect which can be challenged. The tribunal should give decision keeping in mind the ambit of sphere of its activity. Any decision which is given by the tribunal which falls out of the arbitration agreement will be a ground for refusal of the enforcement of the award. It is also suggested that arbitral award should be in writing and arbitrators should provide reasons for arriving at their decision. Reasons should be given even if it is not provided in the arbitration agreement or in the provisions
of the law of the place of arbitration. The tribunal should follow the due process and give equal chance to each party to present its case. Time lines laid down should normally be followed by the tribunal while deciding the case. In case the time lines are short, they should be extended with the agreement of the other parties where as it is seen that time lines are extended without the consent of the parties which lead to the refusal of enforcement..

Suggestions in regard to New York Convention

New York Convention is one of the most noted and the successful Convention relating to the enforcement of the foreign awards. Some people suggest that it has become too old and should be repealed. However, it is suggested that Convention has been very successful in last 40 years to harmonize the law relating to the enforcement; only certain provisions of the said convention, require amendments in order to bring it in line with the international changes which have taken place since the time it was formulated. It is therefore, suggested that instead of replacing the said Convention altogether, following changes can be incorporated to make it effective:-

(i) Article 1\(^{11}\) of the convention provides for the enforcement of the arbitral awards which are given in the countries other than the country where its enforcement is sought. However, article 1 (3)\(^{12}\) says that countries who ratify the convention can declare that they will only enforce the awards which are given in countries that have ratified the convention. This restricts the scope and the application of the convention. It is suggested that the reciprocity

\(^{11}\) For detail see Supra Chapters 2,3 and 4.

\(^{12}\) Ibid.
reservation in the Art 1 (3) should also be removed as it limits the application of the New York Convention and award which are given in any country should be enforced. This will strengthen arbitration as the process of the resolution of the dispute.

(ii) One provision where the convention has proved to be problematic is Art II(2)\textsuperscript{13} which requires the agreement to be in ‘writing’ and ‘signed’ or contained in the documents which are exchanged between the parties. In the course of the research work, however, the perusal of the practice of international trade suggests, that transaction nowadays are possible on the phones, through e-mails with the help of the third parties where the people enter into a binding relationship without meeting each other. It is suggested that, keeping in light the changes which have taken in regard to how these agreements are to be concluded, it is strongly suggested that, the countries and the Courts where these agreement are interpreted should be given liberal interpretation. Form should not be given prominence over the substance. It is also suggested that countries who lay stress on the writing requirement of the agreement should accept the agreement which, though have not been made in the formal and traditional manner by writing or by signing but which have some written record of its existence, as valid. It is suggested that, the countries should follow the approach which has been laid down in the revised\textsuperscript{14} Article 7 of the UNCITRAL (United Commission on

\textsuperscript{13} Supra note 3.

\textsuperscript{14} Model Law was amended by the General Assembly resolution 61/33, to include change to Article 7 on the writing requirement in 2006.
International Trade Law\textsuperscript{15} Model Law\textsuperscript{16} on the arbitration which stipulates that the agreement will be valid if some written record of its existence can be proved by the parties as this approach be in line with the present and the future means by which the people will enter into agreement with each other and covers the situation which will help in the enforcement of the award. Further, it also proposed that, the parties who want to resolve their differences thorough arbitration should check the requirement of particular form in which the contract should be made before incorporating the name of the country where the arbitration will be conducted.

(iii) Further, another article which requires amendment is Article V (1)(e)\textsuperscript{17} which states that in case the award has been set aside it should be ground for the refusal of the enforcement of the award. It is suggested that, although the New York Convention which has rectified the words which were used in the Geneva Convention 1927, that award should have become \textit{binding}, but still the current position is that if the award has been set aside in one country it acts as bar for the party to get it enforced in other country, is not tenable. It is therefore, proposed that such awards should be enforced in other countries provided they do not interfere with the most fundamental norms the enforcing countries. Further, the permissive language used in Article V has also lead to confusion which should be rectified.

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{15} Supra note 5.
\item\textsuperscript{16} Supra note 6.
\item\textsuperscript{17} For detail see Supra Chapters 2 and 4.
\end{enumerate}
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(iv) Another ground which has led to considerable debate is ground of public policy and it is a ground on which awards are refused enforcement, the concept which varies from one country to another. It is seen that countries have made the ambit of the term so wide that even the violation of even certain provisions of their domestic Acts have been taken to offend the public policy of the country. As the word is not capable of any precise meaning so it is suggested that Art V (2) (b)\(^{18}\) should be amended to make it more specific by enumerating what can come under public policy.

Suggestions in regard to India's position on Recognition and Enforcement

(i) Indian Arbitration and Conciliation Act, 1996\(^ {19}\) contains law relating to arbitration in India. Arbitration Act of 1996 is based on UNCITRAL Model law and is in line with present international practice on international arbitration. But decisions given by Supreme Court, in the recent years, have resulted in wrong interpretation of provisions of the new Act.\(^ {20}\) It is suggested that, judges in Indian Court needs to clearly follow the dividing line which has been provided in the Act, separating the domestic awards under part I and international awards under part II.\(^ {21}\)

\(^{18}\) Ibid.

\(^{19}\) Supra note 7.

\(^{20}\) For details see Supra chapter 5.

\(^{21}\) However, after following the wrong interpretation for a decade Supreme Court corrected its stance in Bharat Aluminum case in September 2012. This is welcome decision and has corrected the position in regard to the enforcement of the foreign awards in India.
(ii) India has opted for the reciprocity reservation under the New York Convention, according to which in India will only enforce those awards which have been given in the countries which have been notified in the official gazette of India as the countries which have ratified the convention on reciprocal basis. It is suggested that, this has limited the enforcement of the awards, as number of countries have ratified the convention but they have not been notified in the official gazette of India, as the countries accepting the convention on reciprocal basis, which means that award given in these countries will not be enforced in India. Therefore, India should remove the reciprocity reservation or should notify the countries in the official gazette to improve enforcement.

(iii) It is further, suggested that, the Supreme Court in the number of decisions like the 'Bulk Trading'\(^{22}\) have wrongly decided that the Part I is applicable to the foreign awards, the approach which is not in unison with the provisions of the Act. In others words, it also suggests that the foreign award could be challenged under the section 34 which otherwise deal with challenging domestic awards. It suggested that, Indian Courts are required to come out of their parochial outlook and start looking at the awards which have been made in other countries as valid based on the sound principles of law after taking all the facts and circumstances into account. It is suggested, since, there is no provision in the present Act, to review the foreign awards, the judiciary should be mindful of the fact and should respect the intention of the legislature in making the clear demarcation between the

\(^{22}\) For details see Supra Chapter 5.
domestic awards which can be reviewed and the international law for which there is no such provision.

(iv) Further, it is further suggested that, only provision on the basis of which the awards can be refused enforcement are the grounds mentioned in section 48 of the Act, which are to be proved by the parties resisting enforcement. However, under the same provision Courts in India can refuse the enforcement of the award if it offends the public policy of the country. It is suggested that, again, the Courts have given very wide meaning to the word public policy and they have gone far in deciding that even the violation of the certain provision of the Act, has been seen as tantamounting to offending the public policy of India. It is suggested that, narrow meaning should be given to the term public policy and only where the awards offend the most fundamental features, is not in the interest of India or is against the justice and morality, should they be refused enforcement.

(v) It is suggested that foreign awards should be to be enforced in India as a decree of the Court as has been laid down in Act, without reviewing them on merits. However, Supreme Court had followed the dogmatic outlook in past few years which will result in making investors apprehensive and have made them more reluctant to deal with India and thus reflecting shoddily on the reputation, as it is seen as the country which will always be hostile to the foreigners, in spite of the changes which have taken place in the world and seeing the dependence that we have on the developed courtiers for fulfilling the needs of our people as we are not self sufficient and still have to cater for 1.27 billion people in India. Decision like
Renusagar\textsuperscript{23} and Bharat Aluminum\textsuperscript{24} should be followed in order to promote international trade and along with it economy of the country.

(vi) It also suggested that, organization on the lines of World Trade Organization should be created which should harmonize the law relating to the enforcement of the awards. International conventions are agreements which are signed by the countries and countries can interpret the provision of the agreement according to their own standards and rules. But organization will have the trained staff, uniform rules, judges or tribunal which not being associated with any particular country, will interpret the provision of the agreement signed under the organization with the broader outlook to provide relief to the aggrieved party, and will result in more organized and harmonized approach to the enforcement of the awards.

In brief, if the above said suggestions are incorporated both in international and national arbitration regime, it would go a long way in strengthening and promoting the settlement of commercial disputes through arbitration.

To quote Wayne Dyer:\textsuperscript{25}

\begin{quote}
When we change the way we look at things, the things we look at change.\textsuperscript{26}
\end{quote}

\begin{footnotes}
\begin{itemize}
\item \textsuperscript{23} Ibid.
\item \textsuperscript{24} Ibid.
\item Wayne W. Dyer, PhD., is an internationally renowned author and speaker in the field of self-development. He’s the author of over 30 books, has created many audio programs and videos, and has appeared on thousands of television and radio shows. Available at http://www.drywaynedyer.com/ (accessed on November 20, 2012).
\end{itemize}
\end{footnotes}