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Challenges and Prospects of International Commercial Arbitration in India

by
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The increasing growth of global trade and the delay in disposal of cases in courts made it imperative to have the perception of the alternative dispute resolution system more particularly, in the matter of the commercial disputes. This alternative mechanism of the court room litigation can be grouped under two broad heads. The Jurisdictional (the decision being binding) and the non-jurisdictional (decision not being binding). While the arbitration does fall under the first category, the conciliation, mediation, negotiation, mini trial etc belong to the latter. Long back in the year 1985, the United Nation Commission on International Trade Law (UNCITRAL) adopted the Model Law on International Commercial Arbitration and handed over the Model law to the Governments willing to enact this. Feeling the need to revamp the arbitration law in our country, the Govt. of India too enacted the Arbitration & Conciliation Act, 1996 after giving due consideration to the UNCITRAL Model Law. It is to be noted that in order to provide an effective and expeditious dispute resolution mechanism in India, to attract foreign investment and also to reassure the international investors in the reliability of the Indian legal system, the legislator enacted the 1996 Act (the Act) repealing the earlier three legislations, i.e. the Arbitration Act, 1940, The Foreign Awards (Recognition and Enforcement) Act, 1961 and the Arbitration Protocol Act, 1937. It is also to be noted that under the aegis of Globalization & Economic liberalization, India too heavily leaned in favour of arbitration which is considered to be the most efficacious & preferred mode of dispute resolution system. India has been dreaming to make this subcontinent as a hub of international commercial arbitration and this dream can turn into reality only when the country will witness the multifold growth in the following three areas: Firstly, a committed judiciary to ensure least intervention in the arbitration, secondly, the growth of world class institutions committed to conduct as well as encourage arbitration as the best alternative to litigation for the amicable

settlement of commercial disputes and finally an efficiently drafted legal framework within which the arbitration shall be conducted.

ROLE OF THE NATIONAL COURT: SUPPORTIVE OR INTERVENTIONIST?

There is a consensus in the business community that arbitration is the principal method of resolving commercial disputes and this has led the arbitral process to distance itself from the risk of domestic judicial parochialism.[1] Indian arbitration law has seen a sea change in the last couple of years especially after the decision of the Supreme Court in *Bharat Aluminium Co.* v. *Kaiser Aluminium Technical Services Inc.* (2012), popularly known as BALCO.[2] The issues of applicable law, seat, venue and the jurisdiction of the Indian court in a foreign seated arbitration have been set at rest by the aforesaid decision of the Apex Court in India. The potential intervention of the Indian courts over the foreign seated arbitration especially after the decision of the Hon'ble Supreme Court in *Bhatia International* v. *Bulk Trading SA* (2002) became a major concern for the foreign investors. In Bhatia International the Court held that

Part I of the Indian arbitration Act shall be applicable even to a foreign seated arbitration until and unless the application of part I has been excluded either in express terms or by necessary implication. As a result of the decision, in an arbitration between one Indian party and a Swiss party, and the arbitration taking place in London, the Indian court will have jurisdiction to deal upon the matters which are enumerated in part I of the Act. The extension of the application of the Act vis-à-vis the extension of the jurisdiction of the Indian courts in a foreign seated arbitration faced widespread criticism from the international arbitral community. Further, the jurisdiction of the Indian courts in a foreign destined arbitration was extended not only in the matter of granting interim measures as decided in Bhatia case[3] but also in the matter of the appointment of arbitrator[4] and setting aside a foreign arbitral

award[5]. This overreaching approach of the Indian judiciary has been remedied to a large extent by BALCO where the Constitutional Bench of the Hon'ble Supreme Court overruled its much criticized decision in Bhatia International and made it abundantly clear that part I of the Arbitration and Conciliation Act, 1996 would not be applicable to arbitrations with a foreign seat. This was a highly welcoming decision of the Hon'ble Supreme Court as the decision consolidated the golden principle of commercial arbitration — i.e., 'Least Judicial Intervention'. In fact, during last few years a series of court decisions in India have strengthened the pro arbitration stance in the Indian judiciary. Reference may be had to the decision of the Supreme Court in *Shri Lal Mahal Ltd.* v. *Progetto Grano SpA*" (2014)[6] where the court very correctly held that the application of the doctrine of public policy of India for the purpose of enforcement of a foreign arbitral award is more limited than the application of the same expression in respect of the domestic arbitral award and thereby restricted the scope of the refusal to enforcement of a foreign award in India. Another notable example to recognize the progressive step of the Indian judiciary is the decision of the Supreme Court in *World Sport Group (Mauritius) Ltd.* v. *MSM Satellite (Singapore) Pte. Ltd.* (2014).[7] In this case the Court was of the view that in cases of foreign seated arbitrations, the arbitrations could be stayed only when the arbitration agreement is void, inoperative or incapable of being performed and the mere allegation of fraud could not prevent foreign seated arbitration from the proceedings. This is definitely a step forward in establishing India as a pro arbitration jurisdiction especially if we recall the Court's other way attitude towards the issue of fraud in *N. Radhakrishnan* v. *Maestro Engineers* (2009).[8] *Reliance Industries Ltd.* v. *Union of India* (2014)[9] also deserves attention on this note. The court held that Indian courts have no jurisdiction to set aside an award rendered in London. Though the court decided the

issue on the line of the ratio in *Bhatia International* as the parties entered into the contract before 6th September, 2012 & thereby being governed by Bhatia, but the court correctly read implied exclusion of the application of Part I of the Arbitration and conciliation Act as the seat of the arbitration was London & the law governing the arbitration agreement was also English law.

The change in the Supreme Court's attitude was also visible in *Enercon (India) Ltd.* v. *Enercon Gmbh* (2014)[10] where the court held that an arbitration agreement cannot be avoided on the basis that there is no concluded contract between the parties. In

the context of international commercial arbitration a reference to arbitration can only be avoided if the arbitration agreement is null and void, inoperative or incapable of being performed. An averment that the underlying contract containing the arbitration clause is not a concluded contract does not fall within the scope of these phrases. We must admit that the observation of the court is in the line of Art II of the New York Convention (1958)[11] which says that the each contracting State must give due recognition to the arbitration agreement and the courts of the contracting states when seized with an action in a matter in respect of which the parties have made agreement, shall refer the parties for arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. Further in the recognition of the party autonomy which we call as one of the most cardinal principles of international commercial arbitration, the Supreme Court in *Centrotrade Minerals & Metal Inc.* v. *Hindustan Copper Ltd.* (2016)[12] approved the incorporation of appellate arbitration clause in the parties' concluded agreement. In this case the parties referred the dispute to Indian council of Arbitration and the arbitrator rendered a nil award. The second part of the arbitration clause was invoked by Centrotrade and accordingly the second arbitration took place in London. The second arbitration was conducted as per the ICC Rules and the award was given in favour of Centrotrade. While enforcing the award in India under section 48 of the Act, HCL sought to resist the enforcement on the ground of the illegality of the contract. HCL contended that the Act does not permit any appeal against the arbitral award and therefore the contract which provided a second appeal before another arbitral tribunal was in derogation of the statutory requirement. The court very rightly distinguished the present issue of appeal before the tribunal from the statutory bar of appeal before the national court. It was very much apt to hold that party autonomy was the backbone of the commercial arbitration and finality attached to an arbitral award shall always be subject to recourse to arbitration in the second instance.

Though there may be a very few decisions of the Indian courts in the post BALCO era which may mark a regressive step in the 'non interference' trend but in my opinion, the interference of the Indian judiciary in a foreign destined arbitration being the most thorny issue has been curbed. On this note, the observation of the Chief Justice of India J.S. Khehar deserves to be quoted. The Hon'ble Chief Justice said, "..... the efforts are on that neither the government nor its agencies will have interference in international arbitration process. The zero interference by the government will give room for foreign traders in India that the process here is neutral..."[13]

GROWTH OF INSTITUTIONAL ARBITRATION: INDIAN SCENARIO

Both the ad-hoc and institutional arbitration are prevalent in India. In terms of cost benefit, expediency, efficiency and hassle —free mechanism for dispute resolution, the institutional arbitration has its edges over ad-hoc arbitration.[14] Surprisingly ad-hoc arbitration, in spite of its inherent flaws, continues to dominate in India. The law Commission of India in its 246th Report[15] has clearly stated that institutional arbitration is minimal in India and "has unfortunately not really kick-started". "Parties adopting ad-hoc arbitration in India seem to be driven by certain misconceived notions about the cost factor, which is perceived to be less expensive than the institutional arbitration."[16] In a study "Corporate Attitudes and Practices towards Arbitration in India" conducted by Price Waterhouse Coopers (PWC), it has been revealed that "majority of the companies in India that experienced arbitration preferred ad-hoc

(47%) over institutional arbitration (40%)."[17]

The Indian corporate houses which are experienced with arbitration have always expressed their concern regarding the constitution of arbitral tribunal which seems to be one of the top most reasons contributing to the length of the arbitration.[18] In this regard this is important to note that institutional arbitration does contain a mechanism and a time frame for the constitution of the arbitral tribunal. However the persisting disbelief in institutional arbitration in India becomes abundantly clear in the said study. Respondents, in the said survey, being asked about their preferences of institutions for

arbitration, the Singapore International Arbitration centre has emerged as the most preferred arbitral institutions in the Indian corporate culture. SIAC was followed by London Court of International Arbitration (LCIA) and as it can be seen from the following figure that Indian institutions were less preferred.[19]

Although the Indian arbitration Act (The Arbitration and Conciliation Act, 1996) defines arbitration as "arbitration whether or not administered by permanent arbitral institution",[20] the Act gives the concept of "tribunal" which is otherwise an institutional concept and also in case of a deadlock, the appointment of arbitrator can be done by an institution if the court designates such, but these are not sufficient to promote institutionalism of Indian arbitration. The Act neither promotes nor discourages the parties to consider institutional arbitration.[21] Feeling the need to inculcate a culture of institutional arbitration in India which can make India's dream of becoming a 'global arbitration hub', the Law Commission of India in its 246th Report made the following recommendations in this regard. The recommendations are as follows:

1. Explanation 2 should be added to sec 11(6A) of the Act so that the High Court or the Supreme Court while performing their functions of appointment of arbitrator, should encourage the parties to refer the matter to institutional arbitration. The Commission also sought legislative sanctions of institutional rules for recognizing 'emergency arbitrator'.
2. The Commission in its Report noted the establishment and working of some arbitral institutions in India like Delhi High Court International Arbitration centre, Indian Council of Arbitration which is associated with FICCI, Nani Palkhivala Arbitration Centre, Chennai etc. The Report suggests for more arbitral institutions to be established by different chamber of commerce and trade bodies.
3. Govt. to take initiative and encourage the establishment of institutional arbitrations by providing fund, land etc.
4. Govt. to consider establishment of a specialized body like an Arbitral Commission of India which must play an active role in the promotion of institutional arbitration.

Surprisingly the Law Commission Report in relation to the institutionalizing the commercial arbitration in India does not find any place in the recent Arbitration and Conciliation (Amendment) Act, 2015. It does not take into account some of the recent developments in the field of international

commercial arbitration like emergency arbitrator, hybrid arbitral process which are gaining significance world over. In fact the recognition of institutional arbitration in the 2015 Amendment Act remains as insignificant as in 1996 Act. A cursory look at the arbitration laws of the two nations — Singapore and, India — the former one which has emerged as the most preferred destination of arbitration amongst the Indian corporate houses and the latter which is still considered at its nascent stage and yet to glorify itself as an emerging hub of commercial arbitration, shall help us comprehend the idea that how a national legislation plays a crucial role in the emergence of an institution of that nation as a world leading international institution for arbitration. The statutory recognition of Singapore International Arbitration Centre (SIAC) in the International Arbitration Act of Singapore has been instrumental in bringing all success to SIAC. Below are some of the relevant provisions in this regard which I produce by making a comparison with the Indian counterpart.

1. Sec 2(1)(d) of the Indian Arbitration Act defines Arbitral Tribunal as follows:

   "Arbitral Tribunal means a sole arbitrator or a panel of arbitrators"

   Sec 2(1) of the Singapore Arbitration Act (IAA) defines Arbitral Tribunal as follows:

   "Arbitral Tribunal means a sole arbitrator or a panel of arbitrators or a permanent arbitral institution and includes an emergency arbitrator appointed pursuant to the rules of arbitration agreed to or adopted by the parties including the rules of arbitration of an institution or organization".
2. Sec 11 of the Indian Arbitration Act talks about the appointment of arbitrator. In case there is a deadlock as has been enumerated in different sub-sections, the Act provides that the appointment shall be done by the High Court or the Supreme Court as the case may be or by any such person or institution as may be designated by such court.

Singapore International Arbitration Centre, on the other hand, has been statutorily recognized as the appointing authority in case the parties can not appoint the arbitrator. The relevant provisions are as follows:

Default Appointment of Arbitrators:

"9A-(1) Notwithstanding Article 11(3) of the Model Law, in an arbitration with 3 arbitrators, each party shall

appoint one arbitrator, and the parties shall by agreement appoint the third arbitrator.

(2) Where the parties fail to agree on the appointment of the third arbitrator within 30 days of the receipt of the first request by either party to do so, the appointment shall be made, upon the request of the party, by the appointing authority."

Article 8(2) of IAA:

"The Chairman of the Singapore International Arbitration centre shall be taken to have been specified as the authority competent to perform the functions under article 11(3) and (4) of the Model Law."

So in Singapore, the whole appointment of the arbitral tribunal, in case there is a dispute in relation to the said appointment, has to be with the intervention of SIAC. This is what we desire as legislative steps to speed up the growth of institutional arbitration in India. There is no denying that institutional arbitration is superior to its counterpart but in India, there is an inherent and systematic malaise that has

adversely affected the popularity of institutional arbitration especially the national arbitral institutions.

It would be wrong to say that this preference to offshore arbitral institutions is because of their superiority in facilities and expedite procedures only. Of course those having world class facilities and much embattled procedure but this is also undoubtedly true that institutions in India are equally competent as their global counterparts. If we draw our attention to the newly revised rules of Indian Council of Arbitration (ICA) which becomes effective from 1st April 2016,[22] the rules also make provision for emergency arbitrator and also take into consideration the other developments in the field of commercial arbitration. Arbitration conducted by ICA seems to be cost-effective as well.[23]

In fact there are factors other than the competency of the rules of procedure which are pragmatically impeding the growth of Indian institutions. The fewer number of arbitral institutions in India than in other Asian countries can be one such factor. If we look at the Indian scenario, it is the Indian Council of Arbitration which is engaged in majority of the arbitrations and a large amount of case load is on ICA. "The problem of understaffing may also arise owing to such increased back log of cases as there

exists virtually no other arbitral institutions of worldwide repute in India."[24] In addition to this, the recent closing of LCIA India aggravates the situation. In this regard we must welcome the opening of a new branch of SIAC in Mumbai.[25] This is also to be noted that the institutions can reach beyond national frontiers when it involves people from different nationalities in its dispute resolution mechanism. If we look at SIAC, it has engaged more than 300 arbitrators from outside of Singapore excluding the 125 arbitrators of their own nationals.[26] In India, ICA being the Apex Arbitral Institution, it has engaged around 50 international arbitrators.[27] No other arbitral institution has even initiated to make it international by engaging arbitrators from other jurisdictions in true sense. To have an international reach, one needs to add on international flavor!!!!

Another extremely important factor is the element of time. In most of the arbitrations we tend to appoint retired judges as arbitrators. In ICA itself, there are around 250 retired judges in the panel of arbitrators (at the time of writing). These judges have got the tendency to treat the arbitration proceedings as courtroom proceedings and therefore keep allowing long adjournments. In this regard the 176th Report of the Law Commission of India deserves special mention. The Report said that in India, the first occasion for considering any question of jurisdiction does not normally arise until the arbitral tribunal has issued at least six adjournments.[28] This has a direct impact on the costs of the arbitration. The Indian arbitral institutions should start behaving professionally. The institutions should try to avoid judges as their arbitrators. There is another cause which can be attributed to this. Engagement of courtroom lawyers in the arbitration who remain busy throughout the day in their litigation matters. The lawyers take arbitration as their evening engagement. Therefore the lawyers who are being engaged in arbitration must be trained so that they stop viewing arbitration as the step-brother of litigation. In the opinion of the author, the time limit prescribed in 2015 amendment Act may serve as the healing to the aforementioned delay factor. The detail steps of the amendment Act to have a time bound arbitration is given in the subsequent discussion on the issue which is under the head — 'legislative framework'. So many times the stakeholders due to their lack of experience and awareness hardly know about the proceedings of arbitration. Barring

ICA, there are no such remarkable

engagements of other Indian arbitral institutions which are actively engaged in promoting awareness regarding arbitration. In India, there is a strong need to conduct numerous workshops to demonstrate the proper conduct of arbitral proceedings. Along with its well designed rules of arbitration which should match international standard, the arbitral institutions must sensitize the Indian crowd regarding the advantages of institutional arbitration. Every institution in India must come up with a strict time limit of arbitration because costs and time are the two important factors which dissuade parties from choosing Indian arbitral institutions. Costs and time are directly proportional too. Even if the arbitral institutions may have clearly laid down schedules to costs, but the increase in number of hearings shall increase the lawyers' and arbitrators' fees and this would certainly increase the cost.

Another extremely important factor for the less popularity of Indian institutional arbitration is the judicial apathy. The then Chief Justice of India, Justice T.S. Thakur in his address in an International Conference pointed out that without judiciary, the institutional arbitration cannot succeed.[29] Learned Chief Justice further stated that the Judiciary must be sensitized regarding the importance of institutional arbitration. The hangover of judge dominated arbitration should not persist.

A choice to an arbitral institution is invariably a choice to the country where that institution is situated. Therefore the judiciary must ensure its significant role for the country's pro-arbitration image. Certainly if FICCI/ICA or any other equivalent institution is designated by the CJI/SC as the case may be for the appointment of an arbitrator to deal with a power-project dispute, probably an expert in this field would be nominated and not a retired judge…!!

Legislative Framework:

The resolution of commercial disputes in India was facing some of the daunting challenges which included inordinate delay, spiraling cost and an undue interference of the national court. This caused an impediment in attracting foreign direct investment and also had put India at a very low international ranking for the 'ease of doing businesses.' Two major developments deserve special mention in this regard, in order to revolutionize the resolution of commercial disputes in India. The 2015 Amendment to the Arbitration and Conciliation Act 1996 is the most crucial step which aims to reckon all the judicial pronouncements in international as well as domestic arbitration of

the commercial disputes and splash the consequential anomalies.

A. The structural changes which are brought to the Act are as follows:

The definition of the court as defined in section 2(1)(e) of the Act has been modified and now all the 26 High Courts have been included within the definition as compared to the previous scenario where only the High courts with ordinary original civil jurisdictions (Bombay, Delhi & Calcutta) could exercise its power. Unless otherwise agreed by the parties, the provision of section 9 (granting of interim measures by the national court), section 27 (Court's assistance in taking evidence)

and section 37 (Appeal from order granting/refusing to grant interim measures by court) will also apply to international commercial arbitration even if the place of the arbitration is outside India. The authority to appoint the arbitrator is now with the Supreme Court in case of international commercial arbitration and that of the High Courts in case of domestic arbitration in place of the Chief Justices as envisaged in the 1996 Act.

Tribunal's power to grant interim measures has been made at par with the power of the national court as the interim measures granted by the tribunal are made enforceable in the same manner as if it is an order of the national court. Further the power of the national court in relation to the grant of interim measures has been restricted and the courts shall not entertain any such application once the arbitral tribunal has been constituted. Application for the appointment of the arbitrator shall be disposed within a period of 60 days. No appeal including the Letters Patent Appeal shall lie against the decision of the court under section 11. The arbitration proceedings shall commence within 90 days from the date an interim order has been taken from the national court under section 9 of the Act. Fast track procedure of the arbitration has been introduced under the Act. An application to set aside the arbitral award shall be disposed by the court within a period of one year.

B. The Changes which are sought to bring more transparency in the arbitral process:

The court while confronted with the appointment of the arbitrator shall confine only to the existence of an arbitration agreement. At the time of appointment of arbitrator, the Court shall seek a disclosure from the prospective arbitrator to clarify any doubts as o his independence and impartiality. The new Amendment has elaborated the relative provisions of independence and impartiality in a more lucid manner. Greater clarity and

details have been added in section 12 of the Act enunciating the different circumstances which are affecting the neutrality of the arbitrator. One notable change in this regard is the addition of two new schedules, namely the Fifth Schedule and the Seventh Schedule. The schedules contain different grounds and circumstances in which justifiable doubts as to the independence and impartiality of the arbitrator shall arise and thereby rendering a person ineligible to act as an arbitrator. These two schedules are modeled on 2014 IBA Guide lines and certainly in the line with international best practices. This will assure the confidence of the foreign investors in India.[30]

C. Several provisions of the 1996 Act have also been modified in view of making arbitration cost effective and time efficient. This can be summarized as follows:

Endeavour should be made to dispose of an application for the appointment of an arbitrator as expeditiously as possible and possibly within 60 days from the date of service of notice to the opposite party. The tribunal shall complete the arbitration within a period of twelve months, not to grant adjournments without sufficient cause and impose exemplary costs on party seeking frivolous adjournments. The stipulated twelve months time limit can be extended by the parties for another six months but not beyond that. Any further extension of time limit can only be done by the national court. Penalty provision by way of reduction of the fees has also been inserted for the arbitrators in case the arbitration is not completed within the stipulated time.

So the whole hearted efforts of the Government are to make arbitration in our country easier, faster and more cost effective and aim to revolutionize the arbitration regime in India. As it has been seen in the working of the 1996 Act that in absence of a clear definition of the term public policy, the judiciary adopted an expansive approach to its interpretation and it became a continuing worry and opened a floodgate of litigation. The 2015 Amendment has put a cap on the width of the expression on the basis of the recommendations of the Law Commission. The move is a welcome step although the cap seems to be minimal, leaving the interpretation in the hands of the judiciary.

The practice of keeping in-house arbitrators seems to have received a jolt as the amendment has elaborated the issue of independence and impartiality of the arbitrators. This move has certainly put the Indian law at par with the international practices but the courts need to exercise caution while

applying the amended provisions. A partial reading of the provisions could lead to unintended consequences. The Amendment fails to address the situations of enforcement proceedings as unlike the setting aside proceedings, the Amendment lacks provision encompassing a time limit enforcement proceedings. Many of the recommendations of the Law commission of India have been followed in order to successfully capture the growing concerns of the judicial interference. However, leaving out some important recommendations of the Law Commission like the role of an emergency arbitrator, arbitrability of fraud etc. the Amendment seems to have missed some opportunities to reform the law in a more compassionate way. We need to wait for another couple of years to see the real effects of the Amendment, but undoubtedly the Amendment aims to bring positive changes in the arbitration regime by plugging the existing loopholes and anomalies in India's arbitration law.[31] Another remarkable move is that the Govt. of India in its quest for enhancing the ease of doing business in India has introduced the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 which provide for the constitution of the commercial courts for adjudicating commercial disputes. This is invariably a step forward for the swift disposal of commercial disputes of a specified value or more. This initiative will certainly reduce the burden of the civil courts and can be viewed as a stepping stone to reforming the civil justice system in India although the application of the new initiatives depends on the promptness for the creation of additional judicial and physical infrastructure, filling up the vacancies etc.

CONCLUDING REMARKS

This needs to be appreciated that Govt. alone cannot make India as hub of commercial arbitration despite its efforts to get the requisite amendments to arbitration laws and other legislations. In order to fulfill the dream of making India a hub of commercial arbitration, the need is to have concerted efforts not only from the Government but also from the legal fraternity and corporate India. The popularity of some of the global arbitration hubs cannot be ignored. The impressive growth of each of these global hubs of arbitration reinforces the fact of emergence of world class arbitral institutions in the respective places. Encouragement as well as the growth of institutional arbitration is the sine qua non of making arbitration a successful mode of settlement of commercial disputes. But it has been seen that institutional arbitration is less popular in India. It is not the competency of the rules of procedure for arbitration, which is actually posing impediment to the growth of institutional arbitrations in India. The fewer number of arbitral institutions is one major reason which impedes the

growth of institutional

arbitrations in India. It is high time that business community and Industry may consider in incorporating an arbitration clause in the commercial contract which refers an institution for providing arbitration. This would certainly brighten the future of arbitration in India. It also needs to be appreciated that we lack proper places and infrastructure to conduct arbitration especially the ad hoc arbitration. As a result of which the parties in India tend to hire star rated hotels as arbitration venues. This increases the cost which adversely affects the popularity of arbitration. Also till recently, arbitration in our country is considered as part time work which is usually conducted on weekends. We tend to engage courtroom lawyers in the arbitration who, after remaining busy in the courtrooms throughout, takes the arbitration as a recreational evening engagement. The appointment of retired judges as arbitrators makes the situation worse. These judges treat arbitration as counterpart of litigation and go for end number of adjournments. There is a dire need to change this attitude. For making arbitration a successful tool for dispute resolution, it is imperative to change this culture and ensure that arbitration is treated as a whole time dispute resolution mechanism. Also, the hangover of judge dominated arbitration should not persist. On this note, establishment of arbitration bar which will provide advocates engaged in the practice of arbitration only, can be a viable option. The Bar Council of India can initiate the matter and do the needful. Moreover the Government, the business community and the corporate houses need to promote awareness regarding arbitration and also to engage in conducting workshops to demonstrate the proper conduct of the arbitral proceedings. This would certainly inculcate the creation of 'arbitration culture' which our country is lacking at present. In a time when the Govt. of India has come up with the much awaited rigorous changes of the existing arbitration law and the Indian arbitration law is witnessing a sea change after the decision of the Apex Court in Bharat Aluminum Company case……. the potential intervention of the Indian courts in a foreign seated arbitration being the most thorny issue, seems to have been curbed and a number of post Balco decisions have strengthened the pro arbitration stance in the Indian judiciary…… the nurturing and propagation of arbitration culture and ideas are essential in the fundamental growth of the popularity of commercial arbitration. Let's not forget that iconic court scene of Shakespeare's Merchant of Venice: "Venice's reputation as a global hub of trade was built on its robust and fair dispute resolution mechanism where commercial contracts between merchant of all races, ethnicities and nationalities were enforced at all costs. Fair, efficient and certain dispute resolution, as it was understood even then, is a sine qua non for trade and commerce to flourish in any region!!!"

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[1] Nigel Blackaby, Constantine Partasides et.al., Redfern and Hunter on International Arbitration 440 (Oxford University Press, New York, 2009).

[2] *Bharat Aluminium Co.* v. *Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552.

[3] *Bhatia International* v. *Bulk Trading SA*, (2002) 4 SCC 105

[4] *Citation Infowares Ltd.* v. *Equinox Corpn.*, (2009) 7 SCC 220; Citation Infowares Ltd., a registered company under the Company's Act and was carrying on its business in United States of America and also in Gurgaon, India through its subsidiary. The respondent Equinox Corporation is a company registered under the appropriate laws

of USA. The Equinox Corporation has been carrying on its business in India through outsourcing. Both the parties agreed to do the business on certain agreed terms. The parties incorporated the governing law provision to the effect that the agreement shall be governed by and interpreted in accordance with the law of California, USA. On termination of the agreement by the respondent, the applicant (Citation Infowares) assessed the damages which need to be compensated by the respondent but the amount not being paid by the respondent; the Citation Infowares invoked the jurisdiction of the Chief Justice of India for the appointment of the arbitrator. The application was being contested by the respondent on the ground that the provisions of the Indian arbitration Act would necessarily stand excluded in view of the specific language of the governing law clause in the contract wherein the governing law would be the law of California. The court, on the line of Bhatia International (2002), held that it was difficult to read any such implied exclusion of Part I of the Indian Arbitration Act because one of the parties was the Indian party and the obligations under the contract were to be completed in India. Considering the nature of the contract the court found it difficult to read any such exclusion of Part I of the Act notwithstanding of the fact that the governing law was a foreign law. The court, accordingly, upheld the application of Citation Infowares and assumed jurisdiction for the matter of the appointment of the arbitrator.

[5] *Venture Global Engg.* v. *Satyam Computer Services Ltd.*, (2008) 4 SCC 190. The Supreme Court in this case entertained an application for setting aside a foreign award which was given by the London Court of International Arbitration. The Court extended the application of the ratio of Bhatia International Case and assumed jurisdiction even for a foreign award under sec 34 of the Indian Act which is a provision for setting aside of domestic award. This decision further aggravated the negative image of India as having a hostile environment to the commercial arbitration.

[6] (2014) 2 SCC 433.

[7] (2014) 11 SCC 639 : AIR 2014 SC 968.

[8] (2010) 1 SCC 72.

[9] (2014) 7 SCC 603.

[10] (2014) 5 SCC 1.

[11] Convention on the Recognition and Enforcement of Foreign Arbitral Award, 1958.

[12] (2017) 2 SCC 228.

[13] Source: ICA Arbitration Quarterly, April-June 2017.

[14] For details of the relative advantages and disadvantages of the ad hoc and institutional forms of arbitration, see Julian D.M. Lew, Loukas A. Mistelis et al., *Comparative International Commercial Arbitration* 31-48 (Wolters Kluwer India Pvt Ltd. 2003).

[15] Report on the Proposed Amendment to Arbitration and Conciliation Act 1996, available at http://lawcommissionofindia.nic.in/reports/Report246-II.pdf (last visited 21/05/2017).

[16] D. Sengupta, *Indian Council of Arbitration Quarterly*, Vol XLXIII, January — March 2012.

[17] Corporate Attitudes and Practices towards Arbitration, available at (https://www.pwc.in/assets/pdfs/publications/2013/corporate-attributes-and- practices-towards-arbitration-in-india.pdf) (Last visited on 23/05/2017).

[18] *Ibid*.

[19] *Ibid*.

[20] Sec. 2(1)(a) of the Arbitration and Conciliation Act, 1996.

[21] 246th Law Commission Report, *Supra* note 15.

[22] See at http://www.icaindia.co.in/international.pdf (Last visited on 23/5/2017).

[23] See the fee schedule which is given in Article 36 of the Rules of International Commercial Arbitration of Indian Council of Arbitration.

[24] Nagham Ghei, "*Challenges to Institutional Arbitration in India: An Asia specific perspective*" 189 ICA Arbitration Quarterly (2016).

[25] India being strong contributor to SIAC SIAC's international case load, SIAC established its first overseas liaison office in Mumbai, India 2013.

[26] In SIAC, at the time of writing, 57 arbitrators are from UK, 24 from USA, 24 from China, 20 from India, 10 from Malaysia, 23 Hong Kong, 13 France, 9 are from Switzerland amongst others. For details, see (http://www.siac.org.sg/our-arbitrators/siac-panel) (Last visited on 12/05/2017).

[27] Source: (http://www.icaindia.co.in/htm/arbitrators.htm) (Last visited on 18/5/2017).

[28] See the 176th Law Commission Report available at (http://www.lawcommissionofindia.nic.in) (Last visited on 12/5/2017).

[29] Inaugural address at the International Conference on Arbitration in the Era of Globalization, New Delhi (11th & 12th December, 2015).

[30] Michael D. Schafler, Deepshikha Dutt et al., "*The Appearance of Justice: Independence and Impartiality of the Arbitrator under the Indian and Canadian Law*" V Indian Journal of Arbitration Law 150-163 (2016).

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