ARBITRATION LAW IN INDIA, UTILITY AND CHALLENGES TO NEW LEGAL SYSTEM

THESIS

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CANDIDATE'S DECLARATION

I hereby declare that the work presented in this thesis entitled **"Arbitration Law in India, Utility and Challenges to New Legal System"** in fulfillment of the requirements for the award of Degree of Doctor of Philosophy submitted in Maharishi Law School, Maharishi University of Information Technology, Lucknow is an authentic record of my own research work carried out under the supervision of **Dr. Amita Rathi**, Associate Professor, Maharishi Law School in this University. I also declare that the work embodied in the present thesis-

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ABSTRACT

Arbitration Law in India has undergone significant reforms aimed at fostering a more efficient and reliable alternative dispute resolution mechanism. This abstract explores the utility and challenges associated with the new legal framework.

The introduction of modern arbitration laws in India, primarily through the Arbitration and Conciliation Act of 1996, has facilitated quicker resolution of disputes, reduced burden on courts, and increased investor confidence. The Act aligns with international standards, promoting India as a favorable arbitration destination.

Arbitration offers parties autonomy in selecting arbitrators and procedural rules, thereby tailoring the dispute resolution process to suit their specific needs. The enforceability of arbitral awards under the New York Convention enhances the credibility of outcomes, both domestically and internationally.

Moreover, arbitration provides confidentiality, which is crucial for sensitive commercial disputes. It also reduces the backlog of cases in Indian courts, contributing to a more efficient judicial system overall.

Despite its advantages, India's arbitration framework faces several challenges. One significant issue is the judicial intervention in arbitration proceedings, which has sometimes led to delays and procedural complexities. The courts' approach to interpreting and enforcing arbitration agreements has at times diverged from the pro-arbitration stance of the Act.

Another challenge is the need for specialized arbitration infrastructure and trained professionals. While major urban centers have developed robust arbitration facilities, smaller cities and rural areas lack adequate resources, limiting accessibility and effectiveness.

Furthermore, concerns exist regarding the enforcement of arbitral awards, especially when challenged in courts. The process can be lengthy, diminishing the perceived efficiency of arbitration as an alternative to litigation.

Additionally, the evolving nature of international arbitration practices requires continuous updates to domestic laws to keep pace with global standards.

This necessitates periodic amendments and judicial interpretations that can sometimes create uncertainty.

India's arbitration law represents a crucial advancement towards facilitating efficient dispute resolution and attracting international investment. While the legal framework offers significant benefits, addressing challenges such as judicial intervention, infrastructure development, and enforcement issues remains essential for maximizing its potential. Continuous refinement and adaptation of the arbitration regime will be crucial in overcoming these challenges and ensuring its effectiveness in the Indian legal landscape.

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1.1 INTRODUCTION

Abraham Lincoln (1967) "Prevent litigation; convince your neighbors to settle wherever possible by demonstrating to them how typical winner is frequently a loser in terms of fees, costs, & time. As a mediator, the lawyer has a greater chance of being a nice man".[1]

Thus, a new era of Alternative Dispute Resolution has begun around the world, and arbitration is one of them, as a result of amazing rise of international trade: business, investment, technology transfer, redevelopment and construction works, and financial activities, to name a few. To adapt to the changing environment, India modified its arbitration law to ensure a level playing field for domestic & foreign businesses. Indian arbitration clause ensures that all parties are treated fairly and equally. International and domestic contracting operations are increasing in tandem with the expansion in commercial transactions.

As a result, the potential for business arbitration has exhibited a strong upward trend. India has made significant changes to its arbitration law in recent years as part of 1991 economic reforms. Simultaneously, numerous initiatives have been taken to modernise the country's judiciary, with the emphasis on minimising court interference in arbitration process through the adoption of United Nations Convention Trade Law. It is a Model Law for commercial arbitration on an international scale. The government has placed a premium on both simplifying and rationalising the legislation in order to fulfil requirements of a competitive economy. Foreign Direct Investment has increased as a result of these policies (FDI).

India has signed bilateral investment plan can be defined with the United Kingdom, Germany, the Russian Federation, Netherlands, Malaysia, & Denmark in the recent past. Each agreement provides for resolution of disputes between investors of one contracting party & investors of other contractual party through alternative dispute resolution processes set forth below.

International arbitration can be initiated within or outside India in situations involving foreign nationals as parties or subject matter of issues. The law applicable to the conduct of arbitration & merits of dispute may be Indian or foreign law, depending on terms of contract & any conflict of laws provisions.

Foreign arbitration is a type of arbitration in which the processes are commenced and ended outside of India, but the arbitral judgement is mandatory to be enforced within the Indian territory. The arbitrators conduct the hearings and determine the procedures in compliance with the terms or with the parties' concurrence. Arbitration might take place on a domestic, international, or international level. In this sort of arbitration, the parties are responsible for establishing the arbitral tribunal that will resolve their dispute on their own and for establishing the rules that will govern arbitration processes. In the event of difficulties, the parties may occasionally seek assistance of a competent state court. Due to the fact that parties are largely on their own in ad hoc arbitration, they will have to negotiate on costs and expenditures directly with the arbitrators.

In institutional arbitration, parties appoint an arbitration centre or arbitral institution to handle the proceedings in line with arbitration rules of institution. The extent to which an institution administers the arbitration procedure varies. In general, the arbitral institution manages the arbitral procedure in part and limits its help to establishment of arbitral tribunal (appointment of arbitrators), taking into consideration parties' objectives and its own arbitration rules.

An institution may serve the opposite party with a notice of arbitration, requesting that it declare its stance on the matter and on composition of the arbitral panel. Occasionally, the institution has authority to fix a sum of money deemed to be sufficient to cover cost of arbitration, to demand payment, & to determine the cost at the conclusion of procedures. It may also be responsible for notifying parties of arbitrators' award. On other side, institution may perform significantly fewer functions; this style of arbitration is commonly referred to as partially administered arbitration. Institutional arbitration can also be completely administered. In this type of arbitration, institution not only receives the request for arbitration and notifies the other party, but also constitutes arbitral tribunal, fixes cost upfront, and determines the location of the arbitration. After receiving the advance on costs, the arbitration institution forwards the file to arbitrators & supervises proceedings until

award is rendered. Thus, it retains control of the proceeding & resolves certain issues, such as choosing whether to replace biassed arbitrators. It occasionally even assures that the award's content is suitable in terms of its form and may direct arbitrators' attention to particular matters regarding case's merits. It is responsible for notifying the parties of award and ensuring that arbitrators are compensated. Finally, the arbitration institution guarantees that each stage of procedure is completed within time period specified in its arbitration rules. ICC Arbitration is an excellent example of an administered arbitration system.

1.2 GENERAL MEANING

Human conflict grew exponentially with the development of society, as the adage goes, where there are two minds, there are three perspectives. Due to the growth of society, human conflicts are unavoidable; as a result of this undesirable scenario, it is necessary to have robust, simple, and rapid systems for resolving such disagreements. Additionally, conflicts must be settled economically and expeditiously to alleviate the judiciary's load and to ensure that such unavoidable situations do not occur.

Throughout the years, civilization has acknowledged the inherent right of each individual to seek redress through courts and tribunals. The common man's traditional understanding of "access to justice" is that it refers to access to courts of law. A court is where the average man receives justice. However, courts have become inaccessible due to a variety of impediments, including poverty, social and political backwardness, illiteracy, ignorance, and procedural formality. To obtain justice through the courts, one must navigate the complicated and expensive procedures associated with litigation, most notably in International Commercial Arbitration [2]. This prompted citizens to consider a way for resolving their disagreements amicably outside of the courts.

Conflict is an inevitable part of existence, and it's difficult to envision a human civilization without it [3]. Human conflicts inevitably result in disagreements. Keeping in mind the fundamental human behaviour and disposition, it may be claimed that disagreements are unavoidable [4]. However, disagreements must be resolved, and they must be settled prudently; indeed, such settlement is necessary for societal peace, amity, comity, and harmony, as well as simple access to justice [5].

This demonstrates the critical importance of a sufficient and successful dispute resolution mechanism, which is a necessary condition for survival of a civilised society & welfare state. They sought a mechanism for resolving disputes, such as arbitration, mediation, conciliation, or negotiation.

Alternative Dispute Resolution, or ADR, is a term that refers to a variety of dispute resolution techniques that are often used in lieu of litigation & are generally handled with assistance of a neutral & independent third party. As the expression says, the fundamental objective of ADR is to resolve disputes outside of the regular legal system, & thus throughout process of appreciating ADR, baseline remains litigation. As a result of the emergence of ADR proceedings as distinct alternatives to courts established by state, term 'alternative' was developed [6].

Alternative dispute resolution systems enable a more expeditious and cost-effective resolution for conflicts referred for out-of-court resolution. ADR processes are done with assistance of an ADR neutral, who is an unbiased, independent, & disinterested third party who assists disputant parties in resolving their issues via the use of well-established dispute resolution techniques [7].

ADR processes can be broadly classified as non-adjudicatory or adjudicatory. Non-adjudicatory ADR processes are those that fall under the umbrella of ADR and do not involve the ADR neutral making a final and binding determination of the dispute's factual or legal issues, but rather involve the parties cooperating to find a mutually acceptable solution with assistance of ADR neutral. Non-adjudicatory ADR approaches exemplify the ADR philosophy that a conflict is a problem to be solved collaboratively rather than a battle to be won [8].

Cooperative issue solving is a fundamental principle of ADR. The ultimate goal is to resolve the issue by the parties' participation and joint effort, aided by the ADR neutral. ADR techniques are designed to mitigate antagonistic attitudes and promote greater openness and dialogue between parties, ultimately leading to a mutually accepted resolution [9]. In that regard, alternative dispute resolution is unquestionably more cooperative & less competitive than adversarial litigation [10]. The ADR approach is aimed at eliminating the adversarial component from dispute resolution process, guiding parties to recognise their common interests, dissuading them from taking hard stances, and persuading them to reach a

negotiated settlement. The parties control both process and the outcome of dispute settlement, and they are solely accountable for resolving the disagreement in an effective, practical, and acceptable manner [11]. The emphasis of ADR, which is informal & adaptable, is thus on "assisting parties in assisting themselves"[12].

The anecdote of two cooks arguing over an orange exemplifies the basic approach of ADR (non adjudicatory). The judge chooses an explanation for awarding it to the first cook. The arbitrator halves it. The mediator inquires as to why each cook desires it - discovering that the first desires the peel for marmalade & second desires the flesh for juice. The mediator provides the first the peel & second the flesh. As a result, both parties benefit. The cooks & mediator approached the problem collaboratively, rather than through the lens of rights and positions [13].

Mahatma Gandhi also pushed for and observed this technique, which serves as the foundation for ADR. "I recognised that the fundamental duty of a lawyer was to reconcile estranged parties. The lesson was so ingrained in me that for first two decades of my legal career, I spent a significant portion of my time resolving private settlements in hundreds of cases. I gained nothing in the process — not even money, and most emphatically not my soul.' [14].

ADR processes are, for the most part, non-adjudicatory, which is to be expected given that ADR is largely a substitute for litigation, which is nothing more than adjudication by a court of law. Non-adjudicatory ADR processes include mediation, conciliation, and conflict resolution through Lok Adalats, all of which get their sanctity from parties' desire to reach a mutually agreeable result amicably.

On other hand, adjudicatory ADR proceedings are those that include the ADR neutral making a final & binding judgment of the dispute's factual and legal concerns. The adjudicatory processes take their sanctity from parties' desire to have their rights assessed outside of the usual litigative process by an ADR neutral. Arbitration & binding expert determination are both forms of adjudicatory alternative dispute resolution.

ADR is occasionally understood rigorously & hyper technically as a process that lacks the accoutrements of arbitration and does not ultimately result in a binding decision on parties' will. However, because adjudicatory ADR processes function

outside realm of state-established courts and are effectively substitutes for traditional litigative process, they are situated within ADR galleries [15].

Additionally, adjudicatory ADR processes are consensual in sense that they cannot be used unless such participants are ad idem, but once parties enter arena, they must submit to a binding ruling by ADR neutral and cannot withdraw unilaterally.

Apart from basic categorization of ADR processes as adjudicatory or non-adjudicatory, there are also hybrid ADR processes that combine the two and exhibit both adjudicatory and non-adjudicatory characteristics. Examples of hybrid ADR methods include Medi-Arb, Con-Arb, and conflict resolution through Permanent Lok Adalats.

1.3 THE ORIGINS AND EVOLUTION OF ALTERNATIVE DISPUTE RESOLUTION

ADR in India, arbitration is not a novel aspect of the dispute settlement system; it has a long history. In India, peaceful resolution has long been preferred method of resolving specific conflicts. It is a technique for resolving disputes that is normally chosen by the parties. The Indian judicial system is well-known as a 'Panchayat' court system.

The present ADR process that prevails in India is mostly modelled after the western perspective and is influenced by western countries' experiences. However, the basics of ADR approaches are not new to the Indian legal system and existed in some form prior to the colonial British rulers' introduction of the current justice delivery system [16]. Indeed, the Panchayat's origins were largely as a law & order institution, a way of conciliation and arbitration within community [17]. Disputes were resolved peacefully in ancient India through the participation of Kulas (family assemblies), Srenis (guild members of men of same occupation), & Parishad, among others [18].

Article 39A[19] was incorporated into the Indian Constitution[20], and within a few years, Constitutional mandate of Article 39A manifested itself in enactment of Supreme Court Act, 1987, which, among other things, provides for the organisation of Lok Adalats, a critical component of ADR[21].

The Government of India established a group in 1989, generally known as the Malimath Committee [22], to recommend corrective measures for managing and

easing the judicial dockets. The Malimath Committee submitted its comprehensive report in August 1990, identifying various causes of arrears accumulation and endorsing the recommendations made in the Law Commission's 124th and 129th reports, as well as in the 246th reports, for improving the effectiveness of Indian arbitration law. Additionally, the Justie Sharaf committee advocated amending the arbitration statute to ensure swift justice and the conclusion of litigation through amicable resolutions.

A movement has been launched in the majority of nations under auspices of United Nations Committee on International Trade Law (UNCITRAL) model law to enhance and streamline arbitration law. In this context, the Indian Parliament adopted the Arbitration and Conciliation Act, 1996, demonstrating unmistakably the legislative awareness and concern for requirement & value of ADR in India.

The turning point in ADR movement, however, was legislative mandate articulated in Code of Civil Procedure, 1908, through the insertion of section 89 of the CPC [23], followed by an extraordinary, committed, & concerted judicial effort that triggered an unprecedented and preeminently unmatched ADR revolution in India. By authorising courts to send parties to ADR for resolution of pending disputes, the legislation recognised the relevance of ADR in sub judice matters. The Supreme Court of India reaffirmed the relevance of alternative dispute resolution while painstakingly studying and elaborating on the provisions of section 89 of Code of Civil Procedure, 1908[24]. The Hon’ble Supreme court Courts have vociferously urged for widespread use of alternative dispute resolution & have taken numerous measures to popularise and promote ADR in India. Since then, there has been no turning back, and ADR has flourished in India, reaching ever-higher echelons on a daily basis.

1.4 ADR'S OBJECTIVES

ADR (non-adjudicatory) is a completely voluntary process, and parties are able to opt out at any time. If a party rejects the settlement or the continuation of the ADR proceedings. He has the authority to cancel the ADR process unilaterally & commence formal legal process. Thus, there is nothing to lose in ADR, and even if it is unsuccessful, time and money invested on ADR are put to good use by advancing trial preparation, narrowing issues, & clarifying thoughts[25]. On the other hand,

adjudicatory ADR provides a fast, effective, and convenient method of resolving conflicts outside of the courts. However, primary advantage of ADR is finality, as the disagreement is decided once and for all, obviating the prospect of subsequent appeals [26].

ADR procedures provide a private process that ensures secrecy, which is not always possible in court processes. Confidentiality protection in ADR enables parties to engage in free and candid exchanges of views and open and honest discussions, ultimately improving their connection and understanding of the issue. Confidentiality also helps to minimise posturing & destructive discourse between the parties during resolution process [27], improving likelihood of an amicable outcome.

Every legal system's principal mission is to administer justice, & access to justice is one of most treasured goals, as well as a necessary condition for existence of a democratic & civilised state. For aeons, humanity has aspired to the concept of justice [28]. The term "access to justice" refers to two fundamental principles of the legal system: first, that the system must be equally available to all, & second, that it must result in individually & socially just outcomes [29]. However, access to justice in its true sense presupposes effective & judicious dispute settlement, which is critical for the achievement of an individual's fundamental rights in a welfare state.

The natural & necessary consequence is that one of a welfare state's primary functions is to build an efficient disagreement mechanism to which all people have equal access for the rational resolution of their problems & the fulfilment of their basic and legal rights [30]. Indeed, in a democratic society, everyone should have adequate access to mechanism/process for resolving disputes, as legal principle ubi jus ibi remedium cannot be reduced to an empty promise. However, when we discuss access to a conflict resolution mechanism/process, it is implicit that mechanism/process must produce beneficial results in an efficient manner.

The birth of ADR in modern India can be attributed mostly to the justice delivery system's inability to deliver quick & effective justice while keeping up with growing judicial dockets. There can also be no doubt that process of establishing need for ADR always entails an unavoidable rhetoric geared at highlighting the court system's flaws and deficiencies. This, however, is not unique to

India; ADR is widely viewed as a means of resolving disputes outside formal court system and is pushed as a viable alternative to the tiresome path of litigation.

However, this is merely one side of coin. While the flaws in traditional justice delivery may have been a primary impetus for the ADR revolution, ADR revolution has gained momentum due to its inherent merits. ADR provides a viable option for disputants who wish to avoid rigours, complications, and defects inherent in formal adjudication. It provides an extra mechanism for resolving disputes outside of traditional litigative process and enables parties to select the remedy that is most suited in circumstances.

ADR has significant advantages & is a more expeditious and cost-effective method of resolving disputes than traditional litigation. It provides a system that is procedurally flexible, offers a diverse array of redress choices, and places a premium on individualized justice [31]. Not just in terms of procedure, but also in terms of dispute resolution, flexibility is accessible. In contrast to judicial adjudication, alternative dispute resolution (ADR) can result in creative solutions — unique methods of settling disputes [32].

Litigation's high cost is also a significant hardship on the plaintiff. Not only must the litigant pay skyrocketing attorney's fees & court costs, but also attendant and ancillary miscellaneous expenditures, which continue to multiply with successive appeals & revisions, transforming litigation into a costly affair that is gradually becoming unaffordable to the average litigant. This exorbitant cost of slow-moving and unsuccessful litigation is completely infuriating for the litigant [33]. As a result, litigation has come to be viewed as expensive, long-consuming, ineffective, and fraught with problems, as well as associated with impression that it devastates both parties in terms of money, time, energy, & goodwill.

ADR is, in fact, a collaborative effort on part of parties to ascertain their true concerns & interests in contrast to their superficial stances & assertions. It creates a win-win situation by avoiding acrimony inherent in the adversarial litigative process, resulting in enhanced trust and faith b/w parties, hence preserving relationships over time [34].

The current ADR movement began in the 1960s in the United States as a continuation of the legal reform movement aimed at improving the legal judicial

system [35], spurred on by desire to avoid the expenses, delays, & difficulties involved with adversarial litigation. ADR had been popular in western world for a long period of time & had proven to be highly effective at relieving docket congestion while also providing an extra quick and economical means of resolving disputes.

India, similarly to the western nations, pursued and learned from their experiences and developed ADR in its present form. The existing environment – the legal system's issues & experiences of building an alternative to traditional courts – appeared to be ideal for adoption of ADR as a complement to the traditional litigative process [36]. This resulted in the emergence of ADR in its present form in India.

1.5 NUMEROUS FACETS OF THE ALTERNATIVE DISPUTE RESOLUTION (ADR) SYSTEM

There are numerous different aspects/mechanisms of alternative conflict resolution that are frequently employed in practise. Although each of these methods is begun by the parties themselves, each has its own unique scope and utility. The following are some of the most often used mechanisms of ADRs.

1.5.1 CONCILIATION AS A MEANS OF RESOLVING DISPUTES

It is a system for resolving referred conflicts with assistance of a third person, commonly referred to as a conciliator. In a larger sense, it can be defined as an out-of-court settlement involving a resolution process facilitated and suggested by a neutral third party (conciliator). Conciliation is a process that brings parties together in front of a third party they have chosen to assist them in resolving their dispute [37]. That is, the conciliation method facilitates an amicable resolution rather than imposing a decision on the parties [38]. Conciliation processes that are successful result in a legally binding settlement agreement.

Part III of Arbitration and Conciliation Act, 1996, which deals with conciliation processes, is assumed to constitute an arbitral award subject to agreed terms & circumstances specified in section 73 of the Act. In both mediation and conciliation, the essential principle is the same: a neutral third party promotes conversations b/w disputant parties in search of an acceptable conclusion. However, there is a narrow line between the two. Furthermore, the introduction of two phrases

separately in India under section 89 of Code of Civil Procedure, 1908, suggests unequivocally that two terms are to be interpreted differently.

1.5.2 MEDIATION FOR DISPUTE RESOLUTION

According to Black's Law Dictionary, mediation is a non-binding technique of resolving disputes that involves a neutral third person (mediator) who attempts to assist opposing parties in reaching a mutually accepted solution [39]. In general, it is a negotiating process facilitated by a third party who suggests mutually agreeable settlements to the parties. However, mediation is an organised process that encompasses several stages, including introduction, joint session, caucus, and agreement [40].

1.5.3 LOK ADALATS AND PERMANENT LOK ADALATS FOR DISPUTE RESOLUTION

Lok Adalat translates as 'People's Court'. However, a Lok Adalat is not a court in the conventional sense, as it is not an adjudicatory body, but an alternative dispute resolution forum established under Legal Services Authorities Act, 1987. Such Lok Adalats are held in accordance with court's schedule and at the location specified by the court and have jurisdiction over any matter pending in any of the courts for which they are organized [41].

The Lok Adalat system is primarily intended to resolve people's conflicts through the use of conciliatory & persuasive techniques, as well as voluntary participation & discussion, in order to arrive at a mutually acceptable solution [42]. The emphasis is entirely on rapprochement rather than adjudication. Thus, compromise or concession can only serve as basis for resolving disputes through Lok Adalats[43]. The settlement reached prior to a Lok Adalat crystallises into the Lok Adalat's award, which is deemed to be a civil court decree and is final & binding on parties, with no right of appeal [44].

Permanent Lok Adalats, on other hand, are a type of pre-litigation ADR designed specifically to resolve disputes regarding public utility services [45]. Any party to a disagreement may file a pre-litigation application with Permanent Lok Adalat to resolve the problem [46]. If a dispute filed before a Permanent Lok Adalat cannot be handled amicably, the Permanent Lok Adalat is obligated to evaluate the subject on merits and must grant an award, either on basis of a consensual settlement

or on merits [47]. The Permanent Lok Adalat's decision is also recognised as a civil court's decree, & it is final & binding on parties [48].

1.5.4 ARBITRATION AS A MEANS OF RESOLVING DISPUTES

Arbitration1 is a well-established private legal procedure for resolving disputes b/w two or more parties in which parties entrust dispute resolution process & outcome to a private neutral third party, arbitrator (or arbitral tribunal), who hears and considers positive aspects of dispute & effectively makes a final & binding decision on merits, known as arbitral award [49]. As a result, arbitration is an adjudicatory alternative conflict settlement tool.

Arbitration's fundamental objective is to resolve a dispute fairly and speedily by an independent judge outside of the regular litigative process. The parties are free to negotiate on how their conflicts will be settled, and the courts' interference is limited[50]. Arbitration, unlike litigation, is a consensual procedure, and the development of an arbitration agreement is required before the arbitral process can begin. However, once the parties have agreed to use arbitral procedure, they cannot withdraw unilaterally and must submit to a final ruling on merits. Arbitration in India is governed by Arbitration and Conciliation Act of 1996.

1.5.5 DISPUTE RESOLUTION VIA MINI-TRIAL

A Mini Trial is a shortened adjudication procedure in which disputant parties' high-level principals present evidence & arguments before a neutral, followed by talks b/w principals [51]. Mini Trial is therefore a non-binding alternative dispute resolution (ADR) process for resolving disagreements, primarily commercial disputes, that combines negotiation, mediation, & advisory arbitration processes. [52]. The Mini Trial concept was originally conceived in a 1977 patent infringement lawsuit, Telecredit v. T.R.W., and has since extended throughout corporate world [53].

A tribunal comprised of senior officers of disputant parties & one or more impartial third parties is formed during the mini trial process to hear and consider the disputant parties' respective cases. A statement on content of dispute is also filed with the tribunal, as is material on which either party is relying, and both parties' representatives submit their respective views to the tribunal. However, it is a

shortened trial since parties are given a limited amount of time to state their separate claims succinctly and precisely, and the procedures are done quickly.

The tribunal next renders a ruling on the merits based on the evidence presented and the arguments stated. Although the tribunal's ruling is confidential and non-binding, it serves as the starting point for negotiation or conciliation between the parties in order to resolve the dispute. The purpose of this simulated procedure is to allow for a concentrated judicial contest prior to parties commencing negotiations. Additionally, the neutral may be asked to render an opinion on most likely outcome of matter if the parties proceed to a full-dressed trial.

After decision is given, the neutral may be retained to help the parties in pursuing an acceptable resolution & facilitating subsequent conversations. The neutral then assumes the role of mediator, attempting to assist the debate and convince the parties to reach an agreement [53]. Due to the neutral's participation in the tribunal and his prior hearing, comprehension, and evaluation of the entire dispute, he is in a better position to facilitate settlement process.

The process may then conclude with a settlement agreement based on Mini-recommendations. Trial's A mini trial, on other hand, has the effect of converting a dispute from a legal to a business matter by placing resolution of the conflict directly in the hands of disputants [54]. If, however, no settlement is reached, the procedure is null and void, and the dispute must be resolved in court or through arbitration [55].

1.5.6 MEDIATION AND ARBITRATION

'Med-Arb' is a hybrid ADR method that combines mediation and arbitration, in which the parties agree to allow a neutral third party to mediate their disagreement and, if no resolution occurs, to arbitrate issue on the merits. Thus, the ADR neutral selected by parties attempts to resolve all or some of issues first through the persuading & conciliatory process of mediation, & then, if some or all of the issues remain unresolved, he acts as an arbitrator to decide them on their merits[56].

Generally, the same neutral person fills both responsibilities in Med-Arb. This type of method has inherent dangers and may exacerbate difficulties as the third party neutral muddies waters of adjudication by diving into mediation & knowing about matters that are unrelated and adverse to the decision-making function [57].

However, the method's advantage is readily apparent if it is viewed primarily as an arbitral process preceded by an opportunity for consensual resolution.

1.5.7 EARLY NEUTRAL EVALUATION FOR DISPUTE RESOLUTION

'Early Neutral Evaluation' is a method of alternative conflict resolution in which a brief presentation to an experienced neutral, followed by the neutral's assessment of case at an early stage, establishes groundwork for a consensual resolution of parties' dispute. E.N.E. is proactive in character, with primary objective of resolving the conflict amicably at the earliest possible time.

ENE is a non-binding, flexible, & private ADR method in which the parties designate a neutral third party with knowledge in subject matter of dispute to conduct an initial merits evaluation of the issue. The parties submit written submissions to the evaluator outlining the substance of their individual claims, as well as the supporting documentation. Although the process can be completed without an oral hearing, if parties so wish, a brief hearing can be held. Again, the concentration is on brevity and precision, & the parties are allotted a limited amount of time to ensure that the hearing is concluded swiftly. Following that, neutral evaluates each disputant's argument and offers an assessment of the likely outcome of the litigation [58]. Thus, ENE provides parties with an early & independent assessment of merits of a dispute at its inception.

ENE is especially beneficial when a disagreement involves a contentious and difficult issue of truth, law, or contractual interpretation that acts as a roadblock to resolution through guided negotiation. Additionally, the parties gain a greater understanding of the merits of their respective cases & gain an understanding of their actual standing in a court of law if matter is determined on the merits. ENE was initially intended to provide an early assessment of a case's merits and was not intended to be used as a settlement tool. However, in its modern version, ENE is used to facilitate the amicable conclusion of a conflict. The evaluator renders an advisory judgement on the most likely outcome of dispute in event of a full-dressed trial.

Following that, the evaluator considers the possibility of a resolution between the parties & may give recommendations to assist them. The parties may then reach an agreement on the basis of the evaluator's findings or with such revisions as the

parties deem acceptable. If the parties cannot resolve the matter amicably, they are able to litigate or arbitration for a final binding verdict.

1.5.8 DISPUTE RESOLUTION BY DISPUTE REVIEW AND ADJUDICATION BOARDS

The Dispute Review Board (DRB) is a tribunal comprised of knowledgeable and unbiased expert reviewers charged with resolving disputes involving a certain project or kind of dispute. The procedure before such a DRB is flexible & straightforward, which is determined with the parties' consent & expanded further by DRB. After hearing from the parties regarding their respective cases & looking over the case records and material supplied by parties, the DRB issues a final report. The report makes recommendations [59]. Generally, however, the participants resolve their dispute in accordance with the report.

1.5.9 RESOLUTION OF DISPUTES THROUGH EXPERT DETERMINATION

Expert Determination is a form of alternative conflict resolution in which parties agree to designate an unbiased arbiter, who is typically an expert in area of dispute resolution, to adjudicate their issue on the merits. Typically, the contract includes a clause stating that expert determination is final & binding. ADR that is adjudicatory in nature is binding expert determination. However, when the expert's opinion does not bind the parties conclusively, the parties may negotiate to resolve disagreement in light of expert's findings.

1.5.10 DISPUTE RESOLUTION VIA NEGOTIATION

Negotiation — communication with intent of persuasion – is by far the most effective method of resolving disputes [60]. Although negotiation does not include a third party, it is nonetheless classified as an ADR process because it provides an alternative to litigation [62]. Negotiation is an alternative dispute resolution procedure in which parties resolve their problems amicably by agreeing on a mutually acceptable solution. In this technique of settlement, parties or their representatives sit down & negotiate directly, laying out the facts of dispute & discussing their claims & counterclaims, indicating the amount to which they are willing to sacrifice their rights and accommodate one another[63]. The parties agree

on a course of action & bargain for their mutual benefit. The preceding list of alternative dispute resolution techniques is not exhaustive. There are other additional ADR processes that are used to resolve conflicts throughout the world. Among them are MEDOLA, summary jury trial, neutral expert fact finding, neutral listener's agreement, expedited arbitration, and final offer arbitration, among others. As a result, the scope of ADR continues to increase, and it has evolved into an indispensable component of the justice delivery system.

1.6 GENERAL ARBITRATION PROCEDURES AND INTERNATIONAL COMMERCIAL ARBITRATION

Arbitration 'Arbitration' is a process for resolving disputes peacefully in the presence of a third party, generally referred to as an arbitrator, who renders a decision (Award) after hearing both parties [64]. Arbitration is a mutually agreeable process. This is not a situation requiring coercion. No arbitration statute has the authority to compel parties to arbitrate if they have not previously agreed to do so. Nor does it preclude them from unilaterally removing specific claims from scope of arbitration agreement. Volt Information Sciences, Inc. v. Leland Stanford University found that courts might pursue and enforce mutual arbitration agreements if necessary, subject to certain terms & conditions agreed upon by parties [65].

Although term 'Arbitration' is not defined in the Arbitration & Conciliation Act, 1996, it is clarified in Section 2(1) (a) of the said Act that arbitration may be institutional, permanent, or ad hoc in character. Additionally, it underlines the importance of governing and initiating arbitration procedures through an arbitration agreement or arbitration clause. The parties must expressly allude to or mention the conflicts they wish to refer to arbitration for resolution. Additionally, the third party's decisions shall have same force & effect as a civil court's decree & shall be binding on parties.

In Jivaji Raja v. Khimiji Poonja & Company, it was established that an arbitration action may be initiated by referring the matter to an arbitrator or by petitioning the court to appoint such authorities.

1.7 ARBITRATION AND THE MANY MANNERS IN WHICH IT CAN BE USED

In reality, the following types of arbitration are frequently used:

Ad-hoc Arbitration: It is a form of arbitration in which conflicts may be referred to arbitration even when no arbitral agreement exists. Under such arbitration, conflicts are referred as they arise and amicably resolved. It is deemed suited for both international & domestic arbitration.

Domestic arbitration: where both parties to arbitration originate from Indian territory and the place of arbitration is likewise located within Indian territory. Domestic arbitration is controlled and affected by Indian substantive law.

International Arbitration: When one of parties to arbitration is a foreign citizen, or when the subject matter of the arbitration is located, registered, or regulated by a foreign national body. International arbitration is governed by legislation selected by parties to the contract.

1.8 INTERNATIONAL DEVELOPMENT OF INTERNATIONAL COMMERCIAL ARBITRATION

According to biblical belief, the first arbitrator was King Solomon, who decided who was the legitimate mother of a young boy. In the narrative, two women were vying for custody of the same infant. Two of them had given birth to sons. One of kids died in the middle of the night, and mother of the deceased child was now claiming the surviving child as her own. Since neither was ready to abandon their claim, King Solomon recommended splitting the kid in half and giving one half to each of them.[66] The genuine mother instantly objected, stating that she would sooner give up her child to the other lady than watch her child slain. Solomon determined that the kind lady was the genuine mother and restored her child to her. As a result, he was able to discover the truth. As far back as 337 B.C, Alexander the Great's father, Philip the Second, used arbitration to settle territorial disputes arising from a peace treaty he had negotiated with southern states of Greece. Later on, arbitration owed its origins to commercial disputes, as it began with trade disputes being resolved by peers as early as Babylonian days.[67]

The Sumerian Code of Hammurabi (about 2100 BC) was established in Babylon, and it was the sovereign's duty to administer justice through arbitration under the Code.[68] Following that, the Greeks were inspired by their Egyptian ancestors & continued to utilise arbitration.

This then progressed with periods into Roman civilisation and was gradually impacted by Roman rules. This was case not just inside Roman Empire, but also among countries with whom Rome did business. Arbitration in England began long before the establishment of the King's courts. According to Massey, [69] arbitration was employed as a frequent mode of commercial1dispute settlement in England as early as 1224. It arose as a way for merchants and dealers to avoid going to court. [70] In England, the first known evidence referring to a written statute of arbitration goes back to 1698. Arbitration was first conceptualised in India under the Panchayat system. Typically, the tribunals were made up of village wise men. Arbitration in India then progressed with first Bengal Regulations, adopted during British control in 1772, followed by more specific law, Indian Arbitration Act 1940, which was subsequently modified by the Arbitration & Conciliation Act 1996. [71] In Bangladesh, a traditional conflict settlement technique called as shalish is widely used. Conflicts including marital disputes, desertion, divorce, child`1custody, support, & land concerns are typically decided through shalish. [72]

1.8.1 ORIGIN & DEVELOPMENT OFI NTERNATIONAL COMMERCIAL ARBITRATION AT INTERNATIONAL LEVEL

International arbitration has a long and illustrious history. Serge Lazareff visually expressed this picture as follows: "International arbitration, it is thought, has its origins in history." Even if precursors existed in the late XVIIIth century, modern commercial arbitration is a real creation of city. It is well knowledge that the earliest contracts arbitrated dealt with commodities. Because the disagreements involved perishable commodities in the majority of cases, they had to be resolved quickly and secretly. London became the centre for nautical & financial concerns, insurance, commodities, & then metals in sixteenth century. This is still true today [73]. Despite this advancement, common law courts were hesitant to demonstrate an interest in dealing with business issues. This was acceptable given that their jurisdiction was geographically limited. The courts could only hear cases that occurred in England or b/w English residents. According to Smith and Keenan:

"Foreign affairs, & many of these economic conflicts did include either a foreign merchant or a contract signed to be completed abroad, were left to some other authority, especially if it may raise problems regarding King & Foreign Sovereign's connections." [74]

Furthermore, Royal Courts did not have a monopoly on administration of justice, and certain local courts1continued to hear cases. Commercial law (or lex mercatoria) is founded on mercantile norms & usages. The law evolved apart from common law. Local & international merchants' disputes were handled at fair or borough. Disputes b/w merchants, both local & foreign, that arose at fairs where majority of important commercial business was transacted in fourteenth century were heard in courts of fair or borough, and were dubbed "courts of pie powder" (pieds poudres) after dusty feet of traders who used them, as Smith and Keenan put it succinctly. The Mayor or his deputy presided over fair or borough courts, or the steward selected by the franchise holder if fair was conducted as part of a private franchise. These courts followed commercial law, and the jury consisted of merchants. Arbitration as an institution emerged from merchants' and traders' habits of sending disputes arising among them on questions of account and other trading disagreements to individuals particularly designated for that purpose. Maritime issues were heard by maritime courts sitting in important ports such as Bristol with the emergence of the courts of the fair and borough. Following that, the Court of Admiralty arose & took over duties of mercantile courts. Beginning in seventeenth century, common law courts began to acquire commercial business, and many norms of merchant law were absorbed into common law. The issue of jurisdiction over foreign nationals emerged as a result of this. This was accomplished in part through fiction. Smith and Keenan's description of the incident was spot on:

"To avoid the dilemma that it still lacked jurisdiction over matters originating outside, court accepted allegations that everything that had transpired abroad had in fact occurred in England within its jurisdiction, for example, by alleging that Bordeaux (in France) was in Cheapside" (in England).

Arbitration has always appealed to merchants & traders, particularly those dealing in perishable goods & need to resolve disputes quickly and in accordance with commercial law & custom. However, it became obvious over time that common law courts had their own set of constraints. According to Ezejiofor:

"As importance of this way of conflict resolution became increasingly apparent, it was realised that practise under common law was not totally sufficient and needed to be augmented." As a result, measures were added to subsequent acts to improve on common law practise."

Aside from the question of technicalities, an arbitral agreement under common law might be oral or written. Such agreements are only valid if there is a real dispute and a submission to a specific arbitrator.[75] An arbitrator appointed under a parol agreement can be withdrawn by either party. 18 As a result of these flaws, it became evident that governmental action was required.

The purpose of these enactments was to strengthen the binding impact of arbitration on parties, to make verdicts more easily enforced, & to correct other flaws that common law practise had shown.

The Arbitration Act was approved by the UK Parliament in 1889. This Act was, for the most part, a declaration of preceding legislation (the 1854 Act, Civil Procedure Act of 1833, & Arbitration Act of 1698) or of business & persuasive practise. Other Acts of 1924, 1930, & 1934 resulted in a Consolidation Act of 1950 known as Arbitration Act 1950. Others were in 1975 and 1979. On sources of English Arbitration Law, Sutton et al. write: "There is no one source of English Arbitration Law." Prior to the Arbitration Act of 1996, there was no statutory regulation at all for conduct of arbitrations. The Arbitration Acts of 1950-1979 were mainly concerned with bridging gaps in an incomplete arbitration agreement & defining High Court's powers."[76]

As a result, the 1996 Arbitration Act modified the previous arbitration statute. It consolidated ideas established by past case law and embraced a portion of the Model Law. Regardless, the Arbitration Act of 1996 is primary UK arbitration legislation. The model legislation known as United Nations Commission on International Trade Law also had an impact on this Act. [77]

This research does not imply that arbitration was limited to England. However, LazarefF reminds us that arbitration is not merely a historical phenomenon, but also a real product of City of London. He went on to say, "International commercial arbitration as we know it began b/w two World Wars." Eisemann, Secretary General of International Chamber of Commerce Court of

Arbitration, used to remark that first ICC arbitration he conducted was spontaneous, without rules, &, most horrifyingly, without a fee. International commercial arbitration was a mechanism used by gentlemen to settle disputes between gentlemen in a gentlemanly manner. Nothing further was blackballed as a consequence for noncompliance. That seems so far distant today.

It is definitely far away because there are currently many Arbitration Rules. Similarly, arbitration processes are nearly as expensive and time-consuming as litigation, the costs paid to arbitrators are significant, & penalty for noncompliance is resort to courts for enforcement.

There are two other reasons why the development has concentrated on England. For starters, London was global trading centre. The London Court of International Arbitration was created in 1892, is based in London, is perhaps the world's oldest arbitration organisation. Second, our legal history is inextricably linked to the English legal system. Until 1988, our arbitration laws were significantly influenced by English law. Arbitration might thus be considered one of England's unseen exports. Today, there are arbitral centres and institutions all over the world. Wherever they exist, the point must be stressed that arbitration began as a private sector judicial process. The law was only enacted to emphasise its significance & relevance.

1.8.2 UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)

The importance of a better legal framework for supporting international business & investment is widely acknowledged in an increasingly interconnected world. The United Nations Commission on International Trade Law (UNCITRAL), created by United Nations General Assembly in resolution 2205 (XXI) on December 17, 1966, plays an essential role in development of that framework. Its mission is to further the gradual harmonisation and modernisation of international trade law1 by preparing and advocating use and acceptance of legislative & non-legislative instruments in a variety of major commercial sectors. Among them include dispute resolution, international contract processes, transportation, insolvency, online commerce, international payments, secured transactions, product procurement, and sale. These instruments are

negotiated through an international process involving a wide variety of participants, including UNCITRAL member states, nonmember states, and invited intergovernmental and nongovernmental organisations. As a result of this open-ended approach, these works are often recognised as giving solutions appropriate for diverse legal systems and nations at varying stages of economic development. UNCITRAL has been considered as premier legal body of United Nations organisation in field of international trade law since its foundation.

1.8.3 SOME MAJOR INTERNATIONAL ARBITRATION INSTITUTES

A brief outline of some of major arbitration institutions that handle international arbitration cases:

1.8.3.1 INTERNATIONAL COURT OF ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCIAL (ICC)

The ICC International Court of Arbitration, the world's premier organisation in international arbitration, was founded in 1923.

Its headquarters are in Paris. Every year, the International Court of Justice (ICC) holds arbitrations in over 35 different nations. The International Criminal Court (ICC) is not a court in the traditional sense. The cases filed to ICC arbitration are decided by arbitrators selected for each specific case. The Court's 80 or more members from 70 different nations are responsible for overseeing the arbitral procedure. One essential and distinctive aspect of Court is that it examines and approves draught arbitral decisions filed by arbitrators. This tool for quality control is a critical component of ICC arbitration system. The Court's secretariat has a permanent workforce of about 40 people, including 25 attorneys grouped into case-monitoring teams. During the year 2000 alone, the ICC Court presided over 550 new cases involving parties from more than 100 nations.

1.8.3.2 INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID)

The World Bank created International Centre for Settlement of Investment Disputes (ICSID) in accordance with 1965 Convention on Settlement of Investment Disputes b/w States Nationals of Other States. The Convention has been ratified by 135 countries. The major goal of the centre is to simplify the resolution of investment

disputes b/w governments & international investors. The Centre has had a set of extra facility regulations in place since 1978, permitting the ICSID Secretariat to administer some types of procedures involving States & foreign people that fall beyond scope of Convention. (These are examples when one of parties is not a member of EU or where dispute is not an investment issue.) The proceedings do not have to take place in the Centre's headquarters in Washington. Governments must provide advance authorization before submitting investment contracts between governments and investors, as well as in over 900 bilateral investment treaties. By January 2001, the Centre had completed over 51 cases, with another 30 still pending.

1.8.3.3 CHINA INTERNATIONAL ECONOMIC & TRADE ARBITRATION COMMISSION (CIETAC)

The China International Economic Trade Arbitration Commission (CIETAC), one of world's busiest international arbitration centres, was founded in 1954 to adjudicate disputes between foreign and Chinese enterprises. CIETAC has established sub-commissions, one of which is the active Shanghai Commission. CIETAC changed its arbitration rules in 1998 to allow it to handle domestic disputes involving joint ventures with international investors and wholly-owned foreign corporations based in China. During 19999, the overall number of new arbitration cases filed at CIETAC, including those filed at its branch offices, was around 700.

1.8.3.4 INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION OF THE AMERICAN ARBITRATION ASSOCIATION (AAA)

The American Arbitration Association (AAA), founded in 1926, provides a wide range of services, including education & training. In the United States in 1999, it handled approximately 140,000 disputes through its specific rules for labour, insurance, construction, commerce, securities, and other fields. The AAA created the International Centre for Dispute Resolution in New York City in 1996, which currently handles all AAA international Arbitration Rules, which were amended in 2000, regulate arbitrations of international issues brought to the AAA. In 1999, it had approximately 450 foreign cases on its docket.

1.8.3.5 ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE (SCC INSTITUTE)

The American Institute of Stockholm Chamber of Commerce (SCC Institute) was founded in 1917 & operates independently of the Stockholm Chamber of Commerce. It is now most popular location for International Commercial Arbitration. It was recognised as a neutral centre for arbitration of East-West trade issues by the United States and the Soviet Union in 1970s. Since then, SCC Institute has grown its services and handled cases involving parties from several nations.

1.8.3.6 LONDON COURT OF INTERNATIONAL ARBITRATION (LCIA)

"The London Court of International Arbitration (LCIA)," situated in London, is possibly the oldest commercial arbitration organisation. It made a significant stride toward globalisation in 1985, when it established the London Court of International Arbitration. Its primary responsibilities include the nomination of arbitral tribunals, resolution of challenges to arbitrators, & regulation of expenses. It does not review arbitral awards. By the end of 1999, it had a workload of about 70 cases per year.

1.8.3.7 KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION

The Kuala Lumpur Regional Centre for Arbitration of Business Disputes within the Region was created in 1978 under auspices of Asian-African Legal Consultative Committee, with collaboration of Government Consultative Committee & aid of Malaysian Government. The Centre follows the UNCITRAL Arbitration Rules of 1976, with certain amendments. A change to the Malaysian Arbitration Act exempts foreign arbitrations conducted under the norms of the centre from the jurisdiction of Malaysian courts. The Centre provides hearing rooms, an arbitrators retiring room, a library, secretarial support, and refreshments.

1.8.3.8 PERMANENT COURT OF ARBITRATION (PCA)

PCA The Permanent Court of Arbitration, established by treaty at First Hague Peace Conference in 1899, is the world's oldest organisation for resolving international disputes. The Court provides a comprehensive variety of services for settlement of international disputes that parties involved have expressly agreed to refer to it for resolution. Unlike International Court of Justice, Permanent Court of Arbitration has no sitting judges: the arbitrators are chosen by the

parties themselves. Another distinction is that the Permanent Court of Arbitration holds its sessions in private & in confidence. The Court also mediates conflicts between international organisations as well as between governments and international organisations. The Hague Justice Portal has digitalized a number of Permanent Court of Arbitration's historic international arbitrations in close collaboration with the Court.

1.8.3.9 CAIRO REGIONAL CENTRE FOR INTERNATIONAL COMMERCIAL ARBITRATION (CRCICA)

The Cairo Regional Centre for International Commercial Arbitration (CRCICA), like the Kaula Lumpur Centre, was created in 1978 with the aid of the Egyptian government under auspices of Asian-African Legal Consultative Committee. The principal activity of Centre is the administration of both national and international arbitration proceedings. Its reported caseload in 2000 was around 38 cases. Construction, export/import, and supply contracts, as well as management and operation contracts and insurance disputes, were all addressed; in 1992, the Centre established a marine arbitration office in Alexandria.

1.8.3.10 INTERNATIONAL COMMERCIAL ARBITRATION COURT AT THE RUSSIAN FEDERATION CHAMBER OF COMMERCE AND INDUSTRY (ICAC)

ICAC (formerly the arbitration Court at USSR Chamber of Commerce & Industry) is a prominent arbitration institution based in Moscow with several decades of experience. The World Intellectual Property Organization's Arbitration & Mediation Centre

1.8.3.11 THE OHADA PERMANENT COURT OF JUSTICE AND ARBITRATION

The OHADA Treaty of 1993, adopted by 16 (mostly) West and Central African states, establishes a single unified legal framework for corporate law in the area. The Permanent Court of Justice and Arbitration, with its headquarters in Abidjan, Cote d'Ivoire, is one of its institutions. The OHADA Arbitration Act, as well as the Permanent Court Rules of Arbitration, went into effect in 1998. The Court oversees arbitrations referred to it by the parties in its administrative capacity. It also looks through draught arbitration awards. Despite the fact that its arbitration

operations began in 200, it is intended to play a major regional role in administration of arbitration issues in West and Central Africa.

1.8.3.12 THE INDIAN COUNCIL OF ARBITRATION (ICA)

The Indian Council of Arbitration was founded in 1965 as the premier arbitral organisation at national level in India. The council's membership has been steadily expanding in recent years. The ICA currently has over 4200 members. The number of cases filed with the Council has recently increased. It is projected that the number of cases involving foreign parties would grow significantly, as international contracts contain an arbitral provision referring to the Council's arbitration procedures. The Council facilitates the resolution of international economic disputes through arbitration. Its arbitration laws are based on international norms, and they offer the trade with the assurance that a dispute will be resolved quickly and fairly. Disputes involving public sector trade organisations, parties, or undertakings of foreign governments and the Indian government may also be subject to arbitration under the Council's regulation.

1.8.4 INTERNATIONAL CONVENTIONS ON INTERNATIONAL COMMERCIAL ARBITRATIONS CONTEMPORARY

In late nineteenth & early twentieth centuries, foundations for today's legal framework for international arbitration were laid. The basic legal framework for international commercial1arbitration was established in first two decades of the twentieth century with Geneva Protocol of 1923 and the Geneva Convention of 1927, as well as the enactment of parallel national arbitration1legislation and the development of effective institutional arbitration rules, as discussed further below. Building on these foundations, current legal regime for international commercial arbitration was largely developed in second half of twentieth century, with countries all over world signing international arbitration conventions (particularly New York Convention) & enacting national arbitration statutes designed specifically to facilitate arbitral process; at same time, national courts in the majority of states provided robust support to the arbitral process. This ostensibly "pro-arbitration" regime, as discussed further below, ensures enforceability of both international arbitration agreements & arbitral awards, gives effect to

procedural autonomy of parties & arbitral tribunals, & seeks to protect arbitral process from interference by national courts or other governmental authorities.

Simultaneously, during last few decades, existing legal framework for international investment arbitration has evolved, most notably with the ratification of the ICSID Convention & a vast network of "bilateral investment treaties" ("BITs"). The 1929 General Act on Pacific Settlement of International Disputes was similarly, albeit less widely and thoroughly, followed. [78] These instruments represented a generally "pro-arbitration" perspective to employment of international arbitration to amicably resolve interstate conflicts, while also establishing a fundamental legal framework within which international arbitrations may take place.

1. 1899 AND 1907 CONVENTIONS FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES

By turn of twentieth century, suggestions for a more universal state-to-state arbitration process had gained traction. Although seldom mentioned in contemporary literature, an 1875 initiative of the Institut de Droit International developed a draught procedural code based on existing interstate arbitral practise & intended to establish fundamental procedural rules and a system for future ad hoc arbitrations. The initiative bears witness to the prevalence of interstate arbitrations as well as the perceived desire of more uniform, transparent, & globally neutral processes for such arbitrations.

In 1899, Hague Peace Conference drafted Hague Convention on Peaceful Settlement of Disputes, which included international arbitration principles & established a "Permanent Court of Arbitration" to oversee state-to-state arbitration under Convention. These advances paved the way for more formal interstate adjudication in Permanent Court of International Justice & International Court of Justice, as well as creation of Permanent Court of Arbitration. At same time, throughout twentieth century, arbitration remained a popular method of resolving interstate disputes, with governments frequently choosing it over established international judicial organisations. [78]

Arbitration Law: Reformation and Nationalization, pp. 25-26 (1992); Benson, An Exploration of the Impact of Modern Arbitration Statutes on the Development of

Arbitration in the United States. 11 J.L. Econ. & Org. 479, pp. 491-94 (1995). (emphasizing role of lobbying from legal profession).

The 1899 Convention was revised in 1907 with new Pacific Settlement of International Disputes, which included or modified a number of sections pertaining to international arbitral proceedings. [79] In 1929, the "General Act on Pacific Settlement of International Disputes" was drafted. (The Act was eventually ratified by a number of states, primarily in Western Europe). [80] The Act, like Conventions of 1899 & 1907, sets a basic legal basis for international arbitrations b/w state parties (subject to contrary agreement by parties).

2. GENEVA PROTOCOL AND GENEVA CONVENTION

During first decades of the twentieth century, developing-country businessmen & lawyers lobbied for laws to make arbitration more accessible for settling domestic and, in particular, international economic conflicts. These pleas emphasised importance of trustworthy, effective, & fair methods for resolving international disputes to expansion of global commerce & investment. The Geneva Protocol was negotiated in 1923 by major trading nations, first under auspices of newly founded International Chamber of Commerce.

Arbitration Clauses in Commercial Transactions The Protocol was eventually approved by United Kingdom, Germany, France, Japan, India, Brazil, & two more countries. Despite the fact that United States did not ratify Protocol, nations that did comprised a sizable share of international trade community at time.

3. NEW YORK CONVENTION

The Geneva Protocol and Convention evolved from the United Nations Convention on Recognition & Enforcement of Foreign Arbitral Awards. The pact, sometimes referred to as the "New York Convention," is by far the most important modern legislative law governing international commercial arbitration. It essentially serves as a universal constitutional charter for international arbitral process, with broad wording that has allowed both national courts & arbitral tribunals to construct long-lasting, effective procedures for enforcing international arbitration agreements & arbitral judgements.

In 1953, International Chamber of Commerce drafted the first draught of what became Convention. The ICC issued draught with conclusion that "1927 Geneva Convention was a significant step forward, but it no longer completely meets modern economic requirements," and with rather extreme objective of "obtaining acceptance of a new international system of arbitral decision enforcement." [81]

In spring of 1958, the ICC & United Nations Economic and Social Council ("ECOSOC") prepared preliminary draughts of a revised convention, which served as foundation for a three-week conference in New York called United Nations Conference on Commercial Arbitration, which was attended by 45 states. The New York Conference resulted in New York Convention, which was a completely unique instrument in many aspects, establishing for first time a full legal foundation for international arbitration. The earliest versions of the New York Convention focused solely on recognition and enforcement of arbitral decisions, with little regard for the efficacy of international arbitration agreements.[82] The wording of Convention was unanimously approved by Conference on June 10, 1958. (with only United States and three other countries abstaining). [83]

4. INTER-AMERICAN CONVENTION

Much of South America effectively abandoned international business arbitration in the early twentieth century. Brazil was the only country to ratify the Geneva Protocol, although it did not sign Geneva Convention. The majority of South American states did not ratify the New York Convention until the 1980s.

In many ways, the Inter-American Convention is comparable to New York Convention; in fact, Convention's writing history shows that it was designed to achieve same outcomes as New York Convention. [84] The Inter-American Convention, among other things, provides for presumption of legitimacy & enforcement of arbitration agreements and arbitral judgements subject to certain expectations similar to those in New York Convention.

5. EUROPEAN CONVENTION

The European Convention went into force in 1964, and it now has 31 signatories. The Convention is signed by the majority of European countries

(excluding the United Kingdom, the Netherlands, and Finland), as well as 10 non-EU countries, including Russia, Cuba, & Burkina Faso. [85] The Convention is made up of 19 articles an extensive appendix (dealing with certain procedural matters).

6. ICSID CONVENTION

The International Centre for Settlement of Investment Disputes ("ICSID") is a specialist arbitration organisation founded in 1965 in accordance with "ICSID Convention" or "Washington Convention." [86] ICSID was founded on initiative of the International Bank for Reconstruction & Development ("IBRD" or "World Bank") & is headquartered in Washington, D.C.

The ICSID Convention is intended to aid in resolution of "investment disputes" (i.e., "legal issues arising directly out of... investment") that parties have agreed to refer to ICSID. [87] Investment conflicts are defined as controversies arising from a "investment" and involving a Contracting State or designated state body (rather than a private entity headquartered or domiciled in a Contracting State) & a national of another signatory state.[88] In the case of such disagreements, the Convention allows for both conciliation and arbitration processes. The ICSID Convention & ICSID Arbitration Rules regulate ICSID arbitrations. [89]

7. BILATERAL INVESTMENT TREATIES OR INVESTMENT PROTECTION AGREEMENTS

During the 1980s & 1990s, bilateral investment treaties ("BITs") or investment agreements ("IPAs") were prevalent as a strategy of stimulating capital investment in emerging markets. Capital-exporting nations (including United States, most Western European countries, Japan) were among first & most zealous proponents of BIT negotiations, mostly with developing countries. BITs have lately been signed by nations from all over the world and at various levels of development. According to a recent count, there are currently over 2,500 BITs in operation.

1.8.5 THEORIES/PRINCIPLES OF INTERNATIONAL COMMERCIAL ARBITRATIONS

When parties choose to have their contractual relationship, & thus any ensuing disputes, governed by general principles of international law by referencing general principles of international law, principles common to certain legal systems, lex

mercatoria, and so on in their agreement's applicable law provision, arbitrators are bound to give effect to that choice, whether or not they consider it appropriate.

Indeed, most recent international arbitration legislation recognises parties' power to select broad principles of law to regulate their contractual interactions by requiring arbitrators to follow " rules of law" rather than "law" selected by parties."

Certain legal systems, such as the UNCITRAL Model Law, which is known for its relative conservatism, discourage this solution; Article 28 (2) of Model Law states that, in absence of a choice by parties, ' arbitral tribunal shall apply law determined by conflict of laws rules which it considers applicable.' Despite being essentially based on UNCITRAL Model Law, German Act of 22 December 1998 deviates from the formula in terms of choice of law rule. It followed Swiss model in this regard, holding that award of an arbitration procedure should be founded and or formulated according to predetermined standards of law, which have been principally adopted by the parties as well as suited to the peaceful resolution of conflicts. Nonetheless, it adheres to the UNCITRAL Model Law by restricting selection of the arbitrators to ' law' as opposed to 'rules of law' most closely related with dispute in absence of a choice of parties.

Other recent legislation, on the other hand, enable arbitrators to utilise international norms if they believe it is appropriate and if parties do not concur. In any case, most national laws, in line with Article 36 of the Model Legislation, do not enable state courts to evaluate arbitrator's decision on pertinent law during exequatur proceedings or an action to set aside award, providing arbitrators significant latitude. The concept that arbitrators can employ broad principles of law in absence of parties' agreement on applicable legislation was embodied in a resolution adopted on April 28, 1992, by the International Law Association in Cairo, which stated:

"The fact that an international arbitrator based a decision on transnational standards (generic principles of law, principles common to numerous jurisdictions, international law, trade usages, etc.) rather than a single law of a specific State should be considered." A more contentious issue is whether the not affects legality or enforceability of award; (1) when parties have agreed arbitrator may use

international rules; or (2) when parties have agreed that arbitrator may use international rules.

1.9 NATIONAL DEVELOPMENT OF INTERNATIONAL COMMERCIAL ARBITRATION

A layperson's conventional sense of access to justice is to approach the courts of law. A court is where the common man receives justice. However, the courts have become inaccessible owing to a variety of issues such as poverty, social & political backwardness, illiteracy, ignorance, procedural formalities, & so on. To obtain justice through the courts, one must confront the harsh reality of the difficulties and costly procedures involved in litigation.

As a result, a trend for out-of-court agreements to offer fast justice arose. Arbitration is a popular method of dispute resolution among the various ADR mechanisms, particularly for commercial disputes, because with Economic Liberalization and market opening, there is a phenomenal growth of international trade, commerce, investment, technology transfer, developmental & construction works, banking activities, & like. In order to deal with rapidly changing environment, India has amended its arbitration rules to give an equal playing field for both domestic & international enterprises. Indian arbitration law provides fairness and justice for all parties involved.

Over last few decades, commercial activities that were formerly exclusive to India have expanded outside the country's borders. Along with this, the establishment of a framework that would be receptive to the quick resolution of any concern that may occur amid commercial exchanges involving various nationalities became notably necessary.

Because of the advancements in worldwide exchange and commerce, as well as the lengthy delays in the transmission of litigation and bids in courts. There has been tremendous progress in the resolution of questions via option discussion of arbitration. Assertion is a question-resolution approach that is an alternative to attempting a discussion in court with a jury and judge. The alternative technique for resolving disputes through arbitration is a quick & efficient process that is being used all over the world.

1.9.1 CONCEPT OF ARBITRATION

Arbitration, without a doubt, is a legal mechanism to give an amicable solution to a specific situation, which is typically an outside court process but legally binding decision equivalent to the decree of the judicial courts. Arbitration is most commonly used way for resolving commercial disputes. It is a diverse strategy for resolving legal disputes involving business difficulties, and it can provide a convenient, careful, discreet, reasonable, and ultimate solution for a conflict. It provides a response to the question by at least one impartial third party, known as an arbitrator, who is chosen by or for the benefit of the parties themselves. Arbitration is a semi-legal or formal procedure for resolving disputes.

Arbitration is appropriate to civil matters just & in large part to the proficient transfer of debate in field of business, all more so in range of International Trade and Commerce, because organisations are more conscious than at any other time in recent memory of the need to locate a reasonable means for settling universal business and venture disputes. It is not another system for resolving a dispute in India. It has a very old historical basis and habit for common dispute resolution. The 'Arbitration & Conciliation (Amendment) Act, 2015' governs discretionary legislation.

1.9.2 ARBITRATION IN PRE BRITISH REGIME

The legislation relating to mediation was not new to India's legal structure, even before the introduction of the British rule, but it may not have fit in the sorted out for like today's. It was in the presence of the "Panchayat" to which persons were chosen based on their standing and existence in the general public. In the case of Chanbasappa Gurushantappa v. Boss Justice Marten, Boss Justice Marten commented on this framework as a noteworthy feature of everyday Indian life and proposed an incredibly feasible comment. Balingaya Gakurnaya, in the sense that arbitration resembles a method of settling a dispute by referring the topic to an outsider, is one of the standard techniques and offering an agreeable arrangement based on the advised conclusions by the groupings. There was no specific statute governing arbitration processes during this time period.

1.9.3 REGULATION RELATING ARBITRATION

There was no specific enactment or instrument for arbitration processes in India during the British period. Indeed, under the Panchayats structure, it was reflected as dispute resolution through the middle man. Similarly, the Bengal Regulations of 1772, 1780, 1781, & 1793 were meant to empower arbitration in India at these times. Lord Cornwallis also attempted to offer the outside court settlement structure through the Regulation of 1787, which required municipal panchayats to ensure the resolution of disputes through the mediation method. Similarly, there was a mechanism for a distinct hardware under town panchayats under the Madras Regulation of 1816, which provides mandatory support of the people by town Munsif as well as the District Munsif. The adoption of the Bombay Regulation of 1827 specifically stated that there may be an out-of-court dispute resolution by assertion.

1.9.4 INDIAN ARBITRATION ACT, 1899:

This Act was based on English Arbitration Act of 1899, and it was enforceable in circumstances when the subject matter of arbitration was also the subject of an action, and the suit may be launched in a jurisdiction of Presidency Town, whether with leave or otherwise. The most notable element of this Act is the provision for referring current and future problems to arbitration by agreement, without intervention of judicial apparatus. The Act's application was limited to Presidency Towns only. Section 2 also gave the Local Government the authority to extend the Act's jurisdiction, but this was not used in practice.

1.9.5 CODE OF CIVIL PROCEDURE

The Act of 1899 did focus on outside court settlement under the organised dispute settlement mechanisms, but it also contained provisions under which parties to a dispute may present their arbitration agreement before court, after which it would refer to arbitration, as well as provisions without intervention of the court. With the 1999 revision, an attempt was made to secure conflict resolution by arbitration under the terms of Section 89 of the same law.

1.9.6 THE ARBITRATION ACT, 1940

In 1927, the Mackinnon Committee offered a proposal, which was followed by English Act of 1934. Following that, in 1938, Government of India nominated Shri Ratan Mohan Chatterjee, Attorney-at-Law, as a special officer for rewriting Arbitration legislation, and the amended Act went into effect in 1940. This Act got the Governor General's assent on March 11, 1940, and went into effect on July 1, 1940. It was an Act to consolidate & reform arbitration legislation. As a result, it can serve as a comprehensive code of legislation for states. Except for J&K, this Act applied to the entire country of India. This Act dealt with three types of arbitration: (1) arbitration without court participation, (2) arbitration with court involvement where no suit is underway, and (3) settlement in cases. The Arbitration Act of 1940 solely addressed domestic arbitration.

1.9.7 SCOPE OF ARBITRATION PROCEEDINGS IN INDIA

Arbitration is primarily regarded as a business conflict resolution method, owing to the fact that in international trade, it is frequently simpler to enforce a foreign arbitral award than a Court verdict. During the final decades of the twentieth century, arbitration gained widespread appeal as a popular method of settling economic disputes.[90] The arbitration is carried out in accordance with provisions of parties' arbitration agreement, which is normally accommodated in the terms & conditions of parties' commercial contract. The disputing parties agree to resolve their disagreement through arbitration. It is becoming increasingly used as a conflict resolution process, notably in construction, industrial, and labour issues. It is regarded as the best vehicle for settling disputes between parties to local or international contracts.

Some significant institutions have significantly contributed to success of ADR1 services in India. The Indian Council for Arbitration (ICA) & International Centre for Alternative Dispute Resolution (ICADR) are two of these organisations, as are the Federation of Indian Chambers of Commerce and Industry (FICCI), the Indian Chamber of Commerce (ICC), and Bengal Chambers of Commerce and Industry (BCCI). The International Court of Arbitration (ICA), London Court of International Arbitration (LCIA), & American Arbitration Association are among the international institutions (AAA). All of these institutions have regulations in place

that are expressly geared for conduct of organised arbitration proceedings. These rules were designed based on previous experiences, & as a consequence, they address all potential circumstances that may happen throughout arbitration process.

On April 15, 1965, Indian Council for Arbitration was created with aim of settling local & international commercial disputes & international trade complaints received from Indian and foreign parties.

1.10 REVIEW OF RELATED LITERATURE

Merton E. Marks (2003) discussed the issue from a US perspective in his article titled "New Trends in Domestic & International Commercial Arbitration & Mediation," as there has been a significant increase in use of arbitration & mediation in United States of America in recent years, & as such trends in United States of America's arbitration regime are now experiencing increased court-ordered arbitration & mediation; increased contractual mandatory bindering; and increased contractual mandatory bindering.[91]

Francisco Orrego Vicua (2004) addressed three key issues of contemporary international dispute settlement in his book International Dispute Settlement in an Evolving Global Society: Constitutionalization, Accessibility, and Privatization. These issues were development of international constitutional law in a global society, increasing access of individual, & developing role of international private arbitration. The book explored contemporary ideas & recommendations for International Court of Justice to take on a new role in exercising judicial constitutional tasks, with a focus on United Nations & forms of judicial review recognition. In light of privatisation agreements, emerging models of international commercial arbitration organisation are examined. [92]

R. Desing Rajan (2005) addressed the history and evolution of arbitration in India in his book A Primer on Alternative Dispute Resolution; how arbitration evolved from the Vedic period to the present. The book discussed how arbitration has certain disclosures because it is slow and expensive, there is a lack of adequate knowledge of potential parties, there is a lack of institutional framework, & there are insufficient infrastructural facilities. This book chronicled the evolution of Alternative Dispute Resolution in general, & Arbitration in particular. By providing thirteen technical solutions, the author has suggested how to develop arbitration culture, fast-

track arbitration awareness programmes, high economic growth, online dispute resolution with advent of Information Communication Technology (ICT), uniformity with enforcement of UNCITRAL Model Law on International Commercial Arbitration, and arranging more arbitration centres. However, the author fails to discuss how Arbitration Proceedings have been successful in resolving disputes in the past.[93]

In their article "International Arbitration: New Trends," Jean-Georges Betto and others (2006) concentrated only on four issues that are emerging in the International arena of Commercial arbitration: the pros & cons of using new technologies in international arbitration; the growing tendency to use provisional measures in arbitral proceedings; the need for more transparency in arbitration; and whether arbitrators' powers should be strengthened to make arbitration more efficient. However, these were addressed in relation to the European perspective, particularly that of Paris.[94]

Sarah.E. Hilmer (2007) discussed the criticised the Arbitration Act, 1940 and mentioned the need for a new act in his article "Did Arbitration Fail India or Did India Fail Arbitration?" This article also focuses on India's need to change their legal regime by implementing new changes in the field of International Commercial Arbitration in both international and domestic arbitration. This article discussed the differences between the earlier Arbitration Act of 1940 & new Arbitration Act of 1996.[95]

In his article "With Globalization of Arbitral Disputes, Is it Time for a New Convention?" Mark Mangan (2008) asks whether it is time for a new convention. The New York Convention's shortcomings were discussed. The author opined in this article that the national courts have explained the provisions of the convention in accordance with the national standards prevailing in their respective countries, which are not interested in international commercial arbitration. This article also looked at the concept of arbitration by examining how different countries approached the New York Convention's provisions.[96]

Horacio A. Grigera Naón and Paul E. Mason (2010) discussed how arbitration is conducted under different legal systems such as law, civil law, & shari'a law, as well as cultural issues in international arbitration, in their book International

Commercial Arbitration Practice: 21st Century Perspectives. It goes through function of arbitration in settling international business disputes in many economic sectors, industries, & commercial activities. It also describes recent trends at several major global commercial arbitration institutions in dealing with how technology has changed in recent years in International Commercial Arbitration practise.[97]

Margaret L.Moses (2012) examined how and why arbitration works in The Principles and Practice of International Commercial Arbitration. It establishes the legal & regulatory foundation for international arbitration. It also contains the most recent updates to arbitration laws, rules, and guidelines. This book is simple to read and will help you understand the world of international arbitration.[98]

Ihab Amro (2013) focuses on the New York Convention on Recognition & Enforcement of Foreign Arbitral Awards in Theory & Practice: A Comparative Study in Common Law and Civil Law Countries in his book Recognition and Enforcement of Foreign Arbitral Awards in Theory and Practice: A Comparative Study in Common Law & Civil Law Countries, as well as clashes b/w the New York Convention & national arbitration laws of both common law & civil law countries (as civil law). The author proposes solutions to problems caused by incorrect judicial application or interpretation of New York Convention by national courts, as well as encouraging the adoption of a more liberal regime in favour of recognition & enforcement of foreign arbitral awards in general, & a more liberal interpretation of New York Convention in national courts of common law and civil law countries in particular. [99]

Andrew Myburgh and Jordi Paniagua (2016) focused on the effect of international arbitration on FDI in their article "Does International Commercial Arbitration Promote Foreign Direct Investment?" and developed a model to interpret the use and effect of resolving international disputes through arbitration. According to findings, having access to arbitration increases FDI flows. The increase in FDI is primarily caused by a change in investment volume. Arbitration has a greater impact in countries with weak institutions and on larger projects.[100]

George A. Bermann (2017) In his book, Recognition and Enforcement of Foreign Arbitral Awards: He focuses on how Convention on Recognition and Enforcement of Foreign Arbitral Awards, also known as The New York Convention,

has been tried in jurisdictions that include almost all of major international arbitration centres in his book The Explanation and Application of New York Convention by National Courts. It also concentrated on a broad report that evaluated country responses to a wide variety of essential topics in interpretation & execution of convention..[101]

1.11 STATEMENT OF PROBLEM

Every commercial activity in international trade & commerce is often preceded by a contract outlining the parties' duties in order to avoid legal issues. However, regardless of how properly a contract is worded, each party may interpret his or her rights and obligations differently.

- Frequently, international trade involves traders from several nations, each of which has a legal system that is significantly different from the other, resulting in intricate and even contradicting aspects.
- Each country's courts have authority only inside its territorial bounds. As a result, arbitration became the favoured method of resolving conflicts between parties from different nations.
- In India, the statutory provisions governing international commercial arbitration are governed and enforced by Part II of A rbitration & Conciliation Act, 1996, which is based on United Nations Commission on International Trade Law's model law, as well as the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, Geneva Convention, & other international conventions.

1.12 RATIONALE OF THE STUDY

International trade expansion will almost certainly result in international disputes that cross political borders & geographical boundaries. Given arbitrator's preference for arbitration over litigation in court system & foreign element in international arbitration over domestic element in national courts, preference for international arbitration over litigation in national courts for resolution of such disputes is natural. This is also due to absence of International Commercial Courts. In these situations, going to arbitration in a convenient & impartial venue is typically seen as preferable than resorting to courts to address any disagreement that cannot be resolved via negotiation.

International arbitration's reasoning and objective should be to provide an accessible, neutral, equitable, speedy, and effective process for discussing disputes involving international commerce.

The fundamental characteristics that are consistent with the legal framework for resolving international commercial disputes "may be divided into three stages: (1) jurisdiction; (2) choice of law; and (3) acceptance & enforcement of the award.

When parties from different legal systems engage in International Commercial Arbitration, a conflict of laws immediately emerges, necessitating the selection of the substantive law to be applied in a particular case. Oftentimes, parties' original agreement specifies the substantive law to be adopted in arbitration. However, difficulties occur in deciding the appropriate law when parties are unable to agree on a choice of law for resolution of their dispute.

A significant factor to examine is trend toward more judicial intervention, which tends to encroach on arbitral autonomy and finality. The difficulty is to strike a balance b/w arbitral independence & finality & judicial oversight of arbitration system. On this subject, national legislation differs. The goal of UNCITRAL Model Law is to increase coherence and uniformity in this domain.

In a variety of international economic disputes, complete avoidance of judicial action does not fit present trend, but scope of judicial supervision must be minimised.

The international arbitral tribunal is empowered by parties' agreement, not by the State's mandate. The applicable law is also established by the arbitration agreement's provision. With enhanced arbitral autonomy, the demand for justification of the award becomes more stringent. Apart from ensuring transparency throughout arbitral procedure, it also works as an inherent check on arbitrators by disclosing to party award's basis & logical process by which arbitrators arrived at their conclusion. Additionally, the presence of justifications governs the scope of court oversight.

With all of these objectives and the growing number of international commercial disputes, it is critical to recognise the demand of business community in a country like India & to expand Indian foreign trade at the global level as well as to attract foreign investors. To accomplish these goals and to attract foreign investors,

the importance of effective international arbitration laws for amicable resolution of international commercial disputes is critical. The Supreme Court observed in matter of food corporation of India v. joginderpal Mohinderpal, That arbitration legislation should be simpler and more satisfactory, and that its concepts of justice should be founded on fair play and mutual settlement.

In light of the recent verdict, parties to international commercial arbitrations are no longer free to include or exclude jurisdiction of Indian courts. whereas the judgement in Bharat Aluminum Co v. Kaiser Aluminum Technical Services Inc provides much-needed relief to foreign players and also correctly recognises the territorial requirement as a cornerstone of arbitration. Even if there are several concerns in international commercial disputes that have been raised or may emerge in the future, they cannot be resolved through international commercial arbitration systems due to a lack of clear and effective standards. The following are some significant difficulties:

1.13 INTERNATIONAL COMMERCIAL ARBITRATION INVOLVES ISSUE

- Arbitration clause/Arbitration agreement enforceability
- Arbitration and hearing locations.
- Laws in conflict
- Differences in substantive and procedural law exist between countries.
- The procedures for selecting arbitrators and their numbers.
- Different countries' public policies.
- Award Recognition and Enforcement.

Without a doubt, the judgements covered here have been well received in the field of international commercial arbitration. At the same time, inadequate arbitration laws have prompted a rethink of the long-held perception of enforcing international decisions in India as a night before going to bed process fraught with the possibility of judicial intervention at various stages.

Recent Indian court decisions restricting the basis for challenging a foreign award would result in faster settlement of conflict through arbitral processes. One can only hope that as a result of the current judicial landscape on the subject, the

world community's faith in commercial arbitration as a viable alternative dispute resolution method in India grows.

1.14 OBJECTIVES OF THE PRESENT WORK

- To conduct research on legal system of international arbitration and to examine the shortcomings in international instruments relevant to international arbitration.
- To assess the effectiveness of international arbitration legislation in fostering trust and luring foreign investment into a country.
- To conduct an analysis of the procedural issues associated with the execution of international awards in various nations throughout the world.
- To examine the difficulties of arbitration court on a worldwide scale and to recommend certain improvements to existing international arbitration laws.
- To develop conclusions and make recommendations based on the study.
- To propose effective steps for amending India's current international commercial arbitration system in order to position India as a centre for international commercial arbitration.

1.15 HYPOTHESIS

The following hypotheses will be used to guide the proposed research:

H1: A procedural aspects of International Commercial Arbitration across the countries differs significantly.

H2: International Arbitration Law in India is capable to attract the foreign investment in the country.

H3: Present setups of International commercial arbitration in India do not sufficient to develop India as a hub for International commercial arbitration.

1.16 SCOPE OF THE STUDY

International arbitration is dynamic approach to resolve the cross border commercial disputes. Their feature like adaptability and party-driven approach allows a resolution system and process that may be tailored as it required. Stakeholders of Indian Commercial Arbitration have proved quest to improve the cross border arbitration mechanisms. For such purposes a comprehensive evaluation of international arbitration and its effectiveness is required for improvement. Collective

feedback mechanisms, which are essential stimulants to material improvements in this systems are rare in the field of law, where confidentiality is valued and practice is both varied and discrete universally.

The primary goal of this experimental study is to collect views/opinions of a diverse set of stakeholders on past & future improvements & innovations to make effective International Commercial Arbitration mechanisms in India in order to develop concrete solutions for Indian commercial communities. The poll was performed in two phases over a six-month period.

Researcher conducted field observation during December 2020 to May 2021. During the entire research work a number of academic members from the legal field especially of different Schools of International Arbitration have provided generous support through feedback on the questionnaire designed.

Researcher approached external focus group comprising Academicians, Arbitrators, Counselors, In-house counsel, Law firms, LPOs, Law Students etc. of different institutions through the questionnaire. Above mentioned stakeholders provided their valuable comments on different questions.

1.17 RESEARCH METHODOLOGY

In spite of various efforts at national and international level in bringing the substantial changes in the international arbitration laws for smooth functioning and promoting the international business across the country, even then there are lots of complexities in the international arbitration laws that are yet unanswered. Hence the issues related to this need to the explored and analyzed.

1.17.1 RESEARCH DESIGN

The research design for this research work is doctrinal as well as exploratory. In doctrinal research there is an analytical and comprehensive study of Statutes, instruments, judicial pronouncements, guidelines of Treaties and Conventions etc. whereas in exploratory research, there is a wide range of field observation based upon designed questionnaire comprising of thirty five opinion based questions for making international commercial arbitration more & more effective in Indian context. The whole research work is based upon the analytical study of collected

opinion through the questionnaire, case comments and case study, law commission reports, experts comments etc.

1.17.2 POPULATION

The population for the proposed study is comprised of all the respondents of the International and National business communities, regulatory bodies and forums, Academia, who is engaged in international commercial arbitration activities.

1.17.3 SAMPLE

The proposed sample of the study is comprised of the following respondents:

- Corporate sectors
- Legal experts
- Educationist/ scholars
- Arbitration councils
- Regulatory bodies/ institutions/ forums etc.
- Arbitration consultants or Arbitration law firms etc.

1.17.4 SAMPLING TECHNIQUES

- The sampling techniques for this research work are convenient and justified samplings.
- Structured questions are made and information are collected personally using questionnaire having both open and close end questions.

1.17.5 DATA COLLECTION

- The data are collected personally using structured questionnaire.
- Focused interviews are also concluded to collect the data.
- The data are also be collected through online by electronic mails & Google docs etc.

1.17.6 DATA ANALYSIS

- The collected data from the field observations are systematically arranged and analyzed accordingly.
- Appropriate statistical tools are used to analyze the data.
- Univariate and Bivariate data analyze techniques are used to analyze the data.

1.18 FIELD OBSERVATION IN BRIEF

Doctrinal as well as empirical both method of legal research have been adopted for this research work. In the former the researcher analyzed the previous work done by different jurists, different legislation, articles and cases laws and for the empirical part a questionnaire was formed with open ended, closed ended and rating based questions, which has sent to different stakeholders and the opinion received from the stakeholders compiled in chapter V and for the statistical analysis of the data collected through the structured questionnaire. Selected sample size was of 250, out of which reply was received from approx 200 respondents and only 150 responses were found suitable for the analysis.

1.19 QUESTIONNAIRE

As a result, all stakeholders were asked to contribute their thoughts, regardless of whether they had prior experience with international arbitration as a private practitioner, in-house counsel, arbitrator, judge, government official, academic, or via employment for an arbitral institution. Questions have been answered by the different respondents through personal and telephonic Interview.

1.20 CHAPTERIZATION

CHAPTER 1

INTRODUCTION

CHAPTER 2

INTERNATIONAL COMMERCIAL ARBITRATION

CHAPTER 3

INTERNATIONAL ARBITRATION LAW

CHAPTER 4

CONSPICUOUS DEFICIENCIES IN INTERNATIONAL COMMERCIAL ARBITRATION

CHAPTER 5

DATA ANALYSIS AND INTERPRETATION

CHAPTER 6

CONCLUSION AND SUGGESTIONS

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CHAPTER-2

INTERNATIONAL COMMERCIAL ARBITRATION

2.1 INTERNATIONAL COMMERCIAL ARBITRATION IN INDIA: LEGISLATIVE APPROACH

2.1.1 THE ARBITRATION AND CONCILIATION ACT, 1996:

The Act of 1940 was thought to have a number of flaws in both law and practise of arbitration. In this regard, Secretary of Legal Affairs made a proposal on July 27, 1977, stating that because the Public Accounts Committee had commented negatively on working of Arbitration Act due to its delay, enormous expenses, and long time spent, government wanted to revisit provisions of Arbitration Act, 1940 to determine whether enormous delay occurring in arbitration proceedings and disproportionate costs incurred therein could be a problem.

The Supreme Court stated in Food Corporation of India v. Joginderpal[1] that "law of arbitration" must be simple, with less technicality, & more responsive to actual reality of situations, responsive to canons of justice & fair play, & that "that being command of law pronounced by highest court of land made Law Commission as well as legislature & thinkers think over issues rather seriously to consider amending law."

Under auspices of United Nations Commission on International Trade Law, an attempt was made to create standard national arbitration rules across world, and the UNICITRAL Model Law in Respect of International Arbitration was recommended in 1985.

It is now required and critical to implement reforms to the present arbitration legislation. The question here was whether the aforementioned 1940 Act should be changed or a new statute drafted. Aside from the 76th Report, several recommendations from the Indian Council of Arbitration (ICA), Indian Society of Arbitrators (ISA), Confederation of Indian Industries (CII), Federation of Indian Chambers of Commerce & Industry (FICCI), and Associated Chambers of Commerce & Industry (ACCI) were made to amend 1940 Act.

2.1.2 THE ACT OF 1996 ACCORDING TO 176th REPORT OF LAW COMMISSION AND ITS ANALYSIS

The commission's 176th report requires a study of the operation of the aforementioned Act in light of several defects discovered in its provisions & representations received. The Commission evaluated numerous arguments and concluded that UNCITRAL Paradigm was primarily intended to provide a standard model for international commercial arbitration among distinct countries. The Indian Act of 1996 introduced provisions comparable to model legislation & made them applicable to situations of exclusively domestic arbitration involving Indian nationals, which has caused some issues in the Act's implementation.

The grounds for objecting to an award under Sections 34 and 37 have been made common for both local & foreign arbitration rulings. It was also suggested that principle of least court interference may be a good principle for international arbitral awards as well as for Indian conditions, & that because several awards are passed in India for Indian nationals by laymen who are not well acquainted with applicable law, interference with such awards should not be as limited as it is in the case of international arbitrations.

The reading of preceding text conjures up the image that, in instance of domestic arbitrations b/w Indian nationals, State may want from the courts to have stronger or stricter control over the arbitrations. It is not intended that the Commission was advocating for an increase in judicial intervention in solely domestic arbitration proceedings. In reality, the Commission proposed limiting judicial intervention in some areas beyond what is permissible under the Model Law and the Act of 1996. It was requested that all matters brought before the court in relation to the award be scheduled for an initial hearing and be denied at first sight. A provision comparable to Section 99 of Civil Procedure Code was also proposed to emphasise that awards should not be tampered with lightly until significant prejudice is demonstrated. It was also recommended to remove difficulties presented by Section 36, which prevents enforcement of an award just because an application to set aside award has been filed and is pending, & that simply filing an application should not result in an automatic stay of award. Furthermore, panel advocated allowing court to set restrictions for compliance with award, partially or entirely, pending resolution of objections.

It was suggested that "Court of Principal Judge, City Civil Court of a city exercising original jurisdiction" be included in meaning of the word "Court" under section 2(1). (e). Another clause was proposed to be added to allow Principal Courts referred to in Section 2(1)(e) to refer problems to Courts of direct jurisdiction. The same clause was thought to get past various High Court decisions that found that Principal Court under Section 2(1)(e) & restrict transfer of proceedings to other Courts. Congestion at Principal Courts would be reduced, as seen by this design.

Sections 8, 9, 27, 35, and 36 were enacted to allow arbitration processes to take place outside of India. Section 8(4) was planned to be added to empower judicial authorities to determine on whether (a) there is no dispute, (b) arbitration agreement is null and void or inoperative, (c) the arbitration agreement cannot be completed, or (d) arbitration agreement does not exist. Section 8(5) was proposed to be added to state that the judicial authority may not decide above-mentioned issues referred to in proposed sub-section (4) if (a) relevant facts or documents are in dispute, (b) oral evidence is required, (c) inquiry into preliminary questions is likely to delay referral to arbitration, (d) request for a decision is unduly delayed, or (e) decision on questions is unlikely to produce.

Based on the foregoing, the judicial authority shall either determine the questions or submit them to arbitration. The above-mentioned parameters were required to ensure that spurious jurisdictional issues are not raised at the outset, causing the orientation to be delayed. At the same time, if the aforementioned questions can be determined quickly and without the need of oral evidence, they can be decided & will almost likely avoid the expenses of arbitration.

Various modifications were requested in Section 11, and effort was made to ensure that the reference to arbitration was not delayed. The intention was to replace the wording "Chief Justice of India" and "Chief Justice" in sub-sections 11(4) to (12) with the words "Supreme Court" & "High Court," so that arbitral panel is appointed on judicial side. Furthermore, Section 24B was proposed to be introduced to allow parties and arbitral tribunal to approach Court in order to enforce interim orders given by arbitral tribunal in Sections 17, 23, & 24.

It was also proposed to completely manage delays before arbitral tribunal by changing sections 23, 24, & 82, as well as introducing new sections 24A, 29A, and 37A. A proposal was also made about time restrictions for passing awards that may be extended by courts, with the caveat that arbitration would continue while Court considered the application.

Temporarily, there were also inconsistent High Court judgements in relation to some clauses of the 1996 Act. The Commission was also made aware of a number of additional issues concerning the difficulty in implementing the aforementioned Act. The Commission principally developed a Consultation Document (Annexure II of Report), hosted two seminars, one in Mumbai & one in Delhi in February & March 2001, & widely publicised the paper by posting it on the Commission's website. The lectures were attended by retired judges and prominent attorneys. Various luminaries also participated in seminars and supplied written notes outlining their recommendations. Suggestions not included in Consultation Paper were also offered & thoroughly considered. Following an in-depth examination of the legislation pertaining to the issue, with an emphasis on the situation of the law in other jurisdictions, the Commission submitted a number of suggestions for revisions to the Arbitration & Conciliation Act of 1996.

Another Committee, widely known as "Justice Saraf Committee on Arbitration," was formed to investigate severity of the Law Commission of India's recommendations included in its 176th Report and Arbitration and Conciliation (Amendment) Bill, 2003. Justice Dr. B. P. Saraf, Retired Chief Justice of High Court of Jammu and Kashmir, presided over the Committee. In January 2005, the Committee submitted its final report[2]. The Report included a thorough examination of the Law Commission's recommendations, as well as suggestions for how the 1996 Act may be revised to improve India's arbitration system. The Government decided to 'withdraw' Bill from Rajya Sabha, where it had been presented, in April 2006.[3]

2.1.3. FOREIGN AWARDS UNDER ARBITRATION AND CONCILIATION ACT, 1996

The Arbitration & Conciliation Act of 1996 provides statutory backing for the recognition of international arbitral awards rendered in nations that have signed either the Geneva Convention of 1927 or New York Convention of 1958. For a

foreign arbitral award to be enforced in Indian courts, it must be issued under the Geneva Convention or the New York Convention.

In Bhatia International v. Bulk Trading, Supreme Court declared that "an arbitral award not delivered in a convention, country would not be treated as a foreign award and, as such, a fresh action would have to be started on basis of award." The New York Convention creates a consistent yardstick for recognising and enforcing these agreements & rewards throughout the nations that have ratified it. As a result, arbitral agreements & judgments that come from it will be recognised and enforced by courts of states where enforcement is sought, encouraging trust in the parties, who may be unfamiliar with different laws common in many nations with whom they trade. [4]

In Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd.[5], Supreme Court considered whether award might be set aside if Arbitral Tribunal failed to follow required procedure outlined in Sections 28 and 29, so jeopardising parties' interests. Section 28 Subsection (1)(a) requires Arbitral Tribunal to determine dispute in accordance with substantive law in force in India at time. The Indian Contract Act, Transfer of Property Act, & any other related laws would likely be included in substantive legislation. For example, if the award is issued in violation of the Transfer of Property Act or the Indian Contract Act, question is whether award may be overturned. Similarly, under subsection (3), Arbitral Tribunal is directed to resolve dispute in accordance with contract's terms & conditions, as well as after taking into account transaction's trade usage. Is it feasible to reverse a judgement if arbitral tribunal disregards contract's or trade usage's terms applicable to transaction? The Supreme Court stated that, when interpreting Section 34 in connection with other parts of Act, it appears that legislative goal could not be that award could not be set aside by the court even if it violated the Act's provisions. It would be contrary to the fundamental notion of justice if it were found that such an award could not be challenged. If Arbitral Tribunal fails to follow Act's mandatory procedure, it has acted outside of its power, & judgement is therefore manifestly illegal & may be set aside under Section 34. Furthermore, Supreme Court found that if award is contradictory to substantive provisions of law or requirements of Act, or contrary to terms of contract, it is clearly illegal & may be interfered with under Section 34.

When a court determines that a foreign award is enforceable, it considers the award to be a decree of that court. Under section 48, an order refusing to enforce a foreign award may be appealed to court authorised by law to hear such appeals. However, no second appeal shall lie from an order issued in appeal, notwithstanding that any right to appeal to Supreme Court shall not be affected or limited, & no appeal shall lie if foreign award is implemented.

2.2. JUDICIAL APPROACH TOWARDS INTERNATIONAL COMMERCIAL ARBITRATION IN INDIA

2.2.1. CHALLENGES TO THE FOREIGN AWARDS:

Arbitration law is founded on two pillars: party autonomy and award finality. If judicial interference misleads these two plinths, arbitration law will fail to realise its ultimate objectivity and would lose its essence. The evolution of Indian arbitration law from undiscriminating judicial interventions established in the Colonial Act and subsequent 1961 legislation to a more sophisticated Act based on Model Law demonstrates need of limited judicial participation. It is difficult to define public policy as a generic term and as a foundation for overturning an arbitral ruling. Judicial rulings on the scope of public policy that allow for nearly unlimited judicial review of arbitral awards are a death blow to international commercial arbitration.

2.2.2. INTERVENTION BY COURTS

The 1996 Act is thought to have two major goals: quick arbitration and little court intrusion. The intervention of a judicial authority is likewise prohibited. In accordance with Section 5 of Act. This fundamental clause is included in the statutes of every other country that has accepted the UNCITRAL Model. The primary goals of the 1996 Act, as stated in the Statement of Objects and Reasons, are "to decrease the supervisory function of courts in arbitral process" and "to assure that every final arbitral award is enforced in the same manner as a civil court order." [6] Section 5 of Act prohibits the courts from interfering in instances where an arbitration agreement exists. In comparison to 1940 Act, the Court's intervention in all matters relating to the conduct of Arbitration, judgement of Arbitrator, & award has been much reduced under the current Arbitration Act.

2.2.3. POST BHATIA CASE MYSTERY

The decision in Bhatia case, which agreed that an India court could issue interim orders prior to commencement of arbitral proceedings, resulted in scores of Section 9 applications for interim relief being filed in courts across country in relation to arbitrations held in India or elsewhere.

The Court accepted just one exception: parties' express or implied exclusion of Part I. There was no definition of a Part I implied exclusion. Part I also included extensive regulations for nomination of arbitrators and setting aside of awards, among other things, which further added to difficulty. Uncertain whether Part I was impliedly or explicitly excluded in specific situations, Indian courts began to appoint arbitrators in arbitrations performed outside India, such as in National Agricultural (2007) & Indtel (2008), & to enable setting aside of foreign rulings, such as in Venture Global (2008).

2.2.4. BALCO AND WHITE INDUSTRIES

On September 6, 2012, Indian Supreme Court's five-judge Constitution Bench released its decision in matter of BALCO v. Kaiser Technical Services Inc[7]. The BALCO judgement resulted from a two-judge panel that couldn't agree on validity of Bhatia ruling referring several similar matters to a larger bench of Supreme Court. The historic White Industries Case, which resulted in first ever BIT judgement against India, was a comparable case that was heard by Court alongside BALCO & raised same legal difficulties.

In BALCO, Court stated that it disagreed with decisions in Bhatia & Venture Global, and that competence to grant interim remedies in foreign-seated arbitrations or deal with appeals to foreign judgements did not stem from provisions of 1996 Act. In doing so, Court decided that the 1996 Act supported 'board' interpretation of Bhatia that entirety of Part I applies to arbitrations held outside India.

The Judicial firmly established the seat of arbitration as the "centre of gravity" of an arbitration, specifically to decide court jurisdiction in connection with that arbitration. Another advantage is that it clarifies previously ambiguous distinction in India b/w contract law & arbitration agreement law. Perhaps most importantly, it defines phrases "of nation in which" & "under New York Convention obligations." While term has sparked debate around world, Court determined that there cannot

be concurrent jurisdiction of two distinct courts in seat of arbitration & nation whose law governs arbitrations—only the court at seat of arbitration can exercise such authority to resolve a dispute. Prior to BALCO proceedings, Court requested interested parties to comment on matters before it. The SIAC was one such intervener, & it shared Singapore's position on these issues by citing Singapore decisions such as Swift Fortune (2007), Sui Southern Gas (2010), & PT Asuransi Jasa (2007), as well as legislative amendments made to Singapore International Arbitration Act in 2009, particularly regarding courts' ability to grant interim measures of protection in foreign-seated arbitrations.

The SIAC has considered India to be an important jurisdiction. For past three years, Indian parties have remained single largest contingent of nationalities arbitrating at SIAC, with a near 200 percent increase in number of cases involving Indian parties in various sectors such as trade, construction, joint ventures, energy & natural resources, international trade, shipping and maritime, and general commercial disputes, among others. In comparison to number of incidents, monetary worth of disputes involving at least one Indian party has increased by more than 140 percent during same time period.

Significantly, in the BALCO case, the Supreme Court defines application of its interpretations by assuming that its view of law only applies to arbitration agreements entered into after its judgement, i.e. after September 6, 2012. In doing so, Court appears to have been influenced by practical considerations & inevitable complications that may have arisen as a result of retroactively applying its opinions. This raises intriguing questions about the stance that Indian courts may adopt in present arbitrations & related litigations, as well as prospective litigations based on agreements that are now in effect but were signed before to the Court's ruling. It will also be interesting to watch if parties re-execute arbitration terms in their business contracts in order to fall inside BALCO net.

The availability of remedies for parties seeking such protective measures against an Indian party or assets based in India is one question that emerges as a result of prohibition on Indian courts affording temporary measures of protection in respect of foreign seated arbitrations.

In this regard, the SIAC Rules' emergency arbitrator provisions provide a plausible alternative because they have been used often in arbitrations involving Indian parties. Indian parties were engaged in 10 of ten applications that SIAC has received and accepted thus far. Interim injunctive and other types of remedies issued in these actions were either followed or resulted in agreements between the parties. In this connection, the Madras High Court's statement in Unknown (2011) about the availability of emergency arbitrator procedures under SIAC Rules for obtaining interim relief is also pertinent. However, the legal argument about the enforceability of an emergency arbitrator's instructions remains. Singapore revised the IAA in 2012 to recognise that an emergency arbitrator would also be considered a 'arbitral tribunal,' assuring validity of such decisions, instructions, or awards in Singapore under Section 12 (6) of IAA. The judgement is a big step forward for India since it aligns Indian stance with international arbitration jurisprudence and practise. This ruling is certain to instil increased faith in the Indian legal system & courts. Similarly, it is bound to boost investor trust in India, and uniformity & consistency in judicial approach can only help to develop a more effective dispute resolution procedure for both Indian & non-Indian parties.

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CHAPTER-3

INTERNATIONAL ARBITRATION LAW

3.1. GENERAL BACKGROUND

India has successfully matured & risen in prominence as a rapidly progressing economic power, ensuring its place as a key factor in world trade & commerce. It is critical that our arbitration methods and regulations, while continuing to meet special demands of Indian citizens, are on par with best practises developed throughout world. The Arbitration & Conciliation Act of 1996, for example, is based on UNCITRAL Model Law, which includes globally acknowledged norms for arbitration proceedings. Because international business arbitration is increasingly transnational & multijurisdictional, procedural components of international commercial arbitration range greatly among nations. In this regard, India's Arbitration & Conciliation Act, 1996, may be traced back to UNCITRAL Model Law, which includes universally recognised norms for arbitration procedures.

The goal of this study is to look at some of most important and important processes governing arbitration in the following jurisdictions: China, Hong Kong, United States, South Africa, Singapore, the United Kingdom, and so on. The goal of this comparative study is to identify & understand strengths and weaknesses of arbitration law & practise in these jurisdictions, & then use this critical analysis to critique our own laws &, hopefully, incorporate stronger & better practises within Indian arbitration regime. Consider following scenarios: England & Singapore have successfully honed and developed their arbitration laws and practises to become preferred destinations for international commercial arbitrations, so much so that both Indian users (outside of India) and foreign users seeking to arbitrate with Indian parties increasingly rely on them. Is this a fair appraisal of current situation? What can India learn from policies & practises put in place in these countries?

The role of judiciary in augmenting alternative dispute resolution system is a critical issue in this regard. Discussions in this respect should eventually take into account India's potential to develop as an internationally preferred arbitration centre.

3.1.1. ARBITRATION IN CHINA

China is a world trade leader with a history of supporting alternative dispute settlement over judicial proceedings.[1] This practise was influenced by Confucianism, and the goal was to promote harmony via conflict avoidance.[2] There was an old proverb that said, "It is better to die from poverty than to become a thief: it is preferable to grow so furious that you die rather than go to court."[3]

3.1.2. ARBITRATION IN CHINA: HISTORICAL DEVELOPMENT

China has a long history of participating in international arbitration. The earliest indications of a formal arbitration system, however, did not develop until mid-twentieth century. Following founding of the People's Republic of China (PRC) in 1949, China established two distinct arbitration systems, one for foreign-related fields of economic contracts & other for technical contracts. Legal principles include intellectual property, real property, consumer protection, & so on. [4]

During that time, Chinese government extensively pushed arbitration and mediation as favoured methods of settling internal economic issues. Beginning in the early 1960s, several rules were enacted requiring the Economic Commission at various levels to arbitrate economic contract disputes. By name, this was arbitration, but it was simply another kind of administrative control.[5] These regulations essentially deprived parties of their autonomy. These domestic arbitral institutions were administrative in nature and did not have jurisdiction based on consent of conflicting parties.

The Economic Contract Law was adopted by Standing Committee of National People's Congress in December 1981. It provided that parties to an economic contract disagreement should first engage in informal dialogue in try to resolve problem. If they were unable to achieve an agreement via discussion, they had three options: ask for mediation or arbitration through the relevant contract administration agencies, or bring a claim immediately before People's Court. If, after arbitration, a party refused to accept the arbitration judgement, such party was entitled to appeal award in front of the People's Court within fifteen days after being notified. Thus, arbitration judgement was only binding if neither party opposed it within 15 days.

These regulations resulted in the creation of a domestic administrative arbitration system distinct from the separate system of foreign-related arbitration.[6] The present arbitration commission system was formed. Each arbitration commission was to be associated with a variable degree of government power, such as technology contracts, labour matters, intellectual property, real estate, consumer protection, & so on.

3.1.3. FEATURES OF CHINESE ARBITRATION (1949-1995)

The contemporary Chinese arbitration system grew swiftly. In response to the existing predicament, the Chinese created a method of continuous growth. Instead of being adopted by an already existing government, the system was designed alongside it. Thus, the formation of Chinese modern arbitration was greatly impacted by Chinese culture and policy during the era of the PRC's founding. These influences manifested themselves in the following characteristics:

Prior to implementation of Arbitration Law, the domestic arbitration commission accepted arbitration applications based on administrative law & norms rather than parties' voluntary arbitration agreement. Domestic arbitration recognised jurisdiction at time by various levels and geographical jurisdiction, denying parties liberty to pick the arbitration commission of their choosing. [7] The arbitration agreement, rather than an administrative regulation, creates jurisdiction in this case, which departs from existing practise. The second point to consider is jurisdiction.

Second, the jurisdiction of domestic arbitration commissions was restricted to disputes involving only Chinese legal and natural people. Foreign natural persons & investment firms, such as equity joint ventures, were deemed to be subject to international arbitration. [8] Only Chinese International Economic & Trade Arbitration Commission (CIETAC) & Chinese International Economic & Trade Arbitration Commission (CIETAC) handled foreign-related cases (CMAC). With implementation of economic reform & an open-door policy, number of foreign-related arbitration claims began to rapidly increase. Because of their exclusive jurisdiction, CIEAC & CMAC were put under a lot of pressure. It also gave these two organisations a monopoly on international matters while doing nothing to improve competitiveness of local commissioners.

Third, arbitration commissions were subject to governmental administrative authorities, & its members were often drawn from those powers. Domestic arbitration has accepted forum level & geographical jurisdiction as well. Because of this hierarchical organisation, lower-level arbitration commissions were subject to those established at higher levels. As a result, most arbitration commissions lacked independence; they were controlled by administrative authorities & affected by their agendas. [9]

Finally, prior to Arbitration Law, judgments of arbitration commissioners were not binding on parties. If a party is dissatisfied with the outcome of an arbitration verdict, he or she may pursue a civil case before People's Court. The adoption of Arbitration Law marked a significant shift in China's domestic arbitration system.

3.1.4. THE PRESENT CHINESE ARBITRATION LAW: AN ANALYSIS

The Arbitration Law went into force on September 1, 1995. To bring domestic arbitration in line with international practise, Arbitration Law accepted various widely recognised arbitration elements, such as party autonomy, independence of arbitration commissioners, & binding impact of ruling. [10] The requirements & procedures for creation of arbitration commissioners were specified for the first time. Following passing of Arbitration Law, six large cities were chosen as pilot cities for construction of domestic arbitration commissions, including Beijing, Shanghai, & Shenzhen. Since then, 148 domestic arbitration commissions in China have been reorganised or established. The majority of arbitration commissioners were founded via consolidation of prior arbitral tribunals. Labor arbitration commissioners & rural contract arbitration commissions are sole exceptions. [11]

- **Jurisdictional issues & Arbitration Agreement** [12]

  Prior to the implementation of the Arbitration Law, jurisdiction of arbitral commissions was based on Article 9 of Regulations on Arbitration of Economic Contracts, which established jurisdiction solely over disputes that came within scope of regulation. Article 10 established several degrees of jurisdiction. In the years that followed such rules, various additional legislation were enacted, such as the-

Arbitration agreements were provided for under Foreign Economic Contract Law, Technology Contract Law, Copyright Law, & Civil Procedure Law, but solely for those specific problems. Any matters that developed beyond the scope of those acts were subject to Articles 9 and 10 jurisdiction requirements. **[13]**

The Arbitration Law abolished forum level jurisdiction as well as territorial and territorial jurisdiction entirely. The parties must agree on makeup of an arbitration commission, according to Article 6 of Arbitration Law. The jurisdiction by level scheme & district jurisdiction system do not apply in arbitration. This is significant not only because parties can choose which commission to use, but also because when parties choose an arbitration commission, they are not constrained by geographical location of their residence or location of dispute, nor by hierarchical jurisdiction of commissions at different levels. This combines concept of party autonomy by allowing parties to choose whether or not to arbitrate & where to do so.

- **Independence Arbitration Commissions**

As previously stated, Chinese arbitration commissions were administratively subordinated. The arbitration legislation modified this by mandating independence from government administration, as well as independence from government and freedom from government intrusion. Furthermore, the Arbitration Law expressly prohibits subservient relationships b/w arbitration commissioners and administrative bodies or b/w arbitration commissions. The most essential article is Article 8, which stipulates that "Arbitration will be performed in conformity with law, without any participation by administrative agencies, social groups, or people."’’

Article 14 goes on to say, "Arbitration commissions are independent of administrative organs, & there are no subordinate links with any administrative organs or among the various arbitration commissioners." For the first time in Chinese arbitration history, law freed domestic arbitration commissioners from government intervention and local protectionism. Because of their independence, commissioners may be able to better assist parties due to greater neutrality.

- **Scope of Arbitrable Disputes**

Prior to Arbitration Law, only conflicts that could be arbitrated were those that were under purview of the Regulations on Economic Contract Arbitration. The scope of what disputes qualified was significantly expanded in compared to new

Arbitration Law standards. According to Article 2 of Arbitration Law, disputes over contracts & disagreements over property rights & interests b/w people, legal persons, and other organisations as equal objects of law may be subject to arbitration. "The following issues must not be addressed to arbitration: (1) Disputes over marriage, adoption, guardianship, child support, and inheritance; (2) Administrative disputes originating within the power of the relevant administrative bodies under law," according to Article 3. [14] Because it did not limit kind of dispute to a certain subject matter, Arbitration Law made arbitration available in a number of areas where it was previously unavailable.

- **Arbitration Agreement and its bindingness**

According to Article 9 of Arbitration Law:

"The single ruling system should be adopted in arbitration." The arbitration commission will not accept any application for arbitration, and no action filed by a party in relation to same dispute will be accepted by a people's court once an arbitration award has been rendered in that matter. If, in accordance with legislation, arbitration judgement is annulled or its enforcement is denied by a people's court, parties may reapply for arbitration or initiate legal proceedings with the people's court in accordance with a new arbitration agreement b/w them in respect of dispute."[15]

It specifically states that if a person files suit with a People's Court or an arbitration commission after an arbitral award has been issued in same matter, the People's Court or arbitration commission must reject to consider case. This was a huge step forward for Chinese arbitration since it permitted arbitration to be last result in dispute resolution process, with no chance of being reversed by judicial system.

3.1.5. LEGISLATIVE AND PRACTICAL DEVELOPMENT

The Supreme People's Court (SPC) announced its newest Interpretation on Certain Issues Relating to Application of Arbitration Law on September 8th, 2006. This interpretation is effectively a modification to the Arbitration Law, and it clarifies several aspects of how the Arbitration Law is applied.

Firstly, Article 16 of Arbitral Law provides for the validation of arbitration agreement: An arbitration agreement should contain the arbitration clauses in contract as well as any other written form of agreement made before or after disputes requiring arbitration. An arbitration agreement must include the following provisions:

1. The parties' explicit desire to submit to arbitration; 2. the issues to be arbitrated; and 3.
2. The parties will appoint an arbitration commission."[16]

The Interpretation clarifies the order writing form, indicating that written form of an arbitration agreement may be met if such agreement is proved by communication and electronic modes of exchange, such as facsimiles and emails. This is consistent with the clause of the People's Republic of China's Contract Law that reads, "The written forms imply the form that may reveal the stated contents visually, such as a written contractual agreement, letters, and data-telex" (including telegram, telex, fax, EDI & emails). These updated standards for an arbitration agreement's written form are more in line with worldwide practise.[17]

Secondly, According to Article 16(3) of Arbitral Law, arbitration commission selected by parties must be specified in arbitration agreement. In practise, if name of arbitration commission is misspelt in arbitration agreement, it may be deemed null and void. The Interpretation alters this circumstance by stating that if an arbitration agreement does not mention actual name of an arbitral institution but such institution may be clearly identified, arbitration agreement will be considered valid. [18]

Thirdly, The principle of automatic transfer is defined in the Interpretation. Unless parties agree otherwise or transferee is uninformed of the arrangement, when one party's rights, property, assets, debt, and so on are transferred to a new person or entity, arbitration agreement remains enforceable on transferee. Thus, Interpretation establishes heritability of arbitration agreement, saying that unless parties agree differently when arbitration agreement is concluded, arbitration agreement is valid to inheritor or undertaker of right and obligation. These criteria bring together many methods of coping with issues in practise.

Fourth, any challenge to legality of an arbitration agreement may be lodged with either an arbitral institution or People's Court under Arbitration Law. The most significant change in Interpretation is that it now states that if an arbitration institution

has already adjudicated on legitimacy of an arbitration agreement, the People's Court will not accept any new application to reconsider the topic. [19]

China's arbitration has evolved over a lengthy and diversified period of time. China's mediation system has achieved remarkable progress in the 10 years after the Arbitration Law was enacted, thanks to a process of constant learning and innovation. Arbitration has moved away from administrative interference and toward institutional arbitration through an independent commission. China's arbitration is increasingly catching up with international norms. However, given today's context of fast economic expansion and globalisation, China must react accordingly. Fortunately, in recent years, the mediation system has seen significant growth, and it is anticipated that, as a result of a number of good improvements, it will serve as a highly effective means of conflict settlement, and will play an increasingly important role in China, as well as worldwide.

3.2. ARBITRATION IN HONG KONG

3.2.1. GENERAL BACKGROUND

Arbitration is not a novel concept in Hong Kong. Hong Kong has a long history of arbitration, making it one of Asia's most well-established seats. Hong Kong has officially recognised arbitration as an alternative dispute resolution mechanism since Civil Administration of Justice (Amendment) Ordinance was established in 1855. The first arbitration legislation, Ordinance No., was enacted as a temporary solution until colony's court system could be established. Surprisingly, reign of arbitration in Hong Kong was brief. Because Ordinance No. 6 was not sanctioned by London, colonial Office declared it unconstitutional five months after it was passed, worrying that it gave governor too much authority. [20]

Since the 1855 Arbitration Ordinance, Hong Kong arbitration legislation has evolved & developed significantly, as one would expect of any sophisticated jurisdiction, Asian or otherwise, reflecting important international developments and incorporating some of the region's most innovative & progressive changes.

Possibly the two most important changes in international spectator regulation occurred between 1977 and 1990. The New York Convention was adopted into Hong Kong legislation in 1975, when Hong Kong was still under British sovereignty, as a result of the United Kingdom's admission to convention.[21] The convention-

incorporated legislation became effective and enforceable in other convention areas.[22] The Chinese Government extended geographical applicability of the Convention to Hong Kong upon return of sovereignty over the territory on July 1, 1997. As a result, awards made in Hong Kong are still recognised and enforceable in convention territories today.

The second significant development occurred in 1990, when Hong Kong became the first Asian jurisdiction to adopt UNCITRAL Model Law for international arbitrations with a seat in Hong Kong, upholding the founding principle that local courts should support, but not interfere with, the arbitral process. An extension of this development, & an important part of Hong Kong's legislative framework's maturation process, occurred when Hong Kong amended its long-standing arbitration legislation by incorporating domestic and international arbitration, effectively extending UNCITRAL Model Law to all arbitration seated in Hong Kong.

The second significant development occurred in 1990, when Hong Kong became first Asian jurisdiction to adopt UNCITRAL Model Law for international arbitrations with a seat in Hong Kong, upholding founding principle that local courts should support, but not interfere with, arbitral process. The incorporation of domestic & international arbitration into Hong Kong's long-standing arbitration legislation, effectively extending UNCITRAL Model Law to all arbitrations seated in Hong Kong, was an extension of this development & an important part of maturation process of Hong Kong's legislative framework.

The reform served four functions. For starters, it aimed to make arbitration legislation more favourable to arbitration parties both within and outside of Hong Kong. Second, because the Model Law is well-known to practitioners from both civil law and common law jurisdictions, reform would enable Hong Kong business community and arbitration practitioners to operate an arbitration regime that is consistent with widely accepted international arbitration practises & developments. [23] Third, it would persuade pre-business parties to undertake arbitral proceedings in Hong Kong. Finally, it would promote Hong Kong as a regional centre for dispute resolution. [24]

As a result, starting June 1, 2011, arbitration in Hong Kong has been controlled by the Arbitration Ordinance (Cap. 609) (New Ordinance or 2011

Arbitration Ordinance).[25] The arbitration legislation incorporates several aspects that one would expect to see in pro-arbitration legislation, as well as some unique features that are meant to encourage parties to hold their arbitration in Hong Kong. For example, because secrecy in arbitration procedures is crucial, New Ordinance mandates that court actions connected to arbitration be held in closed court in general.[26] That court may also order a person to appear before an arbitral tribunal, give evidence, or provide papers or other evidence. Furthermore, because the topic is left to the arbitral tribunal's discretion, discovery throughout the arbitral procedure can be flexible and restricted.

The med-arb provision, which was kept and strengthened from the previous regimes, is an intriguing aspect of New Ordinance in which a member of arbitral tribunal plays the position of mediator throughout the course of proceedings in an effort to encourage resolution. Another feature brought over from previous regulation worth mentioning is that arbitral tribunals are specifically entitled to issue interim remedies such as asset preservation and evidence preservation. Interim measures may also be granted by Hong Kong courts in cases initiated inside or outside of Hong Kong. The emergency arbitrator powers are increasingly being used to appoint arbitral institutions for interim relief before the tribunal.[27] One of most recent changes to arbitration Act makes this procedure easier by making any emergency relief provided by an emergency arbitrator, whether awarded in or outside of Hong Kong, enforceable in the same way as an order or direction of Court with same effect.[28] The recent amendments to the HKIAC Rules, which are detailed in further detail below, triggered this adjustment. In response to the HKLAC's request for this legislative change, Hong Kong government collaborated closely with HKIAC to establish relevant legislation to ensure the enforcement of emergency arbitrator rulings both within and outside of Hong Kong. Such a quick and well-thought-out modification indicates Hong Kong government's commitment to the growth of arbitration in Hong Kong.[29]

This new law, which is simpler, more user-friendly, and more adaptable than previous Arbitration Ordinance, displays Asia's arbitral offering's strength & ability to respond to market need.

3.2.2. JUDICIAL ATTITUDE FOR ARBITRATION IN HONG KONG

The attitude of courts toward arbitration is also critical to robustness & dependability of any arbitral infrastructure. The Hong Kong judiciary has long served as a lighthouse in the area, supporting rule of law & exemplifying a completely independent court devoid of any interference.[30] In reality, Hong Kong is placed fourth among 148 nations on the index of judicial independence in the international economic forum's (forum) 2013-2014 global competitiveness report, trailing only New Zealand, Finland, & Ireland.[31] This rating is based on the forum's executive opinion poll, in which the persons being questioned scored on a scale of 1 to 7 in answer to question "In your nation, to what extent is the judiciary independent from influences of members of government, citizens, or firms?" The fact that Court of Final Appeal, Hong Kong's highest court, is made up of non-permanent justices from other common law jurisdictions, especially United Kingdom & Australia, demonstrates the independence of Hong Kong's judiciary.[32]

Aside from this reputation for excellence, the Hong Kong courts have maintained a pro-arbitration stance in its supervisory duty. For example, Hong Kong judges have widely interpreted arbitration agreements in accordance with UK case law. [33] The Hong Kong court has also ruled in favour of enforcement. [34] The Hong Kong judiciary has earned international reputation & respect for its ability to deliver reasoned & logical decisions that have influenced evolution of substantive international arbitration law.

- **Lin Ming v. Chen Shu Quan**[35]

  In this case, Hong Kong court of first instance issued a stay of proceedings in favour of HKIAC arbitration while rejecting to impose an anti-arbitration injunction in concurrent proceedings.

The issue centred on an alleged failure by Mr. Lin Ming's food processing firm to honour a put option contained in a share purchase agreement with Sequedge group. The Sequedge businesses initiated a HKIAC arbitration in September 2011, whereas MR LIN FIELD filed a lawsuit in Hong Kong court against the Sequedge companies & other defendants in November 2011. On November 29, 2011, Mr. Lin filed an anti-arbitration injunction. On December 19, 2011, the

seqenedge firms filed a duplicate motion for a stay of court procedure in favour of arbitration.

Article 8(1) of UNCITRAL Model Law, as implemented by Section 20 of 2011 Arbitration Ordinance, emphasises that any action relating to an arbitration agreement shall refer to parties unless agreement is declared null & void, inoperative, or incapable of being completed. In general, court felt obligated to grant stay motion in favour of the HKIAC arbitration since a solid prima facie case had been shown that a legitimate arbitration agreement existed b/w Sequedge and Lin.

Section 12 of Arbitration Ordinance, which adopted Article 5 of Model Law and states that "the Court has no power to intervene unless it is not permitted by law," & Section 21L of High Court Ordinance, which grants courts general jurisdiction to grant injunctive relief, were relevant legislation when deciding whether to grant anti-arbitration injunction. The court did decide that it retained option to limit arbitration disputes as part of its broad jurisdiction to give injunctive relief. The court determined that it retained competence to suspend arbitration proceedings as part of its general jurisdiction to provide injunctive relief, but it stressed that such authority should be utilised "very seldom & with great precaution."

The Hong Kong courts took a cautious approach in interpreting possibly contradictory legislation in favour of arbitration, declining to award anti-arbitration injunctions.

- **Grand Pacific Holdings v. Pacific China Holdings**[36]

By taking a careful approach and refusing to impose anti-arbitration injunctions, the Hong Kong courts interpreted potentially conflicting statutes in favour of arbitration.

The ICC arbitration, which was held in Hong Kong, commenced in 2006. In August 2009, the tribunal issued a judgement directing the claimant, Grand Pacific Holdings Ltd (GPH), to pay respondent, Pacific China Holdings Ltd (PCH), an amount in excess of US$55 million plus interest. PCH then sought to vacate award in Hong Kong, citing UNCITRAL Model Law Article 34 (2) (a) (ii) and (iv), saying that it was unable to submit its case because it was not in accordance with arbitral procedures.

Following a consideration of commentary on Articles 18 & 34 of the UNDITRAL Model Law, Court of Appeal ruled, as cited above, that in order to set aside an award, the wrongdoing must be so substantial or flagrant that one may conclude that a party was deprived due process. Furthermore, court ruled that a party who has been given a reasonable opportunity to submit his position will "rarely be able to prove that he has been denied due process."

The court did, however, concur with lower court's assessment that "where breach had no influence on conclusion of arbitration, it is a good ground for using one's discretion against setting aside." Using this as a guideline, Court found that behaviour was not substantial or flagrant enough.

On February 19, 2013, Court of Final Appeal denied leave to appeal against the Hong Kong Court of Appeal's verdict, emphasising once more "the jurisdictions' arbitration-friendly credentials & reluctance of its courts to meddle with arbitral process and awards."[38]

- **Gao Haiyan v.. Keeneye Holdings Ltd.**[39]

In this case, Hong Kong Court of Appeal rejected a lower court's judgement refusing to execute a PRC arbitral award on grounds of public policy due to claimed prejudice originating from manner a med-arb' procedure was handled in 2011.

The award made in Mainland China was outcome of an arbitration held at the Xian Arbitration Commission between Goa and Keeneye. Following the first hearing, the parties agreed to arb-med, in which arbitrators conducted a mediation process, a practise often used in Mainland China. The mediation compromise was rejected by both parties, & arbitration proceeded to a final award against Keeneye.

Keeneye filed an appeal with the Xian Intermediate Court, claiming bias. The court found no bias and concluded that the arb-med procedure was carried out in compliance with the applicable regulations. Goa was granted permission to implement the award in Hong Kong. Keeneye then contested award's enforcement in Hong Kong. The Hong Kong Court of Appeal upheld the award's enforcement, overturning a judgement by the Court of First Instance to reject enforcement on grounds of public policy. It reasoned that just because approach used might raise concerns about prejudice if carried out in Hong Kong did not inevitably suggest a violation of public policy. If the process was permissible in jurisdiction in which it occurred, it

would not be a violation of public policy in Hong Kong unless it was so bad as to contradict basic moral and legal principles.

The ruling underlines that Hong Kong courts will not easily refuse to enforce arbitral judgments, whether delivered in China or abroad, & will narrowly construe public policy grounds for rejection of execution. The Court of Appeal further stated that, in assessing whether or not to refuse execution of an award, any judgement of courts of the seat as to whether or not to set aside award may be given weight.

The above judgements demonstrate that the Hong Kong courts function similarly to the courts of the traditionally most established seats. Another reason why arbitrations have shifted east is dependability of the court system that supports the arbitral procedure.

3.2.3. THE ROLE ARBITRAL INSTITUTION IN HONG KONG

The expansion of open, efficient, and multinational arbitral institutions in the area has also greatly contributed to robustness of Asia's arbitral infrastructure. When dealing with Asian parties & regional institution, parties are more likely to seat their arbitration in a location where they are certain that their administered processes will be conducted impartially, professionally, expeditiously, & cost effectively.[40] When dealing with Asian parties, there may be a desire for localised expertise, and Asian regional institutions have responded to task of offering local knowledge within an autonomous international framework. The HKIAC has clearly been on regional scene for some time, but in recent times it has addressed the pressing market demands, allowing users of arbitration from all over the world a viable alternative, as the following paragraph demonstrates.

For many years, HKIAC did not have its own rules as an arbitral jurisdiction that originally serviced a sector more used to an ad hoc procedure with some institutional backing — the construction industry. Construction conflicts accounted for 54 percent of all lawsuits in 1995, while business disputes accounted for just 13 percent.[41]

With increasing popularity of UNCITRAL arbitration rules, the HKIAC developed a set of procedures for administration of arbitrations under provide to be an appealing alternative to simply ad hoc arbitration without institutional backing.

The HKIAC then took it a step further in 2008. As a result of growing number of Chinese enterprises engaged in commercial trade, the HKIAC adopted its own institutional norms [2008'rules] The HKLAC developed a set of rules based on UNCITRAL Arbitration Rules, bearing in mind Hong Knog's heritage as a typically ad hoc seat, as well as goal to provide parties with an alternative unique from the other arbitral jurisdictions' in the area.

These guidelines were touted as having a light touch approach, which means that arbitral rulings are not reviewed. Furthermore, in view of rising dissatisfaction with arbitration expenses, the organisation intended to provide parties the option of paying its arbitrators by hourly rates or by a fee schedule. This can be a difficult issue for parties because it has been anecdotally demonstrated that larger conflicts (in terms of value) may be handled more efficiently if arbitrators are paid by hour. The rationale for this appears to be that larger disagreements do not always need more effort from an efficient arbitrator than smaller disputes.

Given effectiveness of this particular approach, as well as the rising number of multi-party and multi-contract disputes that HKLAC has witnessed in last five years, the HKLAC initiated a modification process of 2008 Rules in late 2011. Despite fact that 2008 Rules were operating effectively generally, the more complicated, multi-contract cases being filed to HKLAC, as well as changes across institutions internationally, encouraged the revision, as did user comments.

The 2013 Rules went into effect on November 1, 2013, and maintained the light-touch approach seen in the 2008 Rules, while increasing HKIAC's ability to meet the evolving needs of its users and preserve worldwide best practise. This aim has been met, and the 2013 Rules contain certain novel state-of-the-art elements that, based on comments to date, will improve the arbitral framework in the future, drawing more arbitrations & so contributing to the rise of international arbitrations in the area.

The mechanism that allows arbitrators to be paid hourly or on a fee schedule is retained in the 2013 Rules. [42] However, if parties choose the hourly rate option, fee is capped at $6500 (US$838) unless they agree otherwise under the 2013 Rules. This method allows parties to better control their expenses while also providing a more

transparent system. Standard arbitrator appointment terms have also been incorporated into discussions b/w parties & tribunals.

Many organisations' rules now call for the appointment of an emergency arbitrator. [43] Despite fact that Hong Kong courts are among most efficient in the world when it comes to applications for interim relief in arbitral proceedings, the HKIAC introduced an emergency arbitrators provision for those arbitrations in which parties do not have luxury of efficient courts that are well versed in arbitration matters.

Prior to formation of arbitral tribunal, a party may ask for such an emergency. Typically, HKICA will select emergency arbitrators who will make their verdict within 15 days after receiving the case file.[44]

Provisions governing the joining of new parties, consolidation of arbitrations, and one arbitration under several contracts are among the most innovative aspects added by the 2013 Rules. These changes are intended to address increased complexity of business disputes involving several parties and multiple contract arbitrations, which account for roughly one-third of cases brought to the HKIAC.

3.3. INTERNATIONAL COMMERCIAL ARBITRATION IN SINGAPORE

3.3.1. GENERAL BACKGROUND

Singapore is often regarded as most suitable location for an international commercial arbitration centre for the resolution of transitional issues. The Singapore International Arbitration Centre (SIAC) is a well-known & effective mechanism for international commercial arbitration, and the Singapore International Mediation Centre gathers expertise in commercial mediation (SIMC).

3.3.2. SINGAPORE ARBITRATION: BENEFITS TO INTERNATIONAL USERS

The basic benefits of Singapore law to international users can be summarised as follows:

i. Jurisdiction issues under SICC

In terms of jurisdiction, the SICC is competent to deal with international business matters subject to non-convenience. It also has authority to compel a third party to participate in SICC proceedings.

3.3.3 FUNDAMENTAL PRINCIPLES OF PROCEDURE BEFORE THE SICC

LICA has affected the essential concepts of SICC. SICC judges actively handle cases and convene case management conferences.[45] The parties are required to strive to develop an agreed-upon List of Issues, which is a crucial aspect for reducing cost and time.[46]

Within the parameters established by the judges' case management efforts, counsel for the parties will continue to play an important role in the proceedings, particularly at trial, when witness evidence is introduced through examination, cross-examination, & re-examination, rather than judge leading discussion & interviewing witnesses. [47]

Nonetheless, SICC has no more leeway in evidentiary areas and may, for example, decide that foreign standards of evidence supersede Singapore rules of evidence.[48] It should also be noted that some "rules of evidence" may have to be qualified as "rules of substance" (rather than "rules of procedure") under specific foreign substantive law, & thus sSICC's evidentiary rules" (lex fori) should not be applied in any case.

3.4. ALTERNATIVE DISPUTE RESOLUTION IN AMERICA

3.4.1. GENERAL BACKGROUND

Initiatives for alternative conflict resolution are not a new chapter in history of United States of America. It may be traced back to 1768 in New York as an agreeable settlement tool for industrial conflicts. It was widely accepted as a mechanism for out-of-court resolution in both domestic and foreign economic transactions. As a judicial statement, the United States Supreme Court noted that for the resolution of disputes, arbitration should be encouraged by the courts, and that arbitrators' judgments should have the same binding character as a court ruling.

The Federal Arbitration Act is a legislative legislation of the United States of America that went into effect in 1925. Because of the adoption of United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, it has been revised several times. Every state in United States has its own arbitration statutes based on the Uniform Arbitration Act of 1955.

Arbitration was initially endorsed by the Supreme Court in 1854, when the court supported an arbitrator's ability to give binding rulings. According to Justice Grier, writing for the Court, "Arbitrators are judges appointed by parties to resolve the subject brought to them, definitively & without appeal."

The Federal Arbitration Act (FAA) of 1925, which provides a statutory framework for the enforcement of arbitration provisions in interstate business contracts. It has been further amalgamated with an arbitration foundation clause to provide private ADR services in United States of America, which is generally known as American Arbitration Association (AAA).

ADR has gained prominence as a popular technique of conflict settlement in the United States during last two decades. Depending on demands of the parties, modern American arbitration law provides both binding and non-binding dispute resolution options. Over previous two decades, ADR methods have multiplied & their use has grown.

Modern legislation establishing binding & nonbinding ADR methods reflect demands of communities and enterprises, as well as rising acceptance of ADR among attorneys & judges.

3.4.2. COMMUNITY-BASED DISPUTE RESOLUTION

The community conflict resolution movement arose from social activism in 1960s & served to boost ADR movement in general. The Civil Rights Act of 1964 established Community Relations (CSR), which employed mediation & negotiation to help in avoidance of violence & resolution of community-wide racial and ethnic conflicts. Throughout 1960s, the CSR helped to resolve a variety of difficulties affecting schools, police, prisons, & other government institutions.

In the late 1960s and early 1970s, Federal Law Enforcement Assistance Administration (LEAA) established both an arbitration and a mediation programme in a metropolitan United States city, both to assist in the resolution of conflicts within these communities. These programmes aided in the resolution of thousands of cases. More than six additional metropolitan municipalities built 'pilot' community justice centres using similar programmes as examples. By 1980, there were over eighty community-based alternative dispute resolution centres in operation.

Increased private-sector backing, as well as successful collaborations with certain federal and state agencies and non-profit groups, aided the expansion of a handful of such programmes to more than 400 local community justice centres now functioning across the United States. According to recent estimates, such community-based conflict resolution initiatives handle more than a few hundred cases every year.

3.4.3. DISPUTE RESOLUTION IN THE JUDICIAL SYSTEM

- **Federal courts**

Since the Civil Justice Reform Act (CJRA) of 1990, which required every federal district court to implement a civil justice spending &delay reduction plan, there has been a significant surge in development of ADR programmes & use of ADR by federal and state courts.

A growing number of courts have established regulations requiring or authorising judges to propose or compel parties to use alternative dispute resolution (ADR) methods such as summary jury trial, early neutral evaluation, mini trials, mediation, and arbitration. By September 30, 1995, 80 of 95 federal district courts had approved or implemented some form of alternative dispute resolution (ADR) programme.

As of 1994, eight of the ten districts permitted to operate voluntary arbitration programmes have done so.[49] These eight programmes refer cases to arbitration using one of two systems: the opt-in' system, in which courts simply notify litigants that the arbitration programme is available if they wish to participate, & opt-out' system, in which the court automatically places all eligible cases in arbitration programme, from which litigants can opt out.

According to federal judicial centre, districts with voluntary arbitration programmes that rely on an opt-in referral mechanism have only had a tiny percentage of cases engage in arbitration. Districts that employ the opt referral system, on the other hand, have participation percentages that are comparable to those of required programmes.

- **State Courts**

  The use of different kinds of alternative dispute resolution (ADR) in state courts has also increased:

- There are presently required, non-binding arbitration programmes in 28 state courts.
- More than half of the states have legally included alternative dispute resolution (ADR) procedures other than arbitration into their systems through statewide law, court rules, or policy.
- Most states provide voluntary or mandated mediation for custody, visitation, or other family concerns.
- Almost every state has tried out ADR in one or more of its courts.[50]

Furthermore, many state & federal local court regulations encourage use of ADR by requiring attorneys to discuss it with clients and opponents, include it in case management plans, & be prepared to discuss it with judges during pretrial conferences. It was also recently reported that at least 50 state appeals courts successfully use mediation. [51]

3.4.4. ADR PROGRAMS THROUGH STATE COURT IN U.S.A.

- **California**

  Recent law, which went into effect on August 1, 1995, mandates Los Angeles County judges to order non-binding mediation in any matters involving $ 50,000 or less in issue.[52] other California judges have the same choice, which encourages parties to pursue mediation in most civil matters.

- **Connecticut**

Connecticut's state courts have been among most vocal proponents of alternative dispute resolution. Their initiatives include using private attorneys as fact-finders & arbitrators; summary jury trials, voluntary settlement conferences in

state supreme court, & a case management tracking system that streamlines case resolution by adapting maximum permissible discovery to complexity of the issue. [53]

- **Minnesota**

The Minnesota Supreme Court also enacted guidelines that encourage the use of alternative dispute resolution processes. These laws require that parties to certain types of civil litigation, as well as their counsel, be informed of ADR possibilities before they initiate a legal suit. Parties will be informed about court-annexed processes and provided a list of outside ADR providers at that time so that they can choose the procedure and provider on their own. If the parties have not freely agreed to employ ADR, the court has the right, following consultation with the parties, to pick a non-binding ADR method. Parties who fail to resolve their disagreement through mediation or who reject judgement of an arbitrator may move to trial.

- **New Jersey**

In 1991, a task group appointed by the New Jersey Supreme Court devised a detailed strategy for the introduction and utilisation of a full spectrum of ADR processes in most courts throughout the state.[54] The establishment of complementary dispute resolution was key to the task force's recommendations, which were later accepted by the New Jersey Supreme Court (CDR). The purpose of CDR is to ensure that the alternative procedure is used on a regular and recurring basis. CDR programmes are now an essential component of New Jersey's Superior and Municipal Courts & have shown to be effective.[55] CDR programmes, among other things, compel the screening of all custody and visitation cases for referral to mediation, provide for mediation of minor claims &, at the court's discretion, landlord-tenant conflicts, and mandate mediation of some municipal court situations.

- **North Carolina**

North Carolina established and launched a statewide, court-ordered, non-binding arbitration program in response to a successful pilot programme that began in 1987.[56] The process may be used in civil proceedings if the claim does not exceed $ 15,000. The arbitrator is either appointed by the court or chosen by the parties. If a

party refuses to participate, that party may face fines, and the arbitrators may continue ex parte.

In addition, state court system encourages judges to choose cases for ad hoc summary jury trials. The authors of a study conducted by the private adjudication Centre in Durham in May 1991 discovered that pilot experiment saved significant discovery costs & supported future availability & flexibility of summary jury trial. In 1991, North Carolina also established a pilot programme for court-ordered, mediated settlement talks in Supreme Court civil cases.

- **Texas**

In addition, state court system encourages judges to choose matters for ad hoc summary jury trials. The authors of a research conducted by the private adjudication Centre in Durham in May 1991 discovered that pilot project saved considerable discovery costs & supported future availability and flexibility of summary jury trial. In 1991, North Carolina also established a pilot programme for court-ordered, mediated settlement negotiations in Supreme Court civil cases.

In addition to state programmes mentioned above, special business courts have been established in three major cities: New York, Chicago, and Wilmington, to provide comparatively speedy resolution of commercial issues. The New York State Supreme Court's Business Dissection is solely focused on peaceful solutions, particularly for commercial issues. Other states, including Pennsylvania, California, Minnesota, Ohio, Texas, & Wisconsin, are exploring the establishment of commercial courts or judicial divisions.

At least one-third of states have formed high-level commissions to structure and plan for ADR use, as well as to handle related confidentiality, ethical, & other concerns on a statewide level.[58]

At least one-third of states have formed high-level commissions to structure & plan for ADR use, as well as to handle related confidentiality, ethical, and other concerns on a statewide level.

3.4.5. FEDERAL AGENCY USE OF ADR IN U.S.A.

Government agencies are increasingly making alternative dispute resolution (ADR) solutions available to parties with whom they have disagreements. This is

partly based on legislation like Alternative Dispute Resolution Act of 1990 (ADRA) & Negotiated Rulemaking Act of 1990.[59]

The ADRA authorised federal agencies to use ADR, including binding arbitration, and required each agency to develop an ADR policy for1all types of actions, including formal and informal adjudications, rulemaking, enforcement actions, licence or permit issuance and revocation, contract administration, & litigation.

The ADRA ended on October 1, 1995. As a result, government agencies have formally lost their jurisdiction to pursue ADR in the majority of instances. Following that, a subsequent Executive Order underlines government's intention to broaden use of ADR.[60] The Department of Health and Human Services is one of agencies that has used these negotiated rulemaking procedures. The Federal Communications Commission, Environmental Protection Agency, the Departments of Housing and Urban Development, Interior, & Education

3.4.6. CORPORATE USE OF ADR IN U.S.A.

Many corporations in the United States have established & implemented ADR programmes to manage consumer complaints and conflicts, as well as those involving franchisees, workers, and others. Employees are subjected to multi-level peer reviews, confidential employee counsellors, ombudspersons, voluntary arbitration, and third-party mediation programmes, among other things. In certain cases, these processes have shown to be a relatively affordable, costly, and speedy alternative to litigation, particularly if they incorporate mechanisms viewed as fair, impartial, and procedurally competent.

Contracts involving workers and consumers in the United States are increasingly containing dispute resolution terms. Suppliers & joint ventures that demand a "cooling-off period," "good faith negotiation," and/or processes for some sort of non-binding conflict settlement, such as mediation, before parties litigate or arbitration.

A commitment by businesses to investigate alternate ways of resolving issues with other pledge signatories before beginning litigation has been another approach to the resolution of inter-corporate disputes.

The ADR landscape in the United States is ever-changing. It is often used by the government's executive, legislative, & judicial branches, as well as by private entities, to emphasise the necessity for judicial reform. It is projected that ADR use in United States will continue to grow as a result of expanded and more detailed disclosure of ADR accomplishments.

3.5 INTERNATIONAL COMMERCIAL ARBITRATION (ICA), IN OTHER COUNTRIES

- **ICA in United Kingdom**

Arbitration in English is as old as the language itself. At common law, the parties might renounce the arbitrator's power at any moment before the award, even if the agreement specifically stated that the submission was irreversible. Disputes were mostly focused on chattel and tort. As the British Empire expanded and commerce expanded, so did disagreements between merchants & traders, & commercial matters were regularly sent to arbitration. This resulted in a significant drop in commercial business trials in court. The English Court was strongly opposed to arbitration. Arbitration was regarded to be an attempt to circumvent court jurisdiction. The 1697500 Act was the first to encourage the use of arbitration. It was followed by the Statute of 1833. The general legislation pertaining to arbitration was codified by the Common Law Procedure Act of 1854 and the England Arbitration Act of 1889. Was an attempt to remove the Court's jurisdiction. The Statute of 1698 was the first piece of law aimed at encouraging arbitration. It was followed by the Statute of 1833. The general legislation pertaining to arbitration was codified by the Common Law Procedure Act of 1854 & England Arbitration Act of 1889.

Except by permission of the Court or a judge, the submission was irrevocable unless a contrary purpose was conveyed in it. An arbitrator was not accountable for lack of expertise or carelessness in carrying out the arbitration. The award had to resolve all of the claims that had been brought to arbitration. Regarding reference under Court order, a Court or a Judge may refer any question arising in any case or matter to an official of Special Referee, whose report may be enforced in same manner as a Judgment or order. The Act of 1889 served as the foundation for later arbitration legislation in England.

- **The England Arbitration Act, of 1889**

However, England Arbitration Act of 1889 and subsequent arbitration laws cannot be claimed to encompass entire law of arbitration in England. Many of Statutory restrictions might be disregarded. The parties might agree on composition of the arbitral panel that would resolve the case. All legal defences accessible to the side before the Court were likewise open to the party in arbitration.

- **The Arbitration Clauses (Protocol) Act, 1924**

The Supreme Court of Judicature (Consolidation) Act of 1925 abolished and replaced several provisions of Arbitration Act of 1889. The Arbitration (foreign Awards) Act of 1930 implemented a convention on the implementation of arbitral awards and amended Protocol Act of 1924. The Arbitration Act of 1934 made significant modifications by replacing the Act of 1889. The Arbitration Act of 1950 combined these two provisions. The Arbitration Act of 1950 went into effect on September 1, 1950.

- **The Departmental Advisory Committee (Dac)**

Due to considerable doubt and misunderstanding in English arbitration law, the Departmental Advisory Committee (DAC) found that there were basic faults in the presentation of Arbitration Law of England.[61] DAC recommends that new and better arbitration legislation be enacted.[62] As a result, the Arbitration Act of 1996 was developed. The Arbitration Act of 1950 was abolished by Arbitration Act of 1996, with exception of Part II, which only applies to the enforcement of a restricted number of Foreign Awards. The remainder of the provisions, with appropriate revisions, were re-enacted in Act of 1996. Although this Act of 1996 does not totally follow the UNICTRAL Model Law, its form & substance are heavily influenced by it.

- **The Arbitration Act Of 1996**

The Arbitration Act of 1996 obtained Queen's assent on June 17, 1996, and went into effect on January 31, 1997. This Act combines the philosophy of arbitration law with the practicability of arbitral activities, and it also incorporates the most significant revisions into regulatory regulations. Which meets the criteria for becoming a model legislation framework for governing an international arbitration case. The 1996 Act was founded on the principles of rapid justice, low-cost and fair

trials by a neutral tribunal, party independence, and limited Court interference. In the event of ambiguity in the interpretation of any section of Arbitration Act 1996, following principles must be followed. The English Common Law of Arbitration & English Arbitration Act are the primary sources of arbitration law in the majority of Commonwealth countries & United States of America. Wolf reform in the field of out-of-court settlement in the United States of America is also acknowledged as a revolutionary transformation in the American judicial system. Although city of London lawyers & others have laudedvmediation as a tool for resolving major business cases, cost savings that may be realised via effective and early use of ADR are significant enough that very few types of disputes cannot be helped by ADR.

Alternative dispute resolution methods are expected to grow rapidly1in popularity in the UK over next few years, owing to opportunity for creative solutions, quick and inexpensive resolution that parties develop & buy into, & a process that enhances rather than destroys ongoing business relationships.

TABLE 3.1: BRIEF ANALYSIS OF DIFFERENTIAL ISSUES IN ICA AMONGST THE STATES

Basis for difference	Commencement of arbitration proceedings
Provisions Under UNCITRAL LAW	Arbitral proceedings are presumed to have begun when the respondent receives a written notice of arbitration from claimant, according to Article 3(2).
Provisions under Law Indian Arbitration Law	According to Section 21 of Arbitration & Conciliation Act of 1996, arbitration procedures are assumed to have begun on the day it is received by other party.
Provisions Under Hongkong Arbitration Law	Arbitration is presumed to begin on the day notice of arbitration is received by HKIAC secretariat, according to HKIAC Article 4.2.
Provisions under Singapore Arbitration Law	According to SIAC Rule 1.1, a party that wishes to initiate arbitration must file a notice of arbitration with Registrar.
Provisions under South African Arbitration Law	Article 1.2 of S.A. arbitration law The date of receipt of Request for Arbitration by registrar shall be regarded as start date of

	arbitration.
Provisions under China Arbitration Law	Arbitral proceedings are presumed to have begun on date the respondent receives a written notice of arbitration from claimant, according to Article 3(2).
Provisions under U.S.A. Arbitration Law	Rule 3.1: To initiate arbitration, a party must file a Notice of Arbitration with Registrar.

TABLE 3.2: SEAT FOR ARBITRATION

Basis for difference	Seat for Arbitration
Provisions Under UNCITRAL LAW	Article 18(1): Unless parties have agreed on a specific location for the arbitration, the Arbitral Tribunal will choose the location.
Provisions under Law Indian Arbitration Law	Parties are permitted to determine the location of arbitration under Section 20 of the Arbitration & Conciliation Act of 1996.
Provisions Under Hongkong Arbitration Law	HKIAC Article 15.1: The People's Republic of China's Hong Kong Special Administrative Region is seat of all arbitrations conducted under the HKIAC Rules.
Provisions under Singapore Arbitration Law	Rule 18.1: The parties can agree on the location of the arbitration. In absence of such an agreement, seat of arbitration shall be in Singapore, unless Tribunal considers that another location is more suitable in light of all of facts of the case.
Provisions under South African Arbitration Law	Article 14(1): Unless the parties agree otherwise, the Court will choose the location of the arbitration.
Provisions under China Arbitration Law	Rule 4: At the request of any party, Director of the KLRCA shall create or arrange for such facilities and assistance for conduct of Arbitral Tribunal.
Provisions under U.S.A. Arbitration Law	Article 16: The parties may agree in writing on arbitration's seat (or legal location). If the parties cannot agree on a seat of arbitration, arbitration will be held in London.

TABLE 3.3: LAW APPLIED

Basis for difference	Law applied
Provisions Under UNCITRAL LAW	Article 35(1): The Arbitral Tribunal shall use norms of law selected by parties; in the absence of such agreement, the Tribunal shall apply law that it deems suitable.
Provisions under Law Indian Arbitration Law	According to Sections 28(2) and 28(3) of Arbitration & Conciliation Act of 1996, arbitral tribunal shall make its decision based on the principles of ex aequo et bono or as a friendly competitor only if parties have specifically approved it in accordance with terms & conditions of the contract and trade usages
Provisions Under Hongkong Arbitration Law	HKIAC Article 31.1: The Arbitral Tribunal shall follow the norms of law chosen by parties; in the absence of such agreement, Tribunal shall determine law of dispute as it deems suitable.
Provisions under Singapore Arbitration Law	Rule 27.1: The Tribunal will apply rules of law that the parties have selected as pertinent to substance of the dispute. In absence of such designation by parties, the Tribunal shall apply the legislation that it deems suitable.
Provisions under South African Arbitration Law	Article 17(1): If the parties do not agree, Arbitral Tribunal will use the legal norms that it deems suitable.
Provisions under China Arbitration Law	UNCITRAL Article 35(1): The Arbitral Tribunal shall apply the rules of law chosen by the parties, failing such agreement the Tribunal shall apply the law which it determines to be appropriate.
Provisions under U.S.A. Arbitration Law	Article 16.3: Unless the parties have agreed in writing on the application of another arbitration law and such agreement is not prohibited by legislation of Arbitral seat, arbitration law (if any) must be the arbitration law of seat of arbitration. Article 22.3: The Arbitral Tribunal will settle parties' dispute in line with law chosen by parties. If parties cannot agree on applicable law, Arbitral Tribunal will use whatever legal criteria it considers appropriate.

TABLE 3.4: PRODUCTION OF EVIDENCE

Basis for difference:	Production of evidence
Provisions Under UNCITRAL LAW	Article 27(3): The Arbitral Tribunal has the authority to order parties to deliver papers & other evidence within a specific time range. Article 27(4) requires Arbitral Tribunal to make a decision on admissibility, relevance, substance, and weight of the evidence provided. Article 30(3): If a party fails to provide documents, exhibits, or other evidence after being called by the Arbitral Tribunal and fails to demonstrate adequate reason, Arbitral Tribunal shall give award based on evidence presented to it.
Provisions under Law Indian Arbitration Law	The parties must apply for it under requirements of Sections 47 and 56 of Arbitration & Conciliation Act of 1996.
Provisions Under Hongkong Arbitration Law	HKIAC Article 23.3: The Arbitral Tribunal may order the parties to provide papers or other evidence at any point throughout the Arbitral proceedings. Any document, witness evidence, or other evidence may be admitted or excluded by the Arbitral Tribunal. HKIAC Article 23.10: The Arbitral Tribunal shall evaluate the admissibility, relevance, materiality, & weight of any issue, as well as whether or not rigorous rules of evidence should be used.
Provisions under Singapore Arbitration Law	Rule 16.6: All information/facts contained in a party's statement and documents must be given to the opposing party.
Provisions under South African Arbitration Law	Article 20(6): Unless any of parties requests a hearing, the Arbitral Tribunal may rule matter solely on the papers supplied by the parties.
Provisions under China Arbitration Law	UNCITRAL Article 27(3): The Arbitral Tribunal may order parties to provide papers & other evidence within a time frame determined by Tribunal. Article 27(4) of UN Convention on Contracts for International Sale

	of Goods: The Arbitral Tribunal shall determine the The admissibility, relevance, materiality, and weight of the evidence presented UNCITRAL Article 30(3) states that if a party fails to present papers, exhibits, or other evidence after being summoned by the Arbitral Tribunal and failing to do so within the The party is in default if the time limit imposed by Arbitral Tribunal is not met. Without demonstrating adequate cause within the period set by the Tribunal, the Arbitral Tribunal shall issue the award based on the facts before it.
Provisions under U.S.A. Arbitration Law	Article 19.1: The parties may agree to a documents-only arbitration in writing. Any party may request an oral hearing before Arbitral Tribunal. Article 15.6: The Statement of Case and Response must both be supported by Copies of all vital papers on which the party relies, unless they are very large, in which case they should be supplied via list.

TABLE 3.5: INTERIM MEASURES

Basis for difference:	**Interim measures**
Provisions Under UNCITRAL LAW	Article 26(1): The Tribunal may award interim measures, such as asset preservation and maintaining status quo, at the request of any party awaiting resolution of dispute.
Provisions under Law Indian Arbitration Law	A party may apply for interim measures before or during arbitral proceedings, or at any time after the arbitral award is made but before it is enforced, for purpose of appointing a guardian, preserving or custody, selling goods, or securing the amount in dispute or property, obtaining an interim injunction, appointing a receiver, or obtaining other relief that is expedient for proper judicature, according to Section 9 of Arbitration and Conciliation Act of 1996.
Provisions Under Hongkong Arbitration	HKIAC Article 24.1: The Arbitral Tribunal may impose any interim measures it considers necessary or suitable at request of

Law	any party. HKIAC Article 24.4: In an order, interim award, or final award, the Arbitral Tribunal has competence to divide costs connected to a request for intermediate measures.
Provisions under Singapore Arbitration Law	Rule 26.1: At the request of a party, the Tribunal may issue an order or an award affording any temporary relief it considers appropriate. The Tribunal has authority to order party requesting interim relief to furnish suitable security in connection with the remedy requested.
Provisions under South African Arbitration Law	Article 23(1): Unless parties have agreed otherwise, Arbitral Tribunal may impose any interim or conservatory action it considers necessary as soon as the file is presented to it.
Provisions under China Arbitration Law	UNCITRAL Article 26(1) states that Tribunal may award interim measures, such as asset preservation and maintaining the status quo, at request of any party awaiting the resolution of the dispute.
Provisions under U.S.A. Arbitration Law	Rule 26.1: At request of a party, Tribunal may issue an order or an award affording any temporary relief it considers appropriate. The Tribunal has authority to order party requesting interim relief to furnish suitable security in connection with remedy requested.

TABLE 3.6: RECOURSE AGAINST ARBITRAL AWARDS

Basis of difference:	**Recourse against arbitral awards**
Provisions Under UNCITRAL LAW	Article 30: If Claimant fails to transmit its Statement of Claim within period prescribed by UNCITRAL Rules or Arbitral Tribunal, Arbitral Tribunal shall issue an order terminating Arbitral proceedings, unless other matters, such as a counterclaim, remain outstanding. (2): If Respondent fails to deliver its response to Notice of Arbitration or its Statement of Defence, Arbitral Tribunal shall order proceedings to proceed without regard to such failure as an acknowledgement of Claimant's charges. Article 30(2): If a party

	fails to appear at a hearing after being properly notified in accordance with Rules, and fails to offer appropriate justification for such failure, Arbitral Tribunal may proceed with the arbitration. Article 30(3): If a party who has been formally called by Arbitral Tribunal to present documents, exhibits, or other evidence fails to do so within time limit set, without acceptable cause, Arbitral Tribunal may issue an award based on material before it.
Provisions under Law Indian Arbitration Law	Section 34 of Arbitration & Conciliation Act, 1996 provides that an arbitral award may be set aside for reasons specified in this section within one year of date on which notice in subsection (5) was served on the other party.
Provisions Under Hongkong Arbitration Law	HKIAC Article 26.1: If Claimant fails to communicate its Statement of Claim within the time set by Arbitral Tribunal without showing sufficient cause, Arbitral Tribunal shall issue an order terminating Arbitral Proceedings, unless Respondent has filed a counterclaim and wishes Arbitration to continue. HKIAC Article 26.1: If Respondent fails to provide its Statement of Defence within time limit established by Arbitral Tribunal & fails to show adequate justification, Arbitral Tribunal may continue with arbitration.
Provisions under Singapore Arbitration Law	Rule 17.8: If Claimant fails to file its Statement of Claim within time limit indicated, Tribunal may make an order terminating Arbitral Proceedings or give any other necessary directions. Rule 17.8: If Claimant fails to file its Statement of Claim within time frame specified, the Tribunal may issue an order terminating Arbitral Proceedings or provide any other required directives. make a conclusion based on arguments & data offered to it
Provisions under South African Arbitration Law	Article 21(2): If any parties, although duly summoned, fails to appear without a Arbitral Tribunal has authority to proceed with the hearing if there is a sufficient excuse.

Provisions under China Arbitration Law	UNCITRAL Article 30: If within a period of time fixed by UNCITRAL (1) If the Claimant fails to submit its Statement of Claim, the Arbitral Tribunal shall issue an order ending the Arbitral proceedings, unless there are any other outstanding issues, such as a counterclaim. (2) If Respondent fails to provide its answer to Notice of Arbitration or its Statement of Defence, the Arbitral Tribunal shall determine that the proceedings proceed regardless of such failure as an admission of Claimant's accusations. UNCITRAL Article 30(2): If a party fails to appear at a hearing after being duly informed in accordance with Rules, & fails to offer appropriate justification for such failure, Arbitral Tribunal may proceed with arbitration. UNCITRAL Article 30(3) states that if a party who has been lawfully invited by Arbitral Tribunal to provide papers, exhibits, or other evidence fails to do so within specified time frame without providing adequate cause, Arbitral Tribunal may make an award based on material before it.
Provisions under U.S.A. Arbitration Law	Rule 17.8: If Claimant fails to file its Statement of Claim within time frame specified, Tribunal may issue an order terminating Arbitral Proceedings or provide any other required directives Rule 17.9: If Respondent fails to submit a Statement of Defence, or if any party fails to present its case in manner required by the Tribunal, arbitration may proceed. Rule 21.3: If any party to proceedings fails to attend at a hearing without providing acceptable justification, the Tribunal may proceed with arbitration & make award based on the submissions and evidence presented to it.

TABLE 3.7: APPEAL

Basis for difference:	**Appeal**
Provisions Under UNCITRAL LAW	Article 34(2) states that all awards must be given in writing and must be final and binding on all parties.
Provisions under Law Indian Arbitration Law	An appeal may be taken from the following orders (and no others) to court authorised by law to consider appeals from the initial decision of the court issuing order.
Provisions Under Hongkong Arbitration Law	Article 30.2 of the HKIAC states that awards are final and binding.
Provisions under Singapore Arbitration Law	Rule 28.9: The award is final and binding on parties as of day it is rendered.
Provisions under South African Arbitration Law	Article 28(6) states that all awards are binding on the parties. By bringing matter to arbitration under these Rules, parties agree to carry out any Award as soon as possible and forgo their right to any form of recourse.
Provisions under China Arbitration Law	UNCITRAL Article 34(2) states that all awards must be given in writing and are final and binding on all parties.
Provisions under U.S.A. Arbitration Law	Rule 28.9: The award is final & binding on the parties as of the day it is rendered.

TABLE 3.8: ENFORCEMENT OF AWARDS

Basis for difference	**Enforcement of Awards**
Provisions Under UNCITRAL LAW	Article 34(6): An award is assumed to be enforced when Arbitral Tribunal communicates to parties copies of award signed by arbitrators.
Provisions under Law	According to Sections 35, 36, 48, 49, 55, 57, and 58 of the

Indian Arbitration Law	Arbitration and Conciliation Act of 1996, when court is satisfied that foreign award is enforceable, it has the same standing as a civil court decision.
Provisions Under Hongkong Arbitration Law	HKIAC Article 30.4: An award is presumed to be enforced if it is signed by all of arbitrators. HKIAC Article 30.5: The HKIAC seal shall be applied to an award.
Provisions under Singapore Arbitration Law	Rule 28.6: An award is presumed to be enforced when it is given to Registrar, who sends certified copies to parties upon full payment of arbitration fees.
Provisions under South African Arbitration Law	Before signing any Award, the Arbitral Tribunal is required by Article 27(1) to present Court with a drafted form. The Award is not issued by Arbitral Tribunal until it has been authorised by Court. Article 28(1): Once an Award has been rendered, the Secretariat shall notify the parties of the Arbitral Tribunal's decision.
Provisions under China Arbitration Law	Rule 6(2): The Arbitral Tribunal shall provide a signed copy of its award, including any interim or interlocutory award, to the Director of the Board of Arbitrators.
Provisions under U.S.A. Arbitration Law	Article 26.5: The sole arbitrator or chairman is responsible for presenting award to tribunal, which will thereafter provide certified copies to parties, provided that tribunals' fees have been paid.

3.6 CONCLUSION

Despite having a comparable normative base, the key distinction between the arbitration legal regimes regulating arbitration in India and other states is the enormous freedom provided to parties to pick their chosen legal regime. In contrast to India, parties to a non international arbitration with a seat in Singapore have the option of using the procedure established by their International Arbitration Statute rather than local Arbitration Act. By exercising this option, such an arbitration would be subject to a procedure with limited court participation and control. An international arbitration located in Singapore, on the other hand, can 'opt out' of

International Arbitration Act. The parties can do so by specifying in arbitration agreement that it will be controlled by the Arbitration Act, which will assure a higher level of court monitoring. With establishment of SIAC and SIAC rules, institutional arbitration has become most preferred method of resolving disputes in Singapore. SIAC's growth has coincided with Singapore's emergence as a significant centre of commercial & financial operations. Singapore's worldwide viability has increased as a result of an accelerated and decisive dispute resolution procedure, making it one of most attractive commercial arbitration seats. Given Indian government's desire to make it easier to do business in India, Singapore may learn a valuable lesson, particularly in terms of overhauling and modernising the arbitration process.

Given the growing backlog of cases in Indian courts, it is still vital to promote arbitration as an effective alternative conflict resolution method for litigants, as it was designed to be. Despite the potential for institutional arbitration to bridge the gap, arbitration in India remains predominantly ad hoc in nature, and it continues to embrace both commercial and non-commercial conflicts. The ongoing arbitration lawsuit demonstrates a lack of uniform and certain legal interpretation and implementation of prevailing laws and norms. Nonetheless, arbitration processes have had to adapt to the greatly different demands of private conflicts in the modern era, although in an organic and randomised fashion. The necessity of the hour is to create arbitration procedures and regulations in a researched and disciplined manner in order to eventually nurture an arbitration culture such as that found in London, Singapore, the United States, Hong Kong, and Dubai.

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CHAPTER-4

CONSPICUOUS DEFICIENCIES IN INTERNATIONAL COMMERCIAL ARBITRATION

4.1 INTRODUCTION

Disputes between contracting parties are unavoidable due to the fast rise of international trade among nations, the introduction of the notion of globalisation, and the ever-changing world of trade and business. To avoid legal conflicts in international trade & commerce, every commercial transaction is often preceded by a contract defining parties' responsibilities. However, under the arbitration agreement, regardless of how properly a contract is structured, one party to contract may interpret his rights & responsibilities differently. International trade involves traders from other nations, each with a legal framework that differs in many ways from the other, offering intricate and often opposing elements. Each country's law courts have jurisdiction solely inside the borders of the country in question.

Choice-of-law problems are critical in international commercial arbitration. It is crucial to differentiate 4 distinct choice-of-law concerns that might emerge in the context of an international arbitration: (a) substantive law governs the merits of parties' underlying contract & other claims; (b) substantive law governs parties' arbitration agreement; (c) law applicable to arbitral proceedings (also known as "procedural law of arbitration," "curial law," or "lex arbitri"); & (d) conflict of laws rules that govern the selection of each of foregoing laws.[1] Although it is uncommon, each of these 4 concerns may be addressed by a distinct national (or other) legislation.

Each of above choice-of-law concerns might have a significant impact on international arbitration procedures. Different national laws establish different–sometimes significantly different–rules that apply at various phases of arbitral procedure.

The most contentious problem for the implementation and enforcement of international business arbitrations is the clash b/w domestic law & international commercial arbitration rules.

4.2 GRAY AREAS OF INTERNATIONAL COMMERCIAL ARBITRATION

The expansion of international trade is inevitable to result in international disputes that cross national borders & geographical limits. For resolution of such issues, preference for international arbitration over litigation in national courts is obvious, because arbitration is favoured over litigation in courts, & foreign element in international arbitration is preferred over the domestic element in national courts. This is also due to the lack of International Courts to hear International Commercial Disputes. In such cases, resort to international arbitration in a convenient and impartial venue is often seen as preferable to recourse to courts as a means of resolving any issue that cannot be resolved via dialogue.

The reason and objective of international arbitration should be to provide a convenient, impartial, fair, speedy, & effective venue for resolving international commercial disputes.

The basic aspects that are consistent in legal framework for resolving international economic disputes "may be divided into 3 stages: (1) Jurisdiction, (2) Choice of Law, and (3) Recognition & Enforceability of Arbitral Award

When parties from different legal systems meet in International Commercial Arbitration, there is an inevitable conflict of laws, & substantive law to be applied in a specific dispute must be chosen. The substantive law to be used in arbitration is frequently defined by parties in their initial agreement. However, when parties cannot agree on a choice of law for resolution of their dispute, challenges emerge in defining the appropriate law.

The increased court interference, which tends to interfere with arbitral autonomy as well as finality, is an important element to consider. The necessity to reconcile & integrate arbitral autonomy and finality with judicial scrutiny of arbitral procedure is essential. National laws differ on this point. In this area, the UNCITRAL Model Law seeks to foster harmony & uniformity. The entire absence of judicial participation in various international commercial matters does not correspond with present trend, but the extent of judicial supervision should be restricted to bare minimum.

The agreement of the parties, not mandate of the State, is the source of power for the international arbitral tribunal. The appropriate legislation is also established by the arbitration agreement's clause. With more arbitral authority comes a greater need for justifications for the award. Apart from providing openness in the arbitral procedure, it also serves as an inherent check on arbitrators by disclosing to the party the foundation of the decision and logical process by which the arbitrators arrived at their conclusion. The inclusion of reasons also limits the scope of judicial oversight.

With all of these goals and increasing International commercial disputes for the effective implementation of economic reforms, it is critical to recognise the demand of business community in a country like India and to expand Indian foreign trade at the global level as well as to attract foreign investors. The importance of effective International arbitration laws for amicable resolution of International commercial disputes is critical. It was said by the Supreme Court in the Food Corporation of India case. [2] Mohinderpal, Joginderpal That "we should make arbitration law simpler, less technical, and more responsive to actual realities of situations, but must also be responsive to cannons of justice & fair play, and make arbitrator adhere to such process and norms that will create confidence not only by doing justice b/w parties, but also by creating a sense that justice appears to have been done."

As a result of the recent decision, parties to international commercial arbitrations are no longer free to include or exclude the jurisdiction of Indian courts.

while the Bharat Aluminum Co v. Kaiser Aluminum Technical Services Inc3judgment gives much-needed relief to foreign businesses while also correctly recognising the territorial criteria concept, which is a cornerstone of arbitration. Even if there are several concerns in international business conflicts that have arisen or may develop in the future, they cannot be resolved through international commercial arbitration systems owing to a lack of clear and effective standards. The following are some important issues:

4.2.1. ISSUES INVOLVE IN INTERNATIONAL COMMERCIAL ARBITRATION

- Arbitration clause enforceability/Arbitration agreement.
- The location of the arbitration and hearing.

- Laws in conflict
- Differences in substantive and procedural legislation exist between countries.
- The processes for selecting Arbitrators and the number of Arbitrators.
- Different countries' public policies.
- Award Recognition and Enforcement.

There is no question that the judgements mentioned here have been well received in the field of international commercial arbitration. At same time, inadequate arbitration regulations have caused a rethinking of the long-held idea of having foreign judgements enforced in India as a time-consuming procedure with the possibility of court intervention at various stages.

The recent rulings of Indian courts restricting the basis for challenging a foreign verdict may result in speedier settlement of disputes through arbitral proceedings. With the current judicial picture on the issue, one hopes that the world community's faith in commercial arbitration as a viable ADR tool in India grows.

Certain hazy regions, as well as untouched or unresolved issues, continue to leave an ineffective impression in the minds of the parties to the International Commercial Arbitration. These are areas in question:

4.2.2. LAW APPLICABLE TO THE SUBSTANCE OF THE PARTIES' DISPUTE

The underlying issue of parties would normally (exaequo et bono or as amiable compositeur)[4] be decided within the substantive law norms of a specific national legal system. In first instance, the arbitrators will normally decide substantive law applicable to the parties' dispute. International arbitral rulings, as discussed in detail below, often give effect to parties' agreements about appropriate substantive law ("choice-of-law provisions"). The main exception is when required national legislation or public policies seek to trump private contractual contracts.

If parties cannot agree on the substantive law governing their dispute, the arbitral tribunal must choose one. In doing so, tribunal may (but does not necessarily) refer to a set of national or international conflict-of-laws standards. These various methods to selection of substantive law in international arbitration are summarised below & discussed in further below.

Although it was historically customary to use the national conflict-of-law norms of the arbitral seat, more recent practise has been more varied. Some courts and commentators take conventional method, while others turn to conflict rules of all nations with a stake in dispute; moreover, some authorities follow either international conflict-of-laws rules or validation principles.

4.2.3. LAW APPLICABLE TO THE ARBITRATION AGREEMENT

Arbitration agreements, as previously mentioned, are widely viewed as presumptively "separable from underlying contract in which they occur." As a result, parties' arbitration agreement may be regulated by a different national law than underlying contract of conflict-of-laws rules (which may pick separate substantive laws for parties' arbitration agreement and their underlying contract).

Four significant choices for legislation governing an arbitration agreement are given below: (a) law selected by parties to govern arbitration agreement; (b) international norms, either as a substantive body of contract law (as in France) or as non-discrimination principles (as in most U.S authority).

4.2.4. PROCEDURAL LAW APPLICABLE TO THE ARBITRAL PROCEEDINGS

Arbitral processes are likewise governed by legal norms, which control both "internal" procedural concerns & "external" relationships b/w arbitration & national courts. In most cases, law that governs arbitral procedure is law of the juridical place of arbitration).[5]

The law of arbitral seat typically addresses issues such as the appointment and qualifications of arbitrators, qualifications and professional responsibilities of the parties' legal representatives, the extent of judicial intervention in arbitration, the form of any awards, and standards for annulment of any award, among others. Different country laws tackle these numerous concerns in vastly different ways. National legislation in several countries sets considerable constraints or requirements on conduct of arbitration.[6] Local courts also have considerable authority to oversee arbitral processes. Other than that, especially in most modern countries, local law gives international arbitrators nearly unrestricted power to administer the arbitral procedure—subject only to fundamental procedural regularity requirements ("due process" or "natural justice").

In certain countries, the parties are allowed to choose law that governs the arbitral processes (also known as the procedural law of the arbitration, curial law, or the lex arbitri). In many situations, this includes the ability to consent to the implementation of a different procedural law than that of arbitral seal. This seldom happens in actuality, and the consequences of such an agreement are unknown.

4.2.5. CHOICE OF LAW RULES APPLICATION IN INTERNATIONAL ARBITRATION

Choosing one of three bodies of law indicated in preceding sections –laws relevant to merits of underlying contract or dispute, arbitration agreement, & arbitral procedure – usually demands application of conflict of laws rules. For example, in order to determine which substantive law governs parties' dispute, arbitral tribunal must typically conduct a conflict-of-laws examination. Various states have different substantive law rules, as well as conflict of law statutes. As a result, an international arbitral tribunal must decide which set of conflict rules to apply from outset.

4.3. OVERVIEW OF INTERNATIONAL COMMERCIAL ARBITRATION, THROUGH RECENT JUDICIAL REMARKS

The present state of conflict-of-laws analysis in international arbitration has not kept pace with parties' desire to avoid special jurisdictional, choice-of-law, & enforcement issues that follow international dispute litigation in national courts. Nonetheless, recent national court decisions & arbitral awards, as discussed in greater detail below, point the way toward the development of international principles of validation & non-discrimination, which hold promise of more fully realising international arbitral process's aspirations.

The term 'International Commercial Arbitration' and Judiciary

This section is concerned with the regulations governing the nature of international arbitration. An ICA is defined in Section 2(I)(f) of the Act as one emerging from a legal connection that must be deemed commercial. if one of the parties is a foreign national or resident, a foreign corporate entity, or a firm, association, or group of persons whose primary administration or control is in foreign hands Thus, an arbitration with a seat in India but containing a foreign element will be considered as an ICA and thus subject to Part I of Act under Indian Law. Part I of

Act applies when an ICA is held outside of India. Would not apply to the parties, although they would be subject to Part II of the Act.

The Supreme Court concluded in the case of TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd that a corporation formed in India has the same legal standing as an Indian citizen.**[7]**

4.3.1. ARBITRABILITY OF INTERNATIONAL COMMERCIAL ARBITRATION

Arbitrability is one of difficulties in international commercial arbitration when contractual & jurisdictional aspects collide. It is just a matter of determining which matters may and cannot be presented to arbitration.

In the case of Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.,[8] The Supreme Court examined idea of arbitrability minutely and determined that term "arbitrability" refers to conflicts committed to arbitration. Arbitraility is generally defined as the option of resolving a dispute outside of the courtroom. It deals with civil issues that are referred to arbitration. Non-arbitrable conflicts include criminal disputes, marriage disputes, insolvency, guardianship, testamentary concerns, and so forth.

The application of any amending legislation to ongoing proceedings or the effect it may have on vested rights is one of the most essential and controversial components of any amending statute. As a result, it is usual for legislation to be amended to clarify this stance. The Ordinance, on the other hand, has totally left the field open, with the exception of Provision 12, where the application of the abovementioned section is explicitly stated. This is notwithstanding the Law Commission's recommendation to include a transitory clause to clarify the scope of operation of each of the modifications in relation to pending arbitrations. This provision's omission is unlikely to be purposeful and is more likely to be a mistake. While a clarification or correction may be made in the future, this is probably the most essential component in every litigant's opinion. As a result, we examine below the anticipated stance that courts will take on the application of each clause to ongoing and future arbitral procedures. However, we acknowledge and agree that they are our best estimations based on principles established in previous precedents. Given the nature of this topic, we must accept that the likelihood of courts having an

altogether different position is considerable, and this analysis should only be taken as a guide, not as an opinion of any kind.

The BALCO decision is, without a doubt, a restatement of international commercial arbitration law as contemplated by the 1996 Arbitration & Conciliation Act. By holding that Parts I and II of Act are mutually incompatible, this well-researched judgement gave conceptual clarity and clarified several long-standing difficulties.

However, several matters remain unresolved since the Indian Supreme Court chose a "hands-off" policy by rejecting to "fill the hole" left by arbitration regime.

The Supreme Court said unequivocally that Part I of the Act cannot be utilised in an arbitration held in another country. As a result, no party may apply to a court in India for temporary measures of protection under Section 9 of Act (which comes under Part I). This ruling puts parties in a more hazardous position than under the Bhatia system, when they had option of opting out of all or any of Part I's rules. In context of temporary measures, the Bhatia logic preserved the parties' right to approach Indian courts under Section 9, unless specifically prohibited. As a result, if the choice of seat is in a foreign nation, the parties are now helpless in terms of temporary remedy. Nonetheless, this ruling may prove to be a beneficial step toward India's goal of becoming a centre of international arbitration, because it is now necessary to pick an Indian seat in order to receive an interim relief from court.

Though the decision has been generally positively received by the international arbitration community, there are some reservations, particularly about the decision's possible overruling component. The cause for concern is that this judgement will only apply to arbitration agreements entered into on or after September 6, 2012. 28 With regard to arbitration agreements made into before to this date, apparent inference is that Indian courts retain possibility of exercising long arm jurisdiction over offshore arbitrations. Given amount of pending litigations in Indian courts, this is likely to be a contentious issue in near future, since it predicts development of two parallel regimes. Depending on the date of the arbitration agreement's inception, there will be anomalous circumstances in which courts supervising arbitrations resolve case utilising either the Bhatia doctrine or the BALCO reasoning. The court's decision to apply the BALCO rationale solely

prospectively, on other hand, may be interpreted as an attempt to balance parties' interests & avoid a miscarriage of justice by fully barring option of an interim remedy. Nonetheless, arbitrators must wait and see how Indian judges maintain these two parallel regimes in future.

REFERENCES

1. G. Born, International Commercial Arbitration 409-561, 1310-47, 2105-2248 (2009)
2. (1989) 2 SCC 347
3. 2012 9 SCC 552;
4. Parties sometimes agree to permit arbitrators to resolve their dispute without reference to law. That is, ex a equo et bono or as amiable compositeur, see in fra pp. 962-63, or by reference to a non- national legal system, see infra pp. 959-61 see also G. Born, International Commercial Arbitration 2227-47 (2009)

5 G Born, International Commercial Arbitration 1287-95 (2009) p. 629;.

6 The United States, England, Switzerland, France, and Singapore generally fall within this latter category.

7 7 2008(14) SCC271

8 8 2011 (1) SCC 532

CHAPTER 5

DATA ANALYSIS AND INTERPRETATION

5.1 INTRODUCTION

- **Need for Alternative Dispute Resolution System**

Any civilised society's basis & goal is justice. The pursuit of justice has been an ideal to which humanity has aspired for aeons. The world has learned that confrontational litigation is not sole way to settle problems. Congestion in courtrooms, a shortage of staff & resources, as well as delays, costs, & process, all point to need for improved alternatives, approaches, & outlets. A click on that option will take you to Alternative Dispute Resolution method.

ADR is faster, less expensive, & more user-friendly than courts. It provides options for technique, process, pricing, representation, & location. Because it is generally faster than legal processes, it can reduce pressure on Courts. Because it is less expensive, it has potential to help to reduce upward spiral of legal expenses & legal aid expenditure, which would benefit both parties.

5.2 DATA ANALYSIS

TABLE-5.1 WHETHER THE ALTERNATIVE DISPUTE RESOLUTION SYSTEM IS A NEED FOR SPEEDY JUSTICE AND AMICABLE SOLUTION?

		FREQUENCY	PERCENT	VALID %	CUMULATIV %
Valid	Yes	98	65.8	65.8	65.8
	No	10	6.7	6.7	72.5
	Can’t Say	24	16.1	16.1	88.6
	Don’t Know	17	11.4	11.4	100.00
	Total	149	100.00	100.00	

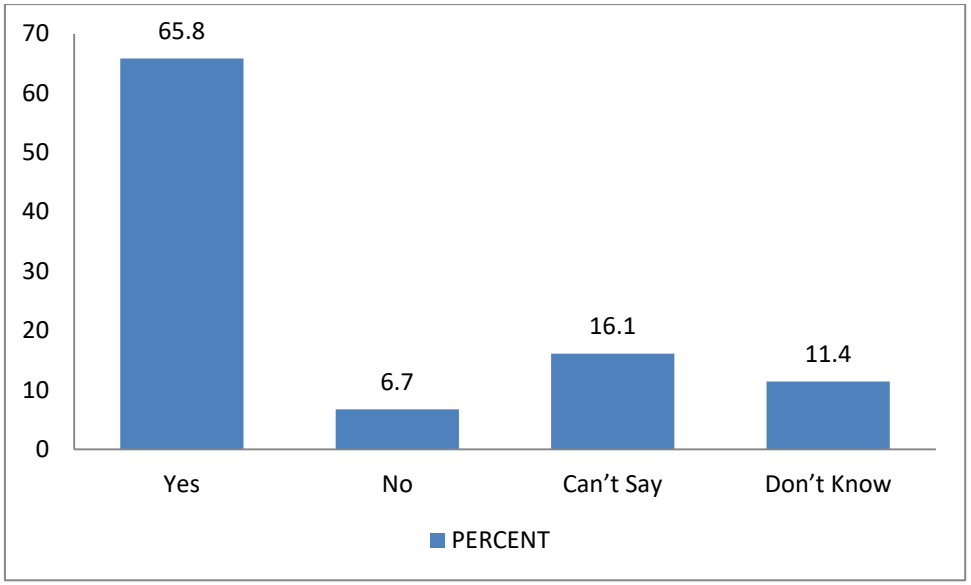

FIG. 5.1 RESPONDENT PERCENTAGE

INTERPRETATION

After statistical analysis of data collected through the questionnaire for the above mentioned question, there were a majority of respondents were in the positive opinion that Alternative dispute resolution system is a need for speedy justice for the disputes. Around 66 percent respondents were in the favor that, ADR is indeed a strong mechanism for assurance of speedy justice. Whereas around 7 percent respondents denied this statement as well, because of some lack of awareness or being ignorant about this system around 16 percent were in respond in the manner that they can‘t say whether the said system is effective for speedy justice or not whereas due to unawareness, around 11 percent respondents shows there expression that they are not fully aware about the ADR system.

- **THE INTERNATIONAL COMMERCIAL DISPUTES AND INTERNATIONAL TRADES**

In fact, it has become customary to include an arbitration clause in every business contract. Arbitration has also grown in strength & popularity as a mechanism of settling disputes in international trade & business. It is hard to tell how extensively accepted arbitration is, however some observers have indicated that arbitration clauses are included in up to 90 percent of all international contracts. Rapid globalisation has resulted in an increase in number of international contracts including terms requiring international arbitration. As a result, many people consider availability & efficacy of

international arbitration as a boon to cross-border trade & investment. This fascinating but increasingly difficult legal landscape provides multinational parties with a plethora of options for managing & resolving their conflicts. Business requirements will always differ depending on context, but some general guidance can be drawn from an examination of those aspects of international arbitration that have traditionally been viewed as most advantageous for international parties while minimising perceived disadvantages of international arbitration.

TABLE 5.2 WHETHER THE INTERNATIONAL COMMERCIAL DISPUTES ARE INEVITABLE AND OBVIOUS FOR INTERNATIONAL TRADES?

		FREQUENCY	PERCENT	VALID %	CUMULATIV %
Valid	Yes	148	99.3	99.3	99.3
	No	1	.7	.7	100.0
	Total	149	100.0	100.0	

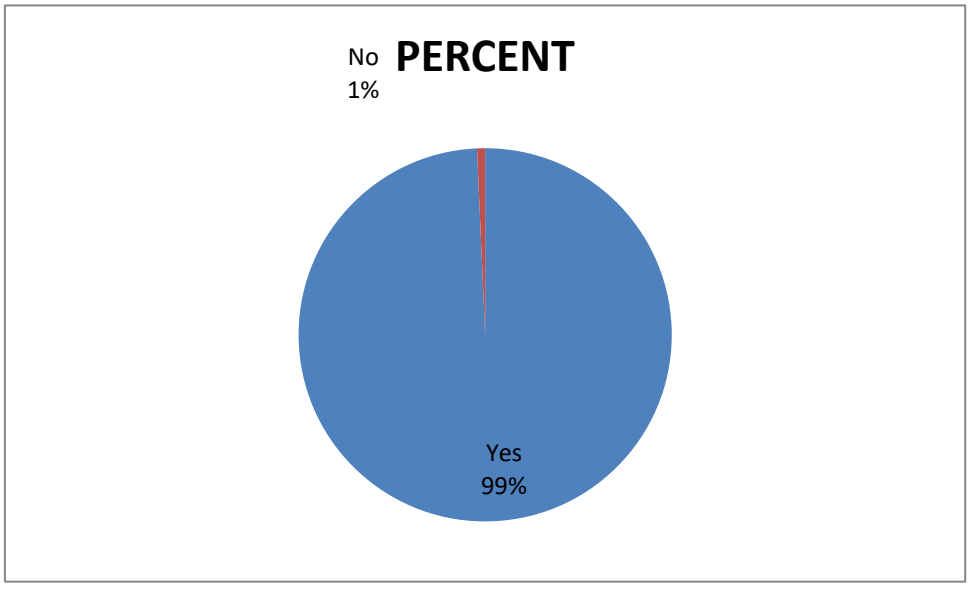

FIG 5.2 WHETHER THE INTERNATIONAL COMMERCIAL DISPUTES ARE INEVITABLE AND OBVIOUS FOR INTERNATIONAL TRADES?

INTERPRETATION

After statistical analysis of data collected through the questionnaire for the above mentioned question, there were a majority of respondents were in positive opinion that, International Commercial Disputes are inevitable and obvious for

international trades. Around 99 percent respondents were in the favor that, due to rapid growth in cross- border commercial activities international commercial disputes are unavoidable situation for word business communities. Whereas around 1 percent respondents denied this statement.

- **THE INTERNATIONAL COMMERCIAL ARBITRATION IN INDIA STATUS UNDER THE ARBITRATION AND CONCILIATION ACT, 1996**

The 1996 Act, which repealed 1940 Act, was enacted to provide an effective and expeditious dispute resolution framework that would inspire confidence in Indian dispute resolution system, attract foreign investments, & reassure international investors in Indian legal system's reliability in providing an expeditious dispute resolution mechanism. Part I of 1996 Act provides for any arbitration conducted in India and enforcement of judgments made thereunder. Part II deals with enforcement of foreign awards. Part I governs any arbitration held in India or enforcement of awards made thereunder (whether domestic or international), whereas Part II governs execution of any overseas award to which New York Convention or Geneva Convention apply. The 1996 Act has two novel provisions that deviate from UNCITRAL Model Law. For starters, unlike UNICITRAL Model Law, which was meant to apply primarily to international commercial arbitrations, 1996 Act applies to both international & domestic arbitrations. Second, in terms of reducing court intrusion, the 1996 Act goes above & beyond UNICITRAL Model Law.

TABLE: 5.3 WHETHER ENACTMENT OF ARBITRATION & CONCILIATION ACT, HAS SOLVED PROBLEMS OF INTERNATIONAL COMMERCIAL ARBITRATION IN INDIA?

		FREQUENCY	PERCENT	VALID %	CUMULATIV %
Valid	Yes	105	70.5	70.5	70.5
	No	8	5.7	6.7	75.8
	Can’t Say	25	16.8	16.8	92.6
	Don’t Know	11	7.4	7.4	100.00
	Total	149	100.00	100.00	

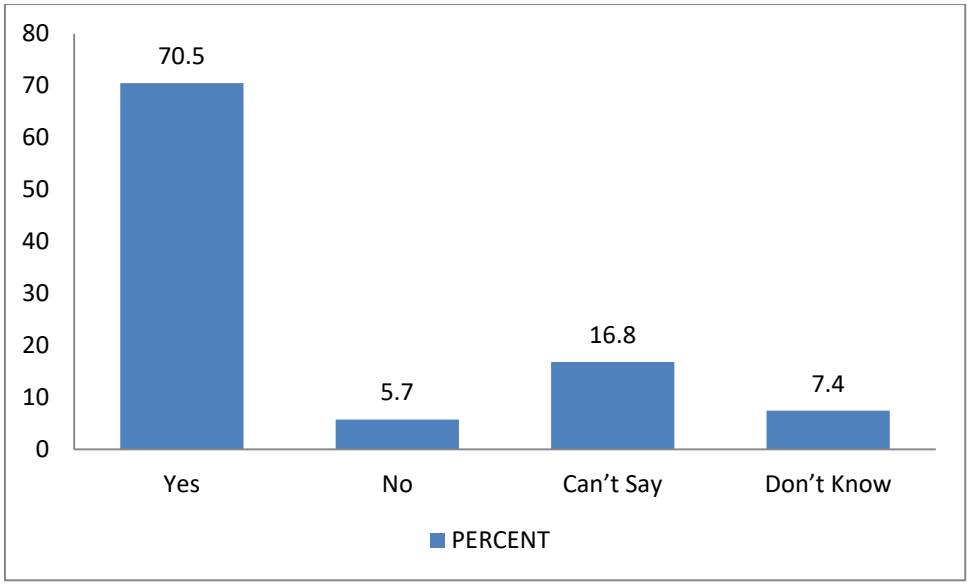

FIG 5.3 RESPONDENT PERCENTAGE

INTERPRETATION

After statistical analysis of data collected through the questionnaire for the above mentioned question, there were a majority of respondents were in the positive opinion that enactment of Arbitration & Conciliation Act, has solved problems of International Commercial arbitration in India. Around 71 percent respondents were in the favor that, yes the enactment of Arbitration & conciliation Act, has proved successful in solving the problems relating to International commercial arbitration in India. Whereas around 5 percent respondents denied this argument as well, because of some lack of awareness or having less faith in ADR system around 17 percent were in respond in the manner that they can't say whether the Indian arbitration is effective in solving the ICA issues or not whereas due to unawareness, around 7 percent respondents shows there expression that they are not fully aware about the Act.

- **DOMESTIC ARBITRATION VERSUS INTERNATIONAL COMMERCIAL ARBITRATION**

Various courts have reviewed rising use of arbitration as an alternative mechanism of dispute settlement in various circumstances of Arbitration & Conciliation Act 1996. Subsection (2) of Section 2 & Provisions 8, 9, 11, & 34 are most contentious sections of Act. Dealing with Section 2(2), one of most widely interpreted clauses, which states that Part I of Act applies if site of arbitration is in India. Where does it give room for interpretation by different Courts? The clause

expressly states that Part I of Act, which is intended for "domestic arbitrations," applies to all arbitrations when "site" of arbitration is India. Even if arbitration is b/w 2 foreign firms governed by foreign law, but site of arbitration is India, Part I will apply & arbitration will be regarded "domestic." What distinguishes it from a domestic arbitration?

TABLE: 5.4 WHETHER LAW RELATING TO DOMESTIC ARBITRATION AND INTERNATIONAL ARBITRATION SHOULD BE SEPARATED IN TWO DIFFERENT STATUTES?

		FREQUENCY	PERCENT	VALID %	CUMULATIV %
Valid	Yes	129	89.58	89.6	89.6
	No	15	10.42	10.4	100.0
	Total	144	100.0	100.0	

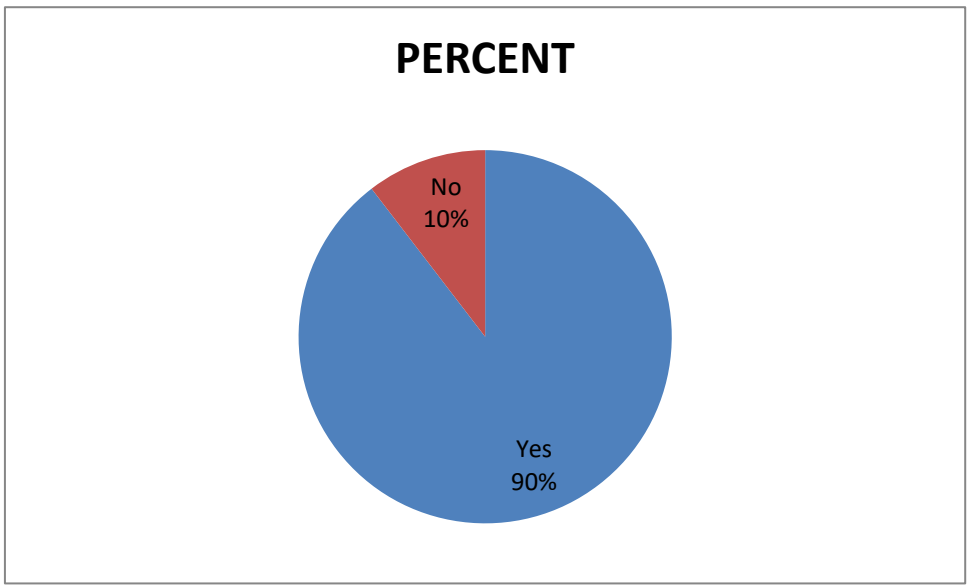

FIG. 5.4 RESPONDENT PERCENTAGE

INTERPRETATION

After analysis of data collected through the questionnaire for the above mentioned question, there were a majority of respondents were in positive opinion that, there should be law relating to domestic arbitration & International Arbitration should be separated in two different statutes. Around 90 percent respondents were in the favor that, due to the certain issues and most disputed

issues relating to domestic as well international arbitration there should be separate law for both. Whereas around 10 percent respondents not in the favor in the division of domestic and international nature of arbitration.

- **INVESTOR'S PROTECTION IN INDIA, SPECIALLY FROM TRADE RELATING LEGAL ISSUES**

Investor grievance redressal mechanisms & foreign investor protection go hand in hand. If there is a transparent, time-bound, easier, & simpler grievance redressal mechanism in place for foreign investors, their protection will be automatically ensured, & they will be able to park their investments in Indian capital markets, contributing to economic development by channelling their savings into investments & facilitating capital formation in economy. The grievances of foreign investors, their redressal under Indian arbitration law always been as challenges for foreign investors. Basically issues relating to enforcement of an foreign award.

Foreign investing is not same as regular commerce. Trading is often defined as one-time exchange of products & money. Investing in a foreign nation, on other hand, is predicated on a long-term connection b/w investor & country where investment is made ("host state").

TABLE: 5.5 DO YOU AGREE THAT ARBITRATION & CONCILIATION ACT, 1996 HAS FAILED TO FULFILL ITS ONE OF THE MAIN OBJECTS TO ATTRACT THE FOREIGN INVESTORS TO SETTLE THEIR DISPUTE IN INDIA?

		FREQUENCY	PERCENT	VALID %	CUMULATIV %
Valid	Yes	126	84.6	84.6	84.6
	No	11	7.4	7.4	91.9
	Can't Say	12	8.1	8.1	100
	Total	149	100	100	

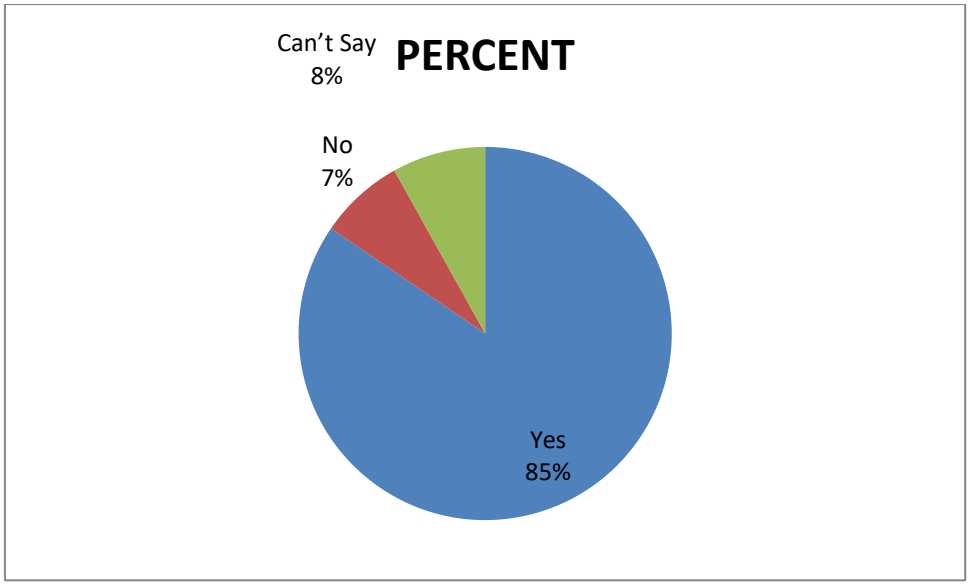

FIG. 5.5 RESPONDENT PERCENTAGE

INTERPRETATION

After statistical analysis of data collected through the questionnaire for the above mentioned question, there were a majority of respondents were in the positive opinion that that Arbitration & Conciliation Act, 1996 has failed to fulfill its one of the main objects to attract the foreign investors to settle their disputes in India. Around 85 percent respondents were in the favor that, after the major amendments in new arbitration law an effort has been made to solve the legal issues relating to cross border investment. Whereas around 7 percent respondents denied this argument as well, because of some lack of awareness or having less faith in ADR system around 8 percent were in the opinions that they can't predict the future effectiveness of new arbitration law for foreign investors in India.

- **INDIA AS A HUB FOR INTERNATIONAL COMMERCIAL ARBITRATION**

To make arbitration in India even less likely, certain well-known global arbitral institutions, such as International Chamber of Commerce (ICC) Paris, London Court of International Arbitration, and Singapore International Arbitration Centre, are aggressively setting up offices in India & offering their services locally. The size of business dispute pie in India is so large that every international arbitral institution wants a piece of it and is more than prepared to go additional mile to woo Indian enterprises.

To make India centre of international commercial arbitration, government, legal profession, & corporate India must work together. Foreign corporations would choose India as their preferred location only if atmosphere for conducting international commercial1 arbitration in India is conducive to commerce. Despite efforts to have the necessary adjustments to arbitration legislation authorised by legislature, government will be unable to do so on its own. Full support from enterprises and the legal community is required, which can only be accomplished on basis of simply commercial and realistic factors, rather than nationalism, patriotism, or protectionism.

TABLE: 5.6 WHETHER ESTABLISHMENT OF INTERNATIONAL CENTRE FOR DISPUTES RESOLUTION BY GOVERNMENT OF INDIA TURNED INTO A HUB FOR INTERNATIONAL COMMERCIAL ARBITRATION?

		FREQUENCY	PERCENT	VALID %	CUMULATIV %
Valid	Yes	97	65.1	65.1	65.1
	No	17	11.4	11.4	76.5
	Can't Say	35	23.5	23.5	100.0
	Total	149	100.0	100.0	

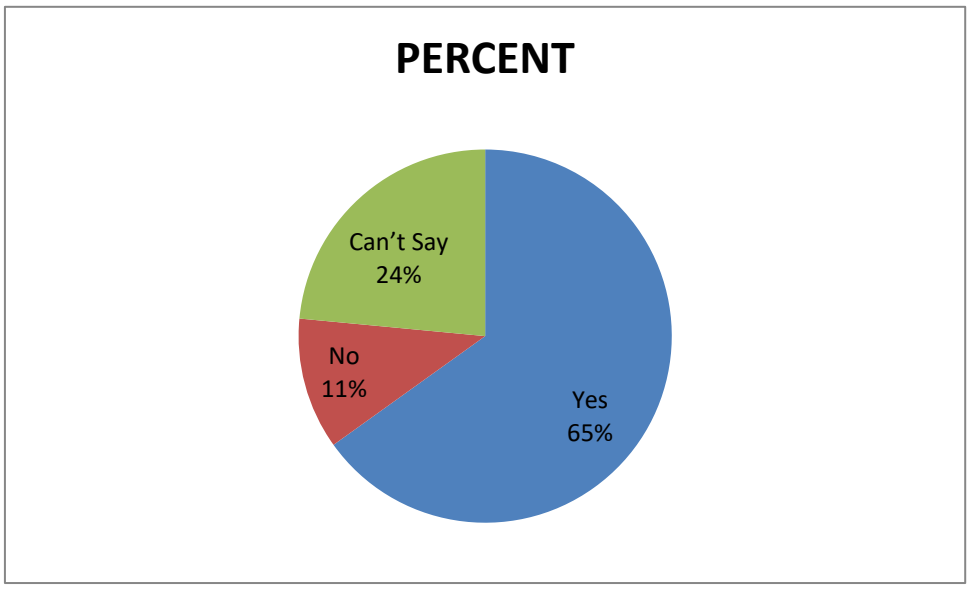

FIG. 5.6 RESPONDENT PERCENTAGE

INTERPRETATION

After critical analysis of data collected through the questionnaire for the above mentioned question, there were a majority of respondents were in positive opinion that that establishment of International Centre for disputes resolution by Government of India turned into a hub for International Commercial arbitration. Around 65 percent respondents were in the favor that, after the establishment of International Centre for disputes resolution by Government of India turned into a hub for International Commercial arbitration. Whereas around 11 percent respondents denied this argument as well, because of some lack of awareness or having less faith in Indian arbitration system around 24 percent were in the opinions that they can't predict the future effectiveness of ICA in India.

- **ENFORCEMENT THE FOREIGN AWARDS IN INDIA**

According to Section 44 of Indian Arbitration and Conciliation Act, 1996, a foreign arbitration a foreign award is defined as an award made in a region that Central Government may declare, by notification, to be a territory to which New York Convention applies. As a result, even if a nation is a signatory to New York Convention, this does not imply that an award made in that country is enforceable in India. The Central Government must issue additional notification designating that nation to be a territory to which New York convention applies.

TABLE 5.7 WHETHER THERE IS VESTED RIGHT TO HAVE FOREIGN AWARD ENFORCEMENT UNDER ARBITRATION & CONCILIATION ACT, 1996?

		FREQUENCY	PERCENT	VALID %	CUMULATIV %
Valid	Yes	98	65.8	65.8	65.8
	Can't Say	41	27.5	27.5	93.3
	Don't Know	10	6.7	6.7	100
	Total	149	100	100	

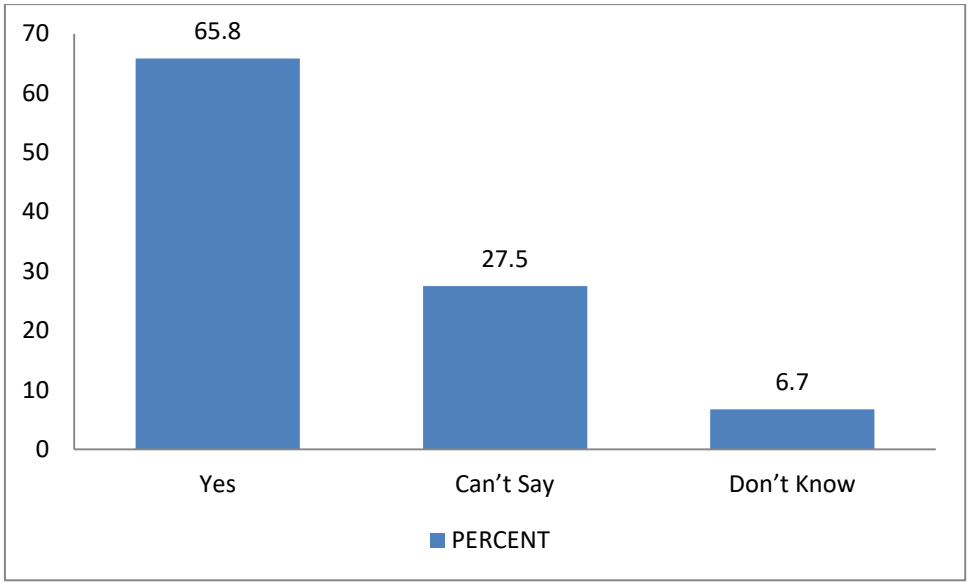

FIG. REPONDENT PERCENTAGE

INTERPRETATION

After the wide analysis of data collected through the questionnaire for the above mentioned question, there were a majority of respondents were in positive opinion that that establishment of International Centre for disputes resolution by Government of India turned into a hub for International Commercial arbitration. Around 66 percent respondents were in the favor that, after the establishment of International Centre for disputes resolution by Government of India turned into a hub for International Commercial arbitration. Whereas, because of some lack of awareness or having less faith in Indian arbitration system around 28 percent were in the opinions that they can't say about the enforcement of such rights as well 8 percent respondent were unaware about this fact.

- **THE BALCO JUDGMENT A NEW HOPE FOR ICA IN INDIA**

The Arbitration and Conciliation Act of 1996 (the "Act") is broken into four sections. 1 The first section of Act ("Part I") deals with arbitrations held in India and enforcement of such1awards; second section ("Part II") deals with enforcement of1foreign arbitral1awards. The subject of whether provisions of Part I of Act apply to international arbitrations held outside India has been considered several times by the Supreme Court of India ("Supreme1Court") and different High Courts.

The Supreme Court ruled in Bhatia International vs Bulk Trading SA ("Bhatia International") that provisions of Part I of Act apply to all arbitrations, including international commercial arbitrations performed outside India, unless parties expressly or tacitly restrict their application. However, in case of Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc ("BALCO"), the Supreme Court's constitution bench dismissed Bhatia International & determined that requirements of Part I of Act would only apply to arbitrations held in India.

Bhatia International has been heavily chastised for judicial overreach & for causing substantial doubt & delay in arbitrations held outside of India. As a result, when BALCO appeared before a two-judge Supreme Court bench, they referred case to Constitution bench in order to rectify harm created by Bhatia International. The five-judge panel resolved the law on application of Part I of Act's provisions to arbitrations held outside India by declaring Part I inapplicable to international arbitrations. The following are Supreme Court's important conclusions in BALCO:

- In respect of territorial concept, legislature has enacted that Part I of Act applies to arbitrations with their place/seat in India.
- The deletion of term "only" from Section 2(2) of Act has no effect on section's text, which limits applicability of Part I of Act to arbitrations with a place/seat in India. It would not apply to arbitrations held outside of India.
- According to interpretation of Section 2(1)(e), two courts have jurisdiction to adjudicate a dispute, namely court whose jurisdiction cause of action is located and courts where arbitration takes place.
- When seat of arbitration is located outside of India, Indian courts do not have authority to award interim relief.
- Foreign arbitral awards would be susceptible to Indian court jurisdiction only if they were sought to be enforced in India in conformity with requirements of Part II of the Act.

The court went on to clarify that agreeing to have Indian Laws regulate arbitration laws does not make Part I applicable to case. Even if the substantive law of arbitration is Indian Law, but arbitration takes place outside of India, Indian courts will be barred from hearing the case.

As a result, it prospectively overturned Bhatia International & Venture Global, holding that legislation established in Bhatia International and Venture Global will only apply to agreements entered into prior to September 6, 2012.

TABLE 5.8 WHETHER JUDGMENT IN BHARAT ALUMINUM CO. LTD. V. KAISER ALUMINUM TECHNICAL SERVICE INC (BALCO), (2012) 9 SCC 649, HAS REMOVED AMBIGUITY RELATING TO APPLICATION FOR PART I & FOR PART II OF THE ARBITRATION AND CONCILIATION ACT, 1996?

		FREQUENCY	PERCENT	VALID %	CUMULATIV %
Valid	Yes	99	66.4	66.4	66.4
	No	7	4.7	4.7	71.1
	Can't Say	38	25.5	25.5	96.6
	Don't Know	5	3.4	3.4	100
	Total	149	100	100	

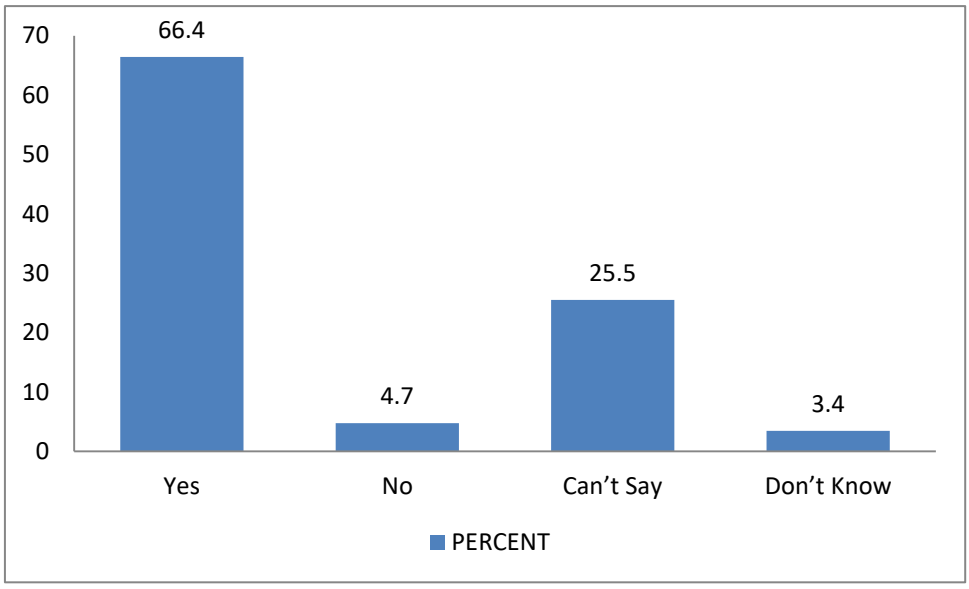

FIG.5.8 REPONDENT PERCENTAGE

INTERPRETATION

After the analysis of response collected through the questionnaire for the above mentioned question, there were a majority of respondents were in positive opinion that judgment of BALCO case is really a remarkable step to remove the

ambiguity relating to application of part I and application of part II in certain cases Around 66 percent respondents were in the opinion that, after this judgment the issue relating to applicability of Part I in international commercial disputes may remove and clear. On the same hand around 5 percent respondents were not satisfy with this statement. Whereas, because of some lack of awareness or having less faith in Indian arbitration system around 26 percent were in the opinions that they can‘t say about the future prospect of the said decision as well 3 percent respondents were unaware about this decision.

- **ARBITRATION VERSUS LITIGATION**

Interim remedies or other short-term measures of relief are frequently required in arbitral procedures since, in actuality, arbitral processes are no less hostile than litigation in public courts. When a conflict emerges, the injured party is always concerned with defending his stake in moveable or immovable property. A party is always interested in taking prompt action against another party or parties in order to safeguard his or her interest in properties. This immediate & timely action prevents any other party or parties from causing harm by interfering with property. Thus, Section 9 of Arbitration and Conciliation Act of 1996 empowers parties to seek interim relief from courts. Allowing court involvement often appears to contradict underlying principle of arbitration, although such judicial interventions are unavoidable for a variety of reasons.

While judiciary did play a role in changing a relatively bad impression of Indian arbitration, last yr's 'The Law Commission of India's Report No. 246' ("Law Commission Report") advocated path-breaking revisions to Act and an overhaul of arbitration landscape in India.

TABLE: 5.9 DO YOU THINK THAT ARBITRATION INDIA IS GENERALLY AND SLOWLY STEPPING INTO THE SHOES OF LITIGATION?

		FREQUENCY	PERCENT	VALID %	CUMULATIV %
Valid	Yes	120	80.5	80.5	80.5
	No	19	12.8	12.8	93.3
	Don’t Know	10	6.7	6.7	100
	Total	149	100	100	

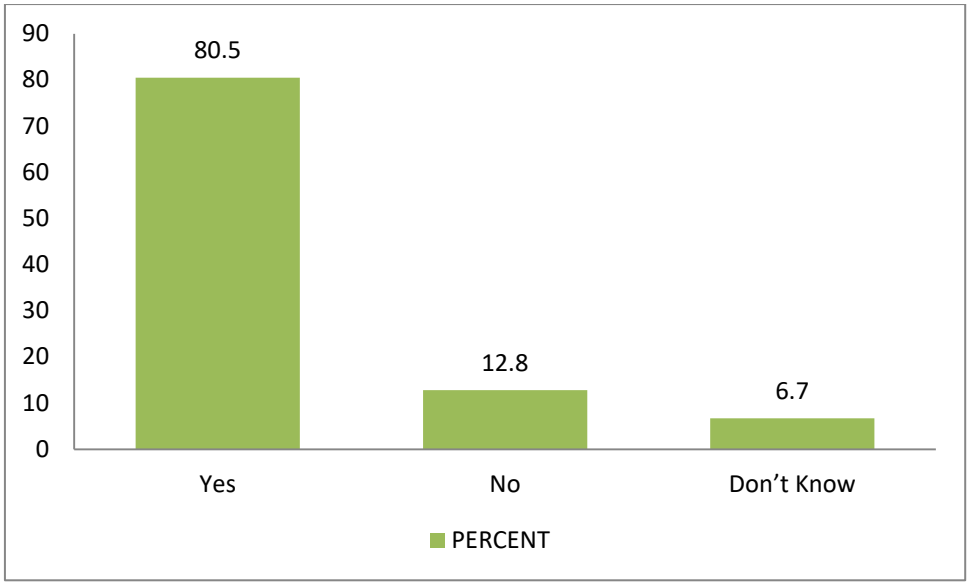

FIG. 5.9 RESPONDENT PERCENTAGE

INTERPRETATION

After the analysis of response collected through the questionnaire for the above mentioned question, there were a majority of respondents were in the positive opinion that in India due to more expensive and complex arbitral system it really stepping into the shoes of Litigation. Around 80 percent respondents were in the favor of this statement. On the same hand around 13 percent respondents were not satisfy with this statement. Whereas, because of some lack of awareness or having less faith in as well 7 percent respondents were unaware about this fact.

- **BALCO EFFECTS UPON FOREIGN INVESTMENT IN INDIA**

In Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc (Balco), a five-judge Constitutional Bench of the Supreme Court rejected Bhatia International & Venture Global, finding that Part I of Arbitration Act applies solely to arbitration procedures held inside India (not to foreign seated arbitrations). The Supreme Court made it plain in this decision that Indian courts do not have the authority to invalidate international arbitral verdicts. The Balco ruling was a favourable step for India's investment and business climate since it limited extent of Indian courts' intervention in offshore arbitration. This is supported by ruling in Shri Lal Mahal Ltd. Nonetheless, at least two aspects of post-Balco arbitral regime may have a detrimental influence on the arbitral process's certainty.

TABLE: 5.10 WHETHER JUDGMENT IN BHARAT ALUMINUM CO. LTD. V. KAISER ALUMINUM TECHNICAL SERVICE INC (BALCO), (2012) 9 SCC 649, HAS ENCOURAGED FOREIGN INVESTORS TO INVEST IN INDIA?

		FREQUENCY	PERCENT	VALID %	CUMULATIV %
Valid	Yes	88	59.1	59.1	59.1
	No	39	26.2	26.2	85.2
	Don't Know	22	14.8	14.8	100.0
	Total	149	100.0	100.0	

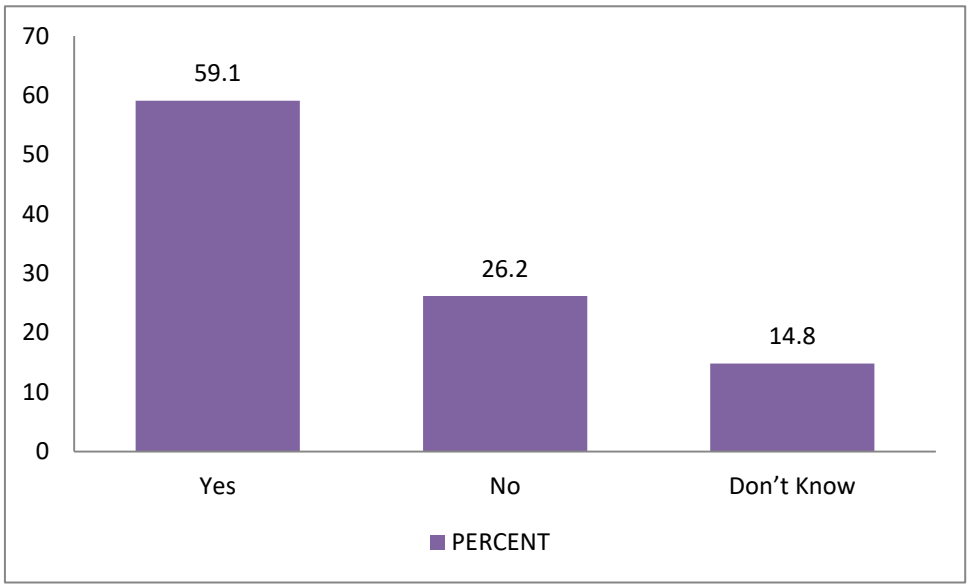

FIG. 5.10 REPONDENT PERCENTAGE

INTERPRETATION

After the analysis of response collected through the questionnaire for the above mentioned question, there were around of 59 respondents were in the positive opinion that in yes BALCO decision has encouraged the foreign investors. Whereas On the same hand around 26 percent respondents were not satisfy with this statement. Whereas, because of some lack of awareness or having less faith in as well 15 percent respondents were unaware about this fact.

➢ CONSTITUTIONAL OBJECTIVES AND INDIAN ARBITRATION LAW

Article 51, paragraphs (c) and (d) of the Indian Constitution indicate that the state must strive to (c) cultivate respect for international law and treaty commitments in interactions of organised peoples with one country and (d) facilitate the resolution of international disputes through arbitration. The President of India issued the Indian Arbitration and Conciliation Act 1996 in accordance with the Constitutional mandate. The Indian Ordinance provides the parties with latitude – subject to a few constraints in carrying out the arbitration agreement. There is no clear definition of phrases such as domestic arbitration or international arbitration in law, either in legislation or in court decisions. The word international commercial arbitration, on the other hand, is defined under 1996 Act. Domestic arbitration (when both parties are Indian nationals) and international commercial arbitration (where at least one party is not an Indian national) are both covered by the 1996 Act. The 1996 Act is broken into 4 parts. Part I is named "ARBITRATION," and it has 10 Chapters with Sections 2 to 43. Part II is headed "Enforcement of Certain Foreign Awards" and includes Chapters I and II, which comprise Sections 44 to 60. Part II's Chapter I is about "New York Convention Awards," while Chapter II is about "Geneva Convention Awards." Part III (Sections 61 to 81) is devoted to 'Conciliation.' Supplementary Provisions are included in Part IV (Sections 82–86). Part I is applicable, according to Section 2(2). "Section 2(2): This portion shall apply if the venue of arbitration is in India," says the existing Section 2 (2).

TABLE: 5.11 WHETHER THE PART II OF THE ARBITRATION AND CONCILIATION ACT, 1996 ARE MADE IN CONSISTENCE WITH THE PROVISIONS GIVEN UNDER ARTICLE 51 CLAUSE (C) & (D)OF THE CONSTITUTION OF INDIA?

		FREQUENCY	PERCENT	VALID %	CUMULATIV %
Valid	Yes	133	89.3	89.3	89.3
	No	7	4.7	4.7	94.0
	Can’t Say	9	6.0	6.0	100
	Total	149	100	100	

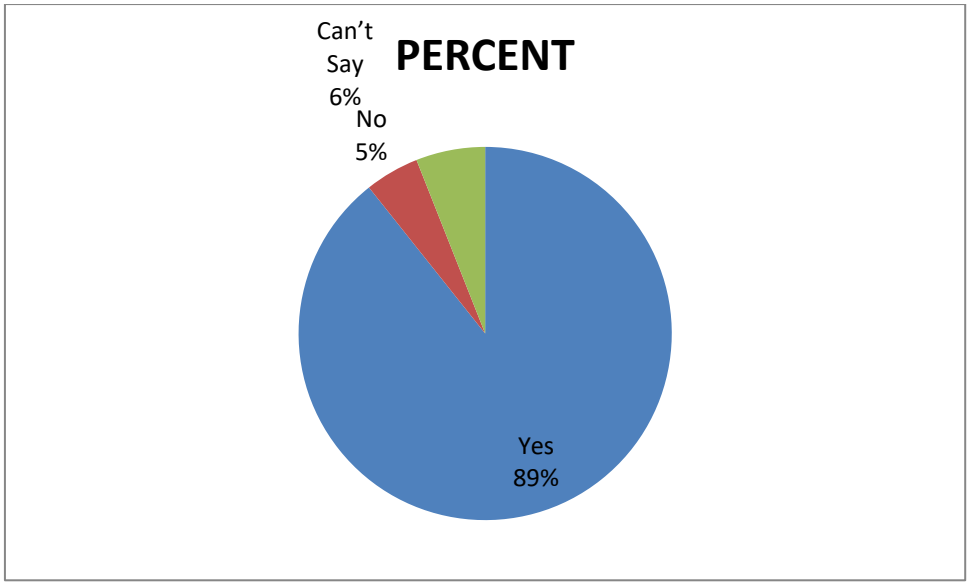

FIG. 5.11 RESPONDENT PERCENTAGE

INTERPRETATION

After the detail analysis of response collected through the questionnaire for the above mentioned question, there were a majority of respondents were in positive opinion that Whether Part II of Arbitration & Conciliation Act, 1996 are made in consistence with provisions given under Article 51 clause (c) & (d) of Constitution of India. Around 89 percent respondents were in the favor of this statement. On the same hand around 5 percent respondents were not satisfy with this statement. Whereas, because of some lack of awareness or having less faith in as well 6 percent respondents were unaware about this fact.

- **APPEAL AGAINST FOREIGN ARBITRAL AWARDS**

The United Nations Commission on International Trade Legislation (UNCITRAL), a subsidiary body of General Assembly, developed a model Arbitration law in 1985. The aforementioned statute, also known as the UNCITRAL Model Law on International Commercial Arbitration, aided numerous nations in improving their arbitration processes. Despite fact that stated model legislation's goal was to persuade member states to adopt a consistent International Arbitration law, which would greatly benefit international trade & commerce, model law also assisted member states in having a uniform domestic arbitration system.

Despite the fact that the new 1996 Act limits the Courts' interference to a bare minimum, losing parties are filing applications under Section 34 & doing everything they can to expand scope of Section 34 & force courts to treat the challenge proceedings as if they were a regular first appeal. Because District courts have authority to hear challenges under Section 34 of Act in majority of areas in India, losing parties can first postpone the implementation of arbitral verdicts for a longer period of time. Despite fact that several High Courts previously allowed all such applications under Section 34 and handled the challenge processes as a normal appeal. Many judges of High Courts & Supreme Court of India have now recognised necessity of safeguarding arbitration process by employing their authority to intervene cautiously. The established law of India generally acknowledges finality of arbitral rulings & limits scope of challenge.

TABLE: 5.12 ARE THERE ANY GROUNDS GIVEN IN PART II OF THE ARBITRATION AND CONCILIATION ACT OF 1996, ON WHICH A FOREIGN AWARD MAY BE APPEALED BEFORE THE COURT?

		FREQUENCY	PERCENT	VALID %	CUMULATIV %
Valid	Yes	108	72.5	72.5	72.5
	Can’t Say	30	20.1	20.1	92.6
	Don’t Know	11	7.4	7.4	100
	Total	149	100	100	

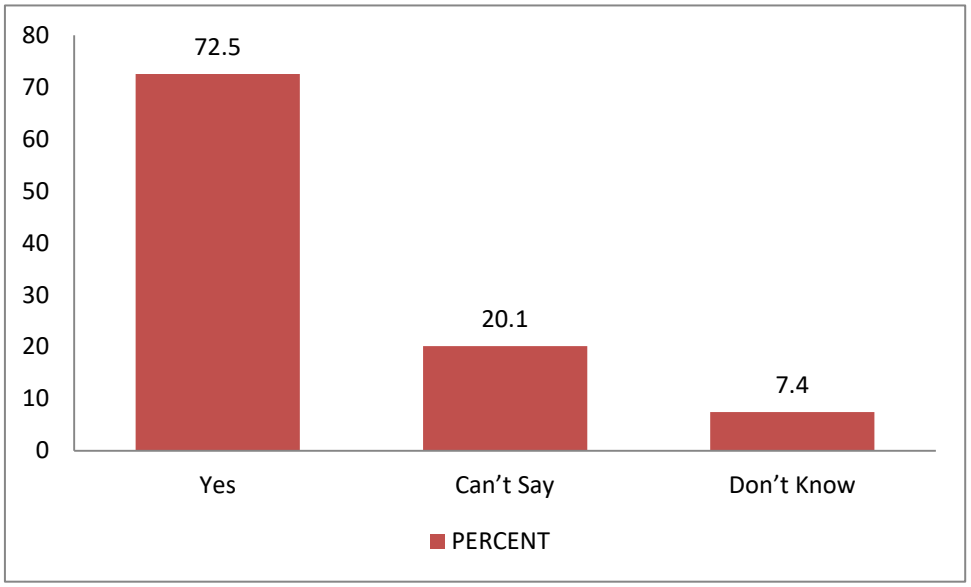

FIG. 5.12 REPONDENT PERCENTAGE

INTERPRETATION

After the critical analysis of response collected through the questionnaire for the above mentioned question, there were a majority of respondents were in the positive opinion that there are certain grounds for appeal against foreign award before Indian courts, which are given under section 34 of the Act.. Around 73 percent respondents were in the favor of this statement. On the same hand around 20 percent respondents were not satisfy with this statement. Whereas, because of some lack of awareness or having less faith in as well 7 percent respondents were unaware about this fact.

- **STATE ENTITY AND FOREIGN AWARDS**

Arbitration between a private party & a state is usually difficult for one fundamental reason: whether state in arbitration will invoke its sovereign immunity defence. When engaging into a business transaction, a private party expects the State to operate similarly to any other commercial partner. A State, on the other hand, maintains its ultimate defence of sovereignty when it is threatened. Throughout the growth of arbitration as a form of dispute settlement, a pattern emerged in which states exercised self-restraint in asserting sovereign immunity in arbitration. The International Convention on Settlement of Investment Disputes (ICSID) Convention, which deals with investment arbitration between a state and a private party, strengthened same viewpoint. The Convention expressly specifies that a disputed State will not use sovereign immunity. 3 In international business arbitration, equilibrium has been maintained for many years, & matter is nearly decided.

TABLE: 5.13 STATE OR STATE ENTITY CAN RAISE A DEFENSE OF STATE OR SOVEREIGN IMMUNITY AT THE ENFORCEMENT STAGE OF A FOREIGN AWARD OR NOT?

		FREQUENCY	PERCENT	VALID %	CUMULATIV %
Valid	Yes	111	74.5	74.5	74.5
	No	16	10.7	10.7	85.2
	Don't Know	22	14.8	14.8	100.0
	Total	149	100.0	100.0	

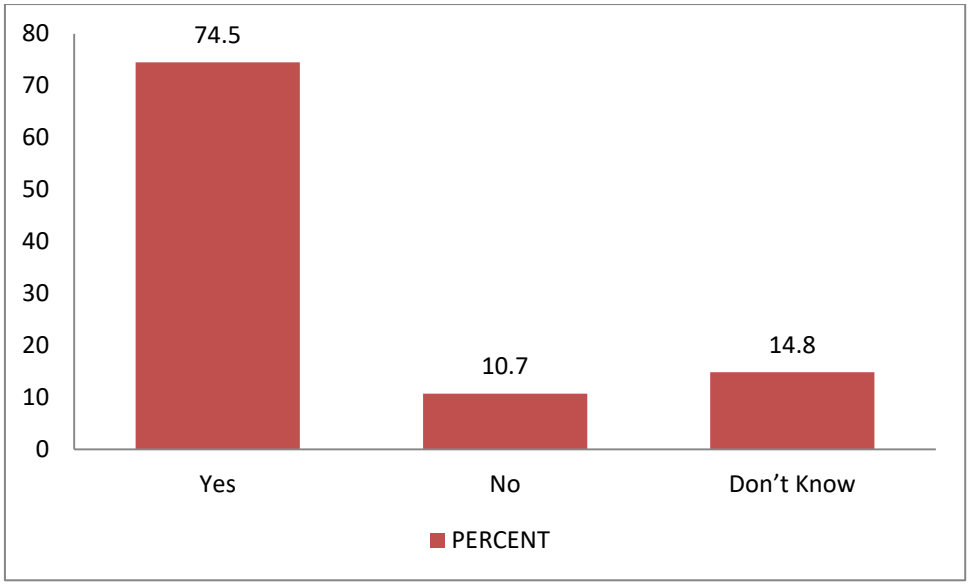

FIG. 5.13 RESPONDENT PERCENTAGE

INTERPRETATION

After the critical analysis of response collected through the questionnaire for the above mentioned question, there were a majority of respondents were in the positive opinion that yes a State entity can raise a defense of State or sovereign immunity at enforcement stage of a foreign Award Around 74 percent respondents were in the favor of this statement. On the same hand around 11 percent respondents were not satisfy with this statement. Whereas, because of some lack of awareness or having less faith in as well 15 percent respondents were unaware about this fact.

- **INSTITUTIONAL INTERNATIONAL ARBITRATION VERSUS AD-HOC INTERNATIONAL ARBITRATION**

Ad hoc arbitration occurs when parties agree on a specific type of arbitration for a specific contract or dispute without resorting to any arbitral institution. Whereas An institutional arbitration is one that is administered by a specialist arbitral institution under its own rules of arbitration Ad hoc arbitration has following characteristics, Independent of all institutions, Maximum degree of flexibility UNCITRAL Arbitration Rules for ad hoc arbitration, in the same way Institutional Arbitration has also having some special features like; Role of institution, Important role in the initial phase of constitution of arbitral tribunal Deal with subsequent difficulties in composition of arbitral tribunal Establish basis for remuneration etc.

TABLE 5.14 IS INSTITUTIONAL INTERNATIONAL ARBITRATION MORE OR LESS COMMON THAN AD HOC INTERNATIONAL ARBITRATION?

		FREQUENCY	PERCENT	VALID %	CUMULATIVE %
Valid	Yes	81	54.4	58.7	58.7
	No	44	29.5	31.9	90.6
	Don't Know	13	8.7	9.4	100.0
	Total	138	92.6	100	
Missing	System	11	7.4		
Total		149	100.0		

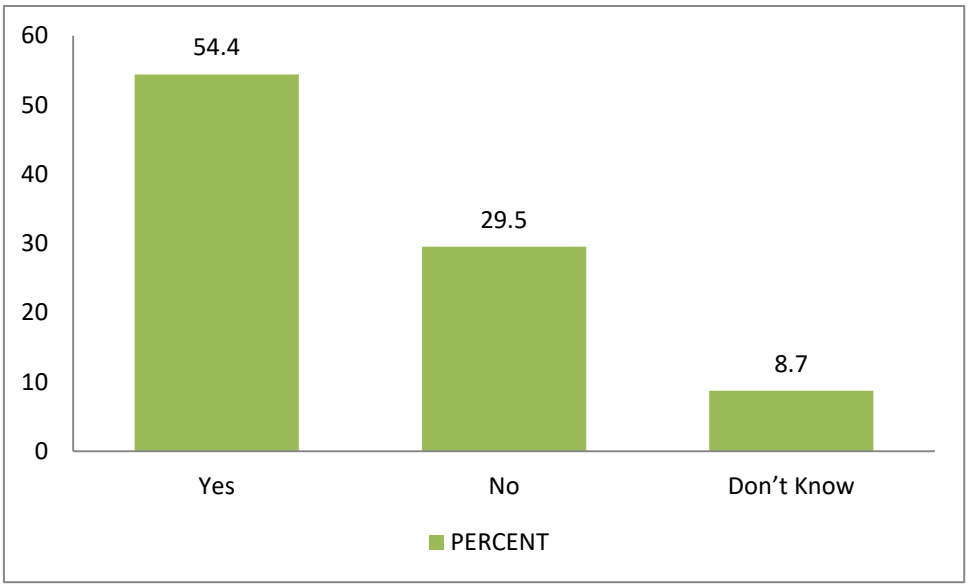

FIG. 5.14 RESPONDENT PERCENTAGE

INTERPRETATION

After the comprehensive study of response collected through the questionnaire for the above mentioned question, around 59 percent respondents were of the positive opinion that Institutional International arbitration more or less common than ad hoc International arbitration. On same hand around 32 percent respondents were not satisfy with this statement. Whereas, because of some lack of awareness or having less faith in as well 9 percent respondents were unaware about this fact.

➢ INTERIM RELIEVES UNDER INTERNATIONAL ARBITRATION

International arbitration has grown in popularity as an alternative dispute resolution process for parties to international economic disputes. National courts are often unsuitable for resolving such complicated international transactions, and arbitration is designed particularly to assist the resolution of disputes resulting from transactions involving parties from different nations. Because interim measures in international arbitration entail junction of national law and arbitral power, conceptual consistency is necessary if interim measures are to supplement arbitral efficacy as intended. To encourage harmonisation in definition & scope of interim rights protection in international arbitration, United Nations Commission on International Trade Law ("UNCITRAL") amended Article 17 of UNCITRAL Model Law ("Model Law") provision on interim measures in 2006 to define tribunal powers to grant interim measures and to describe enforcement role of national courts..

TABLE: 5.15 WHETHER THE INTERIM RELIEVES ARE AVAILABLE IN RESPECT OF INTERNATIONAL ARBITRATION?

		FREQUENCY	PERCENT	VALID %	CUMULATIVE %
Valid	Yes	87	58.4	58.4	58.4
	No	18	12.1	12.1	70.5
	Can't Say	14	9.4	9.4	79.9
	Don't Know	30	20.1	20.1	100
	Total	149	100	100	

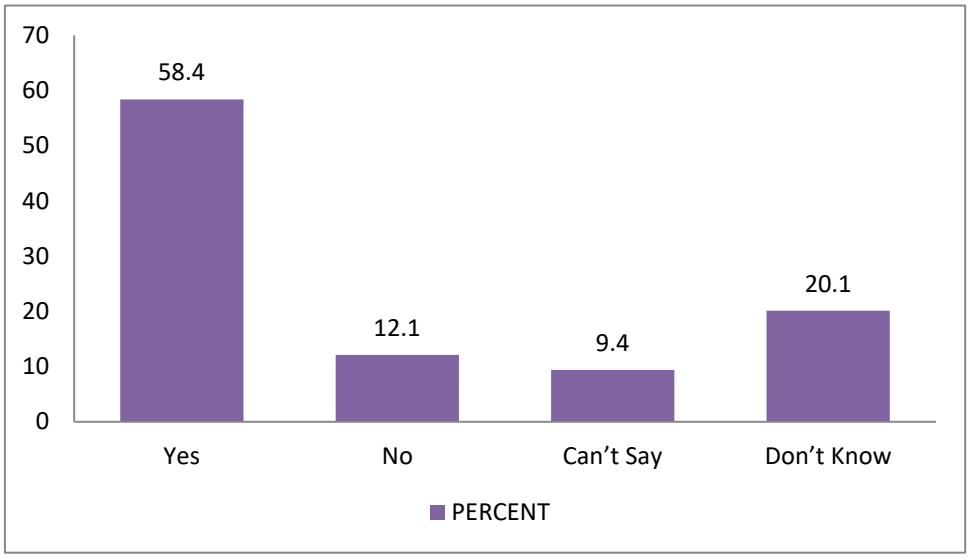

FIG. 5.15 REPONDENT PERCENTAGE

INTERPRETATION

After the comprehensive study of response collected through the questionnaire for the above mentioned question, around 58 percent respondents were of the positive opinion that the interim relieves are available in respect of International arbitration . On other hand around 12 percent respondents were not satisfy with this statement. As well 10 were not relying the statement. Whereas, because of some lack of awareness or having less faith in as well 20 percent respondents were unaware about this fact.

- **ENFORCEMENT OF FOREIGN ARBITRAL AWARD IN INDIA**

An Arbitral Award under the 1996 Act can't be upheld as a Decree till the time of test under Sec.34 (3) is over or the protests documented have been rejected. It is a typical practice that at whatever point an Arbitral Award is made, the gathering unfavorably influenced by it records an appeal to u/s 34 of Act in the Court and the Court issues take note. At that point, till the time this complaint appeal to is expelled the said grant can't be upheld. Given the deferrals in our legal framework, it practically takes years for the Objection Petition to be arranged off and till such time the gathering having the arbitral honor to support its remaining parts in limbo. Along these lines, the praiseworthy target behind doing without end of legitimate procedures to make arbitral honor a Rule of Court under 1940 Act by presenting Sec.36 in 1996 Act has been weakened all things considered.

It is proposed to accommodate, entomb alia, that minor recording complaint appeal to under Sec.34 won't work as remain of the honor and the court may concede remain of the operation of honor subject to burden of such conditions as it might regard fit to force and the ability to force conditions incorporate the ability to allow between time measures against the gatherings to the honor as well as against the outsiders to ensure the enthusiasm of the gathering in whose support the honor is passed. The Execution method set down in Order XXI of CPC is extensive, complex and tedious and just about an endless story. when execution application is documented, the judgment indebted person would have for all intents and purposes energetic away every one of its advantages.

TABLE 5.16 ENFORCEMENT OF FOREIGN ARBITRAL AWARD IS A MAJOR PROBLEM OF INTERNATIONAL COMMERCIAL ARBITRATION IN INDIA

		FREQUENCY	PERCENT	VALID %	CUMULATIVE %
Valid	Average	10	6.7	6.7	6.7
	Good	24	16.1	16.1	22.8
	Strong	17	11.4	11.4	34.2
	Strongest	98	65.8	65.8	100.0
	Total	149	100.0	100.0	

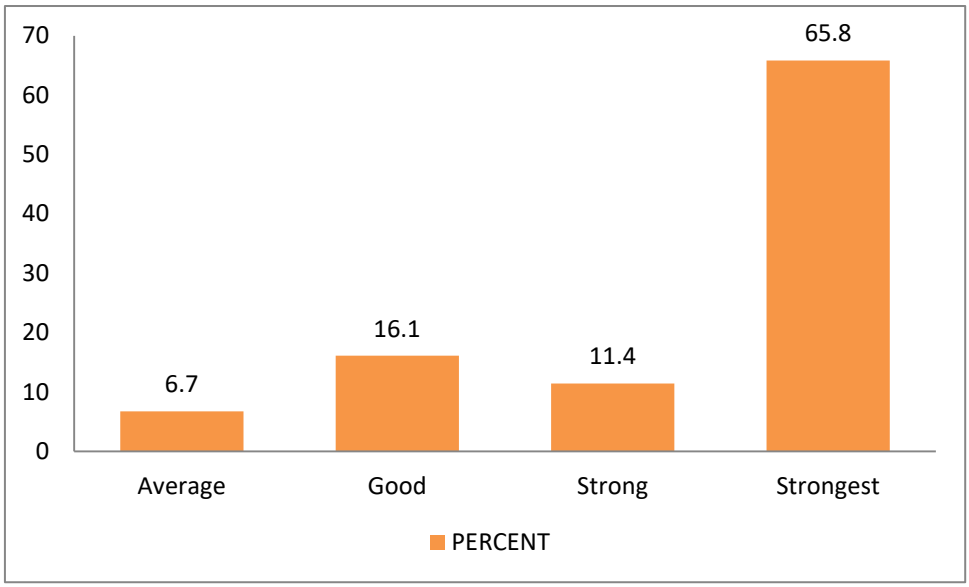

FIG. 5.16 RESPONDENT PERCENTAGE

INTERPRETATION

Under this chapter of field observation certain question were on basis of rating/ preference given by respondents. In response to above question relating to enforcement mechanisms of foreign arbitral award in India, around 65 percent of respondents recognize this mechanisms as strongest tool for enforcement of foreign arbitral award in India. Whereas 11 percent rated it strong, 16 percent rated it good as well 7 percent rated it average mechanisms for enforcement of foreign award.

- **UNCITRAL MODEL LAW AND ENFORCEMENT OF FOREIGN AWARD**

The United Nations1Commission on International Trade Law is a subsidiary body of the General Assembly (UNCITRAL). It contributes significantly to the improvement of the legal framework for international commerce by producing international legislative1texts for use by States in updating international trade law, as well as non-legislative texts for use by commercial parties in negotiating deals. UNCITRAL legislative texts1 address international commercial dispute resolution, including arbitration and conciliation, electronic commerce, insolvency, including cross-border insolvency, international transport of goods, international payments, procurement and infrastructure development, and security interests. Rules for the conduct of arbitration and conciliation proceedings, comments on organising and conducting arbitral hearings, and legal advice on industrial construction contracts and countertrade are examples of non-legislative publications.

TABLE: 5.17 UNCITRAL MODEL LAW DOES NOT HAVE EFFECTIVE MEASURES FOR THE ENFORCEMENT OF FOREIGN AWARD.

		FREQUENCY	PERCENT	VALID %	CUMULATIVE %
Valid	Average	1	0.7	0.7	0.7
	Strongest	148	99.3	99.3	100.0
	Total	149	100.0	100.0	

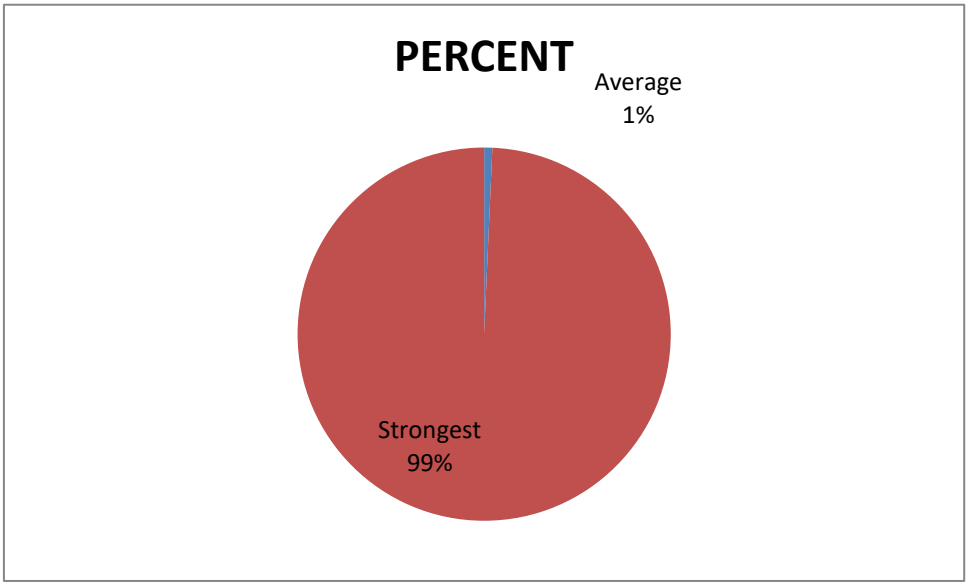

FIG. 5.17 RESPONDENT PERCENTAGE

INTERPRETATION

Under this chapter of field observation certain question were on basis of rating/ preference given by respondents. In response to above question around 99 percent of respondents recognized that UNCITRAL Model law does not have effective measures for Enforcement of foreign award. Whereas 1 percent rated it as average mechanisms for the enforcement of foreign awards.

- **THE CONCEPT OF LEX ARBITRI AND INTERNATIONAL COMMERCIAL ARBITRATION**

When a matter comes before a court and all of key elements of case are local, court will determine case using lex fori, existing municipal law. However, if the case has "foreign" aspects, forum court may be required by the conflict of laws system to consider:

- Whether forum court has jurisdiction to hear case.
- It must then characterize issues, i.e. allocate factual basis of case to its relevant legal classes; &
- Then apply choice of law rules to decide which law is to be applied to each class.

The lex locus arbitri is a component of the choice of law principles that are employed in circumstances involving the legality of a contract. As part of the public policy of contract freedom, the parties to an agreement are free to insert a clause for which law shall apply, and these clauses will be regarded legal unless there is a lack of bona fides. If no stated selection of a proper law is made, courts will normally regard the designation of a forum as a "connecting element," or a fact that relates a case to a certain geographical region. Arbitration is one of "forums" that can be used for these purposes. As a result, fact that parties designated a state as location of arbitration suggests that they may have wanted local law to apply.

TABLE: 5.18 THE PROCEDURE LAW (LEX ARBITRI) AND THE SEAT OF ARBITRATION PLAYS A VITAL ROLE UNDER INTERNATIONAL COMMERCIAL ARBITRATION

		FREQUENCY	PERCENT	VALID %	CUMULATIVE %
Valid	Average	8	5.4	5.4	5.4
	Good	25	16.8	16.8	22.1
	Strong	11	7.4	7.4	29.5
	Strongest	105	70.5	70.5	100.0
	Total	149	100.0	100.0	

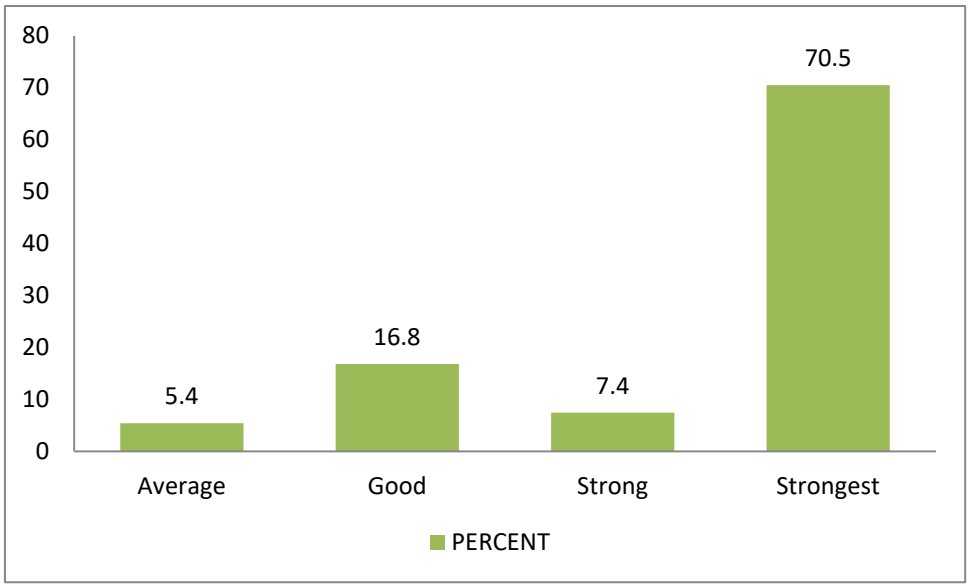

FIG. 5.18 RESPONDENT PERCENTAGE

INTERPRETATION

Under this chapter of field observation certain question were on basis of rating/ preference given by respondents. In response to above question around 70 percent of respondents recognized that the procedure law (lex arbitri) & seat of arbitration plays a vital role under International commercial arbitration. As well 7 percent rated it strong, whereas 17 percent rated it as good and 5 percent rated it average factor of International commercial arbitration.

- **DEFECTIVE ARBITRATION CLAUSES/ AGREEMENT AND FOREIGN INVESTMENTS**

Imperfect intervention provisions are surely remarkable; yet do show up on a repeating premise in local and worldwide mediation hone. Numerous specialists can go their whole expert lives without seeing any, while others experience a few cases over their profession.

The sorts of faulty discretion assertions or provisions are shifted. Clearly, by and large the deformity is because of the rupture of some prerequisite under the law relevant to the assertion. This happened on a regular basis in Spain under the old Mediation Act 1988, article 5 of which obliged gatherings to express their aim to take their debate to intervention as well as to agree to the honor. Despite the fact that at last the courts elucidated this was not a consecrated content that must be incorporated into those terms, and could be precluded if the gatherings' expectations to go to mediation were clear, by and by discarding that goal to consent prompted to various difficulties against interventions and endeavors to have grants abrogated. Different cases are those situations where discretion understandings allude to matters that can't be refereed or are insufficient in a way that makes them incapable.

TABLE: 5.19 BECAUSE OF DEFECTIVE ARBITRATION CLAUSES/AGREEMENT, FOREIGN INVESTMENTS ARE DIRECTLY AFFECTED.

		FREQUENCY	PERCENT	VALID %	CUMULATIVE %
Valid	Average	39	26.2	26.2	26.2
	Strongest	110	73.8	73.8	100.0
	Total	149	100.0	100.0	

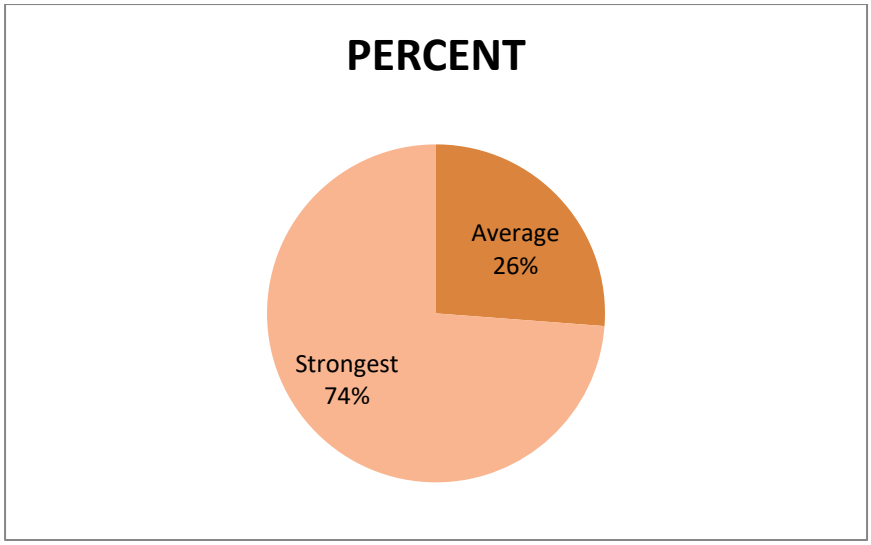

FIG. 5.19 RESPONDENT PERCENTAGE

INTERPRETATION

In response to above question around 74 percent of respondents recognized that Because of defective arbitration clauses/ agreement, foreign investments are directly affected. As well 26 percent rated it as average assumption.

- **INEFFECTIVE ENFORCEMENT OF ARBITRAL AWARD**

The benefits of arbitration over suit for most part spill out of its hypothetical premise as an instrument of gathering independence. Dissimilar to the board of judges in the court framework, the arrangement of an arbitral tribunal is regularly controlled by the understanding of the gatherings. The run of the mill arrangement framework for a 3-part arbitral tribunal is for each gathering to select a solitary mediator & 2 judges to then designate a third, directing referee. It is in this way workable for the gatherings to designate a tribunal that is very had some expertise in the topic of the question. Notwithstanding, the predetermined number of driving authorities on the planet has prompted to concerns with respect to their freedom and the danger of irreconcilable circumstances. These worries are mitigated by freedom necessities existing under all principle mediation guidelines and laws.

TABLE: 5.20 DUE TO INEFFECTIVE ENFORCEMENT OF ARBITRAL AWARD, USUALLY LITIGATION IS MOST PREFERABLE OPTION RATHER THAN ARBITRATION UNDER INTERNATIONAL COMMERCIAL ARBITRATION.

		FREQUENCY	PERCENT	VALID %	CUMULATIVE %
Valid	Average	15	10.1	10.4	10.4
	Strongest	129	86.6	89.6	100.0
	Total	144	96.6	100	
Missing	System	5	3.4		
Total		149	100		

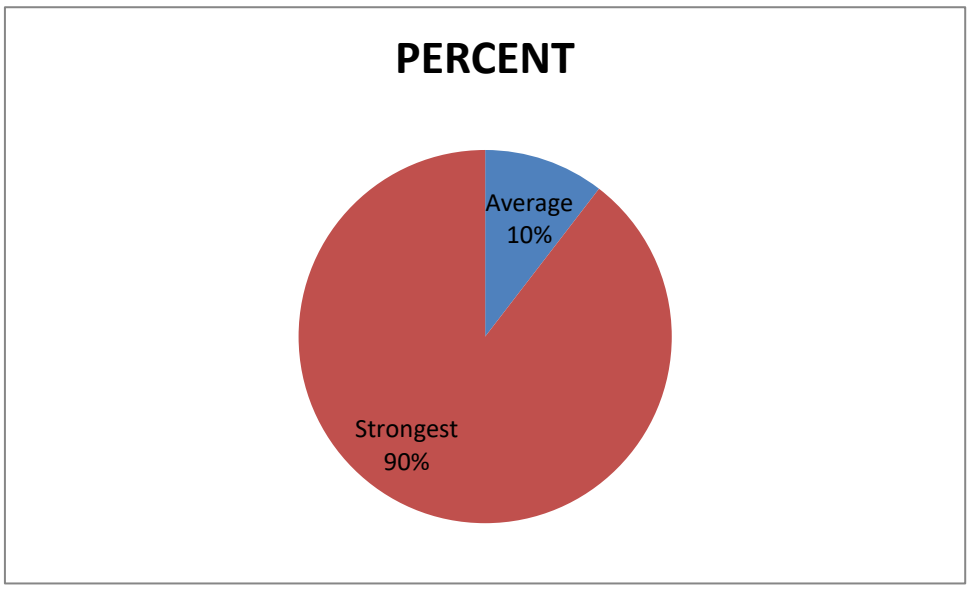

FIG. 5.20 RESPONDENT PERCENTAGE

INTERPRETATION

In response to above question that Due to ineffective enforcement of Arbitral award, usually litigation is most preferable option rather than Arbitration under International commercial arbitration, around 90 percent of respondents recognized that the procedure law (lex arbitri) and seat of arbitration plays a vital role under International commercial arbitration. As well 10 percent rated it average assumption.

CHAPTER 6

CONCLUSION AND SUGGESTIONS

6.1 INTRODUCTION

Human conflicts and disagreements are both unavoidable. People may have disagreements over their personal, familial, economic, & political life. Because disagreements are unavoidable, there is an urgent need to develop a quick & simple technique of resolving them. Disputes must be settled at the lowest feasible cost, both financially and in terms of time, so that more time & energy may be spent on productive endeavors.

The reason and objective of International Business Arbitration (ICA) mechanism are typically to create a convenient, impartial, fair, quick, & effective setting for resolving disputes involving international commercial matters. The basic aspects present in the legal framework for the resolution of such international business disputes may be summarized into 3 stages: forum jurisdiction, choice of law, & recognition & enforcement of foreign arbitral awards.

When parties from different legal systems meet in International Commercial Arbitration, there is an inevitable conflict of laws, & substantive law to be applied in a specific dispute must be chosen. The substantive law to be used in arbitration is frequently defined by parties in their initial agreement. However, challenges occur in deciding appropriate law when parties are unable to agree on a choice of law for resolution of their dispute.

The increased court interference, which tends to interfere with arbitral autonomy as well as finality, is an important element to consider. The necessity to reconcile & integrate arbitral autonomy & finality with judicial scrutiny of arbitral procedure is essential. National laws differ on this point. In this area, the UNCITRAL Model Law seeks to foster harmony & uniformity.

The Government of India has shifted its attention to making India the global centre for international commercial arbitration for resolution of cross-border business conflicts. A three-day global arbitration conference was recently hosted in Delhi by the government think tank NITI Aayog, with the administration's repeated commitment to create a conducive cross-border business climate at the helm of

affairs. Under the auspices of this Global Conference, a national initiative has been launched in India to strengthen arbitration legislation and enforcement, particularly in cross-border conflicts.

The Arbitration & Conciliation Act, 1996, was passed in India in expectation of ushering in winds of change, but it instead plunged into its own abyss. A succession of court decisions gradually but steadily ensured that preferred seat in every cross-border transaction was always thoroughly negotiated for and, more often than not, ended up being either Singapore, New York, or London—established global arbitration centres.

However, recent court rulings in arbitration jurisprudence have demonstrated the judiciary's support for enabling India to embrace foreign best practises. Never before have Indian courts issued so many pro-arbitration judgments. From 2012 to 2015, Supreme Court issued several landmark rulings demonstrating a much-needed pro-arbitration stance, including declaring Indian arbitration law to be seat-centric; removing Indian judiciary's power to interfere with arbitrations seated outside country; referring nonparties to an arbitration agreement to settle disputes through arbitration; defining scope of public policy in foreign-seated arbitration; and determining that even fraud is a defence in foreign-seated arbitration.

When parties from different legal systems meet in International Commercial Arbitration, there is an inevitable conflict of laws, & substantive law to be applied in a specific dispute must be chosen. The substantive law to be used in arbitration is frequently defined by parties in their initial agreement. However, challenges occur in deciding appropriate law when parties are unable to agree on a choice of law for resolution of their dispute.

The increased court interference, which tends to interfere with arbitral autonomy as well as finality, is an important element to consider. The necessity to reconcile & integrate arbitral autonomy & finality with judicial scrutiny of arbitral procedure is essential. National laws differ on this point. In this area, the UNCITRAL Model Law seeks to foster harmony & uniformity. The entire absence of judicial participation in various international commercial matters does not correspond with present trend, but extent of judicial supervision should be restricted to bare minimum.

The agreement of parties, not mandate of the State, is the source of power for the international arbitral tribunal. The appropriate legislation is also established by the arbitration agreement's clause. With more arbitral authority comes a greater need for justifications for award. Apart from providing openness in arbitral procedure, it also serves as an inherent check on arbitrators by disclosing to party foundation of decision & logical process by which arbitrators arrived at their conclusion. The inclusion of reasons also limits the scope of judicial oversight.

With all of these goals and increasing International commercial disputes for the effective implementation of economic reforms, it is critical to recognise demand of business community in a country like India & to expand Indian foreign trade at the global level as well as to attract foreign investors. The importance of effective International arbitration laws for amicable resolution of International commercial disputes is critical. In case of Food Corporation of India v. Joginderpal Mohinderpal, Supreme Court stated, "We should make law of arbitration simple, less technical, and more responsible to actual realities of situations, but must be responsive to canons of justice and fair play and make arbitrator adhere to such process and norms which will create confidence not only by doing justice b/w parties, but by creating sense that justice appears to have been done."

As a result of recent decision, parties to international commercial arbitrations are no longer free to include or exclude jurisdiction of Indian courts. Although the result in Bharat Aluminum Co v. Kaiser Aluminum Technical Services Inc gives much-needed relief to foreign players while also correctly recognising the idea of territorial criteria, which is a cornerstone of arbitration. Even if there are several concerns in international business conflicts that have arisen or may develop in the future, they cannot be resolved through international commercial arbitration systems owing to a lack of clear and effective standards. Some key difficulties are as follows: enforceability of arbitration clause/agreement, location of arbitration and hearing, conflict of laws, differences in substantive and procedural legislation between nations, Different nations' public policies, award recognition and enforcement, and so forth.

There is no question that judgements mentioned here have been well received in the field of international commercial arbitration. At the same time, inadequate arbitration regulations have caused a rethinking of the long-held idea of

having foreign judgements enforced in India as a time-consuming procedure with possibility of court intervention at various stages.

The recent rulings of Indian courts restricting the basis for challenging a foreign verdict may result in speedier settlement of disputes through arbitral proceedings. With the current judicial picture on the issue, one hopes that the world community's faith in commercial arbitration as a viable ADR tool in India grows.

In addition to efforts made by the Indian government to promote 'ease of doing business,' the President issued the Arbitration & Conciliation (Amendment) Ordinance, 2015 on October 23, 2015, following two failed attempts to reform the arbitration legislation in 2001 and 2010. The modifications included the core of significant judgements issued during the previous two decades, including the majority of the suggestions in 246th Law Commission Report, & resolved major conflicts that developed in recent yrs.

Following that, on January 1, 2016, Arbitration & Conciliation Amendment Act, 2015, which altered provisions of the 1996 Act prospectively, was published in official gazette. The reforms are intended to take substantial & reform-oriented steps to bring Indian arbitration law up to global standards & to create an effective process for settling disputes with little court intervention. The reason and objective of international arbitration should be to provide a convenient, impartial, fair, speedy, & effective venue for resolving international commercial disputes.

This chapter is broken into two sections: conclusion and recommendations. After demonstrating hypothesis with the aid of the chapters of this research, the conclusion was formed in first half of this chapter. In order to meet the purpose of this study, an analysis of objectives of this research has been performed on a priority basis. Later on, suggestion ways to make the Indian Arbitration Law so efficient that it may attract international investors without any hesitations or insecurity for legal protection in the event of any dispute connected to International Commercial Arbitration in India. Last but not least, the entire scope of this study may be viewed as an endeavour to establish India as a "Hub for International Commercial Arbitration" for foreign parties.

Overall assessment of attempts to improve effectiveness of Indian arbitration legislation in relation to international commercial arbitration.

- **The 246th Law Commission report**

The Law Commission of India was tasked with evaluating provisions of Arbitration & Conciliation Act, 1996 in light of significant shortcomings in Act's operation. Following lengthy deliberations, Commission issued recommendations & suggested revisions to the Act. On August 5, 2014, this was presented to Government of India.

Objectives

- Coverage of worldwide commercial arbitration & conciliation, as well as local arbitration & conciliation;
- To reduce role of courts as supervisors in arbitral process;
- To provide that every final arbitral award is enforced in same way as a court judgement.

- **The Arbitration and Conciliation (Amendment) Act, 2016**

The Arbitration and Conciliation Act, 1996 ("Act") has been changed by The Arbitration & Conciliation (Amendment) 2015 ("Ordinance"), which was proclaimed on October 23, 2015 by President of India. The new Arbitration Act of 2016 aims to make arbitration a preferred method of resolving business disputes & to establish India as a centre for international commercial arbitration. With the revisions, it is hoped that arbitrations in India would become more user-friendly and cost-effective.

- **FDI Policy of 2015**

The Government of India intends and intends to promote foreign direct investment to augment native capital, technology, & skills in order to drive economic growth. Foreign Direct Investment, as opposed to portfolio investment, has the connotation of having a "lasting stake" in a company based in a country other than the investor's.

The government has established a Foreign Direct Investment policy framework that is clear, predictable, and simple to understand. This framework is contained in the Circular on Consolidated FDI Policy, which may be modified

annually to incorporate and maintain pace with regulatory changes implemented during the interregnum.

- **Commercial Division & Commercial Appellate Division of the High Courts Act, 2015 (the "Act"),**

The Indian government has been fairly outspoken & serious about their 'Make in India' campaign & increasing 'ease of doing business in India.' Contracts must be enforced quickly and effectively, monetary claims must be recovered, and appropriate compensation for losses must be awarded in order to stimulate investment & economic activity. The passage of Commercial Courts, Commercial Division, & Commercial Appellate Division of High Court Act, 2015 ("Act") will serve as a catalyst for achievement of pet program's goal. By enacting the Act, government also looks to be serious about making litigation less onerous & more quick. The Act reflects and confirms comparable legal concepts expressed in numerous statutes of industrialised nations that provide prompt judicial response. On December 31, 2015, President of India gave his assent to the Act. However, in accordance with Ordinance, the Act is regarded to be in effect as of October 23, 2015.

The Act effectively creates a Commercial Court at District level and a Commercial Division in High Court, both of which have ordinary original civil jurisdiction to deal with Commercial Disputes of a Specified Amount of Rs.1,00,00,000 or such greater value as Central Government may announce. Commercial Appellate Divisions, which would be formed in all High Courts, would hear all appeals from Commercial Court/Commercial Division orders.

- **Bilateral Investment Treaty**

Given the number of conflicts, the Government of India released a new model bilateral investment treaty (BIT) for public discussion for two weeks in April 2015. Several procedures have been put in place to protect sovereign against investment conflicts. Foreign investors would also be denied access to bilateral investment promotion and protection agreements (BIPPAs) or bilateral investment treaties (BITs) if the contracts they have signed with local investors or government only provide for legal redress in India. As many as 17 companies1or individuals, including Vodafone International1Holdings BV, Deutsche Telekom, Sistema, Children's Investment Fund, and TCI1Cyprus Holdings, have filed BIPPA arbitration letters

against India after their investments were subjected to adverse government action. A number of investors1have also questioned legitimacy of a Supreme1Court judgement to revoke telecom licences.

- **Make in India programs**

On August 17, 2014, India's Independence Day, Prime Minister Narendra Modi unveiled his Make in India project, a branded campaign aimed at attracting international investments to country's ailing manufacturing industry. Investors have began to question the government's approach after it looked hesitant to offer economic reforms that matched its promises & failed to carry many of policies it did propose through Parliament.

The Government of India has shifted its attention to making India the global centre for international commercial arbitration for resolution of cross-border business conflicts. A three-day global arbitration conference was recently hosted in Delhi by the government think tank NITI Aayog, with the administration's repeated commitment to create a conducive cross-border business climate at the helm of affairs. Under the auspices of this Global Conference, a national initiative has been launched in India to strengthen arbitration legislation and enforcement, particularly in cross-border conflicts.

The panel talks were attended by Supreme Court of India judges, high government officials, luminaries, legal experts, and corporate executives. The interactive workshops concentrated on all of the procedures required in developing a strong and cost-effective arbitration environment.

A variety of illuminating perspectives have been discussed by legal luminaries in the presence of India's Prime Minister. According to Mr. Narendra Modi, "a robust legal system with a thriving arbitration culture is important for companies to develop," and "creating a dynamic eco-system for institutional arbitration is one of this government's top goals." The Chief Justice of India, Justice T.S. Thakur, supports need to advance Alternative Dispute Resolution (ADR), remarking that "deluge of cases continually puts judiciary under considerable stress," and expressing his worries about needless judicial intervention in arbitral decisions.

Although the practise of arbitration is not new to India, the conference played an important role in meeting competencies of the best arbitration practises & way forward from world-class arbitration organisations such as the ICC, SIAC, LCIA, KLRCA, HKIAC, and PCA. The conference brought together members of the user community who have been victims of high-level conflicts, such as BALCO, Airtel, J.K Tyres, IndiGo Airlines, NHAI, BHEL, and FICCI, in an effort to give an all-around perspective in the development of an efficient arbitration procedure.

The decentralised form of India's political system contributes to a portion of the problem. Investors in India should be prepared to deal with a wide range of political & economic situations throughout the country's twenty-nine states & seven union territories. There are disparities in government, regulation, taxes, labour relations, and educational levels. Despite its pride in the rule of law, India scores 186 out of 189 in World Bank's Ease of Doing Business Report in category of Contract Enforcement. Its courts have had cases backlogged for years, & some estimates suggest that more over 30 million cases are waiting at various levels of judiciary.

While government has succeeded in enacting a number of investor-friendly changes, such as raising foreign direct investment (FDI) restrictions in insurance to 49 percent, it has struggled to garner sufficient political support for others, such as land acquisition. Other long-awaited measures, including as the Goods and Services Tax, labour law improvements, and subsidy reform, were still to be presented to Parliament as of April 2015. As a result, while outlook has improved significantly, objective circumstances for doing business in India remain comparable to previous yrs.

In current situation, there are several opportunities. Indian conglomerates & high-tech firms are typically on par with their foreign counterparts in terms of complexity and significance. Certain industrial areas, such as information technology, telecommunications, & engineering, are well-known for their innovation & competition across the world. Foreign corporations operating in India emphasise that success necessitates a long-term planning horizon & a state-by-state approach to adapt to India's market complexity & variety.

6.2 MODALITY / SUGGESTIONS

Global convergence & harmonisation in international commercial arbitration are most visible in domain of judicial control over a foreign arbitral ruling. In most nations, prospect of bringing an action in court to invalidate an arbitral ruling given overseas is barred. On other hand, Supreme Court of India has taken a highly assertive nationalistic stance in judging international arbitration cases throughout the years, and is an anomaly in this sector. In instances involving international arbitration conflicts, Supreme Court has regularly demonstrated a worrisome proclivity to use authority in ways that run counter to corporate expectations.

For a long time, arbitration has been the preferred method of resolving commercial disputes. This is true even in purely domestic issues in India, where trials in courts take substantially longer due to a large backlog. However, during last 2 decades, arbitration procedure – particularly in ad hoc domestic conflicts – has become to resemble ordinary court processes in India. When the high expenses of the procedure are combined with a tiny pool of competent and trustworthy arbitrators, there is an increasing feeling of irritation among the method's users.

Without a doubt, prerequisites The trend and practise of arbitration in India is developing in tandem with the expansion of international trade and its related activities. According to the preceding research, there are still certain ambiguities in Indian arbitration legislation that require judicial clarification and, in practise, require some fundamental revisions to resolve cross-border conflicts through arbitration. The Arbitration & Conciliation Act, 1996 (Amendment) Act is widely anticipated to be a helpful instrument for ICA. The Amendment aims to bring about a positive improvement in arbitration law by removing ambiguity and irregularity in India's arbitration legislation. It is envisaged that it would promote arbitration in India as well as India as a site for international arbitration. Indeed, legislative efforts to amend the Arbitration and Conciliation Act, which will no doubt close loopholes in the country's arbitration law, particularly in the ICA, will go a long way toward establishing India as an arbitration-friendly jurisdiction and a hub for International Commercial Arbitration.

The current structure of International Commercial Arbitration in India is insufficient to establish India as a centre for International Commercial Arbitration. With the great 'Make in India' goal, which is based in part on increasing investor trust, certain of our regulations must be brought into line with worldwide practise. The Arbitration and Conciliation Act of 1996 is particularly significant, especially since India positions itself as a worldwide centre for commercial arbitration. The goals are to reduce delays, bring international business arbitrations under our jurisdiction, reduce the role of courts as supervisors, and ensure efficient enforcement of arbitral rulings. Despite the fact that Arbitration & Conciliation (Amendment) Act of 2016 has created new opportunities for India to serve as a centre for international commercial arbitration before other countries. This research paper examines briefly the efficacy of the new Arbitration Act of 2016, through which the Indian government intends to attract international investment by portraying India as an investor-friendly country with a solid legal framework.

The 2016 Act will almost certainly have a favourable influence on the arbitration scene. Many commercial parties have been frustrated by India's overloaded courts. The reforms address this by speeding up arbitration, limiting judicial intervention, and avoiding the abuse and delay tactics that had grown common under the previous regime. This adjustment should stimulate investment and maybe improve India's reputation as a venue for arbitration.

The rule of law is essential to govern the behaviour of the individuals who coexist in society. The reasons are self-evident; conflict within society has grown inexorably with the expansion of civilization, as it has been said that where there are two brains, there will be three viewpoints. Human conflicts are unavoidable as civilization grows; as a result of this unwelcome scenario, robust, simple, and efficient systems for resolving such disagreements are required. It is also necessary that conflicts be settled swiftly and at a low cost, in order to lessen the pressure on the judiciary while yet ensuring rapid justice in such unavoidable instances.

Throughout history, civilization has acknowledged right of every individual to seek redress via courts & tribunals. The average man's understanding of "access to justice" is access to courts of law. A court is where justice is meted out to ordinary man. However, due to many impediments such as poverty, social & political backwardness, illiteracy, ignorance, procedural formalities, & so on, courts have

become inaccessible. To get prompt justice through the courts, one must first navigate the difficult and costly procedures of litigation, notably International Commercial Arbitration. This prompted individuals to consider a mechanism for resolving disagreements peacefully outside of the courts.

To avoid legal conflicts in international trade & commerce, every commercial transaction is usually preceded by a contract outlining parties' duties. However, regardless of how precisely a contract is worded, one party to contract may interpret his rights and responsibilities differently. Because, in international transactions, merchants come from several nations with legal systems that differ in many ways from one another, presenting intricate and even opposing qualities. Each country's law courts have jurisdiction solely inside the borders of the country in question. As a result, arbitration started to be preferred as an effective method of settling conflicts between parties from various countries.

The expansion of international trade is inevitable to result in international disputes that cross national borders and geographical limits. For resolution of such issues, preference for international arbitration over litigation in national courts is obvious, because arbitration is favoured over litigation in courts, & foreign element in international arbitration is preferred over domestic element in national courts. This is also due to the lack of International Courts to hear International Commercial Disputes. In such cases, resort to international arbitration in a convenient & impartial venue is often seen as preferable to recourse to courts as a means of resolving any issue that cannot be handled through arbitration.

6.3 TESTING OF HYPOTHESIS

H1: "A procedural aspects of International Commercial Arbitration across the countries differs significantly".

TABLE: 6.1 (Hypothesis 1)

Factors	**Countries**						
Model law	**UNCITRAL**	**India**	**Hong Kong**	**Singapore**	**South African**	**China**	**U.S.A.**
Commencement of arbitration	Well defined	At the Option of the parties	Well defined	Well defined	Well defined	Well defined	Well defined

proceedings							
Seat for Arbitration	Well defined	At the option of the parties	Well defined	At option of the parties	Well defined	Well defined	Well defined
Law applied	At the option of the parties	At the option of the parties	Well defined	Well defined	Well defined	Well defined	Well defined
Production of evidence	Well defined	Not clearly defined	Well defined	Well defined	Well defined	Well defined	Well defined
Interim measures	Yes Available	Conditionally available	Yes Available	Yes Available	Yes Available	Yes Available	Yes Available
Recourse against arbitral awards	Yes Available	Conditionally available	Yes available	Yes available	Yes available	Yes available	Yes available
Appeal provision	Yes Available	Conditionally available	Yes Available	Yes Available	Yes Available	Yes Available	Yes Available
Enforcement of Awards	Well defined	Not clearly defined	Well1 Defined	Well1 defined	Well1 Defined	Well1 defined	Well1 defined

FINDINGS FOR HYPOTHESIS

After the detail analysis of procedural aspect of International Commercial Arbitration across the countries , it is concluded that it differs significantly at most of the serious issues especially the provisions relating to proceedings, choice of law, seat of arbitration, interim and appeal provisions, recourse against foreign awards and law relating to enforcement of foreign awards, under Indian arbitration law. Hence the hypothesis is accepted.

H2 "International Arbitration Law in India is capable to attract the foreign investment in the country".

TABLE: 6.2 (Hypothesis 2)

FACTORS	**RESPONSES (%)**			
	YES	**NO**	**CAN'T SAY**	**DON'T KNOW**
Whether the Arbitration & Conciliation Act, 1996 has	85	07	0	0

failed to fulfill its one of the main objects to attract the foreign investors to settle their disputes in India				
Are there any grounds for appeal has been given in Part II of Arbitration & Conciliation Act of 1996, on which a Foreign award may be appealed before the Court?.	73	20	07	0
Whether the interim relieves are available in respect of International arbitration?	58	12	10	20
State or State entity can raise a defense of State or sovereign immunity at enforcement stage of a foreign Award or not?	74	10	0	15

FACTORS	**RESPONSES (%)**			
	STRONG ASSUMPTION	**AVERAGE ASUUMPTION**	**CAN'T SAY**	**DON'T KNOW**
Because of defective arbitration clauses/ agreement, foreign investments are directly affected.	74	26	0	0
Because of defective arbitration clauses/ agreement, foreign investments are directly affected	74	10	0	0
Due to ineffective enforcement of Arbitral award, usually litigation is most preferable option rather than Arbitration under International commercial arbitration.	90	10	0	0

FINDINGS FOR HYPOTHESIS

After the detail analysis of capability of Indian International Arbitration law to attract the foreign investors it is infer that there is no favorable environment towards the protection of the interest of Foreign Investors because of inefficient dispute

settlement mechanisms relating to commercial issues, that's ways the present assumption is rejected.

H3: "Present setups of International commercial arbitration in India do not sufficient to develop India as a hub for International commercial arbitration".

TABLE: 6.3 (HYPOTHESIS 3)

FACTORS	RESPONSES (%)			
	YES	NO	CANT' SAY	DON'T KNOW
Whether establishment of International Centre for disputes resolution by Government of India turned into a hub for International Commercial arbitration?	65	11	24	
Whether enactment of Arbitration & Conciliation Act, has solved problems of International Commercial arbitration in India?	71	05	17	07
Whether there is vested right to have foreign award enforcement under Arbitration & Conciliation Act, 1996?	66	0	27	7
Do you think that arbitration India is generally and slowly stepping into the shoes of Litigation?	80	13	0	7
Whether judgment in Bharat Aluminum Co. Ltd. V. Kaiser Aluminum Technical service Inc (BALCO) , (2012) 9 SCC 649, has encouraged foreign investors to invest in India?	59	26	0	15

FACTORS	RESPONSES (%)			
	STRONGEST	STRONG	GOOD	AVERAGE
Enforcement of foreign arbitral award is a major problem of International ommercial arbitration in India.	65	11	16	08

FINDINGS FOR HYPOTHESIS

After the detail analysis of assumption that Present setup of International commercial arbitration in India, do not sufficient to develop India as a hub for International Commercial, it is evident that there are lots of deficiencies in existing Indian arbitration law', especially the ambiguities relating to application of provisions of Part I Arbitration and conciliation Act, 1996, for foreign awards in the absence of any mutual agreement for such purposes. That's way the major reform in the light of present International commercial environment, are so required, so that India can be develop as a hub for International commercial arbitration, hence present hypothesis is accepted.

6.4 IMPORTANT FINDINGS

The researcher in the current study made significant discoveries, which were investigated and documented in the thesis. This may be summarised as follows.

- The statutory provisions in India for execution of foreign awards and international commercial arbitration are ineffective.
- There are significant disparities across the nations included in this study in terms of procedural and substantive elements.
- The enforcement agencies participating in international commercial arbitration are not adequately sanctioned.
- Indian institutions created for arbitration, especially international commercial arbitration, such as ICA and ICADR, have struggled to achieve the required global reputation.
- The mechanisms for setting aside and appealing a foreign award are insufficient.
- In terms of local and international business arbitration, there is no clear image.
- For international investors, there is no protection provided.
- Parts I and II of Indian arbitration legislation are unclear as to their application.

6.5 THE ARBITRATION AND CONCILATION (PROPOSED AMENDMENT) ACT,

6.5.1 INTRODUCTION

Arbitration plays an important role in resolving disputes, which is a vital part of an ideal legal system. Following an in-depth examination of Indian Law Commission Report 246th, The Arbitration & Conciliation Act, 1996, & Arbitration & Conciliation (Amendment) Act, 2015, as well as opinions of commercial experts, following modality may be proposed in form of proposed amendments to existing Act.

The current proposed Amendment Act has been designed to tackle concerns related in International commercial arbitration & to make India a centre for International commercial arbitration in order to accelerate the process & boost ease of doing business in India.

6.6 STATEMENT OF OBJECT AND KEY FINIDINGS

- The application of part I in relation to part II is clearly stated, particularly for legal concerns under International commercial arbitration.
- The change makes Sections 2, 9, 34, 37, and 48 of Act applicable even if arbitration is held outside of India.
- The proposed modification guarantees that procedures are concluded as quickly as possible by declaring that international commercial arbitration will encompass the resolution of disputes within 90 days under Section 9.
- Because of the proposed modifications, anybody claiming through or under any party to International commercial arbitration, not simply parties to International commercial arbitration, can seek protection under Indian arbitration laws.
- In context of international commercial arbitration, the definitions of public policy in sections 34 and 48 shall clearly apply.
- Filing an objection under Section 34 for International commercial arbitration would not, on its own, stop implementation of foreign Awards. Parties opposing foreign Awards must apply to Court for an injunction to prevent foreign Awards from being enforced in a separate proceeding.

6.7 THE ARBITRATION AND CONCILATION (PROPOSED AMENDMENT) ACT,

6.7.1 AN ACT TO AMEND ARBITRATION AND CONCILIATION ACT, 1996.

1. **Short title & commencement**
    - The Arbitration and Conciliation (Proposed Amendment) Act may be cited as Arbitration & Conciliation (Proposed Amendment) Act.
    - It is assumed to have entered into force on date that it is adopted or accepted by legislature.
2. **Amendment of section 2**
    - Section 2 of the Arbitration & Conciliation Act of 1996 (26 of 1996) and the Arbitration and Conciliation (Amendment) Act of 2015 (3 of 2016) (hence referred to as the basic Act),-

(I) In subsection (1) Clause (e) (ii), following shall be substituted:- in case of international commercial arbitration, Indian Council of Arbitration (ICA) or International Centre for Alternative Dispute Resolution (ICADR) having jurisdiction to decide questions forming subject-matter of a case, & in other cases, Supreme Court having jurisdiction to hear appeals against foreign awards.

Explanation:- In the event of foreign Awards issued under International commercial arbitration, regulatory authorities such as the ICA and ICADR will have jurisdiction to deal with the concerns involved. Similarly, in all of the preceding cases, the Hon'ble Supreme Court has competence to consider appeals against foreign awards.

(II) The following proviso shall be inserted in sub-section (2):- This section applies if location of arbitration is in India, as well as in international commercial arbitration, notably in areas pertaining to interim measures, judicial aid, setting aside, & appealing foreign Awards.

Explanation- The part's application for certain situations involving international commercial arbitration, which seeks some protective measures for Award issued even by a foreign-seated tribunal. Because the proposed amendment would make provisions of sections 7, 27, 34, and 37 of principal Act applicable even

in cases of International commercial arbitration, this provision clarifies ambiguities regarding the application of such provisions in International commercial arbitration, particularly in matters relating to interim measures, court assistance, setting aside, & appeal.

3. **Amendment of section 9**

Subsection 9(1A) is being added as a new section:-

The laws of the court related to interim measures, etc., shall also apply in international commercial arbitration.

Explanation:- This proposed change would provide a feasible environment for foreign investors, particularly in event of some temporary measures in case of international commercial arbitration, which might provide them with protection. As a result of this change, not only parties to an International business arbitration, but also anybody claiming through or underany party to an International commercial arbitration, may seek arbitration of problem.

4. **Amendment of section 27-**

The addition of a new section as subsection 27(7), specifically:-

In context of international business arbitration, the regulations pertaining to court aid in taking evidence may also apply.

Explanation- This proposed amendment will provide a favourable climate for foreign investors, particularly in terms of court aid in gathering evidence in cases involving foreign awards under international commercial arbitration. This proposed modification would also assist to establish trust among foreign investors and eliminate the uncertainty surrounding international commercial arbitration in India.

5. **Amendment of section 34-**

Insertion of new provision as sub section 34(2)(iii) namely:-

In context of international commercial arbitration, the regulations pertaining to setting aside an Award shall also apply.

Explanation:- The word 'public policy' of India is defined in section 48 of main Act, in terms of conflict of laws b/w state parties to International commercial arbitration, and this is the disputing significant problem under International commercial arbitration.

6. Amendment of section 37-

Section 37 (4) is amended to include a new subsection:-

In light of proposed adjustments made under section 2(2) of this Act, the provision of section 37 for appeal shall also apply to foreign awards in cases of international commercial arbitration.

Explanation- International commercial arbitration appeals against foreign awards have been a contentious topic for international commercial communities. It has been observed, particularly in India, that because to a lack of adequate processes for appealing against foreign-seated verdicts, Indian arbitration law has been unable to establish respect as a hub for international commercial arbitration. This new subsection attempts to safeguard investors' rights under international trade & commerce from legal difficulties addressed by international commercial arbitration.

7. Amendment of section 48

The provisions of this section, which deal with international business arbitration, will be included into Part II of the current Act.

The parties are claimed to be the masters of arbitration, but in institutional arbitration, institutions effectively assume some rights of parties, such as nomination of arbitrators, & are able to force their will on parties. This appears to be contrary to spirit of arbitration, & one may argue that it is not arbitration in genuine sense. Though ad hoc arbitration would be favoured in such case, it might be claimed that in today's contemporary & complicated business world, ad hoc arbitration is only appropriate for disputes involving lesser claims & less affluent parties, as well as domestic arbitrations. "Whatever its benefits in a strictly domestic environment, ad hoc arbitration in an international setting typically frustrates party attempting to enforce contract," one may argue. In context of international commercial disputes, institutional arbitration may be more appropriate, even if it appears to be more expensive, time consuming, & rigid than ad hoc arbitration, because it provides established and updated arbitration rules, support, supervision, and monitoring of arbitration, review of awards, & most importantly, strengthens credibility of awards. The modifications introduced in Arbitration & Conciliation (Proposed Amendment) Act will not only correct problem, but will also aim to lay ground for arbitration in India to reach a greater level of development. The revisions

will undoubtedly instil confidence in foreign investors & are a step in right way toward establishing India as a centre for international commercial arbitration.

6.8 SUGGESTIONS

The analytical research was primarily concerned with the guidelines of the BALCO ruling and the recent revisions to the Arbitration & Conciliation (Amendments) Act, 2015. The former requires certain tangible adjustments to current laws, and even after this amendment, the laws are not capable of resolving these concerns when the latter is comprehensively altered. As a result, it has been determined that there should be robust and codified legislation in place to control matters involving international commercial arbitration in India.

The last chapter of thesis discusses conclusion and recommendations for the study issue. After demonstrating the hypothesis with the aid of the chapters of this research, the conclusion was formed in the first half of this chapter. In order to meet the purpose of this study, an analysis of the objectives of this research has been performed on a priority basis. Later on, suggestive measures to make the Indian Arbitration Law so effective that it may attract foreign investors without any hesitations and insecurity for legal protection in case of any dispute relating to International Commercial Arbitration in India, and last but not least, the entire research work may be considered as an effort to make India a Hub for International Commercial Arbitration for foreign parties. Finally, the recommendations might be summarised as follows.

- The ICA in India should be governed by robust and codified legislation.
- The statutory framework in India for enforcement of foreign awards & international commercial arbitration should be more effective.
- In accordance with UNCITRAL standards, governments should strive for consistency in both procedural and substantive areas.
- The law enforcement authorities engaged in ICA should be appropriately legitimized.
- The mechanisms for setting aside and appealing a foreign award must be adequate and effective.
- Domestic and international commercial arbitration should have different statutory provisions.

- There must be strong safeguards in place for foreign investment.
- Parts I and II of Indian arbitration legislation should be clearly applicable.

At the moment, India is regarded as a top market for multinational corporations as well as a fruitful platform for international investors. In this context, it is reasonable to believe that, with a little care and effort, India may be prepared to be a similarly excellent location for resolution of business disputes. The peaceful resolution of disputes is inherent in Indian culture, as evidenced by the ancient notion of Panch Parmeshwar. The model amendment Act presented by the researcher, in conjunction with Arbitration & Conciliation (Amendments) Act, 2015, has potential to make India a centre for international commercial arbitration.

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QUESTIONNAIRE

❖ **Open ended questions**

- Whether the Alternative Dispute Resolution System is a need for speedy justice and amicable solution?
- Whether the International Commercial Disputes are inevitable and obvious for international trades?
- Whether enactment of Arbitration & Conciliation Act, has solved problems of International Commercial arbitration in India?
- Do you know about International Center for Alternative Dispute Resolution (ICADR) and Indian council of Arbitration (ICA)?
- Whether law relating to domestic arbitration & International Arbitration should be separated in two different statutes?
- Whether law relating to domestic arbitration & International Arbitration should be separated in two different statutes?
- Do you agree that Arbitration & Conciliation Act, 1996 has failed to fulfill its one of the main objects to attract the foreign investors to settle their disputes in India?
- Whether establishment of International Centre for disputes resolution by Government of India into a hub for International Commercial arbitration?
- Whether there is vested right to have foreign award enforcement under Arbitration & Conciliation Act, 1996?
- Whether the Part II of Arbitration & Conciliation Act, 1996 provides solution relating to issue involve in International Commercial arbitration in India?
- Does judiciary in India has scope to intervene under Arbitration & Conciliation Act, 1996 in settlement of disputes relating to International Commercial arbitration?
- Whether judgment in Bharat Aluminum Co. Ltd. v. Kaiser Aluminum Technical service Inc (BALCO), (2012) 9 SCC 649, has removed ambiguity relating to application for Part I & for Part II Of Arbitration and Conciliation Act, 1996?
- Do you think that n India is generally slowly stepping into the shoes of Litigation?

- Whether judgment in Bharat Aluminum Co. Ltd. v. Kaiser Aluminum Technical service Inc (BALCO), (2012) 9 SCC 649, has encouraged foreign investors to invest in India?
- Is there an Arbitration Act or something similar in place, & if so, is it based on UNCITRAL Model Law? Is it applicable to all arbitral proceedings?
- Is it possible to separate arbitration terms from main contract?
- How is substantive law of dispute determined? Where substantive law is unclear, how will a tribunal determined what it should be?
- Does Indian arbitration law place any limitation in respect of a party's choice of arbitrator?
- Are there any grounds are given in Part II of the Arbitration & Conciliation Act of 1996, on which a Foreign award may be appealed before the Court?
- Does particular issues relating to International Commercial arbitration should be given preference in drafting of arbitration clause for International arbitration?
- Is ad hoc international arbitration more or less prevalent than institutional international arbitration?
- Whether anti-suit injunctions are available where proceedings are brought elsewhere (outside the country) in breach of an arbitration agreement?

❖ **Closed ended questions**

- To invoke international commercial arbitration it is necessary that at least one of parties should belong from foreign country.
- Institutional arbitration has its own set of rules.
- A arbitral award becomes enforceable when the period to set aside is been expired or no such application is been made for such purposes.
- A court may overturn an arbitral ruling if it is contrary to Indian public interests.
- The major issue in conflict of International commercial arbitration are applicability of law, place of arbitration, choice of law, party autonomy as well as enforcement of foreign award etc.

❖ **Rating based Questions**

- Enforcement of foreign arbitral award is a major problem of International commercial arbitration in India.
- UNCITRAL Model law does not have effective measures for Enforcement of foreign award.
- The procedure law (lex arbitri) and seat of arbitration plays a vital role under International commercial arbitration.
- Because of defective arbitration clauses/agreement, foreign investments are directly affected.
- Due to ineffective enforcement of Arbitral award, usually litigation is most preferable option rather than Arbitration under International commercial arbitration

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A STUDY ON INTERNATIONAL COMMERCIAL ARBITRATION

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ABSTRACT

Human conflicts are inevitable. Disputes may arise amongst the people in relation to their personal, family, economic and political lives. Since disputes are inevitable, there is an urgent need to find a quick and easy method of their resolution. Disputes must be resolved at minimum possible cost both in terms of money and time, so that more time resources and energy can be utilized for constructive pursuits. The research work is with respect to the International Commercial Arbitration (ICA) in India. This research is further analyze of legislative approach towards International Commercial Arbitration(ICA) in India whereas also Judicial approach toward International Commercial Arbitration(ICA) has been discussed.

Keywords:- International commercial arbitration, legislative approach, judicial approach

INTRODUCTION

India has successfully matured & risen in prominence as a rapidly progressing economic power, ensuring its place as a key actor in world trade & commerce. It is critical that our arbitration methods and regulations, while continuing to meet special demands of Indian citizens, are on par with best practises developed throughout world.

The Arbitration & Conciliation Act of 1996, for example, is based on UNCITRAL Model Law, which includes globally acknowledged norms for arbitration proceedings. Because international business arbitration is increasingly transnational & multijurisdictional, procedural components of international commercial arbitration range greatly among nations.

In this regard, India's Arbitration & Conciliation Act, 1996, may be traced back to UNCITRAL Model Law, which includes universally recognised norms for arbitration procedures. The role of judiciary in augmenting alternative dispute resolution system is a critical issue in this regard. Discussions in this respect should eventually take into account India's potential to develop as an internationally preferred arbitration centre.

The rationale and purpose of International Commercial Arbitration (ICA) are generally to provide a convenient, neutral, fair, expeditious and efficacious forum for resolving disputes relating to international commerce. The Basic features which are uniform in the legal framework for resolution of international commercial disputes can be broken down into three stages, Jurisdiction, choice of law and the recognition and enforcement of Arbitral Award.

In International Commercial Arbitration, when the parties are of different legal systems, there automatically arises a conflict of laws, and a choice of the substantive law to be applied in a given dispute has to be made. Many a time, the substantive law to be applied in arbitration may be specified by the parties in their original agreement. But problems arise in determining the applicable law in situations when the parties fails to agree upon a choice of law for the settlement of their dispute.

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THE ARBITRATION AND CONCILIATION ACT, 1996:

The Act of 1940 was thought to have a number of flaws in both law and practise of arbitration. In this regard, Secretary of Legal Affairs made a proposal on July 27, 1977, stating that because the Public Accounts Committee had commented negatively on working of Arbitration Act due to its delay, enormous expenses, and long time spent, government wanted to revisit provisions of Arbitration Act, 1940 to determine whether enormous delay occurring in arbitration proceedings and disproportionate costs incurred therein could be a problem.

The Supreme Court stated in Food Corporation of India v. Joginderpal[1] that "law of arbitration" must be simple, with less technicality, & more responsive to actual reality of situations, responsive to canons of justice & fair play, & that "that being command of law pronounced by highest court of land made Law Commission as well as legislature & thinkers think over issues rather seriously to consider amending law."

Under auspices of United Nations Commission on International Trade Law, an attempt was made to create standard national arbitration rules across world, and the UNICITRAL Model Law in Respect of International Arbitration was recommended in 1985.

It is now required and critical to implement reforms to the present arbitration legislation. The question here was whether the aforementioned 1940 Act should be changed or a new statute drafted. Aside from the 76th Report, several recommendations from the Indian Council of Arbitration (ICA), Indian Society of Arbitrators (ISA), Confederation of Indian Industries (CII), Federation of Indian Chambers of Commerce & Industry (FICCI), and Associated Chambers of Commerce & Industry (ACCI) were made to amend 1940 Act.

THE ACT OF 1996 ACCORDING TO 176th REPORT OF LAW COMMISSION AND ITS ANALYSIS

The commission's 176th report requires a study of the operation of the aforementioned Act in light of several defects discovered in its provisions & representations received. The Commission evaluated numerous arguments and concluded that UNCITRAL Paradigm was primarily intended to provide a standard model for international commercial arbitration among distinct countries. The Indian Act of 1996 introduced provisions comparable to model legislation & made them applicable to situations of exclusively domestic arbitration involving Indian nationals, which has caused some issues in the Act's implementation.

The grounds for objecting to an award under Sections 34 and 37 have been made common for both local & foreign arbitration rulings. It was also suggested that principle of least court interference may be a good principle for international arbitral awards as well as for Indian conditions, & that because several awards are passed in India for Indian nationals by laymen who are not well acquainted with applicable law, interference with such awards should not be as limited as it is in the case of international arbitrations.

The reading of preceding text conjures up the image that, in instance of domestic arbitrations b/w Indian nationals, State may want from the courts to have stronger or stricter control over the arbitrations. It is not intended that the Commission was advocating for an increase in judicial intervention in solely domestic arbitration proceedings. In reality, the Commission proposed limiting judicial intervention in some areas beyond what is permissible under the Model Law and the Act of 1996. It was requested that all matters brought before the court in relation to the award be scheduled for an initial hearing and be denied at first sight.

A provision comparable to Section 99 of Civil Procedure Code was also proposed to emphasise that awards should not be tampered with lightly until significant prejudice is demonstrated. It was also recommended to remove difficulties presented by Section 36, which prevents enforcement of an award just because an application to set aside award has been filed and is pending, & that simply filing an application should not result in an automatic stay of award. Furthermore, panel advocated allowing court to set restrictions for compliance with award, partially or entirely, pending resolution of objections.

It was suggested that "Court of Principal Judge, City Civil Court of a city exercising original jurisdiction" be included in meaning of the word "Court" under section 2(1). (e). Another clause was proposed to be added to allow Principal Courts referred to in Section 2(1)(e) to refer problems to Courts of direct jurisdiction. The same clause was thought to get past various High Court decisions that found that Principal Court under Section 2(1)(e) & restrict transfer of proceedings to other Courts. Congestion at Principal Courts would be reduced, as seen by this design.

Sections 8, 9, 27, 35, and 36 were enacted to allow arbitration processes to take place outside of India. Section 8(4) was planned to be added to empower judicial authorities to determine on whether-

- there is no dispute,
- arbitration agreement is null and void or inoperative,
- the arbitration agreement cannot be completed, or
- arbitration agreement does not exist.

Section 8(5) was proposed to be added to state that the judicial authority may not decide above-mentioned issues referred to in proposed sub-section (4) if-

- relevant facts or documents are in dispute,
- oral evidence is required,
- inquiry into preliminary questions is likely to delay referral to arbitration,
- request for a decision is unduly delayed, or
- decision on questions is unlikely to produce.

Based on the foregoing, the judicial authority shall either determine the questions or submit them to arbitration. The above-mentioned parameters were required to ensure that spurious jurisdictional issues are not raised at the outset, causing the orientation to be delayed. At the same time, if the aforementioned questions can be determined quickly and without the need of oral evidence, they can be decided & will almost likely avoid the expenses of arbitration.

Various modifications were requested in Section 11, and effort was made to ensure that the reference to arbitration was not delayed. The intention was to replace the wording "Chief Justice of India" and "Chief Justice" in sub-sections 11(4) to (12) with the words "Supreme Court" & "High Court," so that arbitral panel is appointed on judicial side. Furthermore, Section 24B was proposed to be introduced to allow parties and arbitral tribunal to approach Court in order to enforce interim orders given by arbitral tribunal in Sections 17, 23, & 24.

It was also proposed to completely manage delays before arbitral tribunal by changing sections 23, 24, & 82, as well as introducing new sections 24A, 29A, and 37A. A proposal was also made about time restrictions for passing awards that may be extended by courts, with the caveat that arbitration would continue while Court considered the application.

Temporarily, there were also inconsistent High Court judgements in relation to some clauses of the 1996 Act. The Commission was also made aware of a number of additional issues concerning the difficulty in implementing the aforementioned Act. The Commission principally developed a Consultation Document, hosted two seminars, one in Mumbai & one in Delhi in February & March

2001, & widely publicised the paper by posting it on the Commission's website.

The lectures were attended by retired judges and prominent attorneys. Various luminaries also participated in seminars and supplied written notes outlining their recommendations. Suggestions not included in Consultation Paper were also offered & thoroughly considered. Following an in-depth examination of the legislation pertaining to the issue, with an emphasis on the situation of the law in other jurisdictions, the Commission submitted a number of suggestions for revisions to the Arbitration & Conciliation Act of 1996.

Another Committee, widely known as "Justice Saraf Committee on Arbitration," was formed to investigate severity of the Law Commission of India's recommendations included in its 176th Report and Arbitration and Conciliation (Amendment) Bill, 2003.

Justice Dr. B. P. Saraf, Retired Chief Justice of High Court of Jammu and Kashmir, presided over the Committee. In January 2005, the Committee submitted its final report[2]. The Report included a thorough examination of the Law Commission's recommendations, as well as suggestions for how the 1996 Act may be revised to improve India's arbitration system. The Government decided to 'withdraw' Bill from Rajya Sabha, where it had been presented, in April 2006.[3]

FOREIGN AWARDS UNDER ARBITRATION AND CONCILIATION ACT, 1996

The Arbitration & Conciliation Act of 1996 provides statutory backing for the recognition of international arbitral awards rendered in nations that have signed either the Geneva Convention of 1927 or New York Convention of 1958. For a foreign arbitral award to be enforced in Indian courts, it must be issued under the Geneva Convention or the New York Convention.

In Bhatia International v. Bulk Trading, Supreme Court declared that "an arbitral award not delivered in a convention, country would not be treated as a foreign award and, as such, a fresh action would have to be started on basis of award." The New York Convention creates a consistent yardstick for recognising and enforcing these agreements & rewards throughout the nations that have ratified it. As a result, arbitral agreements & judgments that come from it will be recognised and enforced by courts of states where enforcement is sought, encouraging trust in the parties, who may be unfamiliar with different laws common in many nations with whom they trade. [4]

In Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd.[5], Supreme Court considered whether award might be set aside if Arbitral Tribunal failed to follow required procedure outlined in Sections 28 and 29, so jeopardising parties' interests. Section 28 Subsection (1)(a) requires Arbitral Tribunal to determine dispute in accordance with substantive law in force in India at time.

The Indian Contract Act, Transfer of Property Act, & any other related laws would likely be included in substantive legislation. For example, if the award is issued in violation of the Transfer of Property Act or the Indian Contract Act, question is whether award may be overturned. Similarly, under subsection (3), Arbitral Tribunal is directed to resolve dispute in accordance with contract's terms & conditions, as well as after taking into account transaction's trade usage. Is it feasible to reverse a judgement if arbitral tribunal disregards contract's or trade usage's terms applicable to transaction?

The Supreme Court stated that, when interpreting Section 34 in connection with other parts of Act, it appears that legislative goal could not be that award could not be set aside by the court even if it violated the Act's provisions. It would be contrary to the fundamental notion of justice if it were found that such an award could not be challenged. If Arbitral Tribunal fails to follow Act's mandatory procedure, it has acted outside of its power, & judgement is therefore manifestly illegal

& may be set aside under Section 34. Furthermore, Supreme Court found that if award is contradictory to substantive provisions of law or requirements of Act, or contrary to terms of contract, it is clearly illegal & may be interfered with under Section 34.

When a court determines that a foreign award is enforceable, it considers the award to be a decree of that court. Under section 48, an order refusing to enforce a foreign award may be appealed to court authorised by law to hear such appeals. However, no second appeal shall lie from an order issued in appeal, notwithstanding that any right to appeal to Supreme Court shall not be affected or limited, & no appeal shall lie if foreign award is implemented.

JUDICIAL APPROACH TOWARDS INTERNATIONAL COMMERCIAL ARBITRATION IN INDIA

CHALLENGES TO THE FOREIGN AWARDS:

Arbitration law is founded on two pillars: party autonomy and award finality. If judicial interference misleads these two plinths, arbitration law will fail to realise its ultimate objectivity and would lose its essence. The evolution of Indian arbitration law from undiscriminating judicial interventions established in the Colonial Act and subsequent 1961 legislation to a more sophisticated Act based on Model Law demonstrates need of limited judicial participation. It is difficult to define public policy as a generic term and as a foundation for overturning an arbitral ruling. Judicial rulings on the scope of public policy that allow for nearly unlimited judicial review of arbitral awards are a death blow to international commercial arbitration.

INTERVENTION BY COURTS

The 1996 Act is thought to have two major goals: quick arbitration and little court intrusion. The intervention of a judicial authority is likewise prohibited. In accordance with Section 5 of Act. This fundamental clause is included in the statutes of every other country that has accepted the UNCITRAL Model. The primary goals of the 1996 Act, as stated in the Statement of Objects and Reasons, are "to decrease the supervisory function of courts in arbitral process" and "to assure that every final arbitral award is enforced in the same manner as a civil court order." [6] Section 5 of Act prohibits the courts from interfering in instances where an arbitration agreement exists. In comparison to 1940 Act, the Court's intervention in all matters relating to the conduct of Arbitration, judgement of Arbitrator, & award has been much reduced under the current Arbitration Act.

POST BHATIA CASE MYSTERY

The decision in Bhatia case, which agreed that an India court could issue interim orders prior to commencement of arbitral proceedings, resulted in scores of Section 9 applications for interim relief being filed in courts across country in relation to arbitrations held in India or elsewhere.

The Court accepted just one exception: parties' express or implied exclusion of Part I. There was no definition of a Part I implied exclusion. Part I also included extensive regulations for nomination of arbitrators and setting aside of awards, among other things, which further added to difficulty. Uncertain whether Part I was impliedly or explicitly excluded in specific situations, Indian courts began to appoint arbitrators in arbitrations performed outside India, such as in National Agricultural (2007) & Indtel (2008), & to enable setting aside of foreign rulings, such as in Venture Global (2008).

BALCO AND WHITE INDUSTRIES

On September 6, 2012, Indian Supreme Court's five-judge Constitution Bench released its decision in matter of BALCO v. Kaiser Technical Services Inc[7]. The BALCO judgement resulted from a two-judge panel that couldn't agree on validity of Bhatia ruling referring several similar matters to a larger bench of Supreme Court. The historic White Industries Case, which resulted in first ever BIT judgement against India, was a comparable case that was heard by Court alongside BALCO & raised same legal difficulties.

In BALCO, Court stated that it disagreed with decisions in Bhatia & Venture Global, and that competence to grant interim remedies in foreign-seated arbitrations or deal with appeals to foreign judgements did not stem from provisions of 1996 Act. In doing so, Court decided that the 1996 Act supported 'board' interpretation of Bhatia that entirety of Part I applies to arbitrations held outside India.

The Judicial firmly established the seat of arbitration as the "centre of gravity" of an arbitration, specifically to decide court jurisdiction in connection with that arbitration. Another advantage is that it clarifies previously ambiguous distinction in India b/w contract law & arbitration agreement law.

Perhaps most importantly, it defines phrases "of nation in which" & "under New York Convention obligations." While term has sparked debate around world, Court determined that there cannot be concurrent jurisdiction of two distinct courts in seat of arbitration & nation whose law governs arbitrations—only the court at seat of arbitration can exercise such authority to resolve a dispute. Prior to BALCO proceedings, Court requested interested parties to comment on matters before it.

The SIAC was one such intervener, & it shared Singapore's position on these issues by citing Singapore decisions such as Swift Fortune (2007), Sui Southern Gas (2010), & PT Asuransi Jasa (2007), as well as legislative amendments made to Singapore International Arbitration Act in 2009, particularly regarding courts' ability to grant interim measures of protection in foreign-seated arbitrations.

The SIAC has considered India to be an important jurisdiction. For past three years, Indian parties have remained single largest contingent of nationalities arbitrating at SIAC, with a near 200 percent increase in number of cases involving Indian parties in various sectors such as trade, construction, joint ventures, energy & natural resources, international trade, shipping and maritime, and general commercial disputes, among others. In comparison to number of incidents, monetary worth of disputes involving at least one Indian party has increased by more than 140 percent during same time period.

Significantly, in the BALCO case, the Supreme Court defines application of its interpretations by assuming that its view of law only applies to arbitration agreements entered into after its judgement, i.e. after September 6, 2012. In doing so, Court appears to have been influenced by practical considerations & inevitable complications that may have arisen as a result of retroactively applying its opinions. This raises intriguing questions about the stance that Indian courts may adopt in present arbitrations & related litigations, as well as prospective litigations based on agreements that are now in effect but were signed before to the Court's ruling. It will also be interesting to watch if parties re-execute arbitration terms in their business contracts in order to fall inside BALCO net.

The availability of remedies for parties seeking such protective measures against an Indian party or assets based in India is one question that emerges as a result of prohibition on Indian courts affording temporary measures of protection in respect of foreign seated arbitrations.

In this regard, the SIAC Rules' emergency arbitrator provisions provide a plausible alternative because they have been used often in arbitrations involving Indian parties. Indian parties were engaged in 10 of ten applications that SIAC has received and accepted thus far. Interim injunctive and other types of remedies issued in these actions were either followed or resulted in agreements between the parties.

In this connection, the Madras High Court's statement in Unknown (2011) about the availability of emergency arbitrator procedures under SIAC Rules for obtaining interim relief is also pertinent.

However, the legal argument about the enforceability of an emergency arbitrator's instructions remains. Singapore revised the IAA in 2012 to recognise that an emergency arbitrator would also be considered a 'arbitral tribunal,' assuring validity of such decisions, instructions, or awards in Singapore under Section 12 (6) of IAA.

The judgement is a big step forward for India since it aligns Indian stance with international arbitration jurisprudence and practise. This ruling is certain to instil increased faith in the Indian legal system & courts. Similarly, it is bound to boost investor trust in India, and uniformity & consistency in judicial approach can only help to develop a more effective dispute resolution procedure for both Indian & non-Indian parties.

CONCLUSIONS

The current structure of International Commercial Arbitration in India is insufficient to establish India as a centre for International Commercial Arbitration. With the great 'Make in India' goal, which is based in part on increasing investor trust, certain of our regulations must be brought into line with worldwide practise. The Arbitration and Conciliation Act of 1996 is particularly significant, especially since India positions itself as a worldwide centre for commercial arbitration. The goals are to reduce delays, bring international business arbitrations under our jurisdiction, reduce the role of courts as supervisors, and ensure efficient enforcement of arbitral rulings. Despite the fact that Arbitration & Conciliation (Amendment) Act of 2016 has created new opportunities for India to serve as a centre for international commercial arbitration before other countries. This research paper examines briefly the efficacy of the new Arbitration Act of 2016, through which the Indian government intends to attract international investment by portraying India as an investor-friendly country with a solid legal framework. The result may be summarised as follows.

- The statutory provisions in India for execution of foreign awards and international commercial arbitration are ineffective.
- There are significant disparities across the nations included in this study in terms of procedural and substantive elements.
- The enforcement agencies participating in international commercial arbitration are not adequately sanctioned.
- Indian institutions created for arbitration, especially international commercial arbitration, such as ICA and ICADR, have struggled to achieve the required global reputation.

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A COMPREHENSIVE EVALUATION OF INTERNATIONAL ARBITRATION AND ITS EFFECTIVENESS

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ABSTRACT

The primary goal of this experimental study is to collect views/opinions of a diverse set of stakeholders on past & future improvements & innovations to make effective International Commercial Arbitration mechanisms in India in order to develop concrete solutions for Indian commercial communities. Researcher approached external focus group comprising Academicians, Arbitrators, Counselors, In-house counsel, Law firms, LPOs, Law Students etc. of different institutions through the questionnaire. Above mentioned stakeholders provided their valuable comments on different questions. The research design for this research work is doctrinal as well as exploratory. The whole research work is based upon the analytical study of collected opinion through the questionnaire, case comments and case study, law commission reports, experts comments etc. The population for the proposed study is comprised of all the respondents of the International and National business communities, regulatory bodies and forums, Academia, who is engaged in international commercial arbitration activities. The data are collected personally using structured questionnaire. Focused interviews are also concluded to collect the data. The data are also be collected through online by electronic mails & Google docs etc. The appropriate statistical tools are used to analyze the data. Univariate and Bivariate data analyze techniques are used to analyze the data.

Keywords:- international commercial arbitration, alternative dispute resolution systems, domestic arbitration

INTRODUCTION

Human conflict grew exponentially with the development of society, as the adage goes, where there are two minds, there are three perspectives. Due to the growth of society, human conflicts are unavoidable; as a result of this undesirable scenario, it is necessary to have robust, simple, and rapid systems for resolving such disagreements. Additionally, conflicts must be settled economically and expeditiously to alleviate the judiciary's load and to ensure that such unavoidable situations do not occur.

Throughout the years, civilization has acknowledged the inherent right of each individual to seek redress through courts and tribunals. The common man's traditional understanding of "access to justice" is that it refers to access to courts of law. A court is where the average man receives justice. However, courts have become inaccessible due to a variety of impediments, including poverty, social and political backwardness, illiteracy, ignorance, and procedural formality. To obtain justice through the courts, one must navigate the complicated and expensive procedures associated with litigation, most notably in International Commercial Arbitration [1]. This prompted citizens to consider a way for resolving their disagreements amicably outside of the courts.

Conflict is an inevitable part of existence, and it's difficult to envision a human civilization without it [2]. Human conflicts inevitably result in disagreements. Keeping in mind the fundamental human behaviour and disposition, it may be claimed that disagreements are unavoidable [3]. However, disagreements must be resolved, and they must be settled prudently; indeed, such settlement is necessary for societal peace, amity, comity, and

harmony, as well as simple access to justice [4]. This demonstrates the critical importance of a sufficient and successful dispute resolution mechanism, which is a necessary condition for survival of a civilised society & welfare state. They sought a mechanism for resolving disputes, such as arbitration, mediation, conciliation, or negotiation.

Alternative Dispute Resolution, or ADR, is a term that refers to a variety of dispute resolution techniques that are often used in lieu of litigation & are generally handled with assistance of a neutral & independent third party. As the expression says, the fundamental objective of ADR is to resolve disputes outside of the regular legal system, & thus throughout process of appreciating ADR, baseline remains litigation. As a result of the emergence of ADR proceedings as distinct alternatives to courts established by state, term 'alternative' was developed[5].

Alternative dispute resolution systems enable a more expeditious and cost-effective resolution for conflicts referred for out-of-court resolution. ADR processes are done with assistance of an ADR neutral, who is an unbiased, independent & disinterested third party who assists disputant parties in resolving their issues via the use of well-established dispute resolution techniques [6]

ADR processes can be broadly classified as non-adjudicatory or adjudicatory. Non-adjudicatory ADR processes are those that fall under the umbrella of ADR and do not involve the ADR neutral making a final and binding determination of the dispute's factual or legal issues, but rather involve the parties cooperating to find a mutually acceptable solution with assistance of ADR neutral. Non-adjudicatory ADR approaches exemplify the ADR philosophy that a conflict is a problem to be solved collaboratively rather than a battle to be won [7].

Cooperative issue solving is a fundamental principle of ADR. The ultimate goal is to resolve the issue by the parties' participation and joint effort, aided by the ADR neutral. ADR techniques are designed to mitigate antagonistic attitudes and promote greater openness and dialogue between parties, ultimately leading to a mutually accepted resolution [8]. In that regard, alternative dispute resolution is unquestionably more cooperative & less competitive than adversarial litigation [9]. The ADR approach is aimed at eliminating the adversarial component from dispute resolution process, guiding parties to recognise their common interests, dissuading them from taking hard stances, and persuading them to reach a negotiated settlement. The parties control both process and the outcome of dispute settlement, and they are solely accountable for resolving the disagreement in an effective, practical, and acceptable manner [10]. The emphasis of ADR, which is informal & adaptable, is thus on "assisting parties in assisting themselves"[11].

The anecdote of two cooks arguing over an orange exemplifies the basic approach of ADR (non adjudicatory). The judge chooses an explanation for awarding it to the first cook. The arbitrator halves it. The mediator inquires as to why each cook desires it - discovering that the first desires the peel for marmalade & second desires the flesh for juice. The mediator provides the first the peel & second the flesh. As a result, both parties benefit. The cooks & mediator approached the problem collaboratively, rather than through the lens of rights and positions [12].

Mahatma Gandhi also pushed for and observed this technique, which serves as the foundation for ADR. "I recognised that the fundamental duty of a lawyer was to reconcile estranged parties. The lesson was so ingrained in me that for first two decades of my legal career, I spent a significant portion of my time resolving private settlements in hundreds of cases. I gained nothing in the process — not even money, and most emphatically not my soul.' [13].

ADR processes are, for the most part, non-adjudicatory, which is to be expected given that ADR is largely a substitute for litigation, which is nothing more than adjudication by a court of law. Non-adjudicatory ADR processes include mediation, conciliation, and conflict resolution through Lok Adalats, all of which get their sanctity from parties' desire to reach a mutually agreeable result amicably.

On other hand, adjudicatory ADR proceedings are those that include the ADR neutral making a final & binding judgment of the dispute's factual and legal concerns. The adjudicatory processes take their sanctity from parties' desire to have their rights assessed outside of the usual litigative process by an ADR neutral. Arbitration &

binding expert determination are both forms of adjudicatory alternative dispute resolution.

ADR is occasionally understood rigorously & hypertechnically as a process that lacks the accoutrements of arbitration and does not ultimately result in a binding decision on parties' will. However, because adjudicatory ADR processes function outside realm of state-established courts and are effectively substitutes for traditional litigative process, they are situated within ADR galleries [14].

Additionally, adjudicatory ADR processes are consensual in sense that they cannot be used unless such participants are ad idem, but once parties enter arena, they must submit to a binding ruling by ADR neutral and cannot withdraw unilaterally.

Apart from basic categorization of ADR processes as adjudicatory or non-adjudicatory, there are also hybrid ADR processes that combine the two and exhibit both adjudicatory and non-adjudicatory characteristics. Examples of hybrid ADR methods include Medi-Arb, Con-Arb, and conflict resolution through Permanent Lok Adalats.

OBJECTIVES

International arbitration is dynamic approach to resolve the cross border commercial disputes. Their feature like adaptability and party-driven approach allows a resolution system and process that may be tailored as it required. Stakeholders of Indian Commercial Arbitration have proved quest to improve the cross border arbitration mechanisms. For such purposes a comprehensive evaluation of international arbitration and its effectiveness is required for improvement. Collective feedback mechanisms, which are essential stimulants to material improvements in this systems are rare in the field of law, where confidentiality is valued and practice is both varied and discrete universally. The primary goal of this experimental study is to collect views/opinions of a diverse set of stakeholders on past & future improvements & innovations to make effective International Commercial Arbitration mechanisms in India in order to develop concrete solutions for Indian commercial communities. The poll was performed in two phases over a six-month period. In spite of various efforts at national and international level in bringing the substantial changes in the international arbitration laws for smooth functioning and promoting the international business across the country, even then there are lots of complexities in the international arbitration laws that are yet unanswered. Hence the issues related to this need to the explored and analyzed.

The research design for this research work is doctrinal as well as exploratory. In doctrinal research there is an analytical and comprehensive study of Statutes, instruments, judicial pronouncements, guidelines of Treaties and Conventions etc. whereas in exploratory research, there is a wide range of field observation based upon designed questionnaire comprising of thirty five opinion based questions for making international commercial arbitration more & more effective in Indian context. The whole research work is based upon the analytical study of collected opinion through the questionnaire, case comments and case study, law commission reports, experts comments etc.

FIELD OBSERVATION IN BRIEF

Doctrinal as well as empirical both method of legal research have been adopted for this research work. In the former the researcher analyzed the previous work done by different jurists, different legislation, articles and cases laws and for the empirical part a questionnaire was formed with open ended, closed ended and rating based questions, which has sent to different stakeholders and the opinion received from the stakeholders compiled in chapter V and for the statistical analysis of the data collected through the structured questionnaire. Selected sample size was of 250, out of which reply was received from approx 200 respondents and only 150 responses were found suitable for the analysis.

NEED FOR ALTERNATIVE DISPUTE RESOLUTION SYSTEM

Any civilised society's basis & goal is justice. The pursuit of justice has been an ideal to which humanity has aspired for aeons. The world has learned that confrontational litigation is not sole way to settle problems. Congestion in courtrooms, a shortage of staff & resources, as well as delays, costs, & process, all point to need for improved alternatives, approaches, & outlets. A click on that option will take you to Alternative Dispute

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Resolution method. ADR is faster, less expensive, & more user-friendly than courts. It provides options for technique, process, pricing, representation, & location. Because it is generally faster than legal processes, it can reduce pressure on Courts. Because it is less expensive, it has potential to help to reduce upward spiral of legal expenses & legal aid expenditure, which would benefit both parties.

TABLE-1 WHETHER THE ALTERNATIVE DISPUTE RESOLUTION SYSTEM IS A NEED FOR SPEEDY JUSTICE AND AMICABLE SOLUTION

		FREQUENCY	PERCENT	VALID %	CUMULATIV %
Valid	Yes	98	65.8	65.8	65.8
	No	10	6.7	6.7	72.5
	Can't Say	24	16.1	16.1	88.6
	Don't Know	17	11.4	11.4	100.00
	Total	149	100.00	100.00	

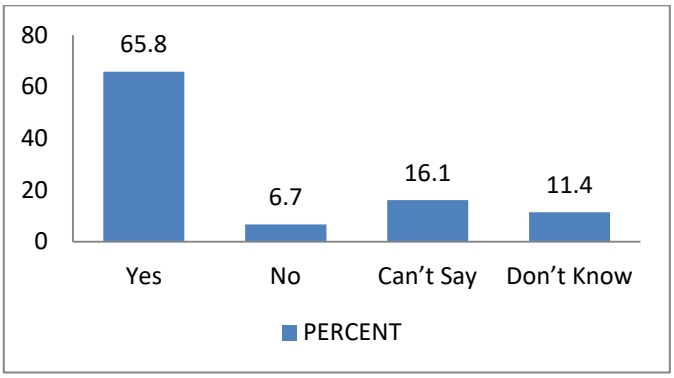

FIG. 1 RESPONDENT PERCENTAGE

INTERPRETATION

After statistical analysis of data collected through the questionnaire for the above mentioned question, there were a majority of respondents were in the positive opinion that Alternative dispute resolution system is a need for speedy justice for the disputes. Around 66 percent respondents were in the favor that, ADR is indeed a strong mechanism for assurance of speedy justice. Whereas around 7 percent respondents denied this statement as well, because of some lack of awareness or being ignorant about this system around 16 percent were in respond in the manner that they can't say whether the said system is effective for speedy justice or not whereas due to unawareness, around 11 percent respondents shows there expression that they are not fully aware about the ADR system.

INTERNATIONAL COMMERCIAL DISPUTES AND INTERNATIONAL TRADES

In fact, it has become customary to include an arbitration clause in every business contract. Arbitration has also grown in strength & popularity as a mechanism of settling disputes in international trade & business. It is hard to tell how extensively accepted arbitration is, however some observers have indicated that arbitration clauses are included in up to 90 percent of all international contracts. Rapid globalisation has resulted in an increase in number of international contracts including terms requiring international arbitration. As a result, many people consider availability & efficacy of international arbitration as a boon to cross-border trade & investment. This fascinating but increasingly difficult legal landscape provides multinational parties with a plethora of options for managing & resolving their conflicts. Business requirements will always differ depending on context, but some general guidance can be drawn from an examination of those aspects of international arbitration that have traditionally been viewed as most advantageous for international parties while minimising perceived disadvantages of international arbitration.

TABLE 2 WHETHER THE INTERNATIONAL COMMERCIAL DISPUTES ARE INEVITABLE AND OBVIOUS FOR INTERNATIONAL TRADES?

		FREQUENCY	PERCENT	VALID %	CUMULATIV %
Valid	Yes	148	99.3	99.3	99.3
	No	1	.7	.7	100.0
	Total	149	100.0	100.0	

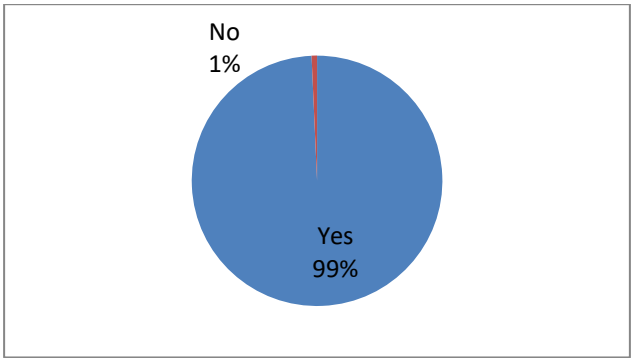

FIG 2 WHETHER THE INTERNATIONAL COMMERCIAL DISPUTES ARE INEVITABLE AND OBVIOUS FOR INTERNATIONAL TRADES?

INTERPRETATION

After statistical analysis of data collected through the questionnaire for the above mentioned question, there were a majority of respondents were in positive opinion that, International Commercial Disputes are inevitable and obvious for international trades. Around 99 percent respondents were in the favor that, due to rapid growth in cross- border commercial activities international commercial disputes are unavoidable situation for word business communities. Whereas around 1 % respondents denied this statement

INTERNATIONAL COMMERCIAL ARBITRATION IN INDIA STATUS UNDER THE ARBITRATION AND CONCILIATION ACT, 1996

The 1996 Act, which repealed 1940 Act, was enacted to provide an effective and expeditious dispute resolution framework that would inspire confidence in Indian dispute resolution system, attract foreign investments, & reassure international investors in Indian legal system's reliability in providing an expeditious dispute resolution mechanism. Part I of 1996 Act provides for any arbitration conducted in India and enforcement of judgments made thereunder. Part II deals with enforcement of foreign awards. Part I governs any arbitration held in India or enforcement of awards made thereunder (whether domestic or international), whereas Part II governs execution of any overseas award to which New York Convention or Geneva Convention apply. The 1996 Act has two novel provisions that deviate from UNCITRAL Model Law. For starters, unlike UNICITRAL Model Law, which was meant to apply primarily to international commercial arbitrations, 1996 Act applies to both international & domestic arbitrations. Second, in terms of reducing court intrusion, the 1996 Act goes above & beyond UNICITRAL Model Law.

TABLE: 3 WHETHER ENACTMENT OF ARBITRATION & CONCILIATION ACT, HAS SOLVED PROBLEMS OF INTERNATIONAL COMMERCIAL ARBITRATION IN INDIA?

		FREQUENCY	PERCENT	VALID %	CUMULATIV %
Valid	Yes	105	70.5	70.5	70.5
	No	8	5.7	6.7	75.8
	Can't Say	25	16.8	16.8	92.6
	Don't Know	11	7.4	7.4	100.00
	Total	149	100.00	100.00	

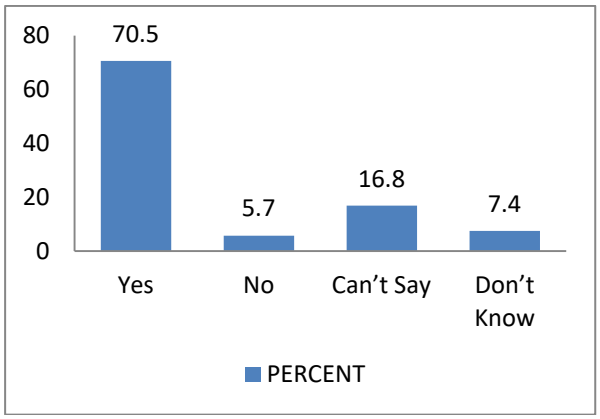

FIG 3 RESPONDENT PERCENTAGE

INTERPRETATION

After statistical analysis of data collected through the questionnaire for the above mentioned question, there were a majority of respondents were in the positive opinion that enactment of Arbitration & Conciliation Act, has solved problems of International Commercial arbitration in India. Around 71 percent respondents were in the favor that, yes the enactment of Arbitration & conciliation Act, has proved successful in solving the problems relating to International commercial arbitration in India. Whereas around 5 percent respondents denied this argument as well, because of some lack of awareness or having less faith in ADR system around 17 percent were in respond in the manner that they can't say whether the Indian arbitration is effective in solving the ICA issues or not whereas due to unawareness, around 7 percent respondents shows there expression that they are not fully aware about the Act.

DOMESTIC ARBITRATION VERSUS INTERNATIONAL COMMERCIAL ARBITRATION

Various courts have reviewed rising use of arbitration as an alternative mechanism of dispute settlement in various circumstances of Arbitration & Conciliation Act 1996. Subsection (2) of Section 2 & Provisions 8, 9, 11, & 34 are most contentious sections of Act. Dealing with Section 2(2), one of most widely interpreted clauses, which states that Part I of Act applies if site of arbitration is in India. Where does it give room for interpretation by different Courts? The clause

expressly states that Part I of Act, which is intended for "domestic arbitrations," applies to all arbitrations when "site" of arbitration is India. Even if arbitration is b/w 2 foreign firms governed by foreign law, but site of arbitration is India, Part I will apply & arbitration will be regarded "domestic." What distinguishes it from a domestic arbitration?

TABLE: 4 WHETHER LAW RELATING TO DOMESTIC ARBITRATION AND INTERNATIONAL ARBITRATION SHOULD BE SEPARATED IN TWO DIFFERENT STATUTES?

		FREQUENCY	PERCENT	VALID %	CUMULATIV %
Valid	Yes	129	89.58	89.6	89.6
	No	15	10.42	10.4	100.0
	Total	144	100.0	100.0	

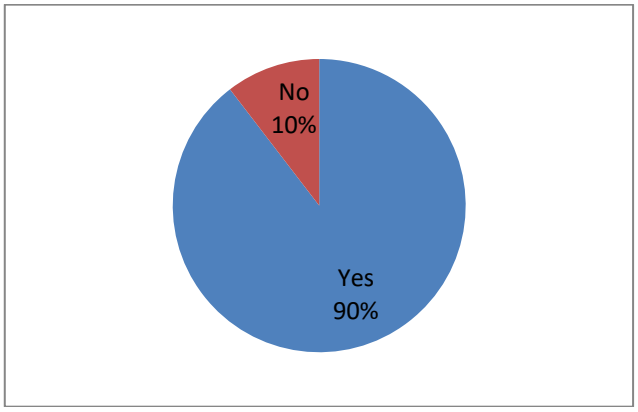

FIG. 4 RESPONDENT PERCENTAGE

INTERPRETATION

After analysis of data collected through the questionnaire for the above mentioned question, there were a majority of respondents were in positive opinion that, there should be law relating to domestic arbitration & International Arbitration should be separated in two different statutes. Around 90 percent respondents were in the favor that, due to the certain issues and most disputed issues relating to domestic as well international arbitration there should be separate law for both. Whereas around 10 percent respondents not in the favor in the division of domestic and international nature of arbitration.

INVESTOR'S PROTECTION IN INDIA, SPECIALLY FROM TRADE RELATING LEGAL ISSUES

Investor grievance redressal mechanisms & foreign investor protection go hand in hand. If there is a transparent, time-bound, easier, & simpler grievance redressal mechanism in place for foreign investors, their protection will be automatically ensured, & they will be able to park their investments in Indian capital markets, contributing to economic development by channelling their savings into investments & facilitating capital formation in economy. The grievances of foreign investors, their redressal under Indian arbitration law always been as challenges for foreign investors. Basically issues relating to enforcement of an foreign award.

Foreign investing is not same as regular commerce. Trading is often defined as one-time exchange of products & money. Investing in a foreign nation, on other hand, is predicated on a long-term connection b/w investor & country where investment is made ("host state").

TABLE: 5 DO YOU AGREE THAT ARBITRATION & CONCILIATION ACT, 1996 HAS FAILED TO FULFILL ITS ONE OF THE MAIN OBJECTS TO ATTRACT THE FOREIGN INVESTORS TO SETTLE THEIR DISPUTE IN INDIA?

		FREQUENCY	PERCENT	VALID %	CUMULATIV %
Valid	Yes	126	84.6	84.6	84.6
	No	11	7.4	7.4	91.9
	Can't Say	12	8.1	8.1	100
	Total	149	100	100	

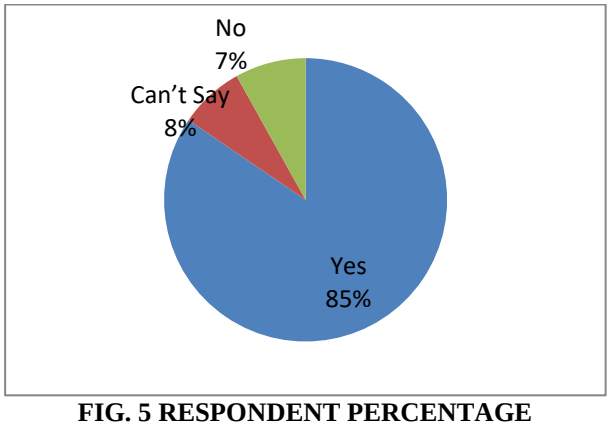

FIG. 5 RESPONDENT PERCENTAGE

INTERPRETATION

After statistical analysis of data collected through the questionnaire for the above mentioned question, there were a majority of respondents were in the positive opinion that that Arbitration & Conciliation Act, 1996 has failed to fulfill its one of the main objects to attract the foreign investors to settle their disputes in India. Around 85 percent respondents were in the favor that, after the major amendments in new arbitration law an effort has

been made to solve the legal issues relating to cross border investment. Whereas around 7 percent respondents denied this argument as well, because of some lack of awareness or having less faith in ADR system around 8 percent were in the opinions that they can‘t predict the future effectiveness of new arbitration law for foreign investors in India.

INDIA AS A HUB FOR INTERNATIONAL COMMERCIAL ARBITRATION

To make arbitration in India even less likely, certain well-known global arbitral institutions, such as International Chamber of Commerce (ICC) Paris, London Court of International Arbitration, and Singapore International Arbitration Centre, are aggressively setting up offices in India & offering their services locally. The size of business dispute pie in India is so large that every international arbitral institution wants a piece of it and is more than prepared to go additional mile to woo Indian enterprises.

To make India centre of international commercial arbitration, government, legal profession, & corporate India must work together. Foreign corporations would choose India as their preferred location only if atmosphere for conducting international commercial1 arbitration in India is conducive to commerce. Despite efforts to have the necessary adjustments to arbitration legislation authorised by legislature, government will be unable to do so on its own. Full support from enterprises and the legal community is required, which can only be accomplished on basis of simply commercial and realistic factors, rather than nationalism, patriotism, or protectionism.

TABLE: 6 WHETHER ESTABLISHMENT OF INTERNATIONAL CENTRE FOR DISPUTES RESOLUTION BY GOVERNMENT OF INDIA TURNED INTO A HUB FOR INTERNATIONAL COMMERCIAL ARBITRATION?

		FREQUENCY	PERCENT	VALID %	CUMULATIV %
Valid	Yes	97	65.1	65.1	65.1
	No	17	11.4	11.4	76.5
	Can’t Say	35	23.5	23.5	100.0
	Total	149	100.0	100.0	

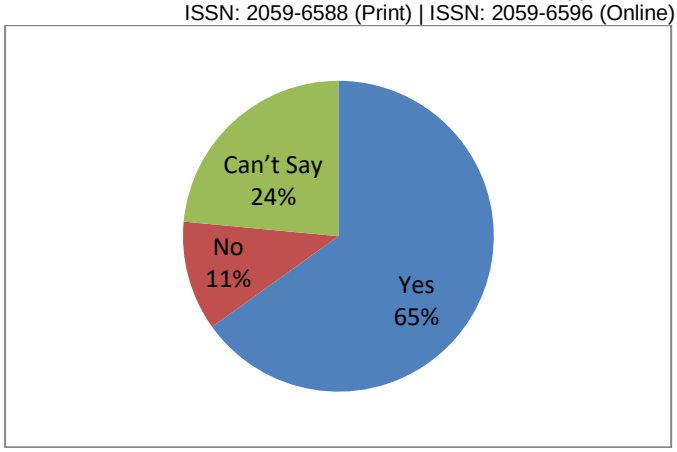

FIG. 6 RESPONDENT PERCENTAGE

INTERPRETATION

After critical analysis of data collected through the questionnaire for the above mentioned question, there were a majority of respondents were in positive opinion that that establishment of International Centre for disputes resolution by Government of India turned into a hub for International Commercial arbitration. Around 65 percent respondents were in the favor that, after the establishment of International Centre for disputes resolution by Government of India turned into a hub for International Commercial arbitration. Whereas around 11 percent respondents denied this argument as well, because of some lack of awareness or having less faith in Indian arbitration system around 24 percent were in the opinions that they can‘t predict the future effectiveness of ICA in India.

THE BALCO JUDGMENT A NEW HOPE FOR ICA IN INDIA

The Arbitration and Conciliation Act of 1996 (the "Act") is broken into four sections. 1 The first section of Act ("Part I") deals with arbitrations held in India and enforcement of such1awards; second section ("Part II") deals with enforcement of1foreign arbitral1awards. The subject of whether provisions of Part I of Act apply to international arbitrations held outside India has been considered several times by the Supreme Court of India ("Supreme Court") and different High Courts.

The Supreme Court ruled in Bhatia International vs Bulk Trading SA ("Bhatia International") that provisions of Part I of Act apply to all arbitrations, including international commercial arbitrations performed outside India, unless parties expressly or tacitly restrict their application. However, in case of Bharat Aluminium

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Co. v. Kaiser Aluminium Technical Services Inc ("BALCO"), the Supreme Court's constitution bench dismissed Bhatia International & determined that requirements of Part I of Act would only apply to arbitrations held in India.

Bhatia International has been heavily chastised for judicial overreach & for causing substantial doubt & delay in arbitrations held outside of India. As a result, when BALCO appeared before a two-judge Supreme Court bench, they referred case to Constitution bench in order to rectify harm created by Bhatia International. The five-judge panel resolved the law on application of Part I of Act's provisions to arbitrations held outside India by declaring Part I inapplicable to international arbitrations. The following are Supreme Court's important conclusions in BALCO:

- In respect of territorial concept, legislature has enacted that Part I of Act applies to arbitrations with their place/seat in India.
- The deletion of term "only" from Section 2(2) of Act has no effect on section's text, which limits applicability of Part I of Act to arbitrations with a place/seat in India. It would not apply to arbitrations held outside of India.
- According to interpretation of Section 2(1)(e), two courts have jurisdiction to adjudicate a dispute, namely court whose jurisdiction cause of action is located and courts where arbitration takes place.
- When seat of arbitration is located outside of India, Indian courts do not have authority to award interim relief.
- Foreign arbitral awards would be susceptible to Indian court jurisdiction only if they were sought to be enforced in India in conformity with requirements of Part II of the Act.

The court went on to clarify that agreeing to have Indian Laws regulate arbitration laws does not make Part I applicable to case. Even if the substantive law of arbitration is Indian Law, but arbitration takes place outside of India, Indian courts will be barred from hearing the case.

As a result, it prospectively overturned Bhatia International & Venture Global, holding that legislation established in Bhatia International and Venture Global will only apply to agreements entered into prior to September 6, 2012.

TABLE 7 WHETHER JUDGMENT IN BHARAT ALUMINUM CO. LTD. V. KAISER ALUMINUM TECHNICAL SERVICE INC (BALCO), (2012) 9 SCC 649, HAS REMOVED AMBIGUITY RELATING TO APPLICATION FOR PART I & FOR PART II OF THE ARBITRATION AND CONCILIATION ACT, 1996?

		FREQUENCY	PERCENT	VALID %	CUMULATIV %
Valid	Yes	99	66.4	66.4	66.4
	No	7	4.7	4.7	71.1
	Can't Say	38	25.5	25.5	96.6
	Don't Know	5	3.4	3.4	100
	Total	149	100	100	

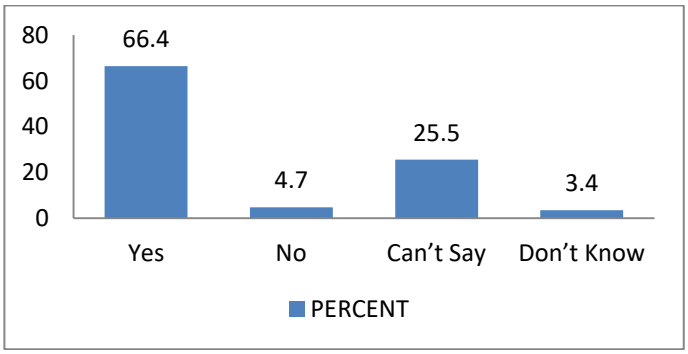

FIG.5.8 REPONDENT PERCENTAGE

INTERPRETATION

After the analysis of response collected through the questionnaire for the above mentioned question, there were a majority of respondents were in positive opinion that judgment of BALCO case is really a remarkable step to remove the ambiguity relating to application of part I and application of part II in certain cases Around 66 percent respondents were in the opinion that, after this judgment the issue relating to applicability of Part I in international commercial disputes may remove and clear. On the same hand around 5 percent respondents were not satisfy with this statement. Whereas, because of some lack of awareness or having less faith in Indian arbitration system around 26 percent were in the opinions that they can't say about the future prospect of the said decision as well 3 percent respondents were unaware about this decision.

CONCLUSIONS

After the detail analysis of assumption that Present setup of International commercial arbitration in India, do not sufficient to develop India as a hub for International Commercial, it is evident that there are lots of deficiencies in existing

Indian arbitration law', especially the ambiguities relating to application of provisions of Part I Arbitration and conciliation Act, 1996, for foreign awards in the absence of any mutual agreement for such purposes. That's way the major reform in the light of present International commercial environment, are so required, so that India can be develop as a hub for International commercial arbitration.

The analytical research was primarily concerned with the guidelines of the BALCO ruling and the recent revisions to the Arbitration & Conciliation (Amendments) Act, 2015. The former requires certain tangible adjustments to current laws, and even after this amendment, the laws are not capable of resolving these concerns when the latter is comprehensively altered. As a result, it has been determined that there should be robust and codified legislation in place to control matters involving international commercial arbitration in India.

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