

CDDRL

WORKING PAPERS

Number 103
October 2009

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Paper prepared for the Law and Economy in India Project at the Center on Democracy, Development, and The Rule of Law.

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DEVELOPMENT AND PRACTICE OF ARBITRATION IN INDIA – HAS IT EVOLVED AS AN EFFECTIVE LEGAL INSTITUTION?

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INTRODUCTION

The significant increase in the role of international trade in the economic development of nations over the last few decades has been accompanied by a considerable increase in the number of commercial disputes as well. In India too, rapid globalization of the economy and the resulting increase in competition has led to an increase in commercial disputes. At the same time, however, the rate of industrial growth, modernization, and improvement of socio-economic circumstances has, in many instances, outpaced the rate of growth of dispute resolution mechanisms. In many parts of India, rapid development has meant increased caseloads for already overburdened courts, further leading to notoriously slow adjudication of commercial disputes.¹ As a result, alternative dispute resolution mechanisms, including arbitration, have become more crucial for businesses operating in India as well as those doing businesses with Indian firms.

Keeping in mind the broader goal of exploring links between the quality of legal performance and economic growth, this paper is an attempt to critically evaluate arbitration in India as a legal institution. To this end, this paper presents an empirical inquiry into the state of arbitration, as well as a more theoretical examination of the political economy and arbitration as developed and practiced in India. In sum, although the huge influx of overseas commercial transactions spurred by the growth of the Indian economy has resulted in a significant increase of commercial disputes, arbitration practice has lagged behind. The present arbitration system in India is still plagued with many loopholes and shortcomings, and the quality of arbitration has not adequately developed as a quick and cost-effective mechanism for resolution of commercial disputes.

¹ Nearly 30 million cases pending in courts (www.rtiindia.org).

In this paper, the evolution of arbitration law and practice in India has been explored. Part I of this paper lays out the basics of arbitration in India, with a brief discussion of its history, the statutes that govern arbitration, the types of arbitration practiced, the enforcement of arbitral awards, and the costs of arbitration as compared to those of litigation. Part II explores the working of arbitration in India, while Part III is a critical analysis of the success of arbitration under the 1996 Act. Part IV briefly examines arbitration practice across regions, and the relationship between arbitration and commercial growth. Finally, Part V offers a series of recommendations for improving arbitration practice in India.

I. ARBITRATION IN INDIA: THE BASICS

A. A Brief History of Arbitration Law in India

Arbitration has a long history in India. In ancient times, people often voluntarily submitted their disputes to a group of wise men of a community—called the *panchayat*—for a binding resolution.²

Modern arbitration law in India was created by the Bengal Regulations in 1772, during the British rule. The Bengal Regulations provided for reference by a court to arbitration, with the consent of the parties, in lawsuits for accounts, partnership deeds, and breach of contract, amongst others.³

Until 1996, the law governing arbitration in India consisted mainly of three statutes: (i) the 1937 Arbitration (Protocol and Convention) Act, (ii) the 1940 Indian Arbitration Act, and (iii) the 1961 Foreign Awards (Recognition and Enforcement) Act.⁴ The 1940 Act was the

² K Ravi Kumar, 'Alternative Dispute Resolution in Construction Industry', *International Council of Consultants (ICC) papers*, www.iccindia.org, at p 2. K Ravi Kumar is assistant executive engineer, Salarjung Museum, Hyderabad.

³ *ibid.*

⁴ *Ibid.*

general law governing arbitration in India along the lines of the English Arbitration Act of 1934, and both the 1937 and the 1961 Acts were designed to enforce foreign arbitral awards (the 1961 Act implemented the New York Convention of 1958).⁵

The government enacted the Arbitration and Conciliation Act, 1996 (the 1996 Act) in an effort to modernize the outdated 1940 Act. The 1996 Act is a comprehensive piece of legislation modeled on the lines of the UNCITRAL Model Law. This Act repealed all the three previous statutes (the 1937 Act, the 1961 Act and the 1940 Act).⁶ Its primary purpose was to encourage arbitration as a cost-effective and quick mechanism for the settlement of commercial disputes.⁷ The 1996 Act covers both domestic arbitration and international commercial arbitration.

B. The Arbitration Act, 1940

The Arbitration Act, 1940, dealt with only domestic arbitration. Under the 1940 Act, intervention of the court was required in all the three stages of arbitration, i.e. prior to the reference of the dispute to the arbitral tribunal, in the duration of the proceedings before the arbitral tribunal, and after the award was passed by the arbitral tribunal. Before an arbitral tribunal took cognizance of a dispute, court intervention was required to set the arbitration proceedings in motion. The existence of an agreement and of a dispute was required to be proved. During the course of the proceedings, the intervention of the court was necessary for the extension of time for making an award. Finally, before the award could be enforced, it was required to be made the rule of the court.

While the 1940 Act was perceived to be a good piece of legislation in its actual operation and implementation by all concerned - the parties, arbitrators, lawyers and the courts, it proved to be ineffective and was widely felt to have become outdated.⁸

⁵ The New York Convention of 1958, i.e. the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, is one of the most widely used conventions for recognition and enforcement of foreign awards. It sets forth the procedures to be used by all signatories to the Convention. This Convention was first in the series of major steps taken by the United Nation since its inception, to aid the development of international commercial arbitration. The Convention became effective on June 7, 1959.

⁶ The 1996 Act, Section 85.

⁷ Justice Ashok Bhan in his inaugural speech delivered at the conference on 'Dispute Prevention and Dispute Resolution' held at Ludhiana, India, October 8, 2005.

⁸ Arbitration and Conciliation Act, 1996, Statement of Objects and Reasons.

C. The Arbitration and Conciliation Act, 1996

The 1996 Act, which repealed the 1940 Act, was enacted to provide an effective and expeditious dispute resolution framework, which would inspire confidence in the Indian dispute resolution system, attract foreign investments and reassure international investors in the reliability of the Indian legal system to provide an expeditious dispute resolution mechanism.

The 1996 Act has two significant parts – Part I provides for any arbitration conducted in India and enforcement of awards thereunder. Part II provides for enforcement of foreign awards. Any arbitration conducted in India or enforcement of award thereunder (whether domestic or international) is governed by Part I, while enforcement of any foreign award to which the New York Convention or the Geneva Convention applies, is governed by Part II of the 1996 Act.

The 1996 Act contains two unusual features that differed from the UNCITRAL Model Law. First, while the UNICITRAL Model Law was designed to apply only to *international* commercial arbitrations,⁹ the 1996 Act applies both to *international* and *domestic* arbitrations. Second, the 1996 Act goes beyond the UNICITRAL Model Law in the area of minimizing judicial intervention.¹⁰

The changes brought about by the 1996 Act were so drastic that the entire case law built up over the previous fifty-six years on arbitration was rendered superfluous.¹¹ Unfortunately, there was no widespread debate and understanding of the changes before such an important legislative change was enacted.¹² The Government of India enacted the 1996 Act by an

⁹ See Article 1 of the UNICITRAL Model Law.

¹⁰ S K Dholakia, 'Analytical Appraisal of the Arbitration and Conciliation (Amendment) Bill, 2003', *ICA's Arbitration Quarterly*, ICA, New Delhi, 2005 vol. XXXIX/No.4 at page 3. S K Dholakia is a Member of ICC International Court of Arbitration and Senior Advocate, Supreme Court of India.

¹¹ (1999) 2 SCC 479 (Sundaram Finance vs. NEPC Ltd.). The Supreme Court held at p 484 thus: 'The provisions of this Act (the 1996 Act) have, therefore, to be interpreted and construed independently and in fact reference to the 1940 Act may actually lead to misconstruction.'

¹² *supra*, note 10.

ordinance, and then extended its life by another ordinance, before Parliament eventually passed it without reference to a Parliamentary Committee—a standard practice for important enactments.¹³ In the absence of case laws and general understanding of the Act in the context of international commercial arbitration, several provisions of the 1996 Act were brought before the courts, which interpreted the provisions in the usual manner.¹⁴

The Law Commission of India prepared a report on the experience of the 1996 Act and suggested a number of amendments.¹⁵ Based on the recommendations of the Commission, the Government of India introduced the Arbitration and Conciliation (Amendment) Bill, 2003, in Parliament for amending the 1996 Act.¹⁶ It has not been taken up for consideration. In the meantime, Government of India, the Ministry of Law and Justice, constituted a Committee popularly known as the ‘Justice Saraf Committee on Arbitration’, to study in depth the implications of the recommendations of the Law Commission of India contained in its 176th Report and the Arbitration and Conciliation (Amendment) Bill, 2003. The Committee submitted its report in January 2005.

II. WORKING OF ARBITRATION IN INDIA

Arbitration in India is still evolving. One of the objectives of the 1996 Act was to achieve the twin goals of cheap and quick resolution of disputes, but current ground realities indicate that these goals are yet to be achieved. The ground realities can be ascertained from the study and analysis of the various aspects in conducting arbitration, which are discussed in the following paragraphs.

A. Types of Arbitration Practice - Institutional Arbitration and Ad Hoc Arbitration

¹³ supra, note 10.

¹⁴ supra, note 10.

¹⁵ The full report of the 176th Report of the Law Commission of India can be downloaded from www.lawcommissionofindia.nic.in.

¹⁶ The Arbitration and Conciliation (Amendment) Bill, 2003 was introduced in Parliament on December 22, 2003. It is available on the website www.lawmin.nic.in.

Arbitrations conducted in India are mostly ad hoc. The concept of institutional arbitration, though gradually creeping in the arbitration system in India, has yet to make an impact. The advantages of institutional arbitration over ad hoc arbitration in India need no emphasis and the wide prevalence of ad hoc arbitration has its ramifications in affecting speedy and cost-effectiveness of the arbitration process.

There are a number of advantages of institutional arbitration over ad hoc arbitration in India, some of which are discussed below:

- In ad hoc arbitration, the procedures have to be agreed upon by the parties and the arbitrator. This requires co-operation between the parties and involves a lot of time. When a dispute is in existence, it is difficult to expect cooperation among the parties. In institutional arbitration, on the other hand, the procedural rules are already established by the institution. Formulating rules is therefore no cause for concern. The fees are also fixed and regulated under rules of the institution.
- In ad hoc arbitration, infrastructure facilities for conducting arbitration pose a problem and parties are often compelled to resort to hiring facilities of expensive hotels, which increase the cost of arbitration. Other problems include getting trained staff and library facilities for ready reference. In contrast, in institutional arbitration, the institution will have ready facilities to conduct arbitration, trained secretarial/administrative staff, as well as library facilities. There will be professionalism in conducting arbitration.
- In institutional arbitration, the arbitral institutions maintain a panel of arbitrators along with their profile. The parties can choose the arbitrators from the panel. Such arbitral institutions also provide for specialized arbitrators. These advantages are not available to the parties in ad hoc arbitration.
- In institutional arbitration, many arbitral institutions such as the International Chamber of Commerce (ICC) have an experienced committee to scrutinize the arbitral awards. Before the award is finalized and given to the parties, the experienced panel scrutinizes it. As a result, the possibilities of the court setting aside the award is minimal, because

the scrutiny removes possible legal/technical flaws and defects in the award. This facility is not available in ad hoc arbitration, where the likelihood of court interference is higher.

- In institutional arbitration, the arbitrators are governed by the rules of the institution, and they may be removed from the panel for not conducting the arbitration properly. In ad hoc arbitration, the arbitrators are not subject to such institutional removal sanctions.
- In the event the arbitrator becomes incapable of continuing as arbitrator in an institutional arbitration, substitutes can be easily located and the procedure for arbitration remains the same. This advantage is not available in an ad hoc arbitration, where one party (whose nominee arbitrator is incapacitated) has to re-appoint the new arbitrator. This requires co-operation of the parties and can be time consuming.
- In institutional arbitration, as the secretarial and administrative staffs are subject to the discipline of the institution, it is easy to maintain confidentiality of the proceedings. In ad hoc arbitration, it is difficult to expect professionalism from the secretarial staff.

In spite of the numerous advantages of institutional arbitration over ad hoc arbitration, there is currently an overwhelming tendency in India to resort to ad hoc arbitration mechanisms. This tendency is counter productive, since there is considerable scope for parties to be aggrieved by the functioning of ad hoc tribunals. An empirical survey will reveal that a considerable extent of litigation in the lower courts deals with challenges to awards given by ad hoc arbitration tribunals.¹⁷

Some of the arbitral institutions in India are the Chambers of Commerce (organized by either region or trade), the Indian Council of Arbitration (ICA), the Federation of Indian Chamber of Commerce and Industry (FICCI), and the International Centre for Alternate Dispute Resolution (ICADR).

¹⁷ Inaugural address by Justice K G Balakrishnan, Chief Justice of India, on International Conference on 'Institutional Arbitration in Infrastructure and Construction', New Delhi, October 16, 2008.

B. Arbitration Practice Across Industries

Generally speaking, unlike in Europe, where the manner of settling disputes has substantially evolved separately across various industry sectors, there is no marked difference in arbitration practice from one industry to another in India. The exceptions to this rule, however, are the construction industry and the IT industry. Due to the technical complexities and long term nature of relationships between parties in these industries, arbitration in construction and IT industry disputes are characterized by certain peculiarities quite distinct from other industries.

The growth in the infrastructure and the IT industry in India is a recent development, and a result of the globalization of the Indian economy. An important secondary effect of this development is that arbitration has also streamlined a sector-specific approach to cater to the technicalities and specific requirements of such specific sectors.

1. Arbitration in the construction industry

Construction/infrastructure is one of the fastest growing sectors of the Indian economy, and millions of dollars are spent in construction related disputes. According to a survey conducted in 2001 by the Construction Industry Development Council, the amount of capital blocked in construction sector disputes was over INR 540,000 million.¹⁸ Ad hoc arbitration is still very popular in the construction industry.

Arbitration in the construction industry has a unique feature, which is quite distinct from the general arbitration practice¹⁹ seen in other industries.

1.1 Standard Contracts of Central and State Governments and Industry Giants

¹⁸ *The Economic Times*, April 10, 2008.

¹⁹ Alfred Arthur Hudson and Ian Norman Duncan Wallace, *Hudson's Building and Engineering Contracts*, 11th Edition, Sweet and Maxwell, U.K., 2003. It says in Hudson's *Building and Engineering Contracts* "it does not seem to be appreciated by many arbitrators that construction contracts give rise to disputes of unusual difficulty and complexity even by comparison with other types of litigation...and...performance of contracts runs over much longer periods than most other forms of commercial contract, with potential scope of argument and financial disagreement arising constantly during the construction period, and with large sums of money and cash flow pressures involved on both sides." Hudson is the recognized text on the interpretation and drafting of Building and Engineering Contracts.

Over the last four decades in India, there has been a great deal of construction activity both in the public and private sectors. Central and state governments; state instrumentalities; and public and private companies have all been entering into contracts with builders as part of their commercial activities. The rights and obligations, privies and privileges of the respective parties are formally written. The central and state governments and instrumentalities of the states, as well as private corporations, have their own standard terms of contract, catering to their individual needs. Often, these contracts provide for remedial measures to meet various contingencies.

Despite these extensive and time-tested contracts, disputes and differences often arise between the parties. To meet these situations, arbitration clauses are provided in the contract themselves, generally covering either all disputes arising from the contract or all disputes save a few ‘excepted matters.’

1.2 Unique Features of Arbitration in the Construction Industry

In the standard forms adopted by the government departments like the Central Public Works Department (CPWD), Military Engineer Services (MES),²⁰ railways and public enterprises, although an arbitration clause may include within its purview all the possible disputes relating to the transaction, there are exemption clauses or exclusion clauses that make the decision of an authority named in the agreement, final and binding on the parties. These clauses are included, because in construction contracts, situations arise for which immediate decisions on a point of difference or dispute is required to avoid costly delays. In these situations, the ‘excepted matters’ or ‘exclusion clauses,’ make the decision of a particular authority final and binding on both the parties, and not subject to arbitration.

There has been a series of judicial decisions, which have held that if a particular matter has been excluded from the purview of arbitration incorporating excepted matter clause/exclusion clause, the same shall not be re-agitated in arbitration. In *Food Corporation of*

²⁰ Military Engineer Services (MES) is one of the largest government construction agencies in India and provides works cover to army, navy and air force.

India vs. Sreekanth Transport,²¹ the Supreme Court held that ‘excepted matters’ do not require any further adjudication, since the agreement itself provides a named adjudicator, and concurrence by the parties to the decision of the named adjudicator is obviously presumed by reason of unequivocal acceptance of the terms of the contract of the parties.

‘Exception’ can also operate differently. There may be certain clauses in the contract which empower either the engineer-in-charge or the consultant to take an on-the-spot decision regarding points of difference between the builder and the employer. Such clauses also provide a right of appeal to a superior officer within a particular time, and impose a liability on the officer to give a decision within a stipulated time. The clause further provides reference of the matter to arbitration, in case one of the parties is not satisfied with such decision, or if the officer does not render a decision. However, the provision expressly provides that if none of the parties opt for the choice to refer the matter to arbitration within the time limit thus prescribed, the decision last rendered shall be treated as final and binding upon both the parties.

1.3 Dispute Review Board in the Construction Industry

The concept of a Dispute Review Board (DRB) is quite common in the construction industry. The DRB is a panel of three experienced, respected and impartial reviewers. The DRB is organized before construction begins and meets periodically at the job site. The DRB members are kept abreast of the developments and progress in the job, and made familiar with the project procedures and the participants, and are provided with the contract plans and specifications.

The DRB meets with the employer and the contractor representatives during regular site visits, and encourages the resolution of disputes at the job level. The DRB process helps the parties to solve problems before they escalate into major disputes.

The proceedings of the DRB can be brought as evidence before an arbitral tribunal or other judicial forum. The board members could also be presented as witnesses. Recommendations

²¹ (1999) 4 SCC 491.

made by the three experts known for their reputation, accepted by both the parties at the start of the work as neutral persons and having thorough knowledge of the project will not normally be changed by any such tribunal.²² It would therefore become difficult to go against the tribunal. On this consideration, due acceptance is given to the system world wide, and almost no case goes up to arbitration.²³

The statistics up to the year 2001 indicate that there were 818 projects with DRBs valued at US \$ 41 billion; and that during that year, 1221 disputes were settled by the DRBs, and out of 1038 recommendations made, only 31 were taken by the parties to the arbitral tribunal.²⁴

1.4 Specialized Arbitral Institutions in the Construction Industry

In India, substantial sums amounting to several crores of Indian rupees (INR) are locked up in contractual disputes in the construction sector alone.²⁵ Therefore, the construction industry felt the need to introduce new measures to resolve disputes in a fair, speedy and cost-efficient manner. Due to such requirements, the Construction Industry Development Council, India (CIDC), in cooperation with the Singapore International Arbitration Centre (SIAC), set up an arbitration centre in India called the Construction Industry Arbitration Council (CIAC).²⁶ This type of institution-administered arbitration has clear advantages over ad hoc arbitrations for construction companies, public sector undertakings and government departments that have construction contracts.

2. Arbitration in the Information Technology (IT) Industry

IT disputes differ from disputes in other industries mostly in their substance. IT projects tend to be complex and characterized by a network of responsibilities shared between parties

²² O P Goel, 'Role of Dispute Resolution Boards', *ICA's Arbitration Quarterly*, ICA, New Delhi, 2006, vol. XL/No.4., p14. O P Goel is the former Director General in the Civil Public Works Department (Works).

²³ *ibid.*

²⁴ Brief report from the DRB Foundation Forum Papers.

²⁵ *The Economic Times*, April 10, 2008.

²⁶ CIAC is a Registered Society with its headquarters in New Delhi. Arbitration under the auspices of the CIAC has the following features: (i) tight timelines for appointment of arbitrators and for rendering of the award; (ii) trained arbitrators consisting of professionals from the construction industry as well as the legal fraternity; (iii) strict codes of ethics for arbitrators; (iv) transparent management of arbitrator's fees; (v) published scales of fees; (vi) monitoring of the progress of the cases by the Secretariat of the CIAC; and (vii) arrangement of facilities and services for hearings.

that are dedicated to carry through a technology-related, long term relationship. Thus, IT disputes typically center on contractual or intellectual property (IP) law issues.

The Indian Council of Arbitration (ICA), which is now considered to be an apex arbitral institution in the country, has started the process of identifying and training specialized arbitrators for disputes connected with the IT industry. In relation to this aspect, the ICA conducted an in-depth seminar on Alternate Dispute Redressal methods for the IT sector in India's major cyber cities like Bangalore and Hyderabad for the purpose of creating an expert pool of arbitrators specialized in cyber laws.

C. Arbitration Practice by Industry Size

There is no marked difference in the arbitration practice based upon the size of the industry. There is a growing recognition that arbitration is becoming a costly affair, which is a departure from the intent of the 1996 Act. This is particularly true in ad hoc arbitration, where the fees of the arbitrators are not regulated, but decided by the arbitral tribunal with the consent of the parties. Some of the arbitral tribunals, consisting of high profile arbitrators such as retired Supreme Court and High Court judges, charge high arbitration fees. Further, it is an emerging trend amongst large corporations involved in high-stake commercial disputes—including government undertakings—to hold ad hoc arbitrations in five-star hotels and other costly venues. Although this cannot be a conclusion that applies to all large corporations, it can reasonably be argued that only such corporations can afford costly arbitration. Thus, in some cases at least, the larger the parties, the costlier will be the arbitration. The reason could be that in ad hoc arbitration, the venues and court fees are decided by arbitrators with the consent of the parties. A large company is assumed to have better funds for incurring these expenses.

D. Fast Track Arbitrations

Establishment of fast track arbitrations is a recent trend aimed at achieving timely results, thereby lowering the costs and difficulties associated with traditional arbitration. Fast track

arbitration is a time-bound arbitration, with stricter rules of procedure, which do not allow any laxity or scope for extensions of time and the resultant delays, and the reduced span of time makes it more cost-effective.²⁷

Fast track arbitration is required in a number of disputes such as infringement of patents/trademarks, destruction of evidence, marketing of products in violation of patent/trademark laws, construction disputes in time-bound projects, licensing contracts, and franchises where urgent decisions are required.

The 1996 Act has built-in provisions for fast track arbitration. Section 11(2) of the 1996 Act provides that the parties are free to agree on a procedure for appointing an arbitrator. Theoretically, under Section 11(6) of the 1996 Act,²⁸ a party does not have to approach a court for appointment of an arbitrator, if the agreement provides for a mechanism to deal with the failure of the other party to appoint the arbitrator. Thus, the parties are given complete autonomy in choosing the fastest possible method of appointing an arbitrator, and constituting a valid arbitral tribunal. Section 13(1) confers the freedom on parties to choose the fastest way to challenge an arbitral award. Section 13(4) expedites arbitral proceedings by providing that if a challenge to an arbitral proceeding is not successful, the arbitral tribunal shall continue proceedings and pass an award. Section 23(3) of the 1996 Act enables parties to fix time limits for filing of claims, replies and counter claims. Section 24(1) also permits the parties to do away with the requirement of an oral hearing, if they so desire. More importantly, Section 25 authorizes an arbitral tribunal to proceed ex parte in the event of default of a party. Section 29 even empowers the presiding arbitrator to decide questions of procedure.²⁹

As a premier Indian organization for institutionalized arbitration, the Indian Council of Arbitration (ICA) has pioneered the concept of fast track arbitration in India. Under the rules of the ICA, before commencement of the arbitration proceedings, parties may request

²⁷ Fast track arbitrations are best suited in those cases in which oral hearings and witnesses are necessary.

²⁸ Section 11(6) of the Arbitration and Conciliation Act, 1996, provides for appointment of an arbitrator by the parties in case of failure by the parties to appoint the arbitrators.

²⁹ Indu Malhotra, 'Fast Track Arbitration', *ICA's Arbitration Quarterly*, ICA, 2006, vol. XLI/No.1 at p 8
Indu Malhotra is an advocate of the Supreme Court of India.

the arbitral tribunal to settle disputes within a fixed timeframe of three to six months or any other time agreed upon by the parties. The Arbitration and Conciliation (Amendment) Act, 2003, proposes to introduce a single-member fast track arbitral tribunal, wherein filing of pleadings and evidence will be on fast track basis, so as to pronounce an award within six months, and will also specify the procedures to be followed by such fast track arbitral tribunals.

III. A CRITICAL ANALYSIS OF THE SUCCESS OF ARBITRATION UNDER THE 1996 ACT

The 1996 Act was brought on the statute book as the earlier law, the 1940 Act, did not live up to the aspirations of the people of India in general, and the business community in particular.³⁰ Even though the 1996 Act was enacted to plug the loopholes of 1940 Act, the arbitral system that evolved under it led to its failure. The main purpose of the Act was to provide a speedy and efficacious dispute resolution mechanism to the existing judicial system, marred with inordinate delays and backlog of cases. But an analysis of the arbitration system, as practiced under the 1996 Act, reveals that it failed to achieve its desired objectives.

A. Speedy Justice

Arbitration in India is rampant with delays that hamper the efficient dispensation of dispute resolution. Though the 1996 Act confers greater autonomy on arbitrators and insulates them from judicial interference, it does not fix any time period for completion of proceedings. This is a departure from the 1940 Act, which fixed the time period for completion of arbitration proceedings. The time frame for completion of the arbitration proceedings was done away with, on the presumption that the root cause of delays in arbitration is judicial interference, and that granting greater autonomy to the arbitrators would solve the problem. However, the reality is quite different. Arbitrators, who are mostly retired judges, usually

³⁰ Professor Anurag Agarwal, 'Resolving Business Disputes in India by Arbitration: Problems due to the Definition of 'Court'', *Indian Institute of Management, Ahmedabad*, 2008 at p10.

treat the arbitration proceedings in the same manner as traditional litigations, and are willing to give long and frequent adjournments, as and when sought by the parties.³¹

Although the scope of judicial intervention under the 1996 Act has been curtailed to a great extent, courts through judicial interpretation, have widened the scope of judicial review, resulting in the admission of large number of cases that ought to be dismissed at the first instance. Moreover, the parties usually approach arbitration with a similar mindset as for litigation, with the result that awards invariably end up in courts, increasing the timeframe for resolution of the disputes. Parties also abuse the existing provision that allows ‘automatic stay’ of the execution of the awards on mere filing of an application for challenge of the awards. So, the objective of arbitration as a mechanism for speedy resolution of disputes gets obstructed due to obtrusive delays.

B. Cost-Effectiveness

Arbitration is generally considered cheaper over traditional litigation, and is one of the reasons for parties to resort to it. However, the ground realities show that arbitration in India, particularly ad hoc arbitration, is becoming quite expensive vis-à-vis traditional litigation. A cost analysis on arbitration vis-à-vis litigation will throw light on the higher cost of arbitration over litigation. This is a crucial factor which weighs against developing a cost-effective quality arbitration practice in India. The following paragraphs analyze the cost of arbitration and litigation.

1. The Cost of Arbitration

Arbitration costs incurred by the parties may include the arbitrator’s fees, rent for arbitration venues, administrative/clerical expenses, and professional fees for the representatives of the parties (which may include lawyers and expert witnesses). The sum of these fees may differ significantly between ad hoc and institutional arbitrations.

³¹ supra, note 29.

There is no regulated fee structure for arbitrators in an ad hoc arbitration. The arbitrator's fees are decided by the arbitrator with the consent of the parties. The fee varies approximately from INR 1000.00 to INR 50,000.00 per hearing for an arbitrator, depending upon the professional standing of the arbitrator and the size of the claim. The number of hearings required and the cost of the arbitral venue vary widely.

In contrast, most institutional arbitration bodies in India, such as the Indian Council of Arbitration (ICA) or the Construction Industry Arbitration Council (CIAC), have their own schedules for arbitrators' fees and administrative fees, based on claim amounts. They also charge a nominal non-refundable registration fee on the basis of the claim amount. For example, the ICA's arbitrators' fees vary from INR 30,000.00 to INR 315,000.00 for claim amounts upto INR 10,000,000.00, while administrative fees vary from INR 15,000.00 to INR 160,000.00 for claim amounts upto INR 10,000,000.00. For the CIAC, the arbitrators' fees varies from INR 5,000.00 to INR 260,000.00 per arbitrator for claim amounts upto INR 100,000,000.00, and administrative fees varies from INR 2,750.00 to INR 62,000.00 for claim amounts upto INR 100,000,000.00.

2. The Cost of Litigation

The cost involved in court proceedings is limited to lawyers' fees and court fees, which are calculated *ad valorem* on the claim amount or the value of the suit. In case of writ petitions or first appeals, court fees are fixed and are very nominal. High Courts across India have their own schedule, which fixes the rates for court fees. In case of suits, court fees do not generally exceed ten per cent of the claim amount of the suit.³² The only recurring expenditure involved is the professional fees paid to the lawyers. Lawyers are generally paid on a per appearance basis. In addition, separate fees may be charged for drafting of the suits, plaints/petitions, counter affidavits/written statements and interim applications. There is a great variation in the professional fees of the lawyers depending upon the seniority and reputation of the lawyer, the stakes involved, the hierarchy of the competent court deciding the case and the location of the concerned court. It may vary from a meager INR 500.00 per

³² The court fees payable on suit claim differs from state to state.

appearance before a district court in a small town to INR 200000.00 per appearance by senior advocates in the Supreme Court of India.

3. Cost of Arbitration vis-à-vis Cost of Litigation

Although arbitration is considered to be a cheaper mechanism for the settlement of disputes, there is a growing concern in India that arbitration has become a costly affair due to the high fee of the arbitrators and liberal adjournments.³³ This is particularly true for ad hoc arbitrations. Arbitration is more cost-effective than litigation only if the number of arbitration proceedings is limited. The prevalent procedure before the arbitrators is as follows - at the first hearing, the claimant is directed to file his claim statement and documents in support thereof; at the second hearing, the opposing parties are directed to file their reply and documents; at the third hearing, the claimant files his rejoinder. At each of these stages, there are usually at least two or three adjournments. Sometimes, applications for interim directions are also filed by either party, which increases the number of arbitration sittings for deciding such interim applications. The first occasion for considering any question of jurisdiction does not normally arise until the arbitral tribunal has issued at least six adjournments.³⁴

If the respondent is the State or a public sector undertaking, the number of adjournments is higher as it takes more time for these parties in internally finalizing pleadings and documents that are to be filed before the arbitral tribunal. Parties pay a fee to the arbitrators for each hearing and thus spend a substantial amount of money.³⁵ This is in addition to the other costs involved.

In contrast, law suits, if admitted, are certainly cheaper, even though they take substantial amounts of time to resolve. This is because lawyers' fees are the only major expenditure in litigation, and lawyers usually charge the same, if not more, as per litigation hearing.

³³ Samar Bhoite, 'Mediation, a process less practiced in India in Business Disputes Resolution' published in the website www.manupatra.com.

³⁴ Law Commission of India, 176th Report on Arbitration and Conciliation (Amendment) Bill, 2001 at p 68.

³⁵ *ibid.*

Litigation may be more costly in certain cases, because procedural delays add to the cost of settling disputes. That is, the costs associated with management of time and money resources—not to mention keeping plants or production offline—can outweigh the costs of arbitration.

Issues of speed and cost-efficiency are the hallmarks of the arbitration procedure, and are often identified as the core reasons why arbitration very clearly surpasses litigation as a suitable choice for dispute resolution, especially with respect to commercial disputes. However, the prevalent high cost of arbitration in India, as discussed above is a factor that prevents arbitration from being an effective mechanism for resolution of commercial disputes. For this reason, arbitration is not progressing in the manner it should in order to keep pace with the increase in commercial disputes due to the inflow of international as well as commercial transactions.

C. Extent of Judicial Intervention under the 1996 Act

One of the main objectives of the 1996 Act was to give more powers to the arbitrators and reduce the supervisory role of the court in the arbitral process.³⁶ In effect, judicial intervention is common under the 1996 Act. Such intervention takes the form of determination in case of challenge of awards. Such a propensity to exercise their authority to intervene may be attributable to their skepticism that arbitration is not effective at resolving disputes or the judges' vested concern that their jurisdiction will be adversely eroded.³⁷ The decision of the Supreme Court in the *Saw Pipes* case³⁸ exemplifies this inclination, and threatens to hamper arbitration's progress toward speed and efficiency. In this case, the Supreme Court expanded the scope of 'public policy' from the earlier ratio laid down by a three bench judgment in the *Renusagar* case³⁹ and that one of the grounds for challenge of an award under the 1996 Act is violation of 'public policy'. The *Renusagar* case, while respecting the opinion that the definition of 'public policy' ought not to be widened in the greater

³⁶ Arbitration and Conciliation Act, 1996, Statement of Objects and Reasons.

³⁷ Pramod Nair, 'Quo vadis arbitration in India?' *Business Line*, October 19, 2006. Pramod Nair is a Visiting Fellow at the Lauterpatch Research Centre for International Law, University of Cambridge.

³⁸ 2003 (5) SCC 705 and 2005 (8) SCC 618.

³⁹ 1969 (2) SCC 554.

interest of society, has laid down three conditions for setting aside an award which are a violation of

- (a) the fundamental policy of Indian law;
- (b) the interest of India; and
- (c) justice of morality.

In the *Saw Pipes* case, the scope of public policy was widened to include challenge of award when such an award is patently illegal. Some arbitrators have viewed the judgment in the *Saw Pipes* case with concern. The main attack on the judgment is that it sets the clock back to the same position that existed before the 1996 Act, and it increases the scope of judicial intervention in challenging arbitral awards.⁴⁰ It was also criticized on the grounds that giving a wider meaning to the term ‘public policy’ was wrong, when the trend in international arbitrations is to reduce the scope and extent of ‘public policy’.⁴¹ Jurists and experts have opined that unless the courts themselves decide not to interfere, the Arbitration and Conciliation Act, 1996, would meet the same fate as the 1940 Act.⁴² The Parliament, when enacting the 1996 Act and following the UNICITRAL Model Law, did not introduce ‘patent illegality’ as a ground for setting aside an award. The Supreme Court cannot introduce the same through the concept of ‘public policy of India.’⁴³

After the *Saw Pipes* case, some judicial decisions have tried to reign the effect of *Saw Pipes*.⁴⁴ One instance of this is the Supreme Court decision in the case of *McDermott International Inc. vs. Burn Standard Co. Ltd.*,⁴⁵ where the court somewhat read down *Saw Pipes*. In respect of the *Saw Pipes* case, the Supreme Court held:

⁴⁰Ashok H Desai, ‘Challenges to an award – use and abuse’, *ICA’s Arbitration Quarterly*, ICA, 2006, vol. XLI/No.2, p 4. Ashok H Desai is a Senior Advocate of the Supreme Court of India.

⁴¹ Pravin H Parekh, ‘Public Policy as a ground for setting aside the award’, *ICA’s Arbitration Quarterly*, ICA, 2005, vol. XL/No.2, p 19.

⁴²Inaugural address by Justice Santosh N Hedge, Judge, Supreme Court of India, on Indian Council of Arbitration’s National Conference on ‘Arbitrating Commercial and Construction Contracts’ held at Hotel Inter Continental, New Delhi, December 6, 2003.

⁴³supra, note 41 at p19.

⁴⁴ Sumeet Kachwaha, ‘Enforcement of Arbitration Awards in India’, *Asian International Arbitration Journal*, 2008, vol. 4, number 1, p 68.

⁴⁵ 2006(11)SCC 181 at p 208.

“We are not unmindful that the decision of this Court in ONGC case had visited considerable adverse comments but the correctness or otherwise of the said decision is not in question before us. It is only for a larger Bench to consider the correctness or otherwise of the said decision. The said decision is binding on us. The said decision has been followed in a large number of cases.”

A few High Court decisions have also sought to give a narrow reading of the *Saw Pipes* case on the ground that a literal construction of the judgment would expand judicial review beyond all limitations contained not only under the 1996 Act, but even under the 1940 Act.⁴⁶ In the case of *Indian Oil Corporation Ltd. vs. Langkawi Shipping Ltd*⁴⁷, the court held that to accept a literal construction on *Saw Pipes* would be to radically alter the statutorily and judicially circumscribed limits to the court’s jurisdiction to interfere with arbitration awards. Following the aforesaid Bombay High Court decision, the High Court of Gauhati held in *Dealim Industrial Co. vs. Numaligarh Refinery Ltd.*⁴⁸ held that the *ONGC vs. Saw Pipes*, *Supra*, does not intend to efface the time-tested legal propositions and judicial tenets on arbitration and thus ought not to be construed away from the well-established trend set by a string of decisions preceding the same.

D. Similarity in the trend of Arbitration Practice under the 1996 Act with that of the 1940 Act

The 1940 and the 1996 Acts differ in some important ways in terms of the Arbitration system they establish and the processes that they require. First, the role of judges is more limited in the 1996 Act. Under the 1940 Act, courts played a substantial role in the arbitration process. Perhaps more importantly, the 1940 Act required that an arbitral award be filed in a court before it could become binding upon the parties.⁴⁹ Furthermore, the grounds for challenging an award before the courts were broad and quite liberal. In the 1996 Act, however, there is limited scope for interference by courts. The award is no longer

⁴⁶ *supra*, note 45.

⁴⁷ 2004 (3) Arb LR 568.

⁴⁸ Arbitration Appeal No. 1 of 2002 (August 24, 2006).

⁴⁹ Under Section 31 of the Arbitration Act, 1940, an award has to be filed before any court having jurisdiction, to make an award the rule of the court.

required to be filed before the court to make it a rule of law, and the grounds on which an award can be challenged are very limited.

Second, the authority of the arbitral tribunal varies. The old Arbitration Act of 1940 did not give any express authority to the arbitral tribunal. However, the situation has changed with the 1996 Act. Under the 1996 Act, the arbitral tribunal has the power to decide its own jurisdiction, which was initially determined by the courts under the 1940 Act. In addition, the arbitral tribunal does not have any power to grant any interim relief in arbitration proceedings under the 1940 Act, and such power is traditionally enjoyed by the courts. However, under the 1996 Act, an arbitral tribunal has powers to give interim relief.

Despite these differences, there are still some notable arbitration practices of the 1940 Act, which continue even under the new 1996 Act. These include the following:

- The tendency for parties to ask for—and for arbitral tribunals to grant—frequent adjournments, although technically constrained by the 1996 Act, continues unabated. While elaborating on this problem, one cannot help but notice the manner in which appeals and revisions are filed at interlocutory stages against every decision or order taken or made by the arbitral tribunal, which is not even contemplated under the Act. Moreover, the intervention of the courts, though statutorily restricted, has not subsided, and the courts have been very liberal in entertaining petitions, revisions, and appeals at an interlocutory stage, because of which the fruits of an existing Alternate Dispute Resolution (ADR) mechanism is neither timely nor effective.
- Section 34 of the 1996 Act makes a mere challenge to an award operate as an automatic stay even without an order of the court, thereby encouraging many parties to file petitions under that provision to delay the execution proceedings. However, under the 1940 Act, there was no such automatic stay. There is an amendment proposed by the Law Ministry in the Arbitration and Conciliation (Amendment) Bill, 2003, which has not been taken up for consideration by the Parliament.

- The 1996 Act narrows down the scope of grounds available for challenging awards as compared to the earlier 1940 Act. However, with gradual judicial interpretation, the scope of appeal against an award under the 1996 Act has become broader particularly after the decision of the ONGC case,⁵⁰ which has widened the ambit of ‘public policy.’ Violation of public policy of India is one of the grounds for challenge of an award under the 1996 Act.⁵¹ The ONGC case, undoubtedly, invited substantial criticism from the legal circles and fraternity. While some large corporations and bodies welcomed the decision, most of the members of the legal profession disagreed and stated that the 1996 Act will in effect become ‘old wine in new bottle’, because under the 1940 Act, it was easy to set aside awards only on the basis of public policy.

E. Enforcement of Awards

One of the factors for determining arbitration as an effective legal institution is the efficiency and efficacy of its award enforcement regime. Under Section 36 of the 1996 Act, an arbitral award is enforceable as a decree of the court, and could be executed like a decree in a suit under the provisions of the Civil Procedure Code, 1908.⁵²

An award resulting from an international commercial arbitration is enforced according to the international treaties and conventions, which stipulate the recognition and enforcement of arbitral awards.⁵³ Enforcement of foreign awards in India is governed by the 1958 New York Convention and the 1927 Geneva Convention, which are incorporated in Chapter II, Part I and Part II, respectively, in the 1996 Act.⁵⁴ The provisions of enforcement are the same under the 1940 Act and the 1996 Act. Any party interested in foreign awards must apply in

⁵⁰ (2003) 5 SCC 705.

⁵¹ Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996.

⁵² Section 36 of the Arbitration and Conciliation Act, 1996 – Enforcement - Where the time for making an application to set aside the award under Section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the court.

⁵³ Sunil Malhotra, ‘Enforcement of Arbitral Awards’, *ICA’s Arbitration Quarterly*, ICA, 2006, vol. XL/No.4 at p 20.

⁵⁴ Chapter I, Part II of the Arbitration and Conciliation Act, 1996, deals with enforcement of foreign awards pursuant to New York Convention, while Chapter II, Part II of the said Act deals with foreign awards pursuant to the Geneva Convention.

writing to a court having jurisdiction over the subject matter of the award. The decree holder must file the award, the agreement on which it is based and evidence to establish that the award comes under the category of foreign award under the 1996 Act.⁵⁵

The rate of enforcement of arbitral awards is high. Under the 1996 Act, the Supreme Court of India declined to enforce or recognize awards in only two out of twentyfour cases relating to enforcement of arbitral awards (Section 36 of the 1996 Act) that came before it. Both cases involved Indian parties and Indian law.⁵⁶

1. Enforcement Statistics of Domestic Awards

Based on reported cases, the enforcement statistics for domestic awards, including the grounds of challenge, are given in Tables 1(a) and (b) for the High Court and Supreme Court, respectively.⁵⁷

⁵⁵ Sections 37 and 56 of the Arbitration and Conciliation Act, 1996, contain provisions relating to the documents to be produced before a Court executing a foreign award.

⁵⁶ S.K. Dholakia, 'Analytical Appraisal of the Arbitration and Conciliation (Amendment) Bill, 2003', *ICA's Arbitration Quarterly*, ICA, 2005, vol. XXXIX/No.4 at p 23. In the said Article, it is stated that the two cases are: Rajinder Krishan Khanna vs. Union of India (1998) 7 SCC 129; and Oil and Natural Gas Corporation vs. Saw Pipes (2003) 5 SCC 705. The data given here is from the Supreme Court Cases Journal. Dholakia is a member of ICC International Court of Arbitration & is a Senior Advocate, Supreme Court of India.

⁵⁷ *supra*, note 44 at p 73.

Table 1(a): Enforcement Statistics for Domestic Awards (High Court)

Sl. no	Grounds for challenge of awards	Total no. of awards challenged before court	Appeals allowed	Appeals rejected	Awards modified by court
1	Jurisdiction	246 43.53%	43 17.47%	197 80.08%	6 2.43%
2	Public policy	151 26.72%	25 16.55%	112 74.17%	14 9.27%
3	Limitation	77 13.62%	9 11.68%	66 85.71%	2 2.59%
4	Violation of natural justice	37 6.54%	8 21.62%	24 64.86%	5 13.51%
5	Bias	22 3.89%	1 4.54%	21 95.45%	-
6	Non appreciation of facts/evidence	14 2.47%	1 7.14%	13 92.85%	-
7	Not a reasoned award or no grounds	9	-	9	-
8	Not signed/ stamped	3	-	3	-
9	Not a party	1	1	-	-
10	Non application of mind	1	1	-	-
11	Wrongful rejection of defense (filing beyond time)	1	-	-	1
12	No arbitration agreement	1	1	-	-
13	Typographical error	1	-	1	-
14	Withdrawn (challenge not pursued)	1	-	1	-
	Total	565 (1996 to Sept 2007)	94 (16.63%)	443 (78.41%)	28 (4.96%)

Source: Asian International Arbitration Journal, 2008, vol.4, number 1, page 73

Table 1(b): Enforcement Statistics for Domestic Awards (Supreme Court)

Sl. no.	Grounds	Total no. of awards challenged	Appeals Allowed	Appeals Rejected	Awards Modified by court
1	Jurisdiction	11 68.75%	2 12.5%	7 43.75%	2 12.5%
2	Public policy	2 12.5%	1 50%	1 50%	-
3	Limitation	1 6.25%	1 100%	-	-
4	Non appreciation of facts/evidence	2 12.5%	-	1 50%	1 50%
	Total	16 (1996 to Sept 2007)	5 (31.25%)	8 (50%)	3 (18.75%)

Source: Asian International Arbitration Journal, 2008, vol.4, number 1, page 74

2. Enforcement Statistics of Foreign Awards:

An examination of the enforcement statistics of foreign awards will show that courts in India greatly leaned in favour of enforcement, and except for a lone case, foreign awards have been upheld and enforced. Based on the reported cases, the enforcement statistics for foreign awards in India are shown in Table 2.⁵⁸

⁵⁸ supra, note 44 at p 81.

Table 2: Enforcement Statistics for Foreign Awards in India - High Court and Supreme Court (1996 to September 2007)

Sl No.	Grounds	Total No of Challenges	Allowed	Rejected	Modified
1	Jurisdiction	29.41%	-	5	
2	Public policy	17.64%	-	2	1
3	Technical grounds (petition to be made under s 48, not s 34)	17.64%	-	3	
4	Requirement of separate execution proceedings	2	-	2	
5	No grounds or reasons in award	1	-	1	
6	Petition filed for winding up on the basis of foreign awards	1	-	1	
7	No arbitration agreement	1	1	-	
8	1996 Act does not apply	1	-	1	

Source: Asian International Arbitration Journal, 2008, vol.4, number 1, page 81

Table 3: Institution-wise Breakdown of Challenges

Sl. No.	Institutions	Total No of Challenges	Allowed	Rejected	Modified
1	Ad hoc	10	-	10	
2	ICC	2	-	1	1
3	LCIA	2	-	2	
4	IGPA (International General Produce Association)	1	-	1	
5	ICA	1	-	1	
6	Korean Commercial Arbitration Board	1	1	-	-
	Total	17	1 5.88%	15 88.23%	1 5.88%

Source: Asian International Arbitration Journal, 2008, vol.4, number 1, page 81

IV. ARBITRATION PRACTICE ACROSS REGIONS – RELATIONSHIP BETWEEN ARBITRATION AND COMMERCIAL GROWTH

To understand the relationship of arbitration with commercial growth, it is relevant to examine the spread of arbitration across regions in India. Based on the extent of the spread, the correlation between arbitration and commercial growth can be studied and analyzed.

For the purpose of understanding the sectoral representation of arbitration cases across the Indian states, 349 arbitration cases decided by the Supreme Court, High Courts, and Tribunals in India were reported between 2004 and 2007. Out of the 349 cases studied, 238 cases pertained to the 1940 Act, while 121 cases pertained to the 1996 Act. The data showing distribution of these cases amongst the various High Courts in India under the 1996 Act and the 1940 Act is provided in Table No. 4. Based on this data, a pie chart showing arbitration cases decided by the various High Courts in India under the Act of 1996 in the years 2004-2007 is shown in Figure 1.

Table 4: Distribution of cases amongst various High Courts under the 1940 Act and the 1996 Act (2004 to 2007)

High Court	Arbitration and Conciliation Act, 1996	Arbitration Act, 1940
Allahabad High Court	3	1
Andhra Pradesh High Court	19	6
Bombay High Court	20	9
Calcutta High Court	11	1
Delhi High Court	80	38
Gauhati High Court	3	0
Gujarat High Court	3	1
Himachal High Court	2	1
Jammu & Kashmir High Court	0	1
Jharkhand High Court	6	0
Karnataka High Court	5	2
Kerala High Court	7	1
Madhya Pradesh High Court	2	2
Madras High Court	17	1
Orissa High Court	7	1
Patna High Court	0	1
Punjab & Haryana High Court	7	8
Rajasthan High Court	7	2
Uttaranchal High Court	1	0
Total no. of cases	238	121

Source: Data collected from arbitration journal for the years 2004-2007

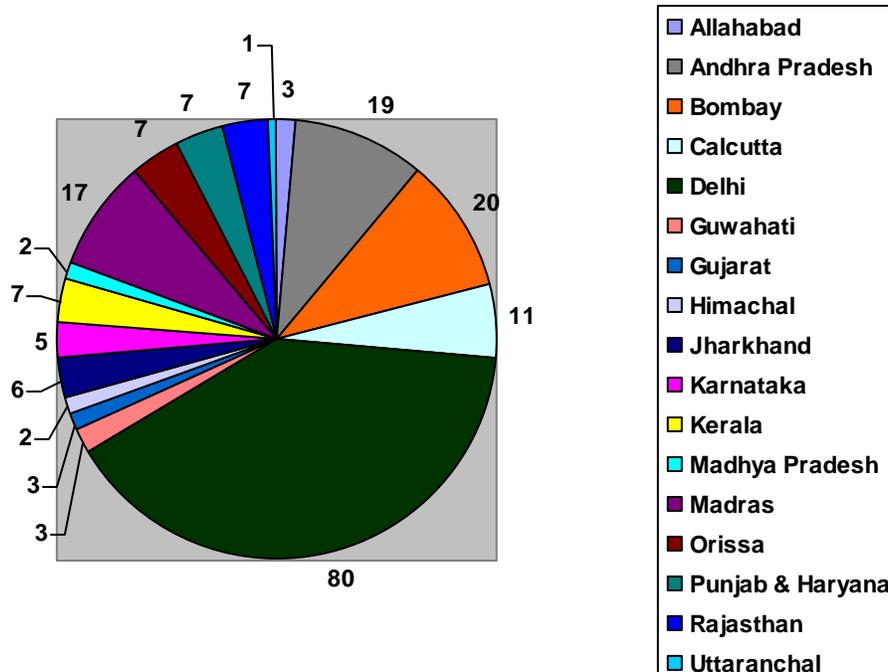


Figure 1: Arbitration cases decided by various High Courts under the 1996 Act for the years 2004 to 2007.⁵⁹

The representative chart shows that across all High Courts, the Delhi High Court has the most cases followed by the Bombay High Court and the Andhra Pradesh High Court.

The figure is only representative of data collected from reported cases. Unlike the 1940 Act, which required the arbitral tribunal to file the award before the court, the 1996 Act does not have such a requirement and arbitration cases come within the public record only when parties approach the courts for procedural assistance or to challenge an award.⁶⁰ Ad hoc arbitrations, in particular, are not recorded if the parties do not challenge the award before a court.

A. Relationship Between Development of Arbitration and Commercial Growth

⁵⁹ Data collected from arbitration journals.

⁶⁰ Under the Act of 1996, there is no provision for filing an award before a court of law to make the award ‘rule of the court’. The award becomes automatically enforceable unless challenged in a court of law.

In India, the development of arbitration is correlated with the growth of commerce and industry. Figure 1 is also indicative of the fact that the number of arbitration cases is higher in the States/Union Territories which are more commercially developed, such as Delhi, Maharashtra, Tamil Nadu, West Bengal, and Andhra Pradesh.

Arbitrations tend to occur more or less frequently in the highly developed states as they have several advantages over the less developed states - more business operations, large companies, better dispensation of justice.

Further, most of the skilled arbitrators tend to work in commercially developed regions due to a larger number of commercial disputes involving higher stakes. On the contrary, few of the arbitrators prefer to work nationally. For instance, some arbitrators on the panel of arbitrators in institutional arbitral institutions like the Indian Council of Arbitrators (ICA) and the Indian Council of Alternate Dispute Resolution (ICADR) have no jurisdictional limitations and arbitrate on any proceeding in any part of India. The prevalence of more skilled arbitrators in commercially developed regions is indicative of the growth of arbitration with the increase in commercial disputes.

B. Difference in Arbitration Practice across Regions

There are also differences in the way arbitration is practiced across states. These differences arise due to a number of factors, such as availability of skilled arbitrators and lawyers alike, and infrastructure that creates an environment conducive to the arbitration process.

C. Difference in the Arbitrators' Fees across Regions

In case of incentives for the arbitrators in various states, the incentives depend upon whether it is ad hoc arbitration or institutional arbitration. The incentives for the arbitrator in ad hoc arbitration vary from state to state, with the trend of arbitrators in major cities of developed states charging relatively more than their counterparts in less developed states. In case of institutional arbitration, the incentives for the arbitrators remain more or less the

same in all the states, as the fees of the arbitrators are regulated under the rules of the arbitral institutions. For example, Table 5 shows the fee structure of arbitrators under the rules of the Indian Council of Arbitrators.

Table 5: Arbitrator and Administration Fees (Indian Council of Arbitration)

Amount in Dispute	Arbitrator's Fee (in INR)	Administrative Fee (in INR)
Up to INR 0.5 million	30, 000	15, 000
From INR 0.5 million one to INR 2.5 million	30, 000 plus 1, 500 per one hundred thousand or part thereof subject to a ceiling of 60, 000	15, 000 plus 750 per one hundred thousand or part thereof subject to a ceiling of 30, 000
From INR 2.5 million one to INR 10 million	60, 000 plus 1, 200 per one hundred thousand or part thereof subject to a ceiling of 150, 000	30, 000 plus 600 per one hundred thousand or part thereof subject to a ceiling of 75, 000
From INR 10 million one to INR 50 million	150, 000 plus 22, 500 per ten million or part thereof subject to a ceiling of 240, 000	75, 000 plus 11, 250 per one hundred thousand or part thereof subject to a ceiling of 1 20, 000
From INR 50 million one to INR 100 million	240, 000 plus 15, 000 per ten million or part thereof subject to a ceiling of 315, 000	120, 000 plus 8000 per ten million or part thereof subject to a ceiling of 160, 000
Over INR 100 million	315, 000 plus 12, 000 per ten million or part thereof	315, 000 plus 12, 000 per ten million or part thereof

Source: www.ficci.com

V. RECOMMENDATIONS

From the above analysis, it is clear that globalization of the Indian economy in the early nineties and the consequent economic reforms necessitated the existence of effective dispute resolution mechanisms to quickly settle commercial disputes. The 1996 Act was enacted to achieve this purpose of quick and cost-effective dispute resolution. Arbitration occupies a prime position in commercial dispute resolution in India. An examination of the working of

arbitration in India reveals that arbitration as an institution is still evolving, and has not yet reached the stage to effectively fulfill the needs accentuated with commercial growth. Viewed in its totality, India does not come across as a jurisdiction which carries an anti-arbitration bias. Notwithstanding the interventionist instincts and expanded judicial review, Indian courts do restrain themselves from interfering with arbitral awards.⁶¹ However, there are still inherent problems that hindered in the working of successful arbitration in India which are multifold – starting from requirement for amendment of certain provision of law to changing the mindset of the stakeholders who are judges, arbitrators, lawyers and parties involved. Based on the identified problems, the following recommendations can be made:

(i) Universities in India could create a separate faculty or department for arbitration law to encourage specialized study and incisive research. Presently, none of the 259 universities in India has a separate faculty or department of arbitration law; nor is arbitration law taught as a specialized subject in any of the law colleges.

(ii) All stakeholders - arbitrators, judges and lawyers- should make efforts to change general attitude towards arbitration. Despite the 1996 Act's prohibition of judicial intervention, (i.e. 'no judicial authority shall intervene except where so provided in [that] part.') courts continue to intervene in direct defiance of the agreement of the parties. Therefore, it is necessary for the players in arbitration proceedings (i.e. arbitrators, judges and lawyers) to know and to understand the direction of the new law, respect the will of the parties set out in arbitration clauses, and observe the dichotomy between arbitration and litigation. This change in the mindset must focus on the need to make the system more effective, attractive and functional.⁶²

(iii) Power vested in the Chief Justice of a High Court (or any person or institution designated by him) for appointment of an arbitrator under Section 11 of the 1996 Act is not being used properly. The practice of appointing retired judges has recently come under strong criticism from the proponents of the alternate dispute resolution mechanism. There is

⁶¹ *supra*, note 45 at p 81-82.

⁶² Excerpt from the article 'Arbitrating Commercial and Construction Contracts' published in ICA's Arbitration Quarterly and webcasted in ICA's official website.

reason for complaint that the appointment of arbitrators is widely perceived as avenues of patronage of superannuated judges. This practice should be corrected. Unless this is corrected, the legitimacy of Section 11 is bound to be seriously undermined. For instance, in the panels of arbitrators who may be selected by those having disputes, maintained by the American Arbitration Association, lawyers dominate in commercial fields of arbitration, college professors make up the second largest group of arbitrators, and physicians, dentists, accountants, managers and other professionals serve as arbitrators in cases recorded in the *Encyclopedia Americana*. Retired judges will not fit the bill for these categories.

(iv) There is requirement for legislative amendment to remove the anomaly which enables a defeated party to avoid execution of arbitral awards by merely filing an application for setting aside under Section 34 of the 1996 Act, without being required to deposit a part of the award amount. Ordinarily, this awarded amount would be deposited as a matter of course in case of a judgment debtor challenging a money decree before a civil court. In *NALCO Ltd. vs. Pressteel Fabrications (P) Ltd.*⁶³, the Supreme Court of India has recently expressed a hope that suitable legislative action would undo this situation. The Court refused to impose any condition on the applicant pending disposal of its application for setting aside the award under Section 34, reasoning being that any such order would run counter to the letter and spirit of the Act. Nevertheless, the court did take judicial notice of the injustice that could be caused to the beneficiary of an arbitral award due to the ‘automatic’ stay by mere challenging of awards. The Arbitration and Conciliation (Amendment) Bill, 2003, appears to have partially remedied this flaw, but the Bill has not yet been taken up for consideration and passed by the Parliament.

(v) The government should disseminate knowledge of the benefits of alternate dispute resolution mechanisms to foster growth of an international arbitration culture amongst lawyers, judges and national courts. The real problem in enforcing foreign awards around the globe despite the enabling provision of the New York Convention, 1958, is not a legal one; but it is a lack of awareness particularly, amongst lawyers and judges, of the benefits of international arbitration and of its true consensual nature.

⁶³ (2004) 1 SCC 540.

(vi) Questions relating to lack of impartiality of arbitrators and procedural defects in the conduct of arbitration proceedings are the subject-matter of frequent litigation and hence add to the caseload before an already overburdened judiciary. In fact, judicial interventions with arbitral proceedings and awards in India have come to constitute a distinct branch of law, i.e. the 'law of arbitration'. This trend clearly frustrates the foundational aim of providing for arbitration clauses - which is to ensure speedy and efficient dispute-resolution in the commercial context.

(vii) Provisions in the arbitration laws in India that require entire arbitral tribunals to impart effective interim measures at par with the authority of a national court should be amended, and an effective mechanism for carrying out these provisions should be put in place. Although the 1996 Act confers powers on arbitral tribunals to issue interim relief, there is variance in the degree and efficacy of these interim measures. Under the 1996 Act, the arbitral tribunal is possessed of limited powers to direct interim measures, pertaining to: - (a) protection of the subject matters in dispute; and (b) providing appropriate security in connection thereof. Moreover, an arbitral tribunal has no mechanism to enforce its own direction. For this reason, it can well be said that the arbitral tribunal does not have any coercive authority to secure implementation of its interim measures, which is like being a toothless tiger. No doubt, this is a flaw that weakens the entire arbitration mechanism, and at times makes it appear spineless.

(viii) There is an emerging trend to go for settlement of business disputes by institutional arbitration, provided such institutions maintain quality standards in conducting proceedings. The standards are evaluated in terms of professional arbitrators, infrastructure facilities, time and cost saving procedures and uniformity of laws - standards that will make the ADR system more sound and acceptable among the business community. Independent institutions should impart training for nurturing competent professionals who are trained to delve into the crux of the dispute for its resolution.
