


BOOKLET ON

COMMERCIAL LITIGATION



**AN IN-DEPTH ANALYSIS OF COMMERCIAL
COURTS AND INTERNATIONAL
ARBITRATION IN INDIA**

By Bhatt & Joshi Associates



Preface


The resolution of commercial disputes in an efficient, fair, and expeditious manner is crucial for fostering a conducive business environment and promoting economic growth. In an increasingly globalized world, where cross-border transactions have become the norm, the mechanisms for resolving commercial conflicts take on even greater significance. This comprehensive analysis delves into two pivotal aspects of commercial dispute resolution in India: the establishment and functioning of commercial courts, and the evolving landscape of international commercial arbitration.

The Commercial Courts Act of 2015 marked a watershed moment in India's efforts to streamline its commercial dispute resolution process. This legislation, aimed at establishing specialized courts to handle high-value commercial disputes, represented a significant step towards enhancing India's ease of doing business rankings and attracting foreign investment. However, as this analysis reveals, the journey from legislative intent to practical implementation has been fraught with challenges and contradictions.

Parallel to the development of commercial courts, India has also been striving to position itself as a hub for international commercial arbitration. The Arbitration and Conciliation Act of 1996, along with its subsequent amendments, reflects India's commitment to aligning its arbitration framework with global best practices. This text examines the intricate interplay between domestic legal reforms and international arbitration norms, highlighting both the progress made and the hurdles that remain.

Through a meticulous examination of legislative history, judicial pronouncements, and on-ground realities, this work provides a nuanced understanding of the commercial dispute resolution landscape in India. It goes beyond mere description, offering critical insights into the effectiveness of these mechanisms and their impact on India's business ecosystem.

The analysis is enriched by comparative perspectives, drawing lessons from established international arbitration centers and commercial court systems around the world. This global



outlook helps contextualize India's efforts within the broader framework of international commercial law and practice.

As India aspires to become a major player in the global economy, the efficacy of its commercial dispute resolution mechanisms will play a crucial role in shaping its economic trajectory. This work aims to contribute to the ongoing discourse on legal and institutional reforms necessary for creating a robust, transparent, and efficient system for resolving commercial disputes.

It is our hope that this comprehensive analysis will serve as a valuable resource for policymakers, legal practitioners, scholars, and businesses engaged in or considering engagement with India's commercial landscape. By shedding light on both the achievements and shortcomings of India's commercial courts and arbitration framework, we aim to foster informed discussions and contribute to the continuous improvement of these vital institutions.

Sincerely,

Bhatt and Joshi Associates

Table of Contents

CHAPTER I - Unraveling the Enigma of Commercial Courts in India	18
Introduction	18
Expectations vs. Reality	18
Economic Implications	18
Contradictions in Ease of Doing Business Rankings	18
Commercial Courts as a Reformatory Measure	19
Expanding on the Evolution of the Commercial Courts Act, 2015: Policy Choice and Policy Design	19
Historical Context and Recommendations	19
Law Commission's Involvement and the 253rd Report	19
Legislative Amendments	20
Reviewing Changing Objectives and Jurisdiction	20
Evolution and Shifting Objectives: The Model of Commercial Courts in India	20
Origins and Initial Goals	20
Fast Track Courts and Early Goals	21
Shift Towards Comprehensive Commercial Courts	21
2015 Act and Enhanced Objectives	21
2018 Amendments and Continued Commitment	21
Shifts in the Basic Model	22
Jurisdictional Framework of Commercial Courts in India: Evolution and Structural Reforms	22
Court Jurisdiction in Early Recommendations	22
Parliamentary Considerations and Evolution	22
Implementation in the 2015 Act	23



Structural Reforms and Budgetary Considerations	23
Evolving Dimensions of Subject Matter Jurisdiction in Commercial Dispute Resolution	23
Foundations Laid by the 188th Report	23
Exhaustive Definition in the 2009 Bill	24
Committee Recommendations and Warnings	24
253rd Report's Broadening of Scope	24
Implications and Future Considerations	24
Parallels in the 2015 Act and the Amended Act	25
Subject Matter Assessment Dilemma	25
Legislative History and Specialist Courts' Transformation	25
Pecuniary Jurisdiction in Commercial Disputes	25
Setting the Stage	25
188th Report's Propositions	25
Concerns Raised by the Select Committee	26
Pecuniary Threshold in the 2015 Act and Progressive Amendments	26
Unintended Consequences	26
Establishing Commercial Courts: Balancing Infrastructure and Expertise	26
Historical Perspectives	26
Shift in Discretion	27
Technological Infrastructure and Model Court Guidelines	27
Legislative Inclusions and cursory Treatment	27
Streamlining Commercial Court Procedures	27
Historical Guidelines	27
Precision in Procedural Modifications	28
Shift of Control to Courts	28



Summary Judgment Powers	28
The Role of Costs in Commercial Litigation	28
Culture Shift through Costs	28
Legislative Adoption	29
Reshaping Incentives	29
Appeals in Commercial Disputes	29
Evolution of Appeal Mechanisms	29
Structural Changes in Appeals	29
Further Evolution	30
Complexity in the Appellate System	30
Implementation and Impact of the Commercial Courts Act, 2015	30
Timeline of Implementation	30
Data Availability and Mixed Methods Model	30
Quantitative Analysis - Delhi High Court	31
Qualitative Study - Bengaluru	31
Anticipated Insights	31
Theories/Principles of International Commercial Arbitrations	31
Freedom of Choice in Governing Laws	31
Recognition of Parties' Right to Choose General Principles	31
UNCITRAL Model Law and Legal System Variations	32
Application of Transnational Rules	32
The Role of International Law Association Resolution (1992)	32
Court Infrastructure and Implementation Challenges	32
Legislative Mandate and Practical Implementation	32
Challenges in Practice	32



Observations and Interviews	33
Implementation Shortcomings	33
Limited Improvement in Infrastructure	33
Judicial Procedure Challenges	33
Provisions for Case Management	33
Case Flow Management Rules	34
Observations and Interviews	34
Challenges in Case Management Implementation	34
Insights from Legal Practitioners	34
Enforcing Court Discipline	34
Costs as a Tool	34
Reality of Cost Imposition	35
Practitioner Perspectives	35
CHAPTER II- The Emergence of International Commercial Courts in India	36
Introduction	36
Background and Challenges	36
Government Initiatives	36
Court Specialization and Its Benefits	36
Comparative Analysis of Commercial Courts	37
Introduction	37
Background and Recommendations	37
International Commercial Court Models	37
Innovations and Lessons	38
Cross-Border Commercial Dispute Resolution in India	38
Private International Law in India	38



Forum Selection Clauses	38
Applicable Law and Enforcement of Foreign Judgments	39
Concerns and Challenges	39
Commercial Courts in India	39
Historical Evolution of Commercial Courts	39
Structural Overview of Commercial Courts	40
Definition and Scope of Commercial Disputes	40
Innovative Applications of Commercial Courts	40
Refining Commercial Dispute Classification and Enhancing Access to Justice	40
Definition of Commercial Dispute	41
Access to Justice Improvements	41
Prohibition of Revision Applications and Interlocutory Orders	41
Pioneering Innovations in Commercial Dispute Resolution	42
Cross-Referencing with Procedure Law	42
Costs and Remedies	42
Case Management and Efficiency	42
Commercial Courts and Arbitration	42
Integration of Commercial Courts and Arbitration	42
Forum Changes for International Commercial Arbitrations	43
Judicial Assistance to International Arbitrations	43
Cost Regime and Concerns	43
Refinement of 'Public Policy' Grounds in Arbitration	44
Improvements in the Enforcement Process	44
Judicial Commitment to Contract Enforceability	44
Contract Enforceability	44



Mandatory Pre-institution Mediation	45
Critique of Commercial Dispute Resolution Mechanism	45
Concerns Regarding Cross-referencing with Arbitration Laws	45
Uncertainty Surrounding Retrospective Application of Amendments	45
Interpretation of Legislation Provisions	46
Discrepancy between Legislation Intent and Practice	46
Need for Technological Integration and Efficiency	46
Concerns about Discovery Procedures	46
CHAPTER III - International Development of International Commercial Arbitration	47
Historical Roots	47
Ancient Civilizations and Early Codes	47
Arbitration in England and India	47
Dispute Resolution in Bangladesh	47
Origin and Development of International Commercial Arbitration at the International Level	48
Early Roots in Maritime and Commercial Contracts	48
Common Law Courts and Commercial Matters	48
Mercantile Law and Local Courts	48
Evolution of Maritime Courts and Common Law Courts	48
Evolution of Arbitration in England and the Arbitration Act, 1996	49
Historical Attraction for Merchants and Traders	49
Deficiencies in Common Law Courts	49
Statutory Intervention	49
Arbitration Acts in the UK	49
Arbitration Act, 1996	49
Influence of Model Law	50
	8



Development of Arbitration in England	50
Current Landscape	50
Significance of England in the Evolution of Arbitration	50
London as the Global Trade Center	50
Legal History and the English Legal System	50
Role of Legal System in Evolution	51
Global Spread of Arbitral Centers	51
Private Sector-Led Proceedings	51
United Nations Commission on International Trade Law (UNCITRAL):	51
Establishment and Mandate of UNCITRAL	51
Areas of Focus in Commercial Law	51
Development of Legislative and Non-Legislative Instruments	52
Inclusivity in Development Process	52
Recognition as Core Legal Body	52
Shaping Global Trade Principles	52
Some major International Arbitration Institutes	52
International Court of Arbitration of the International Chamber of Commerce (ICC)	52
London Court of International Arbitration (LCIA)	53
International Centre for Settlement of Investment Disputes (ICSID)	53
Singapore International Arbitration Centre (SIAC)	53
China International Economic and Trade Arbitration Commission (CIETAC)	54
International Centre for Dispute Resolution of the American Arbitration Association (AAA)	54
Arbitration Institute of the Stockholm Chamber of Commerce (SCC Institute)	54
London Court of International Arbitration (LCIA)	54
Kuala Lumpur Regional Centre for Arbitration	55



Permanent Court of Arbitration (PCA)	55
Cairo Regional Centre for International Commercial Arbitration (CRCICA)	55
International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry (ICAC)	56
Arbitration and Mediation Centre of the World Intellectual Property Organization (WIPO)	56
OHADA Permanent Court of Justice and Arbitration	56
Indian Council of Arbitration (ICA)	56
World Intellectual Property Organization	57
Court of Arbitration for Sport	57
German Institution of Arbitration (DIS)	57
Japanese Commercial Arbitration Association (JCAA)	57
Australian Centre for International Commercial Arbitration (ACICA)	57
Swiss Chamber's Arbitration Institution	58
Vienna International Arbitral Centre (VIAC)	58
Stockholm Chamber of Commerce Arbitration Institute (SCC)	58
International conventions on International Commercial Arbitrations	58
Contemporary International Arbitration Convention	58
Early Proposals for State-to-State Arbitration	59
Hague Peace Conference of 1899	59
Evolution into the Permanent Court of International Justice	59
Preference for Arbitration in the Twentieth Century	60
Revision in 1907 and the General Act of 1929	60
Call for Legislative Facilitation of Arbitration	60
Negotiation of the Geneva Protocol	60
Limited Ratification and Global Significance	61
	10



Genesis of the New York Convention	61
Origins and Objectives	61
Drafting and Innovation	61
Focus on Enforcement	62
Reluctance in South America	62
Inter-American Convention	62
Parallel Objectives	62
European Convention	63
ICSID Convention	63
Scope of Investment Disputes	63
Bilateral Investment Treaties (BITs) or Investment Protection Agreements (IPAs)	63
CHAPTER IV- National development of International Commercial Arbitration	65
Theories/Principles of International Commercial Arbitrations	65
International Conventions on Commercial Arbitration	66
Bilateral Investment Treaties or Investment Protection Agreements	66
Major International Arbitration Institutes	66
Contemporary International Arbitration Convention	66
Arbitration in Pre-British Regime	66
Regulations Relating to Arbitration During the British Era	67
Indian Arbitration Act, 1899	67
Code of Civil Procedure, 1908	67
The Arbitration Act, 1940	67
Scope of Arbitration Proceedings in India	68
Various Aspects of Alternative Dispute Resolution System	68
1. Dispute Settlement through Conciliation	68
	11



2. Mediation and Conciliation	68
3. Dispute Settlement through Lok Adalats	69
4. Permanent Lok Adalats	69
5. Dispute Settlement through Arbitration	69
6. Dispute Settlement through Mini Trial	70
7. Dispute Settlement through Med-Arb	70
8. Dispute Settlement through Early Neutral Evaluation (ENE)	70
9. A Dispute Review Board (DRB)	71
10. Dispute Settlement through Expert Determination	71
11. Dispute Settlement through Negotiation	71
Contribution of ADR Institutions	72
Arbitration and Its Various Forms	72
1. Ad-hoc Arbitration	72
2. Domestic Arbitration	73
3. International Arbitration	73
Arbitration Process in General & International Commercial Arbitration	73
1. Medola (Mediation and Last Offer Arbitration)	73
2. Summary Jury Trial	73
3. Neutral Expert Evaluation	74
4. Early Neutral Evaluation	74
5. Fast-Track Arbitration	74
6. Mediation-Arbitration (Med-Arb)	74
The Act of 1996 according to 176th Report of Law Commission	74
Expansion of the Definition of "Court"	75
Extension of Arbitration Proceedings Outside India	75
	12



Efficient Handling of Preliminary Issues	75
Amendments in Section 11 to Expedite Arbitral Tribunal Appointments	75
Introduction of Section 24B for Execution of Interim Orders	76
Efforts to Control Delays in Arbitral Proceedings	76
Addressing Contradictory High Court Judgments	76
Comprehensive Review and Recommendations	76
Formation of the "Justice Saraf Committee on Arbitration"	76
Government's Decision to Withdraw the Bill	77
Enforcement of Foreign Arbitral Awards under the Arbitration and Conciliation Act, 1996	77
Judicial Approach towards International Commercial Arbitration in India	77
Public Policy Dilemma	78
Intervention by Courts	78
Post Bhatia Case Mystery: Unraveling the Impact on Section 9 Applications	78
BALCO & White Industries: A Landmark Decision Shaping Indian Arbitration	79
Analyzing the Impact of the BALCO Judgment on International Commercial Arbitration	80
Mutual Exclusivity of Part I and Part II: Conceptual Clarity vs. Lingering Ambiguities	80
Implications of the Exclusivity: Interim Measures and Remedial Challenges	80
Prospective Overruling and Concerns within the International Arbitration Community	80
Balancing Interests: The Dilemma of Parallel Regimes	81
CHAPTER V - Evaluation of notable shortcomings in India's International commercial arbitration	82
Gray Areas of International Commercial Arbitration	82
1. Law Applicable to the Substance of the Parties' Dispute	83
2. Law Applicable to the Arbitration Agreement	84
3. Procedural Law Applicable to the Arbitral Proceedings	84
	13



4. Choice-of-Law Rules Application in International Arbitration	85
Legal Conflicts in International Commercial Arbitration	85
Judicial Intervention in Arbitral Autonomy and Finality	85
Authority and Autonomy of International Arbitral Tribunals	86
The Imperative of Effective International Arbitration Laws	86
Simplification and Responsiveness in Arbitration Laws	86
Recent Judicial Pronouncements and Implications	86
Persistent Challenges in International Commercial Arbitration	87
1. Enforceability of Arbitration Clause/Agreement	87
2. Choice of Arbitration Venue and Hearing	87
3. Conflict of Laws	87
4. Differences in Selection Procedures and Arbitrator Numbers	87
5. Public Policy Variances	87
6. Recognition and Enforcement of Awards	87
Arbitrability in International Commercial Arbitration	88
Judicial Insights into Arbitrability: <i>Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd</i>	88
Challenges and Complexities in Arbitrability	88
Applicability of Amendments: A Critical Analysis	89
Estimating Court Perspectives on Applicability	89
UNCITRAL's Role in Harmonizing Commercial Arbitration Laws	89
The Evolution of UNCITRAL's Model Law	89
Hague Conventions and the Permanent Court of Arbitration	90
International Chamber of Commerce (ICC) and its Contribution to Arbitration	90
Evolution of International Conventions in Promoting Arbitration	90
The 1923 Geneva Protocol: A Landmark in Arbitral Process	90
	14



The European Convention on International Commercial Arbitration (1961)	91
The Washington Convention of 1965 and the Establishment of ICSID	91
The European Convention providing a Uniform Law on Arbitration (1961)	92
The Moscow Convention of 1972	92
The Panama Convention of 1975	93
Issue of International Harmonization of Commercial Arbitration Laws	93
Model Law by UNCITRAL	93
Salient Features of the Model Law	94
International Treaties	94
The OHADA Treaty of 1993	94
The North American Free Trade Agreement of 1994 (NAFTA)	95
Bilateral Investment Treaties or Investment Protection Agreements	95
CHAPTER VI - Other Contemporary Developments	96
Conflict of Interest in International Arbitration in the Context of Third-Party Funder	96
Third-Party Funding Regulation in International Arbitration	97
General Standards Governing Third-Party Funding	97
ICC Guidance on Conflicts and Third-Party Funding	97
The Role of ICCA-Queen Mary Task Force	97
Ongoing Impact and Contribution	98
Impact of ICCA-Queen Mary Task Force's Work	98
Emergence of National Legislation on Third-Party Funding	98
Strategic Role of Legislation in Attracting Arbitration Proceedings	98
Disclosure Challenges in International Commercial Arbitration	98
General Trends in Transparency and Disclosure Obligations	99
Divergent Views on General Disclosure Obligation	99
	15



Key Questions Surrounding General Disclosure Obligation	99
Challenges Involving Funding Agreement Content and Confidentiality	99
Voluntary Disclosure by Funded Parties	100
Funder's Reluctance Towards Disclosure	100
Disclosure Requirements in Investor-State Arbitration	100
Growing Role of Litigation Funds in Investor-State Arbitration	100
Balancing Confidentiality and Transparency in Dispute Resolution	101
Role of Confidentiality in International Arbitration	101
Privacy and Confidentiality Distinctions in Arbitration	101
Evolution of Transparency in Arbitration	101
Dual Concepts: Public Access and Transparency	102
Distinguishing Public Access and Transparency	102
Discrepancy in Treatment	102
Domestic vs. International Approach	102
Disclosure vs. Transparency: Unraveling the Concepts	103
Disclosure's Regulatory Focus	103
Coexistence of Transparency and Disclosure	103
The Imperative of Transparency	103
Benefits of Arbitral Transparency	103
Implied Duty of Confidentiality in International Commercial Arbitration	104
The Crucial Link between Privacy and Confidentiality	104
Balancing Acts in Jurisdictional Approaches	104
Confidentiality in National Legislations	104
Confidentiality in Arbitration Rules	105
Case Law: The Classical View on Confidentiality in English Law	105



Dolling-Baker v. Merrett and Another (1991)	105
Hassneh Insurance Co. of Israel v. Mew (1993)	105
Ali Shipping Corporation v. "Shipyard Trogir" (1998)	105
Instruments for Enhancing Transparency in Investor-State Arbitration	106
Evolution of Transparency in Trade Agreements	106
UNCITRAL Rules on Transparency	106
UNCITRAL Transparency Registry	106
Mauritius Convention	107
UNCITRAL Transparency Instruments in Practice	107
Transparency Initiatives by Arbitral Institutions	107
The Role of the Court of Arbitration for Sport (CAS) in International Sports Dispute Resolution	107
CAS as a Hub for International Sports Dispute Resolution:	108
International Commercial Arbitration as an Alternative:	108
CAS Jurisprudence and Interpretation:	108
Consistent Line of Reasoning in CAS Jurisprudence:	108
Emerging Jurisprudence of the Court of Arbitration for Sport (CAS)	109
Lex Ludica	109
Good Governance:	109
Procedural Fairness:	109
Harmonization of Standards:	109
Fairness and Equitable Treatment:	110
Key Themes in CAS Jurisprudence:	110
Emergency Arbitrator and India Seated International Arbitrations	110
Key Features of Emergency Arbitrator	110
Emergency Arbitrator in Indian Legal Framework	111
	17



Interim Protections in India	111
Enforceability and Challenges	111
Aim of Emergency Arbitration	111
Role of Emergency Arbitration	112
Procedures Involved in Emergency Arbitration	112
Role of Emergency Arbitrator	113
Status of Emergency Arbitrator's Order	114
Law Commission's Report on Emergency Arbitrations	114
Enforcement in India: A Complex Landscape	114
HSBC v. Avitel	115
Raffles Design International India Private Limited & Ors. v. Educomp Professional Education Limited & Ors	115
Global Scenario: Evolving Practices in Emergency Arbitration	115
Institutional Approaches	115
Asian Jurisdictions Leading the Way	116
Global Adoption	116
New York Convention Challenges	116
Disparity in National Laws and the Need for a Unified Approach in International Arbitration	116
The Role of Information Technology in International Arbitration	117
Need for Uniformity in International Arbitration	118
CHAPTER VII - Conclusion and Suggestions	119
Incorporating Institutional Rules in International Commercial Arbitration	120
Convergence of Investment Arbitration and International Commercial Arbitration	121
Suggestions for Improvement	121
Important Findings	123
	18



1. Ineffectiveness of Statutory Provisions	123
2. Differences in Procedural and Substantive Aspects	123
3. Lack of Regularization of Enforcement Agencies	123
4. Limited Recognition for Indian Arbitration Institutions	123
5. Insufficiency in Provisions for Setting Aside and Appeal	123
6. Unclear Distinction Between Domestic and International Arbitration	123
7. Absence of Protection for Foreign Investors	123
8. Ambiguity in the Applicability of Arbitration Law Parts	123
Modality	124
1. Global Convergence in Judicial Control	124
2. Review of Supreme Court's Approach	124
3. Transformation of Arbitration Process	124
4. Expectations from Legislative Changes	124
5. Alignment with International Practice	124
6. Analysis of the 2016 Amendment Act	124
7. Impact of 2016 Act on Arbitration Landscape	124
8. Role of Law in Society	124
9. Access to Justice	125
10. International Trade and Contractual Disputes	125
11. Preventing Legal Disputes	125
12. Resolution of International Disputes	125
Make in India Programs and Global Arbitration Initiative	125
The Arbitration and Conciliation (Amendment) Act, 2016	126
FDI Policy of 2015	126
Commercial Division and Commercial Appellate Division of the High Courts Act, 2015	
126	



Bilateral Investment Treaty	127
Our Comments	127



CHAPTER I - Unraveling the Enigma of Commercial Courts in India

Introduction

This chapter critically assesses the effectiveness of commercial courts in India, addressing three fundamental challenges within the legal system reform. Employing a comprehensive approach, the study reviews the performance of commercial courts established under the Commercial Courts Act, 2015, four years post-enactment. Utilizing a blend of quantitative and qualitative methods, the evaluation focuses on live examples from the Delhi High Court and on-the-ground observations of the Bengaluru commercial court.

Expectations vs. Reality


The primary concern is the substantial gap between the anticipated outcomes of commercial courts and their actual performance. Despite the lofty objectives set forth under the Commercial Courts Act, the delivery of swift and effective justice for commercial matters appears elusive. On the contrary, the study presents evidence suggesting a discernible slowdown in justice delivery since the enactment of the 2015 Act.

Economic Implications

The chapter highlights findings from the Economic Survey of India 2017-18, emphasizing the adverse economic consequences of delays and pendency in economic cases across various legal forums. Stalled projects, escalating legal costs, contested tax revenues, and diminished investment underscore the urgency of addressing the challenges within the legal system to spur economic growth.

Contradictions in Ease of Doing Business Rankings

Examining India's impressive ascent in the World Bank's Ease of Doing Business Report, this section delves into the contradictions between the accolades for regulatory reforms and the



persistent challenges outlined in the Economic Survey. The chapter probes the paradox between positive rankings and the hindrances posed by legal delays, setting the stage for a nuanced examination of the relationship between India's regulatory environment and its actual impact on business operations.

Commercial Courts as a Reformative Measure

The establishment of commercial courts is scrutinized as a pivotal policy measure aimed at enhancing India's standing in contract enforcement. Assessing the government's assertion that these courts would reform the civil justice system, expedite contract enforcement, and encourage investments for rapid economic growth, this section critically evaluates whether these objectives have been met.

Expanding on the Evolution of the Commercial Courts Act, 2015: Policy Choice and Policy Design

The journey of the Commercial Courts Act, 2015, is a tapestry woven with the threads of legal recommendations, legislative scrutiny, and subsequent amendments. This section embarks on a comprehensive exploration, tracing the Act's origins from the 188th Report of the Law Commission in 2003 to its most recent amendments in 2018. The objective is to unravel the intricate layers of policy evolution, discern the nuanced changes in court jurisdiction, delve into procedural guidelines, and illuminate the transformations in cost rules.

Historical Context and Recommendations

The narrative begins with the 188th Report of the Law Commission in 2003, a pivotal moment that initially recommended the establishment of fast-track courts in High Courts. This recommendation set the stage for subsequent legislative endeavors. A significant milestone in this journey is the introduction of the Commercial Division of High Courts Bill in 2009. However, parliamentary scrutiny and reservations prompted a re-examination of the bill by the Law Commission, focusing particularly on the delineation of 'commercial dispute.'



Law Commission's Involvement and the 253rd Report

A crucial juncture emerged with the Law Commission's engagements with expert committees, culminating in the submission of the 253rd Report in 2015. This report, an outcome of extensive discussions, advocated for a more comprehensive approach: the establishment of not only commercial courts but also Commercial Divisions and Commercial Appellate Divisions in High Courts. This transformative recommendation laid the groundwork for the eventual enactment of the Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Act, 2015. The Act, ushered in on January 1, 2016, became effective from October 23, 2015.

Legislative Amendments

The legislative journey took an unconventional turn, marked by substantial modifications over 15 years. The Act underwent notable amendments in August 2018 through the Commercial Courts, Commercial Division, and Commercial Appellate Division of High Courts (Amendment) Act, 2018, hereafter referred to as the "Amended Act." These amendments, specifically the reduction of pecuniary limits to jurisdiction for commercial disputes, significantly impacted the workload and dynamics of commercial courts.

Reviewing Changing Objectives and Jurisdiction

This section goes beyond a mere chronological account, delving into the substance of the policy changes. It critically analyzes the evolution of objectives underlying the policy, shedding light on shifts in court jurisdiction. The examination extends to procedural guidelines and associated costs, offering valuable insights into the dynamic nature of policy choices and design.

Evolution and Shifting Objectives: The Model of Commercial Courts in India

This segment delves into the dynamic evolution of the model of commercial courts in India, tracing its trajectory from the 188th Report of the Law Commission to the recent amendments in 2018. The examination not only explores the metamorphosis in the primary objectives of these courts but also scrutinizes the evolving structural framework and the rationale behind such transformations.



Origins and Initial Goals

The inception of the concept of commercial courts in India can be traced back to the 188th Report of the Law Commission in 2003. Concerned about the perceived collapse of the Indian judicial system due to prolonged delays, the report emphasized the need for expeditious resolution of high-value commercial matters. Proposing a High Court Division Bench approach, the report envisioned instilling confidence in investors, both local and foreign, by ensuring a swift resolution of disputes.

Fast Track Courts and Early Goals

The subsequent 2009 Bill implemented the 188th Report's recommendations, establishing Commercial Divisions of High Courts. These Divisions were mandated to follow a fast-track procedure, aiming to dispose of cases and pronounce judgments within a mere 30 days of concluding arguments. However, reservations were voiced about the borrowed concept of commercial courts from Western jurisdictions, sparking concerns about its applicability to the Indian scenario.

Shift Towards Comprehensive Commercial Courts

The model of fast-track courts underwent a significant transformation in the 253rd Report, expanding beyond High Court Divisions. This report envisaged commercial courts as forums exclusively dedicated to resolving complex commercial matters, with a broader scope encompassing disputes of varying pecuniary values over time. The underlying rationale was to create a stable, certain, and efficient dispute resolution mechanism crucial for India's economic development. These commercial courts were visualized as model courts, setting new norms of practice in commercial litigation that could potentially influence broader civil litigation reforms in India.



2015 Act and Enhanced Objectives

The subsequent enactment of the 2015 Act established commercial courts as an independent mechanism focusing on the early resolution of 'high value' commercial disputes with complex facts and legal questions. The objectives expanded to not only creating a positive image for the investor world but also promoting accelerated economic growth, enhancing the international image of India's justice delivery system, and bolstering investor confidence in the country's legal culture.

2018 Amendments and Continued Commitment

The 2018 amendments reinforced the commitment outlined in the 253rd Report, emphasizing the speedy settlement of commercial disputes of varying values, widening the scope of courts, and facilitating ease of doing business. The renewed objectives aimed to enhance India's ranking in the Ease of Doing Business Report, projecting a positive image of a robust and responsive legal system.

Shifts in the Basic Model

The foundational model of commercial courts has undergone a notable shift over time. While the 188th Report concentrated on establishing Commercial Divisions at the High Court level, granting no jurisdiction to district courts, the Amended Act shifted the adjudication burden to commercial courts at the subordinate court level. This shift in the basic model forms the focal point of the subsequent exploration into the choice of forum.

Jurisdictional Framework of Commercial Courts in India: Evolution and Structural Reforms

This section navigates through the intricate jurisdictional landscape of commercial courts in India, exploring its evolution from the recommendations of the Law Commission's 188th Report to the transformative structural reforms outlined in subsequent legislative enactments. The examination delves into pivotal shifts in the court hierarchy, considering the recommendations of the Law Commission, parliamentary considerations, and subsequent amendments.



Court Jurisdiction in Early Recommendations

The 188th Report by the Law Commission laid the groundwork by recommending that commercial disputes of significant pecuniary value be directed to a dedicated Commercial Division of the High Court, bypassing District Courts or Single Judge Benches. This approach was aimed at expediting the resolution of commercial matters and ensuring the execution of decrees by the Commercial Division itself.

Parliamentary Considerations and Evolution

The Select Committee reviewing the 2009 Bill expressed foresight by suggesting the potential need for a Commercial Division in the Supreme Court in the future. It emphasized the importance of a comprehensive law on judicial reforms to establish uniformity in the judicial system. The 253rd Report subsequently proposed a multi-faceted approach, recommending Commercial Divisions in High Courts, commercial courts even in regions beyond the original jurisdiction of High Courts, and commercial courts at the district level in territories without High Court original civil jurisdiction.

Implementation in the 2015 Act

The 2015 Act, aligning with the 253rd Report, mandated Commercial Divisions in High Courts with ordinary original civil jurisdiction – Bombay, Calcutta, Chennai, Delhi, and Himachal Pradesh. In these territories, commercial courts at the district level were not established. Commercial Divisions had jurisdiction over commercial disputes filed on the original side and transferred to High Courts under other laws. For states and Union Territories without ordinary original civil jurisdiction, commercial courts were designated at the district level. The Amended Act in 2018, however, expanded the scope by introducing district-level commercial courts even in territories with High Courts possessing ordinary original civil jurisdiction.



Structural Reforms and Budgetary Considerations

The transformative journey from a minor reform introducing a new High Court Division to a structural reform of the subordinate court structure is apparent. However, this magnification of reform lacks a corresponding budgetary allocation or program for radical cultural transformation in these new lower courts. The absence of such initiatives raises questions about the assumed transformative impact of introducing these courts.

Evolving Dimensions of Subject Matter Jurisdiction in Commercial Dispute Resolution

This segment navigates the dynamic evolution of subject matter jurisdiction within the framework of commercial dispute resolution in India. It traces the metamorphosis from the Law Commission's 188th Report, proposing a comprehensive definition, to subsequent legislative enactments and debates that have shaped the contemporary landscape.

Foundations Laid by the 188th Report

The Law Commission's 188th Report laid the groundwork by advocating a broad definition of 'commercial dispute cases.' Encompassing transactions and disputes of a commercial or business nature, it spanned diverse areas such as banking and insurance transactions, contracts for the sale and supply of goods or services (national or international), disputes of building contracts, partnership agreements, and business property. The inclusion of a residuary clause empowered High Courts to notify additional disputes falling within the commercial ambit.

Exhaustive Definition in the 2009 Bill

The subsequent 2009 Bill took a more exhaustive approach, defining 'commercial disputes' as those arising from ordinary transactions between merchants, bankers, and traders. This expansive definition included mercantile transactions, franchising, distribution and licensing agreements, maintenance and consultancy agreements, as well as agreements related to hardware, software technology, the internet, and intellectual property. Intriguingly, the bill introduced the concept of a 'specified value' as a determinant for vesting jurisdiction in the Commercial Division.



Committee Recommendations and Warnings

During the scrutiny of the 2009 Bill, the Select Committee recognized the need for inclusivity in the definition to enhance clarity. It recommended augmenting the definition to encompass 'joint venture, shareholder, subscription and investment agreements,' along with agreements in the services industry, outsourcing services, and financial services. The committee, however, cautioned against an overly expansive definition, foreseeing the potential for extensive litigation.

253rd Report's Broadening of Scope

Contrary to the warning, the 253rd Report expanded the ambit of 'commercial disputes' even further. Encompassing all categories of disputes arising from ordinary transactions of merchants, bankers, financiers, and traders, it included 22 categories of documents. This comprehensive list ranged from mercantile documents to agreements related to immovable property, construction and infrastructure contracts, and transactions involving intellectual property rights, insurance, aircraft, carriage of goods, and export and import of goods and services.

Implications and Future Considerations

The legislative journey showcases a continuous expansion of the definition of 'commercial disputes.' While aimed at comprehensive coverage, this broadening scope raises concerns about subject matter assessment. As we navigate through subsequent discussions, we will dissect the implications of such expansive definitions on the efficiency, specialization, and adaptability of commercial dispute resolution mechanisms in India.

Parallels in the 2015 Act and the Amended Act

The legislative scenario in the 2015 Act and its amendment resonates with Goode's concerns. The expansive definition of 'commercial disputes' spans ordinary transactions of merchants, bankers, financiers, and traders, categorized into trade/mercantile disputes, infrastructure and construction disputes, and business and financial disputes. This broad categorization, while

comprehensive, poses challenges in subject matter assessment, blurring the lines between what constitutes a civil or commercial dispute.

Subject Matter Assessment Dilemma

The dilemma emerges from the perceived superfluity of such a broad definition, potentially undermining the critical process of subject matter assessment. The three-fold categorization encapsulates a myriad of disputes, ranging from mercantile transactions and infrastructure contracts to business and financial arrangements. In practice, this broad definition tends to treat commercial disputes as essentially higher pecuniary value civil disputes.

Legislative History and Specialist Courts' Transformation

The legislative history, as scrutinized, hints at a convergence with the view that commercial disputes, despite their specialized nature, may ultimately align with ordinary civil disputes of higher financial stakes. This transformation, although converting specialist commercial courts into ordinary civil courts, prompts contemplation on the effectiveness of such reclassification in achieving the intended objectives of the legislative reforms.


Pecuniary Jurisdiction in Commercial Disputes

Setting the Stage

The delineation of pecuniary jurisdiction in commercial cases has undergone a significant evolution, reflecting a delicate balance between efficiency in dispute resolution and the constitutional principle of equality. The journey from the 188th Report to the recent amendments underscores the nuanced considerations embedded in this legal landscape.

188th Report's Propositions

The 188th Report advocated for a substantial pecuniary threshold (initially Rupees One Crore, with flexibility up to Rupees Five Crore) for commercial cases on the original side and those on appeal before Division Benches of High Courts. This proposal aimed to streamline the adjudication process, ensuring dedicated attention to high-value commercial disputes.



Concerns Raised by the Select Committee

The 2009 Bill aligned with this approach, but the Select Committee raised concerns about creating a dichotomy between litigants based on the value of their disputes. The apprehension centered around potential Article 14 violations due to unequal access to specialized forums. This dilemma persisted until the 253rd Report, which lowered the threshold to Rupees One Crore, emphasizing the need to alleviate the burden on High Courts.

Pecuniary Threshold in the 2015 Act and Progressive Amendments

The 2015 Act adopted the Rupees One Crore threshold, emphasizing the expeditious resolution of commercial disputes. However, recognizing the evolving dynamics, the Amended Act further reduced the threshold to Rupees Three Lakh. This reduction reflects a paradigm shift, prioritizing accessibility and swift resolution over rigid monetary demarcations.

Unintended Consequences

While the periodic reduction in pecuniary limits aligns with the goal of making the legal system more responsive, it inadvertently blurs the intended distinction between ordinary civil and high-value commercial disputes. This unintended consequence contributes to an upsurge in the workload of commercial courts, challenging their initial role as a focused mechanism for expedited dispute resolution.

Establishing Commercial Courts: Balancing Infrastructure and Expertise

Historical Perspectives

The establishment of Commercial Divisions, as envisioned by the 188th Report, underscored the importance of robust infrastructure and judicial expertise. The report mandated that State Governments and High Courts ensure the availability of Commercial Divisions with an adequate number of benches and judges possessing proficiency in civil and commercial laws. This inclusive approach extended to the appointment of retired judges for their experience and efficiency.



Shift in Discretion

In contrast, the 2009 Bill granted considerable discretion to the Chief Justice of High Courts regarding the composition of commercial courts, without explicit provisions for better-trained judicial manpower. The Select Committee identified the need for single-judge determinations in Commercial Divisions, emphasizing prompt appointments and addressing existing vacancies due to the anticipated increase in workload.

Technological Infrastructure and Model Court Guidelines

The 253rd Report, influenced by the Model Court Guidelines, emphasized the integration of technological infrastructure, proposing computerization for Commercial Divisions. It endorsed the government's plan to bolster bench strength by 25% and advocated for the creation of a specialized cadre of judges with demonstrable expertise in commercial litigation. Specialized training, a distinct recruitment process, higher remuneration, and continuous professional education were integral components.


Legislative Inclusions and cursory Treatment

The subsequent legislative acts, the 2015 Act and the Amended Act, adopted a more cursory approach. While recognizing the necessity of judges with experience in commercial disputes, these acts lacked detailed mandates on infrastructure. Instead, the onus was placed on State Governments to provide essential facilities and training infrastructure at all levels. The absence of explicit legislative directives on infrastructure and judicial selection led to a situation where existing courts were rebranded as commercial courts. This unintended consequence suggests a gap between legislative intent and practical implementation, impacting the effectiveness of these specialized courts.

Streamlining Commercial Court Procedures

Historical Guidelines

The 188th Report initiated the concept of fast-tracking procedures for Commercial Divisions, emphasizing a process akin to fast-track arbitration for civil courts. The 2009 Bill proposed



modest modifications to the Code of Civil Procedure, 1908 (CPC), but concerns were raised about potential delays.

Precision in Procedural Modifications

The 253rd Report delved deeper into procedural enhancements. It recommended targeted modifications to civil procedural rules, aiming for expeditious resolution of commercial disputes. Barriers to streamlined litigation, such as civil revision applications against interlocutory orders, were removed to discourage unnecessary delays.

Shift of Control to Courts


The 2015 Act marked a paradigm shift, advocating a transfer of control from litigating parties to the courts. It introduced procedures to ensure judges' authority over the litigation process, emphasizing concise pleadings, simplified document submissions, and cost-effective timelines. High courts were mandated to issue rules for trial management, promoting internationally recognized practices like case management hearings.

Summary Judgment Powers

Further enhancements came with the 2015 Act, empowering commercial courts to order summary judgments at any stage before framing issues. This aimed to expedite the litigation process by dismissing claims lacking substance. Retaining the core changes introduced by the 2015 Act, the Amended Act endorses the pre-institution mediation requirement in cases without urgent interim relief needs. However, a notable absence lies in the limited impact these procedural changes have had in actual practice, with commercial courts often resembling traditional civil courts governed by the CPC, 1908.

The Role of Costs in Commercial Litigation

The 188th Report and the 2009 Bill lacked specific provisions on costs imposition, with limited discretion for the commercial courts to extend time limits after imposing costs. However, the



253rd Report recognized the need to alter the litigation culture, advocating a 'costs to follow the event' regime.

Culture Shift through Costs

The 253rd Report highlighted the inadequacy of infrequent and unrelated costs as a deterrent against delaying tactics in litigation. The recommended 'costs to follow the event' regime aimed to instill a meaningful fear of punishment and discourage frivolous litigation. Commercial courts were mandated to provide reasons if costs were not awarded.

Legislative Adoption

The 2015 Act and the Amended Act, 2018 embraced the recommendations of the 253rd Report, introducing a robust costs framework. Aligned with the 'costs to follow the event' principle, the Acts empowered commercial courts to impose costs to discourage vexatious or frivolous matters. Amendments to the CPC determined liability, quantum, and payment periods for costs.


Reshaping Incentives

The wide-ranging costs rules introduced by the Acts have the potential to reshape the incentive structure of commercial litigation. Costs can now be imposed on parties with no genuine claim or those refusing reasonable settlement offers, emphasizing a shift toward efficient and fair dispute resolution. The legislative evolution, from a lack of focus on costs to a comprehensive 'costs to follow the event' regime, reflects an understanding of the role costs play in shaping litigant behavior. The real impact, however, depends on the consistent application of these provisions and their influence on the overall litigation landscape.

Appeals in Commercial Disputes

Evolution of Appeal Mechanisms

The Law Commission's 188th Report initially suggested a statutory right of appeal to the Supreme Court. The 253rd Report replaced this with the Commercial Appellate Division at the High Court level, addressing appeals against orders and decrees from Commercial Divisions or



commercial courts. The 2015 Act maintained this structure, introducing a single forum of appeal - the Commercial Appellate Division.

Structural Changes in Appeals

The 2015 Act restricted avenues for challenges, disallowing civil revision applications or petitions against interlocutory orders of commercial courts. All challenges to commercial court orders were directed to the Commercial Appellate Division, ensuring a streamlined appellate process. The Act mandated a 60-day filing period for appeals, with a commitment to disposing of appeals within six months.

Further Evolution

The Amended Act introduced a dual appellate court system. In High Courts without ordinary original jurisdiction, appeals from commercial courts below the district court level go to the district court functioning as a Commercial Appellate Court. High Courts with original civil jurisdiction continue to have Commercial Appellate Divisions hearing appeals from district commercial courts or Commercial Divisions.

Complexity in the Appellate System

While the original intent was to reform the civil justice system, the current system of appeals at both the subordinate court and High Court levels appears intricate. The bar on interlocutory litigation aims to improve adjudication flow in commercial courts, but the overall impact of these changes on the efficiency of dispute resolution remains to be seen. Understanding the legislative and executive decision-making processes is crucial in assessing the impact of policy choices on the functioning of commercial courts. The evolving appeal mechanisms demonstrate the iterative nature of institutional development and the need for ongoing evaluation of outcomes.



Implementation and Impact of the Commercial Courts Act, 2015

Timeline of Implementation

The Commercial Courts Act, 2015, came into implementation in October 2015. The original side Commercial Divisions were established by High Courts, including Delhi, Calcutta, Himachal Pradesh, and Bombay, between late 2015 and mid-2017. Commercial courts at the district court level and Commercial Appellate Divisions in High Courts were set up for states without original civil jurisdiction. Notifications for the establishment of these courts were available for 24 states and Union Territories.

Data Availability and Mixed Methods Model

Detailed information on commercial matters, including litigants' names, case filing, and disposal status, is available for only 8 instances under the e-Court Mission Mode Project from the respective High Court websites. To assess the performance of commercial courts, a mixed methods model is adopted. The analysis involves quantitative evaluation using data from the Delhi High Court, one of the early implementers, and a qualitative study in Bengaluru, focusing on court observations and unstructured interviews with legal practitioners.

Quantitative Analysis - Delhi High Court

The Delhi High Court, meeting the criteria of early implementation and consistent data availability, is analyzed quantitatively. The objective is to determine if the establishment of commercial courts has expedited the resolution of commercial disputes.

Qualitative Study - Bengaluru

For a more in-depth understanding, a qualitative study is conducted in Bengaluru. This involves extended court observations and unstructured interviews with legal practitioners to gain insights into the implementation outcomes and identify factors influencing the impact of the Commercial Courts Act.



Anticipated Insights

The qualitative analysis in Bengaluru is expected to provide valuable insights into the practical implications and outcomes of implementing the Commercial Courts Act, helping explain certain patterns observed in the quantitative analysis of the Delhi High Court. The combination of quantitative and qualitative methods aims to offer a comprehensive assessment of the Act's impact on the resolution of commercial disputes.

Theories/Principles of International Commercial Arbitrations

Freedom of Choice in Governing Laws

When parties opt to have their contractual relationship and subsequent disputes governed by general principles of international law, *lex mercatoria*, or principles common to specific legal systems, arbitrators are bound to uphold this choice. Regardless of their personal views on the appropriateness of this choice, arbitrators must give effect to the parties' decision, as indicated in the applicable law provision of their agreement.

Recognition of Parties' Right to Choose General Principles

Recent legislative developments in international arbitration acknowledge the parties' right to select general principles of law to govern their contractual relations. Many modern statutes emphasize the application of 'the rules of law' instead of 'the law' chosen by the parties. However, certain legal systems, like the UNCITRAL Model Law, may discourage this approach.

UNCITRAL Model Law and Legal System Variations

The UNCITRAL Model Law, known for its relative conservatism, articulates that, in the absence of a choice by the parties, the arbitral tribunal should apply the law determined by the conflict of laws rules it considers applicable. Some legal systems, such as the German statute of December 22, 1998, diverge from this formula, allowing arbitrators to base awards on pre-determined rules of law chosen by the parties.



Application of Transnational Rules

Some recent laws permit arbitrators to apply transnational rules if they find it appropriate and in the absence of an agreement by the parties. While national laws, in line with Article 36 of the Model Law, often grant arbitrators significant latitude in deciding applicable law, they generally do not subject this decision to court review during exequatur proceedings or actions to set aside awards.

The Role of International Law Association Resolution (1992)

The International Law Association, in a resolution adopted in Cairo on April 28, 1992, emphasized that an arbitrator's decision to base an award on transnational rules should not affect its validity or enforceability. This holds true, especially when parties have agreed to the application of transnational rules or have remained silent on the applicable law. The resolution supports the arbitrator's flexibility in applying general principles of law when parties have not explicitly chosen applicable law.

Court Infrastructure and Implementation Challenges

Legislative Mandate and Practical Implementation

The Commercial Courts Act specifies the appointment of specialist judges with experience in commercial disputes and mandates State Governments to provide the necessary infrastructure for the functioning of commercial courts and Commercial Divisions of High Courts. Additionally, provisions are made for training judges dealing with commercial matters.

Challenges in Practice

In practice, the implementation of the Act has been slow, particularly at the subordinate court level. Several State Governments have not established the required infrastructure, leading to challenges in operationalizing the law effectively. The lack of proper infrastructure is evident in the overburdening of judges with matters of various categories, not limited to commercial disputes.



Observations and Interviews

Court observations reveal that judges, such as an Additional City Civil & Sessions Judge, handle a substantial caseload, averaging about 76 matters daily. Many of these matters are transferred from other courts due to their suit value falling within the jurisdiction of a commercial court. Interviews with advocates indicate that there has been a limited filing of fresh matters since the Act's implementation, and compliance with the prescribed fast-track procedure is lacking.

Implementation Shortcomings

The court, referred to as "CCH-39," is observed to not function as a fast-track court effectively. Advocates note a slow understanding and adaptation by commercial court judges to the changes introduced by the Act. There is a consensus among practitioners that more efforts are needed to enhance awareness among judges and the court registry regarding the Act's provisions.

Limited Improvement in Infrastructure

Despite the legislative mandate, the Act does not seem to have brought substantial improvements to the infrastructure of commercial courts. The overall implementation has faced challenges, impacting the effectiveness of the commercial justice system. Addressing these issues is crucial to realizing the intended benefits of expedited commercial dispute resolution.

Judicial Procedure Challenges

Provisions for Case Management

The Commercial Courts Act mandates commercial courts and Commercial Divisions to conduct case management hearings to ensure the speedy and efficient disposal of transferred matters. Strict time limits are imposed on the filing and disposal of appeals to expedite the overall process.

Case Flow Management Rules

Several Indian states and Union Territories have initiated case flow management rules since 2005, covering various civil proceedings, not limited to commercial matters. However, the

effectiveness of these rules has been limited, as they are not consistently followed, leading to challenges in improving matter disposal rates.

Observations and Interviews

Court observations in Bengaluru could not conclusively determine the adoption of case management practices at the City Civil Court. Interviews with legal practitioners suggest that procedural hindrances from the ordinary civil litigation system have seeped into the commercial courts. Delays are reportedly condoned easily, and judges may be hesitant to impose substantial costs on parties, diminishing the deterrent effect.

Challenges in Case Management Implementation

Practitioners in Bengaluru express concerns about the neglect of case management techniques in commercial trials, with timelines not strictly enforced. The role of lawyers in influencing case management practices, adapting them to client convenience, is highlighted. Recommendations include the need for a specific case manager, maintaining a special register, and limiting the number of matters listed on a particular day.


Insights from Legal Practitioners

Legal practitioners recommend the appointment of a dedicated case manager and a register for maintaining court schedules. Suggestions are made to limit the number of matters listed on a given day to enhance efficiency. However, these practices are reportedly not adopted in the Bengaluru commercial court, indicating a gap between legislative provisions and practical implementation.

Enforcing Court Discipline

Costs as a Tool

The Commercial Courts Act utilizes costs as a primary tool for judges to enforce court discipline and discourage unnecessary litigation. This power is not new to Indian courts, but the Act amends Section 35 of the Civil Procedure Code (CPC) to grant commercial courts broader



discretion in determining whether costs should be imposed, the amount of costs, and the timeframe for payment. The Act outlines various circumstances for the court to consider when ordering the payment of costs.

Reality of Cost Imposition

According to interviews with legal practitioners, commercial courts seldom impose costs on litigating parties. The practitioners argue that when costs are ordered, the amounts are not sufficiently prohibitive to penalize errant parties. They claim that these costs often lack correlation with the commercial value of the dispute, the complexity of issues, actual expenses incurred, or the paying capacity of the party at fault.

Practitioner Perspectives

An advocate with over 10 years of practice experience in Karnataka mentioned that even when costs are imposed, they are usually low, ranging from Rs. 100 to Rs. 1,500, and in exceptional cases, Rs. 10,000. This practitioner expressed the opinion that this aspect of the existing civil justice system allows for the abuse of court time, indicating a potential gap between legislative intent and practical implementation.



CHAPTER II- The Emergence of International Commercial Courts in India

Introduction

The globalized order has intensified the focus on regulating international commerce, especially in dispute resolution. Challenges in enforcing contracts, often tied to deficiencies in legal systems, prompted the establishment of specialized commercial courts, both international and domestic. India, like other jurisdictions, has legislated in favor of these mechanisms to expedite justice. This research critically examines the strengths and reform spaces within India's legislation on commercial courts, emphasizing their status in the context of cross-border contracts. Commercial dispute resolution in India primarily relies on civil courts in each of the 719 districts. This system faces challenges such as increased pendency and delays, impacting litigants' confidence. Recognizing these issues, the Indian government initiated efforts in 2015 to overhaul commercial dispute resolution, separating them from civil disputes and prescribing timelines for resolution. Specialized commercial courts are seen as crucial for effective access to contract enforcement and improving the investment climate.

Background and Challenges

An empirical analysis in 2010 highlighted the challenges in India's judicial system, including increased pendency and delays, impacting litigant confidence. The World Bank's 2016 'Ease of Doing Business' report indicated that resolving civil disputes, including commercial disputes, took a total of 1,420 days in India, significantly higher than BRICS partners like China and Russia.

Government Initiatives

In 2015, the Indian government initiated reforms to streamline commercial dispute resolution, aiming to enhance investor confidence and reduce delays. This involved separating commercial disputes from civil disputes and setting timelines for resolution.



Court Specialization and Its Benefits

Court specialization is viewed as a utility to address developmental constraints, enhance access to contract enforcement, and improve the investment climate. Specialized courts offer benefits such as efficient processes, a deeper understanding of the law, and effective mapping of decisions' impact on parties.

Comparative Analysis of Commercial Courts

Introduction

The establishment of commercial courts in India has been a subject of discussion and reform. This paper reviews the recommendations of the Law Commission's 188th and 253rd Reports, emphasizing the need for specialized courts to address the high pendency of commercial disputes and boost investor confidence. To appreciate the Indian model, it is essential to examine the functioning of commercial courts in other jurisdictions. This comparative analysis explores the strengths and reform spaces within international commercial courts, including those in England, Dubai, Abu Dhabi, Qatar, and Singapore.

Background and Recommendations

The Law Commission's reports highlight the importance of specialized dispute resolution to enhance economic prosperity and investor confidence. Commercial courts are viewed as crucial for facilitating the speedy enforcement of contracts, addressing the high percentage of civil disputes categorized as commercial. Insights from the London Commercial Court's success, with features like user feedback mechanisms, guide the development of international commercial courts.

International Commercial Court Models

1. ***London Commercial Court:*** The Lord Thomas of Cwmgiedd emphasizes the economic significance of specialized dispute resolution. The London Commercial Court's user

feedback and continuous adaptation contribute to its success, inspiring other international models.

2. ***DIFC Courts (Dubai)***: Described as a "common law island in a civil law ocean," the DIFC Courts serve as curial courts for arbitrations seated in the DIFC. A unique feature allows converting DIFC Court judgments into arbitral awards, streamlining dispute resolution procedures.
3. ***Singapore International Commercial Court (SICC)***: Established in 2015, the SICC combines elements of arbitration and litigation. Its jurisdiction covers primarily international and commercial disputes, offering flexibility in forum selection and the use of international rules of evidence. The SICC's composition includes local and international judges, promoting a global perspective.

Innovations and Lessons

International commercial courts demonstrate innovative approaches to dispute resolution, such as the conversion of court judgments into arbitral awards. The use of international rules and the inclusion of foreign counsel contribute to a streamlined process, benefitting international investors and commercial entities. These models provide valuable lessons for refining India's commercial court framework.

Cross-Border Commercial Dispute Resolution in India

Cross-border commercial disputes are commonly resolved through national courts, subject to private international law rules. This paper delves into India's legal framework for handling such disputes, emphasizing the role of commercial courts under the Commercial Courts Act, 2015. The analysis explores India's adherence to private international law principles, the application of the lex situs principle, and the validity of forum selection clauses. Additionally, the paper discusses party autonomy, jurisdictional clauses, and the recognition and enforcement of foreign judgments.



Private International Law in India

India relies on colonial and post-independence judicial developments for cross-border dispute resolution, with limited adherence to international conventions. The Commercial Courts Act designates commercial courts as the first instance for such disputes, applying the same private international law rules used by civil courts. The *lex situs* principle is notable, and the commercial courts handle applications related to immovable property within commercial disputes.

Forum Selection Clauses

India recognizes the validity of forum selection clauses, provided they adhere to specific principles outlined in the *ABC Laminart Pvt. Ltd. v. A.P. Agencies* case. The Delhi High Court recently upheld the validity of a forum selection clause designating the London Commercial Court. The principle of party autonomy allows commercial courts to hear disputes based on chosen forums, respecting the jurisdictional clauses in contracts.

Applicable Law and Enforcement of Foreign Judgments

Indian courts favor party autonomy in choosing applicable law, prioritizing the parties' express or implied choices over presumptions. Recognition and enforcement of foreign judgments are contingent on the principle of reciprocity. Non-reciprocating territories require civil suits for enforcement, where the foreign court's order serves as a cause of action.

Concerns and Challenges

The analysis highlights concerns related to the enforcement of contracts, particularly the limited engagement with harmonized law and the historical reluctance to issue and enforce cost-related orders in both litigation and arbitration. The paper underscores the need for reforms in cost-related orders within the commercial dispute resolution system in India. India's legal landscape for cross-border commercial dispute resolution exhibits a reliance on established principles, with a few areas of concern. The paper emphasizes the significance of reforms, especially in addressing cost-related orders, to enhance the efficacy of the commercial dispute resolution system in India and promote the ease of doing business.

Commercial Courts in India

A robust legal system is pivotal for bolstering investor confidence and ensuring the enforcement of contracts. This paper explores India's venture into commercial courts, tracing its inception in 2003 and the subsequent promulgation of the Commercial Courts Act, 2015. Emphasizing the importance of efficient commercial dispute resolution, the paper delves into the legislative framework and the multi-tiered court structure established to address commercial claims.

Historical Evolution of Commercial Courts

India's foray into commercial courts dates back to 2003 when the Law Commission recommended the creation of fast-track commercial divisions in High Courts. Despite initial recommendations, the actual implementation gained momentum with the Commercial Courts Act, 2015. The legislation introduced a comprehensive structure for adjudicating commercial disputes, catering to both federal and state-level jurisdictions.

Structural Overview of Commercial Courts

The Commercial Courts Act delineates a multi-tiered structure for handling commercial disputes:

1. ***District-level Commercial Courts:*** Established by state governments in territories without High Courts exercising original civil jurisdiction.
2. ***Commercial Divisions:*** Constituted within High Courts' jurisdictions, presided over by a Single Judge, as ordered by the Chief Justice of the High Court.
3. ***Commercial Appellate Division:*** Instituted within each High Court, comprising one or more benches for appellate purposes.

Definition and Scope of Commercial Disputes

The term 'commercial disputes' is expansively defined, encompassing a non-exhaustive list of twenty-two standard commercial transactions. However, judicial interpretation varies, with some reluctance to adopt a broader meaning. Instances such as the Qatar Airways case showcase the judiciary's cautious approach, prompting a nuanced exploration of what constitutes a commercial



dispute. Nevertheless, precedents like the Great Eastern Energy case demonstrate a more inclusive interpretation.

Innovative Applications of Commercial Courts

Commercial courts have showcased their versatility in handling a spectrum of disputes. Noteworthy instances include considering disputes related to one-time payments of signature bonuses, suits for the recovery of mesne profits, and cases involving immovable properties in notified commercial locations. The paper highlights the adaptive nature of commercial courts in addressing diverse commercial scenarios. India's journey with commercial courts signifies a pivotal stride in enhancing the efficacy of its legal system for commercial dispute resolution. The legislative framework and the courts' adaptability to varied commercial scenarios underscore their potential as catalysts for innovative dispute resolution. As the commercial courts continue to evolve, their role in fostering investor confidence and expeditiously resolving commercial disputes is set to become increasingly crucial.


Refining Commercial Dispute Classification and Enhancing Access to Justice

Definition of Commercial Dispute

The legislative provision defines a "commercial dispute" in intricate detail, encompassing various agreements related to immovable property exclusively used in trade or commerce. The paper illustrates the nuanced interpretations offered by commercial courts, citing examples such as specific performance suits related to land development not being classified as commercial disputes. It emphasizes the need for the judiciary to acknowledge the expansive definition and align interpretations with Law Commission recommendations for comprehensive coverage.

Access to Justice Improvements

The paper underscores the pivotal role of the Commercial Courts Act in enhancing access to justice. It discusses the prescription of pecuniary jurisdiction, initially set at INR 10,000,000 and later reduced to INR 300,000 by the Amendment Act of 2018. This change aligns with global



parameters used in the World Bank's Ease of Doing Business Report, ensuring that commercial courts contribute to assessing enforceability of contracts. The Act facilitates the transfer of suits or applications related to commercial disputes to commercial courts, promoting a streamlined dispute resolution process.

Prohibition of Revision Applications and Interlocutory Orders

To streamline case management and prevent disruptions, the Act prohibits the filing of civil revision applications or petitions for interlocutory orders, including those challenging a Commercial Court's jurisdiction. This prohibition aims to deter frequent filings that could disrupt case schedules. The Law Commission's recommendation to limit the right to approach other courts for revision applications or interlocutory orders aligns with the Act's provisions, fostering expeditious dispute resolution within commercial courts. The paper concludes by emphasizing the symbiotic relationship between a refined definition of commercial disputes and improved access to justice. The Commercial Courts Act, with its amendments, emerges as a catalyst for promoting efficient and comprehensive commercial dispute resolution. By addressing nuanced classifications and procedural aspects, the Act contributes to the larger goal of bolstering investor confidence and facilitating a conducive environment for business operations.


Pioneering Innovations in Commercial Dispute Resolution

Cross-Referencing with Procedure Law

After the amendments to the Code of Civil Procedure (CPC), aligning it with the Commercial Courts Act., the litigating parties face stringent timelines, such as a 120-day limit for defendants to file written statements. The Act allows for summary judgments based solely on documentary evidence. Sections 16(3) and 21 assert the primacy of the amended CPC in cases of procedural conflicts with other laws or jurisdictional rules.

Costs and Remedies

Drawing from the Law Commission's recommendation, the legislation incorporates a detailed costs-follow-the-event regime and comprehensive provisions on interest. This aims to discourage



frivolous litigation and encourage adherence to contractual obligations. Notably, the Act permits remedies against state entities engaged in commercial activities, ensuring equitable treatment regardless of the party's governmental affiliation.

Case Management and Efficiency

Introducing case management, the legislation seeks to expedite proceedings by fixing schedules and adhering strictly to timelines. This echoes the Supreme Court's emphasis on timely case management. A new provision in the CPC mandates a 'Case Management Hearing' for framing issues, listing witnesses, and scheduling proceedings, reinforcing the commitment to efficient dispute resolution.

Commercial Courts and Arbitration

The Act positions commercial courts as the first instance for arbitration-related applications involving specified commercial disputes. It grants exclusive jurisdiction to Commercial Divisions in High Courts for international commercial arbitrations and assigns Commercial Courts the responsibility for applications and appeals related to domestic arbitrations. This integration streamlines the arbitration process, aligning it with the broader commercial dispute resolution framework.

Integration of Commercial Courts and Arbitration

The Report sheds light on the symbiotic relationship between commercial courts and arbitration, noting that while parties often choose between the two, circumstances may necessitate recourse to national courts. The Commercial Courts Act and the amended Arbitration Act aim to minimize judicial intervention in arbitration, fostering investor confidence. The legislative changes have garnered positive responses from governance institutions, businesses, and the legal community.



Forum Changes for International Commercial Arbitrations

The twin legislations introduced significant shifts in the forum for applications related to International Commercial Arbitrations and the enforcement of foreign arbitral awards. The amended Arbitration Act directed such applications to be presented to the High Courts, while the Commercial Courts Act transferred pending applications from High Courts to Commercial Divisions. The Act maintains the parties' right to appeal to the Supreme Court.

Judicial Assistance to International Arbitrations

Commercial Courts play a crucial role in providing judicial assistance to international arbitrations. They handle applications for interim relief in both domestic and international arbitrations until the tribunal is constituted. The commercial court's extension of time limits for arbitral proceedings and handling of challenges to arbitral awards within stringent timelines demonstrate a commitment to effective dispute resolution.

Cost Regime and Concerns

The Arbitration Amendment Act, 2015, introduced a new cost regime emphasizing party conduct, particularly in seeking court interventions to delay arbitration proceedings. Commercial courts are tasked with considering these factors when deciding on the imposition of costs. However, concerns persist regarding judicial intervention in enforcing foreign arbitral awards based on public policy grounds in India, as noted by legal literature and reports from the Law Commission of India. The legislative changes, with retrospective effect from October 23, 2015, signify a significant step towards aligning arbitration and commercial court frameworks. Positive responses from governance institutions and the legal community, along with initiatives like the establishment of the Mumbai Centre for International Arbitration, reflect a proactive approach to institutionalizing arbitration in India. The report concludes by emphasizing the evolving landscape and the potential positive impact on contracts and their enforcement.



Refinement of 'Public Policy' Grounds in Arbitration

The Arbitration Amendment Act of 2015, along with subsequent judicial opinions, addressed concerns about the vulnerability of challenges based on 'public policy' in enforcing foreign arbitral awards. While 'public policy' remains a valid ground for challenges, its scope has been narrowed. It now applies specifically to cases involving fraud, corruption, contravention of the fundamental policy of Indian law, or violation of basic notions of morality or justice. The amendment clarifies that the concept of patent illegality applies solely to domestic arbitration, enhancing the enforceability of foreign awards.

Improvements in the Enforcement Process

The enforcement process is further streamlined by eliminating the automatic stay on award enforcement due to the commencement of setting aside proceedings for international arbitral awards. This legislative change contributes to a more robust enforcement mechanism for arbitration awards.

Judicial Commitment to Contract Enforceability

Recent judgments from the Delhi High Court reinforce the legal commitment to contract enforceability. In *Cruz City I Mauritius Holdings v. Unitech Limited*, the court emphasized that parties intending to attribute enforceability to their contract cannot later claim unenforceability based on foreign exchange regulation violations. In *NTT Docomo v. Tata Sons Ltd.*, the court upheld a substantial award, rejecting objections related to regulatory framework violations. These decisions reflect a restrained approach to public policy grounds, prioritizing the sanctity of contracts.

Contract Enforceability

The legislative and judicial developments underscore a positive shift toward ensuring the enforceability of contracts, particularly in the context of international arbitration. The refined interpretation of 'public policy,' coupled with procedural improvements, contributes to a more favorable environment for businesses and investors, fostering confidence in contract enforcement.

mechanisms. The mentioned court decisions exemplify the judiciary's commitment to upholding the sanctity of contracts, even in the face of regulatory challenges.

Mandatory Pre-institution Mediation

The Amendment Act of 2018 introduced a significant change by mandating pre-institution mediation for cases where a lawsuit does not involve urgent interim relief. In such instances, plaintiffs are required to undergo pre-institution mediation before initiating legal proceedings.

Critique of Commercial Dispute Resolution Mechanism


To assess the effectiveness of a commercial dispute resolution mechanism, particularly in the context of cross-border commerce, Sir William Blair outlined essential prerequisites. These include the application of ascertainable legal principles, accessibility without artificial barriers, predictability through known procedures, transparency, independence, tribunal expertise, efficient case management, and achieving effective outcomes, including enforcement if necessary.

Concerns Regarding Cross-referencing with Arbitration Laws

One notable concern raised in the critique pertains to the extensive cross-referencing attempted in the 2015 legislation concerning arbitration laws. The decision in *Kandla Export Corporation v. M/s OCI Corporation* emphasizes the need for clarity in cross-referenced sections, particularly in cases involving the enforcement of foreign awards. The Supreme Court clarified that appeals related to foreign awards must adhere to the grounds specified in Section 50 of the Arbitration Act, and certain appeals won't proceed to the Commercial Appellate Division.

Uncertainty Surrounding Retrospective Application of Amendments

The retrospective application of the Arbitration Amendment Act of 2015 has led to conflicting decisions among commercial courts in India. The uncertainty revolves around whether the



amendments should apply to arbitration proceedings initiated before October 2015. Inconsistent rulings on this matter have raised concerns about the clarity and predictability of the law. While the commercial dispute resolution mechanism in India has undergone transformative changes, concerns persist regarding the harmonization of legislation, clarity in cross-referencing, and the retrospective application of amendments. Addressing these issues is crucial to ensure the effectiveness, accessibility, and predictability of the dispute resolution system, aligning it with the evolving needs of businesses, both domestic and international.

Interpretation of Legislation Provisions

The interpretation of provisions in the Commercial Courts Act, especially concerning disputes pending before courts and their transfer to commercial courts, has been subject to interesting articulation. The Delhi High Court, in *Guinness World Records v. Sababbi Mangal*, clarified the law on the transfer of suits pending in civil courts under Section 7 of the Commercial Courts Act. The court endorsed the transfer of an intellectual property rights dispute to the Commercial Division of the High Court, emphasizing the legislative intent over the specified value of the dispute.

Discrepancy between Legislation Intent and Practice

Despite the legislative commitment to establishing specialized forums for commercial dispute resolution, the practical implementation has shown discrepancies. Examination of the Bombay High Court's roster revealed judges alternating between civil court and commercial division/appellate division duties. This practice, instead of fostering specialized expertise in commercial disputes, has increased the workload on an already burdened judiciary.

Need for Technological Integration and Efficiency

An effective specialized dispute resolution system for commercial disputes should prioritize expeditious resolution and leverage technology to achieve this goal. The Commercial Courts Act in India is urged to adopt competitive practices like e-filing, video-conferencing for cross-examination, and digital transcription services. Some Indian courts have independently embraced e-filing procedures, reflecting a positive trend.



Concerns about Discovery Procedures

The legislation's envisioned discovery procedures have raised concerns about potentially dilatory and protracted processes related to document production requests. These concerns highlight the need for efficient and speedy dispute resolution, calling for a reevaluation of the current discovery mechanisms outlined in the law.

CHAPTER III - International Development of International Commercial Arbitration

Historical Roots

International Commercial Arbitration has deep historical roots, with biblical references suggesting King Solomon's use of arbitration to resolve a dispute over the true mother of a baby. This ancient practice, rooted in biblical times, symbolizes the earliest form of arbitration. Additionally, historical figures like Philip II, father of Alexander the Great, employed arbitration to settle territorial disputes arising from peace treaties as early as 337 B.C.

Ancient Civilizations and Early Codes


The Sumerian Code of Hammurabi (c. 2100 BC) in Babylon marked a significant development in arbitration, establishing the sovereign's duty to administer justice through arbitration. The Greeks, influenced by their Egyptian ancestry, continued and adapted arbitration, and this practice evolved into Roman civilization, impacting countries with which Rome traded.

Arbitration in England and India

In England, arbitration predates the establishment of King's courts, with records dating back to 1224. It emerged as a common means of commercial dispute resolution among merchants and traders. The first written law related to arbitration in England dates back to 1698. Meanwhile, in India, the Panchayat system laid the foundation for arbitration, and subsequent regulations and legislation, such as the Indian Arbitration Act 1940 and the modernized Arbitration and Conciliation Act 1996, contributed to its development.

Dispute Resolution in Bangladesh

In Bangladesh, the traditional dispute resolution mechanism known as "shalish" is prevalent. Shalish is commonly used for disputes involving marital issues, such as desertion, divorce, child custody, maintenance, and land disputes. This historical overview reflects the diverse origins and



evolution of international commercial arbitration, encompassing biblical narratives, ancient civilizations, and the legal systems of various countries. The practice has adapted and thrived across centuries, contributing to the rich tapestry of dispute resolution mechanisms worldwide.

Origin and Development of International Commercial Arbitration at the International Level

Early Roots in Maritime and Commercial Contracts

International commercial arbitration finds its historical roots in the city, with modern arbitration emerging as a product of historical precedents dating back to the late XVIIIth century. The first contracts submitted to arbitration often dealt with commodities, especially perishable goods, necessitating rapid and confidential dispute resolution. London, in the XIXth century, became a central hub for maritime and financial matters, insurance, commodities, and metals.

Common Law Courts and Commercial Matters

Despite the growth of commercial activities, common law courts, primarily driven by geographical limitations and jurisdiction over matters within England, initially showed limited interest in commercial disputes. Matters involving foreign merchants or contracts to be performed abroad were often left to other bodies, especially when they raised questions about the relations between the English King and foreign sovereigns.

Mercantile Law and Local Courts

The development of mercantile law, based on customs and usages among merchants, evolved separately from common law. Disputes between merchants, both local and foreign, were resolved at fairs or boroughs. Courts of the fair or borough, presided over by mayors or deputies, applied mercantile law, and juries were comprised of merchants. This setting laid the groundwork for the practice of merchants referring disputes to specially selected individuals for settlement.



Evolution of Maritime Courts and Common Law Courts

With the establishment of maritime courts in major ports like Bristol, maritime disputes found resolution. The Court of Admiralty later evolved, taking over the work of mercantile courts. During the seventeenth century, common law courts began incorporating commercial work, integrating many rules of the law merchant. Overcoming jurisdictional challenges, common law courts accepted allegations that events abroad occurred within their jurisdiction, often through legal fictions.

Evolution of Arbitration in England and the Arbitration Act, 1996

Historical Attraction for Merchants and Traders

Historically, arbitration gained popularity among merchants and traders dealing in perishable commodities due to the need for expeditious dispute resolution in accordance with mercantile law and custom.

Deficiencies in Common Law Courts


Over time, it became evident that common law courts had limitations. Arbitral agreements at common law could be oral or written, with provisions for removal of arbitrators appointed by parol agreement. Recognizing these deficiencies, successive statutes were enacted to enhance the common law practice.

Statutory Intervention

Provisions in successive statutes aimed to improve the common law practice, reinforcing the binding effect of arbitration submissions, making awards more enforceable, and addressing defects highlighted by common law practice.

Arbitration Acts in the UK

- In 1889, the UK Parliament passed the Arbitration Act, largely declaratory of previous statutes and commercial practices.

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- Acts of 1924, 1930, and 1934 led to the Arbitration Act 1950, consolidated in a Consolidation Act.
 - Subsequent acts in 1975 and 1979 followed.

Arbitration Act, 1996

The Arbitration Act 1996 restated and codified principles established by previous case law.

Influenced by the Model Law of the United Nations Commission on International Trade Law.

The principal UK arbitration statute, codifying principles and procedures for arbitrations.

Influence of Model Law

The Arbitration Act, 1996 drew from the Model Law, popularly known as the United Nations Commission on International Trade Law (UNCITRAL).

Development of Arbitration in England

- Prior to the 1996 Act, there was no comprehensive statutory code for arbitration conduct.
- The 1996 Act, influenced by the Model Law, became the principal legislation for UK arbitration.
- Lazareff notes that international commercial arbitration, as known today, started between the two World Wars, evolving from a gentlemen's agreement to a more structured and regulated procedure.

Current Landscape

- Various Arbitration Rules now govern proceedings, introducing structure.
- Arbitration proceedings may be comparable in cost and duration to litigation.
- The consequences for non-compliance include recourse to the courts for enforcement, marking a departure from the earlier informal practices.



Significance of England in the Evolution of Arbitration

London as the Global Trade Center

- London, being the global trade center, played a pivotal role in the evolution of arbitration.
- The London Court of International Arbitration (LCIA), founded in 1892, stands as one of the oldest arbitration institutions globally.
- London's prominence in international trade contributed to the establishment and growth of arbitration practices.

Legal History and the English Legal System

- England's legal history, deeply intertwined with the English legal system, influenced the development of arbitration practices.
- Until 1988, laws on arbitration in many jurisdictions, including England, leaned heavily on English laws.
- Arbitration, as a mechanism, became an invisible export of England due to its legal and commercial significance.

Role of Legal System in Evolution


- Arbitration evolved primarily as a private sector judicial proceeding, driven by the needs of the business and trade community.
- The law stepped in to formalize and reinforce the importance and relevance of arbitration.

Global Spread of Arbitral Centers

- While London remained a key hub, arbitral centers and institutions have proliferated worldwide.
- The evolution of arbitration transcended geographical boundaries, with many countries establishing their arbitration institutions.

Private Sector-Led Proceedings

- Arbitration, at its core, is a private sector-led judicial process.

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- The legal framework served to support and enhance the efficacy of arbitration rather than dictate its evolution.

United Nations Commission on International Trade Law (UNCITRAL):

Establishment and Mandate of UNCITRAL

The United Nations Commission on International Trade Law (UNCITRAL) was established by the United Nations General Assembly through resolution 2205 (XXI) on December 17, 1966. The organization is mandated to play a pivotal role in the progressive harmonization and modernization of international trade law.

Areas of Focus in Commercial Law

UNCITRAL actively engages in addressing key areas within commercial law, including dispute resolution, international contract practices, transport, insolvency, electronic commerce, international payments, secured transactions, procurement, and the sale of goods. Its work encompasses a broad spectrum of legal aspects crucial to facilitating global trade.

Development of Legislative and Non-Legislative Instruments

A distinctive feature of UNCITRAL's work involves the preparation and promotion of both legislative and non-legislative instruments. These instruments serve as guidelines and standards applicable across diverse legal traditions and economic development stages. The organization actively participates in an inclusive international process to negotiate and formulate these instruments.

Inclusivity in Development Process

UNCITRAL's development process is characterized by inclusivity, involving member States, non-member States, and various intergovernmental and non-governmental organizations invited to contribute. This collaborative approach ensures that the resulting instruments are widely accepted and adaptable to different legal systems and economic contexts.



Recognition as Core Legal Body

UNCITRAL has gained recognition as the core legal body of the United Nations system specializing in international trade law. Its instruments contribute to creating a legal framework that accommodates different legal systems and economic contexts, fostering cooperation and ensuring a more efficient, transparent, and equitable environment for international trade and investment practices.

Shaping Global Trade Principles

In essence, UNCITRAL plays a pivotal role in shaping and advancing legal principles that govern global trade. Through its inclusive and collaborative approach, the organization contributes significantly to the establishment of a comprehensive and adaptable legal framework that addresses the complexities of international trade and investment.


Some major International Arbitration Institutes

International Court of Arbitration of the International Chamber of Commerce (ICC)

Established in 1923, the ICC International Court of Arbitration stands as the preeminent organization in the realm of international arbitration. While headquartered in Paris, its influence extends globally, with ICC arbitrations held annually across approximately 35 countries. Unlike a traditional court, the ICC Court does not directly decide on matters submitted to arbitration. Instead, arbitrators, appointed for each specific case, hold that responsibility. The ICC Court, comprising 80 or more members from 70 different countries, oversees the arbitral process. A distinctive feature is its scrutiny and approval of draft arbitral awards submitted by arbitrators, emphasizing quality control. With a secretariat of over 40 permanent staff, including 25 lawyers organized into monitoring teams, the ICC Court administered around 550 new cases involving parties from over 100 countries in the year 2000 alone.

London Court of International Arbitration (LCIA)

The London Court of International Arbitration (LCIA) is a leading institution in the field of international arbitration. Founded in 1883, it has been instrumental in resolving a wide range of



commercial disputes. The LCIA's rules and procedures are designed to provide an efficient and flexible framework for arbitration. Its caseload is diverse, spanning various industries and geographical locations. The LCIA's reputation for neutrality, professionalism, and adherence to best practices has solidified its standing as a key player in international arbitration.

International Centre for Settlement of Investment Disputes (ICSID)

Established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), the International Centre for Settlement of Investment Disputes (ICSID) focuses on resolving disputes arising from international investment. Founded in 1965, ICSID provides a forum for arbitration and conciliation, facilitating the settlement of investment-related disputes between governments and private investors. Its caseload includes a wide array of matters, emphasizing its significance in the field of investment arbitration.

Singapore International Arbitration Centre (SIAC)

Situated in the heart of Asia, the Singapore International Arbitration Centre (SIAC) has emerged as a prominent institution for international arbitration. Known for its efficiency, accessibility, and commitment to innovation, SIAC administers a growing number of cases involving parties from diverse jurisdictions. The SIAC Rules provide a comprehensive framework for arbitration proceedings, and the institution has gained recognition for its proactive approach to meeting the evolving needs of the global arbitration community.

China International Economic and Trade Arbitration Commission (CIETAC)

Established in 1954, the China International Economic and Trade Arbitration Commission (CIETAC) stands as one of the world's busiest international arbitration centers. Initially created to settle disputes between foreign and Chinese companies, CIETAC, with its active Shanghai Commission, has expanded its scope. In 1998, it revised its arbitration rules to encompass domestic disputes involving joint ventures with foreign investors and wholly-owned foreign companies in China. In 1999, CIETAC, including its branch offices, handled approximately 700

new arbitration filings, emphasizing its significance in the resolution of international and domestic disputes.

International Centre for Dispute Resolution of the American Arbitration Association (AAA)

Founded in 1926, the American Arbitration Association (AAA) is a comprehensive organization providing services, education, and training. In 1999, it administered over 140,000 disputes in the United States, covering various areas such as labor, insurance, construction, commerce, and securities, among others. In 1996, the International Centre for Dispute Resolution was established in New York City, handling all AAA international Arbitration Rules since its revision in 2000. The International Centre for Dispute Resolution managed over 450 international disputes in 1999, showcasing its significance on the global arbitration stage.

Arbitration Institute of the Stockholm Chamber of Commerce (SCC Institute)

Established in 1917, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Institute) operates as a separate entity within the Stockholm Chamber of Commerce. Emerging as a preferred hub for International Commercial Arbitration, the SCC Institute gained recognition in the 1970s as a neutral center for resolving East-West trade disputes, acknowledged by both the United States and the Soviet Union. Over the years, the SCC Institute has broadened its services, administering cases with parties from diverse countries.

London Court of International Arbitration (LCIA)

Based in London, the London Court of International Arbitration (LCIA) is one of the oldest and well-established commercial arbitration institutions. Taking a significant stride towards internationalization in 1985, the LCIA plays a crucial role in appointing arbitral tribunals, resolving challenges to arbitrators, and controlling costs. Unlike some institutions, the LCIA does not scrutinize arbitral awards. By the end of 1999, it handled an annual caseload of approximately 70, underlining its enduring importance in the field of international arbitration.



Kuala Lumpur Regional Centre for Arbitration

Established in 1978 under the auspices of the Asian-African Legal Consultative Committee with the assistance of the Government of Malaysia, the Kuala Lumpur Regional Centre for Arbitration specializes in resolving business disputes within the region. Applying the 1976 UNCITRAL Arbitration Rules with certain modifications, the Centre's significance is underscored by an amendment to the Malaysian Arbitration Act, excluding international arbitrations conducted under its rules from the supervision of Malaysian courts. Equipped with facilities such as hearing rooms, arbitrators' retiring rooms, a library, and secretarial assistance, the Centre provides comprehensive support for arbitration proceedings.

Permanent Court of Arbitration (PCA)

Established by treaty at the First Hague Peace Conference in 1899, the Permanent Court of Arbitration (PCA) stands as the oldest global institution dedicated to settling international disputes. Offering a broad spectrum of services for dispute resolution, the Court operates when parties expressly agree to submit disputes under its auspices. Notably different from the International Court of Justice, the PCA lacks sitting judges, with arbitrators being selected by the involved parties. Sessions of the PCA are conducted privately and maintained with confidentiality. The Court extends its arbitration services to disputes involving international organizations and conflicts between states and international organizations. In collaboration with the Hague Justice Portal, the PCA's historic international arbitration proceedings have been digitized, enhancing accessibility and transparency.

Cairo Regional Centre for International Commercial Arbitration (CRCICA)

Established in 1978 under the auspices of the Asian-African Legal Consultative Committee, with the assistance of the Egyptian Government, CRCICA is a pivotal institution for international commercial arbitration. Primarily focused on administering arbitration cases, both national and international, CRCICA's reported caseload for the year 2000 encompassed approximately 38 cases. These cases covered diverse areas such as construction, export/import and supply

contracts, management and operation contracts, and insurance disputes. In 1992, the Centre further expanded its reach by inaugurating a maritime arbitration branch in Alexandria.

International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry (ICAC)

Situated in Moscow, ICAC, formerly known as the Arbitration Court at the USSR Chamber of Commerce and Industry, boasts several decades of experience as a leading arbitration institution. With its headquarters in the Russian Federation Chamber of Commerce and Industry, ICAC has played a significant role in facilitating commercial arbitration. This institution has actively contributed to the resolution of disputes, showcasing its enduring prominence in the field.

Arbitration and Mediation Centre of the World Intellectual Property Organization (WIPO)


As a distinguished institution under the World Intellectual Property Organization, the Arbitration and Mediation Centre holds a central position in addressing disputes related to intellectual property. Leveraging its expertise and association with WIPO, the Centre provides a specialized platform for the resolution of intellectual property conflicts through arbitration and mediation.

OHADA Permanent Court of Justice and Arbitration

Established under the 1993 OHADA Treaty, ratified by 16 West and Central African States, the Permanent Court of Justice and Arbitration operates as a pivotal institution with its seat in Abidjan, Cote d'Ivoire. The OHADA Arbitration Act, in force since 1998, is complemented by the Rules of Arbitration of the Permanent Court. In its administrative role, the Court manages arbitrations referred to it by the involved parties, scrutinizing draft arbitration awards. Despite its relatively recent commencement of arbitration activities from 2000, the Court is poised to play a leading regional role in administering arbitration disputes within West and Central Africa.

Indian Council of Arbitration (ICA)

Founded in 1965, the Indian Council of Arbitration stands as the apex arbitral organization at the national level in India. Boasting a substantial membership of about 4200 members, the ICA has



witnessed an increasing trend in cases, with expectations for a considerable rise in disputes involving foreign parties. The Council facilitates the resolution of international commercial disputes through arbitration, aligning its rules with international standards. It provides a reliable mechanism for the swift and equitable settlement of disputes, including those involving public sector trading organizations or foreign government entities in conjunction with the Indian Government.

World Intellectual Property Organization

The Arbitral Centre of the World Intellectual Property Organization (WIPO) was established in Geneva, Switzerland, in 1994. Tailored rules make it suitable for intellectual property disputes, while still allowing for the resolution of other types of controversies.

Court of Arbitration for Sport

Established in Lausanne, Switzerland, in 1984, the Court of Arbitration for Sport (CAS) is often referred to as the "Supreme Court of world sport." It serves as the primary arbitration facility for major sports governing bodies, including the International Olympic Committee, International Association of Athletics Federations, FIFA, and UEFA.

German Institution of Arbitration (DIS)

Originally founded in 1920 to provide arbitration services in Germany, the German Institution of Arbitration (DIS) was formed in 1992 through a merger with the German Arbitration Institute. DIS aims to offer nationwide arbitration services covering all sectors of the German economy.

Japanese Commercial Arbitration Association (JCAA)

Founded in 1950 by the Japan Chamber of Commerce and Industry, the Japan Commercial Arbitration Association (JCAA) focuses on international commercial disputes, providing a platform for their resolution.



Australian Centre for International Commercial Arbitration (ACICA)

Established in 1982 at the initiative of the Institute of Arbitrators in Australia, ACICA has gained a growing reputation, particularly in arbitrations involving parties from the Asia/Pacific region. It stands as a credible alternative to other arbitration centers such as HKIAC or SIAC. Hong Kong International Arbitration Centre (HKIAC) Established in 1985, the HKIAC became Asia's leading international arbitration institution before the handover of British administration. Concerns about future stability and judicial independence in Hong Kong have been raised by some potential users, leading to hesitancy in designating the HKIAC, especially in disputes involving Chinese parties.

Swiss Chamber's Arbitration Institution

Established in 2004 by the Swiss Chamber of Commerce, the Swiss Chamber's Arbitration Institution is an independent association consisting of a Court of Arbitration and Secretariat. Arbitrations under the Swiss Rules benefit from the pro-arbitration Swiss Law on Private International Law and the availability of experienced arbitrators in Switzerland.

Vienna International Arbitral Centre (VIAC)

Established in 1975 and based in Vienna, VIAC conducts only international arbitrations. The VIAC Rules mandate that at least one party must be of non-Austrian origin or that the dispute must have an international character.

Stockholm Chamber of Commerce Arbitration Institute (SCC)

Founded in Stockholm in 1917, the SCC evolved into a substantial forum for disputes involving parties from the USSR and China during the 1970s and 1980s. The SCC continues to be a preferred foreign arbitral institution for Chinese state-owned entities, with China-related disputes constituting a significant portion of the SCC's current caseload.




International conventions on International Commercial Arbitrations

Contemporary International Arbitration Convention

The roots of the present-day legal framework for international arbitration trace back to the nineteenth and early twentieth centuries. Crucial foundations were laid during the initial decades of the twentieth century, marked by the establishment of the 1923 Geneva Protocol and 1927 Geneva Convention. National arbitration legislation, mirroring these instruments, was enacted along with the development of effective institutional arbitration rules. This historical progression set the stage for the evolution of the current legal regime for international commercial arbitration, a process predominantly occurring in the latter half of the twentieth century. During this period, nations worldwide engaged in international arbitration conventions, with the New York Convention holding particular significance. Concurrently, nations enacted national arbitration statutes tailored to facilitate the arbitral process. National courts across most jurisdictions robustly implemented and interpreted these legislative instruments, often going beyond their explicit terms. This unequivocally "pro-arbitration" regime aimed at ensuring the enforceability of both international arbitration agreements and arbitral awards. It emphasized the parties' procedural autonomy, the procedural discretion of arbitral tribunals, and sought to shield the arbitral process from undue interference by national courts or other governmental entities. Simultaneously, the legal framework for international investment arbitration took shape in the past few decades. This evolution included the adoption of the International Centre for Settlement of Investment Disputes (ICSID) Convention and the establishment of a vast network of Bilateral Investment Treaties (BITs). While not as extensively and comprehensively developed, the legal regime was also influenced by the 1929 General Act on the Pacific Settlement of International Disputes. Both sets of instruments reflected a general pro-arbitration stance in resolving interstate disputes peacefully, providing a foundational legal framework for conducting international arbitrations.

Early Proposals for State-to-State Arbitration

At the outset of the twentieth century, there emerged credible proposals for a more universal state-to-state arbitration mechanism. While often overlooked in contemporary literature, an 1875



project by the Institut de Droit International produced a draft procedural code. This code, based on existing interstate arbitral practice, aimed to provide fundamental procedural guidelines and mechanisms for future ad hoc arbitrations. The project reflected both the frequency of interstate arbitrations and the perceived need for consistent, transparent, and internationally neutral procedures.

Hague Peace Conference of 1899


The 1899 Hague Peace Conference marked a significant development in the establishment of a legal framework for international arbitration. The resulting Hague Convention of 1899 on the Pacific Settlement of Disputes included chapters specifically addressing international arbitration. Moreover, it led to the creation of the "Permanent Court of Arbitration," designed to administer state-to-state arbitration under the Convention. This conference laid the groundwork for more formal interstate adjudication in institutions like the Permanent Court of International Justice and the International Court of Justice.

Evolution into the Permanent Court of International Justice

The Permanent Court of Arbitration underwent a transformation into the Permanent Court of International Justice. This evolution continued with the subsequent establishment of the International Court of Justice. These institutions played pivotal roles in formalizing and institutionalizing interstate dispute resolution, contributing to the ongoing development of a legal regime for international arbitration.

Preference for Arbitration in the Twentieth Century

Despite the creation of standing international judicial bodies, states maintained a preference for arbitration as a method to resolve interstate disputes throughout the twentieth century. The flexibility and tailored nature of arbitration continued to appeal to states, and they often opted for arbitration over other international judicial mechanisms.



Revision in 1907 and the General Act of 1929

Building on the foundation laid by the 1899 Convention, a revision took place in 1907. The new Convention for the Pacific Settlement of International Disputes introduced amendments to provisions related to international arbitral proceedings. In 1929, a "General Act on Pacific Settlement of International Disputes" was negotiated and ratified by several Western European states. This Act provided a basic legal framework for international arbitrations between state parties, subject to contrary agreements by the involved parties.

Call for Legislative Facilitation of Arbitration


In the early decades of the twentieth century, a growing need for legislation to facilitate arbitration surfaced, primarily driven by businesses and legal practitioners in developing states. The emphasis was on creating mechanisms that were reliable, effective, and fair for resolving both domestic and international commercial disputes. This call underscored the pivotal role of robust dispute resolution mechanisms in fostering the expansion of international trade and investment.

Negotiation of the Geneva Protocol

In response to the growing demand for effective dispute resolution mechanisms, major trading nations convened in 1923 under the newly established International Chamber of Commerce. The outcome of these negotiations was the Geneva Protocol on Arbitration Clauses in Commercial Matters. The negotiation involved significant trading nations such as the United Kingdom, Germany, France, Japan, India, Brazil, and others. The Protocol aimed to provide a legal framework for incorporating arbitration clauses in commercial agreements.

Limited Ratification and Global Significance

While the United States did not ratify the Geneva Protocol, its adoption by influential nations, including the United Kingdom, Germany, France, Japan, India, and Brazil, reflected a substantial portion of the international trading community's commitment to the cause. The limited



ratification, though not universal, highlighted the Protocol's global significance and its role in shaping international arbitration practices during that era.

Genesis of the New York Convention

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the "New York Convention," emerged as a landmark legislative instrument in the realm of international commercial arbitration. This convention, adopted in 1958, holds unparalleled significance as a universal constitutional charter governing the international arbitral process. Its expansive provisions have empowered both national courts and arbitral tribunals to establish enduring and effective mechanisms for enforcing international arbitration agreements and arbitral awards.

Origins and Objectives

The origins of the New York Convention trace back to the early 1950s when the International Chamber of Commerce (ICC) drafted the initial proposal in 1953. The ICC recognized the limitations of the 1927 Geneva Convention, stating that it no longer entirely met modern economic requirements. The ICC aimed for the adoption of a new international system for enforcing arbitral awards, reflecting the evolving needs of the international business community.

Drafting and Innovation

Preliminary drafts of the revised convention were collaboratively prepared by the ICC and the United Nations Economic and Social Council (ECOSOC). These drafts laid the groundwork for the three-week United Nations Conference on Commercial Arbitration held in New York in the spring of 1958. The resulting document, the New York Convention, marked a radical departure from previous instruments, creating a comprehensive legal framework for the international arbitral process.



Focus on Enforcement

In its original form, the New York Convention primarily concentrated on the acknowledgment and enforcement of arbitral awards, with less emphasis on the effectiveness of international arbitration agreements. The convention's text was officially accepted on June 10, 1958, during the United Nations Conference, garnering unanimous support (with the United States and three other countries abstaining). This marked a pivotal moment in the evolution of international arbitration law.

Reluctance in South America


In the early decades of the twentieth century, much of South America exhibited a notable reluctance to embrace international commercial arbitration. The Geneva Protocol and Convention faced limited ratification, with only Brazil among South American states endorsing the former and none adopting the latter. The ratification of the New York Convention, a pivotal instrument in international arbitration, was also met with hesitation, with South American states, for the most part, beginning to do so only in the 1980s.

Inter-American Convention

The Inter-American Convention emerges as a significant development in the landscape of arbitration in South America. In many aspects, it mirrors the provisions of the New York Convention. The drafting history of the Inter-American Convention underscores its intended alignment with the outcomes and objectives of the New York Convention. This alignment reflects a concerted effort to establish a coherent framework for international arbitration that resonates with global standards.

Parallel Objectives

Among its key features, the Inter-American Convention, like its New York counterpart, asserts the presumptive validity and enforceability of arbitration agreements. This alignment with the principles of the New York Convention positions the Inter-American Convention as a regional instrument designed to yield similar results. The legislative history of the Inter-American



Convention emphasizes its commitment to facilitating the recognition and enforcement of arbitration agreements and awards, echoing the broader international objectives set by the New York Convention.

European Convention


The European Convention, in force since 1964, currently boasts 31 participating states. Notably, most European nations are party to this convention, with exceptions such as the United Kingdom, the Netherlands, and Finland. Additionally, about ten non-European Union (EU) states, including Russia, Cuba, and Burkina Faso, are parties to this convention. Comprising 19 articles and a detailed annex addressing specific procedural matters, the European Convention underscores its significance in fostering a harmonized approach to arbitration within the European region.

ICSID Convention

The International Centre for the Settlement of Investment Disputes (ICSID) operates as a specialized arbitration institution, established under the ICSID Convention, also known as the Washington Convention of 1965. Initiated by the International Bank for Reconstruction and Development (IBRD or World Bank), ICSID is headquartered at the World Bank's Washington office. The primary objective of the ICSID Convention is to streamline the resolution of "investment disputes," specifically legal conflicts arising directly from investments that the involved parties have agreed to submit to ICSID.

Scope of Investment Disputes

The ICSID Convention distinctly defines investment disputes as controversies stemming from an "investment" and involving a Contracting State or designated state entity (excluding solely private entities based in a Contracting State) in opposition to a national from another signatory state. To address such disputes comprehensively, the Convention furnishes both conciliation and



arbitration procedures, laying out the legal framework through the ICSID Arbitration Rules alongside the ICSID Convention.

Bilateral Investment Treaties (BITs) or Investment Protection Agreements (IPAs)

The proliferation of Bilateral Investment Treaties (BITs) or Investment Protection Agreements (IPAs) gained momentum during the 1980s and 1990s, serving as a strategic approach to stimulate capital investment in emerging markets. This phenomenon was particularly championed by capital-exporting states, including the United States, major Western European nations, and Japan. These states were active proponents of negotiating BITs, primarily with countries in developing regions, fostering an environment conducive to cross-border investments. The initial push for BITs was motivated by the desire to provide legal frameworks that assure protection to investors, encourage economic development, and facilitate foreign direct investment. While the early focus was on developed states engaging with developing nations, the landscape has evolved. In contemporary times, states from diverse regions and at various stages of development have actively participated in the negotiation and implementation of BITs. As of recent assessments, the operational landscape reveals the existence of over 2,500 BITs globally. This proliferation underscores the widespread recognition of the utility and significance of BITs and IPAs as instruments that shape and safeguard the dynamics of international investment, contributing to the overall stability and predictability of the global economic landscape.

CHAPTER IV- National development of International Commercial Arbitration

The conventional perception of access to justice often leads individuals to approach traditional courts of law, where justice is expected to be served. However, the reality is that the courts have become increasingly inaccessible for many due to factors such as poverty, social and political backwardness, illiteracy, ignorance, and procedural formalities. Seeking justice through the courts requires individuals to navigate these harsh realities and deal with the expensive procedures involved in litigation. As a response to these challenges, a movement emerged to promote alternative dispute resolution (ADR) mechanisms for swift justice. Among various ADR methods, arbitration stands out as a popular choice, particularly for commercial disputes. The rise of international trade, commerce, investment, technology transfers, and various business activities led to the need for efficient dispute resolution mechanisms.

India, recognizing the changing landscape, updated its arbitration legislation to create a conducive environment for both domestic and foreign entrepreneurs. The goal is to ensure fairness and justice for all parties involved in dispute resolution. In recent decades, business activities have expanded beyond national borders. With this globalization, there is a growing need for a framework that facilitates the quick resolution of disputes arising from business transactions between parties of different nationalities. This necessity arises not only due to the increasing global nature of trade but also because of the prolonged delays in court proceedings. Arbitration, as an alternative dispute resolution method, has gained prominence. It offers a rapid and convenient process for resolving disputes, serving as an efficient alternative to traditional court systems with judges and juries. The adoption of arbitration as a dispute resolution mechanism has become widespread worldwide, addressing the challenges posed by delays and inefficiencies in traditional legal processes.



Theories/Principles of International Commercial Arbitrations

In cases where parties choose to govern their contractual relationship by general principles of international law, the arbitrators are obligated to honor that choice. The application of transnational rules, *lex mercatoria*, or general principles of law is recognized in some legal systems. However, there are variations in national laws and the UNCITRAL Model Law regarding the arbitrator's authority to apply these principles.

International Conventions on Commercial Arbitration

The Geneva Protocol and Geneva Convention marked the establishment of a legal framework for international commercial arbitration in the early twentieth century. The New York Convention, arising from the United Nations, significantly influences contemporary legislative instruments related to international commercial arbitration. Other conventions, such as the Inter-American Convention and the European Convention, have further contributed to the global framework for arbitration.

Bilateral Investment Treaties or Investment Protection Agreements

Bilateral investment treaties (BITs) and investment agreements (IPAs) gained prevalence in the 1980s and 1990s, primarily to encourage capital investment in developing markets. Initially championed by capital-exporting states, these treaties have seen widespread adoption globally, with over 2,500 BITs currently in operation.

Major International Arbitration Institutes

Several international arbitration institutes play a crucial role in administering dispute resolution. These include the International Court of Arbitration (ICC), International Centre for Settlement of Investment Disputes (ICSID), China International Economic and Trade Arbitration Commission (CIETAC), American Arbitration Association (AAA), and others. Each institution has unique features and rules governing their arbitration processes.



Contemporary International Arbitration Convention

The contemporary legal regime for international commercial arbitration was developed during the second half of the twentieth century. Key conventions, such as the New York Convention and ICSID Convention, provide a comprehensive legal framework for the enforcement of arbitration agreements and awards. The evolving legal regime also addresses international investment arbitration.

Arbitration in Pre-British Regime

The roots of arbitration in the Indian legal system date back to the pre-British era when a system known as "Panchayat" existed. In this system, individuals were elected based on their societal status to serve as arbitrators. This informal method of dispute resolution, deeply embedded in the fabric of Indian society, was acknowledged by Chief Justice Marten as a prominent feature of civil Indian life. Despite its prevalence, there was no specific law governing arbitration procedures during this period. The system relied on community-elected arbitrators and the collective wisdom of the parties involved, reflecting a decentralized and community-centric approach to dispute resolution.

Regulations Relating to Arbitration During the British Era

During the British colonial period in India, there was no specific legislation or instruments dedicated to arbitration procedures. However, under the Panchayats system, a form of dispute resolution through intermediaries was recognized. The Bengal Regulations of 1772, 1780, 1781, and 1793 aimed to facilitate arbitration during this period. In 1787, Lord Cornwallis attempted to introduce an extrajudicial settlement system through regulations, where village Panchayats were responsible for ensuring dispute resolution through arbitration. Special provisions for dispute resolution were also introduced under the Regulation of Madras in 1816, mandating the participation of village and district Munsifs. The Bombay Regulation of 1827 explicitly allowed for extrajudicial dispute settlement through arbitration.



Indian Arbitration Act, 1899

Enacted based on the English Arbitration Act, 1899, this legislation was applicable when the subject matter of arbitration was the subject of a lawsuit that could be instituted in a Presidency Town. A notable feature was the provision allowing the reference of disputes, both present and future, to arbitration by agreement, excluding the intervention of the judicial machinery. However, its application was limited to Presidency Towns, with the Local Government having the power to extend its jurisdiction.

Code of Civil Procedure, 1908


While the Indian Arbitration Act of 1899 emphasized organized dispute settlement mechanisms, it included provisions for parties to present their arbitration agreement before the court. Amendments in 1999 aimed to ensure dispute settlement through arbitration under the provisions of section 89 of the Code of Civil Procedure, 1908.

The Arbitration Act, 1940

Following recommendations by the Mackinnon Committee in 1927 and the English Act of 1934, the Government of India appointed Shri Ratan Mohan Chatterjee in 1938 to revise legislation on arbitration. The revised Arbitration Act of 1940, in force from July 1, 1940, became a comprehensive code of legislation for states, dealing mainly with domestic arbitration. It encompassed three types of arbitration: without the intervention of the court, with the involvement of the court where no suit is pending, and settlement in suits. This Act applied to the whole of India except Jammu and Kashmir.

Scope of Arbitration Proceedings in India

Arbitration serves as a prominent dispute resolution mechanism in the commercial domain, especially in international trade, where enforcing a foreign arbitral award is often more straightforward than enforcing a court judgment. The latter part of the 20th century witnessed global acknowledgment of arbitration as a popular mode for resolving commercial disputes. The process is guided by the terms of the parties' arbitration agreement, typically embedded in the



terms and conditions of the commercial contract they enter into. Parties willingly choose arbitration to resolve their disputes, making it increasingly popular in construction, industrial, and labor disputes. It's deemed the most suitable mechanism for resolving conflicts arising from domestic or international contracts.

Various Aspects of Alternative Dispute Resolution System

Alternative Dispute Resolution (ADR) is a collective term for various mechanisms designed to settle disputes outside conventional court proceedings. These mechanisms, initiated by the involved parties, offer alternatives to traditional litigation, each having distinct features and applications.

1. Dispute Settlement through Conciliation


Dispute resolution through conciliation involves the intervention of a neutral third party known as a conciliator. The objective is to guide the disputing parties in reaching an amicable decision. Conciliation encourages voluntary negotiations and ultimately results in a binding settlement agreement. In the context of the Arbitration and Conciliation Act, 1996, Part III treats conciliation proceedings as an arbitral award on agreed terms and conditions.

2. Mediation and Conciliation

Mediation and conciliation are closely related ADR mechanisms. Both involve a neutral third party facilitating negotiations between the disputing parties, with the aim of achieving a mutually acceptable resolution. While they share a fundamental philosophy, the introduction of these terms separately under section 89 of the Code of Civil Procedure, 1908, signifies nuanced distinctions. The success of these processes lies in the parties reaching a binding settlement agreement.

3. Dispute Settlement through Lok Adalats

The term "Lok Adalat," translated as "People's Court," signifies an Alternative Dispute Resolution (ADR) forum distinct from a conventional court. Established under the Legal



Services Authorities Act, 1987, Lok Adalats operate periodically at specified venues, having jurisdiction over cases pending before any court. The Lok Adalat system focuses on resolving disputes through conciliatory and persuasive techniques, encouraging voluntary participation and discussion to reach mutually acceptable solutions. Lok Adalats emphasize conciliation over adjudication, and settlements or compromises are pivotal to their dispute resolution process. The settlements reached during Lok Adalat proceedings crystallize into awards, deemed decrees of civil courts. These awards are final, binding upon the parties, and immune from appeal.

4. Permanent Lok Adalats

Distinct from Lok Adalats, Permanent Lok Adalats serve as permanent pre-litigation ADR forums specifically designed for resolving disputes related to public utility services. Parties involved in a dispute may apply to a Permanent Lok Adalat during the pre-litigation stage. If mutual settlement attempts fail, the Permanent Lok Adalat assumes the responsibility of deciding the dispute on its merits.

5. Dispute Settlement through Arbitration

Arbitration stands out as a recognized private legal procedure aimed at resolving disputes between parties. In this mechanism, the disputing parties entrust the dispute resolution process and outcome to a neutral third party, known as the arbitrator or arbitral tribunal. The arbitrator hears and considers the merits of the dispute, rendering a final and binding decision termed the arbitral award. Governed by the Arbitration and Conciliation Act, 1996, arbitration provides a consensual and expedited alternative to conventional litigation. Arbitration is consensual, and the existence of an arbitration agreement is a prerequisite for initiating the arbitral process. Once engaged, parties cannot unilaterally withdraw, and they must abide by the binding decision on merits. This approach offers a just resolution outside the traditional litigation process, promoting expediency and convenience for the involved parties.

6. Dispute Settlement through Mini Trial


A Mini Trial involves an abbreviated adjudication-style presentation of evidence and arguments to a neutral, accompanied by high-level principals of each disputant party. Following this, negotiations between the principals ensue. The Mini Trial combines negotiation, mediation, and advisory arbitration, primarily addressing business disputes. In this process, a tribunal comprising senior officers of the disputant parties and one or more third-party neutrals is constituted. The tribunal hears and considers the cases of the disputant parties, fostering brevity and precision within a condensed trial format. The decision rendered by the tribunal is confidential and non-binding, serving as a baseline for negotiation or conciliation between the parties.

7. Dispute Settlement through Med-Arb

'Med-Arb' represents a distinctive hybrid ADR process, combining mediation and arbitration. In this approach, parties consensually empower a neutral third party to mediate their dispute initially. If no settlement is reached through mediation, the neutral arbitrator proceeds to arbitrate the dispute on merits. The appointed ADR neutral first attempts to resolve issues through mediation, facilitating negotiation and potentially aiding the parties in achieving a mutually acceptable solution. The same neutral individual typically performs both roles in this process, presenting advantages in consensual resolution but posing potential complexities. While Med-Arb involves the risk of muddying the adjudicative waters, the process proves advantageous when viewed primarily as an arbitral process preceded by consensual attempts at resolution.

8. Dispute Settlement through Early Neutral Evaluation (ENE)

'Early Neutral Evaluation' (ENE) emerges as an ADR process where an experienced neutral assesses a concise presentation of the case, forming the baseline for consensual resolution. This pre-emptive, non-binding, and confidential process aims to reconcile disputes at the earliest stages. ENE entails appointing a neutral third party with expertise in the dispute's subject matter for an early evaluation of the case. Parties provide written



submissions, and the neutral assesses the merits, providing an early and confidential evaluation. ENE is particularly useful for disputes involving complex questions of fact, law, or contractual interpretation hindering resolution through negotiation. Originally designed for early case evaluation, ENE has evolved into a procedure facilitating amicable resolution. The evaluator gives a non-binding decision expressing their opinion on the likely trial outcome, exploring settlement possibilities and making recommendations. Parties may settle based on the evaluation, with modifications if needed. If no settlement occurs, parties retain the option to litigate or arbitrate for a final binding adjudication.

9. A Dispute Review Board (DRB)

It operates as a tribunal with experienced and impartial expert reviewers, facilitating the resolution of project-related disputes. The DRB procedure is flexible and determined with the parties' consent, allowing the board to hear both sides, review records, and produce a recommendatory final report. Although non-binding, parties often resolve disputes based on this report. It streamlines the resolution process for specific projects or dispute types.

10. Dispute Settlement through Expert Determination

Expert Determination involves parties agreeing to appoint an impartial arbitrator, usually an expert in dispute resolution, to adjudicate their dispute on merits. Contracts often stipulate that the expert's determination is final and binding. While binding expert determination is an adjudicatory ADR form, non-binding decisions may lead to negotiations based on the expert's findings. This process leverages the expertise of a neutral party to bring clarity to complex disputes.

11. Dispute Settlement through Negotiation

Negotiation stands as the predominant mode of dispute resolution, characterized by communication for persuasion. Despite not involving a third party, negotiation is classified as an ADR process, offering an alternative to litigation. In negotiation, parties

or their representatives voluntarily engage in direct discussions, presenting the factual content of the dispute, discussing claims and counterclaims, and expressing willingness to compromise. The parties mutually agree on a course of action, engaging in a bargaining process for a mutually acceptable solution.

Contribution of ADR Institutions

Several notable institutions have significantly contributed to the success of Alternative Dispute Resolution (ADR) services in India. These include:

- ***Indian Council for Arbitration (ICA)***: Established on April 15, 1965, the ICA aims to facilitate both domestic and international commercial disputes, as well as the conciliation of international trade complaints from Indian and foreign parties.
- ***International Centre for Alternative Disputes Resolution (ICADR)***: This institution, along with others like the Federation of Indian Chambers of Commerce and Industry (FICCI), Indian Chamber of Commerce (ICC), and the Bengal Chambers of Commerce and Industry (BCCI), plays a crucial role in shaping the ADR landscape in India.
- ***International Institutions***: Global institutions like the International Court of Arbitration (ICA), the London Court of International Arbitration (LCIA), and the American Arbitration Association (AAA) contribute significantly to the development of structured rules for conducting arbitration proceedings. These rules are designed based on experiences, addressing a wide range of potential situations that may arise during arbitration.

The prevalence of these institutions and their formulated rules enhances the credibility and effectiveness of arbitration as a dispute resolution mechanism in India.

Arbitration and Its Various Forms

Arbitration, as a dispute resolution method, comes in various forms, catering to different scenarios. Some popular kinds of arbitration include:

1. Ad-hoc Arbitration

- *Definition:* Ad-hoc arbitration refers to a type of arbitration where disputes can be referred for arbitration even in the absence of an arbitral agreement.
- *Characteristics:* Disputes are referred to arbitration as they arise, chosen for amicable solutions. It is well-suited for both international and domestic arbitration scenarios.
- *Application:* This form of arbitration is particularly suitable for resolving disputes that may arise sporadically without a pre-existing agreement.

2. Domestic Arbitration

- *Scenario:* In domestic arbitration, both parties involved in the arbitration are from Indian territory, and the place of arbitration is also within the boundaries of India.
- *Governance:* All proceedings related to domestic arbitration are governed and influenced by the substantive laws of India.
- *Applicability:* This form of arbitration is applicable when the dispute involves parties located within the geographical confines of India.

3. International Arbitration

- *Context:* In international arbitration, one of the parties to the arbitration belongs to a foreign country, or the subject matter of arbitration is situated, registered, or regulated by a foreign national authority.
- *Laws Governing:* The laws applicable in international arbitration are determined by the law chosen by the contracting parties. This provides flexibility in selecting the legal framework that best suits the international nature of the dispute.

These different forms of arbitration allow parties to choose the most suitable mechanism based on the nature and context of their dispute, contributing to the versatility and effectiveness of arbitration as a dispute resolution tool.

Arbitration Process in General & International Commercial Arbitration

Arbitration is a dispute resolution mechanism involving a third party, known as an arbitrator, who delivers a judgment (award) after hearing both parties involved. This process is consensual and cannot be imposed on parties without their agreement. The Arbitration and Conciliation Act,

1996, defines arbitration under Section 2(1)(a) as either institutional or ad-hoc and emphasizes that arbitration proceedings must be governed by an arbitration agreement or clause. Arbitration encompasses various methods, including:

1. Medola (Mediation and Last Offer Arbitration)

- ADR procedure where a neutral third party selects between final negotiated offers if mediation fails.

2. Summary Jury Trial

- A process simulating a jury trial with a mock jury to assess how they would handle the case.

3. Neutral Expert Evaluation

- Employed in complex technical cases, a neutral expert reevaluates conflicting technical evidence to encourage parties to reassess the issue.

4. Early Neutral Evaluation

- Parties discuss settlement offers with a neutral third party who suggests settlement options after analysis.

5. Fast-Track Arbitration

- An expedited arbitration process designed to achieve results swiftly.

6. Mediation-Arbitration (Med-Arb)

- Parties submit final offers to the neutral arbitrator, who chooses the most appropriate offer.


Arbitration is consensual, and courts can enforce mutual agreements for arbitration under specific terms. While the Arbitration and Conciliation Act, 1996, does not explicitly define the term 'arbitration,' Section 2(1)(a) clarifies its institutional or ad-hoc nature. The arbitration proceedings must be initiated through an arbitration agreement or clause, clearly outlining the disputes to be settled through arbitration. The decisions of the third party, the arbitrator, hold the same status as a decree of a civil court and are binding upon the parties.

The Act of 1996 according to 176th Report of Law Commission

The 176th report of the Law Commission focused on reviewing the Arbitration and Conciliation Act of 1996, taking into account observed flaws and received representations. One key observation was that the UNCITRAL Model, designed for international commercial arbitration, posed challenges when applied to purely domestic arbitration among Indian nationals. The Act, aligning with the model law, created difficulties in its implementation for domestic cases. The report emphasized the need for differentiation between domestic and international arbitration awards, especially in terms of grounds available for objection under sections 34 and 37. While the principle of least court interference is suitable for international arbitral awards, it was suggested that, given the context of India, where awards are sometimes rendered by individuals not well-versed in applicable law, there might be a requirement for a more flexible approach. The Commission proposed a nuanced approach, advocating for greater control over domestic arbitrations, not to excessively increase court interference but to ensure proper oversight. The suggestion was to limit court interference in specific respects, even more so than permitted by the Model Law and the Act of 1996. The proposal included listing all matters before the court against the award for an initial hearing, allowing quick dismissal if necessary. A provision akin to Section 99 of the Civil Procedure Code was recommended to ensure that awards are not lightly interfered with unless substantial prejudice is demonstrated. To address challenges posed by Section 36, which prevented the enforcement of awards when an application to set aside the award was pending, the Commission recommended changes. They proposed that merely moving an application should not result in an automatic stay of the award. Additionally, the report suggested empowering the court to impose conditions for compliance with the award, either partly or wholly, while objections were pending. This holistic approach aimed to enhance the efficiency and effectiveness of the arbitration process in the Indian context.

Expansion of the Definition of "Court"

Proposals to broaden the definition of the term "Court" under section 2(1)(e) by including the 'Court of the Principal Judge, City Civil Court in a city exercising original jurisdiction.'



Additionally, the suggestion of introducing a clause allowing Principal Courts to transfer matters to Courts of direct jurisdiction to alleviate congestion.

Extension of Arbitration Proceedings Outside India

Projections related to Sections 8, 9, 27, 35, and 36 aimed at facilitating the availability of arbitration proceedings outside India. The addition of Section 8(4) and (5) proposed to empower judicial authorities to decide preliminary issues, ensuring that frivolous jurisdictional matters do not cause delays in the arbitration process.

Efficient Handling of Preliminary Issues

Exploration of the proposed amendments in Sections 8(4) and (5), outlining the conditions under which judicial authorities can decide or refer matters to arbitration based on preliminary issues. The objective is to streamline the process, avoid delays, and save costs by addressing jurisdictional matters effectively.

Amendments in Section 11 to Expedite Arbitral Tribunal Appointments


Proposed amendments in Section 11 to expedite the appointment of arbitral tribunals. Subsections 11(4) to (12) suggest replacing references to the "Chief Justice of India" and "Chief Justice" with "Supreme Court" and "High Court," respectively, ensuring that appointments are made on the judicial side.

Introduction of Section 24B for Execution of Interim Orders

Proposal to introduce Section 24B, enabling parties and arbitral tribunals to approach the Court for the execution of interim orders passed under Sections 17, 23, and 24. The aim is to provide a mechanism for enforcing such orders when necessary for the arbitration process.

Efforts to Control Delays in Arbitral Proceedings

Proposals aimed at controlling delays before arbitral tribunals through amendments in sections 23, 24, and 82, along with the introduction of new sections 24A, 29A, and 37A. The



recommendations include setting time limits for passing awards, allowing extensions by courts but ensuring that arbitration continues during the pending disposal of related court applications.

Addressing Contradictory High Court Judgments

Acknowledgment of contradictory judgments by High Courts regarding certain provisions of the 1996 Act. The Commission took note of various challenges and difficulties in the functioning of the Act, leading to the preparation of a Consultation Paper (Annexure II of the Report) and the organization of seminars in Mumbai and Delhi. The paper was made publicly accessible through the website, and feedback from retired judges, leading lawyers, and other contributors was actively sought.

Comprehensive Review and Recommendations

A comprehensive review process, including the preparation of a Consultation Paper, seminars, and expert contributions, formed the basis for the Law Commission's recommendations to amend the Arbitration and Conciliation Act, 1996. The focus extended to studying the legal landscape in foreign jurisdictions to ensure informed suggestions for enhancing the effectiveness of arbitration in India.

Formation of the "Justice Saraf Committee on Arbitration"

Constitution of the "Justice Saraf Committee on Arbitration" to thoroughly examine the recommendations of the Law Commission's 176th Report and the Arbitration and Conciliation (Amendment) Bill, 2003. Led by Justice Dr. B. P. Saraf, the Committee presented its final report in January 2005, offering a detailed assessment of the Law Commission's recommendations and proposing additional improvements to the 1996 Act.

Government's Decision to Withdraw the Bill

In April 2006, the government made the decision to 'withdraw' the Arbitration and Conciliation (Amendment) Bill, 2003, from the Rajya Sabha, where it was initially introduced. The


withdrawal indicated a reevaluation or reconsideration of the proposed amendments in light of various inputs and assessments.

Enforcement of Foreign Arbitral Awards under the Arbitration and Conciliation Act, 1996

The Arbitration and Conciliation Act, 1996, provides a statutory framework for the application and enforcement of foreign arbitral awards. These awards must originate from countries that are signatories to either the Geneva Convention of 1927 or the New York Convention of 1958. To be enforceable in Indian courts, a foreign arbitral award should fall under the purview of either the Geneva or New York Convention. In the case of *Bhatia International v. Bulk Trading*, the Supreme Court clarified that an arbitral award not made in a convention country is not considered a foreign award. Consequently, a separate action must be filed based on the award. The New York Convention establishes a common standard for recognizing and enforcing such agreements and awards, instilling confidence among parties unfamiliar with diverse laws in different trading nations. The Supreme Court, in the case of *Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.*, addressed the issue of whether an award could be set aside for non-compliance with mandatory procedures outlined in Sections 28. Section 28(1)(a) mandates the Arbitral Tribunal to decide disputes in line with the substantive laws in force in India. The court opined that if an award contravenes the provisions of the Act, it can be set aside under Section 34, ensuring adherence to the principles of justice. When the court is satisfied with the enforceability of a foreign award, it is deemed a decree of that court. An appeal can be made against an order refusing to enforce a foreign award under section 48, with the authorized court hearing such appeals. However, no second appeal is allowed, though it does not impede the right of appeal to the Supreme Court, except when the foreign award is enforced.

Judicial Approach towards International Commercial Arbitration in India

Arbitration law rests on the principles of party autonomy and the finality of awards. The harmony of these principles is crucial for the successful realization of the objectives of



arbitration law. Over the years, Indian arbitration law has transitioned from extensive judicial interventions, prevalent in the Colonial Act and the subsequent 1961 legislation, to a more sophisticated Act aligned with the Model Law. This evolution underscores the significance of limiting judicial interference to uphold the essence of arbitration.

Public Policy Dilemma


The concept of public policy, both as a general notion and a ground for setting aside arbitral awards, poses challenges due to its elusive definition. Judicial decisions that broadly interpret public policy, allowing extensive judicial review of arbitral awards, pose a significant threat to the integrity of international commercial arbitration.

Intervention by Courts

The 1996 Act prioritizes expeditious arbitration and minimal court intervention. Section 5 of the Act explicitly bars judicial authority from intervening in matters governed by an arbitration clause. This provision aligns with international standards, emphasizing reduced court interference. The Act's objectives, as stated in the Statement of Objects and Reasons, highlight the intent to diminish the supervisory role of courts in the arbitral process and ensure the enforcement of every final arbitral award as a civil court decree. The Act, in its provisions, significantly curtails court interference compared to its predecessor, the 1940 Act. This deliberate reduction in judicial involvement aims to foster an arbitration-friendly environment, promoting efficiency and autonomy in the resolution of disputes.

Post Bhatia Case Mystery: Unraveling the Impact on Section 9 Applications


Following the Bhatia case, where Indian courts were granted the authority to issue interim orders before the commencement of arbitral proceedings, there was a surge in Section 9 applications for interim relief. These applications flooded courts across India, irrespective of whether the arbitration was seated within the country or abroad. The court's only exception was the possibility of parties expressly or impliedly excluding Part I of the arbitration law. However, the decision lacked clarity on what constituted an implied exclusion of Part I. This added a layer of



complexity, especially considering that Part I encompassed crucial provisions related to the appointment of arbitrators and the setting aside of awards. The ambiguity surrounding the implied exclusion of Part I prompted Indian courts to appoint arbitrators for arbitrations seated outside India, as seen in cases like National Agricultural (2007) and Indtel (2008). Similarly, there were instances where the setting aside of foreign awards was allowed, exemplified by the Venture Global case (2008). The aftermath of the Bhatia case thus introduced uncertainty and challenges, particularly in determining the applicability of Part I in specific scenarios. This uncertainty permeated the arbitration landscape, impacting various facets of the arbitration process.

BALCO & White Industries: A Landmark Decision Shaping Indian Arbitration

The decision in *BALCO v. Kaiser Technical Services Inc.* by a Five-Judge Constitution Bench of the Indian Supreme Court on September 6, 2012, marked a crucial turning point. The context stemmed from related cases referred to a larger bench due to disagreements on the correctness of the Bhatia decision. The White Industries Case, heard alongside BALCO, further underscored the legal issues in focus and resulted in the first-ever BIT award against India. In BALCO, the Court diverged from Bhatia and Venture Global, asserting that the power to grant interim measures or address challenges to foreign awards in foreign-seated arbitrations did not derive from the provisions of the 1996 Act. The decision firmly established the seat of arbitration as the 'centre of gravity,' determining the jurisdiction of courts concerning that arbitration. Notably, it clarified the distinction between the substantive governing law of a contract and the law governing the arbitration agreement. The interpretation of the phrase 'of the country in which' under the New York Convention received attention. The Court held that concurrent jurisdiction of two separate courts in the seat and the jurisdiction governing the arbitration was untenable, emphasizing that only the court at the seat could exercise such jurisdiction. Crucially, the Court's decision applied only to arbitration agreements executed post the BALCO decision. This limitation raised intriguing questions about pending arbitrations and related litigations and prompted considerations on re-executing arbitration agreements. While the decision restricted Indian courts from granting interim measures for foreign-seated arbitrations, the emergency



arbitrator provisions under the SIAC Rules emerged as a viable option. These provisions, frequently employed in arbitrations involving Indian parties, gained recognition in legal debates despite ongoing discussions on enforceability. The decision's positive impact on India's legal system and investor confidence was evident, aligning the country's position with international arbitration jurisprudence. The newfound clarity and consistency in the judicial approach promised a more efficient dispute resolution process for both Indian and non-Indian parties, fostering confidence in the Indian legal landscape.

Analyzing the Impact of the BALCO Judgment on International Commercial Arbitration

The BALCO judgment represents a significant milestone in the realm of international commercial arbitration, offering a comprehensive restatement of the law within the framework of the Arbitration and Conciliation Act of 1996. While providing conceptual clarity and resolving longstanding contentious issues, the decision also leaves certain aspects unaddressed, prompting the need for further clarification.

Mutual Exclusivity of Part I and Part II: Conceptual Clarity vs. Lingering Ambiguities

One of the central pronouncements of the Supreme Court in BALCO is the declaration of the mutual exclusivity of Part I and Part II of the Act. This declaration aims to eliminate ambiguity and streamline the application of the law. However, certain issues requiring clarity remain unattended, as the Court adopts a "hands-off" approach to fill perceived voids in the arbitration regime.

Implications of the Exclusivity: Interim Measures and Remedial Challenges

The categorical assertion that Part I of the Act cannot be applied to arbitrations seated abroad has profound implications, particularly in the realm of interim measures of protection. With the exclusion of the option to approach Indian courts for interim relief under Section 9 of the Act, parties now find themselves in a potentially disadvantageous position compared to the previous Bhatia regime. The freedom to opt out of Part I provisions, as allowed under Bhatia, no longer extends to interim remedies, compelling parties to select an Indian seat for such remedies.



Prospective Overruling and Concerns within the International Arbitration Community

While the BALCO judgment has generally received positive feedback from the international arbitration community, concerns linger, primarily regarding the prospective overruling element of the decision. The limitation of the decision's applicability to arbitration agreements concluded on or after September 6, 2012, raises questions about its coexistence with the Bhatia doctrine for agreements executed prior to this date. This prospective application creates a scenario of two parallel regimes, potentially leading to inconsistencies and challenges in ongoing litigations.

Balancing Interests: The Dilemma of Parallel Regimes

The court's decision to apply the BALCO rationale only prospectively can be interpreted as an attempt to balance the interests of the parties and prevent the complete erosion of the possibility of interim remedies. However, the existence of two parallel regimes, wherein courts may apply either the Bhatia doctrine or the BALCO rationale based on the arbitration agreement's formation date, introduces complexities. The future trajectory will depend on how Indian judges navigate and maintain coherence between these two regimes, promising an intriguing chapter in the evolution of international arbitration in India.

CHAPTER V - Evaluation of notable shortcomings in India's International commercial arbitration

The escalating pace of international trade and the advent of globalization have made disputes inevitable among contracting parties. In the realm of international trade and commerce, contractual agreements typically precede commercial activities, delineating responsibilities to avert legal conflicts. Despite meticulous drafting, differences in interpreting rights and obligations often arise, particularly under arbitration agreements. International trade involves entities from diverse countries, each governed by distinct legal systems, presenting intricate and potentially conflicting scenarios. National law courts hold jurisdiction only within their territorial boundaries, emphasizing the need for alternative dispute resolution mechanisms.

Choice-of-law issues assume significance in international commercial arbitration, requiring a nuanced understanding of four distinct aspects:

- 1) The substantive law governing the merits of the parties' underlying contract and other claims.
- 2) The substantive law governing the parties' arbitration agreement.
- 3) The law applicable to the arbitral proceedings, also known as the "procedural law of the arbitration," "curial law," or "lex arbitri."
- 4) The conflict of laws rules applicable to selecting each of the aforementioned laws.

While uncommon, each of these issues may be subject to different national or international laws. Their resolution can significantly impact various stages of the arbitral process, with different national laws prescribing disparate rules. The most contentious issue in the adaptation and enforcement of international commercial arbitrations revolves around the conflict between the domestic legal framework and international guidelines for international commercial arbitration. Striking a balance between these elements remains a challenge, requiring careful consideration to foster a harmonious and effective international arbitration framework.

Gray Areas of International Commercial Arbitration

The expansion of international trade inevitably leads to disputes that transcend national borders and geographical boundaries. In resolving such disputes, the inclination towards international arbitration over litigation in national courts is natural. Arbitration is often preferred to litigation due to its efficiency, and in the realm of international disputes, the foreign element is favored over the domestic element in national courts. The absence of dedicated international courts for commercial disputes further underscores the preference for international arbitration. In the absence of international courts, international arbitration serves as a pragmatic and neutral forum for dispute resolution, especially when negotiations fail. The key rationale and objective of international arbitration are to offer a convenient, neutral, fair, expeditious, and effective platform for resolving disputes arising from international commerce.


The fundamental features of the legal framework governing the resolution of international commercial disputes can be categorized into three stages:

1. Jurisdiction: Determining the authority of the arbitral tribunal.
2. Choice of Law: Selecting the applicable legal principles governing the dispute.
3. Recognition and Enforcement of Arbitral Award: Establishing procedures for acknowledging and enforcing arbitral awards.

These stages form the bedrock of international commercial arbitration, yet certain gray areas persist in their interpretation and application, necessitating ongoing attention and refinement in the evolving landscape of global trade disputes. Some additional gray areas are as follows:

1. Law Applicable to the Substance of the Parties' Dispute

The resolution of the parties' underlying dispute typically falls under the rules of substantive law from a specific national legal system, often determined by arbitrators. International arbitral awards commonly uphold parties' agreements on applicable substantive law through "choice-of-law clauses." However, mandatory national laws or public policies can override private contractual arrangements, serving as a principal



exception. In cases where parties haven't agreed on the governing substantive law, the arbitral tribunal must make a selection. This choice occasionally involves reference to national or international conflict-of-laws rules. The approaches to selecting substantive law in international arbitration vary and will be further detailed below. Historically, applying the national conflict-of-law rules of the arbitral seat was common practice. However, recent trends indicate diverse practices. Some tribunals and commentators stick to the traditional approach, while others consider conflict rules from all states connected to the dispute. Additionally, certain authorities adopt either international conflict-of-laws rules or validation principles. The diverse approaches to the choice of substantive law in international arbitration will be summarized and examined in detail in the subsequent sections.

2. Law Applicable to the Arbitration Agreement

Arbitration agreements are universally considered as presumptively "separable from the underlying contract in which they appear." This separation implies that the parties' arbitration agreement might be subject to a different national law than the one governing the underlying contract, or it could be subject to conflict-of-laws rules that choose different substantive laws for the arbitration agreement and the underlying contract. This distinction in the applicable law to the arbitration agreement is crucial, and four alternatives for determining this law hold particular significance:


- a. Law Chosen by the Parties: The parties themselves may select the law to govern the arbitration agreement.
- b. International Principles: Some jurisdictions, like France, apply international principles as a substantive body of contract law.
- c. Rules of Non-Discrimination: In several U.S. authorities, rules of non-discrimination are used to determine the law governing the arbitration agreement.

3. Procedural Law Applicable to the Arbitral Proceedings

The conduct of arbitral proceedings is governed by legal rules that address both internal procedural matters and external relations between the arbitration and national courts. In most cases, the law that governs the arbitral proceedings is determined by the juridical place of arbitration. This legal framework encompasses various aspects, including the appointment and qualifications of arbitrators, the qualifications and responsibilities of legal representatives, the extent of judicial intervention, the form of awards, and the standards for annulment. Different national laws adopt significantly diverse approaches to these issues. In certain countries, national law imposes strict limits or requirements on the arbitration process, and local courts possess broad powers to supervise arbitral proceedings. On the other hand, in most developed jurisdictions, local law grants international arbitrators substantial freedom to conduct the arbitral process, subject only to basic requirements of procedural regularity, such as "due process" or "natural justice." It's worth noting that in some jurisdictions, parties have the freedom to choose the law governing the arbitral proceedings, often referred to as the procedural law of the arbitration, the curial law, or the *lex arbitri*. While this option theoretically allows parties to agree on a different procedural law than that of the arbitral seat, such agreements are infrequent in practice, and their effects remain uncertain.

4. Choice-of-Law Rules Application in International Arbitration

Choosing the applicable law for the various aspects of international arbitration involves navigating the principles of conflict of laws. Each component, whether it's the law governing the merits of the underlying contract or dispute, the arbitration agreement, or the arbitral proceedings, typically requires the application of conflict of laws rules. When determining the substantive law that governs the parties' dispute, the arbitral tribunal faces the challenge of applying conflict-of-law principles. Just as different states have distinct rules of substantive law, they also maintain varying conflict of law rules. Hence, an international arbitral tribunal must make an initial decision on which set of conflict rules to apply in order to ascertain the applicable substantive law for the dispute. This



initial decision plays a crucial role in shaping the legal framework that will guide the resolution of the parties' dispute, ensuring consistency and fairness in the application of laws with potentially divergent principles.

Legal Conflicts in International Commercial Arbitration

In the realm of International Commercial Arbitration, where parties belong to different legal systems, conflicts of laws inevitably arise, necessitating a choice of substantive law to govern the dispute. While parties may stipulate the applicable law in their initial agreement, challenges emerge when no consensus is reached on the choice of law for dispute resolution.

Judicial Intervention in Arbitral Autonomy and Finality


A noteworthy trend is the increasing judicial intervention that encroaches upon arbitral autonomy and finality. Striking a balance between preserving the autonomy and finality of arbitration while allowing for judicious review is a crucial consideration. National laws vary on this matter, with the UNCITRAL Model Law aiming to foster harmony and uniformity in international arbitration. While complete exclusion of judicial intervention is inconsistent with contemporary trends, there is a growing consensus to limit the scope of judicial supervision.

Authority and Autonomy of International Arbitral Tribunals

The authority of an international arbitral tribunal stems from the parties' agreement, not the mandate of the State. The choice of applicable law is also dictated by the arbitration agreement. As arbitral autonomy expands, the need for detailed reasons behind awards becomes more pronounced. Beyond ensuring transparency in the arbitral process, providing reasons serves as a built-in check on arbitrators, revealing the basis and logical process leading to the award. Additionally, the presence of reasons helps define the scope of judicial oversight.

The Imperative of Effective International Arbitration Laws

In response to the escalating number of international commercial disputes and the growing need for economic reforms, the recognition of the business community's demands in countries like



India becomes paramount. To foster global expansion of Indian foreign trade and attract foreign investors, the establishment of effective international arbitration laws is deemed essential. The Supreme Court, in the case of Food Corporation of India v. Joginderpal Mohinderpal, underscores the necessity for simplifying arbitration laws, making them less technical, and aligning them with the realities of situations while upholding justice and fair play.

Simplification and Responsiveness in Arbitration Laws

The Supreme Court emphasizes the importance of simplifying arbitration laws, making them more responsive to real-world situations, and ensuring adherence to the principles of justice and fair play. The goal is to instill confidence not only in delivering justice between parties but also in creating a perception that justice has been served. The case law cited underscores the need for arbitrators to follow processes and norms that inspire confidence in the fairness of arbitration outcomes.

Recent Judicial Pronouncements and Implications

Recent judicial pronouncements, such as the Food Corporation of India v. Joginderpal Mohinderpal case, have significant implications. Parties involved in arbitration are now constrained regarding the inclusion or exclusion of the jurisdiction of Indian courts in international commercial arbitrations. On the other hand, judgments like Bharat Aluminum Co v. Kaiser Aluminum Technical Services Inc provide relief to international players and uphold the principle of territorial criterion as a fundamental aspect of arbitration. This recognition contributes to the overall legitimacy and effectiveness of the arbitration process.

Persistent Challenges in International Commercial Arbitration

Despite the positive developments in international commercial arbitration, several issues persist due to the lack of clear and effective guidelines. These issues, both current and potential, pose challenges to the resolution of disputes through international commercial arbitration mechanisms. Key challenges include:



1. Enforceability of Arbitration Clause/Agreement

The effectiveness and enforceability of arbitration clauses or agreements remain a significant concern in international commercial disputes.

2. Choice of Arbitration Venue and Hearing

Determining the appropriate place for arbitration proceedings and the location for hearings introduces complexities that need clear resolution.

3. Conflict of Laws

The divergence in substantive and procedural laws between countries creates challenges in navigating and harmonizing legal frameworks.

4. Differences in Selection Procedures and Arbitrator Numbers

Disparities in the selection process and the number of arbitrators can lead to disputes and uncertainties in the arbitration process.

5. Public Policy Variances

Varying public policy considerations across different countries introduce complications in reaching consistent arbitration outcomes.

6. Recognition and Enforcement of Awards

The process and criteria for recognizing and enforcing awards across borders pose significant challenges.

While recent judgments have been positively received in the domain of international commercial arbitration, they necessitate a reevaluation of the traditional perception of the time-consuming process of enforcing foreign awards in India. The decisions, restricting the grounds for challenging foreign awards, indicate a potential for expediting dispute resolution through arbitration processes. This development is anticipated to enhance the confidence of the international community in commercial arbitration as a viable alternative dispute resolution (ADR) mechanism in India.



Arbitrability in International Commercial Arbitration

Arbitrability stands as a critical juncture where the contractual and jurisdictional aspects of international commercial arbitration converge. It essentially revolves around the fundamental question of which types of issues can be appropriately submitted to arbitration. In the landmark case of *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd*, the Supreme Court delved into the concept of arbitrability. The term "arbitrability" signifies disputes referred for arbitration, typically involving issues amenable to extrajudicial settlement. It plays a pivotal role in delineating the scope of disputes suitable for resolution through arbitration.

Judicial Insights into Arbitrability: *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd*


A comprehensive examination of the Supreme Court's stance in the *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd* case provides valuable insights into the nuanced understanding of arbitrability. The court clarified the term "arbitrability," emphasizing that it encompasses disputes with the potential for outside court settlement. Notably, it draws a distinction between arbitrable and non-arbitrable disputes, citing examples such as criminal disputes, matrimonial issues, and matters related to insolvency, guardianship, and testamentary concerns.

Challenges and Complexities in Arbitrability

Arbitrability introduces challenges and complexities arising from the intricate interplay between contractual and jurisdictional dimensions. A critical examination of these challenges involves identifying specific dispute categories deemed non-arbitrable. Recognizing the limitations of arbitrability becomes crucial in framing the scope of arbitration agreements. This nuanced understanding is essential for ensuring that only disputes suitable for arbitration are subjected to the process.

Applicability of Amendments: A Critical Analysis

The recent amendments in the Ordinance have introduced significant changes, yet the legislation lacks explicit provisions regarding their applicability, particularly to pending arbitrations.



Transitory provisions, customary in amending statutes, are absent. This absence raises questions about the scope of operation of each amendment concerning ongoing arbitral proceedings. A critical analysis of this aspect reveals potential implications and underscores the need for judicial clarification.

Estimating Court Perspectives on Applicability

An exploration into possible court perspectives sheds light on the challenges surrounding the applicability of amendments to both pending and future arbitral proceedings. In the absence of specific provisions, courts are likely to rely on principles from earlier precedents, contributing to an environment of uncertainty. This analysis serves as a guide, recognizing the potential for diverse judicial interpretations rather than providing definitive opinions.

UNCITRAL's Role in Harmonizing Commercial Arbitration Laws

The United Nations Commission on International Trade Law (UNCITRAL) stands as a pivotal institution established by the United Nations General Assembly to fulfill the crucial objective of harmonizing and promoting international trade law. Comprising 60 member states representing diverse geographical regions and economic legal systems, UNCITRAL serves as the core legal body within the UN system for International Trade Law. Its mandate includes coordinating legal activities, preventing duplication of effort, and fostering efficiency, consistency, and coherence in the unification and harmonization of trade law.

The Evolution of UNCITRAL's Model Law

Recognizing the necessity for uniformity in reflecting commonly accepted standards for international arbitration, UNCITRAL played a significant role in the development of the Model Law. Based on the foundational concepts of party autonomy and the supportive role of courts in the arbitration process, the Model Law emerged as a harmonized and modernized framework, complementing the New York Convention and UNCITRAL Rules. This framework represents a crucial step forward in facilitating international arbitration.



Hague Conventions and the Permanent Court of Arbitration

In the late 19th and early 20th centuries, to facilitate arbitration, two Hague Conventions were established in 1899 and 1907, both titled "The Hague Conventions for the Pacific Settlement of International Disputes." These conventions led to the creation of the Permanent Court of Arbitration, which, remarkably, continues to exist and function in the present day. The conventions laid the foundation for a mechanism to peacefully resolve international disputes through arbitration.

International Chamber of Commerce (ICC) and its Contribution to Arbitration


Founded in 1919, the International Chamber of Commerce (ICC) stands as the voice of the global business community. In 1923, the ICC established its Court of International Arbitration, providing a framework for an independent and neutral arbitration system for resolving commercial disputes between parties from different countries. Since its inception, the ICC has played a crucial role in promoting arbitration as a mechanism for resolving international commercial disputes, emphasizing the need for international regulation to uphold and support the arbitration process.

Evolution of International Conventions in Promoting Arbitration

International conventions and treaties play a crucial role in promoting and enforcing arbitration awards on a global scale. Key conventions such as the 1923 Geneva Protocol, the 1927 Geneva Convention, and the New York Convention have significantly contributed to the development and recognition of international commercial arbitration. This section explores the impact of these conventions, emphasizing their role in supporting the arbitral process.

The 1923 Geneva Protocol: A Landmark in Arbitral Process

The 1923 Geneva Protocol stands out as a landmark in the history of international arbitration. As one of the earliest significant international conventions, it had dual objectives. First, it mandated signatory countries to recognize and enforce arbitration clauses in international agreements, thereby prioritizing arbitration over court proceedings. Parties were obligated to resolve disputes



through arbitration if their agreement contained an arbitral clause. Second, the protocol aimed to ensure that awards based on arbitration agreements were enforceable exclusively within the territory of the state where they were made, limiting enforceability to the country of origin.

Despite its limitations, the 1923 Geneva Protocol had a substantial impact. It applied specifically to arbitration agreements between parties subject to the jurisdiction of different contracting states. The concept of a "commercial reservation" further restricted its scope, recognizing only those arbitration agreements deemed commercial by the signatory countries. While countries could make reservations in treaties, allowing them to comply selectively, the protocol's enforcement of arbitral awards was confined to domestic awards within member states. While the Geneva Protocol, 1923, had its shortcomings, it marked a significant step forward in international arbitration by addressing the initial challenges in recognizing arbitration as a viable method for dispute resolution.

The European Convention on International Commercial Arbitration (1961)

The European Convention on International Commercial Arbitration, established in 1961, aimed primarily to facilitate trade between Eastern and Western nations. While open to signatures from states beyond Europe, its focus was on enhancing economic ties between these regions. Developed by the United Nations Economic Commission for Europe, this convention differs from the New York Convention as it applies only when the parties involved in arbitration reside in contracting states. With 26 ratifications, it lacks the global significance of the New York Convention. The European Convention addresses various aspects, including parties' rights to submit to arbitration, arbitrator selection, organization of arbitration proceedings, determination of applicable law, and the setting aside and challenge of awards.

The Washington Convention of 1965 and the Establishment of ICSID

The Washington Convention of 1965, also known as the ICSID Convention, introduced the International Centre for the Settlement of Investment Disputes (ICSID). Sponsored by the World Bank, this convention is crucial for resolving disputes arising from investments made in a

contracting state by a national of another contracting state. With 140 ratifications, ICSID arbitration has become widely accepted, and its provisions are included in numerous international contracts. The convention allows for both conciliation and arbitration procedures, with the World Bank potentially assisting in enforcing ICSID awards. Unlike the New York Convention, ICSID awards are directly enforceable in signatory states without review in national courts. The convention also features an annulment mechanism, where the Chairman of the Administrative Council of ICSID can appoint an ad hoc committee to review and possibly annul awards, contributing to the unique nature of ICSID arbitration. Despite initial criticisms, the annulment mechanism has gained favor over time.

The European Convention providing a Uniform Law on Arbitration (1961)

Developed through the Council of Europe, the European Convention providing a Uniform Law on Arbitration aimed at establishing a uniform national and international arbitration law. This convention, signed by Austria and Belgium, holds significance as one of the world's most important and oldest regional conventions for international commercial arbitration. Its primary goal was to enhance the legal framework for international arbitration involving parties from European states, focusing on East-West trade. The convention, which came into force in 1964, currently has 31 states as parties. While most European states, excluding the United Kingdom, the Netherlands, and Finland, are part of the convention, around ten non-EU states, including Russia, Cuba, and Burkina Faso, are also parties. Comprising 19 articles and a detailed annex addressing certain procedural matters, the European Convention focuses on three key phases of the international arbitral process: arbitration agreements, arbitral procedure, and arbitral awards. Concerning arbitration agreements, the convention doesn't expressly presume their validity but outlines specific limited bases for their invalidity in proceedings concerning the recognition of awards. Regarding arbitral procedure, the convention restricts the role of national courts, affirming the autonomy of parties and arbitrators (or arbitral institutions) in conducting arbitration proceedings. In terms of arbitral awards, the convention serves as a supplement to the New York Convention, primarily dealing with the effects of a judicial decision annulling an award in the arbitral seat in other jurisdictions and not addressing other recognition obligations.



The Moscow Convention of 1972

The Moscow Convention, concluded in 1972, was part of the implementation process for the "socialist economic integration" of countries within the Council of Mutual Economic Assistance (CMEA). This convention mandated that "economic organizations" in the participating states resolve their disputes through arbitration in the designated chambers of commerce. It accorded awards from such arbitration the same effect as final judgments and provided for their reciprocal enforcement. However, with the dissolution of the CMEA, the Moscow Convention's status became uncertain. Several states that were parties to the convention denounced it, rendering it largely obsolete.

The Panama Convention of 1975

Amidst South America's initial reluctance towards international commercial arbitration, the Panama Convention of 1975 marked a significant development. In this convention, negotiated between the United States and most South American nations, Latin American countries, in particular, expressed mistrust towards US and European business interests. The Panama Convention, their preferred alternative to the New York Convention, adopts many principles from it, recognizing the benefits of international arbitration. While bearing similarities to the New York Convention, the Inter-American Convention provides for the presumptive validity and enforceability of arbitration agreements and arbitral awards, subject to specified exceptions. Notably, it lacks provisions for the enforcement of arbitration agreements. Additionally, if parties fail to agree on the arbitration procedure, the Inter-American Commercial Arbitration Commission (IACAC) Rules of Procedure or, currently, the UNCITRAL Arbitration Rules apply. The convention introduces provisions allowing the constitution of an arbitral tribunal to appoint arbitrators of their choosing, regardless of nationality. However, it departs from the New York Convention by omitting provisions expressly dealing with judicial proceedings brought in national courts in breach of an arbitration agreement.

Issue of International Harmonization of Commercial Arbitration Laws

The quest for international harmonization in commercial arbitration laws is gaining momentum, with various initiatives aiming to create a cohesive legal framework. The United Nations Commission on International Trade Law (UNCITRAL) plays a pivotal role in this pursuit. States are encouraged to consider enacting the revised articles of the UNCITRAL Model Law on International Commercial Arbitration, fostering a more unified approach.

Model Law by UNCITRAL

UNCITRAL's Model Law on International Commercial Arbitration serves as a beacon for nations seeking to streamline their legal systems in handling international commercial disputes. This model law, adopted in 2006, emphasizes interpretative reference to internationally accepted principles, promoting a consistent understanding. Key amendments address the form of arbitration agreements and interim measures.

Salient Features of the Model Law

a. Substantive and Territorial Scope of Application:

The model law defines an arbitration as international based on the parties' places of business and the location of the subject matter of the dispute. The territorial scope applies if the place of arbitration is within the state, with exceptions for certain provisions that have a global application.


b. Arbitration Agreement:

The focus on arbitration agreement, recognizing its validity and effect by courts. Both existing and future disputes are covered, with a requirement for written form. The definition of written form is comprehensive, encompassing various means of communication.

c. Composition of the Arbitral Tribunal:

The appointment, challenge, termination, and replacement of arbitrators. The model law balances party autonomy with suppletive rules to ensure effective arbitration proceedings.

d. Jurisdiction of Arbitral Tribunal:



The model law empowers the arbitral tribunal to determine its own jurisdiction, adopting the principles of "Kompetenz Kompetenz" and the autonomy of the arbitration clause. Courts retain control, but the model law introduces procedural safeguards to prevent dilatory tactics. The tribunal can issue interim measures upon party request.

The UNCITRAL Model Law on International Commercial Arbitration reflects a commitment to a globalized and consistent approach to resolving international commercial disputes, providing a framework that nations can adopt to enhance legal harmonization.

International Treaties

The OHADA Treaty of 1993

OHADA, or the Organisation for the Harmonisation of Business Law in Africa, is a treaty signed by 16 Francophone African countries in 1993. This treaty aims to modernize and harmonize business law in Africa, fostering investor confidence, facilitating trade, and promoting arbitration for resolving commercial disputes. OHADA plays a crucial role in unifying legal frameworks within its member states.

The North American Free Trade Agreement of 1994 (NAFTA)

Signed by Canada, the United States, and Mexico in 1992, NAFTA came into force on January 1, 1994. It focuses on promoting free trade and protecting/enforcing rights among its signatory countries. NAFTA establishes a dispute settlement mechanism for investment-related conflicts, ensuring equal treatment and due process before an impartial tribunal. Parties involved in disputes with a NAFTA party can initiate arbitration under ICSID Arbitration Rules, Additional Facility Rules of ICSID, or UNCITRAL Arbitration Rules.

Bilateral Investment Treaties or Investment Protection Agreements

Bilateral Investment Treaties (BITs) or Investment Protection Agreements (IPAs) gained popularity in the 1980s and 1990s to encourage capital investment in developing markets. Many capital-exporting states, including the United States, Western European states, and Japan, entered into numerous BITs or IPAs with developing countries. These agreements often address the

enforceability of international arbitration agreements and awards. Some also allow foreign investors to demand international arbitration for specific disputes, even without a prior arbitration agreement in the contracts involved. The inclusion of "arbitration without privity" in certain BITs underscores its importance in international commercial dispute resolution, emphasizing the need for careful consideration of applicable BITs.

CHAPTER VI - Other Contemporary Developments

Conflict of Interest in International Arbitration in the Context of Third-Party Funder

Despite the achievements in international commercial arbitration, several perplexing issues persist. These contemporary issues require serious attention, and some of them include:

1. ***International Harmonization of Domestic Laws on International Arbitration:*** There is a need to harmonize domestic laws on international arbitration globally.
2. ***Precise Definition of International Arbitration:*** A more precise definition of international arbitration is needed.

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3. ***Institutionalization of International Commercial Arbitration:*** Greater institutionalization of international commercial arbitration is required, as ad-hoc arbitration has not been entirely successful.
 4. ***Promotion and Acceptability of International Arbitration:*** Efforts should be made to promote and encourage the respect and acceptability of international arbitration among business people, minimizing the role of state laws and courts.
 5. ***Conflict of Interests in Third-Party Funding:*** The issue of conflict of interests in third-party funding needs attention. This involves examining the role of commercial litigation funding and its impact on international arbitration. The phenomenon of third-party funding has gained prominence in recent years, with its roots in Australia, Germany, the United Kingdom, and the United States. It has become more prevalent in international arbitration, attracting attention in the arbitration community.
 6. ***Evolution of Third-Party Funding:*** Originally designed to support parties lacking resources to protect their rights, third-party funding has evolved. It is not only used to address financial imbalances but has become a financing tool for parties with significant means.
 7. ***Concerns with Third-Party Funding:*** Concerns have been raised about the economic interest of third-party funders in arbitration cases, even though they are not parties to the arbitration agreement. Critics argue that this may alter the dynamics of arbitral proceedings, affecting procedural rights and interests. Additionally, concerns include the potential increase in frivolous claims and conflicts of interest.
 8. ***Regulation and Disclosure:*** The demand for more regulation regarding third-party funding is growing. Suggestions include a general obligation to disclose the existence of third-party funding in national legislations and arbitration rules to address conflicts of interest and allow for security orders.

Third-Party Funding Regulation in International Arbitration

The evolution of regulations pertaining to third-party funding in international arbitration has been gradual, with the 2014 IBA Guidelines for Conflicts of Interest playing a pioneering role.

These guidelines established fundamental principles emphasizing the necessity for arbitrators to maintain impartiality and independence from all involved parties, including third-party funders.

General Standards Governing Third-Party Funding


- a. ***Principle of Equivalence (General Standard 6(b))***: Understanding the IBA Guidelines' stance that individuals or entities with a controlling influence or direct economic interest in a legal entity party are to be treated as equivalent to the party itself. Significance of maintaining arbitrator impartiality and independence from external entities, such as third-party funders and insurers.
- b. ***Duty of Disclosure (General Standard 7)***: Exploration of the duty placed on the funded party to disclose any relationships between the arbitrator and entities with a direct economic interest or duty to indemnify for the anticipated award. The broadened scope of disclosure to encompass relationships with entities providing funding for the arbitration.

ICC Guidance on Conflicts and Third-Party Funding

Guidance Note by the International Chamber of Commerce (ICC): Overview of the ICC's guidance note for arbitrators regarding the disclosure of conflicts, emphasizing considerations related to entities with a direct economic interest in the dispute Alignment of the ICC's definition of third-party funding with that outlined in the IBA Guidelines on Conflicts of Interest.

The Role of ICCA-Queen Mary Task Force

Establishment and Objectives: Introduction to the ICCA-Queen Mary Task Force, formed in collaboration between the International Council for Commercial Arbitration (ICCA) and Queen Mary University of London in 2014 Systematic study and recommendation objectives related to procedures, ethics, and policy issues surrounding third-party funding in international arbitration.



Ongoing Impact and Contribution

Dynamic Discourse and Standards Development: The ongoing role of the ICCA-Queen Mary Task Force in contributing to the evolving discourse on third-party funding. Its significant contribution to the development of standards and best practices in this dynamic and evolving area of international arbitration.

Impact of ICCA-Queen Mary Task Force's Work

The ICCA-Queen Mary Task Force took a significant step towards addressing third-party funding by presenting a working draft of its report at the 14th Annual ITA-ASIL Conference on Third-Party Funding in Washington, DC on April 12, 2017. However, as of now, the complete report has not been officially published, leaving the full extent of its findings and recommendations undisclosed.

Emergence of National Legislation on Third-Party Funding

Until the early months of 2017, no national legislation explicitly addressed third-party funding in arbitration. The regulatory landscape, however, began to shift, with the issue gaining prominence as a decisive factor in choosing arbitration seats. Instances of third-party funding in jurisdictions where it was prohibited raised substantial risks for funded parties. Potential challenges included injunctive actions, claims of abuse of process or tort, and the risk of award annulment based on public policy concerns.

Strategic Role of Legislation in Attracting Arbitration Proceedings

Certain jurisdictions recognized the strategic importance of allowing third-party funding as a means to attract a larger share of international arbitration proceedings. Singapore and Hong Kong, in particular, responded proactively to user demands and subsequently amended their legislation to permit third-party funding. This legislative shift contributed to both jurisdictions being listed among the most preferred and widely used arbitration seats, a notable change from their status in 2010.



Disclosure Challenges in International Commercial Arbitration

In international commercial arbitration, disclosure of third-party funding by the funded party is generally not obligatory. As of the current timeframe, no arbitration rules or national laws mandate such disclosure, except for the amended Legal Profession (Professional Conduct) Rules of Singapore. Hong Kong is considering legal reforms, including a potential general obligation for third-party funding disclosure.

General Trends in Transparency and Disclosure Obligations

The broader trend in international arbitration points toward an increasing demand for transparency concerning parties' funding arrangements. Despite this, there is an ongoing debate without a consensus on whether a general obligation to disclose third-party funding should be established and the specific modalities such an obligation should entail.

Divergent Views on General Disclosure Obligation

Debates surrounding a general obligation to disclose third-party funding reveal a stark division between proponents and opponents. Advocates contend that such an obligation is imperative to address potential imbalances and issues arising from third-party funding. On the contrary, opponents argue that imposing a general duty to disclose is both impractical and unnecessary, asserting that existing disclosure rules and international arbitration practices adequately cover third-party funding disclosures.

Key Questions Surrounding General Disclosure Obligation

The proposition of a general disclosure obligation prompts several critical questions that demand careful consideration. One major point of contention is whether disclosing the mere existence of a funding arrangement suffices or if the obligation should extend to revealing the content of the funding agreement. Additionally, concerns arise regarding the types of funding arrangements subject to disclosure, the recipients of such disclosure, the timing of disclosure, and the authority responsible for imposing this general duty.



Challenges Involving Funding Agreement Content and Confidentiality

The content of funding agreements introduces further complexity, potentially including confidentiality or non-disclosure clauses. In cases where a funding agreement conflicts with a disclosure obligation, resolving this conflict becomes essential. Whether the responsibility lies with the party or the arbitral tribunal, the imposition of a general disclosure obligation necessitates careful planning to avoid protracted and intricate procedural challenges.

Voluntary Disclosure by Funded Parties


Despite the ongoing ambiguity surrounding the existence of mandatory disclosure obligations, some funded parties may willingly disclose their funding arrangements. Voluntary disclosure can serve strategic purposes, indicating financial capability to pursue proceedings and potentially influencing settlement negotiations. It may also signal the perceived strength of a claim, backed by a funder's agreement to provide financial support.

Funder's Reluctance Towards Disclosure

In contrast, as a general practice, third-party funders often exhibit reluctance in disclosing their involvement to the opposing party or the arbitral tribunal. This hesitation suggests a broader trend within the industry, where funders prefer maintaining confidentiality about their participation in arbitration proceedings.

Disclosure Requirements in Investor-State Arbitration

Recent free trade agreements, including the Comprehensive Trade and Economic Agreement (CETA) between Canada and the European Union, introduce mandatory disclosure of third-party funding arrangements in investor-state arbitration. Under CETA, the disputing party benefiting from third-party funding must disclose the name and address of the funder to the other party and



the arbitral tribunal. While CETA focuses on disclosing the funder's identity without requiring details of the funding agreement, the definition of third-party funding is broad, covering any financing arrangement entered into by a third party to support the proceedings.

Growing Role of Litigation Funds in Investor-State Arbitration

The discourse on third-party funding in investor-state arbitration stems from the increased participation of litigation funds, often termed "vulture funds," in large-scale arbitrations against states. These funds aim to secure a portion of the award, presenting a lucrative investment opportunity. The heightened scrutiny on disclosure is fueled by concerns about the negative public perception of litigation funds and the belief that matters involving states should be transparent due to their impact on public interests.

Balancing Confidentiality and Transparency in Dispute Resolution

One crucial aspect in shaping dispute resolution provisions is the delicate balance between confidentiality and transparency. While international arbitration generally offers a private dispute resolution process, ensuring confidentiality poses significant obligations on parties, counsel, and arbitrators. The contrast with open court proceedings is evident, but there are debates on the extent of confidentiality obligations, with some jurisdictions imposing them by law or institutional rules.

Role of Confidentiality in International Arbitration

Confidentiality, a hallmark of arbitration, is considered both a benefit and a challenge. The ability to keep proceedings confidential is lauded for fostering efficient dispute resolution, reducing the risk of disclosing sensitive business information, and facilitating settlements. However, the perceived lack of transparency, especially in investor-state arbitration, has led to a legitimacy crisis, eroding public confidence. Striking a balance between the benefits of transparency and the traditional view of arbitration as a confidential process becomes paramount.



Privacy and Confidentiality Distinctions in Arbitration

The private nature of arbitration often leads parties to assume automatic confidentiality, but this is not universally agreed upon. Privacy and confidentiality are distinct concepts in arbitration, where privacy pertains to attendance at hearings, and confidentiality involves the obligation not to disclose arbitration-related information. The absence of a consensus on confidentiality treatment globally results in commercial arbitration being perceived as increasingly opaque rather than transparent. The ongoing debate revolves around finding a nuanced equilibrium between these diverging interests.

Evolution of Transparency in Arbitration

The contemporary call for increased transparency in arbitration prompts a reflection on the historical operation of arbitration. Transparency in arbitration involves navigating two closely linked yet distinct concepts: public access and disclosure. Understanding these components is crucial to defining transparency within the arbitration context.

Dual Concepts: Public Access and Transparency

- a. **Public Access:** This refers to an individual citizen's right to attend a hearing, promoting open scrutiny of public officials and preventing the abuse of power. It ensures accountability and transparency in the proceedings.
- b. **Disclosure:** Transparency also involves the disclosure of information relevant to the arbitration process. This can include details about the proceedings, decisions, and the parties involved.

Distinguishing Public Access and Transparency

It's vital to differentiate between public access and transparency to grasp the motivations behind the calls for enhanced transparency in international commercial arbitration. Public access emphasizes an individual's right to attend proceedings, contributing to the scrutiny of the adjudicator's performance. While these concepts often intertwine, they remain distinct. Public access is an individual right, whereas transparency is a characteristic of the overall system.



Discrepancy in Treatment

In the realm of international commercial arbitration, there is a noticeable difference in the treatment of transparency and public access. Transparency is increasingly considered imperative, while public access is sometimes viewed as expendable. The divergence arises from the distinct objectives each concept pursues. Public access, rooted in considerations of fairness and justice, is an individual right. International tribunals may endorse public access to ensure transparency, but it is not inherently tied to the concept.

Domestic vs. International Approach

The fundamental contrast lies in how transparency and public access are approached domestically versus internationally. Domestic legislators may hesitate to infringe on fundamental rights to avoid local backlash and human rights concerns. In international disputes, such domestic considerations often do not apply, allowing for a different treatment of public access and transparency. This highlights the nuanced relationship between individual rights and the broader goals of transparency in the international arbitration context.

Disclosure vs. Transparency: Unraveling the Concepts

In the realm of arbitration, the distinction between disclosure and transparency is paramount. While disclosure is focused on the release of substantive information to serve specific regulatory purposes, transparency addresses the broader handling of information within an institution.

Disclosure's Regulatory Focus

- a. **Regulatory Purpose:** Disclosure obligations serve specific regulatory goals, such as stabilizing labor markets, educating consumers, ensuring financial market health, and protecting the public from health and safety concerns.
- b. **Specific Information:** Disclosure deals with the specific release of identifiable material, fulfilling regulatory requirements.



Coexistence of Transparency and Disclosure

While transparency and disclosure differ in their nature and scope, they can coexist synergistically. Disclosure serves as a tool to achieve transparency. For instance, arbitrators disclosing conflicts of interest contribute to transparent arbitrator appointments, reducing the likelihood of appeals based on bias.

The Imperative of Transparency

- a. ***Building Trust:*** Transparency contributes to trust and acceptance of the arbitral process. It holds arbitrators, counsel, and parties accountable, as their actions are subject to public scrutiny.
- b. ***Enhanced Decision-Making:*** Publicly rendered awards drive arbitrators to conduct thorough research, ensuring accurate decision-making. This adherence to transparency aligns with democratic principles, including the right of access to information, promoting fairness, the rule of law, equity, and due process.
- c. ***Corporate Social Responsibility:*** Companies embracing transparent dispute resolution mechanisms fulfill their corporate social responsibility, contributing to a more accountable and equitable business environment.

Benefits of Arbitral Transparency

- a. ***Consistency:*** Transparent arbitral processes contribute to the consistency of awards.
- b. ***Legal Development:*** It fosters the development of arbitral law.
- c. ***Dispute Prevention:*** Transparent processes help prevent prospective disputes.
- d. ***System Development:*** It provides opportunities for the development of the arbitral system.
- e. ***Enhanced Arbitrator Expertise:*** Publicly scrutinized proceedings increase efficacy in determining the expertise of an arbitrator.



Implied Duty of Confidentiality in International Commercial Arbitration

The concept of an implied duty of confidentiality plays a pivotal role in international commercial arbitration, intertwining elements of both confidentiality and privacy.

The Crucial Link between Privacy and Confidentiality

- a. **Court Consideration:** Courts emphasize the privacy of the arbitral process as integral to maintaining utmost secrecy. This underscores the implicit obligation of confidentiality, viewed as a vital prerequisite to any arbitration contract.
- b. **Implicit Corollary:** Confidentiality is not merely considered a necessity but is deemed an implicit corollary to the inherent privacy of arbitration. The implied duty of confidentiality is positioned as including a duty of confidence.

Balancing Acts in Jurisdictional Approaches

In the pursuit of finding a delicate balance between confidentiality and transparency, various jurisdictions exhibit diverse approaches.

Confidentiality in National Legislations

- a. **Limited Protection:** In many countries, confidentiality in international commercial arbitration lacks statutory protection. The UNCITRAL Model Law, widely followed, does not include provisions safeguarding confidentiality.
- b. **Notable Exceptions:** Some countries like New Zealand, Peru, Scotland, and Australia stand out for their meticulous regulations on confidentiality.
- c. **Case Law Developments:** While Great Britain lacks statutory regulations, notable developments in case law serve to protect confidentiality.
- d. **Divergent Global Practices:** Jurisdictional practices on confidentiality vary, with the absence of statutory regulations in some countries and detailed provisions in others, reflecting a global divergence.

Confidentiality in Arbitration Rules

- a. ***Institutional Regulations:*** Many arbitration institutions address confidentiality primarily as a duty of arbitrators and center staff.
- b. ***Varied Emphasis:*** While some rules, like the ICC rules, specify duties for arbitrators and staff but lack explicit obligations for parties, others provide detailed codes of ethics for arbitrators without mandating confidentiality for parties.
- c. ***Empowering Tribunals:*** Certain rules empower the arbitral tribunal to issue confidentiality orders upon request, adding a layer of flexibility to the proceedings.

Case Law: The Classical View on Confidentiality in English Law

The classical view of confidentiality in arbitrations under English law has been articulated through significant case law, representing a foundational principle.

Dolling-Baker v. Merrett and Another (1991)

Articulation of the Classical View: The English Court of Appeal in *Dolling-Baker v. Merrett* established a general principle of confidentiality in arbitrations under English law. This view, often considered classical, emphasizes the privacy of arbitral proceedings.

Hassneh Insurance Co. of Israel v. Mew (1993)

- a. ***Recognition of Implied Duty of Confidentiality:*** In *Hassneh Insurance Co. of Israel v. Mew*, the English Court acknowledged the existence of an implied duty of confidentiality, extending naturally from the inherent privacy of international commercial arbitration hearings.
- b. ***Scope of Confidentiality Obligations:*** The Court recognized that the obligation of confidentiality encompasses documents created for the arbitration, including evidence notes, transcripts, witness statements, and submissions to the arbitrator.

Ali Shipping Corporation v. "Shipyard Trogir" (1998)

- a. **Reaffirmation of Classical Position:** The English Court of Appeal, in *Ali Shipping Corporation v. "Shipyard Trogir"*, reaffirmed the classical position that the confidentiality rule is grounded in the privacy of arbitral proceedings.
- b. **Implied Term of Confidentiality:** The Court emphasized that the duty of confidentiality is an implied term arising from the nature of the arbitration contract, deemed necessary for a definable category of contractual relationships.
- c. **Boundaries of Confidentiality:** Acknowledging that the boundaries of confidentiality obligations require delineation, the Court highlighted the evolving nature of these limitations, subject to case-by-case determination.

These landmark cases in English law underscore the existence of an implied duty of confidentiality in arbitration, grounded in the privacy of proceedings but subject to ongoing exploration of its boundaries.

Instruments for Enhancing Transparency in Investor-State Arbitration

The movement towards transparency in investor-state arbitration, driven by concerns about secret proceedings, has resulted in the development of various instruments and initiatives:

Evolution of Transparency in Trade Agreements

Background: Transparency provisions have become integral in contemporary free trade agreements and bilateral investment treaties.

UNCITRAL Rules on Transparency

- a. **Introduction:** UNCITRAL has introduced the "UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration" (UNCITRAL Transparency Rules).
- b. **Provisions:** These rules, effective from April 1, 2014, aim to enhance transparency by allowing the publication of arbitral documents, amicus curiae submissions, and opening

arbitral hearings. Clear definitions of confidential or protected information are provided, including business information and law enforcement-related data.

- c. **Application:** Applied to disputes arising from treaties initiated under UNCITRAL Arbitration Rules on or after April 1, 2014, unless parties agree otherwise.

UNCITRAL Transparency Registry

- a. **Establishment:** UNCITRAL has set up the "Transparency Registry" as a database for publishing information and documents related to treaty-based investor-state arbitration.
- b. **Contents:** The registry includes documents from disputes under Chapter 11 of NAFTA and descriptions of arbitrations under the UNCITRAL Transparency Rules.

Mauritius Convention


- a. **Purpose:** The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, known as the "Mauritius Convention," enables parties to express consent to apply UNCITRAL Transparency Rules to future arbitrations.
- b. **Reservations:** Signatory states can make reservations regarding the convention's application to specific investment treaties.
- c. **Status:** Opened for signature in March 2015, the convention awaits entry into force, with 18 signatory countries to date.

UNCITRAL Transparency Instruments in Practice

Application: The UNCITRAL Transparency Rules have been applied in two investor-state arbitrations involving Iberdrola, S.A. (España) and BSG Resources Limited.

Transparency Initiatives by Arbitral Institutions

- a. **ICSID:** The International Centre for Settlement of Investment Disputes (ICSID) has been a pioneer in transparency. ICSID cases and awards are frequently published, and hearings are live-streamed. Award publication requires party consent.

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- b. **PCA:** The Permanent Court of Arbitration (PCA) maintains a case repository with details of investor-state proceedings. Certain PCA case hearings have been video-archived.

The evolving landscape of transparency in investor-state arbitration is shaped by these instruments and initiatives, reflecting a commitment to openness and public accessibility.

The Role of the Court of Arbitration for Sport (CAS) in International Sports Dispute Resolution


The Court of Arbitration for Sport (CAS) in Switzerland plays a crucial role in the resolution of international sports disputes. Here are key points regarding CAS and its jurisdiction:

CAS as a Hub for International Sports Dispute Resolution:

- a. **Global Significance:** CAS is situated in Switzerland and serves as the primary institution for resolving international sports disputes. It has gained prominence due to the numerous disputes brought before it by major sports institutions, contributing to its global recognition.
- b. **Impact on International Sports Arbitration:** CAS, through its statutes, has significantly influenced the resolution of disputes in international sports arbitration. It acts as a border-defining entity, delineating the scope of international sports dispute resolution.

International Commercial Arbitration as an Alternative:

- a. **Overview:** International Commercial Arbitration provides an alternative method for resolving disputes arising from cross-border commercial transactions. It allows parties to avoid litigation in national courts, proving to be an effective and efficient means of dispute resolution.
- b. **Hub in New Delhi:** Recognizing the effectiveness of commercial arbitration, the government has expressed interest in establishing an International Commercial Arbitration hub in New Delhi.

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- c. **Relevance in Sports Law:** Commercial arbitration is crucial in addressing various issues in the lives of athletes, including drug abuse, contractual disputes, and labor issues. The speedy resolution of these disputes is essential, especially considering the time-sensitive nature of an athlete's career.

CAS Jurisprudence and Interpretation:

- a. **Characteristics:** Sports arbitration shares similarities with commercial and investment arbitration. CAS interprets the rules governing sports disputes and serves as the final stage in the internal appeal system of sports federations.
- b. **Legal Interpretation:** CAS has the authority to rule on the proper legal interpretation of rules when parties disagree. However, its jurisdiction is limited to the competence of the body where the appeal is lodged.

Consistent Line of Reasoning in CAS Jurisprudence:


- a. **Due Process:** CAS emphasizes the need for sporting federations to respect due process in its jurisprudence. It functions as a harmonizing force, setting consistent norms, especially concerning doping offenses, across different sports.
- b. **Role in Setting Standards:** CAS plays a role in harmonizing standards across various sports, ensuring a consistent approach to issues such as doping offenses. This contributes to the development of norms that can be applied by sports federations globally.

Emerging Jurisprudence of the Court of Arbitration for Sport (CAS)

The jurisprudence of the Court of Arbitration for Sport (CAS) is categorized into five main areas, highlighting its evolving role and principles:

Lex Ludica

- **Definition:** Refers to the rules of the game, reflecting CAS's self-imposed reluctance to interfere with what it deems purely sporting matters.

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- *Scope:* Extends beyond decisions made by match officials to encompass issues related to the broader nature of sports.

Good Governance:

- *Definition:* Encompasses the proper standards legally required for decision-making within private organizations with disciplinary power over athletes.
- *Key Aspects:* Includes having clear authority in rules for decision-making, avoiding arbitrary decisions, preventing a sporting federation from being the sole arbiter of rule interpretation, and using transparent and objective criteria.

Procedural Fairness:

- *Definition:* Involves a set of minimum standards that sporting federations must adhere to when handling disciplinary matters.
- *Importance:* Ensures fair processes in disciplinary proceedings.

Harmonization of Standards:

- *Objective:* CAS, as an international body, aims to ensure consistency by formulating general principles applicable to all federations.
- *Policy Measures:* Asserts the primacy of international sporting federations over national ones, exercises a supervisory function over federation rulebooks, and suggests amendments for consistency.

Fairness and Equitable Treatment:

- *Primary Function:* CAS plays a crucial role in achieving fairness in individual cases.
- *Approach to Penalties:* Disapproves of automatic fixed penalties, follows the principle of proportionality, and requires sanctions to "fit the crime."
- *Additional Principles:* Applies the principles of legitimate expectation and estoppel where appropriate.



Key Themes in CAS Jurisprudence:

- *Balance Between Sporting Autonomy and Judicial Oversight:* CAS maintains a balance by respecting sporting autonomy in purely sporting matters while providing judicial oversight in legal and procedural aspects.
- *Consistency and Harmonization:* The harmonization of standards and the pursuit of consistent principles across international sports federations are central themes in CAS jurisprudence.
- *Individual Fairness:* CAS emphasizes fairness and equitable treatment in individual cases, especially concerning penalties.

Emergency Arbitrator and India Seated International Arbitrations


The concept of an Emergency Arbitrator has emerged as a crucial solution to address challenges in international arbitration, particularly in situations requiring urgent interim protection. This mechanism becomes essential due to limitations in the enforceability of National Court Orders across borders, as these orders lack recognition in other countries. Consequently, the international arbitration community introduced the Emergency Arbitrator to provide swift resolutions during emergencies.

Key Features of Emergency Arbitrator

An Emergency Arbitrator is appointed by an arbitration institution upon the parties' request and is limited to deciding on interim protection applications. Typically, their jurisdiction ends with the formation of the regular arbitration tribunal, and their participation is contingent on explicit consent from the involved parties. Noteworthy international arbitration institutions, such as ICC, SIAC, and HKIAC, efficiently appoint Emergency Arbitrators and facilitate the recognition of their awards under the New York Convention, ensuring international enforceability.

Emergency Arbitrator in Indian Legal Framework

Despite recent amendments to the Arbitration and Conciliation Act, 1996, India has not expressly recognized Emergency Arbitrators. However, several Indian arbitration institutions



have incorporated provisions for Emergency Arbitrators in their rules. While there is limited direct judicial recognition of Emergency Arbitrator awards, some have been indirectly acknowledged.

Interim Protections in India

India's legal framework provides two forums for interim orders: Section 9 (courts) and Section 17 (arbitration tribunals) of the Arbitration and Conciliation Act, 1996. Court orders under Section 9 are granted when the arbitration tribunal is yet to be formed, contingent on the existence of an arbitration clause. Arbitration tribunals, under Section 17, are empowered to issue interim orders in emergency situations.

Enforceability and Challenges

Historically, the 1996 Act recognized only final awards for enforcement, with amendments limiting court powers under Section 9 post-arbitration tribunal formation. The Act, however, lacks an express provision regarding the powers and enforceability of Emergency Arbitrators. Given this uncertainty, parties engaged in India-seated arbitrations may prefer court orders for situations not requiring foreign enforcement, as Indian courts are known for expeditious actions.

Aim of Emergency Arbitration

The primary objective of an Emergency Award is to swiftly provide interim measures or conservatory measures to a party or parties, especially when the formation of a full Arbitral Tribunal is impractical or time-consuming. The efficacy of Emergency Arbitration relies on the dual principles of "Fumus boni iuris" and "Periculum in mora."

- ***Fumus boni iuris (Reasonable possibility of success)***: This principle asserts that there must be a reasonable possibility that the party seeking urgent relief will succeed on the merits of the case.
- ***Periculum in mora (Risk of irreparable harm)***: This principle emphasizes that the measure must be granted immediately to prevent irreparable loss that cannot be compensated through damages.



Role of Emergency Arbitration

Emergency Arbitration plays a crucial role in scenarios where no Arbitral Tribunal is in place, or the establishment of one would consume substantial time based on arbitration agreement requirements or institutional rules. Several shortcomings in the existing legal systems contribute to the prominence of Emergency Awards. These include a lack of confidence in national courts to grant urgent relief, concerns about confidential information leakage, and the perceived high cost of traditional litigation.

Procedures Involved in Emergency Arbitration

Upon deciding to pursue the remedy of an Emergency Award, parties must adhere to specific procedures:

1. Filing Proof of Service

- The party seeking emergency relief must file proof of service, demonstrating that the application has been duly served upon the opposing parties.

2. Payment of Fees

- Payment of fees according to the established fee schedule for the relevant arbitration center.
- The application for Emergency Arbitration is generally limited to signatories of the arbitration agreement or their successors, with an implicit understanding of this limitation.

Powers Vested in Emergency Arbitration:

An Emergency Arbitration possesses the authority to grant interim measures or conservatory relief, albeit for a specific and limited duration. Its functions are akin to those of an ad hoc tribunal, constituted for a precise purpose, and it dissolves promptly upon achieving its designated objectives or the expiration of the stipulated time frame. The prevailing trend in Arbitration Rules worldwide is to adopt an 'opt-out' policy for emergency provisions. This

implies that such provisions automatically apply unless explicitly excluded in the agreement between the parties.

Role of Emergency Arbitrator

An individual appointed as an Emergency Arbitrator assumes various responsibilities and ceases to have authority (*functus officio*) once the Interim Order is issued. The key functions of an Emergency Arbitrator include:

1. *Establishing a Schedule:*

- Within two business days of appointment, the Emergency Arbitrator sets a schedule for considering the application for emergency relief.

2. *Ensuring Opportunity for All Parties:*

- The schedule allows all parties a reasonable opportunity to present their case, with provisions for telephonic conferences or written submissions as alternatives to formal hearings.

3. *Timely Decision-Making:*


- Due to strict timelines, the Emergency Arbitrator may not engage extensively with the parties, making decisions primarily based on submitted documents.
- A typical emergency arbitration process takes approximately eight to ten days from application to award.

4. *Exercising Powers Similar to Arbitral Tribunal:*

- The Emergency Arbitrator is vested with powers akin to those of the Arbitral Tribunal as per the applicable Rules.
- This includes ruling on jurisdiction and ordering any party to take necessary interim protective measures concerning the dispute.

5. *Nature of Interim Orders:*

- Interim orders may include asset freezing, prohibitive and mandatory injunctions, preservation and inspection of evidence, preventive measures against intellectual property misuse, and anti-suit injunctions.



Status of Emergency Arbitrator's Order

While the emergency arbitrator's order doesn't bind the arbitral tribunal on any determined matter, it can be varied, discharged, or revoked by a subsequent order or award from the Arbitral Tribunal, either upon application by any party or at the tribunal's own initiative.

Law Commission's Report on Emergency Arbitrations

The Law Commission, through its 246th Report on proposed amendments to the Arbitration and Conciliation Act, 1996, aimed to address the recognition of emergency arbitrations in India. The pivotal recommendation involved amending Section 2(d) of the Act to explicitly include emergency arbitrators within the definition of an arbitral tribunal. The proposed amendment sought to provide statutory recognition to institutional rules, such as those of SIAC (Singapore International Arbitration Centre) or ICC (International Chamber of Commerce), which incorporate the provision for the appointment of an emergency arbitrator. The suggested amendment read as follows:

"Section 2(d): 'Arbitral tribunal' means a sole arbitrator or a panel of arbitrators and, in the case of an arbitration conducted under the rules of an institution providing for the appointment of an emergency arbitrator, includes such emergency arbitrator."

There was anticipation that the Arbitration and Conciliation (Amendment) Act of 2015 would align with this global trend and introduce provisions for the appointment of emergency arbitrators. However, the Amendment of 2015 did not incorporate the Law Commission's recommendation, and as a result, the Act continues to lack specific provisions addressing emergency arbitrations.

Enforcement in India: A Complex Landscape

Enforcing a foreign-seated award in India faces considerable challenges, primarily governed by Part II of the Arbitration and Conciliation Act, 1996. The landmark decision in *BALCO v. Kaiser*

Aluminum Technical Services has set a precedent, prospectively excluding Indian courts from granting interim relief for foreign-seated arbitrations.

However, when it comes to Emergency Awards, India takes a nuanced stance with ancillary enforceability. Notably, judicial decisions on emergency arbitrations are limited but impactful.

HSBC v. Avitel

In this case, the Bombay High Court played a crucial role. The arbitration agreement allowed parties to seek interim reliefs from Indian courts, even for arbitrations conducted outside the country. The Emergency Arbitrator's order, originating from Singapore, was upheld by the Bombay High Court. Importantly, since the subject agreements predated the BALCO judgment, its applicability was not considered.

Raffles Design International India Private Limited & Ors. v. Educomp Professional Education Limited & Ors

This case involved an arbitration agreement governed by Singapore laws. Following an Emergency Arbitrator's interim order in Singapore, it was enforced in the High Court of Singapore. Subsequently, the party sought enforcement in India under the amended Section 9 of the Arbitration and Conciliation (Amendment) Act, 2015. The Delhi High Court allowed the maintainability of such petitions, emphasizing the relevance of the amended Section 2(2) of the Act. The proviso to Section 2(2) expanded the court's powers to grant interim relief for international commercial arbitrations, even if conducted outside India. Crucially, the agreements in question were made post the BALCO judgment.

Global Scenario: Evolving Practices in Emergency Arbitration

The landscape of Emergency Arbitration (EA) is dynamically evolving globally, with arbitral institutions adapting their rules to accommodate this expedited process. Several prominent institutions have incorporated provisions for both the expedited formation of arbitral tribunals and Emergency Arbitrators (EA), while others have focused solely on the latter.



Institutional Approaches

- ***Both Expedited Formation and EA:*** SIAC, SCC, SCAI, CANACO, NAI
- ***EA Only:*** LCIA, HKIAC, ICDR/AAA, ICC

Asian Jurisdictions Leading the Way


Singapore and Hong Kong, in particular, have emerged as leaders in embracing Emergency Arbitration. Amendments to their respective arbitration laws expressly recognize and provide for the enforcement of interim orders by Emergency Arbitrators. Singapore, through amendments to its International Arbitration Act, expanded the definition of 'arbitral tribunal' to include Emergency Arbitrators. Similarly, Hong Kong introduced Part 3A to its Arbitration Ordinance, facilitating the recognition and enforcement of EA orders.

Global Adoption

Building on this trend, institutions like LCIA, AAA, and ICC have amended their rules to incorporate Emergency Arbitration, aligning with the efficiency and enforceability advantages it offers. These changes not only streamline the arbitration process but also enhance the enforceability of amendments.

New York Convention Challenges

The New York Convention, recognizing only final awards, poses challenges for the enforceability of interim orders. However, notable cases like *Yahoo! Inc. v. Microsoft Corporation* in 2013 demonstrated a willingness by the District Court of New York to recognize an Emergency Arbitrator's award as essentially final. The court reasoned that an Emergency Arbitrator can provide final relief to preserve the status quo, even before a final award from the Arbitral Tribunal. Contrastingly, the Southern District Court of California in 2011, in *Chinmax Medical Systems v. Alere San Diego*, took a different stance. It denied jurisdiction, arguing that the decision of an emergency arbitrator was not final and binding under the New York Convention.




Disparity in National Laws and the Need for a Unified Approach in International Arbitration

The field of international arbitration is marred by challenges arising from significant disparities in national laws on arbitral procedures. These differences, stemming from both mandatory and non-mandatory provisions or even a lack thereof, pose substantial problems and give rise to undesired consequences. The impact is particularly pronounced when parties involved are confronted with unfamiliar procedural frameworks, often stemming from foreign jurisdictions. One of the primary concerns is the wide-ranging nature of these national laws, causing complications in international arbitration where parties may be unfamiliar with the procedures applicable to their case. For a party, especially when foreign, obtaining a comprehensive understanding of the local law can be financially burdensome, impractical, or even unattainable. This lack of clarity can have profound implications not just on the arbitral process but also on the selection of the place of arbitration. The uncertainty surrounding local laws introduces inherent risks of frustration and can influence the choice of the place of arbitration. Parties may hesitate or refuse to agree on a location due to concerns about the local legal landscape. To address these challenges and create a more conducive environment for international commercial arbitration, there is a compelling need for a unified approach. The adoption of a Model Law, easily recognizable and tailored to meet the specific requirements of international commercial arbitration, could serve as a solution. Such a Model Law would provide an international standard, offering solutions that are acceptable to parties from diverse states and legal systems. This harmonization of laws would not only streamline the arbitral process but also broaden the choices of arbitration venues, facilitating the smooth functioning of arbitral proceedings on a global scale.

The Role of Information Technology in International Arbitration


In the realm of international arbitration, information technology plays a pivotal role, encompassing various tools such as email and electronic communications among involved



parties, arbitrators, and administering bodies. Additionally, it involves the storage of information accessible to all relevant entities through portable or fixed storage media. The integration of information technology in international arbitration serves multiple purposes. Primarily, it facilitates efficient communication, allowing parties and tribunals to correspond swiftly and seamlessly, thereby saving valuable time and costs. Properly managed, IT ensures the effective management and conduct of arbitrations. However, inadequate management of IT tools can lead to increased time and costs and, in extreme cases, unfair treatment of a party. The landscape of IT in international arbitration has evolved significantly since the ICC Commission on Arbitration and ADR's task force first addressed this issue in 2004. Technological advancements have introduced solutions that were not readily available or mature at that time. While in 2004, email was the primary mode of communication, today, written communication predominantly occurs in electronic formats once the tribunal is constituted. One notable advancement discussed in 2004 was the concept of a secure, confidential, and flexible online "virtual data room." This virtual space would allow continuous real-time access to all pleadings, correspondence, and submissions for parties, arbitrators, and arbitral institutions. The ICC, for instance, launched its innovative case management product, "Net case," in 2005, reflecting the growing emphasis on such technological solutions. As technology continues to advance, there is ongoing development in internet-based case management products, showcasing the commitment to harnessing the benefits of information technology for the effective administration of international arbitrations.

Need for Uniformity in International Arbitration


The United Nations Commission on International Trade Law (UNCITRAL) has undergone various revisions to align its procedures with modern institutions and enhance flexibility concerning common circumstances addressed by contemporary institutions. Acknowledging the importance of the arbitrator's effectiveness and assessment, UNCITRAL has aimed for harmonization and unification. The imperative for uniformity in international arbitration stems from the necessity to bring coherence, unity, and certainty to the field. By achieving consensus on the true meaning of international arbitration, unification facilitates the recourse to international arbitration for disputing parties. If domestic laws governing the procedural rules of



international commercial arbitration are standardized or similar, parties involved in commercial disputes are more likely to accept arbitration as a dispute resolution mechanism. Uniformity in domestic laws can significantly contribute to removing uncertainty related to the requirements and validity of arbitration agreements. This harmonization not only builds confidence but also streamlines the international arbitration process, making it more accessible and acceptable to the parties involved. Ultimately, the goal is to establish a framework that promotes consistency, clarity, and a shared understanding of the principles guiding international arbitration.

CHAPTER VII - Conclusion and Suggestions


International arbitration has solidified its position as the primary method for resolving international commercial disputes worldwide. Countries across the globe have undergone legal modernization to keep pace with this trend. In an era of globalization, businesses and their advisors must stay informed about the developments and challenges in dispute resolution. The rise of international arbitration can be attributed to the escalating costs associated with litigating across borders. This alternative dispute resolution method offers advantages such as speed, flexibility, and the arbitrator's ability to accommodate diverse legal and regulatory principles that may impact each party involved. The ongoing debate revolves around the need for uniform rules governing commercial arbitration and whether specific industries, like telecommunications, require tailored regulations. One of the significant global trends in arbitration is its increasing popularity as the preferred method for resolving international commercial disputes. Courts in most countries have also shown greater support for arbitration. The enduring appeal of



arbitration lies in its ability to help parties avoid the expense, delays, and rigidities often associated with court litigation.

The UNCITRAL Model Law has played a pivotal role in reforming and modernizing arbitral procedures worldwide. It addresses various stages of the arbitration process, including the arbitration agreement, composition of the arbitral tribunal, court intervention, and recognition and enforcement of arbitral awards. Widely accepted across states and legal systems, the Model Law represents a consensus on key aspects of international arbitration. The historical backdrop includes the establishment of the Permanent Court of Arbitration through Hague Conventions in 1899 and 1907, creating a framework for the pacific settlement of international disputes. The International Chamber of Commerce (ICC), founded in 1919, has been a prominent voice for the international business community. The ICC's Court of International Arbitration, established in 1923, has been instrumental in promoting arbitration as a mechanism for resolving international commercial disputes. As the world continues to witness the globalization of trade, the importance of international arbitration is expected to grow. Its effectiveness in providing efficient, pragmatic, and impartial dispute resolution makes it a vital tool for businesses, particularly in industries like telecommunications seeking resolution in a complex and interconnected global landscape.

In addition to the UNCITRAL Model Law, the New York Convention establishes both minimum formal requirements for award enforcement and maximum standards for refusal of enforcement. Importantly, contracting states can enhance the law's favorability for enforcement by restricting grounds for refusal outlined in Article V of the New York Convention. Article VII allows parties seeking to uphold an award to rely on any more favorable right to enforcement, whether derived from multilateral conventions, bilateral treaties, or domestic laws on enforcement. The New York Convention serves as the backbone of the international regime for enforcing foreign awards. The primary goal of the convention is to achieve uniformity globally in international commercial arbitration. Mere adoption of the convention by individual states is insufficient; interpreting its provisions consistently across countries is equally vital. A radical proposal would grant an




international tribunal the authority to make preliminary rulings on questions arising from convention interpretation. India's Arbitration and Conciliation Act of 1996 aligns with the UNCITRAL Model Law on International Commercial Arbitration 1985. While Part I of the Act addresses domestic awards, Part II pertains to the enforcement of foreign awards, specifically those with an arbitration seat outside India.

Certain provisions of Part I, such as sections 9, 27, and sub-section (1)(3) clause (a) of section 37, also apply, albeit in a limited manner, to international commercial arbitration where the seat is outside India. Enacted to fulfill international obligations, the Act draws from the UNCITRAL Model Law and emphasizes dispute resolution through arbitration. Despite criticism, the 1996 Act represents an improvement, fostering a predictable and stable arbitration system. Courts intervene only when necessary, and legislative provisions can curtail such intervention, making India an attractive destination for arbitration proceedings.

Incorporating Institutional Rules in International Commercial Arbitration

Apart from conventions, numerous institutions have emerged recently, equipped with well-developed arbitration rules. These rules do not require a special procedure for incorporation into contracts; a simple reference in the arbitration agreement suffices for their application. The practice of international commercial arbitration indicates the effectiveness of these rules, continually updated and featuring detailed provisions to address potential challenges. Staff trained in assisting parties makes these rules well-suited for the fast-paced commercial world. While institutional rules act as a complete code when mentioned in the arbitration agreement, parties entering commercial relationships should consider explicitly naming the established institution, taking advantage of the associated benefits. Several issues hinder the development of international commercial arbitration. Third-party funding, also known as litigation funding, comes in two major types: consumer and commercial. Third-party funding is an emerging method for parties to fund arbitration-related costs during proceedings. The funder's monetary incentive lies in becoming entitled to a share of any monetary award the funded party receives at the proceedings' conclusion. Other issues include concerns about confidentiality and




transparency, the evolving jurisprudence of the Court of Arbitration for Sport, disparities in national arbitration laws, the need for uniformity in these laws, and challenges related to Information Technology (IT) in international arbitration. Confidentiality and privacy are crucial aspects of arbitration, even though their regulation may not be uniform across legal norms, as they are universally recognized principles synonymous with arbitration proceedings.

Convergence of Investment Arbitration and International Commercial Arbitration

The swift evolution and institutionalization of investment arbitration have left a substantial impact on the landscape of international commercial arbitration. The inherently autonomous and delocalized nature of public international law arbitrations has reinforced the prominence of both institutional and ad-hoc arbitrations. In essence, there is minimal divergence in overall structures, procedures, and efficacy between the two, with the primary distinction arising in the enforcement challenges against sovereign entities. What is evident is the interchangeability of characteristics between investment arbitrations and commercial arbitrations, highlighting a symbiotic relationship between the two.

Suggestions for Improvement

1. ***Harmonization of Domestic Laws:*** Prioritize international harmonization of domestic laws on commercial arbitration to mitigate controversies and disagreements among parties.
2. ***Establishment of Arbitration Centers:*** Promote the creation of more arbitration centers in India to facilitate the smooth and efficient enforcement of arbitral awards.
3. ***Government Participation:*** Encourage government participation in the development of international commercial arbitration by passing a dedicated statute for international commercial arbitration.
4. ***Commercial Dispute Resolution Hubs:*** Leverage the opportunity for major Indian cities, such as Mumbai, New Delhi, and Bangalore, to become significant commercial dispute resolution hubs.

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5. ***Alignment with UNCITRAL Rules:*** Support developing nations in aligning their laws with UNCITRAL Rules to enhance their participation in institutional arbitration.
 6. ***Reform of Indian Arbitration Act:*** Regularly update and reform the Indian Arbitration Act to ensure it remains user-friendly, meets contemporary commerce and finance needs, and contributes to India's emergence as a major center for international commercial arbitration.
 7. ***Autonomy in Arbitration:*** Consider greater autonomy for international arbitration with minimal court interference, except in exceptional cases.
 8. ***Promotion of Institutional Arbitration:*** Promote institutional arbitration, recognizing its advantages over ad-hoc arbitration.
 9. ***Elimination of Distinctions:*** Explore the removal of distinctions between domestic and foreign awards, creating similar procedures for both to align with international best practices.
 10. ***Reform of Arbitration Provisions:*** Reform or update certain provisions related to the definition of "commercial" in international commercial arbitration.
 11. ***Adoption of New Technologies:*** Encourage parties and tribunals to adopt new technologies to save time and costs in arbitration proceedings.
 12. ***Regulation of Arbitral Fees:*** Establish mechanisms for regulating arbitral fees to ensure fairness and transparency.
 13. ***Limitation on Grounds to Challenge Awards:*** Limit the grounds on which awards can be challenged to streamline the arbitration process.
 14. ***Minimization of Stay on Awards:*** Discourage the norm of granting stays on awards to expedite the resolution process.
 15. ***Training Programs:*** Organize robust training programs for arbitrators to enhance their skills and knowledge.
 16. ***Technical Knowledge of Arbitrators:*** Emphasize the importance of technical knowledge in the selection of arbitrators.
 17. ***Respect for Autonomy of Parties:*** Respect the autonomy of parties involved in arbitration proceedings.

Important Findings

1. Ineffectiveness of Statutory Provisions

- The statutory provisions for the enforcement of foreign awards and international commercial arbitration in India are found to be ineffective.

2. Differences in Procedural and Substantive Aspects

- Significant differences exist in both procedural and substantive aspects among the countries included in the research.

3. Lack of Regularization of Enforcement Agencies

- Enforcement agencies involved in international commercial arbitration are not adequately regulated, leading to potential challenges.

4. Limited Recognition for Indian Arbitration Institutions

- Indian arbitration institutions, including ICA and ICADR, have not achieved the desired recognition on a global scale.

5. Insufficiency in Provisions for Setting Aside and Appeal

- Provisions related to setting aside and appeal for foreign awards are deemed insufficient, indicating a need for review.

6. Unclear Distinction Between Domestic and International Arbitration

- There is a lack of clarity concerning the distinction between domestic and international commercial arbitration.

7. Absence of Protection for Foreign Investors

- Foreign investors lack sufficient protection, raising concerns about the attractiveness of India as an investment destination.

8. Ambiguity in the Applicability of Arbitration Law Parts

- The applicability of Part I and II of the Indian arbitration law is unclear, leading to potential confusion and challenges.

These findings underscore the need for reforms and improvements in India's legal framework related to international commercial arbitration. Addressing these issues could enhance the efficiency, clarity, and attractiveness of the arbitration process in the country.

Modality

1. Global Convergence in Judicial Control

- Advocate for global convergence and harmonization in judicial control of foreign arbitral awards to align with international practices.

2. Review of Supreme Court's Approach

- Assess and reconsider the aggressive nationalistic approach of the Supreme Court of India in international arbitration disputes to align with global expectations.

3. Transformation of Arbitration Process

- Facilitate a transformation in the arbitration process, making it more efficient, cost-effective, and distinct from traditional court proceedings.

4. Expectations from Legislative Changes

- Anticipate positive impacts from legislative changes, especially The Arbitration and Conciliation (Amendment) Act, 2016, in promoting India as an arbitration-friendly jurisdiction.

5. Alignment with International Practice

- Align Indian laws, especially the Arbitration and Conciliation Act, 1996, with international practices to enhance investor confidence and support India's positioning as an international hub for commercial arbitration.

6. Analysis of the 2016 Amendment Act

- Conduct a thorough analysis of the effectiveness of The Arbitration and Conciliation (Amendment) Act, 2016, in attracting foreign investment and projecting India as an investor-friendly country.



7. Impact of 2016 Act on Arbitration Landscape

- Recognize the potential positive impact of the 2016 Act on the arbitration landscape, addressing issues such as court interference and delays in the arbitration process.

8. Role of Law in Society

- Acknowledge the role of law in regulating society and resolving conflicts, emphasizing the need for strong, easy, and quick mechanisms for dispute resolution.

9. Access to Justice

- Consider the concept of "access to justice" beyond traditional courts, exploring alternative dispute resolution mechanisms to provide quick and cost-effective resolutions.

10. International Trade and Contractual Disputes

- Recognize the complexities of international trade and contractual disputes, emphasizing the preference for arbitration over litigation, especially in resolving disputes between parties from different nations.

11. Preventing Legal Disputes


- Encourage careful drafting of contracts to prevent legal disputes, recognizing the importance of arbitration in resolving disputes arising from differing legal systems.

12. Resolution of International Disputes

- Acknowledge the growth of international trade and the inevitability of international disputes, advocating for the preference of international arbitration over litigation for efficient and neutral dispute resolution.

Make in India Programs and Global Arbitration Initiative

The Make in India initiative, launched in 2014, aimed to invigorate India's manufacturing sector by attracting international capital. However, the journey has been marked by a gap between




rhetoric and the implementation of key economic reforms. Recognizing the need for a strategic shift, the Indian government has set its sights on becoming a global hub for international commercial arbitration. The pivotal Global Arbitration Conference, organized by NITI Aayog, brought together legal luminaries, government officials, and corporate leaders. Prime Minister Narendra Modi underscored the necessity of a robust legal system and vibrant arbitration culture. Chief Justice of India, Justice T.S. Thakur, advocated for Alternative Dispute Resolution (ADR) and expressed concerns over undue judicial intervention in arbitral awards. The involvement of renowned international arbitration institutions added a global perspective, contributing best practices to shape effective arbitration policies. Members of the user community, including major corporations, shared insights into navigating high-level disputes, fostering a holistic understanding.

Challenges stemming from India's decentralized political system and judicial backlog were acknowledged. While progress has been made in investor-friendly reforms, certain initiatives like land acquisition, Goods and Services Tax, and labor law reforms await parliamentary approval. Amidst challenges, opportunities abound for foreign companies in India, especially in sectors like information technology, telecommunications, and engineering. Success demands a long-term perspective and adaptive strategies tailored to India's diverse states and union territories. As India aspires to be an arbitration-friendly jurisdiction, the recent legislative amendments and the government's commitment to creating an efficient arbitration ecosystem are steps in the right direction. The Make in India programs, coupled with a global arbitration initiative, aim to position India as an attractive destination for international investments and dispute resolution. The journey towards becoming a preferred global economic player is underway, and concerted efforts continue to shape India's economic landscape.

The Arbitration and Conciliation (Amendment) Act, 2016

The Arbitration and Conciliation Act, 1996, underwent significant amendments through The Arbitration and Conciliation (Amendment) 2015 (Ordinance) promulgated by the President of India on October 23, 2015. The subsequent Arbitration Act of 2016 aimed to establish arbitration



as the preferred mode for settling commercial disputes, positioning India as a hub for international commercial arbitration. The amendments focused on enhancing user-friendliness and cost-effectiveness in arbitration proceedings.

FDI Policy of 2015


The Foreign Direct Investment (FDI) Policy of 2015 reflects the Indian government's commitment to attracting and promoting foreign direct investment. This policy aims to supplement domestic capital, technology, and skills for accelerated economic growth. The government has implemented a transparent, predictable, and easily comprehensible framework, embodied in the Circular on Consolidated FDI Policy. This framework undergoes periodic updates to align with regulatory changes.

Commercial Division and Commercial Appellate Division of the High Courts Act, 2015

In line with the 'Make in India' initiative and the goal of enhancing the ease of doing business, the Commercial Courts, Commercial Division, and Commercial Appellate Division of the High Courts Act, 2015, were enacted. This legislation seeks to expedite the enforcement of contracts, recovery of monetary claims, and just compensation for damages. The Act establishes Commercial Courts at the district level and Commercial Divisions in High Courts, equipped to handle commercial disputes of specified values. The establishment of Commercial Appellate Divisions in all High Courts facilitates appeals from the decisions of Commercial Courts/Commercial Divisions.

Bilateral Investment Treaty

Recognizing the significance of disputes, the Government of India introduced a new model bilateral investment treaty (BIT) in April 2015. This model aims to protect the sovereign from investment disputes, and foreign investors may not have access to bilateral investment promotion and protection agreements (BIPPAAs) if their contracts exclusively stipulate legal recourse in India. The move addresses concerns raised by foreign investors who served arbitration notices





under BIPPAAs due to adverse policy actions, and it aligns with the government's commitment to uphold its sovereign interests.

Our Comments

In the realm of international business and commerce, disputes are inevitable, and their swift resolution is imperative to maintain the efficiency of economic activities. International Commercial Arbitration (ICA) emerges as a mechanism designed to provide an expedient, impartial, fair, and effective environment for resolving cross-border commercial issues. The legal framework governing ICA encompasses key stages: jurisdiction of the forum, choice of law, and the recognition and enforcement of foreign arbitral awards. The complexity arises in ICA when parties from different legal systems engage, leading to a conflict of laws. The choice of substantive law becomes crucial, and while parties may specify it in their agreement, challenges arise when no consensus is reached. The evolving trend of judicial intervention in arbitral processes necessitates a delicate balance between arbitral autonomy and finality, which varies among national laws. The UNCITRAL Model Law seeks to harmonize this landscape.

India, acknowledging the importance of international arbitration, has embarked on a journey to position itself as a global hub for such disputes. Initiatives like the three-day global arbitration conference underscore the government's commitment to creating a favorable cross-border business environment. Legislative amendments, such as the Arbitration and Conciliation (Amendment) Act, 2016, signify India's resolve to align its arbitration laws with international best practices. The judiciary's pro-arbitration rulings and the restriction of grounds to challenge foreign awards signal a positive shift. These developments, coupled with the government's focus on improving the ease of doing business, showcase India's commitment to fostering a conducive environment for international trade and attracting foreign investors. However, challenges persist, including issues related to the enforceability of arbitration clauses, determination of the place of arbitration, conflicts of laws, and recognition and enforcement of awards. The recent legal decisions, while welcomed, underscore the need for clear and effective guidelines to address these challenges.



In conclusion, the importance of effective international arbitration laws cannot be overstated for India's economic growth, global trade expansion, and investor confidence. The recent legal reforms and judicial pronouncements signal a positive trajectory, but ongoing efforts are essential to create a robust and responsive arbitration framework that instills confidence in both domestic and international stakeholders. The journey towards simplicity, reduced technicalities, and adherence to principles of justice and fairness, as envisioned by the judiciary, remains a shared responsibility for all stakeholders involved in the international commercial arbitration landscape in India.

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