Strengthening Arbitration and its Enforcement in India – Resolve in India

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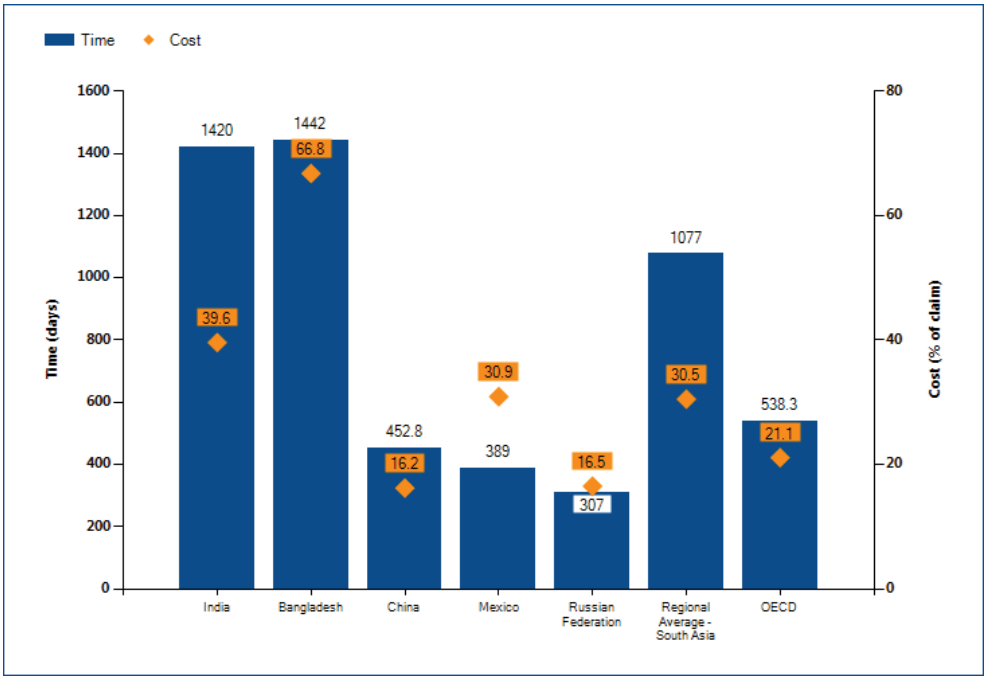
Background on Dispute Resolution in India

India has an estimated 31 million cases pending in various courts. As of 31.12.2015 there were 59,272 cases pending in the Supreme Court of India, around 3.8 million cases pending in the High Courts and around 27 million pending before the subordinate judiciary. 26% of cases, more than 8.5 million, are more than 5 years old. It has been estimated that 12 million Indians await trial in criminal cases throughout the country. On an average it takes twenty years for a real estate or land dispute to be resolved.

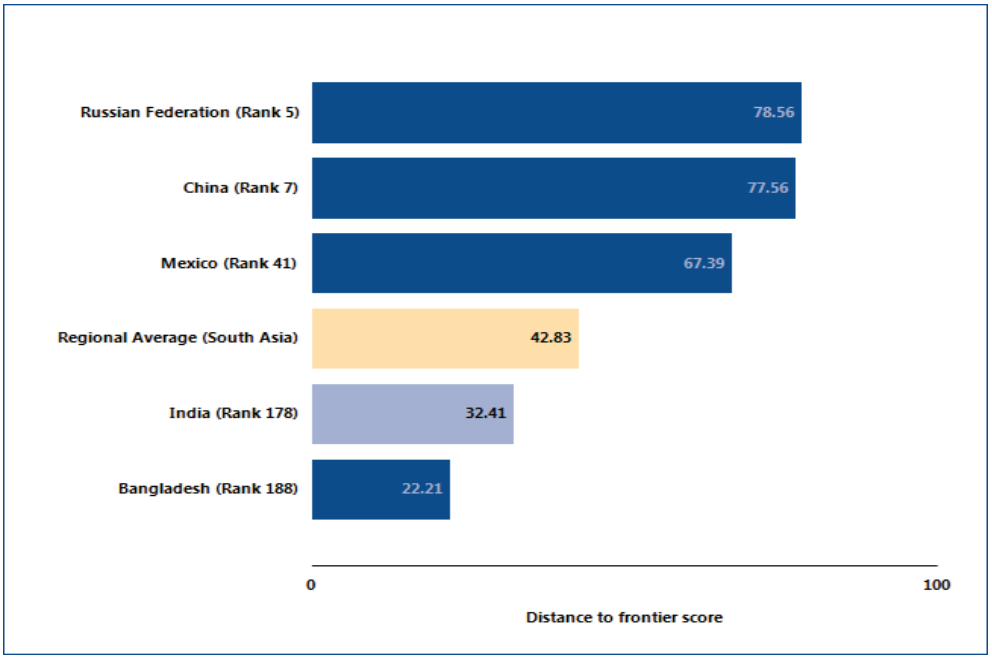
The dispute resolution process has a huge impact on the Indian economy and global perception on "doing business" in India. This is clearly indicated by World Bank rating on Ease Of Doing Business 2016 which has ranked India 131 out of 189 countries on how easy it is for private companies to follow regulations. The study notes that India takes as much as 1,420 days and 39.6% of the claim value for dispute resolution. The table below shows comparative data on both the time and cost for resolving disputes.



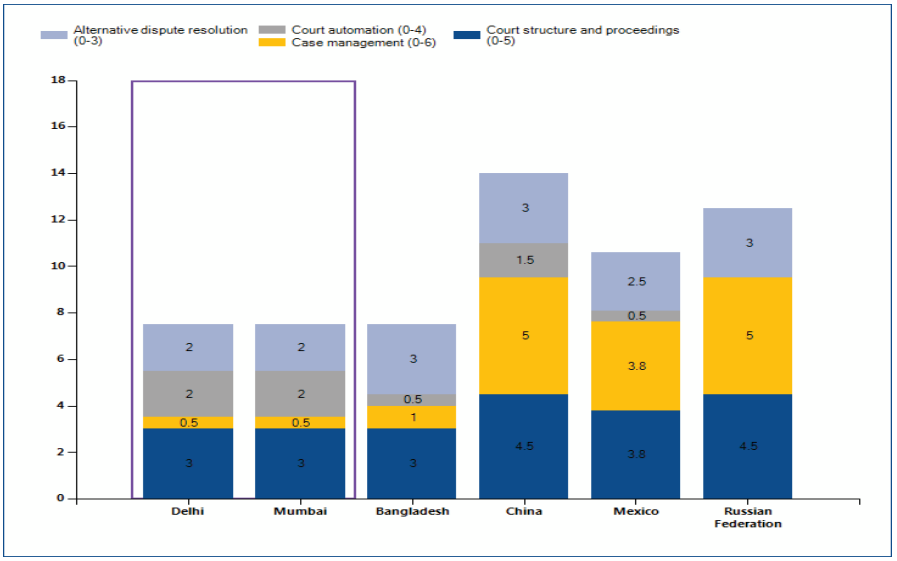
This is higher than that of OECD countries as well as that of South Asia's regional averages. Globally, India stands at 178 in the ranking of 189 economies on the ease of enforcing contracts (*see table below)*

[1] Member, Niti Aayog.
[2] OSD, Niti Aayog.

How India and comparator economies rank on the ease of enforcing contracts



So far as the quality of judicial processes is concerned (court structure and proceedings, case management, court automation and alternative dispute resolution), once again, India has a poor ranking.



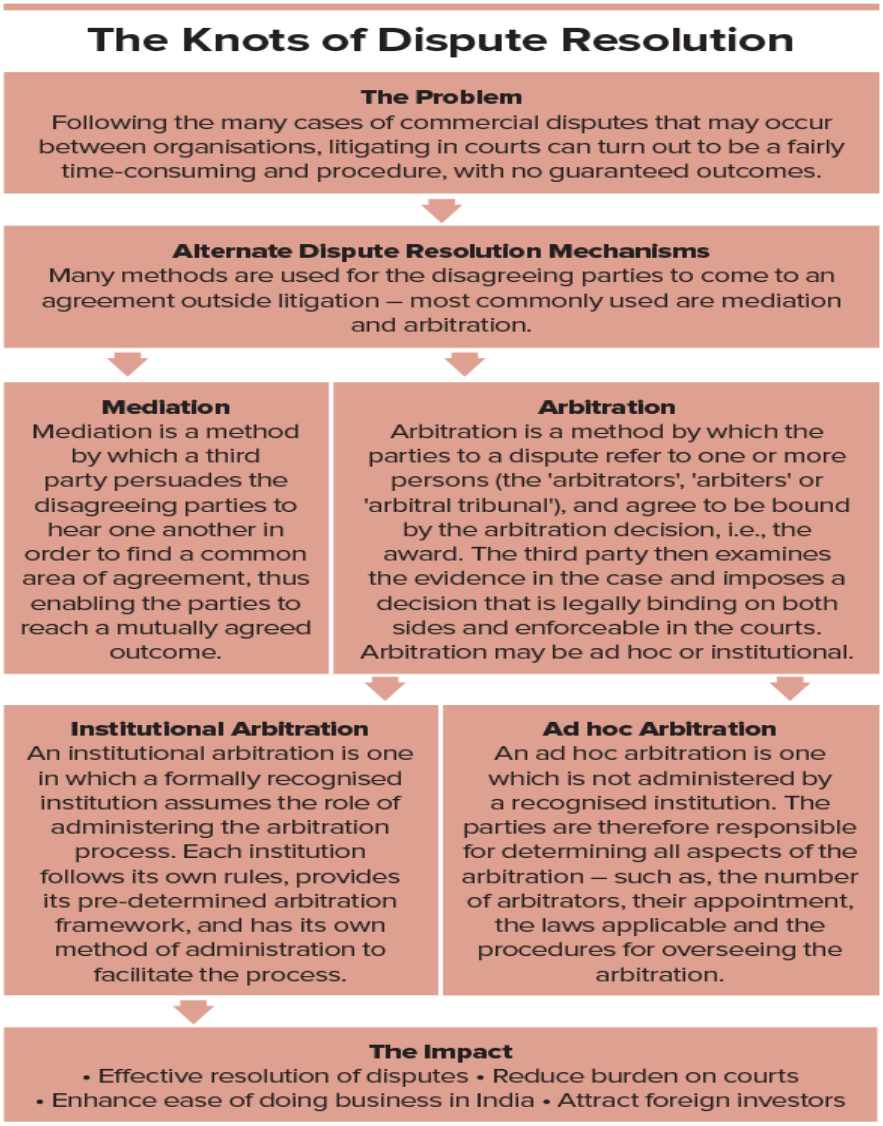
Note: *The score on the quality of judicial processes index is the sum of the scores on these 4 sub-components. The index ranges from 0 to 18, with higher values indicating better, more efficient judicial processes.*

Glimmer of Hope: Various Forms of Alternate Dispute Resolution

The above statistics reiterate the need for reforms not only in speeding up dispute resolution, but also having a strong in-country mechanism for out of court dispute resolution. Legally, this process is known and is practiced in the forms of arbitration, negotiation conciliation and mediation.

The difference between all these "alternate dispute resolution mechanisms" lies in the process and mode of resolving the dispute. Broadly, in arbitration, the arbitrator hears evidence and makes a decision. Arbitration is like the court process, where parties provide testimony and give evidence, as in a trial. However, it is usually less formal. In mediation, on the other hand, the process is a negotiation with the assistance of a neutral third party where mediators do not issue orders. Instead they help parties reach a share opinion and reach settlement. Conciliation is another dispute resolution process that involves building a positive relationship between the parties to the dispute. Conciliation tries to individualize the optimal solution and direct parties towards a satisfactory common agreement. As per the Merriam Legal Dictionary, conciliation is "the settlement of a dispute by mutual and friendly agreement with a view to avoid litigation". Although this sounds strikingly similar to mediation, the conciliator plays a relatively direct role in the actual resolution of a dispute and even advises the parties on certain solutions by making proposals for settlement. The fourth mode of ADR, i.e negotiation, is a process where parties (or their attorneys) can try to work out a solution that they are both satisfied with, often giving offers and counter-offers without legal counsel.

The present paper focuses on the first and internationally the largest mode of dispute resolution, that is, Arbitration. However, prior to looking at how arbitration functions in the country, it would be useful to understand the process of arbitration.



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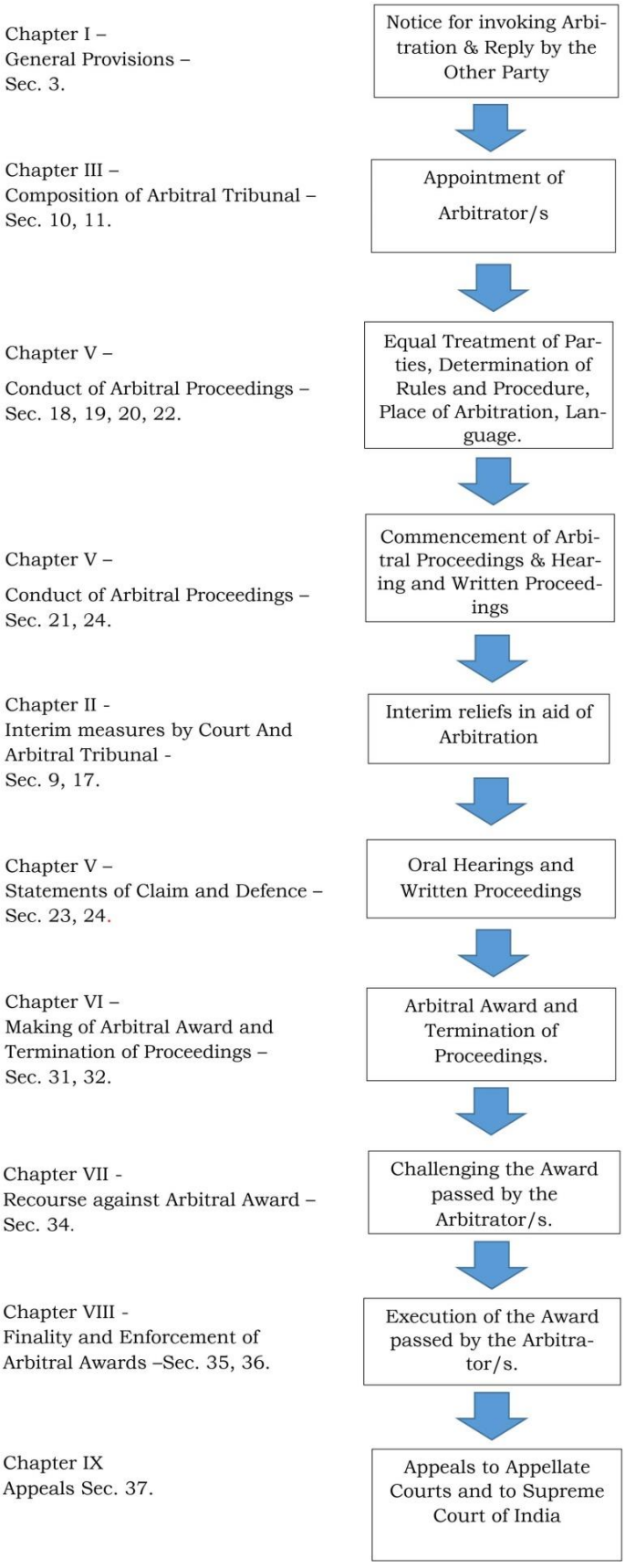
Process of Arbitration

Arbitration works as under: while entering into a contract, parties agree that in case of a conflict the matter would be sought to be resolved by an arbitrator. Often the name of the potential arbitrator, agreed upon by both the parties, is mentioned in the contract itself. In case a dispute arises, the first step is issuing of an arbitration notice by either of the parties. This is followed by response by the other party and subsequently appointment of an arbitrator, decision on rules and procedures, place of arbitration and language. Once the arbitration proceedings commence, there are formal hearings and written proceedings. The arbitrator, if the matter so requires, issues interim reliefs followed by a final award which is binding on both parties. The tricky part arises if either of the parties, unhappy with the award, challenges it before the court. This can be before the appellate court or the Supreme Court depending upon the matter.

[3] http://www.cfo-india.in/article/2015/10/07/case-arbitration

Stages of Arbitration Proceedings

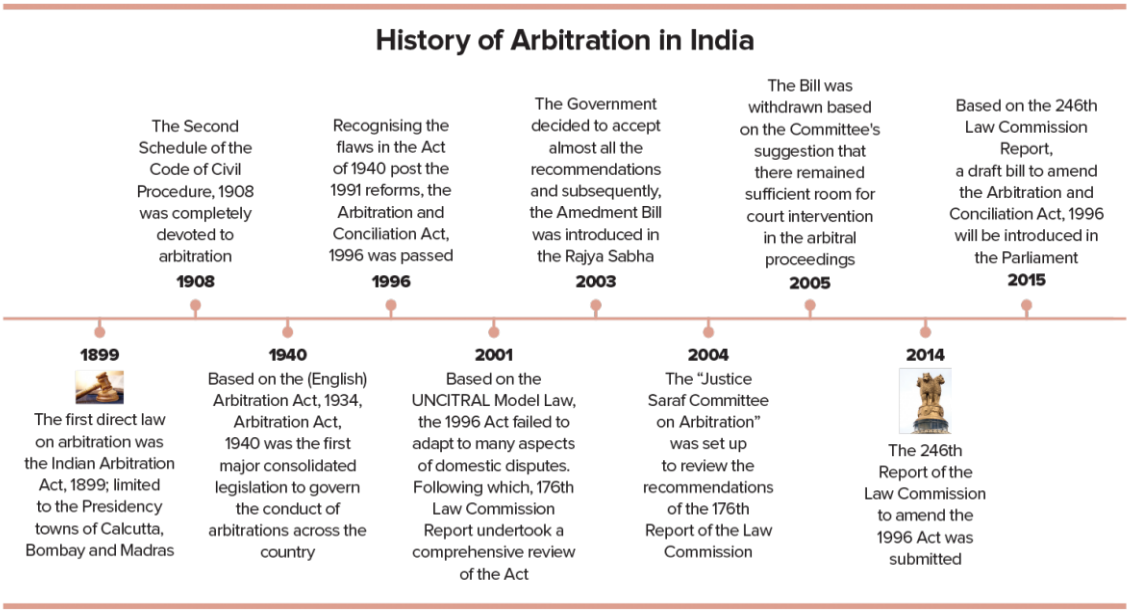
Arbitration and Arbitration Agreement (Sec 2 (a), & Sec 7)



Tracing the History of Arbitration in India

India has had a long tradition of arbitration. The settlement of differences by tribunals chosen by the parties themselves was well known in ancient India. There were in fact, different grades of arbitrators with provisions for appeals in certain cases from the award of a lower grade of arbitrators to arbitrators of the higher grade.

Ancient texts of Yajnavalka and Narada refer to three types of popular courts (Puga, Sreni, Kula). Besides at the village level, Panchayats have also been a prevalent form of alternate dispute resolution.



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In the British era, the Bengal Regulation of 1772, 1780, 1781 and the Cornwallis Regulation of 1787 recognised and encouraged arbitration. Thereafter, the Bengal Regulation of 1793, the Madras Regulation of 1816 and the Bombay Regulation of 1827 provided for arbitration. It was finally in 1859 that the Civil Code of the courts was codified with provisions for arbitration. This was followed by Codes for Civil Procedure of 1877 and 1882. However, there was no notable change in law relating to arbitration in these amendments. Next came the Indian Arbitration Act of 1899. This did not apply to disputes which were subject matters of suits. It dealt with arbitration by agreement without the intervention of the court and that too only in Presidency towns. Further, it did not permit arbitration in disputes which were being adjudicated through a suit. The Civil Procedure Code was later amended in 1908 removed the limit of arbitration to only Presidency Towns. In the mid-1920s, the Civil Justice Committee, appointed to report on the machinery of 'civil justice in the country', also made suggestions for modification of arbitration laws. However, owning to anticipation of taking cues from the British Arbitration Laws which was expected, it was finally in 1938 that the Government of India

[4] http://www.cfo-india.in/article/2015/10/07/case-arbitration

appointed an officer to revise the Arbitration Law. As a result the first Arbitration Act of the country was enacted in 1940.

The 1940 Act however, did not deal with enforcement of foreign awards. In fact a separate law, Foreign Awards (Recognition and Enforcement) Act, 1961 applied to the enforcement of awards under the Geneva Convention, 1927 and New York Conventions to which India was a signatory. Over time, the working of this Act was found to be unsatisfactory due to too much court intervention. In 1977, the functioning of the 1940 Act was questioned and examined by the Law Commission of India on grounds of delay and hardship caused due to clogs that affect smooth arbitral proceedings. The Commission recommended amendment of certain provisions of the Act rather than reworking the entire framework. Consequently, the Arbitration and Conciliation Act, 1996, based on the 1985 United Nations International Commission on International Trade Law (UNICTRAL) model law and rules, was enacted.

However, the working of the 1996 Act also led to various practical problems. Various Committee reports like the 176th report of the Law Commission (2001), Justice B.P. Saraf Committee (2004), the report of the Departmental Related Standing Committee On Personnel, Public Grievances, Law And Justice (2005) and the 246th report of the Law Commission (2014) highlighted these challenges. Ultimately, in December last year, the Arbitration and Conciliation (Amendment) Act, 2015 brought in crucial changes to the 1996 statute to overcome the shortcomings.

Key Highlights of Arbitration and Conciliation (Amendment) Act 2015

The Arbitration and Conciliation (Amendment) Act 2015 brought about certain noteworthy modifications which would be critical in supporting international arbitration in the country. One of these is the provision permitting arbitral institutions to create their own rules consistent with the Act to ensure that arbitrations are swift and effective. Coupled with this is the express inclusion of "communication through electronic means" for formulating the arbitration agreement[5] and a model fee schedule to curb exorbitant fee of tribunals and arbitrators (however for international commercial arbitration and institutional arbitration, the fee limit is not applicable)[6]. One of the most widely debated amendments is the fixing of a one year time limit for resolving arbitral matters[7]. This timeline may be extended by a period of six months with the consent of the parties. Interestingly, timely disposal within six months is incentivised by increasing the fee of the arbitral tribunal and delay is penalised by up to 5% per month for each month of delay. The amendment also provides for 'fast track proceedings' under which parties can consent for resolving the dispute within six months with only written pleadings and without any oral hearing or technical formalities[8]. Further, an arbitrator has to be appointed within six months and a challenge to an award has to be iwithin one year. The costs for the proceedings are to be

[5] Section 7(4)(b) ibid
[6] See Fourth Schedule ibid
[7] See section 29A ibid
[8] See section 29B ibid

determined on the basis of the parties conduct and other facets[9]. This would play an important role in dis-incentivising dilatory tactics. The tribunal has been now empowered to impose a higher rate of post award interest and to hold day to day hearings as far as possible[10]. The arbitrator can confer high costs in case a party seeks unreasonable adjournments. With respect to the involvement of courts, the amendment provides that an arbitration tribunal can be constituted within 90 days of interim protection of the court and has limited the powers of the court once the tribunal has been constituted[11]. Even the tribunal has been given powers similar to those of the court in granting interim protection[12]. So far as regulating the arbitrator is concerned, the amendments has built inclusions to ensure that the arbitrator has sufficient time for arbitrations that they take up[13]. Another significant amendment is inclusion of neutrality in promoting proceedings. This has been done through prescribing International Bar Association guidelines (Under fifth and seventh schedule) on conflict of interest as a schedule to the Act. Under this employees of a party to the case cannot be appointed as an arbitrator.

Making India the Global Arbitration Hub

With growing international commercial trade and agreements, international arbitration is growing manifold. One key reason for this is that parties from different jurisdictions and countries are reluctant to subject themselves to jurisdiction of other countries. To develop India as a global hub for international arbitration it is important that we open ourselves to the outside world and incorporate best practices for creating word class Institutional and legal procedure. Recently, NITI Aayog, along with other supporting institutions, organised a three day Global Conference on "National Initiative towards Strengthening Arbitration and Enforcement in India". The following section on ways to making Indian the Global Arbitration hub draws largely upon the takeaways from this conference.

In the backdrop of evolution of arbitration along with the present legislative and institutional framework in the country, there are three fronts on which intervention is needed: *first*, streamlining the governance framework for arbitration. Under governance, restructuring would be needed on legislative, executive and judicial fronts. Once the governance related aspects are resolved, the next step would be to create a suitable positive infrastructure to promote arbitration. This would include both physical infrastructure as well as human capital. Having resolved the above, the last step would be promoting both domestic arbitration and making India as preferred international Arbitration venue. Within each of these, measures are needed on several individual fronts. These are discussed in the following sections.

I. RESTRUCTURIING ARBITRAL INSTITUTIONS:

[9] See section 31A ibid
[10] See section 24(1) ibid
[11] See section 9(3) ibid
[12] See section 17 ibid
[13] See Section 12(1)(b), Fourth Schedule and Sixth Schedule ibid

The restructuring of arbitral institutions can be broken down into several steps. Though these are listed step wise, the intent is not to say that one has to precede two.

Step I: Institutional Setup

Setting up of arbitration institutions with international standard with hearing centres on widened jurisdiction of India is one of the foremost challenges. The decision to be made is whether arbitration across the nation has to be governed through a single centre or should there be multiple centres across cities. For instance, China has 230 arbitral institutions while other countries such as Singapore have only one institution. In case having centres across the country are preferred, then choice of cities and the criteria for their selection becomes critical. During the course of above discussed conference, the unanimous suggestion was India needs to have one central arbitral institution with regional offices in key commercial cities such as Mumbai, Delhi, Bangalore, Hyderabad etc.

Further another aspect which needs deliberation is whether the centres should be government funded or be private. The Singapore International Arbitration Centre (SIAC) was set up as a not for profit non-governmental organisation in 1991. Though it was funded by the Singapore government at its inception, SIAC is now entirely financially self-sufficient. The Hong Kong International Arbitration Centre (HKIAC), on the other hand was established in 1985 by a group of leading businesspeople and professionals with funding support from the Hong Kong Government. It now operates as a company limited by guarantee and a non-profit organisation. International Chamber of Commerce (ICC) based in Paris was founded in 1919 and is operating as a non-profit Chamber and the London Court of International Arbitration (LCIA) was set up in 1883. Like all other institutes it is also a private, not-for-profit company not linked to, or associated with, the government of any jurisdiction. In India a number of arbitral institutions are operation. Foremost amongst there is the International Centre for Alternative Dispute Resolution (ICADR) which was founded as a society in 1995. It is an autonomous organization working under the aegis of the Ministry of Law & Justice, Govt. of India. ICADR has its head office in Delhi and two regional offices in Hyderabad and Bangalore. In Southern India, the Nani Palkhiwala Arbitration Centre in Chennai is a private institution incorporated as a Company. Another institution is the Indian Council for Arbitration (ICA) which was set up in 1965 at the national level under the initiatives of the Govt. of India and apex business organizations like FICCI. Recently, the Government of Maharashtra and the domestic and international business and legal communities have set up a non profit centre called the Mumbai Centre for International Arbitration (MCIA). International Institutions, SIAC, LCIA, ICC and KLRCA also have set ups in India. SIAC has a liaison office in Mumbai and ICC in Delhi. LCIA did start a facility in India but recently its closure was announced. There are other micro level institutions as well functioning to promote arbitration. However there is no single arbitral seat or institution in the country which is a centre with global repute.

Step II: Upgrading Institutional Infrastructure

Establishing a stable and vibrant eco-system for the arbitral institution is the next significant consideration. The institutions in themselves should be credible, independent, efficient and transparent which is a challenge in India looking at its diversity. Further, the leadership of the institution should be vibrant and should be supported by well-trained support staff for qualitative arbitration and library apart from physical and technological infrastructure. Effective use of Technology such as e-filing, creating database of cases, big data analytics, Online Dispute Resolution, video conferencing needs to be scaled up and be put to extensive use in the process of arbitration. One example being video conferencing as no adjournment would be required, cases can be registered on line, voluminous papers can be instantly transmitted, and testimony of experts can be recorded through video conferencing.

Having strong and credible arbitral institution is essential since institutes serve as centres of learning for establishing a culture think-tank for discussion. This would be useful for students, professionals and perhaps even for the judiciary to discuss and deliberate on the subject through seminars, journals and case-law. This in turn would help in developing journals on the subject, on creation of a bar, evolution of best practices and honing of rules on the subject –all of which would contribute to the 'soft law'.

Step II: Scaling Human Capital

Creation of physical infrastructure in itself would be insufficient without a pool of professional arbitrators who are able, conflict free and above all, non-partisan. The arbitrators should be competent, technically sound and specialized in their field. Therefore arbitrators who serve on a tribunal, in effect as a party's counsel should be avoided and their partial views should be ignored.

As on date, Indians fare extremely poorly in appointment as international arbitrators. As per LCIA data for 2015, out of 449 appointment of arbitrators last year, there were no Indians. Similarly, even though most Indian arbitrations are seated in Singapore, SIAC report for 2015 records that out of 126 arbitrator appointments, only 3% were Indians. This is a clear case in point showing that Indians are excluded from the system of international arbitration

In order to develop a pool of arbitrators focus on five aspects would be crucial: *one*, training of the arbitrators especially for the ones not having any judicial background so that the awards passed by them can withstand judicial scrutiny; *two*, developing a system of blacklisting of arbitrators who try to overstretch the process and delve upon those issues on which they do not have expertise, *three* setting up of dedicated arbitral bar, *four* setting up of designated and specialized Arbitral Tribunals in the same manner as commercial benches and courts, at High Courts and District level and *five* having designated institutions in place to appoint arbitrators as is done in Hong Kong and U.S.A. For instance, in California there is an arrangement where every Court has a panel of Arbitrators attached with it. India can follow the above model or alternatively judicial academies in India can maintain a panel of trained arbitrators that can work at grass root level with the Courts.

Experts of appropriate fields may be made Member of the Arbitral Tribunal besides the Judicial Member. In the context of Singapore the competitive environment that has made the arbitral institution perform even better. There are mostly young lawyers and case managers from different countries who are part of SIAC exposing them to cross cultural inputs and experiences and it is they who are the front line soldiers.

Step III: Institutionalising Arbitration

Presently in the Indian context, arbitrations are not conducted in a structured matter. The Law Commission of India has in its 246th Report has noted that *ad hoc* arbitrations usually devolve into the format of a court hearing with the result that adjournments are granted regularly and lawyers too prefer to appear in court rather than completing the arbitration proceeding. What is therefore recommends is that India needs to promote institutional arbitration where a specialized institution with a permanent character aids and administers the arbitral process. Such institutions may also provide qualified arbitrators empaneled with the institution, lay down the fee payable and the mode of submission of documents. This would entail a perception of autonomy (i.e. freedom from government control) with the end users with sources of income to sustain their autonomy. In all the set ups it is not that the arbitral institution is totally immune from government control and there are government institutions and Boards to be dealt with. However, the institution should enjoy some immunities and privileges. The operational funding is to be provided by an agency at the outset and thereafter, the institution should operate so as to self-generate the development funding.

Another crucial aspect on institutionalizing arbitration is whether one institution or more than one institutions are to be established and with what objective i.e. undertaking domestic arbitration or international arbitration. Looking at the size of the country that is India domestic arbitration in itself would be huge. Apart from this, international arbitration that is going outside India should also be brought to be held in India. For instance, in Hong Kong the arbitral mechanism is installed by the business houses whereas in Singapore it is a government initiative and in Malaysia it is an international body.

Step IV: Setting up a Dedicated Bar

Institutionalising arbitration would also have to be supported by a dedicated bar comprising of professionals competent to conduct arbitration in accordance with the rules of the institutions and provide competent, viable services. Rules of the dedicated arbitration bar would help it adhere to timelines and not mirror court proceedings. The body of qualified arbitrators would also help strengthen the arbitral institutions and help institutionalise arbitration. One example of such a bar is the International Bar Association Arbitration Committee (the IBA Committee) which focuses on laws, practice and procedures relating to arbitration of transnational disputes. In the Indian context, the recently enacted Insolvency and Bankruptcy Code, 2016 also provides for "Insolvency Professionals" and "Insolvency Professional Agencies" who are enrolled with the Board. Taking cur from the IBA Committee and the 'insolvency professional' what is perhaps a must for strengthening arbitration in India is promoting a similar cadre of 'arbitrators'.

This would help in not only having specialised professionals but would also ensure that arbitration does not take a back seat as compared to litigation in court.

Step V: Awareness Generation

Strengthening of arbitration in the country would have to be coupled with promoting arbitration as a mode for dispute resolution. This would include preventing tendency of private players to rush to the courts without resorting to the relevant provisions of arbitration in the contract whereby the commencement/continuation of the work was stalled. This can be done through creating awareness as to better understanding of commercial matters and an eco-system wherein the awards were passed by neutral umpires to ensure that it is a win-win situation for all the stake holders leaving a limited scope of the award being challenged under Section 34 of the Arbitration Act, 1996.

II. ADDRESSING POLICY ISSUES

In addition to restructuring the arbitration setup as discussed above, there are a few issues that need to be addressed at the policy level.

Foremost amongst these is ensuring disposal of proceedings in time and ensuring that the project under dispute should not stall as a consequence of the difference. It has often been observed that work under contract gets stalled due to disputes particularly in government infrastructure projects. Two main reasons for this are lack of decision making strength with officials in resolving the arbitration proceedings and apprehension that they may be hauled up or may face the vigilance proceedings. In such cases not only the disputes needed to be nipped in bud considering the money value over time but also the proceedings should not be allowed to linger on any account. One suggested way of fast tracking of disputes in case of government contracts is having an independent settlement committee consisting of a retired High Court Judge, Secretary of the concerned Ministry and another member which could be approached by the stake holders at any stage of proceedings for resolution of disputes.

The *second* issue is converging between the legal regimes for international arbitration and domestic arbitration. The domestic regime for arbitration should follow the principles of the international regime and equal standards should be applied to both the regimes.

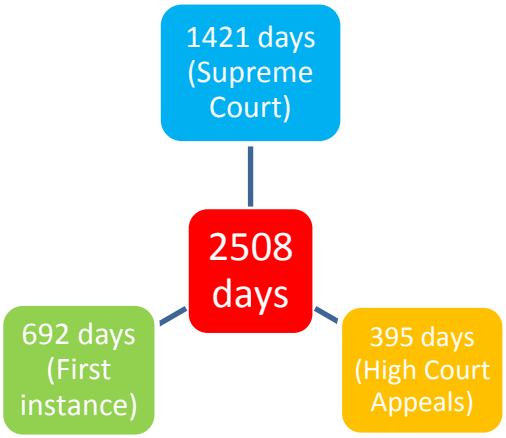
The *third* is the scope of challenging the arbitration award before courts. Under Section 34 of the Indian Arbitration and Conciliation Act, 1996 (the Act) an award would be considered to be in conflict with the public policy in India only of "(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81 or (ii) it is in contravention with the fundamental policy of Indian law or (iii) it is in conflict with the most basic notions of morality or justice, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute. Challenging arbitral awards on grounds of 'public policy' has

become an Achilles heel for arbitration in India: a means by which losing parties can attack arbitral awards, on much broader grounds than are permitted in other countries.

This has been a source of conflicting opinion between the Law Commission and interpretation by the Supreme Court on what constitutes public policy. When considering the enforcement of foreign awards, the courts have adopted a narrower approach[14] and as far as domestic awards are concerned, the courts have upheld a broad view of public policy. In 2003, the Supreme Court in *ONGC v Saw Pipes*[15] upheld reviewing the merits of an arbitral awards on grounds that a tribunal had made an error in applying Indian law. In 2014, this was confirmed two other Supreme Court decisions. In *ONGC –v- Western Geco*[16], the Supreme Court upheld the above approach and directed that a court could assess whether a tribunal: (i) has applied a "judicial approach" i.e. has not acted in an arbitrary manner; (ii) has acted in accordance with the principles of natural justice, including applying its mind to the relevant facts; and (iii) has avoided reaching a decision which is so perverse or irrational that no reasonable person would have arrived at it. Subsequently, in Associate Builders -v- DDA[17], the Supreme Court stated that section 34 does not normally permit the courts to review findings of fact made by arbitrators. It therefore restored the arbitral award. However, the Supreme Court only clarified, and did not restrict, the law concerning public policy. In particular, the Supreme Court said an award can be set aside if it is contrary to the fundamental policy of Indian law, contrary to the interest of India, contrary to justice and/or morality or patently illegal. The decisions of the Supreme Court were reconsidered by the Law Commission in its 246th Report and it recommended restricting of the definition of public policy by Courts. It held that an award can be set aside on public policy grounds only if it is opposed to the "fundamental policy of Indian law" or it is in conflict with "most basic notions of morality or justice". Accordingly, amendments made in 2015 to Section 34 have added explanations as to what would be public policy. In the present context, the interpretation of the recent amendments by Court is critical for ensuring that challenges to arbitral awards are not admitted by Court on grounds of being against public policy. Until and unless there is a prima facie case justifying the need for an elaborate argument on the objection petition, there should be a provision of their dismissal at the inception stage. A circular has been issued by the Government of India whereby 75% of the amount was required to be deposited as a guarantee for the purpose of enforcement of award while the same was under challenge before the courts of law under Section 34 of the Arbitration Act. Further, as a matter of policy, Government of India is not challenging arbitral awards, passed on sound grounds unless a legal advice to the contrary is given. It is claimed that objections are being filed only in around 20% of the arbitral awards while rest 80% are finally disposed at the arbitration stage alone.

[14] Shri Lal Mahal Ltd -v- Progeto Grano Spa (Civil Appeal No. 5085 of 2013)
[15] ONGC Ltd. –v- Saw Pipes Ltd. 2003 (5) SCC 705
[1616] ONGC Ltd. –v- Western Geco International Ltd. 2014 (9) SCC 263
[17] Associate Builders –v- Delhi Development Authority 2014 (4) ARBLR 307

However, what remains a cause of concern is the time taken to resolve challenges filed under section 34 of the 1996 Act. A study has estimated that it takes 24 months to resolve challenges under section 34 at the in lower courts, 12 months in High Courts and 48 months in Supreme Court. In all it takes around 2508 days on an average to decide applications filed under Section 34.



III. LEGISLATIVE CONCERNS

Updated arbitral legislation with certainty and flexibility are key aspects that help parties in deciding upon the seat in an international arbitration. While the recent 2015 amendments have made the requisite, on the legislative front, Indian is in a position to be a preferred seat for international arbitration. However, there is one key aspect of settling arbitration proceedings within twelve months under Section 29-A of the Arbitration Act which has been subject to debate and varying viewpoints particularly in complex international cases where the arbitral proceedings become lengthy. It has been argued that though routine matters can be completed within the prescribed time frame, the question of extension may be considered in cases of international arbitration. On the other hand it has also been argued that the introduction of this provision has brought in accountability in arbitrators which in turn brings discipline and accountability in lawyers as well as litigants.

Though both arguments for and against making delivery of arbitral awards time bound are valid, it is important that that efforts to abide by this amendment are undertaken and only after passage of a reasonable period of time if it is felt that 12 months is too short a period that legislative changes to this may be sought. In the meanwhile institutions should take over the management of time limit and the case management of the arbitration proceedings and should evolve techniques to control the arbitration proceedings which would make the entire system more transparent. While deciding the time limit, due regard should be given to the number of witnesses, number and complexity of issues involved, volume of record, the stakes involved and the number of arbitrators. Further, guidelines can be framed for providing time slabs for deciding the matters, keeping in view the considerations given above. Perhaps, the consent for extension of time by further six months as provided in Section 29 B should also be taken from the parties at the start of the arbitration proceedings.

V. NEED FOR JUDICIAL SUPPORT

In addition to the local legislation of a country which guides the arbitration process therein, the courts of that jurisdiction play a pivotal role in exercising supervisory jurisdiction over arbitration and in marking an arbitral institution into a "good seat". Though Arbitration involves parties' autonomy, but judicial co-operation is vital to give effect to the law of arbitration. Therefore, an effort is to be made to identify those steps which would make good balance between judiciary and arbitration, at pre, during and post arbitral proceedings. This would entail court intervention in upholding/restraining arbitral awards, providing timely court assistance when needed, recognising party autonomy in the arbitral process.

In the Indian context, interference by courts was identified as one of the major reasons for delay in arbitrations. An award in *White Industries Vs. Republic of India* in 2011, is a case in point. In this matter, an Australian company successfully claimed compensation, equivalent to the amount of award, from the Indian government on account of judicial delay. There are two issues that emerge from the above award: one is interference by courts and two delay in arbitration. With respect to interference by courts, it is well debated and agreed that judiciary should minimize its intervention into the arbitration, as is being done in various other jurisdictions. In China for instance, the Supreme Court alone can interfere in arbitration matters. This helps in lowering and limiting the impediments in arbitral awards.

Another issue that has been recognised as a cause of concern is lack of consistency in decisions by Indian judiciary on arbitration and decisions taken by arbitral authorities. Judicial supervision lacks uniformity in so far as owing to the federal structure of States and Central relations in India and each State having its own Judiciary, the perspective of individual Courts to the objections filed under Section 34 of Arbitration and Conciliation Act vary as per local conditions. This calls for action on the part of judicial academies which should be asked to impart training to judges on how to deal with cases challenging and seeking setting aside of arbitral award and other related issues, besides ensuring that frequent transfer of judges holding such courts should be avoided.

Heavy reliance on retired judges as arbitrators has also been identified as being problematic. This affects the proceedings in two ways. One, it is believed that with retired judicial members as arbitrators, the case acquires a rather languid pace, with traditional hierarchy taking precedence in the matter. Coupled with this is the exorbitant fee charge for arbitration by retired judges which is seen to have a discouraging impact on the parties. It has been suggested that of fixing a lump sum fees for the Arbitrators instead of provision of per hearing remuneration would perhaps be a solution to this issue. Presently, the law is silent on this issue as to who can be appointed arbitrator, generally arbitrators are being appointed from judicial background. There is a need to expand the base of arbitration not only from judiciary but members of Bar should also be got involved in this field.

Another aspect of concern is the low support of civil courts in referring matters for arbitration. Section 89 of the Civil Procedure Code (CPC) provides: "Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for – arbitration, conciliation, judicial settlement including settlement through Lok Adalat; or mediation". There is a need to sensitise judges to refer civil disputes for arbitration on one hand and upholding the arbitral awards/their implementation

Assistance of Court is needed during arbitration proceedings particularly for enforcement of awards within a time frame and for initiation of contempt proceedings in case of non-compliance of interim arbitration orders. This would include that arbitral orders under section 17(2) may be treated as court orders and recourse may be taken to the provisions Section 25 (5) of the Act along with Order 39 Rule 2-A of CPC.

Clearly, there is a need to sensitize the judges and the consumers of justice that the parties should be bound by arbitration and there is need to enforce trust in arbitrators. The fact that the petition is termed as a "suit" in various states in the country, necessarily implies that the proceedings are continued as a suit thus resulting in delay. The court should interfere only in rare cases and the concept of public policy under section 34 of the Act should not be interpreted too broadly. When it comes to enforcing an arbitration agreement, courts must hold parties to their agreement to resolve issues through the agreed mode of dispute resolution –arbitration. For instance, in U.K., there are only two narrow grounds for challenging the arbitration award: (a) whether arbitration tribunal lacked jurisdiction and the very constitution of arbitration tribunal was not valid and (b) injustice caused by serious irregularity or a situation where arbitrator has gone so wrong. Clearly, though the ground of 'public policy' is also recognized in UK, but courts there have been given very restricted interpretation to it.

The judiciary and the arbitration proceedings should be supportive roles to each other- when the arbitrator decides the merits of a case, the court should support the decision and its implementation. Broadly, the courts should support arbitration in the following ways: Where it is mandatory to refer the matter to the arbitration; in case of interim measures, which assume importance in absence of any provision for appointment of emergency arbitrators and the role of the court becomes all the more important; in case of application under Section 11 reference may be made to designated institutions rather than individual arbitrators; court may ensure effective arbitration by constituting special/designated benches.

VI. MAKING INDIA THE PREFERRED INTERNATIONAL ARBITRATION SEAT

India has diverse and useful human resources in law as well as other disciplines which can help support and sustain the domestic arbitration ecosystem in India. Legal

reforms are certainly a step in the right direction to strengthen the arbitration. However it also needs further support on few other fronts. First amongst these is the need to decentralise dispute resolution mechanism as a private market based solution. Parties can resolve privately through constituted tribunals without reaching out to courts. This would need a vibrant arbitration bar as well respected pool of the seasoned arbitrators who build enough confidence amongst the 'potentially litigant' community that they seek resolution through arbitration rather than judiciary. It would also need an administrative mechanism to ensure that arbitration matters would have to handle separately and efficiently. For this, the government would need to create an enabling framework for institutional arbitration including arbitration events, training and conferences. In addition there is a call for demonstrating to the world that Indian arbitral institutions are homogenised with the world and can deliver an effective arbitration work at lower cost. Major Indian cities have the necessary Infrastructures like communication with other facilities to help international arbitrators. Taking a cue from the exponential growth of SIAC, what is needed to make India the global hub of international arbitration is ensuring that arbitration in India be less time consuming and more cost effective as compared to arbitration elsewhere across the globe. It also needs a commitment by institutions to accord primacy to the agreement to arbitrate. This includes primacy not only to conduct arbitration but also to implement the arbitral award without interference, except on public interest considerations.

India is on the track of establishing confidence in its legal system which is the fundamental condition for any country to become an international arbitration venue. Needless to say that regular amendment in the Arbitration laws to keep abreast with economic changes would be needed. However, given that India has already done the needful in this regard recently, the present need is reforms in the implementation of the legislative changes by the judiciary along with building of institutional capacity in the country. Only then would we be able to "resolve in India".