DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENT FOR THE DEGREE OF LLM (BUSINESS LAW)

COMMERCIAL DISPUTES AND ARBITRATION AS A METHOD OF DISPUTE RESOLUTION

UNDER THE GUIDANCE OF:	SUBMITTED BY:
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DECLARATION

I, Aashna Gupta, do hereby declare that this dissertation "Alternate Dispute Resolution: effectiveness of arbitration in commercial disputes" is the outcome of the research conducted by me under the guidance of Prof. V. Nagaraj at the National Law School of India University. It is submitted in partial fulfilment of the Degree of Master of Laws.

I also declare that this work is original except such help from such authorities as have referred to at appropriate places for which necessary acknowledgments have been made. I further declare that this work has not been submitted either in parts or whole for any degree or diploma at any other University or Institution.

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CERTIFICATE

This is to certify that this dissertation "Alternate Dispute Resolution: effectiveness of arbitration in commercial disputes" submitted by Aashna Gupta (LL.M- Business Law) for the Degree of Master of Laws of the National Law School of India University is the product of bona fide research carried out under my guidance and supervision. This dissertation or any part thereof has not been submitted elsewhere for any other degree.

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TABLE OF CONTENTS

Chapter	Chapter Name	Page No.
1	Introduction	6
1.1	Growth of Arbitration in India	7
1.2	Objective of 1996 Act and the Amendments thereafter	7
1.3	Chapterisation	9
2	Research Design	10
2.1	Aims and Objectives	10
2.2	Hypothesis	10
2.3	Research Questions	11
2.4	Research Methodology	11
2.5	Sources of Data	12
2.6	Scope and Limitation	12
3	Provisions Reflecting Judicial Intervention	15
3.1	Section 5: Extent of Judicial Intervention	15
3.2	Section 8: Referral by a Party	15
3.3	Section 11: Appointment of Arbitrator	16
3.4	Section 14 & 15: Termination of Mandate	18
3.5	Section 34: Setting Aside Arbitral Award	19
3.6	Section 29A: Time Period	22
3.7	Section 36: Enforcement	24
3.8	Appeal : Section 37 & Article 136	25
4	Singapore Arbitration Act	27
4.1	Comparison between Singapore and India	30
5	Commercial Courts	31
5.1	Singapore International Commercial Court	32
6	Discussion	33
7	Conclusions	37
8	Suggestion	38
	Bibliography	40
	Appendix	44

CHAPTER 1: INTRODUCTION

Alternate dispute resolution ("ADR"), as the name suggests, is an alternate way of settlement of dispute arising between the parties. It is a simple, flexible and voluntary process whereby parties submit themselves to a third neutral person(s) to resolve their disputes. There are three main categories of ADR recognised across the globe i.e. Mediation, Conciliation and Arbitration. While generally mediation and conciliation are informal processes and non-binding in nature; arbitration is considered as a formal process subjects parties into a binding agreement. The finality of award passed in the arbitral process makes it a preferred choice for many. Arbitration is a quasi-judicial process having its features similar to litigation. However it comes under the category of alternate since it is not per se a court administered litigation. The issue of judicial intervention in arbitral process is long debated. On the one hand parties enter into arbitral agreements to get their disputes resolved in a speedy and inexpensive manner while on the other hand states want the arbitral process to be fair and impartial[1]. While interest of parties is served with minimal judicial interference, support of national courts is necessary for an effective and efficient ADR mechanism. Therefore a balance needs to be struck between the party autonomy and the protectionist approach of courts. The purpose of statutory regulations related to ADR was due to over pendency in courts. In the period of six months from January 2020 to September 2020 only, there was a rise of 12.4% and 6.6% in pending cases in High Courts and District and Subordinate courts respectively[2]. Even in Code of Civil Procedure, 1908 ("CPC"), Section 89[3] was instituted in the year 1999 which provides for reference of cases to mechanisms other than court for their resolution such as arbitration, mediation, conciliation, judicial settlement and Lok Adalat. Where on one hand legislature is trying to reduce judicial dependency, whether this effort has been achieved successfully in arbitration cases has to be seen. Thus in this article the

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[1] Okezie Chukwumerije, *Judicial Supervision of Commercial Arbitration: The English Arbitration Act of 1996,* 15(2)Arbitration International (171-191), at p. 171

[2] BQ Desk, *India's Pending Court Cases on the Rise: In Charts*, Bloombergquint (August 01, 2021, 3:00PM), https://www.bloombergquint.com/law-and-policy/indias-pending-court-cases-on-the-rise-in-charts.

[3] Code of Civil Procedure, 1908, S. 89, No. 5, Acts of Parliament, 1908 (India).

efficiency of arbitration will be analysed in terms of independence of the tribunal and the interference of the courts.

1.1 GROWTH OF ARBITRATION IN INDIA

Emergence of arbitration in India can be traced back to the end of nineteenth century. In the year 1859, arbitration regulations were introduced in a codified form as a part of Code of Procedure of Civil Courts. By the introduction of Arbitration Act, 1899 in the presidency towns of Madras, Bombay and Calcutta, statutory recognition was given to arbitration as a dispute resolution. The provision was extended to further regions by its codification in Section 89 and Schedule II of CPC. The unsuitability and technicality involved led to the repealing of the Act of 1899 and the relevant provisions of CPC. Arbitration Act, 1940 emerged as a fresh statutory legislation to govern the conduct of arbitrators across the country.[4] Thus the arbitration law was mainly covered in three enactments, the Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961. The Arbitration Act, 1940 failed to keep pace with the growing economic needs of the country and were subject to numerous shortcomings and mistrust of arbitral process. An amendment to the Act was proposed by different stakeholders to make the Act in consonance with the economic reforms brought in force after economic liberalisation in 1991. In order to address these fallacies, Arbitration and Conciliation Act, 1996 ("1996 Act") was introduced.

1.2 OBJECTIVE OF 1996 Act and the AMENDMENTS THEREAFTER

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[4] M. Rishi Kumar Dugar, *The Failure of Arbitration in India: Derailment in Fast Track Dispute Resolution, 2010* Lawasia J. 129 (2010) at p. 129. Also see: Law Commission of India, Report No. 246, Amendments to the Arbitration and Conciliation Act, 1996 (2014), GOI. The report before stating the need for amendment to 1996 Act provides a brief account of legislative history regarding flourishing of arbitration in India; Tariq Khan & Muneeb Rashid Malik, *History and development of Arbitration Law in India*, Bar and Bench (August 30, 2021, 14:30PM), https://www.barandbench.com/columns/history-and-development-of-arbitration-law-in-india.

This 1996 Act which covers both domestic and international arbitration was based on the model law adopted by United Nations Commission on International Trade Law ("UNCITRAL"). The preliminary objective of the 1996 Act was to make the arbitral procedure fair, efficient and binding as a decree of the court and to expedite the arbitral process by minimizing the supervisory role of the courts. The purpose was to reduce the burden on courts and ensure speedy and efficient delivery of judgments[5]. To address the shortcomings, a commission was formed which gave its 176th law report. Thereafter in the year 2004, another committee under the chairmanship of Dr, Justice B.P. Saraf was formed to analyse the recommendations made by 176th commission report. The reports highlighted the growing commercial contract in India whether between private individuals or with the state. Injustice is caused to litigation cases which end up in courts due to delayed and expensive procedure. Therefore arbitration is being recognized as a significant method but needs to address the issue of high cost and delays to emerge as an alternate hub for settlement of disputes[6].

In line with achieving the objective of fairness, speed and economy in dispute resolution, Arbitration and Conciliation (Amendment) Act, 2015 was passed[7] ("2015 Act"). The 246th Report also highlighted the need to develop institutional arbitration, establishment of independent body called Arbitration Council of India and the introduction of clause wherein High Courts or Supreme Court as the case may be refers the appointment to such institutions[8]. These proposals though did not find place in the Amendment Act of 2015, were introduced in the Arbitration and Conciliation (Amendment) Act, 2019 ("2019 Act"). Other major amendments made in the 2019 Act include change in time limit for rendering arbitral awards and institution of arbitral institution[9].

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[5] The Arbitration and Conciliation Act, 1996, Statement of Objects and Reasons, No. 26, Acts of Parliament, 1996 (India).

[6] Law Commission of India, Report No. 246, Amendments to the Arbitration and Conciliation Act, 1996 (2014), GOI at 4-8.

[7] *Id.* at p. 37

[8] *Id*. at p. 9-10

[9] The Arbitration and Conciliation (Amendment) Act, 2019, S. 11 and 29A, No. 33, Acts of Parliament, 2019 (India).

The Eighth Schedule prescribing qualification of the arbitrators was omitted in the Arbitration and Conciliation (Amendment) Act, 2021 ("2021 Act") and is substituted by Section 43J according to which the qualifications, experience and norms of arbitrators will be as specified by the regulations. Major change brought forth through 2021 Act is the amendment of Section 36 of the Act of 1996 and insertion of proviso which provides for unconditional stay of arbitral awards pending their disposal under Section 34 of the 1996 Act in case the court is prima facie satisfied that the arbitration agreement or the award was induced by fraud or corruption[10].

1.3 CHAPTERISATION

This paper includes following chapters:

CHAPTER 2: Research Design
CHAPTER 3: Provisions Reflecting Judicial Intervention
CHAPTER 4: Singapore Arbitration Act
CHAPTER 5: Commercial Courts
CHAPTER 6: Discussion
CHAPTER 7: Conclusions
CHAPTER 8: Suggestion

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[10] The Arbitration and Conciliation (Amendment) Act, 2021, S. 36 and 43J, No. 3, Act of Parliament, 2021 (India).

CHAPTER 2: RESEARCH DESIGN

2.1 AIMS AND OBJECTIVES

The aim and objective of this study is to analyse the effectiveness of arbitration as a method of alternate dispute resolution in commercial disputes. The study involves examination of judicial interference in the arbitration process and the impact of commercial courts act in India and Singapore as growing arbitration choice. This will help me in examining the progress o arbitration in India and suggest need for any changes, if any, required.

To this effect, I will analyse the relevant provisions under the Arbitration and Conciliation Act, 1996. This includes firstly Section 5 which brings the arbitration agreement into effect followed by section 8 that provides for the referral clause. Further I will examine Section 11 related to appointments of the arbitrator, the time taken in appointment and its contribution towards delay in initiation of proceedings. Moving further, I will also briefly discuss Section 14 and 15 providing for termination of mandate and its effect on the arbitration proceedings and its interplay with Section 8. Thereafter the concept of public policy under Section 34 will be analysed in detail through judicial decisions in order to determine the scope of judicial interference. Then the positive and negative impact of section 29A will be seen and its ultimate impact upon effectiveness of arbitration. Lastly provision of section 37 along with the effect of 2021 amendment in the section will be studied.

The paper also discusses the relevant provisions in Singapore Arbitration Act, the amount of judicial interference and its impact on the dispute settlement. Thereafter comparative analysis is made with the Indian Arbitration Act to determine whether any improvements or change is required to be made in line with Singapore Arbitration Act.

Finally in the end suggestions are made to improve the effectiveness of arbitration and reduce the dependency on courts.

2.2 HYPOTHESIS

The hypothesis of this study is that the Arbitration is not very efficient in resolving commercial disputes due to judicial intervention at various stages.

2.3 RESEARCH QUESTIONS

1) Does judicial intervention causes a negative impact on the effectiveness of disposal of disputes through arbitration?

1.1 What is the contribution of court in delay in reference of cases to arbitration under section 8?

1.2 Is there a relationship between section 11 related to appointment of arbitrators by court and the delay caused in the initiation of arbitration proceedings?

1.3 Does the termination of mandate under section 14 and 15 and subsequent appointment involves delay due to pendency in courts?

1.4 Do courts take liberal or protectionist view in the interpretation of public policy ground for setting aside the award? What is its consequent impact on commercial establishments?

1.5 Whether section 29A has any positive effects in settlement of dispute?

1.6 Does the provision of appeal leads to delay and defeat the purpose of justice?

2. What has been the effect of commercial courts Act on resolution of commercial disputes?

3. What is the principle followed by Singapore Arbitration tribunal and National courts for disposing off its cases?

2.4 RESEARCH METHODOLOGY

This research involves doctrinal study. A descriptive-analytical and quantitative research is done by the researcher. The research has been done by studying the legislative acts of India and Singapore, law commission reports and scholarly articles. Analysis of judgments passed by High Court and Supreme Court has been done.

a) The study has been made by examining relevant legislative acts of India and Singapore, law committee reports and case laws of High Court and Supreme Court of India, journals and scholarly articles.

b) Further analyses have been made in regard to time taken by court in appointment of arbitrator under section 11 from 42 cases (2018-March 2021) of Delhi High Court. The cases have been taken from SCC Online by searching 'appointment' and further refined search to 'section 11'. Due to non-availability of date of filing the application in many cases, date of notice for invocation of arbitration agreement has been taken as the starting date in such cases. From such date, calculation is made as to time taken in disposing of the application for appointment. Such disposal need not necessarily imply appointment but also includes cases wherein parties have been referred to arbitral institution or arbitrator of one party is approved and the two arbitrators have to appoint a neutral arbitrator.

c) Views of 13 professionals have been taken by circulating questionnaire amongst them. The persons include research associate, lawyers, arbitrator and legal consultant. The experience of professionals range from 3-25years.

2.5 SOURCES OF DATA

Both primary and secondary sources have been referred in the research for collection of information and data.

The primary sources referred to include legislative enactments in both India and Singapore, judgments delivered by the High Court and Supreme Court in India, Law Commission Report and the data collected through questionnaire circulated amongst thirteen professionals. Due to Covid-19 pandemic, sampling has been used wherein views of experts having practical experience ranging from three years to twenty five years has been taken.

Secondary sources referred to include journal articles, research article and online database.

2.6 SCOPE AND LIMITATION

a) In this paper only the disputes involving domestic arbitration are studied.

b) The paper involves an analysis of judicial intervention in domestic arbitration. Through this it is determined whether this is the causal factor affecting the effectiveness of arbitration thereby causing delay in settlement of commercial disputes and making India a less favorable place for investment.

c) The paper also examines whether commercial courts act is a good alternative to arbitration.

d) Further, the provisions of Singapore Arbitration Act are studied to see whether there is any difference in the legislative act or approach of courts in settlement of disputes effectively.

This will help in analyzing the reason for Singapore as a preferred destination.

e) The paper will also see if any other factor can also be considered as reason which impact effectiveness of arbitration.

The following are the limitations involved in writing the paper:

a) The paper does not cover cases involving international commercial arbitration or foreign awards in India as well as in Singapore.

b) Due to Covid-19 pandemic, an emergency situation had arisen and therefore a limited sample space is studied.

c) The paper does not cover other alternative methods which can be effective in settlement of commercial disputes such as mediation and conciliation.

d) The judgments analysed by the author under Section 11 are the ones which have been disposed off. It does not cover pending cases considering the lack of updated data on court website.

e) The paper does not involve quantitative analysis of any other sections. Main reliance has been placed upon secondary data.

f) The paper does not discuss the cost factor which also impacts efficiency and thereby decision to choose forum for settlement.

g) The paper omits the aspects of delay covered under section 34 other than ground of public policy.

h) The paper mainly covers judicial interference as a ground for non-effective arbitration and does not discuss in detail other factors such as party interference.

i) This paper being a descriptive-analytical study identifies and examines the issue of growth of commercial disputes and the effectiveness of arbitration as a means to settle such disputes. Meaning thereby, no further proposals or solutions are made in this paper. The solutions already proposed are analysed and extended.

CHAPTER 3: PROVISIONS REFLECTING JUDICIAL INTERVENTION

3.1 SECTION 5: EXTENT OF JUDICIAL INTERVENTION

Section 5 of the 1996 Act provides for the extent of judicial intervention. It states that

> "notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part[11]"

The legislative intent has been to restrict the judicial interference which can be inferred from the words "notwithstanding anything...". It implies that minimal interference from the judicial authority is expected which help in retaining party autonomy and ensure speedy and effective disposal of cases. The purpose is to reduce court intervention and increase the powers of the arbitral tribunal. The words used 'judicial authority' brings within its ambit broader framework by including not only courts but all other authorities that have been administered and defined as judicial authority by the government[12]. The intervention is to be made only in matters expressly provided in the 1996 Act or the amended Act. Whether this express provision has any substantial effect in reducing judicial intervention will be seen through the sections discussed below.

3.2 SECTION 8: REFERRAL BY A PARTY

Section8 of the 1996 Act gives the power to the court to refer the dispute for arbitration in case requested by one of the parties to the dispute. The bare language of the Act suggests that if the arbitration agreement exists, then court must refer the dispute to arbitration. However mere fact that the words arbitration agreement is written is not enough. Court further looks into whether the agreement is valid or not and also whether it is filed within the limitation period or not. Thus in cases where court prima facie finds the existence of agreement, the matter must be sent to tribunal. Only while not being satisfied of the existence of agreement or finding the agreement

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[11] Supra Note 5, S. 5.

[12] Sankalp Jain, *Judicial Intervention In Arbitration*, SSRN, at p. 2

to be null and void, the court should reject such reference[13]. Practically the procedure followed by court is taking the pleadings from both the parties and sometimes also giving them opportunity to oral hearing. After the opposite party discharges its onus of proving how the dispute will not be arbitrable, court accordingly decides the application. Here even though court tries to confine itself to the existence of agreement, but some delay is caused in determining the existence of arbitration agreement. According to a professional[14] contacted, it also depends upon the facts of the case and the clarity in the agreement at the time it was drafted. Another professional also stated that in cases where objection is raised after filing of written statement, the court must also see the conduct of the petitioner as to whether he is trying to delay the normal court proceedings by filing application under this section or whether the petitioner had knowledge but still avoided filing the application without any reasonable cause. Such arbitrary applications can be checked by imposing huge costs on them.

In the case of *Vidya Drolia vs. Durga Trading Corporation* ("Vidya Drolia"), apex court dealt with the scope of jurisdiction of court at the referral stage under Section 8[15]. The court referred to the position taken in the case of *National Insurance Company Limited vs. Boghara Polyfab Private Limited* wherein it was held that while deciding an application under section 8 the court has to firstly see whether the agreement for initiating arbitral proceedings cover the disputes arisen between the parties and secondly judicial application of mind to see whether the disputes arisen can be settled by arbitration or not[16]. Therefore the rule of the court followed is 'when in no doubt, do refer'.

3.3 SECTION 11: APPOINTMENT OF ARBITRATOR

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[13] Law commission Supra Note 6 at p. 20

[14] The names of the professionals contacted and the insights given by them have not been disclosed due to confidentiality agreement. Therefore the word 'professional' used further in the paper shall mean the experts chosen through sampling who have given their views according to their practical experience.

[15] Vidya Drolia and Others versus Durga Trading Corporation, SC civil appeal no 242 of 2019 at p. 2

[16] *Id*. at p. 85.

Section 11(2) of the 1996 Act gives freedom to parties to choose the arbitrator of their choice. This enables the parties to enter into an agreement where they have the power to govern how the disputes would be resolved. However in cases where the parties are unable to mutually agree or have so provided in their contract, they may approach the court to appoint an arbitrator[17]. There have been shifting decisions on whether this appointment comes under judicial or an administrative power of the court. Considering it to be an administrative power, court only has to see whether there exists an arbitration agreement or not. This helps in ruling out cases where either the parties have not followed appropriate procedure to invoke arbitration clause or the dispute with respect to which claim has arisen is not subjected to arbitration. Even though on one hand this power would avoid unnecessary indulgence by courts in arbitration but on the other hand initiating arbitration proceeding without proper check and eventually the award being declared void may be considered as wastage of time. While if the appointment is considered as a judicial power as was held in *S.B.P. & Co*. v. *Patel Engineering Ltd.* not only does it entails increase in judicial interference, the very purpose of the Arbitration Act seems obsolete. Considering judicial power also enables the parties to invoke Article 136 of the Constitution of India leading to further delay at appointment stage only[18]. The apex court in Vidya Drolia case delved into how much detail the court should go into while determining the non-existence of valid arbitration agreement. For this purpose, party has to summarily state the finding in its favour by the production of documents. However in case a detailed examination is required, then the matter must be referred to tribunal for trial[19]. Therefore following questions need to be enquired into by the court for determining validity of the agreement:

> "Whether the arbitration agreement was in writing? Or
>
> Whether the arbitration agreement was contained in exchange of letters, telecommunication, etc?

[17] *Supra* Note 5, S. 11.

[18] K. N. Chandrasekharan Pillai & others, *ADR: Status /Effectiveness Study*, ILI 1, at p. 44.

[19] *Supra* Note 15 at p. 235-236

Whether the core contractual ingredients qua the arbitration agreement was fulfilled?

On rare occasions, whether the subject matter of disputes is arbitrable?[20]"

The court tries to restrict its power unless it is clearly evident from the facts.

Around 62% of the professionals contacted are of the view that the appointment process under Section 11 leads to delay in initiation of arbitration proceedings. According to them, when the parties do not conform to their agreement or fail to mutually agree, the only solution available presently is to approach courts. Due to the over-burdening state of courts, it takes months and sometimes years to decide the appointment application. Scope for improvement was reflected in the 2019 Act which provided referral to arbitral institution but sadly this appointment procedure has not been notified yet.

However it can seen from the Delhi High cases analysed that when matter is sent to arbitral institution (Delhi has set up its Arbitral Institution), delay has already been caused by the court in referring the matter. Out of the forty two cases analysed, the time taken for appointment of arbitrator varied between one month to one and half years with maximum cases falling in the range around of six-eight months.

3.4 SECTION 14 & 15: TERMINATION OF MANDATE

These sections deciding the mandate of the arbitrator also leads to some delay and consequent inefficiency. Even though it enables the parties to keep an advantage in their hands in case the arbitrator falls short of any expectations but the application is sometimes filed after a considerable delay as no limitation period is provided under section 14 and 15 of the 1996 Act. Therefore limitation provided under Article 137 of the Limitation Act, 1963 i.e. three years can be applicable. Approximately 62% professionals agree that the application of these sections lead to delay in arbitral proceedings. However professionals do not deny the requirement of this section. But considering the judicial backlog it is sometimes seen as a halt in the proceedings by them. Moreover they also say that since the new tribunal has discretion to start the proceedings again, usually fresh proceedings are undertaken by them. Where the case

[20] *Id.* at p. 238

is in the middle of proceedings, it may be difficult for the new arbitrator(s) to understand the position without hearing the parties. Further a conjoint reading of Section 14 and 15 with Section 11 highlights the fact that once the mandate is over, the parties may again go to court for appointment/substitution which would then take few more months to decide the application. Hence the delay seems like a vicious circle. Thus the two issues to be determined by courts in terminating the mandate are firstly whether the circumstances have arisen leading to termination of mandate and secondly the appointment of a new arbitrator in case the answer to first is positive. Keeping in mind the overburdened nature of courts, delay is unavoidable in such cases.

3.5 SECTION 34: SETTING ASIDE ARBITRAL AWARD

Section 34 of the 1996 Act provides grounds for challenging and setting aside the arbitral award. One such ground is in case the award is against the public policy provided under section 34(2) (b). There is no mention of the degree of proof required to be made by the party to set aside the award. According to 1996 Act, the term public policy includes:

(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 public policy ground gives ultimate control in the hands of the court. In the case of *Murlidhar Aggarwal vs. State of Uttar Pradesh*, it was stated by the court that the meaning and character of public policy keeps on changing with change in time, culture and community. It does not remain static[21]. Public policy has been defined as the basic norm, violation of which causes injury to public good and would be against the people for whom legislations are framed by the government[22]. In *Central Inland Water Transport Corporation ltd. vs. Brojo Nath Ganguly*, public policy has been

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[21] Murlidhar Aggarwal versus State of Uttar Pradesh, 1974 (2) SCC 472, at p. 482.

[22] Amelia C. Rendeiro, *Indian Arbitration and Public Policy*, 89 TEX. L. REV. (699-728) (2011) at p. 715.

interpreted broadly. It has included within its ambit public conscience, public good and public interest[23].

The court had given a narrower interpretation to the public policy in the case of *Renusagar Power Co. vs. General Electric Co.* The court had held the grounds for considering violation of public policy can be said if it is

a) against the fundamental policy of Indian law
b) against the interest of India and
c) against justice or morality[24].

Even though this case was interpreted under Arbitration Act, 1940; it is widely followed and considered as a precedent.

After this in the year 2003 another important case which gave liberal meaning to the term public policy was *Oil* **&** *Natural Gas Corp. vs. SAW Pipes Ltd.* The arbitral award was challenged on the ground that the law of liquidated damages was not applied appropriately. The court expanded the scope of public policy and stated that apart from the grounds enumerated under Renusagar case, there are certain other grounds to be considered for setting aside award under it. This includes any provision which is in violation of the 1996 Act or other substantive law by which party is governed or is against the terms of the contract. It also stated that in case the award is patently illegal, then a valid ground for setting aside arises[25].

Legislature seems to be taking appropriate caution to limit the intervention as was also proposed in 256th report. After 2015 amendment, the scope of public policy does not involve review on the merits of the dispute. Clause 2-A had been added to section 34 which states patent illegality as a ground to set aside the arbitral award. The Hon'ble Supreme Court in *Ssanyog Engineering and Construction Company Limited*

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[23] Central Inland Water Transport Corporation Limited and Another versus Brojo Nath Ganguly and Another, 1986 (3) SCC 156 at p. 218.

[24] Renusagar Power Co. Ltd. versus General Electric Co., 1994 Supp (1) SCC 644 at p. 682

[25] Oil **&** Natural Gas Corporation Ltd. versus. SAW Pipes Ltd., 2003 (5) SCC 705 at 727-728

vs. NHAI has also clarified the scope of public policy. The court limited the scope of public policy in line with Renusagar Case and has done away with the ground of 'interest of India'[26]. The interpretation of 'fundamental policy of Indian law' was expanded in the case of *ONGC Ltd vs. Western Geco International Ltd.* by signifying the importance of 'judicial approach' to be taken in the matter[27]. This according to apex court would open the floodgates. Under the guise of judicial approach application will be accepted on the merits of the award. Setting aside the award on ground of justice and morality would be determined if it shakes the conscience of the court[28]. In regard to patent illegality, challenge will be upheld if it goes to the root of the matter as was also held in Saw Pipes case. Mere erroneous application of law or reappreciation of evidence has been excluded from its purview. Certain factors which may be looked into for the invocation of this ground includes "a) award given without any reason b) impossible view taken by arbitrator while construing the contract c) questions decided beyond a contract or his terms of reference d) finding arrived at without any evidence or by overlooking the vital evidence or taking into documents without giving due notice to the parties"[29].

The grounds stated and current case held by the apex court signify the correctness for challenging the award as has also been said by a professional. Therefore instead of challenging the grounds in itself, the time taken by the courts in deciding the grounds must be evaluated. Different high courts take different view. Such precedents need to be followed by tribunals too so that the question of challenge does not even arise. But the high courts must also understand the necessity of restriction. It is not a supervisor to tribunal. Fairness can also be maintained by keeping a birds' eye view. It is argued

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[26] Ssanyog Engineering and Construction Company Limited versus National Highways Authority if India, (2019) 15 SCC 131 at p. 169-170

[27] Oil and Natural Gas Corporation Ltd. versus Western Geco International Ltd., 2014 (9) SCC 263 at p. 278.

[28] *Supra* Note 26.

[29] Shivansh Jolly & Sarthak Malhotra, *Ssangyong v. NHAI: Supreme Court of India Fixing some Troubles, and Creating Some?*, 2019 Kluwer Arbitration, http://arbitrationblog.kluwerarbitration.com/2019/07/06/ssangyong-v-nhai-supreme-court-of-india-fixing-some-troubles-and-creating-some/

that such broad interpretation would open floodgates on challenge. According to a professional, a well drafted and well argued petition can bring the case under the grounds set forth. Parties who have lost the case would certainly take advantage and try to bring their case within such wide meaning of public policy. The contravention of Indian law or contractual terms is a ground which should have been left to the tribunals to consider. It is also considered to be in violation of Section 5 of the 1996 Act which specifically provides for minimal court intervention. It cannot be said that such grounds are expressly provided in the Act. The liberal interpretation has been made by the courts themselves. Even though legislature had given some liberty to the courts for development of principles, but the reason was because the public policy cannot be put in a straight jacket or water tight compartment. One precaution that court tried to take in the Saw Dust case is by stating that the illegality must go to the roots of the issue. Under public policy defence, what is required is judicial interpretation as well as legislative certainty. The goal of the arbitration act was to enhance efficiency by minimizing the judicial role. Such interpretation is against the interest of vulnerable sections having unequal bargaining power. It would otherwise be against societal interest and would discourage foreign investments.

Due to the broad interpretive power under Section 34, some judges generally refrain from interfering by looking at the award broadly while other judges tend to look at the provision narrowly like in an appellate provision[30].

3.6 SECTION 29A: TIME PERIOD

Section 29A was introduced by way of an amendment under 2015 Act[31]. Time limit has been prescribed in this section within which arbitral awards have to be passed. The section has been further amended under 2019 Act according to which the twelve months period for rendering award begins 'from the date of completion of proceedings'. An extension of six months may be given to the arbitrator with the consent of the parties. However in cases where the award is not passed with such

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[30] Gourab Banerji, *Judicial Intervention in Arbitral Awards: A Practitioner's Thoughts* , 21 (2) National Law School of India Review 39 (2009) at p. 49.

[31] Section 29A (1) of the 2015 Act stated that the "award shall be made within a period of twelve months from the date arbitral tribunal enters upon the reference".

extended period, then the mandate of the arbitrator shall terminate. A further extension is possible only if the court grants it on an application by the parties. Here again the autonomy of the parties is taken away with by giving power to the court to determine the extended period. For such determination, the courts look at the conduct of the parties as well as the arbitrator and the stage of proceedings. Some respite has been given vide 2019 Act wherein proviso has been inserted after clause 4 which states that during the pendency of application, the mandate of the arbitrator shall continue.

Another point to be considered in this section is the extent to which time limit helps in rendering effective awards. 84.6% of professionals agree and point out that such limitation has enable arbitrators as well as parties to function quickly. Any delay would also be considered as a mark on the functioning of the arbitrator therefore he will try to complete well within time. Being cognizant of the time has helped the arbitrators to structure their schedule accordingly. There are lesser adjournments and shorter time gap between two proceedings. However few of the professionals contacted were of the opinion that the disputes belong to different category of complexity. Thus imposing a standard time for all is against the interest of justice. Moreover due to this restriction, parties do not opt for mediation in the process of arbitration proceedings. Therefore any chance of settlement through negotiation is vitiated.

It has also been argued that since the arbitrators are working under strict schedule they may disallow a valid request of the parties[32]. In the hurry to dispose off disputes, its effectiveness may be hampered. In cases of hurried decision making, the challenge would again be made to the courts which will ultimately lead to delay and put a question on the effectiveness of arbitration process. Justice Saraf Committee set up to study the effects of 176th Report had mentioned that neither any time limit should be fixed nor the courts be required to monitor or supervise the arbitration. Expeditious settlement of disputes will be affected and tribunals will become the organ of the

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[32] Badrinath Srinivasan, *Reforming Indian Arbitration Post-Reforms: Seven Challenges*, SSRN 1 at p. 9.

court[33]. The complexity involved in a case can be determined by the requirement of detailed evidences or the time involved in hearing a case etc. Moreover Section 29A (6) of the 1996 Act provides for substitution of arbitrator in case the previous arbitrator is unable to decide within the given time period. Here the number and appointment process will be based upon the agreement between the parties. Firstly this process becomes time consuming; secondly the new arbitrator may restart the process leading to further delay. Time is also consumed in cases where the arbitration sits at a place different from the place of residence of parties or one of the parties[34].
Fault of parties in deciding the delayed award was dealt with by Delhi High Court in the case of *Chandok Machineries v. SN Sunderson* **&** *Co*[35]. In this case, petitioner had delayed the proceedings at various steps and then refused to give extension under Section 29A (3) to the award passed after 12months. The court proceeded with the case under Section 29A (4) even though no formal written request had been placed by the parties for the same covering oral plea as within its scope. Further it validated the award passed by the arbitrator even after expiry of period in case the court thereafter extends the time limit.

3.7 SECTION 36: ENFORCEMENT

The stay to the award shall be granted by the court only in cases where request has been so made. It gives discretion to the court to grant stay order. Due regard is to be given to CPC provisions regarding stay under Order XLI Rule 5 where courts have discretion to stay for 'sufficient cause'. However the problem arises when court gives unconditional stay to the parties. In the case of *Pam Developments Private Limited vs. State of West Bengal,* the court stated that the words used under section 36(3) is 'having due regard' before granting stay. The words used do not put a mandate on the courts to follow CPC rules while granting stay. Moreover the conditions that can be

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[33] Manini Brar, *Implications of the New Section 29A of the Amended Indian Arbitration and Conciliation Act, 1996*, 5 INDIAN J. ARB. L. (113-128) (2017) at p. 125.

[34] Tishta Tandon, *Section 29A: Time Bound Arbitration - Have Arbitral Tribunals Become Organs of the Court*, 7 INDIAN J. ARB. L. (146-160) (2019) at p. 156.

[35] M/S Chandok Machineries versus M/S SN Sunderson & Co, 2018 SCC Online Del 11000, at para 32.

imposed are subject to the discretion of the court[36]. This creates some discrepancy considering the pro-arbitration approach being encouraged by the legislature. The most concerning provision here is the insertion of further proviso to Section 36(3) proviso. Unconditional stay is granted if the court is prima facie satisfied that the agreement or award was induced by fraud or corruption. However what is fraud and corruption have not been defined. Courts would have to ensure that not all objections get covered under these, defeating the purpose of ADR[37]. The final finding is based upon the decision rendered under Section 34. Considering the delay caused in such decision, the enforcement would again become a difficult road. On the other hand, it may be said that stay is granted only after the party proves that fraud has been committed[38]. But the extent of the proof required will be preliminary to satisfy prima facie case.

3.8 APPEALS: SECTION 37 & ARTICLE 136

Section 37 of the 1996 Act provides for appeal in limited cases. Appellate provisions are generally considered favourable since it provides the parties an opportunity to correct the wrong committed by the judicial authority. Professionals consider appeal

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[36] Aditya Mehta, Arjun Sreenivas & Swagata Ghosh, *Conditional or Unconditional Stay, That is the Question – The Fate of Arbitral Awards in India, Pending Challenge, 2020*, Cyril Amarchand Mangaldas, (August 01, 2021, 18:30PM), https://corporate.cyrilamarchandblogs.com/2020/04/conditional-or-unconditional-stay-that-is-the-question-the-fate-of-arbitral-awards-in-india-pending-challenge/

[37] Alishan Naqvee & Swet Shikha, *India: Unconditional Stay On Arbitral Awards, 2021,* Mondaq, (August 01, 2021, 17:00PM), https://www.mondaq.com/india/trials-appeals-compensation/1042098/unconditional-stay-on-arbitral-awards.

[38] Samaksh Goyal & Nubee Naved, *Fraud and its effect on Arbitral Awards in India: Have the Legal Developments of 2020 given us a clear path,* Bar and Bench, (August 01, 2021, 17:30PM), _https://www.barandbench.com/columns/fraud-effect-arbitral-awards-india-legal-developments-2020.

as an important provision to maintain balance and ensure fairness. Delay in cases is also dependant on the parties.

However the problem arises when such authority is already overburdened. Further time taken can prove to be against the interest of the winning party. Provision is also made for revision or filing of special leave petition ("SLP") under Article 136. Appeal under Article 136 involves two stages; firstly to examine if special leave should be granted and if the Supreme Court decides in positive then it is treated as an appeal to the decision of lower court or tribunal[39].

Letter of patent courts have their own High Court procedure rules according to which matter has to first go before a single bench whose appeal goes further to division bench. This process can be changed in arbitration cases wherein direct appeal before division or larger bench can be filed. It is necessary to reduce the number of steps in enforcement of a dispute.

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[39] Badrinath Srinivasan, *Appeal against the Order of the Chief Justice under Section 11 of the Arbitration and Conciliation Act, 1996: An Empirical Analysis*, 1 INDIAN J. ARB. L., (18-35) (2012) at p. 22.

CHAPTER 4: SINGAPORE ARBITRATION ACT

The growth and success of arbitration in Singapore is largely attributed to the national courts of that country. The national courts have proved to be supportive engine promoting and initiating arbitral process. They do not consider arbitration as a threat to their existence but rather as a mode where working together will render effective administration of justice. With the growth of trade and commerce there also arises the number of disputes. Such disputes always become more complex with each passing time. The ability of arbitration is considered better in handling such dispute crisis. Since the arbitrators are experts in the field, they are better able to understand and analyse the dispute at hand. Singapore consists of two kinds of arbitration; one being Arbitration Act (Cap 10) ("AA") for domestic disputes and the other being International Arbitration Act where one of the parties is from outside Singapore or the subject matter lies outside Singapore. Parties are also free to choose the preferred applicable Act[40]. However in the current paper, discussion is based on AA.

Like the Indian Arbitration Act, even the Singapore Arbitration Act of 1953 was based upon English Arbitration Acts of 1950. Thereafter the 2001 arbitration act was enacted[41]. This act is also a reflection of UNCITRAL Model laws of 1985. The purpose was to align the domestic laws with the model law[42]. Singapore is considered as growing hub for arbitration while this not the case in India. The main attribute can be the extent of judicial intervention and support received from the domestic courts on party autonomy and finality of arbitration awards.

It cannot be said that the degree of court intervention is negligible in domestic arbitration cases. Appeal can be made by the parties against the arbitral award[43]. However the courts in Singapore ensure that the parties do not take advantage of such

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[40] Lawrence G. S. Boo, *SIAC and Singapore Arbitration*, 1 Asian Bus. LAW. 32 (2008) at p. 34.

[41] Mohan R. Pillay, *The Singapore Arbitration Regime and the UNCITRAL Model Law*, 20(4) Arbitration International 355, at p. 356

[42] *Supra* Note 40 at p. 34.

[43] Arbitration Act (Chapter 10, 2002 Rev Ed.), S. 49 (Singapore).

appellate provision. Appeals made by moulding factual findings into question of law are not entertained by the courts[44].

Singapore courts have discretionary power to decide whether to forward the case for arbitration or continue with the court proceedings when an application is made before it by the party concerned[45]. Court decides by determining whether the matter can be best adjudicated by itself or not. Parties themselves may also apply to the court to determine a question of law involved in the case[46]. According to Section 12, the question regarding number of arbitrators is to be decided by the parties themselves. This is to ensure party autonomy. However the sole arbitrator is to be appointed in case of absence of arbitrator.

The balance between the ability of the parties to gain access to the arbitral tribunal and the power of the arbitral tribunal to ensure voluntariness must be maintained[47]. This equilibrium can be achieved with the following three provisions "1) form of arbitration agreement 2) separability of arbitration agreement and 3) enforcement of arbitration agreement"[48].

Section 4(1) of AA provides recognition to the agreements to submit for arbitration future as well as existing disputes. Section 4(3) has the requirement of written arbitration agreement. Such agreements may be in the form of arbitration clause or as a separate agreement[49]. For the validity of arbitration agreement it may be contained in a document which is separate from the contract or is there in the form of an electronic communication. The reference is enough to make it a part of the contract. This clause is similar to the section 7 under 1996 Act. Section 21(2) provides the

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[44] Lawrence G. S. Boo, *SIAC and Singapore Arbitration*, 1 Asian Bus. LAW. 32 (2008) at 35.

[45] *Supra* Note 43, S. 6.

[46] *Id.*, S. 45.

[47] Evelyn Ai Lin Teo & Ajibade Ayodeji Aibinu, *Legal Framework for Alternative Dispute Resolution: Examination of the Singapore National Legal System for Arbitration*, 133 J. Prof. Issues Eng. Educ. Pract. 148 (2007) at p. 150.

[48] *Id.*, at p. 150.

[49] *Supra* Note 43, S. 4(2).

separability clause stating that the agreement is independent of the contract and in case the contract is declared void, arbitration agreement would still be enforceable. Section 21(1) gives the authority to the arbitral tribunal to rule on its own jurisdiction and also on the question regarding existence or validity of arbitration agreement. The decision of the tribunal on its jurisdiction may be challenged before the court within 30 days of such ruling. An appeal to such decision of High Court shall be made before court of appeal only with the leave of High Court[50]. In order to avoid delay and cost, it is provided under Section 14 that in cases of disagreement between parties regarding appointment of arbitrator, sole arbitrator will be appointed. AA gives all the powers to the arbitrator as that of the court and is not liable for any negligent act done in the course of acting as an arbitrator[51]. Like in India, the request for removal of arbitrator is first made to the arbitral tribunal and in case of any dissatisfaction, aggrieved party may apply to the Court within 30 days of receiving notice of rejection[52]. No appeal shall lie to such decision of the court[53]. The pendency of challenge does not restraint the tribunal from carrying on the proceedings[54]. The tribunals usually proceed unlike in India where mostly proceedings get stayed.

Request can be made to the high court for removal of arbitrator in case he fails to act. Grounds for removal have been provided which include namely the case where arbitrator has not performed properly or substantial injustice is caused[55]. But the approach taken by courts is of reluctance. The courts are unwilling to remove the arbitrator easily unless gross injustice is caused. They are cognizant of the time and expense involved in proceedings and therefore would rather encourage proceedings under the same arbitrator[56].

Moreover in Singapore, arbitral institutions are given due prominence. More and more disputes are settled under it. They have become engine of change by applying innovative rules. Once these innovations prove effective, other institutions also follow

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[50] *Id.*, S. 21A.

[51] *Id.*, S. 20.

[52] *Id.*, S. 15(4).

[53] *Id.*, S. 15(5).

[54] *Id.*, S. 15(6).

[55] *Id.*, S. 16.

[56] *Supra* Note 47, at p. 153

them. Slowly they become norm in the society[57]. The decision of registrar is final on the applicability of domestic rules and no further appeal or review lies on such decision[58]. First schedule of SIAC Domestic Arbitration Rules applies in case parties choose for expedited procedure.

4.1 COMPARISON BETWEEN SINGAPORE AND INDIA

To the extent India and Singapore jurisdiction rely on UNCITRAL Model Rules; they have a common base reference. Most of the arbitration provisions in the two jurisdictions are similar. Main test is in regard to its implementation. The interpretation adopted by courts in Singapore is narrower than Indian courts. In regard to appointment of an arbitrator, a contrast can be made. In Singapore, sole arbitrator is appointed irrespective of what the parties had agreed in beginning while in India appointment is made having due regard to agreement between the parties. While on one hand party autonomy is maintained in India on the other hand the objective of the Act is promoted in Singapore. Even though ad-hoc arbitrations are prevalent in Singapore but there has been increased shift towards institutional arbitration. While in India, institutional arbitration is still at its nascent stage. Moreover courts in Singapore ensure that only those arbitrators who can ensure their availability sign up as an arbitrator in a dispute. Further unnecessary applications or appeals are discouraged by courts by avoiding the taking up of such applications, unless necessary. Therefore effectiveness in Singapore is achieved with the assistance of domestic courts. Since the disposal of cases is quick under national courts of Singapore it does not face much resistance.

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[57] 2 Peter Quayle & Xuan Gao, International Organizations and the Promotion of Effective Dispute Resolution 1-254 (Brill Nijhoff 2019) at p. 10.

[58] SIAC Domestic Arbitration Rules (2nd Edition), Rule 1.3 (Singapore).

CHAPTER 5: COMMERCIAL COURTS

Before 2015 there was a rise in pendency of commercial cases in courts. This was the biggest drawback in attracting companies for investment in India. Even though there have been investments, but the economic society believes that had the decision making be quicker, more investments could be attracted. The establishment of Commercial Courts Act, 2015 was an efficacious technique to attract business community[59]. The setting up of fast track court especially for cases under commercial division got incentivised after 188th and 253rd law commission reports. The purpose was to incorporate an effective mechanism, necessary for promoting investor confidence and economic development of the country[60].

The definition of commercial disputes gives an exhaustive list to include transactions of merchants, bankers, financiers and traders[61]. In order to broaden the base for resolution of disputes, power has also been granted to subordinate courts[62] by the 2018 amendment to the Act and accordingly threshold limit has been reduced to rupees three lakhs[63]. Section 10 provides the transfer of arbitration applications and appeals to commercial division of high courts or commercial courts exercising territorial jurisdiction over such arbitration cases. Section 8 prohibits civil revision on interlocutory orders including order related to issue of jurisdiction passed by the

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[59] Pankaj Kumar Gupta & Sunil Mittal, *Commercial Arbitration in India*, 2 IPEDR, (186-191) (2011) at p. 186.

[60] Sudhir Krishnaswamy &Varsha Mahadeva Aithala, *Commercial Courts In India: Three Puzzles for Legal System Reform,* 11(1) Journal of Indian Law and Society, (21-47) [Monsoon (2020)] at p. 23-24.

[61] The Commercial Courts Act, 2015, S. 2(1) (c), No. 4, Acts of Parliament 2016 (India). [S. 2(1) (c) gives a detailed list of disputes that are included under commercial disputes.

[62] *Supra* Note 60 at p. 29.

[63] *Supra* Note 61, Section 2(1) (i). (Under S. 2(1)(i) Specified Value has been defined as "in relation to commercial disputes shall mean the value of the subject-matter in respect of a suit as determined in accordance with section 12 which shall not be less than three lakh rupees or such higher value, as may be notified by the Central Government."

commercial court. The only option made available is that of an appeal. One of the most progressive sections added in this Act is Section 12A mandating pre-institution mediation. Mediation is an effective tool where parties are able to understand the position of each other and come to a common settlement without going through the delayed court procedure. With the assistance of a well trained mediator, parties can settle their disputes at an initial stage only. In order to ensure that the objective of establishment of the Act is achieved, section 17 mandates maintenance and monthly publication of statistical data filed before commercial courts.

5.1 SINGAPORE INTERNATIONAL COMMERCIAL COURT ("SICC")

The SICC was established as an alternative dispute resolution mechanism for commercial users. It can be considered as a mixture of both: litigation and arbitration. Jurisdiction of SICC is based upon the consent of parties who can choose its applicability at different stages by using 'opt-in' provision. But the disputes dealt with under SICC must have 'international' and 'commercial' character. Chief justice of Singapore has the power to transfer cases from Singapore High Court to SICC. The bench consists of judges from not only Singapore High Court but also eminent jurists from common law and civil law jurisdiction[64]. One of the reasons behind establishment of SICC was due to perception of bias against foreign parties by the local courts[65]

The commercial disputes of domestic character are being efficiently dealt with in national courts or through arbitration in Singapore. Due to increase in pendency in courts, domestic commercial courts in India were necessitated while no such need was felt in Singapore.

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[64] Steven Chong, *The Singapore International Commercial Court: A New Opening In A Forked Path*, speech delivered at British Maritime Law Association Lecture and Dinner in London, at p. 20-21. See also Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), S. 18A-18M.

[65] *Id.,* at p. 6.

CHAPTER 6: DISCUSSION

The purpose behind enactment of Arbitration Act was to ensure speedier and efficient delivery of justice. But when the courts intervene even in the arbitral process, then it affects its smooth functioning. To avoid the loss suffered by people due to continuous delay in judicial proceedings, arbitration was considered a favourable option. But it has also become another name for litigation. It is said that 'justice delayed is justice denied'. The pendency of cases in Supreme Court of India alone is 55,985 cases as on August 02, 2021[66]. Cases pending for more than one year in High Courts are 86.32% and in District and Subordinate Courts are 77.37%[67]. In this state of overburdened courts, when certain strings concerning arbitration are kept with judiciary, it can only lead to further delay and slower process.

However as analysed above, judiciary cannot be the sole reason causing delayed disposition of commercial disputes. Other stakeholders such as parties involved and the arbitrators is another factor contributing to the inefficiency and slower investment. The losing party tend to take advantage of the multiple appeals and revision provision and by filing other unnecessary application only to cause delay. 71% of the professionals view this as one of the factor. Every such application in court blows away the entire objective of the Act. In order to prevent this courts have to use their discretion narrowly and only when necessary. Like in Singapore where courts have taken restricted approach in including public policy within its ambit, courts in India too should avoid paternalistic approach. Some intervention is certainly necessary in the interest of justice but all courts must be incentivised to encourage finality to arbitration. Only then can commercial confidence be gained.

In considering section 8 and 11 of the 1996 Act together, it can be said that even though court states that only prima facie evidence will be considered, but to consider the validity of agreement, evidences have to be produced. Further discretion was left

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[66] Supreme Court of India, Summary: Types of Matters in Supreme Court of India, (August 01, 2021, 17:30PM), https://main.sci.gov.in/statistics.

[67] National Judicial Data Grid: Pendency Dashboard, High Court and District and Taluka Courts of India (August 01, 2021, 18:00PM), https://njdg.ecourts.gov.in/njdgnew/?p=main/pend_dashboard.

to the courts even in Vidya Drolia case wherein the court under special circumstances may go into subject matter of the case. Here mere providing this opportunity will bring numerous cases under its ambit. Since different high courts take different stance it may rather lead to a conflicting situation. Furthermore, the legislature seems on one hand to be promoting arbitral institutions for speedier and efficient delivery while on the other hand has failed to notify the amendment under section 11(6). But merely promoting of arbitral institutions would not be enough. Since the courts still have power to appoint or take decision on whether appointment is needed or not, the time taken by them in this process would make the difference. It is required of them to take a restrictive view and put high costs on defaulting parties.

In considering the termination of mandate, section 14 and 15 are important provisions to be utilised during pendency of judicial proceedings as also viewed by the professionals. However like in Singapore, if the new arbitrators are appointed by the institution with the condition of appointment of sole arbitrator only irrespective of agreement between parties, then this may help in reducing the time. This possibility should be considered even under appointment where parties fail to agree. In light of maintaining efficiency and achieving objectives of the Act, this will not be detrimental to party autonomy.

In considering the time limits imposed under Section 29A, as suggested by a professional and is also followed in Singapore, different time limits should be imposed based upon the pecuniary limit involved. In cases which are complex in nature, longer time limit must be given. Discretion can be left to parties themselves in determining the increase in the time constraint.

The automatic stay while challenging the awards has been done away with in India. However the unconditional stay under section 36 especially in cases of fraud and corruption is absolutely against the push towards efficiency.

Further, appeals and revision of interlocutory orders are made at different levels. Though they are considered necessary in terms of giving right to parties but at the same time they also lead to delay. Therefore a balance must be struck between the two interests. As in the case of Commercial Courts Act wherein there is no provision of interlocutory revision and appeal is also limited to specified higher courts, in arbitration too, limited appeal must be provided. Where SLP is allowed, special

preference may be given to arbitration cases considering the need for quick disposal. Heavy costs may be imposed upon the parties to restrict them from taking advantage at any future stage.

Commercial Courts are proving to be successful in disposing of commercial disputes in time. Even though there are certain loopholes such as judicial vacancy, appointment of judges by states or determining the subject matter from within the given exhaustive list, improvements can be seen in stages of disposal. According to the reform updates given by Department of Justice on basis of World Bank report on Ease of Doing Business, there has been improvement in times taken in trial and judgment by commercial courts in Delhi.

	DBR: 2019	**DBR: 2020**
Indicators	**Delhi**	**Delhi**
Time-Days	**1445**	**1067**
Filing and Service	45	15
Trial and Judgment	1095	746
Enforcement of Judgment	305	305

Table[68]

However the improvement is not significant in reducing the time taken in enforcing a contract. Till the time contract becomes enforceable, its benefits cannot be enjoyed by the winning party. Therefore it becomes important in the current globalised world to make efficient delivery from the beginning to the end of the dispute. Singapore which is increasingly being considered as favourable destination for resolution of disputes has been recorded as best in regulatory performance. It takes an average 120 days in

[68] Department of Justice, Enforcing Contracts: Ease of Doing Business, (August 01, 2021, 18:00PM), https://doj.gov.in/eodb/reform.html.

enforcing contracts[69]. The statistics show that India needs to relook at the way it has been interpreting its laws relating to commercial disputes.

[69] World Bank (2020), Doing Business 2020, DOI: 10.1596/978-1-4648-1440-2 at p. 80.

CHAPTER 7: CONCLUSIONS

It may be concluded that arbitration is not an alternate but a mechanism which goes along with the domestic court systems. As seen from Singapore AA, arbitration in India can flourish only if there is support from national legal system. It cannot be said that judiciary and arbitration should be at two different ends to maintain party autonomy. Nor can it be said that only a protectionist approach will help in settlement. Rather a balanced approach needs to be followed. There must also be support from parties who should be ready and willing to settle through arbitration and not take any advantageous position. Further arbitrators must also ensure that while taking up a case they can devote adequate time in it. Since the arbitrators also work at some other place, they take more time than required due to increase in the number of cases in which they arbitrate. In Singapore a separate panel is prepared for emergency awards in which only those persons sign who are capable of accommodating time.

The success of a nation depends upon various indices such as GDP, Ease of Doing Business etc. which is calculated on base factors such as production, trade, consumption and marketing. With an efficient administration of justice, national economic strength can be strengthened. Disputes are bound to arise with increase in trade and commerce which calls for effective resolution mechanism[70]. Better resolution of disputes leads to increase in confidence in the judicial system and other alternative mechanisms of a country. Moreover every delay leads to increase in cost due to depreciation of money and loss of interest. The ease of doing business in India has improved considerably to 63rd position as per World Bank report[71]. However 'enforcement of contract' as a factor has remained stagnant since 2015. More investment and thereby economic progress can be encouraged with the strong settlement bodies in the country. Thus judicial minimalist approach must be followed in India to ensure that commercial disputes are not dragged for long. This will help in maintaining balance between the need for fair decision making and to encourage financial investment by maintaining party autonomy.

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[70] Justice V. Ramasubramanian, *Commercial Litigation or Litigation Commercial: Specialised Commercial Courts in India,* 2015 NLS Bus. L. REV. 79 (2015) at p. 80.

[71] *Supra* Note 69 at p. 4.

CHAPTER 8: SUGGESTIONS

1. **Online Dispute Resolution**: The concept of online settlement of disputes in arbitration can be considered as an important step towards achieving speedier and effective dispute resolution. 76.9% of the professionals consider it to be an option for future. This has been made more practical during the pandemic. Professionals have highlighted the following advantages and disadvantages of online arbitration. The online settlement reduces the travelling time for the arbitrators in conducting arbitration. It thus enables arbitrators to conduct proceedings with little breaks, effectively disposing the petitions. Moreover paper cost is also saved whereby parties can approach without worrying about the distance. With the growing digitalisation, the working of electronic proceedings becomes easier. However the process cannot and should not be made mandatory for all the arbitrations. There are limitations with respect to access to technology. Ineffective bargaining power and accessibility must not lead to hampering justice delivery. Further considering the complexities in cases involved, not all disputes can be well settled through online mode. Physical evidences may be necessary especially in cases which involve heavy documentation. Factors such as privacy, confidentiality and cyber attacks must also be borne in mind and proper IT Regulations must be in place before making it a reasonable alternative.
2. **Arbitration Bench:** Another step which can be undertaken to increase efficiency and attracting commercial investment is establishing separate arbitration bench. Overburdening of courts has been one of the major contributors towards delay in decision making leading to its ineffectiveness. Since it may not be feasible to completely do away with the presence of traditional courts, separate benches like the commercial courts or labour courts can prove efficient in speedy disposal of disputes. The resolution of this issue can to a large extent resolve the problem. It does not imply that courts should become liberal in its application. The factor to be considered is that a separate bench will divide the current work load. It will enable the courts to deal with applications in an expeditious manner. This is required to be done especially in those high courts where arbitration cases are more.

3. **Arbitration-Mediation-Arbitration:** The purpose of any adjudicatory body is settlement of disputes. If this can be done through negotiations between the parties then it will only benefit the overall process. The disposal rate will outnumber the cases instituted. According to a professional, parties are best able to understand each others' needs and interest after submission of pleadings. In such cases they may be willing to resolve disputes amicably with the help of third neutral party. The time restriction may be stopped in cases where parties are willing to choose such option. This process is also followed in Singapore. Parties are given option to mediate in between the arbitration proceedings. With proper guidance this may actually be an effective method. Mediator can be a different person than arbitrator to ensure fairness.
4. **Arbitral Institutions:** The development of arbitral institutions have also been proposed in 256th Law Commission Report. It does not imply completely doing away with ad hoc arbitration, but adding a new bloc. As in the case of Singapore, the appointment power may be given to the institution. Considering the size of disputes in India, the multiple institutions having their own rules may be made on similar basic rules. Institutions help in rendering time bound decisions and are better organised. Better records are maintained if proceedings are carried on through it. Moreover since the institutions have variety of experienced arbitrators in their panel, parties may themselves also choose according the experience and technical qualification required in concerned dispute. This will also save time in calling for an expert on the subject matter.
5. **Other Steps:** Steps such as increasing awareness amongst people to go for arbitration, giving training to the judicial officers regarding arbitration process, appointment of arbitrators trained in commercial and business laws and encouraging courts to promote finality in arbitration by taking restrictive view are some of the other steps that may be taken for the efficient disposal of commercial disputes through arbitral process.

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APPENDIX

Questionnaire for Professionals

This is a short questionnaire for LLM dissertation on "Effectiveness of Arbitration in India" to be submitted by Aashna Gupta at NLSIU, Bengaluru. I request to kindly provide your views. All the information shall remain confidential.

Email *

Name

Profession *

Number of years of experience in the field of arbitration *

Kindly give true responses according to your practical experience in the field of arbitration. Please do state reasons, where ever required for better research and understanding.

1. Do you think arbitration act has been successful in achieving the objective for which it was enacted (quick disposal of case and less judicial intervention)?

A) Yes
B) No

Please State your reason for the answer to question 1. *

2. Would you recommend to your clients arbitration over regular court procedure for dispute settlement?

A) Yes

B) No

C) Maybe

3. Will you consider institutional arbitration a better and effective mechanism than ad-hoc arbitration?

A) Yes

B) No

C) Other...

Kindly State reason for the answer to question 3. *

4. Do you think online arbitration can lead to quicker dispute settlement? *

A) Yes

B) No

C) Other...

Please state reason(s) for your answer to question 4. *

5. Does the respondent need to prove through evidences or merely showing the arbitration agreement is enough for reference under section 8 of the Arbitration Act?

A) Involves Evidences and statement as required in other civil proceedings

B) Prima facie showing the arbitration agreement

C) Other...

Please state reason(s) for your answer to question 5. *

6. Do you think there is a relationship between section 8 of the Arbitration Act and the delay caused thereby?

A) Yes

B) No

7. Does time taken under section 11 of the Arbitration Act of the appointment of arbitration by the High Court's contribute towards delay in initiation of arbitration proceedings?

A) Yes

B) No

C) Other...

Kindly state reason(s) for the above question *

8. Does the application u/s 14 and 15 of the Arbitration Act for termination of mandate causes a halt (delay) in the already progressing arbitration proceedings?

A) Yes

B) No

C) Other...

Please State reason for the answer to question 8. *

9. Do you think that the applications under above point 8 should be allowed to be filed during the proceedings or after the passage of award?

A) During the proceedings

B) After the reward

C) Other...

In case the answer to the question 9 is others, please state what according to you is the appropriate time period?

10. Has there been any benefit in terms of quick disposal of case with the addition of section 29A?

A) Yes
B) No

Please state reason(s) for your answer to question 10. *

11. What are your views on the provisions provided for setting aside arbitral award under section 34?

12. Does Section 34 give arbitrary and excessive discretion on the courts leading to delay?

A) Yes
B) No
C) Other...

Please state reason(s) for your answer to question 12. *

13. Parties have the provision of filing appeal and revision applications during and after the passage of award. Do you think that a party can also be blamed for delay by filing multiple applications?

A) Yes
B) No
C) Maybe

14. Do you think there should be a limit to the stages at which applications as mentioned under question 11 must be filed?

A) Yes
B) No

15. Article 137 of the Limitation Act provides 3 year limitation period in cases where there is no prescribed period and Section 5 of the Limitation Act provides for condonation of delay. Do they also contribute towards delayed applications by the party before court under Arbitration Act leading to delay in proceeding?

A) Yes

B) No

C) Other...

Kindly State reason(s) for your answer. *

16. What improvements (esp. on judicial side) would you suggest for a better and effective arbitration in India?