**GROWING IMPORTANCE OF INDIA AS A WORLD ECONOMIC POWER AND “MYTHS” SURROUNDING ARBITRATION PRACTICE IN INDIA.**

I. **INTRODUCTION:**

The combination of protectionist, import-substitution, and Fabian social democratic-inspired, also known as the licence raj, policies governed India for sometime after the end of British occupation. Therefore, after pursuing a strategy of self-reliance for almost 40 years, compelled by the balance of payment crisis, India initiated wide range of economic reforms in 1991. In 1991, India adopted liberal and free-market principles and liberalized its economy to international trade. The Indian growth story thereafter has always borne a distinctive feature i.e. though progressive in intent and content, it has been a gradual process particularly in respect of external liberalization. On the risk of being categorized as “reluctant globaliser”, India embarked on the path of slow and steady liberalization and still maintains high tariffs in many agricultural products and has given limited access to foreign investors in many sectors. Steps were also taken to facilitate the inflow of Foreign Direct Investment (FDI). These included raising the limit of foreign equity holdings from 40-51 per cent in a wide range of priority industries. In India’s external sector, the ratio of trade in goods and services to GDP increased from an average of 15 per cent in 1980’s to 39 per cent in the decade of 2000, indicating closer commercial links between India and the global economy since 1991. As a result of liberalization by 2008, India had established itself as one of the world's fastest growing economies. Today India is the ninth largest economy in terms of nominal GDP and the third largest in terms of purchasing power parity. It is also a member of the G20 economic grouping of nations and an integral part of the BRICS nations which represents the emerging market economies of our times. However although our focus presently is not related to human development, but it may just be necessary to mention here that despite growth India still remain behind the world’s poorest nation in terms of human development indexes.

**II. LIBERALIZATION AND ARBITRATION IN INDIA:**

As India quite literally ‘joined the world’ in terms of the existing commercial scenario at the time, it also undertook legislative process and far reaching changes to its existing legal framework, which at the time remained inclined towards State interference and control over commercial enterprise. It is pertinent to note that though the judiciary remained largely independent and un-biased it too wore an expression of social goals above commercial realities at the time. Let us not forget there is a constitutional mandate as well and the people of India have given themselves a written Constitution.

As the commercial interactions between India and the world widened, post the liberalization of the Indian economy in 1991, there were bound to be issues in terms of implementation of the new trade relations and arising of disputes stemming from cultural and economic disparity between India and the liberalized commercial world. At the time ‘Alternate Dispute Resolution’ mechanism in India was governed under the terms of the Arbitration Act of 1940, which was a creature of the colonial interests in India and did not encompass the realities of cross continental trade and disputes arising therefrom. Therefore, in 1996 there arose a need to make the law pertaining to ‘Alternate Dispute Resolution’ more up to date with the times and hence the old 1940 act was replaced by the new Arbitration and Conciliation Act of 1996. India had reached a stage when the world echoed we can do business with you provided our disputes get resolved quickly and timely.

The Arbitration and Conciliation Act of 1996 was an adoption of the UNCITRAL Model law on arbitration and moreover a definitivelegislative ratification of the New York Convention of 1958, to which India was a signatory.

**III. DEVELOPMENT OF ARBITRATION IN INDIA:**

Arbitration has a long history in India. The first so-called reference to Alternate Dispute Resolution in India may be drawn from the Hindu epic the Mahabharata, when Lord Krishna attempted to mediate a truce between the Kaurav’s and the Pandava’s (the warring cousins). Also in ancient times, people after voluntarily submitted their disputes to a group of wise men of a community – called the Panchayat for a binding resolution.[[1]](#footnote-2)

The Bengal Regulations of 1772 introduced modern arbitration in India, during the British Regime. The Bengal Regulations provided for reference by court to arbitration, with the consent of the parties, in law suits for accounts, partnership deeds and breach of contract, amongst others.

The year of 1940 is an important year in the history of the law of arbitration in British India, as in that year was enacted the Arbitration Act, 1940. It consolidated and amended the law relating to arbitration as contained in the Indian Arbitration Act, 1899 and the second schedule of the Code of Civil Procedure 1908. This amended Act was largely based on the English Arbitration Act, 1934 and came into force on 1 July 1940. The Act dealt with broadly three kind’s arbitration: viz. (1) Arbitration without intervention of a court: (2) arbitration with intervention of a court where there is no suit pending and (3) arbitration in suits. Thus, the Arbitration Act, 1940 dealt with only domestic arbitrations. Under the 1940 Act, intervention of the courts was required in all three stages of arbitration, i.e. prior to the reference of dispute to the arbitral tribunal, during the conduct of the arbitral proceedings before the arbitral tribunal and after wards when the award was passed by the arbitral tribunal – at the stage of enforcement. While the 1940 Act was perceived to be a good piece of legislation in its actual implementation by all concerned – the parties, arbitrators, lawyers and the courts, it proved to be ineffective and was widely felt to have become out dated[[2]](#footnote-3).

Globalisation and shortening of distances between foreign shores, for trade and commercial activities made it imperative that a mechanism be set up for the expeditious resolution of any disputes that might arise in the course of commercial transactions between different nationalities across borders. The UN Commission on International Trade Law, in keeping with the changing world economy and its challenges had adopted the UNCITRAL Model Law on International Commercial Arbitration in 1985. The General Assembly of the UN had recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice.  In response to the above call of the UN, the Government of India brought the new enactment called 'Arbitration and Conciliation Act, 1996 which came into force from August 16, 1996 by repealing the Act of 1940.  The New Act of 1996 has tried to bring about sea changes in the Arbitration law and to correct the deficiencies noticed in the earlier Act and also to hasten the process of settlement of international commercial disputes.

Some of the notable features of the new 1996 Act may be briefly mentioned at this stage. The most important departure made by the new 1996 Act from the previous law is in regard to judicial intervention with the process and product of arbitration. Firstly, where there is an arbitration agreement, the judicial authority is required to direct the parties to resort to arbitration as per the agreement, provided the application for that purpose is made before or when a written statement on the merits is submitted to the judicial authority by the party seeking arbitration. Secondly, the grounds on which award of an arbitrator may be challenged before the court have been severely cut down so that, broadly speaking, such a challenge will now be permitted only on the basis of invalidity of the agreement, want of jurisdiction on the part of the arbitrator or want of proper notice to a party of the appointment of the arbitrator or of arbitral proceedings or a party being unable to present its case. At the same time, an award can now be only set aside if it is in conflict with “the public policy of India” - a ground which covers, inter alia, fraud and corruption. Thirdly, the powers of the arbitrator himself have been amplified by inserting specific provisions on several matters, such as the law to be applied by him, power to determine the venue of arbitration failing agreement, power to appoint experts, power to act on the report of a party, power to apply to the court for assistance in taking evidence, power to award interest, and so on. Fourthly, obstructive tactics sometimes adopted by parties in arbitration proceedings are sought to be thwarted by an express provision where under a party who knowingly keeps silent and then suddenly raises a procedural objection will not be allowed to do so. Fifthly, the role of institutions in promoting and organizing arbitration has been recognized. Sixthly, the power to nominate arbitrators has been given (failing agreement between the parties) to the Chief Justice or to an institution or person designated by him. Seventhly, the time limit for making awards has been deleted. Eighthly, present provisions relating to arbitration through intervention of court when there is no suit pending or by order of the court when there is a suit pending, have been removed. Ninthly, the importance of transnational commercial arbitration has been recognized and it has been specifically provided that even where the arbitration is held in India, the parties to the contract would be free to designate the law applicable to the substance of the dispute. Finally, unless the agreement provides otherwise, the arbitrators are required to give reasons for the award. The award itself has now been vested with the status of a decree, inasmuch as (subject to the power of the court to set aside the award) the award itself is made executable as a decree and it will no longer be necessary to apply to the court for a decree in terms of the award. In the following paragraphs, an attempt has been made to present an analytical study of the Arbitration Act, 1940 and the new Arbitration and Conciliation Law.

The new 1996 Act, in its implementation has faced several hurdles as its provisions have been brought before courts in India. Therefore, by way of the 176th Report of the Law Commission of India, a report on the experiences of the 1996 Act and suggestions for amending the same were submitted to Parliament[[3]](#footnote-4). In keeping with the recommendations of the Law Commission of India, the Government of India introduced the Arbitration and Conciliation (Amendment) Bill of 2003. Further in order to reform and modernize the arbitration regime in India the Ministry of Law and Justice, Government of India also set up the ‘Justice Saraf Committee on Arbitration’, to study in depth the implications of the recommendations of the Law Commission of India as set out in its 176th report and the Arbitration and Conciliation (Amendment) Bill of 2003. The committee submitted its report in January 2005[[4]](#footnote-5).

Therefore, arbitration in India is still evolving and has not come full circle as of now. However, it must be noted here that significant strides have been made in this regard already which is evident from the fact that 349 arbitration cases were decided by the Supreme Court, High Courts and Tribunals in India between 2004-2007. Out of the said 349 cases, 238 cases pertained to the old 1940 Act, while on 121 cases pertained to the 1996 Act[[5]](#footnote-6). Therefore, it can safely be said that court intervention in international commercial disputes between parties, as covered by arbitration and alternate dispute resolution mechanism, has significantly reduced. It is also pertinent to note that by the recent judgment of the Supreme Court of India, in the case of *Bharat Aluminum Company Vs. Kaiser Aluminum Technical Services Inc.,* *Civil Appeal No. 7019 of 2005[[6]](#footnote-7), the* 5 member constitutional bench of the Supreme Court of India, after considering various previous decisions, concluded that the Indian Arbitration and Conciliation Act of 1996 should be interpreted in a manner to give effect to the intent of the Indian Parliament. This decision has played a major role in reversing the earlier interventionist trend being pursued by Indian courts, particularly in respect of international commercial arbitrations and has opened new avenues for India to develop as an arbitration friendly economy.

**IV. JUDICIAL INTERPRETATION AND INTERVENTION IN ARBITRATION IN INDIA:**

"It is equitable to be willing that a difference shall be settled by discussion rather than by force; to agree to arbitration rather than go to Court – for the arbitrator looks to what is equitable, the judge to what is law; and it was for this purpose that arbitration was introduced, namely, that equity might prevail."[[7]](#footnote-8)

The fundamental basis upon which Alternate Dispute Resolution is founded is, “The freedom of parties", also recognized as “party autonomy”. In contracting to resolve their disputes through Alternate Dispute Resolution, the parties have specifically rejected the mechanism of Courts.  Unfortunately, the Courts in India are not willing; despite such express rejection by the parties, to give up their power of control over Alternate Dispute Resolution. Courts undoubtedly have, and must have, supportive and supervisory powers over Arbitration. Review of some of the Judgments of the Supreme Court evidences this approach.

In the case of *ONGC v Saw Pipes Ltd.[[8]](#footnote-9)*, the Supreme Court opened up the floodgates of challenge to awards under the 1996 Act, by widening the scope of the term 'public policy of India'. The Court held that the expression 'public policy' must not be given a narrow but a wide meaning and that in addition to the grounds, for challenge to Award, enumerated under the 1996, Act, an award could be set aside if it was found to be 'patently illegal'. This judgment has had the effect of making more and more awards vulnerable at the hands of judges, and an increasing number of awards languished in the Courts, thus effectively defeating the purpose of the Act which was to enable a quick and decisive outcome, with absolutely minimal judicial interference.

Coupled with this is instant stay of the Awards, mostly automatic and sometimes specific, due to serious lacuna in Section 34 as even lamented by the Supreme Court in *National Aluminium Co. Ltd. vs Pressteel & Fabrications (P) Ltd.[[9]](#footnote-10)* The Awards are stayed unconditionally and the challenges can be heard only in course of time, and may be in a decade.

The judgment of the Supreme Court in *Bhatia International v Bulk Trading S. A.* and another[[10]](#footnote-11) is an important decision that has a bearing on international commercial and legal dealings with India. The Supreme Court held that Part I of the Arbitration and Conciliation Act which gives effect to the UNCITRAL Model Law and which confers power on the Court to grant interim relief applied even to arbitrations held outside India. The Court held that “*by omitting to provide that Part I will not apply to international commercial arbitrations which take place outside India, the effect would be that Part I would also apply to international commercial arbitrations held out of India*." This is an interpretation that appears to be contrary to the Constitutional mandate that the jurisdiction of Indian Courts is limited to the territory of India. Therefore, by virtue of the decision in Bhatia International an Indian Court would have jurisdiction before as well as during the arbitration proceedings, irrespective of the fact that such proceedings were held outside India. Thus, the internationally accepted and applied doctrine of ‘Law of the Seat’, was rendered ineffective by this order of the Supreme Court.

In a comment on judicial pronouncements on arbitration law in India and in an obvious reference to the Bhatia International case, Lord Mustill remarked:

*"Naturally, the Courts of India are free to interpret the Acts by which they are governed in any way which they consider fit. It would be an impertinence to suggest otherwise. But it may perhaps be enquired whether it is in the long term interests of India not only to hold that on the true construction of the Statute there is jurisdiction in its Courts to exercise an extraterritorial power to control by injunction, or in other ways. The conduct of pending arbitrations overseas governed by a jurisprudence of arbitration worldwide is unanimous in rejecting the right of Courts to interfere in pending arbitrations even within their own jurisdiction. How much more reticence may be required when the parties have agreed that disputes shall be resolved elsewhere?"* [[11]](#footnote-12)

Another major setback to the principle of exclusion of judicial intervention and the concept of kompetenz kompetenz was the judgment of the Supreme Court in the Patel Engineering case of 2005 (SBP and Co. v. Patel Engineering Ltd).[[12]](#footnote-13) In this case, while interpreting Section 11 of the Arbitration Act relating to the appointment of an Arbitrator, the Supreme Court held that the power to appoint an Arbitrator is a judicial power, not an administrative one. In the process, the Supreme Court opened up the floodgates by holding that in an application under Section 11, the Chief Justice or his designate can decide whether there is a valid arbitration agreement, whether the applicant is a party to the arbitration agreement, whether there was a dispute subsisting between the parties and whether the same was capable of being arbitrated upon. The Supreme Court held that under Section 11 (6), the Chief Justice can also decide whether the claim was a dead one or a time barred one or whether the parties had concluded the transactions by recording satisfaction of their mutual rights and obligations.

Section 16, based on article 16 of the Model Law, is virtually made redundant. The Judgment creates artificial dichotomy between parties going to arbitration directly and those going through Court via section 11. Could this have been envisaged at all? And where was the need? Result is obvious and disturbing. Every request for appointment of an Arbitrator under section 11, otherwise routine, is now being converted into full scale trials, even some times justifying requests for adducing oral evidence.

This judgment is a serious inroad into arbitral autonomy and the Supreme Court itself in subsequent orders under Section 11 is still coming to terms with its ramifications, treating the judgment with varying degrees of caution and circumspection.[[13]](#footnote-14)

The Division Bench of the Delhi High Court in a recent judgment in the case of *International Amusement Ltd. Vs. ITPO[[14]](#footnote-15)*, while interpreting the aforesaid judgment of the Supreme Court in Patel Engineering Case has gone one step ahead and held that even in those matters where application for appointment of Arbitrator (Section 11) has been disposed of, the said order disposing of the said application was open to judicial review under the constitutional powers exercised under Article 226 and 227 of the Constitution of India. That apart, there are several examples of Courts including the Supreme Court having granted anti-arbitration injunctions, including in International commercial Arbitrations taking place outside India. There are also instances of High Court permitting intervention under the guise of grounds for challenge to award in respect of decision of the arbitral tribunal on the maintainability of a claim, even before the final Award has been rendered[[15]](#footnote-16). Applications for enforcement of Awards including foreign awards were treated and disposed off like regular suits and that too after years. In fact another disturbing and debatable judgment of the Supreme Court rendered in the context of enforcement of the foreign award is in the case of *Shin-Etsu Chemicals Vs. Aksh Optifibre Ltd.[[16]](#footnote-17)* wherein a full scale trial at enforcement stage has been recommended. Supreme Court in *Sukanaya holdings P. Ltd. Vs. Jayesh Pandya[[17]](#footnote-18)* has further detrimental effect on arbitration proceedings, in as much as the said judgment in terms hold that even if a part of the subject matter preferred before a judicial authority is covered by the Arbitration Agreement, the same cannot be referred to arbitration as there cannot be a split in the cause of action. The Court has overlooked the principle underlying Section 8 of the Act, viz., to stay the trial pending arbitration and not otherwise. Again, the Supreme Court has brought out new dichotomy in Section 8, wholly unwarranted and undesirable.

 Throughout, the Asia Pacific region, except to some extent in China, the approach of the Judicial Systems is exactly opposite; Robust and Arbitration Friendly. From New Zealand and Australia to South Korea and Japan to Singapore and Hong Kong, the Courts have continually striven to uphold “Party Autonomy” to resolve their disputes.[[18]](#footnote-19)

In keeping with the global trend on arbitration and after much reluctance both on part of the legislature as well as the judiciary, recently the Supreme Court of India took corrective steps to undo the interventionist jurisprudence that had come about in the aforesaid judgments. In the case of *Bharat Aluminum Company Vs. Kaiser Aluminum Technical Services Inc., Civil Appeal No. 7019 of 2005[[19]](#footnote-20)*, the 5 member constitutional bench of the Supreme Court of India, after considering various previous decisions, held that Part-I of the 1996 Act which applied to domestic arbitrations, could not be extended under any circumstance to an international commercial arbitration, having its seat outside India as it was expressly covered by Part – II of the 1996 Act, dealing with international arbitrations. The Supreme Court embarked on a landmark ruling that further went on to limit the intervention by India courts in such international arbitrations, in the name of interim measures and challenge to the award, by further holding that the court at the seat of arbitration would have jurisdiction to decide and dispose of such issues. Thus, the principle of law of the seat was given its due recognition in Indian arbitration jurisprudence. The said judgment set aside the earlier view taken by the Supreme Court under Bhatia International’s case and also made certain suggestions with regard to improving the arbitration scenario in India, especially with respect to international commercial arbitrations.

**V. MY SUGGESTIONS TO MAKE INDIA AN ARBITRATION FRIENDLY DESTINATION FOR INTERNATIONAL COMMERCIAL ARBITARTION:**

1. Although legislation and center have made immense contribution in the recent part as explained herein above the most important contribution to litigation are the members of the Bar. It is their mind set which reads to undergo a revolutionary change. They must advise their clients for a equitable settlement through ADR system.

2. We need to develop full time arbitration and Counsel who only practice Arbitration. Part time Arbitrators including retired Judges of High Courts and Supreme Court must take a back seat.

3. All Government Departments, Public Sector Undertakings must also give up on their age old practice of having stereo typed Arbitration Agreements where their own Officers are appointed sole Arbitrators.

4. More emphasis should be given to institutional Arbitration. The effort of Delhi High Court in setting up of Delhi High Court International Arbitration Center is to be lauded.

5. At this juncture, I would like to refer to the reasons why India has not been able to establish a universally acceptable system of Arbitration given by Mr. F. S. Nariman, Senior Advocate at the LCIA Annual Arbitration Lecture held in New Delhi on February 12, 2011 are extremely important and I shall now briefly refer to them.

i. There should be an exclusive forum for enforcing or not enforcing foreign Awards in India like the Swiss Legal System or the system followed in China where whether a foreign Award has to be enforced or set aside. It must compulsorily be referred to people of Supreme Court in Beijing.

ii. Arbitrators in India should take recourse to conciliation and mediation as it is done in Hong Kong.

iii. Retired Judges of the High Courts and Supreme Court did not always appreciate ethos of Arbitration therefore they should not be frequently appointed as Arbitrators which is the normal practice in India.

iv. Indemnity cost should be awarded against unsuccessful party who has tried to challenge or resist the enforcement of the Arbitral Award.

v. This is a practice which is followed in Hong Kong and has been adopted in Australia as well.

vi. One of the main reasons why arbitration has not been so successful in India is because there is no exclusive arbitration bar i.e. a bar comprising of Lawyers or experienced layman and experts who regularly practice and plead before the Arbitrators.

vii. It is essential for successful arbitration that there must be good Arbitrators.

viii. There should be support for emergence and recognition of a hardcore or elite core of international Arbitrators

ix. We must develop spirit of arbitration i.e. that we must also learn to be good losers when we embark on arbitration.

x. Savaging arbitration in India is not possible until three decisions of the Supreme Court are consigned to the dustbin of history:-

a. Bhatia International (2002)

b. Saw Pipes (2003)

c. Global Venture (2008)

xi. Domestic arbitration should be segregated from international arbitration as has been done in many parts of the world.

It is heartening to know that out of the reasons given above at least the Supreme Court of India has done its job by setting aside Bhatia International (2002) and Global Venture (2008) by a Constitution Bench Judgment rendered in Bharat Alumunium Company Vs. Kaiser Aluminium Technical Services.

**VI.** **CONCLUSION:**

In conclusion, one can only expect that the evasion of arbitration practice in India would improve at a greater pace or one could say the pace with which it is already changing will have to be further exhilarated.

The journey from 1940 to 1996 and then thereafter has not been easy but is quite clear that India is not going to remain behind the rest of the world and we shall endeavor to see the day when India marches shoulder to shoulder with the rest of the world.

---------x---------

1. K Ravi Kumar, ‘Alternative Dispute Resolution in Construction Industry’, International Council of Consultants (ICC) papers, [www.iccindia.org](http://www.iccindia.org). at p 2. K Ravi Kumar is Assistant Executive Engineer, Salarjung Museum, Hyderabad. [↑](#footnote-ref-2)
2. Arbitration & Conciliation Act, 1996, statement of objects and reasons. [↑](#footnote-ref-3)
3. The full report of the 176th Report of Law Commission of India available at www.lawcommissionofindia.nic.in [↑](#footnote-ref-4)
4. The Arbitration & Conciliation (Amendment) Bill, 203 was introduced in Parliament on December 22, 2003 – available at – [www.lawmin](http://www.lawmine).nic.in [↑](#footnote-ref-5)
5. Data collected from Arbitration Journals between 2004-2005. [↑](#footnote-ref-6)
6. (2012) 9 SCC 552 [↑](#footnote-ref-7)
7. Aristotle, *The Rhetoric of Aristotle*, Book I, Ch 13, D Appleton – Century Company, New York, 1932.  [↑](#footnote-ref-8)
8. (2003) 5 SCC 705  [↑](#footnote-ref-9)
9. (2004) 1 SCC 540 [↑](#footnote-ref-10)
10. (2002) 4 SCC 105 [↑](#footnote-ref-11)
11. Foreword by Lord Mustill to *The law and Practice of Arbitration and Conciliation* , 2nd Edition, by OP Malhotra and Indu Malhotra. [↑](#footnote-ref-12)
12. (2005) 8 SCC 618.  [↑](#footnote-ref-13)
13. (2006) 4 SCC 372, (2006) 10 SCCC 763, (2006) 11 SCC 651, (2006) 5 SCC 501, (2007) 4 SCC 599 [↑](#footnote-ref-14)
14. Judgment Dated 16.07.2007 in Writ Petition No. 2015 of 2001 [↑](#footnote-ref-15)
15. NTBCL Vs. Mitsui Marubeni Corporation – (2005) 3 ALR 234 [↑](#footnote-ref-16)
16. (2005) 7 SCC 234 [↑](#footnote-ref-17)
17. Sukanaya Holding P. Ltd. Vs. Jayesh Pandya – (2003) 5 SCC 531 [↑](#footnote-ref-18)
18. Article by Christopher Lau Titled “International Arbitration in Asia Pacific: Regional Overview and Recent Developments - reported in The International Comparative Legal Guide to: International Arbitration 2007. [↑](#footnote-ref-19)
19. Supra Footnote 6 [↑](#footnote-ref-20)