Address by Shri Rajiv Dutta, Senior Advocate - Supreme Court of India, on the topic "Roadmap to a World Class Arbitration System" at the Rule of Law Convention – 2014; organized by the Bar Association of India, on 14th September, 2014. at India Habitat Centre, Lodhi Road, New Delhi - 110003.

I. INTRODUCTION:-

I, am thankful for this invitation, to speak before this distinguished audience, today. I congratulate the Bar Association of India, for organizing the Rule of Law Convention - 2014, which is yet another attempt to infuse positive thinking through debate and deliberation with an intent to usher in changes towards creating a world class justice delivery and legal system.

> *"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."* [1]

So far, India has failed to set up a world class Arbitration system - There may be a multitude of reasons for that, but what is worthy of appreciation is the fact that, there is a strong desire within and without the legal community to develop a world class Arbitration system in India. However, the process has been slow and progress though made, is not

[1] Aristotle, *The Rhetoric of Aristotle*, Book I, Ch 13, D Appleton – Century Company, New York, 1932.

satisfactory enough so as to be able to bridge the gap between the rest of the world and India.

II. ROAD FROM PAST TO PRESENT OF INDIAN ARBITRATION:-

To pave the road for a world class Arbitration system, let us first analyse as to what has been the place of Arbitration in our system.

In the year 1899, the Legislative Council for India set up by the British Government enacted the Indian Arbitration Act, 1899. This was substantially based on the British Arbitration Act, 1889. The Application of this Act was confined however only to the Presidency towns i.e. Calcutta, Bombay and Madras. The working of this Act presented many problems owing to which judicial opinion started voicing its displeasure and dissatisfaction with this Act. The provisions relating to arbitration were later on enacted in the second Schedule of the new Code of Civil Procedure, 1908 which repealed the Code of Civil Procedure, 1882. The law of arbitration was contained in the first Schedule of this Code and was extended to other parts of India whereas, the second Schedule to this act dealt with arbitration outside the operation and scope of the 1899 Act. This Schedule in a way supplemented the provisions of the Arbitration Act, 1899 but even these measures proved to be far from satisfactory. Subsequently, the Geneva protocol on Arbitration Clauses, 1923 and the

Geneva Convention on the execution of Foreign Arbitral Awards, 1927 were implemented in India by the Arbitration (Protocol and Convention) Act, 1937. India became a signatory to the clauses set forth in the second Schedule to this Act. It is significant to mention that, this Act applied only to such matters that were considered commercial under the law enforced in India. The outcry of the commercial community led to the enactment of a consolidating and amending legislation namely the Arbitration Act of 1940. This Act was supposed to be a comprehensive and a self-contained code. After the end of second world war in 1945 and particularly after independence in 1947, industry and trade in India started progressing at a swift pace and men of commerce and industry began to be more inclined towards arbitration for settlement of their disputes, in view of its relative cost and time advantages over litigation. There were, however many lacunae in this Act. Since, India was a signatory to the New York Convention of 1958 which has been described by Lord Mastil "*as the most effective instance of international legislation in the entire history of commercial law*". The Foreign Awards (Recognition and Enforcement) Act, 1961 was enacted with the main object of giving effect to this Convention. The Supreme Court of India in *Renusagar Power Company Ltd. Vs. General Electric Company and another - (1984) 4 SCC 679* concluded that, the object of this legislation was to facilitate and promote international trade by providing for speedy settlement of disputes in trade

through arbitration. This was also a successor to Geneva Convention. The Law Commission of India in the year 1978 by its Report suggested extensive amendments in the 1940 Act, taking into account commercial realities, in order to settle the conflicting decisions of various points. In the case of *Raipur Development Authority Vs. Chokhamal Contractors etc. etc. - AIR 1990 SC 1426*, the Supreme Court of India noted with disgust that, the dispute resolution system has acquired a certain degree of notoriety by the manner in which, in many cases, the financial interests of Government has come to suffer by awards which have raised eye-brows on account of doubts raised as to their rectitude and propriety.

The United Nations Commission on International Trade Law (UNCITRAL) was established by the General Assembly of the United Nations in December, 1966 with the object of harmonizing and promoting the law relating to international trade.

The UNCITRAL Model Law on Arbitration and Model Rules on arbitration are also significant international instruments on arbitration. Many national legal systems have amended their Arbitration Acts in line with the UNCITRAL Model. The General Assembly of the United Nations recommended to all the States throughout the world to enact model arbitration legislation, based on the model law.

In the year 1996, the Arbitration Act, 1940 was amended to bring it in line with the rest of the international world as India was emerging as a global leader and international trade and commerce was growing rapidly. Therefore, one could safely presume that, this was probably the first step, taken towards modernizing the arbitration regime in India, to bring it up to standard with the concept and regime of arbitration, existing in the developed world .

The Law Commission of India had recommended the need for replacing the arbitration law, also the worldwide recognition of conciliation as an instrument of alternate dispute resolution, was given full recognition. The constitutional validity of this act was upheld by the Supreme Court of India in the case of *Babar Ali Vs. Union of India and others - (2000) 2 SCC 178*. The Act is divided into Part - 1 and Part - 2. Part - 1 comprises of 43 Sections and deals mainly with the domestic arbitration and international commercial arbitration held in India whereas Part - 2 relates to enforcement of certain foreign awards and Part - 3 deals with conciliation.

The working of the aforesaid Act during the last 18 years has not been a very happy situation. The judgments rendered by the Supreme Court of India in the cases of (1) *Bhatia International Vs. Bulk Trading S.A. and another - (2002) 4 SCC 105*, (2) *Venture Global Engineering Vs Satyam Computer Services Ltd. and another - (2008) 4 SCC 190* and (3) *Oil &*

Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd. - (2003) 5 SCC 705 led to a very sharp criticism about the enforcement of this Act within the country as well as outside and finally the Supreme Court of India had to constitute a Constitution Bench of 5 Hon'ble Judges to re-consider the aforementioned judgments and finally in the case of *Bharat Aluminium Co. Vs. Kaiser Aluminium Technical Services Inc. - (2012) 9 SCC 552* following the doctrine of prospective overruling the Supreme Court of India held that, the judgments in Bhatia International which was delivered in the year 2002 and Venture Global which was delivered in the year (2008) had laid down incorrect position in law will continue to prevail with regard to Part - 1 of the Act where the seat of arbitration is within India but where is seat of arbitration is outside India Part - 1 will have no application whatsoever. Thus, the concept of 'law of the seat' finally and duly echoed in the arbitration practice and law in India and territoriality principles, which were recognized worldwide came to be accepted as a reality of international commercial arbitration, in India. BALCO declared that, the law laid down would have only prospective effect and would apply to all arbitration agreements entered into after the date of judgment i.e. September 06, 2012. Having crossed the Bhatia International hurdle, came the judgment in the case of *Shri Lal Mahal Limited Vs. Progetto Grano Spa - (2014) 2 SCC 433* - But before referring to the judgment in the Lal Mahal case, let's not forget the words of Hon'ble Mr. Justice S.B. Sinha in the

case of *Mcdermott International Inc. Vs. Burn Standard Co. Ltd. and others - (2006) 11 SCC 181*. He said and I quote:-

> *"The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The Court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."*

Now coming to *Shri Lal Mahal Limited Vs. Progetto Grano Spa - (2014) 2 SCC 433*, the Supreme Court of India in para-47 of the judgment said and I quote:-

> *"47. While considering the enforceability of foreign awards, the court does not exercise appellate jurisdiction over the foreign award nor does it enquire as to whether, while rendering foreign award, some error has been committed. Under Section 48(2)(b) the enforcement of a foreign*

award can be refused only if such enforcement is found to be contrary to: (1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. The objections raised by the appellant do not fall in any of these categories and, therefore, the foreign awards cannot be held to be contrary to public policy of India as contemplated under Section 48(2)(b)."

I am reminded of the words of Mr. Fali Sam Nariman, Senior Advocate who while delivering the first LCIA Annual Arbitration Lecture held in New Delhi on 12th February, 2011 said, if Arbitration has to succeed in India, the following should happen, and I quote:-

"Salvaging arbitration in India is just not possible until three decisions of the Supreme Court are consigned to the dustbin of history – either by requesting the Court to constitute larger Benches to review them (which appears to me to be unlikely); or approach the Law Minister to introduce legislation for this purpose. This is also a task which LCIA India could undertake in a detailed paper objectively setting out the problems arising from these three decisions: they are: Bhatia International (2002); Saw Pipes (2003); and Venture Global (2008); they have totally messed up our law of Arbitration."

It appears that, as far as the Courts are concerned, they have realized and given recognition to enforce in India Arbitration Law in *pari metaria* with the rest of the world. The jurisprudence of arbitration worldwide is unanimous in rejecting the rights of the Courts to interfere in pending arbitrations even within their own jurisdiction. Thus of the many suggestions given by Mr. Fali Sam Nariman, Senior Advocate we have crossed one major hurdle[2].

III. WAY AHEAD - EFFECTIVE SUGGESTION:-

Having said the above, let me tell you what are the steps in my humble opinion which are required to be taken forthwith to strengthen the law of Arbitration in India.

- The Law Commission recommendations for amendment of the Arbitration and Conciliation Act, 1996 should be enforced forthwith. I am aware that, after due deliberations with necessary parties, Law Commission has forwarded its recommendations to the Government of India in the month of August, 2014. Now, it is left to the Government to prepare a Bill and introduce it in the Parliament for its approval, for it to become the Law. The amendments sought are all based on the past eighteen years of various interpretations given by the courts all over India, and are aimed at removing the lacuna in this

[2] LCIA Annual Arbitration Lecture held in New Delhi on 12th February, 2011.

Act. This will ensure that, we are now at par with the rest of the world as far as law is concerned. It is my opinion that, domestic Arbitration Law should be separated from International Commercial Arbitration, by enacting two separate statutes, just like the Singapore Model. A lot of problems have arisen in the past due to mixing of the two.

- We have to keep in mind that, in case of Arbitration and specially International Commercial Arbitration, we should stop experimenting and stop the practice of what we want Arbitration to be and rather adopt the practice(s) which are prevailing world over.

- Now even if the law is amended as I have said above in my humble opinion nothing is going to change on the ground because as has been very often said the first thing to remember is that, Arbitration is only as good as the Arbitrator and hence the need to create condition for appointment of fair, independent, impartial, qualified and modern arbitrator is the need of the hour. Even as late as the year 2009, Supreme Court in the case of "*Indian Oil Corporation Ltd. and others Vs. Raja Transport (P) Ltd. - (2009) 8 SCC 520*" held that :-

> "*We find no bar under the new Act, for an arbitration agreement providing for an*

employee of a government/ statutory corporation/ public sector undertaking (which is a party to the contract), acting as Arbitrator.

- Arbitrators sitting in arbitrations must confine themselves to the role of an arbitrator assigned to them by the parties and should not carry forth their past experiences as constitutionally appointed judges, while sitting as arbitrators. It is often noticed by those closely involved in the practice of arbitration, in India, that erstwhile officers of the court, carry forth a judicial attitude and very often are unable to detach themselves from their preference for court procedure in dealing with arbitration, which renders the effectiveness of an alternate mechanism such as arbitration a nullity and essentially makes it a disguised form of litigation.

- Another area of concern is the fact that members of the bar i.e. lawyers themselves treat arbitrations as post 4 pm sessions and thus, unless we develop a committed arbitration bar within the existing legal system it is highly unlikely that arbitration will get its due.

- The International Bar Association has created a list, the Orange list and the Red list that, the Arbitrators must look to before deciding to become Arbitrators.

- International Commercial Arbitration will not succeed in India until we realize the impact of missed opportunities. If Singapore, Hong Kong, Malaysia, China are able to instil the confidence in the needs of commercial world why can't we. It is an acknowledged fact that, more than 40% of the load of cases referred to (Singapore International Arbitration Centre (SIAC) are from India. International Commercial Arbitration has now acquired a status of global acceptability.

- Institutionalization of arbitration in India is the need of the hour. It will lend the much needed professionalism, efficiency and certainty to arbitral proceedings. Confidence in the system will itself deter judicial intervention.

- Before the Courts embark upon proceedings in a Civil Case, it should be made mandatory that, the parties are made to go through Alternate Dispute Resolution Mechanism; Court enforced mechanism is of great value, but a process which will establish communication between parties

will lead them to a better path, which will solve many problems that arise only on account of trivial disputes.

IV. CONCLUSION:-

We have come quite a distance from the first conception of arbitration in British India, but the need is to take the next leap and make arbitration as an effective alternate to litigation, which will not only serve to lessen the ever increasing bulk of cases in the judicial forums but also serve as an effective resolution mechanism to the parties. The Bar must contribute therefore, towards this endeavour and practitioners need to treat alternate dispute resolution mechanisms as a reality and need of the commercial world we live in. After all the change in order to remain effective and be realised in totality, must surely come from within. As members of the legal system we have a duty to play a part in building up a system that delivers justice in a quick, decisive and cost effective manner. Warren Burger, former Chief Justice of the Supreme Court of the United States of America had lamented in an address to the American Bar Association:

> *"The entire legal profession has become so mesmerized with the stimulation of the Courtroom that we tend to forget that we ought to be healers of conflicts. For many claims, trials by adversarial contests must in time, go the way of the ancient trial*

by battle and blood. Our system is too costly, too painful…As healers of human conflicts, the obligation of the legal profession is to provide mechanisms that can produce an acceptable result in the shortest possible time with the shortest possible expense and the minimum of stress on the participants. That is what justice is all about."

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