FINDING HARMONY WITH UNCITRAL MODEL LAW: CONTEMPORARY ISSUES IN INTERNATIONAL COMMERCIAL ARBITRATION IN INDIA AFTER THE ARBITRATION AND CONCILIATION ACT OF 1996

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Abstract: India’s international commercial arbitration system has undergone substantial changes over the past decade with India’s sudden emergence as a global economic power. The Arbitration and Conciliation Act of 1996 was enacted in response to address extreme latency in the court system, attract foreign direct investment, and to establish India as a viable forum for international commercial arbitration. While the enactment of the 1996 Act has proven largely successful on these fronts, significant problems remain in providing interim measures of protection, enforcing and challenging arbitral awards, defining arbitral subject-matter, challenging and removing biased arbitrators. Not coincidentally, tensions remain greatest in areas which depart from United Nations Commission on International Trade Law (UNCITRAL) Model Law. An underlying issue throughout arbitration reform is the extent of the involvement of the Indian judiciary which threatens the very autonomy that the 1996 Act sought to usher forward. The author concludes that the Indian arbitration movement should adhere as closely as possible to the mandates of UNCITRAL Model Law in order to establish predictability into a system that has long been without it.

INTRODUCTION

India’s adoption of the Arbitration and Conciliation Act of 1996 (“1996 Act”), has greatly enhanced its reputation in the eyes of the international business community as a viable forum for commercial

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arbitration disputes.\(^1\) Prior to the adoption of the 1996 Act, Indian rules of arbitration were contained in three different enactments, namely, the Arbitration Act of 1940, Arbitration Act of 1937, and the Foreign Awards Act of 1961.\(^2\) Arbitration under these measures was widely considered to be archaic, unpredictable, untimely, and expensive, thereby discouraging foreign investment.\(^3\) In response, India adopted the 1996 Act, based on the United Nations Commission on International Trade Law’s (UNCITRAL’s) Model Law on International Commercial Arbitration and Conciliation Rules (“Model Law”). The 1996 Act ushered in a vital new era in the Indian arbitration movement.

Now a decade after its adoption, the majority response to the 1996 Act among legal commentators and the international business community has been overwhelmingly positive.\(^4\) The 1996 Act has admirably achieved two goals. First, it has unified the legal regime surrounding arbitration for both domestic and international arbitration conducted in India.\(^5\) Second, it has improved arbitral efficiency by reducing the need for judicial intervention, enforcing awards as judicial decrees, and granting greater

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2. See id.
4. The vast majority of the research conducted for this comment begin with the idea that the adoption of the 1996 Act was a major step forward in modernizing India’s arbitration regime.
5. See Krishan, Ranbir. *An Overview of the Arbitration and Conciliation Act 1996*. 21 J. Int'l Arb. 263, 265 (No. 3, 2004). (stating the objects and reasons behind the adoption of
autonomy to arbitral tribunal decisions. The result has been a fairer, efficient, and predictable procedure that is better equipped to handle India’s unprecedented rise in international commercial transactions.

Nevertheless, there remain a few chinks in the armor of the 1996 Act. Tensions continue in areas that depart from Model Law such as the court’s role in granting of interim measures, enforcement and challenge of foreign arbitral awards, arbitrability of disputes, and challenge of biased arbitrators are areas that either depart from or remain in significant tension with the Model Law. This has raised concerns that India’s transformation into a dependable forum for international commercial arbitration may still fall short of international standards. Underlying these problems is the courts’ ongoing struggle with relinquishing control and giving primacy to the arbitral process pursuant to international standards (i.e. Model Law or institutional arbitral bodies).

The purpose of this comment is to provide a general picture of international commercial arbitration and the rules it abides by, to offer a context of the forces underlying India’s adoption of the 1996 Act, and to explore the contemporary problems under the 1996 Act, while providing suggestions where possible for resolving those problems. Part II explains why arbitration has become the de facto choice for parties seeking

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6 Id.
international commercial dispute resolution, provides a short overview of the UNCITRAL Model Law framework from which the 1996 Act substantially borrows, and offers a historical perspective of the rise of commercial arbitration in India and the economic pressures driving system reform. Part III examines the contemporary issues in international commercial arbitration under the 1996 Act and explores possible solutions.

I. BACKGROUND

A. To Arbitrate or Not to Arbitrate

The tremendous expansion of international commerce in the past sixty years has fueled an increased need for dispute resolution distinct from public litigation.\textsuperscript{7} Commercial arbitration has fast become the preeminent means of dispute resolution between transnational trading partners because it greatly reduces the complexities, time-drain, and expense associated with traditional litigation.\textsuperscript{8} A defining characteristic of international arbitration is its non-governmental nature and the parties’ ability to dictate through contractual agreement the scope of settlement.\textsuperscript{9} A brief description of some of the chief advantages and disadvantages are:


Advantages

1. Neutrality: Basic fairness and risk of bias in a foreign court system is of great importance and concern to parties. Parties may feel misgivings with regard to the judiciary and independence of the other party or may simply feel uncomfortable in the legal system and culture of the other party. Arbitration gives each party an unbiased forum for dispute resolution by allowing them to accept a neutral forum on negotiable terms.

2. Speed and Cost: Streamlined and less formalized discovery procedures and simplified evidentiary rules facilitate time and cost efficiency.

3. Customization and control: Arbitration allows each party to have a great deal more control over the nature and conduct of the proceedings than traditional court proceedings. Each party is free to choose procedural matters to be employed, the rules pertaining to taking

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11 See James Huleatt & Nicholas, Gould *supra* n. 9, at 4.
12 See Reddy & Nagaraj, *supra* n. 10, at 118.
13 See *id*.
testimony, evidentiary matters, presiding arbitrators, language, interim measures, substantive law, and the degree of procedural formality.\(^\text{15}\)

4. **Confidentiality**: International commercial arbitration may involve commercially sensitive information that parties prefer to keep confidential. Arbitration allows for confidentiality because most arbitral hearings remain closed, and awards are generally kept confidential unlike traditional courts where hearings are open and awards and decisions are published.\(^\text{16}\) Arbitration gives a level of confidentiality that courts cannot offer.

5. **Expertise**: Litigants in court often find that the judge or fact-finder lack the expertise in a specialized subject area needed in making a well-reasoned decision.\(^\text{17}\) Arbitration allows the parties to choose an arbitrator with the requisite technical knowledge and experience enhancing the quality of decision making in many cases.

6. **Enforcement**: Traditional court systems do not have a system of enforcing judgments internationally which may result in great time and

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\(^{15}\) Reddy & Nagaraj, *supra* n. 10, at 118.

\(^{16}\) See *id.*

\(^{17}\) See *id.* at 119.
expense for a litigant seeking enforcement.\textsuperscript{18} Thus, foreign arbitral awards are generally easier to enforce at a lower cost.

7. **Finality**: The arbitrator’s decision is final and binding. This usually eliminates lengthy and expensive appeals.

**Disadvantages**

However, arbitration may not always be best alternative. Some of the disadvantages peculiar to international arbitration are:

1. **Lack of authority to grant specific remedies**: Arbitrators lack the power to grant coercive relief such as permanent injunctions, or order specific performance, or award punitive damages under a tort theory.\textsuperscript{19}

2. **Unenforceability for reasons of public policy**: Parties may choose to draft choice of law provisions that allow them to circumvent the laws of the situs. Such awards that result from such provisions may be found to unenforceable against public policy.

\textsuperscript{18} See id.
\textsuperscript{19} See id. at 120 (stating that in most cases the arbitrators lack the power to grant
3. **Conflict of laws problems**: The inclusion of several legal regimes into the arbitration proceeding complicates the issues of private international law for the arbitrator. For instance, an action for arbitration may include law of contract, law of the arbitration agreement, law of situs, law of situs of enforcement, etc.\(^{20}\) An arbitrator may lack the expertise to address the legal complexities of the proceeding.\(^{21}\)

4. **Non-arbitrability**: States may decide that certain areas are of exclusive jurisdiction of state courts. Where the arbitral agreement concerns itself with exclusive state jurisdiction, the arbitral agreement is unenforceable and void.

5. **Cost**: Cost may be an issue where parties fail to tailor their proceedings causing unnecessary delays and adding to the expense of the arbitration proceeding. Also, arbitrator fees may be expensive and even more so where a three-arbitrator panel is chosen.\(^{22}\)

Disadvantages notwithstanding, the benefits of arbitration in the vast remedies that courts are normally able to grant).

\(^{20}\) *Id.* at 120.

\(^{21}\) *Id.*

\(^{22}\) See Krishan, Ranbir, *supra* n. 5, at 277 (stating that the tendency of the parties is to appoint High Court/Supreme Court judges as arbitrators whose high fees contribute to costs making it potentially more expensive than litigation); see also Reddy & Nagaraj, *supra* n.
majority of cases outweigh the benefits of litigation. Therefore, arbitration will likely remain the most viable alternative to court-based litigation for the foreseeable future.

B. International Commercial Arbitration under UNCITRAL Model Law

An understanding of the form and function of the UNCITRAL Model law is relevant to understanding India’s arbitration framework because the 1996 Act is based substantially on the Model Law.

UNCITRAL promulgated the Model Law on International Commercial Arbitration in June 1985 in response to the lack of uniformity in international commercial arbitration. The Model Law harmonizes arbitration concepts of different legal systems of the world thus allowing it to be universally applicable. Currently, fifty countries and/or territories have based their international arbitration legislation on the UNCITRAL Model Law on International Commercial Arbitration, and one-hundred and thirty seven countries are signatories to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York”)

10, at 120 (stating that international arbitration is extremely expensive and the cost often offsets the advantages of speed and flexibility)

23 Id. at 264.

24 Id. at 265.

The Model Law’s stated goals envision an arbitral procedure which is fair, efficient, and needs-focused to minimize the supervisory role of courts. Other goals include: (1) limiting the role of national courts and to give primacy to the will of the parties in establishing the procedure for the settlement of their disputes; (2) securing procedural fairness by means of a limited number of provisions from which the parties could not agree to depart; (3) putting in place rules which advances arbitration, even if the parties have not reached agreement on all relevant procedural matters; (4) enforcing court decrees as awards; and (5) that a settlement agreement reached by its conciliation proceedings would have the same status as an arbitral award. Also, Model Law was drafted so as to give the parties to the arbitration agreement as much autonomy as possible in drafting and carrying out their agreement. Model Law provides for flexibility by allowing countries to depart from the document to the extent it considers necessary to tailor the law to its needs.

With regards to jurisdiction, the Model Law is intended to be *lex specialis*, i.e. it is to be a special regime of law that prevails over any
contradictory domestic law that deals with the same subject. National laws dealing with subject matter not covered by the model law remain applicable; however, the Model Law does not prevail over treaties in effect in the adopting country.

Finally, the Model Law was designed for *ad hoc* arbitration (i.e. those in which the parties devise their own procedures) as opposed to “institutional” arbitrations (i.e. those in which parties conduct arbitration according to an arbitral institution such as International Court of Arbitration or American Arbitration Association). *Ad hoc* arbitration is more prevalent in private international arbitration mainly because of the high costs and time delays associated with the administrative style of institutional arbitration.

**C. The Rise of Commercial Arbitration in India**

This section discusses the historical origins of arbitration in India, the economic climate that served, and continues to serve, as an impetus to India’s evolving arbitration law, and the importance of adopting the 1996 Act as a corrective measure with regards to its previous arbitration regime.
1. Historical Roots

Although India has only recently experienced a major expansion into the areas of arbitration and conciliation, arbitration has long been recognized as a valid mechanism for dispute resolution. A three-tier structure of dispute resolution existed in ancient India closely related to modern-day arbitration called Panchayats. Historians have suggested that early Indian law-givers gave more importance to the resolution of disputes by arbitrators than through judges appointed by the King. The structure of Panchayats essentially survived until the arrival of the British in India when the traditional legal system underwent considerable change including codification of arbitration laws with the passage of the first Code of Civil Procedure of 1859.

The Indian Arbitration Act of 1899 was the first Indian legislation

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37 Raghavan, supra n. 3, at 6. The structure was comprised of the Puga, the Srenti, and the Kula, each representative of a class or locality of people.
38 Id.
devoted entirely to arbitration and was built on English common law principles.\textsuperscript{40} As the Act of 1899 was largely unsatisfactory,\textsuperscript{41} it was consolidated and amended by the Indian Arbitration Act of 1940 (“1940 Act”)—a code of arbitration that lasted for over fifty-years.\textsuperscript{42}

Laws pertaining to international commercial arbitration were initially addressed in the context of recognition and enforcement of foreign arbitral awards.\textsuperscript{43} India had become a party to the Geneva Protocol on Arbitration Clauses 1923, the Geneva Convention on the Execution of Foreign Arbitral Awards 1927, and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.\textsuperscript{44} Recognition of these frameworks came in three Acts: the 1940 Act, the 1937 Act, and the 1961 Act.\textsuperscript{45}

2. India’s New Economic Reality

A brief look at India’s remarkable economic success gives context and meaning to the adoption of the 1996 Act.
Much of India’s recent economic success is attributable to the New Industrial Policy of 1991 (NIP)—an economic liberalization strategy that sought to free its economy from the chains of over-regulation and bureaucracy. Following a near economic collapse in 1991, India adopted the NIP which brought its economy to a state of parity with other developed economies by introducing broad economic initiatives aimed at increasing foreign direct investment (FDI), privatizing India’s burdensome state-owned enterprises, and removing the myriad of restrictions on private sector business activity.

The NIP has certainly succeeded in its purpose as India has recently burgeoned into an economic giant. India has achieved better efficiency and harmony in world trade and continues to realize its vast economic

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45 See Bansal, supra n. 1, at 191.
47 See id. at 220-221 (explaining the background to a near economic collapse. India’s economy prior to the NIP consisted of socialistic goals prescribed in five major industrial policies from 1947 to 1980. These policies were designed to construct a self-reliant economy which empowered the government to play a heavy regulatory role in directing and regulating foreign investment. The government applied the regulations scrupulously such that foreign investment was near impossible for commercial lenders thus driving their investment money away. With foreign exchange reserves of less than a billion (two weeks worth of imports) and a soaring foreign debt (external debt service payments relative to current receipts was 35.3%) India’s economy was on the brink of default by the late 1980s).
49 Id. at 220.
The numbers give pause even to the most pessimistic of observers: India’s GDP currently ranks sixth in the world at $3.699 trillion; its combined markets grew at a robust 7.0% per annum over the last decade; and its productivity numbers rose to an industrious 4.1%. The economy is also showing signs of diversification as manufacturing output has risen to 9% per annum, close to catching its services sector at 10% per annum. Some observers predict that India’s economy will surge ahead of China’s economy within a few decades given its favorable demographics, its vast functioning democracy, and the eventual benefits of its economic reforms. As India continues to adopt the economic liberalization strategies of the NIP, India remains poised to become the next great economic power.

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52 Reddy & Nagaraj, supra n. 10, at 117.
57 Id. (arguing that a prime reason India is now developing into the world’s next big industrial power is that many global manufacturers are already looking ahead to a serious demographic squeeze facing China. Because of China’s “one child” policy, family sizes have been shrinking there since the 1980’s, so fewer young people will be available soon for factory labor.)
3. In Need of Arbitration Reform

The increase in FDI and international commercial transactions in India created a distinct pressure to improve on its mechanisms for dispute resolution system. With economic liberalization in full swing, the Indian legal system, infamous for its delays and unpredictability, was ill-equipped to deal with the impending increase of commercial disputes.\(^{59}\) Foreign investors who wished to resolve their dispute either by litigation or by alternative means under India’s infamously gridlocked court system could not afford to wait decades for a dispute to reach finality.\(^{60}\)

Arbitration under the previous laws governing arbitration (1940 Act, 1937 Act, and the various foreign arbitration conventions) provided a poor alternative and little guarantee that relief would be given quickly and effectively, if at all.\(^{61}\) Indian courts frequently failed to enforce arbitral awards, reconsidered arbitral decisions on the merits, and denied enforcement of awards as contrary to public policy.\(^{62}\) Arbitration was also painfully slow, often taking a decade or more to obtain and enforce an

\(^{59}\) See Baker, *supra* n. 56 (stating that “[C]onvenience and justice are not on speaking terms”).

\(^{60}\) Newsweek, *Unclogging the Courts* http://www.msnbc.msn.com/id/8525757/site/newsweek/from/RL.2/ (last visited 4/27/06) (reporting that India's lower courts currently have a backlog of about 20 million civil and criminal cases. An additional 3.2 million cases are pending before the high courts, while the Supreme Court has about 20,000 old cases on the docket. As a result, each case takes an average of 20 years to litigate).

\(^{61}\) Bansal, *supra* n. 50, at 67.

\(^{62}\) *Id.*
award\textsuperscript{63} deterring potential foreign investors from investing in India.\textsuperscript{64} Foreign investors who sought an efficient or, at the least, a predictable dispute resolution system, could take little solace when settling commercial disputes through arbitration in India. Thus, without the ability to resolve a dispute efficiently, full-scale investment in India was a risky proposition for international businesses.

4. Adoption of the 1996 Act as a Move Towards Consensus

The judiciary and business leaders called for arbitration reform as it became apparent that dispute resolution in India was a deterrent to foreign investment.\textsuperscript{65} Indian leaders converged in 1995 to revise the rules on commercial arbitration and to join international consensus on the issue.\textsuperscript{66} Consequently, the Minister of Law introduced the 1996 Act which was substantially based on UNCITRAL Model Law.\textsuperscript{67} The main aims of the 1996 Act were to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, and the enforcement of

\begin{itemize}
  \item \textsuperscript{63}Id.
  \item \textsuperscript{64}Bansal, supra n. 1, at 194 (stating that settling abroad was the only viable alternative).
  \item \textsuperscript{65}See Raghavan, supra n. 3, at 24 (emphasizing that the call for change was echoed by various associations of Indian industry and commerce as well as the Judiciary). See also Guru Nanak Foundation v. Rattan Singh and Sons, AIR 1981 SC 2075, 2076 in which the Supreme Court famously echoed the growing frustration at how arbitration in India took place: “[T]he way in which the proceedings under the [previous Acts] are conducted and challenged in Courts, has made lawyers laugh and legal philosophers weep.” See also Raipur Development Agency v. Chokhamal Contractors, AIR 1990 SC 1426.
  \item \textsuperscript{66}Motiwal, O.P. Alternative Dispute Resolution in India. 15 J. Int’l Arb. 117 (1998).
\end{itemize}
foreign arbitral awards. A further aim was to make provisions for a fair and efficient arbitral procedure in which arbitrators would need to give reasons for their conclusions.

The adoption of the 1996 Act was significant for two reasons. First, the 1996 Act unified three separate bodies of arbitration law by consolidating, repealing, and amending the previous law relating to domestic arbitration, international commercial arbitration, and the enforcement of foreign arbitral awards.

Second, adoption of the UNCITRAL Model Law brought efficiency and predictability where little existed before. The Model Law, already widely in use internationally, ensured India would be consonance with international standards of arbitration practice. Thus, in adopting the UNCITRAL Model Law, India’s arbitration system moved a step closer to gaining international acceptance.

II. CONTEMPORARY ISSUES OF INTERNATIONAL COMMERCIAL ARBITRATION UNDER THE 1996 ACT

The 1996 Act addresses both international and domestic arbitration. Part II of the 1996 Act pertains to international commercial arbitration.

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67 Raghavan supra n. 3, at 13.
68 Id.
69 Id.
70 Bansal, supra n. 1, at 191.
Nevertheless, Part I contains select portions that are also applicable to international arbitration. This section examines several areas of arbitration that remain unsettled a decade after the 1996 Act’s implementation which include: (1) interim measures of protection; (2) enforcement and challenge of foreign awards; (3) arbitrability of disputes; and (4) challenge and removal of biased arbitrators.

A. Interim Measures of Protection in Foreign Arbitrations

Interim measures refer to intermediary protective actions taken by a court or arbitral tribunal at the request of a party in order to save itself from irreparable harm or grave inconvenience before the final award is issued. Interim measures have the effect of compelling parties to behave in a manner conducive to the success of the proceedings, preserving the rights of the parties, preventing self-help, and ensuring that an eventual final award can be implemented. Examples of interim measures include temporary injunction, partial payment of claims, posting of security for costs, or appointment of receiver for a disputed property. Section 9 of the 1996

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71 Work, supra n. 46, at 228.
72 See Prathiba Singh and Devashish Krishnan, The 1996 Arbitration Act: Solutions for a Current Dilemma, 18 J. Int’l Arb. 41, 41 (2001). (stating that interim measures perform three central functions: (1) to conserve certain elements of proof (2) to safeguard the rights and interests of the parties and (3) to prevent any aggravation of the dispute).
74 Singh & Krishnan, supra n. 95, at 42.
Act empowers parties to apply to the court for interim measures of protection. Section 17 of the 1996 Act empowers the arbitral tribunal to order a party to make interim measures of protection in response to a request.

An unresolved issue that has arisen with regard to interim measures is whether Indian courts have jurisdiction to grant interim measures of protection where the seat of arbitration is foreign. This might occur where two parties (Indian national v. non-Indian) hold arbitration outside of India and the Indian party needs an interim measure of protection of an Indian court to secure their rights (i.e. to secure assets, to appoint receivership, etc). Since interim measures are of great practical importance to the parties involved, the determination of which decision-making body to approach is of critical importance. Unfortunately, the Supreme Court has not yet settled the issue, and the answer “has, like a burning ember, been tossed from court to court.”

The underlying conflict centers on the extent of judicial restraint the courts should apply when dealing with supplementary actions in foreign arbitrations. On one hand, a reduced role for the courts makes good sense

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75 Section 9 of the 1996 Act corresponds to Article 9 of the UNCITRAL Model Law.
77 Singh & Krishnan, *supra* n. 95, at 43.
78 Id. at 41.
given the over-reaching and disruptive role it played in arbitrations prior to
the 1996 Act.\textsuperscript{80} This is supported by the 1996 Act which envisions a
reduced role for the courts in arbitration hearings.\textsuperscript{81} Another reason why
courts should be wary of intervening during a foreign arbitration proceeding
is that the benefits in efficiency, cost, confidentiality, and reduced
complexity of the arbitration process diminish.

On the other hand, there is a flaw in taking this concern with court
intervention too literally. Without recourse to a court, parties to a foreign
arbitration simply will not have the option to seek interim measures which
may result in a denial of justice.\textsuperscript{82} Court assistance may be essential to
justice because in many cases jurisdiction of the foreign arbitral tribunal is
limited and it inherently lacks enforcement capabilities.\textsuperscript{83} The very purpose
of § 9’s interim measures is to give the court co-extensive power with the
arbitral tribunal to provide relief without jeopardizing the arbitral process.\textsuperscript{84}
Therefore, although one of the main purposes of the 1996 Act was to
minimize the supervisory role of the Courts, a literal reading of § 2(2)
carries the risk of depriving the parties of an important avenue of

\begin{itemize}
\item \textsuperscript{79} Id. at 43.
\item \textsuperscript{80} See id. at 43.
\item \textsuperscript{81} See Krishan, supra n. 5, at 265.
\item \textsuperscript{82} Singh & Krishan, supra n. 95, at 50.
\item \textsuperscript{83} Id.
\item \textsuperscript{84} Id.
\end{itemize}
The problem is essentially one of statutory construction and interpretation. The 1996 Act is divided into three parts of which Parts I and II are relevant here. Part I § 2(2) (provisions governing arbitration) applies “where the place of arbitration is in India.” Further, § 2(7) states that all awards made under Part I shall be domestic awards. Part II incorporates the New York and Geneva Conventions for enforcement of foreign arbitral awards. However, interim measures under § 9, is found in Part I. Therefore, on its face, it seems that courts have jurisdiction to grant interim measures under § 9 only in domestic arbitrations, not in foreign arbitrations. To complicate matters further, this reading is contrary to the UNCITRAL Model Law which confers extraterritoriality to Article 9 (the equivalent to § 9 of the 1996 Act).

Indian courts have fluctuated on this point. A split of high courts has advanced several lines of reasoning calling for a position of judicial restraint. One such court reasons that confusion about the applicability of §

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85 Id.
86 Part III addresses Conciliation under the 1996 Act.
87 See Singh & Krishnan, supra n. 95, at 44 footnote 15 (citing Art. 1(2) of the UNCITRAL Model Law: “The provisions of this Law, except articles 8, 9, 32, and 36, apply only if the place of arbitration is in the territory of this State).
88 IndiaMart, India File - Government System http://finance.indiamart.com/government_india/judicial.html (Last visited 4/30/05). (noting that the legal system is based on English common law, the Supreme Court is the apex court in the country, and the High Court stands at the head of the state's judicial administration. Each state is divided into judicial districts presided over by a district and sessions judge, who is the highest judicial authority in a district).
9 extra-territorially should be resolved by reference to § 2(2) which contains definitive language that Part I shall apply to domestic arbitration only. The court further reasons that since the 1996 Act was so clearly absent of the Model Law provisions to apply extraterritoriality to § 9, the Indian Legislature must have intended to limit the scope of all the provisions in Part I to domestic arbitrations only. Other courts have maintained that the judicial restraint position is in line with the main objective of the Act—to minimize the supervisory role of the courts in arbitration proceedings. Finally, courts have held that §§ 2(2) and 2(5) read together leads to the conclusion that § 2(2) is redundant and therefore it cannot be read to be an inclusive definition.

The contrarian line of cases is represented by the Delhi High Court in Dominant Offset Pvt. Ltd. v. Adamovske Strojiny A.S. which applied the doctrine of “harmonious construction” between §§ 2(2) and 2(5). Section 2(5) states in part that Part I “shall apply to all arbitrations and to all

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89 Singh & Krishan, supra n. 95, at 45.
90 Id. See also East Coast Shipping Ltd v. M.J. Scrap Pvt. Ltd., 1997 (3) ICC 429 (Cal); Keventer Agro Ltd v. Seagram Company Ltd., Civil Appeals No. 1125 and 1126 in two unreported orders (APO 490 of 1997; APO 499 of 1997 and C.S. No. 592/97) dated 27 January 1998 and 23 April 1998, Calcutta High Court.
91 See supra note 97 Keventer.
92 Singh & Krishnan, supra n. 95, at 49. (citing Marriott International Inc. v. Ansal Hotels, 1999 (82) DLT 137, where the court maintained: “The only way in which subsections (2) and (5) of Section 2 can be harmoniously read together is that Part I of the Act shall apply to all arbitrations being held under an agreement between the parties or under the rules and bye-laws of certain associations of merchants, stock-exchanges, chambers of commerce, or under a statute where the place of arbitration is in India”)
93 1997 (2) Arbn. LR 335.
94 Singh & Krishan, supra n. 94, at 46.
proceedings relating thereto” which seems to extend the applicability of Part I to all arbitrations. The judge reasoned:

A conjoint reading of all the provisions clearly indicates that sub-section (2) of section 2 [contains] an inclusive definition and that it does not exclude the applicability of Part I to those arbitrations not taking place in India. The aforesaid interpretation gets support from the provisions of sub-section (5) of section 2 which provides that Part I shall apply to all arbitrations and to all proceedings relating thereto.”95

The court used the broad language of § 2(5) to give an inclusive meaning to § 2(2) thereby making Part I applicable to extra-territorial arbitrations. Other high courts have also followed this line of reasoning.96

Given the skepticism of court intervention under the 1996 Act, one workable approach is given by the ICC in Article 23(2) which provides that

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95 See id.
96 See Singh & Krishnan, supra n. 95, at 46-47 (citing Marriott International v. Ansal Hotels, 1999 (82) DLT 137 and Suzuki Motor Corporation v. Union of India, )
a party must fulfill an *appropriate test* before obtaining court protection.\(^{97}\) The Indian Supreme Court in *Sunderam Finance*\(^{98}\) followed this approach by holding that once a court is satisfied that there is 1) a valid arbitration agreement and 2) the applicant’s intention to take the dispute to arbitration, the court can exercise its discretion whether the application merits the grant of an interim measure.\(^{99}\) Though this case was restricted to the issue of whether an interim measure could be granted *before* the start of arbitration proceedings, the *Sundaram* standard could be expanded more generally to place the burden on the moving party to prove that the interim measures are not being used to frustrate the arbitral process.\(^{100}\) Only the English model comes close to this standard by defining preconditions for court intervention where the arbitral tribunal is the first resort and the court is the last resort.\(^{101}\)

**UNCITRAL** is in the process of making significant revisions on interim measures of protection and enforcement. The revisions generally reveal that interim measures of protection issued by arbitral tribunals are to be recognized and enforced by the courts except for specific circumstances.\(^{102}\) The Indian legislature should adopt such language

\(^{97}\) See *id.* at 52.
\(^{98}\) AIR 1999 SC 565.
\(^{99}\) Singh & Krishan, *supra* n. 95, at 52.
\(^{100}\) *Id.*
\(^{101}\) See *id.* at 52.
\(^{102}\) See Ferguson, *supra* n. 96, at 64. (Sub-paragraph 2(a) identifies the situations in which a court may refuse to recognize and enforce an interim measure on the request of a party including issues of jurisdiction, notice, opportunity to be heard, and suspension. Sub-paragraph 2(b) allows the court to refuse to recognize and enforce the interim measure on
because by reducing the number of situations in which a party must seek redress in the courts, fewer abuses of launching diversionary proceedings in the courts are likely to occur. In the past, courts have played a heavy-handed role in arbitration, only to strip the arbitral process of its cost and time efficiency. Reducing the courts role maximizes efficiency by streamlining the arbitration process. Thus, where the objective in arbitration reform seeks to make arbitration a more viable process, a position of judicial restraint should be adopted.

B. Enforcement and Challenge of Foreign Arbitral Awards

Prior to the 1996 Act, foreign arbitral awards were governed by The Foreign Awards (Recognition and Enforcement) Act, 1961. Under the 1961 Act, the Indian judiciary recognized foreign arbitrations conducted pursuant to the 1958 New York Convention. Similarly, Part II of the 1996 Act provides for the enforcement of foreign arbitral awards under the 1958 New York Convention and, in addition, the Geneva Protocol of 1923 on Arbitration Clauses and the Convention for the Execution of Foreign

its own finding that it does not have the power by its laws to enforce the measure or such enforcement would be contrary to public policy).

104 Id.
Arbitral Awards of 1927 (the “Geneva Conventions”). Under the 1996 Act, an award is foreign if delivered outside of India in a signatory country to the 1958 New York Convention on matters that are commercially arbitrable under Indian law.

1. Enforcement of Foreign Awards

The 1996 Act requires certain conditions to be met before a court may enforce a foreign award. First, evidence of an award requires proof of: (1) the original award or a copy thereof, authenticated in a manner as required by the law of the country where the award was issued; (2) the original arbitration agreement or a copy thereof; and (3) any additional evidence that may be necessary to prove that the award is foreign.

The primary benefit under the 1996 Act is that it obviates the need for getting a decree from an Indian court to enforce a foreign award. Previously, an enforcing party would have to get a decree from the court thereby adding an extra layer of bureaucracy and uncertainty to the arbitration. But, under the 1996 Act, valid arbitral awards automatically

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105 Id.
106 Id.
107 Kwatra, supra n. 95, at 94.
108 Work, supra n. 46, at 236.
109 See Jambholkar, supra n. 43, at 605 (Validity is a prerequisite for transforming the arbitral award into a court-ordered decree.)
become court decrees and are made effective by separate notification. In other words, if a court is satisfied that an award to which the New York Convention under § 48 applies is enforceable, that award is “deemed to be a decree of that Court.”

The Supreme Court has recognized that foreign arbitral awards are enforced in countries other than were the award originates, that awards must be enforceable internationally, and therefore should be international in their validity and effect. The Court went a step further in *Renusagar Power Co. Ltd v. General Electric Co.*, AIR 1994 SC 860, and endorsed the view that foreign awards are to be enforced more liberally than domestic awards for reasons of comity.

2. Challenge of Foreign Awards

Similar to the UNCITRAL approach, § 48(1-2) of the 1996 Act provides the court may set-aside a foreign arbitral award where (1) there is incapacity of one the parties or an invalid arbitration agreement; (2) there is improper notice of hearing or appointment of arbitrator; (3) the award addresses matters that go beyond the scope of the arbitration agreement; (4)

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111 See id. (stating that to be valid, the award must meet the conditions in article V of the New York Convention, which corresponds to § 48 of the 1996 Act).
112 Ramaswamy, supra n. 134, at 466 (citing *Brace Transport Crop. Of Monrovia, Bermuda v. Orient Middle East Lines Ltd*, 1994 (All India Reporter Supreme Court) 1715,
the composition of procedure of the arbitral tribunal was not in accordance
with the laws of the award issuing country; (5) the award has not yet
become binding on the parties, or has been set aside or suspended by a
competent authority under the award issuing country; (6) a dispute is non-
arbitrable under the laws of India; or (7) the enforcement of the award
would be against the public policy of India.\textsuperscript{114}

Section 34(2)(b)(ii) of Part I sets out virtually the same standards for
set-aside of domestic awards as § 48(2)(b) provides for set-asides of foreign
awards. Like many other countries, setting aside of arbitral awards under
the ground of public policy has been problematic.

\textbf{a. The Public Policy Exception}

Challenge on grounds of “public policy” is by far the most
contentious aspect of the 1996 Act because of the high degree of
subjectivity that courts employ to the term. The 1996 Act, on its face, sets a
\textit{high} threshold for a party seeking to set-aside or resist recognition or
enforcement of an arbitral award on grounds of public policy.\textsuperscript{115} In order
for the award to be against the public policy of India, the award must rise to

\begin{footnotes}
\footnote{1720).}
\footnote{113 \textit{Id.}}
\footnote{114 1996 Act Part II Sec. 48(2)(a-b).}
\footnote{115 Nadia Darwazeh & Rita F. Linnane. \textit{The Saw Pipes Decision: Two Steps Back for
\end{footnotes}
the level of having been induced by fraud or corruption.\textsuperscript{116}

In \textit{Renusagar Power}, the Supreme Court held that mere contravention of law would \textit{not} attract the bar of public policy, but the award must be contrary to (i) fundamental policy of Indian law, or (ii) the interests of India, or (iii) justice or morality. In addition, if the award is actually induced by fraud or corruption, or it violates the rule of confidentiality, or the rules of evidence, then the award is void for public policy and may be set-aside under the 1996 Act.\textsuperscript{117}

Much to the displeasure of the arbitration movement, the Supreme Court has recently expanded the public policy justification for setting aside a domestic award under Part I § 34 of the 1996 Act. In \textit{Oil and Natural Gas Corp. v. Saw Pipes Ltd.} ("\textit{Saw Pipes}"), the Supreme Court of India substantially broadened the standard of violating public policy by creating a new ground of “patent illegality.” The facts of the case relate to the supply of casing pipes by Saw Pipes Co. to the Oil and Natural Gas Co. ("ONGC"). Timely delivery was of the essence. Saw Pipes Co. could not deliver on time and requested an extension from ONGC who acceded to this under the condition that liquidated damages would be received for the delay in delivery. This deduction was disputed by Saw Pipes Co. and the dispute went to arbitration. The arbitral tribunal held that ONGC had not suffered

\textsuperscript{116} See \textit{id.} (Recently, “error of law” has been found to be a ground for set-asides).

\textsuperscript{117} Krishan, \textit{supra} n. 5, at 272-273.
any damage at all and was precluded for asking for liquidated damages in the amount of $304,970.

After deciding it had jurisdiction to hear the matter, the Supreme Court held that there is “no necessity of giving a narrow meaning to the term public policy of India. On the contrary, wider meaning is needed so that the *patently illegal* award passed by the arbitral tribunal could be set aside.” [emphasis added] The Supreme Court went on to explain that the term “public policy” is to be read “depending upon the object and purpose of the legislation. In essence, the award which is passed in contravention of §§ 24, 28, or 31 could be set aside.” The Court went on to reconsider the award *on its merits* and held that the appellant did not need to prove its loss and was rightfully entitled to liquidated damages.

The decision is problematic for three reasons. First, the party aggrieved by an arbitral award can challenge an award by contending that such an award is allegedly *in mere contravention of law* and thus in conflict with the public policy of India. The decision significantly lowered the threshold of the public policy justification for setting-aside an award by including the ground of “patently illegal” to the three grounds already established in *Renusagar*. The Court accomplished this by interpreting

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119 *Id.*

120 Darwazeh & Linnane, *supra* n. 139, at 3.
“public policy” to include the concept of “error of law.” Although “error of law” was not stated as a grounds for a set-aside under § 34(2)(b)(ii), the Court found that this was appropriate in context of set-asides.121 The Court then went on to equate “patent illegality” with “error of law” essentially creating a new category for setting-aside an award on public policy grounds.122

Second, it creates a new avenue for judicial reconsideration under § 34 set-asides by distorting the meaning of “illegality.”123 Illegality in the enforcement of arbitral awards has traditionally meant “. . . facilitation or promotion of drug trafficking, terrorism, subversion, prostitution, child abuse, slavery, and other forms of human rights violations.” The underlying conflict of liquidated damages in *Saw Pipes* was clearly not within the traditional meaning of “illegal.” Such expansion of the meaning might allow courts another justification to set-aside many more cases than it previously could.

Third, and perhaps most importantly, this interpretation allows the court through its set-aside authority to review the arbitration on its merits.

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121 See *id.* at 5-6 (positing that the legislator did not intend to include “error of law” as a public policy ground under § 34(2)(b)(ii) of the 1996 Act. The Law Commission of India proposed a bill in April 2001 amending the 1996 Act. A further bill was introduced to Parliament as recently as December 2003. In both bills, “error of law” is contemplated as a new ground for setting aside domestic awards. This only goes to show that it as not already included under the 1996 Act at the time of the *Saw Pipes* decision and putting the legal correctness of *Saw Pipes* in doubt).
122 *Id.*
123 See *id.* at 4.
After ruling that the award was “patently illegal,” the court used the public policy ground as a means to conduct a review of the merits of the case and to “substitute its own view [with the one] taken by the arbitrators.” Thus, the Court retains a backdoor way to review the merits of an arbitral proceeding—a step in contravention of the “letter and spirit” of the 1996 Act.

Though the “public policy” justification appears to apply only to domestic awards under § 34, it is possible that such reasoning may well extend to foreign awards as well. Arguably, since the foreign award set-aside provisions in Part II § 48(2)(b) mirror the domestic award set-aside provisions in Part I § 34, it is plausible that the courts may use the Saw Pipes decision to reach foreign awards, thereby opening the floodgates to reconsideration of foreign arbitral awards. The question was further complicated by the 2001 case Bhatia International v. Bulk Trading SA where the Court held that Part I provisions should apply to international arbitrations—thus opening the door even more for a Saw Pipes reasoning to extend to foreign awards.

For the time being, it remains unclear whether the decision marks a

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124 Id. at 6.
125 Id. at 2. (Under the 1996 Act, a court is no longer allowed to review the merits—directly or indirectly—since set-asides are no longer possible for errors of law or fact).
126 See Gaya, supra n. 142, at 574 (stating that the Saw Pipes court rationalized that the principles laid down in the case apply only to domestic awards because a foreign award is subject to challenge in the country where the award is made, whereas for a domestic award,
regression to the interventionist approach that courts took prior to adoption of the 1996 Act or whether this was a singular decision of an over-reaching court. Thus far, the courts have not used the Saw Pipes reasoning extensively. Nonetheless, many have advocated for an explicit overruling of this case and the adoption of a narrower definition of the public policy exception.  

For the purposes of protecting the arbitral process, a narrower interpretation of the public policy justification is preferable because such a meaning prevents backdoor reconsideration of the arbitral decision by Indian courts.

### C. Arbitrability of Disputes

Arbitrability refers to “whether a dispute is capable of settlement by arbitration under the applicable law.”\(^{129}\) Usually, where the subject matter of the dispute has to do with everyday business transactions, the state will not be concerned. However, where a dispute concerns public claims, states reserve a right to intervene in such disputes.\(^{130}\) Examples of public claims include constitutional issues, welfare of individuals, insolvency rights, anti-
trust issues, banking and finance regulations, regulatory functions of
government, natural resource development, or criminal matters.\textsuperscript{131} Accordingly, awards made pursuant to disputes which are considered non-arbitrable by the state of enforcement, will not be enforceable.\textsuperscript{132}

The problem of arbitrability arises often in international arbitration because there may be more than one system of law involved in the proceeding as to whether the subject matter of the dispute is arbitrable.\textsuperscript{133} To illustrate, in a contract between trading partners from Pakistan and India, the contract provisions may be governed under Canadian law and substantive disputes be governed under US law. Here, after taking into account each party’s native country’s laws, an arbitrator potentially has to address four different legal systems.

Diversity of national rules further complicates the picture because developed countries such as the US, Australia and Canada, have adopted more liberal approach to arbitrability than developing countries which are wary of ceding state control for fear that arbitrators will under-enforce important state development objectives.\textsuperscript{134} As a result, an award made according to a jurisdiction where the dispute is arbitrable may not be

\textsuperscript{9) criminal matters).} \\
\textsuperscript{131} See generally Reddy & Nagaraj, supra n. 10, at 124-126 \\
\textsuperscript{132} New York Convention of 1958, Articles V(1)(a) and 2(a) (1958). \\
\textsuperscript{133} Reddy & Nagaraj, supra n. 10, at 122. \\
\textsuperscript{134} Id. at 124-125. (State objectives include constitutional matters, matrimonial
matters, insolvency, welfare legislation, special tribunals, taxation, tortious claims, public
enforceable in a country where the dispute is not deemed an arbitrable matter.

1. Defining “Commercial” under the 1996 Act

The meaning of “commercial” is important as it determines the extent to which the scope of international arbitration would be covered under the 1996 Act. International disputes that fall outside the definition of “commercial” would not be arbitrable. Too narrow a definition would lead to many foreign awards not being enforced. Too broad a definition wrests from state control important state objectives.

But what is “commercial?” Both the Model Law and 1996 Act take similar approaches but differ slightly in practice. Model Law Art. I applies to “international commercial arbitration.” Interestingly, the Model Law provides a working definition but does so only in a footnote to Article 1. The footnote to Article 1 states:

The term commercial should be given a wide interpretation so as to cover matter arising from all relationships of a commercial nature,

\footnote{Id. at 135.}
\footnote{Id.}
\footnote{See id. Most legal systems do not rely on the use of footnotes for reading statutes.}
whether contractual or not. Relationships of a commercial nature, include, but are not limited to the following transactions: any trade transactions for the supply or exchange of goods and services; distribution agreement; commercial representation or agency; factoring, leasing; construction of works; constructions; engineering; licensing; investment; financing; banking; exploitation agreement of concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail, or road.\textsuperscript{138}

This footnote was intentionally excluded from the main body of the Model Law because there was a concern that in adopting a precise definition for such a sensitive and important term, countries, especially socialist and developing countries, would lose the freedom to retain judicial control over essential state regulated objectives.\textsuperscript{139} The compromise was to include a footnote giving adopting countries the freedom to retain control

over essential activities while still encouraging the widest interpretation possible. Thus, the Model Law gives wide latitude to charter countries to define those “commercial” matters that would give rise to arbitration.

The 1996 Act § 2(1)(f) defines “commercial” as “disputes arising out of a legal relationship, whether contractual or not, considered as commercial under the law in force in India.” No mention is made of the Model Law Article 1 footnote stated above. This is significant considering that the 1996 Act is substantially based on Model Law. The omission may have been the Indian legislature’s attempt at giving courts discretion to decide the definition of “commercial.” This would allow the courts to narrow or broaden their definition according to their needs.

Previously, the court made a distinction between a contract for the transfer of services and a contract for the sale of goods—of which only the latter was considered “commercial” in nature. For instance, a contract for technical assistance does not involve the direct participation of profits

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139 Reddy & Nagaraj, supra n. 10, at 127.
140 Id. (emphasizing that too restrictive a definition of “commercial” could lead to foreign arbitral awards not being enforced).
141 See generally Reddy & Nagaraj, supra n. 10, at 123-128 (noting that the 1996 Act specifies that the legal relationship need not be contractual. This means that matters relating to torts, intellectual property, and securities regulation could potentially be considered under “commercial” under the new Act. Though Indian courts have been reluctant to extend arbitrability that far, the modern trend favors expansion of arbitrable subject-matter by extending non-contractual transactions to the “commercial” realm).
142 Id. at 135.
143 Id.
144 See id. at 135 (citing Kamani Engineering Corp. v. Societe de Tractions e d’Electricite Societe Anonyme where he court held that a contract for technical assistance in which there was no participation of profits between the parties was not “commercial” in
between the parties and is therefore not “commercial.” But, the court took a big step forward in *R.M. Investment and Trading Co. v. Boeing Co.*\(^{145}\) where the court held that “commercial” must be given a wide interpretation consistent with the purpose of the New York Convention and to promote international trade and commercial relations.\(^{146}\) Significantly, the court also referenced Model Law Article 1 footnote and said that guidance could be taken from its wording.\(^{147}\)

However, in that same decision, the court left the question of whether the distinction between a contract for transfer of services and a contract for sale of goods is valid. It is not yet clear that a contract for a transfer of services (i.e. technology exchange, technical support, etc.) would be arbitrable under the 1996 Act. Some have called for inclusion of such services to the meaning of “commercial” since these services can be traded just like a contract for sale of goods.\(^{148}\)

Thus far, the court has maintained a broad definition of “commercial,” in line with internationally accepted standards of the term and should continue to do so.


\(^{146}\) Id.

\(^{147}\) Id.

\(^{148}\) Reddy & Nagaraj, *supra* n. 10, at 137.
2. Defining “International” under the 1996 Act

Another problem related to the concept of arbitrability in international arbitration is defining what is meant by “international.” This warrants attention for two reasons. First, whether a dispute is *arbitrable* may be defined differently under either domestic or international rules of arbitration. As a result, a dispute which may be arbitrable under “international” arbitration rules may not be so under domestic rules. Second, in context of the 1996 Act, it follows that if a dispute was *not* considered “international,” then enforcement of foreign awards found in Part II under the 1996 Act and select provisions of Part I would be inapplicable to an arbitral proceeding. Thus, how arbitration law defines an “international” dispute become important for parties that seek to take advantage of international commercial arbitration rules.

The Model Law considers an arbitration “international” if (1) the place of business of the parties is in different States; or (2) the place of arbitration is outside the state of which the parties have their places of business; or (3) the place where a substantial part of the obligations of the commercial relationship is to be performed is outside the state in which the parties have a business; or (4) the place with which the subject matter of the dispute is most closely connected is in a state other than the one in which the parties have their places of business; or (5) the subject matter of the arbitration
agreement is related to more than one state.\textsuperscript{149} Thus, the Model Law focuses primarily on the \textit{place} of the parties, arbitration, or dispute.

The 1996 Act definition of what constitutes “international” is at variance with the Model Law. Section 2(1)(f) of the 1996 Act provides that an arbitration is international where at least one of the parties is: (1) an individual who is a national of, or habitually resident in, any country other than India; or (2) a body corporate which is incorporated in any country other than in India; or (3) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or (4) the government of a foreign country.

The key distinction is that the 1996 Act focuses more on the \textit{status} of the parties rather than the \textit{place} of performance of the contract—an emphasis on form rather than substance.\textsuperscript{150} For example, under 1996 Act definition, any contract between an Indian national and a foreign national or a non-resident Indian habitually resident abroad, automatically is considered “international” and subject to international arbitration standards regardless of whether the transaction was \textit{local} in nature.\textsuperscript{151} By the same token, a foreign company in India would not be subject to international arbitration under the 1996 Act whose “management and control” is exercised within

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{149} Dore, \textit{supra} n. 29, at 102.
\item \textsuperscript{150} Reddy & Nagaraj, \textit{supra} n. 10, at 135.
\item \textsuperscript{151} \textit{Id.}
\end{enumerate}
\end{footnotesize}
India. By focusing on the status of the parties, the Indian approach seems to ignore the parties’ actual connections to international trade and commerce and the forum connected to that commerce. As a result, there is a danger that “international” arbitrations will be categorized arbitrarily potentially aggrieving a party wishing to arbitrate under international rules.

The Model Law’s approach should be adopted because of its focus on the substance of the commercial interaction reflects more accurately the commercial reality of the parties and/or forum. The result would be a more predictable application of the rules to parties seeking to take advantage of international arbitration rules in India.

D. Challenge and Removal of a Biased Arbitrator

One of the defining features of the Model Law is to offer an international yardstick to satisfy the needs of a speedy and impartial arbitration. The Model Law states that where bias is suspected, an arbitrator may be removed by the court if the arbitrator did not act with timeliness, acted with misconduct during the proceedings, or where the arbitrator is de jure or de facto incapable of performing their duties. An arbitrator’s mandate also ends where he/she withdraws from the

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152 Id. (noting that another problem is that indicators used for determining what constitutes “management and control” remain unclear).

proceedings or the parties agree on removal.  

The 1996 Act departs significantly from Model law in the case of challenging and removing a biased arbitrator. Both the Model Law (Art. 12) and the 1996 Act (§ 12) place a duty on the arbitrator to disclose at the earliest “any circumstances likely to give rise to justifiable doubts as to his independence or impartiality” and also gives the right to the party aggrieved to challenge the authority of the defaulting arbitrator.  

The 1996 Act and Model Law diverge with regards to providing a remedy for a party failing in its challenge to remove an arbitrator. Under Article 13(3) of the UNCITRAL Model Law, a party failing in its challenge of an arbitrator may elect the remedy before the court or other authority specified in Article 6 (i.e. re-selection or appointment of arbitrator by the parties or an appointing authority). A successful challenge usually mandates substitution by a new arbitrator.  

Unfortunately, the 1996 Act omits this remedy in its effort to expedite the arbitration and prevent diversionary tactics in the courts. Section 13(4) simply provides that if a challenge “is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.” The

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155 Arbitration and Conciliation Ordinance sec. 15(a) and (b) (Jan. 16, 1996).
156 Gupta, supra 153, at 126.
157 UNCITRAL Model Law, supra n. 154, at sec. 13(3).
158 Krishan, supra n. 5, at 269.
159 Gupta, supra n. 153, at 126.
only recourse is for the challenging party to set aside the entire award under § 34 (domestic awards) and § 48 (foreign awards) in the post-award stage. This method requires a re-hearing of the entire case which inevitably wastes precious time and money. Complicating matters, under §§ 34 or 48, a charge of “bias” is not enumerated as one of the circumstances that an award may be set aside under. Thus, the problem of challenging and removing an arbitrator remains unsolved both at the arbitration stage and at the post-award stage.

Adherence to the Model Law is preferable here because it supplies a remedy early in the process before the parties expend time and money on the arbitration. Also, by providing a judicial remedy, the parties are not left out on a limb waiting for a potentially biased arbitrator to rule on him/herself. Other countries have dealt with this problem by accepting not only courts but also institutional arbitration bodies as mechanisms for challenging biased arbitrators. For instance, the ICC relies on the International Court of Arbitration (ICA) to decide any challenge to an arbitrator suspected of bias.\(^{160}\) Likewise, the American Arbitration Association (AAA) handles a claim of bias under its Rule 20 in which a complaint of partiality is submitted to AAA for determination of disqualification. However, if the complaint is denied, the complaining party

\(^{160}\) The ICA is attached to the ICC.
still has a right to a claim of bias after the award has been preserved.¹⁶¹

India would be well-served to amend the 1996 Act to provide either a judicial remedy or provide for institutional safeguards to decide on a charge of bias. In a legal system where bias has been a concern in the past, a provision such as this would go a long way towards holding biased arbitrators accountable.

CONCLUSION

Before the 1996 Act, the process of settling international commercial disputes in India “made lawyers laugh, and legal philosophers weep.”¹⁶² Judicial interference, long bureaucratic delays, and unpredictable decisions by arbitrators marred the arbitration process leaving little to no alternative for international business to resolve their disputes. But with India’s emergence as a global economic power following its liberalization scheme under the NIP of 1991, reform of its domestic and international arbitration system was essential to gaining the trust of the international business community. By adopting the 1996 Act, India implemented international standards of commercial arbitration under UNCITRAL Model Law making arbitral proceedings considerably shorter, more predictable and fair, less formalistic, and subject to less judicial scrutiny.

But, old habits die hard. Judicial intervention currently poses the

¹⁶¹ See Gupta, supra n. 153, at 129.
¹⁶² Motiwal, supra n. 65, at 121.
biggest risk to international commercial arbitration in India. As adjustments to the 1996 Act are underway, the courts and legislature should adopt a policy against taking too active a role in arbitration proceedings only to repeat the mistakes of the past. One way to ensure this is by keeping in line with the mandates of Model Law which give primacy to arbitral autonomy and the parties’ freedom to contract. In doing so, India can succeed in building its reputation as an international arbitration-friendly country and complete its transformation into a legitimate forum for international commercial arbitration.

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