INTERNATIONAL COMMERCIAL ARBITRATION: ROADMAP FOR A BRIGHTER FUTURE

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Abstract

Institutional arbitration posits a more secure environment for arbitration than that conducted on an ad hoc basis. The reputation of these institutions is gradually built up through sustained standards of integrity and can be tarnished by a single incident of favouritism/unfairness. While no institution (including the judiciary) is infallible, it would be pragmatic to trust arbitral institutions given the self-corrective and testing nature of the arbitration process, in which the onus of quality rests on the institution. With institutional arbitration being much more effective and dependable in practice, the overambitious invasion by the judiciary to take absolute control in the appointment of arbitrators has given a blow to the institutional arbitration. This needs to be urgently redressed and an attempt is made to

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delve into factors which place institutional arbitration at a higher pedestal.

I. THE BACKDROP

Spurred by the discontent with the incongruent standards of dispensation of justice and the dysfunctional condition of public courts across the world, Arbitration has evolved as the most effective mechanism for resolution of international commercial disputes. Judicial systems are plagued by endless delays, political influence, prohibitive costs and corruption, and are usually at the root of the malady of 'Misrule of law'. Notwithstanding the fact that the vast majority of states otherwise fulfil the formal requisites of statehood, their institutional capabilities are appalling, with justice being a luxury available only to the privileged few in the developed countries. The basic institutions in many states are grossly inadequate - without substantive legislative, judicial or law enforcement mechanism, which considerably hampers social and economic growth.

As global economy spawned disputes, an internationally uniform practice became a prerequisite to facilitate transnational economic exchanges, devoid of risks. Often huge amounts were held up due to lengthy litigation clogged in national adjudication systems. Liquidity being a critical factor, International Arbitration proved to be a convenient alternative being expeditious, cost-effective and confidential.[1]

[1]It protects the reputation and trade secrets of the parties by maintaining confidentiality of the whole process.

With India being a promising destination for foreign investment, it is essential that India's arbitration law is aligned with the contemporary international practice. This minimizes the fear of prolonged litigation in case of disputes. Such a response to the changing requirements will ensure a promising future for India as a favourable destination for arbitration, and can become a game changer for the progress of our economy as a developing nation. A robust arbitration regime in India would eliminate the possibility of investors having transactions in India to resort to arbitration elsewhere, since it would not only be convenient and time saving but also inexpensive. This is a strong contention to promote and market India as a world class facility for arbitration.

With judicial legislations increasingly sanctioning judicial intervention in the arbitral process, the growth of arbitration in India had been throttled. Evidenced by a plethora of decisions of the apex court, the objective behind arbitration seems to have evaporated into thin air. However, in the recent landmark judgment of *Bharat Aluminium Company v Kaiser Aluminium Technical Service*[2] *(*hereinafter referred to as "**BALCO**"), the Supreme Court has declared that Part I of the Arbitration and Conciliation Act, 1996[3] (hereinafter referred to as "**the 1996 Act**") is inapplicable to arbitrations held outside India. This is likely to have huge consequences, catalysing the flow of foreign investment into India.

[2]Bharat Aluminium Company v Kaiser Aluminium Technical Service (2012) 9 S.C.C. 552 [hereinafter BALCO].
[3]Arbitration and Conciliation Act, 1996 (India), Act 26 of 1996.

II. LEGITIMACY AND UNIVERSALITY

Propelled by the expansion of international private commercial relations, trans-border arbitrations have multiplied manifold, breeding a plethora of complexities including the claim of state sovereignty. It is important to neutralize such unrestrained defensive claims of state exclusivity, which have the potential to disrupt the greater legal order.

Law must ultimately be relevant to the social reality. A legal order is a set of norms acknowledged by a social order to be authoritative. Its existence may be independent and based on *rights* guaranteed by authorities other than the state.[4] Arbitration draws its legitimacy from its practical effectiveness and can be categorised as a private social institution.

Arbitration subjects private disputes to a separate regime[5] outside the operation of rules of law, which would have been applicable in the ordinary course. It affords to the parties the freedom to choose some of the procedural and the substantive law. Placing primacy on the consent of the parties to the contract, it postulates that social groups may create distinct legal orders, existing within a greater legal order which tolerates and nourishes them without imposing itself on the domain for which the sub-group has prescribed its own rules. Thus, 'arbitral order' does not trump the national order. It emerges out of the necessity of co-existence. It does not reject law but merely reproves certain facets of it, especially the apparatus.

[4]MAX WEBER, LAW IN ECONOMY AND SOCIETY 16, 17 (Harvard University Press).
[5]In cases of foreign players it is also a neutral fora, independent of their respective municipal laws, eg. The London Court of International Arbitration and the ICC International Court of Arbitration.

Paradoxically, arbitration relies on the cooperation of the very public authorities, from which it tries to disengage itself, seeking the power and authority of the state only to support arbitration, not to interfere in it. This makes it obligatory to connect the conduct of arbitral proceedings to a national legal system, which will support and supervise it and encompasses *inter alia* fixing of the permissible degree of party autonomy (curtailed by mandatory or non-derogable rules), assistance by grant of provisional measures and in collection of evidence by the court (especially in cases of procedural matters affecting the position of third parties who are not subject to the jurisdiction of the arbitrators).

In a short span of time, International Arbitration has become the norm for resolving international commercial disputes, and the success of UNCITRAL Model Law on International Arbitration (hereinafter "**Model Law**") bears witness to its claim of universality. The UN Commission on International Trade Law (hereinafter "**UNCITRAL**") adopted the Model Law in 1985 and the UN General Assembly subsequently recommended its incorporation in domestic legislations.[6]

The Arbitration and Conciliation Act, 1996 regulates the conduct of arbitration in India[7] and reproduces the model law almost verbatim with a few notable exceptions. It seeks to minimise the supervisory role of the courts to effect speedy disposal of disputes and provides finality to the arbitral awards by making them enforceable as a decree of a court.[8] The 1996 Act is divided into four parts with the first

[6]UNGA 40/72 (11th December, 1985).
[7]Earlier it was regulated by The Arbitration Act, 1940, The Arbitration (Protocol and Convention) Act (1937), and The Foreign Awards (Recognition and Enforcement) Act (1961).
[8]Statement of Objects and Reasons, The Arbitration and Conciliation Act (1996) No. 26, Acts of Parliament.

concerned with arbitration in India; second with Enforcement of 'certain' foreign awards (Arbitral awards given in countries signatories to New York Convention, Geneva Convention and Protocol); third with conciliation and the fourth lays down the supplementary provisions. It has consolidated within its scope domestic arbitration[9], international commercial arbitration and enforcement of foreign arbitral awards.

Till recently, the Indian judiciary had been perplexed by two competing and conflicting policy considerations of injustice, resulting from delay due to its review of the merits of arbitral awards, and that from a patent illegality in an award (genuine excesses or abuses by arbitrators, incapacity of the parties, invalidity of the agreement, etc.[10]). The arguments which had been advanced by it to justify its excessive paternalistic approach of interference were heavily misplaced. This became prominent especially in disputes involving high monetary stakes, with speedy justice being but a distant dream. The Supreme Court in BALCO has taken a step in the right direction for ensuring that Arbitration develops as an effective method of dispute resolution in India. Notably, the enforceability of awards without judicial review of the merits is what makes it an attractive alternative to litigation.

III. CONVOLUTED JURISDICTION

Modern arbitration thrives on a pluralistic environment and it is plausible to have overlapping legal orders giving effect to it. They

[9]UNCITRAL Model Law was designed to be applicable to international arbitrations and not domestic arbitrations.
[10]The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, § 34.

may regulate different aspects of arbitral relationship and may not be exclusively that of one state. They can be categorised as:[11]

a) Proper Law of the Arbitration Agreement

It governs the agreement to arbitrate and to honour the arbitral award. It determines the validity of the arbitration agreement, the question of arbitrability of dispute, validity of notice of arbitration, constitution of the arbitral tribunal, the question whether the award is within the jurisdiction of the arbitrator as well as the formal validity of the award. It is the source of authority of the arbitrators. It would apply to the filing of the award, to its enforcement and to its setting aside.

The arbitration clause embedded in a contract which creates the obligation to refer a dispute to arbitration is governed by a proper law of its own. It is recognised as independent of the contract, having a distinct life of its own and capable of surviving the termination of the substantive agreement.[12]

b) Curial or procedural law (lex arbitri)

It is the law applicable *to* arbitration and is operative during arbitration. It deals with 2 sets of issues[13]:

(i) *Internal:* It governs the conduct of the individual reference, procedural powers, appointment and duties of the arbitrator (e.g. whether they must hear oral evidence; questions of evidence; misconduct); the determination of the proper law of the contract.

[11]Sumitomo Heavy Industries Ltd. v. ONGC Ltd. and Ors., (1998) 1 S.C.C. 305.
[12]The Arbitration and Conciliation Act, 1996, § 16(a) & (b), No. 26, Acts of Parliament.
[13]DICEY, MORRIS & COLLINS, THE CONFLICT OF LAWS 722 (2007).

(ii) *External:* It is the source of authority to entertain applications for incidental reliefs and to ensure that the procedure adopted in the arbitral proceedings conforms to the requirements of the curial law. This power is discretionary in nature and lies with the courts administering the curial law. It determines court's power of supervision such as remedies available for challenging the award (lack of jurisdiction or serious irregularity) once it has been rendered but before its enforcement is sought. The power to remove arbitrators and to secure attendance of witnesses is also under its domain. It also specifies the circumstances in which such judicial remedies may be excluded by the parties. Curial law does not apply to the filing of an award in court since the enforcement process is subsequent to and independent of the proceedings before the arbitrator.

Pragmatism entails that parties choose curial law corresponding to the 'seat' of arbitration i.e. the place at which proceedings to be conducted. In the absence of agreement to the contrary, prima facie presumption exists that parties intend the curial law to be the law of the 'seat' of the arbitration, on the ground that it is most closely connected with the proceedings.[14]

In BALCO, the apex court pointed out the distinction between 'seat'/'place' and 'venue' of arbitration. The 'seat'/'place' is a juridical concept distinct from the 'physical seat' or 'venue' which can be a geographically convenient place[15] chosen to conduct

[14]MUSTILL & BOYD, COMMERCIAL ARBITRATION 64 (1989).

[15]As stipulated by Article 16(2) of UNCITRAL Arbitration Rules which state "The arbitral tribunal may determine the locale of the arbitration within the country agreed upon by the parties. It may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration". Also, see § 20(3) of The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament.

particular hearings. There can be only one 'seat' of arbitration;[16] however, the tribunal is free to hold meetings or hearings at any other place for the sake of convenience. This is in consonance with its previous judgment in *Videocon Industries Limited* v. *Union of India and Anr*.,[17] wherein the arbitration as per the agreement was to be conducted at Kuala Lumpur, Malaysia, but was later shifted to London.[18] It was held that the mere change in physical venue of hearing from Kuala Lumpur to London did not amount to change in juridical seat of arbitration.

The law at the 'seat'/'place' of arbitration is the wellspring of the binding character of the arbitral award. The courts at the 'seat' are the sole supervisors and primary supportive functionaries of the proceedings, except where lex arbitri is different from law at the 'seat', wherein party autonomy will be restricted by mandatory rules (non-derogable) of the latter. In case of conflict between them and upon a subsequent failure to comply with the latter, the courts at the 'seat' can set aside the award. It also stipulates directionary rules or 'fall back provisions' which apply if the parties have not made their own arrangements. BALCO reaffirms this by positing that only if the 'seat'/'place' of Arbitration is in India, will Part I of the 1996 Act be applicable.[19]If the 'seat'/'place' is outside India, Part I would be inapplicable to the extent it is inconsistent with the arbitration law of the 'seat', even if the agreement purports to provide that the1996 Act shall govern the arbitration proceedings.[20]

[16]BALCO; Dozco India P. Ltd. v. Doosan Infracore Co. Ltd., (2011) 6 S.C.C. 179.
[17](2011) 6 S.C.C. 161.
[18]Due to outbreak of epidemic SARS.
[19]BALCO ¶ 100.
[20]*Id.*

c) Proper law of the contract or the Substantive law (lex causae)

It is the law applicable *in* arbitration and governs the contract. It is the source of the substantive rights of the parties, in respect of which the dispute has arisen, and determines the law to be followed in making the award. It forms the basis of the arbitrator's decision.

The determination of the applicable law was examined in *National Thermal Power Corporation* v. *The Singer Company and Ors.*[21], wherein it was affirmed that in absence of any express choice and any contrary indication, the presumption lies that the proper law of the contract and the law governing the arbitration agreement are same as the law of the 'seat'. If proper law of the contract is chosen by the parties, it must govern the arbitration agreement.

IV. ENFORCEMENT JURISDICTION & THE NEW YORK CONVENTION

The main loophole in arbitration is the enforcement mechanism, which is often beset by 'court intervention'. Arbitrations carry a significant risk that enforcement jurisdiction might not agree to recognise and enforce the award since it may be susceptible to manifold challenges. Most of the complexities in arbitration arise due to the unpredictability of the enforcement jurisdiction. Usually, these cannot be contemplated at the time of arbitration agreement or even at the time of commencement of arbitration. The attitude of the legal order of a country where the debtor has his assets is highly relevant to

[21](1992) 3 S.C.C. 551.

efficaciousness of the arbitration. However, uniformity has been possible largely due to increasing interdependence between states.

Judicial systems of countries are usually prepared to enforce an arbitral award if they are satisfied that it will be 'binding' either due to conventions or the principle of comity. The pervasive reach of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958[22] (hereinafter referred to as "**New York Convention**") exemplifies the former. With 146 signatory countries,[23] it is the dominant tool for recognition and enforcement of international arbitral awards made in signatory jurisdictions, without requiring prior approval of the courts at the seat of arbitration.[24] Its signatories cease to be bound by the predecessors of the convention:[25] Protocol on Arbitral Clauses, 1923,[26] and Convention of the Execution of Foreign Arbitral Awards, 1927, (hereinafter "**Geneva Convention**")[27] thereby rendering them archaic.[28] Only Myanmar, The Gambia, Guyana, Iraq and The Democratic Republic of Congo are parties to the earlier instrument and not to New York Convention.

The strength of the New York Convention lies in its relative simplicity and widespread adherence. While emphasising the integrity

[22]Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, June 10, 1958, 330 UNTS 38 [hereinafter New York Convention].
[23]*Id.*, Chapter XXII: Commercial Arbitration.
[24]*Id.*, Article III. "Awards are binding as per the rules and the procedure of the territory where the award is relied upon."
[25]*Id.*, Article VII.
[26]Protocol on Arbitration Clauses, Sept. 24, 1923, 27 L.N.T.S. 157.
[27]Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 301.
[28]This was due to the wide acceptability of the New York Convention and its superseding effect over them. These instruments were the results of the efforts to achieve uniformity under the auspices of the League of Nations.

of national order, it limits the grounds for refusal to enforce awards[29] to seven cases listed in Article V.[30] Thus, it negates any scope of concurrent jurisdiction to courts in the enforcing territory with respect to entertaining challenges as to the binding nature of the awards.[31] Significantly, certain states like Switzerland do recognise an agreement between the parties to opt out of judicial review of the arbitral awards.

The question of arbitrability is basic to the arbitral process. The New York Convention and the Model Law recognise this by referring to disputes that are 'capable of being resolved by arbitration', implicitly acknowledging that all disputes are not legally arbitrable.[32] Multi-territorial contracts yield a multitude of potentially relevant jurisdictional criteria e.g. place of signing, of residence/work of the parties, of its enforcement. The same set of facts can lead to different interpretations of obligations by legal systems of two countries. National orders are dissimilar and can impute different outcomes to the same event. However, it has been left to the enforcement forums to test the award against their conception of public policy and arbitrability.[33]

[29]The award cannot be set aside but can only be refused to be enforced.
[30]Incapacity of parties; Invalidity of arbitration agreement (including inarbitrability); Violation of principles of Natural Justice (sanctions the application of standards of due process of the enforcement forum); Excess of Jurisdiction (decisions beyond the scope of submission to the tribunal); Breach of Procedural law (including mandatory rules of the seat of arbitration); Award not binding; Public Policy.
[31]New York Convention, Article V. It lays down the grounds under which the Recognition & Enforcement of an award may be challenged or refused.
[32]New York Convention, Article V (2)(b).
[33]New York Convention, Article V (2).

V. JUDICIAL LEGISLATION: THE FIASCO

In *Bhatia International* v. *Bulk Trading S.A. and Anr.*[34], the court had drawn an absurd analogy between Part I & II of the 1996 Act. It had construed the absence of the word 'only' in Section 2(2) (in light of the non-obstante clause[35] in Section 45 and 54) to hold it only as 'an inclusive and Clarificatory provision'. It held that a conjoint reading of the 1996 Act makes Part-I applicable to offshore international commercial arbitrations wherein Indian law governed the contract, unless the parties, by agreement express or implied, excluded all or any of its provisions (including those non-derogable). However, in arbitrations held in India the non-derogable provisions would be mandatorily applicable.[36]

The court was concerned that exclusion of Part I to offshore International Commercial Arbitration would leave those parties remediless who secured arbitral awards in non-convention countries (which are not signatories of New York or Geneva Conventions), for such a construction would have left no provision for their enforcement under the 1996 Act. According to it, this would amount to holding that there was a lacuna in the law. The court did not consider that India had exercised both the *Reciprocity* and the *Commerciality* reservations.[37] There is a mandatory requirement of notification in the Official Gazette before offshore arbitral awards become enforceable. This also extends to a country acceding to the New York[38] and Geneva Convention.[39]Thus, the 1996 Act explicitly

[34](2002) 4 S.C.C. 105.
[35]It reads 'notwithstanding anything contained in Part I'.
[36]This view has been affirmed in Venture Global Engineering v. Satyam Computer Services Ltd. and Anr. (2008) 4 S.C.C. 190.
[37]New York Convention, Article 1(3).
[38]The Arbitration and Conciliation Act 1996, § 44, No. 26, Acts of Parliament.

excludes enforcement of awards obtained in non-convention jurisdictions as a decree and a suit has to be filed for their enforcement in India.

The decision in BALCO has prospectively overruled the aforesaid judgment. The constitutional bench in BALCO held that Part I of the 1996 Act, is inapplicable to arbitrations held outside India in so far as the arbitration agreements were entered into after September 9, 2012.[40]

VI. INTERVENTIONIST ROLE OF THE INDIAN JUDICIARY: THE ERA OF THE CONCURRENT JURISDICTIONS

Prior to BALCO, national courts whose laws govern the arbitration agreement were held to be the competent courts in respect of matters arising under the arbitration agreement, and the jurisdiction exercised by the courts at the 'seat' was merely concurrent, and not exclusive and strictly limited to matters of procedure.[41] Section 48(1)(e) of the 1996 Act states that for the enforcement of foreign awards, they need to be binding as per the law of the land where the 'challenging' jurisdiction rests. This evidently suggests a difference between 'challenging' jurisdiction and the 'enforcement' jurisdiction which was overlooked. Though ambiguously demarcated, they are not concurrent. Such judicial pronouncements asserting concurrent

[39]The Arbitration and Conciliation Act 1996, § 53, No. 26, Acts of Parliament.
[40]BALCO ¶ 200.
[41]National Thermal Power Corporation v. The Singer Company and Ors.,(1992) 3 S.C.C. 551.

jurisdictions rendered arbitration an expensive affair, negating the cost-effectiveness of arbitration which makes it an attractive alternative to traditional litigation.

In BALCO, the court categorised regulation of arbitration as comprising of the following four stages:

(a) the *commencement of* arbitration;
(b) the *conduct* of arbitration;
(c) the *challenge* to the award; and
(d) the *recognition or enforcement* of the award.

The court has held that though Part I of the 1996 Act regulates arbitrations at all the four stages, Part II regulates arbitration only in respect of commencement, and recognition or enforcement of the award.[42] While upholding the principle of territoriality, it drew a distinction between the 'challenging' jurisdiction and the 'enforcement' jurisdiction and held that challenge to an arbitral award could be done only by the courts of the country in which the arbitration is being conducted as only such courts possess the supervisory power to annul the award.[43] This is in consonance with the scheme of international instruments, such as the Geneva Convention and the New York Convention as well as the UNCITRAL Model Law.

The court stated that Section 48(1)(e) merely recognizes that the courts of two countries are competent to suspend or annul an award. It does not entail concurrent jurisdiction to them to annul an award. Such jurisdiction must be specifically provided in the national legislations of the countries. The corresponding section in Indian law

[42]BALCO ¶ 126.
[43]BALCO ¶ 128.

i.e. Section 34, does not apply to arbitrations conducted abroad.[44] Furthermore, it elucidated that "under the laws" in Section 48(1)(e) pertained to curial law and not the substantive law.[45]

VII. THE PUBLIC POLICY CONUNDRUM

During the *Bhatia* era, public policy had been a bone of contention as a ground for refusal to enforce or setting aside of foreign awards. Indian courts do have the right to refuse recognition to repugnant procedures. But where will the courts draw a line?

In *Renusagar Power Co. Ltd.* v. *General Electric Co.*[46] the SC gave a narrow inclusive construction to 'public policy' in the context of Section 34 of the 1996 Act, holding that an award could be set aside if it was contrary to[47]

(a) fundamental policy of Indian law, or *(b)* the interest of India, or *(c)* justice or morality.

This was given a wider connotation in *Oil & Natural Gas Corporation Ltd* v. *SAW Pipes Ltd*[48] with the inclusion of another expansive ground: 'patent illegality' of the award, encompassing within its scope an award contrary to (a) substantive provision of law, or (b) provisions of the Act, or (c) terms of the contract.

However, it cautioned that such illegality must go to the root of the matter and could not be trivial in nature. It affirmed that an award

[44]BALCO ¶ 138.
[45]BALCO ¶ 157.
[46](1994) A.I.R. SC 860.
[47]*Id.* at ¶ 64.
[48](2003) 5 S.C.C. 705.

could also be set aside if was unfair and unreasonable to the extent of shocking the conscience of the court.[49]

Post BALCO, a foreign award cannot be set aside under the provisions of Section 34 of the 1996 Act. Notably, the apex court in *Phulchand Exports Ltd. v. OOO Patriot*[50], has upheld indirectly the same "public policy test" under Section 34 as being applicable under Section 48 as well. Thus, a foreign award is still subject to the same scrutiny.

The possibility of abuse of the grounds of recourse by a dissatisfied party cannot be ruled out. In the pre-BALCO era the agony of the Arbitral award holder was further exacerbated by the automatic suspension of the execution of the Award upon filing of objections under Section 34 results.[51] It was suggested by many that the delay caused in review of arbitral award be neutralised by allowing enforcement of the award during the pendency of challenge, while providing courts discretion to stay such enforcement. Section 48(3) gives the court discretion to suspend the enforcement of the award in case of an application for setting aside or suspension of the award. This comes as a great relief for those struggling with delay in the over-stretched procedure for enforcement of award.

[49] *Id.* at ¶ 30.
[50] (2011) 10 S.C.C. 300.
[51] National Aluminium Co. Ltd. v. Pressteel and Fabrications Pvt. Ltd., (2004) 1 S.C.C. 540.

VIII. THE STING: INTERIM RELIEF

It is suggested that, as held by the Apex Court in Bhatia International[52], Section 9 should be made applicable for offshore International Commercial Arbitration. It is likely that by the time courts exercising jurisdiction over the seat of arbitration are petitioned for interim measures of protection, the assets of a party located in India will be transferred or removed. The only possible alternative a party has is to obtain an interim order from a foreign Court or the arbitral tribunal, and file a civil suit to enforce this right. However, the interim order would not be enforceable directly by filing an execution petition as it would not qualify as a "judgment" or "decree" for the purposes of Section 13 and 44A of the Code of Civil Procedure, 1908[53] (which chalk out the procedure for enforcement of foreign judgments). The efficacy of enforcement through such a mechanism is suspect. The party obtaining an arbitral award in its favour would more often than not find that the entity against which it has to enforce the award has been stripped of its assets, defeating the award.

It is suggested that since the courts of the 'seat' are the natural forum for granting interim relief, the onus should lie on the claimant to establish why Indian courts should be preferred over them. The discretionary equitable doctrine of *Forum non conveniens* should be applied by courts to decline jurisdiction owing to appropriateness of the other forum.

[52]Bhatia International v. Bulk Trading, (2002) 4 S.C.C. 105.
[53]Code of Civil Procedure, 1908, No. 5 of Acts of Parliament.

IX. NON-STATE ENFORCEMENT: A FEASIBLE ALTERNATIVE

Parties can choose arbitration to be conducted on an *ad hoc* basis or under the auspices of an arbitration institution. Usually, the enforcement of the tribunal's orders on interim measures or arbitral award is done with the assistance of the national courts. However, some arbitral institutions wield sufficient coercive power to enforce their award independent of the state.

The Court of Arbitration for Sports (CAS) has successfully enforced its awards without the assistance of states, since the sports federations accept them as binding. *Clube Atlético Mineiro v. Fédération Internationale de Football Association (FIFA)*[54] perfectly exemplifies a conflict of an international arbitral award with the national legal order, wherein the former triumphed. The award was enforced without the help of the state and against its mandate. A Brazilian footballer had violated his four-year contract with a Mexican Club after a year, for which the club had paid him a transfer fee of $1million. FIFA suspended him from playing worldwide, but a Brazilian court ruled in his favour, allowing him to pursue his career. He started playing for a Brazilian club. However, the FIFA Player's Committee ordered him to restore the amount, failing which the Brazilian club he was playing for would be liable. This was challenged before CAS which confirmed the decision of FIFA. The club could be counted upon to pay the amount since otherwise it would face sanctions from the Brazilian Federation which in turn would face sanctions from FIFA in case of non-compliance. This could even lead to disqualification of Brazil from the World Cup!

[54]CAS 2005/A/957.

This could be viewed as one of the many international non-state organisations having sufficient coercive power to ensure compliance. They legislate and establish adjudicatory bodies and enforce awards through an array of internal sanctions. Such systems draw legitimacy from being impersonal and intended to exclusively govern specific aspect of social life. It would do good to promote them in the larger common interest.

X. THE INTERNATIONAL COURT OF ARBITRATION

The International Court of Arbitration (hereinafter referred to as "**ICC Court**") is the arbitration body attached to the International Chamber of Commerce (hereinafter referred to as "**ICC**"). ICC has a wide reach with members and national committees in many countries, which assist in obtaining voluntary compliance from defiant parties.

The ICC Court, established in 1923, is an administrative body charged with the responsibility of overseeing the ICC arbitration process. Its members are chosen for a renewable term of three years by the ICC's World Council in which each National Committee is represented. [55]

The Court is unique both in its composition and its supervisory role. Among its many functions are appointment of arbitrators; reviewing and confirming the appointment of arbitrators; reviewing and confirming the appointment of arbitrators; reviewing and deciding allegations of arbitrator bias or misconduct; extending time limits;

[55]To uphold high standards of integrity, a member is barred from being appointed as arbitrator by the court but is free to be appointed by any party and can also appear as a counsel in any arbitration.

fixing fees of arbitrators; reviewing and approving (as to their form) the arbitral awards.

To ensure that the award addresses all the disputed issues, ICC requires Terms of Reference to be spelled out by the tribunal before the commencement of arbitration.[56] This includes the respective parties' claims, relief sought and a list of issues to be determined. Additionally, a provisional time-table is to be submitted, which though flexible, provides a broad framework and deadline for expeditious disposal by the tribunal. The Court also has the power to replace an arbitrator 'who does not fulfil his functions'[57] and has used it on several occasions.

It is mandatory for the ICC Court to approve the form of all arbitral awards[58] and while doing so it may also draw the tribunal's attention to points of substance. Despite being of non-binding nature, this does enhance the quality of the awards. Thus, the legitimacy of the award owes much to supervision of the Court, reinforced by its diverse composition and collective character of decisions. Though no arbitral institution can guarantee ultimate quality and efficacy, the ICC Court has counterbalanced the flexibility and autonomy in arbitration by a highly supervisory (yet not intrusive) set up.

XI. AD HOC VERSUS INSTITUTIONAL ARBITRATION

Institutional arbitration posits a more secure environment for arbitration than that conducted on ad hoc basis and is therefore a preferred mode due to cost-effectiveness if compared to a long drawn

[56]ICC Arbitration Rules (2012), Article 18,
[57]*Id.* Article 12(2).
[58]*Id.*, Article 27.

litigation, though institutional arbitration is generally more expensive than ad-hoc arbitration; pre-laid institutional procedural rules for conduct of arbitration; infrastructure facility; removal of arbitrators by institution; and scrutiny of awards.

Section 11 of the 1996 Act leaves it to the discretion of the Chief Justice to appoint the arbitrator or designate any person or institution to do so. However, in *S.B.P. and Co.* v. *Patel Engineering Ltd. and Anr*.[59] it was held that such delegation could only be to another Judge of the court who could seek the opinion of an institution in exercise of such duty, but the order had to be made only by Chief Justice or such designated judge.[60] This retrograde step is a severe blow to institutional form of arbitration which could be earlier recommended by judiciary.

Notably, the reputation of arbitral institutions is gradually built up over a period through sustained, impeccable standards of integrity and can be tarnished by a single incident of favouritism/unfairness. While no institution (including the judiciary) is infallible, it would be pragmatic to trust arbitral institutions due to the self-corrective and testing nature of the process in which the onus of quality rests on the institution. An institution upholding high standards of justice and transparency would be a natural consensus choice for arbitration.[61] With institutional arbitration being more effective and dependable in practice, this overambitious digression to take absolute control over appointment is required to be reviewed urgently by the judiciary or be rectified by legislative amendment. Such an approach would be

[59](2006) A.I.R. SC 450.

[60]It held that appointment of arbitrator is a judicial function and not an administrative function.

[61]The foundation of arbitration rests upon choice and the parties while selecting an institution will come to a consensus only upon only those, where they feel that they will get 'justice' through a fair and transparent procedure.

consistent with the international framework, appropriately catering to the forthcoming demands.

XII. CONCLUSION

The Commercial Division of High Courts Bill, 2009, which has been passed by the Lok Sabha lying pending before the Rajya Sabha heralds a much brighter future for speedier settlement of commercial disputes. It envisions the creation of a division within the High Courts carved out of its existing strength, having jurisdiction over commercial matters above a threshold limit of Rs.5 crore as well as appeals lying before the High Court under the 1996 Act. It would use a fast-track mechanism[62] and would bind judges to deliver the judgement within 30 days of the conclusion of arguments. Appeals would lie only before the Supreme Court. However appointment of judges as arbitrators poses the danger of render the environment and purpose of arbitration void since they tend to impose the procedural and substantive rules as followed in a formal court, without being formally trained as arbitrators.

It is of critical significance at this juncture to highlight the paternalistic stand of the judiciary which has a direct impact on arbitration. As the ultimate guardian of the rights of the people, the judiciary which adjudicates upon the finality of the arbitral award is already overburdened. A sizeable blame of the delay rests upon the Supreme Court collegium, which has appropriated the responsibility of appointment of Judges to the Higher Judiciary upon its shoulders.[63]

[62]Setting of specific time-limits for filing documents, delivering judgements etc.

[63]Of making mandatory binding recommendations for appointment to the Higher Judiciary to the President of India. SC Advocate-on-Record Association vs. UOI, (1993) 4 S.C.C. 441.

Thus, the onus of filling up the vacancies rests on them.[64] The distressing handicap[65] of the collegium to discharge this additional burden effectively calls for an urgent review of the appointment process. This will bring much needed respite to the judicial system and will also lubricate the wheels of the commercial division of the High Courts.[66]

It is evident that the problem is multi-axial, fraught with complexities of different dimensions. Arbitration assumes a significant role in providing a level playing field for robust trade and commerce. Therefore, it is imperative for the legal framework to rise to the occasion and equip the infrastructure with the requisite tools to tackle the forthcoming challenges with professionalism. Resetting the negative trend of judicial interference is sine qua non for achieving a conducive environment for healthy business in India. Speed and cost-efficiency are the hallmarks of arbitration, and the obstruction of either can adversely affect international trade, retarding our economic growth. Thus, it is important that the grounds for judicial intervention be construed narrowly, giving paramount consideration to the principle of party autonomy, to bring the arbitration regime at par with the global standards.

[64]In September 2009, 254 posts out of 886 sanctioned for judges of High Courts were lying vacant.

[65]The court, in absence of a secretariat is overburdened with administrative work. It lacks resources to investigate into competence, character and integrity of candidates, resorting to informal consultation with other judges or members of the bar. This is a poor substitute for intensive data collection. National Judicial Appointment Commission is the need of the hour.

[66]As provided for in the Commercial Division of High Courts Bill, 2009.