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A Comparative Study

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Abstract

Ⅰ. Background and Purpose

□ The significance of the study of commercial arbitration especially international commercial arbitration lies in the fact that, in the contemporary world of changing dimensions it has become a sophisticated mechanism for consensually dealing with international disputes. International commercial arbitration being a consensual means of dispute resolution, it has the binding effect only by virtue of complex framework of national and international law including the national arbitration laws, international conventions and institutional arbitrations. This legal arena enhances the enforceability of both arbitration agreements and arbitral awards. It seeks to insulate the arbitral process from undue interference from the national courts.

□ In the recent past and especially in the last two decades, there has been a tremendous explosion in the number of cases being settled through arbitration and similar mechanisms in Asia. At the same time such an attempt is threatened by the lack of effective legal framework in some of these countries, which might affect the economic and commercial growth and investment in them.

□ The research study is confined to a comparative analysis of the international commercial arbitration laws of selected South Asian countries like, India, Bangladesh, Pakistan, Nepal and Sri Lanka. The main focus of this study is identifying various problem areas in the commercial arbitration law in those South Asia countries so that suitable changes and improvements may be suggested.

Ⅱ. Main Contents

□ Firstly, the concept, evolution and the scope of the practice of international commercial arbitration and issues like important principles, procedures and interpretations of international commercial arbitration laws in resolving commercial disputes, would be discussed in the introductory chapter. The primary focus would be the need for Asian countries to have a strong and effective international commercial arbitration law. In addition, an attempt would be made to examine as to what change it would make in the development and welfare of countries in South Asia.

□ Sec.ondly, laws of countries like, India, Bangladesh, Pakistan, Nepal and Sri Lanka would be examined. Looking at South Asia's potential for international trade, it is prudent to conduct an in-depth analysis of the law of international commercial

arbitration laws in these countries to understand the law and practice.

□ Thirdly, it would analyze the differences and similarities exist amongst various countries in South Asia. In the light of the existing areas of concurrences and contradictions, an attempt would be made to understand the philosophical and practical underpinnings in the law and development of international commercial arbitration practice in these countries.

□ Finally, last chapter would contain the important observations carved out during the study. The issues specific to each jurisdiction would be examined independently. The key issues and challenges in the unification of arbitration laws in South Asia would be assessed in detail and possible solutions would be suggested.

Ⅲ. Expected Effect

□ Lack of effective commercial dispute resolution policies and laws in various Asian countries has affected the economic and commercial growth and impinges investment in them. In this context, it is much necessary to study the limitations of dispute resolution policies and laws from a comparative perspective. Once the problems in each legal system stand identified,

improvements could be made through appropriate changes in the policies and amendments in the domestic laws.

- The aim of this research would be to analyze the arbitration laws in the countries in South Asia. Eventually, in a comparative perspective, the solutions for the existing problems in these jurisdictions would be suggested.

- It could provide first hand information regarding the dispute resolution mechanism of commercial disputes in the South Asia.

Key Words : International Commercial Arbitration, South Asia, India, Bangladesh, Pakistan, Nepal, Sri Lanka, ADR, Arbitration

Contents

Chapter 1: General Introduction

The post 1990's have seen an augmented economic and trade interaction between Asia and the West, as well as within Asia itself. These interactions also resulted in an unprecedented increase in the cross border trade disputes. These disputes attracts scholarly attention because, unlike trade disputes in the Europe or North America, the parties in a trade dispute in Asia come from extremely different and divergent social, legal, economic and cultural backgrounds resulting often in different expectations as to the manner in which they perform the business. More and more businesses are at risk of being sued in foreign jurisdictions where their commercial rights and trade obligations become subject to unfamiliar laws and procedural technicalities in alien cultural backgrounds. Avoiding such a situation requires careful thought and attention as to the question of when, how and where disputes are amicably settled. In international trade, this is of utmost importance as compared to purely national transactions. In the recent past and especially in the last two decades, there has been a tremendous explosion in the number of cases being settled through arbitration and similar mechanisms. At the same time such an attempt is threatened by the lack of effective legal framework in some of these countries, which might affect the economic and commercial growth and investment in them.

This research study is confined to a comparative analysis of the international commercial arbitration laws of not all Asian countries but of various South Asian countries like, India, Bangladesh, Pakistan, Nepal and Sri Lanka. Given the region's potential for international trade such a ceiling may be justified. The main focus of this study is in identifying various

problem areas in the commercial arbitration law in various South Asian countries so that suitable changes may be made.

The present chapter analyses various important principles, procedures and interpretations of International Commercial Arbitration Laws generally. Thereafter it also focuses on the need for South Asian countries to have a strong and effective International Commercial Arbitration Law. Also an attempt would be made to answer the question as to what change it would make in the development and welfare of countries in South Asia. The development of arbitration law in India has been highlighted to explain the law prevailing today in South Asia, due to two reasons:

a. The Indian law on Commercial Arbitration is comparatively the more developed legal framework in South Asia at present.
b. The Indian Arbitration Act (1940) (repealed in India), forms the basis of the commercial arbitration laws of three countries in South Asia viz. India, Pakistan and Bangladesh.

Section 1. Scope of Arbitration in Resolving International Trade Disputes

Dispute resolution policy plays a crucial role in determining the acceptability and suitability of a legal system by the international trading community. The society, state and the parties to the dispute are equally under an obligation to resolve the dispute before it disturbs the peace in the family, business community, society or ultimately humanity as a whole, because in a civilized society the rule of law should prevail and principles of natural justice should apply and resulting in complete justice.[1] Primarily

1) Madabhushi Sridhar, ADR: *An Attempt to Achieve Constitutional Goal of Complete*

there are two forms of dispute resolution mechanisms *viz*., the traditional form of ordinary litigation before the courts and alternate dispute resolution methods commonly known as Alternative Dispute Resolution (ADR) which is a collective term for the ways in which the parties can settle disputes outside the judicial process with or without the help of a third party. The different modes of ADR include, Arbitration, Conciliation, Mediation, Negotiation, *etc*. All these techniques except negotiation, generally contemplate the hearing and determining of a dispute or the settling of differences between parties by a person or persons chosen or agreed to by them. These ADR mechanisms are complementary to court proceedings and are gradually gaining recognition.[2] The main advantage of ADR techniques is that the litigants are not bound by the technicalities of ordinary court procedures.

Section 2. Concept of Arbitration

There are numerous options, both binding and non-binding, available to parties to an international dispute, such as litigation before national or international courts, arbitration which may be *ad hoc* or institutional, and

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Justice in India, http://adrr.com/adr4/ADR-Constitution.htm (visited on November 24, 2008.)

2) The large number of pending cases in the courts all over the country has in fact added momentum to the development of the alternate dispute resolution mechanisms. An empirical study conducted by the same researchers for the World Bank on the effectiveness of ADR system in India has revealed many factors that contributed to the evolution of the modern ADR mechanisms. The general statistics shows that the rate of disposal of cases rests on a lower side when compared to the rate of institution of suits in the courts. As a result the pendency of cases in the courts rises every year. The reasons cited include, insufficient infrastructure of the courts, deficient number of judicial officers, improper cadre management, lack of skill, efficiency and techniques adopted by the judicial officers, nature of the particular case, lack of effective case management, the non-cooperation among lawyers, unhealthy relationship between parties etc. Indian Law Institute, "A Report on ADR: Status/Effectiveness Study", (2008).

other alternate dispute resolution mechanisms like; mediation, conciliation, *etc*. Amongst these methods arbitration is a prominent method, which is the oldest known type of third-party settlement of international disputes.[3] The principal difference between arbitration and judicial settlement is that, decisions in arbitration proceedings are made by judges chosen by the parties, who can also indicate special rules that they wish the arbitral tribunal to apply to their disputes. It is also opined that international arbitration may be preferable to court proceedings as the outcome is more predictable.[4] While the choice of final and binding dispute settlement mechanisms may vary from a strategic perspective, from a systematic point of view, arbitration has certain unparalleled merits.[5] Parties have a great degree of autonomy, and therefore control over the resolution of their dispute. This means they have the ability to choose arbitrators (crucial when specialized knowledge is required), venue, substantive and procedural laws and standards, and language. The ability to make these choices translates into a neutral and flexible system of dispute resolution where parties can adapt the rules and procedures to particular needs and requirements. This is a feature not associated with court proceedings usually rigidly controlled by the judges and court administration.[6]

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3) S. Agar, *Interstate Arbitrations in the Greek World 337-390 BC*, (University of California Press, Berkley, 1996).

4) Cf. Shabtai Rosenne, "The perplexities of Modern International Law", *Recueil des Cours* 109 (2001).

5) Amongst the various modes of ADR, arbitration is considered as binding and final in terms of its outcome. The common trend is that an arbitral award is treated at par with the court decree in terms of its enforcement. However, the choice between the binding decision making process before the national courts and independent arbitral tribunal is made by the parties concerned. It generally depends upon the nature of the dispute, amount or claim involved and the pre-existing business relationship between the parties.

6) *Id*. at 110.

Halsbury's Laws of England defines arbitration as "…a process used by agreement of the parties to resolve disputes. In arbitration, disputes are resolved, with binding effect, by a person or persons acting in a judicial manner in private, rather than by a national court of law that would have jurisdiction but for the agreement of the parties to exclude it. The decision of the arbitral tribunal is usually called an award."[7] It is becoming the most important method of dispute resolution in international transactions. Arbitration, whether national or international, is different from litigation in the ordinary courts. It enables the parties to exercise a high degree of control over proceedings,[8] the terms of reference[9] and composition of tribunal, which are not possible in the ordinary courts.[10] It may also provide the advantages of a relatively inexpensive and expeditious dispute resolution process in a neutral forum. Since it is based on the doctrine of party autonomy, it offers the added flexibility of allowing parties to choose the arbitration tribunal, the arbitrators and in some cases the arbitration rules and the substantive law.

(1) Meaning of International Commercial Arbitration

The establishment of an international law on arbitration that is acceptable to States with diverse legal, social and economic systems contributes to the development of harmonious international economic relations. The term "commercial" should be given a wide interpretation so as to cover matters arising

7) Halsbury's Law of England, (5th Edn. 2008).

8) Unlike litigation before ordinary courts, in arbitration, parties are given the freedom to determine the rule of procedure.

9) Parties are also given the freedom to decide what all disputes are to be referred to arbitration, under the present law.

10) Regarding the appointment of arbitrations also, the parties are given the right to choose arbitrators as they like.

from all relationships of a commercial nature, whether contractual or not. According to UNCITRAL Model Law on Commercial Arbitration, the phrase 'relationships of a commercial nature' include, but are not limited to, "… any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road."[11] Further the UNCITRAL Model Law says that, an arbitration is international if (a) the parties have their place of business in different States; or (b) one of the following places is situated outside the State in which the parties have their place of business:(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the arbitration agreement relates to more than one country.[12]

The Supreme Court of India while interpreting the Indian law in this regard used the aforesaid UNCITRAL model definition of the phrase, 'relationships of commercial nature.' In *R. M. Investment and Trading Co. Pvt. Limited v. Boeing Co.*[13], the R.M. Investment and Trading Company (petitioner) was a company incorporated under the (Indian) Companies Act (1956). The petitioner entered into an agreement with Boeing Company (respondent), a company incorporated under the laws of the State of Delaware in the United States of America, in the year 1986. As per the terms of this

11) The UNCITRAL Model Law, 1985, Article 1(1).
12) *Id*., Art. 2(3).
13) AIR 1994 SC 1136.

agreement the petitioner agreed to provide the respondent with consultancy services for promotion of sale of Boeing aircrafts in India. The petitioner was also required to play an active role in promoting the sale of the aircraft of Boeing to customers and was again required to provide 'commercial and managerial assistance and information which may be helpful to Boeing's sales efforts with customers'. The question was whether such a dealing, i.e. rendering of consultancy services between the parties was commercial or not. The Supreme Court of India (the highest court in India) while interpreting section 2 (f)[14] of the (Indian) Arbitration and Conciliation Act (1996), took aid from the aforesaid provision of the UNCITRAL Model Law, and held that relationships of a commercial nature includes 'commercial representation or agency and consulting'.

Other countries in the south Asian region have also prescribed the limit of international commercial arbitration in different ways. Whereas the Bangladesh Arbitration Act (2001) has adopted a similar approach with that of Indian Law in terms of nature and scope of an arbitration agreement[15], the Sri Lanka Arbitration Act (1995) says differently about an arbitration agreement.[16] In Pakistan after the enactment of the Recognition and

14) Section 2(f) of the (Indian) Arbitration and Conciliation Act (1996) says "International commercial arbitration means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in for in India and where at least one of the parties is-(i) an individual who is a national of, or habitually resident in, any country other than India; or (ii) a body corporate which is incorporated in any country other than India; or(iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or (iv) the Government of a foreign country."

15) Section 7 & 9 of the Indian Arbitration and Conciliation Act (1996) and the Bangladesh Arbitration Act (2001) respectively.

16) Section 4 of the Sri Lanka Arbitration Act (1995) provides that by an agreement, 'any dispute' can be determined by the arbitrator unless the matter in which the arbitration agreement is entered into 'is contrary to public policy or is not capable of determination by arbitrator.'

enforcement of (Arbitral Awards and Foreign Arbitral Awards) Act (2011), the courts have begun to deviate substantially from its earlier stand under the Arbitration Protocol and Convention Act (1937) in defining the scope and meaning of international commercial arbitration. In Nepal, the Arbitration Act (1999) has been enacted in tune with the UNCITRAL Model Law, thereby giving the same meaning to the term 'commercial' in interpreting the agreements in international arbitration matters.

Section 3. Evolution of the Law of International Commercial Arbitration

The law of international commercial arbitration has been developed as a result of the progress of international trade and also due to various conventions adopted at the international level by various international organizations. The first such international convention was the Geneva Protocol on Arbitration Clauses (1923) which was drawn up on the initiative of the International Chamber of Commerce (ICC) under the auspices of the then League of Nations. The protocol had two objectives, first, it sought to make arbitration agreements and arbitration clauses enforceable internationally. secondly, it sought to ensure that awards made pursuant to such arbitration agreements would be enforced in the territory of the state in which they were made. Most of the countries from Asia are signatories to this Protocol. This was followed by the Geneva Convention on the Execution of Foreign Arbitral Awards (1927) which was also drawn up under the auspices of the League of Nations. The purpose of this Convention was to widen the scope of the Geneva Protocol (1923) by providing recognition and enforcement of Protocol awards within the territory of contracting state, and not merely the

state in which the award was made. Thereafter the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted by the UNESCO[17] under the guidance of ICC in the year 1958. The Convention provided for a simpler and effective method of obtaining recognition and enforcement of foreign awards. It does not permit review on the merits of an award to which it applies. Currently 147 states have ratified the New York Convention. All the member countries in the South Asian Region except Bhutan are parties to the convention.

(1) Unification of Arbitration Law by UNCITRAL Model Law on International Commercial Arbitration (1985)

There are wide divergences and disparity in the laws relating to various aspects of business contracts in different countries. Such disparities create practical difficulties and legal problems in the smooth and swift flow of international business. With a view to promote uniformity at least on fundamental principles in the various business laws, United Nations Commission on International Trade Law (UNCITRAL) has either made model laws/conventions or has prepared guidelines on various subjects. The conventions/model laws are intended to provide useful means of reconciling the existing conflicts and diversities between civil law, common law and several other legal systems prevailing in different parts of the world. The UNCITRAL Model Law contains provisions, which may form as a model for various legal systems in updating their domestic laws. The UNCITRAL Model Law on International Commercial Arbitration aims at assisting countries

17) United Nations Educational, Social and Cultural Organization, a specialized agency of the United Nations was founded on 16th November 1945. UNESCO promotes international co-operation among its member states and associate members in the fields of education, science, culture and communication.

"in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world."[18] However, it is also worth noting that, many countries have adopted the UNCITRAL Model Law without becoming a party to it, thus proving its wide recognition across the globe.[19]

Section 4. Fundamental Principles of International Commercial Arbitration

As global business expands, the number of business disputes are also on the rise. It is extremely difficult or rather impossible to get all these disputes resolved through the conventional method of courts. Moreover, international business disputes involving issues of jurisdiction, law, language, culture, *etc*. bring additional problems. As the courts all over the world are loaded with unresolved cases, delay in getting justice is inevitable. In such a scenario, businessmen have to search new methods of resolving business disputes and

18) UNCITRAL Model Law on International Commercial Arbitration, 1985. Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html (visited 12/09/2012).

19) India has ratified many Conventions and Model Law including the UN Convention on Multimodal Transport of Goods (1980) and the UNCITRAL Model Law on Electronic Commerce, 1996. Bangladesh and Sri Lanka have ratified the Model law whereas Pakistan and Nepal have not become a party to it. Nonetheless, Nepal Arbitration Act (1999) has heavily relied upon the Model Law in various aspects.

arbitration is one of them. Arbitration is a private court by a private judge. The decision of the arbitrator is called an award, which is binding on the parties. When the business dispute is international in character and is to be resolved with the help of arbitration, it is known as 'international commercial arbitration.' The arbitration is a creation of contract between the parties. Hence, party autonomy is the heart and soul of each and every arbitration contract. However, this autonomy is not unbridled. The applicable law and public policy provide the boundaries to this autonomy. Rules of arbitral institutions also curtail the autonomy of parties.

1. Doctrine of Party Autonomy

A basic principle in international commercial arbitration is that of party autonomy. It is described by authors that 'party autonomy is the guiding principle in determining the procedure to be followed in an international commercial arbitration. It is a principle that has been endorsed not only in national laws, but also by international arbitral institutions and organizations. The legislative history of the UNCITRAL Model Law shows that the principle was adopted without opposition...'[20] Party Autonomy actually means the freedom of the parties to do what is intended. The 'freedom of contract' is the commencement of the party autonomy. In arbitration this is carried forward to determining the procedure, practice and the applicable law. The legal systems all over the world have implemented this freedom of the parties. The concept may be analysed under four heads including (ⅰ) the Agreement (ⅱ) the Procedure (ⅲ) the Practice and (ⅳ) the Applicable Law.

20) Redfern and Hunter, *International Commercial Arbitration* (2006).

The Agreement: Arbitration agreement is a form of a contract and free consent is the basic element of a contract. In a 'standard contract' the words are already printed overleaf and there could be an arbitration clause already incorporated. Sometimes even the name, either of an individual or of a person *ex-officio*, is previously determined and printed. The other party has to 'take it or leave it.' The party Autonomy of the one who is compelled to arbitrate becomes a 'deception' on the face of it. On the other hand, the arbitration procedures have to comply with the domestic legal compulsions as well. Hence the issue is how to incorporate the concept of party autonomy in forming arbitration agreement and the scope of 'free consent in a contract'.

The Procedure: In the domestic judicial forums based on the principle of generally the codified laws guide the procedure. There is no scope of choice of law as the provisions are mandatory in nature. In arbitration the parties lay down the agreed procedure and the arbitrator is under an obligation to decide the dispute in accordance with the agreed procedure.[21)]

The Practice: The Law of Merchants which were the guiding law for the merchants in the medieval Europe, including England and was evolved based on the common trade usage and customs. Law merchant precepts have been reaffirmed in new international commercial arbitration law. As the new commercial law is grounded on commercial practice directed at market efficiency and privacy, national trade barriers are loosing its relevance in promoting international trade and commerce.

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21) This aspect of the party autonomy is reflected in the Art. 19 of the UNCITRAL Model Law, which lays down: "Subject to the provision of this law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings."

The Applicable Law: The principle of party autonomy provides a right for the parties to an international commercial agreement to choose applicable substantive law. When the parties have made a choice of substantive law this choice generally refers to the law governing the parties' contractual relationship. Unless otherwise provided for, such choice does not refer to the conflict rules arising under private international law.[22] Regarding the procedural law governing the conduct of the arbitration proceedings, similar opportunity is provided to the parties under the principle of party autonomy. However, in practice, the procedural law in an international commercial arbitration proceeding is determined by the law of the place of arbitration unless there is an agreement to the contrary by the parties.

2. Limitation on the doctrine of Party Autonomy:

Modern views of freedom of contract recognize that the principle of party autonomy has mainly two restrictions viz. (a.) Law of the land and (b.) public policy (which includes both national as well as international public policy).

Public Policy: Public policy is often regarded as a vague concept, which is impossible to define, and varies from State to State. This leads to uncertainty and unpredictability, which encourages the unsuccessful party in the arbitration to resist enforcement of the award on the ground of public policy. He might get lucky, or at least delay the fateful day when he must make payment. When considering the application of public policy, it is

22) Similar provisions are there in the arbitration laws of many countries, which have adopted the UNCITRAL Model Law. For example, section 28(i)(b (ii) of the Indian Arbitration and the conciliation Act (1996).

especially important to define one's terms; and, in particular, to distinguish between public policy, international public policy and transnational public policy. In using the term 'public policy', it is meant those moral, social or economic considerations, which are applied by the courts as grounds for refusing enforcement of an arbitral award either domestic or foreign. The English House of Lords in 1853 described public policy as 'that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against public good.'[23)]

In using the term 'international public policy' (or *ordre public international*), it is meant that public policy, which is applied by State courts to foreign awards rather than domestic awards. International public policy is understood to be narrower than domestic public policy not every rule of law which belongs to the domestic public policy (*ordre public interne*) is necessarily part of the international public policy (*Ordre public externe*). But 'international public policy' is not to be confused with 'transnational public policy'. The latter is supra-national while the former is specific and subjective to each State. *Transnational or truly international public policy* are those principles that represent an international consensus as to universal standards and accepted norms of conduct that must always apply. The concept of 'transnational public policy', or 'truly international public policy', is said to be comprised of fundamental rules of natural law, principles of universal justice, *jus cogens* in public international law, and the general principles of morality accepted by what are referred to as 'civilized nations'.

23) *Egerton v Brownlow*,(1853) 4 HL Cas 1.

3. Doctrine of *Competence-Competence*

The doctrine has two aspects. Firstly, it means that arbitrators are judges of their own jurisdiction and have the right to rule on their own competence. Therefore, if the validity of the arbitration agreement itself and thus the competence of the arbitrator is impugned, he or she does not have to stop proceedings but can continue the arbitration and consider whether he or she has jurisdiction. secondly, in some countries, the arbitration agreement ousts the initial jurisdiction of ordinary courts. If the *prima facie* existence of the arbitration agreement is objected to, a court must refer the dispute to arbitration. But there is great variation where this second aspect is concerned. In civil law countries such as France, arbitrators appear to have a wide jurisdiction to determine their competence.[24] The prevalent view in common law countries is that arbitrators have only a limited competence to rule on

24) In France, the statutory provisions regarding arbitration are found in Book IVof the Code of Civil Procedure (CCP), which comprises a Title I regarding domestic arbitration and a Title II regarding international arbitration. Such provisions entered into force on 1 May 2011 following the implementation of Decree No. 2011-48 of 13 January 2011. Hence, the '2011 Reform', replaced prior provisions enacted in 1980 and 1981. The provisions applicable to international arbitration are not based on the UNCITRAL Model Law but they do not materially differ from it. The 2011 Reform is designed to further modernise international arbitration in France and codify a number of solutions adopted by case law over the past thirty years, in order to make French international arbitration law more accessible to international users. French law accords great importance to the principle of competence-competence. Based on article 1448 of the CCP, a French court will grant priority to an arbitral tribunal to decide whether it has jurisdiction to hear a particular case, unless the arbitration agreement is manifestly null or inapplicable to the case, an exception which is narrowly construed. Article 1457 says that the arbitrators shall carry out their mandate until it is completed, unless they are legally incapacitated or there is a legitimate reason for them to refuse to act or to resign. Similarly, article 1465 CCP further provides that the arbitral tribunal has exclusive jurisdiction to rule on objections to its jurisdiction.

their jurisdiction, and that these rulings may be reopened and scrutinized by the courts.

The doctrine of competence-competence is justified on the ground that there is a rebuttable presumption that such jurisdictional power has been conferred by the will of the parties when they entered into the arbitration agreement. If it is presumed that the parties have conferred the arbitrator with the power to decide his or her own jurisdiction in the same way that he or she deals with the other legal matters arising in the arbitration, the court should respect the contract of the parties so long as the arbitrator acts in good faith. Competence-competence is best seen as a rule of convenience designed to reduce unmeritorious challenges to an arbitrator's jurisdiction. It also promotes the arbitral process by giving arbitrators the competence to decide their own jurisdiction so that parties are not compelled to seek relief in the courts.

4. Doctrine of Separability

There is a well-established legal fiction that when parties enter into a contract containing an arbitration clause, they are really entering into two separate agreements: the principal agreement containing their substantive obligations, and the arbitration agreement which provides for the settlement of disputes arising out of the principal agreement. This legal fiction is perfectly justified if we consider what happens if the parties enter into two physically-separate contracts. In this situation, if the principal agreement is alleged to be void, there is no question about the validity of the arbitration agreement since it is an independent contract. It is a widespread practice that courts usually review only arbitral awards and not the merits of disputes that are meant to be arbitrated.

The doctrine of separabilty is justified on the grounds that when parties enter into an arbitration agreement that is widely phrased, they usually intend to require that all disputes, including disputes over the validity of the contract, are to be settled by arbitration. This may be an implied term of the contract. The doctrine of separability is based on the idea that if simply by denying the validity of main contract, one party can deprive the arbitrator of his competence to rule upon that allegation, thus providing a loophole for parties to repudiate their obligation to arbitrate. This defeats one of the main advantages of choosing arbitration over litigation as a means of dispute settlement i.e., speed and simplicity without any waste of time and cost of court expense. The problem is worse in international arbitration agreements, since there is no international court with compulsory jurisdiction to determine and enforce the validity of the contract.

Section 5. Salient Features of the UNCITRAL Model Law

1. Special procedural regime for international commercial arbitration

The principles and individual solutions adopted in the UNCITRAL Model Law aim at reducing or eliminating the above concerns and difficulties. As a response to the inadequacies and disparities of national laws, the Model Law presents a special legal regime geared to international commercial arbitration, without affecting any relevant treaty in force in the State adopting the Model Law. While the need for uniformity exists only in respect of international cases, the desire of updating and improving the arbitration law may be felt by a State also in respect of non-international

cases and could be met by enacting modern legislation based on the Model Law for both categories of cases.

2. Substantive scope of application

The UNCITRAL Model Law defines an arbitration as international if 'the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States.'[25] The vast majority of situations commonly regarded as international will fall under this criterion. In addition, an arbitration is international if the place of arbitration, the place of contract performance, or the place of the subject-matter of the dispute is situated in a State other than where the parties have their place of business, or if the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country. As regards the term 'commercial', no hard and fast definition could be provided.[26]

3. The territorial scope of application

Another aspect of applicability is what one may call the territorial scope of application. The Model Law as enacted in a given State would apply only if the place of arbitration is in the territory of that State.[27] However,

25) Article 1(3) of the UNCITRAL Model Law.

26) Article 1 contains a note calling for 'a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not'. The footnote to article 1 then provides an illustrative list of relationships that are to be considered commercial, thus emphasizing the width of the suggested interpretation and indicating that the determinative test is not based on what the national law may regard as 'commercial'.

27) *Id*., Art. 1(2).

there is an important and reasonable exception which deal with recognition of arbitration agreements, including their compatibility with interim measures of protection[28], and articles 35 and 36 dealing with the recognition and enforcement of arbitral awards. These provisions are given a wider scope and they apply irrespective of whether the place of arbitration is in that State or in another State or even if the place of arbitration is not yet determined. The strict territorial criterion, governing the bulk of the provisions of the Model Law, was adopted for ensuring certainty. The place of arbitration is used as the exclusive criterion by the great majority of national laws in determining the procedural law of arbitration. Where the national laws allow the parties to choose the procedural law of a State other than that where the arbitration takes place, experience shows that parties in practice rarely make use of that facility. This also includes the possibility of incorporating into the arbitration agreement procedural provisions of a 'foreign' law, provided there is no conflict with the few mandatory provisions of the Model Law.[29]

4. Delimitation of court assistance and supervision

As evidenced by the recent amendments to the arbitration laws in the various countries, there exists a trend in favour of limiting court involvement in international commercial arbitration. This seems justified in view of the fact that the parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and, in particular in commercial cases, prefer expediency and finality to protracted battles in court. In this direction,

28) *Id*., Art. 8(1) & 9.

29) The strict territorial criterion is of considerable practical benefit in respect of articles 11, 13, 14, 16, 27 and 34, of the Model Law which entrust the courts of the respective State with functions of arbitration assistance and supervision.

the Model Law envisages court involvement only in the specified instances. It comprises appointment, challenge and termination of the mandate of an arbitrator[30] jurisdiction of the arbitral tribunal and setting aside of the arbitral award.[31] It also includes court assistance in taking evidence[32], recognition of the arbitration agreement, including its compatibility with court-ordered interim measures of protection[33], and recognition and enforcement of arbitral awards.[34]

5. Summary

The Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world. The Model Law was necessary due to the factors that the domestic laws alone were inadequate to deal with the intricacies of the international trade. The global survey of national laws on arbitration revealed considerable disparities not only as regards individual

30) *Id*., Articles 11, 13 & 14.

31) *Id*., Articles 16 and 34 respectively. These instances are listed in article 6 as functions which should be entrusted, for the sake of centralization, specialization and acceleration, to a specially designated court or, as regards articles 11, 13 and 14, possibly to another authority like an arbitral institution or the chamber of commerce.

32) *Id*., Art. 27

33) *Id*., Articles 8 & 9.

34) *Id*., Articles 35 & 36.

provisions and solutions but also in terms of development and refinement. Some laws may be regarded as outdated, sometimes going back to the nineteenth century and often equating the arbitral process with court litigation. Other laws may be said to be fragmentary in that they do not address all relevant issues.

Problems and undesired consequences, emanating from the fact that national laws on arbitral procedure differ widely are a frequent source of concern in international arbitration, where at least one of the parties is, and often both parties are, confronted with foreign and unfamiliar provisions and procedures. For such a party it may be expensive, impractical or impossible to obtain a full and precise account of the law applicable to the arbitration. Uncertainty about the local law with the inherent risk of frustration may adversely affect not only the functioning of the arbitral process but already the selection of the place of arbitration. A party may well for those reasons hesitate or refuse to agree to a place which otherwise, for practical reasons, would be appropriate in the case at hand. The choice of places of arbitration would thus be widened and the smooth functioning of the arbitral proceedings would be enhanced if States were to adopt the Model Law which is easily recognizable, meets the specific needs of international commercial arbitration and provides an international standard with solutions acceptable to parties from different States and legal systems.

Chapter 2: International Commercial Arbitration Law in South Asia

Section 1. Introduction

South Asia's potential for international trade has invoked the need for a more unified and mature legal system that will be able to contain the new challenges of globalisation and investment liberalisation. It is also pertinent to note that the maturity of a legal system in international trade is often judged in terms of the flexibilities it offers to the stakeholders while ensuring that variations in the domestic law is not acting as a disincentive for its foreign counterparts. This means that any domestic law containing stringent regulations or restrictions in the area of free flow of trade and commerce has now been treated as inconsistent with the international trade principles and rules framed in the aftermath of globalisation. Though after the adoption of WTO mandate, many member countries have made appropriate changes complementing these international commitments, yet there exists many variations at the domestic level. In the light of the existing areas of concurrences and contradictions, this chapter would be an attempt to understand the theoretical foundation and practical underpinnings in the law of international arbitration in South Asian countries like; India, Bangladesh, Nepal, Sri Lanka and Pakistan.

Section 2. Commercial Arbitration Law in India

In India, the law governing arbitration is the Arbitration and Conciliation Act (1996) based on the UNCITRAL Model Law. Earlier, statutory provisions

on arbitration were contained in three different Acts. They were the Arbitration Act (1940), the Arbitration (Protocol and Convention) Act (1937) and the Foreign Awards (Recognition and Enforcement) Act (1961). The Arbitration Act (1940) set the framework based upon which domestic arbitration was conducted in India. The other two enactments dealt with foreign awards. The present enactment, i.e. the Arbitration and Conciliation Act (1996) repealed the Arbitration Act (1940) and also the Acts of 1937 and 1961. By repealing those legislations, the Arbitration and Conciliation Act (1996) consolidated and amended the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards in India. It also defined the law relating to conciliation. The Arbitration Act (1996) contains mainly three parts. Part I deals with domestic arbitrations, Part II deals with international commercial arbitrations and Part III deals with provisions as to conciliation.

1. Arbitration and Conciliation Act (1996): A New Era

The highly technical and formal procedures of courts have in fact stimulated the need for the less formal and speedy dispute resolution mechanisms. The Arbitration Act (1940) that had been enacted for the effective and speedy resolution of disputes had become outdated. In many respects, the Act failed to achieve the desired objectives and the entire process thereunder became litigation oriented. The court's frequent intervention in almost all the stages of the arbitral process led to the inevitable delays, formalities and technicalities. The Act thus allowed the court to exercise more supervision and intervention than necessary. The Act was also not in tune with India's newly adopted economic reforms, which might not become fully effective if the law dealing with settlement of commercial disputes

was not changed to make it responsive to the contemporary requirements.[35] The ineffectiveness of the Act was also emphasised by the Supreme Court of India in Gurunanak Foundation v. Rattan Singh and Sons.[36] In the context of liberalisation of the economy and globalisation of world markets, the Government of India realised that for the effective implementation of economic reforms in India, it was necessary to introduce reforms in the business laws. As part of such an effort, changes were also made in the arbitration law in India. The Arbitration and Conciliation Act (1996), has been enacted in close similarity with the UNCITRAL Model Law on Arbitration with the objective that, disputes arising in international commercial relations shall be settled in a fair, efficient and expeditious manner.[37] This could be regarded as one reason why the settlement of international disputes through arbitration has got a tremendous impact in these recent years. There is also an opposite view stating that the unification in the arbitration laws has brought about certain practical difficulties in arbitration due to the changing dimensions of global trade.[38] It is an accepted fact that the 1996 Act has several advantages over the 1940 Act.[39] The most

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35) Uruguay Round was concluded on the December 15, 1993 and the final treaty was signed on the April 15, 1994. A world Trade Organisation (WTO) in the place of General Agreement on Tariffs and Trade (GATT) came into existence and WTO started its official functioning on January, 1, 1995.

36) (1981) 4 SCC 634. The Court observed as follows, "Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternate forum, less formal, more effective and speedy for resolution of disputes avoiding procedural delays and this led them to Arbitration Act, 1940. However, the way in which the proceedings under the Act were conducted and without an exception challenged in the court had made lawyers laugh and legal philosophers weep."

37) *Konkan Railway Corporation Ltd. v. Mehul Construction Ltd.*, (2000) 7 SCC 201.

38) Janak Dwarkadas, "A Call for institutionalised arbitration in India: A step towards certainty, efficiency and accountability", (2006) 3 SCC (Jour) 1.

39) Part III of the 1996 Act deals with binding conciliation proceedings in tune with UNCITRAL Conciliation Rules (1980). The award passed by the conciliator is binding

important variation made by the Act from the Arbitration Act (1940) is in regard to the judicial intervention with the process and product of arbitration. There are many distinctive features in this Act. To quote them:

1. If there is an arbitration agreement the court is required to direct the parties to resort to arbitration as per the agreement.[40] However in such cases the parties seeking arbitration are expected to make an application to the court either before or at the time of filing a written statement on merits before the court.
2. The grounds on which the award of an arbitrator could be challenged before the court under the 1940 Act have been severely cut down. Such a challenge is now allowed on the following reasons like: (a) invalidity of agreement, (b) want of jurisdiction on the part of the arbitrator, (c) want of proper notice to a party of the appointment of the arbitrator or of arbitral proceedings or (d) a party being unable to present its case.[41] At the same time an award can now be set aside if it is in conflict with 'the public policy of India' a ground which covers inter alia fraud and corruption.[42]
3. The power of the arbitrator have been enhanced enlarged by inserting provisions on several matters, like (a) the law to be applied by him, (b) power to determine the venue of arbitration failing agreement, (c) power to appoint experts, (d) power to act on the report of a party, (e) power to apply to the court for assistance in taking evidence or (f) power to award interest and so on.[43]

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and has the same status as that of a court decree. This is a substantial variation from the arbitration laws in other countries in the South Asian Region studied hereunder.

40) Section 8 of the Arbitration and Conciliation Act (1996).

41) *Id*., Sec. 13.

42) *Id*., Sec. 34(2)(b)(ii).

43) *Id*., Sections 19, 20, 25, 26, 27 and 31.

4. Dilatory tactics sometimes adopted by parties in arbitration process were discouraged through the inclusion of a provision where under a party who knowingly keeps silence and then suddenly raises a procedural objection will not be permitted to do so.
5. The role of arbitral institutions in promoting and organising arbitration has been recognised for the first time in law.
6. The Act provides considerable improvement in the nature of appointment of arbitrators, with the formulation of the Chief Justice scheme, which takes the task of selecting an arbitrator by the courts outside the litigation process. It is the prerogative of the parties to appoint their own arbitrator. It is only when there is a difference between the parties on the appointment that court intervention becomes necessary.
7. Under the 1940 Act, there was a time limit within which the arbitrators have to make the award. However this time limit used to be extended by the arbitral tribunal with the agreement of the parties and failing such agreement, by the court. This resulted in an inordinate delay. The time limit for making the award has now been deleted.
8. The importance of international commercial arbitration has been recognized. It has been specifically provided that even where the arbitration is held in India, the parties to the contract would be free to designate the law applicable to the substance of the dispute.[44)]
9. The requirement of a formal arbitral agreement under the 1940 Act has now been relaxed to include even an informal agreement.
10. The 1996 Act has clothed the arbitrator with the power of granting interim orders in respect of the preservation of property and for

44) *Id*., Sec. 28(1)(b)(i).

ordering security. This is in addition to the interim orders that can be passed by the court.[45]

11. The arbitrator can now decide on his own jurisdiction. This will in way help considerably reduce court intervention. Prior to the 1996 Act, the Supreme Court in *Renusagar Power Co. v. General Electric Co*[46] had restricted the power of the arbitral tribunal to decide on the question of jurisdiction, almost invariably the parties had to approach courts for adjudication, which caused enormous delay. The 1996 Act, having defined the jurisdiction of the arbitrator, will surely prevent interim intervention by courts and consequent delay.[47]
12. The 1996 Act also provides for various time saving measures such as requiring an arbitrator to disclose any possible bias at the threshold itself.[48]
13. Under the new Act, when an arbitrator is replaced, the proceedings conducted by him are protected. This will save time as it would otherwise require de novo proceedings before the new arbitrator.
14. Unless the agreement otherwise provides, the parties are required to give reasons for the award. The award itself has now been vested with the status of a decree, in as much as (subject to the power of the court to set aside the award) the award itself is made executable

45) *Id*., Sections 9 and 17.

46) AIR 1985 SC 1156.

47) *Supra*. note 45, Section 16(1) reads thus: "The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose, (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and (b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."

48) *Id*., Sec. 12.

as a decree of the court and it is no longer necessary to apply to the court for a decree in terms of the award.[49]

2. Meaning of Arbitration in India

As a matter of fact, arbitration has a long tradition in many countries in Asia and India too has an age-old tradition of settlement of disputes through arbitration and conciliation.[50] Arbitration is generally understood in India as adjudication over disputes between parties by a neutral person who has been agreed upon by the parties to be the arbiter and decide upon the matter. The parties are permitted to agree upon the procedure to be followed for such arbitration. The law does not define arbitration as such.[51] It merely says that arbitration means any arbitration whether or not administered by a permanent arbitral institution.[52] This means that arbitration may be ad *hoc*[53] *or institutional*. Institutional arbitration is conducted under the rules

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49) *Id*., Section 36 reads thus: "Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the court."

50) In ancient India there were three categories of dispute resolution through ADR techniques, viz., (ⅰ) *Puga*: Board of different sects of tribes (ⅱ) *Sreni*: Assembly of traders and artisans of different classes (ⅲ) *Kula*: Meeting point of family ties. This was followed by the Panchayat system.

51) Section 2(a) of the Arbitration and Conciliation Act (1996) reads thus: "any arbitration whether or not administered by a permanent arbitral institution." It does not give a specific and clear explanation or definition to the term arbitration.

52) *Id.,* Sec. 2(a).

53) An *ad hoc* arbitration is arbitration agreed to and arranged by the parties themselves without recourse to any institution. The proceedings are conducted and the procedures are adopted by the arbitrators as per the agreement or, with the concurrence of the parties. In case of disagreement on the appointment of an arbitrator under *ad hoc* arbitration cases, section 11 of the Arbitration and Conciliation Act (1996) empowers the Chief Justice of the High Court or Chief Justice of India, as the case may be, to appoint the arbitrators. The Chief Justice is also empowered to designate any person or institution to take the

laid down by an established arbitration organisation.[54] Such rules are meant to supplement provisions of the arbitration law in matters of procedure and other details the Act permit. They may provide for domestic arbitration[55] or international arbitration[56] or for both, and the disputes dealt with may be general or specific in character. In order to facilitate the conduct of the arbitral proceedings, it is provided that the parties or the arbitral tribunal, with the consent of the parties may arrange for administrative assistance by a suitable institution[57] and expressly facilitates the adoption of institutional rules.[58] Other kinds of arbitration are *specialised arbitration, statutory arbitration, compulsory arbitration by the government and permanent machinery of arbitrators.*[59]

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necessary steps for the appointment of arbitrators. The new provision has really given recognition to the role of arbitral institutions in justice may designate a person by name, ex-officio or an institution, which is specialising in the area.

54) For example, Indian Council of Arbitration (ICA), New Delhi and International Centre for Alternate Dispute Resolution (ICADR), New Delhi.

55) Domestic arbitration takes place in India when the arbitration proceedings, the subject matter of the contract and the merits of the disputes are all governed by Indian law, or when the cause of action for the dispute arises wholly in India, or where the parties are otherwise subject to Indian jurisdiction.

56) An international arbitration is an arbitration conducted in a place outside India and the resulting award is sought to be enforced as a foreign award. A foreign arbitration can take place either within India or outside India in cases where there are ingredients of foreign origin relating to the parties or the subject matter of the dispute. The law applicable to the conduct of arbitration and the merits of the dispute may be Indian law or foreign law, depending on the contract in this regard, and the rules of conflict of laws.

57) Section 6 of the Arbitration and Conciliation Act (1996).

58) *Id*., Sec. 2(8).

59) *Specialised arbitration* is arbitration conducted under the auspices of arbitral institutions, which have framed special rules to meet the specific requirements for the conduct of the arbitration in respect of disputes of particular types including disputes as to commodities, maritime, construction, specific areas of technology, etc.
Statutory arbitrations are arbitrations conducted in accordance with the provisions of certain special Acts, which specifically provide for arbitration in respect of disputes

3. Variations from the UNCITRAL Model Law

Though the Act adopts the UNCITRAL Model Law, in the following cases it departs from this model:

1. Section 10(1) of the 1996 Act deals with the number of arbitrators in an arbitral tribunal and provides that the number of arbitrators shall not be an even number. The Model Law does not contain any such limitation. Where the parties fail to determine the number of arbitrators, the Model Law provides that the number of arbitrators shall be three. Section 10(2) provides that in such an eventuality, the arbitral tribunal shall consist of a sole arbitrator. In *Narayan Prasad Lohia v. Nikunj Kumar Lohia*[60], a three-judge bench of the Supreme Court held that the number of arbitrators comprising the arbitral tribunal "shall not be an even number" is not mandatory and an arbitral tribunal can consist of an even number of arbitrators also. This is tantamount to judicial

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arising from matters covered by those Acts. The provisions of the 1996 Act generally apply to those arbitrations unless they are inconsistent with the particular provision of those Acts, in which case the provisions of those Acts are applicable.

Government contracts generally provide for *compulsory arbitration* in respect of disputes arising thereunder. Usually the arbitrators appointed to decide such disputes are senior government officers. A standing committee consisting of senior officers is constituted to ensure no litigation involving such dispute is taken up in a court or tribunal without the matter having been first examined by the said committee and the committee's clearance for litigation obtained. This procedure has helped in the settlement of a large number of disputes in an amicable manner, which would have otherwise ended up in litigation.

A *Permanent machinery of arbitrators* has been set up in the Department of Public Enterprises for resolving commercial disputes except taxation between Public sector Enterprises (PSE) inter-se as well as between a PSE and a Central Government Department or Ministry.

60) (2002) 3 SCC 572.

legislation as it wipes out the proviso in section 10(1), which in imperative language states that "such number shall not be an even number."

2. In the matter of appointment of arbitrators where the parties fail to reach an agreement, the Model Law permits the parties to approach the court or the other authority specified in the national law for appointment of the third arbitrator or sole arbitrator as the case may be. However, section 11 of the 1996 Act empowers the Chief Justice of the High Court concerned or any person or institution designated by him to appoint the arbitrator. Further, in the case of international commercial arbitration, it is the Chief Justice of India, or any person or institution designated by him, who is empowered to appoint the arbitrator. section 11(10) empowers the Chief Justice of India or the Chief Justice of the High Court, as the case may be, to make such a scheme as he may deem appropriate for dealing with such appointments.
3. The Model Law lays down the procedure for challenging an arbitrator. It empowers the arbitral tribunal to decide on the challenge- if a challenge is not successful, the challenging party may request a court or other authority to decide on the challenge. While such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award. The corresponding provision contained in section 13 of the 1996 Act does not permit the challenging party to approach the court at that stage. However, after the award is made the party could challenge the award on the ground that the arbitrator has wrongly rejected the challenge.
4. Under the Model Law, if the arbitral tribunal turns down the plea that it has no jurisdiction, provision exists for the party concerned to

approach a court to decide the matter. The corresponding provision contained in section 13 of the 1996 Act does not make any provision for approaching the court at that stage.

5. The following provisions in the 1996 Act is in addition to that in the Model Law:
   i. Section 31(7) contains detailed provision on award of interest by the arbitral tribunal.
   ii. Section 36 provides that under the following two situations, viz
      a. Where an award is not challenged within the prescribed period
      b. Where an award has been challenged but the challenge is turned down, the award shall be enforced in the same manner as if it were a decree of the court.
   iii. Section 37 makes provision for appeals in respect of certain matters.
   iv. Section 38 enables the arbitral tribunal to fix the deposit or supplementary deposit, as the case may be, as an advance for the cost of arbitration.
   v. Section 39 to 43 make provisions for lien on arbitral awards and deposits as to costs, arbitration agreement not to be discharged by death of a party thereto, the rights of a party to an arbitration agreement in relation to the proceedings in insolvency of a party thereto, identification of the court which shall have exclusive jurisdiction over the arbitral proceedings and application of the Limitation Act to arbitrations under the 1996 Act.
   vi. The 1940 Act provided for a detailed process for implementation of the award viz., the award had to be approved by the civil court. At this stage, parties could make objections to the award, which means

that the matter was almost reheard by the civil court. This led to the inordinate delays, which the arbitration sought to avoid. The 1996 Act introduces an improvement in this regard. It makes the award final in character and provides for execution of the award without approval by the civil court. This is a great step to forward in arbitration.

4. Court Intervention

Section 5 of the Indian Arbitration and Conciliation Act (1996) prescribes the extent of judicial intervention in arbitration matters.[61] According to the Indian law, in relation to the arbitration proceedings, the parties can approach the court only for two purposes: (a) for any interim measure of protection in the nature of injunction or like orders[62] or (b) for the appointment of an arbitrator in the event a party fails to appoint an arbitrator or if two appointed arbitrators fail to agree upon the third arbitrator. In such an event, in the case of domestic arbitration, the Chief Justice of a High Court may appoint an arbitrator, and in the case of international commercial arbitration, the Chief Justice of the Supreme Court of India may carry out the appointment. A court of law can also be approached if there is any controversy as to whether an arbitrator has been unable to perform his functions or has failed to act without undue delay or there is a dispute on the same. In such an event, the court may decide to terminate the mandate of the arbitrator and appoint a substitute arbitrator.[63]

61) Section 5 of the Arbitration and Conciliation Act (1996) reads: notwithstanding anything contained in any other law for the time being in force, in matters governed by this part, no judicial authority shall intervene except where so provided in this part.

62) This can be even prior to the institution of arbitration proceedings, provided that it is clear that the applicant intends to take the dispute to arbitration.

63) *Id*., Sec. 11.

5. Challenge of Arbitrators and Their Jurisdiction

As per the scheme of the Act, an arbitrator may be challenged only in two situations. First, if circumstances exist that gives rise to justifiable grounds as to his independence or impartiality and Second, if he does not posses the qualifications agreed to by the parties.[64] A challenge is required to be made within 15 days of the petitioner becoming aware of the constitution of the arbitral tribunal or of the circumstances furnishing grounds for challenge.[65] Further, subject to the parties' agreement, it is the arbitral tribunal and not the court which shall decide on the challenge.[66] If the challenge is not successful the tribunal shall continue with the arbitral proceedings and render the award, which can be subsequently challenged by an aggrieved party before the court under section 34 dealing with the grounds for setting aside an arbitral award. This is another significant departure from the Model Law, which envisages recourse to a court of law in the event the arbitral tribunal rejects the challenge.[67] The Indian courts have held that "the apprehension of bias must be judged from a healthy, reasonable and average point of view and not on mere apprehension of any whimsical person. Vague suspicions of whimsical, capricious and unreasonable people are not our standard to regulate our vision."[68]

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64) *Id*., Sec. 12(3).

65) *Id*., Sec. 13(2).

66) Under the earlier Arbitration Act (1940), the challenge as to the mandate of the arbitrator had to be made before the court and not to the tribunal itself. To minimize the effect of court intervention, the present legislation has done away this provision and now the arbitral tribunal has the power to decide the challenge and not the court during arbitral proceedings.

67) Article 13 of the UNCITRAL Model Law.

68) *International Airports Authority of India v. K.D. Bali & Anr*; (1988) 2 SCC 360]

The Act provides that the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. The arbitration agreement shall be deemed to be independent of the contract containing the arbitration clause, and invalidity of the contract shall not render the arbitration agreement void.[69] Hence, the arbitrators shall have jurisdiction even if the contract in which the arbitration agreement is contained is vitiated by fraud and/or any other legal infirmity. Further, any objection as to jurisdiction of the arbitrators should be raised by as party at the first instance, i.e., either prior to or along with the filing of the statement of defense.[70] If the plea of jurisdiction is rejected, the arbitrators can proceed with the arbitration and make the arbitral award. Any party aggrieved by such an award may apply for having it set aside under section 34 of the Act. Hence, the scheme is that, in the first instance, the objections are to be taken up by the arbitral tribunal and in the event of an adverse order, it is open to the aggrieved party to challenge the award.

6. Form and Contents of the Award and Its Recognition and Enforcement

The arbitrators are required to set out the reasons on which their award is based, unless the parties agree that no reasons are to be given or if it arises out of agreed terms of settlement.[71] The tribunal may make an interim award on matters on which it can also make a final award.[72] Unless otherwise agreed by the parties, the arbitral tribunal may include in

69) Section 16(1)(a) of the Arbitration and Conciliation Act (1996).
70) *Id*., Sec. 16(2).
71) *Id.,* Sec. 31(3).
72) *Id*., Sec. 31(6).

the sum for award, interest at such rate as it deems reasonable.[73] Indian law provides for a very healthy 18% interest rate on sums due under an award. Thus, unless the arbitral tribunal directs otherwise, the award will carry interest at 18% per annum from the date of the award till the date of payment.[74] The tribunal is free to award costs, including the cost of any institution supervising the arbitration or any other expense incurred in connection with the arbitration proceedings.

The grounds for setting aside an award rendered in India in a domestic or international arbitration are provided for under section 34 of the Act. These are materially the same as in section 34 of the Model Law for challenging an enforcement application. An award can be set aside if, a party was under some incapacity; or the arbitration agreement was not valid under the governing law; or a party was not given proper notice of the appointment of the arbitrator or on the arbitral proceedings; or the award deals with a dispute not contemplated by or not falling within the terms of submissions to arbitration or it contains decisions beyond the scope of the submissions; or the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties; or the subject matter of the dispute is not capable of settlement by arbitration and the arbitral award is in conflict with the public policy of India. A challenge to an award is to be made within three months from the date of receipt of the same.[75] The courts may, however, condone a delay of maximum 30 days on evidence of

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73) *Id*., Sec. 31(7)(a). Interest may be ordered against whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

74) *Id*., Sec. 31(7)(b).

75) *Id*., Sec. 34(3).

sufficient cause. Subject to any challenge to an award, the same is final and binding on the parties and enforceable as a decree of the Court.

The definition of 'International commercial arbitration' in section 2(f) makes no distinction between international commercial arbitrations which take place in India or which take place outside India. Similarly the definition of Court in section 2(e) does not provide that the Courts in India will not have jurisdiction if an international commercial arbitration takes place outside India. An ouster of jurisdiction cannot be implied. An ouster of jurisdiction has to be express. In the absence of such an express provision it is presumed that the courts in India would have jurisdiction even in respect of an international commercial arbitration. An award passed in an arbitration which takes place in India would be a 'domestic award' and there would thus be no need to define an award as a 'domestic award' unless the intention was to cover awards which would otherwise not be covered by this definition. Strictly speaking an award passed in an arbitration which takes place in a non-convention country would not be a 'domestic award.' Thus the necessity is to define a 'domestic award' as including all awards made under Part I. This uncertainty has contributed to a wide range of ambiguous judicial pronouncements in India that has been the focus of criticism by the legal and business community ever since the Act was passed in 1996.[76)]

India's global exposure in international arbitration is well-known and well acclaimed. Ever since the enactment of the Arbitration and Conciliation Act (1996), there has been a flow in international commercial arbitration. It is noteworthy that the Arbitration and Conciliation Act (1996) is based on what is popularly known as the UNCITRAL Model Law. With foreign direct investment flowing into India surely and steadily, international

76) The judicial pronouncements will be separately dealt with under chapter 3.

commercial arbitration with an India-centric focus is gaining momentum. In this context, the question of the enforcement of foreign awards has formed the subject of intense judicial debate. It is interesting to observe that the Legislature in its wisdom has consciously chosen to statutorily incorporate international covenants into domestic law. These are contained in Part II of the Arbitration and Conciliation Act (1996) and include Chapter I, being the New York Convention Awards, and Chapter II, being the Geneva Convention Awards. Hence, the legislative wisdom has prevailed in bringing out uniformity in the recognition and enforcement of foreign awards in tune with India's commitments at the international level subject to the two independent conditions of commerciality and reciprocity in the enforcement of a foreign award.[77]

Section 3. Commercial Arbitration Law in Bangladesh

Bangladesh has enacted the Arbitration Act (2001) which came into force on April 10, 2001. The Act has repealed The Arbitration (Protocol and Convention) Act (1937) and The Arbitration Act (1940).[78] With this new enactment Bangladesh has kept pace with the recent trends in the field of international commercial arbitration in the rest of the world. Such a

77) Section 44 of the Arbitration and Conciliation Act (1996) reads thus "Definition-In this chapter, unless the context otherwise requires, 'foreign award' means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960—(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and (b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the official gazette, declare to be territories to which the said Convention applies."

78) *Id*., Sec. 59(1).

legislative step was urgent in the face of increasing foreign investment in various sectors, especially in the natural gas and power sectors in Bangladesh, and her ever-growing export trade with the rest of the world. The new Act, principally based on the UNCITRAL Model Law, consolidates the law relating both to domestic and international commercial arbitration. The Bangladesh Arbitration Act (2001) thus creates a single and unified legal regime for arbitration in Bangladesh which has also been the trend in recent years elsewhere. However, in the context of international commercial arbitration, the Act has specific prescriptions, which are not applicable to domestic arbitration. In certain respects it has drawn on the Indian Arbitration and Conciliation Act (1996). This is obviously in tune with the reality of the region as a growing popular destination for foreign investment. Until recently, the 1940 Act governed arbitration in India and Bangladesh, and it still does in Pakistan. Thus the 1940 Act is the common heritage of all these countries. Experience had taught that a change in the arbitral legal regimes in these countries was a must.[79] In light of their common historical experience as such, both Bangladesh and India have modernized their arbitration laws along the lines of the UNCITRAL Model Law.

1. Meaning of International Commercial Arbitration in Bangladesh

In defining "international commercial arbitration," the new Bangladesh Act has adopted verbatim the definition of the Indian Act (1996), but has deviated from the UNCITRAL Model Law. In this respect Bangladesh or

79) *Gurunanak Foundation* case, (AIR 1981 SC 2075), per Justice D.A. Desai.

Indian Law significantly differs from the UNCITRAL Model Law. The former defines the "internationality" of arbitration in terms of natural or juridical personality, *i.e.* nationality, or other status of the parties, and the latter in terms of locale of business of the parties or of the subject matter of the dispute. Thus, according to the new Bangladesh Act, a party to international commercial arbitration has to qualify as (i) an individual who is a national of, or habitually resident in, any country other than Bangladesh; (ii) a body corporate which is incorporated in any country other than Bangladesh; (iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than Bangladesh; or (iv) the government of a foreign country. This means that a commercial dispute between two Bangladeshi nationals having places of business even in different States cannot be considered the subject matter of international commercial arbitration under the new Act, which would be otherwise possible under the Model Law. In this context the internationality of the nature of the transactions, in that they take place in different jurisdictions, has been subjugated to the nationality of the disputing parties.[80]

2. Arbitration Agreement

On the definition and form of the arbitration agreement, the new Act adopts verbatim the Model Law provisions. Thus an arbitration agreement, either in the form of an arbitration clause in a contract or in the form of a separate agreement, may be concerned with future and existing disputes respectively.[81] The new Act requires the arbitration agreement to be in

80) Section 2 of the Bangladesh Arbitration Act (2001), Article 1(3) of the UNCITRAL Model Law and section 2(1) of the Indian Arbitration and Conciliation Act (1996).

81) Section 2(n) of the Bangladesh Arbitration Act (2001)

writing exactly in the same manner as the Model Law prescribes. In other words, the new Act follows verbatim the Model Law prescription on the matter which has, in fact, wider scope than that of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. However, unlike the Model Law or the New York Convention, the new Act specifically mentions "fax" and "e-mail" as the modes of writing amongst others, which are, of course, implied in the expression "other means of telecommunication" in the former.

3. Composition of the Arbitral Tribunal and Appointment of Arbitrators

The new Act gives the parties the freedom to determine the number of arbitrators. Failing such determination, the number of arbitrators shall be three. Thus the 2001 Act confirms the Model Law prescription on the number issue in contrast to the 1996 Indian Act which provides for a sole arbitrator in the absence of the parties' determination. Subject to some restrictions, the parties are free under the new Act to agree on a procedure for appointing an arbitrator or arbitrators. Following the recent trend towards the internationalisation of arbitration, the new Act does not impose any restriction on the nationality of the arbitrator and leaves the matter to the choice of the parties.[82] A default procedure is also available under an appointment procedure agreed between the parties in the following cases of failure: (i) of a party to act as required under the agreed procedure; (ii) of the parties or the arbitrators to reach an agreement under the same procedure; and (iii) of a person or any third party to perform any function

82) *Id*., Sec. 11(1).

assigned to him under that procedure, unless other means for securing the appointment is provided by the parties' agreement on the appointment procedure. Under the default procedure in all the foregoing cases, upon the application of a party (ⅰ) the District Judge within whose local jurisdiction the concerned arbitration agreement has been entered into, in case of arbitration other than international commercial arbitration and (ⅱ) the Chief Justice of the People's Republic of Bangladesh or any other Judge of the Supreme Court designated by the Chief Justice in case of international commercial arbitration, shall make the appointment of the arbitrator or arbitrators within sixty days from the receipt of the application thereof. As the case may be, they can appoint a sole arbitrator, or in the case of a multi-arbitrator arbitration, all the arbitrators including the Chairman of the arbitral tribunal from amongst them. Especially, in the case of appointment of a sole arbitrator or a third arbitrator in an international commercial arbitration, the Chief Justice or his designate, a Judge of the Supreme Court, may appoint an arbitrator of a nationality other than the nationalities of the parties, when the parties belong to different nationalities.[83]

In the absence of any agreed procedure for challenge between the parties, the party intending to challenge an arbitrator shall, in the first instance, approach the arbitral tribunal itself. The party aggrieved by the decision of the arbitral tribunal on the matter, has the option to appeal from such decision to the High Court Division of the Supreme Court of Bangladesh which has the final word on the challenge issue. Such an intervention by the High Court Division is especially desirable when the challenge is rejected by the sole arbitrator against whom it is levelled. It is noteworthy that in the default procedure, as discussed above, it is the Chief Justice of Bangladesh or

83) *Id*., Sec. 12.

his designate, a judge of the Supreme Court, who must appoint an arbitrator(s) in international commercial arbitration, while in case of appeal from the decision of the arbitral tribunal on the challenge of an arbitrator, both in domestic and international commercial arbitration, it is the High Division of the Supreme Court that must be approached as a matter of course.[84]

In the context of challenge of an arbitrator, the approaches to arbitration differ significantly in the new Bangladesh Act, the 1996 Indian Act, and also the Model Law. The Bangladesh Arbitration Act (2001) provides that the concerned arbitral tribunal, in case of such a challenge, has to wait until the challenged matter is finally disposed of. Even during the appeal against the decision of the arbitral tribunal on the challenge to the High Court Division, the arbitral tribunal has to stay in place. It is only when such a challenge or the appeal against the decision of the arbitral tribunal is not successful, that the arbitral tribunal shall continue the arbitral proceedings and make an award.[85] However, it has to be mentioned that in order to avoid any undue delay for such intervention by the court the new Act, unlike the Model Law, has specifically prescribed a stringent time limit (i.e. ninety days from the date on which the appeal is filed) within which the High Court must decide the appeal.[86] Though the 1996 Indian Act has similar provisions on the challenge procedure, it has not provided, unlike the new Bangladesh Act and the Model Law, for the intervention by a court on the challenge issue. It mandates the arbitral tribunal to continue the arbitral proceedings and to make an arbitral award, once the challenge has proven unsuccessful under the parties' agreed procedure or the arbitral

84) The Supreme Court of Bangladesh comprises two divisions, i.e., the Appellate Division and the High Court Division. (Art. 94 of the Constitution of the People's Republic).

85) Section 14(6) of the Bangladesh Arbitration Act (2001).

86) *Id*., Sec. 14(5).

tribunal has rejected the challenge, as the case may be.40 In the circumstances, under the Indian Act, unlike the Model Law, the arbitral tribunal has no option but to carry on with its mission as such as it is mandatorily required to do so.[87)]

In the similar circumstances, the order of appointment of an arbitrator by the chief justice or his nominee under section 11 of the Indian Arbitration Act has been a subject of vibrant judicial dynamics. Since the new Bangladesh Arbitration Act (2001) mainly follows the Indian Act on the matter of appointment of arbitrators, similar issues might arise in due course. It remains to be seen what Bangladesh Courts will have to decide on the issues concerned under section 12(3) to (7) of the new Act. Such an occasion has not yet arisen under the 2001 Act.

4. Jurisdiction of Arbitrators

In keeping pace with the recent developments in the field of international commercial arbitration, the new Bangladesh Act has adopted the doctrines of competence-competence and autonomy of the arbitration clause in the context of the jurisdiction of arbitral tribunals. Unlike the Model Law and the 1996 Indian Act, which have identical provisions on the matter of competence and allow the arbitral tribunal unbridled freedom in this regard; the new Bangladesh Act restricts such freedom with the words “unless otherwise agreed by the parties. The major areas covered by the jurisdiction of the tribunal include questions like: (a) whether there is in existence a valid arbitration agreement; (b) whether the arbitral tribunal is properly constituted; (c) whether the arbitration agreement is against public policy;

87) See section 13(4) of the Indian arbitration and the Conciliation Act (1996) and article 13(3) of the UNCITRAL Model Law.

(d) whether the arbitration agreement is incapable of being performed;, and (e) what matters have been submitted to arbitration in accordance with the arbitration agreement. The arbitral tribunal may, subject, of course, to the aforementioned proviso, rule on its own jurisdiction on any questions beyond the above list. It is probable that the arbitral tribunal may decide questions of jurisdiction not only at the instigation of the parties but also on its own motion.[88)]

The second doctrine, *i.e*. "autonomy of the arbitration clause" described by some as "a conceptual cornerstone of international arbitration, buttresses the first one, *i.e.* the competence-competence doctrine. As far as the arbitral jurisdictional issues are concerned, both doctrines prove to be the two sides of the same coin.[89)] The autonomy of the arbitration clause doctrine is sometimes expressed as the "separability" or the "severability" of the arbitration clause. The new Bangladesh Arbitration Act (2001) opted for the latter expression. Whatever is the expression - "autonomy," "separability," or "severability" of the arbitration clause - it means that the arbitration clause is separate from the principal contract in which it is contained. Whatever happens to the principal contract in which it is contained should not affect it. Thus the arbitration clause will always survive the principal contract. International arbitral practice has, however, embraced the doctrine as a matter of practical exigency because of the legitimate expectation that the arbitration clause creates for the parties when it is inserted in the principal agreement. The insertion of such a clause at least provides the parties with the chance to ventilate their grievances through it about the principal agreement whatever they may be. This is in essence what the Model Law

88) Sections 17 and 18 of the Bangladesh Act.

89) Alan Redfern & Martin Hunter, *Law And Practice Of International Commercial Arbitration* 134 (1986).

has explicitly provided, also reproduced in the 1996 Indian Act.[90] The Bangladesh Arbitration Act (2001) has not used the Model Law prescription and the former appears to be straight forward in its wording.[91]

In tune with article 19(1) of the Model Law the new Bangladesh Act (2001) provides that subject to this Act, the arbitral tribunal shall follow the procedure to be agreed on by all or any of the parties in conducting its proceedings. The questions still remain as to what extent the parties' choice of the arbitral procedural law will prevail when such choice proves inconsistent with the Act itself, or simply whether the choice of any foreign procedural law or any international institutional arbitration rules will automatically exclude the application of the Act to the procedural matters unless the parties have expressly so stated in their contract. The new Bangladesh Act has provided a safeguard mechanism against the arbitral tribunal's decision on jurisdictional issues by providing the parties with recourse to the High Court Division of the Supreme Court for the determination of the issues. Furthermore, the application is required to state the reasons on which the High Court Division should decide the matter.[92] It is noteworthy that section 20 of the new Bangladesh Act has followed, in

90) Section 16(1)(b) of the Arbitration and the Conciliation Act (1996).

91) Article 21(2) of the UNCITRAL Model law reads that "a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."

92) Under section 20 of the Bangladesh Act, the High Court Division may determine any question as to the jurisdiction of the arbitral tribunal: (i) on the application of any of the parties to the arbitration agreement; and also (ii) after serving notice upon all other parties. It is thus clear that the High Court Division cannot decide such jurisdictional questions of its own volition. However, before the High Court Division takes into account any application on the matter it must be satisfied that: (a) the determination of the question is likely to produce substantial savings in costs; (b) the application was submitted without any delay; and (c) there is good reason why the matter should be decided by the Court.

essence, section 32 of the English Arbitration Act (1996) and is different from the provisions of the 1996 Indian Act.[93] It is understandable that in order to minimize judicial intervention on the jurisdictional issues the 1996 Indian Act has allowed the arbitral tribunal to continue with the arbitral proceedings and make an award and the party aggrieved by the award to apply to the competent court for setting it aside. Although this approach may have blessings for expeditious dispute resolution, it may also have a sinister effect if the arbitral award is set aside at the end of the day. The setting aside of the arbitral award at that stage on the jurisdictional issues would mean the waste of the parties' time and money and other resources which could have been avoided at the very initial stage of arbitration.

5. Interim Measures by the Arbitral tribunal and the Court

Like the 1996 Indian Act, the new Bangladesh Act adopts the Model Law provision on the matter, but it includes some added features such as the requirement of notification to the other parties involved and application to a court for enforcement of an arbitral tribunal's order of interim measures.[94] Under the law, party autonomy is paramount in the matter of interim measures in that the parties can bypass the arbitral tribunal and have recourse directly to the court for interim measures. Thus, the new Act allows the arbitral tribunal, *unless otherwise agreed by the parties*, to order a party to take any interim measure of protection, as it may consider necessary in respect of the subject

93) Under section 16 (6) of the Indian Act, once the arbitral tribunal decides against a party's plea against its jurisdiction, the party has no other option open to him but to wait until the arbitral tribunal makes an award. The party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34 of the 1996 Indian Act which deals with setting aside an arbitral award.

94) Sections 21(3) and (4) of the Bangladesh Act.

matter of the dispute and at the same time allows no appeal to be taken against such order. Such interim measures may be required to be enforced by the court, in which case the party requesting such measures should apply to the court. These orders are not enforceable alone as a decree or order of a court. It is noteworthy that neither the 1996 Indian Act nor the UNCITRAL Model Law clarifies the nature of enforceability of the interim measures ordered by the arbitral tribunal.[95] The new Bangladesh Act specifically provides for the need of court assistance for the enforcement of such orders - a fact that is, however, implied in the Model Law and the Indian Act. This is a marked weakness of the Arbitration Act (2001) as far as it relates to the protection of parties who intend to arbitrate in Bangladesh. Even before the constitution of the arbitral tribunal or the commencement of arbitral proceedings, situations or circumstances might warrant interim measures to be taken by the court to protect the interest of a party, otherwise the whole purpose of such arbitration will be frustrated. If there is no statutory obligation to offer such protection, the court may not take an interest in it. It is now a well-established trend in international arbitration law and practice that recourse to a judicial authority for interim measures or for the implementation of any such measures ordered by an arbitral tribunal is not deemed to be an infringement of the parties' agreement to arbitrate or a waiver of the right to arbitrate.[96]

It is noteworthy that although the Model Law and the 1996 Indian Act have made provision for recourse to the court for interim measures of protection even before the commencement of arbitral proceedings as a matter of practical exigency, there is no specific obligation imposed on the

95) The model Law does not provide any solution to any conflict between the court and the arbitral tribunal regarding the grant of interim measures that may or may not be restricted to the subject matter of the dispute.

96) *Channel Tunnel Group Ltd. v. Balfour Beatty Const. Ltd.,* [1992] 1 Q.B. 656, 656.

party in whose favour the interim measure has been granted, to take effective steps for the appointment of the arbitral tribunal in a specific time frame, *i.e.* "the locking period." In the absence of such specific obligations and requirements the beneficiary of the interim measures may resort to dilatory tactics to commence arbitral proceedings at the expense of the other party to the dispute. Thus it is necessary to prevent the abuse of interim measures before the commencement of arbitral proceedings. In future amendments to the Bangladesh Arbitration Act (2001), this and other pertinent issues concerning interim measures as mentioned above should be carefully considered. Further, in the context of the provision concerning interim measures in the new Bangladesh Act, the question is also whether the arbitral tribunal is empowered to grant "interim measures" that are in the nature of a "*Mareva injunction*" or "*Anton Piller order*" as are well-known in English civil law to prevent a defendant from frustrating the satisfaction of a monetary judgment that the plaintiff may obtain against him.

6. Settlement of Disputes

Section 22(1) of the new Bangladesh Act manifests a typical Asian approach to dispute resolution.[97] Thus, the encouragement of settlement between the parties is the main thrust of the provision, and is the role of the arbitral tribunal. The new Act also provides: "If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall, if requested by the parties, record the settlement in the form of an award on agreed terms."[98] The new Act does not distinguish between such an award

97) It provides, "It shall not be incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute otherwise than by arbitration and, with the agreement of all the parties, *the arbitral tribunal may use mediation, conciliation or any other procedures at any time during the arbitral proceedings to encourage settlement."*

98) Section 22 (2) of the Bangladesh Act (2001).

on agreed terms and any other award in respect of the dispute in terms of status and effect. In many other Asian countries the combination of conciliation/mediation and arbitration in the same proceeding subject, of course, to the parties' consent, seems to be a common trend. The Indian Arbitration and Conciliation Act (1996) the laws of various countries have the same approach applicable to both domestic and international arbitration.

7. Conduct of Arbitral Proceedings and Its Termination with Award

In the conduct of arbitral proceedings the new Bangladesh Act has endorsed certain principles of natural justice, which are, common to other modern arbitration laws elsewhere, not just the UNCITRAL Model Law. These include the duty of the arbitral tribunal to deal with a dispute fairly and impartially by: (ⅰ) giving each party a reasonable opportunity to present its case orally or in writing, or both, and (ⅱ) giving each party a reasonable opportunity to examine all the documents and other relevant materials filed by the other party or any other person concerned before the tribunal.[99] On the point of whether "reasonable opportunity" equals "equal opportunity", the Bangladesh Arbitration Act (2001) differs from that of the UNCITRAL Model Law but it is in line with the English Arbitration Act (1996).[100] The concept of "reasonable opportunity" has to be decided as a matter of expediency by the arbitral tribunal having regard to all the surrounding

99) Section 23(10)(a) and (b) of the Bangladesh Act (2001).

100) Article 18 of the Model Law provides: "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case." While under the English Arbitration law, section 33(1)(a) talks about reasonable opportunity for the parties concerned.

circumstances in a particular context. In this respect though, the guiding principles for the arbitral tribunal should be fairness and impartiality.[101] Hence it can be seen that the provisions of the Bangladesh Act on matters such as "place of arbitration," "statements of claim and defense," and "hearings and proceedings" are taken verbatim from the Model law whereas other procedural matters such as "consolidation of proceedings and concurrent hearings," "legal or other representation," "power to appoint experts, legal advisors and assessors and the powers of the arbitral tribunal in case of default of the parties have taken from the English Arbitration Act (1996)."

Chapter Ⅶ of the Bangladesh Act deals with the rules applicable to the merits of the dispute, decision-making by the panel of arbitrators, form and contents of the award, decision on costs, finality and binding nature of the arbitral award, correction and interpretation of awards, and termination of proceedings. It has to be noted that although the Bangladesh Act followed in this chapter articles 28, 29, 31, 32 and 33 of the UNCITRAL Model Law, it has deviated in some respects from the Model Law provisions and introduced some innovation and added new provisions. These deviations, innovations and additions are not surprising as they are in keeping with the post-Model Law recent developments in the field of international arbitration.

101) Section 23(3) of the Bangladesh Act. However, following the English Arbitration Act (1996), the Bangladesh Act has gone beyond the Model Law prescription on the matter, in that it enumerates objectively certain aspects of procedural and evidential matters, which include (a) time and place of holding the proceedings either in whole or in part; (b) language of the proceedings and to supply translation of a document concerned; (c) written statement of claim, specimen copy of defense, time of submission and range of amendment; (d) publication of document and presentation thereof; (e) the questions asked of the parties and the replies thereof; (f) written or oral evidence as to the admissibility, relevance and weight of any materials; (g) power of the arbitral tribunal in examining the issues of fact and of law; and (h) submission or presentation of oral or documentary evidence.

Like the UNCITRAL Model Law,[102] the new Bangladesh Act upholds party autonomy or the parties' freedom of choice and allows the parties to choose any rules of law, not necessarily the law or the legal system of the country whose law is applicable to the substance of the dispute.[103] This choice is so expansive that the parties can choose the *lex mercatoria* or the rules of transnational commercial law, rules of specific international trade or anything, which is not characteristically the legal system of a particular country. It further provides that if the law or the legal system of a country is designated by the parties, such designated law is meant to refer directly to the substantive law of that country and not to its conflict of laws rules. Like the UNCITRAL Model Law, the Act thus expressly avoids the renvoi situation.[104] However, unlike the Model Law, the new Bangladesh Act allows the arbitral tribunal, in the absence of the parties' choice of applicable substantive law, the freedom to apply any rules of law, as it objectively deems appropriate in the circumstances of the dispute.[105] Thus in the absence of the parties' choice the arbitral tribunal is no longer required to have recourse to the applicable conflict of laws rules as under the Model Law to determine the applicable substantive law.[106] It is striking that unlike the Model Law, the Bangladesh Act makes no provision on the matter of the arbitral tribunal's authority to decide ex *aequo et bono or as amiable compositeur*, nor does it expressly prohibit such authority.[107]

Section 43 of the Act deals with the grounds for setting aside the award. The list of grounds for setting aside an arbitral award provided therein the

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102) Article 28(10) of the UNCITRAL Model Law.
103) Section 36(1) of the Bangladesh Act.
104) Section 36 of the Bangladesh Act.
105) *Id.*
106) Article 28(2) of the UNCITRAL Model Law.
107) *Id*., Art. 28(3).

Act is exclusive. Now the question arises whether the court has the power to set aside the award for "error of law or fact on the face of the award" or when the award is in "manifest disregard of the law." In the light of the recent developments in the Indian Arbitration law as discussed in the earlier part of this chapter, it should be noted that both the Model Law and the new Bangladesh Act are silent on the issue of what happens when an arbitral award has been set aside by the court. The dispute will, however, remain unresolved after the arbitral award has been set aside. The question still remains whether the dispute should be referred to the court, or the parties are still bound by their arbitration agreement to refer the dispute to arbitration again if the arbitral award has been set aside on grounds other than the absence of a valid arbitration agreement. The new Bangladesh Act, however, unlike the Model Law, introduces a safeguard against the move to set aside either domestic or international awards.[108] The Act authorizes the court, where the application for setting aside an award is made, to order that any money payable by the award be deposited with that court, or otherwise secured, pending the determination of the application.[109] This safeguard will be a deterrent to the losing party's playing prank with the arbitral award and it also will save the court's valuable time.

8. Enforcement and Recognition of Awards

Under the Act both domestic and foreign arbitral awards are directly given the status of a decree of the Court. In both cases the Act provides

108) Unlike the Model Law, the new Bangladesh Act remains silent on whether to give the arbitral tribunal an opportunity to eliminate the grounds for setting aside the arbitral award either by resuming the arbitral proceedings or any other way that the tribunal considers suitable. See, Art. 34(4) of the Model Law.

109) Section 43(2) of the Bangladesh Act.

that the award "shall be enforced under the Code of Civil Procedure, in the same manner as if it were a decree of the Court."[110] As far as the recognition and enforcement of foreign arbitral awards are concerned, the new Bangladesh Arbitration Act (2001) differs in some respects from the UNCITRAL Model Law as well as from the New York Convention. Concerning the rules about the recognition and enforcement and about the grounds for refusing recognition or enforcement of awards, the Model Law distinguishes between "international" and "non-international" awards rather than between "domestic" and "foreign" arbitral awards as traditional categories. It was noted that the grounds on which recognition or enforcement may be refused under the Model Law "are relevant not merely to foreign awards but to all awards rendered in international commercial arbitration." The recognition and enforcement regime of the Model Law entertains an arbitral award "irrespective of the country in which it was made" so long it is an international award.[111] The term foreign award is defined in the Bangladesh Arbitration act irrespective of the lex arbitri under which the award was rendered whether it is Bangladesh arbitration law or any foreign arbitration law.[112] The new Bangladesh Act endorses the territoriality principle in the context of recognition and enforcement of foreign arbitral awards. Thus, the scope of the rules concerning the recognition and enforcement of foreign arbitral awards in the new Bangladesh Act is narrower than that in the Model Law and in the New York Convention.[113]

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110) Sections 44 and 45(1)(b) of the Bangladesh Act.

111) Articles 35(1) and 36(1) of the Model Law.

112) Section 47 of the Bangladesh Act (2001) provides that foreign arbitral award is an award made in pursuance to an arbitration agreement in the territory of any state other that Bangladesh but it does not include an award made in the territory of a specified state.

113) Before the enactment of the present legislation on arbitration (i.e. the 2001 Act)

The Act reproduces in section 46 the grounds for refusing recognition or enforcement of foreign arbitral awards as provided in Article V of the New York Convention. The Act also provides that a foreign arbitral award shall, on the application being made to it by any party, be enforced by execution by the Court under the Code of Civil Procedure of Bangladesh, in the same manner as if it were a decree of the Court. It is noteworthy that the Court in the context of recognition and enforcement of foreign arbitral award is statutorily meant to be the District Judge's Court exercising the jurisdiction within the district of Dhaka. Whereas, or the purpose of setting aside any arbitral award made in an international commercial arbitration held in Bangladesh it is the High Court Division of the Supreme Court of Bangladesh.

The Bangladesh legal regime has embraced the fundamental tenets of modernization of international arbitration such as (i) party autonomy; (ii) minimal judicial intervention in arbitration; (iii) independence of the arbitral tribunal; (iv) fair, expeditious and economical resolution of disputes and (v) effective enforcement of arbitral awards. This modernization has also been brought about in the context of domestic arbitration. Although the new Act is principally based on the UNCITRAL Model Law, it has introduced certain improvements on the Model Law prescriptions in certain respects as highlighted above. Certainly, Bangladesh, being a prospective destination for increasing foreign investment in the future, has made a positive step in the

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there existed no legal mechanism for enforcement of a foreign arbitral award in Bangladesh. Although Bangladesh acceded to the New York Convention on July 6, 1992, it has not yet enacted any enabling statute to give effect to the Convention itself. Hence, Bangladesh Courts are very reluctant to apply the New York Convention to the issues of recognition and enforcement of foreign arbitral awards. See also, Haji Azam v. Singleton Binda &Co., 27 DLR 583 (1975); Bangladesh Air Service v. British Airways, 49 DLR 187 (AD) (1997). However, the 2001 Act has incorporated the mechanism of the New York Convention for the recognition and enforcement of foreign arbitral awards in Chapter X.

right direction by enacting the new law on arbitration. Although Bangladesh, like her sub-continental counterparts, has historically a long tradition of settlement of disputes by alternative methods - a phenomenon that pervades her social fabrics for centuries - she can still improve her international arbitral legal regime by incorporating, as it may be deemed appropriate, lessons from various other jurisdictions in her efforts towards modernization and internationalization of arbitration.[114] In order to make Bangladesh an attractive place for much-needed foreign investment, for economic growth and development, and for alternative dispute resolution (*i.e.* ADR), it is not enough simply to enact a new law on arbitration, the Government has to go a long way to achieve the stated purpose. Bangladesh needs more than a mere piece of legislation on arbitration at the present time. The Government and the judiciary, as well as the legal profession, must take initiatives and make constant efforts towards the development of legal infrastructure and institution building in the field of alternative dispute resolution, including arbitration.

Section 4. Commercial Arbitration Law in Nepal

In April 1999, Nepal enacted the Arbitration Act which came into force at once. The principal object of the Act is to up-date the current legal provisions relating to arbitration (as stated in the Preamble). The Act borrows some propositions incorporated in the UNCITRAL Model Law on the subject. But it does not blindly copy them. Besides this, it tries to put, in simple language, the governing principles, without a slavish imitation of the conservative style of drafting.

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114) Peter Binder, *International Commercial Arbitration In UNCITRAL Model Law Jurisdictions* (2000).

1. Arbitration Agreement

Arbitration agreement is the foundation of arbitration under the Nepal Arbitration Act (1996). It must be an agreement for the settlement (through arbitration) of any dispute concerning any specific legal issue, arising under a contract or otherwise. The Act avoids the vague words "defined legal relationship" occurring in the UNCITRAL Model Law and in the 1996 Indian Act. It is clarified that letters, telex, telegrams or telefax messages, or any other similar messages "whose records can be maintained in a written form" can form an arbitration agreement. Not raising an objection to the other party's claim for reference to arbitration also amounts to arbitration agreement[115] Counter-claim is expressly recognised, and so is a "Rejoinder" to a counter-claim.[116] Once there is an arbitration agreement in respect of a dispute, then resort to arbitration is mandatory Arbitration in a pending suit is permitted by agreement.[117]

2. Appointment of Arbitrators

The number of arbitrators can be determined by agreement, failing which, it should ordinarily be three.[118] If an even number is provided for, then the arbitrators must choose an additional arbitrator.[119] Subject to agreement, the process of appointing arbitrators must be started within 30 days from the date when the "reason for the settlement of a dispute through arbitration arises."

115) Section 2(a) of the Arbitration Act (1999).
116) *Id*., Sections 2(g) &(f)
117) *Id*., Sections 3(1), (2) & (4).
118) *Id*., Sec. 5(1).
119) *Id*., Sec. 5(2).

The method of appointment is left to the agreement. Failing agreement, each party shall appoint one arbitrator and the arbitrators so appointed shall appoint a third arbitrator, who shall work as 'chief arbitrator'.[120] Under the Nepal Act, where the agreement is silent about the appointment of arbitrators or where no arbitrator can be appointed according to the agreement, then a party may apply to the appellate court for appointing three arbitrators.[121] On receipt of an application explicitly mentioning the full name, address, occupations and the fields of specialisation of at least three persons who can be appointed as arbitrators along with a copy of the arbitration agreement, the appellate court shall notify the parties regarding appointment of arbitrators deemed appropriate by it within sixty days of the receipt of the agreement.

The Nepal Act contains an interesting provision not usually found in the arbitration Acts of other countries requiring the arbitrator to take a written oath of impartiality and honesty, for which a form is provided in the Schedule. A copy is to be sent to the Appellate Court. The arbitrator must clear any matters raising a reasonable doubt about his impartiality or independence before signing the oath.[122]

Another very interesting provision, found in the Nepal Act, relates to the qualifications of arbitrators. The following persons shall not be qualified for appointment as arbitrators:[123]

(a) Those who are disqualified for entering into contracts under 'current law'-a phrase that pithily express the concept of 'any law for the time being in force.'

120) *Id*., Sec. 6. The concept of 'chief arbitrator' is not to be found in the Indian Act of 1996. The 'presiding arbitrator' mentioned in the Indian Arbitration Act of 1996 does not have that status.

121) *Id*., Sec. 7.

122) *Id*.. Sec. 8.

123) *Id*., Sec. 8.

(b) Those who have been punished by a court on criminal charges involving a moral turpitude.
(c) Those who have become insolvent or who have been declared bankrupt.
(d) Those who have any personal interest in the dispute that is to be settled through arbitration.
(e) Those who do not possess the specific qualifications laid down in the arbitration agreement.

The Act contains a rather strong provision, for the removal of arbitrators. The matter can, of course, be dealt with by agreement. But, failing that, the Act provides that a party may apply to the arbitrator, requesting for permission to remove the arbitrator. This procedure can be resorted to in the circumstances, where the arbitrator clearly shows bias instead of working in an impartial manner, where the arbitrator engages in improper actions or commits fraud in the course of arbitration, in case any arbitrator frequently commits mistakes or irregularities in the arbitration proceedings, if the arbitrator does not attend meetings for more than three months, without furnishing satisfactory reasons, in order to delay the proceedings in an improper manner, if the arbitrator takes any action opposed to the principle or rules of natural justice and if the arbitrator lacks the requisite qualifications or ceases to be qualified. The arbitrator must take a decision on the application to remove him within 30 days. Against his decision, an appeal may be filed with the Appellate Court, whose decision shall be final.[124] Venue and the language of the arbitration proceedings shall be as chosen by the parties.[125] A noteworthy feature of the Nepal Arbitration Act is the

124) *Id*., Sec. 11.
125) *Id*., Sec. 12. The 'office' of the arbitrator under the Nepal Arbitration Act is to be

detailed provisions, which it makes, regarding the claim, and subsequent pleadings of the parties, and annexure thereto.[126)]

The Nepal Act also lays down time limits for filing the various categories of claims and the arbitrator is empowered to extend the time limit for not more than seven days.[127)] If there is failure to submit the claim within the prescribed time limit, the arbitration proceedings shall terminate unless the agreement provides to the contrary. If there is failure to submit the objection i.e., the defence within the specified time limits, then the arbitrator must still proceed to determine the claim on the merits.[128)]

3. Jurisdiction of Arbitrators

The Nepal Act contains a fairly elaborate provision as to the procedure to be followed, where a party raises an objection that the arbitrator has no jurisdiction over the dispute referred to him, or that the contract because of which the dispute has emerged is itself illegal or null and void. Such objection must be raised before expiry of the time limit laid down for filing the defence to the main case. Any party not satisfied with the arbitrator's decision on such an objection may appeal to the Appellate Court within

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located at the place chosen by the parties. If the parties fail to agree, then the office shall be at the place, specified by the arbitrator in the light of all the circumstances. However, (unless the parties have made other arrangement), the arbitrator may record the statements of witnesses, obtain opinion of experts and inspect any document, object or place at any other appropriate place.

126) The claim must be made in writing, explicitly mentioning the details of the subject matter of the dispute and the remedy sought, along with the evidence. Copy is to be given to the other party. To the claim so filed, the other party shall submit its ‘objection’ (defense). The other party can, along with the ‘objection’, submit a counter-claim. To the counter-claim, the claimant can file a ‘rejoinder’ with copy to the opposite party.

127) Section 14 of the Nepal Arbitration Act.

128) *Id*., Sec. 15.

thirty days. The decision of the appellate court is final. But the filing of the appeal shall not be deemed to have prejudiced the power of the arbitrator to continue his proceedings and to pronounce his decision before the petition is finally disposed of by the court.[129] The fact that during interim appeal the arbitral proceedings are continued has invited criticism from the legal community. This may be because of the fact that once the objection to jurisdiction is ultimately allowed by the Appellate Court, and then the arbitration proceedings, which are allowed to be held, in the meantime would become infructuous. It is also provided that where the dispute is referred to three or more arbitrators, the arbitrators who are present may conduct all arbitration proceedings, other than taking the final decision or issuing the final order.[130] In the arbitration proceedings, each party shall be provided with an equal and adequate opportunity to present its case subject to the provisions of the Act.[131] On completion of the hearing, the arbitrator has to issue an order that the hearing has concluded.[132]

4. Arbitral Awards

Unless the agreement provides otherwise, the arbitrator must read out his written decision, within 30 days of the order closing the hearing. This is a step in the positive direction to fulfil the requirement of speedy resolution

129) *Id*., Sec. 16. It may be noted here that the 1996 Indian Act does not permit an interim appeal to the court against the decision of the arbitrator, rejecting the objection to jurisdiction.

130) *Id*., Sec. 16(4).

131) *Id*., Sec. 21(1). The point of difference with the Indian Act is that the Indian Act contemplates 'full opportunity', while the Nepal Act provides for 'equal and adequate' opportunity.

132) *Id*., Sec. 17(6).

of the dispute as against some other jurisdictions, lacking similar provisions.[133] The Nepal Arbitration Act (1999) expressly provides that the arbitration proceedings shall be held in camera, unless the parties otherwise decide.[134] The Nepal Act provides that the Nepal law shall be the substantive law applicable, unless the agreement provides otherwise. But the arbitrator must settle the dispute according to the 'conditions stipulated in the concerned contract' but while doing so, he has also to take into account the applicable commercial usages.[135] Another interesting provision found in the Nepal Act relates to the foreigners. If any party is a foreigner, so that the decision pronounced by the arbitrator is not likely to be implemented, then the arbitrator has power to obtain a bank guarantee or other appropriate guarantee, as prescribed by the arbitrator.[136] The Act also confers on the arbitrator power to issue on the request of a party, preliminary orders or interim or provisional orders, in respect of any matter connected with the dispute or to take a 'conditional decision.'[137] The Act also confers power on the arbitrator to issue certified copies and the same is a very useful provision, as many documents tend to be locked up before the arbitrator.[138] Against these various interim orders issued by the arbitrator under an appeal lies to the Appellate Court.[139] The Nepal Arbitration Act (1999) contains provisions regarding the time limit for pronouncing the award.[140] The Act

133) *Id*., Sec. 17(7). The Indian Act does not contain a time frame for passing the arbitral award.

134) *Id*., Sec. 19.

135) *Id*., Sec. 18(3).

136) *Id*., Sec. 21(1)(d).

137) *Id*., Sec. 21(1)(g).

138) *Id*., Sec. 21(1)(h).

139) *Id*., Sec. 21(2).

140) *Id*., Section 24 read with section 17(7). Subject to agreement between the parties,

provides that where there are three or more arbitrators, the decision of the majority prevails.[141]

Subject to a contrary provision in the agreement, the award under the Nepal Act must give brief particulars of the matter referred to arbitration, the grounds for deciding that the arbitrator had jurisdiction where such a point had been raised and reasons for the decision and the decision in the award has to read out to the parties.[142] In a monetary award subject to agreement to the contrary, award of interest is compulsory under the Nepal Act. The interest is to be paid at the rate prescribed by the arbitrator in the light of the nature of the business connected with the dispute, ensuring that it is not higher than the rate of interest currently charged by commercial banks in respect of similar transactions.[143]

5. Recourse against the Award

An award may be challenged on a petition filed before the Appellate Court within 35 days from receipt of a copy by the petitioner. The grounds of challenge are similar with the law in other countries in South Asia which include: incompetence of a party to sign the agreement or invalidity of the agreement, notice of arbitration proceedings not given to the petitioner, decision has been rendered on a matter not referred to the arbitrator or in a manner contrary to the prescribed conditions or by acting beyond the arbitrator's

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the award must be pronounced within 120 days from the date on which the process of submission of pleadings is complete. However, this is subject to the provision that the award must be pronounced within 30 days of the date on which the hearing is 'closed' by a formal order.

141) *Id*., Sec. 26(1).

142) *Id*., Sections 27 & 28.

143) *Id*., Sec. 34.

jurisdiction, procedure of designation of arbitrators or their functions and actions do not conform to the agreement or the Act, the matter is not arbitrable under the law of Nepal and the award is likely to prove detrimental to the 'public interests or policies.[144] The award is to be implemented by the District Court, under the Nepal Act on a petition filed within 30 days from the date of expiry of the time limit prescribed for implementing it in case the parties have failed to implement the decision taken by the arbitrator within 45 days from the date when they receive a copy thereof.[145]

6. Recognition and Enforcement of the Awards

The Nepal Arbitration Act also contains provisions, though not exhaustive regarding the recognition and enforcement of foreign awards.[146] Any party which wishes to have a decision taken in a foreign country implemented in the Kingdom of Nepal must submit an application to the Appellate Court along with the original document of the arbitrators decision or a certified copy thereof, the original document of the agreement, or a certified copy thereof and in case the arbitrators decision is not in the Nepali Language, an official translation thereof in the Nepali language. In case Nepal is a party to any treaty which provides for recognition and implementation of decisions taken by arbitrators in foreign countries, any decision taken by an arbitrator after the commencement of this act within the area of the foreign country which is a party to that treaty shall be recognised and implemented in the Kingdom of Nepal in the following circumstances subject to the provisions of that treaty and the conditions mentioned at the time of becoming a party to it:

144) *Id*., Sec. 30.
145) *Id*., Sections 31 and 32.
146) *Id*., Sec. 34.

(a) In case the arbitrator has been appointed and decision taken according to the laws and procedure mentioned in the agreement.;
(b) In case the parties had been notified about the arbitration proceedings in time.;
(c) In case the decision has been taken according to the conditions mentioned in the agreement or by confining only to the subject-matters referred to the arbitrator.;
(d) In case the decision has become final and binding on the parties according to the laws of the country where the decision has been taken: and?
(e) In case the laws of the country of the person who has applied for the implementation of an arbitrator's decision, or the laws of the country where arbitration proceedings have been conducted, do not contain provisions under which arbitration decisions taken in the Kingdom of Nepal cannot be implemented.

It is also stated that in case the application has been filed for the implementation of the decision within 90 days from the date of decision. If the Appellate Court is satisfied about the conditions specified herein, it shall forward the decision to the District court for its implementation. However, it has been noted that, no decision taken by an arbitrator in a foreign country shall be implemented in case the dispute after settling which the decision has taken is a dispute which cannot be settled through arbitration according to the laws of Nepal or the implementation is detrimental to the public policy.[147)]

147) This provision seems to be in tune with the UNCITRAL Model Law and the Indian and Bangladesh Arbitration Law. Yet the uniformity depends substantially on the harmonious interpretation of the term public policy by the courts in Nepal.

Section 5. Commercial Arbitration Law in Sri Lanka

With the dawn of peace and access to geographical areas that were inaccessible for almost three decades, Sri Lanka is better positioned now to attract FDIs. Sri Lanka has lagged behind many countries in introducing reforms to facilitate and streamline business operations; the payment of taxes and duties; and with regard to conducting litigation. For the resolution of disputes, the worldwide trend is to move towards arbitration procedures in preference to the institution of proceedings in courts of law. Court proceedings are often perceived to be costly, tedious, time consuming and offering too many opportunities for appeals. Most business entities now prefer conciliation and arbitration to court proceedings, and this often becomes a prerequisite to the finalisation of the other clauses in the contract. Provision for conciliation followed by arbitration is now the standard blueprint in most contracts involving one or more Chinese entities. The drafting of arbitration clauses and their inclusion in contracts is an art in itself. Recognising the potential benefits of offering a neutral and convenient venue (in terms of access, ease of communication, etc.) for arbitration, and with modern state-of-the-art facilities and infrastructure, such a centre could be a financially rewarding venture. In 1995, Sri Lanka enacted the Arbitration Act. As stated in the Preamble, one of its objectives is to make “comprehensive legal provision” for the conduct of arbitration proceedings and the enforcement of arbitral awards. The second object is to make legal provision to “give effect”, to the principles of the Convention on the Recognition and Enforcement of Foreign Awards of 1958 viz., the

New York Convention. The Act substantially follows the UNCITRAL Model law. At the same time, certain variations from, or additions to, the rules given in the Model Law have been considered necessary.

1. Arbitration Agreement

The Sri Lanka Act provides that an arbitration agreement shall be in writing. It can be contained in a signed document or in an exchange of letters, telexes, telegrams or other means of telecommunications which provide a record of the agreement It also provides that by an agreement "any dispute" can be determined by arbitration "unless the matter in respect of which the arbitration agreement is entered into, is contrary to public policy or is not capable of determination by arbitration"[148] Under the Act, if legal proceedings are instituted in court by a party to an arbitration agreement, in respect of a matter covered by the arbitration agreement, the court shall have no jurisdiction to hear and determine the same, if the other party objects to it.[149]

2. Appointment of Arbitrators

Parties are free to determine the number of arbitrators. But if it is an even number, then the arbitrators so appointed shall jointly appoint an "additional arbitrator" who shall act as the Chairman. Where the parties do not determine the number, it shall be three.[150] The parties are free to agree

148) Section 4 of the Sri Lanka Arbitration Act (1995). But the Act does not elaborate on the two exceptions.

149) *Id., Elgitread Lanka (Pvt) Ltd v Bino Tyres (Pvt) Ltd*., SC (Appeal) No. 106/08 Available at http://www.supremecourt.lk/images/documents/SCAppeal10608FINAL.pdf

150) Section 6 of the Sri Lanka Act.

on the procedure for appointment. Failing such agreement, the High Court can make the appointment. If the agreed procedure fails, then also, the High Court has power to make the appointment.[151] The mandate of an arbitrator terminates, if the arbitrator becomes unable to perform his functions or, for any other reason fails to act without undue delay or dies, or withdraws from office or if the parties agree on the termination. It may be noted that the provision for terminating the mandate by agreement is not common in many Arbitration Acts.[152] In case of undue delay by an arbitrator, the aggrieved party may move the High Court to remove him and to appoint another person in his place. It is further provided that where the mandate of an arbitrator is terminated, the proceedings shall not be held *de novo*, unless the parties otherwise agree.[153] An arbitrator has to disclose circumstances raising justifiable doubts as to his impartiality or independence. If circumstances exist which give rise to such doubt, a party may challenge an arbitrator. If the arbitrator does not resign, the matter can be taken to the High Court for judicial review.[154]

3. Jurisdiction of Arbitrators

If an arbitrator's appointment is challenged about the existence or validity of the arbitration agreement, then the arbitrator determines the matter in the first instance. But the aggrieved party may "apply" to the High Court for a determination of such question. In the meantime, the arbitral tribunal may continue the proceedings.[155] This provision is similar to the law as

151) *Id*., Sec. 7.

152) Though Indian and Bangladesh Acts contain similar provisions, Nepal Arbitration Act is silent about the same.

153) *Id*., Sections 8 & 9.

154) *Id*., Sec. 10.

155) *Id*., Sec. 11.

contained in the Indian arbitration Act and the Bangladesh Arbitration Act. The Sri Lanka Arbitration Act (1995) provides for interim measures of protection to be ordered by the arbitrator to protect or secure the claim under section 13. The Act also contains provisions for settlement of the dispute. It is provided that it shall not be incompatible with arbitration proceedings, for an arbitrator to encourage settlement. Further, with the agreement of the parties, the arbitrator may use at any time during the arbitral proceedings; mediation, conciliation or any other procedure to encourage settlements. It the parties settle the dispute, the settlement is recorded as an award on agreed terms.[156] The arbitrator is expected to deal with the dispute in an "impartial, practical and expeditious manner" and he must afford all the parties "an opportunity of presenting their respective cases and of examining all documents and other material furnished by the other party or by any other person."[157] An arbitral tribunal is authorized by the Sri Lanka Act to continue the arbitral proceedings and to determine the dispute on the available material, notwithstanding the failure of a party without reasonable cause to appear before it or to comply with any order made by it.[158]

4. Conduct of Arbitral Proceedings

An interesting and useful provision to be found in the Sri Lanka Arbitration Act (1995) relates to the amendment of pleadings in relation to relief and the parties are allowed to introduce "new prayers for relief", provided such prayers fall within the scope of the arbitration agreement and

156) *Id*., Sec. 14
157) *Id*., Sec. 15.
158) *Id*., Sec. 13.

it is not inappropriate to accept them, having regard to the point of time at which the new prayers are submitted and other circumstances.[159] Parties are also allowed to amend or supplement the prayers for relief already introduced and to rely on new circumstances, in support of their respective cases. This is also a useful provision. However, it is somewhat strange that the main provision as to pleadings under section 15(2) is not very elaborate and does not set out the contents of pleadings, time limits for the same and points of detailed nomenclature, such as "statement of claim", "defence", "rejoinder" etc.[160] As per the Act, the parties may determine the venue of arbitration, by agreement. Failing agreement, the arbitrator decides it, having regard to the "circumstances of the case, including the convenience of the parties." But subject to a contrary agreement between the parties, the arbitral tribunal may meet at any place considered appropriate for consultation among the members, hearing the witnesses, inspection, etc.[161] Subject to the provisions of the Act, the parties can agree on the procedure of the arbitral, tribunal in conducting the proceedings.[162] Subject to agreement to the contrary, under the Sri Lanka Act in regard to any decision made in the course of arbitral proceedings, the decision shall be by a majority of the arbitrators or failing a majority, the decision of the arbitrator appointed by the other arbitrators shall be binding or where, in terms of the agreement or the Act, there is a Chairman, then the decision of the Chairman shall be binding. Where there is a Chairman, he has the power "to administer the conduct of the arbitral proceedings"[163] Penalty is

159) *Id*., Sec. 15(4).

160) The Nepal Arbitration Act (1999) is much more specific on this aspect.

161) Sections 16(1) and (2) of the Sri Lanka Act.

162) *Id*., Section 17 reads: "The power conferred upon the arbitral tribunal shall include the power to determine the admissibility, relevance and weight of any evidence."

163) *Id*., Sec. 19.

provided for failure to attend or refusal to take oath, etc. It may be mentioned that the arbitrator is expressly empowered to administer oath, unless otherwise agreed upon by the parties.[164] The power to administer oath is not provided in the 1996 Indian Act though it was provided in the 1940 Act. The Sri Lanka Act contains two important provisions regarding evidence before the arbitral tribunal, as under unless otherwise agreed upon by the parties, evidence before the arbitral tribunal may be given orally or in writing or by affidavit. This provision seems to confer a wide discretion on all concerned.[165] However, the Sri Lanka Act is silent about the "materiality" of the evidence, a concept expressly mentioned in section 19(4) of the 1996 Indian Act.

5. Applicable law

The domestic legislations following the UNCITRAL Model Law, usually permits the parties to choose the substantive law to be applied, if it is a transnational contract. Like the Indian legislation, the Sri Lanka Act goes a little further under section 24(1) in this regard. Here, there is no limitation that the main contract should have a foreign element and the only limitation is to the extent agreed to by the parties.[166] The trade usages and custom apply to the proceedings only if the parties have expressly authorised it do so. This would mean that trade usages will be relevant, only if the agreement adopts them. This approach is contrary to the UNCITRAL Model Law. The Sri Lanka draftsman had to adopt this course, presumably in view

164) *Id*., Sec. 22.

165) *Id*..

166) An arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute"

of some peculiarities of the commercial and legal scene in that country.[167]

The Sri Lanka Act makes a fairly comprehensive provision as to interest to be awarded by the arbitrator.[168] It further states that in an award for the payment of money, interest can be awarded, whether it is a claim for liquidated or unliquidated amount. The rate is that agreed between the parties or in the absence of agreement, it will be the 'legal interest'.[169] The interest is awarded on the principal sum awarded from the date of commencement of arbitration proceedings to the date of the award. As regards subsequent period, the Sri Lanka Arbitration Act (1995) provides that the arbitral tribunal may award further interest at the aforesaid rate on the aggregate sum so awarded, from the date of the award to the date of payment or such earlier date as the arbitral tribunal thinks fit. The Sri Lanka Act also contains a specific provision as to compensation of the arbitrators, to the effect that the parties shall be jointly and severally liable for the payment of reasonable compensation to the arbitrators constituting the arbitral tribunal, for their work and disbursements.

6. Recognition and Enforcement of the Award

The award can be enforced by the High Court, on an application made to the High Court within one year after the expiry of fourteen days of the making of the award.[170] Subject to provisions regarding setting aside the award, the High Court shall, on a day notified to the parties "proceed to

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167) Section 24 of the Sri Lanka Act.

168) *Id*., Sec. 28.

169) The expression "legal interest" is defined in section 50, as meaning interest at the rate specified in an order made under section 192 of the code of Civil Procedure and for the time being in force.

170) *Id*., Sec. 31(1).

file the award and give judgment according to the award." Upon the judgment so given, a decree shall be entered.[171] Thus, the intention seems to be that the decree so entered shall be executed like any other decree of a civil court. One of the notable features here is that unlike the arbitration laws in other countries, Sri Lanka arbitration Act does not automatically confer the status of a civil decree to the arbitral award. The parties have to seek the court assistance to get it passed as a decree of the court for execution. The award can be set aside by the High Court on an application made within sixty days on grounds which are substantially similar to those laid down in the UNCITRAL Model Law.[172] A foreign arbitral award irrespective of the country in which it was made subject to the conditions of enforcement in section 34 shall be recognized as binding and, upon application by a party under section 31 to the High Court, be enforced by filing the award in accordance with the provision of that section.[173] The conditions for recognition and enforcement of the foreign award is similar to the provisions contained in the arbitration laws in India, Bangladesh and Nepal.

Section 6. Arbitration Law in Pakistan

The Arbitration Act, 1940 is the law governing arbitration in Pakistan. Being a colony of the British Empire, the undivided India including Pakistan was governed by the Arbitration Act (1940) modeled in the line of English arbitration Act (1936). After the declaration of independent status of

171) *Id*., Sec. 31(6).

172) *Id*., Sec. 32.

173) Section 31 reads: "A party to an arbitration agreement pursuant to which an arbitral award is made may, within one year after the expiry of fourteen days of the making of the award, apply to the High Court for the enforcement of the award.'

both the countries in the year of 1947, they continued to follow the same Act, but India until the enactment of the Arbitration and Conciliation Act (1996) in tune with the UNCITRAL Model Law. Though the attempts to review this pre-independent legislation have been in progress, the arbitration law in Pakistan is still the colonial piece of legislation containing primarily three kinds of arbitration viz., arbitration without court intervention,[174] arbitration where no suit is pending, but through the intervention of the court[175] and arbitration in suits pending before the court.[176] The Pakistan Arbitration Act also contains further provisions, common to all the three types of arbitration.[177] Though the Arbitration Act (1940) deals with domestic arbitration proceedings and applies to recognition and enforcement of domestic awards, the same is not based on the UNCITRAL Model Law. To recognize this development Pakistan has ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. To comply with this treaty an Ordinance has been, promulgated. This was subsequently re-promulgated from time to time before the enactment of the Convention Act, the Recognition and Enforcement (Arbitration Agreements Foreign Arbitral Awards) Act of 2011 which implements the New York Convention in Pakistan ("Convention Act") and is limited to the enforcement of "foreign arbitral awards." This has brought about a qualitative change in respect of foreign arbitral awards. Contrary to earlier provisions of law it is no longer discretionary with courts to refuse stay of proceedings before than in any case where there existsa solemn agreement

174) Chapter II, Sections 3-19.
175) Chapter III, Sec. 20.
176) Chapter IV, Sections 21-25.
177) Chapter V, Sections 26-38.

to get the disputes resolved through foreign arbitration. It is important for all organs of state to abide by international commitments made by Pakistan. In addition to this there existed the Arbitration (Protocol and Convention) Act (1937) which gave effect to the Geneva Protocol on Arbitration Clauses and Convention on the Execution of Foreign Arbitral Awards and was limited to the recognition and enforcement of 'foreign awards.' The Arbitration and Protocol Act (1937) has been repealed by the recently promulgated Convention Act to the extent that it continues to be applicable for 'foreign awards' made before 14 July 2005 and which are not "foreign arbitral awards" for the purpose of the Convention Act. In so far as the New York Convention has been ratified by the international community at large, including signatories of the Geneva Convention, application of the 1937 Act, will have little or no practical significance. It is important to note that in the absence of clear definitions of "domestic arbitration," "domestic award," and "foreign arbitral award" under the arbitration laws of Pakistan, the scope and ambit of the aforementioned laws is unsettled. Accordingly it is possible that a particular arbitration agreement or arbitral award may attract the application of the Arbitration Act and/or the Convention Act. A Bill for a new consolidated arbitration law based on the UNCITRAL Model Law was presented to the Parliament on 27 April 2009 and is still pending before the National Assembly. The Bill aims to consolidate law relating domestic arbitration, international commercial arbitration, recognition and enforcement of foreign arbitral awards as well as settlement of international investment disputes.

1. Arbitration Agreement

Whatever be the class of arbitrations there must be an arbitration agreement. As defined in the Arbitration Act (1940), it means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.[178]

The number of arbitrators can be one, two, three or even more. In the case of an even number of arbitrators, an umpire is to be appointed according to the procedure given in the Act and where the arbitration agreement does not specify the number, the arbitration shall be by a sole arbitrator. An arbitrator may be named in the arbitration agreement or may be left to be appointed by a designated authority. Where the arbitration agreement is silent about the mode of appointment of arbitrators and the parties cannot agree about the choice of the arbitrator, the Act gives power to the court to make the appointment, after following the prescribed procedure.[179] An arbitrator who does not diligently conduct the proceedings, or who is guilty of misconduct, can be removed by the court after due inquiry.[180]

2. Form and Contents of the Award

Where there are more than one arbitrator, they must all act together. The award is bad, if one arbitrator is absent. The position may be different if what was done during the absence of one arbitrator is done all over again by all the arbitrators, or if the act performed in the absence of one arbitrator is only ministerial, such as looking into an account book. All arbitrators

178) Section 2(2) of the Pakistan Arbitration Act (1940).
179) *Id*., Sections 8 & 9.
180) *Id*., Sec. 11.

must deliberate jointly. However, the parties may waive the irregularity. Delegation by the arbitrator, or associating strangers with the arbitration. An arbitrator cannot delegate his functions to another person. It follows, that if the award is given by a person to whom the arbitrator delegates his functions, the award is a nullity.[181] An arbitrator cannot associate a third person with the decision-making process. Here again, there is no misconduct, if there was consent of all the parties, to such a course being adopted.

3. Scope of Court Intervention

If a party to an arbitration agreement refuses to go to arbitration, the other party can seek intervention of the court to compel a reference to arbitration procedure.[182] The Arbitration Act (1940) is totally inadequate, in regard to matters of procedure. Of course the arbitrator must observe the essentials of natural justice, failing which, the arbitrator's award can be set aside for misconduct. But various stages of the process are not dealt with in the Act. The award must be pronounced within the time limits laid down in the arbitration agreement or failing such agreement, within 4 months of the commencement of hearing. However, the time limit can be extended by the court in certain circumstances.[183] The award has to be in writing and signed by the arbitrator. If there are more than one arbitrator, the majority view prevails. The Act itself does not provide that the arbitrator shall give reasons for the award. When the award is a non-speaking award, the scope for interference by the court with the award becomes somewhat limited. An award cannot be enforced, by itself. Judgment of the court has to be

181) There is, however, an exception to this rule, where the delegation is (i) with the consent of all the parties, or (ii) a purely ministerial act.

182) *Id*., Sec. 20.

183) *Id*., Sec. 28.

obtained in terms of the award.[184] Under the scheme of the Act, the court may modify or correct the award under section 15[185] or remit the award under on any matter referred to arbitration for reconsideration by the arbitrator or umpire under section 16[186] or may set aside the award under section 30.[187]

4. Misconduct of the Arbitrator

One of the principal grounds for setting aside the award under the 1940 Act 1940 is the ground of misconduct. section 30 of the Act expresses it in rather cryptic terms by phrasing it in this manner "the arbitrator has misconducted himself or the proceedings." No exhaustive definition of "misconduct" in this context can be given because misconduct is as large as life itself. Because of the endless variety of situations in life, treatment of the subject in an exhaustive manner is likely to degenerate into a mere catalogue of instances. It will be more useful if selected instances of misconduct are collected and are classified under a few convenient groups. In arranging the cases under such group, one should bear in mind the fact

184) *Id*., Sec. 17.

185) a) Where it appears to the court that a part of the award is upon a matter not referred to arbitration and can be separated from the other and does not affect the section on the matter referred, or (b) where the award is imperfect in form, or contains an obvious error which can be amended without affecting such decision, or (c) where an award contains a clerical mistake or an error arising from an accidental slip or omission.

186) (a) Where the award has left undetermined certain matters or where it determines matters which are not referred to arbitration, and which cannot be separated from the rest or (b) where the award is so indefinite, as to be incapable of execution or (c) where an objection to the legality of the award is apparent on the face of it.

187) (a) That the arbitrator or umpire has misconducted himself or the proceedings; (b) that the award has been made after issue, by the court, of an order superseding the arbitration; or (c) that an award has been improperly procured or is otherwise invalid

that misconduct may arise from the arbitrator's conduct of the case, the arbitrator's relations with the parties, the arbitrator's mode of arriving at the decision (in regard to the materials relied on by the arbitrator or the tests applied), and the arbitrator's mode of formulating his award.[188)]

5. Errors of Law Apparent on the Face of Record

The parties can approach the court for setting aside the arbitral award on the ground of procedural irregularity by the arbitrators or for the breach of principles of natural justice. Questions of difficulty arise, when the arbitrator's decision is challenged, for an erroneous conclusion reached by the arbitrator on matters of law. The position appears to be a bit complex and cannot be stated with absolute certainty. However, broadly speaking, one can state the law on the subject in the form of the following propositions:

(a) Where a question of law has been specifically referred to the arbitrator for his decision, then his ruling on that question, if bona fide and if not suffering from any other defect, is not open to challenge, merely because it is erroneous;

(b) If a question of law has not been specifically referred to the arbitrator, his ruling on the point of law (if material to the result) may render the award void. Where an arbitrator is called upon to decide the effect of the agreement, he has to decide a question of law, (i.e., in interpreting the agreement), and hence his decision on

188) Some specific heads of misconduct which recur frequently in practice include the following: proceeding ex parte, without justification (and analogous acts); private inquiries by the arbitrator; absence of the arbitrator; delegation by the arbitrator, or the arbitrator associating strangers with the arbitration; use of wrong criteria by the arbitrator; use of wrong material (by the arbitrator); irregularities in the award.

the point is not open to challenge. Generally, the question of error of law can arise only if reasons are given in the award. However, if the very relief granted by the award is illegal, the position is different. Thus, an arbitrator cannot grant specific performance of a contract of service. Nor can a contract for the sale of movable property be enforced specifically, save in exceptional cases. An arbitrator must decide according to legal rights, and not according to his own notions of fairness.

The logical basis, on which the jurisdiction of the court to interfere for apparent error can be justified, needs first to be explained. The general principle is that an arbitrator is a final judge both of fact and of law. So far as questions of fact are concerned, this jurisdiction has been limited to decisions pronounced after serious procedural lapses, which reveal breach of natural justice or other technical misconduct. So far as errors of law are concerned, the jurisdiction of the court, (though not conferred in so many words by section 30), seems to have been based on the assumption that if the parties have not specifically referred a question for the decision of the arbitrator, then it is implied that the general power of the court to determine legal questions between the parties remains unimpaired. In theory, the jurisdiction can also be supported on the ground that the ultimate arbiters of questions of law should be the courts, so that uniformity is maintained.

Where the award is an unreasoned one, the court cannot interfere on the ground of an error therein. If the arbitrator chooses to give reasons, then the award can be set-aside on the ground of error of law, although, in general, the reasonableness of the reasons themselves cannot be challenged.[189] The

189) This is a major criticism against the Arbitration Act of 1940 is that it does not

same principle is also followed, regarding questions of interpretation of contract as determined in the award. Court can interfere only if the award is a speaking award. It is only if the line of interpretation is set out in the award that the court can interfere.

6. Recognition and Enforcement of the Award

The Recognition and Enforcement (Arbitration Agreements Foreign Arbitral Awards) Act (2011) which implements the New York Convention (1958) in Pakistan has brought in uniformity in the law governing recognition and enforcement of arbitral awards. Till recently, the Pakistani courts were exercising excessive judicial activism to secure a protectionist bias against international commercial arbitration.[190] The new enactment has in effect repealed the Arbitration Protocol and Convention Act (1937), which was the implementing legislation of the Geneva Convention (1927). In the light of these recent development, while dealing with an application in relation to a foreign arbitration clause under section 34 of the Arbitration Act (1940), the Court's approach should be dynamic. With the development and growth of International trade and commerce and due to modernization of communication transport system in the world, the contracts containing such an arbitration clause are very common nowadays. The rule that the

provide for any mandate for giving only speaking awards as against the law in other countries.

190) In *Eckhardt & Co. Marine GMBH West Germany v. Mohd. Hanif,* PLD 1993 SC 42, the Supreme Court of Pakistan refused to enforce a foreign arbitration agreement on the ground that it would be too inconvenient and expensive for the Pakistan party to bear the cost of abducing evidence at a foreign forum. The reasoning of the court was found squarely in consideration of natural justice rather than laying down any test for a forum convenience of a particular dispute. The high fee involved couple with a general perception that foreign arbitration invariably rule against Pakistan parties also contributed to the fear against international commercial arbitration.

court should not lightly release the parties from their bargains, that follows form the sanctity which the court attaches to contracts must be applied with more vigor to the contract containing a foreign arbitration clause. The grounds for recognition and enforcement of the arbitral awards are similar to those contained in the different jurisdictions discussed in the earlier part of this chapter. It is pertinent to note that recognition and enforcement of foreign arbitral awards may also be refused if the authority in the country where recognition and enforcement is sought, finds the subject matter of the dispute to be incapable of settlement by arbitration under the law of that country, or the recognition or enforcement of the award will be contrary to the public policy of the country. It is an undisputed fact that the arbitration law in Pakistan should be improved in terms of the UNCITRAL Model Law and the Arbitration Act (1940) needs fundamental changes to cater to changing requirements of the 21st Century. In the place of three different legislations, a single consolidated piece of legislation covering both domesic and international arbitration is urgently required to bring about consistency in the law.

Chapter 3: Comparative Analysis of International Commercial Arbitration Law in South Asia

Section 1. Introduction

The significant increase in the role of international trade in the economic development of nations over the last few decades has been accompanied by a considerable increase in the number of commercial disputes as well. Speedy settlement of disputes itself means the absence of long and delaying technicalities of ordinary courts. But the aspect of judicial interference in the arbitration process is against this objective. The right to go for judicial review is an accepted fundamental right and each party to the dispute has got the freedom to exercise it. The scope and extent of that freedom is an important issue in the context of alternate dispute resolution mechanisms. Over interference on the part of the judiciary will definitely result in the lagging of arbitration process, causing much worry to the disputants.

One of the main areas where reforms are made is the sphere of judicial intervention in the arbitration process. The tendency was to keep the judicial forum away from the sphere of arbitration. To achieve this, the present law of arbitration is made in close resemblance with the UNCITRAL Model law of international arbitration. This is the reason why the settlement of international disputes through arbitration has got a tremendous impact in these recent years.

Section 2. Recent Developments

No law is static. In the same way, the law of arbitration has also been a subject of discussion for change. Recently, the Indian government has

proposed certain amendments to Arbitration and Conciliation Act (1996) keeping in view the judicial developments in Arbitration law.[191] Earlier, the Law Commission of India had also proposed certain amendments to the arbitration law in India. As has been discussed in the previous chapter, countries like Bangladesh, Sri Lanka, Nepal and Pakistan have either modified their arbitration law to suit the requirements of the international trade in the globalized world or introduced a fresh law in tune with the UNCITRAL Model Law and the New York Convention (1958).[192] The changes they have proposed, give an impression that, it will surely re-introduce into the law or arbitration, the old procedural difficulties and high expenses. The fact that unlike in other jurisdictions discussed earlier, India has maintained a variation from the UNCITRAL Model Law while ensuring to minimize court intervention during arbitral proceedings, adds to the criticisms.[193] The question as to whether the areas where changes have been introduced are in tune with the needs of the society is also to be examined here. It is also an undisputed fact that as an alternative to dispute resolution, the arbitration process has to be separated from the formal technicalities as an alternative to dispute resolution through of the ordinary courts.

Section 3. Appointment of Arbitrators

The appointment of arbitrators is a major step in the international commercial arbitration proceedings. So greater caution is required to be exercised

191) Consultation paper on Arbitrtaion and Conciliation Act, 1996, Ministry of Law & Justice, government of India, available at http://lawmin.nic.in/la/consultationpaper.pdf.

192) 176th Report of the Law Commission of India, 2001, available at http://lawcommissionofindia.nic.in/reports.htm.

193) In India, an immediate appeal to the court after unsuccessfully challenging the jurisdiction of the arbitrator is not provided under the Arbitration and Conciliation Act (1996). For details, *see* Chapter 2 dealing with arbitration law and practice in India, Bangladesh, Nepal, Sri Lanka and Pakistan.

by the parties during the selection of arbitrators. The parties are given the freedom to select the arbitrators of their own choice. If the parties fail to do so, the judiciary is given the freedom to choose arbitrators. The debate as to nature of appointment to be done by the chief justice has now been settled down in India by judicial interpretation. In a decision rendered by a Bench of Seven Judges in *SBP & Co. v. Patel Engineering Co.g Ltd.*,[194] the Supreme Court of India held that the nature of power conferred on the Court under section 11 of the Indian Arbitration and Conciliation Act (1996) is judicial in nature and while giving such an order, the court has the power to go in to the merits of the dispute. Hence, the court overruled its earlier ruling that such an order was merely an administrative order facilitating arbitration. Accordingly, the present position is that if the parties approach the Court for appointment of arbitral tribunal under section 11 and the Chief Justice pronounces that he has jurisdiction to appoint an arbitrator or that there is an arbitration agreement between the parties or that there is a live and subsisting dispute to be referred to arbitration and the Court constitutes the tribunal as envisaged, this would be binding and cannot be re-agitated by the parties before the arbitral tribunal.[195] The amendments to the Indian Arbitration and Conciliation Act (1996) now propose to replace the words, 'Chief Justice of India' and the words, 'Chief Justice' by the words, 'Supreme Court' and 'High Court', respectively, so as to convert the process of appointment of arbitrators from being an administrative act to a judicial one. This will make the arbitration law in India in conformity with the UNCITRAL Model Law as the latter empowers the court to make appointment of arbitrators. Taking into account the Indian conditions it is not at all feasible to bring in court intervention into each and every step in

194) (2005) 8 SCC 618.

195) *Konkan Railway v. Rani Construction Pvt. Ltd*, (2002) 2 SCC 388.

the arbitration process. So inconsistencies are to be kept wherever it necessitates.

The environment for arbitration in Bangladesh was intended to, and has indeed, changed following the introduction of the Arbitration Act (2001) and it appears to be more 'arbitration friendly' now. The courts have started to deal with all arbitration applications and challenges more expeditiously and the trend seems to be that the courts are interfering less in matters relating to arbitration. Where any contractual dispute is covered by an arbitration clause contained in the contract, it must be resolved through arbitration. Writ Jurisdiction[196] cannot be invoked against breach of contract without resort to arbitration.[197] The court shall refer the matter to arbitration and stay the legal proceedings unless the court finds the arbitration agreement void, inoperative or incapable of determination by arbitration. However, the court must refuse to stay proceedings when the claim in the suit is outside the clause of arbitration agreement. section 7 of the Bangladesh Arbitration Act puts a bar for judicial authority to hear any legal proceedings commenced by any of the parties to the arbitration agreement against the other party except in so far as provided under that Act. The court or the judicial authority shall stay the further proceedings

196) A writ is a written order issued by a court, commanding the party to whom it is addressed to perform or cease performing a specified act. Under the Indian legal system, jurisdiction to issue prerogative writs is given to the Supreme Court, and to the High Courts of Judicature of all Indian states. Parts of the law relating to writs are set forth in the Constitution of India, 1950. The Supreme Court, the highest in the country, may issue writs under article 32 of the Constitution for enforcement of Fundamental Rights while High Courts, the superior courts of the States, may issue writs under Articles 226 of the Constitution. The Constitution broadly provides for five kinds of writs; viz., habeas corpus, certiorari, mandamus, quo warranto and prohibition.

197) *Governor, Bangladesh Bank and Others v. M/s. Shah Islam Construction Ltd. 6 MLR (AD) 245.*

thereof and refer the dispute to arbitration.[198] Since the Bangladesh law is modeled on Indian arbitration law in many respects, the developments in India will certainly ensue similar results in Bangladesh as well.

Hence, it is suggested that the provisions as it stands now, should either be retained or the Chamber of Commerce of various states or other arbitral institutions shall be given the power to appoint arbitrators, as they are well versed in the matter of arbitration both domestically and internationally. This will definitely help the trading industries also.

Next problem is with regard to the number of arbitrators. The highest judicial forum is always manned by two judges, so that the chances of committing errors are less as one man's mistake can be pointed out by his colleague. In arbitration also, instead of the sole arbitrator, the tribunal shall be constituted by two arbitrators. This will ensure confidence in those who are seeking for arbitration. Again, the fact that one of the parties to the dispute chooses one arbitrator and the other party to the dispute would choose another arbitrator would not at all ensure confidence in the forum of arbitrators. As a remedy to this, it is suggested that, both the arbitrators must be nominated by both the litigants. The appointed arbitrators can together select the presiding arbitrator. The law in India and Bangladesh is the same in this regard whereas in Nepal, Sri Lanka and Pakistan, the law provides for even number of arbitrators also. Competent arbitral institutions can assist the parties in choosing the right persons to act as arbitrators. After the appointment is made, the institution would keep contact with the proceedings to ascertain the performance of arbitrators.[199] Another problem

198) *Brexco Bremer Export ContorBrand, West Germany & others v. M/s. Popular Biscuit Ltd. 6 MLR (HC) 281.*

199) The arbitral institution in the countries under study include: Indian Council of Arbitration and International Centre for Alternate Dispute Resolution (India), Sri Lanka

area is the overburdening of retired, eminent persons with several arbitration cases at a time. Here, the remedy is that no person should be appointed as an arbitrator, until he has finished the case in his hand. There should also be a reasonable time for the completion of arbitration cases. This will provide a check on prolonged arbitral process.

When there is a clear proof of bias or misconduct on the part of the arbitrators the courts are given the power to set aside an arbitral award. Under the Indian law the power is given to the court only after the final award is made and not before that. In such a case, the parties have to wait till the entire arbitration proceedings are over. In such a case, there is wastage of both money and time. So it would be better to give the court the power to interfere with the arbitration process at an early stage, when there is a reasonable apprehension as to the absence of impartiality and independence of arbitrators.[200] Similar is the case with jurisdictional matters. Also, when it is clear from the arbitration agreement that the arbitrators have no jurisdiction to decide the dispute, the parties shall be given the freedom to approach the proper judicial forum, at the initial stage itself. The extent of the arbitrator's power is decided by the arbitration agreement. So when there is a doubt as to the validity of the arbitration agreement, the proper remedy is to refer the matter to the judiciary for consideration. This power of judicial review should not be exercised by the courts in a defensive manner. Keeping in mind the interest of the business community and public policy, it is desirable that the courts exercise its power of judicial review in the right place at the right time.

National Arbitration Centre, Bangladesh Council of Arbitration, Karachi International Arbitration Centre and Nepal Council of Arbitration.

200) In countries like Bangladesh, Sri Lanka, Nepal and Pakistan the law provides for an immediate appeal to the court against jurisdictional issues in arbitration. UNCITRAL model Law also contains a similar provision.

Section 4. Procedural Justice

Procedural justice is the most important aspect of arbitration process. Equal justice for all is the cardinal principle on which the entire system of administration of justice is based. Violation of the principles of natural justice is a ground for inviting the interference of judiciary. Like judges in an ordinary court, the arbitrators are also bound by these rules. An arbitral award can be challenged successfully, if it is proved that, there is a violation of the principles of natural justice by not giving a notice, or not allowing the other party to present his version of the dispute.

The courts power to grant interim measures in arbitration matters was a contentious issue in India for more than a decade until resolved recently. The Indian Supreme court in *Bhatia International v. Bulk Trading*[201] held that in cases of international commercial arbitrations held out of India, provisions of Part I of the Indian Arbitration and Conciliation Act (1996) dealing with domestic arbitrations would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. Hence the parties were held to be entitled to invoke section 9 of the Act dealing with powers of domestic courts in granting interim measures. This was held in the premise that section 2(2) states that Part I is to apply where the place of arbitration is in India. Part I of the Indian Arbitration and Conciliation Act (1996) applies to arbitrations in India while Part II of the Act applies when the place of arbitration is outside India. However, the court interpreted the provisions of the Act to give it an effect not envisaged by the legislature. The effect of the judgment was that even in international

201) (2002) 4 SCC 105.

commercial arbitrations held outside India, Indian courts could have the power to assume jurisdiction and grant injunctions against international arbitral awards as and when a party attempted to enforce the award in India under Part II. The only exception to the application of this principle was if the parties had excluded the application of Part I of the Act. Another impact was that section 34 of the Act, which allows an Indian court to set aside an award rendered in a domestic arbitration, was found to be applicable to international commercial arbitration since Part I was applicable to international commercial arbitration held abroad. By virtue of this, certain expansive and doubtful interpretations of Part I of the Act, were also imported into an enforcement proceeding under Part II.[202] The Supreme court of India has over ruled the above two judgments vide its recent decision in *Bharat Aluminium Co.v Kaiser Aluminium Services.*[203]

The term 'natural justice' itself is a vague term and its meaning differs from case to case. If unlimited power is given to the judiciary in deciding the sanctity of the whole arbitral proceedings that will definitely affect the integrity of the arbitration process. So it is suggested that, the judiciary should keep some kind of restraint over its power to review arbitral award on the ground of minor procedural discrepancies. The law seems to be the same in all jurisdictions under study.[204]

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202) *Venture Global Engineering v. Satyam Computers Services*, (2008) 4 SCC 190.

203) Decided by the constitution Bench on 6 september, 2012.

204) *Saipem SpA v Bangladesh Oil Gas and Mineral Corporation MLR*, (2000) (AD) 245. In this case, the High Court Division of the Supreme Court of Bangladesh, held that where the district court acting under section 5 of the Arbitration Act 1940, revoked the authority of an ICC arbitral tribunal constituted under the ICC Rules at the request of one of the parties, the arbitrators could not render any award. The lower court held that the tribunal had conducted the arbitration proceedings improperly by refusing to determine the question of admissibility of evidence and the exclusion of certain documents from the record. Accordingly, the tribunal had acted in manifest

1. Legality and fairness of arbitral awards

Legality of an arbitral award mainly depends on the propriety of the substantive law applied to the arbitration. The interpretation of the applicable law also matters here. Among the countries in the South Asia, recently Pakistan has enacted the Recognition and enforcement of (Arbitral Awards and Foreign Arbitral Awards) Act (2011) implementing the New York Convention (1958). In *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Government of Pakistan*,[205] it was explained in respect of arbitration agreements and arbitral awards falling within the ambit of the Convention Act, the New York Convention suggests that the substantive law of the dispute shall be the law of the country where the award was made. Often the arbitrators find it very difficult to come up with an interpretation of law in accordance with the intention of the parties and the applicable law.

Fairness in the final award may also invite the attention of courts when there is a patent irregularity in the award made. An award passed without reasons can be one among such situations. But how far the judiciary is permitted to intervene in such cases is a serious problem to be solved. Because all cases where a non-speaking award is given cannot be counted as a case of unfair award. Now, the proposed amendments to the Indian Arbitration and conciliation Act (1996) also contain a provision as to set aside an award on the ground of error apparent no the face of the decision.[206]

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disregard of law and the arbitral proceedings were likely to result in a miscarriage of justice. The High Court held that the award by arbitrators whose authority had been revoked acted without jurisdiction. Appellate court declined to interfere with the order raising concerns amongst the international community.

205) 2008 EWHC 1901 (Comm.).

206) The Arbitration and Conciliation (Amendment) Bill, 2003. It seems to be an

It is not desirable to extend the scope of judicial review to such circumstances because each case differs from the other. A common standard cannot be adopted n every case, because that will definitely go against the national interest. So also the element of fairness depends on the facts and circumstances of each and very case.

It is suggested that only in cases where there is a substantial violation of the fundamental principles of legality and fairness, the award can be challenged before a court of law. This is because, the arbitrators should act as public officers discharging the public function of dispensation of justice and they are expected to act in a judicious manner without any lapse on fairness.

2. Recognition and Enforcement of Awards

Under the present arbitration legislation in south Asian countries, there is a presumption of finality of awards. In domestic arbitration, the awards are enforceable as a decree of the court due to this finality aspect.[207] But this is not the case with international or foreign awards. In an international arbitration, issues relating to different national laws will come into play. As a result, during the enforcement process, it has to get through a number of hurdles. The law specifically says about certain conditions under which, the court can intervene in the enforcement process of an arbitral award. Though there is uniformity in the aspect of conditions for enforcement in the

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implementing provision of the ratio of the Supreme Court case in *ONGC v. Saw Pipes Ltd*., (2003) 5 SCC 705 and several other judgments giving wide scope of judicial intervention in arbitration matters.

207) Under the Pakistan Arbitration Act (1940), the award does not have the status of a court decree and for execution the parties have to approach the court concerned to get it passed as a decree of the court. For details see chapter 2.

international level, the interest of individual nations overweighs such uniformity.

Bangladesh acceded to the New York Convention on 6 May 1992. However, the convention was not ratified by way of enabling legislation in Bangladesh as a *signatory State to the New York Convention*. This was noted in the case of *Bangladesh Air Service (Pvt) Ltd v. British Airways PLC*[208] by the Supreme Court of Bangladesh. In Bangladesh, international treaties are not automatically applicable as law unless enacted as such by Parliament. However, the courts will so interpret the treaties as to give it effect within the framework of the existing law unless totally inconsistent with the treaty. The New Arbitration Act (2001) allows for recognition and enforcement of awards in situations similar to those contemplated by the New York Convention.[209]

In Pakistan, after the enforcement of recognition and enforcement of Foreign Awards Act (2011) radical changes have been made in law and discretion of court which was available under section 34 of the Arbitration Act (1940) apparently is no more available to court. The question on which earlier, while exercising discretion under section 34 of the Pakistan Arbitration Act (1940) about convenience or inconvenience of the parties,

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208) (1997) 49 DLR (AD) 187.

209) In the case of *ABCI v. Banque Franco-Tunisienne & Ors,*. [2002] 1 Lloyd's Rep 511, the plaintiff had received an arbitral award in its favour, which was sought to be enforced against the defendant in England. The defendant resisted enforcement on the grounds, inter alia, that the arbitration agreement had been entered into, and the arbitration proceedings had been made and conducted, on its behalf by persons without authority to represent it, and the plaintiff knew that these putative agents lacked the necessary authority. These same grounds were raised in a French court which dismissed them eventually. English Courts accepted that, in principle, res *judicata* and issue estoppel principles applied to foreign judgments on the setting aside of awards in the same manner as they would apply to any other foreign judgment.

availability of evidence on a place other than the place of arbitration, whether to stay proceedings or not, was within the discretion of the court. However, while dealing with the matter under section 4 of the Act, the court has no such discretion except where cases fall within exception categories mentioned in the section itself.[210]

The arbitration law in Pakistan contains a provision for setting aside an arbitral award on the ground of mis conduct of the arbitrators.[211] In *President of Islamic Republic of Pakistan v. Syed Tasneem Hussain Naqvi*,[212] the High Court of Sindh held that truly speaking the arbitrator is a judge of all matters arising out of a dispute whether of fact or law and the court is not to act as a court of appeal sitting in Judgment. It was observed that the court should always endeavor to sustain the award rather than destroy it unless it could be shown by sufficient and reliable material on the record that the arbitrator was guilty of misconduct or that the award was beyond the scope of reference or that it was violative of a statute or was in contradiction to the well settled norms and principles of law.' In case of *Meredith Jones & Co through Attorney vs. Usman Textile Mills*[213] it was held by the Supreme Court that the award could be challenged only on the grounds mentioned in section 30 of the Arbitration Act, 1940 i.e. if the Arbitrator had misconduct himself and the proceedings were not based on merits. The court while hearing objections against the award could not sit as a court of appeal against the award and interfere with it on merits. The courts, however, have been very much conscious or rather jealous of their

210) *Travel Automation (Pvt.) Ltd. v. Abacus International (Pvt.) Ltd..,* 2006 CLD 497.

211) Section 34 of the Arbitration Act (1940). In India also, a similar provision was there under the repealed Act of 1940.

212) 2004 SCMR590.

213) 2002 CLD 1121.

jurisdiction. In *Hitachi Limited v. Rupali Polyester's and Others*[214] the Supreme Court observed that the agreement which provided for arbitration under the rules of Conciliation and Arbitration of International Chamber of Commerce would not divest the jurisdiction of courts of Pakistan if otherwise it was vested in them. As for the enforcement of a foreign arbitral award, certain statutory requirements were pronounced to be necessary. In *Islamic Republic of Iran Shipping Lines through Attorney v. Hassan Ali & Co Cotton (Pvt.) Ltd.*[215] the High Court held that requirements as laid down in Rule 297 of the Sindh Chief Court Rules should be met and fulfilled by the person seeking enforcement of a foreign award, if deficient in any material particular, application for enforcement be returned for removing deficiency within time allowed by the court. The plaintiff in this case had not also filed authenticated copy of the award. The court held that rules provided for producing either original award or its authenticated copy. Original award having been produced, it was held that requisite conditions were fulfilled and the award was rightly made.

The Indian arbitration law has undergone some dramatic changes with respect to recognition and enforcement of arbitral awards. The earlier view, as expounded by the Supreme Court in *Renu Sagar Power Co. Ltd. v. General Electric Co.*[216] was that an award could be set aside if it is contrary to the public policy of India or the interests of India or to justice or morality, but not on the grounds that it is based on an error of law or fact. The Supreme Court in that case was faced with the issue to determine the scope of public policy in relation to proceedings for enforcement of a

214) 1998 SCMR 1618.
215) 2006 CLD 153.
216) (1994) Supp (1) SCC 644

foreign award under the Foreign Awards (Recognition and Enforcement) Act (1961). The Court also held that in proceedings for enforcement of a foreign award, the scope of enquiry before the court in which the award is sought to be enforced would not entitle a party to the said proceedings to impeach the award on merits.

However, in a later decision in *Oil and Natural Gas Corporation v. Saw Pipes*[217] the Supreme Court of India added an additional ground of "patent illegality", thereby considerably widening the scope of judicial review on the merits of the decision. In Saw Pipes case the court accepted that the scheme of section 34 of the Indian Arbitration and Conciliation Act (1996) which dealt with setting aside the domestic arbitral award and section 48 which dealt with enforcement of foreign award were not identical. The court also accepted that in foreign arbitration, the award would be subject to being set aside or suspended by the competent authority under the relevant law of that country whereas in domestic arbitration the only recourse is to section 34. The court in *Saw Pipes* case although adopted the wider meaning to the term 'public policy' but limited its application to domestic awards alone. The *Saw Pipes* case has generated some controversy, and it remains to be seen if it will stand the test of time. The position of a foreign award has also undergone some recent controversy. A foreign award is enforceable under Part II of the Indian Arbitration and Conciliation Act, 1996 if it is rendered in a country that is a signatory to the New York Convention or Geneva Convention and that territory is notified by the Central Government of India. Once an award is held to be enforceable it is deemed to be a decree of the court and can be executed as such. Under the Act there is no procedure for setting aside a foreign award. A foreign

217) (2003) 5 SCC 705.

award can only be enforced or refused to be enforced but it cannot be set aside.

However, this fundamental distinction between a foreign and a domestic award has been altered by the Supreme Court in the recent case of *Venture Global Engineering v. Satyam Computer Services Ltd.*[218] Here, the Supreme Court was concerned with a situation where a foreign award rendered in London under the Rules of the LCIA was sought to be enforced by the successful party (an Indian company) in the District Court, Michigan, USA. The dispute arose out of a joint venture agreement between the parties. The respondent alleged that the appellant had committed an 'event of default' under the shareholders agreement and as per the said agreement exercised its option to purchase the appellant's shares in the joint venture company at book value. The sole arbitrator appointed by the LCIA passed an award directing the appellant to transfer its shares to the respondent. The respondent sought to enforce this award in the USA.[219] The appellant filed a civil suit in an Indian District Court seeking to set aside the award. The District Court, followed by the High Court, in appeal, dismissed the suit holding that there was no such procedure envisaged under Indian law. However, the Supreme Court in appeal, following its earlier decision in the case of *Bhatia International v. Bulk Trading*[220] held that even though there was no provision in Part II of the Act providing for challenge to a foreign

218) (2008) 4 SCC 190.

219) A somewhat strange move considering that the shares were in an Indian company and various Indian regulatory steps and authorities would be involved for transfer of shares. The Respondents move was perhaps influenced by the fact that the governing law under the Agreement was the law of the State of Michigan and the appellant was situated in the USA. The Respondent thus attempted to bypass the natural forum (India) hoping to enforce the award through the contempt of court mechanism of the U.S. Courts. This did not go well with the Indian Supreme Court.

220) *Supra* note 9.

award, a petition to set aside the same would lie under section 34 Part I of the Act. The Court held that the property in question i.e., the shares in an Indian company are situated in India and necessarily Indian law would need to be followed to execute the award. In such a situation, the award must be validated on the touchstone of public policy of India and the Indian public policy cannot be given a go by through the device of the award being enforced on foreign shores. Going further the Court held that a challenge to a foreign award in India would have to meet the expanded scope of public policy as laid down in *Saw Pipes* i.e., challenge on merits contending that the award is 'patently illegal'. The *Venture Global* case thus largely rendered superfluous the statutorily envisaged mechanism for enforcement of foreign awards and substitutes it with a judge made law. The Supreme Court in Venture Global did not notice this self-created limitation in Saw Pipes nor did it notice the narrower interpretation of public policy in Renu Sagar and therefore application of the expanded interpretation of public policy to foreign awards is clearly *per incuriam*. The decision thus had to be reviewed. In the recent decision of the Indian Supreme Court in *Bharat Aluminium Company v. Kaiser Aluminium technical Services*[221] has finally settled the issue by deciding that the two decisions were erroneously made. Accordingly, Part I of the Indian Arbitration Act does not apply to arbitrations seated outside of India. However, this ruling only applies prospectively to arbitration agreements executed after 6 September 2012. Pertinently, this does not automatically include all arbitrations initiated after 6 September 2012.

In other jurisdictions like Sri Lanka, the Arbitration Act (1995) provides for recognition and enforcement of arbitral awards in accordance with the

221) Civil Appeal No.7019 of 2005 decided on September 6, 2012.

New York Convention (1958).[222] Nonetheless, in Nepal, the Arbitration Act (1999) is still at the rudimentary level with lot of inconsistencies and contradictions as compared to the arbitration law of other countries in the South Asian region.[223]

To foster regional cooperation among the member countries in the South Asian Region, the efforts being taken up by the South Asian Association for Regional Cooperation SAARC is worth noting here.[224] For creating conditions favourable for fostering greater investment by investors of one Member State in the territory of another Member State and for providing a regional forum for settlement of commercial disputes by conciliation and arbitration an agreement for the establishment of SAARC Arbitration Council was entered in to by the member countries in 2009. They include the Governments of the SAARC Member States comprising the People's Republic of Bangladesh, the Kingdom of Bhutan, the Republic of India, the Republic of Maldives, the Kingdom of Nepal, the Islamic Republic of Pakistan and the Democratic Socialist Republic of Sri Lanka.

"Arbitrate and don't litigate" shall be the principle in mind while going for an alternate dispute resolutions mechanism to resolve disputes. Lawyers and businessmen are frequently criticized for judicial interference in arbitration process. There are horror stories of arbitrations being delayed for years by the parties fighting through the courts in an attempt to delay an inevitable result. It is quiet natural that the parties want minimum judicial interference in such situations. Though it is not possible to exclude judicial intervention fully, the role of courts in the arbitral proceedings shall be to complement arbitration and not to supervise the proceedings at every stage.

222) *Trico Maritime (Pvt) Ltd.,v. Ceylinco Insurance Co. Ltd, SC. Appeal No. 101/2005.*
223) For details see chapter 2.
224) South Asian Association for Regional Cooperation.

Chapter 4: Conclusion

In its role as an alternative to national courts, arbitration has been proved to be a successful one. Parties entering into economic agreements often include arbitration clauses in their contracts to ensure that any dispute can be solved without recourse to expensive and time consuming litigation. The significance of the study of commercial arbitration especially international commercial arbitration lies in the fact that, in the contemporary world of changing dimensions it has become a sophisticated mechanism for consensually dealing with international disputes. Beyond its practical importance, international arbitration is worthy of attention because it involves a framework of international rules durable and efficient means for resolving complex transnaactional problems. These rules have evolved over a time, in multiple countries thought the joint efforts of governments and big corporations. The driving and dominant force of international commercial arbitration depends on a number of factors. Though it is different from ordinary court procedures many a times, the intervention of court becomes necessary to make it more effective.

International commercial arbitration being a consensual means of dispute resolution, it has the binding effect only by virtue of complex framework of national and international law including the national arbitration laws, international conventions and institutional arbitrations. This legal arena enhances the enforceability of both arbitration agreements and arbitral awards. It seeks to insulate the arbitral process from undue interference from national courts. At the same time it is also necessary to have judicial remedy from of the court in situations where there are questions as to

competency or jurisdiction of an arbitral tribunal or finality and enforcement of arbitral awards.

Forces of globalisation, of which international trade is one of the most important channels have brought additional challenges and opportunities for South Asia. The developing countries in this region have been the focus of investment ever since the idea of free market economy was launched at the initiative of WTO. In the era of a progressive and integrated world economy, there exists realistic probabilities of dispute arising between parties out of investment transactions. With the new global economic order allowing the free flow of FDI in and out of the countries in the South Asia, the existing regulatory framework in international law to standardize this increasing investment is often seen as ineffective, hence consequent disputes. The existence of such dispute calls for an effective method of dispute resolution and preferably arbitration to ensure continued expansion of business transactions. In this context it is also pertinent to note that in the last decade there was a constant increase in the number of disputes that could be subjected to international arbitration and more interestingly, a major chunk of those disputes covered investment law. International investment law is a very important branch of international economic law, and one of the important forces of liberalisation propelling economic globalisation is also investment liberalization. International investment arbitrations are proceedings initiated by foreign investors against the state in which they invested to amicably settle claims arising directly out of their investment by virtue of an international investment treaty. Such claims are based on alleged breaches by the state of its international law obligations towards foreign investors, as enshrined in bilateral or multilateral investment treaties to which the host state is a party.

The concept of 'investment' usually extends well beyond what might be considered traditional notions of foreign direct investment. As technology grows, and the globalization of trade and economy increases, satisfactorily defining the word investment may become increasingly difficult. The investment treaties usually offer the protection in addition to the normal contractual rights that the investor will have against its counter party. Normally, the investment treaties are directly enforceable by the investor against the host state even without the involvement of the government of the host state. Though investment arbitration at the instance of ICSID[225] is viewed as a great achievement of World Bank's diplomacy and innovative thinking in the pursuit of increased international investment for development, it is also not free from criticisms.[226] Among the countries in the South Asia as discussed in the previous chapters, all have ratified the ICSID except India. To meet the requirement of specific incorporation of the convention into the domestic law, Pakistan recently enacted the Arbitration (International Investment Disputes) Act (2011).[227] India is not becoming a party to the ICSID is being seriously looked into by the international community in the light of huge investment potential that India has to its credit.[228] The success of any dispute resolution depends on the

225) International Center for the Settlement of Investment Disputes between Stats and Nationals of other States, established under the Convention for the Settlement of Investment Disputes between Stats and Nationals of other States, 1965 commonly known as the Washington Convention. There are a total of 159 states are party to the convention at present.

226) *Id.*

227) Section 3 of the Act entitles a person seeking recognition and enforcement of an arbitral award issued by ICSID to have the award registered in the local high court subject to proof of any matters that may be prescribed.

228) India's recent investment dispute with Australia (*White Industries Case*) and impending dispute with Mauritius and Russia for alleged violation of Bilateral treaty obligations by India.

compatibility of the nature of the dispute with the technique to which it is submitted for resolution, so does international commercial arbitration. A detailed analysis of the law and policy of international commercial arbitration law in the South Asia has explained the following challenges.

There shall be a well recognised and internationally acclaimed arbitral institution for each country in the South Asia to facilitate and promote arbitration in their respective state. The government should take the policy initiative to strengthen the existing arbitral institutions to make them compete with other major arbitral institutions in the world. Once the institutional arbitration in these countries gets status of an international institution like ICC, AAA or LCIA[229], regional cooperation will be fortified and it can also transform South Asia into a major hub of international Arbitration. Another advantage is that these institutions will help to avoid the difficulties being faced under the domestic arbitration law regarding appointment and conduct of arbitral proceedings.

Competent arbitral institutions can assist the parties in choosing the right persons to act as arbitrators. After the appointment is made, the institution would keep contact with the proceedings to ascertain the performance of arbitrators. Another problem area is the overburdening of retired, eminent persons with several arbitration cases at a time. Here, the remedy is that no person should be appointed as an arbitrator, until he has finished the case in his hand. There should also be a reasonable time for the completion of arbitration cases. This will provide a check on prolonged arbitral process. It is to be remembered that fairness and justice should not be sacrificed at the altar of speed. Unnecessary and enormous sittings of arbitration should be

229) International Chamber of Commerce (Paris), American Arbitration Association and the London Court of International Arbitration respectively.

curtailed. Both the arbitrators and the lawyers are paid normally on the number of sittings they hold and appearances they make. The arbitrators should act as public officers discharging the public function of dispensation of justice. In this context, it is suggested that the Chamber of Commerce of various states and independent arbitral institutions may also be given the power to appoint arbitrators, as they are well versed in the matter of arbitration both domestically and internationally. This will definitely help the trading industries also.

The members of the judiciary as well as the legal profession must appreciate the reality that in this era of globalization, dispute settlement by alternative methods is not only a domestic matter, but also an increasingly growing international phenomenon in the context of cross-border transactions. They have to be open to absorbing international values, norms and principles while performing their professional functions in the field of international dispute settlement, otherwise their professionalism will prove moribund and will be useless to the international business community. This demands that the different countries should adopt systematic and integrated process of unification and harmonisation of arbitration laws in the South Asia with the objective of fostering inter country trade and commerce.

Another crucial issue is regarding the uncertainties prevailing in the recognition and enforcement of arbitral awards. Under the present law, the parties even after getting the arbitral award without any delay have to wait for a long time, if the opposite parties raise a claim as to its non-enforcement. Opposite parties preferring appeals are in a way preventing the other party from getting it enforced. In this background, it is suggested that instead of judicial review by the domestic courts, what is needed is an alternate forum for review of award during the process of enforcement. An

independent international arbitration court for the South Asia or strengthening the existing SAARC Arbitration Council with more institutional powers may be useful in this matter. What is needed first, is an acceptable universal code for the enforcement of international commercial arbitral awards. This shall be implemented by the above mentioned international arbitration court irrespective of the overriding provisions in the national laws. So wherever an international commercial arbitration award is made, the question of its enforceability will come before this court. The court shall be consisted of members of major arbitral institutions and others who are experts in the field of international arbitration belonging to South Asian region. The court shall look into the conditions for enforcement and if they are satisfied, the award will be enforced.

This can definitely help the parties in avoiding the delay by getting the problems connected with enforcement to be remedied at the earliest. At this point, the common fear of arbitrators running the finances and commerce of the parties may also come into reality. To remedy these issues, it will be useful if such an alternate forum is established to deal with such enforcement issues. This can also cure all the infirmities, present in the international commercial arbitration process, especially in the aspect of enforcement of awards.

Most of the areas, where the issue of judicial review of arbitral award arises, have a close connection with the conduct of arbitrators. Any kind of misconduct or mal a fide acts from the arbitrators will definitely vitiate the arbitral award. It is therefore, necessary that there should be an internationally accepted code of conduct for the arbitrators, while resolving the disputes. On the basis of that, the court can decide the fairness in the award made in an arbitration process. The arbitrators should adhere to those standards, which

are expected out of them. A feeling of responsibility should there in the mind of arbitrators. This will enhance the uniformity in arbitration laws in the international level and will help the business community in achieving the objectives of arbitration law and promotion of trade.

International commercial arbitration is a complex matter. It involves expertise in public international law, private international law and also knowledge of international commerce, law and practice. One may wonder whether District Court Judges are equipped with sufficient knowledge, expertise and training to handle foreign arbitral awards that may very often involve complicated international legal issues. Steps shall be taken in the direction of developing specialised bar of arbitrators, judicial officers and lawyers. The Government and professional organizations should promote ADR, especially arbitration, and enhance the understanding of them by sponsoring and conducting educational and training programs for both the bar and the bench. Different stakeholders including the common man shall be made aware of the advantages of arbitration and ADR professionals to keep them abreast of recent developments in theory and practice of arbitration, and by allowing cross-fertilization of knowledge in the field of dispute resolution by organizing occasional seminars and workshops.

These measures, once implemented successfully will help the South Asian Countries to combat the key issues and challenges in the growth of a unified system of international commercial arbitration.

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