International Conference on

ARBITRATION IN THE ERA OF GLOBALISATION

BACKGROUND PAPER



INDIAN COUNCIL FOR ARBITRATION

Undisputed Leader in Dispute Resolution

International Conference on

ARBITRATION IN THE ERA OF GLOBALISATION

BACKGROUND PAPER

ICA
INDIAN COUNCIL OF ARBITRATION

INDIAN COUNCIL FOR ARBITRATION

Undisputed Leader in Dispute Resolution

Table of CONTENTS

From the President's Desk 01

Preface - Arbitration in the era of Globalization 02

Section - I: Best Arbitration Practices across Borders 06

Section - II: Bilateral Investment Treaty Awards - The Indian Context 10

Section - III: Changing Face of Arbitration in India. 14

Section - IV: Enforcement of Foreign Arbitral Awards and 21
Applicability of Part-I of the Act in Foreign 'Seated' Arbitrations

Section - V: Viability of Arbitration for Adjudicating Commercial Disputes. 27

Endnotes and References 31

FROM THE PRESIDENT'S DESK



The present Conference titled 'Arbitration in the Era of Globalization', reflects the growing popularity of arbitration as an alternative dispute resolution mechanism, especially for commercial disputes. With the Indian economy's massive strides towards becoming a global force, bolstering the dispute resolution has been one of the top priorities for the policy makers given its direct impact on the 'ease of doing business' in India.

The Indian Council for Arbitration has pioneered reformatory action to reinforce an evolving arbitration regime in India. With this in mind, the present Background Paper is a primer to the Conference, setting the tone for discourse on certain vital facets of the arbitration regime focusing on the Indian economy's integration with the global financial ecosystem. The Background Paper highlights issues surrounding the present Arbitration and Conciliation Act, 1996 the Ordinance enacted to amend its provisions and the areas requiring further legislative and policy reforms.

I am confident the present Conference will see spirited discussion and debate on the important developments in arbitration law in India and abroad, highlighting the reforms needed to bring India in line with best global practices in arbitration.

N.G. Khaitan
President

PREFACE - ARBITRATION IN THE ERA OF GLOBALIZATION

> *"The pound of flesh, which I demand of him,*
> *Is dearly bought; 'tis mine and I will have it.*
> *If you deny me, fie upon your law!*
> *There is no force in the decrees of Venice."*
> *Shylock in William Shakespeare's Merchant of Venice,*
> *Act 4 Scene 1*

It is not for nothing that Shakespeare's Merchant of Venice ends in an iconic court scene - Venice's reputation as a global hub of trade was built on its robust and fair dispute resolution mechanism where commercial contracts between merchants of all races, ethnicities and nationalities were enforced at all costs. Fair, efficient and certain dispute resolution, it was understood even then, is a sine qua non for trade and commerce to flourish in any region.

The era of globalization that we are currently living in is marked by unprecedented movement of goods, services, labour and finances across artificial national borders. Globalization has undoubtedly had an impact on the manner of conducting arbitration, and on its utility as a dispute resolution tool. Conversely, arbitration itself has had its impact on the manner in which globalization has taken place across the world. This interface between arbitration and globalization in the Indian context can be broken down into three aspects as follows:

a. How arbitration in India is affected by changes in business practices outside India?

b. How India is affected by changes and developments in arbitration law abroad?

c. How business in India is affected by changes to arbitration law in India?

Arbitration law in India last underwent dramatic changes in 1996 with the introduction of the Arbitration and Conciliation Act, 1996, replacing the Arbitration Act, 1940. This was done to reflect the vast changes that had taken place in the international arena in respect of arbitration and as, the Supreme Court observed, "to attract the confidence of the international Mercantile community and the growing volume of India's trade and commercial relationship with the rest of the world after the new liberalization policy of the Government..." (Konkan Railway Corporation v. Mehul Construction Company, AIR 2000 SC 2821). The opening up of the Indian economy to trade and commerce with the outside world has thrown up its consequential challenges. This rapid growth has

inevitably resulted in increasing the exposure to international law and practices on arbitration. Indian businesspersons and lawyers interacting more frequently with their global peers has led to two things: awareness of various international practices relating to arbitration and, the realisation of specific deficiencies in Indian laws and practices related to arbitration. While this awareness has long been pervasive in Indian business and corporate circles, legislators and policy makers have been slow to incorporate requisite reforms on the one hand; on the other, lack of necessary legislative reform has resulted in an ever increasing intervention of the judiciary to plug the deficiencies. This judicial oversight has at times lead to contentious and hotly debated interpretations to the Arbitration and Conciliation Act, 1996 such as the judgment of the Supreme Court in Bharat Aluminium Co v. Kaiser Aluminium Technical Services, (2012) 9 SCC 552 ("BALCO case").

The timing of this conference has been decided in light of the second wave of critical and, probably equally dramatic, legislative changes to arbitration law, quite apart from the "post-BALCO" world of Indian arbitration that is still taking shape. Efforts to reform the law on arbitration by implementing the 246th Report of the Law Commission (suggesting key amendments to the Arbitration and Conciliation Act, 1996) have now culminated in the Arbitration and Conciliation (Amendment) Ordinance, 2015, as promulgated on 23rd October, 2015, amending several provisions of the 1996 Act. The said Ordinance has been placed before the Parliament in the ongoing winter session and only if approved, will be converted into an Act amending the 1996 Act. Despite these actions reflecting a sense of urgency in the present Government to implement crucial reforms for dispute resolution, the Ordinance per se is guilty of poor drafting and some inherent contradictions. While the Ordinance survives for till the next session of Parliament, it is necessary that the legal creases are ironed out before amending the law definitively. A more detailed analysis of the Ordinance, and the reformatory action it has produced, is discussed in this Paper.

In the aforesaid backdrop, the first section of this Paper will focus on understanding what are internationally regarded as best practices in relation to arbitration law in India. We have narrowed the study to focus on three jurisdictions, namely, Singapore, United Kingdom and the United States of America, for the reason that each of these are widely accepted to be exemplary 'hubs' for arbitration. Further, since each jurisdiction employs different approaches and systems that are designed to suit the legal framework in that particular country, important lessons and insights may be gained on how diverse and seemingly varying laws and practices nevertheless culminate into highly effective, successful practices forming a supportive framework for arbitration. The object of the study and analysis of these jurisdictions is to identify precisely such approaches, practices and strategies that will be of relevance to the law and practice of arbitration in India.

Arbitration is undertaken not only between private parties or between nations, but also between private parties and nations. These relate to investment dispute arbitration usually under the framework of a multilateral body such as the International Centre for Settlement of Investment Disputes (ICSID) or under ad hoc arbitral tribunals set up under the Bilateral Investment Treaties entered into by States. Here, the State is engaging in arbitration not as a commercial entity but in its capacity as a State and in respect of its actions as a sovereign authority as a State. The legal and policy ramifications of treaty arbitration are extremely significant, on account of the financial stakes typically involved, and more so for the fact that mechanisms allowing for foreign entities to sue the State pose new, unprecedented challenges that are not altogether regulated or even comprehensible at this nascent stage. The second section will address the growing discourse on issues surrounding investment treaty arbitration, which have come into sharp focus in India subsequent to the award passed in the White Industries case. This section will consider potential consequences of the White Industries award for India and India's more than 80 BITs. The Law Commission has also had occasion to weigh on this issue in the context of the Model Bilateral Investment Treaty in its 260th Report which will be discussed in some more detail in this Background Paper.

For all the attendant concerns and shortcomings on account of being a developing country, India remains an attractive destination for foreign investment and trade, and likewise, Indian businesses have been expanding their horizons in interacting with the global market. Yet, India's position as an attractive business opportunity and market for trade and commerce is being seriously jeopardized by the poor performance of dispute resolution mechanisms and institutions in the country. While India's low ranking in the World Bank's Ease of Doing Business Report may be regarded as one reflection of this situation, the fact that even Indian parties are now choosing to arbitrate in foreign locations because of the better institutions and laws there, must, on that ground alone, give the legal community and lawmakers pause to think.

The next two sections of this Background Paper therefore address the developments in Indian law of arbitration relating to both the substantive law and the issues of enforcement of arbitral awards. In the last two decades, more than legislative changes, it has been judicial interpretation of arbitration law that has had the maximum impact on the development of the law in India. The repercussions and implications of the five judge Bench judgment of the Supreme Court of India in BALCO are still being felt even as the Supreme Court understands the need for limited and focussed judicial review on issues of enforcement such as its decisions in Shree Lal Mahal v Progetto Grano SPA (2014) 2 SCC 433. Limited judicial intervention in arbitration and ease of enforcement of foreign awards are two issues which are currently the source of much controversy and debate in the areas of international commercial arbitration in India.

With all these developments in mind, and more to come, there's a need to re-appreciate why arbitration is a preferred form of dispute resolution in India and elsewhere. Arbitration being only one form of alternate dispute resolution among others such as mediation and conciliation, businesses and counsel have to make their choice for dispute resolution in a given scenario keeping various factors in mind: cost, certainty, confidentiality, fairness and time. Institutional arbitration has not been able to fully replace the existing model of ad hoc arbitration in India, unlike in other jurisdictions, and there needs to be a serious examination of the underlying causes for this state of affairs. To this effect, the final section is an examination of the merits of arbitration, specifically institutional arbitration, for businesses looking to resolve their disputes in an efficient, fair and speedy manner. Additionally, this section will also seek to generate discourse with respect to the proposed Commercial Courts under the recently promulgated Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Ordinance, 2015, and their impact on certain arbitrations as prescribed thereunder.

For each session of the conference, this Background Paper has outlined the latest developments in that particular areas of arbitration law as on date, and raised issues framed as questions to be addressed. These questions are by no means exhaustive of the issues in the sessions; they are intended to provide a starting point to the critical analysis, expert views and opinions by the various stakeholders in the field of arbitration. In this spirit of consultative discussion and comment, we hope to encourage and generate a greater understanding of the issues and challenges being faced by arbitration in India.

Section-I BEST ARBITRATION PRACTICES ACROSS BORDERS

a) Introduction

International commercial arbitration today, is ever more transnational and multi-jurisdictional wherein India has successfully grown and acquired relevance as a rapidly advancing economic power, and securing its position as an important player in international trade and commerce. It is vital that our arbitration practices and laws, while continuing to cater to the specific needs of the Indian citizenry, are at par with the best practices established across the world. Pertinently, the Arbitration and Conciliation Act, 1996, traces its genesis to the UNCITRAL Model Law, which encompasses globally accepted standards for arbitration proceedings. The present section undertakes a discussion on these 'best practices' which holds significance in light of the fact that the previous interpretations of the Arbitration and Conciliation Act, 1996, have not been in line with international practice; on the contrary, these were blatantly contrary to international practice and understanding of arbitration law.

This section aims to discuss, mainly by way of a comparative analysis, of some of the crucial and relevant practices governing arbitration in three main jurisdictions - the United States, United Kingdom and Singapore. The objective behind such a discussion is to identify and understand the strengths and weaknesses of the arbitration law and practice prevalent in these jurisdictions, and ultimately use the insights gleaned to critique our own laws and using this critical analysis, hopefully, incorporate stronger and better practices within the Indian arbitration regime. In this regard, consider the examples set by England and Singapore - both have successfully honed and developed their arbitration laws and practices to become the preferred destinations for international commercial arbitrations, so much so that they are relied upon increasingly even by Indian users (outside of India), and also for foreign users seeking to arbitrate with Indian parties. Is this a fair appraisal of the present scenario? What are the lessons that India can learn from the practices and policies deployed in these jurisdictions? A crucial issue in this respect is the role of the judiciary in supplementing the alternative dispute resolution framework. Discussions in this regard should ultimately consider India's potential to emerge as a globally preferred centre of arbitration.

b) Comparative analysis:

A. UNITED STATES OF AMERICA

The Federal Arbitration Act [1] (hereinafter referred to as the "FAA") governs arbitrations conducted at the federal level, in the United States. Unlike most jurisdictions with robust arbitration regimes, the FAA is not structured on the UNCITRAL Model Law, as the United States has not adopted the Model Law at the federal level. [2] In addition to the FAA, several states have adopted independent arbitration statutes pertaining to international commercial arbitration. However, the focus of the present section is limited to the FAA and its role in expediting arbitration proceedings in the US.

The FAA strongly enforces a presumption in favour of arbitral awards, thereby drastically limiting the grounds for appeal against such awards. [3] As such, the review of arbitration awards is extremely limited, so as to ensure effective settlement of disputes, and ensure inexpensive and swift arbitration. Pertinent to this discussion is the fact that unlike the Indian arbitration regime, the FAA, does not allow judicial review for an 'error of law' committed by the tribunal. The FAA provides limited grounds for setting aside of an arbitral award [4], viz award procured by corruption, fraud or undue means, evident partiality or corruption in the arbitrators or arbitrators exceeding, or imperfectly executing their powers. Despite no express stipulation in the said legislation, US case law introduced an additional factor, namely 'manifest disregard of law', which could result in the setting aside of an arbitral award. [5] This additional ground would only be applicable to situations where the arbitrators' findings are more than an error or misunderstanding of law. [6] However, the US Supreme Court has subsequently held that the grounds for vacating an arbitral award are exclusive, as listed under Section 10 of the FAA.[7] This contextual background shows the contradistinction between the Indian and American legal regimes governing arbitration. The Arbitration and Conciliation Act, 1996, and related jurisprudence, have been critiqued for allowing excessive judicial intervention.[8] The Law Commission of India has also advised on the need to balance out the scope of judicial intervention, in order to make the judiciary a vital institution reinforcing arbitration, rather than impeding its growth. The proposed amendments to the Arbitration and Conciliation Act, 1996, which have been elaborately discussed in the subsequent sections, inter alia aim towards ensuring this balance. [9]

B. UNITED KINGDOM

Unlike the United States, the English arbitration regime is more congruent to Indian law; both of them structured on lines of the UNCITRAL Model Law. The Arbitration Act, 1996, establishes a broader scope of judicial review, thereby reinforcing the normative mandate to the arbitrator correctly applying English law. [10] Though the grounds for appeal against an arbitral award are similar to the US FAA, their enforcement is more liberal.

The fundamental basis of the English regime governing arbitration is to ensure accuracy of arbitral awards when the governing law is English law. Additionally, the Arbitration Act, 1996 also emphasises greatly on party autonomy. An interesting specimen of the latter is a recent judgment of the Supreme Court in Jivraj v. Hashwani. [11] An appeal herein challenged the order passed by the Court of Appeal, which had held that arbitrators were subject to the same anti-discrimination laws applicable to employees in the UK; therefore, any arbitration agreement or clause mandating an arbitrator to be of a particular religion or belief, was unenforceable. The Supreme Court reversed this decision upholding that validity of such arbitration agreements imposing faith or nationality qualifications on the choice of arbitrators, thereby reinforcing the principle of 'party autonomy'.

With respect to the scope and threshold of judicial intervention, a major difference between the arbitration regimes in the US and the UK is the legislative permissibility of setting aside of an award, because of an 'error of law', in the latter. [12] The Arbitration Act, 1996 allows three grounds to challenge an arbitral award - want of jurisdiction, serious irregularity and error of law. In fairness, it should be noted that though the judiciary has been afforded greater latitude to intervene in the arbitration process, the English regime prioritises preserving the nature of arbitration as an expeditious dispute resolution mechanism. The law inter alia imposes a strict time bar of 28 days from the date of the award to challenge it, and not giving leave to appeal when there is merely a suspicion about the accuracy of the award on the point of law.

Given Indian legal system's foundation in common law, a parallel analysis evaluating its merit qua the English arbitration regime is warranted. That said, reiterating the aforementioned comment, the English system is quite similar to the Indian arbitration mechanism; especially with respect to the degree and standard of judicial review of awards. India can however, adopt the liberal approach of ensuring high standards of neutrality of arbitrators, party autonomy, and adherence to time frames provided under the Arbitration Act, 1996, to ensure a speedy process. The amendments to the Arbitration and Conciliation Act, 1996, are a step in this direction.

C. SINGAPORE

Singapore provides a bifurcated mechanism for conducting arbitrations - while international arbitrations[13] are subject to the International Arbitration Act, the remaining 'non-international' arbitrations not covered thereunder, are subject to the Arbitration Act.[14] Like India, Singapore's law follows the UNCITRAL Model Law; in fact, the International Arbitration Act actually gives the Model Law (except Part VIII thereof), the force of law in Singapore.[15] Singapore's switch to the Model Law also traces a similar course, as was traversed by Indian law governing commercial arbitration, both domestic and international.

Despite having a common normative basis, the significant difference between Indian and Singaporean legal regimes governing arbitration is the extensive flexibility available to parties to choose their preferred legal regime. Unlike India, parties to a non-international arbitration, with its seat in Singapore, are at liberty to 'opt in' to the procedure established under their International Arbitration Statute, instead of the local Arbitration Act. Exercising this option would place such an arbitration under a procedure where judicial intervention and oversight are limited. [16] Conversely, an international arbitration seated in Singapore can 'opt out' of the International Arbitration Act. [17] The parties can do so by stipulating in the arbitration agreement that it be governed by the Arbitration Act, which would ensure a greater degree of court supervision.

With the introduction of SIAC and the SIAC rules, institutional arbitration in Singapore has become the popular mode of arbitrating disputes. The development of SIAC has occurred parallel to Singapore emerging as a vital hub of commercial and financial activities. An expedited and definitive dispute resolution mechanism has boosted Singapore's global viability thereby, making it one of the most popular commercial arbitration seats.[18] Given the Indian government's ambition to ease the ability of conducting business in India, a crucial leaf can be taken from Singapore's book, especially with respect to the revamping and modernizing of the arbitration regime.

MAIN POINTS FOR DISCUSSION:

1. Does the Indian legal system governing arbitration adhere to the Model Law in the manner in which it has been adopted in other jurisdictions?
2. Now that we are in a phase of important legislative changes, how can we reconcile issues that we have recently grappled with - for example - international arbitrations vis-a-vis ostensibly 'domestic' arbitrations?

Section-II BILATERAL INVESTMENT TREATY AWARDS - THE INDIAN CONTEXT

a) Introduction

The Indian Government's efforts towards emphatically pitching its stake for a substantial share in foreign investments have bolstered a rapid growth in Bilateral Investment Treaties (hereinafter referred to as "BITs"). In a little over two decades since the inception of bilateral investments, India has signed 83 BITs, of which 74 are currently in force. [19]

In November 2011, the Indian Government received its first adverse arbitral award in an international investment dispute. The arbitral award passed in the White Industries case [20] has encouraged a growing trend of resorting to BITs as popular instruments to initiate international commercial arbitrations (colloquially referred to as investment treaty arbitrations). According to the Law Commission of India (hereinafter referred to as the "Commission") there are presently fourteen (14) known claims' proceedings against India under different BITs. [21]

Despite some serious debate [22] it is widely perceived that a sound investment treaty arbitration mechanism will safeguard investor interests, thereby making large scale foreign investments conducive, and lucrative. Furthermore, with the growing scope of Indian investments in other jurisdiction, a well drafted BIT will ensure preservation of such investments and their economic viability.

In this context, this section seeks to initiate the discourse on the growing trend of Investment Treaty Arbitrations. Beginning with a brief primer to the White Industries case and its impact on India's bilateral investments, this section of the Background paper will review the recommendations of the Commission in its 260th Report on the draft Model BIT prepared by the Indian Government. The endeavour here is to further the discourse on the utility of BITs, and to balance investors' interests with the State's regulatory powers.

A. White Industries Case - Watershed for Investment Treaty Arbitrations in India

Investment Treaty Arbitrations in India have become more commonplace for investment related disputes, in the aftermath of the White Industries case. Prominent companies like Cairn Energy, Vodafone UK and Nokia have raised investment related disputes under respective BITs signed by India, with the home countries. [23] So far, in the Indian

context, investment treaty arbitrations have been instituted, or considered as legal recourse, in response to cancellation of telecom licenses and imposition of retrospective taxes. A brief overview of the White Industries case is essential to appreciate this growing trend.

White Industries entered into a mining contract with Coal India Ltd in 1989. In 1999, certain disputes, including one on the quality of extracted coal, were referred to arbitration. The arbitral tribunal returned with an award for approximately four million Australian dollars (AUD 4,000,000) in favour of the claimant, White Industries.

The award was challenged before the Calcutta High Court by Coal India, while parallel proceedings for its enforcement were instituted by White Industries in the Delhi High Court. The Delhi High Court stayed the enforcement proceedings in view of the proceedings pending before the Calcutta High Court. This interim order was appealed before the Supreme Court of India. Failing to achieve an expedited adjudication of its issues either before the Supreme Court, or the two High Courts, White Industries invoked the dispute resolution clause under the BIT signed between India and Australia. The claimant (White Industries) inter alia claimed violation of the Most Favoured Nation clause (hereinafter referred to as "MFN Clause") under the aforesaid BIT.

The arbitral tribunal constituted to resolve the investment treaty dispute, gave an Award in favour of the claimant only on its claim of violation of the MFN Clause. The reasoning behind the tribunal's award was that effective means of asserting claims and enforcing rights, had been denied to the investor. This fact was evidenced by the inordinate delay in the proceedings pending before the Supreme Court. The tribunal, using the MFN Clause, incorporated an 'additional' liability of providing effective means; an obligation imposed on India under another BIT entered into with Kuwait. [24]

The award in the White Industries case spurred the Indian Government into action. The draft Model BIT was revised and this updated model text was to form the basis of future investment treaty negotiations and bilateral treaties. [25] It is pertinent to note that the Model BIT reviewed by the Commission, does not incorporate a Most Favoured Nation Clause (hereinafter "MFN Clause"). A MFN Clause mandates the host nation to not employ any discriminatory standards against a particular investor, given its nationality, and therefore prevents arbitrary treatment of certain investments. Most BITs incorporate the MFN Clause on a reciprocal basis, to inspire investor confidence, as well as insulate investments from arbitrariness and prejudicial measures.

The Commission in its 260th Report has reviewed the draft Model BIT on a clause by clause basis, and provided its recommendations. Crucially, the Commission has noted the absence of the MFN Clause in the draft text of the Model BIT. The Commission has attributed this removal of the MFN Clause to India's experience in the White Industries case, where a foreign investor indulged in 'treaty shopping' and under the MFN Clause, was able to read additional favourable standards into the India-Australia BIT which were never previously negotiated, or agreed upon. While corroborating the Government's decision to prevent repetition of such tactics by investors in the future, it has expressed concern and recommended circumspection against the absolute removal of a MFN

Clause. The Commission has advocated the incorporation of a MFN Clause limited in scope to the application of domestic measures. Such a limited provision will inhibit systemic and potential 'treaty shopping'; simultaneously, it will protect Indian as well as foreign investor interests from being exposed to discriminatory treatment from the host state.

B. Growing Rate of Investment Related Arbitrations - Indian Perspective

The conclusion of the White Industries case has resulted in a spate of subsequent investment treaty arbitrations. While foreign investors raising investment treaty arbitrations against India is a growing concern, it is equally important to secure Indian investments in foreign countries. The recent dispute between the Indian infrastructure giant, GMR, and the Government of the Maldives is a case in point. GMR was engaged by the Maldivian government to construct an international airport on the island nation, which involved an investment of more than USD 500 million. With a change in regime in the Maldives, disputes arose culminating in the premature termination of the tripartite Concession Agreement signed between GMR, the Republic of Maldives and the Maldives Airports Company Ltd. The disputes between the parties have been referred to commercial arbitration in Singapore. It is pertinent to note that given the absence of any BIT between India and Maldives, the dispute is not an investment treaty arbitration, but a conventional international commercial arbitration. [26]

The GMR-Maldives case projects the shortcomings of an inadequate bilateral investment programme. At a time when investment treaty arbitrations are becoming en vogue and commonplace, a comprehensive bilateral investment programme has become the need of the hour. In the case on point discussed hereinabove, a BIT could have ensured protection against the discriminatory and arbitrary termination of the Concession Agreement, allegedly caused by the change in political regime in Maldives. It is in this background that the Indian Government sought to revisit and revamp the draft Model BIT. The Commission's recommendations, which have been discussed hereinafter, also seek to address these emerging concerns with respect to India's bilateral treaty programme.

C. 260th Report of the Law Commission of India - Brief Overview

As is aforementioned, the Commission undertook a suo motu exercise of carrying out a clause by clause review of the provisions of the draft Model BIT [27] to facilitate the Indian Government's objective of doing business in India. The 260th Report pursues an analytical discourse on India's bilateral treaty programme; particularly, the Commission's recommendations with respect to 'Dispute Resolution' provisions under the draft Model BIT, are vital in the present economic context. [28] With the Government engaging in multiple transboundary negotiations with government and corporations alike, to augment foreign investments, a predictable and expeditious dispute resolution mechanism must be adopted.

The Commission has indicated that the constitution of the tribunal may very well influence the outcome of an investment treaty arbitration. The draft Model BIT does not provide for any appellate review of the award. This can pose difficulties for Indian

investments abroad, and as such must be addressed. The Commission has recommended amendments to the draft provisions to ensure greater clarity to the operation of the dispute resolution mechanism, as well as removal of inherently contradictory provisions. Pertinent to mention here are the Commission's recommendations with respect to Article 14.2 of the draft Model BIT. While Article 14.3 mandates the pre-condition (to instituting an arbitration under the BIT) of exhaustion of domestic legal remedies present in the host country, Article 14.2(ii)(a) disallows such claims to be further adjudicated by arbitration. This sweeping limitation on the arbitral tribunal's jurisdiction renders the whole dispute resolution mechanism under the BIT nugatory. The Commission has further recommended removal of certain provisions which cause unfair prejudice against the investor.[29] With respect to governing law, the Commission has pointed out the redundancy of subjecting the BIT to the Vienna Convention on the Law of Treaties (hereinafter referred to as "VCLT"). India is neither a signatory, nor has ratified the VCLT, and as such its application is futile.

The Commission's recommendations thus, merit discussion and deliberation before being considered for incorporation in the draft Model BIT, to ensure a transparent, simple and expedited dispute resolution mechanism.

D. Conclusion - Questions for Discussion and Debate

The preceding discourse in the present section demonstrates the growth in India's bilateral investment treaty regime. With rapid expansion, the accompanying concerns of foreign investors must be allayed, in order to ensure a consistent augmentation in bilateral investments. The draft Model BIT is a definitive step towards ensuring optimisation of the investor's and the State's interests. However, further deliberation, specifically regarding dispute resolution mechanisms governing international investment disputes, is crucial.

MAIN POINTS FOR DISCUSSION:

1. What is the actual influence of a BIT in ensuring a high investment rate, especially in view of India's strong bilateral ties with the US and Canada, despite the absence of investment treaties?
2. Whether the revised model BIT can actually be incorporated into BITs negotiated in future?
3. Is there a realistic scope for the Indian Government to renegotiate its BITs, to ensure their concomitance with the revised Model BIT?
4. Is the Indian legal regime well suited to handle investment treaty arbitrations, and if not, what amendments can enhance adequate regulation of such disputes?

Section-III CHANGING FACE OF ARBITRATION IN INDIA

a) Introduction

Considering the burgeoning pendency and backlog of cases of Indian Courts, it remains necessary to develop arbitration as an effective alternative dispute resolution mechanism for litigants, as it was intended to be. However, arbitration in India remains overwhelmingly ad-hoc in nature despite the potential for institutional arbitration to bridge the gap, and continues to encompass both commercial and non-commercial disputes. The continuing litigation in respect of arbitrations too reflects the lack of consistent and certain legal interpretation and application of prevalent laws and standards. Even so, arbitration practices have had to adapt to the widely varying present-day needs of private disputes, albeit in an organic and randomised manner. The need of the hour is to develop arbitration practices and laws in a studied and structured manner so as to ultimately foster a culture of arbitration as there exists in London, Singapore, USA, Hong Kong and Dubai.

The observations made by the Supreme Court are identified and included by the 260th Law Commission Report, suggesting law reforms. Further, salient features of the Ordinance promulgated on 23rd October, 2015 with regard to the amendments in the Arbitration & Conciliation Act, 1996, are included in this Background paper and discussed in the following sections of this Background paper. Largely, after careful analysis of the Ordinance, it can be said that key recommendations provided by the Law Commission, with certain variations (highlighted wherever applicable), have been incorporated in the same.

b) The Arbitration and Conciliation (Amendment) Ordinance, 2015

India, in pursuit of becoming a commercial hub, is trying to attract foreign investments and set up commercial centres. Apart from fiscal incentives- robust, economic and speedy dispute settlement mechanism is essential for developing an investment

destination. In order to complement the said effort, the Commission in its 246th Report, and the Central Government through the Arbitration Ordinance, 2015, seek to reform the arbitration regime in the country at par with global standards to ensure minimum judicial interference and efficient disposal of commercial disputes. Also, by adopting best practices across borders, the idea is to eventually make Arbitration in India investor friendly. Following are the key amendments in the Act;

A. ISSUE OF DELAY IN ARBITRAL PROCEEDINGS AND BEFORE COURTS

Arbitration proceedings in India are becoming a replica of Court proceedings.[30] The Courts have already indicated that delay in passing an award can lead to such an award getting set aside.[31] The practice of frequent adjournments led arbitration being treated as secondary by the lawyers, with priority being given to court matters. In this perspective, the Commission has recommended addition of the second proviso to section 24 (1) to the Act, which is intended to discourage the practice of frequent and baseless adjournments, and to ensure continuous sittings of the arbitral tribunal for the purposes of recording evidence and for arguments. Further, Section 29 of the principal Act is amended and a time limit of 12 months is provided to make an award from the date arbitral tribunal enters upon the reference (liberty is given to the parties to extend this period for a maximum period of 6 months). Also, if the arbitral tribunal renders award within 6 months, the tribunal is entitled to receive such additional fees as the parties may agree.

To deal with the issue of delay when an award is challenged before a Court, the Commission has recommended setting up of dedicated benches across India analogous to the Delhi Model to deal with arbitration related cases in an effective and expeditious manner.[32] The Government has been asked to request Chief Justices of High Courts to this effect.[33]

B. APPOINTMENT AND FEES OF ARBITRATORS

As per the recommendations of the Commission, the Ordinance amends Section 11 of the Act to confer the power of appointing arbitrators on the Supreme Court or the High Court (as the case may be), instead of vesting this power in the Chief Justice of India, or the Chief Justice of the concerned High Court, or a person nominated by such Chief Justice. This would rationalize the law and provide greater incentive for the High Court and/or Supreme Court to designate specialized, external persons or institutions as an 'appointing authority'.[34] Further, as per the recommendations of the commission, while there shall be no appeal against an order passed by the Court, referring the parties for arbitration (under Section 8) or appointment of an arbitrator (under Section 11), an appeal can be maintained under Section 37 only if the court refuses to refer parties to arbitration.[35]Another proposed amendment in the context of referral to arbitration and appointment of arbitrator requires the court to make an endeavour to dispose of the matter within 60 days from service of notice.

With respect to the question of fees paid to the arbitrators, one of the main apprehension against arbitration in India, especially ad hoc arbitrations, is the high costs accompanied with the same - including the arbitrary, unilateral and disproportionate fixation of fees by several arbitrators. The subject of fees of arbitrators has been the subject of the lament of the Supreme Court in Union of India v. Singh Builders Syndicate. [36] Taking into account the problem of unguided fixation of fees in arbitration proceedings, the amendment Ordinance provides a model schedule of fees. In this regard, High Courts are empowered to frame appropriate rules for fixation of fees for arbitrators. The model schedule of fees are based on the fee schedule set by the Delhi High Court International Arbitration Centre, which are over 5 years old, and which have been suitably revised.[37] Further, to ensure that the said schedule stays realistic, periodical review every 3-4 years is suggested. It is pertinent to note that the provisions with regard to the fixation of fees, do not apply to international commercial arbitrations. This is considering the involvement of foreign parties who have different values and standards as well as institutional rules having their own schedule of fees.

C. JUDICIAL INTERVENTION (PRE-ARBITRAL)

The law, in its present form, recognizes situations where the intervention of the Court is envisaged at the pre-arbitral stage, i.e. prior to the constitution of the arbitral tribunal. The Courts in India had the occasion to deliberate upon the nature and scope of permissible pre-arbitral judicial intervention and the Supreme Court has ruled in favour of dealing with the issue prima facie. [38] If the judicial authority is of the opinion that prima facie, there exists a valid arbitration agreement, then it shall refer the dispute to arbitration, and leave the existence of valid arbitration agreement to be finally determined by the arbitral tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not prima facie. The amendment also envisages that there shall be a conclusive determination as to whether the arbitration agreement is null and void.

Further, the provisions relating to appeal have already been discussed in the earlier part (Appointment and Fees of Arbitrators).

D. NEUTRALITY OF ARBITRATORS

It is universally accepted that any quasi-judicial process must be in accordance with the principles of natural justice. In the context of arbitration, neutrality of arbitrators, viz. their independence and impartiality, is critical to the entire process.[39] The amendments require written disclosures from the prospective arbitrator/s with regard to any circumstances that may give rise to justifiable doubts as to their independence or impartiality. The nature of circumstances has also been detailed and there is an additional layer of checks and balances provided which is incorporation, as a guide, of the red and orange lists of the International Bar Association Guidelines on Conflicts of

Interest in International Arbitrations as Schedules to the Act. [40] There is an express bar of certain persons also provided for, which may be waived, only after disputes have arisen and by way of an express agreement between parties (in writing) making this waiver. This is done keeping in mind the whole scheme of arbitration process where party autonomy is central.

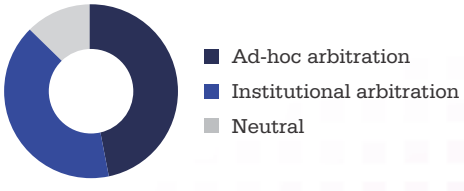
Moreover, in line with global practices, before the appointment of arbitrator, it has been proposed that the concerned arbitrator discloses in writing any circumstances i) such as existence of direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and ii) which are likely to affect the arbitrator's' ability to devote sufficient time to the arbitration and in particular his ability to finish the entire arbitration within 12 months (24 months was proposed by the Law Commission) and render an award within 3 months from such date.[41] The mentioned grounds give sufficient cause for challenging the appointment of an arbitrator.

E. ENCOURAGING INSTITUTIONAL ARBITRATION

Arbitration is primarily categorized as: (i) ad hoc or (ii) institutional. When parties choose to proceed with ad hoc arbitration, the parties have the choice of drafting their own rules (most referred is the UNCITRAL Rules) and procedures which fit their needs, as per the nature of the dispute. Institutional arbitration, on the other hand, is one in which a specialized institution with a permanent character intervenes and assumes the functions of aiding and administering the arbitral process, as provided by the rules of such institution. Basically, the contours and the procedures of the arbitral proceedings are determined by the institution designated by the parties. Such institutions may also provide qualified arbitrators empanelled with the institution.

A recent study conducted by Price Waterhouse Coopers ("PWC") has established that ad-hoc arbitrations are more popular in Indian corporate culture. A diagram depicting the breakdown of ad-hoc versus institutional arbitration, taken from the study is presented hereinbelow:

Which of the following of arbitrations does your company prefer?



Source: Pricewaterhouse Coopers, 'Corporate Attitudes and Practices towards Arbitration in India', available at https://www.pwc.in/assets/pdfs/publications/2013/corporate-attributes-and-practices-towards-arbitration-in-india.pdf

As a result of the structured process and administrative support provided by institutional arbitration, it provides distinct advantages, which are unavailable to parties opting for ad hoc arbitration. Taking into consideration, the mentioned advantages, Law Commission of India has suggested promotion of institutional arbitration by recommending appropriate proposals which it hopes will be used by the Supreme Court and High Courts to promote institutional arbitration. It proposes further, to accord legislative sanction to institutions such as ICC (International Chamber of Commerce, International Court of Arbitration) and SIAC (Singapore International Arbitration Centre) which provide for "Emergency Arbitrator" by broadening the definition of "Arbitral Tribunal".[42] The Commission has further discussed idea of having an Arbitral Commission of India (with representation from all the stakeholders of arbitration) which would, inter-alia, encourage the spreading of institutional arbitration in India.

The recommendations made by the Law Commission relating to institutional arbitration, however does not find any mention in the Ordinance making amendments to the 1996 Act.

F. DEFINITION OF THE TERM "PARTY"

Arbitration is a consensual form of dispute resolution, with the arbitral tribunal deriving its powers and authority on the basis of the "contract" or "agreement" between the parties. [43] Section 2(1)(h) defines the term 'party' as a party to the arbitration agreement. However, a party does not necessarily mean only the "signatory" to the arbitration agreement. In appropriate contexts, a "party" may further include persons "claiming through or under" a signatory to an arbitration agreement - for instance, successors-of-interest of such parties, alter-egos of such parties, etc. [44] It is to be noted that the Law Commission proposed amendment to Section 2(1)(h) of the Act (which defines "party"), but the Ordinance has not given effect to the broader understanding of the term, as has been discussed hereinabove.

G. STATEMENT OF DEFENCE (IN THE CONTEXT OF SCOPE OF REFERENCE)

A sub-section in the form of Section 23 (2A) is added to Section 23 of the Act, wherein when a respondent in an arbitration proceedings submits a counter claim or pleads a set off, it shall be treated as being within the scope of reference and be adjudicated upon by the arbitral tribunal even if it did not fall within the scope of initial reference, as long as it arises out of the arbitration agreement. The purpose is to ensure that counterclaims and set off can be adjudicated upon by an arbitrator without seeking a separate/new reference by the respondent so long as it falls within the scope of the arbitration agreement, in order to ensure final settlement of disputes between parties and prevent multiplicity of litigation.

H. COSTS

Frivolous and meritless litigation/arbitration has become a serious concern.[46] The loser-pays rule logically follows, as a matter of law, from the very basis of deciding the underlying dispute in a particular manner; and as a matter of economic policy, provides economically efficient deterrence against frivolous conduct and furthers compliance with contractual obligations. The Commission has, therefore, sought comprehensive reforms to the prevailing costs regime applicable both to arbitrations as well as related litigation in Court by proposing section 6-A to the Act, which expressly empowers arbitral tribunals and courts to award costs based on rational and realistic criterion.[47]

It is to be noted that the Ordinance includes the said recommendation by the Law Commission proposing imposition of costs, wherever necessary. However, it has been incorporated in the Act by inserting a new provision, i.e., Section 31A.

I. ARBITRABILITY OF DISPUTES ALLEGING FRAUD

The power of arbitrators to deal with certain types of disputes or with certain kinds of allegations or the power to grant certain remedies has been debated with differing outcomes. Both, the UNCITRAL Model Law on International Commercial Arbitration and the New York Convention, 1958 (Convention on Recognition and Enforcement of Foreign Arbitral Awards) provides grounds to challenge or oppose the enforcement of awards if it be found that the subject matter of dispute is not capable of settlement by arbitration.

Various High Courts in the Country held divergent opinions about the issue of arbitrability of a dispute concerning/alleging fraud. A distinction was made between 'serious issue of fraud' and 'mere allegation of fraud' and the former was held to be outside the purview of arbitration.[48] Further, the Supreme Court held in N Radhakrishnan v. Maestro Engineers that disputes involving serious allegations of fraud were not capable of adjudication by arbitration.[49] The Apex Court subsequently, has held that allegations of fraud do not render a dispute non-arbitrable - distinguishing it from its early ruling in Radhakrishnan simply by reference to the fact that it related to a domestic arbitration and without commenting on it any further. [50]

Further, coming on to the applicable law in England and Wales, there is no public policy requiring issues of fraud to be adjudicated by the courts. Therefore, allegations of fraud are, in principle, capable of falling within the scope of an arbitration agreement. Whether they do so also depends on the wording of the relevant arbitration agreement/clause. In Fiona Trust v. Privalov (2007 UKHL 40), the House of Lords while examining the doctrine of severance held that the tribunal will have the jurisdiction to arbitrate even if a party claims that the arbitration agreement itself is induced by fraud. However, there are some grounds of invalidity that could affect the arbitration clause and the main contract

equally. For example, the contract itself could be a forgery and had, in fact, never existed (Nigel Peter Albon v. Naza Motor Trading SDN BHD, [2007] EWHC 665 (Ch).

The recommendation of the Law Commission proposing to expressly include "issues of fraud" under the ambit of arbitration has not been included in the final amendments to the Act (through the Ordinance).

MAIN POINTS FOR DISCUSSION:

1. What is the impact of the recently promulgated Arbitration Ordinance to set a higher threshold for judicial intervention in arbitral proceedings?
2. In light of the judicial interpretation of the main provisions, what further amendments and changes would be needed to minimise judicial enforcement and speedy conduct of arbitrations?
3. Do the proposed changes to the Arbitration and Conciliation Act, 1996 move India closer to the UNCITRAL Model Law? If yes, is such concomitance desirable to nurture a strong culture of arbitrating commercial disputes in India?

Section-IV ENFORCEMENT OF FOREIGN ARBITRAL AWARDS AND APPLICABILITY OF PART-I OF THE ACT IN FOREIGN 'SEATED' ARBITRATIONS

a) Introduction

This section of the Background paper will discuss the current situation under Indian law (including subsequent developments through judicial pronouncements) regarding the enforcement of arbitral awards and the applicability of Part I of the Arbitration and Conciliation Act, 1996 in foreign 'seated' arbitrations. Further, in the same context, it will also highlight the recommendations provided by the Law Commission of India, in its 246th Report and the final amendments to the Act through the Ordinance.

b) Enforcement of Arbitral Awards in India

An award resulting from an international commercial arbitration is enforced in accordance with the principles of enforcement of foreign awards set out in treaties and conventions. [51] According to the Act, a 'foreign award' is enforced in the same manner as a decree of a (foreign) Civil Court.[52] Further, under Section 36 of the Act, a domestic award is also enforced like a court decree. Under the Act, Sections 34 and 48, setting out grounds for refusal of enforcement of domestic and foreign awards, respectively, are pari materia. This results in a troublesome scenario where domestic and foreign awards are seemingly treated as same, and subject to the same standards, which is unjustifiable. While greater judicial intervention is legitimate in a purely domestic award, intensive scrutiny and review of foreign awards is uncalled for, and poses unwarranted impediment to their enforcement. This conflicting paradox has resulted in setting varying standards for interpreting Sections 34 and 48 of the Act, which as mention hereinabove, provide the same grounds for refusing enforcement of domestic and foreign awards. [53]

c) "Public Policy" Dilemma

It is to be noted that the term "public policy" is not defined in the Act. Under Section 48 of the Act [54], a Court can refuse to enforce a foreign award on the ground that it is against

the public policy of India. Also under Section 34, an application may be made before a Court for setting aside an arbitral award if it is against the public policy of India.

In this regard, the Commission has further recommended the restriction of the scope of "public policy" in both Sections 34 and 48. This is to bring the definition in line with the definition propounded by the Supreme Court in Renusagar Power Plant Co Ltd v General Electric Co, [55] where the Supreme Court while construing the term "public policy" in section 7 (1)(b)(ii) of Foreign Awards (Recognition and Enforcement) Act, 1961 held that an award would be contrary to public policy if such enforcement would be contrary to;

(i) fundamental policy of Indian law; or

(ii) interests of India; or

(iii) justice or morality.

The formulation proposed by the Commission is even tighter and does not include the reference to "interests of India", which is vague and is capable of interpretational misuse, especially in the context of challenge to awards arising out of international commercial arbitrations (under S 34) or foreign awards (under S 48). Under the formulation of the Commission, an award can be set aside on public policy grounds only if it is opposed to the "fundamental policy of Indian law" or it is in conflict with "most basic notions of morality or justice".

Further, the Supreme Court in the case of Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.[56] case broadly read the ground of public policy for setting aside arbitral awards to the consternation of many stakeholders in Indian arbitration. The Court had to decide whether 'public policy' was broad enough to cover 'patent illegality' of the award. Although the Court conceded that public policy could be interpreted in a narrow or a broad manner depending on the context, it nevertheless held that there was no necessity to construe the term narrowly. The Court while defining Public policy included in the definition-the fundamental policy of India; or the interests of India; or justice or morality; or in addition, if it is patently illegal.

The present case has been criticized for subverting the arbitral process and for being in contradiction to the policies contained in the Act, especially the policies of finality of awards and minimum judicial intervention into the arbitral process.[57] The judgment, it has been argued, has struck at the very heart of arbitration in India by potentially exposing all awards to be questioned in courts and has made commercial dispute resolution a time-consuming and expensive process, and has hindered foreign investment in India.

Further, the Supreme Court of India in Phulchand [58] case held that "patent illegality" needs to be considered under the term "public policy of India" while adjudicating the

enforcement of a foreign award under Section 48 (2)(b) of the Act. However, this case was overruled by the SC in Shri Lal Mahal Ltd. v. Progetto Grano Spa, [59] where a three judges bench ruled on the scope of a 'Public Policy' defence under Section 48 (which provides grounds for refusing the enforcement of foreign arbitral awards) of the Act against enforcement of a foreign award and distinguished such defence from a 'Public Policy' challenge for setting aside an award as available under Section 34 of the Act. The decision of the Supreme Court in the instant case is a welcome development, especially for those seeking to enforce foreign arbitral awards in India. While the scope of 'public policy' defence for section 48 has been limited, 'patent illegality' as a ground to challenge an award under section 34 continues to be valid.

d) Law Commission's Recommendation Codifying "public policy"

The Commission took the view that liberal construction accorded to the term "public policy" in Saw Pipes[60] cannot apply to the use of the same term "public policy of India" in section 48(2)(b). However, after taking into account a recent judgment by the Supreme Court in the case of ONGC Ltd. v. Western Geco International Ltd. [61] where the term "public policy" was widely interpreted so as to include Wednesbury principle of reasonableness [62] (an award which "no reasonable person would have arrived at") within the phrase "fundamental policy of Indian law", the Commission proposed further modifications to Section 34 (which provides 'public policy' as a ground for setting aside an award). This paved way for the Courts to review an arbitral award by going into the merits of the case. The Commission further apprehended that this particular judgment would discourage international arbitration coming to, and domestic arbitration staying, in India. [63]

As to challenge of domestic award under Section 34 and recognition/enforcement of foreign awards under Section 48, the proposed amendment requires the disposal of matters within one year from the date of service of notice. [64] Further, the Commission, in case of domestic awards has recommended the addition of section 34 (2A), which may also be set aside by the Court if the Court finds that such award is vitiated by "patent illegality appearing on the face of the award." In order to provide a balance and to avoid excessive intervention, it is clarified in the proposed proviso to the proposed section 34 (2A) that such "an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciating evidence." [65]

Finally, it would not be unreasonable to say that Commission's recommendations go a step further. It is intended to ensure that the legitimacy of court intervention to address

patent illegalities in purely domestic awards is directly recognised by the addition of section 34 (2A) and not indirectly by according an expansive definition to the phrase "public policy".

Regarding Section 34, the recommendations provided by the Law Commission are included in the amendments (through the Ordinance), as it is.

e) Applicability of Part-I/Judicial Intervention in a Foreign 'Seated' Arbitration

The issue of extent of judicial intervention in arbitration or any other alternative dispute resolution proceedings, has always attracted widespread attention and debate. Taking into account the legislative intent behind the Arbitration and Conciliation Act, 1996, which is to strike a balance between excessive judicial interference and supervisory responsibility of the Courts to administer complete justice, the Commission has made an effort to review the existing position under Indian law.

A. "SEAT" OF ARBITRATION

The definition of 'seat of arbitration' has been recommended to be incorporated so as to make 'seat of arbitration' distinct from venue of arbitration. Similarly, Section 20 of the Act has been proposed to be amended to bring in a clear distinction between 'seat' and 'venue' of arbitration. This is consistent with the law laid down by Supreme Court of India in BALCO [66] case, where the Court made Indian arbitration law 'seat-centric' and also discussed the difference between seat and venue of arbitration. This proposed amendment is also in line with globally used terminology. Further, in the mentioned case, the Court interpreted the term 'seat' of arbitration as the curial/procedural law applicable on an arbitration proceeding and held that Part I of the Act (which apart from procedural aspects, also has provisions for interim measures, setting aside the arbitral award etc.) will not apply in foreign 'seated' arbitrations. In this case, the Apex Court overturned a decade-old line of precedents that had controversially given the domestic courts excessive jurisdiction to intervene even in arbitrations seated outside India. Reinstating the territoriality principle, the Supreme Court decided to review and overrule its previous decisions. Based on an analysis of the history, legislative intent and scheme of the 1996 Act, the Court concluded that the regulation of arbitration proceedings (including review of the award) fell within the exclusive domain of the courts at the seat of the arbitration. The Court also clearly delineated the respective jurisdiction of the courts in cases where arbitrations are seated in India and offshore.

However, it is to be noted that this judgment has prospective application, meaning that the same would be applicable on arbitration agreements/clauses entered into between

the parties after 6th September, 2012, i.e., the date of the judgment. But, High Courts relying on recent judgments by the Apex Court (discussed at a later part) in certain cases have started applying this finding of the Apex Court in cases where arbitration agreement/clause entered into between the parties was before the mentioned date. This issue has been dealt separately in this Background paper.

B. JUDICIAL INTERVENTION IN FOREIGN 'SEATED' ARBITRATION

The Law Commission Report acknowledges the lack of efficacious remedy available to a party seeking protection of assets located in India, where an arbitration is seated abroad. In this regard, a large number of changes were proposed by the Commission that are also included in the amendment Ordinance. They are;

(i) Indian courts will exercise jurisdiction under Part 1 of the Act only when the seat of arbitration is within India;

(ii) Certain provisions in Part 1 of the Act, such as Section 9 (interim relief)[67], Section 27 (court assistance for taking evidence), Section 37(1)(a) and 37(3) (Appealable orders), will remain available to parties in a foreign seated arbitration;

(iii) The proposed changes will not affect applications pending before any judicial authority, relying upon the law set out by Bhatia [68] (where it was held that all the provisions contained in Part-I of the Act would apply to foreign 'seated' arbitrations as well, unless it is expressly or impliedly excluded by the parties.)

C. INTERIM MEASURES: THE ISSUE OF ENFORCEMENT

The issue of enforcement of an interim order passed by the tribunal is worth mentioning. In Sundaram Finance Ltd v. NEPC India Ltd., [69] the Apex Court observed that though section 17 gives the arbitral tribunal the power to pass orders, the same cannot be enforced as orders of a court and it is for this reason only that section 9 gives the court power to pass interim orders during the arbitration proceedings. Subsequently, in M.D. Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd., [70] the Court had held that under section 17 of the Act no power is conferred on the arbitral tribunal to enforce its order nor does it provide for judicial enforcement thereof.

Section 9 (which provides for interim relief by the Court) of the Act is proposed to be made applicable to international commercial arbitration even when it is seated abroad, unless parties agree to the contrary. In order to ensure timely initiation of the arbitration proceedings by the parties when granted interim measure of protection, it is proposed that arbitral proceedings shall be commenced within 90 days (60 was proposed by the Law Commission) from the date of grant of interim measure order by the Court or within such shorter or further time as indicated by the Court, failing which the interim measure of protection shall cease to operate. This will ensure that arbitration proceedings commence even when relief under Section 9 has been obtained by a party.

Further, in order to check interventions from Courts for grant of interim measures, once the Tribunal has been constituted, the Courts shall ordinarily not entertain an Application for interim measures unless circumstances exist owing to which the remedy under Section 17 is not efficacious. Section 17 has been amended to provide the tribunal the same powers as a civil court in relation to grant of interim measures. Therefore, there would not exist differential nature of power to award interim measures under Section 9 and 17 of the Act. The Tribunal would have powers to grant interim relief post award.

D. Post Balco Developments

The prospective overruling in this case was seen as disappointing as it allowed a decision that the court recognised to be flawed to continue to exist as a precedent. However, it seems that disappointment was to be short-lived. While the decision in BALCO[71] was made prospective to ensure that hotly negotiated bargains are not overturned overnight, it resulted in a situation where courts, despite knowing that the decision in Bhatia[72] is no longer good law, are forced to apply it whenever they are faced with a case arising from an arbitration agreement executed pre-BALCO.

In Reliance Industries v. Union of India, [73] the Apex court clarified that though Balco case has prospective application, the position of law as it stood prior to that, would not allow Indian courts to interfere with foreign awards. The court observed that it was too late in the day for anyone to contend that seat of arbitration did not amount to an exclusive jurisdiction clause. The court also dismissed attempts to justify Indian courts' jurisdiction by reference to mandatory fiscal and other laws that applied to the issue in dispute by clarifying that grounds of challenge cannot be a consideration in deciding whether Indian courts have jurisdiction to entertain the challenge.

Further, in Harmony Innovation Shipping Ltd v. Gupta Coal India Ltd, [74] the Supreme Court - while disagreeing with the High Court's reliance on BALCO to deny jurisdiction of Indian courts in a pre-September 2012 agreement - reached the same conclusion by applying the principles laid down in decisions prior to Bharat Aluminium and in Reliance Industries. The court effectively held that once it was determined that London was the seat of arbitration, it was clear that parties impliedly excluded application of part I of the 1996 Act leading to the conclusion that Indian courts would have no jurisdiction.

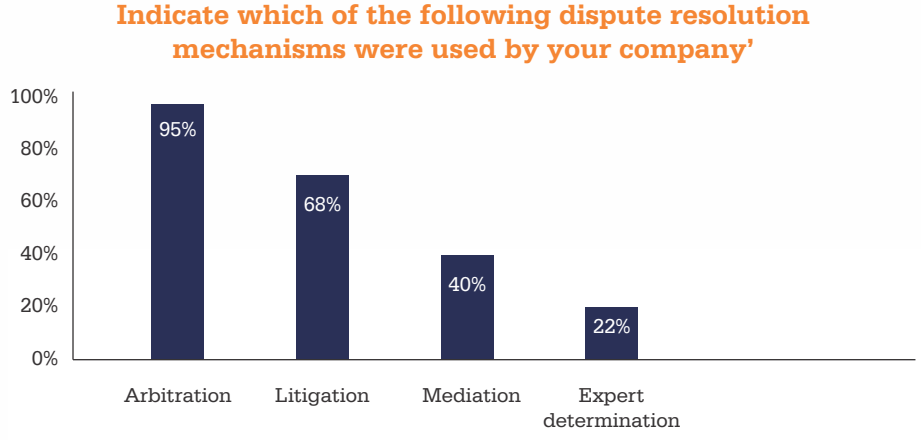
MAIN POINTS FOR DISCUSSION:

1. Is the post-BALCO approach of the Indian courts towards foreign seated arbitrations beneficial for Indian parties?
2. Have the clear findings of the Constitution Bench of the Supreme Court of India in BALCO been rendered uncertain in light of the subsequent judgments?
3. What is the ideal level of judicial intervention which must be permitted in enforcement of foreign awards in India, keeping in view the specific Indian conditions?

Section-V VIABILITY OF ARBITRATION FOR ADJUDICATING COMMERCIAL DISPUTES

As the overall theme of this conference suggests, commercial arbitration is rapidly growing in the globalised Indian economy. In fact, as per one study conducted by PWC, arbitration is the preferred mode of dispute resolution for more than 90 percent of the responding corporates.

The following diagram exhibits the popularity of arbitration vis-à-vis other dispute resolution mechanism, including litigation:



Source: Pricewaterhouse Coopers, 'Corporate Attitudes and Practices towards Arbitration in India', available at https://www.pwc.in/assets/pdfs/publications/2013/corporate-attributes-and-practices-towards-arbitration-in-india.pdf

Despite the obvious inclination towards arbitration, bolstered by the increasing role of global trade and commerce in the Indian economy, the law and jurisprudence governing arbitration in India, has failed to keep up pace. [75] The Arbitration and Conciliation Act, 1996, was first legislated, to incorporate the UNCITRAL Model Law and ensure a cost effective and efficacious dispute resolution but has clearly failed so far in meeting these two objectives.

The present section seeks to debate the success of arbitration in resolving commercial disputes. The globalisation of the Indian economy in the 1990s warranted an efficient dispute resolution mechanism for commercial disputes. The Arbitration and Conciliation

Act, 1996 was enacted to revamp the existing legislation and reinforce the acceptance of arbitration as the preferred dispute resolution mechanism for commercial disputes. While the actual practice of arbitration is still undergoing evolution, it is of growing concern that the process of adjudicating commercial disputes through arbitration is rampant with delays and cost ineffective. Another concern, as mentioned in the earlier part of this Paper, has to do with the high level of judicial review. The Arbitration and Conciliation Act, 1996, was enacted in turn to ensure that the role of the judiciary in the arbitral process is complementary, rather than broad oversight.

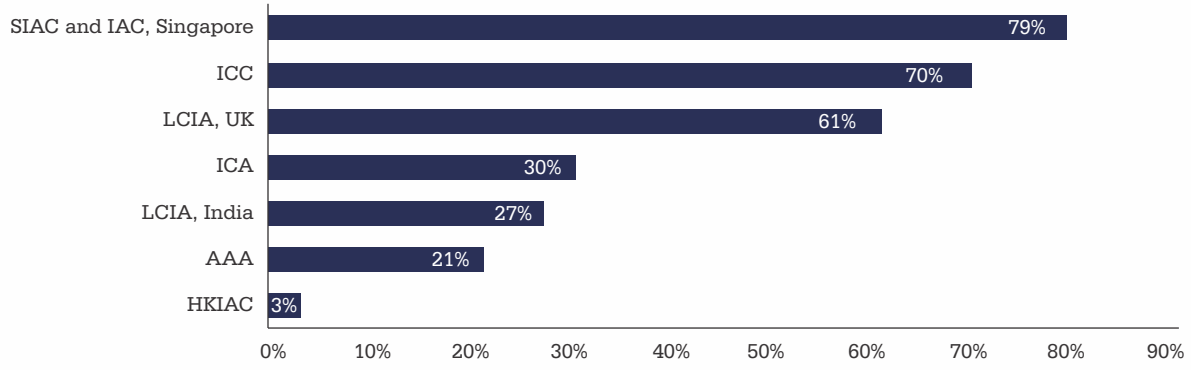
The recently promulgated Ordinance addresses most of the issues faced by the stakeholders of the Indian arbitration regime. While the preceding chapters have inter alia analysed and elaborately discussed these proposed changes, the present section will primarily focus on one of these proposed area for legislative and policy reform - the enhancement of institutional arbitration in India. It will also analyse the role of special commercial courts, which are proposed to be set up under a bill tabled before the Parliament earlier this year, [76] and their impact on arbitration as an alternative dispute resolution mechanism.

a) Promoting Institutional Arbitration

Institutional Arbitration presents many upsides like a predetermined procedural rules for arbitration, appointment of arbitrators from a select panel of experts in a timely manner, availability of necessary infrastructure for conducting arbitration and predetermined costs for the arbitrators conducting the arbitrations. Though slowly gaining momentum, institutional arbitration is yet to make a substantial impact on alternative dispute resolution mechanisms prevalent in India. The Commission too, has voiced its concern on how the major portion of arbitrations are conducted ad-hoc. [77]

While the Ordinance does not have provisions expressly promoting institutional arbitration, the need to enhance the scope of the same cannot be ignored. It is vital to change the existing perception. Most ad-hoc arbitrations today engage retired judges or some eminent senior advocates to sit on arbitral tribunals. This has resultantly influenced the nature of these proceedings to acquire the trappings of courtroom litigation. A change in the legal fraternity's perception must be backed with adequate infrastructure to conduct institutional arbitrations.[78]

The following chart exhibits the popular institutions engaged for both domestic and international commercial arbitrations:



Source: Pricewaterhouse Coopers, 'Corporate Attitudes and Practices towards Arbitration in India', available at https://www.pwc.in/assets/pdfs/publications/2013/corporate-attributes-and-practices-towards-arbitration-in-india.pdf

The above diagram clearly indicates the mass exodus of Indian corporations to foreign institutions for conducting arbitrations. This is a direct implication of failings of India's indigenous arbitration regime, in particular the conspicuous absence comprehensive infrastructure to bolster institutional arbitrations.

b) Commercial Courts More Advantageous to Arbitrations?

Another facet that must feature in the present debate is the future of commercial arbitration in view of the proposed setting up of exclusive commercial courts and commercial divisions. [79] Two questions emerge herein - first, the feasibility of arbitrating commercial disputes versus conventional litigation in commercial courts devoted exclusively to speedy adjudication of such disputes; secondly, the direct interface the Commercial Courts Bill has a with the arbitration regime.

Regarding the first question, the main advantages favouring an arbitration of disputes over conventional litigation, is the cost effective nature and expediency attributed to the former. However, the cost incurred in arbitrations, especially ad hoc arbitrations, can be considerably expensive. The costs in arbitrations as conducted in India, typically involve arbitrator's fees, rent for arbitration venues, administrative/clerical expenses, and professional fees for the representatives of the parties. Additionally, even with respect to expediency of dispute resolution, the Indian example has clearly demonstrated the inordinate delay impeding arbitrations, primarily stemming from incidental legal proceedings before courts. Instead, with the setting up of commercial courts, litigating commercial disputes might become more viable on this singular facet, namely speedy adjudication. Furthermore, the provisions setting out procedure for applications and

appeals in arbitrations of commercial disputes valuing Rs. 1 crore or more, [80] also operate with the overall objective of ensuring speedy adjudication of the same.

c) Concluding Remarks and Propositions for Discussion

The aforesaid discussion establishes two points - the popularity of arbitration as an alternative dispute resolution mechanism, especially with the Indian economy's growing interaction with foreign players; and secondly, a paradoxical apprehension against Indian arbitration regime, more so by Indian parties. The Arbitration and Conciliation Act, 1996, was enacted with a lot of promise, to boost a nascent, liberal economy. Unfortunately, the practice of arbitration has in time, witnessed a relapse into some of the ills that the new regime sought to eschew out of the equation.

MAIN POINTS FOR DISCUSSION:

a). How can the setting up of Commercial courts and commercial divisions operate to better the arbitration regime?

b). In addition to the Ordinance, what further reformatory action is needed to bolster arbitration mechanism in India?

END NOTES AND REFERENCES

[1] Federal Arbitration Act, (codified at 9 U.S.C. § 1)

[2] 'Commercial Arbitration: United States', available at <http://globalarbitrationreview.com/know-how/topics/61/jurisdictions/23/united-states/>, accessed on October 12, 2015

[3] Brentwood Medical Associates v. United Mine Workers, 396 F.3d 237, 241 (3d Cir. 2005)

[4] Section 10 of the Federal Arbitration Act.

[5] Devrim Deniz Celik, 'Judicial Review under the UK and US Arbitration Acts: Is Arbitration a Better Substitute for Litigation', IALS Student Law Review | Volume 1, Issue 1, Autumn 2013 available at <http://sas-space.sas.ac.uk/5237/1/1702-2275-1-PB.pdf>, accessed on October 12, 2015.

[6] Merrill Lynch, Pierce, Fenner & Smith Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986).

[7] Hall Street Associates v. Mattel Inc. 128 S.C. 1396 (2008)

[8] 246th Law Commission of India Report, Amendments to the Arbitration and Conciliation Act, 1996, August 2014, available at <http://lawcommissionofindia.nic.in/reports/reports216onwards.htm>, accessed on October 10, 2015.

[9] Amendments to the Arbitration and Conciliation Bill, 2015, Press Information Bureau, available at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=126356>, accessed on October 1, 2015.

[10] Devlik Celik, [f.n. 5, at Pg. 21].

[11] [2011] UKSC 40.

[12] Section 69(1) of the Arbitration Act 1996.

[13] Section 5(1) of the International Arbitration Act. It is pertinent to mention that in addition to international arbitrations, as defined under Section 5(2) of the said Act, a

non-international arbitration may also 'opt in' to be governed by the International Arbitration Act.

[14] Section 3 of the Arbitration Act. All arbitrations conducted pursuant to agreements considered 'domestic', or where the seat of arbitration is Singapore to whom Part II of the International Arbitration Act does not apply, are governed by the Arbitration Act.

[15] Section 3(1) of the International Arbitration Act.

[16] Lawrence, G.S. Boo, 'The Law and Practice of Arbitration in Singapore', available at <http://www.aseanlawassociation.org/docs/w4_sing1.pdf>, accessed on October 12, 2015. See also, Section 5(2) International Arbitration Act, [f.n. 13].

[17] Section 15(1) of the International Arbitration Agreement.

[18] Lawrence, [f.n. 16, at Pg. 166].

[19] Law Commission of India, 260th Report titled 'Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty', available at <http://lawcommissionofindia.nic.in/reports/Report260.pdf>, accessed on October 1, 2015.

[20] White Industries Australia Ltd. v. Republic of India, Final Award, available at <http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf>, accessed on October 7, 2015.

[21] 260th Report, [f.n.1].

[22] 'India and Bilateral Investment Treaties - Are they Worth it?, Guest Post, Financial Times, January 21, 2015, available at <http://blogs.ft.com/beyond-brics/2015/01/21/guest-post-india-and-bilateral-investment-treaties-are-they-worth-it/>, accessed on October 8, 2015

[23] 'Vodafone turns to Arbitrators in Seven-Year Old Indian Tax Dispute', Financial Times, May 7, 2014, available at < http://www.ft.com/intl/cms/s/0/21f91f9c-d5fa-11e3-a017-00144feabdc0.html#axzz3nslIpyCe>, accessed on October 7, 2015.

[24] Prabhash Ranjan, 'The White Industries Arbitration: Implications for India's Investment Treaty Programme', available at < https://www.iisd.org/itn/2012/04/13/the-white-industries-arbitration-implications-for-indias-investment-treaty-program/>, accessed on October 7, 2015.

[25] Around 2003, the Indian Government had prepared its first draft of a model BIT. In March 2015, in the aftermath of the White Industries Case, the Government of India decided to review the 2003 model and revamp it with present day needs.

[26] Indian and Maldives Bilateral Tension, available at < http://indianlawyer250.com/features/article/202/india-maldives-bilateral-tension/>, accessed on October 6, 2015.

[27] Chapter IV of the draft Model BIT pertains to 'Dispute Resolution'. The draft Model BIT is available at <https://mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf>, accessed on October 5, 2015.

[28] 260th Report, [f.n.1], at Pgs. 39-52.

[29] For instance, the Commission has recommended the removal of the introductory provision, i.e. Article 14.1, as being vague and possibly, hampering the enforcement of an arbitral award against a respondent State, where such enforcement entails the payment of monetary compensation.

[30] 246th Report, [f.n. 8].

[31] See for instance the decisions of the Delhi High Court in Oil India Ltd v. Essar Oil Ltd, 2012 (3) ARBLR 220 (Delhi) at paras 30-40; UOI v. Niko Resources Ltd, 191 (2012) DLT 668 at paras 43-51; Peak Chemical Corporation Inc v. NALCO, 188 (2012) DLT 680 at para 29 .

[32] Delhi HC Chief turns 4 benches into part-paperless commercial Courts (DHCBA unhappy), legallyindia,http://www.legallyindia.com/Bar-Bench-Litigation/delhi-hc-chief-turns-4-benches-into-part-paperless commercial-courts-dhcba-unhappy, last seen on 01/10/2015.

[33] The 253rd Law Commission report recommends the setting up of commercial Courts at the district level and dedicated commercial bench/s in the High Courts (exercising original jurisdiction) to deal with commercial disputes. It also provides for the setting up of Commercial appellate division in the High Courts which will exclusively deal with appeals from commercial courts or commercial division of a High Court, as the case may be.

[34] 246th Report, [f.n. 8], para 24, p. 16.

[35] Id.at 47.

[36] (2009) 4 SCC 523.

[37] 246th Report, [f.n. 8], at 12.

[38] Shin Etsu Chemicals Co. Ltd. v. Aksh Optifibre, (2005) 7 SCC 234.

[39] See Executive Engineer, Irrigation Division, Puri v. Gangaram Chhapolia, 1984 (3) SCC 627; Secretary to Government Transport Department, Madras v. Munusamy

Mudaliar, 1988 (Supp) SCC 651; International Authority of India v. K.D.Bali and Anr, 1988 (2) SCC 360; S.Rajan v. State of Kerala, 1992 (3) SCC 608; M/s. Indian Drugs & Pharmaceuticals v. M/s. Indo-Swiss Synthetics Germ Manufacturing Co.Ltd., 1996 (1) SCC 54; Union of India v. M.P.Gupta, (2004) 10 SCC 504; Ace Pipeline Contract Pvt. Ltd. v. Bharat Petroleum Corporation Ltd., 2007 (5) SCC 304.

[40] 246th Report, [f.n. 8], at 31.

[41] Id, at 48.

[42] Id, para 7, at pp. 9-10.

[43] 246th Report, [f.n. 8].

[44] See Chloro Controls v. Severn Trent Water Purification, (2013) 1 SCC 641. The Hon'ble Supreme Court of India was dealing with the scope and interpretation of section 45 of the Act and, in that context, discussed the scope of the relevant doctrines on the basis of which "non-signatories" could be said to be bound by the arbitration agreement, including in cases of inter-related contracts, group of companies doctrine etc.

[45] Proposed Amendment in Section 2(h) of the 1996 Act.

[46] Observations of the Supreme Court of India in the case of Salem Advocate Bar Association v. Union of India, AIR 2005 SC 3353.\

[47] 246th Report, [f.n. 8], at 35.

[48] See Ivory Properties and Hotels Private Ltd v. Nusli Neville Wadia, 2011 (2) Arb LR 479 (Bom); CS Ravishankar v. CK Ravishankar, 2011 (6) Kar LJ 417). The Supreme Court in Meguin GMBH v. Nandan Petrochem Ltd., 2007 (5) R.A.J 239 (SC).

[49] N Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72.

[50] World Sport Group (Mauritius) Ltd v. MSM Satellite (Singapore) Pte Ltd, (2014) 11 SCC 639.

[51] Sunil Malhotra, 'Enforcement of Arbitral Awards', ICA's Arbitration Quarterly, ICA, 2006, vol. XL/No.4 at p 20; Also See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention).

[52] §49 Enforcement of foreign awards. - Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court.

[53] 246th Report, [f.n. 8], at 21.

[54] Arbitration and Conciliation Act, 1996.

[55] AIR 1994 SC 860

[56] 5 SCC 705: AIR 2003 SC 2629.

[57] Sarah E. Hilmer, Did Arbitration Fail India or did India Fail Arbitration, 10 INt. A.L.R. 2007 33, 34 (2007).

[58] Phulchand Exports ltd. v. OOO Patriot, 2011 (11) SCALE 475.

[59] (2014) 2 SCC 433.

[60] Saw Pipes [f.n. 55].

[61] 2014 (9) SCC 263.

[62] Associated Provincial Picture houses Ltd. v. Wednesbury Corporation, (1948) 1 KB 243.

[63] Law Commission of India, Supplementary to Report No. 246 on Amendments to the Arbitration and Conciliation Act, 1996; "Public Policy" Developments post- Report No. 246, February 2015, available at http://lawcommissionofindia.nic.in/reports/reports216onwards.htm, last seen on 10/10/2015.

[64] 246th Report, [f.n. 8], para 35, p.21.

[65] Id.

[66] Bharat Aluminium Co v. Kaiser Aluminium Technical Services, (2012) 9 SCC 552.

[67] The Commission observed that the issue that a party in a foreign seated arbitration could not apply to the court for interim measures under Section 9 to secure the assets or for assistance in taking evidence should be redressed as the parties may make express agreement to incorporate the relevant sections to avail of the benefits.

[68] Bhatia International v. Bulk Trading S.A. and Anr., AIR 2002 SC 1432.

[69] (1999) 2 SCC 479.

[70] (2004) 9 SCC 619.

[71] Bharat Aluminium [f.n. 66].

[72] Bhatia International [f.n. 68].

[73] CIVIL APPEAL NO. 5765 OF 2014; (2014) 7 SCC 603.

[74] CIVIL APPEAL NO. 610 OF 2015.

[75] Krishna Sarma, Momota Oinam and Anghshuman Kaushik, 'Development and Practice of Arbitration in India - Has it Evolved as an Effective Legal Institution',

CDDRL Working Paper No. 103, October 2009, available at <http://iis-db.stanford.edu/pubs/22693/No_103_Sarma_India_Arbitration_India_509.pdf>, accessed on October 17, 2015.

[76] The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Bill, 2015.

[77] 246th Report, [f.n. 8].

[78] Sarma, Oinam and Kaushik [f.n. 75].

[79] Commercial Courts Bill [f.n.76].

[80] Section 10 of the Commercial Courts, Commercial Divisions and Commercial Appellate Divisions of High Courts Bill, 2015, stipulates how applications and appeals arising out of both international and domestic commercial arbitrations must be adjudicated by the proposed commercial courts and commercial divisions and commercial appellate divisions of the High Court(s). Section 2(c) Explanation (j), defines 'Specified Value' in relation to a commercial dispute as value of the subject matter in respect of a suit as determined in accordance with section 12 which shall not be less than one crore rupees or such higher value, as may be prescribed.

INDIAN COUNCIL OF ARBITRATION
Federation House
Tansen Marg
New Delhi 110001

Email : ica@ficci.com
Website : http://www.icaindia.co.in/