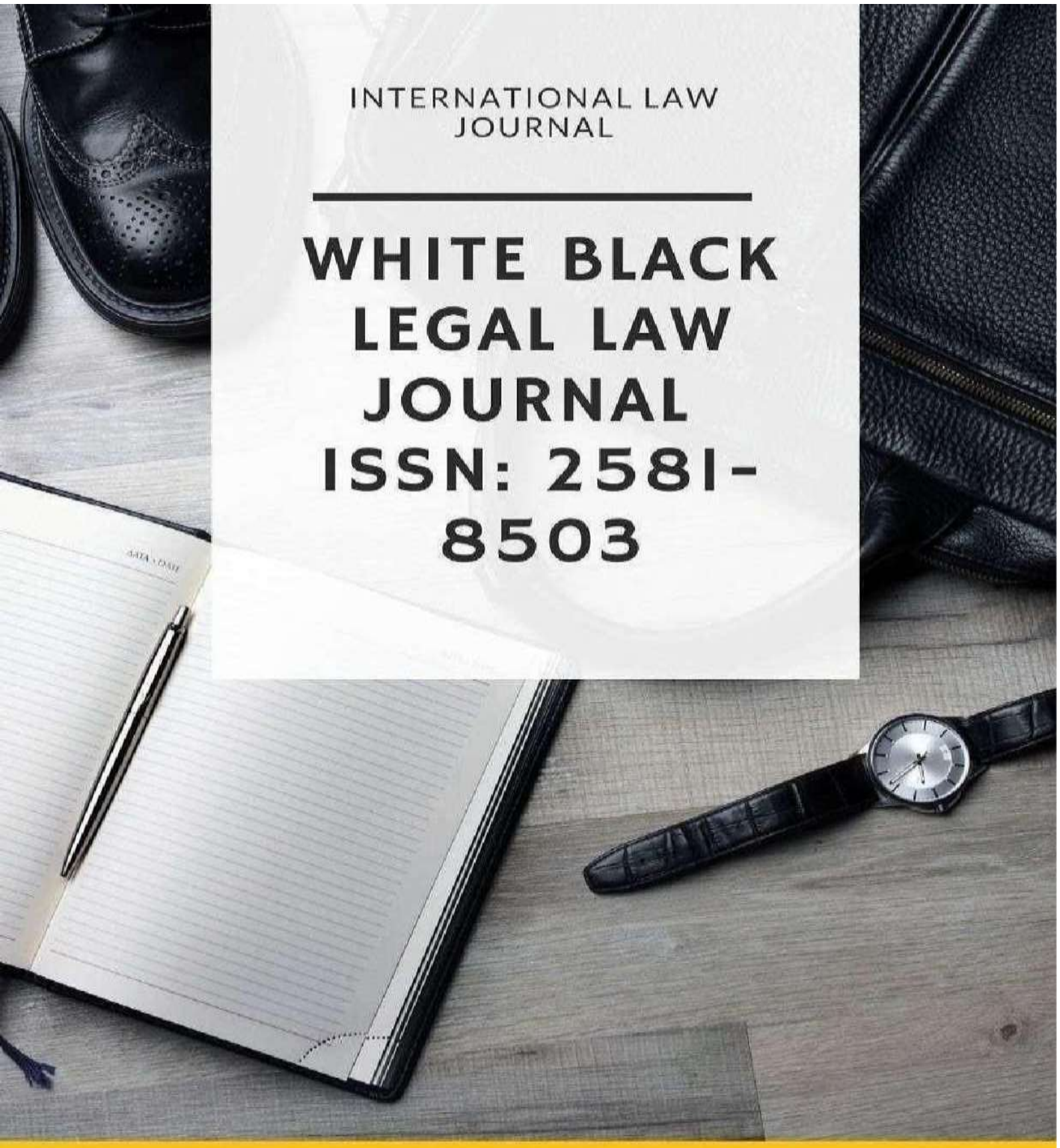

INTERNATIONAL LAW JOURNAL

WHITE BLACK LEGAL LAW JOURNAL

ISSN: 2581-8503

Peer - Reviewed & Refereed Journal

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

DISCLAIMER

EDITORIAL TEAM

Raju Narayana Swamy (IAS) Indian Administrative Service officer

Dr. Raju Narayana Swamy popularly known as Kerala's Anti Corruption Crusader is the All India Topper of the 1991 batch of the IAS and is currently posted as Principal Secretary to the Government of Kerala . He has earned many accolades as he hit against the political-bureaucrat corruption nexus in India. Dr Swamy holds a B.Tech in Computer Science and Engineering from the IIT Madras and a Ph. D. in Cyber Law from Gujarat National Law University . He also has an LLM (Pro) (with specialization in IPR) as well as three PG Diplomas from the National Law University, Delhi- one in Urban Environmental Management and Law, another in Environmental Law and Policy and a third one in Tourism and Environmental Law. He also holds a post-graduate diploma in IPR from the National Law School, Bengaluru and diploma in Public a professional Procurement from the World Bank.

Dr. R. K. Upadhyay

Dr. R. K. Upadhyay is Registrar, University of Kota (Raj.), Dr Upadhyay obtained LLB , LLM degrees from Banaras Hindu University & Phd from university of Kota.He has succesfully completed UGC sponsored M.R.P for the work in the ares of the various prisoners reforms in the state of the Rajasthan.

Senior Editor

Dr. Neha Mishra

Dr. Neha Mishra is Associate Professor & Associate Dean (Scholarships) in Jindal Global Law School, OP Jindal Global University. She was awarded both her PhD degree and Associate Professor & Associate Dean M.A.; LL.B. (University of Delhi); LL.M.; Ph.D. (NLSIU, Bangalore) LLM from National Law School of India University, Bengaluru; she did her LL.B. from Faculty of Law, Delhi University as well as M.A. and B.A. from Hindu College and DCAC from DU respectively. Neha has been a Visiting Fellow, School of Social Work, Michigan State University, 2016 and invited speaker Panelist at Global Conference, Whitney R. Harris World Law Institute, Washington University in St.Louis, 2015.

Ms. Sumiti Ahuja

Ms. Sumiti Ahuja, Assistant Professor, Faculty of Law, University of Delhi,

Ms. Sumiti Ahuja completed her LL.M. from the Indian Law Institute with specialization in Criminal Law and Corporate Law, and has over nine years of teaching experience. She has done her LL.B. from the Faculty of Law, University of Delhi. She is currently pursuing Ph.D. in the area of Forensics and Law. Prior to joining the teaching profession, she has worked as Research Assistant for projects funded by different agencies of Govt. of India. She has developed various audio-video teaching modules under UGC e-PG Pathshala programme in the area of Criminology, under the aegis of an MHRD Project. Her areas of interest are Criminal Law, Law of Evidence, Interpretation of Statutes, and Clinical Legal Education.

Dr. Navtika Singh Nautiyal

Dr. Navtika Singh Nautiyal presently working as an Assistant Professor in School of law, Forensic Justice and Policy studies at National Forensic Sciences University, Gandhinagar, Gujarat. She has 9 years of Teaching and Research Experience. She has completed her Philosophy of Doctorate in 'Intercountry adoption laws from Uttranchal University, Dehradun' and LLM from Indian Law Institute, New Delhi.

Dr. Rinu Saraswat

Associate Professor at School of Law, Apex University, Jaipur, M.A, LL.M, Ph.D,

Dr. Rinu have 5 yrs of teaching experience in renowned institutions like Jagannath University and Apex University. Participated in more than 20 national and international seminars and conferences and 5 workshops and training programmes.

Dr. Nitesh Saraswat

E.MBA, LL.M, Ph.D, PGDSAPM
Currently working as Assistant Professor at Law Centre II, Faculty of Law, University of Delhi. Dr. Nitesh have 14 years of Teaching, Administrative and research experience in Renowned Institutions like Amity University, Tata Institute of Social Sciences, Jai Narain Vyas University Jodhpur, Jagannath University and Nirma University.
More than 25 Publications in renowned National and International Journals and has authored a Text book on Cr.P.C and Juvenile Delinquency law.

Subhrajit Chanda

BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); Ph.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

ARBITRATION LAW IN INDIA - ENFORCEMENT AND CHALLENGE WITH SPECIAL EMPHASIS ON INTERNATIONAL COMMERCIAL ARBITRATION

AUTHORED BY - PRAGATI SRIVASTAVA
LL.M. II TRIMESTER

A. ABSTRACT

Arbitration is a component of the alternate dispute resolution mechanism that benefits parties who won to evade the mundane lengthy course to the local courts for settlement of disputes. It is a licit technique for the resolution of dispute outside the court, wherein the party to a dispute refers it to one or more persons namely arbitrator by whose decisions they concur to be bound. India adopted consequential reforms to the laws governing arbitration in the 1990s. The principal reason was that precedent legislation regarding arbitration was felt highly problematic and thus resulted in delay and needless expense. International Commercial Arbitration has become the traditional denotes of resolving disputes in international commercial transactions. International disputes with regard to India are steadily incrementing because of the influx of peregrine investments, overseas commercial transactions, and open-ended economic policies. This has drawn an incredible focus from the international community on India's International arbitration regime. There's no obligatory licit regime governing International commercial Arbitration, it has a permissive regime of conventions which a nation follows if it's a signatory of the identical. The 2 most vital conventions during this regard are, The Geneva Convention, The Incipient New York Convention 1958 and the UNCITRAL MODEL Law 1885. India may be a signatory for the identical. In fact, with the ten pristine Asian nations India was to possess signed the Convention of this paper is an endeavour to critically evaluate arbitration in India as the licit institution and withal evaluate international arbitration and international arbitration tribunal in India. It withal discusses concepts like arbitrator, arbitration accidence ,arbitrary award and its enforcement.

B. Introduction

This paper discusses the Indian statue of arbitration and conciliation i.e., the Arbitration and Conciliation Act. The aim of arbitration and conciliation act, 1996 is to engender expeditious decision redressal of commercial dispute by arbitration. The law of arbitration is mentioned within the arbitration and conciliation act, 1996. It came into force on 22nd August 1996. This Act includes the domestic, International commercial arbitration and additionally the enforcement of arbitral awards.

The purport of the act is:

- To cover international commercial arbitration and withal domestic arbitration and conciliation.
- To provide that the Arbitral Tribunal justify the award passed by it by giving reasons.
- The Act ascertains that the arbitral tribunal would remain within the circumscription of its jurisdiction.
- To make a just and fair arbitral procedure so that it consummate the wants of the precise arbitration.
- To minimize and minimize the supervisory role of courts in the process of Arbitration.
- To provide that every final arbitral award is enforced within the manner as a court decree.
- To sanction the arbitral tribunal to utilize different modes of settlement of disputes like mediation and conciliation.

C. HISTORY OF ARBITRATION IN INDIA

Arbitration contains a long history in India. In earlier people, people often voluntarily submitted their disputes to a group of sagacious men of a community, called the panchayat, for a binding resolution. Modern arbitration law in India was engendered by the Bengal Regulation in 1772, during the British rule. The Bengal Regulations provided for reference by a court to arbitration, with the consent of the parties, in lawsuits for accounts, partnership deeds, and breach of contract, amongst others. Until 1996, the law governing arbitration in India consisted mainly of three statutes: (i) the 1937 Arbitration (Protocol and Convention) Act. (ii)the 1940 Indian Arbitration Act, and (iii) the 1961 Peregrine Awards (Apperception and Enforcement) Act15. The 1940 Act was the general law governing arbitration in India along the lines of the English Arbitration Act of 1934, and both the 1937 and the 1961 Acts were designed to enforce peregrine arbitral awards (the1961 Act implement the Incipient York Convention of 1958)16 The regime enacted the Arbitration and Conciliation Act, 1996 in an effort to modernize the archaic 1940 Act. The 1996

Act is a comprehensive piece of legislation modelled on the lines of the UNCITRAL Model Law. This act repealed all the three antecedent statutes (the 1937 Act , the 1961 Act, and the 1940 Act). The 1996 Act covers both domestic and international commercial arbitration.

i. THE ARBITRATION ACT,1940

The Arbitration Act, 1940 was enacted in British India which consolidated and amended the law relating to arbitration as contained in the India Arbitration Act, 1899 and the second schedule of the Code of Civil Procedure 1908. The aim of the Act was for expeditious disposal of the disputes through the forum culled by the affected parties. The Arbitration Act, 1940 treated only domestic arbitration. As far as international arbitration was concerned, there was no substantive law on the subject.

ii. THE ARBITRATION AND CONCILIATION ACT,1996

The 1996 Act, which repealed the 1940 Act, was enacted to provide an efficacious and expeditious dispute resolution framework, which would inspire confidence in the Indian dispute resolution system, magnetize peregrine investments and reassure international investors in the reliability of the Indian licit system to provide an expeditious dispute resolution mechanism.

The 1996 act contains two eccentric features that differed from the UNCITRAL Model Law. First, while the UNCITRAL Model Law was designed to apply only to international commercial arbitration, the 1996 Act applies both to international and domestic arbitrations. Second, the 1996 Act transcends the UNCITRAL Model Law in the area of minimizing judicial intervention.

iii. APPOINTMENT OF ARBITRATOR

Section 11 of the Act mention about the strategy of arbitrators appointment, Section 12 of the Act enumerates the on which grounds can be challenged about the appointment of an arbitrator by a party or parties whereas the advanced Section i.e. Section 13 mentions the procedure to be adopted for challenging the appointment of an arbitrator. Both the sections are, consequently, cognate sections. In keeping with Section 11, “a person of any nationality may be an arbitrator, unless concurred by the parties”. The abovementioned section withal deals with wherein the parties fail to appoint an arbitrator mutually. In such a situation, the appointment shall be made, upon request of a party, by the Supreme Court or any person or institution appointed by such Court, in the case of an International Commercial arbitration or by High Court or any person or institution appointed by such Court, in a domestic arbitration.

As per section 12, the arbitrator appointment could withal be challenged only in two situations. First, if the circumstances subsist the justifiable grounds is independence or impartiality; second, if this does not qualify accord the parties. Sub-section(1) casts an obligation on a person who is for an arbitrator to disclose in inscribing whether there is independence, impartiality or not. These obligations apply not only to a sole arbitrator or the chairman of the arbitral tribunal but withal party-appointed arbitrators. This provision contemplates two stages for an arbitrator to make the disclosure. The primary stage is the pre-appointment stage, when the prospective arbitrator is approached for being appointed as an arbitrator and the second stage is after his appointment as arbitrator and during the course of arbitral proceedings; any circumstances liable to convey ascend to justifiable doubts regards to his independence or impartiality it comes into subsistence then the arbitrator should without any nonessential delay disclose the circumstances in inscribing to the parties.

iv. JURISDICTION OF ARBITRATORS

Under the Arbitration Act of 1940 no provision of the arbitral tribunal was sanctioned to make a final decision of jurisdiction and it was the potency of the court to decide on the jurisdiction. But under Section 16 of the Arbitration and Conciliation Act 1996 verbalized that the Arbitral Tribunal has sanctioned the puissance to make a rulings on its own jurisdiction. Section 16 (1) of the Arbitration and Conciliation provides that the Arbitral Tribunal may rule on its own jurisdiction, including ruling on any remonstration with reverence to the ease or validity of the arbitration accidence. Section 16 of the Arbitration and Conciliation Act additionally contains the principle of competence. It has two aspects that are as follows: Firstly, without support of the courts the tribunal may decide on its jurisdictions .

Secondly, afore the tribunal has made a resolution on this issue the courts are averted from determining this issue.

D. ARBITRATION ACQUIESCENT

The definition of “arbitration agreement” under section 7 is identical to Article II (1) of the Incipient York Convention. Incipient York Convention sets forth the requisite of valid acquiescent and is of a categorical consequentiality within the context of Article 7 of the Model Law. The Model Law was optically discerned as an expedient of demystifying and widening the range of betokens that constitutes an “arbitration agreement” under the convention.

Under per Section 7(1) of the Act and UNCITRAL Model Law defines an arbitration accidence

as " An acquiescent by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in reverence of a defined licit relationship, whether contractual or not". Between the parties the arbitration accidence must disclose their definite intention to refer their present or future dispute in reverence of a definite licit relationship for arbitration with bilateral rights and binding obligations to make such reference46 and no particular kind of arbitration47 and ergo the parties have an intention to refer the dispute to the arbitration according to terms of accidence.

E. ARBITRAL AWARD

An arbitration award is an award which is granted by the arbitrator through their decision. It's that one party has to pay mazuma to the alternative party. It should even be a non-financial award, such as ceasing a certain business practise or annexing an employment inducement. Arbitral award as per section 2 (1)(c) includes 'an interim award'.

According to Section 31 of the Act:-

1. The award should be in inscribing; oral awards are not apperceived in law.

2. The award can be signed by the members of the arbitral tribunal.

3. If an arbitral tribunal consists of more than one member, majority members are to sign the award.

4. the arbitral tribunal shall mention date and place of the award where it is made; and

5. After the award is made, a signed copy shall be distributed to each party.

6. An arbitral award may either be a 'final award' or an 'interim award'. It may additionally be a "domestic award

7. An award shall have the same effect as any award in the dispute, it is final and binding between the parties and is enforceable as if it was a decree of the court.

F. INTERNATIONAL COMMERCIAL ARBITRATION IN INDIA

International Commercial Arbitration is an area of arbitration which, over the years, has sanctioned parties to foster commercial trading relationships by breaking down the barriers of national borders. Keeping this in mind, this chapter discusses what International Commercial Arbitration is, what the law governing it is in India along with the case laws that have availed develop it over the years. International Commercial Arbitration is peradventure one of the most

paramount forms of arbitrations in the coming times, simply because the magnitude of the disputes that are dealt with by it.

S. 2(1)(f) of the Arbitration Act164 defines the term "International Commercial Arbitration" as a licit relationship which must be considered commercial, with the term commercial being construed broadly, while keeping in mind the manifold of activities which are an integral part of international trade today.

For an arbitration to be genuinely considered as an "International Commercial Arbitration", either of the parties must be a peregrine national or denizen, or a peregrine body corporate or a company, sodality or body of individuals whose central management or control is in peregrine hands. Ergo, an arbitration having its seat in India, with one of the parties being a peregrine party, will be considered to be an International Commercial Arbitration, which is subject to Part I of the Act166. However, if the parties opt to have their seat of arbitration outside of India, with one party being a peregrine party, then Part I of the Act will not be applicable, in which situation, Part II of the Act will find applicability on the parties.

G. INTERNATIONAL CONVENTIONS TO WHICH INDIA IS A PARTY.

1. The Incipient York Convention on the Apperception and Enforcement of Peregrine Arbitral Awards, 1958.

2. This convention is a consequential milestone on the timeline of International Commercial Arbitration. It has a total of sixteen Articles. It introduces the conception that the same convention will apply to bilateral and withal multilateral contracts between the nations, enabling the convention to be protective of the rights of each party that is involved in the contract.

3. Geneva Convention on the Execution of Peregrine Arbitral Awards, 1927 - This convention enacted in 1927 has precisely 11 Articles in total. Under Article 1 of this convention, certain criteria have been laid down in order for a peregrine award to be apperceived and enforced. Further, the second Article lays down that even if the criteria in the first article are consummated, the award won't be apperceived and enforceable unless the Courts are duly slaked. It further dictates that, "If the award has not covered all the questions submitted to the arbitral tribunal, the competent ascendancy of the country where apperception or enforcement of the award is sought

can, if it cerebrates fit, defer such apperception or enforcement or grant it subject to such guarantee as that ascendancy may decide.171

H. UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, 1985.

The UNCITRAL Model Law, as it is commonly referred to, was adopted by the Coalesced Nations Commission on International Trade Law on June 21, 1985. Each of the individual states which are parties to this, have individually adopted this Law into their own domestic laws, to bring into conformity their respective National Laws with the prevailing international scenario. Apart from the above Conventions and Protocols, India is a party to virtually 85 bilateral and multilateral investment treaties with a number of countries.

The Procedure of International Commercial Arbitration in India.

India, primarily apperceives two types of International Commercial Arbitration by way of the Arbitration Act173. They are as follows:

(1) International Commercial Arbitration with a seat in India.

(2) International Commercial Arbitration with a seat in a reciprocating country.

I. INTERNATIONAL COMMERCIAL ARBITRATION WITH A SEAT IN INDIA

When the seat of arbitration of the International Commercial Arbitration is in India, the procedure, as laid down below, is followed:

a. Notice of Arbitration.

The first step, like in any other arbitration in India, is to send the Notice of Arbitration. The primary reason for this is the applicability of Part I of the Arbitration Act to International Commercial Arbitrations with a seat in India. The Arbitration can only be verbally expressed to have commenced when either party sends a Notice of Arbitration to the other party, whereby, the other party is required to take certain steps in connection with the arbitration. The Notice of Arbitration is a requisite of S.21 of the Indian Arbitration Act. The remaining process will remain the same as stated above.

b. International Commercial Arbitration with a seat in a Reciprocating Country.

The Law in India with regards to International Commercial Arbitration which has a seat in a reciprocating country is governed by Part II of the Indian Arbitration Act. Post the amendment of 2015 and the decision of the Hon'ble Supreme Court of India in the case of Bharat Aluminium Co. v. Kaiser Aluminium Technical Accommodation the law has optically discerned major changes, with the law becoming more fixated on the seat of arbitration. The Amendment Act makes it clear that Part I of the Arbitration Act does not apply to peregrine seated arbitrations, with the exception of Sections 9, 27 and 37, unless there is an acquiescent to the contrary between the parties. The cull of a peregrine seat of arbitration is an implicative insinuation that the application of Part I of the Arbitration Act is omitted.

Part II of the Act is divided into two chapters and is applicable to all peregrine awards sought to be enforced in India and to refer parties to arbitration when the seat is outside India. Chapter I deals with peregrine awards distributed by the signatory territories to the Incipient York Convention which have reciprocity with India, while Chapter II deals with the Geneva Convention. Since now most countries which are a signatory to the Geneva Convention are a signatory to the Incipient York Convention, Chapter II of Part I of the Act has virtually been rendered infructuous

c. Foreign award.

Section 44 of the Act defines a peregrine award It must consist of the following essentials:

(1) It must be an arbitral award;

(2) It must be on distinctions between persons which arose out of a licit commercial relationship, whether that relationship is contractual or not;

(3) The relationship must be considered commercial under the law that is in force in India;

(4) The relationship must have arisen on or after October 11, 1960;

(5) The Award must have been made in pursuance to an Arbitration Acquiescent to which a Convention of the First Schedule applies, that is, the Incipient New York Convention.

(6) The Award must have been made in a territory which has been notified as a 'Reciprocal Territory' by notification in the Official Gazette.

(7) Section 46 provides the circumstances when a Peregrine Award will be binding and states that any peregrine award which is enforceable under this Act shall be treated as binding for all purposes between the persons whom it was made, and may be relied upon by any of those persons by way of defence, set off or otherwise in any licit proceedings in India

d. Enforcement and Execution of Peregrine Award:

Peregrine Awards, once made, may be enforced at the request of a party by initiation of the felicitous proceedings. Sec 48 provides that the enforcement may be relucted at the request of the party against whom it is invoked, if that party can furnish proof to the Court or the Court finds as follows:

(a) The parties to the accidence were in some incapacity under the law applicable to them; or

(b) The Acquiescent is not valid under the law to which the parties had subjected it, or under the law of the country where the award was made; or

(c) The Party against whom the award is invoked was not given congruous notice of appointment of the arbitrator, or of the arbitral proceedings, or was otherwise unable to present their case; or

(d) The composition of the arbitral tribunal or the procedure of arbitration was not in accordance with the acquiescent of the parties or the law of the country where the arbitration took place, as the case may be; or

(e) The award has not yet become binding or has been set aside by a competent court of the country under whose law such award was made; or

(f) The subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(g) The enforcement of the award is contrary to the Public Policy of India; or

(h) The award deals with a dispute which does not fall under the scope of the arbitration acquiescent.

CONCLUSION AND SUGGESTIONS

Arbitration in India has evolved a great deal over the ages, and has made leaps and bounds over the years. The Indian Administration has wrought profoundly and strenuously hard to stay in touch with the prevailing International position of Arbitration and has even reformed its Arbitration Act in 1996 to bring it in line with the UNCITRAL Model Law. Due to this, albeit the Indian Arbitration Law has more or less been in line with the prevailing international position, a long way yet is to be covered. Judicial Intervention and the differing view of Courts. Judicial intervention into Arbitral Proceedings is one of the most major challenges that is hampering the magnification of Arbitration in India and this has to be ameliorated.

Challenge of Arbitral Award

The Arbitration and Conciliation Act provides for the challenge of an Arbitral Award, on certain grounds which are envisioned in the Act. Apart from that, it withal provides for the enforcement and execution of awards, which only acts in protracting the duration of arbitration.

Party Autonomy should be minimized

The Indian Arbitration Scheme already provides for a substantial amplitude of party autonomy as parties have the liberation to opt the place of arbitration, the law governing the dispute, the arbitrators, i.e. the adjudicators of the dispute, apart from the procedure itself that is to be followed. Any further control over the proceedings will only do more harm than good.