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THE 1996 ARBITRATION AND CONCILIATION ACT: A STEP TOWARD IMPROVING ARBITRATION IN INDIA

Harpreet Kaur

I. INTRODUCTION

India implemented the 1996 Arbitration and Conciliation Act (hereinafter referred to as the 1996 Act) for the following purposes: to narrow the basis of challenges of the awards; decrease judicial supervision; ensure finality of awards; and expedite the arbitration process. Parliament intended to increase party autonomy and create uniformity in the arbitration process with the minimum judicial intervention. More than a decade later, scholars and practitioners, within and outside of India, complain that despite Parliament’s intent, judicial intervention and delays lead to unpredictability and frustration in the arbitration process. In fact, these critics claim that parties prefer to arbitrate outside the country or choose litigation in Indian courts rather than include arbitration as an option in contractual agreements.

This paper evaluates the reform and makes three points. First, I demonstrate that the 1996 Act improved the arbitration process since judicial intervention only occurs when necessary to police the process and to resolve and interpret ambiguities about Parliament’s intent. Second, in spite of being a substantial improvement, the process can be even more effective in expediting the process with a few revisions. Arbitration in

* J.D. Candidate 2010, Hastings University of Law. I would like to thank Professor William Dodge and Dorit Reiss for their valuable assistance, input and encouragement with this article.


3. Justice A K Sikri, Judge, High Court of Delhi, Recognition and Enforcement of Awards in India, Address before the Indian Arbitration Bar & Singapore International Arbitration Centre (Jun. 22, 2008).

4. Id.

5. Id.
India can further improve if the arbitral tribunal had a more active role in dispute resolution. Finally, revising the act to only allow institutional arbitration is crucial for parties and attorneys to gain confidence in the legitimacy of arbitration process.

Arbitration is a deeply embedded dispute resolution mechanism in India’s commercial practices and social life. It can be traced back to when people voluntarily submitted their disputes for consideration to the panchayat, the wise men of the community, whose decisions were binding on the parties. The law governing arbitration in a formal sense was first introduced during the British rule with the creation of the Bengal Regulations in 1772. Prior to 1996, arbitration rules were found in three different enactments, the Arbitration Act of 1940 (hereinafter referred to the 1940 Act), the Arbitration (Protocol and Convention) Act of 1937, and the Foreign Awards Act of 1961.

Although arbitration has a long history in India, the arbitration process itself was considered to be archaic, unpredictable, and expensive. Mistrust in arbitration increased litigation in courts and a larger backlog of cases. This added further pressure to the limited existing judicial resources. Justice D.A. Desai remarked, “The way in which the proceedings under the 1940 Act are conducted and without an exception challenged in the Courts, has made lawyers laugh and legal philosophers weep.” The enforcement of awards was another long and arduous process. The losing party used the court as a mechanism to delay or avoid enforcement. One author described arbitration in India as a never ending war between two irreconcilable principles—the high one that demands justice even if the heavens fall and the low principle which demands an end to litigation. “In India, we have our Arbitration Act since 1940—it governs domestic and reaches out to foreign arbitration as well; it is based on the ‘high principle’ and the losing party never lets a Court forget it!”

Furthermore, the 1940 Act only governed domestic arbitration, limiting its applicability in dealing with the increasing international litigation. India’s lack of established standards in resolving international arbitration disputes resulted in unpredictability and disgust towards the

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7. Id.
9. Id.
10. Id.
13. Id.
process. Moreover, the continuing trend of globalization, increasing technological advances, availability of information and transportation increased the amount of domestic and international commerce activities.\textsuperscript{15} The increase in commercial transactions led to an urgent need for an efficient and reliable dispute resolution mechanism.\textsuperscript{16} The backlog of cases and length of time to resolve a single case increasingly undermined the courts' credibility in dealing with disputes and impacted the flow of foreign investment.\textsuperscript{17} Domestic and foreign parties claimed that the delays and expenses incurred in adjudicatory proceedings were key barriers for parties to enter into contractual obligations in India.\textsuperscript{18} The domestic parties, interested in attracting foreign investment, challenged Parliament to modernize the arbitration regime and increase party autonomy.\textsuperscript{19} The Indian Government, recognizing the importance of creating an arbitration system that would increase efficiency and attract foreign investors, repealed all previous statutes and enacted the 1996 Act to provide a uniform regime for both domestic and international arbitration.

II THE 1996 ARBITRATION ACT

The 1996 Act is comprised of three different parts. The first part deals with provisions governing domestic and international arbitration in the Indian territory, such as arbitration agreements, composition and jurisdiction of arbitral tribunals, and parameters for court intervention; the second part provides provisions for the recognition and enforcement of foreign awards under the New York and Geneva Conventions; the final piece of the Act lists provisions related to conciliation in India.\textsuperscript{20}

The rules adopted for domestic and international arbitration are similar with three exceptions. First, domestic arbitration can be any type of dispute that is arbitrable under Indian law; whereas an international arbitration must satisfy the additional requirement of being a dispute arising out of a legal relationship defined as 'commercial' within Indian law.\textsuperscript{21} Second, the 1996 Act allows the parties to choose the proper law; however, domestic cases require the use of applicable Indian law.\textsuperscript{22}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{15} Jain, supra note 14.
\item\textsuperscript{16} Id.
\item\textsuperscript{17} Id.
\item\textsuperscript{18} Id.
\item\textsuperscript{19} Id.
\item\textsuperscript{20} Sikri, supra note 3, at .2 Concilliation is a form of ADR that allows the parties to utilize a conciliator to work with the parties separately to resolve their differences, normally through concessions.
\item\textsuperscript{22} Id.
\end{enumerate}
\end{footnotesize}
Finally, the Chief Justice of an appropriate High Court or his delegate is empowered to intervene if there is a deadlock in appointing a domestic arbitral tribunal; only the Chief Justice of the Supreme Court or his delegate is vested with this power in international arbitration. The reasoning is that a High Court has jurisdiction over a state and thus is better able to deal with domestic issues. On the other hand, the Supreme Court as the supreme law of the land is more effective in resolving international disputes.

The codification of the 1996 Act primarily implemented the UNCITRAL Model Law on International Commercial Arbitration but with some important deviations. The 1996 Act contained two unusual characteristics: (1) it minimized judicial intervention to a greater extent than what was stipulated in the UNCITRAL Model Law; (2) it extended the UNCITRAL Model Law, which was designed for international arbitration, to domestic and foreign arbitration.

A. JUDICIAL DISCRETION

Parliament responded to criticisms that the 1940 Act gave judges wide discretion to intervene in arbitration proceedings by favoring party autonomy and efficiency in the 1996 Act. Judges face a particular challenge in implementing this Act. They seek a delicate balance between ensuring justice by correcting any injustice, resolving arbitration disputes efficiently and granting parties’ autonomy. The 1996 Act specifically provided for limited instances in domestic arbitration when a court can intervene prior to the making of an award by the arbitral tribunal. The Court can intervene only in the following ways: to stay legal proceedings and refer parties to arbitration; to grant interim measures; to appoint arbitrators in cases of conflict; to terminate the mandate of arbitrators in a limited set of circumstances; and assist in taking evidence. A court is also limited in its ability to stay a proceeding. If a court finds other means

25. Dholakia, supra note 6, at 1.
28. Id. at § 9.
29. Id. at § 11.
30. Id. at § 14(2).
31. Id.
of expanding its scope of authority, Parliament included additional safeguards to minimize intervention. For instance, in Section (8) of the code, a court’s power is limited to referring the parties to arbitration if there is an arbitration agreement. The Supreme Court held that if there is an agreement and the subject matter is within the scope of the agreement and a party is requesting arbitration, the parties must be referred to arbitration. "There must be an arbitration agreement: a party to the agreement brings an action in the court against the other party; . . . the subject matter of the action is the same as the subject matter of the arbitration agreement and the other party moves to the court for referring the parties to arbitration before submitting the first statement on the substance of the dispute."

The judicial intervention is further limited by Section 5 of the code which allows intervention but only to the extent permitted in Part I of the Act. Part I requires the court to enforce an arbitration agreement and refer the parties to arbitration. Parties attempt to avoid arbitration by claiming that the subject matter of their dispute falls outside the scope of the arbitration agreement. However, courts tend to allow the arbitral tribunal to determine the scope of the agreement to ensure the integrity and timeliness of the arbitration proceedings.

Courts’ diligence in following the Parliament’s intent led to broad interpretation of the limitation on judicial power. For instance, the 1996 Act does not include any provisions to separate parties or disputes that exceed the arbitration clause of the agreement. Therefore, in Sukanya Holdings Limited v. Jagdish Pandya, the Supreme Court refused to split the causes of action or parties because intervention will result in a totally new procedure not contemplated by the Act and will inevitably lead to delaying the proceedings.

Even if a court is entitled to determine the validity of an arbitration agreement, the court must still consider the limitations set forth in Section 16 of the Act. This provision grants the arbitral tribunal the following powers: to establish the existence of the underlying of the contract; once established, to determine its validity; to verify if the subject matter is within the scope of the arbitration agreement; and to decide if it has jurisdiction. There is no statutory authority in applying Section 5 for the court to stay a proceeding based on a determination that a tribunal lacks jurisdiction or

36. Id.
39. Id. at 7.
that the agreement is invalid. A court is only limited to review the proceedings if an award is challenged. Part I of the Act minimized the judicial role in arbitration to only limited instances.

Part II of the 1996 Act contained similar provisions to limit judicial intervention in international arbitration. It expressly states that the court must refer the parties to arbitration upon the request of one of the parties unless the court finds the agreement is null and void, inoperable, or incapable of being performed. The Supreme Court held that it will be a prima facie review and will not be binding on the arbitral tribunal. Thus, an arbitral tribunal can still proceed with arbitral proceedings. A party can request a full trial before the tribunal or the court at the post award stage. The Court further stated that if the arbitrator, after trying the issue, finds that the agreement is invalid or void or that the dispute is outside the scope of the agreement, it will still afford the party requesting arbitration an opportunity of proceeding to arbitration.

Courts have attempted to follow the edict set forth in the 1996 Act and only interfere in cases of ambiguity or challenges, where their intervention may well be in the interest of the parties. Judicial intervention can be justified when Parliament’s intent is not clearly stated in the Act. Unclear provisions create uncertainty, one of the criticisms of the earlier act. If the act clearly does not address the issue at hand, the judiciary in its role as the interpreter of Parliament’s intent is the most likely actor to resolve the dispute.

Judicial intervention is also necessary in the enforcement of awards. If the courts did not intercede in the arbitration proceedings at this stage, it can possibly lead to instability and unmerited awards. Arbitrators would decide on cases based on their interpretation of Parliament’s intent in enacting a provision. This leads to an issue of consistency and fairness in the arbitration process as each proceeding is dependent on a subjective interpretation of the arbitrators of that particular proceeding. To ensure fairness, consistency, and legitimacy of arbitration, the judiciary must intervene in proceedings. A judge will also be involved in the enforcement of an award if it goes against public policy. Again, it is necessary for the courts to intervene because it is the role of the state—here represented by the judicial branch—to ensure that the award does not run counter to India’s public policy. If awards are enforced that are contrary to public interest, it delegitimize the arbitration process. It also defeats Parliament’s purpose in enacting this Act because parties will be reluctant to pursue arbitration. In addition, in enacting provisions that necessitate judicial

40. Kamal, supra note 38.
43. Id.
interpretation or enforcement, Parliament clearly intended the judiciary to play a role in arbitration.

Despite the arguments supporting judicial discretion, the courts have been cautious and respectful of the limits of their role. They only intervened when necessary to resolve ambiguities or challenges to the enforcement of awards that are contrary to public policy. Recent instances of judicial interference occurred when the Act differed from the UNCITRAL Model Law or was ambiguous in defining terms such as international arbitration and commercial arbitration. The judiciary also intervened in as required in the enforcement of awards. The following section describes several such interventions.

B. DEFINING INTERNATIONAL ARBITRATION

When dealing with dispute resolution in India, it is important to determine if it is a domestic or international arbitration because of the distinction's relevancy in dealing with the application of proper law, nullification, and enforcement of proceedings. It was necessary for the court to intervene here because the 1996 Act's characterization of an international arbitration deviated from the UNCITRAL Model law's definition. Section 2(f) of the 1996 Act defines international arbitration as arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under law in force in India and where at least one of the parties is

an individual who is a national of, or habitually resident in, any country other than India; or

a body corporate which is incorporated in any other country that India; or

a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or

the government of a foreign country.

UNCITRAL Model law states "An arbitration is international if: a.) the parties to an arbitration agreement have, at the time of the conclusion of the agreement, their places of business in different States; or b.) one of the following places is situated outside the State in which the parties have their place of business: (i) any place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or c.) the parties have expressly agreed that the subject matter of the
arbitration relates to more than one country.\textsuperscript{44}

This deviation from the UNCITRAL Model Law also conflicts with the traditional understanding of International Law.\textsuperscript{45} For instance, even if the disputed act or agreement occurred within the Indian territory, it will be an international arbitration if one of the parties is defined as 'international' under the 1996 Act. Thus, the parties must follow the provisions set forth for governing international arbitration. Although this is contrary to what is common practice in international transactions, parties are allowed to still choose Indian law as the substantive law when forming the contracts based on the exception that is set forth in the first section of the 1996 Act. Furthermore, an agreement between two Indian parties will always be considered domestic despite all the actions arising out of the dispute occurred outside the Indian boundary. This is also contrary to international law and caused confusion. The complexity of the definition of international arbitration required the court to intervene in interpreting the term in the context of the 1996 Act. The court clarified the term ensuring that the parties were aware of the difference in the Act and included the necessary clarification in the contractual agreement. Judicial intervention was necessary here to avoid future litigation on similar issues by ensuring parties were aware of this deviation when entering into contractual agreements.

C. COMMERCIAL ARBITRATION

The courts will also involve themselves in the arbitration process to resolve ambiguities and ensure it reflects Parliament's intent. The UNCITRAL Model Law defines commercial arbitration as: covering all matters arising from all relationships of a commercial nature, whether contractual or not.\textsuperscript{46} However, similar to the prior act, the 1996 Act did not provide any definition of its own. The result was variation in how courts interpreted a 'commercial transaction.' Some courts interpreted it very broadly, even holding divisions of assets between families to be of a commercial nature.\textsuperscript{47} In contrast, other courts have held that agreements

\textsuperscript{44} UNCITRAL Model Law, supra note 24.
\textsuperscript{45} Nair, supra note 2 at 705.
\textsuperscript{46} UNCITRAL Model Law states
  Relationships of a commercial nature include, but are not limited to the following transactions: any trade transaction for the for the supply or exchange of goods and services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; construction; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail, or road.
dealing with the exchange of technical know-how were not commercial.\textsuperscript{48}

However, in recent years, the Supreme Court has adopted the UNCITRAL interpretation of the term "commercial."\textsuperscript{49} The court reasoned that the purpose of the act was to facilitate trade and provide a quick resolution and this required a liberal construction of the term.\textsuperscript{50} Thus, the Supreme Court applied a uniform definition of the term "commercial." The judiciary intervened in proceedings to ensure that Parliament’s intent was implemented by providing a clear meaning to an ambiguous term. Furthermore, a uniform definition of the term commercial arbitration ensured fewer litigants asking the courts to intervene to resolve disputes.

D. ENFORCEMENT OF AWARDS

Although critics would try to interpret the arbitration process as one that is separate from the judiciary, arbitrators and judges are actually partners in the arbitration process. A judge from the Supreme Court likened the relationship between the two as a "relay race."\textsuperscript{51} In the initial stages, the Court is the only one who is able to step in to enforce the arbitration agreement.\textsuperscript{52} The arbitrators are then in the charge of the process until they make the award.\textsuperscript{53} The Courts will then step in to use their coercive powers to ensure the enforcement of the award.\textsuperscript{54}

The 1996 Act also revised the enforcement of awards to decrease award challenges. The options available to challenge an award under the 1996 Act are much more limited than under the 1940 Act.\textsuperscript{55} Unlike the prior act which required the arbitral tribunal to file the award in court, the 1996 Act provides for legal finality of an award instantaneously unless a party challenges it under Section 34 of the 1996 Act.\textsuperscript{56} An award is considered valid if it is recorded, written, and signed by a member of the tribunal, and states the reasons, date, and place that the award is to be delivered to the successful party.\textsuperscript{57}

Another difference from the prior act is that there is no provision

\textsuperscript{49} Nair, supra note 2, at 706
\textsuperscript{50} Sikri, supra note 3, at 6.
\textsuperscript{51} Jain, supra note 14 at 2.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{56} Bhatia International, 4 S.C.R. 411.
\textsuperscript{57} The 1996 Arbitration Act, supra note 21 at § 31.
allowing a challenge on an “error apparent on the record.”

The amount of time and reasons for a party challenging an award decreased with the elimination of this provision. The 1940 Act was applicable only for challenging domestic awards and the Foreign Awards Act for enforcement of international arbitration. The 1996 Act applies to both foreign and domestic awards. The 1996 Act confined objections to those available against a foreign award even if a party is disputing a domestic award.

However, a foreign award must fit two standards to be enforceable under the 1996 Act: (1) the dispute must arise out of a legal relationship considered to be commercial under India’s law and (2) the country making the award must be one notified by the Indian Government. Although India signed the New York Convention, it included two reservations. First, recognition and enforcement only applies if it is a contracting state. India will notify the countries to which the Convention would apply and which ones have made reciprocal provisions for enforcement. There are only a few countries that are acceptable under the second requirement, thus creating a limitation on which countries parties can choose for arbitration. The second reservation is that it will only apply the Convention to differences arising out of legal relationship which are considered “commercial” under Indian law.

There are two fundamental differences between domestic and foreign award enforcement. First, unlike a domestic award which is final and enforceable unless there is a successive challenge, a foreign award is required to go through an enforcement procedure in which the court determines if the award is enforceable before it is executable in India. Second, unlike a domestic award, courts can only refuse to enforce a foreign award but are not able to set it aside. Some may argue that requiring court enforcement of a foreign award causes the same type of delays as before in the arbitration process. However, the court’s enforcement of foreign awards expedites the process and ensures that there are no further delays. By filing the foreign award with the court, the award has already been reviewed for its applicability. This decreases the amount of litigation and ensures the enforceability of the award by deterring parties from appealing the award.

One area where judicial intervention is necessary because of the 1996

62. Id.
63. Kachwaha, supra note 60.
64. Id.
Act is a challenge based on public policy. Public policy is a highly controversial ground for a challenge. Parties argue that allowing such intervention widens judicial discretion in arbitration. However, by inserting this provision that was absent in the prior Act, Parliament wanted to ensure that awards were in the public interest or public good.

Domestic and foreign awards follow the same standards in setting aside the enforcement of an award on public policy grounds. Although the 1940 Act did not have a specific provision for public policy, such a challenge could proceed under Section 30. This section allowed judicial interference when the award was improperly procured or invalid. The Foreign Awards Act did have a specific provision for setting aside an award on a public policy challenge but did not specify if the provision was based on India’s public policy. Since there was no specific policy defined, it increased litigation on challenges. However, the Supreme Court ruled that the term “public policy” in the Act referred to India’s public policy. The 1996 Act, in Section 34, specifically provides for the setting aside of a domestic award if it is contrary to India’s policy. Section 48 permits courts to refuse a foreign award if it is contrary to India’s public policy.

An issue arises as to the scope of a challenge under the public policy defense. Prior to Renugascar, the Supreme Court defined it to include matters of public interest or public good. In Renugascar, the Supreme Court held that a foreign award can be put aside on the grounds of public policy if it is contrary to the fundamental policy of India’s law or the interest of India, goes against justice or morality, or shocks the conscience. As discussed above, a foreign award is one that is made outside India in a Convention country or from an agreement governed by India’s law. This narrows the scope as to when or what can be challenged by the parties.

The legislature wanted to narrow the scope of challenges to domestic awards also. In that spirit, when deciding on enforcing a domestic award, the Supreme Court interpreted public policy similarly to its decision in

65. Nair, supra note 2, at 1.
67. The 1940 Arbitration Act, supra note 58.
68. Id.
69. Mukhopadhyay, supra note 66, at 1.
73. Id.
74. Id.
75. Id. at 4.
76. Id. at 2.
Renugascar but extended it to include patent illegality.77 This meant the award must affect the rights of the parties and be either contrary to the substantive law or against the terms of the contract to be put aside.78

Although it can be argued that the Supreme Court intervened here to extend its jurisdiction over arbitration proceedings, the court tends to intervene when the reasoning behind an award is not clearly stated. The legal trend lately recognizes the importance of the rule that requires reasoning behind an award.79 An award is required to state reasons for the decision unless the award was a settlement or the parties agreed not to list the reasons.80 Although it can be viewed as an expansion of the court’s powers, intervention is justified here because it increases the transparency of the arbitration process. This procedural intervention legitimizes the arbitration process by providing the parties and the courts clarity and visibility into the decision making process. Not only does this provide the losing party with an explanation for the decision but also gives the courts a substantive record to review in case of an appeal.81

Critics see this as the Court giving a broad interpretation to the term “public policy.” However, it has not led to the review of the merits of each award that is appealed under the guise of a violation of public policy. The Delhi High Court held that it will not review the merits of each case if there is no allegation of fraud or corruption in the making of the award that would be contrary to the public policy of India.82 Additionally, statistics show that from the reported cases relating to international arbitration between 1996 to September 2007, there have only been three challenges on public policy grounds at the High Court and Supreme Court level; of which two were rejected and one was modified.83 Slightly more domestic awards were set aside on grounds of public policy. Out of 151 reported challenges at the High Court level, only 25 were allowed and 14 modified; the rest were rejected.84 The Supreme Court has only dealt with two such challenges; it allowed one and rejected the other.85

When the 1996 Act was enacted, it was to serve the two purposes of creating a uniform system and limiting judicial intervention. This intent was not reflected with clarity in the provisions. This gave the judiciary discretion to involve itself in the arbitration process. Despite having

78. Id.
81. Parekh, supra note 79, at 17.
82. Id.
83. Kachwaha, supra note 60, at 4.
84. Id.
85. Id.
legitimate authority to intervene in the process at the parties’ request, courts tend to interpret the provisions as limiting their role in the arbitration process. The judiciary did not just follow the language of the provision but also Parliament’s intent to minimize judicial intervention and increase party autonomy. However, arbitral tribunals faced the problem of not having the legitimacy or enforcement ability to complement the expansion of their role in the arbitration process. The following sections suggest two possible improvements to the scheme set by the act. The first is legitimizing the arbitral tribunal by increasing its role in granting interim measures. Second, India can further instill confidence in the arbitration process by adopting institutional arbitration only.

III. INVOLVE THE ARBITRAL TRIBUNAL

The arbitral tribunal’s scope of authority was expanded in the 1996 Act. Nonetheless, the court is still required to intervene to enforce its orders. One area where court intervention is especially important is in the area of interim measures of protection. Currently both the court and tribunal can provide such measures but the tribunal does not have the necessary enforcement mechanism. Parliament must revise the Act to give the arbitral tribunal the legitimacy and power it needs to enforce its order. This can be accomplished by allowing the arbitral tribunal a more active role in the arbitration process thus giving it more legitimacy.

A. INTERIM MEASURES OF PROTECTION

India, following the UNCITRAL Model Law, included provisions for interim measures of protection. Unlike the prior act, the 1996 Act empowers both courts (Section 9) and the arbitral tribunal (Section 17) to grant interim measures. The provision allows the courts to implement measures before or during an arbitration proceeding as long as it is prior to the enforcement of the award. The court can be called upon to conserve the disputed subject matter, secure the amounts in dispute, secure evidence, require third parties to comply with requests, and grant other measures such as including pre-award attachments and seizure of assets, referred to as a *Mareva Injunction*. To ensure fairness and efficiency, the court held that it will follow a prima facie review of the case and balance the

88. Id.
inconvenience to each party against irreparable injury. Additionally, before granting the interim measures, the court must also ensure that the party seeking such relief intends to begin arbitral proceedings within a reasonable time and can impose conditions to that effect. These interim measures also apply to international arbitration unless the parties expressly state otherwise in the contract. The issue here is that in a normal contracting exercise, parties tend to concentrate on terms to include rather than exclude from an agreement. Thus, the construction of the act leaves the court no choice but to intervene when these disputes occur in the process. The act also allows parties to appeal the granted interim measure to a High Court that is vested with the authority to hear such appeals. Although there are many ways that a court can intervene, courts tend to follow the provisions and limit involvement as required in dispute resolution.

Another reason that courts have to intervene is that the jurisdiction granted to the arbitral tribunal in Section 17 is much more limited than that of the courts. For instance, unlike an arbitral tribunal, a Court can implement measures before the commencement of arbitration and has jurisdiction over third parties. The arbitral tribunal is only able to provide interim measures to protect the subject matter in dispute and to provide security of the subject matter. Nevertheless, the biggest difference between the powers vested in these two entities is that the arbitral tribunal is not able to enforce its own orders and can’t provide interim measures at the same pace as the courts. This limitation was evident when the Bombay High Court agreed with the arbitral tribunal that the tribunal lacked power to stay a proceeding until a party got the necessary bank guarantee. Thus, the only remedy for a party to ensure enforcement of such an interim measure is to also seek relief from the Court under Section 9. Although Parliament expanded the arbitral tribunal’s authority, it also limited it by requiring judicial intervention for enforcement of their orders. It is the judiciary’s role to ensure compliance with Parliament’s intent.

Although a court can grant interim measure, its power is limited in that it can only grant interim relief to a party if there is a condition

89. Bhavna, supra note 86, at 7.
92. Mukhi, supra note 38, at 4.
94. Bhavna, supra note 86, at 1.
95. Id.
97. Bhavna, supra note 86, at 1.
99. Id.
precedent to the relief or it emanates from the agreement terms. The court is restricted in granting relief if a party intends to enter into arbitration or the agreement specifically provides for such relief. A court is not able to intervene to determine if the arbitration clause is valid. "There cannot be applications under Section 9 for stay of arbitral proceedings or to challenge the existence of or validity of the arbitration proceedings or of the jurisdiction of the arbitral tribunal." The Supreme Court has held that in matters that still need to be decided by the arbitrators, it will only decide the appealed matter on grounds of equity and balance of convenience. The Supreme Court reversed a high court decision on the grounds that it can only intervene in arbitration proceedings if prescribed in the 1996 Act.

The Supreme Court has interpreted a court’s powers to be limited to the provisions applied in Section 9. Courts can be further limited if the arbitral tribunal was involved in the process of granting interim measures. It can also legitimize the role of the arbitral tribunal. This can be achieved by the arbitral tribunal playing a gatekeeper role in the process. Allowing the arbitral tribunal to play this role will legitimize its existence and reassure parties that the judiciary’s discretion is limited to cases where it is necessary to interpret or clarify Parliament’s intent.

B. CHANGING THE INTERIM MEASURES PROCESS

A solution to court intervention that results in delays and detracts from the tribunal’s legitimacy is to grant the arbitral tribunal a more active role. Parliament can also increase the legitimacy of the arbitration process and decrease challenges by granting the arbitral tribunal a key role. For example, India can benefit by following China’s example in granting interim relief measures. China’s arbitration law provides for the court to be the only one with the power to grant interim relief. However, a party can not directly apply for relief to the court. A party is required to apply to the Arbitration Commission and it is this organization that would submit the application of relief to court. The Arbitration Commission plays a gatekeeper role in China. This same concept can be applied to the arbitral tribunal in India. The arbitral tribunal can be the intermediary in the process similar to the Arbitration Commission. This process legitimates

101. 3 S.C.C. 135.
105. Id.
arbitration in two ways. First, it allows for a more efficient and quicker process because the tribunal would be able to determine if the matter justifies granting relief. Second, it also gives the tribunal more powers than are currently granted and avoids conflicts with the courts.

As the 1996 Act exists today, there is no way to resolve a conflict between an arbitral tribunal's and court's ruling on the same issue. Furthermore, the arbitral tribunal does not have any way to enforce or prevent rulings. By allowing the organization to play an intermediary role, it forces parties and attorneys to be more precise and vigilant of the type of issues raised requiring interim relief.

C. INCREASE CONFIDENCE IN THE ARBITRATION PROCESS

Despite the many criticisms of judicial intervention and unpredictability of India’s arbitration process, judicial intervention occurs mainly because of parties’ lack of confidence in the arbitration process and the lack of uniformity and understanding of the rules. "The success of the institution of arbitration like a judicial institution depends upon the confidence the institution creates and establishes in the mind of the public." The public’s confidence in the institution is dependent on its character, credibility, impartiality, and honesty. This is crucial because there is no appellate forum to correct the award because of the narrow scope of challenges to the enforcement of an award. Also, by instilling confidence in the process, it gives parties a viable alternative to resolve disputes. Rather than attempt to limit judicial intervention further than as prescribed in the act, we should focus on what is really needed to increase confidence in arbitration institutions. The most efficient way of gaining legitimacy is by institutionalizing arbitration. Institutional arbitration will ensure that the arbitration process is impartial, efficient, and is uniform in its application of procedural rules.

D. INSTITUTIONAL ARBITRATION

India, following the UNCITRAL Model Law, allows for both ad hoc and institutional arbitrations. I argue that for reasons of legitimacy and efficiency, India should allow only institutional arbitrations. The main purpose of creating the UNCITRAL Model Law is to create uniformity of arbitration laws between countries. However, countries like India and China have adopted the same rules to apply to domestic and foreign

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107. *Id.*
108. *Id.*
arbitration in the hopes of achieving uniformity and attracting foreign investments. Following that reasoning, naming an institution to resolve disputes automatically creates uniformity and predictability as the institution's rules bind the parties and arbitrators under the same rules and procedures.\footnote{10}

Institutional arbitration will also decrease costs and increase the fairness and expectation of the procedures that will be followed in the arbitration proceeding. It will also decrease the perception of bias. Currently, each member gets to choose an arbitrator and that arbitrator tends to favor that party.\footnote{11} In cases of deadlock in appointing arbitrators, only the court is allowed to intervene thus resulting in a retired judge being appointed the arbitrator in most cases.\footnote{12} Judges tend to follow the same procedures in arbitration as in court, resulting in similar delays and frustrations. Unlike a judge who usually sets a high fee for his services and may not be familiar with the disputed subject matter, the institution would most likely appoint an expert from the field in cases where there is a deadlock.\footnote{13} Furthermore, an arbitrator who is familiar with the disputed matter will be able to expedite the proceeding by not wasting time on evaluating the relevancy of each piece of evidence.\footnote{14}

Another advantage of institutional arbitration is that it prevents mistakes that result in disastrous results for parties because of the omission or inclusion of a clause. By incorporating a set of established rules of the institution, it provides parties the necessary protection in an arbitration proceeding.\footnote{15} Institutions can also establish and enforce a Code of Conduct and a method for evaluating arbitrators.\footnote{16} Furthermore, there will be a decrease in delays because there would be tighter time limits set for the exchange of pleadings, evidence, the hearings, and the rendering of an award.\footnote{17}

Another purpose served by institutional arbitration is that it will change the way that judges and attorneys perceive the arbitration process. Currently ad hoc arbitrations result in frequent adjournments and delays due to tedious processes.\footnote{18} Furthermore, attorneys are not as familiar with

\footnotesize{


12. \textit{Id.} at 5.

13. \textit{Id.}


}
the arbitration process and tend to seek unnecessary adjournments and schedule these proceedings between regular court appearances. Most of the criticism that is currently aimed at India’s arbitration process will end with institutionalizing arbitration.

Parliament enacted legislation allowing for both ad hoc and institutional arbitration. Ad hoc arbitration allows parties the freedom to choose the arbitrators and procedural rules applicable in case of a dispute. However, the lack arbitrators’ expertise in the subject matter and procedural rules has only added to the delays and costs in the arbitration process. I argue that institutional arbitration will add efficiency, fairness, uniformity, and legitimacy which will not only attract foreign investment but ease some of the backlog that faces the court currently.

IV. CONCLUSION

Responding to claims of inefficiency and unpredictability, the Indian Government enacted the 1996 Arbitration and Conciliation Act. Parliament’s goal was to increase party autonomy and efficiency while minimizing judicial intervention in the arbitration process. Critics claim that despite Parliament’s efforts, judicial intervention, unpredictability, and delays still make arbitration an unlikely choice for international and domestic parties. They further claim that the inefficient dispute resolution mechanism results in increased litigation or parties opting to contract outside of India. However, the 1996 Act improved the arbitration process.

The judiciary intervenes only when it is necessary, such as to resolve ambiguities and interpret Parliament’s intent in enacting specific provisions. Moreover, the courts are empowered by the legislatures to enforce interim measures of protection or awards as required by the 1996 Act. Nevertheless, courts’ decisions have reinforced the goal of increased efficiency with minimum intervention. Additionally, Parliament can decrease judicial intervention further if the arbitral tribunal played a larger role in the arbitration process. For instance, instead of parties seeking interim measures relief directly from the court, all claims can be filed with the arbitral tribunal. It will be the arbitral tribunal who reviews the claim and determines if judicial intervention is necessary. This leads to further legitimize the arbitral tribunal’s role in the process. Another recommendation is to only allow institutional arbitration. By creating a system of uniformity in procedures and process, it will increase confidence in the arbitration process. Parties and attorneys will be more willing to arbitrate in India if they know that there is an established system that

119. Shah, supra note 118.
results in predictability and efficiency. Although the 1996 Act can be improved in certain areas, it is still an improvement in the arbitration process over prior legislation.