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Matthew Maragulia

THE CONTINUING PRO-ARBITRATION TREND IN INDIA: A NEW GLOBAL HUB?

By
Matthew Maragulia*

I. INTRODUCTION

Mahatma Gandhi once said,

> I realized that the true function of a lawyer was to unite parties. A large part of my time during the 20 years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby – not even money, certainly not my soul.[1]

To add insult to injury to the litigation system, Abraham Lincoln also encouraged people to "persuade your neighbors to compromise whenever you can . . . the nominal winner is often a real loser in fees, in expenses, and waste of time."[2] It is no surprise than many of the world's leading countries share similar philosophies.

As one of the world's largest economies and populations, India's attractiveness to arbitration is apparent. India has been claimed to be the best place to start a business and is a favorable location for foreign direct investments.[3] The human resources available in India are paving the way for the country to become, if the country is not already, a global power in the business world.[4]

One would think the same notion that has led India to become dominant in the commercial world would overlap in the legal world. However, the courts are overloaded and many judicial positions remain unfilled,[5] and this problem does not see signs of

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* Matthew Maragulia is an Associate Editor of the Yearbook on Arbitration and Mediation and a 2017 Juris Doctor Candidate at The Pennsylvania State University Dickinson School of Law.

[1] ALBERT FIADJOE, ALTERNATIVE DISPUTE RESOLUTION: A DEVELOPING WORLD PERSPECTIVE 3 (2004).

[2] Erik Svane, *Persuade Your Neighbors to Compromise*, N.Y. TIMES, Jan. 19, 1991.

[3] *See generally* Government of India Ministry of Commerce & Industry, *Fact Sheet on Foreign Direct Investment*, DEP'T OF INDUS. POL'Y & PROMOTION (June 2015), http://dipp.nic.in/English/Publications/FDI_Statistics/2015/india_FDI_June2015.pdf.

[4] For example, India's technology capital, Bangalore, has had its office supply grow by six times since 2006 and now boasts more offices than Singapore. For this and further examples of India's business culture, *see* Gus Lubin & Mamta Badkar, *15 Facts About India That Will Blow Your Mind*, BUS. INSIDER (Jan. 3, 2011), http://www.businessinsider.com/amazing-facts-about-india-2010-12?op=1.

[5] In 2011, the Mumbai High Court alone had over 300,000 pending cases. Daniel D'Mello, *8 incredible facts about Mumbai*, CNN TRAVEL (Oct. 4, 2011), http://travel.cnn.com/mumbai/life/8-incredible-facts-about-Mumbai-082838.

improvement.[6] This judicial backlog and the fact that businesses prefer inexpensive, efficient, and less-adversarial proceedings make arbitration an appealing choice to parties involved in commercial disputes in India.[7]

Arbitration in India is currently governed by the Arbitration and Conciliation Act, 1996 (the "1996 Act").[8] Part I of the Act controls all arbitration conducted in India, regardless of the parties' nationalities, and Part II manages enforcement of foreign awards.[9] Past judicial decisions, as well as amendment proposals,[10] have showcased India's pro-arbitration stance and the country's desire to join New York, London and Singapore as a premiere location for international arbitration.

II. AN OVERVIEW OF ARBITRATION IN INDIA

The rapid globalization of India has led to economic competition, which ultimately leads to disputes. Arbitration in India, unlike this economic boom, however, is not so new. Since ancient times, people in India voluntarily went to the panchayat – roughly translated to mean the wise man of the community – to resolve disputes in a binding manner.[11] Modern, and formal, arbitration was regulated under the British rule by the Bengal Regulation in 1772.[12]

Prior to 1996, arbitration in India was laid out in the following three statutes: the 1937 Arbitration (Protocol and Convention) Act,[13] the 1961 Foreign Awards (Recognition and Enforcement) Act[14] and the 1940 Indian Arbitration Act.[15]

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[6] When 2013 came to an end, 31,367,915 cases were still pending. Tom Lasseter, *India's Stagnant Courts Resist Reform*, BLOOMBERG BUS. (Jan. 8, 2015), http://www.bloomberg.com/news/articles/2015-01-08/indias-courts-resist-reform-backlog-at-314-million-cases.

[7] *Id.* (noting that, because India has roughly only fifteen judges per every million people, the backlog would take thirty-five non-stop working years to fix).

[8] The Arbitration and Conciliation Act, No. 26 of 1996, INDIA CODE (1996), http://lawmin.nic.in/ld/P-ACT/1996/The%20Arbitration%20and%20Conciliation%20Act,%201996.pdf.

[9] *Id.*

[10] LAW COMMISSION OF INDIA, REPORT NO. 246, Amendments to the Arbitration and Conciliation Act 1996, (2014), http://lawcommissionofindia.nic.in/reports/Report246.pdf [hereinafter *Amendments*].

[11] Harprett Kaur, Note, *The 1996 Arbitration and Conciliation Act: A Step Toward Improving Arbitration in India*, 6 HASTINGS BUS. L.J. 261, 262 (2010).

[12] Krishna Sarma et al., *Development and Practice of Arbitration in India – Has it Evolved as an Effective Legal Institution?*, CTR. ON DEMOCRACY, DEV., & RULE OF LAW (Oct. 2009), http://cddrl.fsi.stanford.edu/sites/default/files/No_103_Sarma_India_Arbitration_India_509.pdf.

[13] The Arbitration (Protocol and Convention) Act, No. 6 of 1937, INDIA CODE (1993), http://indiacode.nic.in.

[14] The Foreign Awards (Recognition and Enforcement) Act, No. 45 of 1961, INDIA CODE (1993), http://indiacode.nic.in.

[15] The Arbitration Act, No. 10 of 1940, INDIA CODE (1993), http://indiacode.nic.in.

A. The Ineffectiveness of the 1940 Arbitration Act

Despite being deeply rooted in the nation's history, arbitration rules in India did not show, initially, the country's pro-arbitration stance.[16] To start, the 1940 Arbitration Act (the "1940 Act"), the country's first major legislation to cover arbitration, only addressed domestic arbitration, thereby limiting its applicability.[17] Because India did not have guidelines for international arbitration, and because of the increasing trend of globalization, parties considered India's arbitration regime to be unpredictable and unappealing.[18]

Furthermore, the 1940 Act relied heavily on court intervention,[19] which contradicts the entire principle of arbitration.[20] Under the Act, the court was needed in every facet of arbitration.[21] Before the dispute was referred to the tribunal, the court required the parties to prove the existence of an agreement and a dispute in order to begin the arbitration proceedings.[22] During the proceeding, court intervention was needed for purposes of time and making an award.[23] After the award was rendered, the Act required the court to rule on the award before making it enforceable.[24]

Moreover, the enforcement of the award in itself posed problems. Because the 1940 Act permitted court intervention, the losing party would often use the court to delay or avoid the enforcement of the award.[25]

The downfalls of the original 1940 Act made parties weary of arbitration in India. Concluding that this legislation was outdated, the Indian Government repealed all prior statutes and enacted the Arbitration and Conciliation Act in 1996 in order to create an efficient arbitration system and attract foreign investors.[26]

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[16] *See, e.g., id.*

[17] Kaur, *supra* note 11, at 262; *see also* The Arbitration Act, No. 10 of 1940.

[18] Kaur, *supra* note 11, at 262-63 (noting that the increase in commercial transactions in India and the ever-growing judicial backlog established a need for efficient and reliable dispute resolution).

[19] *See* The Arbitration Act, No. 10 of 1940.

[20] THOMAS E. CARBONNEAU, CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE 15 (7th ed. 2014).

[21] *Id.*

[22] Sarma et al., *supra* note 12 at 3.

[23] *Id.*

[24] *Id.*

[25] Kaur, *supra* note 11, at 262 (noting conflict between providing justice and ending litigation).

[26] The Arbitration and Conciliation Act, No. 26 of 1996, Statement of Objects and Reasons, http://lawcommissionofindia.nic.in/reports/Report246-II.pdf.

B. The Arbitration and Conciliation Act, 1996

The 1996 Act was created to establish confidence in the Indian arbitration regime.[27] The Act contains two significant parts. The first part provides rules to govern domestic and international arbitration in India, while the second part provides rules to govern the enforcement of foreign awards.[28]

While the 1996 Act is based on UNCITRAL Model Law,[29] two features of the Act differ. First, the UNCITRAL Model Law applies only to international commercial arbitration,[30] while the 1996 Act applies to both international and domestic arbitration.[31] Further, the 1996 Act minimized court intervention in a greater manner than the UNCITRAL Model Law.[32]

According to the Act, any commercial matter can be subject to arbitration, bound by a few public policy exceptions.[33] Similar to U.S. law, the arbitration clause is considered separate from the main contract; thus, parties challenging the arbitration clause must challenge the clause specifically.[34] Separability grants the arbitrator jurisdiction even if the main contract is considered void.[35] Under the 1996 Act, the arbitrator can only be challenged in two ways: if evidence exists of impartiality, or if the arbitrator is not as qualified as the parties believed.[36] Thus, arbitrators in India, like arbitrators in the global hubs, have an abundance of power.

In the Act, the rules governing domestic and international arbitration are very similar, with a few notable differences. First, any civil dispute is subject to domestic arbitration, but international arbitration adds the prerequisite that the dispute must also be considered commercial.[37] Second, any high court in India can intervene to appoint a

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[27] Sarma et al., *supra* note 12 at 4.

[28] Kaur, *supra* note 11, at 263 (noting that the first part deals with arbitration agreements, tribunal jurisdiction issues and court intervention guidelines, while the second part models the New York and Geneva conventions).

[29] *See* United Nations Commission on International Trade Law (UNCITRAL), G.A. Res. 31/98 (Dec. 15 1976), http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf [hereinafter *UNCITRAL*] (created for the purpose of establishing "harmonious international economic relations" through arbitration).

[30] *See id*.

[31] The Arbitration and Conciliation Act, No. 26 of 1996.

[32] Kaur, *supra* note 11, at 263.

[33] The Arbitration and Conciliation Act, No. 26 of 1996.

[34] The Arbitration and Conciliation Act, No. 26 of 1996, § 7(2); *see also* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 446-48 (2006) (reaffirming the importance of the separability doctrine in U.S. arbitration).

[35] CARBONNEAU, *supra* note 20 at 35.

[36] The Arbitration and Conciliation Act, No. 26 of 1996, § 12(3).

[37] *Id.* at § 2(1)(f).

domestic arbitral tribunal; however, only the Supreme Court can intervene in this scenario internationally.[38]

Because of these distinctions, it is important to determine if the issue relates to domestic or international arbitration. If the conduct occurred solely in India, the issue can still be subject to international arbitration under Section 2(f).[39] The opposite is true as well.[40] Moreover, the rules governing setting aside awards for both domestic and international arbitration are set out in Section 34, and they are practically the same as the UNCITRAL Model Law.[41]

The 1996 Act was enacted to fill in the gaps left by the unsuccessful 1940 Act.[42] Like nearly all legislation, the 1996 Act has been met with criticisms. One criticism is that the 1996 Act does not achieve its main goal of creating an efficient, alternative dispute resolution system.[43] Unlike the 1940 Act, which included an express time frame in which arbitration had to be completed,[44] the 1996 Act eliminated the express deadline and relied on constraints on judicial intervention in order to expedite the arbitration process.[45] Most arbitrators are retired judges, however, and many treat the process, at least in regards to time, in the same manner as litigation proceedings.[46]

Another problem that the 1996 Act, and arbitration in general, meant to fix was the expensive cost of litigation. While, in general, arbitration is cheaper than traditional

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[38] *Id.* at § 11.

[39] Section 2(f) of the 1996 Act defines international commercial arbitration is as

> an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is-
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> (i) an individual who is a national of, or habitually resident in, any country other than India; or
>
> (ii) a body corporate which is incorporated in any country other than India; or
>
> (iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or
>
> (iv) the Government of a foreign country.

The Arbitration and Conciliation Act, No. 26 of 1996, § 2(f).

[40] *See* TDM Infrastructure Private Ltd. v. UE Development India Private Ltd., (2008) 14 SCC 271 (India) (holding that both parties were of Indian nationality, and therefore subjected to domestic arbitration as opposed to international arbitration, because both parties were incorporated in India, even though one party's "central management and control" was conducted in Malaysia).

[41] *Compare* The Arbitration and Conciliation Act, No. 26 of 1996, § 34, *with UNCITRAL*, *supra* note 29, at Article 34.

[42] The Arbitration and Conciliation Act, No. 26 of 1996, Statement of Objects and Reasons.

[43] Sarma et al., *supra* note 12, at 14.

[44] The Arbitration Act, No. 10 of 1940, INDIA CODE (1993), http://indiacode.nic.in.

[45] The Arbitration and Conciliation Act, No. 26 of 1996.

[46] Sarma et al., *supra* note 12 at 14.

litigation, critics have run cost analyses to show that arbitration in India can be more costly than litigation.[47] Arbitration costs can include arbitrators' fees, venue fees, professional fees including witnesses and experts, as well as administrative fees.[48] In India, the cost involved in litigation is normally limited to attorney fees and court fees.[49] Because of the high fees charged by arbitrators, arbitration is cheaper in India only when a limit exists on the amount of proceedings.[50]

In addition, case law in India has somewhat broadened the scope in which courts may intervene to challenge an award.[51] Critics fear that the 1996 Act will experience the same fate as the 1940 Act.[52]

Despite the criticisms, the 1996 Act is still an improvement and shows a positive movement toward a predictable and stable arbitration system. Courts intervene only when necessary, and the legislature can limit that intervention if the arbitral tribunal is more pivotal in the process.[53] By leaning toward a more uniform process, the 1996 Act will likely entice parties to arbitrate in India. Recent case law and amendments focus on this proposition as well as the challenges India's arbitration system still face.

III. RECENT TRENDS FAVORING ARBITRAL INDEPENDENCE IN INDIA

The legislative and judicial history in India show that, in order to make an efficient arbitration system, the government and the courts, as well as lawyers and corporate entities, need to work together. Similar to the United States, where the courts have interpreted and essentially changed the Federal Arbitration Act,[54] courts in India have analyzed the 1996 Act, and the government itself has approved key amendments.[55]

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[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.* (noting that parties pay a fee to the arbitrators for each hearing).

[51] *See* Renusager Power Co. v. General Electric, A.I.R. 1994 SC 860 (India) (holding that violations of the fundamental policy of Indian law, the interests of India and morality are the three conditions where courts may intervene); *see also* Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705 (India) (widening the scope of public policy that constitutes proper court intervention by including an award that is plainly illegal); *but see* Shri Lal Mahal Ltd. v. Progetto Grano Spa, Civil Appeal No. 5085 of 2013 (India) (holding that doctrine of "patent illegality" doesn't apply to enforcement of foreign awards and confirmed that challenges to set aside a domestic award under Section 34 of the 1996 Act are inherently different than foreign awards set out in Section 48 of the 1996 Act, effectively limiting the scope of the "public policy" in Section 48, thereby making "patent illegality" not enough to constitute an appropriate intervention of a reviewing court).

[52] Sarma et al., *supra* note 12.

[53] Kaur, *supra* note 11.

[54] *See generally* Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RES. L. REV. 91 (2012).

[55] *Amendments*, *supra* note 10.

While arbitration in India is still burdened with problems, recent Indian law has shown a pro-arbitration stance.

A. Case Law

Since 2012, with the decision in *Bharat Aluminum Co. v. Kaiser Aluminum Technical Services, Inc.* ("*BALCO*"), India has experienced a positive revolution in the area of international commercial arbitration.[56]

Before *BALCO*, the law in India was governed by the controversial case of *Bhatia International v. Bulk Trading S.A.*, which held that Part I of the 1996 Act was to be applied even when arbitration was seated outside of India.[57] The impact of the *Bhatia* decision was an increase in court intervention, as Indian courts had jurisdiction to challenge an award made in India even when the contract called for the law of another country.[58]

Recognizing the problems created by court intervention, the Indian Supreme Court overruled *Bhatia* in its *BALCO* decision a decade later.[59] The Court in *BALCO* also restricted the court's power further by holding that the Indian Parliament has the sole power to fill in the gaps of the 1996 Act.[60] Because of the *BALCO* decision, businesses will not fear court intervention in India arbitration, and they now have no need to cater their arbitration clauses specifically for India. Specifically, *BALCO* held as follows:

> Section 28(1)(a) makes it clear that in an arbitration under Part I to which Section 2(1)(f) does not apply, there is no choice but for the Tribunal to apply the Indian substantive law applicable to the contract. This is clearly to ensure that two or more Indian parties do not circumvent the substantive Indian law, by resorting to arbitrations. This provision would have an overriding effect over any other contrary provision in such contract.[61]

After *BALCO*, more cases have come out of the Indian high courts that show how the judiciary is recognizing arbitral independence. In *Avitel Post Studioz & Ors v. HSBC PI Holdings*, HSBC learned of the possible illegitimacy of Avitel's business and sought interim injunctive relief to compel payment under a Singapore arbitration proceeding.[62]

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[56] Bharat Aluminum Co. v. Kaiser Aluminum Technical Services, Inc., (2012) 9 SCC 552 (India).

[57] Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 105 (India).

[58] *Id.*

[59] *Bharat Aluminum*, (2012) 9 SCC 552 (holding that Part I and II of the 1996 Act are mutually exclusive and no section of Part II applies to any arbitration seated outside of India).

[60] *Id.* (focusing specifically on interim measures).

[61] *Id.*

[62] Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd., (2014) Appeal No. 196 of 2014 in Arbitration Petition No. 1062 of 2012 (Bombay High Court).

Avitel argued that the parties' agreement was governed by Indian law and Indian law does not support arbitration on issues of fraud.[63] The Bombay High court found in favor of HSBC, and thus arbitration in general, by holding that the parties expressly agreed to arbitrate in Singapore, which allows arbitral tribunals to decide claims of fraud.[64]

Another case upholding an arbitration agreement is *World Sports Group v. MSM Satellite*.[65] The Supreme Court of India delivered a standard to be applied when compelling arbitration, and held that courts are required to compel the parties to arbitration pursuant to their agreement unless the agreement is "null and void, inoperative, or incapable of being performed."[66] Similar to *HSBC*, an agreement does not become inoperative just because the dispute deals with fraud.[67]

Both *HSBC* and *World Sports Group* show Indian higher courts upholding arbitration agreements and expanding the scope of the arbitrator's powers to rule on issues of fraud. Essentially, these cases upheld the *kompetenz-kompetenz* doctrine in India.[68]

The Indian Supreme Court furthered the pro-arbitration stance again in *Reliance Industries v. Union of India* by limiting the court's jurisdiction.[69] In *Reliance*, the parties' contracts themselves were governed by Indian law, but the arbitration agreement within the contract was to be governed by the laws of England, with London as the seat of arbitration.[70] The Union of India argued that the laws of India, and therefore Part I of the 1996 Act, should govern because the contracts were signed in India and the dispute occurred in India.[71] Reliance, on the other hand, argued that, by choosing London as the seat of arbitration and English law to govern the arbitration clauses, both parties expressed intent to ignore Part I of the 1996 Act.[72] The Supreme Court of India found in favor of Reliance and upheld the arbitration agreement as it stood.[73]

The court's decision effectively limited the court's interference with foreign-seated arbitration and shows a favoring view toward international arbitration. Notably,

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[63] *Id.*

[64] *Id.*

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

[66] *Id.*

[67] *Id.* (noting that this rationale is consistent with the New York Convention).

[68] The *kompetenz-kompetenz* doctrine gives the arbitral tribunal the ability to rule on their own jurisdiction. CARBONNEAU, *supra* note 20 at 35.

[69] Reliance Indus. v. Union of India, (2014) 7 SCC 603 (India).

[70] *Reliance*, (2014) 7 SCC 603.

[71] *Id.*

[72] *Id.*

[73] *Id.*

the *Reliance* case dealt with an arbitration agreement that was executed before *BALCO*.[74] Therefore, parties who have entered into arbitration agreements before September 6, 2012 will still have recourse and protection from court intervention in foreign-seated arbitration.

By expanding the applicability of international arbitration and narrowing the ability for courts to intervene, the Indian courts have made significant strides in transferring the country from an arbitration-unfriendly jurisdiction to one that has a pro-arbitration stance.

B. Amendments to the 1996 Act

As seen above, case law has dealt with the issue of the "seat" or arbitration, and most of the time, the seat ended up being in either New York, London or Singapore. While the courts were producing pro-arbitration results, foreign investors were still weary to put their trust in the system. As noted in *BALCO*, the Indian Parliament has the sole power to fill in the gaps left by the 1996 Act,[75] which is now in the midst of occurring.

In August of 2014, the 246th Law Commission Report (the "Law Commission Report") proposed key amendments to the 1996 Act.[76] On August 26, 2015, the government of India agreed to amend the 1996 Act and presented to parliament the Arbitration and Conciliation (Amendment) Bill (the "Amendment Bill").[77]

By acknowledging the gaps and attempting to fill in the loopholes, the Law Commission Report demonstrates a pro-arbitration stance in India, and the amendments, if passed, would improve the trust of foreign investors in choosing India for their arbitration proceedings.

The first key amendment deals with interim measures. In the original 1996 Act, Section 17 gives the arbitrator the power to grant interim measures.[78] In Section 9, the court has that same power.[79] The difference is that no enforcement mechanism currently exists for those orders granted by the arbitrator.[80] In the Amendment Bill, the Indian government seeks to amend Section 17 to give the arbitrator the power to grant interim measures that "shall be enforceable in the same manner as if it is an order of the Court."[81]

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[74] *See* Bharat Aluminum Co. v. Kaiser Aluminum Technical Services, Inc., (2012) 9 SCC 552 (India).

[75] *See Bharat Aluminum Co.*, (2012) 9 SCC 552.

[76] *Amendments*, *supra* note 10.

[77] Amendments to the Arbitration and Conciliation Bill, Press Information Bureau, Government of India, Cabinet (Aug. 26, 2015) http://pib.nic.in/newsite/PrintRelease.aspx?relid=126356.

[78] The Arbitration and Conciliation Act, No. 26 of 1996, § 17.

[79] *Id.* at § 9.

[80] *Id.*

[81] Amendments to the Arbitration and Conciliation Bill, *supra* note 78.

Another proposal in the Law Commission Report seeks to amend Section 12 of the 1996 Act.[82] Emphasizing the importance of arbitral neutrality, the Amendment Bill requires written disclosures from potential arbitrators when circumstances give rise to "justifiable doubts" as to their impartiality.[83] Further, specific relationships, although not spelled out in the Amendment Bill, will render an arbitrator ineligible for appointment.[84] Not only does this change provide a greater deal of trust within the arbitration system, but the amendment is also consistent with international standards.[85]

As previously mentioned, the courts in India have severe backlogs and delays.[86] While the 1996 Act aimed to fix this issue, the amendments reach further. Section (ii) of the Amendment Bill proposes a new provision that ensures the arbitral tribunal delivers its award within twelve months.[87] While the deadline can be extended with sufficient cause, the amendment notes that the parties' fees may correlate with the time frame.[88] This "fast track" procedure is also a norm in other international arbitration hubs, bringing India one step closer to becoming a hub itself. To further reduce court delays, the Amendment Bill proposes new changes to challenging awards. Sections (iv) and (v) of the Amendment Bill limit the causes for challenging awards,[89] and also state that the application to challenge the award shall be disposed of within one year.[90]

Changes to the 1996 Act also take form in regards to cost. In section (viii) of the Amendment Bill, "comprehensive provisions" are proposed to establish a cost regime for both arbitrators and litigators.[91] With the purpose to minimize frivolous claims, the proposed cost regime will likely increase the efficiency of the arbitral process in India.

While the proposed amendments have a greater focus on domestic arbitration than international commercial arbitration, the amendments are a step in the right direction to make the arbitral process in India analogous to several other international arbitration powerhouses.

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[82] *Amendments*, *supra* note 10.

[83] *Amendments*, *supra* note 10.

[84] *Id.*

[85] In the United States, for example, evident partiality is specifically spelled out in The Federal Arbitration Act as a means to vacate the award. 9 U.S.C. § 10(a) (2016).

[86] D'Mello, *supra* note 5; Lasseter, *supra* note 6.

[87] Amendments to the Arbitration and Conciliation Bill, *supra* note 78.

[88] *Id.* (suggesting that a court may reduce arbitrators' fees if the award period is extended).

[89] Amendments to the Arbitration and Conciliation Bill, *supra* note 78 (limiting awards that are contrary to public policy to those that are induced by fraud or corruption, or those that conflict with Indian law or morality).

[90] *Id.*

[91] *Id.*

C. Looming Challenges Still Exist

Despite the improvements discussed above, the arbitration system in India still faces its fair share of problems to overcome. In particular, foreign-seated arbitration has been a controversial issue in India and the courts seem to be scattered when making their decisions.

While *Reliance*, discussed above, started to pave the way for a pro-arbitration stance in international arbitration, decisions following that case, with the exception of *BALCO*, have not always been as forward-thinking.

After *Reliance*, the Delhi High Court took on the issue of whether Indian parties can choose foreign-seated arbitration again in *Delhi Airport Metro Express v. CAF India*.[92] In that case, the plaintiff, an Indian party, first entered into a contract with another Indian party, and then entered a contract with a Spanish party.[93] The arbitration clause in the contracts provided for Indian law to be applied to the contract, the arbitration to be seated in London, and Paris law to govern the arbitration.[94] Because the arbitration agreement was not entirely between the two Indian parties, the court overlooked the issue of whether two Indian parties can enter an arbitration agreement with the seat outside of India.[95]

Another case, *TDM Infrastructure*, settled the fact that two Indian parties cannot exclude Indian law as doing so would be opposed to public policy.[96] However, the question of whether Indian parties can choose foreign law to resolve arbitral disputes has not been addressed clearly. One argument would be that the parties' choice of law should be recognized. On the other hand, the argument would be that resolving disputes by choosing a foreign law would be against public policy because the parties have contracted out of Indian law. While *Reliance* and *Delhi Airport* may suggest that foreign seated arbitration between Indian parties can be a valid exercise, the recent case of *Addhar Mercantile v. Shree Jagdamba Agrico Exports* ("*Addhar*") has added to the confusion.[97]

In *Addhar*, both parties were Indian and the arbitration agreement provided for arbitration to be conducted in either India or Singapore and for English law to apply.[98] On one side, Jagdamba argued that both parties are governed by English law and that the arbitration should take place in Singapore, leaving the Bombay High Court without

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[92] Delhi Airport Metro Express Private Ltd. v. CAF India Private Ltd., (2014) I.A. No. 10776/2014 in CS(OS) 1678/2014 (High Court of Delhi).

[93] *Delhi Airport*, I.A. No. 10776/2014.

[94] *Id.*

[95] *Id.*

[96] TDM Infrastructure Private Ltd. v. UE Development India Private Ltd., (2008) 14 SCC 271 (India).

[97] Addhar Mercantile Private Ltd. v. Shree Jagdamba Agrico Exports Private Ltd., (2015) Arbitration Application No. 197 of 2014 along with Arbitration Petition No. 910 of 2013 (Bombay High Court).

[98] *Id.*

jurisdiction.[99] On the other side, Addhar argued that, because the arbitration clause stated that the proceedings could take place in either Singapore or India, and because both parties are Indian, the Bombay High Court should still have jurisdiction.[100]

Addhar made the aforementioned argument by relying on the following language from *TDM Infrastructure*:

> Section 28 of the 1996 Act is imperative in character in view of Section 2(6) thereof, which excludes the same from those provisions which parties derogate from (if so provided by the Act). The intention of the legislature appears to be clear that Indian nationals should not be permitted to derogate from Indian law. This is a part of the public policy of the country.[101]

When interpreted broadly, the language in *TDM Infrastructure* can suggest that public policy in India prohibits Indian nationals from straying away from Indian law unless they are contracted with a foreign party, even if the arbitration seat is outside of India. Thus, an Indian party can be considered to have violated public policy by choosing foreign law.

When interpreted narrowly, the language in *TDM Infrastructure* simply supports the attitude that Indian parties cannot apply foreign law domestically. Either way, it is still unclear whether two Indian parties can choose a foreign seat for arbitration and have Indian courts retain jurisdiction.[102]

The Bombay High Court in *Addhar* concluded that, even though the arbitration clause clearly stated that the arbitration could take place in either Singapore or India, the arbitration would have to take place in India because both parties are Indian and the agreement was executed in India.[103] When deciding the issue of whether two Indian parties could agree to foreign law, the court held that they could not stray away from Indian law because both parties are Indian.[104] Because other decisions suggest otherwise,[105] the Supreme Court needs to give clarity to whether or not foreign-seated arbitration can be recognized between Indian parties.

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[99] *Addhar*, Arbitration Application No 197 of 2014 along with Arbitration Petition No 910 of 2013 (arguing that the parties could agree to resolve their dispute with foreign law).

[100] *Id.*

[101] *TDM Infrastructure*, (2008) 14 SCC 271.

[102] Reliance Industries Ltd. v. Union of India, (2014) 7 SCC 603 (India) (holding that when two parties have chosen a seat outside India and foreign law to control the arbitration, Indian courts have no jurisdiction unless the parties have chosen substantive Indian law to govern the contract as a whole). By merely limiting the court's jurisdiction, the Court failed to hold on whether foreign-seated arbitration was against India's public policy.

[103] *Addhar*, Arbitration Application No 197 of 2014 along with Arbitration Petition No 910 of 2013.

[104] *Id.*

[105] *See Reliance*, (2014) 7 SCC 603; *see also* Delhi Airport Metro Express Private Ltd. v. CAF India Private Ltd., (2014) I.A. No. 10776/2014 in CS(OS) 1678/2014 (High Court of Delhi).

One problem that the uncertainty of foreign-seated arbitration creates is that it gives an advantage to parties who wish to hold arbitration in India. Another problem to consider is the enforcement of international awards. If two Indian parties receive a foreign arbitration award, the losing party can potentially delay enforcement in India by arguing that the award violated public policy. Because arbitration is meant to be efficient, cheap and final, the delayed enforcement problems contradicts the many basic principles of the arbitral system. Thus, while India has made great strides, their arbitration system is not without further hurdles.

IV. COMPARING INDIA WITH OTHER GLOBAL ARBITRATION HUBS

The procedural laws in many pro-arbitration venues, such as New York, London and Singapore, have relatively few provisions and allow parties to draft their agreements without interruption. In other countries, such as India, the courts have more control. To understand how far India has come with arbitration, it is important to compare India's system with those of arbitration hot spots.

A. New York

New York is a one of the most selected venues for arbitration because of the amount of experts and its predictable commercial law, as well as the United States' strong policy favoring international arbitration.[106] Additionally, because English has become the language of commerce, many international arbitration proceedings are now conducted in English.

In the United States, the Federal Arbitration Act (the "FAA") largely governs arbitral proceedings.[107] Unlike Part I of India's 1996 Act, the FAA is not governed by UNCITRAL Model Law,[108] and India developed Part II of their 1996 Act based off of the New York Convention,[109] which allows enforcement of awards of contracting states.

Because of the strong federal policy favoring arbitration in the United States, several matters that used to constitute inarbitrability, such as antitrust and securities matters, are now often referred to arbitration. On the other hand, the 1996 Act in India

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[106] *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983) (concluding that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration").

[107] Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2016).

[108] *See UNCITRAL*, *supra* note 29.

[109] Convention on Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517), http://www.newyorkconvention.org/texts; *see also India – International Arbitration 2015*, INTERNATIONAL COMPARATIVE LEGAL GUIDES (July 24, 2015), http://www.iclg.co.uk/practice-areas/international-arbitration-/international-arbitration-2015/india.

fails to define inarbitrability.[110] Another concept the 1996 Act is missing is the vacatur of awards for evident partiality of the arbitrators.[111]

Most importantly, the United States emphasizes freedom of contract principles.[112] While this is true to some extend in India, it is clear that certain cases, such as the *Addhar* case mentioned above,[113] greatly hinder this principle.

B. London

Similar to New York, London is an arbitration hot spot because of the history of predictable legal principles and the expertise that is abundantly available. The London Court of International Arbitration (LCIA) dates back to 1891, and nearly one-third of survey respondents preferred their seat of arbitration to be London.[114]

Not to be confused with India's 1996 act, the Arbitration Act 1996 governs all arbitrations in England.[115] The Arbitration Act covers both domestic and international arbitration and, as one major difference from UNCITRAL Model Law, the default is to have one arbitrator as opposed to three,[116] which parties may enjoy as arbitration with a sole arbitrator is most likely cheaper than arbitration using three arbitrators.

Unlike arbitrators in India, arbitrators in London have the power to award punitive damages if the parties agree.[117] Arbitrators in London also have free reign to publish dissenting opinions, whereas this ability is much more vague in India.[118]

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[110] The Arbitration and Conciliation Act, No. 26 of 1996, INDIA CODE (1996), http://lawmin.nic.in/ld/P-ACT/1996/The%20Arbitration%20and%20Conciliation%20Act,%201996.pdf.

[111] *See* 9 U.S.C. § 10.

[112] *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967) (holding that the purpose of the FAA is to ensure that "the arbitration procedure, *when selected by the parties to a contract*, be speedy and not subject to delay and obstruction in the courts") (emphasis added); *but see* Hiro Aragaki, *Arbitration: Creature of Contract, Pillar of Procedure*, 8 Y.B. ON ARB. & MEDIATION 2 (2016) (arguing that courts overemphasize the contractual aspects of arbitration at the expense of its procedural aspects).

[113] Addhar Mercantile Private Ltd. v. Shree Jagdamba Agrico Exports Private Ltd., (2015) Arbitration Application No. 197 of 2014 along with Arbitration Petition No 910 of 2013 (Bombay High Court).

[114] Lucy Scott-Moncrieff, President, The Law Society of England and Wales, Speech at the International Arbitration Centre: Arbitration: What Makes London So Special? (Nov. 15, 2012), https://www.lawsociety.org.uk/news/speeches/arbitration-what-makes-london-so-special.

[115] Arbitration Act 1996, c. 23 (Eng.).

[116] *Id.* § 15.

[117] Arbitration Act 1996 § 15 (Eng.); *but see* Sumeet Kachwaha, *Arbitration Guide – India*, INT'L B. ASS'N (June 2013), http://www.ibanet.org/Document/Default.aspx?DocumentUid=1CF8C452-D4C3-4043-90F6-6F39B1B628B2.

[118] The London Court of International Arbitration (LCIA) is silent on dissenting opinions. *See* LCIA ARBITRATION RULES (2014), http://www.lcia.org/media/download.aspx?MediaId=379; *but see* Kachwaha *supra* note 118.

When challenging an award in England, there exist only the three following grounds: challenging the tribunal's jurisdiction,[119] challenging the award for serious injustice,[120] and appealing a point of law.[121] Unlike in India, there exists no explicit ground to vacate an award for being opposed to public policy.[122]

C. Singapore

Closest geographically to India, Singapore can be regarded as India's main competitor in establishing an international arbitration center in Asia. According to Singapore International Arbitration Centre's (SIAC) website, Singapore has been dubbed "the hub of all trades,"[123] making arbitration an increasing trend in the country.

The Arbitration Act (the "AA") governs domestic arbitration,[124] while the International Arbitration Act (the "IAA") governs foreign arbitration and has adopted many UNCITRAL Model Law provisions.[125] The main difference between domestic and international arbitration in Singapore is, of course, court intervention. Appeals to a court regarding a question of law arising out of a domestic award are permitted,[126] but these appeals are not permitted under the IAA.[127] This diminished court intervention is something India needs in order to attract parties to their arbitration system.

A big difference between arbitration in India and Singapore is that Singapore law imposes an obligation of confidentiality to all arbitration proceedings,[128] which is an attractive concept for businesses and other parties.

Taking concepts from three of the world's most chosen venues for arbitration, such as the freedom of concept principles in New York, the increased power of arbitrators in London, and the confidentiality obligation in Singapore, India could possibly fill the gaps in its ever-improving arbitration system.

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[119] Arbitration Act 1996 § 67 (Eng).

[120] *Id.* at § 68.

[121] *Id.* at § 69.

[122] *See generally id.* at §§ 66-71.

[123] *Frequently Asked Questions*, SING. INT'L ARB. CTR., http://www.siac.org.sg/faqs (last visited June 18, 2016).

[124] Arbitration Act, STATUTES REPUBLIC SING. ch. 10 (2012).

[125] International Arbitration Act, STATUTES REPUBLIC SING. ch. 143A (2012).

[126] Arbitration Act § 49 (Sing.).

[127] International Arbitration Act § 10 (Sing.).

[128] International Arbitration Act § 17 (Sing.); *but see generally* The Arbitration and Conciliation Act, No. 26 of 1996, INDIA CODE (1996), http://lawmin.nic.in/ld/P-ACT/1996/The%20Arbitration%20and%20Conciliation%20Act,%201996.pdf (including no specific provisions regarding confidentiality).

V. CONCLUSION

From one piece of legislation to another, India was able to transform its arbitration regime in a way where courts would, and did, undoubtedly follow. In a process of filling in gaps, the 1996 Act was able to improve the ineffective 1940 Act, and while the 1996 Act has weaknesses of its own, recent trends, such as decreasing court intervention and upholding arbitration agreements, aim to improve those hindrances as well.

India has come a long way from the arbitration pitfalls that plagued the country in the 1940s. With new legislation and judicial decisions, India as a seat for arbitration has become more appealing. While the courts in India do, in fact, favor arbitration, the jurisdiction itself still has some improvements to make to get on board with the best methods of international arbitration that are practiced in today's global hubs.