INTERNATIONAL COMMERCIAL ARBITRATION IN INDIA: PROBLEMS AND PROSPECTIVES

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"*Discourage litigation persuades your neighbours to compromise whenever you can point out to them how the nominal winner is often a real loser, in fees, expenses, waste of time...*"

-Abraham Lincoln

ABSTRACT

In the era of commercialisation where the cross-border trade is prevalent, India is developing itself as a big commercial hub to attract traders and making policies in the light of foreign direct investment (FDI). International arbitration has been acknowledged as an effective instrument for resolving disputes by the international community. The researcher through this article wants to enlighten that how international community is facing challenges in Indian prospective and also the process through which India's becoming a hub to commercial trade and commerce. International commercial arbitration consists of arbitration proceedings that, deals with disputes which involve foreign parties and arises out of a relationship which is of a commercial or mercantile nature. Through this article researcher has also given suggestion of improvement in the International commercial arbitration in India which will help the investor to invest and feel free from litigation proceedings.

KEYWORDS: International Commercial Arbitration, cross-border disputes, government, law, agreement.

INTRODUCTION

International Commercial Arbitration is defined as a legal relationship that must be considered commercial, whether one of the parties is a foreign national or resident, a foreign body corporate, or a company, association, or group of individuals whose central management or control is in foreign hands, according to Section 2(1)(f) of the Arbitration and Conciliation Act, 1996.

As a result, arbitration with a seat in India but involving a foreign party will be considered an ICA under Indian law and will be subject to Part I of the Act. However, if the ICA is held outside of India, Part I of the Act will not apply to the parties, but they will be bound by Part II of the Act.

The Supreme Court determined the scope of Section 2(1)(f)(iii) in the case of ***TDS Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd***.[1], where it was concluded that "a company incorporated in India can only have Indian nationality for the purposes of the Act," despite TDS Infrastructure Pvt. Ltd. having foreign control.

Corporations controlled by foreign hands are recognised as foreign bodies corporate under the Act; however, the Supreme Court has ruled that it does not apply to companies established in India and having Indian nationality. As a result, if a corporation has dual nationality, one based on foreign control and the other based on registration in India, it will not be considered a foreign corporation for the purposes of the Act.

The Supreme Court concluded that the central management and control was in India in one case where an Indian business was the lead partner in a consortium (which included foreign corporations) and had the last say in appointing the chairman, while the consortium was based in Mumbai. ***Mumbai Metropolitan Region Development Authority v. M/s Larsen & Toubro Ltd. SCOMI Engineering BHD***[2]

India has long desired to be a commercial hub and has always wanted to attract itself as a significant commercial market due to its cheap labour. Due to its litigious tendency, this has produced deep suspicion within the global trade community. It has, however, never been a primary location for attracting large contracts. Even if there is an alternative dispute resolution

[1] 2008 (14) SCC 271
[2] 2018 SCC ONLINE SC 1910

system in place, any party/foreign party intending to enter into a contract with an Indian party is suspicious of judicial intervention in the event of a dispute. As a result, India has lost a great deal of trust, and it now needs to keep pace with international standards, where parties are aware of the long and complex nature of litigation in India. People have started bringing in the concept of alternate dispute resolution because there are so many cases that have been going on for years and years. When parties die, their legal heirs arrive, and cases continue, so to give more sanctity to commercial relationships or family settlements, people have started bringing in the concept of alternate dispute resolution. International arbitration[3] has been widely regarded as an effective system for resolving economic disputes by the international community. International commercial arbitration has been used in India as a means of resolving disputes since the medieval period, when trade and commerce between Indian and foreign traders began to expand. In the early twentieth century, legislation governing the resolution of international commercial disputes, as well as the acceptance and enforcement of foreign awards, were adopted. For the first time, ICA was concerned about the aggression toward cross-border arbitration for the settlement of international commercial disputes in the Asian region. After WWII, other countries in their region improved their net worth economy and had remarkable growth.

Over the last few years, the global trading community has anticipated an increase in cross-border trades as well as an increase in international investor disputes. Foreign parties had traditionally backed ICA as a means of resolving disputes. The choice of arbitral seat and the intervention of the judiciary in the arbitration venue raise questions. Asian countries have reacted to these demands of their strong ICA mechanism through effective development. Following the trend in ICA, there arise a lot of increases in the conflict of laws example of various countries like: India, Malaysia, Hong Kong, Singapore etc. In the case of ***Sundaram Finance Ltd v Abdul Samad and another*** (Civil Appeal No 1650 of 2018, 15 February 2018) the Supreme Court held that "An award holder can now file for execution in any Indian court where the assets are located".

1. STATUTORY FRAMEWORK OF ICA

Mahatma Gandhi defined Arbitration as follows:

[3] Simon Greenberg, International Commercial Arbitration: An Asia Pacific Perspective, (2011). For example, arbitration in china can be traced back to about 2100 – 1600 BC.

"I'd learned how to practise law in its purest form. I'd figured out how to discover the better side of human nature and how to get into men's heads. The essential role of a lawyer, I learned, is to bring the parties in a conflict together. The lesson had left such an indelible impression on me that for the next two decades of my legal career, I spent a significant portion of my time negotiating private settlements in hundreds of cases. I didn't lose anything, not even money, and definitely not my soul."[4]

International commercial arbitration consists of arbitration proceedings that, deals with disputes which involve foreign parties and arises out of a relationship which is of a commercial or mercantile nature.

The purpose of international commercial arbitration is to ensure that where issues of international trade and commerce are involved, there is a method to resolve any dispute which may arise in a quick and efficient manner so as not to hold up or hamper the benefits if such international relationships. The basic facets of international commercial arbitration proceedings are a) there must be an "international" nature, and b) the must arise out of a "commercial" relationship. The requirement of "internationality" is satisfied when one of the parties to the arbitration proceeding is, as per the requirement of the definition clause, either:

a) An individual who is a national of, or habitually resident in, any country other than India; or
b) A body corporate which is incorporated in any country other than India; or
c) A company or an association or a body of individuals whose central management and control is exercised in any country other than India; or
d) The government of a foreign country[5].

The concept of "commerce" is "trade and commerce," which does not have to mean only "goods traffic" or only the "exchange of commodities" for money or other commodities. It shall include transactions in the immediate vicinity that may be considered commercial because they serve as a support system for or the foundation for solely commercial or mercantile operations. To support its understanding of the term "commercial relationship," the court resorted to the UNCITRAL Model Law, which states that "commercial relationships" include commercial

[4] https://www.narendramodi.in/valedictory-speech-by-prime-minister-at-national-initiative-towards-strengthening-arbitration-and-enforcement-in-india-532838 last visited on 6/5/2021
[5] Section 2(1)(f) of Arbitration and Conciliation Act, 1996

representation, commercial agency, and consultancy.[6]

1.1 POWER TO REFER PARTIES TO ICA

A contractual obligation to be given due regards. When a party has specifically chosen particular body of rules to govern the arbitration proceedings by their contract, such contractual obligations must be adhered to. Where in the absence of any specific mention of what laws are applicable to an arbitration, one may validly assume that the applicable law will be the law of place where the arbitration proceedings are being held, this is not so when the applicable law has been specifically mentioned in the arbitration agreement.

The enforcement of foreign awards granted under the New York Convention is addressed in Section 45 of Chapter I of Part II of the 1996 Act. Section 54 of the Act, which can be found in Chapter II of Part II, deals with the enforcement of foreign awards granted under the Geneva Convention.

45. *Power of judicial authority to refer parties to arbitration. —Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.*[7]

54. *Power of judicial authority to refer parties to arbitration.—Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, on being seized of a dispute regarding a contract made between persons to whom section 53 applies and including an arbitration agreement, whether referring to present or future differences, which is valid under that section and capable of being carried into effect, shall refer the parties on the application of either of them or any person claiming through or under him to the decision of the arbitrators and such reference shall not prejudice the competence of the judicial authority in case the agreement or the arbitration cannot proceed or becomes inoperative.*[8]

[6] Mallika Taly, *Introduction to Arbitration* 285(Eastern Book Company, Lucknow, first edition, 2015)
[7] The Arbitration and Conciliation Act, 1996 (26 of 1996)
[8] *Ibid*

The parties are required to choose a system of law that will govern arbitration proceedings at four different stages

1. The law governing the recognition and enforcement of the arbitration agreement.
2. The law governing the procedure to be adopted in the conduct of arbitration.
3. The substantive law that is to be applicable to the determination of the substance of the dispute.
4. The law that governs the recognition and enforcement of the foreign award.[9]

1.2 FOREIGN AWARDS AND PUBLIC POLICY

The principles governing the ambit of the term "public policy of India" under Section 7(1)(b)(ii) in its application to foreign awards were defined as follows in ***Renusagar Power Co. Ltd. v. General Electric Co. (Renusagar)***[10], which dealt with the principles governing the ambit of the term "public policy of India" under Section 7(1)(b)(ii). 1) Indian law's basic policy, 2) India's interests, and 3) justice and morality As a result, the scope of a public-policy challenge to a foreign award was severely limited. Because it is a case under Section 34 of the 1996 Act, ***ONGC Ltd. v. Saw Pipes Ltd.***[11] ***(Saw Pipes)*** can be considered to have no influence on the enforcement of foreign awards under Section 48(2)(b) of the 1996 Act. However, in ***Phulchand Exports Ltd. v. O.O.O.Patriot,***[12] the court considered the scope of the term "public policy" in the Saw Pipes case and decided to broaden the meaning of the expression "public policy of India" as found in Section 34(2)(b)(ii) in its application to the recognition and enforcement of foreign awards.

Later, in ***Shri Lal Mahal Ltd. v. Progetto Grano SPA***[13], the Supreme Court had another chance to evaluate the scope of "public policy" as it applied to foreign awards. The appellants asserted that, in light of the Saw Pipes and Phulchand rulings, the court has the authority to refuse to enforce a foreign award if it is clearly unconstitutional. It was contended that the term "public policy of India" as defined in Section 48(2)(b) of the 1996 Act had a broader meaning than "public policy" as defined in Section 7(1)(b)(ii) of the 1996 Act (now repealed). That, in contrast to the restricted definition of the term in the Renusagar case, the expansive construction accorded to the phrase "public policy" of India in Saw Pipes must also be applied to the

[9] Mallika Taly, *Introduction to Arbitration* 255(Eastern Book Company, Lucknow, first edition, 2015)
[10] *(1984) 4 SCC 679*
[11] *(2003) 5 SCC 705*
[12] *(2011) 10 SCC 300*
[13] *(2014) 2 SCC 433*

recognition and enforcement of foreign awards. The court disagreed, holding that the Renusagar's narrower view must apply and that the Saw Pipes' broad approach cannot be applied to foreign awards. When the court was reminded of the holding in the Phulchand case, it expressly overruled the conclusion therein. The court found that the term "public policy of India" under Section 48(2)(b) must be construed narrowly in relation to foreign awards, as it was under Section 7(1)(b)(ii) of the 1996 Act, and cannot be given a larger interpretation by applying the Saw Pipes decision.[14]

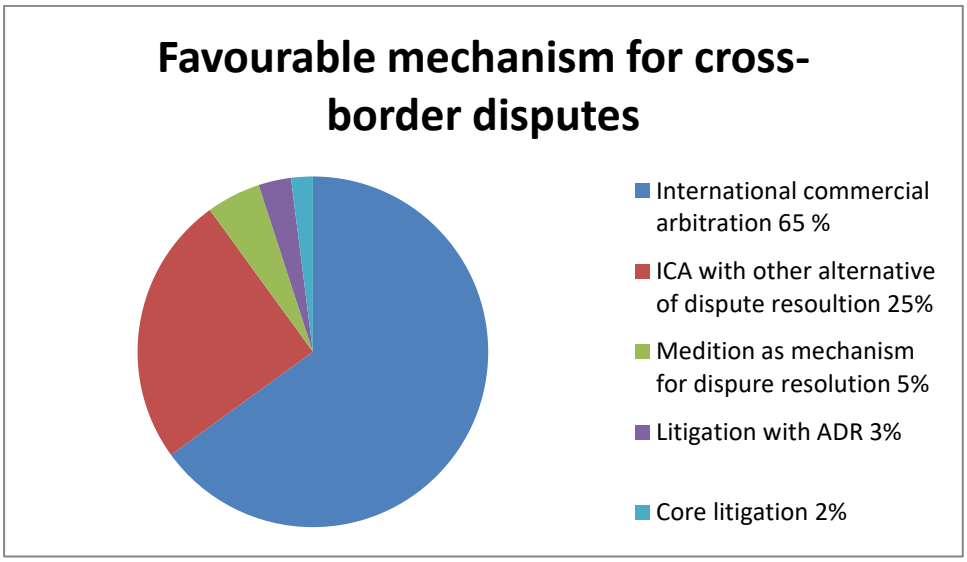
1.3 PART I APPLICATION TO ICA

Part I must apply to international commercial arbitration, according to the court in ***Bhatia International v. Bulk Trading S.A. (2002) 4 SCC 105***. Also, just though Section 2(2) indicates that Part I will apply where the proceedings are held in India, this does not mean that Part I will only apply in India. However the judgement was overruled in the case of ***Bharat Aluminium co. v. Kaiser Aluminium technical Services Inc.(2012) 9 SCC 648*** in which it was held that the arbitration agreement between the parties must be consulted first in order to decide whether India is the seat. Part I applies if the seat is in India. The presumption is that India is the seat of arbitration if the procedural law governing arbitration is Indian law, although this is not always the case. The 1996 Act will only apply to arbitration procedures if they do not clash with the curial law of the nation in which the arbitration is agreed to be held. Part I of the 1996 Act solely covers arbitrations with an Indian seat.

Features of International Commercial Arbitration

Features of avoiding specific legal actions - **65%**
Features of selection of arbitrators – **40%**
Features of flexibility – **33%**
Feature of privacy – **30%**
Feature of neutrality – **22%**
Feature of Finality – **20%**
Feature of speed – **15%**
Feature of cost – **3%**
Other features – **2%**

[14] https://lawtimesjournal.in/enforcement-of-foreign-awards-in-india/#_edn5 (visited on 2/07/2021)



From the above states, International commercial arbitration is the one of the favoured mechanism for the cross-border disputes with 65% and the ICA other alternative dispute resolution with 25% etc.

ISSUES AND CHALLENGES TO INTERANTIONAL COMMERCIAL ARBITRATION

- **No proper law of arbitration** –The term "*lex arbitri*" literally means "arbitration law" and it governs the procedure followed before the Arbitral Tribunal. This word is occasionally used interchangeably with *lex curiae* due to seat theory, but only when seat theory is applied. As a result, the law that governs arbitration agreements is one of those areas that is ambiguous and requires additional explanation. In the arbitral procedure, the choice of legislation that governs an international arbitration is a recurring topic. These questions revolve around the arbitration agreement's existence, interpretation, and validity. The choice of law starts with the separability presumption and its natural consequences. The supreme court of India in the case of ***National Thermal Power Corporation v. Singer Company and Others [NTPC],*** held that the proper law of the arbitration agreement is usually the same as the proper law of the contract. Even though the parties have clearly specified the right law of the contract, this is only the case in exceptional cases. There may be a presumption that the law of the nation where the arbitration is to be held is the proper law of the arbitration agreement if there is no

express choice of law for the entire contract or the arbitration agreement. However, this is merely a speculative hypothesis.[15] In ***Sumitomo Heavy Industries Ltd. v. ONGC Ltd. and Ors. [Sumitomo],*** The Supreme Court confirmed an English court's earlier ruling that the contract's proper law was the lex arbitri.

- **Two-tier arbitration: Appellate arbitration clause** - In ***Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd[16],*** The Supreme Court's two-judge bench was deciding whether or not appellate arbitration was permissible. Because no clear decision had been reached, the case was referred to a higher bench for final adjudication. The Supreme Court unanimously held that, under Indian law, two-tier arbitration, as specified in the agreement in question, was lawful. Also two-tier arbitration process is not against Indian public policy, as per the Indian Supreme court.[17]

- **Decision makers** – The right of the parties to choose the impartial third party, or decision maker, is one of the most important characteristics of international based arbitration. The presence of a neutral third party was first viewed as a positive aspect, but it has since been criticised. The legitimacy of an award made by arbitrators hired privately has been questioned in particular. The right to appoint the arbitrators provides validity to the proceedings. The arbitrators nominated by the parties, in particular, play an important role in ensuring that the tribunal takes their arguments and evidence into account. Apart from ensuring that the award adequately considers the parties' viewpoints, it also increases the possibility that the losing party will accept and follow the award. It has been suggested that this reflects not only the views of individual parties, but also the views of several states. However, robust conflict regulations, as well as procedural controls on nominations, must be adopted and implemented to ensure that events do not abuse their ability to nominate arbitrators (for example, by nominating arbitrators who are undeserving or forcing their nominee to resign in order to delay the complaints); and ethical guidelines to ensure that arbitrators act diligently and judiciously. The legitimacy of party-appointed arbitrators could be further

[15] (1992) 3 SCC 551 (India).
[16] *Centrotrade Minerals & Metals Inc. V. Hindustan Copper Ltd.* (2006) 11 SCC 245
[17] https://www.mondaq.com/india/arbitration-dispute-resolution/957910/two-tier-arbitration-progress-in-enforcement-of-international-arbitral-awards-in-india last visited on 28/5/2021

increased, according to Jan Paulsson, if the parties agree on the President of the tribunal first and then propose the alternative arbitrators with her/his participation.

- **Domestic court oversight** -The distinction between arbitration and litigation would be blurred if courts took a more active role in the arbitration process. It would be antithetical to the idea of using arbitration as a kind of alternative dispute resolution. Bifurcation of international commercial arbitration, in the case of ***Chloro Controls Case***[18] held that it would not be possible to bifurcate proceedings so as to refer one part to arbitration and retain the other part with the civil court and this would led to multiplicity of proceedings and possibly conflicting decisions. In the ***Bhatia International case***[19] and the ***Venture Global Case***[20] where it was held that Part I of the 1996 Act applies to all arbitrations where or not the seat is in India. This also means that Section 34 (contained in Part I) is also applicable to the recognition and enforcement of a foreign awards.

- **Conduct of counsel** - While the parties' counsel play an important role in international arbitration, they are no longer always guided by the same principles and moral beliefs because of their diverse histories and legal cultures. The lack of a binding universal code and a worldwide body to enforce it makes policing suggest conduct difficult, raising doubts about international arbitration's validity. There appears to be a growing consensus on the importance of managing and sanctioning attorneys who engage in unethical behaviour. Throughout the procedures, the criteria should focus on objective issues such as the filing of needless challenges to arbitrators and arbitrator disagreements originating from the appointment of new counsel.

INDIAN GOVERNMENTS EFFORTS FOR MAKING INDIA AS A HUB FOR INTERNATIONAL COMMERCIAL ARBITRATION

"The Government has no business being in business" – Prime Minister Narendra Modi[21]

[18] (2013) 1 SCC 641
[19] (2002) 4 SCC 105
[20] (2010) 8 SCC 660
[21] https://www.livemint.com/news/india/govt-has-no-business-to-be-in-business-pm-modi-11614171440787.html (visited on 21/06/2021)

The Indian government is refocusing its efforts to make India a global centre for international commercial arbitration to resolve cross-border business conflicts.

One of the fastest growing states India is facing difficult as a center for International arbitration. In terms of investments, India has long been regarded as a jurisdiction that sends contradictory signals to the international investor community. Many investors are not sure whether or not to invest in India. The government's and judiciary's attempts to make India a centre of arbitration are commendable, but we've lost the plot somewhere. In contrast to Singapore, which adopted the New York Convention in 1986, India started early and was one of the first few countries to do so in 1960. Despite this, parties favour Singapore as a neutral site for arbitration, making it one of the major centers for international commercial arbitration. Singapore has successfully established itself as a centre for international arbitration, among other well-known arbitration centers such as Paris, London, and Geneva. The Singapore Supreme Court, which has supported arbitration agreements, enforced foreign awards, and construed public policy narrowly, and the Singapore Government, which has ensured world-class infrastructure and is famed for its competitiveness, deserve recognition.

Investors consider a variety of factors before investing in a country, including whether the country has a robust arbitration mechanism, whether the country's courts and government are arbitration-friendly, and whether the country is easy to do business in and has a stable environment, among other things. Every country wishes to be a centre of arbitration because of the numerous benefits that come with it.

The majority of arbitrations in India are ad hoc, but we are gradually heading toward institutional arbitrations. The Indian government has taken attempts to establish India as an arbitration centre. Based on the recommendations of the B.N. Srikrishna Committee Report, the Arbitration and Conciliation (Amendment) Act, 2019 seeks to institutionalize arbitration in India. Sections 43-A to 43-M also provide for the establishment of an Indian Arbitration Council. These steps, however, are insufficient.

"A robust legal system with a lively arbitration culture is necessary for businesses to develop," says Prime Minister Narendra Modi, and "One of this government's key aims is to provide a healthy environment for institutional arbitration." India's Chief Justice,T.S. Thakur, agreed with the viewpoints on the importance of advancing Alternative Dispute Resolution (ADR), stating that "the avalanche of cases constantly puts the judiciary under great stress" and

expressing his reservations about unnecessary judicial involvement in arbitral awards." The conference highlighted the importance of developing world-class arbitral infrastructure in India in order to achieve the goals of making India a regional and global hub for domestic and international arbitration. "Getting the 'A, B, C, D of Arbitration right, i.e., (Universal) Access, (Reducing) Backlog, (Lowering) Cost, and (Removing) Delay, can help make arbitration more efficient and popular.," stated senior advocate Dr. Abhishek Manu Singhvi.

The government must also make necessary changes to arbitration law. Only with the assistance of business houses and the legal community will it be feasible to achieve the aim, rather than on the basis of nationalization, patriotism, or protectionism.[22]

CONCLUSION AND SUGGESTIONS

It is very well evident through this article that India is keeping pace with the international norms and accepted ICA as a tool for resolution of disputes in the cross-trade disputes. International commercial arbitration has also been regarded as an effective instrument for resolving economic disputes by the international community all over the world. The choice of arbitral seat, as well as the judiciary's interference in the arbitration venue, raises questions. The arbitration and conciliation Act, 1996 (amendment) Act, is proving as an effective tool for ICA. The latest amendments are intending to bring improvement by preventing ambiguity, irregularity and other challenges in Indian arbitration law. In 2015, changes to the arbitration legislation were made to incorporate the IBA rules of evidence and conflict of law concepts. When the case (***Perkins Eastman* v. *HSCC Ltd*[23]**) was filed the fundamental argument in this case was where the fairness is, and how to implement the 2015 amendment, which includes a particular provision to challenge an arbitrator's prejudice. The Supreme Court went on to state that any contract in which the arbitrator or the authority appointing the arbitrator has any interest in the outcome of the arbitration is null and void, and they must petition the court for appointment. So, in the ***BALCO case***, the court went on to say that this will not apply (aside from the issue of seat and venue). And the government was not pleased. So, in order to reclaim these powers, the most recent amendment states that unless the parties in an international commercial arbitration expressly reject the applicability of part I (certain parts of part I), such as sec-9... It will also apply to international business arbitrations held in countries other than

[22]https://www.researchgate.net/publication/313444911_India_as_a_Hub_for_International_Commercial_Arbitration_An_Overview_In_Reference_to_the_Amendments_in_Indian_Arbitration_Law (visited on 20/06/2021)
[23] Judgment on 26.11.2019 in Arbitration Application No. 32 of 2019

India. It is not something that is forced onto individuals; instead, they have a choice, which must be used wisely when entering into a contract. So there's a distinction to be made between domestic and international arbitration. There was a lot of ambiguity about the seat and venue until BALCO came up. Your seat will never change, according to BALCO, but your venue may. The ICA recommends the med/arb procedure for resolving disputes, but this is dependent on the parties' goals. The Indian arbitration Act, which deals with a variety of issues connected to commercial disputes and aids India's development as a commercial centre, will continue to keep up with international trends in the future.

If the following suggestions are implemented, India can realise its goal of becoming a global centre.

- There is a need for full-time arbitration lawyers who are totally focused on arbitration so that there are no delays in the process.
- The most significant impediment to the enforcement of arbitral awards is sloppy drafting of laws.
- Institutional arbitrations are lacking; more good facilities, such as the Delhi International Arbitration Centre (DIAC), Nani Palkhivala Arbitration Centre (NPAC), Mumbai Centre for International Arbitration (MCIA), and others, are needed.
- Appointment of retired judges as arbitrators is a common practice.
- Raising public awareness of the benefits of arbitration over litigation.
- Less need for judicial intervention.
- Inviting foreign lawyers to come to India to conduct arbitration.
- Dispute Settlement through Med-Arb

The general public is unaware of the advantages of arbitration versus litigation. The reason for this is because Indian institutions do not organize conferences like SIAC and ICC on a regular basis. As a result, more public awareness campaigns to educate the general public should be launched. Students, lawyers, and others in the legal profession should be trained and encouraged to function as full-time arbitrators. Aside from that, judicial intervention is not required. We can also explore inviting overseas lawyers to conduct arbitrations in India.