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India Satisfies Its Jones for Arbitration: New Arbitration Law in India

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India Satisfies Its Jones for Arbitration: New Arbitration Law in India

Tracy S. Work*

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* J.D., McGeorge School of Law, University of the Pacific, to be conferred 1998; B.A., University of California, Davis, 1995. I wish to thank Tom, Yan, Tom and Jocelyn for their love, patience and support.

I. INTRODUCTION

Almost daily there is more news about how India strives to open its doors wider to lure foreign investment into its increasingly modern economy.¹ Today, India² is in the process of integrating its formerly closed economy with that of the outside world;³ however, this was not always the case.⁴

While India had much to attract foreign investors prior to the reform movement,⁵ potential investors faced a formidable challenge because the Indian government did not want foreign investment. Prior to the reforms of the early 1990s, India strove to be economically self-sufficient and foreign investment was not encouraged.⁶ To achieve this goal, India riddled its foreign investment with restrictive regulations.⁷ It had a well deserved reputation for red tape, bureaucratic delays, and bribery.⁸

Today, India enjoys a more modern business economy—one which actively seeks foreign investment.⁹ A significant factor in this change in business climate is the recent adoption of the Arbitration and Conciliation Ordinance of 1996 (Ordinance).¹⁰ With the adoption of this new arbitration ordinance, the Indian government strives to replace its outdated arbitration laws,¹¹ bringing its laws in tune

1. In conducting my research, I found that there were numerous articles describing India as a country now actively seeking foreign investment. See *infra* notes 53-64.

2. See Francine R. Frankel, *India: The Waking Giant*, WASH. Q., Autumn 1996, 129 (stating that since the 1947 partition of the subcontinent into India and Pakistan, American policy makers have recognized, and India's leaders have asserted, that India over the long term would become a major Asian Power). This assessment is based on India's vast population, enormous economic potential, and indigenous scientific and technological know-how. *Id.* India is a country with a great deal of natural resources which make it an attractive region for potential investors. *Id.* See *The Republic of India*, INFOPEdia CD-ROM (1994) (giving the total population of India based upon the 1991 census as 843,930,861). With a population of over 800 million, India ranks second only to China in its labor supply. *Id.* This vast population gives India an enormous potential for economic growth. *Id.* India's current predominant educational pattern is 10 years of elementary and high school, two years of higher secondary education, and three years of university. *Id.* Further, India had 135 universities and about 5,000 technical, arts and science colleges in the mid-1980s. *Id.* Further, it is a country of considerable educational development, thus possessing a highly educated labor force.

3. See *A Changing Scenario*, LAW. INT'L, Mar. 1995, at 7 (noting that India is well into the process of integrating its previously closed economy).

4. See *infra* notes 28-32 and accompanying text.

5. See *supra* note 2 and accompanying text.

6. See Alan Kitchin et al., *Doing Business In Asia: Focus on Japan, India, and Vietnam*, C942 ALI-ABA 177, 186 (summarizing opportunities for foreign investment prior to the reforms of the early 1990s).

7. See *id.* at 186 (describing the restrictive regulations on foreign investment in India).

8. See *id.* at 186 (outlining the problems foreign investors faced in dealing in India prior to the early 1990s).

9. See Akil Hirani, *Getting It Right in India*, INT'L COM. LITIG., Apr. 1996, at 37 (stating that foreign investment is now encouraged in India as a result of liberalization of the economy which began in 1991).

10. See *India Adopts New Arbitration Law*, MEALEY'S LITIG. REP.: INT'L ARB. REP., Feb. 1996 (confirming that the Arbitration and Conciliation Ordinance 1996 was promulgated by India's former Prime Minister, Mr. P.V. Narasimha Rao, on January 16, 1996 and took effect January 25, 1996).

11. See *India Considering Revised Arbitration Law*, 6 WORLD ARB. & MEDIATION REP. 51, 52 (Mar. 1995) (indicating prior to India's adoption of the Arbitration and Conciliation Ordinance of 1996, arbitration was governed by the Arbitration Act of 1940 and the 1961 Foreign Awards Act). The Arbitration Act of 1940 created

with current international commercial arbitration rules.¹² This new arbitration law is based upon the United Nations Commission on International Trade Law's (UNCITRAL) Model Law on International Commercial Arbitration (Model Law) and Model Conciliation Rules (Model Rules),¹³ and it streamlines the process of resolving commercial disputes.¹⁴

This comment focuses on the new arbitration law and seeks to put the law into context with the economic history of India and its government's other efforts to provide a more open, free market economy.¹⁵ The discussion within this comment will examine the Ordinance in light of India's history and the changes which the country is attempting to institute.¹⁶ Further, comparisons shall be made between India and its new law and other countries which have adopted new arbitration law based upon the Model Law and Model Rules.¹⁷

Part II provides a broader view of India by taking a historical look at its economy and the recent changes favoring foreign investment.¹⁸ Part III examines other advances the Indian government recently enacted in attempting to increase foreign investment.¹⁹ Further, Part III looks at the role arbitration laws play in an increasingly global economy and the laws formerly governing arbitration in India.²⁰ In Part IV, turning to the Ordinance itself, this comment takes a close look at the provisions of the law and its application to domestic and foreign arbitration and conciliation.²¹ After this thorough look at the Ordinance, Part V makes an assessment of the law and its potential effects based in part on the experience of other countries that recently adopted a form of the Model Law and Model Rules in their arbitration law.²² Finally, Part VI draws conclusions as to the effect of the new law in making India more desirable to potential investors.²³

a relatively complex and court-intensive legal context for arbitration. *Id.* The Foreign Awards Act codified India's accession to the 1958 New York Convention. *Id.* The latter codifying India's accession to the 1958 New York Convention. *Id.* which will be discussed *supra* note 3.

12. See *A Changing Scenario*, LAWYER INT'L., Mar. 1995, at 7 (citing the rationale of the new arbitration act is alignment of India's laws with international commercial rules); see *India To Consider Changing Laws Governing Legal Dispute Resolution*, INT'L. TRADE REP., Oct. 26, 1994, at 1644 (discussing India's desire to change its laws relating to arbitration procedures to resolve commercial disputes). Prime Minister P.V. Narasimha Rao said that the liberalized business environment created by Indian economic reforms and the influx of foreign companies into India necessitated simplifying the legal system. *Id.*

13. *Draft Indian Arbitration Law Awaits Approval*, 6 WORLD ARB. & MEDIATION REP., Aug. 1995, 172 (confirming that the Arbitration and Conciliation Ordinance of 1996 is based on the UNCITRAL Model Law).

14. See *infra* notes 103-209 and accompanying text.

15. See *infra* notes 53-64 and accompanying text.

16. See *infra* notes 24-52 and accompanying text.

17. See *infra* notes 210-28 and accompanying text.

18. See *infra* notes 24-64 and accompanying text.

19. See *infra* notes 65-102 and accompanying text.

20. See *infra* notes 65-102 and accompanying text.

21. See *infra* notes 103-228 and accompanying text.

22. See *infra* notes 229-46 and accompanying text.

23. See *infra* notes 247-48 and accompanying text.

II. BACKGROUND

Before one can make an accurate assessment of any new law it is crucial to first have a point of reference from which to begin. This Comment opens by giving a historical perspective on the events leading to the economic collapse of India in the early 1990s. It was this economic collapse which sparked many changes in India, its government, and its economy.

A. Historical Look at India's Economic Climate

In 1991, India took measures to unshackle industry from its infamous bureaucracy and over regulation by adopting the New Industrial Policy 1991 (NIP).²⁴ This was a major step to attracting foreign investment and opening India to the world.²⁵ However, prior to the NIP and the reformation which followed, foreign investors faced a discouraging economic climate and attitude that was markedly different from that of today.²⁶ The country's economic emphasis was directed toward large state-owned enterprises, not unlike that of the former Soviet Union, with tightly controlled and limited private sector activity.²⁷

The five industrial policies enacted in India since its independence in 1947 through 1980²⁸ were designed to create and continue a self-sufficient and independent economy.²⁹ India desired to be a socialistic democracy.³⁰ While the government recognized a need for foreign investment, the government provided this investment should be carefully overseen to ensure it was in line with national economic interests.³¹ India and its leadership had an appetite for self-reliance and were fastidious

24. See Rhonda Bershok, *Releasing the Tiger? India Moves Into the Global Market*, 4 FALL INT'L LEGAL PERSP. 53, 53 (1992) (focusing on India's adoption of the New Industrial Policy and its effects).

25. See *id.* at 60 (stating under the NIP, India welcomes and invites foreign investment).

26. See generally BALDEV RAJ NAYAR, *INDIA'S MIXED ECONOMY* (Sangam Books Ltd. 1989) (discussing post-independence India and its changing economy and paying particular attention to development of the public sector).

27. See Kitchin, *supra* note 6, at 186 (maintaining that India's economic emphasis was firmly directed toward large state-owned enterprises).

28. Industrial Policy Resolution (1948); Industrial Policy Resolution (1956); Industrial Policy Statement (1973); Industrial Policy Statement (1977); and Industrial Policy Statement (1980).

29. See Bershok, *supra* note 24, at 54 (comparing India's policy prior to the NIP with the NIP itself).

30. See *Contradictions Reign Indian Deals*, MARKET ASIA PAC., Nov. 1, 1995 (stating the economic model which India sought to follow was that of a socialistic economy).

31. See Bershok, *supra* note 24, at 54 (finding that the Indian government carefully regulated foreign capital to be sure it was in the national interest). Section 25 of the Industrial Policy Statement of 1977 states,

Foreign investment and acquisition of technology necessary for India's industrial development would be allowed only on such terms as are determined by the government of India to be in the national interest. In areas where foreign technological know-how is not needed, existing collaborations will not be renewed and foreign companies operating in such fields will have to modify their character and activities in conformity with national priorities.

Id.

in enforcing this desire.³² Under these policies it was made clear industry should be controlled by Indian residents.³³ Subsequently, India sought to promote and support village and small-scale industries.³⁴

B. Recent Change in Attitude

While managing to meet many of the socialistic goals prescribed in the five major industrial policies,³⁵ India also managed to isolate itself from the global market.³⁶ As a result, by 1991, India was on the verge of economic collapse.³⁷

In 1990, rising budgetary and foreign exchange debt rates could no longer be held off by household savings, which were on the decline at that time.³⁸ The government began to resort to increasing amounts of new-money financing.³⁹ Further, supplies of foreign commercial lending were quickly becoming exhausted.⁴⁰ By the late 1980s, foreign commercial lenders and credit rating agencies began losing their remaining confidence in India.⁴¹ Foreign debt started to soar.⁴² The Gulf crisis in 1990 complicated matters as it caused the import bill to rise, reduced remittances, and blocked exports to Iraq and Kuwait.⁴³ Moreover, India faced threats of "Special 301" trade sanctions⁴⁴ by the United States.⁴⁵

32. See JOHN P. LEWIS, *INDIA'S POLITICAL ECONOMY: GOVERNANCE AND REFORM 9-10* (Oxford Univ. Press 1995) (describing India as a country ardent in its preference for self-reliance).

33. See Bershok, *supra* note 24, at 54 (stating that the pre-NIP policies made clear that industry should be controlled by Indian residents).

34. See *id.* (describing India's policy and its goal to promote and support village and small-scale industry).

35. See *supra* note 28 and accompanying text.

36. See Bershok, *supra* note 24, at 55 (talking about the effects of India's socialistic policy).

37. See Kitchin, *supra* note 6, at 186 (explaining the effects of India's socialistic policy as leading to economic collapse).

38. See Lewis, *supra* note 32, at 304-06 (characterizing India's decrease in the household savings rate and its effects). In the late eighties the rates of increase of the budgetary and foreign-exchange deficits began to surge. *Id.* Household savings hovered around 20% in the seventies. *Id.* The savings which helped to cover these deficits began to decline by the end of the eighties compounding the deficit problems which came to a head in 1991. *Id.*

39. See *id.* (stating that India began to resort to increasing amounts of new money financing).

40. *Id.*

41. See *id.* (finding during this time foreign commercial lenders and credit rating agencies lost much of their remaining confidence in India).

42. See *id.* (indicating foreign debt in India was on the rise). India's foreign debt, which had equaled 128% of the country's exports in 1980, rose to 250% of far higher exports in 1990. *Id.* Foreign debt service climbed from 9% to 30% over the same period. *Id.*

43. See *id.* at 305-06 (alluding to the impact of the Gulf crisis on India's financial struggles of 1990-1991); see also VIJAY JOSHI & I.M.D. LITTLE, *INDIA: MACROECONOMICS AND POLITICAL ECONOMY 1964-1991* 191 (Oxford Univ. Press 1994) (stating a temporary shock like the Gulf War was enough to trigger a full-scale economic crisis).

44. Section 301 of the Trade Act of 1974 allows the U.S. Trade Representative to impose sanctions against countries which unfairly restrict U.S. commerce. 19 U.S.C. § 2411 (1988); see Bershok, *supra* note 6, at 92 (describing the nature of these sanctions). The U.S. threat of sanctions was due to complaints in three areas: (1) India's previous 40% limit on foreign equity investment; (2) U.S. dissatisfaction with India's intellectual property rights laws and India's unwillingness to sign the Paris Convention; and (3) India's high tariffs and import

The inflation rate which was a modest seven percent between 1985 and early 1990⁴⁶ rose to thirteen to fourteen percent in 1990 and 1991 and continued to grow in 1992.⁴⁷ External debt service payments relative to current receipts was 35.3 percent for 1990-1991.⁴⁸ India's economic growth rate for 1991-1992 was less than one percent.⁴⁹ By June 1991, foreign exchange reserves were barely one billion U.S. dollars—two weeks worth of imports.⁵⁰ India was on the verge of default.⁵¹ As a result of all these problems, in 1991, India sought reformation of its foreign investment policy.⁵²

C. *The New Industrial Policy 1991 and Other Reforms*

India's new attitude toward foreign investment manifested itself in several ways. One of these was the New Industrial Policy 1991 (NIP).⁵³ The goals of the NIP were to attract foreign investment by releasing industry from the bonds of India's restrictive administration and to upgrade the country's technology.⁵⁴ Consequently, under the NIP several changes were instituted.

Formerly, under the Foreign Exchange Regulation Act (FERA), foreign companies wanting to invest in India were required to obtain the approval of the Reserve Bank of India (RBI) and could only own up to forty percent equity in a company

restrictions. *Id.* See generally Tara K. Giunta & Lily H. Shang, *Ownership of Information in a Global Economy*, 27 GWJ. INT'L L. & ECON. 327, 327-58 (1994) (giving a thorough discussion of the intellectual property issue and the problems developing countries face).

45. See Bershok, *supra* note 6, at 60 (discussing that India faced a threat of Special 301 sanctions); *cf.* Frankel, *supra* note 2 (describing the state of the relationship between India and the United States between 1995-1996). The U.S. compartmentalizes its dealings with India into economic, political, and security relations and tends to send mixed signals to Indian government. *Id.* The United States recognizes India's dominant position in South Asia as well as its attributes of a major world power. *Id.* However, on issues such as human rights, the historic enmity with Pakistan over Kashmir, and nuclear non-proliferation, the United States does not distinguish between India and Pakistan. *Id.*

46. See JOSHI & LITTLE, *supra* note 43, at 189 (showing figures of India's inflation between 1980 and 1990).

47. See Lewis, *supra* note 32, at 306 (giving a comparison of figures for India's rate of inflation between 1970 and 1990).

48. See Frankel, *supra* note 2, (finding external debt service payments relative to current receipts declined from 35.3% in 1990-1991 to 26.6% in 1994-1995).

49. See *id.* 2 (stating the economic growth rate in India for 1991-1992 fell below 1%).

50. See Lewis, *supra* note 32, at 306 (commenting on the lack of foreign exchange reserves).

51. See *id.* (stating in June of 1991 India was on the verge of default). *But cf.* Frankel, *supra* note 2, at 129 (describing the state of the Indian economy after the collapse). Economic growth rates, which fell below 1% in 1991-1992, recovered to 5% and 4.5% in the two subsequent years and rose to 6.7% and 6.3% in 1994-1995 and 1995-1996 respectively. *Id.* Industrial growth rates increased by 8.6% in 1994-1995 and rose almost 12% in the first half of 1995-1996. *Id.*

52. See Bershok, *supra* note 24, at 55 (commenting on India's change of heart regarding foreign investment).

53. New Industrial Policy (1991).

54. Bershok, *supra* note 24, at 53.

registered in India unless certain conditions existed.⁵⁵ Even if such conditions existed, companies with greater than forty percent foreign ownership were subject to restrictions with respect to expansions, diversifications, transferring securities, appointment of agents, and the acquisition or transfer of real estate.⁵⁶ Currently, under the NIP, there are thirty-six industries in which large capital investment and advanced technology are required⁵⁷ and up to fifty-one percent foreign equity is permitted in these areas.⁵⁸ Foreign equity of greater than fifty-one percent is permitted if the company will bring sophisticated technology, particularly in essential fields, or is export-oriented.⁵⁹

Other reforms which deserve mention, but are beyond the scope of this comment, include: (1) the institution of a new trade policy boosting exports and making imports easier;⁶⁰ (2) numerous tax incentives to encourage investment and development;⁶¹ (3) liberalization of foreign trademark requirements;⁶² (4) abolishment of asset limits under the Monopolies and Restrictive Trade Practices Act;⁶³ and (5) the privatization of many sectors of the economy.⁶⁴

III. FORMER ARBITRATION LAWS

In order to put the Ordinance into perspective an examination of the history of arbitration and the laws formerly governing arbitration in India is necessary.

55. See *id.* at 64 (stating that under FERA, companies wishing to invest were required to get the approval of the Reserve Bank of India and could not own more than a 40% interest unless certain conditions existed). A foreign investor could own in excess of 40% if it brought in sophisticated technology or was mainly export-oriented. *Id.* Moreover, the privilege of greater than 40% foreign interest was granted on a case-by-case basis. *Id.*

56. See *id.* at 64 (laying out the 40% restrictions which foreign owned companies were subject).

57. See Kitchin, *supra* note 6, at 186 (stating India labeled 36 "high priority" industries allowing up to 51% investment); see also Bershok, *supra* note 24, at 64 (finding 34 "high priority" industries in which up to 51% equity is permitted).

58. See Bershok, *supra* note 24, at 65 (stating that up to 51% foreign equity is permitted in these 34 industries labeled "high priority industries").

59. See *id.* (commenting foreign equity of greater than 51% will be allowed if the foreign investor brings in sophisticated technology particularly in essential fields).

60. See generally Bershok, *supra* note 24, at 71 (discussing the institution of a new trade policy); see also Kitchin, *supra* note 6, at 186 (commenting on the relation of import controls under the NIP making importation more attractive to overseas companies).

61. See generally P.R.V. Raghavan, *India's Recent Reforms Open the Way for Investment and Technology*, J. INT'L TAX'N, Apr. 1995 (discussing recent tax incentives to encourage investment and development).

62. See Bershok, *supra* note 24, at 66 (discussing changes in India's regulation of the use of foreign trademarks and its positive effects on foreign companies considering investment).

63. See *id.* at 65 (dealing with the abolishment of asset limits under the Monopolies and Restrictive Trade Practices Act).

64. See *The Benefits of Liberalization*, LAW. INT'L, Sept. 1995, at 6 (stating that since 1991 the central government has consistently engaged in privatizing sectors which, until recently, were the exclusive domain of public sector enterprises.) Areas which are now privatized include: power, telecommunications, banking, oil exploration, and civil aviation. *Id.*

A. Importance of Arbitration Laws

Arbitration possesses deep roots throughout history.⁶⁵ While it has been a long-favored means of dispute resolution among modern commercial groups,⁶⁶ use of arbitration between international parties dates back to ancient Greece.⁶⁷ Moreover, since the origin of arbitration agreements, parties have consistently witnessed their positive impact.⁶⁸

Parties who choose to resolve future disputes through arbitration enjoy many benefits.⁶⁹ These agreements provide resolution for parties who are either hesitant to bring their disputes before a foreign court system or, in the case of India, cannot get their dispute heard due to the tremendous surplus of unheard court cases.⁷⁰ Resorting to the courts is often expensive, uncertain, and riddled with procedural delay.⁷¹ Further, it can bring publicity where none is desired.⁷² In contrast, arbitration agreements provide stable, predictable, neutral and cost-effective relief where the courts often fail.⁷³ The modern business person often wants effective resolution of her

65. See Henry P. De Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 TUL. L. REV. 42, 43 (1982) (finding the arbitral process has deep roots in history). Arbitration is one of the earliest methods of dispute resolution. *Id.* Long before law was established or courts were organized, people resorted to arbitration for resolving disputes. *Id.*

66. See De Vries, *supra* note 65, at 43 (discussing the history of arbitration).

67. See William K. Slate II, *International Arbitration: Do Institutions Make a Difference?*, 31 WAKE FOREST L. REV. 41, 41 (1996) (discussing the early origins of international arbitration in Greece between Athens and Sparta in an agreement known as the Peace of Nicias); see generally W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 TEX. INT'L L. J. 1, 5-8 (1995) (giving a historical perspective on commercial arbitration). Development of private dispute resolution systems can be traced back to medieval Europe when merchants and traders from different regions would assemble at markets and fairs to do business. *Id.* at 5. In England, the first arbitration act dates from 1698 formalizing a practice of informal arbitration by members of trade guilds, the need for which was reinforced by the inefficiency of common law courts in applying mercantile law. *Id.* at 6.

68. See Craig, *supra* note 65, at 42 (describing arbitration agreements as positively impacting dispute resolution procedure).

69. See *infra* notes 70-77 and accompanying text.

70. See *India Sets Changes to Tackle Mounting Court Cases*, REUTERS WORLD SERVICE, Oct. 6, 1995 (describing the state of India's court system). India has a staggering 25 million pending court cases which hinders the speedy delivery of justice. *Id.* See *infra* note 84 and accompanying text.

71. See Slate, *supra* note 67, at 43 (illuminating the pitfalls of using foreign courts); see also *supra* note 70.

72. See De Vries, *supra* note 65, at 43 (touching on the business person's desire to maintain relationships after resolution of the dispute).

73. See Jane L. Volz, *Foreign Arbitral Awards: Enforcing the Award Against the Recalcitrant Loser*, 21 WM. MITCHELL L. REV. 867, 869 (1996) (laying out the benefits of arbitration agreement and their prevalent use in the modern global business economy).

dispute while keeping the business relationship intact for the future;⁷⁴ arbitration helps provide these benefits.

Disputes between business parties are inevitable, particularly in an increasingly global economy. Differences in customs, language and culture add yet another dimension to an already existing barrier and help to make already difficult conditions even worse. Countries seeking to attract foreign investment, such as India, see providing effective relief to disputes as an integral link to gaining foreign investment.⁷⁵ Prime Minister P. V. Narasimha Rao, in an October 1994 conference, told lawyers in India it was necessary to bring the laws on settlement of disputes in India in line with international standards because the economy is "undergoing substantive reforms," and the liberalized business environment necessitates such change.⁷⁶ With the Arbitration and Conciliation Ordinance of 1996, India officially recognizes the vital need for speedy and effective relief to international commercial disputes.⁷⁷

B. Former Indian Arbitration Laws

In order to stimulate and encourage foreign investment, the Indian government, in 1995, appointed a committee to propose revisions to the national law on commercial arbitration.⁷⁸ The Indian government made this new proposal in an effort to address problems of enforcement and reduce opportunities for judicial intervention.⁷⁹ Prior to the adoption of the Arbitration and Conciliation Ordinance of 1996, which took effect on January 25, 1996,⁸⁰ the Arbitration Act of 1940⁸¹ (1940 Act) and the 1961 Foreign Awards Act (Foreign Act)⁸² governed India's arbitration laws.

74. See De Vries, *supra* note 65, at 43 (describing the benefits of arbitration for the modern business person); see also Alan W. Shilston, *The Evolution of Modern Commercial Arbitration*, 4 J. INT'L ARB. 45, 46-47 (1987) (discussing modern commercial arbitration and the role of an arbitrator). Shilston describes commercial arbitration as a problem-solving process. *Id.* at 46. It is essential for arbitration to be viewed by the producers in a commercial context as an aid to business activities in industry and commerce and not as a replication of the court judicial process. *Id.* at 47.

75. See *A Changing Scenario*, *supra* note 12, at 7 (finding that India specifically views speedy resolution of international commercial disputes as a vital part to attracting foreign investment). Enhanced dispute resolution provides Indian companies greater access to the global market and encourages foreign investors, previously wary of doing business in India, to begin investing. *Id.*

76. See *India To Consider Changing Laws Governing Legal Dispute Resolution*, *supra* note 12, at 1644 (relating comments made by Prime Minister P. V. Rao at an October 17, 1994 conference regarding the need for changes in the law to give easier resolution of commercial disputes).

77. See *A Changing Scenario*, *supra* note 12, at 7 (indicating the Indian government's recognition of the need to provide effective alternative dispute resolution).

78. See *India Considering Revised Arbitration Law*, *supra* note 11, at 51 (stating that a committee was appointed to propose revisions of arbitration law in order to stimulate foreign investment).

79. *Id.*

80. *India Adopts New Arbitration Law*, *supra* note 10.

81. See generally V. S. Deshpande, *International Commercial Arbitration and Domestic Courts in India*, 2 J. INT'L ARB. 45 (1985) (discussing the history of commercial arbitration prior to the Arbitration Act of 1940).

82. *India Considering Revised Arbitration Law*, *supra* note 11.

1. Arbitration Act of 1940

The 1940 Act governed domestic awards while the Foreign Act governed foreign awards.⁸³ Under the 1940 Act, each interim award could be appealed to successively higher courts so that an arbitration could be entangled in the Indian courts for many years.⁸⁴

Further, the 1940 Act permitted an Indian court to modify, remit or set aside a domestic award for any one of ten reasons.⁸⁵ Under Section 35 of the Act, simply having an arbitration agreement did not take away the jurisdiction of the court to entertain a suit or a proceeding relating to the subject matter of the arbitration between the parties.⁸⁶ Once notice of a suit was given to the arbitrator, any further action in the arbitration became invalid because the proceeding in a court of law prevailed over the proceedings before the arbitrator.⁸⁷

Discussion below will illustrate that the new Ordinance is a vast improvement over the 1940 Act as it has a much stricter appeal process and awards are less likely to be set aside.⁸⁸ The enforcement of arbitral awards by the courts under the 1940 Act left much to be desired.⁸⁹ The courts often showed a willingness to scrutinize arbitral awards on their merits.⁹⁰

2. 1961 Foreign Awards Act

Foreign awards are those awards which are decided by a tribunal outside of India.⁹¹ In India, awards by foreign tribunals were governed by the 1961 Foreign

83. *Id.*

84. See *ICC Award Not Contrary to Indian Public Policy*, MEALEY'S INT'L ARB. REPORT, Dec. 1993 (illustrating the time consuming nature of the Indian court system with the case of *Renusagar Power Co. v. General Electric Co.*). Fending off arguments that the award was contrary to public policy, General Electric sought to enforce a seven year old award under the NY Convention. *Id.* The court finally held in favor of General Electric in 1993. *Id.*

85. See *Update on Indian Arbitration: The Arbitration and Conciliation Ordinance, 1996*, MEALEY'S INT'L ARB. REP., Nov. 1996 [hereinafter *Update on Indian Arbitration*] (revealing under prior law each interim award could be successively appealed to higher court and it permitted Indian courts to modify, remit or set aside a domestic award for any one or more of ten reasons).

86. See Deshpande, *supra* note 81, at 47 (relating that under § 35 of the Arbitration Act of 1940, having an arbitration agreement did not take jurisdiction away from the court to entertain a suit or proceeding relating to the subject matter of the arbitration).

87. *Id.* at 47 (stating once notice of suit was given to the arbitrator any further proceedings in the arbitration were invalid).

88. See *infra* notes 67-73 and accompanying text.

89. See *India Considering Revised Arbitration Law*, *supra* note 11, at 52 (describing the former arbitration law of India as unsatisfactory).

90. See *id.* (stating under the 1940 Act Indian courts showed a willingness to scrutinize arbitral awards on the merits).

91. See *Update on Indian Arbitration*, *supra* note 85 (defining an award as foreign if rendered outside of India in a signatory country to the New York Convention or the Geneva Conventions upon matters considered commercial under the law of India).

Awards Act.⁹² The Foreign Act recognized foreign arbitrations conducted pursuant to the 1958 New York Convention.⁹³ To enforce a foreign award in India under the Foreign Act a decree from an Indian court was necessary.⁹⁴ Due to the cumbersome nature of the Indian court system,⁹⁵ getting such a decree was time consuming and therefore made the enforcement and collection of foreign awards difficult. Under the Foreign Act, the courts also showed a willingness to refuse enforcement of foreign awards on public policy grounds.⁹⁶ Thus, for all these reasons, the outlook for one doing business in India was bleak.

3. *Former Arbitration Law in Action*

The net affect of the arbitration law prior to the Ordinance was a system which gave slow and unsatisfactory relief when and if it gave relief at all. Much of the problem with former Indian arbitration law stemmed from Indian courts' failure to enforce the results of both domestic and foreign arbitration.⁹⁷ Indian courts were not adverse to scrutinizing arbitral awards on the merits and often refused to enforce foreign awards on public policy grounds.⁹⁸ Parties seeking relief through judicial assistance of arbitral proceedings often experienced prohibitive delays.⁹⁹ As of March 1995, the courts had approximately twenty-four million pending cases.¹⁰⁰ One report estimates litigation in the Indian court system takes an average of twenty years.¹⁰¹

92. *See id.* (finding prior to the Ordinance foreign awards were governed by the Foreign Act).

93. *See India Considering Revised Arbitration Law*, *supra* note 11 (confirming that Foreign Awards Act, 1961, codified India's accession to the 1958 New York Convention); *see also* Deshpande, *supra* note 81, at 45 (stating the Foreign Act gives effect to the New York Convention and is binding on every court and tribunal in India). *See generally* De Vries, *supra* note 65, at 55-57 (defining the New York Convention). The New York Convention of 1958 is unquestionably the major arbitration treaty with worldwide effects. *Id.* A United Nations Conference on Commercial Arbitration held in New York in May and June of 1958 formulated the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the New York Convention. *Id.* The New York Convention was prepared and opened for signature on June 10, 1958. *Id.* It entered into force on June 7, 1959. The New York Convention became effective United States law in July 1970 with federal legislation. *Id.*

94. *See Update on Indian Arbitration*, *supra* note 85 (stating in order for a foreign award to be enforced under the Foreign Act, a decree from an Indian court was necessary).

95. *See infra* note 101 and accompanying text.

96. *See India Considering Revised Arbitration Law*, *supra* note 11, at 52 (characterizing India's courts as willing to refuse enforcement of foreign awards on public policy grounds).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *See Update on Indian Arbitration*, *supra* note 85 (stating litigation in the Indian court system takes an average of 20 years). *See generally* Akil Hirani, *Getting It Right in India*, INT'L COM. LITIG., Apr. 1996, at 37 (identifying the flaws in the Indian judicial system and its litigation procedure and techniques). At present, it takes anywhere between 15 and 20 years for a suit to reach final hearing and disposal. *Id.* In April of 1996, the Bombay High Court was hearing cases from 1977. *Id.* Approximately 5,000 new suits are filled every year. *Id.* This massive backlog is attributed to an inadequate number of judges, and a lack of practicality in the way the Indian system handles its cases. *Id.* For instance, it is argued that the system could relieve 50% of its workload if it required

Thus, on the eve of the promulgation of the Ordinance, the possibility of having to settle a dispute in India was simply too intimidating in the eyes of investors.¹⁰²

IV. THE ARBITRATION AND CONCILIATION ORDINANCE 1996

In response to increasing pressure to modernize Indian arbitration law, the 1996 Arbitration and Conciliation Ordinance was passed by Parliament and took effect on January 25, 1996.¹⁰³ The Ordinance sought to address complaints by foreign investors that, despite India's wealth of resources, the prospect of dispute settlement was too daunting.¹⁰⁴ The discussion now turns to the Ordinance itself and examines the basis for this new law and the provisions of the Ordinance.

A. Basis of New Arbitration Law

The Arbitration and Conciliation Ordinance of 1996 is based upon the United Nations Commission on International Trade Law's¹⁰⁵ (UNCITRAL) Model Law on International Commercial Arbitration and their Model Conciliation Rules.¹⁰⁶ The Model Laws and Rules were already being widely used internationally¹⁰⁷ and thus India joined the international consensus on their use.¹⁰⁸ The Ordinance consolidates and amends prior law relating to domestic and foreign arbitration, enforcement of arbitral awards and provides for conciliation of disputes.¹⁰⁹

mandatory arbitration before cases could go to trial (much as is the case under the California Code of Civil Procedure). *Id.*

102. See Hirani, *supra* note 101, at 37 (giving a discussion of the Indian court system and its flaws).

103. See *India Adopts New Arbitration Law*, *supra* note 10 (stating India adopted the Arbitration and Conciliation Ordinance of 1996 on January 16, 1996, and it took effect on January 25, 1996).

104. *India Considering Revised Arbitration Law*, *supra* note 11, at 52.

105. See De Vries, *supra* note 65, at 53 (stating arbitration rules evolved by public international bodies such as the United Nations Commission on International Trade Law and others like it furnish guidance and reduce the need for cost and time-consuming research). The UNCITRAL Rules are of worldwide significance and are being used increasingly. *Id.*

106. See *India Adopts New Arbitration Law*, *supra* note 10 (describing the new Arbitration Ordinance as being based on the UNCITRAL Model Law on International Commercial Arbitration). The Model Law on International Commercial Arbitration is UNCITRAL's model for laws governing commercial arbitration while the UNCITRAL Model Conciliation Rules provides a model for conciliation of disputes. *Id.*

107. See United Nations Commission on International Trade Law, *Status of Conventions* (last modified Dec. 3, 1996) <<http://www.un.or.at/uncitral>> (giving a list of those countries in which the Model Law on International Commercial Arbitration has been enacted). The Model Law on International Commercial Arbitration has been enacted in: Australia, Bahrain, Bermuda, Bulgaria, Canada, Cyprus, Egypt, Finland, Guatemala, Hong Kong, Hungary, India, Kenya, Malta, Mexico, Nigeria, Peru, Russian Federation, Scotland, Singapore, Sri Lanka, Tunisia, Ukraine and, within the United States of America: California, Connecticut, Oregon and Texas. *Id.*

108. See *Update on Indian Arbitration*, *supra* note 85 (discussing the wide acceptance of the UNCITRAL Model Laws).

109. See *id.* (outlining the main tasks of the Ordinance).

B. The Ordinance

The Ordinance is divided into three sections: (1) domestic and foreign arbitration; (2) enforcement of certain foreign awards, and (3) conciliation.¹¹⁰ Each section shall be discussed in order.

1. Domestic and Foreign Arbitration

The Ordinance contains provisions which apply to both domestic and foreign arbitration and further sets out provisions applying solely to domestic proceedings or foreign arbitration.

a. Provisions Which Apply to Both Domestic and Foreign Arbitration

Part I of the Ordinance defines arbitration and outlines the provisions which apply to both domestic and foreign arbitration.¹¹¹ An arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which arose or which may arise between them with respect to a defined legal relationship.¹¹² An arbitration agreement may be in the form of an arbitration clause or in the form of a separate agreement.¹¹³ The arbitration clause which forms part of a contract shall be treated as an agreement independent of other terms of the contract.¹¹⁴ Therefore, a decision by the arbitral tribunal that the contract is void shall not entail *ipso jure*¹¹⁵ the invalidity of the arbitration clause.¹¹⁶

i. Terms Which the Parties May Set

Freedom to determine the composition of the arbitral tribunal and the terms of arbitration is expressly recognized in the Ordinance.¹¹⁷ Parties to the agreement have a great deal of flexibility in determining the terms for arbitration.¹¹⁸ For instance, parties are free to determine the number of arbitrators that will govern the dispute, provided that the number shall not be an even number,¹¹⁹ and the nationality of the arbitrators.¹²⁰

110. The Arbitration and Conciliation Ordinance (1996), parts I, II, & III.

111. *Id.* part I.

112. *Id.* part I, ch. II, sec. 7(1).

113. *Id.* part I, ch. II, sec. 7(2).

114. *Id.* part I, ch. IV, sec. 16(1)(a).

115. See BLACK'S LAW DICTIONARY (6th ed. 1990) (defining *ipso jure* as by the mere operation of law).

116. See Ordinance, *supra* note 110, part I, ch. II.

117. See *Update on Indian Arbitration*, *supra* note 85 (describing the Ordinance as flexible with regard to the terms of the arbitration agreement).

118. Ordinance, *supra* note 110, part I, ch. III.

119. *Id.* part I, ch. III, sec. 10(1).

120. *Id.* part I, ch. III, sec. 11(1).

The procedure for appointing the arbitrators may be set by the parties as well.¹²¹ In the event that the parties cannot agree on a procedure to appoint arbitrators, and it is a tribunal of three arbitrators,¹²² then each party shall pick one arbitrator and the two arbitrators shall decide upon a third.¹²³ If the parties fail to appoint arbitrators or the two appointed arbitrators fail to decide upon a third, then the Ordinance provides that upon the request of one party, the Chief Justice, or any person or institution designed by her shall make an appointment.¹²⁴ If the arbitral tribunal is composed of a single arbitrator and the parties cannot come to a resolution on a selection, then the matter is again referred to the Chief Justice for settlement.¹²⁵ The Chief Justice's choice of arbitrator is tempered by a requirement that she give due regard to any qualifications required of the arbitrator based on the parties' arbitration agreement.¹²⁶ Most importantly, her choice must secure the appointment of an independent and impartial arbitrator.¹²⁷

Under the Ordinance, the parties have the ability to determine the procedure for challenging an arbitrator.¹²⁸ Any person approached for possible appointment as an arbitrator shall disclose in writing any circumstances likely to give rise to justifiable doubts as to her independence or impartiality.¹²⁹ Following an appointment, arbi-

121. *Id.* part I, ch. III, sec. 11(2); see Suresh Krishnamurthy, *India: Appointment of Arbitrators*, BUS. LINE, Dec. 12, 1996 (discussing the recent Supreme Court case of *MMTC Ltd. v. Sterlite Industries Ltd.*). In a dispute over the recovery of certain dues from MMTC, Sterlite invoked the arbitration clause of an agreement entered into before the Ordinance came into effect. *Id.* MMTC claimed that the arbitration agreement was invalid on the grounds the Ordinance specifically states parties cannot decide upon an even number of arbitrators (ch. III, sec. 10(1) *Id.* Further, MMTC argued that a requirement prohibiting an even number of arbitrators was in conflict with the First schedule of the previously controlling Arbitration Act of 1940 and was therefore invalid. *Id.* The Supreme Court ruled that an arbitration clause providing for the appointment of an even number of arbitrators was no bar on the validity of an arbitration agreement. *Id.* Section 10 which provides for the number of arbitrators is part of the machinery provision of the working of the arbitration agreement. *Id.* Because it came after the requirement that the agreement be in writing (section 7), the Court found that the validity of an arbitration agreement does not depend on the number of arbitrators to be appointed. *Id.* It is merely a term of an already existing and valid arbitration agreement. *Id.*

122. See generally De Vries, *supra* note 65, at 69 (discussing the constantly recurring problem of the status of the party-appointed arbitrator). The great dichotomy that pervades the international arbitral process is whether the arbitrators are bound to act completely independent of the parties like professional judges, or whether the party-appointed arbitrator is to be regarded as in a special relationship of agent or advocate for the party who appointed him. *Id.*

123. Ordinance, *supra* note 110, part I, ch. III, sec. 11(3).

124. *Id.* part I, ch. III, sec. 11(4).

125. *Id.* part I, ch. III, sec. 11(5); see *Indian Council of Arbitration to Revise Rules of Arbitration Soon*, BUS. LINE, Dec. 1996 (stating that Mr. Sudhir Jalan, President of the Indian Council of Arbitration, found provisions of the ordinance relating to appointment of arbitrations by the Chief Justices of High Courts were key features of the ordinance). Another important new feature, according to Jalan, is that the Chief Justice is empowered to designate any person or institution to take necessary steps for the appointment of arbitrators. *Id.*

126. *Id.* part I, ch. III, sec. 11(8)(a).

127. *Id.* part I, ch. III, sec. 11(8)(b).

128. *Id.* part I, ch. III, sec. 13(1).

129. *Id.* part I, ch. III, sec. 12(1).

trators must disclose any circumstances which cast doubt in the event they arise.¹³⁰ Parties may challenge an arbitrator only if circumstances give rise to justifiable doubts as to her independence or impartiality or the arbitrator does not possess the qualifications which the parties previously agreed upon.¹³¹ A party may only challenge an arbitrator which it has had a hand in appointing for reasons made known after the appointment has been made.

Other provisos of the arbitration agreement which the parties are free to set the terms include: (1) the place of the arbitral proceedings;¹³² (2) the procedures to be followed by the tribunal in conducting the arbitration proceedings; (3) when the arbitral proceedings will commence; (4) the language or languages to be used in the proceedings;¹³³ (5) whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials;¹³⁴ and (6) the procedure and ability to use experts.¹³⁵

The ability to set terms is useful in many ways.¹³⁶ Careful arbitration planning aids in the negotiation process, in the process of drafting the arbitral clause, and at the time of instituting the proceeding and during the proceedings.¹³⁷ After a dispute arises, parties are less inclined to provide for arbitration.¹³⁸

ii. Mandatory Elements Under the Ordinance

Having examined the provisions which the parties have the freedom to alter to better serve their tastes and needs, it is also important to look at those features of the

130. *Id.* part I, ch. III, sec. 12(2).

131. *Id.* part I, ch. III, sec. 12(3).

132. *Id.* part I, ch. V, sec. 20(1). See generally Filip De Ly, *Current Issues in International Commercial Arbitration: The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning*, 12 J. INTL. L. BUS. 48, 48-85 (1991) (discussing the importance of the place of arbitration in arbitration planning). Traditionally, the availability of skilled arbitrators, secretarial staff and translators, and access to good libraries, conference rooms and lodging is important in selecting the place of arbitration. *Id.* at 51. Legal considerations influencing the place of arbitration include neutrality of tribunal, conflict of laws issues, procedural aspects such as means of recourse against awards, the law to be applied to the merits of the dispute and the recognition and enforcement of arbitral awards. *Id.* at 52-53; see De Vries, *supra* note 65, at 66 (finding that the question of where to arbitrate has become more important and complex because there is a growing recognition that international arbitration cases should be conducted in a third country, different from the countries of the two parties). This trend accelerated with the growth of trade between capitalists and socialist countries and between industrialized and lesser-developed economies. *Id.*

133. Ordinance, *supra* note 110, part I, ch. V, sec. 22(1).

134. *Id.* part I, ch. V, sec. 24(1).

135. *Id.* part I, ch. V, sec. 26.

136. See generally De Vries, *supra* note 65, at 69-73 (discussing the benefits of the ability to set terms in arbitration).

137. See De Ly, *supra* note 132, at 50-51 (describing the benefits of careful arbitration planning).

138. *Id.* (finding that after a dispute has arisen, parties are less inclined to provide for arbitration). But see Slate II, *supra* note 67, at 55-56 (stating even when an arbitration agreement exists, if the parties have not addressed certain terms, such as place of arbitration, they may experience some difficulty coming to an agreement). In cases such as these, the body administering the arbitration is instrumental in reaching an agreement. *Id.*

Ordinance which, while more structured, provide stability and reliability that make the use of arbitration clauses under the Ordinance more attractive. The jurisdiction of an arbitral tribunal is outlined in the Ordinance.¹³⁹ The basic rules governing such jurisdiction are as follows: Any plea that the tribunal does not have jurisdiction over shall be raised not later than the submission of the statement of defense.¹⁴⁰ However, a party shall not be precluded from raising such a plea merely because he has appointed or participated in the appointment of an arbitrator.¹⁴¹ A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter which is alleged to exceed its scope is raised during the arbitral proceedings.¹⁴² After a plea is raised, if the tribunal finds its has not exceeded its jurisdiction, then it may continue to make an award.¹⁴³

iii. Guidelines for Party Conduct

Another aspect of the Ordinance which helps provide the necessary structure to arbitral proceedings is that it provides mandatory guidelines for the conduct of the arbitral proceedings.¹⁴⁴ The Ordinance makes clear that each party shall be treated equally and shall be given a full opportunity to present its case.¹⁴⁵ While it is generally understood that the purpose of judicial proceedings is to provide justice, the fact that the Ordinance unmistakably reiterates this point goes to absolve the more progressive India of today from its former reputation of rampant bribery and the inability to find equity in the courts.¹⁴⁶ Further, the arbitral tribunal is not bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872 under the Ordinance.¹⁴⁷ Freeing the arbitral tribunal from these rigid sets of rules is a direct response to the Indian government's recognition of a need to streamline its legal

139. Ordinance, *supra* note 110, part I, ch. IV, sec. 16.

140. *See id.* part I, ch. IV, sec. 16(2) (stating a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defense). The requirements of a statement of defense or the elements making up a statement of defense are not defined in the Ordinance.

141. *Id.* part I, ch. IV, sec. 16(2).

142. *Id.* part I, ch. IV, sec. 16(3).

143. *Id.* part I, ch. IV, sec. 16(5).

144. *Id.* part I, ch. V.

145. *Id.* part I, ch. V, sec. 18.

146. *See* Bershok, *supra* note 24, at 58 (describing the procedural problems potential investors faced in India, including bribery).

147. Ordinance, *supra* note 110, part I, ch. V, sec. 19(1). The Code of Civil Procedure, 1908 and the Indian Evidence Act, 1872 govern ordinary litigation. *See American Arbitration Association: A Beginner's Guide to Alternative Dispute Resolution* (visited Feb. 22, 1996) <<http://www.adr.org/guide.html>> (discussing one benefit of alternative dispute resolution is the relaxation of evidence rules). Each side may present their case in a more informal manner. *Id.* Hearings may take place at the site of the arbitration or during the evening hours. *Id.* Testimony may even be taken by phone. *Id.* The American Arbitration Association even offers administration via private online computer chat room on Lexis Counsel Connect. *Id.*

system to meet the demands of the modern business world.¹⁴⁸ It sends a clear message that India attempts to provide adequate relief to those doing business within its borders.¹⁴⁹

iv. *Determining Which Law Applies*

Another way India assures the business world it desires to provide an adequate system for relief is in the way the Ordinance makes arbitral awards.¹⁵⁰ If the arbitration is in India, and it is not an international commercial dispute,¹⁵¹ then the tribunal shall decide the dispute in accordance with the law of India.¹⁵² In an international commercial arbitration, the arbitral tribunal decides the dispute in accordance with the rules of law designated by the parties.¹⁵³ Failing any designation by the parties, the arbitral tribunal shall apply the rules of law it considers appropriate in light of all circumstances.¹⁵⁴

v. *Alternate Means of Settlement*

In making arbitration awards, India has recognized the need for expedient and effective relief.¹⁵⁵ The Ordinance finds that it is not incompatible with an arbitration agreement for a tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the proceedings to encourage settlement.¹⁵⁶ If the parties

148. See *A Changing Scenario*, *supra* note 12, at 7 (confirming that the Indian government's recognition of a vital need to implement a new legal regime for speedy settlement of international commercial disputes).

149. *Id.*

150. See generally John Y. Gotanda, *Awarding Interest in International Arbitration*, 90 A.J.I.L. 40, 40-63 (1996) (finding there is a failure of international standardization in the area of awarding compensatory interest in contrast to many other areas of arbitration law and procedure). Claims subject to international arbitration often involve millions of dollars and because of the lengthy period before settlement whether an arbitrator awards interest may be as significant as the principle claim itself. *Id.* at 40.

151. See *infra* notes 174-76 and accompanying text.

152. Ordinance, *supra* note 110, part I, ch. VI, sec. 28(1)(a).

153. *Id.* part I, ch. VI, sec. 28(1)(b)(i)-(ii).

154. *Id.* part I, ch. VI, sec. 28(1)(b)(iii). See generally Henry P. De Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 TUL. L. REV. 42, 70-73 (1982) (discussing the effects governing law has on a arbitral proceeding).

155. See *India: Judicial Reforms Bill This Session*, THE HINDU (Nov. 1996) (discussing a new bill to be introduced in the winter session of Parliament aiming to provide relief to the over-burdened court system).

156. Ordinance, *supra* note 110, part I, ch VI, sec 30(1). See generally *American Arbitration Association: A Beginners' Guide to Alternative Dispute Resolution*, *supra* note 147 (defining the difference between arbitration and mediation). Arbitration is the submission of a dispute to one or more impartial persons for a final and binding decision. *Id.* In contrast, mediation attempts to resolve dispute with the aid of a neutral third party. *Id.* The mediator's role is advisory and she may offer suggestions but resolution of the dispute rests with the parties themselves. *Id.*

reach a settlement in this manner, it may be recorded and given the full effect of an arbitral award.¹⁵⁷

Any arbitral award made shall be in writing and signed by the members of the tribunal.¹⁵⁸ The award shall state the reasons upon which it is based unless the parties have agreed not to give reasons or the award was reached by way of settlement described above.¹⁵⁹ A signed copy of the agreement is then delivered to each party.¹⁶⁰

The arbitral proceedings may terminate prior to an award under several circumstances.¹⁶¹ Termination occurs when the claimant withdraws his claim,¹⁶² when the parties agree on a termination,¹⁶³ or the arbitral tribunal finds the continuation of the proceedings has become unnecessary or impossible.¹⁶⁴ However, the proceedings may not be terminated in the event the respondent objects to the withdrawal of a claim and the tribunal recognizes a legitimate interest in obtaining final settlement of the dispute.¹⁶⁵ Provisions such as these seem to illustrate the Indian government's sincere desire to provide effective dispute resolution for those conducting business within India.

The only way to challenge an award is application to set aside the award.¹⁶⁶ An award may be set aside if: (1) a party was under some incapacity;¹⁶⁷ (2) the agreement is void under applicable law;¹⁶⁸ (3) a party was not given proper notice of the

157. Ordinance, *supra* note 110, part I, ch. VI, sec. 30(2); *see infra* notes 185-88 and accompanying text (describing the benefits of an arbitral award).

158. Ordinance, *supra* note 110, part I, ch. VI, sec. 31(1).

159. *Id.* part I, ch. VI, sec. 31(3).

160. *Id.* part I, ch. VI, sec. 31(5).

161. *Id.* part I, ch. VI, sec. 32.

162. *Id.* part I, ch. VI, sec. 32(2)(a).

163. *Id.* part I, ch. VI, sec. 32(2)(b).

164. *Id.* part I, ch. VI, sec. 32(2)(c).

165. *Id.* part I, ch. VI, sec. 32(2)(a).

166. *Id.* part I, ch. VII, sec. 34.

167. *Id.* part I, ch. VII, sec. 34(2)(a)(i); *cf.* *Doctor's Assoc. v. Distajo*, 66 F.3d 438, 453 (2nd. Cir. 1995) (holding that Doctor's Association Inc. (DAI) had waived its right to enforce arbitration provisions contained in franchise agreements between DAI and several of its franchisees because DAI had voluntarily participated in eviction lawsuits through subleasing companies controlled by DAI). DAI is the national franchisor of Subway sandwich shops. *Id.* at 438. DAI and its franchisees entered into standard franchise agreements requiring arbitration of all contractual disputes. *Id.* When problems arose, DAI did not invoke arbitration. *Id.* Instead, it directed its wholly owned real-estate leasing companies to bring summary eviction. *Id.* The Court found the wholly owned real-estate companies were DAI's alter egos and therefore DAI had waived its right to invoke arbitration. *Id.* at 453.

168. Ordinance, *supra* note 110, part I, ch. VII, sec. 34(2)(a)(ii); *cf.* *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244, 1248 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 195 (holding a arbitration clause, which was invalid under the Petroleum Marketing Practices Act, was severable from the rest of the agreement and therefore the dispute should be settled by the court and not an arbitrator). Graham Oil and ARCO entered into agreement to purchase a minimum amount of gasoline each month for a two-year period. *Id.* at 1244. The agreement contained an arbitration clause. *Id.* at 1246. Though the Court specifically noted that arbitration is a form of dispute resolution that finds favor in the courts, the arbitration clause in this case forfeited certain important statutorily-mandated rights under the Petroleum Marketing Practices Act. *Id.* at 1247. In particular, the clause expressly forfeited Graham Oil's right to recover exemplary damages and reasonable attorney's fees. *Id.* at 1247. Further, the clause expressly forfeited Graham Oil's statutorily mandated right to a one-year statute of limitations by reducing the time in which

appointment of an arbitrator or of the proceedings;¹⁶⁹ (4) the award deals with a dispute outside the terms of the arbitration agreement or is beyond the scope of the arbitration agreement;¹⁷⁰ or (5) if the arbitral tribunal or its procedure was not in accordance with the parties' agreement.¹⁷¹ An arbitral award may also be set aside if the subject matter of the law is not capable of settlement by arbitration or the award is in conflict with the public policy of India.¹⁷² Further, an application for setting aside an award must be made within three months from the date the party making the application received the award.¹⁷³

b. Provisions Which Apply Solely to Domestic Arbitration

A domestic award becomes effective as a decree of the Court and is enforced under the Code of Civil Procedure, 1908¹⁷⁴ three months after the award is issued or after an application to set aside an award has been refused.¹⁷⁵ An award is domestic if the arbitration proceeding is conducted in India even if such proceeding is otherwise defined as an "international commercial arbitration" under the Ordinance.¹⁷⁶ Arbitration is considered "international commercial arbitration" if one of the parties is not a resident of India, has its central management and control exercised outside of India or is a foreign government.¹⁷⁷

c. Provisions Which Apply Solely to Foreign Arbitration

Arbitral awards of tribunals outside India are governed by Part II of the Ordinance titled "Enforcement of Certain Foreign Awards." This portion of the

a claim could be brought to 90 days. *Id.* at 1247-1248.

169. Ordinance, *supra* note 110, part I, ch. VII, sec. 34(2)(a)(iii).

170. *Id.* part I, ch. VII, sec. 34(2)(a)(iv).

171. *Id.* part I, ch. VII, sec. 34(2)(a)(v).

172. *Id.* part I, ch. VII, sec. 34(2)(b); see *Update on Indian Arbitration*, *supra* note 85 (finding that a award found unenforceable due to conflict with public policy generally applies in situations where the award is induced by fraud or corruption); *cf.* *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967) (holding that where a party opposes a motion for arbitration based on allegations of fraud in inducement of the entire contract, the issue is one for an arbitrator, not a court). *Prima Paint* argued that *Flood & Conklin* fraudulently represented its solvency when it fact it was insolvent and thereby induced *Prima Paint* to enter into a contract which contained an arbitration clause. *Id.* The court held that if the claim is fraud in the inducement of the arbitration clause itself then it is an issue going to the making of the agreement to arbitrate and the a court may proceed to adjudicate. *Id.* at 403. However, the court is not permitted to consider claims of fraud in the inducement of the contract generally when an enforceable arbitration agreement exists. *Id.* at 404.

173. Ordinance, *supra* note 110, part I, ch. VII, sec. 34(3).

174. *Id.* part I, ch. VIII, sec. 36.

175. See *Update on Indian Arbitration*, *supra* note 85 (interpreting when a domestic award becomes effective under the Ordinance).

176. *Id.*

177. See *id.* (defining "international commercial arbitration" when one of the parties is not a resident of India, has its central management and control exercised outside of India or is a foreign government).

Ordinance governs foreign arbitral awards under the New York Convention.¹⁷⁸ If a foreign award is found enforceable by an Indian court then that award is binding on the parties and may accordingly be relied upon by any of those in subsequent proceedings in the Indian courts.¹⁷⁹ Further, such an award is enforceable as a court decree.¹⁸⁰

To obtain enforcement, the party applying for enforcement shall produce: (1) the original award,¹⁸¹ and (2) evidence proving the award is final.¹⁸² If the award falls under the New York Convention, the party seeking to enforce it must also produce evidence demonstrating the award is foreign.¹⁸³ Enforcement of an award under the Ordinance may be refused if: (1) a party was under some incapacity or the agreement is not valid; (2) proper notice was not given; (3) the award deals with a matter outside the scope of the arbitration agreement; (4) the tribunal or its procedure was not in accordance with the parties' agreement or applicable law; (5) the award has not yet become binding on the parties or has been set aside; (6) the subject matter is not capable of settlement by arbitration under Indian law; or (7) enforcement would be against public policy.¹⁸⁴

The primary benefit under the Ordinance is it eliminates the need for obtaining a decree from an Indian court to enforce a foreign award.¹⁸⁵ Foreign awards automatically become court decrees and are made effective by separate notification.¹⁸⁶ Further, appeals from foreign arbitral awards are limited to select grounds—those

178. See De Vries, *supra* note 65, at 55-58 (giving a description of the New York Convention of 1958 and its importance to international arbitration). A United Nations Conference on Commercial Arbitration held in New York in May and June of 1958 formulated the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards later to be known as the New York Convention. *Id.* The New York Convention is unquestionably the major arbitration treaty with worldwide effects. *Id.* Under the New York Convention, international commercial agreements to submit disagreements to arbitration must be recognized by each state member of the Convention regardless of the parties' nationality, residence, governmental, individual, or corporate nature. *Id.* The New York Convention has made it possible for foreign arbitral awards to be more easily enforced than foreign judgments in most of the trading countries of the world. *Id.* See Slate II, *supra* note 67, at 44 (discussing the New York Convention). As of October 1994, ratifications and accessions to the Convention totaled 101 countries. *Id.* The Convention provides for mutual recognition and enforcement of arbitral awards by contracting states, and limits the defenses that may be raised in opposition to the confirmation of an award. *Id.* Further, it eliminates duplicative litigation following an arbitration. *Id.*

179. Ordinance, *supra* note 110, part II, ch. I, sec. 46 & ch. II sec. 55.

180. *Id.* part II, ch. I, sec. 49, ch. II sec. 58; see *Update on Indian Arbitration*, *supra* note 85 (stating that an arbitral award or settlement pursuant to conciliation is automatically deemed a decree of an Indian court without presentment to the court which expedites enforcement of the award). Therefore, the major benefit of an award being deemed a decree of the court is that the parties do not have to apply to the court for enforcement of the agreement or settlement. *Id.*

181. Ordinance, *supra* note 110, part II, ch. I, sec. 47(1)(a) & ch. II sec. 56(1)(a).

182. *Id.* part II, ch. I, sec. 47(1)(b) & ch. II sec. 56(1)(b).

183. *Id.* part II, ch. I, sec. 47(1)(c).

184. *Id.* part II, ch. I, sec. 48 & sec. 57(1).

185. See *Update on Indian Arbitration*, *supra* note 85 (stating the new Ordinance eliminates the need for obtaining a decree from an Indian court to enforce a foreign award).

186. *Id.*

primarily being issues of enforcement listed in the proceeding paragraph.¹⁸⁷ Once an arbitral award is confirmed as a court judgment, it can be used to collect payment from the losing party through judicial enforcement procedures.¹⁸⁸

2. Provisions Regarding Conciliation

In Part III, the Ordinance sets forth the laws governing the use of conciliation.¹⁸⁹ An arbitration agreement is the result of the parties contemplating dispute settlement prior to finalizing their business contracts. In contrast, conciliation is the voluntary agreement to seek a conciliator or mediator after a contractual relationship is formed and a dispute has arisen.¹⁹⁰

In conciliation, the disputing parties voluntarily agree to amicably settle their dispute without resorting to arbitration or litigation.¹⁹¹ Conciliation begins with a party sending the other party a written invitation to conciliate under the Ordinance and a brief description identifying the subject of the dispute.¹⁹² Conciliation may be declined by an outright rejection of the invitation or a failure to reply within thirty days.¹⁹³ Conciliation proceedings begin when the other party accepts the invitation in writing.¹⁹⁴ Because conciliation is a voluntary procedure, if the parties do not agree to conciliate, they must seek another method of dispute resolution.¹⁹⁵

Once conciliation begins, the parties must agree upon the number and appointment of conciliators (one, two or three).¹⁹⁶ After the conciliator is selected, she may request each party to submit a brief written statement of the general nature of the

187. Ordinance, *supra* note 110, part II, ch I, sec 50(1)(b) & sec 59(1)(b); cf. Glenn P. Hendrix, *Enforcing Russian Arbitrazh Court Judgments*, RUSSIA & COMMONWEALTH BUS. L. REP., Jan. 1996 (discussing the enforcement of arbitral awards in Russia). On July 1, 1995, jurisdiction of the Russian commercial courts, known as arbitrazh courts, was extended to foreign parties. *Id.* While many business parties find it easier to obtain a favorable ruling in these courts than in other foreign courts, lack of adequate enforcement is a major problem. *Id.* The Supreme Arbitrazh Court estimates that only 30% to 40% of sums awarded by arbitrazh court are actually collected. *Id.*

188. See Joseph Colagiovanni & Thomas W. Hartmann, *American Arbitration Association: Enforcing Arbitration Awards* (visited Feb. 22, 1997), <<http://www.adr.org/enforce.html>> (stating an arbitration award confirmed by the court can be used to collect payment through judicial enforcement). In the United States, arbitral awards are governed by the Federal Arbitration Act and the Uniform Arbitration Act. *Id.*

189. Ordinance, *supra* note 110, part III; see De Vries, *supra* note 65, at 54 (distinguishing conciliation from party negotiations). The conciliator is endowed with considerable discretionary powers and is expected to play an active role in an independent and impartial manner. A conciliator formulates the terms of a possible settlement and submits them to the parties. *Id.*

190. See De Vries, *supra* note 65, at 77 (noting the distinction between conciliation and arbitration).

191. See *Update on Indian Arbitration*, *supra* note 85 (finding conciliation to be a method of dispute resolution wherein the parties agree to amicably settle their disputes without resorting to arbitration or litigation).

192. Ordinance, *supra* note 110, part III, sec. 62(1).

193. *Id.* part III, sec. 62(3) & (4).

194. *Id.* part III, sec. 62(2).

195. See *Update on Indian Arbitration*, *supra* note 85 (stating if conciliation is unsuccessful, the parties can choose to arbitrate or litigate).

196. Ordinance, *supra* note 110, part III, sec. 64.

dispute and the particular points at issue.¹⁹⁷ She may also request a further written statement of a party's position¹⁹⁸ or additional relevant facts.¹⁹⁹ As with arbitration proceedings, the conciliator is not bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872.²⁰⁰ The lack of such rigid rule and procedures reduces formality and allows for faster settlement.

The role of the conciliator is to assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.²⁰¹ The conciliator shall be objective, fair and just, giving consideration to the rights and obligations of the parties, the usages of the trade concerned and the surrounding circumstances including a course of dealings between the parties.²⁰² When the conciliator receives factual information from a party, not subject to confidentiality, he has a duty to disclose the information to the other party in order to provide the other party opportunity to present an explanation.²⁰³ At any stage in the proceedings the conciliator or parties may make proposals of settlement.²⁰⁴ Such requirements aid the confidence of foreign investors contemplating investment in India by showing that Indian government seeks to provide a stable and flexible environment to resolve disputes.

The proceedings shall be terminated if: (1) the parties sign a settlement agreement;²⁰⁵ (2) the conciliator makes a written declaration that further efforts at conciliation are no longer justified;²⁰⁶ (3) the parties make a written declaration to the conciliator stating that the proceedings are terminated;²⁰⁷ (4) one party makes a declaration to the other and the conciliator that the proceedings are terminated.²⁰⁸ If

197. *Id.* part III, sec. 65(1).

198. *Id.* part III, sec. 65(2).

199. *Id.* part III, sec. 65(3).

200. *Id.* part III, sec. 66.

201. *Id.* part III, sec. 67(1).

202. *Id.* part III, sec. 67(2). While the Ordinance specifically states that the conciliator should be objective, fair, and just there does not appear to be any actual means of enforcement other than the ability for the party considering the proceedings unfair to withdraw from the proceedings. *See American Arbitration Association: A Beginner's Guide to Alternative Dispute Resolution*, *supra* note 147 (touting the major advantages of alternative dispute resolution is the ability to choose expert and impartial third parties). In contrast to courts, which may possess judge's with little or no knowledge on the subject, parties who use alternative dispute resolution enjoy the assistance of neutrals who are already expert in the subject matter of the dispute. *Id.* The "subject matter expertise" of the third party reduces time required to educate a judge or jury and raises the confidence level of the parties that the result of the process will be well-informed. *Id.*

203. Ordinance, *supra* note 110, part III, sec. 70.

204. *Id.* part III, sec. 67(4), sec 72; *see American Arbitration Association: A Beginner's Guide to Alternative Dispute Resolution*, *supra* note 147 (stating informality and flexibility are two major benefits of alternative dispute resolution). Such informality and flexibility allows each side to present their case in a more informal manner. *Id.* The parties better understand the process and are more confident that they had the opportunity to present their side of the matter. *Id.*

205. *Id.* part III, sec. 76(a).

206. *Id.* part III, sec. 76(b).

207. *Id.* part III, sec. 76(c).

208. *Id.* part III, sec. 76(d).

the parties successfully resolve their dispute, then a settlement agreement shall be drafted. A signed settlement agreement is final and binding on the parties and enjoys the status of a decree of the Court.²⁰⁹

C. *The Model Law in Ontario?*

The Ordinance is closely based on the UNCITRAL Model Law and Model Rules, therefore it is helpful to look at other countries where the Model Law and Model Rules have been implemented to get a perspective on their effectiveness.

On June 8, 1988, the Province of Ontario enacted the International Commercial Arbitration Act (ICAA) which substantially altered the law governing commercial arbitration.²¹⁰ This law is the result of a recognition of the desirability of uniformity and universality in settling commercial disputes.²¹¹ The ICAA essentially adopted the UNCITRAL Model Law on International Commercial Arbitration.²¹² Prior to the ICAA, arbitration in Ontario was governed by The Arbitrations Act.²¹³

Unfortunately, there were numerous problems under the Arbitrations Act.²¹⁴ First, the issuance of a stay was a discretionary issue.²¹⁵ Courts were under no obligation to stay a legal action based on a dispute which otherwise might be the subject of an arbitration agreement.²¹⁶ Further, there was no guarantee the courts would refuse to hear a dispute otherwise governed by an arbitration agreement.²¹⁷ In contrast, under the ICAA the discretion of the courts to refuse to stay legal proceedings has been seriously reduced.²¹⁸

Since the enactment of the ICAA, court support for the act has been strong. Courts have been steadfast in enforcing arbitration agreements²¹⁹ going so far as to encourage arbitration even where the requirements of the ICAA were not strictly followed.²²⁰

209. *Id.* part III, sec. 74.

210. See *International Commercial Arbitration in Ontario: A Judicial Shift of Perspective*, MEALEY'S INT'L ARB. REP. (Sept. 1996) (discussing the adoption of the International Commercial Arbitration Act).

211. *Id.* (describing the reason for the change as a recognition of the desirability of uniformity and universality in commercial disputes).

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. See *generally Arbitration Clause, Award In Real Estate Sales*, MEALEY'S INT'L ARB. REP., Mar. 1996 (discussing the application of the ICAA and the model law in real estate agreements). In a dispute over the sale of a house, the court concluded that an arbitration clause in a real estate sales agreement was "commercial" under the ICAA and thus subject to its provisions. *Id.*

220. See *International Commercial Arbitration in Ontario: A Judicial Shift of Perspective*, *supra* note 210, at 30 (stating that courts of Ontario enforced arbitration agreements where the strict requirements of the ICAA have not been followed.)

Along with the ICAA, the courts adopted a policy of non-interference in commercial disputes governed by an arbitration agreement thus inciting greater enforcement of foreign arbitral awards.²²¹ In leading cases, courts denied attempts to set aside arbitral awards for reasons outside of those specifically outlined in the Model Law.²²² Justice Feldman, in enforcing an arbitral award, stated, "The purpose of enacting the model law in Ontario. . . is to establish a climate where international commercial arbitration can be resorted to with confidence by parties from different countries on the basis that if arbitration is conducted in accordance with the agreement of the parties an award will be enforced if no defenses are successfully raised. . . ."²²³ Thus, the courts clearly support the ICAA and intend to enforce its results.

The effects on commercial arbitration of the adoption of the Model Law through the ICAA has been excellent.²²⁴ Over the course of nine years, the courts of Ontario have created an environment in which foreign entities may enter into an agreement secure in the knowledge that the courts will not interfere with an agreement to arbitrate or an award stemming from such an agreement.²²⁵ People in Ontario now realize that arbitration agreements are likely to be enforced.²²⁶ If such agreement exist, they will be unable to resort to courts to resolve their disputes.²²⁷ The result is that businesses forming arbitration agreements under the ICAA must pay closer attention to the proposed agreements before entering into contracts. Justice Rutherford summed up the effects of the ICAA and Model Law in commenting in a leading case, "The model law implemented in Ontario provides an efficient and inexpensive enforcement procedure for those who agree on arbitration as a dispute resolution mechanism."²²⁸

V. EFFECTS OF NEW ORDINANCE

While adopted in January of 1996, the effects and the success of legislation such as the Ordinance can only be determined after several years of employment. Nonetheless, India appears to be moving in a positive direction.

221. *Id.* at 31

222. These provisions of the Model Law incorporated into the ICAA which Ontario courts have strictly followed to aid in arbitral award enforcement are also incorporated in India's Arbitration and Conciliation Ordinance, 1996. *See* Ordinance, *supra* note 110, part II, ch. I, sec. 48, sec. 57(1); *see also supra* notes 167-73 and accompanying text.

223. *International Commercial Arbitration in Ontario: A Judicial Shift of Perspective, supra* note 210, at 35.

224. *See id.* at 30 (finding the effects of the ICAA have been excellent).

225. *See id.* at 38 (stating since the creation of the ICAA nearly a decade ago, Ontario is now an environment in which foreign entities may enter into arbitration agreements secure that the courts will not interfere with these agreements).

226. *See id.* at 38 (finding people in Ontario now realize that arbitration agreement will be enforced).

227. *See id.* at 38 (discussing where arbitration agreements exist, parties in dispute will be unable to resort to courts for resolution).

228. *Id.* at 38

The UNCITRAL Model Law and Model Rules have been adopted in many countries with varying degrees of success.²²⁹ One key to the success of the Model Law in Ontario is its strict enforcement of the law.²³⁰ Indian government would be wise in following Ontario's example. Parties in Ontario enter into agreements with arbitration clauses knowing the courts will honor such agreements.²³¹ Therefore, these parties know that if a dispute arises they will get predictable relief unaltered by the courts. Such commitment to enforcement of the Ordinance in India is vital in determining the Ordinance's success in the long term.

Thus far, the Indian government appears resolute in its application of the Ordinance.²³² Recently, the Indian Council of Arbitration²³³ (ICA), moved to revise its Rules of Arbitration to bring them in line with the Ordinance.²³⁴ Moreover, the ICA seems willing to adapt. ICA President, Mr. Sudhir Jalan, said the Council has been trying to improve and modify its arbitration procedures in light of experience gained through the administration of cases over the years.²³⁵

In December 1996, Jalan stated a key feature of the Ordinance was its provisions relating to appointment of arbitrators²³⁶ by the Chief Justices of High Courts in the case where parties to the dispute are unable to agree on the procedure for appointments.²³⁷ Different High Courts in India have already initiated measures to evolve a scheme of appointment of arbitrators.²³⁸ Further, Chief Justice V. N. Khare of the Calcutta High Court is expected to designate an institution for the appointment of arbitrators.²³⁹ The ICA also expects to open an online service in an attempt to bridge the information gap about the legal regimes governing international business and disseminate information on Indian laws and regulations.²⁴⁰ In April of 1996, the ICA

229. See *supra* note 107 and accompanying text (listing those countries in which the Model Law has been adopted).

230. See *supra* 224-28 and accompanying text.

231. *Id.*

232. See *infra* 233-46 and accompanying text.

233. See *Indian Council of Arbitration to Revise Rules of Arbitration Soon*, *supra* note 125 (finding the Indian Council of Arbitration is an administrative body under the Ministry of Commerce, Industry and Law).

234. See *id.* (discussing the ICA's intentions to revise its Rules of Arbitration to bring them in line with the Ordinance).

235. See *id.* (according to Jalan, the ICA has continuously attempted to improve and modify its arbitration procedures based on its experience with cases over the years).

236. See *supra* notes 121-31 and accompanying text.

237. See *Indian Council of Arbitration to Revise Rules of Arbitration Soon*, *supra* note 125 (stating that Jalan found a key feature of the Ordinance is the provisions relating to the appointment of arbitrators).

238. See *id.* (stating, according to Jalan, different High Courts already initiated measures to evolve a scheme of appointment of arbitrators).

239. See *id.* (stating the Chief Justice of the Calcutta High Court would soon designate an institution for the appointment of arbitrators under provisions of Section 11(10) of the Ordinance).

240. See *id.* (discussing ICA plans to open an online service to provide information about legal regimes governing international business in India). This new online service will be titled "COMLAWNET" developed by Business Information Service Network. *Id.*

began organizing training programs to educate practitioners on the new arbitration law and its procedures.²⁴¹

In November 1996, Union Minister of State for Law and Justice, Mr. Ramakant D. Khalap, stated that as a result of the Ordinance the issue of an alternative dispute resolution settlement system was upper most in the Government's agenda.²⁴² Additional Solicitor General of India, Mr. M. Chandrashekar, in July 1996, stated that the International Centre for Alternative Dispute Resolution (ICADR) planned extensive training programs to create a reservoir of trained arbitrators to fully implement a system of alternative dispute resolution.²⁴³ These trainings follow a series of national seminars given through the ICADR in order to set up a broad framework for an alternative dispute resolution (ADR) system.²⁴⁴ This new ADR system stresses mediation, conciliation and arbitration.²⁴⁵ Institution of the ADR system is a response to the Ordinance and the overburdened court system which created a need for out of court settlement.²⁴⁶

VI. CONCLUSION

India continues to get closer to obtaining status as a major economic power.²⁴⁷ Since its economic collapse in 1991, India strives to encourage foreign investment. With the NIP and other legislation that followed, India has signaled to the world that it is shedding its socialistic attitude and is serious in its desire for consideration by foreign investors.²⁴⁸

With the Ordinance, the Indian government continues to cast off relics of its former socialistic self. By stressing the importance of a system of alternative dispute resolution and being steadfast in its installation, India should be able to trim its pending case load to a more manageable size. However, in reaching this goal, a key question still remains—will Indian courts obstinately enforce awards resulting from ADR proceedings as decrees of the court as permitted by the Ordinance? If Indian courts follow the lead of the courts of Ontario and adopt a policy of strict enforcement and non-interference with international commercial disputes they may soon

241. See *Dispute Resolution Easier Under New Arbitration Law*, FINANCIAL EXPRESS, Apr. 1996 (stating the ICA organized training programs to educate people on the Ordinance and its procedures).

242. *India: Judicial Reforms Bill This Session*, *supra* note 155.

243. See *India: Training Courses for Arbitrators Soon: ADR Will Ease Pressure on Courts*, BUS. LINE, July 1996 (stating the ICADR has planned training courses to create a reservoir of trained arbitrators in order to implement an ADR system.) The ICADR was set up in May 1995 as an independent non-profit organization based in New Delhi. *Id.* It is sponsored by the Asian Development Bank and collaborated with Pepperdine University of California to setup the new ADR system. *Id.*

244. See *id.* (discussing the ICADR's attempts to setup a national system of ADR).

245. See *India: Training Courses for Arbitrators Soon: ADR Will Ease Pressure on Courts*, *supra* note 243 (finding the ICADR stresses three key areas in their ADR package: mediation, conciliation, and arbitration).

246. *Id.*

247. Frankel, *supra* note 2, at 129.

248. See *supra* notes 53-64 and accompanying text.

reap the benefits of the Model Law and Model Rules. By providing a predictable and effective means for businesses to solve disputes its insures the road to economic success for India shall not be blocked by its legal system.

