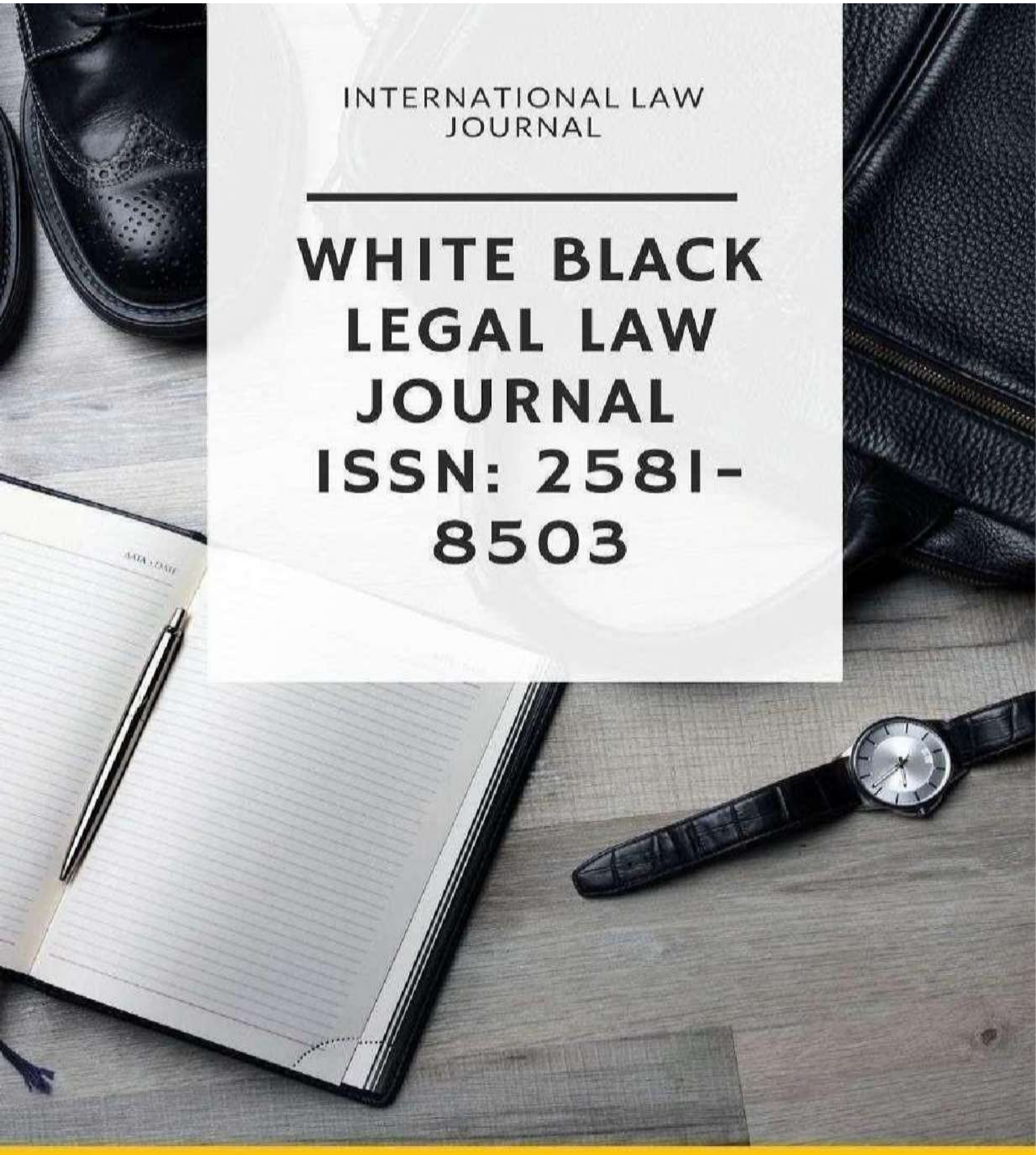

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ABOUT US

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

With this thought, we hereby present to you

LEGAL ISSUES IN INTERNATIONAL COMMERCIAL ARBITRATION – A COMPARATIVE STUDY

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1. ALTERNATE DISPUTE RESOLUTION: AN OVERVIEW

Alternative Dispute Resolution or ADR refers to an assortment of dispute procedures that primarily serve as alternatives to litigation and are generally conducted with the assistance of a neutral and independent third party. The basic rationale of ADR as a expression itself implies to resolve dispute outside the conventional judicial system and therefore during the entire process appreciation of ADR, the baseline remains to be litigation. ADR procedures have thus emerged a distinct alternatives to the court established under the writ of the state as the epithet 'alternative' has been coined the alternative dispute resolution system provides more speedy and cheaper solution for disputes which are referred for outside courts settlement.

One of the basic principles of ADR is cooperative problem solving. The ultimate objective is to resolve the dispute by arriving at a compromise with the participation and collaborative efforts of the parties, facilitated by the ADR neutral. ADR methods encouraging more openness and better communication between the parties leading to a mutually acceptable resolution. In that sense ADR methods are definitely more cooperative and less competitive than adversarial litigation. The parties control the dispute resolution processes as well as the outcome of the process and they themselves responsible for finding an effective practical and acceptable solution of the dispute.

ADR processes are, mostly non -adjudicatory and they are bound is to be since ADR is one of the option parallel litigation which is nothing but adjudication by a court of law. The examples of non - adjudicatory ADR processes are mediation, conciliation, dispute resolution, through Lok Adalats etc., which drive their sancity from the will of the parties to arrive at a mutually acceptable resolution by way of an amicable settlement. On the other hand, adjudicatory ADR processes are

those dispute resolution procedures which involve a final and binding determination of factual and legal issues of the dispute, by the ADR neutral.

2. HISTORICAL BACKGROUND OF INTERNATIONAL COMMERCIAL ARBITRATION

- **Origin and Development of International Commercial Arbitration at International Level:** International arbitration has its root in history. The picture was graphically captured by laser and thus international arbitration it is said as its roots in history. Modern commercial arbitration is a true product of the city, even though there were precedents in the late 18th century. It is well known that the first contracts to be submitted to arbitration dealt with communities. As the disputes involved in most cases perishable goods they had to be settled rapidly and confidently. London became in the century the centre of maritime and financial matters, insurance, commodities and then metals. This is still in case today, despite the development the common law courts were slow to show interest in dealing with commercial matters. This was understandable because the jurisdiction had a geographical limitation. The courts were restricted to matters which had arisen in England and between English citizens. According to Smith, foreign matters and many of these commercial disputes did involve either a foreign merchant or a contract made to perform the there left to some other body specially if it could rise in question about the relation between king and foreign sovereign.

Furthermore, the Royal Courts did not have a monopoly of the administration of justice and certain local courts continued to hear cases. Mercantile law is based upon mercantile customs and usages. The law developed separately from common law disputes between merchants, local and foreign were resolved at the fair or borough. As rightly put by Smith, disputes between merchants, local and foreign which arose at the fairs where most important commercial business was transacted in the 14th century were tried in the courts of the fair or borough and known as courts of pie powder' after the dusty feet of the traders who used them. The courts of the fair or borough were presided over the Mayor or his deputy or, if the fair were held as part of a private franchise, the steward appointed by the franchise holder. Historically therefore arbitration had an attraction for merchants and traders especially those of them dealing in perishable commodities and the need to dispose of the disputes expeditiously and in accordance with mercantile law and custom. However with the

passage of time common law courts had their own inhibitions. Apart from the issue of technicality at common law, arbitration agreement could be oral or in writing for such agreement could be valid, there must be an actual dispute and submission to a particular arbitrator.

- **National Development of International Commercial Arbitration:** Conventional perception of access to justice as understood by a layman is to approach the courts of law, for a common man a court is where justice is meted out to him but the courts have become unreachable due to different complexities such as poverty, social and political backwardness, illiteracy, ignorance, procedure formalities, etc. To get justice through courts one must go face this harsh reality and complexity as well as expensive procedures involved in litigation. Therefore a movement started for outside court settlements to provide speedy justice amongst the various ADR mechanisms. Arbitration is one of the popular methods of the dispute resolution especially for commercial in nature because with economic liberalization and privatization and globalization and the opening of market there is a phenomenal growth of international trade commerce and investment transfer of technology developmental and construction works banking activities and the like are increasing day by day to handle with the fast changing situation.

India has updated its arbitration legislation to provide a level playing field for both domestic and foreign entrepreneurs. Indian arbitration law ensures fairness and justice to all the concerned parties over the most couple of decades the business exercises got reached out outside India which was before limited inside the nation alongside. This is necessary for setting up a framework which would be respective to the speedy determination of any question that may emerged throughout business exchanges between various nationalities wound up noticeably required because of the development.

In the global exchange and business and furthermore by virtue of long postponements happening in the transfer of suits and bids in the courts. There has been magnificent development towards the determination of question through option discussion of arbitration. Assertion is a question determination technique, is another option to attempt a debate in the court framework with jury or a judge. The opinion strategy for settlement of dispute of questioning through arbitration is a rapid and helpful process which is being taken after all through the world.

3. INTERNATIONAL COMMERCIAL ARBITRATION IN INDIA

- **International Commercial Arbitration in India: A Legislative Approach: The Arbitration and Conciliation Act, 1996:** The 176th report of the commission required a review of the functioning of the aforesaid Act regarding various flaws noticed in its provisions and certain representations received. The Commission considered various representations to point out that the UNCITRAL model was mainly planned to enable various countries for having a common model for international commercial arbitration. The Indian Arbitration and Conciliation Act of 1996 has made provisions like the Model Law and made applicable to cases of purely domestic arbitration between Indian nationals and that this has given rise to some difficulties in the implementation of the Act. Grounds available for action against an award under section 34 and section 37 of the Act have been made for domestic and international arbitration awards as well. It was also suggested that the principle of least court interference may be a good principle for international arbitral awards and in respect to Indian condition as well as and the fact that several awards are passed in India for the Indian nationals is sometime by laymen not well acquainted with the law applicable, the interference with such award should not be as restricted as they are in the matter of international arbitrations.

- **Judicial Approach towards International Commercial Arbitration in India:** Speedy arbitration and least court intervention are considered as the main objectives of the Arbitration and Conciliation Act, 1996. The intervention by the judicial authority is also bar under Section 5 of the Act. The basic provision is contained in the laws of all other countries that have adopted the UNCITRAL Model. The key objectives sat out in the Statement of Objects and reasons of the Act of 1996 are "to minimize the supervisory role of courts in the arbitral process" and "to provide every final arbitral award is enforced in the same manner equaling to decree of civil court". Section 5 sets a comprehensive bar interference of the courts in the matters where there exists an arbitration clause. Under the new Arbitration Act, the interference of the Court in all matters connected with the conduct of Arbitration, decision of the arbitrator and the award has been very much minimized as compared to that under the 1940 Act.

4. INTERNATIONAL ARBITRATION LAW: A COMPARATIVE STUDY

1. **Arbitration in China:** China is a world leading trade nation that has a tradition of promoting alternative dispute resolution instead of a court proceeding. This tradition has been inspired by Confucianism and the aim has been to achieve harmony through avoidance of conflicts. In ancient time there was a saying that, - It is better to die from starvation than to become a thief: it is better to get so vexed that you die rather than going to court. China has a long history of arbitration. However, the beginnings of a formal arbitration system in China did not begin until the mid 20th century. Following the founding of the People's Republic of China (PRC) in 1949.

China establish two separate systems of arbitration, the foreign related fields of economic contracts, technology contracts, intellectual property, real property, consumer protection and so on. During the period, the PRC government actively promoted arbitration and mediation as the preferred means for resolving disputes. Beginning in the early 1960s, various revolutions were put into effect, providing for mandatory arbitration of economic convenient disputes by Economic Commission at various levels. This was called arbitration by name. The majority of arbitration commissions were stablished through the consolidation of the existing arbitration institutions. The only exception being labor dispute and rural contract arbitration commissions.

2. **Arbitration in Hong Kong:** Arbitration in Hong Kong is not a recent phenomenon. The history of arbitration in Hong Kong is long, making it one of the most established seats in Asia. Hong Kong has officially recognized arbitration as an alternative dispute resolution mechanism dating back to 1855 when the Civil Administration of Justice (Amendment) Ordinance was enacted. Indeed, the very first arbitration of ordinance was enacted, as an interim measure while a legal system was established in the colony. As ordinance No. 6 was not sanctioned by London, the colonial office prohibited the ordinance five months after its enactment, giving the governor too much power. As one would expect any sophisticated jurisdiction, Asian or otherwise Hong Kong arbitration has strongly evolved and developed since the 1855 Arbitration Ordinance to deflect important international developments and incorporating some of the most innovative and progressive changes in the region.

The two most significant developments in the legislation for international spectators, took place in

1977 and 1990. At a time when Hong Kong was still under the British rule, the New York Convention was included into Hong Kong legislation in 1975 as a result of the United Kingdom's accession to the convention. The role of arbitral institution in Hong Kong related to growth of transparent, efficient and international arbitral institutions in the region here also contributed significantly to the strength of the arbitral infrastructure in Asia. Parties are more likely to seat their arbitration in a place where they are comfortable that their administered proceedings will be handled impartially, professionally, efficiently and cost effectively by reputable when dealing with Asian parties, and the regional institutions.

3. **Arbitration in Singapore:** Singapore is known as most preferred place for international commercial arbitration hub for settlement of transitional disputes. The Singapore International Arbitration Centre (SIAC) is well known and most effective mechanism for international commercial arbitration, expertise in commercial mediation is gathered through the Singapore International Mediation Centre (SIMC). The basic benefits to the international users in Singapore law can be summed up in the following manners - Jurisdiction issues under SICC and fundamental issues is concerned under the SICC. The fundamental principles of SICC is influenced by LICA. The SICC judges actively manage cases and hold case management conferences.

4. **Arbitration in America:** In the United State of America the initiatives for the alternative dispute resolution is not a new chapter of its past history. It can be traced out as an amicable solution mechanisms for industrial disputes in 1768 in New York. It was strongly recognizing domestic and international commercial activities as a tool for outside court settlement. As a judicial remark the Supreme Court of United States stated that for the disposal of the disputes arbitration should get encouragement from the courts and also emphasis that the arbitrators decisions should get binding status like a judgment of a court.

In last two decades, ADR has got recognitions in U.S.A., as a popular mode for dispute resolution. Modern American arbitration law providing a binding and non - binding solution mechanisms for the dispute depending upon the needs of the parties. Over the last two decades, ADR mechanisms have replicated and their use has expanded. Modern laws reflect the needs of communities and businesses as well as the growing support for ADR among lawyers and judges.

5. International Commercial Arbitration (ICA) in Other Countries: Arbitration in English is old as its legal history. At Common Law the parties could at any time before award revoked the authority of the arbitrator even where the submission irrevocable even where the agreement expressly made the submission irrevocable. The subject matter of disputes was mainly confined to chattel and tort. With the expansion of the British Empire and the growth of trade, disputes the merchants and traders increased and commercial matters were frequently referred to arbitration. This resulted in substantial reduction of trial of commercial business in court.

The England Arbitration Act, of 1889 and the subsequent legislation relating to arbitration, however, cannot be said to contain the whole law of arbitration in England. The Arbitration Clauses Protocol Act, 1924 and The Departmental Advisory Committee (DAC) reported that there were fundamental problems in the presentation of arbitration law England due to some uncertainty and confusion in English arbitration law. The Arbitration Act of 1996 received the Queen's assent on 17 June 1996. This act was a combination of doctrine of arbitration law with practicability of arbitral practices, and also merges the latest changes into regulatory provisions.

6. Analysis of Conspicuous Deficiencies in International Commercial Arbitration in India: The following are the issues and deficiencies involved in International Commercial Arbitration. These are:

- Enforceability of Arbitration clause/ Arbitration agreement.
- The place of Arbitration and hearing.
- Conflict of laws.
- Country to country difference in substantive and procedural laws.
- The selection of procedures and number of Arbitrators.
- Public policy of different countries, and
- Recognition and Enforcement of Award, etc.

7. Field Observation and Analytical Overview: In spite of various efforts at national and international level in bringing the substantial changes in the international arbitration laws for smooth functioning promoting the international businesses across the country, even though there are lots of complexities in the international arbitration laws that are yet unanswered. Hence the

issues related to this need to the explore and analyzed by the **field observation** and **analytical overview**. **The research design for this research work is doctrinal as well as well exploratory**.

As to talk about **Data Analysis**, Alternate Dispute Resolution is quicker, cheaper and more user-friendly than courts. It offers choice: choice of method, of procedure, of cost, of representation, of location, etc. because often it is quicker than judicial proceedings, it can ease burdens on the Court's. Because it is cheaper, it can help to curb the upward spiral of legal costs and legal aid expenditure too, which would benefit the parties. Whether the Alternative Dispute Resolution System is a need for speedy justice and amicable solution? The answer is data analysis. Data Analysis clearly shows that the data collected through the questionnaire for the mentioned question, there were a majority of respondents were in the positive opinion that alternate dispute resolution system is a need for speedy justice for the disputes.

8. Procedural Law Applicable to the Arbitration Proceedings: The arbitral proceedings themselves are also subject to legal rules, governing both "Internal" procedural matters and "external" relationship between the arbitration and national courts. In most instances, the law governing the arbitral proceedings is the juridical place of arbitration. Among other things, the law of arbitral seat typically deals with such issues as the appointment and qualifications of arbitrators, the qualifications and professional responsibilities of parties, legal representatives, the extent of judicial intervention in the arbitration, the form of any awards, and the standard for annulment of any award. Different national laws take significantly different approaches to these various issues. In some countries, national law imposes significant limits or requirements on the conduct of the arbitration, and local courts have broad powers to supervise arbitral proceedings.

5. CONCLUSION AND SUGGESTIONS AND MODALITY:

- **Modalities:** In International Commercial Arbitration, when the parties are of different legal systems, there automatically arises a **conflict of laws, and a choice of the substantive law to be applied in a given dispute has to be made.** Many a time, the substantive law to be applied in arbitration may be specified by the parties in their original agreement. **But problem arise in determining the applicable law in situations when the party fails to agree upon a choice of law for the settlement of their dispute.** The need is to reconcile and harmonize arbitral autonomy

and finality with judicial review of the arbitral process. The National Law differ on this issue. **UNCITRAL Model** issues, the total exclusion of judicial intervention does not match with the current trend but the scope of judicial supervision needs to be reduced to the minimum.

Suggestions:

- The suggestions may be summed up as follows:
- There should be a strong and codified legislation which will govern the ICA in India;
- The statutory provisions for enforcement of foreign awards as well as for ICA in India should be more effective;
- There should be uniformity between procedural and substantive aspects among the countries in consistence with UNCITRAL guidelines;
- The enforcement agencies which are involved in ICA should be properly regularized;
- There must be effective protective measures for the foreign investors, and
- The applicability of Part I and II of Indian arbitration law should be clear.