



## INSTITUTIONAL ARBITRATION IN INDIA: THE WAY TO THE FUTURE

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### INTRODUCTION

“Conflict is inevitable, but combat is optional.” — Max Lucade

The diversity of human needs, interests, and goals have led to conflicts becoming an inevitable part of our lives. While some of these conflicts are resolved through communication and cooperation, some require the assistance of a third party for their resolution.<sup>1</sup>

‘Resolving a conflict is rarely about who is right and who is wrong, it is about the acknowledgment and appreciation of the differences’<sup>2</sup> between two sides. In India, settlement of disputes without court intervention dates back to ancient times. Our ancient texts and scriptures have reflected similar processes like Arbitration and Mediation that were practiced to resolve various kinds of disputes in the community.

It has been seen that in the last few decades, these processes have been increasingly resorted to, as methods of Alternative Dispute Resolution in India.

‘If necessity is the mother of invention, conflict is its father.’<sup>3</sup> And these conflicts have led to the innovation of alternate forms of dispute resolution. Due to the impact of Globalization<sup>4</sup>, effectiveness of Private International Law<sup>5</sup> and rapidly changing landscape of business<sup>6</sup> and commerce all the around the world, including India, there is a demand for efficient time bound methods of dispute resolution. The aim of these methods is to resolve disputes outside court of law and are comparable to international standards<sup>7</sup>, for which we need proper rules and regulations<sup>8</sup> to run that structure.<sup>9</sup>

As far as India is concerned the goal of the Constitution<sup>10</sup> is to render justice<sup>11</sup> categorised into social, economic and political sections<sup>12</sup>. Access to fast, inexpensive, expeditious justice is a basic human right to people of all segments of society and the delays in the judicial proceedings in India, due to multiple reasons, are often unacceptable to the people involved

<sup>1</sup> Shashank Garg; The Indian Perspective Alternative Dispute Resolution ,Oxford University Press,2018

<sup>2</sup> Thomas Crum; Magic of Conflict: Turning a Life of Work into a Work of Art, Touchstone; 2nd edition (February 1, 1998)

<sup>3</sup> Andrea Menaker; International Arbitration and the Rule of Law: Contribution and Conformity; Kluwer Law

International B.V., 2017

<sup>4</sup> Manfred B. Steger; Globalization- A very short Introduction; Oxford University Press, 2009

<sup>5</sup> George A. Bermann; International Arbitration and Private International Law; Pocketbooks of the Hague Academy of International Law; Publisher Brill/Nijhoff, 2017

<sup>6</sup> <https://www.herbertsmithfreehills.com/latest-thinking/arbitration-in-india-dispute-resolution-in-the-worlds-largest-democracy>; accessed on 05/06/2020 at 13:03

<sup>7</sup>[https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671\\_Ebook.pdf](https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf); accessed on 05/06/2020 at 13:16

<sup>8</sup>[https://www.lcia.org/Dispute\\_Resolution\\_Services/lcia-arbitration-rules-2014.aspx](https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx); accessed on 05/06/2020 at 13:19

<sup>9</sup> Supra 1

<sup>10</sup> <http://legislative.gov.in/sites/default/files/COI-updated.pdf>; accessed on 05/06/2020 at 13:22

<sup>11</sup>[https://www.constitutionofindia.net/constitution\\_of\\_india/preamble](https://www.constitutionofindia.net/constitution_of_india/preamble); accessed on 05/06/2020 at 13:24

<sup>12</sup> Supra 9



in modern legal transactions and they prefer the simpler and faster method of dispute resolution, which is Domestic and International Arbitration.<sup>13</sup>

Taking about arbitration we have seen that there are various techniques used like Ad-hoc Arbitration, Institutional Arbitration, Emergency Arbitration, Plea Bargaining etc. to resolve disputes according to the needs and requirements of the parties present in a particular kind of culture. The techniques and the regulations of arbitration have varied forms in different cultures and they have evolved over a span of times in all the countries. We would be focusing on the rise of arbitration in India and analysing the modern approach with its pros and cons. At the moment India is going through a phenomenal change in the field of international dispute resolution and our research will show this gradual evolution.

**MODERN INDIAN APPROACH: INSTITUTIONAL ARBITRATION**

The recent trends in arbitration in India today mainly follow the Doctrine of *Kompetenz-Kompetenz*<sup>14</sup> along with the allied Principle of Separability<sup>15</sup> which simply implies that the arbitral tribunals have the power to comprehensively rule on its own jurisdiction. Ruling over one’s own jurisdiction is much easier in an Institutionalised Arbitration where the set of laws are already well defined as compared to Ad-hoc Arbitrations.

Institutional and Ad-hoc are two main categories of Arbitration and the practitioners of arbitration need to have a very differently grinded mind set than normal lawyers who do one or two arbitration just incidentally. There are various other differences between the two ways of Arbitration which can be seen below in the table that has been drafted by a first-of-its-kind arbitral institution in India named the Mumbai Centre for International Arbitration (MCIA):<sup>16</sup>

Aspect of procedure	MCIA (Institution of Arbitration)	Ad-hoc Arbitration
Appointment of arbitrator	The MCIA Rules provide precise timelines for the appointment of the tribunal in various scenarios (sole arbitrator, three arbitrators, multiparty proceeding etc.).	Parties have to approach the courts to secure arbitrator appointments.

<sup>13</sup> Shashank Garg; The Indian Perspective Alternative Dispute Resolution ,Oxford University Press,2018

<sup>14</sup> Suresh C. Gupte; The Doctrine of ‘Kompetence-Kompetence’ : An Indian Perspective; the doctrine says that an arbitral tribunal has the authority to decide whether it has jurisdiction to deal with the matter brought forth it and whether the dispute is covered under the arbitration clause of the contract.; Richard Kreindler , Competence- Competence in the

Face of Illegality in Contracts and Arbitration Agreements ,2013

<sup>15</sup> The **doctrine of separability** is the **principle** that an **arbitration** agreement is a separate contract, not necessarily affected by the invalidity, ineffectiveness or non-existence of the main contract.

<sup>16</sup> <https://mcia.org.in/about/why-mcia/mcia-vs-ad-hoc/> accessed on 25.05.2020 at 20:20



Arbitrator challenges	The MCIA Rules have provisions dealing with the challenge of arbitrator(s) , and if necessary, the replacement of the arbitrator(s) .	Parties will have to approach the courts to challenge arbitrator(s) and seek a replacement. This can lead to delays and costs.		Consolidation of proceedings	The MCIA Rules have specific provisions dealing with the consolidation of proceedings .	No such procedure is available, which may lead to conflicting awards and/or increased costs.
Fees	The MCIA Rules provide an upfront fee schedule, which define an upper limit for arbitrators' fees as well the MCIA administrative fee.	Parties may have to negotiate the fees with the arbitrator(s).	SUPREMO AMICUS	Appointment of emergency arbitrator for urgent interim relief	The MCIA Rules provide a mechanism for the appointment of an emergency arbitrator to grant interim relief in appropriate circumstances.	Parties will have to approach a court of law to seek interim relief, before the appointment of the arbitral tribunal.
Supervision of arbitrations	The MCIA Secretariat and the Council supervise the conduct of arbitration proceedings under the MCIA Rules.	There is no institutional supervision of proceedings.	SUPREMO AMICUS	Scrutiny of awards	The MCIA Rules provide for scrutiny of draft awards, so that the MCIA Registrar can suggest modifications to the form of the draft award (without affecting the Tribunal's	There is no scrutiny of awards process in an Ad-hoc Arbitration.



	liberty of decision).	
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The above table gives us an insight into the functioning of two most prominent ways of arbitration. This could initiate, rather it has already initiated, debates and discussions by administration, corporates, lawyers, arbitrators and counsels etc. at various platforms to find out which of them is more beneficial or impactful, and the discussion continues till date as there are pros and cons at both sides. It has been observed over the past few years that Singapore, United Kingdom, United States of America and a few other countries have developed Institutional Arbitration as one of their main part of their countries dispute resolution regime and have established themselves as a hub of International Commercial Arbitration<sup>17</sup>. India's journey towards becoming a center of International Institutional Arbitration is also on a rise but it gets hampered by the ineffective arbitration law and the age old legal regime.<sup>18</sup>

Institutional arbitration is a procedure where arbitral proceeding is undertaken according to a set of rules and is administered by a particular arbitration institution which we have already seen above in the table.

Having said that, Institutional Arbitration is still in its nascent stage in India, a pioneering economic power in the contemporary world with the largest population that has consumers of indefinite products arising from International trade and commerce. India has developed in its Business and Trade patterns over the years and has arisen to almost the levels which many developed countries of the West achieved in hundreds of years. These transactions based on bilateral and multilateral agreements do face conflicts many a times that become difficult to resolve without any proper framework. The current legal framework in the country comprises of the Court Structures which are incompatible and create roadblocks instead of providing a smooth functioning of dispute resolution mechanisms. The present day judiciary in India and the Parliament till very recently had not undertaken much effort, to promote any other alternate dispute resolution system, that now has been introduced in the 2019 amendment viz-a-viz Arbitration Council of India<sup>19</sup>. This council has been made with an attempt to make India a hub of institutional arbitration and its real life implementation would be a dream come true for International Investors and Multinational Firms to start their setups in India as envisioned by our Hon'ble Prime Minister.

There are over 35 arbitral institutions in India. These include, domestic and international arbitral institutions where arbitration facilities are provided by various public-sector undertakings, trade and

<sup>17</sup> Burkhard Hess, *The Private -Public Divide in International Dispute Resolution* Brill/Nijhoff Publishers, 2018

<sup>18</sup> Janak Dwarkadas; 'A Call for Institutionalised Arbitration in India: A Step towards Certainty, Efficiency and Accountability'; Bar Council of

India, National Summit of the Legal Fraternity, Mumbai, 4th and 5th March, 2006.

<sup>19</sup> Section 43, Part IA, The Arbitration and Conciliation (Amendment) Act, 2019; <http://egazette.nic.in/WriteReadData/2019/210414.pdf>



merchant associations, and city-specific chambers of commerce and industry.

Despite the existence of these arbitral institutions in India, parties opt for Ad-hoc arbitration and regularly approach courts to appoint arbitral tribunals under the relevant provisions of the Arbitration Act. The preference for Ad-hoc Arbitrations by Indian parties is not limited to arbitrations where the amounts of the disputes are small but even where crores of rupees are spent for instance construction and infrastructure arbitration, and there are various reasons behind parties choosing Ad-Hoc Arbitration, some of which are listed below<sup>20</sup>:

- Lack of credible arbitral institutions
- Misconceptions relating to institutional arbitration
- Lack of governmental support for institutional arbitration
- Lack of legislative support for institutional arbitration
- Judicial attitudes towards arbitration in general.

Though many of the above given points are major roadblock still we see that the new India is adapting to Institutional Arbitration slowly and gradually.

To identify the roadblocks to the development of institutional arbitration we

need to examine specific issues affecting the Indian arbitration landscape. We also need to prepare a road map for making India a robust centre for institutional arbitration, both domestic and international, and for this the Central Government of India had constituted a High Level Committee<sup>21</sup> under the Chairmanship of Justice B. N. Srikrishna, Former Judge of the Supreme Court of India. This Committee submitted its report on July 30, 2017 and with a view to strengthen institutional arbitration in the country, the Committee identified six points to improve the performance of Indian arbitral institutions<sup>22</sup>:

- a. Accreditation of arbitral institutions
- b. Accreditation of arbitrators
- c. Creation of a specialist arbitration bar and bench
- d. Amendments suggested to the Arbitration and Conciliation Act and other laws
- e. Role of the government in promoting institutional arbitration
- f. Changes in arbitration culture

It was also decided to amend the Arbitration and Conciliation Act, 1996, wherein new sections were inserted from 43A to 43M in the Act<sup>23</sup>, which established Arbitration Council of India (ACI).

<sup>20</sup> Nigel Blackaby & Constantine Partasides QC; Redfern and Hunter on International Arbitration, Student

Version; sixth edition; Oxford University Press, United Kingdom; Pg 42-43

<sup>21</sup> The Committee was set up by the Ministry of Law and Justice, Government of India to review the Institutionalisation of arbitration mechanisms in India and submit a report on suggested reforms.

<sup>22</sup> Press Information Bureau Press Release, 'Constitution of high level committee to review Institutionalization

of Arbitration Mechanism in India', 29.12.2016, available at

<http://pib.nic.in/newsite/PrintRelease.aspx?relid=155959> (accessed on 18.07.2019).

<sup>23</sup> THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2019 received the assent of the

President on the 9th August, 2019, and was published for general information in the Official Gazette of India on August 9, 2019.



Sub-section (1) of section 43-D provides that it is the duty of the Council to take all measures necessary to promote and encourage arbitration, mediation conciliation or other alternate dispute resolution mechanisms, and for that purpose to frame policy and guidelines for the establishment, operation and maintenance of uniform professional standard in respect of all matters relating to arbitration.

Section 43-I provides that the Council shall make grading of arbitral institution on the basis of criteria relating to infrastructure, quality and calibre of arbitrators, performance and compliance of time limit for disposal of domestic and international commercial arbitration.

The keys areas which will play a significant role in developing International Arbitration today and in the coming years are as follows<sup>24</sup>:

1. Total Transparency of the Arbitration System
2. Clarity in the Selection Process of a Sole Arbitrator or Multiple Arbitrator Tribunal
3. More Specific Investment Arbitration Rules
4. Guidelines and Rules regarding Third Party Funding, which is not yet very common in India.
5. Rise in Financial Institution Arbitration
6. Potential Appeal Mechanism (By Consent)
7. Sanitising Arbitral Awards
8. A shift to the Oriental Hemisphere
9. Diversity in International Arbitration
10. Appropriate use of Emergency Arbitration, Summary Dismissal,

Expedited Procedure, Joinder & Consolidation.

11. An Accelerated Timeline for low-value or simple disputes
12. Mechanisms which cater to Multi-party / Multi-contract scenarios
13. Availability of an Emergency Arbitrator to determine urgent applications for interim relief before the main arbitral tribunal is appointed
14. A Time-limit for the arbitral tribunal to render its Final Award
15. A Clear Costs Schedule providing guidance on Tribunal and Administrative Fees

In India many of these key points are being implemented but not in the whole country and wherever it is implemented it is not very robust. It is a fact that the Indian sub-continent has no strong arbitral institution which could operate within the complicated as well as complex Indian system, though the insights of the 20th Law Commission Report have reflected an updated development but not very stable or uniform.

India is already consumed with the phenomenon of globalization and the need of the hour is indicative of a robust dispute settlement infrastructure. The establishment of Commercial Courts, Divisions, Commercial Appellate Division of High Courts Act, 2015; in which a specific limit is set, in case of its outreach, it shall be heard by specially qualified commercial courts. The jurisdiction that wishes to promote arbitration must adopt a pro-arbitration policy which is required to be in connectivity and consensus between the Administrators, Lawmakers and Courts.

<sup>24</sup> HOWARD, M. 2018. Impacts of cultural differences on international arbitration based on the example of Iran. Robert Gordon University, PhD thesis.



Since the procedures and rules are already framed for specific mechanisms, the only part to be reckoned and practically implemented is that of implementation and procedural execution. Institutional Arbitration is transparent and credible, the cost of litigation in the Courts is unpredictable but when it comes to Institutional Arbitration the cost is specific and the fee structure is transparent which makes it easier. The fee structures and costs involved can be seen on the website of various institutions like the MCIA. This shows the transparency and the clear cost schedules with reference to Interim Reliefs, Administrative Costs, Filing Fees etc. There are many 'soft' factors which makes the mentioned form more adaptable and acceptable including monitoring and supervision, administrative and infrastructural assistance from the Institution, the code of conduct and quality of arbitrators.

### CONCLUSION:

It is evident that the Parliament and the Government of India recognises that if India intends to grow as a commercial super power, it needs to develop a robust institutional dispute settlement infrastructure and inculcate confidence in its legal system.<sup>25</sup> Given the lack of the success of the Indian arbitral regime, the government has chosen a top down approach to initiate reform and increase the effectiveness of arbitration.<sup>26</sup> In this context the changes made by the 2019 amendment would be helpful in establishing

accredited arbitral institutions as undeniable part of the arbitration regime.

India can be a Strong Seat of International Arbitration<sup>27</sup> for the whole world as it would be economically very cost effective and geographically in the Centre of the Far East and Far West. Institutional Arbitration should also be promoted in India so that:<sup>28</sup>

- Instead of the High Courts & Supreme Court the right for the selection of an Arbitrator/s should be held with the Institution which has access to a whole pool of International Arbitrators and Counsels who are Experts in this field.
- Arbitration is carried out on a daily basis from morning till evening in normal working hours so that there is no backlog of cases or delay in concluding the arbitration proceedings.
- Exorbitant amount of fee charged by the counsels and arbitrators can also be taken care of by having a fixed fee schedule which will negate space for ambiguity.
- Steps can be taken regarding the Finality of an Award which is open to appeal or review only by a President or Registrar of the Institution so as to negate the parties taking a court route.
- The decision of the President of the Arbitral Institution can be made final and binding on the parties and any right of the parties to appeal can also be waived off.
- Foreign parties and investors are attracted to use the Arbitral Institutions in India as a seat

<sup>25</sup> Shashank Garg -The Indian Perspective Alternative Dispute Resolution ,Oxford University Press,2018

<sup>26</sup> Rohit Singal, Shishir Kant, Mayank Rajput, 'Dispute Resolution in Light of the New Arbitration Act of 2015',

Long International, available at [http:// www. Long-intl.com/articles/Long\\_Intl\\_Disputes\\_Resolution\\_in\\_India\\_in\\_Light\\_of\\_New\\_Arbitration\\_Act\\_of\\_2015.pdf](http://www.Long-intl.com/articles/Long_Intl_Disputes_Resolution_in_India_in_Light_of_New_Arbitration_Act_of_2015.pdf)

accessed on 25.05.2020 at 18:09

<sup>27</sup> Nigel Blackbay and Constantine Partasides QC with Alan Redfern and Martin Hunter, International Arbitration, 6<sup>th</sup> Edn. 2015, Oxford University Press

<sup>28</sup> <https://www.indianbarassociation.org/what-india-needs-to-do-to-make-institutional-arbitration-success-in-india/>; accessed on 24.05.2020 at 19:04



of arbitration as it is backed by the Judiciary of the country and the judiciary has a pro-enforcement approach.

- These institutions get a chance to attend international conferences and host international conferences where they represent the nation and enhance the international image of Institutional Arbitration in India and this is possible only if they are provided with ample resources and opportunities.

- There are good bilateral relations between the Arbitral Institutions in India and the ones in other countries to ensure constant updates of rules governing International Arbitrations in various fields of law internationally.

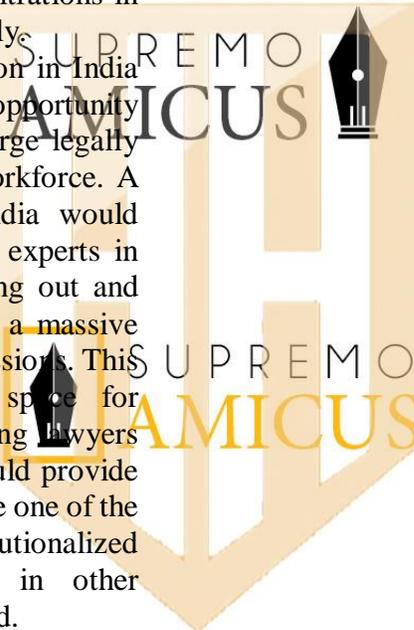
In addition, institutional arbitration in India would not only be a monetizing opportunity for the nation but also for our large legally skilled and highly intellectual workforce. A strong seat of arbitration in India would prevent our Senior Lawyers and experts in the field of arbitration from going out and doing arbitration which leads to a massive brain drain like all the other professions. This would also generate a great space for employment for the young budding lawyers in this field. Every institution could provide legal team support which would be one of the basis for successful institutionalized arbitrations which is lacking in other arbitration institutions of the world.

Institutionalisation of arbitration can go a long way in securing ideals like informality, simplicity, quickness, cost effectiveness. The more robust the arbitral institutions are in India it is more likely that India will become a preferred arbitral destination.<sup>29</sup>

‘Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser-in fees, expenses and waste of time.’

-Abraham Lincoln

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<sup>29</sup> Depto Roy & Madhukeshwar Desai; Institutional Arbitration In India- The Way Forward; Shashank Garg (Ed.), Alternative Dispute Resolution- The

Indian Perspective; Oxford University Press, 2018; Pg 104