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Arbitration in Government Contracts: Party Autonomy vs. Public Policy



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Introduction

Arbitration is a widely sought-after alternative dispute resolution (ADR) mechanism in India that allows parties to resolve disputes outside the traditional court-litigation system. From being an ancillary means of resolving disputes, arbitration has come a long way and evolved into the cornerstone of the Indian dispute resolution regime. Over the past three decades, Indian lawmakers have taken concrete measures to establish and fortify the arbitration law framework, aligning it with global standards.

While the contributions of the Indian legislature and judiciary are well-recognised, the evolution of the Indian arbitration-law regime is also intricately intertwined with the State's administrative decisions. In this article, we examine the Government's influence on arbitration in India, delving into the two hats it wears i.e. one of a regulator and another of a disputant and the resulting implications on the legal framework in India.

The general outlook

(i) Government's commitment to arbitration

The Indian Government (both at the Central and State levels) has been vocal about promoting arbitration as a preferred means of dispute resolution. The Government's focus on arbitration stems from the role played by the recent amendments made to the Arbitration and Conciliation Act, 1996¹ (Arbitration Act) which resulted in a sudden and noticeable improvement in India's ease of doing business ranking. In a conference, namely, the National Initiative towards Strengthening Arbitration and Enforcement in India, the Prime Minister emphasised the Government's priority to develop a "vibrant ecosystem for institutional arbitration" and position India as a global hub.² Similarly, the then Minister of Law and Justice also opined that a robust dispute resolution system is utmost important for creating a conducive environment for trade and investment.³

The Minister for External Affairs, in the inauguration ceremony of the Arbitration Bar of India, highlighted the role of arbitration in facilitating international trade and assuring foreign investors of a predictable and stable dispute resolution mechanism.⁴ In a Press Release⁵ published in December 2024, the Ministry of Law and Justice wrote that the Government was taking active steps to promote ADR mechanisms including arbitration and mediation. Amongst the measures taken, the Government cited the amendments made to the Arbitration Act,⁶ and the Commercial Courts Act⁷ coupled with the introduction of the Mediation Act, 2023.⁸

(ii) Legislative policy, and judicial reforms for enhancing arbitration ecosystem

The 2015⁹, 2019¹⁰, and the 2021¹¹ Amendments to the Arbitration Act have considerably contributed to India's rise in the ease of doing business rankings¹² by the World Bank. The efforts to strengthen the arbitration law regime of India were not only made to enhance investor confidence, but also to convey the message that India could be a potential international arbitration hub in Asia like Singapore and Hong Kong.

In recent years, the Indian judiciary has rendered several important judgments which stress upon fundamental concepts of arbitration. These include landmark judgments by the Supreme Court of India on aspects such as minimal judicial interference,¹³ arbitrability of disputes,¹⁴ general illegality of unilateral appointments,¹⁵ interplay of stamping requirements and arbitration,¹⁶ impleadment of group companies.¹⁷ The then Chief Justice of India remarked that, "arbitration is no longer an alternative", rather "it is the preferred method of seeking commercial justice".¹⁸

Through policy-based and judicial reforms, the State endeavours to elevate India's standing as an arbitration-friendly jurisdiction. However, as would be noted from subsequent segments, balancing this intent with the practical implementation poses unique challenges.

The guidelines

Despite the Government's vocal support for arbitration, in June 2024, the Ministry of Finance came up with an office memorandum which contained new guidelines¹⁹ (Guidelines) for arbitration and mediation in domestic public procurement contracts. The guidelines came as a surprise to many as they imposed considerable limitations on the use of arbitration in domestic Government procurement contracts. In the guise of streamlining the dispute resolution policy of the Government²⁰, the guidelines reflect a departure of the administrative arm of the State from the aggressive promotion of arbitration witnessed in recent years.

Broadly put, the guidelines recommend that arbitration must not be routinely or automatically used in public procurement contracts, especially for disputes of large value. Arbitration, as a means of dispute resolution, has been restricted only to matters where the subject-matter and/or the value of the dispute is less than Rs 10 crores. Disputes of higher values would require intervention from senior officials of the relevant departments.

Apart from restricting the use of arbitration, the guidelines also advocate for using mediation and renegotiation of contracts (wherever appropriate in public interest) to cull disputes at the grassroot level.

Experts in the domain of arbitration have not responded favourably to the sudden reorientation of the Government's dispute resolution policy. The emphasis within the guidelines on the Government's own experience with arbitration and the purported shortcomings of arbitration raise questions about its potential impact on arbitration's role in India's dispute resolution framework.

Unique position of the Government as a disputant

The guidelines issued by the Government set out the peculiarities of Government-related arbitration matters. Unlike its private counterparts, the Government is accountable to the people at large for its decision-making and is required to adhere to a high degree of fairness and non-arbitrariness. The said duty to act "without arbitrariness" often adds multiple tiers to the internal decision-making process. Thus, the possibility of accepting an adverse award when all judicial avenues are not exhausted is less for the Government.²¹

As per the guidelines, a further complication arises given the transferable nature of government officers, which may often result in loss of institutional memory.²² In addition to the frequent transfers or changes in roles and positions among employees in Government, the poor maintenance of records and lack of robust contract/dispute management systems would mean that the personal knowledge of a government officer may not be the same as that of an employee of a private party.

The guidelines opine that the above factors ultimately affect the Government's strategy-making in arbitral proceedings and have adverse implications on the experience of the Government in arbitrations.²³

Perceived benefits versus actual experience of the Government

(i) Theoretical advantages of arbitration

The Guidelines suggest that the Government perceives a considerable divergence in the theoretical advantages of arbitration and the on-ground experience when the Government is one of the disputants.²⁴

Arbitration is championed by experts for its relative efficiency when compared to litigation be it in terms of speed, convenience, cost-effectiveness, technical expertise of the arbitrator(s), and finality of the process. Arbitration is also found to be less formal and more flexible than litigation.²⁵ Thus, given its expected benefits, arbitration has the potential to enhance the quality of decision-making.

(ii) Practical challenges faced by Government

Regardless of the perceived advantages of arbitration, the Government in the guidelines paint a less optimistic picture of its own experience. The arbitral process which is otherwise intended to be expeditious, in practice, is often plagued by delays. The guidelines also challenge the notion that arbitration is cost effective. In fact, the Government terms arbitration as a very expensive option, particularly in high-value disputes.²⁶

Concerns are also expressed in the guidelines about the reduced formality of arbitration. While reduced formality is expected to foster flexibility and facilitate better decision-making, the Government believes that it also leads to wrong decisions on facts and improper application of law.²⁷ The Government also appears to take an issue with the fact that the proceedings are conducted behind closed doors and that the arbitrator(s) are not necessarily subject to high standards of selection. This, as per the Government, increases the possibility of wrong-doing and collusion.²⁸

The expectation of finality, a cornerstone of arbitration, also seems to have faltered in practice. According to the guidelines, a large number of arbitral awards involving government entities are routinely challenged in the courts, often by both parties dissatisfied with the outcome. This propensity for litigation has, paradoxically, rendered arbitration an additional layer in the dispute resolution process, rather than a mechanism to alleviate the burden on the judiciary.²⁹

Lastly, the Government opines that the existence of an arbitration clause may discourage the officials concerned from taking a commercially-oriented and a pragmatic approach. Instead of resolving disputes at the threshold by negotiations or mediation, the

Government may let disputes proceed to full-blown arbitrations.

As per the Government, the above factors, coupled with the broader public interest, render arbitration not fit for high-value disputes. The above perspective also provides the Government a foundation to call for a re-examination of the Government's approach to dispute resolution.

Recommendations of the Government — Avoid arbitration

The recommendations under the guidelines appear to be the Government's attempt at addressing the unique challenges faced by it as a disputant.

(i) Selective use of arbitration in high-value disputes

Firstly, the guidelines oppose the routine and indiscriminate inclusion of arbitration clauses in domestic public procurement contracts. The use of arbitration as a means of resolving disputes is now restricted to disputes where the subject-matter is valued less than Rs 10 crores. For disputes where the subject-matter is valued higher than the threshold of Rs 10 crores, arbitration may only be resorted to upon a careful deliberation by senior officials³⁰ and recording of reasons.³¹

Secondly, in cases where arbitration may be resorted to, the Government prefers institutional arbitration over ad hoc arbitration so long as the costs are reasonable and proportionate to the value of the dispute.³²

Thirdly, the guidelines recommend that the Government must avoid challenging arbitral awards/decisions arrived at in arbitral proceedings in a routine manner.³³ While referring to the General Instructions on Procurement and Project Management dated 29-10-2021, the guidelines opine that a challenge may be preferred by the Government only when the case has genuine merits and there are high chances of winning in the Court.³⁴

(ii) Promoting amicable settlements through mediation

Fourthly, the guidelines encourage government officials to prioritise amicable resolution of disputes and adopt methods like mediation under the Mediation Act, 2023. For disputes of high value, the guidelines recommend the setting up of High-Level Committees (HLCs), comprising retired Judges, senior officials, or technical experts. The HLCs may either negotiate directly with the opposite party and place a proposed solution for their consideration. Alternatively, the HLCs may itself mediate the matter.³⁵ In exceptional cases where the performance of the underlying contracts is envisaged for longer terms, the guidelines leave it to open to the Government to renegotiate the terms.³⁶ Ultimately, all decisions taken consequent to the parties participating in a mediation must bear the approval of the appropriate authority in terms of Section 49 of the Mediation Act, 2023.³⁷

Finally, the guidelines clarify that mediation agreements need not be routinely or automatically included in domestic public procurement contract/tenders. The absence of a mediation agreement does not in any manner preclude the parties from engaging in pre-litigation mediation.³⁸

Critique of the guidelines

The Guidelines were widely criticised by domain experts who identified fundamental flaws in the underlying rationale for the proposed measures. As such, the Guidelines are overly restrictive, and inconsistent with the broader object of fostering an effective ADR ecosystem in India.

(i) Restriction of arbitration to low-value disputes

One of the most contentious aspects of the guidelines is limiting usage of arbitration for disputes valued at less than Rs 10 crores. This restriction, in one sweep, exclude disputes of higher value. With the rise in complex commercial transactions across sectors such as infrastructure development, renewable energy, emerging technologies, healthcare, aviation, etc. it is highly probable that foreign parties may be discouraged to make investments in contracts which are not amenable to arbitration.

Moreover, diverting such high-stake matters to litigation would worsen the docket explosion that the Indian courts are witnessing day-in, and day-out. The judiciary, which is already grappling with over 50 million pending cases, lacks the capacity to handle these intricate and document-intensive disputes efficiently.³⁹ Critics have pointed out that arbitration clauses provide a clear, pre-agreed framework for dispute resolution, which is especially crucial in high-stakes contracts involving public funds.⁴⁰ Removing arbitration as a standard mechanism introduces uncertainty and could lead to inconsistent dispute resolution practices across different contracts.

(ii) Preference for mediation

While mediation is an important ADR tool, the guidelines over-emphasise on mediation over arbitration. Mediation is fundamentally a non-binding process. The very arguments which work against arbitration under the guidelines would also apply to mediation. Most importantly, there is a very high possibility of Government officials avoiding mediated settlement of disputes involving large payouts fearing a vigilance inquiry.

(iii) High-Level Committees and additional bureaucracy

The proposal to establish HLCs for dispute resolution has been critiqued as adding another layer of bureaucracy without delivering substantive benefits.⁴¹ While HLCs are intended to ensure impartiality and scrutiny, their recommendations are non-binding, further undermining their utility. Critics argue that these Committees could deter meaningful resolution, as parties are unlikely to place significant confidence in non-enforceable decisions. Moreover, the additional administrative layer risks delaying rather

than expediting the resolution process, especially in high-value disputes.

(iv) Inexplicable distrust towards arbitrators

The guidelines express distrust and are inexplicably sceptic towards arbitrators, raising issues about their accountability, expertise, and the alleged lack of rigorous selection standards compared to the judiciary. However, critics argue that this perspective is misguided and harmful to the overall arbitration system. Many arbitrators are former Judges or professionals chosen with the oversight of courts or institutions, which helps ensure their neutrality and expertise. The guidelines do not sufficiently advocate for institutional arbitration, which offers strong mechanisms for selecting, monitoring, and holding arbitrators accountable. By casting doubt on the integrity of arbitrators, the guidelines risk undermining trust in arbitration as a valid and effective means of resolving disputes.

(v) Disincentivising investment

The guidelines' overall approach, which deprioritises arbitration and limits its application, has raised concerns about its potential impact on India's investment ecosystem. Robust dispute resolution mechanisms are a critical factor for both domestic and foreign investors. Financial institutions such as the World Bank assess the bankability of projects based on the availability of effective ADR frameworks. By limiting arbitration and pushing disputes towards litigation, the guidelines send a negative signal to investors, undermining India's aspirations to position itself as a global arbitration hub.

(vi) Mixed signals on institutional arbitration

While the guidelines acknowledge the benefits of institutional arbitration, they fail to fully embrace it as a solution to the issues they raise. Institutional arbitration provides procedural predictability, ensures accountability, and leverages the expertise of vetted arbitrators. The absence of a strong push for institutional arbitration in Government contracts represent a missed opportunity to enhance the credibility and efficiency of India's arbitration framework.

Way forward

The guidelines are an attempt to address the peculiarities associated with the Government as a disputant. However, the concerns raised by practitioners and stakeholders indicate that these measures need significant recalibration to ensure that they align with the Government's broader policy objectives of fostering arbitration, reducing judicial backlog, and enhancing India's attractiveness as an investment destination. A pragmatic way forward must focus on balancing the Government's unique challenges with the larger object of strengthening the alternative dispute resolution (ADR) ecosystem.

(i) Promote institutional arbitration

One of the most effective measures would be a robust embrace of institutional arbitration. Institutions such as the Delhi International Arbitration Centre (DIAC), Mumbai Centre for International Arbitration (MCIA), and other bodies provide structured frameworks, experienced arbitrators, and mechanisms for ensuring procedural discipline. Institutional arbitration addresses several concerns raised in the guidelines, such as delays, accountability, and costs. To realise its potential, the Government should incorporate model institutional arbitration clauses in all public contracts and mandate institutional arbitration for disputes above a certain financial threshold.

(ii) Reconsider arbitrary value limits for arbitration

The Rs 10 crores cap provided in the Guidelines for arbitration is arbitrary and counterproductive. Instead of blanket restrictions, the Government should adopt a more nuanced approach that considers the complexity and nature of disputes, rather than their monetary value. High-value disputes, particularly in sectors like infrastructure, technology, and manufacturing, require the expertise and flexibility that arbitration uniquely offers. Establishing thresholds based on factors such as technical requirements and public interest rather than rigid monetary limits would create a more adaptable framework.

(iii) Strengthen accountability without undermining arbitrators

While concerns about arbitrators' accountability are valid, they should be addressed through institutional reforms rather than unwarranted scepticism. Introducing a standardised code of conduct for arbitrators, with clear benchmarks for integrity, impartiality, and professional expertise, can ensure accountability without eroding trust. Additionally, institutional arbitration inherently provides oversight and accountability mechanisms that the Government could leverage to address its concerns about the quality of arbitral decisions.

(iv) "Med-Arb" clauses

The Guidelines focus on mediation is well-intentioned but overlooks the inherent limitations of a non-binding mechanism. A more effective approach would be to encourage using mediation-arbitration (Med-Arb) clauses in contracts. Under this framework, parties can attempt mediation as a first step and, in the event of failure, seamlessly transition to binding arbitration. This dual approach ensures that disputes are resolved efficiently and addresses the Government's concerns about promoting amicable settlements.

(v) Reduce litigation propensity

The Government's proclivity to challenge adverse arbitral awards has been a significant contributor to delays and judicial backlog. To address this, the Government should establish a formal review mechanism wherein independent panels evaluate arbitral awards and determine whether an appeal is genuinely merited. Only challenges with high

prospects of success should proceed, ensuring that frivolous appeals are minimised.

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