HIGH LEVEL COMMITTEE TO REVIEW THE INSTITUTIONALISATION OF ARBITRATION MECHANISM IN INDIA

New Delhi
30 July, 2017

Shri. Ravi Shankar Prasad
Minister for Law and Justice
Government of India
New Delhi 110 001.

Dear Law Minister,

The High Level Committee to review the institutionalisation of arbitration mechanism in India presents its Report to the Government of India. The Report is in three parts. Part I of the Report contains the Committee's findings on institutional arbitration in India and its recommendations. Part II contains a study of the working and performance of the International Centre for Alternative Dispute Resolution (ICADR) and the Committee's recommendations for its reform. Part III deals with the role of arbitrations in BIT disputes involving the Union of India, and the Committee's recommendations on the same.

Two members of the Committee, Justice S. Ravindra Bhat and Mr. K.K. Venugopal, the Attorney General for India, did not participate in the deliberations of the Committee on Part II and have dissociated themselves from that Part of the Report.

The Committee did not release the Report in the public domain since the mandate was to submit it to the Government. However, given the high level of stakeholder interest on the subject and the need for transparency, the Government may release the Report at the earliest.

Yours sincerely

Justice B.N. Srikrishna
Retired Judge, Supreme Court of India
Chairman

Justice R. V. Raveendran
Retired Judge, Supreme Court of India
Member

Justice S. Ravindra Bhat
Judge, High Court of Delhi
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Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India

Chairman
Justice B. N. Srikrishna
Retired Judge, Supreme Court of India

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I. EXECUTIVE SUMMARY

The provision of quick and easy means for the resolution of commercial disputes has been a priority for Indian lawmakers for some time now. The enactment of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 ("**Commercial Courts Act**") was aimed at revitalising India's commercial dispute resolution ecosystem. The promotion of arbitration as a quick and effective alternative to litigation is another area of focus for the Government of India ("**Government**").

India's efforts to encourage dispute resolution through arbitration and become a major arbitration hub had long been impeded by the judicial interpretation of certain provisions of its arbitration legislation and excessive court involvement in the arbitral process. The 2015 amendments to the Arbitration and Conciliation Act 1996 ("**ACA**") were therefore focused on undoing the effect of such judicial precedent and limiting judicial intervention.

The promotion of institutional arbitration in India by strengthening Indian arbitral institutions has also been identified as being critical to encouraging dispute resolution through arbitration. Though various arbitral institutions have been set up in India, particularly in the last five years, they have not been preferred by parties, who have leaned in favour of ad hoc arbitration or arbitrations administered by arbitral institutions located abroad. It was in this context that the High Level Committee ("**Committee**") was set up to identify the roadblocks to the development of institutional arbitration, examine specific issues affecting the Indian arbitration landscape, and prepare a roadmap for making India "a robust centre for international and domestic arbitration."[1]

The Committee had extensive deliberations and consultations with stakeholders to identify specific areas of reform for the development of institutional arbitration. In Part I of this Report, the Committee recommends the strengthening of institutional arbitration in India through measures such as the grading of arbitral institutions, the accreditation of arbitrators, the creation of a specialist arbitration bar and bench, and the provision of governmental and legislative support for institutional arbitration. The Committee also recommends further amendments to the ACA to clear ambiguities in the legislation and promote the use of India as a seat of arbitration. In Part II, the Committee recommends the development of the International Centre for Alternative Dispute Resolution ("**ICADR**"), an arbitral institution receiving significant funding from the Government, as a flagship arbitral institution. In Part III, the Committee examines the issues of management and resolution of bilateral investment treaty ("**BIT**") arbitrations involving the Union of India, and makes specific recommendations for effective dispute resolution, dispute management and prevention.

[1] 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 18.07.2017).

Key recommendations

1. **Arbitration Promotion Council of India** – An autonomous body styled the Arbitration Promotion Council of India ("**APCI**") and having representation from various stakeholders may be set up by amendment to the ACA for grading arbitral institutions in India. *(See Chapter VI, Section A)*

2. **Accreditation of arbitrators** – The APCI may recognise professional institutes providing for accreditation of arbitrators. Accreditation may be made a condition for acting as an arbitrator in disputes arising out of commercial contracts entered into by the government and its agencies. *(See Chapter VI, Section B)*

3. **Creation of a specialist arbitration bar** – Measures may be taken to facilitate the creation of an arbitration bar by providing for admission of advocates on the rolls of the APCI as arbitration lawyers, encouraging the establishment of fora of young arbitration practitioners, and providing courses in arbitration law and practice in law schools and universities in India. *(See Chapter VI, Section C)*

4. **Creation of a specialist arbitration bench** – Judges hearing arbitration matters should be provided with periodic refresher courses in arbitration law and practice. These courses could be conducted by the National Judicial Academy and the respective state judicial academies. *(See Chapter VI, Section D)*

5. **Amendments to the ACA** (*See Chapter VI, Section E)*

    - **Applicability of the 2015 Amendment Act** – Section 26 of the 2015 Amendment Act may be amended with retrospective effect to provide that unless parties agree otherwise, the 2015 Amendment Act shall apply only to arbitral proceedings commenced on or after the commencement of the 2015 Amendment Act and to court proceedings arising out of or in relation to such arbitral proceedings.

    - **Amendment to section 2(2) of the ACA** – Section 2(2) may be amended to provide that clause (b) of sub-section (1) of section 37 shall also apply to international commercial arbitrations, even if the place of arbitration is outside India, instead of clause (a) of sub-section (1) of section 37.

    - **Amendment to section 17(1) of the ACA** – Section 17(1) may be amended to delete the words "or at any time after the making of the arbitral award but before it is enforced in accordance with section 36".

    - **Timelines under section 29A of the ACA** – Amendments may be made to section 29A: (a) to limit its application to domestic arbitrations only, and not international commercial arbitrations; (b) to provide for a 6-month period for the submission of pleadings; (c) to provide that the time limit for completion of arbitral proceedings

starts to run the aforementioned 6-month time period; (d) to provide for the continuation of the mandate of the arbitral tribunal during the pendency of an application to extend the time limit; (e) to provide that the application is deemed granted if it is not disposed of within the period mentioned in section 29A; and (f) to provide for sufficient opportunity for hearing the arbitrator(s) where the court seeks to reduce the fees of the arbitrator(s).

- **Amendments to Section 34 of the ACA** –
  - An amendment may be made to section 34(2)(a) of the ACA substituting the words "furnishes proof that" with the words "establishes on the basis of the arbitral tribunal's record that".
  - An amendment may also be made to section 34(6) of the ACA substituting the words "in any event," with the words "an endeavour shall be made to dispose of the application" so that the time limit specified therein is construed as being directory only.
- **Reference to arbitration under section 45 of the ACA** – Section 45 may be amended to clarify that the court shall refer parties to arbitration on the basis of only a prima facie conclusion that the arbitration agreement is not null and void, inoperative, or incapable of being performed.
- **Enforcement of foreign arbitral awards** – A new sub-section (4) may be inserted in section 48 of the ACA providing that an application for enforcement of a foreign award under section 47 shall be disposed of expeditiously and an endeavour shall be made to dispose of such application within a period of one year from the date on which the application is filed before the court.
- **Amendments to section 37 and 50 of the ACA** – In sub-section (1) of section 37 of the ACA, the words "Notwithstanding anything contained in any other law" shall be added before the words "An appeal shall lie". Similarly, in sub-section (1) of section 50 of the ACA, the words "Notwithstanding anything contained in any other law" shall be added before the words "An appeal shall lie".
- **Costs in proceedings under Part II of the ACA** – A provision akin to section 31A pertaining to imposition of costs in connection with court proceedings under Part II of the ACA should be incorporated.
- **Typographical error in the Fourth Schedule** – The Fourth Schedule may be amended to provide that the model fee where the sum in dispute is above INR 10,00,00,000 and up to INR 20,00,00,000 is 12,37,500 plus 0.75 per cent of the claim amount over and above INR 10,00,00,000.

- **Immunity for arbitrators** – A new provision may be inserted to provide for immunity for arbitrators for acts or omissions in the discharge or purported discharge of his functions as arbitrator except in case of bad faith.

- **Confidentiality of arbitral proceedings** – A new provision may be inserted in Part I of the ACA providing for confidentiality of arbitral proceedings unless disclosure is required by legal duty, to protect or enforce a legal right, or to enforce or challenge an award before a court or judicial authority.

- **Default rules of procedure** – Model arbitral rules of procedure as provided in Annexure 2 to this Report may be incorporated in the ACA to operate as the default rules of procedure for arbitrations, unless parties exclude its operation (wholly or in part) by mutual consent at any time.

- **Amendments to section 11 of the ACA** – In order to ensure speedy appointment of arbitrators, section 11 may be amended to provide that the appointment of arbitrator(s) under the section shall only be done by arbitral institution(s) designated by the Supreme Court (in case of international commercial arbitrations) or the High Court (in case of all other arbitrations) for such purpose, without the Supreme Court or High Courts being required to determine the existence of an arbitration agreement.

- **Recognition of emergency awards** – Amendments may be made to section 2 of the ACA to enable the recognition of awards given by emergency arbitrators.

- **Insertion of a separate chapter establishing the APCI** – A new Part IA may be inserted after Part I of the ACA establishing the APCI and providing for its composition, and functions and powers.

- **Depository of awards** – The APCI may maintain an electronic depository of all arbitral awards made in India and such other records as may be specified by the APCI. Courts may access the depository for getting a copy of an award.

- **Incorporation of arbitral institutions** – An amendment may be made to the ACA providing that all arbitral institutions shall be incorporated as companies under section 8 of the Companies Act 2013, or registered as societies under the Societies Registration Act 1860 or the corresponding state legislation.

6. **Other measures that can promote arbitration practice in India** – Measures that promote access to the jurisdiction by permitting foreign lawyers to represent clients in international arbitrations held in India and promote India as a venue by easing restrictions related to immigration, tax, etc. may be adopted. (*See Chapter VI, Section F)*

7. **Role of the government and the legislature in promoting institutional arbitration** – Measures to promote institutional arbitration such as facilitating the construction of

integrated infrastructure for arbitration in major commercial hubs, adopting arbitration policies providing for institutional arbitration in commercial disputes involving the government, amending the ACA swiftly to keep abreast of developments in arbitration law and practice internationally, etc. may be adopted. (*See Chapter VI, Section G)*

8. **Changes in ADR culture** – Measures may be taken to promote the use of ADR mechanisms, including requiring the provision of mediation facilities by arbitral institutions. The Government may also consider the feasibility of a separate legislation governing mediation. (*See Chapter VI, Section H)*

9. **The International Centre for Alternative Dispute Resolution** – The ICADR should be taken over and be re-branded as the India Arbitration Centre in keeping with its character as a flagship arbitral institution. There must be a complete revamp of its governance structure to include only experts of repute who can lend credibility and respectability to the institution. *(See Part II)*

10. **Bilateral investment arbitrations involving the Union of India** – Recommendations for effective dispute management and resolution, and dispute prevention include: (a) appointing the Department of Economic Affairs as the Designated Representative of the Government in existing BITs; (b) creating the post of an International Law Adviser, who shall advise the Government and coordinate dispute resolution strategy for the Government in disputes arising out of its international law obligations, particularly disputes arising out of BITs; (c) establishing a 5-member permanent Inter-Ministerial Committee in order to ensure effective management of disputes arising out of BITs entered into by the Government; and (d) tasking the Department of Economic Affairs with the preparation and implementation of dispute prevention strategies in order to prevent disputes from arising or escalating to formal dispute resolution proceedings. *(See Part III)*

II. INTRODUCTION

A. Mandate

The Committee was set up by the Ministry of Law and Justice, Government of India by an office order dated 13 January 2017 to review the institutionalisation of arbitration mechanisms in India and submit a report on suggested reforms. The Committee functioned under the Chairmanship of Justice (Retd.) B. N. Srikrishna (former Judge, Supreme Court of India).

The Government has placed emphasis on facilitating: (a) the quick and effective resolution of commercial disputes through arbitration; and (b) the effective conduct of international and domestic arbitrations. With this objective in mind, the Committee was constituted to identify issues that affect the arbitration landscape in India and formulate a roadmap for making India a hub for international and domestic arbitrations. It was felt that this would help in improving the ease of doing business in India and promoting India as an investor-friendly jurisdiction.

The Committee's Terms of Reference ("**Terms of Reference**") included examining the effectiveness of existing arbitration mechanisms, studying the functioning and performance of arbitral institutions in India (including those funded by the Government), and identifying gaps in terms of manpower, skills, infrastructure and funding in such institutions. Based on this, the Committee was tasked with: (a) suggesting measures to encourage institutional arbitration in India; (b) recommending amendments to the ACA and other laws to encourage international commercial arbitration; (c) devising an action plan for implementation of the law to encourage speedy arbitrations; (d) proposing measures to strengthen arbitral institutions through revisions in rules and regulations, funding, empanelment of qualified domestic and international arbitrators, and skill and manpower building; (e) making arbitration more widely available in curricula and study materials; (f) devising a roadmap to strengthen research in the area; and (g) evolving an effective and efficient arbitration ecosystem for commercial dispute resolution. Finally, the Committee was also tasked with considering the role of arbitrations in matters involving the Union of India, including BIT arbitration and suggesting measures for reform. The Terms of Reference are annexed to this Report as Annexure 1.

During the Committee's deliberations, it was decided to divide the project into three parts: (a) to study the institutional arbitration landscape in India and suggest reforms; (b) to study the working and performance of the ICADR, and suggest reforms; and (c) to identify issues arising in BIT arbitrations involving the Union of India and make recommendations.

B. Working Process of the Committee

The Committee had its first meeting on 12 February 2017. The Committee had 6 subsequent meetings between 11 March 2017 and 21 July 2017 (both dates inclusive).

In March 2017, the Committee published a working paper ("**Working Paper**") that: (a) delineated issues that exist in the institutional arbitration landscape in India; and (b) set forth its initial proposals for reform. The Working Paper was accompanied by two questionnaires ("**Questionnaires**") aimed at understanding why several existing arbitral institutions in India were not functioning effectively. The Questionnaires were circulated to: (a) arbitral institutions in India; and (b) stakeholders in an arbitration such as parties, their in-house counsel, lawyers and arbitrators. The Committee invited comments and suggestions on the Working Paper from members of the public through a notification dated 16 March 2017.[2] The Committee also invited presentations from persons with expertise in arbitration (including judges, practitioners, and representatives from arbitral institutions and professional bodies of arbitrators) at its meeting on 23 April 2017. Further, as part of its study of the ICADR, a visit was arranged to the ICADR on 28 April 2017.

On 22 April 2017, the Committee organised a workshop titled *Bilateral Investment Treaties — Treatment Standards and other Issues* ("**Workshop**") in collaboration with EBC. The objective of the Workshop was to get the views of experts in investment law and investment treaty arbitration on India's position in relation to its BITs and in the revised 2015 Model Text for the Indian Bilateral Investment Treaty ("**2015 Model BIT**") on the following issues: (a) definition of 'investment'; (b) fair and equitable treatment; (c) expropriation; and (d) dispute resolution under BITs. The Workshop brought together leading Indian and international academics and practitioners in investment law and investment treaty arbitration. The Committee also had further conversations with academics and practitioners.

The Committee is thankful to the following persons for their inputs in the preparation of this Report.

1. Justice Dr. S. Muralidhar, Judge, High Court of Delhi
2. Darius Khambata, Senior Advocate
3. Arvind P. Datar, Senior Advocate
4. Gaurav Pachnanda, Senior Advocate
5. N. L. Rajah, Director, Nani Palkhivala Arbitration Centre
6. Abhinav Bhushan, Director (South Asia), International Chamber of Commerce, International Court of Arbitration
7. Vikas Mahendra, Partner, Keystone Partners
8. Ratan Singh, Director - India, Chartered Institute of Arbitrators
9. Samir Shah, Director, Chartered Institute of Arbitrators - India Branch

[2] Press Information Bureau Press Release, 'Comments invited on the working paper of the high level committee to review the Institutionalisation of Arbitration Mechanism in India by 7 April 2017', 16.03.2017, available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=159370 (accessed on 18.07.2017).

10. Dr. V. D. Sharma, Joint Secretary, Legal & Treaties Division, Ministry of External Affairs, Government of India
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25. P.S. Rao, Special Adviser, Office of the Attorney-General, State of Qatar

Vidhi Centre for Legal Policy, New Delhi assisted the Committee with legal research and drafting of this Report.[3]

C. Structure of the Report

This Report is divided into 3 parts.

Part I of the Report deals with institutional arbitration in India. Chapter III of the Report studies the current state of institutional arbitration vis-a-vis ad hoc arbitration and examines the reasons as to why institutional arbitration is not the preferred form of arbitration. Chapter IV of the Report sets out the results of the Committee's consultative process with stakeholders, analyses the reasons behind the poor performance of arbitral institutions in India, and identifies areas for reform. Chapter V of the Report examines the reasons behind the success of leading arbitral institutions worldwide with a view to identifying measures for reform that can be adopted in the Indian context. Chapter VI sets out the Committee's recommendations in detail.

Part II of the Report contains a case study of the ICADR and the Committee's recommendations for its reform. Two members of the Committee, Justice S. Ravindra Bhat and Mr. K.K. Venugopal, the Attorney General for India, did not participate in the deliberations of the Committee on Part II and have dissociated themselves from that Part of the Report.

[3] The Vidhi team that assisted the Committee consisted of Anjali Anchayil, Medha Srivastava and Suchindran B.N.

Part III of the Report deals with the role of arbitrations in BIT disputes involving the Union of India.

Annexure 1 of the Report contains the Committee's Terms of Reference. Annexure 2 contains a set of model arbitration rules that may be added as a Schedule to the ACA. Annexures 3 and 4 contain the Questionnaires circulated as part of the Committee's study of the working and performance of arbitral institutions in India.

PART I: INSTITUTIONAL ARBITRATION IN INDIA

III. INSTITUTIONAL ARBITRATION: THE STATE OF PLAY

Institutional arbitration refers to the administration of arbitration by an institution in accordance with its rules of procedure. The institution provides support for the conduct of the arbitration in the form of appointment of arbitrators, case management services including oversight of the arbitral process, venues for holding hearings, etc. It differs from ad hoc arbitration in that several aspects of the arbitral proceedings such as appointment of arbitrators, conduct of the arbitral proceedings, scrutiny of awards, etc. may be determined by the arbitral institution.

India has not fully embraced institutional arbitration as the preferred mode of arbitration despite the existence of several institutions which administer arbitrations. In this Chapter, the Committee examines the current Indian institutional arbitration landscape and explore some of the reasons behind the lukewarm attitudes towards institutional arbitration.

A. Arbitral institutions in India

There are over 35 arbitral institutions in India. These include, in addition to domestic and international arbitral institutions, arbitration facilities provided by various public-sector undertakings ("**PSUs**"), trade and merchant associations, and city-specific chambers of commerce and industry. A large number of these arbitral institutions administer arbitrations under their own rules or under the Arbitration Rules of the United Nations Commission on International Trade Law ("**UNCITRAL Arbitration Rules**").

Some of the Indian institutions that administer arbitrations include the ICADR, the Indian Council of Arbitration ("**ICA**"), the Delhi International Arbitration Centre ("**DAC**"), and recently, the Mumbai Centre for International Arbitration ("**MCIA**"). Many of these institutions have their own sets of arbitral rules, panels of arbitrators, and offer venues for conducting arbitral proceedings. They offer varying degrees of administrative support for arbitrations. While these institutions are growing in popularity, their caseload is insignificant compared to those of well-established international arbitral institutions.[4]

[4] For instance, the case load of the ICADR has been 49 arbitration cases since its inception as compared to 343 new cases handled by the SIAC in 2016, 303 new cases handled by the LCIA in 2016, and 966 new cases handled by the ICC Court in 2016.
ICADR Annual Report 2015–16, available at http://icadr.nic.in/file.php?123?12:1490865651 (accessed on 18.07.2017); LCIA, 'LCIA Facts and Figures—2016: A Robust Caseload', 03.04.2017, available at http://www.lcia.org/News/lcia-facts-and-figures-2016-a-robust-caseload.aspx (accessed on 18.07.2017); SIAC Annual Report 2016, available at http://www.siac.org.sg/images/stories/articles/annual_report/SIAC_AR_2016_24pp_WEBversion_edited.pdf (accessed on 18.07.2017); ICC News, 'ICC reveals record number of new Arbitration cases filed in

Many arbitrations involving Indian parties are administered by international arbitral institutions such as the Court of Arbitration of the International Chamber of Commerce ("**ICC Court**"), the Singapore International Arbitration Centre ("**SIAC**") and the London Court of International Arbitration ("**LCIA**"), despite the presence of arbitral institutions in India.[5] Even when international arbitral institutions have attempted to establish operations in India, appetite for the same has been low. For instance, the LCIA maintained a presence in India from 2009 to 2016 through an Indian arm (LCIA India), giving Indian parties the ability to have their arbitrations administered by the LCIA India in New Delhi at Indian rates. However, the LCIA India closed down its operations due to insufficient caseload.[6] Similarly, though the SIAC has maintained an Indian office in Mumbai since 2013, this office serves a limited role of promoting the activities of the SIAC, while actual administration of arbitrations continues to be handled by the Singapore office of the SIAC. Thus, unless these institutions provide facilities for administering arbitrations in India, arbitrations will continue to be administered from the cities in which these institutions are based, significantly raising costs for Indian parties.

For disputes involving Indian public sector enterprises ("**PSEs**"), there is also a Permanent Machinery of Arbitration ("**PMA**") under the Department of Public Enterprises to settle disputes between PSEs and government departments or between PSEs *inter se*.[7] However, since the PMA is not subject to the ACA, arbitral awards rendered by such mechanism are not enforceable by Indian courts. This has negatively impacted its efficacy and legitimacy as a mechanism for dispute resolution.

B. Preference for ad hoc arbitration over institutional arbitration

Despite the existence of numerous arbitral institutions in India, parties in India prefer ad hoc arbitration and regularly approach courts to appoint arbitral tribunals under the relevant provisions of the ACA. A 2013 survey showed that there was a strong preference for ad hoc arbitration amongst both Indian companies that had experienced arbitration and Indian

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2016', 18.01.2017, available at https://iccwbo.org/media-wall/news-speeches/icc-reveals-record-number-new-arbitration-cases-filed-2016/ (accessed on 18.07.2017).

[5] Indian parties were the top foreign user of the SIAC with 153 new cases in 2016. Disputes involving Indian parties contributed to 4.4 % of the LCIA's caseload in 2016.
LCIA, 'LCIA Facts and Figures—2016: A Robust Caseload', 03.04.2017, available at http://www.lcia.org/News/lcia-facts-and-figures-2016-a-robust-caseload.aspx (accessed on 18.07.2017);
SIAC Annual Report 2016, available at http://www.siac.org.sg/images/stories/articles/annual_report/SIAC_AR_2016_24pp_WEBversion_edited.pdf (accessed on 18.07.2017).

[6] 'LCIA India to end operations', Herbert Smith Freehills Arbitration Notes, available at http://hsfnotes.com/arbitration/2016/02/08/lcia-india-to-end-operations/ (accessed on 16.06.2017).

[7] Department of Public Affairs website, 'Permanent Machinery of Arbitration', available at http://dpe.gov.in/dpe-guidelines/permanent-machinery-of-arbitration-(pma) (accessed on 22.06.2017).

companies that had no experience of arbitration.[8] This is contrary to global practice — a 2008 worldwide survey of corporate preferences in dispute resolution by PricewaterhouseCoopers and Queen Mary University of London ("**QMUL**") showed that: (a) 86 per cent of arbitral awards given during the preceding ten years were given in arbitrations administered by arbitral institutions and not ad hoc arbitrations; and (b) 67 per cent of arbitrations to which states or state-owned enterprises were a party were institutional arbitrations.[9]

The preference for ad hoc arbitrations by Indian parties is not limited to arbitrations where the amounts in dispute are small. For instance, construction and infrastructure, one of the fastest growing sectors in the Indian economy, spends crores of rupees on resolution of disputes. In 2001 alone, 54,000 crores of capital was blocked in construction sector disputes.[10] Dispute resolution in this sector consists mostly of ad hoc arbitration.[11]

Is ad hoc arbitration necessarily better than institutional arbitration, particularly in the Indian context? The following paragraphs discuss this issue in detail.

1. The relative advantage of institutional arbitration over ad hoc arbitration

The issue of institutional arbitration versus ad hoc arbitration has been a topic of much discussion. Institutional arbitration offers the advantages of providing a clear set of arbitration rules and timelines for the conduct of an arbitration, support from trained staff who administer various stages of the arbitration proceedings, a panel of arbitrators to choose from to decide the dispute, and in some cases, supervision in the form of scrutiny of awards.[12] On the other hand, ad hoc arbitration gives parties greater control over the arbitration process, the flexibility to decide the procedure, and cost-effectiveness where administration charges levied by an arbitral institution constitute a significant portion of the overall costs.[13]

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[8] 'Corporate Attitudes & Practices towards Arbitration in India', PricewaterhouseCoopers (2013), available at https://www.pwc.in/assets/pdfs/publications/2013/corporate-attributes-and-practices-towards-arbitration-in-india.pdf (accessed on 03.02.2017).

[9] 'International Arbitration: Corporate attitudes and practices 2008', Queen Mary University of London and PricewaterhouseCoopers (2008), available at http://www.arbitration.qmul.ac.uk/docs/123294.pdf (accessed on 03.02.2017).

[10] Krishna Sarma et al., 'Development and Practice of Arbitration in India—Has it Evolved as an Effective Legal Institution', Working Paper 103, Center on Democracy, Development, and The Rule of Law Freeman Spogli Institute for International Studies (2009), available at https://cddrl.fsi.stanford.edu/sites/default/files/No_103_Sarma_India_Arbitration_India_509.pdf (accessed on 28.02.2017).

[11] *Id.*

[12] Sundra Rajoo, 'Institutional and Ad hoc Arbitrations: Advantages and Disadvantages', The Law Review (2010), available at http://sundrarajoo.com/wp-content/uploads/2016/01/Institutional-and-Ad-hoc-Arbitrations-Advantages-Disadvantages-by-Sundra-Rajoo.pdf (accessed on 28.02.2017).

[13] *Id.*

Broadly, it has been accepted that ad hoc arbitration is more effective in cases where parties to a dispute cooperate with each other, and can mutually agree to constitute a tribunal and select arbitrators to resolve their dispute.[14] However, typically once a dispute reaches arbitration, it is highly likely that parties no longer want to cooperate. In such a case, ad hoc arbitration is vulnerable to the risk of dilatory tactics, which increases delays and costs. A developed arbitral institution can handle these challenges adequately. Moreover, where parties are not sophisticated and do not have sufficient knowledge regarding arbitral proceedings, institutional arbitration is decidedly preferable.[15]

In India, ad hoc arbitration is accompanied by its own share of problems. For one, ad hoc arbitrations tend to be protracted and costly in some cases in the absence of monitoring. One of the reasons for these delays and costs is that the fees of arbitrators are charged on a sitting-by-sitting basis without any regulation. Costs and delays in ad hoc arbitration also mount in case of additional procedural hearings, adjournments, litigation arising from procedural defects in ad hoc arbitrations, etc.

While the ACA gives sufficient powers to the arbitral tribunal to reduce delays, arbitration proceedings in India are still long-drawn and take years to conclude. In this regard, changes were made by the Arbitration and Conciliation (Amendment) Act 2015 ("**2015 Amendment Act**") whereby time limits were set out for arbitration proceedings.[16] Further, a provision was introduced that empowered courts to reduce the fees of arbitrators for delays attributable to the arbitral tribunal.[17] While these amendments can help set fixed standards and solve problems of delays and costs to some extent, what is required is a big change in attitudes towards arbitration. Parties and arbitrators should be incentivised to resolve disputes efficiently and follow guidelines when conducting arbitrations. Institutional arbitration where the progress of the arbitration is monitored by the arbitral institution assumes importance in this context.

2. Reasons behind parties' choice of ad hoc arbitration

Why is it that parties do not opt for institutional arbitration despite the long delays and higher costs that often accompany ad hoc arbitrations? Literature on this issue points to the following factors: (a) lack of credible arbitral institutions; (b) misconceptions relating to institutional

[14] See Edlira Aliaj, 'Dispute resolution through ad hoc and institutional arbitration', Academic Journal of Business, Administration, Law and Social Sciences, Vol. 2 No. 2 (2016), p.241–250, available at http://iipccl.org/wp-content/uploads/2016/07/241-250.pdf (accessed on 28.02.2016). See also Norton Rose Fulbright, 'A basic guide to international arbitration' (February 2015), available at http://www.nortonrosefulbright.com/files/arbitration-a-guide-to-international-arbitration-26050.pdf (accessed on 02.03.2017).

[15] Edlira Aliaj (2016), *id.* at p. 247.

[16] Section 29A, ACA.

[17] Section 29A(4), ACA.

arbitration; (c) lack of governmental support for institutional arbitration; (d) lack of legislative support for institutional arbitration; and (e) judicial attitudes towards arbitration in general. These are discussed in detail in the following sub-sections.

(a) Lack of credible arbitral institutions

While there are established arbitral institutions in India, these arbitral institutions lack access to quality legal expertise and lack exposure to international best practices. For this reason, the rules and practices followed by these arbitral institutions are often outdated and inadequate. The infrastructure and support provided by arbitral institutions is largely inadequate. Most arbitral institutions can only provide hearing venues with basic facilities and lack more advanced facilities such as multi-screen video conferencing, sound-proof caucus rooms, audio / video recording, court recorders, etc. Further, because arbitral institutions are staffed mostly by persons without adequate knowledge and experience of arbitration, the quality and range of support available from arbitral institutions to parties and arbitrators is invariably limited — even in matters relating to the interpretation and application of the rules and practices followed by arbitral institutions. Thus, as such, arbitral institutions do not provide much by way of value addition.

(b) Misconceptions relating to institutional arbitration

There are several misconceptions relating to institutional arbitration that exist among parties. One of these is related to costs. Parties consider institutional arbitration to be substantially more expensive than ad hoc arbitration, primarily because of the administrative fees payable to arbitral institutions.[18] This assessment is largely misconceived because: (a) numerous arbitral institutions charge very reasonable fees; (b) the use of an arbitral institution helps avoid disputes over procedural matters, avoiding multiplicity of proceedings and legal issues; and (c) the costs of an ad hoc arbitration can easily exceed the costs of an institutional arbitration in case of additional procedural hearings, adjournments, use of per-hearing fees, litigation arising from procedural infirmities in ad hoc arbitrations, etc.

Parties also often believe that institutional arbitration is inflexible because arbitral institutions follow rules that take away exclusive autonomy of the parties over arbitration proceedings. However, most arbitral institutions that exist in the international scenario have made an attempt to balance institutionalisation with party autonomy — they keep only those issues which deal with the legality and integrity of proceedings out of the purview of party autonomy.

[18] See Gary Born, 'International Arbitration: Law and Practice', (2012) at p. 13; see also 'The pros and cons of arbitration', A Lexis PSL document produced in partnership with Mayer Brown International LLP, available at https://m.mayerbrown.com/Files/News/04165fd5-5165-41ea-bb6f-19d9235c171d/Presentation/NewsAttachment/7e531e5e-4040-4251-b1a8-1d4b6168c99b/Practice%20Note_Duncan_Pros-Cons-Arbitration_oct12.pdf (accessed on 02.03.2017).

These misconceptions could be due to a general lack of awareness regarding institutional arbitration and its advantages. This could also be due to the lack of initiative on the part of arbitral institutions to promote their work and facilities as well as on the part of lawyers to properly advise parties about the advantages of institutional arbitration. Even when there is awareness on the existence of institutional arbitration as an option, there is often the misconception that this option is only available to bigger businesses and / or high value disputes.

(c) Failure by the Government and its agencies to use institutional arbitration

Another reason for a weak institutional arbitration framework in India is the lack of sufficient governmental support for the same over the years. While the Government is the most prolific litigant in India, it can do more in this capacity to encourage institutional arbitration. The general conditions of contract used by the Government and PSUs often contain arbitration clauses, but these clauses usually do not expressly provide for institutional arbitration.

Further, government policy on arbitration requires a relook if institutional arbitration is to become the norm, particularly for disputes valued at large amounts. For instance, if the government, being the biggest litigant, were to adopt institutional arbitration as regular practice, the sheer volume of cases moving to arbitral institutions would provide a powerful impetus to institutional arbitration.

There have recently been discussions and initiatives on the part of some state governments as well to promote institutional arbitration, citing that it would be more organised and cost-effective.[19] However, effectively, the Government has so far focussed its attention on arbitration in general. To encourage institutional arbitration, special action aimed at the development of arbitral institutions is required.

(d) Lack of statutory backing for institutional arbitration

The ACA has been arbitration-agnostic, with no provisions specifically geared towards promoting institutional arbitration. This is in contrast with jurisdictions like Singapore, where the SIAC is the default appointing authority for arbitrators under the International Arbitration Act 1994 ("**IAA**") which governs international arbitrations.[20] Similarly, under the Arbitration Ordinance 2011 ("**AO**"), the Hong Kong International Arbitration Centre ("**HKIAC**") has been designated as the appointing authority for arbitrators where the parties are unable to come to an agreement on the appointment of arbitrators.[21]

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[19] 'Maharashtra readies arbitration policy', Business Standard (online), 15.10.2016, available at http://www.business-standard.com/article/economy-policy/maharashtra-readies-arbitration-policy-116101400574_1.html (accessed on 17.02.2016).

[20] Section 9A(2) read with sections 2(1) and 8(2), IAA.

[21] Section 24(3) and (4) read with section 13(2), AO.

In fact, one of the provisions of the ACA — section 29A — which was inserted by the 2015 Amendment Act, is perceived to have made arbitral institutions wary of arbitrations in India. Section 29A provides for strict timelines for completion of arbitration proceedings. This has been criticised as unduly restrictive of the conduct of arbitrations by arbitral institutions which provide for timelines for different stages of the arbitration proceedings.[22] In comparison, the AO refrains from setting out fixed guidelines for fees or timelines for arbitration, acknowledging that such factors "very much depend on the complexity of the issues in dispute."[23] Instead, the AO seeks to facilitate the fair and speedy resolution of disputes by significantly minimising court intervention in the arbitral process. The merits of the Indian approach require examination in light of the endemic problem of delays plaguing arbitration in India.

(e) Judicial attitudes towards arbitration

Delays in Indian courts and excessive judicial involvement in arbitral proceedings have resulted in India not being favoured as a seat for arbitration. While this may not have a direct bearing on arbitral institutions, it has contributed to discouraging foreign parties to arbitrate in India.

Parties often delay arbitration proceedings by initiating court proceedings before or during arbitral proceedings, or at the enforcement stage of the arbitral award. The high pendency of litigation before Indian courts means that arbitration-related court proceedings take a long time to be disposed. The Commercial Courts Act sought to remedy this situation by setting up commercial courts at the district level or commercial divisions in High Courts having ordinary original civil jurisdiction.

These commercial courts / divisions hear arbitration matters involving commercial disputes amongst other commercial matters. However, an examination of the recent roster of the Bombay High Court, for example, indicates that commercial division judges often hear matters other than commercial matters, such as family law matters, juvenile justice-related matters, etc.[24] If commercial division judges are tasked with hearing matters other than commercial matters, it would detract from the legislative intent of speedy disposal of commercial matters, including arbitration matters. Additionally, the Committee noted that the rotation policy of these High

[22] Special Address by Justice A.P. Shah at the Nani Palkhivala Arbitration Centre 9th Annual International Conference on Arbitration on Current Issues in Domestic and International Arbitration, 18.02.2017.

[23] Hong Kong Legislative Council Bills Committee on Arbitration Bill, '(1) Costs of Conducting Arbitral Proceedings in Hong Kong; (2) The objective of facilitating the Fair and Speedy Resolution of Disputes and (3) Simplified Procedures for Arbitral Proceedings', LC Paper No. CB(2)2546/08-09(04) (September 2009), available at http://legco.gov.hk/yr08-09/english/bc/bc59/papers/bc591005cb2-2546-3-e.pdf (accessed on 19.07.2017).

[24] Sitting List with effect from 15 November 2016 of the Bombay High Court (Original Side), available at http://bombayhighcourt.nic.in/sittinglist/PDF/sitlistbomos20161027181818.pdf (accessed on 02.03.2017); Sitting List with effect from 4 January 2017 of the Bombay High Court (Original Side), available at http://bombayhighcourt.nic.in/sittinglist/PDF/sitlistbomos20161222191515.pdf (accessed on 02.03.2017).

Courts was also applicable to commercial division judges. An excessively frequent rotation might hinder the creation of specialist arbitration judges who are well-versed in arbitration law and practice.

Indian courts' tendency to frequently interfere in arbitral proceedings has also contributed to India's reputation as an 'arbitration-unfriendly' jurisdiction. It is a well-known fact that courts in India are generally interventionist when it comes to regulating arbitration proceedings, whether at an initial stage of the arbitral proceedings (such as the appointment of arbitrators, referral of disputes to arbitration or grant of interim relief) or at the enforcement stage.[25] They have, despite good intentions and justifications, often misjudged the course to take, doing justice in the case at hand but laying down questionable precedent for the future.[26] Further, inconsistent judicial precedent on several crucial issues[27] has contributed to uncertainty regarding the law, with severe consequences for India's reputation as a seat of arbitration.

Indian arbitration law jurisprudence has been criticised particularly with regard to its interpretation of legal provisions concerning setting aside of domestic arbitral awards (section 34 of the ACA) and refusing enforcement of foreign arbitral awards (section 48 of the ACA). For instance, the expansive interpretation given to the "public policy" ground for setting aside of domestic arbitral awards[28] and its extension to foreign arbitral awards[29] created a climate where parties seeking to enforce arbitral awards in India had no certainty as to its enforcement. Recent judicial decisions,[30] which have restricted the use of the "public policy" ground to undertake a review on merits, appear to have changed this perception to some extent. Further, the 2015

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[25] Bibek Debroy and Suparna Jain, 'Strengthening Arbitration and its Enforcement in India—Resolve in India', Research Paper of the Niti Ayog (2016), p.15, available at http://niti.gov.in/writereaddata/files/document_publication/Arbitration.pdf (accessed on 02.03.2017). See also Moin Ghani, 'Court Assistance, Interim Measures, and Public Policy: India's Perspective on International Commercial Arbitration', The Arbitration Brief 2, no. 1: 16-29 (2012), available at http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1026&context=ab (accessed on 03.02.2017); Promod Nair, 'Ringfencing Arbitration from Judicial Interference: Proposed Changes to the Arbitration and Conciliation Act', The Practical Lawyer (2010).

[26] See decisions in *Bhatia International v. Bulk Trading S.A.,* (2002) 4 SCC 105; *Venture Global Engineering v. Satyam Computer Services*, (2008) 4 SCC 190.

[27] For instance, there are conflicting decisions by two High Courts on whether two Indian parties can have a foreign seat of arbitration. See *Addhar Mercantile Private Limited v. Shree Jagdamba Agrico Exports Pvt Ltd.*, Arbitration Application No. 197 of 2014 and Arbitration Petition No. 910 of 2013 (Bombay High Court) and *Sasan Power Limited v. North American Coal Corporation India Pvt. Ltd.*, First Appeal No. 310 of 2015 (Madhya Pradesh High Court). See also Moin Ghani, *id*.

[28] *ONGC v. Saw Pipes Ltd*., (2003) 5 SCC 705; *ONGC v. Western Geco International Ltd.*, (2014) 9 SCC 263.

[29] *Phulchand Exports Ltd v. O.O.O. Patriot*, (2011) 10 SCC 300.

[30] *Shri Lal Mahal Ltd. v. Progretto Grano Spa*, (2014) 2 SCC 43; *Associated Builders v. DDA*, 2014 (4) ArbLR 307 (SC).

amendments to the ACA have underlined the legislative intent of limited judicial interference in the enforcement of arbitral awards.

The 2015 amendments, in two important respects, signal a paradigm shift towards minimising judicial intervention in the arbitral process. *First*, the amendment to section 9 of the ACA provides that courts should not entertain applications for interim relief from the parties unless it is shown that interim relief from the arbitral tribunal would not be efficacious. *Second*, the amendment to section 36 of the ACA provides that the filing of an application to set aside an arbitral award will no longer trigger an automatic stay on the operation of that award. Prior to the 2015 Amendment Act, both section 9 and section 36 enabled uncooperative parties to engage in dilatory tactics through unnecessary involvement of the courts. However, continuing confusion regarding the retrospective applicability of the 2015 Amendment Act has limited its impact in creating a pro-arbitration climate.

Thus, India continues to be viewed largely as an arbitration-unfriendly jurisdiction.

IV. Performance of Arbitral Institutions: Results of the Consultative Process

In the preceding Chapter, the Committee identified the lacklustre performance of arbitral institutions in India as one of the reasons behind the poor take-up of institutional arbitration. As part of its mandate, the Committee studied the performance of arbitral institutions in India in order to identify areas for reform and suggest appropriate measures to facilitate their growth.

A key difficulty with assessing the performance of the arbitral institutions in India is the lack of publicly available information in relation to their functioning. A number of arbitral institutions do not have websites. For several of the ones that do, their arbitration rules are not available on their websites. There is a dearth of information relating to caseload and functioning, particularly in the case of arbitration centres associated with trade and merchant associations and city-specific chambers of commerce. In fact, information relating to caseload is available on the websites of only a few arbitral institutions. Therefore, it was felt that sufficient data had to be collected in order to review the working and performance of arbitral institutions in India.

With this in mind, the Committee circulated two Questionnaires along with the Working Paper.

The first questionnaire ("**Questionnaire 1**") was circulated to arbitral institutions. The second questionnaire ("**Questionnaire 2**") was circulated to other stakeholders in the field of arbitration such as lawyers, in-house counsels, parties and arbitrators. The Questionnaires are annexed as Annexures 3 and 4.

Additionally, the Committee received comments and suggestions on the Working Paper from the general public, mainly legal practitioners and law firms who work in the area of dispute resolution.

This Chapter sets out the responses the Committee received to the Questionnaires and comments on the Working Paper, along with an analysis of the responses. Key areas of reform have been identified based on these responses and comments.

A. Questionnaire 1: Findings

The purpose of Questionnaire 1 was to get an in-depth understanding of the functioning of arbitral institutions and the challenges, if any, faced by them. Therefore, Questionnaire 1 asked arbitral institutions various questions relating to their organisational structure, infrastructure, fees, caseloads, panel of arbitrators, arbitration rules, and the manner in which they administer arbitrations.

A limited number of arbitral institutions (6) responded to Questionnaire 1. While this limited sample restricts the Committee's ability to draw reliable conclusions, the responses still help us understand broadly the working and performance of these institutions.

The responses revealed that most of these arbitral institutions were section 25 companies that were being run independently. This means that these institutions most likely function without any governmental control and utilise their administrative fees and fees charged for their facilities (including rental income as a venue for arbitrations) for their functioning. Arbitral institutions across the world, while they may be established with some government help, eventually function independently, maintaining themselves through fees charged to parties.

Questionnaire 1 asked the arbitral institutions about their caseload, number of new references in the last year, number of references since the time of their inception, and number of awards rendered by them till date. Most arbitral institutions that responded did not have significant caseloads. Amongst the institutions that responded, the one that had the largest active caseload as of 28 February 2017 had 240 matters, which is far lesser than the active caseloads of arbitral institutions abroad.[31] These circumstances suggest that parties are generally hesitant to submit their disputes to institutional arbitration. This appears to be to some extent due to misconceptions associated with institutional arbitration, such as high costs and lack of flexibility[32] — this was reflected in the responses received for Questionnaire 2.[33]

Questionnaire 1 sought to gauge whether the rules of the arbitral institutions studied were modern and party-friendly. For this purpose, the Committee asked questions about the frequency with which rules were updated, and the existence of provisions for e-filing, e-discovery, consolidation of parties, multi-party arbitrations, emergency arbitrators, etc. These questions were also aimed at understanding how the rules of these institutions fared vis-a-vis the rules of international arbitral institutions. The answers the Committee received reflected certain well-recognised problems with the working of arbitral institutions in India. The arbitral rules of these institutions were not updated as often as they should be. Some rules were last updated as long back as 2014, prior to the 2015 amendments. Additionally, most institutions' rules did not have provisions permitting accepted best practices such as e-filing, e-discovery, etc. While a number of arbitral institutions provided for a periodic review of their rules, most of these institutions did not mention the existence of any mechanism for providing feedback on such rules.

Additionally, the Committee also asked the institutions to give us an overview of the secretarial and case management services provided to users. Most international arbitral institutions provide these services to parties who submit disputes to them. These facilities are what often draws parties to these institutions and makes them more efficient in managing arbitrations. While a number of institutions mentioned that they provided secretarial and clerical assistance to parties, none of them mentioned providing case management services along the lines of international arbitral institutions such as the ICC, the LCIA, the SIAC, etc.

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[31] *Supra* n. 4.
[32] This is also reflected in the comments to the Working Paper, which is discussed later in this Chapter. See section C of this Chapter.
[33] See section B of this Chapter.

As far as physical infrastructure for the conduct of arbitration hearings was concerned, most institutions indicated that they have standard facilities such as hearing rooms, conference rooms, video-conferencing, internet, photocopying and printing, etc. but the actual quality of these facilities could not be specifically assessed. This is in contrast with international arbitral institutions functioning overseas, which provide state-of-the-art facilities for dispute resolution across the board.[34]

Questionnaire 1 contained questions on the panel of arbitrators maintained by these institutions, including questions on the composition of the panel, criteria for inclusion on the panel, the process followed to appoint arbitrators, and mechanisms for feedback on the appointment and performance of arbitrators. This question was asked as Indian arbitral institutions have often been criticised for the poor quality of arbitrators on their panels, a lack of professionalism in appointments, and a heavy reliance on retired judges as arbitrators.[35] All responses received indicated that the panel of arbitrators maintained by these institutions consisted mainly of retired judges and advocates. However, in a few cases, there were also industry experts on these panels. Further, many of these institutions used criteria such as educational qualifications and experience for inclusion on their panels. Typically, such individuals were appointed as arbitrators by these arbitral institutions with a sufficient degree of choice given to parties. It may be noted that barring two institutions, the arbitral institutions that responded did not act as appointing authorities in ad hoc arbitrations. While most institutions responded that they had mechanisms for providing feedback on the appointment and performance of arbitrators, no specific details regarding the same were provided.

While considering best practices followed by international arbitral institutions, the Committee noticed that those institutions provide for a fixed structure and timeline(s) for the conduct of arbitrations, which is usually agreed by the arbitral tribunal with parties prior to the start of the arbitral proceedings.[36] In order to understand whether arbitral institutions in India conduct arbitrations in a similar manner, the Committee asked questions on the existence of timelines for different stages of the arbitral proceedings, availability of expedited procedures for arbitrations, average time taken for specific stages of the proceedings, and whether there were any provisions under their rules (or otherwise) that they followed to ensure adherence to timelines. Barring one or two arbitral institutions, arbitral institutions that responded have timelines for different stages

[34] See 'Facilities', HKIAC website, available at http://www.hkiac.org/our-services/facilities (accessed on 19.07.2017); 'Arbitration in Singapore', SIAC website, available at http://www.siac.org.sg/2014-11-03-13-33-43/why-siac/arbitration-in-singapore (accessed on 19.07.2017).

[35] Global Arbitration Review, 'Modi makes institutional arbitration a priority', 24.10.2016, available at http://globalarbitrationreview.com/article/1069841/modi-makes-institutional-arbitration-a-priority (accessed on 24.10.2016).

[36] For an overview of the timelines in international arbitrations, see 'Comparison of Arbitration Rules', Kennedys, available at http://www.kennedyslaw.com/files/Uploads/Documents/Comparison_of_Arbitration_Rules.pdf (accessed on 14.06.2017).

of the arbitral proceedings. Most arbitral institutions also offered expedited procedures for arbitration. However, the responses reflected that most institutions' rules do not have any provisions to monitor adherence to timelines, although the Secretariat / Registrar appeared to exercise some oversight over the progress of the arbitral proceedings. Most institutions did not penalise arbitrators for delays in making awards.

In India, challenges to arbitral awards in courts and pendency of such proceedings are major problems affecting arbitrations. However, internationally, it is generally believed that awards made in institutional arbitrations are more likely to be enforced by courts in view of an institution's reputation in managing the arbitral proceedings in a structured manner.[37] In order to understand whether awards made in institutional arbitrations in India were challenged regularly, Questionnaire 1 included questions relating to the quantum of awards challenged and whether the institutions keep a track of these challenges. Most respondents did not scrutinise draft awards before final awards are rendered. Further, from the responses received, it appears that some institutions do monitor the challenge of awards, while others do not.

Additionally, Questionnaire 1 also contained questions relating to the fee structure of the Indian arbitral institutions. These questions were posed to understand the costs associated with institutional arbitration, and whether additional costs incurred in institutional arbitration could be considered as a factor that discourages parties. From the responses received, it appears that most institutions charge fees on an *ad valorem* basis, and many of them impose a cap on the fees of the arbitrators. The cap on fees of arbitrators may help in keeping the costs of institutional arbitration lower than ad hoc arbitrations, where there is no such cap and per-sitting fees are charged.

Other comments from arbitral institutions

Many arbitral institutions stated that institutional arbitration is in its developmental stages in India, and there is a long way to go before institutional arbitration becomes the preferred mode of dispute resolution. Further, the institutions felt that targeted reforms and action need to be taken by every stakeholder involved (i.e., practitioners, parties, the judiciary and the legislature) to improve the state of institutional arbitration in India. In particular, the government could provide financial assistance to help improve the functioning of existing arbitral institutions. Institutions also stated that they are working towards strengthening their capacity to deal with domestic arbitrations and developing institutional arbitration at the district level. Further, some institutions are also working towards developing web-portals for providing facilities such as e-signatures, e-filing, e-payments, etc.

[37] Sundra Rajoo, *supra* n. 12 at p. 554.

B. Questionnaire 2: Findings

Questionnaire 2 was designed to understand the perspective of stakeholders (lawyers, in-house counsels, parties and arbitrators) on arbitration in India, and more specifically, institutional arbitration. The Committee asked for the stakeholders' opinions on the kind of dispute resolution they prefer, the kind of disputes they refer to arbitral institutions, the working of Indian arbitral institutions, their experiences with Indian institutions, and how they compared with the working of arbitral institutions abroad.

The Committee received 40 responses to Questionnaire 2. Most of the respondents were lawyers or arbitrators. Barring one respondent, all other respondents had prior experience of arbitration.

Questionnaire 2 then asked some common and some targeted questions according to the category into which the respondent fell. The responses are discussed in detail below.

1. Preferred mode of dispute resolution: Arbitration or alternatives?

In order to understand the popularity of arbitration as a mode of dispute resolution, the Committee asked lawyers, parties and their in-house counsel what their preferred mode of dispute resolution is. For most of the respondents, the preferred mode of dispute resolution for both domestic and cross-border disputes is arbitration.

2. Preferred mode of arbitration: Institutional or ad hoc?

The Committee asked all respondents about their preferred mode of arbitration: institutional or ad hoc. Further, they were asked to state the reasons for their preference. The question was asked to gain an understanding of the reasons behind the lukewarm attitude towards institutional arbitration as compared to ad hoc arbitration, the latter being preferred in India according to literature.[38]

The responses showed a preference for institutional arbitration, although responses to further questions show that this preference is not actually reflected in practice.

The reasons given for an articulated preference for institutional arbitration illustrated stakeholders' perceptions of certain inherent advantages of institutional arbitration, namely, better management of the arbitral process and assurance of timely resolution of disputes. Further, respondents cited the following reasons for their preference: (a) a fixed framework of rules governing the arbitral proceedings; (b) the provision of administrative support for the arbitration; (c) a higher standard of professionalism; (d) accountability of arbitrators, which in turn ensures timely hearings and awards; (e) appointment of arbitrators from a wider pool of individuals; and (f) scrutiny of awards by the arbitral institution. It was also opined that institutional arbitration

[38] *Supra* n. 36.

would create potential for the development of arbitral jurisprudence with publication of redacted awards.

Respondents who preferred ad hoc arbitration emphasised the flexibility and autonomy it gave to the parties. Additionally, respondents felt that ad hoc arbitrations allowed them to choose arbitrators having knowledge / experience in the area in which the dispute arose, and gave them the liberty to choose arbitrators in accordance with the complexity of the dispute. Interestingly, one respondent who preferred ad hoc arbitration stated that institutional arbitration was not accessible to all due to high costs, and that nomination to the panels of arbitrators maintained by arbitral institutions is fraught with nepotism. Another respondent stated that there is an insufficient number of arbitral institutions to meet the demands of users, and existing arbitral institutions are not equipped to handle the current volume of arbitrations.

While there appears to be in theory a preference for institutional arbitration, a different picture emerges as far as practice is concerned. Most respondents are involved in domestic ad hoc arbitrations. Institutional arbitration, whether domestic or international, formed a negligible percentage of the disputes submitted to arbitration. This confirms that India prefers ad hoc arbitration as a mode of dispute resolution. Additionally, it appears that international arbitrations seated in India are not very common. The responses reflect some of the reasons for the same — the general perception is that institutional arbitration is not as flexible as ad hoc, and is expensive. The following sections use data gathered from responses to discuss other reasons why institutional arbitration is not preferred in India, which are primarily related to the functioning of arbitral institutions.

3. Popular institutions for arbitration

Ideally, ad hoc arbitration may be used for low to medium value disputes, whereas institutional arbitration should be available for international disputes or complex, high value disputes.[39] For high value disputes, ad hoc arbitration may not be a good idea. This is because the stakes involved in high value disputes are very high, and the delays in ad hoc arbitration due to additional procedural hearings and litigation arising out of disagreement over procedural issues can easily increase time and costs for parties.

In order to confirm whether parties used institutional arbitration for high value disputes, the Committee asked parties which arbitral institutions they had used, the sectors in which the disputes arose, nature of disputes, and quantum of claim involved.

Amongst Indian arbitral institutions, the ICA appears to be a popular institution for arbitration. The other institutions respondents used were the ICADR, the DAC, the National Stock Exchange

[39] Ernst & Young LLP, 'Emerging trends in arbitration in India', (2013), available at http://www.ey.com/Publication/vwLUAssets/EY-FIDS-Emerging-trends-in-arbitration-in-India/$FILE/EY-Emerging-trends-in-arbitration-in-India.pdf (accessed on 19.07.2017).

of India Ltd., Bombay Stock Exchange Ltd. - Regional Arbitration Centre, Pune, and the Bangalore Arbitration Centre. Most of the disputes were medium to very low in their value.[40] The parties were mostly individuals and corporations, and the disputes were from sectors such as construction, banking, manufacturing, financial, automobile dealership, agricultural finance, and technology.

Amongst foreign arbitral institutions used, the ICC Court, the LCIA and the SIAC were the institutions used by the respondents for international arbitrations. Most of the disputes were high value disputes, with a few (3) being of medium value.[41] The parties included a mix of government and corporations (including multi-national corporations). The disputes were mainly in the areas of construction, security, power and mining.

4. Arbitral Institutions in India: Challenges

Questionnaire 2 asked the respondents for their views on the challenges faced by arbitral institutions in India. A discussion on these challenges is provided below.

(a) Issues relating to administration and management of arbitral institutions

The respondents to Questionnaire 2 mentioned several problems with the working of arbitral institutions in terms of their administration and management. Many respondents were of the view that arbitral institutions in India are poorly managed. One response even went to the extent of stating that a large number of these institutions exist to provide post-retirement employment to government officers.

Respondents also stated that the arbitral institutions lack the expertise required for their effective functioning. They are not headed by skilled persons who are interested in popularising institutional arbitration. Further, support staff are not adequately trained in arbitration law and practice and therefore cannot provide parties with requisite support during the arbitral proceedings.

According to the respondents, the rules of many institutions need re-drafting to match international standards. Further, respondents stated that strict implementation of rules was not followed in many cases. Arbitral institutions were also criticised for having little or no administrative control over the arbitral tribunals. Therefore, there is no assurance of adherence to timelines, review of awards, or review and tracking of the performance of arbitrators.

[40] The scale provided was as follows: Very low value — less than INR 50 lakhs; low value — INR 50 lakhs to 2.5 crores; medium value — INR 2.5 crores to 20 crores; high value — above INR 20 crores.
[41] The scale provided was as follows: Very low value — less than USD 75,000; low value — USD 75,000 to 375,000; medium value — USD 375,001 to 3,000,000; high value—above USD 3,000,000.

Further, some responses also said that the working of High Courts' arbitration centres was problematic because they operate as extensions of the High Court to which they are attached. It was further stated that their membership is limited to mostly retired High Court / district court judges.

(b) Perceptions regarding arbitrators and expertise

A common complaint was that arbitral institutions in India lacked arbitrators with sector-specific expertise. There is inadequate exposure to experts / arbitrators from reputed international institutions. Respondents also felt that there was a bias towards retired judges.

Institutions were also criticised for not exercising insufficient scrutiny of the empanelment process for arbitrators — often, payment of a nominal fee leads to the empanelment of individuals on institutions' panels. Some responses mentioned that low fees might be a reason institutions are unable to attract well-qualified arbitrators.

Respondents also expressed their discontent with the method of appointment of arbitrators to arbitral tribunals, citing the lack of professionalism and transparency in the process. While competent lawyers, judges, etc. are members of panels of arbitrators maintained by arbitral institutions, a select few were appointed repeatedly, and no work was given to the others. The lack of professionalism of arbitrators was another commonly cited problem.

(c) Issues relating to resources and government support

Some respondents felt that the lack of initial capital to set up an arbitral institution leads to poor and inadequate infrastructure, lack of properly trained administrative staff, lack of qualified arbitrators (who, according to a response, may not want to be part of the panel of an institution that does not maintain international standards), etc. Several responses suggested that the lack of sufficient support from the government was a challenge. However, respondents were clear that while an arbitral institution may get government and / or private funding, they need to be independent of either. One of the responses also referred to issues of accessibility faced by foreign lawyers who come to India for participating in arbitrations: for instance, the issuance of visas takes time.

5. India as a seat for international arbitrations

The respondents were asked whether they would choose India as a seat for international arbitrations and the reasons for their choice. The Committee asked this question to understand the perception of India as a seat of arbitration, and to identify areas which can then be a point of focus for reforms aimed at developing India as a seat for international arbitrations.

Many respondents stated that they would be in favour of India being a seat for international arbitrations. The reason cited was that cross-border transactions involving Indian parties are on the rise, with a concomitant rise in cross-border disputes involving Indian parties. Choosing India as a seat is better for Indian clients as they are more familiar with the Indian legal regime. Further, respondents also support India as a seat for reasons of cost advantage — arbitrating in India would be cheaper than travelling to another jurisdiction and using a foreign institution whose fees are higher.

Additionally, the 2015 amendments to the ACA are being viewed positively because of the resulting improvements in the arbitration regime that India is likely to see. Respondents believe that the amendments would reduce court intervention and difficulties in the enforcement of arbitral awards, thereby resulting in India becoming a preferred seat for arbitration. Respondents also mentioned that Indian courts have become more arbitration-friendly.

However, some respondents stated that Indian arbitration jurisprudence is ambiguous and confusing, with the Supreme Court and High Courts delivering decisions that are often contradictory to each other. They therefore expressed scepticism about India as a seat for international arbitrations.

One respondent believed using India as a seat for international arbitrations should be encouraged, provided that existing institutions are brought to par with international standards and arbitrators are given specialised training by those with international exposure in the field of arbitration. Another respondent said that he / she would not choose India as a seat for international arbitrations as Indian institutions lack the required facilities such as transcription services, interpreter services, and other administrative support at par with international standards.

As a follow-up, the Committee also asked the respondents whether, if India was a seat for international arbitrations, they would use an Indian or a foreign arbitral institution to administer the arbitration.

The responses to this question were mixed, with some respondents preferring Indian, and some foreign institutions. Foreign institutions were preferred because they conducted time-bound arbitrations, and had clear arbitral rules, a systematic way of conducting the proceedings and good administrative control over the same. Additionally, it was stated that foreign arbitral institutions would be a better choice as their arbitrators were experienced in international commercial arbitration.

Respondents who preferred Indian institutions stated that provisions for access to civil courts are clearer and parties would be spared the inconvenience of approaching courts of other jurisdictions. Other reasons included lower costs associated with using Indian institutions. Some respondents also stated that they would use Indian institutions for arbitrations if they were at par with international standards, and displayed professionalism and better management.

These responses reflect that while some parties believe that it would be more convenient and cost-effective for them to arbitrate in India using the existing institutions, they also feel that the facilities provided by these institutions is inadequate for conducting time-bound and efficient arbitrations. In fact, individuals seem keen to arbitrate within India as it would avoid having to approach foreign courts for various remedies during the course of arbitral proceedings. This shows that improvement of facilities in and strengthening the existing institutions would perhaps encourage more parties to make use of these institutions for dispute resolution. Additionally, the lack of professionalism and shortage of experts seems to be an oft-quoted problem with Indian institutions, which again points to the need for equipping these arbitral institutions to meet the requirements of parties. The positive attitudes towards the 2015 amendments to the ACA are encouraging, and it is expected that the changes would persuade more parties to choose India as a seat of arbitration.

6. Suggestions to improve the performance of Indian arbitral institutions

(a) Better facilities, infrastructure and expertise in institutions

The responses revealed that there should be a minimum standard according to which arbitral institutions function. Further, respondents expressed the need for institutions to perform better, with an emphasis on ensuring professionalism of staff and proper administration of the arbitral process. In this regard, suggestions were made for appointment of an independent board for each institution, with at least one member who had experience working with a reputed international arbitral institution.

One respondent, in their comments, used foreign institutions as an example to point out how to manage Indian arbitral institutions in a better way. The example given was that of the HKIAC, where Lord Peter Goldsmith QC, former Attorney General of the United Kingdom ("**UK**"), was made the HKIAC's Vice Chairman after it was set up. It was stated that such qualified professionals are required to head these institutions in the nascent stages of their development, which can then go a long way in ensuring their success as centres for international arbitrations.

Responses also revealed a need for institutions to market themselves better and create awareness about institutional arbitration in general. Additionally, arbitral institutions should prepare annual reports on their functioning.

It was also felt that the administrative fees charged by arbitral institutions were not commensurate to the facilities and support provided by them. Therefore, there were several suggestions regarding improvements in infrastructure, case management services, and administrative support required in arbitral institutions such as good stenographers and transcription services.

(b) Panels of arbitrators

Respondents felt that the lists of arbitrators of almost all existing institutions require a relook. The criteria for inclusion of arbitrators on panels must be made more stringent. Responses emphasised the need for transparency in the appointment of empanelled arbitrators to arbitral tribunals. Empanelment of arbitrators must be based on domain knowledge and expertise in a particular trade / industry. There should also be an emphasis on including non-lawyers with technical knowledge in various sectors rather than including only retired judges and lawyers.

The responses received also showed a strong preference for accreditation and proper training to be given to counsel and arbitrators. It was opined that younger arbitrators with greater availability, requisite experience and qualifications (such as membership of the Chartered Institute of Arbitrators ("**CIArb**")), and specialists in each field (engineers, quantum experts, etc.) should be added to the panel of arbitrators of the institutions. It was also suggested that arbitration be made an independent course to be taught compulsorily in law colleges. In addition, respondents felt that training sessions by seasoned arbitration practitioners should be actively considered.

Responses also suggested that arbitral institutions must keep records of the performance of all arbitrators appointed by them and review them annually.

(c) Role of the government

A number of responses suggested that the Government must give a big push to institutional arbitration by requiring disputes arising out of government contracts to be resolved by arbitration administered by an arbitral institution.

C. Comments and suggestions received on the Working Paper

The Committee received 13 sets of comments and suggestions on the Working Paper. Most of the comments received were from law firms and individual lawyers.

1. Accreditation of arbitral institutions

Most responses to the Working Paper revealed scepticism towards a regulatory body; instead, the respondents suggested the establishment of an independent and autonomous body comprising representatives of stakeholders for accreditation of institutions. Such body can have the power to issue guidelines and / or recommendations to arbitral institutions in relation to infrastructure, personnel, training, fees, etc. and seek compliance reports from arbitral institutions in India.

Amendments to the ACA for effecting minimum standards for arbitral institutions were also proposed. Another suggestion that came forth was the issuance of circulars by the Ministry of

Law and Justice to lay down certain standards for arbitral institutions and mandate annual accreditation of arbitral institutions by specified international accreditation agencies.

2. Accreditation of arbitrators

Most of the comments reflected the preference for an independent self-regulatory body for accreditation of arbitrators that will prescribe minimum standards (after consultation with industry experts and arbitrators, etc). The comments also reflected the view that this body should be free of the Government's involvement. It was also suggested that accreditation of arbitrators must be made mandatory. Additionally, stakeholders felt that there should be mandatory and anonymised feedback for arbitrators, and publication of experience and accreditations so that parties may make an informed choice of arbitrators.

3. Creation of a specialist arbitration bar and bench

It was suggested that voluntary bar associations for arbitration practitioners be set up along the lines of International Bar Association's Arbitration Committee. Suggestions were also made to have separate benches to hear arbitration matters in High Courts. The suggestions also emphasised the need for periodic training for judges hearing arbitration matters.

There were some reservations expressed against the creation of an arbitration bar, e.g. bar politics that would ensue from the creation of a new bar. However, the comments largely reflected a positive attitude towards the creation of a specialist bar and bench.

4. Amendments suggested to the ACA and other laws

In their comments on the Working Paper, stakeholders also put forth their suggestions relating to amendments to the ACA. Many respondents suggested clarifying the applicability of the 2015 Amendment Act.

Several amendments were suggested to bring the working of arbitral institutions and arbitration practice in line with international best practices. For instance, one suggestion was to amend the Fourth Schedule of the ACA to include higher fees comparable with other international arbitration centres. Similarly, another suggestion was to amend section 19 to bring uniformity in rules for recording evidence. In this regard, it was further suggested that International Bar Association Rules on the Taking of Evidence ("**IBA Rules**") be followed. Another response stated that the grounds for challenge of domestic and foreign arbitral awards must be limited.

Further, some amendments were suggested to section 34, namely: (a) the time limit for challenge should be reduced to 30 days; (b) there should be a condition of a 75 per cent pre-deposit of the sum awarded; and (c) the challenge petition should be disposed of in 60 days (extendable by another 30 days) with no further challenge. It was also suggested that a dedicated court for

hearing arbitration matters or national arbitration court equivalent to Supreme Court of India be set up.

As regards timelines, it was felt that the rigid new timelines under section 29A would not be practical. Therefore, it was suggested that there may be an amendment of section 29A to permit parties to extend the time limit for completing arbitrations by mutual consent.

To ensure disputes are referred to arbitral institutions, one respondent stated that section 11 may be amended to designate institutions exclusively as appointing authorities for arbitrators. Other responses suggested specific amendments to provide for a minimum of 3 arbitrators for ad hoc arbitrations, including a subject-matter expert with requisite experience. There must be provision for simultaneous appeal before a competent court for misconduct of arbitrators. Provisions must be inserted for the recognition of emergency awards and their enforcement. Additionally, one respondent stated that there should be a dedicated court for enforcement of arbitral awards.

In addition to the suggestions made regarding amendments to the ACA, the respondents also stated that there may be amendments required in other laws, such as the Code of Civil Procedure 1908 ("**CPC**"), for instance, by amending section 89 to permit referrals of civil or commercial disputes to alternative dispute resolution ("**ADR**"), particularly where resolution by a Lok Adalat fails. It was also suggested that there may be amendments made to the Advocates Act 1961 ("**Advocates Act**") to allow foreign law firms / lawyers to participate in arbitrations in India.

5. Role of the government in promoting institutional arbitration

The comments received on the Working Paper envisaged a greater role for the government to promote and improve institutional arbitration in India. Some respondents suggested that the government can assist in setting up infrastructure for arbitral institutions in the major cities in India (as done in the case of Maxwell Chambers in Singapore), which can then become hubs for commercial arbitrations. However, ultimately the institutions which are set up should function independent of governmental control.

Stakeholders also suggested the giving of incentives such as tax incentives to accredited arbitral institutions in India. It was also suggested that the Government should proactively follow up on the recommendations of the Law Commission of India ("**LCI**") and other regulatory bodies to ensure that it keeps up with developments in arbitration and ADR in India. Further, many stakeholders felt that institutional arbitration must be made mandatory where the Government is a party to arbitral proceedings. There should be mandatory reference of disputes over INR 5,00,00,000 (INR 5 crores) to institutional arbitration.

6. Changes in arbitration culture

In addition, stakeholders also suggested that there must be changes to arbitration culture in India. It was suggested that there be training and awareness programmes relating to arbitration law and practice through bodies such as the CIArb. Additionally, costs must be imposed on parties who delay the progress of arbitral proceedings.

Some other measures suggested by the parties were the provision for insurance for arbitral institutions to protect parties from untimely death, resignation, or removal of arbitrators, etc. Another suggestion was to merge arbitration centres, particularly High Court arbitration centres, to form regional arbitration centres.

D. Concluding observations

From the responses to Questionnaire 1 as well as literature, it is evident that most arbitral institutions are not performing on par with international institutions and have negligible caseloads. Very few institutions responded to the questionnaire, which in itself was indicative of lax attitudes towards institutional arbitration. It seems apparent that many of these institutions suffer from a lack of professional administration and management. Further, there are problems in terms of lack of good administrative facilities, mediocre management of arbitrations, and lack of discipline in enforcing and adhering to timelines for dispute resolution.

The respondents to Questionnaire 2 also pointed to various deficiencies with institutional arbitration in India. Stakeholders expressed concerns about how Indian arbitral institutions need to be on par with international institutions, with respect to the services and facilities offered and the way in which they conducted proceedings. It is apparent that arbitral institutions in India currently do not provide any value addition commensurate with the administrative fees charged by the institution. It is also evident from the responses that if existing arbitral institutions were to be brought on par with international arbitral institutions, parties may shift from using arbitral institutions abroad to using Indian arbitral institutions, which are more cost-effective.

There is clearly an untapped potential in India for institutional arbitration. Thus, there is a need for reforms aimed at improving the overall quality and performance of Indian arbitral institutions.

E. Identifying areas for reform

Based on the responses received to the Questionnaires and the comments and suggestions on the Working Paper, the Committee is of the opinion that in order to promote institutional arbitration in India, it is critical that: (a) Indian parties involved in domestic and international arbitrations be encouraged to shift to institutional arbitrations rather than resort to ad hoc arbitrations; and (b) India becomes a favoured seat of arbitration for international arbitrations, at the very least in matters involving Indian parties. Accordingly, in this Part of the Report, the Committee decided

to suggest measures for reform, some of which are directly aimed at improving the quality and performance of arbitral institutions in India, and others which are targeted at creating an ecosystem in which institutional arbitration has the necessary support to flourish. The latter measures are therefore aimed at developing India as an arbitration-friendly seat and are expected to have an impact on both institutional and ad hoc arbitration.

The Committee has identified the following areas for suggesting reform measures:

- Establishment of a body for grading arbitral institutions
- Accreditation of arbitrators
- Creation of a specialist arbitration bar
- Creation of a specialist arbitration bench
- Amendments to the ACA
- Other legislative / non-legislative measures that can promote arbitration practice in India
- Enhancing the role of the government and the legislature in promoting institutional arbitration
- Changes in ADR culture

V. LESSONS TO LEARN FROM INTERNATIONAL ARBITRAL INSTITUTIONS

There are several institutions worldwide that administer international arbitrations. The earliest international arbitral institutions were based in Europe, but with the increase in the popularity of arbitration in Asia, a number of arbitral institutions have been set up in Asian countries. While some of these institutions may be popular in a national or regional context, only a handful of institutions have emerged as successful in an international context.

In this Chapter, the Committee looks at: (a) what goes into parties' choice of arbitral institutions; (b) which are the most preferred arbitral institutions; and (c) why these institutions are more successful than others. The purpose behind this exercise is to identify the reasons behind the success of pre-eminent international arbitral institutions and discover best practices that may be applied in the Indian context with necessary modifications.

A. Factors that affect parties' choice of arbitral institutions

One of the foremost reasons why parties choose a particular arbitral institution is the arbitration rules that apply as a result of such choice. Therefore, arbitral institutions that provide rules that are clear, efficient, and flexible to accommodate parties' needs and expectations tend to be favoured.[42]

However, other factors such as quality of arbitrator appointments, case administration services, reputation, neutrality, quality of the legal system where the arbitral institution is located, and pricing policy (both administrative charges of the institution and fees of the arbitrators) are considered by the parties when selecting an arbitral institution.[43] The geographic location of the arbitral institution also plays a very important role, with Asian parties tending to choose arbitral institutions located in Asia.[44]

A 2015 survey conducted by the School of Arbitration at the QMUL in collaboration with White & Case LLP ("**QMUL Survey**") reported that parties generally considered the following four factors in decreasing order of importance when choosing an arbitral institution:

a. a high level of administration (i.e., the proactiveness and responsiveness of the arbitral institution);
b. perceived neutrality or 'internationalism' of the arbitral institution;

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[42] Elvira Gadelshina, 'What plays the key role in the success of an arbitration institution?', Financier Worldwide (2013), available at https://www.financierworldwide.com/what-plays-the-key-role-in-the-success-of-an-arbitration-institution/#.WK5vClV96M8 (accessed on 23.02.2017).
[43] *Id.*
[44] Dr. Nicolas Wiegand and Dr. Tom Christopher Pröstler, 'Arbitration is becoming increasingly Asian', Business Law Magazine (2015), available at http://www.businesslaw-magazine.com/2015/09/03/arbitration-is-becoming-increasingly-asian-there-are-four-main-drivers-of-the-process/ (accessed on 19.07.2017).

c. ability of the arbitral institution to administer arbitrations across the world / its global presence; and
d. free choice of arbitrators (no exclusive list of arbitrators maintained by the arbitral institution).[45]

On the other hand, features that are specific to institutions such as regional presence / expertise, expertise in specific types of matters, costs of services provided by the institution, fees of arbitrators, etc., while important, were secondary to the above factors.[46]

Previous surveys conducted by the QMUL have also shown that neutrality of the arbitral institution, its reputation, and arbitration rules are key factors considered by parties while choosing an arbitral institution.[47] Moreover, some institutions were preferred because of parties' previous experience with them, and, very significantly, the connection of the institution to the chosen seat. The quality of the legal system of a country had a strong correlation to the success of any arbitral institution located in such country.[48]

B. Most preferred arbitral institutions

According to the QMUL Survey, the ICC Court, the LCIA, the HKIAC, the SIAC and the Arbitration Institute of the Stockholm Chambers of Commerce ("**SCC**") are the five most preferred arbitral institutions worldwide.[49] Out of these, the ICC Court and the LCIA have consistently been ranked in the top two in previous surveys conducted by the QMUL. Amongst Indian parties, the SIAC is a favourite with 153 Indian parties arbitrating disputes at the SIAC, well ahead of other overseas parties, as per 2016 statistics.[50]

C. Reasons behind the success of the top five arbitral institutions

An examination of the reasons behind the success of the arbitral institutions mentioned in section B above reveals certain commonalities: (a) sufficient support from governments; (b) backing from the business and / or legal communities; (c) location in a jurisdiction which has an arbitration-friendly legislative framework and judiciary; (d) extrinsic advantages such as

[45] '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration', Queen Mary University of London and White & Case LLP (2015), available at http://www.arbitration.qmul.ac.uk/docs/164761.pdf (accessed on 16.02.2017).
[46] *Id.*
[47] '2010 International Arbitration Survey: Choices in International Arbitration', Queen Mary University of London and White & Case LLP (2010), available at http://www.arbitration.qmul.ac.uk/docs/123290.pdf (accessed on 16.02.2017).
[48] *Supra* n. 46.
[49] *Supra* n. 46.
[50] *Supra* n. 48; See also '2006 International Arbitration Study: Corporate Attitudes and Practices', Queen Mary University of London and PricewaterhouseCoopers LLP (2006), available at http://www.arbitration.qmul.ac.uk/docs/123295.pdf (accessed on 16.02.2017).

geographical location or expertise; and (e) intrinsic advantages such as party-friendly rules, an experienced and skilled panel of arbitrators, etc. These are discussed in detail below.

1. Support from governments

Two out of the top five arbitral institutions, namely the SIAC and the HKIAC, have benefited significantly from the support they enjoyed from their respective governments.

The SIAC was established as a part of the Singapore government's efforts to create an arbitration industry in Singapore.[51] It was set up by the government with two governmental agencies, the Economic Development Board and the Trade Development Board as its shareholders, and operated for many years under their aegis.[52] The government also played a role in promoting the SIAC at an international level, getting international arbitration practitioners to be associated with the institution.[53] This was crucial in giving the SIAC an international profile.

Both the SIAC and the HKIAC have received financial assistance and / or infrastructural support from their respective governments. The Singapore government permitted the SIAC to initially operate out of the City Hall, a government-owned building. Later, the government provided funding to establish Maxwell Chambers, the world's first integrated dispute resolution centre with state-of-the-art infrastructure. The SIAC, together with other arbitral institutions such as the ICC Court, the LCIA and the International Centre for the Settlement of Investment Disputes, is housed here.[54] Similarly, the Hong Kong government and its business community provided initial funding to the HKIAC.[55] The government also ensured that the HKIAC received an entire floor of a building in the heart of the business district in Hong Kong for use as a hearing centre.[56]

In this context, it should be noted that infrastructural constraints was one of the main concerns raised by the respondents to Questionnaire 2. The Indian government, like the Singapore and Hong Kong governments, could consider assisting arbitral institutions in India by building suitable infrastructure such as integrated dispute resolution facilities in major commercial centres such as Mumbai and Delhi.

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[51] Ang Yong Tong, 'SIAC: Arbitration in the New Millennium', Law Gazette (2000), available at http://www.lawgazette.com.sg/2000-1/Jan00-23.htm (accessed on 27.02.2017).
[52] *Id.*
[53] Opening Address by Singaporean Minister for Law, K. Shanmugam at SIAC Congress 2016, available at https://www.mlaw.gov.sg/content/minlaw/en/news/speeches/opening-address-by-minister-for-law--k-shanmugam--at-siac-congre.html (accessed 23.02.2017).
[54] Chong Yee Leong and Qin Zhiqian, 'The Rise of Arbitral Institutes in Asia', Global Arbitration Review's The Asia-Pacific Arbitration Review 2011 (2011), available at http://globalarbitrationreview.com/insight/the-asia-pacific-arbitration-review-2011/1036651/the-rise-of-arbitral-institutes-in-asia (accessed on 27.02.2017).
[55] 'About HKIAC', HKIAC website, available at http://www.hkiac.org/about-us (accessed 27.02.2017).
[56] *Supra* n. 55.

2. Support from business and / or legal communities

The business and / or legal communities have played a big role in the establishment of some of the top five arbitral institutions. In fact, several established arbitral institutions were created in response to the business community's need for effective dispute resolution services. For instance, the ICC Court was set up to provide dispute resolution services under the aegis of the International Chamber of Commerce, a body created by and serving the business community. Similarly, the LCIA's establishment came at a time when commercial parties in England sought a private forum for adjudication of disputes by experts chosen by them.[57]

In more recent times, the HKIAC was set up by the business and legal communities in Hong Kong in response to the burgeoning need for dispute resolution services in Asia.[58] The legal community has also helped in marketing the HKIAC and in lobbying the Hong Kong government to upgrade Hong Kong's arbitration infrastructure.[59]

The business community in India has to some extent played a similar role with the Federation of Indian Chambers of Commerce and Industry ("**FICCI**") and the Associated Chambers of Commerce and Industry of India ("**ASSOCHAM**") being involved in the establishment of two arbitral institutions, the ICA and the ASSOCHAM International Council of Alternate Dispute Resolution, respectively. However, more needs to be done to develop these institutions as leading arbitral institutions globally.

3. Location in an arbitration-friendly jurisdiction

The success of many arbitral institutions is predicated on the popularity of the jurisdiction they are located in as a seat of arbitration. The QMUL Survey noted that the arbitral seat was one of the three main factors that influenced parties' choice of arbitral institutions. Thus, it is clear that arbitral institutions benefit from their perceived connection with a jurisdiction, and the quality of such jurisdiction has enormous bearing on their popularity.

The neutrality of the legal system, the local arbitration legislation, and a favourable record in enforcing arbitration agreements and arbitral awards, which form the key ingredients of a supportive arbitration jurisdiction, therefore are critical to the success of an arbitral institution. It is no coincidence that the five most preferred arbitral institutions are located in arbitration-friendly jurisdictions. In fact, the ICC Secretariat is based out of Paris and Hong Kong, two leading arbitration jurisdictions. Similarly, the LCIA benefits from its location in London, which is not only a pre-eminent arbitration jurisdiction, but also a source of financial and legal expertise

[57] 'History', LCIA website, available at http://www.lcia.org/LCIA/history.aspx (accessed on 27.02.2017).
[58] 'About HKIAC', HKIAC website, available at http://www.hkiac.org/about-us (accessed 27.02.2017).
[59] 'White List: Asia Pacific', Global Arbitration Review (2016), available at http://globalarbitrationreview.com/editorial/1070152/white-list-asia-pacific (accessed on 27.02.2017).

and experience, and a neutral venue for doing business. London is the first choice seat for a majority of respondents to the QMUL Survey as well as the most used seat.[60]

(a) Modern arbitration legislation

As noted above, a key ingredient of a supportive arbitration jurisdiction is the existence of effective local arbitration legislation that gives priority to party autonomy, efficacy of proceedings, sanctity of arbitral awards and the provision of ample court assistance in arbitrations. Needless to say, such legislation should also recognise and implement the New York Convention in letter and spirit. In Singapore, the IAA incorporates the provisions of the UNCITRAL Model Law on International Commercial Arbitration ("**UNCITRAL Model Law**") and gives effect to the Convention on the Enforcement and Recognition of Foreign Arbitral Awards 1958 ("**New York Convention**"). The Arbitration Act 1996 in the UK applies to both domestic and international arbitrations and is heavily influenced by the UNCITRAL Model Law and the New York Convention.[61] Similarly, the AO in Hong Kong and the Arbitration Act 1999 in Sweden are based on the UNCITRAL Model Law and adheres to the New York Convention as far as recognition and enforcement of foreign awards are concerned.[62] French arbitration law provisions, although not based on the UNCITRAL Model Law, are no less favourable. All the above legislations contain provisions that respect party autonomy and finality of the arbitral award while providing court assistance in form of referrals to arbitration, interim measures for protection, etc.

The legislatures in these jurisdictions have a clearly articulated objective of ensuring a legislative framework that is supportive of arbitrations. For instance, the Singapore legislature, in its efforts to keep Singapore law attuned to changes in the international arbitration landscape and to rectify conflicting / ambiguous judicial precedent, has passed as many as 7 amendments to the IAA since its enactment in 1994. In some cases, amendments to the IAA have been passed in a matter of months.[63] Similarly, the Hong Kong government has actively collaborated with the HKIAC to

[60] *Supra* n. 46.
[61] 'England and Wales Arbitration Guide', IBA Arbitration Committee, (April 2012), available at https://www.ibanet.org/Document/Default.aspx?DocumentUid=D49BD82B-83AA-47C3-A238-F7E165D03891 (accessed on 26.06.2017).
[62] Mattias Goransson et al., 'Arbitration procedures and practice in Sweden: overview', available at https://uk.practicallaw.thomsonreuters.com/9-385-8297?service=arbitration&__lrTS=20170522085947225&transitionType=Default&contextData=(sc.Default) (accessed on 26.06.2017).
[63] Opening Address by Singaporean Minister for Law, K. Shanmugam at SIAC Congress 2016, available at https://www.mlaw.gov.sg/content/minlaw/en/news/speeches/opening-address-by-minister-for-law--k-shanmugam--at-siac-congre.html (accessed on 23.02.2017).

incorporate changes in the AO, which permit enforcement of relief granted by an emergency arbitrator for arbitrations seated in or outside Hong Kong.[64]

It is thus evident that an active legislature which regularly updates arbitration legislation to reflect best practices and resolve ambiguities in judicial precedent is essential for creating a supportive arbitral seat where arbitral institutions can flourish. The Indian government should consider mechanisms that allow the Indian legislature to play a similar role.

(b) Support from the judiciary

The arbitral institutions studied are located in jurisdictions where the judiciary enjoys a reputation for being non-interventionist and supportive of arbitration. The court systems in these jurisdictions are generally considered to be fair, and the judiciary is itself viewed as being independent and consistent. The judiciary is mindful of the need for respecting party autonomy, the sanctity of parties' consent for arbitration, and the finality of an arbitral award. Accordingly, arbitration clauses are almost invariably interpreted to favour arbitration and challenges to arbitral awards are required to meet a very high threshold. For instance, the Singapore Court of Appeal has even enforced a potentially pathological arbitration agreement that provided for SIAC arbitration in accordance with the Rules of Arbitration of the ICC ("**ICC Rules**").[65]

As mentioned above, the courts in these jurisdictions are also strongly pro-enforcement. Further, in relation to the controversial ground of contravention of public policy in challenges to / enforcement of awards, Singapore and Hong Kong courts have given a narrow construction to this ground by stating that arbitral awards shall be set aside on this ground only in the most 'egregious' cases.[66] As of March 2015, Singapore courts had not refused enforcement of any arbitral award on the ground of violation of public policy.[67] Also, since 2011, only 3 awards have been set aside on any available ground in Hong Kong.[68] Additionally, Hong Kong courts have also created an indemnity costs rule, which permits the imposition of indemnity costs on parties who are unsuccessful in challenging or resisting enforcement of an award, or who use court

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[64] Chiann Bao, 'International Arbitration in Asia on the Rise: Cause & Effect', The Arbitration Brief 4, no. 1 (2014): 31–51, p. 38, available at http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1042&context=ab (accessed on 27.02.2017).

[65] *Insigma Technology Co. Ltd v. Alstom Technology Ltd*, [2009] SGCA 24.

[66] *Coal & Oil Co LLC v. GHCL Ltd*, [2015] SGHC 65; *Hebei Import & Export Corporation v. Polytek Engineering Company Limited*, [1999] 1 HKLRD 665; *Gao Haiyan v. Keeneye Holdings Ltd*, [2011] HKEC 514.

[67] Memorandum from Clifford Chance Singapore to the International Bar Association on Public Policy and Singapore Law of International Arbitration, 25.03.2015, available at http://www.ibanet.org/Document/Default.aspx?DocumentUid=B179BAF0-63E1-46C5-B1D3-3834DEF95AE2 (accessed on 01.03.2017).

[68] Statistics on enforcement of awards in Hong Kong, HKIAC website, available at http://www.hkiac.org/about-us/statistics/enforcement-awards (accessed on 28.02.2017).

proceedings to reopen issues decided in an arbitration, unless special circumstances exist.[69] This rule serves to deter parties from initiating court proceedings aimed at frustrating arbitration proceedings.

While Indian courts are increasingly adopting a pro-arbitration stance, endemic delays and ambiguities in judicial precedent such as inconsistencies between different High Courts have prevented the Indian courts from being viewed as supportive of arbitration. This has certainly had an impact on the choice of India as an arbitral seat and consequently on the growth of arbitral institutions in India. The Indian government could improve such perception by taking measures to curb endemic delays and providing opportunities for increasing awareness amongst members of the judiciary of developments and positive trends in arbitration jurisprudence worldwide.

(c) Other measures

Apart from arbitration legislation, in certain jurisdictions, the enactment of supporting legislation has contributed significantly towards the growth of these jurisdictions as arbitration hubs. For instance, Singapore has recently passed amendments to its Civil Law Act legalising third party funding for arbitration and associated proceedings.[70] Similarly, Hong Kong recently legalised third party funding for arbitrations and mediations.[71] The Paris Bar Council has also indicated its support for third party funding.[72]

Other legislative efforts have focussed on creating a conducive environment for arbitration through favourable regulatory measures and tax incentives. For instance, Singapore has passed legislation waiving the requirement for work permits for foreigners rendering arbitration services in Singapore and removing restrictions on the nationality of counsel and arbitrators involved in arbitrations in Singapore. Singapore also provides incentives in the form of tax exemptions for

[69] 'Hong Kong Cements its Place in International Arbitration—Recent Developments in Hong Kong', Mayer Brown Briefing (2009), available at https://www.mayerbrown.com/pt/publications/detailprint.aspx?publication=443 (accessed on 01.03.2017).

[70] 'UPDATE: Singapore passes law to legalise third-party funding of international arbitration and related proceedings', Herbert Smith Freehills — Arbitration Notes, 11.01.2017, available at http://hsfnotes.com/arbitration/2017/01/11/update-singapore-passes-law-to-legalise-third-party-funding-of-international-arbitration-and-related-proceedings/ (accessed on 27.02.2017).

[71] 'Hong Kong allows third party funding for arbitration and mediation', Herbert Smith Freehills — Arbitration Notes, 14.06.2017 available at http://hsfnotes.com/arbitration/2017/06/14/hong-kong-allows-third-party-funding-for-arbitration-and-mediation/ (accessed on 15.06.2017).

[72] 'Paris Bar Council indicates support for third-party funding', Herbert Smith Freehills — Arbitration Notes, 11.05.2017, available at http://hsfnotes.com/arbitration/2017/05/11/paris-bar-council-indicates-support-for-third-party-funding/ (accessed on 15.06.2017).

income derived by non-resident arbitrators for arbitration work carried out in Singapore[73] and a tax exemption of 50 per cent for qualifying law practices on their incremental income that arises out of international arbitration cases which culminate in Singapore or in which substantive hearings have been held in Singapore.[74] In Hong Kong too, there are no restrictions on foreign law firms engaged in arbitration and no requirements are imposed on nationality and professional qualifications on advisers to parties.[75] In Sweden, any person with full legal capacity without constraints of nationality or professional qualification is permitted to act as an arbitrator.[76]

Similar measures, if adopted with suitable modifications for the Indian context, could give a boost to arbitration in India.

4. Extrinsic advantages of the arbitral institution

For some arbitral institutions, extrinsic factors, such as the timing of their establishment or their geographical location, have had a significant role in their growth.

For instance, the growth of the LCIA and the ICC Court was significantly aided by the simultaneous growth of international arbitration itself. The popularity of these arbitral institutions also increased with parallel developments in the international arbitration landscape, such as the adoption of the New York Convention, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and the UNCITRAL Model Law.

Similarly, the SCC became prominent in the 1970s during the Cold War era when the American Arbitration Association ("**AAA**") and the USSR Chamber of Commerce and Industry agreed to recognise Sweden and the SCC as a neutral location.[77] Eventually, the SCC also became a neutral location for arbitrations involving Chinese parties. In effect, the SCC gained prominence on account of its status as a neutral centre for resolving 'East-West' disputes (i.e., disputes with the Union of Soviet Socialist Republics ("**USSR**") / Soviet bloc / Chinese parties on one side and

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[73] 'Enhancing competitiveness', PricewaterhouseCoopers website, available at http://www.pwc.com/sg/en/singapore-budget-2015/bc02-02.html (accessed on 27.02.2017).

[74] 'Incentive Schemes', Ministry of Law, Singapore, available at https://www.mlaw.gov.sg/content/minlaw/en/legal-industry/incentive-and-exemption-schemes.html (accessed on 27.02.2017).

[75] 'Arbitration—The International Arbitration Centre for Asia Pacific', Department of Justice, the Government of Hong Kong Special Administrative Region, available at http://www.doj.gov.hk/eng/public/arbitration.html (accessed 15.06.17).

[76] Section 7, The Swedish Arbitration Act (SFS 1999:116). *See also* Mattias Goransson et al., 'Arbitration procedures and practice in Sweden: overview', Practical Law Company, available at https://uk.practicallaw.thomsonreuters.com/9-385-8297?service=arbitration&__lrTS=20170522085947225&transitionType=Default&contextData=(sc.Default) (accessed on 26.07.2017).

[77] Staffan Michelson and Hiba Sabbagh, 'Stockholm as a Neutral Place for Arbitration', Hellstrom Law, 2 available at http://iln.com/articles/pub_245.pdf (accessed on 19.07.2017).

European / North American parties on the other side). Even after the disintegration of the USSR, the preference for the SCC continued.[78]

In a similar manner, the HKIAC has benefited immensely from Hong Kong's geographical and political proximity with China. As a result of China's recent economic growth, a large number of disputes involving Chinese parties have arisen. These disputes have been arbitrated in Hong Kong before the HKIAC, as Hong Kong is seen as a neutral location for arbitration.[79] This is evident from the fact that after Hong Kong parties, Chinese parties bring the most number of disputes to the HKIAC.[80] The HKIAC is envisaged to have a prominent role as a dispute resolution hub in China's One Belt, One Road strategy.[81]

Finally, the LCIA also benefits from its location in London on account of the favourable perception of London as an unparalleled centre of financial and legal expertise and as a neutral venue for doing business. The excellent infrastructure available in London is an added incentive for parties. Also, because of England's strong connection to other common law jurisdictions across the world, London remains a perennially popular choice of seat for parties from such jurisdictions.

5. Intrinsic advantages of the arbitral institution

The top five arbitral institutions boast of intrinsic advantages in the form of modern party-friendly arbitration rules, a diverse and experienced panel of arbitrators, excellent staff, and strategic leadership from leading arbitration practitioners.

(a) Arbitral rules

All five arbitral institutions studied have modern and updated arbitration rules reflecting best practices and latest developments in international arbitration. Some common features of these rules include provisions on joinder of parties, multi-contract arbitrations, consolidation of arbitrations, emergency arbitrators, fast-track arbitrations, etc. Some arbitral institutions, such as the SCC and the HKIAC, also permit parties to adopt the UNCITRAL Arbitration Rules or ad hoc arbitration rules for arbitrations administered by these arbitral institutions. Thus, they offer much needed flexibility to parties.

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[78] Sverker Bonde, Global Arbitration Review Chapter on Sweden (2015), available at http://globalarbitrationreview.com/chapter/1036960/sweden (accessed on 23.02.2017).

[79] 'White List: Asia Pacific', Global Arbitration Review (2016), available athttp://globalarbitrationreview.com/editorial/1070152/white-list-asia-pacific (accessed on 27.02.2017).

[80] '2015 Case Statistics', HKIAC website, available at http://www.hkiac.org/about-us/statistics (accessed 27.02.2017).

[81] 'HKIAC well-positioned as Belt & Road dispute resolution hub', Asia Law, 02.02.2017, available at https://www.asialaw.com/articles/hkiac-well-positioned-as-belt-and-road-dispute-resolution-hub/ARSZQDOY (accessed on 14.07.2017).

Arbitration rules of these institutions are regularly updated to provide maximum flexibility to parties and ensure maximum efficacy in arbitration proceedings. Practice notes / guidance notes are regularly issued by the arbitral institutions to supplement their arbitration rules and clarify possible ambiguities, thereby promoting certainty in the arbitrations administered under such arbitration rules.

In addition, these arbitration rules often include one or more unique features / innovations that give the relevant arbitral institution an edge over other arbitral institutions, and which may become a relevant factor for parties choosing between rules of different institutions. For instance, the ICC Rules provide for scrutiny of the draft arbitral award by the ICC Court before it is finally signed by the arbitral tribunal. This scrutiny helps remove potential deficiencies and defects that might otherwise result in the arbitral award being set aside or rendered unenforceable, and thus results in substantial time and costs savings for parties. In contrast, the HKIAC Administered Arbitration Rules are known for their 'light touch' approach to administering arbitrations and do not provide for scrutiny of arbitral awards.[82] Finally, a recent update to the Arbitration Rules of the Singapore International Arbitration Centre has introduced a novel procedure for early dismissal of claims and defences that helps parties save time and costs.[83]

(b) Governance structure

Each of the top five arbitral institutions has a board of directors (or equivalent body) with some of the best arbitrators and arbitration counsel from across the world. The participation of such experts provides these arbitral institutions with international expertise and a keen insight into developments in arbitration practice worldwide. This advantage permits these arbitral institutions to focus on potential opportunities and areas of further development. These arbitral institutions are usually led by a professional chief executive officer who is responsible for day-to-day operations of the arbitral institution and business development.

Most of these arbitral institutions also rely on a court (or an equivalent body) that performs functions such as the admission of arbitrators to the panel of arbitrators, the appointment of arbitrators, deciding challenges to arbitrators, etc.

(c) Case management services

Each of the top five arbitral institutions provides excellent case management services. The secretariats of these arbitral institutions usually consist of a registrar / secretary-general assisted by a team of experienced arbitration lawyers qualified in diverse jurisdictions. A case management team is typically assigned to each case and is available to assist parties in resolving

[82] 'Why choose HKIAC', HKIAC website, available at http://www.hkiac.org/arbitration/why-choose-hkiac (accessed on 01.03.2017).
[83] See Rule 29, SIAC Rules, 2016.

queries, making arrangements for hearing venues, preparing and adhering to the procedural timetable, interpreting and applying the arbitration rules, and dealing with any matters required under the arbitration rules.

(d) Panel of arbitrators

A majority of the arbitral institutions studied maintain a panel of skilled and experienced arbitrators from diverse jurisdictions. For instance, the SIAC maintains an excellent panel of arbitrators that includes arbitrators from 41 countries.[84] A prominent exception to this general trend is the ICC Court which does not maintain a panel of arbitrators at all.

Apart from maintaining a panel of arbitrators, arbitral institutions also seek to ensure fairness and professionalism from arbitrators in arbitrations administered by them by requiring compliance with sophisticated codes of ethics. For instance, the SIAC's Code of Ethics requires arbitrators to submit an undertaking concerning their capacity to devote adequate time to the arbitration throughout the duration of the proceedings. The HKIAC also maintains a similar code of conduct.[85] Institutional rules also require arbitrators to file a statement declaring their independence and impartiality.[86]

(e) Infrastructure

Each of the arbitral institutions studied has state-of-the-art infrastructure for conducting hearings. These institutions are also usually located close to the business or financial centres. The typical facilities provided by these arbitral institutions include hearing rooms with separate break-out rooms for parties, video-conferencing facilities for witnesses and experts, multimedia facilities to assist counsel, sophisticated recording and transcription services, secretarial services to assist counsel, internet, photocopying and printing, etc. At the same time, these institutions are equally adept in managing disputes long distance in case parties choose to have a convenient venue for hearings that is not the same as the location of the arbitral institution.

(f) Costs

Even as dispute resolution becomes an increasingly cost-sensitive field, leading arbitral institutions have introduced innovations in cost structure and management to keep their services cost-effective. Each of the top five arbitral institutions regularly publish data about costs incurred in an arbitration to facilitate decision-making by parties. These arbitral institutions also provide

[84] 'SIAC Panel', SIAC website, available at http://www.siac.org.sg/our-arbitrators/siac-panel (accessed on 19.07.2017).
[85] 'Code of Ethical Conduct', HKIAC, available at http://www.hkiac.org/arbitration/arbitrators/code-of-ethical-conduct (accessed on 15.06.2017).
[86] Article 11, ICC Rules; Article 18, SCC Rules; Article 5.3 LCIA Rules.

advice on cost management and free cost-calculators which provide parties with an estimate of fees typically based on the amount in dispute and number of arbitrators. Also, the HKIAC has incorporated innovative rules on costs by providing parties with a choice between hourly rates and ad valorem rates based on the HKIAC's fee schedule.[87] Further, where an hourly rate is chosen, the arbitrator's fees shall not exceed a cap set by the HKIAC.[88]

The reasons discussed above form the basis for the Committee's recommendations for institutional arbitration in India — subject to modifications taking into consideration India's specific needs and position. While some reasons behind the success of the top five arbitral institutions arise from fortuitous circumstances, the success of these arbitral institutions is ultimately based on sustained positive action by governments, business and legal communities, and these institutions themselves.

[87] Article 16, HKIAC Rules.
[88] Paragraph 9.3, Schedule 2, HKIAC Rules.

VI. Recommendations for Reform

Various reasons contribute to the sustained popularity of ad hoc arbitration over institutional arbitration in India. As discussed in the preceding Chapters, some of the reasons that can be identified for this are related to the lack of sufficient supporting infrastructure for institutional arbitration, such as skilled and experienced arbitrators on panels of arbitral institutions, a well-qualified arbitration bar, effective monitoring by existing arbitral institutions, and internationally and domestically recognised arbitral institutions that cater to parties' needs adequately. Other reasons are related to the perception of India as a seat that is 'arbitration-unfriendly', although that perception is slowly changing. In order to encourage arbitration, and particularly institutional arbitration, there needs to be a change on both these fronts.

In the following sections, the Committee proposes certain recommendations, aimed at: (a) improving the overall quality and performance of arbitral institutions in India; and (b) improving India's perception as a seat of arbitration, in order to encourage parties to arbitrate in India using Indian arbitral institutions.

A. Establishment of a body for grading arbitral institutions

There are over 35 arbitral institutions currently functioning in India. The quality of these institutions varies greatly in terms of efficiency and speed of the arbitral process, infrastructure, panel of arbitrators, and quality of the arbitral awards made. The responses to the Questionnaires as well as the comments on the Working Paper confirmed the existence of several problems with the working of Indian arbitral institutions, particularly as regards their infrastructure, facilities and services. This has adversely impacted the reputation and popularity of institutional arbitration in India.

Therefore, the establishment of a body at the national level, which shall grade arbitral institutions on the basis of criteria related to infrastructure, personnel and performance, is required. As discussed in Chapter IV of this Report, almost all stakeholders were in favour of establishing an accreditation body for arbitral institutions.

It is expected that the proposed body would set a benchmark for assessing arbitral institutions and thus serve as an indicator to the general public regarding their quality. Further, it may incentivise institutions which are not performing well to improve their functioning and infrastructure or find themselves weeded out by a competitive market for arbitral institutions. Ultimately, it is hoped that the grading process would result in the evolution of certain common minimum standards by which arbitral institutions in India function.

At the same time, it should be emphasised that the body would not act as a regulator set up by the government, but only grade arbitral institutions and thereby evolve minimum standards for centres administering institutional arbitration in India. The Committee is cognizant of the fact

that regulating institutional arbitration and / or arbitral institutions by statute would be antithetical to the foundation of party autonomy on which arbitration is based. Moreover, other established arbitration jurisdictions such as Singapore, Hong Kong or the UK, do not provide for regulation of arbitral institutions by the government. Instead, what may be advisable is a body with representation from stakeholders, i.e., parties and their lawyers, the government and arbitral institutions. The Government, as a stakeholder, both as a litigant and as state, could be represented on the body and could provide infrastructure and funding for its proper functioning.

The Committee is also of the opinion that accreditation of the arbitral institution should not be a condition for recognition and enforcement of awards made in arbitrations administered by that institution. Otherwise, it would cripple the easy enforceability of awards, and ultimately reduce appetite for arbitration in India.

Recommendations

1. An autonomous body styled the Arbitration Promotion Council of India ("**APCI**") having representation from stakeholders — representatives from industry bodies such as CII (Confederation of Indian Industry), FICCI and the ASSOCHAM, the bar, the Government — should be set up to monitor the working of arbitral institutions in India.

2. The APCI may be set up by statute, through the inclusion of a separate Part IA in the ACA.[89]

3. The APCI shall have a Governing Board with the following composition, each of whose members shall have substantial experience in arbitration law and practice:

    a. A retired judge of the Supreme Court of India or a High Court who has substantial experience dealing with arbitration matters or has acted as an arbitrator, nominated by the Chief Justice of India;
    b. An eminent counsel having substantial knowledge and experience in institutional arbitration, both international and domestic, nominated by the Central Government;
    c. An overseas arbitration practitioner having substantial knowledge and experience in international arbitration nominated by the Attorney General for India;
    d. A nominee from the Ministry of Law and Justice; and
    e. A representative of commerce and industry who will be chosen on a rotation basis by the Ministry of Commerce and Industry.

4. The Chairperson of the APCI shall be appointed by the members of the Governing Board.

5. The term of each member of the Governing Board of the APCI shall be for a period of three years, extendable by another term of three years on re-nomination.

[89] See *infra* section E.

6. The APCI shall have a Chief Executive Officer ("**CEO**") and a professionally run Secretariat.

7. The CEO of the APCI shall have the following minimum qualifications:

    a. He / she shall possess a bachelor's degree in law from a recognised university;
    b. He / she shall have special knowledge or practical experience in respect of one or more of the following matters, namely:
        i. law;
        ii. management.
    c. Persons having 10 years' experience in: (i) administering an arbitral institution in India or overseas; (ii) acting as an arbitration practitioner; or (iii) acting as an arbitrator may be preferred.

8. The CEO shall be responsible for the day-to-day operations of the APCI. The Secretariat may be responsible for carrying out the functions of the APCI such as: (a) preparing a policy governing the grading of arbitral institutions for approval by the Governing Board; (b) grading arbitral institutions on the basis of such policy for approval by the Governing Board; (c) reviewing the grading given to arbitral institutions on a periodic basis; (d) preparing recommendations or guidelines to be issued by the APCI to arbitral institutions for approval by the Governing Board; (e) preparing a policy governing the recognition of professional institutes for accreditation of arbitrators for approval by the Governing Board; (f) admitting advocates on the roll of arbitration lawyers maintained by the APCI, etc.

9. The CEO may appoint other officers and employees as necessary for assisting the Secretariat in the performance of its functions.

10. The APCI may also seek the assistance of experts, both Indian and overseas, on any matter it considers necessary.

11. The APCI may have the following functions:

    a. to lay down a policy governing the grading of arbitral institutions based on criteria such as governance structure, updated arbitration rules, conduct of arbitral proceedings by the arbitral institution and oversight of such proceedings, adherence to timelines, adoption of international best practices, expedited procedures for arbitration, fee structure, panel of arbitrators, infrastructure for conducting arbitral proceedings, scrutiny of arbitral awards, caseload and pendency, training programmes and data management;
    b. to grade arbitral institutions into different grades / categories based on such policy;

c. to review the grading given to arbitral institutions on a yearly or other periodic basis;
d. to issue recommendations or guidelines for arbitral institutions in relation to infrastructure, personnel, fees, training, etc.;
e. to conduct research or studies on the performance of arbitral institutions in India;
f. to recognise professional institutes providing for accreditation of arbitrators on the basis of criteria such as method of accreditation, training provided before and after the accreditation of arbitrators, review of accreditation, membership ,etc.;[90]
g. to provide training through workshops and courses aimed at advocates with an interest in arbitration, in collaboration with law firms, law schools and existing professional institutes accrediting arbitrators, and to conduct an examination upon completion of requisite training;[91]
h. to admit advocates to the roll of arbitration lawyers maintained by it upon successful completion of the examination in (g) above and to stipulate continuing professional development ("**CPD**") requirements for such advocates;[92]
i. to maintain a statutory depository of arbitral awards made in arbitrations seated in India;[93]
j. to recommend timely legislative or other changes to the Government for promoting institutional arbitration in India and promoting India as an arbitration hub;[94]
k. to institute scholarship(s) / fellowship(s) to enable candidates to gain practical experience and training at select international arbitral institutions worldwide, who will then return to India after the completion of the same and work with Indian arbitral institutions in their areas of expertise for a certain number of years; and
l. to do anything that may be necessary or incidental to the exercise of the above functions.

12. The APCI may initially be set up with funding by way of grant from the Central Government, with the objective of eventually becoming a self-sustaining body funded by the fees collected from arbitral institutions for their grading.

13. The High Courts and the Supreme Court of India may be encouraged to designate arbitral institutions as appointing authorities for arbitrators for the purposes of section 11 of the ACA on the basis of the grading given by the APCI. This may be done through consultations with the High Courts and the Supreme Court and / or mandated either by rules made under section 11 of the ACA or by an explanation added to the section.

[90] See section B below.
[91] See section C below.
[92] See section C below.
[93] See section E below.
[94] See section F below.

14. The grading of arbitral institutions may not be mandatory, but voluntary. Instead, arbitral institutions may be incentivised to be graded by the APCI by requiring such grading as a precondition to being eligible to: (a) be designated as an appointing authority for arbitrators under section 11 of the ACA; (b) have arbitrations referred to it by courts under section 8 or 45 of the ACA; (c) have references to arbitration under section 89 of the CPC with the consent of parties; (d) being designated as the institution administering arbitrations in commercial contracts entered into by the Central Government and various state governments, and its various agencies and undertakings; and (e) being eligible for any grants made by the Central Government. Additionally, the grading of institutions must be made as transparent as possible, with the publication of the grading system and results on a public portal maintained by the APCI.

B. Accreditation of arbitrators

Many stakeholders perceive the poor quality of domestic arbitrators and the lack of professionalism amongst arbitrators as a problem affecting the growth of arbitration in India. Another common complaint is that where judges are arbitrators, they often import the ills of the judicial process into the arbitral process. To change this, India needs to have a pool of young, qualified, and well-trained arbitrators. One of the steps that can be taken to facilitate the creation of a pool of qualified and experienced arbitrators is the accreditation of arbitrators. Accreditation would also act as a reliable standard for parties wishing to appoint arbitrators. Therefore, it is necessary that arbitrators be encouraged to seek accreditation from bodies already providing such accreditation in India and internationally, such as the CIArb.

There are two types of accreditation available: (a) accreditation by a professional body of arbitrators; and (b) membership on a panel / list of arbitrators maintained by an arbitral institution.

Internationally, there exist several bodies / professional institutes providing accreditation of arbitrators as well as mediators. The CIArb, the Singapore Institute of Arbitrators ("**SIArb**"), the Resolution Institute ("**RI**"), and the British Columbia Arbitration and Mediation Institute ("**BCAMI**") are prime examples of such professional institutes. These institutes were set up with the view of encouraging and developing effective ADR services. They are independent bodies unaffiliated to any particular industry. Their membership consists of arbitrators, mediators and other dispute resolution professionals.

These institutes apply stringent criteria for accreditation by membership. Different grades or categories of membership that reflect different levels of accreditation are given to arbitrators on satisfaction of the criteria set for each grade or category.

Most professional institutes use a combination of the following criteria to assess persons who wish to be accredited by becoming members:

a. *Professional education* - Institutes such as the RI, the CIArb, the BCAMI and the SIArb require a person seeking accreditation to complete professional training courses conducted by the institute or recognized by it.[95] These courses usually cover procedural and substantive aspects of arbitration law, law of obligations, law of evidence, and the drafting of awards. The level of training to be completed often varies according to the category of membership sought. Certain institutes (for instance, the CIArb) may waive the requirement to complete the prescribed training courses where the person seeking accreditation can demonstrate in his / her application that he / she possesses the requisite level of expertise and experience required by the institute.

b. *Attendance of arbitration hearings* - This criterion is used by the RI which requires that for a member to be graded as an arbitrator, he / she must attend a minimum of one preliminary conference and one or more arbitration hearings lasting for a period of at least three days prior to his application.[96]

c. *Qualifying examinations* - Instead of, or in addition to, the completion of professional education, qualifying examinations for each grade / category of membership are also used by many institutes, such as the SIArb, the Arbitrators and Mediators Institute of New Zealand ("**AMINZ**"), and the ADR Institute of Canada. For instance, the AMINZ requires individuals to undergo an interview and qualifying written examination for becoming a fellow of the institute.[97] These qualifying examinations usually assess candidates on arbitration procedure, drafting of directions and awards, law of evidence and law of contracts, often under the laws of the specific jurisdictions.

d. *Peer interviews / assessments by a panel of approved arbitrators* - Persons seeking accreditation by professional institutes may also be interviewed or assessed by peers or a panel of approved arbitrators. The RI, for instance, requires all persons seeking grading as an arbitrator to be assessed by its assessment panel which considers a variety of criteria, including judicial capacity, personality, professional qualifications, experience as an arbitrator / counsel / other adjudicator, and knowledge of the law and practice of arbitration.[98] Similarly, the CIArb requires persons seeking to qualify as Fellows to be assessed by peers and persons seeking to qualify as Chartered Arbitrators to be assessed by a panel of three approved arbitrators.

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[95] For instance, see the membership requirements for the SIArb, available at http://siarb.org.sg/index.php/membership/categories (accessed on 11.05.2017).

[96] See Policy for the Registration of Practising Arbitrators of the RI, available at https://www.resolution.institute/documents/item/2306 (accessed on 11.05.2017).

[97] See 'Fellowship', AMINZ website, available at https://www.aminz.org.nz/Category?Action=View&Category_id=708 (accessed on 11.05.2017).

[98] See Section 7 of the Policy for the Registration of Practising Arbitrators of the RI, available at https://www.resolution.institute/documents/item/2306 (accessed on 11.05.2017).

e. *CPD requirements* - Completion of CPD requirements may form a criterion for continued membership of certain professional institutes. Even after accreditation is obtained, CPD requirements stipulated by professional institutes must be satisfied on a periodic basis to ensure that the accreditation remains effective. For instance, the RI provides for consequences for failure of compliance with its continuing education requirements, namely removal from the Register of Practising Arbitrators.[99] The SIArb has guidelines relating to CPD. While these requirements are not compulsory, members are strongly encouraged to engage in CPD activities.[100]

Many arbitral institutions also maintain a panel or list of arbitrators who have met certain standards set by the institution in terms of expertise and experience. These lists are used by these institutions in either appointing arbitrators or recommending arbitrators to parties. The eligibility criteria for admission to a panel or list as well as the method of admission vary across arbitral institutions. However, broadly speaking, most arbitral institutions consider the following factors for inclusion on their panel of arbitrators:

a. *Educational qualification* - Several arbitral institutions prescribe a minimum educational qualification for membership of their panels / lists of arbitrators. The SIAC stipulates a minimum of tertiary education to be on their panel of arbitrators.[101] The AAA requires arbitrators on their panels to possess educational qualifications relevant to their field of expertise.[102]

b. *Age* - Not many arbitral institutions stipulate a minimum and / or a maximum age limit for inclusion in their panels / lists of arbitrators. The SIAC is an example of an institution which does stipulate an age limit. However, it must be noted that where membership of a professional institute of arbitrators is a criterion for inclusion, the age limits set by such professional institute for membership will effectively apply.

c. *Experience* - Most arbitral institutions impose a requirement for substantial experience as a counsel / arbitrator. In addition, some arbitral institutions also require an arbitrator to have served as a counsel or arbitrator in a minimum number of cases and to have written a minimum number of commercial arbitral awards. For instance, the AAA in its

[99] See '12. Failure to Comply with Continuing Professional Development Scheme' in the Policy for the Registration of Practising Arbitrators of the Resolution Institute, available at https://www.resolution.institute/documents/item/2306 (accessed on 11.05.2017).
[100] See CPD Points Guidelines of the SIArb, available at http://siarb.org.sg/index.php/panel-of-arbitrators/cpd-points-guidelines (accessed on 11.05.2017).
[101] See Admission Criteria on the website of the SIArb, available at http://siarb.org.sg/index.php/panel-of-arbitrators/admission-criteria (accessed on 11.05.2017).
[102] See Qualification Criteria for Admittance to the AAA® National Roster of Arbitrators, available at https://www.adr.org/sites/default/files/document_repository/Qualification%20Criteria%20for%20Admittance%20to%20the%20AAA%20National%20Roster%20of%20Arbitrators.pdf (accessed on 11.05.2017).

qualification criteria stipulates that potential members of their roster of arbitrators should have training or experience in arbitration and / or other forms of dispute resolution.[103]

d. *Membership of a professional institute of arbitrators* - Some arbitral institutions, notably the SIAC, the Australian Centre for International Commercial Arbitration ("**ACICA**") and the AAA, require arbitrators on their panels / lists of arbitrators to be members of the CIArb or a similar professional institute of arbitrators.

e. *References* - Many arbitral institutions (such as the ACICA, the HKIAC, the AAA, etc.) require an arbitrator applying for admission to their panels / lists of arbitrators to provide two or more references.[104]

f. *Professional and moral standing* - The professional reputation of an arbitrator as well as his moral standing are also considered as criteria for inclusion in panels / lists of arbitrators by some arbitral institutions (such as the HKIAC, the AAA, etc).[105]

It should be noted that panels / lists of arbitrators are not common to all major arbitral institutions. For example, the LCIA does not have a panel of arbitrators but maintains a database from over 90 jurisdictions where arbitrators can easily enrol themselves after furnishing some minimum information.[106] If requested by parties after the commencement of arbitration, names of prospective arbitrators are furnished for parties to agree on the arbitrators. Similarly, under the ICC Rules, whenever the ICC Court is required to make appointments it seeks recommendations from a National Committee or Group of the ICC that it considers appropriate.[107] It does not maintain any roster of arbitrators and these groups enjoy sufficient discretion in making recommendations.

Having considered the above, the Committee is of the opinion that accreditation of arbitrators on the basis of criteria such as the ones discussed in the preceding paragraphs may be instrumental in the creation of a pool of well-qualified and trained arbitrators. The Committee does not recommend the establishment of a new body for accreditation of arbitrators in view of the existence of bodies like the CIArb in India providing for the accreditation of arbitrators. The establishment of another body would only result in the duplication of efforts and involve substantial financial commitment from the Government. Instead, what may be desirable is the recognition of professional institutes providing for accreditation of arbitrators by the APCI.

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[103] *Id.*

[104] For instance, see the website of the ACICA under 'Membership: Fellow/Panel of Arbitrators', available at https://acica.org.au/fellow-panel-of-arbitrators-membership/#join (accessed on 12.05.2017).

[105] See 'Criteria & Application Procedure', HKIAC website, available at http://www.hkiac.org/arbitration/arbitrators/criteria-application (accessed on 19.07.2017).

[106] See Question 12 in 'Frequently Asked Questions', LCIA website, available at http://www.lcia.org/Frequently_Asked_Questions.aspx#List (accessed on 19.07.2017).

[107] Article 13, ICC Rules.

Recommendations

1. The APCI may recognise professional institutes providing for accreditation of arbitrators on the basis of criteria such as method of accreditation, training provided before and after the accreditation of arbitrators, review of accreditation, membership, etc.

2. The accreditation of arbitrators by any such recognised professional institute may be preferable for: (a) international commercial arbitrations seated in India; and (b) other arbitrations seated in India where the value of the claim is equal to or exceeds INR 5,00,00,000 (INR 5 crores).

3. The Central Government and various state governments may stipulate in arbitration clauses / agreements in government contracts that only arbitrators accredited by any such recognised professional institute may be appointed as arbitrators under such arbitration clauses / agreements.

C. Creation of a specialist arbitration bar

The development of an arbitration bar that is well-trained in substantive and procedural aspects of arbitration and who regularly appear before arbitral tribunals is critical to the growth of arbitration and particularly, institutional arbitration in India. A good arbitration bar could help in the speedy and efficient conduct of arbitral proceedings. It is strongly believed that the Indian legal community is capable and will rise to the challenge of creating a specialist and highly competent arbitration bar in the country. Already there are signs that the introduction of a timeline for completing arbitral proceedings in section 29A of the ACA is reducing the practice of evening arbitrations and supporting the creation of a dedicated bar and more committed arbitrators in the country. Initiatives such as the Indian Arbitration Forum (a body created by arbitration practitioners at certain Indian law firms with the objective of promoting best practices in arbitration) and Young MCIA (a forum for young arbitration practitioners or students by the MCIA) are positive indicators that India's legal environment is recognising the importance of arbitration.

However, more can always be done, especially in providing training in arbitration law and practice to students and lawyers with an interest in this area, and providing opportunities for networking and exchange of ideas with leading arbitration practitioners. Law firms, law schools and colleges, and arbitral institutions can play a significant role in this. A short specialist course on arbitration that could be undertaken either during the final years of law school or early years of practice could help train young lawyers in arbitration practice. The Committee notes the success of the Singapore International Arbitration Academy, a three-week course on international arbitration, which is catered towards teaching government officials and arbitration practitioners international best practices and new legal trends in order to build capacity in the

Asia-Pacific region in international arbitration and investment treaty arbitration.[108] Similar initiatives may be help in facilitating the creation of a specialist arbitration bar in India.

Recommendations

1. The APCI may be tasked with: (a) the holding of training workshops and courses aimed at advocates with an interest in arbitration, in collaboration with law firms, law schools and existing professional institutes for arbitrators such as the CIArb; and (b) the conduct of an examination upon completion of requisite training. While appearing for the examination may not be made mandatory for appearing in an arbitration matter, upon successful completion of the examination, the concerned advocate may be admitted to the roll of arbitration lawyers maintained by the APCI. This may serve as an indicator to the general public that the concerned advocate has certain minimum skills and knowledge in arbitration law and practice. The advocate may be required to satisfy CPD requirements in order to remain on the roll.

2. The APCI may collaborate with law schools to provide the training referred to in (1) above as part of their curriculum in the final year of the law degree course.

3. The Central Government and state governments may be encouraged to appoint only advocates on the roll maintained by the APCI in (1) above as its counsel in arbitration matters.

4. Arbitral institutions may be encouraged through consultations held with them to form their own fora of young arbitration practitioners and students which provide training in arbitration procedure and practice, facilitate exchange of ideas on topical issues in arbitration practice nationally and internationally, and provide opportunities for networking with experienced arbitration practitioners. The ICADR, in particular, should establish such a forum of young arbitration practitioners.

5. Diploma courses and specialised LL.M. programmes in arbitration law and practice could be provided by premier law schools and universities in India. The Government and the legal community may provide funding and establish research chairs for promoting research and studies on developments in arbitration law in these law schools and universities.

6. The Government may also institute scholarships for students admitted for Master's level courses in international arbitration and investment treaty arbitration in universities abroad. The scholarship terms may include a bond that requires the student to come back and work for the government as an advocate practising arbitration law for a particular period of time.

[108] See the Centre for International Law website at https://cil.nus.edu.sg/siaa-2012/ (accessed on 19.07.2017).

D. Creation of a specialist arbitration bench

Support from a specialised judiciary has been instrumental in the growth of arbitration and arbitral institutions in jurisdictions such as Singapore, Hong Kong and the UK. In these jurisdictions, it has been observed that the judiciary is mindful of the independence of the arbitral process, at the same time providing support for the arbitral process where required.

The Committee believes that one of the important incentives for the creation of an arbitration-friendly ecosystem is the training of judicial officers to understand the supervisory jurisdiction of courts in the arbitral process. A frequent complaint of arbitration practitioners has been that judges often treat a section 34 challenge to an award as a regular appeal. The pendency of challenges under section 34 and consequent uncertainty created for parties are commercial deterrents to arbitrating in India. To add to this, successful parties are unlikely to be awarded costs on an indemnity basis as compensation for the time and money spent on the defence of an award. The creation of commercial divisions and commercial appellate divisions in the High Courts is a positive step but could be set to naught without adequate judicial training and sensitisation of the judicial officers who will man these courts.

Recommendations

1. Arbitration challenges under section 34 may be heard only by district judges who have undergone refresher courses and / or training in arbitration law and practice in the National Judicial Academy or the respective state judicial academies. An endeavour shall be made to keep such judges on the roster for at least two years.

2. Commercial court, commercial division and commercial appellate division judges should be provided with refresher courses in arbitration law and practice before and after being appointed to such benches. These courses could be conducted annually by the National Judicial Academy and the respective state judicial academies.

3. The High Courts may be encouraged to maintain the commercial division and commercial appellate division roster for at least six months in order to encourage specialisation in arbitration.

4. Even judges not on the arbitration roster may have to deal with arbitration matters in the context of section 8 and section 45 applications / petitions. Therefore, judges who are not on the roster should be provided periodic training in developments in arbitration law and practice, both domestic and international. For this purpose, intensive courses may be conducted by the National Judicial Academy and state judicial academies for judges hearing arbitration matters.

5. The Government may also collaborate with international organisations such as the International Council for Commercial Arbitration, the UNCITRAL Regional Asia-Pacific

office, and Indian and international arbitral institutions to provide judicial training and to promote exchanges between judges from New York Convention countries.

E. Amendments to the ACA

The 2015 Amendment Act made substantive changes to the ACA with a view to making arbitration speedier and more efficacious, and improving India's reputation as a seat of arbitration. Several of those changes have been positively received by arbitration practitioners for clarifying ambiguities created by or undoing the effect of certain "arbitration-unfriendly" judicial precedents. However, there are certain areas where the amendments brought about by the 2015 Amendment Act need clarification. Additionally, there are certain issues with the arbitration law framework that the 2015 Amendment Act has failed to address. There need to be suitable amendments to the ACA to remedy these and to bring the ACA up to speed with international developments in arbitration law and practice. This is necessary to improve India's perception as a seat of arbitration, which ultimately has a direct bearing on the growth of arbitral institutions in India.

In the following paragraphs, the Committee proposes some amendments to the ACA. These amendments have been categorised as: (a) amendments to correct obvious errors and ambiguities in the ACA and incorporate international best practices; and (b) amendments specifically aimed at promoting institutional arbitration in India.

Amendments to correct obvious errors and ambiguities in the ACA

1. Clarifying the applicability of the 2015 Amendment Act

Section 26 of the 2015 Amendment Act governs the applicability of the 2015 Amendment Act. This section provides that the 2015 Amendment Act applies: (a) to arbitral proceedings commenced prior to 23 October 2015 (the date of commencement of the 2015 Amendment Act) where parties agree to that effect; and (b) in relation to arbitral proceedings commenced on or after 23 October 2015.

However, section 26 has remained silent on the applicability of the 2015 Amendment Act to court proceedings, both pending and newly initiated in case of arbitrations commenced prior to 23 October 2015. Different High Courts in India have taken divergent views on the applicability of the 2015 Amendment Act to such court proceedings. Broadly, there are three sets of views as summarised below:

a. The 2015 Amendment Act is not applicable to court proceedings (fresh and pending) where the arbitral proceedings to which they relate commenced before 23 October 2015.[109]

b. The first part of section 26 is narrower than the second and only excludes arbitral proceedings commenced prior to 23 October 2015 from the application of the 2015 Amendment Act. The 2015 Amendment Act would, however, apply to fresh or pending court proceedings in relation to arbitral proceedings commenced prior to 23 October 2015.[110]

c. The wording "arbitral proceedings" in section 26 cannot be construed to include related court proceedings. Accordingly, the 2015 Amendment Act applied to all arbitrations commenced on or after 23 October 2015.[111] As far as court proceedings are concerned, the 2015 Amendment Act would apply to all court proceedings from 23 October 2015, including fresh or pending court proceedings in relation to arbitrations commenced before, on or after 23 October 2015.

Thus, it is evident that there is considerable confusion regarding the applicability of the 2015 Amendment Act to related court proceedings in arbitrations commenced before 23 October 2015. The Committee is of the view that a suitable legislative amendment is required to address this issue.

The Committee feels that permitting the 2015 Amendment Act to apply to pending court proceedings related to arbitrations commenced prior to 23 October 2015 would result in uncertainty and prejudice to parties, as they may have to be heard again. It may also not be advisable to make the 2015 Amendment Act applicable to fresh court proceedings in relation to such arbitrations, as it may result in an inconsistent position. Therefore, it is felt that it may be desirable to limit the applicability of the 2015 Amendment Act to arbitrations commenced on or after 23 October 2015 and related court proceedings.

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[109] *Electrosteel Castings Limited v. Reacon Engineers (India) Private Limited,* A.P. No. 1710 of 2015 decided on 14.01.2016, (Calcutta High Court) (fresh application filed after 23 October 2015 to set aside an arbitral award) and *Pragat Akshay Urja Limited Company v. State of M.P and Ors.,* (Arbitration Case Nos. 48, 53 and 54/2014, decided on 30.06.2016) (Madhya Pradesh High Court) (application to appoint arbitrators under section 11(6) pending as of 23 October 2015).

[110] *New Tirupur Area Development v. Hindustan Construction Co. Limited,* Application No. 7674 of 2015 in O.P. No. 931 of 2015 (Madras High Court); *Rendezvous Sports World* v. *BCCI* (Bombay High Court) Chamber Summons No. 1530 of 2015 in Execution Application (L) No. 2481 of 2015, Chamber Summons No. 1532 of 2015 in Execution Application (L) No. 2482 and Chamber Summons No. 66 of 2016 in Execution Application (L) No. 2748 of 2015, decided on 08.08.2016.

[111] *Tufan Chatterjee v. Rangan Dhar,* FMAT No. 47 of 2016 and CAN 308 of 2016, decided on 02.03.2016 (Calcutta High Court).

Recommendations

1. Section 26 of the 2015 Amendment Act may be amended to provide that:
    a. unless parties agree otherwise, the 2015 Amendment Act shall not apply to: (a) arbitral proceedings commenced, in accordance with section 21 of the ACA, before the commencement of the 2015 Amendment Act; and (b) court proceedings arising out of or in relation to such arbitral proceedings irrespective of whether such court proceedings are commenced prior to or after the commencement of the 2015 Amendment Act; and
    b. the 2015 Amendment Act shall apply only to arbitral proceedings commenced on or after the commencement of the 2015 Amendment Act and to court proceedings arising out of or in relation to such arbitral proceedings.
2. The amended section 26 shall have retrospective effect from the date of commencement of the 2015 Amendment Act.

2. Amendment to section 2(2) of the ACA

The 2015 Amendment Act has inserted a proviso in section 2(2) of the ACA whereby the provisions of sections 9, 27, and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitrations, even if the place of arbitration is outside India. There is an error in this provision since clause (a) of sub-section (1) of section 37 pertains to refusing to refer parties to arbitration under section 8 of the ACA. It is obvious that the reference in the proviso to section 2(2) was with respect to clause (b) of sub-section (1) of section 37 which pertains to granting or refusing to grant any measure under section 9.

Recommendation

Section 2(2) of the ACA may be amended to provide that clause (b) of sub-section (1) of section 37 shall also apply to international commercial arbitrations, even if the place of arbitration is outside India, instead of clause (a) of sub-section (1) of section 37.

3. Amendment to section 17 of the ACA

Section 17(1) has been substituted by the 2015 Amendment Act to provide that a party may during the arbitral proceedings, or at any time after the making of the arbitral award, but before it is enforced in accordance with section 36, apply to the arbitral tribunal for interim measures.

Upon the making of the final arbitral award, under section 32, the arbitral proceedings shall terminate. Once the proceedings terminate, the arbitrator / tribunal becomes *functus officio*.

Hence, once the arbitral tribunal becomes *functus officio*, after the final arbitral award is rendered, no application can be made for grant of interim measures under section 17(1).

Recommendation

Section 17(1) may be amended to delete the words "or at any time after the making of the arbitral award but before it is enforced in accordance with section 36".

4. Amendment to section 29A of the ACA

The 2015 Amendment Act inserted section 29A in the ACA which, *inter alia*, imposes a time limit of 12 months (extendable by a further 6 months by consent of the parties) for completion of arbitral proceedings. If arbitral proceedings are not completed within the 18-month period, the mandate of the arbitral tribunal will be terminated unless on an application made by the parties, the court has extended the time period for sufficient cause being shown.[112] The court, when considering such application, has powers to substitute the arbitrator(s) or order a reduction of the fees of the arbitrator(s) up to a maximum of 5 per cent for delays attributable to the arbitral tribunal.[113]

The introduction of a time limit of 12 months (extendable to 18 months by mutual consent) for completion of arbitral proceedings has received mixed responses. While there is some evidence that it has prompted arbitrators and parties to conclude their arbitrations within the time period, it has also been criticised as going against party autonomy and bringing in more court involvement.

Firstly, it has been argued that section 29A restricts party autonomy significantly by taking away the ability of parties to structure arbitral proceedings in accordance with the nature, size and complexity of the dispute and their own needs. By forcing parties to adhere to an 18-month time limit no matter what the size and complexity of the arbitration might be, section 29A takes a one-size-fits-all approach which is not suitable in all cases.

Second, by forcing parties to approach the court where the arbitral proceedings are not completed within twelve months, section 29A(4) paves the way for more judicial involvement, contrary to the objective of the ACA of limiting judicial intervention. This provision is regressive and resurrects section 28 of the Arbitration Act 1940, which had empowered the court to extend the time for making the award. Judicial intervention at this stage could lead to more delays, particularly given that the mandate of the arbitral tribunal may have terminated during the pendency of the application before the court. The Committee notes that section 29A(9) provides for the application to be disposed of within a 60-day period; however, this provision may only be directory and not mandatory. Further, the requirement to show sufficient cause for an extension

[112] Section 29A(4) and (5), ACA.
[113] Proviso to section 29A(4) and section 29A(5), ACA.

to be granted could mean that extensive evidence and arguments may be led by the parties on this point. This may lead to prolonged court proceedings scuppering timely resolution of disputes.

The Committee notes that international arbitral institutions have strongly criticised the setting of timelines for conducting international commercial arbitrations.[114] These institutions are of the view that monitoring the conduct of the arbitral proceedings is best left to the arbitral institutions. Institutions have their own machinery for case management and do not require monitoring by the court. With respect to domestic arbitrations, the general opinion of arbitrators is that the timelines fixed for conducting domestic arbitrations under section 29A should take effect post-completion of pleadings.

The Committee is also of the view that the power of the court in the provisos to section 29(4) and (6) to substitute the arbitrator(s) or order a reduction in the fees of the arbitrators when hearing an application for extension under section 29(5) is rather peculiar. These provisions ought to be modified, as the arbitrator is not being heard before he / she is penalised, as only the parties to the arbitration are before the court. Even if such an opportunity were to be afforded, practically, it would lead to problems affecting the integrity of the arbitral process. Arbitrators would be wary of being foisted with a reduction in fees and have a perverse incentive to rush through proceedings to render the award within the stipulated time period. Further, if an application for reduction of fees of the arbitral tribunal were to be denied and an extension granted, it would strain relations between the tribunal and the party applying for the same. The punitive nature of these provisions may also act as a deterrent for reputed arbitrators from accepting domestic arbitrations.

It may be noted that the arbitration legislations of established arbitration jurisdictions such as the UK, Hong Kong and Singapore do not contain a provision similar to section 29A. Timelines for arbitral proceedings are usually agreed between the parties themselves or between the parties in consultation with the arbitral tribunal and the arbitral institution administering the arbitration. There also exist no provisions empowering the court to order a reduction of the fees of the arbitrator.

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[114] See Manini Brar, 'Implications of the New Section 29A of the Amended Indian Arbitration and Conciliation Act, 1996', Indian Journal of Arbitration Law Vol. 5 Issue 2 (2017), available at http://www.ijal.in/sites/default/files/IJAL%20Volume%205_Issue%202_Manini%20Brar.pdf (accessed on 02.05.2017); see also Sanjeevi Seshadri, 'S. 29A of the New Indian Arbitration Act: An attempt at slaying Hydra', Kluwer Arbitration Blog, available at http://kluwerarbitrationblog.com/2016/02/02/s-29a-of-the-new-indian-arbitration-act-an-attempt-at-slaying-hydra/ (accessed on 02.05.2017).

Recommendations

1. A new sub-section may be inserted in section 29A limiting the applicability of the section to domestic arbitrations only. International commercial arbitrations may be left outside the purview of the timelines provided in section 29A.
2. Section 29A(1) may be amended such that the time in section 29A(1) starts to run post-completion of pleadings. Further, a time period of 6 months may be provided for submission of pleadings.
3. Section 29A(4) may be amended to provide that if an application under section 29A(5) is filed before a court, the mandate of the arbitral tribunal continues till the application is disposed.
4. Section 29A(9) may be amended to add that if the application is not disposed of within the period mentioned therein, it is deemed to be granted.
5. A new sub-section should be inserted in section 29A providing that where the court seeks to reduce the fees of the arbitrator(s), sufficient opportunity should be given to such arbitrator(s) to be heard.

5. Amendment to section 34(2)(a) of the ACA

Sub-section (2)(a) of section 34 of the ACA provides for the setting aside of arbitral awards by the court in certain circumstances. The party applying for setting aside the arbitral award has to furnish proof to the court. This requirement to furnish proof has led to inconsistent practices in some High Courts, where they have insisted on section 34 proceedings being conducted in the manner as a regular civil suit.[115] This is despite the Supreme Court ruling in *Fiza Developers & Inter-Trade P. Ltd. v. AMCI(I) Pvt. Ltd. & Anr.*[116] that proceedings under section 34 should not be conducted in the same manner as civil suits, with framing of issues under Rule 1 of Order 14 of the CPC.

In light of this, the Committee is of the view that a suitable amendment may be made to section 34(2)(a) to ensure that proceedings under section 34 are conducted expeditiously.

[115] See *HDFC Bank Limited v. Ram Singh and another*, MANU/PH/0989/2012; Rule 7 of the High Court of Himachal Pradesh (Arbitration and Conciliation) Rules, 2002; Schedule to the Punjab, Haryana and Union Territory, Chandigarh Arbitration and Conciliation Rules, 2003; Rule 8 of the High Court of Jharkhand (Arbitration and Conciliation) Rules, 2010 (Part of Civil Court Rules of the High Court of Jharkhand).
[116] (2009) 17 SCC 796.

Recommendation

An amendment may be made to section 34(2)(a) of the ACA substituting the words "furnishes proof that" with the words "establishes on the basis of the arbitral tribunal's record that".

6. Amendment to section 34(6) of the ACA

The 2015 Amendment Act inserted section 34(6) in the ACA which provides for the expeditious disposal of applications made under section 34. The sub-section provides that "in any event", an application under section 34 shall be disposed of within a period of 1 year from the date of service of notice of the application on the other party. Thus, it provides for an outer time limit of 1 year within which applications have to be disposed. This provision was inserted based on the recommendations of the LCI in its 246th Report on *Amendments to the Arbitration and Conciliation Act 1996* to speed up the enforcement of domestic awards.

The provision of an outer time-limit in section 34(6), while laudable in intent, may result in litigation over whether the time limit is mandatory or directory. There is no clarity on what would happen where the court is not able to dispose of an application under section 34 within the 1-year time period. Therefore, the Committee is of the opinion that the outer time limit specified in section 34(6) should only be directory.

Recommendation

An amendment may be made to section 34(6) of the ACA substituting the words "in any event," with the words "an endeavour shall be made to dispose of the application" so that the time limit specified therein is construed as being directory only.

7. Amendment to section 45 of the ACA

Under section 45 of the ACA, a judicial authority is empowered to refer those parties who have entered into an arbitration agreement to which the New York Convention applies to arbitration. The judicial authority may, however, refuse to refer the parties to arbitration where it finds that the arbitration agreement is "null and void, inoperative or incapable of being performed." The issue that arises with respect to this provision is the standard of review employed by the judicial authority in determining whether the arbitration agreement is valid, operative and capable of being performed. This issue is significant for the reason that a determination by a judicial authority on the basis of a full trial cannot be subsequently reviewed by an arbitral tribunal as opposed to a determination based on a prima facie basis.

The Supreme Court first considered this issue in *Shin-Etsu Chemical Co Ltd v. Aksh Optifibre Ltd & Anr.*[117]and held that the approach to be taken by the judicial authority in reviewing the validity of the arbitration agreement under section 45 is that of a prima facie review. The majority judgment reasoned that to take a "final and determinative approach" would result in proceedings being prolonged at an early stage, increasing costs and uncertainty for parties. However, the concurring judgement, while agreeing that only a prima facie conclusion had to be arrived at, added a qualification that where the judicial authority refuses to refer the parties to arbitration on the basis of such prima facie conclusion, it would have to decide on whether the arbitration agreement is null and void, inoperative, or incapable of being performed after conducting a full trial.

The decision in *Shin Etsu* was followed by the decision in *SBP & Co. v. Patel Engineering,*[118] where the Supreme Court, while considering an application under section 11 of the ACA held that the findings of the Chief Justice of India who was the appointing authority for arbitrators under section 11 were final and could not be reviewed subsequently by an arbitral tribunal. This approach was extended to referrals to arbitrations under section 45 of the ACA by the Supreme Court in *Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc. and Ors,*[119] where the Court held that the finding of the judicial authority on whether the arbitration agreement was null and void, inoperative, or incapable of being performed was final and could not be subject to later scrutiny by the arbitral tribunal.

Position under section 8 of the ACA

Section 8 of the ACA which applies to arbitrations seated in India roughly corresponds to section 45 of the ACA. Following the 2015 Amendment Act, when deciding to refer parties to arbitration under this section, the judicial authority can only make a prima facie finding on whether a valid arbitration agreement exists.

This has resulted in an inconsistent position as regards section 8 and section 45. In case of arbitrations seated in India to which section 8 applies, the judicial authority refers parties to arbitration on the basis of only a prima facie conclusion as to the validity of the arbitration agreement. However, for arbitrations seated outside India to which section 45 applies, the judicial authority refers parties to arbitration after a full trial, to decide whether the arbitration agreement is null and void, inoperative or incapable of being performed. These different levels of scrutiny (prima facie or full trial) by the court in section 8 and section 45 should be made consistent, so that a greater scrutiny does not apply to arbitrations where India is not the seat of arbitration.

[117] (2005) 7 SCC 234.
[118] (2009) 10 SCC 293.
[119] (2013) 1 SCC 641.

Recommendation

An amendment may be made to section 45 of the ACA clarifying that the court shall refer parties to arbitration under section 45 on the basis of only a prima facie conclusion that the arbitration agreement is not null and void, inoperative or incapable of being performed.

8. Amendment to section 48 of the ACA

It is noted that challenges to the enforcement of a foreign award under section 48 of the ACA are often pending in Indian courts for several years. The statistics on this differ — a 2007 paper presented at ICMA XVI Congress suggests that it takes 6 to 12 months for uncontested applications for enforcement to be disposed of and up to 2 years for contested applications,[120] while other sources suggest a time period of 2 to 3 years for the enforcement of a foreign arbitral award.[121]

As discussed above, the LCI in its 246th Report had recommended the insertion of sections 34(5) (in the context of challenge to domestic awards) and 48(4) (in the context of enforcement of foreign awards), which would require the expeditious disposal of applications made under those sections.[122] The maximum time limit suggested by the LCI was one year from the date of service of the notice for the disposal of applications. Taking the LCI's recommendations into account, the 2015 Amendment Act inserted section 34(6) in the ACA, which provides for the expeditious disposal of applications made under section 34, with an outer time limit of 1 year for the disposal of applications. However, no corresponding provision was inserted in section 48, perhaps by legislative oversight. A provision similar to section 34(6) should be inserted in section 48 as well, taking into account the changes suggested by the Committee to section 34(6) in (7) above.

Recommendation

A new sub-section (4) may be inserted in section 48 of the ACA providing that an application for enforcement of a foreign award under section 47 shall be disposed of expeditiously and an endeavour shall be made to dispose of such application within a period of one year from the date on which the application is filed before the court.

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[120] Simon Greenberg, Christopher Kee and J. Romesh Weeramantry, International Commercial Arbitration: An Asia-Pacific Perspective (2011) at p.446.

[121] IBA Arbitration Committee Arbitration Guide — India, 2016, available at http://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=a646cf32-0ad8-4666-876b-c3d045028e64 (accessed on 12.05.2017); *supra* n. 40.

[122] Law Commission of India, Report No. 246 on Amendments to the Arbitration and Conciliation Act 1996, August 2014, available at http://lawcommissionofindia.nic.in/reports/Report246.pdf (accessed on 27.03.2017).

9. Amendments to sections 37 and 50 of the ACA

Section 37 provides for limited appeals against orders made by an arbitral tribunal or by the court in arbitrations seated in India. Similarly, section 50 provides for limited appeals against orders made by a court in foreign-seated arbitrations. Both sections provide for a right of appeal against certain orders only and no others.

Section 13(1) of the Commercial Courts Act however, provides for a general right of appeal against a decision of the Commercial Court or Commercial Division of a High Court. This would provide a general right of appeal in decisions made in arbitration matters where the subject matter of the arbitration is a commercial dispute of specified value. There is an inconsistency between the provisions of sections 37 and 50 of the ACA and section 13(1) of the Commercial Courts Act insofar as it provides for a wider right of appeal than that provided by the former sections. The Committee is of the view that the right to appeal should be restricted to what is already provided in sections 37 and 50. For this purpose, suitable legislative amendments may be made to sections 37 and 50 of the ACA.

Recommendations

1. In sub-section (1) of section 37 of the ACA, the words "Notwithstanding anything contained in any other law" shall be added before the words "An appeal shall lie".
2. Similarly, in sub-section (1) of section 50 of the ACA, the words "Notwithstanding anything contained in any other law" shall be added before the words "An appeal shall lie".

10. Costs in proceedings under Part II of the ACA

The 2015 Amendment Act inserted section 31A in Part I which provides for a comprehensive regime on costs that may be awarded by the arbitral tribunal or the court in relation to an arbitration proceeding or related court proceedings respectively. However, the ACA is silent on the costs regime applicable to court proceedings initiated under Part II of the ACA. In order to ensure that the winning party is adequately compensated for costs incurred in enforcement of its arbitral award or arbitration agreement, it is necessary that a provision corresponding to section 31A be made applicable to proceedings under Part II.

Recommendation

A provision akin to section 31A pertaining to imposition of costs in connection with court proceedings under Part II of the ACA should be incorporated.

11. Amendment to the Fourth Schedule to the ACA

There is a typographical error in the Fourth Schedule as regards the model fee where the sum in dispute is above INR 10,00,00,000 and upto INR 20,00,00,000. The model fee in such cases is INR 12,37,500 plus 0.75 per cent of the claim amount over and above INR 1,00,00,000. This seems to be a typographical error as the fee should be INR 12,37,500 plus 0.75 per cent of the claim amount over and above INR 10,00,00,000, i.e., a zero is missing.

Recommendation

The Fourth Schedule may be amended to provide that the model fee where the sum in dispute is above INR 10,00,00,000 and up to INR 20,00,00,000 is 12,37,500 plus 0.75 per cent of the claim amount over and above INR 10,00,00,000.

12. Immunity to arbitrators

The immunity of arbitrators from liability for acts or omissions in the discharge of their functions as arbitrators except in cases of bad faith is a well-accepted principle internationally.[123] Such immunity is granted on the basis that any individual who is performing a judicial or quasi-judicial act should be granted immunity for the same. It is necessary to ensure independence of the arbitrators and to preserve the integrity of the arbitral process from interference by protecting arbitrators from unnecessary harassment by parties.[124]

The ACA does not contain any provision on immunity of arbitrators. In the absence of such provision, arbitrators have to rely on arbitral rules of arbitral institutions where institutional arbitration is opted for by the parties. The rules of some arbitral institutions provide for such immunity[125] but not all do.[126] Moreover, arbitrators acting in ad hoc arbitrations often do not have such immunity unless this has been agreed with the parties.

It may be pertinent to examine international practices in this regard. Singapore, in both the IAA and the Arbitration Act (which applies to arbitrations other than international arbitrations), provides for arbitral immunity from negligence in respect of acts or omissions in the capacity as an arbitrator, and from mistakes in law, fact or procedure made during the course of arbitral

[123] Dennis Nolan and Roger Abrams, 'Arbitral Immunity', Berkeley Journal of Employment and Labour Law, Vol. 11 Issue 2 (1989), pp.228–266.
[124] *Id.*
[125] Rules 78 and 79, Rules of Domestic Commercial Arbitration of the Indian Council of Arbitration, and Rule 28, Rules of International Commercial Arbitration of the ICA; Rule 34.1 of the Arbitration Rules of the Mumbai Centre for International Arbitration.
[126] For instance, the Delhi International Arbitration Centre (DAC) (Arbitration Proceedings) Rules do not provide for immunity of arbitrators.

proceedings or making of an award.[127] The Hong Kong AO makes arbitrators liable for acts or omissions done in their capacity as arbitrators only if it is proved that such act or omission was done dishonestly.[128] Similarly, the United Kingdom also provides for arbitral immunity except where the act or omission is proven to have been in bad faith.[129] Thus, all these jurisdictions accept the principle of arbitral immunity.

In order to ensure that Indian legislation is brought up to date with international best practices, it is imperative that such immunity be granted to arbitrators under the ACA.

Recommendation

The following provision, based on section 29 of the AA (UK), may be inserted in the ACA to provide for immunity of arbitrators:

"An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith."

13. Confidentiality of arbitral proceedings

The ACA does not contain any provision expressly providing for confidentiality of arbitral proceedings. In the absence of such a provision, parties must fall back on any confidentiality clause in the arbitration agreement or the arbitral rules of the administering institution.

Internationally, there is some divergence in how confidentiality of arbitral proceedings is treated in different jurisdictions. At one end is the Hong Kong's AO, which provides for protection of confidentiality in arbitral proceedings as well as court proceedings related to such arbitral proceedings.[130] On the other hand, the AA in the UK is completely silent on the matter. However, English Courts consider arbitration to be a private means of dispute resolution and consider an obligation of confidentiality to be implied in the arbitration agreement between the parties.[131] Similarly, Singapore's arbitration legislations do not contain an express duty of

[127] See section 25 of the IAA and section 20 of the Arbitration Act.
[128] Section 104, AO.
[129] Section 29A, AA.
[130] Sections 16–18, AO.
[131] *John Forster Emmott v. Michael Wilson & Partners Ltd,* [2008] EWCA Civ 184; Richard Smellie, 'Is arbitration confidential?', Fenwick Elliot, available at https://www.fenwickelliott.com/sites/default/files/richard_smellie_-_is_arbitration_confidential.pdf (accessed on 03.05.2017); Sharon Gerbi, 'Confidentiality arbitration UK law', Bird & Bird, available at https://www.twobirds.com/en/news/articles/2006/confidentiality-arbitration-uk-law (accessed on 03.05.2017).

confidentiality.[132] However, like the UK, Singapore recognises the existence of an implied duty of confidentiality in arbitration proceedings.[133] Thus, there is at least recognition of an implied duty of confidentiality through case law.

Given the above, it may be advisable to insert a provision providing for confidentiality of arbitral proceedings in the ACA itself.

Recommendation

A new provision may be inserted in Part I of the ACA providing for confidentiality of arbitral proceedings unless disclosure is required by legal duty, to protect or enforce a legal right, or to enforce or challenge an award before a court or judicial authority.

14. Model Rules for ad hoc arbitrations

The Committee notes that the flexibility that ad hoc arbitrations offer, particularly the flexibility to set rules of procedure and timelines, has been its curse as well. Arbitral tribunals in ad hoc arbitrations do not usually lay down clear rules of procedure or timelines for the completion of arbitral proceedings at the start of an arbitration. This often results in parties having to address procedural issues during the conduct of the proceedings or approach courts for deciding procedural issues, wasting substantial time in the process.

The Committee is of the opinion that model arbitration rules may be incorporated as a Schedule to the ACA. The arbitration rules may be the default procedure to be adopted under section 19(3) of the ACA unless parties exclude its operation by agreement. The model arbitration rules may include the IBA Rules on the taking of evidence, with suitable modifications. The model arbitration rules may be read together with the provisions of the ACA, and are to be construed as complementing each other.

Providing for a default procedure in the ACA will be beneficial for parties and / or the arbitral tribunal as they have a pre-determined procedure that they can follow with modifications. Further, it may also promote institutional arbitration in an indirect manner — if parties find the default procedure too strict and detailed to administer, they may have an incentive to opt for an arbitral institution which can administer the arbitration.

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[132] Darius Chan, 'Singapore's International Arbitration Act 2012 vs Hong Kong's Arbitration Ordinance 2011', Kluwer Arbitration Blog, available at http://kluwerarbitrationblog.com/2012/04/05/singapores-international-arbitration-act-2012-vs-hong-kongs-arbitration-ordinance-2011/ (accessed on 03.05.2017).

[133] Gary Born, International Commercial Arbitration (2nd ed., 2014); 'Confidentiality in Asia- Based International Arbitrations', Jones Day, available at http://www.jonesday.com/confidentiality_in_asia-based_international_arbitrations/#_ednref2 (accessed on 03.05.2017).

Recommendations

1. Model arbitral rules of procedure as provided in Annexure 2 to this Report may be set out in the form of a Schedule to the ACA.
2. The model arbitral rules may operate as the default rules of procedure applicable to arbitrations, unless parties exclude its operation by mutual consent at any time, either in whole or part.
3. Section 19(3) of the ACA may be amended to provide that failing any agreement between the parties as referred to in section 19(2), the model arbitral rules shall apply.
4. Section 19(4) of the ACA may accordingly be deleted.

Amendments specifically aimed at promoting institutional arbitration

15. Amendments to section 11 of the ACA

Section 11 of the ACA, which provides for the appointment of arbitrators, has been subject to significant judicial scrutiny. Prior to the 2015 amendments, the section gave the Chief Justice[134] or any person or institution designated by him the power to appoint an arbitrator where: (a) the parties have not agreed on a procedure for the appointment of arbitrator(s) and the default appointment procedure under section 11(3) or section 11(5) fails; or (b) the parties have agreed upon an appointment procedure and such agreed procedure has not been followed.

The most contentious issue in cases arising under section 11 concerned the nature of the power of the Chief Justice under section 11. Earlier judicial pronouncements such as *Konkan Railway Corporation Ltd & Ors v. Mehul Construction Co.*[135] and *Ador Samia (P) Ltd. v. Peekay Holdings Ltd*.[136] held this power to be of an administrative nature. However, the position of law was overturned in *SBP & Co. v. Patel Engineering Ltd. and Another*,[137] where the Supreme Court held that the power exercised by the Chief Justice under section 11 is a judicial power.

The decision in *SBP & Co.* meant that the Chief Justice could delegate the power to appoint arbitrators to another judge only and not to an institution. This had the effect of keeping arbitral institutions which are qualified to act as appointing authorities for arbitrators away from the appointment process under section 11.

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[134] Chief Justice of India in international commercial arbitrations and the Chief Justice of the relevant High Court in other arbitrations.
[135] (2000) 7 SCC 201.
[136] (1999) 8 SCC 572.
[137] (2005) 8 SCC 618. Followed in *National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd.*, (2009) 1 SCC 267.

The 2015 amendments now empower the Supreme Court (in case of international commercial arbitrations), or the High Court (in case of domestic arbitrations) or a person or institution designated by such court to appoint an arbitrator pursuant to an application under section 11. The 2015 amendments further provide that the Supreme Court or the High Court shall only examine the existence of an arbitration agreement when considering an application under sections 11(4), (5) or (6). In order to overrule *SBP & Co.*, a new section 11(6B) has been inserted whereby it has been clarified that the designation of a person or institution by the Supreme Court or the High Court would not be considered as a delegation of judicial power by such Court.

Further, by virtue of the amended section 11(7), no appeal (including Letters Patent Appeal), would lie against the decision of the Supreme Court, the High Court or the person or institution designated by such court. The 2015 Amendment Act also inserted section 11(13), which requires applications under section 11 to be disposed of expeditiously, with an effort being made to dispose of such applications within a time period of 60 days from the date of service of the notice on the other party.

Thus, the 2015 amendments to section 11 are geared towards facilitating speedy disposal of section 11 applications by: (a) enabling the designation of any person or institution as an appointing authority for arbitrators in addition to the High Court or Supreme Court under section 11; (b) limiting challenges to the decision made by the appointing authority; and (c) requiring the expeditious disposal of section 11 applications, preferably within the prescribed 60-day time period.

While these amendments no doubt facilitate the speedy disposal of section 11 applications to a large extent, they do not go all the way in limiting court interference. Pursuant to the amendments, the appointment of arbitrators under section 11 may be done: (a) by the Supreme Court or the High Court; or (b) by a person or institution designated by such court in exercise of an administrative power following section 11(6B). In either case, the amendments still require the Supreme Court / the High Court to examine whether an arbitration agreement exists, which can lead to delays in the arbitral process as extensive evidence and arguments may be led on the same.

The Committee notes that the default procedure for appointment of arbitrators in other jurisdictions do not require extensive court involvement as in India.

For instance, in Singapore, the relevant provision of the IAA provides that where the parties fail to agree on the appointment of the third arbitrator, within 30 days of the receipt of the first request by either party to appoint the arbitrator, the appointment shall be made by the appointing authority (the President of the SIAC) by the request of the parties.[138]

[138] See section 9A(2) read with sections 2(1) and 8(2), IAA.

The arbitration legislation of Hong Kong incorporates Article 11 of the UNCITRAL Model Law relating to the appointment of arbitrators. Like in the case of Singapore where the SIAC is the appointing authority for arbitrators, the default appointment of arbitrator(s) is done by the HKIAC.[139]

In the United Kingdom, in the case of default of one party to appoint an arbitrator, the other party may appoint his arbitrator as the sole arbitrator after giving notice of 7 clear days to the former of his intention to do so.[140] The defaulting party may apply to the court to set aside the appointment.[141] In case of a failure of the appointment procedure, any party may apply to the court to make the appointment or give directions regarding the making of an appointment.[142]

The Committee recommends the adoption of the practice followed in Singapore and Hong Kong in the Indian scenario — apart from avoiding delays at court level, it may also give impetus to institutional arbitration.

The Committee also notes that 2015 Amendment Act inserted a new sub-section (14) in section 11 of the ACA. Section 11(14) states that for the purposes of determination of the fees of the arbitral tribunal, and the manner of its payment, the High Courts may frame rules, after taking into consideration the rates specified in the Fourth Schedule. Most High Courts have not framed rules to fix the fees of the arbitral tribunal and the manner of payment so far. In the absence of rules being framed, the Central Government must notify uniform rules for payment of fees to the arbitral tribunal.

Recommendations

1. In order to ensure speedy appointment of arbitrators, section 11 may be amended to provide that the appointment of arbitrator(s) under the section shall only be done by arbitral institution(s) designated by the Supreme Court (in case of international commercial arbitrations) or the High Court (in case of all other arbitrations) for such purpose, without the Supreme Court or High Courts being required to determine the existence of an arbitration agreement.

2. The institutions which may act as appointing authorities under section 11 may be designated by the Supreme Court and the High Courts. Only those institutions which have been graded by the APCI may be eligible for such designation. In designating arbitral institutions, the Supreme Court and the High Courts shall consider the grading given to such institution by the APCI and ensure that only those institutions which

[139] Section 13(2) read with section 24, AO.
[140] Section 17, AA.
[141] Section 17(3), AA.
[142] Section 18(2), AA.

receive a high grade from the APCI are designated as appointing authorities under section 11.

3. In order to give time for institutions to be graded by the APCI and designated by the Supreme Court and the High Courts, the amendment to section 11 above may come into force at a later date.

4. The Central Government may notify uniform rules for payment of fees to the arbitral tribunal under section 11(14).

16. Enforcement of emergency awards

There is significant uncertainty in the law regarding the enforceability of emergency awards in arbitrations seated in India. The LCI in its 246th Report had recommended recognising the concept of emergency arbitrator by widening the definition of arbitral tribunal under section 2(d) of the ACA to include emergency arbitrator. However, this recommendation was not incorporated in the 2015 Amendment Act.

While one could possibly rely on section 17(2) of the ACA to enforce emergency awards for arbitrations seated in India, the Delhi High Court decision in *Raffles Design International India Pvt. Ltd.& Anr. v. Educomp Professional Education Ltd.& Ors.*[143] held that an emergency award in an arbitration seated outside India is not enforceable in India.

India's approach differs from that of developed arbitration jurisdictions such as Singapore and Hong Kong which have recognised the enforceability of orders given by an emergency arbitrator. Singapore amended the IAA in 2012 to broaden the definition of 'arbitral tribunal' in section 2(1) to include emergency arbitrator(s). Hong Kong amended the AO in 2013 to include Part 3A which deals with the enforcement of emergency relief. Section 22B provides that emergency relief granted by an emergency arbitrator shall with the leave of the Court of First Instance of the High Court be enforceable in the same manner as an order or direction of the Court.

Given that international practice is in favour of enforcing emergency awards,[144] it is time that India permitted the enforcement of emergency awards in all arbitral proceedings. This would also provide legislative support to rules of arbitral institutions that presently provide for emergency arbitrators.[145] For this purpose, the recommendation made by the LCI in its 246th Report may be adopted.

[143] (2016) 234 DLT 349.
[144] Singapore, Hong Kong and the United Kingdom all permit enforcement of emergency awards.
[145] *Supra* n. 123.

Recommendations

1. Clause (c) of sub-section (1) of section 2 of the ACA may be amended to add the words "an emergency award" after the words "an interim award".

2. Clause (d) of sub-section (1) of section 2 of the ACA may be amended to add the words "and, in the case of an arbitration conducted under the rules of an institution providing for appointment of an emergency arbitrator, includes such emergency arbitrator;" after the words "…panel of arbitrators".

3. An emergency award may be defined as "an award made by an emergency arbitrator".

17. Insertion of a separate chapter establishing the APCI

Section A above provides for the establishment and powers of the APCI, which would, *inter alia*, act as a body grading arbitral institutions. The APCI may be set up by statute, by the insertion of a separate Part in the ACA providing for its establishment, composition, and its functions and powers. The provisions in this Part may be based on the Committee's recommendations in section A above.

Recommendation

A new Part IA may be inserted after Part I of the ACA establishing the APCI and providing for its composition, and functions and powers.

18. Amendment for creating a depository of arbitral awards

The Committee notes that in many instances, it is difficult for courts considering applications under section 34 to obtain an authentic copy of the arbitral award. While many institutions maintain copies of arbitral awards given in arbitrations administered by them, this problem is particularly severe in the case of ad hoc arbitrations where arbitral tribunals might not maintain records of proceedings or copies of the arbitral award given by them. This problem could be solved if a centralised depository of all arbitral awards made in India, given in both ad hoc and institutional arbitrations, were to be maintained. The Committee is of the opinion that the APCI may maintain such depository. In order to maintain confidentiality, only courts may access the depository for the limited purpose of accessing the arbitral award being challenged.

Recommendations

1. A provision may be inserted in the proposed Part IA of the ACA, requiring the APCI to maintain an electronic depository of all arbitral awards made in India and such other records as may be specified by the APCI.

2. Parties to an arbitration seated in India may be required to file such arbitral awards and such other records as may be specified by the APCI with the APCI within 45 days of the award being given.

3. Courts may access the depository for obtaining a copy of the arbitral award certified by the APCI.

19. Incorporation of arbitral institutions

The Committee notes that there exist several bodies that are merely centres that provide venues for conducting arbitration hearings. It is possible that they may designate themselves as arbitral institutions once the APCI is established. The mushrooming of arbitral centres which do not perform any functions of an arbitral institution such as oversight of the arbitral proceedings, appointment of arbitrators, etc. might lower the overall quality of arbitral institutions in India. Therefore, in order to bring some accountability and transparency to their functioning, it is desirable that all arbitral institutions be required to organise themselves as section 8 companies or registered societies. This may prevent arbitral centres owned by private individuals from misleading the public by marketing themselves as arbitral institutions.

Recommendation

A provision may be inserted in Part IA of the ACA providing that arbitral institutions should not be privately owned, but incorporated as companies under section 8 of the Companies Act 2013 ("**Companies Act**"), or registered as societies under the Societies Registration Act 1860 ("**SRA**") or the corresponding state legislation.

F. Other legislative / non-legislative measures that can promote arbitration practice in India

Measures that promote access to the jurisdiction (i.e., whether foreign lawyers can represent clients in international arbitrations held in the country) and promote the jurisdiction as a venue by easing restrictions related to immigration, tax, etc. have been instrumental in the growth of institutional arbitration in many countries.

The Indian legal position with respect to permitting foreign lawyers to represent clients in arbitrations in India is not very clear. In A.*K. Balaji v. Government of India*,[146] the Madras High Court held that foreign lawyers are permitted to visit India temporarily on a fly in and fly out basis to advise clients regarding foreign law and international legal issues and conduct arbitration proceedings in respect of disputes arising out of a contract relating to international commercial arbitration. However, a mechanism to facilitate this process has not been put in place. In 2016, the Bar Council of India ("**BCI**") released draft Rules for registration and regulation of foreign lawyers in India.[147] With the draft rules withdrawn since then[148] and a pending legal challenge to *A.K. Balaji* in the Supreme Court,[149] the legal position continues to remain uncertain.

At the other end of the spectrum are countries such as Singapore and Hong Kong.[150] In both jurisdictions, a mechanism is provided which allows foreign lawyers to get them registered and practice foreign law in the respective jurisdiction. Singapore goes a step ahead and allows foreign lawyers to practice permitted areas of Singapore law as well.[151] Singapore does not impose a visa requirement for non-resident arbitrators. The only requirement is that of a Short Term Visit Pass which is granted at the immigration checkpoint subject to a maximum of 60 days. While non-residents are required to hold a work pass before they can work in Singapore, the provision of arbitration and mediation services is categorised as a Work Pass Exempt Activity.[152] It also provides tax exemption to the non-resident arbitrators and tax concessions and incentives on incremental income of law practices.[153] The adoption of such measures is necessary to boost arbitration practice in India.

Recommendations

1. An amendment may be made to the Advocates Act clarifying that foreign lawyers advising on or appearing in arbitrations seated in India where the substantive law of the contract is foreign law are not practicing Indian law. The Committee recognises the need for the BCI to lay down the extent to which foreign lawyers are subject to regulation while granting foreign lawyers the right to advise on foreign law and to set up a place of

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[146] *A.K. Balaji v. Government of India*, AIR 2012 Mad 124.
[147] Draft Bar Council of India rules for registration and regulation of foreign lawyers in India, 2016.
[148] Kanu Sarda, 'Bar council stops entry of foreign lawyers, firms', The New Indian Express, 09.10.2016, available at http://www.newindianexpress.com/thesundaystandard/2016/oct/09/bar-council-stops-entry-of-foreign-lawyers-firms-1526330.html (accessed on 05.07.2017).
[149] *Bar Council of India v. A.K. Balaji & Ors*., SLP (Civil) No(s). 17150–17154/2012 (July 4, 2012).
[150] Cap. 159S, Foreign Lawyers Registration Rules (L.N. 493 of 1994, Hong Kong).
[151] Part IVA, Legal Profession Act (Singapore).
[152] 'Eligible activities for a work pass exemption', Ministry of Manpower, Singapore Government, available at http://www.mom.gov.sg/passes-and-permits/work-pass-exempt-activities/eligible-activities (accessed on 07.07.2017).
[153] 'Incentive and Exemption Schemes', Ministry of Law, Singapore, available at https://www.mlaw.gov.sg/content/minlaw/en/legal-industry/incentive-and-exemption-schemes.html (accessed on 06.07.2017).

business in India. This is necessary as a large number of Indian parties enter into contracts with foreign counterparties where the governing law of the contract is foreign law and consequently need foreign law advice in dispute resolution under those contracts. If foreign lawyers and law firms are prevented from advising or appearing in arbitrations in India, then India stands to lose a substantial share of arbitrations involving Indian parties to Singapore, Hong Kong and London.

2. As far as the issue of foreign lawyers being permitted to appear before Indian courts is concerned, no view is offered on the same.

3. A quick visa facilitation system and / or a special category of multiple-entry visas for the purpose of participating in an arbitration may be considered by the government to ensure that ease of entry to foreign lawyers and arbitrators.

4. The government may also consider providing tax breaks on payments made to arbitrators / arbitration counsel who are not Indian nationals. This will increase India's attractiveness as a seat for arbitrations, particularly those involving Indian parties, and consequently lead to an increase in the caseload of Indian arbitral institutions. A similar practice has greatly enhanced the reputation of Singapore as a seat and venue for international commercial arbitrations.

5. The provision of tax breaks on service tax imposed on the services of an Indian arbitral institution may also provide a major incentive for encouraging parties to resolve their disputes through arbitration administered by an Indian arbitral institution.

G. Role of the government and the legislature in promoting institutional arbitration

A study of successful arbitral institutions across the world shows how the governments and the legislatures in the jurisdictions they are located in have played a significant role in helping them flourish. This has been through governmental and legislative efforts in promoting such jurisdictions as arbitration hubs.

The Committee is of the opinion that the government and the legislature can play a similar role in promoting institutional arbitration in India, and more generally, promoting India as an arbitration hub. For this purpose, the Committee has identified certain areas where the government and / or the legislature can play a more proactive role in creating a conducive environment for institutional arbitration to flourish.

The Committee proposes that a permanent standing committee be constituted under the aegis of the APCI that can help liaise with the government to ensure a healthy ecosystem for the development of arbitration in India. As can be seen from the successes of Singapore and Hong Kong as arbitration hubs, this is vital to ensure the competitive edge and the success of arbitration in any jurisdiction.

The Committee notes that a similar initiative has been established in Hong Kong where as part of its efforts to promote Hong Kong as an Asia-Pacific hub for international arbitration, the Department of Justice of the Government of Hong Kong constituted an Advisory Committee on the Promotion of Arbitration ("**Advisory Committee**") in 2014.[154] The Advisory Committee is a standing committee that consists of representatives from the Department of Justice, legal, arbitration and other sectors in Hong Kong. The mandate of the Advisory Committee includes reviewing and advising on strategies and initiatives for promoting Hong Kong's arbitration services inside and outside Hong Kong, discussing concerns raised by legal and dispute resolution sector in relation to the same, and advising on related matters including by conducting research or studies related to arbitration.[155] The Advisory Committee can seek the expertise of overseas arbitration experts either generally or on specific issues.[156]

The Committee also notes that the LCI had in its 246th Report recommended the establishment of a body called the Arbitral Commission of India with representation from all stakeholders in arbitration which would be responsible for promoting the growth of institutional arbitration in India.[157]

The Committee is of the view that the Government can incentivise institutional arbitration by providing incentives for developing physical infrastructure for arbitration. This is crucial as the lack of initial capital has been cited by respondents to Questionnaire 2 as a reason why Indian arbitral institutions have poor and inadequate infrastructure. In this regard, the Committee notes the efforts of the Singapore government in establishing and promoting Maxwell Chambers, the world's first integrated dispute resolution complex. The Chambers is fully equipped and has all modern facilities ensuring confidentiality, convenience, and comfort for the clients and arbitrators. Further, it houses the regional offices of as many as 6 globally established ADR institutions. Maxwell Chambers has been instrumental in making Singapore a hub of international arbitration in the past 15 years.[158]

The Committee is also of the opinion that the National Litigation Policy ("**NLP**") and state litigation policies must promote arbitration in government contracts. Arbitration must be encouraged as a dispute resolution mechanism in disputes involving government departments or PSUs and private parties.

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[154] Press release, 'Government sets up Advisory Committee on Promotion of Arbitration', 18.12.2014, available at http://www.info.gov.hk/gia/general/201412/18/P201412180576.htm (accessed on 21.03.2017).

[155] Terms of Reference of the Advisory Committee on Promoting Arbitration, available at http://www.doj.gov.hk/eng/public/pdf/2016/terms.pdf (accessed on 21.03.2017).

[156] *Supra* n. 155.

[157] *Supra* n. 132.

[158] 'Profile', Maxwell Chambers website, available at http://www.maxwell-chambers.com/profile (accessed on 10.07.2017).

The Maharashtra government has recently approved an institutional arbitration policy in October 2016. The Maharashtra Arbitration Policy provides that all state government contracts with a value of over INR 5,00,00,000 (INR 5 crores) shall contain an arbitration clause providing for arbitration administered by a recognised institution.[159]

Recommendations

1. A standing committee may be constituted under the aegis of the APCI to review developments in Indian arbitration law and practice, consult with stakeholders, and recommend timely legislative or other changes to the government. This standing committee may be composed of leading arbitrators, arbitration practitioners, arbitral institutions, judges, representatives from industry bodies and experts from foreign jurisdictions. The remit of this committee must be to:
    a. review the government's arbitration policy and suggest necessary changes to the Ministry of Law and Justice;
    b. to promote international dispute resolution services in India and work with arbitration-related institutions and bodies, and law firms for this purpose;
    c. to monitor the operation of the ACA and to collect data from the High Courts and the Supreme Court for this purpose;
    d. to maintain a depository of all awards challenged in courts for purposes of research;
    e. to liaise with international and local arbitral institutions in holding events to assist in the interpretation of the provisions of the ACA;
    f. to stay abreast of the latest arbitration trends and practice, prepare annual reports analysing the march of arbitration law, and assist the legislature in introducing timely amendments to the ACA;
    g. to organise arbitration-related conferences and events;
    h. to liaise with relevant government departments and arbitral and other professional bodies to conduct activities to promote India as an arbitration hub and to promote institutional arbitration in India both within and outside India; and
    i. to do any other activities that may be necessary or incidental to the performance of the above functions.

2. Instead of waiting for courts to clear ambiguities in legislation through case law, where appropriate, the legislature can be proactive to ensure that the ACA keeps pace with developments in international arbitration law and practice. For this purpose, the proposed standing committee may be tasked with monitoring the operation of the ACA and recommending amendments to the ACA in a timely fashion.

[159] 'Maharashtra government makes institutional arbitration mandatory for contracts above Rs 5 crore', The Indian Express, 08.04.2017, available at http://indianexpress.com/article/business/economy/maharashtra-government-makes-institutional-arbitration-mandatory-for-contracts-above-rs-5-crore-4604321/ (accessed on 11.07.2017).

3. The Government may promote institutional arbitration by facilitating the building of physical infrastructure. The government, may, after consultations with arbitral institutions and industry bodies like CII, FICCI and ASSOCHAM, which represent users of arbitration, take steps to build integrated infrastructure for arbitration on the lines of Maxwell Chambers in major commercial hubs like Mumbai and Delhi. In particular, in Delhi, the ICADR building complex may be developed as an integrated arbitration facility.

4. The Central Government and state governments can proactively encourage institutional arbitration by adopting arbitration policies on the lines of the Maharashtra Arbitration Policy. Such policies may provide that all commercial contracts exceeding a specified value entered into by the appropriate government and its agencies should contain an institutional arbitration clause. This will be a positive vote of confidence in favour of institutional arbitration and could act as a catalyst for the accelerated growth of institutional arbitration in India.

5. The Government may amend Schedule VII to the Companies Act to add "contributions or funds provided to arbitral institutions" as an activity which may be included by companies in their Corporate Social Responsibility Policies. This will give impetus to the growth of arbitral institutions and provide them with capital for the development of necessary infrastructure.

H. Changes in ADR culture

While the mandate of this Committee is to propose reforms for bolstering institutional arbitration, this Committee will be remiss if it fails to iterate the need to reorient the way litigants, judges, and other stakeholders perceive ADR mechanisms. ADR is thought of as a substitute to litigation, with the latter being deemed as the conventional and default format for resolving disputes. While the growing use of ADR mechanisms has precipitated some change to notion, in most cases, they continue to play second-fiddle to litigation.

As Justice Sundaresh Menon (the Chief Justice of Singapore) pointed out in an address last year, ADR must be transformed into 'Appropriate Dispute Resolution'. This paradigm shift is necessary to create a parity between ADR mechanisms and litigation, and instil faith in them as equally (or more) efficient and comprehensive dispute resolution frameworks.[160] Consequently,

[160] 'Shaping the Future of Dispute Resolution & Improving Access to Justice', Opening address by Justice Sundaresh Menon (the Chief Justice of Singapore) at the Global Pound Conference Series 2016— Singapore, 17.03.2016, available at http://www.supremecourt.gov.sg/Data/Editor/Documents/[Final]%20Global%20Pound%20Conference%20Series%202016%20-%20'Shaping%20the%20Future%20of%20Dispute%20Resolution%20%20Improving%20Access%20to%20Justice'.pdf (accessed 15.03.2017).

this revamped understanding of ADR will allow parties to look beyond a culture of adversarial litigation, and evaluate the 'appropriate' mechanism of dispute resolution, based on the subjective facts and circumstances of a case.

To pursue this objective of transformation of the image of ADR frameworks, not only arbitration, but even mediation (and other such mechanisms), must be bolstered simultaneously.

In India, mediation received recognition through Parliamentary legislation by the introduction of section 89 in the CPC. This form of dispute resolution differs from adjudicatory frameworks which define court and arbitration proceedings. According to Adrian Locke:

> "*Mediation is essentially a negotiation that includes a third party who is knowledgeable in effective negotiation procedures and can help people in conflict to co-ordinate their activities and to be more effective in their bargaining. Mediation is an extension of the negotiation process in that it involves extending the bargaining into a new format and using a mediator who contributes new variables and dynamics to the interaction of the disputants.*"[161]

Intrinsic to mediation is negotiation by which the disputants with the aid of a neutral (and disinterested) third party attempt to resolve the dispute. The third-party mediator aids through a process of negotiations with the participants. The process is designed to analytically pinpoint and segregate disputed issues with a view to develop options, consider alternatives and reach a consensual agreement that will accommodate their needs and rights. The third-party mediator lacks authority to resolve the dispute amicably but strives to create a congenial environment to enable the parties to resolve their disputes.

Mediation has gained momentum in India as a viable ADR mechanism in the last decade or so. Currently, there are mediation centres (predominantly court-annexed institutions) that are popular in Delhi, Bangalore, Chennai, etc. These centres have shown considerable progress, in regard to conduct of mediation, training of mediators and trainers and notched impressive success figures in disputes referred to them. Certain kinds of commercial disputes, matrimonial disputes, resolution of intellectual property disputes (mainly on areas like damages), and family settlements have found their way into the mediation process.

There is judicial recognition and acceptance of the mediation process. The Supreme Court has emphasized the need to cultivate and foster growth of this alternative, non-adjudicatory form of dispute resolution, as it can be a strong docket reducing process.[162]

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[161] Adrian Locke, 'Mediation in the Singapore Family Court', (1999) 11 SAcLJ 189.

[162] *Salem Advocate Bar Association v. Union of India,* 2005 (6) SCC 344; *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co (P) Ltd,* (2010) 8 SCC 24.

Mediators' training programs in India have, however, been on cellular basis, with each centre using its own model of mediation orientation, and basic and advanced training courses.[163] Each centre has its own standards for accreditation. As yet, there is no concrete effort to co-ordinate to achieve commonly acceptable standards, for purposes of recognition of mediation qualification, or the minimum standards of training (in terms of learning content, or trainer qualifications and experience). Despite these shortcomings, at individual levels, many of these centres have shown significant successes having regard to the references received.

Courts play a prominent part in referring disputes to mediation. In fact, in any given case, the role of the presiding judge or the court is crucial; she or he is expected to first identify if the dispute before the court is one capable of resolution through mediation; if it is and the parties are amenable (consent to the step) the dispute is referred to mediation.

Given the growing popularity of mediation as a dispute resolution process in India, it is an opportune time to consider reforms for its further augmentation. Many countries (like Australia, Brazil, Italy, and Malaysia) have enacted standalone laws on mediation. Singapore is the latest country to follow suit and enact its Mediation Act in November 2016. The Government may consider the feasibility of having a standalone legislation for mediation after debate and discussions with the relevant stakeholders.[164]

Further, the use of 'Med-Arb' or 'Arb-Med' procedures may be promoted by arbitral institutions. The process involves a single individual combining the roles of both (i) a mediator facilitating a settlement between the parties; and (ii) arbitrator adjudicating on the issues in dispute and issuing a final and binding award. In the US, often parties who succeed in settling their dispute through facilitated mediation agree their mediator will resolve by arbitration disputes that arise out of the settlement agreement in the future. This is a variation of the 'Med-Arb' theme.

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[163] For instance, the Delhi Mediation Centre, which has multiple centres in district court complexes in Delhi, the *Samadhan* centre (of the Delhi High Court), the mediation centres at Bangalore and Chennai, and the ICADR, all have their mediation training programs. All these centres broadly insist upon a first level training programme involving 40 hours of training. Some insist that for accreditation, the trainee should also actually participate in a minimum of references as a co-mediator.

[164] A recent White Paper entitled '*Strengthening Mediation in India: A Report on court-connected mediations*' prepared by the Vidhi Centre for Legal Policy, on strengthening mediation in India, has been submitted to the Department of Justice, Ministry of Law and Justice, on 30 December 2016, and has been approved by the Department. This report has, *inter alia,* recommended a standalone legislation for mediation in India. A standalone law for mediation has also been recommended by a special task force of the Department of Justice, which is reviewing the enforcement of contracts as a parameter for the ease of doing business in India. In fact, in a meeting on 18 April 2017, the task force tasked the representative of the Department of Legal Affairs on the task force, to take necessary steps for this. These minutes are available at http://doj.gov.in/sites/default/files/Minutes%20of%202nd%20Task%20Force%20Meeting%20%20held%20on%2018th%20April%2C%202017%20%281%29.pdf (accessed 19.07.2017).

'Med-Arb' is a well-known practice in civil law jurisdictions, where both judges and arbitrators assume the role of mediators to support settlement between the parties during the proceedings. 'Med-Arb' or 'Arb-Med' has been recognized in section 30 of the ACA as well.

Several arbitral institutions abroad offer mediation services along with arbitration.[165] For instance, where a disputing party makes a reference to the SIAC, according to the Arb-Med-Arb protocol ("**AMA protocol**") jointly developed between the SIAC and the Singapore International Mediation Centre ("**SIMC**"), after parties exchange their pleadings (claims and counter claims) and a tribunal is constituted, the dispute / reference is stayed for 8 weeks to facilitate mediation. Parties can attempt to negotiate a mutually acceptable settlement during the mediation. If it is achieved, the settlement is embodied in a consent award.[166] The AMA protocol envisions that parties are free to decide on their mediator(s) of choice from the SIMC's panel of mediators or any other mediator. If they cannot agree, a mediator will be appointed by the SIMC.

'Med-Arb' has attracted some criticism for permitting the same mediator who may have received *ex parte* communications from parties during mediation meetings (referred to as 'caucuses') — oftentimes of information not admissible in a judicial trial or in an even less formal arbitration — to subsequently decide the dispute as arbitrator possessing such knowledge. In some jurisdictions, like Hong Kong, a single individual cannot combine the roles of a mediator and arbitrator, due to a bar in statute. The SIAC, however provides the middle path, whereby mediation takes place first, during which there is a mandatory 8-week stay of the arbitration reference. In the event of settlement, that agreement is embodied in an arbitral award; in case of no settlement, adjudication through arbitration proceeds. The mediators and arbitrators are different; a single individual does not discharge the two roles, to avoid possibility of bias. The Committee recommends a similar procedure.

The hybrid 'Med-Arb' process provides at once, efficiency in terms of time and cost, greater party autonomy as to how the dispute can be settled, and a regimented timeline for achievement of outcomes.[167] Thus, it has advantages over separate mediation and arbitration processes. It is of added advantage for parties who particularly value business and commercial relationships and their preservation.

Recommendations

1. The Committee, having regard to the experience and practices of the international arbitral institutions, recommends that every arbitral institution should provide mediation services,

[165] For instance, the SIAC, ICC Court offer mediation services.
[166] 'Arb-Med-Arb—the future of dispute resolution?', SIMC website, available at http://simc.com.sg/arb-med-aeb-the-future-of-dispute-resolution/ (accessed on 19.07.2017).
[167] Thomas J. Brewer and Lawrence R. Mills, 'Combining Mediation and Arbitration', Dispute Resolution Journal, Vol. 54 Issue 4 (1999), pp. 32–39.

through a cell or panel. Each arbitral institution should be mandated to set up a mediation cell or centre. Such mediation cell or centre should, in turn enroll trained mediators. This service should be provided by the centre as part of its routine, where parties should be encouraged to strive to settle the dispute without recourse to arbitration. Attempt to settle (through mediation) every dispute referred should be first made, within a limited time frame. If this effort does not succeed, the parties should then revert to the adjudicatory mode in arbitration.

2. The APCI should indicate standards that institutions can adopt, for enrolling mediators in every institution, in terms of minimum training, experience, etc. The APCI should prescribe the necessary standards or experience which mediators ought to possess.

3. The possibility of parties seeking mediation, as a method of arriving at a settlement, before or during the course of the arbitral proceedings, in respect of one or some points of dispute, should be available. Like in the case of the AMA protocol devised by the SIAC and the SIMC, this may be through a limited stay of arbitral proceedings (barring hearings on interim measures) for a specified time, when the parties should make intensive efforts to arrive at a mutually acceptable settlement. This can be a full settlement of all disputes, or partial settlement, that can be embodied in an award; other unresolved issues of the dispute may be subject matter of the reference to arbitration.

4. The Government should discuss and debate the feasibility of a standalone mediation law, its scope and ambit, and the way forward for its drafting.

5. The Government should consider separating the mediation and conciliation regimes in the country.

6. ADR culture has to be developed, disseminated, and inculcated at the stage of contract formation to parties and counsel. This is often necessary because ADR requires both parties to see the long-term benefits of private dispute resolution; convincing parties or lawyers once the dispute has arisen to give up the perceived advantages of litigation is more difficult.

7. The general focus on legal training in India is on dispute resolution through court proceedings or threat of court proceedings. The professional lawyer is also supposed to be an advisor looking after the best interests of the client but often lacks the training to conduct professional negotiations in a dispassionate manner. Law schools and colleges in India should concentrate on this aspect of legal training which prevents disputes from escalating into emotional diatribes through notices, and builds capacities and skills to negotiate, mediate and settle disputes.

PART II: THE ICADR

Two members of the Committee, Justice S. Ravindra Bhat, Judge, High Court of Delhi and Mr. K.K. Venugopal, the Attorney General for India, did not participate in the deliberations of the Committee on this Part (The ICADR) and have dissociated themselves from this Part of the Report.

PART II: THE ICADR

In the preceding Chapter, the Committee made certain recommendations aimed at improving the overall quality and performance of Indian arbitral institutions. At the same time, the Committee is of the opinion that one arbitral institution may be chosen by the Government for targeted reform to develop it as a flagship institution in India for conducting international and domestic arbitrations. It is expected that this institution will provide cost-effective and timely services for the conduct of arbitrations and be a frontrunner in the development of institutional arbitration in India.

The ICADR has been chosen as the arbitral institution to be developed for three reasons: (a) the ICADR was set up under the aegis of the Ministry of Law and Justice with the object of promoting ADR in India; (b) it has received substantial funding by way of grants and other benefits from the Government; and (c) it benefits from an excellent location, good infrastructure and facilities which makes it ideal for development as an arbitral institution. It may also be noted that the Terms of Reference contained a specific mandate to review the working of arbitral institutions funded by the Government and suggest reforms.

Keeping this in mind, the Committee studied the functioning and performance of the ICADR. The following sections discuss the results of the study, and form the background for the reforms suggested in respect of the ICADR in section L.

A. Background

The ICADR was set up in 1995 under the aegis of the Ministry of Law and Justice, Government of India with the objective of promoting alternative dispute resolution methods and providing facilities for the same.[168] This was part of the larger agenda of facilitating swift dispute resolution and easing the burden on courts. The ICADR is registered as a Society under the SRA and is autonomous in its functioning. Its headquarters are in New Delhi, with regional centres in Bengaluru and Hyderabad.

B. Objectives

The ICADR was set up with the objectives of: (a) promoting research and studies, providing teaching and training, and organising conferences and seminars in ADR and other related matters; (b) providing facilities and administrative assistance for conciliations, mediations, mini-trials and arbitral proceedings; (c) maintaining panels of arbitrators, conciliators and mediators or specialists such as surveyors and investigators; (d) collaborating with other institutions in

[168] ICADR Brochure, available at http://icadr.nic.in/file.php?123?12:1475756936 (accessed on 08.04.2017).

achieving the ICADR's objectives; (e) setting up regional centres in India and overseas to promote the ICADR's activities; and (f) laying down rules for different modes of ADR.[169]

One of the objects of the ICADR as specified in its Memorandum of Association is "to provide facilities and administrative and other support services for holding conciliation, mediation, mini-trials and arbitration proceedings."[170] As part of this object, the ICADR provides services and facilities as an arbitral institution to parties.

C. Governance structure

The ICADR has the following authorities: (a) the General Body; (b) the Governing Council; (c) the Chairperson; (d) the Secretary General; and (e) such other authorities as may be set up by the Governing Council.[171]

The General Body of the ICADR consists of all the Members of the ICADR. Membership of the ICADR is divided into 6 classes: (a) Foundation Members; (b) Life Members; (c) Corporate Members; (d) Associate Members; (e) Ordinary Members; and (f) Honorary Members. The Rules and Regulations of the ICADR provide for the admission of members, procedure for admission, and the renewal and termination of membership.[172]

The Governing Council, currently consisting of 47 members, is responsible for the management of the ICADR. It consists of the following persons:

a. All Foundation Members;
b. Two members elected by the Corporate Members from amongst themselves;
c. One member elected by the Associate Members from amongst themselves;
d. Fifteen members elected by the Life Members from amongst themselves; and
e. Five members elected by the Ordinary Members from amongst themselves.

The Chief Justice of India is the ex-officio Chairperson of the ICADR.

The Founder Chairperson of the ICADR, Dr. H. R. Bhardwaj is the lifetime Patron of the Society. The Patron is a regular invitee to the meetings of the General Body and Governing Council.[173]

Eight committees have been constituted by the Governing Council for handling specific aspects of the ICADR's functioning. These are the (a) Finance Committee; (b) Research Advisory Committee; (c) Appointments Committee; (d) Building Committee; (e) Empanelment of

[169] *Id.*
[170] Article 3(t), Memorandum of Association of the ICADR.
[171] Rule 5, Rules and Regulations of the ICADR.
[172] Rules 3 and 4, Rules and Regulations of the ICADR.
[173] Rule 7A, Rules and Regulations of the ICADR.

Arbitrators Committee; (f) Screening Committee for Membership; (g) Activities and Publicity Committee; and (h) Committee to consider suitable amendments in the Rules of the ICADR.

D. Sources of funding

The ICADR receives funding from four sources: (a) membership fees and subscription; (b) fees and charges for services and facilities provided by the ICADR to parties; (c) donations, grants, contributions and income from other sources; and (d) investment income.[174]

The ICADR has received substantial funding from the Government since its establishment. The headquarters of the ICADR is located on land which has been given on perpetual lease by the Government. Further, an initial corpus grant of INR 3,00,00,000 (INR 3 crores) was given to the ICADR by the Government. Large grants have also been given from time to time by the Government for the construction of the ICADR's buildings.[175]

The Regional Centres of the ICADR at Hyderabad and Bengaluru have also been set up with financial and other assistance from the state governments of Andhra Pradesh and Karnataka respectively. In the financial year 2015–16, the Regional Centre at Hyderabad was given a corpus grant of INR 35,20,000 (INR 35.2 lakhs) by the State of Telengana.[176]

E. Infrastructure

On 28 April 2017, the members of the team assisting the Committee visited the ICADR and met with the Secretary General and Assistant Registrar of the ICADR. The visit and the meeting with the Secretary General and Assistant Registrar was conducted with the aim of gaining a deeper insight into the ICADR's working, as well as assessing the infrastructure and facilities offered by the institution.

The Committee notes that the main building (Administrative Block) of the ICADR has a floor area of more than 50000 square feet spread over a basement and 3 floors.[177] The Committee noted that the first floor of this building had been leased out to the Office of the Principal Chief Commissioner of Income-Tax, New Delhi from 15 July 2016.[178] The Committee understands that prior to this, the space had been leased out to other government departments. Rental income received from the Income Tax department is the primary source of income of the ICADR.[179] It is

[174] Rule 15.1, Rules and Regulations of the ICADR.
[175] See Annual Report 2015–2016 of the ICADR, available at http://icadr.nic.in/file.php?123?12:1490865651 (accessed on 19.07.2017).
[176] *Id.*
[177] B.S. Saluja, 'Why Alternative Dispute Resolution (ADR)?', ICADR website, available at http://icadr.nic.in/file.php?123?12:1395657355 (accessed on 08.04.2017).
[178] Minutes of the 62nd Meeting of the Governing Council of the ICADR held on 17.07.2016.
[179] Conversation with Randhir Singh, Assistant Registrar, the ICADR on 28.04.2017.

evident that the ICADR is currently unable to utilise its full space as a venue for conducting arbitrations.

The ICADR has 3 arbitration rooms designed in a courtroom format. While the facilities offered in the rooms are modern and support the smooth conduct of arbitration proceedings, the layout of the rooms is not ideal for arbitrations as arbitrations are typically held in a less formal atmosphere, with parties and arbitrators seated at a conference table. The ICADR also has a spacious lounge for arbitrators. Additionally, there are library facilities, WiFi internet, videoconferencing, document display facilities, etc. The rental rates are nominal and vary between INR 4000 to INR 8000 for the whole day. Despite this, it is understood that the ICADR's arbitration rooms are not even fully utilised as a venue for arbitration hearings.

The construction of the second phase of the ICADR's buildings began in 2010 and is complete, but the Central Public Works Department has not handed possession of the completed building to the ICADR.[180] This phase consists of two buildings consisting of an auditorium with a seating capacity of up to 200 people, a convention centre, new arbitration / mediation halls with breakout rooms and latest facilities for video conferencing, transcription, etc.

F. Staff

The ICADR has a total staff of about 25 people. The Secretary General is responsible for day-to-day operations of the ICADR. The Assistant Registrar is responsible for case management and renders assistance to tribunals set up under the ICADR Arbitration Rules 1996 ("**ICADR Rules**"). There is no other case management team.

G. Governing Rules

The ICADR arbitrations are governed by the ICADR Rules.[181] The ICADR Rules have been amended in 2016. The Rules are accompanied by schedules, which specify procedures, fees, and other costs for domestic commercial, domestic non-commercial and international commercial arbitrations. Additionally, they provide for fast-track arbitrations where the award is given within six months of filing of the claim. The 2016 amendments notably also provided model guidelines for expeditious conduct of arbitration proceedings.

H. Services offered by the ICADR

The ICADR seeks to facilitate arbitrations and other forms of ADR. Under the ICADR Rules, the ICADR can function as: (a) the appointing authority in ad hoc arbitrations where parties agree to designate the ICADR as the appointing authority; or (b) the appointing authority where

[180] *Id.*

[181] See the ICADR Arbitration Rules, 1996 (with provision for Fast-track arbitration), available at http://icadr.nic.in/file.php?123?12:1473159419 (accessed on 22.03.2017).

the parties have submitted a dispute to the ICADR to be administered by it under the ICADR Rules (without specifically designating it as the appointing authority).[182]

In addition, the ICADR provides administrative facilities, such as assistance in the exchange of information, fixing of dates for sittings / hearings, physical infrastructure,[183] reporter transcripts of the arbitral proceedings and hearings. The ICADR also provides similar facilities for other forms of ADR under the ICADR Rules. Further, the ICADR also conducts courses on ADR in collaboration with universities.

I. Caseload

As per the ICADR's Annual Report for the year 2015-16, the ICADR has since its inception only received 49 cases for arbitration and 4 cases for conciliation.[184] These 49 cases included 4 international commercial arbitration cases as well.[185]

J. The ICADR's functioning: observations

The ICADR has several advantages which could make it a preferred institution for conduct of arbitrations. These include financial and other support from the government, central location, spacious and good quality physical infrastructure, low fee structure for administration of arbitrations and use of facilities, etc. However, its track record leaves a lot to be desired. As mentioned above, the ICADR has not had a significant case load that contributes to its income. Income received from lease of its premises to the Income Tax department and charges for use of its facilities in arbitrations form the primary sources of income of the ICADR.

Firstly, the ICADR has failed to keep pace with the dynamic nature of arbitration. Despite having an Governing Council consisting of eminent lawyers and judges, the body has not been able to actively engage and embrace developments in the arbitration ecosystem and create a reputation for excellence. There seems to be a complete failure of the organisation to address and market themselves to prospective parties at the stage of contract formation which is essential for an arbitral institution. This is apparent from the fact that despite two decades of its functioning, the ICADR's caseload has been very low. To date, the ICADR has not been specified as the institution of choice for administering arbitrations in a significant number of government / PSU contracts.

Second, the present Governing Council of the ICADR is too large and cannot effectively coordinate governance of the institution. There is a need for a young, talented CEO with

[182] See Rule 36 of the ICADR Rules.
[183] As per the rules of the ICADR: "These charges will be billed separately and are not included in the fee for administrative services. However, where these facilities are provided in any place other than the offices of the ICADR, the charges will be determined by the ICADR and billed separately in each case."
[184] *Supra* n. 176.
[185] *Supra* n. 176.

experience and expertise in arbitrations who can provide it the necessary leadership and vision for it to succeed.

Third, the ICADR Rules have not kept pace with developments in arbitration law worldwide. While competing institutions have revised their rules to include provisions concerning joinder, consolidation of arbitral proceedings, emergency arbitrators, etc., the ICADR Rules, despite their (only) revision in 2016, have failed to include these provisions. This is surprising considering that it conducts regular national and international level conferences, including conferences on the changing nature of arbitration, with the latest being in 2016 as well.[186]

Fourth, while the ICADR appears to have sufficient infrastructure to support arbitration hearings including arbitration rooms, waiting lounges for arbitrators, library facilities and videoconferencing facilities, these appear to be put to limited use. The design of the arbitration rooms need to be modified to suit arbitrations rather than mirroring a courtroom format. If the ICADR can be promoted as a venue for arbitration hearings, it might result in increased visibility for the institution.

K. Developing the ICADR as a flagship arbitral institution

As noted in section J above, the ICADR's track record since its establishment in 1995 leaves a lot to be desired. In order to make the ICADR achieve the intended objective of being a flag bearer of institutional arbitration in India, it is necessary to completely revamp its structure and governance model. Such reform may not be possible within the existing structure of the ICADR as a society. Therefore, it may be preferable for the Government to take over the ICADR.

Two options that may be considered to take over the ICADR and / or its properties to develop it into a world-class arbitral institution are discussed below. Further, the Committee has made some recommendations for developing the ICADR as a model institution following its takeover in section L.

Options for taking over the ICADR

1. Option 1: Declaration of the ICADR as an institution of national importance and takeover of the institution by statute

An ordinance / legislation declaring the ICADR to be an institution of national importance and providing for the transfer of the properties, assets, debts, obligations, liabilities and contracts of the ICADR to a separate body corporate may be enacted. It may be noted that the first Chairperson of the ICADR when stepping down from his position and handing over the

[186] See for e.g., ICADR International Level Conferences, ICADR website, available at http://icadr.nic.in/index.php?page=international-level-conferences&p=132 (accessed on 08.04.2017).

Chairpersonship to the Chief Justice of India had desired that the institution is "developed in future as an Institution of National Importance".[187]

It is suggested that the ordinance / legislation may contain:

i. a precise preamble covering the reasons for the takeover;
ii. a provision declaring the ICADR to be an institution of national importance;
iii. provisions vesting the properties, assets, debts, obligations, liabilities and contracts of the ICADR in a separate body corporate, preferably a company under section 8 of the Companies Act;
iv. provisions determining compensation to be paid for assets / properties of the ICADR that have not been acquired through grants given by the Government; and
v. provisions laying down a new governance structure, powers and functions for the body corporate mentioned in (iii) above.

It must be noted that it is the arbitral institution ICADR (referred to as the ICADR hereafter) which may be taken over, and not the society ICADR (referred to as the Society hereafter). The proposed ordinance / legislation should not affect the Society or its composition in any manner.

There is ample precedent for takeovers of societies by state legislatures / the Parliament. For instance, the Asiatic Society was taken over by the Asiatic Society Act 1984 ("**Asiatic Society**"), and the Indian Council of World Affairs ("**ICWA**") by the Indian Council of World Affairs Act 2001 ("**ICWA Act**") and its preceding ordinance. The proposed legislation may be modelled on the ICWA Act, the Asiatic Society Act, the Kalakshetra Foundation Act 1993 or the Auroville Foundation Act 1988.

The Parliament has legislative competence to enact a legislation declaring the ICADR to be an institution of national importance and taking it over. Under entries 62 to 64 of List I (Union List), Seventh Schedule to the Constitution of India 1950, the Parliament has legislative competence to enact legislation relating to certain specified institutions of national importance. In particular, Entry 63 permits the Parliament to enact legislation pertaining to "any other institution declared by Parliament by law to be an institution of national importance".

2. Option 2: Cancellation of lease of land and taking over possession of buildings only

The ICADR headquarters are located in Plot No.6, Vasant Kunj Institutional Area Phase-II, New Delhi - 110 070. The land on which the ICADR is located has been given on lease to the Society by the Government by a perpetual lease dated 3 May 2005 ("**Lease**") for a lease premium of INR 2.4 crores and yearly rent at the rate of 2.5 per cent of the lease premium. The Lease is given retrospectively from 4 March 1998. The buildings of the ICADR have been constructed on this land.

[187] Minutes of the Meeting of the Finance Committee of the ICADR held on 27.07.2016.

The second option is to cancel the Lease and take over possession of the ICADR premises only with the objective of creating a new arbitral institution which will have its own set of rules, governance structure, employees, etc.

The Lease has been granted under the Government Grants Act 1895 ("**GGA**"). Therefore, the provisions of the Transfer of Property Act 1882 do not apply to the Lease.[188] Instead, all provisions, restrictions, conditions and limitations contained in the grant shall take effect according to the tenor of the grant irrespective of any rule of law, statute or enactment of the legislature.[189] Therefore, any determination of the Lease would have to be in accordance with the terms of the Lease itself.

The buildings on the land have been constructed by the ICADR. The Government has provided grants for construction of the buildings. The buildings may be taken over by the Government following the procedure, if any, laid down for the same in the grants.

L. Recommendations

1. The government may either: (a) declare the ICADR as an institution of national importance and take over the ICADR by statute in accordance with Option 1; or (b) cancel the lease of land given to the ICADR and take over possession of its land and buildings in accordance with Option 2. On a close analysis of the legal issues involved, Option 1 may be considered first by the Government.

2. The ICADR may be re-branded as the India Arbitration Centre in keeping with its character as a flagship arbitral institution.

3. The ICADR's infrastructure and facilities must be upgraded to ensure that they are on par with international arbitral institutions of repute.

4. A complete revamp of its governance structure to include only experts of repute who can lend credibility and respectability to the institution and also act as an advisory body to keep the ICADR globally competitive is necessary. A two-tier structure consisting of a Board of Directors and CEO & Secretariat may be created. The Board of Directors must consist of leading arbitration practitioners (both Indian and international), judges and academics who will set the direction and strategy for the ICADR.

5. The CEO will be responsible for the management and operations of the ICADR and for this purpose, will liaise with the Board of Directors and the Secretariat.

6. The Secretariat shall provide case management support for arbitrations administered by the ICADR. The Secretariat shall be headed by a Registrar who shall supervise its

[188] Section 2, GGA.
[189] Section 3, GGA.

activities. The Secretariat shall be composed of Counsel who shall be lawyers, qualified in India or overseas. One Counsel shall be assigned to each case referred to the ICADR and shall be responsible for providing case management services for that case.

7. There may be established a Chamber of Arbitration consisting of dedicated and experienced arbitration practitioners who will approve the admission of arbitrators to the permanent panel and also act as the appointing authority for institutional arbitrations or section 11 referrals. The Registrar shall be the Member-Secretary to the Chamber.

8. Stringent criteria must be laid down for admission to the ICADR's panel of arbitrators so as to ensure that the panel is composed of well-trained and skilled arbitrators, both Indian and international.

9. It is necessary to re-brand the ICADR through a public relations team which will market the institution amongst PSUs and other commercial undertakings as a premier and first rate arbitral institution. Arbitration centres, unlike courts or other statutory authorities, must market themselves since it is the autonomous choice of parties at the time of contracting that will determine the inflow of work.

10. The ICADR may establish an arbitration academy that will not only train arbitrators but will also conduct arbitration research and keep a watch on the 'march' and development of arbitration law throughout the country and globally. A permanent three-member committee may be created to submit a report to the APCI standing committee on a yearly basis and recommend the removal of any statutory, judicial or governmental roadblocks in the arbitration ecosystem. This will be consistent with the position of the ICADR as the flagship arbitration centre and a first among equals in the competitive marketplace.

11. Procedures may be laid down to ensure the monitoring of challenge proceedings initiated in courts against awards issued by the ICADR and the maintenance of a depository of all awards that have been challenged in the courts for purposes of research and analysis.

12. If Option 1 is followed by the Government, a relevant statute taking over the ICADR may be enacted along with the amendments to the ACA.

PART III: BILATERAL INVESTMENT TREATY ARBITRATIONS

PART III: BILATERAL INVESTMENT TREATY ARBITRATIONS

The Committee's Terms of Reference include focusing on "the role of arbitrations in matters involving the Union of India, including bilateral investment treaties (BIT) arbitrations"[190] and suggesting suitable measures for reform. With this in mind, the scope of this Part of the Report is limited to: (a) dispute management by the Government when an investor files an arbitration claim; (b) dispute resolution under BITs; and (c) dispute prevention, both under existing BITs and new BITs that may be entered into based on the 2015 Model BIT.

After extensive deliberations in the meetings of the Committee, the Committee is of the view that issues relating to treatment standards such as expropriation, fair and equitable treatment, etc., and their interpretation require a greater debate involving all concerned government departments, experts in international law and those engaged in drafting and negotiating investment treaties. Therefore, the Committee does not express any comment or make any recommendations in respect of such issues.

A. Background

India's economic liberalisation brought with it a need to provide potential foreign investors with an enhanced form of investment protection that did not rely solely on municipal laws and the domestic judicial system. In order to make India an attractive destination for foreign investment, it was necessary for the Government to agree to the resolution of investment disputes by an independent and unbiased international arbitral panel. As a consequence, India initiated an extensive BIT programme to attract foreign investment.[191] According to data available on UNCTAD's Investment Policy Hub, India currently has 76 BITs and 13 other treaties with investment provisions.[192]

In the early years, India saw few claims. The dispute regarding the Dabhol power project was the most prominent, but it was eventually settled by the Government.[193] However, the adverse award

[190] See Terms of Reference of the High Level Committee on institutionalisation of Arbitration Mechanisms in India, available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=155959 (accessed on 26.04.2017).
[191] Nish Shetty and Romesh Weeramantry, 'India's New Approach to Investment Treaties', Asian Dispute Review 18 (2016), p. 189.
[192] Investment Policy Hub website, available at http://investmentpolicyhub.unctad.org/IIA (accessed on 19.04.2017).
[193] For details of the process of settlement, see Kenneth Hansen et al, 'The Dabhol Power Project Settlement What Happened? and How?', Infrastructure Journal (2005), available at https://www.chadbourne.com/files/Publication/a5aa1e52-4285-4bb5-87e6-7201123895a0/Presentation/PublicationAttachment/352f8f09-ae96-40fc-a293-720d0b8f0ca8/Dabhol_InfrastructureJournal12_2005.pdf (accessed on 19.04.2017).

in *White Industries v. The Republic of India*[194] not only resulted in many fresh notices, but also caused much consternation as the primary ground for the award was based on delays of the Indian judiciary. The award in *White Industries* triggered a spate of investment treaty claims being raised against India — 17 notices of dispute were received following the award in *White Industries*.[195] The most prominent among these claims was the one raised by Vodafone. In April 2012, Vodafone invoked the India - Netherlands BIT and issued a notice of arbitration to the Government for its failure to protect investor rights.[196] Vodafone essentially challenged the amendment to the Income Tax Act 1961, which gave the Income Tax Department the power to raise a retrospective demand for tax.[197]

The developments following the award in *White Industries* prompted India to consider redrafting its model BIT (published in 2003) in order to balance investor protection with the Government's regulatory powers and to renegotiate existing BITs on the basis of a revised model BIT. On the basis of this decision, India has written to terminate many of its existing BITs.[198]

The 2015 Model BIT was approved in December 2015 by the Union Cabinet and was proposed as a major change to India's BIT regime. It replaced the earlier 2003 Model BIT.[199] The 2015 Model BIT took almost two years of inter-ministerial consultations. Further, the LCI had also submitted its report on the draft Model BIT to which public comments were invited.[200]

B. Dispute management under BITs

The rise in the number of investment arbitrations against states, as well as the high number of substantial awards made against developing countries in particular, calls for the adoption of mechanisms for dispute management by states in order to ensure that states can effectively

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[194] *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award (30 November 2011).

[195] See Grant Hanessian and Kabir Duggal, 'Indian Model BIT: Is This Change the World Wishes to See?', ICSID Review, (2015) at p. 3.

[196] Vodafone Group release, 'Vodafone Serves Notice Against Indian Government Under International Bilateral Investment Treaty', 17.04.2012, available at http://www.vodafone.com/content/index/media/vodafone-group-releases/2012/bit.html# (accessed on 18.07.2017).

[197] The dispute is still ongoing as of 10 July 2017.

[198] 'India to renegotiate all bilateral investment pacts', Economic Times, 25.07.2016, available at http://economictimes.indiatimes.com/news/economy/policy/india-to-renegotiate-all-bilateral-investment-pacts-nirmala-sitharaman/articleshow/53385020.cms (accessed on 19.04.2017).

[199] Press Information Bureau Press Release, Model Text for the Indian Bilateral Investment Treaty, 16.12.2015, available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=133411 (accessed on 20.04.2017).

[200] Law Commission of India, Report No. 260, 'Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty', (2015), available at http://lawcommissionofindia.nic.in/reports/Report260.pdf (accessed on 21.04.2017).

handle disputes which arise under BITs. This should be different from the adoption of strategies to defend inter-state disputes.

From a state's perspective, defending investment arbitrations can be a very expensive process. Evidence seems to indicate that in more than half the cases, the arbitral tribunals in investment arbitrations ordered parties to bear their own costs.[201] Further, the reputational damage resulting from investor-state proceedings can deter future foreign investments into the country.[202] Effective dispute management mechanisms are therefore essential, especially for developing countries that would have to safeguard themselves from arbitral awards that provide for payment of huge costs to the investors.

The Government needs to address the issue of the management of disputes arising from BITs more comprehensively. It is critical that formal structures be established to deal with disputes as they arise. This is of extreme importance in light of the number of claims made against India. According to data collected by UNCTAD's Investment Policy Hub, India has had 21 cases in which it is the respondent to a claim under a BIT, and 4 in which it is the home state of the claimant investor.[203] Out of these, 11 are still pending, while the others have been settled, and 1 case was decided in favour of the investor.[204]

Many of the speakers at the Workshop organised by the Committee also highlighted the importance of strategy and dispute management in BIT arbitrations.[205]

The following are the five pillars of a proper mechanism for dispute management — procedures, authority, coordination, counsel and funds.[206]

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[201] Matthew Hodgson, 'Counting the costs of Investment Arbitration', Global Arbitration Review, 24.03.2014, available at http://www.allenovery.com/SiteCollectionDocuments/Counting_the_costs_of_investment_treaty.pdf (accessed on 26.04.2016).

[202] Asia-Pacific Economic Cooperation Investment Experts' Group, 'Investor-State Dispute Prevention Strategies: Selected Case Studies', (2013), available at http://www.apec.org/Groups/Committee-on-Trade-and-Investment/~/media/Files/Groups/IEG/20130625_IEG-DisputePrevention.pdf (accessed on 26.04.2017).

[203] Investment Policy Hub website, available at http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry (accessed on 07.04.2017).

[204] *Id.*

[205] Pramod Nair (Partner, Arista Chambers), Jeremy Sharpe (Partner, Shearman & Sterling); Anirudh Krishnan (Partner, AK Law Chambers), and P.S. Rao (Special Adviser, Office of the Attorney-General, State of Qatar and Visiting Professor, Center for International Law Studies, Jawaharlal Nehru University) at Workshop on Bilateral Investment Treaties — Treatment Standards and Other Issues, organised by the High Level Committee and EBC on 22.04.2017; call with Kabir Duggal, Senior Associate, Baker Mackenzie on behalf of the Committee on 24.04.2017.

[206] Presentation by Jeremy Sharpe, Partner, Shearman & Sterling and former Chief of Investment Arbitration in the Office of the Legal Adviser of the U.S. Department of State at Workshop on Bilateral

1. Dispute management procedures

In order to effectively defend a state in an investment treaty arbitration, standard operating procedures need to be put in place for receipt of notices, requests for arbitration and other documents.[207] An example of this can be seen in the India - Colombia BIT, wherein the Department of Economic Affairs, Ministry of Finance, North Block, New Delhi ("**DEA**") is designated in the BIT itself as the department to which notices for claims or other documents have to be sent.[208]

The Government has now designated the DEA as the single negotiating authority for negotiating both BITs and investment chapters in free trade agreements.[209] The Secretary / Additional Secretary / Joint Secretary, Department of Economic Affairs, Ministry of Finance, Government of India has been made the Designated Representative for the receipt of notices and other documents under the 2015 Model BIT.[210]

The designation of the DEA as the negotiating authority for investment agreements and as the Designated Representative for the receipt of notices and documents in the 2015 Model BIT is laudable.[211] However, many existing BITs do not designate any representative for receipt of notices and documents, potentially leading to confusion and delays.

Another crucial measure is the designation of a single authority to deal with investment arbitrations. There appears to be no coherent strategy adopted for handling the dispute once the DEA has received a notice of dispute under a BIT, nor a lead state agency / nodal agency tasked with dispute management. State practice greatly differs in this area with certain states designating a particular ministry to act as the lead state agency representing the state in investment arbitrations, and others designating inter-governmental / inter-institutional groups.[212]

The advantage of designating a nodal agency that is responsible for handling all investor-related claims under the BIT is that it ensures that: (a) there are no administrative delays; and (b) there is certainty among the investors as to the body that is to be approached in case they have grievances under the BIT. This also becomes important considering that administrative delay is one of the factors taken into consideration by investment arbitration tribunals in judging state conduct and indeed the *bona fides* of the host state.

Investment Treaties — Treatment Standards and Other Issues, organised by the High Level Committee and EBC, on 22.04.2017.

[207] *Id*.

[208] Annex I, Agreement for the Promotion and Protection of Investments between the Republic of Colombia and the Republic of India.

[209] Office Memorandum dated 28.12.2015 annexed to Final approved Model Bilateral Investment Treaty Arbitration, available at http://finmin.nic.in/reports/ModelTextIndia_BIT.pdf (accessed on 19.04.2017).

[210] Article 16.4 read with Article 1.2, 2015 Model BIT.

[211] See Article 16.4 read with Article 1.2, 2015 Model BIT.

[212] *Supra* n. 206.

Therefore, it would be beneficial if the Government designates a body that would be responsible for dispute management and other related claims of investors, in order to ensure that there are no procedural hurdles for the investor or confusion in the Government as to the agency that is to deal with such disputes.

2. Authority

Alongside designation of an appropriate authority or body for procedural formalities in relation to dispute management, it is essential that the body so designated has the requisite legal authority to defend and represent the state, both in terms of legal communications to the investors as well as before the arbitral tribunal. While usually the body so designated would be the same as the body that is responsible for coordinating all operating procedures (referred to above), some states also prefer to establish a group such as a High-Level Government Body (Colombia), an Inter-Institutional Commission (Costa Rica) or a Special Commission (Peru). This body will be responsible for coordinating the state's defence at all stages of the arbitration against the investor.

3. Coordination

Coordination, both at the internal (at national and sub-national levels) and external level (with other state party or parties to the treaty as well as with third states) is necessary for efficient management of disputes.[213] Internal coordination consists of establishing possibly an inter-ministerial group that would coordinate with the nodal dispute management agency in order to ensure that the agency representing the state adequately espouses the state's views on the questions of treaty interpretation before the arbitral tribunal.[214] This group can also ensure that considerations and experiences from previous investment disputes involving the state are taken into consideration while negotiating investment treaties, ensuring that the state's concerns in relation to dispute management are addressed sufficiently. Internal coordination with state government agencies or PSUs is also important in investment arbitration disputes, considering that often claims are made against the host state on the basis of the conduct of certain agencies or PSUs or companies towards the investor. Therefore, it is essential that the group establish appropriate internal coordination with these agencies or state undertakings whose conduct has been alleged by the investor to be in violation of the treaty. Such internal coordination can be both through formal legal channels as in Colombia, or through informal channels as happens in the United States ("**US**") where every time the state is faced with an investment dispute, coordination is done as a matter of practice with all relevant stakeholder agencies.[215]

[213] *Supra* n. 206.
[214] *Supra* n. 206.
[215] *Supra* n. 206.

External coordination involves the nodal agency closely monitoring all existing disputes that arise under the investment agreements to which the state is a party.[216] For BITs, this would mean not only monitoring disputes brought by the investor against the Indian government, but also closely monitoring disputes which Indian investors bring against the other contracting state. This would be necessary to ensure that treaty interpretations espoused by Indian investors do not run contrary to the position adopted by the Indian government itself, keeping in mind the impact of such interpretations on future disputes brought by foreign investors against the Indian government. In case of multilateral investment treaties, this would involve the nodal agency coordinating with both the disputing as well as non-disputing parties to the treaty, keeping in mind that the outcome of any arbitration / other dispute resolution under a multilateral investment treaty would impact all the states that are parties to such treaty.

4. Counsel

One of the most crucial aspects of effective dispute management is ensuring that the interests of the state are adequately represented by legal counsel with expertise in public international law and investment law. There are three models that are prevalent in this regard: (a) using in-house counsel, i.e., government lawyers for defending the state in investment disputes; (b) engaging external lawyers (including foreign lawyers) who are experts in investment arbitration; and (c) adopting a hybrid model consisting of government lawyers assisted by outside counsel.[217] It is said that most states increasingly prefer to adopt the hybrid model.[218] This is because by themselves, government lawyers or domestic lawyers may not have the requisite competence or knowledge to be able to effectively represent the state in investment arbitration disputes. At the same time, when such lawyers work together with foreign counsel who are experts in the field, through the process of interaction, the expertise of domestic counsel in dealing with such disputes is developed. This in turn leads to in-house capacity building, which will be extremely beneficial in the future in managing the state's investment disputes, both in terms of negotiating new treaties as well as representing the state before investment tribunals.

Of late, there has been heightened awareness within the government of the importance of having specialists in investment treaty arbitration on board. The Ministry of Finance has empanelled international and domestic law firms to deal with this area of dispute resolution.[219] This will ensure some consistency in the resolution of disputes arising under investment agreements. However, this alone is not sufficient to address the issues relating to dispute resolution in BIT claims.

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[216] *Supra* n. 206.
[217] *Supra* n. 206.
[218] *Supra* n. 206.
[219] 'Arbitrations under trade pacts: Finance Ministry hiring global law firms to represent India', Indian Express, 02.11.2016, available at http://indianexpress.com/article/business/business-others/arbitrations-under-trade-pacts-finanace-ministry-hiring-global-law-firms-to-represent-india-3732896/ (accessed on 21.04.2017).

The Government should not go for lowest quote on appointing counsel to represent it, but should appoint qualified and reputed counsel in the field of investment treaty arbitration who are not conflicted by the slightest of terms as counsel. The team of counsels should consist of a solicitor firm and lead counsel, with the role of each member of the team clearly specified. Unlike the current scenario where law firms engaged are also doubling up as arguing counsel, the practice should be to have experienced and reputed arguing counsel argue the matter for the Government.

Additionally, there must be targeted capacity building measures within the Government to help in policy formulation, decision-making and timeline management to help the state effectively deal with an investment treaty arbitration. Therefore, it may be worthwhile for the Government to undertake a capacity building exercise, whereby mid-level and senior lawyers who appear for or advise the Government, as well as senior bureaucrats and potential judges, are sent to attend appropriately tailored courses on investment law and investment treaty arbitration. If need be, arbitral institutions which impart relevant education and training may be approached to put together a course, which may be conducted in India.

In order to effectively handle arbitrations, it is equally important to maintain a panel of arbitrators with expertise in investment law and public international law. Party appointed arbitrators are commonplace in investor-state arbitration. It may be desirable for the Government to have a panel of arbitrators whose views on BIT interpretation are either known publicly or who otherwise have an experience of handling investment disputes, to counterbalance pro-investor arbitrators.

5. Funds

The final aspect relevant for effective dispute management is the allocation of funds necessary for defending the state in arbitral proceedings.[220] This fund would essentially have two components to it — the first would be designated for the costs of arbitration that would be needed for contesting the claims before the investment tribunal. This would include the costs of legal representation. The second would be designated for meeting the quantum of any award that is passed against the state in such investment arbitration. In the US, such funds have been established — the International Litigation Fund to cover costs of international investment disputes, and the Judgment Fund to pay claims against the US government.

The creation of a fund for defence of investor-state proceedings similar to the International Litigation Fund maintained by the US needs to be explored, so that the unavailability of funds does not delay investor-state arbitration proceedings. Such a fund can be created for instance, through the Union budget, allocating a particular amount towards investment dispute management through the year. While the fund may initially bear the costs of arbitration

[220] *Supra* n. 206.

proceedings and amounts awarded to the claimant, it may later be allocated to the agency that has triggered the investment dispute.

C. Dispute resolution

1. Dispute resolution procedure under the 2015 Model BIT

Article 15 of the 2015 Model BIT prescribes a multi-tiered dispute resolution procedure providing for exhaustion of local remedies before investor-state arbitration can be invoked. An investor alleging a breach of an obligation is required to first submit his claim before domestic courts or administrative bodies within 1 year from when the investor acquired, or ought to have acquired, knowledge of the breach. The investor is not permitted to assert that the obligation to exhaust local remedies is not applicable, or has been complied with, on the ground that the claim under the BIT is "by a different party or in respect of a different cause of action". The requirement of exhaustion of local remedies may be waived in cases where the investor is able to demonstrate that there are no available local remedies which may give relief to the investor.

The investor is required to exhaust all local remedies for a period of at least 5 years from the date on which he first acquired knowledge of the breach. If a satisfactory resolution is not reached within the 5-year period, then the investor can send a notice of dispute to the host state. Once the notice of dispute is received by the host state, both parties must use best-efforts to resolve the dispute amicably for a period of 6 months, only failing which can the investor submit a claim for arbitration. Additional conditions have to be satisfied at this stage: (a) the claim must be brought within 6 years from the date on which the investor acquired knowledge of the breach; and (b) the claim must be brought within 12 months of the conclusion of domestic proceedings.

Having examined the dispute resolution procedure followed in Article 15, the Committee is of the view that it may be effective in resolution of investment disputes, and therefore no suggestions are made on the dispute resolution procedure in the 2015 Model BIT.

2. Alternatives to investor-state dispute resolution

An issue to be considered is whether India should shift away entirely from investor-state dispute resolution. According to publicly available information, the India-Brazil BIT which is in near-final form does not provide for investor-state arbitration, but instead provides for a tiered dispute resolution procedure, involving an ombudsman, state-state arbitration and dispute prevention procedures.[221]

[221] Nicholas Peacock et al, 'India and Brazil conclude negotiations of Bilateral Investment Treaty', Herbert Smith Freehills Arbitration Notes, 05.12.2016, available at http://hsfnotes.com/arbitration/2016/12/05/india-and-brazil-conclude-negotiations-of-bilateral-investment-treaty/ (accessed on 19.04.2017).

The Government can explore ADR mechanisms that are available under BITs. For instance, state-state arbitration gives states greater control over the arbitral proceedings as compared to investor-state arbitration. The claimant and the respondent are the contracting states instead of investors who are beneficiaries of the BIT. The involvement of both the states directly can allow some room for reciprocity, prevent unnecessary arbitration claims and otherwise provide for greater involvement of states in the dispute resolution process.

3. Appellate mechanisms in BITs

If India decides to continue with investor-state dispute resolution, it may be desirable to incorporate provisions for appellate mechanisms in BITs. One of the common critiques of investor-state arbitration is that arbitral tribunals often rule in favour of the investor, leaving states without recourse to appeal.[222] Additionally, critiques have pointed to problems of inconsistency and unpredictability — decisions of different arbitral tribunals constituted under ad hoc arbitration clauses may differ in similar fact situations, leading to uncertainty regarding the meaning of several public international law rights incorporated in BITs.[223] Incorporating an appellate mechanism may resolve these problems to a large extent. The US has included such appellate mechanisms in its free trade agreements with Singapore, Chile and Morocco, and in its 2004 Model BIT.[224] This is of particular relevance as India continues to be implicated in BIT disputes.

4. Multilateral investment courts

The reform of the investor-state dispute resolution system through alternatives to ad hoc investor-state arbitration is another issue to be considered. The European Union has been working since 2015 on the creation of a multilateral investment court.[225] The proposed multilateral investment court would be a permanent body dealing with investment disputes and provides for both first instance and appellate tribunals, staffed with qualified judges with a fixed tenure.[226] The efficacy of such an investment court may be assessed based on experiences of other countries and a position adopted on the usage of such investment court mechanisms.

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[222] Cherie Blair, 'A global investment court for a changing era of trade', Financial Times, 24.01.2017, available at https://www.ft.com/content/e10e10de-e22e-11e6-9645-c9357a75844a (accessed on 27.04.2017).

[223] Deepu Jojo Sushama, 'Appellate Structure and Need for Legal Certainty in Investment Arbitration', Kluwer Arbitration Blog, 01.05.2014, available at http://kluwerarbitrationblog.com/2014/05/01/appellate-structure-and-need-for-legal-certainty-in-investment-arbitration/ (accessed on 27.04.2017).

[224] Sachet Singh and Sooraj Sharma, 'Investor-State Dispute Settlement Mechanism: The Quest for a Workable Roadmap', Merkourios 29(76) (2013), pp. 88–101.

[225] European Commission, The Multilateral Investment Court project, 21.12.2016, available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608 (accessed on 27.04.2017).

[226] *Id.*

5. The mediation option in investment treaty arbitration

The present process of investment treaty arbitration places emphasis on parties' legal rights and entitlements. Awards are focused on dispute resolution through the interpretive process, based on legal rights,[227] whereas the parties' extra-legal interests may be even more important and helpful in fashioning a resolution.[228] There is a view that dispute resolution pursued through investor-state arbitration would lose on elements of parties' helpful socio-cultural characteristics and mutual interests which may potentially salvage or sustain troubled business relationships. In this context, significant observations have been made by Grant Kesler (CEO of Metalclad), after his company won a 17-million-dollar arbitral award against Mexico. In retrospect, and despite being victorious, Kesler said that arbitration was so dissatisfying that he wished his company had relied upon its 'political options' to resolve the dispute.[229] Such views suggest that losing parties, and some of those who have won, may seek a process with fewer transaction costs that allows them to explore problem-solving options rather than outcomes through formalized legal procedures and processes.

Recognizing this, some international legal scholars have advocated procedures and systems that potentially could minimize investor-state disputes, or once they have arisen, channelise them to processes and platforms which focus and highlight communication and the shaping of consensual solutions. Such forums include mandatory negotiation, conciliation, ombudspersons, and mediation. Some states have begun to put such procedures into place, generally focusing on those that require communication before the submission of a dispute to arbitration and thus fostering early information exchange and negotiations.[230] States as well as investors, scholars and international bodies have started developing principles and norms encouraging use of

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[227] Mark A. Clodfelter, 'Why Aren't More Investor-State Treaty Disputes Settled Amicably?' in Mandatory Mediation and Its Variations and Dispute System Design in Investor-State Arbitration, in Investor State Disputes: Prevention and Alternatives to Arbitration II (Susan Franck and Anna Joubin-Bret, eds., 2011), pp. 38–42.

[228] See Jennifer Gerarda Brown, 'Peacemaking in the Culture War Between Gay Rights and Religious Liberty', 95 Iowa Law Review (2010) at p. 747 where she suggests that mediation is the most "appropriate to craft customized implementation of judicially-determined legal entitlements."

[229] See Susan D. Franck, 'Integrating Investment Treaty Conflict and Dispute Systems Design', 92 Minnesota Law Review 161, n. 266 (2007); see Jack J. Coe, Jr., 'Toward A Complementary Use of Conciliation in Investor-State Disputes—A Preliminary Sketch', 12 U.C. Davis Journal of International Law and Policy 7 (2005), pp. 8–9; Jeswald W. Salacuse, 'Is There A Better Way? Alternative Methods of Treaty Based Investor-State Dispute Resolution', 31 Fordham International Law Journal 138 (2007) at p. 147.

[230] United Nations Conference on Trade and Development, UNCTAD Series on International Investment Policies for Development, Investor-State Disputes: Prevention and Alternatives to Arbitration, U.N. Doc. UNCTAD/DIAE/IA/2009/11 (Aug. 1, 2010), available at http://www.unctad.org/en/docs/diaeia200911_en.pdf (accessed on 18.05.2017).

mediation.[231] A few even propose that mediation should not be merely encouraged, but mandated, to a significant extent.[232]

The mediation option does not have all round acceptance. Skeptics question the efficacy and feasibility of such processes when parties' efforts at resolution through mutually agreed negotiated processes fail; others steadfastly hold that the politico-legal nature of the investor-state arbitration process lends greater legitimacy to the participants and results in enduring principle-based decisions.[233]

(a) The advantages of mediation in investor-state disputes

Mediation enlists outside assistance even as parties control the outcomes of the dispute; the involvement of a neutral third party has a disruptive effect on the bilateral negotiation process. It enables parties to go beyond the barriers which hinder agreement. Mediators are able to achieve this by creating an overall atmosphere conducive to information sharing, confidence building and cooperation. The language of the mediator is neutral and helps to identify and reframe vital questions that are in dispute. Mediation introduces effective procedures to generate and evaluate options for settlement.[234] Mediators can employ advanced knowledge of negotiation and communications theory to counter or defuse 'hardball' tactics, deception, power imbalances between the parties, or a genuine impasse in the negotiations. It would be stereotypical to assume that parties to investor-state disputes are any less exposed to such obstacles than others.

Another advantage of mediation is its cost-effectiveness. Investor-state arbitrations are much more expensive — some disputes last for years resulting in costs spiralling to millions in legal fees. Delayed resolution of such disputes has significant negative impact, such as detracting potential investors even while straining the relationship between parties. Mediation is less time consuming and entails lower costs. As mediation can result in the preservation or even strengthening of relationship between the parties, the process is especially beneficial. In the context of investment in public utilities, the business relationship between the investor and the

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[231] *Id*; See the International Bar Association website for information on its Mediation Committee, available at http://www.ibanet.org/LPD/Dispute_Resolution_Section/Mediation/Default.aspx (accessed on 18.05.2017).

[232] Nancy A. Welsh, 'The Place of Court-Connected Mediation in a Democratic Justice System', 5 Cardozo Journal of Conflict Resolution 117 (2004); see Bobbi McAdoo & Nancy A. Welsh, 'Look Before You Leap and Keep On Looking: Lessons from the Institutionalization of Court-Connected Mediation', 5 Nevada Law Journal 399 (2005).

[233] *Supra* n. 231, W. Michael Reisman, 'International Investment Arbitration and ADR: Married but Best Living Apart', in Investor-State Disputes: Prevention and Alternatives to Arbitration II, 22–7, U.N. Doc. UNCTAD/WEB/DIAE/ IA/2010/8 (Mar. 29, 2010), available at http://www.unctad.org/en/docs/webdiaeia20108_en.pdf (accessed on 18.05.2017); also see Lucy Reed, Synopsis of Closing Remarks, in Investor State Disputes: Prevention and Alternatives to Arbitration II (Susan Franck and Anna Joubin-Bret, eds., 2011).

[234] Christopher W. Moore, The Mediation Process (3rd ed., 2003) at pp. 211–294.

host state is symbiotic and near permanent. Debilitating and adversarial arbitration can threaten or damage working relationships between parties and officials whose cooperation is vital to accomplishing the investor's goals in the host country.[235] States too can be in a position to preserve long-term relationships to the extent that they rely on foreign investment for economic development.

Further, the mediation process mandates confidentiality. In contrast, states who are parties to investor arbitration, would be subject to demands for public information. Though in arbitral proceedings awards cannot be published without the consent of the parties, the submissions and awards are sometimes made public as a concession to calls for transparency. Even where arbitral tribunals are constrained in disclosing information related to the case, there is no general duty of confidentiality relating to arbitral proceedings and the scope of any such duty is at the discretion of the tribunal.[236] In the context of investor-state arbitration, confidentiality during mediation enables parties to better manage the timing of unavoidable disclosures, some of which might draw public or political backlash.

(b) Introducing a mediation clause

The most direct method of including mediation into investor-state dispute resolution is to write it into BITs. This change could be a simple one, mentioning the possibility of mediation in the context of the cooling-off period, or one creating a system of compulsory mediation. Professors Nancy Welsh and Andrea Schneider, for instance, have suggested that the dispute resolution clauses of international investment treaties be rewritten to include a default mediation option analogous to court-connected mediation.[237] Before initiating arbitration, parties should try a good-faith attempt at mediation or to meet to discuss the possibility of mediation. This would increase the use of mediation and can result in increased voluntary settlements made outside the arbitral process.

Implementing such changes may be possible through renegotiation of existing treaties at a bilateral or multilateral level. More effectively, treaties negotiated based on the 2015 Model BIT may incorporate a mandatory proposal to mediate the dispute. Such mediation may be at an early stage of the dispute, preferably before positions harden and a request for arbitration is triggered through notice. It may also be after receiving the notice requesting arbitration; the state can propose arbitration through a third party neutral in whom both parties have confidence. An outer time limit to strive for settlement may be mutually agreed to by the parties, at the stage of agreeing to mediation.

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[235] *Supra* n. 228.

[236] Cindy G. Buys, 'The Tensions Between Confidentiality and Transparency in International Arbitration', 14 American Review of International Arbitration 121 (2003) at pp. 133–34.

[237] Nancy A. Welsh & Andrea Kupfer Schneider, 'The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration', 18 Harvard Negotiation Law Review 71 (2013).

D. Dispute prevention strategies

As India signs more BITs and other investment agreements, there is an increased likelihood of claims arising under such investment agreements. They often assail policies which form the core of the state's regulatory powers and involve claims for substantial money damages.[238] The only deterrent for an investor is the high costs involved in invoking the dispute resolution mechanism in the first place.[239] From a state's perspective, defending investment arbitrations can be very expensive. Therefore, it is in the interest of the state that dispute prevention strategies are adopted to prevent disputes from arising or to prevent disputes from escalating to formal dispute resolution proceedings.[240]

Some states, like Peru, Costa Rica and Colombia, have created formal institutional set ups for dispute prevention and for coordinating the state's response to investment treaty claims.[241] Moreover, some states have also introduced measures for dissemination of information and training on obligations and commitments arising under investment agreements amongst various branches of government (executive, legislative and judiciary) and all levels of government (federal, regional and local).[242] For instance, the Department of Foreign Affairs and International Trade of the Government of Canada has issued a pocket guide for Canadian municipalities providing information on Canada's trade agreements and giving guidance for assessing how provisions in such agreements may affect municipal activities. Given that many decisions taken by the central and state governments may affect investment treaty commitments, it is important that India devote resources to ensure the dissemination of information and training to officials making such decisions.

The use of joint interpretative statements may also be encouraged as a dispute prevention tool. Joint interpretative statements are useful tools in clarifying and limiting the meaning of vague provisions, thereby promoting a clearer understanding of investor rights and reducing discretion vested with arbitral tribunals.[243] It may be noted that the 2015 Model BIT recognizes joint interpretative statements as binding on arbitral tribunals.[244] Further, the Government has initiated the process of signing joint interpretative statements with 25 countries with whom the initial

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[238] *Supra* n. 206.
[239] Presentation by Anirudh Krishnan, Partner, AK Law Chambers, at Workshop on Bilateral Investment Treaties — Treatment Standards and Other Issues, organised by the High Level Committee and EBC on 22.04.2017.
[240] *Id.*
[241] *Supra* n. 202.
[242] *Supra* n. 202.
[243] Geoffrey Gertz and Taylor St. John, 'State interpretations of investment treaties: Feasible strategies for developing countries', Blavatnik School of Government Policy Brief, (2015), available at http://www.geg.ox.ac.uk/sites/geg/files/GEG%20Gertz%20and%20St%20John%20June2015_A.pdf (accessed on 27.04.2017).
[244] Article 24, 2015 Model BIT.

duration of BITs entered into is not over.[245] At the same time, the Government should be mindful of the timing of the joint interpretative statement. While joint interpretative statements can be issued at any time, before or after a dispute has arisen under a BIT, it might be prudent to issue such interpretative statements prior to the initiation of the arbitral process.

It is possible that several contracting states may not agree to issue a joint interpretative statement. In such a scenario, the Government can issue unilateral statements of interpretation and make them public. The unilateral statements can be uploaded on the relevant website(s) of the Government. These statements can constitute relevant documents that the arbitral tribunals will need to take into account while adjudicating a dispute and interpreting the treaty. At the same time, India will need to be sufficiently aware if other states have issued similar unilateral declarations.

E. Recommendations

1. The DEA may be appointed as the Designated Representative of the Government in existing BITs by annexing an Additional Protocol to such BITs / issuing a unilateral interpretative statement which clearly mentions that the DEA is the authority for the receipt of notices and other documents under such BITs.

2. The Government may create the post of an International Law Adviser ("**ILA**") who shall advise the Government and coordinate dispute resolution strategy for the Government in disputes arising out of its international law obligations, particularly disputes arising out of BITs. The ILA may be appointed / designated by the Government in consultation with the Attorney General for India. The ILA should have the rank of an Additional Solicitor General and should possess substantial knowledge and expertise in international law. The ILA may be assisted by a team of lawyers with knowledge and expertise in international law and investment law.

3. The ILA may maintain a panel of Indian and overseas lawyers / law firms with experience in investment treaty arbitrations who may be engaged to represent the Government in BIT arbitrations. Counsel may be engaged on the basis of their expertise and experience in handling investment treaty disputes and their reputation / standing, rather than on the basis of a low fee quote.

4. The ILA may maintain a database of arbitrators with expertise in investment law and arbitration, from which arbitrators may be nominated by the Government once BIT arbitration proceedings are initiated.

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[245] Office Memorandum dated 08.02.2016 regarding Issuing Joint Interpretative Statements for Indian Bilateral Investment Treaties, available at http://indiainbusiness.nic.in/newdesign/upload/Consolidated_Interpretive-Statement.pdf (accessed on 27.04.2017).

5. The ILA may be consulted by the DEA at the time of negotiating and entering into BITs.

6. A 5-member permanent Inter-Ministerial Committee ("**IMC**") may be set up in order to ensure effective management of disputes arising out of BITs entered into by the Government. The IMC may consist of 1 member each from Ministries of Finance, External Affairs, and Law and Justice, not below the rank of Joint Secretary or equivalent. The ILA shall be the member-secretary of the IMC. A representative of the concerned ministry / department / state government ministry or department whose action / decision is challenged by the investor, not below the rank of Joint Secretary (in case of Central Government ministries / departments) or Principal Secretary (in case of state government ministries / departments) or their respective equivalent, may be the fifth member of the IMC.

7. Once a notice of claim is received under a BIT, the DEA shall communicate the receipt of such notice to the ILA as well as the concerned ministry / department / state government ministry or department that has triggered the dispute.

8. Upon receipt of the notice, the ILA shall promptly convene a meeting(s) of the IMC to formulate the strategy to be adopted in defending the Government, appoint its counsel and make preparations for the defence. The IMC may be responsible for ensuring that adequate funds are available to the ILA to coordinate the defence and appoint lawyers. The ILA shall be responsible for day-to-day management of the dispute and may coordinate with the IMC to take decisions.

9. The Government should look at building in-house expertise in investment law and investment treaty arbitrations by hiring consultants or lawyers who have prior work experience and knowledge about the subject in an advisory role, without limiting it to bureaucrats who might not have the requisite capacity to handle such complex issues.

10. The Government may consider creating a separate fund under the control of the Ministry of Finance for defending investment treaty claims and making any payments required under an investment treaty award made against the Union of India. Allocations may be made in the Union Budget to this fund. While the fund may initially bear the costs of arbitration proceedings and amounts awarded to the claimant, it may later be allocated to the ministry / department that has triggered the investment dispute.

11. While negotiating future BITs, the Government may consider alternatives to investor-state arbitration such as state-state arbitration, mediation as a precursor to BIT arbitration etc. The incorporation of appellate mechanisms for dispute resolution in BITs may also be considered.

12. In order to prevent disputes under BITs from arising, the DEA may be made responsible for: (a) liaising with foreign investors to identify areas where disputes may arise and attempt to resolve problems; (b) engaging with state governments and various branches of the Government to examine the possible BIT implications of policy decisions; and (c) providing information and training to government officials to foster greater understanding of how policy decisions can affect India's investment treaty commitments.

ANNEXURE 1: TERMS OF REFERENCE

The terms of reference for the High Level Committee are as under:

(i) To analyze & review effectiveness of present arbitration mechanism

(ii) To review the facilities, resources, funding and manpower of existing ADR institutions.

(iii) To review working of the institutions funded by the Government of India for arbitration purposes.

(iv) To assess skill gaps in ADR and allied institutions for both national and international arbitration.

(v) To evaluate information outreach and efficacy of existing legal framework for arbitration.

(vi) Based on the foregoing, to

(a) Suggest measures for institutionalization of arbitration mechanism, national and international, in India so as to make the country a hub of international commercial arbitration.

(b) Identify amendments in other laws that are needed to encourage International Commercial Arbitration (ICA).

(c) Devise an action plan for implementation of the law to ensure speedier arbitrations.

(d) Recommend revision in institutional rules & regulations and funding support thereof.

(e) Advise empanelment of national and international arbitrators for time bound arbitral proceedings.

(f) Suggest road map for further strengthening of research and development impacting the domain.

(g) Enlist requisite steps for augmenting skill sets and professional manpower buildup for the sector.

(h) Recommend measures to make arbitration more widely available in curricula and study materials.

(i) Focus on the role of arbitrations in matters involving the Union of India, including bilateral investment treaties (BIT) arbitrations and make recommendations where necessary.

(j) Evolving an efficient arbitration ecosystem for expeditious resolution of International and Domestic Commercial disputes.

ANNEXURE 2: MODEL ARBITRATION RULES

Section I. Introductory Rules

Article 1: Scope of application

1. Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration, then such disputes shall be settled in accordance with these Rules in the absence of any agreement to the contrary.

2. These Rules shall apply to arbitrations commenced after [*insert date*].

3. Where these Rules are in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate or with a provision of the arbitration agreement, then that provision shall prevail.

4. Insofar as these Rules are silent on any matter concerning the arbitral proceedings and the parties have not agreed otherwise, the arbitral tribunal shall conduct the arbitral proceedings in the manner it considers appropriate, in accordance with the general principles of these Rules.

5. In the event of any dispute regarding the meaning of these Rules, the arbitral tribunal shall interpret them according to their purpose and in the manner most appropriate for the particular arbitration.

Article 2: Means of giving notice and calculations of periods of time

1. A notice including a notification, communication or proposal, may be transmitted by any means of communication that provides or allows for a record of its transmission.

2. A notice transmitted by electronic means is deemed to have been received on the day it is delivered, and such time shall be determined in accordance with the addressee's time zone.

3. For the purpose of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice is deemed to have been received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

Article 3: Notice of arbitration

1. The party or parties initiating recourse to arbitration in respect of a particular dispute (the "claimant") shall communicate to the other party or parties (the "respondent") a request for the dispute to be referred to arbitration (the "notice of arbitration").

2. The notice of arbitration shall include the following:
   (a) A demand that the dispute be referred to arbitration;
   (b) The names and contact details of the parties and their designated representatives, if any;
   (c) Identification of the arbitration agreement that is invoked;
   (d) Identification of any contract or other legal instrument out of or in relation to which the dispute arises or, in the absence of such contract or instrument, a brief description of the relevant relationship;
   (e) A brief description of the claim and an indication of the amount involved, if any;
   (f) A broad description of the relief or remedy sought; and
   (g) A proposal as to the number of arbitrators, language and place of arbitration, if the parties have not previously agreed thereon.

3. Subject to any agreement of the parties, the notice of arbitration may also include:
   (a) A proposal for the designation of an appointing authority or institution;
   (b) A proposal for the appointment of a sole arbitrator; or
   (c) Notification of the appointment of an arbitrator.

4. The constitution of the arbitral tribunal shall not be hindered by any controversy with respect to the sufficiency of the notice of arbitration, which shall be finally resolved by the arbitral tribunal.

Article 4: Response to the notice of arbitration

1. Within 30 days of the receipt of the notice of arbitration, the respondent shall communicate to the claimant a response to the notice of arbitration, which shall include:
   (a) The name and contact details of each respondent and their designated representatives, if any; and
   (b) A response to the information set forth in the notice of arbitration, pursuant to Article 3, paragraphs 2 (c) to (g).

2. The response to the notice of arbitration may also include:
   (a) Any plea that an arbitral tribunal to be constituted under these Rules lacks jurisdiction;
   (b) A proposal for the designation of an institution or appointing authority;
   (c) A proposal for the appointment of a sole arbitrator;
   (d) Notification of the appointment of an arbitrator;

(e) A brief description of counterclaims or claims for the purpose of a set-off, if any, including where relevant, an indication of the amounts involved, and the relief or remedy sought; and

(f) A notice of arbitration in accordance with Article 3 in case the respondent formulates a claim against a party to the arbitration agreement other than the claimant.

3. The constitution of the arbitral tribunal shall not be hindered by any controversy with respect to the respondent's failure to communicate a response to the notice of arbitration, or an incomplete or late response to the notice of arbitration, which shall be finally resolved by the arbitral tribunal.

4. A notice of arbitration need not be provided for a counterclaim.

Article 5: Reply to counterclaim raised in response to notice of arbitration

The claimant shall submit a reply to any counterclaim within 30 days from the date of receipt of the counterclaim.

Section II. Arbitral proceedings

Article 6: Conduct of proceedings

The arbitral tribunal shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.

Article 7: Case management conference and arbitration timetable

1. As soon as practicable after its constitution, the arbitral tribunal shall convene a case management conference to consult the parties on procedural measures that may be adopted.

2. During or following such conference, the arbitral tribunal shall establish the procedural timetable of the arbitration (the "arbitration timetable") in accordance with the Act and these Rules. The arbitral tribunal may, at any time, after inviting the parties to express their views, extend or abridge any period of time prescribed under these Rules or agreed by the parties for reasons to be recorded in writing.

3. To ensure continued effective case management, the arbitral tribunal, after consulting the parties by means of a further case management conference or otherwise, may adopt further procedural measures or modify the arbitration timetable.

4. Case management conferences may be conducted through a meeting in person, by video conference, telephone or similar means of communication. In the absence of an agreement of the parties, the arbitral tribunal shall determine the means by which the

conference will be conducted. The arbitral tribunal may request the parties to submit case management proposals in advance of a case management conference and may request the attendance at any case management conference of the parties in person or through an internal representative.

Article 8: Communication

All communications to the arbitral tribunal by one party shall be simultaneously communicated by that party to all other parties and it shall confirm in writing to the arbitral tribunal that it has done so or is doing so.

Article 9: Joinder of Parties

1. The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration.

2. The request for joinder shall contain the following information:
   (a) The reference of the existing arbitration;
   (b) The names and contact details of each of the parties, including the additional party, and their designated representatives, if any; and
   (c) The information set forth in the notice of arbitration, pursuant to Article 3, paragraphs 2 (c) to (g).

Article 10: Statement of claim

1. The claimant shall communicate its statement of claim in writing to the respondent and to each of the arbitrators within a period of 30 days from constitution of the arbitral tribunal or in accordance with the arbitration timetable. The claimant may elect to treat its notice of arbitration as a statement of claim, provided that the notice of arbitration also complies with the requirements of this Article.

2. The statement of claim shall include the following particulars:
   (a) The names and contact details of the parties;
   (b) A statement of the facts supporting the claim;
   (c) The points at issue;
   (d) The relief or remedy sought; and
   (e) The legal grounds or arguments supporting the claim.

3. A copy of any contract or other legal instrument out of or in relation to which the dispute arises and of the arbitration agreement shall be annexed to the statement of claim.

4. The statement of claim should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them.

Article 11: Statement of defence

1. The respondent shall communicate its statement of defence in writing to the claimant and to each of the arbitrators within a period of 45 days from receipt of the statement of claim by the arbitral tribunal. The respondent may elect to treat its response to the notice of arbitration referred to in Article 4 as a statement of defence, provided that the response to the notice of arbitration also complies with the requirements of paragraph 2 of this Article.

2. The statement of defence shall reply to the particulars (b) to (e) of the statement of claim (Article 10, paragraph 2). The statement of defence should, as far as possible, be accompanied by all documents and other evidence relied upon by the respondent, or contain references to them.

3. In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counterclaim or rely on a claim for the purpose of a set-off provided that the arbitral tribunal has jurisdiction over it.

4. The provisions of Article 10, paragraphs 2 to 4, shall apply to a counterclaim, a claim under Article 4, paragraph 2 (f), and a claim relied on for the purpose of a set-off.

Article 12: Further written statements

The arbitral tribunal shall decide which further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements.

Article 13: Amendments to the claims or defence

During the course of the arbitral proceedings, a party may, on application, amend or supplement its claim or defence, including a counterclaim or a claim for the purpose of a set-off, unless the arbitral tribunal considers it inappropriate to allow such amendment or supplement having regard to the delay in making it or prejudice to other parties or any other circumstances. However, a claim or defence, including a counterclaim or a claim for the purpose of a set-off, may not be amended or supplemented in such a manner that the amended or supplemented claim or defence falls outside the jurisdiction of the arbitral tribunal. The arbitral tribunal shall record in writing the reasons for permitting amendment or supplementation of any written statements.

Article 14: Interim measures

1. The arbitral tribunal may, at the request of the parties, grant interim measures, as provided for in Section 17 of the Act.

2. The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

3. The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

4. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the interim measure was requested or granted.

5. The party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in the circumstances then prevailing, the measure should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

6. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

Article 15: Hearings and closure

1. The arbitral tribunal shall, if any party so requests or if it so decides, have evidentiary hearings and hear oral submissions (preceded by opening written submissions and followed by closing written submissions, if necessary).

2. At the end of evidentiary hearings and/or as the case may be, oral submissions, the arbitral tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed.

3. The arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own initiative or upon application of a party, to reopen the hearings at any time before the award is made.

Section III. Taking of evidence and witnesses

Article 16: Consultation on evidentiary issues

1. Each party shall have the burden of proving the facts relied on to support its claim or defence.

2. The arbitral tribunal shall consult the parties at the earliest appropriate time in the arbitral proceedings and invite them to consult each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence.

3. The consultation on evidentiary issues may address the scope, timing and manner of the taking of evidence, including:

   (a) the preparation and submission of witness statements and expert reports;
   (b) the taking of oral testimony at any evidentiary hearing;
   (c) the requirements, procedure and format applicable to the production of documents;
   (d) the level of confidentiality protection to be afforded to evidence in the arbitration; and
   (e) the promotion of efficiency, economy and conservation of resources in connection with the taking of evidence.

4. The arbitral tribunal is encouraged to identify to the parties, as soon as it considers it to be appropriate, any issues:

   (a) that the arbitral tribunal may regard as relevant to the case and material to its outcome; and / or
   (b) for which a preliminary determination may be appropriate.

Article 17: Documents

1. Within the time ordered by the arbitral tribunal, each party shall submit to the arbitral tribunal and to the other parties all documents available to it on which it relies, including public documents and those in the public domain, except for any documents that have already been submitted by another party.

2. Within the time ordered by the arbitral tribunal, any party may submit to the arbitral tribunal and to the other parties a written request that another party produce documents (a "request to produce").

3. A request to produce shall contain:

   (a) (i) a description of each requested document sufficient to identify it, or

   (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist; in the case of documents maintained in electronic form, the requesting party may, or the arbitral tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such documents in an efficient and economical manner;

(b) a statement as to how the documents requested are relevant to the case and material to its outcome; and

(c) (i) a statement that the documents requested are not in the possession, custody or control of the requesting party or a statement of the reasons why it would be unreasonably burdensome for the requesting party to produce such documents, and

(ii) a statement of the reasons why the requesting party assumes the documents requested are in the possession, custody or control of another party.

4. Within the time ordered by the arbitral tribunal, the party to whom the request to produce is addressed shall produce to the other parties and, if the arbitral tribunal so orders, to it, all the documents requested in its possession, custody or control as to which it makes no objection.

5. If the party to whom the request to produce is addressed has an objection to some or all of the documents requested, it shall state the objection in writing to the arbitral tribunal and the other parties within the time ordered by the arbitral tribunal.

6. Upon receipt of any such objection, the arbitral tribunal may invite the relevant parties to consult with each other with a view to resolving the objection.

7. Either party may, within the time ordered by the arbitral tribunal, request the arbitral tribunal to rule on the objection. The arbitral tribunal shall then, in consultation with the parties and in timely fashion, consider the request to produce and the objection. The arbitral tribunal may order the party to whom such request is addressed to produce any requested document in its possession, custody or control. Any such document shall be produced to the other parties and, if the arbitral tribunal so orders, to it.

8. If a party wishes to obtain the production of documents from a person or organisation who is not a party to the arbitration and from whom the party cannot obtain the documents on its own, the party may, within the time ordered by the arbitral tribunal, ask it to take whatever steps are legally available to obtain the requested Documents, or seek leave from the arbitral tribunal to take such steps itself. The arbitral tribunal shall decide on this request and shall take, authorize the requesting party to take, or order any other party to take, such steps as the arbitral tribunal considers appropriate.

Article 18: Witnesses of fact

1. Within the time ordered by the arbitral tribunal, each party shall identify the witnesses on whose testimony it intends to rely and the subject matter of that testimony.

2. Any person may present evidence as a witness, including a party or a party's officer, employee or other representative.

3. The arbitral tribunal may order each party to submit within a specified time to the arbitral tribunal and to the other parties witness statements by each witness on whose testimony it intends to rely.

4. Each witness statement shall contain:

   (a) the full name and address of the witness, a statement regarding his or her present and past relationship (if any) with any of the parties, and a description of his or her background, qualifications, training and experience, if such a description may be relevant to the dispute or to the contents of the statement;
   (b) a full and detailed description of the facts, and the source of the witness's information as to those facts, sufficient to serve as that witness's evidence in the matter in dispute. Documents on which the witness relies that have not already been submitted shall be provided;
   (c) a statement as to the language in which the witness statement was originally prepared and the language in which the witness anticipates giving testimony at the evidentiary hearing;
   (d) an affirmation of the truth of the witness statement; and
   (e) the signature of the witness and its date and place.

5. Any party may, with the prior approval of the arbitral tribunal. submit to the arbitral tribunal and to the other parties revised or additional witness statements, including statements from persons not previously named as witnesses.

6. If a witness whose appearance has been requested pursuant to Article 20.2 fails without a valid reason to appear for testimony at an evidentiary hearing, the arbitral tribunal shall disregard any witness statement related to that evidentiary hearing by that witness unless, in exceptional circumstances, the arbitral tribunal decides otherwise.

7. If a party wishes to present evidence from a person who will not appear voluntarily at its request, the party may, within the time ordered by the arbitral tribunal, ask it to take whatever steps are legally available to obtain the testimony of that person, or seek leave from the arbitral tribunal to take such steps itself. The arbitral tribunal shall decide on this request and shall take, authorize the requesting party to take or order any other party to take, such steps as the arbitral tribunal considers appropriate.

Article 19: Party-appointed experts

1. A party may rely on an expert appointed by it (a "party-appointed expert") as a means of evidence on specific issues. Within the time ordered by the arbitral tribunal, (i) each party shall identify any party-appointed expert on whose testimony it intends to rely and the subject-matter of such testimony; and (ii) the party-appointed expert shall submit an expert report.

2. Any party may, with the prior approval of the arbitral tribunal, submit to the arbitral tribunal and to the other parties revised or additional expert reports, including reports or statements from persons not previously identified as party-appointed experts.

3. If a party-appointed expert whose appearance has been requested pursuant to article 20.2 fails without a valid reason to appear for testimony at an evidentiary hearing, the arbitral tribunal shall disregard any expert report by that party-appointed expert related to that evidentiary hearing unless, in exceptional circumstances, the arbitral tribunal decides otherwise.

Article 20: Evidentiary hearing

1. 'Evidentiary hearing' means any hearing, whether or not held on consecutive days, at which the arbitral tribunal, whether in person, by teleconference, videoconference or other method, receives oral or other evidence.

2. Within the time ordered by the arbitral tribunal, each party shall inform the arbitral tribunal and the other parties of the witnesses whose appearance it requests. Each witness shall appear for testimony at the evidentiary hearing if such person's appearance has been requested by any party or by the arbitral tribunal.

3. The arbitral tribunal may request any person to give oral or written evidence on any issue that the arbitral tribunal considers to be relevant to the case and material to its outcome. Any witness called and questioned by the arbitral tribunal may also be questioned by the parties.

ANNEXURE 3: QUESTIONNAIRE FOR ARBITRAL INSTITUTIONS IN INDIA

Thank you for taking the time to respond to this questionnaire.

This questionnaire has been sent to you by the High Level Committee constituted by the Ministry of Law and Justice, Government of India to review the institutionalisation of arbitration mechanisms in India.

The purpose of this questionnaire is to gather information about the working of arbitral institutions in India with a view to suggest measures to promote the growth of institutional arbitration in India.

Your responses will be kept confidential and will only be used to generate anonymous and aggregated data for analysis.

Please print this form in hard copy, complete it and then scan and email the completed form to hlcarbitration@gmail.com by **7 April 2017**. Please feel free to use additional sheets or provide attachments, wherever necessary or relevant.

Name of the arbitral institution:

_____

A. Organisational structure

a. Year of establishment

_____

b. What is the juristic character (i.e., society, trust etc.) of your institution?

_____

c. Please describe briefly the organisational structure of your institution (members, their tenure, manner of selection and tenure restrictions, if any).

_____

_____

_____

B. Arbitration rules

a. What rules do you follow in administering arbitrations? Please provide a copy of the rules followed by your institution.

_____

b. Do you have any mechanism for (i) review, and (ii) providing feedback on your arbitration rules? If so, please elaborate.

i.	Review	Yes	No
ii.	Feedback	Yes	No

_____

_____

_____

c. How often are your arbitration rules updated?

_____

d. Do your arbitration rules provide for any of the following:

i. e-filing

Yes No

ii. e-discovery

Yes No

iii. multi-party and multi-contract arbitrations

Yes No

iv. joinder of additional parties to an arbitration

Yes No

v. consolidation of arbitrations

Yes No

vi. emergency arbitrators

Yes No

C. Caseload

a. What is the total number of references that you have received from inception till

date?

_____

b. How many new references did you receive in 2016?

_____

c. As of 28 February 2017, what is the active caseload of your institution? By active caseload, we refer to the number of cases in which pleadings / evidence has been filed in the past year or hearings, excluding adjournment hearings, have taken place in the past year.

_____

d. What is the total number of awards rendered by your institution since inception?

_____

D. Infrastructure and secretarial assistance

a. Please provide a general description of the facilities provided by your institution for conducting arbitration proceedings.

_____

_____

_____

_____

b. If parties wish to resort to mediation or conciliation during the course of arbitration proceedings, do you provide these services? If yes, how often are these services used?

Yes No

_____

E. Fees

a. Please provide a brief description of (i) the fees charged by your institution for the administration of an arbitration, (ii) the basis for the same, and (iii) a breakdown of its components.

_____

_____

b. How are the fees payable to the arbitral tribunal determined? For example, *ad valorem*, hourly rate etc.

_____

_____

_____

c. Is there any cap on the fees payable to an arbitrator? If yes, what is the cap?

Yes No

_____

F. Panel of arbitrators

a. Do you maintain a panel / database of arbitrators?

Yes No

b. What is the composition of the panel of arbitrators?

_____

_____

c. Please explain the criteria for inclusion as an arbitrator on your panel.

_____

_____

_____

G. Appointment of arbitrators

a. What is the process that you follow for the appointment of arbitrators?

_____

_____

_____

b. Have you acted as an appointing authority for arbitrators in any ad hoc arbitrations? If yes, how many such appointments have you made till date?

Yes No

_____

c. Is there a mechanism in place for providing feedback on appointment of arbitrators and the performance of arbitrators?

Yes No

H. Timelines

a. Does your institution provide for standard timelines for different stages of an arbitration proceeding? If yes, please elaborate.

_____

_____

_____

b. Do you provide for any expedited procedure for conducting an arbitration?

Yes No

c. What is the average time taken for an arbitration administered by you to be completed, starting from the date on which a request for arbitration is received to the date on which the award is made? Please provide relevant statistics to support your response.

_____

d. What is the average time taken for an award to be rendered once the hearings are

completed? Please provide relevant statistics to support your response.

_____

e. What procedure do you follow for monitoring the progress of an arbitration and ensuring adherence to timelines?

_____

_____

_____

f. Do you impose penalties for delays in the making of awards? If yes, please elaborate.

Yes No

_____

_____

I. Scrutiny of awards

a. Are draft awards scrutinized before the final award is rendered? If yes, please elaborate on the procedure for the same.

Yes No

_____

_____

_____

b. If your answer to (a) above is yes, is there a time limit within which draft awards are scrutinised? Please specify the same.

Yes No

_____

c. How many awards rendered in arbitrations administered by your institution have been challenged to date?

_____

d. Do you monitor the progress of such challenge proceedings?

Yes No

J. Comments

a. Any other comments?

_____

_____

_____

ANNEXURE 4: QUESTIONNAIRE FOR PARTIES / IN-HOUSE COUNSEL, LAWYERS AND ARBITRATORS

Thank you for taking the time to respond to this questionnaire.

This questionnaire has been sent to you by the High Level Committee constituted by the Ministry of Law and Justice, Government of India to review the institutionalisation of arbitration mechanisms in India.

The purpose of this questionnaire is to gather information about (a) preferences amongst various stakeholders between ad hoc and institutional arbitration; and (b) their assessment of the working of Indian and foreign arbitral institutions, with a view to suggest measures to promote the growth of institutional arbitration in India.

Your responses will be kept confidential and will only be used to generate anonymous and aggregated data for analysis.

Please print this form in hard copy, complete it and then scan and email the completed form to hlcarbitration@gmail.com by **7 April 2017**. Please feel free to use additional sheets or provide attachments, wherever necessary or relevant.

Role: Party / party's in-house counsel Lawyer Arbitrator

A. Introductory questions

1. If you are an arbitrator, what percentage of your work time do you devote to practice as an arbitrator?
   0 - 25% 25 - 50% 50 - 75% 75 - 100%

   _____

   If you are an arbitrator, please proceed to question 4. Otherwise, please proceed to question 2.

2. Please rank the following dispute resolution mechanisms in order of preference, with 1 being most preferred and 4 being least preferred.

   a. domestic disputes

      Litigation ____ Arbitration ____ Mediation ____ Expert determination ____

   b. cross-border disputes
      Litigation ____ Arbitration ____ Mediation ____ Expert determination ____

3. Have you had any previous involvement in any arbitration?

   Yes No

   If your answer to question 3 is Yes, please proceed to question 4. If your answer is No, please proceed to question 6.

4. In the last 5 years, how many arbitrations have you been involved in?

   _____

5. How many of such arbitrations have been:

	Ad hoc	**Institutional**	**Total**
Domestic			
International[246]			

6. Which of the following types of arbitration do you prefer? Please give the reasons for your preference.

   Ad hoc arbitration Institutional arbitration

   _____

   _____

   _____

B. Indian arbitral institutions

7. Have you participated as a party or its counsel / acted as an arbitrator in an arbitration administered by an Indian arbitral institution?[247] If your answer is No, please give reasons for the same.

   Yes No

[246] For the purpose of this questionnaire, an international arbitration is an arbitration in which at least one of the parties is (a) an individual who is a national of, or habitually resident in, any country other than India; (b) a body corporate which is incorporated in any country other than India; (c) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or (d) the Government of a foreign country.

[247] For the purpose of this questionnaire, an Indian arbitral institution is an arbitral institution which has its headquarters in India.

_____

_____

_____

If your answer to question 7 is Yes, please proceed to question 8. If your answer is No, please proceed to question 10.

8. Please list the names of the Indian arbitral institutions you have used and a description of the dispute (subject to any applicable confidentiality requirements) in the table below.

   Very low value - less than INR 50 lakhs; Low value - INR 50 lakhs to 2.5 crores; Medium value - INR 2.5 crores to 20 crores; High value - above INR 20 crores

Arbitral institution	**Parties (whether individual / corporate / Government)**	**Sector involved (e.g. construction, shipping)**	**Nature of dispute (e.g. joint venture, commercial)**	**Value of claim (whether high, medium, low or very low)**

9. Please assess the performance of such arbitral institutions by rating the institution on a scale of 1 to 5 and providing comments against the criteria listed below. Please feel free to attach a supplemental sheet with additional responses if you are rating more than 2 institutions.

   Scale: 1 - Very satisfied, 2 - Satisfied, 3 - Average, 4 - Dissatisfied, 5 - Very dissatisfied

Institution 1	**Institution 2**
Name of Institution:	**Name of Institution:**

Size of the arbitral tribunal:	**Size of the arbitral tribunal:**
Rules of procedure Rating: 1 2 3 4 5 Comments: _____ _____	**Rules of procedure** Rating: 1 2 3 4 5 Comments: _____ _____
Constitution of arbitral tribunal Rating: 1 2 3 4 5 Comments: _____ _____	**Constitution of arbitral tribunal** Rating: 1 2 3 4 5 Comments: _____ _____
Completion of pleadings and exchange of evidence Rating: 1 2 3 4 5 Comments: _____ _____	**Completion of pleadings and exchange of evidence** Rating: 1 2 3 4 5 Comments: _____ _____
Hearings Rating: 1 2 3 4 5 Comments: _____ _____	**Hearings** Rating: 1 2 3 4 5 Comments: _____ _____

Awards Rating: 1 2 3 4 5 Comments: _____ _____	**Awards** Rating: 1 2 3 4 5 Comments: _____ _____
Adequate infrastructure Rating: 1 2 3 4 5 Comments: _____ _____	**Adequate infrastructure** Rating: 1 2 3 4 5 Comments: _____ _____
Fees and expenses Rating: 1 2 3 4 5 Comments: _____ _____	**Fees and expenses** Rating: 1 2 3 4 5 Comments: _____ _____
Any other Rating: 1 2 3 4 5 Comments: _____ _____	**Any other** Rating: 1 2 3 4 5 Comments: _____ _____

10. In your opinion / experience, what are the challenges facing Indian arbitral institutions?

_____

_____

_____

11. What measures would you suggest to improve the performance of Indian arbitral institutions?

_____

_____

_____

C. India as a seat for international arbitrations

12. Would you choose / suggest India as a seat for international arbitrations? Please state your reasons for the same below.

    Yes No

    _____

    _____

    _____

13. If India is chosen as a seat for an international arbitration, would you prefer to use a foreign arbitral institution or an Indian arbitral institution? Please give the reasons for your preference.

    Foreign arbitral institution Indian arbitral institution

    _____

    _____

    _____

D. Foreign arbitral institutions

14. Have you participated as a party or its counsel / acted as an arbitrator in arbitration proceedings administered by any foreign arbitral institution?

    Yes No

    If your answer to question 14 is Yes, please continue with the rest of the questionnaire. If your answer is No, please proceed to question 17.

15. Please list the names of the foreign arbitral institutions you have used and a description of the dispute (subject to any applicable confidentiality requirements) in the table below.

Very low value - less than USD 75,000; Low value - USD 75,000 to 375,000; Medium value - USD 375,001 to 3,000,000; High value - above USD 3,000,000

Arbitral institution	**Parties (whether individual / corporate / Government)**	**Sector involved (e.g. construction, shipping)**	**Nature of dispute (e.g. joint venture, commercial)**	**Value of claim (whether high, medium, low or very low)**

16. Please assess the performance of such arbitral institutions by rating the institution on a scale of 1 to 5 and providing comments against the criteria listed in the table below. Please feel free to attach a supplemental sheet with additional responses if you are rating more than 2 institutions.

Scale: 1 - Very satisfied, 2 - Satisfied, 3 - Average, 4 - Dissatisfied, 5 - Very dissatisfied

Institution 1	**Institution 2**
Name of Institution:	**Name of Institution:**
Size of the arbitral tribunal:	**Size of the arbitral tribunal:**

Rules of procedure Rating: 1 2 3 4 5 Comments: _____ _____	**Rules of procedure** Rating: 1 2 3 4 5 Comments: _____ _____
Constitution of arbitral tribunal Rating: 1 2 3 4 5 Comments: _____ _____	**Constitution of arbitral tribunal** Rating: 1 2 3 4 5 Comments: _____ _____
Completion of pleadings and exchange of evidence Rating: 1 2 3 4 5 Comments: _____ _____	**Completion of pleadings and exchange of evidence** Rating: 1 2 3 4 5 Comments: _____ _____
Hearings Rating: 1 2 3 4 5 Comments: _____ _____	**Hearings** Rating: 1 2 3 4 5 Comments: _____ _____
Awards Rating: 1 2 3 4 5 Comments: _____ _____	**Awards** Rating: 1 2 3 4 5 Comments: _____ _____

Adequate infrastructure Rating: 1 2 3 4 5 Comments: _____ _____	**Adequate infrastructure** Rating: 1 2 3 4 5 Comments: _____ _____
Fees and expenses Rating: 1 2 3 4 5 Comments: _____ _____	**Fees and expenses** Rating: 1 2 3 4 5 Comments: _____ _____
Any other Rating: 1 2 3 4 5 Comments: _____ _____	**Any other** Rating: 1 2 3 4 5 Comments: _____ _____

E. Comments

17. Any other comments?

_____

_____

_____

Signatures

Justice B.N. Srikrishna
Retired Judge, Supreme Court of India
Chairman

Justice R. V. Raveendran
Retired Judge, Supreme Court of India
Member

Justice S. Ravindra Bhat
Judge, High Court of Delhi
Member

K. K. Venugopal
Attorney General for India
Member

P. S. Narasimha
Additional Solicitor General of India
Member

Indu Malhotra
Senior Advocate
Supreme Court of India
Member

Arghya Sengupta
Research Director
Vidhi Centre for Legal Policy
Member

Arun Chawla
Deputy Secretary General, FICCI
Member

Vikkas Mohan
Senior Director, CII
Member

Suresh Chandra
Secretary, Department of Legal Affairs, Government of India
Member Secretary