

ENHANCING THE PROMINENCE OF INSTITUTIONAL ARBITRATION AND BOLSTERING ITS ENFORCEMENT MECHANISMS IN THE INDIAN CONTEXT

Dr. Sudhir Tarote

Introduction

Arbitration has emerged as an effective alternative dispute resolution mechanism globally, providing parties with a flexible and efficient means of resolving their disputes outside the traditional court system. In recent years, the significance of institutional arbitration has gained momentum, wherein arbitral proceedings are administered by specialized institutions to ensure transparency, fairness, and impartiality.

In the Indian context, the growth of institutional arbitration has witnessed a steady rise, owing to the country's commitment to promoting arbitration as a preferred mode of dispute resolution. The enactment of the Arbitration and Conciliation Act in 1996 was a significant milestone in creating a legal framework that aligned with international standards and aimed to streamline the arbitration process. However, despite these efforts, challenges persist to hinder the full potential of institutional arbitration in India.

This research paper delves into the realm of enhancing the prominence of institutional arbitration in India and bolstering its enforcement mechanisms. The objective is to identify the existing gaps and propose effective strategies to address them, ultimately promoting a robust arbitration ecosystem in the country.

The Indian judiciary has also played a crucial role in promoting institutional arbitration. In various landmark judgments, the Supreme Court of India has emphasized the importance of institutional arbitration, recognized the role of arbitration institutions, and upheld the primacy of institutional rules in the arbitration process. These decisions have further bolstered the credibility and prominence of institutional arbitration in India.

The rise of institutional arbitration in India signifies a significant shift towards a structured and professional approach to dispute resolution. The establishment of specialized institutions, along with supportive legislative reforms and judicial pronouncements, has contributed to the growth of institutional arbitration. These developments have not only enhanced the credibility and efficiency of arbitration

but have also positioned India as an attractive destination for domestic and international parties seeking institutionalized and reliable dispute resolution mechanisms.

I. Institutional Arbitration In India : An Overview

1. Historical Evolution of Arbitration in India

The roots of arbitration in India can be traced back to ancient times when communities relied on the wisdom of respected elders to settle disputes. Over the years, the country has witnessed the development of arbitration under various statutes and court decisions. However, it was only in 1996 that the Indian Arbitration and Conciliation Act was enacted, which provided a comprehensive legal framework for arbitration.

The law and practice of private and transactional commercial disputes without court intervention, is rooted in the haze of ancient history. It has a striking feature of ordinary Indian life and it prevailed in all ranks of life. To refer matters to a *panch* has been one of the natural ways of deciding a variety of disputes. In some cases, the *panch* more resembled a judicial court, because he could intervene on the complaint of one party and not necessarily on the agreement of both, e.g., in a caste matter. However, in most cases, the arbitral award was made by agreement between the parties.¹ In the absence of some serious flaws of bias or misconduct, by and large, the courts have given recognition and credence to the awards of the *Panchayats*.²

After the advent of the British in India, attempts were made to regulate the judicial system in the country. In exercise of the powers conferred upon by the British Parliament, East India Company promulgated regulations in the three Presidency towns, Calcutta³, Bombay⁴ and Madras.⁵ These regulations substantially changed the *Panchayat* system in the Presidency town. The first attempt of codifying the law was made by Bengal Regulations of 1772 and 1780 where provision was made for submission of disputed accounts to decision by arbitration. Later, in Bengal Regulation of 1787 provisions were inserted to empower the courts to refer the suits to arbitration with the consent of the parties.

Code of Civil Procedure again revised in 1908, wherein Second Schedule was devoted completely to arbitrations. This code contained elaborate provisions relating to the arbitration under Section 89 and 104 of the Second Schedule. This Act contained (a) provisions for arbitration in respect of the subject-matter of suits⁶; (b) provisions where under parties to a dispute might file their arbitration agreements before the court, which would then refer the matter to arbitration⁷; and (c) provisions for arbitration without the intervention of court.⁸ Arbitration Act of

1899 then repealed by Arbitration Act, 1940. This Act of 1940 also repealed Sections 89 and 104 (1), clause (a) to (f) and the Second Schedule of the Code of Civil Procedure and continued to govern the law of arbitration in India till 1996.

The 1940 Act however, did not deal with enforcement of foreign awards, and for that purpose, the legislature had passed the 'Arbitration (Protocol and Convention) Act, 1937' to deal with awards related to 'Geneva Convention on the Execution of Foreign Arbitral Awards, 1927' (herein after 'Geneva Convention') and the 'Foreign Awards (Recognition and Enforcement) Act, 1961' to deal with the awards related to 'New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958' (herein after 'New York Convention'). The working of the 1940 Act, which dealt with domestic arbitrations, was far from satisfactory.

Taking into account commercial realities, in order to settle the conflicting decisions on various points, The Law Commission of India suggested extensive amendments in the Act of 1940.⁹

To understand the exact status of 1940 Act, at that point of time it is relevant see the opinion of Supreme Court in the case of *M/s Guru Nanak Foundation v. Rattan Singh & Sons*¹⁰. J. Desai opined:

"Interminable, time consuming, complex and expensive Court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes, avoiding procedural claptrap and this led them to Arbitration Act, 1940 ("Act" for short). However, the way in which the proceedings under the 1940 Act are conducted and without exception challenged in Courts, has made Lawyers laugh and legal philosophers weep."

To consolidate and to amend the law relating to arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto, "the Arbitration and Conciliation Act, 1996 was passed and made effective to cases where the arbitral proceedings commenced as on 25th January, 1996."¹¹

2 The Rise of Institutional Arbitration

The rise of institutional arbitration in India has been a significant development in the country's arbitration landscape. Institutional arbitration refers to arbitration proceedings that are administered by specialized institutions, offering a structured framework and professional support throughout the dispute resolution process. This approach brings numerous advantages over *ad hoc* arbitration, including enhanced credibility, efficiency, and procedural fairness.

In recent years, several institutions have emerged in India to promote and

administer institutional arbitration. These institutions play a vital role in promoting the use of arbitration as a preferred method of dispute resolution and have contributed to the growth of institutional arbitration in the country.

The Indian Council of Arbitration (ICA)¹³ is a premier arbitration institution in India, established in 1965. It is a non-profit organization dedicated to the promotion and development of arbitration and other alternative dispute resolution mechanisms in the country. ICA operates under the auspices of the Federation of Indian Chambers of Commerce and Industry (FICCI), a leading business chamber in India. The primary objective of ICA is to promote arbitration as an effective means of resolving commercial disputes in India. It aims to create awareness among businesses, legal professionals, and the general public about the benefits and importance of arbitration.

Another prominent institution is the Mumbai Centre for International Arbitration (MCIA)¹⁴, which was established in 2016. MCIA aims to provide world-class arbitration services and infrastructure to facilitate efficient resolution of international and domestic disputes. It offers comprehensive rules, robust case management systems, and a panel of experienced arbitrators, attracting both domestic and international parties.

Similarly, the Delhi International Arbitration Centre (DIAC)¹⁵ has emerged as another important institution in India. Established in 2009, DIAC focuses on promoting institutional arbitration in the national capital region. It provides a dedicated arbitration centre with state-of-the-art facilities, administrative support, and a panel of arbitrators with diverse expertise.

The International Centre for Alternative Dispute Resolution (ICADR)¹⁶, established by the Indian government in 1995, is another notable institution. ICADR aims to facilitate the resolution of commercial disputes through arbitration, mediation, and conciliation. It offers training programs, conducts research, and organizes conferences to promote awareness and capacity-building in alternative dispute resolution mechanisms.

These institutions have contributed to the growth of institutional arbitration in India by addressing various challenges faced by parties in *ad hoc* arbitrations. They provide a structured process, appointment of qualified arbitrators, and administrative support throughout the arbitration proceedings. This in turn builds confidence among the parties involved, ensuring fairness and efficiency in the resolution of disputes.

Furthermore, the rise of institutional arbitration in India has been facilitated by supportive legislative reforms. The Arbitration and Conciliation Act of 1996, based

on the UNCITRAL Model Law, provides a legal framework for institutional arbitration. The Act recognizes the autonomy of parties in selecting arbitration institutions and upholds the enforceability of institutional arbitral awards.

3. Advantages of Institutional Arbitration

Institutional arbitration offers several advantages over *ad hoc* arbitration, providing parties with a structured and efficient dispute resolution process. The key advantages of institutional arbitration include Administrative Support, Expertise and Specialization, Established Rules and Procedures, Neutrality and Impartiality, Enforcement of Awards and Reputation and Credibility.

Institutional arbitration provides parties with administrative support throughout the arbitration process. Institutions often maintain panels of experienced and specialized arbitrators. The availability of specialized arbitrators ensures that the disputes are decided by individuals with the relevant knowledge and experience, thereby enhancing the quality and credibility of the arbitral awards. Institutional arbitration is governed by well-established rules and procedures provided by the institution. The existence of these rules brings clarity and predictability to the arbitration process, promoting procedural fairness and reducing the scope for disputes regarding procedural matters.

Institutional arbitration provides a neutral and impartial platform for resolving disputes. This impartiality contributes to the overall integrity and legitimacy of the arbitration process. The reputation of the institution can act as a seal of quality, signalling that the arbitration proceedings will be conducted in a fair and professional manner.

These advantages contribute to a more efficient, reliable, and effective resolution of disputes, making institutional arbitration an attractive choice for parties seeking a structured and well-regulated alternative to traditional court litigation.

II. Challenges in the Promotion of Institutional Arbitration

1. Legislative Framework

The legislative framework in India for institutional arbitration is primarily governed by the Arbitration and Conciliation Act, 1996 (the Act). The Act provides the legal framework for both domestic and international arbitration in India and incorporates the provisions of the UNCITRAL Model Law on International Commercial Arbitration.

The Act recognizes and supports institutional arbitration as a preferred mode of dispute resolution. It offers a comprehensive framework that governs various

aspects of institutional arbitration, including the appointment of arbitrators, conduct of proceedings, enforcement of awards, and intervention of courts.

The Act recognizes the autonomy of parties to choose institutional arbitration by including provisions for arbitration agreements. It specifies that parties can refer disputes to arbitration administered by a recognized institution, either by incorporating the institution's rules or by designating the institution directly. The Act provides a mechanism for the appointment of arbitrators in institutional arbitration. It allows parties to rely on the appointment process stipulated in the institutional rules or seek assistance from the institution in appointing arbitrators. The Act also outlines the criteria for the qualifications and impartiality of arbitrators.

The Act sets out provisions related to the conduct of institutional arbitration proceedings. It includes provisions on the powers and duties of arbitrators, the conduct of hearings, submission of evidence, and the timeline for the issuance of awards. These provisions ensure that the arbitration process is conducted in a fair and efficient manner.

The Act also provides for the enforcement of institutional arbitral awards in India. An award rendered through institutional arbitration is deemed to be a domestic award under the Act. More importantly, the Act limits judicial intervention in institutional arbitration proceedings. The Act specifies that courts can only intervene in certain circumstances, such as the appointment of arbitrators, granting interim measures, and setting aside or enforcement of awards. But it is plain that in a wider, more general context, something more is needed if a system of "private justice" is to be truly effective – and that is the support of the legal system within which the process of private dispute resolution operates.¹⁷

UNCITRAL Model Law on International Commercial Arbitration is the basis of Indian Act, which facilitates the recognition and enforcement of international institutional awards in India. It provides a framework for the recognition and enforcement of foreign arbitral awards, including those rendered through institutional arbitration.

It is important to note that the Act allows parties to deviate from its provisions by expressly opting out or modifying certain sections, subject to the requirements of public policy and mandatory provisions of Indian law.

Despite substantial improvements, certain aspects of India's arbitration law continue to raise concerns. The 1996 Arbitration Act has been amended over the years, but some ambiguities and gaps persist, leading to inconsistent interpretations and delays in arbitration proceedings. Streamlining and modernizing the legislative framework are crucial for strengthening institutional

arbitration.

2. Capacity Building

Institutional arbitration's success heavily relies on the availability of competent arbitrators and support staff. Training and capacity-building programs are necessary to nurture a pool of skilled arbitrators who can handle complex commercial disputes with utmost professionalism and expertise.

Capacity building plays a crucial role in the development and promotion of institutional arbitration in India. It involves various initiatives aimed at enhancing the knowledge, skills, and expertise of stakeholders involved in the arbitration ecosystem.

Organizing training programs and workshops focused on arbitration is essential to build a skilled pool of arbitrators, lawyers, and professionals well-versed in institutional arbitration. These programs can cover various aspects such as arbitration procedures, case management, drafting of arbitration agreements, and advocacy skills. Such training programs can be conducted by arbitration institutions, professional bodies, and academic institutions in collaboration with international experts and experienced practitioners.¹⁶

Establishing accreditation and certification mechanisms can help ensure the competence and credibility of arbitration practitioners. Recognizing and accrediting individuals who have successfully completed training programs, demonstrated expertise, and acquired experience in institutional arbitration can enhance the quality and reliability of arbitration services in India. It is also important to encourage continuous professional development to keep practitioners updated with the latest developments in institutional arbitration. Offering opportunities for professional networking, participation in conferences, seminars, and continuing education programs can facilitate knowledge sharing, exchange of best practices, and staying abreast of emerging trends and legal developments.

It is essential to promoting research and publishing scholarly works on institutional arbitration in India to knowledge dissemination and academic discourse. Encouraging research projects, conducting studies, and supporting publications on topics such as institutional arbitration practices, case law analysis, and comparative studies can foster a deeper understanding and analysis of arbitration trends and challenges specific to India.

Collaborating with international arbitration institutions, organizations, and universities can bring global expertise, experience, and best practices to India. Partnering with renowned institutions can facilitate joint programs, conferences,

and exchange programs that expose Indian arbitration practitioners to international standards, diverse perspectives, and global networks.

In India, the alternative methods of solving disputes have been present from a long time, since trade and commerce started to grow outside the country.¹⁹ Encouraging government support and involvement is crucial for capacity building in institutional arbitration. Governments can allocate resources, promote legislative reforms, and establish collaboration with academic institutions, arbitration institutions, and international organizations to strengthen the capacity building initiatives. Government support can also extend to providing scholarships, grants, and funding for research projects and training programs.

By focusing on these areas of capacity building, India can foster a skilled and knowledgeable pool of practitioners, enhance the understanding and acceptance of institutional arbitration, and promote a robust and reliable arbitration ecosystem that attracts both domestic and international parties.

3. Public Perception and Awareness

Public awareness regarding the benefits of institutional arbitration remains relatively low in India. A lack of understanding of the process and misconceptions about its efficacy often lead parties to opt for conventional court litigation instead. Efforts to educate stakeholders about the advantages of institutional arbitration can significantly enhance its prominence.

Public perception and awareness about institutional arbitration in India have been steadily growing in recent years, although there is still room for improvement.

Institutional arbitration is gaining acceptance among businesses and legal professionals in India. There is a growing recognition that institutional arbitration offers a structured and efficient means of resolving disputes, providing benefits such as neutrality, expertise, and procedural fairness. The business community in India, including corporations, start-ups, and small and medium-sized enterprises (SMEs), has become more aware of the advantages of institutional arbitration. Many businesses prefer institutional arbitration due to its credibility, enforceability of awards, and the specialized expertise offered by arbitration institutions. Legal professionals, including lawyers and law firms, are increasingly engaging with institutional arbitration. They recognize the benefits of institutional arbitration, such as access to a panel of experienced arbitrators, streamlined processes, and the administrative support provided by arbitration institutions.

The Indian judiciary has played a crucial role in raising awareness about institutional arbitration. The Supreme Court of India, through various landmark

judgments, has emphasized the importance of institutional arbitration, recognized the role of arbitration institutions, and upheld the primacy of institutional rules in the arbitration process. Such judicial recognition has bolstered the credibility and public perception of institutional arbitration.

Despite the progress made, there is still a need for greater awareness among the general public about institutional arbitration. Many individuals and businesses, especially those outside the legal community, may not be fully aware of the advantages and processes of institutional arbitration. Efforts should be made to conduct targeted awareness campaigns, educational initiatives, and media outreach to reach a wider audience and improve understanding.

While public perception and awareness about institutional arbitration in India have been growing, there is still a need for continued efforts to raise awareness among businesses, legal professionals, and the general public. Through collaborative efforts between arbitration institutions, legal professionals, the judiciary, and the government, the understanding and acceptance of institutional arbitration can be further enhanced, contributing to a more robust and widely embraced dispute resolution mechanism in India.

III. Strengthening Institutional Arbitration : The Way Forward

Strengthening institutional arbitration in India requires a multi-faceted approach that involves various stakeholders and focuses on key areas.

In the case of Institutional Arbitration, the disputing parties submit their issue to an institution that has been designated to administer the arbitral process. The institution then arbitrates the dispute according to the rules laid by them in front of the parties. Generally, the dispute is not arbitrated by the institution; it selects a panel which administers the whole process.²⁰

1. Legislative Reforms

Continuous reforms and updates to the legislative framework can enhance institutional arbitration in India. The government should consider periodic review and amendments to the Arbitration and Conciliation Act, addressing emerging challenges and aligning it with international best practices. This may include provisions related to interim measures, fast-track procedures, confidentiality, and multi-party arbitrations.

2. Promoting Institutional Rules

Encouraging parties to adopt institutional rules rather than relying on *ad hoc* arbitration can bolster the prominence of institutional arbitration. Arbitration

Institutions should continue to develop and refine their rules, ensuring they are efficient, adaptable to various types of disputes, and reflect the needs of the Indian business environment. Emphasizing the benefits and credibility of institutional rules through awareness campaigns can help generate trust and acceptance.

3. Strengthening Infrastructure

Investing in robust arbitration infrastructure is crucial for the growth of institutional arbitration. Arbitration centres should provide state-of-the-art facilities, including well-equipped hearing rooms, libraries, and digital resources. The development of dedicated arbitration centres, equipped with modern technology and case management systems, can enhance the efficiency and effectiveness of the arbitration process.

4. Capacity Building

Enhancing the capacity and expertise of arbitrators, lawyers, and professionals involved in institutional arbitration is essential. Certain institutions administer the whole process of arbitration (International Court of Arbitration of the International Chamber of Commerce)²¹. Institutions should continue to organize training programs, workshops, and seminars to educate practitioners about institutional arbitration practices, procedures, and emerging trends. Collaboration with international arbitration institutions and experts can facilitate knowledge sharing and exposure to global best practices.

5. Collaboration and Partnerships

Strengthening collaboration among arbitration institutions, professional bodies, universities, and the government can create a supportive ecosystem for institutional arbitration. Partnerships can involve joint research projects, exchange programs, and initiatives to foster dialogue and knowledge exchange. Collaboration with international institutions can promote India as an attractive destination for international arbitration.

6. Early Adoption by Government Entities

Encouraging government entities to adopt institutional arbitration for resolving their disputes can have a cascading effect on the private sector. This can be achieved through policy initiatives, guidelines, and incentives that promote the use of institutional arbitration by government agencies. Demonstrating the success and benefits of institutional arbitration in government disputes can build confidence and encourage wider adoption.

7. Streamlined Enforcement Mechanisms

Strengthening the enforcement mechanisms for arbitral awards is crucial for the effectiveness of institutional arbitration. Creating specialized commercial courts or divisions within existing courts can expedite the enforcement process and ensure consistency in the judicial approach. Training and capacity building for judges and judicial officers on arbitration-related matters can also enhance the enforcement regime.

Many institutional arbitrators expressly provide the rule that the proceedings will continue and not stop in between, even if one of the parties defaults in the course of the proceedings. For instance, the ICC Rules²² states that if any party fails to appear for the proceeding without giving any valid excuse, even after it has been duly summoned by the institution, the Tribunal will proceed with the proceedings.

8. International Promotion

Actively promoting institutional arbitration in India on the international stage can attract foreign parties and investments. Collaboration with international arbitration institutions, participation in international conferences and events, and marketing initiatives targeted at potential users of institutional arbitration can position India as a preferred arbitration destination.

Strengthening institutional arbitration in India requires a comprehensive approach that encompasses legislative reforms, infrastructure development, capacity building, collaboration, streamlined enforcement mechanisms, and international promotion. The Courts in India also fully support arbitration proceedings.

The Supreme Court has also shown its pro-arbitrational judgment in *Sumitomo Heavy Industries Ltd. V. ONGC*²³ where it stated,

".... If the conclusion of the arbitrator is based on a possible view of the matter, the Court is not expected to interfere with the award. The High Court has erred in so interfering. Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator..."

By implementing these strategies and involving all relevant stakeholders, India can create a conducive environment for the growth and prominence of institutional arbitration, fostering efficient and effective resolution of disputes in the country.

IV. Conclusion

In conclusion, this paper has explored the significance of enhancing the prominence of institutional arbitration and bolstering its enforcement mechanisms in the Indian context. Institutional arbitration, with its structured framework,

administrative support, and specialized expertise, offers a credible and efficient means of resolving disputes. However, challenges persist that hinder its full potential.

Through a comprehensive analysis, this paper has identified key areas for improvement. It has emphasized the importance of legislative reforms to align the legal framework with international best practices, promoting the adoption of institutional rules, and strengthening the enforcement mechanisms for arbitral awards. The role of capacity building, collaboration, and international promotion has also been highlighted as critical factors in fostering the growth of institutional arbitration in India.

By addressing these areas and implementing the proposed strategies, India can create a favourable environment for institutional arbitration to thrive. Enhanced public perception and awareness, along with improved infrastructure, capacity, and enforcement mechanisms, will contribute to the development of a robust arbitration ecosystem. Such a framework will instill confidence among domestic and international parties, attract investments, and position India as a preferred arbitration destination.

While challenges lie ahead, the path towards enhancing the prominence of institutional arbitration in the Indian context is attainable. Through collective efforts by arbitration institutions, legal professionals, the government, and other stakeholders, the vision of a vibrant and reliable institutional arbitration system in India can be realized. By embracing these changes, India can unlock the full potential of institutional arbitration, offering efficient and effective dispute resolution mechanisms that align with global standards and contribute to the growth of the Indian economy.

Endnotes

1. Assistant Professor, Coordinator – SCLC Centre for ADR, MM Shankarrao Chavan Law College, Pune, Maharashtra.
2. *Chandrasekhar Guruswami v. Basalingappa Gokarnaya Hiremath*, AIR (1957) Bom. 565.
3. *Amir Bibi v. Arokiam*, AIR (1919) Mad. 1113 (DB).
4. Bengal Regulation I of 1772.
5. Bombay Regulation I of 1799.
6. Madras Regulation I of 1802.
7. Code of Civil Procedure, 1908, Second Schedule, Para 1-15.
8. Code of Civil Procedure, 1908, Second Schedule, Para 17-19.
9. Code of Civil Procedure, 1908, Second Schedule, Para 20-21.

- Law Commission of India, 76th Report on Arbitration Act, 1940 (November, 1978) available at : <http://lawcommissionofindia.nic.in/51-100/Report76.pdf> (last visited on March 14, 2022).
- AIR (1981) SC 2075.
- Introduction to the Act of 1996.
- Arbitration and Conciliation Act, 1996, s. 85.
- More details available at: <https://icaindia.co.in/about> (last visited on September 19, 2022)
- More details available at: <https://mcla.org.in/> (last visited on September 19, 2022)
- More details available at: <https://dhcdlac.nic.in/> (last visited on September 19, 2022)
- More details available at: <https://www.india.gov.in/official-website-international-centre-alternate-dispute-resolution> (last visited on September 19, 2022)
- Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration 4* (Sweet & Maxwell, London, 4th edn., 2004).
- See events of Indian Council of Arbitration.(ICA) available at: <https://icaindia.co.in/events> (last visited on February 1, 2023).
- P.C. Rao & William Sheffield eds., *Alternate Dispute Resolution*, 13 (, Universal Law Publishing Co. Pvt. Ltd.).
- *Supra* note 18 at 47.
- G.K. Kwatra, *Arbitration and Alternative Dispute Resolution*, 59 (Universal Law publishing co., 2008).
- Art. 21.2, ICC Arbitration Rules.
- 1998 (1) SCC 305.