Dispute Resolution Hotline

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TIME TO VIEW ARBITRATION AS A PARALLEL RATHER THAN AN ALTERNATIVE DISPUTE RESOLUTION MECHANISM?

- **Government Guidelines**: Recent guidelines discourage routine arbitration in domestic procurement contracts, limiting its default use to disputes below INR 10 crores and mandating careful consideration for higher-value disputes.
- **Role of Arbitration**: Despite governmental caution, arbitration appears to be turning into a parallel justice system with growing legislative support and minimal judicial interference, fostering its efficacy.
- **Challenges and Solutions**: Stakeholders advocate for specialized arbitration benches, the "loser pays" principle, and appointing experienced lawyers as arbitrators to enhance arbitration's efficiency and credibility.
- **Future Outlook**: Embracing innovative solutions can position arbitration as a robust parallel to courts, crucial for resolving disputes effectively in India's legal landscape.

Recently, in June of 2024, the Procurement Policy Division of the Ministry of Finance, Government of India ("**Government**"), published 'Guidelines for Arbitration and Mediation in Contracts of Domestic Public Procurement' ("**Guidelines**"). The Guidelines in essence discourage the choice of arbitration as a mechanism for dispute resolution in contracts for domestic procurement by the Government and its entities and agencies ("**Procurement Contracts**").

As per the Guidelines, arbitration should neither be a routine nor a default choice for dispute resolution in procurement contracts / tenders; and as a norm it may be restricted to disputes valued at less than INR 10 (ten) crores. Arbitration can be chosen as a method of dispute resolution for disputes valued at INR 10 crores and higher, only upon "*careful application of mind and recording of reasons*". Further, if arbitration were to be chosen, institutional arbitration should be given preference.

The Government cited certain "peculiarities" that a government entity / agency, as a disputant possesses and certain practical considerations, underlying the issuance of the Guidelines. One of the practical considerations is that the benefit of finality of awards is lost because a large majority of the awards are either sought to be set aside or their enforcement is challenged. In contrast, a peculiarity cited by the Government in the Guidelines is the accountability and fairness required in government decision-making, because of which the acceptance of an adverse award without judicial avenues being exhausted is considered improper.

A reading of the Guidelines as a whole, suggests that the Government aims to give primacy to the court system in Procurement Contracts, while considering arbitration as an alternative that is not exhaustive. Infact the rationale behind the Guidelines, its expected *modus operandi,* and the arguments opposing these Guidelines, by stakeholders such as the Arbitration Bar of India ("**ABI**") are still in discussion before the Indian Parliament[1]. The discussions reveal that the genesis of the Guidelines is motivated by past dissatisfaction with arbitration outcomes. Statistical data revealed that more than 60% of the arbitration awards are challenged in the courts, leading to dual expenditure by the government on both arbitration and litigation[2]. However, discussions in Parliament indicate that there are concerns that the current draft of the Guidelines may not address these issues from a solution-oriented perspective.

However, theoretically as well as in practicality, arbitration is an effective and exhaustive parallel to the court system. According to jurisdictional theory, arbitration is a parallel, privately administered justice system that has been delegated to arbitrators and permitted by the state within its territory. This is underpinned by the quasi-judicial role of an arbitrator and the legal effect, i.e., bindingness and enforceability, that the state attaches to an arbitration agreement and award. While the nomination and jurisdiction of an arbitrator is the choice of the parties, the arbitrator, like a judge, derives authority from the sovereign.[3]

Interestingly, the Guidelines themselves acknowledge that the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") accords finality to the decisions of arbitrators and limits the grounds for setting aside as well as challenging the enforcement of an arbitral award. In recent years, with the aim of making India an arbitration friendly jurisdiction, the legislature and judiciary have also been increasingly adhering to the principle of minimal judicial interference in arbitration and arbitral awards. An example of this is the Arbitration and Conciliation (Amendment) Act, 2015 by way of which the legislature set out strict and limited grounds for setting aside a domestic arbitration award and challenging the enforcement of a foreign award. Another recent example is the Supreme Court judgement in *In re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899*,[4] wherein the court not only held that unstamped and inadequately stamped arbitration agreements are enforceable in law but also that courts at the pre-referral stage and at the time of adjudicating on the grant of interim

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reliefs, ought not to decide on the adequacy of stamping of the arbitration agreement. The issue of stamping ought to be decided by the arbitral tribunal.

Hence, the scheme of the Arbitration Act, the actions of the legislature and recent judicial pronouncements are clearly indicative of the fact that arbitration is being shaped up to be an efficacious parallel to the court system. The most recent development that supports this is the appointment of the ABI which has been established with the aim of fostering arbitration as a preferred method of dispute resolution. In light of these observations from the legislations and judicial pronouncements, and recent developments, it may be time for viewing arbitration as an exhaustive and effective parallel dispute resolution mechanism rather than a mere alternative.

In conclusion, while the Guidelines signal a cautious approach towards arbitration in domestic public procurement contracts, it is crucial to recognize arbitration as a robust and essential parallel to the court system. Rather than shying away from its challenges, embracing arbitration requires innovative solutions that enhance its efficacy and attractiveness.

- *Firstly*, establishing a specialized arbitration bench within the court system could streamline proceedings and ensure that arbitration-related matters are handled by judges well-versed in the nuances of arbitration law. This would expedite the resolution process and bolster confidence in arbitration as a viable option for dispute resolution.
- *Secondly*, implementing the "loser pays" principle could deter frivolous challenges to arbitral awards, thereby reducing the burden on courts and promoting fairness in the arbitration process. This would encourage parties to engage in arbitration in good faith, knowing that they may have to bear the costs of unjustifiable challenges.
- *Lastly*, appointing practicing lawyers as ad-hoc arbitrators, especially those experienced in arbitration, could further strengthen the arbitration process. Practicing lawyers could bring specialized knowledge and perspective to complex arbitration cases, ensuring balanced and informed decisions.

In essence, the future of arbitration in India lies not in sidelining its challenges, but in embracing innovative solutions that enhance its efficiency, fairness, and credibility. By fostering a supportive legal framework and judicial infrastructure, India can truly realize the potential of arbitration as a preferred and effective mechanism for resolving disputes, both in procurement contracts and beyond.

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You can direct your queries or comments to the relevant member.

[1] 'Unstarred Lok Sabha Question No. 23 to be Answered On Monday, July 22, 2024 / 31 Ashadha, 1946 (Saka)- Arbitration and Mediation in Contracts of Domestic Public Procurement', available at: https://images.assettype.com/barandbench/2024-07/f3e106cd-2b2c-4d5f-9351-03cde9678b63/Unstarred_Lok_Sabha_Question_No_23_July_22.pdf

[2] *Ibid*

[3] Julian D. M. Lew, Loukas A. Mistelis, et al., *Comparative International Commercial Arbitration* (Chapter 5 Juridical Nature of Arbitration, Kluwer Law International 2003).

[4] 2023 SCC OnLine SC 1666. Our hotline on this judgement can be accessed here.

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