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INSTITUTIONAL ARBITRATION IN INDIA- CHALLENGES AND WAY AHEAD

- **Yash Singh 2nd Year Student, Chanakya National Law University, Patna**

Introduction

The pendency of matters before different courts in India has been a glaring issue for decades. The same continues to this day, but with the advent of time, many other mechanisms have been resorted to in the form of Alternate Dispute Resolution [**"ADR"**], which includes Arbitration, Mediation, Conciliation, Negotiation, and Lok Adalats. Arbitration has been the most preferred form of ADR according to a report of the Price Water Coopers (PWC), and close to 95% of the respondents chose Arbitration as an effective form of ADR, either standalone or in conjunction with the other forms of ADR[1]. Institutional Arbitration as a facet of arbitration has come a long way in resolving disputes in an amicable and time-efficient manner, with every arbitral institution having its own set of rules and mechanisms. Despite arbitration having such a significant impact in India, Institutional Arbitration as a legal domain has not seen the light of the day in comparison to the culture of arbitral institutions being established in countries like Singapore, the UK, and others[2], and this sometimes creates hurdles in resolving disputes when arbitral mechanisms such as Ad-Hoc Arbitration fail to bring a favorable settlement between the parties and which in turn, waters down the whole effect of Arbitration[3]. So, this article will deal with the lacunas that Institutional Arbitration is facing in India, the legal stature it has as a domain of ADR, and the key

[1] PWC, "*Corporate Attitudes and Practices towards Arbitration in India*" (*pwc.in*, 15 May 2013) <https://www.pwc.in/assets/pdfs/publications/2013/corporate-attributes-and-practices-towards-arbitration-inindia.pdf> accessed 18 December 2022.

[2] Internationalarbitration, 'International Arbitration Institutions' (*internationalarbitration.in*) <https://www.internationalarbitration.in/areas/forums.html> accessed 07 March 2023.

[3] Venancio D' Costa and Aastha Ojha, 'Institutional Vis-à-vis Ad-Hoc Arbitrations in India' (*mondaq.com,* 24 June 2020) <https://www.mondaq.com/india/arbitration--dispute-resolution/957706/institutional-vis-a-vis-ad-hocarbitrations-in-india> accessed 07 March 2023.

steps stakeholders can take to provide an impetus to this domain of law. **Institutional Arbitration in India and its present legal stature**

Institutional Arbitration, according to the High-Level Committee Report to review the institutionalization of Arbitral Mechanism in India[4] [**"2017 Report"**], is the *"administration of arbitration by an institution by 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."*

The foundation for Institutional Arbitration in India was laid down by the Federation of Indian Chambers of Commerce and Industry [**"FICCI"**] in 1952, but it did not get wide support from the business fraternity due to its unpopularity during that period within a period, the Ministry of Law and Justice came up with the International Centre for Advanced Dispute Resolution [**"ICADR**"][5] in 1995 but with the FICCI and ASSOCHAM saga, it went unpopular. Hence, the government came up with the New Delhi International Arbitration Centre[6] [**"NDIAC"**] in 2019 with the intent to undertake all the assets, rights, and responsibilities of ICADR. The government, with the NDIAC act, wanted to institutionalize this as a center of national importance and become a world center for international disputes. This arbitral institution is the only one in India that is backed by a statute, but things did not happen in the same manner.

Nevertheless, some arbitral institutions like the Mumbai Center for International Arbitration [**"MCIA"**], Hyderabad Arbitration Center [**"HAC"**], Nani Palkiwala Arbitration Center [**"NPAC"**], Chennai, and many others have been established and have earned a renowned stature in the field of arbitration wherein every institute has its own rules, procedures, fees, and costs but, the registration of disputes in these institutions remains abysmally low. According to the MCIA's Annual Report of 2021, it received a total of 40 cases in 2021 in comparison to just 5 cases in 2018[7]. Although this looks promising, comparing it with the institution of cases in the Singapore International Arbitration Center [**"SIAC"**] wherein, in 2021 alone, 469 cases were registered in the institution from 21 different jurisdictions[8]. The government has even pain stacked to prepare a **"2017 Report"** and suggested certain measures like *"the establishment of the Arbitration Promotion*

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[4] Law Commission, *Institutionalisation of Arbitral Mechanism in India* (Law Com No.- 246, 2017) pages 50-87.

[5] icadr.telangana.gov.in 'ICADR' <https://icadr.telangana.gov.in/> accessed 19 December 2022.

[6] legalaffairs.gov.in, *The New Delhi International Arbitration Act, 2019* (2019) <https://legalaffairs.gov.in/sites/default/files/The%20New%20Delhi%20International%20Arbitration%20Centre%20Act%2C%202019.pdf> accessed 19 December 2022.

[7] mcia.org.in, *MCIA-Report* (2022) <https://mcia.org.in/wp-content/uploads/2016/05/mcia-report.pdf> accessed 19 December 2022.

[8] klgates.com 'International Arbitration and the International Arbitration Centre' (2022) <https://www.klgates.com/International-Arbitration-and-the-Singapore-International-Arbitration-Centre-6-72022> accessed 19 December 2022.

*Council of India [***"APCI"***] as an apex body for monitoring every institution and acting as a grading institution, accreditation of arbitral institutions, creation of bar like system in arbitral institutions, amendments to the Arbitration and Conciliation Act, 1996 [***"Arbitration Act***,,""***"***],"*[9] and many more but even today, the committee's report has not received the statutory backing.

Even the Law Commission of India, in its 246th Report [**"LCI Report"**], had called for institutionalizing arbitration in India and proposed certain amendments to the Arbitration Act[10]. In toto, the renowned arbitral institutions mentioned above work autonomously and have not been badged as 'institutes of national importance' (The Institute of National Importance is a status that may be conferred on a premier public higher education institution in India by an act of Parliament of India) in order to receive statutory backing, unlike the NDIAC which despite being an institute of national importance, has not come to the fore to receive an ample of disputes for their settlements.

Backlashes in the arbitral institutions in India vis-à-vis the foreign arbitral institutes

The global perspective of Institutional Arbitration has been very promising when considering countries like Singapore. The SIAC has been a renowned arbitral institution and is the second most preferred arbitral institution after the International Chamber of Commerce's International Court of Arbitration [**"ICA"**] and the second most preferred seat of arbitration after London.[11] Some of the factors that make the SIAC the leading contender are the *"maximum judicial support and least judicial interference in the disputes undertaken by SIAC, the business-friendly rules of the institution, the location factor having an arbitral seat in the 'Asia-Pacific', the state of the art infrastructure having all the administrative and secretariat facilities, the diversity in the impanelment of the arbitrators, smooth and efficient administrative assistance provided by SIAC, efficient grievance settlement mechanism in the form of 'Court of Arbitration' and many more"*[12]**.**

The Singapore Arbitration Act of 2001 [**"2001 Act"**] has been enforced on the ethos of SIAC and its rules wherein the statute, through various provisions, has called for the enforcement and usage of the arbitral institution in the country. Section 13(4) of the 2001 Act[13] talks about the

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[9] Law Commission (n 2).

[10] indiacorplaw.in, *Report no. 246 Amendments to the Arbitration and Conciliation Act, 1996* (2014) <https://indiacorplaw.in/wp-content/uploads/2014/08/Report246.pdf> accessed 19 December 2022.

[11] whitecase.com, *2021 International Arbitration Survey* (2021) <https://www.whitecase.com/sites/default/files/202106/qmul-international-arbitration-survey-2021-web-single-final-v2.pdf> accessed 19 December 2022.

[12] White&case, 'Current choices and future adaptions' (*whitecase.com*, 06 May 2021) <https://www.whitecase.com/insight-our-thinking/current-choices-and-future-adaptations> accessed 08 March 2023.

[13] The Singapore Arbitration Act 2001, s 13(4).

appointment of Arbitrators wherein, if the parties under Section 13(3)(a) fail to appoint the arbitrators within 30 days of the receipt of the notice, then the appointment will be done by the 'appointing authority' which according to Section 13(8) is the President of the Court of Arbitration of SIAC.[14] Further, Section 16(2) of the 2001 Act[15] gives immunity to the arbitral institution wherein if there is a request moved by the party for the removal of the arbitrator/s, then the court will not adjudge the matter unless the parties have resorted to all means in the arbitral institution itself. Also, Section 59 of the 2001 Act[16] gives immunity to the Arbitral Institutions in case of any glaring mistake committed by the arbitrator during the arbitral proceedings.

Apart from the 2001 Act, the SIAC Rules of 2016 also provide credence to the institution due to the transparency and party-centric provisions the rules provide to the parties of the dispute. Rule 15 of the SIAC Rules[17] calls for notice for a challenge on the appointment of the arbitrator to the Registrar of the SIAC, whereas Rule 16[18] calls for the Decision of the Challenge to be made by the Court of Arbitration of SIAC. Rule 39[19] is one of the most intrinsic provisions of SIAC, wherein it calls for the Confidentiality of all matters to be maintained by the arbitrator unless agreed by the parties. Emergency Arbitration, which is the arbitral relief provided by the institution in cases of urgency till the arbitral tribunal is convened, has been inserted in the ICC Rules of Arbitration 2021 in Appendix 5[20] and is also mentioned under Schedule 1 of the SIAC Rules[21] also made these institutions distinct and promising for the business fraternity and other claimants for quick relief in cases of urgency.

Unlike the above legislations and the institutional rules, the Indian Arbitration Act does not acknowledge the institutional arbitrations in India in terms of administrative and judicial purposes. Although the Arbitration Act has acknowledged the arbitral institution in a number of provisions like Section 11(5)[22], the impanelled arbitrators from the institutions can only be appointed for the redressal of disputes when the request for an appointment has been made by either of the parties to the Supreme Court or the High Court and it depends upon the Courts whether to appoint an arbitrator from the institution or not. This works in contrast to Section 13(4) of the 2001 Act

[14] The Singapore Arbitration Act 2001, s 13(8).
[15] The Singapore Arbitration Act 2001, s 16(2).
[16] The Singapore Arbitration Act 2001, s 59.
[17] Singapore International Arbitration Centre Rules 2016, r 15.
[18] ibid r 16.
[19] Singapore (n 14) r 39.
[20] ICC Arbitration Rules 2021, app 5.
[21] Singapore (n 14) sch 1.
[22] Arbitration and Conciliation Act 1996, s 11(5).

mentioned above, giving no formal recognition to the arbitral institutions. Also, in the Indian legal landscape, if the parties have a grievance with the arbitrator, then either of the parties shall, within 15 days of becoming aware of the biased status of the arbitrator, write the reasons to the arbitrator for challenging him under Section 13 of the Arbitration Act. This ground does not hold a positive footing because according to Section 13(5) of the Arbitration Act if the arbitral tribunal decides to proceed with the arbitral award on the failure of the challenge and the party decides to set aside the arbitral award, then only the Court can intervene to set aside the arbitral award. Now, this position of the law totally discards the role of the arbitral institutions in providing recommendations to the arbitral tribunal in deciding to write the arbitral award, which could have stopped the intervention of the court in deciding the arbitral award.

The Arbitral Institutions in India, although hosting a mass-level of panel of arbitrators, do not have good support and corpus of funding from the government, due to which, the administrative and secretariat service of these institutions ceases to be efficient.

Judicial legitimacy of institutional arbitration

The judges of various High Courts and Supreme Court have time and again called for the institutionalization of arbitral institutions in India with a view to lessen the burden of the pendency of cases. In the case of *Union of India v. Singh Builders Syndicate*[23], the Hon'ble Supreme Court held the importance of Institutional Arbitration in India and gave credence to it in terms of the arbitrator's fees, which are uniform and hassle-free in case of institutional arbitration. In *SBP & Co. v. Patel Engg. Co.*[24], the Hon'ble Supreme court acknowledged the importance of Arbitral Institutions and held that the Chief Justice or his designate may take the assistance of the Arbitral Institution in appointing an arbitrator under Section 11 of the Arbitration Act, or may even delegate such authority to the arbitral institution.

Recently, the Delhi High Court in the case of *Abhishek Agarwal v. Union of India and Anr*[25], the Delhi High Court has at length discussed the importance of Institutional Arbitration in India and has thus said, *"We cannot lose sight of the fact that there is an urgent need of a credible institutional arbitration center in India, akin to other jurisdictions such as the Singapore International Arbitration Centre, Hong Kong International Arbitration Centre, and London Court of International Arbitration. These internationally renowned centers are also run with the involvement of their governments respectively".*[26]

[23] *Union of India v Singh Builders Syndicate* [2009] 4 SCC 523 [9].
[24] *SBP & Co. v Patel Engg.. Co.* [2005] 8 SCC 618 [21].
[25] *Abhishek Agarwal v Union of India & Anr* (Delhi High Court, 9 December 2022) [19].
[26] ibid.

Suggestions for stakeholders

Institutional arbitration in India can be very promising and can have broader prospects for its enforcement in the country as a domain of arbitration. The stakeholders, i.e. the legislators as well as the government, need to ponder upon the 2017 Report on Institutional Arbitration and accordingly make desirable changes in the Arbitration Act. The establishment of bodies like the APCI for monitoring and providing accreditation to the arbitral institutions as well as the panel of arbitrators can have positive impacts. Governments need to cater more to Institutional Arbitration while dealing with their own disputes, like the Maharashtra Government's move to make every contract of Rs. 5 Crores and above of the government to be administered by the MCIA[27].

The established bodies should go for creating repositories and databases for all the activities around Institutional Arbitration in India, and on the basis of which, reports and committees can be established for further the establishment of Arbitral Institutions in India, and even Private Organisations can be promoted through MOU's with the government to take part in the creation of databases. Even the stakeholders should go for a ranking/index-based system to rank the arbitral institutions based on their performance on key parameters, and likewise, as previously stated, the Private Organisations should take a part in it or can prepare the ranking individually (e.g.- Reporters Without Borders' Press Freedom Index). The stakeholders should also ponder upon the diversification of arbitrators in the arbitral institutions so as to resolve disputes from different jurisdictions efficiently. Along with the corpus of funding, the government also needs to provide state-of-the-art infrastructure along with all the technological facilities and also ponder upon virtual hearing of disputes since, according to the White and Case 2021 survey, 38% of respondents would prefer other arbitral institutions if logistical/administrative support is provided for virtual hearings[28].

Conclusion

Institutional Arbitration has taken an in-road to India but is yet to achieve its milestone owing to the number of disputes pending in India and the cases handled by Arbitral Institutions at present. Institutional Arbitration as an assistance body can prove to be beneficial for the beneficial community and other claimants not only in terms of administrative and secretariat support but also effective and transparent disposal of issues. So, the stakeholders, including the government, should revisit the 2017 Report as well as the ICC Rules of Arbitration and the SIAC Rules so as to

[27] Indian Law Partners, 'Government of Maharashtra grants approval to MCIA under Institutional Arbitration Policy' (*ilp.in,* 30 March 2022) <https://ilps.in/government-of-maharashtra-grants-approval-to-mcia-under-institutionalarbitration-policy/> accessed 20 December 2022. [28] Whitecase (n 11).

make the Arbitration Act party-centric as well as efficient, and transparent. By this, India can be a game changer and can become a hub of Arbitration across the globe in the future course of time.