

THE ROLE OF MARKET LIBERALISATION IN NAVIGATING INDIA'S ARBITRATION LANDSCAPE

AUTHOR(S)

Mansi Tripathi

III Year, B.Sc. LL.B. (Hons.) Student at School of Law, Forensic Justice and Policy Studies

Introduction

With a GDP exceeding \$3 trillion, India's economy dwarfs those of Canada, Russia, Brazil, and Australia, presenting immense economic prospects. With such an expected influx, the heads of companies are optimistic that the expansion would lead to a substantial increase within the country's market.²³ In a recent exchange with Bar&Bench, Claudia Salomon, who is the first female president of the International Chamber of Commerce's International Court of Arbitration, stated in her valuable insight that continued endeavour to liberalise the Indian market might lead to the emergence of a more competitive arbitration landscape.²⁴

In the past few decades, India has undertaken substantial initiatives to establish the efficiency and effectiveness of dispute resolution processes by, aligning with international standards and fostering a more conducive business environment. Arbitration, as a pivotal Alternative Dispute Resolution ["ADR"] mechanism on a global scale, is gaining paramount space in the Indian legal landscape as the country embarks upon the journey of market liberalisation which is, a strategic initiative meticulously crafted to catalyse economic growth, attract foreign investments, and fortify global trade relations. This paradigm shift toward opening up the market carries the potential to not only

²³ Jessica Seah, "Bracing for Impact: The Liberalization of India's Legal Market is Huge, Which Firms Will be Most Affected?"; (*Lawcom International*, 16 March 2023); <www.law.com/international-edition/2023/03/16/bracing-for-impact-the-liberalization-of-indias-legal-market-is-huge-which-firms-will-be-most-affected/> accessed 2 January 2024.

²⁴ Pallavi Saluja, "Liberalization of Indian market can lead to a more competitive arbitration landscape: ICC Court of Arbitration President Claudia Salomon"; (*Bar&Bench*, 20 December 2023); <www.barandbench.com/interviews/claudia-salomon-first-woman-president-icc-court-of-arbitration-interview> accessed 2 January 2024.

influence but also redefine the mechanisms, challenges, and opportunities within the realm of arbitration, thus, marking a crucial juncture in India's economic and dispute resolution landscape.

This research paper explores the relationship between market liberalisation and India's arbitration landscape, focusing on the potential advantages and challenges that can arise from the evolution of the country's arbitration mechanisms. The paper emphasizes the benefits of arbitration as a flexible, efficient, and cost-effective dispute resolution method, contributing to a conducive business environment in a liberalized market. The paper also discusses the implications and challenges of this relationship.

Background

In 1991, India initiated a process of economic liberalisation aimed at making the Indian economy more market-oriented to acquire a seat at the highest table.²⁵ This reform had a significant impact on the Indian economy by leading to an increase in foreign investment and a shift towards a service-oriented economy. With liberalisation, India has not only had success at the macro level but it has also impacted people in terms of per capita income at the micro level.²⁶ The introduction of technology and innovation in India has significantly boosted productivity growth, thereby enhancing the country's economic growth. Alongside this exponential expansion, disputes between the businesses also increased proportionately²⁷. Since these disputes need speedy resolution, litigation is often the least preferred method because the Indian judicial system is plagued by delays which causes businesses to suffer losses. Thus, arbitration became the most commonly used mode of ADR methods for resolving these disputes offering a cost-effective, neutral alternative to lengthy court proceedings²⁸. Globally, arbitration has been the most effective method for resolving disputes, promoting a conducive environment for international commerce.

Arbitration in India has flourished since the end of the nineteenth century and has been statutorily recognized as a form of dispute resolution for the first time with the enactment of the Indian Arbitration Act, 1899 [**“1899 Act”**].²⁹ However, after the enactment of the 1899 Act, there were

²⁵ Chetan Agrawal, “The Effects of Liberalization on the Indian Economy: A Labour Force Perspective”; (2013) 38 (4) *MLS* 373-398; <<https://doi.org/10.1177/0258042X13513135>> accessed 2 January 2024.

²⁶ Kishore G. Kulkarni and Shreesh Bhattarai, “A Case Study: Impact of International Liberalization on the Indian Economy”, (November 2012) 4 *JEKEM*; <www.researchgate.net/publication/271237356_A_Case_Study_Impact_of_International_Liberalization_on_the_Indian_Economy> accessed 2 January 2024.

²⁷ Anurag K. Agarwal, “Resolving Business Disputes in India by Arbitration: Problems Due to the Definition of Court”; (2008) *IIMA Working Papers* WP2008-12-03 <[Resolving Business Disputes in India by Arbitration: Problems Due to the Definition of Court \(repec.org\)](http://www.iima.ac.in/workingpapers/2008-12-03/Resolving%20Business%20Disputes%20in%20India%20by%20Arbitration%20Problems%20Due%20to%20the%20Definition%20of%20Court%20(repec.org))> accessed 3 January 2024.

²⁸ *ibid.*

²⁹ Tariq Khan and Muneeb Rashid Malik, “History and development of Arbitration Law in India”, (*Bar & Bench*, 30 April 2020); <<https://www.barandbench.com/columns/history-and-development-of-arbitration-law-in-india>>; accessed 3 January 2024.

various amendments to the Arbitration Act, 1940 [“1940 Act”]³⁰ and following the economic liberalisation in 1991, measures were implemented to draw foreign investment, necessitating a conducive business environment and business-friendly practices. Consequently, the Arbitration and Conciliation Act, 1996 [“1966 Act”] was enacted to replace the 1940 Act.³¹ Notably, the 1996 Act was founded on the UNCITRAL Model Law on International Commercial Arbitration 1985 [“UNICITRAL Model”] which, encompasses both domestic and international arbitration.³² The foremost objective behind implementing the 1996 Act was to minimise arbitration delays to position India as a cardinal hub for arbitration proceedings.

India’s Present Arbitration Landscape

The implementation of the 1996 Act in India marked a substantial shift towards favouring arbitration as a preferred dispute resolution method. India, being an early adopter of the UNCITRAL Model, aligned its arbitration laws with global standards, hence making it an appealing destination for international commercial arbitration.³³ As the seventh nation to ratify the New York Convention, India not only enhanced the efficiency and credibility of its arbitral procedures but also positioned itself as a regional centre for international commercial arbitration.³⁴ Despite these positive developments, India has made minimal concrete advancements toward arbitration reform and continues to grapple with its image as an “*arbitration-unfriendly*” jurisdiction.³⁵ To outsiders, the primary obstacle to arbitration reform in India is the perceived excessive intervention by the Courts, which is seen to be undermining the arbitration process.³⁶ However, insiders believe the issues plaguing the Indian arbitration framework are more complex. It is unique to India that over 90% of the total arbitrations are believed to be conducted ad hoc, as a result of limited institutional supervision and inadequate promotion of the arbitration process. This absence of coordination impedes the advantages of uniform rules, such as predictability, transparency, and consistency in treatment.³⁷

³⁰ Sukhleen Saluja, “History and Development of Arbitration Law in India”; (*LawLex.Org*, 23 May 2020); <<https://lawlex.org/lex-pedia/history-and-development-of-arbitration-law-in-india/20489>>; accessed 3 January 2024.

³¹ Anurag K. Agarwal, “Resolving Business Disputes in India by Arbitration: Problems Due to the Definition of Court”; (2008) IIMA Working Papers WP2008-12-03 <Resolving Business Disputes in India by Arbitration: Problems Due to the Definition of Court (repec.org)> accessed 3 January 2024

³² Vikash Kumar Singh, ‘Arbitration in India: Recent Developments and Key Challenges’, (2011) 11(7) IJCRT, <[IJCRT2307247.pdf](#)>, accessed 3 January 2024.

³³ Hiro N. Aragaki, “Arbitration Reform in India: Challenges and Opportunities”, (2017); Los Angeles Legal Studies Research Paper No. 2017-51, <<https://ssrn.com/abstract=3088355>>, accessed 3 January 2024.

³⁴ *Ibid.*

³⁵ Hiro N. Aragaki, “Arbitration Reform in India: Challenges and Opportunities”, (2017); Los Angeles Legal Studies Research Paper No. 2017-51, <<https://ssrn.com/abstract=3088355>>, accessed 3 January 2024.

³⁶ Charu Singhal, ‘Arbitration in India: A study of issues and challenges’, (*Lexforti*, 23 April 2020), <<https://lexforti.com/legal-news/arbitration-in-india-a-study-of-issues-and-challenges>>, accessed 3 January 2024.

³⁷ *Hiro N. Aragaki* (note 11).

After this act, three other amendments were made in the year 2015, 2019 and 2021. The Arbitration and Conciliation (Amendment) Act, 2015 [**“2015 Act”**] and 2019 [**“2019 Act”**] were aimed at improving arbitration procedures and jurisdictional clarity in India. The 2015 Act narrowed the relevant court for international arbitration,³⁸ extended provisions to international commercial arbitrations outside India, and empowered courts to refer parties to arbitration despite prior judgments.³⁹ The 2019 Act proposed the creation of the Arbitration Council of India [**“ACI”**] to promote alternative dispute resolution.⁴⁰ The Arbitration and Conciliation (Amendment) Act, 2021 [**“2021 Act”**] aimed to curb the misuse of arbitration laws and prevent misuse of arbitration laws by "fly-by-night operators" for fraudulent gains, introducing provisions like removing arbitrator qualifications, granting courts the power to stay awards based on fraud or corruption, and regulating arbitrator accreditation through an arbitration council.⁴¹

Arbitration and Liberalisation

In recent decades, India's economic growth has surged, largely attributed to the liberalizing reforms implemented by the government in 1991, signalling the end of the "*License Raj*" era.⁴² Liberalisation denotes a shift from a regulated, planned economy to a market-driven one,⁴³ involving the removal of regulatory barriers to encourage domestic and international participation.⁴⁴ With increasing globalisation and liberalisation policies, the arbitration landscape in India needs a conducive environment for it to flourish to constitute India as an international arbitration hub.⁴⁵ However, liberalisation of the legal market has been a debatable matter since decades which led to foreign

³⁸ Ms. Zabeen Motorwala, "Arbitration And Conciliation (Amendment) Act, 2015 - Key Changes And Circumstances Leading To The Amendments", *Bharati Law Review*, April – June 2016, pg: 261-266, (Manupatra), <ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2015 - KEY CHANGES AND CIRCUMSTANCES LEADING TO THE AMENDMENTS (Manupatra.In)>. Accessed 23 February 2024.

³⁹ PRS Legislative Research, "The Arbitration and Conciliation (Amendment) Bill, 2015", (prsindia.org), <The Arbitration and Conciliation (Amendment) Bill, 2015 (prsindia.org)>. Accessed 23 February 2024

⁴⁰ AZB & Partners, "The Arbitration and Conciliation (Amendment) Act, 2019-Key Highlights", (Mondaq, 27 August 2019), <The Arbitration And Conciliation (Amendment) Act, 2019 – Key Highlights - Arbitration & Dispute Resolution - India (mondaq.com)>, accessed 23 February 2024.

⁴¹ Ganesh Chandru, Aditi Sheth, Hrithik Merchant, "The 2021 Amendment to Arbitral Legislation in India: Is it a Step in the Right Direction?", Vol. 7 issues 2 (2021), *National Law School Business Law Review*, <repository.nls.ac.in/cgi/viewcontent.cgi?article=1099&context=nlsblr>

⁴² Anna Robinson, "1991 Economic Liberalisation Reforms in India: A Micro-Level Analysis", (Master of Science in Contemporary India Dissertation University of Oxford, 2017), <https://www.southasia.ox.ac.uk/sites/default/files/southasia/documents/media/robinson_a_dissertation.pdf>, accessed 4 January 2024.

⁴³ V. Basil Hans, "Economic Liberalisation in India", (*JSRN*, 20 June 2017), <<https://ssrn.com/abstract=2989420>> accessed 4 January 2024.

⁴⁴ BusinessEssay, "Market Liberalization for Developing Countries", (*BusinessEssay*, 12 December 2022), <<https://business-essay.com/market-liberalization-for-developing-countries>>, accessed 4 January 2024.

⁴⁵ Zil Shah, 'LIDW 2023: India: Trends, Opportunities, and Challenges', (*Kluwer Arbitration Blog*, 20 May 2023), <<https://arbitrationblog.kluwerarbitration.com/2023/05/20/lidw-2023-india-trends-opportunities-and-challenges/>> accessed 5 January 2024.

lawyers having to operate on a fly-in, fly-out basis when it comes to India-related deals.⁴⁶ It was only in the case of *Bar Council of India v. A.K Balaji*,⁴⁷ that the Apex Court clarified the definition under Section 2(1)(f) of the 1996 Act by stating that an arbitration matter would be termed as “International Commercial Arbitration” if it involves disputes, contractual or otherwise, where at least one party is habitually residing abroad, irrespective of their nationality.⁴⁸ After this judgement, few measures have indicated towards a potential liberalisation of India’s legal sector. In 2021, an agreement was reached between the United Kingdom [“UK”] and India which aimed to increase exports and investments between the two countries with both nations pledging to eliminate obstacles in the Indian legal services sector which hinder lawyers based in UK from practising international and foreign law in India.⁴⁹

Early in 2023, the Bar Council of India [“BCI”] released the Bar Council of India Rules for Registration and Regulation of Foreign Lawyers and Foreign Law Firms in India, 2022 in order to facilitate the registration and practice of international lawyers in India.⁵⁰

This change is expected to alter the competitive landscape for Indian law firms, which have been dominating as legal advisors for a long time. This global competition is expected to accelerate economic growth⁵¹ and improve the quality and efficiency of legal services.⁵² It could also provide Indian lawyers with opportunities to expand their practices internationally with many analysts and scholars strongly believing that liberalising the legal market could result in increased job opportunities for Indian lawyers, along with improved compensation and working conditions.⁵³ Also, the liberalisation of the arbitration market, coupled with strategic reforms and strong institutional support, enables India to model itself along the lines of the United States of America, Singapore, etc., in becoming a globally competitive arbitration hub.

⁴⁶ Jessica Seah, “India Finally Liberalizes its Legal Market, Foreign Firms Set to Move In”, (*Law.com International*, 15 March 2023), < <https://www.law.com/international-edition/2023/03/15/india-finally-liberalizes-its-legal-market-foreign-firms-set-to-move-in/>>, accessed 5 January 2024.

⁴⁷ *Bar Council of India v. A.K. Balaji* [2018] 5 SCC 379.

⁴⁸ Durgesh Shukla, “Liberalization In Indian Arbitration: The Curious Case Of Foreign Arbitrators In India”, (2018) 4(8) JCIL 35-46, <<https://jcil.lsyndicate.com/wp-content/uploads/2023/06/LIBERALIZATION-IN-INDIAN-ARBITRATION-Durgesh-4.pdf>>, accessed 5 January 2024.

⁴⁹ *Jessica Seah*, (note 23)

⁵⁰ Bhadra Sinha, “Bar council finally allows entry of foreign lawyers and firms in India, but these conditions apply”, (*The Print*, 15 March 2023), <<https://theprint.in/india/bci-finally-allows-entry-of-foreign-lawyers-and-firms-in-india-but-these-conditions-apply/1445354/>>, accessed 5 January 2024.

⁵¹ *Economy watch*, “Benefits of International Trade”, (*Economy Watch*, 24 April 2018), < <http://www.economywatch.com/international-trade/benefit.html>> accessed 5 January 2024.

⁵² Jayanth K. Krishnan, “Globetrotting Law Firms” (2010), *Articles by Maurer Faculty*, <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1226&context=facpub> > accessed 9 January 2024.

⁵³ Niriksha Sanghvi and Rich Sharma, “Liberalization of Legal Profession in India- Opening Doors for Foreign Law Firms”, (2017) 3(2) JCIL.

Case Study: Allen & Overy's Entry into the Indian Arbitration Market

Allen & Overy, a leading international law firm, entered the Indian arbitration market in response to India's liberalization efforts and the growing demand for specialized legal services in arbitration.⁵⁴ The firm adopted a collaborative approach, forming strategic alliances with prominent Indian law firms to navigate the regulatory landscape and establish a foothold in the market. These partnerships allowed Allen & Overy to offer a comprehensive range of legal services, including arbitration, to clients operating in India.

The firm's dedicated team of arbitration lawyers offered tailored solutions to multinational corporations facing complex disputes in the Indian market. With a deep understanding of international arbitration practices and procedures, Allen & Overy provided clients with strategic advice and representation in arbitration proceedings. Allen & Overy has represented Vodafone, Nissan, Reliance industries, etc. in many arbitral cases.⁵⁵

The firm's entry into the Indian arbitration market had a significant impact on the legal landscape, contributing to the development of arbitration practices in India and promoting international best practices and standards. By offering access to top-tier arbitration expertise, Allen & Overy enhanced the competitiveness of the Indian market and raised the bar for quality legal services.

Despite facing regulatory challenges in establishing its presence in India, Allen & Overy successfully overcame these challenges through strategic partnerships and a commitment to compliance. Allen & Overy's entry into the Indian arbitration market exemplifies the intersection of liberalization policies and the evolution of legal services in emerging economies. By leveraging global expertise and forming strategic alliances with local partners, the firm has successfully established itself as a leading provider of specialized arbitration services in India.

Challenges in Arbitration and Market Liberalisation

Market liberalisation in India has stimulated economic growth and global cooperation, attracting foreign companies and facilitating cross-border transactions. However, this process introduces complexities, particularly in the realm of arbitration. While liberalisation promotes economic expansion, it also gives rise to disputes that necessitate arbitration, revealing the impact of foreign entities on domestic legal systems.

⁵⁴ Bar & Bench, "Allen & Overy Singapore Partners Sheila Ahuja and Pallavi Gopinath Aney to jointly chair firm's India Group", (*Bar & Bench*, 25 May 2021, 4:52 pm), < <https://www.barandbench.com/news/corporate/sheila-ahuja-pallavi-gopinath-aney-jointly-chair-allen-overly-india-group>>, accessed 1 March 2024

⁵⁵ Chambers and Partners, "Dispute Resolution in India", < <https://chambers.com/department/allen-overly-dispute-resolution-global-2:467:110:6:7>>, accessed 1 March 2024

In the context of arbitration, power dynamics can be skewed, with multinational corporations often exerting influence over local mechanisms. The *Chevron Corporation vs. Ecuador* case⁵⁶ exemplifies this, casting doubt on Ecuador's legal sovereignty.⁵⁷ Transnational arbitration tribunals, operating beyond national frameworks, raise concerns about accountability and transparency, lacking appellate mechanisms.

Enforcing arbitral awards against sovereign states poses challenges to the international legal order. Although the New York Convention facilitates recognition and enforcement, it restricts states' ability to contest awards based on public policy grounds, as demonstrated in the *Philip Morris v. Australia* case.⁵⁸

Given the interconnectedness of the global economy, arbitration plays a crucial role in resolving disputes. However, its vulnerability to foreign influence necessitates thoughtful reforms. Despite India's progress in economic liberalization and dispute resolution, obstacles remain, including resistance from traditional legal practices.

To enhance the effectiveness of arbitration, a balanced approach is essential - one that ensures transparency, accountability, and respect for sovereignty. India must create an environment conducive to fair arbitration, reaping the benefits of liberalization while safeguarding legal integrity.

Opportunity in Arbitration and Market Liberalisation

Market liberalization in India attracts foreign investments by creating a conducive environment for businesses to operate, boosting economic growth and requiring robust dispute-resolution mechanisms. This expansion of the legal services sector also necessitates the development of arbitration infrastructure and enhanced legal expertise to meet global demands. To fully leverage market liberalization opportunities, India must invest in arbitration infrastructure, establishing state-of-the-art facilities and cultivating a skilled pool of arbitrators. Targeted training programs are essential for enhancing the skills of legal practitioners, including lawyers, judges, and arbitrators, to navigate cross-border transactions and international arbitration proceedings effectively. Regulatory reforms are crucial for creating a predictable and business-friendly environment, attracting foreign investments, fostering confidence among businesses, and positioning India as a competitive global arbitration hub. India must strike a delicate balance between preserving

⁵⁶ *Chevron Corp. v. Republic of Ecuador*, PCA Case No. 2009-23.

⁵⁷ San Ramon, "Dutch Supreme Court Rules for Chevron in Ecuador Dispute", (Chevron.com, 15 April 2019), <<https://www.chevron.com/ecuador/press-releases/archive/dutch-supreme-court-rules-for-chevron-in-ecuador-dispute#:~:text=In%202011%2C%20the%20Ecuadorian%20plaintiffs,%2C%20witness%20tampering%2C%20judicial%20bribery%2C>>, accessed 1 March 2024

⁵⁸ *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12

tradition and embracing innovation to enhance its global standing in arbitration, contribute to economic growth, and foster international collaboration in dispute resolution.

Conclusion

The interaction between the liberalisation of the market and India's arbitration landscape represents a pivotal moment in its economic and dispute-resolution journey. The endeavours towards liberalisation have not only stimulated economic expansion but have also paved the way for progress in arbitration. Despite advancements, challenges such as perceptions of excessive Court involvement persist. The opening up of opportunities for international corporations due to market liberalisation necessitates robust dispute resolution mechanisms. By emulating successful models like Singapore International Arbitration Centre, India has the potential to enhance its global standing in arbitration. However, obstacles like intricate regulations and resistance from conventional legal practices still exist. Addressing these challenges requires a delicate balance between preserving tradition and embracing innovations. Market liberalization can attract foreign investments by creating a more conducive environment for businesses to operate in India. In the legal services sector, market liberalization can broaden opportunities for legal professionals by allowing foreign law firms to operate in the country and enabling domestic firms to collaborate with international counterparts. To fully capitalize on market liberalization opportunities, India needs to invest in Arbitration Infrastructure which includes, state-of-the-art facilities and a well-trained pool of arbitrators, which is essential for instilling confidence in investors and businesses.

Also, India should implement Targeted Training Programs to adapt and enhance their skills to meet the demands of a globalized marketplace. The targeted training programs can aim at equipping lawyers, judges, and other legal practitioners with the knowledge and expertise required to navigate cross-border transactions, international arbitration proceedings, and the complexities of foreign legal systems. India should undertake reforms to streamline regulatory processes, reduce red tape, and enhance clarity and consistency. This will create a more predictable and business-friendly regulatory environment, attract foreign investments, and foster greater confidence among domestic and international businesses. Such a strategic approach would position India as a competitive global arbitration hub, therefore contributing to its economic growth and fostering international collaboration in dispute resolution.