GNLU SRDC ADR
MAGAZINE
VOLUME V | ISSUE I

PUBLIC PROCUREMENT CONTRACT GUIDELINES: A COLLABORATIVE MED-ARB SOLUTION TO CONFLICTS

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Introduction

Over the years, arbitration has emerged as a preferred method for resolving disputes in India, due to its efficiency and commercial practicality.[1] As noted by former Chief Justice of India in his speech at the UK Supreme Court, "arbitration is no longer an alternative but the preferred method for commercial justice."[2] Arbitration mechanism has also been promoted by the Indian government and various stakeholders for addressing disputes in government contracts, praised for its speed, informality, and finality compared to litigation in the past.[3] Arbitration in India has been the traditionally promoted form of alternate dispute resolution. The importance of arbitration can be noted in the comments of former Minister of Law and Justice[4], there he reiterated the importance of arbitration in facilitating international trade and investment for providing a stable and predictable dispute resolution mechanism and therefore fostering confidence among foreign investors.

However, the recent 2024 Guidelines for Arbitration and Mediation in Domestic Public Procurement Contracts issued by the Ministry of Finance ["**Guidelines**"] signals a shift in approach, advocating mediation instead of arbitration as the primary mode of dispute resolution

[1] Deepika Kinhal & Tarika Jain, 'The Future of Dispute Resolution in India' (*Vidhi Centre for Legal Policy*, July 2020) <https://vidhilegalpolicy.in/wp-content/uploads/2020/07/200727_The-future-of-dispute-resolution-in-India_Final-Version.pdf> accessed on 17 November 2024.

[2] Bhumika Indulia, 'Future of arbitration is already here: CJI Dr. DY Chandrachud at UK Supreme Court' (*SCC Times Online*, 7 June 2024) <https://www.scconline.com/blog/post/2024/06/07/future-arbitration-already-here-cji-dr-dy-chandrachud-uk-supreme-court/> accessed on 17 November 2024.

[3] Department of Legal Affairs, *Report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India* (Ministry of Law and Justice, 2017) <https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf> accessed on 17 November 2024.

[4] Arjun Ram Meghwal, 'Keynote address' (Conference on Arbitrating Indo-UK Commercial Disputes on 5 July, 2022 at London) <https://legalaffairs.gov.in/sites/default/files/speech.pdf> accessed on 18 November 2024.

in public procurement contracts.[5] This article examines the implications of these new guidelines and evaluates the inherent challenges in the proposed framework. It also analyses successful mediation models around the globe to suggest a uniform framework which can be adopted for Domestic Public Procurement Contracts in India.

Understanding the Guidelines

The guidelines propose a more restrained use of arbitration clauses in public procurement contracts. Specifically, arbitration is now recommended only for disputes below INR 10 Crores, with institutional arbitration preferred when feasible.[6] For high-value disputes, there is a proposal of establishment of a High-Level Committee which may act as mediator between the parties besides allowing them to directly negotiate the matter, if they prefer to do so. For these high-value contracts, there are no arbitration clause included which means that arbitration mechanism cannot be resorted to by the parties.

The guidelines, noting the shortcomings of arbitration in government-related disputes in the past, recommend that where the alternative methods are unsuccessful, litigation should be preferred.[7] The guidelines emphasize the advantages of mediation under the Mediation Act, 2023.[8] This pivot marks a significant departure from the earlier focus on positioning India as a global hub for arbitration. Public procurement, essential to government operations, involves procuring goods and services from the private sector to achieve public objectives. Given its reliance on the taxpayer's money, the process demands transparency, efficiency, and fairness.

This significant policy shift raises several critical questions regarding its practicality and implications. First, how viable is the preference for mediation over arbitration in high-value government contracts? Second, is the INR 10 Crore threshold an effective parameter for determining dispute resolution mechanisms? Finally, would a uniform dispute resolution framework across all public procurement contracts, regardless of value, better serve the government's pro-arbitration stance, especially considering India's broader policy objectives.

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[5] Rajesh Kumar, 'Ministry of Finance Pushes For Mediation Over Arbitration In Domestic Public Procurement Contracts' (*LiveLaw*, 7 June 2024) <https://www.livelaw.in/news-updates/ministry-of-finance-pushes-for-mediation-over-arbitration-in-domestic-public-procurement-contracts-229456> accessed on 17 November 2024.

[6] Ministry of Finance, *Guidelines for Arbitration and Mediation in Contracts of Domestic Public Procurement* (Office Memorandum No. F.1/2/2024-PPD, 3 June 2024) <https://doe.gov.in/files/circulars_document/Guidelines_for_Arbitration_and_Mediation_in_Contracts_of_Domestic_Public_Procurement.pdf> accessed on 17 November 2024.

[7] 'The Final Decree' (Supreme Court Observer, 2024) <https://www.scobserver.in/journal/the-final-decree/> accessed on 17 November 2024.

[8] The Mediation Act 2023 (India).

Assessing Mediation as a Preferred Alternative to Arbitration in Dispute Resolution

Practical Implications of the Guidelines

The guidelines fail to consider a factor that without arbitration agreements, failed mediation would cause the disputes to go to overburdened courts with already huge pendency of cases.[9] Given that courts have been struggling to deal with the challenges to arbitral awards within the statutory period, full trials in complex cases, can still take over 10+ years.

The Guidelines also fail to follow the Law Commission and Supreme Court directions to curtail excessive litigation by the government and Public Sector Undertakings.[10] The presumption behind the guidelines that arbitration can lead to incorrect application of law lacks a sound backing. On the contrary, one of the core benefits of arbitration is the higher probability of the matter being adjudged by a field expert, while such opportunity may not always be the case in litigation.

However, in a case where one of the parties deliberately pushes the matter to litigation, as has been highlighted by the routine manner in which arbitral awards are appealed by the government itself, such an issue may continue to persist despite mediation becoming the prescribed mode. A change in the attitude instead of the mode of dealing with such conflicts is of enhanced importance here.

Arbitration plays a vital role in enhancing the Ease of Doing Business.[11] The amendments of 2015 in the Arbitration Act significantly improved this ranking by fostering investor confidence.[12] However, the shift in focus under the new guidelines, prioritizing mediation and litigation over arbitration, could adversely affect investment inflows and potentially harm India's standing on the index. Institutions like the World Bank also evaluate projects not only for the financial efficiency but also for the strong framework of dispute resolution mechanisms which largely discourage prolonged litigations.

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[9] Deepika Kinhal, Shriyam Gupta and Sumathi Chandrashekaran, 'Government Litigation: An Introduction' (*Vidhi Centre for Legal Policy*, 16 February 2018) <https://vidhilegalpolicy.in/wp-content/uploads/2019/05/GovernmentLitigationFinal.pdf> accessed on 18 November 2024; Ministry of Law and Justice, *Action Plan to Reduce Government Litigation*, (Ministry of Law and Justice, June 2017) <http://doj.gov.in/page/action-plan-reduce-government-litigation> accessed on 18 November 2024.

[10] *Ibid.*

[11] Arbitration Bar of India and Indian Arbitration Forum, *Representation to the Ministry of Finance* (Arbitration Bar of India and Indian Arbitration Forum, 3 June 2024) <https://www.livelaw.in/pdf_upload/representation-to-the-ministry-of-financeabi-and-iaf-545988.pdf> accessed on 18 November 2024.

[12] *Ibid.*

Proposing a pro Med-Arb approach

In light of the aforementioned implications, at a time when India is advocating to become a global arbitration hub,[13] such guidelines that proscribe arbitration as lengthy, expensive and unreliable due to arbitrators' standards may hinder its aforementioned goal. The same may be true for settlement of disputes through mediation, which despite its good intentions is not bound by any legal encumbrance to reach a decision, not to mention reaching a decision within the prescribed limitation of time.[14]

In the authors' opinion, mediation and arbitration are not agnostic to each other, on the contrary, they are very much capable of being used together efficiently to reduce the workload of the judiciary. Pre-arbitration mediation, as a comparable measure to pre-litigation mediation, is an alternative to conflict which is required, not only as a legislative measure, but also as a measure to be pushed from the judiciary.

Making mediation a pre-arbitration mandate, rather than completely erasing the possibility of arbitration may facilitate seamless dispute resolution all while avoiding resorting to litigation. Prescribing mandatory mediation with experienced mediators guiding the process can prevent disputes from reaching arbitration in the first place. An analysis of successes of mandatory mediation regimes may form important inspirations and learning while dealing with associated challenges of implementing mandatory form of mediation.

Countries such as Italy have experimented with making pre-litigation mediation a mandate for resolving the disputes at the initial level itself.[15] The Italian experience shows that lack of a mediation culture is one of the major hurdles that needs to be targeted. Their legislation instead of vesting the responsibility on the courts to refer the parties to mediation mandates all parties to participate in mediation but with a choice to 'opt-out' in case the proceeding does not lead to an agreement.[16] The mediation model has not only been effective in raising the acceptance of

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[13] Narendra Modi, 'The Quest for Making India the Hub of International Arbitration' (Prime Minister of India, 21 October 2016) <https://www.pmindia.gov.in/en/news_updates/the-quest-for-making-india-the-hub-of-international-arbitration/> accessed on 18 November 2024.

[14] Deepika Kinhal, 'Mandatory Mediation in India - Resolving to Resolve' (*Vidhi Centre for Legal Policy*, 05 March 2021) <https://vidhilegalpolicy.in/wp-content/uploads/2021/03/Mandatory-Mediation-in-India-Resolving-to-Resolve.pdf> accessed on 17 November 2024.

[15] Directorate-General for Internal Policies, *Italian Legislation on Mediation* (Note, PE 453.175, 2011) Ch 2.2.

[16] Leonardo D'Urso, Julia Radanova, Constantin Adi Gavrila, 'The Italian Opt-Out Model: A Soft Mandatory Mediation Approach in Light of the Recent CJUE Decision (Wolters Kluwer, 14 Oct 2024) <https://mediationblog.kluwerarbitration.com/2024/10/14/the-italian-opt-out-model-a-soft-mandatory-mediation-approach-in-light-of-the-recent-cjue-decision/> accessed on 18 November 2024.

mediation and but has also contributed in an increased number of mediators successfully reducing the rates of litigation.[17]

Italian model is peculiar in the sense that despite the mandatory nature of referring parties to mediation, it does not restrict their autonomy by forcing them to reach a settlement, and thus, it is instrumental in fostering an environment where mediation complements traditional litigation rather than competing with it.[18] In Italy, arbitration in disputes is not prohibited and can relied upon as another alternative means of dispute resolution before litigation.

The England & Wales model of compulsory, court-referenced mediation in the field of family and employment law is another effective example. The state encourages mediation in the civil procedure rules[19] and in family matters through the Children and Families Act 2014.[20] The procedure prescribed in the act induces parties to go through the 'Mediation Information and Assessment Meeting' before going forward with proceeding with disputes in the court, further approaching a merits-based analysis of the said dispute in 'Early Neutral Evaluation'.[21]

Mediation and arbitration can co-exist efficiently by serving complementary roles within the spectrum of alternative dispute resolution ["**ADR**"]. Mediation, as a facilitative and voluntary process, fosters communication between parties, helping them arrive at mutually acceptable solutions through negotiation. It is particularly effective for preserving relationships and addressing complex, multi-faceted issues. Arbitration, on the other hand, functions as a more formal, adjudicative mechanism where a neutral arbitrator delivers a binding decision. The coexistence of these processes as streamlined by incorporating mediation as a precursor to arbitration, allows parties to first attempt amicable resolution. Together, they enhance efficiency by reducing litigation costs, expediting resolution, and tailoring dispute resolution to parties' needs.

According to the guidelines, the actual experience of arbitration in respect of contracts where the Government is a party has been unsatisfactory in many cases.[22] It is purported therein that arbitration is expensive and time-consuming, with questionable ability and expertise of arbitrators to judge cases and improper application of the law. In the authors' opinion and the view expressed in the 'Report to Review the Institutionalisation of Arbitration Mechanism in India,' proper and

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[17] MondoADR Editorial Board, 'Cartabia: "Alternative forms of conflict resolution produce virtuous effects of easing the administration of justice"' *Mondo ADR* (Italy, 5 April 2021).
[18] Directive on certain aspects of mediation in civil and commercial matters [2008] 2008/52/EC, art 1.
[19] Ministry of Justice, 'Civil Procedure Rules' (*Ministry of Justice*, 6 April 2022) <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part01> accessed on 18 November 2024.
[20] Children and Families Act 2014, S. 10(1).
[21] Ministry of Justice, 'Court's Case Management Powers' (*Ministry of Justice*, 5 September 2023) <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part03#3.2> accessed on 18 November 2024.
[22] *ibid.*

effective institutionalisation of arbitration will help solve most of these issues.[23] The exact number of cases challenging arbitration awards currently pending in India isn't widely reported, but it is clear that there is a significant backlog. Indian courts frequently handle challenges under Section 34[24] of the Arbitration and Conciliation Act, which allows parties to seek the setting aside of arbitral awards.

Proposed Monetary Threshold and Associated Challenges

As per the Guidelines, arbitration may only be restricted to disputes with a value less than Rs. 10 crores. The differentiation by the contract value, for instance, grouping of contracts and disputes below and above INR 10 crores may actually hamper the efficiency of the dispute resolution mechanism in public procurement contracts. This kind of threshold can end up causing inconsistency and fragmentation of the resolution process whereby disputes of lesser value may still involve significant operational and reputational stakes.

A uniform and consistent dispute resolution mechanism, irrespective of a monetary limit, may be employed to ensure fairness and predictability in all public procurement contracts. Since arbitration can be institutionalized together with mediation as a pre-dispute resolution method, implementing a more holistic and flexible model to address disputes can be developed to handle disputes of all complexities.

The MSME Dispute Resolution Mechanism Model – A Probable Solution

The Micro, Small, and Medium Enterprises Development Act, 2006[25] [“**MSMED**”] provides a model which can be employed regardless of the value of the contractual disputes and applied to domestic public procurement contracts. The Micro and Small Enterprise Facilitation Councils [“**MSEFC**”] created by the Act have proved to be effective, efficient and fair in its resolution of the disputes.[26] Drawing inspiration from this, the proposed High-Level Commission under the current guidelines may act parallel to the Facilitation Councils under the MSMED. Other key

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[23] Department of Legal Affairs, *Report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India* (Ministry of Law and Justice, 2017) <https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf> accessed on 18 November 2024.
[24] Arbitration and Conciliation Act, 1996, s 34.
[25] Micro, Small, and Medium Enterprises Development Act, 2006 (India).
[26] E Bhaskaran, 'The Performance of Micro and Small Enterprise Facilitation Councils in India' (January 2021) <https://www.researchgate.net/publication/348523881_THE_PERFORMANCE_OF_MICRO_AND_SMALL_ENTERPRISE_FACILITATION_COUNCILS_IN_INDIA> accessed 18 November 2024.

points in adopting the MSMED Act Model for Domestic Public Procurement Contract are as follows:

i. *Structure and Membership:*

Like the Micro and Small Enterprise Facilitation Councils, the proposed High-Level Commission could consist of three to five members and Chairperson from the senior government positions, for example, the Director of Public Procurement. Members could be drawn from the law, relevant industry and finance, government and private sector bodies and associations.

ii. *Jurisdiction and Role:*

The High-Level Commission would have jurisdiction over all disputes over public procurement contracts that are executed in its territory, irrespective of the contract value. Paralleling MSME Section 18[27] which provides that its role would entail, at first stage, to conciliate the dispute and at second stage, to arbitrate the dispute.

iii. *Procedure for Dispute Resolution:*

On the instance that the Commission received a dispute referral, it would commence conciliation with principles stipulated in the Mediation Act, 2023. If conciliation does not work, the Commission may either arbitrate the matter or refer it to other recognized arbitration institutions under the Arbitration and Conciliation Act, 1996. The next principle of resolution would be time-bound resolution with arbitration proceedings expected to take a specific time-frame, as is the case with the MSEFC's 90 days' timeline.[28]

iv. *Incentives for Resolution:*

In a bid to discourage frivolous appeals, the appellants could be made to deposit a substantial portion of the awarded amount similarly as prescribed in the provisions of the MSMED Act.

The implementation of such model would enhance the use of mediation for solving disputes in compliance with the objectives of the Mediation Act, 2023.[29] Through insisting on parties to engage in dialogue first, the framework would reduce reliance on litigation and costs and time that come with it. On the same note, institutional arbitration guarantees the parties a formal system of dispute resolution that remains open to them in case of failure in mediation. This twin strategy not

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[27] Micro, Small, and Medium Enterprises Development Act, 2006, s 18.

[28] Press Information Bureau, *Enterprises Facilitation Councils* (PIB 2016) <https://www.pib.gov.in/newsite/PrintRelease.aspx?relid=145093> accessed 19 November 2024.

[29] The Mediation Act 2023 (India).

only serves the Indian vision of the promotion of mediation but also helps to clear the backlog in courts and keep out of litigation, which could otherwise delay public procurement projects. Through this balanced mechanism, India can establish a robust and efficient framework for domestic public procurement contracts dispute resolution, meeting the needs of both public and private stakeholders while advancing its standing as a global hub for commercial arbitration.

Conclusion

The new guidelines for public procurement contracts surely deflect from the approach preferred by the government, which is to promote arbitration as the primary form of dispute resolution and as an alternative to litigation. However, it may not all be for the worst provided exploring other dispute resolution methods may prove effective and possibly less expensive. The Mediation Act, 2023 has provided the much needed framework for institutionalising one of the most effective forms of dispute resolutions, however, it must not be at expense of the work done in its absence.

A uniform dispute resolution framework, inspired by the MSME model, can provide the balance needed to address inefficiencies while maintaining investor confidence and public trust. By fostering a complementary relationship between mediation and arbitration, India can set a global precedent for efficient and equitable dispute resolution in public procurement, reinforcing its position as a leader in commercial justice.