Changing face of arbitration in India
A study by Forensic & Integrity Services
In India, we have witnessed a noticeable progress in the area of arbitration, particularly after the enactment of “The Arbitration and Conciliation Act, 1996.” Today, due to new liberal policies and continuous efforts by the Government, India has opened up to foreign investments in varied industries and sectors, but this has been accompanied by a considerable increase in the number of commercial disputes. The scenario is further complicated with the use of technology in all aspects of business. There is pressure from international companies and various Governments as they are making it mandatory to enforce arbitration clauses in the contract.

All these factors coupled with delays in the traditional Indian litigation system, have led to a considerable increase in the number of arbitration cases.

Historically, the awareness and reliance on alternate dispute resolution, as a solution, was very low. However, the recent increase in the number of cases, positive results and Government support has motivated companies to consider arbitration as an approach to resolve disputes.

Considering the changing trend around arbitration in India, Ernst & Young conducted a survey, where 68 respondents including general counsels at large companies, attorneys of various organizations in India and senior partners of domestic and international law firms participated. Ernst & Young also interviewed some of the key lawyers and eminent personalities in this field to gain their perspective on arbitration in India. We are pleased to share the findings of our study in this report.

The main objective of this study was to understand the perspectives of general counsels and law firms on the need for arbitration in India, its drawbacks, regulatory system and steps that would be required to make India a preferred arbitration destination. The survey findings also highlight the preference of corporates while selecting arbitrators and arbitration institutes.

We take this opportunity to express our gratitude to the people and organizations who took time to respond to our survey. The report and the findings would not have the same value without the support of these respondents and all those who made the survey successful.

We hope you find this report relevant and insightful.

Arpinder Singh
Partner and Head - India and Emerging Markets,
Forensic & Integrity Services
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Executive summary
Arbitration has given the economy a large number of choices, while resolving complicated disputes. Choices such as the appointment of an arbitrator, location of proceedings, selecting governing laws and operational aspects of proceedings have made the arbitration process easier.

In this report, we have captured the evolution of the arbitration law and the practice in India. This report provides a snapshot of the current scenario of arbitration in India, its advantages and disadvantages, perception of known personalities and the suggested way forward for long-term sustainability.

This survey was conducted over a period of two months by the way of online feedback from 68 respondents and interviews of 6 eminent personalities. The respondents to the online survey were legal professionals from large corporate and leading law firms (both Indian and global).

**Significant findings of the survey:**

- **Arbitration clause:** 74% of the survey respondents highlighted that the arbitration clause is an essential part of their legal contract.

- **Type of arbitration:** The survey highlighted the mixed usage of the arbitration mechanism. Out of the total respondents, 24% of the respondents have undertaken Indian ad hoc arbitration, whereas 20% of the respondents have undertaken international commercial arbitration. 27% of the respondents have undertaken both Indian ad hoc arbitration and international commercial arbitration.

- **Arbitration institutes:** During the selection of institutes outside India, 60% of the respondents preferred the Singapore International Arbitration Centre (SIAC), and while selecting institutes within India, 34% of the respondents preferred the London Court of International Arbitration (LCIA), India.

- **Indian regulations:** The survey highlighted the importance given by the Government of India to the improvement of the arbitration mechanism. More than 50% of the respondents said that the ministry's recent steps to develop dispute resolution mechanism are in the right direction.

- **Enforcement of the arbitral award:** 78% of the respondents revealed that they were satisfied with the arbitral award.

- **Cost and time disadvantage:** Around 50% of the respondents said that arbitration in India is expensive and does not provide timely resolutions, which highlights the need for radical changes in procedural aspects.

- **Arbitrator selection:** 68% respondents believed that subject matter experts should be appointed as arbitrators, as against 22% who believed that retired judges should play this role.

- **Role of experts:** The survey highlighted the growing importance of experts such as forensic accountants in the arbitration process as more than 50% of the respondents said that they have used expert services and they believe that experts advice make difference in their arbitration process.
Dispute resolution in India

“Arbitration is a much desired Alternative Dispute Resolution mechanism in India, and would do much good to Indian companies. The improvement in certain issues such as weaknesses of delay, high cost, ad hoc nature and a robust enforcement by court, would ensure the growth of arbitration.”

Zia Mody, Partner, AZB & Partners
India historically followed various means of arbitration or mediation in different forms. It typically used to be a king intervening between a dispute of two people or an official Panchayat intervening and giving their decisions. The Alternate Dispute Resolution (ADR) picked up pace in the country, with the inception of the Bengal Resolution Act, 1772 and 1781, which provided parties an option to submit the dispute to an arbitrator, appointed after mutual agreement and whose verdict would be binding on both the parties. ADR gained further importance in India, post the implementation of the Arbitration Act, 1940, and the Arbitration and Conciliation Act, 1996, which was passed in consonance with the UNCITRAL Model Law of Arbitration. An important International Convention on Arbitration, which enhanced the Indian mechanism, was the New York Convention of 1958 on the Recognition and Enforcement of the Foreign Arbitral Award.

The growing liberalization in India and extraordinary business growth in the last decade increased the interaction between Indian and international organizations. This has resulted in redefining global frontiers for organizations across industries. Such growth and interaction has considerably increased the number of disputes taking place in the last five years in India. During 2004–2007, the Supreme Court decided 349 arbitration cases and the Delhi High Court’s mediation and conciliation center decided 668 out of 868 cases, indicating the growing importance of arbitration as an alternate dispute resolution mechanism in India.

**Causes for dispute:** In the current scenario, it is often observed that the disputes take place mainly because of dynamic business relations and transactions, geographical and cultural differences, increased complexities in technology and misinterpretation of regulations or contract clauses. Other causes such as the lack of clarity on the defined roles and responsibilities as well as terms and conditions in the contract, differences in revenue sharing and cost calculations, change in ownership or management control and regulatory changes enforced by the Government have further aggravated the matter.

**Is arbitration on the right track?**

There are numerous challenges and issues in the way of arbitration being successful in India. Philip Haberman, EMEIA, Ernst & Young, says, "The huge influx of overseas commercial transactions spurred by the growth of the Indian economy has resulted in a significant increase in commercial disputes. The large number of domestic and international disputes has made arbitration a crucial part of doing business in India and therefore the evolution of arbitration as an effective method of commercial dispute resolution is key for future growth."

The opening of institutional arbitrations such as LCIA, India, has indicated the growth of arbitration.

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1. “Development and practice of arbitration in India – Has it evolved as an effective legal institution?” Center on Democracy, Development and The Rule of Law, October 2009, pg.29
2. Annual Report-High Court,” Ch.20. Alternative dispute resolution & legal services, 2007-08, Pg.73
Arbitration in India
Arbitration clause: how critical is it in your contract?

Traditionally, the arbitration clause is one of the most neglected clauses, and while drafting an agreement, is often referred as the “midnight clause” or “last minute clause.” The approach usually followed is plain drafting, standard wordings irrespective of the type of contract or parties involved. This poor drafting leaves loopholes and scope for a dispute over the clause itself and jeopardizes the ability of parties to enforce their rights and resolve disputes amicably. Regularly overlooked parameters of the arbitration clause include the governing law, selection of arbitrator, seat of arbitration, fees and jurisdiction.

The past experiences with Indian courts, growing awareness and the benefits of the alternate means of dispute resolution have been key drivers for companies to focus on drafting a comprehensive arbitration clause.

Figure 1:

Q. Do you have the arbitration clause in all the contracts?

Arbitration clause as part of contracts

- Yes: 74%
- No: 26%

74% of the respondents highlighted that the arbitration clause is an essential part of their legal contracts.

Indian courts have repeatedly highlighted the need to have clear arbitration clauses by way of several case laws in the past. For instance, the case of M/s Dozco India P. Ltd. (the petitioner) vs. M/s Doosan Infracore Co. Ltd. (the respondent) highlighted the need for a specific “seat” clause.3

“Arbitration clauses are increasingly prevalent among the US companies conducting business internationally. The general mindset of US companies doing business in India, or in any international market, is to put in the arbitration clause, as it is perceived to be one of the critical risk mitigation aspects of the contract. Today, arbitration has emerged as the preferred, satisfactory, cost-effective and quicker alternative in resolving international disputes in a mutually beneficial fashion.”

Daniel G. Lentz, Americas, Ernst & Young

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3 Dozco India (P) Ltd v. Doosan Infracore Co. Ltd (2011)6 SCC 179
Ad hoc or institutional arbitration: preferred approach

India is still at a nascent stage as far as arbitration is concerned. When the respondents were asked whether they have undertaken international commercial arbitration or Indian ad hoc arbitration, we received mixed responses.

**Figure 2:**
Q. Have you undertaken international commercial arbitration or Indian ad hoc arbitration?

- International commercial arbitration/Indian ad hoc arbitration
- Both of the above
- None of the above

24% of the respondents have undertaken Indian ad hoc arbitration, whereas 20% of the respondents have undertaken international commercial arbitration. 27% of them preferred undertaking both the arbitrations.

Zia Mody, Partner, AZB & Partners, believes that “Arbitration institutions should play a key role in persuading clients to the concept of institutional arbitration, and thus provide credible, efficient and cost-effective institutional alternatives within India itself. However, there is a need to impart training for nurturing competent professionals so that they can reach the crux of the dispute for its resolution.”

Pros and cons of Indian ad hoc arbitration:

In India, ad hoc arbitration is predominant, whereas institutional arbitration has still not been able to root itself. Ad hoc arbitration may result in a company getting caught in the legal tangle and not really benefiting from arbitration. The advantages of institutional arbitration include predefined rules, the presence of infrastructure facilities, provision of arbitrators by the institution and experienced institutions.

The recent case of ICC granting an award in favor of Tata Steel has given importance to domestic arbitration.

Institutional arbitration:

Both domestic and international institutional arbitration has started gaining momentum, primarily among Indian companies. Key events such as LCIA opening a chapter in India has further strengthened the importance of institutional arbitration. Our survey indicated key preferences among Indian and international institutes.

“Arbitration has generally been perceived as cheaper than traditional litigation, and is often one of the factors taken into account by parties when agreeing to submit disputes to arbitration. However, the ground realities show that arbitration in India, particularly ad hoc arbitration, is becoming quite expensive vis-a-vis traditional litigation.”

Mathew Gearing, Partner, Allen & Overy LLP

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**Changing face of arbitration in India**

“SIAC is preferred by many Indian corporate firms as they are perceived to be good when it comes to being responsive, managing arbitration and providing adequate infrastructure. As a matter of preference, companies prefer an institution that provides facilities all together. Indian arbitration institutions can also look to attract clients by benchmarking their practices with SIAC.”

Rajendra Barot, Partner, AZB & Partners

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**Figure 3:**
Q. Would you refer any dispute to the following Indian arbitration institutes?

<table>
<thead>
<tr>
<th>Indian arbitral institutions</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>LCIA, India</td>
<td>34%</td>
</tr>
<tr>
<td>ICA</td>
<td>29%</td>
</tr>
<tr>
<td>Delhi HC Arbitration Center</td>
<td>11%</td>
</tr>
<tr>
<td>ICADR</td>
<td>9%</td>
</tr>
<tr>
<td>International center of arbitration, Goa</td>
<td>2%</td>
</tr>
<tr>
<td>FACT</td>
<td>4%</td>
</tr>
<tr>
<td>Others</td>
<td>9%</td>
</tr>
</tbody>
</table>

34% of the respondents stated that they would refer their disputes to LCIA, India, while 29% of the respondents mentioned ICA, under institutional arbitration entities within India.

**Figure 4:**
Q. Would you prefer arbitration under institutional arbitration to entities outside India?

<table>
<thead>
<tr>
<th>International arbitral institutions</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>SIAC</td>
<td>60%</td>
</tr>
<tr>
<td>LCIA, UK</td>
<td>50%</td>
</tr>
<tr>
<td>Hong Kong</td>
<td>8%</td>
</tr>
<tr>
<td>Permanent Court of Arbitration, Hague</td>
<td>6%</td>
</tr>
<tr>
<td>Any other institute</td>
<td>12%</td>
</tr>
</tbody>
</table>

60% of the respondents preferred SIAC and 50% of the respondents preferred LCIA, UK, under institutional arbitration entities outside India.

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**Figure 5: International commercial arbitration/Indian ad-hoc arbitration**

- **Disadvantages of Indian ad hoc arbitration**
  - Limited remedies
  - Complex
  - Scope for bias
  - Limited application
  - Judicial intervention
  - Delay in decision
  - Expensive mode of dispute resolution

- **Advantages of Indian ad hoc arbitration**
  - Final and binding decisions
  - Limited right of appeal
  - Flexibility of procedure
  - Confidentially
  - Neutrality
  - Specialized competence of arbitral
Indian regulation: creation of a conducive environment for arbitration

The Government of India has taken steady steps for developing arbitration as an alternate dispute resolution method. In addition to retired judges being appointed as arbitrators, the biggest hindrance in effectively utilizing arbitration in India is the regulatory set up where every award is challenged in the Indian courts. The matter is further complicated with difficulties encountered during the enforcement of awards. The overall regulatory hindrance resulted in a heightened burden on Indian courts. However, recent judgments have indicated an arbitration-friendly approach by the courts.

**Figure 6:**

**Q. Are the ministry’s recent steps for the amendment of the Arbitration and Conciliation Act, 1996, and opening new dispute resolution centers, among other objectives, in the right direction?**

**Government’s steps towards Arbitration**

- Yes: 52%
- No: 37%
- Cannot say: 11%

More than 50% of the respondents believe that the ministry’s recent steps to develop dispute resolution mechanism in India are in the right direction.

The center has formulated the National Litigation Policy 2010 to reduce the cases pending in various courts throughout India with the mission to reduce the average pendency time from 15 years to 3 years. The policy also highlights that ADR should be “encouraged at every level” as long as arbitrations would be “cost effective, efficacious, expeditious and conducted with high rectitude.”

With the growing need for arbitration, the Ministry of Law proposed changes in the Arbitration and Conciliation Act, 1996, based on the past experiences of the courts and understanding the need for institutional arbitration. While this is yet to be finalized, the amendments to the Arbitration and Conciliation Act, 1996, focuses on (a) reducing the interference of courts and (b) correctly interpreting the clauses without any ambiguity. It is specifically changing the decision-making responsibility for international commercial arbitration to the Supreme Court instead of the High Court, which have the authority to appoint an arbitrator being modified from Chief Justice to High Court. Further, to maintain independence, it is suggested that the arbitrator disclose in writing before the appointment circumstances, such as the existence of any past or present relationship, either direct or indirect, with any of the parties or any of their counsel, whether financial, business, professional, social or other kind or in relation to the subject matter in dispute, which are likely to give rise to justifiable doubts as to his independence or impartiality.

In the recent case of 2011, Penn Racquet Sports v Major International, the Delhi High Court adopted a non-interventionist and an arbitration-friendly approach. It is stated that the interpretation of the agreement solely vests with the arbitral tribunal and the courts are typically slow to interfere in cases where the allegation pertains to the misinterpretation of the agreement and the court has set a precedent for the enforcement and recognition of foreign awards.

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5 “Proposed amendments to the arbitration & conciliation act, 1996”, Consultation paper
6 Penn Racquet Sports v. Mayur International 2011 [1] ARB LR 244 (Delhi)
India as a destination for arbitration

“It is my dream that India should emerge as a hub of international arbitration” — Dr. HR Bhardwaj, former Law Minister of India.

India is currently not a preferred destination for arbitration. With the prevalence of ad hoc arbitration, paucity of well-established Indian Institutes and the lapse of confidentiality as a part of the Arbitration and Conciliation Act, 1996, companies are looking for a much more organized and speedier resolution method where confidentiality of their data would also be maintained. This has taken Indian companies to neutral destinations such as Singapore and London. Even Hong Kong is rising as a key destination; however, it is still not one of the favored places due to difficulty in the enforcement of the award (as it is not a notified territory in the Official Gazette). The favored and recognized institutions include the International Chamber of Commerce (ICC), Singapore International Arbitration Center (SIAC) and the London Court of International Arbitration (LCIA).

In India, arbitration is being rationalized as sector-specific expertise, for instance, Construction Industry Arbitration Council (CIAC) and Bombay Stock Exchange (BSE) have developed specific arbitration cells, which provide relevant technical expertise. However, the survey revealed that only 31% of respondents were aware of institutions such as the CIAC.

Mathew Gearing, Partner, Allen & Overy LLP, says that “The regime governing arbitration in India has been subjected to criticism for the lack of expedition in the arbitration process, thereby escalating costs. The problems have been exacerbated by judicial intervention in its efforts at striking a balance between fair trial and party autonomy.”

Figure 7:
Arbitration is conquering new terrains and advancing in other sectors in India:

“THE REGIME GOVERNING ARBITRATION IN INDIA HAS BEEN SUBJECTED TO CRITICISM FOR THE LACK OF EXPEDITION IN THE ARBITRATION PROCESS, THEREBY ESCALATING COSTS. THE PROBLEMS HAVE BEEN EXACERBATED BY JUDICIAL INTERVENTION IN ITS EFFORTS AT STRIKING A BALANCE BETWEEN FAIR TRIAL AND PARTY AUTONOMY.”

Rajendra Barot, Partner, AZB & Partners
Enforcement of the arbitral award: inherent challenges in the Indian economy

According to the current scenario in India, an award at any of the international institutions may take six to eight months; however, the enforcement of the arbitral award in India may take an alarming six to eight years. The effectiveness of arbitration as a legal institution also depends upon efficiency and efficacy of its award enforcement regime. However, the party dissatisfied with the arbitral award may within three months of receiving a copy of the award, apply to the court for setting aside the order on the grounds mentioned in section 34 of the Arbitration and Conciliation Act, 1996.

Figure 8: Q. Were you satisfied with the arbitral award (just and impartial)?

Satisfied with the arbitral award

- Yes: 78%
- No: 22%

78% of the respondents revealed that they were satisfied with the arbitral award.

Figure 9: Public policy

Public policy:
Awards made, signed and pronounced by the learned sole Arbitrator/Arbitral Tribunal after entering into the reference and conduct of the arbitration proceedings are challenged, considering the awards may be posed against the “Public Policy of India.” Creating such awards needs careful consideration. Against the backdrop that most of the foreign awards end up being challenged in the Indian courts on the ground that the same is opposed to the “Public Policy of India,” our courts entertain and sustain such challenges on the widest grounds possible.

"It is widely recognized from overseas that there is a tendency of the courts to interfere and derail the arbitration process or prevent the enforcement of the award. As business increases, the opportunity for arbitration will also increase and clients are looking for arbitration-friendly destinations. There is a preference for places such as Paris, London and Singapore, where one is sure that the court will not interfere with the enforcement of the award."

Philip Haberman, EMEIA, Ernst & Young
Changing face of arbitration in India

Around 50% of the respondents reveal that arbitration in India is expensive and does not provide timely resolutions.

“There is a slant toward ad hoc arbitration in India, which can impact the speed and cost-effectiveness of the arbitration process. Institutional arbitration, which should improve professionalism, speed and expertise, is gradually making its mark in the country.”

Philip Haberman, EMEIA, Ernst & Young

Cost and time: major hurdles

The respondents indicate that arbitration suffers from two major limitations. The twin goals of cost-effective and timely resolution of disputes have not been achieved, even after more than a decade of the passing of the Arbitration and Conciliation Act, 1996.

Cost of arbitration

Arbitration is considered as an expensive mechanism for the settlement of disputes. The costs incurred by the parties include the arbitrator’s fees, rent for arbitration venues, administrative expenses and professional fees paid to the representatives of the parties.

Figure 10:
Q. Is arbitration in India cost effective?

Cost-effectiveness

Strongly agree 23%
Agree 8%
Disagree 46%
Cannot say 23%

Figure 11:
Q. Does arbitration in India provide timely resolutions?

Timelines

Strongly agree 15%
Agree 2%
Disagree 50%
Cannot say 33%

Quick resolution

In India, arbitration is plagued by delays that hamper the essence of dispute resolution. Moreover, the time frame for the completion of proceedings has been done away with, based on the presumption that judicial interference is the root cause of delays in arbitration. The timeliness of arbitration is also compromised by the number of hearings taken for the disposal of cases.

Around 50% of the respondents reveal that arbitration in India is expensive and does not provide timely resolutions.
Who is the most preferred arbitrator?

The Indian trend is to appoint retired judges of the Supreme Court or High Court as arbitrators. This often leads to difficulty in understanding the technical matters, which arbitrators may not possess.

There are different aspects to be considered while selecting an arbitrator such as position of the claimants, subject matter and interpretation of technical parameters in contract, which warrants the selection of relevant technical experts as arbitrators. Most institutions have a panel of professionals and experts who can be appointed as arbitrators.

Figure 12:
Q. Who would you prefer to appoint on an arbitration panel?
Appointment of an Arbitrator

- Subject matter professional: 68%
- Retired judge: 22%
- Lawyer: 10%

68% of the respondents believe that subject matter experts should be arbitrators, as against 22% who believe that retired judges should play this role.

In the Denel case, the court sounded a note of caution to public sector undertakings (PSUs), albeit through its obiter dicta finding, advising PSUs to change their practice of nominating their own senior employees as arbitrators.7

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7 Denel (pty) Ltd. v. Bharat Electronics Ltd. (2010) 6 SCC 39
Evolving role of subject matter experts in the arbitration process

The complexity and highly specialized nature of some arbitration cases, necessitates involvement of subject matter experts. The arbitration panel may lack the technical knowledge of the subject in dispute.

The experts may range from a surveyor, finance analyst, IT expert, engineers to forensic accountants. Experts bring with them a wealth of specific knowledge and professional independent advice to assist in arbitration such as insurance claim assessments, breach of intellectual property, contract compliance, interpretation of financial statements as well as valuation matters.

The current documentation scenario makes it difficult to retrieve and analyze a large number of information, which is stored in various media over IT infrastructure. This requires specialized tools and techniques to identify and separate relevant information so that it can be presented in a meaningful pattern.

More than 50% of the respondents said that they have used expert services and they believe that experts advice make difference in their arbitration process.

Philip Haberman, EMEIA, Ernst & Young, says “Accounting experts and other professionals can be very useful in arbitration matters, both as a formal part of the process and behind the scenes. Experienced accountants, with their combination of objectivity, knowledge and commercial awareness, can bring a matter-of-fact perspective to issues, which in turn can help bring about early solutions that benefit clients.”

“The role of subject matter experts is very important as they provide insights and useful perspectives over the dispute matter and this can be developed much more in the future.”

Zia Mody, Partner, AZB & Partners
Annexure
For this report, Ernst & Young conducted interviews with some of the key lawyers and eminent personalities in this field to gain more perspective on arbitration in India. The legal professionals with whom we conducted the in-depth interviews include:

- Zia Mody, Partner, AZB & Partners
- Promod Nair, Partner, J Sagar and Associates
- Mathew Gearing, Partner, Allen & Overy LLP
- Rajendra Barot, Partner, AZB & Partners
- Daniel G. Lentz, Americas, Ernst & Young
- Philip Haberman, EMEIA, Ernst & Young

Profile of online respondents:

Figure 13: Sectors of respondents

Figure 14: Designation of respondents

Figure 15: Revenue classification
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