

Emerging trends in arbitration in India

A study by Forensic & Integrity Services

Foreword

The Indian economy has seen an increasing number of commercial disputes in recent times. Disputes in sectors including construction, energy, pharmaceutical, etc., are snowballing, and becoming more and more complicated. Parties are increasingly turning to arbitration over traditional court litigation for resolution of domestic and cross-border disputes.

A study *Changing face of arbitration in India* conducted by EY in 2011 highlighted the need for arbitration in India, its drawbacks and the legislative steps that would be required to make the country a preferred arbitration destination. Since then, arbitration has been seeing a rapid transformation and becoming increasingly sophisticated.

We felt that there is a need to study the current arbitration scenario in India to gain an understanding of developing trends in the domain. With this objective in mind, we conducted research, for which we approached leading legal practitioners and prominent users of arbitration in India and abroad. They shared their perspectives on emerging trends such as independence of arbitrators in the country, “hot tubbing” of experts, pertinent evidence, third-party funding of arbitration and increasing use of technology in the field. We are pleased to share with you our findings and experts opinions we gleaned during the course of the study.

We would like to express our appreciation of the people and organizations that contributed to our research. Our report would not have the same value without their support as well as that of all the others who made the survey successful.

We sincerely hope you find this report relevant and insightful.



Arpinder Singh
Partner and Head - India and Emerging Markets
Forensic & Integrity Services, EY



Contents

Executive summary	4
Introduction	8
Independence of arbitrators	10
Changes in legislative environment	15
Importance of technology in arbitration	16
Importance of evidence in arbitration proceedings	17
Third-party funding and cost allocation of proceedings	19

Executive summary

Changes in the arbitration scenario in India

The Indian judicial system is advancing progressively in the field of arbitration. This is evident from the recent decisions of Indian Courts in various cases such as the overruled Bhatia International case, the famous White Industries case and several others, which indicate a pro-arbitration trend in the country, thereby laying down a positive trend by reducing intervention of Indian courts in arbitrations seated outside India.

Form of arbitration

The EY study Emerging trends in arbitration in India (hereinafter referred to as "EY Study") indicates that although adhoc arbitration continues to be the preferred choice in the domestic scenario, the Indian system has seen an increasing rise in institutional arbitration. The entry of institutes such as the International Chamber of Commerce (ICC), the Singapore International Arbitration Centre (SIAC), the London Court of International Arbitration (LCIA), etc., in the market adds further weightage to institutional arbitration in India due to the efficient structure, competence, world-class facilities, credibility, quality services and case management of these institutes. This is the reasons why parties should be encouraged to refer their disputes to institutional arbitration.

Arbitration clause

Time and again, the arbitration clause has been reiterated as an essential part of a contract to expedite resolution of disputes arising out of it. **EY study indicates that the arbitration clause constitutes almost 95% of agreements between parties.** Inclusion of the arbitration clause in a contract is high in the construction and infrastructure, and oil and gas sectors.

Independence of arbitrators

EY study indicates that there is a need to lay down explicit provisions for checking the independence and impartiality of arbitrators. Provisions for filing disclosure reports prior to arbitration proceedings (stating the past disputes heard by the arbitrator and awards rendered, along with the current matters which the arbitrator is adjudicating upon) are essential. An arbitrator appointed by the same party more than three times should be required to provide a detailed disclosure in this regard.

Role of experts in arbitration

The role of experts (as evidence in the resolution of high-profile and complex disputes in accounting, financial quantum specification, forensic matters, infrastructure and construction, and medicine, etc.) has evolved significantly in recent times. Technical experts, including accountants, engineers, architects, scientists, doctors, etc., are increasingly being considered indispensable by arbitral tribunals in matters requiring expertise and technical know-how.

Hot tubbing

The procedure of hot tubbing is widely gaining recognition and importance over the old-school method of cross examination. This may be attributed to the fact that expert witnesses in a complex technical trial can testify at the same time on a panel, rather than one by one in the witness box. This enables lawyers and arbitrators to question experts in the presence of other specialists. It allows them to challenge each other's evidence, and thereby simplifies complex trials and saves valuable time.



Execution and enforcement of arbitral award

Execution and enforcement of an award in India has been seen as unsatisfactory. An award passed by an arbitral tribunal takes considerable time (around two to three years) to be enforced by Indian courts. However, with the reduction of court intervention in foreign seated arbitrations following the recent Supreme Court judgments, it is anticipated that awards will be enforced proactively and at a faster pace. As indicated in the consultation paper published by the Ministry of Law and Justice, Government of India, a bench in each High Court should be dedicated to arbitration matters alone.

A common concern expressed by many legal professionals indicates that when an award is challenged under Section 34 of the Act, it leads to an automatic stay on proceedings, and enforcement of the award is delayed even further. Therefore, an imperative change in this provision is vital in the current arbitration legislation scenario.

Technology in arbitration

Arbitration often involves a high level of documentation, transactions, facts and information flow. The scope of technology in arbitration is significant in view of costs and time it can save. With the aid of technology, heavy documentation can be segregated and indexed properly, thereby saving valuable time and effort. Furthermore, it can be made easily accessible to disputing parties across countries. The use of e-Discovery, financial modeling tools, data management systems, etc., in arbitration is expected to make the process time and cost effective. However, **the use of technology in arbitration is minimal and is not being exploited to its fullest potential.**

A mechanism developed for **Online Dispute Resolution (ODR)** may result in a viable and cost-effective dispute-resolution system. Since parties are often located at different jurisdictions, disputes can be resolved without their leaving their places of residence, and thereby, save significant time and cost.

Fast-track arbitration

Renowned practitioners in the field of arbitration are of the opinion that an effective mechanism, implemented for effective fast-track arbitrations with reasonable time limits, and adhered to by parties would result in time-bound resolution of disputes.

Arbitration institutes for instance SIAC provides for rules with regard to expedited procedures and emergency arbitrator, these methodologies in resolving disputes is useful in controlling time and cost. If parties agree to follow expedited procedures the award is made by SIAC within a time line of **six months**. Further, if the matter is crucial and requires immediate attention for interim relief prior to constitution of the tribunal and parties agree for emergency arbitrator. Then an emergency arbitrator is appointed within one business day by SIAC, emergency arbitrator must establish a schedule for considering the application for emergency relief within two business days of his appointment.

Third-party funding

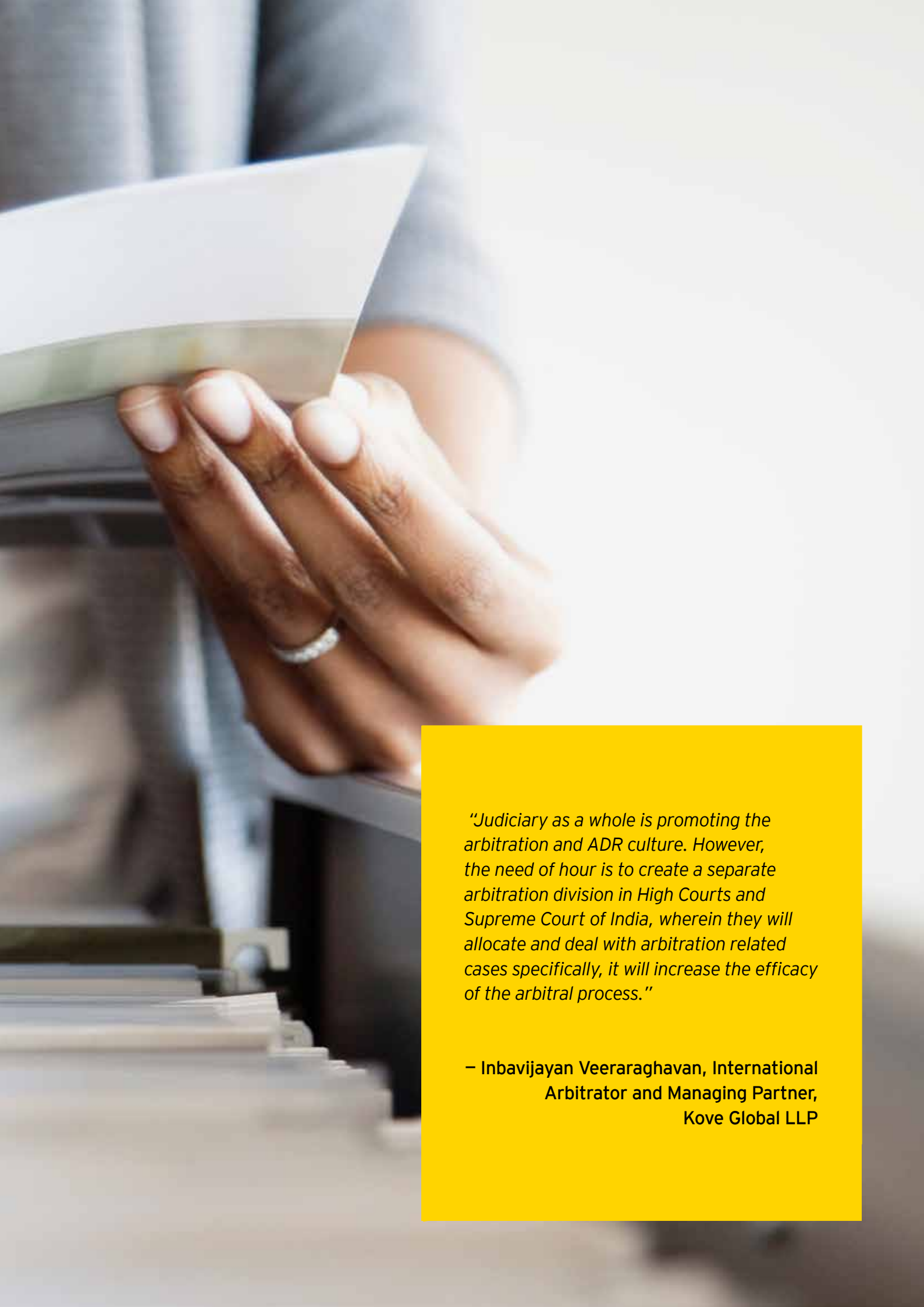
While recourse to third-party funding appears to be increasingly attractive to claimants in international arbitration, especially those embroiled in claims arising out of bilateral investment treaties, it is still in its nascent stage in India and its impact needs to be examined.

Cost and time-effectiveness

It is believed that the arbitration scenario in India will take a stride in a positive direction through implementation of cost- and time-effective measures, with streamlining of certain provisions of the law and resolution of the current challenges faced in the arbitration process.







"Judiciary as a whole is promoting the arbitration and ADR culture. However, the need of hour is to create a separate arbitration division in High Courts and Supreme Court of India, wherein they will allocate and deal with arbitration related cases specifically, it will increase the efficacy of the arbitral process."

– Inbavijayan Veeraraghavan, International Arbitrator and Managing Partner, Kove Global LLP

Introduction

In 2011, EY released a report titled *Changing face of arbitration in India*, which elaborated on the scope of India becoming a global arbitration hub and a dispute-resolution mechanism in the country. The report emphasized the importance of the arbitration clause in a contract. It also focused on the long-standing debate on ad hoc vs institutional arbitration, and highlighted the inherent challenges faced by the Indian judicial system in enforcing arbitral awards.

Since then, the arbitration environment in India has been changing rapidly. Various landmark judgments have been given by the Supreme Court and the High Courts, which have drastically transformed the scope of current legislation. Interpretations of various sections of the Arbitration and Conciliation Act, 1996 (the "Act") by the courts indicate the emergence of a pro-arbitration culture that matches international best practices.

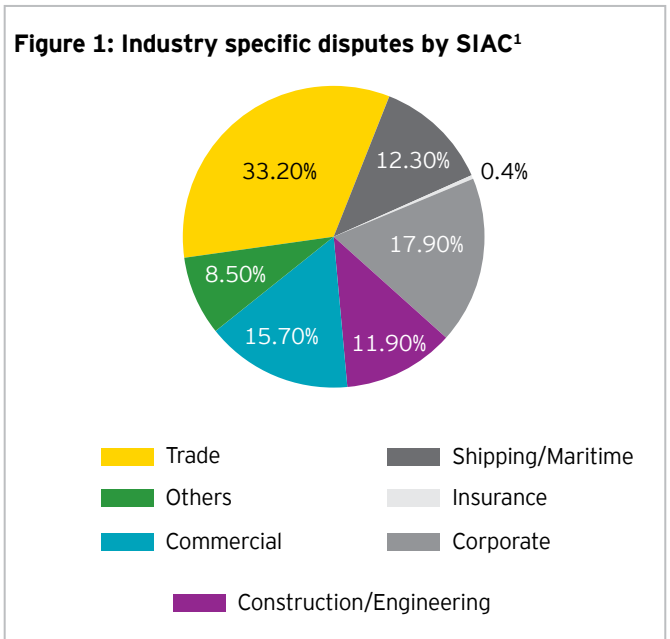
There have been significant developments in India's arbitration scenario. For example, in April 2009, the London Court of International Arbitration launched LCIA India - its first independent subsidiary. Similarly, Singapore International Arbitration Centre (SIAC) has opened its first-ever overseas/offshore office in India. It is anticipated that the positive trend of resolving international disputes through arbitration will gain further momentum in India at a rapid pace.

Industry-specific arbitration disputes

In the last three years, India has seen a growth of nearly 200% in the number of disputes that have been referred to arbitration, with cases in various sectors including trade, construction, general commercial disputes, joint ventures, shipping and maritime matters, energy and natural resources, international trade, among others.

Arbitration disputes in India have been rampant (and continue) in the construction and infrastructure, and oil and gas sectors, due to the nature of these businesses and exigencies attached in running the business.

The pie chart below elaborates on global industry-specific disputes handled by SIAC in 2012.



Indian companies were involved in 18% of arbitration cases filed in Singapore in 2012



¹ SIAC Annual Report 2012

“In cases of foreign investments into the country, while promoter related defaults and consequent disputes have been there even in the past, it is the approach of foreign investors which is now changing. They are willing to take active legal actions against the defaulters. Courts are passing orders against the defaulters, but they do appreciate the current Indian economic scenario.”

**– Bindi Dave,
Senior Partner, Wadia Ghandy & Co.**

“Courts should be more cautious and circumspect in admitting petitions (under Section 34 of the Act) challenging the awards made by an arbitral tribunal. In practice, as soon as a petition under Section 34 is admitted, the award is auto stayed. Thus, admission of a petition u/s 34 should not lead to automatic stay of award, unless Court goes into the merits of the case and passes an explicit order”

**– Hiroo Advani,
Senior Partner, Advani & Co.**

It has been recently observed that financial sector disputes are being reported at an increasing rate in areas including private equity, joint ventures and mergers and acquisitions.

In light of the above, EY India conducted research on arbitration in India, held discussions with eminent professionals in the domain and invited them to share their views and experiences on various topics, which were broadly categorized under the following themes:

- ▶ Independence of arbitrators
- ▶ Changes in the legislative environment
- ▶ Importance of technology in arbitration
- ▶ Importance of evidence
- ▶ Third-party funding and costs of proceedings

The themes elaborated in the below section, indicate the complexities of and the changing trends in the current arbitration scenario in India.



Independence of arbitrators

Appointment of Arbitrator(s) to the arbitral tribunal is the most decisive and key step in arbitration proceedings. Thus, it can be said that an arbitration is only as good as the arbitrator.²

Importance of independent arbitrators

An independent arbitrator, free from bias toward either party, is fundamental for the arbitration proceeding to be successful. A biased arbitrator defeats the end purpose of the proceedings. An award passed by such an arbitrator is most likely to be challenged by a petition filed under Section 34 of the Act in a court of law. The resultant outcome would be that the arbitral award is “stayed” as matter become subjudice, which renders the arbitration process futile.

In the prominent case of **Shakti Bhog Foods Ltd. v. Kola Shipping Ltd. & Anr**³, on 21 August 2012, the Delhi High Court set aside the impugned award passed by the arbitrator due to his non-disclosure at the time of acceptance of his appointment that he had acted as co-arbitrator for the respondent in a related dispute between the respondent and another party involved in the same transaction.³

Similarly, in **Murlidhar Rongta v. Jagannath Tibrewala**⁴ the Bombay High Court set aside the award on the grounds that the duty to disclose was mandatory and an essential procedural safeguard that had to be followed, and since the procedural duty was not adhered to, the award deserved to be set aside.

In case of institutional arbitration, SIAC / LCIA / ICC rules, prescribe a challenge procedure. An arbitrator may be challenged, if circumstances that give rise to justifiable doubts as to the arbitrator’s impartiality or independence or if the arbitrator does not possess any requisite qualification on which the parties have agreed.

In deciding such challenges, the IBA Guidelines on Conflicts of Interest in International Arbitration are often relevant. A committee of the SIAC Court of Arbitration decides challenges to arbitrators. A committee of the Court consists of not less than two members of the Court as appointed by the President of SIAC.

Disclosure of conflicts and other commercial interests

Every arbitrator is duty bound to disclose any conflicts and other commercial interests to the disputing parties at the earliest.

Legislative scenario in India

Section 12 of the Act imposes a legal obligation on a person, who is approached for possible appointment as an arbitrator, to make disclosures (in writing) without any delay of circumstances that are likely to give rise to justifiable doubts as to his or her independence or impartiality. Duty to disclose permeates the entire arbitral process.

Section 12 does not specify or lay down the exact nature of disclosures that need to be made. Neither does it specify any format or set of disclosures. It only states that disclosures should be made about circumstances likely to give rise to justifiable doubts about the independence or impartiality of an arbitrator.

² J.F. Lalive, “Melanges en l’ honneur de Nicolas Valticos”, Droit et Justice (Editions Pedone, 1989), p 289.

³ 2012(3)ArbLR372(Del)

⁴ 2005(1)ArbLR103(Bom)

In *Alcove Industries Ltd. v. Oriental Structural Engineers Ltd.*⁵ the Delhi High Court laid down the legal implications of Section 12 of the Act. This states and clarifies the legal position that an arbitrator may be disqualified from becoming or remaining an arbitrator in a given dispute, not due to the existence of an actual bias, but because of the existence of such facts and circumstances that are “likely to give rise to justifiable doubts about his or her independence and impartiality”.

In *The Loot (Pvt.) India Limited v. Reliance Capital Ltd.*⁶ before the Bombay High Court, the court emphasized the need for disclosure of facts and circumstances affecting the impartiality and independence of a unilaterally appointed arbitrator in an adhoc arbitration.

The Red List includes situations that showcase examples of the overriding principle that no person can be his or her own judge. The list enumerates specific situations, which are bifurcated into a non-waivable red list and a waivable red list. This is a non-exhaustive list.

The Orange List includes situations where an arbitrator had provided services for one of the parties in the past. The situation can however only be considered waivable if the parties were aware of conflict of interest and appropriate disclosures were made.

The Green List includes a non-exhaustive record of specific situations where no actual conflict of interest exists. An arbitrator is not duty bound to disclose situations included in the Green list.

International Legislative scenario

The legal provision under Section 12 of the Act is in line with international standards. Institutes such as SIAC, LCIA, IBA, ICSID and the UNICITRAL Rules make similar provisions – that every arbitrator is legally bound to make disclosure (in writing) of circumstances that are likely to give rise to justifiable doubts about his or her independence or impartiality. This obligation is a continuing one.

Reliance may be placed on international best practices followed by institutes such as the following to identify and develop the nature of disclosures that should ideally be made by arbitrators in India:

- ▶ **IBA Guidelines on Conflicts of Interest in International Arbitration.**
- ▶ **The Code of Ethics for arbitrators in commercial disputes** published by SIAC, which came into effect on 1 March 2004

Process in practice

1. **The IBA Guidelines on Conflicts of Interest in International Arbitration**⁷ have color- coded lists of specific situations, which, depending on the degree of conflict, do or do not warrant disclosures to be made by arbitrators.

2. Arbitrators appointed in cases administered by SIAC are required to undertake to abide by the Code of Ethics. The Code specifically prescribes that

“A prospective arbitrator shall accept an appointment only if he is fully satisfied that he is able to discharge his duties without bias...”.

The Code also prescribes duties in relation to disclosures to be made by arbitrators. It provides some guidance on the nature of relationships that must be disclosed and enumerates the following:

“(a) any past or present close personal relationship or business relationship, whether direct or indirect, with any party to the dispute, or any representative of a party, or any person known to be a potentially important witness in the arbitration;

(b) the extent of any prior knowledge he may have of the dispute.”

The Code dictates that an arbitrator must decline to accept an appointment in these circumstances unless the parties agree in writing that he may proceed.

⁵ 2008 (1) Arb LR 393 (Del)

⁶ Arbitration Petition No. 1178 of 2012

⁷ The IBA Guidelines on Conflicts of Interest in International Arbitration



Independence in ad-hoc arbitration

While institutional arbitration has become an increasingly preferred option in complex dispute matters involving high transactional value, the trend in domestic arbitrations is more in favour of the ad-hoc approach.

In the case of institutional arbitration, the arbitrator or panel of arbitrators are appointed from a list of qualified arbitrators who have been pre-approved by the institute. Parties can seek the assistance of the institute for appointment of arbitrators.

On the other hand, in ad-hoc arbitration, all aspects (including the appointment of arbitrators) are to be determined by the parties themselves. Such appointments tend to be a delicate process and parties frequently have difficulty in making the right choice. Any error in judgment can result in a biased award, which can be challenged in a court of law and render the arbitration process futile.

Background checks in adhoc arbitration

Background checks are extremely crucial, given the fact that the independence of arbitrators is of paramount importance and due to non-availability of expert guidance in appointment of arbitrators in ad-hoc arbitration.

The practice of conducting background checks involves a scrutiny of the profiles of arbitrators, desktop searches or through word of mouth information gathered on them by parties consulting with their counsels or advocates. Reliance is placed on the credibility attributed to arbitrators by well-respected and reputed judges, counsels, advocates and other prominent persons within the profession.

Although there is a pressing need, especially in ad-hoc arbitration, to conduct a background check prior to the appointment of an arbitrator by a professional body, no regulatory framework has been implemented for this purpose.

Pre-appointment meetings

The practice of conducting pre-appointment meetings with prospective arbitrators is commonly seen in case of foreign arbitrations.. This is a relatively new concept in the current Indian arbitration scenario and is gradually gaining momentum.

Disclosure reports

It is an up-to-date report that lists previous awards rendered by arbitrators as well as current matters which they are adjudicating upon. Disclosure reports provide parties an opportunity to review the past history of arbitrators, however, all precautions should be taken to maintain the confidentiality of the parties.

While the Indian law has no provisions relating to disclosure reports, implementation of such provision would help to keep a check on the independence and impartiality of arbitrators.

Statement of independence

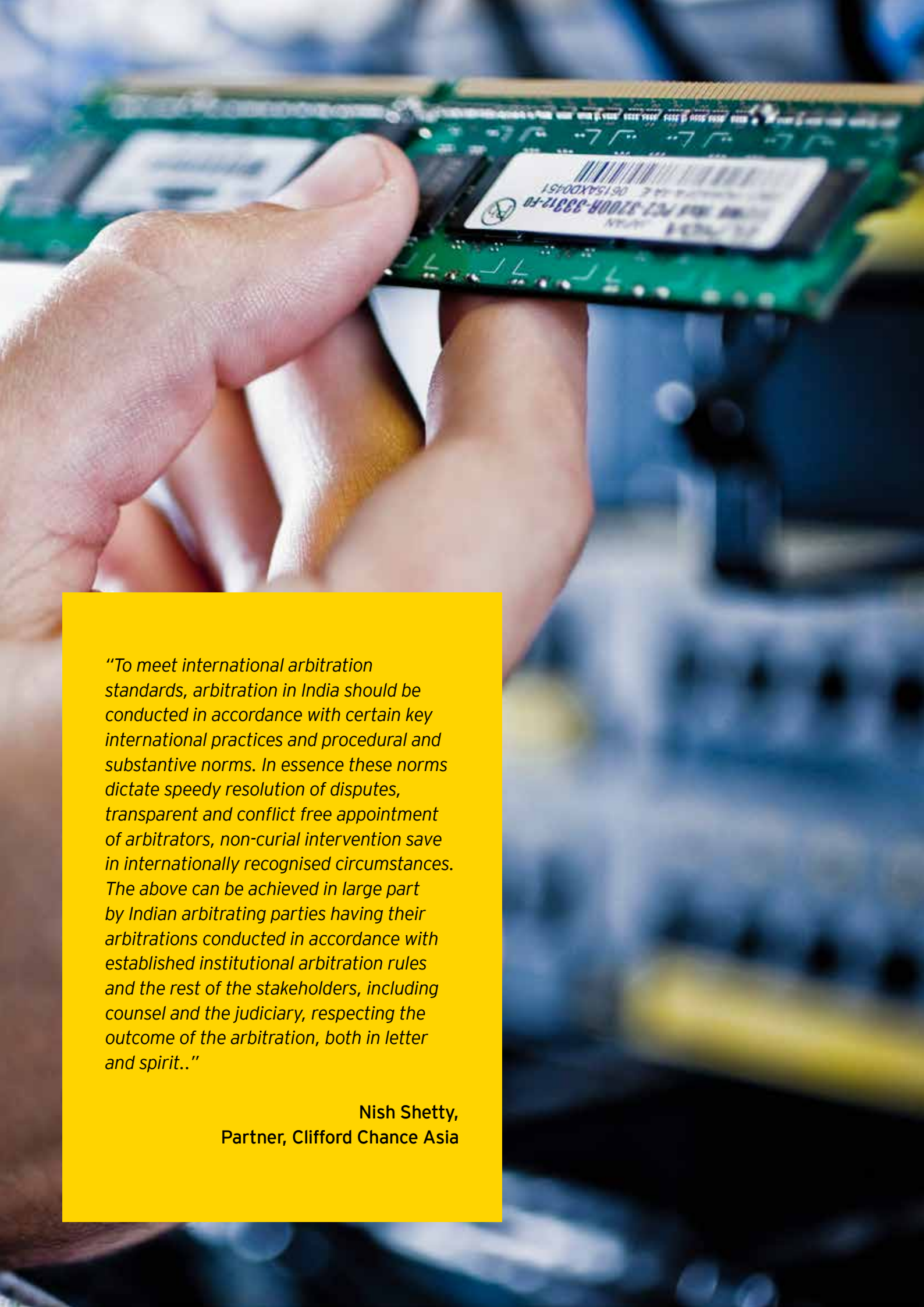
In line with SIAC and IBA Rules, persons approached in connection with their likely appointment should not hold back vital and material information with regard to their independence and impartiality. Every prospective arbitrator should file a Statement of Independence for the purpose of a conflict check.

In adhoc arbitrations, issues of conflict of interest may not get appropriately addressed at the beginning of the arbitral proceedings and thus can lead to prejudice for the parties at a later stage.

**– Vyapak Desai,
Partner, Nishith Desai Associates**

“Institutional arbitration for small monetary claims upto a defined threshold limit should be made mandatory through regulations laid down in this regard, taking in view complexity of the matter and quantum of money in dispute.”

**– Chakrapani Misra,
Partner, Khaitan & Co.**



“To meet international arbitration standards, arbitration in India should be conducted in accordance with certain key international practices and procedural and substantive norms. In essence these norms dictate speedy resolution of disputes, transparent and conflict free appointment of arbitrators, non-curial intervention save in internationally recognised circumstances. The above can be achieved in large part by Indian arbitrating parties having their arbitrations conducted in accordance with established institutional arbitration rules and the rest of the stakeholders, including counsel and the judiciary, respecting the outcome of the arbitration, both in letter and spirit..”

**Nish Shetty,
Partner, Clifford Chance Asia**

Changes in legislative environment

Amendment in Indian Arbitration and Conciliation Act 1996 (the "Act")

In 2001, the Law Commission of India undertook a comprehensive review of the working of the Act and recommended various amendments to it in its 176th Report.

The Arbitration and Conciliation (Amendment) Bill, 2003 was introduced in the Rajya Sabha on 22 December 2003 on the basis of this report.

The Bill was withdrawn from the Rajya Sabha in view of the large number of amendments recommended by the Committee and because many provisions of the Bill were contentious.

The Supreme Court and High Courts have interpreted many provisions of the Act, and while doing so, have also discovered some gaps in the Act. This may lead to conflicting views.

The following are some provisions proposed for amendments to remove practical difficulties in interpretation of the Act and make alternative dispute resolution for settlement of disputes more popular and effective:

- ▶ Section 2 (2): Scope of application of Part I of the Act
- ▶ Section 11: Appointment of arbitrators
- ▶ Section 12: Disclosure by arbitrators on their possible interest in the matter
- ▶ Section 28 (3): Taking into account terms of the agreement and trade usage
- ▶ Section 31 (7): Rate of interest
- ▶ Section 34: Providing meaning of "public policy of India" and harmonizing it with Sections 13 and 16
- ▶ Section 36: Enforcement of arbitral award
- ▶ Insertion of provisions for implied arbitration agreement in commercial contract of high consideration value

The proposed amendments are expected to result in minimal court intervention in arbitration matters, enhance institutional arbitration and lead to arbitrators disclosing any interest in the case. India can become a hub of international commercial arbitration if these amendments are carried out successfully.

Recent judgment that substantially changed the arbitration landscape

The following is a recent judgement, which is pro-arbitration in nature and indicates a positive trend by reducing the intervention of Indian courts in arbitrations seated outside India and restricts the courts from providing broad interpretations to the term "Public Policy".

This decision of the Supreme Court leads the way in reducing the intervention of Indian courts in arbitrations seated outside India. However, application of the decision is restricted to arbitration agreements entered after 6 September 2012.

The controversial decision of the Supreme Court in *Bhatia International v Bulk Trading SA* was overruled by the apex court on 6 September 2012, paving the way for reduced court intervention in arbitrations seated outside India. The Supreme Court held as follows:

- ▶ Part I of the Act (which vests courts with the power of awarding interim relief in support of arbitration and setting aside arbitral awards) only applies to arbitration seated within India.
- ▶ Awards rendered in foreign seated arbitrations are only subject to the jurisdiction of Indian courts when they need to be enforced in India under Part II of the Act.
- ▶ Indian courts cannot order interim relief in support of foreign seated arbitrations.
- ▶ The decision of the Supreme Court in the above case only applies to arbitration agreements entered after 6 September 2012

This decision of the Supreme Court leads the way in reducing the intervention of Indian courts in arbitrations seated outside India. However, application of the decision is restricted to arbitration agreements entered after 6 September 2012.

Importance of technology in arbitration

Cost constraints and the need for speedy resolution of disputes continue to be bottlenecks in a scenario of increasingly global and complex disputes involving multiparty proceedings and mass claims. Dispute resolution is one of the most rapidly developing fields in which there is significant usage of IT.

One method of reducing the excessive duration and cost of arbitration is to use IT tools to facilitate arbitration proceedings. Use of these tools can reduce costs and time significantly, and thereby, aid timely administration of justice.

Technology is a very powerful tool for international arbitration and is rapidly penetrating the legal profession. It has the potential to facilitate handling of increasingly voluminous records that are part and parcel of present-day arbitration in India. The Arbitration institutes for instances SIAC / LCIA / ICC encourages parties to use electronic means to transmit correspondence, documents and submissions.

The process of arbitration can be made more accessible through the use of technology, for instance, by making it possible for parties with scarce economic resources to save costs they cannot afford, which puts them in a disadvantageous position against more powerful players.

e-Discovery

e-Discovery is a growing trend in commercial arbitration proceedings, especially when parties seek significant discovery. It is growing as a means to reach fair results in complex commercial matters. Companies whose commercial disputes are likely to involve exchange of significant Electronically Stored Information (ESI) need to understand the pros and cons of arbitration clauses in the agreements they negotiate due to e-Discovery becoming more and more accepted as a part of arbitration.

However, arbitrators need to familiarize themselves with technological issues that arise in connection with electronic data to be able to appropriately address issues pertaining to e-discovery.

Importance of data management

Electronic data management systems focus on facilitating management of documents pertinent to particular enterprises, projects and work groups in computer networks. Early document-management systems used dedicated networks and user interfaces of their own in addition to the basic file management capabilities of operating systems.

Financial modeling tools

Financial modeling constitutes the representation of a business case being built in a model to reflect the performance of various financial parameters. It has gained importance in various business situations, e.g., evaluation of financial hypotheses, accounting parameters, project forecasts, management decision-making, etc.

The use of financial modeling as a tool to support arbitration is rapidly gaining strength. Companies use it to evaluate various hypotheses/parameters that have financial implications in arbitration. A financial model can provide insight on the possible impact of various issues under consideration and enable a company to be prepared for each outcome or a combination of them.

Financial modeling is particularly useful in a complex business environment where multiple criteria are involved in arbitration and each criterion has multiple financial repercussions. It can help companies assess the risk of outcome in each scenario and make suitable provision in its financial modeling if required.

Financial modeling tools are designed to evaluate everything from the performance of investments to borrowing requirements. They take into consideration the mathematical relationships between financial variables to forecast their future performance and evaluate different operating scenarios. Consequently, financial models are valuable tools that support management's decision-making.

Financial models help in quantifying damages and analyses. They help significantly in reducing time and costs in arbitration proceedings.

"Under the DIAC rules, it is important for parties to present their case in a crisp, precise manner. Parties are encouraged to provide documents in CD's or any electronic format. The use of professional 'transcription services', which includes voice recording, to record every aspect of the arbitration proceedings is coming into existence."

**- Krishna Vijay Singh,
Senior Partner, Kochhar & Co.**

Importance of evidence in arbitration proceedings

Importance of evidence

Evidence has always been an essential element that plays a vital role in commercial arbitration proceedings. The outcome of any legal dispute substantially depends on the evidence presented during the course of the proceedings. Historically, oral and documentary evidence has been relied on in arbitration as well as in court proceedings. Recently, the concept of electronic evidence has been gaining ground in arbitration in India.

Oral and documentary evidence

Evidence can be oral or in writing. While proving a dispute, written as well as oral evidences have their respective places.

Civil Law countries prefer written documents as evidence over oral evidence, whereas Common Law ones rely on both forms of evidence to understand facts of a dispute in totality.

Indian law is largely based on English common law, and relies on both written as well as oral evidences.

Eminent legal practitioners are also of the opinion that neither oral nor documentary evidence can be singled out as being solely important, since both are equally significant contributors to the outcome of a dispute. This clearly indicates that all evidence is valid and cannot be dispensed with, in whatever form it is provided. Thus it can be stated that all evidence is good evidence.

The importance of evidence can be ascertained from the following international arbitration rules:

Articles 24(3) Swiss Rules, 20(5) ICC Arbitration Rules, 22(1)(e) LCIA Rules, 27(3) UNCITRAL Arbitration Rules, 19(2) and (3) AAA (ICDR) Arbitration Rules – empower arbitral tribunals to order production of documents or other evidence before they pass arbitral awards.

Electronic evidence

Arbitration in India has been facing significant challenges due to the magnitude and complexity of cases involving huge amounts of information in the form of pleadings, witness statements, experts' reports and evidence submitted to arbitrators. Such information, contained in written documents, often runs into thousands of pages.

Maintenance of such documents and access to them, particularly in arbitration involving multiple parties from various jurisdictions, often makes the process a cumbersome and expensive means of resolving a dispute.

"In institutional arbitration, emergency arbitrator hearings are routinely conducted via videoconference or teleconference due to the inherent urgency in the nature of such proceedings. The use of facilities such as the Maxwell Chambers in Singapore facilitates the use technology in international arbitration due to the ready availability of services. The use of facilities for transcription services during arbitral hearings is routine in SIAC cases. This provides an accurate record of hearings for use by arbitrators for deliberations or for drafting an award."

**- N. Vivekananda,
Deputy Registrar & Head (South Asia), SIAC**

Increasing importance is being given to evidence in electronic forms including compact discs (CDs), digital versatile discs (DVDs), web hosting, hosting on virtual private networks, etc., due to the fast growth of cross-border arbitration and remarkable progress made in technology. Furthermore, "Evidentiary Hearings" through tele-conferencing or video-conferencing are on the rise. This reduces the overall time and cost of arbitration proceedings.

Importance of expert witness reports as evidence

The need for experts' reports before passing an arbitral award is gradually growing due to the increasing sophistication and complexity of matters referred to arbitration.

Experts' reports are gradually becoming a norm in arbitration, since subject matter experts' reports are seen as independent, professional and unbiased. They help in ascertaining the amount in dispute and/or determining the technicalities of a dispute on which the arbitral award is generally based.

Our research reveals that leading Indian practitioners are of the view that the need for financial experts is going to increase in arbitral proceedings.

Experts may be appointed by the parties themselves or by the arbitral tribunal to report to it on specific technical and complex issues that need to be determined by the arbitral tribunal. An expert witness report provides concrete supporting evidence with regard to issues in arbitral proceedings. It helps an arbitral tribunal deliver an arbitral award in all fairness.

Hot tubbing (also known as Witness Conferencing) is a commonly used colloquialism for concurrent evidence and saves a significant amount of time and resources. It is therefore considered to be better and time-saving than cross-examination. According to leading practitioners, the practice of hot tubbing, although present in India, is practically negligible at the moment. This practice is viewed as desirable for increasing the efficacy of domestic arbitration.

“Hot tubbing” or “witness conferencing” is an innovative evidentiary technique that can speed up the arbitration process, reduce costs and narrow the issues in dispute.”

– Madhur Baya,
Founder, Lex Arbitri.

“An expert’s opinion can be useful in international arbitration where there are multi party disputes & multiple jurisdictions involved. In our experience, where matters are complex and involve, for example, detailed loss of profits claims, it is often essential to engage experienced quantum experts to assess the estimated loss and damage and arbitrators will typically welcome the assistance of such experts.”

– Edwina Kwan,
Senior Associate, Herbert Smith Freehills LLP

“In practice, a reasonable number of SIAC cases see the use of expert evidence by parties. This is particularly common place with disputes arising from the construction and engineering sectors, cases involving valuation of shares in joint venture disputes, cases involving analysis of financial products, cases involving the international trade of commodities and issues on quality, amongst others. In addition, the use of expert evidence on substantial questions of law of a particular jurisdiction is extremely common.”

- N. Vivekananda,
Deputy Registrar & Head (South Asia), SIAC



Third-party funding and cost allocation of proceedings

Third-party funding

The rapidly increasing cost of arbitration due to operational and legal limitations has led to parties involved in arbitration exploring the possibility of using specialist arbitration funders to provide capital for their arbitration proceedings. Globally, there is a growth of professional funders, who provide funding for international arbitration proceedings.

Third-party funding of international arbitration has been growing in many jurisdictions, i.e., the US, the UK, Canada, Germany and Australia, and is seeing increasing attention in international arbitration.

A third-party funder seeks to acquire a percentage of the proceeds of a successful case or a multiple of the financed costs incurred by a party.

Depending on the jurisdiction involved, a funder can be the following:

- ▶ A client's law firm (where authorized)
- ▶ An insurance company
- ▶ A bank or financial institution

While recourse to third-party funding appears to be increasingly attractive for claimants in international arbitration, especially those embroiled in claims arising out of bilateral investment treaties, it is still at its nascent stage in India and its impact needs to be examined. It may take a while for arbitration funding to become a feasible option in India (in the way of foreign venture capital funds); such cross-border funding is yet to be approved by Indian regulators.

In a recent arbitration (valued at US\$400 million) relating to a bilateral investment treaty against the state of Uzbekistan, the claimant, Oxus Gold, disclosed publicly that it had recourse to third-party funding.⁸

In September 2012, Euro Gas entered a financing agreement with a Luxembourg-based investment fund that specializes in financing arbitration proceedings, to pursue a €1 billion ICSID claim against the Slovak Republic over expropriation of a mining concession.⁹

"With costs becoming more of an issue in arbitrations, the use of third party funding in arbitration is becoming increasingly popular. The same is gradually gaining momentum in India, although there are no specific laws on the same in India."

– Hiroo Advani,
Senior Partner, Advani & Co.



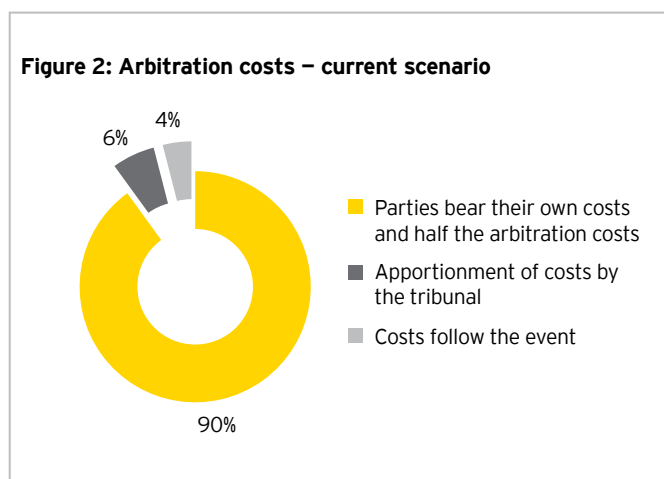
⁸ <http://www.cdr-news.com/categories/expert-views/out-in-the-open-third-party-funding-in-arbitration>

⁹ <http://www.proactiveinvestors.co.uk/companies/news/48234/oxus-gold-extremely-confident-of-compensation-in-arbitration-48234.html>

Cost allocation in arbitration proceedings

The Indian Arbitration statute does not make explicit provisions relating to cost allocation of arbitration proceedings.

Section 31 of the Act merely states that in the absence of a contrary agreement between parties, arbitration costs are to be fixed by the arbitral tribunal. These costs constitute the fees and expenses of arbitrators and witnesses, legal fees and expenses, institutions' administration fees (if any) and any other expenditure in connection with arbitral proceedings and awards.



Our study reveals that in 90% of arbitration matters, parties bear their own costs. In 6% of the proceedings, the arbitration tribunal apportions the costs of the proceedings between the parties and in 4% of the cases only costs follow the event (i.e., the unsuccessful party pays all the costs incurred during the arbitration process).

However, a large majority of eminent legal professionals are of the opinion that in these pressing economic times, it is more significant than ever for arbitration to follow cost-effective processes that essential amendments are made to current arbitration legislation and a well-set out framework for allocation of costs is put in place through legislation in this regard.



Methodology

For this study, EY conducted in-depth interviews with leading lawyers and senior legal professionals for their views on arbitration in India. The legal professionals with whom we conducted interviews include:

- ▶ **Bindi Dave**, Senior Partner, Wadia Ghandy & Co.
- ▶ **Kunal Vajani**, Partner, Wadia Ghandy & Co.
- ▶ **Chakrapani Misra**, Partner, Khaitan & Co.
- ▶ **Vyapak Desai**, Partner, Nishith Desai Associates
- ▶ **Madhur Baya**, Founder, Lex Arbitri
- ▶ **Krishna Vijay Singh**, Senior Partner, Kochar & Co.
- ▶ **Hiroo Advani**, Senior Partner, Advani & Co.
- ▶ **Shukla Wassan**, Legal Head, Hindustan Coca Cola
- ▶ **Edwina Kwan**, Senior Associate, Hebert Smith Freehills LLP
- ▶ **Inbavijayan Veeraraghavan**, International Arbitrator and Managing Partner, Kove Global LLP
- ▶ **N. Vivekananda**, Deputy Registrar & Head (South Asia), SIAC
- ▶ **Nish Shetty**, Partner, Clifford Chance, Asia

We would like to thank all who shared their experiences with us.

About EY's Forensic & Integrity Services

Dealing with complex issues of fraud, regulatory compliance and business disputes can detract from efforts to succeed. Better management of fraud risk and compliance exposure is a critical business priority – no matter the size or industry sector. With approximately 4,500 forensic professionals around the world, we will assemble the right multidisciplinary and culturally aligned team to work with you and your legal advisors. We work to give you the benefit of our broad sector experience, our deep subject-matter knowledge and the latest insights from our work worldwide.



EY offices

Ahmedabad

2nd floor, Shivalik Ishaan
Near C.N. Vidhyalaya
Ambawadi
Ahmedabad - 380 015
Tel: +91 79 6608 3800
Fax: +91 79 6608 3900

Bengaluru

6th, 12th & 13th floor
"UB City", Canberra Block
No.24 Vittal Mallya Road
Bengaluru - 560 001
Tel: +91 80 4027 5000
+91 80 6727 5000
+91 80 2224 0696
Fax: +91 80 2210 6000

Ground Floor, 'A' wing
Divyasree Chambers
11, O'Shaughnessy Road
Langford Gardens
Bengaluru - 560 025
Tel: +91 80 6727 5000
Fax: +91 80 2222 9914

Chandigarh

1st Floor, SCO: 166-167
Sector 9-C, Madhya Marg
Chandigarh - 160 009
Tel: +91 172 331 7800
Fax: +91 172 331 7888

Chennai

Tidel Park, 6th & 7th Floor
A Block, No.4, Rajiv Gandhi Salai
Taramani, Chennai - 600 113
Tel: +91 44 6654 8100
Fax: +91 44 2254 0120

Delhi NCR

Golf View Corporate Tower B
Sector 42, Sector Road
Gurgaon - 122 002
Tel: +91 124 464 4000
Fax: +91 124 464 4050

3rd & 6th Floor, Worldmark-1
IGI Airport Hospitality District
Aerocity, New Delhi - 110 037
Tel: +91 11 6671 8000
Fax: +91 11 6671 9999

4th & 5th Floor, Plot No 2B
Tower 2, Sector 126
NOIDA - 201 304
Gautam Budh Nagar, U.P.
Tel: +91 120 671 7000
Fax: +91 120 671 7171

Hyderabad

Oval Office, 18, iLabs Centre
HITECH City, Madhapur
Hyderabad - 500 081
Tel: +91 40 6736 2000
Fax: +91 40 6736 2200

Jamshedpur

1st Floor, Shantiniketan
Building
Holding No. 1, SB Shop Area
Bistupur, Jamshedpur - 831
001
Tel: +91 657 663 1000
BSNL: +91 657 223 0441

Kochi

9th Floor, ABAD Nucleus
NH-49, Maradu PO
Kochi - 682 304
Tel: +91 484 304 4000
Fax: +91 484 270 5393

Kolkata

22 Camac Street
3rd Floor, Block 'C'
Kolkata - 700 016
Tel: +91 33 6615 3400
Fax: +91 33 2281 7750

Mumbai

14th Floor, The Ruby
29 Senapati Bapat Marg
Dadar (W), Mumbai - 400 028
Tel: +91 22 6192 0000
Fax: +91 22 6192 1000

5th Floor, Block B-2
Nirlon Knowledge Park
Off. Western Express
Highway
Goregaon (E)
Mumbai - 400 063
Tel: +91 22 6192 0000
Fax: +91 22 6192 3000

Pune

C-401, 4th floor
Panchshil Tech Park
Yerwada
(Near Don Bosco School)
Pune - 411 006
Tel: +91 20 6603 6000
Fax: +91 20 6601 5900

Contact us

Arpinder Singh	Partner and Head - India and Emerging Markets	+ 91 12 4443 0330	arpinder.singh@in.ey.com
Sandeep Baldava	Partner	+ 91 22 6192 0817	sandeep.baldava@in.ey.com
Vivek Aggarwal	Partner	+ 91 12 4464 4551	vivek.aggarwal@in.ey.com
Mukul Shrivastava	Partner	+ 91 22 6192 2777	mukul.shrivastava@in.ey.com
Anurag Kashyap	Partner	+ 91 22 6192 0373	anurag.kashyap@in.ey.com
Rajiv Joshi	Partner	+ 91 22 6192 1569	rajiv.joshi@in.ey.com
Yogen Vaidya	Partner	+ 91 22 6192 2264	yogen.vaidya@in.ey.com
Dinesh Moudgil	Partner	+ 91 22 6192 0584	dinesh.moudgil@in.ey.com
Jagdeep Singh	Partner	+ 91 80 6727 5300	jagdeep.singh@in.ey.com
Amit Rahane	Partner	+ 91 22 6192 3774	amit.rahane@in.ey.com
Vikram Babbar	Partner	+ 91 22 6192 2155	vikram.babbar@in.ey.com
Harshavardhan Godugula	Partner	+ 91 40 6736 2234	harshavardhan.g@in.ey.com
Vinay Garodiya	Partner	+ 91 22 6192 2164	vinay.garodiya@in.ey.com

Ernst & Young LLP

EY | Assurance | Tax | Transactions | Advisory

About EY

EY is a global leader in assurance, tax, transaction and advisory services. The insights and quality services we deliver help build trust and confidence in the capital markets and in economies the world over. We develop outstanding leaders who team to deliver on our promises to all of our stakeholders. In so doing, we play a critical role in building a better working world for our people, for our clients and for our communities.

EY refers to the global organization, and may refer to one or more, of the member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients. For more information about our organization, please visit ey.com.

Ernst & Young LLP is one of the Indian client serving member firms of EYGM Limited. For more information about our organization, please visit www.ey.com/in.

Ernst & Young LLP is a Limited Liability Partnership, registered under the Limited Liability Partnership Act, 2008 in India, having its registered office at 22 Camac Street, 3rd Floor, Block C, Kolkata - 700016

© 2018 Ernst & Young LLP. Published in India.
All Rights Reserved.

EYIN1310-079
ED None

This publication contains information in summary form and is therefore intended for general guidance only. It is not intended to be a substitute for detailed research or the exercise of professional judgment. Neither Ernst & Young LLP nor any other member of the global Ernst & Young organization can accept any responsibility for loss occasioned to any person acting or refraining from action as a result of any material in this publication. On any specific matter, reference should be made to the appropriate advisor.

YTG



EY refers to the global organization, and/or one or more of the independent member firms of Ernst & Young Global Limited