Analysis of Arbitration in Public Procurement Contracts in India

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Abstract

The popularity of Arbitration in India rose due to three main reasons, namely the limited time period, Legal expertise on subject matter along with enforceability in the court of law. Arbitral Tribunals resolve disputes within a limited time period as compared to the excessive amount taken through litigation in courts. Tribunals usually consist of members having the requisite Legal expertise along with in depth knowledge of the subject matter of the dispute, thus being able to serve the specific needs of the disputes and cater better to the parties. Further, the enforceability of the arbitral award having the same effect as that of an award granted by the court of law ensures that issues concerning the legality of the said award are limited to the least[i].

With the passage of time, the practice of Arbitration in the world in general and specifically in the country came to hold major ground and attracted large commercial clientele from various parts of the world. One of the major avenues of such audience consisted private to private agencies and private to government agencies involving commercial transactions over public procurement. Recently, the government through notification No. F. 11212024-PPD released the "Guidelines for Arbitration and Mediation in Contracts for Domestic Public Procurement"[ii] *released by the Department of Expenditure Procurement Policy Division.*

Introduction

Research Methodology:

The researcher has used doctrinal method of research for this research project i.e. research used by the information given by the various credible sources which makes the data of the research admissible. To complete this project, the researcher has used the primary data such as the Acts and Judgments along with secondary data like article, blogs etc.

The researcher used the doctrinal technique, reading and analyzing the present scenario as well as various articles and journals. For this particular study project, the researcher drew on secondary data found in a variety of published and well-known books. The majority of the works included primary research information. The researcher primarily referred to reference books pertinent to the topic, but a few online sources were also consulted. The conceptual and evaluative nature of the topic drove the decision to use the doctrinal technique of research in the project.

Hypothesis:

The research is built upon the hypothesis that arbitration and mediation are complementary dispute resolution mechanisms, and restricting arbitration in public procurement contracts may negatively affect foreign investment, hinder legal business, and disrupt India's efforts to become a global arbitration hub.

Objectives Achieved:

1. Analysis of Government Guidelines: The study critically assesses government guidelines on arbitration and mediation in domestic public procurement contracts.
2. Current State of Dispute Resolution: It provides insights into the existing landscape of dispute resolution, particularly in the context of Indian public procurement contracts.
3. Comparative Study: The research compares approaches toward arbitration in common law and civil law countries and assesses their applicability in India.
4. Foreign Investment Impact: The study highlights how restricting arbitration can diminish India’s attractiveness to foreign investors.
5. Legal Reforms: It provides actionable recommendations for amending the Arbitration and Conciliation Act, 1996 in light of recent government guidelines.

Research Questions Addressed:

1.Validity of Limiting Arbitration: Is it legally valid for the government to limit arbitration in public procurement contracts?

2.Dispute Resolution in Public Contracts: How are commercial disputes in public procurement resolved in India, and how should they be handled?

3.International Approaches: What are the approaches of common law and civil law countries toward arbitration in public procurement, and are they applicable to India?

4.Impact of Restricting Arbitration: How would limiting arbitration affect competitive bidding and tender processes?

5.Jurisprudential Reasoning: What is the legal reasoning behind the government's recommendations to limit arbitration?

6.Necessary Amendments: What changes could improve the Arbitration and Conciliation Act, 1996 to better address these challenges?

Significance of the Study:

This research is crucial in understanding the evolving landscape of dispute resolution in India, especially in the context of public procurement contracts. The study offers several key contributions:

1. **Policy Implications:** By analyzing the reforms recommended by the government, the study will provide critical insights into the implications of restricting arbitration in public procurement. The government's guidelines could significantly affect how contracts are awarded and disputes are resolved, making this study valuable for policymakers in structuring more effective, fair, and efficient dispute resolution mechanisms.
2. **Impact on Foreign Investment:** Limiting arbitration in public procurement could impact India's attractiveness to foreign investors. Arbitration is often preferred by international parties due to its perceived neutrality, efficiency, and enforceability. This study will help stakeholders, including legal practitioners and investors, understand how the government's recommendations might affect India's reputation as a hub for arbitration and its position in the global market.

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3. **Comparative Analysis:** By comparing the approaches of common law and civil law countries towards arbitration in public procurement, the research will offer valuable lessons for India. This comparative analysis will help evaluate whether adopting similar measures from other legal systems could lead to more effective dispute resolution practices in India.
4. **Legal and Practical Challenges:** The research will shed light on the practical challenges faced by the government and other stakeholders in managing arbitration proceedings. This includes addressing the inconsistencies in arbitral awards, the time-consuming nature of arbitration, and the knowledge gap within government entities. By identifying these challenges, the study will propose solutions to enhance the effectiveness of dispute resolution in public procurement.
5. **Future Legal Reforms:** The study will provide viable suggestions for potential amendments to the Arbitration and Conciliation Act, 1996, in light of the government's recommendations. These suggestions will be beneficial for legal scholars, practitioners, and policymakers aiming to improve the legal framework for dispute resolution in India.
6. **Balancing Arbitration and Mediation:** The research will explore the balance between arbitration and mediation in resolving public procurement disputes. This will help clarify how both methods can complement each other, potentially leading to more efficient dispute resolution mechanisms that benefit all parties involved.

Overall, this study holds significance for improving India's dispute resolution framework, shaping future policies, and reinforcing India's role as a global hub for arbitration.

Review of Literature:

1. **Arbitration and disputes arising out of public procurement contracts - incompatibility or regularity?**[iii]

   The article by Gumbis and Dereskeviciute examines the question of whether disputes arising from public procurement contracts are arbitrable. The authors explore the key arguments for and against the arbitrability of such disputes, including the role of public interest, the efficiency of court versus arbitration procedures, the importance of upholding the rule of law, and the need for a neutral forum. While different national legal systems provide varying answers, the authors conclude that arbitration can effectively serve as a mechanism for resolving disputes related to public procurement contracts, as long as it

upholds principles of commercial nature, efficiency, neutrality, and adherence to applicable laws. The article provides a nuanced analysis of the compatibility between public procurement contracts and arbitration as a dispute resolution method.

2. **Guidelines for Arbitration and Mediation in Contracts of Domestic Public Procurement.**[iv]

   The document outlines guidelines issued by the Government of India's Ministry of Finance regarding the use of arbitration and mediation in domestic public procurement contracts. The guidelines advise against the routine inclusion of arbitration clauses, particularly for disputes exceeding ₹10 crores in value, and suggest that mediation should be the preferred method of dispute resolution. The guidelines also provide recommendations for the establishment of high-level committees to review and approve dispute resolution approaches, with the aim of promoting fair and transparent decision-making. The guidelines reflect the government's concerns about the effectiveness and accountability of arbitration in public procurement disputes and its effort to promote alternative dispute resolution mechanisms.

3. **Arbitration Bar of India Calls for Withdrawal of Government's New Arbitration Guidelines on Procurement Contracts.**[v]

   The article discusses the response of the Arbitration Bar of India (ABI) and the Indian Arbitration Forum (IAF) to the recent government guidelines issued by the Ministry of Finance that discourage the use of arbitration for disputes arising from public procurement contracts in India. The ABI and IAF have expressed concerns that the guidelines contradict the government's previous efforts to promote arbitration as a preferred dispute resolution mechanism, and they have proposed several measures to address the issues raised, such as encouraging the use of mediation-arbitration clauses, protecting government officials from backlash for settlement proposals, and promoting the use of institutional arbitration. The article provides a detailed account of the concerns raised by the legal community and their recommendations to the government.

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4. **Reflections on the Judicial Approach in Arbitration Matters Concerning Government and Public Sector Enterprises.**[vi]

   The article provides a comprehensive analysis of the role of Indian courts in arbitration matters involving the government and public sector enterprises. It examines key judicial decisions that have shaped the interpretation and application of the Arbitration and Conciliation Act, 1996, particularly in the context of issues such as the treatment of the government as a party, computation of limitation periods, and the scope of judicial intervention in arbitral awards. The author highlights instances where the courts have emphasized the principles of party autonomy, minimum judicial intervention, and the need for expeditious resolution of commercial disputes, while also discussing cases where the government has continued to litigate arbitration matters despite well-established precedents. The article offers valuable insights into the evolving jurisprudence on arbitration law in India and the challenges faced in achieving the goals of the Arbitration and Conciliation Act.

5. **India Recalibrates Policy on Dispute Resolution Mechanisms in Public Procurement Contracts.**[vii]

   The article "India Recalibrates Policy on Dispute Resolution Mechanisms in Public Procurement Contracts" published in Arbitration Asia examines India's recent shift in its approach to dispute resolution in public procurement contracts. The authors, Avinash Pradhan and Devathas Satianathan, analyze the Indian government's new guidelines that restrict the use of arbitration and promote mediation as an alternative dispute resolution mechanism. The article provides an overview of the key features of the guidelines and discusses the potential implications for commercial parties seeking to enter into public procurement contracts with the Indian government. The article offers insights into the evolving landscape of dispute resolution in the context of India's public procurement sector.

6. **Arbitrability of public procurement contracts.**[viii]

   The article "Arbitrability of public procurement contracts" by Stefan Deaconu examines the complex relationship between public procurement contracts, which are governed by public law, and private arbitration tribunals. The author discusses the increasing openness

of states to use arbitration to resolve disputes in public procurement, highlighting key advantages such as the need for swift dispute resolution, specialized expertise, and confidentiality. The article explores the varied approaches adopted by European Union member states, ranging from those that do not explicitly address the arbitrability of public procurement disputes to those that expressly allow for arbitration, as well as the emergence of specialized dispute resolution mechanisms within the public procurement framework. The article provides insights into the evolving landscape of arbitration in the context of public procurement contracts.

7. **Arbitration Realities: Patterns of Challenges and Judicial Responses.**[ix]

The article "Arbitration Realities: Patterns of Challenges and Judicial Responses" by Madhav Goel, Karan Gulati, Sonam Patel, and Anjali Sharma examines the practical application of arbitration in India. The authors analyze data from the Delhi and Bombay High Courts to shed light on three key aspects: the proportion of arbitration awards that are challenged, the time taken by courts to resolve these challenges, and the differences in how government entities and private parties challenge arbitration outcomes. The findings indicate that a significant number of arbitration awards are subject to judicial scrutiny, with the government being a more frequent and less successful litigant compared to private parties. The article highlights the need to align the choice of dispute resolution mechanism with the nature of the dispute and the incentives of the parties involved, in order to create a more effective system for contract enforcement.

8. **Public Procurement Laws in India.**[x]

The article "Public Procurement Laws in India" by Manas Kumar Chaudhuri and Ebaad Nawaz Khan provides an overview of the legal framework governing public procurement in India. The authors explain that public procurement in India is governed by a complex framework involving constitutional provisions, Supreme Court rulings, various central and state legislations, and administrative guidelines. The article highlights the key provisions of the Indian Constitution, such as the mandate of Article 14 requiring the government to act in a non-arbitrary and non-discriminatory manner, as well as important central legislations like the Competition Act 2002 and the Prevention of Corruption Act 1988. The authors also discuss the role of administrative guidelines, such as the General

Financial Rules 2017, in regulating public procurement practices in the country. The article offers insights into the multifaceted legal landscape surrounding public procurement in India. "

9. **Bid Challenges: What Role Can Arbitration Play in Tender Disputes?**[xi]

The article examines the role that arbitration can play in resolving tender disputes, particularly in the context of public procurement. It discusses the review procedures for public procurement disputes under various international frameworks, such as the Government Procurement Agreement (GPA), UNCITRAL Model Law, and EU Procurement Directives, which generally provide for judicial review rather than explicit references to arbitration. The article then explores the possibility of arbitrating disputes arising from contractual tender procedures, such as concession agreements and production sharing contracts, and highlights a recent ICC arbitration award addressing tender disputes. Additionally, the article considers a proposal in the UK to establish a tribunal-based system for a subset of procurement challenges, and it outlines the potential challenges in adapting arbitration to the resolution of tender disputes, including the need for speed, disclosure of relevant information, joinder of interested parties, and the interplay with public law, state aid, and competition law issues. The article concludes that there is a clear role for arbitration in tender disputes, and the potential for further development of suitable rules and procedures to address the specific requirements of this type of dispute."

10. **Role of Constitutional Courts in Matters Concerning Contracts by Government and Public Contracts: A Brief Analysis of Case Law.**[xii]

The article provides a comprehensive analysis of the role of constitutional courts in interpreting contractual matters involving the government and public contracts in India. It examines the application of constitutional values, particularly fundamental rights enshrined in Part III of the Indian Constitution, to government contracts and the principles developed by the judiciary to balance the competing rights and duties of the government and private parties. The article delves into various aspects of government contracts, including the concept of public contracts, the applicability of principles of natural justice, the law relating to blacklisting and debarment of contractors, and the available remedies.

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The discussion is enriched by an extensive review of relevant case law, highlighting the nuanced approach adopted by the courts in safeguarding the constitutional ethos while addressing issues arising in the realm of government contracts.

11. Arbitration of International Contract Disputes.[xiii]

The article "Arbitration of International Contract Disputes" by William W. Park explores key aspects of arbitration in international contracts, emphasizing its growing importance in resolving disputes across jurisdictions. Park highlights that international arbitration is often favored when parties from different countries are unwilling to subject themselves to each other's legal systems. A core theme of the paper is the need for clarity in drafting arbitration agreements, especially when determining if parties genuinely prefer arbitration over litigation or other methods like mediation. The paper also warns against "pathological" arbitration clauses, which fail to clearly define arbitration processes and can lead to costly delays. The role of institutional versus ad hoc arbitration is another focal point, with the former being recommended for its structure and ability to address unforeseen procedural issues. Furthermore, Park discusses various critical elements of arbitration agreements, such as the selection of arbitrators, applicable law, and the role of conciliation or mediation prior to arbitration. The review underscores the necessity of ensuring an enforceable and fair arbitration process, tailored to the specifics of international commercial relationships.

12. The Public Interest in Arbitration.[xiv]

The article by Stavros Brekoulakis, "The Public Interest in Arbitration," explores the intersection of public and private arbitration, focusing on disputes arising from public-private contracts. Brekoulakis discusses how arbitration, traditionally a private mechanism, is increasingly used in cases where public interests are involved, particularly in contracts between governments and private entities. A significant issue arises when private arbitration fails to account for public law norms, as seen in cases like the UK's e-Borders project, where public funds and national interests were at stake. Brekoulakis argues that English arbitration law's reliance on party autonomy and confidentiality can obscure crucial public interests, as arbitrators often apply private law paradigms without considering public accountability or transparency. He contrasts this with other

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jurisdictions, like France and Brazil, which recognize the public implications of such arbitrations and impose transparency or judicial review requirements. Brekoulakis concludes that the lack of a distinct framework in English law for public-private arbitrations poses challenges for addressing broader societal interests in arbitration."

Legal Analysis

"Guidelines for Arbitration and Mediation in Contracts for Domestic Public Procurement" released by the Department of Expenditure Procurement Policy Division[xv].

What the government proposed, the government's guidelines included considerations of other viable methods of dispute resolution such as mediation and litigation instead of the parties approaching the Arbitral tribunals. The key reasoning behind this recommendation was the prolonged time taken up by the tribunals these days nullifying the very reason why arbitration was being considered in such cases.

The reasoning can be summarized as follows-

i. There have been cases in the recent past where Arbitral Tribunals have taken stance contrary to the stance taken up by judges in a court of law in disputes of similar nature having similar parties and facts being considered. For awards to be accepted, they must be fair as well as considerate. If Arbitral awards are different from how similar cases are being usually handled, it becomes hard for the parties to accept them. Imagine two contractors involved in similar work for the government, but one goes through Arbitration and gets a different outcome than the other who approached the court of law. This inconsistency in the outcomes makes it hard to trust the arbitral process.

ii. In continuance with the above point, Arbitral Tribunals may at times give decisions that are adverse or contrary to the law leading to prolonged litigations as well as delayed settlements achieved ultimately through reference to the courts, under Section 34 and section 37 of the Arbitration and Conciliation Act.

iii. Further, knowledge gap in the government, makes arbitration an unfeasible option at times for the government. Contrary to their private counterpart, government officials are often transferred frequently, so they might not have a deep understanding of the

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dispute at hand for which the arbitral tribunal has been approached for. On the other hand, private parties involved in arbitration usually have a detailed knowledge of the case, which puts the government at a disadvantage when presenting its arguments to the arbitrators because the party is better prepared.

Further, the government points out that arbitration is long and time-consuming process. The binding nature of the arbitral decisions along with its reduced formality makes them perceivable to wrong doings including corruptions in matters of high financial value. Arbitrators unlike the judiciary are more often than not, not subject to high selection standards applied to judiciary and judicial conduct. Further, with arbitration proceedings being conducted behind closed doors and not in a public forum like and open court proceeding, awards are susceptible the existence of an arbitration clause might also act as a leeway for the officers to avoid taking a decision.

Recommendations by the guidelines in brief-

In short, the government proposed that Arbitration should be the routine procedure followed in public procurement contracts o tenders especially those of high value or extending over a large period of time.

i. Arbitration in such contracts needs to be restricted to disputes with a value less than Rs 10 crores and only in such cases wherein it has been specifically mentioned in the bid conditions/ conditions of the contracts. In all other cases dispute resolution should not be taken up as through arbitration.
ii. In cases wherein it is imperative for arbitration to be taken, parties should only resort to institutional arbitration through institutions such as SIAC, ICC, LCIA etc. This should be done taking into account the reasonableness of the cost of arbitration in relation to the value involved.
iii. In place of this parties should adopt mediation as an approach for dispute resolution under the Mediation Act of 2023. Mediation refers to a voluntary, confidential process where a neutral third party (mediator) facilitates communication between disputing parties to help them reach a mutually acceptable agreement, without imposing a binding decision.

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iv. In matters where its dispute resolution is necessary, like those involving high value, it might be appropriate to constitute a High-Level Committee (HLC) for dispute resolution which would consist of- i. a retired judge, ii. a retired high-ranking officer and/ or a technical expert. Once the High-Level Committee has been constituted, the Government department entity/agency may either i. negotiates directly with the other party and place a tentative proposed solution before the Committee or place a tentative mediate agreement before the High-Level Committee after mediation through a mediator. The departments could as well use the High-Level Committee as a mediator to the dispute while exercising an arm's length approach. Cases where protection of public-interest demands the renegotiation of the terms, re-negotiated contracts may be placed before a suitable constituted High-Level committee for its approval, this approval needs to be consonance with Section 48 and section 49 of the Mediation Act, 2023. Section 48 of the Mediation Act, 2023, provides that mediated settlement agreements shall be final and binding and have the same effect as a decree of the court of law, while Section 49 states that such agreements can be enforced by applying to the relevant court, in a process similar to that of the enforcement of arbitral awards.

v. Mediation as an alternative

Something that the guidelines fail to recognize is that, mediation and arbitration are not alternatives to each other but complimentary to the end result of achieving speedy dispute resolution. Although Ministry's proposal to establish a High-Level Committee for speedy dispute resolution is well-intentioned it is not well thought out. The government overlooks the fact that the success of mediation as an approach depends highly upon the willingness of all parties involved to engage in good faith and respect whatever final outcomes the committee proceeds with.

Similar mechanisms such as a High-Level Committee have been adopted in the past but have failed, for example, often a Dispute Adjudication Board or a DAB has been set up in construction disputes but they have faced significant challenges as a result of their final decision. For example, Governmental parties more often than not disregard orders of the Dispute Adjudication Boards which do not favour them, ultimately escalating the matter to arbitration i.e. the very approach the guidelines try to dismiss. In conclusion, there is a high

probability that in matters wherein Mediation, through High-Level Committees are involved, the independency that Arbitration enjoys up till now gets taken away.

vi. Pecuniary Jurisdiction

The guidelines recommend limiting arbitration as a method of dispute resolution to amounts less than Rs. 10 Crores. Such a limitation is not only short-sighted but arbitrary as well, since nowhere in the guidelines does the government give any reason as to why such a limit has been decided. Further, limiting the amount of value to a mere 10 crore rupees, would lead to arbitration in only matters involving low-value disputes, this stance is rather illogical especially since commercial contracts especially the ones involving government and private foreign entities dealing with foreign direct investment often cover matters that expand over large areas of land and are involving high investment costs. Private foreign entities would be more interested in entering into a contract with government agencies of an alien country through contracts where they have some kind of say in the adjudicating authority thereby ensuring the forum's neutrality, they might not in majority of the cases want to submit their disputes in front of a foreign government.

vii. Being favorable/ favoring litigation or mediation.

As of September, 2024 there are more than five crore cases pending in Indian courts, including the Supreme Court, High Courts, and District Courts. This includes around 61.7 lakh cases pending in 25 high courts across India and around 4.4 crore cases pending in district and other subordinate courts. To add to that, as of 1st December, 2023 the Supreme Court's pendency list has increased from 69,766 to 80,040 cases. Thus, by favoring litigation over mediation, the government is increasing the load on the already over-burdened courts and counter the original intent of promoting arbitration.

The shift from arbitration in commercial disputes to litigation or mediation could very well swerve from the global trends and strengthen the perception that India is not conducive to arbitration. Such an approach risks undermining the credibility of India's arbitration framework and could discourage both domestic and international parties from choosing arbitration. This would ultimately lead to the hinderance of India's goal to become a global hub for commercial dispute resolution. This regressive stance would deter foreign investors and prompt Indian businesses to seek more favorable arbitration environments elsewhere,

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potentially jeopardizing India's aspirations to be a preferred International Commercial Dispute Resolution.

It is a known principle in Indian Jurisprudence, that when evaluating government actions and contracts it is important to consider regional contexts and economic development goals. For example, in the case of Ramana Dayaram Shetty v. The International Airport Authority of India and Others[xvi], the procurer by a public notice had invited tender for putting up and running a second-class restaurant and two snack bars at the Bombay International Airport. One of the tender conditions in the notice inviting tender stipulated that only a person running a registered IInd Class hotel or restaurant and having at least 5 years' experience would be eligible to tender. However, subsequently, the procurer accepted tender of an applicant which did not satisfy the condition of eligibility prescribed in the notice inviting tender. The Supreme Court held that action of the procurer was in contravention of the mandate of Article 14 of the Constitution of India[xvii] and the judicially evolved principles of administrative law. In the Supreme Court's view, the procurer was bound to conform to a reasonable and non-discriminatory standard or norm laid down in the notice inviting tender. Similarly, in the case of Kasturi Lal Lakshmi Reddy v. State of Jammu and Kashmir and Anr.[xviii], a case where an award of contract to a party was questioned on the ground that it was arbitrary, malafide and not in public interest and was made without affording an opportunity to others to compete. The Court emphasized that the State's action was based on standards that were not arbitrary or unauthorized, and that entrepreneurs had to be offered attractive terms to persuade them to set up industries in an industrially underdeveloped region like Jammu and Kashmir.

How Arbitration in Contractual matters has been addressed nationally in the past.

The Indian Government spends about Rs. 12 to 15 trillion per year in public procurement. It is therefore obvious, that the country would more or less dedicate a legislative basis to regulate public procurement procedures in order to protect public funds in the country, and this has been noted earlier through supreme court decisions and directions issued by the government.

(a) Supreme Court Initiatives:

As early as 1992, the Supreme Court recognized the need to use Alternative Dispute Resolution (ADR) mechanisms to reduce litigation between government agencies. In cases such as "O.N.G.C. v. Collector of Central Excise"[xix] and "Chief Conservator of Forest, Govt. of A.P. v. Collector", the Court emphasized that various branches of the government should not bring their disputes to court. The Court even held that disputes between public sector undertakings and the Union of India should be resolved outside the courts to avoid wasting public time and resources. It recommended that such disputes be addressed at the highest government levels. In cases where litigation was pending, the Cabinet Secretary was instructed to personally manage the matter and report back to the Court. The Constitution and the Civil Procedure Code did not envision departments of the State or Union of India litigating in court. Therefore, it was neither appropriate nor permissible for government departments to bring their disputes to court; such controversies should be settled internally within the government.

In "O.N.G.C. v. Collector of Central Excise", the dispute arose between a government department and a public sector undertaking, leading to court intervention on September 11, 1991. The court directed the parties to resolve the matter through consultation rather than litigation. Following this, the Cabinet Secretary took measures to settle the issue amicably, with a report confirming the resolution. The Cabinet Secretariat further emphasized resolving such disputes via mutual consultation, empowered agencies, or arbitration. The court, satisfied with the resolution, ruled that no further action was required, commending the collaborative approach to dispute resolution. This case highlighted the importance of administrative directives to reduce litigation between government entities and promote efficient conflict resolution. In "Chief Conservator of Forests, Govt. of A.P. v. Collector and Others"[xx], the issue revolved around whether the case should be published under Rule 27 of the CESTAT (Procedure) Rules, 1982.[xxi] The dispute involved the issuance of a Show Cause Notice to the Divisional Railway Manager, but proceedings were mistakenly initiated against state actors instead of the State. The court emphasized that the correct parties must be involved in litigation under Rule 10 of Order I, C.P.C.[xxii], or the case would fail. Since the initiation of service tax liability proceedings against Indian Railways was deemed misconceived, the court declared the proceedings a nullity and dismissed the appeal.

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(b) Settlement of Commercial Disputes between Public Sector Enterprises:

On 22 January 2004, the Government of India established a Permanent Machinery of Arbitrators (PMA) under the Administrative Mechanism for Resolution of CPSEs Disputes (AMRCD) within the Department of Public Enterprises. This was aimed at the swift resolution of disputes involving commercial contracts between Central Public Sector Enterprises (CPSEs) and between CPSEs and government departments. The initiative followed recommendations from the courts to expedite dispute resolution. The guidelines for this mechanism were outlined in the Department of Public Enterprises Office Memorandum No. DPE/4(10)/2001-PMA-GL-I, dated 22 January 2004[xxiii].

In May 2018, the Indian government introduced a two-tier mechanism to further streamline dispute resolution and minimize court litigation:

1. First Level (Tier): Disputes are first referred to a committee comprising Secretaries from the involved Ministries/Departments, the Secretary of the Department of Legal Affairs, and Financial Advisors. If both parties belong to the same Ministry, additional members such as a Joint Secretary and a Financial Advisor from the same Ministry are included.

2. Second Level (Tier): If the dispute remains unresolved, it is escalated to the Cabinet Secretary, whose decision is final and binding. This approach aims to reduce litigation costs, save public resources, and foster equitable resolutions through collaborative efforts.

Indian Legislations dealing with public procurement

Public procurement in India is primarily governed by the General Financial Rules (GFRs) 2017[xxiv], which are comprehensive guidelines for handling public finances, including procurement. These rules apply to all ministries and departments under the Government of India, providing a unified framework. The GFRs 2017 evolved from earlier versions issued in 1947, 1963, and 2005, with the latest update in 2017.

Key features include:

- Chapter 6: It outlines procedures for procurement of goods and services by government bodies, allowing departments to customize their own rules within the GFR framework.[xxv]

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- Rule 163 introduces a "two-bid system" where technical and financial bids are submitted separately for complex, high-value procurements. This ensures that technical specifications are evaluated first, followed by the financial bid of technically qualified offers.[xxvi]

- Rule 146 allows for a two-stage bidding process in cases where detailed specifications are not possible at the outset or in rapidly advancing sectors. This process is ideal for research-based or experimental contracts.[xxvii]

- Rule 175 enforces a strict code of integrity for both the procurer and the bidder to prevent bribery, collusion, or bid-rigging.[xxviii]

In addition to the GFRs, sector-specific rules exist, such as the Defense Procurement Procedure 2016[xxix] and policies governing electronics, renewable energy, and pharmaceuticals. The Government e-Marketplace (GeM), introduced in 2019[xxx], ensures greater transparency and efficiency in procurement, promoting electronic procurement methods.

Finally, the Competition Act, 2002[xxxi], addresses anti-competitive practices like bid-rigging and cartelization, which are common in public procurement, emphasizing the need for competition to achieve efficiency and prevent taxpayer money waste. It advocates for the enforcement of competition laws and effective design of procurement processes to prevent collusion. Public procurement represents a significant part of India's economy, constituting about 30% of the GDP. Therefore, ensuring efficient and competitive procurement is crucial for safeguarding public resources."[xxxii]

International Analysis

Internationally Public Procurement legislations are usually performed under standard commercial practice, if no exceptions are provided in national laws (for example, with regard to change of the contract price, etc.). Sometimes commercial relationships between public authorities and private entities, likewise entirely private relationships (i.e. relationships between two or more private entities), may end up with a dispute. In order to re-establish the balance between the conflicting parties as quickly and as fairly as possible, the dispute shall be solved effectively, transparently, and legitimately.

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The validity of arbitration as a method of dispute resolution depends on the inclusion of public procurement as a valid subject matter for arbitration in the country. Some disputes may only be solved in court. The list of these disputes depends on national legislation. If the subject matter of the dispute is non- arbitrable, the court may set aside the arbitral award or refuse the recognition or enforcement of the arbitral award. In order to have the possibility to forecast if the arbitral award will be enforceable, it shall be clear whether the subject matter of the dispute is arbitrable.

There is a paradoxical relationship between public procurement contracts, which are governed by public laws, and arbitral tribunals, which operate within private justice systems. However, internationally, more states are becoming receptive to arbitration. This trend is driven by several factors in the context of public procurement contracts:

1. These contracts often involve the supply of goods or services that the state requires urgently, making it impractical to wait for lengthy court proceedings to resolve disputes.
2. Arbitration allows for the resolution of disputes by arbitrators with specialized expertise in public procurement.
3. Confidentiality, which is important in public procurement relationships, can be better safeguarded through arbitration.
4. Disputes involving foreign entities awarded contracts can be more efficiently resolved through international arbitral tribunals, as this process is more accessible than national courts.
5. Arbitrators from the private sector often have a better understanding of market and economic conditions, enabling them to apply more flexibility beyond the legal frameworks governing such relationships.

Principal of dividing Legal relations

Internationally, there has been a growing trend toward separating the legal aspects of public procurement into two parts: public law, which governs administrative procedures, and private law, which governs the execution of the contract. As a result, disputes related to contract performance may be eligible for arbitration.

i. The first category includes countries where although the legislation mentions no explicit provision but no prohibition:

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In Central and Eastern Europe, arbitration legislation has evolved alongside the transition to a market economy and public procurement systems. Many countries in the region have been receptive to the use of Arbitral Tribunals. In Slovenia, national legislation that transposes European public procurement directives does not explicitly address how disputes should be resolved, and the Civil Procedure Act, which regulates arbitration, does not specifically exclude its use in public procurement disputes. This situation is similar in countries like Bulgaria, the Czech Republic, Slovakia, and Croatia.

ii. In the second category the states that expressly allow arbitration in public procurement disputes:

In **Romania**, Law no. 101 of 2016[xxxiii], which governs the National Council for the Settlement of Appeals in public procurement, explicitly states in Article 57 that disputes can be resolved through arbitration. In **Turkey**, a country in the pre-accession phase of European Union membership, arbitration is also permitted in public procurement disputes, as provided by the country's arbitration laws[xxxiv]. In many European countries, the clear division between the administrative and contractual stages of public procurement has led to specific regulations outlining which authority is competent to resolve disputes. For example, in the case of **Hungary,** according to art. 145 Act no. CXLIII of 2015[xxxv], the **non-compliance with the rules on awarding public procurement contracts** is dealt especially by the **Public Procurement Arbitration Board,** while- **execution of public procurement** contracts are under the ambit of the **ordinary civil courts.** In **Lithuania**, Disputes concerning public procurement contracts **unlike bankruptcy**, employment and consumption agreements are not explicitly mentioned as non-arbitrable.[xxxvi]

In certain legal systems, public authorities, such as contracting authorities, are prohibited from submitting their disputes—particularly those involving domestic matters—to arbitration. This raises the issue of **"objective arbitrability" or "arbitrability ratione materiae,"** which refers to whether a dispute is capable of being resolved through arbitration. There is no unanimous answer to this question, as each national legal system defines which types of disputes must be adjudicated by national courts and which can be arbitrated. These determinations vary from state to state, influenced by political, social, and economic factors.

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In the Russian Supreme Court's decision in case No. A40-176466/2014[xxxvii], the dispute involved the Russian Federal State Unitary Enterprise "Russian Post" and the German company Siemens AG. The central issue was whether the arbitration clause in their contract was enforceable. The Russian court ruled that the arbitration clause was not enforceable due to its lack of clarity and specificity. The decision emphasized that while arbitration is generally accepted for commercial disputes, such clauses must be explicitly agreed upon, particularly in contracts involving state entities. The ruling reflects the broader principle in Russian arbitration law that for arbitration to be valid, there must be clear and specific consent from all parties involved. In contrast, a Brazilian case, "Câmara Brasileira de Arbitragem Empresarial (CAMARB) vs. Petrobras"[xxxviii], addressed the enforceability of arbitration clauses in public procurement contracts. In 2015, Brazil's Superior Court of Justice (STJ) upheld the arbitration clause in a contract between Petrobras and a consortium led by Camargo Corrêa, related to the construction of a refinery. The court reaffirmed that arbitration is permissible in public procurement contracts, as long as the clause complies with legal requirements, including clarity and adherence to public procurement laws. The court underscored that arbitration in public contracts must safeguard public interests and comply with transparency and legal standards, establishing a precedent for Brazil's pro-arbitration stance in such disputes. These cases highlight contrasting approaches: while Russian courts may refuse arbitration due to vagueness or public policy concerns, Brazilian courts show stronger support for arbitration, provided it aligns with legal and public policy frameworks."[xxxix]

Brazil

Arbitration in public procurement contracts in Brazil, under the new Government Procurement Act (GPA) (Law n. 14,133/2021), is structured to promote non-judicial dispute resolution mechanisms, such as conciliation, mediation, and arbitration, for both new and existing public contracts. The GPA limits arbitration to negotiable and pecuniary matters, like contract breaches and economic imbalances. Arbitrations in public contracts must follow Brazilian statute law and cannot use ex aequo et bono or trade usages as bases for decisions. Furthermore, these arbitrations are public, ensuring transparency and accountability, except in cases involving national security.

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***England*:**

- Pre-1979: Arbitrators could be compelled to submit points of law to the High Court through the "case stated" procedure, which delayed final awards.[xliii]

- Post-1979 (Arbitration Act 1979): This act limited appeals on points of law, allowing appeals only if they could substantially affect the rights of the parties, subject to the court's leave. For international arbitration, parties can enter into exclusion agreements*in "non-domestic" contracts, excluding judicial review of arbitral awards. However, shipping, insurance, and commodities contracts governed by English law cannot include pre-dispute exclusion agreements to ensure judicial review for development of English law.[xliv]

- Residual Judicial Control: Courts retain the right to set aside awards for arbitrator misconduct, though recent case law trends toward non-intervention in arbitral independence.

***France*:**

- France's arbitration system, particularly after the 1981 decree, emphasizes arbitral autonomy. The decree provides for judicial review of international commercial arbitral awards in France, limited to ensuring basic standards of fairness and integrity in proceedings. French courts can

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set aside awards in international arbitration, but only for narrow reasons, unlike in purely domestic cases.[xlv]

Switzerland:

- Swiss arbitration law is guided by the Concordat,[xlvi] a uniform arbitration law adopted by most Swiss cantons. It has mandatory provisions, such as court intervention in case of arbitrary awards. Courts may annul awards if decisions are seen as manifestly unjust or contrary to equity or law. The Swiss system also allows for more extensive court involvement in comparison to other jurisdictions."[xlvii]

- Proposed Reforms: Revisions to "Swiss private international law"[xlviii] would limit court intervention in international arbitration, allowing for contractual exclusion of appeals when both parties are foreign and have no strong Swiss connections. This is broader than the English approach, where only one party needs to be foreign for appeal exclusion.

These jurisdictions reflect varying degrees of judicial intervention, with Switzerland allowing more court involvement and France leaning towards limited review to uphold fairness, while England provides a mechanism for excluding judicial oversight in non-domestic contracts.

Jurisprudential Analysis

As seen, no uniform approach exists across national legal systems regarding the arbitrability of public procurement contracts. Several key factors underlie the classification of these contracts:

i. The public interest inherent in public procurement contracts;
ii. The need for prompt resolution of public procurement disputes;
iii. The requirement that decisions comply with the imperative national laws of the respective country;
iv. The neutrality of the forum for resolving public procurement disputes.

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A. Public Interest as a Key Feature of Public Procurement.

The rationale for resolving public procurement disputes in court is closely tied to public interest. Some disputes may involve sensitive public policy issues, which are considered best handled by state courts. Two primary justifications are often cited:

1. It may be viewed as inappropriate or even illegal for private arbitrators to rule on matters involving public policy.

2. The risk that arbitrators might render decisions that are not socially acceptable is too high for arbitration to be considered in such sensitive areas, such as antitrust law.[xlix]

However, this reasoning may not always be sufficient as-

1. Public Interest: Public procurement procedures are strictly regulated, making it unlikely for a public procurement contract to violate public policy. Procurement documents are subject to multiple reviews, both by the contracting authority and other relevant institutions, as well as potential suppliers and, in some cases, judicial bodies. Consequently, public procurement contracts are typically commercial in nature. While the use of state funds may raise public policy concerns, as confirmed by the European Court of Justice (ECJ), the protection of public interest is not exclusive to state courts—arbitrators can and should protect the public interest when necessary.

2. Confidentiality: Another significant issue is the confidentiality of arbitration proceedings. While confidentiality is often seen as a key advantage in private commercial disputes, it becomes more complex in public procurement cases. When state funds are involved, the public may demand transparency, and the idea of resolving such disputes behind closed doors could be questioned.

B. Efficiency of Court vs. Arbitration Procedures.

Public procurement disputes must be resolved quickly to prevent delays in procurement processes, especially when EU or other international funds are involved. Similarly, disputes should not disrupt public authorities or suppliers. Arbitration is often favored for its cost-effectiveness and speed, especially through mechanisms like fast-track arbitration, where

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parties may opt for a sole arbitrator to expedite proceedings. In this context, arbitration can be as efficient, or even more efficient, than court procedures.

C. Rule of Law.

Arbitrators generally apply the law chosen by the parties in a contract. In the absence of an explicit choice, they are free to determine the applicable law. However, even when no law is specified, arbitrators are still expected to apply the rule of law where appropriate. To protect public interest, disputes arising from public procurement contracts should be adjudicated under the national laws of the state where the public authority is based. If an arbitration clause fails to designate the national law of the public authority's state, such a dispute may be declared non-arbitrable, and arbitrators must uphold the rule of law of the respective state.

D. Neutrality of the Forum.

One of the main advantages of arbitration over litigation is the neutrality of the forum. Parties often choose arbitration or include arbitration clauses in contracts to ensure that disputes will be resolved by an impartial and neutral body. In public procurement disputes, however, courts may lean toward favoring the public authority, driven by a strong focus on protecting public interest. Arbitration provides a neutral platform, ensuring that neither party is unfairly favored in the dispute resolution process."[1]

Competitive Tendering in Public Procurement Projects.

Public infrastructure projects involve massive expenditures, with the World Bank estimating that governments globally spend approximately US$9.5 trillion annually on public contracts. Various international frameworks provide mechanisms for reviewing public procurement procedures, including:

i. The Government Procurement Agreement (GPA).[li]

ii. The UNCITRAL Model Law.[lii]

iii. The EU Procurement Directives.[liii]

However, these frameworks do not explicitly reference arbitration; instead, they typically mention independent review bodies, with the option of ultimate review by the courts. Public

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policy often prioritizes transparency and accountability in the use of public funds, which contrasts with the confidential nature of arbitration. Foreign bidders may, nonetheless, be wary of the independence of national review bodies and prefer international arbitration before a neutral panel. In some cases, disputes over tender decisions have even led to investment treaty arbitrations. It is common for companies involved in public infrastructure projects or natural resource exploitation to be required to undergo competitive tendering. Disputes can arise if a party believes that the contract was unfairly awarded, prompting complaints from aggrieved bidders or claims from the state about procedural non-compliance. Arbitration is frequently used to resolve such disputes. "

In November 2020, an ICC arbitration award addressing tender disputes became public. The case involved Doula International Terminal (DIT) and the Autonomous Port of Doula (APD) concerning a container terminal concession at the Port of Doula in Cameroon. The disputes centered on the allocation of parking rights and DIT's exclusion from a tender procedure for a replacement concessionaire, initiated by APD in January 2018. The ICC tribunal ordered APD to pay damages to DIT and to re-issue an open tender notice that included DIT. Simultaneously, DIT's shareholders initiated legal proceedings in Cameroon to challenge the irregularities in the tender process and the legality of the public entity set up by APD to operate the terminal in DIT's place.[liv]"

Suggestions

Suggestions that the government should have recommended for enhancing arbitration in public procurement and addressing its loopholes in place of the guidelines-

1. Diversifying the Arbitrator Roster: Expand Arbitrator Pool: Include a broader range of professionals like domain experts, seasoned counsels, law firm partners, and specialized lawyers. Enhances competence and flexibility within arbitration panels, improving their capacity to handle diverse cases.

2. Elevating Arbitrator Standards: Establish stringent standards for choosing and evaluating arbitrators. Grading System: Introduce a rating system based on expertise, case efficiency,

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award success rates, and counsel feedback. Training and Certification: Strengthen training and certification programs to improve arbitration quality and restore trust in the system.

3. Ensuring Award Integrity: Pre-Publication Review: Conduct thorough reviews of arbitration awards to ensure consistency and protection against legal challenges. Benchmark with Best Practices: Learn from institutions like the International Chamber of Commerce (ICC), known for their high standards in award reviews.

4. Streamlining Court Processes: Address delays in appointing arbitrators and enforcing awards. Implement reforms to enable courts to handle arbitration matters swiftly, maintaining arbitration as an efficient dispute resolution tool.

5. Promoting Institutional Arbitration: Promote institutional arbitration for a more transparent and predictable process. Integrate methods from global institutions like ICC, DIAC, and SIAC Mandate institutional arbitration in government contracts to raise the quality of Indian arbitration to global standards.

Key Elements that parties need to keep in mind while Drafting Arbitration Clauses in public-procurement:

1. Number of Arbitrators: Opt for one arbitrator for simplicity and cost-efficiency; use three for complex cases. Avoid over-specifying arbitrator qualifications to prevent delays.

2. Language Clause: Specify the language of proceedings to avoid future disputes, and allow documents in an additional language understood by the arbitrator.

3. Applicable Law: Clearly define the governing national law and exclude *renvoi*. Alternatively, consider using *lex mercatoria* or authorizing the arbitrator to apply equitable principles (*amiable compositeur*).

4. Conciliation/Mediation: Include a mediation or conciliation step before arbitration to resolve tensions, ensuring it does not weaken the arbitration clause.

5. Entry of Judgment: In jurisdictions like the U.S., allow judgment on the arbitration award to be entered in any court with jurisdiction.

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6. Waiver of Appeal: To ensure finality, consider waiving the right to appeal, though this might not always be enforceable in certain jurisdictions.

7. Waiver of Sovereign Immunity: In contracts with state entities, explicitly waive sovereign immunity to ensure enforceability.

8. Place of Arbitration: Choose a venue based on desired court intervention levels. Countries like France and the U.S. limit intervention, while others, like England and Switzerland, allow more involvement. Consider leaving the decision to an experienced institution like the ICC[lv].

Conclusion

The Apex Court in State of Goa v. Western Builders[lvi], held that commercial disputes should be disposed of quickly so that the country's economic progress can be expedited. In this case, the State appealed against the lower court's decision to enhance the interest rate and retroactively award interest from November 13, 1984, contrary to the Arbitrator's original decision. The main issue was whether the lower court had the authority to modify the interest rate to 18% and backdate the interest commencement, a decision explicitly denied by the Arbitrator. Counsel for the State argued that the court overstepped its jurisdiction, while the respondents maintained that the modification was permissible under Section 15(b) of the Arbitration Act[lvii]. The appellate court agreed with the State, ruling that the lower court exceeded its authority. The judgment was set aside regarding the 18% interest rate and the retroactive commencement of interest. However, the appellate court allowed the respondents to receive interest at a 6% rate from the date of the lower court's judgment until the full realization of the award, in line with Section 34 of the Code of Civil Procedure[lviii]. This decision reaffirms the authority of arbitration and limits judicial modifications of arbitrators' awards. For commercial parties, the Guidelines may be both boon and bane. On one hand, the promotion of mediation is welcome, offering parties a chance to resolve their disputes amicably. It also encourages Government decision-makers to keep legal and practical realities in mind and avoid unnecessary appeals against adverse awards. On the other hand, the new restrictions on arbitration potentially introduce complications for commercial parties who may prefer to arbitrate. Parties may be hesitant to lose the neutrality and efficiency that arbitration may offer. Where an arbitration clause is successfully negotiated, parties should

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take care to ensure that its inclusion has been properly Authorized bearing in mind the Guidelines. Parties invoking an arbitration clause implicated by the Guidelines would also be well placed to take measures to guard against, as far as possible, challenges to the enforcement of the resulting award.

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