



Building arbitration hub and investor confidence: India's institutional evolution and quest for global investment in investment dispute resolution

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Abstract

This research paper explores the legal and institutional aspects of investment arbitration in India as the country moves towards economic liberalisation and increased globalisation. It follows the development of early Bilateral Investment Treaties (BITs) in the 1990s to current modifications in the Arbitration and Conciliation Act, 1996, which has been faced with challenges such as judicial interventionism and minimal court supervision to meet UNCITRAL standards. The discussion contrasts the important institutions, including the Delhi International arbitration Centre (DIAC) and Mumbai Centre International arbitration (MCIA) in terms of their governance, caseloads and transparency with other similar institutions across the world like SIAC and ICC, which reveals the lack of transparency and independence of the arbitrators and international caseloads. The research identifies lack of credibility and prescribes solutions such as a National Arbitration Commission to accredit, a hybrid reality to govern DIAC and assist MCIA to be a flagship hub, drawing on primary sources, comparative jurisprudence and institutional data. Finally, it concludes that India can be made a top arbitration seat through specific institutional improvements, which can narrow the reputational gap between India and other top arbitration seats such as Singapore and London.

Keywords: Investment arbitration, Bilateral Investment Treaty (BIT), institutional reforms, arbitration council, investor-state disputes

Introduction

The Global Imperative of Investment Arbitration and India's Strategic Moment

The protection of cross-border investment by treaty obligations that are legally binding and the settlement of disputes could arise out of the guarantee by contract through neutral arbitral procedures which has become one of the leading concerns of international law in the twenty-first century. There is a question of special acuity to a country of India, scale, ambition, and complexity, whose institutional and legal plumbing to enable it not only to be a destination of, and a subject of international investment arbitration, but also to be a credible and an attractive destination of the latter.

The research article answers this questions in a comprehensive manner. It discusses the development of the Indian investment arbitration regime, and its current status in dimensions including: the international law on investment protection and the global structure of investor-State dispute resolution; the Indian legislative regime governing the practice of arbitration; the institutional structure of the major arbitral centres of India; and, finally, a concerted reform agenda and institutional map. The analysis is based on primary legal sources, institutional statistics, comparative jurisprudence, and the practitioner and scholarly literature to build an argument which is diagnostic, comparative and prescriptive in nature.

The central research question is, "Whether India's legal and institutional framework for arbitration meets the credibility criteria of major international arbitral institutions, and what institutional modifications are necessary to bridge the credibility gap?"

India's Historical Framework towards Investment Arbitration

As part of its 1991 Liberalization, Privatization and Globalization (LPG) Policy, India embarked on its journey in the investment treaty framework in the early 1990s. India was open to foreign investments when it achieved independence in 1947. However, development of domestic industry and import substitution were the chief objectives of the policy strategy of India ^[1]. The 1970s saw a steady movement towards the adoption of protectionist and self-centred economic policies, which began to change this openness to international change. Limited liberalization and deregulation took place in the 1980s as a consequence of the slow economic growth in the 1970s ^[2].

In an attempt to attract and motivate foreign investments, India and United Kingdom agreed on first Bilateral Investment Treaty (BIT) in 1994 ^[3]. This BIT has a specific objective, namely to achieve attraction and promotion of foreign investment. It put protecting foreign investment over the state's globally recognized regulatory power ^[4].

India has about 70 ratifications of BITs and more than 80 signatures between 1994 and 2011. For nearly two decades, the system that was too investor-friendly did not change. There had only been 1 international arbitration against India before 2011. The Dabhol Power Company in Maharashtra, which accounted for the largest foreign direct investment in India in the 1990s, was linked to this project.

Indian Legal Framework Governing Investment Dispute Resolution

The Indian legal system in investment arbitration is developed by incremental legislation, which has been developed by judicial interpretation. The core of the

framework is the Arbitration and Conciliation Act, 1996^[5] ("the ACA" or "the Act"), a law that was created in the direct aftermath of economic liberalisation in India to modernise an already archaic arbitral framework and bring it into line with international standards i.e. the UNCITRAL Model Law on International Commercial Arbitration, 1985^[6]. The Act was not primarily developed to meet the requirements of investment treaty arbitration, which is a shortcoming that has come to gain added relevance in the twenty-first century as the exposure of India to bilateral investment treaty (BIT) claims has increased significantly. The history of the legislative process since 1996 has not been even. After being amended three times (in 2015, 2019 and 2021) with varying success, the Act has been reoriented to aim at minimal judicial intervention, institutional performance and international competitiveness. However, the amendments have also brought about new complexities and the cumulative force of judicial interpretation has resulted in consequences which at some point are in a very uncomfortable conflict with the desire of India to become a seat of choice in international arbitration^[7].

1. The Arbitration and Conciliation Act, 1996

The ACA 1996 is a primary legislation in the Indian arbitral law, which is a combination and replacement of three previous legislative instruments: the Arbitration Act, 1940^[8], the Arbitration (Protocol and Convention) Act, 1937^[9], and the Foreign Awards (Recognition and Enforcement) Act, 1961^[10]. The new statute took a widely dualist framework which has remained the structure of the Act. Part I regulates domestic arbitrations and international commercial arbitrations that are located in India, including setting of arbitral tribunal, proceedings, interim relief, and award challenges. Part II consisting of Chapters I and II enforces the duties of India as specified in the New York Convention and the Geneva Convention on the enforcement of foreign awards^[11], respectively.

The original Act had philosophical foundations that were clearly internationalist. The parliamentary debate and the statement of objects and reasons, suggested that there was a desire to ensure that judicial intervention in arbitral proceedings would be minimized, and the Indian law on arbitration would be aligned with international best practices, and that foreign awards would be easily enforceable^[12]. The drafters relied heavily on the UNCITRAL Model Law, which incorporated the main principles of this approach on the autonomy of the parties, principle of '*kompetenz-kompetenz*', separability of the arbitration clause and the few exceptions to set aside awards. Nevertheless, the most notable differences made by the drafters of the Model Law were not formally made to apply Part I solely to domestic arbitrations but rather left open the possibility of whether Part I could be applied to foreign-seated arbitrations under some conditions, which created decades of legal uncertainty.

Evolution within Institutional Contexts: The Evolution of Arbitration Centres in India and the Credibility Quest

The benefits of institutional arbitration as opposed to ad hoc proceedings in the Indian context are multi-dimensional. To

begin with, having a professional arbitrator will make proceedings immune to the delaying tactic of uncooperative respondents who decline to form a tribunal. Second, the rules as provided by the institutions put compulsory deadlines on submissions, hearings and award delivery which builds on the mandatory timeframes in the statutory 1996 Act. Third, regular publication of rules, schedules of fees, and more and more redacted awards, promote transparency and predictability, which are not well-developed in *ad hoc* proceedings. Fourth, institutional appointment systems can be viewed as structural check on the repeat-player game and conflict-of-interest risks which plague party-appointed arbitration in the absence of any administrative regulation. Overall, the institutionalisation of Arbitration in India is persuasive both as normative suggestion as well as a practical requirement of the nation of India to make itself an attractive hub of international arbitration^[13].

1. Delhi International Arbitration Centre (DIAC)

The Delhi International Arbitration Centre is credited with the honour of being the first institutional arbitration centre annexed by a High Court, ever to be set up in India. According to the initial vision of the then Chief Justice Ajit Prakash Shah of the Delhi High Court, DIAC was formed in November 2009 to provide orderly arbitration services offered professionally under the physical and institutional surroundings of the Delhi High Court. The physical infrastructure is truly impressive, quite literally by the domestic standards, with 19 fully equipped hearing rooms, video-conferencing facilities, a dedicated research library, which has access to Westlaw, Manupatra, and SCC Online. The Delhi International Arbitration Centre (Internal Management) Rules 2012^[14] has been amended, and the Delhi International Arbitration Centre (Arbitration Proceedings) Rules 2023^[15] govern the governance of DIAC. According to Rule 3 of the Internal Management Rules, the Arbitration Committee which is the ultimate governing body of DIAC is composed of five judges of the Delhi High Court, whose Chairperson and Vice-Chairperson are nominated by the Chief Justice of the High Court, and four Senior Advocates, also nominated by the Chief Justice, are the other members of the Committee^[16]. The institution has the Patron-in-Chief as the Chief Justice of the Delhi High Court. In Rule 5, the Chief Justice appoints a Coordinator who is in charge of day-to-day administration. Those Rules replaced previous ones and provided new procedures, such as emergency arbitration, fast-track proceedings, and a new fee schedule between domestic and international commercial arbitrations.

The caseload trend of DIAC has been phenomenal in terms of quantity. Since its formation, the Centre handled 528 cases in 2013; in 2023, it handled more than 7,358 cases more or less a fourteen-fold increase in a decade^[17]. The domestic arbitrations that comprise the majority of the caseload of DIAC are mainly the conflicts that arose as a result of government contracts and court referrals under Section 11 of the 1996 Act. DIAC has failed to prove itself as a major international commercial arbitration venue and its international reputation is still many times lower than that of other arbitral institutions especially Mumbai.

The institutional design of DIAC has received the most basic criticism in regard to structural entanglement between the Centre and the Delhi High Court. The fact that the power of government rests on the shoulders of sitting High Court judges who represent, at the same time, as arbitral authority supervisor, dispute manager, and would provide an appeal review which creates a natural tension with the institution of independence that international actors perceive as being fundamental. According to this standard, the very fact that DIAC is a High Court-annexed entity in which the Chief Justice is the sole person to appoint its members, and there is no clause on independent non-judicial governance, is not devoid of justifications.

2. Mumbai Centre of International Arbitration (MCIA)

Founded in 2016 as a collaboration between the domestic and international business and legal communities (and representing a truly unprecedented institutional form in the Indian arbitration market), the Mumbai Centre of International Arbitration is an independent, not-for-profit organisation with a Council of practitioners as its governing body instead of a judicial one. The vision of its origin was clearly international oriented i.e. to establish an institution in the commercial capital of India that would administer disputes to a quality comparable to the best arbitral centres in the world. MCIA has been able to position itself as the leading international arbitral institution in India since its inauguration and has managed to administer proceedings that have attracted foreign parties as varied as China, Germany, Cyprus, Singapore, United Kingdom, United States of America, and the British Virgin Islands.

The institutional structure of MCIA is based on a Council of Arbitration that is currently comprising of 25 members who are chosen equally by Indian and international arbitration practitioners on either side or a professional Secretariat that is headed by a Registrar and Secretary-General. The role of the Council is to conduct oversight and to administer the strategic direction of the institution and day-to-day proceedings are carried out by the Secretariat. More importantly, the members of the governing Council as well as the Chairperson are not recruited within the Indian judiciary which makes its structure to be independent of the court system. MCIA is located in Mumbai, Gurugram, and Bengaluru; it is an indication of the efforts by the Centre to spread institutional arbitration across other than one metropolitan seat.

The MCIA Arbitration Rules, initially issued in 2016 but thoroughly revised in 2021, is the most elaborate domestic institutional rules framework^[18]. The 2021 Rules introduce the following provisions: emergency arbitrators (Rule 14), where an application has to be made within 14 days after appointment; expedited procedures where the value of the dispute is lower (Rule 13); joinder and consolidation mechanisms (Rules 10 and 11); third-party funding disclosure (although this is not a full regulation of the practice); and fixed timelines on the award delivery. The 2025 Rules, on which the 2021 framework is based, have gone a step higher with early dismissal and summary procedure provisions, formal third party funding provisions and a mechanism of publishing redacted awards a step of

significant importance in the construction of an indigenous Indian arbitral jurisprudence^[19].

The caseload trend of MCIA shows a steady positive trend, but it is based on a small foundation. In 2022, the Centre has averaged two new case filings per month, which is 20 per cent more than the previous year, and has administered about 60 cases since its opening as at the end of that reporting period^[20]. The total caseload per year had expanded to 23 cases administered in 2023; in 2024, this number has swelled by 48 per cent to 34 cases and the value of matters disputed in total USD 257 million with an average case value of USD 11.4 million^[21]. The number of cases that implicated international parties amounted to about 18 per cent in 2024, which, although not large, is still a substantial growth in the cross-border interactions. Most importantly, all MCIA arbitral awards appealed to the Indian courts have been affirmed, and 91 per cent of those arbitrations governed by MCIA Rules have been adjudicated within the statutory 18-month timeframe of India an outcome that is relatively high in comparison to the performance of international institutions.

3. Governance Benchmarks: Independence, Appointment and Transparency

Comparative evaluation of major arbitral institutions in India in terms of global governance standards indicates improvement and a lot of procedural gaps. The main institutional governance virtues are: the independence of the institution against the parties, counsel, and redacted awards of the state; a transparent and merit-based system of appointing, challenging and removing arbitrators; and publication of the procedural rules, statistics and redacted awards^[22]. On all these lines, the institutional environment in India is an ambivalent one.

The difference between DIAC and MCIA is exemplary on the question of independence. As observed, DIAC is governed by the structure in which the powers are vested in the service of judges of the Delhi High Court, the court over which arbitrations in Delhi have the supervisory jurisdiction under the ACA. This overlap of institutions is not an abstract issue: it gives an impression that is harmful to the international user confidence that the centre running the arbitration and the court that can intervene or set aside the award may have institutional leadership in common. The model of MCIA, which has a 25-member Council balancing Indians and international practitioners, is less cluttered with structure of curial authority, despite the impossibility of discounting the informal impact of institutional relations.

Perhaps the most obvious governance weakness in all the Indian institutions is arbitrator accreditation. In comparison to SIAC, which relies on a globally recognised panel whose appointment criteria is uniform, or the ICC, whose Court undertakes a rigorous review of arbitral appointments, India does not have a single national accreditation standard of arbitral appointments. Every institution has its own panel whose criteria are independent i.e. DIAC has its own panel of former Supreme Court and High Court judges, Senior Advocates, experts in the field, and practising advocates, MCIA with its panel of practitioners with proven international arbitration experience, The Srikrishna Committee suggested that a system of national accreditation

of arbitrators be established as a condition to institutional credibility; the date of writing this recommendation is not yet implemented.

Another area where the Indian institutions are lagging behind the international institutions is in transparency in award publication. SIAC, ICC, HKIAC, and LCIA publish books of redacted arbitral decisions, which is a part of the institutional jurisdiction building, and parties, counsel, and scholars can use the quality and consistency of awards. The 2025 Rules of MCIA also propose the mechanism of publication of awards through redacted publication, which is a positive trend but this is not a practice yet, but a prospect. The awards of DIAC are not published systematically. The cumulative impact of this murkiness is to hinder the development of an Indian institutional arbitral jurisprudence which can develop user trust and scholarly involvement of the type that is enjoyed by the well-established foreign centres.

4. The Reputation Gap: Why Parties Continue to Prefer Foreign Seats

London, Singapore, Hong Kong, Paris and Geneva are the five most preferred seats of arbitration in the world. India is not at the top five (or even top package), in any category in the world^[23]. Three adaptations which make the alternative seats most appealing would be: 1) increased support of alternative seat by the local judicial courts and local judicial system, 2) increased impartiality and fairness of the local judicial system and 3) improved record in enforcing agreements to arbitrate and arbitral awards. All these have been traditionally the weakness of Indian arbitral environment. The interventionist judicial culture that had traditionally typified Indian courts with high injunction applications, appointment petitions and setting-aside challenges, has been slowly remedied under the 2015 amendments and a series of pro-arbitration Supreme Court cases, but the stigma of institutional scepticism remains. The resistance against foreign investors and multinational corporations providing advice on Indian-seat clauses is still observed by more advanced counterparties preferring Singapore or London on basis of institutional track record and basically on basis of a belief that awards will be reliably enforced.

The institutional resources dilemma is augmented by foreign funding restrictions. The access of foreign philanthropic or institutional investment is constrained both on a regulatory and practical basis within Indian arbitral institutions and especially the not-for-profit institutions. Public-Private Partnership (PPP) models, where government infrastructure assistance is added to the private sector administration experience and overseas co-branding have been proposed in policy discussions, though have not yet been implemented in any structural manner.

Conclusion

Reforms for Institutional Convergence and National Arbitration Commission

The discussion in the above sections reveals both a diagnosis which is both encouraging and sobering. In MCIA and DIAC and an up-and-coming ecosystem of specialised bodies, India has the institutional structure of a real

arbitration hub. A notable policy presence in the form of institutionalisation is evident in the line of legislative changes since 2015 and 2019 through the current Draft Bill. The recent enhanced arbitration jurisprudence of India with the decisions of Amazon.com NV Investment Holdings v Future Retail Ltd^[24] (acceptance of emergency arbitrator orders) and PASL Wind Solutions v GE Power Conversion^[25] (freedom to have two Indian parties adopt foreign seat) have improved the normative environment of arbitration in India. But, the reputational distance against Singapore and London is still quite distant, as the ACI is not operationalised, and institutional caseloads especially on international affairs are much less than a commercial economy of Indian size should produce.

The reformation agenda as suggested in this research goes through in a number of overlapping dimensions. To begin with, the most urgent structural reform is the formation of a functioning and fully constituted National Arbitration Commission (NAC) a rationalisation and empowerment of the Arbitration Council of India that is anticipated by the 2019 amendments and the 2024 Draft Bill. The NAC must be established as truly independent in nature, non-judicial in its management, employ professional administrators who have expertise in international arbitration and have the powers to: accredit arbitrators based on agreed competency standards; grade arbitral institutions under a transparent and criteria-based methodology. The suggestion included in the Draft Bill regarding the introduction of an award depository is welcome, albeit with the condition that it should be underpinned by strong confidentiality measures and not obligatory access to maintain party autonomy.

Second, DIAC governance systems needs some reform. As argued above, it is structurally against the international best practice that the judicial over-involvement in DIAC governance. The DIAC governing model ought to add outside Council members or practitioners, scholars and Indian industry representatives to execute power together with independent judicial members, and ought to attribute administrative power to an executive Chief Executive Officer or Registrar who is more focused on commercial efficiency and global interaction than judicial administration. Co-existence of DIAC with the High Court and IAC with the statute gives rise to confounding institutional environment that needs to be rationalised by legislation.

Third, MCIA needs to be assisted in its development as the flagship international institution in India. Such support can be in several forms: designation as a priority institution in any NAC accreditation system; investment in PPP to fund its digital infrastructure and international marketing capacity; and, most importantly, a programme of reforming underprivileged arbitration clause to refer infrastructure and government-sector disputes to MCIA instead of solely to *ad hoc* or judicial process. The Singapore case is instructive as the SIAC's starting caseload was heavily comprised of arbitrations ordered by the government, and its later international reputation was in a great part a product of the institutional richness that was afforded by such an initial caseload.

Overall, the institutional arbitration in India has developed to the point that the main shortcomings can now be defined

as institutional and reputational, as opposed to being purely legislative or judicial. The institutions are there; the question is to endow them with the quality of operation, government credibility and global presence that will eventually break through the reputational inertia that now directs India-related conflicts to the overseas platforms.

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