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TROLLING



A NEW FORM OF CYBER VIOLENCE;
THREAT TO WOMEN AND GIRLS

PG NO. 48

COVID-19
DATA BREACHES
AND THE RISE OF
REGTECH

PG NO. 44

REGULATION OF
CONTENT ON
OTT PLATFORMS
A WORK-IN-PROGRESS

PG NO. 56

INSTITUTIONAL
ARBITRATION
& THE FUTURE

PG NO. 36

INSTITUTIONAL ARBITRATION & THE FUTURE



Arbitral institutions can certainly play a key role in ensuring convenient initiation, continuation and completion of arbitral proceedings in these digital times

There have been several efforts in the recent past to give institutional arbitration in India a boost. Institutional arbitration has several advantages over ad-hoc arbitration, such as providing procedural rules for conduct of the arbitration, assistance with the appointment of arbitrators, and general administrative assistance. In this piece, we analyze the recent legislative changes

in India as well as the need for strengthening institutional arbitration in an increasingly virtual world.

As per a study by the Chartered Institute of Arbitrators (CIArb) in 2011, 62% of arbitrations studied world-over were institutional arbitrations.¹ The trends in India were not similar. In 2013, a PricewaterhouseCoopers study recorded that only 40% of the

¹ CIArb Costs of International Arbitration Survey 2011, available at: <https://www.international-arbitration-attorney.com/wp-content/uploads/2017/01/CIArb-Cost-of-International-Arbitration-Survey.pdf>.

² Corporate Attitudes & Practices towards Arbitration in India, 2013, PricewaterhouseCoopers, available at: <https://www.pwc.in/assets/pdfs/publications/2013/corporate-attributes-and-practices-towards-arbitration-in-india.pdf>.

arbitrations in India were conducted institutionally.² However, Indian parties are increasingly opting for institutional arbitration to resolve their disputes. For instance, in 2014, Indian parties stood in the third position in the number of case filings by foreign parties in the Singapore International Arbitration Centre (SIAC),³ but in 2019, Indian parties were the top foreign users of SIAC.⁴ Further, institutions such as the SIAC and the International Chamber of Commerce (ICC) have established representative offices and chapters in India.⁵

In July 2017, a High-Level Committee chaired by Justice Srikrishna (Retd.) which was established to review the institutionalization of arbitration in India issued its report (“**Report**”).⁶ Inter alia, the Report suggested the establishment of an autonomous body called the Arbitration Promotion Council of India (“**APCI**”) by statute for grading arbitral institutions. It was proposed that the APCI has a Governing Board with arbitration law experts from both the public and private spheres. The Report also suggested that the APCI can recognize institutions which provide accreditation of arbitrators.

In 2019, the Arbitration and Conciliation Act, 1996 (“**Act**”) was amended⁷ with the intent to strengthen institutional arbitration based on the recommendations in the Report (“**Amendment Act**”).⁸ The Amendment Act inserted a chapter to the Act to set up the Arbitration Council of India (“**ACI**”) to, inter alia, promote arbitration, frame policies for grading arbitral institutions, recognize professional institutes that provide accreditation of arbitrators and promote institutional arbitration by strengthening arbitral institutions. However, the Amendment Act significantly departed from the suggestions of the Report in terms of the composition of the ACI. The ACI comprises of only government, ex-government or government-nominated persons. This may significantly compromise the independence of the ACI and arbitration in India, considering that the government itself is often a party to arbitrations. Further, the Amendment Act provides ACI with broad powers to make regulations in order to discharge its functions and perform its duties, which may result in unchecked authority, and susceptibility to litigation.

It must be noted that as of the date of writing this piece, the provisions pertaining to the ACI and accreditation of arbitrators have not been notified by the Central Government. The amendment pertaining to the ACI in the Amendment Act requires a serious reconsideration. While the motive behind the legislative changes to strengthen institutional arbitration is laudable, it remains to be seen how effectively the ACI will function once the provisions pertaining to it are notified, particularly due to the evident issues of independence in its proposed constitution. Hopefully, the intention to create a body for arbitration promotion, will not result in excessive regulation

² SIAC Annual Report 2014, available at: https://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2014.pdf

³ SIAC Annual Report, 2019, available at: [https://www.siac.org.sg/images/stories/articles/annual_report/SIAC%20AR_FA-Final-Online%20\(30%20June%202020\).pdf](https://www.siac.org.sg/images/stories/articles/annual_report/SIAC%20AR_FA-Final-Online%20(30%20June%202020).pdf)

⁴ SIAC India Representative Offices, available at: https://www.siac.org.sg/2014-11-03-13-33-43/about-us/siac-india-representative-offices-ICC-India-Chapter_, available at: <http://www.iccindiaonline.org/index.html>.

⁵ Report of the High Level Committee to Review the Institutionalization of Arbitration Mechanism in India, July 2017, available at: <http://legallaffairs.gov.in/sites/default/files/Report-HLC.pdf>.

⁶ Arbitration and Conciliation (Amendment) Act, 2019.

⁷ Statement of Objects and Reasons, Arbitration and Conciliation (Amendment) Bill, 2019.

⁸ Trio of top arbitration bodies form international alliance to hear ‘hybrid’ COVID-19 compliant hearings, Global Legal Post, available at: <https://m.globallegalpost.com/big-stories/trio-of-top-arbitration-bodies-form-international-alliance-to-hear-hybrid-covid-19-compliant-hearings-98099925/>.⁹ [CS(OS) 78/2016 & IAs No.2362/2016]

¹⁰ Gary Born, Arbitration at SIAC during COVID-19, available at: https://www.siac.org.sg/images/stories/press_release/2020/5bOpen%20Letter%20from%20SIAC%20Court%20President%5d%20Arbitration%20at%20SIAC%20during%20COVID-19.pdf.⁹ [CS(OS) 78/2016 & IAs No.2362/2016]

¹¹ LCIA Services Update: COVID-19, available at: <https://www.lcia.org/lcia-services-update-covid-19.aspx>.



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or interference in arbitration, which is otherwise a flexible, party-driven process.

The need to strengthen institutional arbitration has gained even more relevance in recent times, due to the ongoing global travel restrictions and lockdowns considering the spread of COVID-19. Arbitral institutions and bodies world-over have reacted quickly and strengthened their capability to handle virtual hearings and e-filings.

Recently, the arbitration bodies Arbitration Place, International Dispute Resolution Centre (IDRC) and Maxwell Chambers formed



An arbitration conducted under the aegis of an arbitral institution can have many benefits in these digital times, as arbitral institutions can set up remote case management systems. Several institutions have already established a virtual hearing framework, and created a platform and procedure for e-filings and payments.

the International Arbitration Centre Alliance (IACA) to facilitate hearings considering the ongoing COVID-19 restrictions.⁹

SIAC trained Remote Technology Specialists introduced a Live Help Desk feature for communicating with the institution.¹⁰ The London Court of International Arbitration encouraged online filings and payments on its platform.¹¹ ICC issued a detailed guidance note on e-filings, conducting virtual hearings and minimizing technical difficulties.¹² In India, the Mumbai Centre

for International Arbitration (MCIA) continued to operate virtually and provided parties with the option to conduct remote arbitrations using its audio-video capabilities.¹³

An arbitration conducted under the aegis of an arbitral institution can have many benefits in these digital times, as arbitral institutions have set up, and can set up, remote case management systems. As noted above, several institutions have already established a virtual hearing framework, and created a platform and procedure for e-filings and payments. Institutions can ensure that filings and hearings take place efficiently, keeping in mind the various time-zones and locations of the parties and their counsels. Many institutions have also set out structured guidance to parties for the virtual hearings, including providing or introducing service providers for virtual hearings and conducting test runs to ensure smooth functioning of the hearings. Virtual arbitrations monitored by arbitral institutions can also significantly save time and costs that are generally associated with physical hearings.

Thus, arbitral institutions can certainly play a key role in ensuring convenient initiation, continuation and completion of arbitral proceedings in these digital times. The need to recognize and strengthen institutional arbitration is now stronger than ever. In fact, the cost and time efficiency presented by competently managed virtual hearings during these trying times can serve as a lesson that can perhaps even be carried forward into the COVID-free future!

¹² ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, available at: <https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf>.

¹³ Neeti Sachdeva, Registrar and Secretary General, MCIA, quoted in 'Arbitration in the time of COVID-19', Bar and Bench, available at: <https://www.barandbench.com/columns/arbitration-in-the-time-of-covid-19>.

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