

Settling disputes made easier

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Supplements

The setting up of an office of the Permanent Court of Arbitration in India should boost use of this alternative dispute redressal mechanism, say Harsh Mahaseth and Aryaman Keshav

Harsh Mahaseth and Aryaman Keshav | October 24, 2024 1:28 pm



Representational image

On 13 May 2024, the Indian government announced that the Permanent Court of Arbitration (PCA) will set up an office at VK Krishna Menon Bhawan in New Delhi. In furtherance of this development, delivering the valedictory address after the 'Conference on International Arbitration and Rule of Law', Supreme Court Judge, Justice Surya Kant opined that: "Today, India stands at the threshold of a new era in arbitration. Not only is it rapidly becoming a preferred mode of dispute settlement in our country, but it is also receiving ever-increasing infrastructural support."

Indeed, India has consistently been the top foreign customer of the Singapore International Arbitration Centre (SIAC) for four years since 2019. In the most recent annual report, India continues to maintain a strong presence, ranking third with 160 Indian parties opting for arbitration at SIAC. These numbers reflect the nation's growing acceptance of alternate dispute resolution.

Moreover, India has always shown an affinity towards arbitration. From the 7-6th century BCE with 'Bṛhadāraṇyaka Upanishad' elaborating on various types of arbitration to the First Indian Arbitration Act enacted on 1 July 1899, arbitration has always existed in India. Further, India was also one of the 10 original states to be a member party of the New York Convention, 1958.

However, India, in recent years, has been positioned more favourably than ever to achieve the goal of becoming the global hub for international arbitration. As per the World Investment Report 2023, India has seen a massive influx of Foreign Direct Investment (FDI), bagging the third rank in attracting investment for greenfield projects. Over the last decade (April 2014 to March 2024), India saw USD 667.41 billion in FDI inflows from over 170 countries.

The increased interest from investors can be attributed to India's relentless efforts to create a more business-friendly environment. One important component of this shift is the promotion of arbitration as an effective and efficient tool for resolving business-related conflicts, giving a more streamlined and dependable alternative to traditional litigation. This shift not only minimizes delays and legal complications but also boosts investor trust in India's commercial legal system.

The road to making that happen passes through making business-friendly amendments to the Arbitration Act. Before 2019, businesses were hesitant to pursue arbitration due to the inherently lengthy and protracted nature of the process. Arbitration tribunals have been established to improve efficiency and lessen the pressure on courts, and reforms have been proposed to speed up dispute settlement. Before 2019, the Act required awards to be rendered within 12 months of the conclusion of domestic arbitration processes. Notably, the 2019 amendment reduced the 12-month period for international trade arbitrations.

Further, in June 2023, a high-level expert committee under the chairmanship of Dr. T. K. Viswanathan investigated the lacunae in India's arbitration legislation. One of the recommendations was the insertion of a new section in the Act to enable arbitration agreements that are insufficiently stamped (according to the Indian Stamp Act of 1899) to be presented as evidence in court or arbitral tribunals if the required stamp duty is paid later.

Moreover, the committee suggested that applications filed under Section 8 of the Act be resolved within 60 days. The time limit has been suggested to avoid unnecessary delays that can be caused by judicial intervention. This amendment will act as a curbing force for judicial intervention, which is a recurrent issue with the current system, while also expediting the process and boosting the ease of doing business.

Furthermore, the Securities and Exchange Board of India (SEBI) issued a circular on 31 July 2023 stipulating that “resolution of disputes with identified market institutions or participants, either through online dispute resolution or through institutional arbitrations in India administered by Indian arbitral institutions.”

The growth of Indian arbitral institutions has also played a role in making India more conducive for international parties to choose for arbitration. The Delhi International Arbitration Center (DIAC) has been steadily handling more and more cases. In 2022, the cases heard by DIAC were 4993. In 2023, the number went up by more than 60 per cent to 8153. Similarly, the Mumbai Centre for International Arbitration (MCIA) saw a 20 per cent increase in its caseload in 2022 which in turn increased the total value of disputes to over \$1 billion.

Justice Kant opined that “the establishment of the PCA’s office in India marks another paradigm shift in our journey towards becoming a hub for international arbitration.”

The PCA was established under the First International Peace Conference held at The Hague, Netherlands, in 1899 with the objective to “facilitate the arbitration of international disputes.” PCA rose in prominence in the latter half of the 20th century as the UNCITRAL Arbitration Rules recognized PCA as the primary forum for arbitrations conducted under the rules. Bilateral Investment Treaties (BITs) and multilateral agreements incorporating arbitration clauses that refer to the UNCITRAL Rules further contributed to the importance of PCA.

Renowned attorney and arbitrator, Claus von Wobeser, in 2023 at a webinar organized by the Latin American Arbitration Association (ALARB), stated that PCA is “a modern arbitration institution, with an increasingly important role.”

PCA has had positive effects in countries where it has established its office. For instance, the establishment of the PCA office in Buenos Aires has led to the growth of international arbitration in the Latin American region. The office has not only carried out an ambitious outreach programme to render arbitration services in a timely manner but has also facilitated several Host Country Agreements with the PCA’s Contracting Parties in the Latin American region resulting in greater international interaction with Buenos Aires.

The establishment of an office in Delhi can result in the same outcome. PCA doesn’t just facilitate arbitration but also acts as a forum for countries to come together and strengthen their ties resulting in development for all involved. Furthermore, PCA boasts of the biggest investment arbitration case which resulted in Russia being found guilty of breaching the Energy Charter Treaty and being told to pay more than \$50 billion as damages.

Further, the establishment of a PCA office in India will reduce the likelihood of Indian parties seeking arbitration overseas while also bringing more global and regional arbitration cases to the country boosting India’s reputation as a favoured arbitration destination. When dealing with international arbitration proceedings, both Indian firms and

the government would benefit from lower costs and logistical complexity. Having a PCA office in the nation would save travel and administrative costs, making the procedure more effective and accessible.

While great developments are happening in the institutional arbitration sector, the Indian population still clings to ad-hoc arbitration. The country has been afflicted by a variety of circumstances, including, but not limited to, the lack of a legitimate arbitral institution, the absence of an exclusive arbitration bar, and court interference. As a result, Indian parties have opted to conduct their arbitrations in overseas nations.

However, all signs point towards a future where greater focus and reliance can be placed on institutional arbitration. With PCA's presence, India might see an increase in foreign parties choosing the country as a venue for arbitration, enticed by PCA's legitimacy and experience. PCA's rules and mode of operation can also influence the domestic arbitration centres to improve which might further reaffirm the faith put in them by the government and the citizens.

India's historical connection with arbitration, and the recent legislative reforms concerning arbitration, all indicate the country's intention to create an arbitration-friendly environment. As alluded to in Justice Surya Kant's remarks, the PCA's presence in New Delhi enhances India's reputation on the international stage and offers legitimacy for Indian arbitration institutions.

This may assist with an increase of Indian parties not required to travel outside India for arbitration. This would mean a greater number of cases would be decided in India thereby reducing costs to Indian businesses and the government. Furthermore, countries with successful PCA offices, like Buenos Aires, will provide India with important lessons in terms of outreach, economic cooperation and growth in arbitration-related activity.

However, despite these promising trends, there remains a challenge of transitioning from ad-hoc arbitration to institutional arbitration. While we can anticipate the PCA will help with institutional arbitration, beyond where we are presently, institutional arbitration will need to generate enough cases to initiate positive changes to domestic arbitrations, increase confidence in professionalism and prevent judicial intervention and increase the use of the court process, or its threatening nature. India has the potential to enhance its position as a global player in arbitration, but substantive sustained changes will need to continue to be made to the institutional process and domestic arbitration frameworks, to make this a realized potential.

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