

Best Arbitration Practices - A Study of Developments by Renowned Institutions

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Introduction

Introductory note

Arbitration is a form of alternative dispute resolution that is used around the world to resolve disputes between parties. Alternate Dispute Resolution practices facilitate the settlement of conflicts between parties through proceedings outside the conventional judicial set-up. While the terminology used to denote one such method is “Arbitration”- derived from the Latin word ‘*arbitrari*’, meaning "to judge”, the process involves the determination of issues by an impartial and neutral third party. The two essential elements of arbitration are- consent of parties and private resolution of disputes. For a particular matter to be submitted to arbitration, both the opposite parties must give their unqualified and voluntary consent for

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the same. Further, the matter is adjudicated upon through a private process as opposed to deliberation in a Court.

Objectives

The objectives of the present paper are as follows-

- i. To identify various arbitration practices from institutions across the world
- ii. To evaluate the benefits and shortcomings of various identified practices
- iii. To outline a strategy for effective incorporation of best arbitration practices into the Indian sphere.

Limitation

The present work is confined to evaluating the best and most effective tools, techniques, practices and methods that may be adopted into the legal framework of alternate dispute resolution in India. This work is primarily concerned with the practice of arbitration. However, for the purpose of identifying and adopting elements of best practices, the work will make reference to the laws and practices of other jurisdictions.

Evaluating different arbitration practices

The present section of the paper will render an overview of the existing framework on arbitration in India and subsequently recognise few jurisdictions that are called the ‘arbitration hubs’ of the world. Thereafter, the paper will focus on the evaluation of select practices that possess scope for inclusion in the process of arbitration, on account of the emerging world order, technological developments and need for expedited dispute resolution.

Overview of Current Legal Framework on Arbitration in India

Arbitration in India is primarily guided by the legal framework established vide the Arbitration and Conciliation Act of 1996, which calls for the creation of an arbitral award that would be proclaimed definitive and binding on all parties concerned.² The Act also stipulates how arbitration rulings can be enforced in the same way that a court decision is.³ Furthermore, the Act establishes a limited ability to challenge an arbitration ruling in court.⁴ Recent legal

² §35, Arbitration and Conciliation Act, 1996 (Act No. 26).

³ §36, Arbitration and Conciliation Act, 1996 (Act No. 26).

⁴ §37, Arbitration and Conciliation Act, 1996 (Act No. 26).

developments in India's arbitration framework, such as the amendment of the Act in 2015, 2018 and 2021 and the establishment of the Mumbai Centre for International Arbitration⁵ and the Delhi International Arbitration Centre⁶, have been introduced to support international commercial arbitration within the country. Overall, the legislative structure governing arbitration in India is intended to encourage a pro-arbitration climate while also providing parties with an effective dispute settlement method.

Many arbitral institutes in India manage both domestic and international arbitrations. The Indian Council of Arbitration is India's main arbitral institution, with a panel of arbitrators representing a wide range of professional backgrounds. In addition, the International Centre for Alternative Dispute Resolution- an autonomous organisation in India provides various alternative dispute resolution services, including inter alia, arbitration.

⁵ See, Naresh Thacker, The Mumbai Centre for International Arbitration (MCIA)—an introduction to the institution and its arbitration rules, LEXISNEXIS UK, Available at: <https://www.lexisnexis.co.uk/legal/guidance/the-mumbai-centre-for-international-arbitration-mcia-an-introduction-to-the-institution-its-arbitration-rules> (last accessed on Feb. 20, 2023).

⁶ The New Delhi International Arbitration Centre Act, 2019 (No. 19 of 2019).

International Arbitration Centres have also found their presence in Mumbai and Delhi in the recent years, post-globalisation.

Evaluation of Arbitration practices in other jurisdictions

Overview of Renowned Hubs

While plenty of jurisdictions have incorporated arbitration as a dispute resolution mechanism, there are a few note-worthy hubs beyond the Indian borders that invite attention. Some of the most prominent hubs include Switzerland, South Korea and France.

Switzerland is famous for being a well-reputed international arbitration centre. The ASA and the SCAI are two prominent bodies that handle various disputes. The Swiss Rules of International Arbitration provide an unbiased and efficient framework for conducting arbitrations.⁷ Additionally, being a signatory to the New York Convention on the Recognition and Enforcement of International Arbitral Awards, the enforcement of arbitration agreements and awards finds effectiveness. Switzerland witnesses

⁷ § III, Swiss Rules of International Arbitration (Swiss Rules).

arbitration proceedings primarily in construction, commercial and financial disputes.⁸

In recent years, South Korea has made tremendous achievements in strengthening its arbitration processes. The KCAB is South Korea's principal arbitration organisation, handling the majority of the country's domestic and international arbitration disputes. The KCAB also provides support and direction for arbitration processes, such as appointing arbitrators, providing hearing facilities, and assisting with award enforcement.⁹ The Korean Arbitration Act, based on the UNCITRAL Model Law, establishes the legal foundation for arbitration in South Korea. Arbitration proceedings are thus conducted in a fair and transparent way, keeping all stakeholders in the loop and protected from biases and oversights. South Korea, has ability to enforce foreign arbitration judgements as well, being a signatory to New York Convention on the Recognition and

⁸ See, Matthias Scherer, Arbitration Guide, IBA ARBITRATION COMMITTEE SWITZERLAND, Available at: <https://www.ibanet.org/MediaHandler?id=8DA26206-5B7E-49A5-A69F-4BEF37D6408A> (last accessed Jan. 31, 2023).

⁹ Rinat Gareev, The Rise of South Korea as an “Arbitration Eager” Jurisdiction: Rethinking the Current Role and a Promising Future, APRAG <https://www.aprag.org/wp-content/uploads/2021/05/8-The-Rise-of-South-Korea-as-an-Arbitration-Eager-Jurisdiction.pdf>. (last accessed Feb. 01, 2023).

Enforcement of International Arbitral Awards. Furthermore, the Korean courts have been supportive of arbitration, with little judicial participation in arbitration procedures.¹⁰ These elements all lead to South Korea being a favourable arbitration jurisdiction.

Additionally, France has well-recognised and appreciable arbitration infrastructure. The International Chamber of Commerce is a world-renowned international arbitration institution headquartered in Paris along with the AFA and the French National Committee of the ICC. French law offers a thorough framework for arbitration, with particular laws on arbitration included in the French Code of Civil Process.¹¹ The Code also includes measures¹² for enforcing arbitral decisions. France is also a signatory to the New York Convention on the Recognition and Enforcement of International Arbitral Awards, which assures that foreign arbitral awards are recognised and enforced in France.

¹⁰ Do, S.P. and Quy, T.M., Analysis of the Recent Commercial Arbitration Development Plan of the Korean Government—Some Suggestions for Vietnam’s Arbitration Law and Policy. 4(1) Vietnamese Journal of Legal 75, pp.65-87, (2021) Available at: <https://sciendo.com/pdf/10.2478/vjls-2021-0009>.

¹¹ Book IV, Articles 1442-1507, French Code of Civil Procedure, 1981.

¹² Book IV, Article 1479, French Code of Civil Procedure, 1981.

While most of the infrastructural features render an upper-hand to each of the above-mentioned hubs, it is necessary to also evaluate the technological developments that at present, the Information Age has opened a vast spectrum of possibilities- including but not limited to the field of dispute resolution.

General Practices

There are a number of best practices that are widely used in arbitration hearings all throughout the world. At the most fundamental level, it is significant to ensure adherence to the rules of procedure and facilitating the proper application of principles of justice. It is therefore necessary to ensure technical formalities, limitation periods, opportunities of being heard and so on, are incorporated into the procedure without compromise on the object of dispute settlement.¹³ These in turn, ensure that the procedure is unbiased, effective and result-oriented. Rules of International Arbitration of the International Chamber of Commerce for example, enable the smooth, unbiased and effective completion of arbitration

¹³ See, Welser, I. and De Berti, G., Best Practices in Arbitration: A Selection of Established and Possible Future Best Practices. Austrian Arbitration Yearbook, 79, (2010). Available at: https://www.cerhahempel.com/fileadmin/docs/publications/Welser/Beitrag_Welser_2010.pdf.

proceedings.¹⁴ At the international level, organisations such as the International Court of Arbitration render support, assistance and information to parties participating in international arbitration processes. The appointment of an experienced and competent arbitrator is another important practice that decides the efficacy of the procedure. The utilisation of neutral locations¹⁵ is another significant best practice in international arbitration. Since they are viewed as unbiased and provide a level of neutrality that can help to assure a fair and unbiased settlement of the dispute, neutral sites such as Singapore, France or Switzerland are frequently chosen as the location for international arbitration procedures.¹⁶ While these general practices are drawn from the prevailing format of

¹⁴ See generally, Yves Derains, New Trends in the practical Application of the ICC Rules of Arbitration, 3 Nw. J. Int'l L. & Bus. 39-55, (1981). Available at: <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1089&context=njilb>.

¹⁵ Pierre Lalive, On the Neutrality of the Arbitrator and of the Place of Arbitration, Revue de l'arbitrage 28-33, (1970). Available at: http://www.lalive.ch/data/publications/43_-_On_the_Neutrality_of_the_Arbitrator_and_of_the_Place_of_Arbitration_Recueil_de_travaux_suissees_sur_l'arbitrage_international.pdf.

¹⁶ Eric A. Schwartz, Is Procedure Really Neutral - The Seat: Does It Matter (A Tale of More than Two Cities), 6 Disp. Resol. INT'l 193 (2012). Available at: https://heinonline.org/hol/cgi-bin/get_pdf.cgi?handle=hein.journals/disreint6§ion=19.

proceedings across jurisdictions, it is necessary to ensure that the above-mentioned find place in the laws and application thereof.

Technology-specific Practices

Virtual Arbitration

Despite the fact that virtual arbitration has been around for a while, current technology advances in the twenty-first century have revolutionised the way individuals interact and decide conflicts. This has made arbitration a more adaptive and creative procedure, especially when an in-person hearing is not possible. The concept of procedural autonomy permits parties to agree on how arbitration proceedings should be carried out, which has resulted in the emergence of new technological platforms in the area of arbitration, such as email, online platforms, electronic signatures, and e-filing.¹⁷ Parties can connect with the arbiter electronically and submit documents, evidence, and papers via teleconferences and emails in virtual arbitration.¹⁸ As a result of the COVID-19 epidemic, several

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¹⁸ Thomas D. Halket, *The Use of Technology in Arbitration: Ensuring the Future Is Available to Both Parties*, 81 St. JOHN'S L. REV. 303 (2007). Available at: <https://heinonline.org/hol->

governments shifted to virtual trials. For example, the English Commercial Court successfully held its first virtual trial in the *NBK and RoK v Bank of New York Mellon*¹⁹ and the *Stati Parties case*²⁰. According to the CIArb Guideline Note on Remote Dispute Resolution Processes, parties should prepare for and agree on early factors such as technology, software, equipment, and connection in order to minimise any technical or connection difficulties throughout the hearing.²¹ Furthermore, the Guidance Note recommends allotting enough time to guarantee that similar failures do not occur after the hearing has commenced.²²

Practices on data security and confidentiality

In the context of arbitration, Data security finds relevance in connection with software/platform selection, document exchange, and communication platforms. While the choice of platforms is

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¹⁹ *NBK and RoK v Bank of New York Mellon*, [2020] EWHC 916 (Comm).

²⁰ *Stati v. Republic of Kazakhstan*, 199 F. Supp. 3d 179.

²¹ Part I, Guidance Note on Remote Dispute Resolution Proceedings, CIArb, (2020), Available at: <https://www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf>. (last accessed on Feb. 02, 2023).

²² *Id.*

primarily at the behest of parties, there is also a need for password-protected/encrypted communication routes²³, in order to ensure maximum security. This practice finds application in the institutions of Singapore²⁴ and Hong Kong²⁵, whereby a list of participants is provided, who are permitted to utilise the platform for communication. In comparison, jurisdictions like Korea witness the Seoul Protocol, which is mute on the subject. The document sharing system is a notable variation between all of the institutions. IAF²⁶ and

²³ Article 15, China International Economic and Trade Arbitration Commission Online Arbitration Rules, 2009. Available at: https://arbitrationlaw.com/sites/default/files/free_pdfs/CIE_TAC%20Online%20Arbitration%20Rules.pdf.

²⁴ *See generally*, Taking Your Arbitration Remote, SIAC, Available at: <https://siac.org.sg/wp-content/uploads/2022/08/31-August-2020-SIAC-Guides-%E2%80%93-Taking-Your-Arbitration-Remote-August-2020.pdf>. (last accessed on Feb. 19, 2023).

²⁵ *See generally*, HKIAC Guidelines on Virtual Hearing, HKIAC, Available at: https://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/services/HKIAC%20Guidelines%20for%20Virtual%20Hearings.pdf. (last accessed on Feb. 19, 2023).

²⁶ Part 2, IAF Protocol on Virtual Hearings for Arbitrations, 2020, IAF, Available at: <https://indianarbitrationforum.com/wp-content/themes/iaf/assets/IAF-Protocol-on-Virtual-Hearings-for-Arbitrations-Oct-2020.pdf>. (last accessed on Feb. 19, 2023).

SIAC²⁷ request that the parties use a secure platform for the same. While Seoul provides a common repository and efforts by parties to maintain it safe,²⁸ HKIAC recommends that the papers be sent to an EPE Manager²⁹.

In terms of confidentiality, Arbitral institutions protect their secrecy by preventing unauthorised access. All standards require pre-approval of a list of participants who will have access to the hearing.³⁰ While the IAF prepares it only for identifying reasons³¹, the HKIAC additionally records the participants' whereabouts, bringing data privacy rules into the spotlight³². Notably, SIAC raises

²⁷ *supra* note 23.

²⁸ Article 4.3, Seoul Protocol on Video Conferencing in International Arbitration, Available at: [http://www.sidrc.org/static_root/userUpload/data/\[FINAL\]%20Seoul%20Protocol%20on%20Video%20Conference%20in%20International%20Arbitration.pdf](http://www.sidrc.org/static_root/userUpload/data/[FINAL]%20Seoul%20Protocol%20on%20Video%20Conference%20in%20International%20Arbitration.pdf). (last accessed on Feb. 18, 2023).

²⁹ Guideline 12, HKIAC Guidelines on Virtual Hearing, *supra* note 24.

³⁰ For example, Article 3, Seoul Protocol, *supra* note 27.

³¹ Guideline 11.9, IAF Protocol for Virtual Hearings, 2020, *supra* note 25.

³² Guideline 9(b) and 10(g), HKIAC Guidelines on Virtual Hearing, *supra* note 24.

the inspection by indicating the time and amount of access provided to the participant, as well as other fundamental information.³³

Party participation

The notion of 'permission'³⁴ is exercised on numerous occasions in a virtual hearing; nonetheless, it was noticed that in all the supplied protocols, it was most crucially necessary for recording the virtual hearing. The recording of the hearing was observed to be subject to the consent of the parties and the tribunal. The distinction is in the manner of approval. The Seoul Protocol and HKIAC Guidelines merely leave the choice to the tribunals³⁵ and parties'/tribunals discretion³⁶, respectively. Consent is more important to the other two

³³ *supra* note 23.

³⁴ Schmitz, et. al., Online Arbitration Protocols, University of Missouri School of Law Legal Studies Research Paper 4, (2021). Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3894707. But c.f., Schultz, et al., Electronic communication issues related to online dispute resolution systems, The Eleventh International World Wide Web Conference, (2002). Available at: https://repository.graduateinstitute.ch/record/294179/files/S_SRN-id899108.pdf;

³⁵ Article 8, Seoul Protocol, *supra* note 27.

³⁶ Guideline 13, HKIAC Guidelines on Virtual Hearing, *supra* note 24.

institutions. The IAF requires explicit approval for this.³⁷ Furthermore, SIAC provides³⁸ the option of omitting the tribunal's discussions from the recording, and the tribunal is anticipated to vigorously enforce the process. It may be argued that tribunals in SIAC can freely debate on the topics at hand, including sensitive business information of the parties, without being concerned about data security. Data security is an essential component of a virtual hearing. As a result, it is critical for an arbitral institution to guarantee that the data of the relevant stakeholders is kept safe.

It is discerned that of all the above jurisdictions, only India currently lacks a data protection framework. As a result, the IAF Protocol's application and compliance are at the mercy of the parties' contractual duties. It accepts no responsibility for the same. Similarly, the Seoul Protocol provides comparably little institutional assistance to participants in virtual arbitral hearings. In general, only parties are expected to guarantee that all hearing standards are satisfied. Whereas SIAC and HKIAC rules make it the obligation of both parties and tribunals to ensure that Guidelines are followed. Furthermore, the organisations provide a thorough checklist that

³⁷ Article 31(5), IAF Protocol for Virtual Hearings, 2020, *supra* note 25.

³⁸ Appendix B, *supra* note 23.

includes data protection measures to help the Tribunal prepare procedural instructions for the hearing.

Case for reform in India

Bearing in mind the generality of arbitration practices in hubs across the world, and the rapid development of technology in the present era, it is proposed that the setup for arbitration in India may benefit from the incorporation of some elements. Technology aids in the streamlining and simplification of arbitration processes. E-filing solutions, for example, can make it easier for parties participating in an arbitration case to submit evidence or documents swiftly and efficiently, saving both parties time and money. Technology allows for remote hearings, which allow arbitrators from all over the world to hear cases from anyplace with internet connection using video tools such as Skype or Zoom. This allows geographically separated parties to participate without having to physically gather all participants in one location, lowering travel expenses associated with traditional face-to-face meetings, which may be costly when performed across different nations. The implementation of technology-driven arbitration systems, like as Niti Aayog's Digital

Arbitration Platform³⁹. These technologies are assisting in the streamlining and simplification of the arbitration process for all stakeholders. A greater emphasis on alternative dispute resolution methods by Indian courts and government authorities⁴⁰, resulting in more parties seeking alternatives such as mediation or arbitration rather than resorting to direct litigation before courtrooms; this shift has been enabled by simpler modes of filing documents electronically, among others. Increasing the use of technology at various stages of the arbitral proceedings⁴¹ - not only during the pre-arbitral stage, but also during substantive hearings and awards being made available online, thereby replacing paper copies with digitally signed ones ensures faster accessibility while lowering costs involved. By deploying AI algorithms that detect data inconsistencies

³⁹ *See generally*, Designing The Future Of Dispute Resolution, NITI Aayog, Available at: <https://www.niti.gov.in/sites/default/files/2021-11/odr-report-29-11-2021.pdf>. (last accessed on Mar. 2, 2023).

⁴⁰ *See*, Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India, Available at: <https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf>.

⁴¹ Francisco Uribarri Soares, New technologies and arbitration, 7 Indian J. Arb. L. 84 (2018). Available at: https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/ijal7§ion=8.

faster than manual review methods, automation of essential document management operations may minimise mistakes while enhancing productivity. Streamlining processes through automation tools, such as e-discovery software and AI assistants that help make legal research faster and simpler, resulting in a reduction in costs associated with proceeding, making it accessible even at lower budgets while maintaining high levels of quality results from arbitrators' analysis, which was previously difficult without continuous human monitoring.

Additionally, automation makes dispute resolution much faster than traditional methods by providing easily monitorable procedures using computers instead of manual human labour throughout the process, providing precise tracking points where required, resulting in decreased turnaround time between filing case until judgement period, ensuring less dilatory tactic measures done knowingly/unknowingly against opponent party taking undue advantage during litigation process. Enhanced record keeping allows everything relating to the hearing (papers, audio recordings, etc.) to be securely stored online, giving stakeholders fast access. facilitating safe cooperation across locations, which is especially useful for enrolling remote participants, and ensuring transparency non-compromising privacy risks must be avoided, but higher-ranked

controls must be implemented within owned resources to ensure claim holders' continuity and competency preservation best practises are followed religiously while surmounting limitations due to existing infrastructure capacity availability restraints under standard conditions. Additionally, these drastically reduced overheads patterns promote agility inside organisations handling numerous cases concurrently, resulting in faster resolutions when compared to earlier models employed.

Additionally, the use of smart contracts on blockchain platforms has made arbitration more efficient⁴² by streamlining contract execution between parties, reducing costs, decreasing errors arising out of human involvement, and simplifying complex negotiations involved in most arbitrations' cases through automated motion filing forms or templates created on these platforms based on international standard models approved by various enforcement bodies like International Chamber of Commerce.

⁴² Ortolani, The impact of blockchain technologies and smart contracts on dispute resolution: arbitration and court litigation at the crossroads. 24(2) Uniform law review, pp.430-448 (2019). Available at: <https://academic.oup.com/ulr/article-pdf/24/2/430/32905092/unz017.pdf>.

Concluding Remarks

With the ever-growing importance and relevance of arbitration, its efficacy as a tool for dispute resolution demands progressive growth along with the changing times. The same must be done without compromising on the principles of fairness, impartiality, and due process. Arbitration is constantly evolving and adapting to the changing needs of the legal community and the business world. As a whole, the future of arbitration is likely to be shaped by the advancement of technology, future changes in business practices, and the evolving needs of the legal community. With the influx of technological developments and virtual proceedings, it is opportune to explore and incorporate digital dimensions into the arbitration infrastructure in India. This is further boosted by India's rapidly evolving technology skills. From its cost savings to the increase in speed and accuracy, Technology can make many aspects associated with arbitration more efficient for parties involved. With its implementation within Indian borders, it would bring much needed modernity into an industry where efficiency has historically been slow and expensive. By adopting such technology solutions, India could become one of the first countries to offer such a tech-oriented legal service; leading way for others around the world. The

development of a new technologically-oriented model of arbitration in India is extremely important for the growth and advancement of this country. Technology reduces costs, increases efficiency, speeds up processes and enhances dispute resolution services. With its rich history and talented legal personnel, India has all it needs to establish an advanced arbitration system that can be taken advantage of by individuals as well as organizations across India. In order to have a successful implementation process the government must focus upon creating awareness about such technology-based models while also implementing strict laws pertaining to cyber security so that confidential information is kept secure at all times within this alternative dispute resolution method. New models for technology-oriented arbitration have been presented as part of this evolution. This sort of technology has the potential to improve and streamline India's dispute resolution process by making processes faster, more efficient, and less expensive than traditional forms of arbitration in a variety of circumstances. In conclusion, introducing technologically-oriented concepts into India's judicial system might provide several advantages over conventional ways, ensuring that justice is dispensed promptly and openly.

LIST OF ABBREVIATIONS

AFA	French Arbitration Association
ASA	Swiss Arbitration Association
CIARB	Chartered Institute of Arbitrators
EPE	Electronic Presentation of Evidence
HKIAC	Hong Kong International Arbitration Centre
IAF	Indian Arbitration Forum
KCAB	Korean Commercial Arbitration Board
NITI	National Institution for Transforming India
SCAI	Swiss Chambers' Arbitration Institution
SIAC	Singapore International Arbitration Centre
UNCITRAL	United Nations Commission on International Trade Law