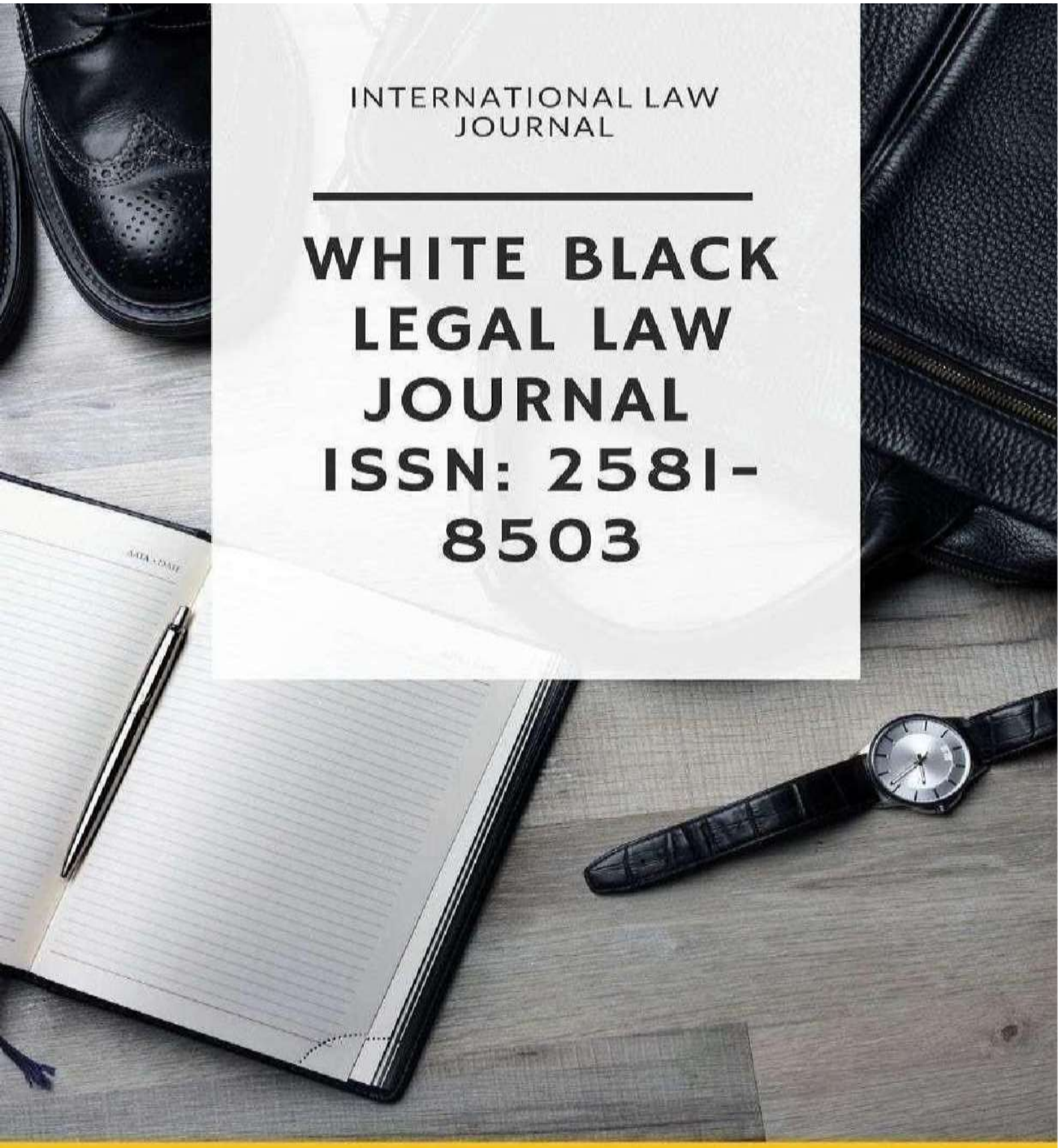

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With this thought, we hereby present to you

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THE PARADIGM SHIFT IN ARBITRATION LANDSCAPE IN INDIA: FROM AD HOC ARBITRATION TO INSTITUTIONAL ARBITRATION

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'The arbitration space in India resembles an Old Boys' Club...'

Justice DY Chandrachud
Former Chief Justice of India

1. Introduction

Civil Dispute arises when one set of facts is alleged by one party and denied by the other. Apart from pleading the redressal of their rights in traditional court set up, parties have an option to resolve their dispute through a medium of Alternative Dispute Resolution (ADR) mechanism. There mechanisms are (i) Negotiation (ii) Arbitration (iii) Conciliation (iv) Mediation. Out of these the most popular and apposite mechanism is arbitration. Arbitration refers to the dispute resolution in a less formal manner, by an arbitrator(s) appointed by the parties. Arbitration offers flexibility in choosing venue, procedure for conduct of arbitral proceedings, and the freedom to pick substantive law and governing law applicable to the parties during arbitral proceedings. The ordinary rules of civil procedure code and evidence law are relaxed in arbitration proceedings as the parties are given free hand to regulate their own procedure.[1]

Recently, India has faced a significant surge in commercial disputes. One of the prime reasons for the surge is linked to the rapid growing economy. ADR mechanism has been time and again proved itself as a parallel mechanism for providing redressal in adjudication of civil disputes. After the repeal of arbitration act of 1940 and the enactment of Arbitration and conciliation Act, 1996 (hereinafter referred as A & C Act, 1996). A stage was set for efficient

[1] Landscape of Institutional Arbitration in India, *available at*:https://www.scconline.com/blog/post/2024/04/05/an-edge-of-the-institution-over-ad-hoc-arbitration/ (last accessed on 20-07-2025)

contractual arbitration. Inevitable changes were made through various amendments in the said act to layout a foundation for Institutional Arbitration in India.

In this era of commercial diversification and evolution, India needs a reliable, robust and efficient mechanisms that can function parallel to the traditional redressal mechanism. keeping in view need, significant changes have been made in the existing procedure of conduct of arbitration proceedings. The legislature has tried to replace existing system of ad hoc arbitration with institutional arbitration.

2. Ad Hoc Arbitration to Institutional Arbitration - a shift in India's dispute resolution mechanism

Ad hoc arbitration refers to the arbitration where parties themselves manage the administrative aspects during the conduct of arbitration proceedings. In ad hoc arbitration parties have the responsibility after choosing their arbitrators, to establish a framework of rules, procedures and administrative aspects for conduct of arbitration. The core advantage, of one of one such system is that it offers Tailor made customised procedures which can be suited as per the situation or the placement of the parties.

On the other hand, institutional arbitration sets a ground for administration, assistance, infrastructure and a provision for a panel of specialised arbitrators. These institutions has a predefined fee structure for the services being offered the comparison between the systems. The subject of fees of arbitrators in ad hoc arbitration, recently raised concerns as it is dependent upon negotiations between parties without any upper limit. It became subject of judicial scrutiny in the case of *ONGC Ltd* v. *Afcons Gunanusa JV*[2] , the Supreme Court finally intervened and held

1. *"An arbitral tribunal cannot unilaterally determine its fees;*
2. *Arbitrators' fees should be decided by an agreement reached between the parties and the arbitral tribunal; and*
3. *If no agreement is reached, then arbitrators' fees can be fixed as per the Fourth Schedule of the Arbitration and Conciliation Act, 1996."*[3]

No doubt, ONGC case provided the clarity but it cannot be overlooked that in ad hoc arbitration

[2] 2022 SCC OnLine SC 1122.
[3] Institutional arbitration in India, *available at*: https://www.barandbench.com/columns/institutional-arbitration-the-right-choice-for-arbitration-users-in-india (last accessed on 20-07-2025).

fee determination is the prerogative of parties and there is no such ultimate limit Further, ad hoc arbitration suffers from other procedural uncertainties and limitations in administrative support. The system poses hindrances in selection of arbitrators who are experts in particular field. However, institutional arbitration maintain a diverse expert arbitrator pool which enhances the overall efficiency of selection procedure. Institutional arbitration also provides for standardised procedures which ensure consistency and uniformity in conduct of arbitral proceedings. It also emphasis more on confidentiality of proceedings. No doubt, ad hoc arbitration offers flexibility and parties retain control throughout proceedings but at the same time the moment a dispute reaches arbitration, it is certain that parties no longer wish to cooperate and in such a matter, ad hoc arbitration is more prone to the risk of dilatory tactics, which increases delays and costs. On the other hand, a fully equipped arbitral institution can face these challenges seamlessly. The awareness and knowledge of parties also play a key role in choosing among both, where parties have no sufficient knowledge, institutional arbitration is more suited in such cases.[4]

3. Future of institutional arbitration - Indian context

In comparison to another economies, India has lacked behind in terms of enforcing institutional arbitration due to various factors which are as follows[5]-

- Reliance on ad hoc arbitration due to its impression of being cost effective has resulted in limited uptake of institutional arbitration.
- Obliviousness in case of institutional arbitration has also contributed to the fact that many are not aware of the advantages it is capable of.
- The perception of high initiation cost sometimes outweighs long-term benefits of institutional arbitration.
- Judicial intervention at every stage, sometimes undermines the mandate of arbitrator and effectiveness of arbitral proceedings.

3.1 Legislative reforms

In order to establish India as a global arbitration hub, the legislature has taken following steps-

[4] Edlira Aliaj, 'Dispute Resolution through Ad hoc and Institutional Arbitration', *Academic Journal of Business, Administration, Law and Social Sciences*, Vol. 2 No. 2 (2016), p.241–250

[5] Comparison between institutional arbitration and ad hoc arbitration, *available at*: https://www.cyrilshroff.com/wp-content/uploads/2024/03/Handbook-on-Institutional-Arbitration-Rules-A-Comparative-Analysis.pdf (last accessed on 20-07-2025)

1. *Changes made in* A & C Act, 1996- The amendment in the said act has change the landscape of the act specifically when it comes to the appointment of arbitrators the amendment of 2015, 2019 and 2021 have altered the structure of the above said act by focusing on-

- Setting a time limit for completion of arbitral proceedings.
- Stressing on neutrality and impartiality of arbitrators.
- Further, the A & C, Act 1996 provides for establishment of Arbitral Council of India to promote institutional arbitration by assigning the role of grading arbitral institutions to Arbitral Council of India.
- The amendment has introduced a thoughtful change in appointment of arbitrators. As per the current scenario in case there is no consensus with respect to appointment of arbitrator, then the parties may file an application to the Supreme Court of India in case of international commercial arbitration and to the High Court of respective states in case of case of arbitration other than international commercial arbitration. But as per the 2019, amendment section 11 of the A & C Act, 1996 provides that the arbitrators may be appointed by the Supreme Court of India or by the High Court or any person or institution designated by such court as per the grading by Arbitral Council of India.[6]

3.2 ***Establishment of India International Arbitration Centre Act, 2019 (IIAC)***

As a flagship institution, the focal point of the centre is to promote research and training in ADR, effective conduct and conclusion of domestic as well as international commercial arbitration, building a strong ecosystem to make institutional arbitration, more reliable and operational. Further, through awareness, providing inspiration and encouragement , to public sector undertaking to opt for institutional arbitration and specifically designating IIAC in their contracts.[7]

3.3 ***Policy push to develop IIAC to be at par with International Arbitration Centre*** -

various awareness programmes are being conducted on regular basis by Ministry of Law and Justice with IIAC to execute the vision of the government to make India a primary player of institutional arbitration.

3.4 ***Dr. T.K Vishwanathan Committee (2024)*** also recommended the overall strengthening of

[6] *Supra* note 4
[7] *Supra* note 1

institutional arbitration with the ultimate objective of restricting excessive judicial intervention and making cost effective and time bound arbitration reality.

3.5 *The Enactment of Mediation Act, 2023*

This act has been enacted to promote institutional framework for the resolution of disputes. Indirectly institutional mediation will also effect the operation and performance of institutional arbitration.

4. Arbitral Institutions playing a key role[8]

- Indian Council of Arbitration (ICA)- this is one of the oldest arbitral institutions in India. It has played an important role in domestic and international commercial arbitration.
- Mumbai Centre for International Arbitration (MCIA)- established in Mumbai, it has countered international arbitration with modern rules and is following international standards to meet up to the requirements of multinational entities.
- Delhi International Arbitration Centre (DIAC) – this Centre is affiliated with Delhi High Court and it focuses on promotion of institutional arbitration with respect to disputes within its jurisdiction.
- India International Arbitration Centre (IIAC)- It is established by the government to play a key role in shaping India's image as arbitration hub.

5. Reasons for preference to ad hoc arbitration over institutional arbitration: Possible shortcomings of institutional arbitration-

- *Non availability of credible arbitral institutions*

  Presently, arbitral institutions established in India are deprived of standard legal expertise and lack awareness to best practices at international level. Therefore, the procedure and rules applied by such arbitral institutions are not up to date and do not match international standards. Inadequacy of infrastructure and support by these institutions is also an important factor. Most arbitral institutions can only provide hearing venues with basic facilities and lack more advanced facilities such as multi-screen video conferencing, sound-proof caucus rooms, audio / video recording, court

[8] Arbitral Institutes in India, *available at*: https://www.arbitration-icca.org/institutes?page=7 (last accessed on 20-07-2025)

recorders and many more such things.[9]

- *Misconstruction of institutional arbitration*

  Parties misconceive institutional arbitration as a costly mode in comparison to ad hoc arbitration due to the administrative fees payable to arbitral institutions. However, this myth can be busted by a fact that institutional arbitration offers standardised services at reasonable rates as it takes care of multiplicity of legal issues and proceedings. In comparison to this in ad hoc arbitration fees is being charged per hearing and adjournments are also not regulated. Parties also often believe that institutional arbitration is inflexible because arbitral institutions follow rules that take away exclusive autonomy of the parties over arbitration proceedings.[10] Many arbitral institutions also have a workable formula in place to maintain parties' autonomy over proceedings.[11] These misconceptions have largely surfaced due to lack of promotional activities by arbitral institutions and lack of general awareness among people about the pros and cons of both modes of arbitration.

- *Neglect by Government and its agencies to rely on institutional arbitration for dispute resolution-*

  absence of support from the government itself is also a reason for non-popularity of institutional arbitration over the years. Government is the copious litigant hence, if it relies on institutional arbitration for resolution of disputes then it will serve as an encouragement to private individuals as well. The most suited route could be that government must clearly provide for settlement of disputes through the medium of institutional arbitration by incorporating it expressly in its agreements with others. Further, government may also modify a policy for providing impetus institutional arbitration to make it a regular norm.[12]

[9] Institutional Arbitration v. Ad Hoc Arbitration, *available at*: https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf (last accessed on 20-07-2025)
[10] *Ibid.*
[11] Gary Born, *International Arbitration: Law and Practice*, (Walter Kluwer, 2012).
[12] Maharashtra readies arbitration policy', Business Standard (online), 15.10.2016, *available at:* http://www.business-standard.com/article/economy-policy/maharashtra-readies-arbitration-policy116101400574_1.html (last accessed on 20-07-2025).

- *Judicial Intervention*

  One of the reason that India is not considered as preferred seat of arbitration is excessive judicial intervention at different stages of conduct of arbitral proceedings. Even though this is not directly linked to under performance of arbitral institutions but it has certainly effected the decision of foreign parties to consider India as seat of arbitration. Parties sometimes indulge in delay tactics by resorting to judicial proceedings during arbitral proceedings and it has been noted that due to high pendency of civil litigation in India has also effected the disposal of arbitration related applications in court. To remedy this, Commercial Courts Act, 2015 set up commercial courts at the district level or commercial divisions in High Courts having ordinary original civil jurisdiction and these courts hear arbitration matters involving commercial disputes along with other commercial matters. However, it has been noticed that such courts are not exclusively hearing such matters but other matters also for instance family disputes which has not improved the overall situation.[13]

- *Simultaneity syndrome*

  No doubt, there have been impactful amendments in A & C Act, 1996 which has prompted the parties to switch to institutional arbitration, yet there is enough in the act to rely on ad hoc arbitration only. In short, the existence of duality of provisions providing for institutional arbitration as well as ad hoc arbitration, does not compel parties to resort to institutional arbitration.[14]

6. Review of performance of International Institutional Arbitration

Earlier arbitral Institutions were located in Europe but recently Asia has become arbitration hub. The chief reason of an arbitral institution getting popular is the availability of certain efficient rules and its flexibility to cater to parties needs. Other factors such as availability of specialized arbitrators, reputation, credibility, experience, neutrality and geographical location also play a pivotal role.[15] The contribution of business and legal communities in the success of arbitral institution is also noteworthy. In few cases, arbitral institutions have been established to satisfy excessive demand of business community to settle their commercial disputes

[13] *Supra* note 11 at 13.
[14] *Supra* note 1.
[15] Dr. Nicolas Wiegand and Dr. Tom Christopher Pröstler, 'Arbitration is becoming increasingly Asian', Business Law Magazine (2015), *available at*: http://www.businesslawmagazine.com/2015/09/03/arbitration-is-becoming-increasingly-asian-there-are-four-main-drivers-of-theprocess/ (last accessed on 20-07-2025)

efficiently and in a time bound manner. Support from judiciary is another key factor for the success of arbitral institution in any nation.

7. Suggestions- 'way forward'[16]

- *Need to enhance the credibility of IIAC*

  Government must continue to support and invest continuously to make IIAC a world class institution. This requires regular alignment with international standards to maintain its reliability and credibility.

- *Collaboration among arbitral institutions*

  Collaboration among different arbitral institutions at national and international level must be encouraged to provide quality services to the parties to dispute. Collaboration might help in achieving standardized model for institutional arbitration.

- *Maintenance of specialized panel of arbitrators*

  Experts must be attracted in order to make institutional arbitration achieve its ultimate goal of settlement of disputes

- *Development of e-arbitration platforms*

  Availability of e-platforms for virtual hearings is the need of hour as this will break all barriers and will also save expense.

8. Conclusion

The Indian governments vision of making India arbitration hub is intertwined to the development of institutional arbitration. Throughout the world Institutional Arbitration has achieved extraordinary feat among such institutions is London Court of International Arbitration (LCIA) in London, International Chamber of Commerce (ICC) in Paris, Hong Kong International Arbitration Centre (HKIAC) in Hong Kong, Singapore International Arbitration Centre (SIAC) in Singapore, etc.[17]

[16] Suggestions to promote institutional arbitration in India, *available at*: https://law.asia/indian-arbitration-hub-progress/(last accessed on 20-07-2025)
[17] *Supra* note 1

In order to establish one such institution at the national front, the efforts of all the stakeholders like government, judiciary, legal fraternity, business fraternity etc., must be combined in order to produce a positive result like a 'way forward' for institutional arbitration. There is a need to build an ecosystem for institutional arbitration in order to make India succeed in its vision of becoming arbitration hub.[18]

[18]Institutional arbitration, *available at*: https://www.internationalarbitration.in/areas/institutional.html#:~:text=An%20institutional%20arbitration%20is%20one,with%20that%20institution's%20arbitration%20rules (last accessed on 20-07-2025)