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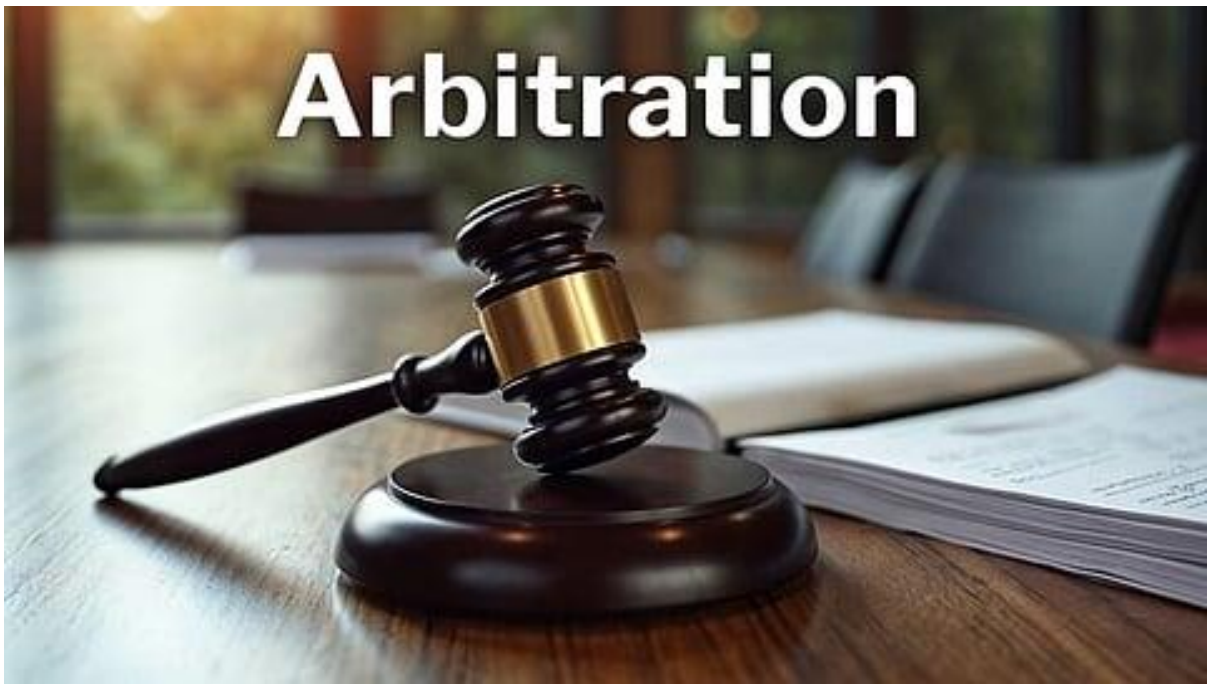
**Columns**

# The problem with the government's mistrust in arbitration

*As much as the government may like to find fault with arbitration, it needs to introspect why arbitration has not worked for it and what it can do to course correct.*




arbitration

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On June 3, 2024, the government issued an Office Memorandum, requiring all government departments and entities to drop the arbitration clause in domestic procurement documents and instead incorporate a mediation/litigation clause for dispute resolution.

This was met with some harsh criticism. This article explores the long and short-term implications of the policy decision.

The problem of mistrust with the arbitral process has a past. Late Senior Advocate **Fali Nariman**, in his arbitration treatise *'Harmony amidst Disharmony'*, traces the initial mistrust in certain regions towards international arbitration. He describes an arbitral

award of 1958 against the Kingdom of Saudi Arabia which triggered a ministerial decree, prohibiting all public corporations of the Kingdom from submitting their disputes to arbitration. Briefly, in 1954, Saudi Arabia concluded an agreement with AS Onassis, granting his company a 30-year "priority" concession for transportation of Saudi Arabian oil. The problem was that the government had a previous agreement with a Californian company (ARAMCO), granting it exclusive long-term rights to transport the oil it had extracted in Saudi Arabia.

This dispute led to arbitration, with the tribunal ruling in favour of ARAMCO. This did not go well with the government, leading to the decree. Nariman points out that the distrust was not confined to bad losers alone - it encompassed several third world and Latin American countries, who perceived arbitration to carry a pro-West bias. However, with time and wider participation of the global community in UN documents (such as the UNCITRAL Arbitration Rules, 1976 and the Model Law of 1985), this mistrust dissipated.

India, in contrast, had no such misgivings and was indeed instrumental in founding international arbitration jurisprudence. A little-known fact is that India was amongst the 10 original signatories to the New York Convention and the fourth country to ratify it (in July 1960). To put India's historic role in it's perspective, the USA ratified the Convention 10 years later in 1970, the UK in 1975 and Singapore, in the mid-1990s. The Convention marks the starting point of international commercial arbitration as we know it today. Briefly, it requires the contracting States to give effect to arbitration agreements and recognise and enforce arbitration awards (save for specific grounds). The limited grounds for challenge to an award form the core of the arbitration jurisprudence and stand universally accepted.

It should seem strange that a country, which can rightly count itself amongst the founding fathers of international arbitration, should now be giving it a thumbs down. This distrust comes when an arbitration clause is virtually irreplaceable where cross-border commerce is involved.

**Impact**

The government's memorandum seems to be confined to domestic procurement. This presumes that an 'Indian' bidder can learn to live with an inefficient dispute resolution mechanism and the underlying project will not suffer. It overlooks that domestic procurement may also involve cross-border participation, including JV partners, financiers, or technology suppliers. There is no clear line of demarcation and the government cannot second guess what finance, technology or partners a bidder may wish to line up. If the underlying project has a flawed contractual architecture, it will discourage wider participation. Given the reality of court litigation, a significant project without an arbitration agreement may well not be bankable. There would be a narrowing of the bidders' pool, cartelisation and non-participation by significant players.

Equally concerning is that if there is no efficient mechanism to settle disputes, questionable means may be resorted to including corruption and political interference. One may recall the superhit movie *'Lage Raho Munna Bhai'*, where the main 'business' of the protagonist was to use strong-arm tactics to eject tenants from valuable properties. These 'business models' flourish when legitimate doors to efficient dispute resolution are closed.

Thus, the immediate impact will be on procurement and investments. Then, there is no way that India can hold itself out as an attractive arbitration jurisdiction. Once the host State expresses its 'no confidence' in arbitration, the jurisdiction as such suffers a crippling blow.

Now, why is this important? If India cannot hold itself out as a pro- arbitration jurisdiction, Indian disputes (which should otherwise be seated here) would increasingly be seated outside. They would be handled by foreign lawyers and under the supervision of foreign courts.

With the growth of cross-border commerce, arbitration has also grown exponentially. The ICC and SIAC (the two leading arbitral institutes) between them registered 1,500 fresh cases in 2023 with a cumulative value of over 65 billion dollars. The actual market size is of course several times larger. Besides, with a web of over 3,000 investment treaties, arbitral tribunals now rule on matters impacting national and public interest.

If India isolates itself, our lawyers and arbitrators also get isolated and find themselves out of sync with the best practices. India would not contribute to the pool of international arbitrators. Our body of case law and arbitration jurisprudence would suffer. Correspondingly, lawyers, arbitrators and jurisdictions which capture this work would constitute a soft power force, ruling on matters where Indian interests are at play.

**The way forward**

There should be no doubt that India is not equipping itself with the necessary tools to help realise its ambitious economic aspirations. India's mistrust comes over half a century too late and when rest of the developing world has moved on and is indeed tirelessly working towards strengthening its arbitration environment. India as an outlier only shows it as a jurisdiction in reverse gear. One should be painfully aware that India has amongst the worst World Bank rankings in enforcement of contracts (at 163 out of 190 and ranking below Pakistan, Nepal and Bangladesh). The new policy will, if anything, pull it further down.

As much as the government may like to find fault with arbitration, it needs to introspect why arbitration has not worked for it and what it can do to course correct. The way forward for the government is to earnestly engage itself in strengthening arbitration and the ecosystem around it, and not the escape route it has chosen.

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