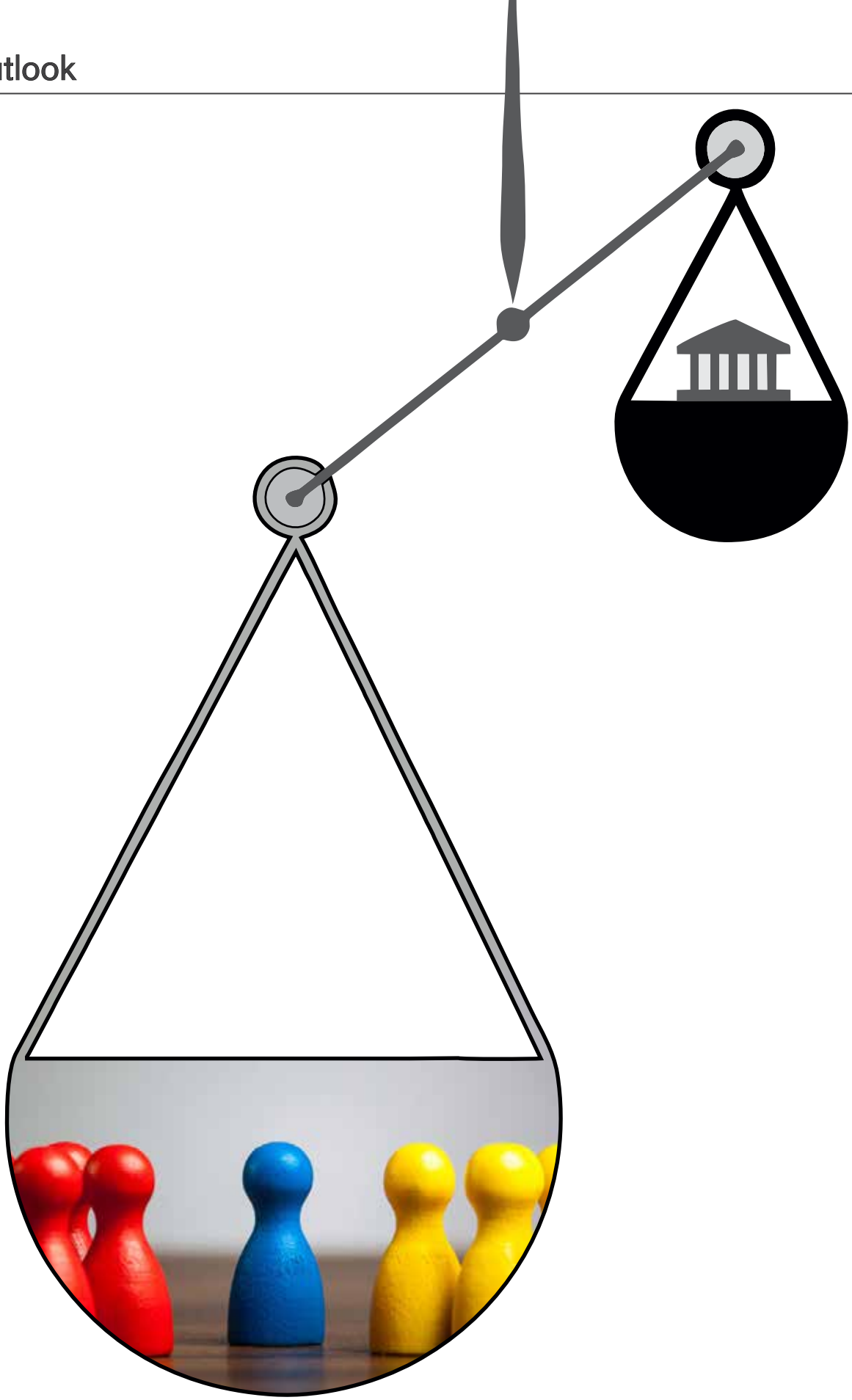

THE FUTURE OF INSTITUTIONAL ARBITRATION IN INDIA

Despite the growing number of credible arbitral institutions, Indian entities still prefer ad-hoc arbitration over institutional arbitration, particularly in respect of domestic disputes

The past

India is not new to the world of arbitration. Ancient India recognized arbitration as an efficacious means of dispute resolution. Disputes were often decided with the intervention of Kulas (members concerned with the social matters of a community), Shrenis (people engaged in the same business or profession) and Pugas (local courts), which were collectively called Panchayats. This form of arbitration of disputes was substantially institutional in nature and was quite similar to certain forms of institutional arbitration prevalent today. For instance, resolution of disputes between two professionals or tradesmen done through Shrenis was the modern-day equivalent of arbitration under the aegis of a trade body or a chamber of commerce. Consolidation of arbitration laws into enactments was first brought about by way of the Bengal Regulations of 1772, 1780 and 1781. These regulations, while ahead of their time, did not envisage institutional arbitration. The Indian Arbitration Act, 1899 (based on the English Arbitration Act of 1889), too, only recognized ad-hoc arbitration. The Arbitration Act of 1940, which remained the comprehensive law on arbitration in India till 1996, also did not accord recognition to institutional arbitration as a means of dispute resolution.

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The Indian Government's first effort at recognizing as well as encouraging institutional arbitration was the setting up of the International Centre for Alternative Dispute Resolution ("ICADR") in 1995. The ICADR was set up with the objective of promoting and developing Alternative Dispute Resolution ("ADR") facilities and techniques and its setting up was timed to coincide with the enactment of the Arbitration and Conciliation Act of 1996 ("1996 Act"). The 1996 Act, which is based on the UNCITRAL Model Law on International Commercial Arbitration, finally recognized institutional arbitration and it was hoped that the ICADR will act as a launch pad for institutional arbitration in India.

The present

At present, India has more than 35 arbitral institutions. Some of the prominent Indian arbitral institutions are the Indian Council of Arbitration ("ICA"), the Delhi International Arbitration Centre ("DIAC"), the Mumbai Centre for International Arbitration ("MCIA"), and the ICADR. While ICADR was envisaged as a model arbitral institution, it failed miserably at achieving its objectives, which included promotion of ADR, providing administrative and logistical support for ADR, appointment of arbitrators and providing training in ADR. Not only did ICADR fail in keeping pace with the developments in arbitration law worldwide, it was also unable to market itself as a credible alternative to ad-hoc arbitration. Plagued by inefficiency, the ICADR had a large and ineffective governing council. However, the biggest cause for ICADR's eventual demise was its failure to address and market itself to prospective parties at the stage of contract formation. Further, not just private sector entities, but even public sector bodies (including public sector undertakings) were reluctant to submit to ICADR managed arbitrations. The death knell for the (stillborn) ICADR was finally sounded after more than 23 years of its birth with the passing of the New Delhi International Arbitration Centre Act, 2019 (the "2019 Act"). The 2019 Act has replaced the ICADR with a modern arbitral institution which shall be called the New Delhi International Arbitration Centre ("NDIAC").

While the ICADR is a case in point on how not to run an arbitration institution, there have been other arbitral institutions which have tasted moderate success and are gradually emerging as trusted alternatives to ad-hoc arbitration. The DIAC (located within the Delhi High Court complex) has emerged as a strong institution and has administered more than 900 cases since its inception. The MCIA, while still in its infancy, is taking giant steps and was recently in the news for being chosen as one of the authorized institutions for arbitration by the Maharashtra Government which has made institutional arbitration mandatory for all contracts valued at more than Rupees 5 crores. The ICA and other arbitral institutions are handling a low volume of cases with value ranging from medium to low. Insofar as international arbitral institutions are concerned, the Singapore International Arbitration Centre ("SIAC") maintains an Indian office in Mumbai since 2013 for the limited purpose of promoting the activities of SIAC.

> *"The Government's decision to declare the NDIAC as an institution of national importance shows its will to establish India as a hub for institutional arbitration. However, the proof of the pudding lies in its eating. While on paper the NDIAC looks poised to change the face of institutional arbitration in India, it is the implementation of the Act which will determine its fate*

The London Court of International Arbitration ("LCIA") closed down its operations in India due to insufficient case load after operating from 2009 till 2016.

A survey carried out by PWC on Corporate Attitudes and Practices towards Arbitration in India shows that 61% of the companies surveyed, had a dispute resolution policy and confirmed inclusion of a dispute resolution clause in their contracts. Ninety-one per cent of the companies which had a dispute resolution policy, included arbitration for resolution of disputes. The survey also reveals that institutional arbitration is yet to be widely used by companies in India. Majority of the companies that experienced arbitration preferred ad-hoc arbitration (47%) over institutional arbitration (40%) while 12% indicated a neutral approach. The participants in the survey, when asked to identify the top three factors which make arbitration the preferred dispute resolution mechanism listed speed, flexibility and confidentiality.

Why is it that despite the growing number of credible arbitral institutions, Indian entities still prefer ad-hoc arbitration over institutional arbitration particularly in respect of domestic disputes? One possible answer is the perception amongst Indian consumers that institutional arbitration costs more than ad-hoc arbitration. While there is no credible study on arbitration costs in the Indian context, most lawyers practising in the arbitration space have experienced that in the long run, ad-hoc arbitrations cost more. The absence of a fee structure and the lack of overall supervision of the arbitral process often leads to a long drawn out proceeding, with arbitrators assuming little accountability. Another misconception about institutional arbitration is that arbitral institutions are rigid, and their rules take away from party autonomy. This couldn't be farther from the truth. Pick up the rules of (almost) any arbitral institution and one can find sufficient flexibility to mold the arbitration process according to the nature of

the dispute whilst respecting party autonomy. The need for leading evidence, the extent to which and the issues on which parties shall lead evidence, the techniques to be used for recording of such evidence, whether or not oral submissions are required et al. are all left open to the parties and the tribunal to decide.

However, the picture is not all rosy. A limited pool of trained and specialized arbitrators on the panel of arbitral institutions is indeed a worrying sign that not all is in order. Bodies providing training to arbitrators are virtually non-existent and one seldom finds arbitrators who have specialized arbitration training (which is substantially different from judicial experience of adjudicating disputes in courts). Further, despite their gradually growing numbers, there are still very few arbitral institutions in India that are seen to be truly credible and trustworthy. Perhaps, India could learn a lesson or two from some of its Asian neighbors who have successfully set up world class arbitral institutions in a relatively short span of time. The SIAC (setup in 1991) and the Hong Kong International Arbitration Centre ("HKIAC") (setup in 1985) are cases in point. The SIAC benefits enormously from the Singapore Government's pro-arbitration stance and Singapore's arbitration-friendly judiciary and has emerged as one of the most preferred arbitral institutions worldwide (handling more than 400 cases in each of the past two years). HKIAC too has an impressive growth story and it has emerged as a leader in adoption of innovative rules, including rules on costs, joinder of parties, consolidation of arbitrations and emergency arbitrations etc.

The future

The report of the committee set up by the Central Government under the Chairmanship of Justice B.N. Srikrishna to review the institutionalization of arbitration in India was the raison d'etre for two major developments in Indian arbitration viz. the Arbitration and Conciliation (Amendment) Bill, 2019 (the "2019 Bill") and the 2019 Act. The proposed amendment in the 2019 Bill, inter alia, seeks to set up the Arbitration Council of India for grading arbitral institutions. It also seeks to introduce a system where arbitrators shall be appointed by the arbitral institutions designated by the Supreme Court or the High Court instead of the Court appointing such arbitrators. The amendment also seeks to address a much desired feature which is missing in the existing framework i.e. the need for utmost confidentiality in arbitration proceedings.

The 2019 Act aims to establish the NDIAC (and replace ICADR) as a hub for institutional arbitrations. The centre aspires to be a breeding ground for talent and dispensation of knowledge. Instead of working in isolation, the NDIAC lists as its objectives-promotion of partnerships, collaborations and relationships with other arbitral institutions.

A close examination of the 2019 Act shows that the NDIAC seeks to succeed where the ICADR failed. Thankfully, it appears that the NDIAC has a much leaner administrative structure and it is likely that it will consequently face far fewer bureaucratic challenges. The Government's decision to declare the NDIAC as an institution of national importance shows its will to establish India as a hub for institutional arbitration.

However, the proof of the pudding lies in its eating. While on paper the NDIAC looks poised to change the face of institutional arbitration in India, it is the implementation of the Act which will determine its fate. Considering the fate of the ICADR, this may very well be the last opportunity to put India on the global arbitration map.