

Corporate Attitudes & Practices towards Arbitration in India





Foreword

The growth in domestic and international trade and commerce has spurred competition, provided new opportunities and imputed risks. Commercial arbitration in India is witnessing a steady transition and resolution of domestic and cross border disputes is becoming more sophisticated. The survey shows that parties are increasingly choosing to resolve disputes away from the courts through arbitration. This survey is our pioneer effort at exploring the level of knowledge, current practices and perceptions regarding arbitration among companies in India.

In-house counsels are leveraging the advantages offered by this mechanism including speed of resolution, flexible processes and confidentiality of proceedings while overcoming the hurdles of undue delay in proceedings and lack of institutional arbitration infrastructure. The future of arbitration as indicated by the survey looks cautiously optimistic owing to several advantages and disadvantages that arbitration provides in the Indian landscape.

We are pleased to share the insights from the survey through this report and we hope it will provide interesting trends to companies in India.

We are grateful to our respondents consisting of Legal Counsels, Legal Heads and Company Secretaries of various companies in India who gave their time and thoughts so generously and enthusiastically.

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Executive Summary

Arbitration is a leading method for resolving disputes arising from commercial agreements and other domestic and international relationships. The practice of arbitration has developed so as to allow parties from different legal and cultural backgrounds to resolve their domestic and / or cross border disputes, generally away from litigation.

This study presents qualitative and quantitative feedback on the use and future of arbitration in India, gathered from 70 respondents comprising of Legal Counsels, Legal Heads and other legal personnel of various companies in India. The survey was conducted over ten months, through detailed in-person interviews.

The results of this survey broadly emphasise the attitudes and practices adopted by in-house counsels in India towards effective resolution of domestic as well as cross border disputes.

Key messages from the study are as follows:

Majority of the companies in India have a dispute resolution policy

- 91% of the companies surveyed in India, who have a dispute resolution policy, include arbitration (not litigation) for resolution of future disputes.

- 61% of the companies surveyed in India have a dispute resolution policy and confirmed inclusion of a dispute resolution clause in contracts entered by their company.
- Companies generally indicated a flexible approach towards negotiating arbitration clauses. However, factors such as law governing the arbitration, seat of arbitration and language primarily drive the negotiation.

Arbitration remains a preferred dispute resolution mechanism, despite certain loopholes and shortcomings in the arbitration environment in India

- An overwhelming majority of the companies surveyed used arbitration, in isolation or in combination with another dispute resolution mechanism
- Top three factors that make arbitration the most preferred dispute resolution mechanism are: speed, flexibility and confidentiality.

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.
- Further, companies with no prior experience of arbitration also indicated a preference for ad-hoc arbitration.

Retired Supreme Court / High Court judges are a preferred choice for arbitrators

- Companies with prior experience of arbitration preferred retired judges as arbitrators when the seat of arbitration is in India and external experts for cases where the seat is outside India.
- Top three factors that guide the selection of arbitrators are reputation and expertise in the relevant industry, knowledge of law applicable to the contract / arbitration and prior experience in arbitration.

Companies in India are yet to fully appreciate the tactical significance of the seat of arbitration

- India, Singapore and England were noted as top three seats for arbitration.
- The choice of seat of arbitration was primarily driven by factors such as regional advantage, cost effectiveness and advice of solicitors / counsel.

More companies are using expert evidence in arbitration proceedings

- More than half of the companies have used expert evidence in arbitration proceedings.
- Industry experts or experts for valuation / accounting are typically appointed.

The future of arbitration in India is optimistic

- 82% of the companies with arbitration experience indicated that they would continue to use arbitration in future disputes.
- 46% of the companies with no arbitration experience were also open to using arbitration in future disputes

Dispute Resolution Policy – #1

An effective safeguard

61% of the companies engaged in commercial transactions in India and outside have indicated having a dispute resolution policy. Companies (36%) that did not have a formal dispute resolution policy also demonstrated positive signs of including a dispute resolution clause in their contracts.

While drafting a contract, companies surveyed, indicated that at a minimum they would include preferred law governing the contract (53%) and seat of arbitration (49%).

Popularity of arbitration as an alternate dispute resolution mechanism is evident as a large number of companies are considering arbitration over litigation to resolve disputes as part of their crystallised dispute resolution policy (91%).

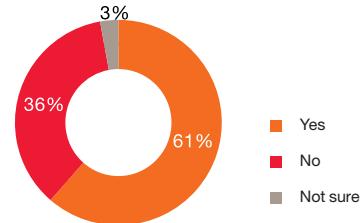
A dispute resolution policy provides a structured approach to resolving disputes, thus providing guidance to in-house counsel to efficiently and effectively deal with disputes.

A qualitative analysis of the responses revealed some of the most important benefits of maintaining a dispute resolution policy:

- Facilitates discussion regarding the availability of important model clauses to mitigate potential risks when a dispute arises.
- Consistency across departments in the company as regards execution of contracts.
- Strategic advantage at the time of contract negotiation.
- Guidance for adoption of tiered dispute resolution procedures to minimise costs associated with dispute escalation. For example, in the event of a dispute, there are pre-determined levels of escalation in the company. This would ensure that disputes are addressed in time and by the relevant authority.

- Appropriate guidance for adoption of dispute resolution mechanisms proportionate to the value at stake, thereby minimising dispute escalation.
- Facilitate dialogue between the legal department and the business units in the company and thereby enhance awareness of the available legal support.

Does your company have a dispute resolution policy?



Arbitration vs. Litigation – Pros and Cons

#2

86% of the companies surveyed had prior experience of domestic and / or cross border dispute resolution. When asked what types of resolution processes they have used for domestic / international disputes, nearly all respondents (95%) reported using arbitration either as a standalone mechanism or in combination with other mechanisms (68% used litigation, 40% had attempted mediation)¹.

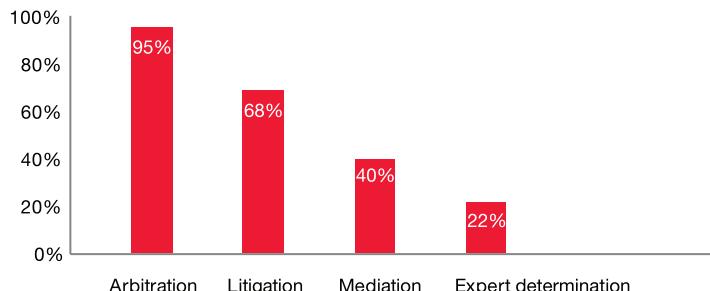
Why do most companies seek to avoid litigation? Companies conceded to greater familiarity to litigation process as opposed to arbitration. However, in most developing nations, litigation being a time consuming process, companies have steered away from using litigation to save time especially when large sums of money are locked in the dispute. Average time taken from the commencement of arbitral proceedings to the award is less than three years, according to companies who used arbitration.

1. Categories are not mutually exclusive as certain respondents used a combination of the above mentioned dispute resolution mechanisms to resolve multiple disputes in the past.

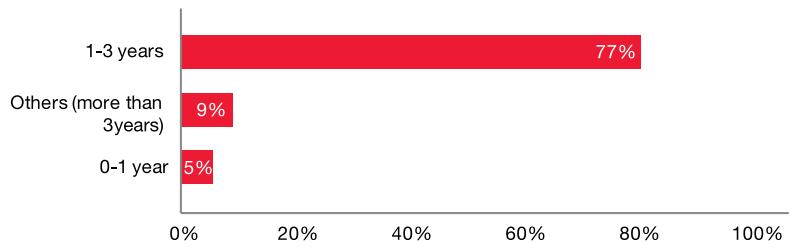
*Does not total up to 100% owing to

a multiple responses provided by respondents.
b 9% of respondents did not provide an answer to this question.

Indicate which of the following dispute resolution mechanisms were used by your company*



In your experience, what is the average time an arbitration takes from the commencement of the arbitral proceedings till the award is passed?*



Other concerns that result in litigation being a less preferred choice include:

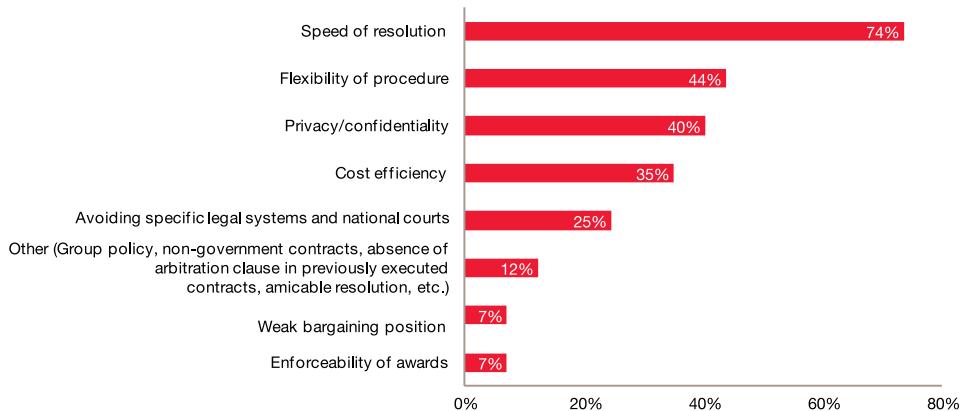
- rigid framework that litigation operates in, and
- lack of confidentiality surrounding the proceedings.

Companies that had experience in alternate forms of dispute resolution (other than arbitration) admitted doing so in accordance with their organisational policy, particularly with respect to disputes relating to low value contracts where arbitration would not be a cost effective option. Alternatively, they continued to follow traditional litigation for previously executed contracts that did not provide for arbitration in the event of dispute.

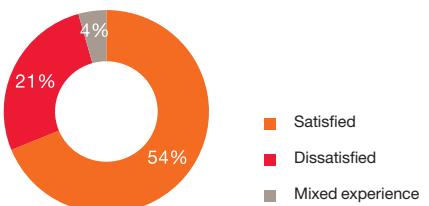
Although majority of the companies opted for arbitration (95%) due to various benefits, not all had a satisfactory experience:

- The level of dissatisfaction is substantial for arbitrations seated in India as compared to arbitration seated outside India.

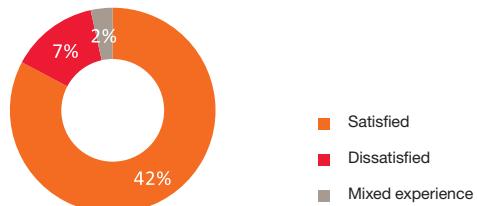
What was the reason your company preferred arbitration over some other dispute resolution mechanism?



Are you satisfied with arbitration (seat in India) as mechanism to resolve disputes?



Are you satisfied with arbitration (seat outside India) as mechanism to resolve disputes?



Based on qualitative feedback, the level of dissatisfaction may be attributed to the following roadblocks that hinder an efficient arbitration process in India:

- Lack of uniformity in the procedures and treatment of arbitral awards has been an acute problem for parties adopting arbitration to resolve disputes. However, the recent Supreme Court judgement in the *Bharat Aluminium*² case may be a breather for arbitrations seated outside India.
- The arbitration award should be binding without recourse to challenge irrespective of the seat of arbitration. There is an immediate need for tightening of grounds to challenge an award in India. Making an appeal again not only escalates the cost and time of arbitration proceeding but also makes the arbitration proceeding similar to litigation.
- As there is no prescribed time limit within which the arbitration proceeding must be completed, it makes arbitration a less attractive mechanism for dispute resolution. 9% of the companies experienced arbitration

that lasted more than three (3) years. As observed from the qualitative responses, duration of more than three years for resolving disputes through arbitration was a tedious and expensive proposition for the parties.

- Constitution of the arbitral tribunal is a time consuming activity and was ranked as the top factor that has a bearing on the length of the arbitration proceedings, followed by exchange of pleadings, discovery and inspection of documents and enforcement of award.
- The time and cost of the proceedings is also affected significantly when the deficient parties take advantage of the loopholes in the procedures and the proceedings lack the requisite level of professionalism.
- Arbitrators' fee was among the top three factors that companies attributed to the cost of the arbitral proceedings. Other factors included solicitors/law firms' and counsel's professional fees.

- In case of ad-hoc arbitration in India, there is a small club of seasoned arbitrators that companies can choose from. This causes a delay in the arbitration process due to lack of availability of such arbitrators. Such administrative hurdles increase the cost of the proceedings significantly, making it a more expensive proposition as against litigation.

The level of dissatisfaction is substantial for arbitrations seated in India

2. <http://supremecourtofindia.nic.in/outtoday/ac701905p.pdf>

Ad-hoc vs. Institutional Arbitration #3

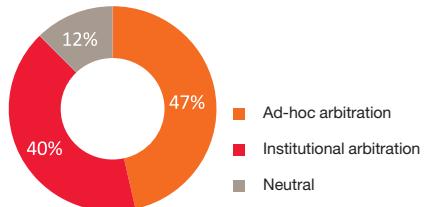
- An Indian perspective

One of the reasons cited by the companies for choosing arbitration over any other dispute resolution mechanism is flexibility of the procedure. This factor of flexibility rests in adopting either ad-hoc or institutional arbitration.

Majority of the companies in India that experienced arbitration preferred ad-hoc (47%) over institutional arbitration (40%). Further, companies with no experience of arbitration also indicated a preference for ad-hoc arbitration.

It is important to note that companies having experience in arbitration indicated constitution of the tribunal as one of the top most reasons contributing to the length of the arbitration proceedings. One of the advantages of adopting institutional arbitration is that it provides a mechanism and time frame for selection of the tribunal. On the other hand the flexibility offered by ad-hoc arbitration may lead to a longer time frame for constitution of tribunal and other administrative procedures. Greater flexibility in procedures may not necessarily produce greater efficiency.

Which of the following types of arbitrations does your company prefer?



In developed countries, institutional arbitration is a preferred type of arbitration owing to presence of a variety of institutions, bespoke administration of the proceedings offered by such institutions, uniform rules and procedures of the institute, absence of interference from the country's legal system and arbitration friendly infrastructure available in such countries.





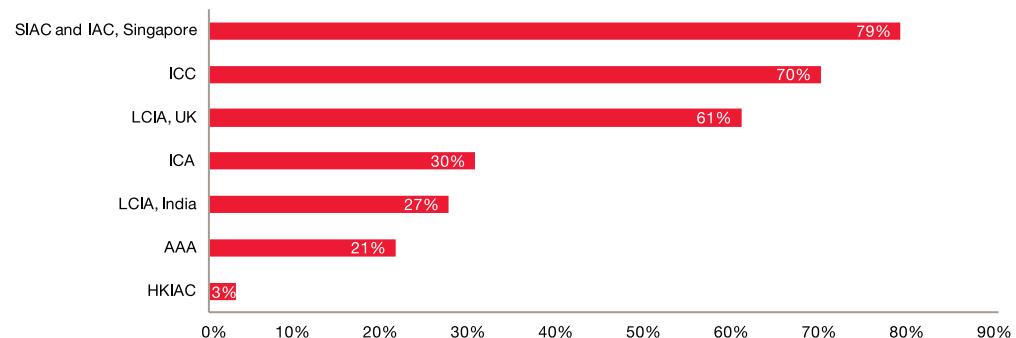
Popularity of Arbitration Institutions

Singapore International Arbitration Centre (SIAC) and Industrial Arbitration Court (IAC), Singapore, International Chamber of Commerce (ICC) and London Court of International Arbitration (LCIA), UK were widely opted to administer and resolve disputes. While choosing an institution, following reasons have

been rated most significant by companies having experience of institutional arbitration:

- Overall cost and fees,
- Reputation, and
- Neutrality and independence of the institution.

Which of these arbitral institutions, if any has administered your company's arbitrations in the past?



Seat of Arbitration – Does it really matter?

#4

While companies generally indicated a flexible approach towards negotiating arbitration clauses, they indicated that the seat of arbitration³ (among other factors such as law governing the arbitration and language followed in the proceedings) would primarily drive the negotiation.

In international commercial arbitration, it is of foremost importance that parties to a dispute agree on the seat of arbitration. Choosing a seat of arbitration is crucial for many reasons.

- It plays a unique role in deciding the law governing the arbitration procedure.
- It determines the support or intervention that may be received from local courts in the course of arbitration.
- It also has a bearing on the process and rights relating to enforcement of the arbitration award.

Consequently, when drafting an arbitration clause in a new contract, it is important to consider myriad factors when deciding upon the seat, particularly, how the local arbitration law of the seat operates and whether the local courts are arbitration-friendly.

In-house counsels see the choice of seat as more a matter of convenience than of legal significance

effective and neutral venue in comparison to London, Paris etc.; and lastly, **England** due to its long standing reputation as an impartial jurisdiction and efficiency of court proceedings. Though India is a preferred choice as a seat of arbitration, however in practice it is not.

The above results indicate that many in-house counsels see the choice of seat as more a matter of convenience than of legal significance. This further suggests that some do not fully appreciate the significance of choosing the right seat for international arbitration. Also the in-house legal departments might benefit from briefings by arbitration specialists on the legal consequences and tactical opportunities arising from the choice of seat.

3. In international commercial arbitration legislation and practices, the seat of arbitration usually refers to the place for arbitration, where the award is made. The terms "seat" and the "place" of arbitration are often used interchangeably.

Selection of Arbitrators – The driving factors behind this decision

#5

One of the primary advantages of arbitration often cited by companies is the ability to choose a decision maker with expertise to understand the nature of the dispute and resolve it effectively and efficiently. In arbitration, parties can mutually agree upon who will serve as their arbitrator.

A tribunal that is proactive and skilled in resolution of disputes will contribute tremendously to managing the arbitration in the most cost and time effective manner. Because arbitrator selection is pivotal to the quality and outcome of the proceeding, careful consideration should be given to how the arbitrator will be selected, how many are needed and their specific qualifications.

Knowledge of the applicable law and prior experience are desirable attributes of an international arbitrator. An arbitration chairman (or presiding arbitrator) coupled with two arbitrators who are specialists in the

applicable law / industry ideally constitutes a versatile and informed tribunal. Such arbitrators are often appointed by respective parties to the dispute and the two arbitrators jointly appoint the presiding arbitrator / chairman who can conduct the process with the necessary authority and dignity. The use of a sole arbitrator is also a concept that is gradually being accepted as a faster and cheaper option in comparison to a three member tribunal.

Companies highlighted various factors they take into consideration in appointing arbitrators. According to the results, companies in India primarily look for arbitrators with an established reputation in the arbitration community along with relevant industry and/or regional expertise.

In case of arbitration seated in India, companies with prior arbitration experience preferred to appoint:

- Retired Supreme Court / High Court judges (68%),
- Senior counsel (32%),
- External experts (30%),
- Solicitors / law firm partners (19%) and
- Others (e.g. District Court judges) (2%).

*Retired Supreme Court/
High Court judges are
preferred as arbitrators*

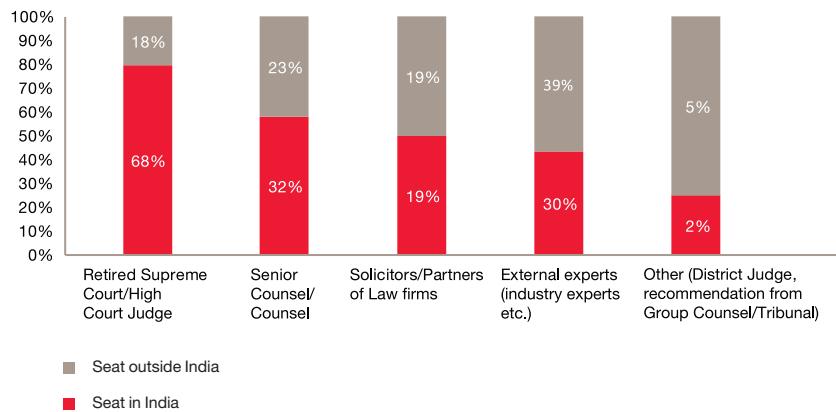
Where the seat of arbitration is outside India, companies preferred:

- External experts (39%),
- Solicitors / law firm partners (19%),
- Senior counsel (23%), and
- District Court judges and/or recommendation from tribunal or group counsel (5%).

Currently nearly two-thirds opt for retired Supreme Court or High Court judges as arbitrators, however, qualitative feedback from the respondents reveals that, arbitration proceedings in India are critically affected due to lack of availability of a large club of arbitrators with requisite industry knowledge coupled with necessary professional attitude.

To instil confidence in the arbitration process, flexibility of the arbitrator-selection should be coupled with important standards for independence / neutrality of the arbitrators. Consequently, by utilising a method that best meets their needs, parties to a business dispute can effectively choose an arbitrator who will hear their case in an efficient and unbiased manner.

Who amongst these is your company's preferred arbitrator? (Companies who experienced arbitration)



Effective use of Experts - #6

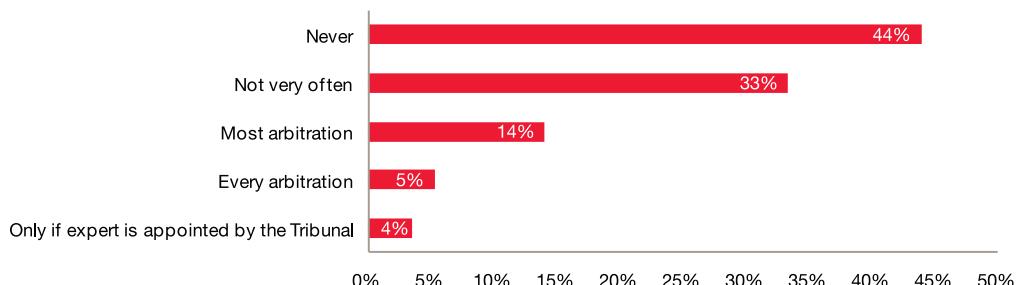
Choosing the right expert

“Expert Witness” is an individual who is qualified, because of his or her specialised knowledge, skill, training, education, and/or experience to provide the court (most often including the judge, opposing counsel, and any jurors present) with a specialised opinion about evidence or about a particular ‘fact’ at issue between the parties.

Black's Law Dictionary

Nearly half the companies that resorted to arbitration have never used expert witnesses as part of the arbitration proceedings.

How often have you used expert evidence in domestic or international arbitrations?



This is not surprising as very often, parties to a dispute prefer to use their own employees to determine the quantum of damages / losses suffered. Companies typically perceive such employees as best suited in this role, given that they possess intricate knowledge about the company and are technically qualified in the industry in which the company operates.

Additionally, such employees may have been involved or are aware of the matter in dispute and are conversant with the facts at hand. From the company's perspective, their use limits the possibility of leakage of confidential information in the public domain, with regard to the case and results in cost saving.

However, while employees may be proficient in understanding the industry and are knowledgeable about the company, they may lack the unique knack of presenting evidence and providing testimony before the Arbitral Tribunal as they are inexperienced in understanding and dealing with the arbitration process. More importantly, employees lack independence and objectivity of opinion and may not possess the requisite skill or competence to compute damages. Accordingly, employees are best suited as fact witnesses due to their proximity to the issue.

On the other hand, expert witnesses can be pivotal in strengthening a case that requires fairly complex damage calculations or intricate understanding of a particular industry. For instance, cases that require the use of valuation methodologies such as the Discounted Cash Flow (DCF) method, internal rate of return etc. would benefit from an expert who is well versed with such techniques. Similarly, cases that revolve around interpretation and application of complex accounting principles as in the case of revenue recognition contracts, valuation of financial instruments etc. would benefit from

an expert who has substantial experience in these fields. This can be collaborated with responses of the companies who indicated that they typically used experts in matters relating to valuations (25%), accounting (19%) and foreign law (12%); or industry specific experts in the field of financial services, construction, engineering, oil and gas (41%).

Having said that, each case must be assessed on a stand-alone basis and an assessment of whether an expert is needed must be made early and in conjunction with the counsel. Experts retained early and for a defined objective can add tremendous value to the arbitral tribunal, counsel and client.

Selection of the right expert is a battle half won. Companies with arbitration experience stated the following top 4 considerations in selecting an expert:

1. Experience – Seasoned experts posses deep expertise in the respective field along with the requisite ability of presenting evidence before an arbitral tribunal. Thus, experience should undoubtedly be an important criterion in selection of an expert.

- 2. Reputation** – Reputation of an expert witness must necessarily be one of integrity and honesty. The conduct of the expert witness before the tribunal can add credibility or discredit a previously written report. Among other aspects, an expert witness' reputation will be governed by his / her ability to present material and opinions clearly and in a style that fits the arbitral system.
- 3. Prior relationship with Experts** – While prior relationship with the expert may lend a degree of comfort to the appointing party, it is important that the expert is viewed by the tribunal as independent from the counsel, client and facts of the case.
- 4. Cost** – Cost of retaining an expert should be viewed in light of potential benefits to the case at hand. Companies assigned equal importance to their relationship with the expert and cost considerations in retaining an expert.

Expert witnesses can help in strengthening a case that requires complex damage calculation with understanding of the industry

Future of Arbitration in India - Cautiously optimistic

#7

Majority of the companies surveyed believe that the arbitration scenario in India looks optimistic (43% have explicitly mentioned that the scenario of arbitration in India looks either optimistic or very optimistic). Accordingly, of the companies with arbitration experience, 82% indicated that they would continue to use arbitration in the case of future disputes. Further, of the remaining respondents with no experience of arbitration, 46% were willing to use arbitration in the future.

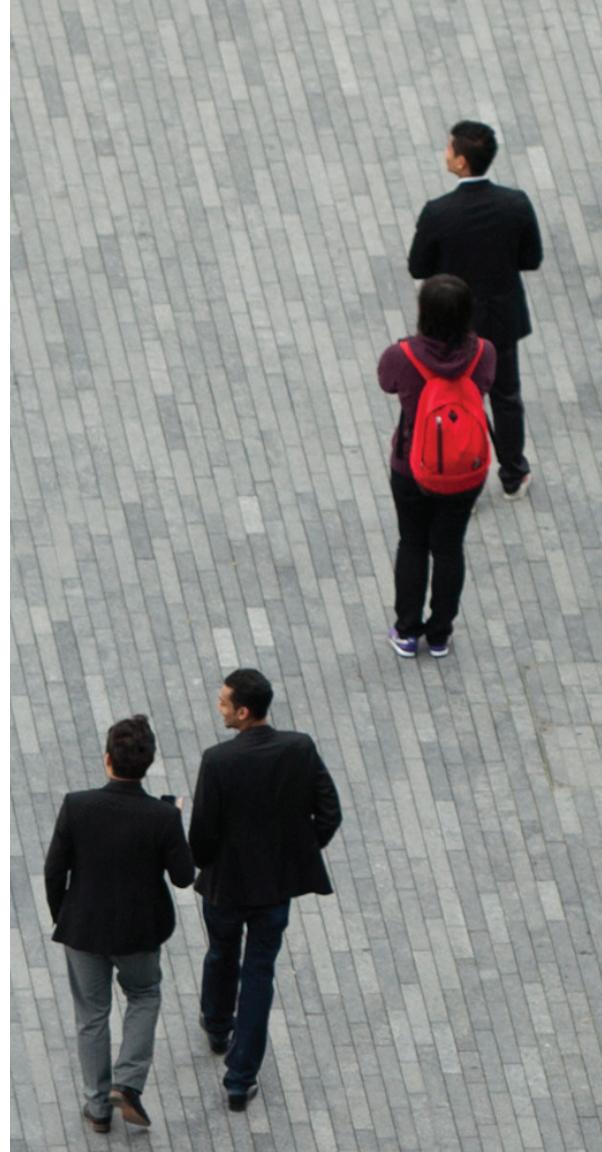
It has already been established that an overwhelming majority of corporations in India are opting for arbitration closely followed by litigation. However, the dissatisfaction associated with resolving disputes when seat of arbitration is in India cannot be ignored.

In India, change is contemplated and the Law Ministry has proposed its recommendations to amend the legislation. Domestic or international arbitration will be a sought after

option for companies in India with such positive steps taken by the industry and the Government together. A qualitative analysis of the challenges faced by companies and their learning from the arbitration process suggests following two critical points that will contribute in shaping the future of arbitration in India;

- Need for a robust institutional arbitration infrastructure to overcome a significant challenge relating to selection and availability of arbitrators and subsequent time and cost of the proceedings; and
- Realising the tactical benefits of seat of arbitration.

82% companies would continue to use arbitration even in future disputes despite the challenges



Methodology

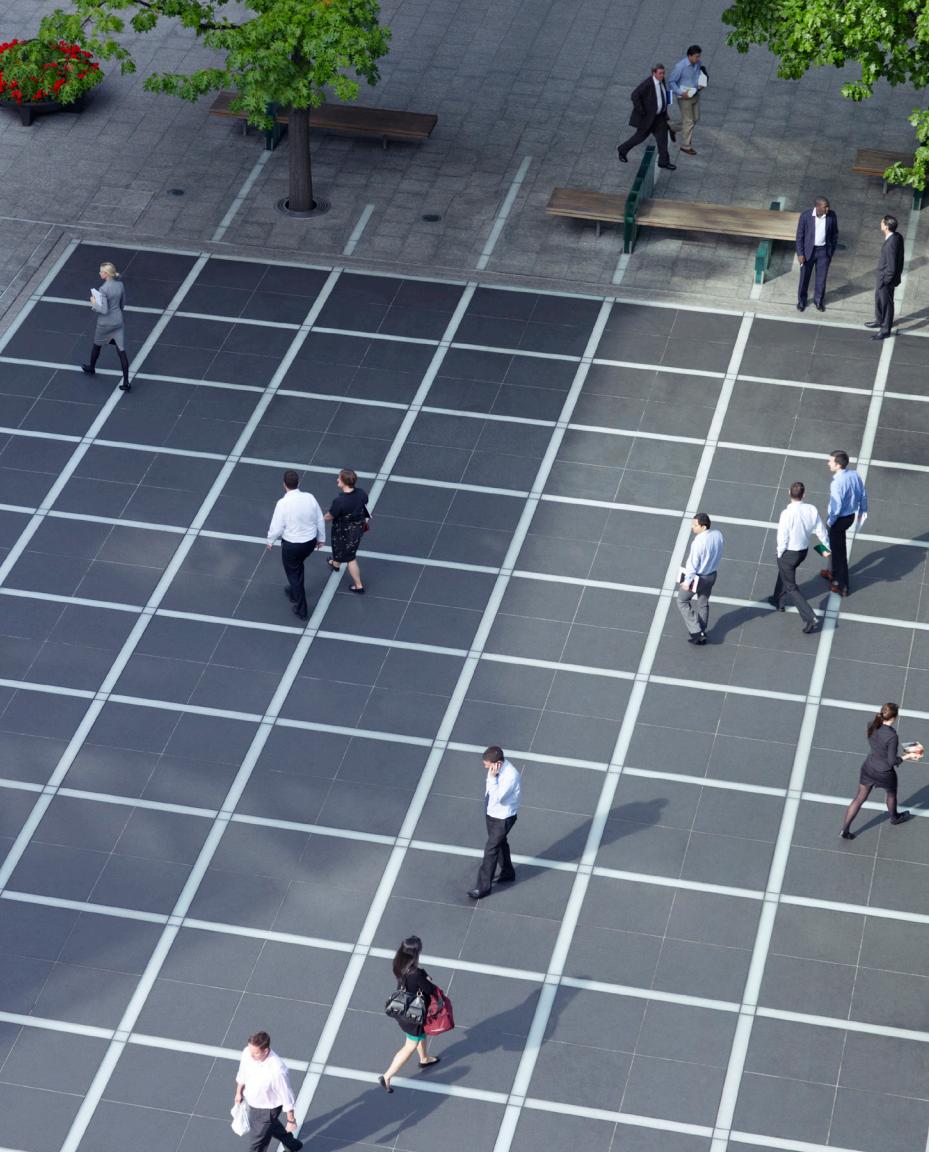
In-person interviews were conducted with 70 companies and their Legal Counsels, Legal Heads and other legal personnel to obtain their quantitative and qualitative feedback on the arbitration landscape.

Industry Sector (multiple responses)	Count	Percentage
Financial Services & Banking	16	23%
Information Technology	11	16%
Pharmaceuticals	10	14%
Construction / Engineering/Real estate	10	14%
Energy and Oil & Gas	8	11%
Manufacturing	6	9%
FMCG & Consumer durables	3	4%
Media & Entertainment	3	4%
Shipping/Maritime	2	3%
Telecommunications	2	3%
Retail & Consumer	2	3%
Hospitality & Leisure	2	3%
Aerospace & Defence	2	3%
Transport & Logistics	2	3%
BPO & Shared Services	2	1%

Respondent's Designation	Count	Percentage
General Counsel / Deputy General Counsel	32	46%
Other (Legal & Company Secretarial)	25	36%
Legal Officer	13	19%
Total	70	100%

No. of Countries that the Respondent's company has operations in	Count	Percentage
More than 20	28	40%
2 to 10	21	30%
1	13	19%
11 to 20	8	11%
Total	70	100%

Nature of cross border activity that the company engages in (multiple responses)	Count	Percentage
Export of good/services to third parties	32	46%
Import of goods and services from third parties	28	40%
Overseas branch/sales offices	25	36%
Others (Joint Venture, Intellectual Property, Private Equity & Offshore Advisors, Engineering, Advisory services, Distribution facilities, Reinsurance, Shared Services etc.)	20	29%
Overseas manufacturing facilities	18	26%
Overseas financing	10	14%



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PwC Dispute Analysis Services

No company enters into an agreement with another entity expecting to become embroiled in disagreements. But disputes do happen. Complex dispute matters require the insight and experience of individuals who understand how to interpret companies' books, records and financial documents. PwC professionals provide business and financial advice to lawyers and their clients in matters that represent some form of crisis or dispute. Our work often leads us to provide expert testimony before the arbitration panel or at the civil court. Our professionals have deep experience in:

- Quantification of damages
- Expert witness testimony
- Accounting and Statistical analysis
- Delay claim analysis in construction disputes
- Forensic technology (digital data collection and analysis)

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