# India Recalibrates Policy on Dispute Resolution Mechanisms in Public Procurement Contracts

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## Introduction

Over the past decades, India has seen arbitration grow in prominence as a preferred dispute resolution mechanism. Arbitration offers several advantages over litigation such as confidentiality, the ability to appoint decision-makers with the relevant technical expertise, and finality of awards. In a speech to the UK Supreme Court on 6 June 2024, the Chief Justice of India, DY Chandrachud, noted that arbitration had become the "preferred method of seeking commercial justice".

Where the Government of India ("**Government**") is party to a dispute, however, these advantages have not always materialised. In light of the Government's accountability to Parliament, the confidentiality of an arbitration conversely transforms into a drawback. Tribunals may depart from judicial practice, leading to similarly situated disputants being treated differently merely because one disputant has chosen to arbitrate. Further, government decision-makers often elect to challenge adverse awards due to a perception that it is improper not to exhaust all judicial avenues, negating the intended finality of awards.

On 3 June 2024, the Government published the Guidelines for Arbitration and Mediation in Contracts of Domestic Public Procurement – reg ("**Guidelines**"). The Guidelines are a significant recalibration of the Government's approach to arbitration in the context of public procurement contracts, placing new restrictions on the use of arbitration and promoting mediation as an alternative dispute resolution mechanism.

Below, we provide an overview of the Guidelines and comment on the impact for parties seeking to enter public procurement contracts.

# Overview

The Guidelines apply to contracts of domestic procurement by the Government, its entities, and its agencies (collectively "**Government Entities**"). This includes Central Public Sector Enterprises ("**CPSEs**"), Public Sector Banks ("**PSBs**"), and Government companies.

The main features of the new guidelines are as follows:

**Restrictions on the use of arbitration**

1. Arbitration clauses should not be routinely or automatically included in procurement contracts or tenders, especially in large contracts.
2. As a norm, arbitration may be restricted to *disputes* with a value below Rs. 10 crore (around US$1.2m), as distinct from the value of the *contract* itself.
3. For disputes above this threshold, arbitration should be allowed only with the careful and reasoned approval of the Secretary of the relevant Government ministry or department, or the managing director of the CPSE or PSB.
4. Institutional arbitration should be preferred over *ad hoc* arbitration where appropriate, with due consideration to the costs involved.
5. Adverse awards should not be challenged or appealed as a matter of routine. Instead, challenges should only be filed where there is genuine merit and a high chance of success.

**Push for mediation**

1. Government Entities are encouraged to resolve disputes by way of negotiation and/or mediation under the Mediation Act 2023, although mediation clauses need not be included in procurement contracts or tenders as a matter of course.
2. For high-value matters, Government Entities may convene a high-level committee ("**HLC**") for dispute resolution.
    a. The HLC may be comprised of a retired judge, retired high-ranking officer and/or technical expert.
    b. It may review any negotiated solution or mediated settlement agreement, or itself act as mediator. This will allow decisions to be scrutinised by a high-ranking body at arm's length, promoting fair and sound decisions in the public interest.

Any modification of the above Guidelines will require the authorisation of the relevant Secretary or managing director, as the case may be.

# Implications

For commercial parties, the Guidelines may be both boon and bane. On one hand, the promotion of mediation is welcome, offering parties a chance to resolve their disputes amicably. It also encourages Government decision-makers to keep legal and practical realities in mind and avoid unnecessary appeals against adverse awards.

On the other hand, the new restrictions on arbitration potentially introduce complications for commercial parties who may prefer to arbitrate. Parties may be hesitant to lose the neutrality and efficiency that arbitration may offer. Where an arbitration clause is successfully negotiated, parties should take care to ensure that its inclusion has been properly authorised bearing in mind the Guidelines. Parties invoking an arbitration clause implicated by the Guidelines would also be well placed to take measures to guard against, as far as possible, challenges to the enforcement of the resulting award.

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