AN ANALYSIS OF THE GOVERNMENT'S SHIFT IN ARBITRATING PUBLIC PROCUREMENT CONTRACTS

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ABSTRACT

The article critically examines the Government of India's decision to move away from arbitration to mediation in public procurement contracts through the Ministry of Finance's Notification dated 03 June 2024. The paper analysis this through the eyes of pro arbitration jurisprudence put forth within the Indian legal system by various amendments to the Arbitration and Conciliation Act, 1996 and Judicial activism in this sphere through cases such as MTNL v Canara Bank and Vidya Drolia v Durga Trading Corporation. The paper also analyses its effects comparing it with the new Mediation Act, 2023. The article evaluates the reasoning given by the government to make this change such as cost, delay, finality and administrative ineffectiveness. The article argues that such a shift; while intending to reduce legitimate concerns it risks judicial backlogs, bureaucratic hurdles and reduces investor confidence. The articles conclude by putting for a more balanced approach and recommends a Med – Arb clauses and carve outs to increase efficiency and accountability that promotes India's goal to remain a global arbitration hub.

Introduction

Arbitration have changed from a rare mechanism of dispute resolution to the cornerstone of Indian commercial dispute settlement mechanism over the years. The primary statute that regulates the arbitration atmosphere in India is the Arbitration and conciliation (A&C) Act of 1996. The A&C Act of 1996 has had successive amendment in 2025, 2019 and 2021 to orient it to the global standard[1]. Even though such amendment aimed at creating India to a "global hub" in the arbitration sector a very divergent approach from the global stand was taken by the government on 03 June 2014[2]. The Ministry of Finance issued Office Memorandum No. F.1/2/2024-PPD, titled "Guidelines for Arbitration and Mediation in Contracts of Domestic Public Procurement," which recommends that arbitration no longer be routinely or automatically included in public procurement contracts.[3]

This article looks into four different aspects of the notification. Firstly, it examines the reasons for the introduction of these guidelines. Secondly, it reviews the status of public procurement contracts prior to this change, where legislative reforms and judicial precedents like MTNL V Canara Bank[4] heavily promoted party autonomy and ADR as the preferred method of justice. Thirdly, it details the effects of the notification, which restricts arbitration of disputes valued under Rs 10 crore[5]. Finally, it critically analyses whether the notification fulfils the intended goals of reducing litigation or if it introduces bureaucratic gatekeeping that undermines investor confidence. The article draws upon the Mediation Act, 2023 and rulings like Vidya Drolia v Durga Trading Corporation[6] and recommend suggestions for the future.

The rationale behind the change

The notification dated 03 June 2024 was a monumental change in the Indian domestic public procurement contract policy. This notification was brought in due to the unsatisfactory results

[1] Vasanth Rajasekaran, Harshvardhan Korada and Bhumika Indulia, 'Arbitration in Government Contracts: Party Autonomy versus Public Policy' (27 January 2025) https://blog.scconline.gen.in/post/2025/01/27/arbitration-in-government-contracts-party-autonomy-versus-public-policy/ accessed 8 January 2026.
[2] Saloni Jaiswal and Kabir Duggal, 'The Way Forward: An Analysis of India's New Guidelines for Arbitration and Mediation in Contracts of Domestic Public Procurement' (24 September 2024) https://aria.law.columbia.edu/the-way-forward-an-analysis-of-indias-new-guidelines-for-arbitration-and-mediation-in-contracts-of-domestic-public-procurement/ accessed 8 January 2026.
[3] Ministry of Finance, Guidelines for Arbitration and Mediation in Contracts of Domestic Public Procurement, Office Memorandum No F.1/2/2024-PPD (3 June 2024) https://doe.gov.in/circulars/guidelines-arbitration-and-mediation-contracts-domestic-publicprocurement-reg accessed 8 January 2026.
[4]Mahanagar Telephone Nigam Ltd v Canara Bank (2019) AIR SC 4449
[5] Ministry of Finance, Guidelines for Arbitration and Mediation (n 3)
[6] Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1

under arbitration of various contracts by various public sector undertakings (PSU).[7]

The primary reason for bringing in such a drastic change was due to the disconnect between theoretical advantages of arbitration such as speed, finality and cost effectiveness when compared to the practicality of dispute settlement in PSUs[8]. Although Arbitration clauses were incorporated to reduce cost and time, at least in high value dispute the opposite is found to be true[9]. The government observed that arbitration decisions were routinely appealed against showing that it just added an extra layer to the litigation process which is counter to what the process was intended.[10] Once of the main reason given for reason for appeal in the notification is that as the PSU contracts uses public money and is accountable to parliament unless a finality is attained through judicial review most judgement is reviewed[11]. The PSUs have frequent transfer of officials between various branches; this led to the new appointees being unaware about the history behind the disputes creating disadvantages for government sector undertaking as the private parties can take more informed decisions[12]. The final reasoning given by the government for the notification is that, when an arbitration clause exists within the contract the officials responsible for resolution instead of taking a pragmatic approach lets the dispute roll on to arbitration leading to inflated claims.[13]

The status prior to the notification

Before this notification arbitration was aggressively promoted and was the preferred method of dispute resolution in commercial contracts.[14] The prime minister and various other ministered focused on portraying India as a global epitome of arbitration and wanted to uphold India to global standards.[15] The various amendments in 2015[16], 2019[17] and 2021[18] along with judicial precedents like MTNL v Canara Bank promoted party autonomy for government entities to resolve disputes through arbitration[19]. To the contrary the supreme court upheld the

[7] Jaiswal and Duggal, 'The Way Forward' (n 2)
[8] Rajasekaran, Korada and Indulia, 'Arbitration in Government Contracts' (n 1)
[9] Ministry of Finance, Guidelines for Arbitration and Mediation (n 3)
[10] ibid
[11] ibid
[12] ibid
[13] ibid
[14] Rajasekaran, Korada and Indulia, 'Arbitration in Government Contracts' (n 1)
[15] Ibid
[16] Arbitration and Conciliation (Amendment) Act 2015
[17] Arbitration and Conciliation (Amendment) Act 2019.
[18] Arbitration and Conciliation (Amendment) Act 2021.
[19] Mahanagar Telephone Nigam Ltd v Canara Bank (2019) AIR SC 4449

idea of sovereign functions and public interest not to be arbitrated and only rights in personam are generally arbitrable.[20]

Effect of the notification on Public Procurement Contracts

The notification has drastically reduced the ambit of arbitration. Now the arbitration of public procurement contracts is only possible when the dispute value is under Rs. 10 crores[21]. The caveat here is that it not the value of contract and not value of the dispute. The arbitration clauses should no longer be included within the procurement contracts of PSUs which was a routine practice.[22] This is not a blanket ban on arbitration, the disputes for which the value exceeds rupees 10 crore the inclusion of arbitration clause requires careful application of mind, recording reasons and approval from the secretary or managing director.[23]Also, where arbitration is used for dispute resolution then the government mandates it shall be institutional arbitration over the ad hoc arbitral tribunals as this ensure procedural discipline and clarity.[24] The notification align profusely towards the incorporation of mediation clause within the procurement contracts over arbitration.[25] The notification also states that the mediation or negotiation shall be done through the assistance of retired judges or technical experts.[26]

Does the Notification achieve its goal

The intend of the notification seems to be well founded to go by trying to move towards mediation instead of arbitration. This intends to resolve most of the issues regarding cost, speed and responsibility of officials but the underlying reasons given for such a change wouldn't be justified by replacing one ADR mechanism with another.

The reasoning given in the guidelines regarding mediation again goes back to the question of cost for hiring experts which can be expensive, even the mediation settlement agreements can be challenged. When there existed a mediation or negotiation clause the officials would still call upon experts and move the burden from their head to that of the experts.

[20] Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1
[21] Ministry of Finance, Guidelines for Arbitration and Mediation (n 3)
[22] Rajasekaran, Korada and Indulia, 'Arbitration in Government Contracts' (n 1)
[23] Ministry of Finance, Guidelines for Arbitration and Mediation (n 3)
[24] ibid
[25] ibid
[26] Jaiswal and Duggal, 'The Way Forward' (n 2)

The guidelines states that in disputes over Rs 10 Crore the judicial courts are preferred over arbitration.[27] This creates the issue of backlogs, according to The New York Times [28] and The Times of India[29] there are at least 50 million cases pending in Indian courts and the Supreme Court in itself have added about 10,000 cases to it pending inventory. Adding up burden to this would only lead to reduction in the overall ease of doing business standard reduce the investor trust with the Indian procurement sector. This may also lead to chilling effects where officials avoid settlement altogether due to requirement of senior approval and vigilance enquiry fears.[30]

To reduce this, multiple alternatives should be preferred such as:

1- Instead of blanket ban, the government should mandate high value disputes to address accountability, cost and delays individually

2- Attempt at a join mediation arbitration clause where if mediation fails transition automatically into arbitration.

3- Rather than a Rs 10 crore cap on public procurement, a more pragmatic approach shall be taken where matters relating specific public interest such as national security, public infrastructure etc. shall be carved out.

4- Instead of litigation appellate bodies or review maybe done of the arbitral decision to look for genuine merits[31].

5- Also, if such a change is to be introduced as public procurement is not defined anywhere such a notification creates a blanket ban on multiple contracts. Therefore, such a change in arbitral proceedings should have ideally been an amendment to A&C Act or through judicial interpretation.[32]

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[27] ibid

[28] Sameer Yasir and Elke Scholiers, 'India's Court System Is Hopelessly Backed Up' *The New York Times* https://www.nytimes.com/2024/01/13/world/asia/india-judicial-backlog.html accessed 8 January 2026.

[29] Over 5 Crore Court Cases Pending, Government Tells Lok Sabha Times of India https://timesofindia.indiatimes.com/india/over-5-crore-court-cases-pending-government-tells-lok-sabha/articleshow/106032857.cms accessed 8 January 2026.

[30] Rajasekaran, Korada and Indulia, 'Arbitration in Government Contracts' (n 1)

[31] ibid

[32] Rudra Singh Krishna and Dhruv Maheshwari, 'Public Procurement Contracts in India: A Case for a Nuanced Approach towards Arbitrability' (27 October 2025) https://www.cadrnlud.in/post/public-procurement-contracts-in-india-a-case-for-a-nuanced-approach-towards-arbitrability accessed 8 January 2026.

Conclusion

The June 2024 Guidelines represent a pivotal turning point for the arbitrability of public procurement in India. By moving away from the routine inclusion of arbitration and imposing a Rs. 10 crore threshold the Government seeks to address its unsatisfactory experience with rising costs, delays, and a lack of finality in awards. This shift departs from the previous status where arbitration was the focus of commercial dispute resolution and risks diverting complex disputes back to a judiciary already burdened with millions of pending cases.

Critically, while the promotion of the Mediation Act, 2023, is a positive development, it should not result in the total sidelining of arbitration. To improve this framework and fulfil its intended goals, the State should move beyond arbitrary value caps and instead embrace "Med-Arb" clauses and institutional arbitration, which provide the accountability and structure the Government currently finds lacking.