

# New Guidelines for Arbitration and Mediation in Indian Public Procurement Contracts: An Overview for International Practitioners

## Introduction

The Government of India has recently introduced important guidelines for arbitration and mediation in domestic public procurement contracts, representing a shift in how disputes under such contracts are to be resolved. These changes are particularly relevant for construction professionals and legal practitioners involved in India's infrastructure and public sector projects.

## The Role of Arbitration in Indian Public Procurement

Arbitration has long been considered a favourable alternative to litigation in resolving construction and procurement disputes, offering potential advantages such as speed, flexibility, and technical expertise.

However, on 3 June 2024, the Procurement Policy Division of the Government of India published guidelines which demonstrated that, when it comes to disputes arising out of government contracts, arbitration has not been used to its full potential. This flows from the government's scepticism as to the effectiveness of arbitration as a dispute resolution mechanism. The guidelines highlight several ongoing challenges, including prolonged timelines, high costs, and concerns about arbitral decisions, especially when government entities are involved.

## Monetary Threshold for Arbitration: INR10 Crore Cap

One of the most significant changes in the guidelines is the introduction of a monetary threshold for government disputes eligible for arbitration. Pursuant to the guidelines, arbitration will generally be limited to disputes with a value under INR10 crore i.e., approx. USD 1.2 million. It is important to note that the monetary limit pertains to the value of disputes and not the value of the contract. This monetary limit



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reflects the government's desire to streamline the arbitration process and reserve it for smaller disputes where litigation might be unnecessarily cumbersome.

For larger disputes exceeding INR10 crore/ approx. USD 1.2 million, arbitration may only be considered if explicitly justified and approved by high-level government officials. This introduces an additional layer of scrutiny, with government departments needing to document the rationale for opting for arbitration over other dispute resolution methods, such as mediation or litigation.

This monetary cap is likely to surprise construction professionals accustomed to seeing arbitration routinely used in high-value disputes. Given the large contract sizes typically involved in infrastructure projects, these guidelines could potentially limit the scope for arbitration in many significant government contracts, particularly in sectors like transportation, energy, and public works. Clearly, from an international arbitration perspective, the new guidelines are disappointing as they limit the opportunities for disputes to be arbitrated where government contracts are concerned.

One silver lining is that the Government of India has also noted that, when there is a decision against the government or public sector enterprise, the decision to challenge or appeal arbitral awards should not be



taken in a routine manner. This might reduce the incidences of arbitral awards being appealed in the courts, saving both the parties from incurring additional legal costs and increasing the efficiency of the arbitral process in India.

## Focus on Mediation and Amicable Settlement

The new guidelines also promote mediation as an alternative dispute resolution method, encouraging government entities to attempt settling disputes through mediation or conciliation before resorting to arbitration or litigation. The Mediation Act, 2023, provides the framework for such proceedings, and the government highlights mediation's potential to achieve quicker, cost-effective resolutions without the adversarial nature of arbitration.

For high-value or complex disputes, the guidelines suggest the formation of High-Level Committees (HLCs) to assist in resolving disputes amicably. These committees could include retired judges or technical experts, promoting a balanced and pragmatic approach to settlement.

## Practical Implications for International Contractors and Legal Practitioners

For international construction companies and their legal teams involved in public procurement in India, these guidelines have several important implications:

1. **Increased use of mediation:** Given the government's push towards mediation, parties involved in public procurement may find themselves in mediated discussions more frequently.
2. **Limited arbitration for large contracts:** The monetary cap on arbitration means that many large-scale infrastructure projects will no longer have an arbitration clause by default. This will likely shift the focus towards other forms of dispute resolution.
3. **Institutional arbitration preferred:** Where arbitration is allowed, the guidelines express a preference for institutional arbitration to ensure better oversight and quality control, potentially making proceedings more reliable and transparent.
4. **Tailoring contracts accordingly:** Dispute resolution clauses in contracts of domestic public

procurement should be carefully drafted with these guidelines in mind.

## Conclusion

India's new guidelines for arbitration and mediation in domestic public procurement highlight the government's long-standing concerns over arbitration inefficiencies. Whilst the focus on seeking to resolve disputes amicably through mediation is positive, the guidelines are undoubtedly an unwelcome development for the international arbitration community. This has led lawyers in India and internationally to express concern about the guidelines and highlight the incongruence between the guidelines and the government's stated desire to promote India as an international arbitration hub. As one of the largest markets in the world for infrastructure and construction projects, international contractors and legal advisors should take note and appreciate the importance of adapting to the evolving legal landscape in India, particularly in relation to how disputes are resolved.

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