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ARBITRATION CLAUSES IN COMMERCIAL CONTRACTS: THE SHIFT FROM PROCEDURAL AFTERTHOUGHT TO DISPOSITIVE PRIORITY

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ABSTRACT

This article examines how arbitration clauses in Indian commercial contracts have ceased to be the boilerplate afterthoughts they once were and have instead become among the most consequential provisions that parties to any significant agreement will ever sign. Drawing on the statutory evolution from the Arbitration Act, 1940 through the 1996 Act¹ and its amendment cycles, on Supreme Court decisions that have steadily enlarged the legal force of arbitral commitments, and on comparative material from England, Singapore, and the United States, the article argues that the arbitration clause today is best understood as a dispositive provision — one that shapes not merely the forum in which disputes are heard but the substantive conditions under which commercial rights can be enforced². The article also engages with the criticisms this evolution has attracted and identifies institutional development as the most significant unfinished business in Indian arbitration reform.

¹ Arbitration Act, 1940, No. 10 of 1940, India Code (repealed 1996); Arbitration and Conciliation Act, 1996, No. 26 of 1996, India Code

² Gary B. Born, International Arbitration: Law and Practice § 5.02 (3d ed. 2021)

I. INTRODUCTION

There is a certain irony in the fact that the provision most likely to govern a major commercial dispute is also the provision most likely to have been drafted in five minutes—and yet, it is precisely this provision that often receives the least attention during contract negotiations³.

That is no longer a sustainable arrangement. Over the past three decades, Indian arbitration law has undergone a transformation so thorough that an arbitration clause must now be treated as a substantive provision demanding the same caliber of drafting attention as any material commercial term. Today, the arbitration clause determines the decision-makers, the procedural rules, the degree of finality, the availability of emergency relief, and, in some configurations, the very justiciability of particular claims.

What follows is an attempt to trace that transformation—through statute, through doctrine, and through the accumulation of judicial decisions that have progressively foreclosed the routes by which parties once escaped arbitral commitments they had agreed to but later found inconvenient. The comparative dimension is not incidental: the experiences of England, Singapore, and the United States illuminate both how far India has come and what remains undone. The article concludes with observations on drafting and on the real criticisms that the pro-arbitration trajectory has attracted.

II. WHERE THINGS STOOD: ARBITRATION UNDER THE 1940 ACT

To appreciate what the 1996 Act changed, it is necessary to have some sense of what preceded it. The Arbitration Act, 1940 regulated domestic arbitration in India for more than fifty years. However, for parties who wanted a quick and efficient resolution of disputes, the law often created difficulties because arbitration proceedings could be easily delayed or challenged. Courts had extensive powers to intervene and supervise the process at almost every stage, which often defeated the purpose of choosing arbitration as an alternative to

³ Dr. Parachant S. Desai, Arbitration Clause and International Contracts: An Analysis, MANUPATRA (2022), <https://articles.manupatra.com/article-details/Arbitration-Clause-and-International-Contracts-An-Analysis> (last visited on 06 June, 2026)

litigation. Before arbitration began, a party could challenge the agreement itself. Once arbitration was underway, a party dissatisfied with the proceedings could file a suit. After the award was rendered, a battery of grounds for challenge lay in wait. The net result was that an arbitration clause frequently delivered not efficient dispute resolution but a second, parallel litigation about whether dispute resolution should happen at all.

Asymmetric clauses that permit only one party to elect arbitration were a particular source of difficulty. Their validity was contested on the grounds that they lacked mutuality, and courts were divided on the question. The practical consequence was uncertainty: parties could not reliably predict whether a clause in their contract would be enforceable, making the clause itself a rather poor substitute for a genuine dispute-resolution mechanism.

The position in other jurisdictions was also evolving. In the United States, the Federal Arbitration Act had been in force since 1925, but for much of the mid-twentieth century, courts did not apply it as broadly as its language suggested. In England, courts have often been described as being hostile to arbitration during the eighteenth and nineteenth centuries, although recent scholarship has questioned whether this view is entirely accurate. What is clear, however, is that all three jurisdictions eventually moved in the same direction. From the 1990s onward, courts increasingly supported the enforcement of arbitration agreements and reduced judicial interference in the arbitral process.

III. THE 1996 ACT AND ITS AMENDMENTS: THE LEGISLATIVE FOUNDATION OF MODERN ARBITRATION IN INDIA

The enactment of the Arbitration and Conciliation Act, 1996 marked a conscious departure from the framework that had governed arbitration under the 1940 Act. Drawing heavily from the UNCITRAL Model Law⁴, the legislation sought to modernize Indian arbitration by reducing judicial interference and giving greater weight to the choices made by contracting parties. While certain modifications introduced into the Indian version of the Model Law later generated interpretive difficulties, the broader objective of the Act was clear: arbitration was to function with a greater degree of independence from the courts. This objective is particularly evident in Section 8⁵. The provision directs a judicial authority to refer parties to

⁴ UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, U.N. Doc. A/40/17, Annex I.

arbitration whenever a valid arbitration agreement exists and a request for reference is made before the filing of the first substantive statement in the dispute. By employing the word “shall,” Parliament left little room for judicial discretion. The mandatory nature of the provision was not the product of careless drafting; rather, it reflected a deliberate legislative choice to ensure that courts respected and enforced agreements to arbitrate.

Yet a statute’s effectiveness ultimately depends on whether the institutions applying it embrace its underlying philosophy. In practice, courts continued to scrutinize issues far beyond the existence of an arbitration agreement when deciding applications under Section 11⁶, often turning the appointment stage into prolonged litigation. The 2015 amendments sought to address this problem. By introducing Section 11(6A)⁷, Parliament limited the court’s role to a single question—whether a valid arbitration agreement existed—thereby preventing unnecessary delays and allowing arbitrations to commence more efficiently.

The 2019 amendment⁸ had two notable features. First, it introduced the Arbitration Council of India as a proposed central regulatory body with powers to grade arbitral institutions, accredit arbitrators, and promote institutional arbitration more broadly. Second, the Council remains non-operational—it has not been constituted as of 2026, nearly six years after enactment.

The 2024 Draft Amendment Bill⁹ seeks to resolve several issues that have troubled Indian arbitration for years. These include the recurring confusion between the concepts of “seat” and “venue,” the lack of fixed timelines for deciding applications under Sections 8 and 11, and the need to strengthen the powers of the Arbitration Council. If implemented effectively, these changes could reduce procedural delays and improve the efficiency of the arbitral process. Whether the Bill will be enacted and fully implemented, however, remains uncertain.

⁵ Arbitration and Conciliation Act, 1996, sec. 8, No. 26 of 1996 (India)

⁶ Arbitration and Conciliation Act, 1996, sec. 11, No. 26 of 1996 (India)

⁷ Section 11(6A)

⁸ Arbitration and Conciliation (Amendment) Act, 2019, §§ 43A–43M, No. 33 of 2019, IND. CODE.

⁹ Draft Arbitration and Conciliation (Amendment) Bill, 2024, India Ministry of Law & Justice (proposed), <https://lawmin.gov.in> (last visited June 08, 2026).

IV. DOCTRINAL FOUNDATIONS

A. Separability

The doctrine of separability means that an arbitration clause is treated as separate from the main contract in which it is included. As a result, even if the main contract is claimed to be invalid, cancelled, or unenforceable, the arbitration clause may still remain valid. Section 16 of the Arbitration and Conciliation Act, 1996 recognizes this principle and allows the arbitral tribunal to decide questions relating to its own jurisdiction, including the validity of the arbitration agreement. This principle is accepted in many countries. The United Kingdom Arbitration Act, 1996, the UNCITRAL Model Law, and the laws of countries such as Singapore all recognize that an arbitration clause can survive even if the main contract is challenged. A similar view was taken by the United States Supreme Court in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co*¹⁰.

Before the 1996 Act, parties could often avoid arbitration simply by challenging the main contract. The doctrine of separability prevents this. Unless the arbitration clause itself is specifically challenged, disputes will generally still be referred to arbitration.

B. Kompetenz-Kompetenz

The principle of kompetenz-kompetenz is closely connected to separability. It means that the arbitral tribunal has the authority to decide whether it has jurisdiction to hear a dispute. Section 16 of the 1996 Act¹¹ gives this power to the tribunal.

This does not mean that courts have no role. A tribunal's decision on jurisdiction can still be reviewed by a court under Section 34¹². However, the principle ensures that the tribunal gets the first opportunity to decide jurisdictional issues. Court intervention comes later, allowing the arbitration process to proceed without unnecessary delays at the initial stage.

¹⁰ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)

¹¹ Arbitration and Conciliation Act, 1996, sec.16, No. 26 of 1996 (India)

¹² Arbitration and Conciliation Act, 1996, sec.34, No. 26 of 1996 (India).

V. THE SUPREME COURT'S ROLE: DOCTRINE TESTED UNDER PRESSURE

A. BALCO¹³: Drawing the Territorial Line

Few decisions have done more to clarify the structural position of Indian arbitration law than the Constitution Bench judgment in *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services, Inc.* The problem addressed was a persistent one: before BALCO, Indian courts asserted supervisory jurisdiction under Part I of the 1996 Act over arbitrations seated abroad. A contract choosing London as the seat of arbitration was still, paradoxically, exposed to interim orders and validity determinations from Indian courts. This produced exactly the kind of unpredictability that institutional arbitration is designed to eliminate.

The Constitution Bench brought this to an end. Holding that Part I of the Act applies exclusively to India-seated arbitrations, the Court aligned Indian practice with the territorial principle that is standard across major arbitration jurisdictions. The selection of the seat within the arbitration clause ceased to be a formality and became, instead, a choice with direct and concrete legal consequences.

B. Amazon v. Future Retail: Enforcing the Emergency¹⁴

The issue before the Supreme Court was whether an emergency arbitrator's order could be enforced under Indian law. Amazon had obtained an emergency order under the SIAC Rules to stop Future Retail's proposed deal with the Reliance Group, but Future Retail argued that the Arbitration and Conciliation Act, 1996 did not recognize emergency arbitrators. The Supreme Court disagreed and held that such orders are enforceable in India when the parties have chosen institutional arbitration rules that provide for emergency relief. The decision strengthened party autonomy and clarified that arbitration clauses can offer important interim protection even before the main arbitral tribunal is constituted.

The *Amazon v. Future Retail* litigation also brought into sharp focus another significant development in Indian arbitration jurisprudence: the Group of Companies doctrine. This

¹³ *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services, Inc.*, (2012) 9 SCC 552 (India).

¹⁴ *Amazon.com NV Investment Holdings LLC v. Future Retail Ltd.*, (2022) 1 SCC 209 (India).

judicially evolved principle, borrowed from French jurisprudence¹⁵, permits non-signatory affiliates within a corporate group to be bound by an arbitration agreement where the facts demonstrate a common intention of the parties to arbitrate. The doctrine does not rest on corporate affiliation alone; rather, it requires evidence of active involvement, such as participation in negotiations, contribution to performance, or assumption of obligations. While the Delhi High Court in the Amazon litigation declined to invoke the doctrine against Future Retail on the facts of that case, the Supreme Court subsequently affirmed its validity in Indian law. In *Cox and Kings Ltd. v. SAP India Pvt. Ltd. (2023)*¹⁶, a five-judge Constitution Bench unanimously held that the Group of Companies doctrine forms part of Indian arbitration jurisprudence, empowering courts and tribunals to bind non-signatories in appropriate cases. The Court clarified that the decisive factor is the mutual intention of the parties, to be inferred from conduct such as “materially participating in the negotiation and performance” of the transaction, rather than mere corporate relationship. This development underscores the growing complexity of arbitration in multi-party commercial arrangements and reinforces the article's central thesis that arbitration clauses today carry dispositive weight extending well beyond the signatories to the contract.

C. Offshore Infrastructures v. BPCL¹⁷: Saving the Clause from Its Own Defects

In the recent decision in *Offshore Infrastructures Ltd. v. Bharat Petroleum Corporation Ltd.*, the court addressed a problem that affects many Indian commercial contracts executed before 2015: the arbitration clause designated the Managing Director of BPCL as the sole arbitrator, an arrangement that the 2015 amendments rendered impermissible under Section 12(5) and the Seventh Schedule. BPCL argued, not unreasonably, that this invalidity infected the entire arbitration clause and made it inoperative. The Supreme Court did not accept this argument. It held that even if the method of appointing an arbitrator was invalid, the parties' agreement to resolve disputes through arbitration remained valid. The defective part of the clause could be separated, while the main intention to arbitrate could still be enforced. This approach is particularly important for older contracts that contain similar appointment provisions. The

¹⁵ Dow Chem. France v. ISOVER Saint Gobain, ICC Interim Award No. 4131, 9 Y.B. Com. Arb. 131 (1984), <https://www.trans-lex.org/204131> (last visited on 09 June, 2026)

¹⁶ Cox & Kings Ltd. v. SAP India (P) Ltd., 2023 SCC OnLine SC 1634

¹⁷ Offshore Infrastructures Ltd. V. Bharat Petroleum Corp. Ltd., 2025 INSC 1196, 2025 SCC OnLine SC 845 (India).

decision reflects the courts' broader tendency to preserve arbitration agreements wherever possible rather than declare them invalid altogether.

VI. COMPARATIVE PERSPECTIVE

A. England and Wales

The United Kingdom Arbitration Act 1996 is widely regarded as one of the most coherent arbitration statutes in the common law world. Section 6¹⁸ defines an arbitration agreement in deliberately broad terms as an agreement to submit present or future disputes to arbitration. The Act explicitly declares that parties are free to agree on how their disputes are resolved, subject to minimum safeguards, and that courts should not intervene except as the Act provides. This legislative posture is matched by a judicial culture that has consistently treated arbitration as a primary dispute resolution mechanism rather than a competitor to the courts. London remains one of the world's leading arbitral seats. **The London Court of International Arbitration reported 362 new referrals in 2024, of which 318 were arbitrations conducted under the LCIA Rules¹⁹.** The figures reflect not merely geographical convenience but institutional confidence that English courts will enforce what parties have agreed.

B. Singapore

Singapore offers the most instructive comparison for Indian arbitration practitioners, particularly those focused on reform. Both jurisdictions share a common law heritage, a Model Law foundation, and similar commercial environments. Singapore's International Arbitration Act closely follows the Model Law and requires courts to stay domestic proceedings in favor of arbitration unless the agreement is null and void, inoperative, or incapable of being performed—the standard New York Convention²⁰ formulation. **The SIAC handled 625 new cases in 2024, 91% of which were international, with parties drawn from 72 jurisdictions²¹.** Indian parties featured prominently in that caseload, which is both a

¹⁸ Arbitration Act 1996, c 23, § 6

¹⁹ LONDON COURT OF INTERNATIONAL ARBITRATION, 2024 ANNUAL CASEWORK REPORT (2025), <https://www.lcia.org> (last visited June 8, 2026)

²⁰ New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

compliment to Singapore's system and a pointed comment about Indian parties' confidence in their own country's institutions. When sophisticated Indian commercial parties choose Singapore as the seat of international contracts, they are expressing a preference that the Indian reform agenda must take seriously.

C. The United States of America

The American approach to arbitration enforcement is notable for its reach. The Federal Arbitration Act²² declares arbitration agreements valid, irrevocable, and enforceable on the same terms as any other contract, and the Supreme Court has interpreted this provision with considerable vigor: preempting state laws that disfavor arbitration, upholding class-action waivers, and enforcing delegation clauses that commit even questions of the arbitration agreement's own enforceability to the arbitrator rather than the court.

Delegation clauses remain contested. Courts in some jurisdictions continue to exercise greater oversight, especially in cases involving consumers, employees, or other parties with weaker bargaining power. This reflects a concern that such parties may not have genuinely agreed to every aspect of the arbitration process. Whether this approach strikes the right balance is open to debate. Supporters see it as necessary protection, while critics argue that it undermines the principle of party autonomy. Much depends on the nature of the parties and the circumstances in which the agreement was made.

D. The Institutional Gap

A comparison with leading arbitration jurisdictions shows that good arbitration depends on more than just good laws. Countries such as England and Singapore have built strong arbitration systems through experienced arbitral institutions, skilled arbitrators, efficient case management, and a legal culture that views arbitration as a primary method of dispute resolution. India has a modern arbitration law, but its institutional framework is still developing. Although the 2019 amendment proposed the establishment of the Arbitration Council of India to promote and regulate institutional arbitration, the Council has not yet

²¹ SINGAPORE INTERNATIONAL ARBITRATION CENTRE, 2024 ANNUAL REPORT (2025), <https://www.siac.org.sg> (last visited June 8, 2026).

²² Act of Feb. 12, 1925, ch. 213, 43 Stat. 883 (codified as amended at 9 U.S.C. § 2 (2018))

become fully operational. As a result, ad hoc arbitration continues to dominate, often resulting in delays and inconsistent practices. Institutions such as the Delhi International Arbitration Centre (DIAC) and the Mumbai Centre for International Arbitration (MCIA) have made important contributions. The 2024 Draft Amendment Bill seeks to address these issues, but creating a strong arbitration culture will require more than legislative reform. It will also depend on effective institutions, professional expertise, and greater confidence in institutional arbitration.

VII. WHAT THIS MEANS FOR DRAFTING

The growing importance of arbitration means that arbitration clauses can no longer be treated as routine boilerplate. A poorly drafted clause can create serious problems when a dispute arises. At a minimum, parties should clearly specify the seat of arbitration, the governing law, the number and method of appointment of arbitrators, the arbitral institution and rules, the language of proceedings, and the availability of interim relief. Recent practice in India shows a clear preference for institutional arbitration over ad hoc arbitration. Well-drafted clauses now commonly identify a specific arbitral institution and incorporate its rules, providing greater certainty and efficiency²³. Another important trend is the use of tiered dispute resolution clauses, which require negotiation or mediation before arbitration. However, such clauses must be drafted carefully, with clear timelines and procedures, as vague requirements for “good faith negotiations” have often led to further disputes instead of resolving them.

Parties should also consider including provisions for emergency arbitration and interim relief, especially in commercial transactions where urgent protection may be required before the arbitral tribunal is constituted. The Supreme Court's recognition of emergency arbitrator awards has made such clauses increasingly valuable. Finally, the appointment mechanism must be drafted with care. Clauses giving one party excessive control over the appointment of arbitrators may be held invalid under current law. A neutral and balanced appointment process not only ensures enforceability but also strengthens confidence in the fairness of the arbitration process.

²³ Standard ICC Arbitration Clauses, INT’L CHAMBER OF COM. (Nov. 1, 2016), <https://2go.iccwbo.org/explore-our-products/standard-icc-arbitration-clause-in-english.html> (last visited June 9, 2026).

VIII. CONCERNS ABOUT ARBITRATION

Despite its advantages, arbitration is not without criticism. First, arbitration can be expensive. Institutional fees, arbitrator fees, and legal costs may make the process unaffordable, particularly for small and medium-sized businesses. In some cases, the cost of arbitration may even discourage parties from pursuing their claims²⁴.

Second, arbitration is generally confidential. While this protects sensitive business information, it also means that arbitral awards are rarely published. Unlike court judgments, they do not create precedents or provide guidance for future disputes, which can reduce transparency and legal certainty.

Third, there is often an imbalance between the parties. Large corporations that frequently use arbitration are usually familiar with the process and have greater resources, while smaller parties may be participating for the first time. This imbalance becomes more significant when arbitration clauses are included as standard terms and are not genuinely negotiated. Although legal reforms have improved arbitrator neutrality, concerns about unequal bargaining power continue²⁵.

Fourth, and perhaps most significantly for the Indian context, the efficiency gained at the arbitral stage is often undermined by prolonged enforcement challenges under Section 34 of the 1996 Act. While courts have progressively restricted the grounds for setting aside awards, crowded dockets mean that a successful arbitral party may still wait years before obtaining a final enforceable decree. This delay risks turning the arbitration clause's dispositive power into a pyrrhic victory—and remains the single most pressing practical concern for commercial parties choosing arbitration in India.

²⁴ Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility*, 61 Emory L.J. 941 (2012).

²⁵ Luis E. Dates, Joaquim Tavares de Paiva Muniz, María Angélica Burgos & Alfonso Cortez-Fernández, *Arbitration Clauses in Adhesion and Commercial Contracts*, in *THE GUIDE TO INTERNATIONAL ARBITRATION IN LATIN AMERICA* (José Astigarraga ed., 4th ed. 2025), <https://globalarbitrationreview.com/guide/the-guide-arbitration-in-latin-america/fourth-edition> (last visited on 09 June, 2026)

CONCLUSION

Over the last three decades, arbitration in India has evolved from being a simple dispute resolution mechanism to becoming a central part of commercial contracts. Legislative reforms and judicial decisions have consistently strengthened the enforcement of arbitration agreements and reduced unnecessary court interference. While India now has a strong legal framework for arbitration, further development of institutions and professional infrastructure is still needed to make the system more effective in practice. The key lesson for businesses and lawyers is clear: an arbitration clause should never be treated as standard boilerplate. It determines how disputes will be resolved, who will decide them, and what remedies will be available. Careful drafting at the contract stage can save significant time, cost, and uncertainty in the future.