



## THE WBNUJS CENTRE FOR ARBITRATION

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1. **Centre Title:** WBNUJS Centre for Arbitration, West Bengal National University of Juridical Sciences, Kolkata, India.
2. **Arbitration in India** – The Arbitration and Conciliation Act, 1996 is based on the UNCITRAL Model law on International Commercial Arbitration, to bring India in line with the best arbitral practices of the world. The Act is divided into several parts where Part I (deals with domestic arbitration), Part IA (establishes the Arbitral Council of India) and Part II (deals with International arbitration). Part I and Part II of the Act provides various stages of an arbitration, from its initiation, to the selection of arbitrators, and the passing and enforcement of the award. This Act also governs the degree of judicial interventions that would be allowed during an arbitration. Part II of the Act states that since India is also a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, it allows companies to engage in foreign arbitration with the knowledge that the Indian court system will enforce awards as a decree of the court.

Investment arbitration too has gained popularity in the recent past. Since the country's liberalization in 1991, India has steadily become one of the largest recipients of Foreign Direct Investment (FDI) in the world, with FDI reaching \$44.4 Billion in the fiscal year 2018-19. This increase in the number of foreign investors also increase the need for a more robust investor state dispute resolution mechanism. The dispute resolution mechanism for foreign investors is governed by the bilateral investment treaty (BIT) that is signed between the host country (India) and the country of the investor. But in 2016 India adopted a new Model BIT which severely reduced the protection that was offered to foreign investors. This Model BIT formed the basis of only one BIT that India subsequently entered into after 2016. And so, in 2020, India signed a BIT with Brazil with a significant deviation from the model BIT, especially with regard to the dispute resolution process.

India has an estimated 31 million cases pending in various courts. As of December 2015, there were 59,272 cases pending in the Supreme Court of India, around 3.8 million cases pending in the High Courts and around 27 million pending cases before the subordinate judiciary. 26% of all these cases i.e. more than 8.5 million, are more than 5 years old. The dispute resolution process has a huge impact on the Indian economy and global perception on "doing business" in India. This is clearly reflected in the World Bank ratings on 'Ease of doing Business 2016' where India ranked 131 out of 189 countries. According to the

World Bank, India takes as much as 1,420 days and 39.6% of the claim value for dispute resolution.

3. **Need for WBNUJS Centre for Arbitration:** Currently as it stands, the government can better optimise the use of the wealth of intellectual resources that are the premier law universities of this country in the field of arbitration. While other law universities have arbitration centres, they do not involve collaboration with the Government of India in the policy space within their scope of activities. While the Department of Justice has reached out to WBNUJS at different times, creating a centre will allow for streamlining these already existing relationships.

The WBNUJS Centre for Arbitration will be dedicated to working with the government, independent arbitral institutions and practitioners to help develop legislations and policies in the field of arbitration. The Centre will act as a research body (consisting of both academicians and practitioners to allow for a comprehensive perspective) to help the government in the drafting of more progressive laws that are in line with international best practices. It will also be actively involved in the creation of frameworks that will allow for the adoption of newer technologies such as artificial intelligence and block chain, as applied to the Indian arbitration field.

The Centre with its robust research methodologies will allow India to align its arbitral practices with international standards, thereby attracting capital to the country through arbitral fees.

The arbitration mechanism in India is going through an inflection point, with the introduction of new amendments to the Arbitration Act and the newly signed bilateral investment treaty with Brazil. The establishment of this centre will act as a think tank for facilitating the positioning of India as a world leader in all forms of arbitration.

NUJS with its well-established culture of involvement in dispute resolution is in a strategic place to be one of the foremost Indian law universities to act alongside the government, helping it to design globally aligned policies in arbitration.

#### 4. **Objectives:**

- NUJS Centre for Arbitration seeks to be the foremost arbitration research body that collaborates with the government to make India a premier destination for arbitration.  
(See *Annexure I*)

- Achieving the above through creating an arbitration friendly environment by helping redesign the Arbitration and Conciliation Act and Arbitration clauses in various international treaties.
- Collaborating with Indian arbitral institutes and practicing professionals to gather real time data to suggest changes to the Indian legislative framework with regards to arbitration.
- Liaising with the proposed Arbitral Council of India to help with the council's functions of framing policies for grading arbitral institutions and accrediting arbitrators and helping in the creation and curation of a digital database consisting of arbitral awards made in India and abroad.
- Making the Indian arbitration framework more future ready through liaison with premier technological institutes to incorporate newer technologies like artificial intelligence and blockchain.
- Becoming an important stakeholder in the discussions surrounding the implementation of legislations and executive action in the field of arbitration.

5. **Structure**: The Centre will comprise of:

- Vice Chancellor
- Chief Coordinator – Responsible for the overall functioning of the Centre alongside liaising with the Department of Justice and the University Administration and overseeing the research work.
- Student Coordinator – Responsible for day to day liaison with the Department of Justice and facilitating the effective functioning of research assistants.
- Research assistants (who could either be professionals or students) – Conducting time bound, project specific research work in all fields of arbitration.

## **PROPOSED ACTIVITIES OF THE CENTRE**

### 1) **Suggesting changes to the Arbitration and Conciliation (Amendment) Act, 2019**

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The Arbitration and Conciliation (Amendment) Act, 2019 which received the presidential assent on the 9<sup>th</sup> of August, 2019 introduced certain provisions that take away from India's objective of being a global arbitration centre. Provisions like the introduction of qualification of arbitrators would decrease the quality of arbitrators that would be allowed to participate in arbitrations seated in India. With this background the centre would create a research paper after conducting a thorough academic analysis followed by an extensive survey to propose changes to the Arbitration and Conciliation Act.

2) **Suggesting changes to the investor state dispute resolution mechanism as proposed under the Brazil- India BIT -**

The investment arbitration scenario in the world is changing rapidly and India with the adoption of the Brazil-India BIT has shown that there exist other methods for the resolution of investor state disputes. While this method has created waves in the international sphere it is still remains to be seen whether such a methodology will be effective or not. In this backdrop, the centre will carry out an empirical study of the same to determine whether the new dispute resolution mechanism adopted by the Brazil-India BIT should be replicated in other subsequent bilateral investment treaties. (*Annexure 2*)

3) **Understanding the enforcement of smart contracts (or other blockchain related contracts) in India –**

The commercial world has started to adopt blockchain technology in various parts of their business models. With the recent supreme court judgement overturning the cryptocurrency ban (*Annexure 3*), there will be greater impetus for Indian and foreign parties to create smart contracts that are based in blockchain technology. While the proliferation of smart contracts will increase, the Arbitration and Conciliation Act is not equipped to handle arbitration disputes arising out of such contracts. For example, the issues in the understanding of seat and venue in the arbitration act would be the first hurdle for parties to overcome in order to initiate arbitration in India, since the smart contract by nature is de-centralized. Firstly, the centre proposes to undertake relevant research to understand the workings of smart contracts and the fundamental principles on which these contracts are created. Secondly, to make the enforcement mechanism in India ready when such contracts become the mainstay of the commercial world.

4) **Impact of CoViD – 19 on arbitrations in India –**

The unprecedented situation of CoViD-19 has created havoc across many sectors of the country. Due to the ensuing lockdown, violations of timelines and issues related to interim measures both in domestic and international arbitrations is expected. Since such a pandemic

has not been witnessed by the world in recent history, there are a lot of issues in arbitration that need to be examined in light of the new situation. The centre will create a research paper on short- and long-term effects of the CoViD crisis on arbitration. This would include how situations like CoViD will be dealt by countries and their arbitration regimes along with proposals for the parties to make sure that their dispute resolution clauses are not easily circumvented by such situations.

## **GUIDELINES FOR THE FUNCTIONING OF THE CENTRE**

1. **Appointment of Student co-ordinator** – A student coordinator will be appointed by the Chief Co-ordinator for a term of one year.
  
2. **Research assistants** (“RA”)–
  - (a) Appointments for this post will be based on the requirements for specific project/projects.
  - (b) The selection of the student RAs for a project will be done jointly for the Chief coordinator and the student coordinator.
  - (c) The selection will be done of students that have an active interest in the field of arbitration.
  - (d) The appointment of non-student RAs will be by invitation to the experts in the field of arbitration.
  
3. **Meetings** –
  - (a) Monthly meeting of the Chief co-ordinator and the Student co-ordinator to discuss the ongoing projects and future engagements.
  - (b) Quarterly meeting of the Chief Co-ordinator and Student co-ordinator with the research assistants to track progress of undertaken projects.

- (c) Meetings on urgent basis can also be called for anytime by the Chief co-ordinator.
4. **Engagement with the Department of Justice** – It is proposed that there be a biannual meeting of the two bodies wherein an assessment of the work accomplished over the last six months is reviewed. Allotment of fresh research work will also be undertaken at these meetings.
  5. **Engagement with non-governmental Arbitral Institutes and private practitioners** – It is proposed that meeting with representatives of these institutes be held for real time data collection on roadblocks faced by the arbitrating parties with regards to the Indian arbitration legislation and frameworks as per need.

## **ANNEXURE 1**

### **Guidelines of the Scheme for Action Research and Studies on Judicial Reforms –**

Under the Scheme for Action Research and Studies on Judicial Reforms, financial assistance shall be extended for undertaking action research evaluation / monitoring studies, organising seminars / conferences / workshops, capacity building for research and monitoring activities, publication of report/material, promotion of innovative programmes/activities the areas of Justice Delivery, legal Research and judicial Reforms. Objectives: The objectives of the scheme are to promote research and studies on the issues related to the National Mission for Justice Delivery and Legal Reforms being implemented by the Department of Justice.

### **Eligible Implementing agencies**

Indian Institute of Public Administration, Administrative Staff College of India, Indian Institute/s of Management, Indian Law Institute, National Law Universities, National Council of Applied Economic Research, National Judicial Academy, State Judicial Academies and other reputed institutions working in the field of justice delivery, legal education and research and judicial reforms. The Project Sanctioning Committee shall be empowered to allow any Government or Government aided Institute/Organisations eligible implementing agency, if found suitable for undertaking project/activity permissible under the scheme.

## **An Indicative list of topics for action research and studies on judicial reform**

Alternate Dispute Resolution

Study on bottlenecks in the organisations and functioning of ADRs

Please find the rest of the notification at the link mentioned below -

[https://doj.gov.in/sites/default/files/Action%20Research\\_0.pdf](https://doj.gov.in/sites/default/files/Action%20Research_0.pdf)

### **ANNEXURE 2**

#### **BRAZIL – INDIA BIT (Relevant Articles)**

Article 13

Joint Committee for the Administration of the Treaty

13.1 For the purpose of this Treaty, the Parties hereby establish a Joint Committee for the administration of this Treaty (hereinafter referred as "Joint Committee").

13.2 This Joint Committee shall be composed of government representatives of both Parties designated by their respective Governments.

13.3 The Joint Committee shall meet at such times, in such places and through such means as the Parties may agree. Meetings shall be held at least once a year and co-chaired by the Parties.

13.4 The Joint Committee shall have the following functions and responsibilities:

- a) supervise the implementation and execution of this Treaty;
- b) discuss and make known opportunities for the expansion of mutual investment;
- c) coordinate the implementation of the mutually agreed cooperation and facilitation agendas;

- d) consult with investors and relevant stake-holders, when applicable, on their views on specific issues related to the work of the Joint Committee;
- e) discuss issues and seek to resolve disputes concerning investments of investors of a Party in an amicable manner; and
- f) supplement the rules for arbitral dispute settlement between the Parties.

13.5 The Joint Committee may establish ad hoc working groups, which shall meet jointly or separately from the Joint Committee. The ad hoc working groups may invite participation from investors.

13.6 The Joint Committee shall establish its own rules of procedure.

## Article 18

### Dispute Prevention Procedure

18.1 If a Party considers that a specific measure adopted by the other Party constitutes a breach of this Treaty, it may invoke this Article to initiate a dispute prevention procedure within the Joint Committee.

18.2 The following rules apply to the aforementioned procedure:

- a) To initiate the procedure, the interested Party shall submit a written request to the other Party, identifying the specific measure in question, and informing the findings of fact and law underlying the submission. The Joint Committee shall meet within ninety (90) days from the date of the request;
- b) The Joint Committee shall have one hundred and twenty (120) days from the date of the first meeting, extendable by mutual agreement, to evaluate the submission presented and to prepare a report;
- c) The report of the Joint Committee shall include:
  - i) Identification of the submitting Party;

ii) Description of the measure in question and the alleged breach of the Treaty;  
and

iii) Findings of the Joint Committee.

d) In the event that the dispute is not resolved upon the completion of the time frames set forth in this Article, or there is non-participation of a Party in the meetings of the Joint Committee convened according to this Article, the dispute may be submitted to arbitration by a Party in accordance with Article 19 of the Treaty.

18.3 If the measure in question pertains to a specific investor, the following additional rules shall apply:

a) the initial submission shall identify the affected investor;

b) representatives of the affected investor may be invited to appear before the Joint Committee; and

c) a Party may deny submission to the dispute prevention procedure matters pertaining to a specific investor which have been previously submitted by that investor to other dispute settlement mechanisms, unless those proceedings are withdrawn from other dispute settlement mechanisms.

18.4 Whenever relevant to the consideration of the measure in question, the Joint Committee may invite other interested stakeholders to appear before the Joint Committee and present their views on such measure.

18.5 The meetings of the Joint Committee and all documentation, as well as steps taken in the context of the mechanism established in this Article, shall remain confidential, except for the report submitted by the Joint Committee, subject to the law of each of the Parties.

## Article 19

### Disputes between Parties

19.1 Any dispute between the Parties which has not been resolved after being subject to the Dispute Prevention Procedure may be submitted by either Party to an ad hoc Arbitral Tribunal, in accordance with the provisions of this Article. Alternatively, the Parties may choose, by mutual agreement, to submit the dispute to a permanent arbitration institution for settlement of investment disputes. Unless the Parties decide otherwise, such institution shall apply the provisions of this Part.

19.2 The purpose of the arbitration is to decide on interpretation of this Treaty or the observance by a Party of the terms of this Treaty. For greater certainty, the Arbitral Tribunal shall not award compensation.

19.3 A Tribunal constituted under this Article shall examine matters related to Part I, Part 11 (excluding Articles 8 and 10.1), Article 16, Article 21, and Part VII of this Treaty.

19.4 Such a Tribunal shall be constituted for each individual case in the following way: within two (2) months of the receipt of the request for arbitration, each Party shall appoint one member of the Tribunal. Those two members shall then select a national of a third State who, on approval by the two Parties, shall be appointed Chairman of the Tribunal. The Chairman shall be appointed within two (2) months from the date of appointment of the other two members.

19.5 If within the periods specified in Article 19.4 the necessary appointment(s) have not been made, either Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make any necessary appointment(s). If the President is a national of either Party or if he or she is otherwise prevented from discharging the said function, the Vice President shall be invited to make the necessary appointment(s). If the Vice President is a national of either Party or if he or she too is prevented from discharging the said function, the member of the International Court of Justice next in seniority who is not a national of either Party shall be invited to make the necessary appointment(s).

19.6 Arbitrators must:

- a) have the experience or expertise in Public International Law/ international investment rules or international trade, or the resolution of disputes arising in relation to international investment agreements;

b) be independent of and not be affiliated, directly or indirectly, with any of the Parties or with the other arbitrators or potential witnesses nor take instructions from the Parties; and

c) comply with the code of conduct detailed in Annex 11, or any other standard of conduct established by the Joint Committee.

19.7 The arbitral tribunal shall reach its decision by a majority of votes. Such decision shall be binding on both Parties, who shall, in accordance with its law, comply with it without delay.

19.8 The Parties to the arbitration shall share the costs of the arbitration/ including the arbitrator fees, expenses/ allowances and other administrative costs. Each Party shall bear the cost of its representation in the arbitral proceeding. The Tribunal may, however, in its discretion direct that the entire costs or a higher proportion of costs shall be borne by one of the two disputing Parties and this determination shall be binding on both disputing Parties.

19.9 The Tribunal shall decide all questions relating to its competence and/ subject to any agreement between the disputing Parties, determine its own procedure, taking into account the PCA Optional Rules.

Please find the rest of the BRAZIL – INDIA BIT at the link mentioned - <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5912/download>

### **ANNEXURE 3**

***Internet and Mobile Association of India v. Reserve Bank of India (Writ Petition (Civil) No.373 of 2018)***

The Minister of Finance, in his budget speech said that the Government did not consider crypto currencies as legal tender or coin and that all measures to eliminate the use of these currencies in financing illegitimate activities or as part of the payment system, will be taken by the Government. However, he also said that the **Government will explore the use of blockchain technology proactively for ushering in digital economy.**

**The blockchain technology they use does have some important advantages in controlling fraud and maintaining privacy**

Please find the rest of the abovementioned judgment at the link mentioned below –

[https://main.sci.gov.in/supremecourt/2018/19230/19230\\_2018\\_4\\_1501\\_21151\\_Judgement\\_04-Mar-2020.pdf](https://main.sci.gov.in/supremecourt/2018/19230/19230_2018_4_1501_21151_Judgement_04-Mar-2020.pdf)