ARBITRATION BAR OF INDIA

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To,

Smt. Nirmala Sitharaman
Hon'ble Union Minister of Finance,
Ministry of Finance,
Government of India,
Room No. 134,
North Block, New Delhi

Sub: Representation in respect of Office Memorandum No. F.1/2/2024-PPD dated 03.06.2024
Ref: Guidelines for Arbitration and Mediation in Contracts of Domestic Public Procurement dated 03.06.2024 ("**Memorandum**")

Dear Ma'am,

1. We write on behalf of the Arbitration Bar of India[1] and Indian Arbitration Forum[2] which are professional associations of leading arbitration practitioners committed to encouraging best practices in arbitration, streamlining the conduct of arbitration and promoting arbitration as an effective means of dispute resolution in India and abroad.

2. We write expressing our grave concern over the Memorandum issued by the Department of Expenditure – Procurement Policy Division and its recommendations/observations vis-à-vis arbitration.

3. You would note that in the valedictory speech delivered at the National Initiative towards Strengthening Arbitration and Enforcement in India, the Hon'ble Prime Minister had stated[3], *"Creation of a vibrant ecosystem for institutional arbitration, is one of the foremost priorities of our government… An enabling alternate dispute resolution ecosystem is a national priority for India. We need to promote India globally as an arbitration hub."*. This has been passionately supported by the Hon'ble Minister of Law and Justice[4] who stated, *"trade, industry, commerce and investment can only thrive when the State policy provides a conducive business environment to the stakeholders along with a robust dispute resolution mechanism."*. The Hon'ble Minister for External Affairs, while inaugurating the Arbitration Bar of India has reiterated[5], *"…the importance of arbitration in facilitating international trade and*

[1] https://arbitrationbarofindia.com/
[2] https://indianarbitrationforum.com/
[3] https://pib.gov.in/newsite/PrintRelease.aspx?relid=151887
[4] https://legalaffairs.gov.in/sites/default/files/speech.pdf
[5] https://www.mea.gov.in/Speeches-Statements.htm?dtl/37808/Remarks_by_EAM_Dr_S_Jaishankar_at_the_inauguration_of_Arbitration_Bar_of_India

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investment. By providing a stable and predictable dispute resolution mechanism, we see it as fostering confidence among foreign investors.".

4. The suggestions in the Memorandum in respect of arbitration do not align with the stated intent of this government to promote this mechanism of alternate dispute resolution.
    a. To suggest that arbitration *"should not be routinely or automatically included in procurement contracts/tenders, especially in large contracts."* undermines the various measures taken by this government to promote arbitration.
    b. It is concerning that the Memorandum suggests that *"arbitration (if included in contracts) may be restricted to disputes with a value less than Rs. 10 crores."*. This would lead to the exclusion of a majority of disputes from the purview of arbitration and would simply increase the burden on courts.

    The Memorandum reverses the object and intent expressed by the Hon'ble Prime Minister and Hon'ble Minister of Law and Justice to promote arbitration and reduce the burden on the courts.

5. Arbitration as a form of dispute resolution is a key ingredient to Ease of Doing Business. This government's efforts including the 2015 reforms to the arbitration law contributed to a spurt in India's rankings in the World Bank's index. The Hon'ble Prime Minister has expressed, *"Recent trends indicate that Asian centers like Hong Kong and Singapore have emerged as preferred arbitration destinations. As popular business hubs, they also rank high in the levels of Ease of Doing Business. Thus, availability of quality arbitration mechanisms is an integral component of Ease of Doing Business, to which our government is committed."* The Memorandum distances itself from this commitment and will negatively impact investment. A potential impact on India's rankings in the index cannot be ruled out. Inconsistent signals on dispute resolution mechanisms will only dissuade investment.

6. While mediation is an effective dispute resolution mechanism, the Memorandum does not adequately assess the non-binding nature of mediation. The Memorandum itself recognizes that decision-making in the government involves accountability and scrutiny. Despite that, the Memorandum fails to consider that, fearing a vigilance enquiry, no government official is willing to sign a mediated settlement if it results in large payouts to private parties. To address this issue, the Memorandum recommends setting up of committees to assist in the mediation itself or to assess the settlement proposals. This too is problematic as the approval of these committees would be a non-binding administrative decision carrying little weight. If economic payouts to the private party are significant, it is unlikely that the government would heed the recommendations of such committees.

7. The Memorandum also ignores the obvious outcome, i.e., in the absence of an arbitration agreement, any invariable failure to arrive at a mediated settlement would relegate the parties to the courts. It is widely known that the judiciary is unnecessarily

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overwhelmed with caseload and that it is not staffed/equipped to handle an influx of matters that were otherwise being resolved through arbitration. The courts are unable to resolve challenges to arbitral awards within the statutorily recommended period of one year. To expect them to conduct the entire trial that is part of the arbitral process would be unrealistic. Especially for disputes in the infrastructure sector, considering the complexity and volume of documents involved therein, trials in courts would take an average of 10 to 15 years to result in a decree. Preference to litigation over arbitration will dissuade foreign investment. Financial institutions such as the World Bank consider bankability of projects not simply based on commercial viability but also on the robust dispute resolution mechanisms that are available to resolve issues. Investment will plummet as dispute resolution through courts is unlikely to yield meaningful and expeditious outcomes. As stated by the Hon'ble Minister for External Affairs, *"If we are to get full mileage from our 3D dividend of democracy, demographics and demand, then high-quality arbitration is a notable factor in further attracting foreign direct investment (FDI)."*

8. Turning to litigation rather than arbitration would also diminish domestic appetite. Take for example, the infrastructure sector, which invariably involves the government as a party. This sector is experiencing cash flow issues due to the government's proclivity to challenge arbitral awards, irrespective of whether such challenges are in fact merited. If disputes were to be adjudicated by courts instead of arbitration, this would lead to a reluctance in bidding for projects or alternatively an inflation of bids to cover the time-cost effect of litigation. This would set the clock back on commercial growth.

9. We also express our grave concern regarding the rationale cited for re-examining the government's approach towards arbitration.

    a. At paragraph 5(v), the Memorandum suggests that the presence of an arbitration clause makes it easy for government officials to avoid taking a decision on settlement by letting the dispute be resolved by arbitration. Respectfully, the presence or absence of an arbitration clause would make no difference to the decision-making process of the officials; they would instead let the dispute be resolved by court. Government officials do not consider the possibility of settlement as they are fearful of potential vigilance investigations that may affect their careers. The government should instead empower the officials to arrive at settlements which are then vetted by independent committees.

    b. The Memorandum, at paragraph 5(i), suggests that arbitration is expensive and protracted. The time-cost benefit analysis of arbitration over litigation is well known. Acknowledging the government's role in stretching out the arbitral process would also potentially solve this concern. The IAF has published[6] Guidelines for Conduct of Arbitrations. These may be adopted to realize the true

[6] https://indianarbitrationforum.com/guidelines/

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benefits of arbitration. Also, despite heavily promoting a variety of institutions, the government is yet to truly embrace institutional arbitration in its contracts. This ought to be the norm going forward. Established arbitral institutions have committees that monitor timelines and hold arbitrators accountable. This would address the concerns of the government.

c. Perhaps what is most disquieting in the Memorandum is the statement in paragraph 5(ii) that arbitrators are not subjected to the same level of scrutiny or standards of conduct as members of the judiciary and hence there is little accountability for incorrect decision making. This is surprising given that the government largely appoints retired judges as arbitrators. Also, where the arbitration clauses call for appointment by consent and such consent is not achieved, it is the courts which appoint independent and qualified arbitrators. In any event, this deep-seated distrust in the ability of arbitrators to arrive at independent and correct decisions is entirely misplaced. An adverse decision does not automatically mean that the tribunal is compromised. Nominee arbitrators do not espouse the case of the parties that appoint them; the tribunal is accountable. Also, promoting institutional arbitration would ensure that vetted arbitrators having requisite sectoral expertise are appointed.

d. At paragraph 4(iii), the Memorandum suggests that arbitration is not suitable because government officials often get transferred and this handicaps effective presentation of the case before an arbitrator. This is an issue that would crop up in any litigation as well. In fact, arbitration offers the flexibility to record evidence at any location. The government ought to take advantage of this.

e. At paragraph 5(ii), the Memorandum suggests that the reduced formality in arbitration, combined with the binding nature of decisions, has often led to wrong decisions on facts and improper application of law. Citing the finality of the arbitral award and limited scope of challenge, the Memorandum questions the accountability of awards and arbitrators. It would be worth acknowledging that on one hand the Memorandum states that the finality of an award is not being achieved and on the other hand it alleges that the finality of an award creates impediments if the award was incorrect. In any event, questioning the finality of an award and its correctness is an archaic view when arbitration is a globally recognized and preferred mode of dispute resolution that renders swift and effective justice. The distrust in the arbitral process and the arbitral award is not keeping in line with global best practices. Although the scope of challenge to an award has to necessarily be limited, where the award is egregiously wrong, courts have interfered. Thus, this concern is unmerited.

f. The Memorandum suggests, at paragraph 5(iii) that the benefit of finality of awards has not been achieved and the routine challenges have virtually added a layer to litigation. We may suggest that the government ought to examine its

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own proclivity for challenging any adverse award without assessing whether the challenge is truly tenable. The Memorandum itself acknowledges in paragraph 4(i) that *"acceptance of an adverse award when judicial avenues are not exhausted is often perceived to be improper by various authorities."*. Instead of routinely challenging awards, the government ought to set up committees that scrutinize awards and recommend whether the awards should be challenged.

10. The Memorandum's intent appears to be protectionist. Rather than accepting adverse arbitral awards, the government appears to be desirous of excluding arbitration as a form of dispute resolution. Various Law Commission Reports and decisions of the Supreme Court have deprecated the propensity of the government and Public Sector Undertakings to litigate until the apex court. The Memorandum ignores these repeated calls for putting a meaningful end to litigation. Through this Memorandum, the parties dealing with the government and its entities are at a probable risk of misuse of mediation. The likelihood of strong arming private parties into unfavorable settlements even if the government's case were unmeritorious cannot be ruled out. It is likely that a private party would agree to an unfavorable settlement rather than await its turn in court. The recent *Vivad se Vishwas II* scheme which imposed severe haircuts on award holders, gave the impression that if award holders didn't agree to such haircuts, the enforcement of such awards would be protracted.

11. While we support the government's push for mediation, we believe that the recommendations to remove or cap arbitration clauses in government contracts are regressive. Instead, the government should adopt the following measures:

    a. It should encourage the introduction of Med-Arb clauses in government contracts.
    b. Only independent, unbiased, expert and accredited mediators ought to be appointed to maximize the benefits of mediation.
    c. It should permit government officials to present settlement proposals without fear of backlash or vigilance inquiries.
    d. To empower the government officials, it should set up committees comprising of independent experts not in the employ of the government to examine, in a time-bound manner, settlements proposed by government officials to provide fair and fearless guidance on settling the disputes. The decisions of such independent committees ought to be sacrosanct and the government should carry out their instructions.
    e. The government should immediately withdraw from its contracts, arbitration clauses involving unilateral appointment processes. Also, several government contracts contain arbitration clauses where arbitrator appointment is from a narrow pool of arbitrators which often includes ex-officials. These arbitration clauses should be replaced with clauses where the appointment process should be fair and mutual.

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f. It should also remove arbitration clauses which send high-value disputes to courts as opposed to arbitration. A uniform and consistent approach ought to be maintained.
g. The government should incorporate model arbitration clauses of institutions into government contracts.
h. The adoption of a model code of conduct of arbitrations would help the government realize the time-cost benefit.
i. The government should also set up committees comprising of independent experts not in the employ of the government to examine awards and provide recommendations on whether the awards ought to be challenged or not. These recommendations ought to be followed as a matter of rule and only deviated from with proper reasons recorded in writing.

12. Shortly after the issuance of this Memorandum, it was announced that the Hon'ble Minister of Law and Justice has signed the National Litigation Policy ("**NLP**") document. The reported objective of this document, amongst others, is to reduce the burden on the courts. The Memorandum is likely to increase the caseload and is therefore contrary to the reported objectives of the NLP.

13. The Hon'ble Minister of Law and Justice has himself questioned, *"Why can't India become a hub for arbitration? We see that in Singapore, Hong Kong arbitration cases, the parties in the dispute are Indians and the lawyers arguing these cases are also Indians! When they can do their arbitration cases there, then why can't they do their arbitration cases here in India? We have to think in this direction."* Towards this end, the National Litigation Policy document ought not to simply consider promotion of arbitration as an objective, but aggressively push for institutional arbitration. Whether one looks at Singapore, Hong Kong, London, Paris, Zurich, Stockholm or New York, one of the key reasons for these being economic nerve centers is the presence of effective arbitration institutions that are recognized and utilized by international entities. Even Dubai and China, who have emerged in the recent past, have fostered institutional arbitration passionately giving investors certainty and assurance. This government too has actively promoted a variety of arbitration institutions across the breadth of India. However, when it comes to incorporating model arbitration clauses of these institutions in government contracts, the government has not followed up in a meaningful manner that would truly support the push for institutional arbitration. The government has on occasion, including in Maharashtra, recommended incorporating arbitration clauses referring disputes to these institutions. However, the actual track record of referrals to these institutions is far from promising. In a country where the judge to caseload ratio is skyrocketing, the NLP should seriously pursue institutional arbitration and mandate the same in all government contracts.

14. The Memorandum, instead of being in line with the stated objective of the NLP, will set the clock back to pre-2015 when this government ushered in laudable reforms to the arbitration law. It will do disservice to the steps taken by the legislature and judiciary

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to foster the growth of arbitration. While the government is actively looking at further improvements to arbitration law through the constitution of the expert committee under the leadership of the former Law Secretary, Dr. T.K. Vishwanathan, this Memorandum can do immeasurable damage to the country's ability to hold itself out as an investment friendly destination.

15. This Memorandum comes at a time when the world is looking to India to provide leadership in all spheres; more so given its economic heft. Instead of charting a path of growth by allowing businesses to realize their full potential, this Memorandum will potentially inhibit investment.

16. We would urge the Hon'ble Minister to review and withdraw the Memorandum in its current form. With the rich experience that our organization has to offer, our input above may be considered in order to fully realize the benefits of arbitration. The Hon'ble Prime Minister and Hon'ble Minister of Law and Justice's commitment to promote arbitration should be championed. Even the Chief Justice of India's statement at a global stage[7] are relevant – *"The future of arbitration is already here. It is now our responsibility to live up to the emerging challenges… Arbitration is no longer an 'alternative'. It is in fact the preferred method of seeking commercial justice."*. Perhaps the words to live by ought to be the views expressed by the Hon'ble Minister for External Affairs – *"'Arbitrate in India' is actually a facet of Make in India."*

Kind Regards,

Gourab Banerji

Mr. Gourab Banerji, Senior Advocate
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[7] https://ddnews.gov.in/en/time-to-build-strong-culture-of-commercial-arbitration-cji-chandrachud/#:~:text=CJI%20further%20said%20that%20the,innovations%20every%20day%2C%20he%20said.

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