



INDIAN JOURNAL OF LEGAL AFFAIRS AND RESEARCH

Peer-reviewed, open-access, refereed journal

IJLAR

+91 70421 48991
editor@ijlar.com
www.ijlar.com

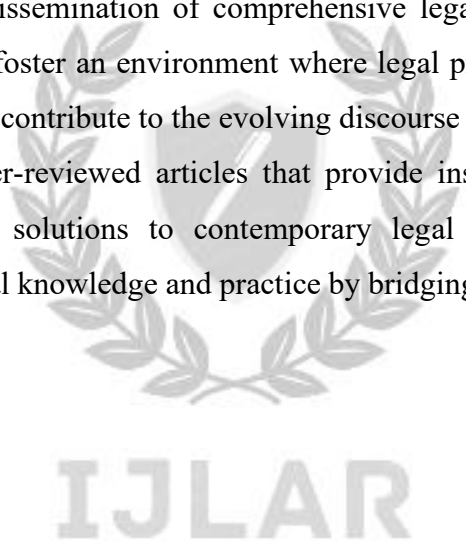
DISCLAIMER

The views and opinions expressed in the articles published in the Indian Journal of Legal Affairs and Research are those of the respective authors and do not necessarily reflect the official policy or position of the IJLAR, its editorial board, or its affiliated institutions. The IJLAR assumes no responsibility for any errors or omissions in the content of the journal. The information provided in this journal is for general informational purposes only and should not be construed as legal advice. Readers are encouraged to seek professional legal counsel for specific legal issues. The IJLAR and its affiliates shall not be liable for any loss or damage arising from the use of the information contained in this journal.

IJLAR

Introduction

Welcome to the Indian Journal of Legal Affairs and Research (IJLAR), a distinguished platform dedicated to the dissemination of comprehensive legal scholarship and academic research. Our mission is to foster an environment where legal professionals, academics, and students can collaborate and contribute to the evolving discourse in the field of law. We strive to publish high-quality, peer-reviewed articles that provide insightful analysis, innovative perspectives, and practical solutions to contemporary legal challenges. The IJAR is committed to advancing legal knowledge and practice by bridging the gap between theory and practice.



Preface

The Indian Journal of Legal Affairs and Research is a testament to our unwavering commitment to excellence in legal scholarship. This volume presents a curated selection of articles that reflect the diverse and dynamic nature of legal studies today. Our contributors, ranging from esteemed legal scholars to emerging academics, bring forward a rich tapestry of insights that address critical legal issues and offer novel contributions to the field. We are grateful to our editorial board, reviewers, and authors for their dedication and hard work, which have made this publication possible. It is our hope that this journal will serve as a valuable resource for researchers, practitioners, and policymakers, and will inspire further inquiry and debate within the legal community.

IJLAR

Description

The Indian Journal of Legal Affairs and Research is an academic journal that publishes peer-reviewed articles on a wide range of legal topics. Each issue is designed to provide a platform for legal scholars, practitioners, and students to share their research findings, theoretical explorations, and practical insights. Our journal covers various branches of law, including but not limited to constitutional law, international law, criminal law, commercial law, human rights, and environmental law. We are dedicated to ensuring that the articles published in our journal adhere to the highest standards of academic rigor and contribute meaningfully to the understanding and development of legal theories and practices.

IJLAR

THE “DELAWARE OF INDIA” PROBLEM: DOES PARTY AUTONOMY JUSTIFY ARBITRATION CLAUSES SELECTING UNREGULATED ARBITRAL INSTITUTIONS?

AUTHORED BY - GANNAVARPU RAJLAKSHMI, MOHI SAVITA & HIYA SAXENA

Institution: National Law Institute University (NLIU), Bhopal.

Academic Qualification: Third (IIIrd) year Student at NLIU, Bhopal.

ABSTRACT

India’s encouragement of institutional arbitration raises a question that contractual freedom alone cannot resolve: what legal consequences follow when parties select an ungraded, inadequately equipped or structurally compromised arbitral institution? This article uses the “Delaware of India” analogy to examine whether competition over institutional safeguards can occur, without assuming that competition necessarily produces weaker protection. It adopts a doctrinal and functional comparative research methodology, analysing Indian legislation, commencement notifications, judicial decisions and institutional rules alongside selected English and Singaporean authorities. The analysis distinguishes institutional regulatory status, administrative incapacity and procedural illegality, and examines their different consequences for arbitration agreements and awards. It also separates the Arbitration Council of India’s statutory framework from its operational implementation. Judicial approaches to misdescription, failed appointment machinery and hybrid clauses reveal that preserving an agreement requires both workable administration and fidelity to the parties’ bargain. The article proposes a proportionate regulatory floor based on disclosure, neutral appointment processes, accessible challenge mechanisms and administrative continuity. Grading should inform choice without becoming a general licensing requirement or an independent ground for invalidating awards. A structured approach to institutional failure can protect consensual arbitration without compelling parties to accept a substantially different process. Institutional freedom remains defensible when the legal system distinguishes permissible procedural economy from the surrender of enforceable minimum protections.

Keywords: Delaware of India, Institutional Arbitration, Party Autonomy, Unregulated Institution, Minimum Institution Standards.

1. INTRODUCTION

Consider a commercial contract referring disputes to a newly established arbitration centre. The centre publishes inexpensive procedural rules and promises rapid appointments. Years later, a dispute arises, but its appointment committee has dissolved, its ownership is unclear, and neither party can obtain the governing fee schedule. The arbitration clause records genuine consent. Nevertheless, consent does not identify who can administer the reference or determine whether an award produced through the remaining machinery deserves enforcement. The difficulty is institutional: a valid promise to arbitrate may depend on an organisation unable to deliver the process promised. Indian arbitration policy encourages institutional administration. The India International Arbitration Centre Act, 2019, established a statutory institutional framework, and the 2019 amendments to the Arbitration and Conciliation Act, 1996, introduced provisions concerning the Arbitration Council of India (ACI).¹ These measures support institutional development, but they do not establish that every privately chosen institution must receive governmental approval. Indeed, the 1996 Act expressly accommodates arbitration administered by permanent institutions and arbitration conducted without them.² A paper that equates institutional growth with compulsory institutional licensing would therefore begin from the wrong premise. The “Delaware of India” analogy concerns competition for contractual selection. In corporate scholarship, Delaware illustrates the disputed relationship between regulatory competition, flexibility and protection. Cary’s critique of permissiveness and Romano’s analysis of incorporation choices offer competing perspectives on that relationship.³

Neither perspective establishes that arbitral institutions compete by reducing fairness. The analogy is used here as a question about incentives, not as an empirical claim that India already experiences a race towards inadequate arbitration administration. Its limits matter. Delaware is a lawmaking jurisdiction; an arbitral institution ordinarily supplies rules and administrative services. Selecting an institution does not itself replace the mandatory law associated with the arbitral seat. Institutional arbitrage can therefore occur within a continuing legal framework. Its potential danger lies in exploiting practical weaknesses in appointment, disclosure, notice or challenge procedures before judicial safeguards become effective. Whether competition

¹ India International Arbitration Centre Act, No. 17 of 2019, §§ 3, 14–15 (India); Arbitration and Conciliation (Amendment) Act, No. 33 of 2019, § 10 (India).

² The Arbitration and Conciliation Act, 1996 (26 of 1996), § 2(1)(a) (India).

³ See William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663 (1974), Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225 (1985),

produces such weaknesses depends on institutional incentives and contractual circumstances, not simply on the availability of choice.

This article asks four connected questions. What protects institutional choice under Indian arbitration law? When does an institutional defect undermine the agreement or subsequent proceedings? How should courts preserve arbitration without substituting a materially different bargain? What additional institutional standards can improve reliability without excluding smaller or specialised providers? The inquiry concerns consensual commercial arbitration, principally seated in India. Foreign awards are considered separately because their enforcement follows a different statutory route. The argument proceeds from the legal foundations of institutional choice to the Indian statutory framework, then examines institutional risk and defective clauses. A focused comparison with England and Singapore informs the proposed regulatory and judicial response. The contribution is a distinction between status, capacity and legality: absence of grading, inability to perform an agreed function and violation of mandatory safeguards require different remedies. Treating them as interchangeable would either suppress legitimate choice or leave procedural abuse sheltered behind contractual language.

2. PARTY AUTONOMY AND THE CHOICE OF ARBITRAL INSTITUTION

Institutional choice deserves presumptive protection because arbitration permits parties to arrange how their disputes will be resolved.⁴ Section 2(6) expressly recognises delegation of decisions to a person or institution where Part I leaves parties free to determine an issue, subject to its exception concerning section 28. Section 2(8) includes referenced arbitration rules within the parties' agreement. Together, these provisions make institutional administration part of the statutory design rather than an exceptional concession.⁵ Delegating appointments, fee administration and procedural coordination can be an exercise of autonomy as meaningful as selecting the arbitrator directly.⁶ The institution must nevertheless be distinguished from the tribunal.⁷ Arbitrators decide the dispute; the institution performs functions conferred by the applicable rules and administrative agreement. The ICC Rules illustrate the distinction

⁴ Robin Cooke, 'Party Autonomy' (1999) 30(1) *Victoria University of Wellington Law Review* 257, 257–278; Arbitration and Conciliation Act 1996, s 2(6).

⁵ The Arbitration and Conciliation Act, 1996 (26 of 1996) §§ 2(6), 2(8), 19.

⁶ Klaus Peter Berger, 'Institutional arbitration: harmony, disharmony and the "Party Autonomy Paradox"' (2018) 34(4) *Arbitration International* 473, 478–482.

⁷ UNCITRAL Model Law on International Commercial Arbitration 1985, art 2(d); Berger (n 42).

expressly: the ICC Court administers dispute resolution but does not itself decide the parties' substantive dispute.⁸

An institution acting only as appointing authority does not necessarily undertake continuing case administration. Equally, an institution managing the reference does not acquire the tribunal's adjudicative powers merely because its name contains the word "court". The legal inquiry must identify the function actually entrusted to it. Autonomy also operates across several relationships. The disputing parties agree to arbitrate with each other, but their agreement cannot, by itself, compel an independent institution to accept an assignment. An institution may decline a modified procedure that it cannot administer or regards as inconsistent with its rules. Institutional acceptance thus supplies a practical boundary distinct from statutory validity. A contractual clause may be intelligible between the parties yet impossible to implement through the named provider.⁹ The Singapore decisions concerning hybrid clauses demonstrate why willingness and capacity must be established rather than assumed.¹⁰

The strongest defence of unrestricted institutional choice rests on informed allocation of risk. Commercial parties may prefer a small specialist organisation, limited administration or inexpensive proceedings. Requiring elaborate facilities could make low-value arbitration uneconomic. The Act's acceptance of ad hoc proceedings strengthens this objection: if parties can dispense with institutional administration altogether, administrative sophistication cannot logically be an indispensable condition of every valid arbitration.¹¹ Regulation must therefore identify the additional risk created by an institution's promised functions, rather than assume that every provider should resemble an established international centre. That defence becomes weaker where an institutional mechanism compromises rights that arbitration law protects independently of agreement. Section 18 requires equal treatment and a full opportunity to present one's case. Section 19 makes procedural agreement subject to Part I. Section 12(5) displaces prior agreements where a specified relationship makes an arbitrator ineligible, with waiver permitted only through an express written agreement after disputes arise.¹² The existence of consent therefore answers whether parties selected a process; it does not answer whether every feature of that process is legally permissible. The distinction between a statutory

⁸ International Chamber of Commerce, Arbitration Rules art. 1(2) (2021).

⁹ Carlos Molina Esteban, 'Hybrid (institutional) arbitration clauses: party autonomy gone wild' (2020) 36(4) *Arbitration International* 475, 475–489.

¹⁰ *Insignia Tech. Co. v Alstom Tech. Ltd.* [2009] SGCA 24, [30 to 36], [48] (Sing.); *HKL Grp. Co. v Rizq Int'l Holdings Pte. Ltd.* [2013] SGHCR 5, [28][30] (Sing.).

¹¹ The Arbitration and Conciliation Act, 1996 (26 of 1996) § 2(1)(a).

¹² The Arbitration and Conciliation Act, 1996 (26 of 1996) § 12 (5).

§§ 12(5), 18–19; *Bharat Broadband Network Ltd. v United Telecoms Ltd.* (2019) 5 SCC 755, ¶¶ 15–20.

protection and an institutional service is essential. Award scrutiny, emergency arbitration and specialised case management may be valuable without being universally mandatory. Their omission cannot automatically establish unfairness. Conversely, contractual adoption of a service gives it importance within that particular bargain even when the statute does not require it. The regulatory question has two dimensions: what the law demands in every relevant arbitration, and what the parties were additionally promised.¹³ Respecting autonomy requires attention to both.

Institutional integrity is consequently a condition of implementing consent, not a competing justification for general judicial supervision. Courts should enforce mandatory safeguards and ascertain whether agreed machinery can work. They should not rank providers according to prestige or improve a bargain merely because another institution offers more extensive administration. The relevant boundary is crossed when institutional choice defeats an applicable legal protection or when the promised procedure cannot be delivered without materially changing the agreement.

3. THE INDIAN LEGAL FRAMEWORK GOVERNING INSTITUTIONAL ARBITRATION

A. Agreement and incorporation

Section 7 requires an agreement to submit existing or future disputes arising from a defined legal relationship to arbitration, recorded in the forms recognised by the statute.¹⁴ It does not make institutional grading an element of agreement formation. Section 7(5) addresses incorporation of an arbitration clause from another document; section 2(8) concerns the rules incorporated into the parties' procedural bargain.¹⁵ These provisions should be kept distinct. Proof that a set of institutional rules exists does not establish that parties agreed to arbitrate, and agreement to arbitrate does not necessarily establish acceptance of every later version of those rules. A clause should therefore be examined for identifiable consent, institutional identity and the applicable rules.¹⁶ A drafting error concerning an institution may be curable even when an absence of consent is not.¹⁷ The court's task is contractual interpretation, not

¹³ Gautam Mohanty, 'Understanding the Interface between Party Autonomy and Mandatory Rules in International Commercial Arbitrations' (2018) *Journal of Legal Studies & Research*.

¹⁴ The Arbitration and Conciliation Act, 1996 (26 of 1996) s 7.

¹⁵ The Arbitration and Conciliation Act, 1996 (26 of 1996) §§ 2(8), 7(1)(5).

¹⁶ *M R Engineers & Contractors Pvt Ltd v Som Datt Builders Ltd* (2009) 7 SCC 696.

¹⁷ *Enercon (India) Ltd v Enercon GmbH* (2014) 5 SCC 1.

institutional accreditation.¹⁸ An objection based only on the provider's obscurity cannot substitute for showing that the statutory requirements of agreement are missing. This distinction also prevents an institution's marketing claims from being treated as independent evidence of arbitral jurisdiction.

B. Appointment and institutional failure

Section 11(6)(c), in the operative court-assisted appointment framework, addresses failure by a person, including an institution, to perform a function entrusted under the appointment procedure.¹⁹ It permits the necessary measure unless the agreement provides another means of securing appointment.²⁰ The provision recognises institutional failure without necessarily invalidating the arbitration agreement.²¹ Its immediate subject, however, is appointment. It does not automatically authorise courts to transfer every administrative obligation, award scrutiny function or fee arrangement to a substitute institution. The 2019 amendment proposed a different architecture involving court-designated institutions graded by the ACI. Its enactment must not be confused with commencement. The August 2019 notification brought specified amendments into force but excluded sections 2 and 3, which contain the new institutional definition and revised section 11 machinery.²² The commencement of the ACI provisions in October 2023 was a separate step. Consequently, the enacted graded-institution appointment model cannot simply be described as a fully functioning replacement for judicial appointment. Nor would eligibility for court designation necessarily determine the legality of an institution privately selected by contracting parties.

C. Independence and procedural equality

Section 12 requires disclosure of circumstances affecting independence, impartiality and the ability to devote sufficient time.²³ The Fifth Schedule guides the assessment of justifiable doubts; the Seventh Schedule operates through section 12(5) to identify ineligibility. Their consequences differ.²⁴ Section 13 supplies the challenge framework, and section 14 addresses

¹⁸ *Duro Felguera SA v Gangavaram Port Ltd* (2017) 9 SCC 729.

¹⁹ The Arbitration and Conciliation Act, 1996 (26 of 1996), s 11(6)(c).

²⁰ The Arbitration and Conciliation Act, 1996 (26 of 1996) § 11(6)(c).

²¹ *TRF Ltd v Energo Engineering Projects Ltd* (2017) 8 SCC 377.

²² Ministry of Law & Justice, Notification S.O. 3154(E), GAZETTE OF INDIA, EXTRAORDINARY, pt. II, sec. 3(ii) (Aug. 30, 2019); Ministry of Law & Justice, Notification S.O. 4486(E), GAZETTE OF INDIA, EXTRAORDINARY, pt. II, sec. 3(ii) (Oct. 12, 2023).

²³ The Arbitration and Conciliation Act, 1996 (26 of 1996), ss 12(1).

²⁴ *HRD Corporation (Marcus Oil & Chemical Division) v GAIL (India) Ltd* (2018) 12 SCC 471.

termination of mandate in the circumstances it specifies.²⁵ These protections concern arbitrators directly. They should not be inaccurately presented as an existing comprehensive licensing code for institutions or their administrative staff. Nevertheless, institutional arrangements can defeat the protections indirectly. In *Central Organisation for Railway Electrification v ECI SPIC SMO MCML*, the Supreme Court held that equal treatment extends to arbitrator appointment and rejected compulsory selection from a panel controlled by the opposing party.²⁶ Its conclusions distinguish sole appointments from the prospective application of the new ruling concerning three-member tribunals.²⁷ Applied by analogy, the reasoning requires scrutiny where an apparently independent centre merely implements one disputant's exclusive appointment control.²⁸ That application is an inference, not a holding that every industry-supported institution is disqualified.

D. Procedure and Time Limits

Section 19 permits procedural agreement within statutory limits. Sections 18 and 24 protect participation, including communication of material and the hearing requirements applicable under the agreed procedure and statute.²⁹ Institutional rules may organise these rights but cannot extinguish them.³⁰ An efficient timetable is defensible when it provides a meaningful opportunity to respond; it becomes problematic when administrative speed depends on withholding documents or denying one party the opportunity afforded to the other. Section 29A requires awards in matters other than international commercial arbitration within twelve months from completion of pleadings under section 23(4), subject to the statutory extension mechanism. For international commercial arbitration, the provision instead requires expedition and an endeavour to meet that period. Parties may extend the prescribed period by up to six months; further extension falls to the competent court under the statutory conditions.³¹ Institutions can track deadlines and facilitate applications. Their internal extensions do not, merely by being institutional decisions, replace an extension required by the Act.

²⁵ The Arbitration and Conciliation Act, 1996 (26 of 1996) §§ 12-14, schs. V-VII.

²⁶ *Central Organisation for Railway Electrification v ECI SPIC SMO MCML* 2024 SCC OnLine SC 3219.

²⁷ *Central Organisation for Railway Electrification v ECI SPIC SMO MCML (JV)*, 2024 SCC OnLine SC 3219, ¶¶ 168–69 (India) (Chandrachud, C.J., majority opinion).

²⁸ *Perkins Eastman Architects DPC v HSCC (India) Ltd* (2020) 20 SCC 760.

²⁹ The Arbitration and Conciliation Act, 1996 (26 of 1996) §§ 18–19, 24.

³⁰ The Arbitration and Conciliation Act, 1996 (26 of 1996), ss 18–19; *Ssangyong Engineering & Construction Co Ltd v National Highways Authority of India* (2019) 15 SCC 131.

³¹ The Arbitration and Conciliation Act, 1996 (26 of 1996) §§ 23(4), 29A(1), (3)–(5).

E. Grading and legal consequences

Section 43I provides for grading by reference to infrastructure, arbitrator quality, performance and compliance with disposal timelines. Section 43D addresses the ACI's promotional and standard-setting functions; section 43L provides regulation-making authority within the Act.³² These provisions envisage assessment of institutional quality.³³ They do not expressly declare privately selected, ungraded institutions unlawful or add absence of grading to the grounds for setting aside an award.³⁴ Converting grading into universal licensing would require a separate legal justification. The implementation position reinforces the need for precision. Notification S.O. 4486(E) commenced section 10 of the 2019 Amendment Act on 12 October 2023.³⁵ Yet the Government's parliamentary response of 6 February 2026 expressly stated that the ACI had not been constituted.³⁶ The latter is a dated official confirmation, not evidence that Part IA never commenced.³⁷ The argument here therefore concerns both the statutory design and the consequences of incomplete implementation, without treating a proposed or anticipated regulatory practice as existing law.

The territorial distinction must remain visible. Section 2(2) supplies the starting point for Part I, subject to its express exceptions concerning certain foreign-seated arbitrations. Recognition of a foreign award under section 48 is not an occasion to impose every Indian procedural requirement retrospectively. The court instead applies the specified enforcement grounds, including the relevant agreement, applicable law and public-policy limits. Institutional choice also cannot make a legally non-arbitrable dispute arbitrable merely by assigning it to a specialist provider.³⁸ Institutional expertise can improve adjudication only where the legal system permits the dispute to be submitted to arbitration.

4. THE UNREGULATED INSTITUTION PROBLEM

"Unregulated" should describe the absence of a specified form of oversight. It should not collapse private status, foreign origin, recent establishment and unlawful operation into one category. An institution may lack public grading yet remain subject to contract law, its

³² The Arbitration and Conciliation Act, 1996 (26 of 1996) §§ 43D, 43I, 43L.

³³ The Arbitration and Conciliation Act, 1996 (26 of 1996), ss 43C, 43D, 43I, 43L.

³⁴ The Arbitration and Conciliation Act, 1996 (26 of 1996), ss 34, 43I.

³⁵ Ministry of Law and Justice (Department of Legal Affairs), Notification SO 4486(E) (12 October 2023).

³⁶ Notification S.O. 4486(E), *supra* note 11; Ministry of Law & Justice, Arbitration Council of India, PRESS INFORMATION BUREAU (Feb. 6, 2026) (reporting the answer to Lok Sabha Unstarred Question No. 1223).

³⁷ Ministry of Law and Justice, 'Arbitration Council of India', Press Information Bureau (6 February 2026).

³⁸ The Arbitration and Conciliation Act, 1996 (26 of 1996) §§ 2(2), 2(3), 34(2)(b)(i), 48(1) (2).

published rules and judicial scrutiny of the resulting arbitration. Conversely, formal recognition cannot guarantee competent administration in every reference. The paper accordingly uses “ungraded” for regulatory status, “incapable” for inability to perform a relevant function and “compromised” for arrangements threatening legally protected fairness. Institutional shopping is not intrinsically objectionable. Parties might choose lower fees, relevant technical expertise, regional language facilities or modest administration. These preferences can make arbitration more accessible. The concern arises when a provider’s competitive advantage depends on concealed relationships, unfair appointment control or procedures that one party cannot realistically use. The analogy with regulatory competition is strongest where the party selecting the institution can capture the benefit of weaker safeguards while shifting the resulting costs to its counterparty.³⁹ This is a theoretical incentive problem; its prevalence requires evidence beyond doctrinal research.⁴⁰

Thomas Varghese v Sundaram Finance directly confronts this risk.⁴¹ The Madras High Court distinguished an appointment by the agreed Madras Chamber of Commerce and Industry from unilateral appointment by the lender. It upheld the institutional appointment but warned against organisations used to disguise creditor-controlled appointments. It also confirmed that the revised institutional designation provisions remained uncommenced in February 2026.⁴² The decision supports scrutiny of substance, yet its reliance on institutional credibility needs disciplined application. Longevity and professional recognition may support confidence, but cannot conclusively establish independence in a particular reference. A newly formed institution should have an equal opportunity to demonstrate neutral governance. Courts should examine control over appointments, challenge decisions and financial relationships with the disputant. Industry funding alone should not disqualify a specialist institution. Otherwise, a protective inquiry could become an informal licensing system favouring established organisations. The relevant distinction is between genuinely delegated appointment power and a counterparty’s control exercised through an institutional intermediary.⁴³ The timing of protection matters. Award review occurs after parties have incurred the costs of the process.

³⁹ William L Cary, ‘Federalism and Corporate Law: Reflections upon Delaware’ (1974) 83 *Yale Law Journal* 663, 663-705.

⁴⁰ Roberta Romano, ‘Law as a Product: Some Pieces of the Incorporation Puzzle’ (1985) 1 *Journal of Law, Economics, & Organization* 225.

⁴¹ *Thomas Varghese v Sundaram Fin. Ltd., Arb. O.P.* 2026 SCC OnLine Mad 1768.

⁴² *Thomas Varghese v Sundaram Fin. Ltd., Arb. O.P.* 2026 SCC OnLine Mad 1768, ¶¶ 25–33, 38 (Madras H.C. Feb. 24, 2026) (India).

⁴³ *Perkins Eastman Architects DPC v HSCC (India) Ltd* (2020) 20 SCC 760; *Voestalpine Schienen GmbH v Delhi Metro Rail Corp Ltd* (2017) 4 SCC 665.

Even successful annulment cannot automatically restore lost time or replace a failed institution's records. Scholarship on institutional liability identifies the separate losses generated by administrative failures and the difficulty of allocating responsibility for them.⁴⁴ This supports preventive standards, but it does not justify converting every service failure into an attack on the award. Administrative accountability and adjudicative validity address different injuries and should have different legal consequences.⁴⁵ Existing safeguards also constrain the problem. Under section 34(2)(a)(iii), denial of proper notice or inability to present a case can support setting aside. Section 34(2)(a)(v) addresses departures in tribunal composition or procedure from the agreement, subject to non-derogable provisions of Part I. Section 48 provides the distinct grounds applicable to enforcement of qualifying foreign awards.⁴⁶ Thus an institution without public grading does not operate outside all legal control. The remaining gap concerns identifying and preventing failure before those safeguards become necessary.

The appropriate regulatory target is therefore verifiable administrative reliability. A published address, accessible rules, identified decision-makers and transparent fees allow parties to understand what they are selecting. Reliable communication and record preservation support the exercise of statutory rights. None requires a prestigious brand, expensive premises or an emergency arbitrator. A modest institution can meet these requirements; a prominent one can fail them. Regulation should measure the relevant conduct rather than use reputation as a substitute for analysis. The absence of emergency arbitration illustrates the need for restraint. In Amazon, the Supreme Court recognised the legal effect of an emergency arbitrator's order under the selected SIAC Rules in an India-seated reference.⁴⁷ That recognition supports contractual innovation; it does not require every institution to offer the same mechanism. Sections 9 and 17 provide statutory routes to interim protection, subject to their respective conditions. A regulatory floor should require accurate disclosure of available services and preserve lawful access to relief, rather than assume that one institutional product is indispensable to fairness in all commercial disputes.

⁴⁴ Pauline Köstner, *The Law Applicable to the Liability of Arbitral Institutions*, 10 EUR. INT'L ARB. REV., no. 2 (2023).

⁴⁵ Mariana França Gouveia and Ana Coimbra Trigo, 'Liability of arbitral institutions: a case law overview' (2024) *Journal of International Arbitration*.

⁴⁶ The Arbitration and Conciliation Act, 1996 (26 of 1996) §§ 34(2)(a)(iii), 34(2)(a)(v), 44, 48(1)(b), 48(1)(d), 48(2).

⁴⁷ *NV Inv. Holdings LLC v Future Retail Ltd.*, (2022) 1 SCC 209 (India); The Arbitration and Conciliation Act, 1996 (26 of 1996) §§ 9, 17.

5. PATHOLOGICAL ARBITRATION CLAUSES AND INSTITUTIONAL FAILURE

A pathological clause contains a defect that obstructs its operation: uncertainty about the institution, incompatible rules, contradictory appointment provisions or machinery incapable of implementation.⁴⁸ The label describes a problem rather than dictating its consequence. *HKL Group v Rizq International Holdings* emphasises that the response depends on the nature and extent of the defect.⁴⁹ Indian courts likewise need to distinguish errors in designation from failure of an accurately selected institution. The first principally concerns interpretation; the second requires an account of performance and remedial authority. Misdescription should first be tested against the agreement as a whole.⁵⁰ In *Pricol v Johnson Controls*, the clause referred to arbitration rules of the “Singapore Chamber of Commerce”. The Supreme Court considered a reference to the Singapore International Arbitration Centre the reasonable construction in the circumstances. It also refused to use section 11 to review an appointment and jurisdictional award already made in Singapore.⁵¹ The decision therefore supports practical interpretation and procedural restraint. It should not be enlarged into authority to replace any unavailable institution with a judicially preferred provider. There are at least three different remedial operations. Interpretation identifies what the parties already meant. Severance removes an offending provision while retaining an independently workable agreement. Substitution introduces a replacement decision-maker or procedure pursuant to agreement or law. Calling all three “curing” a clause conceals their different implications for consent.⁵² Correcting an unmistakable institutional misnomer is less intrusive than replacing a named institution whose scrutiny process, specialist panel or fee structure formed an essential part of the bargain.

Shin Satellite v Jain Studios supplies a useful severability principle. The Supreme Court preserved an agreement to arbitrate after removing an offending restriction on recourse to courts, stressing substantial severability rather than textual divisibility.⁵³ The reasoning supports preserving lawful arbitration machinery where the defective term is dispensable. It does not establish that institutional identity is always dispensable. A court must examine

⁴⁸ Alok Jain, ‘Pathological Arbitration Clauses and Indian Courts’ (2008) 25(4) *Journal of International Arbitration* 433.

⁴⁹ HKL Grp., [2013] SGHCR 5, [12]–[15].

⁵⁰ *Enercon (India) Ltd v Enercon GmbH* (2014) 5 SCC 1.

⁵¹ *Pricol Ltd. v Johnson Controls Enter. Ltd.*, (2015) 4 SCC 177, ¶¶ 4, 8–10 (India).

⁵² Carlos Molina Esteban, ‘Hybrid (institutional) arbitration clauses: party autonomy gone wild’ (2020) 36(4) *Arbitration International* 475.

⁵³ *Shin Satellite Pub. Co. v Jain Studios Ltd.* (2006) 2 SCC 628, ¶¶ 25–27.

whether removing the designation preserves the substance of the promised reference or creates a process the parties did not undertake to accept. This inquiry also differs from separability under section 16. Separability protects the arbitration clause's distinct existence from the main contract. It does not automatically sever every provision inside the arbitration clause.⁵⁴ Confusing these doctrines would allow the survival of the arbitration agreement against one kind of challenge to become a universal answer to institutional failure. The maxim *ut res magis valeat quam pereat* supports an effective interpretation where the language permits one; it cannot supply missing consent to an entirely different form of arbitration. Institutional essentiality should be assessed objectively. Relevant indicators include an express exclusion of alternatives, selection of a unique review process, designation of an institution merely for appointment and a contractual fallback. Failure of an appointing authority will often be more readily addressed through section 11 than failure of an administrator responsible for features defining the reference. A preference expressed after the dispute should carry less weight than the agreement and admissible evidence of the bargain. Otherwise, either party could strategically redefine the institution's importance when its interests change. A functional inquiry should follow. Does the institution still exist? Can it accept the reference, appoint a neutral tribunal and perform the agreed administrative tasks? Can its own rules resolve the difficulty? Has it refused a modified procedure? These questions prevent premature substitution based on unfamiliarity alone. They also prevent a purely formal approach that treats incorporation or a website as proof of operational capacity. The institution's legal existence and its ability to administer the particular arbitration are separate matters.⁵⁵

Finally, courts must identify the statutory route before selecting the remedy. Appointment assistance, arbitrator challenges, mandate termination, setting aside and foreign-award enforcement carry different conditions and consequences.⁵⁶ An early section 11 proceeding should not become a general institutional audit. Equally, enforcement should not be granted merely because a court previously helped constitute the tribunal. Preservation is justified when it maintains valid consent through lawful and workable machinery; the policy favouring arbitration does not authorise an unlimited judicial power to redesign contracts. Objections must also be raised through the appropriate process. Section 4 recognises waiver where a party

⁵⁴ The Arbitration and Conciliation Act, 1996 (26 of 1996) § 16(1)(a)–(b); *Shin Satellite*, (2006) 2 SCC 628, ¶¶ 25–27.

⁵⁵ Klaus Peter Berger, 'Institutional arbitration: harmony, disharmony and the "Party Autonomy Paradox"' (2018) 34(4) *Arbitration International* 473.

⁵⁶ The Arbitration and Conciliation Act, 1996 (26 of 1996) §§ 11–16, 34, 48.

knowingly proceeds without timely objection to non-compliance with a derogable provision or an agreed requirement. This prevents a participant from retaining an ordinary procedural objection solely as insurance against an adverse award. It must be distinguished from the express post-dispute waiver required by section 12(5).⁵⁷ A court examining institutional failure should therefore ask what was known, what was challenged and which protection is involved, rather than treating participation as either universal consent or legally irrelevant conduct.

6. COMPARATIVE APPROACHES TO INSTITUTIONAL CHOICE

A. England and Wales

The English Arbitration Act 1996 expressly distinguishes mandatory provisions from rules parties may alter. Section 4 and Schedule 1 identify the mandatory framework; section 33 imposes duties of fairness and impartiality. Section 18 provides court assistance following failure of an appointment procedure, subject to the statutory scheme.⁵⁸ The architecture protects substantial contractual freedom without making institutional prestige the measure of validity.⁵⁹ Its relevance to India lies in the clarity of the distinction between agreed machinery and legal safeguards. *Fiona Trust* supports construing commercial arbitration agreements in a manner consistent with the parties' presumed intention to resolve their disputes through a single tribunal. Its treatment of separability also prevents challenges to the main contract from automatically defeating arbitration.⁶⁰ Neither proposition means that courts may replace an expressly indispensable institution. A presumption about the scope and continuing existence of the agreement is not a power to disregard the procedure selected within it. This limitation is central to transferring comparative principles responsibly. The Arbitration Act 2025 adds an express statutory disclosure duty concerning circumstances reasonably capable of raising justifiable doubts about impartiality.⁶¹ This illustrates a targeted legislative intervention: autonomy survives, but a defined protection receives clearer legal expression. India's disclosure framework already addresses arbitrators. The comparative lesson is therefore not wholesale borrowing. It is that additional institutional obligations should identify their subject, content and consequence precisely, instead of relying on an undefined judicial expectation that

⁵⁷ The Arbitration and Conciliation Act, 1996 (26 of 1996) §§ 4, 12(5); *Bharat Broadband Network Ltd. v United Telecoms Ltd* (2019) 5 SCC 755, ¶¶ 15–20.

⁵⁸ The Arbitration and Conciliation Act, 1996 (26 of 1996), c. 23, §§ 4, 18, 33, sch. 1 (UK).

⁵⁹ *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40.

⁶⁰ *Premium Nafta Prods. Ltd. v Fili Shipping Co.* [2007] UKHL 40, [13], [17]–[19].

⁶¹ The Arbitration and Conciliation Act, 1996 (26 of 1996); 2025, c. 4, § 2 (UK).

an institution be sufficiently reputable.

B. Singapore

Singapore offers more direct engagement with defective institutional designation. In *Insignia Technology v Alstom Technology*, the Court of Appeal upheld a clause combining SIAC administration with ICC rules because the arrangement could be implemented. Its principle of effective interpretation remained qualified by protection of the parties' rights and avoidance of arbitration outside their contemplation.⁶² Practical feasibility was part of preserving autonomy, not an afterthought. The decision cannot establish that every combination of institutional rules and administrators is workable. HKL Group carried this logic into a clause naming a non-existent "Arbitration Committee at Singapore". The court contemplated a stay conditional on securing an institution willing to administer the hybrid reference.⁶³ That conditional approach exposes a weakness in abstract judicial rescue: deciding that parties intended arbitration does not establish that the required service provider will accept it.⁶⁴ Indian courts can learn from this insistence on feasibility, although the source and limits of their own procedural powers must remain decisive.

Re Shanghai Xinan adds a useful distinction between misnaming an existing institution and choosing no identifiable institution. The court construed the disputed designation as referring to CIETAC and rejected the relevant enforcement challenge.⁶⁵ Its value is methodological. Courts should investigate objective identity before declaring a clause impossible. The case concerned foreign-award enforcement and the evidence of the applicable law before that court; it should not be represented as a universal rule governing institutional designation under every legal system. Institutional rules themselves qualify the comparison. Article 1(2) of the ICC Rules 2021 reserves administration under those rules to the ICC Court. Earlier hybrid-clause decisions must therefore be read with attention to the rules actually incorporated and the administrator's consent.⁶⁶ England supplies a clear statutory division between discretion and mandatory duty; Singapore supplies a practical method for preserving imperfect arrangements. Together they support functional scrutiny rather than compulsory selection from a government-approved list.

⁶² *Insignia Technology Co Ltd v Alstom Technology Ltd* [2009] SGCA 24.

⁶³ *HKL Group Co Ltd v Rizq International Holdings Pte Ltd* [2013] SGHCR 5.

⁶⁴ Carlos Molina Esteban, 'Hybrid (institutional) arbitration clauses: party autonomy gone wild' (2020) 36(4) *Arbitration International* 475.

⁶⁵ *Re Shanghai Xinan Screenwall Bldg. & Decoration Co.*, [2022] SGHC 58, [40]–[54], [63] (Sing.).

⁶⁶ International Chamber of Commerce, Arbitration Rules art. 1(2) (2021).

7. RECONCILING PARTY AUTONOMY WITH MINIMUM INSTITUTIONAL STANDARDS

The strongest case for a regulatory floor is that institutions exercise powers affecting the conditions under which parties can obtain a binding adjudication. Control over appointments, challenges and communications can affect fairness even before the tribunal acts. Requiring disclosure and reliable administration can therefore protect the conditions necessary for effective consent. It is less convincing to regulate every institutional service on the ground that better administration is generally desirable. The proposed obligation must address a specified risk rather than a preference for elaborate procedure. Three layers should be distinguished. The first consists of mandatory legal protections already applicable to the arbitration, including equality, participation and the statutory independence framework. The second consists of administrative standards needed to deliver promised services, such as published rules, clear fees and record continuity. The third consists of optional enhancements, including emergency arbitration, scrutiny of awards and particular technologies. The first binds according to existing law. The second is the principal field for proportionate reform. The third should remain open to contractual choice and institutional competition. This classification answers whether parties can contract out of institutional safeguards. A mandatory legal protection remains subject to the statute's own rules, including any carefully limited waiver. An optional service may be excluded if the applicable institutional rules and the institution permit that arrangement. A promise integral to the accepted administrative package cannot simply be removed unilaterally. The result turns on the source of the safeguard, not its label. Courts should enforce applicable law and contract without inventing a universal package of premium institutional services.⁶⁷

The objection based on cost deserves a concrete answer. Small institutions could comply through published digital rules, accessible disclosures, standard conflict questionnaires and secure electronic records. Requiring expensive premises, large permanent panels or elaborate internal courts would risk protecting incumbents. Proportionate obligations should follow the functions offered and the disputes administered. A provider undertaking only appointment services should not bear every obligation appropriate to full case administration. Conversely, an institution advertising comprehensive management should disclose what happens if it cannot continue. Regulation can itself introduce conflicts. Government influence over grading may create concern where public entities are frequent arbitration users. A single score can also

⁶⁷ The Arbitration and Conciliation Act, 1996 (26 of 1996) §§ 12(5), 19, 34(2)(a)(v); Arbitration Rules art. 29(6)(b) (2021).

conceal whether an institution performs well on speed but poorly on disclosure. The composition and public functions prescribed for the ACI make governance design relevant to confidence in its assessments.⁶⁸ Published criteria, reasons, review procedures and conflict controls would make grading more useful. These safeguards concern the regulator's credibility as well as the institutions it evaluates. Institutional accountability should also extend beyond award validity. Wong's argument for greater institutional liability links accountability to users' continuing confidence in arbitration.⁶⁹ The proposal here is narrower: distinguish good-faith procedural judgments from failures to perform basic administrative obligations. A transparent complaints process and defined contractual remedies may address the latter without creating an appeal against every institutional decision. Any broader liability regime would need careful treatment of causation, applicable law and immunity. It should not be smuggled into section 34 through an expanded notion of institutional public policy.

8. TOWARDS AN INDIAN FRAMEWORK FOR INSTITUTIONAL CHOICE

The first reform should be an accessible institutional information framework. Providers offering administration of India-seated commercial arbitration should disclose their legal identity, ownership or controlling body, governing rules, appointment and challenge processes, fees and arrangements for case continuity. These are proposed standards, not a claim that the Act already imposes this complete list. Public disclosure would allow parties to compare providers and identify relevant relationships without requiring the government to determine the best institution for every transaction. Compliance should be proportionate and prospective. Institutions need a reasonable transition period and an opportunity to correct administrative omissions. Failure to publish a fee schedule should first attract correction and any appropriate service-related remedy; it should not automatically invalidate an otherwise fair award. A concealed appointment conflict may require a different response because it connects directly with mandatory protections. This separation prevents regulatory enforcement from becoming a new source of opportunistic challenges by parties disappointed with the merits.

Judicial treatment of a defective designation should follow five questions. First, is there a valid arbitration agreement under the applicable law? Second, can the intended institution and its

⁶⁸ The Arbitration and Conciliation Act, 1996 (26 of 1996) §§ 43C-43D.

⁶⁹ Jason P.H. Wong, *Time to Tackle the Elephant in the Room? Repeating the Call for Greater Institutional Arbitral Liability*, 32 AM. REV. INT'L ARB. 475 (2021).

function be identified through ordinary interpretation? Third, is the problem a curable description error, failed machinery or an indispensable condition that cannot be fulfilled? Fourth, can a proposed cure operate within mandatory law and the court's statutory powers? Fifth, does the agreement or applicable law permit a workable alternative without materially changing the promised reference? These questions should produce reasons tied to the actual defect. A court correcting a misnomer should explain why the intended institution is identifiable. A court assisting appointment should identify the failed obligation and the relevant statutory power. A court considering replacement should address the importance of the original institution and the substitute's willingness. Where no lawful cure preserves the agreement, refusal to manufacture a new reference respects the limits of consent. A policy favouring arbitration cannot supply that missing authority. The ACI's role should centre on information, standards and credible grading within its statutory powers. Any mandatory registration regime, sanctions or new consequences for institutional failure should rest on clear legislative authority. Section 43I grading should inform users rather than become an implied condition of every private arbitration agreement.⁷⁰ Public procurement may require additional provider checks, but those requirements should not silently become general validity rules for private contracts. Institutional diversity and public purchasing policy need not operate through identical standards.

Finally, institutional choice should receive serious contractual protection without being equated with choice of seat. The seat identifies the supervisory legal framework; an institution undertakes defined services within it. A foreign institution can administer an India-seated arbitration, as the New Delhi seat and SIAC rules in *Amazon v. Future Retail* demonstrate.⁷¹ Respecting both choices requires courts to preserve their distinct functions. The proposed framework protects institutional selection precisely by making its content, limits and consequences more predictable. Contract drafting can reduce the need for public intervention. Parties should identify the institution precisely, specify whether its role is appointment or administration, identify the governing rules and address institutional closure. A fallback should preserve the seat, essential qualifications and agreed procedural protections, and should identify how a replacement will be selected. Such clauses should also distinguish temporary administrative delay from permanent inability to act. Their value lies in allocating foreseeable implementation risks before a dispute changes the parties' incentives. Regulation should

⁷⁰ The Arbitration and Conciliation Act, 1996 (26 of 1996) §§ 43D, 43I, 43L.

⁷¹ *NV Inv. Holdings LLC v Future Retail Ltd.* (2022) 1 SCC 209 ¶ 2.2.

encourage this planning through model clauses, without making adoption of any particular model compulsory or treating departures as presumptively defective. This approach also makes institutional competition more intelligible by allowing parties to compare services without confusing public grading with legal validity.

9. CONCLUSION

The “Delaware of India” problem is best understood as a question about the conditions of trustworthy choice. Competition can expand access through lower costs, specialised knowledge and procedural variety. It becomes legally troubling when administrative freedom obscures who controls the process or makes protected rights difficult to exercise. The doctrinal inquiry therefore cannot stop at asking whether parties selected an institution. It must identify what that selection authorises, what the institution undertakes to deliver and which protections remain beyond ordinary contractual displacement. The findings reveal a mismatch between the language of regulation and the remedies needed. An ungraded institution presents an information question; an incapable institution presents a performance question; a compromised appointment process presents a legality question. One defect may develop into another, but the categories should not be presumed equivalent. A uniform response of invalidation would punish permissible choice. A uniform response of judicial rescue would permit courts to replace important parts of the bargain without adequate authority.

Indian law already provides substantial protection through agreement requirements, appointment assistance, independence rules, procedural equality and controlled review of awards. Its weakness is not the complete absence of legal safeguards around private institutions. The more specific problem is the distance between selecting institutional machinery and discovering whether that machinery can reliably perform its promised functions. Additional regulation is justified to the extent that it reduces that distance through disclosure, administrative continuity and accountable decision-making. The comparative analysis also changes the meaning of a pro-arbitration approach. Preserving arbitration does not require preserving every defective term. It equally does not require discarding every inconvenient institutional choice. Effective interpretation depends on evidence of the parties’ bargain, the feasibility of implementation and a lawful remedial route. Judicial restraint is compatible with practical assistance when the intervention is no broader than the identified failure requires. A regulatory floor should accordingly protect the conditions under which informed contractual autonomy remains meaningful, leaving parties free to purchase different

levels of service above it. Grading can support this objective, but it cannot replace transparent criteria or become a retrospective shortcut for attacking awards. The legitimate boundary of institutional freedom is reached where the selected machinery defeats mandatory protections or cannot deliver the reference without destroying its contractual identity. That boundary preserves both the enforceability of arbitration and the diversity from which informed institutional choice derives its value.

