



Navigating complex commercial disputes
The role of independent experts

October 2023

Overview

Over the past decade, we have seen tremendous progress in terms of precedence being given to Alternative Dispute Resolution (ADR) mechanisms in the Indian dispute landscape. The recently proposed institutionalisation of the mediation process is also a step forward in facilitating the ease of doing business in India and reducing the pressure on the judiciary.

Certain gaps remain on a few aspects, such as procedures, timelines/extensions, and enforcement of awards under

domestic ad hoc arbitrations. However, the proposed reforms and developments, such as the Mediation Act, 2023, the amendments to the Arbitration Act, 1996, and institutionalisation of ADR by the establishment of centres, such as Mumbai Centre for International Arbitration (MCIA), Indian International Arbitration Centre (IIAC), and International Arbitration and Mediation Centre (IAMC), will provide for the inculcation of international best practices and further pave the way for the adoption of ADR mechanisms in India.

Modern-day disputes becoming increasingly complex


The nature and complexities of issues involved in commercial disputes have grown, due to the increasing integration of major world economies and the development of new ways of doing business. Alongside, rapid technological advancements and digitisation have brought forward a host of new and ever-evolving issues for both traditional and new-age

businesses. These businesses heavily rely on technological support/infrastructure for their day-to-day operations. Interestingly, these threats are panning out as a sector-agnostic phenomenon and not limited to traditional situations/sectors that have dominated the dispute landscape.


We have witnessed the “theory of harm” being tested/applied in the following instances:



Cyber-attacks leading to the collapse of the sales system for manufacturing companies, resulting in business disruption claims being filed with insurance companies



Data exfiltration by ex-employees, leading to the loss in business income and unjust enrichment by ex-employees



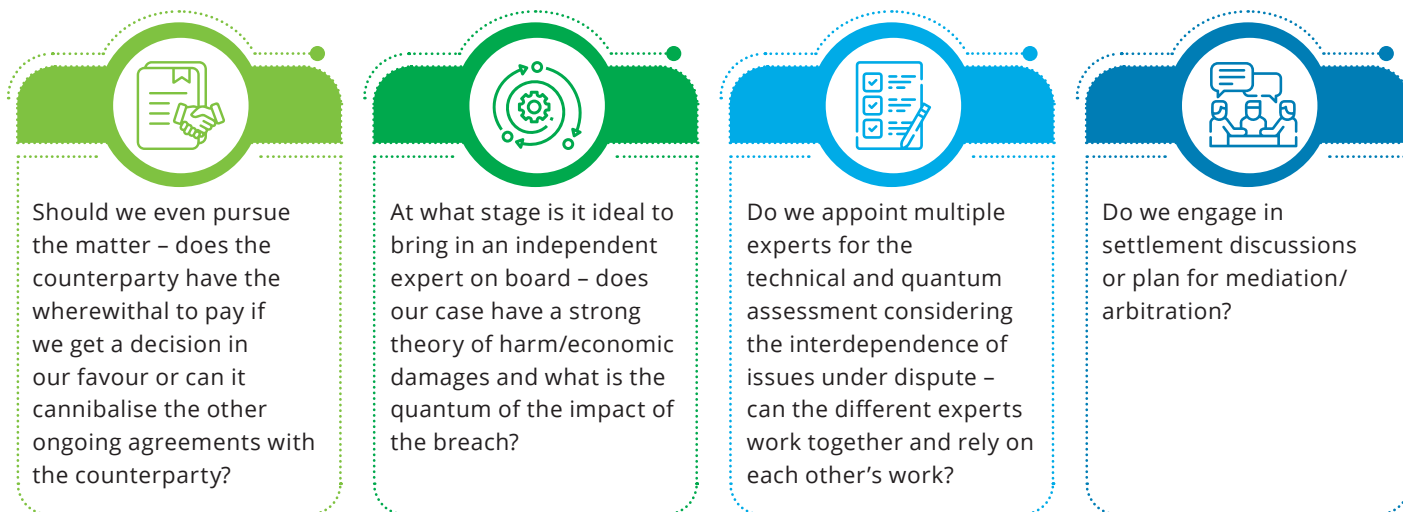
Delay in setting up IT infrastructure to upgrade work for long-running governmental contracts (seen across sectors), leading to non-performance of obligations contained in the contract and spill-over impact on expected revenue/income



Technical disruption on online platforms of financial services companies resulting in claims being made by brokers/customers for the alleged loss of trade opportunities, amongst others

Increased emphasis on charting out a resolution strategy, at the outset

Considering the intersection of myriad issues involved in modern-day disputes, charting out an effective dispute-resolution strategy has become complex. Businesses, in consultation with their legal consultants/counsel, are often seen debating on issues such as (but not limited to):



There is no one-size-fits-all approach. An effective dispute resolution strategy would differ on a case-by-case basis and needs to be drawn out by taking into consideration both legal and subject matter expertise after identifying the areas of dispute.

Evolving role of independent experts

In the context of disputes, asset tracing has gained prominence with the surfacing of increased forms of financial juggling, involving fund diversion and insolvency declaration. To mitigate these types of risks, clients are taking the assistance of asset tracing experts during arbitration proceedings. This has largely been useful to get an injunction/stay on the disposal of encumbered assets to avoid the risk of fund diversion/asset misappropriation in the interim. Asset tracing services are also being resorted to by clients/counsels for award enforcement.

The form and timing of experts’ appointment has evolved over the past decade. Many times the Arbitral Tribunal shares recommendations for the appointment of an expert given the complexity of the issues involved. The parties are keen to evaluate the joint appointment of an expert to narrow down areas of disagreement. Such joint appointment allows for saving on both cost and time. More recently, we have seen the arbitral tribunal appointing an expert to assist the tribunal in appreciating the assessment presented by the parties.

The appointment of multiple experts is becoming a common phenomenon specifically for disputes wherein disagreements between parties prevail over the veracity of

the incident/breach of the contract as well as the quantum/damages involved. In the context of construction dispute matters, quantum assessment highly depends on the findings of the delay expert, making it incumbent for parties to appoint both delay and quantum experts. Likewise, in technology disputes such as those pertaining to cyber and data theft-related incidents/breach, the appointment of a forensic technology expert, alongside a quantum expert, is critical. Forensic technology experts help establish the veracity of the incident, perform containment measures, and identify the nodes affected in the business value chain for the quantum expert to perform the damage quantification exercise.

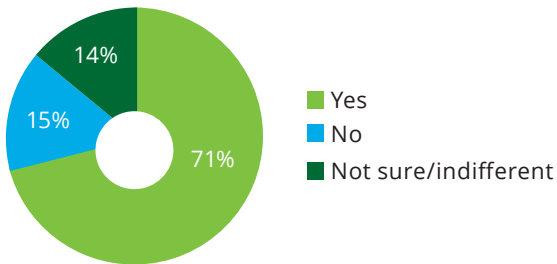
Lastly, we see more clients are interested in exploring negotiated settlements using independent experts. We have assisted multiple clients in negotiated settlements much prior to the commencement of any legal process. The key to a successful negotiated settlement amongst parties wherein a commercial dispute has arisen (may not be in arbitration/litigation), is the willingness amongst the parties to explore a middle ground. The probability of a successful negotiated settlement increases manifold if such a process is initiated early in the life cycle of the dispute.

LinkedIn Pulse survey conducted on the Mediation Bill, 2023

The Mediation Act, 2023 was passed by the Rajya Sabha on 1 August 2023, the Lok Sabha on 7 August 2023, and was notified in the Gazette of India after receiving the assent of the President of India on 15 September 2023.

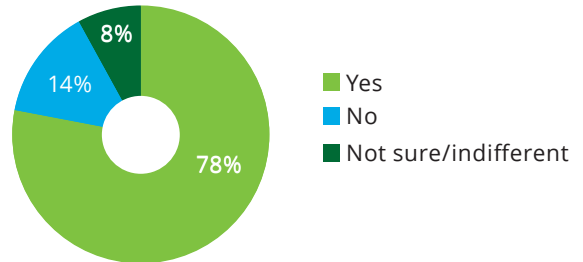
To understand the market sentiments around this bill (before it became an Act), we conducted a pulse survey over LinkedIn covering a few key themes about the bill. Here are the results:

Q1: Do you think the pre-litigation mediation should have been made mandatory in the Mediation Bill, 2023?



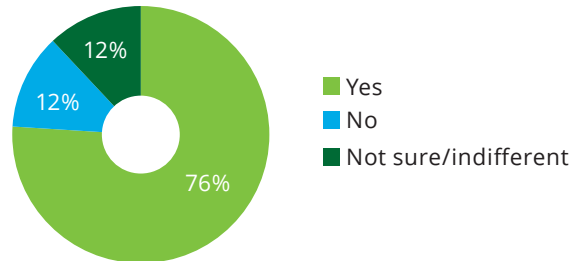
More than 70% of the respondents felt that pre-litigation mediation should have been mandatory in the Mediation Bill, 2023.

Q2: Will you consider mediation as a dispute resolution mechanism after it was proposed to be institutionalised in Mediation Bill, 2023?



Close to 80% respondents indicated that they will consider mediation as a dispute resolution mechanism in the future.

Q3: Does the inclusion of a withdrawal provision make it more likely for you to explore mediation as an Alternate Dispute Resolution (ADR)?



More than 75% of the respondents highlighted that the inclusion of a withdrawal provision will push them towards using mediation as an ADR.



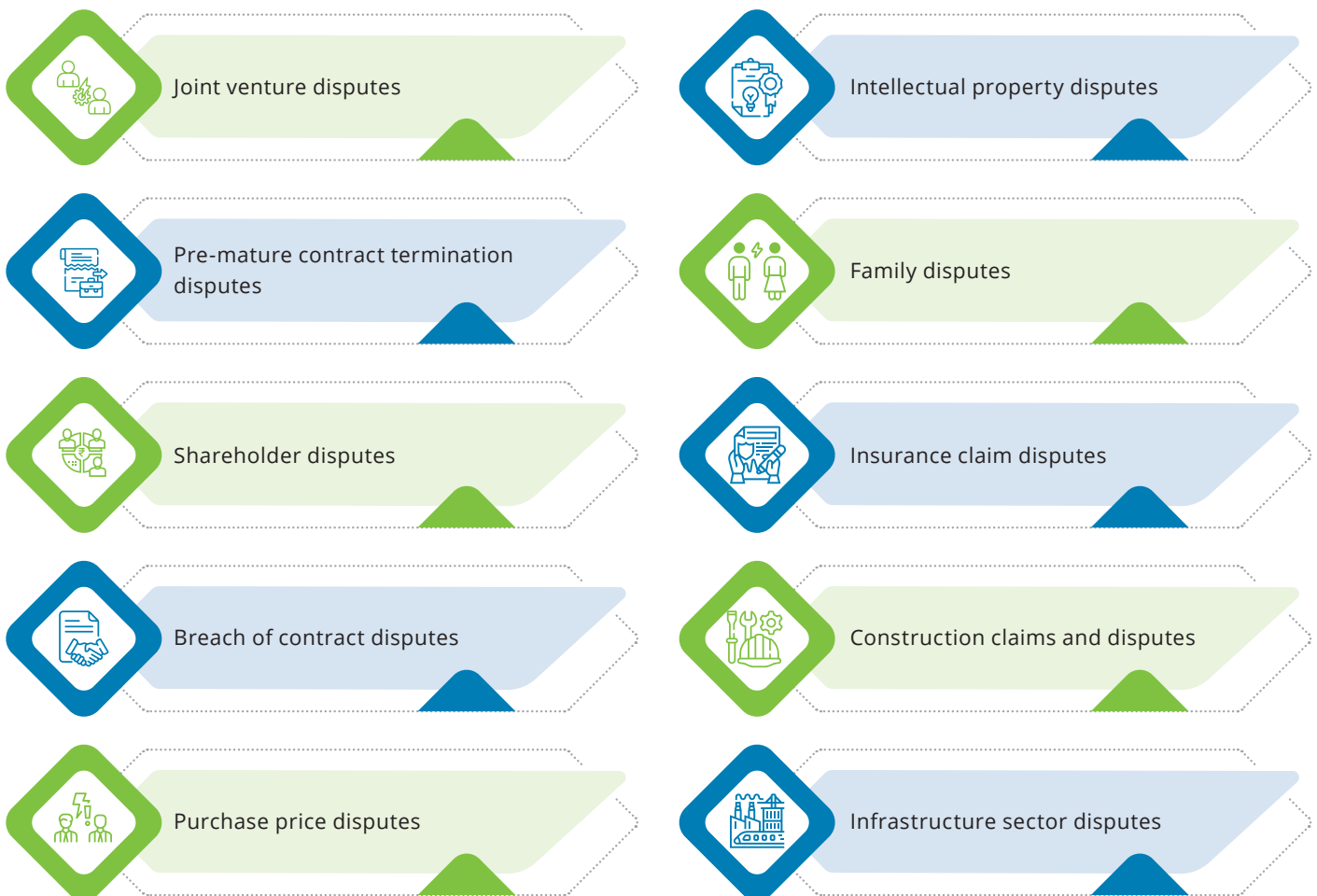
What approach works best for you?

The choice of an appropriate dispute resolution approach hinges upon the unique facts and circumstances of the case. Crafting an effective strategy necessitates vigilance on the part of businesses and their legal teams to promptly discern the associated risks wherein the primary objective should be to resolve disputes over protracted legal battles.

Must-do checks include checking for the wherewithal of the other side party to pay and the timely appointment of relevant experts for complex/technical matters that demand impartial expertise. Sustaining an ongoing dialogue between businesses, legal counsel, and independent experts is of paramount importance to derive optimal value for businesses.

About Deloitte India's dispute support practice

Deloitte India's dispute support practice works closely with leading organisations and their lawyers in judicial and alternative dispute resolution forums, across a range of jurisdictions to assist them manage disputes effectively through expert services. This includes gathering evidence in a legally tenable manner in relation to various situations, such as:



We can provide an independent expert report on the above-mentioned situations. The report will offer the quantification of the financial impact/damages that the client may have suffered. We have also been appointed to assess the damage report of the other side experts in multiple matters.

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