



# **Arbitration at the Supreme Court: Unsteady, uncertain, and slow**

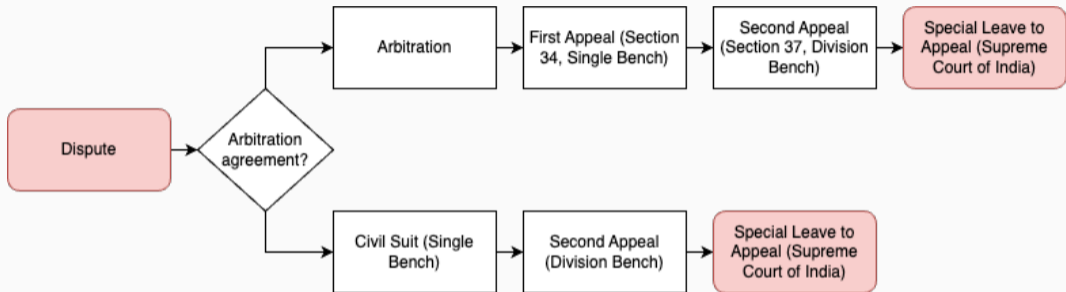
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Your Lordship, we're here to litigate the arbitration clause that was meant to avoid litigation.





\*Assuming a dispute of over rupees 2 crores in Delhi.

# Judicial review of arbitration

- In arbitration, there are two levels of judicial review:
  - Review of an arbitral award (or proceeding); and
  - Review of a judgment deciding the validity of arbitral award (or proceeding).
- First level: High Courts (depending on the monetary value of the claim).
  - There has been considerable work done on this (e.g., work at TrustBridge).
- Second level: Supreme Court of India – under Article 136 of Constitution.
  - The Supreme Court both reviews the arbitral award or proceedings, and interprets the law.
  - For example, *ONGC v Saw Pipes* broadened “public policy” to include patently illegality.<sup>1</sup>
  - However, relatively less attention has been paid to these reviews.

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<sup>1</sup>Sharma 2009.

- The Arbitration Act has been in existence for nearly three decades now.
- The last substantive amendment was in 2015, a decade back.
- It's useful to understand: (i) what kind of questions come up before the Supreme Court in the context of arbitration?, and (ii) In what manner does the court deal with them?
- This is important to understand from the perspective of certainty, consistency and predictability in dispute resolution.

## Questions and methodology

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# Questions

- What types of arbitration-related matters are brought before the Supreme Court?
- Does the Supreme Court create appellate incentives for parties?
- What is the life cycle of arbitration disputes that reach the Supreme Court?
- Can the challenges and shortcomings in Supreme Court arbitration judgments be attributed to party types?

## Methodology i

- We study Supreme Court judgments between 2015 and 2023.
- Allows us to understand review of judgments deciding the validity of arbitral awards (or proceedings).
- High courts also take the Supreme Court's actions as signals for their own conduct.
- We used the Manupatra subject toggle set to “arbitration”, resulting in 347 judgments.
- “Significant” judgments
  - Top 10% of most cited cases.
  - Top 10% of most cited cases per year.
  - Cases with benches of five or more judges.
  - Cases mentioned in the Supreme Court's Annual Report as “landmark judgments”.
- From the initial 347 cases, 33 were identified as “significant” judgments.



**Table 1:** Summary statistics

<b>Citations</b>	<b>Count</b>	<b>Judges</b>	<b>Count</b>
0 to 99	9	2	19
100 to 199	17	3	10
200 to 299	5	5	3
300 +	2	7	1

## Repeated litigation

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## The bane of uncertainties

- Repeated litigation involving the same section or law can lead to uncertainties within the legal system.
- It may lead to conflicting judgments if different courts interpret the law differently.
- This also strains judicial resources, potentially delaying other cases.

**Table 2:** Repeated litigation

<b>Section</b>	<b>Count in sample</b>	<b>Total citations</b>
<b>8</b>	8	1104
<b>11</b>	7	1579
<b>34</b>	11	1379
<b>37</b>	8	1017

- **Section 8:** If an arbitration agreement exists between parties, courts must refer them to arbitration.
- **Section 11:** Courts can take interim measures in arbitration cases, but their involvement is limited till an arbitral tribunal is formed.
- **Section 34:** Courts can set aside arbitral awards for procedural errors or if they violates public policy.
- **Section 37:** Courts can entertain appeals against section 34 orders.

## A Ayyasamy v A Paramasivam (2016)

- A dispute among partners in a hotel business with an existing arbitration clause.
- Lower courts' reliance on previous judgments suggesting serious fraud allegations is non-arbitrable.
- Supreme Court:
  - Inappropriate application of the N Radhakrishnan case by lower courts.
  - Difference between complex fraud affecting the public interest and simpler internal disputes.
  - The alleged fraud was not complex enough to preclude arbitration.

## Ameet Lalchand Shah v Rishabh Enterprises (2018)

- A dispute over agreements for a solar plant in Uttar Pradesh.
- Key agreements involved:
  - Equipment and Material Supply Contract with an arbitration clause.
  - Equipment Lease Agreement with an arbitration clause.
  - Sale and Purchase Agreement without an arbitration clause.
- High Court:
  - Dismissed an arbitration application under Section 8.
  - Relied on the absence of an arbitration clause in the Sale and Purchase Agreement.
  - Cited the inability to arbitrate due to serious allegations of fraud.
- Supreme Court:
  - All agreements were interconnected.
  - Allegations of fraud in commercial disputes does not preclude arbitration.

## Cycle of appeals

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## Not all appeals are bad

- Judges integrate personal policy preferences into their decisions.<sup>2</sup>
- In India, judgments impact social and legal norms, influencing the evolution of rights.<sup>3</sup>
- Appeals involve legal principles, judicial discretion, and the broader legal system.<sup>4</sup>
- They scrutinise decisions, potentially reversing them to correct errors.<sup>5</sup>
- Judges may have their decisions overturned on appeal, which **might influence their judgment**.<sup>6</sup>
- However, consistent review increases uncertainty and reduced predictability.

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<sup>2</sup>Hall, 2009.

<sup>3</sup>Wahi, 2022.

<sup>4</sup>Owens & Wedeking, 2011.

<sup>5</sup>Scott, 2006.

<sup>6</sup>Carrubba et al., 2008

**Table 3:** Results of appeals to the Supreme Court

<b>Impugned judgment overturned</b>	<b>Count</b>
No	7
NA	9
Yes	17

## DAMEPL v DMRC (2021)

- DAMEPL and DMRC entered a concession agreement for the Airport Metro Express Line in New Delhi.
- DAMEPL raised concerns about defects in the civil structure. Disputes were referred to arbitration.
- The Arbitral Tribunal found that DAMEPL's termination of the concession agreement was valid due to unrectified defects.
- The High Court initially upheld the arbitral award but later reversed it, setting aside parts of it.
- Supreme Court:
  - It affirmed that the Arbitral Tribunal's findings were based on a valid interpretation of the concession agreement.
  - The CMRS certificate was not conclusive evidence that DMRC had rectified the defects.
  - The High Court's findings were incorrect.

## UHL Power Company Ltd v State of Himachal Pradesh (2022)

- UHL and Himachal Pradesh entered agreements concerning a hydroelectric project.
- Disputes arose regarding contractual obligations, leading to arbitration.
- The arbitrator awarded UHL a significant sum, including pre-claim and compound interest.
- The High Court first overturned the arbitral award but later allowed the principal amount and simple interest.
- However, it rejected compound interest based on Supreme Court precedent.
- Supreme Court:
  - It held that the High Court erred in following the precedent on compound interest, which a later Supreme Court judgment had overruled.
  - Therefore, it restored the arbitrator's award.

## Swift resolution

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# Need for swift dispute resolution

- Delays in arbitration can limit access to justice, stressing the need for fast processes.<sup>7</sup>
- Expediency is essential to streamline procedures and simplify processes.<sup>8</sup>
- Fast-track arbitration minimizes time and costs.<sup>9</sup>
- Streamlined procedures and the balanced involvement of courts can help arbitration be a preferred resolution method.

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<sup>7</sup>Far & Mohsen, 2020.

<sup>8</sup>Tahir, 2023.

<sup>9</sup>Ng et al., 2019; Teichmann et al., 2023.

**Table 4:** Time taken in dispute resolution (in days)

<b>Time taken</b>	<b>Arbitration</b>	<b>First Litigation</b>	<b>Approaching SC</b>	<b>SC</b>
Count	7	4	12	33
Minimum	139	22	75	10
Median	1251	<b>91</b>	<b>518</b>	<b>459</b>
Maximum	1929	130	1279	5256

**Table 5:** Time taken at the Supreme Court by section

<b>Time taken at the SC (in days)</b>	<b>8</b>	<b>11</b>	<b>34</b>	<b>37</b>
Count	8	7	11	8
Minimum	95	33	60	60
Median	458	355	<b>937</b>	<b>1136</b>
Maximum	4266	562	4394	4133



## DAMEPL v DMRC (2021)

- **23 October 2012:** DMRC invoked arbitration.
- **11 May 2017:** The Arbitral Tribunal delivered its award.
- **6 March 2018:** The Single Judge of the High Court dismissed the petition filed by DMRC.
- **15 January 2019:** The Division Bench of the High Court reversed the Single Judge's decision and partly set aside the Arbitral Tribunal's award.
- **15 February 2018:** Decision challenged in the Supreme Court.
- **9 September 2021:** The Supreme Court judgment was delivered.

## UHL Power Company Ltd v State of Himachal Pradesh (2022)

- **10 February 1992:** An MoU was signed between Himachal Pradesh and UHL.
- **5 June 2005:** The Sole Arbitrator awarded Rs. 26,08,89,107 to UHL.
- **16 December 2008:** Himachal Pradesh filed a petition under Section 34 of the Arbitration Act challenging the Arbitrator's award. A Single Judge disallowed UHL's entire claim.
- **24 May 2011:** The High Court partly allowed UHL's appeal under Section 37 of the Arbitration Act, modifying the award.
- **7 January 2022:** The Supreme Court reversed certain findings of the High Court. It upheld the award of compound interest as originally decided by the Sole Arbitrator.

## **Party types: An explanation?**

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# The role of parties

- Previous work has shown the difference in arbitration outcomes depending on party types.<sup>10</sup>
- We explore whether any of the challenges and shortcomings in Supreme Court arbitration judgments vary as per party types?
- In short, no. Delay, repetitive litigation, and overturning of judgments are party agnostic i.e. they may communicate more about the nature of the Supreme Court itself.

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<sup>10</sup>Goel and Sharma 2024; Goel et al 2024.

**Table 6:** Repeated litigation by party types

<b>Section</b>	<b>Private Parties</b>	<b>State Parties</b>
<b>8</b>	8 (29%)	0 (0%)
<b>11</b>	5 (18%)	2 (33%)
<b>34</b>	9 (32%)	2 (33%)
<b>37</b>	6 (21%)	2 (33%)

**Table 7:** Results of appeals by party types

<b>Impugned judgment overturned</b>	<b>Private Parties</b>	<b>State Parties</b>
<b>No</b>	8 (31%)	2 (33%)
<b>NA</b>	5 (19%)	1 (16%)
<b>Yes</b>	13 (50%)	3 (50%)

**Table 8:** Time taken at the Supreme Court by party types

<b>Time taken at the SC (in days)</b>	<b>Private Parties</b>	<b>State Parties</b>
Minimum	10	33
Median	465	504
Maximum	4394	5256

## Conclusion

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## Key takeaways

- Swift and certain dispute resolution processes enhance trust, minimise business disruptions, and reduce costs.
- While judicial reviews are crucial to ensure fairness and correcting errors, they can introduce delays and unpredictability into the arbitration process.
- The study of significant judgments from 2015 to 2023 reveals that:
  - The same provisions are repeatedly litigated, leading to potential uncertainty.
  - This uncertainty is reflected in the regular setting aside of impugned judgments. This may also create incentives to appeal to the Supreme Court.
  - It is aggravated by the time required to reach finality in dispute resolution.

## Rethinking arbitration and ADR efficiency

- There are two primary pathways for dispute resolution: with or without arbitration.
- The value-add of the arbitration pathway is unclear due to a lack of data on arbitration outcomes.
- A recent Ministry of Finance Office Memorandum has also criticised arbitration due to the frequency of appeals.
- However, can any ADR mechanism be effective if the judicial system is flawed?
- Understanding the interplay between arbitration effectiveness and judicial efficiency could lead to different policy decisions.
  - Fixing Arbitration
  - Optimising ADR Suitability
  - Judicial Overreach

Thank you