

CHAPTER 6

DATA ANALYSIS

For the purposes of this study, the researcher has conducted a survey so as to gauge the current opinion of lawyers practising in arbitrations, senior counsels, arbitrators and academicians on arbitrations in India. The questionnaire comprises of 20 questions. Since international commercial arbitration in India is such a niche field, the researcher has limited himself to about 101 respondents who have either conducted arbitrations or participated in arbitrations, or handled matters in court pertaining to arbitrations. The method of sampling that is used for the survey is purposive sampling. The questionnaire is designed in such a way so as to get an idea of the general perception on arbitration by practitioners in India. The respondents in the survey are lawyers from Gujarat, Maharashtra, New Delhi, Rajasthan, Karnataka, Madhya Pradesh, Tamil Nadu, Uttar Pradesh, West Bengal and Assam, practising in their respective High Courts and the Supreme Court of India. In order to get their responses and to include a large number of diverse lawyers practising in different jurisdictions, the survey was sent to the members of the respective bar associations of those High Courts. Despite a number of legislative amendments and judicial precedents, India is still not a favourable arbitration destination. The survey aims to show the reasons behind this.

The survey is as below-

A survey on International Arbitration in India

This survey is conducted by Anshul Shah and is a part of his study on the challenges to International Commercial Arbitration in India, for the award of the degree of Ph.D. from the Law Faculty, The Maharaja Sayajirao University of Baroda. The responses shall be kept confidential and shall be used for academic purposes only.

*** Required**

1. Email address *

2. Have you either represented a party in an arbitration or presided over an arbitration? *

Mark only one oval.

☐ Yes

☐ No

3. Have you participated in arbitrations where one or both the parties are international parties? *

Mark only one oval.

☐ Yes

☐ No

4. For how long does your average arbitration go on? *

Mark only one oval.

☐ Less than 6 months

☐ 6 months to 1 year

☐ 1 - 2 years

☐ More than 2 years

A survey on International Arbitration in India

This survey is conducted by Anshul Shah and is a part of his study on the challenges to International Commercial Arbitration in India, for the award of the degree of Ph.D. from the Law Faculty, The Maharaja Sayajirao University of Baroda. The responses shall be kept confidential and shall be used for academic purposes only.

*** Required**

1. Email address *

2. Have you either represented a party in an arbitration or presided over an arbitration? *

Mark only one oval.

☐ Yes

☐ No

3. Have you participated in arbitrations where one or both the parties are international parties? *

Mark only one oval.

☐ Yes

☐ No

4. For how long does your average arbitration go on? *

Mark only one oval.

☐ Less than 6 months

☐ 6 months to 1 year

☐ 1 - 2 years

☐ More than 2 years

A survey on International Arbitration in India

This survey is conducted by Anshul Shah and is a part of his study on the challenges to International Commercial Arbitration in India, for the award of the degree of Ph.D. from the Law Faculty, The Maharaja Sayajirao University of Baroda. The responses shall be kept confidential and shall be used for academic purposes only.

*** Required**

1. Email address *

2. Have you either represented a party in an arbitration or presided over an arbitration? *

Mark only one oval.

☐ Yes

☐ No

3. Have you participated in arbitrations where one or both the parties are international parties? *

Mark only one oval.

☐ Yes

☐ No

4. For how long does your average arbitration go on? *

Mark only one oval.

☐ Less than 6 months

☐ 6 months to 1 year

☐ 1 - 2 years

☐ More than 2 years

A survey on International Arbitration in India

This survey is conducted by Anshul Shah and is a part of his study on the challenges to International Commercial Arbitration in India, for the award of the degree of Ph.D. from the Law Faculty, The Maharaja Sayajirao University of Baroda. The responses shall be kept confidential and shall be used for academic purposes only.

*** Required**

1. Email address *

2. Have you either represented a party in an arbitration or presided over an arbitration? *

Mark only one oval.

☐ Yes

☐ No

3. Have you participated in arbitrations where one or both the parties are international parties? *

Mark only one oval.

☐ Yes

☐ No

4. For how long does your average arbitration go on? *

Mark only one oval.

☐ Less than 6 months

☐ 6 months to 1 year

☐ 1 - 2 years

☐ More than 2 years

A survey on International Arbitration in India

This survey is conducted by Anshul Shah and is a part of his study on the challenges to International Commercial Arbitration in India, for the award of the degree of Ph.D. from the Law Faculty, The Maharaja Sayajirao University of Baroda. The responses shall be kept confidential and shall be used for academic purposes only.

*** Required**

1. Email address *

2. Have you either represented a party in an arbitration or presided over an arbitration? *

Mark only one oval.

☐ Yes

☐ No

3. Have you participated in arbitrations where one or both the parties are international parties? *

Mark only one oval.

☐ Yes

☐ No

4. For how long does your average arbitration go on? *

Mark only one oval.

☐ Less than 6 months

☐ 6 months to 1 year

☐ 1 - 2 years

☐ More than 2 years

A survey on International Arbitration in India

This survey is conducted by Anshul Shah and is a part of his study on the challenges to International Commercial Arbitration in India, for the award of the degree of Ph.D. from the Law Faculty, The Maharaja Sayajirao University of Baroda. The responses shall be kept confidential and shall be used for academic purposes only.

*** Required**

1. Email address *

2. Have you either represented a party in an arbitration or presided over an arbitration? *

Mark only one oval.

☐ Yes

☐ No

3. Have you participated in arbitrations where one or both the parties are international parties? *

Mark only one oval.

☐ Yes

☐ No

4. For how long does your average arbitration go on? *

Mark only one oval.

☐ Less than 6 months

☐ 6 months to 1 year

☐ 1 - 2 years

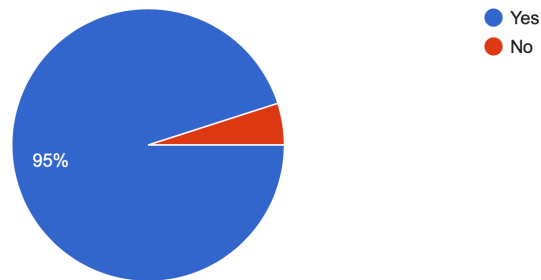
☐ More than 2 years

The results are as shared below-

QUESTION 1

Have you either represented a party in an arbitration or presided over an arbitration?

101 responses

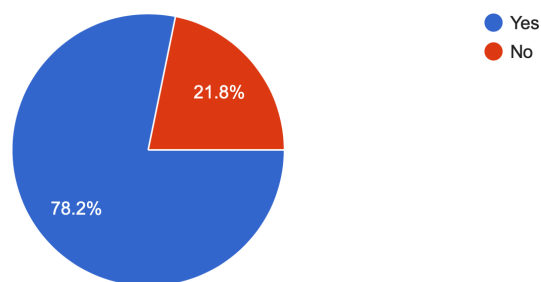


Out of the total respondents, 95% of the respondents have participated or presided over an arbitration. Hence, the researcher can be certain that most of the respondents have some knowledge of arbitration.

QUESTION 2

Have you participated in arbitrations where one or both the parties are international parties?

101 responses

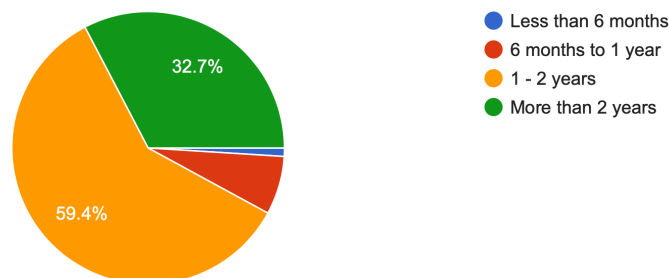


78.2% of the respondents have participated in arbitrations where one or more of the parties is a foreign party.

QUESTION 3

For how long does your average arbitration go on?

101 responses

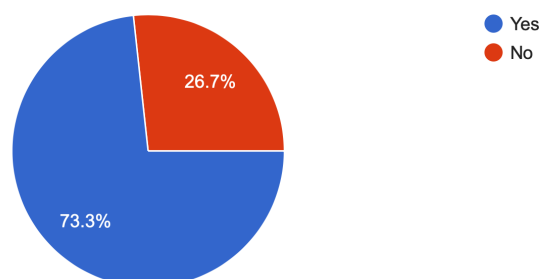


When asked about the duration of an average arbitration proceeding in India, 92.1% of the respondents said that it lasts for either one to two, or for more than two years. Out of these 32.7% of the respondents said that the arbitration went on for a period of more than two years. Such statistics are alarming especially when there are timelines in place in the legislation itself. However due to a number of other reasons like interim applications in courts, and adjournments, along with courts having the power to extend the time-frame for an arbitration, the Act is not achieving its desired purpose.

QUESTION 4

Have you participated in arbitral proceedings commenced under the Amended Arbitration Act?

101 responses



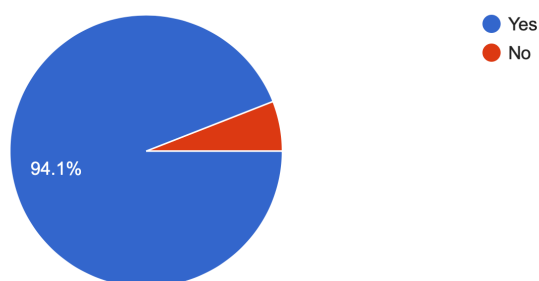
When asked whether the respondents have participated in arbitral proceedings

commenced under the amended Arbitration Act, 73.3% of the respondents said ‘yes’. This question was important because it was necessary to understand whether the reason behind an ineffective arbitral set up was only because of a lacuna in legislation or because of other factors as well. A majority of the respondents voting for ‘yes’ goes on to show that they have experienced the Indian arbitration process under the amended legislation as well. Thus, their responses for the other questions are even more relevant.

QUESTION 5

Have you come across instances where interim orders of the tribunal/preliminary orders are challenged before the courts?

101 responses

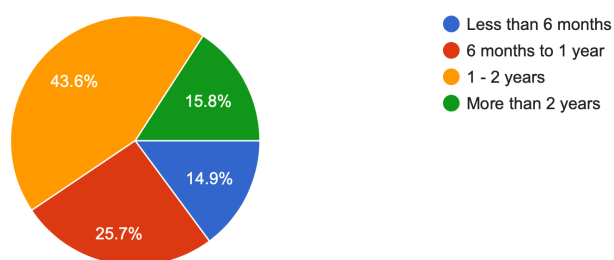


A whopping 94.1% of the respondents had experienced interim orders of the tribunal or preliminary orders being challenged before the courts. Inadvertently, this would happen because one party, being the respondent in the arbitration proceedings, would want to delay the proceedings initiated by the claimant.

QUESTION 6

What is the average time consumed in challenges to interim arbitral orders?

101 responses

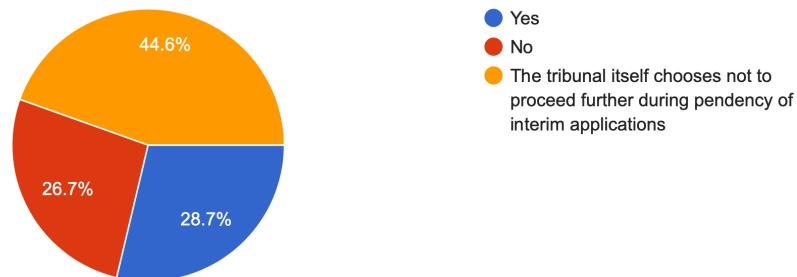


25.7% of the respondents had experienced challenges to interim arbitral orders in court taking about six months to a year for disposal. However, 59.4% of the respondents said that challenges to interim arbitral orders took more than a year and in some cases even more than two years.

QUESTION 7

Have you experienced arbitrations getting stayed during the pendency of interim applications before the courts?

101 responses

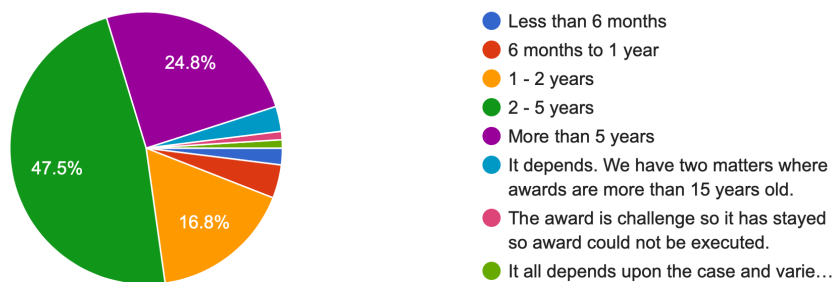


44.6% of the respondents said that when there is an interim application that is pending before the court pertaining to arbitral proceedings, the tribunal itself chooses not to proceed further during the pendency despite there not being any injunction granted by the court. 28.7% of the respondents said that courts tend to stay arbitrations when there is an interim application that is pending. Only 26.7% of the respondents did not experience arbitrations getting delayed because of the pendency of interim applications before the court.

QUESTION 8

What is the average time consumed in challenges to final arbitral awards and/or enforcement proceedings?

101 responses

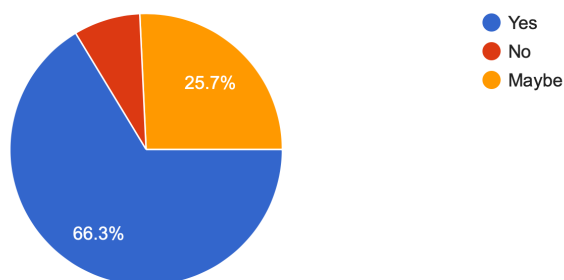


When asked about the average time consumed in challenges to final arbitral awards and enforcement proceedings, 72.3% of the respondents said that they go on for at least two years and in some cases can go on for longer. 24.8% of the respondents said that it takes more than 5 years for challenges to arbitral awards to be decided. This question had the option for respondents to put in their comments and a respondent candidly stated that in two matters, the arbitral award was more than 15 years old and was still pending execution.

QUESTION 9

In your opinion, are there problems/lacunae that are not addressed in the Amended Arbitration Act with respect to International Commercial Arbitrations?

101 responses

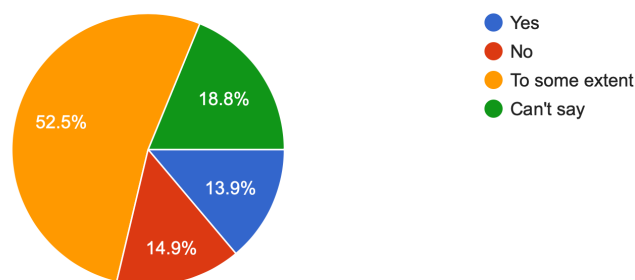


When asked if there are problems or lacunae that are not addressed in the amended Arbitration Act with respect to international commercial arbitration, only 7.9% of the respondents said ‘no’.

QUESTION 10

Do you think that Indian arbitration laws are more or less similar in other jurisdictions like Singapore and London?

101 responses

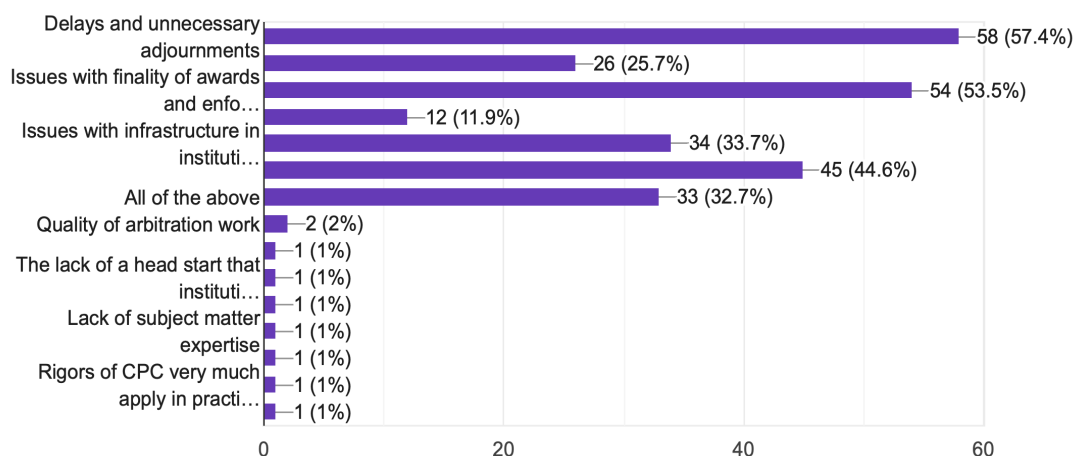


The researcher has tried to compare the arbitration legislation in India with the arbitration legislation in Singapore and London, since both Singapore and London are preferred destinations for arbitrations around the world. This question was asked as an attempt to find out whether people believe that Singapore and London have better arbitral laws as compared to India and a better framework for international commercial arbitration. 52.5% of the respondents said that the arbitration legislation in India is similar to the arbitration legislation in Singapore and London to some extent. Only 14.9 people said ‘no’ and that the legislations were totally different.

QUESTION 11

Why in your opinion is India not a preferred destination for international arbitration? (You can check multiple options)

101 responses



The respondents are of the opinion that delays and unnecessary adjournments, interference by courts and issues with finality of awards and their enforcement are major reasons behind India not being a favourable arbitration destination. 32.7% of the respondents are of the opinion that all the factors contribute in the lacunae in arbitration in India. Respondents are also of the opinion that lack of subject matter expertise goes a long way in contributing to this lacuna. Disputes such as shipping disputes or disputes where technical knowledge is required to be possessed, need to be presided over by an arbitrator who is an expert on the subject.

57.4% of the respondents said that delays and unnecessary adjournments are one of the primary reasons.

53.5% of the respondents said that issues with finality of awards and their enforcement is a major factor for India not being a favourable arbitration destination.

44.6% said that interference by courts is one of the major reasons.

25.7% of the respondents found it to be a very expensive affair and that being one of the causes behind India not being a favourable arbitration destination.

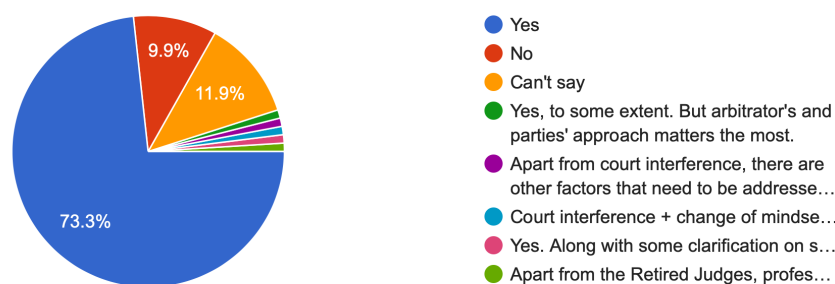
32.7% respondents voted for all of the options as reasons behind India's reputation.

A few respondents also suggested other reasons for India not being a favourable arbitration destination. Some of the most common reasons were that arbitrators applied the same approach to arbitral matters that would ordinarily apply to court proceedings. An interesting reason that was given was that there was a lack of subject matter expertise in the arbitrators and it could happen that an arbitrator who has never had the opportunity of being exposed to a particular subject, might be sitting as an arbitrator in a that very technical issue. A few respondents also stated that arbitrations ought not to be decided like suits and that is one of the main reasons why even arbitrations take long.

QUESTION 12

Do you think international arbitration could get a major boost merely by reducing court interference?

101 responses



A whopping 73.3% of the respondents agreed that merely reducing court interference in arbitration matters could give a major boost to international commercial arbitration in India. This shows that minimising court interference in arbitration matters could make a

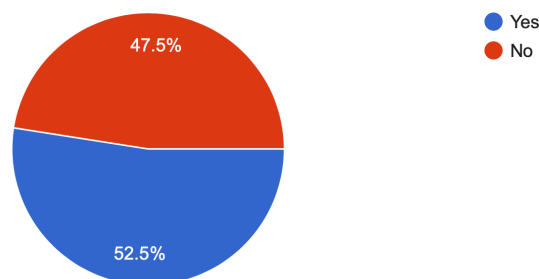
major difference. Amendments in legislation would definitely go a long way, but if the court continues to second-guess arbitral awards, the amendments would not be of any significance.

An interesting suggestion that was received by one of the respondents was that apart from retired judges taking up most of the arbitrations, professionals in the legal field or in other fields where technical issues are involved, should also consider taking up arbitrations as a full-time activity instead of it just being a weekend fling. Most lawyers that do arbitrations appear before the tribunal during the weekends because during the weekdays they are engaged in litigation before the court.

QUESTION 13

Have you participated in any institutional arbitrations?

101 responses

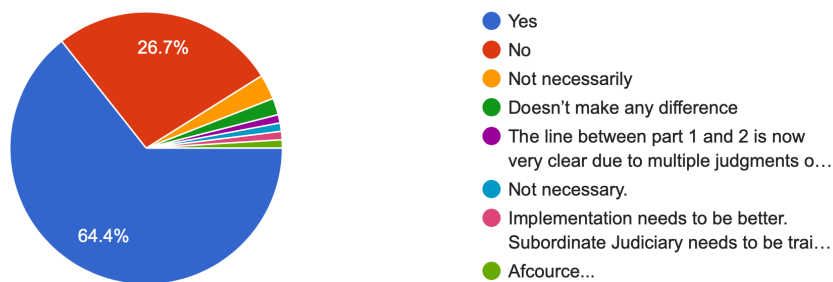


52.5% of the respondents have participated in institutional arbitrations and thus, would be in a position to assess the institutional arbitration framework that exists in India.

QUESTION 14

Do you think that there should be a separate legislation for international arbitration in India instead of bifurcating one Act into two parts?

101 responses



64.4% of the respondents voted in favour of a separate legislation for international arbitration in India instead of the current scheme of dividing one Act into two parts, one for domestic arbitration and one for international arbitration.

Some other suggestions that were received were that there could be amendments in the existing legislation and the line of difference between Part I and Part II of the Act be demarcated clearly.

Another suggestion that was received was that sub-ordinate judiciary could be trained to deal with arbitral disputes in a different manner than how they would ordinarily decide civil suits.

QUESTION 15

Do you think that an exclusive dedicated court for deciding arbitral disputes should be set up for expeditious disposal of arbitration applications and enforcement applications?

101 responses

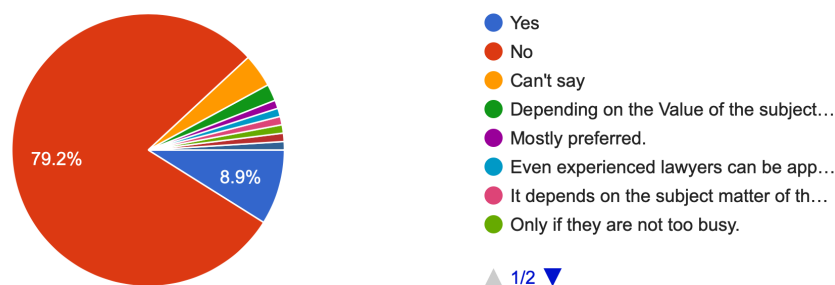


89.1% of the respondents are in favour of a separate and exclusive court for the settlement of arbitration disputes and interim applications. An interesting suggestion that was received was that there is a need of a separate bar for lawyers practising solely in arbitration.

QUESTION 16

Would you be in favour of retired judges as arbitrators for all disputes?

101 responses



Almost 80% of the respondents voted for not being in favour of retired judges as

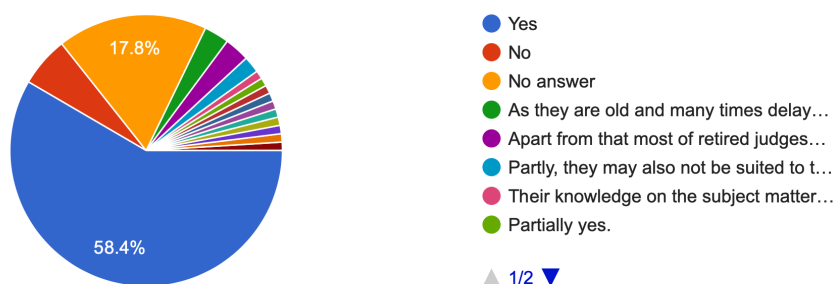
arbitrators for all disputes. Respondents also voted for experienced lawyers being appointed as arbitrators to cut down on costs and to speed-up the arbitral process.

A few respondents also stated that the arbitrator can be chosen depending on the issue. For example, judges having experience in admiralty matters may be appointed as arbitrators in maritime arbitrations.

QUESTION 17

If your answer is 'No' to the previous question, is it because judges bring with them the same approach to arbitration as they would while deciding court cases?

101 responses



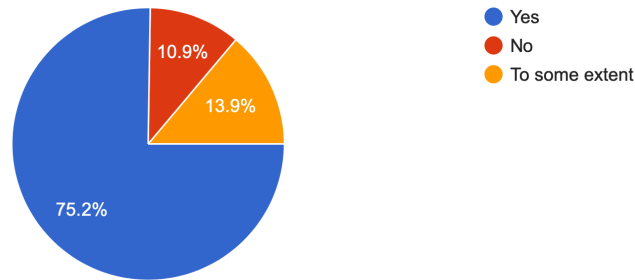
17.8% of the respondents chose not to answer the question.

When asked as to why the respondents weren't in favour of retired judges as arbitrators for all disputes, almost 60% of the respondents said that it is because of retired judges bringing with them the same approach that they bring to court cases. However, it must be clarified here that a number of times, the pendency of cases is such a burden on the judges, that they have to entertain fresh disputes and cases in which interim relief is granted or notice is issued, take a back seat. Even lawyers seek adjournments on multiple occasions and this can prevent judges from speedily proceeding with a matter even if they want to. It is expected that the respondent to a matter will seek to delay and the petitioner will be the one having urgency.

QUESTION 18

Are you aware of the NAFED judgement and its implications?

101 responses

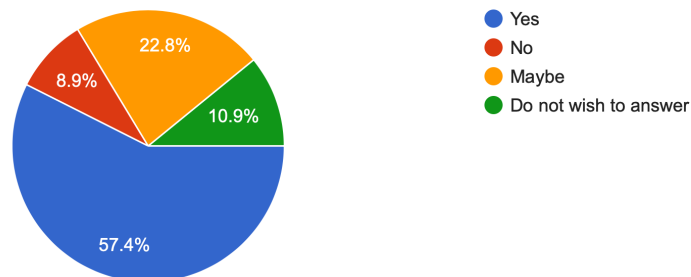


75% of the respondents are aware of the NAFED judgement and its implications, thus being in a position to effectively comment on the international commercial arbitration scenario in India and answer the following question. 14% of the respondents are aware of the implications to a certain extent.

QUESTION 19

Do you think that the judgement is a step back for international arbitrations in India?

101 responses

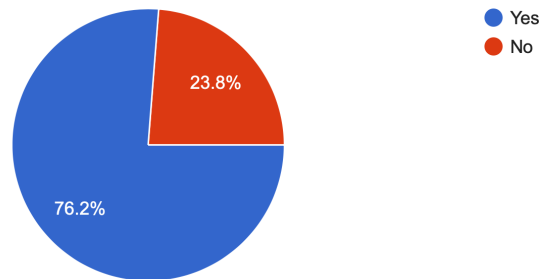


When asked if the judgement was a step back for India, only 8.9% of the respondents voted for 'No'. A discussion regarding the NAFED judgement is dealt with by the researcher in Chapter 5.

QUESTION 20

Have you participated in virtual hearings whether in courts or in arbitrations?

101 responses



This question was asked so as to understand whether arbitration can also progress from virtual hearings. This can happen if lawyers and judges get increasingly used to moving ahead with technology and embracing new techniques of hearings and dispute resolution.

76% of the respondents, within a span of 4 months into the pandemic, had already participated in virtual hearings.

OTHER SUGGESTIONS

Respondents in the survey also had the option to add comments. The following are some of the comments received.

“Unless arbitrator adopts different mindset, there will not be much difference in litigation and arbitration, which is a hindrance for international arbitration”

“All in all, India certainly has a long way to go before we become a force to reckon with as regards institutional arbitrations”

“The NAFED judgement: it is possibly a correct outcome on wrong reasoning laying down wrong law. It is settled that a mere breach of law is not breach of public policy. This judgment flies in the face of all such judgments. However, as the contract was

subject to Indian law, the issue of ability to perform for lack of license would hit at the very capacity to contract. Though this is a factual issue it can be argued that these are jurisdictional fact of section 7(1)(a)(I) of the foreign awards act. Would an Indian court permit enforcement of damages if a bona fide attempt to export on license was disallowed by the authority?”

“In the fastly changing era of international arbitration, change in approach by indian law makers and judiciary, can bring major change in the role of India to make and establish it as an international hub for international arbitration.”

“I think arbitration law is constantly changing and there is a degree of uncertainty as far as interpretation is concerned. Concepts such as 'venue' and 'seat' are also subject to changing judicial interpretation given the complex commercial transactions. Also, enforcement of awards is something that the legislature needs to think upon. Any award, though obtained expeditiously, is only a paper award if its enforcement is unnecessarily prolonged.”

“To make India as a preferred destination for international arbitration, there has to be minimal interference by court”

“Arbitration is merely a pre-litigation exercise. Till the mindsets change, amendments in the law are pointless.”

“We are catching on in terms of awareness and portability of arbitration awards in India but there is still a fairly long road ahead in getting to a stage where all courts and stakeholders understand the importance of allowing arbitration to have an independent identity. One of the major issues is the closely knit court mechanism provided in the Act that clearly impedes the process, even at an interim stage. This is not too easy to resolve either, as there are plenty of instances where arbitration is misused or impartial - reasons for which court interference is necessary. Institutional arbitration is an answer to these issues to a better extent, but the costs associated with the process can be a major deterrent for parties these days. In my experience, certain corporate entities now

prefer to go to a court or specialized tribunal instead of arbitrating to avoid costs or unnecessary delays.”

“In the NAFED case was a very fact specific case. And enforcement of foreign awards should not be looked at through NAFED lens.”

“Like commercial courts there has to be a dedicated court for arbitration under the act which would deal with appointment of the tribunal to the S. 37 appeal.”

“Lesser court interference and higher degree of sophistication by arbitrators are the major factors required for making India a pan arbitration centre”