

ARBITRATING DATA DISPUTES: CHARTING INDIA'S PATH FORWARD

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I. OVERVIEW: INDIA'S DATA PROTECTION REGIME

In August 2023, the Indian Parliament passed the Digital Personal Data Protection Act 2023[“**DPDP Act**”] into law. Being a principles-only legislation, the DPDP Act remains to be notified and operationalised through detailed executive rules¹, which are likely to be notified by the close of 2024.²In a manner akin to the General Data Protection Regulation [“**GDPR**”]³ passed by the European Union [“**EU**”] and the Personal Data Protection Act of Singapore [“**Singapore PDP Act**”]⁴, the DPDP Act:

- (i) Categorises entities engaging with personal data into three categories. Data principals (‘data subject’ under the GDPR and ‘individual’ under the Singapore PDP Act) are individuals to whom the personal data actually relates. Data fiduciaries (‘controller’ under the GDPR and ‘organisation’ under the Singapore PDP Act) refers to a person – natural or juridical – who determined the purpose and means of processing personal data envisaged under the DPDP Act. Finally, data processors (‘processor’ under the GDPR and ‘intermediary’ under the Singapore PDP Act) are those persons that process the personal data on behalf of data fiduciaries [together, “**Data Stakeholders**”];
- (ii) Prescribes distinct sets of rights and obligations of each Data Stakeholder; and
- (iii) Establishes a Data Protection Board of India [“**Board**”].The Board marks the starting point of the dispute resolution mechanism under the DPDP Act and is charged with an investigative and quasi-judicial function. Pursuant to complaints of data breaches from Data Stakeholders or references made by the Central Government, the Board is empowered to undertake inquiries, issue directions and impose penalties.⁵Appeals from directions or orders of the Board lie to the Appellate Tribunal.⁶

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¹ Section 1(2), DPDP Act.

² <https://legal.economictimes.indiatimes.com/news/law-policy/government-to-release-digital-personal-data-protection-rules-by-month-end/115462460>

³ Regulation (EU) 2016/679 (General Data Protection Regulation).

⁴ Personal Data Protection Act, 2012.

⁵ Section 27, DPDP Act.

⁶ Section 29(1), DPDP Act. Appellate Tribunal is the Telecom Disputes Settlement and Appellate Tribunal established under Section 14 of the Telecom Regulatory Authority of India as defined under Section 2(a), DPDP Act.

Within this overarching framework, the data principal has several key rights, principally as against the data fiduciary. For instance, the data principal has the right to (i) request information regarding further sharing of their data⁷, subject to certain lawful exceptions⁸; (ii) withdraw consent, by means and methods the ease of which ought to be comparable to those of giving consent in the first place; (iii) seek updating, completion, correction, or erasure of misleading or incomplete personal data; (iv) obtain information about identities of Data Stakeholders with whom such data principal's personal data has been shared; and (v) seek information regarding the use of the data principal's personal data.

Meanwhile, as between data fiduciaries and data processors, the DPDP Act makes the data fiduciary responsible for compliant data processing whether undertaken by itself or the data processor. Similar to the GDPR, the DPDP Act mandates that data processing agreements be executed between data controllers and data processors if the data processors are engaged by data fiduciaries to process personal data of data principals⁹, in a bid to ensure compliance and further the intention of the legislation to hold data controllers definitively responsible¹⁰ for any irregularities in data processing.

II. REQUIREMENT OF A ROBUST DATA DISPUTES RESOLUTION MECHANISM

The DPDP Act represents India's first legislative foray into personal data protection. Naturally, there exists limited regulatory or industry experience in managing data within the parameters of a demanding legal framework. Given this unpreparedness, coupled with the extensive rights-obligation framework briefly delineated above and the mandate of reporting data breaches to the Board¹¹, India can reasonably anticipate a high volume of data-related disputes following the coming into force of the DPDP Act. Notably, even globally, an overwhelming 94% of respondents in an industry survey [**"Disputes Trends Survey"**] reported concern around cyber security and data-related disputes in 2024; and 21% believed that theft of personal data presented a risk.¹²

Keeping these factors in view, India will require a robust dispute resolution mechanism for data-related disputes. This is currently absent from the DPDP Act. The DPDP Act vests dispute resolution of identified breaches with the Board. All other disputes, which are not covered by this identified subject-matter jurisdiction of the Board¹³, would default to civil-commercial courts in terms of the Code of Civil Procedure 1908. Indian courts have traditionally been marked by low case disposal

⁷ Section 11(1)(b), DPDP Act.

⁸ Section 11(2), DPDP Act.

⁹ Section 8(2), DPDP Act.

¹⁰ Section 8(1), DPDP Act.

¹¹ Section 8(6), DPDP Act.

¹² <https://www.bakermckenzie.com/-/media/files/insight/publications/2024/the-year-ahead-report-2024.pdf>, accessed on 28 July 2024.

¹³ Section 39, DPDP Act.

rates. While the DPDP Act does provide for mediation in cases where the Board directs the parties to do so¹⁴, this allowance comes with its own challenges:

- (i) The Board continues to remain the first point of intervention for any dispute – even to be referred to mediation, the parties require an assessment from the Board, and certification that the dispute is fit for mediation. This creates a bottleneck and leads to an inefficient dispute escalation mechanism; and
- (ii) The provision of pre-dispute mediation ignores the experience of Indian practitioners and litigants under the civil-commercial litigation framework, where pre-dispute mediation requirements (the equivalent of Board interventions under the DPDP Act) are treated as formalistic and often circumvented.

Thus, directly prescribing arbitration as a dispute resolution mechanism – whether in combination with a pre-arbitration mediation clause or on a standalone basis –for appropriate, pre-identified categories of disputes under the DPDP Act may be a viable solution to boost the effectiveness and implementation of the DPDP Act. The introduction of arbitration as a dispute resolution mechanism for data-related disputes warrants review along three considerations: (i) arbitrability of data-related disputes; (ii) whether arbitration lends itself to resolution of data-related issues; and (iii) acceptance of arbitration as a suitable method of dispute resolution by users. Each of these is addressed, in seriatim, below.

III. LEGAL PRINCIPLES GOVERNING ARBITRABILITY: DO DATA DISPUTES QUALIFY

The United Nations Commission on International Trade Law Model Law on International Commercial Arbitration does not specifically set out which disputes are arbitrable and relegates this question to national laws.¹⁵ The Singapore Court of Appeal has provided a helpful, ‘composite’ test for determining the sets of laws that would determine arbitrability of a dispute: in the first instance, the law governing the arbitration agreement; and as an additional public policy consideration, the law of the seat.¹⁶

In cases where Indian law is the governing law or law of the seat, the overarching principle to assess arbitrability of a subject-matter is not defined in statute. Instead, the jurisprudence evolved by the Supreme Court of India regarding ‘arbitrability’ of disputes rests on the distinction between (i) rights ‘in rem’ i.e. ‘real’ rights, valid and exercisable against the world at large; and (ii) rights ‘in personam’

¹⁴ Section 31, DPDP Act.

¹⁵ Article 1(5), Model Law on International Commercial Arbitration.

¹⁶ Anupam Mittal v Westbridge Ventures II Investment Holdings, [2023] SGCA 1.

i.e. ‘personal’ rights, valid and exercisable against specific individuals.¹⁷ While the former have been held to be in the domain of public courts, the latter are permitted to be resolved by arbitration. The Supreme Court has further clarified that “*disputes relating to sub-ordinate rights in personam arising from rights in rem have always been considered to be arbitrable*”¹⁸. This conceptual framework forms the legal basis for why validity of a patent is not arbitrable in India, but the determination of rights under a license of such patent is. This view draws on generally accepted principles in the United Kingdom.¹⁹

Thus, in India, what appears to be relevant to determining arbitrability of a subject-matter is whether it involves interplay of private rights and larger public considerations. If it does, the issue of ‘arbitrability’ gets muddled and requires subject-specific consideration by courts.

It is useful to simultaneously examine jurisprudence around arbitrability across the EU and Singapore, to allow India to draw from best practices and legislate or make rules pursuant to the DPDP Act thoughtfully and efficiently.

- (i) The European Court of Justice has long affirmed that matters of anti-trust law – which involve layers of public import as well as private rights – are amenable to arbitration.²⁰ Similarly, disputes involving intellectual property rights [“**IPR**”], ranging from licensing rights to validity of patents, are increasingly recognised as arbitrable across EU member states.²¹
- (ii) The Singapore Court of Appeal has repeatedly re-affirmed the arbitrability of minority rights disputes in Singapore.²² Additionally, IPR disputes are arbitrable in Singapore, by statute.²³

While arbitrability of data-related disputes have not specifically or extensively been considered across these jurisdictions, the trend analysed above indicates that Singapore and the EU are likely to adopt a liberal lens and classify data breach disputes as ‘arbitrable’.

¹⁷ *Booz Allen & Hamilton Inc. v SBI Home Finance Inc.*, (2011) 5 SCC 532, *Vidya Drolia v Durga Trading Corporation*, (2021) 2 SCC 1.

¹⁸ *Ibid.*

¹⁹ Mustill & Boyd, *Law and Practice of Commercial Arbitration in England*, 2nd Edition, 1989; Mustill & Boyd, *Companion Volume to Commercial Arbitration*, 2nd Edition, 2001.

²⁰ *Eco Swiss China Time Ltd. v Benetton International NV* (C126/97) EU:C:1999:269 (01 June 1999).

²¹ <https://arbitrationblog.kluwerarbitration.com/2022/11/29/should-i-arbitrate-my-patent-dispute/>. Accessed on 9 August 2024

²² *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2015] 1 SLR 373, *Anupam Mittal v Westbridge Ventures II Investment Holdings*, [2023] SGCA 1.

²³ Section 25B, International Arbitration Act 1994.

Importantly, applying even conservative Indian jurisprudential principles of a hard ‘*in rem*’ and ‘*in personam*’ distinction, disputes under the DPDP Act actually lend themselves to arbitration. To illustrate, foreseeable categories of disputes under the DPDP Act would typically extend to:

- (i) disputes based on a complaint by or on behalf of a data principal, the primary beneficiary of the DPDP Act’s protective mandate. These fall within the jurisdiction of the Board under the DPDP Act²⁴. This recourse appears aligned with the “*in rem*” test for determining arbitrability – as a data breach of such nature is directly violative of rights of the data subject against the world (or at the very least, data controllers and processors, at large) i.e. ‘public’ rights enshrined in and protected by the statute.
- (ii) Disputes between data fiduciaries and data processors, arising from breach of ‘data processing agreements’, resulting in a claim for contractual or common law remedies, such as damages. The DPDP Act is silent on the mechanism for resolving such ‘private’ disputes – thus, they do not fall within the ambit of disputes referable to the Board; and
- (iii) Disputes between data fiduciaries and data principals that do not fall within the category of personal data breach disputes reportable to the Board. For instance, compensation claims under contract or common law for harm caused to the data principal. These would run parallel to complaints brought before the Board, exercising its powers in terms of scenario (i) above and give the data principal a ‘private’ basis for action – which, unlike the GDPR, is currently missing from the DPDP Act. Under the GDPR, in addition to filing a complaint with the “supervisory authority” (akin to the Board), a data subject “*who has suffered material or non-material damage as a result of an infringement of [GDPR has] the right to receive compensation from the controller or processor for the damage suffered*”²⁵.

The DPDP Act, on the precipice of becoming operational, is well positioned to explicitly allow for arbitration in cases involving ‘private’ disputes envisaged under scenarios (ii) and (iii) above. The default alternative, from the scheme of the DPDP Act could be inferred to be recourse to national courts. The mechanics of implementation are discussed in Part IV below.

IV. AMENABILITY OF ARBITRATION TO DATA-RELATED DISPUTES

Enforceability of awards, choice of specialist arbitrators and flexibility have consistently been recognised as desirable features of the arbitral process.²⁶ Additionally, confidentiality and time

²⁴ Section 27, DPDP Act.

²⁵ Article 82(6) read with Article 79, GDPR.

²⁶ <https://www.qmul.ac.uk/arbitration/research/2015/>. Accessed on 12 August 2024.

efficiency, particularly as opposed to protracted litigations in India, are definitive advantages of the arbitral process.

Data-related disputes are marked by (i) involvement of personal or sensitive information that demands confidential treatment and limited dissemination; (ii) technical information such as data logs, which warrants specialist analysis; and (iii) voluminous records, requiring time-consuming examination. Specialised arbitrators are better suited to these requirements than national courts, which are often at capacity and may not possess the specialisation required to understand technicalities underlying complex data-driven disputes.

Further, there are advantages to overtly allowing for arbitration of identified disputes arising under the DPDP Act (as detailed in Part III above). *First*, the position regarding arbitrability of select data-related disputes shall be clear from the outset – and will not have to take the long and winding jurisprudential route to ‘arbitrability’ taken by IPR disputes in India. Singapore, too, had adopted a statutory approach to settle the arbitrability of IPR disputes.²⁷ This would create an environment of legislative certainty around the implementation of the DPDP Act – data subject individuals and data controller corporations would equally benefit from clarity around recourses available to (or against) them in case of ‘private’ violations or disputes under the DPDP Act.

Second, the DPDP Act can, by providing specifically for arbitrability of specified data-related disputes, facilitate systematic and fair arbitration mechanisms – such that they are not necessarily tilted in favour of the data controller, which typically has much larger litigative capacity and bargaining power than an individual data subject. Much like the EU²⁸, India can prescribe standard-form clauses in the rules pursuant to the DPDP Act for inclusion in contracts executed between Data Stakeholders, to (i) ensure compliance with the DPDP Act; but also (ii) provide fair and equitable standard form arbitration agreements that Data Stakeholders can opt into when giving consent.

V. INDUSTRY PERSPECTIVES: DO DATA STAKEHOLDERS WANT TO ARBITRATE

An industry survey undertaken in 2016²⁹ [“**QMUL Survey**”] revealed that disputes within the Technology, Media and Telecommunications [“**TMT**”] sector were on the rise, of which data-related issues comprised a notable component. Arbitration emerged as the most preferred means of dispute resolution amongst private disputes practitioners, with 92% respondents indicating that international

²⁷ Intellectual Property (Dispute Resolution) Act, 2019.

²⁸ https://commission.europa.eu/law/law-topic/data-protection/international-dimension-data-protection/standard-contractual-clauses-scc_en. Accessed on 10 August 2024.

²⁹ An Insight into Resolving Technology, Media and Telecoms Disputes. <https://www.qmul.ac.uk/arbitration/research/2016/>. Accessed on 13 August 2024.

arbitration is well suited to TMT disputes. In contrast, litigation was the least desirable. The more recent Disputes Trends Survey buttresses these findings, where almost 63% respondents expected cyber security and data disputes in 2024.³⁰

From an institutional perspective, the World Intellectual Property Organization [“WIPO”] Arbitration and Mediation Centre’s caseload categorically reflects the (a) volume of ; and (b) disputes that specifically relate to data processing agreements; and (b) the range of services on offer for resolving such specialised disputes.³¹ It is notable that given the increased legislative focus on data globally, the WIPO has recognised increased susceptibility of data-related business-to-business disputes. This increase in TMT (including data) disputes and WIPO’s specialised resolution services tie in with practitioners’ preference of arbitration over litigation for resolution of such disputes.

Thus, resolution of data-related disputes by arbitration does not appear to be a concern amongst practitioners and institutions. To the contrary, practitioners and international institutions demonstrate a clear preference for resolution of TMT, data and cyber security disputes by arbitration.

VI. TAKEAWAYS: WAY FORWARD

It is evident from the above analysis that the Indian position on the suite of arbitrable disputes is more conservative than that adopted by the EU and Singapore. This creates an opportunity for India to borrow and tailor best practices from these jurisdictions and expand the scope of ‘arbitrability’.

That said, even without having to necessarily expand the scope of ‘arbitrability’, the DPDP Act remains amenable to carving out of a category of ‘non-public-interest’ and squarely private commercial disputes, which are best-suited to be resolved by arbitration.

Keeping these considerations in view, it is recommended that the DPDP Act should explicitly provide that data-related disputes, barring those reserved for the Board’s jurisdiction, are arbitrable. This may be done either through suitable legislative amendments to the DPDP Act or by prescribing executive rules that provide for arbitrability of specified, ‘private’ data-related disputes. This statutory recognition of arbitrability of data-related disputes will lend certainty to dispute resolution recourses available to Data Stakeholders – and pre-empt and mitigate any legal ambiguity on this front.

³⁰ <https://www.bakermckenzie.com/-/media/files/insight/publications/2024/the-year-ahead-report-2024.pdf>.

³¹ https://www.wipo.int/amc/en/center/specific-sectors/b2b_data/. Accessed on 10 August 2024.