

# ARBITRATION IN INDIA

---

By Chakrapani Misra and Sanjeev Kapoor, Khaitan & Co



# Table of Contents

<b>1.</b>	<b>Overview</b>	<b>421</b>
<b>2.</b>	<b>Scope of application and general provisions of the Indian Arbitration Act</b>	<b>422</b>
<b>3.</b>	<b>The arbitration agreement</b>	<b>423</b>
3.1	Definitions	423
3.2	Formal requirements	424
3.3	Special tests and requirements of the jurisdiction	425
3.4	Separability	426
3.5	Legal consequences of a binding arbitration agreement	426
<b>4.</b>	<b>Composition of the arbitral tribunal</b>	<b>427</b>
4.1	Constitution of the arbitral tribunal	427
4.2	Challenge of arbitrators	428
4.3	Responsibilities of the arbitrators	430
4.4	Arbitrator fees	431
<b>5.</b>	<b>Jurisdiction of the arbitral tribunal</b>	<b>431</b>
5.1	Competence to rule on jurisdiction	431
5.2	Power to order interim measures	432
<b>6.</b>	<b>Conduct of proceedings</b>	<b>433</b>
6.1	Commencement of arbitral proceedings	433
6.2	General procedural principles	433
6.3	Seat and language of arbitration	434
6.4	Multi-party issues	435
6.5	Oral hearings and written proceedings	435
6.6	Default by one of the parties	437
6.7	Evidence generally	438
6.8	Appointment of experts	438
6.9	Confidentiality	439
6.10	Court assistance in taking evidence	439

<b>7.</b>	<b>Making of the award and termination of proceedings</b>	<b>440</b>
7.1	Choice of law	440
7.2	Timing, form, content and notification of the award	441
7.3	Settlement	443
7.4	Power to award interest and costs	445
7.5	Termination of the arbitral proceedings	445
7.6	Effect of the award	447
7.7	Correction, clarification and issue of a supplemental award	447
<b>8.</b>	<b>Role of the courts</b>	<b>449</b>
8.1	Jurisdiction of the courts	449
8.2	The extent of court interference	449
<b>9.</b>	<b>Challenging and appealing an award through the courts</b>	<b>450</b>
9.1	Challenge to enforcement of domestic and foreign awards	450
9.2	Appeals	452
<b>10.</b>	<b>Recognition and enforcement of award</b>	<b>453</b>
10.1	Domestic awards	453
10.2	Foreign awards	453
<b>11.</b>	<b>Special provisions and consideration</b>	<b>456</b>
<b>12.</b>	<b>Contacts</b>	<b>457</b>

## 1. Overview

- 1.1.1 The Arbitration and Conciliation Act 1996 (**Indian Arbitration Act**) came into force on 22 August 1996 and is deemed to have effect from 25 January 1996.<sup>1</sup>
- 1.1.2 The Indian Arbitration Act is based on the Model Law (1985) and was the result of recommendations for reform, particularly concerning improving the efficiency of the arbitral process.<sup>2</sup>
- 1.1.3 Until the Indian Arbitration Act, the law governing arbitration in India consisted of three statutes: the Arbitration (Protocol and Convention) Act 1937 (**1937 Act**); the Arbitration Act 1940 (**1940 Act**); and the Foreign Awards (Recognition and Enforcement) Act 1961 (**1961 Act**).
- 1.1.4 The provisions of the 1940 Act were comparable in their content to those of the English Arbitration Act 1934. The 1961 Act implemented the New York Convention and, along with the 1937 Act, was designed to enforce foreign awards.
- 1.1.5 Historically, the 1940 Act was heavily criticised due to the intervention of the Indian courts, which was required during the arbitral proceedings when an arbitral tribunal needed a time extension when drafting the award and during the enforcement stage.
- 1.1.6 In addition, national institutions criticised the operation of the 1940 Act, including the Public Accounts Committee of Lok Sabha<sup>3</sup> and the highest court in India – the Indian Supreme Court (**Supreme Court**) – which observed that the law of arbitration must be “simple, less technical and more responsive to the actual reality of the situations ... [and] ... responsive to the canons of justice and fair play.”<sup>4</sup>
- 1.1.7 As a result, the Indian Law Commission and the Indian Legislature considered revising the arbitration legislation. A proposal was mooted on 27 July 1977 by the Secretary of the Department of Legal Affairs stating that the Indian government sought to revise the 1940 Act with a view to preventing the enormous delay and disproportionate costs in arbitral proceedings. This resulted in the 76th Report by the Law Commission of India which, along with the Model Law (1985) and the

---

<sup>1</sup> *M/S Fuerst Day Lawson Ltd v Jindal Exports Ltd* [2001] SCC(6) 356.

<sup>2</sup> *Guru Nanak Foundations v Rattan Singh & Sons* [1981] AIR SC 2075; and *Food Corporation of India v Joginderpal Mohinderpal* [1989] AIR SC 1263.

<sup>3</sup> Public Accounts Committee, 9th Report 1977–78, pp 201–202.

<sup>4</sup> *Food Corporation of India v Joginderpal Mohinderpal* [1989] AIR SC 1263.

observations of the Supreme Court at paragraph 1.1.6 above, were the primary factors leading to the enactment of the Indian Arbitration Act.

- 1.1.8 The Indian Arbitration Act sought to achieve the following main objectives:
- to comprehensively cover international and domestic arbitration and conciliation;
  - to make provision for an arbitral process which is fair, efficient and capable of meeting the needs of each arbitral proceeding;
  - to ensure that the arbitral tribunal gives reasons for its award;
  - to ensure that the arbitral tribunal remains within the limits of its jurisdiction;
  - to minimise the supervisory role of the Indian courts in the arbitral process;
  - to permit an arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes;
  - to provide that every final award is enforced in the same manner as if it were a decree of the court;
  - to provide that a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an award rendered by an arbitral tribunal; and
  - to provide that every award made in a country that is party to an international convention to which India is also a signatory will be enforceable as a foreign award.
- 1.1.9 The objectives listed in paragraph 1.1.8 above clearly indicate the legislative intent to make arbitral proceedings more efficient and result-oriented. To achieve those objectives, and to encourage the use of arbitration in all civil disputes at family, commercial, domestic and international law levels, Section 89 was inserted into the Civil Procedure Code 1908 (**CCP**) by the Civil Procedure Code (Amendment) Act 1999. Its aim is to promote alternative methods of dispute resolution by requiring the courts to consider the possibility of settlement through such methods at any stage of legal proceedings.

## 2. Scope of application and general provisions of the Indian Arbitration Act

- 2.1.1 The Indian Arbitration Act covers both domestic and international arbitrations (i.e. where at least one party is not an Indian national), as well as mediation and conciliation.

- 2.1.2 The Indian Arbitration Act comprises four parts and three schedules, as follows:
- Part I: general provisions on arbitration (**General Provisions**);
  - Part II: enforcement of certain foreign awards (Chapter I of Part II of the Indian Arbitration Act deals with New York Convention awards and Chapter II covers awards under the 1927 Geneva Convention);
  - Part III: conciliation;
  - Part IV: supplementary provisions;
  - First Schedule: New York Convention;<sup>5</sup>
  - Second Schedule: 1923 Geneva Convention;<sup>6</sup> and
  - Third Schedule: 1927 Geneva Convention.<sup>7</sup>
- 2.1.3 Accordingly, the Indian Arbitration Act puts domestic awards and foreign awards in two different and distinct compartments, subject to certain overlapping provisions.
- 2.1.4 The General Provisions apply to all other parts and chapters of the Indian Arbitration Act, unless it is expressly stated otherwise. For example, Part II provides a separate definition of “arbitral award” and contains separate provisions for the enforcement of foreign awards. In addition, if the arbitral proceedings are seated outside of India, all or some of the General Provisions may be excluded by the express or implied agreement of the parties. However, if no such exclusion is agreed, the General Provisions will apply to the arbitration and it will not be open for the parties to argue that Part I of the Indian Arbitration Act is not applicable to the arbitration.<sup>8</sup>

## 3. The arbitration agreement

### 3.1 Definitions

- 3.1.1 The Indian Arbitration Act defines “arbitration agreement” as an agreement by the parties to submit to arbitration all, or certain, disputes which have arisen, or which may arise, between them in respect of a defined legal relationship, whether contractual or otherwise.<sup>9</sup>

---

<sup>5</sup> Indian Arbitration Act, s 44.

<sup>6</sup> *Ibid*, s 53(a).

<sup>7</sup> *Ibid*, s 53(b).

<sup>8</sup> *Bhatia International v Bulk Trading* [2002] SCC(4) 105; and *Venture Global Engineering v Satyam Computers Services* [2002] AIR SC 1432.

<sup>9</sup> Indian Arbitration Act, s 7(1).

### 3.2 Formal requirements

- 3.2.1 The arbitration agreement must be in writing and may take the form of an arbitration clause in a contract or as a separate agreement.<sup>10</sup> A document containing an arbitration clause may also be adopted by way of reference through a written agreement of the parties.<sup>11</sup>
- 3.2.2 An arbitration agreement is deemed to be in writing if it is contained in:
- a document signed by the parties;
  - an exchange of letters, telex, telegrams or other means of telecommunication providing a record of agreement; or
  - an exchange of submissions in which the existence of the agreement is alleged by one party and not denied by the other.<sup>12</sup>
- 3.2.3 The intention of the parties to enter into an arbitration agreement must be gathered from the terms of the agreement in which it is contained. If the terms of the agreement clearly indicate the parties' intention to refer disputes between them to an arbitral tribunal for adjudication and a willingness to be bound by the decision of that arbitral tribunal on such disputes, it shall constitute an arbitration agreement.<sup>13</sup>
- 3.2.4 While there is no specific form for an arbitration agreement, the words used should express a determination and obligation for arbitration. A mere possibility of the parties agreeing to arbitrate in the future – rather than an obligation to refer future disputes to arbitration – will not constitute a valid and binding arbitration agreement.
- 3.2.5 Furthermore, even if the words “arbitration”, “arbitral tribunal” or “arbitrator” are not used in a clause relating to the settlement of disputes, it does not detract from that clause being construed as an arbitration agreement if it contains the following attributes:
- the agreement is in writing;
  - the parties have agreed to refer any disputes (present or future) between them to the decision of a private tribunal;

---

<sup>10</sup> *Ibid*, s 7(2) and 7(3).

<sup>11</sup> *Ibid*, s 7(5).

<sup>12</sup> *Ibid*, s 7(4).

<sup>13</sup> *In State of Orissa v Damodar Das* [1996] (2) SCC 216.



- the arbitral tribunal is empowered to adjudicate upon disputes in an impartial manner, giving the parties the opportunity to put forward their respective cases before the arbitral tribunal; and
- the parties agree that the decision of the arbitral tribunal is binding.<sup>14</sup>

3.2.6 However, where a clause relating to the settlement of disputes specifically excludes any of the attributes stated in paragraph 3.2.5 above, or contains anything that detracts from an arbitration agreement, it will not be considered to be an arbitration agreement. For example, a clause shall not be considered an arbitration agreement where it:

- permits an authority to decide a dispute without a hearing;
- requires the authority to act in the interests of only one of the parties;
- provides that the decision of the authority will not be final and binding on the parties; or
- provides that if either party is not satisfied with the decision of the authority they may file a civil suit seeking relief.<sup>15</sup>

### 3.3 Special tests and requirements of the jurisdiction

3.3.1 The Indian Arbitration Act does not specifically exclude any category of dispute as being non-arbitrable. However, an award will be set aside if the court finds that the subject matter of the dispute is not capable of settlement by arbitration under the laws currently in force, or if the award conflicts with Indian public policy.<sup>16</sup>

3.3.2 Where a dispute is non-arbitrable, the court where a suit is pending will refuse to refer the parties to arbitration, even if the parties have agreed upon arbitration as the forum for settlement of that dispute. Disputes that are non-arbitrable include:

- disputes relating to rights and liabilities which give rise to, or arise out of, criminal offences;
- matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights and child custody;
- guardianship matters;
- insolvency and winding up matters;
- testamentary matters (grant of probate, letters of administration and succession certificate); and
- eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and where specified courts are conferred jurisdiction to grant an eviction or decide such matters.

---

<sup>14</sup> *Ibid.*

<sup>15</sup> *Jindal Exports Ltd v Fuerst Day Lawson Ltd* (2011) 8 SCC 333.

<sup>16</sup> Indian Arbitration Act, s 34(2)(b) and 48(2).

3.3.3 The cases referred to in paragraph 3.3.2 above relate to actions *in rem* (i.e. actions that deal with a right exercisable against the world at large), as contrasted from a right *in personam* (which is an interest protected solely against specific individuals). Generally, all disputes relating to rights *in personam* are considered to be arbitrable and all disputes relating to rights *in rem* are required to be adjudicated by courts and public tribunals. They are therefore considered unsuitable for private arbitration. There are, however, exceptions to this rule. Disputes relating to subordinate rights *in personam* arising from rights *in rem* have always been considered to be arbitrable.

### 3.4 Separability

3.4.1 Under the Indian Arbitration Act, the arbitration clause is separable from other clauses of an agreement and constitutes an agreement by itself.<sup>17</sup> The Supreme Court has also observed that an arbitration clause is part of a contract and that, being a collateral term, it will survive after the contract in which it is contained has come to an end.<sup>18</sup> This concept of “separability” is now widely accepted.

3.4.2 Thus the decision by an arbitral tribunal that a contract is null and void shall not result in the invalidity of the arbitration clause contained within that contract, provided that such clause constitutes a valid arbitration agreement. An arbitration clause in a contract shall be treated as an independent agreement between the parties and will be enforced as such.

### 3.5 Legal consequences of a binding arbitration agreement

3.5.1 It is settled law that where, in consequence of an arbitration agreement between parties, any act is done to further the transaction or to abide by the terms of the arbitration agreement, the necessary inferences are that a dispute regarding such a matter must be referred to arbitration and that the party who has carried out the act in question cannot renege from the dispute being submitted to arbitral proceedings.<sup>19</sup> Thus as far as the provision of Section 7 of the Indian Arbitration Act is concerned, an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Furthermore, an arbitration agreement is considered to be in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication that provide a record of the agreement. Alternatively, an arbitration agreement is considered in writing if the parties exchange a statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

---

<sup>17</sup> *Firm Ashok Traders and Another v Gurumukh Das Saluja and Others* [2004] AIR SC 1433.

<sup>18</sup> *M/S P. Manohar Reddy and Bros v Maharashtra Krishna Valley Development Corporation and Ors* [2009] AIR SC 1776.

<sup>19</sup> *Dr. S.Z. Jafrey v Modern Industrial Enterprises, Indore, 2006* (3) Arb. LR 424 (MP).

- 3.5.2 It is an obligation of each judicial authority to refer the parties to arbitration if an action brought before it is covered by an arbitration agreement. However, this obligation is conditional upon a request being made by either of the parties for the court to refer the dispute to arbitration. Such a request must be made before the first statement of defence of that dispute has been submitted to the court.<sup>20</sup> Where a party fails to make a request within the specified time frame, they will be deemed to have waived their right to invoke the arbitration agreement. Whether and what the court considers to be a statement of defence by a party on the substance of a dispute that results in proper jurisdiction of the court is to be determined on the basis of the facts of each case.<sup>21</sup>

## 4. Composition of the arbitral tribunal

### 4.1 Constitution of the arbitral tribunal

- 4.1.1 Chapter III of Part I of the Indian Arbitration Act relates to the composition of the arbitral tribunal. The parties to an arbitration agreement are free to determine the number of arbitrators, provided that this does not result in an even number of arbitrators.<sup>22</sup> In the event that the parties fail to determine the number of arbitrators, the arbitral tribunal shall consist of one arbitrator.<sup>23</sup>
- 4.1.2 A person of any nationality can be an arbitrator, unless the parties have made an agreement to the contrary.<sup>24</sup> The parties are also free to agree on a procedure for appointing an arbitrator, subject to the provisions set out in paragraphs 4.1.5 and 4.1.6 below.<sup>25</sup> In the absence of an agreement between the parties, the Indian Arbitration Act sets out the procedure to apply for appointing a sole arbitrator.<sup>26</sup> Where the arbitral tribunal is to consist of three arbitrators and the parties fail to agree on a procedure for their appointment, each party shall nominate one arbitrator. The two party-appointed arbitrators shall then appoint the third arbitrator, who will act as presiding arbitrator (and not as an umpire).<sup>27</sup>

---

<sup>20</sup> Indian Arbitration Act, s 8(1).

<sup>21</sup> *Booz Allen and Hamilton Inc v SBI Home Finance Ltd and Ors* [2011] SCC(5) 532 (where the filing of detailed affidavit opposing interim relief was not considered to be a submission to the jurisdiction of the court).

<sup>22</sup> Indian Arbitration Act, s 10(1).

<sup>23</sup> *Ibid*, s 10(2).

<sup>24</sup> *Ibid*, s 11(1).

<sup>25</sup> *Ibid*, s 11(2).

<sup>26</sup> *Ibid*, s 11(5).

<sup>27</sup> *Ibid*, s 11(3).

- 4.1.3 In the event that one party fails to appoint an arbitrator within 30 days of a request to do so from the other party, or the two arbitrators fail to appoint the third arbitrator within 30 days from the date of their appointment or the arbitral institution fails to appoint an arbitrator under a function entrusted to it, a party can approach the chief justice of the High Court of the state which has the jurisdiction to entertain the petition (or any person or institution designated by that justice) or, in international commercial arbitrations, the Chief Justice of India (or any person or institution designated by the Chief Justice) to appoint an arbitrator.<sup>28</sup>
- 4.1.4 If two arbitrators are appointed on two different dates, the 30 day period to appoint the third arbitrator runs from the date on which the latter was appointed.<sup>29</sup> However, it should be noted that this does not prevent a party from appointing an arbitrator – or prevent two party-appointed arbitrators from appointing a third arbitrator – after the 30 day time limit has elapsed. It merely gives a right to the party to approach the Chief Justice of the relevant High Court in domestic arbitrations and the Chief Justice of India in case of international commercial arbitrations.
- 4.1.5 However, if an alternative method for appointment is provided for in an arbitration agreement, the parties must follow this method instead of approaching the concerned Chief Justice.<sup>30</sup>
- 4.1.6 It is settled law that a court cannot interpose and interdict the appointment of an arbitrator that the parties have chosen under the terms of an agreement, unless the legal misconduct, fraud or disqualification of that arbitrator has been pleaded and proven.<sup>31</sup> Consequently, an arbitrator that has been appointed by the parties cannot have its authority revoked by the parties acting of their own will without a just and sufficient cause for such revocation.<sup>32</sup>

## 4.2 Challenge of arbitrators

- 4.2.1 A person that has been approached to be an arbitrator is under an obligation to disclose to the parties, in writing, any circumstances that may give rise to justifiable doubts as to independence or impartiality.<sup>33</sup> This obligation applies when the

---

<sup>28</sup> *Ibid.*, s 11(4).

<sup>29</sup> *Ibid.*, s 11(4) to s 11(6).

<sup>30</sup> *Ibid.*, s 11(6).

<sup>31</sup> *Bhupinder Singh Bindra v Union of India and Another* [1995] AIR SCC 2464.

<sup>32</sup> *Ibid.*

<sup>33</sup> Indian Arbitration Act, s 12(1).

arbitrator is appointed and throughout the arbitral proceedings.<sup>34</sup> Appointment of an arbitrator can be challenged if there are justifiable doubts as to that arbitrator's independence or impartiality, or if the arbitrator does not possess the qualifications agreed to by the parties.<sup>35</sup> However, such a challenge can be made only for reasons which the party making the challenge becomes aware of after the appointment has been made.<sup>36</sup>

- 4.2.2 The parties are free to agree on a procedure to challenge the arbitrator(s), provided that the reasons for the challenge are discovered after an arbitrator has been appointed.<sup>37</sup> Failing any agreement, the party who makes a challenge must, within 15 days after becoming aware of the constitution of the arbitral tribunal, or of any of the circumstances mentioned in paragraph 4.2.1 above, send a written statement containing the reasons for the challenge to the arbitral tribunal.<sup>38</sup> Unless the challenged arbitrator withdraws or the other party to the arbitration agrees to the challenge, the arbitral tribunal shall decide on the success of the challenge.<sup>39</sup> If the challenge is not successful, the arbitral tribunal shall continue with the arbitral proceedings and make an award. The party who made the unsuccessful challenge can then seek to set aside that award under Section 34 of the Indian Arbitration Act.
- 4.2.3 Sections 14 and 15 of the Indian Arbitration Act enumerate the circumstances in which the mandate of an arbitrator shall be terminated. The mandate of an arbitrator shall terminate if the arbitrator becomes *de jure* or *de facto* unable to perform the required functions or, for other reasons, acts with undue delay and withdraws from the office, or the parties agree to terminate the arbitrator's mandate.<sup>40</sup> Unless the parties have agreed otherwise, they may also apply to the court for the termination of an arbitrator's mandate if any controversy arises between them in relation to the aforementioned grounds.
- 4.2.4 If an arbitrator withdraws from the office,<sup>41</sup> or the parties agree to the termination of the arbitrator's mandate,<sup>42</sup> it is not deemed to constitute grounds for challenging the validity of the arbitrator's appointment.

---

<sup>34</sup> *Ibid.*, s 12(2).

<sup>35</sup> *Ibid.*, s 12(3).

<sup>36</sup> *Ibid.*, s 12(4).

<sup>37</sup> *Ibid.*, s 13(1).

<sup>38</sup> *Ibid.*, s 13(2).

<sup>39</sup> *Ibid.*, s 13(3).

<sup>40</sup> *Ibid.*, s 14(1).

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*, s 13(3).

- 4.2.5 Section 15 of the Indian Arbitration Act specifies additional circumstances in which the mandate of an arbitrator shall be terminated (which include: (a) where the arbitrator withdraws from office for any reason; or (b) by or pursuant to agreement of the parties) and also provides for the substitution of an arbitrator. A substitute arbitrator must be appointed in accordance with the same procedure used to appoint the original arbitrator.<sup>43</sup>
- 4.2.6 The Indian legislature has repeatedly emphasised the necessity of adhering to the terms of an agreement between the parties in relation to the appointment of arbitrators and the procedure to be followed for such appointments. As stated in paragraph 4.2.5 above, even a substitute arbitrator is required to be appointed in accordance with the procedure used to appoint the original arbitrator(s). Further, in Section 15 of the Indian Arbitration Act, the term “rules” is not confined to statutory rules or the rules framed by a competent authority in exercise of the power delegated to it by legislation, but also includes the terms of an agreement entered into between the parties.

### **4.3 Responsibilities of the arbitrators**

- 4.3.1 The Indian Arbitration Act requires that the arbitrators perform their functions honestly and impartially and adhere to the principles of natural justice by providing the parties with an equal opportunity to present their case and giving the parties proper notice of hearings.<sup>44</sup>
- 4.3.2 Once an arbitrator has been appointed and arbitral proceedings have commenced, that arbitrator should not act with a particular interest towards the appointing party or act in a manner that could be construed as indicative of partiality or unfairness.
- 4.3.3 The arbitral tribunal must only base its conclusions upon the material submitted before it by the parties and must not act on personal knowledge. Evidence of unfairness and/or unreasonableness by the arbitrators will render any decision or award given by the arbitral tribunal questionable.<sup>45</sup>
- 4.3.4 In general, the arbitrators must act jointly and must all be present at every meeting. However, the parties can agree to dispense with the regular attendance of all the arbitrators at certain meetings, except where the arbitral tribunal is examining a party or witness. It would amount to misconduct for an arbitrator to examine a party or witness in the absence of the other arbitrators.<sup>46</sup>

---

<sup>43</sup> *Ibid.*, s 15(2).

<sup>44</sup> *Ibid.*, s 18.

<sup>45</sup> *Payyavula Vengamma v Payyavula Kesanna*, AIR 1953 SC 21.

<sup>46</sup> *Ibid.*

#### 4.4 Arbitrator fees

- 4.4.1 There is no regulated fee structure for arbitrators in an ad hoc arbitration. In practice, the arbitrator's fees are decided by the arbitrator, with the consent of the parties. The fee varies from approximately INR 1,000.00 to INR 50,000.00 per hearing for an arbitrator, depending upon the professional standing of the arbitrator and the size of the claim.<sup>47</sup> The number of hearings required and the cost of the arbitral venue also vary widely.
- 4.4.2 In contrast, most institutional arbitration bodies in India, such as the Indian Council of Arbitration (**ICA**) or the Construction Industry Arbitration Council (**CIAC**), have their own schedules of arbitrators' fees and administrative fees, based on the amounts claimed. The ICA and CIAC also charge a nominal, non-refundable registration fee on the basis of the claim amount. For example, an ICA arbitrator's fees vary from INR 30,000.00 to INR 315,000.00 for claim amounts up to INR 10,000,000.00, while administrative fees vary from INR 15,000.00 to INR 160,000.00 for claim amounts up to INR 10,000,000.00. For the CIAC, fees vary from INR 5,000.00 to INR 260,000.00 per arbitrator for claim amounts up to INR 100,000,000.00, and administrative fees vary from INR 2,750.00 to INR 62,000.00 for claim amounts up to INR 100,000,000.00.

## 5. Jurisdiction of the arbitral tribunal

### 5.1 Competence to rule on jurisdiction

- 5.1.1 Under the Indian Arbitration Act an arbitral tribunal is competent to rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of arbitration agreements.<sup>48</sup> A decision by the arbitral tribunal that a contract is null and void shall not result in the invalidity of the arbitration clause contained therein (see further section 3.4 above on separability).
- 5.1.2 A ruling concerning the arbitral tribunal's jurisdiction may be appealed under a procedure set out in Section 37 of the Indian Arbitration Act. Regardless of such proceedings, if the arbitral tribunal holds that it has jurisdiction then it may carry on with the arbitral proceedings and make an award which could be subject to challenge only under the procedure set out in Section 34 of the Indian Arbitration Act.

---

<sup>47</sup> "Development and Practice of Arbitration in India – Has it Evolved as an Effective Legal Institution", October 2009, Center on Democracy, Development, and The Rule of Law Freeman Spogli Institute for International Studies.

<sup>48</sup> Indian Arbitration Act, s 16(1).

5.1.3 Whilst the arbitral tribunal has the power to decide whether there is a valid arbitration agreement between the parties and the power to rule on its own jurisdiction, the existence of these powers do not take away the right of the Indian courts to examine whether the arbitral agreement is fraudulent, or was entered into under undue influence, before a decision to refer it to an arbitral tribunal is made.<sup>49</sup>

## **5.2 Power to order interim measures**

5.2.1 The arbitral tribunal may order interim measures in arbitral proceedings, unless such power is excluded by an agreement between the parties.<sup>50</sup> This power is only legislatively recognised in connection with interim measures and not otherwise.

5.2.2 The list of interim measures available is, by its very nature, non-exhaustive. Such measures include, for example, orders for preservation, custody, sale and protection of goods, protection of trade secrets, maintenance of machinery, works and continuation of certain works. A common characteristic of all interim measures is the restricted circumstances in which they may be granted (see paragraph 5.2.4 below).

5.2.3 A party to arbitral proceedings is able to appeal against an order granting or refusing an interim measure.<sup>51</sup> However, the Indian Arbitration Act does not empower the arbitral tribunal to enforce orders granting interim measures, nor does it provide for judicial enforcement of such orders. Nevertheless, if a court upholds the order in an appeal, the judicial enforcement of that order will be ensured.<sup>52</sup>

5.2.4 The interim measures that the arbitral tribunal can grant are slightly different from those which a court may grant under Section 9 of the Indian Arbitration Act, although there is some overlap. Nevertheless, the court's power to grant an interim measure has far wider scope than that of an arbitral tribunal, which is restricted by both the subject matter of the dispute and the agreement of the parties.

5.2.5 The arbitral tribunal's power to grant interim measures can only be exercised against a party to the arbitral proceedings and a third party whose rights may be affected by way of such interim measures cannot be included as a party to the proceedings. While exercising the power, the arbitral tribunal is not bound strictly

---

<sup>49</sup> *SBP and Co v Patel Engineering Ltd and Another* [2005] SCC(8) 618.

<sup>50</sup> Indian Arbitration Act, s 17(1).

<sup>51</sup> *Ibid*, s 37(2).

<sup>52</sup> *Ibid*.



by the CCP or the Indian Evidence Act 1872 (**IEA 1872**) and the arbitral tribunal enjoys flexibility to adopt those rules of procedure which may be most convenient or cost effective. However, the broad principles underlying these enactments are, nevertheless, kept in mind.

## 6. Conduct of proceedings

### 6.1 Commencement of arbitral proceedings

6.1.1 Where the arbitration agreement is silent about the date of commencement of the arbitral proceedings, the proceedings will be deemed to have commenced on the date that the respondent received the request for arbitration.<sup>53</sup> The request should clearly indicate that the claimant seeks to submit the dispute to arbitration. A request is deemed to have been received if it has been delivered to the respondent personally, or at their place of business, habitual residence or mailing address or, alternatively, the respondent's last known place of business, habitual residence or mailing address.<sup>54</sup>

6.1.2 Section 21 of the Indian Arbitration Act gives freedom to the parties to agree on the date of commencement of arbitral proceedings. For instance, in the case of an arbitration administered by an arbitral institution, the parties may agree to abide by the rules of that arbitral institution for determining the point of time at which the arbitral proceedings can be deemed to have commenced.

6.1.3 In situations that involve a consideration of the limitation period for bringing arbitral proceedings, the relevant date for commencement of arbitral proceedings shall be the date that the request for arbitration is received by the proposed respondent.<sup>55</sup>

### 6.2 General procedural principles

6.2.1 As arbitral autonomy is one of the important features of the Indian Arbitration Act, the parties are able, through agreement, to determine the manner of – and the procedure for – conducting the arbitral proceedings.<sup>56</sup> This can be achieved in several ways, such as agreeing on a set of rules of procedure to use, or by using the standard rules of an arbitral institution, with or without modification.

---

<sup>53</sup> *Ibid*, s 21.

<sup>54</sup> *Ibid*, s 3(1).

<sup>55</sup> *Ibid*, s 43(2).

<sup>56</sup> *Ibid*, s 19(2).

- 6.2.2 If there is no agreement between the parties on the rules of procedure then the arbitral tribunal is authorised to conduct the proceedings in a manner it considers appropriate.<sup>57</sup> This includes having the power to determine the admissibility, relevance, materiality and weight of any evidence.
- 6.2.3 In addition, the fact that the arbitral tribunal benefits from an express exemption from the provisions of the CCP and the IEA 1872 further demonstrates its autonomy to determine the procedure of the arbitration.<sup>58</sup> The Supreme Court has observed that the provisions of the CCP must not be applied in arbitral proceedings where the procedure is likely to hinder the efficiency of the arbitral proceedings but, equally, the CCP is to be used where it can aid the delivery of justice in the arbitral proceedings.<sup>59</sup>
- 6.2.4 Where the arbitration is administered by an arbitral institution, the arbitral proceedings are governed by the rules of that arbitral institution. As a result, those rules become a part of the arbitration clause by implication.<sup>60</sup>

### **6.3 Seat and language of arbitration**

- 6.3.1 The seat of arbitration can be fixed by the parties themselves.<sup>61</sup> If there is no such agreement, the arbitral tribunal has the freedom to determine the seat of arbitration. However, this discretion is not absolute. The arbitral tribunal must keep in mind the circumstances of the particular dispute and the convenience of the parties.
- 6.3.2 Normally, the appropriate courts of the seat of arbitration will have jurisdiction in respect of procedural matters concerning the conduct of the arbitration. However, the overriding principle is that the courts of the country whose substantive laws govern the arbitration agreement are the competent courts in respect of all matters arising under the arbitration agreement.<sup>62</sup> Thus if the law governing the arbitration agreement is Indian, it follows that Indian courts would have jurisdiction in respect of any and all disputes arising out the arbitration agreement.
- 6.3.3 The parties are free to agree upon the language or languages to be used in the arbitral proceedings.<sup>63</sup> In the absence of such an agreement, the arbitral tribunal

---

<sup>57</sup> *Ibid*, s 19(3).

<sup>58</sup> *Ibid*, s 19(1).

<sup>59</sup> *Mcdill And Company Pvt. Ltd v Gouri Shankar Sarda And Others* [1991] SCC(2) 548.

<sup>60</sup> Indian Arbitration Act, s 2(8).

<sup>61</sup> *Ibid*, s 20(1).

<sup>62</sup> *National Thermal Power Corporation v Singer Company and Ors* [1992] SCC(3) 551.

<sup>63</sup> Indian Arbitration Act, s 22(1).

will determine the language or languages to be used.<sup>64</sup> The agreement of the parties or the determination by the arbitral tribunal on the language of the arbitral proceedings shall, unless otherwise specified, apply to a statement of claim, written statements, hearings, the award or decision and any other communications made by the arbitral tribunal.<sup>65</sup>

- 6.3.4 The arbitral tribunal may also order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.<sup>66</sup>

#### **6.4 Multi-party issues**

- 6.4.1 A person who is not a party to an arbitration agreement cannot claim any right before the arbitral tribunal and cannot be joined as a party.<sup>67</sup>
- 6.4.2 However, a party to the arbitration agreement may be joined to arbitral proceedings on the basis of the principles laid down in the CCP, which provides that only a necessary or proper party may be added.<sup>68</sup> A necessary party is one without whom no order can be made effectively. A proper party is one in whose absence an effective order can be made, but whose presence is necessary for a complete and final decision on the question involved in the arbitral proceedings. It will however depend strictly on the facts and circumstances of a particular case.

#### **6.5 Oral hearings and written proceedings**

- 6.5.1 The time frame for filing the statement of claim and defence can be agreed upon by the parties. Failing an agreement between the parties, the arbitral tribunal shall determine the deadline for these documents.<sup>69</sup> The parties are also free to agree on the required elements of such statements. In the event that the parties have not reached an agreement, a statement of claim is required to provide:
- all of the facts supporting the claimant's claim;
  - the points at issue; and
  - the relief or remedy sought.<sup>70</sup>

---

<sup>64</sup> *Ibid*, s 22(2).

<sup>65</sup> *Ibid*, s 22(3).

<sup>66</sup> *Ibid*, s 22(4).

<sup>67</sup> *Reliable Finance Corporation Pvt. Ltd v Ajoy Pal Singh* [1987] ILR 1 Del 267; *Pawan Kumar Jain v Parduman Jain* [2005] ILR Delhi 397; and *J.L. Kapur v Burmah Shell Co-operative Housing Society (DB)* [2008] (103) DRJ(103) 527.

<sup>68</sup> CCP, Order I, Rule 10.

<sup>69</sup> Indian Arbitration Act, s 23.

<sup>70</sup> *Ibid*, s 23(1).

- 6.5.2 The respondent's statement of defence is required to state the defence in respect of the particulars of claim and may include any counterclaim.<sup>71</sup>
- 6.5.3 The Indian Arbitration Act only states the core elements of the statement of claim and the respondent's defence that are required to establish the dispute on which the arbitral tribunal is to render its award. The parties are permitted – and are indeed expected – to submit relevant supporting documents with their statements, or refer to relevant supporting documents and/or other evidence that they propose to submit.<sup>72</sup> The arbitral tribunal is also free to ask the parties to submit additional submissions. The Indian Arbitration Act does not specify that the statement of claim and the defence must be in writing, although in practice both would generally be in written form. The word "claim" also includes a "counterclaim" and likewise, the word "defence" includes "defence to a counterclaim". Accordingly, Section 23 of the Indian Arbitration Act applies *mutatis mutandis* to counterclaims and defence to counterclaims.
- 6.5.4 As regards to supplementing and/or amending the claim or defence, the arbitral tribunal can reject a belated amendment or supplement in cases where it is considered inappropriate.<sup>73</sup> In addition, the amendment or supplement cannot go beyond the terms of the arbitration agreement, as the arbitral tribunal has no discretion to allow such amendments. If a party fails to raise any objection to an amendment or supplement which enlarges the scope of the arbitration agreement and proceeds with the arbitral proceedings, that party is deemed to have consented to the amendment or supplement in question.<sup>74</sup>
- 6.5.5 Unless there is an agreement between the parties to the contrary, the arbitral tribunal decides the manner in which oral submissions and evidence are presented during the hearing.<sup>75</sup> In this respect, the parties are free to determine the method of tendering evidence and/or oral arguments, and whether oral hearings are necessary. Such agreement is binding on the arbitral tribunal. Furthermore, the parties are free to change the agreement at any stage of the arbitral proceedings.
- 6.5.6 In the absence of an agreement between the parties, the arbitral tribunal has the discretion to decide whether oral hearings – either for the presentation of the evidence, for oral arguments, or both – should be permitted, or whether the

---

<sup>71</sup> *Ibid.*, s 23(1).

<sup>72</sup> *Ibid.*, s 2(2).

<sup>73</sup> *Ibid.*, s 23(3).

<sup>74</sup> *Ibid.*, s 4 and 16.

<sup>75</sup> *Ibid.*, s 24(1).

arbitral proceedings should be conducted on the basis of documents and other materials only. Moreover, either party can make a request for oral hearings at an appropriate stage of the arbitral proceedings. In these circumstances, the arbitral tribunal is bound to grant such a request, unless there is a specific agreement between the parties not to have such hearings.<sup>76</sup>

- 6.5.7 The arbitral tribunal is required to provide the parties with sufficient notice of a hearing or meeting held for the purpose of inspecting documents, goods, or other property.<sup>77</sup> The Indian Arbitration Act also requires that all statements, documents, other information supplied or applications made to the arbitral tribunal by one party to the arbitral proceedings shall be communicated to the other party.<sup>78</sup> In addition, any expert report or document which the arbitral tribunal may rely on in making its award or decision must also be communicated to the parties.<sup>79</sup>

## 6.6 Default by one of the parties

- 6.6.1 The Indian Arbitration Act addresses default by a party as follows:
- where the claimant fails, without sufficient cause, to submit a statement of claim in accordance with Section 23(1) of the Indian Arbitration Act, the proceedings will be terminated;<sup>80</sup>
  - where the respondent fails to communicate, without sufficient cause, a statement of defence, in accordance with Section 23(1) of the Indian Arbitration Act, the arbitral proceedings shall continue the proceedings without treating that failure in itself as an admission of the allegations by the claimant;<sup>81</sup> or
  - where either of the parties fails to appear at an oral hearing or produce documentary evidence without sufficient cause, the arbitral tribunal has the discretion to continue the arbitral proceedings and make the award on the evidence before it.<sup>82</sup>
- 6.6.2 The arbitral tribunal has the discretion to decide what constitutes a “sufficient cause”. In relation to the second bullet point of paragraph 6.6.1, a failure to communicate a statement of defence does not amount to an admission by the respondent of the claimant’s allegations. In addition, the provisions set out in

---

<sup>76</sup> *Ibid.*, s 24(2).

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*, s 24(3).

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*, s 25(a).

<sup>81</sup> *Ibid.*, s 25(b).

<sup>82</sup> *Ibid.*, s 25(c).

paragraph 6.6.1 above will not apply where the parties have agreed otherwise.<sup>83</sup> Furthermore, a civil suit remedy against such an order is not available and the only available remedy may be to file a writ petition challenging the order made under Section 25 of the Indian Arbitration Act.<sup>84</sup>

- 6.6.3 An arbitral tribunal may proceed *ex parte* for good cause. There is no mandatory requirement under the Indian Arbitration Act to issue a pre-emptory notice to the parties before proceeding *ex parte*. Where an arbitral tribunal provides notice of a hearing and issues an *ex parte* award in the absence of a party, that party will be unable to set aside the award on the grounds that a specific second notice was not given before the *ex parte* proceedings. It is also not necessary to state a warning in the first notice that the matter would proceed *ex parte* on default in the absence of a party.

## 6.7 Evidence generally

- 6.7.1 Under the Indian Arbitration Act, the arbitral tribunal has the power to determine the admissibility, relevance, materiality and weight of any evidence.<sup>85</sup> The expression “presentation of the evidence” covers all types of evidence, whereas the expression “oral arguments” covers arguments on both the substance of the dispute and the procedural issues.

## 6.8 Appointment of experts

- 6.8.1 The arbitral tribunal is empowered, although not obligated, to appoint experts to report on specific issues.<sup>86</sup> However, the parties can agree that the arbitral tribunal will not have the power to appoint experts.
- 6.8.2 The Indian Arbitration Act does not restrict or specify the areas in which the arbitral tribunal may seek the assistance of experts.<sup>87</sup> Tribunal-appointed experts may only advise the arbitral tribunal on specific issues. The arbitral tribunal is authorised to ask the parties to provide a tribunal-appointed expert with relevant information, or to grant tribunal-appointed experts access to relevant documents, goods, or other property for the inspection of the arbitral tribunal.<sup>88</sup> The tribunal-appointed expert’s fees and expenses form part of the arbitral tribunal’s award on costs.

---

<sup>83</sup> *Ibid*, s 25.

<sup>84</sup> *Dilnawaz Kohinoory And Ors v Boman Kohinoor And Ors* AIR 1999 Bom 219.

<sup>85</sup> Indian Arbitration Act, s 19(4).

<sup>86</sup> *Ibid*, s 26(1).

<sup>87</sup> *Ibid*, s 26(1)(a).

<sup>88</sup> *Ibid*, s 26(1)(b).

- 6.8.3 Unless otherwise agreed by the parties, a tribunal-appointed expert may, at either an arbitral tribunal or a party's request, participate in an oral hearing.<sup>89</sup> In such an oral hearing, the parties will have the opportunity to put questions to the tribunal-appointed expert and also produce their expert witnesses to testify on the points at issue.<sup>90</sup>
- 6.8.4 Subject to an agreement stating otherwise, the parties may request to examine the documents, goods or other property relied upon by a tribunal-appointed expert in any report.<sup>91</sup> This is based on the principle that an expert can only effectively arrive at a finding on the basis of material that has been disclosed to the parties.
- 6.8.5 The arbitral tribunal must reach its own decision and cannot delegate this responsibility to an expert, legal adviser or technical assessor which it has instructed.

## 6.9 Confidentiality

- 6.9.1 Under the Indian Arbitration Act, there is no express or implied obligation to treat an arbitration agreement, any proceedings arising from it, or the award as confidential.
- 6.9.2 In India, the IEA 1872 legislation governs issues of confidentiality. Under the IEA, no barrister, attorney or pleader shall be permitted to disclose any communication, advice or contents of a document made available in the course and for the purpose of employment, unless with the client's express consent.<sup>92</sup>

## 6.10 Court assistance in taking evidence

- 6.10.1 Section 27 of the Indian Arbitration Act contains a procedure for seeking court assistance in the taking of evidence (including the production of documents and the inspection of property). Assistance may be sought either by the arbitral tribunal itself, or by one of the parties with the prior approval of the arbitral tribunal.
- 6.10.2 The power to request the court to assist the arbitral tribunal in the taking of evidence is a discretionary one.<sup>93</sup> The court may, exercising its discretion, execute the request for evidence by ordering a witness or expert to provide evidence to the arbitral tribunal directly.<sup>94</sup> The court's assistance in this regard may be necessary

---

<sup>89</sup> *Ibid.*, s 26(2).

<sup>90</sup> See generally *Ibid.*, s 18.

<sup>91</sup> *Ibid.*, s 26(3).

<sup>92</sup> IEA 1872, s 126.

<sup>93</sup> *Ibid.*

<sup>94</sup> Indian Arbitration Act, s 27(3).

because the arbitral tribunal does not have the power to summon a witness or an expert. However, Section 27 of the Indian Arbitration Act has no application where a party to the arbitration agreement must be summoned to appear before the arbitral tribunal in order to participate in the arbitral proceedings and state its defence.

6.10.3 An order by the arbitral tribunal rejecting the application of Section 27 of the Indian Arbitration Act is not an award, interim order or final order.

## 7. Making of the award and termination of proceedings

### 7.1 Choice of law

7.1.1 For domestic arbitrations in India, the applicable law is the law of India. This is a mandatory requirement under the Indian Arbitration Act and cannot be contracted out of by the parties.<sup>95</sup>

7.1.2 For international arbitrations with a seat in India, the arbitral tribunal shall follow the laws the parties have agreed to apply to the substance of their dispute.<sup>96</sup> The designated law or legal system applying to the substance of the dispute is to be construed, unless expressly agreed otherwise, as referring to the substantive law of that country and not its conflict of laws rules.<sup>97</sup> In the absence of any agreement between the parties as to the applicable law, the arbitral tribunal shall apply the laws that it considers to be appropriate and relevant to the dispute.<sup>98</sup>

7.1.3 If the parties expressly agree, the arbitral tribunal may make a determination *ex aequo et bono*, deciding the dispute in light of general notions of fairness, equity and justice as opposed to the strict rule of law.<sup>99</sup> Furthermore, the arbitral tribunal may decide the applicable law by using the terms of any contract between the parties, taking into account the usages and trade practices applicable to that contract.<sup>100</sup> It is understood that such terms and usages are not in conflict with the mandate of the Indian Arbitration Act, India's public policy and the law applicable to the substance of the dispute.

---

<sup>95</sup> *Ibid*, s 28(1)(a).

<sup>96</sup> *Ibid*, s 28(1)(b)(i).

<sup>97</sup> *Ibid*, s 28(1)(b)(ii).

<sup>98</sup> *Ibid*, s 28(1)(b)(iii).

<sup>99</sup> *Ibid*, s 28(2).

<sup>100</sup> *Ibid*, s 28(3).



7.1.4 Parties may choose, either expressly or by implication, the substantive law governing the arbitration agreement as well as the procedural law governing the conduct of the arbitration. Where there is no express choice of the law governing the contract as a whole, or the arbitration agreement in particular, and in the absence of any contrary indication, there is a presumption that the parties have intended that the proper law of the contract, as well as the law governing the arbitration agreement, to be the same as the law of the seat in which the arbitration is agreed to be held. On the other hand, where the proper law of the contract is expressly chosen by the parties, in the absence of an unmistakable intention to the contrary, such law must govern the arbitration agreement which, though collateral or ancillary inclusion into the main contract, is nevertheless a part of such contract.<sup>101</sup>

7.1.5 As stated above, the substantive law governing the arbitration determines the validity, effect and interpretation of the arbitration agreement. In the absence of any agreement to the contrary, the arbitral proceedings are conducted in accordance with the law of the seat of the arbitration. On the other hand, if the parties have specifically chosen the law governing the conduct and procedure of arbitration, the arbitral proceedings will be conducted in accordance with that law, provided that it is not contrary to the public policy or the mandatory requirements of the law of the country in which the arbitration is held. If no such choice has been made by the parties, expressly or by necessary implication, the procedural aspect of the conduct of the arbitration (as distinguished from the substantive agreement to arbitrate) will be determined by the law of the seat of arbitration.<sup>102</sup>

7.1.6 The overriding principle is that the courts of the country whose substantive laws govern the arbitration agreement are the competent courts in respect of all matters arising under the arbitration agreement. The jurisdiction exercised by the courts of the seat of arbitration is merely concurrent, not exclusive, and strictly limited to matters of procedure. All other matters in respect of the arbitration agreement fall within the exclusive competence of the courts of the country whose laws govern the arbitration agreement.<sup>103</sup>

## **7.2 Timing, form, content and notification of the award**

7.2.1 The Indian Arbitration Act does not stipulate a time frame within which the arbitral tribunal is to render its award.

---

<sup>101</sup> *National Thermal Power Corporation v Singer Company and others* (1992) 3 SCC 551.

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.*

- 7.2.2 An award must be in writing and signed by the members of the arbitral tribunal.<sup>104</sup> Where the arbitral tribunal consists of more than one arbitrator, the signatures of the majority of the arbitral tribunal will suffice, provided that valid reasons for the omitted signature(s) are made clear.<sup>105</sup> Section 31(2) of the Indian Arbitration Act provides that valid reasons for such an omission may include, among others: the death of an arbitrator, the physical inability of an arbitrator to sign, and an arbitrator's refusal to sign based on a dissenting position.<sup>106</sup> Although the signatures of the majority of the arbitral tribunal afford finality to the award, non-signature is a formal curable defect.<sup>107</sup>
- 7.2.3 Under the Indian Arbitration Act, the arbitral tribunal must provide a reasoned award, except where the parties have agreed otherwise or the award is on agreed terms.<sup>108</sup> However, this provision is flexible; it seeks to provide transparency in the decision-making process and accommodate party autonomy. The reasons given by the arbitral tribunal are not required to be as detailed as in a court judgment but should at least indicate the arbitral tribunal's thought process.<sup>109</sup>
- 7.2.4 The award should state the location where the arbitration took place and the date on which the arbitral proceedings concluded.<sup>110</sup> The award will be deemed signed at the seat of the arbitration, even if the arbitrators signed at different places and on different dates.<sup>111</sup> The date stated in the award is considered to be the date of the award, even if it is a deemed date. The date of the award is relevant, among other things, in connection with the nature and payment of interest under Section 31(7) of the Indian Arbitration Act and the correction of any errors in the award under Section 33 of the Indian Arbitration Act.
- 7.2.5 Signed copies of the award should be delivered to each of the parties.<sup>112</sup> The date of receipt of the award has relevance, *inter alia*, in connection with:
- the correction and interpretation of the award;
  - making an additional award under Section 33 of the Indian Arbitration Act;

---

<sup>104</sup> Indian Arbitration Act, s 31(1).

<sup>105</sup> *Ibid*, s 31(2).

<sup>106</sup> *Ibid*.

<sup>107</sup> *State of West Bengal v Sree Sree MA Engineering* [1987] 4 SCC(4) 452.

<sup>108</sup> *Ibid*.

<sup>109</sup> *Delhi Development Authority v Alkaram* 1982 (3) DRJ 286.

<sup>110</sup> Indian Arbitration Act, s 31(4).

<sup>111</sup> *Ibid*.

<sup>112</sup> *Ibid*, s 31(5).

- filing an application for setting aside the award under Section 34(2) of the Indian Arbitration Act; and
- enforcing the award under Section 36 of the Indian Arbitration Act.

7.2.6 An arbitral tribunal may make an interim award on any matter on which it can make a final award.<sup>113</sup> An award is also deemed to include an interim award.<sup>114</sup> By its very nature, an interim award does not constitute a final disposition of all matters submitted to the arbitral tribunal to consider. As a result, the interim award does not terminate the arbitral proceedings.

7.2.7 The Supreme Court of India has considered that whether or not an interim award is final will depend upon the form of the award.<sup>115</sup> If the interim award is only intended to have effect until the final award is delivered, it will cease to have effect after the final award is made. If, on the other hand, the interim award is intended to finally determine the rights of the parties, it will have the force of a final award and will therefore be in force even after the final award is delivered.

7.2.8 The Supreme Court has taken a position in support of arbitration and, in regard to awards, has held the following:<sup>116</sup>

- there is a presumption in favour of arbitration and an award;<sup>117</sup>
- a court will presume that the award finally disposes of all the matters in dispute;<sup>118</sup> and
- where an award is made “*de praemissis*” (that is, of and concerning all matters in dispute referred to the arbitrator), the presumption is that the arbitral tribunal intended to dispose finally of all of the matters in dispute and its award will be final.<sup>119</sup>

### 7.3 Settlement

7.3.1 Section 30 of the Indian Arbitration Act provides for the means of settlement of arbitral proceedings. Even if the arbitration agreement does not expressly authorise the arbitral tribunal to do so, the arbitral tribunal is required to encourage the parties to settle the dispute and, if so authorised by the parties, to use alternative

---

<sup>113</sup> *Ibid*, s 31(6).

<sup>114</sup> *Ibid*, s 2(1)(c).

<sup>115</sup> *Satwant Singh Sodhi v State of Punjab* [1999] SCC(3) 487.

<sup>116</sup> *Smt. Santa Sila Devi and Another v Dhirendra Nath Sen and Others* (1963) AIR SC 1677.

<sup>117</sup> *Fiza Developers & Inter-Trade (P) Ltd. V. AMCI (I) Pvt. Ltd. & Ann.* 2009 (11) SCALE 371.

<sup>118</sup> *UOI v Jai Narain Misra* AIR 1970 SC 753.

<sup>119</sup> *Ibid*.

methods of dispute resolution during the arbitral proceedings, such as mediation and conciliation.<sup>120</sup>

- 7.3.2 Upon settlement, the arbitral tribunal is required to terminate the arbitral proceedings.<sup>121</sup> If requested by the parties, the arbitral tribunal is authorised to record the settlement in the form of an award on agreed terms.<sup>122</sup>
- 7.3.3 The arbitral tribunal has the discretion of whether or not to record the settlement. Typically, the arbitral tribunal does record the settlement, but in certain circumstances, such as fraud, unfairness or violation of public policy, the arbitral tribunal may not agree to do so. Any settlement request to the arbitral tribunal must be made by both of the parties. While the parties do not have to make the request simultaneously, it is critical that there is a common will of the parties to settle before the arbitral tribunal.
- 7.3.4 An award containing terms agreed by the parties must be made in accordance with Section 31 of the Indian Arbitration Act.<sup>123</sup> Awards on agreed terms or otherwise are no different to each other, except that the award on agreed terms need not be a reasoned one.<sup>124</sup>
- 7.3.5 An award on agreed terms has the same status and effect as any other award.<sup>125</sup> It should be noted that an agreed award is not a settlement *per se* which is executable, but an award made by a duly constituted arbitral tribunal based on a settlement which is executable.<sup>126</sup> An award on agreed terms stops the parties from continuing with the arbitral proceedings.
- 7.3.6 A settlement that has been reached between the parties cannot be challenged on the ground that it was a mistake. If the dispute is settled only in part, the arbitral tribunal shall have the jurisdiction to decide the remaining dispute on merits and make an award in respect of matters not yet settled.<sup>127</sup>

---

<sup>120</sup> Indian Arbitration Act, s 30(1).

<sup>121</sup> *Ibid*, s 30(2).

<sup>122</sup> *Ibid*.

<sup>123</sup> *Ibid*, s 30(3).

<sup>124</sup> *Ibid*, s 31(3)(b).

<sup>125</sup> *Ibid*, s 31(4).

<sup>126</sup> *Shri Ravi Aggarwal v Shri Anil Jagota* [2009] MANU DE 4646.

<sup>127</sup> See *Kapila Textile Mills Ltd v Madhava & Co* (1963) AIR HP 30.

## 7.4 Power to award interest and costs

- 7.4.1 In the absence of any agreement to the contrary, the arbitral tribunal maintains full discretion on matters connected with the award of interest. For example, the arbitral tribunal may include interest on the sum awarded by it, at such rate as it deems reasonable on the whole or part amount and for the whole period or any part thereof, between the dates on which the cause of action arose and the date of the award.<sup>128</sup>
- 7.4.2 Unless otherwise specified in the award, the awarded sum shall carry interest at the rate of 18 per cent per annum from the date of the award until it is paid.<sup>129</sup> This provision seeks to discourage litigants from employing delaying tactics in the matter of enforcement of the award.
- 7.4.3 The parties have a degree of autonomy in relation to costs. The word “costs”, as interpreted within the meaning of the Indian Arbitration Act, means reasonable costs relating to the fees and expenses of the arbitrators and witnesses, legal fees and expenses, administration fees of the institution supervising the arbitration and any other expenses incurred in connection with the arbitral proceedings and the award.<sup>130</sup> The arbitral tribunal is obligated to specify the elements of the costs payable by the parties.<sup>131</sup>

## 7.5 Termination of the arbitral proceedings

- 7.5.1 Section 32 is a mandatory provision of the Indian Arbitration Act and provides for the termination of arbitral proceedings. Section 32 has several purposes, including determining the starting point of the limitation period for instituting court proceedings.
- 7.5.2 Arbitral proceedings are terminated by a final award or by way of an order of the arbitral tribunal.<sup>132</sup> The situations in which the arbitral tribunal may order a termination of the arbitral proceedings include:
- withdrawal of the claim by the claimant;
  - agreement by the parties to terminate the proceedings; and
  - where the arbitral tribunal finds that, for any reason, the continuation of the proceedings becomes unnecessary or impossible.<sup>133</sup>

---

<sup>128</sup> Indian Arbitration Act, s 31(7)(a).

<sup>129</sup> *Ibid*, s 31(7)(b).

<sup>130</sup> *Ibid*, s 31(8).

<sup>131</sup> *Ibid*, s 31(8)(b).

<sup>132</sup> *Ibid*, s 32(1).

<sup>133</sup> *Ibid*, s 32(2).

- 7.5.3 While the claimant cannot be forced to continue the arbitral proceedings once commenced, fairness demands that the claimant is not allowed to abuse the withdrawal facility in order to force the respondent to participate in other legal proceedings.
- 7.5.4 The mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings.<sup>134</sup> This is subject to certain, non-exhaustive circumstances where the arbitral tribunal can resume proceedings, including where:
- the arbitral tribunal extends the arbitral proceedings for the purposes of correcting, interpreting or making an additional award in accordance with Section 33 of the Indian Arbitration Act; or
  - in instances where a party has applied for setting aside of an award under Section 34(1), the court may in appropriate cases adjourn the proceedings and give the arbitral tribunal an opportunity to resume the arbitral proceedings or take such other action which, in the view of the arbitral tribunal, will eliminate the grounds for setting aside the award.<sup>135</sup>
- 7.5.5 Furthermore, the arbitral tribunal is also required to terminate the arbitral proceedings in the following situations:
- where the claimant fails to communicate its statement of claim in accordance with Section 23(1) of the Indian Arbitration Act;<sup>136</sup>
  - where the parties settle the dispute and the arbitral tribunal records the settlement in the form of an award on agreed terms (if this is requested by the parties and the arbitral tribunal does not object);<sup>137</sup> and
  - where a party does not pay its share of the arbitrators' deposit in respect of a claim or counterclaim that is the subject of the arbitral proceedings.<sup>138</sup>
- 7.5.6 The terms "order" and "award" are distinct. An "order" signifies the termination of arbitral proceedings without deciding the merits of the dispute, whereas an "award" is a termination on the merits. In addition, a decision given under Section 25(a) of the Indian Arbitration Act is an order terminating the arbitral proceedings and does not amount to a final award.<sup>139</sup>

---

<sup>134</sup> *Ibid*, s 32(3).

<sup>135</sup> *Ibid*, s 34(4).

<sup>136</sup> *Ibid*, s 25(a).

<sup>137</sup> *Ibid*, s 30(2).

<sup>138</sup> *Ibid*, s 38(2).

<sup>139</sup> *Ibid*, s 25(a).

## 7.6 Effect of the award

- 7.6.1 Under the Indian Arbitration Act, an award – including a foreign award – has the status of a decree of an Indian court. Accordingly, the award can be enforced as such.
- 7.6.2 Section 35 of the Indian Arbitration Act deals with the finality of awards. Where the time for making an application under Section 34 of the Indian Arbitration Act has expired, or such an application has been refused, the award shall be enforced under the CCP in the same manner as if it were a decree of the court.<sup>140</sup>
- 7.6.3 Under Section 35 of the Indian Arbitration Act, if an award remains unchallenged during the time period stipulated in Section 34(3) of the Indian Arbitration Act, it then becomes final and binding on the parties. Where there is a Section 34(3) application, the court must either set aside the award or reject the application to challenge it. A court's decision on the challenge under Section 34 is subject to appeal.<sup>141</sup>
- 7.6.4 After the award is pronounced as final and binding by the arbitral tribunal, it is not permissible to initiate an action on the basis of the original claim. All of the rights and liabilities of the parties in respect of the claims which are the subject matter of the arbitral proceedings can only be determined on the basis of the award.<sup>142</sup> The award is final in the sense that there cannot either be a further award on the same subject in dispute or an appeal against the finality of the award.<sup>143</sup>

## 7.7 Correction, clarification and issue of a supplemental award

- 7.7.1 Under Section 33 of the Indian Arbitration Act, an arbitral tribunal may:
- correct any computation, clerical, typographical or similar error;
  - provide its interpretation of a specific point or part of an award; and
  - make an additional award as to claims omitted from the original award.<sup>144</sup>
- 7.7.2 All of the arbitral tribunal's powers outlined in paragraph 7.7.1 above can also be exercised by the arbitral tribunal at the request of one or both of the parties.<sup>145</sup>

---

<sup>140</sup> *Ibid*, s 36.

<sup>141</sup> *Ibid*, s 37(b).

<sup>142</sup> *Satish Kumar v Surendra Kumar* [1970] AIR SC 833; and *K. V. George v Secretary to Govt, Water and Power Dept, Trivandrum* [1989] 4 SCC(4) 595.

<sup>143</sup> *Firm Madanlal Roshanlal Mahajan v Hukumchand Mills Ltd* (1967) SCR(1) 105; and see *Damodar Engineering & Construction Co v Board of Trustees for the Port of Calcutta* [1994] SCC(1) 370.

<sup>144</sup> Indian Arbitration Act, s 33(1).

<sup>145</sup> *Ibid*.

- 7.7.3 A request for the correction and interpretation of an award can be made to the arbitral tribunal, with notice being given to the other party, within a period of 30 days from the receipt of the award or any other period as agreed by the parties.<sup>146</sup>
- 7.7.4 If the arbitral tribunal considers a request to correct or interpret an award to be justified, it is required to carry out the correction or give its interpretation within 30 days from the receipt of the request.<sup>147</sup> In addition, an interpretation of an award by an arbitral tribunal subsequently forms part of that award.<sup>148</sup>
- 7.7.5 In addition to a request made by one or both of the parties, an arbitral tribunal may, on its own initiative, correct errors in an award within 30 days of the date the award was issued.<sup>149</sup> However the arbitral tribunal does not have the authority to correct errors of substance or content.<sup>150</sup>
- 7.7.6 Unless otherwise agreed, either party can make a request for an additional award concerning claims presented in the arbitral proceedings but omitted from the final award.<sup>151</sup> Such a request has to be made within 30 days from the receipt of the award. The party making the request must also give notice to the other parties.
- 7.7.7 If requested by one of the parties, the arbitral tribunal must make an additional award if it is satisfied that the request is justified.<sup>152</sup> An additional award must be made by the arbitral tribunal within 60 days from the date that it is requested. A longer period is provided for the making of an additional award in order that the arbitral tribunal may hear the parties and take evidence on the omitted claims where necessary.
- 7.7.8 The arbitral tribunal is empowered, if necessary, to extend the time limit for making its correction, providing its interpretation or making an additional award.<sup>153</sup> In addition, the provisions regarding the form and content of an award<sup>154</sup> also apply when the arbitral tribunal corrects or interprets an award or an additional award.<sup>155</sup>

---

<sup>146</sup> *Ibid*, s 33(1).

<sup>147</sup> *Ibid*, s 33(2).

<sup>148</sup> *Ibid*.

<sup>149</sup> *Ibid*, s 33(3).

<sup>150</sup> *Instrumentation Ltd v E. Kuttappan* [1992] Arb. LR(1) 284 (Ker).

<sup>151</sup> Indian Arbitration Act, s 33(4).

<sup>152</sup> *Ibid*, s 33(5).

<sup>153</sup> *Ibid*, s 33(6).

<sup>154</sup> *Ibid*, s 31.

<sup>155</sup> *Ibid*, s 33(7).



7.7.9 When an arbitral tribunal corrects or interprets an award, or makes an additional award, it is required to ensure that each party is given full opportunity to present their case in respect of the proposed correction or interpretation of the award or the proposed additional award.<sup>156</sup>

## 8. Role of the courts

### 8.1 Jurisdiction of the courts

8.1.1 Notwithstanding anything contained elsewhere in Part I of the Indian Arbitration Act, or in any other law currently in force, where an application with respect to an arbitration agreement under Part I has been made in a court, that court alone will have jurisdiction over the arbitral proceedings and all subsequent proceedings arising out of that agreement.<sup>157</sup> Thus disputes arising out of an arbitration agreement cannot be subject to the territorial jurisdiction of more than one court. This provision is mandatory and not subject to the principles of party autonomy.<sup>158</sup>

8.1.2 The phrase “with respect to an arbitration agreement” referred to in paragraph 8.1.1 above and stated in Section 42 of the Indian Arbitration Act, should be interpreted widely and should include an application for setting aside an award. The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal under Section 32(2) of the Indian Arbitration Act.

### 8.2 The extent of court interference

8.2.1 It may be noted that it is open for parties to raise a preliminary objection to jurisdiction of a particular court, asserting that that court lacks the territorial jurisdiction on the ground that the respondent does not reside within its territorial jurisdiction and does not have any cause of action that has arisen within such jurisdiction. Rejection of arbitration proceedings on the ground of jurisdiction will only mean that the party would be at a liberty to move to the appropriate court within the prescribed time frames.

8.2.2 Section 5 of the Indian Arbitration Act prescribes the extent of judicial intervention. It states that the object of the Indian Arbitration Act is to encourage resolution of disputes expeditiously and cost-effectively and ensure the minimal intervention of the court where the parties to a dispute have an arbitration agreement in place.<sup>159</sup>

---

<sup>156</sup> See generally *Ibid*, s 18.

<sup>157</sup> *Ibid*, s 42.

<sup>158</sup> *Guru Nanak Foundations v Rattan Singh & Sons* [1981] AIR SC 2075.

<sup>159</sup> See *P. Anand Gajapathi Raju v P.V.G. Raju* [2000] SCR(2) 684.

The extent of judicial intervention is limited by Section 5 of the Indian Arbitration Act,<sup>160</sup> which provides that no judicial authority shall interfere in matters governed by Part I (Sections 7 to 43) of the Indian Arbitration Act, unless provided for within Part I itself.<sup>161</sup> Where the Indian Arbitration Act does not address a particular situation, a court may not assume jurisdiction and interfere in the arbitration.<sup>162</sup>

- 8.2.3 Part I of the Indian Arbitration Act provides for judicial interference in the following instances:
- making reference in a pending suit;<sup>163</sup>
  - passing interim orders;<sup>164</sup>
  - appointment of arbitrators;<sup>165</sup>
  - terminating the mandate of an arbitrator;<sup>166</sup>
  - court assistance in the taking of evidence;<sup>167</sup>
  - setting aside an award;<sup>168</sup>
  - enforcement of an award by way of decree;<sup>169</sup>
  - entertaining appeals against certain orders;<sup>170</sup>
  - directing the delivery of award subject to payment of cost;<sup>171</sup> and
  - reference of a dispute to arbitration in insolvency proceedings.<sup>172</sup>

## 9. Challenging and appealing an award through the courts

### 9.1 Challenge to enforcement of domestic and foreign awards

9.1.1 Chapter VII of the Indian Arbitration Act provides the recourse available against awards. Most notably, an application may be made to the court to set aside an award.<sup>173</sup> An award under the Indian Arbitration Act can be enforced under the CCP.

---

<sup>160</sup> *Krishna Kumar Mundhra v Narendra Kumar Anchalia* [2003] MANU/WB 444.

<sup>161</sup> *State of Jharkhand v R.K. Construction Pvt. Ltd* [2005] Arb. LR(2) 48.

<sup>162</sup> See *Bharat Heavy Electricals Ltd. v Indian Overseas Bank and Another* [2000] Arb. LR(3) 674.

<sup>163</sup> Indian Arbitration Act, s 8.

<sup>164</sup> *Ibid*, s 9.

<sup>165</sup> *Ibid*, s 11.

<sup>166</sup> *Ibid*, s 14(2).

<sup>167</sup> *Ibid*, s 27.

<sup>168</sup> *Ibid*, s 34.

<sup>169</sup> *Ibid*, s 36.

<sup>170</sup> *Ibid*, s 37.

<sup>171</sup> *Ibid*, s 39(1).

<sup>172</sup> *Ibid*, s 41(2).

<sup>173</sup> *Ibid*, s 34(2) and 34(3).

- 9.1.2 When an award is made, the process for challenging its validity requires an application under Section 34 of the Indian Arbitration Act to be filed. Only upon the expiry of the period specified in Section 34 to challenge an award, or when such objection is refused, will the award then become enforceable. Section 36 of the Indian Arbitration Act merely specifies how such an award can be enforced by stating that it can be enforced as if it were a court decree.<sup>174</sup>
- 9.1.3 An application to challenge an award may not be made after three months have elapsed from the date on which the party making the application has received the award or, if requested under Section 33 of the Indian Arbitration Act, from the date on which that request had been disposed by the arbitral tribunal.<sup>175</sup> A qualification to this is that the court, if satisfied of sufficient cause, has the power to entertain the application for setting aside the award within a further period of 30 days.
- 9.1.4 A domestic award may be set aside on the following grounds:
- a party was under some form of incapacity;
  - the arbitration agreement is not valid under the law to which the parties have subjected it;
  - the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present his case;
  - the award deals with a dispute not contemplated by, or not falling within, the terms of the submission to arbitration;
  - the award contains decisions on matters beyond the scope of the submission to arbitration;
  - the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the provisions of the Indian Arbitration Act
  - the subject-matter of the dispute is not capable of settlement by arbitration under the law in force for the time being, or
  - the award is in conflict with the public policy of India.<sup>176</sup>

---

<sup>174</sup> *Morgan Securities and Credit Pvt. Ltd v Modi Rubber Ltd* [2006] RD-SC 955.

<sup>175</sup> Indian Arbitration Act, s 34(3).

<sup>176</sup> *Ibid*, s 34(2).

- 9.1.5 An award has been held to be contrary to public policy if its enforcement were contrary to the fundamental policy of Indian law, the interests of India, justice or morality, or that the award was patently illegal.<sup>177</sup> As per the explanation to Section 34 (2) (b) (ii) an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81.
- 9.1.6 The aim of Section 34 of the Indian Arbitration Act is to limit judicial intervention in the arbitral proceedings. It is also a mandatory provision from which the parties cannot derogate.
- 9.1.7 In certain circumstances, foreign international awards can also be challenged under the procedure set out in Section 34 of the Indian Arbitration Act, provided that it is not expressly or impliedly excluded by agreement between the parties.<sup>178</sup>
- 9.1.8 Generally, the courts have not favoured interference with awards that are incorrect due to an error of law or of fact, or on account of an error of law or of fact due to a misreading of materials. Instead, the courts have shown a definite inclination to preserve the award as far as possible in these instances.<sup>179</sup>

## 9.2 Appeals

- 9.2.1 The following is an exhaustive list of the orders which are appealable under the Indian Arbitration Act:<sup>180</sup>
- granting or refusing to grant any interim measure by the court;<sup>181</sup>
  - setting aside or refusing to set aside an award by the court;<sup>182</sup>
  - accepting the plea of lack of its jurisdiction by the arbitral tribunal;<sup>183</sup>
  - accepting the plea of excess scope of authority by the arbitral tribunal;<sup>184</sup> and
  - granting or refusing to grant an interim measure by the arbitral tribunal.<sup>185</sup>

---

<sup>177</sup> *ONGC v SAW Pipes Ltd.* [2003] AIR SC 2629.

<sup>178</sup> See *Venture Global Engineering v Satyam Computer Services Ltd* [2008] AIR SC 1061.

<sup>179</sup> See *State of Rajasthan v Puri Construction Co. Ltd.* [1994] SCC(6) 485 (where the court held that it does not sit in appeal over arbitral awards and review the reasons why the tribunal gave its award and can set aside the award only if it is apparent that there is no evidence to support the conclusions the tribunal reached or if the award is based upon legal propositions which are erroneous).

<sup>180</sup> Indian Arbitration Act, s 37.

<sup>181</sup> *Ibid*, s 9.

<sup>182</sup> *Ibid*, s 34.

<sup>183</sup> *Ibid*, s 16(2).

<sup>184</sup> *Ibid*, s 16(3).

<sup>185</sup> *Ibid*, s 17.

- 9.2.2 No second appeal can be made against an appellate order passed under Section 37 of the Indian Arbitration Act.<sup>186</sup> However, there is no bar against the right to challenge the order passed under Section 37 by way of a “Special Leave Petition” under Article 136 of the Constitution of India.

## 10. Recognition and enforcement of award

### 10.1 Domestic awards

- 10.1.1 Under Section 36 of the Indian Arbitration Act, a domestic award (i.e. an award made under Part I) is enforceable under the CCP in the same manner as if it were a decree of an Indian court.
- 10.1.2 The procedure for the execution of a domestic award is laid down in Order XXI of the CCP and must be followed. Order XXI of the CCP also lays down the detailed procedure for enforcement of decrees.
- 10.1.3 All proceedings in execution are commenced by way of an “application for execution” in accordance with Rule 10 of the CCP. The execution of a decree against the property of the judgment debtor can be under two heads, namely:
- attachment of property; and
  - sale of the property of the judgment debtor.
- 10.1.4 At the execution stage, there can be no challenge as to validity of the domestic award. Thus, once a party has failed to challenge an award under Section 34 of the Indian Arbitration Act, this possibility is no longer available in execution proceedings.

### 10.2 Foreign awards

- 10.2.1 A foreign award can be enforced in India under the multilateral international conventions to which India is a party, namely the 1927 Geneva Convention and the New York Convention. The award must have been made in a country that has ratified the 1927 Geneva Convention or the New York Convention. The 1927 Geneva Convention has ceased to apply to those awards to which the New York Convention now applies.
- 10.2.2 India made two reservations when it ratified the 1927 Geneva Convention and the New York Convention. The first was that India would apply both the 1927 Geneva Convention and the New York Convention to the recognition and enforcement of

---

<sup>186</sup> *Ibid*, s 37(3).

an award only if it was made in the territory of another state that is bound by either convention. The second was that India would apply the 1927 Geneva Convention and the New York Convention only to differences arising out of legal relationships which are considered as “commercial” under the Indian laws. The concept of “commercial relationship” takes place within the ambit of all relationships which arise out of, or are ancillary or incidental to business dealings.<sup>187</sup>

10.2.3 In pursuance of those reservations, the 1937 Act and 1961 Act provided that the government of India would notify the names of the countries to which the 1927 Geneva Convention and the New York Convention would apply and also the countries which have made reciprocal provisions for the enforcement of Indian awards.

10.2.4 A foreign award can be enforced under Part II of the Indian Arbitration Act. The procedure for enforcement of awards is largely the same in the Indian Arbitration Act as under the 1937 Act and the 1961 Act. The New York Convention and the 1927 Geneva Convention provide a procedure for enforcement which has been given statutory recognition by way of enabling legislation, namely the 1937 Act and the 1967 Act. This continues under the Indian Arbitration Act (which has replaced the 1937 Act and the 1967 Act).

10.2.5 A person intending to enforce a New York Convention award should apply to the court and produce the following four documents:

- the original award, or copy thereof, duly authenticated in the manner required by the law of the country in which it was made;
- the original arbitration agreement, or a duly certified copy;
- such evidence as may be necessary to prove that the award is a foreign award; and
- if necessary, the translated versions of the documents stated above.<sup>188</sup>

10.2.6 Similarly for a 1927 Geneva Convention award the party applying for the enforcement of award shall at the time of the application, produce before the court:

- the original award, or copy thereof, duly authenticated in the manner required by the law of the country in which it was made;
- evidence that the award has become final;

---

<sup>187</sup> *Indian Organic Chemical Ltd v Subsidiary 1 (US) Subsidiary 2 (US) and Chemtex Fibres Inc (Parent Company) (US)* (1979) IV Ybk Comm Arb 271; and *Union of India and Ors v Lief Hoegh Co (Norway)* (1984) IX Ybk Comm Arb 405.

<sup>188</sup> Indian Arbitration Act, s 47(1).

- that the conditions for enforcement of award as stated in Section 57 (1) (a) and (c) of the Indian Arbitration Act are satisfied; and
- if necessary, the translated versions of the documents stated above.<sup>189</sup>

10.2.7 Section 48 of the Indian Arbitration Act provides the grounds where the enforcement of a New York Convention award may be refused:

- where a party to an arbitration agreement was, under the law applicable to them, under some incapacity;
- where the arbitration agreement was invalid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;
- where a party was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings, or was otherwise unable to present their case;
- where the award was given due to a jurisdictional defect;
- where the composition of the arbitral authority or the arbitral procedure was not in accordance with the arbitration agreement of the parties, or failing such agreement, with the law of the country where the arbitration took place;
- where the foreign award has not yet become binding for the parties, or has been set aside, or suspended, by a competent authority of the country in which, or under the law of which, it was made;
- where the foreign award is in respect of a matter which is not capable of settlement by arbitration under the laws of India; or
- where the enforcement of a foreign award would be contrary to the public policy of India.

10.2.8 Section 57 of the Indian Arbitration Act provides for the conditions to be fulfilled in order that a 1927 Geneva Convention award may be enforced. These conditions are:

- the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;
- the subject-matter of the award is capable of settlement by arbitration under the laws of India;
- the award has been made by the arbitral tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;
- the award has become final in the country in which it has been made; and
- the enforcement of the award is not contrary to the public policy or the law of India.

---

<sup>189</sup> *Ibid*, s 56.

10.2.9 However even if the conditions laid down in the preceding paragraph are fulfilled, enforcement of the 1927 Geneva Convention award shall be refused if the Court is satisfied that:

- the award has been annulled in the country in which it was made;
- the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case, or that, being under a legal incapacity, he was not properly represented;
- the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration.

10.2.10 The Indian Arbitration Act does not prescribe any time limit within which an application to enforce a foreign award must be made. However, a number of High Court cases have held that the period of limitation would be governed by the residual provisions under the Limitation Act 1963, i.e. the period would be 12 years from the date when the right to apply for enforcement accrues.<sup>190</sup>

10.2.11 An appeal lies under Section 50 of the Indian Arbitration Act against an order refusing to enforce a foreign award under Section 48 in case of New York Convention awards and against an order refusing to enforce a foreign award under Section 57 in case of 1927 Geneva Convention awards. Furthermore a petition would lie against such order with the Supreme Court under Article 136 (Special Leave Petition) of the Indian Constitution. Such petitions are only entertained if the Supreme Court considers that they raise a question of fundamental importance or public interest.

10.2.12 Once the court determines that a foreign award is enforceable, it can be executed as a decree straightaway.<sup>191</sup> Non-1927 Geneva Convention and non-New York Convention awards will be enforceable in India under the common law on grounds of justice, equity and good conscience.<sup>192</sup>

## 11. Special provisions and consideration

11.1.1 The presence of an arbitration agreement in a contract will not be a bar to either party seeking a remedy under the Consumer Protection Act 1986 (**CPA**) in addition to, and not in derogation of, other provisions of Indian law currently in

---

<sup>190</sup> *Noy Vallesina Engineering Spa v Jindal Drugs Limited* [2006] Arb. LR(3) Bom. 510.

<sup>191</sup> *M/S Fuerst Day Lawson Ltd v Jindal Exports Ltd* [2001] SCC(6) 356.

<sup>192</sup> *Badat & Co. Bombay v East India Trading* [1964] CAIR SC 538.



force.<sup>193</sup> If a complaint is made by a consumer in relation to a certain deficiency of service under an agreement, the existence of an arbitration clause in that agreement will not prevent the complaint from being brought before the Redressal Agency, constituted under the CPA. The remedy provided under the Indian Arbitration Act is in addition to the provisions of any other law currently in force.<sup>194</sup>

## 12. Contacts

### Khaitan & Co

One Indiabulls Centre, 13th Floor  
841 Senapati Bapat Marg  
Elphinstone Road  
Mumbai 400 013  
India

### **Chakrapani Misra**

**T** +91 22 6636 5000  
**E** chakrapani.misra@khaitanco.com

### Khaitan & Co

Ashoka Estate, 12th Floor  
24 Barakhamba Road  
New Delhi 110 001  
India

### **Sanjeev Kapoor**

**T** +91 11 4151 5454  
**E** sanjeev.kapoor@khaitanco.com

---

<sup>193</sup> *Skypak Couriers Ltd v Tata Chemical* [2008] AIR SC 2008.

<sup>194</sup> *Ibid.*

