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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

No particular form is required by law. It may be in the form of an arbitration clause in a contract or in the form of a separate agreement. An arbitration agreement need not necessarily use the word "arbitration" or "arbitral tribunal" or "arbitrator". The agreement, however, must be in writing. The arbitration agreement shall be deemed to be in writing if it is contained in an exchange of letters or other means of communication which provide a record of the agreement. Further, the agreement need not be signed and an unsigned agreement affirmed by the parties' conduct would be valid as an arbitration agreement. An arbitration agreement would also be considered to be in writing if there is an exchange of a statement of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other. By an amendment to the Arbitration Act (not applicable to arbitrations which have commenced prior to 23rd October, 2015), it stands clarified that such agreements can also include communication through electronic means. [Section 7 of the Arbitration and Conciliation Act, 1996, ("Act").]

1.2 What other elements ought to be incorporated in an arbitration agreement?

From an Indian point of view, the most significant element would be the seat of arbitration, for that would determine which part of the Act would apply to the proceedings and the court which would have jurisdiction in relation thereto. Domestic arbitrations are governed by Part I of the Act, while off-shore arbitrations are governed by Part II of the Act. While Part I contains a comprehensive scheme for the conduct of arbitration (based on the Model Law), Part II is essentially confined to enforcement of foreign awards (on the basis of the New York Convention). A long ranging controversy in India has been whether Indian courts can grant interim relief in relation to foreign arbitrations (in the absence of any enabling statutory provisions in Part II). This now stands settled with the 2015 amendment to the Act clarifying that courts would have jurisdiction to grant interlocutory relief (in aid of foreign seated arbitrations) as well as assistance in summoning witnesses, production of documents, etc.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Section 8 of the Act states that a judicial authority before which an action is brought, in a matter which is the subject matter of an arbitration agreement, shall refer the parties to arbitration – the only condition being that the party objecting to the court proceedings must do so no later than his first statement on the substance of the dispute. In the meantime, the arbitration proceedings may commence and continue, and an award can be rendered. The Supreme Court of India has held in *Rashtriya Ispat Nigam Ltd. v. Verma Transport Co.* – (2006) 7 SCC 275, that once the conditions of the Sections are satisfied, the judicial authority is "statutorily mandated" to refer the matter to arbitration. Section 5 supplements this and provides, through a *non-obstante* clause, that in matters governed by the Act, no judicial authority shall interfere except where so provided for. This position stands further affirmed by the 2015 amendment to the Act which nullifies certain judgments which had created inroads into Section 8. The Section now has a *non-obstante* clause requiring the Court to refer the parties to arbitration unless it finds that *prima facie* no valid arbitration agreement exists. However, Section 8 applies only to arbitrations where the seat is in India. Agreements for off-shore arbitrations are governed by Section 45 of the Act, which is somewhat differently worded. Here it is provided that a judicial authority, when seized of any matter where there is an arbitration agreement, shall refer the parties to arbitration – "*unless it finds that the said agreement is null and void, inoperative or incapable of being performed*". The latter part is borrowed from Article 8 of the Model Law. Thus, India has retained court intervention (to the extent permitted by the Model Law) only in relation to foreign arbitrations. An issue arose in *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.* – (2005) 7 SCC 234, as to whether a ruling by court (in relation to off-shore arbitrations) on the validity or otherwise of an arbitration agreement is to be on a *prima facie* basis or is to be a final decision. If it were to be a final decision, it would involve a full dress trial and, consequently, years and years of judicial proceedings, which would frustrate the arbitration agreement. Keeping this and the object of the Act in mind, the Supreme Court, by a 2:1 decision, held that a challenge to the arbitration agreement under Section 45 on the ground that it is "*null and void, inoperative or incapable of being performed*" is to be determined on a *prima facie* basis.

At the same time, an issue would remain as to what is to be done in cases where the court does in fact come to a conclusion that the arbitral agreement is null and void, inoperative or incapable of being performed. A decision to this effect is appealable under Section 50

of the Act. Thus, a ruling on a *prima facie* view alone would not be satisfactory. One of the judges addressed this and held that if the court were to arrive at a *prima facie* conclusion that the agreement is in fact null and void, it would have to go ahead and hold a full trial and enter a final verdict (in order that it can be appealed if need be). Therefore, in such a situation, a foreign arbitration may well come to a halt pending final decision from an Indian court, but otherwise Section 45 proceedings would not have any significant impeding effect on progress of a foreign arbitration.

A recent case of seminal importance is *Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc.* – (2013) 1 SCC 641. Here, the court was faced with a situation where parties to a joint venture had entered into several related agreements – some with different entities from amongst their group. These agreements had diverse dispute resolution clauses: some with ICC arbitration in London; some with no arbitration clause; and one agreement with an AAA arbitration clause with Pennsylvania, (USA) as its seat. The Supreme Court strongly came out with a pro-arbitration leaning stating that the legislative intent is in favour of arbitration and the Arbitration Act "*would have to be construed liberally to achieve that object*". The Court held that non-signatory parties could be subjected to arbitration provided the transactions were within the group of companies and there was a clear intention of the parties to bind non-signatories as well. It held that subjecting non-signatories to arbitration would be in exceptional cases. This would be examined on the touchstone of direct relation of the non-signatory to the signatories, commonality of the subject matter and whether multiple agreements presented a composite transaction or not. The situation should be so composite that performance of the "*mother agreement*" would not be feasible without the aid, execution and performance of the supplemental or ancillary agreements.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The Arbitration and Conciliation Act, 1996 (as amended by the Arbitration and Conciliation (Amendment Act), 2015) governs the enforcement of arbitration proceedings relating to domestic and international commercial arbitration conducted in India.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

India has a composite piece of legislation governing both domestic and international arbitration. The Act has two main parts. Part I deals with any arbitration (domestic, as well as international), so long as the seat of arbitration is in India. Part II deals mostly with enforcement of foreign awards.

"International commercial arbitration" is defined as an arbitration where at least one of the parties is a national or habitual resident in any country other than India or a body corporate which is incorporated in any country other than India or a company or association of an individual whose "central management and control" is exercised in any country other than India or the Government is a foreign country (Section 2 (1) (f) of the Act). However, the Supreme Court of India in *TDM Infrastructure Private Limited v. UE Development India Private Limited* – (2008) (2) Arb LR 439 (SC), has held that if both parties are incorporated in India, then even if the control and management is from outside India, the arbitration would be "domestic" and not "international". The difference between domestic and international arbitration (conducted in India) is discussed below.

The first difference is that if there is a failure of the parties' envisaged mechanism for constitution of the Arbitral Tribunal, the appointment shall be made, in the case of a domestic arbitration by the High Court and in the case of international arbitration by the Supreme Court of India.

The second difference is in relation to governing law. In international arbitration, the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute and, failing any such designation, the rules of law the tribunal considers appropriate given all the circumstances. In domestic arbitration (arbitration between Indian parties), however, the tribunal can only apply the substantive law for the time being in force in India.

The third difference is that in domestic arbitrations an additional ground for setting aside the award on 'patent illegality' has been inserted by the 2015 amendment to the Act. This is not available in international arbitrations seated in India.

The fourth difference after the recent amendment is that any application to the court in an international arbitration shall lie to the High Court, whereas in cases of domestic arbitration it will lie to a court which has original jurisdiction in relation to the matter.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

The law governing international arbitration is based faithfully on the UNCITRAL Model law and the UNCITRAL Rules 1976 (amended in 2010, but which has not yet been adopted by the Indian Legislature). There are a couple of departures designed to keep out court intervention. Thus, for instance, Section 8 of the Act departs from the Model Law in as much as it does not permit a court to entertain an objection to the effect that the arbitration agreement is "null and void, inoperative or incapable of being performed". (See also question 1.3 above.)

Section 16 (corresponding Article 16 of the Model Law) also makes a slight departure. Unlike the Model Law, no interim court recourse is permissible if the tribunal declares that it has jurisdiction. In such case, the challenge is permissible only once the final award is passed.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

International arbitration proceedings taking place in India are governed by the same set of provisions as domestic arbitrations.

See question 2.2 above.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

The Act states that the relationship between the parties need not be contractual. Hence, disputes in tort (relating to the contract) can also be referred to arbitration. "Generally and traditionally all disputes relating to rights *in personam* are considered to be

amenable to arbitration; and all disputes relating to rights *in rem* are required to be adjudicated by courts and public tribunals." *Booz Allen & Hamilton Inc. v. SEBI Home Finance Ltd.* – (2011) 5 SCC 532. Examples of non-arbitrable disputes are: disputes relating to a criminal offence; matrimonial disputes; child custody; guardianship; insolvency; winding up; and testamentary matters.

Another (court sanctified approach) to determine arbitrability is to see whether the parties can make a settlement regarding their dispute on a subject matter of private contract. (*Olympus Superstructures v. Meena Khetan* – (1999) 5 SCC 651.) The court here relied on Halsbury's Laws of England stating that the differences or disputes which can be referred to arbitration must consist of "*...a justiciable issue, triable civilly. A fair test of this is whether the difference can be compromised lawfully by way of accord and satisfaction*". (4th Edition, volume 2, paragraph 503.)

Where serious fraud has been alleged the dispute was considered to be non-arbitrable (*N. Radhakrishnan v. Maestro Engineers*, (2010) 1 SCC 72) and courts refused to refer parties to arbitration under Section 8 of the Act. But that was in the past. In *World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd.*, pronounced on 24 January 2014, the Supreme Court departed from *N. Radhakrishnan* and held that in the case of foreign seated arbitrations (covered by Section 45 of the Act), the Court can decline to make a reference of a dispute covered by the arbitration agreement only if it comes to the conclusion that the arbitration agreement is null and void, inoperative or incapable of being performed, and not on the grounds that allegations of fraud or misrepresentation are involved. Another decision of the Supreme Court in *Swiss Timing Limited v. Organising Committee, Commonwealth Games 2010, Delhi* – (2014) 6 SCC 677 held *N. Radhakrishnan* to be *per incuriam* and that allegations of serious fraud are arbitrable even in relation to domestic arbitrations. Several cases are now following this line and the amended Act (2015) also nullifies the effect of *N. Radhakrishnan*. However, (whilst the courts will not interfere with the arbitral process) the position of arbitrability of serious fraud is still a grey area as non-arbitrability of subject matter of the dispute is a ground for setting aside an arbitral award (Section 34 (b) (i) of the Act). Thus, while a reference to arbitration cannot be stalled on the ground that serious fraud is involved, whether or not it is arbitrable will still be an issue before the court considering the setting aside of an award petition.

3.2 Is an arbitrator permitted to rule on the question of his or her own jurisdiction?

An arbitrator is permitted to rule on his or her own jurisdiction. This is provided for in Section 16 of the Act, which corresponds to Article 16 of the Model Law. (See question 2.3 above.)

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

See question 1.3 above.

3.4 Under what circumstances can a court address the issue of the jurisdiction and competence of the national arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

See questions 1.3 and 2.3 above.

Additionally, the issue of jurisdiction can be raised by a party before the court by way of an appeal under Section 37 (2) (a) on the Arbitral tribunal refusing jurisdiction. On the other hand, if the tribunal's finding is that it has jurisdiction, it can only be challenged after the award is rendered.

Indian courts have not yet determined the standard of review in respect of a tribunal's decision regarding its own jurisdiction. The likelihood is that challenge to jurisdiction will be unhampered by the otherwise narrow grounds under Section 34 provided it is not a disguised challenge on merits.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

A landmark Supreme Court decision, *Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc.* – (2013) 1 SCC 641, states the circumstances under which the arbitral tribunal would have jurisdiction over non-signatories to the arbitration. Please see the latter part of question 1.3 above.

Section 8 (as amended by the 2015 Amendment Act) clarifies that a person claiming "through or under" a party to an arbitration agreement also has locus to ask for dismissal of the judicial proceedings and reference of the dispute to arbitration.

Indian courts have also taken a liberal view as to consolidation of arbitrations. A Supreme Court decision in *P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.*, (2012) 1 SCC 594 held, *inter alia*, "*if A had a claim against B and C and if A had an arbitration agreement with B and A also had a separate arbitration agreement with C, there is no reason why A cannot have a joint arbitration against B and C*".

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

The Limitation Act, 1963 applies to arbitrations in the same way as it does to proceedings in court (Section 43 of the Act). For these purposes, arbitration proceedings are deemed to have commenced (unless the parties have agreed otherwise) on the date on which a request for the dispute to be referred to arbitration is received by the respondent (Section 21 of the Act). The Limitation Act provides that the party invoking the arbitration has three years from the date of commencement of arbitration proceedings to seek appointment of arbitral tribunal. The courts consider the limitation period as part of the substantive law.

Once time has started to run, no subsequent inability to bring the action stops the time running. However, well-known exemptions apply if:

- In good faith, proceedings are started in a court without jurisdiction.
- The case is based on subsequently discovered fraud or mistake.
- Any document necessary to establish the claimant's right has been fraudulently concealed from him.
- There is written acknowledgment of liability.
- There is a part payment of the debt.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

The law of insolvency (winding-up) of an incorporated company is contained in the Companies Act, 2013. Sections 279 and 280 thereof provide that where a winding-up order has been made or a provisional liquidator or an official liquidator has been appointed, no suit or other legal proceeding shall be commenced or shall be proceeded with against the company without leave of the court and subject to such terms as the court may impose. Thus, once a winding-up order is passed or a provisional liquidator is appointed, all legal proceedings against the company have to come to a halt (subject to such orders as may be passed by the winding-up court). It may be mentioned that besides the winding-up provisions, if a reference is made to the Board for Industrial & Financial Reconstruction (BIFR) under the provisions of Sick Industrial Companies Act, 1985 (SICA), then no award can be executed against the said company without the permission of BIFR. However, there is no stay of legal proceedings and the same can continue and an award rendered but the resultant award cannot be executed against the applicant company. A reference to the BIFR is mandatory where the company's accumulated losses exceed its net worth.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

If the parties have Indian nationality (and in the case of companies, if they are incorporated in India), the Tribunal can only apply Indian law to the substance of the dispute. In other cases, the parties may either make an express choice of law or the proper law may be inferred from the terms of the contract and surrounding circumstances. It is the law with which the contract is most closely connected. Factors such as the nationality of the parties, the place of performance of the contract, the place of entering into the contract, the place of payment under the contract, etc., can be looked at to ascertain the intention of the parties.

The proper law of the arbitration agreement is normally the same as the proper law of the contract. Where, however, there is no express choice of the law governing the contract as a whole, of the arbitration agreement as such, a presumption may arise that the law of the country where the arbitration is agreed to be held is the proper law of the arbitration agreement. But this is only a rebuttable presumption. (*NTPC v. Singer Co.* – (1992) 3 SCC 551.)

See also question 2.2, last paragraph.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

In respect of procedural matters relating to the arbitration proceedings, the laws of the seat of jurisdiction shall prevail. The court may, invoking the principle of comity of nations, apply the mandatory laws of another jurisdiction if the contract is in breach of that law.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

The proper law of arbitration (i.e., the substantive law governing arbitration) determines the formation and legality of arbitration agreements. Please see question 4.1 above.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

The law does not impose any limits on the parties' autonomy to select arbitrators. The number of arbitrators, however, cannot be an even number. An arbitrator need not have any special qualification or training or be a member of the bar.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

There is a default provision provided for *vide* Section 11 of the Act. The default provisions are triggered if:

- The parties cannot agree on the appointment of an arbitrator within 30 days of receipt of a request to do so.
- Two appointed arbitrators fail to agree on the third arbitrator within 30 days of the date of their appointment.
- The arbitration is to be heard by one arbitrator and the parties fail to agree on that arbitrator within 30 days of receipt of a request to agree on the appointment.
- The parties' mechanism for appointment of an arbitrator fails.

If the default is in relation to an international commercial arbitration, the appointment shall be made by the Supreme Court of India. In domestic arbitrations, the appointment shall be made by the High Court which has jurisdiction in relation to the matter (determined by where the cause of action arise; or the respondent resides or carries on its business).

The Amendment of 2015 states that the Supreme Court/High Court can delegate powers to any person or institution to appoint arbitrators. (So far there is no delegation of the power to any person or institution.)

An application under Section 11 now has to be disposed off by the Supreme Court or High Court as expeditiously as possible and an endeavour be made to dispose it within 60 days from the date of service of notice on the opposite party (Section 11 (13), Act). Impliedly overruling a 7 Bench decision in *SBP v. Patel Engineering Ltd.*, AIR 2006 SC 450, the 2015 amendment to the Act states that the courts role at this stage will be restricted to only *prima facie* examining the existence of an arbitration agreement (Section 11 (6) A).

5.3 Can a court intervene in the selection of arbitrators? If so, how?

The court can intervene only in a default situation (see question 5.2 above).

After the arbitral tribunal is constituted, the jurisdiction of the court can be invoked only if an arbitrator has become *de jure* or *de facto*

unable to perform his functions or fails to act without undue delay. If there is any controversy as to these circumstances, a party may apply to the court for a decision on the same.

5.4 What are the requirements (if any) as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators imposed by law or issued by arbitration institutions within your jurisdiction?

Like Article 12 of the Model Law and Article 10 of the UNCITRAL Rules 1976, the Act also requires the arbitrators (including party appointed arbitrators) to be independent and impartial and make full disclosure in writing of any circumstance likely to give rise to justifiable doubts on the same (Section 12 of the Act).

Schedule V to the Act lists the kind of relations between an arbitrator and a party/advocate/subject matter of the dispute, which give rise to justifiable doubts regarding an arbitrator's independence.

Schedule VII to the Act lists the kinds of relations between an arbitrator and a party/advocate/subject matter of the dispute, which would, notwithstanding any prior agreement between the parties, disentitle a person from acting as an arbitrator, unless post-arising of disputes, parties expressly waive such a conflict.

Schedule V and VII (inserted *vide* the 2015 Amendment) can be said to be along the lines of the IBA Guidelines on Conflicts of Interest.

An arbitrator can be challenged only if circumstances exist that give rise to justifiable doubts as to his independence or impartiality or if he does not possess the qualifications agreed to by the parties. Subject to any agreement between the parties, any challenge shall be made within 15 days of a party becoming aware of the constitution of the tribunal or becoming aware of the circumstances leading to the challenge. The arbitral tribunal shall decide on the challenge. The court has no role at that stage and if a challenge is rejected, the arbitral tribunal shall continue with the proceedings and render its award. It would be open to the party challenging the arbitrator to take any wrongful rejection of challenge as a ground for setting aside the award.

The Indian courts have held that "the apprehension of bias must be judged from a healthy, reasonable and average point of view and not on mere apprehension of any whimsical person. Vague suspicions of whimsical, capricious and unreasonable people are not our standard to regulate our vision". (*International Airports Authority of India v. K.D Bali* – (1988) 2 SCC 360.)

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

The arbitrators are masters of their own procedure and, subject to the parties' agreement, may conduct the proceedings "in the manner it considers appropriate" (Section 19). This power includes "the power to determine the admissibility, relevance, materiality and weight of any evidence" (Section 19). The only restraint on them is that they shall treat the parties with equality and each party shall be given a full opportunity to present its case, which includes sufficient advance notice of any hearing or meeting. Neither the Code of Civil Procedure, 1908 (CPC) nor the Indian Evidence Act, 1872 (Evidence Act) applies to arbitrations. Unless the parties agree otherwise, the tribunal shall decide whether to hold oral hearings for the presentation of evidence or for arguments or whether to conduct the proceedings on the basis of documents or other material alone. However, the arbitral tribunal shall hold oral hearings if a party so requests (unless the parties have agreed that no oral hearing shall be held).

The arbitrators have the power to proceed *ex parte* where the respondent, without sufficient cause, fails to communicate his statement of defence or appear for an oral hearing or produce evidence. However, such failure shall not be treated as an admission of the allegations and the tribunal shall determine the matter on evidence, if any, before it. If the claimant fails to communicate his statement of claim, the tribunal shall be entitled to terminate the proceedings.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

See question 6.1 above. The other procedural steps are mostly as envisaged under the Model Law and UNCITRAL Rules 1976.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

The conduct of Indian registered advocates is governed by the Rules of the Bar Council of India and the Advocates Act, 1961. These also govern the conduct of Indian advocates in arbitral proceedings sited elsewhere. There are no provisions guiding the conduct of foreign counsel in arbitrations sited in India.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

Apart from the provisions envisaged under the Act, the arbitrators are bound by the fundamental principles of natural justice and public policy in conducting the arbitration proceedings.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

Foreign lawyers have no right of audience before Indian courts. However, they can appear and represent clients in arbitration proceedings. The position is, however, not crystal clear pending an appeal before the Supreme Court of India challenging this (*Bar Council of India v. A.K. Balaji* – SLP (Civil) No. 17150-54/2012).

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

There are none.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

No, the courts have no such jurisdiction. In relation to both India-seated and foreign seated arbitrations, parties can, with the approval of the arbitral tribunal, seek the court's assistance in taking evidence. The court may issue summons to witnesses or order that evidence be provided directly to the arbitral tribunal (Section 27).

7 Preliminary Relief and Interim Measures

7.1 Is an arbitrator in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitrator seek the assistance of a court to do so?

This is provided for *vide* Section 17 of the Act. A party may, during the arbitral proceedings or at any time after the making of the award but before it is enforced, apply to the tribunal for grant of interim measures. Prior to the 2015 amendment, the orders of the tribunal were not enforceable without recourse to a separate court proceeding. However, the new Act states that the tribunal shall have the same power as is available to a court under Section 9 and an interim order passed by an arbitral tribunal would be enforceable in the same manner as if it were an order of the court. India has not adopted the 2006 Amendments to the Model Law.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Section 9 of the Act enabled a party to approach a competent court for any interim relief before or during the arbitral proceedings or even after the award is pronounced, but before it is enforced. The Model Law, in fact, has a more restrictive provision – it does not contemplate recourse to a court for an interim measure after the award is pronounced (Article 9). This, however, now stands curtailed as explained below:

After the Amendment of 2015, the court is restrained from entertaining an application under Section 9 once the tribunal has been constituted, unless circumstances exist which may not render the remedy provided for under Section 17 efficacious (Section 9 (3), Act). The aim is to empower the tribunal and keep court intervention out.

The Supreme Court, in the case of *Sundaram Finance v. NEPC* – (1999) 2 SCC 479, held that if a court is approached before the arbitral proceedings are commenced, the applicant must issue a notice to the opposite party invoking the arbitration clause or, alternatively, the court would have to be first satisfied that the applicant shall indeed take effective steps to commence the arbitral proceedings without delay. Further, the court would have to be satisfied that there exists a valid arbitration agreement between the parties.

The 2015 Amendment has crystallised the position and Section 9 (2) of the Act now states that if the court passes an interim order before commencement of the arbitral proceedings, then the proceedings must commence within 90 days from the date of such order or within such further time frame the court determines.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

Usually, a three-fold approach is followed: (i) existence of a *prima facie* case in favour of the applicant; (ii) irreparable hardship, i.e. which cannot be compensated in terms of money; and (iii) balance of convenience.

Indian courts are somewhat liberal in granting interim relief and rarely hold an applicant to terms such as security or costs.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

Injunctive relief is governed by the provisions of the Specific Relief Act and an interlocutory relief in relation thereto is governed by the provisions of the Code of Civil Procedure. Interlocutory relief is granted on the principles highlighted in question 7.3 above. The same principles would apply to an anti-suit injunction. The Indian Supreme Court has held that, with regard to the principles of comity, this power will be exercised sparingly, as such an injunction can interfere with the exercise of jurisdiction by another court (*Modi Entertainment Network v. W.S.G. Cricket Pte Ltd.* – (2003) 4 SCC 341). In this case, the court also laid down some principles relating to an anti-suit injunction, as follows:

- The court must be satisfied that, if the injunction is declined, the ends of justice will be defeated and injustice will be perpetuated.
- The principle of comity must be borne in mind.

The court will examine as to which is the appropriate forum (*forum conveniens*) and may grant an anti-suit injunction in relation to proceedings which are oppressive or vexatious or in a *forum non-conveniens*.

7.5 Does the national law allow for the national court and/or arbitral tribunal to order security for costs?

The arbitral tribunal can order security for costs (by way of deposit) that it expects to be incurred in relation to the claim or counterclaim (Section 38, Act).

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

Under the amended Act, the tribunal shall have the same powers that are available to a court under Section 9 and the interim orders passed by an arbitral tribunal would be enforceable in the same manner as if it were an order of the court. Hence, subject to any stay an aggrieved party may obtain from an appellate court, the interim measures ordered by an arbitral tribunal are to take immediate effect and be enforced through court process (should the need so arise). There is no precedent so far as to the scope of judicial review in so far as the appellate court is concerned. See question 7.1 above.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

Section 19 of the Act states that the arbitral tribunal shall not be bound by the provisions of the Evidence Act. However, decided cases have held that certain provisions of the Evidence Act, which are founded on fundamental principles of justice and fair play, shall apply to arbitrations.

Hence, "fundamental principles of natural justice and public policy" would apply, though the technical rules of evidence contained under the Indian Evidence Act would not apply (*State of Madhya Pradesh v. Satya Pal* – AIR 1970 MP 118).

8.2 Are there limits on the scope of an arbitrator's authority to order the disclosure of documents and other disclosure (including third party disclosure)?

There are no limits prescribed under the Act on the power of the arbitrator to order disclosure of documents. Section 27 of the Act provides that the arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the court for assistance in taking evidence, including any disclosure or discovery. Hence, (unless the parties voluntarily comply) disclosure/discovery can only be ordered through the court and in accordance with the provisions of the CPC.

Indian courts do not encourage wide requests for discovery. Generally, courts would order discovery if satisfied that the same is necessary for a fair disposal of the matter or for saving costs.

8.3 Under what circumstances, if any, is a court able to intervene in matters of disclosure/discovery?

Please see question 8.2 above.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal or is cross-examination allowed?

The Indian Oath's Act, 1969 extends to persons who may be authorised by consent of the parties to receive evidence. Thus, this Act encompasses arbitral proceedings as well. Section 8 of the said Act states that every person giving evidence before any person authorised to administer an oath "shall be bound to state the truth on such subject". Thus, witnesses appearing before an arbitral tribunal can be duly sworn by the tribunal and be required to state the truth on oath, and, upon failure to do so, commit offences punishable under the Indian Penal Code. Witnesses are generally required to give evidence by sworn affidavits (witness statements). However, a mere irregularity in the administration of an oath or affirmation does not invalidate the proceeding (Section 7, Indian Oaths Act, 1969).

The right of cross-examination would necessarily have to be granted as a principle of fairness. If cross-examination is not possible (say, due to subsequent death of a witness), the affidavit is disregarded.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

The arbitral proceedings or record is not privileged. Indian law under the Indian Evidence Act, 1872 (Sections 122–129) recognises the following as privileged: (i) lawyer-client communications; (ii) unpublished official records relating to affairs of the State if detrimental to public interest; (iii) communications between husband and wife (during and even when the marriage is over); and (iv) communications made to a public officer in official confidence when he considers that it would be detrimental to public interest. All of the above are capable of waiver by the party affected.

Indian law provides that no attorney shall be asked to disclose any communication made to him by his client in the course of and for the purpose of his employment. There are some exceptions to this rule. For instance, there is no privilege if the communication is made in furtherance of an illegal purpose or if the attorney observes that some crime or fraud has occurred after commencement of his employment.

Privilege cannot be extended to in-house counsel as a lawyer is required to give up his certificate of practice (the same is suspended) so long as he is in full time employment. (The relationship switches from a lawyer/client one to an employer/employee one.)

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the Award contain reasons or that the arbitrators sign every page?

An arbitral award must be in writing and signed by the arbitrators (or a majority of them) and state the date and place of arbitration. It shall state reasons upon which it is based, unless the parties have agreed otherwise (Section 31, Act).

9.2 What powers (if any) do arbitrators have to clarify, correct or amend an arbitral award?

The arbitrator's powers to clarify, correct or amend an arbitral award are limited. The arbitral tribunal may, on its own initiative or on application of a party, correct any computation, clerical, typographical or any other errors of a similar nature occurring in the award within thirty days from the date of the award (Section 33(4), Act).

Parties may by agreement request the tribunal to give an interpretation of a specific point or part of the award, or request for an additional award as to claims presented in the proceedings but omitted from the award. The time limit for such an application is also 30 days.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

A challenge to an arbitration award would lie under Section 34 of the Act, corresponding to Article 34 of the Model law. To paraphrase, an award can be set aside if:

(a) the party making the application was under incapacity;

(b) the arbitration agreement was not valid under the law agreed to by the parties (or applicable law);

(c) the party making the application was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

(d) the award deals with a dispute not contemplated by or falling within the terms of submissions to arbitration or it contains decisions beyond the scope of the submissions to arbitration;

(e) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties;

(f) the subject matter of the dispute was not capable of settlement by arbitration; or

(g) the arbitral award is in conflict with the public policy of India.

The Amendment of 2015 has clarified that an award is said to be in 'conflict with the public policy of India' only if:

(i) the making of the award was induced or affected by fraud or corruption or was in violation of Sections 75 and 81 (pertaining to breach of confidentiality of constitution or settlement proceedings);

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Prior to the amendment, the Supreme Court in *ONGC v. Saw Pipes* – (2003) 5 SCC 705, had held that a domestic award can be set aside if it is "patently illegal", i.e., if the award is contrary to the terms of the contract entered into between the parties or the substantive law. The Amendment has narrowly construed the "public policy" ground as stated above. Further, it stands clarified that the ground of "patent illegality" is not available in an international commercial arbitration (seated in India). Secondly, an award can be set aside for being patently illegal only if the same is apparent on the face of the award. Thirdly, a challenge on the ground of public policy and whether an award contravenes the 'fundamental policy of Indian Law' will not entail a review on the merits of the dispute (thus overruling the controversial *Saw Pipes Judgment*). It has also clarified that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.

Prior to the amendment, the mere filing of a Section 34 Application to set aside the award would result in automatic stay of the enforcement of an award. However, under the new Act this is not the case. A separate application is now required to be made to stay the enforcement of the award during the pendency of the Section 34 proceeding.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

Though the Act is silent on the point, in law it may be possible to exclude certain grounds of challenge but judicial review as such cannot be excluded as that would be contrary to Public Policy of India and would be considered to be a restraint on legal proceedings (which is prohibited in law).

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

No, the courts cannot assume a new jurisdiction (which it otherwise does not have) on the basis of the parties' agreement.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

An application for setting aside a domestic award can be filed under Section 34 of the Act. Such application must be made within three months from the date of receiving of the award. The court, if satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months, may condone delay of a further period of 30 days but not thereafter. There is no provision to set aside a foreign award (the only provision being to enforce or refuse to enforce the same on the New York Convention grounds). The Supreme Court in *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services* (*supra*) has overruled an earlier controversial decision which permitted Indian courts in certain circumstances to entertain and set aside application of foreign awards.

The 2015 Amendment to the Act calls for expeditious disposal of a challenge to the award and in any event within one year from the date on which notice has been issued to the other party (Section 34 (6), Act). It remains to be seen how this will work out in practice.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Yes. The relevant legislation is the Arbitration and Conciliation Act, 1996. India has made the 'reciprocity' and 'commercial' reservations under Article I of the New York Convention. As a result, the Central Government of India must further notify the foreign territory as a territory to which the New York Convention applies in order for the foreign award to be enforced. However, an award made in Ukraine after the breakup of the USSR was held to be an enforceable foreign award even in the absence of a separate notification recognising the new political entity as a reciprocating territory (*Transocean Shipping Agency (P) Ltd. v. Black Sea Shipping* – (1998) 2 SCC 281).

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

No, it has not.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

The general approach is to support the arbitral award – see *Bijendra Nath v. Mayank* – (1994) 6 SCC 117. The Supreme Court has held that "the court should approach an award with a desire to support it, if that is reasonably possible, rather than to destroy it by calling it illegal".

In the case of a foreign award, a party seeking enforcement would have to file an application before the High Court where the defendant resides or has assets along with the original award, or a copy duly authenticated, original arbitration agreement, or a duly

certified copy, and such evidence as may be necessary to prove that the award is a foreign award (Section 47(1), Act). After the amendment, it is only the High Court which has jurisdiction for all matters concerning international commercial arbitration.

See also question 11.5 below.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Subject to any challenge to the arbitral award, the same is enforceable as a decree and in such a situation, the principles of *res judicata* would apply.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

There are two different regimes under the Indian Act for enforcement of an arbitral award. The domestic law regime is covered under Section 34 of the Act, which is based on Article 34 of Model Law. Enforcement of a foreign award is governed by Section 48 of the Act, which is based on the New York Convention. Section 34 stipulates that an award can be set aside if it is in conflict with the public policy of India. See question 10.1.

Section 48 stipulates that a foreign award will not be enforced if the enforcement would be contrary to the public policy of India.

Indian courts have applied different standards in construing the "public policy" ground in the aforesaid sections. In relation to domestic awards, the Supreme Court in *ONGC v. Saw Pipes* (*supra*) has held that an award will be contrary to public policy "if it is patently illegal" (i.e., an award can be challenged on merits on the public policy ground). However, in so far as foreign awards are concerned, the public policy ground has been narrowly construed. In *Renusagar Power Co. v. General Electric Corporation* – (1994) Suppl 1 SCC 644, the Supreme Court held that "*public policy*" shall be confined to "*the fundamental policy of Indian law or the interest of India or justice or morality*". The rationale for this diversity in approach is noted in the *Saw Pipes* case, *viz* a foreign award may be questioned in the country in which or under the laws of which it was made. Hence a domestic award would have undergone a more vigorous judicial scrutiny before its enforcement in India.

A recent Supreme Court decision (*Oil and Natural Gas Corporation Ltd. v. Western Geco International Ltd.*, (2014) 9 SCC 263 has narrowly explained the expression "fundamental policy of Indian law" (as a ground to set aside an arbitral award as sanctified by *Saw Pipes*). In the *Western Geco* the Supreme Court illustratively explained this expression included three concepts: first, the tribunal must adopt a judicial approach; secondly, it must adhere to the principles of natural justice; and thirdly, the decision should not be so perverse or irrational that no reasonable person would have arrived at the same. The court has clarified that these are not an exhaustive enumeration of what would constitute the "fundamental policy of Indian law".

The Amendment Act of 2015 clarifies that a merit based challenge is no longer available (see question 10.1 above).

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

The law does not require arbitral proceedings to be confidential. If confidentiality is required, it must be provided for in the parties' agreement. However, it is doubtful that such agreement would be effective or valid where large corporate entities or government companies are involved as they must act transparently.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Yes, it can; there is no bar.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

Arbitrators can grant declaratory relief and order specific performance. Damages can only be compensatory in nature. Liquidated damages must also fulfil the test of reasonableness. Punitive damages are not permitted. (Section 73 and 74, Indian Contract Act, 1872.)

13.2 What, if any, interest is available, and how is the rate of interest determined?

Subject to the party's agreement, the arbitral tribunal may award interest as it deems reasonable from the date of the award to the date of payment. Prior to the amendment, the default rate of post-*pendente lite* interest was 18%. However, now unless otherwise directed by the Tribunal, the award shall carry interest at 2% higher than the current rate of interest (prevalent on the date of award) from the date of the award until the date of payment (Section 7 (b), Act). The provision shall apply only to awards rendered in India.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Costs mean:

- Reasonable costs relating to the fees and expenses of the arbitrators, courts and witnesses.
- Legal fees and expenses.
- Any administrative fees of the institution supervising the arbitration.
- Other expenses incurred in connection with the arbitral proceedings and the arbitral award.

Normally the court or tribunal will follow the general rule while awarding costs, which is that the unsuccessful party will be ordered to pay the costs of the successful party. If the court or tribunal makes a different order, the reasons are be recorded in writing.

The circumstances under which costs are to be determined are:

(i) conduct of parties;

(ii) whether a party has succeeded partly in the case;

(iii) whether the party had made a frivolous counter-claim leading to delay in the disposal of the arbitral proceedings; and

(iv) whether any reasonable offer to settle the dispute is made by a party and refused by the other party. (Section 31-A(3).)

The court or tribunal can order that a party shall pay:

(i) a proportion of another party's costs;

(ii) a stated amount in respect of another party's costs;

(iii) costs from or until a certain date only;

(iv) costs incurred before proceedings have begun;

(v) costs relating to particular steps taken in the proceedings;

(vi) costs relating only to a distinct part of the proceedings; or

(vii) interest on costs from or until a certain date.

The tendency of Indian courts and domestic arbitral tribunals, has been not to award actual costs. It is to be seen if this will change following the 2015 amendment.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

An award is required to be stamped. The stamp duty depends on the amount involved in the award and varies from State-to-State. An award relating to immovable property must be registered under the Registration Act, 1908 within four months of its date. Registration fees also vary from State-to-State and are *ad valorem*.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

The Bar Council of India Rules prohibits lawyers from charging contingency fees or any fees dependant on the outcome of a matter. Hence, there have been no professional funders in the market so far. Investor associations that wish to file class action suits can approach the Central Government through the Ministry of Corporate Affairs for funding.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

No, it has not.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

India has signed 84 BITs, and 72 have been ratified to date. India is not a party to the Energy Charter Treaty.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

We have not come across any typical noteworthy language in investment treaties.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

The defence of state immunity is all but disregarded by the national courts in India.

15 General

15.1 Are there noteworthy trends in or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

Civil courts in India are typically bogged down with delays. Arbitrations are thus popular and indeed necessary. Traditionally, arbitrations are more common place in shipping and construction related disputes.

The enactment of the Arbitration and Conciliation (Amendment) Act, 2015 is the most recent noteworthy development. The amendment seeks to restrain judicial intervention and tackle inordinate delays with court related arbitrations. Many landmark judgments have been watered down or overruled including the controversial *Saw Pipes Judgment* (please see also question 10.1 above). The main amendments are discussed below:

- The public policy ground for setting aside an award has been narrowly construed. The court will not look into the merits of the dispute.
- There is no automatic stay of an award upon its challenge. An application for stay has to be made to the competent court for this purpose. A setting aside of award proceedings has to be disposed of within a year.
- The courts power under Section 11 for appointment of a sole or presiding arbitrator is now restricted to only *prima facie* examining the existence of an arbitration agreement. Section 11 Applications have to be disposed off within 60 days.
- Arbitration proceedings have to be completed within a period of 12 months with a six-month extension if the parties agree.
- The tribunal's interim measure powers have been widened and any order of the tribunal shall be deemed to be an order of the court for all purposes and shall be enforceable in the same manner as if it were an order of the court. Correspondingly, the court's intervention is now limited and it will only step in prior to the constitution of the tribunal or if recourse to the tribunal for interim measures is inefficacious.
- Parties to a foreign arbitration can seek the assistance of Indian courts for interim measures of protection and obtaining evidence.
- The Act now provides for extensive guidelines to determine arbitrators' independence or impartiality.

The new amendments are largely yet to be tested in courts. However, they constitute a bold step to make India a more arbitration-friendly country.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

LCIA India has, in the past, published a set of "Notes for Arbitrators" to provide guidance to arbitrators conducting arbitrations under its Rules including on issues relating to management of time and costs. However, LCIA India is in the process of winding down its India establishment.

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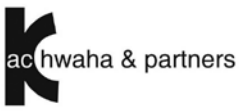

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