India

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1 Arbitration Agreements

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

No particular form is required by law. 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. [Section 7 of the Arbitration and Conciliation Act, 1996 - (Act).]

1.2 Are there any special requirements or formalities required if an individual person is a party to a commercial transaction which includes an arbitration agreement?

No there are not.

1.3 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 as to which part of the Act would apply to the proceedings. Domestic arbitrations are governed by Part I of the Act, while off-shore arbitrations are governed by Part II of the Act. In the controversial and currently under review judgment *Venture Global Engineering v. Satyam Computer Services Ltd.* (2008) 4 SCC 190, the Supreme Court has held that Part I of the Act would apply to foreign arbitrations also unless there is specific or implied exclusion of its applicability. Hence in the case of foreign arbitrations, it is advisable to expressly exclude the applicability of Part I of the Act to the arbitration. Otherwise (as per current law) a foreign award can also be challenged in India, whether or not it is sought to be enforced here.

Further, as is well known, the place of arbitration would largely determine the procedural law of the arbitration.

1.4 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 with and an award 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. Thus, a judicial authority seized of a matter which contains an arbitration agreement, must refer the parties to arbitration and it is up to the arbitral tribunal to determine any issue as to its jurisdiction including objections in relation to the existence or validity of the arbitration agreement. However, this provision (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 some what 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 it 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). In such situation therefore, 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.

1.5 What has been the approach of the national courts to the enforcement of ADR agreements?

A settlement agreement arrived at between the parties in a conciliation proceeding as per section 73 of the Act was held to be binding upon the parties and the persons claiming under it, by the Supreme Court in *Haresh Dayaram Thakur v. State of Maharashtra*, (2000) 6 SCC 179. It is only when the settlement agreement is signed by the parties to the proceedings that the status and effect of a legal sanctity of an arbitral award could be conferred upon such agreement in terms of section 74 of the Act.

Indeed the Indian Courts are expected to encourage ADR and this is enshrined in Section 89 of the Code of Civil Procedure, 1908 (CPC). Section 89 contemplates alternative dispute resolution (ADR) mechanism through arbitration or conciliation or judicial settlement including settlement through '*Lok Adalat*' or mediation. '*Lok Adalats*' (literally 'peoples court') have a statutory framework and are basically a court encouraged settlement through former Judges and NGOs. The Supreme Court in *Salem Advocate Bar Association v. Union of India*, (2003) 1 SCC 49, observed that where it appears to the Court that there exists an element of settlement which may be acceptable to the parties, the parties at the instance of the Court shall be made to apply their mind so as to opt for one or other of the four ADR methods mentioned in the Section.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in India?

See questions 1.3 and 1.4 above and question 2.2 below.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do the laws 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 (Section 2(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 minimal and 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 Chief Justice of the relevant High Court and in the case of international arbitration by the Chief Justice of the Supreme Court of India.

The second difference is in relation to governing law. In international commercial 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.

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

The law governing international arbitration is based faithfully on the UNCITRAL Model law (and the UNCITRAL Rules 1976). 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 1.4 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. The *Kompetenz Kompetenz* principle of Article 16 suffered a modification at the hands of the *Supreme Court in S.B.P & Co. v. Patel Engineering Ltd.*, (2005) 8 SCC 618, where the Court held that when a Court is approached for constitution of the Arbitral Tribunal (i.e. where the parties envisaged mechanism for the same breaks down) the Courts (and not the tribunal) would have the final say in matters of its jurisdiction.

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

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 India? 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. However, matters of public interest such as dissolution and winding up of incorporated companies; family relationships; workers rights; anti-trust matters; rent control laws etc. may not be arbitrable.

The general approach of the court to determine whether or not a dispute is arbitrable is to see whether the parties can make the settlement thereof a subject matter of private contract. This was indicated by the Supreme Court in the case of *Olympus Superstructures v. Meena Khetan*, (1999) 5 SCC 651, where the court relied on Halsbury's Laws of England stating that the

differences or disputes which may be referred 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, para 503.)

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 India towards a party who commences court proceedings in apparent breach of an arbitration agreement?

Section 8 of the Act makes it mandatory on the Court to refer the parties to arbitration where the action brought before the judicial authority is also the subject matter of an arbitration agreement. However, a party seeking reference to arbitration should file an application not later than when submitting his first statement on the substance of the dispute. See question 1.4 above.

3.4 Under what circumstances can a court address the issue of the jurisdiction and competence of the national arbitral tribunal?

See questions 1.4 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 a finding of 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.

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

This is not permitted. Indeed the Supreme Court of India in *Sukanya Holdings v. Jayesh Pandya*, (2003) 5 SCC 531, refused to stay a court action when some of the parties had an arbitration agreement, on the ground that the parties to the arbitration agreement and to the court action were not the same.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in India and what is the typical length of such periods? Do the national courts of India 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 as it does to proceedings in court (Section 43, 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, 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.

4 Choice of Law Rules

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

If the parties have an 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 with. Factors such as the nationality of the parties, the place of performance of the contract, place of entering into of the contract, 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.)

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.

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. An arbitrator need not have any special qualification or training or be a member of the bar. Persons, known to or in the employment of one or more of the parties may be appointed so long as full disclosure is made (and not objected to).

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 Act's default provisions governing the appointment of arbitrators 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 Chief Justice of India. In other cases, the appointment shall be made by the Chief Justice of the High Court having jurisdiction in relation to the matter.

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 court for a decision on the same.

5.4 What are the requirements (if any) as to arbitrator independence, neutrality and/or impartiality?

Like Article 12 of the Model Law and Article 10 of the Model Rules, 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. (See section 12.)

An arbitrator may be challenged only in two situations. First, if circumstances exists that give rise to justifiable grounds as to his independence or impartiality; second, if he does not posses the qualifications agreed to by the parties.

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.

5.5 Are there rules or guidelines for disclosure of potential conflicts of interest for arbitrators imposed by law or issued by arbitration institutions within India?

No there are not.

6 Procedural Rules

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

The arbitrators are masters of their own procedure and subject to the parties' agreement, may conduct the proceedings "in the manner they consider appropriate" (Section 19). This power includes - "the power to determine the admissibility, relevance, materiality and weight of any evidence" (Section 19). The only restrain 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 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 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 India, 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 rules that govern the conduct of an arbitration hearing?

See questions 6.1 and 6.2 above.

6.4 What powers and duties does the national law of India 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 India and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in India?

Foreign lawyers have no right of audience before Indian courts. However, they can appear and represent clients in arbitration proceedings.

6.6 To what extent are there laws or rules in India 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. The parties can with the approval of the arbitral tribunal or otherwise, 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).

6.8 Are there any special considerations for conducting multiparty arbitrations in India (including in the appointment of arbitrators)? Under what circumstances, if any, can multiple arbitrations (either arising under the same agreement or different agreements) be consolidated in one proceeding? Under what circumstances, if any, can third parties intervene in or join an arbitration proceeding?

The Act does not provide for multiparty arbitrations or consolidation of proceedings or third party intervention. Unless the parties so agree, there can be neither consolidation nor third party

intervention in arbitration proceedings.

6.9 What is the approach of the national courts in India towards *ex parte* procedures in the context of international arbitration?

Before a party can be proceeded *ex parte* in an international arbitration it is necessary for the arbitral tribunal to give notice to the concerned party of the intention of the tribunal to proceed *ex parte* and after having done so a further notice should be given to the said party that the arbitral tribunal has proceeded *ex parte*. Such notice has to be duly served on the concerned party and also reasonable time should be granted to the party to respond to such notices. If a party is proceeded *ex parte* without due notice or reasonable time to respond to such notices the Courts in India may see it as a breach of the principles of natural justice and set aside the award on the ground of breach of public policy of India.

7 Preliminary Relief and Interim Measures

7.1 Under the governing law, is an arbitrator 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 (corresponding to Article 17 of Model Law). An arbitral tribunal may order interim measures of protection as may be considered necessary in respect of the subject matter of the dispute. The order is appealable and not enforceable without recourse to a separate court proceeding.

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 enables a party to approach a competent court before or during the arbitral proceedings or even after the award is pronounced, but before it is enforced for any interim relief. 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).

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 court has power to grant interim relief even in proceedings outside India where parties have neither expressly nor impliedly excluded the applicability of section 9 of the Act (*Bhatia International v. Bulk Trading SA*, (2002) 4 SCC 105).

This provision is independent of the arbitrator's power to grant interim relief (see question 7.1 above).

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

Indian courts have very wide powers to grant interim relief. Usually a three-fold approach is followed: (i) existence of *prima facie* case in favour of the applicant; (ii) irreparable hardship to the applicant if the interim relief is not granted; and (iii) balance of convenience.

Indian courts are perceived to be liberal in granting interim relief and rarely put an applicant to terms as to security or costs (should they ultimately not succeed in their action).

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

Yes. Section 9 and section 17 of the 1996 Act envisages the power of the national court and/or the arbitral tribunal respectively, by way of an interim measure to order security for costs.

8 Evidentiary Matters

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

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 of discovery (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 through court and in accordance with the provisions of the CPC.

Courts would order discovery if satisfied that the same is necessary for fair disposal of the suit 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 is the general practice for disclosure / discovery in international arbitration proceedings?

Please see question 8.2 above.

8.5 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? 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. This Act, thus, encompasses arbitral proceedings as well. Section 8 of the

said Act states that every person giving evidence before any person authorised to administer 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.

Right of cross-examination would necessarily have to be granted as a principle of fairness.

8.6 Under what circumstances does the law of India treat documents in an arbitral proceeding as being subject to privilege? In what circumstances is privilege deemed to have been waived?

The arbitral proceedings or record is not privileged. Indian law recognises two classes of documents as privileged: (i) lawyer-client communications; and (ii) unpublished official records relating to affairs of the State if detrimental to public interest. Both are capable of waiver by the party affected.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award?

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.

10 Appeal of an Award

10.1 On what bases, if any, are parties entitled to appeal an arbitral award?

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 some 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.

In addition to the above grounds, the Supreme Court in *ONGC v. Saw Pipes*, (2003) 5 SCC 705, has held that a domestic award can be set aside if it is patently erroneous i.e., if the award is contrary to the terms of the contract entered into between the parties or the substantive law.

10.2 Can parties agree to exclude any basis of appeal or 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.

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 India?

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. No such similar application for setting aside a foreign award is contemplated under Part II of the Act. It is only when an application for enforcement of a foreign award is filed, can objections be taken against the same on the New York Convention Grounds. However a recent controversial judgment in the case of *Venture Global Engineering v. Satyam Computer Services Ltd.*, (2008) 4 SCC 190 (which is currently under review) has held that it is permissible to set aside a foreign award also even though a party may not seek to enforce it in India.

Application in both cases must be made before the Court having jurisdiction and this would, *inter alia*, depend on the place of residence or business of the defendant or the place where the assets of the defendant are located.

11 Enforcement of an Award

11.1 Has India 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 entered 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. Till date 43 countries have been notified and only award rendered in these territories would be enforceable in India.

However, an award made in Ukraine after the break up of the USSR was held to be an enforceable foreign award even in 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 India 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 India 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 case of a foreign award, a party seeking enforcement would have to file an application before the 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)).

11.4 What is the effect of an arbitration award in terms of *res judicata* in India? 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 situation, the principles of *res judicata* would apply.

12 Confidentiality

12.1 Are arbitral proceedings sited in India confidential? What, if any, law governs confidentiality?

The law does not require the arbitral proceedings to be confidential. Confidentiality would thus, have to be based on general principles of Common Law or the parties' agreement.

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

Yes it can.

12.3 In what circumstances, if any, are proceedings not protected by confidentiality?

See question 12.1 above.

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 of the 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. Unless otherwise directed by the tribunal the award shall carry interest at 18% per annum from the date of award till the date of payment. This 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 are at the discretion of the tribunal. The general principle is that costs follow the event. (Section 31 (8).)

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*.

14 Investor State Arbitrations

14.1 Has India signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965)?

No it has not.

14.2 Is India party to a significant number of Bilateral Investment Treaties (BITs) or Multilateral Investment treaties (such as the Energy Charter Treaty) that allow for recourse to arbitration under the auspices of the International Centre for the Settlement of Investment Disputes ('ICSID')?

Although India has signed several BITs with provision of arbitration under ICSID as one of the mechanism for dispute resolution, India not being a party to the Washington Convention, the said clause is inoperative.

14.3 Does India have standard terms or model language that it uses in its investment treaties and, if so, what is the intended significance of that language?

No it does not.

14.4 In practice, have disputes involving India been resolved by means of ICSID arbitration and, if so, what has the approach of national courts in your country been to the enforcement of ICSID awards and how has the government of India responded to any adverse awards?

No they have not.

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

See question 14.4 above.

15 General

15.1 Are there noteworthy trends in the use of arbitration or arbitration institutions in India? Are certain disputes commonly being referred to arbitration?

Civil courts in India are typically bogged down with delays. Arbitrations are thus becoming increasingly popular - nay necessary. Traditionally, they are more common in shipping and construction.

The Indian Council of Arbitration (promoted by the Central Government) is the leading arbitration institution in India but a good part of arbitration continues to be *ad hoc*. The London Court of International Arbitration has recently set up an institutional arbitration forum in India. The Delhi High Court is contemplating setting up of an arbitration centre with the aim to encourage arbitration and cut down the work load of the Courts. It has already set up a designated arbitration court which would deal with all arbitration matters. The Supreme Court in *Union of India v. Singh Builders Syndicate*, 2009 (2) Arb. LR 1 (SC) acknowledged that cost of arbitration in India can be high if the Arbitral Tribunal consists of retired Judge/s and viewed institutional arbitration as a solution to bring down the arbitration cost.

Generally retired Judges of the High Court or Supreme Court are nominated as arbitrators. India does not have a distinct arbitration bar. Thus, arbitrations tend to carry the baggage of litigation practices. There is a great emphasis on oral hearings and a typical arbitration ends up with a large number of hearings even for procedural directions and interlocutory matters.

15.2 Are there any other noteworthy current issues affecting the use of arbitration in India, such as pending or proposed legislation that may substantially change the law applicable to arbitration?

The Government is committed to bring about an arbitration friendly culture as it considers it necessary to facilitated economic reforms. Arbitrations are poised for rapid growth and development.

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Sumeet Kachwaha has over three decades experience in litigation and arbitrations. He has been involved in some of the major cases ever to come up in India including the Union Carbide Bhopal gas leak case - the largest damage case in the world.
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Mr. Rautray was called to the Bar of England and Wales and is a member of Lincoln's Inn. He has done his LLM from the London School of Economics. He has over 15 years standing at the Bar chiefly devoted to international litigation and dispute resolution. He has authored a full length Book titled "Master Guide to Arbitrations in India" published by Wolters Kluwer. Mr. Rautray is frequently invited to speak on Arbitration in various forums and was a speaker at the ICC U.K. Arbitration Day in November 2008. Mr. Rautray is presently handling several multi million dollar arbitrations for multinational companies. He is currently involved with drafting of Rules and setting up of the Delhi Arbitration Centre (the first of its kind in India). This Centre will be affiliated with the High Court of Delhi.