

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. 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. [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. 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 also apply to foreign arbitrations, 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.

1.3 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. 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 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). In such a 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.

2 Governing Legislation

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

The Arbitration and Conciliation Act, 1996 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 (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 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 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 two?

The law governing international arbitration is based faithfully on the UNCITRAL Model law and the UNCITRAL Rules 1976 (amended in 2010, but 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. 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 must decide whether there is an arbitration agreement. Further, the court may (at its discretion) decide whether the claim is a dead or a live one (including if it is time-barred) or whether there has been accord and satisfaction. This, the court held, was a necessary adjunct to its power to make an appointment (of the Tribunal when called upon to do so).

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; disputes connected with criminal offences (e.g., serious fraud); 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 no later than when submitting his first statement on the substance of dispute. (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 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.

Indian courts have not yet determined the standard of review in respect of a Tribunal's decision regarding its own jurisdiction. However, it has interpreted its power to review an award very widely. The Supreme Court has held in *ONGC v. Saw Pipes*, (2003) 5 SCC 705, that an award can be challenged if it contravenes the provisions of the Arbitration Act or the substantive law governing the parties or is against the terms of the parties contract. The court also expanded the "public policy" ground and held that an award would be contrary to public policy if it was "patently illegal". Applying this measure, it can be concluded that the court would not be restrained in its review in respect of a Tribunal's decision regarding its own jurisdiction.

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 521, 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 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 India 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, 1956. Section 446 thereof provides 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 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. However 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 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. 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 domestic arbitration, the appointment shall be made by the Chief Justice of the High Court who has jurisdiction in relation to the matter (determined by where the cause of action arises; or the respondent resides or carries on its business).

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 India?

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).

An arbitrator may be challenged only in two situations. First, if circumstances exist that give rise to justifiable grounds as to his independence or impartiality; second, if he does not possess 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).

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 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 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).

7 Preliminary Relief and Interim Measures

7.1 Is an arbitrator in India 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 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).

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 Under what circumstances will a national court of India 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 a consideration of *prima facie* cases and balance of injury to the parties. 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 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 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 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).

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 (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.

Courts would order discovery if satisfied that the same is necessary for 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. 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 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 oath or affirmation does not invalidate the proceeding (Section 7, Indian Oaths Act, 1969).

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 India? 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) recognise 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 the 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 on 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 India 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 of the Act).

10 Challenge of an Award

10.1 On what basis, if any, are parties entitled to challenge an arbitral award made in India?

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:

- the party making the application was under incapacity;
- the arbitration agreement was not valid under the law agreed to by the parties (or applicable law);
- 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;
- 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;
- the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties;
- the subject matter of dispute was not capable of settlement by arbitration; or
- 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 illegal, i.e., if the award is contrary to the terms of the contract entered into between the parties or the substantive law.

No further right of appeal exists, apart from a discretionary appeal to the Supreme Court under Article 136 of the Constitution.

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.

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. A Supreme Court decision (*Oil & Natural Gas Corporation v. SAW Pipes*; (2003) 5 SCC 705) introduced the concept of a challenge to a domestic award on the merits if the court finds it to be ‘patently illegal’ or ‘against the terms of the parties’ contract. 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 also permissible to set aside a foreign award, even though a party may not seek to enforce it in India.

Application in both cases must be made before the court which has 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.

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) of the Act).

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 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. 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 distinction, as noted in the *Saw Pipes* case, is that a foreign award can in any event be questioned in the country in which or under the laws of which it was made. Hence a foreign award would have undergone judicial scrutiny before its enforcement in India. Therefore the Indian courts need not undertake a full judicial review under the “public policy” ground for such awards.

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. To date, 49 countries have been notified and only awards 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”.

12 Confidentiality

12.1 Are arbitral proceedings sited in India 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 binding in disputes between large corporate entities or governments, which must act transparently.

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

Yes it can.

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).)

Costs mean:

- Reasonable costs relating to the fees and expense of the arbitrators 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.

Courts, however do not award actual costs. Under various High Court rules, there is a ceiling on the amount of costs that can be awarded. For instance, the High Court of Bombay sets a ceiling of about US\$625 (about EUR 460) on costs regardless of the actual costs incurred.

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 India? Are contingency fees legal under the law of India? Are there any "professional" funders active in the market, either for litigation or arbitration?

The Bar Council of India Rules prohibit 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. However, recently the Securities and Exchange Board of India (SEBI) have announced a decision to set up a fund to finance investor associations in class action litigation.

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) (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 India party to?

India has signed BITs with provision of arbitration as a dispute resolution mechanism. India is not a party to the Energy Charter Treaty.

14.3 Does India 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 India 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 India (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 becoming increasingly popular and necessary. Traditionally, arbitrations are more common in shipping and construction related disputes.

In April 2010, the Ministry of Law circulated a Consultation Paper soliciting views on extensive proposed amendments to the Act. The proposed amendments would have, *inter alia*, done away with some of the retrograde judgments of the court. Unfortunately, to date it has not progressed and is unlikely to in the near future.

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

The Delhi High Court Arbitration Centre has implemented stricter measures in relation to completion of pleadings within a specified period of time and if the same is not adhered to by the Parties, the Secretary has the power to impose costs.



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Sumeet Kachwaha has around 33 years' experience primarily in Dispute Resolution (Arbitration & Litigation). He figures in Band One in Chambers Asia from 2009 through to 2012 in the Litigation, as well as in the Arbitration Sections. He also figures in Asia Pacific Legal 500 in the Dispute Resolution Section as a "Leading Individual".

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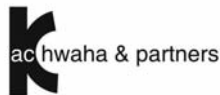
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Dharmendra Rautray completed his LLM in 1996 from the London School of Economics and was thereafter called to the England and Wales Bar in 2001. He is a member of the Lincoln's Inn. He topped the Bar Vocational Course in International Trade Law (London) and secured Very Competent (VC) grade (London Bar). He stood amongst the top students in the Faculty of Law, Delhi University.

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Kachwaha & Partners is a multi-discipline, full service law Firm having its offices in Delhi and Mumbai (Bombay) and associate lawyers in most major cities of India. The main office of the Firm is in New Delhi, conveniently located, next to the diplomatic mission area. It is easily accessible from all parts of Delhi, as well as its suburbs.

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