International
Comparative
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Practical cross-border insights into international arbitration work

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Contributing Editors:
Steven Finizio & Charlie Caher
Wilmer Cutler Pickering Hale and Dorr LLP

CDR Commercial Dispute Resolution
ICLG.com

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Sumeet Kachwaha


Tara Shahani

Kachwaha and Partners

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 prescribed. An arbitration agreement 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*", "*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 that provide a record of the agreement. An 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 and Conciliation Act, 1996 ("Act"), it stands clarified that such agreements can also include communication through electronic means. (Section 7 of the Act.)

All agreements are required to be stamped under a Federal statute called the Indian Stamp Act. They must be transcribed on a non-judicial stamp paper of the prescribed value. The stamp duty for an "agreement" is nominal and varies from State to State. The consequences of non-stamping are, however, severe. A recent Supreme Court five-judge decision in the case of *N.N. Global Mercantile Private Limited v. Indo Unique Flame Ltd.* (2023) has settled the controversy of whether an unstamped arbitration agreement is nevertheless enforceable subject to *post facto* payment of the duty/penalty. It concluded that if an arbitration agreement (or the agreement in which it is contained) is not duly stamped, it is not enforceable in law and has no legal existence. Such agreements are liable to be impounded by the court (or an arbitrator) and can be admitted in evidence only upon payment of the duty, together with the prescribed penalty. Where the arbitration agreement has come into existence through exchange of correspondence consisting of two or more letters, any one letter may bear the applicable stamp and the agreement shall deemed to be duly stamped.

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 offshore arbitrations are governed by Part II thereof. While Part I contains a comprehensive scheme for the conduct of arbitration (based on the Model Law), Part II is essentially confined to the 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 Arbitration and Conciliation (Amendment) Act, 2015 ("2015 Act") clarifying that domestic courts 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 that 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 its 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, in *Rashtriya Ispat Nigam Ltd. v. Verma Transport Co.* (2006), held that once the conditions of the Section 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 nullifying certain judgments that 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 offshore arbitrations are governed by Section 45 of the Act, which is worded in line with the Model Law, i.e., 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*". Thus, the Act has wider room for 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) as to whether a ruling by court (in relation to offshore arbitrations) on the validity or otherwise of an arbitration agreement is to be assessed on a *prima facie* basis or requires a final decision. If it were to be a final decision, it would

involve a full-dress trial consuming years of judicial proceedings, which would frustrate the arbitration agreement. Keeping this and the object of the Act in mind, the Supreme Court 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 the 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 judge in *Shin-Etsu* 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 (so that it can be appealed if need be). Therefore, in such a situation, a foreign arbitration may well be impacted pending the final decision from an Indian court; but otherwise, Section 45 proceedings would not have any significant impeding effect on the progress of a foreign arbitration.

A case of seminal importance with regard to non-signatories is *Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc.* (2013). Here, the court was faced with a situation where the 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 International Chamber of Commerce ("ICC") arbitrations seated in London; some with no arbitration clause; and one agreement with an American Arbitration Association ("AAA") arbitration clause with Pennsylvania (USA) as its seat. The Supreme Court came out with a strong pro-arbitration leaning, stating that the legislative intent is in favour of arbitration and the Act "*would have to be construed liberally to achieve that object*". The Court held that non-signatory parties could be subjected to arbitration provided that the transactions were within the group of companies and there was a clear intention of the parties to also bind non-signatories. 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.

The Supreme Court in *Cox & Kings Ltd. v. Sap India Pvt. Ltd. & Anr.* (2022) has referred the issue of non-signatories to a larger five-judge bench "*to expound on the intricacies of the Group of Companies doctrine*" and formalise the scope, ambit and validity of the *Chloro Controls* judgment. A ruling is expected soon.

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 2021 Act) governs the enforcement of arbitration proceedings relating to domestic and international commercial arbitration conducted in India, as well as reference of foreign awards.

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 party is a national or habitual resident in any country other than India or a body corporate 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). The Supreme Court of India in *TDM Infrastructure Private Limited v. UE Development India Private Limited* (2008) held that if both parties are incorporated in India, then (even if the control and management is from outside of India) the arbitration would be "*domestic*" and not "*international*". Two Indian parties can, however, select a foreign seat. (*PASL Wind Solutions Pvt. Ltd. v. GE Power Conversion India Pvt. Ltd.* (2021).)

The differences between "*domestic*" and "*international*" arbitration (conducted in India) are discussed below.

The first difference is that if there is a failure of the parties' envisaged mechanism for the 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 commercial arbitration, the arbitral tribunal shall decide on 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 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*" was inserted by the 2015 amendment to the Act. This ground is not available in international arbitrations seated in India.

The fourth is the difference in the default procedure for appointment of arbitrators. Please see question 5.2.

The fifth is that the time limit of one year prescribed under Section 29A for making an award will not apply to international commercial arbitrations.

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 on the UNCITRAL Model Law and the UNCITRAL Rules 1976 (amended in 2010, but has not yet been adopted by the Indian legislature). There are a couple of departures, mostly designed to keep out court intervention and speed up arbitration. Thus, for instance, Section 8 of the Act departs from the Model Law inasmuch 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 question 1.3 above.)

Section 16 (corresponding to 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?

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).) 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-sanctioned) approach to determine arbitrability is to determine whether the parties can make a settlement regarding their dispute a subject matter of a private contract. 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*".

The Supreme Court in *Emaar MGF Land Limited v. Aftab Singh* (2018) held that proceedings under the Consumer Protection Act are special remedy proceedings and recourse to arbitration would normally be barred, unless the consumer elects to waive the statutory remedy in favour of arbitration.

Whether an allegation of "*serious fraud*" is arbitrable has been subject to a see-saw approval, leading to much confusion. The law was recently settled in a seminal decision in *M/s. N.N. Global Mercantile Pvt. Ltd. v. M/s. Indo Unique Flame Ltd. & Others* (2021), where a three-judge bench held that: "*The civil aspect of fraud is considered to be arbitrable … the only exception being … that the arbitration agreement itself is vitiated by fraud … or the fraud goes to the validity of the underlying contract, and impeaches the arbitration clause itself.*"

The Supreme Court in *Vidya Drolia v. Durga Trading Corpn.* (2021) 2 SCC 1 propounded a four-fold test for determining when the subject matter of a dispute is not arbitrable. It is when cause of action and subject matter of the dispute: 1) relate to actions *in rem* (which do not pertain to subordinate rights *in personam* that arise from rights *in rem*); 2) affect third-party rights (where mutual adjudication would not be appropriate and enforceable; 3) relate to inalienable sovereign and public interest functions of the State; and 4) are expressly or by necessary implication non-arbitrable as per mandatory statute(s).

High Court decisions pending confirmation by the Supreme Court on the issue of arbitrability include judgments holding copyright disputes as arbitrable, while shareholders' "*oppression and mismanagement*" disputes are not (again, on the ground of a specific statutory remedy being provided for). The Delhi High Court has taken a liberal view, holding that debt restructuring disputes may be referred to arbitration despite the constitution of a special forum to decide such matters.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Yes. This is provided for under Section 16 of the Act, which corresponds to Article 16 of the Model Law. (See also 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 national court address the issue of the jurisdiction and competence of an 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.

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), states the circumstances under which the arbitral tribunal would have jurisdiction over non-signatories to the arbitration agreement.

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

Please, however, see the latter part of question 1.3 above. The issue stands referred to a larger bench (five-judge bench) of the Supreme Court.

Indian courts have taken a liberal view as to the consolidation of arbitrations. A Supreme Court decision in *P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.* (2012) held, "*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*".

In *Gammon India Ltd. v. National Highways Authority* (2020), the Delhi High Court held that where arbitration and proceedings arise out of identical or similar contracts between one set of entities and wherein the other entity is common, a joint arbitration is maintainable.

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 applies to arbitrations in the same way as it does to proceedings in court. 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.

Once time has started to run, no subsequent inability to bring the action stops the time from running. The mere issuance of letters or reminders by the claimant does not extend the limitation period. However, well-known exemptions apply if:

- 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 (as defined under Section 18 of the Limitation Act, 1963).
- 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?

In May 2016, the Ministry of Law and Justice in India introduced the Insolvency and Bankruptcy Code, 2016 ("Code"). The Code has established an Insolvency and Bankruptcy Board of India ("Board").

Once the insolvency process has been initiated by the creditors/company, there is a moratorium against any new or ongoing proceeding.

Where a liquidation 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 proceeded with by or against the corporate debtor (subject to prior approval on behalf of the company by the Adjudicating Authority).

However, recent decisions by the Supreme Court and the Delhi High Court have cast ambiguity on the question of whether all legal proceedings stand barred during the moratorium period. The Supreme Court in *Alchemist Asset Reconstruction Company Ltd. v. Hotel Gaudavan Pvt. Ltd.* ("*Alchemist*") (2017) held that no arbitration proceeding can be initiated after the commencement of the moratorium period. However, the Delhi High Court in *Power Grid Corporation of India Ltd. v. Jyoti Structures* ("*Power Grid*") (2017) held that the Code only prohibits initiation of debt recovery proceedings against a corporate debtor, and that other proceedings which may benefit or enhance the financial position of the debtor may still be initiated during the moratorium period. Subsequently, it also held that challenge proceedings under Section 34 are not covered under the moratorium. To this extent, the judgment was expressly overruled as incorrect by the Delhi High Court in *P. Mohanraj v. Shah Bros. ISPAT (P) Ltd.* (2021) 6 SCC 258, wherein it was held that challenge proceedings are certainly against the corporate debtor, which may result in an arbitral award against the corporate debtor being upheld, as a result of which, monies would then be payable by the corporate debtor, and would therefore be covered just as an appellate proceeding in a decree from a suit would be covered.

4 Choice of Law Rules

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

In case of domestic arbitrations, Indian parties 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.

The proper law of the arbitration agreement is normally the same as the proper law of the contract. There is a rebuttable presumption that the proper law of the arbitration agreement is that of the seat of the arbitration. (*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?

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 the 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?

An arbitrator need not have any special qualification or training. The Supreme Court in *State Trading Corporation of India v. Jindal Steel and Power Limited and Ors.* (2020) clarified that once the parties have agreed to follow a particular mechanism, including the procedure for appointment of an arbitrator, it is incorrect for courts to overlook the same and to *suo moto* appoint an arbitrator. However, courts have also prioritised principles of fairness and impartiality over party autonomy, as seen in *Perkins Eastman Architects DPC & Another v. HSCC (India) Limited* (2019), where the Supreme Court held that a sole arbitrator cannot be appointed unilaterally by one party. In an extension of the same principle, the Delhi High Court in *Overnite Express v. DMRC* (2022) held that requesting a party to select an arbitrator from a panel of five names "*tantamounts to unilateral appointment of Arbitrator*", which may create a doubt about the arbitrator being partial or biased. Rules have also been prescribed under the Indian Arbitration Act loosely based on the International Bar Association ("IBA") Guidelines on Conflicts of Interest to safeguard against apparent bias. These, *inter alia*, include flagging a potential conflict if an arbitrator within the past three years has been appointed on more than three occasions by the same counsel or the same law firm.

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

There is a default provision provided for in 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 the appointment of an arbitrator fails.

If the default is in relation to an international commercial arbitration, the appointment will be made by the Supreme Court of India. In domestic arbitrations, the appointment shall be made by the High Court that has jurisdiction in relation to the matter.

The 2015 amendment to the Act provides that the Supreme Court/High Court can delegate its power 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 is required to be disposed of by the court as expeditiously as possible or within 60 days from the date of service of notice on the opposite party (Section 11(13) of the Act). Impliedly overruling a seven-bench decision in *SBP v. Patel Engineering Ltd.* (2006), the 2015 amendment to the Act states that the courts' role at this stage is restricted to only a *prima facie* examination of the existence of an arbitration agreement.

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

Please see question 5.2.

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

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 that give rise to justifiable doubts regarding an arbitrator's independence.

Schedule VII to the Act lists the kind of relations that would, notwithstanding any prior agreement between the parties, disentitle a person from acting as an arbitrator – unless, post the dispute arising, parties expressly waive such conflict.

Schedules V and VII 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. In the absence of any agreement, 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 reagitate its challenge as a ground for setting aside the award.

Generally, Indian courts follow the English common law of apparent bias.

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?

An arbitrator is the master of its own procedure and, subject to the parties' agreement, may conduct the proceedings "*in the manner it considers appropriate*" (Section 19 of the Act). This power includes "*the power to determine the admissibility, relevance, materiality and weight of any evidence*". The only restraint is that it 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. The arbitral tribunal shall hold an oral hearing 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.

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.

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

Apart from the provisions envisaged under the Act, arbitrators are bound by the fundamental principles of natural justice and public policy in conducting 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, save with special permission. However, they can appear and represent clients in arbitration proceedings. They are not permitted to set up offices in India and can only appear in arbitrations on a fly-in, fly-out basis.

Under a recently announced regime, foreign lawyers and law firms have been allowed to set up offices in India and practise international arbitration. Once registered, foreign lawyers/law firms can represent Indian clients in foreign-seated arbitrations (irrespective of whether Indian or foreign law is involved) or in an India-seated arbitration under certain circumstances. These offices can represent Indian clients in India-seated arbitrations if non-Indian law is involved and the Indian client has "an address" in a foreign country. (There are no restrictions in partnering such matters with Indian lawyers where Indian law is involved.) The rules have recently been introduced (in March 2023) and are already facing a barrage of suggestions/criticism. The opening

up of the sector is at a very nascent stage and the ground realities will emerge with time. In the meantime, foreign lawyers and firms can freely participate in India-seated arbitrations on a "fly-in and fly-out basis".

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

Section 42-B of the Act states that no suit or other legal proceeding shall lie against an arbitrator for anything done in good faith or intended to be done under the Act or law made thereunder. This provision came into effect on 30 August 2019.

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 of the Act).

7 Preliminary Relief and Interim Measures

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

This is provided for in Section 17 of the Act. Prior to the 2015 amendment, interim orders of the tribunal were not enforceable without recourse to fresh court proceedings. However, now that the tribunal has the same power as is available to a court for grant of interim relief, an interim order passed by an arbitral tribunal is enforceable in the same manner as if it were an order of the court. Any disobedience of such order can result in contempt of court proceedings. Since the 2019 amendment, a party cannot seek interim measures from a tribunal after the making of the award, and must apply to the court for such purpose.

As to an emergency arbitrator, the Supreme Court in *Amazon.com NV Investment Holdings LLC v. Future Retail Limited & Ors.* (2022) liberally interpreted the provisions of the Act and Section 17 thereof to conclude that orders passed by an emergency arbitrator under the rules of an arbitral institution would fall within the purview of Section 17. In other words, the expression "*arbitral tribunal*" in Section 17 would include an emergency arbitrator appointed under applicable institutional rules. An order of the emergency arbitrator would equally be enforceable in the same way as an order of the court. However, unlike an order passed by the tribunal, an order passed by an emergency arbitrator is not an appealable order to the court. (Recourse against such orders would lie to the arbitral tribunal, as per the rules of the arbitral institution.)

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.

Following the 2015 amendment, the court is restrained from entertaining an application for interim relief once the tribunal has been constituted, except where recourse to the tribunal is inefficacious.

The court's jurisdiction can be invoked even in relation to foreign-seated arbitrations if a party or a relevant asset is situated in India, or the cause of action has arisen in India. However, parties can contract out of this provision if they so wish.

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) 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?

Interlocutory relief is granted on the principles highlighted in question 7.3 above. The same principles would apply to an anti-suit injunction. The leading case is *Modi Entertainment Network v. W.S.G. Cricket Pte Ltd.* (2003). The Supreme Court here crystallised the principles for granting an anti-suit injunction. The court must be satisfied that the party against whom the injunction is sought is amenable to the personal jurisdiction of the court. Further, if the injunction is declined, the ends of justice will be defeated. The court will also take into account the principles of comity.

7.5 Does the law of your jurisdiction 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 of the Act). In practice, however, the provision is rarely invoked.

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?

The tribunal has the same powers as are available to a court under Section 9 of the Act, and so interim orders passed by an arbitral tribunal are enforceable in the same manner as if they were an order of the court.

Such orders are, however, appealable to the designated court.

There is no parallel provision for enforcement of interim measures ordered by a foreign-seated tribunal.

As for emergency arbitrators, please see question 7.1.

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 provisions of the Evidence Act, which are founded on fundamental principles of justice and fair play, can be applied.

Hence, "*fundamental principles of natural justice and public policy*" would apply, though the technical rules of evidence contained under the Evidence Act would not apply.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

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, discovery or attendance of witnesses. Hence (unless the parties voluntarily comply), disclosure/discovery/attendance of witnesses can 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, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

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 and is cross-examination allowed?

The Indian Oaths Act, 1969 extends to persons who may be authorised by consent of the parties to receive evidence. This encompasses arbitral proceedings as well. Section 8 of the Oaths 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, are liable for offences punishable under the Indian Penal Code. However, a mere irregularity in the administration of an oath or affirmation does not invalidate the deposition (Section 7 of the Indian Oaths Act, 1969). Witnesses are generally required to give evidence by sworn affidavits (witness statements).

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 Evidence Act (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 dissolved); and (iv) communications made to a public officer in official confidence when he considers that disclosure 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 suspend his certificate of practice so long as he is in full-time employment. (The relationship switches from that of lawyer-client to employer-employee.)

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 contains 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).

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

The arbitral tribunal'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 30 days from the date of the award (Section 33(4)). A time limit of 30 days is prescribed in this regard.

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 the 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 2015 amendment 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 conciliation 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.

The 2015 amendment has also 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. Fourthly, 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 2015 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. An application is now required to be made to stay the enforcement of the award during the pendency of the Section 34 proceeding, which normally entails securitising or deposit of the awarded sums or part thereof.

The Act was further amended in 2019 and 2021. The 2019 amendment added a rider stating that an application for setting aside of the award must be on the basis of the record of the arbitral tribunal. According to the 2021 amendment, provided that where the court is satisfied that a *prima facie* case has been made that either the arbitration agreement or the making of the award was induced by fraud or corruption, the court shall stay the award unconditionally pending disposal of the challenge to the award under Section 34 of the Act.

Recently, the Supreme Court in *NHAI v. M. Hakeem* (2020) held that under Section 34, the court can only set aside or affirm the award and not modify it.

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

Judicial review cannot be excluded as it would be contrary to the public policy of India, and it would also be considered a restraint on legal proceedings (which is prohibited by law). At the same time, this has not been judicially tested.

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. The court reinforced this principle in *Delhi Airport Metro Express (P) Ltd. v. DMRC* (2021), wherein it held that judicial interference is strictly limited to the grounds available under Section 34.

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 the award. The court may condone a delay of 30 days, but not thereafter. The Supreme Court has clarified that the period of limitation for challenging the award under Section 34 commences from the date on which the party making the application has "*received*" a signed copy of the arbitral award, i.e., only after a valid delivery of the award (including dissenting opinion, if any) takes place under Section 31(5). 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* has overruled an earlier controversial decision that permitted Indian courts in certain circumstances to entertain and set aside a foreign award.

The 2015 amendment 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)). In practice, such time limits are not uniformly adhered to.

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 "*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 despite 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 *Bilendra Nath v. Mayank Srivastava* (1994). 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)).

The Supreme Court in *Sundaram Finance Ltd. v. Abdul Samad* (2018) held that enforcement of an award can be sought in any court of the country where such a decree can be executed.

The Supreme Court has recently held that objection to the enforcement of a foreign award on the premise that it is not binding on a non-signatory is not maintainable under Section

48(1)(c) (*Gemini Bay Transcription (P) Ltd. v. Integrated Sales Service Ltd.* (2022)).

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, accordingly, 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 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 the 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, an award will be contrary to public policy "*if it is patently illegal*" (but not merely on the ground of a legal error or by reappreciation of evidence). However, insofar as foreign awards are concerned, the public policy ground under Section 48 has been amended and clarified by the 2015 amendment, and public policy is now confined to instances of "*fraud or corruption*", "*contravention of fundamental policy of Indian law*", and "*conflict with the most basic notions of morality or justice*". This was inspired by the observations of the Supreme Court in *Renusagar Power Co. v. General Electric Corporation* (1994), wherein 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 Supreme Court in *Ssangyong* (2019) clarified the scope of "*patent illegality*", "*fundamental policy of Indian law*" and "*most basic notions of morality or justice*" featuring in Sections 34 and 48 as under:

- "*patent illegality*" – illegality that goes to the root of the matter, but excluding the erroneous application of law by an arbitral tribunal or re-appreciation of evidence by an appellate court. This ground may be invoked if: (a) no reasons are given for an award; (b) the view taken by an arbitrator is an impossible view while construing a contract; (c) an arbitrator decides questions beyond a contract or his terms of reference; and (d) if a perverse finding is arrived at based on no evidence, or overlooking vital evidence, or is based on documents taken as evidence without notice to the parties;
- "*fundamental policy of Indian law*" – contravention of a law protecting national interest, or disregarding orders of superior courts in India or principles of natural justice, such as *audi alteram partem*; and
- "*most basic notions of morality or justice*" – an award would be against justice and morality if it shocks the conscience of the court; morality, however, would be determined on the basis of "*prevailing mores of the day*".

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 2019 Amendment introduced Section 42A, which provides that notwithstanding anything contained in any other law, the arbitrator, the arbitral institution, and the parties to an arbitration agreement must maintain confidentiality as regards all arbitral proceedings. The only exception carved out is where disclosure of the arbitral award is necessary for enforcement procedures. The Section seems too widely worded and may well be subjected to future legislative or judicial intervention.

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

Please 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. (Sections 73 and 74 of the Indian Contract Act.)

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

Subject to the parties' 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 2015 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 bank interest (prevalent on the date of award) from the date of the award until the date of payment (Section 31(7)(b) of the Act). This provision shall apply only to awards rendered in India.

In *Hyder Consulting (UK) Limited v. Governor, State of Orissa through Chief Engineer* (2015), the Supreme Court held that post-award interest can be granted by an arbitrator on even the interest amount awarded. In another judgment, the Court held that in an international commercial arbitration, in the absence of an agreement between the parties, the rate should be governed by the law of the seat of arbitration. While making an award for interest, a number of factors such as the prevailing rate of interest, rate of inflation, simple or compound interest, commercial impact of the interest awarded, etc. should be considered. If the rate of interest awarded was not in consonance with the prevailing economic conditions or was found unreasonable, the court can reduce the same. (*Vedanta v. Shenzen Shandong Nuclear Power Construction Co.* (2018).)

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?

Yes. Reasonable costs can be awarded towards:

- Legal fees and expenses.
- 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 that costs follow the event. Any departure from this rule requires the reasons to be recorded in writing.

The circumstances under which costs are to be determined are:

(i) the conduct of the parties;
(ii) whether a party has succeeded partly in the case;
(iii) whether the party had made a frivolous counterclaim leading to a delay in the disposal of the arbitral proceedings; and
(iv) whether any reasonable offer to settle the dispute was made.

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 began;
(v) costs relating to particular steps taken in the proceedings;
(vi) costs relating only to a distinct part of the proceeding; or
(vii) interest on costs from or until a certain date.

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

A domestic award is required to be stamped. The stamp duty may depend 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?

There is no bar to third-party funding in India. However, the Bar Council of India Rules prohibit lawyers from charging contingency fees or any fees dependent on the outcome of a matter.

The Supreme Court in *Bar Council of India v. A.K. Balaji* (2018) clarified that there is no restriction on third parties (non-lawyers) funding the litigation and getting repaid after the outcome of the litigation. However, funding of litigation by advocates on behalf of their clients is not permissible.

Some States in India including Gujarat, Madhya Pradesh and Uttar Pradesh have given statutory recognition to third-party funding by amending provisions of the CPC by enabling the financer to become a party to the suit subject to safeguards.

In arbitrations, some leading construction companies have entered into agreements with investor consortiums to monetise an identified pool of awards and claims for a consideration. At the same time, professional funders are not yet active largely due to the nascent stage of the market and grey areas on permissible boundaries.

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 issued notice of termination for 77 of its BITs and is shifting to a new model which, *inter alia*, provides for exhaustion of domestic remedies in the first instance (see question 14.3 below).

The new Model BIT is available at https://static.mygov.in/rest/s3fs-public/mygov_15047003859017401.pdf. Four BITs (with Belarus, the Kyrgyz Republic, Taiwan and Brazil) have been entered into adopting this new model. A number of BITs which have been terminated are subject to a sunset clause. Six BITs were not terminated by India, i.e., with Bangladesh, Colombia, Libya, Lithuania, Senegal and the UAE.

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?

The Indian 2016 Model BIT has done away with the "*most favoured nation*" clause. Rather, it has introduced a provision that a breach of a separate international agreement would not constitute the breach of the Standard of Treatment India is obligated to provide to its investors.

Further, the 2016 Model BIT includes a clause for "*exhaustion of local remedies*". Broadly stated, the investor has to diligently pursue all judicial or domestic legal remedies for a period of five years before submitting a notice of dispute for initiation of arbitration against India.

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 obsolete in India.

15 General

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

Civil courts in India are typically bogged down with delays. Arbitration is thus popular and indeed necessary for commercial disputes. Traditionally, arbitration is more commonplace in shipping, construction contracts, joint venture agreements and cross-border commercial contracts.

The 2015 amendment seeks to minimise judicial intervention and tackle judicial delays. Many controversial rulings (leading to delaying arbitrations) have been watered down or overruled by the amendment.

The Arbitration and Conciliation (Amendment) Act, 2019 was enacted on 9 August 2019 and brought about significant changes, including the following:

- Section 17 has been amended to restrict a tribunal's power to issue interim measures only during the pendency of arbitral proceedings.
- Subsection (4) has been added to Section 23 providing that the pleadings – statement of claim and defence – ought to be completed within six months from the date the arbitrators receive the notice of their appointment.
- Section 29A has been amended to provide that the 12-month period for completion of arbitral proceedings shall apply only to domestic arbitrations, and will begin to run only on completion of pleadings.
- Section 42A has been introduced, which provides for maintaining confidentiality of all arbitral proceedings except where the disclosure of the award is necessary for the purpose of the enforcement proceedings.

Certain amendments have not come into force, as follows:

- A new Part has been proposed (Part IA) which provides for the creation of an independent body, namely the Arbitration Council of India ("ACI"), for the promotion of arbitration, mediation, conciliation and other alternative dispute redressal mechanisms. Its functions include: (i) framing policies for grading arbitral institutions and accrediting arbitrators; (ii) making policies for the establishment, operation and maintenance of uniform professional standards for all alternate dispute redressal matters; and (iii) maintaining a depository of arbitral awards (judgments) made in India and abroad.
- Section 11 has been amended to provide a new default procedure for appointment of arbitrators. (Please see question 5.2.)

Further, the New Delhi International Arbitration Centre Act, 2019 was enacted on 26 July 2019 (deemed to have come into force from 2 March 2019). This Act provides for the establishment of the New Delhi International Arbitration Centre (now known as the India International Arbitration Centre ("IIAC")) to conduct arbitration, mediation, and conciliation proceedings and declares the IIAC an institution of national importance. The key objectives of the IIAC include: (i) promoting research, providing training and organising conferences and seminars in alternative dispute resolution matters; (ii) providing facilities and administrative assistance for the conduct of arbitration, mediation and conciliation proceedings; and (iii) maintaining a panel of accredited arbitrators, mediators and conciliators.

A new centre, namely, the International Arbitration and Mediation Centre ("IAMC"), was established in Hyderabad in December 2021. Furthermore, India has planned to set up another international arbitration centre in a special economic zone, i.e., the Gujarat International Finance Tec-City ("GIFT").

The Arbitration and Conciliation (Amendment) Act, 2021 provided that where the court is *prima facie* satisfied that either the arbitration agreement or making of the award was induced by fraud or corruption, the court shall stay the award unconditionally, pending disposal of the challenge under Section 34 to the award. This amendment is controversial and an invitation to raise bogus grounds and delay enforcement. Further, the amendment has been given retrospective effect.

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

In 2016, the Mumbai Centre for Arbitration ("MCIA") was launched with support from the Maharashtra State Government. The MCIA Arbitration Rules include a mechanism for expedited proceedings and interim and emergency relief (including emergency arbitrators). The Rules provide an accelerated procedure for low-value or simple disputes, where the Chairman determines whether the expedited procedure is appropriate. The fee structure is in proportion to the value of the sum in dispute.

Rules 12 and 13 of the MCIA Rules 2016 provide for an expedited procedure if the quantum of dispute does not exceed Rs. 10 Crores. A tribunal following the expedited procedure must render an award within a period of six months from the date of constitution of the arbitral tribunal, unless such time period is extended by the Registrar.

The Delhi International Arbitration Centre ("DIAC") provides parties with an option to adopt a fast-track procedure, wherein the parties sign a written undertaking to dispense with oral evidence for the award to be made within a period of six months. The Indian Council of Arbitration Rules of Domestic Commercial Arbitration (with effect from 1 January 2021) provides the option of a fast-track arbitration process on similar grounds as the DIAC. There is also a provision for appointment of an emergency arbitrator.

15.3 What is the approach of the national courts in your jurisdiction towards the conduct of remote or virtual arbitration hearings as an effective substitute to in-person arbitration hearings? How (if at all) has that approach evolved since the onset of the COVID-19 pandemic?

The national courts have recognised the difficulties faced by litigants due to the COVID-19 pandemic. The Supreme Court had *suo moto* extended the period of limitation under all ongoing proceedings as well as for the filing of fresh proceedings, thus abating the statutory timelines imposed under the Limitation Act. The extension of the limitation order has recently lapsed (with effect from 28 February 2022). On 6 April 2020, in the matter titled *Re: Guidelines For Court Functioning Through Video Conferencing During COVID-19 Pandemic*, *Suo Moto* Writ (Civil) No. 5/2020, the Supreme Court took *suo moto* cognisance of the outbreak of the virus and directed that all national courts should use modern technology to ensure the smooth and continued functioning of the judiciary through the use of video-conferencing technologies and e-filing. The courts have resumed physical hearings, with an option for hybrid hearings.

Sumeet Kachwaha has over 44 years' experience in the legal profession, mainly in dispute resolution, corporate and commercial law. Mr. Kachwaha has been recognised in Band One of the Arbitration section of *Chambers Asia* since 2009. He also features in *Who's Who Legal* in the Construction, Arbitration, Procurement, Government Contracts and Asset Recovery sections, and has a Band One ranking in the Dispute Resolution section of the *The Legal 500 Asia Pacific*. He also features in *GAR*'s *Who's Who Legal* Arbitration section and ranks in *IBLJ*'s "A List" of "India Top 35 Lawyers". He has handled some of the leading and landmark commercial litigations ever to come before Indian courts. Mr. Kachwaha has also been involved on the non-contentious side in several high-stakes projects in infrastructure, power, construction and telecoms. He has previously served as a Chair of the Dispute Resolution & Arbitration Committee of the Inter-Pacific Bar Association (three-year term) and as the Vice-President of the Asian Pacific Regional Arbitration Group ("APRAG"). He is currently serving on the Advisory Board of the Kuala Lumpur Regional Centre for Arbitration (now known as the Asian International Arbitration Centre).

Kachwaha and Partners
1/6 Shanti Niketan
New Delhi – 110021
India

Tel: +91 11 4166 1333
Email: skachwaha@kaplegal.com
URL: www.kaplegal.com

Tara Shahani has over 14 years' standing in the legal profession. Ms. Shahani graduated from Amity Law School, IP University, Delhi, scoring a first division. Her practice focuses on arbitration and litigation. Over the past few years, she has been involved in several high-stakes international arbitrations, white-collar crimes and tax matters. Ms. Shahani features in the *India Business Law Journal* and *The Legal 500 Asia Pacific*.

Kachwaha and Partners
1/6, Shanti Niketan
New Delhi – 110021
India

Tel: +91 11 4166 1333
Email: tshahani@kaplegal.com
URL: www.kaplegal.com

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