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IBA ARBITRATION COMMITTEE

Arbitration Guide

INDIA

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I. Background

(i) How prevalent is the use of arbitration in your jurisdiction? What are seen as the principal advantages and disadvantages of arbitration?

Arbitrations are very common in commercial contracts in India (especially in cross border agreements). Indeed, arbitration clauses are not only advisable, they are considered necessary. This is because the ordinary civil courts (which would otherwise entertain a suit for damages or breach of contract) are so badly clogged with backlog and judicial delays that in low stake matters it can become pointless to pursue these remedies. Added to this are ad valorem court fees payable up front in civil suits.

The principal disadvantages of an arbitration in India are: the lack of a pool of specialized arbitrators; the absence of strong domestic arbitration institutions; and local arbitrators (mostly retired judges) not being in sync with the best practices of international commercial arbitration. At the same time, India is an arbitration friendly jurisdiction and the State is working vigorously toward strengthening arbitrations.

(ii) Is most arbitration institutional or ad hoc? Domestic or international? Which institutions and/or rules are most commonly used?

Most arbitrations are ad hoc. UNCITRAL Rules are sometimes used in ad hoc international arbitration.

Amongst the domestic arbitration institutions, the Indian Council of Arbitration (ICA) (headquartered in New Delhi) was historically at the forefront but now faces competition from the Delhi International Arbitration Centre (which functions under the aegis of the Delhi High Court) and the Mumbai based MCIA (Mumbai Centre for International Arbitration). The Central Government has thrown its weight behind creating a new institution for administering arbitrations. This Centre (called the India International Arbitration Centre (IIAC) has been set up by a statute and designated as an institute of 'national importance'). The Centre is headed by a former Supreme Court Judge. Its rules have been framed but otherwise it is at its preliminary stages.

Amongst the international institutions, the Singapore International Arbitration Centre (SIAC) has gained a prime place. The ICC remains popular too (especially with Government agencies).

(iii) What types of disputes are typically arbitrated?

Shipping, construction, joint venture agreements and cross border commercial contracts usually contain an arbitration clause. However, for loans and allied agreements, arbitrations are not ordinarily used, as the lenders typically depend on the built-in securitization mechanism contained in special statutes which affords them vigorous protection.

(iv) How long do arbitral proceedings usually last in your country?

A standout feature of the Indian statute is the strict timelines it prescribes in relation to arbitration proceedings. Provisions to this effect were introduced via an Amendment in 2015 to the Arbitration and Conciliation Act, 1996 (Act) and further amended in 2019 (w.e.f. 30 August 2019). The timelines prescribed are as below:

- In domestic arbitrations, the arbitral tribunal is required to deliver its award within 12 months from the date of completion of pleadings (which expression is not defined). This does not apply to international arbitrations (where the arbitral tribunal is to endeavour to dispose the proceedings within 12 months or 'as expeditiously as possible').
- Parties may consent to extend the period of 12 months by another 6 months (but no further).
- Upon expiry of the aforesaid period, any party may apply to the competent court for an extension, which may be granted for sufficient cause and on terms which may entail substitution of one or all of the arbitrators.
- The mandate of the arbitrator shall continue during the pendency of an application for extension of time. The court can extend the time even if the mandate of the arbitrator stands terminated due to lapse of time.

(v) Are there any restrictions on whether foreign nationals can act as counsel or arbitrators in arbitrations in your jurisdiction?

The Act expressly states that a person of any nationality may be an arbitrator, unless otherwise agreed by the parties. It is fairly common for foreign arbitrators to sit as arbitrators in high stake international arbitrations. Foreign advocates sometimes appear in arbitrations and there is no legal bar to do so.

II. Arbitration Laws

(i) What law governs arbitration proceedings with their seat in your jurisdiction? Is the law the same for domestic and international arbitrations? Is the national arbitration law based on the UNCITRAL Model Law?

The governing statute is titled the Arbitration and Conciliation Act, 1996, (as defined above, the Act). The Act was last amended in 2021. It has two significant parts: Part I is applicable to any arbitration seated in India irrespective of the nationality of the parties. Hence, any arbitration seated in India (domestic or international) is governed by Part I of the Act. This part is substantially based on the UNCITRAL Model Law and the UNCITRAL Rules of 1976. Part II is mainly concerned with the enforcement of foreign awards under the New York Convention regime.

However, there are two provisions of Part I which may apply even if the arbitration is seated offshore. These are: Section 9, which empowers courts to grant interim measures of protection (but normally, prior to constitution of the tribunal) and Section 27, where the court may, at the request of the arbitral tribunal, assist in taking evidence, production of documents or inspection of property. Parties may, if they so wish, contract out of the applicability of the aforesaid provisions (in relation to offshore arbitrations).

(ii) Is there a distinction in your arbitration law between domestic and international arbitration? If so, what are the main differences?

As stated above, both domestic and international arbitrations (ie, where at least one party is a foreign individual or entity), seated in India, are governed by the same set of provisions (contained in Part I of the Act). However, special provisions have been carved out for India seated international arbitrations:

- First; in the case of an international arbitration, if the court's assistance is required to constitute the tribunal, an application in this regard would lie to the Supreme Court of India. In the case of an arbitration between Indian parties, it would lie to the High Court where the arbitration is seated.
- Second; when a court is approached for appointment of a sole / presiding arbitrator in an international arbitration between parties belonging to different nationalities, it is required to appoint an arbitrator from a neutral nationality. (This however is not interpreted as a mandatory requirement).
- Third; in an international arbitration, the parties or the arbitral tribunal can apply non-Indian substantive law. In an arbitration between Indian parties, the tribunal is obliged to apply the substantive law of India.
- Fourth; in an international arbitration, the court while appointing and fixing the arbitrator(s) fees (where the court is competent to do so), need not be guided by the model fees prescribed under the Act.
- Fifth; by the 2015 Amendment, an additional ground of 'patent illegality' for setting aside an award has been inserted, in arbitrations between Indian parties only. This (merit based) ground is not available in the case of an international arbitration.
- Sixth; The strict timelines prescribed for completion of an arbitration (*see* Section I (iv) above) do not apply to an international arbitration.

- Seventh; in an international arbitration, any application to an Indian court, (eg for interim relief, or for setting aside of an award, or for execution of an award etc.) shall lie to the High Court, having territorial jurisdiction over the seat. In the case of a domestic arbitration however, an application may lie before the lower courts having jurisdiction under local laws.

(iii) What international treaties relating to arbitration have been adopted (eg New York Convention, Geneva Convention, Washington Convention, Panama Convention)?

India is a signatory to the New York Convention and the Geneva Convention. It is not a signatory to any other convention relating to arbitration (including the Washington Convention).

(iv) Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

Please see Section II (ii) above. In a domestic arbitration, the tribunal must decide the dispute in accordance with the substantive law of India.

In an international arbitration, the arbitral tribunal is required to decide the dispute in accordance with the rules of law designated by the parties, and failing such designation apply the rules of law it considers to be appropriate 'given all the circumstances surrounding the dispute'.

III. Arbitration Agreements

(i) Are there any legal requirements relating to the form and content of an arbitration agreement? What provisions are required for an arbitration agreement to be binding and enforceable? Are there additional recommended provisions?

There is no legal requirement as to the form and content of an arbitration agreement. It may be even contained in an exchange of letters or any other means of telecommunication, which provides a record of the agreement, including communication through electronic means. The agreement need not be signed but it must be in writing.

An arbitration agreement need not necessarily use the word 'arbitration' or 'arbitral tribunal' or 'arbitrator'. The court will examine certain factors to determine whether the agreement has the attributes or elements of an arbitration agreement. These include, whether: (a) the parties agreed to refer their disputes to a private tribunal; (b) the said tribunal is obliged to adjudicate upon the disputes in an impartial manner after giving due opportunity to both sides to put forth their case; (c) the parties agreed that the decision of the private tribunal will be binding on them.

At the same time, mere use of the word 'arbitration', 'arbitral tribunal' or 'arbitrator' will not suffice to make it an arbitration agreement. If the parties have made the reference dependent on a future act which may or may not happen, it will not result in an agreement. Use of language such as 'parties can, if they so desire, refer their disputes to arbitration,' or 'in the event of any dispute, the parties may also agree to refer the same to arbitration' or 'if any dispute arises between the parties, they should consider settlement by arbitration' may not result in an arbitration agreement.

Under Indian law, an agreement is required to be executed on a non-judicial stamp paper of the prescribed value (generally a nominal value). There was some controversy as to the legal validity of an agreement not properly stamped. The Supreme Court straightened out the law in Re. *Interplay between Arbitration Agreement under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899 (2023 SCC OnLine SC 1666)*. The Court held that non-stamping or insufficient stamping of an arbitration agreement is a 'curable defect' and does not render the agreement void or unenforceable. The arbitration agreement would be admissible in evidence upon payment of the deficient stamp duty.

(ii) What is the approach of courts towards the enforcement of agreements to arbitrate? Are there particular circumstances when an arbitration agreement will not be enforced?

Indian courts lean in favour of enforcement of arbitration agreements. The Act (by a non-obstante clause) prohibits judicial authorities from intervening in any arbitration, except as provided for under the Act. The principle of non- intervention is expressly recognised as one of the 'main objectives' of the Act in its Statement of Objects and Reasons.

A court would not enforce an arbitral agreement if it prima facie finds that no valid arbitration agreement exists. The scope of intervention in relation to a foreign seated arbitration is wider as the court in such proceedings will defer to arbitration unless on a prima facie basis it finds the arbitration agreement to be 'null and void, inoperative, or incapable of being performed'.

Courts have in the past also refused to refer a civil suit to arbitration on the ground that the dispute is not arbitrable, or that the subject matter of the arbitration agreement is not the same as the subject matter of the civil suit, or if the parties to the civil action are different from the parties to the arbitration agreement. However, the 2015 Amendment provides that reference to arbitration must now be made 'notwithstanding any judgment, decree or order of the Supreme Court or any Court,' thereby nullifying past judgments which enabled escape from arbitration on the grounds stated above.

(iii) Are multi-tier clauses (eg arbitration clauses that require negotiation, mediation and/or adjudication as steps before an arbitration can be commenced) common? Are they enforceable? If so, what are the consequences of commencing an arbitration in disregard of such a provision? Lack of jurisdiction? Non-arbitrability? Other?

A bare agreement to negotiate is not enforceable and therefore does not constitute a legal impediment in commencement of arbitration proceedings. However, if the clause contemplates different levels of dispute resolution or constitutes a pre-condition to initiating the arbitration, it may be binding depending upon the language used. Thus, an agreement to first refer the dispute to a dispute review board or to an engineer (in a construction contract) would be binding and cannot be bypassed. Failure to comply with the dispute resolution mechanism would render the arbitral tribunal devoid of jurisdiction and the resultant award liable to be set aside.

(iv) What are the requirements for a valid multi-party arbitration agreement?

Indian law (like the Model law) is silent on multi-party arbitrations. There can be various scenarios:

A Supreme Court decision in *P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.; (2012) 1 SCC 594* held that a common arbitration may be brought against multiple parties, even if all the parties do not have a common arbitration agreement with each other. To quote: *'...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...'*. This would of course be applicable only where the subject matter of the dispute is interlinked or interdependent.

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

The issue of non-signatories was later referred to a larger five-judge bench of the Supreme Court of India in *Cox & Kings Ltd.* (2023) "*to expound on the intricacies of the Group of Companies doctrine*" and formalise the scope, ambit and validity of the *Chloro Controls* judgment. The Supreme Court held that the Act does not prohibit the joinder of

a non-signatory as a party to an arbitration, provided there is a defined legal relationship between the non-signatory and the parties to the arbitration agreement, and that the non-signatory has consented to be bound by the arbitration agreement, either expressly or impliedly. The Court specified certain factors which need to be satisfied before binding a non-signatory to an arbitration agreement, including: mutual intent of the parties; relationship of the non-signatory with the signatory; commonality of the subject-matter; composite nature of the transactions and performance of the contract.

(v) Is an agreement conferring on one of the parties a unilateral right to arbitrate enforceable?

The general view amongst the various High Courts is to uphold agreements conferring a unilateral right on a party to opt for arbitration or litigation. The issue is yet to be tested before the Supreme Court.

(vi) May arbitration agreements bind non-signatories? If so, under what circumstances?

See Section III (iv) above.

(vii) How do the courts in the jurisdiction determine the law governing the arbitration agreement?

Initially, the courts in India followed the principle of extending the law of the underlying contract to the law of the arbitration agreement. However, in *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc. (2012)* the court turned the approach from 'contract-centric' to 'seat centric', a position, which has remained somewhat constant since.

(viii) Do courts in your jurisdiction distinguish between the seat (or legal place) of the arbitration and the venue of meetings/hearings?

The Act does not incorporate the term 'seat' or 'venue' in reference to arbitration. Instead, it employs the term 'place' of arbitration to signify the legal seat.

The Supreme Court tackled this ambiguity in *Bharat Aluminium* Company by distinguishing between 'seat' and 'venue' to determine the jurisdiction of arbitration courts. Parties can choose the 'seat', failing which the tribunal will decide. The Act enables the tribunal to meet at any suitable venue for discussions, witness hearings, document inspections, etc. without impacting the seat.

(ix) Are blockchain- and NFT-related disputes arbitrable in your jurisdiction?

Indian jurisprudence related to arbitrability is well settled. Broadly, the dispute is arbitrable if it impacts commercial rights of the parties and pertains to actions in personam as against actions in rem and does not impact any of the State's inalienable sovereign and public interest functions. (Please also see Section IV(i) below).

NFTs are legal and in fact income generated from trading of NFTs are taxable. However, there is no statutory framework governing NFTs. In principle, NFT related disputes would be arbitrable, unless the dispute concerns in rem rights. This also applies to blockchain.

(x) Are there circumstances in which courts find that a valid arbitration agreement has become inoperable?

Please see Section III (i) above.

IV. Arbitrability and Jurisdiction

(i) Are there types of disputes that may not be arbitrated? Who decides – courts or arbitrators – whether a matter is capable of being submitted to arbitration? Is the lack of arbitrability a matter of jurisdiction or admissibility?

The Act recognizes the principle of non-arbitrability. It is an express ground for setting aside an arbitral award ('the subject matter of the dispute is not capable of settlement by arbitration'). The Act, however, nowhere defines what is considered to be non-arbitrable. Generally, any civil or commercial dispute is in principle capable of being resolved by arbitration. A dispute becomes non-arbitrable where jurisdiction of a private tribunal is expressly or impliedly excluded. Examples of non-arbitrable disputes under Indian law are: matrimonial disputes including child custody or guardianship; insolvency or winding up of companies; testamentary matters (grant of probate, letters of administration or succession certificates); eviction of tenants governed by tenancy statutes; suit for the sale of mortgaged property; criminal offences etc.

Non-arbitrability also depends generally on whether the award would affect third parties or the public at large, that is, whether it would be a judgment in rem or in persona. Another test is whether the dispute between the parties is capable of a private settlement between the parties (if it is not, it is not arbitrable).

One vexed issue which perhaps remains unresolved is the Indian position as to arbitrability of fraud. A 1962 Supreme Court's decision (*Abdul Khadir's case*) held that where serious allegations of fraud are made against a party, that party can elect to be tried in open court and in such situation, the court would not refer the parties to arbitration. This would suggest that it is not that 'fraud' is not arbitrable as such but that in certain situations a court may not refer the parties to arbitration. Abdul Khadir clarified that it is not that the moment there is an allegation of dishonesty of some kind (including in matters of accounts) a party would be allowed to side step the arbitration clause. However, a subsequent 2009 decision of the Supreme Court (*Radhakrishnan's case*) stated the rule too broadly holding that allegations relating to fraud and serious malpractice can only be settled through detailed evidence and cannot properly be gone into by an arbitrator. In parallel, India courts have spoken in different voices – some following the Radhakrishnan line blindly and some side stepping (or not noticing it at all) and referring parties to arbitration notwithstanding the cause of action resting on fraud. A recent Supreme Court decision *(Ayyasamy*) seeks to take a middle path stating that Radhakrishnan cannot be invoked as a convenient ruse to avoid arbitration and that the decision has incorrectly been given a wide interpretation. At the same time, where there are serious issues of wrong doing and misappropriation of funds and malpractice, coupled with elaborate production of evidence, the arbitration forum may not be appropriate – otherwise, allegations of fraud, like in other civil disputes, can be decided in the framework of normal commercial disputes. *Ayyasamy* concludes: '*if an allegation of fraud can be adjudicated upon in the course of a trial before the ordinary civil court, there is no reason or justification to exclude such disputes from the ambit and purview of a claim in arbitration … Any other approach would seriously place in uncertainty the institutional efficiency of arbitration. Such consequence must be eschewed*'.

The latest Supreme Court decision on the subject [*N.N. Global Mercantile Pvt. Ltd - 2023*] holds: '*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 Court's general approach is to leave the issue of arbitrability to the tribunal in the first instance and exercise its jurisdiction as warranted at the award set aside stage. This is however not an absolute rule and a court may refuse to refer the parties to arbitration if it clearly finds the dispute to be non-arbitrable.

(ii) What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an arbitration agreement? Do local laws provide time limits for making jurisdictional objections? Do parties waive their right to arbitrate by participating in court proceedings?

The Act states that if an action brought before a judicial authority is the subject matter of an arbitration agreement, the judicial authority shall refer the parties to arbitration, unless it finds that prima facie no valid arbitration agreement exists. The objecting party however must make its objection no later than filing its first statement on the substance of the dispute (otherwise it is deemed to have waived its right to object).

The amendment to Section 8(1) of the Act (*see* Section III (ii) above) makes it clear that the only ground to reject reference to arbitration is as stated above. While the matter is pending adjudication, an arbitration may be commenced or continued and an arbitral award made (Section 8(3) of the Act).

The position in relation to foreign seated arbitration gives greater discretion to the court. Here the Act, following the language of the Model Law, permits the court to scrutinize (though on a prima facie basis only) if the arbitration agreement is null and void, inoperative or incapable of being performed.

(iii) Can arbitrators decide on their own jurisdiction? Is the principle of competence-competence applicable in your jurisdiction? If yes, what is the nature and intrusiveness of the control (if any) exercised by courts on the tribunal's jurisdiction?

The principle of competence-competence is recognized and enshrined in the Act. Indeed (going beyond the Model Law) the Act envisages that should the arbitral tribunal reject any challenge to its jurisdiction it shall proceed with the arbitration and render the award. The aggrieved party would then have a right to challenge the award before a court on the ground of lack of jurisdiction (ie there is no interim recourse to a court on the tribunal's decision on jurisdiction.

V. Selection of Arbitrators

(i) How are arbitrators selected? Do courts play a role?

Parties are free to select the arbitrators or create a mechanism for their selection. However, a sole arbitrator cannot be unilaterally appointed by a party, nor can a party have a right to constitute a panel compelling the other party to select an arbitrator from within that panel.

The court's role (default provision) is triggered if the parties are unable to agree upon a sole arbitrator or if the parties appointed arbitrators fail to agree on a third arbitrator (and there is no agreed mechanism in place).

In such situation the Supreme Court will make the appointment in international commercial arbitrations and a High Court in the case of a domestic arbitration.

(ii) What are the requirements in your jurisdiction as to disclosure of conflicts? Do courts play a role in challenges and what is the procedure?

When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose (in writing) any circumstance likely to give rise to justifiable doubts as to his or her independence or impartiality.

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

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

Schedules V and VII (inserted by the 2015 Amendment) are 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 or her independence or impartiality or if he or she does not possess the qualifications agreed to by the parties. Subject to any agreement, any challenge shall be made within 15 days of a party becoming aware of the constitution of the tribunal or becoming aware of the circumstances leading to the challenge. The arbitral tribunal shall decide on the challenge. The court has no role at that stage and if a challenge is rejected, the arbitral tribunal shall continue with the proceedings and render its award. It would be open to the party challenging the arbitrator to take any wrongful rejection of challenge as a ground for setting aside the award.

(iii) Are there limitations on who may serve as an arbitrator? Do arbitrators have ethical duties? If so, what is their source and generally what are they?

The Act does not prescribe or require any qualification for an arbitrator and it expressly states that a person of any nationality may be an arbitrator (unless otherwise agreed by the parties).

The law does not prescribe any code of conduct or ethical duties for arbitrators. Generally, it can be expected that common law standards of ethical duties for judges (or members of judicial tribunals) would apply equally to arbitrators as customary law.

(iv) Are there specific rules or codes of conduct concerning conflicts of interest for arbitrators? Are the IBA Guidelines on Conflicts of Interest in International Arbitration followed?

See Section V(ii) above.

VI. Interim Measures and Emergency Arbitration

(i) Can arbitrators issue interim measures or other forms of preliminary relief? What types of interim measures can arbitrators issue? Is there a requirement as to the form of the tribunal's decision (order or award)? Are interim measures issued by arbitrators enforceable in courts?

The arbitral tribunal is empowered to order a wide variety of interim measures of protection in respect of the subject matter of the dispute. This has received a major impetus by the 2015 Amendment, which provides that the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceeding before it. Furthermore, any interim order passed by the tribunal shall be deemed to be an order of the court for all purposes and be enforceable as such.

The Section (Section 17) uses the expression '*any order issued by the arbitral tribunal*', thus excluding a requirement to issue any formal award.

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 related arbitral institution.) Thereafter, recourse would lie to a court.

(ii) Will courts grant provisional relief in support of arbitrations? If so, under what circumstances? May such measures be ordered after the constitution of the arbitral tribunal? Will any court ordered provisional relief remain in force following the constitution of the arbitral tribunal?

Under the Act, courts have very wide powers to grant interim measures before, during or even after the award is pronounced (but before it is enforced). However, post the 2015 Amendment, a court shall entertain an application for grant of interim measures post formation of the arbitral tribunal, only if it is satisfied that the facts and circumstances of the case make it inefficacious for the party to approach the arbitral tribunal for the relief.

If a court is approached before the arbitration proceedings have commenced, the applicant should have at least invoked the arbitration clause or satisfy the court that it will take the necessary steps to do so without delay. The 2015 Amendment lays down a time limit of 90 days from the passing of an interim order (extendable by the court) for invocation of the arbitration.

Subject to parties' agreement to the contrary, the court has the same power to grant interim measures of protection in relation to offshore arbitrations as outlined above.

(iii) To what extent may courts grant evidentiary assistance/provisional relief in support of the arbitration? Do such measures require the tribunal's consent if the latter is in place?

The arbitral tribunal or any party with the approval of the tribunal may apply to the competent court for assistance in taking evidence. Going beyond the Model Law, the Act states that any person failing to attend in accordance with the court direction, or refraining from giving evidence, or guilty of contempt of the arbitral tribunal, shall be subject to like penalties and punishments as are applicable in law. Judicial assistance also extends in a similar manner to any document to be produced or property to be inspected. This provision is applicable to offshore arbitrations as well (unless the parties have provided otherwise).

(iv) Are decisions by emergency arbitrators enforceable in your country?

The Act does not provide for an emergency arbitrator and only envisages passing of an interim order by the arbitral tribunal or by a court prior to the constitution of the tribunal. The courts have however been proactive in recognising decisions by emergency arbitrators where appointed under applicable Rules. The issue came up for consideration in a 2020 decision (Amazon case). This concerned a Singapore seated arbitration under the SIAC rules. The decision of an emergency arbitration was sought to enforced in India. The Supreme Court of India held that by agreeing to the SIAC rules, the parties are deemed to have agreed to the orders passed by the emergency arbitrator and hence any order passed by an emergency arbitrator shall be binding and enforceable in the same way as an order passed by an arbitrator under Section 17 of the Act and enforceable as such (see Section VI (i)).

(v) What is the approach in your country to anti-suit injunctions or injunctions by arbitrators preventing parties from initiating litigation proceedings?

There is no precedent in public domain of an arbitrator preventing or injuncting parties from initiating litigation. In so far the court's powers are concerned, Indian courts have held that they cannot interdict an arbitration in view of the clear provisions of the Act. The court has very limited discretion to not refer the parties to arbitration and can do so if it doubts the existence or validity of the arbitration agreement (in relation to foreign seated arbitration the discretion is wider - if the court finds the arbitration agreement to be null and void, inoperable or incapable of being performed.)

(vi) Do courts provide assistance in aid of foreign-seated arbitrations, including for disclosure of documents?

The 2015 Amendment to the Act clarified that a party can (in a foreign seated arbitration) approach an Indian court for any interim measure of protection. If the arbitral tribunal has already been constituted, the court can entertain such application only if it finds that an approach to the arbitral tribunal for interim measures is not likely to be efficacious.

Further, the arbitration tribunal or a party with the approval of the tribunal may apply to an Indian court for assistance in taking evidence including any discovery, disclosure or attendance of witness.

VII. Disclosure/Discovery

(i) What is the general approach to disclosure or discovery in arbitration? What types of disclosure/ discovery are typically permitted?

A request for discovery must satisfy the test of relevance, materiality, and proportionality. Unduly wide requests (fishing enquiries) will not be allowed.

(ii) What, if any, limits are there on the permissible scope of disclosure or discovery?

See above.

(iii) Are there special rules for handling electronically stored information?

Elaborate rules have been prescribed under the Evidence Act for electronically stored information. However, this Act does not apply to arbitrations and it is rare for Indian arbitrators to require compliance with the same.

VIII. Confidentiality

(i) Are arbitrations confidential? What are the rules regarding confidentiality?

The 2019 Amendment introduced a confidentiality obligation for the first time. The obligation applies to the arbitrator, arbitral institutions and the parties and relates to 'all arbitral proceedings', except the award, where its disclosure is required for the purposes of implementation and enforcement. The confidentiality obligation is imposed by a non-obstante clause (and therefore would override statutory or other obligations which would otherwise require disclosure). The confidentiality clause is very widely stated and there is no definition of 'arbitral proceedings' or relevant Indian case law, clarifying the expression. Moreover, the consequences of violation of the obligation have not been spelt out. This newly introduced provision is likely to run into controversy and it remains to be seen how the section is interpreted and enforced.

(ii) Are there any provisions in your arbitration law as to the arbitral tribunal's power to protect trade secrets and confidential information?

See above.

(iii) Are there any provisions in your arbitration law as to rules of privilege?

Conciliation proceedings initiated under the provisions of the Act are privileged and the conciliator or parties cannot testify as to views expressed, or proposals or admissions made, during any arbitral or judicial proceeding.

There are no special provisions in the arbitration law as to attorney client privilege, but the general law is wide enough to cover arbitrations and indeed any attorney work product.

IX. Evidence and Hearings

(i) Is it common that parties and arbitral tribunals adopt the IBA Rules on the Taking of Evidence in International Arbitration to govern arbitration proceedings? If so, are the Rules generally adopted as such or does the tribunal retain discretion to depart from them?

Indian arbitrators rarely refer to or rely upon the IBA Rules. Where adapted, the tribunal retains discretion to depart from them.

(ii) Are there any limits to arbitral tribunals' discretion to govern the hearings?

Arbitrators are masters of the procedure and, subject to the parties' agreement, may conduct the proceedings in a manner they consider appropriate. They are required to treat the parties with equality and each party shall be given a fair opportunity to present its case, which includes sufficient advance notice of any hearing or meeting. Neither the Code of Civil Procedure nor the Indian Evidence Act apply to arbitrations, but in practice only the technical rules of procedure contained therein are ignored. The arbitrators generally guide themselves by the underlying legal principles contained in these statutes. The Act provides that the arbitral tribunal shall hold an oral hearing if a party so requests (unless the parties have agreed that no oral hearing will be held).

(iii) How is witness testimony presented? Is the use of witness statements with cross examination common? Are oral direct examinations common? Do arbitrators question witnesses?

The usual method is to have witness statements in advance followed by cross examination. The claimant's witnesses are examined first. An arbitrator may question witnesses as often and at any stage as he or she deems appropriate. Under Indian practice, the cross examination is usually not recorded verbatim of what the witness states. The transcript is quite often paraphrased or re-phrased by the arbitrator and recorded as such. Counsel for the witness or a party can of course request that a particular question or answer be reproduced exactly. The tribunal can interject the cross examination with their own comments and observations as to witness demeanour, hesitation, lack of forthrightness, etc.

Very few live transcript agencies operate out of India. Their services are not usually used in domestic or low stake disputes.

(iv) Are there any rules on who can or cannot appear as a witness? Are there any mandatory rules on oath or affirmation?

Under Indian law, any person is competent to testify unless the judicial authority feels that he or she is prevented from understanding the questions or giving rational answers. Subject to this, even a mentally challenged person is qualified to testify. The principle applies to arbitrations as well.

The Indian Oaths Act encompasses persons who may be authorized by parties' consent to receive evidence; thus, it extends to arbitration proceedings as well. The general practice in domestic arbitration is to affirm the affidavits in evidence before an Oath Commissioner. The witness is put under oath before his or her oral testimony or cross-examination and signs the transcript upon conclusion of his or her testimony.

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 are required to state the truth, and, upon failure to do so, are liable under the Indian Penal laws. However, a mere irregularity in the administration of an oath or affirmation does not invalidate the deposition (Section 7 of the Indian Oaths Act).

(v) Are there any differences between the testimony of a witness specially connected with one of the parties (eg legal representative, director or employee) and the testimony of unrelated witnesses?

It is highly unusual for a legal representative to depose on behalf of a party he or she is representing. If objected to, the legal representative would be expected to retire from the case.

Relationship with a party is per se not a disqualification for being a witness. There is no legal presumption as to evidence from a witness who may be related to a party (though the court will carefully scrutinize his or her credibility).

(vi) How is expert testimony presented? Are there any formal requirements regarding independence and/or impartiality of expert witnesses?

Expert testimony is presented in the same manner as any other evidence (ie, based on a sworn witness statement followed by cross examination). There are no formal requirements regarding independence and/or impartiality of expert witnesses.

(vii) Is it common that arbitral tribunals appoint experts beside those that may have been appointed by the parties? How is the evidence provided by the expert appointed by the arbitral tribunal considered in comparison with the evidence provided by party-appointed experts? Are there any requirements in your jurisdiction that experts be selected from a particular list?

Normally a tribunal would not appoint its own expert unless a party so requests or there are compelling reasons to do so. A tribunal-appointed expert may have certain special powers (if so conferred by the tribunal). He or she may require relevant information (including goods, documents or other property for inspection) from any party. An expert may also be requested by a party to make available for examination all documents, goods or other property in his or her possession which he or she was provided to prepare his or her report.

There is no legal presumption as to credibility of a tribunal-appointed expert as opposed to a party-appointed expert.

Some courts do maintain a list of experts but there is no requirement that the expert be selected from that list only.

(viii) Is witness conferencing ('hot-tubbing') used? If so, how is it typically handled?

Witness conferencing is not used in India.

(ix) Are there any rules or requirements in your jurisdiction as to the use of arbitral secretaries? Is the use of arbitral secretaries common?

The Act enables an arbitrator with the consent of parties to arrange for administrative assistance by a suitable institution or person. However, there are no rules or regulations in this regard. Tribunal secretaries are being more frequently appointed.

(x) Are there any ethical codes or other professional standards applicable to counsel and arbitrators conducting proceedings in your jurisdiction?

In so far as conflict of interest is concerned, Schedules 5 to 7 of the Act list out matters which are deemed to / may constitute conflict of interest / impact the independence and impartiality of the arbitrator (they are based on the IBA Guidelines for conflict of interest). The professional code of conduct of legal counsel is governed by the Advocates Act, 1961.

(xi) Have arbitral institutions in your jurisdiction implemented rules empowering arbitral tribunals to exclude counsel based on conflicts of interest or other reasons?

The rules of Indian arbitral institutions are silent on this.

(xii) Has your jurisdiction adopted any rules with regard to remote hearings and have there been any court decisions on same?

Statutory notifications enabled remote hearings during the pandemic. In the post Covid-19 era, arbitrators routinely resort to videoconference hearings (especially in relation to procedural matters). There are no rules governing the same. Though

physical courts have resumed long back, as a matter of practice the court permits any party to join proceedings through videoconference link if it so wishes.

X. Awards

(i) Are there formal requirements for an award to be valid? Are there any limitations on the types of permissible relief?

An award is required to be made in writing and signed by all members of the tribunal or by the majority with reasons for any omitted signatures. It shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given.

The award shall bear its date and state the place of the arbitration. A signed copy is required to be delivered to each party. There are no limitations on the type of permissible relief save as may apply to any court *(See* Section X(ii) below).

(ii) Can arbitrators award punitive or exemplary damages? Can they award interest? Compound interest?

Arbitrators cannot award punitive or exemplary damages for breach of contract (indeed under Indian law, even courts cannot do so). Damages can only be compensatory in nature, liquidated damages must also meet the test of reasonableness.

Arbitrators can award interest, on the whole or part of the sum awarded, and for any period between the date of cause of action and the date of the award, and thereafter until payment is received.

Where the contract specifies a particular rate of interest (or prohibits grant of interest), the arbitrator is bound to abide by the same while awarding pre-award interest.

Insofar as post-award interest is concerned, the arbitrator can award interest in the manner deemed reasonable. The general rule is that pre-award interest gets subsumed in the amount awarded, and the post award interest is on such amount (ie principal amount + pre-award interest). The arbitrator has the power to award compound interest, even if the contract does not provide for the same.

Unless otherwise directed by the tribunal, the award shall carry interest at 2 per cent higher than the current rate of bank interest (prevalent on the date of award) from the date of the award till the date of payment.

(iii) Are interim or partial awards enforceable?

Yes. Under the Act, the definition of arbitral award includes 'interim award'. *See* Section VI (i).

(iv) Are arbitrators allowed to issue dissenting opinions to the award? What are the rules, if any, that apply to the form and content of dissenting opinions?

An arbitrator can issue a dissenting opinion but there are no rules as to the form or content thereof.

A recent decision of the Supreme Court has given considerable recognition to dissenting opinions. In *Ssangyong Engineering and Construction Co Ltd. v. NHAI* (Judgment dated 8 May 2019) the majority had awarded compensation on account of inflation, but it deviated from the contractually agreed formula. The minority on the other hand granted compensation as per the contractually agreed formula.

The Supreme Court of India struck down the majority award but felt that it would cause grave injustice to require the successful party to relitigate its claims afresh before a new tribunal. The court resorted to the Constitution of India (Article 142) which empowers the Supreme Court to make such orders as may be necessary for doing 'complete justice' and on this basis it upheld the minority award as the binding award (while setting aside the majority).

(v) Are awards by consent permitted? If so, under what circumstances? By what means other than an award can proceedings be terminated?

A consent order can be made at the request of the parties if not objected to by the arbitral tribunal. It can be recorded in the form of an award on agreed terms. An award on agreed terms shall comply with other requirements of a formal award (except for the requirement of giving reasons). It shall have the same status and legal effect as any other award on the substance of the dispute.

The arbitral tribunal shall issue an order of termination of the arbitral proceedings where: the claimant withdraws his or her claim or fails to communicate his or her statement of claim as per the directions of the tribunal; the parties agree to terminate the proceedings; or the tribunal finds that continuation of the proceedings has become unnecessary or impossible.

(vi) What powers, if any, do arbitrators have to correct or interpret an award?

An arbitral tribunal is empowered to make typographical or clerical corrections or computations, or correct other errors of a similar nature either on its own initiative or on an application by a party. A time limit of 30 days is prescribed in this regard.

If the parties agree, any party may request the arbitral tribunal to provide an interpretation of a specific point or part of the award. Unless otherwise agreed by the parties, a party with notice to the other party may request the arbitral tribunal to make 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.

When a court is seized of an application to set aside an award, it may adjourn the proceedings for a specified period to give the arbitral tribunal an opportunity to take such actions, which may eliminate the ground for setting aside the arbitral award.

XI. Costs

(i) Who bears the costs of arbitration? Is it always the unsuccessful party who bears the costs?

The normal rule is that the unsuccessful party bears the costs. However, where the case of the parties is evenly balanced or a fair point of law is involved, parties are often left to bear their own costs. In case the unsuccessful party is not being burdened with the costs, the tribunal is required to record its reasons in writing.

(ii) What are the elements of costs that are typically awarded?

The Act stipulates that costs include reasonable sums relating to the fees and expenses of the arbitrators and witnesses; legal fees and expenses; fees of the arbitral institution; and any other expense in connection with the court and arbitration proceedings and the arbitral award.

While awarding costs, the Act requires the court / tribunal to have regard to the conduct of parties, whether a party made a frivolous counter-claim leading to delay, whether any reasonable offer to settle the dispute is made by a party and refused by the other party and whether a party has succeeded partly in the case.

A court / tribunal may make any order on costs, including that a party shall pay a proportion of another party's costs; a stated amount in respect of another party's costs; costs from or until a certain date only; costs incurred before

proceedings have begun; costs relating to particular steps taken in the proceedings; costs relating only to a distinct part of the proceedings; and interest on costs from or until a certain date.

However, historically, Indian arbitrators have not been liberal in granting real costs.

(iii) Does the arbitral tribunal have jurisdiction to decide on its own costs and expenses? If not, who does?

Insofar as ad hoc and domestic arbitrations (ie involving Indian parties only) are concerned, the tribunal's fees will be guided by the model fees prescribed under the Fourth Schedule to the Act. Indeed, the Indian arbitration institutes are also expected to follow the fees specified under the Fourth Schedule. There are no restrictions/guidelines in the tribunal deciding on its own costs or expenses.

(iv) Does the arbitral tribunal have discretion to apportion the costs between the parties? If so, on what basis?

Yes. The tribunal would exercise its discretion inter a*lia* on the merits of the parties' claim, defence and conduct. *See* Section XI (ii) above.

(v) Do courts have the power to review the tribunal's decision on costs? If so, under what conditions?

A challenge against costs alone can be on very limited grounds, for instance: where a proforma party (against whom no relief was sought) was made to bear costs or where the tribunal below committed a fundamental error (making the successful party bear the costs of the losing party on an erroneous factual assumption). In the absence of decided cases, it is not clear to what extent these principles (which apply to courts) will apply to an arbitral award.

XII. Challenges to Awards

(i) How may awards be challenged and on what grounds? Are there time limitations for challenging awards? What is the average duration of challenge proceedings? Do challenge proceedings stay any enforcement proceedings? If yes, is it possible nevertheless to obtain leave to enforce? Under what conditions?

There is a difference between India seated awards (Indian awards) and foreign awards regime.

An Indian award is straightaway enforceable as a decree of the court, without the need to go through a separate proceeding to convert it into a decree.

An application to 'set aside' an Indian award may be filed, within three months of receipt of the same (extendable by 30 days thereafter, but no further).

An application for execution of an Indian award may be preferred, when the time prescribed for making of an application to set aside the same has lapsed.

Prior to 2015, mere preference of an application for setting aside of an award resulted in an automatic stay of enforcement (until disposal of such application). The 2015 Amendment has changed this. Now, execution of an award as a decree can nonetheless proceed pending adjudication of the setting aside application, unless the court has specifically 'stayed' execution of the award. While staying execution of an award, the court is required to pass a reasoned order, taking into account the provisions applicable for stay of a money decree, (which ordinarily requires the judgment debtor to deposit the awarded sums, or part thereof, in court) and which may, be allowed to be withdrawn by the award holder, subject to suitable security.

The grounds to challenge an Indian award are substantially based on the Model Law (Article 34 thereof). The differences are that under the Act an award can also be challenged on the ground of lack of impartiality or independence of the arbitrator or any ruling by the arbitrator as to the existence or validity of the arbitration agreement. Under Indian law, there is no interim recourse to courts on these grounds during the arbitral process and therefore the challenge stage is back ended and permitted once the award is rendered.

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 (ie, 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 relation to an international commercial arbitration (seated in India). Secondly, an award can be set aside for being patently illegal only if the alleged illegality 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.

The 2015 Amendment also introduced a time limit of one year from the date of service of notice on the non-applicant, for deciding an application to set aside an award. In practice, however, the time limit is not followed and award challenge proceedings can take up to three years or so.

Dealing with foreign awards, the first point of distinction is that an application is required to be moved for enforcement and execution of a foreign award. Such application shall lie before the appropriate High Court having jurisdiction over the subject matter, or the respondent (at the applicant's discretion).

A foreign award cannot be set aside; it can only be enforced or declined to be enforced. The grounds on which enforcement of a foreign award can be declined are similar to the New York Convention grounds.

The 2015 Amendment, as a matter of abundant caution, clarifies that a merits- based review is not available while considering an application for enforcement of a foreign award.

(ii) May the parties waive the right to challenge an arbitration award? If yes, what are the requirements for such an agreement to be valid?

As a matter of public policy this right cannot be waived as it would be considered to be a restraint on legal proceedings.

(iii) Can awards be appealed in your country? If so, what are the grounds for appeal? How many levels of appeal are there?

There is no provision to 'appeal' an arbitral award.

A set aside proceeding would lie in relation to an India seated arbitration award. A statutory right to appeal is available against the decision therein. There is no right of a second appeal but the Supreme Court of India at its discretion may grant leave to appeal if there is a gross error of law or an issue of public importance.

Regarding foreign awards, no statutory appeal lies against an order enforcing a foreign award – it lies only against an order refusing to enforce a foreign award. A discretionary appeal would still lie in either case to the Supreme Court of India (as stated above).

(iv) May courts remand an award to the tribunal? Under what conditions? What powers does the tribunal have in relation to an award so remanded?

A statutory power to remand exists in relation to India seated arbitration awards as discussed in Section X (vi) above.

(v) Is there a specialist arbitration court in your jurisdiction?

No.

(vi) To what extent do courts in your jurisdiction allow arbitrators to amend and/or replace wrongly invoked law or the law not invoked by the parties (iura novit arbiter)? Could this be a basis to set aside the award?

If a party refers to a wrong statutory provision, the tribunal can always alert the parties as to the correct provision. Thus, reference to a wrong section of a particular statute is not fatal to the case. This however cannot extend to invocation of legal doctrine or defences *suo moto* by the tribunal. For instance, if a party has not pleaded estoppel, it cannot later argue that the facts made out give rise to plea of estoppel. The arbitrator cannot act iura novit arbiter, as it can lead to denial of a legal right or opportunity to any party to plead a specific defence, nor can it absolve a party from discharging a burden of establishing a case which it otherwise has in law.

XIII. Arbitrator Liability

(i) Does the arbitration law in your jurisdiction expressly provide for the immunity of arbitrators, experts, translators, interpreters and/or other participants in arbitration proceedings from civil liability in connection with their mandate? If so, are there exceptions to this immunity?

Yes, Section 42B of the Act states that '*No suit or other legal proceedings shall lie against the arbitrator for anything which is in good faith done or intended to be done under this Act or the rules or regulations made thereunder.'* Evidently, the immunity extends only to acts done in good faith. However, this does not extend to experts, translators, etc.

(ii) Does this immunity, if any, extend to criminal liability?

The protection is not likely to extend to criminal liability as only acts done in good faith are protected.

XIV. Recognition and Enforcement of Awards

(i) What is the process for the recognition and enforcement of awards? What are the grounds for opposing enforcement? Which is the competent court? Does such opposition stay the enforcement? If yes, is it possible nevertheless to obtain leave to enforce? Under what circumstances?

An India seated award does not require any enforcement application proceeding. Once the time prescribed for making an application to set aside the award has lapsed, the award can straight away be enforced. *See* Section XII (i) above.

A foreign award on the other hand needs to go through an enforcement process. The grounds for opposing enforcement are the same as in the New York Convention. *See* Section XII (i) above.

A foreign award can be enforced (at the discretion of the enforcing party) in any High Court within the territorial limits where the defendant resides or has its business or where the defendant's assets are located.

Any opposition to the enforcement of a foreign award will have the legal effect of staying the same, until such an application is decided. However, the court can pass appropriate interim orders to secure the interest of the party seeking enforcement.

(ii) If an exequatur is obtained, what is the procedure to be followed to enforce the award? Is the recourse to a court possible at that stage?

Indian law does not require double exequatur in relation to enforcement. The procedure for enforcement would be the same as described in Section XIV (i) above.

(iii) Are conservatory measures available pending enforcement of the award?

Yes.

(iv) What is the attitude of courts towards the enforcement of awards? What is the attitude of courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

The general approach is to support the arbitral award. Indian courts do not suffer from any anti-foreigner bias and it is rare for a foreign award not to be enforced. Statistics from the past 20 years show that foreign awards were not enforced in only about eight per cent of cases.

Indian courts would not enforce a foreign award set aside by the court at the seat of the arbitration. This has however not yet been tested in India.

(v) How long does enforcement typically take? Are there time limits for seeking the enforcement of an award?

An application for enforcement of a foreign award must be brought within three years of the award.

India is a large and diverse jurisdiction. The average duration of court proceedings can vary widely depending upon the complexity of the case and the court involved. Though it is difficult to hazard a guess on the time, broadly it can take between two to three years to enforce a foreign award. *See* Section XII (i) above.

XV. Sovereign Immunity

(i) Do state parties enjoy immunities in your jurisdiction? Under what conditions?

The doctrine of sovereign immunity has had a bumpy ride in India chiefly due to a 1965 decision of the Supreme Court which gave it recognition (*Kasturi lal Ralia Ram Jain v. State of Uttar Pradesh*). The case dealt with an act of negligence and subsequent misappropriation committed by police officers relating to property seized in exercise of their statutory powers. The Supreme Court held that if a tortious act is committed by a public servant in discharge of statutory functions based on a delegation of the sovereign powers of the State, then the State is not vicariously liable. It relied on the maxim 'the King can do no wrong', thereby embracing an absolute view of sovereign immunity. However, the doctrine has not been applied since and courts have continuously held the State liable in a variety of circumstances. The doctrine is for all purposes dead where the State is involved in commercial or private undertakings.

(ii) Are there any special rules that apply to the enforcement of an award against a state or state

entity?

There are no special rules that apply to enforcement of an award against a State or State entity.

(iii) Are there any requirements for arbitrations involving sovereign entities?

Please see above response.

XVI. Investment Treaty Arbitration

(i) Is your country a party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States? Or other multilateral treaties on the protection of investments?

India is not a party to the Washington Convention or indeed any other Convention or treaty pertaining to arbitration (other than the New York Convention and the Geneva Convention).

(ii) Has your country entered into bilateral investment treaties with other countries?

India had BITs with 83 countries. However, of late there has been a fundamental shift in its policy. In 2015, India declared a new Model BIT as a template for future treaties and from 2016 onwards almost all of its BITs were terminated (due to efflux of time or otherwise). A new BIT between India and the United Kingdom is in the pipeline and another between India and the United Arab Emirates has been signed and awaiting ratification. Based on its 2015 Model BIT, India has signed or agreed upon 'Joint Interpretative Statements' with four countries to clarify contentious issues. Attempts are underway to sign similar Statements with other countries. For further information, please see the Government website (http://dea.gov.in/bipa).

(iii) Have there been any recent court decisions in your country in relation to intra-European investor-state arbitration?

No.

XVII. Resources

(i) What are the main treatises or reference materials that practitioners should consult to learn more about arbitration in your jurisdiction?

The most popular electronic media for reference and research are: (www.scconline.com), (www.westlawindia.com) and (www.manupatra.com). Supreme Court judgments and its day to day orders can be openly accessed free of cost from (www.supremecourtofindia.nic.in) but there is no search engine. The link to various High Court websites is also available. Delhi High Court at (www.delhihighcourt.nic.in) and the Bombay High Court at (www.bombayhighcourt.nic.in). A leading text book is Justice R.S. Bachawat's Law of Arbitration & Conciliation published by LexisNexis.

(ii) Are there major arbitration educational events or conferences held regularly in your jurisdiction? If so, what are they and when do they take place?

India is becoming an attractive destination for international conferences on arbitration and all major arbitral institutions regularly conduct seminars or conferences. However, there are no regular events announced and it is generally on an ad hoc basis.

XVIII. Trends and Developments

(i) Do you think that arbitration has become a real alternative to court proceedings in your country?

Arbitration is the only real alternative to court proceedings in commercial matters.

There is no negative attitude in courts towards arbitration and the legislation is also vigilant and progressive. However, there is a problem of judicial delays.

(ii) What are the trends in relation to other ADR procedures, such as mediation?

Despite genuine efforts from various quarters (Government, NGOs, trade bodies and judges) ADR mechanisms for commercial disputes are yet to mature. There are several reasons for this. The government agencies are culturally not open to lend themselves to conciliation as they are answerable to internal and external watchdog bodies. In so far as private parties are concerned, the sluggishness of the court system combined with the absence of real costs being awarded against the losing party does not offer the necessary encouragement for the responding party to co-operate towards a genuine settlement effort. The Act contains an entire chapter dedicated to conciliation based on the UNCITRAL Conciliation Rules of 1980. The Act also states that it is not incompatible for an arbitral tribunal to encourage settlement through mediation, conciliation or other procedures at any time during the arbitral proceeding. This legislative initiative, however, has fallen short of expectations due to the reasons outlined above.

Recently, the much-awaited Mediation Act 2023 was passed, which seeks to govern mediation proceedings in India. It inter alia recognises pre-litigation mediation, online mediation, and community mediation. The Act applies to mediations conducted in India involving only domestic parties; involving at least one foreign party and relating to a commercial dispute. The mediation should conclude within 180 days (which may be extended by another 180 days by the parties). Further certain disputes like disputes relating to claims against minors or persons of unsound mind, involving criminal prosecution, and affecting the rights of third parties are not fit for mediation. A mediated settlement agreement signed by the parties and authenticated by the mediator shall be final and binding on the parties and persons claiming under them and enforceable as per provisions of the Code of Civil Procedure, 1908 ie, as if it were a court judgment.

(iii) Are there any noteworthy recent developments in arbitration or ADR?

Please see Section XVIII (ii) above.

(iv) Are there any official plans to reform the arbitration laws and practice in your jurisdiction?

India is keen to position itself as an arbitration friendly jurisdiction. There have been a series of amendments (in 2015, 2019 and 2021) towards this end. However, many of these amendments were rushed and later found to be unadvisable and indeed some never brought in force (for instance prescribing minimum qualifications for arbitrators).

The government wishes to revisit and clean-up some of the past anomalies. It constituted an expert committee in 2023 to suggest changes required. A draft report was submitted to the Ministry in February 2024 but has not been tabled or discussed so far.

(v) Are there any rules governing third-party funding in your jurisdiction? Is there an obligation to disclose the identity of any non-party who has an economic interest in the outcome of the proceedings, including any third party funder? Have there been any recent court decisions in your

jurisdiction in relation to third-party funding?

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 a litigation. However, funding 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 Code of Civil Procedure and enabling the financer to become a party to the suit subject to conditions.

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.

In a recent case *Tomorrow Sales Agency Pvt. Ltd. v. SBS Holdings, Inc. (2023)*, the High Court of Delhi recognised the importance of the third-party funding as '*essential to ensure access to justice*'. The court also held that the third-party funder cannot be held liable for costs for enforcement of arbitral award against the party funded. The court advocated framing of requisite rules to render third-party funding transparent.

(vi) Has your country implemented a sanctions regime? Do the courts in your jurisdiction consider international economic sanctions as part of their international public policy? Have there been any recent court decisions in your country in relation to the impact of sanctions on international arbitration proceedings?

The issue of international economic sanctions has not yet been tested by Indian courts. Impacted entities continue to participate in India seated arbitration or litigation as claimant or respondent without any hinderance.