

INDIA

DELOS GUIDE TO ARBITRATION PLACES (GAP)

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FOR FURTHER INFORMATION

[GAP TABLE OF CONTENTS](#) | [GAP TRAFFIC LIGHTS FOR ALL JURISDICTIONS](#) | [FULL GAP ONLINE](#)

[GAP COMBINED SUMMARIES FOR IN-HOUSE AND CORPORATE COUNSEL](#)

[GAP COMBINED SUMMARIES FOR ARBITRATION PRACTITIONERS](#)

[EN DELOS MODEL CLAUSES & LIST OF SAFE SEATS](#)

[ES DELOS CLÁUSULAS MODELO & LISTA DE SEDES SEGURAS](#)

[FR DELOS CLAUSES TYPES & LISTE DE SIÈGES SÛRS](#)

[PT DELOS CLÁUSULAS MODELO & LISTA DE SEDES SEGURAS](#)

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JURISDICTION INDICATIVE TRAFFIC LIGHTS ‡

- | | |
|---|---|
| 1. Law | ● |
| a. Framework | ● |
| b. Adherence to international treaties | ● |
| c. Limited court intervention | ● |
| d. Arbitrator immunity from civil liability | ● |
| 2. Judiciary | ● |
| 3. Legal expertise | ● |
| 4. Rights of representation | ● |
| 5. Accessibility and safety | ● |
| 6. Ethics | ● |

VERSION: 29 MAY 2020 (v02.000)

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

India has always used arbitration as a forum of dispute resolution for commercial disputes. This holds true, especially for contracts entered by and between corporations. Corporations also prefer opting for institutional arbitration as it provides a structured ecosystem for disputes. The new amendment act has further codified the pro arbitration approach of India. This has led to formation and growth of various arbitral institutions in India, that have been used for both domestic and international arbitrations.

Key places of arbitration in the jurisdiction?	New Delhi, Mumbai, Bangalore, Goa, Cochin and Kolkata.
Civil law / Common law environment?	Common Law.
Confidentiality of arbitrations?	The arbitrator, arbitral institution and the parties to an arbitration shall maintain confidentiality of all arbitral proceedings except an award where its disclosure is necessary for implementation and enforcement of the award (see s.42 A of the Arbitration and Conciliation Act, 1996 (as amended most recently in 2019) (" Act ")).
Requirement to retain (local) counsel?	There is no such requirement. The parties can also retain foreign counsel in an arbitration.
Ability to present party employee witness testimony?	Yes, parties can present employee testimony in arbitration.
Ability to hold meetings and/or hearings outside of the seat?	Parties may choose to hold meetings at a different venue than the seat of arbitration. Unless the parties have agreed on a specific venue, the tribunal has discretion to decide where to hold meetings.
Availability of interest as a remedy?	Interest may be awarded by the Arbitral Tribunal at its discretion depending upon the facts of the case. However, the Act does not provide for any set rules on the awarding of interest. Interest may be awarded in an arbitration as per the Interest Act, 1978 or as per the agreement of the parties.
Ability to claim for reasonable costs incurred for the arbitration?	The Arbitral Tribunal under the Act has the discretion to determine the allocation of arbitration costs in an arbitration.
Restrictions regarding contingency fee arrangements and/or third-party funding?	The Bar Council of India prohibits advocates from charging fees to their clients contingent on the results of litigation or pay a percentage or share of the claims awarded by the Court. Third-party funding is not yet codified in Indian law, but it is accepted and increasingly being used.
Party to the New York Convention?	Yes.
Other key points to note?	Φ
WJP Civil Justice score (2019)	0.45

ARBITRATION PRACTITIONER SUMMARY

The Arbitration and Conciliation Act, 1996¹ (“**Act**”), as amended in 2019, is closely modeled on the 1985 UNCITRAL Model Law. Part I of the Act governs arbitral proceedings seated in India and Part II of the Act governs the recognition and enforcement of foreign-seated arbitral awards.

With respect to Part I, pursuant to s. 2(1)(f) of the Act, an arbitration is international if at least one of the parties to the arbitration is (i) a national of a country other than India; (ii) a corporate body under the laws of any country other than India; (iii) an association or body of individuals whose central management and control is exercised in any country other than India; or (iv) the Government of a foreign country.

With respect to Part II, India recognizes foreign awards under the New York Convention (“**NYC**”) and the Geneva Convention on the Execution of Foreign Arbitral Awards (“**Geneva Convention**”). India has made reservations regarding the applicability of the NYC. As per Section 44 under Part II of the Act, a foreign award will be enforced in India under the NYC only if it was made in the territory of another contracting state of the NYC. In cases of recognition and enforcement of foreign awards, India applies the NYC to differences arising out of a “commercial” legal relationship under Indian Law, whether they are contractual or not. Similarly, foreign arbitral awards under the Geneva Convention are recognized and enforced in accordance with Sections 53 to 60 of the Act and the Second and Third Schedules of the Act.

All arbitration related matters requiring the assistance of courts are handled by the commercial benches of either the district, state or apex (Supreme Court of India) level, depending on either the monetary value of the subject-matter/relief or the nature of the assistance sought.

Date of arbitration law?	26 August 1996 (last amended w.e.f. 23 October 2015).
UNCITRAL Model Law? If so, any key changes thereto?	<p>Yes, the Act is based on the UNCITRAL Model Law with a few variations. The following are among the major variations:</p> <ul style="list-style-type: none"> • A time-limit has been prescribed under the Act for completion of an arbitral proceeding under the Act, being 12 months, extendable by a further 6 months. • The Act contains a provision for fast-track proceedings. • The number of arbitrators must be odd. • There is a time-limit from when an interim measure is granted by a local court within which an arbitration proceeding has to be initiated. • The Act contains a regime governing the cost of arbitration. • For domestic arbitrations, the arbitral award may be set aside if the award is vitiated by patent illegality.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	Ordinary courts handle applications for appointment of arbitrators, jurisdictional challenges, annulment, recognition and enforcement of the award. Within these courts, all arbitration-related matters are assigned to the specialized commercial benches, to ensure that such matters are handled by judges with relevant experience. Further, the relevant seats of arbitration, like New Delhi, Mumbai, Bangalore, Goa, Cochin

¹ Available at: <https://indiacode.nic.in/bitstream/123456789/1978/1/199626.pdf>.

	and Kolkata, have many experienced judges.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes, parties can request <i>ex parte</i> interim measures at any time before the commencement of the arbitral proceeding until before the enforcement of award.
Courts' attitude towards the competence-competence principle?	Courts tend to refrain from interfering in arbitration matters and usually abide by the <i>kompetenz-kompetenz</i> principle, holding that they do not have jurisdiction when there is an arbitration agreement mandatorily referring the parties to arbitration (see s. 16 of the Act). One of the main exceptions to this rule is when jurisdictional issues pertaining to the validity of the arbitration agreement are decided by the court while appointing an arbitrator or while referring the parties to arbitration; and when courts grant interim measures under s. 9 of the Act, the arbitral tribunal cannot go into the same issues again and is bound by the decision of the court.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Only the grounds set out in the NYC. However, the ambit of challenge/refusal of the award on the ground of public policy has been defined under the Act and clarified in judicial pronouncements.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	The attitude of courts towards requests is fairly positive, as in the past they have usually respected the foreign courts' decisions without reviewing the facts of the matter <i>de novo</i> .

Other key points to note?

- Court applications for the appointment of arbitrators have to be disposed of as expeditiously as possible and, to the extent possible, within 60 days.
- Mandatory disclosure by the arbitrators, in writing, about the existence of any relationship or interest of any kind with the parties which may give rise to justifiable doubts to their independence.
- 12-month time-limit for completing arbitral proceeding in an Indian seated arbitration, which may be further extended by 6 months by the parties. Upon a showing of sufficient cause before the court, the time period may further be extended by up to another 6 months. If the court finds that the delay is attributable to the arbitral tribunal, the court may order the reduction of the tribunal's fee. Conversely, if the award is made within 6 months, arbitrators may get an additional fee if the parties agree.
- Provision for fast-track procedure for conducting an arbitration. The award in such cases shall be rendered within 6 months.
- Challenge to the award is to be proposed to be determined by the court within one year.
- Mere filing of an application for challenging the award does not automatically stay the execution of the award, unless there is a specific order of stay by the court hearing the challenge of the award.

JURISDICTION: A DETAILED ANALYSIS

1. The legal framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model Law?

The Act is closely modelled on the UNCITRAL Model Law. It applies to all kinds of arbitrations and not only commercial disputes. However, the Act does not apply to certain disputes which may not be arbitrable under Indian law, e.g., matrimonial disputes relating to divorce, criminal offences, insolvency and winding-up matters, guardianship matters, matters related to a grant of probate, letters of administration, succession certificate, matters related to the eviction of tenants where the tenant enjoys a statutory protection against eviction, intellectual property and anti-trust disputes, as well as certain statutory arbitrations.

1.2 When was the arbitration law last revised?

The Indian arbitration law was substantially reformed in 1996 by passing of the Act. Before the Act, the law of arbitration in India was governed by the Arbitration (Protocol and Convention) Act, 1937, the Arbitration Act, 1940 and the Foreign Awards (Recognition and Enforcement) Act, 1961.²

The Act was amended by the Arbitration and Conciliation (Amendment) Act, 2015, which has been in effect since 23 October 2015.³

Further, the Arbitration and Conciliation (Amendment) Act, 2019 ("**2019 Act**") has recently been passed by the Parliament and received the assent of the President amending certain provisions of the Act. The 2019 Act, effective from 9 August 2019, aims at further streamlining the arbitration law in India in view of global arbitration standards and seeks to showcase India's increasingly pro-arbitration approach.⁴

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

Indian courts, when determining the law applicable to the arbitration agreement, call for the application of one or more of the following laws:⁵

- a) The proper law of the contract, *i.e.*, the law governing the contract which creates the substantive rights of the parties, in respect of which the dispute has arisen.
- b) The curial law, *i.e.*, the law governing the conduct of the arbitration to the extent one has been chosen by the parties in their contract.
- c) In the event the arbitration agreement between the parties does not provide for the curial law, there is a strong *prima facie* presumption that the parties intend the curial law to be the law of the seat of the arbitration as the country most closely connected with the proceedings.

In this regard, there is a crucial question which remains unsettled: whether two Indian parties can opt for a foreign seat of arbitration. In 2016, the Supreme Court allowed such a foreign-seated arbitration to

² Section 85 of the Act. The consolidated text of the Act is available at <https://indiacode.nic.in/bitstream/123456789/1978/1/199626.pdf>.

³ Available at: <http://lawmin.gov.in/arbitration-and-conciliation-amendment-act-2015>.

⁴ Available at: <http://egazette.nic.in/WriteReadData/2019/210414.pdf>.

⁵ *Union of India v. Hardy Exploration and Production*, civil appeal no. 4628 of 2018, available at https://www.sci.gov.in/supremecourt/2016/34525/34525_2016_Judgement_25-Sep-2018.pdf.

proceed, but on the basis that there was a foreign nexus to the dispute between the parties.⁶ In 2017, the state High Court of New Delhi ruled squarely on this question, finding that two Indian parties can contract to have a foreign seat of arbitration.⁷ Final determination by the Supreme Court on this issue is much awaited.

The dichotomy between “venue or place of arbitration” and “seat of arbitration” still exists under Indian law. The Supreme Court in two of its recent decisions has held that in absence of a designated seat, the venue does not become the seat of arbitration automatically, as it has to be contextually determined. The venue can become the seat only if something else is added to it as a concomitant.⁸ Contrary to this, the Supreme Court in another recent decision⁹ has held that the decision in *Hardy Exploration*¹⁰ was incorrect because it ignored the *Roger Shashoua*¹¹ principle, the reliance of the said principle in *BALCO decision*¹² and the Indian leg of the *Roger Shashoua* case¹³, all of which upheld that the venue of an arbitration is the juridical seat in the absence of any significant contrary indicia.

2.2 Is the arbitration agreement considered to be independent from the rest of the contract which is set forth?

Yes.¹⁴

2.3. What are the formal requirements (if any) for an enforceable arbitration agreement?

Section 7 of the Act sets out the requirements of a valid arbitration agreement in India. This provision is in line with the UNCITRAL Model Law. The arbitration clause must be contained either in a document signed by the parties, or in an exchange of letters, telefaxes, telegrams or other means of telecommunication through electronic means (emails, SMSs, chats, etc.), or through an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party but not denied by the other.

In addition, the agreement must also satisfy the requirements of enforceability of contracts under the Indian Contract Act, 1872,¹⁵ such as capacity of the parties to contract (age, soundness of mind, etc), free consent, lawful consideration and lawful object of the contract, etc.

An arbitration agreement can cover future disputes, given the use of the words “disputes which have arisen or which may arise” in s. 7(1) of the Act.

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by the said arbitration agreement?

This has been a highly debated and litigated question in India.

In *Chloro Controls*,¹⁶ the Supreme Court had to determine whether non-signatory parties to agreements that constitute a composite transaction could seek to be referred to arbitration. The court held that if the

⁶ *Sasan Power Limited v. North American Coal Corporation India Private Limited*, civil appeal no. 8299 of 2016, available at: <https://sci.gov.in/jonew/judis/43901.pdf>.

⁷ *GMR Energy Limited v. Doosan Power Systems India Private Limited*, CS (Comm) 447 of 2017, Delhi High Court, available at: <https://vlex.in/vid/gmr-energy-limited-vs-696546757>.

⁸ *Union of India v. Hardy Exploration and Production (India) Inc*, AIR 2018 SC 4871; and *Mankastu Impex Private Limited v. Airvisual Limited*, 2020 SCCOnLine SC 301.

⁹ *BGS SGS SOMA JV v. NHPC Ltd.*, 2019 SCCOnLine SC 1585

¹⁰ *Union of India v. Hardy Exploration and Production (India) Inc*, AIR 2018 SC 4871.

¹¹ *Roger Shashoua v. Mukesh Sharma*, [2009] EWHC 957 (Comm).

¹² *Bharat Aluminium Co v. Kaiser Aluminium Technical Service, Inc* (2012) 9 SCC 552.

¹³ *Roger Shashoua v. Mukesh Sharma*, (2017) 14 SCC 722.

¹⁴ Section 7(2) of the Act.

¹⁵ The Indian Contract Act, 1872, available at: <https://indiacode.nic.in/bitstream/123456789/2187/3/A1872-9.pdf>.

pre-requisites under the Act¹⁷ are met, the court can refer non-signatories to the agreement to arbitration. The Supreme Court stated that the non-signatory party has a high burden to show that, in fact and in law, it is claiming under or through a signatory party, as contemplated under the Act. The Supreme Court further noted that the “*discretion of the Court has to be exercised in exceptional, limiting, befitting and cases of necessity and very cautiously*”, since normally only parties to the arbitration agreement can be referred to arbitration.

According to the court, the words *person claiming through or under* a party to an arbitration agreement contained in s. 45 of the Act have to read in together with s. 44 and Articles II(1) and (3) of the NYC, and can mean non-signatories. Specifically, the court noted that:

1. the words “*agreement referred to in section 4*” would include “*an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies..*”, which in turn would mean an “*agreement in writing in respect of defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration.*”
2. there is an inextricable nexus between the scope of the concept of “*legal relationship*” (as incorporated in Article II(1) of the NYC) and the expression “*any person claiming through or under him*” (appearing in s. 8 and s. 45 of the Act) and therefore they need to be read in conjunction. Once they are so read, it will be evident that the expression “*legal relationship*” connotes the relationship of the party with the person claiming through or under him. A person may not be a signatory to an arbitration agreement, but their cause of action may be directly relatable to that contract and thus, s/he may be claiming through or under one of those parties.

Subsequently, the Act was amended via the Arbitration and Conciliation Act, 2015 to bring Section 8 of the Act at par with Section 45 of the Act, stating that the court can refer to arbitration a party to the arbitration agreement, as well as any person claiming through or under that party, unless the court finds that *prima facie* no valid arbitration agreement exists.

Following the amendment of the Act, the apex court reaffirmed the principle established in *Chloro Control* in several recent decisions.¹⁸

2.5. Are there restrictions to arbitrability?

In this context, the Supreme Court in India has noted that in those cases where the subject matter falls exclusively within the domain of public fora, viz. the courts, such disputes would be non-arbitrable and cannot be decided by the Arbitral Tribunal. The justification and rationale given for adjudicating such disputes by the courts, i.e., public fora, and not by Arbitral Tribunals, i.e., a private forum, is detailed as follows.

Additionally, time-barred claims are inarbitrable.¹⁹ This determination is done by the Tribunal.²⁰

2.5.1 Do these restrictions relate to specific subject matters (such as IP, corporate law etc.)?

The well-recognised examples of non-arbitrable disputes in India are as follows:²¹

1. disputes relating to rights and liabilities which give rise to or arise out of criminal offences;

¹⁶ *Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc. & Ors.*, civil appeal no. 7134 of 2012, available at <https://www.casemine.com/judgement/in/5608fbade4b014971114a560>.

¹⁷ Sections 44 and 45 read with Schedule I of the Act.

¹⁸ *Cheran Properties Limited v. Kasturi & Sons Ltd. & Ors.* (Civil Appeal Nos. 10025-10026 of 2017); and *Ameet Lalchand Shah & Ors. v. Rishabh Enterprises and Anr.* [2018 SCC Online SC 487].

¹⁹ *State of Goa v. Praveen Enterprises* (2012) 12 SCC 581; and Section 43 of Act.

²⁰ Section 11 (6A) of the Act.

²¹ *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. & Ors.* (2011) 5 SCC 532; and *A. Ayyaswamy v. A. Paramasivam*, Civil Appeal No. 8245-8246 of 2016, available at <https://www.sci.gov.in/jonew/judis/44116.pdf>.

2. matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody;
3. guardianship matters;
4. insolvency and winding-up matters;
5. testamentary matters (grant of probate, letters of administration and succession certificate);
6. eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes;
7. disputes under lease deeds;²²
8. patent, trademark and copyright;²³ and
9. anti-trust/competition laws.

The reasoning given by the Supreme Court to treat the above matters as non-arbitrable is that they relate to actions in *rem*. A right in *rem* is a right exercisable against the world at large, as contrasted from a right in *personam* which is an interest protected solely against specific individuals. Actions in *personam* refer to actions determining the rights and interests of the parties themselves in the subject-matter of the case, whereas actions in *rem* refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property.

The question of arbitrability of fraud has been highly litigated in India. However, it is now settled that all disputes involving fraud are arbitrable in foreign-seated arbitrations, but serious allegations of fraud are non-arbitrable in India-seated arbitrations.²⁴

2.5.2 Do these restrictions relate to specific persons (i.e., State entities, consumers etc.)

No, such restrictions are applicable to specific persons. In fact, consumer disputes are settled as being arbitrable.²⁵

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

A court seized of a dispute which is the subject of an arbitration agreement must, if the respondent raises an objection prior to filing its first statement on the substance of the dispute, treat the matter as inadmissible and refer the matter to arbitration; unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.²⁶

While the issue is pending before the court, arbitral proceeding may nonetheless be commenced or continued, and an award may be made by the tribunal.²⁷

3.1.1 If the place of the arbitration is inside of the jurisdiction?

The answer in 3.1 above applies equally if the place of arbitration is inside of the jurisdiction. There is no difference.

²² *Himangni Enterprises v. Kamaljeet Singh Ahluwalia*, civil appeal no. 16850 of 2017, available at https://www.sci.gov.in/supremecourt/2017/21033/21033_2017_Judgement_12-Oct-2017.pdf. However, this issue is presently being considered by a larger bench of the Supreme Court.

²³ *Eros International Media Limited v. Telemex Links India Pvt. Ltd. and Ors*, 2016 (6) ARBLR 121 (BOM); and *Mundipharma AG v. Wockhardt Limited*, ILR 1991 Delhi 606.

²⁴ *A. Ayyaswamy v. A. Paramasivam*, Civil Appeal No. 8245-8246 of 2016, available at <https://www.sci.gov.in/jonew/judis/44116.pdf>.

²⁵ *M/s Emaar MGF Land Limited v. Aftab Singh* (Review Petition (C) Nos 2629-2630 of 2018 in Civil Appeal Nos 23512-23513 of 2017).

²⁶ Section 8(1) of the Act.

²⁷ Section 8(3) of the Act.

3.1.1 If the place of the arbitration is outside of the jurisdiction?

The answer in 3.1 above applies equally if the place of arbitration is outside of the jurisdiction. There is no difference. However, the relevant factor is that the court passing the order must have jurisdiction.

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halting or withdrawing litigation proceedings?

Arbitrators rarely pass injunctions prohibiting parties from initiating court proceedings. Thus, the recognition of the same by courts is equally rare.

3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to the anti-suit injunction but not only)

Courts in India will seldom issue anti-suit injunctions to restrain proceedings brought in breach of arbitration clauses. However, provision for grant of interim relief by court is made under the Act.²⁸ Further, the court's assistance can also be sought for the taking of evidence by either the arbitral tribunal or the parties with the approval of the arbitral tribunal.²⁹ The High Court of New Delhi in *Union of India vs. Vodafone Plc and Anr.* laid down the following principles:

1. Courts in India have inherent jurisdiction to grant anti-arbitration injunction;³⁰
2. This jurisdiction is to be exercised only in compelling circumstances where there is no alternate efficacious remedy;
3. An Arbitral Tribunal is competent to decide on its own jurisdiction;
4. Multiple claims under different BITs do not per se give rise to abuse of process; and
5. The Act does not apply to BIT arbitrations.

4. The conduct of proceeding

4.1 Can parties retain outside counsel or be self-represented?

Both are possible. Parties can represent themselves, or they can engage lawyers to act as their authorized representatives. The parties can also retain foreign counsel in an arbitration. In its judgment in *Bar Council of India v. A.K. Balaji and Others*,³¹ the apex court sided with the High Courts of the States of Bombay and Madras, and decided that foreign lawyers can visit India for temporary periods on a "fly in and fly out" basis for the purposes of giving legal advice to their clients in India regarding foreign laws, their own system of law, and on diverse international legal issues.

4.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

An arbitrator may be challenged only if circumstances give rise to justifiable doubts as to his/her impartiality or independence,³² or if s/he becomes *de facto* or *de jure* unable to perform his/her functions.³³ Schedule 5 and Schedule 7 of the Act are based on the IBA Guidelines on Conflict of Interests.

²⁸ Section 9 of the Act.

²⁹ Section 27 of the Act.

³⁰ *Bina Modi and Ors. v. Lalit Modi and Ors.* (03.03.2020 - DELHC) : MANU/DE/0685/2020 holds *MC. Donalds India Private Limited v. Vikram Bakshi* 2016 SCC OnLine Del 3949 *per incuriam* in view of *Kvaerner Cementation India Limited v. Bajranglal Agarwal* (2012) 5 SCC 214 to state that Court may not have vested jurisdiction to injunct arbitrations.

³¹ *Bar Council of India v. A.K. Balaji & Ors.*, (2018) 5 SCC 379.

³² Section 12 of the Act.

³³ Section 14 of the Act.

A failure to comply with the duty to disclose all relevant circumstances as to the arbitrator's impartiality and independence may justify a challenge of the arbitrator. Whether the failure to disclose alone is sufficient to give rise to justifiable doubts depends on the circumstances. If the facts required to be disclosed under the Act fall under any of the categories specified in Schedule 7, the person would be ineligible to be appointed as an arbitrator.³⁴ Whether such facts ought to render him or her ineligible would then depend upon the facts of the case. Non-disclosure may not be the only basis.

Additionally, the courts have held that the independence of arbitrators is of paramount importance and have gone one step ahead to hold invalid clauses granting power to appoint arbitrators unilaterally to one party of the arbitration agreement.³⁵ However, the case of *Central Organization for Railway Electrification* goes on to hold that agreements, where the appointing party gives an option to the other party to choose from a panel of arbitrators, are valid. This has created some level of confusion in respect of a firm position of law on unilateral appointments.

4.3 On what grounds do courts intervene to assist in the Constitution of the Arbitral Tribunal (in case of *ad hoc* arbitration)?

When there is no agreement between the parties on an appointment procedure, the courts may intervene in in following cases:³⁶

- (i) if a party to the arbitration agreement fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; and
- (ii) if the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment.

When there is an appointment procedure agreed by the parties, a party may request the court to appoint an arbitrator in the following cases:

- (i) if a party fails to act as required under the procedure; or
- (ii) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
- (iii) a person, including an institution, fails to perform any function entrusted to him or it under the procedure.

4.4 Do courts have the power to issue interim measures in connection with arbitrations?

Upon request by a party, the courts may grant interim relief to a party before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced. However, once the arbitral tribunal has been constituted, the courts normally do not entertain such request, unless the courts find that the granting of interim relief by arbitral tribunal may not be efficacious.³⁷

4.4.1 If so, are they willing to consider *ex-parte* requests?

Generally, the courts do not issue interim measures in favour of a party on an *ex-parte* request. However, if the party fails to appear before the court even after issuance of notice to that party to appear before the court, *ex-parte* requests may be allowed.

³⁴ Seventh Schedule of the Act.

³⁵ *Perkins Eastman Architects DPC & Anr. vs. HSCC (India) Ltd.* 2019 (6) ArbLR132 (SC); and *Central Organisation For Railways Electrification v. M/s ECI-SPIC-SMO-MCML (JV) A Joint Venture Company* 2019 SCC OnLine SC 1635.

³⁶ Section 11(4) of the Act.

³⁷ Section 9 of the Act.

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

The conduct of the arbitral proceedings in relation to the following is governed by law:³⁸

- (i) equal treatment of parties;
- (ii) determination of rules of procedure;
- (iii) place of arbitration;
- (iv) commencement of arbitral proceedings;
- (v) language;
- (vi) statement of claim and defence;
- (vii) hearings and written proceedings;
- (viii) default of a party;
- (ix) expert appointed by Arbitral Tribunal; and
- (x) court assistance in taking evidence.

However, in the absence of an agreement between the parties, the arbitral tribunal shall conduct the arbitration in such a manner as it considers appropriate.

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

The Act as amended by 2019 Act has now incorporated a provision with respect to confidentiality. The newly added section provides that the arbitrator, arbitral institution and the parties to an arbitration shall maintain the confidentiality of all arbitral proceedings, except for an award where its disclosure is necessary for the purposes of its implementation and enforcement.³⁹

4.5.2 Does it regulate the length of arbitration proceedings?

After the amendment in the Act in 2015, s. 29A was introduced which requires the award to be made within 12 months from the date of arbitral tribunal being constituted. The period may be extended by another 6 months by consent of the parties. If an award is not made within the extended period, the mandate of the arbitrator(s) shall terminate unless the court has, prior to or after the expiry of the period so specified, extended the period.⁴⁰

4.5.3 Does it regulate the place where hearings and/or meetings may be held?

The parties are free to agree on the place of arbitration. In the absence of such agreement, the place of arbitration shall be determined by the arbitral tribunal which shall pay regard to the circumstances of the case, including the suitability of the place for the parties.

The arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for an oral hearing, for hearing witnesses, experts or the parties, for consultation among its members or for inspection of property or documents.

4.5.4 Does it allow for arbitrators to issue interim measures? In the affirmative, under what conditions?

The arbitral tribunal during the arbitral proceedings may issue interim measures and, in that case, it shall have the same power as a court.

There is no provision in the Act which categorizes an interim order as an award (in contrast to the SIAC Arbitration Rules on emergency arbitration, for example).

³⁸ Chapter V of the Act.

³⁹ Section 42 A of the Act

⁴⁰ Section 29 A of the Act.

There are no express provisions laying down the conditions under which interim measures may be granted by an arbitral tribunal, and the grant of such relief depends upon the facts and circumstances of the case.

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence? For example, are there any restrictions to the presentation of testimony by a party employee?

The arbitral tribunal is empowered to determine the admissibility of evidence, to take evidence and to freely assess such evidence.⁴¹ The courts also refuse to look into the manner of appreciation of evidence by the arbitrators in an arbitration.

4.5.6 Does it make it mandatory to hold a hearing?

Unless the parties have agreed that no oral hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings if requested by a party.⁴²

However, if parties agree in writing at any stage either before or at the time of appointment of the arbitral tribunal to have their disputes resolved by fast track procedure under the Act as introduced under the 2015 amendment, the arbitral tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without any oral hearing.⁴³

4.5.7 Does it prescribe principles governing the awarding of interest?

The Act does not provide for any rules on the awarding of interest. Interest may be awarded in an arbitration as per The Interest Act, 1978 or as per the terms of any agreement between the parties.

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

The arbitral tribunal has the discretion to determine the allocation of arbitration costs in an arbitration but shall take the circumstances of the case, in particular the outcome of the proceedings, into consideration. Where it considers it to be appropriate, an arbitral tribunal may also take into account the conduct of the parties.⁴⁴

5. The award

5.1 Can parties waive the requirement for an award to provide reasons?

Parties can waive the requirement to provide reasons for an award.⁴⁵ Further, parties may also agree on the wording of an arbitral award which emanates out of a settlement between the parties.⁴⁶

5.2 Can parties waive the right to seek the annulment of the award?

Section 34 of the Act provides for grounds of annulment of the arbitral award. That provision and Indian law generally are silent on whether parties can waive their right to seek the annulment of the award. However, given the nature of the grounds to annul an award (which are in parity with the UNCITRAL Model Law), it would be extremely tough to argue/establish waiver of the right to seek annulment of the arbitral award, since in the event any of those grounds exist, the entire award would be annulled. It is settled law that a statutory right of a party cannot be waived.

⁴¹ Section 19 (4) of the Act.

⁴² Section 24 of the Act.

⁴³ Section 29B(3)(a) of the Act.

⁴⁴ Section 31A of the Act.

⁴⁵ Section 31(3) (a) of the Act.

⁴⁶ Section 31(3) (b) and Section 30 of the Act.

Notwithstanding the above, parties may waive their right to object to certain categories of non-compliance if objections regarding such non-compliances have not been raised in a timely manner by the party who has knowledge of such non-compliance.⁴⁷

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

An atypical requirement in India is the requirement for stamping for the purposes of the enforcement of awards. The Indian Stamp Act, 1899 provides for stamping of arbitral awards with specific quantum of stamp duties, which varies from state to state in India. Section 35 of the Indian Stamp Act, 1899 provides that an award which is unstamped or is insufficiently stamped is inadmissible for any purpose. However, such deficiency may be rectified on payment of the stamp duty and penalty.

Issues of stamping of an award can be raised at the stage of enforcement of the arbitral award before the court⁴⁸ (s. 36 of the Act), but not at the time of annulment of the award (s. 34 of the Act).

Finally, this stamping requirement does not render foreign awards unenforceable,⁴⁹ but it would result in a procedural defect (rectifiable upon payment of stamp duty) in the filing of an application for enforcement.

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)?

No, arbitral awards are not appealable in India and can only be annulled⁵⁰ or refused to be enforced.⁵¹ Only limited categories of orders are appealable under the Act, for example, orders granting or refusing the grant of interim measure, orders setting aside or refusing to set aside an arbitral award, orders deciding the jurisdiction of an arbitral tribunal, orders accepting jurisdictional challenge before the tribunal, etc.⁵²

5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

- 1) *Enforcement of domestic awards*:⁵³ The procedure for enforcement of a domestic award is given under s. 36 of the Act. The award creditor, after expiry of the time for seeking annulment of the award,⁵⁴ can file for enforcement of the award before the court of competent jurisdiction.⁵⁵ The application should mention all of the important facts, points of reference framed by the arbitral tribunal and the tribunal's determination on those points. The relief granted should be specifically mentioned. The application for enforcement of the award is to be accompanied by either the original award or a duly authenticated copy of it. The award also needs to be adequately stamped as detailed in para 5.3 above. Pertinently, unless specifically granted by the court, there is no automatic stay on the enforcement proceeding before the court, if an application for annulment of the award has been filed.⁵⁶ Further, the application for enforcement of the award should be filed within 12 years⁵⁷ from the date of the award, unless there is a mandatory injunction in which

⁴⁷ Section 4 of the Act.

⁴⁸ *M. Anasuya Devi and Anr v. M. Manik Reddy and Ors.*, civil appeal no. 7940-7942 of 2001.

⁴⁹ *Shriram EPC Limited v. Rioglass Solar SA*, civil appeal no. 9515 of 2018, available at https://www.sci.gov.in/supremecourt/2018/16428/16428_2018_Judgement_13-Sep-2018.pdf

⁵⁰ Section 34 of the Act.

⁵¹ Section 48 of the Act.

⁵² Section 37 of the Act.

⁵³ An award rendered under Part I of the Act, is considered as a domestic award (Sections 2(2) and 2(6) of the Act).

⁵⁴ Under Section 34 (annulment of the award), an application challenging the award must be made within 3 months of the receipt of the award.

⁵⁵ Section 42 of the Act.

⁵⁶ Sections 36(2) and 36(3) of the Act.

⁵⁷ Article 136, Limitation Act, 1963, available at <https://indiacode.nic.in/bitstream/123456789/1565/1/196336.pdf>

case the period of limitation to file for execution is 3 years.⁵⁸ However, there is no period prescribed under Indian law for completion of the enforcement proceeding before the court.

- 2) *Recognition⁵⁹ and enforcement of NYC foreign awards:*⁶⁰ An award passed in a foreign seat which is a signatory to the NYC and recognized by the government of India as a reciprocating convention country. For the enforcement of a foreign award, an application has to be made to the high court of a state with jurisdiction in the matter. The application has to be accompanied by either the original award or a duly authenticated copy of it, the original arbitration agreement or a duly authenticated copy of it, and if the award or agreement is in a foreign language, an authenticated English translation thereof. The time limit for filing for execution is similar to that for domestic awards, as detailed above; however, the computation of said period is interpreted differently by different state high courts in India.⁶¹ There is no period prescribed under Indian law for completion of the enforcement proceeding before the court.

The enforcement of a foreign award maybe refused, if it is proven that: (1) the parties to the agreement were in some incapacity to perform under the law to which they were subjected to or, in the absence of mention of such law, the law of the place of arbitration; or (2) the agreement was invalid under the law to which the parties have subjected it or, in the absence of mention of such law, the law of the place of arbitration; or (3) a fair trial was not conducted by the arbitral tribunal and it failed to adhere to the principle of fair hearing; or (4) the award was partly or wholly beyond the scope of the arbitration agreement; or (5) the composition of the arbitral tribunal and/or the procedure of its appointment was not in accordance with the arbitration agreement or, in the absence of mention of such law, the law of the place of arbitration; or (6) the award has not yet been made binding on the parties or has been set-aside or suspended by a competent authority of the country where the award was made; or (7) if the subject-matter of the dispute is incapable of settlement by arbitration under the laws of India; or (8) the enforcement of the award is contrary to the public policy of India.⁶²

The refusal to enforce a foreign award as being contrary to public policy is a ground which is construed extremely narrowly by the Indian courts.⁶³ An award is said to be in conflict of public policy⁶⁴ if it has been affected by fraud or corruption, or it was in violation of the Act, or it was in contravention with the fundamental policy of Indian law or basic principles of morality or justice.

Furthermore, s. 48 of the Act only provides grounds for the refusal of enforcement of foreign awards but does not permit the court to review the merits of the case.

Thus, after evaluating the above, if the court is satisfied that the foreign award is enforceable, the award shall be deemed to be a decree of the court and executed accordingly.⁶⁵

⁵⁸ Article 135, Limitation Act, 1963.

⁵⁹ Sections 44 and 46 of the Act.

⁶⁰ Sections 47 and 48 of the Act.

⁶¹ Bombay High Court in *Noy Vallesina v. Jindal Drugs Limited*, 2006 (3) ARBLR 510 (Bom); Madras High Court in *Compania Naviera v. Bharat Refineries Ltd.*, AIR 2007 Mad 251; Delhi High Court in *Hindustan Petroleum v. M/s Videocon Industries Ltd.*, 2012 (3) ARBLR 194 (Delhi).

⁶² Section 48 of the Act.

⁶³ *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India (NHAI)*, civil appeal no. 4779 of 2019, available at https://www.sci.gov.in/supremecourt/2017/19190/19190_2017_Judgement_08-May-2019.pdf.

⁶⁴ Section 48 (2) (b) Explanation 1 of the Act.

⁶⁵ Section 49 of the Act.

- 3) *Recognition and enforcement of Geneva Convention foreign awards*:⁶⁶ Similarly, foreign arbitral awards under the Geneva Convention are recognized and enforced in accordance with Section 53 to 60 of the Act and the Second and Third Schedule of the Act.

As a difference between the setting-aside of a domestic award and the refusal to enforce a foreign award (for arbitrations other than international commercial arbitrations), the domestic arbitral award, additionally, maybe set aside if the award is vitiated by patent illegality.⁶⁷ Interpretation of 'patent illegality' has been the subject of various landmark judgments in the field of arbitration. The Supreme Court in *ONGC Ltd. v. Saw Pipes Ltd.*⁶⁸ introduced 'patent illegality' as a sub-ground under the public policy ground available under Section 34 of the Act for the setting aside of awards. In *Associate Builders v. Delhi Development Authority*,⁶⁹ the Supreme Court narrowed down the scope of patent illegality and held that the following would constitute patent illegality:

- (i) Contravention of the substantive law of India;
- (ii) Contravention of the Act itself; and
- (iii) Contravention of Section 28 (3) of the Act which mandates that the arbitral tribunal will decide the case in accordance with the terms of the contract, taking into account the usages and trade applicable to the transaction.

Recently, the Supreme Court in *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India*⁷⁰ further elaborated on and clarified the above points, as follows:

- (i) patent illegality has to appear on the face of award and refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of law;
- (ii) mere contravention of the substantive law by itself would not be a ground available to set aside an arbitral award; however, if an arbitrator gives no reasons for an award and contravenes section 31 (3) of the Act, it would certainly amount to patent illegality;
- (iii) a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and patently illegal. Additionally, a finding based on documents taken behind the back of parties by the arbitrator would also qualify as a decision based on no evidence and would be patently illegal; and
- (iv) if an arbitrator wanders outside of the contract and deals with matters not allotted to him, it would be a jurisdictional error which could be addressed on the ground of patent illegality.

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

No. The mere filing of an application for challenging the award would not automatically stay the execution of the award, unless there is a specific order of stay by the court hearing the challenge to the award.⁷¹

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

Yes, one of the grounds for challenging enforcement of a foreign award is if the award has been annulled at its seat.⁷² However, the discretion vests with the court to accept or reject such a plea for challenging the

⁶⁶ Sections 53 to 60 of the Act.

⁶⁷ Section 34(2A) of the Act.

⁶⁸ *ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 70

⁶⁹ *Associate Builders v. Delhi Development Authority*, 2014 SCC Online SC 937

⁷⁰ *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India*, Civil Appeal No. 4779 of 2019, available at https://sci.gov.in/supremecourt/2017/19190/19190_2017_Judgement_08-May-2019.pdf.

⁷¹ Section 36(3) of the Act.

⁷² Section 48(1)(e) of the Act.

enforcement. Despite the legislation being couched in non-mandatory terms, we are yet to come across a case where the foreign award was annulled at its seat but was enforced by the court.

5.8 Are foreign awards readily enforceable in practice?

The courts in India seldom interfere with the enforcement of foreign awards. In fact, since 2016, the courts have refused to enforce a foreign award in India only in extreme/rare situations.⁷³ The existence of grounds for refusal is not accepted lightly. Further, as detailed above at paragraph 5.5, the refusal to enforce a foreign award as being contrary to public policy is a ground which is extremely narrowly construed by the Indian courts.⁷⁴

Thus, given the pro-arbitration position in India, in practice, foreign awards are usually enforced in a timely manner.

6. Funding arrangements

6.1 Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction? If so, what is the practical and/or legal impact of such restrictions?

Yes, there are certain restrictions to the use of contingency or alternative fee arrangements or third-party funding ("TPF").

Presently in India, contracts of champerty are not *per se* illegal, except in cases where the lawyer representing the claimant is a party to the agreement. However, a lawyer is prohibited from charging contingent fees or having any financial interest in the claim amount.⁷⁵ Indeed, contingency fee agreements by lawyers are expressly barred under Bar Council of India Rules ("BCI Rules"), which govern the conduct of lawyers in India. The BCI Rules prohibit an advocate from stipulating a fee contingent on the results of the litigation or from agreeing to share the proceeds thereof.⁷⁶ The BCI Rules further prohibit practices akin to champerty or maintenance, under which an advocate is prohibited from buying or trafficking in or stipulating or agreeing to receive any share or interest in an actionable claim.⁷⁷

In comparison, there is no regulatory framework for TPF in India at present. It is neither expressly permitted nor prohibited under Indian law. Some states expressly allow third parties to cover costs for a party in a civil suit.⁷⁸ Moreover, Indian courts have on various occasions ruled that the common law doctrines of champerty and maintenance are not strictly applicable to India.⁷⁹ Only those third-party financing agreements to which the advocate is a party or which are extortionate and unconscionable and hence contrary to public policy are held to be void.⁸⁰ This implies that, although there are no express regulations governing TPF in India, it is perfectly legal to enter into a TPF agreement as long as it is not extortionate or unconscionable. However, the test related to the "*extortionate and unconscionable*" nature of the funding agreement still leaves the question open for judicial scrutiny.⁸¹ Furthermore, as the global economic centre of gravity and cross border trade move towards Asia, and India more particularly, there is

⁷³ *Campos Brothers v. Matru Bhumi Supply Chain Pvt. Ltd. & Ors.*, O.M.P (EFA) (COMM.) 1/2017

⁷⁴ *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India (NHAI)*, civil appeal no. 4779 of 2019, available at https://www.sci.gov.in/supremecourt/2017/19190/19190_2017_Judgement_08-May-2019.pdf.

⁷⁵ *Bar Council of India vs. A.K Balaji & Ors.*, (2018) 5 SCC 379.

⁷⁶ Rule 20 in Part VI, Chapter II of the BCI Rules.

⁷⁷ Rule 21 in Part VI, Chapter II of the BCI Rules.

⁷⁸ Order XXV Rule 1, Code of Civil Procedure, 1908 (as amended by Maharashtra, Gujarat, Madhya Pradesh and Uttar Pradesh).

⁷⁹ In *Ram Coomarr Coondoo v. Chunder Canto Mookerjee*, 1876 SCC OnLine PC 19.

⁸⁰ This arises out of Section 23 of the Indian Contract Act, 1872.

⁸¹ See *Suganchand v. Balchand*; 1956 SCC OnLine Raj 127 ; see also, *Nuthaki Veukataswami v. Katta Nagireddy*, 1962 SCC OnLine AP 100.

a consequential rise in the disputes from the region. Resultantly, in view of the costs involved in arbitration, Indian parties are now willing and open to have their dispute resolution funded through TPF.

7. Is there likely to be any significant reform of the arbitration law in the near future?

The Act has been recently amended in August 2019 by virtue of the 2019 Act. The key changes include: the change in the procedure of appointing arbitrators by arbitral institutions designated by the Supreme Court or High Courts of the states; and the constitution of an arbitral council of India for accreditation of arbitrators. Another key change is that the statements of claim and defence shall be completed within a period of 6 months. The proposed amendment also provides for maintaining confidentiality of the proceedings other than the award, and also protect, the arbitrator(s) from any suit or other legal proceedings for any action or omission done in good faith in the course of the arbitration proceedings.

Finally, the New Delhi International Arbitration Centre Bill, 2019 has been passed by the Parliament and received the assent of the President. It came into effect on 26 July 2019, and provides for the incorporation of the New Delhi International Arbitration Centre (“**NDIAC**”) for creating an autonomous regime for institutionalised arbitration.