# Arbitration in India

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Practice notes | **Maintained** | India

This note describes the most significant features of the arbitration process in India, including the law regarding arbitration agreements, the duties and powers of the tribunal, and the conduct of arbitration proceedings. It also considers the role of the Indian courts, including in relation to challenges to, and the recognition and enforcement of, arbitral awards in India.

## Scope of this note

This note considers the framework for domestic and international arbitrations in India, as well as foreign arbitrations, as set out in the *Arbitration and Conciliation Act, 1996* (ACA 1996) and the case law of Indian courts. It describes the most significant features of national law on the validity of arbitration agreements, requirements imposed on the arbitral process in India, powers of the tribunal and the role of the state courts.

The note also briefly addresses the enforcement of arbitral awards in India. For a more detailed discussion of this topic, see *Practice note, Enforcing arbitration awards in India: overview*.

In recent years, India has positioned itself as an emerging destination for arbitration through robust pro-arbitration jurisprudence and amendments to the ACA 1996. This law governs and creates regimes for both domestic arbitrations and international commercial arbitrations (ICA), which refer to arbitrations where at least one of the parties is an individual, who is a national or habitual resident of a country other than India, or a body corporate incorporated outside India.

This trend is reflected in the steadily growing caseload of major Indian arbitral institutions. For instance, the caseload of the Delhi International Arbitration Centre (DIAC) rose from just 341 cases in 2012 to 7,358 cases in 2023 (see *DIAC: Statistics: Progressive cases*), while new cases registered with the Mumbai Centre for International Arbitration (MCIA) increased nearly sevenfold from 2018 (five cases) to 2024 (34 cases) (see *MCIA: Annual Report (2024)*). Indian parties were the third largest foreign users of Singapore International Arbitration Centre (SIAC), while, apart from Singaporean arbitrators, arbitrators from the UK, India and Australia were most common (see *SIAC: Annual Report 2024*).

In 2020, the World Bank reported that the quality of judicial processes relating to alternative dispute resolution (ADR) in Mumbai and Delhi scored a 2.5, on a scale between 0 and 3 (see *World Bank Group, Economy Profile of India: Doing Business in India 2020*, at 103).

Some key reasons for this development include:

- India's adoption of the UNCITRAL Model Law.
- India's focus on reform in arbitration. Since the ACA 1996's enactment, there have been five detailed reports aimed at reforming arbitration in India by the Law Commission and other committees formed especially for that purpose by the government. In 2023, the Indian government proposed a major reform of the existing arbitration regime under the ACA 1996, with the aim of making India a global hub for arbitration. It formed an Expert Committee to examine the

 

existing arbitration regime and to recommend reforms (see *Legal update, Indian government proposes major reform of Arbitration and Conciliation Act 1996 to make India global arbitration hub*). Following the Expert Committee's report in 2024, the government introduced a draft bill to amend the ACA 1996 to, among other things, introduce fixed timelines for the completion of arbitration proceedings, reduce judicial interference in the arbitral process and support virtual hearings (see *Legal update, Strengthening India's arbitration framework: government invites comments on draft Bill to amend Arbitration and Conciliation Act 1996*).

- The legislature's focus on expediting timelines for arbitration and arbitration-related litigation. For instance, the ACA 1996 imposes strict timelines for the parties to file challenges to awards (*section 34(3), ACA 1996*). It also limits timelines within which an award must be passed (*section 29A(1), ACA 1996*).
- The pro-arbitration stance adopted by Indian courts in decisions that seek to give effect to arbitration agreements and to enforce the resulting awards.

## Sources of Indian arbitration law

### Arbitration and Conciliation Act, 1996

The *ACA 1996* is based on the original 1985 version of the UNCITRAL Model Law. The ACA 1996 is a self-contained code (*Fuerst Day Lawson Ltd and others v Jindal Exports Ltd and others (2011) 8 SCC 333*) and is the primary law governing arbitration and related proceedings in India. It has been amended a number of times in recent years, with each set of amendments aimed at making the statute more arbitration-friendly, including by reducing the scope for interference by courts and imposing strict timelines for the conduct of domestic arbitrations:

- **2015 amendments.** The *Arbitration and Conciliation (Amendment) Act, 2015* (ACAA 2015) (discussed in *Legal update, India welcomes new arbitration law and model BIT*) introduced various pro-arbitration changes, such as fast-track procedures for arbitration (*section 29B, ACAA 2015*) and strict time limits for passing awards (*section 29A, ACAA 2015*). The ACAA 2015 also minimised judicial interference by placing restrictions on courts' powers to grant interim relief after an arbitral tribunal has been constituted (*section 9(3), ACAA 2015)* and reducing the scope of court review when deciding applications to refer parties to arbitration (*section 8, ACAA 2015)*.
- **2019 amendments.** The *Arbitration and Conciliation (Amendment) Act, 2019* (ACAA 2019) (discussed in *Legal update, India introduces key amendments to Arbitration and Conciliation Act 1996*) was a significant step forward in promoting institutional arbitration in India, since it defined and recognised arbitral institutions, while empowering the Supreme and High Courts to designate institutions or panels of arbitrators to act and discharge the functions of an arbitral institution (*sections 11(3A) and 43A, ACAA 2019*). The ACAA 2019 also introduced timelines for filing the first round of arbitral pleadings (that is, statements of claim and defence) (*section 23(4), ACAA 2019*), limited the scope of inquiry for setting aside awards (*section 34(2)(a), ACAA 2019*) and established the principle of confidentiality of arbitral proceedings (*section 42A, ACAA 2019*). It also provided immunity to arbitrators by preventing any suits or legal proceedings from being filed against arbitrators that have acted in good faith under the ACA 1996 (*section 42B, ACAA 2019*). The changes became effective on 30 August 2019.
- **2021 amendments.** The most recent amendments came in 2021 with the *Arbitration and Conciliation (Amendment) Act, 2021* (ACAA 2021) (discussed in *Legal update, Indian Arbitration Amendment Ordinance 2020 comes into force with immediate effect*), which amended the ACA 1996 in the following significant ways:

 

- courts may automatically stay the enforcement of an award rendered in an Indian-seated arbitration where there is clear evidence that it was influenced by fraud or corruption. This was given retrospective effect from 23 October 2015; and
- the Eighth Schedule, which provided for an arbitrator's qualifications, experience and other norms, was repealed. Therefore, in practical terms, parties were given the freedom to appoint foreign arbitrators in India-seated arbitrations.

**Pending reforms**

In 2024, the Indian government invited public comments on the draft Arbitration and Conciliation Bill, 2024 (see *Legal update, Strengthening India's arbitration framework: government invites comments on draft Bill to amend Arbitration and Conciliation Act 1996*). This bill proposes dynamic changes to the ACA 1996 aimed at expediting arbitration, reducing court intervention and promoting institutional arbitration. Key among these changes is specifically providing for a "seat" of arbitration (which is presently absent from current law, as the ACA 1996 only refers to "place" of arbitration), disallowing parties from seeking interim relief from courts during the pendency of arbitration and prescribing a protocol on enforcing and challenging emergency arbitrator awards. The bill also proposes the introduction of Appellate Arbitral Tribunals, which would preside over appeals against arbitral awards (in effect, doing the work of a court seised of an application under section 34 of the ACA 1996).

Further, changes to India’s bilateral investment treaty regime are also under consideration. In her speech on the Union Budget for the year 2025-26, India’s Finance Minister outlined that India intends to revamp its Model Bilateral Investment Treaty (Model BIT) to make it more investor-friendly and encourage sustained foreign investment (see *Speech of Nirmala Sitaraman, Minister of Finance, Union Budget 2025-26 (1 February 2025)*).

### Multilateral conventions

India ratified the New York Convention in 1960 and adopted it in Part II, Chapter I of the *ACA 1996*. The New York Convention applies to the enforcement of foreign awards in India, where the award to be enforced:

- Was rendered in an arbitration seated in a state that is both party to the New York Convention and has been specifically notified by the Central Government for the purpose of the New York Convention.
- Deals with differences that arise out of a legal relationship considered "commercial" under Indian law. Commercial disputes, as defined under the *Commercial Courts Act, 2015* may, therefore, help shed light on the meaning of "commercial relationship".

See *New York Convention enforcement table: status*.

Sections 53 to 59 of the ACA 1996 also provide for enforcing awards under the Geneva Convention. However, by virtue of article VII(2) of the New York Convention, under which the Geneva Convention ceases to have effect on contracting states to the New York Convention, the Geneva Convention's application in India has reduced considerably.

## Key institutions

Historically, there was a preference for ad hoc arbitration (47%) over institutional arbitration (40%) in India (*PricewaterhouseCoopers, Corporate Attitudes & Practices towards Arbitration in India (2013)*). A 2017 report showed these statistics remaining relatively stable (*Herbert Smith Freehills, Arbitration in India: Dispute Resolution in the world's largest*

 

*democracy (2017)*). The main reasons for this, at least until recently, were the lack of reliable arbitral institutions in India and the preference of government entities, which are the most common counterparties in arbitrations, for ad hoc arbitration.

However, more recent statistics suggest a shift in preferences, with 52% of respondents to a 2024 survey expressing a preference for institutional arbitration, compared to 40% for ad hoc arbitration, with 8% expressing no preference (see *Khaitan & Co, Current Trends in Domestic Arbitration in India (2024)* (2024 Trends Report)).

Historically, Indian parties that sought to avail themselves of the structural benefits and neutrality of arbitral institutions (especially in cross-border commercial transactions) routinely opted for the SIAC in their arbitration agreements (for resources on SIAC arbitration, see *SIAC arbitration toolkit*). However, there has been a tangible shift toward opting for arbitral institutions, even for domestic arbitrations, since the establishment in 2016 of the MCIA and other international arbitral institutions, including the DIAC and the International Arbitration and Mediation Centre (IAMC). Of these, 45% of the users prefer MCIA and 32% prefer DIAC, as noted in the 2024 Trends Report.

The MCIA has become one of the leading Indian arbitral institutions, reporting a total value of case filings exceeding INR3 billion. According to the *MCIA Annual Report 2024*, 83% of all new matters in 2024 involved domestic parties only, while 17% involved at least one foreign party. Further, in 2017, the government of Maharashtra state launched a policy prescribing arbitration under the *MCIA Rules 2016* as the preferred mode of dispute resolution in all government contracts having a value exceeding INR50 million (about USD649,845).

The *DIAC*, established in 2009, is the oldest "High Court annexed arbitral institution" in India. As at 31 December 2023, there were 9,707 listed cases pending before the DIAC, while 8,153 hearings had taken place (see *DIAC, Statistics: Details of Cases Listed vis-a-vis Hearings*).

The IAMC was established in Hyderabad in 2019 and has reported an aggregate value of disputes amounting to about USD400 million (see *IAMC, Quarterly Report: December 2021 - March 2022*).

## Arbitration agreements

### Formal and substantive requirements

The *ACA 1996* defines an arbitration agreement as an "agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not" (*section 7(1), ACA 1996*). An arbitration agreement can be concluded either in the form of a clause contained in a larger contract or as a separate arbitration agreement (*section 7(2)*).

An arbitration agreement must be in writing (*section 7(3), ACA 1996*), and an arbitration agreement is considered to be in writing if it is contained in either:

- A document signed by the parties.
- An exchange of correspondence or communication (including by electronic means) between the parties, which records the agreement.
- Any exchange of statements of claim and defence in which the existence of the arbitration agreement is alleged by one party and not denied by the other.

(*Section 7(4), ACA 1996*.)

 

An arbitration agreement can also be incorporated by reference where a contract refers to a document containing an arbitration clause, provided that the document referred to is in writing and the reference is such as to make the arbitration clause in the document a part of the contract (*section 7(5)*). In *MR Engineers & Contractors Ltd v Som Datt Builders Ltd, (2009) 7 SCC 696* (*MR Engineers*), the Supreme Court gave guidance on the application of section 7(5) and clarified that an arbitration clause in another document may be incorporated into a contract by reference where the following are satisfied:

- The contract contains a clear reference to the documents containing the arbitration clause.
- The reference to the other document clearly indicates the parties' intention to incorporate the arbitration clause into the contract.
- The arbitration clause is capable of application to the disputes under the contract (in other words, the arbitration clause is not incompatible with any term of the contract into which it is purportedly incorporated by reference).

*MR Engineers* further held that, where parties to a contract make general reference to another contract, the general reference does not have the effect of incorporating the arbitration clause from the referred document into the contract. An arbitration clause in another contract can be incorporated only by way of a "specific reference" to the arbitration clause. However, where the contract provides a standard form of terms and conditions of an independent trade association or professional institute, these standard terms, including any provision for arbitration, is deemed incorporated by reference.

Later, in *Inox Wind Ltd v Thermocables Ltd, 2018 2 SCC 519* (*Inox*), the Supreme Court went further and stated that, while a general reference to an earlier contract is insufficient, where the reference is to a standard contract, a general reference is enough to incorporate the arbitration clause. *Inox* also held that, along with standard contracts of trade associations, a general reference to a standard form contract of one party would also be sufficient.

The Supreme Court followed the principles it laid down in *MR Engineers* in *NBCC (India) Ltd v Zillion Infraprojects (P) Ltd (2024) 7 SCC 174*. The Court held that, where a contract makes a reference to the terms and conditions of another contract, an arbitration clause contained in the latter would only be applicable to the former where there is a specific reference to the arbitration clause. It observed that in *Inox*, the contract was issued while categorically stating that the performance would be in accordance with the terms mentioned in the contract, including the standard terms and conditions, which were attached along with the contract. Accordingly, the Court distinguished *Inox*, noting that it dealt with a "single contract and not a two-contract case". Further, it drew a distinction between "reference" and "incorporation" along these lines, and noted that a general reference to another contract would not have the effect of incorporating an arbitration clause contained in it.

For guidance on drafting an ad hoc arbitration clause, providing for an Indian seat, see *Standard clause, India: ad hoc arbitration clause*.

**Arbitration and stamping**

Under Indian law, all agreements are subject to stamp duty under the *Indian Stamp Act, 1899* (Stamp Act). The specific duty payable and whether arbitration agreements are subject to the Stamp Act differs from one state to another.

In NN Global Mercantile Private Limited v Indo Unique Flame Ltd (2023) 7 SCC 1 (*NN Global 5 Bench*), a five-judge bench of the Supreme Court had held that an unstamped instrument containing an arbitration agreement is void, unenforceable and cannot be acted upon (see *Legal update, Indian Supreme Court lays down the law on the invalidity of an unstamped arbitration agreement*). However, the case was referred to a larger, seven-judge bench of the Supreme Court, which on 13 December 2023, reconsidered the issue and set aside the decision in *NN Global 5 Bench* (*2023 SCC OnLine SC 1666*). The enlarged bench held that an arbitration agreement in an unstamped, or insufficiently stamped, contract would be enforceable because

 

inadequate stamping is a curable defect. The Supreme Court further held that any objections in relation to the stamping of an agreement, and the consequent invalidity of the arbitration agreement in the host agreement, would fall within the arbitral tribunal's ambit. Therefore, while an agreement or arbitration agreement being insufficiently stamped or unstamped would not prevent an arbitration from commencing, the parties should ensure that the requisite stamp duty is paid before the trial stage of the arbitration begins (see *Legal update, Indian Supreme Court upholds validity of unstamped arbitration agreement*).

**Disputes arising from a "defined legal relationship"**

An arbitration agreement is an agreement to submit to arbitration disputes arising in respect of a "defined legal relationship, whether contractual or not" (*section 7(1), ACA 1996*).

While the ACA 1996 does not define the term "defined legal relationship", the Supreme Court in *Vidya Dolia v Durga Trading Corp, (2021) 2 SCC 1* (*Vidya Drolia*) defined it to mean a relationship that gives rise to obligations and duties, thereby conferring a right on a party (see *Legal update, Landlord and tenant disputes are arbitrable (Supreme Court of India)*). In *Cox and Kings Ltd v SAP India Pvt Ltd, (2024) 4 SCC 1* (*Cox and Kings*), the Supreme Court considered the applicability of the term in the context of non-contractual relationships. While relying on *Vidya Drolia*, the Supreme Court held that:

> ""in case of a non-contractual legal relationship, the cause of action arises in tort, restitution, breach of statutory duty, or some other non-contractual cause of action. Thus, the legislative intent underlying Section 7 suggests that any legal relationship, including relationships where there is no contract between the persons or entities, but whose actions or conduct has given rise to a relationship, could form a subject matter of an arbitration agreement under Section 7." (*Cox and Kings*, paragraph 70.)

See *Legal update, "Group of companies doctrine" upheld: non-signatories can also be made parties to arbitral proceedings (Supreme Court of India)*.

## Governing law of the arbitration agreement

India recognises the principle of separability (see *Separability*), meaning that an arbitration agreement forming part of a larger (or "matrix") contract is treated as a separate and independent agreement. Accordingly, the arbitration agreement can be subject to its own governing law, meaning that three legal systems are of relevance to arbitrations in India:

- **The proper law governing the contract between parties.** This is the legal system governing the matrix contract, which creates the substantive rights and obligations of the parties under which the dispute has arisen.
- **The law governing the arbitration agreement.** This is the legal system governing the rights and obligations of the parties arising out of their agreement to arbitrate. This law governs the validity of the arbitration agreement and the jurisdiction of the tribunal. The law governing the arbitration agreement can be different from the proper law of the contract.
- **The law of the seat.** The law of the seat, which is the location that parties have selected as the legal place of arbitration, is often referred to as the curial law of an arbitration (or *lex arbtri*) and determines the procedural framework of the arbitration and, particularly, which courts exercise supervisory jurisdiction over the arbitration and resultant award.

Where the contract does not expressly provide which law is to govern the arbitration agreement, Indian courts will extend the governing law of the contract to the arbitration agreement, unless the parties have expressed a contrary intention (*National Thermal Power Corporation v Singer Company (1992) 3 SCC 551* and *Indtel Technical Services Pvt Ltd v WS Atkins Rail Ltd*

 

*(2008) 10 SCC 308*). This is different from many jurisdictions, which, in the absence of express party agreement, deem the law of the seat to be the governing law of the arbitration agreement.

In *Disortho SAS v Meril Life Sciences (P) Ltd, 2025 SCC OnLine SC 570* (*Disortho*), the Supreme Court applied the three-part test laid down by the English Court of Appeal in *Sulamerica Cia Nacional de Seguros SA v Enesa Engenharia SA [2012] EWCA Civ 638* (*Sulamerica*, discussed in *Legal update, Sulamerica: full update on Court of Appeal decision on determining law of arbitration agreement*) to determine the law governing the arbitration agreement. The three-stage enquiry laid down in *Sulamerica* involved an assessment, which should be undertaken separately and sequentially, of:

- The express choice of the parties.
- The implied choice of the parties.
- The closest and most real connection.

In *Disortho*, the agreement between the parties stipulated that the law governing their agreement would be Indian law and that all matters pertaining to, or arising out of, the agreement would be subject to the jurisdiction of the courts in Gujarat, India. The agreement also provided that disputes between the parties may be referred to arbitration, which would be conducted at the Arbitration and Conciliation Centre at the Chambers of Commerce in Bogota.

In applying the *Sulamerica* test, the Supreme Court held that, first, the parties had not made an express choice of governing law for the arbitration agreement and, secondly, the parties had impliedly agreed that Indian law would govern the arbitration agreement. The Court noted that it would be reasonable to assume that the parties had been aware of the clause that designated Indian law as the law of the agreement and the clause that provided any arbitration would be held in Bogota. Accordingly, the Court held that the intention of the parties was to designate Bogota as the venue of the arbitration and for the courts of Gujarat to retain exclusive jurisdiction over the disputes. The Supreme Court held that there was a strong presumption that the law of the contract would govern the arbitration agreement and the mere choice of the ‘place’ of arbitration would not be sufficient to override that presumption. Accordingly, the Court concluded that the parties had impliedly agreed that Indian law, as the *lex contractus*, would govern the arbitration agreement.

For further discussion of applicable laws in international arbitration, see *Video, International arbitration (2): applicable laws* and *Practice note, Which laws apply in international arbitration?*.

## Separability

The doctrine of separability of an arbitration agreement is recognised under the *ACA 1996*, which provides that "an arbitration clause which forms a part of a contract shall be treated as an agreement independent of the other terms of the contract" (*section 16(1)(a), ACA 1996*). Even where the matrix contract is declared null and void, an arbitration agreement contained within that contract is not *ipso jure* invalidated (*section 16(1)(b)* and *Today Homes & Infrastructure (P) Ltd v Ludhiana Improvement Trust, (2014) 5 SCC 68*). Therefore, when the performance of a contract comes to an end due to repudiation, frustration or breach of contract, the arbitration agreement survives for the purpose of resolution of the disputes arising under the contract (*National Agricultural Coop. Marketing Federation India Ltd v Gains Trading Ltd (2007) 5 SCC 692*).

The only exception to the doctrine of separability recognised in India is where allegations are made that an agreement was procured by fraud. Where they are upheld, these allegations can invalidate even the arbitration agreement within the contract (*India Household and Healthcare v LG Household and Healthcare, (2007) SCC OnLine SC 324; Uttarakhand Purv Sainik Kalyan Nigam Ltd. v Northern Coal Field Ltd., (2020) 2 SCC 455* (*Uttarakhand v Northern Coal*)). In *Uttarakhand v Northern Coal*, the Supreme Court clarified that an arbitration agreement is only enforceable in law if it is not tainted by fraud (see *Legal update, Appointment of arbitrator cannot be rejected on limitation grounds (Indian Supreme Court)*).

 

For further discussion of the doctrine of separability in international arbitration, see *Practice note, Separability of arbitration agreements in international arbitration*.

## Kompetenz-kompetenz

The principle of kompetenz-kompetenz is statutorily recognised under section 16(1) of the *ACA 1996*, which is modelled on article 16 of the UNCITRAL Model Law and provides that the "arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement".

In *Uttarakhand v Northern Coal*, the Supreme Court held that, when considering an application for the appointment of an arbitrator under section 11, the court is limited to determining the existence of the arbitration agreement (*section 11(6-A), ACA 1996*), meaning that "all other preliminary or threshold issues are left to be decided by the arbitrator under Section 16, which enshrines the *kompetenz-kompetenz* principle". Therefore, at the stage of appointment of the tribunal or a reference to arbitration (see *Appointment* and *Commencing arbitral proceedings*), the court's jurisdiction is limited, and the arbitrator is vested with the power to determine its own jurisdiction, subject to the possibility of a later challenge to that decision. If the tribunal rules against a challenge and holds that it has jurisdiction, it must proceed with the arbitral proceedings and issue an award (*section 16(5), ACA 1996*).

For further discussion of the principle of *kompetenz-kompetenz* in international arbitration, see *Practice note, Jurisdictional issues in international arbitration: Kompetenz-kompetenz*.

**Anti-arbitration injunctions**

There has been significant controversy around the utility of anti-arbitration injunctions in India and particularly whether these interfere with the principle of *kompetenz-kompetenz* (see *Kompetenz-kompetenz*). In *Bina Modi v Lalit Modi (2020 SCC OnLine Del 1678 (DB))*, the Delhi High Court followed the Supreme Court's decision in *Kvaerner Cementation India Ltd v Bajranglal Agarwal ((2012) 5 SCC 214)* and held that courts cannot grant applications for anti-arbitration injunctions, as the tribunal has the power to rule on its own jurisdiction. However, later in the same year, the Delhi High Court, in *Spentex Industries Ltd v Quinn Emmanuel Urquhart & Sullivan LLP (2020 SCC OnLine Del 2484)* (see *Legal update, Anti-arbitration injunction refused: relationship between foreign law firm and Indian client is commercial in nature (Delhi High Court)*), affirmed the power to grant anti-arbitration injunctions, even against a foreign seated arbitration, though the High Court stated that courts must be mindful and cautious while granting this remedy, as did the Calcutta High Court in *Balasore Alloys v Medima LLC, 2020 SCC OnLine Cal 1699*.

In *Techfab International (P) Ltd v Midima Holdings Ltd, 2024 SCC OnLine Del 699*, the Delhi High Court issued an anti-arbitration injunction against an arbitration being conducted at the Asian International Arbitration Centre in Kuala Lumpur. The arbitration clause in the agreement between the parties provided that the seat of the arbitration would be India or "any other UNCITRAL following countries to be decided mutually". The Court noted that there had been no agreement between the parties for the appointment of an arbitrator in any jurisdiction outside of India and held that the appointment of the arbitral tribunal was not in accordance with the procedure agreed to by the parties. Accordingly, the defendant was restrained from proceeding further with the arbitration proceedings.

## Jurisdictional challenges

An arbitral tribunal is competent to rule on a challenge to its jurisdiction (*section 16(1), ACA 1996*).

 

In *Indian Farmers Fertilizer Cooperative Limited v M/S Bhadra Products, (2018) 2 SCC 534*, the Supreme Court clarified that the term "jurisdiction" relates to three issues:

- The existence of a valid arbitration agreement.
- Whether the arbitral tribunal has been properly constituted, that is, whether the appointment of the arbitrators was in accordance with parties' agreement or applicable laws.
- Whether the matters submitted to the arbitration are within the scope of the arbitration agreement and whether the subject-matter of the dispute is arbitrable.

A party can challenge the jurisdiction of the arbitral tribunal either by objecting that the tribunal lacks jurisdiction on the basis of one or more of above grounds (*section 16(2), ACA 1996*) or by alleging that the tribunal has exceeded its jurisdiction or acted beyond the scope of its authority (*section 16(3), ACA 1996*).

A challenge to the tribunal's jurisdiction cannot be raised later than the submission of the statement of defence (*section 16(2), ACA 1996*). However, a party is not prevented from challenging jurisdiction simply because it appointed, or participated in the appointment of, an arbitrator. Similarly, an objection that the tribunal is exceeding its authority must be raised as soon as the matter alleged to be beyond the scope of the tribunal's authority is raised in the proceedings (*section 16(3)*). However, the arbitral tribunal can allow a delayed challenge under either section 16(2) or (3) to proceed if it considers that the delay was justified (*section 16(4)*).

Where the tribunal rejects a challenge and upholds its jurisdiction, it must proceed with the arbitral proceedings and render an arbitral award (*section 16(5)*). In line with the legislature's intent of limited judicial interference with a tribunal's discretion, a party cannot directly challenge a decision upholding jurisdiction. Instead, the aggrieved party must wait for the final award and may, at that stage, apply to set aside the final award on the ground that the tribunal lacked jurisdiction or exceeded the scope of its authority under section 34 of the ACA 1996 (*section 16(6)*).

However, notwithstanding the restriction on the right to appeal, in *M/S Deep Industries Ltd v Oil and Natural Gas Corporation ((2020) 15 SCC 706)*, the Supreme Court held that tribunal decisions upholding jurisdiction can be challenged before the High Courts in their writ jurisdiction under limited circumstances, that is, where the tribunal patently lacks inherent jurisdiction (see also *Navayuga Engineering Company v Bangalore Metro Rail Corporation Ltd (Civil Appeal Nos 1098-1099 of 2021)*, discussed in *Legal update, High Court interference in arbitration limited to exceptional cases (Supreme Court of India)*). In a later judgment, the Supreme Court further clarified that judicial interference should only be allowed in exceptional circumstances, where a party is either left remediless under the statute or one of the parties has shown clear bad faith (*Bhaven Construction v Executive Engineer, Sardar Sarovar Narmada Nigam Ltd and another (2022) 1 SCC 75*). Later judgments have emphasised the limited circumstances in which high courts can exercise writ jurisdiction against tribunals' orders rejecting challenges under sections 16(2) or (3) of the ACA 1996 (see, for example, the Delhi High Court's decision in *Home & Soul (P) Ltd v TV Today Network Ltd. (2024 SCC OnLine Del 7252)*.

On the other hand, where a tribunal accepts a challenge and rules that it lacks jurisdiction or has exceeded its authority under either section 16(2) or (3), the decision can be challenged immediately before the relevant court (*section 37(2), ACA 1996*).

## Arbitrability

In *Booz Allen Hamilton Inc v SBI Home Finance Ltd and others, 2011 (5) SCC 532* (*Booz Allen*), the Supreme Court held that arbitrability takes three forms:

 

- **Scope of agreement arbitrability.** Whether the dispute falls within the scope of the parties' arbitration agreement. Given that arbitration is a creature of contract, parties can, by contract, exclude certain disputes from arbitration. Therefore, any dispute that is not covered by the arbitration agreement is not arbitrable.
- **Scope of reference arbitrability.** Whether the dispute is covered by the scope of the parties' reference to arbitration. A dispute, notwithstanding that it is arbitrable by subject-matter or under the arbitration agreement, may still not be arbitrable if it does not fall within the scope of the particular submission to arbitration. Therefore, if the parties have not included a particular set of disputes within their reference to arbitration, those disputes are not arbitrable.
- **Subject-matter arbitrability.** Whether the type or subject matter of the dispute can be resolved by arbitration.

As to subject-matter arbitrability, the Supreme Court in *Vidya Drolia* set out a four-pronged test to determine arbitrability (Drolia Test). In an Indian-seated arbitration, a dispute is non-arbitrable where it:

- Relates to actions *in rem*, which do not pertain to subordinate rights *in personam*.
- Would have an *erga omnes* effect, that is, disputes that affect the rights and liabilities of third parties, who are not bound by the arbitration agreement.
- Concerns the sovereign functions of the state.
- Is non-arbitrable either expressly or by necessary implication under a specific mandatory statute by virtue of jurisdiction being conferred on a particular forum or court by the statute.

The Supreme Court also listed the classes of disputes that are not arbitrable, including guardianship, insolvency, matrimonial disputes, criminal offences and testamentary matters.

For further discussion, see *Practice note, Arbitrability in international arbitration*.

**Evolution of the law on subject matter arbitrability**

The Drolia Test was developed from the Supreme Court's decision in *Booz Allen*, which provided an illustrative list of non-arbitrable disputes. These included matters concerning insolvency, succession, guardianship, matrimonial issues and criminal cases. After *Booz Allen*, a series of decisions have further developed the law on subject-matter arbitrability

Therefore, serious allegations of fraud are not arbitrable in India, but allegations of fraud simpliciter can be referred to arbitration (*A Ayyasamy v A Paramasivam and others, (2016) 10 SCC 386*). In other words, the seriousness of the fraud alleged determines whether the dispute is arbitrable under Indian law. In *Rashid Raza v Sadaf Akhtar 2019 SCC OnLine SC 1170*, the Supreme Court set out a test to determine the seriousness of fraud based on whether the alleged fraud permeates the entire contract and the arbitration agreement, rendering it void, or relates only to the parties' internal affairs, having no implication in the public domain.

Similarly, in *Vimal Kishor Shah v Jayesh Dinesh Shah (2016) 8 SCC 788*, the Supreme Court held that trust matters, including those pertaining to trusts, trustees and beneficiaries, arising out of the *Indian Trusts Act, 1882*, are not arbitrable.

**Arbitrability of disputes pertaining to shareholder disputes**

Shareholder disputes of a contractual nature, pertaining to rights *in personam*, are arbitrable under Indian law. However, the arbitrability of oppression and mismanagement (O&M) disputes is a frequently contested question. Under the *Companies Act, 2013* (CA 2013), the National Company Law Tribunal (NCLT) has exclusive jurisdiction to decide O&M disputes (*sections 241, 242 and 430, CA 2013*). However, disputes that seek purely contractual remedies or those that are "dressed up" O&M

 

petitions (in other words, petitions that, in reality, seek merely contractual relief) are arbitrable. In *Rakesh Malhotra v Rajinder Kumar Malhotra, 2014 SCC OnLine Bom 1146*, the Bombay High Court, while deciding a dispute under the provisions of the (now repealed) Companies Act, 1956 (that corresponded to sections 241, 242 and 244 of the CA 2013), held that an O&M dispute could be referred to arbitration if the Company Law Board (now the NCLT) was satisfied that:

- The O&M petition was dressed up merely to avoid an arbitration clause.
- The matter would be eligible for referral to arbitration based on the applicable tests under sections 8 or 45 of the ACA 1996.

In *Chaitra Gowdar Chidanand v Get Simpl Technologies Pvt Ltd & Ors (CA-67/2022 in CP 09 (MB) 2022, Order of 6 October 2023)*, the NCLT found that the dispute related entirely to contractual obligations under a shareholder agreement. Therefore, the NCLT referred the dispute to arbitration. In its decision, the NCLT devised a three-pronged test to determine when a "dressed up" O&M dispute must be referred to arbitration:

- The parties to the arbitration agreement must also be parties to the O&M petition.
- The court or the NCLT must examine the O&M petition to determine the substance, and not the form, of the dispute, as well as the relief sought.
- If all the relief or remedies sought could be granted by the arbitrator, the O&M petition should be referred to arbitration.

On the other hand, when the shareholder dispute appears to the court, or to the NCLT, to be a legitimate O&M petition, it will not refer the dispute to arbitration.

In *Anupam Mittal v People Interactive (India) (P) Ltd and others (2023 SCC OnLine Bom 1925)*, for example, the Bombay High Court held, among other things, that since O&M disputes were non-arbitrable as a matter of Indian law, an arbitral award deciding an O&M dispute would not be enforceable in India on public policy grounds. Pursuant to this decision, the NCLT issued an anti-arbitration injunction and temporarily restrained the parties from continuing arbitration proceedings in Singapore during the pendency of the O&M proceedings (*Anupam Mittal v People Interactive (India) Pvt Ltd & Ors., CA/392/2023 in CP/92(MB)2021, Order dated 15 September 2023*). These decisions are discussed in *Legal update, Indian courts issue anti-anti suit injunction and anti-arbitration injunction as Anupam Mittal saga continues (Bombay High Court and National Company Law Tribunal)*.

## Asymmetric option clauses

Asymmetric option clauses (sometimes referred to as unilateral arbitration clauses) provide that one party, typically the one with greater negotiating power, has the option to choose between referring a dispute to arbitration or litigation, while the other party is limited to a single forum. These clauses may take several forms, including, for example, requiring disputes to be resolved before civil courts, while giving just one party the option to initiate arbitration or providing for arbitration, with an option for one party to insist on litigation before a particular court (for further discussion, see *Practice note, Hybrid, multi-tiered and carve-out dispute resolution clauses: Asymmetric option clauses*).

The hallmark of a unilateral arbitration clause is the lack of mutuality between the parties as to their right to refer a dispute to arbitration. Notably, the definition of an arbitration agreement in section 7 of the *ACA 1996* (see *Formal and substantive requirements*) does not specify mutuality as a prerequisite to a valid arbitration agreement.

 

The case law on whether asymmetric option clauses are valid in India is inconsistent, with different state courts reaching different decisions. For example, in *Castrol India Ltd v Apex Tooling Solutions 2015 SCC OnLine Mad 2095*, a division bench of the Madras High Court (MHC) held that unilateral clauses should, in principle, be valid. The court observed that, as the ACA 1996 was based on the UNCITRAL Model Law, the ACA 1996 and Model Law should be interpreted in a consistent manner. Accordingly, the MHC held that it should follow decisions of the English and Australian courts upholding the validity of unilateral arbitration clauses. The Calcutta High Court (see *New India Assurance Co Ltd v Central Bank of India and others (1985) AIR Cal 76*) and the Delhi High Court (*Jindal Exports Ltd v Fuerst Day Lawson, 2009 SCC OnLine Del 4061*) reached similar decisions. In the latter case, the Delhi High Court rejected the contention that unilateral arbitration clauses were against the public policy of India.

However, a differently constituted Delhi High Court held, in *Lucent Technologies Inc v ICICI Bank Limited and others (2009 SCC OnLine Del 3213)*, that a clause conferring the unilateral option on one party to refer a dispute to arbitration was invalid.

Therefore, while there does seem to be a trend in favour of upholding unilateral arbitration clauses, the Supreme Court has not yet had an opportunity to rule on the issue and, until it does, the validity of these clauses remains uncertain.

**Escalation or tiered arbitration clauses**

Often parties provide for resolution of disputes in a tiered manner, including, for example, a requirement for parties to undertake one or more rounds of non-binding dispute resolution process (for example, mediation, conciliation or some bespoke procedure to seek an amicable resolution of the dispute) for a prescribed period, before they can refer the dispute to arbitration.

In principle, parties can also agree to a two-tiered arbitration procedure, although these are less common. The Supreme Court has upheld the validity of tiered arbitration clauses. For example, in *Centrotrade Minerals & Metal Inc v Hindustan Copper Ltd, (2017) 2 SCC 228*, the Supreme Court upheld the validity of an arbitration clause that required parties to, first, engage in an Indian-seated arbitration, with possibility of an appeal (if either party was dissatisfied with the first award) to a London-seated, ICC arbitration. The Supreme Court held that there was nothing "fundamentally objectionable in the parties preferring and accepting a two-tier arbitration system" and the ACA 1996 did not prohibit the parties from entering into this type of arbitration agreement.

Generally, Indian courts tend to enforce the terms of the contract, including compliance with pre-arbitral procedures (*Nirman Sindia v Indal Electromelts Ltd, 1999 SCC OnLine Ker 149*; *Sushil Kumar Bhardwaj v Union of India, 2009 SCC OnLine Del 4355*). However, the courts have carved out exceptions to this rule and held that, in certain circumstances, the pre-arbitration steps or procedure can be waived (*MK Shah Engineers & Contractors v State of MP, (1999) 2 SCC 594*). These exceptions include:

- **Pre-arbitration steps would be an "empty formality" or an exercise in futility.** This exception comes into play where the parties have already adopted rigid or entrenched positions in the dispute and it is clear that there is no scope for settlement (*VISA International Ltd v Continental Resources (USA) Ltd, (2009) 2 SCC 55*; *Demerara Distilleries (P) Ltd v Demerara Distillers Ltd, (2015) 3 SCC 610*).
- **Urgency.** Where there is urgency and a party requires interim protection, it may be possible to circumvent the pre-arbitration steps (*Ravindra Kumar Verma v BPTP Ltd and another, 2014 SCC OnLine Del 6602; Bell South International v Crompton Greaves Ltd and others, 2000 SCC OnLine Mad 919*).
- **Not a mandatory pre-condition.** Where, on the proper interpretation of the clause, the pre-arbitration step is not expressed in mandatory terms, parties are not required to comply with the pre-condition (*Kumar Construction Co v Municipal Corpn. of Greater Bombay 2017 SCC OnLine Bom 130, NHAI v Pati-Bel (JV), MANU/DE/0306/2019*). The

 

same is true where there are any procedural ambiguities or defects (*Orissa Power Transmission Corporation Ltd v Ranjit Singh and Co, MANU/OR/1882/2023).*

However, the issue of compliance with pre-arbitration procedures is a question of admissibility, not jurisdiction. Challenges to compliance should be raised before, and dealt with by, the tribunal, once constituted. Therefore, the Indian courts tend to refer parties to arbitration notwithstanding non-compliance with pre-arbitral procedures and to require parties to ensure compliance in parallel (*Ravindra Kumar Verma v BPTP Ltd and another, 2014 SCC OnLine Del 6602*).

## Extension of an arbitration clause to non-parties

**During the arbitration**

It is settled that non-parties to an arbitration agreement can be joined to an arbitration on the basis of the group of companies doctrine.

In *Chloro Controls India (P) Ltd v Severn Trent Water Purification Inc (2013) 1 SCC 641* (*Chloro Controls*), the Supreme Court held that non-signatories to an arbitration agreement could be subjected to arbitration under certain circumstances. In that case, the court considered a parent agreement and multiple ancillary agreements, the performance of which were inextricably linked to achieve a common objective, the success of a joint venture. It held that these agreements could not be severed from one another and that a party that was not a signatory to one or more of these agreements could still be bound to arbitrate dispute under the following "exceptional" circumstances:

- The non-signatory has a direct relationship to the signatory party.
- There is direct commonality of subject matter and the agreements between the parties represent a composite transaction.
- The transaction is of a composite nature, whereby performance of the main agreement may not be feasible without the aid, execution and performance of the supplementary or ancillary agreements for achieving the common object, and which collectively have a bearing on the dispute.
- A composite reference of the parties to arbitration will serve the ends of justice.

In *Chloro Controls*, the Supreme Court relied on section 45 of the *ACA 1996*, which provides that courts must, when seised of a dispute involving a foreign-seated arbitration, "at the request of **one of the parties or any person claiming through or under**" them (emphasis added), refer the parties to arbitration. The court found that non-signatories to arbitration agreements could be bound as a person "claiming through or under" a party.

However, in its 2023 decision in *Cox and Kings, Arbitration Petition (Civil) No 38 of 2020*, a constitution (five-judge) bench of the Supreme Court overruled *Chloro Controls* to the extent that the court there had traced the group of companies doctrine to the phrase "claiming through or under" in section 45 of the ACA 1996. The Supreme Court in *Cox and Kings* held that it would still recognise the group of companies doctrine and developed the following position on it:

- The definition of "parties" under section 2(1)(h), read with section 7, of the ACA 1996 includes both signatories and non-signatories to the arbitration agreement.
- When determining whether a non-signatory company in a group of companies is bound by an arbitration agreement, the factors set out by the Supreme Court in *Oil and Natural Gas Corporation Ltd v Discovery Enterprises Pvt Ltd 5 (2022) 8 SCC 42* (*Discovery)* must be applied cumulatively. Those factors include the mutual intent of the parties,

 

the relationship of a non-signatory to a signatory, the commonality of the subject-matter, the composite nature of the transaction and the performance of the contract.

- A court making a reference to arbitration should leave to the arbitral tribunal to decide whether a non-signatory is bound by the arbitration agreement.

The Supreme Court in *Cox and Kings* also noted that there are two theories that would apply to bind non-signatories to an arbitration, namely consent-based theories (including, agency, novation, assignment, operation of law, merger and succession and third-party beneficiaries) and non-consent-based theories (including piercing the corporate veil or alter ego and estoppel).

**During enforcement of the arbitral award**

The position of law regarding enforcement of an arbitral award against a non-signatory and non-party to the arbitration was settled by the Supreme Court in *Cheran Properties v Kasturi and Sons Limited, (2018) 16 SCC 413* (*Cheran Properties*). In that case, the court held that, in light of section 35 of the *ACA 1996*, an award could be enforced against a non-signatory who is the nominee of a party to an arbitration agreement. Section 35 states that an award shall be final and binding "on the parties and persons claiming under them respectively".

**Third-party funders**

In *Tomorrow Sales Agency Private Ltd v SBS Holdings, Inc and others [FAO(OS)(COMM) 59 of 2023]* (*Tomorrow Sales*), a division bench of the Delhi High Court held that an arbitration award could not be enforced against third-party funder that had not been party to the underlying arbitration. The court held that, while third-party funding was a relevant factor when considering whether a security for costs order should be made, permitting enforcement of the award against a non-party, which has not accepted that risk, was "neither desirable nor permissible" (see *Legal update, Delhi High Court limits exposure of third-party funders in arbitrations*).

For further discussion of third-party funding in Indian arbitration, see *Third-party funding*.

# Arbitral tribunal

## Number of arbitrators

The parties are free to agree to on the number of arbitrators, provided that it is not an even number (*section 10(1), ACA 1996*). Absent agreement, the tribunal will consist of a sole arbitrator (*section 10(2)*).

## Necessary qualifications

In principle, the parties to an arbitration agreement can stipulate any requirements, such as professional qualifications, expertise, linguistic proficiency or otherwise, that they require the arbitrators to possess. Parties are also free to choose an arbitrator of any nationality or to specify that an arbitrator should not be of a particular nationality, for example, that, where the parties are of different nationalities, the president of the tribunal should not have the same nationality as any of the parties.

As far as the *ACA 1996* is concerned, the only requirements for a person to be appointed as an arbitrator are that they must be independent and impartial, and they must be able to devote sufficient time to conclude the arbitration within the prescribed timelines (*section 12(1)(a) and (b), ACA 1996*).

The Fifth Schedule to the ACA 1996 identifies circumstances which could give rise to justifiable doubts as to the independence or impartiality of the arbitrator. However, the existence of one or more of these circumstances does not, of itself, disentitle a

 

person from being appointed as arbitrator. Rather, it requires that the relevant circumstances be disclosed to the parties, who will then decide whether to proceed with the appointment *(section 12(1)*). The circumstances that give rise to justifiable doubts as to the independence or impartiality of an arbitrator and trigger a disclosure obligation under the Fifth Schedule and section 12(1) include:

- An arbitrator's relationship with the parties or their counsel (for instance, the arbitrator is an employee, consultant or advisor of one of the parties, or the arbitrator works as a lawyer in the same firm that represents one of the parties to the dispute).
- An arbitrator's relationship to the dispute (for instance, an arbitrator has been previously involved in the case).
- An arbitrator's direct or indirect interest in the dispute (for instance, a close family member has significant interest in the outcome of the dispute, or an arbitrator holds shares in a privately held company, which is either one of the parties or their affiliates).
- An arbitrator has previously provided services to one of the parties or been involved in the case (for instance, the arbitrator has, in the past three years, been appointed as arbitrator on two or more occasions by one of the parties or its affiliates).
- A relationship between an arbitrator and another arbitrator, or counsel to a party (for instance, if two arbitrators on the same tribunal belong to the same law firm).
- A relationship between an arbitrator and a party or others involved in the arbitration (for instance, if the arbitrator's law firm is currently acting adverse to one of the parties or an affiliate of one of the parties).
- Other circumstances (for instance, if the arbitrator holds a position in an arbitration institution with appointing authority over the dispute).

Where an arbitrator is appointed, the duty to disclose circumstances that are likely to give rise to justifiable doubts as to their independence or impartiality is a continuing one (*section 12(2), ACA 1996*).

There are certain circumstances that, if they exist, make a person ineligible to be appointed as arbitrator in a matter *(section 12(5), ACA 1996).* These circumstances are set out in the Seventh Schedule to the ACA 1996 and arise where the person has certain personal, professional or financial relationships with the parties or their counsel, or where the arbitrator has a direct or indirect interest in the dispute. The first three grounds listed above from the Fifth Schedule also form part of the Seventh Schedule. These criteria are modelled on the *IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines*) (discussed in *Practice note, Challenges to arbitrators: an overview: Lack of impartiality or independence*).

The parties cannot derogate from the grounds listed under the Seventh Schedule by prior agreement. In that sense, they are analogous to the non-waivable Red List under the IBA Guidelines. However, once a dispute has arisen, the parties can agree in writing to waive the application of section 12(5). Following a waiver, parties are estopped from claiming that the arbitrator is ineligible under section 12(5) at the stage of mounting a challenge to the award under section 34 of the ACA 1996. (*M/S Truly Pest Solution Pvt Ltd v Principal Chief Mechanical Engineering (PCME) Central Railway (2024 SCC OnLine Bom 3528)*).

## Appointment

The parties are free to agree on the procedure for the appointment of the tribunal (*section 11(2), ACA 1996*). Failing agreement, section 11 of the ACA 1996 sets out a detailed default procedure.

In an arbitration where three arbitrators are to be appointed, if the parties cannot agree on a procedure for appointment, then each party appoints one arbitrator, and these two arbitrators appoint a third arbitrator, who is the presiding arbitrator (*section*

 

*11(3), ACA 1996*). Each of these actions must be taken within a period of 30 days (respectively), and if it is not, a party can apply to the High Court at the seat (for domestic arbitrations) or the Supreme Court (for ICAs) to make the necessary appointment (*section 11(4), ACA 1996*).

Similarly, if the agreed appointment procedure fails, for example because a party refuses to appoint or because a designated person or institution fails to perform their function, the appointment is made, on an application by the party, by the arbitral institution designated by the Supreme Court (for ICAs) or the High Court at the seat (for domestic arbitrations), unless the agreement on the appointment procedure provides other means for securing the appointment (*section 11(6), ACA 1996*).

Section 11(6A) of the ACA 1996 clarifies that, when called upon to make an appointment, the courts must confine themselves to the examination of the existence of an arbitration agreement. This section has yet to come into force. However, the Supreme Court has consistently held that the scope of enquiry under section 11 is limited to a *prima facie* determination as to the existence and validity of an arbitration agreement, as well as to arbitrability of the dispute (see NTPC Ltd v SPML Infra Ltd, (2023) 9 SCC 385), with all other matters left to be determined by the tribunal, once constituted (see *Goqii Technologies (P) Ltd v Sokrati Technologies (P) Ltd, 2024 SCC OnLine SC 3189*).

**Unilateral appointment procedures**

The unilateral appointment of an arbitrator refers to scenarios where either:

- In the case of a sole arbitrator, one party has the exclusive right to appoint the arbitrator.
- In the case of a three-member tribunal, one party is confined to selecting its appointee from a panel or list of candidates curated by the other party to the dispute.

In *Perkins Eastman Architects DPC v HSCC (India) Ltd, [2019] SCC Online SC 1517* (*Perkins*), the Supreme Court held that the exclusive right of a party to appoint a sole arbitrator contravened the provisions of the *ACA 1996* and that any appointment made following this procedure would be invalid. This was because, in a case where only one party has the right to appoint a sole arbitrator, the relevant party's choice will be unilateral and always entail an element of exclusivity, which will have a significant impact on the course of the arbitration.

In Central Organisation for Railway Electrification v ECI SPIC SMO MCML (JV) A Joint Venture Company [2024 SCC OnLine SC 3219], the Supreme Court considered the validity of an arbitration clause that provided the appointment of a three-member tribunal, which envisaged that one party would appoint not only its own arbitrator and the presiding arbitrator but also draw up a shortlist from which the other arbitrator would have to appoint. The court upheld the decision in *Perkins*and further decided that:

- Unilateral appointment clauses in public-private contracts violate article 14 of the Indian Constitution (*paragraph 163*).
- A clause that allows one party to unilaterally appoint a sole arbitrator gives rise to justifiable doubts as to the independence and impartiality of the arbitrator. Further, a unilateral clause is exclusive and hinders equal participation of the other party in the appointment process of arbitrators (*paragraph 169*).
- An arbitration clause cannot mandate that a party must select its arbitrator from a panel curated by Public Sector Undertakings (PSUs). The PSUs can give a choice to the other party to select its arbitrators from the curated list only if the other party expressly waives the applicability of the *nemo judex* rule (that is, no one should be a judge in their own cause) (*paragraph 137*).

 

- The principle of express waiver contained under the *proviso* to section 12(5) of the ACA 1996 also applies where the parties seek to waive the allegation of bias against an arbitrator appointed unilaterally by one of the parties after the dispute has arisen (*paragraph 169*).

The Supreme Court ruled that its decision will have prospective effect only, to ensure that it does not adversely affect ongoing arbitrations where the tribunal was appointed by an agreed procedure, which could fall foul of the ruling (see *Legal update, Unilateral arbitrator appointment procedure struck down by Indian Supreme Court*).

For further resources on the appointment of arbitrators, see *Practice notes, How do I appoint an arbitrator?* and *Selection of party-nominated arbitrators*, as well as *Checklist, Appointing an Arbitrator to an International Arbitration*.

## Termination of mandate

Separately from any challenge to an arbitrator under section 13 of the *ACA 1996* (see *Challenges to arbitrators*), the ACA 1996 recognises that an arbitrator's mandate may terminate, and they will need to be replaced, where:

- The arbitrator withdraws from their office for any reason (*section 15(1)(a), ACA 1996*).
- The parties agree to terminate the arbitrator's mandate (*section 15(1)(b)*).
- The arbitrator fails, or becomes *de jure* or de facto unable, to perform their functions, either at all or without undue delay (*section 14(1)(a), ACA 1996*). Any controversy in relation to termination can be brought before the court by a party, unless otherwise agreed (*section 14(2)*).

After the mandate of an arbitrator terminates, they become *functus officio*. A substitute arbitrator must be appointed to fill the vacancy. The appointment of the substitute arbitrator would be made in accordance with the rules that were applicable to the appointment of the arbitrator being replaced (*section 15(1), ACA 1996*). Generally, where the parties have agreed to a specific procedure or any qualifications that the arbitrators must possess, those would equally apply while replacing an arbitrator, even if the agreement does not specifically say so. However, the Supreme Court clarified in *Union of India v UP State Bridge Corporation Limited (2015) 2 SCC 52* that, where a party failed to adhere to the agreed procedure and the arbitrator was appointed by the court, the appointment of any replacement arbitrator must also be made by the court. Otherwise, a party that originally defaulted in adhering to the agreed appointment procedure will be unduly advantaged in being able to appoint the substitute arbitrator. However, the Supreme Court also noted that a court's exercise of its power to appoint a substitute arbitrator despite there being an agreed appointment procedure will depend on the particular facts of each case.

## Challenges to arbitrators

**Grounds for challenge**
An arbitrator can be challenged only where either:

- Circumstances exist that give rise to justifiable doubts as to the arbitrator's independence or impartiality.
- The arbitrator does not possess the qualifications agreed to by the parties.

(*Section 12(3), ACA 1996*.)

 

A party that has participated in the appointment of an arbitrator can only challenge the arbitrator for reasons that the party became aware of after the appointment was made (*section 12(4)*).

Where the challenge alleges that there are justifiable doubts as to the independence or impartiality of an arbitrator, the grounds set out in the Fifth Schedule to the ACA 1996 will be treated as guidance (*explanation 1, section 12(1)*).

Since an arbitrator's authority and jurisdiction derives from the parties' arbitration agreement, if the arbitrator does not possess the qualifications required by the parties' agreement, the arbitrator's appointment would be invalidated (see *Indu Malhotra, Malhotra's Commentary on the Law of Arbitration, Chapter 12, Grounds for Challenge, at page 532 (Law & Justice Publishing, 4th ed. 2023)*).

**Procedure for challenge**

The parties are free to agree on a procedure for challenging the appointment of the arbitrator, including through the adoption of a set of arbitral rules. The only mandatory rule is that arbitral tribunal must continue the proceedings and issue an arbitral award where a challenge under the agreed procedure is unsuccessful *(section 13(1) and (4), ACA 1996*).

Absent an agreed procedure for arbitrator challenges, the default procedure provided by the ACA 1996 applies. In these cases, a party that intends to challenge an arbitrator must send to the tribunal a written request setting out the grounds of challenge within 15 days of that party becoming aware of either the constitution of the arbitral tribunal or the existence of grounds for challenge *(section 13(2), ACA 1996*).

Unless the challenge is agreed by all other parties or the challenged arbitrator withdraws from their office, the arbitral tribunal will decide the challenge *(section 13(3), ACA 1996*). This means that a challenged arbitrator will, in the case of a sole arbitrator, determine the challenge to them or, in the case of a three-member tribunal, participate in determining the challenge, unless the parties have agreed otherwise. If the challenge is rejected, the tribunal will continue the arbitral proceedings and make its award (*section 13(4)*).

While there is no right to appeal the tribunal's decision on a challenge, where a challenge is rejected, an aggrieved party can still challenge the tribunal's award (once rendered) under section 34 on the ground that the tribunal was not properly constituted *(section 13(5)*). If the award is set aside, the court will determine whether the arbitrator is entitled to any fees (*section 13(6)*).

**Impact on ongoing proceedings**

Unless the challenged arbitrator withdraws from their office or the other party agrees to the challenge, the arbitral tribunal will decide the challenge (*section 13(3), ACA 1996*). If the challenge is successful, the mandate of the arbitrator terminates, but that does not result in termination of the arbitral proceedings. The arbitrator would be replaced by a substitute arbitrator under section 15 of the ACA 1996.

Unless the parties agree otherwise:

- Any hearings held previously by the arbitrator can be repeated at the discretion of the newly appointed tribunal (*section 15(3), ACA 1996*).
- Prior orders or rulings made by the tribunal are not invalidated solely because the composition of the tribunal changed (*section 15(4)*).

For further discussion of arbitrator challenges, see *Practice notes, Challenges to arbitrators: an overview* and *Challenges to arbitrators under the major international arbitration rules*.

 

### Arbitrators' procedural powers

The arbitral tribunal has broad discretion to conduct the proceedings in the manner it considers appropriate, subject to any agreement between the parties as to the procedure to be followed (*section 19(3), ACA 1996*). Further, if authorised by either the parties or all the members of the tribunal, questions of procedure can be decided by the presiding arbitrator alone *(section 29(2), ACA 1996*).

The procedure adopted by the tribunal under section 19(3) cannot be contrary to the mandatory provisions of Part I of the ACA 1996, including the duty to treat the parties equally and afford each a full opportunity to present its case (*section 18, ACA 1996*). Other mandatory provisions that the procedure adopted by the tribunal must not contravene include section 23, which deals with filing of the statement of claim and defence, section 24 on hearings and, if the provisions relating to court assistance in taking evidence under section 27 are invoked, the arbitral tribunal must follow the directions of the court.

The arbitral tribunal is not bound by either the *Code of Civil Procedure, 1908* (CPC) or the *Evidence Act, 1872* (Evidence Act) (*section 19(1), ACA 1996*), although this does not preclude the arbitral tribunal from drawing guidance from the fundamental principles underlying the CPC or the Evidence Act (*State of Orissa v Samantary Constn Pvt Ltd and others, 2016 (4) SCJ 133; Mahanagar Telephone Nigam Limited and others v Anant Raj Agencies Pvt Ltd, 2017 IIIAD (Delhi) 357*).

### Immunity of arbitrators

Arbitrators in Indian-seated proceedings are immune from legal proceedings for all acts done in good faith or in discharge of their functions under the ACA 1996 *(section 42B, ACA 1996)*.

In *Kothari Industrial Corporation Limited v Southern Petrochemicals Industries Corporation Limited, 2021 SCC OnLine Mad 5325*, the Madras High Court, while dealing with a challenge to an award under section 34 of the ACA 1996, deleted the name of the arbitrator who had been impleaded as a party by the petitioner, removing the arbitrator from the case. The court observed that it was a "pernicious practice in this court to implead arbitrators or arbitral tribunals" without good cause. It is only in the rare instance involving a personal allegation against an arbitrator where the arbitrator should be impleaded, or joined, to proceedings. The court observed that, just as parties appealing a first instance decision of the court should not implead the judge who made that decision, it was "utterly unnecessary" to implead members of an arbitral tribunal, which would require them to answer the allegations, in a challenge to an award under section 34 of the ACA 1996.

For further discussion of the position on arbitrator liability under different national laws, as well as institutional rules, see *Practice note, Arbitrator immunity and institutional liability in international arbitration*.

## Interim relief

### Emergency arbitration

The *ACA 1996* does not expressly provide for emergency arbitration or the appointment of an emergency arbitrator. However, most modern institutional rules provide for emergency arbitration. While the ACA 1996 does not contain a mechanism for enforcement of emergency arbitration awards, Indian courts have pro-actively taken steps towards this.

In *Amazon.com NV Investment Holdings LLC v Future Retail Ltd, 2021 SCC OnLine SC 557* (*Amazon NV*), the Supreme Court held that emergency arbitration awards issued in Indian-seated arbitrations are enforceable in the same manner as interim measures orders made by tribunals under section 17 of the ACA 1996, which provides that these orders are deemed to be an order of the court for the purposes of enforcement (*section 17(2), ACA 1996*).

 

In keeping with the Supreme Court's decision in *Amazon NV*, the Arbitration and Conciliation Bill, 2024 proposes including provisions for the appointment of an emergency arbitrator before the constitution of the tribunal and for enforcement of emergency awards in the same manner as interim awards. It remains to be seen whether this proposal will be incorporated. The Arbitration and Conciliation Bill, 2024 also provides that emergency awards can be challenged before the arbitral tribunal, once constituted. This aligns with several institutional rules, such as rule 14.9 of the *MCIA Rules 2016*, paragraph 20 of Schedule 1 to the *SIAC Rules 2025* and article 29(3) of the *ICC Rules 2021*.

Parties seeking to enforce in India awards made in foreign-seated emergency arbitrations must apply to the Indian courts under section 9 of the ACA 1996 requesting interim relief in terms of the foreign emergency award. The Indian court seised of the application under section 9 is entitled to consider the application for interim relief independently on its merits, while also having the benefit of considering the emergency award (*Raffles Education Investment (India) Pte Ltd and others v Educomp Professional Education Limited, 2016 SCC OnLine Del 5521; HSBC PI Holdings (Mauritius) Limited v Avitel Post Studioz Limited and others, 2020 SCC OnLine SC 656*).

However, the Indian courts have clarified that, once a party has opted for emergency arbitration and failed to obtain interim relief, it cannot approach Indian courts for the same relief under section 9 of the ACA 1996, as this would amount to having a "second bite at the cherry" (*Ashwini Minda and Jay Ushin Limited v U-Shin Limited and Minebea Mitrsumi Inc, 2020 SCC OnLine Del 721*).

For further discussion, see *Practice note, Emergency arbitrators in international arbitration*.

## Recourse to courts for interim relief

### When parties can approach courts

The ACA 1996 permits parties to approach the Indian courts for interim protection at any time before, during or after the passing of an award (*section 9(1), ACA 1996*). However, the ACA 1996 limits court intervention in arbitration proceedings by providing that courts should only entertain applications for interim relief during arbitration proceedings, where interim relief granted by the tribunal under section 17 would be inefficacious (*section 9(3)*).

Therefore, the default position is that, from the constitution of the tribunal until a final award is made, the parties are limited to seeking interim relief from the tribunal unless they can establish that the remedies available from the tribunal under section 17 would be inefficacious. The term "entertain" is not defined in the ACA 1996, but it has been held to mean consideration and application of the mind to the issues raised. Therefore, if a tribunal has been constituted before the court has applied its mind to the issues, the court should refrain from entertaining the application unless the remedy available from the tribunal would inefficacious. However, where the court has substantially applied its mind to the issues raised by an interim measures application before the tribunal is constituted, the court's power to grant interim relief remains unimpacted, and it will go on to make a decision (*Arcelor Mittal Nippon Steel India Limited v Essar Bulk Terminal Limited, (2022) 1 SCC 712*, at paragraphs 84-87 (*Arcelormittal*)).

The concept of an "efficacious" remedy is also not defined by the ACA 1996. However, in *Ashwini Minda and Jay Ushin Limited v U-Shin Limited and Minebea Mitrsumi Inc* (*2020 SCC OnLine Del 721*), a Division Bench of the Delhi High Court observed that whether the tribunal would be able to grant the relief requested from the court in the section 9 application would be a relevant factor in determining whether efficacious relief is available. The Supreme Court analysed these circumstances in *Arcelormittal*, holding that they include, among others:

- Unavailability of one of the arbitrators, whether on account of illness, travel or otherwise.

 

- A pending special leave petition challenging the constitution of the arbitral tribunal.
- The arbitral proceedings being conducted in a delayed and "lethargic" manner.

**Courts to whom application for interim relief may be made**

It is settled that the courts exercising jurisdiction over the seat have exclusive jurisdiction over any arbitration-related litigation. In *BE Simoese von Staraburg Niedenthal v Chhattisgarh Investment Ltd, (2015) 12 SCC 225*, the Supreme Court held that, where parties have agreed to confer exclusive jurisdiction on the courts at one place (in that case, Goa), an application for interim relief under section 9 of the *ACA 1996* cannot be filed at any other court.

**The court's power to grant interim relief**

Section 9 of the *ACA 1996* details the scope of the courts' powers to grant interim relief to parties. The courts' powers are broad and include appointing a guardian for a minor or person of unsound mind, for the purposes of arbitral proceedings (*section 9(1)(i), ACA 1996*), as well as interim measures of protection to:

- Preserve the subject matter of the arbitration (*section 9(1)(ii)(a), ACA 1996*).
- Secure the amount in dispute (*section 9(1)(ii)(b)*).
- Detain, preserve or inspect any property (*section 9(1)(ii)(c)*).
- Grant an interim injunction and appoint a receiver (*section 9(1)(ii)(d)*).
- Make any other order as an interim measure of protection that the court considers just and convenient (*section 9(1)(ii)(e)*).

Courts will only grant relief under section 9 if the applicant meets the well-established three-fold test:

- There is a prima facie case on the merits.
- The balance of convenience favours the party seeking relief.
- If the court granted the interim relief sought, the losing party would not suffer irreparable injury or loss.

(See *Adhunik Steels Ltd v Orissa Manganese Minerals Private Limited, 2007 SCC OnLine SC 882* and *Essar House Private Limited v ArcelorMittal Nippon Steel India Limited, 2022 SCC OnLine SC 1219*.)

**Appeal against an order under section 9**

Any appeal against a court's decision under section 9 of the *ACA 1996* (whether granting or refusing interim measures) is heard before the appellate court empowered to entertain appeals against original decrees passed by the lower court under section 37(1)(b) of the ACA 1996. The court's power while considering such an appeal is limited, and it is well settled that the court should not substitute its own discretion for that of the lower court, except where the lower court exercised its discretion in a manner that was arbitrary, capricious, perverse or against settled principes of law (*Mewa Mishri Enterprises Private Limited v AST Enterprises, 2021 SCC OnLine Del 3332*).

In *Asian Hotels Limited v Sital Dass Sons*, 2022/DHC/005842, a single judge of the Delhi High Court held that the court, in the exercise of its appellate jurisdiction under section 37 of the ACA 1996, could modify orders passed by the arbitrator under section 17:

 

> "43. This Court is aware of the limited scope of interference in appeal against orders passed by Arbitrators on applications under Section 17 of the [ACA 1996]. However, in appropriate cases, Court can exercise its jurisdiction under Section 37 of the [ACA 1996] to protect the legitimate interest of the appellant, which includes modifying the order of the learned Arbitral Tribunal."

This would equally apply to an order of interim relief made by a court, that is, an appellate court would have power to modify interim relief orders entered by a lower court.

### Tribunal's power to grant interim relief

Section 17 of the *ACA 1996* provides that, on a party's application, the tribunal can order interim measures. The orders that the tribunal can make are the same as those provided for under section 9(1) (see *The court's power to grant interim relief*), and the tribunal has the same power for making orders as the court has for the purpose of, and in relation to, any proceedings before it (*section 17(1), ACA 1996 as amended by ACAA 2019*). Originally modelled on article 17 of the UNCITRAL Model Law (as adopted in 1985), section 17 of the ACA 1996 previously provided that an arbitral tribunal, in exercise of its powers, could direct a party "to take any interim measure of protection" it considered "necessary in respect of the subject-matter of the dispute". However, the ACAA 2019 amended section 17, and the power of the tribunal to grant interim remedies is no longer limited by the phrase "in respect of the subject matter of the dispute".

After appointment of the arbitral tribunal, the parties are required to approach the tribunal for interim relief (unless a party can establish that the tribunal cannot grant an efficacious remedy, in which case it may apply to the court (*section 9(3), ACA 1996*).

As with orders of the court under section 9, interim orders made by the tribunal under section 17 can also be appealed under section 37(2)(b) of the ACA 1996. Orders passed by the tribunal under section 17 are enforceable in the same manner as orders of the court (*section 17(2), ACA 1996*). In fact, the Supreme Court has expressly held that non-compliance with an interim order made by the tribunal would be tantamount to contempt and punishable in the same way (*Alka Chandeswar v Shamshul Ishrar Khan, Civil Appeal No 8720 of 2017, Judgment dated 6 July 2017*).

For further discussion of interim measures, see *Practice note, Interim, provisional and conservatory measures in international arbitration*.

## Arbitration proceedings

### Commencing arbitral proceedings

#### Commencement

Unless otherwise agreed by the parties, arbitral proceedings in respect of a particular dispute commence on the date when the respondent receives a request for the dispute to be referred to arbitration (*section 21, ACA 1996*).

#### References to arbitration from the courts

Section 8 of the *ACA 1996*, which is applicable to Indian-seated arbitrations, deals with the powers of a judicial authority to refer parties to arbitration where the dispute is covered by an arbitration agreement. Section 8(1) provides that, where there is an arbitration agreement between the parties and a dispute arises that is within the scope of that agreement, a court before which

 

either of the parties has brought the case must refer the parties to arbitration, notwithstanding any judgment, decree or order of the Supreme Court or any other court. To invoke the reference powers of the judicial authority, the party applying for reference to arbitration must do so not later than the date of submitting its first statement on the substance of the dispute (*section 8(1)*).

In *Rashtriya Ispat Nigam Ltd v Verma Transport Company* (*AIR 2006 SC 2800*), the Supreme Court held that the expression "first statement on the substance of the dispute" must be contrasted with the expression "written statement". The former means the submission of the party to the judicial authority's jurisdiction. Therefore, the enquiry before the judicial authority is whether the party has made a statement on the substance of the dispute, thereby submitting to the court's jurisdiction and waiving its right to invoke the arbitration clause.

In determining whether to refer the dispute to arbitration, the court need only determine that, prima facie, a valid arbitration agreement between the parties exists. In *Vidya Drolia*, a three-judge bench of the Supreme Court observed that this is not a full review but rather a preliminary first review to "weed out manifestly and ex facie non-existent and invalid arbitration agreements and non-arbitrable disputes". The Supreme Court also highlighted that referral proceedings are preliminary and summary, and they should not result in a mini-trial.

One judge of the three-judge bench in *Vidya Drolia* held, in a separate concurring opinion, that matters that might arise during the determination of the validity of the arbitration agreement can be categorised as follows:

- Matters that must compulsorily be investigated by the court.
- Matters that may be investigated by the court.
- Matters that should not be reviewed by the court at the referral stage.

The Court indicated that the first category would include an inquiry into whether:

- The party has approached the appropriate High Court.
- There is an arbitration agreement.
- The party that has applied for a reference to arbitration is party to that agreement.
- The cause of action relates to an action *in rem* or *in personam*.
- The subject matter of the dispute is necessarily inarbitrable, per mandatory law.

These matters, the judge indicated, would be subject to more thorough examination in comparison to the second and third categories, which are presumptively, except in exceptional cases, for the arbitrator to decide. Issues that might arise in those categories would include issues relating to contract formation, existence and validity, and would be connected and intertwined with the issues underlying the merits of the dispute. The Court also highlighted that "the court may for legitimate reasons, to prevent wastage of public and private resources, … exercise judicial discretion to conduct an intense yet summary prima facie review while remaining conscious that it is to assist the arbitration procedure and not usurp jurisdiction of the arbitral tribunal".

Orders under section 8(1) of the ACA 1996 refusing to refer parties to arbitration are appealable to the relevant court under section 37 of the ACA 1996.

Section 45, contained in Part II of the ACA 1996, deals with the power of the relevant judicial authority to refer parties to arbitration in cases involving foreign-seated arbitrations. Section 45 provides that, when the court is seised of an action in respect of which the parties have entered into an arbitration agreement providing for a seat outside India, then the court must

 

refer the parties to arbitration "unless it prima facie finds that the said agreement is null and void, inoperative or incapable of being performed". Notably, before its amendment by the ACAA 2019, the provision did not include the words "prima facie".

Despite the fact that the words prima facie were only introduced in 2019, courts pre-amendment had held that the review of the judicial authority must be prima facie and not final. In *Shin-Etsu Chemical Co Ltd v Aksh Optifibre Ltd and Anr (2005) 7 SCC 234*, the Supreme Court dealt with the scope of review under the pre-amendment version of section 45 and held that it should be a prima facie review only, as opposed to a final one. Similarly, in *Sasan Power Ltd v North American Coal Corpn (India) (P) Ltd, (2016) 10 SCC 813*, the Supreme Court held that the scope of enquiry under section 45 does not extend to the legality and validity of the substantive contract.

An order refusing to refer the parties to arbitration under section 45 of the ACA 1996 is appealable under section 50.

## Time limits

### Completion of pleadings

Parties must file their statement of claim and statement of defence within six months of the formal constitution of the tribunal (*section 23(4), ACA 1996*). However, the ACA 1996 does not provide for the filing of further rounds of pleadings, such as a reply or a defence to a counterclaim.

While the language of section 23(4) implies that the timelines are mandatory, the ACA 1996 does not stipulate any consequences for non-compliance with these timelines and it is unclear whether these timelines are strictly enforced.

### Making the arbitral award

For discussion of time limits for making awards, see *Time limits for issuing awards*.

## Place of arbitration

### Seat versus venue

There are conflicting judgments from different courts dealing with ascertaining the "seat" and the "venue" of an arbitration. In particular, there has been controversy regarding the parties' intention where the arbitration agreement either does not expressly designate the "seat" or identifies the location of the arbitration proceedings in the arbitration agreement as the "venue" or "place", rather than "seat". In these circumstances, Indian courts consider the other indicators present in the contract and the surrounding circumstances with a view to ascertaining the parties' true intention regarding the seat (see *A. Gupta, 'Seat and the Law of Arbitration', in ICC India Arbitration White Paper, 2022, page 2*). However, despite several cases dealing with this issue, there is no clear jurisprudence on the matter.

In *Union of India v Hardy Exploration and Production (India) INC, Civil Appeal No. 4628 of 2018* (*Hardy Exploration*), the parties' agreement provided that the "venue of conciliation or arbitration proceedings… unless the parties otherwise agree, shall be Kuala Lumpur", and that "[a]rbitration proceedings shall be conducted in accordance with the UNCITRAL Model Law on International Commercial Arbitration of 1985". When disputes arose, the parties commenced arbitration proceedings, which were held in Kuala Lumpur. The proceedings resulted in an award signed in Kuala Lumpur. India challenged the award under provisions of the *ACA 1996* at the Delhi High Court, contending that the arbitration agreement only referred to Kuala Lumpur as the "venue" and did not expressly designate a "seat", which India argued ought to be determined to be New Delhi. The Supreme Court, observing that a choice of venue did not, by itself, assume the status of the seat, held that the parties, by designating Kuala Lumpur as the venue, had failed to choose the seat. However, the venue could become the seat but only if "something else is added to it as a concomitant" (see *Legal update, Place of arbitration not necessarily the seat (Indian Supreme Court)*).

 

However, in *BGS SGS Soma JV v NHPC Ltd, 2019 SCC OnLine SC 1585* (*BGS SGS Soma*) (discussed in *Legal update, Venue of arbitration is synonymous with seat when seat not expressly provided (Supreme Court of India)*), the Supreme Court considered an arbitration agreement stipulating that "Arbitration Proceedings shall be held at New Delhi/Faridabad, India". The court provided detailed guidance on determining whether a chosen venue could be treated as the seat of arbitration, stating that:

- Where a location is designated in the arbitration agreement as the "venue" of "arbitration proceedings", the use of the expression "arbitration proceedings" signifies that, as opposed to certain hearings, the arbitration proceedings as a whole (including the making of the award) are to be conducted at that place. In these cases, the choice of venue is synonymous with a choice of the seat.
- Where the arbitration agreement contains language such as "tribunals are to meet or have witnesses, experts or the parties", meaning that only (certain) hearings are to take place at the specified "venue", this may lead to the conclusion, all other things being equal, that the designated venue is not the "seat" of arbitral proceedings but only a convenient place for meeting or holding hearings.
- If the arbitration agreement provides that arbitration proceedings "shall be held" at a particular venue, it indicates the parties' intention to anchor the arbitral proceedings to a particular place, thereby signifying that the venue amounts to a choice of the seat of arbitration.

This guidance was subject to there being no other "significant contrary indicia", which suggests that the stated venue is just that, a venue for certain proceedings, as opposed to the seat of arbitration. The court further observed that, in the context of international arbitration, the choice of a supranational body of rules to govern the arbitration (for instance, the ICC Rules) would further demonstrate that the chosen venue is in fact the seat of arbitration. In the context of domestic arbitral proceedings, the choice of the ACA 1996 would provide a similar indication. In its ruling, the Supreme Court affirmed the so-called "Shashoua principle", articulated by the English Commercial Court in *Shashoua v Sharma [2009] EWHC 957 (Comm)*, in the context of a London arbitration.

The tests established in *Hardy Exploration* and *BGS SGS Soma* differ significantly in their approach in determining whether the designated "venue" amounts to the "seat". While *Hardy Exploration* observes that a chosen venue could not by itself become the seat absent additional factors, *BGS SGS Soma* states that a designated venue for arbitration proceedings is synonymous with the choice of a seat in the absence of any "significant contrary indicia".

However, in *Arif Azim Co Ltd v Micromax Informatics FZE, 2024 INSC 850*, the Supreme Court resolved this inconsistency, holding that, in the first instance, the seat of arbitration should be determined by applying the Shashoua principle. In circumstances where the venue is unclear, the closest connection test is suitable to determine the seat of arbitration.

From a practical perspective, the law of the seat holds significance because it dictates which courts exercise jurisdiction over arbitration-related litigation including, for example, courts entertaining applications to appoint arbitrators and set aside awards (see *Practice note, How significant is the seat in international arbitration?*).

Section 2(1)(e) of the ACA 1996 defines the term "Court" as:

- For domestic arbitrations, the "principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit".
- For ICAs, the High Court having jurisdiction to decide the questions forming the subject-matter of the arbitration, as it they had been the subject-matter of a suit.

 

The Supreme Court has interpreted this definition in multiple judgments, holding that an arbitration clause that designates a specific seat of arbitration operates to confer exclusive jurisdiction over the arbitration on the courts of that location (see, for example, *Indus Mobile Distribution Private Ltd v Datawind Private Ltd and others, AIR 2017 SC 2105* and *BGS SGS Soma*).

However, in *BGS SGS Soma*, the Supreme Court held that, where parties have not determined a seat of arbitration, the courts within whose territorial limits a cause of action has arisen may have jurisdiction. It is possible that this may cause confusion when the cause of action has arisen in multiple places, but its consequences are, as yet, untested.

In *Kings Chariot v Tarun Wadhwa* (*Arbitration Petition 421 of 2024*), the Delhi High Court held that, in cases where the parties had not specified a seat of arbitration, sections 16 to 20 of the *CPC* would be used to determine which court has exclusive jurisdiction over the arbitration. These sections provide that:

- Suits dealing with immovable property situated in India can be instituted before courts having territorial jurisdiction over the relevant property.
- Suits dealing with wrongs done to persons and moveable property can be instituted either before the courts having territorial jurisdiction over the place where the wrong was committed or where the defendant resides or carries on business.
- Other suits can be instituted where the defendant resides or carries on business, or where the cause of action arises.

The reasoning in the *Kings Chariot* decision aligns with the proposed amendments to the ACA 1996 under the draft Arbitration and Conciliation Bill, 2024, which would change the definition of "Court", insofar as it concerns domestic arbitrations, to the following:

> "(i) where seat of arbitration has been agreed by the parties or determined by the arbitral tribunal as per Section 20, the court means the court having pecuniary and territorial jurisdiction over the seat of arbitration.
>
> (ii) in all other cases, the court means the court having pecuniary and territorial jurisdiction to decide the disputes forming the subject- matter of the arbitration if the same had been the subject-matter of a suit."

## Conduct of proceedings

### Procedure to be followed

The parties are free to agree on the procedure for the conduct of arbitral proceedings (*section 19(2), ACA 1996*). If they do not, the arbitral tribunal is empowered to conduct the proceedings in the manner it considers appropriate (*section 19(3)*). In determining the appropriate procedure, the tribunal is not bound by the strict rules of civil procedure set out in the CPC or the Evidence Act (*section 19(1)*). In practice, however, Indian courts have held that arbitral tribunals can draw guidance from the fundamental principles underlying the CPC and Evidence Act, even though these statutes are not binding on them (see, for example, *State of Orissa v Samantary Constn Pvt Ltd and others, 2016 (4) SCJ 133; Mahanagar Telephone Nigam Limited and others v Anant Raj Agencies Pvt Ltd, 2017 IIIAD (Delhi) 357*).

### Ad hoc v institutional arbitration

 

Institutional arbitration has been historically underutilised in India, where parties have tended to favour ad hoc arbitration (see *Scope of this note*). The legislature has attempted to provide incentives for institutional arbitration by introducing the ACAA 2019 and by proposing changes to promote institutional arbitration in the draft Arbitration and Conciliation Bill, 2024.

Where parties opt for institutional arbitrations seated in India, they are bound by the mandatory provisions of the *ACA 1996*. These include the ability of parties to seek interim protection from courts (*section 9*), the right to seek reference to arbitration (*section 8*), the disqualifications applicable to arbitrators (*Fifth and Seventh Schedules*), timelines for completion of pleadings and the rendering of awards (*sections 23 and 29A*), rules applicable to the substance of a dispute (*section 28*), seeking court assistance in obtaining evidence (*section 27*) and the provisions on challenges to awards (*section 34*) .

## Consolidation and joinder

The *ACA 1996* is silent on the consolidation of arbitrations and joinder of additional parties. However, Indian courts have, in several situations, permitted arbitrations under multiple contracts to be consolidated *(Weatherford Oil Tool Middle East Limited & Ors v Baker Hughes Singapore Pte, (2022) 15 SCC 729).*

When the same set of parties have multiple contracts for the transaction between them and one contract can be said to be an umbrella contract, with the others ancillary or consequential to it, then, notwithstanding that the agreements may have different arbitration clauses, if the terms of the umbrella contract are wide enough to cover disputes under the ancillary contracts, they can be referred to arbitration under the umbrella contract (*Balasore Alloys Limited v Medima LLC (2020) 9 SCC 136*).

If the parties to the contracts are different, then Indian courts would apply the test laid down for extension of arbitration agreements to non-signatories (see *Extension of an arbitration clause to non-parties*).

Parties to an institutional arbitration can, in any event, rely on the provisions of the chosen procedural rules to seek to consolidate arbitrations or join additional parties. For instance, rule 6 of the DIAC (Arbitration Proceedings) Rules 2023 (DIAC Rules) provides for a limited consolidation mechanism, whereby the tribunal can, with the consent of all parties, direct consolidation of two or more arbitral proceedings before it, if the disputes or differences are identical and between the same parties or between parties having commonality of interest, or where the disputes arise out of separate contracts but relate to the same transaction. Similarly, rule 5 of the *MCIA Rules* allows for consolidation of two or more arbitrations pending under the MCIA Rules where either the parties agree to the consolidation or all claims in the arbitration are made under the same arbitration agreement. Rule 5 provides a detailed mechanism for the consolidation of arbitral proceedings. Rule 28 of the DIAC Rules also provides a mechanism for the joinder of additional parties.

For further discussion, as well as consideration of other rules, see *Practice notes, Multi-party and multi-contract issues in arbitration* and *Major international commercial arbitration rules: comparison and key features*.

## Rules applicable to substance of dispute

Section 28 of the *ACA 1996* deals with the rules applicable to the substance of dispute, where the seat of arbitration is in India. Where an arbitration is between Indian parties only and is therefore purely domestic in nature, the disputes must be decided in accordance with Indian law (*section 28(1)(a), ACA 1996*). For ICAs, that is arbitrations with a foreign element and at least one foreign party, the parties can designate any law to decide their disputes. If the parties fail to designate the applicable law, the tribunal will determine which rules of law would be most appropriate after considering all the circumstances surrounding the dispute (*section 28(1)(b), ACA 1996*). The tribunal can only decide *ex aequo et bono* or as *amiable compositeur* where expressly authorised to do so by the parties (*section 28(2), ACA 1996*).

 

**Confidentiality**

Before its amendment in 2019, the *ACA 1996* only provided for the confidentiality of conciliation proceedings and was silent as to confidentiality of arbitration proceedings. Therefore, there was no express obligation to maintain the confidentiality of arbitration proceedings, and parties had to fall back on any confidentiality clause in the governing arbitration agreement or the relevant arbitral rules of the administering institution.

This was considered to be a shortcoming in Indian arbitration law. To address this issue, a high-level committee was constituted to review the institutionalisation of arbitration in India. On 30 August 2017, the committee issued its *Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India*, popularly known as the "Justice Srikrishna Committee Report" (in reference to the committee's chairperson), and recommended the insertion of a new provision in Part I of the ACA 1996, providing for confidentiality of arbitral proceedings, unless disclosure was required "by legal duty, to protect or enforce a legal right, or to enforce or challenge an award before a court or judicial authority".

Implementing this recommendation, the ACAA 2019 introduced section 42A into the ACA 1996. Section 42A imposes an obligation on the arbitrators, the arbitral institution (if any) and the parties to maintain the confidentiality of all arbitral proceedings. Despite not being expressly stated, it is generally accepted that the confidentiality obligation imposed by section 42A extends to the parties' legal representatives, witnesses, experts and other participants in arbitral proceedings.

As enacted, section 42A contains a more limited exception to the duty of confidentiality than that recommended in the Justice Srikrishna Committee Report and only permits the disclosure of the arbitral award for the purposes of its implementation and enforcement. None of the other exceptions recommended by the Justice Srikrishna Committee Report were included in section 42A.

The rules of several Indian arbitral institutions, including those of the MCIA and DIAC, as well as the rules of widely used international institutions like SIAC, contain more detailed provisions on confidentiality and include an elaborate list of exceptions to confidentiality obligations. For example, rule 35.2 of both the *MCIA Rules 2016* and the *DIAC Rules 2023* lists out various exceptions (in addition to the exception for award enforcement), including:

- To pursue or enforce a legal right or claim.
- Compliance with the provisions of the laws of any state, which are binding on the party making the disclosure.
- Compliance with the request or requirement of any regulatory body or other authority.
- Pursuant to an order of the tribunal or an order or subpoena of a court of competent jurisdiction.

Rule 59.3 of the *SIAC Rules 2025* sets out similar exceptions to the general duty of confidentiality, which is imposed by rule 59.1.

## Hearings

Unless otherwise agreed by the parties, it is for the arbitral tribunal to decide whether to hold an oral hearing or conduct the proceedings a documents-only basis. However, unless the parties have agreed that no oral hearing should be held, the tribunal must hold an oral hearing where a party requests one (*section 24(1)*, *ACA 1996*).

In *Sohan Lal Gupta and others v Asha Devi Gupta and others (2003) 7 SCC 492*, the Supreme Court held that, while each party should have a reasonable opportunity to present its case, that does not amount to an unfettered right to make submissions. On the contrary, the Court held that the tribunal has the right to manage the hearing and may decide to forego oral argument, if each party has had a reasonable opportunity to present its case. The court held that, to ensure a hearing constitutes a reasonable opportunity for the parties to present their respective cases, each party must have:

 

- Notice that the hearing is to take place.
- A reasonable opportunity to be present at the hearing, together with the party's advisers and witnesses.
- The opportunity to be present throughout the hearing.
- A reasonable opportunity to present evidence and argument in support of its case.
- A reasonable opportunity to test its opponent's case by cross-examining witnesses and experts, presenting rebutting evidence and addressing oral argument.

In addition, unless the parties expressly agree otherwise, the final hearing should be the occasion when the parties present their whole case.

While the ACA 1996 does not specifically provide for virtual hearings, in the post-pandemic world, virtual hearings are widely accepted. The parties can decide on the procedure to conduct proceedings (*section 19(2), ACA 1996*) and, absent any agreement on a matter, the tribunal can determine the appropriate procedure (*section 19(3), ACA 1996*). This includes an agreement or determination as to whether hearings can be conducted virtually. In fact, Indian courts have accepted this position (*Suasth Health Care (India) Ltd v Praxair India Pvt Ltd, 2020 SCC OnLine Bom 8862*), although not in the context of deciding a challenge to the validity of virtual arbitration hearings.

Tribunals are required, as far as possible, to conduct oral hearings on a day-to-day basis, and to avoid granting adjournments unless sufficient cause is made out (*section 24, ACA 1996, as amended by ACAA 2015*). The tribunal also has the power to award costs, including exemplary costs, where a party seeks adjournments without sufficient cause (*proviso, section 24, ACA 1996*).

Parties must be given sufficient advance notice of any hearing or meeting of the tribunal for the purposes of inspection of documents, goods, or other property (*section 24(2*). Further, all statements, documents, applications or information supplied to the tribunal by one party must be communicated to all other parties (*section 24(3)*). Any expert reports or other documentary evidence on which the tribunal proposes to rely in making its decision must be communicated to the parties (*section 24(3)*).

Where a party fails to appear at a hearing without showing sufficient cause, the tribunal can continue the proceedings and make the arbitral award on the evidence before it (*section 25(c), ACA 1996*).

Where the tribunal appoints an expert to report to it on specific issues (*section 26(1), ACA 1996*), a party can request, following delivery of the expert's report, that the expert appear at the hearing to be examined by the parties on their report (*section 26(2)*).

Where an arbitrator has been replaced (due to termination of the mandate of the previous arbitrator), any hearings that were previously held may be repeated at the discretion of the tribunal, unless the parties otherwise agree (*section 15(3), ACA 1996*).

### *Tribunal decision-making*

Where the tribunal comprises multiple arbitrators, unless otherwise agreed by the parties, decisions of the tribunal shall be made by a majority of all its members (*section 29(1), ACA 1996*).

Where an arbitrator gives a dissenting opinion, it cannot be treated as an award. While there have been a few instances of courts upholding the minority view when setting aside majority awards, the Supreme Court has recently clarified that an arbitrator's dissenting opinion cannot be treated as award, even when the majority award is set aside (*Hindustan Construction Company Limited v National Highway Authority of India, 2023 SCC OnLine SC 1063*).

Questions of procedure may be decided by the presiding arbitrator, if authorised either by the parties or by all the members of the tribunal (*section 29(2), ACA 1996*).

### *Termination of proceedings*

Arbitral proceedings terminate when the tribunal makes its final award under section 31 of the *ACA 1996* (*section 32(1)*).

The tribunal can also make an order for the termination of the proceedings, without deciding the merits of the dispute, where:

- The claimant withdraws its claim.
- The parties agree to termination of the proceedings.
- The tribunal finds that it has become unnecessary or impossible to continue with the proceedings.

(*Section 32(2), ACA 1996*.)

The arbitral proceedings could also terminate in the following situations:

- Failure by the claimant to submit its statement of claim (*section 25(a)* and *SP Singla Construction Pvt Ltd v State of Himachal Pradesh, 2019 (2) SCC 488*).
- Settlement by the parties under section 30(2).
- Failure by the parties to make advance deposits (*second proviso, section 38(2)*).

After the proceedings are terminated in any one of the above circumstances, the arbitral tribunal becomes *functus officio (section 32(3), ACA 1996)*.

### Settlement

Unusually, the *ACA 1996* expressly provides that the tribunal can encourage the parties to attempt settlement of the dispute and, with the agreement of the parties, the tribunal itself can use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement (*section 30(1), ACA 1996*).

Where the parties reach a settlement, the tribunal will terminate the proceedings and, if the parties request, it may record the settlement in the form of an award on agreed terms (sometimes referred to as a consent award) (*section 30(2), ACA 1996*). The ACA 1996 does not require the tribunal to agree to making a consent award, and section 30(2) expressly provides that the tribunal may object to doing so.

Where the tribunal does agree to issue a consent award, it shall be made in accordance with section 31 of the ACA 1996 (see *Awards*) and will have the same status and effect as any other arbitral award on the substance of the dispute (*section 30(3) and (4)*).

For further discussion, see *Practice note, Settlement and discontinuance in international arbitration: overview* and *Standard document, Sample consent award embodying parties' settlement agreement and terminating arbitration*.

## Courts' powers in support of arbitration

 

## Introduction and general powers

The Indian courts are expressly prohibited from intervening in arbitrations except as provided for in Part I of the ACA 1996 (*section 5, ACA 1996*). This was an express policy choice underlying the ACA 1996 to limit judicial interference in, and to promote, arbitration. However, there are various provisions that enable parties to either seek assistance from the court to exercise their rights or seek court intervention where required. These provisions include the power to grant interim relief (*section 9*), assist in obtaining evidence for an arbitration (*section 27*) and appoint arbitrators where parties have failed to do so (*section 11*).

## Scope of court's powers in foreign versus domestic seated arbitrations

The scope of the powers of Indian courts differs depending where the seat of arbitration is. Part I of the ACA 1996 applies to arbitrations with an Indian seat (*section 2(2), ACA 1996*). However, unless the parties have agreed otherwise, they could still have recourse to Indian courts to seek interim relief under section 9, compel evidence under section 27 and challenge certain orders under section 37, even if the seat of arbitration is outside India (*proviso, section 2(2), ACA 1996*).

If the parties' agreement excludes recourse to Indian courts, they will be bound by that election. However, the exclusion must be in express terms (*Heligo Charters (P) Ltd v Aircon Beibars FZE (2018) SCC OnLine Bom 1388*).

While determining whether parties have impliedly excluded the applicability of Part I, courts have considered a variety of factors, including procedural rules of a foreign arbitral institution, seat of arbitration and the law governing the arbitration agreement (see, for example, *Yograj Infrastructure Ltd v Ssang Yong Engg and Construction Co Ltd, (2011) 9 SCC 735*).

## Proceedings in breach of arbitration agreement

An arbitration agreement encapsulates the intention of the parties to finally resolve by arbitration disputes that arise and are within the scope of the arbitration agreement. However, a party to the arbitration agreement may bring proceedings before a court in breach of the arbitration agreement.

Where the offending proceedings are brought in the Indian courts, the counterparty can apply to the court for an order referring the dispute to arbitration in accordance with the parties' agreement (*section 8, ACA 1996*) (see *References to arbitration from the courts*).

Where the proceedings are brought in the courts of another jurisdiction, the counterparty may approach either the Indian courts (*section 9, ACA 1996*) or the arbitral tribunal (once constituted) (*section 17, ACA 1996*) for an anti-suit injunction restraining the continuation of the breach of the arbitration agreement.

In *Enercon (India) Ltd v Enercon GmbH, (2014) 5 SCC 1*, the parties initiated parallel proceedings in the courts of India (Bombay High Court and the trial court of Daman) and in the English courts. The appellant was seeking a declaration in the Indian courts that arbitration agreement was invalid, and the respondent was seeking an interim remedy from the English courts to constitute the tribunal. The Indian Supreme Court issued an anti-suit injunction restraining continuation of the English proceedings. In doing so, the Supreme Court considered the following factors:

- The agreement was to be performed in India.
- The governing law of the agreement was Indian law.
- Neither of the parties was English (one was Indian, the other German).

 

- Any interim measures in aid of the arbitration should be sought before the Indian courts, since the assets of the appellant were in India.
- The respondent had participated in the proceedings initiated by the appellant before the Bombay High Court and the Daman Trial Court and had filed separate proceedings under the Indian Companies Act. Therefore, the Court did not consider India to be *forum non conveniens*.

In *Honasa Consumer Limited v RSM General Trading LLC (2024 DHC 6227)* (*Honasa Consumer*), the Delhi High Court was faced with a scenario where the respondent had initiated proceedings before the courts of Dubai to seek remedies for the breach of the contract between the parties, despite the contract containing an arbitration clause. The Dubai court subsequently found in favour of the respondent. The petitioner asked the Delhi High Court to issue an anti-enforcement injunction preventing the respondent from executing the decree of the Dubai court. The Delhi High Court held that it had the power under section 9(1)(e) of the ACA 1996 to issue an injunction given the wide ambit of the provision or, alternatively, under the power to pass orders to secure the ends of justice or to prevent abuse of the process of the court (*section 151, CPC*).

Relying on the Supreme Court's judgment in *Modi Entertainment Network and others v WSG Cricket PTE Ltd (2003 INSC 27)*, the Delhi High Court stated that, before exercising its discretion to grant an anti-suit injunction, the court must be satisfied that:

- The party against whom the injunction is sought is amenable to the personal jurisdiction of the court.
- If the injunction was declined, the ends of justice would be defeated, and injustice would be perpetuated.
- The principle of comity, or respect, for the court in which the proceedings were commenced must be borne in mind.

In cases where more than one potential forum is available, in exercising its discretion to grant an anti-suit injunction, the court will examine which is the appropriate forum (*forum conveniens*), having regard to the convenience of the parties, and it may grant anti-suit relief in relation to proceedings that are oppressive, vexatious or brought in a *forum non conveniens*.

In *Honasa Consumer*, in view of the clear agreement to arbitrate disputes arising under the contract and the fact that the respondent had sought to claim remedies for a potential breach of the contract, which was within the ambit of the arbitration agreement, the Delhi High Court enjoined the respondent from executing the decree issued by the court of Dubai.

## Power to provide assistance in collecting evidence

The tribunal or, more often, the parties, with the approval of the tribunal, can apply to the court for assistance in taking evidence for an ongoing arbitration (*section 27(1), ACA 1996*). This section applies to applications for assistance in taking evidence both from parties to the arbitration who are not cooperating with orders of the tribunal in relation to producing evidence and from third parties to the arbitration over which the tribunal has no jurisdiction (*Delta Distilleries Limited v United Spirits Ltd and another*, *(2014) 1 SCC 113*, paragraphs 19-21, discussed in *Legal update, Supreme Court of India allows court's assistance in production of evidence in arbitral proceedings*). Parties can therefore file applications before the court at the seat of arbitration to compel:

- A person to give evidence as a witness or expert (including in writing and appearing for cross-examination).
- The production of any document or inspection of property.

(*Section 27(2)(c), ACA 1996*).

If it grants the application, the court can direct that the evidence be provided directly to the tribunal (*section 27(3), ACA 1996*), and a person failing to comply with the order may be held in contempt and may, on application by the tribunal, be made subject

 

to the disadvantages, penalties and punishments by court order that they would incur for the same offences in proceedings before the court (*section 27(5)*).

In considering whether to grant a party permission to approach the court under section 27, arbitral tribunals must find on a prima facie basis that the evidence, whether documentary or from a witness, is relevant to the issues in dispute (*Hindustan Petroleum Corporation Ltd v Ashok Kumar Garg 2006 (91) DRJ 591, paragraphs 13-14*).

The court's powers under section 27 are not adjudicatory in nature. It follows that courts cannot hear the parties or witnesses on the merits of the orders made by the tribunal in relation to acquiring evidence under section 27 (*Montana Developers Pvt Ltd, Mumbai v Aditya Developers, Mumbai and others, 2016(6) Mh.L.J. 660*, paragraphs 16-20; *M/s Rasiklal Ratilal and another v Fancy Corporation Ltd and another, 2007(4) Mh.L.J. 876*, paragraphs 9-10).

# Awards

## Form, content and notification

### Form requirements

The ACA 1996 sets out the form requirements for an arbitral award made in an Indian-seated arbitration. The award must:

- Be in writing and signed by the arbitral tribunal (*section 31(1), ACA 1996*).
- State the reasons on which it is based, unless the parties have agreed to dispense with reasons or it is a consent award (*section 31(3)*).
- Set out the date on which it is made and the place of arbitration, which establishes the seat of the arbitration (*section 31(4)*).

Where the tribunal comprises multiple arbitrators, the signatures of the majority of its members are sufficient, provided that the award states the reason for any omitted signature (*section 31(2)*). Moreover, the law allows for the authentication of documents, including arbitral awards, through electronic signatures as prescribed by the *Information Technology Act, 2000*. Merely inserting an image of a signature does not meet this requirement.

The stamping of arbitral awards is an additional requirement in India for the award. An arbitral award cannot be enforced until stamp duty is paid. Although the stamping requirement does not make foreign awards unenforceable, it may cause a procedural flaw that needs to be fixed before enforcement can take place by paying the relevant stamp duty (*Shriram EPC Ltd. v Rioglass Solar Sa, (2018) 18 SCC 313*) (for discussion of stamping in the context of arbitration agreements, see *Formal and substantive requirements*).

### Dissenting opinions

While dissenting opinions are permitted, they cannot be treated as an award. As noted by the Supreme Court, a dissenting opinion cannot be treated as an award in an arbitration even where the award rendered by the majority is set aside (*Hindustan Construction Company Limited v National Highway Authority of India, 2023 SCC OnLine SC 1063*).

### Time limits for issuing awards

For all arbitrations (other than ICAs), the tribunal must issue its award within 12 months from the date of completion of pleadings under section 23(4) (*section 29A(1), ACA 1996*). The parties may agree to extend this period by a maximum of six months

 

(*section 29A(3)*). Unlike the position in relation to timelines for the filing of pleadings, the ACA 1996 specifies consequences for non-compliance with the time limits for rendering an award. If the award is not made within the period specified by section 29A (or the extended period, if the parties agree), the mandate of the tribunal would terminate, unless the court has granted a further extension. The court would, when entertaining a request for extension, consider the reasons for delay and may, after giving the tribunal an opportunity to be heard, order a reduction of the tribunal's fees by up to 5% per month of delay (*section 29A(4)*). The court may also substitute one or all of the arbitrators while extending the time to render an award (*section 29A(6)*). The Supreme Court has, in *Rohan Builders (India) Pvt Ltd v Berger Paints India Limited, 2024 SCC OnLine SC 2494*, clarified that an application for extension of the tribunal's mandate can even be filed after the statutory time period has lapsed, but any application would be decided on its specific facts and where the court finds that there is sufficient cause for the extension.

Although ICAs are excluded from the ambit of section 29A of the ACA 1996, the proviso to section 29A(1) states that, in an ICA, the award "may be made as expeditiously as possible and endeavour may be made to dispose of the matter within a period of twelve months from the date of completion of pleadings" under section 23(4) of the ACA 1996.

**Notification of award to the parties**

Once the award is made, a signed copy of the award to be delivered to each party (*section 31(5), ACA 1996*). However, unless otherwise agreed by the parties, the tribunal can exercise a lien over the award for any unpaid costs of the arbitration (*section 39(1), ACA 1996*).

**Interest**

Section 31(7) of the *ACA 1996* empowers the arbitral tribunal to include both pre- and post-award interest in its award, unless otherwise agreed by the parties. The tribunal can fix pre-award interest at the rate it deems reasonable and award it for the entire award amount or any part of it, and impose it for the whole or any part of the period from when the cause of action arose to the date of the award (*section 31(7)(a)*). The rate of post-award interest is set at a default rate of 2% higher than the "current rate of interest" (as defined in section 2(b) of the *Interest Act, 1978*), unless the tribunal directs otherwise (*section 31(7)(b), ACA 1996*).

Alternatively, the parties can agree the basis on which interest is to be calculated or agree that no interest should be paid.

## Types of awards

Awards are final and binding on the parties to an arbitration and on persons claiming under them (*section 35, ACA 1996*).

The arbitral tribunal has power to make any of the following types of awards:

- **Final award**. An award finally disposing of all the issues submitted to arbitration.
- **Partial award**. The arbitral tribunal can make a partial award, which resolves some but not all the issues in the arbitration. For example, the tribunal may make a partial award on liability, and then determine the appropriate remedy, as well as issues such as costs, in a later award.
- **Consent award**. Where the parties settle their dispute during the arbitration, they may request that the tribunal record the terms of their agreement in the form of a consent award (*section 30(2), ACA 1996*) (see *Settlement*).
- **Additional award**. The ACA 1996 provides that the parties may request the arbitral tribunal to issue a second award to address the matters that were not adjudicated upon with the final award (*section 33(5)*).
- **Interim award**. During the course of the arbitral proceedings, a tribunal has the same power to issue an interim arbitral award as a court does to make interim decisions during proceedings before it (*sections 2(c) and 31(6), ACA 1996*).

 

## Final remedies

The arbitral tribunal has the power to grant the following remedies:

- **Damages**. The arbitral tribunal has the authority to award damages based on the evidence presented and applicable legal principles. Damages can only be compensatory, as punitive or exemplary damages are not permitted, save in exceptional cases where the Respondent's conduct was wrongful or punishable (*i Koninlijke Philips NV v. Amazestore (2019) (260 DLT 135)*). While Indian courts generally award compensatory damages only, they have recognized that arbitral tribunals may award damages for mental distress, agony or harassment in certain exceptional cases. (*Tejpal Singh v. Surinder Kumar Dewan, 2022 SCC OnLine Del 4667; Krishan Gopal v. Parveen Rajput, 2019 SCC OnLine Del 8330.*)
- **Declarations.** There is no prohibition under Indian law against an arbitral tribunal making an award granting declaratory relief (*National Thermal Power Corpn Ltd v Wig Brothers Builders and Engineers Ltd, 2009 SCC OnLine Del 911*). However, there are limits on the extent to which declaratory relief can be enforced (see *Practice note, Enforcing arbitration awards in India: overview: Enforceable awards*).
- **Injunctions and interim measures**. Section 17 of the *ACA 1996* provides that parties can seek injunctions or interim measures from the arbitral tribunal to preserve their rights, prevent irreparable harm or maintain the status quo pending the final resolution of the dispute.
- **Specific performance**. In cases where monetary damages are inadequate to remedy the harm, parties may seek specific performance to fulfil their contractual obligations as agreed upon in the contract.
- **Costs and expenses.** Where the tribunal determines appropriate, it can also in the award deal with the allocation of costs and award of interest to the parties (*section 31(7) and (8), ACA 1996*).

## Correction, interpretation and additional awards

Within 30 days from the date it receives an award, unless another timeline has been agreed, a party can apply to the tribunal and request:

- **Correction.** A party can, with notice to all other parties, request that the arbitral tribunal correct any computational, clerical or typographical errors, or other errors of similar nature in the award (*section 33(1)(a), ACA 1996*). If the tribunal agrees that the request is justified, it should issue a correction within thirty days of receiving the request (*section 33(2), ACA 1996*). The arbitral tribunal can also correct an error of this type on its own initiative within 30 days of issuing the award (*section 33(3), ACA 1996*). The Supreme Court has highlighted the limited scope of section 33, observing that the award can be modified only to correct arithmetical or clerical errors, or similar (*Gyan Prakash Arya v Titan Industries Limited, 2021 SCC OnLine SC 1100*). In addition, there is authority that a "clerical error", which can be amended retrospectively where identified, is distinct from a "judicial error", which can only be rectified through review or appeal, where available (*Manesha Ram L Jagdish Rai v Tej Bhan L Gurditta Mal Sahne, AIR 1962 Punj 110*).
- **Interpretation**. If agreed between the parties, a party can, with notice to all other parties, request that the arbitral tribunal give an interpretation of a specific point or part of the award (*section 33(1)(b), ACA 1996*). If the tribunal agrees that the request is justified, it should issue its interpretation within thirty days of receiving the request and that interpretation will form part of the award (*section 33(2), ACA 1996*).

 

- **Additional award**. Unless otherwise agreed, a party can, with notice to all other parties, request an additional award on claims that it presented in the arbitral proceedings but that the tribunal omitted from the award (*section 33(4), ACA 1996*). If the request for an additional award is deemed justified by the arbitral tribunal, it can make the award within 60 days of receiving the request (*section 33(5)*).

The Arbitral Tribunal can extend the time limit for determining a request by a party for a correction, interpretation or additional award if necessary (*section 33(6), ACA 1996* and *Gujarat Water Supply & Sewerage Board v Man Industries (India) Ltd, C/F/1257/2024*). However, it cannot extend the period for making a correction of its own initiative.

Although the ACA 1996 does not specify this, in practice, the tribunal would likely invite observations on a request for a correction or additional award, in line with the tribunal's obligation under section 18 to give each party a full opportunity to present its case. This would appear to be unnecessary in relation to applications for interpretation of awards, since those applications can only be made where they are agreed between the parties.

## Challenges to awards

**Overview: standard and evolution of legal principles**

Under the *ACA 1996*, an award rendered in an Indian-seated arbitration can be challenged by an application under section 34 of the ACA 1996. The available grounds for challenge are limited to those specified in section 34(2), which reflects the international jurisprudence of minimal intervention by courts in arbitration and the finality of arbitral awards.

The standard of review for a court when assessing a challenge to an arbitral award prohibits the court from sitting in appeal over the decision of the arbitral tribunal. A court cannot examine the merits of the dispute, review the validity of the findings of an arbitral tribunal, assess the tribunal's reasoning behind or re-evaluate evidence presented to the tribunal.

The legal principles concerning challenges to arbitral awards have primarily revolved around section 34(2)(b)(ii) of the ACA 1996, which provides that an award can be set aside where it is conflicts with the public policy of India.

Section 34 of the ACA 1996 applies only to Indian awards, as foreign awards cannot be challenged before the Indian court. Applications to set aside an award must be made to the competent courts of the seat, meaning that an Indian court is limited to refusing to recognise or enforce a foreign award in India under grounds specified under section 48 (see *Enforcement of awards*).

**Grounds of challenge**

An arbitral award rendered in India, whether in a domestic arbitration or an ICA, may be set aside where, on the basis of the record of the arbitral tribunal, the applicant satisfies the court that:

- A party was under some incapacity.
- The arbitration agreement was not valid under the law chosen by the parties or, absent an agreement, not valid under the law in force at the time.
- The applicant was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present their case.
- The arbitral award deals with a dispute not contemplated by, or not falling within the terms of, the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

 

- The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the parties' agreement or, absent any agreement, was not in accordance with Part I of the ACA 1996.

(*Section 34(2)(a), ACA 1996*.)

An award can also be set aside if the court finds, either on the application of a party or of its own initiative, that:

- The subject matter of the dispute cannot be settled by arbitration under the law for the time being in force.
- The arbitral award is in conflict with the public policy of India.

(*Section 34(2)(b), ACA 1996*.)

These grounds under section 34 broadly mirror of those under the New York Convention, such as the invalidity of the arbitration agreement, incapacity of a party and non-arbitrability of the subject matter. The express reference in section 34(2)(a) to the "record of the arbitral tribunal" gives an indication of the limited scope of the review by the Indian court.

Awards rendered in domestic arbitrations can only be set aside where the award is vitiated by patent illegality, which appears on the face of the award (*section 34(2A), ACA 1996*). The ACAA 2015 introduced this provision into the ACA 1996. However, an award will not be set aside simply because the court finds that the tribunal erroneously applied the law or because the court would have assessed the evidence differently (*proviso, section 34(2A), ACA 1996*).

The Supreme Court has clarified the scope of patent illegality. Patent illegality must appear on the face of the award, which refers to illegality that goes to the root of the matter but does not amount to mere erroneous application of the law. The Supreme Court has made clear that re-assessment of evidence, which an appellate court can do on appeal against a judgment, is not permitted in relation to a challenge to a domestic award on the ground of patent illegality appearing on the face of the award (*SsangYong Engineering and Construction Company Ltd v NHAI, 2019 INSC 647* (*SsangYong Engineering*)). For example, if an arbitrator, in breach of section 31(3) of the ACA 1996, gives no reasons for an award, that would amount to a patent illegality on the face of the award.

**Meaning of Indian public policy**

The contours of public policy of India have been restricted and narrowed over the years to ensure minimum judicial intervention by courts. Following multiple judgments of the Supreme Court on the scope of Indian public policy, the ACAA 2015 amended the *ACA 1996* to provide expressly that an award only contravenes Indian public policy if:

- The making of the award was induced or affected by fraud or corruption, or was in violation of sections 75 (which addresses the confidentiality attaching to conciliation proceedings) or 81 (on the admissibility as evidence, among other things, of admissions or statements made in settlement negotiations or conciliation proceedings) of the ACA 1996.
- It conflicts with the fundamental policy of Indian law.
- It conflicts with the most basic notions of the morality or justice.

(*Explanation 1, section 34(2), ACA 1996*.)

While the ACAA 2015 to the ACA 1996 clarified the scope of "public policy", the Supreme Court has provided further guidance as to what constitutes public policy under the ACA 1996 (see *SsangYong Engineering; Associate Builders v Delhi Development Authority, 2014 INSC 809*).

 

It is now clear that Indian public policy is restricted to mean that an award is invalid only if it is contrary to the fundamental policy of Indian law or is against the basic notions of justice or morality. The ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice".

The ground to challenge an award on the basis that it concerns an "interest of India", which appeared in an earlier version of the ACA 1996, has been deleted and is no longer available to parties seeking to challenge an award made in an Indian-seated arbitration.

A decision that is perverse, while no longer being a ground for challenge under "public policy of India" after the ACAA 2015, would amount to patent illegality appearing on the face of the award. Therefore, a finding based on no evidence at all or an award that ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality under section 34(2A) of the ACA 1996. Additionally, a finding by an arbitrator based on documents that were not known to one or more of the parties would also qualify as a decision based on no evidence, in as much as the decision is not based on evidence led by the parties, and therefore, would also be characterised as perverse.

**Competent courts**

The competent court for filing a petition challenging an Indian arbitral award a domestic arbitration is the principal civil court of original jurisdiction in the district where the arbitration was seated and that would have had jurisdiction had there not been an arbitration agreement. This includes the High Court, in exercise of its ordinary original civil jurisdiction, but excludes civil courts inferior to the principal civil court as well as any court of small causes.

The competent court for challenges to award made in ICAs is the High Court at the seat of arbitration either:

- In exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit.
- Having jurisdiction to hear appeals from decrees of courts subordinate to that High Court.

Time limits

An application to challenge an award rendered in an Indian-seated arbitration must be made within three months from either:

- The date on which the party making the application received the award.
- The date on which any application for correction or an interpretation of the award, or an additional award, under section 33 is disposed of by the tribunal.

(*Section 34(3), ACA 1996*.)

This three-month period can be extended by 30 days if the court is satisfied that the applicant was prevented from making the application within the three-month period due to sufficient cause (*proviso, section 34(3), ACA 1996*). The court cannot extend the time to entertain a challenge where the application is made beyond 120 days after either receipt of the award or resolution of any application under section 33 (*Bhimashankar Sahakari Sakkare Karkhane Niyamita v Walchandnagar Industries Ltd, (2023) 8 SCC 453*).

The court can, on application by a party, adjourn proceedings to give the tribunal the opportunity to either resume its proceedings or take any other action that the tribunal considers would eliminate the grounds for setting aside its award. Where it decides that it would be appropriate to adjourn proceedings, the court has discretion to determine the appropriate length of the adjournment (*section 34(4), ACA 1996*).

 

A party must give advance notice to all other parties to the arbitration before it files an application to set aside an award (*section 34(5)*). Once filed, the set aside petition must, in theory, be disposed of expeditiously and, in any event, within one year from the date of the notice to the other parties (*section 34(6)*). However, in practice, this provision is rarely adhered to, with section 34 petitions usually taking around two to three years to reach a first-instance decision. For example, according to data from the Delhi High Court, as at 1 September 2023:

- There were 2,106 section 34 petitions pending before it.
- The disposal of section 34 petitions took on average 1,327 days, or slightly more than three and a half years.
- The final disposal of a section 34 petition required an average of 23 hearings.

**Procedure**

An application to set aside an Indian award can be filed only after serving prior notice to the other party. The application to the court must be accompanied by an affidavit confirming compliance with that requirement (*section 34(5), ACA 1996*). The applicant must prima facie satisfy the court regarding the existence of grounds to set aside the arbitral award for the court to issue notice indicating that the matter has been admitted in Court. This is followed by written and oral submissions.

Before the ACAA 2015, an application to set aside an award would automatically stay any proceedings for the enforcement and execution of that award. However, following the amendments made by the ACAA 2015, a party challenging an award must make a separate application to seek a stay (*section 36(2), ACA 1996*). If it decides to grant the stay, the court can impose such conditions as it deems fit, for example the payment of money into court. This decision of the Court is accompanied by reasons recorded in writing (*section 36(3), ACA 1996*).

Section 36(1) of the ACA 1996 provides for enforcement of an Indian arbitral award. Where the time for making an application to set aside the arbitration award under section 34 has expired or the court refuses to stay enforcement under section 36(2), then a party can proceed with enforcement of the award in accordance with the provisions of the CPC.

It is also important to note that an Indian award must be stamped and registered, as mandated under section 35 of the Stamp Act.

**Appeal against decision on challenge to award**

While the rights of appeal under the *ACA 1996* are limited, the court's decision on an application under section 34, whether setting aside the award or rejecting the challenge, can be appealed (*section 37(1)(c)*). Although section 37(3) provides that there is no right of second appeal, a party can apply to the Supreme Court by way of a special leave petition under article 136 of the Indian Constitution.

The ACA 1996 does not stipulate a period within which parties must file their appeal. In *State of Maharashtra v Borse Bros Engineers & Contractors (P) Ltd, (2021) 6 SCC 460*, the Supreme Court held that appeals under section 37 must be filed within 60 days of the section 34 decision, where the dispute is governed by the Commercial Courts Act and for disputes whose quantum is more than INR300,000, the *Limitation Act, 1963* (Limitation Act) applies. For intra-court appeals (that is, appeals to a larger bench of judges of the same court) the limitation period under the Limitation Act is 30 days, and for inter-court appeals (that is, appeals from a lower court to a higher court) it is 90 days.

Similar to the principle applicable to the initial section 34 petition, the courts cannot entertain appeals filed more than 120 days after the section 34 decision.

## Enforcement of awards

For detailed discussion of the principles and procedures for the enforcement of awards in India, see *Practice note, Enforcing arbitration awards in India*.

A party that is dissatisfied with an arbitral award has three months to apply to have the award set aside (*section 34(3), ACA 1996*). While an application to challenge an award does not automatically stay enforcement, a party can apply for enforcement to be stayed (*section 36(2), ACA 1996*), meaning that an award creditor may elect to wait three months before filing for enforcement. The power of the court to set aside an award under section 34 is limited, in that a challenge to an award is not an appeal (see *Challenges to awards*), and the courts cannot modify arbitral awards (*McDermott International Inc v Burn Standard Co Ltd, (2006) 11 SCC 181)*.

### Enforcement of domestic and foreign awards

Awards rendered in Indian arbitrations (both domestic and ICAs) are enforced under section 36 of the *ACA 1996*, the regime for the enforcement of foreign awards is embodied in Part II of the ACA 1996.

A "foreign award" is an arbitral award that:

- Relates to differences arising out of legal relationships considered as commercial under Indian law
- Was rendered under an arbitration agreement providing for arbitration seated in a jurisdiction that is party to the New York Convention (see *New York Convention enforcement table: status*) or the Geneva Convention.
- Was made in a jurisdiction specifically notified by the Central Government for the purpose of the New York Convention.

(*Section 44, ACA 1996*.)

An Indian award is enforced under section 36(1) of the ACA 1996 as a decree of a civil court in accordance with the provisions of the CPC. Where either the period for filing a challenge to an award under section 34 has expired, or any challenge has been finally disposed of without the award being set aside, then the award can be enforced.

The grounds for refusing enforcement of a foreign award reflect both article V of the New York Convention (see *Practice note, Enforcing arbitral awards under the New York Convention 1958: overview: Defences to and resisting enforcement: article V*) and the grounds for challenging an Indian award under section 34 (*section 48, ACA 1996*).

The enforcement of a foreign award requires making an application under section 47 of the ACA 1996 to the competent High Court.

### Resisting enforcement of foreign awards in India

The Indian courts can only refuse enforcement of a foreign award where:

- On application by the party resisting enforcement, the court is satisfied that:
    - the parties to the arbitration agreement under which the award was made were under some incapacity;
    - the arbitration agreement was not valid under the law to which the parties subjected it or, in the absence of a chosen law, under the law of the country where the award was made;

 

- the party resisting enforcement did not have proper notice of the appointment of the arbitrator or arbitral proceedings, or was otherwise unable to present its case;
- the award has not yet become binding on the parties or has been set aside or suspended by the courts of the seat;
- the composition of the tribunal or the arbitral procedure was not in accordance with the parties' agreement; or
- the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

(*Section 48(1), ACA 1996*.)

- The court finds either that:
  - the subject-matter of the dispute was not capable of settlement by arbitration under the law of India; or
  - enforcement of the award would be contrary to the public policy of India.

(*Section 48(2)*.)

The ACAA 2015 amended section 48(2), as it did section 34(2), to expressly narrow the concept of Indian public policy (see *Meaning of Indian public policy*).

It is settled law that the ground of public policy of India should be construed narrowly and that there is a "pro-enforcement bias" under the ACA 1996 (*Vijay Karia v Prysmian Cavi E Sistemi SRL 2020 SCC OnLine SC 177* (Vijay Karia)). In *Vijay Karia*, the Supreme Court classified the various grounds available to refuse enforcement of a foreign award into three categories:

- There are infirmities with the tribunal's jurisdiction.
- One party's interests have been prejudiced.
- The award is contrary to the public policy of India.

However, the court adopted a balanced approach and held that "a residual discretion remains in the Court to enforce a foreign award, despite grounds for its resistance having been made out".

**Competent courts**

In *Sundaram Finance Ltd v Abdul Samad, (2018) 3 SCC 622*, the Supreme Court confirmed that a party seeking to enforce a foreign arbitral award must apply to the commercial division of the High Court that would have jurisdiction to decide the issues in the arbitration, if it was a regular suit, as decided according to sections 16 to 20 of the *CPC*.

**Time limits**

The *ACA 1996* does not specify a time limit for the enforcement of foreign arbitral awards. However, the Supreme Court has clarified that article 137 of the Limitation Act applies, meaning that the enforcement application should be made within three years from when the right to enforce accrues (*Government of India v Vedanta Ltd, 2020 SCC Online SC 749*). The courts have not yet delved into when the "right to apply" accrues. This would be assessed based on the facts of each case, for example, if parties are negotiating pursuant to an award, the right to apply may accrue when the award debtor refuses to pay the award amount.

**Procedure to enforce foreign awards**

 

A party wanting to enforce a foreign award in India must file an application, together with:

- The original award or a certified copy.
- The original arbitration agreement or a certified copy.
- Any necessary evidence to show that the award is a foreign award within the meaning of section 44.

(*Section 47(1), ACA 1996*.)

If the award is not in English, the enforcing party must also submit an English translation by a sworn translator (*section 47(2), ACA 1996*). Unlike for Indian awards, there is no requirement to stamp foreign awards (see *M/S Shri Ram EPC Limited v Rioglass Solar SA, 2018 SCC Online 147*). Once the application is filed, the award debtor may object to the enforcement based on the grounds specified in section 48 of the ACA 1996.

If an application to set aside the award is pending before the courts of the seat, the Indian court may adjourn its enforcement proceedings pending resolution of the set-aside proceedings at the seat. On application by the enforcing party, the court may make adjournment conditional on provision of suitable security (*section 48(3), ACA 1996*).

The court can then enforce the award as a decree of the court if it is satisfied that the award is enforceable (*section 49, ACA 1996*).

Once a court decides that the foreign award is enforceable, it proceeds to take further steps for execution, the process of which is identical to the process of execution of a domestic award.

**Appeals against enforcement decisions**

Section 50 of the *ACA 1996* provides for an appeal against a decision refusing to recognise or enforce a foreign award. Unlike section 37, which provides for appeals against decisions granting or refusing applications to set aside Indian awards, there is no provision for an appeal against a decision granting recognition and enforcement of a foreign award. Parties can only appeal to the Supreme Court under article 136 of the Constitution by seeking "special leave". That said, the Supreme Court would exercise its discretion to entertain the appeal sparingly, only "in appropriate cases" (*Shin-Etsu Chemical Co Ltd v Vindhya Telelinks Ltd (2009) 14 SCC 24*), and not as a means of circumventing the legislative policy of section 48 (*Vijay Karia v Prysmian Cavi E Sistemi SRL 2020 SCC OnLine SC 177*).

**Enforcement of emergency arbitrator decisions**

Enforcement of emergency arbitrator awards made in Indian-seated arbitrations (see *Emergency arbitration*) was settled by the Supreme Court, which has held that an emergency arbitrator's award will be considered as an order enforceable under section 17(1) of the *ACA 1996* (*Amazon.com NV Investment Holdings LLC v Future Retail Limited and others, (2022) 1 SCC 209*).

However, there is lack of clarity on enforcement of emergency arbitration awards made in foreign-seated arbitrations. In these cases, parties may file an application for interim measures under section 9 of the ACA 1996, with the emergency arbitrator's award or order appended as an exhibit, and request that court grant relief in the same terms as those granted by the emergency arbitrator.

**Enforcement of awards against third-party funders**

India permits the use of third-party funding in arbitration (see *Third-party funding*). The High Court of Delhi has held that third-party funders cannot be made liable for an arbitral award where they were not party to the arbitration and absent any agreement to that effect (see *Tomorrow Sales*, discussed in *Legal update, Delhi High Court limits exposure of third-party funders in arbitrations*).

 

However, India's Model Bilateral Investment Treaty (BIT) prohibits third-party funding. This prohibition was adopted in article 16 of the *India-UAE BIT (2024)*.

**Differences between enforcement of commercial and BIT awards**

The framework for the enforcement of BIT awards in India remains uncertain due to a lack of judicial clarity. While India is one of the original signatories to the New York Convention, it entered the commercial reservation. Therefore, section 44 of the *ACA 1996* restricts the New York Convention's applicability in India to foreign awards arising out of legal relationships "considered as commercial under Indian law".

India is not a party to the ICSID Convention and is, therefore, under no obligation to recognise any investment arbitration awards rendered under that Convention.

For a BIT award to be enforced in India, it must satisfy the "commercial test". However, the Delhi High Court has held that an arbitration under a BIT is fundamentally distinct from a commercial dispute because the "cause of action" is based on state assurances. Therefore, BIT awards may not satisfy the commercial test and, therefore, may not qualify as "foreign awards" under section 44 of the ACA 1996, since these arbitrations find their roots in public international law, administrative law and state obligations (see *Union of India v Vodafone Group PLC United Kingdom & Another (CS(OS) 383/2017 & I.A.No.9460/2017)*, discussed in *Legal update, Anti-arbitration injunction issued against Vodafone Group vacated (Delhi High Court)*). Therefore, while a foreign commercial arbitration award can be enforced directly under section 48 of the ACA 1996, the position on the enforcement of BIT awards remains uncertain.

In practice, foreign investors looking to enforce BIT awards identify Indian assets that are located outside India, preferably in a jurisdiction that has an established, recognised, tried and tested mechanism for the enforcement of BIT awards. These typically include Singapore and the UK, where BIT awards can be enforced without the hurdles that exist in India. For example, in 2021, Cairn Energy won an award in its favor against the levying of retrospective taxes by the Indian government. In order to enforce the USD1.2 billion award, it had sued Air India (owned by the government at the time) in the US.

For discussion of the enforcement of arbitration awards in England and Wales, and Singapore, see respectively *Practice notes, Enforcing arbitration awards in England and Wales* and *Enforcing arbitration awards in Singapore: overview*.

**Execution**

Once the court is satisfied that an award, whether Indian or foreign, is enforceable, it is deemed to be a decree of that court and can be executed accordingly (*sections 36(1) and 49, ACA 1996*). For the execution of an arbitral award, the procedure set out in Order XXI of the *CPC* must be followed.

In the execution of a decree against the assets of the judgement debtor, the following methods are usually applied by courts:

- Disclosure on oath of details of all the movable and immovable assets and bank accounts.
- Attachment of any properties or assets.
- Orders for the sale or auction of such assets as may be necessary for the satisfaction of the award.
- Restraining the judgement debtor from alienating, selling, encumbering, parting with or creating any third-party rights or interest in any movable or immovable property.

**Sovereign immunity**

 

Section 86 of the *CPC* contemplates prior consent of the central government before the institution of a suit in any court of law against a foreign state. However, this excludes execution proceedings in respect of an arbitral award (*Nawab Usmanali Khan v Sagarmal, AIR 1965 SC 1798*). Under Indian jurisprudence, sovereign immunity is not absolute, and foreign states do not have immunity in proceedings that involve commercial transactions. The Supreme Court has held that sovereign immunity of a foreign state cannot apply to commercial transactions and that the contracting party, even where it is a state, should be held liable for its contractual and commercial activities and obligations (*Ethiopian Airlines v Ganesh Narain Saboo, (2011) 8 SCC 539*).

The assets of a foreign state are not completely immune from enforcement in India, and immunity can be waived by a state expressly or impliedly. While no definite criteria regarding a waiver have been laid down, the courts have considered the sovereign's invocation of jurisdiction in a case as a plaintiff, or appearing as a defendant without objections, as constituting a waiver. The execution of an arbitration agreement has also been held to be an implied waiver by a foreign state, which would preclude it from raising a defence of sovereign immunity in enforcement proceedings (*KLA Const Technologies Pvt Ltd v Embassy of Islamic Republic of Afghanistan, (2021) SCC OnLine Del 3424*).

## Costs

The *ACA 1996* defines costs as the reasonable costs relating to:

- The fees and expenses of the arbitrators, courts and witnesses.
- Legal fees and expenses.
- Any administration fees of the institution supervising the arbitration.
- Any other expenses incurred in connection with the arbitral or court proceedings and the arbitral award.

(*Section 31A(1), ACA 1996.*)

### Arbitrator fees

The Fourth Schedule to the *ACA 1996* sets out a model fee structure for arbitrators in domestic arbitrations, to which the court can refer when determining tribunal fees (*section 11(14), ACA 1996*). However, application of the Fourth Schedule is not mandatory, and it is not applicable at all to either ICAs or arbitrations conducted under the rules of an arbitral institution.

The Supreme Court has held that an arbitrator cannot unilaterally fix their own fees (*Oil and Natural Gas Corporation Limited v Afcons Gunanusa JV, 2022 SCC OnLine SC 1122*). The parties have flexibility to agree on a different fee structure or to choose institutional arbitration, which may have its own fee guidelines. This ensures that the fee structure can be adapted to the specific circumstances and needs of each arbitration case by way of fixing hourly rates and lump sum rates based on the size or complexity of the matter.

Both the MCIA and DIAC fix the tribunal's fee *ad valorem* by reference to the amount in dispute in the arbitration (see, respectively, *MCIA Schedule of Fees* and *DIAC (Administrative Costs & Arbitrators' Fees) Rules, 2018*).

### Legal costs

The fees for lawyers representing parties in arbitrations in India are not fixed by law. The fees charged by lawyers in arbitration proceedings are generally determined by factors including:

 

- Negotiation of the market rates.
- Hourly rates v lump sum fees.
- The complexity of the matter.
- The seat of arbitration.
- The value of the claims.

Contingency fee agreements are expressly barred for lawyers under the *Bar Council of India Rules* (BCI Rules), which regulate the conduct of lawyers in India. Lawyers are prohibited from charging contingency fees or having any financial interest in the claim amount. However, the High Court of Bombay, has held that a contingency fee agreement entered by a non-advocate to represent a client before an arbitrator would not render the agreement void (*Jayaswal Ashoka Infrastructures (P) Ltd. v Pansare Lawad Sallagar, (2020) 206 AIC 282*). Despite this ruling, other courts have not followed this decision, leaving the legal permissibility of these agreements uncertain.

### Cost allocation and quantum

For arbitrations seated in India, the arbitral tribunal has authority to determine whether costs are payable by one party to another, the amount of such costs and when they are to be paid (*section 31A(1), ACA 1996*).

Where the tribunal decides to make an order for costs, the general rule is that the tribunal will order the unsuccessful party to pay the costs of the successful party (*section 31A(2)(a), ACA 1996*). However, the tribunal may make a different order, giving reasons for departing from the general rule (*section 31A(2)(b)*). In determining the allocation of costs, the tribunal must have regard to all the circumstances, including:

- The conduct of the parties.
- The relative success of the parties.
- Whether a party made a frivolous counterclaim causing delay in the arbitration.
- Whether any reasonable offers to settle were made and refused.

(*Section 31A(3).*)

An agreement that has the effect that one party must pay the whole or part of the costs of the arbitration in any event is invalid if it was made before the dispute in question arose (*section 31A(5), ACA 1996*).

For further discussion of costs in arbitration, see *Practice note, Costs in international arbitration: overview* and *Costs and third-party funding in international arbitration toolkit*.

## Third-party funding

Third-party funding refers to a financing method in which an external entity, unrelated to the dispute, provides financial support to one of the parties (typically the claimant) by covering its arbitration costs in return for reimbursement of the funder's direct outlays and a share of any sum recovered from the resolution of the claim. In theory, anyone can be a third-party funder, but due to the costs associated with arbitration proceedings, third-party funding of claims can be capital intensive. This means that funders are typically public or private companies or private funds (including hedge funds) (see *Practice note, Third-party funding for international arbitration claims: overview: Third-party funders*).

 

There is no express bar on third-party funding in India. The State amendments to the CPC recognise the concept of a third-party "financer" of litigation (or arbitration), which apply in Gujarat, Madhya Pradesh and Maharashtra (*Order XXV Rules 1 and 3 of the CPC as enacted in Maharashtra, Gujarat, Karnataka and Madhya Pradesh*). The Supreme Court recently upheld the legal validity of third-party funding of litigation in India. However, the Court noted that financing of this kind from a lawyer would not be permitted (*AK Balaji v Bar Council of India, (2018) 5 SCC 379*).

In the context of arbitration, the Delhi High Court has provided key guidance on third-party funding. In *Tomorrow Sales* (discussed in *Legal update, Delhi High Court limits exposure of third-party funders in arbitrations*), the court noted the permissibility of third-party funding in arbitration and emphasised its significance for access to arbitration, given that the costs of pursuing claims in arbitration can be significant. In the case, the court set aside an order that directed a third-party funder to provide security for the amount awarded under an arbitral award. It held that permitting enforcement of an arbitral award against a non-party, which has not accepted any risk of liability, is neither desirable nor permissible. Further, it would be counterproductive to introduce an element of uncertainty by imposing liability on third party funders that they have not agreed to bear.

Indian law does not provide guidance regarding disclosure requirements in cases of third-party funding. While the High Court decision in *Tomorrow Sales* did address the requirement of the funding arrangements being disclosed to the arbitral tribunal, these requirements were derived from the SIAC Arbitration Rules, which applied in the underlying arbitration, and were not based on any provisions of Indian law. Given the absence of a legal framework regulating third-party funding in India, the third-party funding agreement should expressly address issues regarding confidentiality, disclosure, costs and funder liability.

For further discussion of third-party funding in arbitration, see *Practice notes, Third-party funding for international arbitration claims: overview* and *Third-party funding in arbitration in Asia: overview*.

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