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International Arbitration 2021

India
Ravi Singhania, Shilpa Shah, Vikas Goel
and Shambhu Sharan
Singhania & Partners LLP

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INDIA

Law and Practice

Contributed by:
Ravi Singhania, Shilpa Shah, Vikas Goel and Shambhu Sharan
Singhania & Partners LLP ***see p.22***

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1. GENERAL

1.1 Prevalence of Arbitration

International arbitration is a common method of resolving commercial disputes in India where one of the parties to the contract is a national or habitual resident of any country other than India, or in a case where there are disputes between corporate entities, one is from any country other than India. Several legislative measures and judicial pronouncements by various courts have contributed to the effective implementation of arbitration as a dispute resolution mechanism in India. In commercial transactions, this is the most preferred dispute resolution mechanism, especially in view of recent amendments which mandates completion of the process within 18 months.

From the definition of international arbitration contained under the statute, parties can resort to international arbitration where one of the parties to the contract is based outside India. It may be relevant to highlight that international arbitration is a popular method of alternate dispute resolution for commercial transactions in India.

Recently, the Supreme Court of India has affirmed the concept of "party autonomy" thereby allowing even two Indian/domestic parties to choose a seat of arbitration outside India. For non-commercial disputes, the traditional mechanism of approaching local courts remains the popular method of dispute resolution.

The domestic parties in India opt for international arbitration as it is the preferred mode of dispute resolution when the other contracting party happens to be an entity based out of India. International arbitration is also chosen because of the impeccable reputation carried by the international arbitration institutions like the SIAC, ICC, LCIA, etc. They are also preferred because the foreign parties to the agreement prefer to have a neutral venue/seat of arbitration.

1.2 Impact of COVID-19

The process of international arbitration was severely affected because of the pandemic. A national lockdown was imposed by the government of India. The Supreme Court of India, taking cognisance of the exceptional situations and difficulties faced by litigants, extended the period of limitation under various laws including the arbitration process. With the imposition of lockdown, conducting physical hearings of arbitrations became impossible, making virtual hearings the norm of the day, and it continues to remain the accepted method for conducting arbitrations. The litigants and arbitrators are getting accustomed to such methods.

1.3 Key Industries

Various sectors where international transactions are involved, and which have the presence of foreign multinationals, have witnessed a surge in international arbitration activities. Oil and gas, construction and infrastructure, telecoms, health and medicine are a few examples which have seen growth. These sectors contributed to the growth of the economy of the country and witnessed significant investments, all of which resulted in the growth of arbitration.

COVID-19 in general has impacted arbitration disputes. Sectors like hospitality and tourism have seen a significant reduction in arbitration because of a decline in investments, interest and overall business in these sectors.

1.4 Arbitral Institutions

The International Chamber of Commerce, Singapore International Arbitration Centre, London Court of International Arbitration and Hong Kong International Arbitration Centre are the most common arbitral institutions for international arbitrations. It has also been observed

that domestic institutions like MCIA, Delhi International Arbitration Centre and the Indian Council of Arbitration, etc, are gaining popularity for international arbitrations. No new arbitral institutions have been established in 2020-21.

1.5 National Courts

For all purposes, except in the case of a dispute related to the appointment of an arbitrator, the High Court of the State has the exclusive jurisdiction to entertain petitions in international arbitration. For issues related to the appointment of an arbitrator in international arbitration, parties mandatorily have to approach the Supreme Court of India. For domestic arbitration, the pecuniary value of the dispute determines the jurisdiction. Specific commercial courts have been created under the recently enacted Commercial Courts Act, 2015 to entertain the disputes. In the case of domestic arbitration, the issue regarding appointment of an arbitrator is mandatorily decided by the High Court of the respective state.

2. GOVERNING LEGISLATION

2.1 Governing Law

The Arbitration and Conciliation Act 1996 governs international arbitration and is based on UNCITRAL Model Law. To bring India on par with the international practices adopted in the arbitration field, the courts in India through various pronouncements have observed parity with the UNCITRAL Model Law. There is no divergence in the law enacted in India when compared to the UNCITRAL Model Law.

2.2 Changes to National Law

Amendments have been brought in the Arbitration and Conciliation Act, 1996 in the recent past to bring it to parity with international practices. Recently, Section 36 of the Arbitration and Conciliation Act, 1996 was amended and a proviso was added stating that where the court is satisfied that a prima facie case is made for the award being induced or effected by fraud or corruption, the award can be stayed by the court unconditionally. Further, the Supreme Court of India, through various judgments, has brought clarity about the interpretation of various provisions related to the Arbitration Act which includes clarity over the usage of the term 'venue' and 'seat' in an international arbitration and the legal implications thereof. The Supreme Court has also clarified the legal position in respect of applicability of limitation for enforcement of foreign awards.

There is no pending legislation in relation to arbitration laws in India.

3. THE ARBITRATION AGREEMENT

3.1 Enforceability

As per the Act, the following are the statutory requirements for an arbitration agreement.

- The agreement shall be in writing (ie, contained in a document signed by the parties, or in an exchange of written physical or electronic communication or in an exchange of statement of claim and defence).
- The parties shall agree to refer any dispute and/or all disputes (present or future) arising out of a contract to a private tribunal.
- The parties must agree to be bound by the decision of such arbitral tribunal.
- The intention of the parties to refer the disputes must be unequivocally indicated.

3.2 Arbitrability

As a general principle, disputes relating to "rights in rem" are incapable of being referred to arbitration such as issues in relation to criminal offenc-

es involving serious allegations of fraud, matrimonial and guardianship disputes, insolvency disputes, disputes arising out of trust deeds or under the Indian Trusts Act 1882, testamentary disputes, etc.

While there is no "watertight compartment" formula to determine the arbitrability of a dispute, courts in India take into consideration the following criteria.

- Whether the dispute is capable of adjudication and settlement by arbitration under Indian law;
- Whether the dispute is within the scope of the arbitration agreement;
- Disputes affecting third-party rights that require centralised adjudication have been held to be non-arbitrable;
- Disputes relating to sovereign and public interest functions of the state are non-arbitrable;
- Disputes that are expressly or by necessary implication non-arbitrable under a specific statute.

3.3 National Courts' Approach

In India, the courts have repeatedly held that where there is an arbitration clause in an agreement, parties would have to be mandatorily referred to arbitration. In such cases, parties cannot wriggle out of arbitration as an agreed forum. However, party autonomy is the basis for such determination by the court and the guiding factor continues to be the intent of parties to resort to arbitration. The courts in India have observed that the true spirit and sanctity of arbitration needs to be kept intact with minimalistic intervention by judicial authorities. In most of the cases, arbitration agreements are enforced except in cases where the existence of an arbitration agreement is not established.

3.4 Validity

The rule of separability is recognised and applicable to arbitration clauses. In cases where the main contract expires or gets terminated, the courts have held that the arbitration clause would still exist and can be resorted to for resolution of disputes between the parties, including the dispute related to validity of the agreement.

4. THE ARBITRAL TRIBUNAL

4.1 Limits on Selection

Under Indian law, there are no limits on the parties' autonomy to select arbitrators. Parties are free to nominate any person of their choice as an arbitrator. The only condition to the appointment of an arbitrator is that the arbitrator/s so appointed are independent and impartial. When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing in terms of Section 12 that there is no existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject matter in dispute, whether a financial, business, professional or other kind which is likely to give rise to justifiable doubts as to his independence or impartiality. In cases where it is specified, the arbitrator/s should possess such qualifications as agreed to by the parties.

Further, the parties are free to agree on the number of arbitrators, although there must be an odd number, as prescribed under S. 10 of the Act.

4.2 Default Procedures

Indian law recognises party autonomy and keeps it in high regard. Under the Indian system, the parties are free to agree to the procedure for the appointment of arbitrators; however, if the parties' chosen method of appointing arbitrators fails, the Arbitration & Conciliation Act, 1996,

under Section 11, provides for the appointment of arbitrators. In the case of international commercial arbitrations, the power to appoint an arbitrator is vested with the Supreme Court of India, and in arbitrations other than international commercial arbitrations, the power to appoint an arbitrator is exercised by the High Court only. For the appointment of an arbitrator, a party has to file a petition under Section 11 seeking the appointment of an arbitrator.

The procedure, which is widely adopted by the parties, is that each party may nominate its arbitrator and the arbitrators so appointed would appoint a presiding arbitrator. Otherwise, the parties may opt for sole arbitrator.

4.3 Court Intervention

As party autonomy is regarded as the foremost stepping stone under the Arbitration Act, the intervention of the courts in the process of selection of arbitrator is very minimal. The intervention, if any, is seen only in cases where the court has to determine whether the mandate of an arbitrator stands terminated on account of such arbitrator becoming de jure or de facto unable to perform his functions on the touchstone of independence or impartiality under Section 14 when a party challenges the selection/appointment of an arbitrator.

The challenge by a party to selection/appointment by a party must be decided by the arbitral tribunal in the first place. Courts generally show reluctance in entertaining a challenge to the appointment of an arbitrator, after the arbitral tribunal has considered and dismissed such challenge. However, when it comes to the challenge against an arbitrator based on the grounds mentioned in the Seventh Schedule to the Act, the courts intervene, as these grounds lay down the specific eligibility criteria for a person to be an arbitrator. The norm is minimum judicial intervention in arbitration proceedings, keeping in view the party autonomy. However, the court intervenes only in such cases where an arbitrator fails to pass muster on account of one or the other grounds mentioned in the Seventh Schedule of the Act.

4.4 Challenge and Removal of Arbitrators

S.12, S.13 and S.14 of the Arbitration Act govern the grounds and procedure for challenge or removal of arbitrators. A party can challenge the appointment of an arbitrator and seek his/her removal on the following grounds under Section 12.

- Existence of circumstances that give rise to justifiable doubts as to the arbitrators' impartiality or independence. Such grounds/circumstances are enumerated in Schedule V of the Act.
- Lack of the qualifications agreed between the parties.
- The Act also provides that any person whose relationship with the parties or counsel or the subject matter of the dispute falls under any of the categories specified in Schedule VII shall be ineligible to be appointed as an arbitrator.

Section 13 provides for the challenge procedure before the arbitral tribunal. A party that intends to challenge the appointment of an arbitrator must submit a written statement of the reasons for the challenge to the arbitral tribunal within 15 days from the date when the party learns the facts and circumstances on which the challenge is based. Unless the arbitrator whose appointment is challenged withdraws from his office, the arbitral tribunal adjudicates and decides the challenge. If the challenge is not successful, the arbitral tribunal continues with the arbitral proceedings and pronounces the award. In such scenario, the party challenging the appointment

may make an application before the court for setting aside such an award on the same ground.

The mandate of an arbitrator will also terminate if:

- he/she is de jure or de facto unable to perform his function as an arbitrator;
- he/she withdraws from office; or
- the parties agree to terminate his/her mandate.

The court under Section 14 may entertain an application challenging the appointment of an arbitrator after its dismissal by the arbitral tribunal; however, the courts are reluctant to interfere with the decision of the arbitral tribunal unless the disqualification falls under the category of Schedule VII to the Act.

4.5 Arbitrator Requirements

The Arbitration Act prescribes a detailed litmus to ascertain the independence and impartiality of a potential arbitrator. Under the Act (S.12), all arbitrators are mandated to disclose at the time of their appointment, and throughout the arbitral proceedings, any circumstances that affect or may affect their impartiality and/or independence and adjudication.

Schedule V to the Arbitration Act identifies the circumstances that give rise to justifiable doubts about the independence and/or impartiality of arbitrators. Arbitrators must disclose any:

- personal and/or professional relationship with parties or their counsel;
- relationship with the dispute; or
- interest in the dispute.

Schedule VII to the Arbitration Act sets out a list of circumstances that render a person ineligible to be appointed as an arbitrator.

5. JURISDICTION

5.1 Matters Excluded from Arbitration

Under Indian law, generally, disputes relating to rights in rem (against public at large) cannot be resolved through arbitration, while disputes relating to rights in personam (against a specific juristic person) can be settled through arbitration. The types of disputes that cannot be resolved by arbitration include the following.

- Criminal offences.
- Matrimonial disputes.
- Guardianship matters.
- Insolvency petitions.
- Testamentary suits.
- Trust disputes.
- Labour and industrial disputes.
- Tenancy and eviction matters governed by rent control statutes.

5.2 Challenges to Jurisdiction

Indian law recognises the principles of kompetenz-kompetenz. Section 16 of the Arbitration Act is in alignment with the said principle. Section 16 sets out the competence of an arbitral tribunal to decide on its own jurisdiction.

5.3 Circumstances for Court Intervention

As explained above, the power of the courts to intervene in arbitration matters is very limited, including the jurisdictional issue decided by the arbitral tribunal under Section 16. The plea as regards lack of jurisdiction of the tribunal has to mandatorily be raised before the arbitral tribunal in the first place. If a plea raised by a party under Section 16 is rejected, the arbitral tribunal continues with the arbitral proceedings and makes the arbitral award. If the party is aggrieved by such rejection, then the party, only after the award is pronounced, can make an application before the court for setting aside such an arbitral award. However, if the plea raised by a party

under Section 16 is allowed by the arbitral tribunal, then the court can hear an appeal against such order under Section 37 of the Act. Once the plea of jurisdiction is heard and rejected by the tribunal, the court very rarely interferes with the award on the grounds of jurisdiction. The courts generally show reluctance and refrain from intervening with the decision of the arbitral tribunal.

5.4 Timing of Challenge

Section 16 lays down that any objections to the jurisdiction of the tribunal must be raised before the filing of the Statement of Defence as stated under S.16(2).

If the arbitral tribunal rules that it does not have jurisdiction, the ruling can be challenged by way of appeal before a court under Section 37. However, if the arbitral tribunal rules that it has jurisdiction, no immediate appeal or challenge is available and the only option is to challenge the final award passed by the arbitral tribunal on the grounds of lack of jurisdiction.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

The judicial review of the decision made by the arbitral tribunal, by and large, is very limited. Courts, on the issue of jurisdiction/admissibility, mostly do not interfere unless the decision is arbitrary, patently erroneous or in complete disregard of the law.

5.6 Breach of Arbitration Agreement

The court in India mostly does not entertain a legal action in the case of agreements having arbitration as a dispute resolution mechanism. There is general reluctance in entertaining court proceedings lodged by a party to an agreement which contains the arbitration agreement.

The court only looks for the existence of the arbitration agreement, and if the arbitration agreement does exist then the court, applying the principle of minimum court intervention, has to refer the parties for arbitration in the terms of Section 8 of the Act. If court proceedings are initiated in breach of an arbitration agreement, the aggrieved party can make an application under S.8 of the Arbitration Act, seeking reference to arbitration in light of the arbitration agreement.

However, the party challenging the initiation of court proceedings must make its objection no later than filing its first statement on the substance of the dispute in the court proceedings. If a party does not do so then such a statement on the substance of the dispute before the court would be deemed as a waiver of the arbitration agreement.

5.7 Third Parties

Party autonomy and consent are the primary drivers of an arbitration proceeding and it is a basic requisite that an agreement providing for arbitration as a dispute resolution mechanism between the parties is binding only to the parties to the agreement. Ordinarily, an arbitration takes place between persons who have been parties to both the arbitration agreement and the substantive contact underlying it.

Therefore, essentially parties that are not a party to the arbitration agreement cannot be forced to resolve disputes through arbitration in terms of S.7 of the Arbitration Agreement. A party who is not signatory to the arbitration agreement cannot be subjected to the arbitration.

As a rule, a party who is not signatory to an arbitration agreement cannot be made a party in the arbitration proceedings unless there is explicit consent, even if their presence has a bearing on the matter in dispute.

In exceptional cases, courts in India have given recognition to the “group of companies doctrine” under which an arbitration agreement entered

into by a company within a group of corporate entities can in certain circumstances bind non-signatory affiliates. Under this doctrine, a non-signatory party could be subjected to arbitration provided these transactions were with a group of companies and there was a clear intention of the parties to bind both the signatory as well as the non-signatory parties.

In the recent times the Indian courts have given due recognition to principles of implied consent, third-party beneficiaries, assignment and other transfer mechanisms of contractual rights, where focus is placed on the intention of the parties and, to a large extent, on good faith principles and have in various instances included third parties in arbitration proceedings.

Furthermore, the Supreme Court in the case of Chloro Controls (I) Pvt. Ltd. v Severn Trent Water Purification Inc. and Ors (2013) 1 SCC 641 has also taken the view that parties involved in a composite transaction executed through several agreements may be subject to the arbitration agreement under the main or the parent agreement.

6. PRELIMINARY AND INTERIM RELIEF

6.1 Types of Relief

The arbitral tribunal in India is empowered to award interim relief during the arbitral proceedings. The power to grant interim relief has been expressly provided under Section 17 (1) of The Arbitration & Conciliation Act, 1996 which provides for interim measures ordered by an arbitral tribunal during the arbitral proceedings. The interim relief ordered by the arbitral tribunal are binding in nature in terms of Section 17 (2) which states that the interim order passed by the arbitral tribunal would be enforceable as if it were an order of a court. A party may, during the arbitral proceedings, apply to the arbitral tribunal and seek the following kinds of interim relief.

- The appointment of a guardian for a minor or person of unsound mind for the purpose of arbitral proceedings.
- Interim measure of protection such as preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement.
- Securing the amount in dispute in the arbitration.
- Detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration.
- Interim injunction or the appointment of a receiver.
- Such other interim measures of protection as may appear to the arbitral tribunal to be just and convenient.

6.2 Role of Courts

The courts in India are also empowered to grant interim relief. The power to grant interim relief has been expressly provided in Section 9 of The Arbitration & Conciliation Act, 1996 which sets out interim measures, etc, by court. Although the power of the arbitral tribunal under Section 17 is on par with that of the court under Section 9 of the Act, meaning thereby that the power to make different types of interim orders of protection or interim relief as enumerated in Section 17 of the Act are the same as the ones mentioned in Section 9 of the Act, there is, however, one distinction. While the arbitral tribunal under Section 17 of the Act can grant interim relief during the arbitral proceedings, the court under Section 9 of the Act can grant interim relief to a party not only during the arbitral proceedings but also before initiation of arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in terms of Section 36 of the Act. Hence, the court under Section 9 can grant interim relief at three stages, ie, before or during

arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36 of the Act.

In so far as the interim relief sought by a party before the commencement of arbitral proceedings is concerned, if the court orders the interim relief/interim protection before the commencement of the arbitral proceedings then the arbitral proceedings shall have to be commenced within a period of 90 days from the date of such order or within such further time as the court may determine.

If a party seeks interim relief from a court even when the arbitral tribunal is constituted, then the court shall not entertain an application seeking interim relief unless the court finds that circumstances exist which may not render the remedy provided under Section 17 efficacious.

Apart from granting interim relief under Section 9 of the Act, the courts also possess the appellate jurisdiction under Section 37 of the Act. Section 37 of the Act, which lays down the appealable orders, ie, the orders wherefrom the appeal shall lie to a court, empowers the court to hear an appeal from an order of the arbitral tribunal granting or refusing to grant an interim relief under Section 17 of the Act.

The courts in India can grant interim relief under Section 9 of the Act in aid of foreign-seated arbitrations. Section 2 (2) of the Act, confers right upon the parties to a foreign-seated arbitration to approach Indian courts for interim relief provided there is no agreement to the contrary. As per Section 2 (2) of the Act, Part 1 of the Act which includes Section 9, ie, interim measures by court, applies where the place of arbitration is in India provided that subject to an agreement to the contrary, the provisions of Section 9 shall also apply to international commercial arbitration, even if the place of arbitration is outside India. Hence, the applicability of Part 1 of the Act can be excluded if the agreement between the parties provides for its exclusion. In case there is no exclusion of Part 1 or no agreement between the parties to the contrary in a foreign-seated arbitration, the court in India can go ahead and grant the interim reliefs enumerated in Section 9 of the Act.

The Arbitration & Conciliation Act, 1996 governing the arbitral proceedings in India does not provide for the use of emergency arbitrators. However, in case a party needs urgent interim relief when the arbitral tribunal is not constituted then in such an eventuality a party can approach the court in the meanwhile and seek urgent interim relief under Section 9 of the Act. Thereafter, the party can initiate arbitral proceedings within 90 days from the date of the order or within such further time as the court may determine.

6.3 Security for Costs

Although the Arbitration & Conciliation Act, 1996 does not allow for the courts or arbitral tribunal to order security for costs, the Act under Section 31A allows a discretionary power to the court or arbitral tribunal to determine (a) whether costs are payable by one party to another (b) the amount of such costs (c) when such costs are to be paid. Costs means reasonable cost relating to fees and expenses of the arbitrators, courts and witnesses, legal fees and expenses, administration fees of the institution supervising the arbitration, any other expenses incurred in connection with the arbitral or court proceedings and the arbitral award. The general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party.

7. PROCEDURE

7.1 Governing Rules

In India, parties to arbitration, unless otherwise agreed between the parties, are governed by the rules prescribed under the Arbitration & Conciliation Act, 1996 ('the Act') in respect of pleadings, trial and completion of arbitration proceedings. The Act, however, gives full autonomy to the parties to mutually agree and adopt any other rules for conducting the arbitral proceedings. In the case of any disagreement, the arbitral tribunal has the necessary powers to decide the rules and procedure to be followed for conduct of arbitration proceedings except fixing the timeline for publishing the arbitral award. The civil proceedings in India are governed by the Code of Civil Procedure, 1908 and Indian Evidence Act, 1872; however, an arbitral tribunal is not bound by the same, strictly. The parties may also choose to adopt rules specified by arbitration institutions like the International Chamber of Commerce Arbitration, London Court of International Arbitration, Singapore International Arbitration Centre, Delhi International Arbitration Centre, Indian Council of Arbitration, etc, to the extent they are not in contravention of the non-derogable rules prescribed under the Act.

The arbitral tribunal is also empowered to pass necessary interim orders, interim awards as well as injunctions in respect of the subject matter of arbitration. Besides, they can also determine the relevancy and admissibility of any documentary or oral evidence led by the parties. The arbitral tribunal shall be bound by the principles of natural justice and follow the established principles of law of evidence.

7.2 Procedural Steps

The Act prescribes that an arbitration can be initiated only by way of a notice invoking arbitration. The arbitral proceeding is deemed to have commenced on the date when the notice invoking arbitration for adjudication of a dispute is received by the other party. Besides, a party is also bound to follow every step or procedure including any pre-arbitration steps specified in the arbitration clause.

Parties are free to determine the number of arbitrators who would constitute the arbitral tribunal; however, the tribunal has to consist of an odd number of arbitrators.

Further, if the arbitration clause provides for the constitution of a three-member arbitral tribunal, then unless the manner of appointing the arbitrators is provided in the arbitration agreement, both parties are required to appoint their respective nominee arbitrators, who in turn have to appoint the third arbitrator. Whereas in a case where the arbitration agreement provides for the appointment of a sole arbitrator, or if the agreement is silent as to the number of arbitrators, then parties have to appoint a sole arbitrator by mutual consent. If either of the parties fails to act in the manner provided in the agreement for appointment of arbitration or avoids doing the same, then the aggrieved party can either approach an institution, if the arbitration agreement provides for the same, or the competent court for appointment of arbitrator. In the case of death, recusal or termination of arbitrator(s), the substitute arbitrator is to be appointed as per the rules applicable to the appointment of the arbitrator being replaced. The arbitration proceeding, in the absence of an agreement to the contrary, shall resume from the stage as may be directed by the tribunal in its discretion. Normally, in a tribunal consisting of three arbitrators, in the case of the replacement of one or more of the arbitrators, proceedings are resumed from the stage where it was halted.

After the amendments introduced in the Act in 2015 and 2019, in a domestic arbitration the pleadings have to be completed within a

maximum period of six months from the date of receipt of notice of appointment by the arbitrator. In the case of a three-member tribunal, a six-month period for completion of pleading shall be calculated from the date of receipt of notice by the third arbitrator.

The arbitral tribunal after completion of pleadings shall proceed to trial in the matter whereby parties shall be allowed to lead their respective witnesses who would be allowed to be cross-examined. However, conducting trial is not a mandatory procedure, as an arbitral tribunal is not bound by the Indian Evidence Act, 1872. Parties may agree not to file any witness statements and straightaway proceed for oral submissions/arguments in the matter based on the pleadings and documentary evidence filed along with their pleadings. An arbitral tribunal thereafter shall proceed to hear oral submissions in the matter.

On the conclusion of oral hearings, the arbitral tribunal is obliged to make an award on the disputes between the parties. In a domestic arbitration (where parties are Indian entities), it is obligatory for the arbitrator to make the award within a period of 12 months from the date of completion of pleadings for making the award. In case the arbitral tribunal cannot make the award within the prescribed period of 12 months, the time may further be extended by mutual consent of the parties, for a period of six months. For any further extension, parties will have to approach the competent court. However, the time limits for completion of pleading and for making of an award are not mandatory in the case of an international commercial arbitration where any one or more parties are foreign entities, though the arbitration proceedings take place in India.

During the time the application seeking extension of time is pending, the mandate of the arbitrator shall not terminate.

Any time during the pendency of the arbitration but before making of an award, a party may apply for injunction or interim protection for protecting the subject matter of dispute before the arbitral tribunal.

7.3 Powers and Duties of Arbitrators

The powers of an arbitrator are as follows.

- The arbitrator is empowered to decide his own jurisdiction to conduct the arbitration proceeding (principle of kompetenz-kompetenz).
- The arbitrator can fix the cost of the arbitration proceeding unless there is an agreed fee between the parties in the arbitration agreement.
- The arbitrator can also decide any objection of a party challenging the validity and existence of the arbitration clause in a contract.
- The arbitrator is empowered to grant any interim measure or protection to a party to secure the subject matter of the arbitration proceeding.
- The interim protection or injunction granted by the arbitrator can be enforced as a decree under the Code of Civil Procedure, 1908.
- In the case of non-compliance of any order passed by the arbitrator, the aggrieved party may approach the competent court seeking to initiate contempt proceedings against the defaulting party.
- In the case of disagreement between the parties regarding the venue or seat of arbitration, the arbitrator is empowered to decide the venue or seat of arbitration.
- If there is no agreement between the parties, the arbitrator is empowered to decide the manner of conducting the arbitration proceeding including the manner in which the parties have to lead the evidence.
- The arbitrator on its own or a party to the arbitration, may approach a court seeking assistance in recording evidence of a person

or production of a document which relates to the subject matter of the arbitration proceeding.
- The arbitrator, unless agreed between the parties, can decide the rate of interest and period for which interest is to be paid on the awarded amount, till the date of making the award. Future interest would be payable at the rate prescribed under the Act, in the absence of any direction by the tribunal as regards future interest.
- The arbitrator can pass an interim award at any time during the arbitration proceeding or even an additional award in certain circumstances after passing of the main award.
- The arbitrator on his own or on an application by a party can correct any computation or typographical error. With the consent of both the parties, the arbitrator can also modify an award by giving an interpretation to a part of the award.
- The arbitrator has also a lien on the award against any unpaid cost.
- The arbitrator can terminate the proceedings in the case that neither party pays his fee or no claim is preferred by any party or it becomes impossible to continue with the arbitration proceedings for any reason.

The duties of the arbitral tribunal are as follows.

- The arbitrator(s) is obliged to give a declaration in writing in the terms of Section 12 read with the fifth and seventh schedule of the Act, thereby disclosing the existence of any direct or indirect relationship with any of the parties or vested interests in any of the parties which may lead to the justifiable doubts on the independence and impartiality of such arbitrator.
- The arbitrator is bound to give equal treatment and full opportunity to all the parties to the arbitration proceeding and remain impartial throughout the arbitration proceedings.
- The arbitrator is bound to decide the disputes between the parties, taking into account the terms of the contract and trade usage applicable to the transaction.
- The arbitrator is obliged to decide the dispute as per the law of the land in the case of domestic arbitration and as per law chosen by the parties in the case of international commercial arbitration.
- The tribunal is bound to act without any undue delay.

7.4 Legal Representatives

There is no qualification prescribed in Indian law for appearing before an arbitrator. However, ordinarily, an advocate registered in India or an expert from the particular field to which the arbitration relates, appear as legal representatives of the parties. In some of the international arbitrations, legal practitioners or experts from other countries also represent parties.

8. EVIDENCE

8.1 Collection and Submission of Evidence

In India, parties file all the relevant documents along with their respective pleadings. As stated earlier, in India, an arbitral tribunal is not bound by the Indian Evidence Act, 1872 (which governs the evidence law in India). However, parties have been given full autonomy to decide the procedure and rules which govern the collection and submission of evidence. The arbitral tribunal is completely free and independent to decide the relevancy and admissibility of the evidence, whether oral or documentary, filed before it. If parties agree, or directed by the arbitral tribunal to lead witnesses, they file evidence by way of affidavits of their witnesses who are permitted to be cross-examined. The substantive principles of the Indian Evidence Act, 1872 are required to be followed. For seeking discovery of docu-

ments, parties usually follow the basic principles of the Civil Procedure Code in spirit though are not bound to follow them in letter. However, arbitral tribunals may not insist on strict compliance with such principles.

In domestic arbitration, generally parties tend to adopt the same procedure for collection and submission of evidence which is being followed for a civil suit. It involves three steps, which are as follows.

- The first step is examination in chief of a witness. This is done by submission of evidence by way of affidavit of a witness who is well versed and conversant with the facts and circumstances of the case.
- The second step is the cross-examination of the witnesses by the advocate/authorised legal representative of the opposite party on the basis of the pleadings and documents filed before the arbitral tribunal.
- The third Step is re-examination of witness by the party producing the said witness.

For seeking discovery of documents, the party seeking such discovery is required to file an application before the arbitral tribunal specifying the documents sought to be discovered.

8.2 Rules of Evidence

As stated earlier, the arbitral tribunals are not bound by any rules of evidence; however, they have to follow the established principles of natural justice and also the basic principles of law of evidence being followed in India in a civil proceeding, without being bound to follow the same strictly. The arbitral tribunals may adopt and follow any rules of evidence as they deem fit. Section 19(4) of the Act empowers the arbitral tribunal to ascertain and determine the admissibility, relevance and weight of any evidence which has been produced before it.

8.3 Powers of Compulsion

The arbitral tribunal is empowered under the Act to approach a court, seeking assistance for appearance of any person or a witness or an expert witness or to seek production of any document which is in the custody or possession of any person and is necessary and relevant for the proper adjudication of the dispute.

In the case of a non-party to the arbitral proceeding, the arbitral tribunal cannot pass an order against a non-party to the arbitral proceeding; however, as stated above, assistance can be sought from the court to summon a non-party as a witness or to produce a document in possession of such non-party.

The non-compliance of order by a witness or a non-party can even lead to the initiation of contempt proceedings against him.

9. CONFIDENTIALITY

9.1 Extent of Confidentiality

In terms of Section 42A of the Act, it is mandatory for the parties to the arbitral proceedings, the arbitral tribunal and the arbitration institution to keep the arbitral proceedings including pleadings, documents, etc, confidential. It is relevant to note here that such confidentiality is limited to the extent of the arbitration proceeding and would not apply in the case of an award being required to be disclosed for the purpose of challenging or enforcing the arbitral award.

10. THE AWARD

10.1 Legal Requirements

In India, an arbitral award must comply with the following legal requirements.

- An arbitral award must be in writing and signed by each member of the tribunal or by the majority of the tribunal with reasons for any omitted signatures.
- An arbitral award must contain reasons on which it is based.
- An arbitral award must state the date on which it is made and place where it is published.
- A signed copy of the arbitral award must be delivered to each party.
- Appropriate stamp duty must be paid on the arbitral award before seeking enforcement thereof in a court of law.

In domestic arbitrations commenced after 23 October 2015, the time limit for making the award is twelve (12) months from the date of completion of pleadings as specified under the Act. This period can be further extended up to six (6) months with the consent of the parties. If the arbitral award is not made even within the time extended by the parties, the mandate of the arbitral tribunal would be terminated, unless the period is further extended by the court. The court, upon the request made by one of the parties for the extension, can extend the time limit to conclude the arbitration proceedings. The mandate of the arbitral tribunal would continue till the disposal of the said application by the court. An application seeking extension of time for the tribunal to pronounce the award can be made only before the court which is competent to appoint arbitration in a given case.

In international commercial arbitrations (where one of the parties to the dispute is a foreign entity), though there is no specific time limit for the making of the arbitral award, the Act provides that the tribunal should endeavour to deliver the award within the period of twelve (12) months from the date of completion of pleadings. However, it is not mandatory.

10.2 Types of Remedies

The Act does not provide any specific limits on the remedies that an arbitral tribunal may award. However, the tribunals are bound to publish the award only in respect of the subject matter of the dispute referred to and pending before the arbitral tribunal. By and large, arbitral tribunals are competent to decide all the disputes in personam, ie, between the parties and not the dispute in rem, ie, against the world at large. The remedies that can be granted by arbitral tribunal are the same as can be allowed by the civil courts in India in contractual matters. However, an arbitral tribunal can pass an award only in respect of parties to the arbitration agreement and not against third parties. Besides, an arbitral tribunal is not allowed to pass an award in respect of a dispute which has been specifically held to be non-arbitrable and for which the remedy is available under a specific statute. An arbitral tribunal has the power to pass an award granting specific performance, declaration, injunctions, payment of money besides interest and cost. However, damages can only be compensatory in nature and punitive damages for breach of contract are not permitted in India.

Whereas in the matters arising out of matrimonial, testamentary and criminal laws and other matters of similar nature which bind the world at large (dispute in rem), the tribunal has no jurisdiction to adjudicate upon such dispute, and the same are considered as non-arbitrable.

10.3 Recovering Interest and Legal Costs

Interest

The Act empowers the arbitral tribunal to award interest on whole or any part of the sum awarded, unless otherwise agreed by the parties. Such interest can be awarded for the whole or part of the period between the date on which the cause of action arose and the date on which the award is made. An arbitral tribunal, in its sole discre-

tion, may also award future interest payable from the date of the award until the date of payment. The Act also provides that an arbitral award shall carry interest at the rate of 2% higher than the current rate of interest prevalent on the date of the award, unless the award directs otherwise.

Legal Cost

Unless otherwise agreed between the parties under the agreement, the arbitral tribunal is empowered to award legal costs in favour of the successful party, for costs incurred during the pendency of the arbitration proceedings, including the arbitrator's fee, administrative expenses and any other expenses that the party may have incurred in relation to the arbitration proceedings or court proceedings. The tribunal can also decide the amount, time and manner in which such costs are to be paid by the unsuccessful party to the successful party. While determining the legal costs, an arbitral tribunal is required to keep in mind factors such as the conduct of the parties, delays on account of frivolous claims, rejection of reasonable settlement between the parties, etc.

In the matter of awarding costs, there is no uniform practice adopted by the tribunals. While some tribunals award costs in favour of the successful party, others adopt the principle of parties sharing the cost of arbitration irrespective of the result of the arbitration proceedings.

11. REVIEW OF AN AWARD

11.1 Grounds for Appeal

Recourse against Domestic Arbitral Award

In India, an award made by an arbitral tribunal is considered to be final and binding on both parties to the dispute and there is no provision for filing an appeal against the arbitral award under the Act. The Act, though, allows a party to challenge the arbitral award on very restricted grounds under Section 34 of the Act by making an application for setting aside of the same. The domestic award can only be challenged on the following grounds:

- a party was under some incapacity; or
- the arbitration agreement is invalid under the law to which the parties have subjected it; or
- the party making the challenge was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was unable to present his case; or
- the award dealt with a dispute and contained a decision that was beyond the scope of the reference to arbitration; or
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement between the parties, or in the absence of such agreement, was not in accordance with applicable provisions of the Act; or
- the subject matter of the dispute is not capable of being settled by arbitration; or
- the arbitral award is in conflict with the public policy of India, which means that:
  - (a) the making of the award was induced or affected by fraud or corruption or was in violation of principles of confidentiality to conciliation proceedings;
  - (b) the award is in contravention of the fundamental policy of Indian Law;
  - (c) the award is in conflict with the most basic notions of morality and justice; or
- the award is vitiated by patent illegality appearing on the face of the award. However, an award cannot be set aside by the court merely on the grounds of an erroneous application of the law or by re-appreciation of evidence. This ground, however, is not available in respect of an award made in an international commercial arbitration held outside India.

A party challenging the award under Section 34 of the Act is required to serve a prior notice of 30 days upon the opposite party. The Act prescribes that courts should endeavour to dispose of an application for setting aside the award expeditiously or within a period of one year from the date when the notice was served upon the opposite party. However, the said requirement is not mandatory and was held to be only directory in nature. Once a period of three months plus 30 days expires, the award cannot be challenged.

Limitation Period in the Case of a Domestic Award

Under the Act, an application for setting aside a domestic award, or an international commercial award passed in an arbitration proceeding held in India, must be made within three months from the receipt of the award from the arbitral tribunal, or in the case where a request has been made by any party under Section 33 of the Act, ie, for correction, three months from the date on which that request had been disposed of by the arbitral tribunal. However, if the party satisfies the court with sufficient cause for delay in filing such an application, this period of three months may further be extended by a maximum period of 30 days, but not thereafter.

Recourse against a Foreign Award in India

Part II of the Act deals with the provisions relating to enforcement of certain foreign awards. The Act does not provide for any appeal or challenge to a foreign award in India. However, a foreign award cannot be executed in India if the same is falling within the grounds mentioned in Section 48 of the Act.

11.2 Excluding/Expanding the Scope of Appeal

Under the Act, the scope to raise an objection for setting aside the arbitral award is very limited. The Act does not allow the parties to exclude or expand the grounds of challenge to an arbitral award and they are bound by the provisions of the Act.

In fact, judicial pronouncements have held that even a decision of a court on a petition challenging the award is subject to the same limitation as provided under Section 34 of the Act. The Supreme Court of India has held that even an appeal would not be allowed to be filed beyond 120 days unless there is any exception circumstance preventing the parties to prefer an appeal within the said period of 120 days.

11.3 Standard of Judicial Review

While reviewing the challenge to the arbitral award, the courts in this jurisdiction are strictly prohibited from reviewing and re-examining the merits of a case or substituting their own views for those of the arbitral tribunal. The courts are also not permitted to interfere in the findings of facts by the arbitral tribunal.

The courts in our jurisdiction can set aside an arbitral award only on the grounds prescribed under section 34 of the Act, as explained in **11.1 Grounds for Appeal**. Further, the courts can either set aside or uphold the award but cannot modify an arbitral award. However, an exception is provided, where, if an award in respect of some disputes is severable from the award passed in relation to other disputes, courts can set aside only a part of the award which is liable to be set aside on the parameters laid down in Section 34 of the Act.

12. ENFORCEMENT OF AN AWARD

12.1 New York Convention

India is a signatory to, and has ratified, the New York Convention, 1958. The provisions relating to the enforcement of certain foreign awards under the aforesaid conventions are given under

Part II of the Act, where Chapter I deals with provisions relating to the New York Convention Awards and Chapter II with the provisions relating to the Geneva Convention Awards. In practice, only awards relating to the New York Convention are sought to be enforced in India.

While rectifying these conventions, India has made the reservations that the arbitral award would be enforceable in India only if a party receives a binding award from a country that is a party to the New York Convention and Geneva Convention and the award is made in a territory which has been notified as a convention country by India.

12.2 Enforcement Procedure

Enforcement of Domestic Arbitral Awards

- In India, an arbitral award, unless set aside by the competent court or the time period for challenging the same has expired or a stay on execution of the same is granted, can be executed/enforced like a decree by making an application under Section 36(1) of the Act. Before making such application before the competent court, the party seeking execution must pay the requisite stamp duty on the award. Stamp duty varies from state to state.
- An award that has been set aside by the court at the place of seat of arbitration cannot be enforced/executed in India.
- In India, an arbitral award may be enforced/executed even if the proceedings for setting aside such award is pending before the court, unless the court grants a stay of the operation of such award by recording reasons in writing and subject to the conditions it may deem fit.
- There is no sovereign immunity available to the state or state entity against enforcement of an arbitral award.

Enforcement of Foreign Awards

New York Convention

In India, a foreign award can be enforced by filing an application under Section 47 of the Act before the competent court having jurisdiction.

The Act also states that an application for enforcing a foreign award must state all the important facts, specifically to the extent to which the enforcement/execution is sought. Such application must be accompanied by the original award or a duly authenticated copy in the manner required by the country where it is made, original agreement or duly certified copy and any other evidence necessary to establish the award is a foreign award.

Once an action for enforcement of a foreign award is initiated, the opposite party can only resist the enforcement of the award on the grounds specified under Section 48 of the Act. The court may refuse to enforce a foreign award in India, if it is satisfied that:

- the parties were under some incapacity or the arbitration agreement is invalid under the law applicable to it;
- no proper notice of appointment of arbitrator was given to the other party or such party was unable to present his case;
- the decision was made beyond the scope of submission to arbitration;
- the composition of the arbitral tribunal was not in accordance with the agreement between the parties;
- the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which it was made;
- the award is in conflict with the public policy of India, or the subject matter of the dispute is not capable of being settled by arbitration.

12.3 Approach of the Courts

Indian courts generality adopt a pro-arbitration approach, even when the award is subjected to a challenge by one of the parties. Broadly speaking, unless the award is such as would shock the conscience of the court or be violative of public policy in India, courts would be reluctant to interfere. The courts have held that the award of the arbitrator should be treated as the last and final word as long as the arbitration has adopted a fair approach, giving parties full opportunity to present their case. Courts ordinarily do not grant unconditional stay on the enforcement of an arbitral award unless it is prima facie of the view that the arbitration agreement or the making of the award was induced by fraud or corruption. In other cases, any condition may be put by the court while granting stay on enforcement of an arbitral award during the pendency of the challenge to an arbitral award.

Further, courts in India do not grant any stay on enforcement or entertain any objection against enforcement of an arbitral award when the challenge to an arbitral award has been disposed of by the court or time for making such challenge has expired.

The courts in India can refuse to enforce a foreign award on the grounds of the public policy of India, only if the courts find that the award was induced or affected by fraud or corruption, or if the award is in contravention of the fundamental policy of Indian law. It is also clarified that where there is a contravention of the fundamental policy of Indian law then it shall not entail a review on the merits of the dispute. The Indian courts do not entertain pleas of violation of public policy of a foreign country.

13. MISCELLANEOUS

13.1 Class-Action or Group Arbitration

The Act does not provide for class-action arbitration or group arbitration. However, in certain cases like matters relating to payment of compensation by the government for land acquisition, cases of arbitrations invoked by the landowners are clubbed together for adjudication and a common arbitral award is passed by the arbitral tribunal. Such arbitrations can be loosely considered as class-action arbitration.

13.2 Ethical Codes

In India, all the lawyers are required to follow the rules of professional standards prescribed by the Bar Council of India such as refusing to act in an illegal manner towards the opposition, refusing to represent clients who insist on unfair means, refusing to appear in front of relations, not suppressing material or evidence, not negotiating directly with the opposing party, not advertising or soliciting work, etc.

The arbitrator is required to make a declaration in terms of Section 12 read with Schedule V and VII of the Act about his independence and impartiality. He should have sufficient time for conducting an arbitration and should act without any undue delay so as to avoid causing any inconvenience to the parties.

13.3 Third-Party Funding

In India, there are no laws which provide for third-party funding in litigation. As per the ruling of the Supreme Court in Bar Council of India v AK Balaji [(2018) 5 SCC 379], advocates in India cannot fund litigation on behalf of their clients. Therefore, third-party funding by advocates is not permissible in India due to the Bar Council of India's rules of professional conduct.

However, there is no restriction on third parties who are non-lawyers to fund the litigation and get repaid after the outcome of the same.

13.4 Consolidation

The arbitral tribunal does not have any power to consolidate separate arbitral proceedings, even if the parties are the same. However, the Supreme Court of India in P.R. Shah v BHH Securities [(2012) 1 SCC 594], allowed the consolidation of arbitral proceedings if the contracts under question have arbitration agreements. Besides, in a few judgments it has been held that if parties are the same in different agreements, then the parties can agree to appoint the same person as arbitrator for deciding the disputes arising out of all such contracts despite the fact that all contracts are separate and independent of each other. In such a situation, either separate awards can be passed in respect of each contract or a common award can be passed. However, passing separate awards for each reference is preferable to a common award.

13.5 Third Parties

The Act does not specifically provide that a third party or the non-signatory can also be bound in an arbitration proceeding. Nor does the arbitral tribunal have the power to bind a non-signatory to an arbitration proceeding. However, over the period of time, the Supreme Court of India, in catena of judgments have concluded that in certain circumstances even a non-signatory can be said to be bound by the arbitration agreement. In the aforesaid judgments, there was more than one contract having arbitration clauses but the contract with the third party did not contain any arbitration clause. The court held that since all the contracts were in respect of the same project/work, even the third party would be liable to participate in the arbitration proceedings, irrespective of whether the contract with such third party contained an arbitration clause or not.

The Act allows a third party, including a foreign entity, who is a non-signatory to the arbitration agreement, to apply for the referral of arbitration proceedings before a competent court, provided that such a third party establishes that it is acting “through” or “under” or on behalf of the party to the arbitration agreement.

Singhania & Partners LLP is a full-service law firm in its 22nd year of practice. The firm is featured amongst leading law firms in India in the Forbes Legal Powerlist 2020.

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It has four offices, in Delhi, Bengaluru, Hyderabad and Gurugram, and eight associate offices across India.

AUTHORS

Ravi Singhania, managing partner of Singhania & Partners, is an alumnus of SRCC and Campus Law Centre of the University of Delhi. He is a renowned lawyer and trusted adviser in the dispute resolution sector. Under his leadership and successful track record as a business litigation and international commercial arbitration practitioner, the firm features amongst India's top dispute resolution firms. Ravi successfully advises companies and provides both hands-on legal advice and overall strategic input while drafting and negotiating contracts for complex transactions to always reflect the clients' interests. He has served on board positions in TerraLex Inc, The Indian Council of Arbitration, and a number of Fortune 500 companies. He is featured in Forbes Legal Powerlist 2020.

Shilpa Shah is a senior partner with the firm and has been practising for almost four decades in the legal profession. Shilpa heads the firm's Bengaluru practice. She appears for domestic as well as multinational corporate houses, PSUs, ministries and government authorities in corporate and commercial disputes. She has successfully represented clients in banking, intellectual property, real estate, taxation, technology and science, joint ventures and acquisitions with a focus on infrastructure, information technology and real estate. She features amongst the top 100 influential individual lawyers in Forbes Legal Powerlist 2020.

Vikas Goel, with 25 years of practice, has appeared before the Supreme Court of India, various appellate tribunals and High Courts on several national/international arbitration and litigation matters. He is a known name in corporate litigation, infrastructure arbitration and contractual/commercial disputes. Vikas graduated from SRCC and then acquired his Bachelor's in Law degree from Delhi University and Master in Law from Kurukshetra University.

Shambhu Sharan, with experience of over two decades, is leading one of the dispute resolution teams of the firm and specialises in the field of construction contracts. He is known for his in-depth knowledge about domestic and international commercial arbitrations and is trusted for saving millions of dollars for clients with his winning arguments in court. Shambhu appears before various dispute resolution bodies, and there are several ministries, public sector undertakings, government authorities, banks and domestic as well as foreign companies amongst his clients.

Singhania & Partners LLP

P-24, Green Park Extension
New Delhi-110016

Tel: +91 11 4747 1411
Fax: +91 11 4747 1415
Email: ravi@singhania.in
Web: www.singhania.in