



Arbitration Guide
IBA Arbitration Committee

INDIA

May 2016

**Sumeet Kachwaha, Kachwaha &
Partners, New Delhi**

Kachwaha & Partners
1/6, Shanti Niketan,
New Delhi – 110021
skachwaha@kaplegal.com

Table of Contents

	Page
I. Background	1
II. Arbitration Laws	3
III. Arbitration Agreements	4
IV. Arbitrability and Jurisdiction	8
V. Selection of Arbitrators	10
VI. Interim Measures	11
VII. Disclosure/Discovery	13
VIII. Confidentiality	13
IX. Evidence and Hearings	14
X. Awards	17
XI. Costs	18
XII. Challenges to Awards	20
XIII. Recognition and Enforcement of Awards	23
XIV. Sovereign Immunity	24
XV. Investment Treaty Arbitration	25
XVI. Resources	25
XVII. Trends and Developments	26

I. Background

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

Arbitrations are very common in commercial contracts in India (especially in cross border agreements). Indeed arbitration clauses are not only advisable, they are perhaps necessary. This is because the ordinary civil courts, which would entertain a suit for damages or breach of contract, are so badly clogged with a backlog that it can become pointless to pursue these remedies. Added to that are ad valorem court fees payable up front in civil suits. In most cases, such court fees do not have any cap. One can hope that with the passing of the “*Commercial Courts, Commercial Division And Commercial Appellate Division of High Courts Act , 2015*,” judicial delays may be reduced, however it is too early to so predict.

The principal disadvantages of an arbitration in India are: the lack of a pool of specialized arbitrators; the tendency to conduct arbitrations like court proceedings in terms of rules and procedures; the absence of strong domestic arbitration institutions; and local arbitrators and the bar not being in sync with the best practices of international commercial arbitration. The recent amendment to India’s arbitration law, i.e. “*The Arbitration And Conciliation (Amendment) Act, 2015*” (2015 Amendment) aims to inculcate a more professional culture for arbitration in India, and also seeks to make arbitration proceedings more expeditious. However, the impact of the 2015 Amendment is yet to be tested.

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

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

Amongst the domestic arbitration institutions, the Indian Council of Arbitration (ICA) (headquartered in New Delhi) is frequently used. The Delhi International Arbitration Centre (which functions under the aegis of the Delhi High Court) is popular for Delhi seated arbitrations. The International Chamber of Commerce (ICC) is popular for off shore arbitrations. In recent times, the Singapore International Arbitration Centre (SIAC) has gained enormous popularity, chiefly for reasons of costs and convenience. The London Court of International Arbitration (LCIA) had set up a branch in New Delhi but has recently announced its closure.

(iii) What types of disputes are typically arbitrated?

Shipping, construction, joint venture agreements and cross border commercial contracts typically contain an arbitration clause. However, for disputes related to loans and borrowings, arbitrations are not ordinarily used, as the lender typically depends on the built-in securitization mechanism rather than a private dispute resolution forum.

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

This greatly depends upon the arbitrators, the parties and also the complexity of the matter. The 2015 Amendment aims to reduce the time consumed in arbitral proceedings, *inter-alia* by specifying an upper limit of 1 year from the date of constitution of the arbitral tribunal, for completion of proceedings and making of an award.

Parties can consent to extend this period by a further 6 months only, after which an application is required to be made to the Court, which while deciding the same, is empowered to (i) should the delay be attributable to the tribunal, reduce the fees of an arbitrator / the tribunal (by a maximum of 5%), (ii) substitute an arbitrator and/or (iii) impose costs, including actual or exemplary costs on any party. The Act further provides that such an application should be disposed off as expeditiously as possible, preferably within 60 days of service of notice on the non-applicant(s).

While this amendment is likely to reduce delays, the precise impact is yet to be seen and would depend largely on the spirit with which courts deal with applications under this provision. A possible scenario is that such applications themselves get stuck in court procedures - rendering the remedy worse than the disease.

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

The Arbitration & Conciliation Act expressly states that a person of any nationality may be an arbitrator, unless otherwise agreed by the parties. Foreign advocates do appear in arbitrations and there is no legal bar. This position has been clarified by the High Court of Madras in *A.K. Balaji v. The Government of India and Ors* (reported in AIR 2012 Mad 124).

II. Arbitration Laws

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

In 1996, India enacted a new Act titled the Arbitration & Conciliation Act ('the Act'). The Act has two significant parts. Part I deals with any arbitration seated in India irrespective of the nationality of the parties. Hence the applicability of Part I depends on the seat of the arbitration (India). Part I is based on the UNCITRAL Model Law and the UNCITRAL Rules of 1976. Part II is concerned with enforcement of foreign awards and is based on the New York Convention.

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

As stated above, both domestic and international arbitrations (i.e, where at least one party is a foreign individual or entity), seated in India, are governed by the same set of provisions (contained in Part I of the Act). However, there are a few vital distinctions.

First, in the case of an international arbitration, if the court's assistance is required to constitute the tribunal, an application in this regard would lie to the Supreme Court of India. In the case of a domestic arbitration it would lie to the High Court where the cause of action may arise or the defendant may reside, or where the arbitration is seated.

Secondly, when a court is approached for appointment of a sole / presiding arbitrator in an international arbitration between parties belonging to different nationalities, it is required to appoint an arbitrator from a nationality other than the nationality of either party. (This however is not necessarily followed in practice).

The third difference is that in an international arbitration, the court while appointing and fixing the arbitrator(s) fees (if approached to do so), need not be guided by the model fees prescribed under Schedule IV of the Act, or Rules framed under Section 11 (14) of the Act.

Fourthly, in an international arbitration, the parties or the arbitral tribunal can apply non-Indian substantive law. In an arbitration between Indian parties, the tribunal is obliged to apply the substantive law of India.

Fifthly, vide the 2015 Amendment, an additional ground for setting aside an award on 'patent illegality' has been inserted, in arbitrations between Indian

parties only. Such a ground is not available in the case of an international arbitration.

The sixth difference is that in an international arbitration, any application to a court, for interim relief, or for setting aside of an award, or for execution etc., shall lie to the High Court where the cause of action may arise or the defendant may reside, or where the arbitration is seated, even if such a High Court does not exercise ‘original jurisdiction’ (i.e. does not have the power to hear civil suits based on pecuniary valuation) or where the pecuniary valuation of the matter is below the pecuniary jurisdiction of the High Court. In the case of a domestic arbitration, an application may also lie to a subordinate court, in case the High Court in question does not exercise original jurisdiction, or where the pecuniary valuation of the matter is below the High Court’s pecuniary jurisdiction.

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

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

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

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

In an international arbitration, the arbitral tribunal is required to decide the dispute in accordance with the rules of law designated by the parties, and failing such a designation, the tribunal is required to apply the rules of law it considers to be appropriate “given all the circumstances surrounding the dispute,” provided that it cannot decide “ex aequo et bono” or as “amiable compositeur”, unless the parties have expressly authorized it to do so.

III. Arbitration Agreements

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

There is no legal requirement as to the form and content of an arbitration agreement. It may be even contained in an exchange of letters or any other means

of telecommunication which provides a record of the agreement, including communication through electronic means. The agreement need not be signed but it must be in writing.

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

At the same time, mere use of the word ‘arbitration’, ‘arbitral tribunal’ or ‘arbitrator’ will not make it an arbitration agreement. If the parties have made the reference dependant on a future act which may or may not happen it will not result in an agreement. Use of clauses such as ‘parties can, if they so desire, refer their disputes to arbitration,’ ‘in the event of any dispute, the parties may also agree to refer the same to arbitration’ or ‘if any dispute arises between the parties, they should consider settlement by arbitration’ do not result in an arbitration agreement. The rationale of the principle is that an agreement to enter into an agreement does not constitute a binding obligation.

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

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

A court would not enforce an arbitral agreement if it finds that it is prima facie invalid or (in the case of a foreign arbitration), prima facie null and void, inoperative, or incapable of being performed.

Courts have in the past also refused to refer a civil suit to arbitration on the ground that the dispute is not arbitrable, or that the subject matter of the arbitration agreement is not the same as the subject matter of the civil suit, or if the parties to the civil action are different from the parties to the arbitration agreement. However, the 2015 Amendment provides that reference to arbitration must be made “*notwithstanding any judgment, decree or order of the Supreme Court or any Court,*” thereby putting all such preliminary objections before the

arbitral tribunal and restraining the courts from getting into these issues and stalling arbitrations.

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

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

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

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

In an earlier case, the Delhi High Court turned down a challenge to a multi-party clause. In that case, (*Focus Brands (India) Pvt. Ltd v. Campari International*) there were three agreements but with only one common party. In two agreements,

parties had agreed to arbitration in Milan under Italian law and in one to arbitration in Singapore under SIAC Rules as per India law. It was contended that the agreements and the cause of action was interlinked and the conflicting arbitration agreements would be unworkable. The court rejected the contention stating that mere inconvenience or difficulties in working out an arbitration agreement cannot be a ground to strike it down.

Another case to note is the Supreme Court decision in *P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.*; (2012) 1 SCC 594 where it has been held that a common arbitration may be brought against multiple parties, even if all the parties do not have an arbitration agreement with each other. To quote from the Judgment: “...if A had a claim against B and C and if A had an arbitration agreement with B and A also had a separate arbitration agreement with C, there is no reason why A cannot have a joint arbitration against B and C...” This would of course be applicable only where the subject matter of the dispute is common.

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

A unilateral right of one party to elect whether to commence an arbitration or a civil suit (should a dispute arise) has been upheld by Indian courts. It may, however, be stated that there is not much case law on the subject and the issue has not been squarely dealt with so far.

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

See Section III (iv) above.

The 2015 Amendment seeks to give legislative force to the Supreme Court’s decision in *Chloro Controls* [see Section III (iv) above], and also extend its applicability to domestic arbitrations, by inserting the words “*or any person claiming through or under him*” in Section 8 (1) of the Act. Section 45 of the Act (applicable to foreign seated arbitrations) already contained such language, which formed the basis for the decision in *Chloro Controls*. The Amendment to Section 8 (1) of the Act can be seen as a statutory approval of the decision in *Chloro*.

While the language of Sections 8 (1) and 45 of the Act make clear that a non-signatory can seek arbitration (so long as it is claiming through or under a signatory), insofar as enforcing an arbitration agreement against a non-party is concerned, judgments such as *Chloro Controls*, and those rendered subsequently may be referred to.

Applying its decision in *Chloro Controls*, the Supreme Court in *Chatterjee Petrochem Co. v. Haldia Petrochemicals Ltd.*, (2014) 14 SCC 574, allowed a non-signatory affiliate to invoke arbitration.

Recently, the Supreme Court has applied *Chloro Controls* to bind a non-party to an arbitration by invoking the doctrine of lifting of the corporate veil (see *Purple Medical Solutions Pvt. Ltd. vs. MIV Therapeutics Inc & Anr.* Arbitration Case (Civil) No. 11 of 2014 and Arbitration Case (Civil) No. 12 of 2014, Decided on January 27, 2015).

The Delhi High Court, applying *Chloro Controls*, has held that members of a consortium, even though not directly parties to an arbitration agreement executed on behalf of the consortium, can be made parties to an arbitration. (see *HLS Asia Ltd. vs. M/s. Geopetrol International Inc. & Ors.* (2013) 196 DLT 52).

In another decision of the Delhi High Court (*Havels India Ltd. v. Electrium Sales Ltd.*) the Plaintiff had entered into a Supply Agreement with a co-subsiary of the Defendant (which contained an arbitration clause). There was no arbitration agreement with the Defendant but the court held that the Supply Agreement was entered into by the co-subsiary on behalf of itself as well as its ‘Related Persons’ (which expression was defined). Moreover, the goods in question were supplied to the Defendant. Under these circumstances, the court held that the Defendant could not be denied the benefit of the arbitration clause contained in the Supply Agreement (though it was not a party thereto).

There is thus a recognized body of case law allowing non-signatories to participate in an arbitration, and also enforcement of arbitration agreements against non-signatories.

IV. Arbitrability and Jurisdiction

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

The Act recognizes the principle of non-arbitrability. It is an express ground for setting aside an arbitral award (‘the subject matter of the dispute is not capable of settlement by arbitration’). The Act, however, nowhere defines what is non-arbitrable. Generally, any civil or commercial dispute is in principle capable of being resolved by arbitration. A dispute becomes non-arbitrable where jurisdiction of a private tribunal is expressly or impliedly excluded. Examples of non-arbitrable disputes are: matrimonial disputes including child custody or guardianship; insolvency or winding up of companies; testamentary matters (grant

of probate, letters of administration or succession certificates); eviction of tenants governed by tenancy statutes; suit for the sale of mortgaged property; criminal offences.

Non-arbitrability also depends generally on whether the award would affect third parties or the public at large, that is, whether it would be a judgment in rem. Another test is whether the dispute between the parties is capable of a private compromise between the parties.

Lack of arbitrability is considered to be a matter of jurisdiction i.e. to be determined in the first instance by the tribunal. At the pre-reference stage, a court may not decide whether a matter is arbitrable. This stands clarified by the 2015 Amendment to Section 8 (1) of the Act (see Section III(ii) above) and also the insertion of Section 11 (6A) which provides that a court while appointing an arbitrator under Section 11 of the Act “*shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.*”

In view of these amendments, a court may have occasion to decide the issue of arbitrability only while deciding a challenge to an award.

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

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

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

(iii) Can arbitrators decide on their own jurisdiction? Is the principle of *competence-competence* applicable in your jurisdiction? If yes, what is the

nature and intrusiveness of the control (if any) exercised by courts on the tribunal's jurisdiction?

The principle of *competence-competence* is recognized and enshrined in the Act. Indeed (going beyond the Model Law) the Act envisages that should the arbitral tribunal reject any challenge to its jurisdiction it shall proceed with the arbitration and render the award. The aggrieved party would later have a right to challenge the award before a court on the ground of lack of jurisdiction.

There are, however, two situations in which the court would overshadow the arbitral tribunal in its *competence-competence* jurisdiction. First, if a judicial authority is seized of a matter and a party objects to the jurisdiction of the court on the ground that the parties have an arbitration agreement, the court can decide whether *prima facie* a valid arbitration agreement exists. Similarly, if the court is petitioned to appoint an arbitrator (sole or presiding), the court may examine whether there is an arbitration agreement in existence before it makes the appointment.

V. Selection of Arbitrators

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

The law does not require the arbitrator to possess any special qualification, and subject to agreement and the requirement of independence/impartiality, parties are free to select any person as an arbitrator. The courts are involved only if parties are unable to agree upon a sole arbitrator or if the two appointed arbitrators fail to agree on a third arbitrator (within a period of 30 days). For further discussion see Section II(ii) above.

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

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

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

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

Schedule V and VII (inserted vide the 2015 Amendment) can be said to be along the lines of the IBA Guidelines on Conflicts of Interest.

An arbitrator can be challenged only if circumstances exist that give rise to justifiable doubts as to his independence or impartiality or if he does not possess the qualifications agreed to by the parties. Any challenge shall be made within 15 days of a party becoming aware of the constitution of the tribunal or becoming aware of the circumstances leading to the challenge. The arbitral tribunal shall decide on the challenge. The court has no role at that stage and if a challenge is rejected, the arbitral tribunal shall continue with the proceedings and render its award. It would be open to the party challenging the arbitrator to take any wrongful rejection of challenge as a ground for setting aside the award.

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

The Act does not require any qualifications from an arbitrator. It expressly states that a person of any nationality may be an arbitrator (unless the parties have agreed otherwise). The law does not prescribe any code of conduct or ethical duties from arbitrators and none have been formulated in case law (though some arbitral institutes have prescribed these). As per principles applicable to all judicial and quasi-judicial tribunals, the legal standard in deciding a challenge to an arbitrator is that justice should not only be done but seen to be done. If the arbitrator has compromised a free trial in any manner or denied due process by any act or omission, it may be a ground for disqualification. Actual bias is never required. The test is whether there is a real likelihood of bias. The law in this regard is part of the administrative law of India.

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

See Section V(ii) above.

VI. Interim Measures

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

The arbitral tribunal is empowered to order a wide variety of interim measures of protection in respect of the subject matter of the dispute. The said power has received a major impetus by the 2015 Amendment, which provides that the

arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it. Furthermore, vide the 2015 Amendment, any interim order passed by the tribunal shall be deemed to be an order of the court for all purposes, and shall be enforceable as such.

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

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

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

A court ordered relief will remain in force following constitution of the arbitral tribunal, but would not prevent the tribunal from reaching final conclusions which may be at variance of the court order.

Vide the 2015 Amendment, courts have also been empowered to grant interim measures of protection in relation to offshore arbitrations.

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

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

VII. Disclosure/Discovery

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

In a civil case, discovery is through a court order and the court would allow it only if it is considered relevant or for saving costs. Courts do not order discovery as a matter of routine (or by way of a fishing expedition) as it may carry adverse consequences for the opposite party. If a document is referred to or relied upon in a pleading, then generally discovery is to be allowed.

If a party deliberately or willfully disobeys an order regarding discovery, its claim or defence is liable to be stricken. However, if the default is not willful or contumacious the court will only draw an adverse inference against the defaulting party.

This approach to discovery is followed in arbitrations as well. If an arbitral tribunal needs court's assistance for discovery the procedure will be as outlined in Section VI(iii) above.

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

See Section VII(i) above.

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

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

VIII. Confidentiality

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

Arbitration proceedings are not confidential per se. The law does not impose any such obligation. Indeed, given the transparency laws of the country (including the Right to Information Act, 2005) the state and its agencies cannot agree to keep arbitration proceedings confidential. Similarly large corporations may also find it difficult to have any such agreement.

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

There are no specific provisions in this regard. However the arbitrator has general power to order interim measures of protection. (See Section VI(i) above). Alternatively the court can be approached for this purpose. (See Section VI(ii) above).

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

Under Indian law, arbitrators do not have the same protection as judges or magistrates and as such do not have any privilege against examination as to their conduct or as to anything which may come to their knowledge in the discharge of their functions. However, no arbitrator can be summoned in a court proceeding as a matter of routine. This would be done by a court (if at all) sparingly and after due deliberation. Further, an arbitrator cannot be summoned as a witness merely to show how he has arrived at his conclusions.

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

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

IX. Evidence and Hearings

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

Indian arbitrators rarely refer to or rely upon the IBA Rules. In practice examination of witnesses is conducted along the lines of a regular court hearing.

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

Arbitrators are masters of their own procedure and, subject to the parties' agreement, may conduct the proceedings in a manner they consider appropriate. The only restraint is that they shall treat the parties with equality and each party shall be given a fair opportunity to present its case, which includes sufficient advance notice of any hearing or meeting. Neither the Code of Civil Procedure nor the Indian Evidence Act apply to arbitrations, but in practice only the technical rules of procedure contained therein are ignored. The arbitrators

generally guide themselves by the underlying legal principles contained in these statutes. The arbitral tribunal shall hold oral hearings if a party so requests (unless the parties have agreed that no oral hearing shall be held).

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

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

Live transcript facilities are not available in India and therefore are usually not followed.

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

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

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

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

Though there is no bar for a legal representative of a party to testify (either for or against a party whose case he is conducting), courts and arbitrators are circumspect in allowing it and find it 'undesirable'. When necessary, the legal representative would be expected to retire from the case.

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

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

Expert testimony is presented in the same manner as any other evidence (ie, based on a sworn witness statement followed by cross examination). There are no formal requirements regarding independence and/or impartiality of expert witnesses; rather the law assumes that an expert witness will lean in favour of the party producing him as a witness and expects the court to test his credibility through collaborative evidence or otherwise.

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

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

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

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

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

Witness conferencing is not used in India.

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

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

X. Awards

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

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

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

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

Arbitrators cannot award punitive or exemplary damages for breach of contract (indeed under Indian law, even courts cannot do so).

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

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

Insofar as post-award interest is concerned, the arbitrator can award interest in the manner deemed reasonable. The general rule is that pre-award interest gets subsumed in the amount awarded, and the post award interest is on such amount (i.e. principal amount + pre-award interest). The arbitrator has the power to award compound interest, even if the contract does not provide for the same. [*Hyder Consulting (UK) Ltd. v. State of Orissa*, (2015) 2 SCC 189, and Supreme Court Order dated 12.03.2015 in Civil Appeal No. 3148 of 2012]

(iii) Are interim or partial awards enforceable?

Yes. Under the Act, the definition of arbitral award includes 'interim award'.

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

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

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

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

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

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

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

If the parties agree, any party may request the arbitral tribunal to give an interpretation to a specific point or part of the award. Unless otherwise agreed by the parties, a party with notice to the other party may request the arbitral tribunal to make an additional award as to claims presented in the proceedings but omitted from the award. The time limit for such an application is also 30 days.

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

XI. Costs

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

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

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

The Act stipulates that costs include reasonable sums relating to the fees and expenses of the arbitrators and witnesses; legal fees and expenses; fees of the

arbitral institution; and any other expense in connection with the court and arbitration proceedings and the arbitral award.

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

A court / tribunal may make any order on costs, including that a party shall pay a proportion of another party's costs; a stated amount in respect of another party's costs; costs from or until a certain date only; costs incurred before proceedings have begun; costs relating to particular steps taken in the proceedings; costs relating only to a distinct part of the proceedings; and interest on costs from or until a certain date.

The elaborate scheme on costs stated hereinabove is provided for by virtue of the 2015 Amendment. Until now, Indian arbitrations (especially ad hoc arbitrations) rarely see full costs being awarded. With the implementation of the 2015 Amendment, it is hoped that realistic costs become the rule rather than the exception.

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

Yes. Insofar as ad-hoc and purely domestic arbitrations (i.e. involving Indian parties only) are concerned, the tribunal's fees, if fixed by the court (when approached for appointment of an arbitrator), may be guided by the model fees prescribed under Schedule IV to the Act, and/ or Rules framed under Section 11 (14) of the Act.

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

Yes. The tribunal would exercise its discretion inter alia based on the merits of the parties' claim or defence and conduct. See Section XI(ii) above.

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

An appeal against costs alone would be on very limited grounds, for instance: where a *pro forma* party (against whom no relief was sought) was made to bear costs or where the court below committed a fundamental error (making the successful party bear the costs of the losing party on an erroneous factual assumption). In the absence of decided cases, it is not clear the extent to which these principles will apply to an arbitral award. Given the present state of law, a review of the tribunal’s decision on costs would not lie (but see Section XII(i) below).

XII. Challenges to Awards

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

There is a difference between domestic awards (including those arising from an international arbitration taking place in India), and foreign awards.

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

An application to ‘set aside’ a domestic award may be filed, within three months of receipt of the same (extendable by 30 days thereafter, but no more).

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

Earlier, mere preference of an application for setting aside of an award resulted in an automatic bar to enforcement (till disposal of such an application). The 2015 Amendment has changed the position. Now, execution of an award as a decree can nonetheless proceed pending adjudication of the setting aside application, unless the court has specifically ‘stayed’ execution of the award. While staying the execution of an award, the court is required to pass a reasoned order, taking into account the provisions applicable for staying of a money decree, which ordinarily requires the judgment debtor to deposit the decretal amount (or a part of the same) in court, which may, pending proceedings, be allowed to be withdrawn by the decree holder, subject to furnishing a suitable security.

The grounds for challenge of domestic awards are the same as per the Model Law (Article 34 thereof). The minor differences are that under the Act an award can

also be challenged on the grounds of lack of impartiality or independence of the arbitrator or any ruling by the arbitrator as to the existence or validity of the arbitration agreement. Under Indian laws there is no recourse to courts on these grounds during the arbitral process and thereafter a challenge is permitted once the award is rendered.

A controversial decision of the Supreme Court (*Oil & Natural Gas Corporation v. SAW Pipes* (2003) 5 SCC 705) (Saw Pipes) has introduced the concept of a challenge to a domestic award on the merits if the court finds it to be ‘patently illegal’ or against the terms of the parties’ contract, by expanding the ‘public policy’ ground as contained in Section 34 of the Act.

The 2015 Amendment restricts the applicability of Saw Pipes, by providing that:-

- The ground to set aside an award on ‘patent illegality’ is not available against an award rendered in an international arbitration (i.e. where at least one party is a foreign national / entity),
- An award can be set aside for being patently illegal, only if the same is apparent on the face of the award,
- An award cannot be set aside merely on the ground of an erroneous application of the law, or by re-appreciation of evidence,
- The public policy ground has been narrowly defined, making clear that it is confined to cases where there is fraud or corruption in the making of the award or where the award is in “contravention with the fundamental policy of Indian law”, or “is in conflict with the most basic notions of morality or justice.” The definition clarifies that the public policy contravention ground shall not entail a review on the merits of the dispute.

Lastly, the 2015 Amendment provides a time limit of 1 year from date of service of notice on the non-applicant, for deciding an application to set aside an award. It is yet to be seen if Indian courts are able to follow this time limit.

Now to deal with foreign awards. The first point of distinction is that a foreign award is not a decree capable of being enforced automatically. An application is required to be moved, for enforcement and execution of a foreign award. Such an application shall lie to the appropriate High Court having jurisdiction over the subject matter, or the respondent.

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

The 2015 Amendment, as a matter of abundant caution, clarifies that a merits based review is not available while considering an application for enforcement of a foreign award. There was some confusion in the past, with another controversial decision in *Venture Global Engineering Vs. Satyam Computer Services Ltd. and Anr.* (2008) 4 SCC 190, (Venture Global) which held that the provisions for setting aside of a domestic award (including on the patent illegality ground laid down in *Saw Pipes*) shall apply to foreign awards as well, unless it could be shown that the parties intended to exclude the applicability of Part-I of the Arbitration Act (which contains the provisions applicable to domestic arbitrations). The decision in *Venture Global* was over-ruled (prospectively) by a 5 Judge decision in *Bharat Aluminum Co. v. Kaser Aluminum Technical Services* - (2012) 9 SCC 552.

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

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

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

There is no provision to “appeal” against an arbitral award.

As stated in Section XII (i) above, only an application seeking to “set aside” a domestic award can be preferred. From a decision rendered in such application, one statutory right to appeal is available. Further, there is a constitutional right to file an appeal to the Supreme Court of India (second appeal). This however is at the discretion of the Supreme Court and is entertained only if there is a gross error of law or an issue of public importance. The appeal provisions mentioned above would not expand the grounds on which an award can be set aside. The appellate court can only consider whether the court of first instance correctly applied the available provisions while considering the application for setting aside the award.

No statutory appeal lies against an order enforcing a foreign award; it lies only against an order refusing to enforce a foreign award. However, a discretionary appeal would lie to the Supreme Court of India (as stated above) from an order enforcing the award.

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

The power to remand exists only in relation to domestic awards (including those arising from an international arbitration taking place in India) as discussed in Section X(vi) above.

XIII. Recognition and Enforcement of Awards

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

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

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

A foreign award can be enforced (at the discretion of the enforcing party) in any court within the territorial limits where the defendant resides or has his business or where the defendant's assets can be traced.

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

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

Indian law does not recognise double *exequatur* in relation to enforcement. The procedure for enforcement would be the same as described in Section XIII above.

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

Yes.

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

Indian courts do not suffer from any anti-foreigner bias and it is very common for foreign awards to be enforced. Statistics from the past 20 years show that the foreign award was not enforced in only about eight per cent of cases.

Indian courts would not enforce a foreign award set aside by the court at the place of arbitration as that it is a complete defence against enforcement under the New York Convention.

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

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

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

XIV. Sovereign Immunity

- (i) **Do State parties enjoy immunities in your jurisdiction? Under what conditions?**

The doctrine of sovereign immunity has had a bumpy ride in India chiefly due to a 1965 decision of the Supreme Court which gave it recognition (*Kasturi Lal Ralia Ram Jain v. State of Uttar Pradesh* AIR 1965 SC 1039). The case dealt with an act of negligence committed by police officers relating to property seized in exercise of their statutory powers. The Supreme Court held that if a tortious act is committed by a public servant in discharge of statutory functions based on a delegation of the sovereign powers of the state, then the state is not vicariously liable. It relied on the maxim 'the King can do no wrong', thereby embracing an absolute view of sovereign immunity. However, the doctrine has not been applied since and courts have continuously held the state liable in a variety of circumstances. The doctrine is for all purposes dead where the state is involved in commercial or private undertakings.

- (ii) **Are there any special rules that apply to the enforcement of an award against a State or State entity?**

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

XV. Investment Treaty Arbitration

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

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

- (ii) **Has your country entered into Bilateral Investment Treaties with other countries?**

As of March 2016, India has entered into BITs with 84 countries, out of which 72 stand ratified. Additionally it has four comprehensive economic co-operation agreements with investment protection provisions.

XVI. Resources

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

The most popular electronic media for reference and research are: (www.sconline.com), (www.westlawindia.com) and (www.manupatra.com). Supreme Court judgments and its day to day orders can be accessed free of cost from (www.supremecourtofindia.nic.in) but there is no search engine. The link to various High Court websites is also available. (Delhi High Court at (www.delhihighcourt.nic.in) and the Bombay High Court at (www.bombayhighcourt.nic.in). A leading text book is: Justice R.S. Bachawat's Law of Arbitration & Conciliation; 5th Edition, 2010; published by LexisNexis Butterworths Wadhwa Nagpur.

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

India is becoming an attractive destination for international conferences on arbitration and almost every major arbitral institution has conducted seminars or conferences in the recent past. However, there are no regular events announced and it is generally on an ad hoc basis.

XVII. Trends and Developments

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

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

Despite a progressive legislation, India has some distance to cover before it brings for itself a fully effective arbitration mechanism. There is no negative attitude in courts towards arbitration but the jurisdiction is yet to get fully in sync with the best practices in international arbitration.

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

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

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

The enactment of the Arbitration And Conciliation (Amendment) Act, 2015 is the most recent noteworthy development in the field. This may be termed as India's second attempt at establishing an arbitration friendly regime. The 1996 Act was a very well drafted and progressive legislation, which unfortunately did not achieve the desired result, largely on account of "judicial innovations" in its application. Much has changed over the last two decades and the 2015 Amendment gives India a chance to start afresh and establish itself as an arbitration friendly jurisdiction. The next few years will indicate whether or not this hope can turn into reality.