Litigation and enforcement in India: overview

Sumeet Kachwaha and Dharmendra Rautray
Kachwaha & Partners

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MAIN DISPUTE RESOLUTION METHODS

1. What are the main dispute resolution methods used in your jurisdiction to settle large commercial disputes?

Arbitration, consumer courts and the anti-trust commission (which can adjudicate on, and award damages in cases of unfair trade practices) are often used to settle commercial disputes. Arbitration has gained popularity with the Arbitration and Conciliation Act 1996 (*see Question 30*). Litigants are often discouraged from filing ordinary civil suits in commercial matters, chiefly due to the *ad valorem* court fees payable in most cases, and very long delays in processing such matters.

The main dispute resolution method against the state (or its instruments and agencies) is by way of a writ petition issued by the High Courts. The writ remedy is used in public procurement matters, wrongful denial of state licences or privileges or any discriminatory, illegal or arbitrary state action, but cannot be used for pure contractual disputes.

Recently, attempts have been made to introduce mediation for large commercial disputes (mediation is already quite successful in non-commercial disputes).

Essentially, India follows an adversarial system.

Civil cases are decided according to a preponderance of probability. If the evidence is evenly balanced and the court is not able to come to a determination one way or the other, then the defendant must be given the benefit of doubt. This standard of proof is applicable to all civil cases including where charges of fraud or other criminal conduct are made.

COURT LITIGATION

Limitation periods

2. What limitation periods apply to bringing a claim and what triggers a limitation period?

Generally, the limitation period is three years. In certain circumstances, the start of the limitation period is delayed (for example, if the claimant has not reached the age of consent, or was not aware of his cause of action due to fraud by the defendant).

The limitation periods in relation to specific matters are as follows.

Contract and specific performance

The action must be brought within three years of the breach or non-performance complained of.

Tort

The limitation period varies between one and three years. For example:

- Defamation: one year.
- Conversion, infringing copyright or other exclusive privilege: three years.
- Compensation for injury caused by an injunction wrongfully obtained: three years.
- Product liability: if before the Consumer Courts, two years. In other cases, three years.

Land disputes

The limitation period ranges between three to 30 years. For example:

- Action by a mortgagor to redeem or recover possession: 30 years.
- Enforcing payment secured by a mortgage: 12 years.
- A mortgagee's action for foreclosure: 30 years.
- Setting up title by adverse possession: 12 years.

Writ petitions

For any writ petition against the state (or its instruments) there is no limitation period prescribed, but there should be no undue delay or laches (that is, inordinate delay) in approaching the courts.

Court structure

3. What is the structure of the court where large commercial disputes are usually brought? Are certain types of dispute allocated to particular divisions of this court?

India has a quasi-federal structure but the judiciary is unified. Broadly, there is a three-tier structure:

- Each administrative district (there are over 600 districts in India) is headed by a District Court.
- There are 29 states and each state has a High Court. Some states share the same High Court so there are 24 High Courts.
- At the apex is the Supreme Court of India (Supreme Court).

Some High Courts, such as the High Courts of Mumbai and Delhi, have exclusive (original) jurisdiction in relation to commercial disputes. Subject to this, commercial disputes in the first instance must be brought before the District Courts where either the cause of action arises (in whole or in part) or the defendant is situated.

There are also many specialised judicial tribunals. The main ones are the:

- Company Law Board (for certain type of disputes under the Companies Act, including oppression and management matters).
- Competition Commission (for anti-trust matters).
- Consumer Protection Forum.
- Debt Recovery Tribunal (for debt owed to banks or financial institutions).

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Admiralty jurisdiction (in relation to arrest of ships and so on) vests only in the High Courts of Mumbai, Calcutta, Madras and Andhra Pradesh (the coastal states).

Jurisdiction in relation to trade marks (including for cancellation or rectification of the Register of Trade Marks) vests in the Registrar of Trade Marks, with its head office in Mumbai and regional offices in Delhi, Calcutta, Ahmedabad and Chennai. Appeals from these decisions are made to the Intellectual Property Appellate Board headquartered at Chennai.

The answers to the following questions relate to procedures that apply mainly in High Courts and the Supreme Court.

Rights of audience

4. Which types of lawyers have rights of audience to conduct cases in courts where large commercial disputes are usually brought? What requirements must they meet? Can foreign lawyers conduct cases in these courts?

Rights of audience/ requirements

The Advocates Act 1961 (Advocates Act) recognises only two types of lawyers in India, advocates and senior advocates. Both categories have equal rights of audience in court. Senior advocates are similar to Queen's Counsel (QCs) in England. An advocate enrolled with any state Bar Council is entitled to practise in any court or tribunal in India by virtue of his single point registration. However, in the Supreme Court of India, registry work, filing of power of attorney and all internal filing with the court office can only be done through an advocate who has cleared the advocate-on-record examination.

Foreign lawyers

Foreign lawyers are not permitted to practice in India except through special permission of the court (*section 32, Advocates Act*).

A recent judgment of the High Court of Madras (*A.K. Balaji v. Government of India*) has clarified that there is no bar for foreign law firms/ lawyers to visit India for a temporary period (on a fly-in and fly-out basis) for the purposes of giving legal advice to their clients regarding foreign law or their own system of law and on diverse international legal issues. Further, they can visit India for arbitrations. The matter is however currently pending consideration before the Supreme Court of India.

FEES AND FUNDING

5. What legal fee structures can be used? Are fees fixed by law?

Lawyers' fees are not fixed by law. Senior advocates charge per hearing and separately for conferences. It is unusual to have a lump sum fee arrangement, particularly in litigation. Contingency fees or fees based on a percentage of the outcome are not allowed under the Bar Council Rules.

6. How is litigation usually funded? Can third parties fund it? Is insurance available for litigation costs?

Funding

Litigation is self-funded. The transfer of a "mere right to sue" is prohibited on public policy grounds (*section 6, Transfer of Property Act*).

Insurance

The insurance market is still developing in India. No insurer currently offers litigation costs insurance. However, litigation costs can be covered as incidental to other specific covers.

COURT PROCEEDINGS

Confidentiality

7. Are court proceedings confidential or public? If public, are the proceedings or any information kept confidential in certain circumstances?

In theory, court proceedings are open to the public, but due to security reasons High Court and Supreme Court hearings can only be attended by the parties or the general public by obtaining a special pass. Lawyers can, however, freely attend any court hearing. Court proceedings are not confidential, and judgments are published and easily available. However, certain proceedings (rape or matrimonial disputes) can be ordered to be held in private and the parties' identities be protected.

Pre-action conduct

8. Does the court impose any rules on the parties in relation to pre-action conduct? If yes, are there penalties for failing to comply?

There are no procedural rules concerning the parties' pre-action conduct. However, an action against the government or public officers (in relation to acts done in their public capacity) cannot be brought unless two-month prior notice is given, stating the cause of action. In urgent matters, the court can dispense with this requirement.

Main stages

9. What are the main stages of typical court proceedings?

Starting proceedings

Civil proceedings start by filing a complaint, setting out the claim in sufficient detail to enable the defendant to answer the claim. Prescribed court fees, which can be a lump sum or depend on the value of the claim (and vary from state to state), are payable. The complaint must be supported by the claimant's affidavit as to the truth of the facts stated. On filing of the complaint, the court will issue summons to the opposite party on the first date of hearing.

Notice to the defendant and defence

A defendant is required to file its written statement within 30 days of service of summons, extendable up to 90 days and more, if sufficient cause is shown.

If the defendant fails to comply with the time limit to file its written statement without sufficient cause, it may lose its right to file it, in which case the court will give judgment, or make such order in relation to the action as it thinks fit. However in practice, these time limits are not strictly enforced.

Subsequent stages

The main subsequent stages are as follows:

- Filing of documents.
- Admission or denial of documents by the parties.
- Filing of affidavit by way of evidence.
- Cross-examination of witnesses and oral arguments.

There can also be an amendment of the complaint or the statement of defence at any stage (including appeal stage) for sufficient cause, with the leave of the court. Courts rarely set a schedule for steps subsequent to the pleadings. Even if a schedule is set, it may not be adhered to, due to intervening applications, including applications for adjournment (which are fairly common). There is a great emphasis on oral arguments in courts, and since oral arguments are not time bound, there is unpredictability in settling actual days of hearing. Cross-examination of witnesses is now being completed before court appointed commissioners, to save time.

There is a procedure for summary trial for certain types of money suits, that is:

- Cases concerning negotiable instruments, for example, bills of exchange or promissory notes.
- Cases for recovering a debt payable on a written contract or under an enactment or a guarantee.

If a summary suit is filed, the defendant must enter appearance within ten days of service of summons, and must show on affidavit that it has a triable defence. If the defence appears to the court to be a sham or untriable, or if no defence is made, the court will simply decide the case. If a defence is made, then the court will grant leave to defend, which can also be conditional on the defendant having to deposit part or the whole of the amount claimed.

INTERIM REMEDIES

10. What actions can a party bring for a case to be dismissed before a full trial? On what grounds must such a claim be brought? What is the applicable procedure?

The court can summarily dismiss a claim if:

- It is outside the limitation period.
- It is otherwise barred by statute.
- The claim does not disclose a cause of action.
- The court fees are not paid.

A claim or defence can be struck out if the pre-trial procedural directions are wilfully breached.

An application must be made under Order 7, Rule 11 of the Code of Civil Procedure (CPC). To bring a claim for striking out a defence on the ground of non-filing of written statement, an application under Order 8 Rule 10 of the CPC must be made. Once an application is made, a reply and rejoinder to it can be filed, following which the case is heard and decided on the merits.

11. Can a defendant apply for an order for the claimant to provide security for its costs? If yes, on what grounds?

The court can order security for costs from a claimant on its own initiative or on the defendant's application. The court's power is discretionary and hardly ever used.

12. What are the rules concerning interim injunctions granted before a full trial?

Indian courts have wide powers in matters of interlocutory relief and such powers are liberally exercised (as a full trial usually takes a long time due to court delays). Interlocutory relief is granted on a three-fold consideration:

- Prima facie case.
- Balance of convenience, that is, the court will weigh the likely inconvenience or damage which would be suffered by the applicant if the injunction is not granted against the likely inconvenience or cost to the respondent if it is.
- To prevent irreparable injury, that is, that which cannot be compensated through damages.

Interim relief will not be granted where the same would amount to grant of final relief. Further, interlocutory relief will not be granted in relation to a contract which cannot be specifically enforced (for instance a contract for service).

Prior notice/same-day

Except in urgent matters, the power to grant interim remedies without hearing the defendant is generally not exercised. If an interim remedy is granted without notice, the court must record the reasons for granting it and post the matter for hearing after due notice to the defendant within a specified time limit.

Mandatory injunctions

Interim mandatory injunctions are granted in rare cases. Generally, a mandatory injunction is granted to compel the undoing of wrongful acts. Courts have evolved certain guidelines which can be summarised as follows:

- The claimant has a strong case for trial (that is, a higher standard than a prima facie case).
- It is necessary to prevent irreparable or serious injury which cannot be compensated in terms of money.

The balance of convenience is strongly in favour of the applicant.

Rights of appeal

An appeal will lie (as a matter of right) against grant or refusal to grant an interim relief.

13. What are the rules relating to interim attachment orders to preserve assets pending judgment or a final order (or equivalent)?

An interim order of attachment can be passed to restrain a defendant from:

- Wasting, damaging or alienating any property in the suit, or wrongfully selling it in execution of a decree.
- Threatening or intending to remove or disposing of the property with an intention to defraud creditors.
- Dispossessing the plaintiff and/or otherwise causing injury to the plaintiff in relation to any property in dispute in the proceedings.

For the applicable grounds and standard of proof, see *Question 12*.

In certain situations, the court can direct the defendant to provide security as specified or to produce and place at the disposal of the court when required the property or the value of it. Such interim order can be made if the court is satisfied, based on the material produced, that the defendant, in order to obstruct, frustrate or delay the execution of any decree that may be made against him, is about to either:

- Dispose of the whole or any part of his property; or
- Remove it from the local limits of the court's jurisdiction.

The standard of proof is higher than of merely establishing a prima facie case. The court must be satisfied of the practical success of the plaintiff's case and of the existence of a grave danger of the property being disposed of or removed.

Prior notice/same-day

The court can grant an attachment order without prior notice to the defendant and on the same day in urgent cases.

Main proceedings

As interim remedies are provided to assist final relief, the claimant must apply for an interim remedy in the same court and in the same proceedings in which the final relief is sought. If the property sought to be attached is outside the local limits of the court's jurisdiction, a party can request the attachment order to be sent to the court in whose jurisdiction the property is situated.

Preferential right or lien

An attachment in itself creates no priority or preferential rights in favour of the claimant. An attachment does not affect *bona fide* pre-existing rights or security created in relation to the property.

Damages as a result

A claimant who obtains an interim injunction on insufficient grounds can be directed to compensate the party affected.

Security

As a condition of issuing an interim order, the court can require the claimant to provide security to compensate the defendant if the claimant ultimately fails. Even without such an order, the party affected can sue for damages, or apply for compensation to the court which granted the interim order. The court's power to summarily order payment of compensation is limited to INR50,000. An order for summary compensation bars the defendant from suing for damages.

14. Are any other interim remedies commonly available and obtained?

Other types of interim remedies commonly used are the appointment of commissioners and receivers, search orders and garnishee orders.

FINAL REMEDIES

15. What remedies are available at the full trial stage? Are damages just compensatory or can they also be punitive?

The courts have wide powers to award substantive relief, including declaration of title or of legal status, damages, possession orders and injunctions. Damages in commercial matters are compensatory in nature and courts do not award punitive damages in tort or in contract.

For burden of proof, see *Question 1*.

EVIDENCE

Disclosure

16. What documents must the parties disclose to the other parties and/or the court? Are there any detailed rules governing this procedure?

The approach to discovery is conservative. Parties can be directed to disclose on oath relevant documents in their possession or power. Documents are relevant if they impact (favourably or otherwise) the claim or the defence. If a document is no longer with a party, the party must explain the circumstances under which the document ceased to be in its possession or power. If the disclosure is insufficient, a party can apply to the court for an order of further disclosure. Documents which are privileged (*see Question 17*) need not be disclosed.

The court can direct the parties to deliver and answer requests for further information, or produce documents.

Each party can be requested to offer its documents for inspection by the other party. If refused, the aggrieved party can apply to the court for an order of inspection.

A party can apply to the court for an order to issue interrogatories (written questions which must be answered on affidavit) to narrow down the issues, either by obtaining admissions or proper factual details (if the claim or defence does not provide them).

Non-compliance with an order for disclosure or to offer inspection or to answer interrogatories can lead to the court striking out the claim or defence. The discovery process is generally completed prior to framing of issues and production of oral evidence. The disclosure schedule is at the court's discretion.

Privileged documents

17. Are any documents privileged? If privilege is not recognised, are there any other rules allowing a party not to disclose a document?

Privileged documents

Privilege attaches to (*Evidence Act*):

- Communications between lawyers (and their clerks, employees, and interpreters) and clients.
- Communications made to public officers in their official capacity.
- Cases where disclosure may be contrary to public interest.
- Unpublished official records relating to affairs of the state.
- Communications between husband and wife.

No magistrate or police officer can be compelled to disclose his source of information relating to the commission of an offence.

Privilege must be specifically claimed. To determine a claim for privilege, the court can examine (on a confidential basis) the relevant document(s).

Privilege does not apply in relation to communications relating to an illegal purpose.

In-house lawyers, while in employment, are not entitled to practise as advocates, as their practising certificate is suspended. While the Supreme Court has not ruled on the question of in-house legal privilege, the High Court in Mumbai has taken a view that consultations and communications with in-house lawyers would be privileged.

Other non-disclosure situations

Regardless of privilege, the courts respect confidentiality. Without prejudice communications, or communications made in circumstances where the court can infer confidentiality (for example, settlement offers) cannot be used in evidence.

Examination of witnesses

18. Do witnesses of fact give oral evidence or do they just submit written evidence? Is there a right to cross-examine witnesses of fact?

Oral evidence

Witnesses of fact are generally required to give evidence by sworn affidavits (witness statements).

Right to cross-examine

There is a right to cross-examine all witnesses and if cross-examination is not possible (for example, due to the death of a witness) the affidavit is disregarded.

To save the court's time, cross-examination is usually done before a court-appointed commissioner who records evidence and notes, but does not rule on objections. The court, while considering the notes of evidence, rules on objections. Court transcript facilities are generally not available but can be arranged by a willing party.

It may be possible to ask for oral examination of a party at the disclosure stage if it has omitted to answer or insufficiently answered any interrogatory.

Third party experts

19. What are the rules in relation to third party experts?

Appointment procedure

Each party usually appoints its own expert witnesses, although the court can appoint experts (*section 45, Evidence Act*).

There is no obligation to disclose expert witnesses at the disclosure stage. Parties are however obliged to furnish a list of witnesses soon after issues are framed.

Role of experts

An expert is expected to be independent and has a duty to the court to accurately explain the position. The court is not bound by expert testimony, but will give due weight to it.

Right of reply

Party- or court-appointed experts are subject to cross-examination. There is no right to cross-examine the expert at the disclosure stage or after the cross-examination is closed. The court however can recall any witness if it feels necessary to do so in the interest of justice.

Fees

Typically, a party appointing or requesting the court to appoint an expert pays the fees involved. If an expert is appointed by the court, the court can require each party to share the expert's fees.

APPEALS

20. What are the rules concerning appeals of first instance judgments in large commercial disputes?

Which courts

An appeal is only available if permitted by statute. A first appeal in civil suits is available as a matter of right. The relevant appeal court depends on the court hierarchy in the jurisdiction. For example, in Mumbai, a decision of a single judge of the High Court can be appealed to a two judge High Court bench. A decision of the City Civil Court of Mumbai can be appealed to a single judge of the High Court of Mumbai.

A decision can be appealed to the Supreme Court if the High Court certifies that there is a question of law of general importance requiring a decision by the Supreme Court. An appeal can be filed to the Supreme Court asking for "special leave to appeal", which can be permitted if an important question of law or of public importance is involved.

Grounds for appeal

The first appeal can be on questions of fact or law. The second appeal is confined to issues of law.

Time limit

The limitation period for bringing an appeal varies between 30 to 90 days.

CLASS ACTIONS

21. Are there any mechanisms available for collective redress or class actions?

The mechanism for a class action is set out in Order 1, Rule 8 of the CPC.

The general principles can be summarised as follows:

- Where there are numerous persons having the same interest in an action, any one or more person, with the permission of the court, can sue or defend that action for the benefit of all interested persons. It is not necessary that the persons included in the class have the same or a common cause of action.
- If the court grants permission to the applicant to sue or defend on behalf of a class it must, at the applicant's expense, order public advertisement or personal notice (as may be appropriate) to all persons who may be interested.
- Any person can apply to court to be made a party to such action and join in the action.
- A class action cannot be abandoned, withdrawn, settled or compromised unless the court gives notice to the persons affected (and hears any person who responds to the notice). Any person representing the class may be substituted at any time if the court determines that he is not proceeding with due diligence in relation to the action.
- A decision made in any such action is binding on the whole class.
- There is no "opt in" or "opt out" mechanism. However, an affected person can petition the court that the action be not treated as a class action.
- Class actions must be self-funded like any other ordinary litigation.

COSTS

22. Does the unsuccessful party have to pay the successful party's costs and how does the court usually calculate any costs award? What factors does the court consider when awarding costs?

Costs usually follow the event, that is, the successful party is awarded costs unless the court, for sufficient reasons, orders otherwise. However costs in India are at best token and not compensatory. Certain High Courts (for example, the High Court of Mumbai) have framed rules for costs awards, and have capped maximum costs at INR25,000.

23. Is interest awarded on costs? If yes, how is it calculated?

While the courts have power to award interest (and usually do so when judgment is for payment of money), no interest is awarded on costs. To the extent that costs form part of the judgment debt, post-judgment interest is awarded.

For the post-judgment period, the court can award interest at a rate considered reasonable, not exceeding the contractual rate, or if there is no contract, at the rate at which nationalised banks lend money in commercial transactions (currently at around 12%). If post-judgment interest is not expressly awarded, such interest is considered to have been refused.

ENFORCEMENT OF A LOCAL JUDGMENT

24. What are the procedures to enforce a local judgment in the local courts?

Enforcement of a judgment is by execution through the courts. Money judgments are executed by attachment and sale of the judgment debtor's properties.

In exceptional circumstances, money judgments can be executed by the arrest and detention in civil prison of the judgment debtor.

All questions relating to execution, discharge or satisfaction of the judgment are determined by the court executing the decree, and a separate suit for determination of these questions is expressly barred (*section 47, CPC*). An executing court cannot scan or scrutinise strengths or weaknesses of the arguments, or reasons provided by the court for accepting or rejecting them. The executing court cannot review the judgment of the court of competent jurisdiction.

Execution of the judgment can be challenged on the grounds that it is barred by limitation or an inherent lack of jurisdiction.

A party can file an application under Order 21, Rule 29 of the CPC, seeking stay of execution of the judgment, if an action is pending in any court between the decree holder and judgment debtor.

A compromise judgment can be set aside on the grounds of fraud, or on the grounds that the advocate had no authority to enter into the compromise. Execution of a consent judgment is not enforceable against a respondent who was not party to the consent judgment.

The judgment holder can, with leave of the court, examine the judgment debtor on oath to disclose his assets.

In relation to judgments for specific performance, for example, for the sale of property, the court can direct the court office to draw up the sale deed and appoint a court officer to execute it.

CROSS-BORDER LITIGATION

25. Do local courts respect the choice of governing law in a contract? If yes, are there any areas of law in your jurisdiction that apply to the contract despite the choice of law?

If the parties have agreed on the governing law, the courts respect the choice of law provided both:

- It has some relevant connection with the transaction.
- It is not contrary to Indian statute or public policy.

However, parties to an arbitration in India, which does not qualify as international commercial arbitration (as defined in section 2(1)(f) of the Arbitration and Conciliation Act) cannot opt for a governing law other than Indian law.

In matters of procedure, the courts apply procedural laws of India. Matters of evidence are considered to be matters of procedure.

The foreign law must be established as a question of fact by expert evidence. Common law has a special place in Indian law. English common law as enforced until 1950 continues to apply, unless it is altered or repealed by a competent legislature (*Article 372 of the Constitution*).

Parties cannot contract out of Indian tax or fiscal laws, nor can parties exclude the application of Indian public policy principles, or statutes based on Indian public policy.

26. Do local courts respect the choice of jurisdiction in a contract? Do local courts claim jurisdiction over a dispute in some circumstances, despite the choice of jurisdiction?

Generally, Indian courts respect a choice of jurisdiction clause. However, parties cannot contractually confer jurisdiction on a court which inherently lacks jurisdiction. If parties have agreed to arbitration, courts must decline jurisdiction and refer parties to arbitration if the defendant, before entering a defence on the merits of the claim, makes such a request.

27. If a foreign party obtains permission from its local courts to serve proceedings on a party in your jurisdiction, what is the procedure to effect service in your jurisdiction? Is your jurisdiction party to any international agreements affecting this process?

The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965 (Hague Service Convention) entered into force in India in 2007. The reservations to the Hague Service Convention made by India include the following:

- Documents for service must be written in English.
- Documents cannot be served by mail.
- Documents must be served by the central authority in India.

Documents cannot be served directly on defendants in India by private judicial officer (that is, a solicitor or private process server).

Under the Hague Service Convention, a central authority is designated and all requests for service can be sent to it. The request should conform with the model annexed to the Hague Service Convention. The authority or judicial officer competent under the law of the state of origin must send the document to the central authority of the relevant state.

The central authority will then execute service itself, or arrange for it to be executed by other means provided in Article 5 of the Hague Service Convention. The service of a judicial document can also be made directly through consular channels. India has made a declaration that the service of judicial documents through diplomatic or consular channels is limited to nationals of the state in which the documents originate.

The central authority designated by India for service is the Ministry of Law and Justice, Department of Legal Affairs, 4th Floor, A-Wing, Shastri Bhavan, New Delhi, 110 001, India.

28. What is the procedure to take evidence from a witness in your jurisdiction for use in proceedings in another jurisdiction? Is your jurisdiction party to an international convention on this issue?

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970 (Hague Evidence Convention) became effective in India from April 2007. Under Article 2, India has designated a central authority to receive all letters from the judicial authority of another contracting state. The central authority will then send it to the competent authority to execute them. The central authority designated by India is as follows:

- Under Articles 2, 16 and 17, it is the Ministry of Law and Justice (*see Question 27*) and the High Courts in all states and union territories in India.

- Under Article 18, it is the district court in whose territory the evidence is to be taken.
- Under Article 8, it is the central authority and the relevant court.

India has made the following reservations:

- All requests under the Hague Evidence Convention must be in English, or accompanied with an English translation.
- Subject to prior authorisation of the central authority and the relevant court, members of the judicial personnel of the requesting contracting state can be present at the execution of a letter of request.
- Evidence by diplomatic officers or consular agents of Indian nationals or nationals of a third state under Article 16 of the Hague Evidence Convention can be taken with the prior permission of the central authority.
- Under Article 18, a diplomatic or consular officer, or a commissioner authorised under Articles 15, 16 and 17, can apply for appropriate assistance to obtain evidence by compulsion to the district court in whose territory the evidence is to be taken.
- India will not execute letters of request issued under Article 23 of the Hague Evidence Convention, for the purpose of obtaining pre-trial discovery of documents, which requires a person to produce any documents other than those documents specified in the letter of request, which are likely to be in his possession, custody or power.

Article 27 of the Hague Evidence Convention does not affect the existing law a contracting state may have on the subject. The relevant existing law in India is set out in Order XXVI, Rules 19 to 22 of the CPC.

Briefly, the procedure is as follows:

- A foreign court issues a letter of request (letter rogatory) addressed to the High Court in the appellate jurisdiction in which the witness is situated.
- The High Court appoints a commissioner with directions deemed fit to carry out the commission.
- The commissioner then records the evidence (including cross-examination) and files it with the High Court, which then forwards it to the central government for onward transmission to the foreign court issuing the request. Alternatively, the High Court can permit the applicant to send the commissioner's record directly to the foreign court.

In litigation, a party can follow the Hague Evidence Convention, or take the Order 26 CPC route. In arbitration, a party can approach an Indian court under section 27 of the Arbitration and Conciliation Act.

Privilege under Indian law is governed by the Evidence Act and is quite restrictive in scope (*see Question 17*).

Enforcement of a foreign judgment

29. What are the procedures to enforce a foreign judgment in the local courts?

Reciprocating countries

Judgments of courts in reciprocating countries are enforceable as if they are judgments of the enforcing Indian court.

Indian courts execute civil orders of foreign judgments in reciprocating countries on receipt of a certified copy of the judgment, and a certificate of that court certifying the extent, if any, to which the judgment is satisfied or adjusted. The certificate is conclusive proof of the satisfaction or adjustment, if any.

The Indian court must allow the judgment debtor a reasonable opportunity to be heard. Execution is refused by Indian courts if the judgment is:

- In relation to taxes or a fine or other penalty.
- Not of a court of competent jurisdiction.
- Not on the merits of the case.
- Founded on an incorrect view of international law.
- Based on a refusal to recognise Indian law (if Indian law were applicable).
- A result of proceedings opposed to natural justice.
- Obtained by fraud.
- One that sustains a claim founded on a breach of Indian law.

Non-reciprocating countries

To enforce judgments of courts of non-reciprocating countries, a civil action must be filed in the Indian court which has territorial jurisdiction over the defendant. In such actions, the Indian court presumes the foreign judgment to be conclusive on matters directly adjudicated between the parties, unless the judgment is:

- Not of a court of competent jurisdiction.
- Not on the merits of the case.
- Founded on an incorrect view of international law.
- Based on a refusal to recognise Indian law (if Indian law were applicable).
- A result of proceedings opposed to natural justice.
- Obtained by fraud.
- One that sustains a claim founded on a breach of Indian law.

ALTERNATIVE DISPUTE RESOLUTION

30. What are the main alternative dispute resolution (ADR) methods used in your jurisdiction to settle large commercial disputes? Is ADR used more in certain industries? What proportion of large commercial disputes is settled through ADR?

Arbitration is the main form of ADR used to settle large commercial disputes in India. Conciliation or mediation is yet to be institutionalised in relation to large commercial disputes, although efforts are being made to strengthen these ADR methods.

Arbitration

All types of arbitrations in India are governed by the Arbitration and Conciliation Act 1996, which is based on the UNCITRAL Model Law on International Commercial Arbitration 1985 and the UNCITRAL Rules 1976. For further information on arbitration in India, see the authors' *Country Q&A India Chapter* in the *Arbitration multi-jurisdictional guide*.

Conciliation

The conciliation provisions under the Arbitration and Conciliation Act are based on the UNCITRAL Conciliation Rules 1980. The conciliator's role is to assist the parties in an independent and impartial manner to reach settlement (*section 67, Arbitration and Conciliation Act*).

Conciliation is voluntary and is started by one party inviting the other in writing to participate in conciliation. The recipient must agree to conciliation in writing within 30 days. Without that agreement, conciliation is considered abandoned. Once conciliation has started, no party can start court proceedings, except to ensure that the claim is not barred by limitation.

Parties are free to agree the number of conciliators, but it should be no more than three. The conciliator can request parties to submit brief particulars of the dispute and such further information he may consider necessary. Any information provided to the conciliator should also be sent to the other party, unless the party providing information requests the conciliator to hold the information confidential. The conciliator is encouraged to make suggestions for settlement and he can formulate settlement suggestions. Once settlement is reached, a settlement agreement is drawn up, signed by the parties and authenticated by the conciliator. The settlement agreement has the same effect as an arbitration award, and can be executed as a court order under the Arbitration and Conciliation Act.

Mediation

The Arbitration and Conciliation Act does not have any separate provisions for mediation and proceeds on the basis that conciliation includes mediation.

Industries

ADR is most often used in matrimonial matters, domestic disputes, motor vehicle accidents, disputes with utility companies and in relation to insurance claims. However, arbitrations cannot be used for matrimonial/domestic disputes as these are considered non-arbitrable.

31. Does ADR form part of court procedures or does it only apply if the parties agree? Can courts compel the use of ADR?

The courts are becoming more proactive in suggesting or bringing about settlement. The CPC provides that where it appears to the court that there are elements of a settlement which may be acceptable to the parties, the court will formulate the terms of settlement and give them to the parties for their observations. After receiving the parties' observations, the court can reformulate the terms of a possible settlement and refer the matter for arbitration, conciliation, judicial settlement or mediation (*section 89, CPC*).

This provision is mostly being used for domestic or matrimonial disputes. Court-assisted mediation is gaining popularity in relation to other disputes, but arbitration cannot be ordered without the consent of parties.

32. How is evidence given in ADR? Can documents produced or admissions made during (or for the purposes of) the ADR later be protected from disclosure by privilege? Is ADR confidential?

Court rules of evidence do not apply to arbitration, but fundamental principles of evidence and fairness do apply. There is considerable flexibility in procedural matters. Parties are free to agree a procedure, and in the absence of agreement, the procedure is decided by the tribunal. In arbitrations, evidence is given through witness statements on oath followed by cross-examination.

The arbitral tribunal decides questions of privilege. If privilege is waived by a party or the claim for privilege denied by the arbitration tribunal, privilege is lost.

Privilege is arguably not lost if a privileged document is used on a confidential basis in conciliation or mediation.

There is no express or implied obligation to treat an arbitration agreement, or proceedings arising from it, as confidential. If confidentiality is required, the parties' agreement must provide for it.

In conciliation proceedings, any information provided to the conciliator should also be sent to the other party, unless the party providing information requests the conciliator to hold the information confidential. By virtue of a non-obstante clause (Section 75 of the Arbitration and Conciliation Act, 1996) the conciliator and the parties must keep all matters relating to the conciliation proceedings confidential. Confidentiality will also extend to the settlement agreement (if any) except where its disclosure is necessary for purposes of implementation and enforcement. An arbitral award in violation of Section 75 is liable to be set aside.

33. How are costs dealt with in ADR?

Unless otherwise agreed, costs are at the discretion of the arbitral tribunal.

34. What are the main bodies that offer ADR services in your jurisdiction?

The following are the leading bodies offering institutional arbitration:

- Indian Council of Arbitration (ICA), New Delhi (*www.icaindia.co.in*).
- Delhi International Arbitration Centre, New Delhi (*www.dacdelhi.org*).
- International Centre for Alternative Dispute Resolution (ICADR), New Delhi (*http://icadr.ap.nic.in*).
- Nani Palkhivala Arbitration Centre, Chennai (*www.nparbitration.in*).

Recently, the London Court of International Arbitration (LCIA) and the Permanent Court of Arbitration (PCA) have set up arbitration centres in India. The Singapore International Arbitration Centre (SIAC) has also entered into a joint venture in India with the Construction Industry Development Council (CIDC), and formed the Construction Industry Arbitration Association (CIAA) concerning construction disputes.

PROPOSALS FOR REFORM

35. Are there any proposals for dispute resolution reform? If yes, when are they likely to come into force?

Reform proposals include:

- Reforms relating to case management, with detailed time lines for procedural matters.
- Permitting foreign lawyers to practice foreign law in India. This long, drawn-out proposal is surrounded by considerable controversy and opposition from certain sectors, and it is difficult to state when it may come about (*see Question 4*).

ONLINE RESOURCES

Ministry of Law and Justice

W http://lawmin.nic.in/legislative/textofcentralacts/1996.pdf

Description. The Arbitration and Conciliation Act, 1996 has been made available by the Ministry of Law and Justice on its website. It is an official website. The information contained is up to date.

Ministry of Law and Justice, Legislative Department

W http://indiacode.nic.in

Description. The Code of Civil Procedure, 1908 has been made available by the Ministry of Law and Justice on its website. It is an official website. The information contained is up to date.

Ministry of Law and Justice, Legislative Department

W http://indiacode.nic.in

Description. The Indian Evidence Act, 1872 has been made available by the Ministry of Law and Justice on its website. It is an official website. The information contained is up to date.

Practical Law Contributor profiles

Sumeet Kachwaha, Partner

KACHWAHA & PARTNERS
T +91 11 4166 1333/1444
F +91 11 2411 0763
E skachwaha@kaplegal.com
W www.kaplegal.com

Professional qualifications. India

Areas of practice. Corporate; commercial; dispute resolution; infrastructure.

Dharmendra Rautray, Partner

KACHWAHA & PARTNERS
T +91 11 4166 1333/1444
F +91 11 2411 0763
E drautray@kaplegal.com
W www.kaplegal.com

Professional qualifications. India; England and Wales, 2001

Areas of practice. International trade and commercial disputes; infrastructure related disputes and arbitration.