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ahead of the curve

# Guide to Arbitration in India

A Cyril Amarchand Mangaldas Thought Leadership Publication



**A** Alternative  
**D** Dispute  
**R** Resolution



**Guide to Arbitration in India - 2025**

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### **A Thought Leadership Publication**

We now present this handbook to enable readers to have an overview of the systems and legal rules and regulations that are essential for business operations in India.



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# Introduction

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The Indian Government has economic reform and growth on the top of its mind. Its attempts to improve the ease of doing business in India and its 'Make in India' or 'Aatma Nirbhar Bharat' (self-reliant India) initiatives have resulted in an increase in foreign investment in India and growth in cross-border trade. This has also necessitated streamlining the dispute resolution process in India with the aim of effective enforcement of contracts in a timely and cost-effective manner.

Unfortunately, litigation in India is beleaguered by lengthy and often unjustifiable delays. Parties involved in commercial activities cannot afford to, and will not willingly, participate in such long drawn litigious processes. Consequently, whether in purely domestic commercial contracts or cross-border transactions, arbitration has emerged as the primary form of dispute resolution in India.

The law on arbitration was consolidated into the Arbitration & Conciliation Act, 1996 (the **Act** or **Arbitration Act**), to bring it in line with contemporary requirements. It was a huge step in the right direction, but in practice, failed to keep pace with international standards and practices. Coupled with the endemic delays in the Indian legal system – even in support of the arbitral process, Indian courts were criticized by the international business and legal communities, for its conflicting jurisprudence and excessive interference.

In 2015, the Act was amended to cure various lacunae and ambiguities that previously existed in the Indian arbitration regime. The amended Act reflected a pro-arbitration approach and recognised that there should be minimal intervention by courts in the arbitral process. It also provided for recourse to Indian courts for protective interim relief even in respect of foreign-seated arbitrations, giving much needed relief that was not otherwise available. It additionally introduced various timelines to speed up the arbitral process, removed the automatic stay of a domestic award pending a challenge proceeding, and included clarifications in relation to narrow scope of the much-used and oft-abused public policy challenge to arbitral awards.

Further ambiguities and creases were ironed out four years later, with the Arbitration and Conciliation (Amendment) Act, 2019 (the **2019 Amendment**), which included further clarifications on the limited challenge to an arbitral award, and a big push for institutional arbitration.

The latest set of amendments were brought in through the Arbitration and Conciliation (Amendment) Act, 2021 (**2021 Amendment**), which included a new condition providing that enforcement of an arbitral award would be stayed unconditionally if the court finds prima facie that the arbitration agreement or the contract which formed the basis for the award, or the making of the award was induced or effected by fraud or corruption.

To further speed up the court process, also in 2015, the Indian Government passed the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, which was amended in 2018 (**Commercial Courts Act**). Special commercial courts were set up to deal with complex commercial matters, including applications in arbitral proceedings (for example, for interlocutory relief, challenges to and enforcement of awards), in a bid to speed up and streamline litigation before an Indian court.

The New Delhi International Arbitration Centre Act, 2019 (**NDIAC Act**), which came into force on March 2, 2019, attempted to bring targeted reforms to develop the New Delhi International Arbitration Centre (**NDIAC**) as a flagship institution for conducting international and domestic arbitration, and for providing cost effective facilities and administrative assistance for conciliation, mediation, and arbitral proceedings. In 2022, the NDIAC Act was amended and renamed the India International Arbitration Centre Act (**IIAC Act**), and the NDIAC was renamed the India International Arbitration Centre (**IIAC**). This amendment expanded the duties of the IIAC and its powers to promulgate regulations governing the conduct of arbitration and other forms of alternate dispute resolution.

In 2022, the government also announced its intention to set up an international arbitration centre in the Gujarat International Financial Tec City (**GIFT City**), to assist in the expeditious resolution of disputes and encourage foreign investment in the city. In 2023, International Financial Services Centres Authority (**IFSCA**) constituted an expert committee to make recommendations for the proposed international arbitration centre at GIFT IFSC. The expert committee submitted its report in July 2024, making several recommendations to guide an efficient and international focussed arbitration regime including through an autonomous Alternative Dispute Resolution Centre (**ADRC**) in GIFT City. One of the key recommendations was the setting up of a specific court (either newly set up or a dedicated bench of Gujarat High Court) to deal with civil and commercial cases that come out of the IFSC.

In 2023, the Government introduced the Vivad se Vishwas II (Contractual Disputes) scheme for the settlement of disputes involving government entities, ascribing a specific percentage for settlement of a claim, depending on the stage of proceedings (whether at the arbitration or post award stage). By doing so, the Government recognised that it is



one of the biggest litigants in Indian Courts and through this scheme, it hoped to de-clog the Indian judicial system and also free up government funds that would otherwise be tied up in litigation.

Last year also saw the Government release of the draft Arbitration and Conciliation (Amendment) Bill, 2024, and invitation for comments / feedback from the public.

These reforms recognise that the world is a global village, and to cement its position as a commercial hub, India must optimise its image as a destination for investment, business, and arbitration. Coupled with these reforms is a very pro-arbitration judiciary, which has been applauded over the past few years for its pro-arbitration and enforcement focussed decisions.

The perception of India as an arbitration unfriendly jurisdiction is slowly changing. Doing business in a foreign country can be fraught with uncertainties and unpredictable outcomes. The support of a robust legal regime and familiarisation with the process can lessen such unpredictability or un-foreseeability. These reforms and an overview of the arbitration regime are further discussed in the relevant chapters of this primer, which we present to our readers in the hope that this will give them a reasonable understanding of the process.

**IMPORTANT NOTE:** *All information given in this handbook has been compiled from credible, reliable sources. Although reasonable care has been taken to ensure that the information in this handbook is true and accurate, such information is provided as is, without any warranty, express or implied, as to the accuracy or completeness of any such information. Cyril Amarchand Mangaldas shall not be liable for any losses incurred by any person from any use of this publication or its contents. This handbook has been prepared for informational purposes only and nothing contained in this handbook constitutes legal or any other form of advice from Cyril Amarchand Mangaldas. Readers should consult their legal, tax and other advisors before making any investment or other decision with regard to any business in India.*

# A

## Arbitration

### 1. Brief History of Arbitration in India and Changes in the Regime

Arbitration in an informal form has existed in India, since the days that village elders, subsequently '*panchayats*', routinely settled disputes between members of the village. The law was first codified under the British regime, with the Indian Arbitration Act, 1899, being the first Indian statute on arbitration. This statute was however only applicable to the Presidency Towns of Calcutta, Bombay and Madras, and it was only with the promulgation of the Code of Civil Procedure, 1908 (**CPC**), where the law of arbitration was codified in Second Schedule, which extended to other States. The law on domestic arbitration was thereafter consolidated in the Arbitration Act, 1940, which was based on the (English) Arbitration Act, 1934. Foreign awards were dealt with by two separate legislations, i.e., the Arbitration (Protocol and Convention) Act, 1937 (dealing with awards under the Geneva Protocol and Convention), and the Foreign Awards (Recognition and Enforcement) Act, 1961 (dealing with foreign awards under the New York Convention).

The Arbitration Act of 1940 ran its course and with the liberalisation of the Indian economy in the early nineties, it became apparent that the Indian Government needed to respond to the fast-changing nature of business in the country along with increased globalisation, including in relation to measures and processes for alternative dispute resolution.

Accordingly, the Arbitration Act was enacted in 1996 to update the law of arbitration in India and make it more responsive to contemporary requirements. The Act is modelled along the lines of the UNCITRAL Model Law on International Commercial Arbitration, 1985, and while seeking to restrict the intervention of courts, it also envisages co-operation between the judicial and arbitral process.

The Act is divided into four parts:

- a. Part I contains provisions relating to the commencement and conduct of arbitral proceedings held in India, as also challenge to and enforcement of awards.
- b. Part II deals with referring parties to (foreign-seated) arbitration and enforcement of foreign awards.
- c. Part III deals with conciliation.

- d. Part IV contains supplementary provisions (such as the power of a High Court to make rules etc.).

In 1996, at the time it came into force, the Act was considered to be a shot in the arm for a quick and cost-effective form of alternative dispute resolution through arbitration. However, after almost two decades, it became apparent that further amendments were critically needed. Indian courts were seen to be particularly interventionist, exercising jurisdiction even in arbitrations outside India and the Indian judicial system was plagued with delays, resulting in a country which sought to be a global player, being shunned as an arbitral seat.

Two landmark Supreme Court decisions (*Bhatia International v Bulk Trading S.A & Anr.*<sup>1</sup> and *Bharat Aluminum & Company & Ors. v. Kaiser Aluminum Technical Service Inc. & Ors.*<sup>2</sup>), and two previous proposals for amendment of the Act,<sup>3</sup> finally culminated in the 20<sup>th</sup> Law Commission's Report No. 246 (issued in August 2014, with a Supplementary Report in February 2015), on amendments to the Act.

The 2015 Amendment to the Act, ushered in a set of much needed and long-awaited amendments. New provisions were inserted, and some existing provisions were amended, largely with the aim of limiting judicial intervention while reinforcing the importance of party autonomy, and expeditious completion of arbitral proceedings. Critically, parties were permitted recourse to Indian courts for interim relief, and the scope of the public policy challenge to awards was clarified as being extremely narrow. The pro-arbitration nature of these amendments signalled India's intent to be, and be seen as, an arbitration friendly jurisdiction.

While the 2015 Amendments were helpful, they were not enough. It was clear that the commonly used ad hoc procedure for domestic arbitration in India, was beleaguered with unnecessarily tedious procedural formalities. This led to undue delays and an increase in costs, reducing both the speed and efficiency of domestic arbitration. On the other hand, arbitrations administered by robust arbitral institutions (usually international institutions such as the Singapore International Arbitration Centre (**SIAC**), International Chamber of Commerce (**ICC**), London Court of International Arbitration (**LCIA**) etc.), were far more efficient and effective. Thence came a realisation that if India were to be seen as a viable seat of arbitration, institutional arbitration should be given a push, by setting up competent domestic Indian institutions for the purpose.

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<sup>1</sup> (2002) 4 SCC 105.

<sup>2</sup> (2012) 9 SCC 552.

<sup>3</sup> (i) The Arbitration & Conciliation (Amendment) Bill, 2003.

(ii) The Consultation Paper on proposed amendments to the Arbitration & Conciliation Act, 1996, issued by the Ministry of Law & Justice on April 8, 2010.

To address this problem, the Indian Government's Ministry of Law and Justice, set up a High-Level Committee under the Chairmanship of Justice (Retd.) B. N. Srikrishna (former Judge, Supreme Court of India), to “review the institutionalisation of arbitration mechanism in India”. The Committee in its Report submitted on July 30, 2017 (the **High Level Committee Report**), identified the roadblocks to the development of institutional arbitration, examined specific issues affecting the Indian arbitration landscape and made various recommendations, including further proposed amendments to the Act, all with the intention of building India into a robust centre for international and domestic arbitration.

Based on the recommendations made by the High-Level Committee, further amendments and new provisions were included through the 2019 Amendment. The then Law Minister noted that the Indian government intended to make India a hub of domestic and international arbitration by bringing in changes in law for faster resolution of commercial disputes. The focus on institutional arbitration and streamlining of the process is clear on even a cursory review of the amendments.

In 2021, the Act was amended again to *inter alia* provide that where a *prima facie* case has been made out that the arbitration agreement or contract which forms the basis of the award, or the making of the award was induced by fraud or corruption, and where such award has been challenged on these grounds, the Court shall grant an unconditional stay against enforcement of such arbitral awards, pending disposal of the challenge.

## 2. Part I of the Act

Part I contains detailed provisions in relation to arbitration procedure, and applies compulsorily where the seat of arbitration is in India.<sup>4</sup> An arbitral award<sup>5</sup> under Part I is considered to be a domestic award, although there are some provisions which deal with ‘international commercial arbitrations’, in a more permissive manner than with purely domestic arbitration (solely between Indian parties), though both kinds of arbitrations may be seated in India.

An international commercial arbitration<sup>6</sup> is one which relates to disputes arising out of legal relationships, considered to be commercial under the law in force in India and where at least one of the parties is a national of, or habitually resident in a foreign country; or a corporate body incorporated outside India; or association of

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<sup>4</sup> For the definition of ‘Arbitration’, see End Notes.

<sup>5</sup> For the definition of ‘Arbitral Award’, see End Notes.



individuals whose central management and control is exercised from abroad; or the government of a foreign country.

The applicability of Part I of the Act to foreign arbitrations should have been a non sequitur, but in fact has had a long history of controversy in India. The controversy and conflicting decisions arose inter alia from the fact that Section 2(2) provided that “*This Part shall apply where the place of arbitration is in India.*” Reading the provision generously, the Supreme Court in *Bhatia International v. Bulk Trading*,<sup>7</sup> held that Part I would apply even to foreign-seated arbitrations *inter alia* because Section 2(2) provides that Part 1 “*shall apply where the place of arbitration is in India*”. It does not use the words “*only in India*” and does not provide that Part I does not apply to arbitrations which take place outside India. Accordingly, the Supreme Court permitted parties in foreign-seated arbitrations, recourse to Indian courts for interim relief (a laudable and well-intentioned ruling, no doubt), unless the provisions of Part I were excluded by the parties. Subsequent decisions ruled that other provisions of Part I would similarly apply, the most notorious of these being *Venture Global Engineering v. Satyam Computer Services*,<sup>8</sup> where the Supreme Court permitted a foreign award to be challenged before an Indian court under Part I of the Act.

The position was finally corrected by the decision of a five-judge bench of the Supreme Court in *Bharat Aluminium v. Kaiser Aluminium Technical Services*,<sup>9</sup> (**BALCO**), which held that Part I would not apply to and Indian courts would not have jurisdiction over foreign-seated arbitrations. The ruling however was applied prospectively from the date of the decision. i.e., on and from September 6, 2012; prior

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<sup>6</sup> For the definition of ‘International Commercial Arbitration’, see End Notes.

<sup>7</sup> 2002 (4) SCC 105.

<sup>8</sup> (2010) 8 SCC 660.

<sup>9</sup> 2012 (9) SCC 552.

thereto, the *Bhatia International* interpretation continued to apply. While *BALCO* correctly laid down the law, it resulted in parties not having recourse to Indian courts for protective measures in support of the arbitral process. The 2015 Amendments cured this lacuna by the welcome move of applying certain provisions (subject to an express agreement to the contrary), to foreign-seated arbitrations, including the provisions for interim relief.

### 3. Part II of the Act

Part II deals with foreign awards under the 1958 New York Convention and the 1927 Geneva Protocol and Convention. A 'foreign award' is one that, (i) arises out of differences between persons arising out of commercial legal relationships (India having adopted the 'commercial' reservation); (ii) is in pursuance of an agreement under the New York Convention, or Geneva Protocol and Convention, and (iii) is in a territory notified by the Central Government as a reciprocating territory.

### 4. Minimisation of Judicial Intervention

The objectives of the Act include the intent to minimise the supervisory role of courts in the arbitral process. The Act seeks to minimise judicial intervention and interference, stating that no judicial authority may intervene, except where so provided (illustratively, to appoint an arbitrator, grant interim relief, provide assistance in taking evidence, and of course in relation to applications for setting aside and enforcement of awards).

### 5. Arbitration Agreement<sup>10</sup>

An arbitration agreement must be in writing (including through electronic means) but need not be signed. The form of the arbitration agreement is not critical – it may be in the form of a formal arbitration agreement, a clause in a contract, in exchange of correspondence, emails, or other electronic communication, or statements of claim and defence where its existence is alleged by one party and not denied by the other. Courts will look at the language of the document to determine if it expresses the intention of parties to enter into an arbitration agreement.

If a contract refers to a document which contains an arbitration clause, such a reference would constitute an arbitration agreement if (i) the contract is in writing and (ii) the reference is such so as to make that arbitration clause part of the contract. The latter requirement has been interpreted by the Supreme Court to mean that: (i) the contract should contain a clear reference to the documents containing

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<sup>10</sup> For the definition of 'Arbitration Agreement', see End Notes.

an arbitration clause; (ii) the reference to the other document should clearly indicate an intention to incorporate the arbitration clause into the contract, and (iii) the arbitration clause should be appropriate, that is, capable of application in respect of disputes under the contract and should not be repugnant to any term of the contract.

Further, the arbitration agreement is an independent agreement, and is treated so even if it is part of a composite agreement, such that the arbitration clause in a contract is severable from the rest of the agreement of which it forms a part. The concept of severability is important to ensure that the intention of the party to resolve the dispute by arbitration remains intact and can be given effect to and that the arbitration clause survives the invalidity or termination of the main agreement.

## 6. Court<sup>11</sup>

As aforesaid, Part I applies to arbitrations seated in India, for which parties have access to Indian courts throughout the arbitration process and thereafter, in relation to challenge / enforcement of the award. Pursuant to the 2015 Amendments, parties have access to Indian courts for interim protection and court assistance in taking evidence, even in respect of foreign-seated arbitrations, unless otherwise agreed.

- i. In the case of a purely domestic arbitration, the principal civil court of original jurisdiction in a district would have jurisdiction (and this includes the High Court if it possessed original jurisdiction). Where the dispute is a commercial dispute of a specified value, the relevant Commercial Court / Division in that jurisdiction, will be the competent court.
- ii. In the case of an international commercial arbitration, the relevant High Court will have jurisdiction. Where the dispute is a commercial dispute of a specified value, the relevant Commercial Division of the High Court, will have jurisdiction.

## 7. Choice of Law

The substantive law chosen by the parties is the law that governs the underlying agreement. Unless the parties have provided separately for the law governing the arbitration agreement (which is not very common), the substantive law is likely to be deemed as the law of the seat.

Where the parties are Indian nationals/resident in India and the arbitration is being held in India, Indian law would compulsorily apply to the underlying contract / dispute.

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<sup>11</sup> For the definition of 'Court', see End Notes.

It is open to parties in an international commercial arbitration to choose a law other than Indian law, to govern the agreement, notwithstanding the fact that the arbitration may be in India.

If the substantive law is not expressly chosen by the parties, the arbitral tribunal/court will take various factors into account for determining applicable law, such as: (i) residence of the parties; (ii) place of execution of the agreement; (iii) place of performance of the agreement; (iv) place of accrual of the cause of action; and (v) place where the assets/subject matter is located and reliefs sought.

### 8. Seat of Arbitration

Parties are free to agree on the ‘place’, i.e., seat, of the arbitration. Failing any agreement between the parties, the venue and seat will be determined by the arbitral tribunal, having regard to circumstances of the case, and the convenience of the parties. As held in *BGS SGS Soma JV v. NHPC Ltd.*,<sup>12</sup> designation of a seat confers exclusive jurisdiction on courts of that seat. A place of arbitration, regardless of its designation as a seat, venue, or place, is the juridical seat of arbitration unless there is an indication to the contrary.

The seat of the arbitration is important inasmuch as, unless otherwise specified, it determines the curial law applicable to the arbitration. Where the arbitration agreement does not expressly specify a ‘seat’, Indian courts have looked at provisions relating to governing law of the underlying agreement, designation of arbitral institutions and other factors to determine the location of the seat.

Note that in the decision in *PASL Wind Solutions Private Limited v. GE Power Conversion India Private Limited*,<sup>13</sup> the Supreme Court upheld party autonomy and ruled that Indian parties could choose a foreign seat of arbitration. In such case, the ensuing award would be a foreign award enforceable on the conditions set out in Part II of the Act.

Where the seat is outside India, while Part I of the Act does not apply, parties are entitled to approach Indian courts to seek interim relief and court assistance in taking evidence (as also in relation to appeals from such orders), unless otherwise agreed.

### 9. Commencement of Arbitration

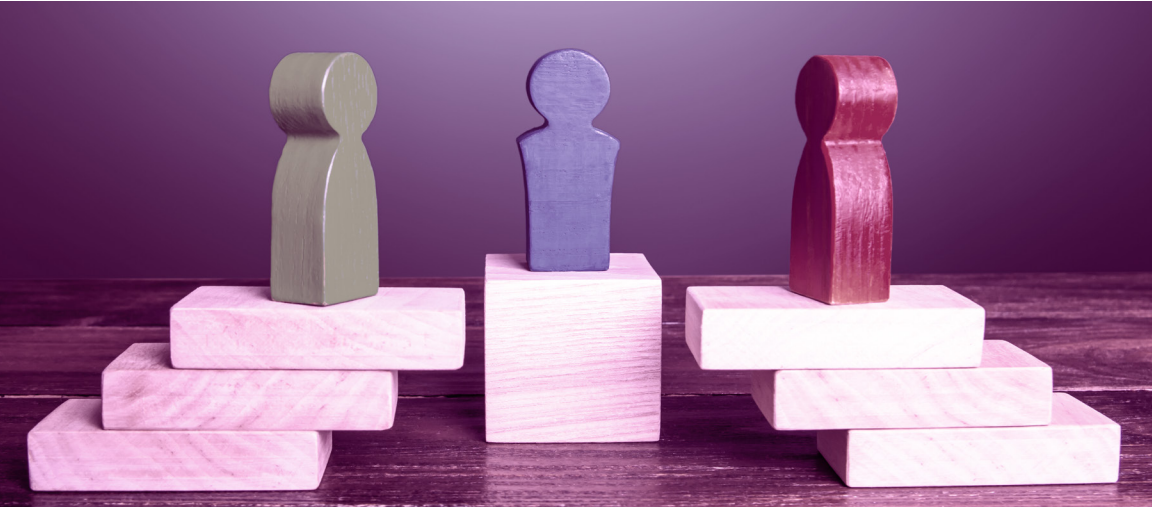
Arbitral proceedings commence on the date on which a request for a dispute to be referred to arbitration is received by the respondent. Where a party has obtained

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<sup>12</sup> (2020) 4 SCC 234.

<sup>13</sup> (2021) 7 SCC 1.





interim relief from a court, that party must commence the arbitration within 90 (ninety) days from the date of the order granting such relief, or within such further time as the court may determine.

## 10. Appointment of Arbitrators

Parties are free to determine the number of arbitrators and the procedure for constituting the arbitral tribunal. The only condition is that the number of such arbitrators must not be an even number. If there is no agreement on the number of arbitrators, the default position is that of a sole arbitrator.

Where the arbitration agreement provides for a sole arbitrator, the Supreme Court has ruled that the appointment cannot be made unilaterally by one of the parties, even if the clause vests such entitlement to a party. In such cases, if there is disagreement over the appointment, it is the competent court alone which could effect the appointment.<sup>14</sup> This position was recently upheld by a five judge bench of the Supreme Court of India<sup>15</sup> wherein it was held that mandating a party to unilaterally appoint the sole arbitrator or to mandate a party to select its nominee arbitrator from a panel of arbitrators put together by the other party in case of a three-member arbitral tribunal, violates the principles of equality under the Act and Article 14 of the Constitution of India.

<sup>14</sup> *Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd.*, (2020) 20 SCC 760.

<sup>15</sup> *Central Organisation for Railway Electrification v M/S ECI SPIC SMO MCML (JV)*, Civil Appeal Nos. 9486-9487 of 2019. Judgement dated November 8, 2024.

In the absence of any agreement as regards the procedure, or if either party does not abide by the prescribed procedure for appointment, a party may approach a court for appointment of the arbitrator. Failing any agreement as to manner of appointment, if a party fails to appoint an arbitrator within 30 (thirty) days from the receipt of a request to do so from the other party, or, the two appointed arbitrators fail to agree on the third arbitrator within 30 (thirty) days from the date of their appointment, the appointment shall be made, upon application by a party, by the Supreme Court (in the case of international commercial arbitrations), or the High Court (in case of arbitrations other than international commercial arbitrations), or an institution designated by such court. In 2022, the Supreme Court recommended that the courts should make an endeavour to dispose of the application within 6 (six) months from the date of its filing.<sup>16</sup>

When appointing an arbitrator, the court shall confine itself to examination of the existence of an arbitration agreement; the intention being to minimise judicial intervention subject to certain exceptions laid down by the Supreme Court.<sup>17</sup>

A person of any nationality may be an arbitrator, unless otherwise agreed by the parties, and further that in the case of an international commercial arbitration, the Court may appoint a sole or third arbitrator of a nationality other than the nationalities of the parties concerned.

The 2019 Amendments introduced a new Part IA, for the establishment of the Arbitration Council of India (**ACI**), which is empowered to inter alia recognise professional institutes providing accreditation of arbitrators and review the grading of arbitral institutions and arbitrators. While Part IA has been notified to come into effect from October 12, 2023, the ACI has not yet been constituted. The 2021 Amendments provide that the qualifications, experience, and norms for accreditation of arbitrators shall be such as may be specified by regulations – which have not as yet been issued.

### 11. Disclosure by Arbitrators

Every person approached in connection with their possible appointment as an arbitrator (whether directly by the parties, or through an order of the court), must disclose to the parties in writing, the existence of any direct or indirect relationship with the parties or the subject matter in dispute which is likely to create justifiable doubts as to their independence or impartiality, and the existence of any

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<sup>16</sup> *M/s Shree Vishnu Constructions v. The Engineer in Chief, Military Engineering Service & Ors.*, Special Leave Petition (C) No. 5306 Of 2022. Order dated May 19, 2022.

<sup>17</sup> *Indian Oil Corporation Limited v. NCC Limited*, 2022 SCC OnLine SC 896.

circumstances that are likely to affect their ability to devote sufficient time to the arbitration.

India is one of the few countries that has incorporated the IBA Guidelines on Conflicts of Interest in International Arbitration, 2014 (**IBA Guidelines**), into its arbitration law. This is done by way of the Fifth and Seventh Schedules to the Act, which consist of items drawn from the Orange and Red Lists of the IBA Guidelines, and which are to 'guide' in determining whether circumstances exist which would give rise to such justifiable doubts as to the independence or impartiality of an arbitrator. Circumstances covered in the Seventh Schedule render a person ineligible for appointment, although parties may, subsequent to disputes having arisen between them, waive the ineligibility by an express agreement in writing.

## 12. Challenge to Arbitrators

An arbitrator can be challenged on two grounds: (i) the existence of circumstances that give rise to justifiable doubts as to the arbitrator's independence or impartiality; or (ii) that the arbitrator did not possess qualifications agreed to by the parties.

## 13. Procedure for Challenge

A party may challenge the appointment of an arbitrator by a written challenge to the tribunal (unless some other procedure is agreed), within 15 (fifteen) days of the following: (i) the party becoming aware of the constitution of the arbitral tribunal, or (ii) the party becoming aware of any circumstances that give rise to justifiable doubts as to his independence or impartiality, or that he does not possess the qualifications agreed to by the parties.

The arbitral tribunal is competent to rule on such challenge, unless the concerned arbitrator withdraws from office, or the other party agrees to such challenge. If the challenge is successful, then the mandate of the arbitrator terminates, and the parties may appoint a new substitute arbitrator. If, however, the challenge is unsuccessful, the arbitral tribunal shall proceed with the arbitration and pass an award, which award may be challenged before the court.

In *Ellora Paper Mills v. State of M.P.*<sup>18</sup> the Supreme Court consolidated the law governing an arbitrator's challenge, ruling that if an arbitrator is automatically ineligible under the Seventh Schedule, their mandate need not be formally challenged, as it automatically terminates because of their ineligibility.

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<sup>18</sup> 2022 SCC OnLine SC 8.

### 14. Fees of the Arbitrators

Arbitrators are entitled to fees as agreed upon by the parties or fixed by an administering arbitral institution. Ideally, in court appointed arbitrators, the order of the court should expressly stipulate the fees the tribunal would be entitled to charge, but where the court leaves this determination to the tribunal, both the tribunal and parties should agree on fees in preliminary hearings, with the default fee being the fees specified in Schedule IV of the Act.

However, in cases where when one or both the parties, or the parties and the arbitral tribunal are unable to reach a consensus, the arbitral tribunal is allowed to fix arbitration fees by charging the model fee stipulated in Schedule IV of the Act.<sup>19</sup> The parties are not entitled to object to such fees fixed by the arbitral tribunal, and it can only be changed by mutual consensus. Schedule IV is not applicable to international commercial arbitrations and arbitrations where parties have agreed to the fees determined by the arbitral institution rules in domestic arbitration.

### 15. Referring Parties to Arbitration

A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement (or any person claiming through or under him), so applies not later than the date of submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that *prima facie* no valid arbitration agreement exists. The scope of examination by the judicial authority in this case is thus extremely narrow. A party may appeal against a decision refusing to refer the parties to arbitration.

Two noteworthy issues here are: (i) an elaboration on this *prima facie* standard of review; and (ii) whether a court can decide the arbitrability of the dispute at this stage of reference itself. This was clarified by the Supreme Court in *Vidya Drolia & Ors. v. Durga Trading Corporation*:<sup>20</sup>

- 7 The scope of *prima facie* validity includes only a primary first review to weed out manifestly and *ex facie* non-existent and invalid arbitration agreements and non-arbitrable disputes. The questions a court can ask itself are: (i) whether the arbitration agreement was in writing; (ii) whether the arbitration agreement was contained in exchange of letters, telecommunication, etc; (iii) whether the core contractual ingredients regarding the arbitration agreement were fulfilled; and (iv) on rare occasions, whether the subject matter of dispute is arbitrable;

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<sup>19</sup> *Oil & Natural Gas Corporation Limited v. Afcons Gunanusa JV*, (2024) 4 SCC 481.

<sup>20</sup> (2021) 2 SCC 1.

7 Insofar as arbitrability of the dispute, is concerned, the arbitral tribunal is the preferred first authority to determine and decide all questions of arbitrability, in line with the *kompetenz-kompetenz* principle enshrined in the Act. The Court may interfere at this stage only when it is manifest that the disputes are non-arbitrable.<sup>21</sup>

If the application is made in respect of a foreign seated arbitration that falls under Part II of the Act, then the judicial authority is required to refer parties to arbitration, unless, it *prima facie* finds that the said agreement is null and void, inoperative or incapable of being performed.

Whether a reference is made under Part I or II, there is no mechanism to appeal from a decision referring parties to arbitration, although the award or its enforcement may ultimately be challenged on the ground that the dispute could not have been arbitrated.

## 16. Arbitrability of Disputes

There are certain disputes that are not ‘arbitrable’, and so cannot be arbitrated under the laws of a relevant jurisdiction. Arbitrability thus refers to whether or not a dispute can be resolved through arbitration. Generally speaking, disputes between private entities involving private rights (i.e. rights in *personam*) can be settled through arbitration, whereas issues involving rights against the world at large (rights *in rem*), or which have some manner of public interest underlying them, are not arbitrable.<sup>22</sup>

Moreover, certain statutes provide for disputes or claims being decided by specially set up courts or tribunals, and which courts / tribunals would be deemed to have exclusive jurisdiction over certain subject matters. The Debt Recovery Tribunal is one such tribunal, and based on the Supreme Court ruling in *Vidya Drolia*,<sup>23</sup> claims for recovery by banks and financial institutions, are not arbitrable. Similarly, disputes within the exclusive jurisdiction of the Court of Small Causes cannot be ousted by the existence of an arbitration clause, and therefore disputes lying before the Court of Small Causes are not arbitrable.<sup>24</sup>

<sup>21</sup> In this regard, see also: *Indian Oil Corporation v. NCC Limited*, 2022 SCC OnLine SC 896.

<sup>22</sup> *Booze Allen & Hamilton Inc. v. SBI Home Finance Ltd.*, (2011) 5 SCC 532.

<sup>23</sup> *Vidya Drolia v. Durga Trading Corpn.*, (2019) 20 SCC 406.

<sup>24</sup> *Vidya Drolia v. Durga Trading Corpn.*, (2019) 20 SCC 406. See also *Central Warehousing Corporation v. Fortpoint Automotive Pvt. Ltd.*, 2010 (1) Mh.L.J. (F.B.) 658, and *Natraj Studios (P) Ltd. v. Navrang Studios*, (1981) 1 SCC 523.



Additionally, Indian courts have ruled that (*inter alia*) the following types of disputes cannot be arbitrated:

- 7 “Serious allegations of fraud”, cannot be arbitrated.<sup>25</sup> Two tests are relevant in this regard : (i) where the court finds that the arbitration agreement itself cannot be said to exist being vitiated by fraud; or (ii) where allegations are made against the State or its instrumentalities, relating to arbitrary, fraudulent, or *mala fide* conduct, giving rise to questions of public law as opposed to questions limited to the contractual relationship between the parties.
- 7 Disputes in relation to oppression of shareholders (minority protection) and / or mismanagement of companies, as well as for winding up of companies.<sup>26</sup>
- 7 Disputes in relation to intellectual property rights can be made subject to arbitration clauses so long as the disputes are in the nature of commercial disputes with parties having consciously decided to refer these disputes arising from contract to arbitration. This is so since such actions would be for enforcement of rights *in personam*, with a well-defined relief being sought against a specific party, and not against the world at large. In case a dispute involving intellectual property rights seeks to enforce a right *in rem*, such dispute would not be arbitrable.<sup>27</sup>

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<sup>25</sup> *Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd.*, (2021) 4 SCC 713.

<sup>26</sup> *Booze Allen & Hamilton Inc. v. SBI Home Finance Ltd.*, (2011) 5 SCC 532. See also *Haryana Telecom Ltd. v. Sterlite Industries (I) Ltd.*, (1999) 5 SCC 688

<sup>27</sup> *Eros International Media Limited v. Telex Links India Pvt. Ltd.*, 2016 SCC OnLine Bom 2179.

- 7 Disputes emanating out of the rights conferred by a trust deed or those arising between the trustees and/or the beneficiaries in relation to the trust are not arbitrable and only civil courts have jurisdiction over them.<sup>28</sup>

Note that one of the grounds for refusing enforcement of a foreign award is if the enforcing court finds that the subject-matter of the dispute “*is not capable of settlement by arbitration under the law of India*”. Accordingly, while seeking to enforce a foreign award in India, the award holder should keep in mind the risk that any dispute which has been arbitrated in a foreign seat, ought to be arbitrable in India, failing which the award may not be enforceable. In this regard, the Bombay High Court’s decision in *Anupam Mittal v. People Interactive (India) Private Limited and Ors.*,<sup>29</sup> is relevant. In this case, the High Court of Singapore had granted an anti-suit permanent injunction order against the Plaintiff, preventing him from proceeding with his petition filed against the defendants before the National Company Law Tribunal (NCLT). The Plaintiff sought for an injunction in the form of an anti-enforcement suit against the anti-suit permanent injunction, before the Bombay High Court. The Court granted the injunction in the Plaintiff’s favour on the ground that if the anti-suit injunction was allowed to operate, the plaintiff would stand restrained from pursuing the only remedy available to him before the NCLT, while the arbitration in Singapore would continue and the award that may be rendered therein would be unenforceable in India as the subject matter was not arbitrable in India.

## 17. Competence of Arbitral Tribunal to Rule on its Jurisdiction

The Act recognises the ‘*kompetenz-kompetenz*’ principle which means that the arbitral tribunal is empowered to rule on its own jurisdiction, including deciding on questions relating to the existence and validity of the arbitration agreement. Given that an arbitration agreement is treated as an agreement independent of and separable from the underlying contract, a decision by the arbitral tribunal that the contract is null and void, will not by itself result in the arbitration clause being treated as null and void or invalid.

Time is of the essence and any objection as to the arbitral tribunal’s jurisdiction must be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea merely because he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

<sup>28</sup> See *Vimal Kishor Shah v. Jayesh Dinesh Shah*, (2016) 8 SCC 788, and *Vidya Drolia v. Durga Trading Corpn.*, (2021) 2 SCC 1.

<sup>29</sup> 2023 SCC OnLine Bom 1925.

Where the arbitral tribunal rejects a plea that it does not have jurisdiction, it may proceed to pass an award and there is no provision to appeal such an order. However, in such a case, parties have recourse to challenge such an award. However, if the plea is successful and the tribunal declines to pass an award or dismisses the arbitration proceedings, the aggrieved party has an immediate remedy in the form of an appeal to the court.

## 18. Interim Relief

### a. By the court

- ⌞ Parties may approach a court for interim reliefs before or during arbitral proceedings or at any time after making the arbitral award but before it is enforced. The court shall not entertain any application for interim relief after the tribunal has been constituted unless it finds that circumstances exist which may not render the remedy granted by the tribunal, efficacious.
- ⌞ Recourse to Indian courts is now also available to parties to a foreign-seated arbitration (unless otherwise agreed).
- ⌞ Interim reliefs sought from the court may include orders for:
  - i. the appointment of a guardian for a minor, or person of unsound mind, for the arbitration;
  - ii. an interim measure, or protection in respect of any of the following matters:
    - a. preservation, interim custody, or sale of any goods which are the subject-matter of the arbitration agreement;
    - b. securing the amount in dispute in the arbitration;
    - c. detention, preservation, or inspection of any property, or thing which is the subject-matter of the dispute in arbitration;
    - d. interim injunction, or the appointment of a receiver; and
    - e. such other interim measure of protection as may appear to the court to be just and convenient.

### b. By the arbitral tribunal

- ⌞ The arbitral tribunal also has the power to grant interim relief and has the same power for making orders as the court for the purpose of and in relation to any proceedings before it. However, this power can be exercised only till



the passing of the award, after which, the arbitral tribunal is *functus officio* and parties will need to approach a court for reliefs post award.

- ⌋ An order of the arbitral tribunal shall be deemed to be an order of the court for all purposes and shall be enforceable in the same manner as if it were an order of the court (subject of course, to the results of any appeal).
- ⌋ The arbitral tribunal may direct either party to take any interim measure of protection as it may deem necessary to protect the subject matter of the dispute, and such orders include:
  - i. the appointment of a guardian for a minor, or person of unsound mind, for the arbitration;
  - ii. an interim measure, or protection in respect of any of the following matters:
    - a. preservation, interim custody, or sale of any goods which are the subject-matter of the arbitration agreement;
    - b. securing the amount in dispute in the arbitration;
    - c. detention, preservation, or inspection of any property, or thing which is the subject-matter of the dispute in arbitration;
    - d. interim injunction, or the appointment of a receiver; and
    - e. such other interim measure of protection as may appear to the Court to be just and convenient.

### **c. Interim orders from foreign tribunals**

- ⌋ There is no provision under Indian law for enforcement of interim orders - whether of foreign courts, or arbitral tribunals in foreign seated arbitrations.

### **d. Emergency arbitrators and orders**

- ⌋ Although the High-Level Committee had suggested including provisions for emergency arbitration and including emergency arbitrators, no such provisions have been incorporated into the Act.
- ⌋ That said, the Supreme Court in *Amazon.com NV Investment Holdings LLC v. Future Retail Limited & Ors.*<sup>30</sup> ruled that in an India seated arbitration administered by an arbitral institution where the relevant rules provided

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<sup>30</sup> (2022) 1 SCC 209.

for emergency arbitration, an emergency award was valid and enforceable. Such awards would be treated on par with awards passed by constituted arbitral tribunals under Section 17(1) of the Act (grant of interim measures of protection). Going further, the Supreme Court recognized that such orders are an important step in decongesting civil courts and providing expeditious interim reliefs to parties. The new draft bill that was briefly released in 2024 for public comments codified the ruling in the aforesaid case.

- 7 This position changes where the emergency arbitration takes place in a foreign-seated arbitration. Such orders / awards are not enforceable. Any interim order of a foreign court or tribunal is not enforceable in India. The usual practice is to apply to a court for interim relief in the same way as has been applied to an emergency arbitrator, and courts have, if satisfied of the merits, passed orders similar if not identical to the emergency arbitrator's order. In this regard, the new draft bill was ambiguous, and the final bill is awaited to see if the position is clarified.

### 19. Hearings and Proceedings

The arbitral tribunal may, in consultation with the parties, decide whether to hold oral hearings, or whether a document-only arbitration should be conducted.

### 20. Fast Track Procedure

The Act envisages a fast track procedure, which: (i) is before a sole arbitrator; (ii) is to be conducted on the basis of written pleadings, documents and submissions without an oral hearing (although an oral hearing may be held if the parties so request, or the arbitral tribunal deems it necessary), and (iii) requires the award to be passed within a period of six months of the arbitral tribunal entering upon the reference.

### 21. Timelines

Strict timelines have been mandated for passing an arbitral award in the case of purely domestic arbitrations. Notably, these timelines are not mandatory, but only directory insofar as international commercial arbitrations are concerned (whether ad hoc or under institutional rules).

The award is required to be made within 12 (twelve) months from the date of completion of pleadings, although parties may by consent extend this period for a further period not exceeding 6 (six) months, i.e., 18 (eighteen) months in

the aggregate. If the award is not made within this extended period, the arbitral tribunal's mandate terminates, unless the parties have applied to the Court for extension and the period for passing the award is accordingly extended. Such extensions are given almost routinely, unless the delay is egregious, in which case, the Courts are empowered to impose actual or exemplary costs on parties for any delay caused by them.

The jurisprudence surrounding which is the appropriate court to extend the period for passing an award is fraught with conflicting decisions. The latest authority in Maharashtra and Goa is *Sheela Chowgule v. Vijay Chowgule & Ors.*<sup>31</sup> wherein the Bombay High Court has held that it is only the High Court which has appointed one or more arbitrators to constitute an arbitral tribunal, can extend the period within which the award must be made. The Bombay High Court, while passing this judgement, has distinguished it from the Supreme Court's position<sup>32</sup> in another case wherein the arbitrators were appointed by the parties themselves and not by a High Court. An appeal against this decision of the Bombay High Court is pending before the Supreme Court of India.

Additionally, the Court may also substitute arbitrators or reduce arbitrator fees if delays are attributable to the tribunal, in which case an opportunity is to be given to the arbitrators to be heard before passing any such order.

If the award is made within a period of 6 (six) months from the date the arbitral tribunal enters into reference, the tribunal would be entitled to an additional fee as agreed between parties.

## 22. Appeal against Orders

An appeal lies (under Section 37), from only the following orders, namely:

### a. Orders from the court

- i. refusing to refer the parties to arbitration (as aforesaid, an order which refers parties to arbitration, is not open to appeal, although the final award may be challenged);
- ii. granting, or refusing to grant any interim measure or relief;
- iii. setting aside, or refusing to set aside an arbitral award.

<sup>31</sup> Pronounced on August 7, 2024 in W.P. 88 of 2024.

<sup>32</sup> Chief Engineer (NH) PWD (Roads) v M/s BSC&C and C JV (Special Leave Petition to Appeal (C) No. 10544/2024 arising out of final judgment and order dated April 22, 2024 in CRP No. 2/2024 passed by High Court of Meghalaya). Available at: [https://webapi.sci.gov.in/supremecourt/2024/19360/19360\\_2024\\_7\\_31\\_53139\\_Order\\_13-May-2024.pdf](https://webapi.sci.gov.in/supremecourt/2024/19360/19360_2024_7_31_53139_Order_13-May-2024.pdf).

**b. Orders from the arbitral tribunal**

- i. accepting a challenge to its jurisdiction under Section 16 (pertains to competence of an arbitral tribunal to rule on its jurisdiction); or
- ii. granting, or refusing to grant an interim measure under Section 17 (pertains to interim measures ordered by an arbitral tribunal).

No second appeal lies from an order passed in appeal; but an aggrieved party may nevertheless approach the Supreme Court for special leave to appeal against any order.

**23. Costs and Interest**

**a. Costs**

The general rule is that the unsuccessful party shall be ordered to pay costs of the successful party, unless the court / tribunal makes a different order, for reasons to be recorded in writing.

The costs which may be awarded include reasonable costs relating to the fees and expenses of the arbitrators and witnesses, the legal fees and expenses; any administrative fees of any institution supervising the arbitration proceedings; and any other expenses which may have been incurred by the party in connection with the arbitral proceedings and award. In determining the costs, the court / tribunal shall take into account circumstances such as conduct of the parties, whether a party raised frivolous counter-claims which delayed disposal of the arbitration proceedings and whether any reasonable offer to settle the dispute made by a party was refused by the other party. An agreement which provides that one party shall bear whole or part of the costs in any event shall only be valid if the agreement was concluded after the dispute in question had arisen.

**b. Pre-Award Interest**

Unless otherwise agreed by parties, the arbitral tribunal may include interest on the amount awarded, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made. Where a rate of interest is agreed between parties in their contract, the arbitral tribunal will have no discretion and is bound to award interest at such contractually



prescribed rate. Where the contract between parties is silent as to the grant of or rate of interest to be awarded, the arbitral tribunal has the discretion to award interest as it deems reasonable.

#### **b. Post-Award Interest**

Unless otherwise directed by a court / tribunal, a sum directed to be paid under an award, shall carry interest @ 2% (two percent) higher than the ‘current rate of interest’<sup>33</sup> prevalent on the date of the award, from the date of the award till the date of payment. (In respect of arbitrations commencing prior to the 2015 Amendment (October 23, 2015), this rate was fixed at 18% (eighteen percent), unless otherwise agreed by the parties.)

Interest cannot be granted where the contract expressly excludes it.<sup>34</sup>

### **24. Confidentiality of Arbitral Proceedings**

The 2019 Amendments introduced provisions for maintaining confidentiality of arbitral proceedings, with an exception for an arbitral award where its disclosure is necessary for the purpose of implementation and enforcement. The exception is rather narrow, given that there may be cause to disclose and produce some parts of the pleadings, documents or proceedings at various stages, say for instance in

<sup>33</sup> For the definition of ‘current rate of interest’, see End Notes.

<sup>34</sup> *Union of India v. Manraj Enterprises*, (2021) SCC OnLine SC 1081.

order to obtain interim protection pending the arbitration, or protect any other legal right; or even where disclosure is required on account of a court order or other legal duty (prior thereto, the Act mandated confidentiality only with regard to conciliation proceedings).

## 25. Immunity to Arbitrators for Acts Done in Good Faith

Introduced by the 2019 Amendments, no suit or other legal proceedings shall lie against the arbitrator for anything which is in good faith done or intended to be done under this Act or the rules or regulations made thereunder.

## 26. Arbitral Award<sup>35</sup>

The award must be in writing, dated and signed by the tribunal and must state the place of arbitration. The award must also state the reasons on which it was based, unless the award is based on agreed terms, or the parties have waived the requirement of a speaking award.

Within 30 (thirty) days from the receipt of the arbitral award, a party may request the arbitral tribunal to correct any computation, typographical errors or other similar errors occurring in the award. A party may also (if so agreed by all parties), request the arbitral tribunal to give an interpretation of a specific point or part of the award.

## 27. Termination of Proceedings

The arbitral proceedings are terminated by the final arbitral award or by an order of the arbitral tribunal terminating the proceedings where (i) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute, (ii) the parties agree to terminate the proceedings, or, (iii) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible. The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings.

## 28. Challenge to and Setting Aside an Award

A court may set aside an award on a challenge made by an aggrieved party:

- a. if the party making the application establishes on the basis of the record of the arbitral tribunal that:

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<sup>35</sup> For the definition of 'arbitral award', see End Notes.

- i. a party was under some incapacity;
  - ii. the arbitration agreement is not valid under the law to which the parties have subjected it or, under the law for the time being in force;
  - iii. the party making the application was not given proper notice of the appointment of an arbitrator, or of the arbitral proceedings, or was otherwise unable to present their case; or
  - iv. the arbitral award deals with a dispute not contemplated by, or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration – provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or
  - v. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of Part I of the Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or
- b. if the court finds that:
- i. the subject matter of the difference is not capable of settlement by arbitration under the law of India;
  - ii. the enforcement of the award would be contrary to Indian public policy; or
  - iii. In case of domestic awards alone, the award may also be set aside if the court finds that it is vitiated by patent illegality appearing on the face of the award. Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.

The party applying to set aside the award must do so within 3 (three) months of the date of receipt of the award with notice to the other party (the giving of notice being directory rather than mandatory). This period may be extended by a further 30 (thirty) days, if sufficient cause for the delay is proved, but no further extension can be granted.

The court may, where it is appropriate and upon the request of a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal

an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

The court has no power to modify an award in set aside proceedings.<sup>36</sup> That said, in *Ssangyong Engineering & Construction Co. v. National Highways Authority of India*,<sup>37</sup> though the award was set aside, the Supreme Court did not relegate the parties to fresh round of arbitration. Instead, the minority award was upheld, by invoking Article 142 of the Constitution,<sup>38</sup> to do complete justice between the parties. While doing so however, the Supreme Court noted that this power must be used sparingly and not as a matter of course. Further in 2024, the Supreme Court used its curative power in *Delhi Metro Rail Corporation Ltd. v. Delhi Airport Metro Express Pvt. Ltd.*<sup>39</sup>, to overrule its Division Bench's judgement and set aside an arbitral award on the ground that it suffered from "perversity and patent illegality". The court utilized its power under Articles 137 & 142 of the Constitution of India to set aside the award on the grounds that the tribunal wilfully ignored vital evidence and unreasonably interpreted the termination clause leading to a gross miscarriage of justice and again clarified that the exercise of curative jurisdiction should not be adopted as a matter of ordinary course.

Note: There is no provision for challenge to a foreign award in the Arbitration Act, and pursuant to the decision in *BALCO* and the 2015 Amendments, it is clear that Indian courts do not have jurisdiction to entertain any challenge to foreign awards.

Part II of the Act deals with enforcement of foreign awards.

## 29. The Public Policy Challenge

The scope of challenge to a domestic award before an Indian court on the ground that the award is in conflict with the public policy of India, has been evolved through judicial precedents which culminated in amendments to the relevant sections by the 2015 Amendment. An award is in conflict with the public policy of India only if:

- i. the making of the award was induced or affected by fraud or corruption, or violated the provisions as to confidentiality in conciliation proceedings, or admissibility of evidence during conciliation, in other proceedings;

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<sup>36</sup> *The Project Director, NH No. 45E and 220 National Highways Authority of India v. M. Hakeem & Anr.*, (2021) 9 SCC 1; *National Highways Authority of India v. P. Nagaraju*, 2022 SCC OnLine SC 864.

<sup>37</sup> (2019) 15 SCC 131.

<sup>38</sup> For the text of Article 142 of the Constitution, see End Notes.

<sup>39</sup> (2024) 6 SCC 357. Judgement dated April 10, 2024.



- ii. the award is in conflict with the fundamental policy of Indian Law; or
- iii. the award is in conflict with basic notions of morality & justice.

The test as to whether there is contravention of the fundamental policy of Indian law shall not entail a review of the merits of the dispute and must be understood in the narrow sense such as where the arbitrator completely ignores/rewrites the contract.

The Supreme Court in *Vijay Karia v. Prysmian Cavi E Sistemi SRL*,<sup>40</sup> reiterated the narrow scope of review of an award. Importantly, it ruled that an award which was in contravention of an Indian statute (in that case, the Foreign Exchange Management Act, 1999 (**FEMA**)), could not be treated as being opposed to the fundamental policy of Indian law merely by virtue of such contravention. Breach of the fundamental policy of Indian law must amount to a breach of some legal principle or legislation which is so basic to Indian law that it is not susceptible of being compromised, and is also a time-honoured, hallowed principle which is followed by the courts.<sup>41</sup>

### 30. Enforcement of Awards

#### a. Award passed under Part I of the Act (domestic award)

Where the time for making an application to set aside the arbitral award has expired, then, subject to the award not having been stayed, it shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908, in the same manner as if it were a decree of the court.

The filing of an application to set aside an award does not itself render that award unenforceable, unless the Court grants an order staying the operation thereof on a separate application made for that purpose. The stay may be granted on such terms as the court deems fit (including deposit of the award amount into court or furnishing of security), and the court is required to record its reasons for grant of stay. Accordingly, a party can proceed with enforcement even in the face of an award that has been challenged where there is no stay on enforcement.

By virtue of the 2021 Amendments, where a *prima facie* case has been made out that the arbitration agreement or contract which forms the basis of the award, or the making of the award was induced by fraud or corruption, and where such award has been challenged on these grounds, the Court shall grant an unconditional stay against enforcement of such arbitral award, pending disposal

<sup>40</sup> (2020) 11 SCC 1.

<sup>41</sup> See also *Cruz City 1 Mauritius Holdings v. Unitech Limited*, 2018 SCC OnLine Del 7810, where the Delhi High Court ruled that an award on the basis of an agreement that is in violation of FEMA, would not be contrary to public policy and would nevertheless be enforceable.

<sup>42</sup> For the definition of 'Foreign Award', see End Notes.



of the challenge. It is noteworthy to point out that a mere allegation of fraud is not enough for the Court to grant such an unconditional stay. The Court must be convinced that *prima facie* there exists such a case, where the arbitration agreement or contract which forms the basis of the award, or the making of the award was induced by fraud or corruption.

**b. Enforcement of a foreign award under Part II of the Act<sup>42</sup>**

A foreign award is enforceable under Part II of the Act, if it meets certain conditions, viz. (i) the award is an arbitral award on differences relating to matters considered as commercial under the law in force in India (India having adopted the ‘commercial’ reservation under the New York Convention and Geneva Convention) (ii) in pursuance of an agreement for arbitration to which the New York Convention or Geneva Convention applies, and (iii) in relation to persons who are subject to the jurisdiction of a territory notified by the Central Government in Official Gazette (as being a party to either of the aforesaid Conventions), and passed in one such notified territory; and (iv) the award is final (an award is not deemed to be final if any proceedings contesting the validity of the award are pending in the country in which it was made).

For the purposes of enforcement, the enforcing party must produce before the executing court the original or authenticated copy of the award, the original or certified copy of the arbitration agreement, and evidence that it is a foreign award.

The period of limitation for enforcement of a foreign award is 3 (three) years from when the right to apply accrues, i.e. when the award becomes final.<sup>43</sup>

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<sup>43</sup> *Government of India v. Vedanta Limited & Ors.*, (2020) 10 SCC 1.

Enforcement of a foreign award may be refused on the same grounds as in the case of a domestic award (except patent illegality and subject to a narrower interpretation of what would be in conflict with the public policy of India), and additionally if (i) the award has been set aside, or suspended by a competent authority of the country in which it was made, and / or (ii) the subject matter of dispute cannot be settled by arbitration under Indian law.

The application for enforcement of a foreign award may be filed in any High Court which has jurisdiction over the territory in which the award debtor's assets are located or where a suit for recovery of money can be filed.

### 31. Group of Companies Doctrine

The “Group of Companies” doctrine is an exception to the general principle of arbitration that all parties to an arbitration must be signatories to the arbitration agreement. This doctrine essentially enables a non-signatory to be bound by the arbitration agreement upon the adjudication of whether the non-signatory intended to be bound by the arbitration agreement. The Supreme Court in the case of *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*,<sup>44</sup> upheld this doctrine by stating that the same is derived from the phrase “*any person claiming through or under him*” in Sections 8 and 45 of the Arbitration Act. The Court held that pursuant to this doctrine, even non-signatories to an arbitration agreement can be referred to arbitration once a court examines certain criteria such as relationship between the non-signatory and the signatory, direct commonality of the subject-matter, the agreement between parties being a “composite transaction” where performance of the parent agreement would not be feasible without performance of subordinate, ancillary or supplementary agreements. This is of course still the exception to the rule and would require the party seeking reference of a non-signatory to arbitration to prove that such criteria are satisfied. The decision in *Chloro Controls* ruling was referred to a larger bench of the Supreme Court for reconsideration.<sup>45</sup> Accordingly, in *Cox and Kings Limited v. SAP India (P) Limited*,<sup>46</sup> while the Supreme Court upheld the doctrine, it stated that this doctrine was not derived from the phrase “*any person claiming through or under him*” under Sections 8 and 45 but it is an established principle used for interpreting and constructing the contract.

In *Gemini Bay Transcription Pvt. Ltd. v. Integrated Sales Service Ltd. & Anr.*<sup>47</sup> the Supreme Court ruled that an enforcing court under Part II of the Act will not entertain

<sup>44</sup> (2013) 1 SCC 641.

<sup>45</sup> *Cox & Kings Ltd. v. SAP India (P) Ltd.*, 2022 SCC OnLine SC 570.

<sup>46</sup> *Cox & Kings Ltd. v. SAP India (P) Ltd.*, 2022 SCC OnLine SC 1634.

<sup>47</sup> (2022) 1 SCC 753.

objections that a party is not bound by the award because it is a non-signatory to the arbitration agreement. The scheme of Section 47, the Court ruled, is merely procedural without going to the extent of requiring substantive evidence to “prove” that a non-signatory to an arbitration agreement can be bound by a foreign award, and only contemplates evidence “as may be necessary” to prove that the award in question is a foreign award. The Court added that the only grounds under which a non-signatory could resist enforcement of a foreign award are the substantive grounds in Section 48(2) (namely, public policy, subject matter of the award not capable of arbitration, and the award being in conflict with the most basic notions of morality or justice).

### **32. Part 1A - Arbitration Council of India (ACI):**

As pointed out above, while these provisions have been notified and have been in effect from October 12, 2023, the ACI has not yet been established. The ACI is intended to be established as an independent statutory body whose goal would be the promotion of arbitration, mediation, conciliation and other alternative dispute redressal mechanisms in India. Its functions include the following:

- i. to frame policies for grading arbitral institutions and accrediting arbitrators;
- ii. to formulate policies for the establishment, operation, and maintenance of uniform professional standards for all alternative dispute redressal matters;
- iii. to establish and maintain a depository of arbitral awards (judgments) made in India and abroad;
- iv. to recognise professional institutes providing accreditation of arbitrators;
- v. to hold training, workshops, and courses in the area of arbitration in collaboration with law firms, law universities and arbitral institutes;
- vi. to frame, review and update norms to ensure satisfactory level of arbitration and conciliation;
- vii. to act as a forum for exchange of views and techniques to be adopted; and
- viii. to conduct examinations and training on various subjects relating to arbitration and conciliation and award certificates thereof;

In terms of composition, the ACI will consist of a Chairperson who is either: (i) a Judge of the Supreme Court; or (ii) a Judge of a High Court; or (iii) Chief Justice of a High Court; or (iv) an eminent person with expert knowledge in conduct of arbitration. Other members will include an eminent arbitration practitioner, an academician with experience in arbitration, and government appointees.

The Supreme Court and the High Courts have been conferred with the power to designate (for the purpose of appointment of arbitrators), arbitral institutions which would be graded by the ACI, thereby attempting to highlight the practical significance of the ACI and its grading system.

### 33. New Delhi India International Arbitration Centre Act, 2019 (NDIAC Act)

The NDIAC Act, 2019 came into force on the March 2, 2019, and provides for the establishment of the NDIAC to conduct arbitration, mediation, and conciliation proceedings. In 2022, the NDIAC Act was amended and renamed the IIAC Act, and the NDIAC was renamed the IIAC.

The key objectives of the IIAC include, (i) promoting research, providing training, and organizing conferences and seminars in alternative dispute resolution matters, (ii) providing facilities and administrative assistance for the conduct of arbitration, mediation and conciliation proceedings, and (iii) maintaining a panel of accredited arbitrators, mediators and conciliators.

The key functions of the IIAC include: (i) facilitating conduct of arbitration and conciliation in a professional, timely and cost-effective manner, and (ii) promoting studies in the field of alternative dispute resolution. The IIAC will also establish a Chamber of Arbitration which will maintain a permanent panel of arbitrators.

### 34. Currency Conversion in Arbitral Awards

The Supreme Court in *DLF Ltd. v. Koncar Generators & Motors Ltd.*<sup>48</sup> ruled on the issue of: (i) determination of the date for foreign exchange conversion in the case of an award expressed in foreign currency; and (ii) date of conversion when the award debtor has deposited any amount in court during the pendency of its challenge of an award.

The court held that the correct date for determining the conversion rate of foreign currency is the date when the award becomes enforceable under the Act, i.e., 3 (three) months from the passing of the award, or, if enforcement is stayed, once the stay is lifted (assuming the challenge to the award is unsuccessful.)

However, if any amount is deposited by the party challenging the award and if the award holder is permitted to withdraw it, the date for conversion of the deposited amount will be the date on which it was so deposited. As to the rest, the remaining amount is to be converted when objections against the award are finally settled – when it becomes enforceable

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<sup>48</sup> 2024 SCC OnLine SC 1907.





## B

# Other forms of Alternative Dispute Resolution – Mediation and Conciliation

## 1. Introduction

Mediation and conciliation are recognized as separate forms of ‘alternative dispute resolution’ (**ADR**) and are in contrast to the adversarial approach used in court and arbitration proceedings.

Even during the course of the arbitral proceedings, the arbitral tribunal is empowered to *“encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement”*.

Part III of the Arbitration Act deals with ‘Conciliation’. Though the term ‘Conciliation’ is not formally defined in the Act, it refers to assistance rendered to disputing parties by the conciliator, *“in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute”*.

## 2. Difference between Conciliation and Mediation

In India, although the words mediation and conciliation are sometimes used interchangeably, there is a recognized difference between the two. For example:

- i. The CPC provides that where it appears to the court (in already instituted legal proceedings), that there exist elements of a settlement which may be acceptable to the parties, the court may formulate possible terms of settlement and/or refer the dispute (subject to the consent of the parties), to:
  - ⌋ arbitration;
  - ⌋ conciliation;
  - ⌋ judicial settlement including settlement through Lok Adalat;<sup>49</sup> or
  - ⌋ mediation.

Disputes referred to conciliation by a court under the CPC, are governed by Part III.

<sup>49</sup> See End Notes for an elaboration on ‘Lok Adalat’.

- ii. The ‘Civil Procedure Alternative Dispute Resolution & Mediation Rules, 2006, (the **CP - ADR & Mediation Rules**), *inter alia* explain the difference between the different modes of settlement,<sup>50</sup> including:
- ⌞ ‘Settlement by Conciliation’, as being “*the process by which a conciliator who is appointed by parties, or by the Court, as the case may be, conciliates the disputes between the parties to the suit by the application of the provisions of (the Act)*”.
  - ⌞ ‘Settlement by Mediation’, as being, “*the process by which a mediator appointed by parties, or by the Court, as the case may be, mediates the dispute between the parties to the suit ...*”.

Additionally, under the Commercial Courts Act (which came into force on October 23, 2015, i.e., the same day as the 2015 Amendments), mediation and an attempt at settlement has been made a mandatory prerequisite to the filing of any commercial suit which does not contemplate any urgent relief. This is, however, restricted to commercial disputes of a specified value, falling within the jurisdiction of the relevant Commercial Court / Division.

Further, the Commercial Courts Act specifically mandates pre-institution mediation for suits which do not contemplate any urgent interim relief, and as a result, it is often seen that parties put up a claim for urgent interim relief as an eyewash so as to evade the mediation requirement. Mediation is defined under the Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018 (**PIMS Rules**), as a process undertaken to “*resolve, reconcile and settle a commercial dispute between the parties*”.

### 3. Role of Conciliator and Mediator

A conciliator may be more pro-active in persuading the parties to settle and the manner of settlement, than a mediator. To that intent, the Act provides that the conciliator “*may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute*”. Similarly, CP - ADR & Mediation Rules, note that a conciliator may make “*proposals for a settlement of the dispute and by formulating, or reformulating the terms of a possible settlement; and has a greater role than a mediator.*”

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<sup>50</sup> See End Notes for ‘the difference between the different modes of settlement’ in the CP - ADR & Mediation Rules.



The CP - ADR & Mediation Rules note that while the mediator assists parties towards a settlement by inter alia facilitating, identifying issues, exploring areas of compromise, etc., the mediator also emphasises that *“it is the parties’ own responsibility for making decisions which affect them”*.

Nevertheless, no matter which method is chosen, a mediator or conciliator or any other authority, does not have the right to impose his will, or opinion on the parties, and they must reach an agreement mutually as to resolution of the dispute.

The conciliator/mediator is not bound by the CPC, or the Indian Evidence Act, 1872 but must be guided by the principles of objectivity, fairness and justice, rights and obligations of parties, usages of trade, surrounding circumstances, and previous business practices.

#### **4. Interim Relief**

Parties are prohibited from initiating any arbitral or judicial proceedings during the pendency of conciliation proceedings under the Act, except when a party considers the same necessary for the purpose of protecting/preserving its rights.

#### **5. Confidentiality**

If a conciliator / mediator receives information from one party; he is bound to disclose the same to the other party, unless such information is provided to the conciliator subject to a specific condition that it be kept confidential, in which case the conciliator shall not disclose it to the other party.

All matters relating to conciliation (under the Arbitration Act) / mediation (under the PIMS Rules and the CP - ADR & Mediation Rules), proceedings, including the settlement agreement are to be kept confidential and the parties thereto are not entitled to rely on statements made or what transpires during the proceedings. The settlement agreement may, however, be disclosed to the extent such disclosure is necessary for its implementation and enforcement.

#### **6. Settlement and Termination**

The conciliation is successfully terminated if a settlement is arrived at, and a settlement agreement is signed by the parties. Under the Act, a settlement agreement has the same status and effect as an arbitral award on agreed terms and would be enforceable as if it were a decree of the court.

Under the PIMS Rules, any settlement agreement arrived at is to be reduced to writing and forwarded by the mediator to the mediation authority set up under the PIMS Rules.

If parties chose to mediate as a form of ADR without there being any pending legal proceedings, the benefits of confidentiality and legal sanctity of the settlement agreement would not be available, and a mediated settlement, if not honoured, would have to be enforced as a separate contract by way of a civil suit. However, where the mediation is conducted under supervision of a court in respect of pending legal proceedings, a settlement agreement arrived at between the parties must be submitted to the court by the mediator. The court then records the settlement and passes a decree in accordance therewith, disposing of the legal proceedings accordingly. Under the Commercial Courts 2015 Amendment, Section 12A provides that the settlement agreement arrived at through (pre-litigation) mediation has the same effect as an award on the agreed terms under Section 30(4) of the Arbitration Act.

### 7. Costs

Costs of the proceedings are fixed by the conciliator / mediator upon termination of conciliation proceedings and are borne by parties equally unless otherwise provided in the settlement agreement.

### 8. The Singapore Convention on Mediation

India has signed (but is yet to ratify), the United Nations Convention on International Settlement Agreements Resulting from Mediation (the **Singapore Convention**), which was opened for signature on August 7, 2019.

Note that though the term used is ‘mediation’, the condition to be met is that of a settlement of disputes through *“a process, irrespective of the expression used, or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their disputes with the assistance of a third person(s) lacking the authority to impose a solution on the parties.”*

The Singapore Convention facilitates the recognition and enforcement of settlement agreements that meet the conditions mandated therein, in a manner similar to the New York Convention. As a result, once the Singapore Convention is ratified by India, a settlement agreement will be enforced directly by an Indian court instead of it being treated only as a contract, with a civil suit having to be filed for its enforcement.

## 9. Mediation Act, 2023

On September 15, 2023, the Indian Government enacted (however, not all provisions are notified) the Mediation Act, 2023, (**Mediation Act**)<sup>51</sup> which provides parties with an option to mediate before initiation of any commercial dispute, regardless of whether a mediation agreement exists or not. However, in matters of commercial disputes of “Specified Value”, the parties have to mandatorily undergo a pre-litigation mediation process under Section 12A of the Commercial Courts Act, 2015, unless the parties are seeking urgent interim relief.

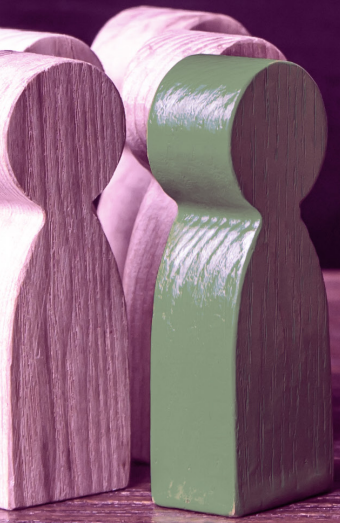
It requires a mediation to be completed within 120 (one hundred and twenty) days (which may be extended by a further period of 60 (sixty) days with consent of parties). A mediated settlement agreement is final and binding on the parties and is enforceable as a decree / judgement of court. Such a mediated settlement agreement can only be challenged on the grounds of fraud, corruption, impersonation, or where the subject matter of dispute is not fit for mediation, and thus judicial intervention is sought to be kept to a minimum.

In a future-looking move, online mediation has been endorsed as acceptable and cost effective. Key features of the Mediation Act include requiring a mediation agreement to be in writing, mandating pre-litigation mediation, specifying the class of disputes which cannot be referred to mediation, and establishing the Mediation Council of India, which shall endeavour to promote mediation through appropriate rules/guidelines.

As things stand today, the Act only treats as directly enforceable, mediated settlement agreements as a result of mediation seated in India (and so does not go as far as the Singapore Mediation Convention in this regard).

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<sup>51</sup> Available at: <https://egazette.gov.in/WriteReadData/2023/248775.pdf>.





# Miscellaneous

## 1. Third-party Funding of Arbitral Proceedings

In its purest form, the third-party funding of a dispute is an arrangement between a funder and a litigant in which the funder ‘funds’ or provides monetary support to a litigant for pursuing and / or enforcing a claim, in exchange for a share in any ensuing award or settlement. The funding provided is ‘non-recourse’ and the funder is repaid the funded amount (its investment) along with its profit, only upon a successful outcome of the action, and not otherwise. The investment or the asset is the litigant’s claim or award.

While there is no express legislation or regulation around litigation financing (as it is also known) in India, there have been several decisions by superior courts which endorse the view that third party funding of disputes is not barred under Indian law.<sup>52</sup> However, although the principles of maintenance and champerty are not applicable in India, agreements which are found to be extortionate and unconscionable, for instance completely one-sided and usurious – say a majority share in the recoveries made, may be treated as being contrary to public policy.<sup>53</sup>

The CPC, which governs the procedure of civil actions in courts, was amended in the states of Maharashtra, Madhya Pradesh, and Gujarat, so as to empower a court to implead a third-party financier in a suit as a plaintiff (in certain circumstances). The financier may be required to give security for the payment of all costs incurred and likely to be incurred by any defendant. This amendment, made more than 2 (two) decades ago, carries the implicit assumption that a plaintiff has been funded in its civil litigation (and that therefore, litigation financing, is permitted).

The Arbitration Act, as amended in 2015, also contains an implied recognition that there may be cases funded by a party not otherwise concerned with the dispute, because it requires an arbitrator to disclose if they or their close family member have a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.

In its landmark decision, in *Bar Council of India v. A K Balaji & Ors.* (in relation to foreign lawyers being permitted to practice in India), the Supreme Court of India,

<sup>52</sup> *Ram Coomar Coondoo v. Chunder Cato Mookerjee*, [1876] 4 IA (PC) 23, and *Bar Council of India v. A.K. Balaji*, (2018) 5 SCC 379.

<sup>53</sup> *Ram Coomar Coondoo*, [1876] 4 IA (PC) 23. See also *G, A Senior Advocate*, (1955) 1 SCR 490, *Rattan Chand Hira Chand v. Askar Nawaz Jung*, (1991) 3 SCC 67, *Nuthaki Venkataswami v. Katta Nagi Reddy*, AIR 1962 AP 457.

observed (as obiter) that third party funding was permissible in India, stating. “There appears to be no restriction on third parties (non-lawyers) funding the litigation and getting repaid after the outcome of the litigation.”<sup>54</sup>

As noted in *Bar Council of India*, Indian lawyers cannot take up cases on a contingency or success fee basis, inasmuch as the Bar Council of India Rules, 1961 explicitly prohibit Indian lawyers from acting in cases where they have any financial interest.<sup>55</sup>

In the recent case of *Tomorrow Sales Agency Private Limited v SBS Holdings, Inc. & Others*,<sup>56</sup> the two-judge bench has noted that third-party funding is essential to ensure access to justice. The Supreme Court now has an opportunity to expand on third-party funding jurisprudence once again, given that an appeal has been filed against this Delhi High Court’s decision.

## 2. Technology and the Indian Legal System

The Indian legal system embraced technology during 2021 and 2022, when the country was beset by the COVID-19 pandemic. In October 2021, NITI Aayog, the government’s think-tank, released a report titled ‘Designing the Future of Dispute Resolution: The Online Dispute Resolution (ODR) Policy Plan for India’.<sup>57</sup>

The report recommends measures at three levels to tackle challenges in adopting ODR framework in India. The report recommends *inter alia* that the following steps be adopted:

- ▮ actions to increase digital literacy, improve access to digital infrastructure and train professionals as neutrals to deliver ODR services.
- ▮ adoption of ODR to address disputes involving Government departments and ministries.
- ▮ amending existing legislation to incorporate ODR and introduce mandatory pre-litigation online mediation for certain classes of cases.

In December 2021, the Ministry of Electronics & Information Technology (**MEITY**) released a report titled ‘National Strategy on Blockchain: Towards Enabling Trusted Digital Platforms’<sup>58</sup> which emphasised the importance of a ‘National Blockchain Framework’ which would include the assessment of value proposition of blockchain

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<sup>54</sup> *Bar Council of India v. A K Balaji & Ors.* (2018) 5 SCC 379 at Paragraph 35.

<sup>55</sup> See Rule 10, Rules on Professional Standards, available at <http://www.barcouncilofindia.org/about/professional-standards/rules-on-professional-standards/>.

<sup>56</sup> 2023 SCC OnLine Del 3191.

<sup>57</sup> Available at <https://www.niti.gov.in/sites/default/files/2021-11/odr-report-29-11-2021.pdf>.

<sup>58</sup> Available at [https://www.meity.gov.in/writereaddata/files/National\\_BCT\\_Strategy.pdf](https://www.meity.gov.in/writereaddata/files/National_BCT_Strategy.pdf).





technology, pilot deployments and prototypes, evaluation for specific and future uses, and adoption in other applications and areas.

India's integration of technology with the means of dispensation of justice has been heartening. Such developments are likely to lead to a legal system which is more transparent, and which is easily accessible to all. Additionally, such technology and processes may also enable courts to reduce the backlog of cases pending with them, and dispense speedy, but qualitative justice.

### 3. Stamping of Arbitral Agreements

One other question which was subject to various conflicting decisions is that of the validity and enforceability of an arbitration clause in an unstamped arbitration agreement. A three-judge Supreme Court decision in *N.N. Global Mercantile Pvt. Ltd. v. M/s. Indo Unique Flame Ltd. & Ors.*<sup>59</sup> affirmed the separability of an arbitration agreement, ruling that an unstamped contract did not prevent a court from acting on an arbitration clause as the two agreements were separable. However, the Court added that the parties must make good the deficiency in stamp duty immediately.

This decision is in conflict with another decision in *Garware Wall Ropes Limited v. Coastal Marine Constructions and Engineering Limited*<sup>60</sup> (which was affirmed by a three-judge bench in *Vidya Drolia & Ors. v. Durga Trading Corporation*<sup>61</sup>) where the Court ruled that its power under Section 11 of the Act to enquire into the “existence” of an arbitration agreement included satisfying itself of the “validity” of such an agreement. The Court stated that an unstamped contract was not valid, rendering

<sup>59</sup> (2021) 4 SCC 379.

<sup>60</sup> (2019) 9 SCC 209.

<sup>61</sup> (2021) 2 SCC 1.

an arbitration clause contained in such agreement unenforceable until stamp duty was paid. As a result, this question was referred by the Supreme Court in *N.N. Global Mercantile* to a five-judge bench<sup>62</sup> for final determination, which held that Section 35 of the Indian Stamp Act, 1899 renders an arbitration agreement invalid and void if the underlying contract is either not stamped or insufficiently stamped (**NN2**).

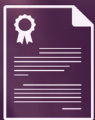
In a separate set of proceedings post NN2, a five-judge bench took up a review and curative petition which involved issues including issue of stamping of arbitral agreement and considering the larger ramifications and consequences of NN2, referred the matter to a seven-judge bench of the Supreme Court of India to decide the correctness of the view adopted in NN2. The seven-judge bench of the Supreme Court in *In Re: The Interplay between arbitration agreements under the Arbitration and Conciliation Act, 1996, and the Indian Stamp Act, 1899*<sup>63</sup> held that non-stamping or improper stamping is a curable defect, and that courts need not consider objections as to stamping of the main contract while deciding applications under Sections 8 & 11 of the Act. This is certainly a step towards promoting arbitration in India.

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<sup>62</sup> *N. N. Global Mercantile Private Limited vs. Indo Unique Flame Ltd. & Ors.* [2023] 9 S.C.R. 285.

<sup>63</sup> [2023] 15 S.C.R. 1081.





## Abbreviations

No.	Abbreviations	Meaning
1.	<b>Arbitration: Section 2(1)(a)</b>	“arbitration” means any arbitration whether or not administered by permanent arbitral institution;
2.	<b>Arbitration Agreement Section 2(1)(b) and section 7</b>	<p><b>Section 2(1)(b)</b> “arbitration agreement” means an agreement referred to in section 7;</p> <p><b>Section 7 – Arbitration agreement</b></p> <p>(1) In this Part, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.</p> <p>(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.</p> <p>(3) An arbitration agreement shall be in writing.</p> <p>(4) An arbitration agreement is in writing if it is contained in-</p> <ul style="list-style-type: none"> <li>(a) a document signed by the parties;</li> <li>(b) an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement; or</li> <li>(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.</li> </ul> <p>(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.</p>

No.	Abbreviations	Meaning
3.	<b>Arbitral Award Section 2(1)(c)</b>	“arbitral award” includes an interim award;
4.	<b>Arbitral Tribunal: Section 2(1)(d)</b>	“arbitral tribunal” means a sole arbitrator or a panel of arbitrators;
5.	<b>Court: Section 2(1)(e)</b>	<p>“Court” means-</p> <p>(i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;</p> <p>(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;</p>
6.	<b>Current Rate of Interest Explanation to Section 31(7)(b)</b>	Explanation. - The expression “current rate of interest” shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978 (14 of 1978) [see below]

## Abbreviations

No.	Abbreviations	Meaning
7.	<b>Current Rate of Interest Interest Act, 1978 Section 2(b)</b>	<p>“current rate of interest” means the highest of the maximum rates at which interest may be paid on different classes of deposits (other than those maintained in savings account or those maintained by charitable or religious institutions) by different classes of scheduled banks in accordance with the directions given or issued to banking companies generally by the Reserve Bank of India under the Banking Regulation Act, 1949 (10 of 1949).</p> <p>Explanation. — In this clause, “scheduled bank” means a bank, not being a co-operative bank, transacting any business authorised by the Banking Regulation Act, 1949 (10 of 1949)</p>
8.	<b>Foreign Award (under the New York Convention) Section 44</b>	<p>“foreign award” means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960—</p> <p>(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies (i.e. the <i>New York Convention</i>), and</p> <p>(b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.</p>
9.	<b>Foreign Award (under the Geneva Protocol and Geneva Convention) Section 53</b>	<p>“foreign award” means an arbitral award on differences relating to matters considered as commercial under the law in force in India made after the 28th day of July, 1924,—</p>

No.	Abbreviations	Meaning
		<p>(b) between persons of whom one is subject to the jurisdiction of some one of such Powers as the Central Government, being satisfied that reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be parties to the Convention set forth in the Third Schedule (i.e. the <i>Geneva Convention</i>), and of whom the other is subject to the jurisdiction of some other of the Powers aforesaid, and</p> <p>(c) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, may, by like notification, declare to be territories to which the said Convention applies (i.e. the <i>Geneva Convention</i>), and for the purposes of this Chapter an award shall not be deemed to be final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made.</p>
10.	<p><b>International Commercial Arbitration: Section 2(1)(f)</b></p>	<p>“international commercial arbitration” means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is—</p> <p>(i) an individual who is a national of, or habitually resident in, any country other than India; or</p> <p>(ii) a body corporate which is incorporated in any country other than India; or</p>

## Abbreviations

No.	Abbreviations	Meaning
		<p>(iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or                      (iv) the Government of a foreign country;</p>
11.	<p><b>Article 142 of the Constitution of India: Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc.:</b></p>	<p>(1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.</p> <p>(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.</p>
12.	<p><b>Lok Adalat</b></p>	<p>Lok Adalat, is loosely translated as ‘peoples’ court’. It is set up under the Legal Services Authority Act, 1987, and may be organised at such intervals and places and for exercising such jurisdiction and for such areas as deemed fit.</p> <p>The procedure is consensual – and is a form of ADR used in India and litigating parties may be referred by a court to the Lok Adalat where the court believe that there is some chance of settlement</p>

No.	Abbreviations	Meaning
		<p>Lok Adalat is mandated to act with utmost expedition to arrive at a compromise or settlement between the parties and shall be guided by the principles of justice, equity, fair play and other legal principles. A compromise or settlement recorded by the Lok Adalat is deemed to be a decree of a civil court. Failing settlement, the parties continue to litigate.</p>
13.	<p><b>Settlement through different modes Civil Procedure Alternative Dispute Resolution &amp; Mediation Rules, 2006 (of The Bombay High Court) Rule 4(a)(v)</b></p>	<p>The difference between the different modes of settlement as explained below:-</p> <p>-Settlement by ‘Arbitration’ means the process by which an arbitrator appointed by parties or by the Court, as the case may be, adjudicates the disputes between the parties to the suit and passes an award by the application of the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) in so far as they refer to arbitration.</p> <p>-Settlement by ‘Conciliation’ means the process by which a conciliator who is appointed by parties or by the Court, as the case may be, conciliates the disputes between the parties to the suit by the application of the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) in so far as they relate to conciliation and in particular, in exercise of his powers under section 67 and 72 of that Act, by making proposals for settlement of the dispute and by formulating or reformulating the terms of a possible settlement; and has a greater role than a mediator.</p>

## Abbreviations

No.	Abbreviations	Meaning
		<p>-Settlement by ‘Mediation’ means the process by which a mediator appointed by parties or by the Court, as the case may be, mediates the dispute between the parties to the suit by the application of the provisions of the Mediation Rules, 2006 in Part II, and in particular, by facilitating discussion between the parties directly or by communicating with each other through the mediator, by assisting parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, generating options in an attempt to solve the dispute and emphasizing that it is the parties own responsibility for making decisions which affect them.</p> <p>-Settlement in ‘Lok Adalat’ means settlement by Lok Adalat as contemplated by the Legal Services Authority Act, 1987.</p> <p>-“Judicial settlement” means a final settlement by way of compromise entered into before a suitable institution or person to which the Court has referred the dispute and which institution or person are deemed to be the Lok Adalats under the provisions of the Legal Service Authority Act, 1987 (39 of 1987) and where after such reference, the provisions of the said Act apply as if the dispute was referred to a Lok Adalat under the Provisions of that Act.</p>





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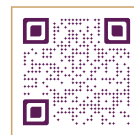
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