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India

INTERNATIONAL ARBITRATION

Contributor

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This country-specific Q&A provides an overview of international arbitration laws and regulations applicable in India.

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INDIA
INTERNATIONAL ARBITRATION

1. What legislation applies to arbitration in your country? Are there any mandatory laws?

The Arbitration and Conciliation Act, 1996 (**Arbitration Act**) which replaced the erstwhile Arbitration Act, 1940, Arbitration (Protocol and Convention) Act, 1937 and Foreign awards (Recognition and Enforcement) Act, 1961, governs domestic arbitration, international commercial arbitration and enforcement of domestic and foreign arbitral awards in India.

The Arbitration Act comprises of four parts. Part I is a complete code for arbitrations seated in India and governs, amongst others, the commencement of arbitration, composition and power of the arbitral tribunal, the conduct and termination of an arbitration, ingredients of an award, the grounds on which an award may be challenged and the enforcement of an award. Part II relates to the enforcement of foreign awards in India and provides the grounds on which enforcement of a foreign award may be resisted. Once the court is satisfied that a foreign award is enforceable, such foreign award is deemed to be a decree of the court and enforced as such. While Part I and Part II of the Arbitration Act are mutually exclusive, certain provisions of Part I, such as the provisions dealing with interim measures and court assistance in taking evidence, may also be applicable to arbitrations seated outside India provided that the parties do not have an agreement to the contrary.

While the Arbitration Act is based on the principle of party autonomy and parties can derogate from the non-mandatory provisions, certain provisions of the Arbitration Act are non-derogable. These include the provisions dealing with the form of the arbitration agreement, mandatory reference to arbitration by court, grounds relating to the independence and impartiality of arbitrators, time limit for making an award (other than in international commercial arbitrations), grounds for setting aside an award and for resisting enforcement of an award.

Many statutes such as the Electricity Act, 2003; the Indian Telegraph Act, 1885 and stock market byelaws provide for mandatory arbitration for resolving disputes pertaining to certain specific subject matters. The Micro, Small and Medium Enterprises (Development) Act, 2006 also prescribes mandatory reference of disputes to arbitration in case the parties fail to resolve their disputes through conciliation.

2. Is your country a signatory to the New York Convention? Are there any reservations to the general obligations of the Convention?

India is a signatory to the New York Convention. Chapter I of Part II of the Arbitration Act deals with enforcement of foreign awards passed under the New York Convention, with the following reservations:

a) The award must deal with disputes arising out of legal relationships which are considered as commercial under Indian law, whether contractual or not; and

b) The award must be made in the territory of another contracting State which has been notified as a reciprocating territory by India under Section 44 of the Arbitration Act.

Currently, the Government of India has notified about forty-nine (49) countries in the Official Gazette as reciprocating territories under Section 44 of the Arbitration Act. Some of the contracting States notified by India include: Australia, Canada, China (including Hong Kong and Macau), Germany, France, Italy, Japan, Republic of Korea, Singapore, Spain, Sweden, Switzerland, Netherlands, United Kingdom and United States of America.

3. What other arbitration-related treaties and conventions is your country a party to?

Apart from the New York Convention, India has given its assent to the Geneva Protocol on Arbitration Clauses,

1923 and ratified the Geneva Convention on the Execution of Foreign Arbitral Awards, 1923 (Geneva Convention).

Pursuant to the Indian Model BIT of 1993, India has also entered into bilateral investment treaties (BITs) with several states to promote and preserve foreign private investments. However, since the introduction of a revised Model BIT in 2015, India has terminated as many as 77 BITs which were negotiated under the Model BIT of 1993. The revised Model BIT names the Permanent Court of Arbitration (**PCA**) as the preferred institution for arbitration and the Secretary General of the PCA as the appointing authority for arbitrations under the BIT. The Ministry of External Affairs has executed an agreement with the PCA for establishing a legal framework for conducting arbitrations administered by PCA in India.

4. Is the law governing international arbitration in your country based on the UNCITRAL Model Law? Are there significant differences between the two?

The Indian legislature has modelled the Arbitration Act on the UNCITRAL Model Law on International Commercial Arbitration (**Model Law**). At the time of its enactment, most provisions in Part I of the Arbitration Act were sourced from the Model Law, with minor variations. However, since its enactment, the Arbitration Act has undergone significant amendments in 2015, 2019 and 2021 to ensure that the Indian arbitration regime is aligned with international best practices.

These amendments have resulted in a departure in some provisions of the Arbitration Act from the corresponding Articles of the Model Law. For instance, unlike Article 9 of the Model Law, a party can apply to the court for interim measures under Section 9 of the Arbitration Act not just before or during the arbitral proceedings but also after the making of the final award but before it is enforced. Similarly, while the Model Law encourages timely disposal of arbitrations in accordance with the agreement of parties, the Arbitration Act prescribes statutory time limits for the making of the final award. The Arbitration Act also has a provision dealing with the regime for costs, which is absent in the Model Law.

5. Are there any impending plans to reform the arbitration laws in your country?

As discussed in Q.4, in the last 7 years the Arbitration Act has undergone extensive changes through amendments. As on date, however, there is no new bill for amending the Arbitration Act pending consideration by the Indian Parliament. Having said that, the Government of India constituted an expert committee in June 2023 to examine the working of arbitration law in the country and recommend reforms to the Arbitration Act. The committee is yet to submit its final report.

6. What arbitral institutions (if any) exist in your country? When were their rules last amended? Are any amendments being considered?

India has a number of arbitral institutions which administer arbitrations in line with internationally recognized best practices and principles of arbitration. Some of the more prominent of these institutions are:

a) The Delhi International Arbitration Centre (**DIAC**) (http://dhcdiac.nic.in/), which was established in 2009, operates under the aegis of the High Court of Delhi and conducts arbitrations in accordance with the DIAC (Arbitration Proceedings) Rules, 2023 (**DIAC Rules**). The DIAC Rules recognise and specify the procedure for emergency arbitration if a party requires urgent interim relief which cannot await the formation of the arbitral tribunal, provide for fast-track procedure subject to an agreement between the parties, in addition to the requirement for concluding the arbitration in a timebound manner. The DIAC also maintains a comprehensive panel of experienced arbitrators which gets updated from time to time.

b) The Mumbai Centre for International Arbitration (**MCIA**) (www.mcia.org.in), which was set up in 2016. While the MCIA is headquartered in Mumbai, it has a dedicated secretariat, including in Bangalore and New Delhi, to facilitate the administration of arbitration. The MCIA conducts arbitrations in accordance with the MCIA Rules, 2016 (**MCIA Rules**). Similar to the DIAC Rules, the MCIA Rules provide an expedited procedure for arbitration. In case of exceptional urgency, the MCIA Rules provide a mechanism for emergency arbitration to cater to parties who wish to seek interim protective measures before the formation of the arbitral tribunal and facilitate expedited formation of the arbitral tribunal. The MCIA Rules also contain specific provisions for multi-party and multi-contract arbitrations to engender cost-effectiveness and efficiency in the conduct of arbitrations.

c) The Indian Council of Arbitration (**ICA**) (https://www.icaindia.co.in), which was set up as an autonomous body in 1965 pursuant to the recommendation of the Indian Ministry of Commerce. The ICA conducts arbitrations under the ICA Rules of Domestic Commercial Arbitration, 2021 and the Maritime

Arbitration Rules, 2016, both of which have undergone certain amendments in 2022 pursuant to the amendments to Schedule IV of the Arbitration Act.

There are other arbitration institutes such as the: (i) Gujarat Chambers of Commerce and Industry – Arbitration, Mediation, Conciliation and Alternate Dispute Resolution Centre (**GCCI – ADRC**), which is a part of the Gujarat Chambers of Commerce and Industry founded in 1949 and headquartered in Ahmedabad; (ii) International Arbitration and Mediation Centre, Hyderabad (**IAMC**) which was set up in 2022 and is headquartered in Hyderabad, Andhra Pradesh; (iii) Madras High Court Arbitration Centre, which was set up in 2015 and operates under the aegis of the Madras High Court; (iv) FICCI Arbitration and Conciliation Tribunal (FACT), which was established in 1952 and operates under the Federation of Indian Chambers of Commerce & Industry. In addition, the India International Arbitration Centre (**IIAC**) has been proposed to be set up under the India International Arbitration Centre Act, 2019. The IIAC will replace the International Centre for Alternate Dispute Resolution (**ICADR**) and will have a chamber of arbitration which will maintain a permanent panel of arbitrators.

International arbitral institutions also have a significant presence in India. For instance, the Singapore International Arbitration Centre (**SIAC**) has a liaison office in Mumbai since 2012 and the International Chamber of Commerce (**ICC**) has a dedicated India Arbitration Group.

7. Is there a specialist arbitration court in your country?

India has designated specialist courts to deal with arbitration matters arising from commercial disputes under the Commercial Courts Act, 2015 (**Commercial Courts Act**). Under Section 10 of the Commercial Courts Act, both at the subordinate/district level and superior /High Court level, Commercial Courts have been designated to exercise exclusive jurisdiction over arbitration matters, where the subject matter is a commercial dispute of a '*specified value*' (this value stands notified by the Central /State Governments and differs from State to State in India). The Commercial Appellate Divisions hear appeals from the orders of the Commercial Courts and endeavour to dispose of them within a period of 6 months.

Pursuant to the 2015 amendment to the Arbitration Act, in the case of international commercial arbitrations – whether seated in India or foreign seated, an application for interim measures under Section 9 of the Arbitration Act is made directly before the competent High Court. Sections 47 and 56 of the Arbitration Act have also been amended to exclusively vest the High Court with jurisdiction with respect to enforcement of a foreign award under Part II of the Arbitration Act. The primary objective behind these amendments is to ensure that cross-border disputes are dealt with expeditiously and do not suffer from any unnecessary delays which may be likely in subordinate courts with higher case burden and pendency.

8. What are the validity requirements for an arbitration agreement under the laws of your country?

Section 7 of the Arbitration Act sets out the substantive definition and the requirements of the form of an arbitration agreement. The legal threshold is that an arbitration agreement must be an agreement to submit to arbitration all or certain disputes which have arisen or which may arise in respect of a defined legal relationship, whether contractual or not. Section 7 also sets out the requirements of the form of an arbitration agreement. An arbitration agreement must be in writing, irrespective of whether it is a clause in a contract or in the form of a separate agreement, and must be contained in:

- a document signed by the parties; or
- an exchange of letters or other means of communication, electronic or otherwise, which provides a record of the agreement; or
- an exchange of statements of claim and defence in which the existence of the agreement is alleged by one of the parties and not denied by the other.

The reference in a contract to a document containing an arbitration clause also constitutes an arbitration agreement if the contract is in writing and the reference is such as to make the arbitration clause part of the contract.

Some of the notable judgments of the Supreme Court on the validity of an arbitration agreement are:

- *Centrotrade Minerals & Metals Inc vs. Hindustan Copper Ltd,* [(2017) 2 SCC 228], where the Supreme Court upheld the validity of a multi-tier arbitration clause.
- *Zhejiang Bonly Elevator Guide Rail Manufacture Company Limited vs. Jade Elevator Components,* [(2018) 9 SCC 774], where the Supreme Court upheld the petitioner's invocation of an arbitration

agreement which allowed the parties to either invoke arbitration or take recourse to litigation by filing appropriate proceedings before the concerned court.

- *Vidya Drolia & Ors vs. Durga Trading Corporation*, [(2021) 2 SCC 1], where the Supreme Court held that an arbitration agreement must satisfy the objective mandates of the law of contract, including the capacity of the parties to enter into a contract (age, soundness of mind, etc.), free consent, presence of lawful consideration and lawful object.
- *NN Global Mercantile Pvt. Ltd. vs. Indo Unique Flame Ltd.*, [(2023) SCC OnLine SC 495] (**NN Global**), where the five-judge bench of the Supreme Court, held that an arbitration agreement which is unstamped or insufficiently stamped cannot be acted upon until cured. The Indian Stamp Act, 1899 ("**Stamp Act**") requires payment of the prescribed stamp duty on all agreements before or at the time of execution. The Stamp Act renders an unstamped or an insufficiently stamped agreement as unenforceable and consequently cannot be acted upon unless the defect is removed by payment of full or deficient duty with a penalty as may be applicable. In light of these stipulations, NN Global held that an unstamped contract, which is eligible to stamp duty, and which contains an arbitration agreement, is not a contract enforceable in law. NN Global also held that a court when seized of an application under Section 11 of Arbitration Act for appointment of arbitrator(s) is dutybound to impound the unstamped contract in terms of the Stamp Act. The correctness of this judgement has been referred to a larger seven-judge bench of the Supreme Court. The decision of the larger bench is likely to give finality on the requirements of stamping of an arbitration agreement for satisfying the test of existence and validity of such an agreement.

9. Are arbitration clauses considered separable from the main contract?

Section 16 of the Arbitration Act recognizes the principle of separability of an arbitration clause from the main contract. As discussed in Q.8, an arbitration agreement may be in the form of an arbitration clause in the main agreement; or a stand-alone agreement; or even incorporated by reference to a document containing an arbitration clause. In line with this doctrine, Section 16(1)(a) provides that an arbitration clause forming part of a contract shall be independent of the other terms of the contract. The statute goes further to stipulate that a decision by the arbitral tribunal declaring the contract as null and void shall not entail ipso jure the invalidity of the arbitration clause. In other words, an arbitration agreement survives termination, breach and invalidity of the underlying contract between the parties.

10. Do the courts of your country apply a validation principle under which an arbitration agreement should be considered valid and enforceable if it would be so considered under at least one of the national laws potentially applicable to it?

Indian courts have not applied the validation principle in a case thus far.

11. Is there anything particular to note in your jurisdiction with regard to multi-party or multi-contract arbitration?

There are no express provisions in the Arbitration Act dealing with multi-party or multi-contract arbitration. Prior to the 2015 amendment to the Arbitration Act, in case of domestic and international commercial arbitrations seated in India, only a party or signatory to the arbitration agreement could apply to the court under Section 8 of the Arbitration Act to refer parties to arbitration. However, the phraseology "*any person claiming through or under him*" introduced in Section 8 of the Arbitration Act by the 2015 amendment expanded the scope of who can apply to court to initiate arbitration proceedings. Pursuant to this amendment even a non-signatory can apply to the court for referring the disputes to arbitration if such a third party is claiming through or under a party to the arbitration agreement and is a proper and necessary party giving due consideration to the reliefs claimed by or against such a party. Similar phraseology of "*any person claiming through or under him*" is also found in Section 45 of the Arbitration Act under Part II of the Arbitration Act dealing with foreign seated arbitrations. This phraseology has been held by the Supreme Court in the case of *Chloro Controls India Private Limited vs. Severn Trent Water Purification Inc. and Ors*, [(2013) 1 SCC 641], to mean and bring within its ambit multiple and multi-party agreements, albeit in exceptional cases.

In *Ameet Lal Chand Shah & Ors vs. Rishabh Enterprises & Anr, [(2018) 15 SCC 678]*, the Supreme Court referred

parties to a single arbitration on the basis that all the agreements were related and were entered in furtherance of a composite transaction even though all parties to the agreements may not be common or all agreements may not have an arbitration agreement. The rationale espoused in the *Ameet Lal Chand Shah was also used in the case of Duro Felguera, S.A. vs. Gangavaram Port Ltd, [(2017) 9 SCC 729]* to refer parties to a single arbitration notwithstanding different arbitration agreements.

Various arbitral institutions in India (such as the MCIA and DIAC) allow a consolidation mechanism for consolidating two or more arbitrations pending under their respective arbitration rules.

12. In what instances can third parties or non-signatories be bound by an arbitration agreement? Are there any recent court decisions on these issues?

While the Arbitration Act does not contain any provisions with regard to joinder of third parties or non-signatories, Indian courts have held that non-signatories or third parties can be bound by an arbitration agreement and be made parties to the arbitration proceedings if certain requirements are fulfilled.

As discussed in Q.11, the landmark judgment by the Supreme Court on joinder of non-signatories to an arbitration proceedings is *Chloro Controls India Pvt. Ltd. vs. Severn Trent Water Purification Inc. & Ors, [(2013) 1 SCC 641]* where it applied the 'Group of Companies' doctrine to join non-signatory affiliates or subsidiaries or parent concerns of a party to the arbitration agreement and held that such entities forming part of the same 'group' would be bound by the arbitration agreement, provided that there exists (i) direct relationship with the party signatory to the arbitration agreement; (ii) direct commonality of the subject matter; (iii) the agreement between the parties being a composite transaction; and (iv) parties, especially the non-signatories, engaging in conduct which demonstrates its consent to be bound by the arbitration agreement.

While the judgment in *Chloro Controls* was passed under Section 45 of the Arbitration Act (Power to refer parties to arbitration in Part II of the Arbitration Act relating to foreign seated arbitrations), the Supreme Court extended the applicability of the '*Group of Companies*' doctrine to Section 8 of the Arbitration Act (Power to refer parties to arbitration in Part I of the Arbitration Act relating to arbitrations seated in India) in the case of *Ameet Lal Chand Shah & Ors vs. Rishabh Enterprises & Anr, [(2018) 15 SCC 678]*. In the case of *Cheran Properties Ltd vs. Kasturi and Sons Ltd & Ors, [(2018) 16 SCC 413],* the Supreme Court applied the '*Group of Companies*' doctrine to enforce an award against a non-signatory.

Another important judgment in this regard is the Supreme Court's judgment in *Mahanagar Telecom Nigam Limited vs. Canara Bank & Ors, [(2020) 12 SCC 767]*, summarizing the principles applicable to the '*Group of Companies*' doctrine. The Supreme Court affirmed that the intention of parties to bind non-signatories needs to be inferred from the terms of the contract, the conduct of the parties and the correspondence exchanged.

Recently, the Supreme Court, in the case of *Cox and Kings Limited vs. SAP India Private Limited and Anr., [(2022) 8 SCC 1],* examined the scope of the '*Group of Companies*' doctrine, particularly with regard to party autonomy, and has referred the issue to a larger bench. The Cox and Kings judgment acknowledges the enlarged scope of the doctrine as expounded in judicial precedents is a departure from its application in some other common law jurisdictions and the need to reconcile a law rooted in party autonomy, with binding non-signatory third parties to arbitration. The decision by a larger bench of the Supreme Court on the applicability and validity of the doctrine will have a significant impact on the current arbitration landscape in India.

13. Are any types of dispute considered non-arbitrable? Has there been any evolution in this regard in recent years?

Section 2(3) of the Arbitration Act provides that Part I of the Arbitration Act shall not affect any other law in force by virtue of which "*certain disputes may not be submitted to arbitration*". In addition, an arbitral award may be set aside under Section 34(2) and the enforcement of an arbitral award may be refused under Section 48(2) of the Arbitration Act if the subject matter of the dispute is not capable of settlement by arbitration. Aside from these provisions, the Arbitration Act does not specifically exclude any category of disputes as being non-arbitrable.

The question of arbitrability of disputes was examined in the case of *Booz Allen and Hamilton Inc vs. SBI Home Finance Ltd. & Others, [(2011) 5 SCC 532]* and has evolved over the years through jurisprudence. In the case of *Booz Allen*, the Supreme Court held that every civil or commercial dispute, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of arbitral tribunals is excluded either expressly or by necessary

implication. The issue was further clarified in *Vidya Drolia and Ors vs. Durga Trading Corporation, [(2021) 2 SCC 1]* where the Supreme Court laid down the following test to ascertain whether a dispute is non-arbitrable:

- when the cause of action and subject matter of the dispute relates to actions in rem and do not pertain to subordinate rights in personam that arise from rights in rem.
- when the cause of action and subject matter of the dispute affects third party rights and have an erga omnes effect. Such disputes require centralized adjudication and mutual adjudication would not be appropriate and enforceable.
- when the cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State.
- when the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute.

Applying the above test, the following types of disputes have been held to be non-arbitrable:

- disputes relating to rights and liabilities which give rise to or arise out of criminal offences. In disputes involving fraud, however, mere allegations of fraud do not suffice to nullify the effect of an arbitration agreement and one of the following two conditions must be fulfilled:
- the arbitration agreement is void due to being induced, made or effected by fraud.
- the allegation is made against the State or its instrumentalities relating to arbitrary, fraudulent, or mala fide conduct which is against public interest.
- By harmoniously reading the jurisprudence where fraud is alleged, all cases of fraud are arbitrable with the exception of cases involving “serious allegations” [Avitel Post Studioz Limited & Ors vs. HSBC PI Holdings (Mauritius) Limited, (2021) 4 SCC 713].
- matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody, guardianship matters, insolvency and winding up matters, testamentary and succession related matters, matters pertaining to oppression and mismanagement in a company, eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction [Booz Allen and Hamilton Inc vs. SBI Home Finance Ltd. & Others, (2011) 5 SCC 532; N.N. Global Mercantile Private Limited vs. Indo Unique Flame Limited and Ors., (2021) 4 SCC 379].
- disputes arising out of a trust deed and the Indian Trusts Act, 1881 [Vimal Kishore Shah & Ors vs. Jayesh Dinesh Shah &Ors (2016) 8 SCC 788].
- anti-trust/ competition disputes [A. Ayyasamy vs. A. Paramasivam & Ors, (2016) 10 SCC 386; Union of India vs. Competition Commission of India, (2012) 128 DRJ 301].
- subject matters which are contractually excluded by parties[Emaar India Ltd. vs. Tarun Aggarwal Projects LLP & Anr., (2022) SCC OnLine SC 1328].

14. Are there any recent court decisions in your country concerning the choice of law applicable to an arbitration agreement where no such law has been specified by the Parties?

Courts in India follow a ‘seat centric’ approach to determine the choice of law applicable to an arbitration agreement where no such law has been specified by the parties and have consistently held that absent an express choice by the parties, the law of the seat of the arbitration would also be the law governing the arbitration agreement. In Reliance Industries Ltd. vs. Union of India, [(2014) 7 SCC 603], the Supreme Court affirmed its ruling in previous judgements that in the absence of an express choice of the parties, the law applicable to the filing of the award and setting aside i.e. the law of the seat would be applicable as the proper law of the arbitration agreement. This position has also been noted by a division bench of the Madras High Court in Archer Power Systems private limited vs. Kohli Ventures Limited Company and Ors., [2017 SCC OnLine Mad 36458].

In Bharat Aluminium Co. vs. Kaiser Aluminium Technical Services Inc., [(2012) 9 SCC 552], the Supreme Court accepted that the law of the seat where the parties had chosen to conduct the arbitration would also govern the agreement between the parties to submit their disputes to arbitration. Similarly, in Enercon (India) Ltd. & Ors vs. Enercon Gmbh. & Anr, [(2014) 5 SCC 1], the Supreme Court held that the agreement to arbitrate has the closest connection with the law of the seat of the arbitration.

In Government of India vs. Vedanta Ltd & Ors., [(2020) 10 SCC 1], the Supreme Court noted that the law governing the arbitration agreement must be determined separately from the law applicable to the substantive contract. The court further observed that the

choice of law applicable to an arbitration agreement would determine: (a) the validity and extent of the arbitration agreement; (b) limits of party autonomy; and (c) the jurisdiction of the arbitral tribunal, etc.

15. How is the law applicable to the substance determined? Is there a specific set of choice of law rules in your country?

Section 28 of the Arbitration Act governs the law applicable to the substance of the dispute. In international commercial arbitrations, the Arbitration Act extends full autonomy to the parties to determine the law applicable to the substance of the dispute. The substantive law agreed between parties would determine the rights and obligations of the parties to the contract. If the parties fail to designate the substantive law, the arbitral tribunal has the power to apply the rules of law it considers appropriate after considering the circumstances surrounding the dispute.

In arbitrations other than international commercial arbitrations i.e. domestic arbitrations, the substantive law in force in India shall be the law governing the substance of the dispute.

16. In your country, are there any restrictions in the appointment of arbitrators?

The Arbitration Act accords freedom to the parties to determine the procedure and number of arbitrators. The parties are free to determine the number of arbitrators under Section 10, provided that such number is not an even number.

Interestingly, the Supreme Court, in the only decision of its kind, in Narayan Prasad Lohia vs. Nikunj Kumar Lohia & Ors., [(2002) 3 SCC 572] has held that Section 10 of the Arbitration Act is a derogable provision and the parties are even free to appoint an even number of arbitrators. The court noted that under Section 11(3), the two arbitrators are free to appoint a third arbitrator who shall act as the presiding arbitrator. Such an appointment could be made at the beginning but can also be made at a later stage, if and when the two arbitrators differ. This would ensure that on a difference of opinion, the arbitration proceedings are not frustrated. If the two arbitrators agree and give a common award, there is no frustration of the proceedings. In such a case their common opinion would have prevailed, even if the third arbitrator, presuming there was one, had differed.

The parties are free to agree on a procedure for appointing the arbitrator or arbitrators under Section 11 of the Arbitration Act and to appoint a person of any nationality as an arbitrator, except in case of an agreement to the contrary.

In recent years, the issue of unilateral appointment of a sole arbitrator has been the subject of much debate in the Indian jurisprudence. The Supreme Court, in the case of Perkins Eastman Architects Dpc & Anr vs. HSCC India Limited, [(2020) 20 SCC 760], while reaffirming the principle laid down in TRF Limited vs. Energo Engineering Projects Limited, [(2017) 8 SCC 377] reasoned that any person with a partisan interest in the outcome or decision of the dispute must not have the absolute authority of appointing a sole arbitrator as the presence of such interest can lead to the possibility of bias. Similarly, in Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. vs. Ajay Sales & Suppliers, [2021 SCC OnLine SC 730], the Supreme Court has emphasised that independence and impartiality of an arbitrator is the hallmark of an arbitration and ruled that the chairman of one of the contesting companies would be ineligible to act an arbitrator under the Arbitration Act, since he cannot be expected to remain impartial.

However, in Central Organization for Railway Electrification vs. M/s. ECI-SPIC-SMO-MCML (JV), [(2020) 14 SCC 712], the Supreme Court, in a departure from the principle upheld in Perkins Eastman (supra) and Bharat Broadband Network Ltd. vs. United Telecoms Ltd., [(2019) 5 SCC 755], upheld the validity of an arbitration clause allowing one of the parties to nominate a panel of four arbitrators and to appoint the third and presiding arbitrator. In view of the dichotomy in the two positions, the Supreme Court has referred this issue to a larger bench in the case of Union of India vs. Tantia Constructions Limited, [2021 SCC OnLine SC 271].

17. Are there any default requirements as to the selection of a tribunal?

Under Section 10(2) of the Arbitration Act, failing parties' determination on the number of arbitrators, the arbitral tribunal will consist of a sole arbitrator. Absent an agreement between the parties on the procedure for appointing the arbitrator or arbitrators, in an arbitration with three arbitrators, each party will appoint one arbitrator and the two party nominated arbitrators will then appoint a third arbitrator to act as the presiding arbitrator. If a party fails to nominate an arbitrator and/or the two nominee arbitrators fail to appoint the presiding arbitrator within the prescribed time, a party can apply to the Supreme Court or the relevant High Court seeking appointment of the arbitrator under Section 11(3) of the Arbitration Act. Likewise, if parties

fail to appoint a sole arbitrator within the time stipulated under the Arbitration Act, then the appropriate court can make such an appointment on an application made by a party under Section 11(6) of the Arbitration Act.

18. Can the local courts intervene in the selection of arbitrators? If so, how?

Indian courts are vested with the power to intervene and pass necessary orders for appointment of arbitrators under Section 11 of the Arbitration Act if the parties fail to agree on the arbitrators within the statutorily prescribed timelines or having agreed to a procedure, fail to act in accordance with such procedure.

The 2015 amendment to the Arbitration Act restricted the scope of inquiry by the Supreme Court or the High Court (where applicable) at the stage of appointment of an arbitrator to examine only the existence of an arbitration agreement. However, in the case of Vidya Drolia and Ors. vs. Durga Trading Corporation, [(2021) 2 SCC 1], the Supreme Court examined whether the word 'existence' in Section 11 merely refers to contract formation and excludes the question of enforcement or validity and whether the question of validity of the arbitration agreement is ousted at the stage of referral. The Supreme Court held that the existence and validity of the arbitration agreement are intertwined, and that existence of an arbitration agreement presupposes a valid agreement capable of being enforced. On this basis, the Supreme Court read in the mandate of a valid arbitration agreement into the mandate of Section 11 and brought the level of scrutiny under Section 11 of the Arbitration Act at par with that under Section 8.

The 2019 amendment to Section 11 of the Arbitration Act has enabled the Supreme Court and the High Court to designate arbitral institutions accredited by the Arbitration Council of India with the power to appoint arbitrators. However, this amendment has not been notified and is yet to come into force. As on date, the Supreme Court and the High Court (where applicable) continue to exercise powers under Section 11 of the Arbitration Act to appoint arbitrators.

Indian courts may also intervene in the selection of the arbitrators if the mandate of an arbitrator is terminated in accordance with the provisions of the Arbitration Act owing to the de jure or de facto inability of the arbitrator to continue with its mandate. In such a case, the court is empowered to appoint a substitute arbitrator according to the rules that were applicable to the appointment of the arbitrator being replaced. These issues are discussed in some depth in the following questions.

19. Can the appointment of an arbitrator be challenged? What are the grounds for such challenge? What is the procedure for such challenge?

Before appointment, it is mandatory for an arbitrator to make a disclosure under Section 12(1) of the Arbitration Act, relating to any circumstances which may give rise to justifiable doubts as to his/her impartiality or independence and inability to devote sufficient time to the arbitration. Such disclosure is required to be made in the form specified in the Sixth Schedule to the Arbitration Act. Failure to make such disclosure may result in serious consequences for the arbitrator, including termination of the mandate.

Appointment of an arbitrator can be challenged under Section 12(3) of the Arbitration Act, only if:

- circumstances exist that give rise to justifiable doubts as to his/her independence or impartiality; or
- he/she does not possess the qualifications agreed to by the parties.

A party can challenge an arbitrator appointed by him under Section 12(4) of the Arbitration Act albeit only for reasons which it becomes aware of after such appointment.

The legislature introduced a new Fifth Schedule and Seventh Schedule by way of the 2015 amendment to the Arbitration Act. The Fifth and the Seventh Schedules are based on the 'Red and Orange lists' provided in the IBA Guidelines on Conflict of Interest in International Arbitration (**IBA Conflict Guidelines**). The grounds enlisted in the Fifth Schedule guide in determining the existence of circumstances giving rise to justifiable doubts as to independence and impartiality. In contrast, the categories specified in the Seventh Schedule make a person ineligible from being appointed as an arbitrator, unless the parties waive such objection subsequent to the disputes having arisen.

The procedure for challenging the appointment of an arbitrator is stipulated in Section 13 of the Arbitration Act, which states:

- failing an agreement on a procedure for challenging an arbitrator, a party intending to challenge an arbitrator is required to, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances which give rise to justifiable doubts as to the independence or impartiality of an arbitrator,

send a written statement to the arbitral tribunal containing the reasons for the challenge to the arbitrator.
- unless the arbitrator challenged withdraws from his office or the other party agrees to the challenge, the arbitral tribunal will decide the challenge.
- should the tribunal dismiss the challenge, the party can challenge the arbitral award passed by such a tribunal under Section 34 of the Arbitration Act.
- if the challenge is unsuccessful, the arbitral tribunal will continue the arbitral proceedings and make an award.
- only once an award has been made, can the party challenging the arbitrator seek setting aside of such an award on the grounds prescribed under Section 34 of the Arbitration Act.

In HRD Corporation vs. GAIL (India) Ltd., [(2018) 12 SCC 471], the Supreme Court held that there is a dichotomy between persons who become "ineligible" to be appointed as arbitrators under the Seventh Schedule, and persons about whom justifiable doubts exist as to their independence or impartiality under the Fifth Schedule. If the arbitrator falls in a category specified in the Seventh Schedule, he becomes "ineligible" to act as arbitrator and de jure unable to perform his functions under Section 14(1) of the Arbitration Act. A party may file an application before the court to decide on the termination of an arbitrator's mandate on this ground under Section 14(2) and it is not necessary to go to the arbitral tribunal under Section 13 of the Arbitration Act to determine whether an arbitrator is de jure unable to perform his functions. In contrast, in a challenge giving rise to justifiable doubts as to the arbitrator's independence or impartiality, has to be determined as per the facts of the particular challenge by the arbitral tribunal under Section 13 of the Arbitration Act.

20. Have there been any recent developments concerning the duty of independence and impartiality of the arbitrators

The Supreme Court, in Perkins Eastman Architects DPC & Anr. vs. HSCC (India) Ltd. [(2020) 20 SCC 760], held that notwithstanding the procedure of appointment of arbitrator(s) agreed by parties, a person who is ineligible to act as an arbitrator on account of having an interest in the outcome of the dispute, is also disqualified to appoint an arbitrator or act as an appointing authority of the arbitral tribunal.

Subsequently, the Bombay High Court, in Lite Bite Food Pvt. Ltd. vs. Airports Authority of India, [2019 SCC OnLine Bom 5163], relied on Perkins Eastman and held that the unilateral appointment of a sole arbitrator by a party is invalid and also proceeded to invalidate the Airport Authority of India's offer to appoint arbitrators from a panel, on the ground that the panel was a tailored one and not broad enough to give freedom of choice to the opposite party.

Qua Section 12(1) of the Arbitration Act contains a statutory mandate to an arbitrator to disclose, in writing, any circumstances, direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, which is likely to give rise to justifiable doubts as to his independence or impartiality. Such grounds have also been lucidly enlisted in the Arbitration Act in the form of the Fifth Schedule and the Seventh Schedule. Under Section 12(2) of the Arbitration Act, an arbitrator is also duty bound to disclose any of the foregoing circumstances which may arise after the time of his appointment and throughout the arbitral proceedings. Indian courts have not held Sections 12(1) and/or 12(2) of the Arbitration Act to be derogable.

The Supreme Court in various judgments, such as HRD Corporation vs. GAIL (India) Ltd., [(2018) 12 SCC 471], has held that an arbitrator must disclose the grounds and circumstances which give rise to "justifiable doubts" regarding his independence and impartiality. If a party wants to challenge an appointment on the ground of the arbitrator's impartiality and independence, it can pursue this challenge under Sections 12 and 13 of the Arbitration Act. Similar observations have also been made by the Supreme Court in the case of Bharat Broadband Network Ltd. vs. United Telecoms Ltd., [(2019) 5 SCC 755].

21. What happens in the case of a truncated tribunal? Is the tribunal able to continue with the proceedings?

The mandate of an arbitrator is terminated under Section 14 of the Arbitration Act if he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and he withdraws from his office or by the mutual agreement of the parties.

When the mandate of an arbitrator terminates, Section 15(2) of the Arbitration Act requires a substitute arbitrator to be appointed in accordance with the rules applicable for appointment of the arbitrator being replaced. Unless the parties agree otherwise, Section

15(3) of the Arbitration Act permits the reconstituted arbitral tribunal, at its discretion, to repeat any hearings which were previously held. Further, under Section 15(4), an order or ruling made prior to the replacement of an arbitrator shall not become invalid merely on account of a change in the composition of the arbitral tribunal.

Similar provisions are also found in the rules of some of the prominent institutions. For instance, Rule 11 of the MCIA Rules provides for replacement of arbitrators. Similarly, Rules 10 and 11 of the DIAC Rules entail provisions for challenging the appointment of arbitrators and termination of the mandate of arbitrators.

The Supreme Court has held that independence and impartiality are the hallmarks of an arbitration. In this context, the recent developments concerning the duly and impartiality of arbitrators has been discussed in some depth in Qs.17, 20 and 21.

22. Are arbitrators immune from liability?

Immunity of arbitrators is a well-accepted principle internationally. The 2019 amendment to the Arbitration Act introduced Section 42B, which provides arbitrators with immunity from any suit or legal proceeding which may be initiated against them in respect of any action taken or intended to be taken in good faith. Prior to 2019, the Arbitration Act did not contain any express provision concerning immunity of arbitrators.

23. Is the principle of competence-competence recognized in your country?

Section 16(1) of the Arbitration Act embodies the statutory recognition of the principle of kompetenz-kompetenz, which empowers arbitrators to rule on their jurisdiction and determine jurisdictional issues, including ruling on any objection concerning the existence or validity of the arbitration agreement. The principle of kompetenz-kompetenz has been upheld by the Supreme Court in a plethora of judgments, including in SBP & Co vs. Patel Engineering Ltd. & Anr, [(2005) 8 SCC 618]; Duro Felguera SA vs. Gangavaram Port Ltd., [(2017) 9 SCC 729]; Sanjiv Prakash vs. Seema Kukreja, [(2021) 9 SCC 732] and State of West Bengal vs. Sarkar & Sarkar, [(2018) 12 SCC 736].

In SBP & Co., the Supreme Court clarified that an arbitral tribunal is only entitled to rule on its own jurisdiction if the arbitration has been initiated by the parties without any assistance from the courts. If the dispute has been referred to arbitration by a court under Section 8 of the Arbitration Act or the tribunal has been appointed under Section 11 of the Arbitration Act, the arbitral tribunal retains no discretion to rule on its jurisdiction thereafter.

In a recent decision in Surendra Kumar Singhal & Ors vs. Arun Kumar Bhalotia & Ors, [2021 SCC OnLine Del 3708], the High Court of Delhi has proposed certain guiding factors to be borne in mind while considering objections under Section 16:

- if the issue of jurisdiction can be decided on the basis of admitted documents on record, the tribunal ought to proceed to hear the matter/objections under Section 16 of the Arbitration Act at the inception itself.
- if the tribunal is of the opinion that the objections under Section 16 of the Arbitration Act cannot be decided at the inception and would require further enquiry into the matter, the tribunal could consider framing a preliminary issue and deciding the same as soon as possible.
- if the tribunal is of the opinion that objections under Section 16 would require evidence to be led, the tribunal could direct limited evidence to be led on the said issue and adjudicate the same.
- if the tribunal is of the opinion that detailed evidence needs to be led both written and oral, then after the evidence is concluded, the objections under Section 16 would have to be adjudicated first before passing of the award.

NN Global is a significant judgment in the context of the principle of kompetenz-kompetenz. In the past, courts appointed the arbitral tribunal on the existence of the arbitration agreement whereas the tribunal once appointed could rule on other threshold objections such as the validity of the arbitration agreement in alignment with the principle of kompetenz-kompetenz embodied in Section 16(1) of the Arbitration Act. This was the position adopted even if the contract, which contained the arbitration agreement, was unstamped or insufficiently stamped. However, NN Global now precludes any reference to arbitration or appointment of arbitral tribunal, unless the contract and the arbitration agreement contained in such contract are sufficiently stamped. As mentioned in Q.8, NN Global has been referred to a larger bench of 7 judges to rule on the correctness of the judgement.

Under Section 37(2), an appeal lies against an order of the arbitral tribunal accepting objection(s) to its jurisdiction raised under Section 16 of the Arbitration Act. However, there is no provision for an appeal against an order by the tribunal rejecting jurisdictional objections. In such a case, the aggrieved party must

await the final award and thereafter challenge the award under Section 34 of the Arbitration Act.

24. What is the approach of local courts towards a party commencing litigation in apparent breach of an arbitration agreement?

If a party commences litigation in apparent breach of an arbitration agreement, the aggrieved party can file an application under the Arbitration Act for reference of the disputes to arbitration. Such an application may be made either under Section 8 of the Arbitration Act where disputes arise concerning arbitration agreements under Part I of the Arbitration Act or under Section 45, which applies to foreign seated arbitrations governed by Part II of the Arbitration Act.

An application under Section 8 must be made no later than the date of submitting the first statement on the substance of the dispute and must be accompanied by a duly certified or original copy of the arbitration agreement. Judgments passed by the Supreme Court in Rashtriya Ispat Nigam Ltd. & Anr vs. Verma Transport Co., [(2006) 7 SCC 275] and Booz Allen and Hamilton Inc vs. SBI Home Finance Ltd. & Others, [(2011) 5 SCC 532] hold that the scope of inquiry in the context of the expression "first statement on the substance of the dispute" must be to ascertain whether and applicant has waived his right to seek reference to arbitration or acquiesced to the jurisdiction of the court. The High Court of Delhi in Parasramka Holdings Private Limited vs. Ambience Private Limited & Anr, [2018 SCC OnLine Del 6573] reasoned that the aggrieved party is not required to file a formal application seeking a specific prayer for reference, as long as he raises an objection in writing on the maintainability of the proceedings before the judicial authority in light of the arbitration clause.

In contrast, the phraseology of Section 45 of the Arbitration Act uses the term "request" and not "application" suggesting that the aggrieved party need only make a request for reference of the disputes to arbitration. In World Sport Group (Mauritius) Limited vs. MSM Satellite (Singapore) PTE Ltd, [(2014) 11 SCC 639], the Supreme Court held that a formal application is not necessary under Section 45 and a request, even though an affidavit, will require the court to refer the matter to arbitration subject to satisfaction of the prima facie test laid down in the section.

While both Sections 8 and 45 of the Arbitration Act pertain to the court's power to refer disputes to arbitration, they vary in some key respects. The principal distinction is that Section 8 is couched in peremptory terms and a judicial authority is bound to refer disputes to arbitration, subject to satisfying itself of the prima facie test of existence and validity of the arbitration agreement. Section 45 of the Arbitration Act, on the other hand, grants the court the power to refuse a reference to arbitration if it finds that the arbitration agreement is null and void, inoperative or incapable of being performed, which examination is also to be done prima facie as held in the case of Shin Etsu Chemical Co. Limited vs. Aksh Optifiber Ltd & Anr, [(2005) 7 SCC 234]. Moreover, Sections 8 and 45 operate in different realms. While Section 8 of the Arbitration Act applies in arbitrations with their seat in India, Section 45 becomes operative in case of foreign seated arbitrations.

Both sections, however, use the expression "person claiming through or under", thereby permitting non signatory parties to be referred to arbitration. This issue has been discussed in some detail in Qs. 30 and 31.

The courts generally adopt a pro-arbitration approach in dealing with an application/request under Sections 8 and 45 of the Arbitration Act, more so in view of the legislative mandate to restrict judicial review to extremely limited circumstances where the respondent is able to ex facie portray non-existence of a valid arbitration agreement or where the arbitration agreement is null and void, inoperative or incapable of being performed.

25. What happens when a respondent fails to participate in the arbitration? Can the local courts compel participation?

As discussed in Q.19, if a respondent fails to appoint its nominee arbitrator or agree to a sole arbitrator, the aggrieved party can seek redressal before the appropriate court of competent jurisdiction for appointment of an arbitrator under Section 11 of the Arbitration Act.

After commencement of the arbitration, if a respondent fails to file its statement of defence within the time prescribed by the arbitral tribunal, the arbitral tribunal is empowered under Section 25(b) of the Arbitration Act to continue the proceedings without treating the failure in itself as an admission of the allegations by the claimant and has the discretion to treat the right of the respondent to file such statement of defence as having been forfeited. If the respondent fails to appear at an oral hearing or to produce documentary evidence, under Section 25(c) of the Arbitration Act, the arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it. Such an award would be considered in accordance with the principles of

natural justice, subject to the grant of sufficient opportunities by the arbitral tribunal to the respondent.

Further, the arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the court for assistance in taking evidence. The court may execute such a request by ordering that the evidence be produced directly before the arbitral tribunal and issue the same processes to witnesses as it may issue in suits, such as issuing summons/commissions or appointing commissioners, to compel the appearance of a witness. The Bombay High Court, in Stemcor (S.E.A.) Pte Limited and Anr. Vs. Mideast Integrated Steels Ltd., [2018 SCC OnLine Bom 1179], directed a foreign witness to be examined in Singapore, observing that the party was at liberty to approach the appropriate court in Singapore for appointment of a commissioner and ultimately, appointed a commissioner for recording such evidence. Courts are also empowered to impose a fine or punishment upon the defaulting party in case of failure to appear or produce evidence.

The non-participation by a respondent may also be a relevant factor for determining costs under Section 31A of the Arbitration Act since the court or arbitral tribunal is empowered to take into account all circumstances in determining costs, including the conduct of the parties.

26. Can third parties voluntarily join arbitration proceedings? If all parties agree to the intervention, is the tribunal bound by this agreement? If all parties do not agree to the intervention, can the tribunal allow for it?

Prior to the 2015 amendment to the Arbitration Act, there were instances where attempts by third parties to voluntarily join arbitration proceedings were denied. Courts denied voluntary intervention by third parties on the reasoning that the third party in question was not a signatory to the arbitration agreement.

In Reliable Finance Corporation Pvt. Ltd. vs. Shri Ajoy Pal Singh and Ors., [1987 SCC OnLine Del 271], the High Court of Delhi dismissed an impleadment application made by a third party since the applicant was not a party to the agreement and was not claiming any right arising out of the agreement. Similarly, in Indusind Bank Ltd. vs. National Highways Authority of India & Anr., [(2010) 166 DLT 354], a party who was voluntarily seeking to participate in the arbitration as it owned the property in dispute, was not allowed to be impleaded in the arbitration as it was not a party to the arbitration agreement.

This position has changed since the 2015 amendment to the Arbitration Act, which introduced the expression “or any person claiming through or under him” in Section 8. Similarly, the amended Section 45 provides parties shall be referred to arbitration at the request of one of the party or any person claiming through or under him.

In Mahanagar Telephone Nigam Ltd. vs. Canara Bank & Ors,. [(2020) 12 SCC 767], the Supreme Court recognized that a non-signatory can be bound by an arbitration agreement on the basis of the ‘Group of Companies’ doctrine, where the conduct of the parties evidences a clear intention of the parties to bind both the signatory as well as the non-signatory parties. This judgment notes that both, courts and arbitral tribunals are empowered to join a non-signatory member of the group, if they are satisfied that the non-signatory company was by reference to the common intention of the parties, a necessary party to the contract. In light of the judicial precedents and the 2015 amendment, a party seeking to voluntarily join an arbitration may be arraigned to an arbitration either through or under a signatory to the arbitration agreement or by virtue of the theory of implied consent or the ‘Group of Companies’ doctrine, amongst others. As discussed in Q.12, the application of the ‘Group of Companies’ is pending review with a larger bench of the Supreme Court.

If all parties are agreeable to the voluntary intervention by the third party, an arbitral tribunal is likely to allow such intervention subject to recording the consent of all parties concerned, including the non-signatory party, since an arbitral tribunal derives its jurisdiction to adjudicate disputes from the consent of parties.

27. What interim measures are available? Will local courts issue interim measures pending the constitution of the tribunal?

Section 9 of the Arbitration Act empowers courts to grant interim reliefs in aid of arbitration. The object of Section 9 of the Arbitration Act is to ensure protection of the property which is the subject matter of arbitration and to ensure that the arbitration proceedings do not become infructuous, and the final award does not become a paper award, of no real value. A party can approach a court under Section 9 of the Arbitration for:

- appointment of a guardian for a minor/person of unsound mind for participating in arbitral proceedings.
- an order for: (i) preservation, interim custody/sale of goods which are the subject matter of arbitration; (ii) securing the amount in dispute in the arbitration; (iii) detention,

preservation, inspection of property forming the subject matter of arbitration; (iv) authorizing any person to enter any land/building in possession of a party, authorizing sample collection, making an observation, conducting an experiment which may be necessary for obtaining full information or evidence; (v) interim injunction or appointment of a receiver; and (vi) an interim measure of protection as may appear to the court to be just and convenient.

While examining whether interim reliefs may be granted in favour of a party under Section 9 of the Arbitration Act, the court applies the three-prong test, namely existence of a prima facie case, balance of convenience in favour of the applicant and irreparable loss to have arisen in the absence of interim relief.

Unlike the Model Law, Section 9 of the Arbitration Act provides for interim measures of protection not just prior to the commencement of the arbitral proceedings and during the arbitral proceedings but also post issuance of final award (but prior to its enforcement). However, if a party moves the court seeking interim measures of protection under Section 9 subsequent to the constitution of the arbitral tribunal, it is required to satisfy the court under Section 9(3) of the Arbitration Act that the nature of the reliefs sought is such which cannot be granted by the arbitral tribunal or that circumstances exist which may render the remedy of seeking interim measures from the arbitral tribunal inefficacious.

The court has expansive powers under Section 9 of the Arbitration Act to grant interim measures of protection as may appear to be just and convenient. Given its scope, Section 9 is the most sought-after remedy under the Arbitration Act.

28. Are anti-suit and/or anti-arbitration injunctions available and enforceable in your country?

Indian courts have the power to issue anti-suit and anti-arbitration injunctions, although in exceptional cases. The Supreme Court, in its judgment in Modi Entertainment Network & Anr vs. WSG Cricket Pte Ltd., [(2003) 4 SCC 341,] examined the question of whether a court of natural jurisdiction can grant an anti-suit injunction against a party restraining him from instituting and/or prosecuting a suit, between the same parties, if instituted, in a foreign court of choice of the parties.

While laying down the principles for granting anti-suit injunctions, the court noted that such an injunction could be passed only if the defendant is amenable to the personal jurisdiction of the court and in cases where the ends of justice will be defeated if the injunction isn't granted, due regard being given to the principle of comity.

The court also observed that in a case involving more forums than one, the court will consider the forum which is convenient to the parties and grant an anti-suit injunction for proceedings which will be oppressive/vexatious in an inconvenient forum. Where jurisdiction is invoked based on a jurisdiction clause in a contract, the recitals in regard to exclusive or non-exclusive jurisdiction of the court of choice of the parties will not be determinative but are relevant factors and the court will decide the nature of jurisdiction agreed to between the parties on a true interpretation of the contract in the facts and in the circumstances of each case. In cases where parties have agreed to submit to the exclusive jurisdiction of a court (including a foreign court), a court of natural jurisdiction will ordinarily not grant an anti-suit injunction, save in exceptional cases for a good reason. The court also held that if parties under a non-exclusive jurisdiction clause have agreed to approach a neutral forum, an anti-suit injunction will not ordinarily be granted against proceedings before such a forum; nor will a court grant an anti-suit injunction where granting such injunction would amount to aiding breach of the contract.

In a recent case, the High Court of Delhi observed that the mere possibility of conflicting orders being passed in different sovereign states cannot be a ground for passing an anti-suit injunction, and on this basis refused to enforce an anti-suit injunction passed by a court in Wuhan, China, in Interdigital Technology Corporation & Ors vs. Xiaomi Corporation & Ors [2021 SCC OnLine Del 2424]. The court examined the enforceability of an anti-suit injunction directing Interdigital Technology to withdraw or suspend any application or suit filed in respect of its claim of infringement of the intellectual property by the opposing party and reasoned that it was impermissible for a court in a sovereign state to injunct the party before it from pursuing its cause against infringement of its intellectual property before another sovereign jurisdiction, particularly when such jurisdiction is the only forum competent to adjudicate the claim of infringement.

Similarly, while the courts have the power to grant anti-arbitration injunctions, in view of the limitation of judicial intervention prescribed in Section 5 of the Arbitration Act and the principle of kompetenz-kompetenz enshrined in Section 16 of the Arbitration Act, the exercise of such powers has been confined to exceptional cases. The principles governing anti-arbitration injunctions are not

the same as those applicable to anti-suit injunctions in view of party autonomy, amongst others. In decisions involving foreign seated arbitrations, such as World Sport Group (Mauritius) Limited vs. MSM Satellite (Singapore) PTE Ltd, [(2014) 11 SCC 639], McDonald's India Private Limited vs. Vikram Bakshi and Ors., [2016 SCC OnLine Del 3949] and The Board of Trustees of the Port of Kolkata vs. Louis Dreyfus Armatures SAS & Ors, [2014 SCC OnLine Cal 17695], the courts have held that unless a party seeking an anti-arbitration injunction can demonstrably show that the arbitration agreement is null and void, inoperative or incapable of being performed under Section 45 of the Arbitration Act, an anti-arbitration injunction cannot be granted. The High Court of Delhi, in Dr.Bina Modi vs. Lalit Kumar Modi & Ors, [2020 SCC OnLine Del 1678], has held that courts can restrain arbitration proceedings if there is an express bar on the arbitrability of the subject matter of dispute. A challenge to the said judgment is, however, pending before the Supreme Court.

In summary, the power to grant anti-arbitration injunctions is exercised sparingly and only when the arbitration agreement between parties does not meet the standard under Sections 8 and 45 of the Arbitration Act for being referred to arbitration.

As regards the enforceability of an anti-suit injunction or an anti-arbitration injunction passed by a foreign court, the same will be subject to Sections 13 and 44A of the CPC. If the judgment is from a reciprocating territory, notified as such by the Central Government of India in the official gazette, it will be directly executable as if it were a decree passed by a domestic court. A judgment or order by a foreign court in a non-reciprocating territory may, however, be enforced by filing a suit before the competent court in India based on the foreign decree or on the original cause of action or both.

Recently, the Bombay High Court in Anupam Mittal v People Interactive (India) Pvt. Ltd. and Ors, [IA No. 1010 of 2021 in Suit No. 95 of 2021], granted an interim stay on the enforcement of an anti-suit injunction order passed by the High Court of Singapore, observing that if an injunction passed by a foreign court is contrary or in derogation of the public policy of India, the enforcement of the injunction can be resisted in light of the principle of comity of courts.

29. Are there particular rules governing evidentiary matters in arbitration? Will the local courts in your jurisdiction play any role in the obtaining of evidence? Can local courts compel witnesses to participate in arbitration proceedings?

There are no particular rules governing evidentiary matters in arbitration. Section 19 of the Arbitration Act specifies that an arbitral tribunal will not be bound by the Indian Evidence Act, 1872 (**Evidence Act**) and allows parties the freedom to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

In case the parties fail to agree on a procedure, the tribunal is empowered to conduct proceedings in the manner it considers appropriate. The power to conduct proceedings in this manner includes the power to determine the admissibility, relevance, materiality, and weight of any evidence and exercise the discretion to decide whether to hold oral hearings for the presentation of evidence, unless otherwise agreed by the parties.

A party can approach courts in India for obtaining evidence under Section 27 of the Arbitration Act. Under this section, the arbitral tribunal, or a party with the permission of the tribunal, can apply to the court for assistance in taking evidence. The court can issue summons and commissions to examine a particular witness and also issue summons for the production of any document(s). In case a person fails to act as per such summons/commissions, they will be liable to incur the same disadvantages, penalties and punishments as may incur for like offences before the court.

Under Section 31 read with Order XVI of the CPC, Indian courts have the power to compel domestic witnesses to give evidence in a suit by issuing summons to such witnesses. By virtue of Sections 27(3) and (4) of the Arbitration Act, the power of an Indian court to issue such summons extends to arbitration proceedings as well and an Indian court can order that the evidence be provided directly to the arbitral tribunal.

As far as foreign witnesses are concerned, under Section 77 read with Order XXVI of the CPC, Indian courts can, upon being satisfied that the evidence of such person is necessary, issue a letter of request or commissions to a foreign court to examine such a witness in a suit before it. In light of Sections 27(3) and (4) of the Arbitration Act, the power of an Indian court to issue such a letter of request or commissions extends to arbitration proceedings as well and an Indian Court can order that the evidence be provided directly to the arbitral tribunal. The Bombay High Court, in Stemcor (S.E.A.) Pte Limited and Ors vs. Mideast Integrated Steels Ltd., [2018 SCC OnLine Bom 1179], allowed a foreign witness to be examined on commission in Singapore in this manner. The Bombay High Court's order has been upheld by the Supreme Court in its order dated 27 July 2018 in Mideast

Integrated Steels Ltd & Ors vs. Stemcor (S.E.A.) Pte Limited & Anr., [Special Leave to Appeal (C) No(s).16735/2018].

30. What ethical codes and other professional standards, if any, apply to counsel and arbitrators conducting proceedings in your country?

The Bar Council of India Rules framed under Section 49 of the Advocates Act, 1961 lay down the rules of professional standards to be followed by Indian advocates. These Rules are also applicable to Indian advocates advising or representing clients in arbitration proceedings. The Supreme Court, in Bar Council of India vs. A K Balaji and Others, [(2018) 5 SCC 379], has held that foreign lawyers visiting India for advising on foreign law or their own system of law or on other international legal issues, would also be bound by the professional standards applicable to Indian advocates.

As regards arbitrators, Section 12 of the Arbitration Act mandates any person who is approached to be an arbitrator, to disclose in writing any circumstances which are likely to give rise to justifiable doubts to his independence/impartiality and affect his/her ability to devote sufficient time to the arbitration.

Additionally, if a potential arbitrator's relationship with the parties or counsel or the subject matter of the arbitration falls under the categories prescribed under the Seventh Schedule of the Arbitration Act, he/she will be ineligible to be appointed as an arbitrator. This issue has been discussed in some detail in Q.20.

31. In your country, are there any rules with respect to the confidentiality of arbitration proceedings?

Section 42A of the Arbitration Act requires the arbitrator, arbitral institution and the parties to the arbitration agreement to maintain confidentiality of all arbitration proceedings, except the arbitral award, where its disclosure is necessary for the purpose of implementation and enforcement of the arbitral award.

Indian arbitral institutions also include rules to maintain confidentiality of arbitral proceedings. For example, the DIAC Rules, the MCIA Rules and the Madras High Court Arbitration Proceedings Rules, 2017 (**Madras High Court Arbitration Centre Rules**) all state that the parties, the arbitral institution and the tribunal shall treat all matters relating to the proceedings and the award as confidential. A party or tribunal member may disclose such information only to the limited extent that such information is sought through a subpoena/order of a competent court, to comply with the requests of a regulatory authority, etc. Otherwise, written consent of all parties is required to disclose such information to a third party. In case a party breaches confidentiality, the tribunal can take appropriate measures, including issuing an order or award for sanctions or costs.

32. How are the costs of arbitration proceedings estimated and allocated?

The 2015 amendment to the Arbitration Act introduced a detailed section dealing with the regime for costs. Section 31A of the Arbitration Act is a statutory recognition for determining costs pertaining to arbitration and arbitration related court proceedings and defines "costs" to mean reasonable costs relating to the fees and expenses of arbitrators, courts and witnesses; legal fees; any administrative fees of the arbitral institution supervising the proceedings; and any other expenses incurred in connection with the arbitral proceedings and the award. The costs are to be estimated by the arbitral tribunal with due regard to all the circumstances, including conduct of the parties, whether a party has partly succeeded, whether a party had made a frivolous counterclaim leading to delay in disposal of proceedings and whether a reasonable offer to settle the dispute was made by a party and refused by the other. The arbitral tribunal can determine the costs and the share of each party.

Section 31A introduces the "costs follow the event" regime for costs where costs are generally paid to the successful party by the unsuccessful party. In case the arbitral tribunal decides to deviate from this general rule, it has the discretion to make a different order based on reasons to be recorded in writing. Section 31A(5) of the Arbitration Act clarifies that an agreement which has the effect that a party is to pay the whole or part of the costs of arbitration in any event is only valid if such agreement is made after the dispute has arisen.

Under Sections 38 and 39 of the Arbitration Act, the arbitral tribunal is empowered to fix the amount of deposit or supplementary deposit as an advance for costs and shall have a lien on the arbitral award for any unpaid costs of the arbitration. If the parties fail to pay the costs, the arbitral tribunal may refuse to deliver the award. In such a case, any party can approach the court and the award will be delivered subject to compliance with the court's directions on the deposit of costs by the parties.

33. Can pre- and post-award interest be included on the principal claim and costs incurred?

It is a settled principle of law that interest is awarded against a party for breach of contract, more specifically monetary obligations, so as to put the injured party in the same economic position it would have been in, if the contract had been duly performed. Therefore, the payment of interest is compensatory in nature and is intended to disincentive delay in payment of the sums awarded in the award. The statutory scheme of the Arbitration Act in India currently allows for both pre-award and post-award interest to be included in the sums awarded in the arbitral award under Section 31(7) of the Arbitration Act.

For pre-award interest, the Arbitration Act lays down that unless otherwise agreed by the parties, the tribunal may include in the sum for which the award is made, interest, at a rate it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date the cause of action arose to the date of the award. The provision makes it clear that pre-award interest will be included in the sum of the award unless the agreement between the parties expressly excludes and prohibits the grant of interest and will not be awarded separately as a separate component. This view has been upheld by the *Supreme Court in Hyder Consulting (UK) Limited vs. Governor, State of Orissa*, [(2015) 2 SCC 189] and has been affirmed in *Indian Oil Corporation Ltd vs. UB Engineering Ltd & Anr.*, [Order dated 12 April 2022 in Civil Appeal No. 2921-2922 of 2022].

Post-award interest is calculated on the total sum (inclusive of costs) awarded by the arbitral tribunal. For post-award interest, the Arbitration Act stipulates that the sum directed to be paid by the award shall, unless the award directs otherwise, carry interest at a 2% higher rate than the current rate of interest prevalent on the date of the award, from the date of the award to the date of payment. The Supreme Court in its recent decision, in *Morgan Securities and Credits Pvt Ltd vs. Videocon Industries Ltd.*, [2022 SCC OnLine SC 1127], has clarified that the arbitrator has complete discretion to grant post-award interest at a particular rate of interest. The Arbitration Act does not fetter this discretion when it states that the award will carry interest at a 2% higher rate than the current rate of interest prevalent and that the 2% higher rate will only apply in a situation where the tribunal has not exercised its discretion in awarding post-award interest at a particular rate in the award.

The Supreme Court, in *Executive Engineers (R and B) and others vs. Gokul Chandra Kanungo* [Judgment dated 30 September 2022 in Civil Appeal No. 8990 of 2017], has however clarified that the Arbitration Act casts a duty on the tribunal to give reasons as to how it deems the rate of interest it ultimately awards to be reasonable and that no interest would be payable for the period on which there were lapses on the part of the award holder.

The Supreme Court, in *Vedanta Limited vs Shenzhen Shandong Nuclear Power Construction Company Limited*, [(2019) 11 SCC 465], has noted that the rate of interest awarded must be compensatory and not punitive, unconscionable or usurious in nature. The court also directed that an arbitral tribunal while awarding interest must take into account factors, such as the 'loss of use' of the principal sum, the types of sums to which the interest must apply, the time period over which interest should be awarded, the internationally prevailing rates of interest, whether simple or compound rate of interest is to be applied, whether the rate of interest awarded is commercially prudent from an economic standpoint, the rates of inflation, proportionality of the amount awarded as interest to the principal sums awarded.

Interest on costs is governed by Section 31A(4)(g) of the Arbitration Act, under which provision the arbitral tribunal has the discretion to order payment of interest on costs from or until a certain date.

34. What legal requirements are there in your country for the recognition and enforcement of an award? Is there a requirement that the award be reasoned, i.e. substantiated and motivated?

The term 'recognition' is not used in the Arbitration Act. However, Section 31 of the Arbitration Act dealing with domestic awards provides that an arbitral award will be in writing and signed by the members of the arbitral tribunal. If the arbitral tribunal comprises more than one member, the signatures of the majority of the members will suffice as long as the reason for any omitted signature is stated. Under Section 31(3), the award must be reasoned unless the parties have agreed otherwise or the award is on the agreed terms of a settlement between the parties and must state its date and place of arbitration as determined by the parties/arbitral tribunal.

An award can only be challenged under the limited grounds available under Section 34 of the Arbitration Act and once the time for challenging the arbitral award as prescribed by the Arbitration Act, has expired, or such a challenge has been rejected, the award becomes final and binding on the parties claiming under it in terms of Section 35 of the Arbitration Act.

Such an award can be enforced under Section 36 of the Arbitration Act in the same manner as a decree of an Indian court under the CPC, once the period of 3 months or the extendable time period (3 months + 30 days) prescribed under Section 34 of Arbitration Act for challenging an arbitral award, has lapsed as held by the Supreme Court in the judgment of P Radha Bai & Ors vs. P Ashok Kumar & Anr., [(2019) 13 SCC 445]. The filing of a challenge to an arbitral award will not, however, automatically render it unenforceable or stay its operation.

If a party wishes to have the operation of an arbitral award stayed, he must file a specific application seeking a stay accompanying the application for challenging the award. The court may then grant (for reasons to be recorded in writing), a stay on the operation of the award, subject to conditions it deems fit. However, if the court is satisfied that a prima facie case is made out that the arbitration agreement or contract on which the award is based or the making of the award, was induced or affected by fraud or corruption, it will stay such award unconditionally pending the disposal of the challenge to the award.

An award passed under Part I of the Arbitration Act which is either unstamped or insufficiently stamped is inadmissible under Section 35 of the Stamp Act. The quantum of stamp duty to be paid under the Stamp Act varies from state to state based on the place of the award. In the case of Mohini Electricals Ltd. vs. Delhi Jal Board, [2021 SCC OnLine Del 3506], the High Court of Delhi held that stamp duty on an award is payable at the time of enforcement, except in cases where parties decide to accept the award and dispense with the requirement of instituting an enforcement petition. However, a party seeking enforcement of an unstamped or insufficiently stamped award can cure the deficiency by paying the appropriate stamp duty or the deficit stamp duty and penalty under the Stamp Act. An arbitral award must also be registered if it concerns immovable property.

Foreign awards are recognized under Part II of the Arbitration Act and are classified as New York Convention awards and Geneva Convention awards. Under Sections 46 and 55 of the Arbitration Act, any award which is enforceable under Part II of the Arbitration Act will be binding on the parties for all purposes.

A party seeking enforcement of a New York Convention award must produce before the courts the original award or a copy which is duly authenticated in the manner required by the law of the country in which it is made; the original arbitration agreement or a duly certified copy thereof and such evidence as may be necessary to prove that the award is a foreign award, as stipulated under Section 47 of the Arbitration Act.

The enforcement of a foreign award under the New York Convention may only be refused, under the very narrow grounds prescribed in Section 48 of the Arbitration Act. Once the court is satisfied that the foreign award is enforceable under Part II of the Arbitration Act, the award shall be deemed to be a decree of that court under Section 49 of the Arbitration Act.

Similarly, for enforcing an award under the Geneva Convention, the party seeking enforcement must produce before the courts the original award or a copy thereof duly authenticated in the manner required by the law of the country in which it was made, evidence proving that the award has become final and such evidence as may be necessary to prove that the award has been made in pursuance of a submission to arbitration valid under the applicable law and the award has been made by the arbitral tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties, in conformity with the law governing the arbitration procedure, as stipulated in Section 56 of Arbitration Act.

A foreign award under the Geneva Convention can only be enforced once the requirements specified under Section 57(1) of the Arbitration Act are met. Thereafter, the enforcement of the foreign award can only be refused under the limited grounds prescribed under Section 57(2) and (3) of the Arbitration Act.

Once the court is satisfied that the foreign award is enforceable under Part II of the Arbitration Act, the award shall be deemed to be a decree of that court, under Section 58 of the Arbitration Act.

As far as foreign awards governed by Part II of the Arbitration Act are concerned, the Supreme court has categorically held in Shriram EPC Ltd. vs. Rioglass Solar SA, [(2018) SCC OnLine SC 1471] that a foreign award is not liable to be stamped and that a plea that a foreign award has not been stamped under the Stamp Act would not render it unenforceable.

Recently, the High Court of Delhi in Nuovopignone International Srl v Cargo Motors Private Limited & Anr. [O.M.P.(EFA)(COMM.) 11 of 2021] upheld the enforceability of foreign consent awards under Part II of the Arbitration Act even though the New York Convention does not contemplate awards rendered upon settlement.

35. What is the estimated timeframe for the recognition and enforcement of an award? May a party bring a motion for the recognition and enforcement of an award on an ex parte basis?

In the past, Indian courts have recognized the malaise of constant abuse of procedural provisions to defeat the ends of justice and frivolous attempts by unsuccessful litigants to delay and obstruct the execution of a decree. However, with the creation of specialized commercial courts under the Commercial Courts Act and the pro-arbitrations amendments introduced to the Arbitration Act, enforcement proceedings are generally expedited and courts endeavor to enforce awards within 1-2 years. The time frame for enforcing awards can differ from court to court and may be dependent on factors such as the nature of challenge or resistance to the enforcement proceedings, the judgment debtor's financial ability to satisfy the award and the caseload of the enforcing court.

The amendments to the Arbitration Act have served as significant deterrents in the oft used dilatory tactics of an unsuccessful party. If a party files an application for stay of the operation of the arbitral award under Sections 34 and 36 of Part I of the Arbitration Act or resists enforcement of a foreign award under Section 48 in Part II of the Arbitration Act, the court may require the party seeking such suspension of the enforcement proceedings, to give suitable security as a precondition to granting stay. If the security provided is in the form of a deposit of the arbitral award amount in court, the successful party may make an application to withdraw such sums pending the suspension order against providing sufficient security.

Further, pro-enforcement authorities passed by courts have also played a key role in the advancement in the arbitration jurisprudence, such as the Supreme Court's decision in the case of Fuerst Day Lawson Limited vs. Jindal Exports Limited, [(2011) 8 SCC 333], which holds that a foreign award can be enforced and executed in one composite proceeding and that the two separate applications, one for execution and the other for enforcement, are not necessary.

A party cannot bring a motion for the enforcement of an award on an ex parte basis in India. India follows the adversarial system of legal procedure, and the general practice is for courts to issue notice to the judgment debtors. It is only if the judgment debtor fails to appear despite being served due notice, will courts proceed ex parte.

36. Does the arbitration law of your country provide a different standard of review for recognition and enforcement of a foreign award compared with a domestic award?

Indian law contemplates a different standard of review for recognition and enforcement of a foreign award passed under Part II of the Arbitration Act compared to a domestic award under Part I of the Arbitration Act.

An award will be recognized as a foreign award on the satisfaction of the criteria provided therefore under Part II of the Arbitration Act. Under Sections 46 and 55 of the Arbitration Act, any award enforceable under Part II of the Arbitration Act will be binding on the parties for all purposes.

Enforcement of a foreign award may be refused by a court on the narrow grounds enlisted in Section 48 of the Arbitration Act, at the request of a party against whom the award is invoked. These include:

- that the parties to the arbitration agreement were under some incapacity or the agreement is invalid;
- the party against whom the award is invoked was not given proper notice of the arbitral proceedings or the appointment of the arbitrator or was otherwise unable to present his case;
- the award deals with matters not contemplated by or not falling within the terms submitted for arbitration or contains matters beyond the scope of submission to arbitration;
- the composition of the tribunal or the arbitral procedure was not in accordance with the agreement of the parties or the laws of the country where the arbitration took place;
- the award is yet to become binding or has been set aside or suspended by a competent authority in the country where it was made.

Enforcement under Section 48 may also be refused if the court finds that the subject matter of the difference is not arbitrable under Indian laws; or if enforcing the award would be contrary to the public policy of India.

In line with the contemporaneous pro-arbitration jurisprudence, courts have consistently refused to interfere with foreign awards and held that Section 48 of the Arbitration Act does not permit the enforcing court to exercise appellate power or enquire if an error has been committed while rendering the foreign award. The Supreme Court has noted in a number of decisions that

Section 48 of the Arbitration Act does not give an opportunity for a 'second look' at the foreign award. The scope of inquiry under Section 48 does not permit review of the foreign award on merits and procedural defects (like taking into consideration inadmissible evidence or ignoring or rejecting the evidence which may be of binding nature) in the course of foreign arbitration do not necessarily lead to excuse an award from enforcement on the ground of public policy. Since the grounds stipulated in Section 48 are exhaustive, the courts have clarified that foreign awards must be recognized and enforced if the objection does not fall within any of the neat legal pigeonholes contained in Section 48 of the Arbitration Act [Shri Lal Mahal Ltd vs. Progretto Grano Spa, [(2014) 2 SCC 433]; Vijay Karia & Ors vs. Prysmian Cavi E Sistemi Srl. & Ors, [(2020) 11 SCC 1)]. Pursuant to the 2015 amendment to the Arbitration Act, the ground of patent illegality is also not attracted to foreign awards or awards passed in international commercial arbitrations and its invocation is restricted to the challenge proceedings of an award in a purely domestic arbitration under Section 34 of the Arbitration Act. This position has been reiterated by the Supreme Court recently in its judgment in Gemini Bay Transcription Private Limited vs. Integrated Sales Service Limited and Anr., [(2022) 1 SCC 753].

The Supreme Court, in Government of India vs. Vedanta Limited and Others, [(2020) 10 SCC 1], has held that courts retain the discretion to proceed with enforcement of a foreign award even if any of the grounds provided under Section 48 of the Arbitration Act for refusing enforcement of a foreign award are made out, provided that the court is satisfied that overall justice has been done between the parties. On the most frequently used defence of public policy, the court ruled that such defence should be construed narrowly and should be permissible only if award is contrary to fundamental policy of Indian, the interest of India, justice or morality.

So far as domestic awards are concerned, the grounds of challenge are enshrined in Section 34 of the Arbitration Act. The standard of review for a domestic award as been discussed in some depth in Q.44. A domestic award will be final and binding on the parties claiming under it in terms of the prescription in Section 35 of the Arbitration Act as long as it is in writing, reasoned, signed by the majority of the tribunal. If a domestic award is not challenged under Section 34 of the Arbitration Act within the stipulated timelines, or the challenge proceedings have been disposed of, a domestic award may be enforced without any other impediment under Section 36 of the Arbitration Act and its enforcement cannot be refused by a court.

While there are some differences in the standard of review adopted by courts, procedurally both domestic and foreign awards will be enforced in terms of the procedure prescribed for the execution of decrees under the CPC.

37. Does the law impose limits on the available remedies? Are some remedies not enforceable by the local courts

In the case of domestic awards under Part I of the Arbitration Act, except the grounds available under Section 34 dealing with a challenge to an award, the Arbitration Act does not impose any other limits on the available remedies. Notably, the remedy available to a party to challenge an arbitral award must be exercised within the 3 months from the receipt of the award, which period can be extended by a further discretionary period of 30 days in cases where the court is satisfied that the applicant was prevented by sufficient cause. The Supreme Court in Simplex Infrastructure Ltd vs. Union of India, [(2019) 2 SCC 455], has noted that the timeframe of 3 months extendable by a further 30 days is absolute, and the court cannot condone any delay thereafter.

In so far as foreign awards governed by Part II are concerned, save the grounds on which enforcement of an arbitral award can be denied under Section 48 and Section 57 of the Arbitration Act, the Arbitration Act does not impose any other limits on available remedies. Recently, the Supreme Court, in Government of India vs. Vedanta Limited and Others, [(2020) 10 SCC 1], held that petitions seeking enforcement of a foreign award are required to be filed within three years from the date when the right to apply accrues.

All remedies available to a party for challenging an award or its enforcement are enforceable by Indian courts.

38. Can arbitration awards be appealed or challenged in local courts? What are the grounds and procedure?

While domestic awards are amenable to challenge before Indian courts under Section 34 of the Arbitration Act, a foreign award cannot be challenged before Indian courts and only its enforcement can be opposed on the narrow grounds available under Sections 48 and 57 of the Arbitration Act. This position has been recently affirmed by the Supreme Court in Noy Vallesina Engineering SpA vs. Jindal Drugs Ltd. & Ors., [(2021) 1 SCC 382]

A party can challenge a domestic award under Section

34 of the Arbitration Act on the following limited grounds:

- a party was under some incapacity.
- the arbitration agreement is invalid.
- 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 his case.
- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration;.
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement between the parties.
- the court finds that the subject matter of the dispute is not capable of settlement by arbitration.
- the award is in conflict with the public policy of India.
- The award is vitiated by patent illegality on the face of it (this ground is only available when both parties are Indian entities).

Section 34(3) provides that an application for setting aside an award must be made within 3 months from the date on which the award is received or if a request is made for correction in the award under Section 33 of the Arbitration Act, the date on which that request had been disposed of by the arbitral tribunal. In this context, the Supreme Court has clarified, in Dakshin Haryana Bijli Vitran Nigam Ltd vs. Navigant Tech. Pvt. Ltd., [2021 SCCOnLine SC 157], that the limitation period for filing a Section 34 application begins from the date on which a signed copy of the award is received by the parties. The period of 3 months can be extended by a further period of 30 days if the court is satisfied that the applicant was prevented by sufficient cause from making the application in the stipulated period.

It is settled law that the court does not sit in appeal over the award in an application under Section 34 and would not interfere with the award if the view taken by the tribunal is a possible view, even though a different view may be possible on the same evidence. This position has been affirmed by Supreme Court in NTPC Ltd. vs. Deconar Services (P) Ltd., [2021 SCCOnLine SC 498]. Further, the court will not re-appreciate the merits or the evidence in deciding an application challenging the award. Under the 2015 amendment to the Arbitration Act, it has also been clarified that the ground of patent illegality is not available as a ground for setting aside an award passed in an international commercial arbitration but is restricted in its application to purely domestic awards. In Indian Oil Corpn. Ltd. vs. Shree Ganesh Petroleum Rajgurunagar, [2022 SCCOnLine SC 131], the Supreme Court distinguished an erroneous interpretation of the contractual terms from a failure to act in terms of the contract. In doing so, the Supreme Court held that while the former is not a ground to set aside an arbitral award, the latter would result in an award being set aside under the ground of public policy since an arbitral tribunal is a creature of the contract and is bound to act in terms of the contract under which it is constituted. The court further reaffirmed the position that a contractual interpretation which amounts to rewriting the agreement should result in setting aside such award.

It is no longer res integra that that Section 34 of the Arbitration Act does not allow courts to modify an arbitral award. In this context two judgments of the Supreme Court are worth noting, namely the decision in the case of Gyan Prakash Arya vs. Titan Industries Limited, [2021 SCCOnLine SC 1100], holding that the power of the court to modify an award under Section 33 of the Arbitration Act is limited to correcting arithmetical or clerical error and the decision in Project Director, National highways No. 45E and 220, National Highway Authority of India vs. M. Hakeem & Anr, [(2021) 9 SCC 1], holding that the only power available with the court is to either uphold the award or to set it aside.

An application challenging the award can be filed only after issuing advance notice to the other party. Upon receiving such an application, the court is required to dispose of it expeditiously and may in its discretion, or upon the request of a party, adjourn the challenge proceedings for a period of time so as to give the arbitral tribunal an opportunity to resume its proceedings and take any action to eliminate the grounds of challenge outlined in Section 34.

After disposal of the Section 34 application, an aggrieved party has a second appeal under Section 37 of the Arbitration Act and thereafter, a final right of appeal to the Supreme Court under Article 136 of the Constitution of India, 1949.

39. Can the parties waive any rights of appeal or challenge to an award by agreement before the dispute arises (such as in the arbitration clause)?

Parties cannot waive the rights of appeal or challenge to an award by agreement before the dispute arises in view of Sections 23 and 28 of the Indian Contract Act, 1872 (**Contract Act**). While Section 23 of the Contract Act provides that an agreement will be unlawful if the consideration or object of such agreement is opposed to

public policy, Section 28 of the Contract Act concerns agreements in restraint of legal proceedings. Under this section, every agreement by which any party is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time for enforcing his rights or extinguishes the rights of a party or discharges any party from any liability so as to restrict any party from enforcing his rights is void to that extent. Exception 1 to Section 28 of the Contract Act specifically saves the arbitration of disputes as not being illegal.

40. In what instances can third parties or non-signatories be bound by an award? To what extent might a third party challenge the recognition of an award?

Under Section 35 of the Arbitration Act, a domestic award is final and binding on the parties as well as persons claiming under them. The Supreme Court, in Cheran Properties Limited vs. Kasturi and Sons Limited and Others, [(2018) 16 SCC 413], considered whether a third party would be bound by an arbitral award in enforcement proceedings even if such third party was not party to the arbitral proceedings. In examining this issue, the court held that the expression "persons claiming under them" used in Section 35 widens the net of those whom the arbitral award binds and constitutes a legislative recognition of the doctrine that an arbitral award binds every person whose capacity or position is derived from and is the same as a party to the arbitral proceedings. The court held that Section 35 is a material provision which expressly stipulates that an arbitral award is final and binding not only on the parties but also persons claiming under them. The fact that a party was not party to the arbitral proceedings will not be conclusive of the question as to whether the award can be enforced against it on the ground that it claims under a party. Placing reliance on the 'Group of Companies' doctrine, the court held that if circumstances exist to show that it was the mutual intention of the parties to bind both signatories and non-signatory third parties, the court can bind non-signatories.

Having said that, the Supreme Court has questioned whether the 'Group of Companies' doctrine as expounded by Chloro Controls case and subsequent judgments (which would include Cheran Properties) is valid in law and has referred the question to a larger bench of the Supreme Court in Cox and Kings Ltd vs. SAP India Pvt Ltd & Anr., [(2022) 8 SCC 1]. The decision of the larger bench is awaited.

Insofar as the question of third parties being bound by a foreign award in enforcement proceedings in India is concerned, the Supreme Court, in Gemini Bay Transcription Private Limited vs. Integrated Sales Service Limited and Anr., [(2022) 1 SCC 753], refused to interfere with a foreign award and held that enforcement of a foreign award against a third party is maintainable in India. Such enforcement action cannot be challenged by a third party within the four corners of the Arbitration Act. The Supreme Court also discussed the scope of the grounds for resisting enforcement of a foreign award and held that the scheme of the Arbitration Act mandates that such grounds must be construed narrowly.

41. Have there been any recent court decisions in your jurisdiction considering third party funding in connection with arbitration proceedings?

The High Court of Delhi in Tomorrow Sales Agency (P) Ltd. v. SBS Holdings, Inc. [2023 SCC OnLine Del 3191] has recognised the vital role of third party funding in arbitration and observed that third party funding can go a long way to ensure access to justice, especially considering the significant costs which parties may incur to pursue arbitration. It was also held that an arbitral award, being at par with a decree of the court under Section 36 of the Arbitration Act, cannot be enforced against a third party funder who was not a party to the arbitration proceedings.

42. Is emergency arbitrator relief available in your country? Are decisions made by emergency arbitrators readily enforceable?

Section 17(1) of the Arbitration Act delineates the power of an Indian seated arbitral tribunal to grant interim relief to the parties. Section 17(2) of the Arbitration Act sets out the manner in which the interim measures granted under Section 17(1) will be enforced. The Supreme Court, in a recent judgement of Amazon.com NV Investment Holdings LLC vs. Future Retail Limited & Others., [(2022) 1 SCC 209], addressed the issue of enforceability of orders or awards passed by an emergency arbitrator and held that awards or orders passed by an Indian-seated emergency arbitrator are akin to awards or orders passed by an Indian-seated arbitral tribunal under Section 17(1) of the Arbitration Act and would be enforceable as an order of the court under Section 17(2) of the Arbitration Act. The court noted that party autonomy being the cornerstone of arbitrations, parties are free to choose the arbitration rules applicable to the disputes. If such procedural rules allow emergency arbitrations, then parties must be bound by such rules.

However, the application of Sections 17(1) and 17(2) is restricted to Indian seated arbitrations since Section 17 is included in Part I of the Arbitration Act. The Arbitration Act does not contain a provision similar to Section 17(2) in Part II of the Arbitration Act, which applies to foreign seated arbitrations. Further, the Arbitration Act, though based on the Model Law, does not contain any provision which is pari materia to Article 17H of the Model Law, enabling enforcement of interim measures issued by a foreign seated emergency arbitrator. The position under Indian law in this respect is summarised in the judgment of the High Court of Delhi in Raffles Design International India Pvt Ltd vs. Educomp Professional Education Ltd & Ors, [(2016) SCC Online Del 5521]. This case involved an award passed by an emergency arbitrator in a foreign seated arbitration. The High Court held that even in a foreign-seated arbitration, a party can seek interim relief under Section 9 of the Arbitration Act but courts will have to review the merits on which such interim relief may be granted independent of an order or award by which interim relief was granted by an emergency arbitrator. The High Court treated the order passed by the emergency arbitrator as an interim order passed by the foreign-seated tribunal.

Similar orders have been passed by the Supreme Court in Avitel Post Studioz Ltd. & Ors. vs. HSBC PI Holdings (Mauritius) Ltd., [(2021) 4 SCC 713] by applying Section 9 of the Arbitration Act.

Since there is no direct mechanism under the Arbitration Act for enforcing interim order(s) passed by emergency arbitrators in foreign seated arbitrations, a party may consider filing an application under Section 9 of the Arbitration Act before the court for seeking relief in terms of the interim order(s) granted by the emergency arbitrator. An application under Section 9 of the Arbitration Act to seek interim relief in terms of the relief granted by the emergency arbitrator cannot be equated to an action for enforcement of the interim relief granted by the emergency arbitrator but will constitute an independent action in aid of arbitration. Albeit such a Section 9 application will place reliance on the pro tem measures granted by the emergency arbitrator, the interim order of the emergency arbitrator, in and of itself, will neither be binding nor enforceable by the court. It is, however, very likely that the court under Section 9 of the Arbitration Act will, while independently applying its mind to the merits of such a Section 9 application, seriously consider any interim order by the emergency arbitrator. If the court is satisfied that the grounds for the grant of interim relief are met in the facts of the case, it is likely to grant similar relief under Section 9 of the Arbitration Act as that granted by the emergency arbitrator subject to compliance with the substantive laws in India.

Notably, most of the arbitral institutions in India extend the provision of getting relief(s) from an emergency arbitrator which cannot await the constitution of the arbitral tribunal. These include the: (i) DIAC Rules; (ii) Madras High Court Arbitration Center Rules; (iii) ICA Rules; and (iv) MCIA Rules, amongst others.

43. Are there arbitral laws or arbitration institutional rules in your country providing for simplified or expedited procedures for claims under a certain value? Are they often used?

Section 29B, introduced by the 2015 amendment to the Arbitration Act, makes an express provision for an expedited procedure for dispute resolution where parties may, at any stage either before or at the time of appointment of the arbitral tribunal, agree in writing to have their disputes resolved by a fast-track procedure. There are, however, no quantum thresholds for adopting such procedure. Parties are free to agree to a sole arbitrator while agreeing for fast-track arbitration. Under Section 29B the tribunal decides the dispute based on written pleadings, documents and submissions. While the tribunal may call for further submissions/ clarifications, an oral hearing is directed to be held only if it is requested by parties or the tribunal considers it necessary to do so. The tribunal can dispense with any technical formalities if an oral hearing is held and can adopt such procedure as required for expeditious disposal of the matter.

The time limit for making an award under this section has been capped at 6 months from the date the arbitral tribunal enters reference.

Similarly, arbitral institutions in India also provide for an expedited procedure for dispute resolution. These include the MCIA, DIAC, ICA and Madras High Court Arbitration Centre, amongst others. For instance, under the MCIA Rules, the aggregate amount of the claim, counter-claim and set off must not exceed Rs. 10 crores to enable a party to apply for expedited procedure, unless all parties agree to fast track procedure, irrespective of the quantum.

44. Is diversity in the choice of arbitrators and counsel (e.g. gender, age, origin) actively promoted in your country? If so, how?

The Arbitration Act allows a person of any nationality to be an arbitrator, unless agreed otherwise by the parties. No statutory restrictions based on gender, age or origin

of arbitrators or counsel have been prescribed in the Arbitration Act.

India has not laid down any specific qualifications or restrictions for arbitrators or counsel. As a result, the arbitration landscape continues to be dynamic and diverse in the choice of arbitrators and counsel. In fact, the Bar Council has enrolled transgender lawyers since 2018.

Advocates who are licensed to practice in courts in India are required to be Indian nationals under the Advocates Act, 1961. For this reason, amongst others, the Supreme Court ruled in Bar Council of India vs. A.K. Balaji & Ors, [(2018) 5 SCC 379] that foreign lawyers/ law firms are not allowed to practice law in India unless the requirements under the Advocates Act and the Bar Council of India Rules are complied with. The court, however, noted that there is no bar for the foreign law firms or foreign lawyers to visit India for a temporary period on a "fly in and fly out" basis for the purpose of giving legal advice to their clients in India regarding foreign law or their own system of law and on diverse international legal issues.

Recently, in March 2023, the Bar Council has notified the Bar Council of India Rules for Registration and Regulation of Foreign Lawyers and Foreign Law Firms in India, 2022 (BCI Rules). The BCI Rules, based on the principle of reciprocity, will enable foreign lawyers and law firms to practice foreign law, diverse international law and international arbitration matters in India.

45. Have there been any recent court decisions in your country considering the setting aside of an award that has been enforced in another jurisdiction or vice versa?

There have been no recent decisions in India setting aside an award that has been enforced in another jurisdiction.

The question whether the enforcement court would be bound by the views taken by the foreign seat court was considered by the Supreme Court in Government of India vs. Vedanta Ltd., [(2020) 10 SCC 1]. In Vedanta, the Supreme Court held that the enforcement court would examine the objections to the enforcement of an award against the limited grounds available under Section 48 of the Arbitration Act, without being constrained by the findings of the foreign seat court. The affirmation of the award by the foreign seat court would not be an impediment for an Indian court to examine whether the award was opposed to the public policy of India under Section 48 of the Arbitration Act. If the award is found to be violative of the public policy of India, it will not be enforced by Indian courts.

The converse position of enforcing an award which has been set aside by the courts exercising supervisory jurisdiction of the seat of the arbitration is barred under the Arbitration Act. One of the conditions for enforcing a foreign award under Section 48 is that the award must not have been set aside, suspended by a competent authority of the country in which the award was made. An award which stands set aside by a foreign court or even suspended will not be enforced in India.

46. Have there been any recent court decisions in your country considering the issue of corruption? What standard do local courts apply for proving of corruption? Which party bears the burden of proving corruption?

There are no recent decisions in India concerning the issue of corruption in arbitration proceedings. The Arbitration Act provides that an award will be set aside if the court finds that the making of the award was induced or affected by corruption and the enforcement of an award will be stayed unconditionally pending the disposal of a party's challenge to the award, if the court is satisfied that a prima facie case is made out that the making of the award was induced or affected by corruption.

In 2014 the Supreme Court examined the issue of allegations of corruption at the stage of appointment of arbitrators under Section 11 of the Arbitration Act in the case of Swiss Timing Limited vs. Commonwealth Games 2010 Organizing Committee, [(2014) 6 SCC 677]. The Supreme Court opined that to shut out arbitration at the initial stage would destroy the very purpose for which the parties had entered into arbitration. It further observed that there was no inherent risk of prejudice to any of the parties in permitting arbitration to proceed simultaneously with the criminal proceedings. In an eventuality where ultimately an award is rendered by the arbitral tribunal, and the criminal proceedings result in conviction rendering the underlying contract void, a necessary plea can be taken on the basis of such conviction to resist the execution/enforcement of the award. Conversely, if the matter is not referred to arbitration and the criminal proceedings result in an acquittal thus leaving little or no ground for claiming that the underlying contract is void or voidable, it would have the wholly undesirable result of delaying the arbitration.

While Section 19(1) of the Arbitration Act provides that

an arbitral tribunal is not bound by the CPC or the Evidence Act, arbitral tribunals nevertheless draw sustenance from the fundamental principles underlying the CPC and the Evidence Act, without being bound by the requirement of observing the provisions of these enactments with all their rigor. Under the Evidence Act, the general rule is that a party who asserts a fact is bound to prove its existence. This principle is also followed in arbitration proceedings. However, the burden to prove the contrary may shift to the party against whom the act of corruption has been claim, particularly when prima facie case the allegations of corruption are established. Moreover, the strict rule of proving beyond reasonable doubt is not applicable to a civil proceeding. In civil cases, courts will generally be guided by the preponderance of probabilities on the misconduct of the party against whom the allegation has been made. This principle was affirmed in Seth Gulabchand vs. Seth Kudilal & Ors, [AIR 1966 SC 1734], where the Supreme Court held that the Evidence Act makes it clear that the same standard of proof applies in all civil cases and it is irrelevant whether a criminal offence has been alleged or not.

47. What measures, if any, have arbitral institutions in your country taken in response to the COVID-19 pandemic?

During and after the Covid-19 pandemic, courts as well as arbitral institutions in India have pro-actively encouraged the use of technology for conducting arbitration proceedings.

Specifically, the DIAC issued a guidance note dated 5 June 2020 encouraging the use of video conferencing for conducting arbitration proceeding and laid down the procedure for filing claims and other pleadings through e-filing. Other arbitral institutions, such as the MCIA continued to administer and resolve dispute throughout the pandemic.

The Supreme Court and the High Courts, vide various circulars and standard operating procedures, passed a number of directions and guidelines to ensure continuance of court proceedings during the Covid-19 pandemic and adopted platforms such as ‘Cisco Web-Ex’, ‘Zoom’, etc. for conducting virtual hearings. The Supreme Court also introduced specialized platforms, namely VidyoDesktop and VidyoConnect, for conducting virtual hearings. These measures adopted by courts served as guidance for arbitral tribunals to conduct arbitral hearings as well as cross-examination of witnesses through videoconferencing.

The Delhi High Court released video-conferencing rules dated 26 October 2021 and the Karnataka High Court released its video-conferencing rules dated 9 June 2020 which provided general principles for arbitral institutions in India for conducting virtual hearings as well as examination of witnesses through videoconferencing. Additionally, various courts also directed parties to continue to use various online platforms and comply with best practices being adopted in order to ensure continuance of arbitral proceedings. In ad-hoc arbitration, in addition to the use of video-conferencing platforms and technology, arbitral tribunals sought suggestions from the parties to put in place processes with the consent of the parties for the conduct of the arbitration.

48. Have arbitral institutions in your country implemented reforms towards greater use of technology and a more cost-effective conduct of arbitrations? Have there been any recent developments regarding virtual hearings?

Please refer to the answer in Q.47.

49. Have there been any recent developments in your jurisdiction with regard to disputes on climate change and/or human rights?

Indian statutes and regulations have always been conscious of the duty to protect the environment. The Indian Constitution is one of the few in the world that contains specific provisions on the duty to safeguard the environment. The Chapters of the Directive Principles of State Policy and the Fundamental Duties in the Constitution explicitly set out India’s commitment to protect, preserve and improve the environment.

Article 48A of the Constitution states that the Indian government will endeavor to protect and improve the environment and to safeguard the forests and wild-life of the country. Similarly, Article 51A of the Indian Constitution states that it is the duty of every citizen of India to protect and improve the natural environment, including forests, lakes, rivers, and wild-life. In Virendra Gaur & Ors vs. State of Haryana & Ors,[(1995) 2 SCC 577], the Supreme Court has recognized the right to a healthy environment to be a part of the right to life guaranteed to every person under Article 21 of the Indian Constitution and held that enjoyment of life and its attainment including their right to life with human dignity encompasses within its ambit, the protection and preservation of environment, ecological balance free

from pollution of air and water, sanitation without which life cannot be enjoyed. Any contra acts or actions would cause environmental pollution. Environmental, ecological, air, water, pollution, etc. ought to be regarded as amounting to a violation of Article 21.

The Supreme Court has consistently passed orders for, amongst others, cleaner fuel, closure of polluting industries and environmentally harmful aqua-farms and protection of forests. By way of examples:

- In Vellore Citizens Welfare Forum vs. Union of India, [(1996) 5 SCC 647], the Supreme Court applied the precautionary principle to check pollution of underground water caused by the leather industries and held that both the precautionary principle and the polluter pays principle are part of the environmental law of the country.
- In Hanuman Laxman Aroskar vs. Union of India, [(2019) 15 SCC 401], the Supreme Court suspended the clearance for an airport in the State of Goa on the grounds that the government failed to take into account the environmental impact of the construction of the airport and held that it is the government's duty to adequately balance environmental concerns with development goals. The suspension was only lifted subsequently through the judgment in Hanuman Laxman Aroskar vs. Union of India & Ors, [(2020) 12 SCC 1] when the airport project stakeholders undertook to revise their plans to factor in adequate environmental safeguards and provide a commitment to make the airport a "zero carbon airport".

Courts in India have also historically championed and advanced the protection and promotion of human rights. Some recent notable judgments in this regard include:

- In National Legal Services Authority vs. Union of India & Ors., [(2014) 5 SCC 438], the Supreme Court recognized the transgender community as a third gender along with male and female.
- In Shayara Bano vs. Union of India & Ors., [(2017) 9 SCC 1], the Supreme Court declared the practice of instant triple talaq, "unconstitutional" and illegal on grounds that it was violative of the fundamental right of equality before the law contained in Article 14 of Indian Constitution.
- In X vs. Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi & Another, [2022 SCC OnLine SC 1321], the Supreme Court held that unmarried women are also entitled to seek an abortion of pregnancy arising out of a consensual relationship.

50. Do the courts in your jurisdiction consider international economic sanctions as part of their international public policy? Have there been any recent decisions in your country considering the impact of sanctions on international arbitration proceedings?

There are no recent decisions that have involved the consideration of international economic sanctions or examined the impact of international economic sanctions on international arbitrations.

51. Has your country implemented any rules or regulations regarding the use of artificial intelligence, generative artificial intelligence or large language models in the context of international arbitration?

While India is yet to implement rules and regulations regarding the use of artificial intelligence in the context of international arbitration, the Supreme Court in February 2023 commenced the use of artificial intelligence to start live transcriptions of its hearings as well facilitate translation of judicial documents, including orders and judgements to Indian vernacular languages.

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