

भारत

India

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Key points

Arbitration proceedings in India are conducted under the Arbitration and Conciliation Act 1996 (the Act). The Act is based on the UNCITRAL model law.

The main arbitration bodies in India are the Indian Council of Arbitration, the International Centre for Alternative Dispute Resolution, the Bombay Chamber of Commerce and the Indian Merchants' Chamber. Each organisation has its own set of arbitration rules.

Court interference is common at all stages of arbitration in India.

Following a recent decision of the Indian Supreme Court, it is advisable to exclude Part I of the Act in any arbitration clause involving India. Part I of the Act makes provision for recourse against an arbitral award. It enables Indian courts to remove arbitrators and set aside awards (including foreign awards) which are deemed "in conflict with the public policy of India". It has been confirmed that a broad definition of public policy will apply.

Avoid multi-layered arbitration clauses where one award may be appealed to a second arbitration. In those circumstances, the Indian courts have found the second award to be unenforceable in India.

India is a party to the New York Convention. It has exercised both the reciprocity and commerciality reservations. However, notification is required in the official *Gazette* in relation to each specific country. Not all countries that have ratified the New York Convention have been notified in the official *Gazette*.

Confidentiality

There is no provision for confidentiality of arbitrations under Indian law but an agreement on confidentiality may be included in the arbitration agreement.

For a model confidentiality clause, see the Arbitration section on drafting arbitration clauses.

Model arbitration clauses

Any dispute or difference whatsoever arising between the parties out of or relating to the construction, meaning, scope, operation or effect of this contract or the validity or the breach thereof shall be settled by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration and the award made in pursuance thereof shall be binding on the parties.

Indian Council of Arbitration

Any dispute or difference whatsoever arising between the parties out of or relating to this contract or construction, meaning, scope, implementation, operation or effect of this contract or the validity or the breach thereof shall be referred to arbitration in accordance with the Rules of Arbitration of the Indian Merchants' Chamber and the Award made in pursuance thereof shall be final and binding on the parties.

Indian Merchants' Chamber

In order to exclude Part I of the Act — and avoid judicial interference with the arbitration proceedings (other than in relation to interim measures) — it is advisable to add the following wording:

“The provisions of Part I of the (Indian) Arbitration and Conciliation Act 1996, except section 9 thereof, are expressly excluded and shall not apply to such arbitration and proceedings”.

See the Arbitration section for best practice in drafting arbitration clauses.

Weblinks

www.ficci.com/icanet/

Indian Council of Arbitration

www.icadr.nic.in

The International Centre for Alternative Dispute Resolution (ICADR)

www.imcnet.org

Indian Merchants' Chamber

www.taxmann.net

Full text of India's Arbitration and Conciliation Act 1996 is available here under "Acts & rules/tax & corporate acts" or via www.taxmann.net/Commercialaws/general_commercial_law/content1.htm

1 What arbitration bodies are there within the jurisdiction?

The Indian Council of Arbitration (ICA) and the International Centre for Alternative Dispute Resolution (ICADR) are the national arbitral organisations.

The Bombay Chamber of Commerce and the Indian Merchants' Chamber (IMC) also provide institutional arbitration services. They deal with both domestic and international arbitration.

2 Is there an Arbitration Act governing arbitration proceedings, and is it based on the UNCITRAL model law?

In India, the Arbitration and Conciliation Act 1996 (the Act) governs arbitration proceedings. The Act takes into account the UNCITRAL model law.

3 What are the available rules?

The arbitration bodies mentioned above have enacted separate sets of rules for arbitration proceedings.

The ICA, the institution most often used for conducting arbitrations, has published the Rules of Arbitration of the Indian Council of Arbitrators.

ICADR has published a number of different sets of rules: the ICADR Arbitration Rules 1996; the ICADR Fast Track Arbitration Rules 1996; the ICADR Mini-Trial Arbitration Rules 1996; and the ICADR Conciliation Rules 1996.

The IMC follows the UNCITRAL model law rules. The IMC Rules of Arbitration also provide for fast-track arbitration, for parties which require expeditious disposal of their cases within a fixed timeframe.

The Bombay Chamber of Commerce has published the Rules of Arbitration and Conciliation 1998 of the Bombay Chamber of Commerce & Industry.

The High Courts at the state level in India also have rules for giving effect to and carrying out administrative and judicial functions relating to arbitration proceedings.

4 What supervision is there of arbitrators and their awards?

Under the Act

The Act provides that the courts shall have the following powers in support of arbitration:

- hearing challenges against the appointment of arbitrators (section 13)
- setting aside arbitral awards (section 34).

An arbitration award can be set aside by the court only on the following grounds:

- a party to the arbitration agreement was under some incapacity
- the arbitration agreement is not valid under the law
- proper notice of the appointment of the arbitrator or arbitral proceedings was not served
- the arbitral tribunal dealt with a dispute beyond the scope of the agreement
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the arbitration agreement

- the subject matter of the dispute cannot be settled by arbitration under the law in force
- the arbitration award is in conflict with the public policy of India.

The Act also contains provisions for the appointment and removal of an arbitrator.

A person of any nationality may be an arbitrator (unless otherwise agreed by the parties). The parties are free to agree on a procedure for appointing the arbitrator and, in an arbitration with three arbitrators, if no prior agreement is made, each party appoints one arbitrator, and they together appoint the third; if this cannot be achieved, then the appointment is made (upon the request of a party) by the Chief Justice of the High Court concerned (in the case of an international arbitration, the Chief Justice of India) (section 11).

An arbitrator can be removed in the manner laid down in the Act.

The appointment may be challenged if there are justifiable doubts as to independence or impartiality or if the arbitrator does not possess the qualifications agreed to by the parties. A party can only challenge an appointment if it becomes aware of these grounds after the appointment was made.

An arbitral tribunal may rule on its own jurisdiction. A plea that a tribunal does not have jurisdiction shall be raised not later than submission of the statement of defence.

Under the ICA rules

The ICA rules provide for a registrar, appointed by the arbitration committee. The registrar supervises the arbitrators and, in consultation with the arbitration committee, may terminate the authority of an appointed arbitrator if that person resigns, dies, becomes incapable of acting expeditiously, neglects or fails to act expeditiously or fails to make the award within the prescribed time (rule 27).

If any party is aggrieved by the decision of the registrar, in accepting or rejecting an application for arbitration, it may apply to the court for suitable directions.

5 How quickly can a tribunal be set up?

The parties to a dispute are free to determine the number of arbitrators, as long as it is not an even number. If the parties do not specify the number, the arbitration will be conducted by a sole arbitrator.

Under the Act, the parties are free to agree on the procedure to appoint an arbitrator. If the parties agree on the appointment of a sole arbitrator or if there are two party-appointed arbitrators and there is no conflict on the appointment of the third, the tribunal can be set up within a few days of starting the arbitration procedure.

Where the parties (in international arbitrations) fail to appoint an arbitrator within 30 days from the receipt of a request by one party to agree to an appointment, or if two arbitrators fail to appoint the third (and no appointing authority has been specified in the arbitration agreement), any party may apply to the Chief Justice of the Supreme Court of India – whose decision shall be final and binding on the parties – to appoint an arbitrator.

6 What happens if one party refuses to participate in the process?

When a party refuses to participate, the arbitral tribunal may continue with the proceedings and issue an arbitral award on the basis of the evidence before it.

7 What interim measures are available?

Under the Act, a party may – before or during arbitral proceedings or at any time after the making of the award but before it is enforced – apply to a court for the following interim measures:

- preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement
- securing the amount in dispute in the arbitration
- detention, preservation or inspection of any property or thing which is the subject matter of the dispute, or as to which any question may arise, and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or any samples to be taken or observation to be made or experiment to be tried, which may be necessary in order to obtain information or evidence
- an interim injunction
- appointment of a receiver
- assisting the arbitral tribunal in taking evidence (section 27)

- such other interim measure of protection as may appear to the court to be just and convenient (section 9).

The arbitral tribunal also has the power to issue interim orders against a party to take any interim protection in respect of the subject matter of the dispute.

8 What right is there to challenge the appointment of an arbitrator?

An arbitrator can be challenged if justifiable doubts arise as to independence or impartiality or if they do not possess the qualifications agreed to by the parties. A party can only challenge an appointment it has made (or in which it participated) if it becomes aware of these grounds only after the appointment was made.

The Act allows the parties to agree on a procedure for challenging the appointment of an arbitrator. In the absence of such procedure, a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances giving rise to the challenge, send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the arbitrator challenged withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge. If the challenge is not successful, the arbitration will continue and the tribunal will make an award. Where an award is made, the party challenging the arbitrator may make an application to set aside such an award in accordance with and in the manner provided in the Act.

9 Can a party appeal the arbitrator's decision and, if so, are there any time limits to be aware of or unusual provisions?

An award passed by a tribunal is final and binding on the parties unless an application for setting aside of the award or appeal is filed before the relevant courts having jurisdiction. Thereafter, the award can be enforced as a decree of court. Any application to set aside an award has to be made within three months from the date of receipt of the award. In case of delay, the court has the power to permit an extension of up to 30 days.

An appeal can also be made to the court against an order of the tribunal directing interim measures.

Where a challenge to an arbitrator has failed, any award subsequently made may be challenged under the Act.

10 Is India a party to the New York Convention?

Yes. India has exercised both the reciprocity and the commerciality reservations so only awards from other New York Convention states which are commercial in nature as a matter of Indian law will be enforceable.

New York Convention awards are enforceable in India if the central Government has, by notification in the official *Gazette of India*, declared that the territory from which the award originates is a territory to which the Convention applies (section 44, the Act). Not all countries that have ratified the Convention have been notified in the *Gazette of India*.

11 Will an arbitration award be enforceable in India and, if so, what is the procedure?

A foreign arbitration award can be enforced in India. The Act provides for the conditions and the manner in which this occurs. New York Convention and Geneva Convention awards are enforceable in India if the central Government, by notification in the *Gazette of India*, has declared that the territory from which such award has been made is a territory to which the conventions apply.

The enforcement of foreign awards can be challenged on the following grounds:

- the parties to the agreement were under some incapacity
- the party against whom the award was invoked was not given proper notice of the appointment of the arbitrator or the arbitral proceedings
- the award deals with disputes 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 of the parties or was not in accordance with the law of the country where the arbitration took place
- the award has not yet become binding on the parties
- the subject matter of the dispute is not capable of settlement by arbitration under the law of India
- the enforcement of the award would be contrary to public policy in India.

An application for enforcement of a foreign arbitration award has to be made in the highest civil court having original jurisdiction over the matter in dispute.

The following documents have to be submitted with the application:

- the original award or copy (authenticated in the manner required by the law of the country in which it was made)
- the original arbitration agreement (or a certified copy)
- evidence necessary to prove that the award is a foreign award
- where the award is in a foreign language, the applicant has to produce an English translation, certified by a diplomatic or consular agent of the country to which the applicant belongs or certified in the manner required by Indian law.

When the court is satisfied that the foreign award is enforceable, the award is then deemed to be a decree of that court. The foreign award so enforced is binding for all purposes on the parties and may be relied on in any legal proceedings in India.

A recent Indian case considered the provisions for challenging a foreign award under the Act. It was held that a foreign award may be challenged before the appropriate court in India by an aggrieved party, even though the successful party in the arbitration proceedings was not seeking to enforce the award under the Act. This would be the case, even where the arbitration agreement stated that the arbitration award would be final and binding on the parties. The court further held that the provisions of

Part I of the Act would apply to all arbitrations including international commercial arbitrations outside India, and to all related proceedings unless the parties (expressly or through implication) excluded all or any of its provisions. To avoid these problems, it is advisable to include wording in the arbitration clause excluding Part 1 of the Act – with the exception of section 9, which deals with interim measures.

See the key points on India for wording.

12 What are the likely costs of the arbitration?

In India, most arbitrations are conducted under the Act. There is no provision for payment of any specific amount upon commencement of arbitration, as there may be under various institutional rules. The only cost of arbitration, (other than the parties' legal costs) is the fees of the arbitrator, which (initially) are shared equally by the parties.

The arbitration bodies in India have their own prescribed fees for conducting arbitrations which may depend on the amount claimed. The Acts and rules governing arbitration in India do not specify procedures for the assessment and award of costs. An award of costs is at the discretion of the arbitrator or tribunal. However, costs are generally awarded to the successful party and some of the costs awarded may also include interest.

13 Are split clauses valid and enforceable?

Split clauses allow one or more parties to elect arbitration or litigation after the dispute arises. It is not clear whether the Indian courts would recognise split clauses as valid and enforceable or whether an award made based on a split clause would be enforced. ■

