Comparative Guide

International Arbitration

Indonesia & India

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International Arbitration Comparative Guide

A. General Legal Framework of International Arbitration

1. **What are the relevant legislations on arbitration in your jurisdiction?**

In Indonesia, Arbitration is generally governed under Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution, partially amended in 2014 under Constitutional Court (*Mahkamah Konstitusi)* Decision No. 15/PUU-XII/2014 on the judicial review over elucidation of Article 70 of the Arbitration Law on the application for annulment that can only be filed against an arbitration award that has been registered in court (together, "**Arbitration Law**").

2. **Does this legislation differentiate between domestic arbitration and international arbitration? If so, how is each defined?**

The Arbitration Law governs all domestic and foreign arbitrations recognized under the Indonesian law. The law provides distinctions between arbitral awards rendered by domestic arbitration bodies and those rendered by foreign arbitration ones. Each is defined as follows:

(a) Domestic Arbitration Awards: all awards conferred by the Indonesian arbitration body (**i.e.**, *Badan Arbitrase Nasional Indonesia* or "**BANI**"), or arbitrators based in Indonesia;
(b) Foreign Arbitration Awards: all awards conferred by foreign arbitration bodies or arbitrators, under the Indonesian prevailing laws and regulations (**i.e.**, arbitrations done outside the Indonesian territory regardless of the parties' nationalities, governing laws, or locations of the subjects of dispute).

3. **Is the arbitration legislation in your jurisdiction based on the UNCITRAL Model Law on International Commercial Arbitration?**

No. Indonesia's Arbitration Law is not based on the UNCITRAL Model Law on International Commercial Arbitration.

4. **Are there any current plans to amend the arbitration legislation in your jurisdiction?**

No. According to the Indonesia's priority national legislation program (*Program Legislasi Nasional*/ Prolegnas), there are no plans to amend Arbitration Law.

On the other hand, BANI, as an independent institution that provides a variety of services related to arbitration, continues to issue arbitration regulations on the applicable arbitration mechanism.

5. **Is your jurisdiction a signatory to the New York Convention? If so, have any reservations been made?**

Yes. Indonesia has ratified the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**") enacted into Presidential Decree No. 34 of 1981 on Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

6. **Is your jurisdiction a signatory to any other treaties relevant to arbitration?**

Yes. Indonesia has ratified the 1966 Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**ICSID Convention**") and other bilateral and multilateral treaties including the ASEAN Charter, which stipulates arbitration as a dispute resolution mechanism in Southeast Asian countries in its protocol.

With regard to ICSID Convention, Indonesia has limited the jurisdiction of ICSID through the issuance of Presidential Decree No. 31 of 2012 ("**PD 31/2012**"), which excludes settlement by ICSID of any dispute arising from state administrative decrees issued by regency governments.

B. Arbitrability and Restrictions on Arbitration

7. **How is it determined whether a dispute is arbitrable in your jurisdiction?**

Pursuant to Article 5 of the Arbitration Law, only disputes that are a commercial in nature, or those involving rights which according to laws and regulations, are within the full legal authority of the disputing parties, can be resolved through arbitration. Furthermore, disputes that cannot be resolved through arbitration are those, which can be settled amicably. Settlements that can be deemed to have permanent legal force shall be considered not arbitrable.

8. **Are there any restrictions on the choice of seat of arbitration for certain disputes?**

No, based on the Arbitration Law, there are **no** restrictions on the choice of the seat of arbitration for any arbitration disputes.

C. Arbitration Agreement

9. **What are the validity requirements for an arbitration agreement in your jurisdiction?**

An arbitration agreement shall be considered valid if the disputing parties have agreed in writing to resolve the dispute exclusively through arbitration, this would usually be stipulated in one of the clauses of the relevant agreement ("**Arbitration Agreement**").

The Arbitration Agreement must also meet the requirements stipulated under the prevailing laws and regulations, such as: (i) Law Number 24 of 2009 on the Flag, Language, State Emblem, and National Anthem, and (ii) fulfill the basic requirements of Article 1320 of the Civil Code, which are:

(a) the parties agree to be bound by a contract;
(b) the parties are competent to enter the relevant agreement;
(c) the contract has a specific object; and
(d) the subject matter of the agreement is permitted under Indonesian law.

Article 9 of Arbitration Law also stipulates additional formal requirements for parties resolving their dispute through arbitration but have no arbitration agreement to commence the proceeding in the form of a notarial deed drawn by a Notary Public in Indonesia.

10. **How is the law of the arbitration agreement determined in your jurisdiction?**

The law of the Arbitration Agreement shall be determined based on the jurisdiction stipulated in the agreement.

11. **Are there any provisions of legislation or any other legal sources in your jurisdiction concerning the separability of arbitration agreements?**

Yes. The principle of separability is provided in Article 10 of Arbitration Law, which reads, "*an arbitration agreement shall not become null or void due to the following circumstances: …(h) expiration or non-applicability of the principal agreement*".

12. **Are there provisions on the seat and/or language of the arbitration if there is no agreement between the parties?**

In the absence of the agreement, or the seat and/or language of the arbitration procedure between the disputing parties, Article 31 paragraph 2 of Arbitration Law stipulates that all disputes whose resolutions are submitted to the arbitrators or arbitral tribunals will be examined and decided according to the provisions of Arbitration Law.

Furthermore, Article 28 of Arbitration Law provides that Bahasa Indonesia shall be used as the language of the arbitration, unless the parties have agreed otherwise. Please note that this provision generally refers to domestic arbitrations.

D. Objections to Jurisdiction

13. **When must a party raise an objection to the jurisdiction of the tribunal and how can this objection be raised?**

Arbitration Law does not regulate the procedure for objections to court jurisdiction. However, Indonesian civil laws can practically challenge the jurisdiction through the delivery of demurrer.

The jurisdiction and legal choice are determined based on the agreement of the parties. The principle of freedom of contract (*Pacta Sun Servanda*) is applied here as regulated in the Indonesian Civil Code.

14. **Can a tribunal rule on its own jurisdiction?**

Yes, the tribunal can rule on its own jurisdiction. However, Arbitration Law does not explicitly recognize *kompetenz-kompetenz* principles to implicitly adhere with Articles 3 and 11 of Arbitration Law, which stipulates that the District Court is not authorized to conduct the proceeding of any dispute between parties bound by an arbitration agreement; and the existence of an arbitration agreement eliminates the rights of the parties to submit disputes to the District Court.

15. **Can a party apply to the courts of the seat for a ruling on the jurisdiction of the tribunal? If "yes", in what circumstances?**

No party can apply to the court of the seat to issue a ruling on the jurisdiction of the tribunal, if the parties have agreed to resolve their disputes through arbitration proceeding.

E. The Parties of Arbitration

16. **Are there any restrictions on the parties that can enter an arbitration agreement?**

No. According to Arbitration Law, there is no restriction on which parties can enter an arbitration agreement.

17. **Are there any specific provisions of law which deal with multi-party disputes?**

Arbitration Law does not provide any provision on multi-party disputes. However, Article 9 (1) of BANI Arbitration Rules 2022 ("**BANI Rules**") allows consolidation of arbitration proceedings if:

(a) the parties have agreed on the consolidation and arbitration disputes arising from the same legal relations;
(b) the demand for arbitration is based on several agreements involving the same parties and BANI has been chosen as an arbitration institution; or
(c) the arbitration claim is based on several agreements, which include one of the same parties of the said arbitration proceeding, and BANI has also been chosen as the arbitration institution in the other agreements.

F. Consolidation and Third Parties

18. **Does the law in your jurisdiction permit consolidation of separate arbitrations into a single arbitration proceeding? Are there any conditions which apply to consolidation?**

Arbitration Law has no provisions on this matter. However, BANI Rules allow a separate arbitration to be consolidated into one arbitration as stipulated in point 17 above.

Based on Article 9 (2) of BANI Rules, the consolidation of third party is permitted by the Chair of BANI in the following circumstances:

(a) If a third party outside the arbitration agreement participates and joins in the dispute resolution process through arbitration, the third party can be charged to pay the administration, examination, and arbitrator fees in connection with his participation; and
(b) A third party may join an arbitration case as long as permitted by law.

19. **Does the law in your jurisdiction permit the joinder of additional parties to an arbitration which has already commenced?**

According to Article 30 of Arbitration Law, the third party outside an arbitration agreement may participate as additional party(ies) in the arbitration proceeding. Provided that, the relevant third parties have related interests in such ongoing arbitration proceeding and if the disputing parties and the arbitration tribunal agree to include the third party(ies) as an additional party in the arbitration proceeding.

20. **Does an arbitration agreement bind assignees or other third parties?**

No. According to Arbitration Law, an arbitration must be based on a written agreement between the disputing parties, and therefore, the Arbitration Agreement shall only be binding to parties of such Arbitration Agreement.

G. The Tribunal

21. **How is the tribunal appointed?**

The Parties may determine the number of arbitrator(s) (**i.e.**, sole or three members tribunal), which should be incorporated into the clause of the Arbitration Agreement.

Article 6 paragraph (4) of BANI Rules regulates the mechanism on the appointment of Arbitrators:

(a) The applicant may appoint an arbitrator no later than 14 (fourteen) days after the application for arbitration is registered at BANI Secretariat, or the appointment is submitted to the Chairman of BANI. If the arbitrator is not appointed within the time limit, the appointment of the arbitrators shall be done by the Chairman of BANI.
(b) The Chairman of BANI, at the request of the applicant for valid reasons, has the authority to extend the time for the appointment of the arbitrator by the applicant, provided the extension is not more than 14 (fourteen) days.

22. **Are there any requirements as to the number or qualification of arbitrators in your jurisdiction?**

Based on Article 12 of Arbitration Law, the appointed or designated arbitrators must meet the following requirements:

(a) They are competent to perform the legal actions;
(b) They are, at least, 35 years of age;
(c) They have no family relationship by blood or marriage up to the third degree, with either of the disputing parties;
(d) They have no financial or other interests in the arbitration award; and
(e) They have, at least, 15 years of experience and active mastery in the field.

23. **Can an arbitrator be challenged in your jurisdiction? If so, on what basis? Are there any restrictions on the challenge of an arbitrator?**

Yes. According to Article 22 of Arbitration Law, an arbitrator can be challenged and subsequently recused if, (i) there are sufficient reasons and authentic evidence to raise doubts that the arbitrator can carry out his/her duties independently or will not be biased in giving an award; or (ii) there is a proven family, financial, or employment relationship between the arbitrator and a party of the dispute or his/her legal representative.

Challenges against the arbitrator based on any of the above grounds must be submitted within 14 (fourteen) days as of the reason being known. If either party intends to refuse the appointment of an arbitrator, it must also file an objection within 14 (fourteen) days as of the appointment of the arbitrator.

24. **If a challenge is successful, how is the arbitrator replaced?**

According to Article 75 of Arbitration Law, if one of the arbitrators passes away, or a demand for recusal or dismissal of one or more arbitrators is granted, the parties must appoint the replacement arbitrator.

If the parties are unable to reach an agreement on the replacement, one of the parties can submit a request to the appointed Judge of the district court within 30 (thirty) days to appoint one or more replacement arbitrators. The replacing arbitrators shall have the duty to continue the resolution of the dispute. based on the most recent conclusions drawn by the preceding arbitrator(s).

25. **What duties are imposed on arbitrators? Are these all imposed by legislation?**

The Arbitrators' imposed duties based on Arbitration Law are as follows:

(a) render an arbitral award within 180 days of establishing the arbitral tribunal;
(b) input their consideration of the dispute in the final arbitral award, which must be signed and in writing;
(c) disclose any facts that may cast doubt on their impartiality;
(d) maintain the confidentiality of the arbitration; and
(e) register the arbitral award to the district court.

26. **What powers does an arbitrator have in relation to: (a) procedure, including evidence; (b) interim relief; (c) parties which do not comply with its orders; (d) issuing partial final awards; (e) the remedies it can grant in a final award and (f) interest?**

(a) ***Procedure, including evidence***. According to Article 46(3) of Arbitration Law, the arbitrator may provide supplementary written submissions of explanations, documentary, or other evidence as may be deemed necessary, within time limits as determined by the arbitrator or arbitration tribunal.

(b) ***Interim relief***. Article 32 of Arbitration Law stipulates that the arbitrators can grant temporary relief at the request of one of the parties. Such temporary relief may include orders on how the investigation of the case will proceed, including orders on security attachments, deposit of goods with third parties, or sale of perishable goods.

(c) ***Parties who do not comply with the orders***. Once the order or award is registered with the district court, the winning party may apply for court assistance for law enforcement if the losing party fails to comply with the order or award (Art. 64 of Arbitration Law).

(d) ***Issuing a partial final award***. Arbitration Law does not regulate the issuance of partial final awards.

(e) ***The remedies arbitrators can grant in a final award****,* According to Article 56 of Arbitration Law, the arbitrators must render their decision based on the provisions of the relevant law, or based on justice and propriety (*ex aequo et bono).* The parties can agree on whether the arbitrators can render an *ex aequo et bono* award as a basic principle.

(f) ***Interest****,* the arbitrators may grant an interest in the award only if the parties have specifically requested it.

27. **How may a tribunal seated in your jurisdiction proceed if a party does not participate in the arbitration?**

If the claimant does not participate in the first hearing for no reason, Article 43 of Arbitration Law states that the party's statement of claim shall be declared null and void and the mandate of the arbitral tribunal will be deemed to have been completed. Furthermore, if the respondent does not participate in the first hearing for no valid reason, Article 44(1) of Arbitration Law stipulates that the arbitral tribunal can deliver a second summons to the defendant. If the respondent fails to appear at the hearing within 10 days after receiving the second summons, the arbitration proceeding will continue without the presence of such respondent and the claimant's claim will be granted in its entirety, unless it is unfounded or found to be in contrary to the prevailing laws and regulations.

28. **Are arbitrators immune from liability?**

Yes. Pursuant to Article 21 of Arbitration Law, the arbitrator or arbitration tribunal may not be held legally responsible for any action during the proceedings in the function of arbitrator or arbitration tribunal unless there is a proven bad faith in the action.

H. The Role of the Court during an Arbitration Proceeding

29. **Will the court in your jurisdiction stay proceedings and refer parties to arbitration if there is an arbitration agreement?**

Yes, Article 3 of Arbitration Law also implies that the district courts have no jurisdiction to hear a dispute between parties that are bound by an arbitration agreement.

30. **Does the court in your jurisdiction have any powers in relation to an arbitration seated in your jurisdiction and/or seated outside your jurisdiction? What are these powers? Under what conditions are these powers exercised?**

Yes, Indonesia's courts have specific powers to exercise arbitration inside and outside Indonesia's jurisdiction. Inside the jurisdiction, Indonesia's civil courts have powers to enforce arbitration awards and/or annul domestic arbitral awards. The courts also have other powers, such as settling the choice of arbitration in which there is no agreement between the parties to choose the composition of arbitration (*Art. 13 of Arbitration Law).* Outside the jurisdiction or in international jurisdiction, the civil courts may enforce an arbitration award after the relevant award has been registered with the relevant district court by the arbitrators or their legal representatives within 30 (thirty) days since the award being rendered by the arbitrators.

31. **Can the parties exclude the court's powers by agreement?**

No. The Arbitration Law does not allow the parties to exclude the court's powers by an agreement.

I. Costs

32. **How will the tribunal approach the issue of costs?**

Article 77 of Arbitration Law provides that the arbitration costs shall be borne by the losing party. In case a claim is partially granted, the arbitration fees shall be borne by the parties equally.

33. **Are there any restrictions on what the parties can agree in terms of costs in an arbitration seated in your jurisdiction?**

No, there is no applicable restrictions on what the parties can agree in terms of costs in an arbitration.

J. Award

34. **What procedural and substantive requirements must be met by an award? Must the award be produced within a certain timeframe?**

The procedural and substantive requirement is regulated under Article 54 of Arbitration Law, which shall include:

(a) A heading to the award containing the words "*Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa*" (In the name Justice based on the belief in the Almighty God);
(b) The full names and addresses of the disputing parties;
(c) A brief description of the matter in dispute;
(d) The respective position of each of the parties;
(e) The full names and addresses of the arbitrators;
(f) The considerations and conclusions of the arbitrators or arbitration tribunal concerning the dispute as a whole;
(g) The opinion of each arbitrator in the event of any difference of opinion within the arbitration tribunal;
(h) The order of the award;
(i) The place and date of the award; and
(j) The signature(s) of the arbitrator(s) or arbitration tribunal.

The arbitrators shall also render their award in accordance with the relevant provisions of law or based on justice and fairness. The content of the award should not be in contravention with the prevailing laws and regulations in Indonesia. It should also settle the dispute of the parties. Article 57 of Arbitration Law further provides that the award shall be rendered **no later than 30 (thirty) days** after the conclusion of hearings.

K. Enforcement of Arbitral Awards

35. **Are arbitral awards (both local and foreign arbitrations) enforceable in your jurisdiction?**

Please refer to our response in Point 30 above.

36. **Are there any specific procedures for the enforcement of an arbitral award? Especially for foreign arbitral awards.**

Suppose an arbitral award is rendered in Indonesia, Article 59 of Arbitration Law states that the original or authentic copy of the decision must be submitted for registration to the clerk at the district court by the arbitrators or their legal representatives.

If a decision is rendered outside Indonesia (international arbitral award), the arbitrators or their legal representatives must register the relevant arbitral award with the Central Jakarta District Court. After registration, an exequatur warrant must be obtained from the appointed Judge of Central Jakarta District Court.

L. Grounds for Challenging an Award

37. **What are the grounds on which an award can be challenged, appealed or otherwise set aside in your jurisdiction?**

In Indonesia, an arbitral award cannot be contested or appealed because **it is final and binding on both parties to the dispute** (Article 60 of Arbitration Law).

However, Article 70 of Arbitration Law stipulates that an arbitration award can be annulled due to the following conditions:

(a) the letters or documents submitted in the hearings are acknowledged to be false or forged, or are declared to be forgeries after the award has been rendered;

(b) after the award has been rendered, the documents are founded to be decisive in nature, which is deliberately concealed by the opposing party; or
(c) the award is rendered as a result of fraud committed by one of the parties to the dispute.

38. **Are there are any time limits and/or other requirements to bring a challenge?**

According to Article 71 of Arbitration Law, an application for annulment of an arbitration award must be submitted in writing not more than 30 (thirty) days as of the date of registration of the award to the Clerk to the District Court.

M. Confidentiality

39. **Is arbitration seated in your jurisdiction confidential? Are there any exceptions to confidentiality?**

Yes, according to Article 27 of Arbitration Law, all hearings of arbitration disputes shall be closed to the public. This means, the arbitration proceedings shall be confidential.

N. Miscellaneous

40. **Are there any other important issues to note regarding arbitration in your jurisdiction?**

Due to the COVID-19 pandemic, BANI issued a Decree No 20.015/V/SK-BANI/HU dated 28 May 2020 and BAPMI Decree No Per-01/BAPMI/03/2020 dated 30 March 2020 to promote the use of online arbitration proceedings. Therefore, Indonesia's arbitration is now can be held virtually, through online, offline, and hybrid (online and offline) proceedings. Further, Article 4 paragraph (3) of BANI Rules stipulates that Notices of the parties may be delivered in person, by courier, facsimile, or e-mail, and shall be deemed effective on the date it was received, or, if the date of receipt cannot be determined, on the day following the said submission.

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A. General Legal Framework of International Arbitration

1. **What are the relevant legislations on arbitration in your jurisdiction?**

The law of Arbitration in India is governed by the Arbitration and Conciliation Act, 1996 **("Arbitration Act")**, as amended up to date. The Arbitration Act was brought into force w.e.f. August 22, 1996. However, it was deemed to be effective from January 25, 1996 as it was in continuation of an ordinance. The Act's primary objective is to provide for timely and cost-effective resolution for both domestic and international commercial disputes. In addition to provisions governing Domestic and International Arbitrations, the Act also contains provisions for Conciliation and Enforcement of Foreign Awards in India. The Arbitration Act is divided into following parts:

(a) Part - I–Arbitration
(b) Part-IA- Arbitration Council of India
(c) Part-II -Enforcement of Certain Foreign Awards
(d) Part-III- Conciliation
(e) Part-IV-Supplementary Provisions.

2. **Does this legislation differentiate between domestic arbitration and international arbitration? If so, how is each defined?**

Yes, the Arbitration Act does differentiate between Domestic and International Arbitration. Part I of the Arbitration Act applies to the arbitrations seated in India (they may be Domestic or International Arbitration), and Part II deals mostly with the enforcement of foreign awards. 'International Commercial Arbitration' is defined under Section 2 (f) of the Arbitration Act, as an arbitration relating to disputes arising out of legal relationship, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is an individual who is a national of, or has their habitual residence in any country other than India or where one of the parties is a body corporate incorporated outside India, or is an association or body of individuals whose central management and control is exercised in any country other than India.

Similarly, where one of the parties is the government of a foreign country, even such arbitrations are considered as international commercial arbitrations. The expression 'domestic arbitration', though not defined under the Arbitration Act, refers to arbitrations being held in India including international commercial arbitrations seated in India. Certain provisions of Part I of the Arbitration Act (such as interim measures, court assistance in aid of arbitration etc.) also apply to arbitrations seated outside of India, unless parties by agreement have excluded the applicability of Part I in entirety.

3. **Is the arbitration legislation in your jurisdiction based on the UNCITRAL Model Law on International Commercial Arbitration?**

The Arbitration Act is based on the UNCITRAL Model Law and same is evident from the preamble of the Arbitration Act. The preamble states that the law with respect to arbitration and conciliation has been made taking into account UNCITRAL Model law and Rules. However, there are minor variations between the two. For example, Section 16 of the Arbitration Act differs from Article 16 of the Model Law. Unlike the Model law, under Section 16, no interim recourse to court is permitted if the tribunal declares that it has jurisdiction. In such instances, challenges may be brought forward only after the Arbitral Tribunal has passed the final award.

4. **Are there any current plans to amend the arbitration legislation in your jurisdiction?**

The Arbitration Act is an evolving piece of legislation and has gone through major amendments in the years 2015, 2019 and more recently in 2021. Recently, the Ministry of Law and Justice, Government of India has released a draft of the Mediation Bill, 2021 **("Bill")** seeking comments of the public and all stakeholders. The objective of the Bill is to strengthen and promote Mediation as Alternative Dispute Redressal (ADR) mechanism, promote institutional mediation in India and enforcement of domestic and international mediation settlement agreements. Section 6 of the Bill provides that any party before filing of the suit or proceeding in any Court or Tribunal shall take steps to settle the disputes by pre-litigation mediation. Therefore, the Bill proposes to provide for compulsory mediation before institution of arbitration proceedings before an arbitral tribunal.

The Bill further proposes to amend Part III of the Arbitration Act covering Conciliation (Sections 61 to 81) and substitute it with Section 61 and 62 of the Bill which inter-alia, provides that any provision in any other enactment for the time being in force, providing for resolution of disputes through conciliation in accordance with the Arbitration Act shall be construed to mean a reference to mediation under the Mediation Act, 2021. It further provides that the Conciliation as provided under the Arbitration Act shall be construed as mediation as defined in the Mediation Act, 2021.

5. **Is your jurisdiction a signatory to the New York Convention? If so, have any reservations been made?**

India is a signatory to the New York Convention, 1958 and ratified the same on 13th July, 1960. The provisions relating to the enforcement of certain foreign awards under the aforesaid convention are provided under Part II of the Arbitration Act. Chapter I of Part II deals with the provisions relating to New York Convention Awards while Chapter II with the provisions relating to the Geneva Convention Awards. In practice only awards relating to New York Convention are sought to be enforced in India.

India has made three reservations on the applicability of the New York Convention:

(a) India provides for the recognition and enforcement of foreign awards relating only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law.

(b) India provides for the recognition and enforcement of foreign awards made in pursuance of an agreement in writing for arbitration to which New York Convention applies.

(c) India provides for the recognition and enforcement of foreign awards made in such territories which have been declared by the Indian Central Government to be the territories to which the New York Convention applies, on the basis of reciprocal provisions having been made in such territories.

6. **Is your jurisdiction a signatory to any other treaties relevant to arbitration?**

In addition to the New York Convention, India is also a signatory to the Geneva Convention. In practice, cases pertaining to enforcement of foreign awards under New York Convention only are noticeable.

B. Arbitrability and Restrictions on Arbitration

7. **How is it determined whether a dispute is arbitrable in your jurisdiction?**

While there is no 'watertight compartment' formula, to determine the arbitrability of a dispute, courts in India take into consideration the following criteria:

(a) Whether the dispute is capable of adjudication and settlement by arbitration under Indian law;
(b) Whether the dispute is within the scope of the arbitration agreement.
(c) Disputes affecting third party rights that require centralized adjudication have been held to be non-arbitrable
(d) Disputes relating to sovereign and public interest functions of the State are non-arbitrable
(e) Disputes that are expressly or by necessary implication non-arbitrable under a specific statute.

Furthermore, while the Arbitration Act does not list out disputes considered to be non-arbitrable or arbitrable, Indian courts usually assess arbitrability by differentiating between actions in personam i.e. determining the rights of the parties *inter se* (are considered as arbitrable) and actions in rem i.e. determining the rights of parties against world at large (are considered as non-arbitrable). Well-recognized examples of non-arbitrable disputes are those relating to criminal offences, matrimonial disputes (divorce, child custody, etc.), Guardianship matters, insolvency and winding-up matters, trust disputes, testamentary matters, taxation disputes and tenancy matters. Additionally, disputes for which a special forum has been constituted by statute are not arbitrable, such as recovery of debts by banks, disputes under the Electricity Act, or disputes relating to service law, labor law and military law.

8. **Are there any restrictions on the choice of seat of arbitration for certain disputes?**

There are no restrictions on the choice of seat of arbitration in India. Section 20 of the Arbitration Act governing the subject of seat of arbitration provides that:

(a) The parties are free to agree on the place of arbitration.
(b) Failing any agreement between the parties, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.
(c) Notwithstanding the above, the arbitral tribunal may, unless otherwise agreed by the parties, meet at anyplace it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.

The Hon'ble Supreme Court of India in the recent case of *PASL Wind Solutions Private Limited v. GE Power Conversion India Private Limited [*2021 SCC OnLine SC 331] ruled that two companies incorporated in India can choose a seat/forum outside India and an award passed by any such forum shall be considered as a foreign award, enforceable in India. In this case, both the parties were companies incorporated in India and had entered into a settlement agreement which provided for the resolution of disputes by way of arbitration as per the Rules of Conciliation and Arbitration of the International Chambers of Commerce with the seat in Zurich, Switzerland.

C. Arbitration Agreement

9. **What are the validity requirements for an arbitration agreement in your jurisdiction?**

Section 7 of the Arbitration Act lays down the following statutory requirements for an arbitration agreement to be valid in India:

(a) The agreement shall be in writing i.e., contained in a document signed by the parties, or in an exchange of letters, telex and telegrams or electronic communication or contained in an exchange of statement of claim and defence in which the existence of agreement is alleged by one party and not denied by the other. The provision further provides that the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

(b) The parties shall agree to refer any dispute and/or all disputes (present or future) arising out of a contract to a private tribunal.

(c) The parties must agree to be bound by the decision of such arbitral tribunal.

(d) The intention of the parties to refer the disputes must be unequivocally indicated.

Additionally, the Arbitration Agreement must also satisfy the requirements of enforceability of contracts under the Indian Contract Act 1872, such as capacity of the parties to contract (i.e., age, soundness of mind, etc.), free consent, lawful consideration and lawful object.

10. **How is the law of the arbitration agreement determined in your jurisdiction?**

The law of arbitration agreement in India is determined by examining the provisions of the arbitration agreement as well as the main agreement between the parties. According to the terms of Section 28 of the Arbitration Act, the substantive law applicable in case of arbitrations held in India, other than international commercial arbitration, shall be the law in force in India. In International Commercial Arbitration, held either in India or outside India, the substantive law applicable to the dispute would be the law designated by the parties. In International Commercial Arbitrations held outside India, the law governing the arbitration proceedings would be the law applicable at the place of seat of arbitration. The law governing arbitration proceeding is always seat centric and the courts having jurisdiction over the seat of arbitration shall have supervisory jurisdiction over the arbitral proceedings.

11. **Are there any provisions of legislation or any other legal sources in your jurisdiction concerning the separability of arbitration agreements?**

The rule of separability of the arbitration agreement is recognized in the Arbitration Act itself. Section 7 of the Arbitration Act provides that arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Furthermore, Section 16 of the Arbitration Act provides that arbitral tribunal would be competent to rule on its own jurisdiction and for that matter the arbitration clause which forms the part of the contract shall be treated as an agreement independent of the other terms of the contract. It is further provided in the aforesaid section that a decision by the tribunal stating that the contract is null and void shall not invalidate the arbitration clause. It has also been held by various judicial pronouncements that the termination of a contract will not affect the validity of an arbitration clause which was part of such contract and the parties would be bound by the same.

12. **Are there provisions on the seat and/or language of the arbitration if there is no agreement between the parties?**

The Arbitration Act does have provisions that helps determine the seat and/or language of the arbitration if there is no consensus between the parties. Section 20(2) of the Arbitration Act states that if there is no agreement between the parties on the place of arbitration, and then the place of arbitration shall be determined by the arbitral tribunal giving due regard and consideration to the circumstances of the case, including the convenience of the parties. Section 22(2) of the Arbitration Act provides that if there is no agreement between the parties as to the language to be used in the arbitral proceedings, the arbitral tribunal shall decide the language or languages to be used in the arbitral proceedings.

D. Objections to Jurisdiction

13. **When must a party raise an objection to the jurisdiction of the tribunal and how can this objection be raised?**

Section 16 of the Arbitration Act provides that the objection that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defense. However, a party shall not be precluded from raising such a plea merely because he has appointed, or participated in the appointment of, an arbitrator. Further, an objection that the arbitral tribunal is exceeding the scope of its authority must be raised as soon as the matter, which is alleged to be beyond the scope of the authority of the tribunal, is raised during the Arbitral proceedings.

The plea as regard lack of jurisdiction of the tribunal has to mandatorily be raised before the arbitral tribunal in the first place. The said objection can be raised in the form of a plea to be presented before the Arbitral tribunal by way of an application and such a plea must convey the brief facts and the ground of such an objection in clear and precise manner.

14. **Can a tribunal rule on its own jurisdiction?**

The Arbitration Law in India recognizes the principle of *kompetenz-kompetenz*. The arbitral tribunal is empowered to decide on its own jurisdiction as per Section 16 of the Arbitration Act.

15. **Can a party apply to the courts of the seat for a ruling on the jurisdiction of the tribunal? If "yes", in what circumstances?**

A party may apply to the courts of the seat with respect to the jurisdiction of the arbitral tribunals. In consonance with Section 16 of the Arbitration Act, if the arbitral tribunal rules that it does not have jurisdiction, the said ruling can be challenged before a court of jurisdiction. However, if the arbitral tribunal rules that it has jurisdiction, no immediate appeal or challenge is available and the only option available is to challenge the final award passed by the arbitral tribunal, on the ground of lack of jurisdiction. Once the plea of jurisdiction is heard and rejected by the tribunal, the court very rarely interferes with the award on the ground of jurisdiction. The courts generally show reluctance and restraint to intervene with the decision of the arbitral tribunal.

E. The Parties of Arbitration

16. **Are there any restrictions on the parties that can enter an arbitration agreement?**

There are no restrictions on the parties that can enter into an arbitration agreement. Any person (even a foreign party) who has attained the age of majority, and who is of sound mind may enter into an arbitration agreement.

17. **Are there any specific provisions of law which deal with multi-party disputes?**

In relation to multi-party disputes, there are no specific provisions in the Arbitration Act.

F. Consolidation and Third Parties

18. **Does the law in your jurisdiction permit consolidation of separate arbitrations into a single arbitration proceeding? Are there any conditions which apply to consolidation?**

The arbitral tribunal does not have any power to consolidate separate arbitral proceedings, even if the parties are same. However, the Supreme Court of India in the case of *P.R. Shah, Shares and Stock Brokers Private Limited v. BHH Securities Private Limited and Others*[(2012) 1 SCC 594] had allowed the consolidation of the arbitral proceedings if the contracts under question have arbitration agreements and held that *"if A had a claim against B and C and if A had an arbitration agreement with B and A also had a separate arbitration agreement with C, there is no reason why A cannot have a joint arbitration against B and C".* The Supreme Court further observed that *"If A has a claim jointly against B and C, and when there are provisions for arbitration in respect of both B and C, there can be a single arbitration".*

Besides, in a few judgments it has been held that if the parties are same in different agreements, then the parties can agree to appoint the same person as arbitrator for deciding the disputes arising out of all such contracts despite the fact that all contracts are separate and independent of each other. In such a situation, either separate awards can be passed with respect to each contract or a common award can be passed. However, passing of separate awards for each reference is preferred to the passing of a common award. In any event, the proceedings arising out of every contract are treated as separate arbitration proceedings.

19. **Does the law in your jurisdiction permit the joinder of additional parties to an arbitration which has already commenced?**

The Arbitration Act does not provide for the joinder of additional parties or third-party participation in arbitration. In the case of *Sukanya Holdings (P) Ltd v. Jayesh H. Pandya and Another* [(2003) 5 SCC 531], the Hon'ble Supreme Court of India held that where part of the subject matter of dispute is governed by arbitration agreement and the other part is outside the arbitration agreement, parties cannot be relegated to arbitration in respect of the entire subject-matter. It is further held by the Hon'ble Supreme Court that there is no provision for bifurcation of the subject matter in two parts one to be tried in suit by the civil court and the other to be adjudicated in arbitration. However, with development of arbitration law, in some instances, the courts have allowed even a non-signatory to arbitration clause to be party to the arbitration proceedings. However, such directions are given with extreme circumspection and only in cases where it is found that the non-signatory is a part of a single economic entity which also includes the signatory to the arbitration agreement. In certain cases, courts have also

compelled non-signatories to arbitrate where it found such non-signatories to be the alter ego of the signatories.

20. **Does an arbitration agreement bind assignees or other third parties?**

Party autonomy and consent are the primary drivers of an arbitration proceeding and it is a basic requisite that an agreement providing for arbitration as a dispute resolution mechanism between the parties is binding only to the parties to the agreement. Ordinarily, arbitration takes place between persons who have been parties to both the arbitration agreement and the substantive contact underlying it.

Therefore, essentially parties that are not a party to the arbitration agreement cannot be forced to resolve disputes through arbitration in terms of Section 7 of the Arbitration Act. A party who is not signatory to the arbitration agreement cannot be subjected to the arbitration.

In exceptional cases, courts in India have given recognition to the “Group of companies doctrine” under which an arbitration agreement entered into by a company within a group of corporate entities can in certain circumstances bind non-signatory affiliates. Under this doctrine, a non-signatory party could be subjected to arbitration provided these transactions were with group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties.

The Supreme Court in the case of *Chloro Controls (I) Pvt. Ltd. v. Severn Trent Water Purification Inc. and Ors (2013) 1 SCC 641* has taken a view that parties involved in a composite transaction executed through several agreements may be subject to the arbitration agreement under the main or the parent agreement. The court held that even a non-signatory or a third party can be subjected to arbitration subject to proving that it is claiming through or under the party signatory to the arbitration.

A third party is normally not permitted to join the arbitration proceedings, except where the third party is a "person claiming through or under" a party to the arbitration agreement. The courts have not provided an exhaustive definition of who qualifies as a "person claiming through or under" a party to the arbitration agreement. However, while interpreting this phrase, the courts have permitted third parties to be joined to arbitration where a single commercial transaction is executed through a number of agreements involving multiple parties. If a dispute arises out of such a transaction, all parties across the multiple agreements can be referred to arbitration under the agreement that lies at the heart of the transaction. This is irrespective of whether a party was a party to the said agreement and whether the agreement to which it is a party contains an arbitration agreement. Also please refer to Ameet Lalchand Shah and Ors. Vs. Rishabh Enterprises and Another ((2018) 15 SCC 678.

Further, the assignment of a contract would entail assigning all rights and obligations under the contract to the assignee and assignee would step into the shoes of the assignor. Therefore, assignee would be entitled to invoke arbitration clause provided in the contract that has been assigned to it.

G. The Tribunal

21. **How is the tribunal appointed?**

The Indian Law recognizes party autonomy and keeps it in high regard. Under the Indian system the parties are free to agree to the procedure for the appointment of the arbitrators. In case the appointment of the arbitral tribunal cannot be secured by following the procedure provided under the arbitration agreement due to non-cooperation of the opposite party or the parties or two appointed arbitrators fail to reach an agreement expected of them under that procedure or a person, including an institution fails to perform any function entrusted to him under that procedure, the appointment of the arbitrator is to

be secured by making an application to the High Court of jurisdiction (in case of Domestic Arbitration) and to the Supreme Court of India (in case of International Commercial Arbitration having seat in India) in terms of Section 11 of the Arbitration Act. Section 11 of the Arbitration Act as applicable on date, provides that where there is no agreement between the parties regarding the manner in which arbitrator(s) can be appointed then in arbitration with three arbitrators each party shall appoint one arbitrator and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator. However, if a party fails to appoint an arbitrator within thirty days from the receipt of request from other party to do so or the two appointed arbitrators fails to agree on the third arbitrator within thirty days from their appointment then the appointment shall be made by the High Court (in case of Domestic Arbitration) or the Supreme Court (in case of International Commercial Arbitration).

Section 11 of the Arbitration Act as applicable on date, further provides that where there is no agreement between the parties regarding the manner in which a sole arbitrator can be appointed then if the parties fail to agree on the arbitrator within thirty days from receipt of request by one party from the other party to so agree then, the arbitrator shall be appointed by the High Court (in case of Domestic Arbitration) or the Supreme Court (in case of International Commercial Arbitration). Though, the power of the High Courts and the Supreme Court to appoint the arbitrator are sought to be conferred on arbitral institutes designated by the High Courts and the Supreme Court, the said provisions have not been implemented till date.

22. **Are there any requirements as to the number or qualification of arbitrators in your jurisdiction?**

Section 10(1) of the Arbitration Act provides that the parties are free to determine the number of arbitrators but it should not be an even number. However, the Arbitration Act provides that a dispute can be decided by majority of the arbitrators and therefore if the majority constitutes of even number of arbitrators, there is no frustration of proceedings and their common opinion will prevail. As per Section 11(1) of the Arbitration Act, a person of any nationality can be appointed as an arbitrator unless otherwise agreed by the parties. An arbitrator does not need to be licensed to practise in India, and the law recognises that foreign qualified lawyers and technical professionals, among others, can serve as arbitrators. Arbitrators are appointed as agreed by the parties and the parties are free to determine their qualifications and nationality.

Pursuant to the passing of the Arbitration and Conciliation (Amendment) Act, 2021 **("2021 Amendment")**, no qualification and characteristic of arbitrators are prescribed by the statute. The 2021 Amendment deleted Eight Schedule of the Arbitration Act, which appeared to, among other things, limit the ability of foreign qualified lawyers from acting as arbitrators in India. For example, Eight Schedule appeared to prescribe requirements such as minimum experience, knowledge of Indian laws and so on, as preconditions for persons to be appointed as arbitrators. The 2021 Amendment however provides that qualifications, experience and norms for accreditation of arbitrators will be specified by regulations passed by the Arbitration Council of India (*Section 43 of the Arbitration Act*).

23. **Can an arbitrator be challenged in your jurisdiction? If so, on what basis? Are there any restrictions on the challenge of an arbitrator?**

An arbitrator may be challenged or objected to under the Indian jurisdiction. Section 12(3) of the Arbitration Act provides that the parties may challenge the appointment of an arbitrator and seek their removal on the following grounds:

(a) where circumstances exist that give rise to justifiable doubts as to his or her independence or impartiality;
(b) where the arbitrator does not possess the qualifications agreed by the parties.

Section 12 (5) of the Arbitration Act provides that any person whose relationship with the parties or counsel or the subject-matter of the dispute falls under any of the categories specified in Seventh Schedule shall be ineligible to be appointed as an Arbitrator. Seventh Schedule refers to instances such as where an arbitrator is an employee or consultant or advisor or has any other past or present relationship with a party or the arbitrator holds shares in one of the parties or an affiliate of one of the parties etc.

Section 13 of the Arbitration Act provides for challenge procedure before the Arbitral Tribunal. The challenge to the appointment of an arbitrator must be made in accordance with the procedure agreed between the parties. If no procedure has been agreed upon between the parties, the party that wishes to challenge an arbitrator must submit a written statement of the reasons for the challenge to the arbitral tribunal within 15 days from the date when the party becomes aware of the circumstances referred to in Section 12(3). Unless the challenged arbitrator withdraws from his/her office or the other party agrees to the challenge, the arbitral tribunal will decide on the challenge. If the challenge is unsuccessful, the arbitral tribunal will continue the proceedings and pass an arbitral award. In such scenario, the party challenging the appointment may make an application before the court for setting aside such an award on the same ground.

According to Section 14 of the Arbitration Act, the mandate of an arbitrator will also terminate and he/she will be substituted by another arbitrator if any of the following conditions are met:

(a) He/she becomes *de jure* or *de facto* unable to perform his function or for other reason fails to act without undue delay.
(b) He/she withdraws from office.
(c) The parties agree to terminate his/her mandate.

If any controversy remains concerning any of the grounds referred to in Section 14 above, a party is free to apply to the court to decide on the termination of mandate.

24. **If a challenge is successful, how is the arbitrator replaced?**

If a challenge to an arbitrator is successful and their mandate is terminated, a substitute arbitrator is appointed as per Section 15 of the Arbitration Act. The same rules shall be followed in appointing a substitute arbitrator which were applicable to the appointment of the arbitrator being replaced. Where an arbitrator is replaced, any hearing previously held may be repeated at the discretion of the arbitral tribunal, unless otherwise agreed by the parties. However, unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.

25. **What duties are imposed on arbitrators? Are these all imposed by legislation?**

The arbitrators are duty-bound to follow some regulations and practices to ensure that the arbitral proceedings are conducted in an impartial and fair manner with no deviations from the law.

Some of these duties are as follows:

(a) The arbitrator(s) is obliged to give a declaration in writing in terms of Section 12 read with Fifth and Seventh Schedule of the Arbitration Act, thereby disclosing the existence of any direct or indirect relationship with any of the parties or vested interests in any of the parties which may lead to the justifiable doubts on the independence and impartiality of such arbitrator.
(b) The arbitrator is bound to give equal treatment and full opportunity to all the parties to the arbitration proceeding and remain impartial throughout the arbitration proceedings.

(c) The arbitrator is bound decide the disputes between the parties taking into account the terms of the contract and trade usage applicable to the transaction.
(d) The arbitrator is obliged to decide the dispute as per Indian law of the land in case of domestic arbitration and as per law chosen by the parties in case of international commercial arbitration.
(e) The tribunal is bound to act without any undue delay.
(f) An Arbitrator cannot decide the dispute on the principle of equity unless he has expressly been authorized by the parties to do so.

The Arbitration Act prescribes detailed litmus to ascertain the independence and impartiality of a potential arbitrator. Arbitrators are required by law to disclose at the time of their appointment, and throughout the arbitral proceedings, any circumstances that affect their impartiality and/or independence.

Fifth Schedule of the Arbitration Act identifies the circumstances that give rise to justifiable doubts about the independence and/or impartiality of arbitrators. Arbitrators must disclose any:

(a) Personal and/or professional relationship with parties or their counsel.
(b) Relationship with the dispute.
(c) Interest in the dispute.

Seventh Schedule of the Arbitration Act sets out a list of circumstances that render a person ineligible to be appointed as an arbitrator. However, the parties can, subsequent to disputes having arisen between them, waive the applicability of this schedule by an express agreement in writing.

26. **What powers does an arbitrator have in relation to: (a) procedure, including evidence; (b) interim relief; (c) parties which do not comply with its orders; (d) issuing partial final awards; (e) the remedies it can grant in a final award and (f) interest?**

(a) Under Section 19(3) of the Arbitration Act, in the absence of an express agreement between the parties, the arbitral tribunal can, subject to Part I of the Arbitration Act, conduct the proceedings in the manner it considers appropriate. Section 19 (1) provides that the arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872. The arbitral tribunal has full power to determine the admissibility, relevance, materiality or weight of any evidence.

(b) The tribunal has power to pass, during arbitral proceedings, interim measures in terms of the provisions of Section 17 of the Arbitration Act. Such interim measures ordered by the arbitral tribunal shall be deemed to be the orders of the court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 in the same manner as if it were the orders of the court.

(c) Any order passed by the arbitral tribunal ordering interim measures under Section 17 of the Arbitration Act is deemed to be order of the court for all purposes and is enforceable under the Code of Civil Procedure as if it were the order of the court.

(d) The Arbitration Act also empowers the tribunal to pass interim awards or partial awards. As per provisions laid down in Section 31(6) of the Arbitration Act, during the arbitration proceedings arbitral tribunal can make interim award on any matter with respect to which it may make final arbitral award. Interim award is included in the definition of “arbitral award” and can be challenged within the timelines prescribed under Section 34 of the Arbitration Act i.e., three months from the date of receipt of the award. Therefore, for challenging the interim award, a party cannot wait for

passing of the final award, more so, when such final award is passed after expiry of three months from the date of receiving the interim award.

(e) The arbitrator is entitled to decide the dispute in the same manner as can be done by a court of law. An award passed by the tribunal is like a decree passed by the court. Therefore, the arbitrator is entitled to pass the award in terms of relief sought by the parties. Invariably, the arbitral tribunals are invited to pass monetary awards and, in some cases, they are called upon to give declaratory reliefs or relief of specific performance. All such reliefs can be granted by the arbitral tribunal.

(f) Where the power of the tribunal to award interest is concerned, Section 31 (7) of the Arbitration Act provides that the arbitral tribunal would be bound by the agreement between the parties on the issue of interest. Therefore, if there is a prohibition in the agreement for granting interest, the arbitral tribunal will have no competence to grant interest for any period up to the date of making of the award. In the absence of any agreement between the parties, regarding interest, tribunal shall be competent to award interest at such rate and for such period, on whole or part of the amount awarded, as the tribunal deems appropriate. In so far as, future interest is concerned, arbitral tribunal is empowered to award the same as per its discretion. In case the award is silent on future interest, all future interest shall be payable at a rate 2% higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.

27. **How may a tribunal seated in your jurisdiction proceed if a party does not participate in the arbitration?**

As per Section 25 (a), if the Claimant fails to communicate his statement of claim without showing sufficient cause within the time fixed by the tribunal, the arbitral tribunal is competent to terminate the arbitration proceedings.

Section 25(b) of the Arbitration Act permits the tribunal to treat the right of the respondent to file a statement of defense as having been forfeited if the respondent fails to communicate statement of defense within the time fixed by the tribunal and would be entitled to continue the proceedings without treating respondent's failure as its admission of the claimant's allegations.

Section 25(c) of the Arbitration Act provides that the tribunal may continue the proceeding and make arbitral award if either of the parties fail to appear at an oral hearing or to produce documentary evidence. Furthermore, the newly introduced Section 31-A of the Arbitration Act enables the tribunal to determine the costs payable by the parties, considering, amongst other things, their conduct.

28. **Are arbitrators immune from liability?**

Yes, arbitrators are immune from liability. Section 42B of the Arbitration Act talks about the 'Protection of action taken in good faith.' The provision states that no suit or other legal proceedings shall lie against the arbitrator for anything which is in good faith done or intended to be done under this Act or the rules or regulations made there under.

H. The Role of the Court during an Arbitration Proceeding

29. **Will the court in your jurisdiction stay proceedings and refer parties to arbitration if there is an arbitration agreement?**

In case there is valid and subsisting arbitration agreement between the parties for resolution of their dispute and one of the parties' files a regular court proceeding in respect of matters covered by the arbitration agreement, the court shall on an application filed by the opposite party, relegate the parties to arbitration. This is the mandate of Section 8 of the Arbitration Act.

However, the party challenging the initiation of court proceedings must make its objection no later than filing its first statement on the substance of the dispute in the court proceedings. If a party does not do so then such a statement on the substance of the dispute before the court would be deemed as a waiver of the arbitration agreement.

30. **Does the court in your jurisdiction have any powers in relation to an arbitration seated in your jurisdiction and/or seated outside your jurisdiction? What are these powers? Under what conditions are these powers exercised?**

The courts in India have the powers to intervene to assist arbitration proceedings seated in their jurisdiction. The assistance can be in one of the following ways:

(a) In case a party to an arbitration agreement brings an action before a court, the Court has the power to refer to parties to arbitration. (Section 8 Arbitration Act).
(b) The court has power to grant interim measures like securing the amount in dispute in arbitration, preservation, interim custody and sale of goods which are subject-matter of arbitration proceedings and such other interim measures etc. before or during the arbitral proceedings or at any time after making the award but before it is enforced. (Section 9, Arbitration Act).
(c) The court has power to appoint arbitrators (Section 11, Arbitration Act).
(d) Deciding any controversy regarding an arbitrator's mandate (Section 14 and 15, Arbitration Act).
(e) Enforcing interim orders of the arbitral tribunal (Section 17, Arbitration Act).
(f) On the request of the arbitral tribunal or on the request of a party (who has been granted approval by the arbitral tribunal), the Court may issue summons to the witnesses for examination or for production of documents and direct that such evidence be provided directly to the arbitral tribunal. Further, on representation of the arbitral tribunal, the court has the power to penalize and punish the person who refuse to give such evidence or is guilty of contempt of court etc.(Section 27, Arbitration Act).
(g) The court has power to extend an arbitral tribunal's mandate after expiry of the period of 18 months within which the tribunal has to pass an award (except in international commercial arbitration), substituting one or more arbitrators in an arbitral tribunal or penalizing the tribunal or the parties for delay in arbitration proceedings (Section 29(A), Arbitration Act).
(h) The court has power to hear challenges to an arbitral award in an application for setting-aside of the award (Section 34, Arbitration Act).
(i) The court has power to hear appeals from certain decisions of the arbitral tribunal (section 37, Arbitration Act) such as when a plea of lack of jurisdiction is accepted by the tribunal (section 16) or an interim measure sought by a party is denied by the Arbitral Tribunal (Section 17, Arbitration Act).
(j) Payment of costs to the tribunal before the rendering of an award (Section 39, Arbitration Act).
(k) Extension of time periods fixed by the parties for the initiation of arbitration (section 43(3), Arbitration Act).

In respect of arbitral proceedings, in international commercial arbitrations, seated outside India, the assistance of Indian Court may be sought in the following matters, provided the parties have not agreed for exclusion of such remedies:

(a) Assistance in taking evidence including for summoning witnesses and producing documents (Section 27 Arbitration Act).

(b) Penalizing and punishing person for refusing to give evidence to the arbitral tribunal or guilty of contempt of arbitral tribunal etc. (section 27, Arbitration Act).
(c) Hearing appeals against orders granting or refusing to grant interim measures under Section 9 of the Arbitration Act (Section 37, Arbitration Act)
(d) Granting interim measures (Section 9, Arbitration Act).

31. **Can the parties exclude the court's powers by agreement?**

Parties by agreement cannot exclude the power of the courts in arbitrations being held in India. It is only in the case of international commercial arbitration seated outside India that the court's power under the provisions of Sections 9, 27 and 37 of the Arbitration Act can be excluded by agreement between the parties.

I. Costs

32. **How will the tribunal approach the issue of costs?**

The newly inserted Section 31A of the Arbitration Act (inserted into the legislation by the 2015 Amendments) legislates, for the first time, a costs regime in Indian arbitration law. Section 31A (1) empowers the arbitral tribunal to decide whether costs are payable by one party to the other, the amount of cost and when such costs are to be paid. "Cost" includes fees and expenses of arbitrators, courts and witnesses, legal fees and expenses, any administration fees of institution supervising the arbitration and any other expenses incurred in connection with the arbitral proceedings or the arbitral award. Under the amended law, the default rule is "costs follow the event" or "loser pays" (Section 31A(2)(a), Arbitration Act). The tribunal may, however, for reasons to be recorded in writing, make a different order on costs Section 31-A(2)(b) of the Arbitration Act.

The guidelines for the determination of costs by the arbitral tribunal are set out in Section 31A (3) of the Arbitration Act includes the following: (i) the conduct of all the parties; (ii) whether a party has succeeded partly in the case; (iii) whether a party has delayed the disposal of the proceedings by making a frivolous counter-claim; and (iv) whether any reasonable offer to settle the dispute is made by one party but rejected by the other.

Section 31A (4) of the Arbitration Act further provides that the arbitral tribunal may make an order including that a party shall pay a proportion of another party's costs, pay costs from or until a certain date only or pay interest on costs from or until a certain date etc.

33. **Are there any restrictions on what the parties can agree in terms of costs in an arbitration seated in your jurisdiction?**

Yes, as per Section 31A (5) of the Arbitration Act, an agreement providing that a party is to pay whole or part of the costs of arbitration in any event, shall be binding only if such agreement is made after dispute in question have arisen.

J. Award

34. **What procedural and substantive requirements must be met by an award? Must the award be produced within a certain timeframe?**

Section 31 of the Arbitration Act lays down the following requirements that an award must meet. They are as follows:

(a) an arbitral award has to be made in writing and has to be signed by members of the arbitral tribunal. In case the arbitral tribunal comprises of more than one arbitrator, signature of majority of members shall be sufficient so long as the reason for any omitted signature is stated.
(b) the arbitral award shall state reasons on which it is based unless parties have agreed that no reasons are required to be given or the arbitral award is made on agreed terms under Section 30 (Settlement).
(c) The arbitral award shall state its date and place of arbitration and the award shall be deemed to have been made at that place. A signed copy of the arbitral award is to be delivered to each party.

Section 29A (1) of the Arbitration Act provides that an arbitral award is to be made within a period of 12 months from the date of completion of pleadings. Section 23(4) of the Arbitration Act provides that the pleadings i.e., statement of claim and defense shall be completed within a period of 6 months from the date the arbitrator(s) received notice in writing of their appointment. However, parties by agreement can extend the period of making the award by another 6 months (Section 29A (3) of the Arbitration Act). After expiry of period of 18 months from the date of completion of pleadings, the time for making the award can be extended only by a court ((Section 29A (3) of the Arbitration Act).

K. Enforcement of Arbitral Awards

35. **Are arbitral awards (both local and foreign arbitrations) enforceable in your jurisdiction?**

Yes, both local and foreign awards are enforceable in India. As far as domestic awards (arising out of all the arbitrations held in India) are concerned, they can be enforced like a decree of a civil court in India. As per the provisions of Section 36 of the Arbitration Act, a party can apply for enforcement of a domestic award once the time for challenging the award has expired or so long as the court where the petition challenging the award has been filed, does not grant an order for stay of operation of the said arbitral award. In so far as foreign awards are concerned a petition for enforcement thereof shall lie before High Court of the jurisdiction and such court shall enforce the foreign award unless the party against whom such an award is sought to be enforced furnishes to the court proof that any ground, as mentioned under Section 48 of the Arbitration Act, exists justifying refusal for enforcement of the foreign award.

36. **Are there any specific procedures for the enforcement of an arbitral award? Especially for foreign arbitral awards.**

Section 36 of the Arbitration Act states that the enforcement of a domestic award is done in the same manner as a decree of the court is enforced. For enforcing a domestic award, a petition has to be filed before a court of competent jurisdiction. Along with the petition, an original award has to be filed which should bear the stamp duty payable on arbitral award depending on the place where award is made. Additionally, along with the petition, an award holder has to give, to the extent possible, details of the assets of the award debtor of which the attachment and sale is sought for satisfaction of the award.

For the enforcement of foreign awards, the party applying for its enforcement has to produce, along with the application original award or a duly authenticated copy thereof in the manner required by the law of the country in which it was made, an original agreement for arbitration or duly certified copy thereof and such other evidence as may be necessary to prove that the award in question is a foreign award. If the award or the agreement is in foreign language, a party seeking enforcement of the award shall produce an English translation of the same. Such translation has to be certified as correct by a

diplomatic or consular agent of the country to which that party belongs or should be certified as correct in the manner provided as per law in force in India. As per Indian law, a foreign award is not required to bear any stamp duty payable in India.

L. Grounds for Challenging an Award

37. **What are the grounds on which an award can be challenged, appealed or otherwise set aside in your jurisdiction?**

Indian courts have adopted a pro-arbitral award approach. Once it is found that the arbitrator's approach is not arbitrary or capricious then he is the last word on facts. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his award. In a proceeding to challenge the award, the courts in India examine the award to ensure that broadly the award is in conformity with law and the findings of the Arbitrator(s) are not preceded by an approach that betrays unreasonableness in procedure or outcome of the kind that would shock a court of law or disclose patent erroneous understanding of law. An award cannot be set aside merely because the arbitrator has committed an error of fact or law. Even a violation of statute having no public policy element, would not make the award liable to be set aside. A plausible interpretation of the arbitrator has to be upheld as the arbitrator is considered to be the master of facts and law.

An award can be set aside only if it is perverse or suffers from patent illegality going to the root of the matter. An award based on no evidence or failing to take into consideration the evidence produced before the tribunal would be liable to be set aside. Similarly, a contradictory finding or an award awarding more than the claim amount would be set aside on the ground of its being contrary to the interest of justice. The award can be set aside if it is contrary to the public policy of Indian law. Section 34 of the Arbitration Act enumerates the grounds on which a domestic award may be set aside or challenged thereto.

It states that a court may set aside the arbitral award if the party making the application establishes on the basis of the record of the arbitral tribunal that:

(a) a party was under some incapacity, or
(b) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
(c) 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; or
(d) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or
(e) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

the Court finds that,

(a) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(b) the arbitral award is in conflict with the public policy of India.

38. **Are there are any time limits and/or other requirements to bring a challenge?**

Section 34(3) of the Arbitration Act provides that an application for setting aside an award may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33 of the Arbitration Act (for correction of typographical error etc. or for interpretation of award or for an additional award), from the date on which such request had been disposed of by the arbitral tribunal. However, if the Court is satisfied that the applicant was prevented by sufficient cause from making the application, for setting aside the award, within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.Therefore, if a petition is not filed within three months plus thirty days from the date of receipt of signed copy of the award by the party intending to challenge the award, no petition for challenging the award would lie before the court as the same would be barred by limitation.

M. Confidentiality

39. **Is arbitration seated in your jurisdiction confidential? Are there any exceptions to confidentiality?**

As per the terms of Section 42A of the Arbitration Act, it is mandatory for the parties to the arbitral proceedings, the arbitral tribunal and the arbitration institution to keep the arbitral proceedings including pleadings, documents, etc., confidential. It is relevant to note here that such confidentiality is limited only to the extent of arbitration proceedings and would not apply in case an award is required to be disclosed for the purpose of challenging or enforcing the arbitral award.

N. Miscellaneous

40. **Are there any other important issues to note regarding arbitration in your jurisdiction?**

Arbitrations have captured a sizable portion of Alternate Dispute Resolution (ADR) mechanisms in India. It is of a very dynamic nature and is evolving every day. Some important issues regarding arbitration in India, may be noted as under:

(a) Considering the rapidly increasing popularity of arbitration as the preferred mode of dispute resolution, invariably, all infrastructure contracts awarded by the government bodies and contracts involving substantial monetary stakes provides for resolution of disputes through arbitration.

(b) Indian courts are well conversant with arbitral law jurisprudence and ever since the Arbitration Act came into force, the courts have examined various issues arising out of arbitration law. In one such instance, after an in-depth review, the Supreme Court of India in the matter *of Perkins Eastman Architect DPC& Another. v. HSCC (India) Ltd*[2019 SCC OnLine SC 1517] held that in an arbitration agreement providing for appointment of a sole arbitrator, either of the parties cannot appoint the sole arbitrator unilaterally even if it is so provided under the arbitration agreement.

(c) The Apex Court in the case of *BGS SGS SOMA JV v. NHPC Limited* [(2020) 4 SCC 234] held that the venue of an arbitration is the same as seat unless a contrary intention appears in the agreement.

(d) Similarly, the Indian Supreme Court in the case of *Government of India Vs. Vedanta Limited; Ravva Oil (Singapore) PTE Limited; Videocon Industries Limited* [(2020) 10 SCC 1] held that a foreign award can be enforced in India within a period of within three years from the date when

the award becomes final and binding in accordance with the law prevailing at the country of seat of the arbitration.

(e) For matters connected with international commercial arbitrations, powers have been given to the High Courts of the competent jurisdiction to entertain any permissible proceedings under the Arbitration Act, except in the matter of appointment of arbitrator in an international commercial arbitration for which power has been specifically conferred to the Hon'ble Supreme Court of India.

(f) For the enforcement of foreign award, Indian courts exercise very limited jurisdiction of refusing to enforce the award. To put it differently, approach of Indian court is to enforce the foreign award expeditiously.

(g) Recently in a case of *N.N. Global Mercantile Private Limited v. Indo Unique Flame Ltd. & Ors*. [(2021) 4 SCC 379], the Supreme Court of India held that where an arbitration agreement is contained in an unstamped/inadequately stamped contract, the arbitration agreement will not be made void, unenforceable or non-existent.

(h) Additionally, there have been multiple amendments to the Arbitration Act in the recent past which have brought about some significant changes. Some of these changes are as given below:

  (i) By way of amendment in 2015, the concept of automatic stay of awards on filing of the petition for challenging the award was done away with and it was made mandatory for the party challenging an award to file an application for the stay of the operation of award. Not only this, it was also provided that while considering the application for grant of stay in case of an arbitral award for payment of money, the court shall have due regard to the provision of the Code of Civil Procedure, 1908 ("CPC"). The provisions of CPC provide for either a deposit of the amount disputed in the appeal, or to permit such security to be furnished as it may deem fit. This means that the Courts in India now have the power to direct furnishing of security or deposit of amount in award while staying the operation of the arbitral award.

  (ii) In 2021, a noteworthy amendment was made to the proviso to Section 36 of the Arbitration Act, which states that where the court is prima facie satisfied that either the arbitration agreement or contract which is the basis of the award or the making of award was induced by fraud or corruption, the court shall stay the award unconditionally pending disposal of the challenge under Section 34 of the Act.

  (iii) Furthermore, the arbitration proceedings were sought to be expedited by providing a time-limit of 12 months for completion of arbitration proceedings. Further, a new concept of fast-track procedure was also introduced whereby the arbitral tribunal, on the basis of pleadings and documents submitted by the parties, would pass an award within a period of 6 months from the date when it enters upon reference. In such fast-track arbitration, oral hearing may only be required if all the parties make a request or if the arbitral tribunal considers it necessary.

  (iv) By way of amendment in 2019, a time limit of 6 months was prescribed, from the date the arbitrator(s) received notice in writing of their appointment, within which the parties were required to file their statement of claim and defense.

(i) India is also slowly establishing itself as a market for International Commercial Arbitration. It now has fully equipped well-established arbitration institutions like Indian Council of Arbitration (ICA), Delhi International Arbitration Centre (DIAC), Mumbai Centre for International Arbitration (MCIA) and recently inaugurated The International Centre for Alternative Dispute Resolution, Hyderabad.

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