

**Morgan Lewis**

**AN INTRODUCTORY  
GUIDE TO  
ARBITRATION  
IN ASIA**

Second edition, 2018



## INDIA

<b>Model Law</b>	Yes
<b>New York Convention</b>	Yes
<b>Arbitral institution</b>	<p><b>Mumbai Centre for International Arbitration (MCIA)</b> 20th Floor, Express Towers, Nariman Point, Mumbai, 400021</p> <p><b>Phone</b> +91 22 6105 8888</p> <p><b>Email</b> contact@mcia.org.in</p>
<b>Current rules</b>	Arbitration Rules of the Mumbai Centre For International Arbitration (MCIA Rules 2nd Edition, 15 January 2017)
<b>Model clause</b>	<p><i>'Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in accordance with the Arbitration Rules of the Mumbai Centre for International Arbitration ("MCIA Rules"), which rules are deemed to be incorporated by reference in this clause.</i></p> <p><i>The seat of the arbitration shall be _____.</i></p> <p><i>The Tribunal shall consist of [one/three] arbitrator(s).</i></p> <p><i>The language of the arbitration shall be _____.</i></p> <p><i>The law governing this arbitration agreement shall be _____.</i></p> <p><i>The law governing the contract shall be _____.'</i></p>
<b>Arbitral institution</b>	<p><b>Singapore International Arbitration Centre, India Office (SIAC)</b> 1008, The Hub One Indiabulls Centre</p>



## **Does Indian law consider all matters to be arbitrable?**

The Act does not in specific terms exclude any category of disputes — civil or commercial — from arbitrability. However, an award will be set aside if the court finds that the subject matter of the dispute is not capable of settlement by arbitration under the laws currently in force, or if the award conflicts with Indian public policy.

Section 2(3) of the Arbitration Act merely declares that Part I, relating to domestic arbitration and award, shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.

Since the Arbitration Act is silent on types of non-arbitrable disputes, the Supreme Court outlined judicially enumerated issues that cannot be referred to arbitration — based on analysis of the types of rights involved (rights in rem or in personam), conferment of jurisdiction on special courts or on public policy. These include matters involving crimes, matrimony, insolvency and winding up, guardianship, tenancy, testamentary matters,<sup>1</sup> trusts<sup>2</sup> and consumer protection.<sup>3</sup> However, it held that the law did not exclude issues of fraud as being non-arbitrable.

The Supreme Court in *World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd.*<sup>4</sup> held that allegations of fraud did not prevent the court from making reference to arbitration under Section 45 of the Arbitration Act. However, in the case of India-seated arbitrations, there was a cloud on efficacy of arbitral proceedings to resolve issues of fraud.

The Supreme Court of India in the recent judgment of *A. Ayyasamy v. A. Paramasivam & Ors.*<sup>5</sup> held that mere allegations of fraud simpliciter does not nullify the arbitration agreement, but only in cases where there are serious allegations of fraud, the disputes may be held non-arbitrable. Every allegation of fraud would need to be weighed on a scale of seriousness and complexity to identify the veracity of the allegations.

## **In what circumstances will the court stay proceedings in favour of arbitration?**

The courts will stay proceedings pending before it in favour of arbitration if the dispute falls within the scope of an arbitration agreement and if the arbitrator is competent or empowered to decide it, unless (in the case of an application made under Section 8 of the Arbitration Act, concerning a domestic commercial arbitration) they find that prima facie no valid arbitration agreement exists, or (in the case of an application made under Section 45, concerning a foreign commercial arbitration) the courts find that the arbitration agreement is null and void, inoperative or incapable of being performed.

## **Is an arbitration clause that does not refer to a set of an administering institution's rules enforceable?**

The courts will uphold an arbitration agreement, including those providing for ad hoc rather than administered proceedings, so long as it evidences an intention by the parties to resolve their dispute

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<sup>1</sup> *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. & Ors.* (2011) 5 SCC 532.

<sup>2</sup> *Shri Vimal Kishor Shah & Ors. V. Mr. Jayesh Dinesh Shah & Ors.*, Civil Appeal No. 8614 of 2016 (Supreme Court).

<sup>3</sup> *Aftab Singh and Others v. Emaar MGF Land Limited and Anr.*, Consumer Case No. 701 of 2015 (NCDRC).

<sup>4</sup> AIR 2014 SC 968.

<sup>5</sup> Civil Appeal Nos. 8245 and 8246 of 2016 (Supreme Court).

by arbitration. The Arbitration Act supplies a default procedure where the parties have not indicated what procedural rules are to apply.

## **How are appointments and challenges to the appointment of arbitrators made?**

Chapter III of Part I of the Arbitration Act relates to the composition and appointment of the arbitral tribunal. 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. The parties are free to agree on the procedure to appoint an arbitrator.

If the parties fail to appoint the arbitrator, they may approach the Supreme Court in case of international commercial arbitration and the High Court in domestic arbitrations under Section 11 of the Arbitration Act. The role of Supreme Court and High Court is confined to the examination of the existence of an arbitration agreement while appointing an arbitrator.

Before appointing an arbitrator, the Supreme Court or the High Court shall seek a disclosure in writing from the prospective arbitrator as to whether any circumstances exist that are likely to give rise to justifiable doubts as to his or her independence and impartiality. The application for appointment of the arbitrator before the Supreme Court or High Court is required to be disposed of as expeditiously as possible, and an endeavour shall be made to do so within a period of 60 days.

An arbitrator can be challenged if justifiable doubts arise as to his or her independence or impartiality or if he or she does not possess the necessary 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 after the appointment was made. The grounds stated in the Fifth Schedule of the Arbitration Act give guidance on determining whether circumstances exist that give rise to justifiable doubts as to the independence or impartiality of an arbitrator. The Seventh Schedule contains circumstances where an arbitrator is rendered ineligible for appointment.

The parties may agree on a procedure for challenging the appointment of an arbitrator. In the absence of such a procedure, a party that 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 or her 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 shall pass 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 Arbitration Act.

## **Who appoints the tribunal if the arbitration agreement does not provide for it?**

In the absence of an agreement by the parties, the following procedure shall be adopted. If a sole arbitrator is to be appointed and the parties are unable to agree on the appointment, the arbitrator shall, in international commercial arbitrations, be appointed by the Supreme Court or, in domestic arbitrations, the High Court, or any person or institution designated by such court. The relevant court must make the appointment within 60 days.

If three arbitrators are to be appointed, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator. If a party fails to appoint an arbitrator within 30 days, the appointment of the arbitrator shall be made by the Supreme Court for international

commercial arbitrations and the High Court for domestic arbitrations, or any person or institution designated by such court.

## **What is the extent and nature of court supervision of arbitration?**

For arbitrations seated in India, under the Arbitration Act, a court may not intervene in an arbitration proceeding except on application by either of the parties under the following circumstances:

- Application for dispute to be referred to arbitration under Sections 8 and 45;
- Application for interim measures under Section 9;
- Application for court to appoint arbitrator under Section 10;
- Application challenging the appointment of an arbitrator under Section 13;
- Application to determine the termination of mandate of an arbitrator under Section 14;
- Application for assistance in taking evidence under Section 27;
- Application to extend time period for completion of arbitral proceedings beyond the 18-month time frame under Section 29A(4);
- Application to set aside an arbitral award under Section 34;
- Enforcement of an award under Section 36;
- Appeals from certain orders of a court under Section 37;
- Application to order the tribunal to deliver an award to an applicant on payment to the court under Section 39;
- Application for a determination of jurisdiction under Section 42; or
- Extension of time periods under Section 43.

## **Can an arbitral tribunal grant interim orders or relief?**

Yes. Section 17 of the Arbitration Act provides that the arbitral tribunal has the same powers as a civil court to grant and enforce interim measures of protection as it considers necessary in respect of the subject matter of the dispute. This is subject to some narrow exceptions, such as the granting of injunctive relief against encashment of a bank guarantee. The arbitral tribunal may also require a party to provide appropriate security in connection with any interim measure ordered. The interim orders passed by an Arbitral Tribunal will be deemed to be an order of the court and will be enforceable as court orders under the Code of Civil Procedure, 1908.

## **Can an arbitral tribunal award interest?**

Yes. Section 31(7) of the Arbitration Act empowers an arbitral tribunal to award interest at such rate as it deems reasonable, unless otherwise agreed by the parties. The principal sum awarded in a final award will carry interest at two per cent per annum over the prevailing rate of interest from the date of award to the date of payment.

## **Are arbitration proceedings confidential?**

Under the Arbitration Act, there is no express or implied obligation to treat an arbitration agreement, any proceedings arising from it, or the award as confidential.

## **Are there any restrictions on who may represent parties in arbitration?**

The Arbitration Act does not impose any restrictions on the representation of parties in arbitration proceedings.

## **How are domestic arbitral awards enforced in India?**

Domestic awards shall be enforced under the Code of Civil Procedure in the same manner as if the award were a decree of the court. Such enforcement can only be refused on the grounds specified in the code.

Foreign awards may be enforced in the same manner as a decree of the court. The party applying for enforcement must produce the original award or an authenticated copy, the original agreement or an authenticated copy, and evidence necessary to prove that it is a foreign award. If the award is in a foreign language, the party must produce a certified English translation.

## **How and when may parties challenge arbitral awards made in India?**

There is no appeal from arbitral awards made in India. A domestic award may only be set aside by the courts upon application by a party. Any such application must be made within three months from the date on which the party making that application had received the arbitral award. The grounds for a court to set aside an award are as follows:

- The parties were under some incapacity, or the agreement was not valid under the law of the country where the award was made or that the agreement was subject to;
- The party against whom the award is invoked was not given proper notice as required;
- The award deals with a difference not contemplated by the submission to arbitration;
- The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties;
- The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country under the law of which that award was made;
- The subject matter of the dispute is not capable of being settled under the laws of India;
- The enforcement of the award would be contrary to the public policy of India. The notion of public policy has been clarified by an explanation to Section 34 and is limited to fraud, corruption, contravention of fundamental policy of Indian law, or basic notions of morality or justice. The court may not review the merits of the dispute in deciding whether the award is in contravention with the fundamental policy of Indian law; or
- In the case of domestic arbitrations only, the award is vitiated by patent illegality that appears on the face of the award.

## **Can foreign arbitral awards be enforced in India?**

Yes. The procedure governing the enforcement of New York Convention awards is set out in Part II Chapter I of the Arbitration Act.

A foreign award is an (i) Arbitral Award, (ii) on differences between persons arising out of legal relationships, whether contractual or not, (iii) considered as commercial under the law in force in India, (iv) made on or after the 11th day of October 1960, (v) in pursuance of an agreement in writing for arbitration to which the convention set forth in the first schedule applies (New York Convention), and (vi) in one of such territories as the Central Government, being satisfied that reciprocal provisions made may, by notification in the Official Gazette, declare to be territories to which the said convention applies.

The enforcement of a foreign award in India is a two-stage process that is initiated by filing an execution petition. Initially, a court would determine whether the award adhered to the requirements of the Arbitration Act. The foreign award is deemed to be the decree of the Court under Part II of the Arbitration Act, once the conditions for enforcement under Section 48 are satisfied. As per recent trend, almost all challenges to enforcement of foreign awards have been rejected in Indian courts.

## **When can the Indian courts refuse enforcement of foreign arbitral awards?**

Under Section 48, the enforcement of a foreign award may be refused on the following grounds:

- The parties were under some incapacity or the agreement was not valid under the law of the country where the award was made or that the agreement was subject to;
- The party against whom the award is invoked was not given proper notice as required;
- The award deals with a difference not contemplated by the submission to arbitration;
- The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties;
- The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country under the law of which that award was made;
- The subject matter of the dispute is not capable of being settled under the laws of India;
- The enforcement of the award would be contrary to the public policy of India; or
- The notion of public policy has been clarified by an explanation to Section 48 and is limited to fraud, corruption, contravention of fundamental policy of Indian law, or basic notions of morality or justice. The court may not review the merits of the dispute in deciding whether the award is in contravention with the fundamental policy of Indian law.

**Nishith Desai Associates, 2018.**



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