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Judicial Intervention in Arbitrations in India

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Arbitration Law Generally

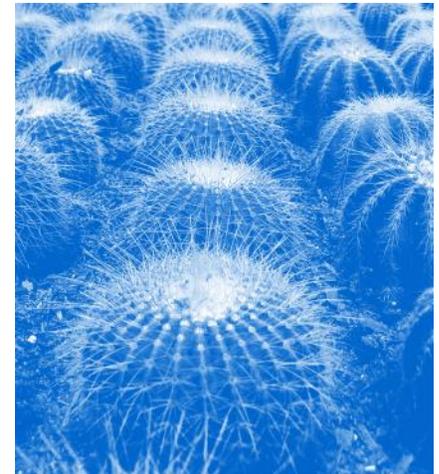
India’s arbitration law is the Arbitration and Conciliation Act 1996 (the “Act”) which is based on the UNCITRAL model law. However, the Act has substantial deviations and departures from the model law. Part I of the Act applies to arbitrations held in India, and Part II of the Act applies to the enforcement of foreign awards of such jurisdictions that are signatories of the New York Convention.

The Act provides considerable flexibility to parties in specifying the arbitration procedure and the

parties may prescribe any specific arbitration procedure to be followed by the arbitral tribunal to conduct the proceedings. Moreover, there exist no statutory restrictions under the Act with regard to the choice of arbitration institutions by the parties. The parties are free to determine the place of arbitration irrespective of their domicile. Hence arbitration between Indian Parties on Indian Law can be conducted in International Arbitral Institutions such as the London Court of International Arbitration (LCIA) or the Singapore International Arbitration

Center (SIAC).

In case these details have not been spelt out in the arbitration clause the arbitral tribunal will conduct the proceedings in the manner it considers appropriate. When conducting its proceedings the tribunal can determine the admissibility, relevance and materiality of any evidence. The Act specifies that a tribunal should not be constrained by the procedures prescribed under statutes which govern court proceedings such as the Code of Civil Procedure, 1908 and the Indian Evidence Act, 1872.



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Model Arbitration Clause

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

*Indian Council of Arbitration,
FICCI*

Forms of Arbitration

Arbitrations are conducted in several models in India based on the type of parties and the dispute at hand.

The first and the most popular method of conducting arbitrations remains, ad-hoc arbitration. Most parties omit to specify arbitrators or institutions in their arbitration

clauses and only approach courts for the appointment of arbitrators post-dispute.

In these cases the proceedings are conducted ad-hoc.

However, institutional arbitration is fast gaining popularity in infrastructure, engineering and construction contracts. With institutional arbitration,

parties hope to have their disputes adjudicated by Arbitrators with the right blend of sectoral and legal knowledge.

There also exist provisions for fast track arbitrations, though gaining in popularity they are seldom utilized in India.

Costs of Arbitration

Another push towards institutional arbitration is the relatively high cost of ad-hoc arbitration. In ad-hoc arbitration the fees of the arbitrators are not regulated, but decided by the Arbitral Tribunal with the consent of the parties.

Some of the Arbitral Tribunals, consisting of Supreme Court and High Court judges, charge high arbitration fees. These fees vary approximately from INR 3000.00 to INR 50,000.00 per hearing for an arbitrator, depending upon the professional standing of the arbitrator

and the size of the claim. The number of hearings required and the cost of the arbitral venue vary widely.

Hence in several instances depending on the quantum of the amount in dispute institutional arbitrations turn out economical when compared to ad-hoc arbitrations. India has several developed bodies which undertake institutional arbitration these include the Chambers of Commerce (organized by either region or trade), the Indian Council of Arbitration (ICA), the Federation of

Indian Chamber of Commerce and Industry (FICCI), and the International Centre for Alternate Dispute Resolution (ICADR).

It is also important to note that law does not specify procedures for the assessment and award of costs. An award of costs is up to the discretion of the arbitrator. In most awards as practice, costs are awarded to the successful party which may also include interest.

Schedule of Fees FICCI Tribunal of Arbitration		
Amount in Dispute	Arbitrator's Fee (in Rs.)	Administrative Fee (in Rs.)
Upto Rs. 5 lac (Rs. 5,00,000)	30,000	15,000
From Rs. 5 lac one to Rs 25 lacs (Rs. 5,00,001 to Rs. 25,00,000)	30,000 plus 1,500 per lac or part thereof subject to a ceiling of 60,000	15,000 plus 750 per lac or part thereof subject to a ceiling of 30,000
From Rs. 25 lac one to Rs. 1 crore (Rs.25,00,001 to Rs.1,00,00,000)	60,000 plus 1,200 per lac or part thereof subject to a ceiling of 1,50,000	30,000 plus 600 per lac or part thereof subject to a ceiling of 75,000
From Rs. 1 crore one to Rs. 5 crores (Rs.1,00,00,001 to Rs.5,00,00,000)	1,50,000 plus 22,500 per crore or part thereof subject to a ceiling of 2,40,000	75,000 plus 11,250 per crore or part thereof subject to a ceiling of 1,20,000
From Rs. 5 crores one to Rs. 10 crores (Rs.5,00,00,001 to Rs.10,00,00,000)	2,40,000 plus 15,000 per crore or part thereof subject to a ceiling of 3,15,000	1,20,000 plus 8000 per crore or part thereof subject to a ceiling of 1,60,000
Over Rs.10 crore (Rs. 10,00,00,000)	3,15,000 plus 12,000 per crore or part thereof	3,15,000 plus 12,000 per crore or part thereof

Source : FICCI

Judicial Interventions

Even though the one of the main objectives of the Act are to give more powers to arbitrators and reduce obstructive litigation there remains considerable room for judicial interventions at several stages in the arbitration.

Pre-arbitration

The first and most popular, is a judicially ordered reference to arbitration under Section 8 of the Act. In such a proceeding a party (often the claimant) approaches a State High Court for the reference to arbitration on the existence of a valid arbitration clause. Another popular procedure availed pre-arbitration is a judicially ordered appointment of an Arbitrator under Sec. 11

of the Act. Alongwith with this measure parties also often approach courts asking them to pass interim orders which are valid limited by courts till the point of constitution of the Arbitral Tribunal. These interim orders are not readily passed by Courts, except when grave urgency is shown with regard to the subject matter of the arbitration or preventing acts which frustrate the enforcement of the Arbitration Award.

On justifiable doubts as to the independence or impartiality of the Arbitrator a party can challenge the constitution of the Arbitration Tribunal. Not only on the counts of erroneous appointment or pre-emption of default, but also on apparent default an arbitra-

tor can be challenged. The procedure has been provided under Section 13 of the Arbitration and Conciliation Act of 1996.

Adding more room for court interference, the Supreme Court of India has held recently that in cases of serious frauds and misrepresentations a civil suit will be maintainable even when an Arbitration Clause is in existence. This is especially applicable to cases where detailed evidence has to be lead and examined, which cannot be undertaken by a Arbitration Tribunal as it examines evidence in a summary procedure.

Judicial Interventions Cont..

During arbitration

Even during the pendency of the Arbitration aggrieved parties can approach courts for interference as some orders have been specified as appealable orders under Sec. 37 of the Act. These appealable orders have been specified as orders by the tribunal on its jurisdiction and specific pleas. When approaching courts under Sec. 37 parties often attempt to have the arbitration proceedings enjoined till the decision of the court is rendered on the appeal. How-

ever, courts do not readily grant such an indulgence to an appellant.

Post arbitration

The act seeking to strengthen the finality of Arbitration Awards specifies them to be final and binding on the parties unless an application for setting aside the award is made or an appeal is filed. Such an application has to be made within three months from the date of receipt of the award. Failing this the award is treated as a decree of the court

for which execution proceedings can be initiated by the claimant. T

he Grounds for challenges to the award are found in Sec. 34. In addition to which there is the Supreme Court has carved out, "public policy" as a ground of challenge. For much of the controversy on the increased scope of judicial interference and non-recognition of Arbitration Awards, recent statistics show Indian Courts accord a high level of deference to Arbitral Awards.

High Court (Domestic Awards)				
Grounds	Total Number of Challenges	Allowed	Rejected	Modified
Jurisdiction	246 43.53%	43 17.47%	197 80.08%	6 2.43%
Public Policy	151 26.72%	25 16.55%	112 74.17%	14 9.27%
Limitation	77 13.62%	9 11.68%	66 85.71%	2 2.59%
Violation of natural justice	37 6.54%	8 21.62%	24 64.86%	5 13.51%
Bias	22 3.89%	1 4.54%	21 95.45%	-
Non-appreciation of facts/evidence	14 2.47%	1 7.14%	13 92.85%	-
Not a reasoned award or no grounds	9	-	9	-
Not signed/stamped	3	-	3	-
Not a party	1	1	-	-
Non-application of mind	1	1	-	-
Wrongful rejection of defence (filing beyond time)	1	-	-	1
No arbitration agreement	1	1	-	-
Typographical error	1	-	1	-
Withdrawn (challenge not pursued)	1	-	1	-
Total	565 (1996 to Sept 2007)	94 (16.63%)	443 (78.41%)	28 (4.96%)

Enforcement

An application for enforcement of a foreign arbitration award has to be made in the highest civil court having original jurisdiction over the matter in dispute. The following documents have to be submitted with the application:

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

When the court is satisfied that the foreign award is enforceable, the award is then deemed to be a decree of that court proceedings in India.

Source : S. Kachwaha, 4(1) A. Int. Arb. J. 68 (2008).

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