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Contents

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1. General

1.1 Prevalence of Arbitration

Arbitration is a common method of resolving commercial disputes in India. While international and institutional arbitration is a more common phenomenon in high-value commercial transactions involving an Indian party and a cross-border element, ad hoc arbitration is the more conventional practice in India.

International arbitration is most often an election of the parties by contractually providing for the arbitration to be seated at, and/or administered by the laws of, a foreign jurisdiction and/or a foreign arbitral institution.

1.2 Trends

India has seen a significant growth annually in the number of disputes referred to arbitration. Several legislative and judicial measures have been adopted in the past few years that have contributed to the pro-arbitration trend in India, including amendments in 2015 (the 2015 Amendment) and 2019 (the 2019 Amendment) to the (Indian) Arbitration and Conciliation Act, 1996 (the Act) and the efforts of the judiciary to adopt a non-interventionist approach in favour of arbitration agreements and declining to review the merits of arbitral awards.

Indian courts have recently entertained actions to restrain investment-treaty arbitrations brought by investors against the Government of India. The Delhi High Court, in the context of the India-Mauritius and the India-UK bilateral investment treaties, held that while Indian courts have jurisdiction to restrain investment-treaty arbitrations, it would do so only in rare cases and in compelling circumstances. An appellate bench of the Delhi High Court is presently considering an appeal against one of these decisions.

1.3 Key Industries

Arbitration is a commonly adopted dispute resolution mechanism in almost all sectors in India in contracts among private parties and between private parties and state-owned entities.

The oil and gas, construction and infrastructure sectors continue to witness large volumes of arbitral claims, principally in view of the nature and complexity of the business. There has been a noticeable surge in investment treaty claims against the Government of India. These are attributable to, inter alia, political and regulatory measures perceived to be unfavourable by investors, non-payment of incentives by the government and changes to the taxation regime.

India terminated several bilateral investment treaties in 2016 and is in the process of either negotiating new international investment agreements or issuing joint interpretative statements to supplement and clarify obligations in certain existing investment agreements. For instance, India has recently signed an investment agreement with the Kyrgyz Republic.

1.4 Arbitral Institutions

The International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the Singapore International Arbitration Centre (SIAC) and the Hong Kong International Arbitration Centre (HKIAC) are commonly used arbitral institutions for international commercial arbitration in India. However, in contracts among Indian parties and in contracts involving relatively lower sums, ad hoc arbitration continues to be the preferred mode, although parties also refer disputes to the Indian Council of Arbitration (ICA), the Nani Palkhivala Arbitration Centre (NPAC), the Delhi International Arbitration Centre (DIAC) and the Mumbai Centre for International Arbitration (MCIA).

Efforts are also being made to establish an independent and autonomous body to conduct arbitration through the 2019 Amendment and through the New Delhi International Arbitration Centre Act, 2019, which seek to establish, among others, a panel of accredited arbitrators at the national and international level.

2. Governing Legislation

2.1 Governing Law

The Act is a composite legislation governing domestic and foreign arbitration and conciliation in India. It takes into account, and aims to give effect to, the UNCITRAL Model Law (the Model Law) and the UNCITRAL Conciliation Rules of 1980.

Part I of the Act (Part I) contains provisions for the regulation of domestic and international commercial arbitrations seated in India. It includes provisions relating to the conduct of proceedings, interim measures in aid of the arbitration, conduct of proceedings, recourse against arbitral awards and their enforcement. The provisions relating to interim measures in aid of arbitral proceedings and assistance of courts in taking evidence also apply to arbitrations seated outside India, unless the parties have agreed otherwise. Part II of the Act (Part II) provides for the enforcement in India of foreign arbitral awards governed by the New York Convention or the Geneva Convention.

The Act departs from the Model Law in some respects, particularly with a view to reduce intervention of the courts in relation to arbitration proceedings. For instance, Section 5 of the Act contains a non obstante provision prohibiting judicial intervention except as expressly provided. Section 8 of the Act (as amended in 2015) also departs from the Model Law to the extent that a judicial authority is required to refer parties to arbitration based on only a prima facie view of whether an arbitration agreement exists, instead of

a finding as to whether the arbitration agreement is "null and void, inoperative or incapable of being performed" as provided in the Model Law.

Unlike the Model Law, the Act does not permit immediate recourse to a court in respect of a decision of an arbitral tribunal rejecting a challenge to the independence or impartiality of an arbitrator and requires that the party making such challenge await the conclusion of the arbitral proceedings and then challenge the award on the ground of the independence or impartiality of the arbitrator. The Act also provides for the appointment of a sole arbitrator instead of a three-member tribunal as provided in the Model Law in the event that an arbitration agreement does not specify the number of arbitrators.

The Act also varies from the Model Law in that it affords parties the choice of approaching Indian courts for interim measures in aid of arbitral proceedings and for assistance in taking evidence even in foreign-seated arbitrations. The Act also permits Indian courts to grant interim relief at any time after the making of the arbitral award and before it is enforced, unlike the Model Law which provides for such measures to be granted only before or during arbitral proceedings.

Sections 29A and 29B (inserted in 2015 and amended in 2019) provide that an award in arbitrations between Indian parties commenced after 23 October 2015 must be rendered within 12 months from the date the parties have completed pleadings (which must be completed within six months from the date the arbitral tribunal enters upon the reference). This period is extendable by up to six months by agreement of the parties, and thereafter only by a court. The Act also provides for a six-month, fast-track procedure, which is a more aggressive timeframe than the one-year period in the Model Law.

2.2 Changes to National Law

Among other matters, legislative amendments have been introduced to establish the Arbitration Council of India, an institution to promote and encourage alternative dispute resolution mechanisms in India and to frame policies and guidelines on, inter alia, uniform professional standards in respect of matters relating to arbitration, for the accreditation of arbitrators and for grading of arbitral institutions. The grading of arbitral institutions is proposed to be made on the basis of factors such as infrastructure, quality and calibre of arbitrators and performance and compliance with time limits for disposal of domestic or international arbitrations.

The 2019 Amendment requires the tribunal, the parties to an arbitration and the arbitration institution (if any) to maintain confidentiality in respect of the arbitral proceedings except where disclosure is required to implement or enforce the award. Prior to the 2019 Amendment the Act did not impose any obligation of confidentiality in respect of the arbitral proceedings or the award.

The proposed legislative amendments also seek to introduce a system for the Supreme Court of India or the High Courts to designate an arbitral institution for the appointment of an arbitrator in the event of a default by a party or the parties in making such appointments in accordance with the agreed appointment mechanism.

The 2019 Amendment to the Act has clarified that the mandatory one-year period prescribed in Section 29A will not apply to to international commercial arbitrations. An arbitral tribunal in an international commercial arbitration is, however, expected to deliver its award expeditiously and to endeavour to deliver its award within a period of 12 months from the date of completion of pleadings.

3. The Arbitration Agreement

3.1 Enforceability

The Act requires an arbitration agreement to be in writing, and states that it may be in the form of an arbitration clause in a contract, in a separate agreement to submit disputes to arbitration or incorporated by reference in a contract.

An arbitration agreement may be made in respect of some or all of the disputes that have either arisen or may arise in future between parties in respect of a defined legal relationship, whether or not such relationship is contractual. It is also fundamental that the subject matter of the dispute should be capable of being determined by arbitration as a matter of Indian law.

The Supreme Court of India has held that the essential elements of a valid arbitration agreement are that:

- the arbitration agreement must be in writing (ie, contained in a document signed by the parties, or in an exchange of written physical or electronic communication);
- there must be a present or a future difference in connection with a contemplated affair;
- there must be an intention of the parties to settle such difference by a private tribunal;
- the parties must agree in writing to be bound by the decision of such tribunal; and
- the parties must be ad idem.

An arbitration agreement is also considered to be in writing if it is contained in an exchange of statements of claim and defence, in which the existence of an arbitration agreement is alleged by one party and not denied by the other. The Supreme Court recently held that an arbitration agreement in an unsigned bill of lading was binding as the parties had

agreed to be bound by the terms of the bill of lading and the Act requires an arbitration agreement to be in writing (but not that it be signed).

To be enforceable, the contract containing the arbitration agreement must also be stamped in accordance with the Indian Stamp Act, 1899.

3.2 Arbitrability

In order to determine whether a dispute is 'arbitrable', Indian courts will generally test: (i) whether the dispute is capable of adjudication and settlement by arbitration under Indian law; and (ii) whether the dispute is within the scope of the arbitration agreement.

Subject to certain exceptions, disputes arising out of legal relationships, whether contractual or not, may be the subject matter of arbitration. These exceptions are not codified in the Act or in any consolidated law, but have evolved by judicial interpretation over the years.

As a general principle, disputes relating to rights in rem are incapable of being referred to arbitration, including:

- criminal offences, including disputes involving serious allegations of fraud that would effectively establish a criminal offence;
- matrimonial and guardianship disputes (such as relating to divorce, restitution of conjugal rights or child custody);
- corporate insolvency;
- oppression and mismanagement in the affairs of a company;
- testamentary matters (such as grant of probate, letters of administration and succession certificates);
- disputes relating to antitrust and competition law;
- disputes relating to infringement and passing-off of trade marks;
- disputes relating to deficiencies in goods and services where the consumer has filed a complaint under the (Indian) Consumer Protection Act, 1986 (as amended) – however, a consumer may elect to arbitrate such disputes instead of filing a statutory complaint, if an arbitration agreement exists;
- disputes arising under statutes governing labour and employment rights; and
- disputes arising from trust deeds or under the (Indian) Trust Act, 1882 (including debenture trusts).

Disputes in relation to which jurisdiction is exclusively vested in specific statutory forums are also incapable of being referred to arbitration.

Indian courts have also held that disputes involving allegations of fraud in the inter se affairs of parties that have no implications in the public domain may be determined in arbitration. However, disputes involving forgery or fabrication of documents or where fraud is alleged in respect of the arbitration agreement or the validity of the contract containing the arbitration clause is in question are not arbitrable.

3.3 National Courts' Approach

Indian courts generally adopt a pro-arbitration approach in relation to matters requiring the enforcement of an arbitration agreement and tend to lean in favour of finding a workable solution even for 'pathological' (ie, defective) arbitration agreements.

Part I of the Act makes it mandatory for a judicial authority seized of an action which is the subject of an arbitration agreement (providing for arbitration seated in India) to refer the parties to arbitration unless it finds prima facie that no valid arbitration agreement exists. Part II of the Act makes a reference to arbitration mandatory in arbitrations to which the New York Convention or the Geneva Convention respectively apply, unless the judicial authority finds that the arbitration agreement is null, void, inoperative or incapable of being performed.

While Indian courts have assumed jurisdiction in anti-arbitration suits, the general approach has been to grant injunctive relief only in exceptional cases, such as forgery in relation to the arbitration agreement or where parties' free consent to the arbitration agreement is in doubt.

3.4 Validity

The Act accepts the premise that an arbitration clause is separable from, and is to be treated as an agreement independent of the underlying contract. The Act specifically envisages that a finding that the underlying contract is null and void shall not ipso facto invalidate the arbitration agreement. However, in relation to contracts which parties could not have executed as a matter of Indian law, or in relation to which circumstances existed to render the contract void ab initio, the arbitration agreement may also be invalid.

4. The Arbitral Tribunal

4.1 Limits on Selection

Parties may nominate any person of their choice as an arbitrator. This choice is subject only to the requirement that the arbitrator so nominated is independent and impartial, and possesses any qualifications the parties may have stipulated.

The Act provides that the parties may determine the number of arbitrators that will comprise the arbitral tribunal, failing which the arbitral tribunal shall consist of a sole arbitrator. The Act stipulates that the arbitral tribunal should not comprise an even number of arbitrators, although parties may be permitted to derogate from this stipulation. Parties may also prescribe qualifications that an arbitrator should possess in

order to be eligible for appointment as an arbitrator. Subject to an agreement between the parties, the arbitrators may be of any nationality.

Parties are also free to agree upon a procedure for the appointment of arbitrators, in the absence of which the Act prescribes default procedures for such appointments.

4.2 Default Procedures

In relation to arbitrations commenced on or after 23 October 2015, the Act provides for a competent court to appoint arbitrator(s) in the event that:

- a party fails to appoint an arbitrator in accordance with the procedure agreed between the parties (or where no such procedure is agreed, the default procedure prescribed in the Act); or
- in case of an arbitration agreement providing for an arbitral tribunal comprising three arbitrators, the two party-nominated arbitrators fail to reach agreement on the third arbitrator; or
- any person, including an arbitral institution, fails to perform any function in relation to the appointment of an arbitrator entrusted to such person or arbitral institution under the procedure agreed between the parties; or
- the 2019 Amendment empowers competent courts to delegate the administrative function of appointing arbitrators to accredited institutions. The relevant provisions of the 2019 Amendment have, however, yet to be brought into force.

In relation to arbitrations commenced prior to 23 October 2015, such appointments are made by the Chief Justice of India and the Chief Justice of the relevant High Court respectively and such decisions are final and not appealable.

4.3 Court Intervention

The Act does not permit courts to intervene in the appointment of arbitrator(s) except to determine if the mandate of an arbitrator stands terminated, inter alia, on account of such arbitrator becoming de jure or de facto unable to perform his or her functions. A party challenging the independence or impartiality of an arbitrator or the composition of the arbitral tribunal as being contrary to the agreement between the parties must do so before the tribunal itself, and in the event such a challenge is unsuccessful, await the conclusion of the proceedings and then challenge the award.

4.4 Challenge and Removal of Arbitrators

The Act provides for an arbitrator's appointment to be challenged where circumstances giving rise to justifiable doubts regarding the independence or impartiality of the arbitrator exist or if the arbitrator lacks the qualifications stipulated by the parties. In 2015, the Act was amended to include certain grounds that serve as a guide in determining whether such circumstances exist.

The Act permits parties to agree on a procedure to challenge the appointment of an arbitrator. In the absence of an agreement as to such procedure, the Act contemplates that a party can challenge the appointment of an arbitrator by way of a written statement to the arbitral tribunal specifying the reasons for the challenge. This statement should be submitted within 15 days of the date on which the party became aware of the constitution of the tribunal or the circumstances on which the challenge is based. The challenge is then determined by the arbitral tribunal, unless the arbitrator whose appointment is under challenge resigns or the other party accedes to the challenge. If the tribunal rejects such a challenge, it will continue with the arbitration and issue its award, and the final award may be challenged based on a party's objections as to the appointment of the arbitrator in question.

The Act provides for the termination of an arbitrator's mandate if: (i) the arbitrator is unable to perform his or her functions or fails to act without undue delay; or (ii) the arbitrator withdraws from office or the parties agree to terminate his or her mandate.

Unless the parties agree otherwise, in the event of a dispute regarding the termination of the mandate of an arbitrator an application may be made to the relevant court to decide the issue.

4.5 Arbitrator Requirements

A potential arbitrator is required to disclose any circumstances that are (i) likely to give rise to justifiable doubts regarding his or her independence or impartiality, and (ii) likely to affect his or her ability to devote sufficient time to the arbitration or to complete the arbitration within the stipulated 12-month time period. These are ongoing disclosure requirements during the continuance of the arbitral proceedings (to the extent such disclosures are not made at the time the relevant arbitrator was approached in connection with his or her appointment).

The Fifth and Seventh Schedules to the Act (added in 2015) specify grounds that serve as a guide in determining whether circumstances exist which create justifiable doubts as to the independence or impartiality of an arbitrator. These are influenced, to a great extent, by the red and orange lists in the IBA Guidelines on Conflict of Interests in International Arbitration. The circumstances set out in the Seventh Schedule can only be waived by the parties by an agreement in writing entered into after the dispute arose. The grounds in the Fifth and Seventh Schedules apply only to arbitrations commenced after 23 October 2015.

5. Jurisdiction

5.1 Matters Excluded from Arbitration

Subject to certain exceptions, Indian law permits disputes arising out of legal relationships, whether contractual or not, and considered to be commercial in nature, to be the subject matter of arbitration. Please refer to **3.2 Arbitrability**, above.

5.2 Challenges to Jurisdiction

The Act embodies the principle of competence-competence, allowing an arbitral tribunal to rule on its own jurisdiction, including with respect to the validity and existence of an arbitration agreement.

5.3 Circumstances for Court Intervention

When a judicial authority is seized of a matter in which a defendant asserts the existence of an arbitration agreement which covers the subject matter of the proceedings before such authority, that judicial authority is required to consider, inter alia, whether a valid arbitration agreement exists and whether it extends to the subject matter of the proceedings before it. Such determination is to be made on a prima facie basis.

In the case of an arbitration agreement that provides for foreign-seated arbitration under the New York Convention or the Geneva Convention, the judicial authority is only required to determine, on a prima facie basis, whether such arbitration agreement is null, void, inoperative or incapable of being performed.

A court may also be required to address issues of jurisdiction of an arbitral tribunal during proceedings for interim relief or for the appointment of an arbitrator. A court may also conduct such a review in a challenge to a decision of the arbitral tribunal accepting a plea of lack of jurisdiction, in proceedings for the setting-aside of an arbitral award in arbitrations seated in India (and in appellate proceedings) and in proceedings to enforce a foreign award in India.

In general, Indian courts tend to address issues of jurisdiction of an arbitral tribunal only to the extent that such issues cannot be addressed by the tribunal itself in terms of the competence-competence principle.

5.4 Timing of Challenge

Parties are required to file a challenge to the jurisdiction of an arbitral tribunal before the tribunal itself. In the event the tribunal accepts that it lacks jurisdiction, such decision may be challenged in appeal to the relevant jurisdictional court. If, however, the arbitral tribunal rejects the challenge to its jurisdiction, the aggrieved party may only challenge the award rendered on grounds of the lack of jurisdiction of the arbitral tribunal.

A challenge to the jurisdiction of the arbitral tribunal can be in proceedings brought for the appointment of an arbitrator or for interim relief in aid of the arbitration.

5.5 Standard of Judicial Review for Jurisdiction/ Admissibility

An arbitral tribunal is generally competent to decide questions of jurisdiction or admissibility. However, an arbitral tribunal's findings on a jurisdictional issue are not binding on a jurisdictional court which can adjudicate such issues in proceedings for the setting-aside of an arbitral award or for resisting the enforcement of a foreign award in India, as the case may be. Indian courts have, however, also taken the view that once the court accepts that the arbitral tribunal had the requisite jurisdiction and was competent to decide the issues between the parties, it will not entertain a challenge to the merits of the award.

5.6 Breach of Arbitration Agreement

If court proceedings are commenced in breach of an arbitration agreement, a party to the arbitration agreement (or any person claiming through or under such party) may file an application seeking reference to arbitration of the dispute. In cases where the arbitration agreement provides for arbitration governed by the New York Convention or the Geneva Convention, the Act mandates that the court refer the parties to arbitration unless it is of the view that the arbitration agreement is null, void, inoperative or incapable of being performed. In case the arbitration agreement provides for arbitration seated in India, it is mandatory for the court to refer parties to arbitration unless it finds prima facie that no valid arbitration agreement exists.

Indian courts generally strive to give effect to agreements between parties to arbitrate their disputes. It is only in scenarios where parties may be deemed to have waived the arbitration agreement that courts have permitted the continuance of proceedings before it notwithstanding an arbitration agreement covering the subject matter of the dispute.

5.7 Third Parties

The Act does not address whether or not an arbitral tribunal can assume jurisdiction over individuals or entities which are neither parties to the arbitration agreement nor signatories to the contract containing the arbitration agreement. As a general matter, an arbitral tribunal cannot assume jurisdiction over such parties, except by consent of the concerned party and the parties to the arbitration agreement. Indian courts have, however, recognised doctrines such as implied consent, third-party beneficiaries, guarantors, assignment of contractual rights, apparent authority, group company doctrine, piercing the corporate veil, alter ego or agent-principal relations, to refer non-parties to arbitration. The Supreme Court has also taken the view that parties involved in a composite transaction executed through several agreements may be subject to the arbitration agreement under the main or

'umbrella' agreement, even if some of the parties were not party to the main agreement and the ancillary agreements to which they are party did not contain an arbitral agreement.

The Act permits a judicial authority seized of a matter in respect of which the parties have made an agreement to which the New York or Geneva Convention apply to refer parties to arbitration even at the request of a person who may not itself be a party to the arbitration agreement, but claims through or under a party to the arbitration agreement. Pursuant to the amendment to the Act in 2015, this position has also been extended to arbitrations seated in India.

6. Preliminary and Interim Relief

6.1 Types of Relief

Tribunals in India-seated arbitrations are empowered to grant interim relief at any time during the arbitral proceedings or up to such time that the ensuing award is enforced. Prior to its amendment in 2015, the Act did not provide a mechanism to enforce order of interim relief granted by India-seated tribunals, other than recourse to the relevant court in the event of disobedience of such orders or conduct amounting to contempt of the tribunal. Subject to an appropriate judicial challenge, a tribunal's order granting interim relief is now enforceable in the same manner as an order of a court.

An arbitral tribunal has the power to grant a wide range of interim reliefs, including interim injunctions, securing amounts in dispute, and the preservation or detention or inspection of property or documents relating to the dispute or relevant to the arbitration, orders for the preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement, the appointment of a receiver or any other interim measure of protection deemed to be just and convenient. Pursuant to the amendment to the Act in 2015, parties can no longer exclude or limit, by agreement, the power of an arbitral tribunal to grant interim relief.

Once an arbitral tribunal has entered reference, courts are not permitted to entertain an application for interim measures in aid of arbitral proceedings unless the court finds that the remedy that can be granted by the arbitral tribunal will not be efficacious (eg, where the interim relief sought would require the assistance of law enforcement).

6.2 Role of Courts

Indian courts have wide powers to grant interim relief in aid of domestic arbitral proceedings at any time before, during or after the making of a final award and until such award is enforced. This remedy is available even in foreign-seated arbitrations unless parties agree to exclude the application of such provision. The interim reliefs a court may grant in aid of the arbitration include interim injunctions, securing amounts in dispute, and the preservation or detention or inspection of property or documents relating to the dispute or relevant to the arbitration or any other interim measure of protection deemed to be just and convenient.

The amendment to the Act in 2015 provides that a court will not entertain an application for interim relief after the constitution of an arbitral tribunal unless it finds that the remedy capable of being granted by the arbitral tribunal would not be efficacious and courts have, in the recent past, been circumspect in granting interim relief after the arbitral tribunal is constituted.

The Act does not specifically provide for emergency arbitrators or an award issued by such arbitrator. However, certain Indian arbitral institutions have incorporated provisions for appointment of emergency arbitrators and to deem any interim relief awarded by an emergency arbitrator to be an interim measure awarded by a tribunal and to be final and binding on the parties in their rules.

Indian courts have not recognised awards issued by emergency arbitrators. Instead, parties have filed applications seeking interim relief from courts in the same terms as those granted by an emergency arbitrator.

There is no reported instance of an Indian court intervening in the appointment of an emergency arbitrator.

6.3 Security for Costs

Indian law specifically empowers courts to direct plaintiffs to furnish security for costs that have been incurred or that may be incurred by the defendants, especially where a sole plaintiff or all the plaintiffs in a proceeding reside outside India and do not possess sufficient immovable property in India other than the property forming the subject matter of the proceeding. At present, Indian law does not specifically empower a court to direct a defendant to provide security for costs.

Indian courts generally do not exercise their inherent jurisdiction to grant security for costs for reasons such as an inability to meet debts or mala fide conduct of a party. Tribunals in India seated arbitrations generally adopt the same approach in ordering security for costs.

7. Procedure

7.1 Governing Rules

Parties are at liberty to agree on the procedure applicable to arbitral proceedings. Parties may either agree on specific procedures to be followed in the arbitration or adopt the rules of an arbitral institution.

In the absence of an agreed procedure, the tribunal will determine its own procedure subject to principles of natural justice and equal treatment of parties and for parties to be given a full opportunity to present their case.

Pursuant to the amendment to the Act in 2015, arbitral tribunals are, however, required to hold, as far as possible, oral hearings for the presentation of evidence and oral arguments on a day-to-day basis and refrain from granting adjournments unless sufficient cause is shown. Arbitral tribunals are also empowered to impose exemplary costs on parties requesting adjournments without sufficient cause.

In respect of arbitrations commenced after 23 October 2015, it is mandatory that the award be made within 12 months of the date on which the parties completed pleadings (where all parties are Indian parties), extendable by six months by agreement of the parties (and thereafter only by the jurisdictional court). The arbitral tribunal is required to continue with proceedings during the period the court considers a request to extend the period to conclude the arbitration proceedings. While this 12-month period is not mandatory in arbitrations where one or more of the parties are foreign parties, the tribunal is expected to endeavour to deliver its award within 12 months of the completion of pleadings.

7.2 Procedural Steps

The Act generally does not specify procedural steps to be followed in the arbitral proceedings and provides for party autonomy in respect of all procedural matters. Parties and arbitrators are, however, bound by the procedural rules of any arbitration institution that parties have agreed will conduct the arbitration. However, certain provisions are mandatory and applicable to all arbitrations seated in India, such as:

- equal treatment of the parties;
- provision of a full opportunity for each party to present its case;
- the limitation period prescribed in the (Indian) Limitation Act, 1963;
- compliance with the requirements of form and contents of an arbitral award prescribed by the Act; and
- payment of applicable stamp duty.

Unless otherwise agreed, the parties' notice to refer a dispute to arbitration is the date on which the arbitration proceedings are deemed to commence.

Further, although statutes governing evidence and rules of civil procedure do not apply to arbitral proceedings, their fundamental principles (such as res judicata and estoppel) apply. In all circumstances, the arbitral tribunal is required to adhere to the principles of natural justice.

In respect of arbitrations commenced after 23 October 2015, it is mandatory that the award be made within 12 months of the date on which the parties completed pleadings (where all parties are Indian parties), extendable by six months by agreement of the parties (and thereafter only by the jurisdictional court). The arbitral tribunal is required to continue with proceedings during the period the court considers a request to extend the period to conclude the arbitration proceedings. While this 12-month period is not mandatory in arbitrations where one or more of the parties are foreign parties, the tribunal is expected to endeavour to deliver its award within 12 months of the completion of pleadings.

7.3 Powers and Duties of Arbitrators

Arbitrators are duty-bound to be, and remain, independent and impartial throughout the arbitral proceedings. To this end, the Act requires any person approached in connection with a potential appointment as an arbitrator to disclose any circumstances that may give rise to justifiable doubts as to his or her independence and impartiality.

The Act also requires that parties be treated with equality and be given a full opportunity to present their case, that sufficient advance notice be provided to the parties of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of documents, goods or other property and that any expert report or evidentiary document on which the tribunal may rely in making its decision be communicated to the parties. Failing an agreement between the parties, the arbitral tribunal is also required to determine the place of arbitration. The Act also requires arbitral tribunals to deliver awards within 12 months from the date the parties have completed pleadings in respect of arbitrations between Indian parties. This period is extendable by up to six months by agreement of the parties, and thereafter only by a court. While this 12-month period is not mandatory in arbitrations where one or more of the parties are foreign parties, the tribunal is expected to endeavour to deliver its award within 12 months of the completion of pleadings.

Arbitrators have a wide range of powers, including powers to rule on their jurisdiction and to determine the procedure to be followed in the arbitral proceedings (in the absence of an agreement between the parties) and to grant interim relief. An arbitral tribunal may also determine the manner of taking evidence, make an interim award and award interest at such rate as it deems reasonable for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made. An arbitral tribunal may decide ex aequo et bono or as 'amiable compositeur' only if the parties have authorised it to do so. A tribunal can also correct an award, interpret an award (if so agreed by the parties) and make additional awards at the request of a party. An arbitral tribunal may also impose costs on one or more of the parties and determine how such costs will be apportioned.

7.4 Legal Representatives

The Act does not prescribe qualifications for legal representatives of a party in arbitral proceedings. However, parties are typically represented in arbitration proceedings seated in India by advocates enrolled under the (Indian) Advocates Act, 1961, as amended.

As a general matter, foreign lawyers are not entitled to practice law in India. Foreign lawyers may, however, represent parties in international commercial arbitrations in India, subject to adherence to the Bar Council of India's code of conduct applicable to Indian lawyers. In court proceedings in connection with the arbitration, parties can only be represented by advocates qualified to practice law in India.

8. Evidence

8.1 Collection and Submission of Evidence

While statutorily-prescribed rules of civil procedure and evidence do not bind arbitrators, and parties are free to agree upon procedures, tribunals and counsel in ad hoc arbitrations tend to follow these rules for the sake of convenience and familiarity. It is, therefore, common for ad hoc arbitrations in India to be conducted in a manner similar to a traditional court litigation.

In ad hoc arbitrations, the bulk of documentary evidence on which a party relies is usually submitted with the pleadings. Discovery is typically limited and depends on the tribunal's (or a jurisdictional court's) findings on the relevancy of documents sought in discovery. Affidavits of evidence of witnesses and experts are usually submitted following completion of pleadings, which typically serve as the examination-in-chief of such witnesses. Parties may also be permitted to produce witnesses and experts in rebuttal after the first round of testimonial evidence is filed. Witnesses and experts whose affidavits of evidence and expert testimony are tendered are then cross-examined at an in-person hearing or by means of video conference, if necessary.

In institutional arbitrations, arbitral tribunals adopt the procedures regarding collection and submission of evidence, if any, prescribed by the rules of the relevant institution. The IBA Rules on the Taking of Evidence in International Arbitration may also be applied as a guideline.

Arbitral tribunals are also increasingly directing the use of the Redfern Schedule for the discovery and production of documents and have also, in recent instances, allowed electronic discovery for production of electronic documents and emails.

8.2 Rules of Evidence

Arbitral tribunals are not bound by statutorily-prescribed rules of civil procedure and evidence, and may conduct the proceedings in any manner they deem fit. However, the fundamental principles underlying these statutory rules and the principles of natural justice continue to apply to arbitral proceedings.

The Act expressly provides that the arbitral tribunal is entitled to determine the admissibility, relevance, materiality and weight of evidence produced before it. The arbitral tribunal or a party to the arbitral proceedings, with the approval of the arbitral tribunal, may also apply to a court for assistance in taking evidence.

8.3 Powers of Compulsion

An arbitrator can direct parties to produce documents within their possession, custody or control and require the attendance of witnesses whose testimony is intended to be relied upon by a party. If a party refuses to produce such document or witness, the tribunal may draw an adverse inference and consider the weight to be ascribed to any written testimony of the witness not produced by a party. An arbitrator cannot compel the production of evidence by persons not parties to the arbitration agreement.

An arbitral tribunal may seek the assistance of a court for the production of any document or witness or expert considered to be relevant for the adjudication of the dispute, including where such document or witness is in the possession, custody or control of a third-party.

Failure to comply with the orders of the tribunal or the court for production of documents or witnesses may result in penal consequences.

9. Confidentiality

9.1 Extent of Confidentiality

The Act (after the 2019 Amendment) requires the tribunal, the parties to an arbitration and the arbitration institution (if any) to maintain confidentiality in respect of the arbitral proceedings except where disclosure is required to implement or enforce the award. Prior to the 2019 Amendment the Act did not impose any obligation of confidentiality in respect of the arbitral proceedings or the award.

10. The Award

10.1 Legal Requirements

An arbitral award is required to be in writing and signed by each member of the arbitral tribunal. In arbitral proceedings with more than one arbitrator, the signatures of a majority of the arbitrators are sufficient if reasons are provided for any omitted signatures. An arbitral award is also required to state the reasons on which it is based, unless the parties have agreed to the contrary or if the award is on terms agreed

between the parties pursuant to a settlement between such parties. The date of making of the award and seat of the arbitration are required to be mentioned in the arbitral award.

A signed copy of the arbitral award must be delivered to each party, subject to any lien that the arbitral tribunal may have for any unpaid costs of the arbitration.

In respect of arbitrations commenced after 23 October 2015, it is mandatory that the award be made within 12 months of the date on which the parties completed pleadings (where all parties are Indian parties), extendable by six months by agreement of the parties (and thereafter only by the jurisdictional court). The arbitral tribunal is required to continue with proceedings during the period the court considers a request to extend the period to conclude the arbitration proceedings. While this 12-month period is not mandatory in arbitrations where one or more of the parties are foreign parties, the tribunal is expected to endeavour to deliver its award within 12 months of the completion of pleadings. If the award is not issued within this timeframe, the mandate of the tribunal terminates.

10.2 Types of Remedies

The Act imposes no specific limitations on the remedies that an arbitral tribunal may award. An arbitral tribunal may grant civil remedies which may otherwise be granted by a civil court, subject to any limitations on the grant of such remedies in Indian law. An arbitral tribunal may (subject to an agreement between the parties) grant remedies such as specific performance, damages, injunctions, costs and interest. However, an arbitral tribunal cannot award compound interest unless the parties have so agreed, nor can an arbitral tribunal grant exemplary or punitive damages for breach of contract.

The remedies that can be granted by an arbitral tribunal are also subject to the arbitrability of the subject matters of the dispute. Accordingly, an arbitral tribunal would not have the power to grant remedies such as the winding-up of a company or to issue orders in rem.

10.3 Recovering Interest and Legal Costs

An arbitral tribunal is empowered to award costs (including arbitrators' fees and expenses, legal and administrative fees and any other expenses) to the successful party in the proceedings and can also decide the time and manner in which such costs are to be paid. An agreement to the effect that a party will pay part or the whole of the costs of the arbitration is valid only if such agreement has been entered into between the parties after the dispute in question has arisen.

While the general rule prescribed is that the unsuccessful party shall bear the costs of the successful party, an arbitral tribunal may depart from this rule for reasons recorded in writing. In determining costs, an arbitral tribunal is to consider factors such as the conduct of the parties, whether a party has been partly successful, delays on account of frivolous counterclaims and rejection of a reasonable settlement offer by one party, if any.

An arbitral tribunal may award interest on the whole or any part of the sum awarded, unless otherwise agreed by the parties. The Supreme Court of India has held that arbitral tribunals should award reasonable interest, with the rate of interest being compensatory (and not penal in nature). A tribunal may consider factors such as the loss of use of the principal sum, the sums to which interest must apply, time period and type of interest, internationally prevailing rates of interest, rates of inflation, proportionality and commercial prudence in determining the rate of interest.

Interest can be awarded for the period from the date of the cause of action until the date of the arbitral award (or any part of such period), unless agreed otherwise by the parties. An arbitral tribunal may also award interest payable from the date of the award until the date of the payment. The Act provides for a default rate of interest (where the tribunal has not determined such rate) which is 2% higher than the rate of interest prevalent on the date of the award (determined in terms of the (Indian) Interest Act, 1978). Prior to the amendment to the Act in 2015, the prescribed rate of such interest was 18% per annum.

11. Review of an Award

11.1 Grounds for Appeal

Parties may seek to set-aside an award issued in an India-seated arbitration on limited grounds such as:

- the arbitration agreement is invalid under the law applicable to it;
- a party was not properly notified of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present its case;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties (or in the absence of such agreement, was not in accordance with applicable provisions of the Act);
- the arbitral award deals with or decides matters not contemplated by or not within the scope of the reference to arbitration;
- the award is in conflict with the public policy of India; or
- the subject matter of the dispute is not capable of being settled by arbitration.

The amendment to the Act in 2015 clarified that an award may only be set-aside on public policy considerations if:

- the award was induced or affected by fraud or corruption or was procured in violation of the Act relating to the confidentiality of conciliation proceedings;
- the award contravenes the fundamental policy of Indian law; or
- the award is in conflict with basic notions of morality or justice.

A determination of whether an arbitral award is in contravention with the fundamental policy of Indian law will not entail a review on the merits of the dispute.

An award rendered in an arbitration seated in India between Indian parties may be set-aside if it is vitiated by patent illegality appearing on the face of the record (ie, apparent error). The amendment to the Act in 2015 also clarified that an erroneous application of law by a tribunal is not patently illegal and the examination of the patent illegality of an award does not involve a re-appreciation of evidence.

The Supreme Court has recently held that a choice of a foreign seat of arbitration or the choice of a foreign venue coupled with a choice of a foreign law to govern the arbitration agreement can be construed as an implied exclusion of Part I of the Act and Indian courts would not have jurisdiction to entertain a petition to set-aside such an award.

An application to set-aside a domestic award is required to be filed within three months of receipt of the award (or if an application for correction or interpretation of an award is filed, the date on which such application is disposed of by the arbitral tribunal). This period may be further extended by a maximum of 30 days by the jurisdictional court for sufficient cause.

Opposite parties are required to be served with advance notice of applications for setting-aside an award. The Act (as amended in 2015) provides that applications for setting-aside awards are required to be disposed of within one year from the date on which notice of such application was served on the opposite party/parties.

An arbitral award may be enforced even if a petition to set-aside such award is pending, unless the jurisdictional court grants a stay of the operation of the award.

11.2 Excluding/Expanding the Scope of Appeal

Parties to an India-seated arbitration cannot contract to exclude, waive or modify their right or the grounds of challenge to an award under Part I of the Act. However, additional grounds to challenge an arbitral award may become available to the extent that parties have agreed an arbitral procedure or requirements for the composition of the arbitral tribunal and that agreement of the parties is not followed.

11.3 Standard of Judicial Review

Indian courts generally adopt a deferential standard of review and refrain from re-examining the merits of the dispute or substituting their own views for those of the arbitral tribunal. The Act specifically provides that a court cannot review the merits of the dispute in a challenge to an arbitral award on the basis that such award contravenes the fundamental policy of Indian law.

12. Enforcement of an Award

12.1 New York Convention

India is a signatory to, and has ratified, both the New York Convention and the Geneva Convention. Part II of the Act contains provisions relating to the enforcement of awards under these conventions.

India has made two reservations while ratifying these conventions. First, that India will apply the conventions only to recognition and enforcement of awards made in the territory of another state party to the convention on a reciprocal basis. Secondly, India will apply the conventions only to differences arising out of legal relationships, whether contractual or not, which are considered commercial under Indian law.

12.2 Enforcement Procedure

A foreign award can be enforced pursuant to an application made to the court which would have jurisdiction over the subject matter of the arbitral award as if it had been the subject matter of a suit in India. All such applications would lie to a competent state High Court.

An application to enforce a foreign award is required to be accompanied by the original award (or a copy thereof duly authenticated in the manner required under the law of the country in which it was made), the original arbitration agreement (or a duly authenticated copy thereof) and any other evidence required to establish that the award is a foreign award.

An Indian court may decline to enforce a foreign award in India if it is satisfied that:

- the arbitration agreement is invalid under the law applicable to it;
- a party was not properly notified of the appointment of an arbitrator or of the arbitral proceedings, or such party was otherwise unable to present its case;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties; or
- the arbitral award deals with or decides matters not contemplated by or not within the scope of the reference to arbitration;

- the award has not yet become binding on the parties or has been set-aside or suspended by a court in the country where the award was made;
- the award is in conflict with the public policy of India or if the subject matter of the dispute is not capable of being settled by arbitration.

The amendment to the Act in 2015 clarifies that an Indian court may decline to enforce a foreign award on public policy considerations if:

- the award was induced or affected by fraud or corruption or was procured in violation of the Act relating to the confidentiality of conciliation proceedings;
- the award contravenes the fundamental policy of Indian law; or
- the award is in conflict with basic notions of morality or justice.

A determination of whether a foreign award is in contravention with the fundamental policy of Indian law will not entail a review on the merits of the dispute.

A composite petition is ordinarily filed seeking the enforcement and execution of a foreign award in India. However, prior to taking steps to execute such award, the court will consider and decide any objections made to the enforcement of such award on the grounds set out in Section 48 of the Act. In the event that proceedings to set-aside such award are pending before the court of the seat, the court may defer the enforcement of the award until the proceedings to set-aside such award conclude.

If a foreign award is made in a country that is not a party to either the New York Convention or the Geneva Convention, parties may apply to enforce such award pursuant to the (Indian) Code of Civil Procedure, 1908, as amended.

The Act permits an appeal only against an order refusing to enforce a foreign award, and not an order enforcing such award. An order enforcing a foreign award can only be challenged by special leave to appeal to the Supreme Court of India.

The Constitution of India permits the Government of India (and state governments) to sue and be sued in its name. A claim for sovereign immunity is not, as a general matter, available for non-sovereign functions of the Government (most commercial contracts) or extend to arbitration agreements with the Government. Accordingly, commercial contracts entered into by the Government in exercise of non-sovereign functions that contain arbitration agreements, and ensuing arbitral awards (and their enforcement), would not be amenable to a claim for sovereign immunity.

The Supreme Court of India is yet to conclusively rule on the possibility of a state or a state entity successfully relying on a defence of sovereign immunity at the stage of enforcement of an award. However, in relation to other subject matters, such as protection of consumer rights, the Supreme Court has disallowed claims of sovereign immunity in view of specialised legislations protecting such rights.

12.3 Approach of the Courts

Indian courts generally adopt a pro-arbitration approach in relation to the enforcement of foreign awards in India. Judgments of the Indian courts reiterate minimal interference in the enforcement of foreign awards. Recent amendments to the Act and judicial precedent now ascribe a narrow scope to the grounds available to resist the enforcement of a foreign award.

The scope of the court's review of a foreign award is more limited than in respect of an India-seated arbitration. The amendment to the Act in 2015 clarified that a court can refuse to enforce a foreign award on grounds of public policy only if the award was induced or affected by fraud or corruption or was procured in violation of provisions in the Act protecting the confidentiality of conciliation proceedings and any evidence in such proceedings or if the award contravenes the fundamental policy of Indian law or the basic notions of morality or justice. Courts have also reaffirmed that these grounds should be narrowly construed.

13. Miscellaneous

13.1 Class-action or Group Arbitration

The Act does not provide for class-action arbitration or group arbitration and there are no reported instances of an Indian court conclusively determining whether such arbitrations are permissible.

13.2 Ethical Codes

Counsel in India, regardless of the forum, are governed by the Bar Council of India's Rules on Professional Standards. The Act does not prescribe a code of ethics or standards for arbitrators, apart from specific duties of disclosure of circumstances likely to give rise to justifiable doubts regarding their independence or impartiality or affect their ability to devote sufficient time to the arbitration and a duty to follow principles of natural justice, treat parties with equality and to give each party an equal opportunity to present its case. Certain individual organisations and arbitral institutions do prescribe codes of conduct for arbitrators in respect of proceedings conducted under their respective procedural rules.

Legislative amendments have been proposed to establish the Arbitration Council of India which will issue policy and guidelines for, inter alia, the maintenance of uniform professional standards in respect of all matters relating to arbitra-

tion, which could potentially include professional standards applicable to arbitrators.

13.3 Third-party Funding

The Act does not provide for third-party funding of arbitration proceedings and there are no reported instances of such funding in India-seated arbitrations. The Supreme Court of India has recently observed that while rules of professional conduct in India would likely prohibit India-enrolled counsel from funding litigation, no similar restriction appeared to exist in respect of non-lawyers engaging in such funding.

13.4 Consolidation

The Act does not provide for consolidation of arbitral proceedings. However, the Supreme Court of India has held that consolidation is possible under certain circumstances, such as where there are multiple agreements which flow from a main agreement and are part of one composite transaction. The Supreme Court of India has, however, disallowed consolidation of foreign and India-seated arbitration proceedings.

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13.5 Third Parties

The Act is silent on whether or not an arbitral tribunal can assume jurisdiction over third parties. As a general matter, an arbitral tribunal cannot assume jurisdiction over such parties, except by consent of the concerned party and the parties to the arbitration agreement. Indian courts have, however, recognised doctrines such as implied consent, third-party beneficiaries, guarantors, assignment of contractual rights, apparent authority, group company doctrine, piercing the corporate veil, alter ego or agent-principal relations, to refer non-parties to arbitration. The Supreme Court has also taken the view that parties involved in a composite transaction executed through several agreements may be subject to the arbitration agreement under the main or 'umbrella' agreement, even if some of the parties were not party to the main agreement and the ancillary agreements to which they are party did not contain an arbitral agreement.

The Act permits a judicial authority seized of a matter in respect of which the parties have made an agreement to which the New York or Geneva Convention apply to refer parties to arbitration even at the request of a person who may not itself be a party to the arbitration agreement, but claims through or under a party to the arbitration agreement. Pursuant to the amendment to the Act in 2015, this position has also been extended to arbitrations seated in India.

The Act stipulates that an award is "binding on the parties and persons claiming under them". This has been interpreted by the Indian Supreme Court to mean that besides the parties to the arbitration, an award can bind every person whose capacity or position is derived from the party to the proceeding. Holding certain third parties to be bound by an award, the Supreme Court noted that factors such as the relationship between the party to the proceeding and the third party, commonality of subject matter and the potential composite nature of the transaction in question are to be considered while binding third parties.