

Arbitration and Conciliation Act, 1996

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The Law

- The Indian Arbitration & Conciliation Act, 1996 is the principal enactment that codifies the law on arbitration and is predominantly modeled on the UNCITRAL Model Law on International Commercial Arbitration.
- Further, India is a signatory to the New York Convention on Enforcement and Recognition of Foreign Arbitral Awards as well as the Geneva Convention on the Execution of Foreign Arbitral Awards.

Overview

Overview

- The Arbitration and Conciliation Act 1996 (Indian Arbitration Act) came into force on 22 August 1996 and is deemed to have effect from 25 January 1996
- The Indian Arbitration Act is based on the Model Law (1985) and was the result of recommendations for reform, particularly concerning improving the efficiency of the arbitral process.

Old laws

- Until the Indian Arbitration Act, the law governing arbitration in India consisted of three statutes:
 - the Arbitration (Protocol and Convention) Act 1937
 - the Arbitration Act 1940
 - the Foreign Awards (Recognition and Enforcement) Act 196

Old laws

- The provisions of the 1940 Act were comparable in their content to those of the English Arbitration Act 1934.
- The 1961 Act implemented the New York Convention and, along with the 1937 Act, was designed to enforce foreign awards.
- Historically, the 1940 Act was heavily criticised due to the intervention of the Indian courts, which was required during the arbitral proceedings when an arbitral tribunal needed a time extension when drafting the award and during the enforcement stage.

Criticism of the old law

- In addition, national institutions criticised the operation of the 1940 Act, including the Public Accounts Committee of Lok Sabha and the Indian Supreme Court which observed that the law of arbitration must be “simple, less technical and more responsible to the actual reality of the situations ... [and] ... responsive to the canons of justice and fair play.”
- Case: Food Corporation of India v Joginderpal Mohinderpal [1989] AIR SC 1263

Reforms

- As a result, the Indian Law Commission and the Indian Legislature considered revising the arbitration legislation.
- A proposal was mooted on 27 July 1977 by the Secretary of the Department of Legal Affairs stating that the Indian government sought to revise the 1940 Act with a view to preventing the enormous delay and disproportionate costs in arbitral proceedings.
- This resulted in the 76th Report by the Law Commission of India which, along with the Model Law (1985) and the observations of the Supreme Court were the primary factors leading to the enactment of the Indian Arbitration Act

Objectives

- to comprehensively cover international and domestic arbitration and conciliation
- to make provision for an arbitral process which is fair, efficient and capable of meeting the needs of each arbitral proceeding
- to ensure that the arbitral tribunal gives reasons for its award
- to ensure that the arbitral tribunal remains within the limits of its jurisdiction

Objectives

- to minimise the supervisory role of the Indian courts in the arbitral process
- to permit an arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes
- to provide that every final award is enforced in the same manner as if it were a decree of the court

Objectives

- to provide that a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an award rendered by an arbitral tribunal
- to provide that every award made in a country that is party to an international convention to which India is also a signatory will be enforceable as a foreign award.

Amendment to CPC

- The indicate the legislative intent to make arbitral proceedings more efficient and result-oriented.
- To achieve those objectives, and to encourage the use of arbitration in all civil disputes Section 89 was inserted into the Civil Procedure Code 1908 (CCP) by the Civil Procedure Code (Amendment) Act 1999.
- Its aim is to promote alternative methods of dispute resolution by requiring the courts to consider the possibility of settlement through such methods at any stage of legal proceedings.

Scope and application

- The Indian Arbitration Act covers both domestic and international arbitrations (i.e. where at least one party is not an Indian national), as well as mediation and conciliation.

Scheme of the Act

- Part I: general provisions on arbitration (General Provisions)
- Part II: enforcement of certain foreign awards (Chapter I of Part II of the Indian Arbitration Act deals with New York Convention awards and Chapter II covers awards under the 1927 Geneva Convention)
- Part III: conciliation
- Part IV: supplementary provisions
- First Schedule: New York Convention
- Second Schedule: 1923 Geneva Convention
- Third Schedule: 1927 Geneva Convention.

Arbitration Agreement

Statutory framework

CHAPTER II - *Arbitration agreement*

- 7. Arbitration agreement.
- 8. Power to refer parties to arbitration where there is an arbitration agreement.
- 9. Interim measures, etc., by Court.

Definition of arbitration agreement

- Section 7
- “arbitration agreement” is an agreement by the parties to submit to arbitration
 - all, or certain, disputes
 - which have arisen,
 - or which may arise,
 - between them in respect of a defined legal relationship,
 - whether contractual or otherwise

Formal requirements

- The arbitration agreement must be in writing and may take the form of
 - an arbitration clause in a contract
 - or as a separate agreement.
- A document containing an arbitration clause may also be adopted by way of reference through a written agreement of the parties.

Agreement deemed to be in writing if

- a document signed by the parties
- an exchange of letters, telex, telegrams or other means of telecommunication providing a record of agreement
- an exchange of submissions in which the existence of the agreement is alleged by one party and not denied by the other.

Intention of the parties

- The intention of the parties to enter into an arbitration agreement must be gathered from the terms of the agreement in which it is contained.
- While there is no specific form for an arbitration agreement, the words used should express a determination and obligation for arbitration.

Types of disputes and jurisdiction

- The Indian Arbitration Act does not specifically exclude any category of dispute as being non-arbitrable.
- 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.
- Per Section 34(2)(b) and 48(2)

Disputes not arbitrable

- Where a dispute is non-arbitrable, the court where a suit is pending will refuse to refer the parties to arbitration, even if the parties have agreed upon arbitration as the forum for settlement of that dispute.
- Disputes that are non-arbitrable include
 - disputes relating to rights and liabilities which give rise to, or arise out of, criminal offences
 - matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights and child custody
 - guardianship matters

Disputes that are non-arbitrable include

- insolvency and winding up matters
- testamentary matters (grant of probate, letters of administration and succession certificate)
- eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and where specified courts are conferred jurisdiction to grant an eviction or decide such matters.

Rights in rem and personam

- Cases referred above are **in rem** (i.e. actions that deal with a right exercisable against the world at large)
- as contrasted from a right **in personam** (which is an interest protected solely against specific individuals).
- Generally, all disputes relating to rights in personam are considered to be arbitrable and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals.
- Exceptions exist

Composition of the arbitral tribunal

Sections

Statutory framework

CHAPTER III - *Composition of arbitral tribunal*

- 10. Number of arbitrators.
- 11. Appointment of arbitrators.
- 11A. Power of Central Government to amend Fourth Schedule.
- 12. Grounds for challenge.
- 13. Challenge procedure.
- 14. Failure or impossibility to act.
- 15. Termination of mandate and substitution of arbitrator.

Composition

- Chapter III of Part I of the Indian Arbitration Act relates to the composition of the arbitral tribunal.
- The parties are free to determine the number of arbitrators, provided that this does not result in an even number of arbitrators.
- In the event that the parties fail to determine the number of arbitrators, the arbitral tribunal shall consist of one arbitrator.

- A person of **any nationality** can be an arbitrator, unless the parties have made an agreement to the contrary.
- The parties are also free to agree on a procedure for appointing an arbitrator
- In the absence of an agreement between the parties, the Indian Arbitration Act sets out the procedure to apply for appointing a sole arbitrator.

Where 3 arbitrators have to be appointed

- Where the arbitral tribunal is to consist of
 - three arbitrators
 - and the parties fail to agree on a procedure for their appointment,
 - each party shall nominate one arbitrator.
 - The two party-appointed arbitrators shall then appoint the third arbitrator, who will act as presiding arbitrator (and not as an umpire).

Failure of one party to appoint arbitrator

IF

- In the event that one party fails to appoint an arbitrator within 30 days of a request to do so from the other party
- or the two arbitrators fail to appoint the third arbitrator within 30 days from the date of their appointment
- or the arbitral institution fails to appoint an arbitrator under a function entrusted to it,

THEN

- a party can approach the chief justice of the High Court of the state which has the jurisdiction to entertain the petition (or any person or institution designated by that justice)
- or, in **international commercial arbitrations**, the Chief Justice of India (or any person or institution designated by the Chief Justice) to appoint an arbitrator.

Challenge of arbitrators

- A person that has been approached to be an arbitrator is under an obligation to disclose to the parties, in writing, any circumstances that may give rise to justifiable doubts as to independence or impartiality.
- This obligation applies when the arbitrator is appointed and throughout the arbitral proceedings.
- Appointment of an arbitrator can be challenged if there are justifiable doubts as to that arbitrator's **independence** or **impartiality**, or if the arbitrator does not possess the qualifications agreed to by the parties

- The parties are free to agree on a procedure to challenge the arbitrator(s), provided that the reasons for the challenge are discovered after an arbitrator has been appointed
- Failing any agreement, the party who makes a challenge must, within 15 days after becoming aware of the constitution of the arbitral tribunal, send a written statement containing the reasons for the challenge to the arbitral tribunal

- Unless the challenged arbitrator withdraws or the other party to the arbitration agrees to the challenge, the arbitral tribunal shall decide on the success of the challenge.
- If the challenge is not successful, the arbitral tribunal shall continue with the arbitral proceedings and make an award.
- The party who made the unsuccessful challenge can then seek to set aside that award under Section 34 of the Indian Arbitration Act.

- Sections 14 and 15 of the Indian Arbitration Act enumerate the circumstances in which the mandate of an arbitrator shall be terminated.
- The mandate of an arbitrator shall terminate if the arbitrator becomes de jure or de facto unable to perform the required functions or, for other reasons, acts with undue delay and withdraws from the office, or the parties agree to terminate the arbitrator's mandate.
- Unless the parties have agreed otherwise, they may also apply to the court for the termination of an arbitrator's mandate if any controversy arises between them in relation to the aforementioned grounds.

- If an arbitrator withdraws from the office, or the parties agree to the termination of the arbitrator's mandate, it is not deemed to constitute grounds for challenging the validity of the arbitrator's appointment.

- Section 15 of the Indian Arbitration Act specifies additional circumstances in which the mandate of an arbitrator shall be terminated (which include:
 - (a) where the arbitrator withdraws from office for any reason; or
 - (b) by or pursuant to agreement of the parties) and also provides for the substitution of an arbitrator.
- A substitute arbitrator must be appointed in accordance with the same procedure used to appoint the original arbitrator.

Responsibilities of an arbitrator

- arbitrators shall perform their functions honestly and impartially and adhere to the principles of natural justice
- Once an arbitrator has been appointed and arbitral proceedings have commenced, that arbitrator should not act with a particular interest towards the appointing party or act in a manner that could be construed as indicative of partiality or unfairness

- The arbitral tribunal must only base its conclusions upon the material submitted before it by the parties and must not act on personal knowledge.
- Evidence of unfairness by the arbitrators will render any decision or award given by the arbitral tribunal questionable.

Fees

- There is no regulated fee structure for arbitrators in an ad hoc arbitration.
- In practice, the arbitrator's fees are decided by the arbitrator, with the consent of the parties.
- The fee varies from approximately INR 1,000.00 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 also vary widely

Jurisdiction of the arbitral tribunal

Statutory framework

CHAPTER IV

Jurisdiction of arbitral tribunals

- 16. Competence of arbitral tribunal to rule on its jurisdiction.
- 17. Interim measures ordered by arbitral tribunal.

Competence to rule on jurisdiction

Section 16(1)

- an arbitral tribunal is competent to rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of arbitration agreements.
- A decision by the arbitral tribunal that a contract is null and void shall not result in the invalidity of the arbitration clause contained therein

- A ruling concerning the arbitral tribunal's jurisdiction may be appealed under a procedure set out in Section 37 of the Indian Arbitration Act.

Power to order interim measures

- The arbitral tribunal may order interim measures in arbitral proceedings, unless such power is excluded by an agreement between the parties.
- The list of interim measures include orders for
 - Preservation, custody, sale and protection of goods
 - protection of trade secrets
 - maintenance of machinery, works and continuation of certain works.

Conduct of arbitral proceedings

Statutory framework

CHAPTER V *Conduct of arbitral proceedings*

- 18. Equal treatment of parties.
- 19. Determination of rules of procedure.
- 20. Place of arbitration.
- 21. Commencement of arbitral proceedings.
- 22. Language.
- 23. Statements of claim and defence.
- 24. Hearings and written proceedings.
- 25. Default of a party.
- 26. Expert appointed by arbitral tribunal.
- 27. Court assistance in taking evidence.

Commencement of arbitral proceedings

- Where the arbitration agreement is silent about the date of commencement of the arbitral proceedings, the proceedings will be deemed to have commenced on the date that the respondent received the request for arbitration.
- Section 21 of the Indian Arbitration Act gives freedom to the parties to agree on the date of commencement of arbitral proceedings.

Procedures

- As arbitral autonomy is one of the important features of the Indian Arbitration Act, the parties are able, through agreement, to determine the manner of – and the procedure for – conducting the arbitral proceedings.
- If there is no agreement between the parties on the rules of procedure then the arbitral tribunal is authorised to conduct the proceedings in a manner it considers appropriate

Other issues

- Place and language as agreed
- Oral hearing and written proceedings
- Default by one party
 - If a party fails to submit a claim, the proceedings are terminated
 - If a party fails to defend or fails to appear before the tribunal, the tribunal can go ahead and decide
- Evidence
- Experts
- Confidentiality

Making of arbitral award and termination of proceedings

Statutory framework

CHAPTER VI *Making of arbitral award and termination of proceedings*

- 28. Rules applicable to substance of dispute.
- 29. Decision making by panel of arbitrators.
- 29A. Time limit for arbitral award.
- 29B. Fast track procedure.
- 30. Settlement.
- 31. Form and contents of arbitral award.
- 31A. Regime for costs.
- 32. Termination of proceedings.
- 33. Correction and interpretation of award; additional award.

Choice of law

- Section 28(1): For domestic arbitrations in India, the applicable law is the law of India. This is a mandatory requirement under the Indian Arbitration Act and cannot be contracted out of by the parties
- For international arbitrations with a seat in India, the arbitral tribunal shall follow the laws the parties have agreed to apply to the substance of their dispute.

Timing, form, content and notification of the award

- The Indian Arbitration Act does not stipulate a time frame within which the arbitral tribunal is to render its award.
- An award must be in writing and signed by the members of the arbitral tribunal.
- Where the arbitral tribunal consists of more than one arbitrator, the signatures of the majority of the arbitral tribunal will suffice, provided that valid reasons for the omitted signature(s) are made clear

- Under the Indian Arbitration Act, the arbitral tribunal must provide a reasoned award, except where the parties have agreed otherwise or the award is on agreed terms.
- An arbitral tribunal may make an interim award on any matter on which it can make a final award.

Settlement

- Section 30 of the Indian Arbitration Act provides for the means of settlement of arbitral proceedings.
- Even if the arbitration agreement does not expressly authorise the arbitral tribunal to do so, the arbitral tribunal is required to encourage the parties to settle the dispute.
- if so authorised by the parties, to use alternative methods of dispute resolution during the arbitral proceedings, such as mediation and conciliation

Power to award interest and costs

- In the absence of any agreement to the contrary, the arbitral tribunal maintains full discretion on matters connected with the award of interest.
- Unless otherwise specified in the award, the awarded sum shall carry interest at the rate of 18 per cent per annum from the date of the award until it is paid.

Costs

- The parties have a degree of autonomy in relation to costs.
- The word “costs”, as interpreted within the meaning of the Indian Arbitration Act, means reasonable costs relating to the fees and expenses of the arbitrators and witnesses, legal fees and expenses, administration fees of the institution supervising the arbitration

Termination of the arbitral proceedings

- Section 32 is a mandatory provision of the Indian Arbitration Act and provides for the termination of arbitral proceedings.
- Section 32 has several purposes, including determining the starting point of the limitation period for instituting court proceedings.
- Arbitral proceedings are terminated by a final award or by way of an order of the arbitral tribunal

- The situations in which the arbitral tribunal may order a termination of the arbitral proceedings include
 - withdrawal of the claim by the claimant
 - agreement by the parties to terminate the proceedings
 - where the arbitral tribunal finds that, for any reason, the continuation of the proceedings becomes unnecessary or impossible.

Finality of award, enforcement

CHAPTER VIII

Finality and enforcement of arbitral awards

- 35. Finality of arbitral awards.
- 36. Enforcement.

Effect of the award

- Under the Indian Arbitration Act, an award – including a foreign award – has the status of a decree of an Indian court. Accordingly, the award can be enforced as such.
- Section 35: Where the time for making an application under Section 34 of the Indian Arbitration Act has expired, or such an application has been refused, the award shall be enforced under the Civil Procedure Code in the same manner as if it were a decree of the court.

Interference of the courts

- Part I of the Indian Arbitration Act provides for judicial interference in the following instances
 - making reference in a pending suit
 - passing interim orders
 - appointment of arbitrators
 - terminating the mandate of an arbitrator
 - court assistance in the taking of evidence
 - setting aside an award
 - enforcement of an award by way of decree

Challenging and appealing an award through the courts

- CHAPTER VII
- *Recourse against arbitral award*
- 34. Application for setting aside arbitral awards.

Challenge to enforcement of domestic and foreign awards

- Chapter VII of the Indian Arbitration Act provides the recourse available against awards.
- Most notably, an application may be made to the court to set aside an award
- When an award is made, the process for challenging its validity requires an application under Section 34 of the Indian Arbitration Act to be filed.
- Only upon the expiry of the period specified in Section 34 to challenge an award, or when such objection is refused, will the award then become enforceable.

- An application to challenge an award may not be made after three months have elapsed from the date on which the party making the application has received the award
- or, if requested under Section 33 of the Indian Arbitration Act, from the date on which that request had been disposed by the arbitral tribunal

A domestic award may be set aside on the following grounds

- a party was under some form of incapacity
- the arbitration agreement is not valid under the law to which the parties have subjected it
- 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
- the award deals with a dispute not contemplated by, or not falling within, the terms of the submission to arbitration

A domestic award may be set aside on the following grounds

- the award contains decisions on matters beyond the scope of the submission to arbitration
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the provisions of the Indian Arbitration Act
- the subject-matter of the dispute is not capable of settlement by arbitration under the law in force for the time being
- the award is in conflict with the public policy of India

Appeals

- granting or refusing to grant any interim measure by the court
- setting aside or refusing to set aside an award by the court
- accepting the plea of lack of its jurisdiction by the arbitral tribunal
- accepting the plea of excess scope of authority by the arbitral tribunal
- granting or refusing to grant an interim measure by the arbitral tribunal

Recognition and enforcement of award

- Under Section 36 of the Indian Arbitration Act, a domestic award (i.e. an award made under Part I) is enforceable under the CPC in the same manner as if it were a decree of an Indian court.
- The procedure for the execution of a domestic award is laid down in Order XXI of the CPC and must be followed. Order XXI of the CPC also lays down the detailed procedure for enforcement of decrees.



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