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Dispute resolution and governing law clauses in India-related commercial contracts
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This guide is primarily intended to assist in-house counsel who handle India-related commercial contracts on behalf of non-Indian companies and who need to have a practical understanding of the nuances of drafting dispute resolution and governing law clauses in the Indian context.

Our aim is to give a practical introduction to:

- what works and what does not;
- traps to avoid; and
- practical drafting solutions.

This issue is important: dispute resolution and governing law clauses in India-related contracts need to be tailored to reflect the nuances of the Indian legal system. Model form clauses which are perfectly effective in other jurisdictions may not (without amendment) work satisfactorily in the Indian context. A party to an India-related agreement containing a non-India specific dispute resolution clause may find itself – contrary to its expectations and intentions – embroiled in lengthy litigation before the Indian courts. Given that resolving a dispute in the Indian courts can take a decade or more, time spent on securing effective dispute resolution and governing law clauses will invariably be time well spent.

The guide has two sections:

A. **Dispute resolution clauses**; and

B. **Governing law clauses**.

Properly drafted contracts of course ought to have both types of clauses.

Remember that this guide is just an introduction and not a substitute for legal advice and the exercise of informed judgment in relation to particular situations. Each clause should be carefully drafted taking into consideration the likely types of disputes, the exigencies of a given situation and the applicable laws. There are many sector-specific and deal-specific issues which justify departure from the general principles set out in this guide. However, we hope that the guide is helpful as a framework for finding workable solutions, deciding when to compromise and when to stand firm, and spotting when an issue has arisen on which advice is required.

In this guide, we use the shorthand “offshore” to mean outside India and “onshore” to mean inside India.

The guide is up to date as of 13 April 2012.
A. Dispute resolution clauses

We suggest five key drafting principles:

(1) agree arbitration with an offshore seat\(^1\) where possible;

(2) understand the differences between the principal offshore arbitration options;

(3) in offshore arbitration clauses, specifically exclude the application of Part I of the (Indian) Arbitration and Conciliation Act 1996 (the “Indian Arbitration Act”);

(4) if offshore arbitration is not possible, opt for institutional (not \textit{ad hoc}) arbitration in India and insist on a neutral chairman, or – as a last resort – agree to arbitration in India under the UNCITRAL Rules, specify an international appointing authority and insist on a clause requiring that the chairman or sole arbitrator be of neutral nationality; and

(5) keep it simple.

**Principle (1): agree arbitration with an offshore seat where possible**

Offshore arbitration is usually the best dispute resolution option. Neither litigation (onshore or offshore), nor onshore arbitration, are typically advisable:

**(i) Litigation in India:** Litigation\(^2\) before the Indian courts is not usually a good option.\(^3\) Whilst the judiciary is professional and independent, delays are endemic, with timelines of ten years or more in obtaining a final judgment not uncommon. Further, compared to jurisdictions such as England, Indian courts have much less experience in adjudicating complex commercial disputes.

**(ii) Offshore litigation:** Whilst offshore litigation may be preferable to onshore litigation depending on the courts chosen (assuming, of course, that the Indian party is prepared to accept that a foreign court should have exclusive jurisdiction), parties are likely to face significant challenges in: (a) enforcing foreign jurisdiction clauses; and (b) ensuring that foreign judgments are recognised and enforced in India.

Indian courts do not consider exclusive jurisdiction clauses to be determinative\(^4\), and have occasionally disregarded such clauses on the vaguely-defined ground that it was in the “interests of justice” to do so. Secondly, only certain “decrees” pronounced by superior courts in a few countries recognised as “reciprocating territories” are entitled to recognition and enforcement under Indian law. Of the twelve territories\(^5\) that have been notified as “reciprocating territories”, only England and Singapore find a place among the common offshore jurisdictions. Decrees pronounced by courts in other offshore jurisdictions would not be
recognised and enforced by the Indian courts. Further, the grounds for refusing enforcement of foreign judgments are wider\(^6\) than those for non-enforcement of arbitral awards, and Indian courts have often been reluctant to enforce foreign judgments without subjecting them to some measure of scrutiny on the merits.

(iii) Arbitration in India: Onshore arbitration conducted under the auspices of one of the major international arbitral institutions (see Principle (4) below) is a better choice than litigation before Indian courts, but still suffers from a number of shortcomings when compared with the standards generally accepted in international arbitration. Onshore arbitrations are especially vulnerable to excessive judicial intervention by the Indian courts.\(^7\) The Indian courts have demonstrated a willingness to reopen onshore awards based on a very broad definition of “public policy”.\(^8\) Ad hoc arbitration in India is best avoided because it allows greater scope for Indian court intervention and subsequent delay – for example, if one party fails to appoint an arbitrator, it can take over a year for the Indian courts to appoint that arbitrator and the courts often embark on an enquiry into the merits at this stage.\(^9\)

(iv) Offshore arbitration: By contrast, offshore arbitration will generally provide a neutral forum for the resolution of disputes and is often acceptable to both Indian and foreign parties.\(^10\) Indian courts generally respect, and enforce, clauses providing for offshore arbitration. India has ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “\textit{New York Convention}”), which provides a superior regime for the enforcement of foreign arbitral awards than that which applies to foreign court judgments. (That said, there remain some concerns in relation to enforcement – see Principle (3) below.)

Principle (2): understand the difference between offshore arbitration options

The seat or place of arbitration is important, because it dictates the legal framework underlying the arbitration (in relation to, for example, the grounds on which the arbitral award may be challenged or appealed). Neutral fora that are currently popular include London, Singapore, Paris, Geneva and Stockholm.

The best option in the Indian context is usually one of:

- LCIA or ICC arbitration in London;
- SIAC or ICC arbitration in Singapore; and
- ICC arbitration in Paris.
Each of London, Singapore and Paris has arbitration laws and courts which are broadly supportive of arbitration and have well established, reputed arbitration institutions.

Other alternatives sometimes seen in the Indian context include: (i) ad hoc arbitration in London or Paris; and (ii) institutional or ad hoc arbitration in other major European arbitration centres (eg, Geneva, Zurich and Stockholm). With the recent inclusion of China in the list of countries notified in the Official Gazette as a reciprocating territory for the purposes of enforcement under the regime of the New York Convention, Hong Kong is likely to emerge in the coming years as another neutral forum parties may wish to consider when selecting a seat for India-related arbitrations. Most other arbitration alternatives are either impractical or undesirable in the Indian context.

Indian parties are often most comfortable with arbitration in London or Singapore perhaps because of India’s historical ties with England and the Commonwealth and the similarity between the basic tenets of the Indian, English and Singapore legal systems. SIAC arbitration in Singapore is increasingly popular with Indian parties. In our experience, Indian parties are reluctant to agree to arbitrate in the USA.

Principle (3): in offshore arbitration clauses, specifically exclude the application of Part I of the Indian Arbitration Act

Most national arbitration laws distinguish between the powers of the national courts in relation to arbitrations: (i) with their seats in the jurisdiction; and (ii) with their seats abroad. Typically, the national courts’ powers in relation to foreign arbitrations are limited to issues such as enforcement and the grant of interim relief in support of the arbitration. The courts are not, therefore, able to intervene unduly in a foreign arbitration – they cannot, for example, set aside foreign arbitration awards or appoint arbitrators (or otherwise interfere in the constitution of the tribunal) in foreign arbitrations.

In India, however, the position is (potentially) different. The Indian Supreme Court has held that the Indian courts may exercise their powers under Part I of the Indian Arbitration Act even in relation to arbitrations with their seat outside India unless the parties provide that Part I does not apply. This considerably extends the scope for the Indian courts to interfere in offshore arbitrations. Under this line of authority, the Indian courts are empowered to, for example: (i) re-open and potentially set aside arbitral awards rendered in offshore arbitrations; and (ii) appoint arbitrators in an offshore arbitration. In 2008, the Supreme Court of India held that unless the parties either expressly or impliedly exclude the application of Part I of the Indian Arbitration Act (selection of an overseas seat alone did not amount to an implied exclusion), that Part shall be deemed to apply, and the courts shall have the power to intervene in an international arbitration as if it were a domestic arbitration.
Note however that where the agreement is between Indian entities only (which may include the Indian subsidiary of an overseas parent company) the Indian courts have held that the parties may not contract out of Indian law. It is not clear if such a restriction prevents Indian entities from excluding Part I of the Indian Arbitration Act, but there is a real risk that such an exclusion may not be recognised by the courts.

In recent years, the Indian courts have shown a willingness to exclude the applicability of Part I of the Indian Arbitration Act, even when parties have not expressly so provided, when, for example, the parties have chosen a foreign seat for the conduct of the arbitration and a foreign law to govern the contract or even just the arbitration agreement.\(^{13}\)

Since the recognition of such an “implied exclusion” of Part I of the Indian Arbitration Act will ultimately depend on the facts of the case and the exercise of discretion vested with the judge, it is desirable to expressly exclude the applicability of Part I of the Indian Arbitration Act in any offshore arbitration clause.

In this context, a drafting practice has developed to seek to carve out sections 9 and 27 from the exclusion of Part I, in order that the reliefs offered by those two sections might continue to be available to the parties.

- **Section 9** of the Indian Arbitration Act allows the Indian courts the power to grant interim measures in support of an arbitration. This could be useful, for instance, in cases where you might want to seek urgent relief against an Indian counter-party or to restrain the sale of assets located in India. On the other hand, this could potentially be detrimental. Interim orders in India are often obtained initially on an *ex parte* basis and can remain in force for a considerable period of time. You should consider, given the specific circumstances of your case, whether it would be beneficial to retain the right to approach the Indian courts for interim relief, or whether it would be better to exclude the application of Part I altogether.

- **Section 27** of the Indian Arbitration Act enables an arbitral tribunal or a party to seek assistance from the Indian courts in obtaining evidence. This could be useful, for example, where you might want to gain access to a document located in India or examine a witness in Indian territory, especially in circumstances where the counterparty is reluctant to cooperate. In practice, given the delays endemic in many Indian courts, it may be difficult to obtain an order on an opposed application under Section 27 in time to be of use in an offshore arbitration.

Even with the exclusion of Part I of the Indian Arbitration Act, some concerns are likely to remain in relation to enforcement. In a recent decision, the Indian Supreme Court
suggested that even offshore awards could be reviewed under a broad approach to “public policy” objections (which could include situations where an arbitral tribunal is alleged to have applied the law erroneously to the facts of the dispute). This ruling has introduced an element of additional uncertainty and is likely to lengthen the timeframe for enforcing an offshore award in India. Moreover, you should keep in mind that Part II of the Indian Arbitration Act, which governs the enforcement of New York Convention awards in India, only applies to awards rendered in jurisdictions notified by the Indian Government as jurisdictions in which the New York Convention applies. Whilst most of the major international arbitration centres lie within such jurisdictions (including, since April 2012, China and Hong Kong), there are still certain exceptions such as the UAE. Therefore, care should be exercised when choosing a seat for India-related international arbitrations to avoid difficulties at the enforcement stage.

**Principle (4): if offshore arbitration is not possible, opt for institutional (not ad hoc) arbitration in India and insist on a neutral chairman**

Foreign parties sometimes find that it is commercially necessary to agree to a demand from the Indian party that disputes be resolved in India. If you find yourself in that situation, arbitration in India remains preferable to Indian litigation, but you should insist in return on:

1. institutional (not ad hoc) arbitration under the auspices of one of the major international institutions (as to which, see Principle (2) above – any of the institutions listed there should be comfortable administering an arbitration with its seat in India). We recommend avoiding (at least for now) the Indian arbitration institutions other than LCIA India (below).

2. where option (1) above is not acceptable, at the minimum, insist on the arbitration being governed by the UNICITRAL Rules (which are designed for use in ad hoc arbitrations) and specify the appointing authority. It is also recommended that the arbitration clause expressly specify that the sole or presiding arbitrator (in a tribunal of three) must be of a nationality different from that of the parties to avoid the possibility of a local majority being appointed to the tribunal.

Even option (1) above is not ideal, but is worth at least considering as a compromise if you are convinced that the point will otherwise be a deal-breaker.

In April 2009, the London Court of International Arbitration (LCIA) established an LCIA centre in India, based in New Delhi (“LCIA India”). With the publication of its Rules in April 2010, LCIA India is now a fully operational arbitration centre and is likely to provide an important alternative for arbitrating India-related disputes.
Principle (5): keep it simple

In India, as elsewhere, it is advisable not to over-complicate arbitration clauses. Adopting the relevant arbitral institution’s model form clause (with amendments where necessary), precise drafting and avoiding over-complications can help contracting parties navigate away from practical troubles in relation to the following areas in India-related contracts:

1. Escalation clauses

Clauses providing for the parties to take certain steps before initiating arbitrations (such as meetings at a certain level), often called “escalation clauses”, are to be approached with caution in India-related contracts because they can cause significant delay whilst (as is often the case) not realising the objective of any meaningful negotiations.

If you consider that such a clause is desirable, or if a counterparty insists, then be aware that such a clause may prevent initiation of arbitration until the time periods set out in the clause have expired – and with that in mind, make the relevant periods short and clear.

2. Clauses specifying the qualifications of the tribunal

It is generally not recommended to impose, in an arbitration clause, specific qualifications that the arbitrators must fulfil (in particular, a condition that only retired judges of the Indian Supreme Court or the various Indian High Courts be appointed to the tribunal). This is because such restrictions operate to reduce the pool of available arbitrators, often causing serious harm to your interests.

3. The submission of the dispute to arbitration

The arbitration clause must contain a clear agreement to arbitrate. Agreements containing an arbitration clause should, of course, not also include a jurisdiction clause referring to a particular state’s domestic courts.

Related to this is a drafting practice, common in Indian commercial contracts, to specify a particular Indian court to have supervisory jurisdiction over an arbitration seated in India (for example, because that court is considered more efficient than other Indian courts that might be approached by a party in the event of an arbitration being commenced or threatened). While such a selection can be beneficial, care must be taken to ensure that the jurisdiction granted to the court does not cut across the parties’ clear election to arbitrate their disputes.
B. Governing law clauses

It is, of course, advisable to include a governing law clause in any contract.

Indian contract law is largely similar in content to principles of English contract law, albeit with some special rules (especially in relation to contracts where the government is the counterparty).

Whilst non-Indian parties will often prefer to choose another legal system for reasons of familiarity, the content of Indian contract law is, broadly speaking, within the normal expectations of most non-Indian parties and can usually be agreed to as part of a wider compromise.

We suggest that non-Indian parties consider the following general approach:

1. First, consider whether Indian law is required (see below).

2. If it is not required then, if you can do so as a matter of commercial bargaining power, choose a non-Indian law with which you are familiar and comfortable.

3. If you are obliged to choose Indian law (whether under a legal requirement to do so or as a matter of commercial bargaining power) ensure that you have a qualified person review the contract to ensure that it takes account of areas where Indian contract law differs from the contract law system(s) with which you are familiar.

The restrictions imposed by Indian law on choice of governing law

The starting point is that Indian law will respect the parties’ choice of governing law, subject to a few important caveats:

1. Indian courts can invalidate a choice of law clause if they perceive it as being opposed to Indian “public policy”.\(^{17}\) If the court decides that a foreign law has been chosen as the governing law to avoid or evade provisions of mandatory Indian laws, then the choice of law clause may be ruled ineffective on the basis that it is opposed to Indian public policy.

2. In a 2008 decision, the Indian Supreme Court appears to have set down a rule that, as a matter of Indian public policy, Indian nationals contracting between themselves are not permitted to contract out of the application of Indian law.\(^{18}\) This rule even extends to companies incorporated in India, but whose “central management and control” is located outside India such as, for instance, wholly-owned subsidiaries of foreign companies.
On a narrow interpretation, this merely re-affirms that Indian arbitration tribunals sitting in a domestic arbitration may not apply a foreign governing law to a contract in a dispute between two Indian parties. On a broader interpretation, however, this decision represents authority that Indian public policy precludes Indian nationals (including wholly foreign owned Indian incorporated subsidiaries) from contracting out of Indian law unless they are contracting with a foreign party, even if any disputes under the relevant agreement will be resolved by arbitration outside of India. If this broader interpretation is adopted, it raises the possibility that the Indian courts could refuse to enforce an award rendered by an arbitration tribunal seated outside of India if that tribunal (pursuant to the relevant governing law clause in a contract between solely Indian nationals) applied a foreign law.

There is, therefore, an element of uncertainty as to two Indian parties’ freedom to choose a “foreign” governing law. Until further clarification becomes available, given the similarities between English and Indian contract law, it would be prudent to opt for Indian law governing law clauses in contracts between exclusively Indian parties (even where one or more of those parties is wholly owned by a foreign investor).
Appendix A

Recommended arbitration clauses

Below are suggested arbitration clauses providing for some of the most common or appropriate choices seen in India-related contracts, namely:

(a) LCIA arbitration;
(b) LCIA India arbitration;
(c) SIAC arbitration;
(d) ICC arbitration; and
(e) UNCITRAL arbitration

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1. The clauses are all based on the standard clause and rules for the relevant institution but incorporate certain amendments which we suggest for your consideration.

2. They all apply the institution’s rules in force at the date of arbitration. It is also acceptable to opt for the rules in force at the date of the contract.

3. Always review the most up to date version of the relevant arbitration rules (available on the various websites cited below) before drafting or agreeing to an arbitration clause providing for the application of those rules.

4. Always consider whether there is any potential for a dispute to involve more than two parties or more than two contracts. If there is, you should consider seeking expert advice on drafting a suitable multi-party or multi-contract arbitration clause (a technical matter of some subtlety).

5. Three arbitrators are generally recommended for all contracts except for those in which any disputes are likely to be of low value, in which case a sole arbitrator may be considered. This is because a three member tribunal allows the parties a greater say over constitution of the tribunal and generally improves the quality of the tribunal (although opting for a sole arbitrator does usually reduce the cost of any arbitration and may help expedite the process).

6. In all cases of offshore arbitration, exclude the application of Part I of the
Indian Arbitration Act subject to any of the carve outs discussed above in Principle (3).

**LCIA arbitration**

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

The number of arbitrators shall be [one/three].

Each party shall nominate one arbitrator, and the two arbitrators nominated by the parties, or appointed by the LCIA Court in the absence of such nomination, shall within [15/30] days of the appointment of the second arbitrator agree upon a third arbitrator who shall act as Chairman of the Tribunal. If no agreement is reached within that period, the LCIA Court shall appoint a third arbitrator to act as Chairman of the Tribunal.  
[Include only where there are three arbitrators]

The seat or legal place of arbitration shall be [City, Country].

The language to be used in the arbitral proceedings shall be [English].

The parties agree to exclude (for the avoidance of any doubt) the applicability of the provisions of Part I of the Indian Arbitration and Conciliation Act 1996 [save and except Section 9 and Section 27 thereof] to any arbitration under this Clause.  
[Include only where the place of arbitration is outside India]

**LCIA India arbitration**

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA India Arbitration Rules, which Rules are deemed to be incorporated by reference into this clause.

The number of arbitrators shall be [one/three].

Each party shall nominate one arbitrator, and the Chairman of the Tribunal shall be selected by the LCIA Court.  
[Include only where there are three arbitrators]
The seat or legal place of arbitration shall be [City, Country].

The language to be used in the arbitration shall be [English].

The parties agree to exclude (for the avoidance of any doubt) the applicability of the provisions of Part I of the Indian Arbitration and Conciliation Act 1996 [save and except as provided for in the LCIA India Arbitration Rules] to any arbitration under this Clause. [Include only where the place of arbitration is outside India]

**SIAC arbitration**

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in [Singapore] in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (“SIAC Rules”) in force at the date of applying for arbitration, which rules are deemed to be incorporated by reference in this clause.

The number of arbitrators shall be [one/three].

Each party shall nominate one arbitrator, and the two arbitrators nominated by the parties (or appointed by the Chairman pursuant to the SIAC Rules as the case may be) shall within [15/30] days of the appointment of the second arbitrator agree upon a third arbitrator who shall act as the Chairman of the Tribunal. If the third arbitrator has not been agreed within that period, the third arbitrator shall be appointed by the Chairman. [Include only where there are three arbitrators]

The language of the arbitration shall be [English].

The parties agree to exclude (for the avoidance of any doubt) the applicability of the provisions of Part I of the Indian Arbitration and Conciliation Act 1996 [save and except Section 9 and Section 27 thereof] to any arbitration under this Clause. [Include only where the place of arbitration is outside India]

**ICC arbitration**

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.
The number of arbitrators shall be [one/three].

Each party shall nominate one arbitrator, and the two arbitrators nominated by the parties shall within [15/30] days of the appointment of the second arbitrator agree upon a third arbitrator who shall act as President of the Tribunal. [Include only where there are three arbitrators]

The seat or legal place of the arbitration shall be [City, Country].

The language of the arbitration shall be [English].

The parties agree to exclude (for the avoidance of any doubt) the applicability of the provisions of Part I of the Indian Arbitration and Conciliation Act 1996 [save and except Section 9 and Section 27 thereof] to any arbitration under this Clause. [Include only where the place of arbitration is outside India]

**UNCITRAL arbitration**

Where you have opted for ad hoc arbitration under the UNCITRAL Rules, (see Principle (4) above) you should provide as follows:

Any dispute, controversy or claim arising out of or relating to this contract or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules.

The appointing authority shall be [insert neutral appointing authority located outside of India or LCIA India].

The number of arbitrators shall be [one/three].

The [sole/presiding] arbitrator shall be of a nationality other than those of the parties.

The place of arbitration shall be [City, Country].

The language of the arbitration shall be [English].

The parties agree to exclude (for the avoidance of any doubt) the applicability of the provisions of Part I of the Indian Arbitration and Conciliation Act 1996 [save and except Section 9 and Section 27 thereof] to any arbitration under this Clause. [Include only where the place of arbitration is outside India]
Appendix B

Governing law clause

This Agreement and any dispute or claim arising out of or in connection with it or its subject matter, existence, negotiation, validity, termination or enforceability (including non-contractual disputes or claims) shall be governed by, and construed in accordance with, the laws of [ ].

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1. It is sufficient to simply add the name of the relevant legal system in the square brackets above.

2. Avoid errors such as “the laws of the UK” or “British law” (use “the laws of England” or “the laws of England & Wales” if that is what is intended) or “the laws of the USA” (use “the laws of New York” or whichever other state law is desired).
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1. The seat or place of an arbitration is a legal concept, and should not be confused with the venue of oral hearings (which need not necessarily take place in the seat, although they often do).

2. i.e. resolving the merits of a commercial dispute in the court system. Even with arbitration one may have to engage with the court system in certain limited contexts; eg, at the enforcement stage, which still sometimes causes problems in India. However, there is a big difference between resolving the merits of a dispute in court and enforcing in court.

3. The Government of India has announced plans to establish fast-track commercial courts across the country which, if successfully implemented, may serve to reduce the time taken to resolve business disputes.


5. The territories notified by the Government of India as reciprocating territories are the United Kingdom, Aden, Fiji, Republic of Singapore, Federation of Malaya, Sikkim, Trinidad and Tobago, New Zealand, Hong Kong, Papua New Guinea, Bangladesh and the United Arab Emirates.

6. Under the (Indian) Code of Civil Procedure 1908, enforcement of a foreign judgment would be refused if the judgment: (a) had not been pronounced by a court of competent jurisdiction; (b) had not been rendered on the merits of the case; (c) was founded on an incorrect view of international law or a refusal to recognise the laws of India in cases in which such law was applicable; (d) had been obtained by fraud; (e) sustained a claim founded on a breach of any law in force in India; or (f) where the proceedings in which the judgment was obtained were contrary to principles of natural justice.

7. The Indian Arbitration Act provides two distinct regimes for dispute resolution depending on the seat of the arbitration. Part I provides a framework of rules for disputes – both domestic and those with an international element – where the seat of arbitration is in India. This Part confers significant powers on the Indian courts to order interim measures, appoint and replace arbitrators and hear challenges to arbitral awards. Part II incorporates the New York Convention and the Geneva Convention on the Execution of Foreign Arbitral Awards into Indian law, and significantly limits the scope of judicial intervention in arbitration.

8. In *ONGC v Saw Pipes*, (2003) 5 SCC 705, the Indian Supreme Court gave an expansive interpretation to “public policy” by essentially equating the term with any error in the application of Indian law.

9. In *SBP and Co v Patel Engineering Limited*, AIR 2006 SC 450, the Indian Supreme Court ruled that the courts could consider a number of contentious issues when approached for the nomination of an arbitrator such as the validity of the arbitration agreement and the existence of a live claim. It further held that any decision made on such matters would be binding on the parties.

11. This principle was first laid down by the Indian Supreme Court in Bhatia International v Bulk Trading SA, (2002) 4 SCC 105 and reiterated in Venture Global Engineering v Satyam Computer Services Limited, Civil Appeal No. 309 of 2008 (Supreme Court of India, 10 January 2008) and Indtel Technical Services Private Limited v WS Atkins PLC, Arbitration Application No. 16 of 2006 (Supreme Court of India, 25 August 2008).

12. Venture Global Engineering v Satyam Computer Services Limited, Civil Appeal No. 309 of 2008 (Supreme Court of India, 10 January 2008).


14. Phulchand Exports Ltd. v OOO Patriot, (2011) 10 SCC 300. In ONGC v Saw Pipes, (2003) 5 SCC 705, the Indian Supreme Court stated that an award would be contrary to public policy if it was contrary to: (a) the fundamental policy of India; (b) the interests of India; (c) justice or morality; or (d) if the award was patently illegal. The ONGC decision stressed that “public policy” would be accorded a significantly narrower meaning in the context of enforcement of offshore awards as compared to challenges to domestic awards. This approach was followed by the Delhi High Court in Penn Racquet Sports v Mayor International [2011] 1 ARBLR 244 (Delhi), which held that the meaning of “public policy” was narrower in Part II than in Part I, and the mere fact that an award was contrary to Indian law, or contrary to the interests of an Indian entity, did not mean it was contrary to the fundamental policy or interests of India. However, in the recent Supreme Court decision of Phulchand, where unlike in ONGC the court was specifically seised to consider the question of enforcement of a foreign award, the Supreme Court expressly recognised that the broad definition of “public policy” given in the ONGC decision (i.e. under Part I of the Indian Arbitration Act) would apply equally even in enforcement proceedings (under Part II of that Act). The court in that case went into a detailed review of the arbitral award on its merits before concluding that the award was not patently illegal and hence enforceable.

15. In April 2010, the Indian Law Ministry released a consultation paper proposing 10 important amendments to the Indian Arbitration Act. One of the key amendments seeks to nullify the impact of the Supreme Court’s ruling in ONGC v Saw Pipes, (2003) 5 SCC 705.

16. Whilst the LCIA India Rules undoubtedly provide a more efficient means of resolving India-related disputes, not all such disputes will be resolved in India itself. Given the background of judicial interference in arbitrations seated in India, LCIA India has refrained from making India the default seat. Rather, the choice of seat will always be a deliberate one. It is expected that parties may select a seat outside of India, thereby choosing the courts of another jurisdiction to support their arbitration insofar as they need them. Nonetheless, for convenience, hearings could still take place in India.


18. TDM Infrastructure Private Limited v UE Development India Private Limited, Arbitration Application No. 2 of 2008 (Supreme Court of India, 14 May 2008).
19. On the basis of a working assumption that the institutions are more likely to improve their rules over time than they are to make them worse.

20. The LCIA Rules are available at www.lcia.org

21. The LCIA India Rules are available at www.lcia-india.org

22. The LCIA India Rules provide that the Tribunal Chairman shall be appointed by the LCIA Court in all cases, and regardless of the parties’ agreement otherwise. This is a deliberate provision within the Indian context aimed at ensuring the Tribunal and the arbitration procedure are in the hands of a Chairman trusted by the LCIA Court to conduct the process expeditiously.

23. The SIAC Rules are available at www.siac.org.sg

24. The ICC Rules are available at www.iccwbo.org/court/arbitration
Herbert Smith LLP does not practise Indian law, and the contents of this guide do not constitute an opinion upon Indian law. If you require such an opinion, you should obtain it from an Indian law firm (we would be happy to assist in arranging this).

The contents of this Guide are for general information only. They do not constitute legal advice and should not be relied upon as such. Specific advice should be sought about your specific circumstances.

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