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Dispute resolution and governing law clauses in **India-related commercial contracts**

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Introduction

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 has been to give a practical introduction to:

- what works under Indian law 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 will 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, and 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 1 January 2011.

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 *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 (unless the law governing the contract is English law or any other EU State's law – See Appendix A, paragraph 7); 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 is 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] In recent judgments, 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 provides 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 "*New York Convention*"), which provides a superior enforcement 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). Popular neutral fora 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). Most other arbitration alternatives (such as Hong Kong) 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 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 specifically provide that Part I does not apply.[11] This considerably extends the scope for the Indian courts to interfere in offshore arbitrations. Under this line of authority, the Indian courts have, for example: (i) re-opened and set aside arbitral awards rendered in offshore arbitrations; and (ii) suggested that they have the power to appoint arbitrators in an offshore arbitration.

Accordingly, it is vital to expressly exclude the applicability of Part I of the Indian Arbitration Act in any offshore arbitration clause.

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, for instance, in affording Indian courts an avenue to make an order prohibiting the parties from proceeding with the arbitration. 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.

Similarly, Section 27 of the Indian Arbitration Act could also prove to be useful. This provision 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.

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 the expanded "public policy" ground.[12] This ruling has introduced an element of uncertainty and is also likely to lengthen the timeframe for enforcing an offshore award in India.[13] 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, notable exceptions are Hong Kong and Australia.

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 UNCITRAL 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. This is not recommended where English law or the law of any other EU State is chosen as the governing law or where the seat of the arbitration is in England or in another EU State (See Appendix A, paragraph 7)

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 ("**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.[14]

Principle (5): keep it simple

In India, as elsewhere, it is advisable not to over-complicate arbitration clauses. Adopting (with amendments where necessary) the relevant arbitral institution's model form clause, 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 period 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.

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.

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".[15] 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.[16] 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) 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).

Appendices

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.[17] 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).

7. It is important to note that, following the decision of the English Court of Appeal in *Jivraj v. Hashwani* [2010] EWCA Civ 712, any arbitration clause that provides for specific characteristics of arbitrators may be found to be void or unenforceable and/or that any award rendered pursuant to the arbitration agreement may be successfully challenged or set aside under English law (and potentially other EU laws). The Court of Appeal held that arbitrators constitute employees for the purpose of legislation implementing EU Directives relating to discrimination. In this case, discrimination on the basis of religion and belief were held to be unlawful. However, there is a risk that equivalent implementing legislation relating to nationality could render clauses applying the rules of certain arbitral institutions unlawful. The rules in question include a restriction on the nationality of persons who may act as arbitrator (specifically as sole arbitrator or Chair). In the light of this decision (and unless it is reversed), it would be prudent to: (i) disapply the "nationality" provisions of any institutional rules that are chosen; and (ii) not specify nationality qualifications for the appointment of arbitrators if the governing law is English law and/or if the seat of the arbitration is in the UK.

* See Principle (3) above.

LCIA arbitration[18]

The standard LCIA arbitration clause is as follows:

> *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 in force on the date when the Request for Arbitration is submitted, which rules are deemed to be incorporated by reference into this clause.*
>
> *"No provision in the said arbitration rules will apply insofar as it renders any individual ineligible for appointment as arbitrator on the grounds of nationality".* [Only include if the governing law is English law or any other EU State's law or if the seat of arbitration is in the UK or in any other EU State].
>
> *The number of arbitrators shall be [1/3].*

"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 Chairman of the Tribunal. If no agreement is reached within [10/15] days, the LCIA Court shall nominate and 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 and/or 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[19]

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.

"No provision in the said arbitration rules will apply insofar as it renders any individual ineligible for appointment as arbitrator on the grounds of nationality". [Only include if the governing law is English law or any other EU State's law or if the seat of arbitration is in the UK or in any other EU State]

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

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

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]

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

SIAC arbitration[20]

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.

"No provision in the said arbitration rules will apply insofar as it renders any individual ineligible for appointment as arbitrator on the grounds of nationality". [Only include if the governing law is English law or any other EU State's law or if the seat of arbitration is in the UK or in any other EU State]

The number of arbitrators shall be [1/3].

[Each party shall appoint one arbitrator, and the two arbitrators appointed by the parties (or by the Chairman pursuant to the SIAC Rules as the case may be) shall within [30] days of the appointment of the second arbitrator agree upon a third arbitrator who shall act as the presiding arbitrator. If the third arbitrator has not been agreed within this time period, the third arbitrator shall be appointed by the Chairman.] [Note that this provision reflects the SIAC Rules default position regarding the appointment of a three member tribunal, save that it introduces an opportunity for the party appointed arbitrators to seek to agree the presiding arbitrator. This should be omitted if there is only to be one arbitrator, in which case the SIAC Rules allow the parties to try to agree the sole arbitrator.]

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 [save and except Section 9 and Section 27 thereof] of the Indian Arbitration and Conciliation Act 1996 to any arbitration under this Clause. [Include only where the place of arbitration is outside India]

Note that if the parties or their appointed arbitrators are unable to agree on the identity of the presiding or sole (as the case may be[21]) arbitrator, SIAC will appoint that arbitrator.

ICC arbitration[22]

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.

"No provision in the said arbitration rules will apply insofar as it renders any individual ineligible for appointment as arbitrator on the grounds of nationality". [Only include if the governing law is English law or any other EU State's law or if the seat of arbitration is in the UK or in any other EU State]

The number of arbitrators shall be [1/3].

"Each party shall appoint one arbitrator, and the two arbitrators appointed by the parties 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." [Include only where there are three arbitrators]

[Note that the ICC will appoint the presiding or sole (as the case may be[23]) arbitrator if the parties or their appointed arbitrators are unable to agree.]

The seat or legal place of the arbitration shall be [City and/or 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 [save and except Section 9 and Section 27 thereof] of the Indian Arbitration and Conciliation Act 1996 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, 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 as at present in force.

"No provision in the said arbitration rules will apply insofar as it renders any individual ineligible for appointment as arbitrator on the grounds of nationality". [Only include if the governing law is English law or any

other EU State's law or if the seat of arbitration is in the UK or in any other EU State]

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

The number of arbitrators shall be [1/3].

The [sole/presiding] arbitrator shall be of a nationality other than those of the parties]. [Include if the place of arbitration is onshore]

The place of arbitration shall be [City and/or 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 [save and except Section 9 and Section 27 thereof] of the Indian Arbitration and Conciliation Act 1996 to any arbitration under this Clause. [Include only where the place of arbitration is outside India]

Where the dispute is to be heard before a panel of three arbitrators, insert as follows:

"The arbitral tribunal shall be composed of three arbitrators appointed as follows:

a) *each party shall appoint one arbitrator, and the two arbitrators so appointed shall appoint a third arbitrator who shall act as president of the tribunal.*

b) *if either party fails to appoint an arbitrator within [15/30] days of receiving written notice of a request for arbitration and the nomination of an arbitrator by the other party, such arbitrator shall at the request of either party be appointed by [the appointing authority].*

c) *if the two arbitrators to be appointed by the parties fail to agree upon a third arbitrator within [15/30] days of the appointment of the second arbitrator, the third arbitrator shall be appointed by the [appointing authority] at the written request of either party."*

It is not necessary to specify a procedure for the appointment of a sole arbitrator, as that process is already specified in the UNCITRAL Rules in a manner which allows parties sufficient control over the process without the need for further amendment.

Appendix B

Governing law clause

This Agreement 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 space indicated above square brackets.

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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Herbert Smith LLP does not practice 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.

End notes

1. The seat or place of an arbitration is a legal concept, and should not be confused with the place of oral hearings (which need not necessarily take place in the seat, although they often do).

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

3. The Government of India has recently 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.

4. (2003) 4 SCC 341.

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

10. Indian law does not prohibit Indian contracting parties from choosing a foreign seat of arbitration. See *Atlas Export v Kotak & Co*, 1999 (7) SCC 61.

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). 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. Whilst 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, the Venture Global decision did not however make this distinction.

13. 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.

14. 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 will often 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.

15. *National Thermal Power Corporation v Singer Corporation*, (1992) 3 SCC 551; *British India Steam Navigation Company v Shanmughavilas Cashew Industries*, (1990) 3 SCC 481.

16. *TDM Infrastructure Private Limited v UE Development India Private Limite*d, Arbitration Application No. 2 of 2008 (Supreme Court of India, 14 May 2008).

17. 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.

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

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

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

21. It is desirable to specify the number of arbitrators in the arbitration clause: the default position absent agreement under the SIAC Rules is for there to be a sole arbitrator unless the SIAC determines a three member tribunal would be appropriate in all circumstances (generally on the basis of the value or complexity of the dispute).

22. The ICC Rules are available at www.iccwbo.org/court/arbitration

23. As with the SIAC system, it is desirable to specify the number of arbitrators in an ICC arbitration clause: the default position absent agreement under the ICC Rules is for there to be a sole arbitrator unless the ICC Court determines a three member tribunal would be appropriate in all the circumstances.

Notes

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8919/070411