

handbook on dispute resolution in india

a primer 1st edition



cyril amarchand mangaldas  
advocates & solicitors

cyril amarchand mangaldas



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## I. Introduction

India's growth has been consistent, if not as quick as initially hoped. The Government's "Make in India", mantra is on the lips of corporate players the World over and India has come into its own on the global stage. Foreign investment remains strong and Indian has withstood fairly well, the global economic crisis. With the promise of ease of doing business, comes the obligation to ensure that the rule of law is upheld and that the Indian legal regime and judiciary facilitate and support the litigation process. This would include respecting and enforcing not just contracts and transactions in respect of litigations initiated in Indian courts, but also respecting and enforcing foreign judgments and arbitral awards, in a timely and efficient manner.

The consummate delay in the judicial process is well known and such delay has contributed to the perception that it is difficult to successfully prosecute a claim or enforce a judgment or arbitral award in India. Moreover, Indian courts have been perceived to be unnecessarily and wrongly, interventionist insofar as foreign arbitrations are concerned, interfering during and after the arbitral process, much to the frustration of the global business community. This perception is perhaps not entirely correct as the majority of foreign awards have actually been upheld Indian courts, although the time taken for such enforcement can be exhausting.

The problems and the criticisms have not gone unnoticed. After three draft proposals, the Indian Government finally amended the Arbitration & Conciliation Act, 1996, with comprehensive amendments to cure various lacunae or ambiguities in the Act. The amendments are effective from October 23, 2015, and give legislative sanction to the generally pro-arbitration policy adopted by Indian courts since the Supreme Court decision in *Bharat Aluminium Co v. Kaiser Aluminium Technical Services* (2012 Supreme Court) from September 6, 2012. The new amendment closely tracks most of the recommendations made by the Law Commission of India in its 246th Report (issued in August 2014, with a Supplementary Report in February 2015). Some of the key amendments include recourse to Indian courts for interim relief even in respect of foreign seated arbitrations, the introduction of various timelines to speed up the arbitral process and clarifications

in relation to the much used and oft abused public policy challenge in relation to setting aside and enforcement of arbitral awards. These amendments though a long time coming, are welcome and should do much to make India an arbitration friendly jurisdiction.

The Indian Government passed at the same time, the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, which also came into force on October 23, 2015. The Act is a culmination of many years of debate, originating from the 188th report of the Law Commission of India in 2003. The Act establishes commercial courts to adjudicate commercial disputes of specified value (over INR 10 million), and matters connected therewith, including incidental amendments of the Code of Civil Procedure, 1908. Additionally, all applications in relation to international commercial arbitrations (i.e. where at least one foreign party is involved), will be heard by the Commercial Division of the relevant High Court (subject of course to meeting the specified value threshold. With dedicated commercial courts, one hopes that access to speedy (speedier, at the very least), justice, will become the norm, easing the concerns of foreign investors in and trading partners with, India.

Other notable and recent reforms include the Companies Act, 2013, which has paved the way for all company law and corporate matters and disputes to be heard by the National Company Law Tribunal, once it is fully constituted.

These reforms are meant to improve the way commercial disputes are resolved in India thereby improving India's position as a destination for investment, business and arbitration.

Doing business in a foreign country can be fraught with uncertainties and unpredictable outcomes. The support of a robust legal regime and familiarisation with the process can lessen such unpredictability or unforeseeability. These reforms and an overview of the dispute resolution process in India – both litigation and arbitration, are further discussed in the relevant chapters of this Handbook, which we present to our readers in the hope that this will give them a reasonable understanding of the process. This Handbook has been updated till January 31, 2016.

*IMPORTANT NOTE: All information given in this handbook has been compiled from credible, reliable sources. Although reasonable care has been taken to ensure that the information in this handbook is true and accurate, such information is provided as is, without any warranty, express or implied, as to the accuracy or completeness of any such information. Cyril Amarchand Mangaldas shall not be liable for any losses incurred by any person from any use of this publication or its contents. This handbook has been prepared for informational purposes only and nothing contained in this handbook constitutes legal or any other form of advice from Cyril Amarchand Mangaldas. Readers should consult their legal, tax and other advisors before making any investment or other decision with regard to any business in India.*

## A. Litigation

### 1. India – a common law system:

Indian law is largely similar to English common law because of the long period of British colonial influence during the British Raj period. In the common law system, which is based on the principle that it is unfair to treat similar facts differently on different occasions, earlier decided cases are treated as binding precedents on lower courts and of persuasive value in courts with the same or superior jurisdiction. Indian court proceedings are adversarial, i.e. where advocates present their case before the judge who must remain impartial and refrain from acting as an inquisitor (as he may in a civil law jurisdiction). The court may, to effectively rule on an issue (on matters of both law and fact), put questions to a witness, or direct parties to lead evidence on certain aspects.

Civil courts in India are governed by the procedure set out in the Code of Civil Procedure, 1908 (“CPC”). Criminal courts are governed by the procedure set out in the Code of Criminal Procedure, 1908 (“CrPC”).

### 2. India’s judicial system:

The Indian Constitution is federal in form - the Constitution is supreme and there is a division of power between the Union and State as well as the existence of an independent judiciary.

India’s judicial system is broken up into three distinct streams, i.e. criminal cases, civil cases and other cases which are to be referred to specific statutorily constituted tribunals depending on subject matter and the status concerned.

Jurisdiction of a court is dependent on its territorial and pecuniary limits. The principal court of original jurisdiction is the City Civil Court (in metropolitan areas), and the Court of Civil Judge, Senior Division (in metropolitan areas). The High Court of each State is the court of appeal and has supervisory jurisdiction over all lower courts and tribunals in that State. Certain High Courts (the High

Courts of Bombay, Delhi, Calcutta and Madras), also have original jurisdiction.

The Supreme Court of India is the final Court of appeal and has overall supervisory jurisdiction over the State High Courts and all lower courts and tribunals in India.

- **Supreme Court:** Under the Constitution of India, the role of the Supreme Court is that of a federal court, guardian of the Constitution and the highest/final court of appeal, having overall supervisory jurisdiction over the State High Courts and all lower courts and tribunals in India.

In its original, or writ jurisdiction, the Supreme Court is empowered to enforce fundamental rights guaranteed under the Constitution by issuing directions, orders, or writs (including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*). It may also adjudicate upon disputes between the Union and one, or more States, or a dispute, inter se, between two, or more States, where the dispute involves any question (whether of law, or of fact), on which the existence, or extent of a legal right depends.

The Supreme Court's appellate jurisdiction can be invoked (pursuant to a certificate granted by the High Court), in respect of any judgment, decree, or final order of a High Court (in both civil and criminal cases). The High Court concerned must certify that the case involves a substantial question of law as to the interpretation of the Constitution, or of general importance which needs to be decided by the Supreme Court. In criminal cases, an appeal lies to the Supreme Court if the High Court has reversed an order of acquittal and sentenced a person to death, or imprisonment for at least 10 years, or certified that the case is fit for appeal to the Supreme Court.

Special leave to appeal may be granted by the Supreme Court on the application of a party, against any judgment, or order of any court in India (not

including a court constituted by, or under any law relating to the Armed Forces).

- **High Courts:** The High Court is the supreme judicial authority at the State level and generally the last court of regular appeals. Judges in the High Court, either sit singly, or in benches of two, or more judges. There are currently 21 HCs in the country (the oldest being the Kolkata High Court).

The High Courts of Bombay, Madras, Calcutta and Delhi, have original jurisdiction. Others have only appellate jurisdiction in respect of which a party can institute a case directly, provided it falls within the court's territorial and pecuniary jurisdiction).<sup>1</sup>

In its writ jurisdiction a High Court is empowered to remedy any violation of, and enforce fundamental rights guaranteed under the Constitution, by issuing directions, orders, or writs (including of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*).

In its appellate jurisdiction, a High Court is the highest court of appeal in a state and the final court of appeal (except in cases where the Supreme Court exercises appellate jurisdiction).

The Constitution confers on every High Court the power of superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction (except those constituted by any law relating to the armed forces).

The High Court also exercises testamentary & intestate jurisdiction, for probating/challenging a will, issuance of letters of administration and succession certificates etc.

The High Courts of the coastal states of Gujarat, Maharashtra, Andhra Pradesh, Karnataka, Kerala,

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<sup>1</sup> The pecuniary jurisdiction of these High Courts is for a claim above:  
INR 10,000,000/- in the Bombay High Court  
INR 1,000,000/- in the Calcutta High Court  
INR 1,000,000/- in the Madras High Court  
INR 2,000,000/- in the Delhi High Court

Orissa and Tamil Nadu exercise admiralty jurisdiction over any ship that is present in their territorial waters (irrespective of whether or not she is a national of, or registered in India, regardless of residence, or domicile of her owners). In India, an action in *rem* lies in a High Court against a foreign-owned ship, for a cause of action arising from tort, or a breach of obligation under a contract for carriage of goods from a port in India to a foreign port.

Certain matters arising out of the Companies Act, 1956 also lie before the High Court, though under the Companies Act, 2013, once fully set up, these will be transferred to / lie before the National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT).

- **District Courts:** In metropolitan areas the principal court of original jurisdiction is the City Civil Court and the High Court of the relevant State is the court of appeal. In non-metropolitan areas, the Court of Civil Judge, Senior and Junior Divisions, is the principal court of original jurisdiction and the District Court is the Court of appeal. The principal court of criminal jurisdiction in a State is the Sessions Court below which lie the Chief Judicial Magistrate and the Judicial Magistrate (First and Second class).
- **Commercial Courts:** Recently, the Government passed the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (“**Commercial Courts Act**”), which creates a new class of commercial courts at the district level and commercial divisions in the High Courts of Bombay, Delhi, Madras and Calcutta High Courts (which already enjoy original jurisdiction), and Commercial Appellate Divisions in all High Courts. Under the new provisions, disputes falling within the purview of ‘commercial disputes’<sup>2</sup> of ‘specified value’ (above INR 10 million), will be heard by specially constituted commercial courts.

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<sup>2</sup> Definition of ‘commercial dispute’ set out in End Note.

### 3. Tribunals/quasi-judicial authorities constituted under certain Acts:

Certain statutes exclude civil court jurisdiction and confer exclusive jurisdiction on statutorily constituted tribunals. For instance:

- **Debt Recovery Tribunal (“DRT”) and Debt Recovery Appellate Tribunal (“DRAT”):**

The DRT has exclusive jurisdiction (to the exclusion of all other courts), to decide cases filed by banks and financial institutions for recovery of debts exceeding INR 1 million. (If the claim is less than INR 1 million, it would have to be filed before a regular civil court). The DRAT hears appeals from orders passed by the DRT. Orders of the DRAT and/or the DRT cannot be challenged before a civil court. However, the writ jurisdiction of a HC may be invoked against an order passed by the DRT/DRAT, and an application for special leave to appeal against any order may be made to the Supreme Court.

- **Securities & Exchange Board of India (SEBI), and Securities Appellate Tribunal (SAT):**

SEBI was set up to protect interests of investors in securities and to promote the development of and to regulate the securities market. It is empowered to pass orders, *inter alia*, restricting a person from accessing the securities market and suspending the trading of any security in a recognized stock exchange. It has 3 functions rolled into one body: (i) quasi-legislative - it issues regulations in its legislative capacity, (ii) quasi-executive - it conducts investigation and enforcement action, and (iii) quasi-judicial - it passes rulings and orders.

SAT hears appeals from orders passed by SEBI. The orders of SAT are appealable before the Supreme Court. SEBI and SAT have exclusive jurisdiction and no civil court is permitted to entertain any proceeding in respect of a matter that is within their jurisdiction.

- **Company Law Board (CLB) / National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT):**

The CLB has benches at New Delhi, Mumbai, Kolkata and Chennai. It deals with matters arising out of the Companies Act, 1956, such as disputes pertaining to ownership of the company, restrictions upon shares and debentures, prohibition of transfer of shares, or debentures, rectification of shareholders register, oppression and mismanagement, investigation of the affairs of a company, etc. Orders passed by the CLB are appealable before the High Court having jurisdiction where the registered office of the company is situate.

The NCLT and NCLAT are proposed to be set up under the Companies Act, 2013 (which replaces the Companies Act, 1956), as a quasi-judicial body with exclusive jurisdiction for adjudication of all company related disputes. The purpose of setting up the NCLT is to avoid multiplicity of litigation before various different forums and to consolidate corporate jurisdiction in a single forum once the NCLT is fully constituted.<sup>3</sup>

All cases pending before the CLB will be transferred to the NCLT. All matters relating to arbitration, compromise, arrangement and reconstruction and winding up of companies, pending before any District Court or High Court, will be transferred to the NCLT. Further, all proceedings pending before the Board for Industrial and Financial Reconstruction (BIFR) the Appellate Authority for Industrial and Financial Reconstruction (AAIFR), constituted under the Sick Industrial Companies (Special Provisions) Act, 1985, will stand abated, although the concerned company in respect of which such proceeding stands abated, will have the liberty to initiate fresh proceedings before the NCLT.

<sup>3</sup> As of January 2016, the NCLT and NCLAT had not been constituted. The Government is in the process of making certain amendments to the 2014 Act in relation to selection and eligibility criteria for appointment of the NCLT members, before operationalisation.

Orders of the NCLT are appealable to the NCLAT. There is no provision for a second appeal although an order from the NCLAT can be appealed to the Supreme Court if it is in respect of a question of law.

- **Competition Commission of India (CCI):**

The CCI was constituted under the Competition Act, 2002, to *inter alia*, monitor and regulate anti-competitive agreements, abuse of dominant positions and merger control. The CCI is empowered to hear complaints and pass orders prohibiting any agreement that it considers anti-competitive, or an abuse of a dominant position. It may also impose a penalty on the offending party.

- **Labour Courts & Industrial Tribunals:**

Labour Courts and Industrial Tribunals are set up under the provisions of the Industrial Disputes Act, 1947. Conciliation Officers are charged with the duty of mediating in and promoting the settlement of industrial disputes.

Labour Courts adjudicate industrial disputes concerning issues such as those related to standing orders, discharge, or dismissal of workers, illegality, or otherwise of strikes and lockouts, withdrawal of any customary benefit, etc. Industrial Tribunals deal with collective disputes such as wages, hours of work, leave, retrenchment, closure etc.

- **Consumer Dispute Forums/Commissions:**

Under the Consumer Protection Act, 1986, a quasi-judicial machinery has been set up at the district, state and central levels, to provide a speedy and simple redressal of consumer disputes. Depending on the value of the goods, or services and compensation claimed, a complaint may be filed before the District Forum, State Commission, or National Commission. Jurisdiction is not exclusive and a complainant also has the option to file a claim by way of a civil suit in a civil court.

- **Tax Tribunals:**

A hierarchy of tribunals commencing from the Assessing Officer to the Commissioner Appeals and finally the Income Tax Appellate Tribunal has been set up under the Income Tax Act to adjudicate income tax related disputes. Appeals from ITAT lie to the High Court.

#### 4. **Structure of Legal Profession:**

The Bar is unified and qualified lawyers enrolled with any State Bar Council can appear before any Indian court. However, in order to represent and appear for a party in any legal proceeding before a District Court, High Court, or the Supreme Court, an advocate, or law firm must be registered with the concerned court.

An advocate of at least 10 years standing who is more than 40 years old may be designated a “Senior Advocate” by the High Court with which he is registered if, in the opinion of that High Court, the advocate possesses expertise and character befitting the status.

The distinction between ‘solicitors’ and ‘advocates’ was removed in 1976. Nevertheless, the Bombay Incorporated Law Society, under the aegis of the Bombay High Court, conducts the qualification examination for solicitors. Solicitors have the same right of audience as advocates.

#### 5. **Appointment of Judges:**

Only an Indian citizen may be appointed as a member of the judiciary. Appointments to the lower judiciary must qualify by clearing the Civil Services Exam conducted by the Union Public Service Commission. A citizen, having held judicial office for at least 10 years, or an advocate, registered as an advocate of a High Court for more than 10 years may be appointed Judge of a High Court. To be appointed a judge of the Supreme Court, the citizen must have served as a judge of a High Court for more than five years, or have practised as an advocate of a High Court for more than ten years, or must, in the opinion of the President of India, be a distinguished jurist.

## 6. Jurisdiction:

Jurisdiction of Indian courts is limited by territory and the pecuniary value of the claim. A court would have territorial jurisdiction over a dispute if the defendant habitually resides, or works for gain, or, if the cause of action arose, or immovable property which is the subject matter of the claim lies, within the territorial limits of such court. The pecuniary jurisdiction of courts is determined by the relevant State. The plaintiff's valuation in his suit determines which court would have pecuniary jurisdiction over the case.

## 7. Choice of jurisdiction and law:

Indian courts recognize jurisdiction stipulations and choice of law provisions as agreed to by contracting parties. Most of the judicial pronouncements on jurisdiction clauses relate to exclusive jurisdiction of one Indian court over others and these stipulations have been uniformly enforced subject to the exception that parties, by contract, cannot confer jurisdiction upon a court which has none. However, in relation to jurisdiction clauses conferring exclusive jurisdiction on foreign courts, while the principle is recognised, Indian courts may refuse to give up jurisdiction on the grounds of balance of convenience, the interests of justice and like circumstances.

Insofar as choice of law is concerned, an Indian court will apply the law chosen by the parties to a contract, subject to such law being pleaded and proved. If not proved, the position under a foreign law will be deemed to be the position as existing under Indian law.

## 8. Court fees:

Court fees are payable to the court for filing suits and other proceedings, or documents, under the Court Fees Act, 1870, although some States have their respective State Acts and the court fees vary from State to State. E.g. Court fees in the Bombay High Court are a maximum of INR 300,000/-. In the Delhi High Court, court fees are payable at the rate of 1% of the value of the subject matter of the suit.

## 9. Period of Limitation:

The Limitation Act, 1963, prescribes the time limit within which an aggrieved person can approach a court for redress. The period of limitation is computed from the date of accrual of the cause of action, or in the case of a continuing cause of action, from each such day on which it accrues. Limitation for civil actions is generally 3 years. Limitation for claims on tortious liability is generally 1 year. Limitation for suits by, or on behalf of the government is 30 years. Limitation for filing an appeal varies between 30 days to 90 days.

Limitation may be extended under certain circumstances, for instance, part-payment, or acknowledgement in writing of a debt before the expiry of the prescribed period of limitation, would further extend the period of limitation.

Courts do not have the power to extend limitation; a suit filed after expiry of the period of limitation is bound to be dismissed even if limitation has not been taken up as a defence. A court may however, under certain circumstances, condone delay in filing appeals.

## 10. Immunity from Civil Proceedings:

The State cannot claim immunity from civil proceedings except in respect of certain sovereign functions. No suit in respect of an official act can be instituted against the Government of India, or any State, or a public officer unless 2 month's advance written notice has been given of the claim and the intention to file a suit, with sufficient details thereof.

Public sector undertakings (including Government controlled, or owned corporations) are distinct from the Government and suits may be instituted against such undertakings without prior notice.

Specific statutory functionaries may be granted immunity from civil proceedings in respect of official acts undertaken by them.

Written consent of the Indian Government is required before instituting civil proceedings against a foreign state. The Government will withhold such consent unless the foreign state has subjected itself to the jurisdiction of an Indian court by instituting proceedings in such court against the person requesting consent to sue, or the foreign state trades within the court's jurisdiction or, holds immovable property within the court's jurisdiction and consent to sue is requested with reference to such trade, or property, or the foreign state has, impliedly, or expressly waived immunity.

## 11. Suits by Foreign entities:

A foreign entity, being an 'alien friend', or an 'alien enemy residing in India with the permission of the Central Government' may institute civil proceedings in Indian courts as if they were citizens of India. An enemy alien is a person residing in a foreign country whose government is at war with India and carrying on business in such country without a licence in that behalf granted by the Government of India. An enemy alien residing in India without the permission of the Government of India, or residing in a foreign country but not holding the requisite license, cannot institute civil proceedings in India.

## 12. Institution of Civil Proceedings:

A suit is commenced by the filing of a plaint, which must contain the following particulars:

- i. name of the court;
- ii. name, description and place of residence of the plaintiff(s) and the defendant(s);
- iii. the cause of action;
- iv. the facts showing that the court has jurisdiction;
- v. the facts showing that the suit is filed within the period of limitation;
- vi. the relief claimed;
- vii. where the plaintiff has allowed a set-off, or

- relinquished a portion of the claim, the amounts so allowed, or relinquished;
- viii. a statement of the value of the subject matter of the suit for the purposes of jurisdiction and of court fees;
  - ix. The plaintiff should have annexed to it a list of documents referred to and/or relied upon by the plaintiff, which are relevant to the dispute and the claim.

A suit must include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; if a plaintiff omits to sue in respect of, or intentionally relinquishes any portion of his claim, he is precluded from afterwards suing in respect thereof (unless he has obtained leave of the court for the purpose). The plaintiff must be supported by an affidavit deposed by the plaintiff verifying the correctness of facts.

Once the suit is filed, the court issues a writ of summons (accompanied by the plaint), to the defendant calling upon him to appear and answer the claim of the plaintiff by filing his statement of defence (written statement). The defendant must appear (either through legal representation, or in person), on the date stipulated in the summons, and must file his written statement within 30 days from the date of service of summons. The Supreme Court has however held that timelines are not mandatory and that a court may, for sufficient cause, extend timelines.

Pleadings may be amended with the leave of the court.

### 13. Procedure:

At the first hearing the court will issue directions for the parties to disclose under oath, relevant documents and offer inspection. If a party's disclosure is inadequate, or the party does not provide inspection, the other party has the right to request the court to direct disclosure, or inspection. Similarly, a party has the right to request the court for directions against the other party to provide particulars, or to answer interrogatories. A court may non-suit a plaintiff, or strike-out the defence of a defendant who has failed to

comply with an order to answer interrogatories, or an order for discovery, or inspection.

On completion of disclosure the court, in consultation with the parties, frames issues for determination and the matter proceeds to trial.

The plaintiff, ordinarily, has the right to begin, and the other parties reply in turn. Parties then present evidence, and have the right to cross examine any witnesses produced.

The party beginning has the right to reply generally on the whole case after all parties have stated their case.

## 14. Summary Suits:

Summary proceedings (under Order 37 of the CPC<sup>4</sup>), may be filed by a plaintiff for monetary claims upon negotiable instruments, or for recovery of debt, or liquidated demand arising on a written contract, or on a guarantee.

Where a suit is instituted as a summary suit, the defendant is not entitled to defend as of right, but must apply to the court for leave to defend, and while so applying, be able to establish a *prima facie* defence in his favour. If he establishes a defence to the satisfaction of the court, the defendant is granted leave to defend and the summary suit is transferred to the list of commercial causes to be tried as an ordinary suit. Leave to defend may be unconditional, or conditional upon deposit by the defendant of the whole, or part of the claim amount. If no defence is made out, the court may pass summary judgment on the suit.

## 15. Evidence:

The Indian Evidence Act, 1872, contains provisions governing admissibility of any evidence in the Indian courts. Evidence may be documentary (digital records and email communications are also admissible), or oral, through witness testimony. Evidence may be documentary (digital records and email communications are also admissible), or oral, through witness testimony. Witness testimony must be

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<sup>4</sup> Order 37, Rules 1-3 set out in the End Note

direct and hearsay evidence is inadmissible, except in certain limited circumstances.

Evidence in chief is normally led by affidavit. However, the court may, for reasons recorded in writing, allow evidence in chief to be led by examination in open court. Evidence in chief is followed by cross-examination unless cross-examination is waived. Re-examination of witnesses is permissible only under limited circumstances.

## 16. Interim relief:

Indian courts have extensive powers to grant interim relief as a measure of protection to preserve some property or the rights of a party pending the final disposal of a suit. A party seeking interim relief should satisfy the court of the following three conditions:

- i. there is a *prima facie* case in favour of the party seeking the order;
- ii. irreparable damage defeating the very purpose of the suit may be caused to the party if the relief is not granted;
- iii. the balance of convenience lies with the party requesting the order.

In cases of urgency, a court may grant an interim order *ex parte*, without directing notice to be issued to the defendant.

Interim reliefs that may be granted include:

- a. **Attachment before judgment:** The court, if satisfied that the defendant, with intent to obstruct, or delay the execution of any decree that may be passed against him, is about to abscond, or leave the local limits of the court's jurisdiction; or, remove/dispose of the whole, or any part of his property from the jurisdiction of the court, it may require the defendant to furnish security to produce and place at the disposal of the court when required, the property, or the value of the same as may be sufficient to satisfy the decree. In making such an order, the court may direct conditional attachment of the whole, or any portion

of the property of the defendant. If the defendant fails to show cause against attachment, or fails to furnish the security required, the court may order that property (sufficient to satisfy any decree which may be passed in the suit) be attached.

The attachment would not affect rights existing prior to the attachment of persons not parties to the suit. Such attachment does not bar persons holding prior decrees against the defendant from applying for the sale of such property in execution of such decree(s).

- b. **Injunction:** A court may pass orders of temporary injunction where it is satisfied that the property in dispute in the suit is in danger of waste, damage, alienation, or that the defendant threatens, or intends to remove, or dispose of his property with a view to defraud his creditors.
- c. **Status quo order:** *Status quo* generally refers to the existing state of affairs, or circumstances. In some respects, similar to an injunction, a *status quo* order may be issued to prevent any of the parties involved in a suit from taking any action that may alter the existing state of things. The intent of such an order is to prevent harm, or preserve the existing conditions, so that a party's position is not prejudiced in the interim.
- d. **Other orders:** A court may pass such interim orders as may be necessary to preserve the subject matter of the dispute or the rights of the parties.
- e. **Receiver:** A court is empowered to appoint a receiver of any property when it is just and convenient to do so. In a mortgagee's suit for foreclosure, or sale, where the mortgagee is entitled to enter into possession on default of payment of the mortgage money, the mortgagee is *prima facie* entitled to the appointment of receiver.

## 17. Substantive/final Relief:

Indian courts have wide powers to mould the reliefs and to make such orders as may be necessary for the ends of justice and to award substantive relief. Such relief includes declarations of title, or status, specific performance of contracts, permanent injunctions, damages, accounts, etc. Punitive or exemplary damages may be awarded in exceptional circumstances.

## 18. Costs:

Indian law recognises the principle that costs follow the event i.e. the winning party is entitled to be awarded costs. Courts are also empowered to direct payment of compensatory costs by a party who delays proceedings, or knowingly raises false, or vexatious claims, or defences. The awarding of costs is in the discretion of the court and the court has the power to determine by whom, or out of what property and to what extent such costs are to be paid. In practice the costs awarded are substantially lower than the costs actually incurred, although the new Commercial Courts Act amends provisions of the CPC to mandate that costs should follow the event and sets out the basis of awarding costs.

Indian courts may order security for costs from a plaintiff, or defendant not resident in India, if he does not possess sufficient immovable property, or assets in India to satisfy any decree that may be passed against him. Where such security is directed to be furnished by a plaintiff, the suit may be dismissed if such security is not provided.

## 19. Binding Effect of Judgements:

A decision of the Supreme Court and decisions of the Privy Council rendered prior to 1950 (when the Supreme Court was established), are binding on all High Courts, lower courts and tribunals in India. Decisions of a High Court are binding within that State; a decision of the High Court of one State is only persuasive in other States.

The CPC recognises the principle of *res judicata* and a final decision on any matter by a competent court is binding on the parties to the litigation and persons claiming under, or through the parties. The same issue cannot be further litigated in subsequent proceedings.

## 20. Decisions of foreign courts:

Rulings of foreign courts are of persuasive value and not binding on Indian courts. Decisions of courts of Commonwealth Countries (most often, the UK), are often cited before High Courts and the Supreme Court in the absence of any binding decision of Indian courts. Decisions of US courts, in constitutional matters, or on administrative principles, are also occasionally cited for persuasive value.

## 21. The Sick Industrial Companies (Special Provisions) Act (SICA):

SICA was enacted for the special purpose of detection of sick and potentially sick companies owning “Industrial Undertakings”. It provides for the establishment of the Board for Industrial and Financial Reconstruction (“BIFR”) which has been entrusted with the task of determining the sickness of companies and formulating preventive, ameliorative, remedial and other measures as it deems fit for the purpose of either curing the sickness, or winding up of the company where it feels that the sickness cannot be cured. It also provides for the establishment of the Appellate Authority for Industrial and Financial Reconstruction (“AAIFR”), empowered to hear appeals from the orders of the BIFR.

The provisions of SICA relating to revival and rehabilitation of companies have been included in the Companies Act of 2013, which provides that on the date notified by the Central Government, all pending proceedings before BIFR/AAIFR will abate and any concerned company will have to make a fresh application to the NCLT within 180 days thereof.

**Stay of proceedings:** Under Section 22 of SICA, during the pendency of an inquiry, or a scheme, or an appeal under, all legal proceedings against the company concerned will be suspended unless otherwise consented to by the BIFR, or the AAIFR. Such proceedings include, (i) winding up of the company, (ii) execution, distress, or the like against any properties of the company, (iii) appointment of receiver, (iv) suit for recovery of money, or enforcement of any security against the company, or any guarantor in respect of loans, or advance granted to the company.

Under the Companies Act, 2013, there is no provision for an automatic stay of legal proceedings and a creditor/the concerned company will have to apply to the NCLT for any order for stay.

## 22. Winding Up Proceedings under the Companies Act:

Under the Companies Act, a company may be wound up on the petition of a creditor if the company is unable to pay its debts. A presumption of inability to pay arises if a creditor, claiming in excess of INR 1,00,000/-, serves a written demand upon the company and within 21 days of the receipt of such demand, the company fails to make payment, or compound for the same to the reasonable satisfaction of the creditor. A company may also be wound up on 'just and equitable' grounds. Winding up is not a legitimate means of seeking payment; a petition ostensibly for a winding up order, but really to exercise pressure, will be dismissed. A winding up petition will also be dismissed if the company *bona fide* disputes its liability to pay, or raises a counter-claim against the creditor.

A secured creditor may stand outside the winding up proceedings by realising his security without the intervention of the court. If, where a company is being wound up, a secured creditor wishes to institute legal proceedings in any court for recovery of its claim, leave of the relevant company court is necessary. A secured creditor also has the option of relinquishing the security and proving

their claim in the winding up process along with other unsecured creditors.

### **23. Enforcement of judgments / decrees and orders:**

A judgment or decree may be enforced by execution proceedings.<sup>5</sup> Money decrees are executed by attachment and sale of the judgement debtor's properties - movable and immovable. Certain properties are immune from execution (e.g. personal ornaments/apparel, tools of artisans, books of account, stipends and gratuities received from a government servant, provident fund, etc.). In exceptional circumstances Indian courts will allow money decrees to be executed by the arrest and detention in civil prison of the judgement debtor.

The court may require the judgement debtor to be examined on oath to ascertain the assets available for execution and may, if required, appoint a receiver over such assets pending execution.

If an interim order is disobeyed, the court is empowered to attach the property of the guilty person and also to detain him in prison for a term not exceeding three months.

### **24. Enforcement of foreign judgments:**

The Government of India has notified certain countries as reciprocating territories<sup>6</sup> and subject to certain restrictions, a final judgment of a court of a reciprocating territory may be enforced in India between the parties, as a judgment of an Indian court. Where the judgment is issued by a court of a non-reciprocating territory, it may be enforced by instituting a suit on such judgement. A foreign judgment would be enforceable except where it has not been pronounced by a court of competent jurisdiction, or is not on merits, or is founded on an incorrect view of international law, or a refusal to recognise Indian law where applicable, or was obtained in proceedings opposed to

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<sup>5</sup> The procedure for execution of decrees is set out in the End Note

<sup>6</sup> Section 44A of the CPC. See End Note

natural justice, or obtained by fraud. Once a foreign judgment is held to be enforceable, it will be enforced in the same manner as a decree of an Indian court.

There is no provision under Indian law for enforcement of interim orders of a foreign court.

## 25. Appeals:

Every original decree may be challenged in appeal, unless an appeal is precluded by statute. An appeal also lies against certain original orders specified in the CPC. The first appeal may include grounds of both questions of fact and/or law. Unless barred by statute, second appeals lie to the High Court on substantial questions of law only.

The judgment, or decree, or final order of a High Court may be appealed before the Supreme Court if the High Court concerned certifies that the matter involves a substantial question of law of general importance; or believes that the matter needs to be decided by the Supreme Court.

Where there is no further right to appeal, the Supreme Court may, on the application of an aggrieved party and in its sole discretion, grant special leave to appeal against any order of a court or tribunal, if it feels that the matter involves a substantial question of law.

Note that execution of a decree is not suspended while an appeal is pending. The appeal court may however, for reasons to be recorded, stay the impugned decree and/or execution thereof, pending the appeal. While doing so, it may also direct the judgement debtor to deposit the decretal amount in court pending hearing of the appeal.

## 26. Revision:

Where there is no appeal provided for, the High Court has the power by revision to examine the record of any case decided by a subordinate court where there is a mistake, illegality, or material irregularity in the exercise of jurisdiction by such subordinate court. In the course of revision, the High Court is empowered to pass any order it deems fit. A revision does not operate as a stay of any other

suit, or proceeding then pending, unless the High Court specifically stays such other suit or proceeding.

## 27. Review:

Where either no appeal is provided for, or no appeal is preferred, the parties can apply to the court passing the decree to review its decision. A review lies when:

- i. The aggrieved party has discovered a new and important matter of evidence which, after the exercise of due diligence, was not within their knowledge, or could not have been produced by them at the time when the decree was passed; or
- ii. There is some mistake, or error apparent on the face of record; or
- iii. There is any other sufficient reason. It has been held that the phrase 'any other sufficient reason' must be interpreted to mean a reason sufficient, or ground analogous to those specified immediately before it.

## B. Arbitration

### 1. The Arbitration & Conciliation Act, 1996:

The Arbitration and Conciliation Act, 1996 (the “**Arbitration Act**”), was enacted to update the law of arbitration in India and make it more responsive to contemporary requirements. It has been modelled along the lines of the UNCITRAL Model Law on International Commercial Arbitration and while seeking to restrict the intervention of courts, envisages co-operation between the judicial and arbitral process. The Arbitration Act is divided into four parts. Part I contains provisions relating to the commencement and conduct arbitral proceedings held in India, as also challenge to and enforcement of awards. Part II deals with reference to (foreign) arbitration and enforcement of foreign awards. Part III deals with conciliation. Part IV contains supplementary provisions (such as the power of a High Court to make rules etc.).

The Arbitration Act was amended by the Arbitration and Conciliation (Amendment) Act, 2015 (“**Arbitration Amendment Act**”), from October 23, 2015, ushering in a set of much needed and long awaited amendments. The amended provisions apply only prospectively and do not apply to arbitrations commenced prior to the Arbitration Amendment Act, unless the parties agree otherwise.

### 2. Part I:

Part I applies compulsorily where the place of arbitration is in India and an arbitral award under Part I is considered to be a domestic award.

Part I also applies to “*international commercial arbitrations*”, which are held in India. An international commercial arbitration is one which relates to disputes arising out of legal relationships, considered to be commercial under the law in force in India and where at least one of the parties is a national of, or habitually resident in a foreign country; or a corporate body incorporated outside India; or association of individuals whose central management and control is

exercised from abroad; or the government of a foreign country.

Pursuant to the decision of the Supreme Court in *Bharat Aluminium v. Kaiser Aluminium Technical Services*,<sup>7</sup> Part I of the Act will not apply to foreign seated arbitrations in respect of arbitration agreements entered into on and from September 6, 2012. Indian courts will not have jurisdiction over such proceedings (even if parties expressly agree to make Part I applicable), except for the purposes of enforcement of foreign awards under Part II of the Act. [The position prior to *Bharat Aluminium* (and September 6, 2012), is governed by the decision of the Supreme Court in *Bhatia International v. Bulk Trading*,<sup>8</sup> where even if the venue of the arbitration is outside India, Part I of the Act would nevertheless apply unless specifically excluded by the parties.]

The consequence of the *Bharat Aluminium* interpretation of the Arbitration Act was that in foreign seated arbitrations, parties would have no recourse to Indian courts for interim reliefs or other support during the arbitral process. The Amendment Act however amends certain provisions so that “*subject to an express agreement to the contrary*”, the provisions of Sections 9 (interim relief), 27 (court assistance in taking evidence), and certain appeals which are in Part I, would apply to foreign seated arbitrations provided that the awards passed in such arbitrations were recognisable in India under Part II of the Arbitration Act.

### 3. Part II:

Part II of the Arbitration Act deals with enforcement of foreign awards under the New York Convention and Geneva Protocol and Convention. A ‘foreign award’ is one that, (i) arises on differences between persons arising out of commercial legal relationships; (ii) is in pursuance of an agreement under the New York Convention, or Geneva Protocol and Convention, and (iii) is in a territory notified by the Central Government as a reciprocating territory.

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<sup>7</sup> Reported in 2012 (9) SCC 552,

<sup>8</sup> Reported in 2002 (4) SCC 105

#### 4. Arbitration Agreement:

An arbitration agreement must be in writing (including through electronic means), but need not be signed. The form of the arbitration agreement is not critical – it may be in the form of a formal arbitration agreement, a clause in a contract, in exchange of correspondence, emails, or other electronic communication, or statements of claim and defence where its existence is alleged by one party and not denied by the other.

Where the arbitration agreement is included, or a part of a composite agreement, the arbitration clause is severable from the rest of the agreement of which it forms part, and therefore, notwithstanding the invalidity of the main agreement, the arbitration clause will survive.

#### 5. Court:

Parties have access to Indian courts in respect of arbitrations with their seat in India, during the course of the arbitral proceedings and thereafter in relation to challenge/enforcement of the award. Provided that the subject matter of arbitration is a commercial dispute of a specified value, the following courts would have jurisdiction:

- i. All applications or appeals arising out of an arbitration which is not an international commercial arbitration will lie before the relevant Commercial Court having territorial jurisdiction over the matter.
- ii. All applications and appeals arising out of an international commercial arbitration will lie before the relevant Commercial Division of the High Court having territorial jurisdiction over the matter.
- iii. Subject to an express agreement to the contrary, parties in a foreign seated international commercial arbitration would be entitled to approach the Commercial Division of the High Court having territorial jurisdiction, for interim relief, court assistance in taking evidence, and certain appeals (provided that the award passed in such arbitration was recognisable under Part II of the Arbitration Act).

## 6. Choice Of Arbitrator:

Parties are free to determine the number of arbitrators and the procedure for constituting the arbitral tribunal. In the absence of any agreement as regards the procedure, or if either party does not abide by the prescribed procedure for appointment, a party may approach a court for appointment of the arbitrator. A party may challenge the appointment of an arbitrator by a written challenge to the tribunal. The tribunal is competent to rule on such challenge and such an order is not appealable until passing of the final award.

## 7. Choice of Law:

The substantive law chosen by the parties is the law that governs the underlying agreement. It is open to parties in an international commercial arbitration to choose a law other than Indian law, to govern the agreement, notwithstanding the fact that the arbitration may be in India. The parties may also provide separately for the procedural law of the arbitration.

Where the parties are Indian nationals/resident in India and the arbitration is being held in India, it would be a domestic arbitration and Indian law would compulsorily apply. It is however open to parties in an international commercial arbitration, to stipulate that foreign law will govern the contract, or the arbitral proceedings (notwithstanding that the arbitration is held in India), or, that the seat of the arbitration will be outside India.

If the substantive law is not expressly chosen by parties, the arbitral tribunal/court will take various factors into account for determining applicable law, such as: (i) residence of the parties; (ii) place of execution of the agreement; (iii) place of performance of the agreement; (iv) place of accrual of the cause of action; (v) place where the assets/subject matter is located and reliefs sought.

## 8. Seat of Arbitration:

Parties are free to agree on the seat of arbitration and failing any agreement between the parties, the venue and seat will

be determined by the arbitral tribunal, having regard to circumstances of the case and the convenience of the parties. The seat of the arbitration is important inasmuch as unless otherwise specified, it determines the procedural law to be followed by the tribunal. Where the seat is outside India, Part I of the Arbitration Act does not apply and Indian courts do not have jurisdiction over such arbitration, subject to applicability of the provisions for seeking interim relief from a court, court assistance in taking evidence and certain appeals, unless otherwise agreed by the parties.

## 9. Referring parties to Arbitration:

If a judicial authority in India is seized of an action which is subject matter of an arbitration agreement and a party applies to refer the matter to arbitration, such judicial authority is required to refer the parties to arbitration. Note that where the arbitration falls within Part I of the Act, the judicial authority has no discretion in the matter and must refer the parties to arbitration.<sup>9</sup> The scope to refuse the request to refer the dispute to arbitration is limited to a case where prima facie no valid arbitration agreement exists.

If the application is made in respect of an arbitration falling under Part II (a foreign seated arbitration)<sup>10</sup>, the judicial authority must satisfy itself that the arbitration agreement is valid and binding on the parties and capable of being performed. Once it is so satisfied, the judicial authority is required to refer parties to arbitration.

## 10. Interim Relief:

- **By the Court:**<sup>11</sup> Parties may approach a court for interim reliefs before or during arbitral proceedings, or at any time after making the arbitral award but before it is enforced. The court shall not entertain any application for interim relief after the tribunal has been constituted unless it finds that circumstances exist which may not render the remedy granted by the

<sup>9</sup> Under Section 8 – See End Note

<sup>10</sup> Under Section 45 – See End Note

<sup>11</sup> Under Section 9 – See End Note

tribunal, efficacious. This provision applies to foreign seated arbitrations subject to proceedings having commenced after the Arbitration Amendment Act, i.e. October 23, 2015, and unless otherwise agreed.

Interim reliefs sought may include orders for:

- i. the appointment of a guardian for a minor, or person of unsound mind, for the arbitration;
- ii. an interim measure, or protection in respect of any of the following matters:
  1. preservation, interim custody, or sale of any goods which are the subject-matter of the arbitration agreement;
  2. securing the amount in dispute in the arbitration;
  3. detention, preservation, or inspection of any property, or thing which is the subject-matter of the dispute in arbitration;
  4. interim injunction, or the appointment of a receiver;
  5. such other interim measure of protection as may appear to the Court to be just and convenient.

- **By the arbitral tribunal:**<sup>12</sup> The arbitral tribunal also has the power to grant interim relief and has the same power for making orders as the court has for the purpose of and in relation to any proceedings before it, unless it has been otherwise agreed by the parties. The arbitral tribunal may direct either party to take any interim measure of protection as it may deem necessary to protect the subject matter of the dispute. Subject to any orders passed in appeal, an order of the arbitral tribunal shall be deemed to be an order of the Court for all purposes and shall be enforceable in the same manner as if it were an order of the Court.

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<sup>12</sup> Under Section 17 – See End Note

## 11. Commencement of arbitration:

Arbitral proceedings commence on the date on which a request for a dispute to be referred to arbitration is received by the respondent. Where a party has obtained interim relief from a court, such party must commence the arbitration within ninety days from the date of the order granting such relief.

## 12. Extent of judicial intervention:

The Act seeks to minimise judicial intervention and interference, stating that no judicial authority may intervene, except where so provided in Part I of the Act. The court may intervene at the instance of a party; illustratively, to appoint an arbitrator, grant interim relief, provide assistance in taking evidence. Pursuant to the judgment in *Bharat Aluminium* (supra), and the Arbitration Amendment Act, in respect of arbitrations commenced after October 23, 2016, Indian courts do not have jurisdiction over and hence cannot interfere in a foreign seated arbitration, except for the purposes of entertaining an application to enforce a foreign award (under Part II of the Act).

## 13. Appeal against orders:

An appeal lies (under Section 37), from the only following orders, namely:

### Orders from the court:

- i. refusing refer the parties to arbitration under section 8;
- ii. granting, or refusing to grant any measure under Section 9;
- iii. setting aside, or refusing to set aside an arbitral award under Section 34.

### Orders from the arbitral tribunal:

- i. accepting a challenge to its jurisdiction under Section 16; or

- ii. granting, or refusing to grant an interim measure under Section 17.

No second appeal lies from an order passed in appeal; but an aggrieved party may nevertheless approach the Supreme Court for special leave to appeal against any order.

#### **14. Award:**

The Arbitration Amendment Act provides that the award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference, i.e. the date on which all arbitrators have received notice of their appointment. Parties may extend this period by consent for a further period not exceeding six months. If the arbitration is not concluded within this extended period, the tribunal's mandate terminates. Parties must then approach a court to extend time further by demonstrating sufficient cause for the delay. Courts are empowered to impose exemplary costs on parties for any delay caused by them and can also substitute arbitrators or reduce arbitrator fees if delays are attributable to the tribunal.

The award must be in writing, dated and signed by the tribunal and must state the place of arbitration. The award must also state the reasons on which it was based, unless the award is based on agreed terms, or the parties have waived the requirement of a speaking order.

#### **15. Challenge to and setting aside an award:**

A court may set aside an award on a challenge made by an aggrieved party, if the party making the application furnishes proof that:

- i. a party was under some incapacity;
- ii. the arbitration agreement is not valid under the law to which the parties have subjected it or, under the law for the time being in force;
- iii. 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 their case; or

- iv. the arbitral award deals with a dispute not contemplated by, or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;
- v. the subject matter of the difference is not capable of settlement by arbitration under the law of India;
- vi. the enforcement of the award would be contrary to Indian public policy.
- vii. In case of domestic awards alone, the award may also be set aside by the court if the court finds that it is vitiated by patent illegality appearing on the face of the award. Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

The party applying to set aside of the award must do so within three months of the date of receipt of the award with notice to the other party. This period may be extended by a further thirty days, if sufficient cause for the delay is proved.

There is no provision for challenge to a foreign award in the Arbitration Act. Part II deals with only enforcement of foreign awards.

## 16. The Public Policy Challenge:

The scope of interference by an Indian court has been evolved through judicial precedents which culminated in amendments to the relevant sections by the Arbitration Amendment Act. An award is in conflict of the public policy of India only if:

- i. the making of the award was induced or affected by fraud or corruption or was in violation with the provisions of Section 75 (confidentiality in conciliation proceedings), or Section 81 (admissibility of evidence during conciliation, in other proceedings);
- ii. the award is in conflict with the fundamental policy of Indian Law; or

- iii. the award is in conflict with basic notions of morality & justice.

The test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review of the merits of the dispute.

## 17. Enforcement of awards:

A domestic award is enforced if it were a decree of a court once the prescribed period of three months for challenging it has expired, or the challenge has been rejected and the award has become final. The award may be enforced in the same manner as is prescribed for execution of a decree under the CPC.

The filing of an application to set aside an award does not of itself render that award unenforceable, unless the Court grants and order of stay of the operation thereof, on a separate application made for that purpose. The Court may grant stay of the operation of such award on such conditions (including deposit of security), and such reasons as may be deemed fit, to be recorded in writing.

A party seeking to enforce a foreign award under Part II of the Act (i.e. one passed under the New York Convention or Geneva Protocol & Convention in a territory notified by the Central Government in this regard), must produce before the executing court the original award, or a copy authenticated as required under the law of the country where the award was made; the original arbitration agreement, or a certified copy thereof; and evidence that the award is a foreign award.

Enforcement of a foreign award may be refused on the same grounds as in the case of a domestic award (subject to a narrower interpretation of what would be in conflict with the public policy of India), and additionally if:

- the award has been set aside, or suspended by a competent authority of the country in which it was made;
- the subject matter of dispute cannot be settled by arbitration under Indian law.

## 18. Costs and Interest:

The general rule is that the unsuccessful party shall be ordered to pay costs of the successful party, unless the court / tribunal makes a different order, for reasons to be recorded in writing. The general rule is that the unsuccessful party shall be ordered to pay costs of the successful party, unless the court / tribunal makes a different order, for reasons to be recorded in writing.

The costs which may be awarded include reasonable costs relating to the fees and expenses of the arbitrators and witnesses, the legal fees and expenses; any administrative fees of any institute supervising the arbitration proceedings; and any other expenses which may have been incurred by the party in connection with the arbitral proceedings and award. The conduct of the parties will also be taken into account while passing any order for costs.

Unless otherwise directed by a court / tribunal, a sum directed to be paid under an award, shall carry interest @ 2% higher than the current rate of interest prevalent on the date of the award, from the date of the award till the date of payment. [In respect of arbitrations commencing prior to the amendments (October 23, 2015), this rate is fixed at 18%, unless otherwise agreed by the parties.]

## 19. Time limit for passing an award:

The arbitral tribunal is expected to hear the matter and make an award within twelve months of it receiving the notice for appointment. The parties may extend this period by a further period of six months, but if the award is not made within eighteen months, the mandate of the tribunal will terminate. Parties must then approach a court to extend time further by demonstrating sufficient cause for the delay. Courts are empowered to impose exemplary costs on parties for any delay caused by them and can also substitute arbitrators or reduce the arbitrators' fees if delays are attributable to the tribunal.

In respect of arbitrations commencing after the amendments (October 23, 2015), parties have the option of choosing a Fast Track procedure under which the tribunal (which may be a sole arbitrator), shall decide the dispute on the basis of written pleadings, documents and submissions and without any oral hearing. The tribunal is required to make an award within six months of entering upon the reference.

## C. Other Forms Of Alternate Dispute Resolution

Mediation and conciliation are recognized and separate forms of 'alternate dispute resolution' ("ADR") and are in contrast to the adversarial approach used in court and arbitration proceedings.

### 1. Mediation and conciliation:

In India, although the words mediation and conciliation are sometimes used interchangeably, there is a recognized difference between the two. Part III of the Arbitration Act, provides for a framework whereby parties to a dispute attempt to settle their disputes through conciliation.

The Arbitration Act does not provide for mediation. The CPC however provides that where it appears to the court (in already instituted legal proceedings), that there exist elements of a settlement which may be acceptable to the parties, the court may formulate possible terms of settlement and/or refer the dispute (subject to the consent of the parties), to:

- arbitration;
- conciliation;
- judicial settlement including settlement through Lok Adalat;<sup>13</sup> or
- mediation.

Conciliation is defined by the Act as assistance rendered to disputing parties by a conciliator, "*in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute*". The 'Civil Procedure Alternative Dispute Resolution & Mediation Rules, 2006, (the "CP - ADR & Mediation Rules"), refer to 'Settlement by Conciliation' as being "*the process by which a conciliator who is appointed by parties, or by the Court, as the case may be, conciliates the disputes between the parties to the suit by the application of the provisions of (the Act)*".

<sup>13</sup>'Lok Adalat' – see End Note

Mediation is referred to in the CP - ADR & Mediation Rules), as being, *“the process by which a mediator appointed by parties, or by the Court, as the case may be, mediates the dispute between the parties to the suit ...”*.

## 2. Role of Conciliator/Mediator:

It is not the mediator's role to tell the parties what their rights are, or how they should resolve the dispute, but a conciliator may be more pro-active in persuading the parties to settle and the manner of settlement. This is recognised by the Act, which provides that the conciliator *“may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute”*. Similarly, CP - ADR & Mediation Rules, note that a conciliator may make *“proposals for a settlement of the dispute and by formulating, or reformulating the terms of a possible settlement; and has a greater role than a mediator.”* A mediator however acts by *“facilitating discussion between parties directly, or by communicating with each other through the mediator, by assisting parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, generating options in an attempt to solve the dispute and emphasizing that it is the parties own responsibility for making decisions which affect them.”* Nevertheless, no matter which method is chosen, the mediator/conciliator does not have the right to impose his will, or opinion on the parties, and they must reach an agreement mutually as to resolution of the dispute.

The conciliator/mediator is not bound by the CPC, or the Evidence Act, but must be guided by the principles of objectivity, fairness and justice, rights and obligations of parties, usages of trade, surrounding circumstances, and previous business practices.

## 3. Interim relief:

Parties are prohibited from initiating any arbitral or judicial proceedings during the pendency of conciliation proceedings under the Arbitration Act, except when a party

considers the same necessary for the purpose of protecting/preserving its rights.

#### **4. Confidentiality:**

If a conciliator/mediator receives information from one party; he is bound to disclose the same to the other party, unless such information is provided to the conciliator subject to a specific condition that it be kept confidential, in which case the conciliator shall not disclose it to the other party.

All matters relating to the conciliation (under the Arbitration Act)/mediation (under the CP - ADR & Mediation Rules), proceedings, including the settlement agreement shall be kept confidential by the conciliator and the parties thereto and the parties shall not be entitled to rely on statements made or what transpires during the proceedings. The settlement agreement may however be disclosed to the extent such disclosure is necessary for its implementation and enforcement.

#### **5. Settlement and Termination:**

The conciliation is successfully terminated if a settlement is arrived at and a settlement agreement is signed by the parties. Under the Arbitration Act, a settlement agreement has the same status and effect as an arbitral award on agreed terms and would be enforceable as if it were a decree of the court.

Where the mediation is conducted under supervision of the court in respect of pending legal proceedings, a settlement agreement arrived at between the parties must be submitted to the court by the mediator. The court then records the settlement and passes a decree in accordance therewith, disposing of the legal proceedings accordingly.

The option to mediate under the CP - ADR & Mediation Rules arises only if legal proceedings have already been filed and the dispute is then referred to mediation. If parties chose to mediate as a form of ADR without there being any pending legal proceedings, the benefits of confidentiality

and legal sanctity of the settlement agreement would not be available, and a mediated settlement, if not honoured, would have to be enforced as a separate contract by way of a civil suit.

## **6. Costs:**

Costs of the proceedings are fixed by the conciliator / mediator upon termination of conciliation proceedings and are borne by parties equally unless otherwise provided in the settlement agreement.

## End Note/Important Terms

<b>Advocate General</b>	Every state appoints an Advocate General to advise and represent the State in matters pertaining to and/or involving the State.
<b>Attorney General</b>	The Attorney General of India is the Government of India's Chief Legal Advisor, and its primary lawyer in the Supreme Court of India.
<b>Solicitor General</b>	The Solicitor General assists the Attorney General, along with four Assistant Solicitor Generals.
<b>Cause of action</b>	A cause of action (sometimes called a claim) is a set of facts sufficient to justify a right to sue. It is a bundle of essential facts, which are necessary for the plaintiff to prove before he can succeed. A cause of action generally encompasses both the legal theory (the legal wrong the plaintiff claims to have suffered) and the remedy (the relief a court is asked to grant).
<b>Chamber Summons</b>	Miscellaneous interlocutory applications which are heard before a judge in chambers (and not in open court), as specified in the Rules of each Court.  Chamber Summons originated from the time when attorneys/solicitors did not have a right of audience before a court (prior to 1976, after which any advocate had a right of appearance).
<b>Commercial Dispute</b>	(Section 2(1)©of the Commercial Courts Act)  “Commercial dispute” means a dispute arising out of–  (i) ordinary transactions of merchants, bankers, financiers

- and traders such as those relating to mercantile documents, including enforcement and interpretation of such documents;
- (ii) export or import of merchandise or services;
  - (iii) issues relating to admiralty and maritime law;
  - (iv) transactions relating to aircraft, aircraft engines, aircraft equipment and helicopters, including sales, leasing and financing of the same;
  - (v) carriage of goods;
  - (vi) construction and infrastructure contracts, including tenders;
  - (vii) agreements relating to immovable property used exclusively in trade or commerce;
  - (viii) franchising agreements;
  - (ix) distribution and licensing agreements;
  - (x) management and consultancy agreements;
  - (xi) joint venture agreements;
  - (xii) shareholders agreements;
  - (xiii) subscription and investment agreements pertaining to the services industry including outsourcing services and financial services;
  - (xiv) mercantile agency and mercantile usage;
  - (xv) partnership agreements;

- (xvi) technology development agreements;
- (xvii) intellectual property rights relating to registered and unregistered trademarks, copyright, patent, design, domain names, geographical indications and semiconductor integrated circuits;
- (xviii) agreements for sale of goods or provision of services;
- (xix) exploitation of oil and gas reserves or other natural resources including electromagnetic spectrum;
- (xx) insurance and re-insurance;
- (xxi) contracts of agency relating to any of the above; and
- (xxii) such other commercial disputes as may be notified by the Central Government.

**Company Law Board (CLB)**

The Company Law Board was constituted by the Central

**National Company Law Tribunal (NCLT)**

Government as an independent quasi - judicial body under Section 10E of the Companies Act, 1956, and is empowered to hear disputes, applications and matters pertaining to the functioning of companies registered in India.

The NCLT will be constituted under the Companies Act, 2013, with exclusive jurisdiction for adjudication of company law matters. All cases pending with the CLB will be transferred to the NCLT.

<b>Coram</b>	The sitting Judge(s) before whom a matter is listed for hearing / directions etc.
<b>Court Receiver</b>	An officer of the High Court appointed during the pendency of proceedings in order to safeguard and prevent misuse of the disputed property.
<b>Enforcement of a foreign judgment (Section 44A, CPC)</b>	<b>Execution of decrees passed by Courts in reciprocating territory-</b> <ol style="list-style-type: none"><li>(1) Where a certified copy of decree of any of the Superior Courts of any reciprocating territory has been filed in a District Court, the decree may be executed in India as if it had been passed by the District Court.</li><li>(2) Together with the certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction, or adjustment.</li><li>(3) The provisions of Section 47 shall, as from the filing of the certified copy of the decree, apply to the proceedings of a District Court executing a decree under this section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (a) to (f) of Section 13.</li></ol>

[*Explanation 1* - “Reciprocating territory’ means any country, or territory outside India which the Central Government may, by notification in the official Gazette, declare to be a reciprocating territory for the purposes of this section; and “Superior Courts,’ with reference to any such territory, means such Courts as may be specified in the said notification.

*Explanation 2* - ‘Decree’ with reference to a superior court means any decree, or judgment of such Court under which a sum of money is payable, not being a sum payable in respect of taxes, or other charges of a like nature, or in respect of a fine, or other penalty, but shall in no case include an arbitration award, even if such an award is enforceable as a decree, or judgment].

**Execution of decrees  
(Order 21, CPC)**

The procedure for execution of a decree is as under:

- An application for execution is required to be filed by the applicant/judgment creditor and notice thereof given to the defendant/judgment debtor.
- The court will then issue its process for execution in accordance with the nature of the application. The process specifies a date before which it is to be executed, as also a returnable date.
- Notice of the process is issued through the court to the defendant.

- On the returnable date, the process may be made absolute by the court and a warrant issued for attachment of the defendant's property (which includes directions prohibiting the defendant from alienating, or charging the property in any manner).
- An application must then be made by the applicant for a warrant for sale of the property and a warrant for sale issued by the court. The warrant for sale requires the defendant to attend the court office on a specified date to settle the terms of the sale and proclamation thereof.
- The terms of the sale (usually by way of public auction), are fixed in the presence of both parties.
- Public notice of the sale must be given in at least two newspapers, at least 15 days before the date of the auction. If required by the court, notice must also be served on the defendant.
- After the public auction, the court will make an order confirming the sale, whereupon the sale becomes absolute. An order will also be passed by the court directing that the decretal amount be paid over to the applicant and balance remaining, if any, be paid over to the defendant.
- It may be noted that at any time during the above procedure the

defendant may tender the decretal amount either directly to the applicant, or through the court, in which case the execution process will be dropped.

**Lok Adalat**

Lok Adalat, is loosely translated as ‘peoples’ court’. It is set up under the Legal Services Authority Act, 1987, and may be may organised at such intervals and places and for exercising such jurisdiction and for such areas as deemed fit.

The procedure is consensual – and is a form of ADR used in India and litigating parties may be referred by a court to the Lok Adalat where the court believe that there is some chance of settlement. Lok Adalat is mandated to act with utmost expedition to arrive at a compromise or settlement between the parties and shall be guided by the principles of Justice, equity, fair play and other legal principles. A compromise or settlement recorded by the Lok Adalat is deemed to be a decree of a civil court. Failing settlement, the parties continue to litigate.

**Notice of Motion**

An interim application for injunction, appointment of receiver, attachment / arrest before judgement and other ad-interim / interim reliefs in a suit, appeal, or proceedings.

**Official Liquidator**

An officer appointed by the High Court as the custodian of assets of a company under liquidation. The Liquidator takes charge of the Assets and Liabilities and disburses the amount to the creditors

	<p>and claimants as per the orders of the High Court.</p>
<b>Official Assignee</b>	<p>Officer appointed by the High Court as the custodian of the assets of an insolvent for disposing them and distributing pro-rata share as per the directions of the Court.</p>
<b>Ordinary/Appellate jurisdiction</b>	<p>Original jurisdiction is the right to hear a case for the first time as opposed to appellate jurisdiction, where a court has the right to review the decision of a previous, lower-court.</p>
<b>Originating Summons</b>	<p>The executors / administrators of a deceased person; the trustees of a trust and any person interested in the relief sought as creditor, devisee, legatee, heir, or legal representative, or as the beneficiary of the trust, may apply for issue of an originating summons before a judge in chambers, for determination of questions, or matters as set out in Rule 238 of the Bombay High Court (Original Side).</p>
<b>Prothonotary &amp; Senior Master</b>	<p>Administrative Head of the Original Side of the High Court.</p>
<b>Registrar</b>	<p>Also discharges certain quasi-judicial functions in terms of the High Court Rules.</p> <p>The Administrative Head of the Appellate Side of the High Court.</p>
<b>Reference to arbitration</b>	<p><b>Power to refer parties to arbitration where there is an arbitration agreement.</b></p>
<b>(Section 8, Arbitration Act)</b>	<p>(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies, not later than</p>

when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

- (2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement, or a duly certified copy thereof.
- (3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, and arbitration may be commenced or continued and an arbitral award made.

**Section 45. Power of judicial authority to refer parties to arbitration.**

Notwithstanding anything contained in Part I, or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties, or any person claiming through, or under them, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative, or incapable of being performed.

**Rule Nisi**

Issued in Writ Petition, by which one party through the Court, calls upon another to show cause as to why the relief set forth in the Writ should not be made final by the court. If no cause is shown the court will enter an order rendering "absolute" [i.e. final] the relief, thereby requiring whatever was sought to be accomplished by the relief.

**Securities & Exchange Board of India (SEBI)**

SEBI, constituted under the Securities & Exchange Board of India Act, 1992, is the Regulator for the Securities Market in India. SEBI has three functions rolled into one body - quasi-legislative, quasi-judicial and quasi-executive. It drafts regulations in its legislative capacity, it conducts investigation and enforcement action in its executive function and it passes rulings and orders in its judicial capacity. An appeal from an order of SEBI lies to the Securities Appellate Tribunal (SAT) and a second appeal from the SAT lies directly with the Supreme Court.

**Summary Procedure (Order 37, CPC)**

1. **Courts and classes of suits to which the Order is to apply:**
  - (1) This Order shall apply to the following Court, namely:-
    - (a) High Courts, City Civil Courts and Courts of Small Causes; and
    - (b) other Courts;  
Provided that in respect of the Courts referred to in clause (b), the High Court may, by notification in the Official Gazette, restrict the operation of this Order only to such categories of suits as it deems proper and may also, from time to time, as the circumstances of the case may require, by subsequent notification in the Official Gazette, further restrict, enlarge, or vary, the categories of suits to be brought under the operation of this Order as it deems proper.
  - (2) Subject to the provisions of sub-rule (1) the Order applies to the

following classes of suits, namely:-

- (a) suits upon bills of exchange, hundies and promissory notes;
- (b) suits in which the plaintiff seeks only to recover a debt, or liquidated demand in money payable by the defendant, with, or without interest, arising,-
  - (i) on a written contract, or
  - (ii) on an enactment, where the sum sought to be recovered is a fixed sum of money, or in the nature of a debt other than a penalty; or
  - (iii) on a guarantee, where the claim against the principal is in respect of a debt, or liquidated demand only.

**2. Institution of summary suits**

- (1) A suit, to which this Order applies, may, if the plaintiff desires to proceed hereunder, be instituted by presenting a plaint which shall contain,-
  - (a) a specific averment to the effect that the suit is filed under this Order;
  - (b) that no relief, which does not fall within the ambit of this rule, has been claimed in the plaint;
  - (c) the following inscription, immediately below the number of the suit in the title of the suit, namely:-  
 “(Under Order XXXVII of the Code of Civil Procedure, 1907).”
- (2) The summons of the suit shall be in Form No. 4 in Appendix B, or in such other form as may, from time to time, be prescribed.

(3) The defendant shall not defend the suit referred to in sub-rule (1) unless he enters an appearance and in default of his entering an appearance the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree for any sum, not exceeding the sum mentioned in the summons, together with interest at the rate specified, if any, up to the date of the decree and such sum for costs as may be determined by the High Court from time to time by rules made in that behalf and such decree may be executed forthwith.

**3. Procedure for the appearance of defendant**

(1) In a suit to which this Order applies, the plaintiff shall, together with the summons under rule 2, serve on the defendant a copy of the plaint and annexure thereto and the defendant may, at any time within ten days of such service, enter an appearance either in person, or by pleader and, in either case, he shall file in Court an address for service of notices on him.

(2) Unless otherwise ordered, all summons, notices and other judicial processes required to be served on the defendant, shall deemed to have been duly served on him if they are left at the

address given by him for such service.

- (3) On the day of entering the appearance, notice of such appearance shall be given by the defendant to the plaintiff's pleader, or, if the plaintiff sues in person, to the plaintiff himself, either by notice delivered at, or sent by pre-said letter directed to the address of the plaintiff's pleader, or of the plaintiff, as the case may be.
- (4) If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgment in Form No. 4A in Appendix B for such other Form as may be prescribed from time to time, returnable not less than 10 days from the date of service supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit.
- (5) The defendant may, at any time within ten days from service of such summons for judgment, by affidavit, or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit and leave to defend may be granted to him unconditionally, or upon such terms as may appear to the Court, or Judge to be just:

Provided that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise, or that the defence intended to be put up by the defendant is frivolous, or vexatious:

Provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court.

- (6) At the hearing of such summons for judgment,-
  - (a) if the defendant has not applied for leave to defend, or if such application has been made and is refused, the plaintiff shall be entitled to judgment forthwith; or
  - (b) if the defendant is permitted to defend as to the whole, or any part of the claim, the Court, or Judge may direct him to give such security and within such time as may be fixed by the Court, or Judge and that on failure to give such security with the time specified by the Court, or Judge, or to carry out such other directions as may have been given by the Court, or judge, the plaintiff shall be entitled to judgment forthwith.

(7) The Court, or Judge may, for sufficient cause shown by the defendant, execute the delay of the defendant in entering an appearance, or in applying for leave to defend the suit.

**Writ of Summons**

A Summons issued in prescribed form by the court calling upon the defendant to enter appearance and file its written statement of defence within the stipulated time.

**Writ jurisdiction**

Under the Indian Constitution, the Supreme Court and High Courts can issue writs for the enforcement of fundamental rights, administrative action and judicial or quasi-judicial action.

**Vakalatnama**

Letter of appointment issued by a party to a legal proceeding, appointing an advocate, or a firm of advocates to act, appear and plead on its behalf in such proceeding.

## Offices of Cyril Amarchand Mangaldas

### Mumbai

Peninsula Chambers,  
Peninsula Corporate Park, GK Marg,  
Lower Parel, Mumbai - 400 013, India  
Tel: +91 22 2496 4455  
Fax: +91 22 2496 3666  
Email: [cam.mumbai@cyrilshroff.com](mailto:cam.mumbai@cyrilshroff.com)

3rd Floor, Lentin Chambers,  
Dalal Street, Fort, Mumbai - 400 001, India  
Tel: +91 22 2265 0500  
Fax: +91 22 2265 9811  
Email: [cam.mumbai@cyrilshroff.com](mailto:cam.mumbai@cyrilshroff.com)

### New Delhi

4th Floor, Religare Building,  
D-3, District Centre, Saket,  
New Delhi - 110 017, India  
Tel: +91 11 6622 9000  
Fax: +91 11 6622 9009  
Email: [cam.delhi@cyrilshroff.com](mailto:cam.delhi@cyrilshroff.com)

### Bengaluru

201, Midford House,  
Off. M. G. Road, Bengaluru - 560 001, India  
Tel: +91 80 2558 4870  
Fax: +91 80 2558 4266  
Email: [cam.bengaluru@cyrilshroff.com](mailto:cam.bengaluru@cyrilshroff.com)

### Hyderabad

8-2-622/5/A, 3rd Floor, Indira Chambers,  
Road No. 10, Banjara Hills,  
Hyderabad - 500 034, Telangana, India  
Tel: +91 40 6730 6000  
Fax: +91 40 6730 6002  
Email: [cam.hyderabad@cyrilshroff.com](mailto:cam.hyderabad@cyrilshroff.com)

## **Chennai**

2nd Floor, ASV Chamiers Square,  
87/48, Chamiers Road, R. A. Puram,  
Chennai - 600 028, India  
Tel: +91 44 6668 4455  
Fax: +91 44 6608 3490  
Email: [cam.chennai@cyrilshroff.com](mailto:cam.chennai@cyrilshroff.com)

## **Ahmedabad**

3rd Floor, Infrastructure House,  
Next To Adani House,  
Near Mithakhali Six Roads,  
Navrangpura, Ahmedabad - 380 009, India  
Tel: +91 79 2648 7900  
Fax: +91 79 2648 7990  
Email: [cam.ahmedabad@cyrilshroff.com](mailto:cam.ahmedabad@cyrilshroff.com)

# Notes



# Notes



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cyril amarchand mangaldas  
advocates & solicitors

Offices: Mumbai • New Delhi • Bengaluru • Hyderabad • Chennai • Ahmedabad