

FORUM VIEWS

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A BOMBAY STOCK EXCHANGE BROKERS' FORUM (BBF) ORIGINAL YEARLY SPECIAL



By undertaking any transaction on the Exchange, one is deemed to have given consent to arbitrate disputes under BSE's mechanism.

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NAVIGATING ARBITRATION ON THE BOMBAY STOCK EXCHANGE

The Bombay Stock Exchange (BSE), Asia's first stock exchange, established in 1875, embraced the arbitral process for resolution of disputes over a decade ago. This progressive step was in tandem with the fact that in India, most commercial contracts include arbitration as the preferred dispute resolution process, as opposed to the default route of traditional court litigation.

BSE has put in place two separate arbitration mechanisms, viz.:

- i) under Chapter XIII of the Byelaws, dealing with disputes between non-Trading Members' and Trading Members, and Trading Members inter-se, arising out of or in relation to dealings, contracts and transactions made on the exchange (the Exchange is not considered to be a party to transactions or dealings); and
- ii) under its recently issued a Standard Operating Procedure (SOP)² for disputes between a listed company, its shareholders and/or Registrars to an Issue and Share Transfer Agents (RTAs), pursuant to specific directions from SEBI in this regard.³

The arbitral process under both mechanisms is largely similar and we deal with them jointly below, setting out a few key differentiators.

As BSE states on its website, its aim is to ensure a speedy and effective resolution of claims, differences and disputes. Over the last 12 years, upwards of 2000 awards have been issued in arbitration conducted under the Byelaws, proving the success of, and proving investors' confidence in the system.

By undertaking any transaction on the Exchange, one becomes subject to its Byelaws and therefore consents to arbitrate disputes as may be covered by the Byelaws. As arbitration is a voluntary mechanism and party consent is mandatory, the Byelaws provide that parties to all transactions on the exchange are deemed to have entered into a valid arbitration agreement⁴ (as opposed to providing for arbitration as an optional / opt-in feature).

Although, as mentioned above, the agreement of parties to arbitrate is sine qua non to arbitrating any dispute, under the SOP, the RTAs and listed companies have been mandatorily subjected to the Exchange's arbitration mechanism, the SOP stating inter alia that, "The provisions of SOP shall be applicable to Listed Companies / RTAs ... In case of claims or disputes arising between the shareholder(s)/ investor(s) of listed companies and the RTAs, the RTAs shall be subjected to the stock exchange arbitration mechanism. In all such instances, the listed company shall necessarily be added as a party." It would therefore appear that by virtue of being listed or doing business on the Exchange, these entities are also deemed to have entered into an arbitration agreement. This position has not however been tested in law.

Prior to invocation of arbitration under the SOP, a claimant is required to comply with certain pre-arbitral actions, such as the filing of a complaint with the SEBI SCORES portal and/or the Investor Grievance Redressal Committee of BSE before the arbitration can proceed. There is no such condition precedent to invoking arbitration under the Byelaws.

Peculiar to the SOP is also a specific categorisation of disputes that may be referred to arbitration. Viz.:

- i) transfer / transmission of shares;
- ii) dematerialisation / rematerialisation;
- iii) issue of duplicate shares;
- iv) transposition of holders;
- v) investor entitlements, such as corporate benefits, dividend, bonus shares, rights entitlements;
- vi) credit of securities in public issue; and
- vii) interest / coupon payments on securities and delay in processing/wrongful rejection of aforesaid investor service requests.

A distinct feature of BSE's mechanism is a second bite at the cherry by way of an appellate arbitral mechanism, whereby an award given in the first instance may be challenged by filing a memorandum of appeal before a new three member appellate tribunal.

All other disputes would not be covered by the deemed arbitration agreement and so subject to any other dispute resolution mechanism that may be agreed, or otherwise, civil court litigation. The lack of such a categorisation in the Byelaws suggests that the nature of disputes that may be referred to arbitration thereunder is wider. To be noted that under Indian law, certain disputes, such as those where serious allegations of fraud are made, are not arbitrable in any event, and would have to be decided by a civil court through an evidentiary trial.⁵

The Relevant Authority⁶ of BSE is authorised to frame regulations for choosing the seat of arbitration - which determines the place of the arbitration and the court which has supervisory jurisdiction over it. Typically, the seat will be at one of the 24 Regional Arbitration Centres established by BSE, unless BSE itself is a party to the dispute, in which case the seat will be Mumbai, and Courts in Mumbai will thus have exclusive jurisdiction over the arbitration proceedings.

While invoking arbitration, claimants are required to submit the prescribed forms including a statement of

claim setting out the relationship between the parties, details of the transactions and reasons for the dispute etc.,⁷ along with supporting documents such as, contract notes, bills issued / received, statement of account given by the trading member etc. The respondent may submit a response / defence and also a counter claim (if any).

Parties may by mutual consent, appoint arbitrator(s) from the common pool of arbitrators on the panel of all stock exchanges and as per Centralised Arbitrator Appointment Process (CAAP) set up by SEBI.⁸ Should parties fail to agree, the arbitrator(s) are chosen by way of an automatic, computer-generated selection process. Where the value of the claim amount is up to INR 25 lakhs, a sole arbitrator is appointed, and for claims of a higher amount, a three-member panel is constituted.

Keeping in mind costs and efficiency of the process, under the SOP, claims up to INR 25,000 are decided on a documents-only basis, thus dispensing with oral hearings. Where parties so chose, as an opt-out feature, they may dispense with oral hearing even for claims of a higher value. While the Byelaws do not have a similar provision, this would not preclude the parties from agreeing to proceed based on only documentary evidence, keeping in mind the complexity of the claims and the interests of efficiency and costs.

Significantly, recognising the importance of speed of disposal of such claims,⁹ the arbitration proceedings are required to conclude within four months from the date of appointment of the arbitrator, extendable by two months for sufficient cause. While the SOP and the Byelaws do not provide any consequence for the proceedings not concluding within this timeline, a review of the data published by BSE¹⁰ in respect of arbitration proceedings initiated against Trading Members under the Byelaws in the last year as also for the year 2019-20, prior to the COVID-19 pandemic, shows that initial awards were issued on an average of 5-6 months after commencement of the arbitration.

A distinct feature of BSE's mechanism is a second bite at the cherry, by way of an appellate arbitral mechanism whereby an award given in the first instance may be challenged by filing a memorandum of appeal before a new three-member appellate tribunal. The appeal must be filed within one month from the receipt of the initial award and decided within three months from the constitution of the appellate tribunal (extendable by two months). This system gives parties the opportunity to appeal the initial award on a substantive basis at the level of the Exchange, rather than being limited by the narrow

scope of intervention in an application to set aside an award under the Arbitration & Conciliation Act, 1996 (the “A&C Act”).

A party aggrieved by the initial award (where no appeal is filed), or the appellate award may file an application before a court to set aside the award under Section 34 of the A&C Act.

While the SOP does not provide for any award implementation mechanism, it requires listed entities / RTAs to inform the Exchange about the status of compliance with an award issued against them. It also envisions setting up of a mechanism for imposition of penalty against a listed company / RTA, in the event they fail to honour the award.

What makes arbitration under the BSE byelaws unique, is the process for implementation of an award. Where an award is made in favour of an investor, the trading member is required to deposit the awarded amount with the BSE or make the payment directly to the award holder, within the time period as may be specified in the award, failing which BSE is entitled to debit the award amount (with interest, if any) from the deposits of the trading member lying with the BSE, and pay it to the award holder. The BSE's obligation to make the payout is however subject to the outcome of any proceedings filed against the initial or appellate award. Should the trading member not have sufficient deposits with the Exchange, they may be declared a defaulter by the Disciplinary Action Committee, and the award

amount (subject to an upper limit of INR 15 lakhs), will be released to the investor from the Investor Protection Fund.” An award holder also has the right to apply for enforcement of the award before a competent court as if it were a decree of the court,¹² much in line with the provisions of the A&C Act, and could do so also for any balance amount that may be due after receipt of any amount from the Fund.

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The transparency and effectiveness of BSE's dispute resolution mechanism ought to give impetus to investors' faith in the reliability and trustworthiness of BSE as a trading platform and the ability to recover under any award passed thereunder. The arbitral process specified, ensures that parties can resolve their disputes in an expedited manner, avoiding the perils of the overburdened Indian judiciary and its strict rules of procedure, while nevertheless enforcing their contracts and claims.

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Shaneen has over two decades of experience and is qualified to practice as an advocate and solicitor in India. She is a Member of the Court of Arbitration of SIAC and the Council of MCIA. She is also qualified as a solicitor in England & Wales, and a Registered Foreign Lawyer of the Singapore International Commercial Court. Shaneen specialises in complex commercial disputes, often involving cross-border issues. Shaneen's experience encompasses some precedent setting litigations in India, relating to securities / commodities trading and transactions which have been among the first of their kind.

1. Non-Trading Members include (i) Constituents, (ii) Authorised Persons, and (iii) Issuers, as defined in Explanation 1 and 2 to Clause 1 of Chapter XIII of the Byelaws.
2. See https://www.bseindia.com/downloads1/SOP_arbitration_mechanism.pdf.
3. See SEBI | Standard Operating Procedures (SOP) for dispute resolution available under the stock exchange arbitration mechanism for disputes between a listed company and its shareholder(s) investor(s).
4. Clause (2), Chapter XIII - Arbitration, BSE Byelaws.
5. See *Vidya Drolia v. Durga Trading Corporation*; 2020 SCC Online SC 1018 and *Ayyasamy v. A. Paramasivam*, (2016) 10 SCC 386.
6. “Relevant Authority/relevant authority” means the Board, SEBI, Managing Director of BSE Limited, Indian Clearing Corporation Limited or any other entity acting as a clearing corporation, such other person or committee, as the context may admit or require, or any person/committee as may be specified by the Board from time to time.
7. See https://www.bseindia.com/downloads1/Arbitration_Forms.zip.
8. See SEBI | Arbitration Mechanism through Stock Exchanges - Introduction of Automatic Process and Common Pool of arbitrators.
9. Clause 13(c) and (d) of the Byelaws, Clause 8.1 of the SOP.
10. See BSE - Complaint /Arbitration Status ([bseindia.com](https://www.bseindia.com)).
11. See Claim against Defaulter ([bseindia.com](https://www.bseindia.com)).
12. See BSE - Arbitration Mechanism ([bseindia.com](https://www.bseindia.com)).