Litigation ADR Questionnaire India

CIVIL LITIGATION

1. **In what language(s) may court proceedings be conducted? What arrangements can be made for translation/interpreter services?**

The Indian Constitution mandates that all proceedings in the Supreme Court of India and in every High Court as also all authoritative texts of all Central and State Legislations, Ordinances, Bills or amendments thereto, all Orders, Rules, Regulations and Byelaws issued under the Constitution or under any Central or State law shall be in English. However, the Indian Parliament is competent to prescribe, by legislation, any other language for the said purposes.

It is relevant that Hindi has been adopted as the official language of the Union of India. Additionally, the Indian Constitution recognizes 21 (twenty one) other languages as being available to the Union/ State for being adopted as a language for official purposes. Some Indian States have in fact, prescribed, in addition to English, Hindi or another regional/ vernacular language for being used in Court proceedings. As a mater of practice, it is not infrequent to witness the use of Hindi or regional/ vernacular languages in addition to English particularly, at the District Court level and lower judiciary by virtue of their wide-spread prevalence and use in the State concerned.

Notably, no document in language other than English can be filed in the Supreme Court unless it is accompanied by a translation agreed to by both the parties or certified to be true translation by a Translator appointed by the Supreme Court or translated by a Translator appointed or approved by the Supreme Court. A party may either privately arrange for translation/ interpreter services at its own expense or file an application in court for appointment and approval of a translator or interpreter. Generally however, the arrangements for as well as costs of translation is to be borne by the party relying on the same.

2. **What types of pre-action measures are available and what are their limitations? Must you send a warning letter before issuing any proceedings?**

A party in entitled, in appropriate cases, to request the court at the threshold of a civil proceeding, for grant of urgent measures of interim (even *ex parte*) protection pending a detailed enquiry into the civil *lis*. However, *stricto sensu,* such a request is to be invariably accompanied with a detailed plaint setting out the entire case.

Pre-action measures may be in the nature of request to court for grant of temporary injunctions in the following cases:

- that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or
- that the delinquent party threatens, or intends, to remove or dispose of his property with a view to defrauding his creditors,
- that the delinquent party threatens to dispossess, the applying party or otherwise cause injury to the applying party in relation to any property in dispute in the civil proceeding.

On such application being made by a party, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property or dispossession of the applying party, or otherwise causing injury to the applying party in relation to any property in dispute in the civil proceeding as the Court thinks fit, until the disposal of the civil proceeding or until further orders.

Conversely, a party anticipating a civil action against itself may file a caveat application which will entitle the filing party to a hearing before any orders or directions are passed or issued against the filing party.

As a precursor to litigation, a party may call upon the other party for negotiations and discussions with a view to resolve the dispute amicably. This however, is not mandatory except where the parties have agreed to an arbitration or conciliation clause in advance. Depending on the nature of action/ cause of action in question, Indian civil laws as also the Indian courts encourage parties to explore amicable settlement and resolution of civil disputes by resorting to institutional or *ad hoc* arbitration, mediation, conciliation and Lok Adalats.

With the exception of such cases where the parties have contracted to refer their disputes and differences to arbitration as also cases involving the state or state instrumentalities, it is not mandatory to issue a warning letter prior to institution of proceedings.

3. What are the costs of civil and commercial proceedings? Who bears the costs?

Court fees and attorney fees constitute the principal cost. The quantum of court fees to be paid in respect of a particular civil or commercial proceeding is stipulated under a special legislation regulating court fees (which may be fixed or scaled ad valorem basis the value of the subject matter/ reliefs in questioning a civil proceedings). Illustratively, court fee is computed on an *ad valorem* basis in actions for money, maintenance, movable and immovable property, enforcing a right of pre-emption, *mesne* profits, and actions for specific performance.

Albeit, there is a legislation prescribing guidelines for attorney fees, in practice, attorney fees is largely a matter of agreement between the client and attorney concerned. Other costs that may be involved may be in the nature of welfare stamps and notary expense.

At the stage of filing, costs are invariably borne by the party concerned. However, a party succeeding in a civil litigation is awarded costs at the time of drawing up of a decree. While such costs generally include costs towards court fees, they do not always reflect attorney fees that may have been incurred by a succeeding party.

It is pertinent that the Code of Civil Procedure, 1908 prescribes that the costs of and incident to all civil suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid.

4. What are the basic rules of disclosure of documents in civil and commercial proceedings? Which documents do not require disclosure? Is electronic disclosure of documents normal?

A party suing upon or relying upon a document in its possession or power in support of its claim is required to produce and file such documents in court at the time of institution of its claim. Similarly, where a party bases its defence to a claim or relies upon any document in its possession or power in support of its defence or claim for set of or counter claim, such party is required to produce and file such documents in court at the time of setting up of its defence.

As regards documents in the possession, power, custody or control of the opposite party in a civil or commercial proceeding, a party seeking to place reliance on such documents in support of its claim or defence is entitled to issue a notice to produce such documents which are in the possession, power, custody or control of the opposite party. A party in a civil or commercial proceeding may also file an application for discovery and inspection of documents or for summoning of documents through court.

In addition to above, a court is empowered, at any time during the pendency of any civil proceedings, to order, where it deems appropriate, production of any document in the possession or power of any party to such proceedings.

5. What is the process for witness evidence (namely, is it deposition based in advance, or witness statement, or examination or cross-examination)? Can a witness be compelled to attend to give evidence?

A list of witnesses is to be filed by the parties in court at the time of settlement of issues.

Examination-in-Chief of a witness is generally conducted by way of tendering an affidavit of evidence of such witness. It is then open to the opposite party to cross-examine the witness in question in respect of the written deposition. Such cross-examination though conducted orally in the presence of the court is immediately reduced into writing and signed by the concerned witness.

It is also open to a party in a civil proceeding to request the court to summon a particular witness with a view to obtain the deposition of such witness or to cross-examine such witness.

A party to a civil proceeding may also deliver written interrogatories, with the leave of court, for the examination of the opposite parties.

Upon a person being summoned by a court as witness in a civil proceeding, it is imperative for the witness to attend to give evidence. Deliberate omission or failure on part of a summoned witness to attend the court entitles a court to impose fine on such delinquent witness and to also order the property of such delinquent witness to be attached and sold.

6. **How are settlement discussions usually conducted (namely whether oral or written and whether between the parties direct or their representatives)? Is the settlement correspondence between the parties/counsel privileged (i.e: may not be disclosed to the court)?**

   Under the present Indian civil law regime, parties are encouraged to explore or resort to conciliation/ mediation/ settlement even during the pendency of a civil proceeding. Except in cases of judicial settlement including settlement through the system of Lok Adalats (which is governed by the Legal Services Authority Act, 1987), settlement discussions may be conducted in any form or manner agreeable to the parties and/or their respective counsels.

   Settlement correspondence exchanged between the parties and/or their respective counsels, are generally and as a rule of practice, undertaken on a without prejudice basis and where the parties have so declared or agreed, are regarded as privileged and confidential (i.e. may not be disclosed to the arbitrator)

7. **How can foreign judgments be enforced?**

   A party relying upon a foreign judgment of countries with which India has an existing reciprocal arrangement (within the meaning and purview of Section 44-A of the Code of Civil Procedure, 1908, by way of a notified treaty or agreement) is entitled to directly file proceedings for execution of such judgment in a court of competent jurisdiction in India. Judgments of reciprocating territories are therefore, without anything furthermore, enforceable as decrees in India.

   However, as regards a party relying upon a foreign judgment of a country with which India does not have any existing reciprocal arrangement within the meaning and purview of Section 44-A of the Code of Civil Procedure, 1908, a party relying upon such foreign judgment is not entitled to directly file execution of such judgment in India but is required to file its claim (to which the foreign judgment pertained) afresh in a court of competent jurisdiction in India. In such proceedings, the foreign judgment may be relied upon by the claiming party as a piece of evidence. It is only upon succeeding in such claim before the Indian courts that the party may seek enforcement of its claim, to the extent decreed by the Indian court, by filing execution proceedings in respect thereof.

Litigation ADR Questionnaire India

ARBITRATION

1. Are mediation clauses in commercial contracts binding and enforceable?

Yes, mediation clauses in commercial contracts have been held to be binding and enforceable in India. Where contractually prescribed, resort to mediation would be regarded as a pre-requisite before an action in civil courts may be instituted.

2. What is the procedure for mediation? Is it a popular method for resolving commercial disputes?

There is no statutorily prescribed rule or procedure governing mediation and the parties are left to adopt and design their own form and procedure in this regard. There are instances however, where High Courts in India have established a mediation cells associated with the High Court. Where such mediation cells have been set up, the High Courts have also formulated mediation rules governing the procedure of mediation. Broadly, mediation is conducted on principles of confidentiality, fairness, impartiality, objectivity and justice.

Historically, mediation is not seen as a popular method for resolution of commercial disputes.

3. Are arbitration clauses in commercial contracts binding and enforceable?

Yes, arbitration clauses in commercial contracts are regarded as binding and enforceable under Indian laws. Arbitration clauses in commercial contracts are regarded as independent agreements and have been held to survive even if the commercial contract itself is found to be void. By virtue of Section 8 of the Arbitration & Conciliation Act, 1996, arbitration clauses in commercial contracts may operate as a bar to civil action in respect of disputes and differences arising under the commercial contract in question.

4. What type of arbitration is commonly used for resolving commercial disputes: ad hoc arbitration or institutional arbitration?

While ad hoc arbitration has been more commonly used over the years, contracting parties are now seen to be maturing towards agreeing to institutional arbitration.

5. Which arbitration institutes are most popular?

In the case of international commercial arbitration, it is not uncommon for parties to refer disputes to the International Chamber of Commerce, London Court of International Arbitration or the Singapore International Arbitration Centre.

Some of the popular arbitration institutes in India are the Indian Council of Arbitration, Chambers of Commerce (organized by either region or trade), Federation of Indian Chamber of Commerce and Industry ("**FICCI**"), FICCI Arbitration and Conciliation Tribunal, Indian Institute of Arbitration and Mediation, International Centre for Alternate Dispute Resolution ("**ICADR**"), or the Delhi High Court Arbitration Centers set up and established under the aegis of the Delhi High Court.

6. What influence can the parties have on the identity of the arbitrator(s)?

Under Section 10 and 11 of the Arbitration & Conciliation Act, 1996, the parties have been accorded the freedom to determine the number of arbitrators (not being an even number) as also the procedure for appointing the arbitrator or arbitrators.

Failing such agreement as to procedure for appointment, in arbitration with three arbitrators, each party is entitled to appoint one arbitrator and the two appointed arbitrators are required to appoint the third arbitrator who shall act as the presiding arbitrator. However, where the immediately preceding appointment procedure applies and a party fails to appoint an arbitrator within 30 days from the receipt of a request to do so from the other party or (b) the two appointed arbitrators failed to agree on the third arbitrator within 30 days from the date of their appointment, the appointment shall be made, upon a request of a party, by the Chief Justice.

Failing an agreement as to procedure for appointment of arbitrator, in an arbitration with a sole arbitrator if the parties fail to agree on the arbitrator within thirty days from receipt

of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him

Where, under an appointment procedure agreed upon by the parties, a party fails to act as required under that procedure, or the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure, or a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

7. In what language is an arbitration proceedings conducted?

Under the arbitration laws of India, parties are at liberty to agree on a language in which arbitration proceedings may be conducted. Failing such agreement, the arbitral tribunal is entitled to determine the language or languages to be used in the arbitral proceedings.

The agreement or determination, unless otherwise specified, shall apply to any written statement by a party, any hearing and any arbitral award, decision or other communication by the arbitral tribunal. The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the languages agreed upon by the parties or determined by the arbitral tribunal.

8. What types of pre-arbitration measures are available and what are their limitations?

Under the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"), a party is entitled, before arbitral proceedings have commenced, to apply to a court for an interim measure or protection in respect of any of the following matters:

- the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
- securing the amount in dispute in the arbitration;
- the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorizing any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;
- interim injunction or the appointment of a receiver;
- such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

While considering an application for grant of such measure or protection, the Court does not undertake a detailed enquiry into the merits of the dispute but is only moved by considerations of *prima facie* case, balance of convenience *inter se* the parties and irreparable injury to a party affected by the grant or refusal of a measure or protection. It is relevant that the grant or refusal to grant of such pre-arbitration measure by Court is appealable by the party aggrieved.

9. What are the costs of arbitration proceedings and who bears these costs?

The Arbitration Act stipulates that unless otherwise agreed by the parties, the costs of arbitration shall be fixed by the arbitral tribunal. Arbitral tribunals are also empowered to specify:

- the party entitled to costs,
- the party who shall pay the costs,
- the amount of costs or method of determining that amount, and
- the manner in which the costs shall be paid.

Such costs signify reasonable costs relating to-

- the fees and expenses of the arbitrators and witnesses,
- legal fees and expenses,

- any administration fees of the institution supervising the arbitration, and
- any other expenses incurred in connection with the arbitral proceedings and the arbitral award.

Costs involved in arbitration may also include cost of stamping of an arbitral award which is prescribed in some jurisdictions in India. The value of the stamp duty payable in respect of an arbitral award is generally assessed on the basis of the quantum of the monetary claims awarded.

10. What are the basic rules of document disclosure in arbitration? Which documents do not require disclosure?

While the Arbitration Act stipulates that the Code of Civil Procedure, 1908 and the Indian Evidence Act, 1872 do not apply to arbitration proceedings, in principle the rules of document disclosure employed in arbitration proceedings remain largely similar to those applied in civil proceedings.

However, it is pertinent that under the Arbitration Act, parties have been accorded freedom to determine the procedure to be followed by the arbitral tribunal, failing which, the arbitral tribunal may conduct the proceedings in the manner it deems appropriate. Ordinarily, the parties are required to submit, with their statement of claim or defence, as the case may be, all documents and evidence that they consider as relevant. Alternately, the parties may add a reference to the documents or other evidence that they propose to submit.

Section 27 of the Arbitration Act entitles an arbitral tribunal, or a party with the approval of the arbitral tribunal, to apply to court for assistance in taking evidence. Upon receiving such a request, the court may within its competence and according to its rules on taking evidence, execute the request or ordering that the evidence be provided directly to the arbitral tribunal. The Court may, while making or order as above, issue the same processes to witnesses as it may issue in suits tried before it.

11. What is the procedure for witness evidence in arbitration (namely, is it deposition based or witness examination or cross-examination)?

The Arbitration Act prescribes that the arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872. The parties are at liberty to agree on a procedure to be followed by the arbitral tribunal in conducting its proceedings. Failing such *inter partes* agreement, the arbitral tribunal is entitled to conduct its proceedings in the manner it considers appropriate and such powers includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Albeit, the provisions of the Code of Civil Procedure, 1908 and the Indian Evidence Act, 1872 applicable to civil proceedings do not apply to arbitration proceedings, ordinarily, the principles of witness evidence for arbitration proceedings remain the same with the crucial exception that it is open to the parties to agree to and adopt their own procedure for witness evidence.

It is apt to note that the Arbitration Act entitles an arbitral tribunal, or a party with the approval of the arbitral tribunal, to apply to court for assistance in taking evidence. Upon receiving such a request, the court may within its competence and according to its rules on taking evidence, execute the request or ordering that the evidence be provided directly to the arbitral tribunal. The Court may, while making or order as above, issue the same processes to witnesses as it may issue in suits tried before it. Persons failing to attend in accordance with such process, or making any other fault, or refusing to give their evidence, or guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings, have been statutorily declared as being subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitral tribunal as they would incur for the like offences in suits tried before the Court.

12. How are settlement discussions usually conducted (namely whether oral or written and whether between the parties direct or their representatives)? Is the settlement

correspondence between the parties and/or counsel privileged (i.e., may not be disclosed to the Arbitrator)?

Under the present Indian civil law regime, parties are encouraged to explore or resort to settlement even during the pendency of a civil proceeding or an arbitration proceeding. Except in cases of judicial settlement including settlement through the system of Lok Adalats (which is governed by the Legal Services Authority Act, 1987), settlement discussions may be conducted in any form or manner agreeable to the parties and/or their respective counsels.

Settlement correspondence exchanged between the parties and/or their respective counsels, are generally and as a rule of practice, undertaken on a without prejudice basis and where the parties have so declared or agreed, are regarded as privileged and confidential (i.e. may not be disclosed to the arbitrator)

It is relevant that if, during arbitral proceedings, the parties are able to settle the dispute, the arbitral tribunal is required to terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms. It is relevant that an arbitral award on agreed terms is accorded the same status and effect as any other arbitral award on the substance of the dispute.

Notably, in conciliation proceedings conducted under the Arbitration Act the conciliator and the parties are required to keep and maintain confidentiality concerning all matter relating to the conciliation proceedings including any settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement**.**

The statute also prescribes that when the conciliator receives factual information concerning the dispute from a party, he shall disclose the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate. However, when a party gives any information to the conciliator accompanied with a specific condition that it be kept confidential, the conciliator is required not to disclose such information to the other party**.**

13. Under what circumstances can an Arbitration Award be enforced, challenged or annulled?

An arbitral award may be enforced by a party upon the expiry of ninety (90) days from the date on which such award was rendered. In cases where an arbitral award has been challenged, enforcement may be made after such challenge has been refused or rejected. Subject to the above, an arbitral award is enforceable as a decree of court.

An arbitral award including a foreign award may be challenged and annulled by Court if the party challenging the same proves that:

- a party was under some incapacity, or the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
- the party challenging was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- 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 matter beyond the scope of the submission to arbitration:
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with non-derogable provision of the Arbitration Act or, failing such agreement, was not in accordance with the same.

A foreign award may, in addition, to the above, may be challenged on the ground that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made

Arbitral Awards (including foreign awards) may also be annulled where the Court finds:

- the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
- the arbitral award is in conflict with the public policy of India.