

FAQs ON ARBITRATION IN INDIA



ARBITRATION AGREEMENT

Arbitration, a widely preferred mechanism of alternate dispute resolution is by and large used to adjudicate disputes of commercial nature. In recent times, arbitration has gained significant importance for settling disputes between parties due to its relatively speedy and flexible framework. This FAQ deals with the fundamental principles of arbitration, its related procedure and relevant law in India.

1. What is Arbitration? How is arbitration different from filing a lawsuit before a court?

Arbitration is a form of alternate dispute resolution. In other words, it is one of the ways through which parties can resolve their dispute outside the court / tribunal. It is an alternative to filing a lawsuit and going to a court / tribunal, which is the traditional method for resolving legal disputes.

Arbitration is different from filing a lawsuit before a court in the following ways:

- i. Arbitration is conducted privately wherein the parties to the dispute, by mutual agreement, submit their dispute to an independent third party (known as arbitrator or arbitral tribunal) which will adjudicate and render its decision. This decision (known as arbitral award / award) is binding on both the disputing parties. Documents / papers / pleadings in arbitration are privately filed only before an arbitrator or arbitral tribunal. Therefore, arbitration is confidential in nature.
- ii. In a lawsuit before a court the dispute is decided by the concerned judge. The judge renders his/her decision in a public courtroom. Documents / papers / pleadings in lawsuit before a court become public record.
- iii. Arbitration provides a speedier resolution unlike court proceedings that may take several months to attain finality.
- iv. In arbitration, the parties are free to mutually agree on a procedure to be followed by the arbitral tribunal for conducting the arbitration, whereas court proceedings are governed by statutory and procedural rules.

2. How is Arbitration governed in India?

Arbitration in India is governed by the Arbitration and Conciliation Act, 1996 ("Act"). Part I of the Act deals with the provisions for domestic and international commercial arbitration seated / conducted in India whereas Part II deals with enforcement of foreign awards. The arbitrations conducted in India are governed by Part I of the Act, irrespective of the nationalities of the parties.

3. What is the difference between *ad hoc* arbitration and institutional arbitration?

In an *ad hoc* arbitration the parties themselves mutually agree and determine the procedure for carrying out the arbitration whereas in an institutional arbitration the rules and procedure for the arbitration process is determined by the arbitration institution. Every arbitration institution has their own set of rules and procedures to carry out the arbitration process.

The Singapore International Arbitration Centre (SIAC), London Court of International Arbitration (LCIA) and the International Chamber of Commerce (ICC) are some of the most renowned arbitration institutions.

4. What is domestic arbitration and international commercial arbitration?

Domestic arbitrations are arbitrations which are conducted in India and where the parties to the arbitration are citizens of India or body corporate incorporated in India or associate / body of individuals whose central management and control is exercised from within India or the Union / State government of India.

International Commercial Arbitration is defined under the Act and means an arbitration relating to disputes arising out of legal relationship and where at least one of the parties is (i) an individual who is a national of, or habitually resident in, any country other than India; or (ii) a body corporate incorporated in any country other than India; or (iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or (iv) the Government of a foreign country.

5. What is an Arbitration Agreement?

An 'Arbitration Agreement' is an agreement between the parties to settle all disputes that have arisen or may arise between them through arbitration. The parties can go for arbitration **only** if there exists a valid arbitration agreement.

The arbitration agreement can be in the form of an arbitration clause in a contract or can exist as a separate agreement. It has to be in writing. In other words, it must be in a document signed by the parties and can also be in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement. When a contract, refers to a document containing an arbitration clause and makes the arbitration clause a part of the contract, such reference in a contract constitutes an arbitration agreement. However, the said contract is required to be in writing. The arbitration clause in an agreement survives even if the main contract is null and void.

6. What happens in a situation where there exists a valid arbitration agreement between the disputing parties, yet the aggrieved party moves the Court to file a lawsuit?

If there exists a valid arbitration agreement between the parties with respect to a defined legal relationship and the aggrieved party moves the Court to file a lawsuit, the responding party may draw the attention of the Court by way of an application, that there exists a valid arbitration agreement between the parties and that the dispute should be resolved by way of arbitration and not by a lawsuit. Such application is required to be filed by the responding party before it submits its first statement on the substance of the dispute. In such a situation, the Indian Courts will refer the matter to arbitration, unless it finds at the very outset that no valid arbitration agreement exists between the parties.

7. How can interim reliefs be obtained under the Act?

Under the Act, interim reliefs can be granted by the Court before the constitution of the arbitral tribunal and also by the arbitral tribunal, once it is constituted. An interim relief can be granted by the Court before or during the arbitral proceedings, or at any time after the arbitral award. An application can be filed before the Court for (i) appointment of a guardian for a minor, or a person of unsound mind for the arbitration; or (ii) for an interim measure with respect to (a) preservation, interim custody or sale of any goods which are subject matter of the arbitration agreement; or (b) securing amount in dispute in the arbitration; or (c) detention, preservation, or inspection of any property, or thing which is the subject matter of the dispute in arbitration; or (d) interim injunction, or the appointment of a receiver; or (e) such other interim measures of protection as the Court thinks just and convenient.

An arbitral tribunal can also grant interim relief in the above matters during the arbitration proceedings, after its constitution. The interim relief granted by an arbitral tribunal by way of an order shall be deemed to be an order of the Court.

It is to be noted that once the arbitral tribunal has been constituted, the court will not entertain an application unless the Court is satisfied that the arbitral tribunal is not in a position to grant the remedy sought by the party.

In a situation where the Court passes an order granting interim measure of protection prior to the commencement of the arbitral proceedings, the arbitral proceedings shall commence within a period of 90 days from the date the Court passes such order or within such time as the Court may determine.

8. Which court has the jurisdiction under the Act?

In the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district including the original side of High Court, if applicable, has the



jurisdiction to decide the questions forming the subject-matter of the arbitration such as granting of interim reliefs. It does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes.

In the case of international commercial arbitration, the jurisdiction to decide the questions forming the subject-matter of the arbitration lies only with the High Courts.

9. **Who is an Arbitrator or what is an Arbitral Tribunal?**

The dispute referred to arbitration is decided by one or more persons who are neutral parties to the dispute and are called arbitrators. A panel of such arbitrators is collectively referred to as an arbitral tribunal.

10. **How are arbitrators appointed?**

Number of Arbitrators:

The parties are free to decide the number of arbitrators to be appointed. However, the number of arbitrators shall not be an even number. In a situation where the arbitration agreement between two parties provides that each party appoints one arbitrator each, then in such a situation the third arbitrator is appointed jointly by the two appointed arbitrators. Further, in a case where the parties do not determine the number of arbitrators, the arbitral tribunal will consist of a sole arbitrator.

Appointment of Arbitrators:

A person of any nationality may be an arbitrator, unless otherwise agreed by the parties. The parties are free to agree on a procedure for appointing the arbitrator or arbitrators. The arbitrators appointed must be independent and impartial. Arbitrators appointed need not necessarily be of a legal background. The appointment of the arbitrator in a domestic arbitration can be challenged if the parties raise doubts on the independence or impartiality of the arbitrator or if the arbitrator does not possess qualifications as agreed between the parties.

Therefore, the arbitrators are either appointed by the parties mutually or by the Court.

11. **When does a Court appoint an arbitrator / arbitral tribunal?**

Where the arbitration agreement does not provide for the procedure for appointment of arbitrator and the parties are unable to mutually agree on the appointment of the arbitrator; or if a party fails to appoint an arbitrator within 30 days from the receipt of a request to do so from the other party; or if the two appointed arbitrators fail to agree on the third arbitrator within 30 days from the date of their appointment, the arbitrator may be appointed by the Court. In domestic arbitrations, the jurisdiction for appointment of arbitrator lies with the respective High Court whereas for international commercial arbitrations the jurisdiction for appointment of arbitrator lies with the Supreme Court of India.

12. **What are the mandatory disclosures to be made by an arbitrator prior to being appointed?**

Every arbitrator who is approached in connection with his / her possible appointment as an arbitrator, shall disclose in writing (i) the existence, either direct or indirect, of any past or present relationship with; or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his / her independence or impartiality; and (ii) which are likely to affect his / her ability to devote sufficient time to the arbitration and in particular his / her ability to complete the entire arbitration within the stipulated period under the Act.

13. **When can the appointment of an arbitrator be challenged?**

The appointment of an arbitrator can be challenged only on two grounds: (i) where circumstances exist that give rise to justifiable doubts as to the arbitrator's independence or impartiality, or (ii) the arbitrator does not possess the qualifications agreed to by the parties. This challenge can be made only once the arbitrator has been appointed. The said challenge can be made by a party by sending a written letter / application with reasons for the challenge to the arbitral tribunal within 15 days of the following: (i) the party becoming aware of the constitution of the arbitral tribunal, or (ii) the party becoming aware of the grounds for challenge. The arbitral tribunal can rule on the challenge unless the concerned arbitrator withdraws from his / her office or the counter party agrees to the challenge. When such challenge is not successful, the arbitral



tribunal shall continue the arbitral proceedings and make an arbitral award. The award can then be challenged before the Court on these grounds.

14. When can a mandate given to an arbitrator be terminated?

A mandate given to an arbitrator can be terminated and the arbitrator can be substituted by another arbitrator, if (i) he / she is unable to perform his / her functions for factual or legal reasons or for other reasons fails to act without undue delay; and (ii) he / she withdraws from his / her office or the parties agree to the termination of his / her mandate. If there exists any controversy on any of grounds as mentioned above, the party may move court to decide on the termination of the arbitrator's mandate, unless otherwise agreed by the parties.

15. Are there any rules of procedure that are required to be followed by the Arbitral Tribunal while adjudicating the dispute?

The parties to an arbitration agreement are free to agree on a procedure to be followed by the arbitral tribunal in conducting its proceedings. If the parties have not agreed on any procedure, the arbitral tribunal is authorized to conduct the proceedings in the manner it considers appropriate. However, if the arbitration proceedings are to be carried out by an arbitration institution, then the rules of the arbitration institution shall apply.

16. Can the rule on its own jurisdiction?

The arbitral tribunal has power to rule on its own jurisdiction. The arbitral tribunal is also empowered to rule on any objections with respect to the existence or validity of the arbitration agreement for the purpose of which (i) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and (ii) a decision by the arbitral tribunal that the contract is null and void will not invalidate the arbitration clause by itself.

A plea that the arbitral tribunal does not have jurisdiction is required to be raised before the submission of the statement of defence. Further, a plea that the arbitral tribunal is exceeding the scope of its authority is to be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

17. What will be the place for conducting the arbitration proceedings?

The parties are free to agree on the place of arbitration. However, in the absence of such agreement the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

18. What is the difference between 'venue' and 'seat' of arbitration?

'Venue' is the geographical location where the arbitration is conducted. 'Seat' of arbitration determines the jurisdiction of the court that would supervise the arbitration proceedings.

19. What will be the language for conducting the arbitration proceedings?

The parties are free to agree upon the language or languages to be used in the arbitration proceedings. However, in the absence of such agreement the language or languages to be used in the arbitration proceedings shall be determined by the arbitral tribunal. The arbitral tribunal can order for any documentary evidence to be accompanied by a translation into the languages agreed upon by the parties or determined by the arbitral tribunal.



20. **When do arbitration proceedings commence?**

Arbitral proceedings with respect to a dispute commence on the date on which a request for a dispute to be referred to arbitration is received by the respondent. This is often referred to as 'notice invoking arbitration'.

If a party has obtained interim relief from a court, then such party must commence the arbitration within 90 days from the date of the order granting such relief, or within such time as determined by the Court.

21. **Will opportunity be given to all parties in an arbitration to present their case.**

In arbitration, the parties shall be treated with equality and each party shall be given a full opportunity to present its case.

22. **What happens once an arbitral tribunal is constituted?**

Once the arbitration is invoked and an arbitral tribunal is constituted, the arbitral tribunal will conduct a meeting with the disputing parties for issuing procedural directions. In the said meeting, parties and / or the arbitral tribunal may decide on the venue where the arbitration is to be conducted, the procedure applicable, etc. The timelines for filing pleadings such as statement of claim, statement of defence, including interim applications are also discussed in the meeting. The preliminary meeting may also provide for directions regarding discovery, production and inspection of documents, framing of points for determination, filing of affidavits of evidence, fixing a schedule for cross examination of witnesses.

The arbitral tribunal shall decide, unless agreed by the parties, whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials.

Unless agreed by the parties, the arbitral tribunal shall hold hearings, at an appropriate stage of the proceedings, on a request made by a party.

23. **What happens if the claimant i.e. party invoking the arbitration fails to communicate its statement of claim within the timeline and without the particulars as required to be in the statement of claim and as agreed by the parties or determined by the arbitral tribunal?**

If the claimant fails to communicate its statement of claim within the timeline and without the particulars required to be in the statement of claim as agreed by the parties or determined by the arbitral tribunal the arbitral tribunal shall terminate the proceedings.

24. **What happens if the respondent fails to communicate its statement of defence within the timeline and without the particulars required to be in the statement of defence as agreed by the parties or as determined by the arbitral tribunal?**

If the respondent fails to communicate its statement of defence within the timeline and without the particulars as required in the statement of defence as agreed by the parties or determined by the arbitral tribunal, arbitral tribunal shall continue the proceedings without treating that failure in itself as admission of the allegations by the claimant.



25. What happens if a party fails to appear at an oral hearing or produce documentary evidence during arbitration proceedings?

If a party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it.

26. What is an Arbitration Award?

An 'Arbitral Award' or an 'Arbitration Award' refers to decision made by an arbitral tribunal pursuant to arbitration proceedings. An Arbitration Award is similar to a final judgment passed by a Court.

27. What are the form and contents of an Arbitral Award?

An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal. The signatures of majority of the members of the arbitral tribunal shall be sufficient. In case any arbitrator omits to sign, the reason for such omission must be stated. The arbitral award shall give reasons upon which it is based, unless: (i) the parties have agreed that no reasons are to be given, or (ii) the award is passed pursuant to settlement of dispute between parties.

The arbitral award must contain the date and the place of arbitration and the arbitral award shall be deemed to have been made at such place. After the arbitral award is made, a signed copy shall be delivered to each party. The arbitral tribunal is empowered to pass an interim award at any time during the arbitral proceedings, on any matter with respect to which it may make a final arbitral award. Where an arbitral award is for the payment of money, the sum in the arbitral award may include the interest, at such rate as the arbitral tribunal deems reasonable.

28. Can disputes be settled between the parties during arbitration proceedings?

During arbitral proceedings, the parties can settle the dispute. In such a situation, the arbitral tribunal shall 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. The form and contents of the arbitral award on agreed terms will be same as that of an arbitral award. An arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute.

29. What is the time frame within which an arbitral award must be passed?

The award in matters other than international commercial arbitration are to be made by the arbitral tribunal within a period of 12 months from the date of completion of pleadings. The pleading will have to be filed / completed within 6 months of forming the arbitral tribunal. The parties by consent, may extend the period specified for a further period not exceeding 6 months. With respect to international commercial arbitration the arbitral tribunal should endeavor to dispose of the matter as expeditiously as possible at least within a period of 12 months from the date of completion of pleadings.

30. When can arbitration proceedings be said to have been terminated?

The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal where (i) the claimant withdraws its claim, unless the respondent objects to the order and the arbitral tribunal recognizes a legitimate interest on its part in obtaining a final settlement of the dispute, (ii) the parties agree on the termination of the proceedings, or (iii) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

31. What happens to the mandate of an arbitral tribunal once arbitration proceedings have been terminated?

The mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings.



32. Can an arbitral award be set aside? What are the grounds under which an arbitral award can be set aside?

An arbitral award can be set aside only on the following grounds: (i) the parties to the arbitration agreement were under some incapacity, or (ii) the arbitration agreement is not valid under law; or (iii) no proper notice of the appointment of an arbitrator or of the arbitral proceedings was given or inability of party to present its 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 matter beyond the scope of the submission to arbitration; or (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties; (vi) the dispute was not capable of settlement by arbitration under the law for the time being in force, or (vii) the arbitral award is in conflict with the public policy of India.

An application for setting aside the arbitral tribunal has to be made within 3 months from the date on which the party making that application had received the arbitral award extending upon a further period of maximum 30 days with the permission of the court.

33. When does arbitral awards attain finality?

An arbitral award shall be final and binding on the parties and persons claiming under it respectively. It attains finality on the completion of 120 days, if the award is not challenged. In case the arbitral award is challenged, and the challenging party fails to have the award set aside by a competent court, the award attains finality.

34. What happens to an arbitration agreement on death of a party in an arbitration agreement?

An arbitration agreement shall not be discharged by the death of any party and shall in such event be enforceable by or against the legal representative of the deceased.

The mandate of an arbitrator shall not be terminated by the death of any party by whom he / she was appointed.

35. When can an appeal be filed?

An appeal can lie to the Court only from the following orders:

Orders of the Court:

- (i) refusing to refer the parties to arbitration; or
- (ii) granting or refusing to grant any interim measure sought by a party to the arbitration; or
- (iii) setting aside or refusing to set aside an arbitral award.

Orders of the arbitral tribunal:

- (i) accepting challenge to its jurisdiction; or
- (ii) granting or refusing to grant an interim measure sought by a party to the arbitration.

36. What is the approximate cost involved in an arbitration?

As far as ad hoc arbitrations are concerned, the Act provides an indicative schedule of fees which will be charged by the arbitral tribunal. However, the said schedule is only directory in nature and parties may agree upon a schedule of fees without referring to the schedule provided under the Act. In institutional arbitration, the rules of the institution prescribe the fees for the arbitration.

37. Which are the foreign awards that are recognized under the Act?

The Act recognizes two forms of foreign award (i) foreign award passed under the New York Convention; and (ii) foreign award passed under the Geneva Convention.

38. What is a foreign award under the New York Convention?

A foreign award under the New York Convention is an arbitration award that fulfills the following ingredients: (i) arises out of legal relationships that are considered as commercial under the law in force in India; (ii) is made on or after 11 October 1960; (iii) made in pursuance of an agreement in writing for arbitration to which the New York Convention applies and (iv) must be passed in a reciprocating territory as notified by the Central Government.

