

India

Amarchand & Mangaldas & Suresh A. Shroff & Co

Litigation

1 What is the structure of the legal profession?

The legal bar is unified. Lawyers enrolled with the Bar Council of any State of the Indian Union can appear in any Court in India. However, to “act” (file pleadings etc) in a High Court, the advocate should be empanelled with that High Court. To act before the Supreme Court of India, the apex Court, an advocate must qualify for and be empanelled as an “advocate on record”. The Bombay High Court recognises as solicitors, those advocates who have passed the solicitors’ examination conducted by the Incorporated Law Society, Mumbai.

An advocate of at least 10 years standing and at least 40 years of age who possesses, in the opinion of the relevant High Court, expertise and character befitting the status, may be designated as a senior advocate.

A judge of the Supreme Court of India must be a citizen of India and must have served as a judge of a High Court for at least five years, or have practised as an advocate of a High Court for at least 10 years, or must in the opinion of the President of India be a distinguished jurist. A High Court judge must be a citizen of India and must have practised as an advocate of a High Court for at least 10 years or held a judicial office for at least 10 years.

2 What is the structure of the Court system?

Civil Courts have jurisdiction to try all matters of a civil nature, except such matters which, by specific statute, are within the jurisdiction of specifically constituted tribunals. Jurisdiction of Courts is divided by territorial and pecuniary limits. Territorial jurisdiction is based on the habitual residence or place of work of the defendants or the place where the cause of action arose (such as where the contract was made or performed). Pecuniary jurisdiction of a Court is determined by the relevant State.

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 Division, is the principal Court of original jurisdiction and the District Court is the Court of Appeal.

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

3 What is the role of the judge (and where applicable, the jury) in civil proceedings?

Judges rule on matters of fact and law. A judge may, in certain circumstances, examine any person as a witness and elicit facts. The decisions of a High Court are binding on all lower Courts and tribunals in that State. However, the High Court of one State is not bound by the decision of a High Court of another State. A decision of the Supreme Court is binding on every High Court and all lower Courts and tribunals in India. Decisions of Privy Council rendered prior to 1950 are also binding on all Courts and tribunals. Rulings of English Courts, in the absence of any authority of Indian Courts, are of persuasive value.

4 What are the time limits for bringing civil claims?

Limitation for civil actions is, generally, three years. Limitation for tort claims is, generally, one year. Limitation for suits by or on behalf of the government is 30 years. Limitation is computed from the date of accrual of the cause of action, but under certain circumstances prescribed by statute, such as part-payment or acknowledgement in writing before the expiry of the prescribed period of limitation, limitation may be extended. Except as prescribed by statute, limitation can neither be extended nor curtailed.

5 How are civil proceedings commenced and what is the typical procedure which is then followed?

Civil proceedings are commenced by filing a plaint in duplicate setting out material facts, the cause(s) of action and relief sought. A summons, with a copy of the plaint attached, must be served on the defendant(s) within 30 days of the initiation of the suit. The summons, ordinarily, must be served through an officer of the Court but the Court may permit service by courier, facsimile or email. Within 30 days of the date stipulated in the summons, the defendant must appear before the Court and file a statement of defence. However, the Supreme Court has very recently held that the timelines are not mandatory and the Court may, for sufficient cause, extend the timelines (*Kailash v Nanhku and Ors* (2005) 4 SCC 480).

Ordinarily, at the first hearing the Court issues directions for the parties to disclose on oath relevant documents and to offer inspection. After pleadings and disclosure are complete, issues are framed and the matter proceeds to trial. At the hearing of the action the plaintiff, ordinarily, has the right to begin. Parties then present evidence. The party that began the case also has a right to reply generally on the whole case.

6 What is the extent of pre-trial exchange of evidence, and how is evidence presented at trial?

Pre-trial exchange of evidence is reasonably extensive. Parties are required to attach to the pleadings, originals (or copies) of documents referred to in the pleadings. If a party's disclosure is insufficient, the other party may, with the leave of the Court, require further disclosure. Either party may, with the leave of the Court, issue interrogatories to the other. Answers to interrogatories may be tendered in evidence. A party may also require the other party to offer inspection of documents where necessary for a fair disposal of the suit or in order to save costs, and, failing compliance, obtain an order of inspection from the Court. Courts have power to non-suit a plaintiff or to strike out the defence of a defendant who has failed to comply with an order to answer interrogatories or for discovery or for inspection.

Apart from documents, either party may lead evidence through witnesses. The Court may appoint a commissioner to record evidence. In lieu of evidence in chief, evidence is led by affidavit, followed by cross-examination and, if essential, by re-examination.

7 To what extent are the parties able to control the procedure and the timetable? How quick is the process?

Litigation is quite slow and Indian Courts are liberal in extending timelines.

8 What interim remedies are available to preserve the parties interests pending judgment?

The Court has extensive powers to grant interim remedies. These include injunctions to maintain the *status quo* or to prevent a defendant from removing or disposing of property to defraud creditors; pre-judgment attachment of the assets of a defendant who has absconded; left the local limits of the Court's jurisdiction; removed property from the Court's jurisdiction (or is about to do any of the foregoing) to delay the plaintiff; avoid the process of the Court or obstruct or delay the execution of a decree against them.

9 What substantive remedies are available?

Substantive remedies are wide ranging and include declarations, specific performance, permanent injunctions, damages, accounts, etc. Non-compensatory (punitive or exemplary) damages are only awarded in exceptional circumstances.

10 What means of enforcement are available?

Enforcement is by execution proceedings. Execution, in respect of a money decree, is normally by attachment and sale of the judgment debtor's properties or by attachment of debts. A money decree may, rarely, be executed by the arrest and detention in civil prison of the judgment debtor. The Court has power to require the debtor to be examined on oath to ascertain assets available for execution. A receiver may also be appointed. Decrees for execution of a document or endorsement of a negotiable instrument may be executed by an officer of the Court.

11 Does the Court have power to order costs? Are foreign claimants required to provide security for costs?

Costs are awarded in favour of the winning party but the Court has discretion, for record in writing, to direct the costs not to follow the event. The Court also has power to direct payment of compensatory costs against a party who delays proceedings or who knowingly raises a false or vexatious claim or defence.

The Court has power to order security for costs from a plaintiff residing outside India who does not possess sufficient immovable property in India. If the security is not provided, the suit may be dismissed.

12 On what grounds can the parties appeal, and what restrictions apply? Is there a right of further appeal? To what extent is enforcement suspended pending an appeal?

An appeal lies against every original decree unless such appeal is precluded by statute. An appeal also lies against certain original orders specified in the Code of Civil Procedure, 1908 (the Code). The first appeal may be on questions of fact and law. Unless precluded by statute, a second appeal to the High Court lies only on substantial questions of law. An appeal lies to the Supreme Court against a judgment or decree or final order of a High Court if the High Court certifies that the case involves a substantial question of law of general importance or, in the opinion of the High Court, the question needs to be decided by the Supreme Court. The Supreme Court has the jurisdiction to entertain an appeal with special leave of the Supreme Court from any order of any Indian Court or tribunal.

The High Court of a State has power to revise any non-appealable decision of a Court subordinate to it if the subordinate Court has exceeded its jurisdiction, or has failed to exercise jurisdiction, or has exercised jurisdiction with material irregularity.

Enforcement is not suspended merely because an appeal is pending. The appeal Court may, for sufficient cause, stay enforcement pending the appeal.

13 To what extent can domestic and / or foreign state entities claim immunity from civil proceedings?

Domestic state entities are not immune from civil proceedings except in respect of sovereign functions. However, the Government, any State, or a public officer cannot be sued, in respect of any act purporting to be done in the official capacity, except after the expiry of two months following a written notice stating the cause of action. No such notice is required in a suit against a government owned or controlled company or corporation except where a statute specifically requires it. Statutory authorities may be granted immunity from civil proceedings in respect of acts done in their official capacity under the relevant statute.

A foreign state cannot be sued without the consent in writing of the Government of India. Such consent will not be granted unless it appears to the Government of India that the foreign state has instituted proceedings in the Court against the person desiring to sue, trades within the Court's jurisdiction, is in possession of immovable property within the Court's jurisdiction and is to be sued with reference to such property or for money charged thereon, or has, expressly or impliedly, waived immunity.

14 What procedures exist for recognition and enforcement of foreign judgments?

The Government of India may declare any foreign country to be a reciprocating territory. Decrees of superior Courts of reciprocating territories under which a sum of money, not being money payable in respect of taxes or other charges of a like nature, is payable, may be executed in India.

Other foreign judgments may be enforced by instituting a suit in India. A foreign judgment is conclusive as to any matter directly adjudicated upon between the same parties or under whom they claim litigating under the same title except where the judgment has not been pronounced by a Court of competent jurisdiction, or the judgment is not on merits, or is founded on an incorrect view of international law, or is founded on a refusal to recognise Indian law (where such law applies), or was obtained in proceedings opposed to natural justice, or has been obtained by fraud, or sustains a claim founded on a breach of Indian law.

15 Is it permissible for lawyers to charge contingency or conditional fees, or other fee arrangements based on the result of the litigation/arbitration?

Contingent/conditional fees are not permissible.

Arbitration

16 Is the arbitration law based on the UNCITRAL Model Law?

The Arbitration and Conciliation Act, 1996 (the "Act") is based upon but is not identical to the UNCITRAL Model Law.

17 What are the main national arbitration institutions?

The Indian Council for Arbitration is the main national arbitration institution (<http://www.ficci.com/icanet>). Certain Chambers of Commerce and the Bombay Incorporated Law Society (fax: +91 22 2267 3470) also provide institutional arbitration.

In domestic arbitration, the preference is for non-institutional arbitration.

18 Are there any restrictions on who may represent the parties to an arbitration?

The Act implies no restrictions and parties may be represented by any person of their choice. The current regulatory regime, however, does not permit foreign lawyers to practise in India. Foreign lawyers would therefore be precluded from appearing as representatives of a party in arbitration.

19 What are the formal requirements for an enforceable arbitration agreement?

An arbitration agreement must be in writing, but need not be signed. An arbitration agreement is in writing if it is in the form of an arbitration clause contained in an agreement, in exchange of letters, telex, telegram or other means of telecommunications which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

20 Can the Court refuse to stay litigation if there is a valid arbitration agreement?

The Court has no discretion to refuse stay either domestic or international arbitrations if the statutory preconditions are fulfilled.

21 If the arbitration agreement and any relevant rules are silent, how many arbitrators will be appointed, and who will be the appointing authority?

The parties are free to agree upon any number of arbitrators, so long as it is not an even number. If the parties have not agreed, there will be a sole arbitrator. If the parties fail to agree one party's request within 30 days, the tribunal shall be appointed by the Chief Justice (or their designate) of the relevant High Court in a domestic arbitration, or by the Chief Justice of India (or their designate) in an international arbitration.

22 Are there restrictions placed on the right to challenge the appointment of an arbitrator?

Arbitrators may be challenged if circumstances exist that give rise to justifiable doubts as to their independence or impartiality, or if they do not possess the qualifications agreed by the parties. A party may challenge an arbitrator appointed by them or in whose appointment they have participated only for reasons of which they become aware after the appointment has been made. Parties are free to agree upon the challenge procedure. Failing an agreed challenge procedure, the concerned party must, within 15 days after becoming aware of any circumstances giving rise to a challenge, send a written challenge to the tribunal. The tribunal is competent to rule on such challenge.

23 Does the domestic law contain substantive requirements for the procedure to be followed?

The Act reflects the Model Law in that it contains few detailed procedural requirements. The parties are free to agree the procedure to be followed by the tribunal. Failing such agreement, the tribunal may conduct proceedings in the

manner it considers appropriate but the parties should be treated with equality and given a full opportunity to present their respective case.

24 On what grounds can the Court intervene during an arbitration?

The Act endeavours to reduce Court intervention. The Court may intervene to grant appropriate interim measures such as for maintaining the *status quo*, securing the amount in dispute in arbitration, or the detention, preservation or inspection of the subject matter of the dispute. The Court may also intervene, at the request of the tribunal or at the request of a party, to provide assistance in taking evidence.

25 Do arbitrators have powers to grant interim or conservatory relief?

Unless otherwise agreed by the parties, the tribunal may order a party to take any interim measure of protection that the tribunal considers necessary and may require a party to provide appropriate security in connection with an interim measure.

26 When and in what form must the award be delivered?

The Act prescribes no period within which an award must be delivered.

The award must be in writing, dated and signed by the tribunal and must state the place of arbitration. Unless the parties have otherwise agreed or the award was on agreed terms, the award must state the reasons on which it was based.

27 On what grounds can an award be appealed to the Court?

The Court may set aside a domestic award if:

- (i) a party was under some incapacity;
- (ii) the arbitration agreement was invalid;
- (iii) the party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present their case;
- (iv) the award deals with a dispute outside the terms of submission or contains a decision on matters beyond the scope of the submission;
- (v) the arbitral tribunal or the procedure was not in accordance with the agreement of the parties;
- (vi) the subject matter of the dispute was not capable of settlement under Indian law, or
- (vii) the award conflicts with the public policy of India.

The application for setting aside of the award must be made within three months of the making of the award, such period being extendable by the Court, for sufficient cause, for a further period of 30 days.

An appeal to the Court also lies against a decision of the tribunal accepting a plea that the tribunal does not have jurisdiction or that the tribunal is exceeding its authority.

28 What procedures exist for enforcement of foreign and domestic awards?

A domestic award is enforced under the Code as if it were a decree of the Court.

The party seeking enforcement of a foreign award must produce the original award or a copy authenticated in the manner required by the law of the country where the award was made; the original agreement of arbitration or a certified copy; and evidence that the award is a foreign award. Enforcement may be refused on the grounds available under the New York Convention 1958 or, as the case may be, the Geneva Protocol and Convention. The Courts would also refuse enforcement if the subject matter of the differences was not capable of settlement by arbitration under Indian law or if the enforcement of the award was contrary to Indian public policy.

29 Can a successful party recover its costs?

Unless otherwise agreed by the parties, costs are at the discretion of the arbitral tribunal.

Alternative dispute resolution

30 Are the parties to a litigation or arbitration required to consider or submit to any alternative dispute resolution before or during proceedings?

The Court is empowered to direct parties to litigation to consider alternative dispute resolution. The Court does not have power to compel parties to alternative dispute resolution.

Parties to an arbitration cannot be required to consider or submit to an alternative dispute resolution.

Amarchand & Mangaldas & Suresh A. Shroff & Co

Contact [Mr M.P. Bharucha](#)
[Peninsula Chambers](#)
[Peninsula Corporate Park, G.K. Marg, Lower Parel, Mumbai-400 013](#)
Phone [+91 22 2496 4455/5660 4455](#)
Fax [+91 22 2496 3666/5662 8466](#)
e-mail mp.bharucha@amarchand.com

Contact [Mrs. Pallavi Shroff](#)
[Amarchand Towers, 216, Okhla Industrial Estate, Phase II, New Delhi-110 020](#)
Phone [+91 11 2692 0500/2692 2900](#)
Fax [+91 11 2692 4900](#)
e-mail pallavi.shroff@amarchand.com

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