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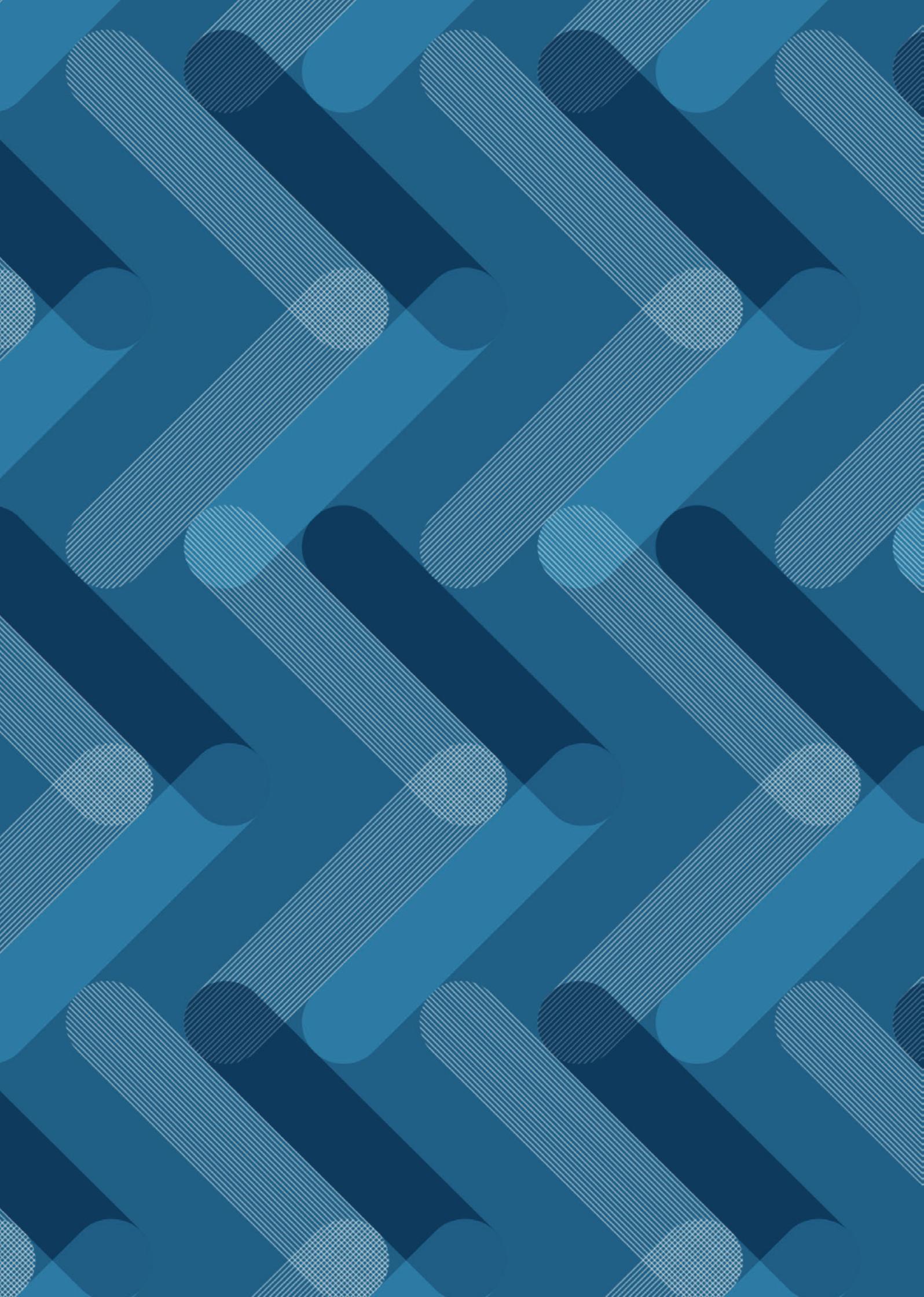
# INDIA RELATED COMMERCIAL CONTRACTS

DISPUTE RESOLUTION AND  
GOVERNING LAW CLAUSES

LEGAL GUIDE  
SIXTH EDITION

AUGUST 2017





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# Introduction

This guide is primarily intended to assist in-house counsel who handle India-related commercial contracts on behalf of non-Indian companies and who need to have a practical understanding of the nuances of drafting dispute resolution and governing law clauses in an Indian context.

## Our aim is to give a practical introduction to:

- what works and what does not;
- traps to avoid; and
- practical drafting solutions.

This issue is important: dispute resolution and governing law clauses in India-related commercial contracts need to be tailored to reflect the nuances of the Indian legal system and parties need to understand what could result from choosing certain dispute resolution options for India-related commercial contracts. Given that resolving a dispute in the Indian courts can take a decade or more, time spent on securing effective dispute resolution and governing law clauses will invariably be time well spent.

## The guide has two sections:

- dispute resolution clauses; and
- governing law clauses.

Properly drafted contracts, of course, ought to have both types of clause.

Remember that this guide is just an introduction and not a substitute for legal advice and the exercise of informed judgment in relation to particular situations. Each clause should be carefully drafted, taking into consideration the likely types of disputes, the exigencies of a given situation and the applicable laws. There are many sector-specific and deal-specific issues which justify departure from the general principles set out in this guide. However, we hope that the guide is helpful as a framework for finding workable solutions, deciding when to compromise and when to stand firm, and spotting when an issue has arisen on which advice is required.

In this guide, we use the shorthand "offshore" to mean outside India and "onshore" to mean inside India.

This guide is up to date as of 21 July 2017. This version of the guide takes into account the recent amendments to the Arbitration and Conciliation Act 1996 (the "**Indian Arbitration Act**"), the Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts Act, 2015 (the "**Commercial Courts Act**") and recent jurisprudence on arbitration.

# Dispute resolution clauses

## We suggest four key drafting principles:

1. consider arbitration with an offshore seat<sup>1</sup> where possible;
2. understand the differences between the principal offshore arbitration options;
3. if offshore arbitration is not suitable or achievable, opt for institutional (not ad hoc) arbitration in India and insist on a neutral chairman or – as a last resort – agree to arbitration in India under the UNCITRAL Rules, specify an international appointing authority and insist on a clause requiring that the chairman or sole arbitrator be of neutral nationality; and
4. keep it simple.

### Principle (1): Consider arbitration with an offshore seat where possible

Offshore arbitration is usually the best dispute resolution option in terms of achieving an efficient and timely resolution of commercial disputes. The Indian judiciary has become progressively more consistent in recognising and enforcing foreign arbitral awards, and can now provide ancillary relief in India in support of arbitral proceedings seated overseas.

Neither litigation (onshore or offshore) nor onshore arbitration is typically advisable in India-related commercial contracts<sup>2</sup>.

**(i) Litigation in India:** Litigation<sup>3</sup> before the Indian courts has not historically been seen by commercial parties as a good option.

Whilst the judiciary is professional and independent, delays are a major concern, with timelines of 10 years or more in obtaining a final judgment not uncommon. Further, compared to jurisdictions such as England, Indian courts have had less experience in adjudicating complex commercial disputes.

However, the litigation landscape in India is changing. In 2015, the Government passed the Commercial Courts Act, which creates dedicated commercial benches across India, to be staffed by judges focusing on commercial matters. It is hoped with this development, commercial litigation in India becomes more attractive for those who use it. That said, the new system is still in its nascent stages, and it will likely be a few years before it is clear what it offers to foreign parties doing business in India.

**(ii) Offshore litigation:** Whilst offshore litigation may be preferable to onshore litigation depending on the courts chosen (assuming, of course, that the Indian party is prepared to accept that a foreign court should have exclusive jurisdiction), parties are likely to face significant challenges in: (a) enforcing foreign jurisdiction clauses (if an obstructive opponent commences proceedings in India); and (b) ensuring that foreign judgments are recognised and enforced in India. In this context, it should be noted that India is not currently a signatory to the Hague Convention on Choice of Court Agreements, which is currently in force between Singapore, the European Union and Mexico, and is under consideration in a number of other jurisdictions.

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1. The seat or place of arbitration is a legal concept and should not be confused with the venue of oral hearings (which need not take place at the seat, although they often do). This distinction was discussed in the judgment of the Indian Supreme Court in *Bharat Aluminium Co. v Kaiser Aluminium Technical Services, Inc.* (Civil Appeal No. 7019 of 2005, Indian Supreme Court, 6 September 2012) (**BALCO**).
  2. However, in some cases, litigation might be unavoidable, i.e. if a particular dispute is deemed not to be 'arbitrable' under Indian law. On the issue of what is arbitrable (at least in the context of onshore arbitration), the case of *Booz Allen and Hamilton Inc. v SBI Home Finance Limited and Others* (Civil Appeal No. 5440 of 2002, Indian Supreme Court, 15th April 2011), drew a distinction between rights *in personam* (i.e. rights against particular individuals who are party to the arbitration agreement), which are arbitrable and rights *in rem* (i.e. rights exercisable against third parties or the world at large), which are non-arbitrable. It further identified a (non-exhaustive) list of subject areas said to be non-arbitrable, most of which were not commercial in nature (e.g. matrimonial or testamentary matters). Further cases to note in relation to arbitrability are: (i) the case of *A. Ayyasamy v A. Paramasivam & Ors* (Civil appeal no. 8245-8246 of 2016, Supreme Court of India, decided on 4 October 2016), which clarified that allegations of simple fraud shall not preclude a reference to arbitration where there is a valid arbitration clause, however complex fraud cases should still be adjudicated by the courts, (ii) the case of *Vimal Kishor Shah & Ors v Jayesh Dinesh Shah* (Civil Appeal No.8164 of 2016, Supreme Court of India, 17 August 2016), in which the court held that an arbitration clause in a trust deed was not effective as between beneficiaries to the trust, and went on to declare that trust disputes falling within the ambit of the Indian Trust Act are not arbitrable under Indian law, and (iii) the case of *Eros International Media Limited v Telemex Links India Pvt. Ltd.* (Notice of Motion No 886 of 2013 of Suit No 331 of 2013, High Court of Bombay), in which the court held that a copyright owner was entitled to bring an infringement claim in arbitration against a particular infringer (under the terms of a term sheet), even though the underlying right (the copyright to the work) was a right *in rem*. Whilst we would expect the courts to show restraint in applying the arbitrability test to offshore arbitration agreements and awards – at least in relation to most commercial relationships – it is not clear whether the test is capable of overriding all arbitration clauses (including offshore), or onshore clauses only, or only those where the law governing the arbitration agreement is Indian law. However, in most cases, it will unlikely be harmful, and most likely be at least potentially helpful, to include an offshore arbitration clause. However, advice should be sought on a case-by-case basis, particularly where the relationship is not wholly commercial, and/or concerns trusts or property (including IP) as its primary subject matter.
  3. Even with arbitration, one may have to engage with the Indian court system in certain limited contexts e.g., at the interim relief, evidence collection or at the enforcement stage, which still sometimes causes problems. However, resolving the merits of a dispute in court is very different – and potentially much more problematic – than relying on the court for assistance or enforcement only.

## Dispute resolution clauses

Indian courts do not consider exclusive jurisdiction clauses to be determinative<sup>4</sup> and have occasionally disregarded such clauses on the vaguely defined ground that it was in the "interests of justice" to do so. Also, only certain "decrees" pronounced by superior courts in countries recognised as "reciprocating territories" are entitled to recognition and enforcement under Indian law. Of the territories<sup>5</sup> that have been notified as reciprocating territories, only England, Hong Kong and Singapore are among the common offshore jurisdictions. Decrees pronounced by courts in other offshore jurisdictions would not be recognised and enforced by the Indian courts: a fresh action would need to be commenced in India on the basis of the decree (which would involve re-opening the merits of the underlying dispute, at least to an extent). Further, the grounds for refusing enforcement of foreign judgments are wider<sup>6</sup> than for those of arbitral awards, and Indian courts have often been reluctant to enforce foreign judgments without subjecting them to scrutiny on the merits.

**(iii) Arbitration in India:** Onshore arbitration conducted under the auspices of one of the major international arbitral institutions (see Principle (3) below) is, in our view, a better choice than litigation before Indian courts, but still suffers from a number of difficulties. Onshore arbitrations are vulnerable to extensive judicial intervention by the Indian courts<sup>7</sup>, which have in the past demonstrated a willingness to re-open onshore awards based on a very broad definition of "public policy"<sup>8</sup>.

Since September 2012, a number of Supreme Court and High Court judgments seem to have adopted a more pro-arbitration stance, but this is by no means a consistent trend. As recently as late 2014, there have been apparently conflicting decisions of the Supreme Court as to the scope of the "public policy" ground for intervention in domestic arbitrations<sup>9</sup>. However, it is hoped that in future, the "public policy" ground will be used restrictively, in light of the recent amendments to the Indian Arbitration Act which now provides a narrow definition of "public policy"<sup>10</sup>.

4. *Modi Entertainment Network v WSG Cricket Pte Ltd*, (2003) 4 SCC 341.

5. The territories notified by the Government of India as reciprocating territories are the United Kingdom, Aden, Fiji, Singapore, Malaysia, Trinidad and Tobago, New Zealand, the Cook Islands (including Niue), the Trust Territories of Western Samoa, Hong Kong, Papua New Guinea, Canada and Bangladesh. Although there is an agreement between India and the UAE as regards reciprocal enforcement of judgments, its status as a "notified" territory is unclear.

6. Under the (Indian) Code of Civil Procedure 1908, enforcement of a foreign judgment would be refused if the judgment: (a) had not been pronounced by a court of competent jurisdiction; (b) had not been rendered on the merits of the case; (c) was founded on an incorrect view of international law or a refusal to recognise the laws of India in cases where such law was applicable; (d) had been obtained by fraud; (e) sustained a claim founded on a breach of any law in force in India; or (f) was obtained following proceedings which were contrary to principles of natural justice.

7. The Indian Arbitration Act provides two distinct regimes for dispute resolution depending on the seat of the arbitration. Part I provides a framework of rules for disputes – both domestic and those with an international element – where the seat of arbitration is in India. This Part confers significant powers on the Indian courts to order interim measures, appoint and replace arbitrators and hear challenges to arbitral awards. Part II incorporates the New York Convention and the Geneva Convention on the Execution of Foreign Arbitral Awards into Indian law, and significantly limits the scope of judicial intervention in arbitration.

8. The "public policy" ground for challenging arbitral awards has a long and complex evolutionary history. In *ONGC v Saw Pipes*, (2003) 5 SCC 705, (**Saw Pipes**), the Indian Supreme Court gave an expansive interpretation to "public policy" by including within the term any error in the application of Indian law. In *Shri Lal Mahal v Progetto Grano Spa* (2014) 2 SCC 433 (**Shri Lal Mahal**), the Supreme Court returned to the narrower interpretation of "public policy" applied in *Renusagar Power Company Ltd v General Electric Company* 1994 Supp (1) SCC 644, which occupied the field before *Saw Pipes*. However, see footnote 9 below for recent (apparently conflicting) decisions on this issue.

9. In *ONGC v Western Geco International Limited* (2014) 9 SCC 263 (**Western Geco**), the Supreme Court referred to *Saw Pipes* but not to *Shri Lal Mahal*, and expanded the scope of "fundamental policy of Indian law", which is one of the limbs of the "public policy" grounds for challenging an arbitral award. This judgment potentially opens offshore as well as onshore awards to judicial scrutiny on merits and is considered a regressive decision, especially in light of the pro-arbitration and anti-interventionist attitude that has been evident in other recent decisions of the Supreme Court. By contrast, some two months later, in November 2014, was the judgment of the Supreme Court in *Associate Builders v Delhi Development Authority* [2014] (4) Arb.L.R. 307 (SC) (**Associate Builders**), which took a critical view of the Delhi High Court re-opening an arbitrator's award on merits and considering evidence beyond that which the arbitrator had considered. The Supreme Court considered existing case law, including *Saw Pipes*, and clarified that although the application of the 'public policy' ground required some assessment of the merits, there were limitations as to when, and the extent to which, the merits could be re-evaluated.

10. The "public policy" ground for setting aside an award is provided under section 34 of the Indian Arbitration Act and for refusing to enforce a foreign award is provided under section 48 of the Indian Arbitration Act. The Indian Arbitration Act clarifies that this ground will only be applicable where (i) an award has been obtained by fraud or corruption; (ii) an award is in contravention with the fundamental policy of Indian law; or (iii) an award is in conflict with the most basic notions of morality or justice. Further, the Indian Arbitration Act recognizes "patent illegality" as a ground for setting aside arbitral awards only in purely domestic arbitrations and also clarifies that an award should not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.

Onshore arbitration is also subject to court involvement in other ways: for example, the Indian Arbitration Act now requires onshore arbitrations to be concluded within 12 months of the appointment of the tribunal, with extensions potentially subject to court oversight. The feasibility of such timescales in more complex disputes, and the knock-on effects of these rules on arbitrators' willingness to accept appointments, are causes for concern with onshore arbitration.

Ad hoc arbitration in India is best avoided because it allows greater scope for Indian court intervention and subsequent delay – for example, if one party fails to appoint an arbitrator and there is no arbitral institution designated to make that appointment in default, it can take over a year for the Indian courts to appoint that arbitrator and the courts often embark on an enquiry into the merits at this stage<sup>11</sup>. An amendment to the Indian Arbitration Act notes that the appointment of the arbitrator is to be done as expeditiously as possible<sup>12</sup>. However, until it is clear how this is put into practice over a period of time, it would be prudent not to choose onshore ad hoc arbitration for India-related dispute resolution.

**(iv) Offshore arbitration:** By contrast, offshore arbitration will generally provide a neutral forum for the resolution of disputes and is often acceptable to both Indian and foreign parties. There is also (probably) no bar to two Indian parties choosing an offshore seat for the resolution of their disputes<sup>13</sup>. Indian courts generally respect, and enforce, clauses providing for offshore arbitration. India has ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**"), which provides a superior regime for the enforcement of foreign arbitral awards than that which applies to foreign court judgments.

Until recently, there remained some concerns in relation to enforcement. Until 2012, the position under Indian law was that the Indian courts could exercise their powers under Part I of the Indian Arbitration Act even in relation to arbitrations with their seat outside India, unless the parties agreed, expressly or impliedly, that Part I shall not apply<sup>14</sup>. This considerably extended the scope for the Indian courts to interfere in offshore arbitrations. Under this line of authority, the Indian courts were empowered to, for example: (i) reopen and potentially set aside arbitral awards rendered in offshore arbitrations; and (ii) appoint arbitrators in an offshore arbitration. Certain Indian courts had shown a willingness to temper the applicability of Part I of the Indian Arbitration Act by expanding the circumstances in which an implied exclusion would be found; for example, where parties had chosen a foreign seat for the arbitration and a foreign law to govern the contract or even just the arbitration agreement<sup>15</sup>.

On 6 September 2012, the Indian Supreme Court recast the law in this area, and held that Part I of the Indian Arbitration Act did not apply to arbitrations that have their seat outside India i.e. it only applied to onshore arbitrations<sup>16</sup>. However, exceptionally, it ruled that this decision would apply as a precedent only on a prospective basis, i.e. it would only apply to arbitration agreements entered into after the date of the Supreme Court's judgment. Therefore, the scope of interference by the Indian courts was reduced to a large extent for arbitration agreements entered into after 6 September 2012 but could still arise for any arbitration agreements concluded before 6 September 2012, irrespective of the date on which the arbitration commenced. That said, a pro-arbitration approach continues to develop in the Indian courts, as they now seem to have a greater propensity to recognise an implied exclusion of Part I of

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11. In *SBP and Co v Patel Engineering Limited*, AIR 2006 SC 450, the Indian Supreme Court ruled that the courts could consider a number of contentious issues when approached for the nomination of an arbitrator, such as the validity of the arbitration agreement and the existence of a live claim. It further held that any decision made on such matters would be binding on the parties.
  12. The Indian Arbitration Act provides that an application made under section 11 of the Indian Arbitration Act to appoint an arbitrator shall be disposed of by the Supreme Court or the High Court, as the case may be, as expeditiously as possible and an endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.
  13. The Supreme Court has ruled that Indian law does not prohibit Indian contracting parties from choosing a foreign seat of arbitration: *Atlas Export v Kotak & Co*, (1999) 7 SCC 61. There are conflicting decisions provided by High Courts in India which would probably need to be finally resolved by the Supreme Court to clearly determine whether two Indian parties can choose a foreign seat of arbitration. In *Addhar Mercantile Private Limited v Shree Jagdamba Agrico Exports Pvt. Ltd.* (Arbitration Application 197 of 2014), the Bombay High Court held that that a clause that provided for arbitration in India or Singapore (with English substantive law to apply) must be construed to mean arbitration in India under Indian law. However, that case may be distinguishable on its facts. In any event, in *Sasan Power Limited v. North American Coal Corporation India Pvt. Ltd.* (First Appeal No. 310/2015), the Madhya Pradesh High Court relied on the *Atlas Export* case and held that Indian parties were free to choose a foreign seat of arbitration.
  14. This principle was first laid down by the Supreme Court in *Bhatia International v Bulk Trading SA*, (2002) 4 SCC 105 (Bhatia) and reiterated in *Venture Global Engineering v Satyam Computer Services Limited*, Civil Appeal No. 309 of 2008 (Supreme Court of India, 10 January 2008) (*Venture Global*) and *Indtel Technical Services Private Limited v WS Atkins PLC*, Arbitration Application No. 16 of 2006 (Supreme Court of India, 25 August 2008).
  15. *Dozco India P. Ltd. v Doosan Infracore Co. Ltd.*, MANU/SC/0812/2010 and *Videocon Industries Limited v Union of India*, MANU/SC/0598/2011.
  16. *BALCO* (see footnote 1 above). This decision overruled *Bhatia* and *Venture Global* but only prospectively i.e. Part I of the Indian Arbitration Act was held to not apply to any arbitration agreements with an offshore seat entered into after 6 September 2012.

## Dispute resolution clauses

the Indian Arbitration Act in a wider category of offshore scenarios, even in respect of arbitration agreements entered into before 6 September 2012<sup>17</sup>.

However, as a corollary of the Supreme Court's finding on Part I of the Indian Arbitration Act the Indian courts did not have the ability to grant interim relief in aid of offshore arbitrations<sup>18</sup>. This meant that parties involved in arbitration proceedings in, for example, London or Singapore were not able to ask the Indian courts for orders to freeze assets, preserve property, etc., pending the outcome of the arbitration. That has now changed as a result of the amendments to the Indian Arbitration Act, whose provisions for interim relief (section 9) and collection of evidence (section 27) are now applicable to international commercial arbitrations seated outside India.

Therefore, there is no longer a trade-off that parties need to make between the benefits of keeping an arbitration offshore and the potential need to access the Indian courts for interim relief relating to parties or assets inside India in the event of a dispute arising.

### Choice of seat and enforcement

Even with the inapplicability of Part I of the Indian Arbitration Act to offshore arbitrations and the amendments to the Indian Arbitration Act, some concerns are likely to remain in relation to enforcement. You should keep in mind that Part II of the Indian Arbitration Act, which governs the enforcement of New York Convention awards in India, applies only to awards rendered in jurisdictions notified by the Indian government as jurisdictions whose arbitral awards it will recognise. Whilst most of the major international arbitration centres lie within such jurisdictions (including London, Paris, Singapore and Hong Kong), there are still certain exceptions<sup>19</sup>. Therefore, care should be exercised when choosing a seat for India-related international arbitrations to avoid difficulties at the enforcement stage.

Further, parties should be aware that even if efforts are made to conclude the arbitration in a timely manner, if enforcement in India is necessary, this can take time. One feature of the Commercial Courts Act is that arbitration-related matters will be heard by the specialist commercial benches, so it is hoped that delays in enforcement become less of a concern over time.

### Principle (2): Understand the differences between the principal offshore arbitration options

The seat or place of arbitration is important because it dictates the legal framework underlying the arbitration (in relation to, for example, the grounds on which the arbitral award may be challenged or appealed). That the seat is the "centre of gravity" of arbitration has been recognised by the Indian Supreme Court<sup>20</sup>. Neutral fora that have been popular for some time include London, Singapore, Paris, Geneva and Stockholm. With the inclusion of China in the list of countries notified in the Official Gazette as a reciprocating territory for the purposes of enforcement under the regime of the New York Convention, Hong Kong has emerged as another Asian seat that parties may wish to consider when selecting a forum for India-related arbitrations.

#### The best option in the Indian context is usually one of:

- LCIA or ICC arbitration in London;
- SIAC or ICC arbitration in Singapore;
- HKIAC or ICC arbitration in Hong Kong; and
- ICC arbitration in Paris.

Each of London, Singapore, Hong Kong and Paris has arbitration laws and courts which are broadly supportive of arbitration and have well established, reputed arbitration institutions.

Other alternatives sometimes seen in the Indian context include: (i) ad hoc arbitration in London or Paris; (ii) institutional or ad hoc arbitration in other major European arbitration centres (eg, Geneva, Zurich and Stockholm); or (iii) AAA/ICDR or ICC arbitration in New York.

Indian parties are often most comfortable with arbitration in London or Singapore, perhaps because of the similarity between the basic tenets of the Indian, English and Singapore legal systems. SIAC arbitration in Singapore continues to be popular with Indian parties. In our experience, Indian parties can be reluctant to agree to arbitrate in the US.

17. For instance, in *Reliance Industries & Anr v Union of India* (2014) 7 SCC 603 the Supreme Court held that the parties had intended to exclude the applicability of Part I of the Indian Arbitration Act, although the law governing the contract between the parties was Indian law. The Supreme Court accepted the submission that the parties' choice of a foreign seat and of English law as the law governing the arbitration agreement demonstrated their intention to exclude the applicability of Part I of the Indian Arbitration Act to their agreement, which pre-dated *BALCO*.

18. The Supreme Court held that parties could not grant jurisdiction to the Indian Courts by incorporating Part I of the Indian Arbitration Act or any part thereof by agreement. Therefore, the historic drafting practice of excluding Part I of the Indian Arbitration Act while making a specific carve out for section 9 of the Indian Arbitration Act (interim reliefs) and section 27 of the Indian Arbitration Act (assistance in obtaining evidence) was no longer effective for arbitration agreements entered into after 6 September 2012.

19. For example, although there is an agreement between India and UAE as regards reciprocal enforcement of arbitral awards, the UAE's status as a "notified territory" is unclear due to the wording of the relevant notification.

20. *BALCO*.

### Principle (3): If offshore arbitration is not suitable or achievable, opt for institutional (not ad hoc) arbitration in India and insist on a neutral chairman

Foreign parties sometimes find that it is commercially necessary to agree that disputes be resolved in India. For example, in contracts with the Indian Government or Public Sector Undertakings, it may be difficult to convince the counterparty to agree to dispute resolution in a foreign jurisdiction. If you find yourself in that situation, arbitration in India remains preferable to Indian litigation, but you should insist on:

1. institutional (not ad hoc) arbitration under the auspices of one of the major international institutions (see Principle (2) above – any of the institutions listed there should be comfortable administering an arbitration with its seat in India)<sup>21</sup>. If a domestic institution is required, you may wish to consider the Mumbai Centre for International Arbitration (the "MCIA"). The MCIA is a new institution established as a joint initiative between the Government of Maharashtra and the business and legal communities. It provides a set of institutional rules consistent with international standards, and is overseen by a Council with strong domestic and international representation. It also has high quality hearing facilities in Mumbai, and provides a good domestic option for arbitrating India-related disputes.
2. where option (1) above is not acceptable, at the minimum, insist on the arbitration being governed by the UNCITRAL Rules (which are designed for use in ad hoc arbitrations) and specify the appointing authority. It is also recommended that the arbitration clause expressly specify that the sole or presiding arbitrator (in a tribunal of three) must be of a nationality different from that of the parties<sup>22</sup>.

### Principle (4): Keep it simple

In India, as elsewhere, it is advisable not to over-complicate arbitration clauses. Adopting the relevant arbitral institution's model form clause (with amendments where necessary), drafting precisely and avoiding over-complications can help contracting parties navigate away from practical troubles in relation to the following areas in India-related contracts:

#### Escalation clauses

Clauses providing for the parties to take certain steps before initiating arbitrations (such as meetings at a certain level), often called "escalation clauses", are to be approached with caution because they can cause significant delay whilst not necessarily realising the objective of any meaningful negotiations. An opponent may also use such clauses to raise disputes as to whether any arbitration is premature.

If such a clause is used, be aware that it may prevent initiation of arbitration until the time periods set out in the clause have expired and, with that in mind, make the relevant periods short and clear.

#### Clauses specifying the qualifications of the tribunal

It is generally not recommended to impose, in an arbitration clause, specific qualifications that the arbitrators must fulfil (for example, a condition that only retired judges of the Indian Supreme Court or the various Indian High Courts be appointed to the tribunal). This is because such restrictions operate to reduce the pool of available arbitrators and can cause serious harm to your interests.

#### The submission of the dispute to arbitration

The arbitration clause must contain a clear agreement to arbitrate. Agreements containing an arbitration clause should, of course, not also include a jurisdiction clause referring the same disputes to a particular state's domestic courts.

Related to this is a drafting practice, common in Indian commercial contracts, to specify a particular Indian court to have supervisory jurisdiction over an arbitration seated in India (for example, because that court is considered more efficient than other Indian courts that might be approached by a party in the event of an arbitration being commenced or threatened). While such a selection can be beneficial, care must be taken to ensure that the jurisdiction granted to the court does not cut across the parties' clear election to arbitrate their disputes.

Parties should also take care when considering including unilateral jurisdiction clauses in their contracts. As things stand, these clauses cannot be relied upon too heavily since there are conflicting precedents on whether such clauses are valid<sup>23</sup>.

Finally, it is important to ensure that any contracts which include arbitration clauses are in writing and signed by all the parties to the contract<sup>24</sup>.

21. The London Court of International Arbitration ("LCIA") established an LCIA centre in India, based in New Delhi ("LCIA India") in April 2009. However, as of 1 June 2016, the LCIA India closed operations and all users who had adopted the LCIA India rules in their arbitration agreements are to be serviced by the LCIA in London.

22. The Supreme Court has recently (helpfully) confirmed that where the Court has to appoint a presiding arbitrator, it will usually choose a candidate whose nationality is different from those of the parties: *Reliance v Union of India*, 31 March 2014 (Arb. Petition No. 27 of 2013).

23. For example, in the case of *Union of India v Bharat Engineering Corporation* ILR 1977 Del 57, the Delhi High Court held that a unilateral jurisdiction clause was invalid. On the other hand in *New India Assurance v Central Bank of India* AIR 1985 Cal 76, the Calcutta High Court upheld the validity of a unilateral jurisdiction clause.

24. In the case of *Virgoz Oils and Fats Pte Ltd. v. National Agricultural Marketing Federation of India EX.P. 149/2015 & EA(OS) No. 66/2016*, the Delhi High Court found that under section 44 of the Indian Arbitration Act and Article II of the New York Convention, an arbitration clause is not valid if the agreement is not signed.

# Governing law

It is, of course, advisable to include a governing law clause in any contract. It is also advisable to provide explicitly for the law governing the arbitration agreement<sup>25</sup>.

Indian contract law is largely similar in content to principles of English contract law, albeit with some special rules (especially in relation to contracts where the government is the counterparty).

Whilst non-Indian parties will often prefer to choose another legal system for reasons of familiarity, the content of Indian contract law is, broadly speaking, within the normal expectations of most non-Indian parties and can usually be agreed to as part of a wider compromise.

We suggest that non-Indian parties consider the following general approach:

- First, consider whether Indian law is required (see below).
- If it is not required then, if you can do so as a matter of commercial bargaining power, choose a non-Indian law with which you are familiar and comfortable.

If you choose Indian law (whether under a legal requirement to do so or as a matter of commercial bargaining power), ensure that you have a qualified person review the contract to ensure that it takes account of areas where Indian contract law differs from the contract law system(s) with which you are familiar.

## The restrictions imposed by Indian law on choice of governing law

The starting point is that Indian courts will respect the parties' choice of governing law, subject to a few important caveats:

- Indian courts can invalidate a choice of law clause if they perceive it as being opposed to Indian "public policy"<sup>26</sup>. If the court decides

that a foreign law has been chosen as the governing law to evade provisions of mandatory Indian laws, the choice of law clause may be ruled ineffective on the basis that it is opposed to Indian public policy.

- In a 2008 decision, the Indian Supreme Court appears to have recognised a rule that, as a matter of Indian public policy, Indian nationals contracting solely between themselves are not permitted to contract out of the application of Indian law<sup>27</sup>. This position of law appears to have been reiterated by a 2012 decision of the Supreme Court<sup>28</sup>. This rule extends even to companies incorporated in India whose "central management and control" is located outside India such as, for instance, wholly owned subsidiaries of foreign companies.

On a narrow interpretation, this merely re-affirms that Indian arbitration tribunals sitting in a domestic arbitration may not apply a foreign governing law to a contract in a dispute between two Indian parties. On a broader interpretation, however, this decision represents authority that Indian public policy precludes Indian nationals (including wholly foreign-owned Indian incorporated subsidiaries) from contracting out of Indian law unless they are contracting with a foreign party, even if any disputes under the relevant agreement will be resolved by arbitration outside of India. If this broader interpretation is adopted, it raises the possibility that the Indian courts could refuse to enforce an award rendered by an arbitration tribunal seated outside of India if that tribunal (pursuant to the relevant governing law clause in a contract between solely Indian nationals) applied a foreign law.

There is, therefore, an element of uncertainty as to two Indian parties' freedom to choose a "foreign" governing law. Until further clarification becomes available, it would be prudent to opt for Indian governing law clauses in contracts between exclusively Indian parties (even where one or more of those parties is wholly-owned by a foreign investor).

25. The law governing the arbitration agreement is significant as it governs issues relating to the validity and effectiveness of the clause. In *Sulamerica CIA Nacional De Seguros SA and others v Enesa Engenharia SA and others* [2012] EWHC 42 (Comm.) the English High Court laid down a test as to which law would apply to the arbitration agreement where none is expressly stated – usually divided between the law governing the contract and the law of the seat. However, in 2014 the Singapore High Court declined to apply this test (*FirstLink Investments Corp Ltd v GT Payment Pte Ltd and others* [2014] SGHCR 12), and instead held that in the absence of indications to the contrary, parties will have impliedly chosen the law of the seat of the arbitration to govern the agreement to arbitrate. In a recent 2016 case (*BCY v BCZ* [2016] SGHC 249) the Singapore High Court followed the *Sulamerica* position and held that the governing law of the main contract is a "strong indicator" of the governing law of the arbitration agreement, thereby taking a different approach that the court in *First Link*. However, since both of these judgements are first instance decisions of the High Court, it remains to be seen what the final position adopted by the Court of Appeal will be. In light of these authorities and in order to avoid surprises it is always worthwhile for parties to stipulate the law they wish to apply to the arbitration agreement.

26. *National Thermal Power Corporation v Singer Corporation*, (1992) 3 SCC 551; *British India Steam Navigation Company v Shanmughavilas Cashew Industries*, (1990) 3 SCC 481.

27. *TDM Infrastructure Private Limited v UE Development India Private Limited*, (2008) 14 SCC 271.

28. *BALCO*, where the Supreme Court noted that the provisions of section 28 of the Indian Arbitration Act, providing for Indian substantive law to apply, was to ensure that Indian parties do not use arbitration to circumvent the application of substantive Indian law to their dispute.

# Appendices

## Appendix A: Recommended arbitration clauses

Below are suggested arbitration clauses providing for some of the most common or appropriate choices seen in India-related contracts, namely:

- LCIA arbitration;
- MCIA arbitration;
- SIAC arbitration;
- ICC arbitration;
- HKIAC arbitration; and
- UNCITRAL arbitration.

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- The clauses are all based on the standard clause and rules for the relevant institution but incorporate certain amendments which we suggest for consideration.
- They all apply the institution's rules in force at the date of arbitration<sup>29</sup>. It is also acceptable to opt for the rules in force at the date of the contract.
- Always review the most up to date version of the relevant arbitration rules (available on the various websites cited below) before drafting or agreeing to an arbitration clause providing for the application of those rules.
- Always consider whether there is any potential for a dispute to involve more than two parties or more than two contracts. If there is, you should consider seeking expert advice on drafting a suitable multi-party or multi-contract arbitration clause (a technical matter of some subtlety).
- Three arbitrators are generally recommended for all contracts except for those in which any disputes are likely to be of low value, in which case a sole arbitrator may be considered. This is because a three member tribunal allows the parties a greater say over constitution of the tribunal and generally improves the quality of the tribunal (although opting for a sole arbitrator does usually reduce the cost of any arbitration and may help expedite the process).

### LCIA arbitration<sup>30</sup>

*Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.*

*The number of arbitrators shall be [one/three].*

*Each party shall nominate one arbitrator, and the two arbitrators nominated by the parties, or appointed by the LCIA Court in the absence of such nomination, shall within [15/30] days of the appointment of the second arbitrator agree upon a third arbitrator who shall act as Chairman of the Tribunal. If no agreement is reached within that period, the LCIA Court shall appoint a third arbitrator to act as Chairman of the Tribunal. [Include only where there are three arbitrators] The seat or legal place of arbitration shall be [City, Country]. The language to be used in the arbitral proceedings shall be [English]. This arbitration agreement shall be governed and construed under [the law of [ ]/ the law identified in clause [ ] (governing law clause)]<sup>31</sup>.*

### SIAC arbitration<sup>32</sup>

*Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in [Singapore] in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") in force at the date of applying for arbitration, which rules are deemed to be incorporated by reference in this clause.*

*The number of arbitrators shall be [one/three].*

*Each party shall nominate one arbitrator, and the two arbitrators nominated by the parties (or appointed by the President pursuant to the SIAC Rules as the case may be) shall within [15/30] days of the appointment of the second arbitrator agree upon a third arbitrator who shall act as the Chairman of the Tribunal. If the third arbitrator has not been agreed within that period, the third arbitrator shall be appointed by the President pursuant to the SIAC Rules. [Include only where there are three arbitrators]*

*The language of the arbitration shall be [English].*

*This arbitration agreement shall be governed and construed under [the law of [ ]/ the law identified in clause [ ] (governing law clause)].*

29. On the assumption that institutions are more likely to improve their rules over time than make them worse.

30. The LCIA Rules are available at [www.lcia.org](http://www.lcia.org)

31. Under the principle that an arbitration agreement is severable from the contract in which it is located, it is generally advisable to identify explicitly the law to govern that provision. Otherwise, in some jurisdictions, there may be doubt as to whether the arbitration agreement is to be governed by the same law as the substantive contract, or the law of the seat of the arbitration.

32. The SIAC Rules are available at [www.siac.org.sg](http://www.siac.org.sg)

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### ICC arbitration<sup>33</sup>

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

The number of arbitrators shall be [one/three].

Each party shall nominate one arbitrator, and the two arbitrators nominated by the parties, or appointed by the ICC Court in the absence of such nomination, shall within [15/30] days of the appointment of the second arbitrator agree upon a third arbitrator who shall act as President of the Tribunal. If no agreement is reached within that period, the ICC Court shall appoint a third arbitrator to act as President of the Tribunal. [Include only where there are three arbitrators]

The seat or legal place of arbitration shall be [City, Country].

The language of the arbitration shall be [English].

This arbitration agreement shall be governed and construed under [the law of [ ]/the law identified in clause [ ] (governing law clause)].

### HKIAC arbitration<sup>34</sup>

Any dispute, controversy or claim arising out of or relating to this contract, including the existence, validity, invalidity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules (the "HKIAC Rules") in force when the Notice of Arbitration is submitted in accordance with the HKIAC Rules.

The number of arbitrators shall be [one/three].

Each party shall nominate one arbitrator, and the two arbitrators nominated by the parties, or appointed by the HKIAC in the absence of such nomination, shall within [30 days] of the appointment of the second arbitrator agree upon a third arbitrator who shall act as the presiding arbitrator of the tribunal. If no agreement is reached within that period, the HKIAC shall appoint a third arbitrator to act as the presiding arbitrator. [Include only where there are three arbitrators]

The seat or legal place of arbitration shall be [City, Country].

The language of the arbitration shall be [English].

The arbitration agreement shall be governed and construed under [the laws of [ ]/the law identified in clause [ ] (governing law clause)].

### MCIA arbitration<sup>35</sup>

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Arbitration Rules of the Mumbai Centre for International Arbitration (the "MCIA Rules"), in force at the date of applying for arbitration, which rules are deemed to be incorporated by reference in this clause.

The number of arbitrators shall be [one/three].

Each party shall nominate one arbitrator, and the Chairman of the Tribunal shall be selected by the MCIA Council<sup>36</sup>. [Include only where there are three arbitrators]

The seat or legal place of arbitration shall be [City, Country].

The language to be used in the arbitration shall be [English].

This arbitration agreement shall be governed and construed under [the law of [ ]/the law identified in clause [ ] (governing law clause)].

### UNCITRAL arbitration<sup>37</sup>

Where you have opted for ad hoc arbitration under the UNCITRAL Rules (see Principle 3 above), you should provide as follows:

Any dispute, controversy or claim arising out of or relating to this contract or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules.

The appointing authority shall be [insert neutral appointing authority located outside of India or MCIA].

The number of arbitrators shall be [one/three].

33. The ICC Rules are available at [www.iccwbo.org/court/arbitration](http://www.iccwbo.org/court/arbitration)

34. The HKIAC Rules are available at [www.hkiac.org](http://www.hkiac.org)

35. The MCIA Rules are available at <http://mcia.org.in>

36. The MCIA Rules provide that the presiding arbitrator shall be appointed by the MCIA Council in all cases, and regardless of the parties' agreement otherwise (Rules 9.4 and 9.5). This is a deliberate provision within the Indian context aimed at ensuring the Tribunal and the arbitration procedure are in the hands of a presiding arbitrator trusted by the institution to conduct the process expeditiously.

37. The UNCITRAL Arbitration Rules are available at <http://www.uncitral.org>

*Each party shall nominate one arbitrator, and the two arbitrators nominated by the parties, or appointed by the appointing authority in the absence of such nomination, shall within [30 days] of the appointment of the second arbitrator agree upon a third arbitrator who shall act as the presiding arbitrator of the Tribunal. If no agreement is reached within that period, the appointing authority shall appoint a third arbitrator to act as the presiding arbitrator. [Include only where there are three arbitrators]*

*The [sole/presiding] arbitrator shall be of a nationality other than those of the parties.*

*The seat or legal place of arbitration shall be [City, Country].*

*The language of the arbitration shall be [English].*

*This arbitration agreement shall be governed and construed under [the law of [ ] / the law identified in clause [ ] (governing law clause)].*

## **Appendix B: Governing law clause**

*This Agreement and any dispute or claim arising out of or in connection with it or its subject matter, existence, negotiation, validity, termination or enforceability (including non-contractual disputes or claims) shall be governed by, and construed in accordance with, the laws of [ ].*

### **User's guide**

- It is sufficient to simply add the name of the relevant legal system in the square brackets above.
- Avoid errors such as "the laws of the UK" or "British law" (use "the laws of England" if that is what is intended) or "the laws of the USA" (use "the laws of New York" or whichever other state law is desired).

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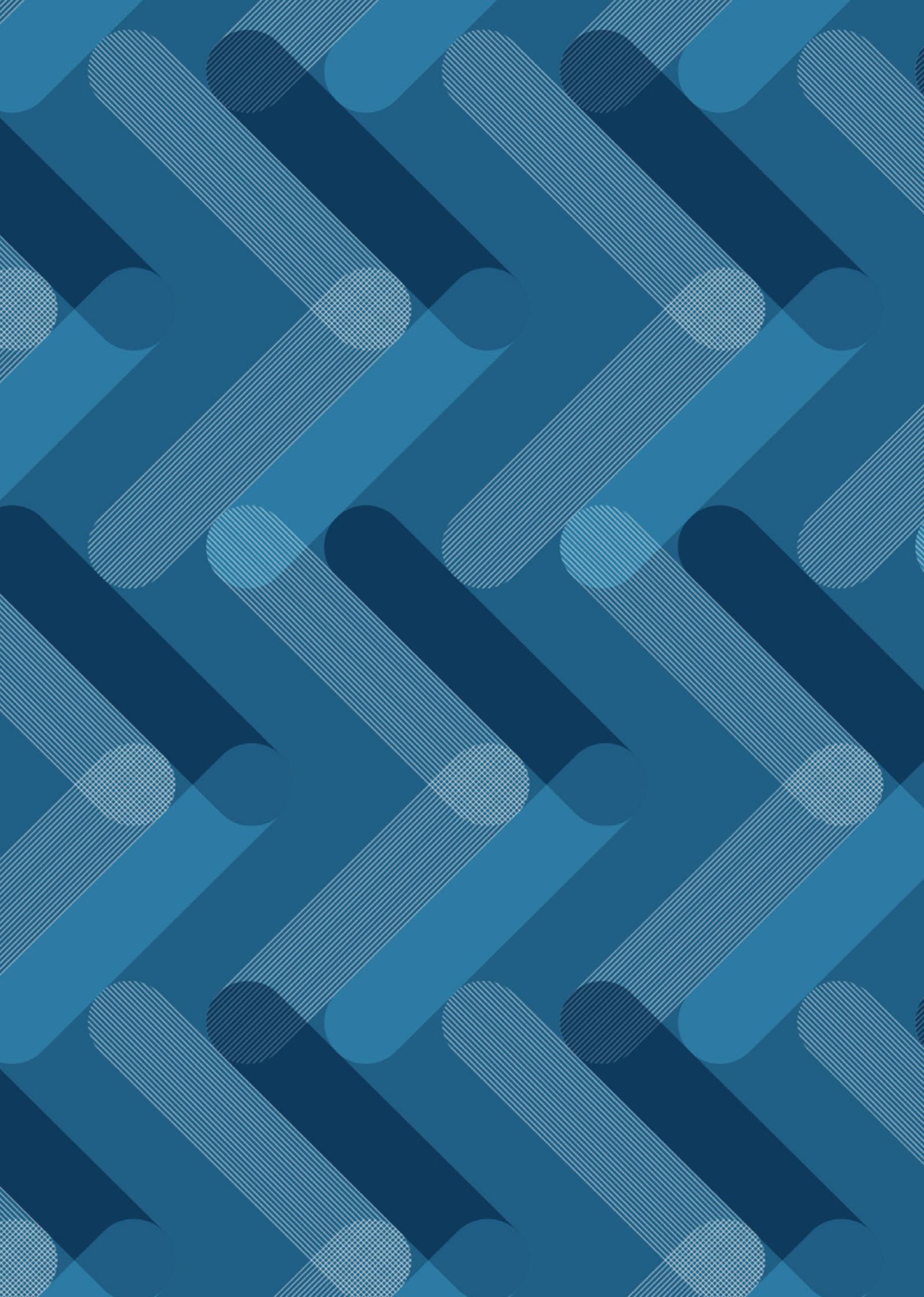


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