

## International Arbitration Update: Choosing A Forum In Disputes Arising Out Of India

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### Background

Indian companies and companies that do business in India increasingly turn to private arbitration in order to resolve their business disputes.<sup>1</sup> The reasons for this are many. One stated cause is the backlog of cases in the Indian court system – by some accounts, around 32 million cases were pending as of 2011.<sup>2</sup> Further encouraging the use of international arbitral forums, the September 2012 Indian Supreme Court decision in *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services* confirmed that Indian courts generally will not have jurisdiction to interfere with arbitral awards rendered outside of India.<sup>3</sup>

While there are domestic arbitral forums available in India, the most popular arbitration forums for Indian companies have proven to be the Singapore International Arbitration Centre (“SIAC”) and the London Court of International Arbitration (“LCIA”). According to a recent study regarding the selection of arbitral forums, Ernst & Young found that for Indian companies seeking an arbitral forum outside India, 60 percent of respondents preferred SIAC.<sup>4</sup> For those seeking an arbitral



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forum within India, 34 percent of respondents preferred the Indian arm of LCIA.<sup>5</sup> The International Chamber of Commerce (“ICC”) has also become a popular arbitral forum.<sup>6</sup>

In addition to those three forums, there are several other major players in the international dispute resolution scene: The International Centre for Dispute Resolution (“ICDR”), an arm of the AAA; the China International Economic and Trade Arbitration Commission (“CIETAC”), the Hong Kong International Arbitration Centre (“HKIAC”), the United Nations Commission on International Trade Law (“UNCITRAL”), and the World Bank International Centre for Settlement of Investment Disputes (“ICSID”). For the adjudication of intellectual property disputes only, the World Intellectual Property Organization (“WIPO”) is also an option.

Importantly, we have seen an increase in

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the recognition by these entities that they operate in a competitive environment. This competition is good for the “consumers” of the arbitral forums — businesses seeking to save costs and resolve disputes quickly. We have compiled a summary chart with a comparison of the rules governing each of these international arbitration organizations with a focus on the criteria that are most important to parties seeking a fair and efficient resolution of business disputes. In particular, we have seen the greatest change and flexibility in the following areas: interim measures (including the availability of provisional relief); the timing of awards (much quicker); and discovery (generally more limited but more flexible). As just one example, in 2012, the ICC amended Article 29 and Appendix V of its rules to permit appointment of an emergency arbitrator to grant urgent relief, if required, before the tribunal has been constituted.<sup>7</sup>

### A Comparison Of Major International Arbitration Forums

Each international arbitration forum has its own set of rules, unless the parties have agreed to different rules in the arbitration agreement. Below is a side-by-side comparison of the rules of these forums that are typically of the greatest concern to international litigants.

### Conclusion

As the establishment of the Delhi High Court’s arbitration center demonstrates,<sup>17</sup> arbitration is considered to be a valid and viable option for the resolution of business disputes involving Indian entities or individuals. The general trend among international arbitral forums is to provide for limited discovery only, and to provide an opportunity for expedited (or at least somewhat faster) adjudication. Both of these efficiencies can result in much lower overall litigation costs and can provide an efficient means to a decision that is enforceable in India and other major international jurisdictions.

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|  | ICDR <sup>8</sup>  | ICC <sup>9</sup>   | LCIA <sup>10</sup>   | CIETAC <sup>11</sup>   | HKIAC <sup>12</sup>   | SIAC <sup>13</sup>  | UNCITRAL <sup>14</sup>   | ICSID <sup>15</sup>  |
|--|--|--|--|--|---|---|--|--|
| <b>Arbitrators</b>                         | Sole arbitrator unless parties provide otherwise or administrator deems appropriate. (Art. 5.) Administrator to appoint if parties fail to do so within time limits. (Art. 6.) | Sole arbitrator unless parties provide otherwise or ICC so determines. (Art. 12.) ICC Court to appoint sole arbitrator or president if parties fail to do so within time limits. (Art. 12.)                                    | Sole arbitrator unless parties provide otherwise or LCIA so determines. LCIA Court has sole authority to appoint, with consideration of agreed qualifications. (Art. 5.) | Three arbitrators unless otherwise agreed. (Art. 23.) Parties nominate from CIETAC panel unless otherwise agreed. Chair of CIETAC to appoint if parties fail. (Art. 25.) | If parties not agreed, HKIAC Council will decide between 1 and 3 arbitrators. (Art. 6.) Council will appoint if parties fail to meet deadline. (Arts. 7, 8.)  | Sole arbitrator unless parties agree otherwise or SIAC Registrar finds 3 are warranted. (Rule 6.) Chair of SIAC to appoint if parties do not meet deadline. (Rules 7, 8.) | Three arbitrators unless parties agree otherwise. (Art. 7.) Appointing authority (Sec. Gen. of Permanent Court of Arbitration) to appoint if deadlines missed. (Art. 8.) | Three arbitrators unless parties agree to some other uneven number. (Rule 2.) Chairman to appoint if parties fail to do so within time limits. (Rule 4.)   |
| <b>Discovery and Evidence<sup>16</sup></b> | Tribunal may order parties to produce documents/evidence. (Art. 19.)   | Tribunal to establish facts by "all appropriate means," including power to summon party to provide evidence. (Art. 25.)  | Tribunal may order parties to produce and exchange evidence, submit for inspection. (Art. 22.)   | Tribunal may investigate, require production, specify time for production of evidence (Arts. 39, 41); provide for "examination of evidence" (Art. 40).                   | Tribunal may order parties to produce, exchange evidence. (Art. 22.3.)  | Tribunal may conduct enquiries, require production of evidence, affidavits. (Rule 24.)  | Tribunal may require production of evidence at any time. (Art. 27.)  | Tribunal may require production of evidence at any time. Tribunal judges the evidence's admissibility and probative value. (Rule 34.)  |
| <b>Interim Measures</b>                    | Parties may request from tribunal or court. (Art. 21.) Emergency arbitrator may order relief prior to constitution of tribunal. (Art. 37.)                                     | Parties may request from tribunal, or seek relief from judicial authority. (Art. 28.) Emergency arbitrator may order relief prior to transmission of file to the tribunal. (Art. 29, App. V.)                                  | Tribunal may order security, provisional relief. Parties may apply to court prior to formation of tribunal. (Art. 25.)   | Tribunal may order interim measures, security. Request for conservatory measures under Chinese law referred to court. (Art. 21.)   | Tribunal may order interim measures, security. Parties may request interim measures from court. (Art. 23.)  | Tribunal may order interim measures, security. Parties may request interim measures from court. (Art. 23.)  | Tribunal may grant interim measures, may require security. Parties may request interim measures from court. (Art. 26.)   | Parties may request from Tribunal or court, and Tribunal may recommend on own initiative. If prior to constitution of Tribunal, parties may submit requests to Secretary-General. (Rule 39.)   |
| <b>Fees and Costs</b>                      | Sliding scale based on sum claimed, capped at \$65,000, paid in two increments. Option for smaller deposit, 3 payments, larger total fee. Arbitrator fees additional.          | Costs advanced, potentially in installments, for administrative fees, arbitrator fees. Bank guarantee for advance in excess of \$500,000. Sliding scale for administrative fees (up to \$113,215). Arbitrator fees additional. | LCIA Court may require deposits in increments. (Art. 24.1.) Fees include administration, LCIA Court, arbitrators' fees (max. £450/hour). (Art. 24.)                      | Deposit per fee schedule. (Art. 72.) Registration Fee and Handling Fee based on amount claimed.  | HKIAC Secretariat to request deposit of fees per schedule upon establishment of tribunal; may request supplemental deposits. (Art. 40.) Registration fee; administrative fee; arbitrator fees (based on amount of claim). (Art. 33) | 50% of fees to be deposited at commencement, based on schedule, with additional deposits possible. (Rule 30.)   | UNCITRAL does not provide administration. Tribunal to set fees and terms of payment (Art. 41.); may require deposit. (Art. 43.)  | Fees determined by Secretary-General at the time of dispute, and subject to Tribunal's review. (Reg. 14.) Currently, \$25,000 for initial fee and \$10,000 for supplemental decision or rehearing. Arbitrators to receive \$3,000 per day. |
| <b>Consolidation</b>                       | Not addressed.   | Possible where parties agree, claims under same agreement, same parties, or same legal relationship. (Art. 10.)  | Joinder with written consent. (Art. 22.)   | Consolidation permitted if all parties agree. (Art. 17.)   | Joinder if parties and/or third person request. (Art. 27.)  | Joinder with written consent. (Rule 24.)  | Joinder if party to arbitration agreement. (Art. 17.)  | Not addressed.   |
| <b>Awards</b>                              | Award to be made "promptly," final and binding on parties. (Art. 27.)  | Award to be rendered within 6 months of terms of reference, subject to extension. (Art. 30.) Award subject to scrutiny and approval by ICC Court; binding on parties. (Art. 33.)   | No time limit. Award is final and binding. (Art. 26.9.)  | Tribunal to render award within 6 months of formation, subject to extension. Award is final and binding. (Art. 46.)  | No time limit. Award is final and binding. (Art. 34.)   | Tribunal to submit draft award to Registrar within 45 days from date proceedings closed. Award is final and binding. (Rule 28.)   | No time limit. Award is final and binding. (Art. 34.)  | Tribunal to submit award within 120 days from close of proceeding. (Rules 46.) Parties may request a supplemental decision or rectification within 45 days of the award (Rule 49), and may request within 120 days an annulment (Rule 50). |