

GAR KNOW HOW LITIGATION

India

Krishnayan Sen and Ankit Jain

VERUS

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Overview

1 Court system

Describe the general organisation of the court system for civil litigation.

The Supreme Court, the high court(s) and the subordinate courts together constitute the three tiers of judiciary in the country. The Constitution of India provides for an independent judiciary with powers of judicial review over actions of the legislature and the executive vested on the superior judiciary (ie, high courts and Supreme Court). The Supreme Court of India is the apex court and highest court of appeal in the country. The Supreme Court has original, appellate and advisory jurisdiction.

The Indian republic has a quasi-federal structure constituting different states that are governed by the respective elected state governments. The high courts of the respective states are constitutional courts and also exercise supervisory jurisdiction over subordinate courts and tribunals in that state. Currently, there are 24 high courts in the country, three having jurisdiction over more than one state or Union Territory. Parties may prefer appeals from the judgments of the high courts before the Supreme Court, which may be entertained at the discretion of the apex court. The Indian legal system follows the common law principle of stare decisis; and the lower courts are bound by the precedents set by superior courts.

Civil courts or district courts have jurisdiction to deal with all matters of civil nature except those that, by specific statute, are reserved for adjudication by specific tribunals such as the company law tribunals, banking law tribunals, labour courts etc. The highest court in each district is that of the district and sessions judge which is the principal court of civil jurisdiction. Below the district courts are courts of sub-judges or civil judge, munsiff courts and courts of small causes. Munsiff courts, courts of civil judge and small causes courts possess original jurisdiction only, while the district courts ordinarily have both original and appellate jurisdiction, subject to certain exceptions.

All trials in India are bench trials, jury trials having been abolished in 1960.

Judges of the Supreme Court are appointed by the President of India only after the concurrence of the collegium of five senior most judges of the Supreme Court. Judges of the high court are appointed upon concurrence of the collegium of the Supreme Court and upon recommendation from the respective high courts.

2 The legal profession

Describe the general organisation of the legal profession.

India has a unified Bar and an advocate enrolled with the Bar Council of any state, can practise and appear in any court of the land. However, for 'acting' in the Supreme Court, an advocate needs to qualify as an Advocate-on-Record by passing an examination conducted under the aegis of the Supreme Court of India.

Besides advocates, the Advocates Act, 1961, also recognises Senior Advocates (akin to Queen's Counsel in UK), who have a right of audience in proceedings. Senior advocates cannot 'act' for a client, but can only 'plead' for a client.

To qualify as a lawyer, an individual must be an Indian citizen (a national of any other country can also be admitted on a state roll if duly qualified Indians are allowed to practise law in that other country). He or she should have attained the age of 21 years and should have completed a bachelor's degree in law. After attaining his or her bachelor's degree in law, to practise law the individual will have to register with any of the State Bar Councils and will have to qualify the All India Bar Exam, which is conducted under the aegis of the Bar Council of India.

Foreign law firms or companies or foreign lawyers cannot practice profession of law in India either in the litigation or in non-litigation side. They are, however, allowed to make casual visits to India on a "fly in and fly out" basis for the purpose of giving legal advice or acting on arbitration matters. The Supreme Court in the recent AK Balaji case (2018) clarified that foreign lawyers appearing in arbitration proceedings shall, however, be governed by the code of conduct applicable to legal profession in India.

3 General

Give a brief overview of the political and social background as it relates to civil litigation.

India's rise in the world economy has also seen a corresponding rise in commercial disputes. While India has improved its rankings in World Bank's recent "Ease of Doing Business", it still fared poorly in the area of 'enforcing contracts'. The main reason for this is that litigation in India can get very protracted. The government has sought to bring in reforms by instituting a new commercial court, moving to a digital and automated case management system, reforming the corporate insolvency laws. However, the sheer volume of litigation makes pendency of cases a serious systemic challenge in the administration of justice across all levels of the court system. Illustratively, as of 1 May 2019, there are a staggering 58,168 pending cases at the Supreme

Court of India alone. Successive governments and Chief Justices of India have sought to tackle the problem of pendency of cases with limited success.

Jurisdiction

4 Jurisdiction and venue

What are the criteria for determining the jurisdiction and venue of the competent court for a civil matter?

Proceedings are ordinarily instituted in the lowest court that has jurisdiction (pecuniary, territorial and subject-matter) in a case. The venue of the court in a civil action is either at the place of residence or business of the defendant or where the cause of action for the suit has arisen. Parties cannot by agreement confer jurisdiction on a court that does not have jurisdiction. However, in cases where two or more courts have the jurisdiction to try a suit, parties may agree to select any one of such courts.

In respect of disputes that are covered by principles of private international law and involve multiple jurisdictions, parties may agree to have their disputes adjudicated by a court of a country that may not be a natural forum.

5 Forum shopping

Does your jurisdiction commonly attract disputes that have a nexus with other jurisdictions?

India is one of the fastest growing economies of the world. In 2018, India saw more than US\$38 billion of inbound deals compared with China's US\$32 billion. As a result of this increase in foreign investment, courts in India are increasingly seeing disputes involving foreign parties. However, owing to India's excruciatingly long litigation process, which is often plagued with enormous costs and endemic delays, parties from other jurisdictions are still wary of submitting their disputes to the jurisdiction of Indian courts. To ameliorate the situation, the government has brought in reforms in the arbitration law that now prescribes for a time-bound proceeding and has also introduced the Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts Act 2015 (Commercial Courts Act) and the Insolvency and Bankruptcy Code, 2016 to streamline resolving of commercial and insolvency disputes. The government has also actively promoted institutional arbitration mechanisms, such as the introduction of the New Delhi International Arbitration Centre in 2019, to resolve international commercial disputes.

6 Pendency in another forum

How will a court treat a request to hear a dispute that is already pending before another forum?

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The common law principles of *res sub judice* and *res judicata* are imbibed in the Code of Civil Procedure 1908. A court, therefore, shall not entertain a proceeding between the parties if the subject matter in issue is already pending adjudication before another court of competent jurisdiction in India.

7 Deference to arbitration

How will the courts treat a dispute that is, or could be, subject to an arbitration clause or an agreement to arbitrate, including in interim proceedings?

The Arbitration and Conciliation Act 1996 mandates a judicial authority to refer a suit or civil action to arbitration if there is an arbitration agreement between the parties with respect to the subject matter of the dispute.

8 Judicial review of arbitral awards on jurisdiction

May courts in your country review arbitral awards on jurisdiction?

The Arbitration and Conciliation Act 1996 incorporates the principle of competence-competence. It confers power upon the arbitral tribunal to decide on matters relating to its jurisdiction. Under the Act, although a decision accepting the plea of lack of jurisdiction shall be an appealable order; a decision rejecting the same plea can be challenged only with the final award.

9 Anti-suit injunctions

Are anti-suit injunctions available?

Courts in India, being courts of both law and equity, have the power to issue an anti-suit (and anti-arbitration) injunction against a party, over whom they have jurisdiction.

10 Sovereign immunity

Which entities are immune from being sued in your jurisdiction? In what circumstances? In what circumstances can creditors enforce a court judgment or arbitral award against a sovereign or a state entity?

The Indian government or state can be sued like any other private person in a court of law. A foreign state may, however, be sued in an Indian court only after the consent of the central government has been obtained in this respect.

Procedure

11 Commencement and conduct of proceedings in general

How are proceedings commenced? To what extent will a court actively lead the proceedings and to what extent will the court rely on the parties to further the proceedings?

Civil proceedings are instituted by filing a plaint in court of competent jurisdiction setting out the cause of action and the reliefs sought against the defendant. Some statutes require a mandatory pre-suit notice to be served in the case.

Courts would ordinarily rely on parties to further the proceedings. Recent reforms require the court to hold a meeting between the parties to decide upon a timeline for most important stages in a proceeding like recording of evidence, filing of written arguments, etc.

12 Statement of claim

What are the requirements for filing a claim? What is the pleading standard?

In a civil action, a statement of claim (called a 'plaint') should only state the material facts in a concise form and should contain the necessary particulars such as the name of the court in which the suit is brought; name, description and place of residence of parties; facts constituting the cause of action; facts demonstrating that the court has jurisdiction; statement of the value of the subject matter of the suit for purposes of jurisdiction and court fees, etc, along with all supporting documents that the plaintiff relies on. The plaint must be supported by an affidavit deposed by the plaintiff verifying the correctness of the stated facts.

13 Statement of defence

What are the requirements for answering claims? What is the pleading standard?

A statement of defence (called a written statement) can be filed by the defendant or by his duly constituted agent. It should only state the material facts in a concise form and should specifically deal with each allegation of fact that is being disputed. Where the defendant relies upon several distinct grounds of defence or set-off or counter-claim founded upon separate and distinct facts, they should be stated separately and distinctly. The defendant is also required to produce all documents in support of his or her defence or claim for set-off or counter-claim.

14 Further briefs and submissions

What are the rules regarding further briefs and submissions?

Parties may amend the pleadings only with the permission of the court. Amicus briefs are ordinarily not permitted in civil actions.

15 Publicity

To what degree are civil proceedings made public?

Open trial is the norm, except in cases where the administration of justice itself may make it necessary for the courts to hold in-camera trials. The judgments of the courts being public records are accessible and the names of the parties, except in cases where the court deems it necessary, are generally not anonymised.

The Supreme Court further, by its recent pronouncement in the case of *Swapnil Tripathi v Supreme Court of India* (2018) 10 SCC 639, has opened its doors for live streaming of cases of constitutional and national importance being argued for final hearing before the Constitution Bench of the court, barring those involving juveniles, cases of sexual assault, matrimonial issues.

Pretrial settlement and ADR

16 Advice and settlement proposals

Will a court render (interim) assessments about any factual or legal issues in dispute? What role and approach do courts typically take regarding settlement? Are there mandatory settlement conferences between the parties at the outset of or during the litigation?

The courts while passing any interim orders in a civil proceedings may render some interim assessments about factual or legal issues in a dispute. Moreover, the courts predominantly take a pro-settlement approach in matters and try and facilitate the parties to reach a settlement. Law requires the courts to hold a preliminary hearing to consider recourse to alternate dispute resolution procedures for the parties to explore settlement.

17 Mediation

Is referral to mediation or another form of ADR an option, or even mandatory, before or during the litigation?

The law requires a court to mandatorily hold a preliminary hearing for appearance of parties, after completion of pleadings, to consider recourse to any of the five ADR procedures viz arbitration, conciliation, mediation, judicial settlement or Lok Adalat settlement. The Commercial Courts Act also requires plaintiffs to mandatorily explore mediation to resolve the disputes before initiating an action.

Interim relief

18 Forms of interim relief

What are the forms of emergency or interim relief?

Indian courts have extensive powers to grant interim relief including injunctions to preserve the subject matter of the dispute, granting of security, attachment of property, sale of movable property where such property is perishable in nature, order for detention, preservation and inspection of suit property. Orders such as a 'freezing order', a Mareva injunction and 'search order' or an Anton Pillar order could be issued even if the property or the person concerned was outside the jurisdiction of the courts. Such interim remedies are also available in support of foreign proceedings.

19 Obtaining relief

What must a petitioner show to obtain interim relief?

The claimant must satisfy three requirements to obtain an interim relief: (i) he or she has a prima facie case, (ii) balance of convenience is in his or her favour and (iii) irreparable harm and injury shall be caused if such interim reliefs, as prayed for, are not granted.

Decisions

20 Types of decisions

What types of decisions (other than interim relief) may a court render in civil matters?

Substantive reliefs which might be granted by courts in civil matters would, amongst others, include award of damages, recovery of debt or investment, enforcement of security, declaratory relief(s), specific performance and injunctions (permanent and mandatory).

21 Timing of decisions

At what stage of the proceedings may a court render a decision? Are motions to dismiss and summary judgment available?

Generally, the courts would pronounce judgment after conclusion of final hearing. However, in suits based on negotiable instruments or where the plaintiff seeks to recover debt or liquidated amount, a plaintiff can seek summary disposal of the suit. The Commercial Courts Act, 2015 further also entitles a plaintiff to move an application for obtaining summary judgment in suits involving commercial disputes.

The court can further reject the plaint filed by the plaintiff, by itself or on an application being moved by the defendant, if the plaint fails to disclose any cause of action, or where the suit is barred by law or on any other grounds.

22 Default judgment

Under which circumstances will a default judgment be rendered?

In cases where the plaintiff or where both the parties to the suit fail to appear before the court; or where summons are not served upon the defendant on account of plaintiff's failure to pay costs for service of summons; or where the plaintiff, in cases where the summons issued to the defendant return unserved, fails to apply for fresh summons within seven days from the date of return to court, the court may proceed to dismiss the suit on account of any of the said defaults. Where, however, the defendant does not appear in the suit despite sufficient service and the plaintiff appears, the court may proceed ex parte against the defendant and may pass a decree in favour of the plaintiff, if the plaintiff proves his or her case.

23 Duration of proceedings

How long does it typically take a court of first instance to render a decision?

While there is no official data available, it is estimated that the total time period from filing of a suit till final decree would be approximately 16 months.

Parties

24 Third parties – joinder, third-party notice, intervenors

How can third parties become involved in proceedings?

If a party is necessary for a proper adjudication of a dispute, then such party needs to be made a party to the lis. A civil action may be dismissed for non-joinder of necessary parties; and third parties could also seek the leave of the court to be made a party to an ongoing litigation claiming interest over the adjudication.

Evidence

25 Taking and adducing evidence

Will a court take or initiate the taking of evidence or will it rely on the parties to request the taking of evidence and to present it?

The courts will usually rely on the parties to present evidence to establish their respective case. The court will, however, decide on the admissibility of such evidence.

26 Disclosure

Is an opponent obliged to produce evidence that is harmful to it in the proceedings? Is there a document disclosure procedure in place? What are the consequences if evidence is not produced by a party?

Under the Code, a party to a suit may require information from his adversary as to facts or as to documents in possession of such opposite party, relevant to the issues in the suit through (i) interrogatories (written questions to the opposite party); (ii) discovery of documents (request for disclosure of documents in the possession or power of the opposite party relating to matters in question in the suit); (iii) inspection of documents in the possession of the other party; and (iv) notice calling upon a party to admit documents or facts. Where a party fails to comply with any order to answer interrogatories or for discovery or production of documents, the court may draw an adverse inference against such a party. Moreover, if such a party happens to be a plaintiff, his or her suit may be dismissed for want of prosecution, and if he or she happens to be a defendant, his or her defence will be struck off by the court.

27 Witnesses of fact

Please describe the key characteristics of witness evidence in your jurisdiction. Is witness preparation allowed?

The evidence of witnesses is, ordinarily, taken orally in open court in the presence and under the personal direction and superintendence of the judge (or such evidence can also be recorded by a Court Commissioner).

In civil cases, the party who has a right to begin, ie, on whom the burden of proof lies examines his or her witnesses first. Though the counsel has the discretion to produce his or her witnesses in the order he likes, the court has the power to dictate the order in which the witnesses may be produced. There are three stages in the examination of a witness, viz, (i) examination in chief by the party who calls the witness for the purpose of eliciting all the material facts to prove his or her case; (ii) cross-examination by the opposite party; and (iii) re-examination, if deemed necessary, by the party who calls the witness to elicit explanation of matters arising in cross-examination. Separately, the court also possesses the power to put across questions to the witnesses wherever deemed necessary. Witness preparation is permitted but cannot amount to directing or influencing the witness's testimony.

28 Expert witnesses

Who appoints expert witnesses? What is the role of experts?

An expert witness can be produced by either of the parties to the suit or can be appointed by the court in cases where the necessity of expert evidence is felt. An expert is not a witness of fact and his evidence is really of an advisory character. The role of an expert witness is to furnish the judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the judge to form his or her independent judgment by the application of these criteria.

29 Party witnesses

Can parties to proceedings (or a party's directors and officers in the case of a legal person) act as witnesses? Can the court draw negative inferences from a party's failure to testify or act as a witness?

Parties to a proceedings or a party's directors and officers in case of a legal person can act as witnesses in civil proceedings. However, court would generally not draw a negative inference if a party does not testify or act as a witness in a suit.

30 Foreign law and documentation

How is foreign law or foreign-language documentation introduced into the proceedings and considered by the courts?

Foreign law needs to be proved as a matter of fact; and for such purpose a foreign law expert, deposing the foreign-law position on affidavit, may be examined as a witness.

31 Standard of proof

What standard of proof applies in civil litigation? Are there different standards for different issues?

The standard of proof in civil litigation is a preponderance of the evidence or a balance of probabilities.

Appeals

32 Options for appeal

What are the possibilities to appeal a judicial decision? How many levels of appeal are there?

Unless precluded by statute, an appeal lies from an original decree. There are ordinarily two levels of appeal. A judgment of the High Court may be appealed before the Supreme Court, which the Supreme Court may entertain at its discretion if a substantial question of law is involved.

33 Standard of review

What aspects of a lower court's decisions will an appeals court review and by what standards?

The first appeal may be on questions of fact or law or a mixed question of fact and law. Unless barred by statute, a second appeal would lie on substantial questions of law.

34 Duration of appellate proceedings

How long does it usually take to obtain an appellate decision?

Litigation in India can often get protracted and appellate proceedings could extend to two to three years.

Special proceedings

35 Class actions

Are class actions available?

The Code of Civil Procedure permits representative actions in civil litigation. A person seeking to sue or defend for, and on behalf of numerous persons with the common interest, can do so only with the permission of the court.

Class action can also take the shape of a public interest litigation, which is when a public spirited person prefers a writ petition before the High Court or Supreme Court claiming infringement of valuable rights of a class of people who, by reason of their poverty or disability, are unable to approach the courts themselves.

36 Derivative actions

Are derivative actions available?

Yes. A shareholder's derivative action (even if they are in minority) is maintainable in respect of reliefs sought solely for the benefit of the company.

37 Fast-track proceedings Are fast-track proceedings available?

Fast-track proceedings, other than summary judgment, are generally not available in civil proceedings. Some states, however, have fast-track civil courts at the district level to ensure speedy disposal of cases.

38 Foreign-language proceedings Is it possible to conduct proceedings in a foreign language?

Proceedings cannot be conducted in a foreign language. English is ordinarily the language of the court. In the lower judiciary, courts occasionally use the regional Indian languages.

Effects of judgement and enforcement

39 Effects of a judgment What legal effects does a judgment have?

A judgment is final and binding between parties and their privies as to issues or questions finally decided in the suit. The four categories of judgments that are in rem, and bind third parties too, are in cases of probate, matrimonial, admiralty and insolvency. The Indian Constitution declares that the law laid down by the Supreme Court will be the law of the land and, as such, binding on all courts below. Indian courts follow the doctrine of stare decisis and, therefore, decisions of supervisory courts are binding on subordinate courts.

40 Enforcement procedure What are the procedures and options for enforcing a domestic judgment?

Enforcement of a decree is by way of execution proceedings through the courts.

41 Enforcement of foreign judgments Under what circumstances will a foreign judgment be enforced in your jurisdiction?

Judgments passed by superior courts in “reciprocating territories” can be enforced in India subject to the same satisfying the following conditions: (i) where it has not been pronounced by a court of competent jurisdiction; (ii) where it has not been given on the merits of the case; (iii) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable; (iv) where the proceedings in which the judgment was obtained are opposed to natural justice; (v) where it has been obtained by fraud; (vi) where it sustains a claim founded on a breach of any law in force in India.

However, in case of a judgment or decree obtained from a non-reciprocating foreign territory, a party has to file a fresh civil action (suit) on that foreign decree in a domestic Indian court of competent jurisdiction.

Costs

42 Costs Will the successful party’s costs be borne by the opponent?

Costs usually follow the event (ie, the successful party is awarded costs unless the court records the reasons for not awarding costs). In practice, the costs awarded are substantially lower than the costs actually incurred.

43 Legal aid

May a party apply for legal aid to finance court proceedings? What other options are available for parties who may not be able to afford litigation?

An indigent person who does not possess sufficient means to pay court-fees or to file a suit may move an application before the court seeking permission to prosecute his suit in forma pauperis and may seek legal aid from court. The Legal Services Authorities Act 1987 also permits certain classes of litigants to seek legal aid from court.

44 Contingency fees

Are contingency fee arrangements permissible? Are they commonly used?

Contingency fees are not permitted under the current regulations governing advocates.

45 Third-party funding

Is third-party funding allowed in your jurisdiction?

Third party funding by non-lawyers have recently been recognised in India. However, in the absence of any regulatory framework, there is still lack of clarity on aspects concerning disclosure, qualifications and conduct of third-party funders, confidentiality, privilege and rules of cost recovery.

46 Fee scales

Are there fee scales lawyers must follow? Are there upper or lower limits for fees charged by lawyers in your jurisdiction?

Lawyers are neither required to follow any fee scales nor are there any upper or lower limits prescribed in respect of fees charges by lawyers in India.



Krishnayan Sen
VERUS

Krishnayan Sen is a partner at Verus and heads the firm's disputes practice. He has been a trusted adviser to a diverse range of clients, including international corporations, government undertakings, banks and statutory authorities. He is also an advocate-on-record at the Supreme Court of India and represents clients across different courts and tribunals.

His recent cases include representing United Bank of India against Kingfisher Airlines and Vijay Mallya; defending McDonald's; advising Schlumberger in a public procurement tender; advising UBER in actions for defamation; representing Huntsman International in recovering its contractual claims; advising GE Healthcare in an arbitration involving a claim for personal damages; and, advising Kotak Mahindra Bank in defending secured creditor's rights.

His principal areas of practice include international arbitration, corporate-commercial disputes and banking litigation. Krishnayan is fluent in English, Hindi and Bengali.



Ankit Jain
VERUS

Ankit Jain is a senior associate at Verus and is a part of the firm's disputes practice group at New Delhi. He focuses on civil and commercial litigation, oil and gas, competition, mining and arbitration. He regularly represents clients across different courts and tribunals and advises them on a wide array of legal issues.

His recent representations include advising and representing a leading global oilfield services provider in a dispute pertaining to award of an offshore oilfield services contract before the Supreme Court; representing a leading Asset Reconstruction Company in IBC proceedings before National Company Law Tribunal and National Company Law Appellate Tribunal; advising and representing a leading public sector undertaking before the anti-trust regulator in a matter pertaining to bid rigging in a public procurement tender; representing a leading public sector bank before the Board for Industrial and Financial Reconstruction; representing a multi-national corporation in an international commercial arbitration pertaining to a services and supply contract.

Ankit is fluent in English and Hindi.



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Languages: English and local Indian languages.

#15, 1st Floor
Firuz-Ara (West Wing)
Opp. Mantralaya,
Madam Cama Road
Mumbai 400021
T | 91 22 22860100
F | 91 22 22834102

www.verus.net

Krishnayan Sen

krishnayan.sen@verus.net.in

Ankit Jain

ankit.jain@verus.net.in