Law Senate
GLOBAL LAW FIRM LOCAL LAWYERS

How to Draft an Effective Arbitration Clause & Arbitration Agreement?

E-Book

Written by:

Mr. S. Ravi Shankar
Advocate on Record
Supreme Court of India

About E-Book

This e-book is intended to assist parties in drafting effective arbitration agreements and clauses. Keeping that in mind, and in addition to the suggested model clauses, the author has tried to highlight all important points which should be kept in mind while drafting any arbitration agreement. Users will be benefited from the points included in the book since they are explained in a simple way so that non-legal professionals and business men also can understand even the complex legal issues without the help of a lawyer. Parties, with questions regarding vetting or drafting of arbitration agreements or any issues on arbitration, can contact the author Mr. S. Ravi Shankar via emails, calls or by a personal visit.

About the Author

The Author is an experienced Supreme Court lawyer with more than 20 years of practice to his credit. He is holding a Master's Degree in Business administration and a bachelor Degree in Law. He is a known speaker and has travelled across the Globe. As a member of International Bar Association (IBA), international Law Association (ILA), International Trade Mark Association (INTA), Chartered Institute of Arbitration, Asian Corporate Law Association, Supreme Court Advocates Association. Law Senate Partner Mr. S. Ravi Shankar has extensive experience in arbitration matters and defending the enforceability of the Awards in courts throughout India and other countries. He is also having expertise in corporate legal matters and Supreme Court of India cases.

About Law Senate

Law Senate is a Full service Indian Law Firm, providing Legal Services and cross-border Consultation in various practice areas including Corporate Litigation, Domestic and International Arbitration, corporate advisory, FDI into India, Contracts, Intellectual Property, tax matters concerning domestic & overseas jurisdictions, Incorporation Services etc. The major work of the Firm is corporate legal work but the Firm has created a mark in servicing the individuals as well.

Law Senate focuses on high degree of legal expertise, commitment to excellence, efficiency and client satisfaction, based in India and serving globally. Firm, with its Indian offices and international presence, works closely with each client to understand practical aspects of client's business. In this way, firm is able to analyze client problems commercially, and provide practical advice and services. Law Senate having Associate offices across the Country and outside the Country is able to serve its clients more effectively because of its strong network of lawyers.

Law Senate Contact Details:

Email Id: contact@lawsenate.com, info@lawsenate.com

Office Numbers: +91-11-26102873, +91-11-26104773

Address: B-3/73, Safdarjung Enclave, Lower Ground Floor, New Delhi - 110029 India.

INDEX

Today arbitration agreement between the Contracting parties is one of the important aspects of any commercial contract. Since there is an impression among the business Community all over the World that Arbitration is the best way to resolve domestic and International Contract related disputes without much wastage of time in the Court of law. Due to the special efforts of United Nations Commission on International Trade Law (UNICITRAL) many Countries including India adopted almost a similar legislation to UNICITRAL Model Law on International Commercial Arbitration. Hence the format and procedure of Arbitration internationally is settled to a large extent and hence the differences in the above said aspect of International Arbitration are negligible. But still it is very important that the arbitration agreement or arbitration clause in a contract should be drafted without any room for a second interpretation. Because loosely drafted arbitration agreements easily get dragged to Court of law by the party, who may not be interested in resolving the matter.

Arbitration Agreement and Arbitration Clause

In normal circumstances when parties sign a commercial Contract, they also incorporate an arbitration clause in the dispute resolution part of the main contract. In such circumstances the arbitration clause is also negotiated by the parties and gets incorporated into the main commercial agreement. In such circumstances of negotiating the commercial contract and arbitration agreement together, parties are more worried about the commercials and financials of the contract. Moreover since no party signs a contract expecting problems, they become very generous and sign the contract without properly appreciating the consequences of the arbitration clause. When a contract is signed between a big company and a small Company the big Company is able to force the small Company to sign a dispute resolution clause in the fashion they want it. Without understanding the risk involved in signing one sided arbitration agreements the small

companies because of their eagerness to sign the contract, they even sign the contracts with one sided arbitration clause.

In case parties did not incorporate any arbitration clause earlier in the main Contract and in a later stage they decide to put a dispute resolution mechanism then either they can amend the main Contract to incorporate the arbitration clause or they can sign a new Arbitration agreement. But in both the situations parties should negotiate and finalise an arbitration agreement which is clear, fair and transparent.

Contents of an Arbitration Clause

The contents of an arbitration agreement may vary according to the nature of the main contract and the other aspects of the contract. But at the same time there are some fundamental aspects which are common for all types of contracts and situations. If care is taken to incorporate the said fundamental aspects of the Contract with clear terms then disputes can be solved in a fair manner. If the parties agree for one sided or unfair contract then Courts also cannot interfere in a later stage to ensure fairness between parties since it is a contract. The fundamental contents required for a strong arbitration agreement are as follows:-

1. Number and qualifications of the Arbitrators.
2. Procedure of appointing Arbitrations.
3. Name and address of the Arbitration centre if it is an Institutional Arbitration.
4. Seat of Arbitration
5. Language of the Arbitration Proceedings
6. Choice of Law in case of International Arbitrations

1. Number and qualification of Arbitrators:

The parties should decide and incorporate the number of Arbitrators to decide if any dispute arises with regard to a contract as per S.10 of the Arbitration and Constitution Act, 1996 otherwise it will consist of a sole Arbitrator. While deciding the number of Arbitrators the parties should keep in mind the Cost involved in appointing a Panel of more than one Arbitrator. But it is always advisable that the total number of arbitrators is an odd number so that in case of difference of opinion between the arbitrators while deciding the disputes, the decision can be taken by majority. In countries like USA even now appointment of non-neutral Arbitrators is also in Practice. But in India and many other countries even the party appointed Arbitrators are considered to be neutral arbitrators only.

The next aspect is the qualification of the arbitrators. In general cases where there is no requirement of a specific technical knowledge or a particular status then it is not necessary to specify any qualification to be appointed as an arbitrator. But in cases where there is a requirement of a particular type of knowledge or experience or exposure then the parties may mention the desired expectation as qualification of the Arbitrators. For example in a huge infrastructure project, if an Arbitrator has either an Engineering qualification from that discipline or has an exposure in executing or managing large infrastructure projects then he will surely be able to understand the complex details of the project execution than a Judge or a general Arbitrator. Hence in such cases the qualification of the Arbitrator may be specifically mentioned by the parties in the agreement itself. This kind of specification is also binding on the courts of Law. Hence in cases where one party goes to court seeking the appointment of an arbitrator due to non-cooperation from the other party, the court also has to appoint some Arbitrator having the required qualification as specified in the Arbitration agreement.

2. Procedure of appointing Arbitrators:

A well drafted arbitration clause will not only specify the number of Arbitrators and the qualifications of the arbitrators but also the process to be used in selecting and appointing them. In some cases where there are three arbitrators in the Panel each one of the party (if there are only two parties) shall decide and appoint one arbitrator each and both of those arbitrators jointly appoint the third one. If there is arbitration which specifies three arbitrators and not specifying the appointment Procedure will force the parties to go to Court seeking the court to make the appointment of arbitrators. Then the aggrieved party may choose to go on an appeal, which again will delay the starting of the Arbitration.

At the same time if one of the parties is not appointing the arbitrator to be appointed by them then the option is to go to the appropriate Court and file an application under S.11 of the Arbitration and Conciliation Act seeking to appoint the 2nd Arbitrator. Same way if two arbitrators appointed by the parties are not able to come to a conclusion in appointing the third arbitrator then the only option again is to file an application under S. 11 of the Arbitration and Conciliation Act, 1996 before the appropriate Court seeking to appoint the 3rd arbitrator.

In the case of parties choosing administered institutional arbitration to resolve the disputes and they have not exercised any choice with regard to appointment of Arbitrators, the arbitration centre may have its own procedure to appoint an arbitrator which can be followed. Hence if the parties decide to leave the appointment of arbitrator to the Arbitration Institute then a statement to that effect may be incorporated in the arbitration agreement. Hence it is advisable that in the initial stage itself the parties must come to an understanding, finalise and incorporate into the arbitration agreement or

arbitration clause, the procedure of appointment of arbitrator also. Such a decision will help the parties to avoid wastage of time by approaching Courts to decide the matter.

3. Name and address of the Arbitration centre:

While signing the contract most of the parties concentrate only on the commercials of the contract. Hence they put an arbitration clause with errors in important matters including in the name of the arbitration centre. These kinds of mistakes will nullify the arbitration clause itself. Hence it is advisable that, if the parties are choosing an Institution they should properly included the name and address of the arbitration centre in the contract in unambiguous terms.

4. Seat of Arbitration:

In big countries like India seat of arbitration is very important because one party may having its office in the Southern part of the Country and the other may be having its office in a north eastern State of the country. Both the parties should choose a convenient place for arbitration and put it in the Contract so that both need not go to Court to finalise these small things. As per S.20 of the Arbitration and Conciliation Act, 1996 if the parties fail to come to a Conclusion with regard to place of Arbitration, the Arbitrator will have the power to decide the same, also taking into Consideration of the parties.

But in the matters of International Arbitration it is very important to specifically mention the Seat of Arbitration in the Contract Place of Arbitration refers to the formal seat of Arbitration, that is, the place where Arbitration is considered as held from legal point of view. That means the Seat of arbitration need not be the place where the hearings takes place. The selection of seat of Arbitration in an International Contract is important, because of various reasons including enforceability of the Arbitral award,

judicial interference, visas, right to use foreign counsel, Costs of Arbitration and Selection of Arbitrators etc. The pre-enforcement regime of New York Convention is available only with respect awards rendered in Nations party to the convention. Parties should not at any point of time take this risk of choosing a place of Arbitration a Nation that is not a signatory to the New York Convention unless there are strong and unavoidable reasons for that. Moreover even among the signatories of the New York Convention, the different standards applied by the Courts as to the grounds for challenging and setting aside arbitral awards. Even though India is a Signatory to the New York Convention it has not approved China as a Convention country for the purpose of enforcement of International arbitral awards, even though China is also a signatory to the New York Convention.

5. Language of the Arbitration Proceedings:

India is having so many local languages and there are many people who communicate all their business transactions in the languages other than English and Hindi. In such a situation conducting Arbitration keeping the relevant documents in different languages and deciding the issue is very difficult. More over the witnesses will also be not able to understand the relevant documents. Hence it is advisable to specify the language of Arbitration in the Arbitration agreement itself.

6. Choice of Law in case of International Arbitrations:

Unlike in the case of Companies belonging to the same legal system, Contractual relationships between persons belonging to different legal systems may give rise to Various questions of International law such as the applicable law, competent forum etc., Hence International Commercial arbitration gives rise to questions as to the choice of applicable law and the Jurisdiction of the courts.

In International Arbitrations it is possible that four different laws govern the contract and the Consequential arbitration in the four levels of the proceedings. The four levels are (1) the proper law which governs the main Contract (2) the proper law which governs the arbitration agreement (3) the law governing the arbitration proceedings (4) the law applicable to the reference. In many cases all the four levels may be governed by either one or two laws.

Model Arbitration Clauses

Normally it is not appropriate to suggest some model of legal clauses, since every contract may have so many different features which may influence the Arbitration clause of that contract. But still some model clauses are suggested in this chapter just to make the readers have an academic understanding of the subject

1. Model Clause for an ad-hoc or Non- Institutional Arbitration:

The Model Clause suggested by UNICITRAL and ICC (International Chamber of Commerce):

The Model arbitration clause suggested by UNICITRAL and ICC is 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 UNICITRAL Arbitration Rules as at present in Force.

Note: - Parties may wish to consider adding:

The appointing authority shall be……. (Name of the Institution or person)

The number of Arbitrators shall be ……

The place of Arbitration shall be …….. (Town and Country)

The languages to be used in the arbitral proceedings shall be ……

The arbitration shall be commenced by a request for arbitration by the claimant, delivered to the respondent. The request for arbitration shall set out the nature of the claim(s) and the relief requested. Within [45] days of receipt of the request for arbitration, the respondent shall deliver to the claimant an answer plus any counterclaim(s), setting out the nature of the counterclaim(s) and the relief requested.

There shall be three arbitrators, appointed as follows:

a) The claimant shall an arbitrator in the request for arbitration and the respondent shall appoint an arbitrator in the answer, and the two arbitrators so appointed shall, within [45] days of delivery of the answer, appoint a third arbitrator who shall act as the presiding arbitrator;
b) If either party fails to appoint an arbitrator within [45] days of receipt of notice of the appointment of an arbitrator by the other party, such arbitrator shall at the written request of that other party be appointed by [the appointing authority];
c) If the two arbitrators to be appointed by the parties fail to agree upon the presiding arbitrator within [45] days of the appointment of the second arbitrator, the third arbitrator [, who shall not be of the same nationality as either of the two arbitrators or of the parties,] shall be appointed at the written request of either party by [the appointing authority];
d) Any challenge of an arbitrator for lack of impartially or other ground shall be decided by [the appointing authority];
e) If a vacancy arises, the vacancy shall be filled by the method by which that arbitrator was originally appointed provided that, if an arbitrator appointed by a party fails or refuses to participate, the two other arbitrators may proceed with the

arbitration and render an award if they determine that the failure or refusal to participate was unjustified.

The procedure to be followed during the arbitration shall be agreed to by the parties or, failing such agreement, by the tribunal.

Default by any party shall not prevent the arbitrators from proceeding to render an award.

The tribunal may make its decisions by a majority. In the event that no majority is possible, the presiding arbitrator may make the decision(s) as if acting as a sole arbitrator.

2. Model Clause for an Institutional Arbitration

Model clauses are readily available from each arbitral institution.

The ICC model arbitration clause is:

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 LCIA suggests the following:

Any disputes 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 arbitrations shall be (once/three).

The seat, legal place, of arbitration shall be (City and / or Country).

The language to be used in the arbitral proceedings shall be [ ].

The governing law of the contract shall be the substantive law of [ ].

The ICDR of the AAA offers the following:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the American Arbitration Association in accordance with its International Arbitration Rules.

The parties may wish to consider adding:

a) The number of arbitrators shall be [one or three];
b) The place of arbitration shall be [city and/or country]; or
c) The language(s) of the arbitration shall be _____.

For arbitration before the AAA, unlike arbitration before the other leading arbitral institutions, he parties have a choice among multiple sets of arbitration rules (International Arbitration Rules, Commercial Arbitration Rules, Construction Industry Arbitration Rules, and others). For international contracts, the parties should specify the International Arbitrational Rules unless there is a particular reason to choose another set of Rules.

The following clause can be adapted as a general purpose clause for institutional arbitration:

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 [designated set of institutional] Rules, which are deemed to be incorporated by reference into this clause.

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

The place of arbitration shall be [city and country].

The language of the arbitral proceedings shall be [ ].

As discussed further below (Chapter13), any arbitration clause should be accompanied by a choice of law clause, either in a separate section of the contract or together with the arbitration clause in a clause entitled “Arbitration [or Dispute Resolution] and Governing Law.”