AN ALL-IMPORTANT ART – DRAFTING OF INTERNATIONALLY ENFORCEABLE ARBITRATION AGREEMENT

S.ADHISHTAA[1]

I. Introduction: Significance of Arbitration in the international stage

With the increase in cross-border trade and investment, parties from different jurisdictions often need a neutral, enforceable, and efficient mechanism to resolve disputes. International arbitration has emerged as the preferred method of dispute resolution in global commerce, offering flexibility, party autonomy, and the ability to enforce arbitral awards across more than 170 jurisdictions under the New York Convention. It allows parties to avoid unfamiliar or potentially biased foreign courts, promoting legal certainty and trust in international transactions.

However, international arbitration can only function effectively when grounded in a properly drafted and enforceable arbitration agreement. The arbitration clause, often inserted as a standard boilerplate, forms the cornerstone of the entire arbitral process. Yet, any ambiguity, inconsistency, or procedural defect in its drafting can derail proceedings, leading to jurisdictional challenges, unenforceable awards, or expensive parallel litigation.

This article explores how to draft arbitration agreements that are enforceable under international law, analyzes relevant case law, identifies modern challenges in arbitration drafting, and proposes forward-looking insights for practitioners operating in today's evolving transnational legal landscape.

II. Legal Frameworks: Governing the international Arbitration Agreements

The enforceability of an international arbitration agreement hinges fundamentally on the legal frameworks enshrined in global instruments and national legislation. Foremost among these is the 1958 **New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards**, which obliges contracting states to uphold valid arbitration agreements, recognise and enforce arbitral awards, subject only to a few narrow exceptions. Article II of the Convention mandates that arbitration agreements be in writing and unequivocally demonstrate the parties'

[1] The author is a student of National Law School, Cochin.

intention to refer disputes to arbitration. Courts are prohibited from entertaining litigation when a valid arbitration agreement exists unless the agreement is "null and void, inoperative or incapable of being performed."

Complementing the Convention is the **UNCITRAL Model Law on International Commercial Arbitration**, which resulted UNCITRAL Model law which is adopted in whole or part by over 85 jurisdictions. Articles 7, 35, and 36 of the Model Law outline key standards for enforceability, such as writing requirements, party consent, arbitrability, and public policy limitations. Many domestic legislations including the Arbitration and Conciliation Act, 1996 in India or the Arbitration Act, 1996 in the United Kingdom, reflect these international standards, adding procedural clarity and predictability. These overlapping frameworks collectively establish a pro-arbitration regime, but they also impose strict compliance requirements. A well-drafted arbitration clause must therefore navigate both international norms and local enforceability conditions.

III. Drafting Effective and Enforceable Arbitration Agreements: Clause-Level Analysis

At the heart of any enforceable international arbitration agreement lies the careful construction of the clause itself. It is not enough to simply express an intention to arbitrate, what matters is the legal precision, structural integrity, and practical operability of the clause. Arbitration agreements that are vague, contradictory, or procedurally incomplete often fall at the threshold of enforcement. To avoid these pitfalls, a series of essential and optional drafting rules must be observed.

1. Use Clear and Mandatory Language

The foundational rule of drafting is to ensure the language is precise and unequivocal. Courts across jurisdictions have invalidated arbitration clauses that used discretionary or ambiguous terms such as "may refer to arbitration" instead of "shall refer." The agreement must clearly reflect the parties' binding intention to submit disputes to arbitration, leaving no room for interpretation.

For instance, in ***Premium Nafta Products v. Fili Shipping*** **(UKHL),** the court emphasized that a properly drafted arbitration clause creates a "one-stop" dispute resolution mechanism. Words

like "shall be referred to arbitration" make it clear that arbitration is mandatory rather than elective.

2. Define the Scope Broadly and Coherently

An enforceable arbitration clause must articulate the scope of disputes it covers. The gold standard is to include language like "any dispute arising out of or in connection with this agreement," which covers both contractual and non-contractual claims.

Moreover, if certain disputes are excluded or carved out (e.g., for litigation or expert determination), the distinction must be express and carefully drafted. The ADB article warns that an unclear division between arbitration and litigation, such as saying "tax issues shall be resolved by courts" without defining "tax issues," can render the entire clause ambiguous and unenforceable.

3. Specify the Seat of Arbitration & Procedural law

The seat of arbitration, not to be confused with the venue, determines the procedural law (lex arbitri) and which courts have supervisory jurisdiction. This should be explicitly stated, such as:

"The seat of arbitration shall be Singapore."

Failing to identify the seat invites unnecessary litigation over jurisdiction and procedural control. The Meredith article explains that even if the rest of the clause is well-drafted, omitting the seat can create conflicts over which national laws apply. It is very important to note that the procedural law selected cannot be different from the procedural law applicable to the Seat.

4. Choose Between Institutional and Ad Hoc Arbitration

The clause must indicate whether the arbitration will be institutional (administered by a body like SIAC, ICC, LCIA) or ad hoc (where parties manage proceedings themselves under chosen rules, such as UNCITRAL). An institutional clause should name both the institution and the rules:

"...shall be administered by the Singapore International Arbitration Centre (SIAC) in accordance with the SIAC Rules in force at the time."

Meredith warns against hybrid formulations like combining ICC Rules with SIAC administration, or naming an institution not suited to the chosen seat, which courts have labeled pathological.

5. Designate the Number and Appointment Method of Arbitrators

Arbitration clauses should clearly specify whether the tribunal will consist of one or three arbitrators, and the appointment mechanism. Common formulations include:

"Each party shall appoint one arbitrator, and the two arbitrators shall appoint a third, who shall act as the presiding arbitrator."

Failing to provide a default rule for appointment can delay proceedings, force court intervention, or even invalidate the agreement under certain national laws.

6. State the Language of Arbitration

It is good practice to state the language of arbitration, especially in contracts involving multilingual parties:

"The language of the arbitration shall be English."

Failure to specify the language of Arbitration may result in difficulties in later stage. If the procedural law applicable to the seat of Arbitration specifies a default "language of Arbitration" then that language will become the language of Arbitration.

7. **Governing Law**

In addition, the clause should identify the governing law of the underlying contract and. It is important to note that parties may choose a neutral country's law also as the substantive law. For example one party to the Contract is from India and the other is from China, they may choose English law as the substantive law. Courts in ***Enka v. Chubb*** **(UKSC) and** ***Kabab-Ji v. Kout Food Group*** **(UKSC)** have emphasized the importance of distinguishing between the two, as they govern different legal questions. It is advisable to specify procedural, substantive

and law applicable to the Arbitration agreement to avoid any adverse view from the Arbitral tribunal in a later stage.

***Optional Clauses That Enhance Enforceability and Efficiency*:**

Beyond these essentials, optional clauses can add significant strategic value and enforceability clarity:

Confidentiality Clauses: While most institutional rules assume confidentiality, stating it explicitly reinforces privacy expectations and protects trade secrets.

Joinder and Consolidation: Including these allows related disputes involving subsidiaries or multiple contracts to be resolved in one proceeding.

Multi-Tiered Clauses: If negotiation or mediation is required before arbitration, the clause must clearly define whether these are mandatory steps, the time frames, and triggering events for escalation to arbitration. Otherwise, courts may find the clause incomplete or inoperative.

Waiver of Appeal on Points of Law: In jurisdictions like the UK, parties may agree to exclude appeals under the Arbitration Act. Including such a waiver bolsters finality.

IV. The Perils of Poor Drafting: Common Pitfalls in Practice

Despite the legal scaffolding that supports arbitration, enforcement can still fail if the drafting of the agreement is flawed. As Ian Meredith points out, arbitration clauses are often treated as routine "boilerplate", pasted at the end of contracts without meaningful review. This approach is dangerous. Clauses that are internally inconsistent, ambiguously worded, or silent on key procedural aspects are labelled "pathological" and risk being deemed unenforceable.

Illustrative examples abound. In certain cases, clauses have provided for arbitration under one institution's rules but administered by another institution seated in a different jurisdiction creating procedural chaos and forum uncertainty. In others, clauses have failed to specify the number of arbitrators, the seat of arbitration, or the applicable rules forcing courts to fill the gaps or, worse, invalidate the agreement. Such drafting failures directly undermine the parties' intention to resolve disputes efficiently and confidentially. Courts are increasingly inclined to

uphold arbitration clauses if they can discern clear intent, as evidenced in ***Enercon (India) Ltd. v. Enercon GmbH.*** However, reliance on judicial goodwill is a poor substitute for precise drafting.

V. Judicial Interpretation and Case Law Trends

Jurisprudence across jurisdictions reveals how courts interpret and enforce arbitration agreements. In ***Fiona Trust v. Privalov***, the UK House of Lords set the modern tone by affirming a liberal construction of arbitration clauses. Lord Hoffmann's principle of "one-stop adjudication" emphasized that commercial parties intend all their disputes, however arising, to be settled in a unified forum. Similarly, the Indian Supreme Court in *Enercon* demonstrated that even a poorly drafted clause may survive if the parties' intent is clear and the dispute is arbitrable.

However, the principle of consent remains foundational. In ***Dallah v. Pakistan***, the UK Supreme Court refused to enforce an award against a party that was not a signatory to the arbitration agreement, reiterating that non-signatories cannot be compelled to arbitrate absent clear evidence of implied or substituted consent. These cases collectively underline that enforceability rests on clarity, mutuality, and respect for due process.

VI. Contemporary Challenges and Evolving Trends

Today's arbitration landscape is evolving to meet the demands of digital economies and multi-jurisdictional commerce. The inclusion of arbitration clauses in smart contracts presents novel challenges. While such clauses may be coded into blockchain-based agreements, questions remain about how consent, scope, and seat are identified in machine-readable formats. Legal systems have yet to conclusively determine whether these forms satisfy the writing requirements under the New York Convention.

Additionally, environmental, social, and governance (ESG) disputes are on the rise, often involving states or public interest dimensions. Arbitration clauses in such contexts may require hybrid procedures combining arbitration with expert determination or requiring transparency obligations.

The use of AI-assisted ODR platforms also raises concerns about fairness, neutrality, and data privacy. While these innovations promise efficiency, they must still adhere to the core principles of party autonomy and procedural integrity to be enforceable under international conventions.

VII. Conclusion

The arbitration agreement may appear as a small component in an international contract, but its consequences are immense. It determines the forum, procedure, and enforceability of any dispute resolution mechanism. In an increasingly complex and borderless commercial environment, the cost of a poorly drafted clause can be catastrophic leading to litigation, delay, and unenforceability. Drawing from institutional guidance, judicial trends, and modern best practices, drafters must treat arbitration clauses not as boilerplate, but as bespoke instruments of transnational justice. Precision, clarity, and foresight remain the cornerstone of an enforceable and effective arbitration agreement.