NEGOTIATING AN INTERNATIONAL ARBITRATION CLAUSE – PART 2

Neutral Seat is a globally recognized concept that allows both the parties to the contract to choose a third country as the seat of arbitration. Such a neutral seat is selected, avoiding the countries to which parties to the contract belong to, as the seat of arbitration to avoid one party having an advantage over the other before the National Courts of that country. For example: When one party is from China and the other party is from India, parties jointly choose Singapore as the seat of arbitration, excluding both China and India to have jurisdiction over the matter and Singapore becomes the neutral seat. It is important to note that the neutral seat also comes with the procedural law of that country. But While negotiating a seat, various other aspects should also be taken into consideration including the distance of the seat for both the parties, the capacity of the supervising courts, procedural law of that seat, costs of legal services etc., It is also important to choose a seat that is a signatory to New York Convention[1] to ensure the enforceability of the arbitration award in the countries of the parties as well as the countries where the assets of the parties are situated.

Limitation Law of the Seat is applicable in the arbitration and hence while selecting a seat, parties should also look into the limitation law of that country and also initiate proceedings before the lapse of the limitation period. For example: In Taiwan the Limitation period for claiming damages after termination of the contract is about 15 years whereas in India it is only 3 years.

Negotiating applicable laws is one of the most important aspects of negotiating and finalizing an arbitration agreement. Every arbitration agreement should specifically state three laws i.e., procedural law, law governing the contract and the law governing the arbitration agreement. The parties have the liberty to choose the laws of three different countries or the laws of one country only. As stated above, procedural law is the arbitration law applicable to the seat (example: Singapore International Arbitration act for Singapore seat). It is also important that the procedural law chosen should not be different from the arbitration law of the seat. For example: If India is chosen as the seat, the procedural law should be only Arbitration and Conciliation Act, 1996 and it cannot be international arbitration act of Singapore. The law governing the contract are the laws to be applied by the Arbitral tribunal to determine the rights and obligations of the parties which include contract law, code of civil procedure etc., The law governing the arbitration agreement is also essential because of the concept of separability of arbitration agreement from the main contract. Since Arbitration agreement even though is a part of the main contract it is treated as a separate contract and hence the law governing the arbitration agreement is the law that governs the arbitration

[1] New York Convention on Recognition and Enforcement of Foreign arbitration awards.

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agreement. To avoid any misinterpretation, parties are advised to specifically state their specific choices for all the three applicable laws and if they are not specifically chosen, the arbitral tribunal shall determine the same.

The Language of Arbitration is the next important point for negotiation. Every country has a default language of arbitration and some of the arbitral institutions also have default languages of arbitration in their Ruls. If a law provides for default language of arbitration then in case of failure of parties to choose a specific language of arbitration, the default language shall become applicable to the case. In the same way in case of failure of parties to choose the language of arbitration, if the arbitral institution rules provide for the default language then that default language will become the language of the arbitration case. If the law does not provide for a default language of arbitration, then the tribunal will have the power to determine the language of arbitration, in the absence of parties specifying the same. While determining the language of arbitration, the language of the contract, the language of communication between parties are indicators for an arbitral tribunal to arrive at a conclusion. For example if the contract between the parties is in English and all the communications between the parties are in English then the tribunal will tilt in favour of English. But if there is a default language clause then tribunal may not have the liberty to decide another language as the language of arbitration. But while negotiating the language of arbitration, the parties should give due importance to the convenience of both the parties, availability of arbitrators, contract documents, availability of counsels etc., to avoid unnecessary translations in a later stage.

Indian Seat of Arbitration is also becoming acceptable after Arbitration And Conciliation (Amendment) Act 2015, which came into effect from 23rd October 2015. The main reason for the change in the mindset of the International parties include timelines prescribed for completion of India seated arbitration proceedings (Section 29 A), Introduction of Schedules V and VII ensuring neutrality of arbitrators, costs under section 31 A of the act etc., The most important attraction for the foreign parties to choose Indian seat lies in Section 36 which requires a mandatory pre deposit for challenging the Indian seated Arbitration awards which compels the parties to settle the matter instead of dragging it on.

From the above it can be understood that one of the most important features of a contract that requires detailed negotiation is an arbitration clause and if it is not negotiated properly it can make the dispute resolution expensive and unaffordable.