

Negotiating an International Arbitration clause- Part-1

Normally, parties do not realize the importance of negotiating dispute resolution clauses, while signing the contract since the commercial team which negotiates contracts would be focusing only on the commercial terms. But, the dispute resolution clause if not negotiated properly keeping in mind the requirements of a complete and enforceable dispute resolution clause, it may lead to either disproportionate expenses or enforceability related issues. Parties are advised to incorporate Arbitration as the dispute resolution mechanism in International contracts, mainly to avoid going to the country of the opposite party and fighting a litigation. The other benefits of choosing arbitration procedure include enforcement of Awards on the strength of New York Convention on Recognition and Enforcement of Foreign Arbitration awards, neutral seat, neutral law, uniform mechanism (UNCITRAL Model Law), less interference by National Courts etc., Now let us deal with the points which are required to be negotiated and the reasons for the same.

Seat of Arbitration, is the first point for negotiation because it expresses the choice of parties about the place (Country & city) where the arbitration shall take place. It is important to note that once you choose the seat you are automatically choosing the Procedural law and the Courts which shall supervise the arbitration. Procedural law is the Arbitration law of the country, where the seat is situated. For example, if you choose Singapore as the seat, International Arbitration Act of Singapore is the Procedural law and the courts in Singapore become the supervising Courts. The Courts in the seat shall have various powers including appointment and removal of arbitrators, to deal with the challenge to the arbitration award, interim orders, etc., If the supervising courts are supportive to arbitration, give consistent interpretations of law and with minimum interference in to arbitrations, then that would be an ideal situation. While negotiating the seat, you should keep in mind the distance of the seat, language normally used in the country, supportive nature of the supervising courts, Arbitration law of that country etc., If a convenient and effective seat is selected by parties, it would create a comfortable dispute resolution atmosphere.

Administering Arbitral Institution is another important point which requires proper negotiation. There are various popular arbitral institutions in the world ensuring high levels of services. But each of those institutions have certain limitations and special features also. For example, International Chamber of Commerce (ICC), Singapore Arbitration Centre (SIAC) are the two most popular arbitral institutions administering arbitrations globally. Many of us have a wrong impression that by selecting SIAC as the administering institution, the arbitration will happen in Singapore, which is incorrect. Both ICC & SIAC do not have a default arbitration seat in their rules. If parties do not specifically choose a seat of Arbitration in their arbitration clause, the arbitration shall happen in the default seat mentioned in the Arbitration Rules. For example, if you choose Hong Kong International Arbitration Centre (HKIAC) as the administering Arbitral institution, then if parties do not specify the seat of Arbitration, automatically Hong Kong will become the seat of Arbitration, since Hong Kong is the default seat of arbitration, as per the HKIAC Arbitration Rules. Since there is no default seat provided in ICC and SIAC

Arbitration Rules, if you do not choose the seat, then Arbitral tribunal applying the principles of international law, shall determine the seat of Arbitration. There are some country specific restrictions also, that may impact the arbitration clauses. For example, Foreign arbitration institutions are not allowed to administer arbitrations in People's Republic of China (PRC) and hence if you wish to conduct arbitration in a Chinese city you need to choose only a China registered arbitral institution to administer the arbitration. There are very good Arbitral institutions like China International Economic and Trade Commission (CIETAC), Shanghai International Arbitration Centre (SHIAC), Beijing International Arbitration Centre (BIAC) etc., The fee schedule of these institutions is much cheaper than the other international Arbitral Institutions and most of their Arbitrations conclude in six months. Some Arbitral institutions reduce the level of party autonomy in certain aspects. For Example, Indian Council of Arbitration (ICA) assumes the power to appoint the Chairman of the tribunal and does not allow the party nominated arbitrators to choose the chairman. Hence, an Arbitral institution should be selected after considering the provisions of the Rules, local arbitration law, provisions of emergency arbitration, Fee schedule, past performance of the institution etc.,

Number, qualifications and the appointment procedure of arbitrators is another important negotiable point. Normally, parties incorporate a three-member arbitration tribunal in international contracts but when the value of the dispute is not that big, the arbitration cost becomes very high in terms of the percentage. Hence, parties can have two types of arbitration categories, sole arbitrator if the value of the dispute lower than a certain amount and above that threshold, three-member tribunal. Institutions like SIAC & ICC has default expedited procedure in their Rules. That means if the sum in dispute less than 2 Million USD (ICC Rules), even if the arbitration clause provides for a three-member tribunal, ICC would appoint a sole arbitrator and do the arbitration under Expedited procedure. The Parties, should analyze the potential disputes which might arise out of the contract and then customize the arbitration clause. One of the important advantages of arbitration is the party autonomy to specify qualifications for an arbitrator. For example, in a construction contract, you can specify that the arbitrator shall be an engineer with some years of experience.