

# Arbitration Agreement

## (Domestic & International Arbitrations)

*Written By*

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## What is an Arbitration agreement?

Arbitration agreement is a written agreement between the parties to a contract or otherwise, committing themselves to resolve all the issues arising out of a contract or otherwise through arbitration. It can be either a separate agreement between parties to a contract (or any legal relationship) or a clause in the contract itself by which both the parties agree to resolve the disputes arising out of the contract or otherwise by way of an Arbitration only. Arbitration agreement between the parties takes away the right of the parties to approach the Court to resolve their disputes. The parties in case of disputes between them, with regard to the issues covered by the arbitration agreement, have to necessarily choose arbitration only. If any one of the party approaches directly a Court of law seeking remedy in a matter, where there is an arbitration clause between them, the other party can approach the court, file an application seeking the court to refer the matter to arbitration since there is an arbitration clause in the contract. The Court will be left with only an option to refer the matter to arbitration.

Section 7 of the Arbitration and Conciliation Act, 1996 defines arbitration agreement as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

### Format for an arbitration agreement:

There is no fixed format or statutory design for an arbitration agreement. It is enough if the recitals of the arbitration agreement state that the parties want to resolve their disputes by way of an arbitration. The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement or from the communication between parties. But to make the arbitration agreement effective and unambiguous the agreement should state the following items:

1. Place or seat of Arbitration or Jurisdiction
2. Language of the arbitration proceedings
3. Number of arbitrators
4. Procedure for appointment of arbitrators
5. Arbitration procedure to be followed
6. Pre-conditions if any

### What is Arbitration Agreement as per the Arbitration and conciliation Act, 1996?

Section 7 of the Arbitration and conciliation Act,1996 defines arbitration agreement as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined relationship either contractual or not. But arbitration agreement has to be in writing. Hence oral arbitration agreements are not recognised as per law.

## What is not an Arbitration agreement?

Where there is only an intention of parties to decide in future the issues if any to refer to arbitration, in case any dispute arise between them then that cannot be a valid arbitration agreement. Same way an agreement for mediation cannot be treated as an arbitration agreement. A clause empowering somebody to immediately resolve any controversy relating to specifications, designs, drawings, quality of workmanship or material used etc., and providing that his decision shall be binding on contractor, held, is not an Arbitration clause **(2014) 1SCC113-B**.

## What is an International Commercial Arbitration Agreement?

International commercial arbitration is an arbitration relating to disputes arising out of legal relationships, arising out of legal relationships whether contractual or not, considered as commercial under the law in force in India and where at-least one of the parties is a foreigner if an individual or Company or an association which is controlled by foreigners.

**The important aspects which should form part of an International commercial arbitration agreement to make it effective and unambiguous are as follows:**

- (a) Choice of law
- (b) Place of Arbitration
- (c) Procedure to appoint arbitrators
- (d) Details of the Institutional arbitration
- (e) Language of arbitration
- (f) Seat of arbitration
- (g) Arbitration procedure

(a) **Choice of Law:** In International arbitration matters, the parties to the contract can choose any law as per which arbitrator has to decide the dispute between the parties and any law of any country which will supervise or decide the procedure of arbitration. Parties can agree to any one of their jurisdictions to with regard to the procedural law so-that they need not travel to a third country for appointment of arbitrator or to challenge the award etc., Even if both the parties decide to either choose a third law which is not the jurisdiction of both the parties, the contract is valid and the arbitration will happen as per the contract terms. But it is important to note that the seat of arbitration or the law of the country which governs the procedural law of the contract must be a signatory to New York convention and recognised by both the countries from which the parties are from. If any one of the countries from where parties are resident of, does not recognise the country from which seat of arbitration is chosen then executing the award in that country will become a major problem. Hence parties must be careful in choosing the law which will govern the contract and procedural law governing the contract.

(b) **Place of Arbitration:** Place of arbitration is very important in International arbitrations. In many situations place of arbitration is the same as seat of arbitration. In some cases place

of arbitration is only the venue of arbitration and hence it does not have much legal importance. If the said word means seat of arbitration then the country in which the place of arbitration is situated decides the procedural law of the contract. Hence any court assistance including appointment of arbitrators, any interim orders or application seeking to set aside the award has to be filed in that jurisdiction only. But the recitals of the contract will decide the nature of the word "*place of Arbitration*".

- (c) **Procedure to appoint Arbitrators: (Adhoc-Arbitration)** The parties have to specifically state in the arbitration agreement, how they wish to appoint the arbitrators. In some cases they may like to have a panel of arbitrators and in some cases a single arbitrator. In heavy matters where the stakes are high or when there are complex issues to be decided parties choose normally a panel of three arbitrators. In majority of the cases when three member panel decides the matter, each party may appoint one arbitrator and the third will be selected by both the arbitrators. When there is no procedure is agreed and incorporated into the contract, the parties have to approach any one of the High Court having Jurisdiction to decide the panel of arbitrators. It is better to decide everything in advance and incorporate into the contract because approaching the court for appointment of Arbitrators under Section 11 of the Arbitration and conciliation Act, 1996 takes a minimum of 3 months' time to conclude.

**Model Arbitration Clause:** Any dispute arising out of the contract shall be settled by Arbitration. The place of Arbitration shall be New Delhi. The language of arbitration shall be English. There will be a sole arbitrator whose decision will be final. The applicable law is Arbitration and Conciliation Act, 1996. As per the Arbitration and Conciliation Act, 1996 and as per the following procedure:

- (1) There will three member arbitration tribunal. The claimant shall appoint the arbitrator in his notice seeking arbitration. Within 15 days from the date of receipt of the notice the respondent has to appoint one arbitrator. Both the arbitrators will appoint the third arbitrator within 15 days from the appointment of the 2<sup>nd</sup> arbitrator.
- (2) The arbitration shall commence on filing of the claim by the claimant. From the date of service of the claim petition to the Respondent, the respondent needs to file the counter within 30 days. The claimant can file rejoinder if any within 10 days from the date of filing of the counter by the respondents.
- (3) The chief examination of the witnesses shall be by way of affidavits and all cross examinations will be completed on one hearing day, by the parties.
- (4) Each of the arbitrator shall be paid a lump sum fee of Rs. 5,00,000 irrespective of the number of hearings or claim amount.
- (5) The arbitration shall be concluded within 100 days from the date of filing of the claim petition.

**Procedure to appoint Arbitrators:**

**Institutional Arbitration** If the parties decide to go for institutional arbitration, then it should be clearly stated in the arbitration agreement. The name and place of the

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Institutional arbitration should be specifically mentioned without any mistake. In case there is a mistake then the parties have to approach the Court for a decision. In cases where parties agree for the Institutional arbitration there are many advantages like, fee structure is pre-fixed by the Institution, Arbitration venue is arranged by the Institution, Institution has its own panel of arbitrators and they also have all the facilities & rules of arbitration. Hence it is advisable to choose institutional arbitrations. ICC (International Chamber of Commerce), Singapore International Arbitration Centre (SIAC), LCIA (London Court of International Arbitration), ICAI (Indian Council of Arbitration-Delhi), Delhi International Arbitration Centre (DAC- Managed by High Court of Delhi) etc., are some of the famous Institutional arbitration Centres. If the parties choose to go for Institutional arbitration Centre then they can incorporate an arbitration clause as follows:

**Domestic Arbitrations:**

**Model Arbitration clause:** “The parties will resolve their disputes by way of Arbitration. There will be a Panel of three Arbitrators. Each party will choose one arbitrator and both those arbitrators will choose the third one. The Arbitration shall be conducted in Delhi International Arbitration Centre, Delhi High Court Campus, New Delhi. The Rules of Delhi Arbitration centre will apply for the proceedings.”

**Model Arbitration clause:** “The parties will resolve their disputes by way of Arbitration as per the Rules of Delhi International Arbitration Centre, Delhi High Court Campus, New Delhi. The sole Arbitrator shall be appointed by the Delhi International Arbitration Centre.”

**International Arbitrations:**

**Model Arbitration clause** “The Parties will resolve their disputes by way of Arbitration. The seat of arbitration will be Singapore and arbitration will be conducted as per the Rules Singapore International arbitration Centre (SIAC). A sole Arbitrator appointed by SIAC shall decide the disputes. The Arbitration proceedings will be conducted in English only. The law applicable shall be Indian law.”

**Model Arbitration clause** “The disputes arising out of this contract shall be decided by a sole Arbitrator appointed by the Delhi International Arbitration Centre (DAC), Delhi High Court Campus, New Delhi. The Arbitration proceedings will be conducted as per the Rules of DAC. The language of Arbitration shall be Hindi. The seat of Arbitration will be New Delhi. The law applicable will be English law.”

- (d) **Language of Arbitration:** Language of arbitration plays an important role in International Arbitrations. When parties belong to countries with different communication languages there may be a lot of documents in local languages. In such a situation to avoid inconvenience to the parties and to the arbitrator parties should decide the language of arbitration in advance and incorporate into the arbitration clause itself. In some countries they insist the arbitration must be conducted in the local languages only (e.g.: China and Taiwan).
- (e) **Seat of Arbitration:** The parties should choose the place of arbitration and incorporate it in the contract. The importance of the place of arbitration is restricted to the convenience

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of the parties only. In majority of the domestic arbitrations arbitrator decides the venue of the arbitration, of course taking into consideration the convenience of all the parties.

- (f) **Arbitration Procedure:** Both the parties can decide the arbitration procedure in advance and incorporate into the contract or into the arbitration agreement in advance. If it is an institutional arbitration the procedure of the arbitration institution shall be followed. Where the arbitration procedure is not decided by the parties in advance the arbitrator in consultation with the parties may decide the arbitration procedure. Arbitration procedure includes the filing of the claim, reply by the respondents, examination of witnesses, fees for the arbitrators, adjournments, summons to witnesses, arguments, costs, arbitration award etc.,

**Arbitration agreement decided in exchange of emails, letters etc.:** From the exchange of mails or letters if intention of the parties, to go for arbitration can be gathered then it can be a binding arbitration agreement, even in the absence of the signature of the parties in a paper. S.7 of the Arbitration and conciliation Act, 1996 recognises an arbitration agreement if it is contained in an exchange of faxes, telex, tele-grams or other means of telecommunication which provide a record of the agreement. An oral acceptance of an arbitration clause is not a valid acceptance.

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