

IMPORTANT ASPECTS IN DRAFTING OF ARBITRATION

AGREEMENT

Arbitration is an out of court settlement mechanism where the parties select their own Arbitrator/s wherein the Business issues are resolved more quickly, efficiently and constructively and also a method where the parties involved in the disputes can maintain their relationship.

The Arbitration agreement is the document which is the basis of reference of disputes to Arbitration. It can be either in the contract itself or in the form of a separate agreement.

➤ Requirements of an Arbitration Agreement.

1. **parties to be ad-idem** - That is parties must agree to the same thing in the same sense. There must be consensus ad-idem between the parties. Parties are to be ad-idem about the dispute to be decided by the arbitrators.
2. **to be in writing** – The effectiveness of an arbitration clause first of all depends on proof of its existence. It should therefore generally be in writing. It is normally considered to be in writing if it is contained in a document signed by the parties, an exchange of letters, telex, telegrams, or other means of telecommunication which provides a record for the agreement, of an exchange of statement of claims and defence in which

the existence of the agreement is alleged by one party and not denied by the other.

3. **Writing and signing in electronic contract –**

In view of enactment of the Information Technology Act, 2000 the contract entered through electronic communication in compliance with the provisions of that Act is valid and enforceable by law and such contract complies with the requirement of writing and signing as provided in Section 7 of the Act.

4. **Arbitration agreement must be clear, certain & definite -** Arbitration of the parties to the agreement. Arbitration clause must not be ambiguous. It must be certain and capable of being made certain or capable of being made certain.

Construction Of Arbitration Clause In The Contract – Endeavour should always be find out the intention of the parties, and that intention has to be found out by reading the terms broadly, clearly and without being circumscribed. However on construction, arbitration clause must be expressly or impliedly spelt out.

“Dispute” –Meaning Of – A dispute arises when an assertion of a right is made by one party and there is repudiation thereof by the other on whatever grounds. A repudiation may be either express or implied and may be by words or by

conduct. Failure to pay under a claim of right is a dispute. A mere failure to pay may constitute a difference between the parties.

Existence Of Dispute- pre requisite- The existence of disputes contemplated by an arbitration agreement is essential condition of and a pre-requisites to the exercise of jurisdiction by an arbitrator. Reference of an arbitration can be made only when a dispute arises between the parties to the arbitration agreement.

Essential Of Arbitration Agreement- The following elements should be considered for inclusion in any arbitration agreement:

1. **Scope Of Arbitration-** The drafter should explicitly state the matters that the Arbitration Agreement shall cover. The question of the 'scope of reference' and 'jurisdiction of the Arbitration of the Arbitral Tribunal' could arise which could cause unnecessary delay to the proceedings. The word "shall be referred" should be used and not "may" to make the Arbitration clause a mandatory one.
2. **Choice Of Arbitrator(s)-** The arbitral clause must specify the selection process or the number of Arbitrators to be appointed, otherwise statutes and rules may fill any gap.
3. **Choice Of Law-** The Parties should designate the substantive law that will be applied in the arbitration. The parties may select a procedural law. If they do not, the procedural law of the place where the arbitration occurs will apply.
4. **Choice Of Location-** Upon the failure of the parties to choose a place of Arbitration, Arbitral Tribunal will decide the same.

5. Choice Of Language- Parties may designate one language as the official language of the proceedings and allow simultaneous interpretation into another language.
6. Choice Of Rules- Parties should specify the rules of procedure that will govern the arbitration and conciliation Act of 1996.
7. Rules Of Evidence- The Indian Evidence Act, is not applicable to arbitration proceeding and parties can agree upon their on procedure of evidences
8. Discovery- For the purpose of speedy disposal their should be fixation of time for the purpose of discovery and the formalities of such discovery should be laid down in writing.
9. Costs- Agreement should be provided for the acquisition of cost to make the ar cost effective, institutional arbitration may be preferred
10. Award Of Tribunal- the agreement should specify that majority of arbitrators must agree on a award and it must be based on applicable law.
11. Confidentiality- One of the advantages of arbitration is the issue of confidentiality. Arbitration proceedings are not subject to public scrutiny and many commercial matters this is very advantageous. The parties are to conform the confidentiality of any dispute resolution procedures which may be undertaken in terms of the agreement.

HINTS FOR DRAFTING ARBITRATION CLAUSE

- The best way for the parties to ensure a successful arbitration is to draft an appropriate Arbitration Clause that specifically meets their needs.
- The model clause may be used in standardized contracts but in complex international transactions the parties should tailor the arbitral provisions to the specific contracts.
- Proper mention of Mediation/Conciliation Clause in Arbitration Agreement.

It is needless to mention that there should be endeavour of parties as well as Arbitrator to settle the dispute by opting Mediation/Conciliation. Even during arbitration proceeding parties may also opt at a point of time for Mediation/Conciliation.

- The drafter must take care that wording of Arbitration Clause should be very clear and specific. A badly worded Clause may inadvertently exclude category of disputes contrary to the parties' interest e.g. a Clause worded to the effect that "all disputes arising under the contract" carry a narrow meaning than "all disputes arising in connection with the contract".
- All ambiguity or imprecision are avoided. Not to use many or too few words.
- Keep the clause simple.
- The choice of place to be carefully decided.

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- When using a model clause, ensure that the model clause is adequate to provide effective measures referring the matter to arbitration.
- The language of the clause should be tested against the worst case scenario.
