Handbook

of

Arbitration Clauses

in

International Agreements in India

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Preface

Arbitration is the easy way to resolve business disputes. However, the process of arbitration can be initiated only if the parties to an agreement have agreed to resolve their disputes through arbitration. In other words, the parties need to have executed an arbitration agreement.

An arbitration agreement can be a stand-alone one or can be part of the broader agreement that the parties have entered into. In the latter case, it appears as an arbitration clause in an agreement covering various other things besides dispute resolution.

Whenever two business houses or companies, whether domestic or international, decide to have a relationship, the first step is often to negotiate an agreement outlining the terms and conditions of the arrangement between the two parties. At the time of negotiation of such an agreement, the parties deliberate on various operative clauses in great depth. However, more often than not when the operative clauses are finalized and it is time to discuss the arbitration clause, the senior persons of the parties take a break and let either the juniors or the lawyers of the two sides discuss and finalize the arbitration clause. Somehow, the arbitration clause is not considered worthy of serious application of minds. It is seen as a cut-paste job that is best left to the minions.

While the arbitration clause is ignored at the time of negotiation and finalization of the relationship, it is always the first clause to be read as soon as some friction raises its ugly head in the working of the relationship. A poorly drafted arbitration clause leads to unnecessary complications and also expensive litigation.

Unfortunately, the Indian legal fraternity is strongly oriented and focused towards litigation. It is rare to find a commercial lawyer in India who has worked extensively on international arbitration law. Even when a legal professional has good experience as an arbitration counsel or as an arbitrator, the chances of him / her having experience of drafting international arbitration agreements are very low.

Law colleges and law faculties of Indian universities have also largely failed to train students in the drafting of international arbitration agreements. Again, the academicians have focused on preparing arbitrators and arbitration counsels while mostly ignoring the foundation on which the arbitration process rests – the arbitration clause / agreement.

This Handbook is intended to fill up this crucial lacuna. We hope that the Handbook will be useful on one hand for practicing advocates, law officers of business houses, entrepreneurs involved in drafting international agreements and on the other hand for teachers, serious students and researchers studying arbitration.

The Handbook starts with giving a brief overview of the legal provisions related to arbitration agreements / clauses. We move on to explaining various desired elements for an arbitration agreement. Some of the key desired elements discussed include - consent to arbitrate, scope of arbitration, number of arbitrators, presiding arbitrator, method of selection of arbitrators, law governing the contract, law governing arbitration & curial law, ad-hoc or institutional arbitration, qualification of arbitrators, seat of arbitration, virtual hearings, language of arbitration, cost of arbitration, punitive damages, attorney fees, arbitrator fees, scope and limits of discovery / group companies. In addition, some other elements that are presented are – pre-arbitration consultation / mediation, notice procedure, limitation period, confidentiality, termination procedure, separability or autonomy of arbitration agreement, fast track procedure, reasoned award, and two-tier arbitration.

We have collated some presently used arbitration clauses and have analyzed them with reference to the above desired elements. The collated clauses are presented in the Appendices. We have also made our recommendations regarding various desired elements. At the end of the Handbook, we have taken liberty to make some recommendations for growth of international arbitration in India.

We hope that the Handbook will serve a useful purpose and will be used as a reference book, both in India and abroad.

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Advocates and Insolvency Professionals

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Abbreviations

ACA	The Arbitration and Conciliation Act, 1996
ADR	Alternative Dispute Resolution
AIA	The American Institute of Architects
Curial Law	Law applicable to arbitration proceedings
DAC	Delhi Arbitration Center
DCC	Dubai Court of Cassation
EDI	Equity, Diversity and Inclusion
FIDIC	The International Federation of Consulting Engineers
GBP	British pound sterling
ICA	Indian Council of Arbitration
ICADR	The International Centre for Alternative Dispute Resolution
ICC	International Chamber of Commerce
INR	Indian Rupee
LCIA	London Court of International Arbitration
LPSU	Large Public Sector Undertaking
M&A	Merger and Acquisition
MCIA	Mumbai Centre for International Arbitration
PSU	Public sector undertaking
QMUL	Queen Mary University of London
SFA	Standard Form Agreement
The Act	The Arbitration and Conciliation Act, 1996[1]
UK	The United Kingdom of Great Britain and Northern Ireland
UNCITRAL	United Nations Commission on International Trade Law
USD	US Dollar

[1] Laws (India): Arbitration and Conciliation Act, 1996

Chapter 1

Introduction

1.1 Background

Prelude

> *India needs arbitration. Arbitration is an indispensable condition for the development of international commerce, because parties to international contracts need a neutral forum to resolve their differences, they need a forum that is flexible, freed of the intricacies of court litigation, and adapted to their need of a time and cost-efficient resolution of the dispute.*
>
> *And arbitration needs India.*
>
> *The development of arbitration in Asia cannot be left to the competition between Singapore and Hong Kong.*
>
> *We need more reliable and robust arbitration venues in Asia, and India needs to be part of them.*[1]

"Today, arbitration plays an essential role in the global infrastructure of international trade, commerce and investment. As an integral member of the global community and a trading and investment giant, how India engages with international arbitration has important ramifications on international transboundary flows of trade, commerce and investments as a whole. It is therefore important to be cognizant of our current bearings and of what lies ahead. Success in endeavours aimed at transforming India into an

[1] Speeches: Alexis Mourre, 2016

international arbitration hub would depend on the diligence shown by various stakeholders in spotting and addressing relevant concerns and issues.[2]"

"International arbitration has long been seen as the optimal way to address and resolve disputes between business parties. In the investment context and often in the purely commercial context, it depoliticizes the dispute, assures neutrality in adjudicating the dispute, and is perceived as an economical, speedy, and flexible procedure. Moreover, it is seen to be offering a fair amount of control over the procedure and assures that awards are easily enforceable abroad, thereby creating a sense of legitimacy."[3]

"International arbitration, therefore, enables parties in dispute to achieve adjudication and implementation of their property rights and binding commitments, which form the base for any commercial activity."[4]

Business and Arbitration

Indian business has been steadily growing its relationships with other countries during the past few decades. As relations grow, so do disputes. Arbitration is the easy way to resolve business disputes. This holds true for domestic disputes, but is more correct for international disputes.

Arbitration is no longer an informal exercise. Both, domestic and international arbitration, have become extremely complex, rule-bound and similar to judicial proceedings.

Arbitration – Legal Foundations

Arbitration is a mode of Alternative Dispute Resolution. ADR methods enjoy significant advantages such as lower costs, greater flexibility of process, higher confidentiality, greater likelihood of settlement, choice of forum, choice of solutions etc. Having said that one of the most popular widely recognised and practised forms of ADR is Arbitration.

[2] Speeches: Ibid.
[3] Speeches: Patricia O'Brien, 2012
[4] Ibid.

Prior to 1996, the arbitration law of the country was governed by a 1940 Act. This Act was largely premised on mistrust of the arbitral procedure and afforded multiple opportunities to litigants to go to the court for intervention. Coupled with a sluggish judicial system, it caused delays rendering arbitrations inefficient and unattractive.

In January 1996, India enacted its new Arbitration Act[5] based on the UNCITRAL Model Law on International Commercial Arbitration and the Arbitration Rules of the UNCITRAL 1976.

The Act is a composite piece of legislation. It provides for domestic arbitration, international commercial arbitration, enforcement of foreign award and conciliation (the latter being based on the UNCITRAL Conciliation Rules of 1980).

The more significant provisions of the Act are to be found in Parts I and II thereof. Part I contains the provisions for domestic and international commercial arbitration. Any arbitration to be conducted in India would be governed by Part I, irrespective of the nationalities of the parties. Part II provides for enforcement of foreign awards.

Section 2(1)(f) of the Arbitration and Reconciliation Act, 1996[6] ("**the Act**") defines International Commercial Arbitration as an arbitration 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 (i) an individual who is a national of, or habitually resident in, any country other than India; or (ii) a body corporate which is incorporated in any country other than India; or (iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or (iv) the Government of a foreign country. Thus, as per Indian laws, arbitration with a seat in India involving a foreign party is regarded as International Commercial Arbitration, subject to Part I of the Act.

Article 1(3) of UNCITRAL Model Law on International Commercial Arbitration[7] defines international arbitration as follows:

> *(3) An arbitration is international if:*

[5] Laws (India): The Arbitration and Conciliation Act, 1996
[6] Laws (India): Arbitration and Conciliation Act, 1996
[7] Laws and Rules (International): UNCITRAL Model Law, 2006

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected;

or

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

(4) For the purposes of paragraph (3) of this article:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

Section 2(1)(f) of Arbitration Act[8] defines international arbitration as follows:

"international commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not,

[8] Laws (India): The Arbitration and Conciliation Act, 1996

considered as commercial under the law in force in India and where at least one of the parties is-

i. an individual who is a national of, or habitually resident in, any country other than India; or

ii. a body corporate which is incorporated in any country other than India; or

iii. a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or

iv. the Government of a foreign country;

Arbitration Agreement

"Arbitration Agreement is a written agreement between the parties to a contract or otherwise, committing themselves to resolve all the issues that arises out of a contract or otherwise through arbitration. It can be either a separate agreement between the 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 that arises 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, regarding the issues covered by the arbitration agreement, have to necessarily choose arbitration only. If any one party approaches directly a Court seeking remedy in a matter, where there is an arbitration clause between them, the other party can approach the court, file an application asking 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 direct the matter to arbitration."[9]

Section 7 of the Act reads as follows:

(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have

[9] Articles and Studies: S.Ravi Shankar, paragraph 1

arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in-

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication [including communication through electronic means] which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

The law does not mandate a separate arbitration agreement. An arbitration agreement can either be in the form of a separate agreement, in the type of a clause in a larger agreement, or can be incorporated by means of reference to a document containing a compatible arbitration clause or agreement. To incorporate an arbitration clause by reference, the reference to the other document must clearly mention an intention to incorporate the arbitration clause into the contract; a general reference to a different document will not have the effect of incorporating an arbitration clause.

There is no prescribed specific format for an arbitration agreement or for an arbitration clause in a contract. The fact was highlighted by Honourable Supreme Court in Babanrao vs. Samarth Builders[10]. Relevant extracts from the judgement reads as follows:

> *13. It is a settled proposition of law that the existence of a valid arbitration agreement Under Section 7 of the Act is sine-qua-non for a court to exercise its powers to appoint an arbitrator/arbitral tribunal Under Section 11 of the Act.*
>
> ***15.** It may be seen that Section 7 of the Act does not mandate any particular form for the arbitration clause. This proposition was settled by this Court way back in Rukmanibai Gupta v. Collector, Jabalpur and Ors. MANU/SC/0002/1980 : (1980) 4 SCC 556, while viewing erstwhile Section 2(a) of the Arbitration Act, 1940 which contained the definition of "arbitration agreement". It was held that:*
>
> > ***6.** .....Arbitration agreement is not required to be in any particular form. What is required to be ascertained is whether the parties have agreed that if disputes arise between them in respect of the subject- matter of contract such dispute shall be referred to arbitration, then such an arrangement would spell out an arbitration agreement. A passage from RUSSELL ON ARBITRATION, 19th Edn., p. 59, may be referred to with advantage:*
> >
> > > *If it appears from the terms of the agreement by which a matter is submitted to a person's decision that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry and hear the respective cases of the parties and decide upon evidence laid before him, then the case is one of an arbitration.*

[10] Domestic Court Judgments: Babanrao Rajaram Pund v. Samarth Builders & Developers and Ors., 2022

16. *This very principle was reiterated in K.K. Modi v. K.N. Modi and Ors. MANU/SC/0092/1998 : (1998) 3 SCC 573 which also dealt with Section 2(a) of the 1940 Act. While attempting to decide whether the arbitration Clause embodied in a Memorandum of* ***Understanding*** *was a valid arbitration Clause or not, this Court laid down the essential attributes of an arbitration agreement in following terms:*

17. Among the attributes which must be present for an agreement to be considered as an arbitration agreement are:

> *(1) The arbitration agreement must* ***contemplate*** *that the decision of the tribunal will be binding on the parties to the agreement,*
>
> *(2) that the jurisdiction of the tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the court or from a statute, the terms of which make it clear that the process is to be an arbitration,*
>
> *(3) the agreement must* ***contemplate*** *that substantive rights of parties will be determined by the agreed tribunal,*
>
> *(4) that the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides,*
>
> *(5) that the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly,*
>
> *(6) the agreement must* ***contemplate*** *that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal.*

18. The other factors which are relevant include, whether the agreement ***contemplates*** *that the tribunal will receive evidence from both sides and hear their contentions or at least give the parties an opportunity to put*

> *them forward; whether the wording of the agreement is consistent or inconsistent with the view that the process was intended to be an arbitration, and whether the agreement requires the tribunal to decide the dispute according to law.*

Honourable Supreme Court in Babanrao vs. Samarth Builders[11] quoted with approval the essential elements of an arbitration as laid down by the Court in Bihar State Mineral Development Corp. vs. Encon Builders[12]. Relevant extract reads as follows:

> *13. The essential elements of an arbitration agreement are as follows:*
>
> *(1) There must be a present or a future difference in connection with some contemplated affair.*
>
> *(2) There must be the intention of the parties to settle such difference by a private tribunal.*
>
> *(3) The parties must agree in writing to be bound by the decision of such tribunal.*
>
> *(4) The parties must be ad idem.*

1.2 Nature of arbitration and arbitration clause / agreement

Nature of Arbitration

"Arbitration is a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute. In choosing arbitration, the parties opt for a private dispute resolution procedure instead of going to court."[13]

"The principal characteristics of arbitration are as follows:

[11] Domestic Court Judgments: Ibid.
[12] Domestic Court Judgments: Bihar State Mineral Dev. Corpn. and Ors. v. Encon Builders (I) Pvt. Ltd., 2003
[13] Articles and Studies: World Intellectual Property Organization

- Arbitration is consensual
- The parties choose the arbitrator(s)
- Arbitration is neutral
- Arbitration is a confidential procedure
- The decision of the arbitral tribunal is final and easy to enforce

The essence of arbitration is that a third-party private person adjudicates on the dispute. It differs from other types of arrangements such as mediation, expert determination, etc. In some cases, disputes must be directed to expert determination before arbitration may proceed.

Arbitration may deal only with certain types of private civil rights. It can only bind the persons to the agreement and the persons to the dispute. It typically concerns rights between private (non-Governmental) parties, arising under contracts and the law of restitution. It may sometimes cover civil wrongs, where there is a specific agreement on the matter.

The arbitration agreement only affects persons to the contract. Property rights which are effective as regards all other persons (the whole world) cannot be determined by arbitration. Similarly, where particular areas of responsibility are reserved to a specific governmental body, to determine whether or not the particular law applies, private parties cannot generally usurp this power."[14]

Nature of Arbitration Agreement / Clause

"In general, the arbitration agreement provides the basis for arbitration. It is defined as an agreement to submit present or future disputes to arbitration. This generic concept comprises two basic types:

[14] Articles and Studies: Paul McMahon, Paragraphs 1-3

a) A clause in a contract, by which the parties to a contract undertake to submit to arbitration the *disputes that may arise* in relation to that contract (arbitration clause); or

b) An agreement by which the parties to a dispute that has already arisen submit the dispute to arbitration (submission agreement).

The arbitration clause therefore refers to disputes not existing when the agreement is executed. Such disputes, it must be noted, might never arise. That is why the parties may define the subject matter of the arbitration by reference to the relationship out of which it derives.

By entering into an arbitration agreement, the parties commit to submit certain matters to the arbitrators' decision rather than have them resolved by law courts.

Thus, the parties:

a) Waive their right to have those matters resolved by a court; and

b) Grant jurisdictional powers to private individuals (the arbitrators)."[15]

We shall call these two main effects of the agreement "negative" and "positive", respectively.

Negative enforcement: Lack of jurisdiction of courts*:* An arbitration agreement precludes judges from resolving the conflicts that the parties have agreed to submit to arbitration. If one of the parties files a lawsuit in relation to those matters, the other may challenge the court's jurisdiction on the grounds that the jurisdiction of the courts has been waived. The judge's lack of jurisdiction is not automatic, nor can it be declared *ex officio*. Instead, it must be raised by the defendant no later than when filing the answer to the complaint. That is so because arbitral jurisdiction is waivable, and the waiver would be presumed if the plaintiff filed a complaint and the defendant failed to challenge the court's jurisdiction. To sum up, once a conflict has arisen over any of the subjects included in the arbitration agreement, the courts will have no jurisdiction to resolve it unless both parties expressly or tacitly agree to waive the arbitration agreement.

[15] Articles and Studies: UNCTAD, 2005, Ch. 1, p. 3-4

Positive enforcement: the "submission agreement"*:* The arbitration agreement grants jurisdiction to arbitrators. By "jurisdiction" we mean the powers conferred on arbitrators to enable them to resolve the matters submitted to them by rendering a binding decision. The negative enforcement of the arbitration agreement is universally accepted and does not depend on the kind of agreement. Conversely, the positive enforcement is inextricably linked to the applicable law. That is so because some local arbitration laws still do not grant the arbitration clause an autonomous status. In fact, some traditional laws require that, even when there is a previous arbitration clause, the parties execute a new agreement called "submission agreement", which must contain the names of the arbitrators and clearly identify the matters submitted to them.

Indian law recognizes arbitration agreement as final and binding. There is no requirement of a submission agreement, which is outmoded and is not in line with the modern trends on international arbitration.

Article 7 of UNCITRAL Model Law[16] gives two options for definition and form of arbitration. The two options are as follows:

Option I

(1) "Arbitration agreement" is 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. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein

[16] Laws and Rules (International): UNCITRAL Model Law, 1985

is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

Option II

"Arbitration agreement" is 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.

The Arbitration and Conciliation Act, 1996[17] of India has largely followed the UNCITRAL Model Law[18]. Section 7 of the Act[19] defines Arbitration Agreement as follows:

(1) In this Part, "arbitration agreement" means 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.

[17] Laws (India): The Arbitration and Conciliation Act, 1996
[18] Laws and Rules (International): UNCITRAL Model Law, 2006
[19] Laws (India): The Arbitration and Conciliation Act, 1996

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in-

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

New York Convention[20] does not define arbitration or arbitration agreement but has the following provision regarding "arbitral awards":

Article I

(2) The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

(3) When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply

[20] Laws and Rules (International): Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958

the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

(1) Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

(2) The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

(3) The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Notably, awards under The Arbitration and Conciliation Act, 1996 of India satisfy all the requirements of arbitral award as laid down under The New York Convention.

Honourable Supreme Court of India in its judgement in the matter of KK Modi vs. KN Modi[21] laid down as follows with regard to the nature of arbitration clause:

16. *Among the attributes which must be present for an agreement to be considered as an arbitration agreement are:*

(1) *The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement,*

[21] Domestic Court Judgements: K.K. Modi v. K.N. Modi and Ors., 1998

(2) That the jurisdiction of the tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the Court or from a statute, the terms of which make it clear that the process is to be an arbitration,

(3) The agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal,

(4) That the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides,

(5) That the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly,

(6) The agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal.

***17**. The other factors which are relevant include, whether the agreement contemplates that the tribunal will receive evidence from both sides and hear their contentions or at least give the parties an opportunity to put them forward; Whether the wording of the agreement is consistent or inconsistent with the view that the process was intended to be an arbitration, and whether the agreement requires the tribunal to decide the dispute according to law.*

As regards the form of the Arbitration Agreement, Honourable Supreme Court has held that no particular form is necessary. The following extract from the judgement of Honourable Supreme Court in Babanrao[22] makes it clear and leaves no doubts:

***15**. It may be seen that Section 7 of the Act does not mandate any particular form for the arbitration clause. This proposition was settled by this Court way back in Rukmanibai Gupta v. Collector, Jabalpur and Ors.*

[22]Domestic Court Judgements: Babanrao Rajaram Pund v. Samarth Builders & Developers and Ors.,2022

MANU/SC/0002/1980: (1980) 4 SCC 556, while viewing erstwhile Section 2(a) of the Arbitration Act, 1940 which contained the definition of "arbitration agreement". It was held that:

> ***6.*** *.....Arbitration agreement is not required to be in any particular form. What is required to be ascertained is whether the parties have agreed that if disputes arise between them in respect of the subject- matter of contract such dispute shall be referred to arbitration, then such an arrangement would spell out an arbitration agreement. A passage from RUSSELL ON ARBITRATION, 19th Edn., p. 59, may be referred to with advantage:*
>
> > *If it appears from the terms of the agreement by which a matter is submitted to a person's decision that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry and hear the respective cases of the parties and decide upon evidence laid before him, then the case is one of an arbitration.*

In the above-referred case of Babanrao[23], Honourable Supreme Court has quoted with approval extract from the judgement of Bihar State Mineral Development Corporation vs. Encon Builders[24] and stated that in the case Honourable Supreme Court "further condensed the essential features of an arbitration agreement into four elements". Relevant extract from the judgement in case of Bihar State Mineral[25] are as follows:

> ***13****. The essential elements of an arbitration agreement are as follows:*
>
> *(1) There must be a present or a future difference in connection with some contemplated affair.*

[23] Domestic Court Judgements: Ibid.
[24] Domestic Court Judgements: Bihar State Mineral Dev. Corpn. and Ors. v. Encon Builders (I) Pvt. Ltd. Bihar State, 2003
[25] Domestic Court Judgements: Ibid.

> *(2) There must be the intention of the parties to settle such difference by a private tribunal.*
>
> *(3) The parties must agree in writing to be bound by the decision of such tribunal.*
>
> *(4) The parties must be ad idem.*
>
> ***14**. There is no dispute with regard to the proposition that for the purpose of construing an arbitration agreement, the term 'arbitration' is not required to be specifically mentioned therein.*

Notably, the Arbitration and Conciliation Act, 1996 does not provide any specific format for the arbitration agreement / clause. Key point stressed by section 7 is that the agreement to submit "*all or certain disputes*" must be in writing. The agreement may be in any format. Some options mentioned in the section are as follows:

a) **Part of the contract that defines the relationship** – In such a case the arbitration agreement appears as one or more clauses in the contract document.

b) **As a separate agreement** – The parties enter into a separate agreement only for the purpose of dispute resolution process or only for agreeing to submit disputes to arbitration.

c) **As part of correspondence** – The agreement to submit disputes need not be part of a formal document. If the parties arrive at such an agreement in letters or emails, the agreement is a valid arbitration agreement.

d) **By tacit admission** – If one party mentions in some claims or such other documents about existence of an agreement to refer disputes to arbitration and the opposite party does not deny it, the non-denial will amount to tacit admission and will be considered as an arbitration agreement.

e) **Reference to Agreement in Standard Form (SFA)** – Often contracts among members of a trade association have a standard clause that terms of the model contract of the trade association will apply. If the referred model contract has provision for arbitration, the arbitration agreement will apply to the relevant contract.

It may be mentioned here that internationally one needs to be cautious in relying on SFA. In a recent judgement in Dubai, the issue of SFAs came up before the Dubai Court of Cassation. The following extract from the article by Rishabh Jogani[26] is most relevant:

> *The Dubai Court of Cassation, in its recent judgement, DCC 1308 of 2020, explored the effect of incorporation of arbitration clauses by reference. Typically, "incorporation by reference" refers to parties agreeing to incorporate arbitral clauses found in separate standard-form agreements ("SFAs") into the agreement between the parties by making reference to the same. Such reference can be specific, where the agreement between the parties refers to the specific clause in the SFA, or general, where the agreement between the parties makes a generic reference to the SFA as a whole without specifying the arbitral clause in particular. The Court of Cassation in DCC 1308 of 2020 held that parties might not necessarily be bound by arbitration clauses incorporated through general reference.*
>
> *Very few debates in the legal field cut across international jurisprudence in the way as discussions regarding the validity and binding nature of arbitration agreements incorporated by reference. The reasons are clear: in a construction contract for example, parties generally agree to SFAs (such as FIDIC, AIA, etc.) with certain specific modifications. The preference for adopting pre-existing SFAs in a specialized and high contract volume industry is understandable. Such documents have a few distinct advantages, in that they allow parties a sense of fairness and to save time which they otherwise would spend negotiating the contract.*
>
> *As discussed by the Court of Cassation in DCC 1308 of 2020 and stated above, this practice of adopting pre-existing SFAs also extends to arbitration clauses found in such agreements. Parties agreeing to such arbitration agreements can be certain that a wider gamut of possible disputes would be covered, and that there would be a deemed acceptance of the arbitration clause. Naturally, with incorporation of arbitration clauses through reference to standard form agreements, questions*

[26] Articles and Studies: Rishabh Jogani, 2021, p. 2

pertaining to validity are bound to arise, especially when truant parties would like to derail the process.

In the context of arbitration agreement, the following observations of Honourable Supreme Court in the matter of The Union of India v. Kishorilal Gupta and Bros.[27] are most relevant:

> ***23.*** *The following principles relevant to the present case emerge from the aforesaid discussion: (1) An arbitration clause is a collateral term of a contract as distinguished from its substantive terms; but none the less it is an integral part of it; (2) however comprehensive the terms of an arbitration clause may be, the existence of the contract is a necessary condition for its operation; it perishes with the contract; (3) the contract may be non est in the sense that it never came legally into existence or it was void ab initio; (4) though the contract was validly executed, the parties may put an end to it as if it had never existed and substitute a new contract for it solely governing their rights and liabilities thereunder; (5) in the former case, if the original contract has no legal existence, the arbitration clause also cannot operate, for along with the original contract, it is also void; in the latter case, as the original contract is extinguished by the substituted one, the arbitration clause of the original contract perishes with it; and (6) between the two falls many categories of disputes in connection with a contract, such as the question of repudiation, frustration, breach etc. In those cases it is the performance of the contract that has come to an end, but the contract is still in existence for certain purposes in respect of disputes arising under it or in connection with it. As the contract subsists for certain purposes, the arbitration clause operates in respect of these purposes.*

For the purpose of preparing the arbitration agreement, section 10 of the Act[28] is relevant since it prescribes the number of arbitrators. The section reads as follows:

[27] Domestic Court Judgements: The Union of India v. Kishorilal Gupta and Bros., 1959, paragraph 23
[28] Laws (India): The Arbitration and Conciliation Act, 1996

(1) The parties are free to determine the number of arbitrators, provided that such number shall not be an even number.

(2) Failing the determination referred to in sub-section (1), the arbitral tribunal shall consist of a sole arbitrator.

A key subject to be decided in the arbitration agreement is about the qualifications of arbitrators. Relevant sub-sections of section 11 of the Act[29] are as follows:

(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in sub-section (3) applies and—

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment,

the appointment shall be made, upon request of a party, by 1[the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court];

[29] Laws (India): Ibid.

Justice Sanjiv Khanna of Honourable Supreme Court of India in Vidya Drolia[30] describes in great detail the requirements that an arbitration agreement must satisfy in order to be valid and not void. Relevant extract from the judgement reads as follows:

> *The term 'agreement' is not defined in the Arbitration Act, albeit it is defined in Section 10 of the Indian Contract Act, 1872 (for short, the 'Contract Act'),11 as contracts made by free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not thereby expressly declared to be void. Section 10 of the Contract Act also stipulates that aforesaid requirements shall not affect any law in force in India (and not expressly repealed) by which a contract is required to be made in writing, in presence of witnesses or any law relating to registration of documents. Thus, an arbitration agreement should satisfy the mandate of Section 10 of the Contract Act, in addition to satisfying other requirements stipulated in the Section 7 of the Arbitration Act. Sections 12 to 18 of the Contract Act state when a person can be said to be of a sound mind for the purpose of contracting and define the expressions 'consent', 'free consent', 'coercion', 'undue influence', 'fraud' and 'misrepresentation'. Sections 19 to 23 relate to voidability of agreements, the power to set aside contracts induced by undue influence, when both the parties are under mistake as to a matter of fact, effect of a mistake as to the law, effect of a mistake by one party as to a matter of fact and what considerations and objects are lawful and unlawful. Sections 24 to 30 relate to void contracts and Sections 26 and 27 therein state that agreements in restraint of marriage and agreements in restraint of trade, respectively are void, albeit Explanation (1) to Section 27 saves agreements for not carrying out the business of which goodwill is sold. Section 28 of the Contract Act states that agreements in restraint of legal proceedings are void, but Explanation (1) specifically saves contracts by which two or more persons agree that any dispute, or one which may arise between them, in respect of any subject or class of subjects shall be referred to arbitration. Arbitration agreement must satisfy the objective mandates of the law of contract to qualify as an agreement. Clauses (g) and (h) of Section 2 of the*

[30] Domestic Court Judgements: Vidya Drolia and Ors. v. Durga Trading, 2020, paragraph 11

> *Contract Act state that an agreement not enforceable in law is void and an agreement enforceable in law is a contract. As a sequitur, it follows that an arbitration agreement that is not enforceable in law is void and not legally valid.*

Justice Khanna further discusses the concept of "excepted matters" or exclusions from the scope of arbitration as follows[31]:

> *Arbitration being a matter of contract, the parties are entitled to fix boundaries as to confer and limit the jurisdiction and legal authority of the arbitrator. An arbitration agreement can be comprehensive and broad to include any dispute or could be confined to specific disputes. The issue of scope of arbitrator's jurisdiction invariably arises when the disputes that are arbitrable are enumerated or the arbitration agreement provides for exclusions as in case of 'excepted matters'. The arbitration agreement may be valid, but the arbitral tribunal in view of the will of the parties expressed in the arbitration agreement, may not have jurisdiction to adjudicate the dispute. The will of the parties as to the scope of arbitration is a subjective act and personal to the parties.*

Any discussion about law related to arbitration clauses cannot be complete without elaborating on what is "*not arbitrable*". Honourable Supreme Court has propounded a fourfold test in this regard as follows[32]:

> *In view of the above discussion, we would like to propound a fourfold test for determining when the subject matter of a dispute in an arbitration agreement is not arbitrable:*
>
> *(1) when cause of action and subject matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.*

[31] Domestic Court Judgements: Ibid. paragraph 15
[32] Domestic Court Judgements: Ibid. paragraph 45

(2) when cause of action and subject matter of the dispute affects third party rights; have erga omnes effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable;

(3 when cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable; and

(4) when the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

These tests are not watertight compartments; they dovetail and overlap, albeit when applied holistically and pragmatically will help and assist in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject matter is non-arbitrable. Only when the answer is affirmative that the subject matter of the dispute would be non-arbitrable.

Before drafting the arbitration clause / agreement one must also understand that an arbitration clause is interpreted strictly and not in a wide loose manner. Honourable Supreme Court has laid down the following principles applicable to interpretation of an arbitration clause[33].

In Narbheram Power and Steel Private Ltd., this Court while dealing with the arbitration clause in the insurance agreement, has held that the arbitration clause should be strictly construed, relying on the principles of strict interpretation that apply to insurance contracts. These observations have been repeated in other cases.

What is true and applicable for men of commerce and business may not be equally true and apply in case of laymen and to those who are not fully

[33] Domestic Court Judgements: Ibid. paragraph 94

aware of the effect of an arbitration clause or had little option but to sign on the standard form contract. Broad or narrow interpretations of an arbitration agreement can, to a great extent, effect coverage of a retroactive arbitration agreement. Pro-arbitration broad interpretation, normally applied to international instruments, and commercial transactions is based upon the approach that the arbitration clause should be considered as per the true contractual language and what it says, but in case of doubt as to whether related or close disputes in the course of parties' business relationship is covered by the clause, the assumption is that such disputes are encompassed by the agreement. The restrictive interpretation approach on the other hand states that in case of doubt the disputes shall not be treated as covered by the clause. Narrow approach is based on the reason that the arbitration should be viewed as an exception to the court or judicial system. The third approach is to avoid either broad or restrictive interpretation and instead the intention of the parties as to scope of the clause is understood by considering the strict language and circumstance of the case in hand. Terms like 'all', 'any', 'in respect of', 'arising out of' etc. can expand the scope and ambit of the arbitration clause. Connected and incidental matters, unless the arbitration clause suggests to the contrary, would normally be covered.

Which approach as to interpretation of an arbitration agreement should be adopted in a particular case would depend upon various factors including the language, the parties, nature of relationship, the factual background in which the arbitration agreement was entered, etc. In case of pure commercial disputes, more appropriate principle of interpretation would be the one of liberal construction as there is a presumption in favour of one-stop adjudication.

Types of arbitration clauses

An arbitration agreement consists either of a single arbitration clause or may consist of many arbitration clauses. If more than one clause makes arbitration agreement, the clauses will be read collectively and coherently.

"Arbitration clauses can be classified into three categories: basic, general and complex clauses.

1. Basic clauses are those that include only the most basic provisions - those that are essential to a viable arbitration agreement. Most institutional model clauses are basic clauses.

2. General clauses are perhaps the most common type of arbitral provisions for substantial transactions. They include certain optional provisions beyond those in a basic clause, designed to solve particular problems (eg, providing for the venue, language, governing law, negotiation or mediation stages, etc). General clauses are typically used when some, but not all, potential provisions are needed, or when the parties are unwilling to risk deviating from institutional rules or violating mandatory rules of the applicable law and they do not have the time or resources to research the issue. Examples of these clauses may be found in the energy industry in joint operating, drilling, natural gas supply and power plant construction agreements.

3. Complex clauses include some more unusual provisions in addition those which are generally accepted. These clauses must be carefully tailored to prevent inconsistencies and meticulously researched to prevent provisions that might invalidate the clause in a given jurisdiction. Beyond those included in general clauses, provisions that may be included in a complex clause include: (i) confidentiality, (ii) discovery, (iii) multi-party arbitration, (iv) consolidation, (v) split clauses requiring litigation of some issues and arbitration of others, (vi) expert determination, (vii) arbitrability, (viii) waivers of appeals or consent to appeals, and (ix) authorisation to adapt the contract or fill gaps, among others."[34]

[34] Articles and Studies: Prashant S Desai, p.4-5

1.3 Institutional arbitration vs. Ad-hoc arbitration

Institutional arbitration refers to the administration of arbitration by an institution in accordance with its rules of procedure. The institution provides support for the conduct of the arbitration in the form of appointment of arbitrators, case management services including oversight of the arbitral process, venues for holding hearings, etc. It differs from ad hoc arbitration in that several aspects of the arbitral proceedings such as appointment of arbitrators, conduct of the arbitral proceedings, scrutiny of awards, etc. may be determined by the arbitral institution. India has not fully embraced institutional arbitration as the preferred mode of arbitration despite the existence of several institutions which administer arbitrations.[35]

There are over 35 arbitral institutions in India. These include, in addition to domestic and international arbitral institutions, arbitration facilities provided by various public-sector undertakings ("PSUs"), trade and merchant associations, and city-specific chambers of commerce and industry.[36]

An ad hoc arbitration is an arbitration whereby the parties have the freedom of choice of drafting their own rules and procedures for the conduct of the arbitration. The rules which determine the conduct of the arbitration, the appointment of the arbitrator, the venues etc. are those which fit the needs of the parties and as per the nature of the dispute. For this reason, in an ad hoc arbitration the parties have the maximum degree of flexibility to agree and specify those aspects of procedure which they wish to be followed, of course, subject to the mandatory law of the seat of the arbitration. Where the parties are silent and there is no reference of any institution for administering / conducting the arbitration, the arbitration will be an ad hoc arbitration.[37]

[35] Reports (India): Report of the High Level Committee, 2017, p. 13
[36] Reports (India): Ibid. p. 13
[37] Articles and Studies: Prasenjit Kundu, 2017, Chapter 4, p. 137-138

One distinct advantage of ad hoc arbitration lies in the fact that it may be shaped to meet the wishes of the concerned parties and also the facts of the particular dispute. Although party cooperation is of the most essence for this to be done, but if there is such party cooperation, the difference between ad hoc arbitration and institutional arbitration is just like the difference between a tailor-made suit and one that is bought "off the peg". There is much to be said in favour of ad hoc arbitration especially in cases where the state or any state entity is involved and issues like public policy and sovereignty are likely to arise. In an ad hoc arbitration, it would be possible for an experienced tribunal and the counsel to devise a procedure which is sensitive to the particular status and requirement of the State party, whilst remaining fair to both the parties. A further advantage of ad hoc arbitration is the cost that the parties generally do incur. Parties will have to pay fees for the arbitrators, lawyers or representatives and the costs incurred in conducting the proceedings. Parties have the freedom to negotiate and settle the fees of the arbitrator and this would allow the opportunity of negotiating reduction in fees. Unlike institutional arbitration, parties in an ad hoc arbitration are not required to bear the expenses of administrative services and facilities.[38]

[38] Articles and Studies: Ibid. p. 139-140

1.4 Arbitration institutions in India and abroad

Some of the well-known and active arbitration institutions in India are as follows:

Table 1.1 Arbitration Institutions in India and their websites

Name of Institution	Website
Construction Industry Arbitration Council	http://www.ciac.in
Council For National and International Commercial Arbitration	http://www.cnica.org/
Indian Chamber of Commerce Council of Arbitration	https://www.indianchamber.org/
Indian Institute of Arbitration & Mediation	http://www.arbitrationindia.org/
Indian Council of Arbitration	http://www.icaindia.co.in/
The International Centre for Alternative Dispute Resolution	http://icadr.nic.in/
India International & Domestic Arbitration Centre	http://www.idacindia.org/

Some of the reputed arbitration institutions outside India are as follows:

Table 1.2 Arbitration Institutions outside India and their websites

Name of Institution	Website
Permanent Court of Arbitration	https://pca-cpa.org/en/home/
London Court of International Arbitration	http://www.lcia.org/
International Chamber of Commerce	https://iccwbo.org/
International Centre for Dispute Resolution	https://www.icdr.org/
Swiss Arbitration	www.swissarbitration.org
Vienna International Arbitral Centre	http://www.viac.eu/en/
Stockholm Chamber of Commerce	https://sccinstitute.com/
Singapore International Arbitration Centre	http://siac.org.sg/
Hong Kong International Arbitration Centre	http://www.hkiac.org/

1.5 Drafting of arbitration agreement / clause

> *The main objectives in drafting an arbitration clause are to reduce (if not eliminate) the risk that a dispute will be referred to a court at any point other than once enforcement of an arbitration award is sought, and to ensure that nothing in the agreement could lead a court to reject enforcement once an award is rendered. An arbitration agreement should therefore be clear in reflecting the parties' intent to resolve disputes in arbitration, specify its scope (i.e., the nature of disputes that must be resolved in arbitration) and include an agreement that judgment may be entered on the award. It should also indicate which procedural rules will govern the arbitration and ensure that the laws governing the arbitration agreement itself as well as the substance of the dispute are designated in the arbitration agreement if not otherwise included in the parties' contractual arrangement. Additionally, it will name the body that will oversee the administration of the arbitration and the actual seat of the arbitration. Finally, it should include the number of arbitrators to be appointed and the method for selecting them. In international arbitrations, parties should also specify the language in which proceedings will be held. These are the core items to include in an arbitration agreement. There are obviously other matters, such as whether arbitrators can award punitive damages and attorney fees, the scope and limits of discovery, consolidation and joinder, and similar items that a practitioner may want to consider including to tailor the arbitration agreement to the specific matter at hand.*[39]

One may sum up the key points vital to an arbitration agreement (mentioned above and also others) as follows:

(a) Intent to arbitrate before approaching court

(b) Scope of arbitration

(c) Rules of procedure governing arbitration

[39] Articles and Studies: Drafting an Arbitration Agreement in 2022: 2021 – Considerations, 2021, p. 1

(d) Law governing the contract

(e) Law governing the arbitration

(f) Ad hoc or institutional arbitration

(g) If institutional arbitration, the body overseeing the arbitration

(h) Number of arbitrators

(i) Method of selection of arbitrators

(j) Qualifications of arbitrators

(k) Seat of arbitration

(l) Venue of arbitration proceedings

(m) Whether virtual hearings are permitted

(n) Language of arbitration

(o) Cost of arbitration

(p) Whether punitive damages can be awarded

(q) Attorney fees

(r) Scope and limits of discovery

Apart from the above, some other points that are mostly included in arbitration agreements are as follows:

"Mediation Clauses – Arbitration, especially in international agreements can be expensive. Hence, mediation or step-up procedures are common pre-arbitration clauses included in many contracts. Parties do often agree on other forms of pre-adjudication negotiation processes, also referred to as "step clauses." For example, "*disputes first go to business unit presidents, then to global presidents, and only then to arbitration, if the parties are unable to resolve their differences*"."[40]

"Equity, Diversity and Inclusion – Social Considerations – Operating in some geographies and nations, one must be sensitive to social and cultural considerations. "Transaction parties may want to consider scrutinizing an arbitration venue's equity, diversity and inclusion (EDI) protocols when deciding which one(s) to select. For M&A deals, such

[40] Articles and Studies: Drafting an Arb. Agreement in 2022: The Drafter's Perspective, 2022, p. 2

examination should apply to accounting firms when they're asked to act as "arbitrators." For international matters, Cathy reminds us that EDI has a different meaning for different nationalities. Although it isn't uncommon to consider arbitrator nationalities for the makeup of an arbitration panel, parties will also have to account for specific and varying cultural and national perspectives when agreeing on EDI parameters in cross-border matters."[41]

"Care must be taken in drafting the arbitration agreement / clause. Many parties fail to realize that the wording of an arbitration clause is important for arbitration to function smoothly. In practice, one may observe, however, recurrent scenarios where arbitration clauses contain defective wording and, thus, are subject to unnecessary incidents and procedural debates. Such clauses are called "*pathological clauses*"."[42]

"Pathological Clauses" are defined in Fouchard, Gaillard, Goldman on International Commercial Arbitration[43] as follows:

> *It denotes arbitration agreements, and particularly arbitration clauses, which contain a defect or defects liable to disrupt the smooth progress of the arbitration. Arbitration agreements can be pathological for a variety of reasons. The reference to an arbitration institution may be inaccurate or totally incorrect; the agreement may appear to allow submission of disputes to arbitration to be optional; it may contain a defective mechanism for appointing arbitrators in that, for example, the chosen appointing authority refuses to perform that function; alternatively, the agreement might itself appoint arbitrators who have died by the time the dispute arises. The agreement may stipulate that the tribunal is to comprise three arbitrators where the dispute involves three or more parties whose interests differ; it may impose impracticable conditions for the arbitral proceedings (such as unworkable deadlines), or provide that certain issues (such as the validity of the contract) are not to be dealt with by the arbitrators, despite the fact that such issues are closely related to the dispute which the arbitrators are called upon to decide.*

[41] Articles and Studies: Ibid. p. 2
[42] Articles and Studies: Aceris Law. 2021, p. 1
[43] Books: Fouchard, 1999, p. 261-262

Some key recommendations for drafting of arbitration clauses have been put forth as follows:

"Recommendation No. 1: Start with Standard Arbitration Clauses Proposed by Arbitral Institutions – "It is typically safe to use standard arbitration clauses proposed by major arbitral institutions as a template. These standard clauses contain clear, basic text of the arbitration clause that is to be adapted by the parties to the circumstances of their contract, if needed.

Recommendation No. 2: Use Terms Precisely – All terms used in the arbitration clause are important, as those terms are going to be interpreted by the arbitral tribunal. By interpreting arbitration clauses, arbitral tribunals will attach primordial importance to the text of the clause itself. They will look at what the parties actually agreed to, not at what they could have agreed to, but ultimately did not, agree. For example, there is a considerable difference between the terms "shall" and "may". The former has mandatory significance, the latter only an optional one. Wording should be precise.

Recommendation No. 3: Keep the Arbitration Clause Simple and Non-Ambiguous – The best-drafted arbitration clauses are ones that are simple, precise and non-ambiguous. This means that all terms are clear and evident and, thus, cannot be seriously challenged. For example, ambiguity is created when the arbitration clause states in one sentence that the dispute shall be resolved by a sole arbitrator, but in another sentence specifies that "*each arbitrator shall be independent and impartial*". What is ambiguous in this particular example is that it is difficult to see whether the intention of the parties was to have only one arbitrator or a panel of arbitrators to rule upon an eventual dispute.

Recommendation No. 4: The Ambit of the Arbitration Clause Matters – The ambit, or scope of application, of the arbitration clause relates to issues and disputes that are covered by the clause and, thus, can be resolved via arbitration. Here again, the wording used in the arbitration clause is important. Although parties can agree to arbitrate specific contract claims only, they are also free to provide a deliberately broad scope of the arbitration agreement covering not only all disputes under a contract, but also disputes related to it, including, in some cases, non-contractual claims. In this respect, different terms such as any or all disputes "*arising out of the contract*", "*arising under the contract*", "*related to the contract*", "*in connection with the contract*" are generally used.

However, one should bear in mind that they have fundamentally different meanings depending on how restricted the scope of the arbitration clause is intended to be, as well as the law governing the arbitration agreement.

Recommendation No. 5: Appointing a Proper Number of Arbitrators – In their arbitration clause, the parties are free to agree on the number of arbitrators that will sit on an arbitral tribunal; usually one or three members are specified. The number of arbitrators will have a direct impact on the overall costs that the parties will need to pay for the arbitrators' fees.

Recommendation No. 6: Name the Applicable Law – The applicable, or governing law (also named the "*substantive law*" or the "*law of the contract*"), is another element parties should not forget to include in their agreement, if they wish to avoid subsequent debates after the initiation of an arbitration. Selection of an appropriate law applicable to the merits of a dispute when none is named is not an easy task to do and a number of considerations will be taken into account by the arbitral tribunal, creating legal uncertainty.

Recommendation No. 7: Procedural Rules Selected - The parties are free to opt either for institutional arbitration or for a purely *ad hoc* arbitration. It is generally a bad idea to select purely *ad hoc* arbitration (unless the UNCITRAL Arbitration Rules are used), since if the parties are unable to agree upon a tribunal when a dispute arises, which frequently occurs, court intervention will be required to constitute the arbitral tribunal, leading to delays and wasted time and costs. If institutional arbitration is chosen, except for the mandatory rules of the seat of arbitration, the arbitration will be conducted under the rules of arbitration of the given arbitration institution. These rules set out a number of obligations that need to be respected regarding, for example, written submissions to be filed, the payment of advance on costs, the conduct of the hearings, the deadline to issue an award, etc. However, here again, it is fundamental that the arbitration clause contains a precise indication of the arbitration institution.

Recommendation No. 8: Place / Seat of Arbitration and Type / Venue of Hearing - The selection of the place of arbitration (also referred to as the seat of arbitration) in the arbitration clause is of importance. The place/seat of arbitration has several legal consequences. It determines the place, i.e., country, where the arbitral award may face annulment proceedings initiating by a losing party and where State courts may

intervene in the arbitration proceedings. One needs to bear in mind that the place/seat of arbitration is to be distinguished from the venue of the hearing. The venue of the hearing, as the term suggests, corresponds to the place where hearings are to be conducted. Although the venue of the hearing can coincide with the place/seat of arbitration, this is not mandatory.

Recommendation No. 9: Language of Arbitration – As stated above, it is preferable that the parties include the language of arbitration in their arbitration clause, in order to avoid any subsequent procedural debates on this issue or the application of default rules contained in the legislation applicable in the seat of arbitration. Parties are free to choose whatever language they would like. The selection of the language of arbitration is of particular interest when the parties have different nationalities.

Recommendation No. 10: Other Considerations – The parties have contractual freedom to agree on any (legally possible) feature of their arbitration clause. This may include or exclude:

- further considerations regarding the arbitrators to be appointed: sex, educational background, professional background (professor, engineer, attorney), nationality, etc.;
- a cap on arbitrator fees;
- the way in which overall costs of arbitration are to be allocated in the final award, i.e., following the "costs follow the event" rule, or not." [44]

[44] Articles and Studies: Aceris Law. 2021, p. 2-7

Chapter 2
Historical Evolution of International Arbitration Law in India

2.1 International arbitration law in pre-independence India

The British introduced the following legislations to regulate the conduct of arbitrations in India:

(a) **Act IX of 1840** – Under the Charter Act of 1833 the Legislative Council for India was established in 1834. It passed Act IX of 1840, which amended the law with reference to Arbitration, Damages and Interested Witnesses.

(b) **Act VIII of 1859, CPC** – Sections 312 to 327 of this Act related to arbitrations. Sections 312 permitted references to arbitration in pending suits and Sections 313-325 laid down the procedure for the arbitration. Section 326 and 327 allowed arbitration without intervention of courts. This Act, however, was not made applicable to the Supreme Court, or the Presidency Small Cause courts or non-regulation provinces.

(c) **Act X of 1877 and Act XIV of 1882 –** The Code of Civil Procedure was revised in the year 1882 and the provisions relating to arbitration were reproduced verbatim in sections 506 to 526. No change in law of arbitration was effected by the said acts of 1877 and 1882.

(d) **Act 9 of 1872 – Indian Contract Act** – Section 28 of this Act recognized two exceptions as to the agreement in restraint of legal proceedings. The first exception related to agreements to refer to arbitration any disputes which may arise between the parties. If any party to such an agreement in contravention of the terms thereof,

filed a suit, the other party was given the right to plead the existence of such a contract as a bar to the suit. The second exception relates to agreements to refer to arbitration any dispute which has already arisen between the parties. This Act, therefore, recognized for the first time, agreements to refer to arbitration present as well as future disputes.

(e) **Specific Relief Act, 1877** – Section 21 of this Act provided that though future disputes could not be referred as per Code of Civil Procedure, but if a person entered into a contract to refer future disputes and later tried to wriggle out of it, by going to the courts on the same matter, he would not be allowed to do so.

(f) **Act IX of 1899 – Indian Arbitration Act** – The Indian Arbitration Act of 1899 was based on English Arbitration Act of 1889. It was the first direct law on the subject of arbitration but its application was limited to the Presidency – towns of Calcutta, Bombay and Madras. The Act allowed reference of present as well as future disputes to arbitration. It recognized arbitration agreements, whether or not an arbitrator was named therein or not.

(g) **Code of Civil Procedure, 1908** – In this Code, the Second Schedule was devoted completely to arbitrations. This Act contained (a) provisions for arbitration in respect of the subject-matter of suits, (b) provisions where under parties to a dispute might file their arbitration agreements before the court, which would then refer the matter to arbitration, and (c) provisions for arbitration without the intervention of court.

(h) **Indian Arbitration Act, 1940** – This Act repealed the Arbitration Act of 1899 and Sections 89 and 104(1), clauses (a) to (f) and the Second Schedule of the Code of Civil Procedure and continued to govern the law of arbitration in India till 1996. This Act was based upon the (English) Arbitration Act of 1914.

Section 4, which dealt with the effect of foreign awards, of the Arbitration (Protocol and Convention) Act, 1937 provided as follows:

> *(1) A foreign award shall, subject to the provisions of this Act, be enforceable in India as if it were an award made on a matter referred to arbitration in India.*

(2) *Any foreign award which would be enforceable under this Act shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India, and any references in this Act to enforcing a foreign award shall be construed as including references to relying on an award.*[1]

Notably, the term "international arbitration" was not defined in the Arbitration (Protocol and Convention) Act, 1937. The same situation continued in The Arbitration Act, 1940[2].

2.2 International arbitration law in pre-liberalization independent India

While law related to arbitration in pre-independent India did not have any provision related to international arbitration, enforcement of foreign awards was provided in the 1937 Act (Act No. 06 of 1937)[3]. The system for recognition and enforcement of foreign arbitral awards, was further strengthened by The Foreign Awards (Recognition and Enforcement) Act, 1961 (Act No. 45 of 1961). The Preamble of the 1961 Act[4] read as follows:

Preamble

An Act to enable effect to be given to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, on the tenth day of June, 1958, to which India is a party and for purposes connected therewith.

The definition of foreign award as provided in the 1961 Act reads as follows:

Section 2 – Defined on

[1] Laws (India): The Arbitration (Protocol and Convention) Act, 1937
[2] Laws (India): The Arbitration Act, 1940
[3] Laws (India): The Arbitration (Protocol and Convention) Act, 1937
[4] Laws (India): The Foreign Awards (Recognition and Enforcement) Act, 1961

In this Act, unless the context otherwise requires, "foreign award" means an award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960—

(a) "in pursuance of an agreement in writing for arbitration to which the Convention set forth in the Schedule applies, and "

(b) "in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be territories to which the said Convention applies."

Provisions for effect and enforcement of foreign awards as provided in the 1961 Act read as follows:

Section 4 – Effect of foreign awards

(1) A foreign award shall, subject to the provisions of this Act, be enforceable in India as if it were an award made on a matter referred to arbitration in India.

(2) Any foreign award which would be enforceable under this Act shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India and any references in this Act to enforcing a foreign award shall be construed as including references to relying on an award.

Section 6 – Enforcement of foreign award

(1) Where the court is satisfied that the foreign award is enforceable under this Act, the court shall order the award to be filed and shall proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award.

Section 7 – Conditions for enforcement of foreign awards

(1) A foreign award may not be enforced under this Act—

(a) if the party against whom it is sought to enforce the award proves to the court dealing with the case that—

(i) the parties to the agreement were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the law of the country where the award was made; or

(ii) that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(iii) the award deals with questions not referred or contains decisions on matters beyond the scope of the agreement:

Provided that if the decisions on matters submitted to arbitration can be separated from those not submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

(iv) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) *the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made; or*

(b) *if the court dealing with the case is satisfied that—*

(i) *the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or*

(ii) *the enforcement of the award will be contrary to public policy.*

(2) *If the court before which a foreign award is sought to be relied upon is satisfied that an application for the setting aside or suspension of the award has been made to a competent authority referred to in sub-clause (v) of clause (a) of sub-section (1), the court may, if it deems proper, adjourn the decision on the enforcement of the award, order the other party to furnish suitable security.*

Before the liberalization of Indian economy in 1992, the law related to arbitration in India could be summed up as follows:

Before the enactment of the Act, the law governing arbitration in India consisted of three statutes:

i. *The Arbitration (Protocol and Convention) Act, 1937 ("**1937 Act**");*

ii. *The Indian Arbitration Act, 1940 ("**1940 Act**"); and*

iii. *The Foreign Awards (Recognition and Enforcement) Act, 1961 ("**1961 Act**")*

The 1940 Act was the general law governing arbitration in India and resembled the English Arbitration Act of 1934. The 1961 Act and the 1937 Act dealt with the enforcement of foreign awards and effected the Convention on the Recognition and Enforcement of Foreign Arbitral

Awards, 1958 ("New York Convention") and Convention on the Execution of Foreign Arbitral Awards, 1927 ("Geneva Convention") respectively.[5]

2.3 International arbitration law in India post-1995

India started on the journey of economic reforms and liberalisation in 1991. With economic reforms, the country became more outward looking and started welcoming foreign investment. Economic reforms were a part of the worldwide movement towards globalization. In a world which was globalizing fast, arbitration as a means of resolving disputes was becoming very important.

United Nations Commission on International Trade Law (UNCITRAL) published UNCITRAL Model Law on International Commercial Arbitration[6] in 1985.

Notably, with the UNCITRAL Model Law, the focus was on "*arbitration as a method of settling disputes arising in international commercial relations*" and not on recognition of foreign arbitral awards. Indian law was at that time focused on only recognition and enforcement of foreign arbitral awards. Disputes arising out of international commercial relations was not in the perspective of the Indian law as it existed in the pre-liberalization era. The lacuna in Indian law was seen as a roadblock for growth of Indian business which was getting into international commercial relations in a big way after the economic reforms of 1991.

The legislative process for comprehensive reform of arbitration law in India began on 16th May, 1995, when the Arbitration and Conciliation Bill, 1995, was introduced in the Rajya Sabha. The Bill was then referred to the Parliamentary / Standing Committee on Home Affairs. The Committee submitted its Report to the Rajya Sabha on 28th November, 1995. A number of amendments were suggested by the Committee and these were accepted. Due to the delay caused by the said process and suggested amendments, the Bill could not be passed and to expedite matters the Arbitration and Conciliation Ordinance, 1996, was promulgated by the President on 16th January, 1996.

[5] Articles and Studies: Nishith Desai Associates, 2022, Ch.2, p.2
[6] Laws and Rules (International): UNCITRAL Model Law on International Commercial Arbitration 1985

In due course, the Arbitration and Conciliation Bill, 1996 was presented before the Parliament.

The Arbitration Act, 1996 consists of four parts – Part I is titled Arbitration and relates mostly to domestic arbitration, Part II is titled Enforcement of Certain Foreign Awards, Part III is titled Conciliation and Part IV is Supplementary Provisions. Part II consists of two Chapters – Chapter 1 (sections 44-52) relates to New York Convention Awards and Chapter II (sections 53-60) relates to Geneva Convention Awards.

Even though the Arbitration and Conciliation Act, 1996 defined "international commercial arbitration", the Act did not have legal provisions for international commercial arbitration. Part II of the act dealt with recognition of foreign arbitral awards. It may be said that despite adopting UNCITRAL Model Law, the arbitration law in India retained the mindset of the pre-liberalization era. To some extent, this lacuna in law was corrected by the Arbitration and Conciliation Amendment Act, 2015[7] which modified the definition of Court by modifying sub-section 2(1)(e) of the Act[8] and by inserting a proviso in sub-section 2(2). After the amendments by the 2015 Act, sub-sections 2(1)(e) and 2(2) read as follows:

> *(e) "Court" means—*
>
> *(i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;*
>
> *(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions*

[7] Laws (India): The Arbitration and Conciliation (Amendment) Act, 2015
[8] Laws (India): The Arbitration and Conciliation Act, 1996

forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;

(2) This Part shall apply where the place of arbitration is in India.

Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (b) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act.

The insertion of proviso in sub-section 2(2) of the Act has provided an option to the contracting parties to either accept or reject the application of some of the sections of Part I of the Act to the arbitration agreement. In a way, **the amendment Act of 2015 has introduced a new element of complexity for drafters of arbitration agreement / clause**.

Based on the recommendations of the Law Commission, the Act was further amended by the Amendment Act, 2019[9]. Section 29A inserted by the 2015 Amendment Act was modified by the 2019 Amendment Act. Sub-sections (1) and (2) of Section 29A (as amended by the 2019 Act)[10] is relevant for our study and is reproduced hereinbelow:

29A. Time limit for arbitral award

(1) The award in matters other than international commercial arbitration shall be made by the arbitral tribunal within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23:

Provided that the award in the matter of international commercial arbitration may be made as expeditiously as

[9] Laws (India): The Arbitration and Conciliation (Amendment) Act, 2019
[10] Laws (India): Ibid.

possible and endeavour may be made to dispose of the matter within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23.

(2) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.

The Arbitration and Conciliation Act, 1996 has undergone one more amendment in the year 2021 by The Arbitration and Conciliation (Amendment) Act, 2021[11] which is not of much relevance for the subject of this book.

[11] Laws (India): The Arbitration and Conciliation (Amendment) Act, 2021

Chapter 3
International Arbitration – Definition and Law

3.1 Definition of international arbitration as per Indian law

Section 2(1)(a), 2(1)(b) and 2(1)(f) of Arbitration Act[1] define arbitration, agreement and international arbitration as follows:

> *(1) In this Part, unless the context otherwise requires,-*
>
> *(a) "arbitration" means any arbitration whether or not administered by permanent arbitral institution;*
>
> *(b) "arbitration agreement" means an agreement referred to in section 7;*
>
> *(f) "international commercial arbitration" means an arbitration relating to disputes 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-*
>
> *i. an individual who is a national of, or habitually resident in, any country other than India; or*
>
> *ii. a body corporate which is incorporated in any country other than India; or*

[1] Laws (India): The Arbitration and Conciliation Act, 1996

iii. a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or

iv. the Government of a foreign country;

Agreement

The term "agreement" is not defined in the Arbitration and Conciliation Act, 1996. This was also stated by the Honourable Supreme Court in the matter of Vidya Drolia[2] where the court stated: "The term 'agreement' is not defined in the Arbitration Act, *albeit* it is defined in Section 10 of the Indian Contract Act, 1872 (for short, 'the Contract Act'), as contracts made by free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not thereby expressly declared to be void."

In the footnote to the above comment about the nature of agreement, the Court states, "**What agreements are contracts** – All agreements are contracts if they are made by the free consent of the parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void. Nothing herein contained shall affect any law in force in India, and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents."

Since reliance has been placed on the Indian Contract Act[3] for definition of the term agreement, it is important to see the following definitions in section 2 of the Indian Contract Act:

(a) "Proposal" – When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal.

[2] Domestic Court Judgments: Vidya Drolia and Others v. Durga Trading Corporation, 2020
[3] Laws (India): The Indian Contract Act, 1872

(b) "Promise" – When one person to whom the proposal is made, signifies his assent thereto, the proposal is said to be accepted. A proposal when accepted, becomes a promise.

(e) "Agreement" – Every promise and every set of promises forming the consideration for each other, is an agreement.

(h) "Contract" – An agreement enforceable by law is a contract.

Validity of Contract Necessary Condition

It is necessary that the agreement between parties is a valid contract and is not void under the Indian Contract Act[4]. The view was expressed in detail in the judgment in the matter of Vidya Drolia[5] as follows:

> *The term 'agreement' is not defined in the Arbitration Act, albeit it is defined in Section 10 of the Indian Contract Act, 1872 (for short, the 'Contract Act'), as contracts made by free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not thereby expressly declared to be void. Section 10 of the Contract Act also stipulates that aforesaid requirements shall not affect any law in force in India (and not expressly repealed) by which a contract is required to be made in writing, in presence of witnesses or any law relating to registration of documents. Thus, an arbitration agreement should satisfy the mandate of Section 10 of the Contract Act, in addition to satisfying other requirements stipulated in the Section 7 of the Arbitration Act. Sections 12 to 18 of the Contract Act state when a person can be said to be of a sound mind for the purpose of contracting and define the expressions 'consent', 'free consent', 'coercion', 'undue influence', 'fraud' and 'misrepresentation'. Sections 19 to 23 relate to voidability of agreements, the power to set aside contracts induced by undue influence, when both the parties are under mistake as to a matter of fact, effect of a mistake as to the law, effect of a mistake by one party as to a matter of fact and what*

[4] Laws (India): Ibid
[5] Domestic Court Judgments: Vidya Drolia and Ohers v. Durga Trading Corporation, 2020

considerations and objects are lawful and unlawful. Sections 24 to 30 relate to void contracts and Sections 26 and 27 therein state that agreements in restraint of marriage and agreements in restraint of trade, respectively are void, albeit Explanation (1) to Section 27 saves agreements for not carrying out the business of which goodwill is sold. Section 28 of the Contract Act states that agreements in restraint of legal proceedings are void, but Explanation (1) specifically saves contracts by which two or more persons agree that any dispute, or one which may arise between them, in respect of any subject or class of subjects shall be referred to arbitration. Arbitration agreement must satisfy the objective mandates of the law of contract to qualify as an agreement. Clauses (g) and (h) of Section 2 of the Contract Act state that an agreement not enforceable in law is void and an agreement enforceable in law is a contract. As a sequitur, it follows that an arbitration agreement that is not enforceable in law is void and not legally valid.

Commercial

Notably, the term "commercial" is not defined under the Arbitration and Conciliation Act, 1996. Honourable Supreme Court in RM Investment vs. Boeing[6] expressed the opinion that the expression "commercial" should be construed broadly. Relevant extract from the judgment reads as follows:

While construing the expression "commercial" in Section 2 of the Act it has to be borne in mind that the "Act is calculated and designed to subserve the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through arbitration and any expression or phrase occurring therein should receive, consistent with its literal and grammatical sense, a liberal construction." [See : Renusagar Power Co. Ltd. v. General Electric Co. and Anr. MANU/SC/0001/1984 : [1985]1SCR432 and Koch Nevigation v. Hindustan Petroleum, MANU/SC/0336/1989 :[1989] Supp. 1 S.C.R. 70 ***The expression "commercial" should, therefore, be construed***

[6] Domestic Court Judgments: R.M. Investment and Trading Co. Pvt. Ltd. v. Boeing Co. and Ors., 1994

broadly having regard to the manifold activities which are integral part of international trade today.

In support of the argument for taking a broad interpretation of the term "commercial", Honourable Supreme Court further quoted with reference to the fundamental rights under the Constitution of India and also from UNCITRAL Model Law as under:

13. In the context of Article 301 which assures freedom of trade, commerce and intercourse, it has been held:

> *Trade and commerce do not mean merely traffic in goods, i.e., exchange of commodities for money or other commodities. In the complexities of modern conditions, in their sweep are included carriage of persons and goods by road, rail, air and waterways, contracts, banking, insurance, transactions in the stock exchanges and forward markets, communication of information, supply of energy, postal and telegraphic services and many more activities - **too numerous to be exhaustively enumerated which may be called commercial intercourse**." (Emphasis Supplied)*
>
> *(Atiabari Tea Co. Ltd. v. The State of Assam and Ors. MANU/SC/0030/1960 : [1961]1SCR809 , Shah, J.)*

14. While construing the expression 'commercial relationship' in Section 2 of the Act, aid can also be taken from the Model Law prepared by UNCITRAL wherein relationships of a commercial nature include "commercial representation or agency" and "consulting".

It may be mentioned here that the judgment of RM Investment vs. Boeing[7] was quoted approvingly by Honourable Supreme Court in the matter of Gemini Bay Transcription vs. Integrated[8].

[7] Domestic Court Judgments: Ibid
[8] Domestic Court Judgments: Gemini Bay Transcription Pvt. Ltd. v. Integrated Sales Service Ltd. and Ors., 2021

Legal Relationship

Like many other concepts, the term "legal relationship" is also not defined in the Arbitration and Conciliation Act, 1996. This was stated by the Honourable Supreme Court in the matter of Vidya Drolia v. Durga Trading Corporation[9] as follows:

> *Sub-section (1) to Section 7 ordains that the arbitration agreement should be in respect of disputes arising from a defined legal relationship, whether contractual or not. The expression 'legal relationship', again not defined in the Arbitration Act, means a relationship which gives rise to legal obligations and duties and, therefore, confers a right. These rights may be contractual or even non-contractual. Non-contractual disputes would require a separate or submission arbitration agreement based on the cause of action arising in tort, restitution, breach of statutory duty or some other non-contractual cause of action.*

Footnote to the above paragraph further explains the nature of "legal relationship" as under:

> *Legal relationship will be normally followed by certain immediate or remote consequences in the form of action or non-action by the judicial and executive agents of the society as distinct from purely private affairs or other events which have nothing to do with law. Legal relationship exists in every situation that is or may be procedurally asserted for a declaration or denial of a right or for imposition of a sanction or any other purpose within the scope of adjudicative action. In actual practice, objection regarding defined legal relationship is seldom raised and tested.*

The above view on legal relationship was further confirmed by Honourable Supreme Court in the matter of Gemini Bay Transcription[10] by the following comments:

[9] Domestic Court Judgments: Vidya Drolia and Ohers v. Durga Trading Corporation, 2020
[10] Domestic Court Judgments: Gemini Bay Transcription Pvt. Ltd. v. Integrated Sales Service Ltd. and Ors., 2021

30. The expression "legal relationships" has been explained in Vidya Drolia v. Durga Trading Corporation, MANU/SC/0939/2020 : (2021) 2 SCC 1 as follows:

> *24. ... The expression "legal relationship", again not defined in the Arbitration Act, means a relationship which gives rise to legal obligations and duties and, therefore, confers a right.*
> *...*

31. Also, the award may deal with differences arising out of breach of contract or tort.

Contractual or Not

Sub-section 2(1)(f) of the Arbitration and Conciliation Act defines "international commercial arbitration" as "*"international commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether* ***contractual or not*** *...".* The expression "contractual or not" refers to agreements which create a legal relationship but which are not contracts.

There seem to be no case law to elaborate on what such agreements might involve. However, given the previous discussion based on Vidya Drolia[11] it can be said that a void contract is not covered by this. One may say that if the agreement is a contract, it must be a valid one and not a void one for it to become eligible to get the benefit of the process of arbitration under the Arbitration and Conciliation Act. However, it may be worthwhile to point out that Vidya Drolia[12] case related to domestic arbitration and not to international commercial arbitration. The inclusion of non-contractual agreements under arbitration is under the definition of "international commercial arbitration". Hence, one may even argue that if it is a case of domestic arbitration, the legal relationship must be contractual and cannot be non-contractual. Surely, the law on this point is unclear and it will need the Honourable Supreme Court or High Courts to clarify it in due course.

[11] Domestic Court Judgments: Vidya Drolia and Ohers v. Durga Trading Corporation, 2020
[12] Domestic Court Judgments: Ibid

Looking at the types of agreements in practice in the area of international commercial relations, one comes across many agreements that are strictly speaking often not contracts but have force of law since they involve mutual promises between two or more parties. Often such agreements do not involve payment of consideration by one party to the other. Some examples of such agreements are as follows:

a) Joint Venture Agreements

b) Shareholder Agreements

c) Non-Disclosure Agreements

d) Confidentiality Agreements

One may conclude that such agreements which are common in cross-border business relationships will be covered by the qualification "whether contractual or not" in the definition of international commercial arbitration. In other words, any form of legal relationship of commercial nature even when it is not covered strictly by the definition of valid contract will be covered within the scope of sub-section 2(1)(f) of the Arbitration and Conciliation Act[13]. This conclusion will need to pass the test of judicial scrutiny and till then it may be treated as only a hypothesis.

Globally, in many arbitration centres non-contractual claims are often subject of arbitration. It may be possible to list four classes of such claims:

i. Pre-contractual claims – It includes principally the civil law notion of *culpa in contrahendo* meaning "fault in conclusion of a contract"; In this context, the claim arises even though the contract is either not executed or suffers from some defect.

ii. Tort claims – This is a broad category including actions for damages for wrongful acts such as in deceit, negligence, defamation, interference with contractual relations, amongst others. India does not have a separate law for torts and claims under torts are seen as a grey area by some courts. In the field of arbitration, claims under torts are hazier and will need to develop as the arbitration law in the country develops.

[13] Laws (India): The Arbitration and Conciliation Act, 1996

iii. Restitution claims – Under this category one may put claims such as unjust enrichment, and equitable claims, such as breach of confidence or breach of trust, in which remedies can include recovery of gains / benefits conferred rather than or as well as compensation for losses.

iv. Statutory claims – This may include claims such as breach of competition laws, securities laws, or anti-racketeering laws. Under Indian laws, most statutory claims are not covered by arbitration.

The above four categories were confirmed by Honourable Supreme Court in Vidya Drolia[14] when the court quoted famous author Russell and said, "Non-contractual disputes would require a separate or submission arbitration agreement based on the cause of action arising in tort, restitution, breach of statutory duty or some other non-contractual cause of action".

At the heart of debate about non-contractual claims is the issue of non-arbitrable claims. Honourable Supreme Court in the matter of Vidya Drolia[15] has given a fourfold test which is of great relevance to deciding which of the non-contractual claims can be subject to arbitration under the laws of India. Relevant extract from the judgement reads as follows:

> *45. In view of the above discussion, we would like to propound a fourfold test for determining when the subject matter of a dispute in an arbitration agreement is not arbitrable:*
>
> > *(1) when cause of action and subject matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.*
> >
> > *(2) when cause of action and subject matter of the dispute affects third party rights; have erga omnes effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable;*

[14] Domestic Court Judgments: Vidya Drolia and Ohers v. Durga Trading Corporation, 2020
[15] Domestic Court Judgments: Ibid

> *(3) when cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable; and*
>
> *(4) when the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).*

These tests are not watertight compartments; they dovetail and overlap, albeit when applied holistically and pragmatically will help and assist in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject matter is non-arbitrable. Only when the answer is affirmative that the subject matter of the dispute would be non-arbitrable.

However, the aforesaid principles have to be applied with care and caution as observed in ***Olympus Superstructures Pvt. Ltd.***[16]*:*

> *35…Reference is made there to certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, which cannot be referred to arbitration. It has, however, been held that if in respect of fats relating to a criminal matter, say, physical injury, if there is a right to damages for personal injury, then such a dispute can be referred to arbitration (Keir v. Leeman). Similarly, it has been held that a husband and a wife may refer to arbitration the terms on which they shall separate, because they can make a valid agreement between themselves on that matter (Soilleux v. Herbst, Wilson v. Wilson and Cahill v. Cahill).*

The example provided by Honourable Supreme Court in the matter of Olympus Superstructures[17] is indeed very interesting. It gives us an instance of non-contractual claims. Let us say a man and a woman get married under Hindu Marriage Act[18] and enter

[16] Domestic Court Judgments: Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan and Ors., 1999
[17] Domestic Court Judgments: Ibid
[18] Laws (India): The Hindu Marriage Act, 1955

into a prenupital agreement relating to division of properties in case of divorce. The marriage itself cannot be dissolved except as provided under the relevant provisions of Hindu Marriage Act. However, in case divorce is granted by the competent court, the matter of division of common properties and such other financials may be subject to arbitration as per the terms of the prenuptial agreement. Prenuptial agreement is unlikely to be treated as a contract under Indian Contract Act[19]. However, as per Honourable Supreme Court the prenuptial agreement can provide for arbitration under the Arbitration and Conciliation Act[20].

Indian Company Controlled by Foreigners

The expression "international commercial arbitration" came under detailed scrutiny of Honourable Supreme Court in the matter of TDM Infrastructure vs. UE Development[21]. In the said matter, the issue raised before the court was whether a company incorporated in India but controlled by foreign nationals would qualify to be one of the parties under definition of "international commercial arbitration" in sub-section 2(1)(f) of the Act. Relevant extract from the judgement reads as follows:

> *The term "International Commercial Arbitration" has a definite connotation. It inter alia means a body corporate which is incorporated in any country other than India. However, according to the petitioner, it is a company whose central management and control is exercised in any country other than India and, thus, despite the fact that the company is incorporated and registered in India, its central management and control being exercised in Malaysia, it will come within the purview of Clause (iii) of Section 2(1)(f) of the 1996 Act.*
>
> *"International Commercial Arbitration" and "Domestic Arbitration" connote two different things. The 1996 Act excludes domestic arbitration from the purview of International Commercial Arbitration. The Company which is incorporated in a country other than India is excluded from the said definition. The same cannot be included again on the premise that its*

[19] Laws (India): The Indian Contact Act, 1872
[20] Laws (India): The Arbitration and Conciliation Act, 1996
[21] Domestic Court Judgments: TDM Infrastructure Private Limited v. UE Development India Private Limited, 2008

central management and control is exercised in any country other than India. Although Clause (iii) of Section 2(1)(f) of the 1996 Act talks of a company which would ordinarily include a company registered and incorporated under the Companies Act but the same also includes an association or a body of individuals which may also be a foreign company. Sub-section (6) of Section 2 of the 1996 Act leaves the parties free to determine certain issues. That freedom shall include the right of the parties to authorize any person including an institution, to determine the same. Thus, in a case of this nature, the court shall not interpret the words in such a manner which would be opposed to the intention of the parties.

Whether, thus, an agreement falls within the purview of Section 2(1)(f) of the 1996 Act is the core question. Section 2(1)(f) speaks of legal relationship whether commercial or otherwise under the law in force in India. The relationship has to be between an individual who is a national of or habitually resident in any country other than India as specified in Clause (i) of Section 2(1)(f). 'Nationality' or being 'habitually resident' in respect of a body corporate in any country other than India should, in my view, receive a similar construction.

15. Determination of nationality of the parties plays a crucial role in the matter of appointment of an arbitrator. A company incorporated in India can only have Indian nationality for the purpose of the Act. It cannot be said that a company incorporated in India does not have an Indian nationality. Hence, where both the parties have Indian nationalities, then the arbitration between such parties cannot be said to be an international commercial arbitration.

Thus, it is clear that an arbitration agreement between two companies incorporated in India is domestic arbitration even when one or both of the companies are owned / controlled by foreign citizens / residents. On the other hand, this could be interpreted to mean that in case one of the parties to an arbitration agreement is an Indian company and the other is a company incorporated outside India but owned and controlled by Indian citizens and residents, the arbitration will be international commercial arbitration.

3.2 Definition of international arbitration as per UNCITRAL Rules

The Arbitration and Conciliation Act, 1996[22] is modelled on Model Law[23] of UNCITRAL. Article 1 of the Model Law has the following definition related to international arbitration:

> *(3) An arbitration is international if:*
>
> *(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or*
>
> *(b) one of the following places is situated outside the State in which the parties have their places of business:*
>
> *(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;*
>
> *(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or*
>
> *(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.*
>
> *(4) For the purposes of paragraph (3) of this article:*
>
> *(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;*
>
> *(b) if a party does not have a place of business, reference is to be made to his habitual residence.*

[22] Laws (India): The Arbitration and Conciliation Act, 1996
[23] Laws and Rules (International): UNCITRAL Model Law on International Commercial Arbitration 1985

It is important to also look at the footnote to Article 1(1) which gives guidance for defining the term "commercial". The footnote reads as follows:

> *The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.*

Honourable Supreme Court referred to the above footnote in the judgment in the matter of Gemini Bay Transcription[24] as follows:

> *32. Likewise, what is considered to be "commercial" under the law of India is well explained in the UNCITRAL Model Law as follows:*
>
> > *The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring, leasing, construction of works; consulting, engineering, licensing investment, financing: banking; insurance; exploitation agreement or concession, joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail, or road.*

[24] Domestic Court Judgments: Gemini Bay Transcription Pvt. Ltd. v. Integrated Sales Service Ltd. and Ors., 2021

33. In R.M. Investment and Trading Co. (P) Ltd. v. Boeing Co., MANU/SC/0246/1994 : (1994) 4 SCC 541, at page 546, this Court held:

> *12. [in] construing the expression "commercial" in Section 2 of the [Foreign Awards (Recognition & Enforcement) Act, 1961] it has to be borne in mind that the Act is calculated and designed to subserve the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through arbitration and any expression or phrase occuring therein should receive, consistent with its literal and grammatical sense, a liberal construction." [See: "Renusagar Power Co. Ltd. v. General Electric Co." [MANU/SC/0001/1984: (1984) 4 SCC 679] (SCC at p.723-24) and Koch Navigation Inc. v. Hindustan Petroleum Corporation Ltd. [MANU/SC/0336/1989) : (1989) 4 SCC 259, 262 (para 8)]*
>
> *"The expression "commercial' should, therefore, be construed broadly having regard to the manifold activities which are integral part of international trade today.*

Essentially, Honourable Supreme Court has relied on the Model Law of UNCITRAL and has given the guidance of construing the expression "commercial" broadly having regard to the manifold activities which are integral part of international trade today.

While the Model Law[25] does not have the force of law in India or in any other jurisdiction, since the Arbitration Act[26] of India is based on the Model Law, the Article in the Model Law regarding definitions and rules of interpretation is extremely important. Relevant portions of the Article read as follows:

Article 2. Definitions and rules of interpretation

For the purposes of this Law:

[25] Laws and Rules (International): UNCITRAL Model Law on International Commercial Arbitration 1985
[26] Laws (India): The Arbitration and Conciliation Act, 1996

(a) "arbitration" means any arbitration whether or not administered by a permanent arbitral institution;

(b) "arbitral tribunal" means a sole arbitrator or a panel or arbitrators;

(c) "court" means a body or organ of the judicial system of a State;

(d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;

In addition to the Model Law, UNCITRAL has published UNCITRAL Arbitration Rules[27] which were amended in 2010. UNCITRAL Arbitration Rules are often adopted by parties in international commercial arbitration. The Rules do not define "international commercial arbitration". However, the Rules do lay down the types of disputes that may be referred for arbitration under the said Rules. Interestingly, the types of disputes referred to in the Rules have some of the essential ingredients prescribed under sub-section 2(1)(f) of the Arbitration and Conciliation Act[28] of India. Relevant extract from the Article 1(1) of the Rules is as follows.

Article 1

1. Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree.

[27] Laws and Rules (International): UNCITRAL Arbitration Rules, 2010
[28] Laws (India): The Arbitration and Conciliation Act, 1996

3.3 Law related to arbitration agreement

Section 7 of The Arbitration and Conciliation Act, 1996[29] contains the following provisions related to arbitration agreement:

> *(1) In this Part, "arbitration agreement" means 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.*
>
> *(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*
>
> *(3) An arbitration agreement shall be in writing.*
>
> *(4) An arbitration agreement is in writing if it is contained in –*
>
> *(a) a document signed by the parties;*
>
> *(b) an exchange of letters, telex, telegrams or other means of telecommunication [including communication through electronic means] which provide a record of the agreement; or*
>
> *(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.*
>
> *(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.*

[29] Laws (India): The Arbitration and Conciliation Act, 1996

Honourable Supreme Court in the matter of KK Modi[30] laid down the key attributes that must be present for an agreement to be considered as an arbitration agreement as follows:

> ***16.*** *Among the attributes which must be present for an agreement to be considered as an arbitration agreement are:*
>
> *(1) The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement,*
>
> *(2) That the jurisdiction of the tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the Court or from a statute, the terms of which make it clear that the process is to be an arbitration,*
>
> *(3) The agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal,*
>
> *(4) That the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides,*
>
> *(5) That the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly,*
>
> *(6) The agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal.*
>
> ***17.*** *The other factors which are relevant include, whether the agreement contemplates that the tribunal will receive evidence from both sides and hear their contentions or at least give the parties an opportunity to put them forward; Whether the wording of the agreement is*

[30] Domestic Court Judgements: K.K. Modi v. K.N. Modi and Ors.,1998

consistent or inconsistent with the view that the process was intended to be an arbitration, and whether the agreement requires the tribunal to decide the dispute according to law.

In the KK Modi judgement (supra) Honourable Supreme Court has also differentiated between expert determination and arbitration. In case the parties agree to refer the dispute for opinion of an expert, the reference is not arbitration. Relevant extract from the judgement read as follows:

18. *In Russell on Arbitration, 21st Edition, at page 37, paragraph 2-014, the question : How to distinguish between an expert determination and arbitration, has been examined. It is stated, "Many cases have been fought over whether a contract's chosen form of dispute resolution is expert determination or arbitration. This is a matter of construction of the contract, which involves an objective enquiry into the intentions of the parties. First, there are the express words of the disputes clause. If specific words such as 'arbitrator', 'arbitral tribunal', 'arbitration' or the formula 'as an expert and not as an 'arbitrator' are used to describe the manner in which the dispute resolved is to act, they are likely to be persuasive although not always conclusive....Where there is no express wording, the court will refer to certain guidelines. Of these, the most important used to be, whether there was an 'issue' between the parties such as the value of an asset on which they had not taken defined positions, in which case the procedure was held to be expert determination; or a 'formulated dispute' between the parties where defined positions had been taken, hi which case the procedure was held to be an arbitration. This imprecise concept is still being relied on. It is unsatisfactory because some parties to contract deliberately choose expert determination for dispute resolution. The next guideline is the judicial function of an arbitral tribunal as opposed to the expertise of the expert;....An arbitral tribunal arrives at its decision on the evidence and submission of the parties and must apply the law or if the parties agree, on other consideration; an expert, unless it is*

agreed otherwise, makes his own enquiries, applies his own expertise and decides on his own expert opinion...."

Further in the KK Modi (supra) case, Honourable Supreme Court has laid down three additional criterion of arbitration agreements. Relevant extract reads as follows:

20. *Therefore our courts have laid emphasis on (1) existence of disputes as against intention to avoid future disputes; (2) the tribunal or forum so chosen is intended to act judicially after taking into account relevant evidence before it and the submissions made by the parties before it; and (3) the decision is intended to bind the parties. Nomenclature used by the parties may not be conclusive. One must examine the true intent and Purport of the agreement. There are, of course, the statutory requirements of a written agreement, existing or future disputes and an intention to refer them to arbitration. (Vide Section 2 Arbitration Act 1940 and Section 7 Arbitration and Conciliation Act, 1996).*

The key principles, prescribed in KK Modi[31] judgement, were quoted with approval by Honourable Supreme Court in Babanrao[32] case while also quoting from an earlier case (Rukamanibai Gupta v. Collector[33]). Relevant extracts are as follows:

15. *It may be seen that Section 7 of the Act does not mandate any particular form for the arbitration clause. This proposition was settled by this Court way back in Rukmanibai Gupta v. Collector, Jabalpur and Ors. MANU/SC/0002/1980 : (1980) 4 SCC 556, while viewing erstwhile Section 2(a) of the Arbitration Act, 1940 which contained the definition of "arbitration agreement". It was held that:*

6. *.....Arbitration agreement is not required to be in any particular form. What is required to be ascertained is whether the parties have agreed that if disputes arise*

[31] Domestic Court Judgements: ibid.
[32] Domestic Court Judgments: Babanrao Rajaram Pund v. Samarth Builders & Developers and Ors., 2022
[33] Domestic Court Judgments: Rukmanibai Gupta v. Collector Jabalpur and Ors., 1980

between them in respect of the subject- matter of contract such dispute shall be referred to arbitration, then such an arrangement would spell out an arbitration agreement. A passage from RUSSELL ON ARBITRATION, 19th Edn., p. 59, may be referred to with advantage:

If it appears from the terms of the agreement by which a matter is submitted to a person's decision that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry and hear the respective cases of the parties and decide upon evidence laid before him, then the case is one of an arbitration.

In the Babanrao case (supra) Honourable Supreme Court further quoted from an earlier case (Bihar vs. Encon[34]) as follows:

18. *Encon Builders (supra) placed reliance on K.K. Modi's case and further condensed the essential features of an arbitration agreement into four elements i.e.:*

13. *The essential elements of an arbitration agreement are as follows:*

(1) There must be a present or a future difference in connection with some contemplated affair.

(2) There must be the intention of the parties to settle such difference by a private tribunal.

(3) The parties must agree in writing to be bound by the decision of such tribunal.

(4) The parties must be ad idem.

[34] Domestic Court Judgments: Bihar State Mineral Dev. Corpn. and Ors. v. Encon Builders (I) Pvt. Ltd., 2003

Another case that was quoted approvingly by Honourable Supreme Court in Bababrao case (supra) is Jagdish Chander[35] where the court said that the intention to refer to arbitration must be clear and beyond ambiguity at the time the arbitration agreement is made. Relevant extract from Jagdish Chander is as follows:

> **9.** *Para 16 of the Partnership deed provides that if there is any dispute touching the partnership arising between the partners, the same shall be mutually decided by the parties or shall be referred to arbitration if the parties so determine. If the clause had merely said that in the event of disputes arising between the parties, they "shall be referred to arbitration", it would have been an arbitration agreement. But the use of the words "shall be referred for arbitration if the parties so determine" completely changes the complexion of the provision. The expression "determine" indicates that the parties are required to reach a decision by application of mind. Therefore, when Clause 16 uses the words "the dispute shall be referred for arbitration if the parties so determine", it means that it is not an arbitration agreement but a provision which enables arbitration only if the parties mutually decide after due consideration as to whether the disputes should be referred to arbitration or not. In effect, the clause requires the consent of parties before the disputes can be referred to arbitration. The main attribute of an arbitration agreement, namely, consensus ad idem to refer the disputes to arbitration is missing in Clause 16 relating to settlement of disputes. Therefore it is not an arbitration agreement, as defined under Section 7 of the Act. In the absence of an arbitration agreement, the question of exercising power under Section 11 of the Act to appoint an Arbitrator does not arise.*

Arbitration agreement / clause must also provide for the place of arbitration. Section 20 of the Arbitration and Conciliation Act[36] is relevant in this context and reads as follows:

[35] Domestic Court Judgments: Jagdish Chander v. Ramesh Chander and Ors., 2007
[36] Laws (India): The Arbitration and Conciliation Act, 1996

20. Place of arbitration.—

(1) The parties are free to agree on the place of arbitration.

(2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(3) Notwithstanding sub-section (1) or sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.

In the context of place of arbitration, following paragraphs of judgement in the case of Balco[37] are interesting:

A plain reading of Section 20 leaves no room for doubt that where the place of arbitration is in India, the parties are free to agree to any "place" or "seat" within India, be it Delhi, Mumbai etc. In the absence of the parties' agreement thereto, Section 20(2) authorizes the tribunal to determine the place / seat of such arbitration. Section 20(3) enables the tribunal to meet at any place for conducting hearings at a place of convenience in matters such as consultations among its members for hearing witnesses, experts or the parties.

99 . The fixation of the most convenient "venue" is taken care of by Section 20(3). Section 20, has to be read in the context of Section 2(2), which places a threshold limitation on the applicability of Part I, where the place of arbitration is in India. Therefore, Section 20 would also not support the submission of the extra-territorial applicability of Part I, as canvassed by

[37] Domestic Court Judgement: Bharat Aluminium v. Kaiser Aluminium, 2012

the Learned Counsel for the Appellants, so far as purely domestic arbitration is concerned.

100 . True, that in an international commercial arbitration, having a seat in India, hearings may be necessitated outside India. In such circumstances, the hearing of the arbitration will be conducted at the venue fixed by the parties, but it would not have the effect of changing the seat of arbitration which would remain in India. The legal position in this regard is summed up by Redfern and Hunter, The Law and Practice of International Commercial Arbitration (1986) at Page 69 in the following passage under the heading "The Place of Arbitration":

The preceding discussion has been on the basis that there is only one "place" of arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the arbitration agreement or the terms of the reference or the minutes of proceedings or in some other way as the place or "seat" of the arbitration. This does not mean, however, that the arbitral tribunal must hold all its meetings or hearings at the place of arbitration. International commercial arbitration often involves people of many different nationalities, from many different countries. In these circumstances, it is by no means unusual for an arbitral tribunal to hold meetings - or even hearings - in a place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses... It may be more convenient for an arbitral tribunal sitting in one country to conduct a hearing in another country - for instance, for the purpose of taking evidence..... In such circumstances, each move of the arbitral tribunal does not of itself mean that the seat of arbitration changes. The seat of the arbitration remains the place initially agreed by or on behalf of the parties.

This, in our view, is the correct depiction of the practical considerations and the distinction between "seat" (Section 20(1) and 20(2)) and "venue" (Section 20(3)). We may point out here that the distinction between "seat" and "venue" would be quite crucial in the event, the arbitration agreement designates a foreign country as the "seat"/"place" of the arbitration and

also select the Arbitration Act, 1996 as the curial law/law governing the arbitration proceedings. It would be a matter of construction of the individual agreement to decide whether:

(i) "The designated foreign "seat" would be read as in fact only providing for a "venue" / "place" where the hearings would be held, in view of the choice of Arbitration Act, 1996 as being the curial law – OR"

(ii) "Whether the specific designation of a foreign seat, necessarily carrying with it the choice of that country's Arbitration / curial law, would prevail over and subsume the conflicting selection choice by the parties of the Arbitration Act, 1996."

***ONLY** if the agreement of the parties is construed to provide for the "seat" / "place" of Arbitration being in India - would Part I of the Arbitration Act, 1996 be applicable. If the agreement is held to provide for a "seat" / "place" outside India, Part I would be inapplicable to the extent inconsistent with the arbitration law of the seat, even if the agreement purports to provide that the Arbitration Act, 1996 shall govern the arbitration proceedings.*

The above ruling by Honourable Supreme Court underlines the importance of specifying the seat of arbitration in the arbitration agreement. The seat of arbitration will decide the court which will have jurisdiction over the arbitration. Even though the seat is decided, the arbitrators are free to hold meetings at any place or places of their choice. The place where the meetings are held is a venue and it does not normally affect the seat of arbitration unless the parties have failed to specify the seat of arbitration in their arbitration agreement. The issue of seat vs. venue of arbitration came up before Honourable Supreme Court in the matter of BGS SGS JV vs. NHPC[38] and the court ruled as under:

***84.** On a conspectus of the aforesaid judgments, it may be concluded that whenever there is the designation of a place of arbitration in an arbitration Clause as being the "venue" of the arbitration proceedings, the expression*

[38] Domestic Court Judgments: BGS SGS Soma JV v. NHPC Ltd., 2019

"arbitration proceedings" would make it clear that the "venue" is really the "seat" of the arbitral proceedings, as the aforesaid expression does not include just one or more individual or particular hearing, but the arbitration proceedings as a whole, including the making of an award at that place. This language has to be contrasted with language such as "tribunals are to meet or have witnesses, experts or the parties" where only hearings are to take place in the "venue", which may lead to the conclusion, other things being equal, that the venue so stated is not the "seat" of arbitral proceedings, but only a convenient place of meeting. Further, the fact that the arbitral proceedings "shall be held" at a particular venue would also indicate that the parties intended to anchor arbitral proceedings to a particular place, signifying thereby, that that place is the seat of the arbitral proceedings. This, coupled with there being no other significant contrary indicia that the stated venue is merely a "venue" and not the "seat" of the arbitral proceedings, would then conclusively show that such a Clause designates a "seat" of the arbitral proceedings. In an International context, if a supranational body of Rules is to govern the arbitration, this would further be an indicia that "the venue", so stated, would be the seat of the arbitral proceedings. In a national context, this would be replaced by the Arbitration Act, 1996 as applying to the "stated venue", which then becomes the "seat" for the purposes of arbitration.

Regarding the seat of an arbitration, it is interesting to also look at the concept in English law as mentioned in the Roger Shashoua vs. Mukesh Sharma[39] of England and Wales High Court. Relevant extract reads as follows:

25.The concept of the seat of an arbitration was known to English law prior to the 1996 Arbitration Act but section 3 of that Act set out a statutory definition as follows:-

3 The Seat of the Arbitration

[39] International Court Judgments: Roger Shashoua and Ors. v. Mukesh Sharma, 2009

> *In this part "the seat of the arbitration" means the juridical seat of the arbitration designated –*
>
> *(a) by the parties to the arbitration agreement, or*
>
> *(b) by any arbitral or other institution or person vested by the parties with powers in that regard, or*
>
> *(c) by the arbitral tribunal if so authorised by the parties,*
>
> *Or determined in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances.*

England and Wales High Court laid down the famous Shashoua principle in the said judgement. The principle reads as follows:

> *34. "London arbitration" is a well known phenomenon which is often chosen by foreign nationals with a different law, such as the law of New York, governing the substantive rights of the parties. This is because of the legislative framework and supervisory powers of the courts here which many parties are keen to adopt. When therefore there is an express designation of the arbitration venue as London and no designation of any alternative place as the seat, combined with a supranational body of rules governing the arbitration and no other significant contrary indicia, the inexorable conclusion is, to my mind, that London is the juridical seat and the English law the curial law. In my judgment it is clear that either London has been designated by the parties to the arbitration agreement as the seat of the arbitration or, having regard to the parties' agreement and all the relevant circumstances, it is the seat to be determined in accordance with the final fall back provision of section 3 of the Arbitration Act.*

Honourable Supreme Court of India referred approvingly to the Shashoua principle in the matters of Roger Shashoua vs. Mukesh Sharma[40], and BGS SGS SOMA JV[41].

[40] Domestic Court Judgments: Roger Shashoua and Ors. v. Mukesh Sharma and Ors., 2017
[41] Domestic Court Judgments: BGS SGS Soma JV v. NHPC Ltd., 2019

Chapter 4
Desired Elements of Arbitration Clause / Agreement

4.1 Overview

Section 7 of The Arbitration and Conciliation Act, 1996[1] contains the provisions related to arbitration agreement and gives the parties to the agreement the freedom to decide that disputes will be referred to arbitration. Essential characteristics of an arbitration agreement as provided in section 7 are as follows:

> *(1) In this Part, "arbitration agreement" means 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.*
>
> *(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*
>
> *(3) An arbitration agreement shall be in writing.*
>
> *(4) An arbitration agreement is in writing if it is contained in –*
>
> > *(a) a document signed by the parties;*
> >
> > *(b) an exchange of letters, telex, telegrams or other means of telecommunication [including communication*

[1] Laws (India): The Arbitration and Conciliation Act, 1996

through electronic means] which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

From the above section in the Arbitration Act[2], it can be seen that the following are essential for an arbitration agreement:

a) Agreement to submit to arbitration all or some of the disputes.

b) Disputes should arise in a legal relationship – if the relationship is illegal the arbitration agreement will be void.

c) Arbitration agreement must be in writing, which includes a document signed by the parties or an exchange of letters / emails / telex / telegrams / faxes or an exchange of claims.

d) Arbitration agreement may be a clause of an agreement or may be a separate agreement.

e) Arbitration agreement may also be in the form of a reference to a separate document.

While the above are statutorily necessary, the arbitration agreement has to include many more things because it serves as the basis for the dispute resolution procedure / process that the contracting parties mutually agree to at the time of getting into a legal relationship or at some time thereafter but before any dispute arises. An arbitration agreement, in addition to satisfying legal requirements of section 7 of the Arbitration and Conciliation Act, must provide for various practical and commercial matters that facilitate the dispute

[2] Laws (India): Ibid.

resolution process. Some of the key considerations that an arbitration agreement must take of are discussed below.

4.2 Consent to arbitrate

An arbitration cannot happen without the consent of the parties to the agreement agreeing clearly and without any ambiguity that they agree to submit their disputes to arbitration. The consent is contained within an arbitration agreement. The agreement clearly specifies the desire of the parties to arbitrate their dispute. In other words, they clearly note that in the event of a dispute between them they would not go to the court, instead they will proceed to arbitrate their dispute.

Honourable Supreme Court in the matter of KK Modi vs. KN Modi[3] ruled about the essential attributes of an arbitration agreement as follows:

> ***16.*** *Among the attributes which must be present for an agreement to be considered as an arbitration agreement are:*
>
> > *(1) The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement,*
> >
> > *(2) That the jurisdiction of the tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the Court or from a statute, the terms of which make it clear that the process is to be an arbitration,*
> >
> > *(3) The agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal,*
> >
> > *(4) That the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides,*

[3] Domestic Court Judgements: K.K. Modi v. K.N. Modi and Ors., 1998

> *(5) That the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly,*
>
> *(6) The agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal.*
>
> ***17.*** *The other factors which are relevant include, whether the agreement contemplates that the tribunal will receive evidence from both sides and hear their contentions or at least give the parties an opportunity to put them forward; Whether the wording of the agreement is consistent or inconsistent with the view that the process was intended to be an arbitration, and whether the agreement requires the tribunal to decide the dispute according to law.*

Without contradicting the above law laid down in KK Modi (supra), Honourable Supreme Court in the matter of Bihar State Minerals vs. Encon Builders[4] summed up the essential characteristics of an arbitration agreement as follows:

> ***13.*** *The essential elements of an arbitration agreement are as follows:*
>
> *(1) There must be a present or a future difference in connection with some contemplated affair.*
>
> *(2) There must be the intention of the parties to settle such difference by a private tribunal.*
>
> *(3) The parties must agree in writing to be bound by the decision of such tribunal.*
>
> *(4) The parties must be ad idem.*

The key attribute that emerges from KK Modi (supra) as well as Bihar State (supra) is that the parties must agree without any ambiguity or conditions to submit disputes to

[4] Domestic Court Judgements: Bihar State Mineral Dev. Corpn. and Ors. v. Encon Builders, 2003

arbitration. The point was further clarified in the case of Jagdish Chander[5], where the parties had agreed to the following clause in their agreement:

> *16) If during the continuance of the partnership or at any time afterwards any dispute touching the partnership arises between the partners, the same shall be mutually decided by the partners or shall be referred for arbitration* ***if the parties so determine****. (Emphasis added)*

The issue was whether the above clause was a valid arbitration agreement in view of the condition "if the parties so determine". Honourable Supreme Court, while deliberating on the issue in Jagdish Chander[6] held as follows:

> *We may at this juncture set out the well settled principles in regard to what constitutes an arbitration agreement:*
>
> > *(i) The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal for adjudication and an willingness to be bound by the decision of such tribunal on such disputes, it is arbitration agreement. While there is no specific form of an arbitration agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration. Where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement.*
>
> > *(ii) Even if the words 'arbitration' and 'arbitral tribunal (or arbitrator)' are not used with reference to the process of settlement or with reference to the private tribunal which has*

[5] Domestic Court Judgements: Jagdish Chander v. Ramesh Chander and Ors., 2007, Para. 2
[6] Domestic Court Judgements: Ibid., Para. 8

to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are : (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the Private Tribunal in respect of the disputes will be binding on them.

(iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to Arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement. But where the clause relating to settlement of disputes, contains words which specifically excludes any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement. For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the Authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the Authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement.

(iv) But mere use of the word 'arbitration' or 'arbitrator' in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they so desire, refer their disputes to arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. ***Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future****.*

9 . *Para 16 of the Partnership deed provides that if there is any dispute touching the partnership arising between the partners, the same shall be mutually decided by the parties or shall be referred to arbitration if the parties so determine.* ***If the clause had merely said that in the event of disputes arising between the parties, they "shall be referred to arbitration", it would have been an arbitration agreement. But the use of the words "shall be referred for arbitration if the***

> ***parties so determine" completely changes the complexion of the provision. The expression "determine" indicates that the parties are required to reach a decision by application of mind. Therefore, when Clause 16 uses the words "the dispute shall be referred for arbitration if the parties so determine", it means that it is not an arbitration agreement but a provision which enables arbitration only if the parties mutually decide after due consideration as to whether the disputes should be referred to arbitration or not.*** *In effect, the clause requires the consent of parties before the disputes can be referred to arbitration. The main attribute of an arbitration agreement, namely, consensus ad idem to refer the disputes to arbitration is missing in Clause 16 relating to settlement of disputes. Therefore it is not an arbitration agreement, as defined under Section 7 of the Act. In the absence of an arbitration agreement, the question of exercising power under Section 11 of the Act to appoint an Arbitrator does not arise. (Emphasis added)*

Notably, the Arbitration and Conciliation Act does not prescribe any particular format for arbitration agreement. There is no particular requirement of any specific statement that must be contained in an arbitration agreement. It is only necessary that the parties must have a clear and unconditional intention to refer disputes to arbitration. Honourable Supreme Court in the matter of Babanrao vs. Samarth Builders[7] ruled as follows:

> ***24 .*** *Even if we were to assume that the subject-clause lacks certain essential characteristics of arbitration like "final and binding" nature of the award, the parties have evinced clear intention to refer the dispute to arbitration and abide by the decision of the tribunal. The party autonomy to this effect, therefore, deserves to be protected.*

[7] Domestic Court Judgements: Babanrao Rajaram Pund v. Samarth Builders & Developers, 2022

4.3 Scope of arbitration

Section 7 of The Arbitration and Conciliation Act, 1996[8] contains the provisions related to arbitration agreement and gives the parties to the agreement the freedom to decide whether all or only certain disputes will be referred to arbitration:

> (1) *In this Part, "arbitration agreement" means 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.* (Emphasis added)

The parties to an agreement have the right to decide which disputes will fall within the purview of arbitration and which ones will not be decided by arbitration. This decides the scope of arbitration. Honourable Supreme Court in the matter of Booz Allen[9] ruled as follows about scope of arbitration:

> ***21.*** *The term 'arbitrability' has different meanings in different contexts. The three facets of arbitrability, relating to the jurisdiction of the arbitral tribunal, are as under:* ***(i) whether the disputes are capable of adjudication and settlement by arbitration? That is, whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the parties (the arbitral tribunal) or whether they would exclusively fall within the domain of public fora (courts).*** *(ii)* ***Whether the disputes are covered by the arbitration agreement?*** *That is, whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the 'excepted matters' excluded from the purview of the arbitration agreement. (iii)* ***Whether the parties have referred the disputes to arbitration?*** *That is, whether the disputes fall under the scope of the submission to the arbitral tribunal, or whether they do not arise out of the statement of claim and the counter claim filed before the arbitral tribunal. A dispute, even if it is*

[8] Laws (India): The Arbitration and Conciliation Act, 1996
[9] Domestic Court Judgements: Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. and Ors. 2011

> *capable of being decided by arbitration and falling within the scope of arbitration agreement, will not be 'arbitrable' if it is not enumerated in the joint list of disputes referred to arbitration, or in the absence of such joint list of disputes, does not form part of the disputes raised in the pleadings before the arbitral tribunal.* (Emphasis added)

The first key principle laid down by the Honourable Supreme Court in the above paragraph is that the dispute which can be included in the scope of arbitration must be capable of being resolved by arbitration. Nature of dispute should not be of the type that falls exclusively within the domain of courts (as opposed to a private forum like arbitration tribunal). This principle was further clarified by the Honourable Court in the subsequent paragraph as follows:

> *22. Arbitral tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of arbitral tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the Legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by a public fora (courts and Tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is in arbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes. The well recognized examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and*

> *succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.*

In the above paragraph, Honourable Supreme Court has given examples of disputes that cannot be referred to arbitration. The examples of non-arbitrable disputes given by the Honourable Court are as follows:

(i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences;

(ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody;

(iii) guardianship matters;

(iv) insolvency and winding up matters;

(v) testamentary matters (grant of probate, letters of administration and succession certificate); and

(vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

In 2016, Honourable Supreme Court vide its judgment Vimal Kishor Shah[10] added seventh category of cases (arising out of Trust Deed and the Trust Act) that cannot be referred to arbitration. Relevant extract from the judgement reads as follows:

> ***62.*** *We thus add one more category of cases, i.e., category (vii), namely, cases arising out of Trust Deed and the Trust Act, in the list of (vi) categories of cases specified by this Court in Para 36 at page 547 of the decision rendered in the case of* ***Booz Allen & Hamilton Inc.*** *(supra) which as held above can not be decided by the arbitrator(s).*

[10] Domestic Court Judgements: Vimal Kishor Shah and Ors. v. Jayesh Dinesh Shah and Ors.,2016

The seventh type of cases added by the Honourable Supreme Court in Vimal Kishor Shah (supra) is only an application of the principle which was laid down in Booz Allen[11] case. The principle is that scope of arbitration can only include matters which are strictly between the parties and do not amount to a wrong against the society in general. Relevant extract from Booz Allen is as follows:

> ***23***. *It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. (Vide: Black's Law Dictionary). Generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to sub-ordinate rights in personam arising from rights in rem have always been considered to be arbitrable.*
>
> ***24*** *. The Act does not specifically exclude any category of disputes as being not arbitrable. Sections 34(2)(b) and 48(2) of the Act however make it clear that an arbitral award will be set aside if the court finds that "the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force."*

[11] Domestic Court Judgements: Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. and Ors. 2011

25. *Russell on Arbitration [22nd Edition] observed thus [page 28, para 2.007]:*

> *Not all matter are capable of being referred to arbitration. As a matter of English law certain matters are reserved for the court alone and if a tribunal purports to deal with them the resulting award will be unenforceable. These include matters where the type of remedy required is not one which an arbitral tribunal is empowered to give.*

The subsequent edition of Russell [23rd Edition, page 470, para 8.043]] merely observes that English law does recognize that there are matters which cannot be decided by means of arbitration. Mustill and Boyd in their Law and Practice of Commercial Arbitration in England [2nd - 1989 Edition], have observed thus:

> *In practice therefore, the question has not been whether a particular dispute is capable of settlement by arbitration, but* ***whether it ought to be referred to arbitration*** *or whether it has given rise to an enforceable award. No doubt for this reason, English law has never arrived at a general theory for distinguishing those disputes which may be settled by arbitration from those which may not. ....*
>
> *Second, the types of remedies which the arbitrator can award are limited by considerations of public policy and by the fact that he is appointed by the parties and not by the state. For example, he cannot impose a fine or a term of imprisonment, commit a person for contempt or issue a writ of subpoena;* ***nor can he make an award which is binding on third parties or affects the public at large, such as a judgment in rem*** *against a ship, an assessment of the rateable value of land, a divorce decree, a winding-up order.... (Emphasis supplied)*

Mustill and Boyd in their 2001 Companion Volume to the 2nd Edition of commercial Arbitration, observe thus (page 73):

> *Many commentaries treat it as axiomatic that 'real' rights, that is* ***rights which are valid as against the whole world, cannot be the subject of private arbitration****, although some acknowledge that subordinate rights in personam derived from the real rights may be ruled upon by arbitrators. The conventional view is thus that, for example, rights under a patent licence may be arbitrated, but the validity of the underlying patent may not….. An arbitrator whose powers are derived from a private agreement between A and B plainly has no jurisdiction to bind anyone else by a decision on whether a patent is valid, for no-one else has mandated him to make such a decision, and a decision which attempted to do so would be useless. (Emphasis supplied)*
>
> *Second, the types of remedies which the arbitrator can award are limited by considerations of public policy and by the fact that he is appointed by the parties and not by the state. For example, he cannot impose a fine or a term of imprisonment, commit a person for contempt or issue a writ of subpoena; nor can he make an award* ***which is binding on third parties or affects the public at large, such as a judgment in rem*** *against a ship, an assessment of the rateable value of land, a divorce decree, a winding-up order…. (Emphasis supplied)*

It is important to note the reference to sub-sections 34(2)(b) and 48(2) of the Act[12] in the above judgement. Section 34 of the Act reads as follows:

[12] Laws (India): The Arbitration and Conciliation Act, 1996

34 - Application for setting aside arbitral award

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if—

> *(a) the party making the application establishes on the basis of the record of the arbitral tribunal that—*
>
> > *(i) a party was under some incapacity, or*
> >
> > *(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or*
> >
> > *(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or*
> >
> > *(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:*
> >
> > *Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or*
> >
> > *(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the*

agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) ***the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force,*** *or*

(ii) ***the arbitral award is in conflict with the public policy of India****.*

Explanation 1.— For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.— For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

2[(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.]

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party. (Emphasis added)

Sub-section 48(2) of the Act reads as follows:

(2) Enforcement of an arbitral award may also be refused if the Court finds that—

(a) ***the subject-matter of the difference is not capable of settlement by arbitration under the law of India****; or*

(b) ***the enforcement of the award would be contrary to the public policy of India****.*

Explanation 1.— For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.— For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute. (Emphasis added)

Key points made in sections 34 and 48 is that scope of arbitration must not be "***not capable of settlement by arbitration under the law of India"*** and must not be against public policy of India. While guidelines for interpretation of the term "public policy" have been provided in the concerned sections of the Act[13], guidelines for what is not capable of settlement by arbitration are provided by the relevant judgements of Honourable Supreme Court referred to hereinabove.

[13] Laws (India): The Arbitration and Conciliation Act, 1996

The subject of arbitrability was expounded in much detail by the three-judge bench of Honourable Supreme Court in the reference case of Vidya Drolia[14]. Relevant extracts from the judgement read as follows:

> *45. In view of the above discussion, we would like to propound a **fourfold test for determining when the subject matter of a dispute in an arbitration agreement is not arbitrable**:*
>
> > *(1) when cause of action and subject matter of the dispute relates to **actions in rem**, that do not pertain to subordinate rights in personam that arise from rights in rem.*
> >
> > *(2) when cause of action and subject matter of the dispute **affects third party rights; have erga omnes effect; require centralized adjudication**, and mutual adjudication would not be appropriate and enforceable;*
> >
> > *(3) when cause of action and subject matter of the dispute **relates to inalienable sovereign and public interest functions of the State** and hence mutual adjudication would be unenforceable; and*
> >
> > *(4) when the subject-matter of the dispute is **expressly or by necessary implication non-arbitrable as per mandatory statute(s)**.*
>
> *These tests are **not watertight compartments**; they dovetail and overlap, albeit when applied holistically and pragmatically will help and assist in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject matter is non-arbitrable. Only when the answer is affirmative that the subject matter of the dispute would be non-arbitrable.*

[14] Domestic Court Judgements: Vidya Drolia and Others v. Durga Trading Corporation, 2019

However, the aforesaid principles have to be applied with care and caution as observed in Olympus Superstructures Pvt. Ltd.:

> *35…Reference is made there to certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, which cannot be referred to arbitration. It has, however, been held that if in respect of fats relating to a criminal matter, say, physical injury, if there is a right to damages for personal injury, then such a dispute can be referred to arbitration (Keir v. Leeman). Similarly, it has been held that a husband and a wife may refer to arbitration the terms on which they shall separate, because they can make a valid agreement between themselves on that matter (Soilleux v. Herbst, Wilson v. Wilson and Cahill v. Cahill).*

46. Applying the above principles to determine non-arbitrability, it is apparent that ***insolvency or intracompany disputes have to be addressed by a centralized forum****, be the court or a special forum, which would be more efficient and has complete jurisdiction to efficaciously and fully dispose of the entire matter. They are also actions in rem. Similarly,* ***grant and issue of patents and registration of trademarks are exclusive matters falling within the sovereign or government functions*** *and have erga omnes effect. Such grants confer monopoly rights. They are non-arbitrable.* ***Criminal cases again are not arbitrable*** *as they relate to sovereign functions of the State. Further, violations of criminal law are offenses against the State and not just against the victim.* ***Matrimonial disputes relating to the dissolution of marriage, restitution of conjugal rights etc. are not arbitrable*** *as they fall within the ambit of sovereign functions and do not have any commercial and economic value. The decisions have erga omnes effect.* ***Matters relating to probate, testamentary matter etc. are actions in rem and are a declaration to the world at large and hence are non-arbitrable****.*

47. In view of the aforesaid discussions, we overrule the ratio in ***N. Radhakrishnan*** *inter alia observing that allegations of fraud can be made a subject matter of arbitration when they relate to a civil dispute. This is subject to the caveat that fraud, which would vitiate and invalidate the arbitration clause, is an aspect relating to non arbitrability. We have also set aside the Full Bench decision of the Delhi High Court in the case of* ***HDFC Bank Ltd.*** *which holds that the* ***disputes which are to be adjudicated by the DRT under the DRT Act*** *are arbitrable. They* ***are non-arbitrable****.*

48. ***Landlord-tenant disputes governed by the Transfer of Property Act are arbitrable*** *as they are not actions in rem but pertain to subordinate rights in personam that arise from rights in rem. Such actions normally would not affect third-party rights or have erga omnes affect or require centralized adjudication. An award passed deciding landlord-tenant disputes can be executed and enforced like a decree of the civil court. Landlord-tenant disputes do not relate to inalienable and sovereign functions of the State. The provisions of the Transfer of Property Act do not expressly or by necessary implication bar arbitration. Transfer of Property Act, like all other Acts, has a public purpose, that is, to regulate landlord tenant relationships and the arbitrator would be bound by the provisions, including provisions which enure and protect the tenants.*

49. In view of the aforesaid, we overrule the ratio laid down in ***Himangni Enterprises*** *and hold that landlord-tenant disputes are arbitrable as the Transfer of Property Act does not forbid or foreclose arbitration. However,* ***landlord-tenant disputes covered and governed by rent control legislation would not be arbitrable when specific court or forum has been given exclusive jurisdiction*** *to apply and decide special rights and obligations. Such rights and obligations can only be adjudicated and enforced by the specified court/forum, and not through arbitration.* (Emphasis added)

With reference to scope of arbitration agreement, based on the above discussion we can conclude the following key points:

a) Arbitration agreement should specify clearly the disputes that can be settled by arbitration.

b) Disputes to be settled by arbitration must relate to right in personam and not right in rem. In other words, the dispute must be related to something personal and private between the parties; the dispute should not violate any right that the party has against the society in general.

c) Certain disputes, even though they do not relate to right in rem, are outside the scope of arbitration – for example, landlord-tenant disputes governed by rent control legislation or matters under Consumer Protection Act.

d) Criminal offences are clearly outside the scope of arbitration.

e) Violation of public policy (as specified in section 34 or 48 of the Act[15]) cannot be settled by arbitration.

4.4 Number of arbitrators

For any arbitration procedure whether domestic or international to proceed, the first and the foremost important step is to form an arbitration / arbitral tribunal. Section 1(d) of the Arbitration and Conciliation Act[16] defines arbitral tribunal as follows:

> *(d) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;*

Section 10 of the Arbitration Act[17] lays down the manner in which number of arbitrators in an arbitral panel can be determined. It states as follows:

> *(1) The parties are free to determine the number of arbitrators, provided that such number shall not be an even number.*
>
> *(2) Failing the determination referred to in sub-section (1), the arbitral tribunal shall consist of a sole arbitrator.*

[15] Laws (India): The Arbitration and Conciliation Act, 1996
[16] Laws (India): Ibid.
[17] Laws (India): Ibid.

Sub-section 10(1) has two components – (a) parties are free to determine the number of arbitrators and (b) the number shall not be an even number. Honourable Supreme Court in the matter of Narayan Prasad Lohia[18] held that the latter provision related to the number of arbitrators being even is derogable. Honourable Supreme Court has given higher priority to party autonomy over the specific provision of the sub-section. It is open to one of the parties to raise objection to the constitution of the tribunal before the tribunal under section 4 of the Act[19]. In case neither party raises such an objection, it is not open to the parties to claim later that the constitution of tribunal was invalid. Relevant extracts from the judgement in the case of Narayan Prasad Lohia (supra) read as follows:

> ***17.*** *It has been held by a Constitution Bench of this Court, in the case of Konkan Railway Corporation Ltd. v. Rani Construction Pvt. Ltd. MANU/SC/0053/2002 : [2002]1SCR728 that Section 16 enables the arbitral tribunal to rule on its own jurisdiction. It has been held that under Section 16 the arbitral tribunal can rule on any objection with respect to existence or validity of the arbitration agreement. It is held that the arbitral tribunals authority under Section 16, is not confined to the width of its jurisdiction but goes also to the root of its jurisdiction. Not only this decision is binding on this Court, but we are in respectful agreement with the same. Thus it is no longer open to contend that, under Section 16, party cannot challenge the composition of the arbitral tribunal before the arbitral tribunal itself. Such a challenge must be taken, under Section 16(2), not later than the submission of the statement of defence. Section 16(2) makes it clear that such a challenge can be taken even though the party may have participated in the appointment of the arbitrator and/or may have himself appointed the arbitrator. Needless to state a party would be free, if he so choose, not to raise such a challenge.* ***Thus a conjoint reading of Sections 10 and 16 shows that an objection to the composition of the arbitral tribunal is a matter which is derogable. It is derogable because a party is free not to object within the time prescribed in Section 16(2). If a party chooses not to so object there will be a deemed waiver under Section 4.***

[18] Domestic Court Judgements: Narayan Prasad Lohia v. Nikunj Kumar Lohia and Ors., 2002
[19] Laws (India): The Arbitration and Conciliation Act, 1996

Thus, we are unable to accept the submission that Section 10 is a Non-derivable provision. In our view Section 10 has to be read along with Section 16 and is, therefore a derogable provision.

18. *We are also unable to accept Mr. Venugopal's argument that, as a matter of public policy, Section 10 should be held to be non-derogable. Even thought the said Act is now an integrated law on the subject of Arbitration, it cannot and does not provide for all contingencies. An arbitration being a creature of agreement between the parties, it would be impossible for the Legislature to cover all aspects. Just by way of example Section 10 permits the parties to determine the number of arbitrators, provided that such number is not an even number. Section 11(2) permits parties to agree on a procedure for appointing the arbitrator or arbitrators. Section 11 then provides how arbitrators are to be appointed if the parties do not agree on a procedure or if there is failure of the agreed procedure. A reading of Section 11 would show that it only provides for appointments in cases where there is only one arbitrator or three arbitrators. By agreement parties may provide for appointment of 5 or 7 arbitrators. If they do not provide for a procedure, then Section 11 does not contain any provision for such a contingency. Can this be taken to mean that the Agreement of the parties is invalid. The answer obviously has to be in the negative. Undoubtedly the procedure provided in Section 11 will mutatis mutandis apply for appointment of 5 or 7 or more arbitrators. Similarly even if parties provide for appointment of only two arbitrators, that does not mean that the agreement becomes invalid. Under Section 11(3) the two arbitrators should then appoint a third arbitrator who shall act as the presiding arbitrator. Such an appointment should preferably be made at the beginning. However, we see no reason, why the two arbitrators can not appoint a third arbitrator at a later stage i.e. if and when they differ. This would ensure that on a difference of opinion the arbitration proceedings are not frustrated. But if the two Arbitrators agree and give a common award there is no frustration of the proceedings. In such a case their common opinion would have prevailed, even if the third arbitrator, presuming there was one, had differed.* ***Thus we do not see how there***

> ***would be waste of time, money and expense if a party, with open eyes, agrees to go to Arbitration of two persons and then participates in the proceedings.*** *On the contrary there would be waste of time, money and energy if such a party is allowed to resile because the Award is not of his liking. Allowing such a party to resile would not be in furtherance of any public policy and would be most inequitable.* (Emphasis added)

The view that section 10 of the Act[20] is derogable was further confirmed by the Honourable Supreme Court in paragraph 20 of the Narayan Prasad Lohia (supra) as follows:

> *Thus so long as the composition of the arbitral tribunal or the arbitral procedure are in accordance with the agreement of the parties, Section 34 does not permit challenge to an award merely on the ground that the composition of the arbitral tribunal was in conflict with the provisions of Part I of the said Act. This also indicates that* ***Section 10 is a derogable provision****.*

Even though Honourable Supreme Court has held that section 10 is a derogable provision of the Act[21], it must be emphasised that provisions of section can be derogated only under the special circumstances of (a) the parties agreeing to constitute an arbitration tribunal in violation of section 10 and (b) neither party raising an objection about the constitution of the tribunal before the tribunal under section 4 of the Act. Waiver of the right to object under section 4 gets higher precedence over the requirements of section 10. Clearly, exceptions aside, most arbitration agreements must comply with the requirements of section 10 of the Act.

4.5 Presiding arbitrator

While section 10 of the Act[22] provides that the number of arbitrators shall not be even, the Act gives the parties the freedom to choose the number of arbitrators as well as the

[20] Laws (India): The Arbitration and Conciliation Act, 1996
[21] Laws (India): Ibid.
[22] Laws (India): Ibid.

procedure for appointing arbitrators. Sub-section 11(2) of the Act is relevant in this context. The parties may choose to have three or five or seven or even nine arbitrators. Of course, the most common practice is to have three arbitrators. In case the parties choose to have three arbitrators, the three arbitrators may all be on equal footing or may not be equals. In case the parties do not agree on the relative standing of arbitrators, sub-section 11(3) provides that each party shall appoint one arbitrator and the so-appointed two arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator. Relevant extract of section 11 of the Act[23] reads as follows:

> ***Section 11 - Appointment of arbitrators***
>
> *(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.*
>
> *(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.*
>
> *(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and* ***the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator****.*

From a reading of the above the following points emerge:

a) The parties may appoint any odd number of arbitrators – 1 or 3 or 5 or 7 or 9 etc.

b) The parties may agree to not have any presiding arbitrator.

c) The parties may agree to place all arbitrators on equal footing.

d) Provisions of sub-section 11(3) apply only if the parties have not agreed on the number of arbitrators and the relative status of arbitrators.

e) In case parties have not agreed about the number of arbitrators and the relative status of arbitrators, each party shall appoint one arbitrator and the two

[23] Laws (India): Ibid.

so-appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

f) The situation of not agreeing about the number of arbitrators and the relative status of arbitrators arises mostly in case of inadequately drafted arbitration clause / agreement. Typically, many contracts have a clause which reads – "*In case of any dispute, the matter will be referred to arbitration under the Arbitration and Conciliation Act, 1996*". In such cases, sub-section 11(3) becomes operative and the parties cannot choose any other structure of arbitration tribunal.

As discussed earlier, the requirements of section 10 are derogable provisions of the Act. In case an arbitration agreement provides for two arbitrators, the agreement does not become void. This lacuna can be corrected by the two arbitrators appointing the third arbitrator using power granted under sub-section 11(3) of the Act. This ratio was laid down by Honourable Supreme Court in the matter of MMTC vs. Sterlite[24]. Relevant extracts are as follows:

> ***9.*** *Sub-section (3) of Section 7 requires an arbitration agreement to be in writing and Sub-section (4) describes the kind of that writing. There is nothing in Section 7 to indicate the requirement of the number of arbitrators as a part of the arbitration agreement. Thus the validity of an arbitration agreement does not depend on the number of arbitrators specified therein. The number of arbitrators is dealt with separately in Section 10 which is a part of machinery provision for the working of the arbitration agreement. It is, therefore, clear that an arbitration agreement specifying an even number of arbitrators cannot be a ground to render the arbitration agreement invalid under the New Act as contended by the learned Attorney General.*
>
> ***12.*** *The question is: whether there is anything in the New Act to make such an agreement unenforceable? We do not find any such indication in the New Act. There is no dispute that the arbitral proceeding in the present case commenced after the New Act came into force and, therefore, the New Act*

[24] Domestic Court Judgements: M.M.T.C. Limited v. Sterlite Industries (India) Ltd., 1996

applies. In view of the term in the arbitration agreement that the two arbitrators would appoint the umpire or the third arbitrator before proceeding with the reference, the requirement of Sub-section (1) of Section 10 is satisfied and Sub-section (2) thereof has no application. As earlier stated the agreement satisfies the requirement of Section 7 of the Act and, therefore is a valid arbitration agreement. The appointment of arbitrators must, therefore, be governed by Section 11 of the New Act.

13. *In view of the fact that each of the two parties have appointed their own arbitrators, namely, Justice M.N. Chandurkar (Retd.) and Justice S.P. Sapra (Retd.), Section 11(3) was attracted and the two appointed arbitrators were required to appoint a third arbitrator to act as the presiding arbitrator, failing which the Chief Justice of the High Court or any person or institution designated by him would be required to appoint the third arbitrator as required by Section 11(4)(b) of the New Act. Since the procedure prescribed in Section 11(3) has not been followed the further consequence provided in Section 11 must follow.*

To sum up, it can be said that it is not necessary for an arbitration tribunal to have a presiding arbitrator. The parties may decide to place all arbitrators on equal or unequal footing. However, if the parties have no such agreement, the default procedure will have one arbitrator appointed by each party and the presiding arbitrator appointed by the two so-appointed arbitrators. Notably, the law is silent on the situation when an agreement is among more than two parties.

4.6 Method of selection of arbitrators

Sub-section 11(2) of the Act[25] allows the parties of an arbitration agreement to agree on a procedure for appointing the arbitrator(s). The sub-section reads as follows:

> *(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.*

[25] Laws (India): The Arbitration and Conciliation Act, 1996

Freedom of the parties to agree on a procedure for appointing arbitrator(s) is subject to the restrictions imposed by section 12[26] which reads as follows:

> ***Section 12 - Grounds for challenge***
>
> *(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,--*
>
> > *(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and*
> >
> > *(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.*
> >
> > > *Explanation 1.-- The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.*
> > >
> > > *Explanation 2.-- The disclosure shall be made by such person in the form specified in the Sixth Schedule.*
>
> *(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.*

[26] Laws (India): Ibid.

(3) An arbitrator may be challenged only if-

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.

Three key points that emerge from section 12 are (a) consent of the appointed arbitrator (b) ability to devote sufficient time to arbitration and (c) independence and impartiality. The last point about independence and impartiality is very important. Before the passing of the Act[27] in 1996, many arbitration agreements used to provide that in case of dispute, a senior officer of one of the parties would act as a sole arbitrator. Such arbitration agreements are not permitted after 1996. Even though the parties appoint the arbitrators, it is necessary that the appointed arbitrators are independent and impartial.

Requirement of independence and impartiality included in the Act is based on IBA Guidelines on Conflict of Interest in International Arbitration[28]. Some extracts from IBA Guidelines are as follows:

[27] Laws (India): The Arbitration and Conciliation Act, 1996
[28] Guidelines: IBA Guidelines on Conflict of Interest in International Arbitration, 2014

(1) General Principle

Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated.

Explanation to General Standard 1:

A fundamental principle underlying these Guidelines is that each arbitrator must be impartial and independent of the parties at the time he or she accepts an appointment to act as arbitrator, and must remain so during the entire course of the arbitration proceeding, including the time period for the correction or interpretation of a final award under the relevant rules, assuming such time period is known or readily ascertainable.

The question has arisen as to whether this obligation should extend to the period during which the award may be challenged before the relevant courts. The decision taken is that this obligation should not extend in this manner, unless the final award may be referred back to the original Arbitral Tribunal under the relevant applicable law or relevant institutional rules. Thus, the arbitrator's obligation in this regard ends when the Arbitral Tribunal has rendered the final award, and any correction or interpretation as may be permitted under the relevant rules has been issued, or the time for seeking the same has elapsed, the proceedings have been finally terminated (for example, because of a settlement), or the arbitrator otherwise no longer has jurisdiction. If, after setting aside or other proceedings, the dispute is referred back to the same Arbitral Tribunal, a fresh round of disclosure and review of potential conflicts of interests may be necessary.

(2) Conflicts of Interest

(a) An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act

as an arbitrator, if he or she has any doubt as to his or her ability to be impartial or independent.

(b) *The same principle applies if facts or circumstances exist, or have arisen since the appointment, which, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, would give rise to justifiable doubts as to the arbitrator's impartiality or independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General Standard 4.*

(c) *Doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.*

(d) *Justifiable doubts necessarily exist as to the arbitrator's impartiality or independence in any of the situations described in the* ***Non-Waivable Red List****.*

Explanation to General Standard 2:

(a) *If the arbitrator has doubts as to his or her ability to be impartial and independent, the arbitrator must decline the appointment. This standard should apply regardless of the stage of the proceedings. This is a basic principle that is spelled out in these Guidelines in order to avoid confusion and to foster confidence in the arbitral process.*

(b) *In order for standards to be applied as consistently as possible, the test for disqualification is an objective one. The wording 'impartiality or independence' derives from the widely adopted Article 12 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law, and the use of an appearance test based on justifiable doubts as to the impartiality or independence of*

the arbitrator, as provided in Article 12(2) of the UNCITRAL Model Law, is to be applied objectively (a 'reasonable third person test'). Again, as described in the Explanation to General Standard 3(e), this standard applies regardless of the stage of the proceedings.

(c) Laws and rules that rely on the standard of justifiable doubts often do not define that standard. This General Standard is intended to provide some context for making this determination.

(d) The Non-Waivable Red List describes circumstances that necessarily raise justifiable doubts as to the arbitrator's impartiality or independence. For example, because no one is allowed to be his or her own judge, there cannot be identity between an arbitrator and a party. The parties, therefore, cannot waive the conflict of interest arising in such a situation.

(3) Disclosure by the Arbitrator

(a) If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and the co-arbitrators, if any, prior to accepting his or her appointment or, if thereafter, as soon as he or she learns of them.

(b) An advance declaration or waiver in relation to possible conflicts of interest arising from facts and circumstances that may arise in the future does not discharge the arbitrator's ongoing duty of disclosure under General Standard 3(a).

(c) It follows from General Standards 1 and 2(a) that an arbitrator who has made a disclosure considers himself or herself to be impartial and independent of the parties, despite the disclosed facts, and, therefore, capable of performing his or her duties as arbitrator.

Otherwise, he or she would have declined the nomination or appointment at the outset, or resigned.

(d) Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure.

(e) When considering whether facts or circumstances exist that should be disclosed, the arbitrator shall not take into account whether the arbitration is at the beginning or at a later stage.

Explanation to General Standard 3:

*(a) The arbitrator's duty to disclose under General Standard 3(a) rests on the principle that the parties have an interest in being fully informed of any facts or circumstances that may be relevant in their view. Accordingly, General Standard 3(d) provides that any doubt as to whether certain facts or circumstances should be disclosed should be resolved in favour of disclosure. However, situations that, such as those set out in the **Green List**, could never lead to disqualification under the objective test set out in General Standard 2, need not be disclosed. As reflected in General Standard 3(c), a disclosure does not imply that the disclosed facts are such as to disqualify the arbitrator under General Standard 2. The duty of disclosure under General Standard 3(a) is ongoing in nature.*

(b) The IBA Arbitration Committee has considered the increasing use by prospective arbitrators of declarations in respect of facts or circumstances that may arise in the future, and the possible conflicts of interest that may result, sometimes referred to as 'advance waivers'. Such declarations do not discharge the arbitrator's ongoing duty of disclosure under General Standard 3(a). The Guidelines, however, do not otherwise take a position as to the validity and effect of advance declarations or waivers, because the validity and effect of any advance declaration or waiver must be assessed in view of the specific text of the advance declaration or

waiver, the particular circumstances at hand and the applicable law.

(c) *A disclosure does not imply the existence of a conflict of interest. An arbitrator who has made a disclosure to the parties considers himself or herself to be impartial and independent of the parties, despite the disclosed facts, or else he or she would have declined the nomination, or resigned. An arbitrator making a disclosure thus feels capable of performing his or her duties. It is the purpose of disclosure to allow the parties to judge whether they agree with the evaluation of the arbitrator and, if they so wish, to explore the situation further. It is hoped that the promulgation of this General Standard will eliminate the misconception that disclosure itself implies doubts sufficient to disqualify the arbitrator, or even creates a presumption in favour of disqualification. Instead, any challenge should only be successful if an objective test, as set forth in General Standard 2 above, is met. Under Comment 5 of the Practical Application of the General Standards, a failure to disclose certain facts and circumstances that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, does not necessarily mean that a conflict of interest exists, or that a disqualification should ensue.*

(d) *In determining which facts should be disclosed, an arbitrator should take into account all circumstances known to him or her. If the arbitrator finds that he or she should make a disclosure, but that professional secrecy rules or other rules of practice or professional conduct prevent such disclosure, he or she should not accept the appointment, or should resign.*

(e) *Disclosure or disqualification (as set out in General Standards 2 and 3) should not depend on the particular stage of the arbitration. In order to determine whether the arbitrator should disclose, decline the appointment or refuse to continue to act, the facts and circumstances alone are relevant, not the current stage of the*

proceedings, or the consequences of the withdrawal. As a practical matter, arbitration institutions may make a distinction depending on the stage of the arbitration. Courts may likewise apply different standards. Nevertheless, no distinction is made by these Guidelines depending on the stage of the arbitral proceedings. While there are practical concerns, if an arbitrator must withdraw after the arbitration has commenced, a distinction based on the stage of the arbitration would be inconsistent with the General Standards. (Emphasis added)

IBA Guidelines (supra) create three lists – Red List, Orange List and Green List. Three lists are described in Part II of the IBA Guidelines as follows:

2. *The Red List consists of two parts: 'a Non-Waivable Red List' (see General Standards 2(d) and 4(b)); and 'a Waivable Red List' (see General Standard 4(c)). These lists are non-exhaustive and detail specific situations that, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator's impartiality and independence. That is, in these circumstances, an objective conflict of interest exists from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances (see General Standard 2(b)). The Non-Waivable Red List includes situations deriving from the overriding principle that no person can be his or her own judge. Therefore, acceptance of such a situation cannot cure the conflict. The Waivable Red List covers situations that are serious but not as severe. Because of their seriousness, unlike circumstances described in the Orange List, these situations should be considered waivable, but only if and when the parties, being aware of the conflict of interest situation, expressly state their willingness to have such a person act as arbitrator, as set forth in General Standard 4(c).*

3. *The Orange List is a non-exhaustive list of specific situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or*

independence. The Orange List thus reflects situations that would fall under General Standard 3(a), with the consequence that the arbitrator has a duty to disclose such situations. In all these situations, the parties are deemed to have accepted the arbitrator if, after disclosure, no timely objection is made, as established in General Standard 4(a).

7. *The Green List is a non-exhaustive list of specific situations where no appearance and no actual conflict of interest exists from an objective point of view. Thus, the arbitrator has no duty to disclose situations falling within the Green List. As stated in the Explanation to General Standard 3(a), there should be a limit to disclosure, based on reasonableness; in some situations, an objective test should prevail over the purely subjective test of 'the eyes' of the parties.*

The Arbitration Act[29] has drawn upon the Red, Orange and Green Lists of IBA Guidelines (supra) to create Fifth and Seventh Schedules of the Act. The fact was highlighted by Honourable Supreme Court in the matter of HRD Corpn. vs. GAIL[30] wherein the court also laid down rules for interpreting of the schedules. Relevant extract reads as follows:

20. However, to accede to Shri Divan's submission that because the grounds for challenge have been narrowed as aforesaid, we must construe the items in the Fifth and Seventh Schedules in the most expansive manner, so that the remotest likelihood of bias gets removed, is not an acceptable way of interpreting the Schedules. As has been pointed out by us hereinabove, the items contained in the Schedules owe their origin to the IBA Guidelines, which are to be construed in the light of the general principles contained therein – that every arbitrator shall be impartial and independent of the parties at the time of accepting his/her appointment. Doubts as to the above are only justifiable if a reasonable third person having knowledge of the relevant facts and circumstances would reach the conclusion that there is a likelihood that the arbitrator may be influenced

[29] Laws (India): The Arbitration and Conciliation Act, 1996
[30] Domestic Court Judgements: HRD Corporation v. GAIL (India) Limited, 2017

by factors other than the merits of the case in reaching his or her decision. This test requires taking a broad common-sensical approach to the items stated in the Fifth and Seventh Schedules. This approach would, therefore, require a fair construction of the words used therein, neither tending to enlarge or restrict them unduly. It is with these prefatory remarks that we proceed to deal with the arguments of both sides in construing the language of the Seventh Schedule.

Regarding independence and impartiality, Honourable Supreme Court in the matter of HRD Corpn. vs. GAIL (supra) quoted approvingly from the judgement in the matter of Voestalpine vs. Delhi Metro[31]. Relevant extracts from Voestalpine vs. Delhi Metro are as follows:

19. *Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applied to all judicial and quasi judicial proceedings. It is for this reason that notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration. The genesis behind this rational is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties. Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial. The United Kingdom Supreme Court has beautifully highlighted this aspect in Jivraj v. Hashwani MANU/UKSC/0041/2011: (2011) UKSC 40 in the following words:*

[31] Domestic Court Judgements: Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation, 2017

> *the dominant purpose of appointing an arbitrator is the impartial resolution of dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties.*

20. *Similarly, Cour de cassation, France, in a judgment delivered in 1972 in the case of Consorts Ury1, underlined that "an independent mind is indispensable in the exercise of judicial power, whatever the source of that power may be, and it is one of the essential qualities of an arbitrator.*

21. *Independence and impartiality are two different concepts. An arbitrator may be independent and yet, lack impartiality, or vice versa. Impartiality, as is well accepted, is a more subjective concept as compared to independence. Independence, which is more an objective concept, may, thus, be more straightforwardly ascertained by the parties at the outset of the arbitration proceedings in light of the circumstances disclosed by the arbitrator, while partiality will more likely surface during the arbitration proceedings.*

22. *It also cannot be denied that the Seventh Schedule is based on IBA guidelines which are clearly regarded as a representation of international based practices and are based on statutes, case law and juristic opinion from a cross-section on jurisdiction. It is so mentioned in the guidelines itself.*

23. *Keeping in view the aforesaid parameters, we advert to the facts of this case. Various contingencies mentioned in the Seventh Schedule render a person ineligible to act as an arbitrator. Entry No. 1 is highlighted by the learned Counsel for the Petitioner which provides that where the arbitrator is an employee, consultant, advisor or has any other past or present business relationship with the party, would not act as an arbitrator. What was argued by the learned Senior Counsel for the Petitioner was that the panel of arbitrators drawn by the Respondent consists of those persons*

who are government employees or ex-government employees. However, that by itself may not make such persons ineligible as the panel indicates that these are the persons who have worked in the railways under the Central Government or Central Public Works Department or public sector undertakings. They cannot be treated as employee or consultant or advisor of the Respondent-DMRC. If this contention of the Petitioner is accepted, then no person who had earlier worked in any capacity with the Central Government or other autonomous or public sector undertakings, would be eligible to act as an arbitrator even when he is not even remotely connected with the party in question, like DMRC in this case. The amended provision puts an embargo on a person to act as an arbitrator, who is the employee of the party to the dispute. It also deprives a person to act as an arbitrator if he had been the consultant or the advisor or had any past or present business relationship with DMRC. No such case is made out by the Petitioner.

24. *Section 12 has been amended with the objective to induce neutrality of arbitrators, viz., their independence and impartiality. The amended provision is enacted to identify the 'circumstances' which give rise to 'justifiable doubts' about the independence or impartiality of the arbitrator. If any of those circumstances as mentioned therein exists, it will give rise to justifiable apprehension of bias. The Fifth Schedule to the Act enumerates the grounds which may give rise to justifiable doubts of this nature. Likewise, Seventh Schedule mentions those circumstances which would attract the provisions of Sub-section (5) of Section 12 and nullify any prior agreement to the contrary. In the context of this case, it is relevant to mention that only if an arbitrator is an employee, a consultant, an advisor or has any past or present business relationship with a party, he is rendered ineligible to act as an arbitrator. Likewise, that person is treated as incompetent to perform the role of arbitrator, who is a manager, director or part of the management or has a single controlling influence in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration. Likewise, persons who regularly advised the appointing party or affiliate of the appointing party are*

incapacitated. A comprehensive list is enumerated in Schedule 5 and Schedule 7 and admittedly the persons empaneled by the Respondent are not covered by any of the items in the said list.

25. *It cannot be said that simply because the person is retired officer who retired from the government or other statutory corporation or public sector undertaking and had no connection with DMRC (party in dispute), he would be treated as ineligible to act as an arbitrator. Had this been the intention of the legislature, the Seventh Schedule would have covered such persons as well. Bias or even real likelihood of bias cannot be attributed to such highly qualified and experienced persons, simply on the ground that they served the Central Government or PSUs, even when they had no connection with DMRC. The very reason for empanelling these persons is to ensure that technical aspects of the dispute are suitably resolved by utilising their expertise when they act as arbitrators. It may also be mentioned herein that the Law Commission had proposed the incorporation of the Schedule which was drawn from the red and orange list of IBA guidelines on conflict of interest in international arbitration with the observation that the same would be treated as the guide 'to determine whether circumstances exist which give rise to such justifiable doubts'. Such persons do not get covered by red or orange list of IBA guidelines either.*

To sum up, one can say that while the parties have full freedom to decide the procedure for appointment of arbitrators, the arbitrators must be independent and impartial. Requirements of independence and impartiality cannot be waived by an agreement between the parties.

4.7 Law governing the contract

The Arbitration Act does not have any specific provisions regarding the law governing the contract. However, various judgements of Honourable Supreme Court have laid down the

law in this regard. Honourable Supreme Court summed up the legal position in this regard very well in the judgement of Bharat Aluminium vs. Kaiser (2016)[32] as follows:

> ***5.*** *Party autonomy being the brooding and guiding spirit in arbitration, the parties are free to agree on application of three different laws governing their entire contract-(1) proper law of contract, (2) proper law of arbitration agreement and (3) proper law of the conduct of arbitration, which is popularly and in legal parlance known as curial law. The interplay and application of these different laws to an arbitration has been succinctly explained by this Court in* ***Sumitomo Heavy Industries Limited v. ONGC Limited and Ors.*** *MANU/SC/0834/1998 : (1998) 1 SCC 305, which is one of the earliest decisions in that direction and which has been consistently followed in all the subsequent decisions including the recent Reliance Industries Limited and Anr. v. Union of India MANU/SC/0518/2014 : (2014) 7 SCC 603.*

In this section we are discussing about the proper law of the contract. It is a settled position of law that domestic arbitration or an arbitration which is not international commercial arbitration as defined under sub-section 2(1)(f) of the Act shall be governed only by the laws of India. This position was stated clearly by Honourable Supreme Court in the matter of TDM Infrastructure[33] as follows:

> *20 . Section 28 of the 1996 Act is imperative in character in view of Section 2(6) thereof, which excludes the same from those provisions which parties derogate from (if so provided by the Act).* ***The intention of the legislature appears to be clear that Indian nationals should not be permitted to derogate from Indian law****. This is part of the public policy of the country.* (Emphasis added)

The above position of law was reiterated by Honourable Supreme Court in the matter of Bharat Aluminium vs. Kaiser (2012)[34]

[32] Domestic Court Judgements: Bharat Aluminium Co. v. Kaiser Aluminium Technical S. Inc., 2016
[33] Domestic Court Judgements: TDM Infrastructure P. Ltd. v. UE Development India P. Ltd., 2008
[34] Domestic Court Judgements: Bharat Aluminium and Ors. v. Kaiser Aluminium and Ors., 2012

> *Section 28(1)(a) makes it clear that in an arbitration under Part I to which Section 2(1)(f) does not apply, there is no choice but for the Tribunal to decide "the dispute" by applying the Indian "substantive law applicable to the contract". This is clearly to ensure that* ***two or more Indian parties do not circumvent the substantive Indian law****, by resorting to arbitrations. The provision would have an overriding effect over any other contrary provision in such contract. On the other hand,* ***where an arbitration under Part I is an international commercial arbitration within Section 2(1)(f), the parties would be free to agree to any other "substantive law" and if not so agreed, the "substantive law" applicable would be as determined by the Tribunal****. The section merely shows that the legislature has segregated the domestic and international arbitration. Therefore, to suit India, conflict of law rules have been suitably modified, where the arbitration is in India. This will not apply where the seat is outside India. In that event, the conflict of laws rules of the country in which the arbitration takes place would have to be applied.* (Emphasis added)

The above position was reconfirmed by the Honourable Supreme Court in the matter of PASL Wind vs. GE Power[35]. Relevant extract is as follows:

> ***47.*** *Hon'ble Supreme Court holds that Section 28 makes a clear distinction between purely domestic arbitration and international arbitration with a seat in India, and it is indicated that Section 28(1)(a) makes it clear that in an arbitration under Part I to which Section 2(1)(f) does not apply, there is no choice but for the Tribunal to decide the dispute by applying the Indian substantive law applicable to the Contract.*

The position regarding freedom of parties in international commercial arbitration was further highlighted by Honourable Supreme Court in the matter of PASL Wind vs. GE Power[36]. Relevant extract is as follows:

[35] Domestic Court Judgements: Pasl Wind Solutions P. Ltd. v. GE Power Conversion I. P. Ltd., 2021
[36] Domestic Court Judgements: Ibid.

> ***53.*** *Take the case of an Indian national who is habitually resident in a country outside India. Any dispute between such Indian national and an Indian national who is habitually resident in India would attract the provisions of Section 2(1)(f)(i) and, consequently, Section 28(1)(b) of the Arbitration Act, in which case two Indian nationals would be entitled to have their dispute decided in India in accordance with the Rules of law designated by the parties as applicable to the substance of the dispute, which need not be Indian law.*

Legal position can be summed as follows: for domestic arbitrations, the substantive law will necessarily be Indian law; for international commercial arbitrations the parties are free to agree to any substantive law in the arbitration agreement.

When two parties from different countries agree to work together, the issue of deciding the substantive law for the contract is a contentious one. Each party wants to have its own country's laws as the substantive law to be used for interpretation and governing of the contract. An option often exercised is to have a clause which states, "*The Agreement shall be interpreted, governed and construed in accordance with the usual norms and practices of international trade and cooperation*".

International contracts are also often governed by the United Nations Convention on Contracts for the International Sale of Goods[37] (CISG), which is a treaty that provides a uniform framework for international sales contracts. The CISG is widely accepted and has been adopted by 97 countries (as of 2023). According to website of Ministry of External Affairs[38], India has neither signed nor ratified the convention.

4.8 Law governing the arbitration & curial law

As stated above, Honourable Supreme Court had summed up the legal position regarding choice of laws in the judgement of Bharat Aluminium vs. Kaiser (2016)[39] as follows:

[37] Laws and Rules (International): UN Convention on Contracts for the Intern. Sale of Goods, 2010
[38] Sourced from https://mea.gov.in/Images/attach/lu6353.pdf
[39] Domestic Court Judgements: Bharat Aluminium Company v. Kaiser Aluminium, 2016

> ***5.*** *Party autonomy being the brooding and guiding spirit in arbitration, the parties are free to agree on application of three different laws governing their entire contract-(1) proper law of contract, (2) proper law of arbitration agreement and (3) proper law of the conduct of arbitration, which is popularly and in legal parlance known as curial law.*

Parties to an arbitration agreement need to decide the law of arbitration agreement and also the proper law for conduct of arbitration. Notably, these two can be different from the substantive law governing the agreement.

Difference between different laws related to an agreement was propounded at length by Honourable Supreme Court in the matter of Sumitomo vs. ONGC[40]. Relevant extract is as follows:

> ***11.*** *In the Law and Practice of Commercial Arbitration in England, Second Edition by Mustill and Boyd, there is a chapter on "The applicable law and the jurisdiction of the court". Under the subtitle, "Laws Governing The Arbitration", it is said,*
>
> > *An agreed reference to arbitration involves two groups of obligations. The first concerns the mutual obligations of the parties to submit future disputes, or an existing dispute to arbitration, and to abide by the award of a tribunal constituted in accordance with the agreement. It is now firmly established that the arbitration agreement which creates these obligations is a separate contract, distinct from the substantive agreement in which it is usually embedded, capable of surviving the termination of the substantive agreement and susceptible of premature termination by express or implied consent, or by repudiation or frustration, in much the same manner as in more ordinary forms of contract. Since this agreement has a distinct life of its own, it may in principle be governed by a proper law of its own,*

[40] Domestic Court Judgements: Sumitomo Heavy Industries Ltd. v. ONGC Ltd. and Ors.,1998

which need not be the same as the law governing the substantive contract.

The second group of obligations, consisting of what is generally referred to as the 'curial law' of the arbitration, concerns the manner in which the parties and the arbitrator are required to conduct the reference of a particular dispute. According to the English theory of arbitration, these rules are to be ascertained by reference to the express or implied terms of the agreement to arbitrate. This being so, it will be found in the great majority of cases that the curial law, i.e. the law governing the conduct, of the reference, is the same as the law governing the obligation to arbitrate. It is, however, open to the parties to submit, expressly or by implication, the conduct of the reference to a different law from the one governing the underlying arbitration agreement. In such a case, the court looks first at the arbitration agreement to see whether the dispute is one which should be arbitrated, and which has validly been made the subject of the reference; it then looks to the curial law to see, how that reference should be conducted; and then returns to the first law in order to give effect to the resulting award.

x x x

It may therefore be seen that problems arising out of an arbitration may, at least in theory, call for the application of any one or more of the following laws -

***1.** The proper law of the contract, i.e. the law governing the contract which creates the substantive rights of the parties, in respect of which the dispute has arisen.*

2. *The proper law of the arbitration agreement, i.e. the law governing the obligation of the parties to submit the disputes to arbitration, and to honour an award.*

3. *The curial law, i.e. the law governing the conduct of the individual reference.*

x x x

(1) The proper law of the arbitration agreement governs the validity of the arbitration agreement, the question whether a dispute lies within the scope of the arbitration agreement; the validity of the notice of arbitration; the Constitution of the tribunal; the question whether an award lies within the jurisdiction of the arbitrator; the formal validity of the award; the question whether the parties have been discharged from any obligation to arbitrate future disputes.

2. *The curial law governs; the manner in which the reference is to be conducted; the procedural powers and duties of the arbitrator; questions of evidence; the determination of the proper law of the contract.*

3. *The proper law of the reference governs: the question whether the parties have been discharged from their obligation to continue with the reference of the individual dispute.*

x x x

In the absence of express agreement, there is a strong prima facie presumption that the parties intend the curial law to be the law of the 'seat' of the arbitration, i.e. the place at which the arbitration is to be conducted, on the ground that that is the country most closely connected with the proceedings. So in order to determine the curial law in the absence of an

> *express choice by the parties it is first necessary to determine the seat of the arbitration, by construing the agreement to arbitrate. (Emphasis supplied.)*
>
> ***12.*** *The conclusion that we reach is that the curial law operates during the continuance of the proceedings before the arbitrator to govern the procedure and conduct thereof. The courts administering the curial law have the authority to entertain applications by parties to arbitrations being conducted within their jurisdiction for the purpose of ensuring that the procedure that is adopted in the proceedings before the arbitrator conforms to the requirements of the curial law and for reliefs incidental thereto. Such authority of the courts administering the curial law ceases when the proceedings before the arbitrator are concluded.*

The ratio in Sumitomo vs. ONGC was confirmed by Honourable Supreme Court in the matter of Bharat Aluminium vs. Kaiser (2016)[41] as follows:

> ***5.*** *Party autonomy being the brooding and guiding spirit in arbitration, the parties are free to agree on application of three different laws governing their entire contract-(1) proper law of contract, (2) proper law of arbitration agreement and (3) proper law of the conduct of arbitration, which is popularly and in legal parlance known as curial law. The interplay and application of these different laws to an arbitration has been succinctly explained by this Court in* ***Sumitomo Heavy Industries Limited v. ONGC Limited and Ors.*** *MANU/SC/0834/1998 : (1998) 1 SCC 305, which is one of the earliest decisions in that direction and which has been consistently followed in all the subsequent decisions including the recent Reliance Industries Limited and Anr. v. Union of India MANU/SC/0518/2014 : (2014) 7 SCC 603.*

In the matter before Honourable Supreme Court in Bharat Aluminium vs. Kaiser (2016) (supra), the substantive law was Indian law and the law for arbitration was English law. In the situation, Honourable Supreme Court ruled as follows:

[41] Domestic Court Judgements: Bharat Aluminium Company v. Kaiser Aluminium, 2016

9. *Article 22 has in fact two parts. In the first part of that Article, it is agreed between the parties that the proper law of the contract will be governed by the prevailing law of India, and in the case of arbitration, English Law would apply. In other words, the agreement as a whole would be governed by Indian Law, and in case of arbitration, the English Law will apply. No doubt, one should not strain too much to interpret an agreement between two parties as in the case of a statutory interpretation. The approach in analysing the terms of agreement should be straight and plain but at the same time cohesive and logical.*

Party autonomy being the brooding and guiding spirit

10. *In the matter of interpretation, the court has to make different approaches depending upon the instrument falling for interpretation. Legislative drafting is made by experts and is subjected to scrutiny at different stages before it takes final shape of an Act, Rule or Regulation. There is another category of drafting by lawmen or document writers who are professionally qualified and experienced in the field like drafting deeds, treaties, settlements in court, etc. And then there is the third category of documents made by laymen who have no knowledge of law or expertise in the field. The legal quality or perfection of the document is comparatively low in the third category, high in second and higher in first. No doubt, in the process of interpretation in the first category, the courts do make an attempt to gather the purpose of the legislation, its context and text. In the second category also, the text as well as the purpose is certainly important, and in the third category of documents like wills, it is simply intention alone of the executor that is relevant. In the case before us, being a contract executed between the two parties, the court cannot adopt an approach for interpreting a statute. The terms of the contract will have to be understood in the way the parties wanted and intended them to be. In that context, particularly in agreements of arbitration, where party autonomy is the grundnorm, how the parties worked out the agreement, is one of the indicators to decipher the intention, apart from the plain or grammatical meaning of the expressions and the use of the expressions at the proper*

places in the agreement. Contextually, it may be noted that in the present case, the Respondent had invoked the provisions of English law for the purpose of the initiation of the unsettled disputes. It has hence, while interpreting an agreement, to be kept in mind that the parties, intended to avoid impracticable and inconvenient processes and procedures in working out the agreement. Potter J. made a similar observation in ***Cargill International S.A. v. Bangladesh Sugar and Food Industries Corporation*** *[1998] 1 W.L.R. 461 CA:*

> *As Lord Goff observed in another context in Palm Shipping v. Kuwait Petroleum [1988] 1 Lloyds Rep 500 at 502: "It is not a permissible method of construction to propound a general or generally accepted principal... (and)... then to seek to force the provisions of the... (the contract)... into the straightjacket of that principle." On the other hand, modern principles of construction require the court to have regard to the commercial background, the context of the contract and the circumstances of the parties and to consider whether, against that background and in that context, to give the words a particular or restricted meaning would lead to an apparently unreasonable and unfair result.*

11. *A close perusal of the terms between the parties would clearly show that the first part of Article 22 is on the law governing the contract and in the second part the parties intended to lay down the law applicable to the arbitration agreement, viz., the proper law of the agreement of arbitration. It is unnecessary that after already agreeing on the procedural law governing the arbitration in Article 17.1, the parties intended to state the same again in a separate clause within the same contract in Article 22. Therefore, the intention of the parties to apply English Law to the arbitration agreement also and not limit it to the conduct of the arbitration is fairly clear from Article 22.*

In conclusion one can say that an arbitration agreement in international commercial arbitration should, in addition to mentioning the substantive agreement, should also

mention the law of arbitration agreement and proper law of the conduct of arbitration, which is popularly and in legal parlance known as curial law. Parties to international commercial arbitration enjoy autonomy in this regard and courts have held such autonomy as sacrosanct.

4.9 Ad hoc or institutional arbitration

> *Institutional arbitration refers to the administration of arbitration by an institution in accordance with its rules of procedure. The institution provides support for the conduct of the arbitration in the form of appointment of arbitrators, case management services including oversight of the arbitral process, venues for holding hearings, etc. It differs from ad hoc arbitration in that several aspects of the arbitral proceedings such as appointment of arbitrators, conduct of the arbitral proceedings, scrutiny of awards, etc. may be determined by the arbitral institution. India has not fully embraced institutional arbitration as the preferred mode of arbitration despite the existence of several institutions which administer arbitrations.*[42]

Report No. 246 of the 20th Law Commission[43] discussed at length about the development of institutional arbitration in India. Relevant extracts read as follows:

> *5. Arbitration may be conducted ad hoc or under institutional procedures and rules. When parties choose to proceed with ad hoc arbitration, the parties have the choice of drafting their own rules and procedures which fit the needs of their dispute. Institutional arbitration, on the other hand, is one in which a specialized institution with a permanent character intervenes and assumes the functions of aiding and administering the arbitral process, as provided by the rules of such institution. Essentially, the contours*

[42] Reports (India): High Level Committee Report to Review the Institutionalisation of Arbitration Mechanism in India, 2017, p. 13

[43] Reports (India): Amendments to the Arbitration and Conciliation Act 1996, Report No. 246, Law Commission of India, 2014

and the procedures of the arbitral proceedings are determined by the institution designated by the parties. Such institutions may also provide qualified arbitrators empanelled with the institution. Further, assistance is also usually available from the secretariat and professional staff of the institution. As a result of the structured procedure and administrative support provided by institutional arbitration, it provides distinct advantages, which are unavailable to parties opting for ad hoc arbitration.

6. *The spread of institutional arbitration however, is minimal in India and has unfortunately not really kick-started. In this context, the Act is institutional arbitration agnostic – meaning thereby, it neither promotes nor discourages parties to consider institutional arbitration. The changes suggested by the Commission however, attempt to encourage the culture of institutional arbitration in India, which the Commission feels will go a long way to redress the institutional and systemic malaise that has seriously affected the growth of arbitration.*

7. *The Commission has, therefore, recommended the addition of Explanation 2 to section 11(6A) of the Act with the hope that High Courts and the Supreme Court, while acting in the exercise of their jurisdiction under section 11 of the Act will take steps to encourage the parties to refer their disputes to institutionalised arbitration. Similarly, the Commission seeks to accord legislative sanction to rules of institutional arbitration which recognise the concept of an "emergency arbitrator" – and the same has been done by broadening the definition of an "arbitral tribunal" under section 2(d).*

Recommendations of the Law Commission (supra) were accepted by the Government and the Act[44] was duly amended to enable institutional arbitration in India. Relevant sub-sections of the Act dealing with institutional arbitration are as follows:

Sub-section 2(1)(ca)

(ca) "arbitral institution" means an arbitral institution designated by the Supreme Court or a High Court under this Act;

Sub-section 2(6)

(6) Where this Part, except section 28, leaves the parties free to determine a certain issue, that freedom shall include the right of the parties to authorise any person including an institution, to determine that issue.

Sub-section 11(3A)

(3A) The Supreme Court and the High Court shall have the power to designate, arbitral institutions, from time to time, which have been graded by the Council under section 43-I, for the purposes of this Act:

Provided that in respect of those High Court jurisdictions, where no graded arbitral institution are available, then, the Chief Justice of the concerned High Court may maintain a panel of arbitrators for discharging the functions and duties of arbitral institution and any reference to the arbitrator shall be deemed to be an arbitral institution for the purposes of this section and the arbitrator appointed by a party shall be entitled to such fee at the rate as specified in the Fourth Schedule:

Provided further that the Chief Justice of the concerned High Court may, from time to time, review the panel of arbitrators.

Sub-section 11(6)

(6) Where, under an appointment procedure agreed upon by the parties,-

[44] Laws (India): The Arbitration and Conciliation (Amendment) Act, 2015

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case maybe] to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

Sub-section 11(8)

(8) The arbitral institution referred to in sub-sections (4), (5) and (6), before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of section 12, and have due regard to--

(a) any qualifications required for the arbitrator by the agreement of the parties; and

(b) the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

Sub-section 11(9)

(9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, 16[the arbitral institution designated by the Supreme Court] may appoint an arbitrator of a nationality other than the

nationalities of the parties where the parties belong to different nationalities.

Sub-section 11(11)

(11) Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to different arbitral institutions, the arbitral institution to which the request has been first made under the relevant sub-section shall be competent to appoint.

Sub-section 11(12)

(12) Where the matter referred to in sub-sections (4), (5), (6) and (8) arise in an international commercial arbitration or any other arbitration, the reference to the arbitral institution in those sub-sections shall be construed as a reference to the arbitral institution designated under sub-section (3A).

Sub-section 11(13)

(13) An application made under this section for appointment of an arbitrator or arbitrators shall be disposed of by the arbitral institution within a period of thirty days from the date of service of notice on the opposite party.

Sub-section 11(14)

(14) The arbitral institution shall determine the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal subject to the rates specified in the Fourth Schedule.

> *Explanation.-- For the removal of doubts, it is hereby clarified that this sub-section shall not apply to international commercial arbitration and in arbitrations (other than international commercial arbitration) where parties have agreed for determination of fees as per the rules of an arbitral institution.*

With the statutory provisions in place, institutional arbitration has some advantages over ad-hoc arbitration whereas ad-hoc arbitration is often seen as less expensive and less cumbersome. Advantages and disadvantages of the two have been summed up very well in the article by Vasudha Tamrakar and Garima Tiwari[45]. Relevant extract from the article reads as follows:

> *Properly structured, ad hoc arbitration should be less expensive than institutional arbitration and, thus, better suit smaller claims and less affluent parties. Ad hoc arbitration places more of a burden on the arbitrator(s), and to a lesser extent upon the parties, to organize and administer the arbitration in an effective manner. A distinct disadvantage of the ad hoc approach is that its effectiveness may be dependent upon the willingness of the parties to agree upon procedures at a time when they are already in dispute. Failure of one or both of the parties to cooperate in facilitating the arbitration can result in an undue expenditure of time in resolving the issues. The savings contemplated by use of the ad hoc arbitral process may be somewhat illusory if delays precipitated by a recalcitrant party necessitate repeated recourse to the courts in the course of the proceedings.*
>
> 1. *The primary advantage of ad hoc arbitration is flexibility, which enables the parties to decide upon the dispute resolution procedure. This necessarily requires a greater degree of effort, co-operation and expertise of the parties in determination of the arbitration rules. Very often, the parties may misunderstand each other since they are of different nationalities and come from different jurisdictions, and this can delay the arbitration. Also, once a dispute arises, parties tend to disagree and lack of co-operation required may frustrate the parties' intention of resolving their dispute by ad hoc arbitration. Such situations can be avoided, if the parties agree that the arbitration should be conducted under certain arbitration rules. This results in reduced deliberation and legal fees and also facilitates early commencement of the arbitration, as the parties do*

[45] Articles and Studies: Vasudha Tamrakar and Garima Tiwari, Ad Hoc and Institutional Arbitration

not engage in the time consuming process of determining complex arbitration rules. There are various sets of rules suitable to ad hoc arbitration, of which the UNCITRAL rules are considered most suitable.

2. *By reason of its flexibility, ad hoc arbitration is preferred in cases involving state parties who consider that a submission to institutional arbitration devalues their sovereignty and they are therefore reluctant to submit to institutional control. Ad hoc arbitration also permits the parties to shape the arbitration in a manner, which enables quick and effective resolution of disputes involving huge sums of public money and public interest. In the Amin oil arbitration, conducted ad hoc, the flexibility permitted the parties to define issues in a manner, which enabled quick resolution of the dispute. Further, the adopted procedure provided that the parties would file their pleadings at the same time. Consequently, neither party was a respondent, a title that parties resent when they believe that they have justifiable claims against the other party. Also, the tribunal directed the state party to lead the case on some issues and Amin oil to lead on other issues, depending on whom the onus of proof laid.*

3. *Another primary advantage of ad hoc arbitration is that it is less expensive than institutional arbitration. The parties only pay fees of the arbitrators', lawyers or representatives, and the costs incurred for conducting the arbitration i.e. expenses of the arbitrators, venue charges, etc. They do not have to pay fees to an arbitration institution which, if the amount in dispute is considerable, can be prohibitively expensive. In order to reduce costs, the parties and the arbitrators may agree to conduct arbitration at the offices of the arbitrators. It can be argued that such proposal would not be acceptable to an institution, lest their reputation be tarnished.*

4. *In ad hoc arbitration, parties negotiate and settle fees with the arbitrators directly, unlike institutional arbitration wherein the*

parties pay arbitrators' fees as stipulated by the institution. This allows them the opportunity of negotiating a reduction in fees. But this involves an uncomfortable discussion & in certain cases, the parties may not be able to negotiate a substantial reduction or for that matter, any reduction at all. The arbitrators are the judges in the cause and no party desires to displease the judge, even before the proceedings have commenced.

Ad hoc arbitrations may not be less expensive than institutional arbitration for a number of reasons

Firstly, the parties are required to make arrangements to conduct the arbitration but they may lack the necessary knowledge and expertise. It has been said that many laymen have to participate in arbitration and many arbitrations have to be conducted by persons who are not lawyers. This would result in misinformed decisions, especially in international commercial arbitration as the parties come from different countries and consequently, in increased costs.

Secondly, where there is lack of co-operation between the parties or delay on part of the tribunal in conducting the arbitration or in writing the award, a party may seek court intervention and the litigation costs negate not only the cost advantage of ad hoc arbitration but also the parties' intention to arbitrate.

Thirdly, the tribunal may, in complex cases involving considerable administrative work, appoint a secretary to administer the arbitration, whose fees will be borne by the parties and this adds to the cost burden of the arbitration.

It can therefore, be said of ad hoc arbitration that if the required co-operation is forthcoming and the parties are conversant with arbitration procedures or the arbitration is conducted by experienced arbitrators, "the difference between ad hoc and institutional arbitration is like the difference between a tailor-made suit and one that is bought off-the-peg". That is to

say, ad hoc arbitration is tailored to the needs of the parties and is more cost effective than institutional arbitration.

Institutional arbitration

An institutional arbitration is one in which a specialized institution with a permanent character intervenes and assumes the functions of aiding and administering the arbitral process, as provided by the rules of that institution. It is pertinent to note that these institutions do not arbitrate the dispute, it is the arbitrators who arbitrate, and so the term arbitration institution is inappropriate and only the rules of the institution apply.

Often, the contract between the parties will contain an arbitration clause which will designate an institution as the arbitration administrator. If the institutional administrative charges, which may be substantial, are not a factor, the institutional approach is generally preferred.

The primary disadvantages attending the institutional approach are: (i) administrative fees for services and use of facilities may be high in disputes over large amounts, especially where fees are related to the amount in dispute. For lesser amounts in dispute, institutional fees may be greater than the amount in controversy; (ii) the institution's bureaucracy may lead to added costs and delays and (iii) the disputants may be required to respond within unrealistic time frames.

Parties to an arbitration agreement must weigh the advantages and disadvantages of ad-hoc arbitration vs. institutional arbitration before finalizing the agreement. In case institutional arbitration is chosen, the parties should decide the name of the arbitration institution and also if the rules of the institution will apply to the arbitration process. UNCTAD Module on The Arbitration Agreement in Course on Dispute Settlement in International Trade, Investment and Intellectual Property[46] has the following recommendations with regard to institutional arbitration:

[46] Articles and Studies: UNCTAD, Dispute Settlement, International Commercial Arbitration, Module 5.2 The Arbitration Agreement, 2005

If the decision is for institutional arbitration, the following step is to determine the most advisable institution to conduct the arbitration. What are the criteria to choose an arbitration institution? What are the aspects to consider?

Many institutions provide arbitration services. Each of them has special characteristics, which make them suitable for some cases and unsuitable for others. There are general arbitral institutions that offer their services in the general field of commercial issues; others that provide different arbitration models for different kinds of question (with rules and panels of arbitrators for each); others that only offer arbitration services concerning some specific matters.

Apart from the prestige and trustworthiness of the organization, there are other elements to analyze before making the decision, namely: its set of rules, the list of arbitrators (or the method of their appointment) and costs.

Before all this, the parties should define the nature of the disputes that may arise out of the contract in question. Knowing what kind of controversies may arise, the parties should naturally rule out the institutions that do not provide arbitration services for that kind of disputes. If the potential questions are too specific or involve technical or complex questions, it is also advisable to discard those institutions that are not experienced enough handling this type of controversy or that do not have appropriate rules and lists of arbitrators.

It is essential to study the rules of the prospective arbitral institutions. The purpose of the analysis is to determine, in the first place, if the procedure is suitable for the kind of conflicts that are likely to be arbitrated. As noted above, there are institutions that have a set of rules designed for a special category of issues and its provisions are suitable for such particular situation. If the conflicts that may arise out of the contract do not have those characteristics, such rules will probably be unsuitable.

In any case, the parties should analyze the powers granted by the rules to the institution in the administration of the arbitration and to the arbitrators in the conduct of the proceedings; the rules of procedure (notice system, procedural terms, rules on evidence) and admissible means of recourse against awards.

An aspect to consider is how arbitrators are appointed under the rules of the institutions. Do the parties have the right to choose arbitrators or is there a standing tribunal? Is there a list of arbitrators and is it mandatory that all the arbitrators, a sole arbitrator or the chairman be chosen from that list? Are there different lists according to the specific fields? Does the institution have discretionary power to choose arbitrators? In the event of a standing tribunal or a list of arbitrators, the analysis should be focused on the competence and experience of arbitrators in the type of questions likely to be arbitrated. If there is no list, the parties should analyze the competence of the organ of the institution in charge of appointing the arbitrators.

Last, but not least, comes the cost study. Arbitral institutions have scales that make it possible to foresee the cost of handling possible conflicts according to their amount. It is advisable to check the scale for the type of conflict that may arise between the parties.

4.10 Qualifications of arbitrators

Qualification of arbitrators is covered by section 11 of the Act[47]. Relevant sub-sections of the section are as follows:

Sub-section 2(1) and 2(2)

(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

[47] Laws (India): The Arbitration and Conciliation Act, 1996

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

Sub-section 11(6)

(6) Where, under an appointment procedure agreed upon by the parties,-

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case maybe to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

From the wordings of the above-quoted sub-sections as well as from section 12, it is clear that the parties (a) are free to arrive at any agreement about the nationality of the arbitrator (b) have full autonomy regarding qualifications and other such criterion for arbitrators. Some agreements involve highly technical transactions and resolution of disputes is likely to need arbitrators with special qualifications. In such agreements, the qualifications that an arbitrator must possess should be mentioned in the arbitration agreement. However, the conditions of independence and impartiality prescribed under section 12 of the Act[48] must be satisfied. Relevant sub-sections of section 12 of the Act are as follows:

[48] Laws (India): The Arbitration and Conciliation Act, 1996

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,--

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise ***to justifiable doubts as to his independence or impartiality****; and*

(b) which are likely to affect his ability to devote ***sufficient time to the arbitration*** *and in particular his ability to complete the entire arbitration within a period of twelve months.*

Explanation 1.-- The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise ***to justifiable doubts as to the independence or impartiality*** *of an arbitrator.*

Explanation 2.-- The disclosure shall be made by such person in the form specified in the Sixth Schedule.

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if-

(a) circumstances exist that give rise ***to justifiable doubts as to his independence or impartiality****, or*

(b) *he **does not possess the qualifications agreed to by the parties***. (Emphasis added)

The above sub-sections of section 12 clearly show on one hand that the parties have freedom or autonomy to prescribe any qualifications that an arbitrator must possess and on the other hand lay down limits to party autonomy by prescribing the twin conditions of independence and impartiality. Parties negotiating an arbitration agreement should understand the autonomy available to them as well as the limiting conditions prescribed under section 12 of the Act.

4.11 Seat of arbitration

The seat of arbitration determines the courts which will exercise jurisdiction over the arbitration proceeding. Notably, there is a difference between seat of arbitration and place of arbitration. An arbitration tribunal may meet at various places while there can be only one seat of arbitration. Relevant section in the Act[49] about the place of arbitration is as follows:

Section 20 - Place of arbitration

(1) The parties are free to agree on the place of arbitration.

(2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(3) Notwithstanding sub-section (1) or sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing winners, experts or the parties, or for inspection of documents, goods or other property.

[49] Laws (India): The Arbitration and Conciliation Act, 1996

While the term used in the Act is "place of arbitration", the term is used as synonymous to "seat of arbitration". Concept of seat of arbitration was discussed at length in Bharat Aluminium vs. Kaiser (2012)[50] by Honourable Supreme Court. Relevant extract is as follows:

> ***96 .*** *We are of the opinion, the term "subject matter of the arbitration" cannot be confused with "subject matter of the suit". The term "subject matter" in Section 2(1)(e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the Learned Counsel for the Appellants would, in fact, render Section 20 nugatory. In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many* ***occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties****. Therefore, the* ***courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process****. For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order Under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the Courts of Delhi being the Courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take*

[50] Domestic Court Judgements: Bharat Aluminium and Ors. v. Kaiser Aluminium and Ors.,2012

> *place in Delhi. In such circumstances, both the Courts would have jurisdiction, i.e., the Court within whose jurisdiction the subject matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution, i.e., arbitration is located.* (Emphasis added)

The above position was further clarified by Honourable Supreme Court in the matter of BGS SGS vs. NHPC[51] as follows:

> ***79.*** *Reference was made to Roger Shashoua (supra) in paragraphs 124 to 128, and then to various other judgments, including BALCO (supra), as follows:*
>
> > ***134.*** *It is accepted by most of the experts in the law relating to international arbitration that in almost all the national laws,* ***arbitrations are anchored to the seat/place/situs of arbitration****. Redfern and Hunter on International Arbitration (5th Edn., Oxford University Press, Oxford/New York 2009), in Para 3.54 concludes that "the seat of the arbitration is thus intended to be its centre of gravity". In BALCO [Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., MANU/SC/0722/2012 : (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810], it is further noticed that this does not mean that all proceedings of the arbitration are to be held at the seat of arbitration.* ***The arbitrators are at liberty to hold meetings at a place which is of convenience to all concerned.*** *This may become necessary as arbitrators often come from different countries. Therefore, it may be convenient to hold all or some of the meetings of the arbitration in a location other than where the seat of arbitration is located. In BALCO, the relevant passage from Redfern and Hunter has been quoted which is as under: (SCC p. 598, para 75)*

[51] Domestic Court Judgements: BGS SGS Soma JV v. NHPC Ltd., 2019

> ***75.*** *... 'The preceding discussion has been on the basis that there is only one "place" of arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the arbitration agreement or the terms of reference or the minutes of proceedings or in some other way as the place or "seat" of the arbitration. This does not mean, however, that the Arbitral Tribunal must hold all its meetings or hearings at the place of arbitration. International commercial arbitration often involves people of many different nationalities, from many different countries. In these circumstances, it is by no means unusual for an Arbitral Tribunal to hold meetings--or even hearings—in a place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses.... It may be more convenient for an Arbitral Tribunal sitting in one country to conduct a hearing in another country --for instance, for the purpose of taking evidence.... In such circumstances each move of the Arbitral Tribunal does not of itself mean that the seat of arbitration changes.* ***The seat of arbitration remains the place initially agreed by or on behalf of the parties****.' (Naviera case [Naviera Amazonica Peruana S.A. v. Compania Internacional De Seguros Del Peru, (1988) 1 Lloyd's Rep 116 (CA)], Lloyd's Rep p. 121)*

These observations have also been noticed in Union of India v. McDonnell Douglas Corporation [(1993) 2 Lloyd's Rep 48]

> ***84.*** *On a conspectus of the aforesaid judgments, it may be concluded that whenever there is the designation of a place of arbitration in an arbitration Clause as being the "venue" of the arbitration proceedings, the expression "arbitration proceedings" would make it clear that the "venue" is really the "seat" of the arbitral proceedings, as the aforesaid expression does not include just one or more individual or particular hearing, but the arbitration proceedings as a whole, including the making of an award at that place. This language has to be contrasted with language such as "tribunals are to meet or have witnesses, experts or the parties" where only hearings are to take place in the "venue", which may lead to the conclusion, other things being equal, that the venue so stated is not the "seat" of arbitral proceedings, but only a convenient place of meeting. Further, the fact that the arbitral proceedings "shall be held" at a particular venue would also indicate that the parties intended to anchor arbitral proceedings to a particular place, signifying thereby, that that place is the seat of the arbitral proceedings. This, coupled with there being no other significant contrary indicia that the stated venue is merely a "venue" and not the "seat" of the arbitral proceedings, would then conclusively show that such a Clause designates a "seat" of the arbitral proceedings. In an International context, if a supranational body of Rules is to govern the arbitration, this would further be an indicia that "the venue", so stated, would be the seat of the arbitral proceedings. In a national context, this would be replaced by the Arbitration Act, 1996 as applying to the "stated venue", which then becomes the "seat" for the purposes of arbitration.* (Emphasis added)

Confirming the above observations about seat of arbitration (as against venue of arbitration), Honourable Supreme Court in the matter of BBR (India) vs. SP Singla[52] observed as under:

> *25. There are good reasons why we feel that subsequent hearings or proceedings at a different location other than the place fixed by the arbitrator as the 'seat of arbitration' should not be regarded and treated as a change or relocation of jurisdictional 'seat'. This would, in our opinion,*

[52] Domestic Court Judgement: BBR (India) P. Ltd. v. S.P. Singla Constructions P. Ltd., 2022

> *lead to uncertainty and confusion resulting in avoidable esoteric and hermetic litigation as to the jurisdictional 'seat of arbitration'.* ***'The seat' once fixed by the arbitral tribunal under Section 20(2), should remain static and fixed, whereas the 'venue' of arbitration can change and move from 'the seat' to a new location. Venue is not constant and stationary and can move and change in terms of sub-section (3) to Section 20 of the Act****. Change of venue does not result in change or relocation of the 'seat of arbitration'.*(Emphasis added)

Based on the judgements quoted above one can conclude that the arbitration agreement should specify the seat of arbitration which means that the courts having jurisdiction over the seat will adjudicate on all matters arising from the arbitration. Even when the seat is fixed at a particular place, the arbitration tribunal will be free to hold meetings or hearings at different venues including venues in different countries.

4.12 Whether virtual hearings are permitted

Section 24 of the Act reads as follows:

> ***Section 24 - Hearings and written proceedings***
>
> *(1)* ***Unless otherwise agreed by the parties****, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials;*
>
> > *Provided that the arbitral tribunal shall hold hearings, at an appropriate stage of the proceedings, on a request by a party, unless the parties have agreed that no oral hearing shall be held.*
> >
> > *Provided further that the arbitral tribunal shall, as far as possible, hold oral hearings for the presentation of evidence or for oral argument on day-to-day basis, and not grant any adjournments unless sufficient cause is made out, and may*

impose costs including exemplary costs on the party seeking adjournment without any sufficient cause.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of documents, goods or other property.

(3) All statements, documents or other information supplied to, or applications made to, the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties. (Emphasis added)

The opening words of the above section, "unless otherwise agreed by the parties", provide freedom to the parties to decide on any method of hearings by the arbitration tribunal. Even otherwise there is nothing in the section to prevent virtual hearings. Presentation of documents and oral arguments can be conducted online. However, as a matter of abundant caution it is advisable that the parties include a clause in the arbitration agreement specifying whether virtual hearings will be permitted or will not be permitted. Holding of virtual hearings will not affect the seat of arbitration as discussed in the previous section.

4.13 Language of arbitration

Section 22 of the Act reads as follows:

Section 22 – Language

(1) The parties are free to agree upon the language or languages to be used in the arbitral proceedings.

(2) Failing any agreement referred to in sub-section (1), the arbitral tribunal shall determine the language or languages to be used in the arbitral proceedings.

(3) The agreement or determination, unless otherwise specified, shall apply to any written statement by a party, any hearing and any arbitral award, decision or other communication by the arbitral tribunal.

(4) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the languages agreed upon by the parties or determined by the arbitral tribunal.

Article 19 of UNCITRAL Arbitration Rules[53] provides as follows:

Language

Article 19

1. ***Subject to an agreement by the parties****, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defence, and any further written statements and, if oral hearings take place, to the language or languages to be used in such hearings.*

2. The arbitral tribunal may order that any documents annexed to the statement of claim or statement of defence, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into ***the language or languages agreed upon by the parties*** *or determined by the arbitral tribunal.* (Emphasis added)

Both, section 22 of the Act and Article 19 of the UNCITRAL Arbitration Rules (supra) grant parties the autonomy to decide the language that shall be the language of arbitration. It is important that this autonomy is duly exercised by the parties and the language of arbitration is clearly mentioned in the arbitration agreement. This is most important for international commercial arbitration where parties may have different official or business languages.

[53] Laws and Rules (International): UNCITRAL Arbitration Rules, 2010

4.14 Cost of arbitration

Regime related to arbitration costs in India went through a significant change after the 246th Report of Law Commission[54]. The Report recommended amendment to the Act to give statutory recognition to the principle of "loser pays". Relevant extract from the Report is as follows:

> *70. Arbitration, much like traditional adversarial dispute resolution, can be an expensive proposition. The savings of a party in avoiding payment of court fee, is usually offset by the other costs of arbitration – which include arbitrator's fees and expenses, institutional fees and expenses, fees and expenses in relation to lawyers, witnesses, venue, hearings etc. The potential for racking up significant costs justify a need for predictability and clarity in the rules relating to apportionment and recovery of such costs. The Commission believes that, as a rule, it is just to allocate costs in a manner which reflects the parties' relative success and failure in the arbitration, unless special circumstances warrant an exception or the parties otherwise agree (only after the dispute has arisen between them).*
>
> *71. The loser-pays rule logically follows, as a matter of law, from the very basis of deciding the underlying dispute in a particular manner; and as a matter of economic policy, provides economically efficient deterrence against frivolous conduct and furthers compliance with contractual obligations.*
>
> *72. The Commission has, therefore, sought comprehensive reforms to the prevailing costs regime applicable both to arbitrations as well as related litigation in Court by proposing section 6-A to the Act, which expressly empowers arbitral tribunals and courts to award costs based on rational and realistic criterion. This provision*

[54] Reports (India): Amendments to the Arbitration and Conciliation Act 1996, Report No. 246, Law Commission of India, 2014

furthers the spirit of the decision of the Supreme Court in Salem Advocate Bar Association v Union of India, AIR 2005 SC 3353, and it is hoped and expected that judges and arbitrators would take advantage of this robust provision, and explain the "rules of the game" to the parties early in the litigation so as to avoid frivolous and meritless litigation/arbitration.

Based on the recommendations of the Law Commission (supra), the Act[55] was amended in 2015[56] and section 31A was inserted in the Act. Section 31A reads as follows:

31A. Regime for costs

(1) In relation to any arbitration proceeding or a proceeding under any of the provisions of this Act pertaining to the arbitration, the Court or arbitral tribunal, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), shall have the discretion to determine--

(a) whether costs are payable by one party to another;

(b) the amount of such costs; and

(c) when such costs are to be paid.

Explanation.--For the purpose of this sub-section, "costs" means reasonable costs relating to--

(i) the fees and expenses of the arbitrators, Courts and witnesses;

(ii) legal fees and expenses;

(iii) any administration fees of the institution supervising the arbitration; and

[55] Laws (India): The Arbitration and Conciliation Act, 1996
[56] Laws (India): The Arbitration and Conciliation (Amendment) Act, 2015

(iv) any other expenses incurred in connection with the arbitral or Court proceedings and the arbitral award.

(2) If the Court or arbitral tribunal decides to make an order as to payment of costs,--

(a) the general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party; or

(b) the Court or arbitral tribunal may make a different order for reasons to be recorded in writing.

(3) In determining the costs, the Court or arbitral tribunal shall have regard to all the circumstances, including--

(a) the conduct of all the parties;

(b) whether a party has succeeded partly in the case;

(c) whether the party had made a frivolous counter claim leading to delay in the disposal of the arbitral proceedings; and

(d) whether any reasonable offer to settle the dispute is made by a party and refused by the other party.

(4) The Court or arbitral tribunal may make any order under this section including the order that a party shall pay--

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct part of the proceedings; and

(g) interest on costs from or until a certain date.

(5) An agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event shall be only valid if such agreement is made after the dispute in question has arisen.

The above section 31A has taken away the freedom of parties to agree to any system of allocation of costs. This was affirmed by Honourable High Court of Delhi in the matter of Union of India vs. Om Vajrakaya[57]. Relevant extracts from the judgement are as follows:

***33**. Unlike the power of the Arbitral Tribunal to award interest under Section 31(7)(a) of the A & C Act, which is subject to the contract between the parties, there are no such fetters on the discretion of the Arbitral Tribunal to award costs under Section 31A of the A & C Act. The only exception being any agreement between the parties regarding costs which is entered into after the disputes have arisen.*

***34**. It is also relevant to note that Section 31A of the A & C Act not only provides for a regime of costs that may be awarded by the Arbitral Tribunal but the Court as well. The opening sentence of Sub-Section (1) of Section 31A of the A & C Act also contains a non-obstante provision. The import of the non-obstante provision is that Section 31A of the A & C Act has an overriding effect over any contrary provision contained in the Code of Civil Procedure, 1908 (CPC). Thus, the Arbitral Tribunal and the Courts would have the power to award costs at their discretion, in terms of Section 31A of the A & C Act despite any repugnancy with the regime of costs under the CPC.*

***35.** The provisions of the contract cannot be read to override the provisions of Section 31A of the A & C Act unless the parties enter into the contract after the disputes have arisen. The discretion of the Court or the Arbitral*

[57] Domestic Court Judgements: Union of India v. Om Vajrakaya Construction Company, 2021

> *Tribunal to award costs is not subject to the agreement between the parties unless that agreement is entered after the disputes have arisen.*

In view of the above clear position of law, it may be said that in case an arbitration agreement is governed by Indian law, it is not advisable for the agreement to include any provisions regarding costs. However, it is worth mentioning here that the parties enjoy freedom to fix interest under sub-section 31(7)[58] of the Act which reads as follows:

> *(7)(a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.*
>
> *(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent. higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.*
>
> > *Explanation.-- The expression "current rate of interest" shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978 (14 of 1978).*

While Indian law is clear that the loser pays, it may not be the same in other jurisdictions. There are, generally, two overriding internationally accepted principles for allocating costs, i.e., the English "*costs should follow the event*" rule, which requires the losing party to bear the prevailing party's costs, and the American "*costs lie where they fall*" rule, which requires parties to bear their own costs. Parties to an arbitration agreement should understand the applicable rule in the law governing the agreement if the law is other than Indian law.

[58] Laws (India): The Arbitration and Conciliation Act, 1996

4.15 Punitive damages

Arbitration tribunals are not allowed to impose punitive or exemplary damages as per Indian law. However, in international commercial arbitrations where law of some other country is chosen as the law governing the arbitration, it is important for the parties to the arbitration agreement to specify clearly in the agreement whether punitive damages may or may not be awarded. Legal position in this regard has been summed up very well by Markus Petsche[59] as follows:

> *In recent years, the issue of punitive damages awards in international commercial arbitration has received increasing attention from legal scholars and practitioners. This growing interest stems, at least in part, from the progressive acceptance of arbitral punitive damages awards in the 'homeland' of punitive damages, the United States. In fact, as early as 1985 and 1987, the US Supreme Court affirmed the arbitrability of antitrust2 and RICO claims3 and, by the same token, the ability of arbitral tribunals to award treble damages.4 In 1995, in Mastrobuono, the Supreme Court generally affirmed the ability of arbitrators to grant punitive relief, a right which had historically been considered as incompatible with public policy.*
>
> *The issue of the availability of punitive damages in international commercial arbitration raises complex conflict of laws questions. Although it is impossible to discuss those questions in detail in the context of this study, it is important to highlight that both the applicable substantive law and the procedural law of the arbitral seat may be relevant. As a result, punitive damages may not be available if either of these two laws fail to provide for, or prohibit, such relief.*
>
> *The availability of punitive damages affects the substance of the rights and obligations of the parties. This question should, therefore, be governed by the applicable substantive law or lex causae (lex loci delicti in tort cases;*

[59] Articles and Studies: Markus A. Petsche, Punitive Damages in International Commercial Arbitration: Much Ado about Nothing? 2013

lex contract us in contract cases). In most countries, private international law principles acknowledge that the lex causae governs the 'matters in respect of which damages may be recovered'. As far as the scope of the lex contract us is concerned, the Rome I Regulation (which is applicable in all Member States of the EU) expressly provides that this law governs 'the consequences of a total or partial breach of obligations, including the assessment of damages'.

While the applicability of the lex contract us is widely acknowledged, most commentators also recognize the relevance of the procedural law of the place of arbitration. Redfern and Hunter, for instance, note that 'the question of whether an arbitral tribunal has the power to impose penal sanctions depends on . . . the law of the place of arbitration (lex arbitri)'. Noussia, who accepts the applicability of the lex contract us, explains that the question of the availability of punitive damages is sometimes viewed as a procedural issue, especially in the United States.

It is, in fact, not impossible to consider that the availability of punitive relief is a procedural issue – although one may wonder how a single issue may constitute both a substantive and a procedural question. Under this approach, the possibility for arbitrators to award punitive damages is governed by the procedural law of the place of arbitration. In the context of international commercial arbitration, this procedural law refers to the 'arbitration law' in force at the arbitral seat. As a general rule, as will be shown, arbitration laws are silent with regard to the issue of remedies and, therefore, with regard to the availability of punitive damages. Still, US courts have interpreted this silence (specifically the silence of the Federal Arbitration Act) to constitute an implicit authorization of arbitral punitive damages awards.

In view of the fact that substantive as well as procedural law can affect arbitrators' right to award punitive damages, parties to an agreement should be careful and examine with reference to the choices made regarding laws. In case it is intended to avoid punitive damages, it may be advisable to include in the arbitration agreement that the arbitration tribunal will not award punitive damages. When the arbitration agreement clearly forbids

award of punitive damages, generally speaking in most jurisdictions the arbitration tribunal will have no right to award punitive damages.

4.16 Attorney fees

In general, each party has to bear its own costs in relation to attorney fees. There is neither a legal requirement nor customary to make any mention about attorney fees in the arbitration agreement. However, due record should be kept of all fees and expenses paid to attorneys since the same may need to be submitted to the arbitration tribunal for claiming costs. The tribunal will determine costs based on reasonableness and not based on actual expenditure. Nevertheless, actual expenditure incurred will provide a useful guidance to the tribunal to determine reasonable costs.

4.17 Arbitrator fees

Sub-section 11(14) of the Act[60] and the Explanation annexed thereto is relevant in the context of determination of fees. The sub-section reads as follows:

> *(14) The arbitral institution shall determine the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal subject to the rates specified in the Fourth Schedule.*
>
> > *Explanation.-- For the removal of doubts, it is hereby clarified that this sub-section shall not apply to international commercial arbitration and in arbitrations (other than international commercial arbitration) where parties have agreed for determination of fees as per the rules of an arbitral institution.*

The explanation clearly enables the parties to include provisions related to fees of arbitrators in the arbitration agreement especially in case of ad-hoc arbitration. This is equally applicable for domestic and international commercial arbitration. It is not

[60] Laws (India): The Arbitration and Conciliation Act, 1996

important for institutional arbitration since arbitration institutions mostly apply their rules for fixing fees of arbitrators.

The issue of fees payable to arbitrators was discussed in great detail by Honourable Supreme Court in the judgement in the case of ONGC vs. Afcons[61]. Extracts from the judgement provide an interesting overview of the subject and are reproduced as follows:

> *52 Typically, **when an arbitration is conducted under the auspices of an arbitral institution, the fees payable to the arbitrator(s) are fixed by the institution itself**. However, some arbitral institutions like ICDR, SIAC and HKIAC allow a certain level of negotiations between the parties and arbitrator(s) for the determination of fees payable to the arbitrators, upholding the principle of party autonomy. ICDR allows determination of compensation by the Administrator in consultation with the arbitrator(s)and the parties. SIAC allows the parties to propose an alternative method of calculating fees prior to the constitution of the tribunal. HKIAC enables the parties to choose between remuneration based on the sum in dispute or hourly rates. Interestingly, UNCITRAL Rules2013 allow greater control to the arbitrator(s) in determining their fees. However, the designated appointing authority or the Secretary General of the PCA can make adjustments to the fees proposed by the arbitrator(s). Thus, none of the international bodies (including arbitral institutions) confer an absolute or unilateral power to the arbitrator(s) to decide their own fees. Gary Born in his treatise on international commercial arbitration has noted that, "number of other institutional rules also minimize the role of arbitrators in fixing the tribunal's fees. These rules typically fix the amount of the arbitrator's fees by reference to the amount in dispute".*
>
> *[....]*
>
> *66 Although there are jurisdictional differences, the following broad principles emerge from our discussion above:*

[61] Domestic Court Judgements: Oil and Natural Gas Corporation Ltd. v. Afcons Gunanusa JV, 2022

(i) Typically, the fees payable to arbitrator(s) are determined through an agreement between the parties (of which the arbitrator(s) become aware of when they take up the assignment) or a separate agreement of the parties with the arbitrator(s). The arbitrator(s) then become bound by such contractually agreed fees; and

(ii) Certain arbitration legislations give the arbitrator(s) effective power to determine their own fees, typically when there is an absence of agreement between the parties on the subject. However, such determination of fees is subject to review by the courts who can reduce the fees if they are not reasonable.

67 Thus, arbitrator(s) do not possess an absolute or unilateral power to determine their own fees. Parties are involved in determining the fees of the arbitrator(s) in some form. It could be by: (i) determining the fees at the threshold in the arbitration agreement; or (ii) negotiating with the arbitrators when the dispute arises regarding the fees that are payable; or (iii) by challenging the fees determined by the tribunal before a court.

[....]

C.2.1 Party autonomy

68 Party autonomy is a cardinal principle of arbitration. The arbitration agreement constitutes the foundation of the arbitral process. The arbitral tribunal is required to conduct the arbitration according to the procedure agreed by the parties. The procedure may stipulate adherence to institutional rules or ad hoc rules or a combination of both. ***Redfern and Hunter on International Commercial Arbitration*** *(supra) compares arbitration to a ship, highlighting the extent of control parties exercise over arbitral proceedings:*

> *In some respects, an international arbitration is like a ship. An arbitration may be said to be 'owned' by the parties, just as a ship is owned by shipowners. But the ship is under the day-to-day command of the captain, to whom the owners*

> *hand control. The owners may dismiss the captain if they wish and hire a replacement, but there will always be someone on board who is in command (5) —and, behind the captain, there will always be someone with ultimate control.*

The leading treatise on international commercial arbitration further notes that the principle of party autonomy is entrenched in the international and national regimes on arbitration:

> *Party autonomy is the guiding principle in determining the procedure to be followed in an international arbitration. It is a principle that is endorsed not only in national laws, but also by international arbitral institutions worldwide, as well as by international instruments such as the New York Convention and the Model Law. The legislative history of the Model Law shows that the principle was adopted without opposition, (7) and Article 19(1) of the Model Law itself provides that: 'Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.' This principle follows Article 2 of the 1923 Geneva Protocol, which provides that '[t]he arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties ...', and Article V(1)(d) of the New York Convention, under which recognition and enforcement of a foreign arbitral award may be refused if 'the arbitral procedure was not in accordance with the agreement of the parties'.*

69 The Arbitration Act recognises the principle of party autonomy in various provisions. It allows the parties to derogate from the provisions of the Act on certain matters. Several provisions of the Arbitration Act explicitly embody the principle of party autonomy. Section 2(6)107 of the Arbitration Act provides that parties have the freedom to authorise any person, including an arbitral institution, to determine the issue between

them. Section 19(2)108 provides that the parties are free to choose the procedure to be followed for the conduct of arbitral proceedings. Section 11(2)109 provides that parties are free to decide on the procedure for the appointment of arbitrators. In ***Bharat Aluminium Co.*** *v.* ***Kaiser Aluminium Technical Services****110, this Court observed that party autonomy is the "brooding and guiding spirit" of arbitration. In* ***Centrotrade Minerals & Metal Inc.*** *v.* ***Hindustan Copper Ltd****111, this Court referred to party autonomy as the backbone of arbitration.*

70 Having spelt out party autonomy as the cardinal principle of arbitration in India, in the sections which follow we analyse how provisions relating to the payment of fees to arbitrators have to be interpreted in light of this principle.

[....]

The Fourth Schedule has to be read along with the provisions of sub-Section (14) of Section 11. In terms of the Explanation to Section 11(14), the Fourth Schedule will not be applicable to international commercial arbitrations. Further, the Fourth Schedule will not be applicable where parties have agreed to the determination of the arbitrators' fees according to the rules of an arbitral institution. The Fourth Schedule was to serve as a guide for different High Courts to frame rules for determining the fees of arbitrators. The High Courts have been slow, if not tardy, in framing these rules. Apart from the High Courts of Rajasthan, Kerala and Bombay, other High Courts have not framed rules under Section 11 (14) of the Arbitration Act for the determination of fees. Further the rules framed by High Courts of Bombay and Rajasthan only govern arbitrators appointed by the courts. Thus, the purpose of Section 11(14) for regulating fees in ad hoc arbitrations remains unrealised.

[....]

The amendments introduced to Section 11 by the Arbitration Amendment Act 2019 came into force on 30 August 2019. However, even after a lapse

of three years, the Arbitration Council has not been established in accordance with Part IA of the Arbitration Amendment Act 2019. In the absence of the Arbitration Council of India, graded arbitral institutions for the purpose of implementing amendments to Section 11 are yet to come into existence. While several High Courts have taken concerted steps to establish and refer matters to court adjunct arbitration centres, ad hoc arbitrations continue to hold the field since the amendments made by the Arbitration Amendment Act 2019 have been non-starters. . However, the amendments indicate the legislative intent that going forward, the fixation of fees of arbitrator(s) would be carried out by an arbitral institution designated for such purpose in terms of sub-Section (14) of Section 11. Further, there is one notable difference between the sub-Section (14) as it stood before the amendment and after, in terms of the applicability of the Fourth Schedule. Earlier, the rates specified in the Fourth Schedule were only to be taken into consideration by the High Court while framing the rules relating to the fixation of fees. However, now the provision reads that, "[t]he arbitral institution shall determine the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal subject to the rates specified in the Fourth Schedule". There are two exceptions to this – Section 11(14) is not applicable to international commercial arbitrations and to a situation where the parties have agreed to determine fees in terms of the rules of an arbitral institution as stipulated in the Explanation to Section 11(14). It is important to note that the newly introduced Section 11(3A) provides that the Supreme Court and the High Courts shall have the power to designate arbitral institutions from time to time, which have been graded by the Arbitration Council of India under Section 43(1) of the Arbitration Act. The first proviso to sub-Section (3A) to Section 11 provides that in those jurisdictions of High Courts where there are no graded arbitral institutions available, the Chief Justice of the High Court may maintain a panel of arbitrators for discharging the functions and duties of an arbitral institution. In terms of the first proviso, the reference to such an arbitrator would be deemed to be reference to an arbitral institution for the purpose of Section 11 and arbitrator appointed by a party is entitled to

such fee at the rate as specified in the Fourth Schedule. A harmonious reading of the first proviso to sub-Section (3A) of Section 11 and sub-Section (14) of Section 11 indicate that the Fourth Schedule shall have a mandatory effect on the stipulation of fees for arbitrator(s) appointed by arbitral institutions designated for such purpose in terms of Section 11 of the Arbitration Act in the absence of an arbitration agreement governing the fee structure.

79 Based on the above discussion, we summarise the position as follows:

*(i) In terms of the decision of this Court in **Gayatri Jhansi Roadways Ltd** (supra) and the cardinal principle of party autonomy, the Fourth Schedule is not mandatory and it is open to parties by their agreement to specify the fees payable to the arbitrator(s) or the modalities for determination of arbitrators' fees; and*

*(ii) Since most High Courts have not framed rules for determining arbitrators' fees, taking into consideration Fourth Schedule of the Arbitration Act, the Fourth Schedule is by itself not mandatory on court-appointed arbitrators in the absence of rules framed by the concerned High Court. Moreover, the Fourth Schedule is not applicable to international commercial arbitrations and arbitrations where the parties have agreed that the fees are to be determined in accordance with rules of arbitral institutions. The failure of many High Courts to notify the rules has led to a situation where the purpose of introducing the Fourth Schedule and sub-Section (14) to Section 11 has been rendered nugatory, and the court-appointed arbitrator(s) are continuing to impose unilateral and arbitrary fees on parties. As we have discussed in **Section C.2.1**, such a unilateral fixation of fees goes against the principle of party autonomy which is central to the resolution of disputes through arbitration. Further, there is no enabling provision under the Arbitration Act empowering the arbitrator(s) to unilaterally issue a binding or enforceable order regarding their fees. This is discussed*

*in **Section C.2.3** of this judgement. Hence, this Court would be issuing certain directives for fixing of fees in ad hoc arbitrations where arbitrators are appointed by courts in **Section C.2.4** of this judgement.*

[....]

*93 Since fees of the arbitrators are not a claim that needs to be quantified at the end of the proceedings based, inter alia, on the conduct of parties and outcome of the proceedings, they can be determined at the stage when the arbitral tribunal is being constituted. **Redfern and Hunter on International Commercial Arbitration** (supra) discusses the concept of fees of arbitrators in Chapter 4, titled "Establishment and Organisation of an Arbitral Tribunal", indicating that fees have to be determined much earlier at the inception of the proceedings. In fact, the commentary states that in ad hoc arbitrations, "it is necessary for the parties to make their own arrangements with the arbitrators as to their fees. The arbitrators should do this at an early stage in the proceedings, in order to avoid misunderstandings later"*

[....]

100 Ideally, in ad hoc arbitrations, the fees payable to the arbitrator(s) should be decided through an arrangement between the parties and the arbitrator(s).

[....]

104 We believe that the directives proposed by the amicus curiae, with suitable modifications, would be useful in structuring how these preliminary hearings are to be conducted. Exercising our powers conferred under Article 142 of the"

Constitution, we direct the adoption of the following guidelines for the conduct of ad hoc arbitrations in India:

1. *Upon the constitution of the arbitral tribunal, the parties and the arbitral tribunal shall hold preliminary hearings with a maximum cap of four hearings amongst themselves to finalise the terms of reference (the "**Terms of Reference**") of the arbitral tribunal. The arbitral tribunal must set out the components of its fee in the Terms of Reference which would serve as a tripartite agreement between the parties and the arbitral tribunal.*

2. *In cases where the arbitrator(s) are appointed by parties in the manner set out in the arbitration agreement, the fees payable to the arbitrators would be in accordance with the arbitration agreement. However, if the arbitral tribunal considers that the fee stipulated in the arbitration agreement is unacceptable, the fee proposed by the arbitral tribunal must be indicated with clarity in the course of the preliminary hearings in accordance with these directives. In the preliminary hearings, if all the parties and the arbitral tribunal agree to a revised fee, then that fee would be payable to the arbitrator(s). However, if any of the parties raises an objection to the fee proposed by the arbitrator(s) and no consensus can be arrived at between such a party and the tribunal or a member of the tribunal, then the tribunal or the member of the tribunal should decline the assignment.*

3. *Once the Terms of Reference have been finalised and issued, it would not be open for the arbitral tribunal to vary either the fee fixed or the heads under which the fee may be charged.*

4. *The parties and the arbitral tribunal may make a carve out in the Terms of Reference during the preliminary hearings that the fee fixed therein may be revised upon completion of a specific number of sittings. The quantum of revision and the stage at which such revision would take place must be clearly specified. The parties and the arbitral tribunal may hold another meeting at the stage specified for revision to ascertain the additional number of sittings that may be required for the final adjudication of the dispute which number*

may then be incorporated in the Terms of Reference as an additional term.

5. *In cases where the arbitrator(s) are appointed by the Court, the order of the Court should expressly stipulate the fee that arbitral tribunal would be entitled to charge. However, where the Court leaves this determination to the arbitral tribunal in its appointment order, the arbitral tribunal and the parties should agree upon the Terms of Reference as specified in the manner set out in draft practice direction (1) above.*

6. *There can be no unilateral deviation from the Terms of Reference. The Terms of Reference being a tripartite agreement between the parties and the arbitral tribunal, any amendments, revisions, additions or modifications may only be made to them with the consent of the parties.*

7. *All High Courts shall frame the rules governing arbitrators' fees for the purposes of Section 11(14) of the Arbitration and Conciliation Act, 1996.*

8. *The Fourth Schedule was lastly revised in the year 2016. The fee structure contained in the Fourth Schedule cannot be static and deserves to be revised periodically. We, therefore, direct the Union of India to suitably modify the fee structure contained in the Fourth Schedule and continue to do so at least once in a period of three years.*

[....]

105 Conscious and aware as we are that (i) Arbitration proceedings must be conducted expeditiously; (ii) Court interference should be minimal; and (iii) Some litigants would object to even a just and fair arbitration fee, we would like to effectuate the object and purpose behind enacting the model fee schedule. When one or both parties, or the parties and the arbitral tribunal are unable to reach a consensus, it is open to the arbitral tribunal

> *to charge the fee as stipulated in the Fourth Schedule, which we would observe is the model fee schedule and can be treated as binding on all. Consequently, when an arbitral tribunal fixes the fee in terms of the Fourth Schedule, the parties should not be permitted to object the fee fixation. It is the default fee, which can be changed by mutual consensus and not otherwise.*

Based on the above judgement and reading of sub-section 11(14)[62] it may be concluded that it is ideal for arbitrator fees to be included in the arbitration agreement.

4.18 Scope and limits of discovery / Group of companies

As and when arbitration proceedings begin, each party has an option of applying for discovery and inspection of documents. The issue that often arises in this context is whether this right of inspection and documents will operate against third parties especially group companies. It is worthwhile to mention here the detailed discussion on the doctrine of group of companies by Honourable Supreme Court in ONGC vs. Discovery[63]. Relevant extracts are as follows:

> ***23.*** *Commentators have noted that* ***a signed written agreement to submit a present or future dispute to arbitration does not exclude the possibility of an arbitration agreement binding a third party****. A non-signatory may be bound by the operation of the group of companies doctrine as well as by the operation of the principles of assignment, agency and succession. A party, which is not a signatory to a contract containing an arbitration clause, may be bound by the agreement to arbitrate if it is an alter ego of a party which executed the agreement. This constitutes a departure from the ordinary principle of contract law that every company in a group of companies is a distinct legal* entity. A non-signatory may be bound by the arbitration agreement where:

[62] Laws (India): The Arbitration and Conciliation Act, 1996
[63] Domestic Court Judgements: Oil and Natural Gas Corp. v. Discovery Enterprises P. Ltd., 2022

(i) There exists a group of companies; and

(ii) Parties have engaged in conduct or made statements indicating an intention to bind a non-signatory.

24. *Gary B. Born in his treatise on International Commercial Arbitration indicates that:*

> *The principal legal basis for holding that a non-signatory is bound (and benefited) by an arbitration agreement ... include both purely consensual theories (e.g., agency, assumption, assignment) and non-consensual theories (e.g. estoppel, alter ego).*

Explaining the application of the alter ego principle in arbitration, Born also notes:

> *Authorities from virtually all jurisdictions hold that a party who has not assented to a contract containing an arbitration Clause may nonetheless be bound by the Clause if that party is an 'alter ego' of an entity that did execute, or was otherwise a party to, the agreement. This is a significant, but exceptional, departure from the fundamental principle ... that each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate rights and liabilities.* (Emphasis added)
>
> *[.....]*
>
> *the group of companies doctrine is akin to principles of agency or implied consent, whereby the corporate affiliations among distinct legal entities provide the foundation for concluding that they were intended to be parties to an agreement, notwithstanding their formal status as non-signatories.*

25. *Recently, John Fellas elaborated on the principle of binding a non-signatory to an arbitration agreement from the lens of the doctrine of estoppel. He situated the rationale behind the application of the principle of direct estoppel against competing considerations of party autonomy and consent in interpreting arbitration agreements. Fellas observed that non-signatory parties can be bound by the principle of direct estoppel to prohibit such a party from deriving the benefits of a contract while disavowing the obligations to arbitrate under the same:*

> ***There are at least two distinct types of estoppel doctrine that apply in the non-signatory context: "the direct benefits" estoppel theory and the "intertwined" estoppel theory. The direct benefits theory bears the hallmark of any estoppel doctrine-prohibiting a party from taking inconsistent positions or seeking to "have it both ways" by "rely[ing] on the contract when it works to its advantage and ignor[ing] it when it works to its disadvantage."*** *Tepper Realty Co. v. Mosaic Tile Co., 259 F.Supp. 688, 692 (SDNY 1966).* ***The direct benefits doctrine reflects that core principle by preventing a party from claiming rights under a contract but, at the same time, disavowing the obligation to arbitrate in the same contract****.*
>
> *[….]*
>
> *By contrast, the intertwined estoppel theory looks not to whether any benefit was received by the non-signatory, but rather at the nature of the dispute between the signatory and the non-signatory, and, in particular whether "the issues the non-signatory is seeking to resolve in arbitration are intertwined with the agreement that the estoppel [signatory party] has signed….the intertwined estoppel theory has as its central aim the perseveration of the efficacy of the arbitration*

process is clear when one looks at the typical fact pattern of an intertwined estoppel case. (emphasis supplied)" (Emphasis was part of original judgement)

26. *In deciding whether a company within a group of companies which is not a signatory to arbitration agreement would nonetheless be bound by it, the law considers the following factors:*

(i) The mutual intent of the parties;

(ii) The relationship of a non-signatory to a party which is a signatory to the agreement;

(iii) The commonality of the subject matter;

(iv) The composite nature of the transaction; and

(v) The performance of the contract.

Consent and party autonomy are undergirded in Section 7 of the Act of 1996. However, ***a non-signatory may be held to be bound on a consensual theory, founded on agency and assignment or on a non-consensual basis such as estoppel or alter ego****. These principles would have to be understood in the context of the present case, where ONGC's attempt at the joinder of JDIL to the proceedings was rejected without adjudication of ONGC's application for discovery and inspection of documents to prove the necessity for such a joinder.* (Emphasis added)

Group of Companies doctrine enables arbitration tribunal to proceed against parties who are not signatories to the arbitration agreement. Parties may avoid such a possibility by providing in the arbitration agreement a clear provision that the arbitration tribunal will not act against any party who is not a signatory to the arbitration agreement. Exclusion of associates, sister companies and group companies when provided explicitly in the arbitration agreement will prevent any arbitration tribunal / court from joining any such entities in the proceedings. Parties discussing and negotiating an arbitration agreement may be advised to take due precaution in this regard.

In some jurisdictions (notably the USA) discovery and inspection rights are very wide. In case the arbitration agreement is being made subject to such jurisdictions, it is advisable to deliberate on the limits of rights of discovery and inspection.

4.19. Other elements and considerations

In addition to the above desired elements of an arbitration agreement, there are many other elements and considerations that may be covered in an arbitration agreement. In general, one has to understand the specific requirements of a contract and of the parties to decide whether a particular element needs to be included or not. Some examples of such elements and considerations are as follows:

Pre-arbitration consultation / mediation

Arbitration, even though it is supposed to be an alternative to judicial proceedings, tends to be expensive, cumbersome and time-consuming. To avoid arbitration, some arbitration agreements provide for pre-arbitration meetings and / or mediation. A party is allowed to issue notice for arbitration only if the pre-arbitration and / or mediation have failed.

Notice Procedure

An arbitration agreement may provide for the procedure to issue notice of arbitration, the number of days' notice required, the method of sending notice and steps to be taken after receipt of notice.

Limitation period

An arbitration agreement may provide that a dispute will be subject to arbitration only if the cause of action has arisen within a specified time period. This is advantageous since after the end of specified period (especially after termination of the contract) no disputes can be raised.

Confidentiality

Arbitration proceedings are confidential and private by their nature. However, it is advantageous for the parties to agree on specific terms and conditions regarding confidentiality. UNCTAD Module on The Arbitration Agreement in Course on Dispute Settlement in International Trade, Investment and Intellectual Property[64] has the following recommendations in this regard.

> *One of the advantages of arbitration over court litigation is the possibility of keeping confidential the existence of the controversy and the way in which it is resolved. Some domestic laws or institutional rules contain provisions in this connection. However, statutory or regulatory rules are generic and may not fulfill specific needs of the parties.*
>
> *For this reason, the parties must expressly agree on any special restriction to be imposed regarding the confidentiality of information relating to the case. This may comprise specific limitations on documents, written allegations or statements of third parties prepared for the arbitration, or about the award.*

Termination Procedure

An arbitration agreement is like any other contract / agreement. It can be terminated by the will of the parties. It is advisable to provide the method of termination of the agreement by mutual consent in the arbitration agreement. Consent of termination of the agreement can be explicit in writing or can be tacit. For example, if a party issues a notice of termination and the other party does not object, the arbitration agreement may provide for such tacit consent to terminate the agreement.

[64] Articles and Studies: UNCTAD, Dispute Settlement, International Commercial Arbitration, 5.2 The Arbitration Agreement, 2005

Separability or autonomy of the arbitration agreement

The issue of autonomy or separability of the arbitration agreement from the underlying contract is a complex legal one. UNCTAD Module on The Arbitration Agreement in Course on Dispute Settlement in International Trade, Investment and Intellectual Property[65] discusses the subject in the following words:

> *Historically, it was held that an arbitration agreement contained in a contract was accessory to the main contract and that the invalidity of the contract also entailed the invalidity of the arbitration agreement. On the basis of that interpretation, arbitral jurisdiction was frequently restricted by challenges to the validity of the contract, since those challenges involved the arbitrators' jurisdiction as well.*
>
> *The argumentative line was as follows:*
>
> - *If the main contract is null and void, so is the arbitration agreement that is accessory to it;*
> - *If the arbitration agreement is considered null and void, arbitrators lack jurisdiction to solve any of the question relating to such contract, including whether the contract is invalid or not;*
> - *As the validity of the arbitration agreement is being questioned, arbitrators must not intervene until a court decides the matter.*
>
> *In this way, the mere filing of such a defence would entail an obstacle to arbitration.*
>
> *In order to avoid that situation, most laws and regulations on arbitration have included two very important principles:*

[65] Articles and Studies: Ibid.

- *"Separability", "autonomy" or "independence" of the arbitration clause; and*
- *"Kompetenz-Kompetenz" or "compétence de la compétence".*

The two principles mentioned refer to different situations. The "Kompetenz-Kompetenz" principle aims at giving arbitrators the possibility to examine and decide in first instance on any objection to their jurisdiction. According to the principle of "separability of the arbitration clause", if the arbitrators decide, within the scope of their jurisdiction, that the contract containing the arbitration clause is null and void, that does not entail the loss of their jurisdiction. In practice, however, the two principles complement one another, since the contentions are usually made at the same time. The invalidity of the contract, the invalidity of the arbitration agreement and the consequent lack of jurisdiction of arbitrators are often part of a common defense strategy.

Fast track procedure

The parties may agree that the arbitration will be conducted under fast-track procedure as provided in section 29B of the Act[66] which reads as follows:

(1) Notwithstanding anything contained in this Act, the parties to an arbitration agreement, may, at any stage either before or at the time of appointment of the arbitral tribunal, agree in writing to have their dispute resolved by fast track procedure specified in sub-section (3).

(2) The parties to the arbitration agreement, while agreeing for resolution of dispute by fast track procedure, may agree that the arbitral tribunal shall consist of a sole arbitrator who shall be chosen by the parties.

(3) The arbitral tribunal shall follow the following procedure while conducting arbitration proceedings under sub-section (1):

[66] Laws (India): The Arbitration and Conciliation Act, 1996

(a) The arbitral tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without any oral hearing;

(b) The arbitral tribunal shall have power to call for any further information or clarification from the parties in addition to the pleadings and documents filed by them;

(c) An oral hearing may be held only, if, all the parties make a request or if the arbitral tribunal considers it necessary to have oral hearing for clarifying certain issues;

(d) The arbitral tribunal may dispense with any technical formalities, if an oral hearing is held, and adopt such procedure as deemed appropriate for expeditious disposal of the case.

(4) The award under this section shall be made within a period of six months from the date the arbitral tribunal enters upon the reference.

(5) If the award is not made within the period specified in sub-section (4), the provisions of sub-sections (3) to (9) of section 29A shall apply to the proceedings.

(6) The fees payable to the arbitrator and the manner of payment of the fees shall be such as maybe agreed between the arbitrator and the parties.

Reasoned award

Generally speaking, an arbitral award has to be a reasoned award or in other words should give in detail the reasons for the award. However, the parties are free to agree that the arbitration tribunal need not give any reasons for its award. This is useful in matters involving small sums or when arbitrators are not legal persons. Relevant sub-sections of section 31 of the Act[67] are as follows:

[67] Laws (India): The Arbitration and Conciliation Act, 1996

(1) An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.

(2) For the purposes of sub-section (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated.

(3) The arbitral award shall state the reasons upon which it is based, unless--

(a) the parties have agreed that no reasons are to be given, or

(b) the award is an arbitral award on agreed terms under section 30.

Two-tier arbitration

Arbitration agreement may be a one-tier procedure or may be a two-tier procedure as per the mutual consent of the parties in the arbitration agreement. The issue of legality of two-tier arbitration procedure was examined by Honourable Supreme Court in the matter of Centrotrade Minerals vs. Hindustan Copper (2016)[68]. In the said matter Honourable Supreme Court ruled as follows:

16. *Before actually discussing the validity of an appellate arbitration in the context of the A&C Act, it might be mentioned that it is doubtful if HCL can even contend that an appellate arbitration is contrary to the laws of India. If this contention is accepted, then it could be argued that HCL entered into a contract with Centrotrade fully conscious and aware that one of the provisions of the contract was contrary to the laws of India. This could amount to HCL playing a fraud on Centrotrade and could have serious long-term implications and ramifications for international commercial contracts with an Indian party.*

[....]

[68] Domestic Court Judgements: Centrotrade Minerals and Metal Inc. v. Hindustan Copper Ltd., 2016

18. *Our attention has also been drawn to several jurisdictions in which the statutory acceptance of a two-tier system of arbitration is prevalent, but it is not necessary to discuss this since the contention of learned Counsel for HCL is that the law in India through the A&C Act is quite different.*

19. *Learned Counsel for the parties agree that historically in India prior to the enactment of the A&C Act, two-tier arbitration was permissible. Justice Sinha adverted to the existence of a two-tier arbitration system in India prior to the A&C Act and referred to several decisions in this regard but did not pronounce on its validity or otherwise.6 However, Justice Chatterjee was of the opinion that prior to the A&C Act a two-tier arbitration system was valid and permissible in India.*

20. *The significance of this is that Parliament must be assumed to have known the view of the UNCITRAL Working Group (of which India was a State member) and must be assumed to have known the decisions of various domestic courts and yet chose not to specifically prohibit the two-tier arbitration system. If that be so, we are entitled to proceed on the basis that even after the passage of the A&C Act, there can perhaps be no objection to the existence of a two-tier arbitration system. But we do not propose to base our decision on this assumption. We may, however, note that it has been brought to our notice that there are several decisions rendered by the Bombay High Court that have accepted the two-tier arbitration system. There are several decisions of the Delhi High Court that have taken the view that since the A&C Act does not proscribe a two-tier arbitration procedure, such a system is acceptable.*

[….]

28. *The fact that recourse to a court is available to a party for challenging an award does not ipso facto prohibit the parties from mutually agreeing to a second look at an award with the intention of an early settlement of disputes and differences. The intention of Section 34 of the A&C Act and of the international arbitration community is to avoid subjecting a party to an arbitration agreement to challenges to an award in multiple forums,*

say by way of proceedings in a civil court as well under the arbitration statute. The intention is not to throttle the autonomy of the parties or preclude them from adopting any other acceptable method of redressal such as an appellate arbitration.

Chapter 5
Presently adopted Arbitration Clauses in India

5.1. Arbitration clauses in ad-hoc agreements in international agreements in India

By its nature an arbitration agreement is part of a contract between private parties and hence is not available in public domain. This poses a challenge for someone studying the presently adopted arbitration clauses in India (or any other country). In case of institutional arbitrations, the arbitration institutions have their model clauses which are often used by parties. The model clauses are published and are hence available on websites of the institutions. There is no such public source for arbitration agreements / clauses in case of ad-hoc arbitrations.

The publicly available sources of ad-hoc arbitration agreements / clauses can be summed up as follows:

a) Judgements of Supreme Court and High Courts – As and when a dispute related to arbitration is brought for adjudication before either the Supreme Court or the High Courts, the judgement quotes the arbitration agreement / clause which was the foundation of the arbitration. This is indeed a very reliable source. However, it is clear that only matters that are brought before the High Courts or Supreme Court are covered by the judgments. Obviously, small matters which normally form bulk of the arbitration agreements never reach the High Court or Supreme Court. So, while the source is reliable it only gives arbitration clauses / agreements of high value matters and skips all low value contracts.

b) Websites of Large Public Sector Undertakings – Websites of most large public sector undertakings (PSUs) have their model contracts / contract formats / tender formats which contain arbitration clauses. PSUs have dominant market position in India and they are inclined to assert their dominance while drafting arbitration clauses. Surely, arbitration clauses adopted by large Indian PSUs cannot be said to be indicative of the general trend of arbitration clauses adopted in India. Nevertheless, the arbitration clauses adopted by PSUs give important indication of the practice regarding the clauses in India.

In addition to the above sources, the authors contacted some law firms asking them for sample international arbitration agreements prepared by them in recent years. While most law firms refused to share their work citing confidentiality concerns, a few were kind enough to provide some sample agreements on conditions of strict confidentiality.

Sample agreements from the two above-mentioned public sources and also the ones shared privately in confidence by some law firms are included in **Appendix A**. Details of the included arbitration clauses / agreements are as follows:

Table 5.1 Ad-hoc Arbitration Clauses / Agreements executed in India and their sources

Sub-Appendix No.	Details of Arbitration Clause / Agreement	Source
A1.	Arbitration agreement between Bharat Aluminium Company and Kaiser Aluminium Technical Service, Inc.	Supreme Court Judgement
A2.	ONGC and Afcons Gunanusa	Supreme Court Judgement
A3.	Bharti Airtel Limited, Reference Interconnection Offer	Website of Bharti Airtel Ltd.
A4.	Bharat Heavy Electricals Limited	Website of PSU

Sub-Appendix No.	Details of Arbitration Clause / Agreement	Source
A5.	GAIL (India) Limited, General Conditions of Contract for Procurement of Proprietary/ OEM-Services	Website of PSU
A6.	GAIL (India) Limited, General Conditions of Contract [Rev.1] for Procurement of Goods	Website of PSU
A7.	NTPC Limited, Bidding Documents for Procurement of 0.2 MMT of Imported Coal on for Power Station Basis for NTPC Lara Power Plant	Website of PSU
A8.	ONGC Energy Centre Trust Agreement for Undertaking Collaborative R&D project	Website of PSU
A9.	Shareholders' Agreement dated 9 October 2015 between a Russian Company and Bhopal based entrepreneur	Private
A10.	Arbitration Agreements: Strategic Partnership Agreement dated 2016 between a Bhopal based MSME and a Russian company.	Private
A11.	Shareholders' Agreement dated March 2019 between an Indian-owned Singapore Company and a Guyana Company	Private
A12.	Shareholders' Agreement dated February 2014 between a British citizen and an Indian citizen	Private
A13.	Shareholders' Agreement dated May 2017 among Israeli Company, British citizen and an Indian citizen	Private

Sub-Appendix No.	Details of Arbitration Clause / Agreement	Source
A14.	Shareholders' Agreement dated 2022 among two Indian citizens and a Poland Company	Private
A15.	Shareholders' Agreement dated June 2016 among Russian citizens and Indian citizens	Private

Authors believe that the sample ad-hoc arbitration agreements included in the Appendix A give a fair indication of the general trend related to arbitration clauses in international agreements executed in India in recent years.

5.2. Recommended arbitration clauses in institutional agreements in international agreements in India

Unlike in the case of ad-hoc arbitrations, in case of institutional arbitrations, the arbitration institutions have their model clauses which are often used by parties. The model clauses are published and are hence available on websites of the institutions. Of course, parties often modify the model clauses to suit their own needs. The changes made by parties to model clauses are not available in public domain except when the matter comes up for adjudication before Supreme Court of the High Courts. Considering the fact that ad-hoc arbitrations form bulk of arbitrations in India, the matters involving institutional arbitrations that come up before the courts are very few. Hence, the authors are able to get only one such institutional arbitration agreement from Supreme Court judgements.

Many (not all) arbitration institutions in India publish on their websites model arbitration clauses. The same have been collected and are collated here in **Appendix B**. Details of the collected institutional arbitration clauses are as follows:

Table 5.2 Institutional Arbitration Clauses / Agreements executed / to be executed in India and their sources

Sub-Appendix No.	Details of Arbitration Clause / Agreement	Source
B1.	Agreement between Atlas Export Industries and Kotak Company	Supreme Court Judgement
B2.	Agreement dated July 2017 between Rwanda Education Board and an Indian Company	Private
B3.	Model Arbitration Clauses of Construction Industry Arbitration Council	Website of the Institute
B4.	Model Arbitration Clauses of Council for National and International Commercial Arbitration	Website of the Institute
B5.	Model Arbitration Clauses of Indian Institute of Arbitration & Mediation	Website of the Institute
B6.	Model Arbitration Clauses of Indian Council of Arbitration	Website of the Institute
B7.	Model Arbitration Clauses of International and Domestic Arbitration Centre India	Website of the Institute
B8.	Model Arbitration Clauses of Mumbai Centre for International Arbitration	Website of the Institute
B9.	Model Arbitration Clauses of Nani Palkhivala Arbitration Centre	Website of the Institute
B10.	Model Arbitration Clauses of International Arbitration and Mediation Centre (IAMC), India	Website of the Institute

Chapter 6
Select Arbitration Clauses in Global Arbitration Centres

6.1. Overview

The focus of this handbook is restricted to international arbitration agreements in India. Nevertheless, the authors have collated some model arbitration agreements recommended by leading global arbitration institutions. The collated agreements are given in **Appendix C**. Details are as follows:

Table 6.1 Select Arbitration Clauses / Agreements in Global Arbitration Centres and their sources

Sub-Appendix No.	Details of Arbitration Clause / Agreement	Source
C1.	Model Arbitration Clauses of Singapore International Arbitration Centre (SIAC)	Website of the Arbitration Centre
C2.	Model Arbitration Clause of London Court of International Arbitration (LCIA)	Website of the Arbitration Centre
C3.	Model Arbitration Clause of Permanent Court of Arbitration (PCA), Hague	Website of the Arbitration Centre

Sub-Appendix No.	Details of Arbitration Clause / Agreement	Source
C4.	Model Arbitration Clause of International Centre for Dispute Resolution (ICDR), division of American Arbitration Association (AAA)	Website of the Arbitration Centre
C5.	Model Arbitration Clause of Swiss Arbitration, Switzerland	Website of the Arbitration Centre
C6.	Model Arbitration Clauses of Vienna International Arbitral Centre (VIAC)	Website of the Arbitration Centre
C7.	Model Arbitration Clauses of Hong Kong International Arbitration Centre (HKIAC)	Website of the Arbitration Centre
C8.	Model Arbitration Clause of Dubai International Arbitration Centre (DIAC)	Website of the Arbitration Centre
C9.	Model Arbitration Clause of WIPO Arbitration and Mediation Center, Switzerland	Website of the Arbitration Centre
C10.	Suggested Arbitration Clause of Asia Pacific Centre for Arbitration & Mediation (APCAM)	Website of the Arbitration Centre

6.2. Singapore

Singapore International Arbitration Centre (SIAC) was established in 1991. SIAC is as an independent, not-for-profit organisation. SIAC has a proven track record in providing neutral arbitration services to the global business community. SIAC arbitration awards have been enforced by the courts of Australia, China, Hong Kong SAR, India, Indonesia, Jordan, Thailand, UK, USA, and Vietnam, amongst other New York Convention signatories.

SIAC is ranked 2nd among the world's top 5 arbitral institutions, and is the most preferred arbitral institution in the Asia-Pacific. SIAC's case management services are supervised by the Court of Arbitration, which comprises internationally renowned arbitration practitioners. SIAC's Board of Directors consists of highly respected lawyers and professionals from all over the world. The Board is responsible for overseeing SIAC's operations, business strategy and development, as well as corporate governance matters. SIAC has an experienced international panel of over 500 expert arbitrators from over 40 jurisdictions.

Model arbitration clause recommended by SIAC is given in **Appendix C1**.

6.3. London

London Court of International Arbitration (LCIA) is one of the world's leading international institutions for commercial dispute resolution. The LCIA provides efficient, flexible and impartial administration of arbitration and other ADR proceedings, regardless of location, and under any system of law. The international nature of the LCIA's services is reflected in the fact that, typically, over 80% of parties in pending LCIA cases are not of English nationality.

The LCIA has access to the most eminent and experienced arbitrators, mediators and experts from many jurisdictions, and with the widest range of expertise. The LCIA's dispute resolution services are available to all contracting parties, without any membership requirements. (based on information at the website of LCIA).

Model arbitration clause recommended by LCIA is given in **Appendix C2**.

6.4. New York

The New York International Arbitration Centre ("NYIAC") is a non-profit organization formed to advance, strengthen and promote the conduct of international arbitration in New York. NYIAC does not administer arbitrations or publish arbitration rules. NYIAC offers world-class hearing rooms, breakout rooms and state-of-the-art technology for

international arbitration of any size, including large, multi-party arbitrations, mediations and conferences of all kinds, however administered.

NYIAC develops programs and materials about international arbitration in New York, the application of New York law in international arbitration, and the recognition, enforcement and implementation in New York of arbitral awards.

NYIAC supports dialogue, discussion and debate to keep New York at the forefront of international arbitration among the legal, judicial, academic and business communities. NYIAC also engages in other activities to promote New York's role as a pre-eminent site for the conduct of international arbitration.

NYIAC does not recommend a model arbitration agreement / clause. NYIAC does not also have its own arbitration rules.

Chapter 7
Usage of Desired Elements in International Agreements in India

7.1 Overview

Arbitration clauses / agreements in international arbitration agreements in India show a wide range in terms of elements covered. While some elements of arbitration clauses are widely present, some others are often ignored. As in other parts of the world, even in India arbitration clauses are sometimes referred to as "champagne clauses" because they are often inserted in a contract just before deal completion. These clauses are frequently copied from other contracts with little or no thought as to their suitability for the contract in question, enforceability, or whether the agreed dispute resolution process is in the parties' best interest – given the particularities of the transaction in question.

The low level of importance and priority accorded to the arbitration clauses by the parties making a deal is a harsh reality that the drafters of agreements or legal professionals assisting in deal negotiation often face. On one hand the parties do not wish to choose institutional arbitration and on the other hand, the parties want a very brief arbitration clause. In case of institutional arbitration, a very brief arbitration clause can serve the needs adequately since the clause is backed by rules of the relevant institution. In case of ad-hoc arbitration where much more detailed arbitration clause is required, the insistence of parties towards a brief skeletal clause leads to problems when disputes arise.

One notices that Large Public Sector Undertakings (LPSUs) and also some large private sector companies have adopted fairly detailed arbitration clauses. However, in case of MSMEs and also most private sector companies in India, arbitration clauses / agreements are very brief and miss out many essential elements. Clearly, there is significant scope of

improvement in the usually adopted arbitration clauses / agreements in international agreements executed by MSMEs and even large private sector companies.

Looking at the different types of arbitration clauses collated in Appendix A (ad-hoc arbitration) one can divide them into two categories:

(a) Large Public Sector Undertaking (LPSU) Agreements with their suppliers – In such cases, LPSU have significantly high negotiating power compared to the suppliers. The LPSUs have a standard format which every supplier must accept. This is possible due to the large quantities that they are in a position to purchase. This is also possible because LPSUs are willing to lose any vendor who refuses to accept their terms even if it means substantial commercial loss. Due to the strong position enjoyed by the LPSUs and also due to the fact that they are able to afford high level of legal expertise, the **arbitration clauses of LPSU standard formats are extremely detailed and elaborate**. It is likely that the LPSUs follow a different format when they execute agreements like joint venture or technology agreements with large global corporations.

(b) All other agreements – This category includes agreements executed by MSMEs and also large private sector companies. In this category, drafter of the agreement is under pressure to keep the agreements brief and concise. The arbitration clause is often looked at as a necessary evil which must be kept to the minimum level possible. In many cases the parties wish to avoid acrimony at the negotiation stage due to arbitration clause and hence a plain vanilla clause without any controversial statements is preferred. It is, hence, not surprising that all such arbitration clauses are skeletal in nature and often miss out on many important desirable elements.

Institutional arbitration agreements are often brief because most of the desirable elements are included in the institution's rules. The arbitration clause only refers to the relevant institution's rules and accepts the same. In a way the rules of the institution become a part of the arbitration clause allowing the clause to be brief. Notably, generally speaking most LPSUs do not choose institutional arbitration and prefer ad-hoc arbitration though in rare cases they do accept rules of some arbitration institutions even while keeping the appointment of arbitrators outside the purview of arbitration institutions.

In the following sections, the attempt is to analyse ad-hoc arbitration clauses as well as institutional arbitration clauses with reference to the concerned element of arbitration clause.

7.2 Consent to arbitrate

Generally speaking, exceptions aside, arbitration agreements in international agreements in India have clear consent to arbitrate. While in some cases it is specifically stated that the arbitral award will be binding; and in some cases it is not clearly stated, it is extremely rare to find an agreement where consent to arbitrate is missing.

In case of all arbitration clauses included in Appendix A and B, clear and unambiguous consent to arbitrate is always present. However, there are often agreements where the consent to arbitrate is either absent or is ambiguous. The following clause quoted by Honourable Supreme Court in the matter of KK Modi vs. KN Modi[1] is an example of clause without consent to arbitrate:

> *Implementation will be done in consultation with the financial institutions. For all disputes, clarifications etc, in respect of implementation of this agreement, the same shall be referred to the Chairman, IFCI or his nominees whose decisions will be final and binding on both the groups.*

Another example of absence of consent to arbitrate is in Bihar State Mineral Development Corporation vs. Encon Builders[2] where the relevant clause reads as follows:

> ***60.*** *In case of any dispute arising out of the agreement, the matter shall be referred to the Managing Director, Bihar State Mineral Development Corporation Limited, Ranchi, whose decision shall be final and binding.*

In the above case it was held by Honourable Supreme Court that while "*the term 'arbitration' is not required to be specifically mentioned therein*", it is necessary that "*There cannot be any doubt whatsoever that an arbitration agreement must contain the broad consensus between the parties that the disputes and differences should be referred*

[1] Domestic Court Judgements: KK Modi v. KN Modi and Ors., 1998
[2] Domestic Court Judgements: Bihar State Mineral Dev. v. Encon Builders (I) P. Ltd., 2003

to a domestic tribunal. The said domestic tribunal must be an impartial one. It is a well-settled principle of law that a person cannot be a judge of his own cause. It is further well-settled that justice should not only be done but manifestly seen to be done."

Another example of absence of clear consent to arbitrate is seen in the arbitration clause quoted in Jagdish Chander[3] where the quoted clause reads as follows:

> *16) If during the continuance of the partnership or at any time afterwards any dispute touching the partnership arises between the partners, the same shall be mutually decided by the partners or* ***shall be referred for arbitration if the parties so determine****.* (Emphasis added)

Observing on the condition contained in the above clause Honourable Supreme Court observed as follows:

> *(iv) But mere use of the word 'arbitration' or 'arbitrator' in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they so desire, refer their disputes to arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement.* ***Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference***

[3] Domestic Court Judgements: Jagdish Chander v. Ramesh Chander and Ors., 2007

to arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future.

Looking at the above examples, one can conclude that while it is rare to see arbitration clauses where the consent to arbitrate is absent, it is not as rare to find arbitration clauses where the consent is either ambiguous or conditional. It is important to underline the fact that the consent to arbitrate must be clear, unambiguous and unconditional. There must not be any fresh application of mind about whether to arbitrate or not as and when the dispute arises.

7.3 Scope of arbitration

In general, both for ad-hoc and institutional arbitration, it is normal practice to include all disputes under the scope of arbitration. However, some LPSUs have provided exceptions to the rule. In the ad-hoc arbitration clauses given in Appendix A, three (3) clauses relating to Gas Authority of India Ltd. (Appendix A5 and A6) and NTPC Ltd. (Appendix A7) provide exclusions that cannot be referred to arbitration.

In A5 and A6, firstly only those matters can be referred to arbitration which cannot be resolved through Conciliation. The list of other exceptions reads as follows:

6.2.6 ***List of Excepted matters:***

a) *Dispute(s)/issue(s) involving claims below Rs 25 lakhs and above Rs 25 crores.*

b) *Dispute(s)/issue(s) relating to indulgence of Service Provider/ Contractor/ Vendor/ Bidder in corrupt/ fraudulent/ collusive/ coercive practices and/ or the same is under investigation by CBI or Vigilance or any other investigating agency or Government.*

c) *Dispute(s)/issue(s) wherein the decision of Engineer-In-Charge/owner/GAIL has been made final and binding in terms of the Contract.*

In A7, the exceptions are similar though not identical. The relevant portion of the arbitration clause reads as follows:

> *6.3.1 If the process of mutual consultation and/or ESC fails to arrive at a settlement between the parties as mentioned at GCC Sub-Clauses 6.1 & 6.2 above, Employer or the Contractor may, within Thirty (30) days of such failure, give notice to the other party, with a copy for information to the ESC (as applicable), of its intention to commence arbitration, as hereinafter provided, as to the matter in dispute, and no arbitration in respect of this matter may be commenced unless such notice is given. The mechanism of settling the disputes through arbitration shall be applicable only in cases where the disputed amount (i.e. total amount of Claims excluding claims of interest) does not exceed Rs. 25 crores. In case the disputed amount exceeds Rs. 25 Crores, the parties shall be within their rights to take recourse to remedies as may be available to them under the applicable laws other than Arbitration after prior intimation to the other party. There shall be no arbitration where the claim amount is only up to Rs. 5 lakhs.*

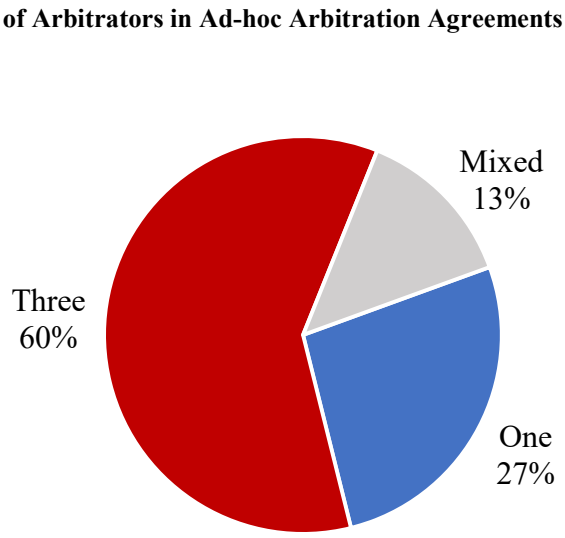
It is only in a few ad-hoc arbitration agreements executed by some LPSUs that exceptions are provided. Except for such few agreements mostly the scope of arbitration is defined to cover all disputes. It seems reasonable and safe to keep scope of arbitration as wide as possible. Hence, there seems to be no reason to recommend that scope of arbitration should be limited in any way. Nevertheless, drafters of arbitration agreements are advised to examine the peculiarities of the transaction or deal being negotiated and if it will serve the said transaction to have some limits on the type of disputes that can be referred to arbitration, such limits should be included in the arbitration agreement.

7.4 Number of arbitrators

Under Arbitration and Conciliation Act, 1996 as well as by the laws in most jurisdictions across the world, number of arbitrators must be odd. Most popular choices are either three (3) arbitrators or one (1) arbitrator.

When we look at the arbitration clauses in Appendix A (ad-hoc arbitration agreements, it is noticed that in 27% of the agreements, the parties have chosen solo arbitrator or one (1) arbitrator. In 60% of the agreements, the parties have chosen three (3) arbitrators.

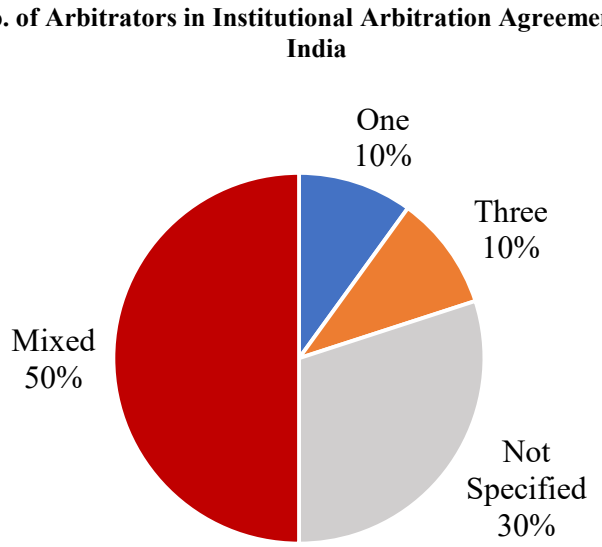
Chart 7.1 Number of Arbitrators in Ad-hoc Arbitration Agreements in Appendix A



In 13% of the agreements, mixed pattern is adopted. In such cases, for disputes below a certain sum the matter is referred to a solo arbitrator while for disputes above the specified sum, the matter is referred to a panel of three arbitrators. Notably, all such ad-hoc arbitration agreements are formats adopted by LPSUs. The specified limit for solo arbitrator is generally Rs. Five Crores. In other words, for disputes below Rs. Five Crores an arbitration tribunal consisting of only one (1) arbitrator is appointed while in case of disputes of higher amount arbitration panel consisting of three (3) arbitrators is appointed.

In case of institutional arbitration agreements only 10% of the arbitration agreements prescribe solo arbitration and only 10% of the agreements specify three (3) arbitrators. In all other cases, it is either mixed or not specified. Since we are referring to formats and not actual executed agreements, the picture is unclear. Many (50% of the agreement formats) specify one / three arbitrators and it is open for the parties to strike out one of the two options at the time of execution of the agreement.

Chart 7.2 Number of Arbitrators in Institutional Arbitration Agreements in Appendix B



In 30% of the institutional arbitration agreement formats, the number of arbitrators is to be determined as per the rules of the chosen arbitration institution. For example, in B1 the applicable rules are Arbitration Rules of the Grain and Food Trade Association Limited, No. 125[4]. In the said rules the rule relating to number of arbitrators reads as follows:

> ***APPOINTMENT OF THE TRIBUNAL***
>
> *The dispute shall be heard and determined by a tribunal of three arbitrators (appointed in accordance with Rule 3.2) or, if both parties agree, by a sole arbitrator (appointed in accordance with clause 3.1). This Rule is without prejudice to Rule 6, which governs the appointment of the tribunal in relation to disputes arising out of the Rye Terms clause, and Rule 5.3, which governs the appointment of a tribunal for examination of samples.*

From the above rule of GAFTA, it is clear that three (3) is the norm unless the parties decide otherwise and chose to have a single arbitrator.

A quick look at rules of arbitration of various institutions indicates that the norm is to go for three / one arbitrators as per the choice of the parties. The same pattern is confirmed

[4] Laws and Rules (International): GAFTA, Arbitration Rules No. 125, 2020

when we look at the model clauses collated in Appendix C from global centres of arbitration.

7.5 Presiding arbitrator

In case of three arbitrators forming arbitration tribunal, even though the parties have the freedom to put all three arbitrators on equal footing it is a well-accepted practice that one of the arbitrators act as the presiding arbitrator.

Almost all ad-hoc arbitration agreements with three arbitrators clearly specify that two arbitrators chosen by the parties will choose a third arbitrator who will act as the Presiding Arbitrator. In some arbitration agreements the procedure to appoint the third arbitrator is specified in case the two arbitrators fail to reach an agreement about the third arbitrator. For example, Appendix A1 contains the following provision:

> *Article 17.3: Before entering upon the arbitration, the two Arbitrators shall appoint an Umpire. If the two arbitrators are not able to reach an agreement on the selection of an Umpire, the Umpire shall be nominated by the International Chamber of Paris.*

Notably, only one other ad-hoc agreement collated in Appendix A has such a provision. Relevant extract from Appendix A14 reads as follows:

> *22.5 The party referring the Dispute shall appoint 1 (one) arbitrator and the other party shall appoint 1 (one) arbitrator. The third presiding arbitrator shall be appointed by the 2 (two) appointed arbitrators. If either of the parties fails to appoint an arbitrator and/or if the appointed arbitrators fail to appoint a third arbitrator then the arbitrator shall be appointed in accordance with the SIAC Rules.*

In case of institutional arbitration agreements prescribing three arbitrators, the general trend is to not mention about presiding arbitrator and leave the same to be covered by the rules of the relevant arbitration institution.

Chart 7.3 Appointment of Presiding Arbitrator in Ad-hoc Arbitration Agreements in Appendix A

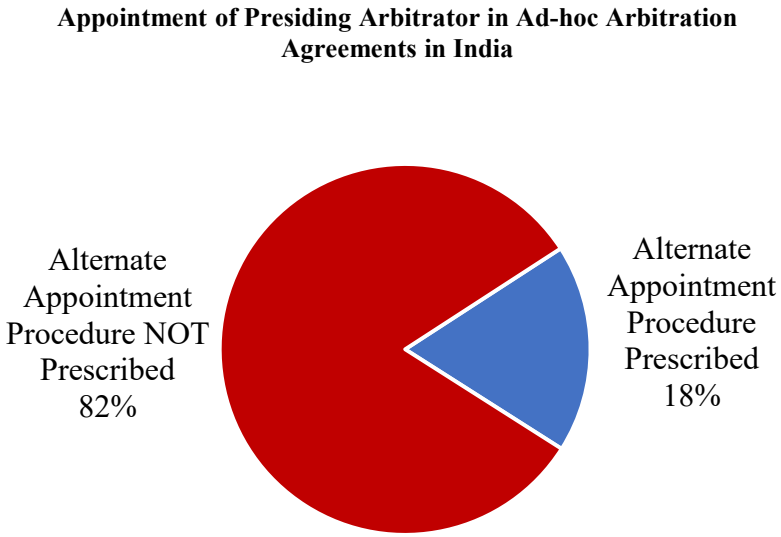
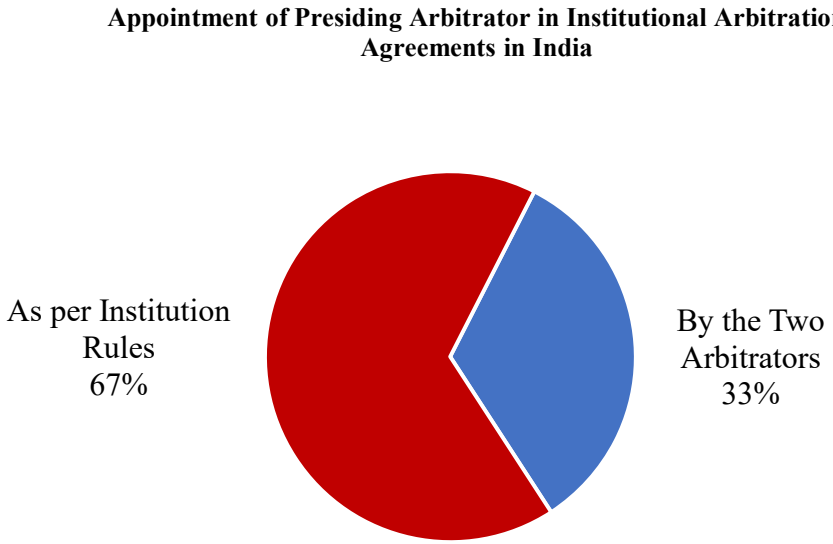


Chart 7.4 Appointment of Presiding Arbitrator in Institutional Arbitration Agreements in Appendix B



All arbitration agreements collated in Appendix A and Appendix B have clear provisions for appointment of presiding arbitrator whenever the number of arbitrators is three. However, the situation that arises when the two arbitrators cannot agree on the third or presiding arbitrator is often not covered by the arbitration agreement. This becomes more

troublesome in case of ad-hoc arbitrations since the possibility is often covered by the rules of the relevant institution in case of institutional arbitration.

It is recommended that drafters of ad-hoc arbitration agreements do give more attention to the possibility of two arbitrators not being able to mutually agree on the third arbitrator and provide for such a situation in the arbitration agreement thereby avoiding unnecessary litigation.

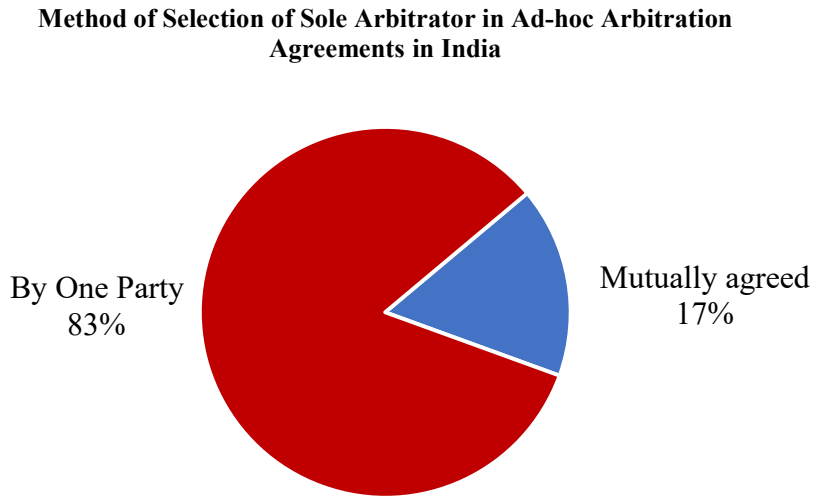
7.6 Method of selection of arbitrators

As mentioned in the previous section, number of arbitrators are either one (1) or three (3). In case of ad-hoc arbitration if number of arbitrators is three (3), the normally agreed method is that each party appoints one (1) arbitrator and the two jointly appoint the third arbitrators. In the arbitration agreements given in Appendix A, this is observed without any exceptions.

In case of arbitration tribunal consisting of only one (1) arbitrator, the stronger party tends to keep to itself the right to appoint the sole arbitrator. As mentioned earlier it is only the Large Public Sector Undertakings (LPSUs) who opt for sole arbitrator. Having chosen the option of sole arbitrator, the LPSUs utilize their stronger negotiating position to give to themselves the right to appoint the sole arbitrator. In 83% of the referred agreements, the LPSUs exercised the right to appoint the sole arbitrator. It is only in 17% of cases that the LPSU agreed to a mutually agreed arbitrator. This clearly reflects a bulldozing attitude of LPSUs which can in long run affect the impartiality and neutrality of the arbitration process.

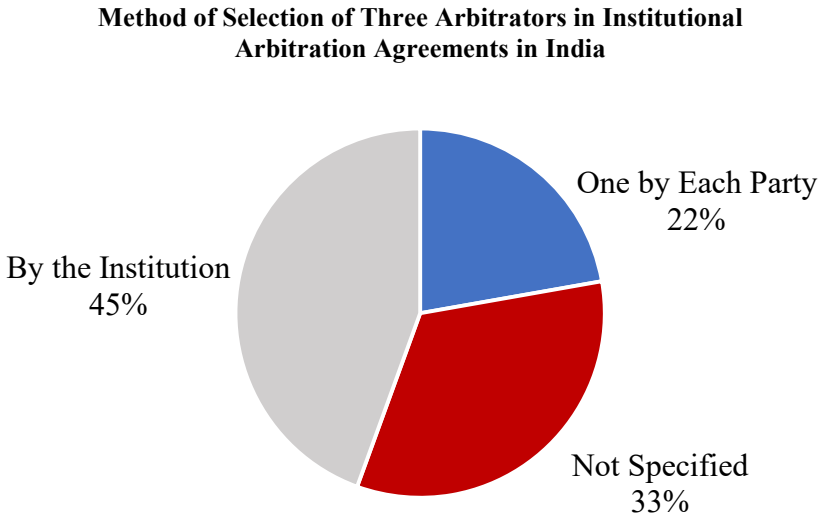
In case of sole arbitrator in ad-hoc arbitration, it is rare to find that the sole arbitrator is mutually appointed. Mostly whenever number of arbitrators is one (1) it is the dominating party that keeps for itself the right to appoint the sole arbitrator. While this exercise of power by the dominant party is legally permissible, the appointing party should exercise caution in appointment of sole arbitrator to ensure independence and impartiality. It may be in the interest of justice and fairness that the law is amended to stop this practice by large corporations.

Chart 7.5 Method of Selection of Sole Arbitrator in Ad-hoc Arbitration Agreements in Appendix A



In case of institutional arbitration, one sees a mixed pattern. Most often (45% of the agreements in Appendix B) the arbitration clause specifies that the arbitrator will be appointed by the arbitration institution. In 22% of the agreements in Appendix B, the arbitration agreement specifies that each party shall appoint an arbitrator. In 33% of the cases, the arbitration agreement did not mention about the method of selection of arbitrator. In such cases, the arbitration rules of the concerned institution apply. Often the rules specify that each party shall appoint one arbitrator and in case either party fails to appoint within a specified time the institution shall appoint the arbitrator.

Chart 7.6 Method of Selection of Three Arbitrators in Institutional Arbitration Agreements in Appendix B



To illustrate typical rules that arbitration institutions often prescribe, the following extract is reproduced below from Arbitration Rules of the Grain and Food Trade Association Limited, No. 125[5].

3.1 Procedure for the Appointment of a Sole Arbitrator

(a) If he requires the appointment of a sole arbitrator the claimant shall, before expiry of the time limit for claiming arbitration, serve a notice on the respondent seeking his agreement to the appointment of a sole arbitrator by Gafta.

(b) Not later than the 9th consecutive day after service of the notice referred to in (a) above, the respondent shall either; (i) serve a notice on the claimant stating that he agrees to the appointment of a sole arbitrator by Gafta, or (ii) appoint an arbitrator to a tribunal of three arbitrators and serve on the claimant a notice of the arbitrator so appointed, in which case Rule 3.2(c) shall apply.

[5] Laws and Rules (International): GAFTA, Arbitration Rules No. 125, 2020

(c) Where the parties have agreed to the appointment of a sole arbitrator, or where the respondent has not responded to the claimant's notice under 3.1(a) above, or where the respondent has not agreed to a sole arbitrator but has not appointed an arbitrator, Gafta shall appoint an arbitrator on receipt of the first statements and evidence submitted in accordance with Rule 4, or, where interlocutory or interim decisions are required of the tribunal, upon the application of either party.

3.2 Procedures for the Appointment of a Tribunal of Three Arbitrators

(a) The claimant shall before the expiry of the time limit for claiming arbitration appoint an arbitrator and serve a notice on the respondent of the name of the arbitrator so appointed, or apply to Gafta for the appointment of an arbitrator on its behalf and serve a copy of the application on the respondent.

(b) The respondent shall, not later than the 9th consecutive day after service of the notice of the name of the claimant's arbitrator, appoint a second arbitrator and serve a notice on the claimant of the name of the arbitrator so appointed.

(c) If the respondent does not agree to the appointment of a sole arbitrator and has instead appointed an arbitrator and given written notice thereof pursuant to Rule 3.1 (b), the claimant shall not later than the 9th consecutive day after service of such notice of appointment, appoint a second arbitrator and serve a notice on the respondent of the name of the arbitrator so appointed.

(d) Where two arbitrators have been appointed, Gafta shall appoint a third arbitrator on receipt of the first statements and evidence submitted in accordance with Rule 4, or, where interlocutory or interim decisions are required of a tribunal, upon the application of either party. The third arbitrator

shall be the chairman of the tribunal so formed and his name shall be notified to the parties by Gafta.

7.7 Law governing the contract

In agreements where one of the parties is a foreign citizen or entity, the parties may choose the law of the contract to be other than the laws of India. In case of Large Public Sector Undertakings (LPSUs), they either choose the Indian law or do not specify the law of the contract presuming that since the seat of arbitration is located in India the laws of India will apply. In case the Indian entity is small and does not have the negotiating strength of an LPSU the foreign entity is able to insist and get the Indian party to accept a foreign law as the law of the contract.

Looking at the arbitration agreements collated in Appendix A it is noticed that in 40% of the cases the law of contract is Indian law while the law of contract is not specified in 27% of the cases. In 20% of the cases, the parties have chosen a foreign law of contract as the binding law. In 13% of the cases, some other option is exercised. In one of such other cases, the parties have chosen to be governed by "usual norms of international trade", while in another case the parties have chosen to be governed by "UNIDROIT Principles of International Commercial Contracts (2010)[6] and, with respect to issues not covered by such Principles, by generally accepted principles of international commercial law". Both the options are based on the parties will to accept a law which does not create favourable ground for either party.

[6] Laws and Rules (International): UNIDROIT Principles of International Commercial Contracts 2010

Chart 7.7 Law governing the contract in Ad-hoc Arbitration Agreements in Appendix A

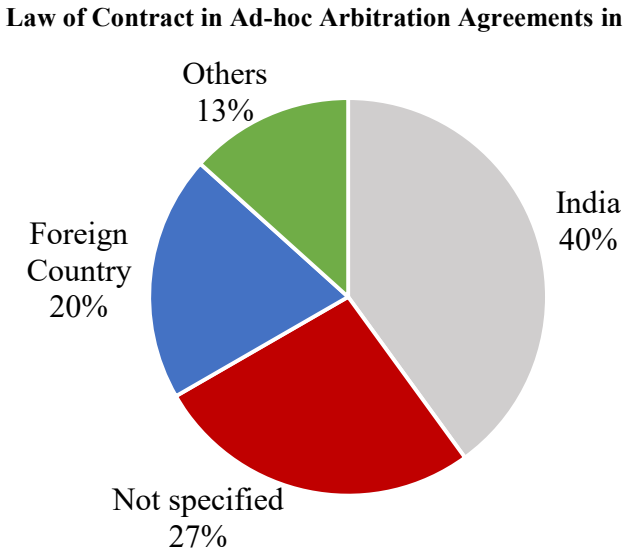
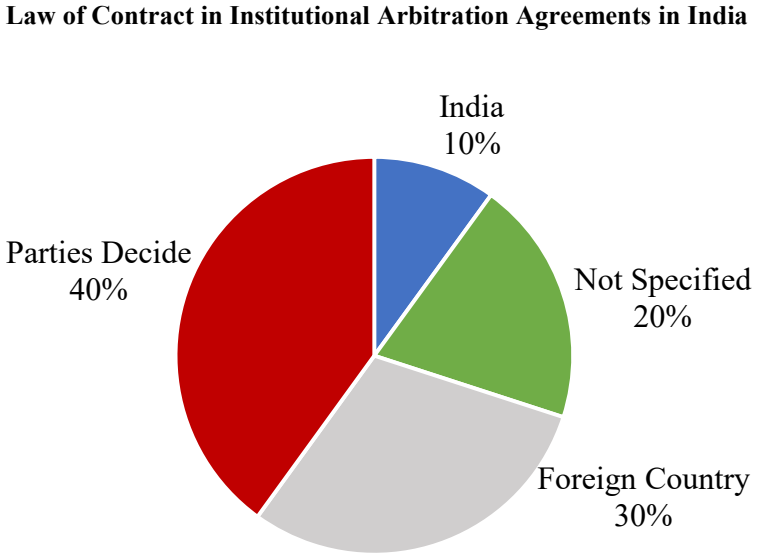


Chart 7.8 Law governing the contract in Institutional Arbitration Agreements in Appendix B



In case of institutional arbitration agreements most Indian parties are relatively small unlike LPSUs in case of ad-hoc arbitration agreements. When we look at the samples from executed agreements, we notice that all of them accept foreign law as the law of the contract. On the other hand, when we look at the formats prescribed by arbitration institutions, we find that the matter is generally either left for the parties to decide or left open. In statistical terms, Indian law is the law of contract in only 10% of institutional

arbitration agreements, while foreign law is the law of contract in 30% of the cases. In 40% of the agreements in Appendix B, it is left for the parties to decide the law of the contract while in 20% of the case it is not specified.

In less than one third of the ad-hoc international arbitration agreements the parties omit to mention the law of the contract. The omission is relatively less common in institutional arbitration agreements since the model arbitration clause often specifies the law of the contract. Whether in ad-hoc arbitration agreements or in institutional arbitration agreements, the omission is a serious lacuna and should be avoided. It is recommended that better awareness is created among legal professionals on this point.

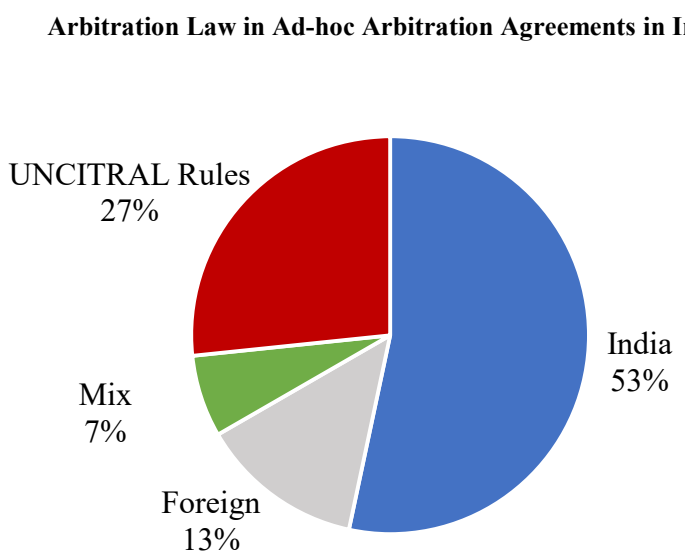
7.8 Law governing the arbitration & curial law

Law governing the arbitration agreement and law governing the conduct of arbitration proceedings are two different laws – a fact highlighted by Honourable Supreme Court in Bharat Aluminium vs. Kaiser (2016)[7]. However, it is rare to find this difference coming out clearly in international arbitration agreements in India. In most cases, the two are treated as one. Of the agreements collated in Appendix A, in only one agreement (A14), the difference is highlighted with different law for arbitration agreement and for conduct of arbitration proceedings.

Looking at the ad-hoc arbitration agreements collated in Appendix A one notices that in 53% of the cases the law of arbitration agreement is Indian law while in only 13% of the cases foreign law is chosen. Notably, in 27% of the agreements UNCITRAL Rules are chosen as the law for conduct of the arbitration proceedings. In 7% of the cases, a mix approach is seen. In this case (7% - amounting to one agreement, Appendix A14) arbitration agreement is governed by Indian Arbitration and Conciliation Act, 1996 while the conduct of proceedings is governed by rules of Singapore International Arbitration Centre.

[7] Domestic Court Judgements: Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc., 2016

Chart 7.9 Law governing the arbitration in Ad-hoc Arbitration Agreements in Appendix A



When we look at the institutional arbitration agreements collated in Appendix B, we notice that without exception all agreements prescribe rules of the institution to be the law governing the conduct of arbitration proceedings. While this is to be expected, it is surprising that none of the agreements even talks about the law governing the arbitration agreement.

Chart 7.10 Law governing arbitration in Institutional Arbitration Agreements in Appendix B

Choices like UNCITRAL Rules, which provide neutral and balanced ground rules, are not very well known in India. Better awareness among legal professionals of such internationally accepted options will help Indian companies to more smoothly negotiate international agreements.

7.9 Ad hoc or institutional arbitration

Ad-hoc arbitration is more common than institutional arbitration in India. There are no statistics available about numbers of ad-hoc arbitration and institutional arbitration in case of international arbitration agreements in India. Notably, all large Public Sector Undertakings (LPSUs) opt for ad-hoc arbitration. The hesitation of large companies (both in private and public sectors) in India is a large stumbling block for growth of institutional arbitration in India.

Parties choosing institutional arbitration generally take the whole package – institution infrastructure, institution arbitrators and institution rules. The situation that parties choose the infrastructure of one arbitration institution while being governed by the curial laws of some other institution or UNCITRAL is almost unheard of.

Ad-hoc arbitration is more popular in India as compared to institutional arbitration. This is in contrast with the trend in most developed countries. While significant efforts have been made by government in the past years to promote institutional arbitration, surely much more needs to be done in this regard.

7.10 Qualifications of arbitrators

The first and foremost condition for appointment of an arbitrator is his independence and impartiality. Looking at the ad-hoc arbitration agreements collated in Appendix A, it is found that none of the agreements has laid this pre-condition for appointment of an arbitrator. It seems that it is presumed by the parties that arbitrator will not have any direct or indirect link / connection with the appointing party. Considering that under Indian law as well as laws of other jurisdictions also, the impartiality and independence of arbitrators is necessary, there is no necessity of mentioning the same in the arbitration

clause. However, care has to be taken that the appointed arbitrator is independent and impartial. In particular, when one party has the right to appoint a sole arbitrator (often the case in agreements involving LPSUs) the party appointing must take care that the appointment does not get challenged under section 12 of Arbitration and Conciliation Act, 1996 on grounds of impartiality. It may be advisable to include this note of caution for the appointing party in the arbitration agreement. However, this is never done.

Most business contracts today involve detailed knowledge of engineering or business processes. Surprisingly, none of the arbitration agreements either in Appendix A or Appendix B have any such requirement prescribed for arbitrators. Out of fifteen (15) agreements collated in Appendix A, two (2) specify qualifications for arbitrators. However, the prescribed qualifications are not technical or related to business experience. The two agreements (A5 and A6) prescribe that the arbitrator will be a retired judge of either Supreme Court or High Court. Both these agreement formats are prescribed by LPSUs.

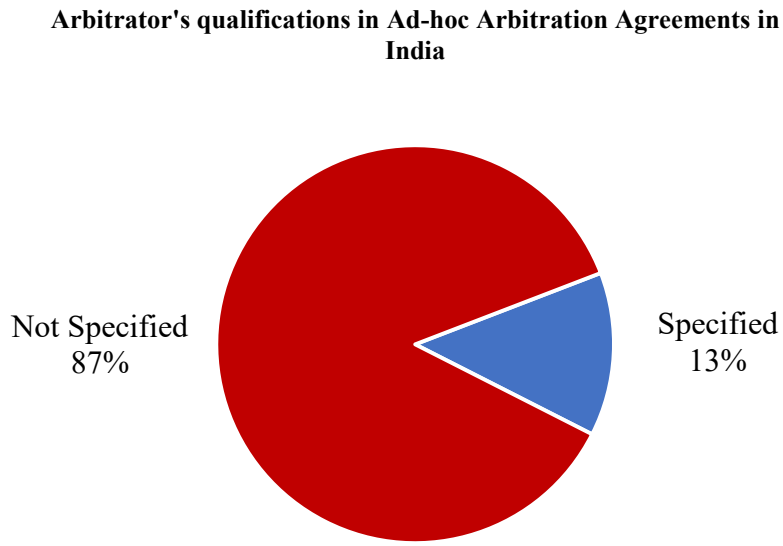
In case of institutional agreements, the arbitration rules of the arbitration institution, generally, give the parties freedom to prescribe qualifications for arbitrators. However, the freedom is rarely used. Notably, it has been observed that some institutional rules give significant importance to arbitrator's independence and impartiality as well as technical abilities, if duly provided for in the arbitration clause.

In the ten (10) agreements collated in Appendix B, not a single agreement has utilized this freedom. By and large, the field of arbitration in India is dominated by retired judges and the same becomes clear when we look at the arbitration clauses collated in Appendix A and Appendix B.

It is surprising that relevant technical qualifications or experience or expertise is almost never prescribed as necessary qualifications for arbitrators. In case of institutional arbitration, the situation is no different. While rules of most institutions allow the parties to prescribe qualifications of arbitrators, the option is rarely exercised.

It is recommended that the government and statutory bodies build better awareness in this regard and encourage parties especially large companies (including LPSUs) to prescribe technical qualifications, experience and expertise for arbitrators in their model agreements.

Chart 7.11 Qualifications of the arbitrators in Ad-hoc Arbitration Agreements in Appendix A



7.11 Seat of arbitration

Seat of arbitration is one of most crucial elements of an arbitration agreement. It is sometimes confused with place of arbitration. Seat of arbitration decides the court that will have jurisdiction over the arbitration proceedings. Place of arbitration means where the arbitration proceedings will be held. There can be only one seat of arbitration whereas there can be several places where arbitration meetings can take place. Seat of arbitration is fixed and cannot be changed. While, place of arbitration can be changed according to the convenience of arbitrators or parties or both. Hence, it is utmost important that the agreement must provide for seat of arbitration in clear terms.

It has been observed from the ad-hoc arbitration agreements as given in Appendix A that majority 73% of the cases provided for the seat of arbitration. In the agreements in Appendix A, 53% of the agreements specified India as the seat while 20% specified a place outside India as seat of arbitration. About 7% of the agreements left it open for the parties to decide seat of arbitration at a later stage may be when dispute arises. The agreements that had not specified seat of arbitration were 20%.

Data from the institutional arbitration agreements as provided in Appendix B is almost similar to the one as mentioned above for Appendix A. In the agreements in Appendix B, 50% of the agreements specified India as the seat while 20% specified a place outside India as seat of arbitration. About 10% of the agreements left it open for the parties to decide seat of arbitration at a later stage may be when dispute arises. The agreements that had not specified seat of arbitration were 20%.

Chart 7.12 Seat of the arbitration in Ad-hoc Arbitration Agreements in Appendix A

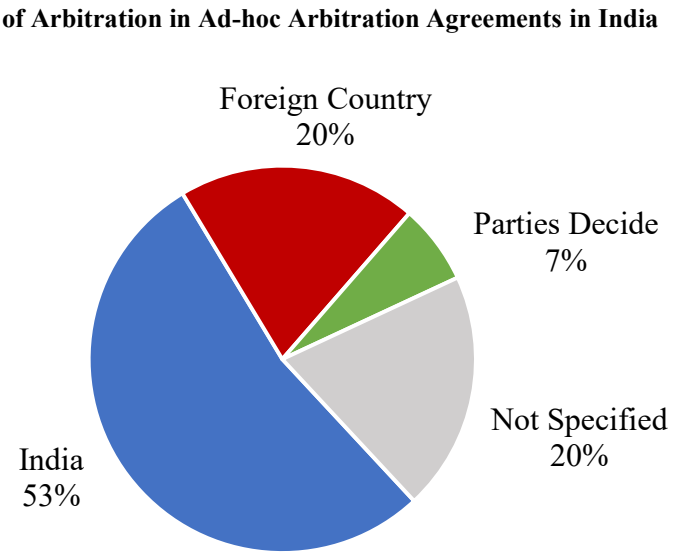
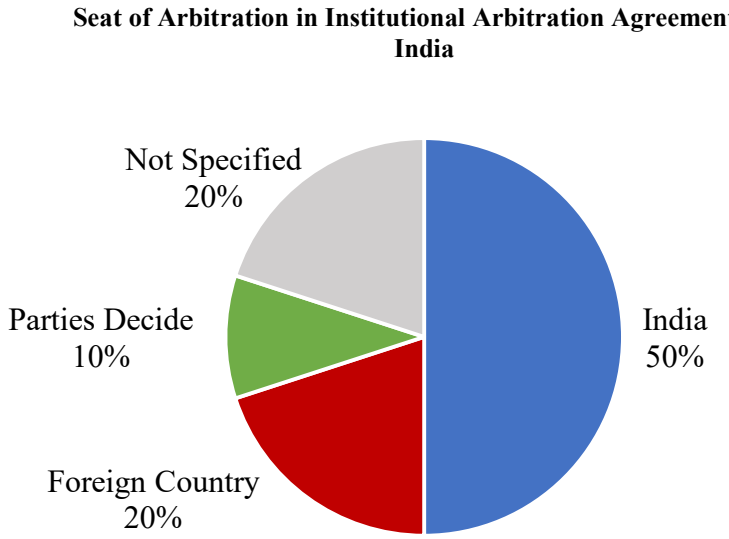


Chart 7.13 Seat of arbitration in Institutional Arbitration Agreements in Appendix B



In the agreements in Appendix A one notices that some agreements have provided for a floating seat of arbitration which is against the norms associated with seat of arbitration. A seat is the juridical place which determines the courts which will have jurisdiction over the arbitration. While place of arbitration can keep changing, the seat of arbitration must be fixed. it seems that the drafters of such agreements lack understanding of the concept of seat of arbitration.

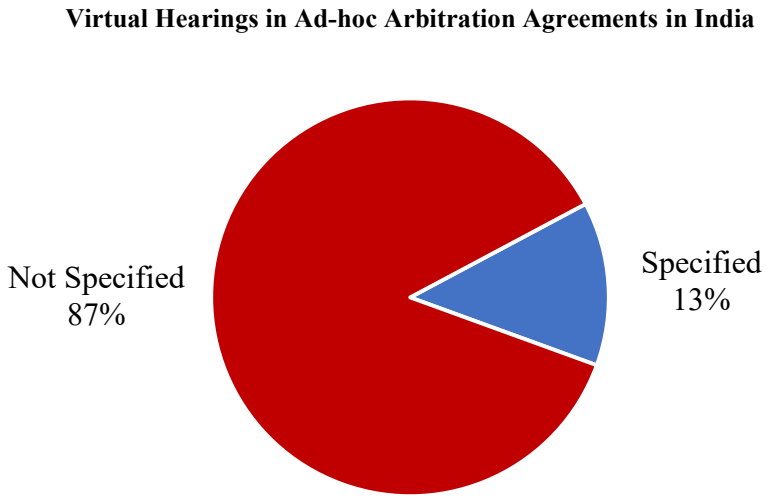
In one out of five international arbitration agreements, both in case of ad-hoc and institutional arbitration agreements, the parties omit to mention the seat of arbitration. This is a serious omission. It is recommended that legal professionals are made more aware of the importance of seat to reduce incidents of this omission.

7.12 Whether virtual hearings are permitted

Virtual hearings are a recent phenomenon which has become popular after the Covid-19 pandemic. In the pandemic period and post-pandemic era, it has been commonly assumed that unless there is a specific bar on virtual hearings, the arbitrators can decide to hold virtual meetings as per their convenience without affecting the seat of arbitration.

Since virtual hearings are a recent phenomenon and there is confusion about the necessity of mentioning the permissibility of virtual hearings in arbitration clause / agreement, it is rare to find mention of virtual hearings in arbitration agreements. it is noticeable that of all agreements collated in Appendix A, Appendix B and Appendix C only two (2) agreements in Appendix A have specific provision permitting virtual hearings (A10 and A11).

Chart 7.14 Virtual hearings in Ad-hoc Arbitration Agreements in Appendix A



It can be argued that even if there is no mention of virtual hearings in the arbitration clause, the arbitrators may by mutual consent decide to hold virtual meetings. Nevertheless, clearly specifying that virtual hearings are permitted will help speed up arbitration process and also reduce costs by eliminating travel. It is recommended that better awareness is created in this regard. It is also recommended that arbitration institutions modify their model clauses to include permission for virtual hearings in the said clauses.

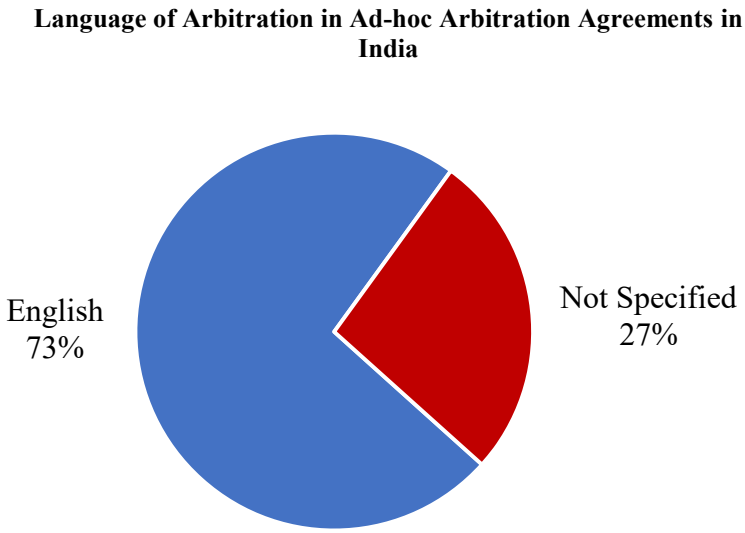
7.13 Language of arbitration

In case of international arbitration when the parties speak different languages, this can lead to significant problems and can cause delays in the arbitration process. The drafters of international arbitration agreements need to be more aware of the importance of specifying the language of arbitration clearly in the arbitration agreements.

Language of arbitration is clearly mentioned in most of the arbitration agreements collated in Appendix A and Appendix B. Notably, in all the agreements in Appendix C language of arbitration is clearly mentioned. India being a multilingual country, it is understandable that there is high awareness about the need to specify a language that will be used for dispute resolution process.

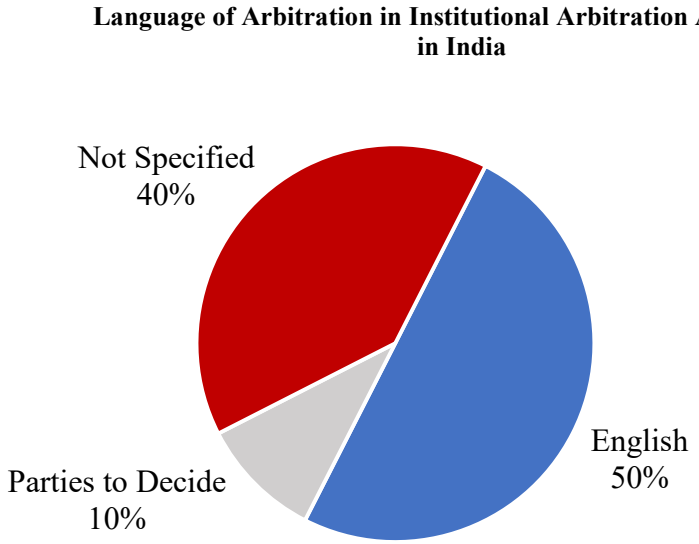
English is the most commonly used language of business for Indians especially in international transactions. It is hence not surprising that English is the commonly accepted language of arbitration for international arbitrations in India. In ad-hoc arbitration agreements collated in Appendix A, 73% of the agreements specify English as language of arbitration while 27% of the agreements do not specify any language of arbitration proceedings.

Chart 7.15 Language of arbitration in Ad-hoc Arbitration Agreements in Appendix A



In case of institutional arbitration agreements collated in Appendix B, English is specified as the language of arbitration in half (50%) of the agreements, while in 10% of the cases it is left for the parties to decide. In 40% of the agreements, there is no mention of the language of arbitration.

Chart 7.16 Language of arbitration in Institutional Arbitration Agreements in Appendix B



7.14 Cost of arbitration

In view of the detailed provision regarding Regime for Costs in section 31A of Arbitration and Conciliation Act, 1996 and also in view of the fact that the parties do not have the right to take any decisions regarding allocation of costs in view of the specific provision under sub-section 31A(5) until the dispute has actually arisen, the scope for including provisions regarding costs in arbitration clause are limited. In particular, the provisions regarding costs can provide for who is to bear the costs during the arbitration proceedings.

In ad-hoc arbitrations collated in Appendix A, in 40% of the cases it is provided that each party will bear its own costs and cost of chairman / presiding arbitrator to be shared equally during the arbitration proceedings. In the same set of agreements, costs are to be shared equally in 13% of the cases. There is no mention of costs in about one third of the collated agreements.

Chart 7.17 Cost of arbitration in Ad-hoc Arbitration Agreements in Appendix A

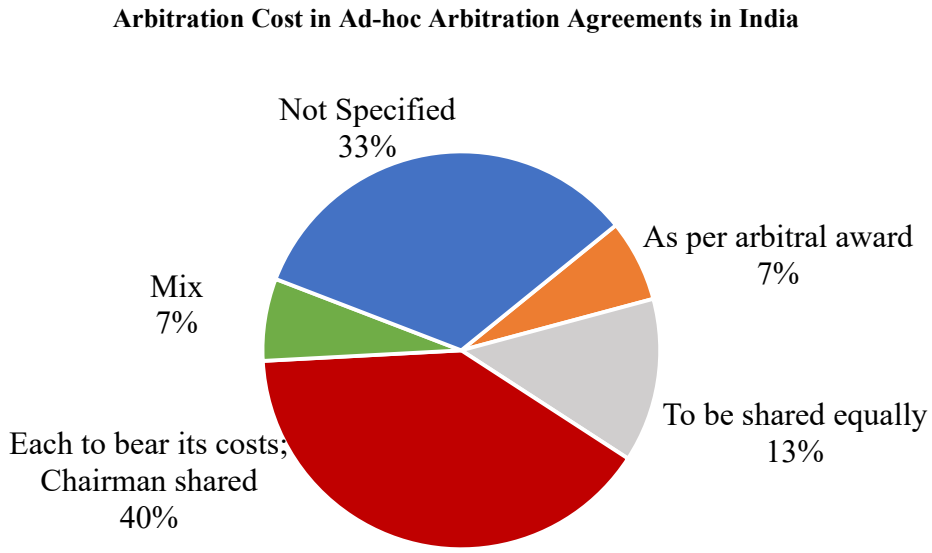
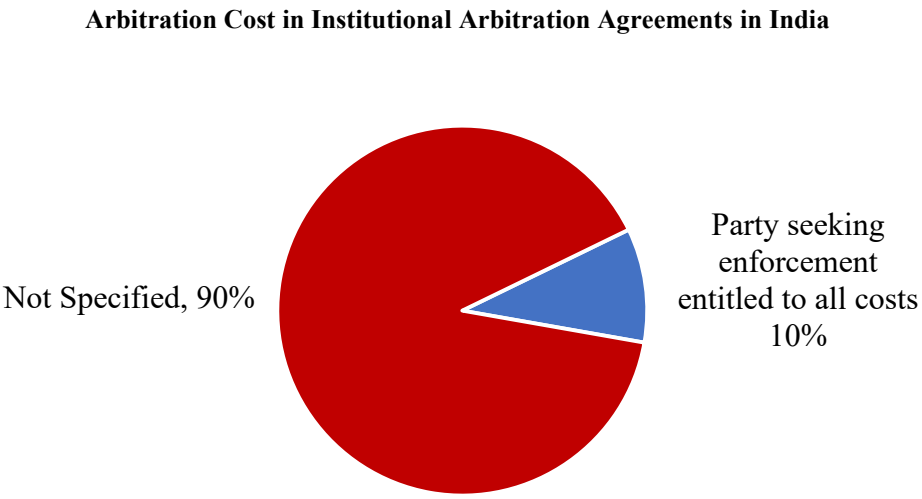


Chart 7.18 Cost of arbitration in Institutional Arbitration Agreements in Appendix B



Institutional arbitration agreements collated in Appendix B as well as Appendix C, generally speaking, are silent about costs. Rules of the relevant institution often have provisions about costs. Hence, it is not surprising that institutional agreements have no mention about costs. It is only in one (1) case out of ten collated in ten (10) in Appendix B (B2) that there is mention of entitlement of party seeking enforcement to get costs.

There are two aspects to costs – (a) Who will bear the cost of arbitration before the start of arbitration proceedings and during the arbitration proceedings (b) How will the costs be allocated after the arbitration tribunal announces its award. While in case of the second aspect the law restricts the parties from taking any decision, the parties must specify in respect of the first aspect. However, it is noted that in about half of the arbitration agreements in Appendix A there is no mention about costs. Even most institutional agreements are silent on the costs presuming that the institutional rules cover the aspect related to costs.

Both in the case of ad-hoc and institutional arbitration agreements, there needs to be better awareness and deliberation about the costs of arbitration. It is recommended that the legal professionals advising parties to international arbitration agreements insist on the parties to include clear provisions related to bearing of costs during and before arbitration proceedings in the arbitration agreements.

7.15 Punitive damages

There is absolutely no mention of punitive or exemplary damages in any of the agreements collated in either Appendix A or Appendix B or even Appendix C. It seems that there is no awareness about the need to avoid punitive damages in arbitration proceeding. While it is understandable for domestic arbitration agreements in India (since Indian law does not allow punitive damages), it shows a glaring lacuna in international arbitration agreements especially in agreements involving a party based in the United States of America where punitive or exemplary damages are relatively common. It is recommended that better awareness of this element is created among Indian legal professionals.

7.16 Attorney fees

It is not customary to mention about attorney fees in arbitration agreement / clause. There is no legal requirement to make such a mention. Hence, it is no surprise that there is absolutely no mention of attorney fees in any of the agreements collated in either Appendix A or Appendix B or even Appendix C. In some agreements it is stated that each party will bear its own costs including attorney fees. In some cases, reference is made to

attorney fees in connection with reimbursement of costs. These cannot be construed as provisions with regard to attorney fees. It is, of course, open for parties to specify that the maximum fees paid to attorneys by either party will not exceed specified upper limit (specified either as percentage of claim amount or in absolute terms). However, in the agreements collated in Appendix A, Appendix B and Appendix C there is no such clause.

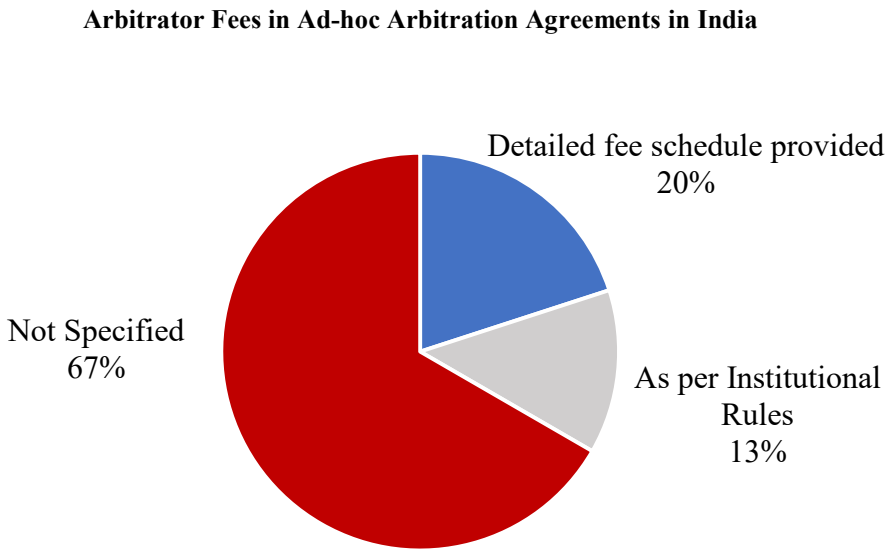
Fees paid to an attorney / advocate / legal consultant by one party may have to be borne by the other party if the arbitral award orders for the costs to be borne by the other party. Hence, specifying upper limit for attorney costs can help keep the overall costs in check. The practice of specifying maximum attorney fees is unheard of in India. Deliberations are needed among legal professionals to adopt this as a practice for international arbitration agreements in India.

7.17 Arbitrator fees

Providing rules and / or limits for arbitrator fees in the arbitration clause / agreement is a recent phenomenon in India. Large Public Sector Undertakings (LPSUs) have taken the lead in this respect. In the agreements collated in Appendix A, only four (4) (A1, A2, A7 and A8) of the fifteen agreements have detailed provisions regarding arbitrator fees. All three of the said agreements are formats of LPSUs. About 13% of the agreements in Appendix A provide for arbitrator fees to be as per an arbitration institution's schedule of fees. This is interesting since even though the arbitration is ad-hoc and the arbitration institution does not administer the arbitration, reliance is placed on the arbitration institution's schedule of fees. In vast majority (67%) of the cases there is no mention of the fees payable to arbitrators.

As is to be expected, agreements in Appendix B as well as in Appendix C have no mention whatsoever about arbitrator fees since the fees are governed by the rules / schedule of the relevant institution.

Chart 7.19 Arbitrator fees in Ad-hoc Arbitration Agreements in Appendix A



It is advisable that the practice of mentioning arbitrator fees is adopted as a norm for all ad-hoc international arbitration agreements. This is most important for MSMEs who can ill afford exorbitant fees charged by arbitrators when they themselves have the right to determine their own fees.

7.18 Scope and limits of discovery / Group of companies

Rights against third parties and Group of companies are new concepts in the field of arbitration in India. There are no arbitration clauses / agreements among the agreements collated in Appendix A and Appendix B having any mention of rights against third parties. Notably, even in agreements collated in Appendix C such a clause / provision is missing.

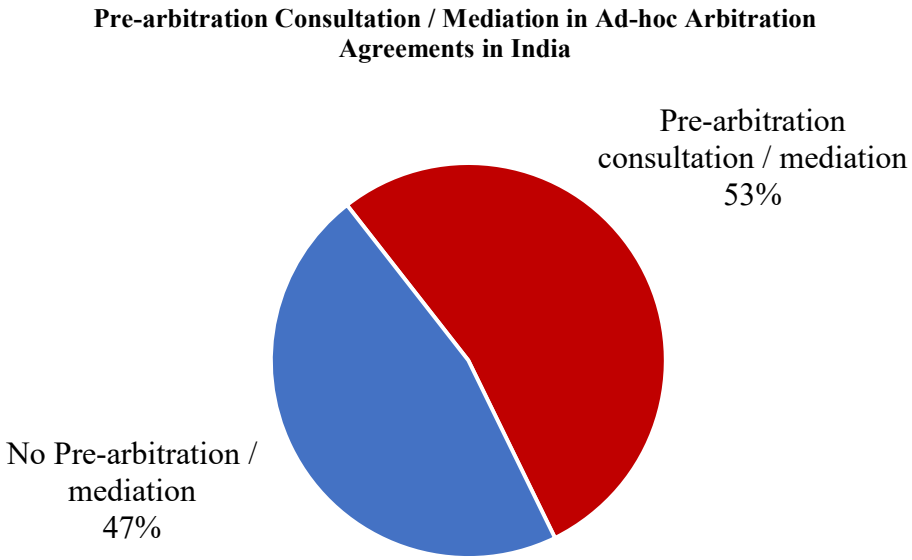
It is important that legal professionals in India become more aware of the legal provisions related to third parties under Indian law as well laws of other jurisdictions. Taking precautionary steps in this regard at the stage of drafting of arbitration agreement can avoid much pain later. It is recommended that better awareness is created about this element across the country.

7.19. Other elements and considerations

Pre-arbitration consultation / mediation

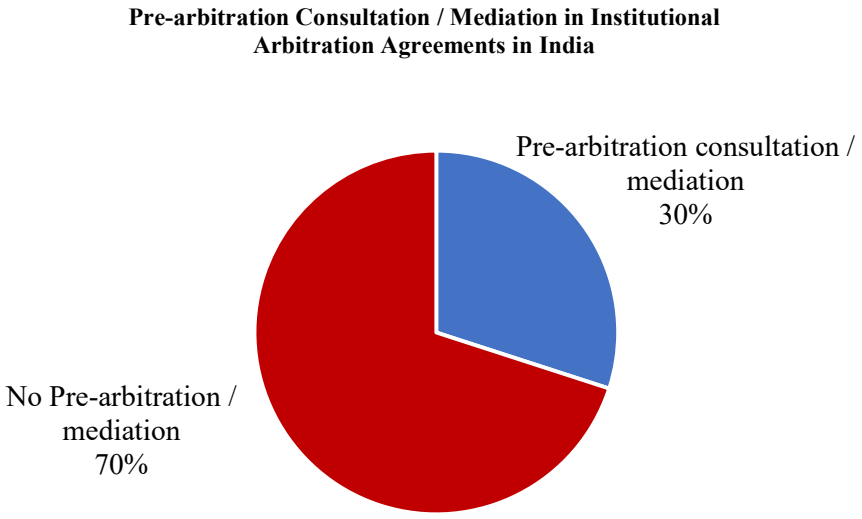
Arbitration, like judicial proceedings, in India is expensive. If one takes into account the appeals that often follow arbitral awards, the whole process is time-consuming in India. It is hence, not surprising that parties in India wish to avoid arbitration (and judicial processes) as far as possible.

Chart 7.20 Pre-arbitration consultation / mediation in Ad-hoc Arbitration Agreements in Appendix A



In the arbitration agreements collated in Appendix A, 53% have a clause providing for pre-arbitration processes / mediation. Notably, pre-arbitration processes are not popular with LPSUs. In only one (A7) of the collated agreements related to LPSUs in Appendix A, there is provision of pre-arbitration process. In private sector and in MSMEs pre-arbitration processes are extremely popular.

Chart 7.21 Pre-arbitration consultation / mediation in Institutional Arbitration Agreements in Appendix B



In case of institutional arbitration agreements collated in Appendix B, in 30% of the cases there is provision of pre-arbitration consultation / mediation. In 70% of the arbitration agreements in Appendix B, there is no provision of pre-arbitration processes / mediation.

Wider adoption of pre-arbitration consultation / mediation is recommended. Better awareness of these provisions needs to be built.

Notice Procedure

Notice procedure is mostly not required in case of institutional arbitration since rules of arbitration of the relevant institution prescribe the procedure for notice. It is advisable to include such a provision in the ad-hoc arbitration agreements.

In majority (53%) of ad-hoc arbitration agreements collated in Appendix A there is no prescribed procedure or time period for serving notice of arbitration. In 47% of the arbitration agreements collated in Appendix A there is some mention of the notice of arbitration or time of notice or procedure of giving notice.

Chart 7.22 Notice Procedure in Ad-hoc Arbitration Agreements in Appendix A

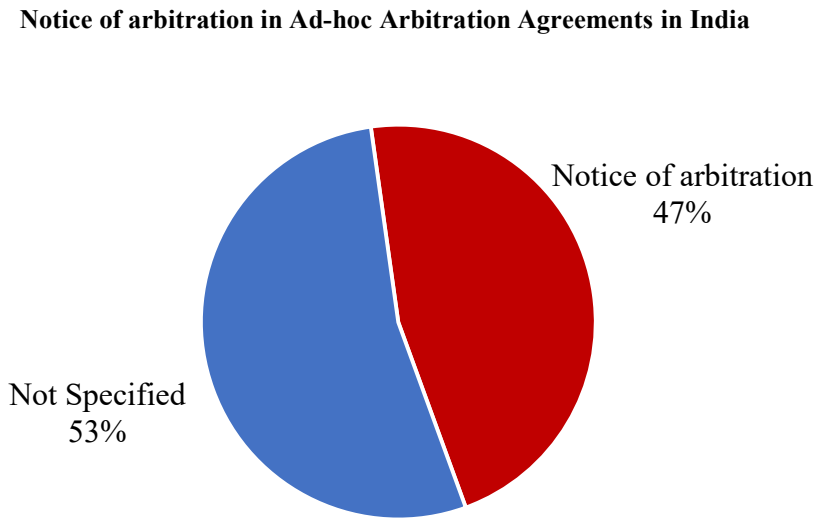
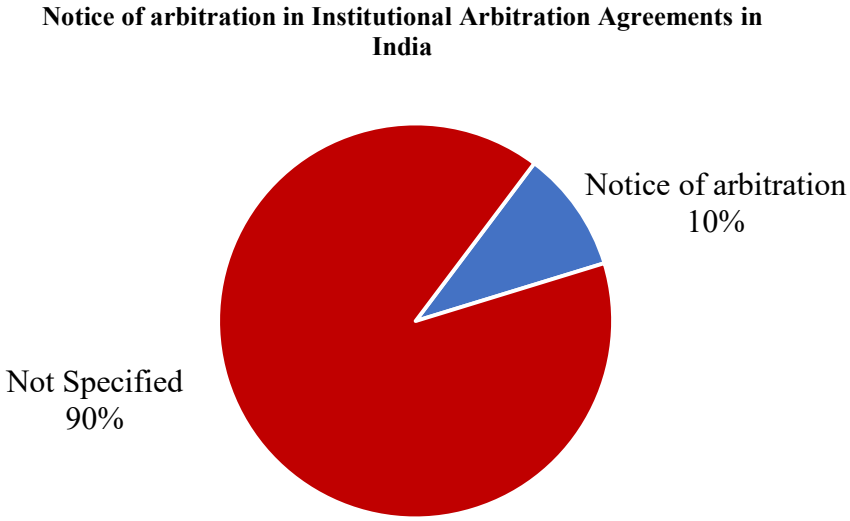


Chart 7.23 Notice Procedure in Institutional Arbitration Agreements in Appendix B



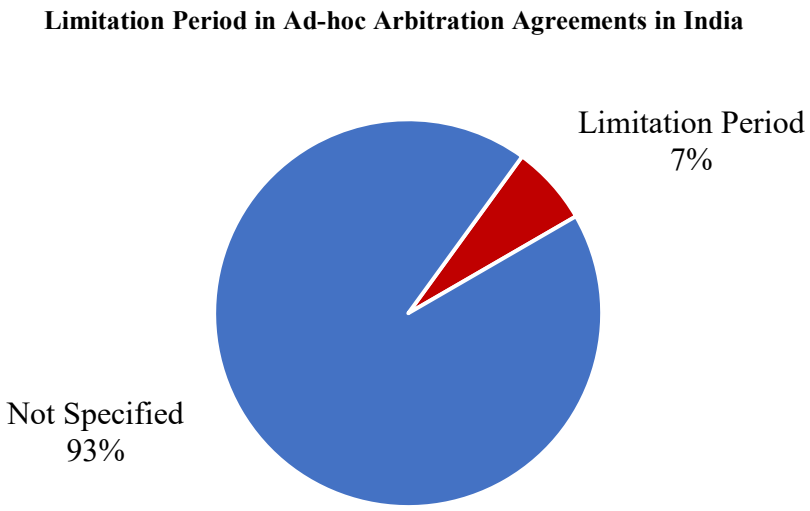
As most of the institutional agreements are governed by the institution's rules of arbitration which prescribe clear rules about serving of notice of arbitration, it is understandable that in most (90%) of the arbitration agreements in Appendix B there is no mention of notice of arbitration.

It is recommended that drafters of ad-hoc arbitration agreements become more aware of the need to provide for procedure related to notice of arbitration.

Limitation period

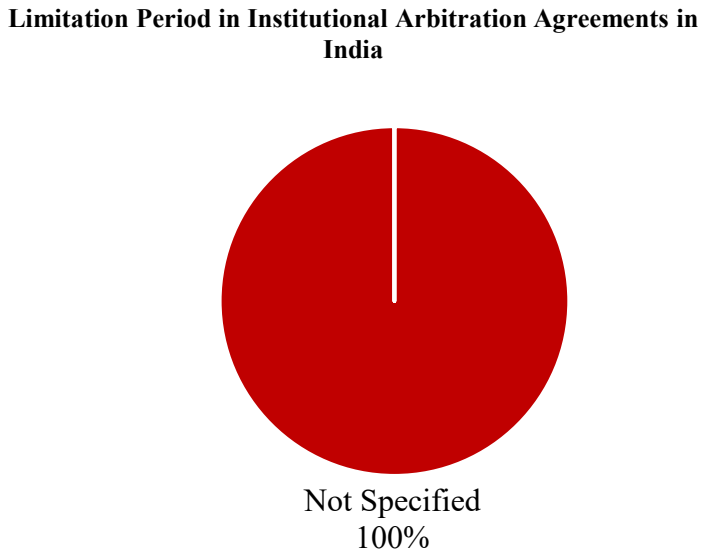
It is rare to find an arbitration clause which specifies in clear terms that disputes can be referred to arbitration within specified period after the cause of action or after the termination of the contract or after some other mutually agreed event. Of all agreements collated in Appendix A and Appendix B, it is in only one (A7) agreement that one see such a limitation clause.

Chart 7.24 Limitation Period in Ad-hoc Arbitration Agreements in Appendix A



Absence of limitation clause is notable even in institutional arbitration agreements in Appendix B as well as in Appendix C.

Chart 7.25 Limitation Period in Institutional Arbitration Agreements in Appendix B



It is recommended that better awareness related to the possibility of mentioning limitation in the arbitration clause is created.

Confidentiality

While it is very common to see confidentiality clauses in contracts, such clauses refer to the confidentiality of information exchanged by the parties during execution of the contract. A clause that allows or disallows confidentiality in arbitration proceedings is extremely rare in India. In the agreements collated in Appendix A and Appendix B (also in Appendix C) there is no mention of confidentiality with respect to the arbitration proceedings. Legal fraternity needs to discuss this issue with their clients and help them take a decision on the matter after due application of mind.

Termination Procedure

Arbitration process may be terminated at any stage before the start of arbitration proceedings and also after start of arbitration proceedings by mutual consent of the parties.

An independent clause providing for termination of arbitration process (distinct from termination of the contract) is practically unheard of in India. One does not find such a clause in the arbitration agreements collated in Appendix A and Appendix B (also in Appendix C).

It may be useful to have provisions for termination of arbitration in the arbitration agreement. Again, this is something on which the legal fraternity needs to discuss with the clients and build wide acceptance for such provisions.

Separability or autonomy of the arbitration agreement

Arbitration agreement, even though contained within a contract between the parties, can stand on its own feet separate and autonomous from the main agreement. However, such separability or autonomy of the arbitration agreement is never seen in India. One does not find such a clause in the arbitration agreements collated in Appendix A and Appendix B (also in Appendix C).

Separability or autonomy of arbitration is almost always assumed but almost never mentioned in the arbitration agreement. Better awareness needs to be created among drafters of arbitration agreements to include such a clause in the arbitration agreements.

Fast track procedure

Section 29B related to Fast Track Procedure was introduced in Arbitration and Conciliation Act, 1996 by amendment act of 2015[8]. So, the provision related to fast-track procedure is relatively new in Indian arbitration law. Hence, it should come as no surprise that there is low awareness about fast-track procedure among Indian businesses.

Among the ad-hoc arbitration agreements collated in Appendix A, it is only in one (A7) that fast track procedure as provided in section 29B of the Arbitration and Conciliation Act, 1996[9] has been adopted.

As far as institutional arbitration agreements in Appendix B are concerned, one finds higher acceptance of fast track or expedited procedure. About thirty per cent (30%) of the

[8] Laws (India): The Arbitration and Conciliation (Amendment) Act, 2015
[9] Laws (India): The Arbitration and Conciliation Act, 1996

arbitration agreements in Appendix B prescribe fast track / expedited procedure. It may be mentioned here that the expedited procedure is always as per the relevant rules of the concerned arbitration institution.

Chart 7.26 Fast track procedure in Ad-hoc Arbitration Agreements in Appendix A

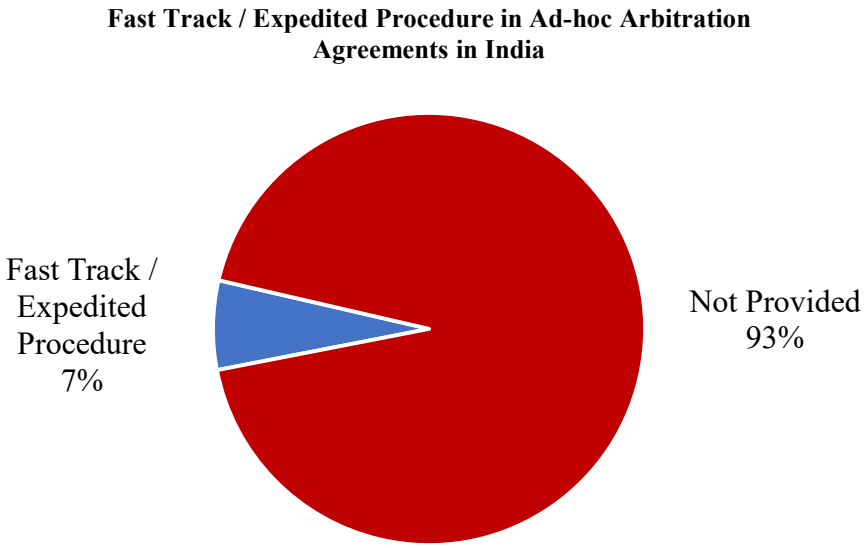
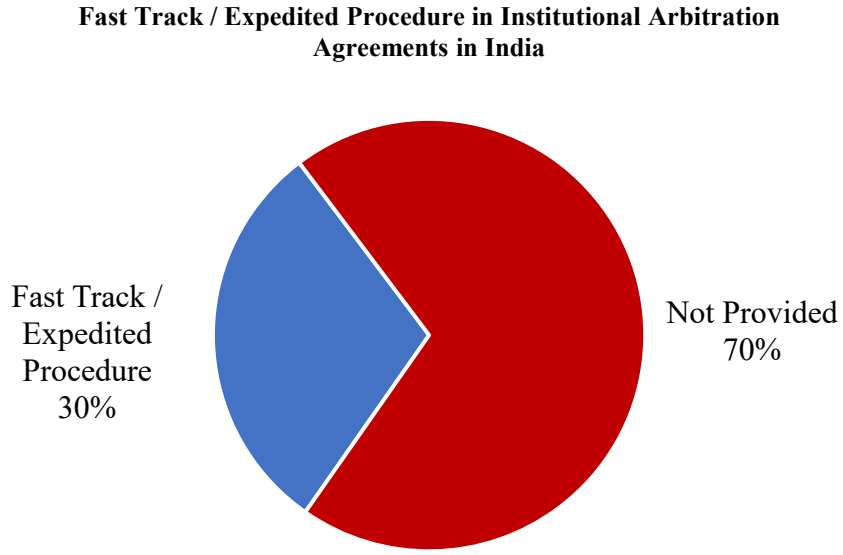


Chart 7.27 Fast track procedure in Institutional Arbitration Agreements in Appendix B



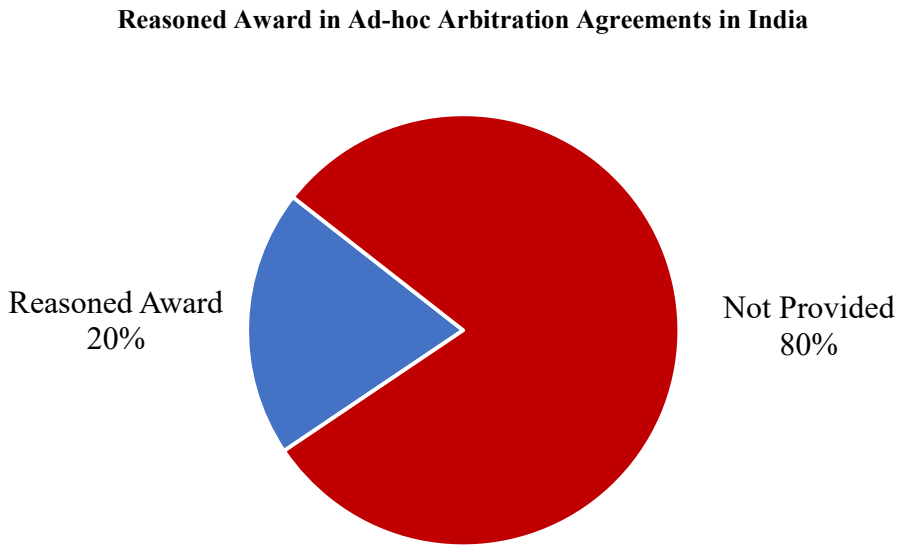
It is recommended that better awareness of advantages of fast-track procedure is created among legal professionals as well as business community.

Reasoned award

Section 31(3) of the Arbitration Act[10] mentions that the arbitral award shall state the reasons upon which it is based. However, under sub-section 31(3)(a)[11] it is open for the parties to decide that no reasons be given in the arbitral award. In other words, only if the arbitration agreement states that no reasons are to be stated in the arbitral award, the arbitration tribunal has the freedom to give an award which is not reasoned award. In all other cases, it is compulsory for the arbitration tribunal to give a duly reasoned award. Hence, it is superfluous for an arbitration agreement to state that the arbitral award shall state the reasons and be a speaking one. Notably, of the agreements collated in Appendix A and Appendix B (even Appendix C) there is not a single agreement which gives the freedom to arbitration tribunal to give an award without stating the reasons for it. In a few cases (20%) of ad-hoc arbitration agreements in Appendix A, the arbitration agreement makes the superfluous assertion about need for the arbitration tribunal to give a reasoned award. This superfluous provision is absent in the agreements collated in Appendix B.

[10] Laws (India): The Arbitration and Conciliation Act, 1996
[11] Laws (India): Ibid.

Chart 7.28 Reasoned award in Ad-hoc Arbitration Agreements in Appendix A



The law (Section 31(3)(a) of the Arbitration Act[12]) gives the parties freedom to let the arbitrators give an award without giving reasons for it. This option is of relevance to small matters where disputed amounts are not significant. it has hardly any relevance for international arbitration agreements, the subject matter of this handbook.

Two-tier arbitration

Two-tier arbitration process is largely unknown in India. None of the agreements in Appendix A and Appendix B (as well as Appendix C) have provision for second level of arbitration tribunal.

Having an appeal process as part of arbitration procedure surely has its advantages. It seems that the legal fraternity and business community of India has never deliberated on the advantages of two-tier arbitration process. It is recommended that the legal fraternity and business community of India apply its mind on the subject.

[12] Laws (India): Ibid.

Chapter 8

Concluding Recommendations

8.1 Summing up recommendations for arbitration clauses

It is recommended that the following desired elements be used in arbitration clauses for ad-hoc and institutional international arbitration agreements in India:

Table 8.1 Recommendations for Use of Desired Elements in Arbitration Clauses for Ad-hoc and Institutional International Arbitration Agreements in India

Desired Element	Ad-hoc arbitration	Institutional Arbitration
Consent to arbitrate	Necessary, must be included	Necessary, must be included
Scope of arbitration	Should be specified; Limits may be considered	Should be specified; Limits may be considered
Number of arbitrators	Necessary, must be included	Necessary, must be included
Presiding arbitrator	In case of more than one arbitrator method of selection should be specified; include provision for	In case of more than one arbitrator method of selection should be specified; provision for

Desired Element	Ad-hoc arbitration	Institutional Arbitration
	appointment in case two arbitrators fail to agree	appointment in case two arbitrators fail to agree specified in institution rules but if not given in rules should be included in agreement
Method of selection of arbitrators	Necessary, must be included	Necessary, must be included
Law governing the contract	Necessary, must be included	Necessary, must be included
Law governing the arbitration & curial law	Advisable to include in the agreement	Necessary to mention that institution rules will apply
Ad hoc or institutional arbitration	Must be stated clearly	Must be stated clearly
Qualifications of arbitrators	Advisable to include in the agreement	Advisable to include in the agreement
Seat of arbitration	Necessary, must be mentioned	Necessary, must be mentioned
Whether virtual hearings are permitted	Advisable though not necessary	Advisable though not necessary
Language of arbitration	Advisable to include in the agreement	Advisable to include in the agreement
Cost of arbitration	Advisable to include in the agreement	Advisable to include in the agreement

Desired Element	Ad-hoc arbitration	Institutional Arbitration
Punitive damages	Advisable to include in the agreement	Advisable to include in the agreement
Attorney fees	Advisable to include in the agreement	Advisable to include in the agreement
Arbitrator fees	Advisable to include in the agreement	Advisable to include in the agreement
Scope and limits of discovery / Group of Companies	Advisable to include in the agreement	Advisable to include in the agreement
Other Elements and Considerations		
Pre-arbitration consultation / mediation	Advisable to include in the agreement	Advisable to include in the agreement
Notice procedure	Advisable to include in the agreement	Advisable to include in the agreement
Limitation period	Advisable to include in the agreement	Advisable to include in the agreement
Confidentiality	Advisable to include in the agreement	Advisable to include in the agreement
Termination procedure	Advisable to include in the agreement	Advisable to include in the agreement
Separability or autonomy of the arbitration agreement	Advisable to include in the agreement	Advisable to include in the agreement
Fast track procedure	Advisable if fast-track procedure is likely to be suitable	Advisable if fast-track procedure is likely to be suitable

Desired Element	Ad-hoc arbitration	Institutional Arbitration
Reasoned award	Not necessary to mention in the agreement	Not necessary to mention in the agreement
Two-tier arbitration	More discussions needed on the suitability of two-tier process	More discussions needed on the suitability of two-tier process

8.2 Recommendations for growth of arbitration eco-system of India

Biggest problem in the Indian context for growth of arbitration is the perspective of Indian legal fraternity (including both bar and bench) regarding arbitration. Arbitration is seen in India as a poor cousin of judicial processes. Field of arbitration is dominated by retired judges of Supreme Court and High Courts. There are no legal professionals who specialize in arbitration from the start of their career to the end of their career. Advocates and judges who spend their whole life in courtrooms cannot be expected to bring a fresh perspective to arbitration. This means that arbitration process is no different from court processes in India thus killing its attractiveness as an alternative dispute resolution process.

The other major problem related to arbitration is rooted in the legal education of the country. While in rare cases, a law student may have had some exposure to arbitration process, it is almost impossible for an undergraduate or postgraduate law student to learn as part of his curriculum or internship basics about drafting of an arbitration agreement whether domestic or international. The absence of inputs regarding drafting of arbitration agreements at the education stage means that most lawyers in India treat arbitration clause in an agreement as a copy-paste job that needs no application of mind.

If arbitration has to be promoted as a dispute settlement system in international agreements in India, there needs to be a paradigm change among advocates, judges, and

legal academicians. Arbitration should not be seen as watered-down version of court processes. A cadre of arbitration professionals (other than retired judges and government officers) needs to be developed. Advocates who act as arbitration attorneys or arbitrators must be given the same level of respect and status as accorded to High Court and Supreme Court advocates and judges.

The field of arbitration in India will gain a lot if it expands to include engineers, managers and other professionals. One need not have studied law for three or five years if one is otherwise qualified and has industry-relevant experience. It is recommended that the government considers having short-term courses for such engineers, managers and other professionals to train them to act as arbitrators and even arbitration attorneys. This may need some modification in existing laws which may also be considered by the Parliament.

Most importantly, all law students must be trained in drafting of arbitration agreements with due importance of all elements of arbitration agreements discussed in this study.

8.3 Recommendations for developing India as a third-country seat of arbitration

Emergence of India as a third-country center of arbitration international commercial agreements of Asia and Africa is likely to remain wishful thinking unless India takes steps recommended above. A country where arbitration profession is dominated by retired judges (and where there are no arbitration professionals) cannot hope to be recognized by other countries as a center of arbitration.

For a country to develop as third country center of arbitration, the key is that arbitration professionals of the country should command respect first in the home country and subsequently globally. The only two categories of advocates under the Advocates Act are advocates and senior advocates. Not a single committed arbitration professional has ever been designated as a senior advocate under section 16[1] of the Advocates Act. That surely speaks volumes about the way India looks at the discipline of arbitration.

[1] Laws (India): The Advocates Act, 1961

As long as arbitration remains a poor cousin of litigation within India, there is absolutely no way that arbitration will grow as a profession in India. Presently, it is rare to find an Indian professional who can draft a good detailed arbitration agreement for a high value international contract.

Arbitration agreements are the foundation on which the domain of arbitration proceedings stands. In the absence of adequate attention to arbitration agreements by law schools of India, young Indian lawyers often do not even understand the importance of arbitration agreements. Suppose an agreement is being negotiated between two companies of two Asian / African countries. In case they wish to select India as the seat of arbitration, they will need to get an Indian lawyer to draft the arbitration clause taking care of the law of the contract as well as the Indian law of arbitration. Searching for such an Indian lawyer may indeed be like looking for a needle in the haystack. In contrast, it is so easy to locate such a lawyer in London, New York or even Singapore. Indian law schools must understand this reality and work to correct this situation.

Indian arbitration institutions can also play an important role in this regard by providing better support to international companies and lawyers who are considering arbitration agreements providing for India as seat of arbitration.

It is also recommended that the law related to arbitrators be suitably amended to remove the overriding role of judiciary. For example, under sub-section 11(3A) of the Arbitration and Conciliation Act[2], the power to designate arbitral institutions has been vested with Supreme Court and High Courts. It is suggested that this power may be vested in a separate body constituted for regulation and promotion of arbitration in India. Such a body with governing board consisting majorly of non-judicial members drawing from the corporate world and arbitration professionals can help and steer the growth of arbitration in India. The proposed body can also encourage Indian law schools to develop specialized courses for arbitration professionals. The proposed body should work with law schools to initiate and encourage continuous debate and deliberations across the country on different types of arbitration agreements / clauses.

[2] Laws (India): The Arbitration and Conciliation Act, 1996

8.4 Recommendations for Indian law schools and academicians

Arbitration clauses / agreements being used in international agreements in India are constantly changing based not only on the needs and but also on the level of knowledge of the field among persons involved in drafting agreements and such related documents. Close symbiotic relationship needs to develop between law departments / schools / universities on one hand and practicing lawyers, law officers and entrepreneurs / business persons on the other hand. Academic institutions should get more involved in helping the practical world draft better arbitration clauses / agreements and should also in the process constantly upgrade its knowledge of the evolving trends in the field. This will also help overcome the problem faced by academic institutions due to confidentiality of contracts (as well as arbitration awards) between commercial entities.

As the academic world gets involved in studying arbitration clauses / agreements in international agreements, the effect of different types of arbitration clauses / agreements on outcomes (awards) at domestic as well as international commercial arbitration tribunals should also be studied on a continuing basis. If a specific clause is consistently interpreted in a particular manner by international commercial arbitration tribunals in major arbitration centres whether in India or abroad, it stands to reason that Indian academic community should become aware of it and, after applying its mind on the issue, should advise practicing lawyers, law officers and entrepreneurs / business persons in India appropriately.

As a concluding remark, the authors will like to say that the field of arbitration clauses / agreements needs a strong body of academic researchers who will constantly study the changing practices in light of awards by various arbitration tribunals in India and across the world and will advise practicing lawyers, law officers and entrepreneurs / business persons on the basis of their studies. Of course, there is no denying that India also needs properly educated and trained practicing lawyers, law officers and entrepreneurs / business persons who understand the nuances and importance of arbitration clauses / agreements and are willing to take professional assistance and support from academicians working in the field.

Appendix A
Select Arbitration Clauses in Ad-hoc Agreements in International Agreements in India

The arbitration clauses / agreements given herein below are either extracted from reported judgements of Supreme Court / High Courts or are taken from websites of public sector undertakings of India. In a select few cases, reliance is placed on agreements shared in confidence by parties / law firms. In such cases, care has been taken to hide the identity of the concerned parties.

A1. Bharat Aluminium and Kaiser Aluminium[1]

Article 17.1 - Any dispute or claim arising out of or relating to this Agreement shall be in the first instance, endeavour to be settled amicably by negotiation between the parties hereto and failing which the same will be settled by arbitration pursuant to the English Arbitration Law and subsequent amendments thereto.

Article 17.2 - The arbitration proceedings shall be carried out by two Arbitrators one appointed by BALCO and one by KATSI chosen freely and without any bias. The court of Arbitration shall be held wholly in London, England and shall use English language in the proceeding. The findings and award of the Court of Arbitration shall be final and binding upon the parties.

[1] Domestic Court Judgements: Bharat Aluminium Company and Ors. v. Kaiser Aluminium Technical Service, Inc. and Ors., 2012 and 2016

Article 17.3: Before entering upon the arbitration, the two Arbitrators shall appoint an Umpire. If the two arbitrators are not able to reach an agreement on the selection of an Umpire, the Umpire shall be nominated by the International Chamber of Paris.

Article 22 - Governing Law - This agreement will be governed by the prevailing law of India and in case of Arbitration, the English law shall apply.

A2. ONGC and Afcons Gunanusa[2]

1.3.2 Arbitration

Except as otherwise provided elsewhere in the contract, if any dispute, difference question or disagreement arises between the parties hereto or their respective representatives or assignees, in connection with construction, meaning, operation, effect, Interpretation of the contract or breach thereof which parties are unable to settle mutually, the same shall be referred to Arbitration as provided hereunder:

> ***1.3**.2.1 A party wishing to commence arbitration proceeding shall Invoke Arbitration Clause by giving 60 days notice to the other party. **The notice Invoking arbitration shall specify** all the points of disputes with **details of the amount claimed** to be referred to arbitration at the time of Invocation of arbitration and not thereafter. **If the claim is in foreign currency, the claimant shall indicate its value in Indian Rupee for the purpose of constitution of the arbitral tribunal.***
>
> ***1.3**.2.2 The number of the arbitrators and the appointing authority will be as under:*

[2] Domestic Court Judgements: Oil and Natural Gas Corporation Ltd. v. Afcons Gunanusa JV, 2022

Claim amount (excluding claim for interest and counter claim, if any)	***Number of arbitrator***	***Appointing Authority***
Upto Rs. 5 Crore	*Sole Arbitrator*	*ONGC*
Above Rs. 5 Crore	*3 Arbitrators*	*One arbitrator by each party and the 3rd arbitrator, who shall be the presiding arbitrator, by the two arbitrators.*

1.3.2.3 The parties agree that they shall appoint only those persons as arbitrators who accept the conditions of this arbitration clause. No person shall be appointed as arbitrator or presiding arbitrator who does not accept the conditions of this arbitration clause.

[...]

1.3*.2.8 Arbitrators shall be paid fees at the following rates.*

Amount of Claims and Counter Claims (excluding interest)	***Lump sum fees (including fees for study of pleadings, case material, writing of the award, secretarial charges etc.) payable to each arbitrator (to be shared equally by the parties)***
Upto Rs. 50 lac	*Rs. 7,500 per meeting subject to a ceiling of Rs. 75,000/-*
Above Rs. 50 lac to Rs. 1 Crore	*Rs. 90,000/- plus Rs. 1,200/- per lac or a part there of subject to a ceiling of Rs. 1,50,000/-*
Above Rs. 1 Crore and upto Rs. 5 Crores	*Rs. 1,50,000/- plus Rs. 22,500/- per crore or a part there of subject to a ceiling of Rs. 2,40,000/-*
Above Rs. 5 Crores and upto Rs. 10 Crores	*Rs. 2,40,000/- plus Rs. 15,000/- per crore or a part there of subject to a ceiling of Rs. 3,15,000/-*
Above Rs. 10 Crores	*Rs. 3,15,000/- plus Rs. 12,000/- per crore or a part there of subject to a ceiling of Rs. 10,00,000/-*

For the disputes above Rs. 50 lacs, the Arbitrators shall be entitled to an additional amount @ 20% of the fee payable as per the above fee structure.

1.3.*2.9 If after commencement of Arbitration proceedings, the parties agree to settle the dispute mutually or refer the dispute to conciliation, the arbitrators shall put the proceedings in abeyance until such period as requested by the parties. Where the proceedings are put in abeyance or terminated on account of mutual settlement of dispute by the parties, the fees payable to the arbitrators shall be determined as under:*

> *I) 25% of the fees if the claimant has not submitted statement of claim.*
>
> *II) 50% of the fees if the award is pending.*

1.3.*2.10 Each party shall pay its share of arbitrator's fee in stages as under:*

> *(I) 25% of the fees on filing of reply to the statement of claims.*
>
> *(II) 25% of the fees on the competition of evidence.*
>
> *(III) Balance 50% at the time when award is given to the parties.*

[...]

1.3.*2.14 Subject to aforesaid, provisions of the Arbitration and Conciliation Act, 1996 and any statutory modifications or re-enactment thereof shall apply to the arbitration proceedings under this clause."*

(emphasis supplied)

A3. Bharti Airtel Limited[3]

25 DISPUTE RESOLUTION

25.1 Without derogation from the Dispute Parties' submission to arbitration under this Clause 25, as a preliminary step in order to avoid conflict and maintain good relations, any Dispute may be referred (at the option of any Dispute Party, by notice in writing to the other Party) to the chief executive officer of both Parties in order to determine an amicable solution can be exercised by the Dispute Parties. If no amicable solution is arrived at by the parties within 45 days of the date of such notice in writing of referral, any Dispute Party shall be entitled to resolve the Dispute by arbitration in accordance with this Clause 25.

25.2 Any dispute, difference, controversy or claim ('Dispute') of any kind whatsoever between the Parties arising under, out of or in connection with this RIO (including without limitation, any question regarding its existence, validity or termination) shall be referred to arbitration in accordance with the Rules of the Arbitration and Conciliation Act, 1996 as in force on the date of this RIO and as amended hereby and:

25.2.1 there shall be three arbitrators;

25.2.2 the place of the arbitration shall be New Delhi; and

25.2.3 the language of the arbitration shall be in English.

25.3 Each party shall appoint an arbitrator each (who shall not be an employee, director, consultant of, or adviser to, either Dispute Party) and two appointed arbitrators shall appoint the third arbitrator and failing agreement between the Dispute Parties within 14 days of the notice of a Dispute, the arbitrators shall at the

[3] Arbitration Agreements: Bharti Airtel Limited, Reference Interconnection Offer, p. 22-23

request of either party be appointed in accordance with the provisions of Arbitration and Conciliation Act, 1996.

25.4 The award rendered in any arbitration commenced hereunder shall be final and conclusive and judgment thereon may be entered in any court having jurisdiction for its enforcement.

25.5 Nothing in this Clause 25 prevents either Party from seeking urgent or interlocutory relief from or against the other Party by reason of the breach by such other Party of its obligations under this RIO.

A4. Bharat Heavy Electricals Limited[4]

7. Except as provided elsewhere in this Contract, in case amicable settlement is not reached between the Parties, in respect of any dispute or difference; arising out of the formation, breach, termination, validity or execution of the Contract; or, the respective rights and liabilities of the Parties; or, in relation to interpretation of any provision of the Contract; or, in any manner touching upon the Contract, then, either Party may, by a notice in writing to the other Party refer such dispute or difference to the Sole Arbitration to be agreed by both parties in accordance with Arbitration and Conciliation Act 1996 or the amendments made thereof and the rules thereunder. The Arbitrator shall pass a reasoned award and the award of the Arbitrator shall be final and binding upon the Parties. It is a term of contract that the party initiating arbitration shall specify the dispute or disputes to be referred to arbitration under this clause together with the amount or amounts claimed in respect of each such dispute. Notwithstanding the existence of any dispute or difference or any reference for the arbitration, the vendor shall proceed with and continue without hindrance the performance of

[4] Arbitration Agreements: Bharat Heavy Electricals Limited, Agreement, p.2

the work under the contract with due diligence and expedition in a professional manner.

8. *Subject as aforesaid, the provisions of Arbitration and Conciliation Act 1996 (India) or statutory modifications or re-enactments thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceedings under this clause, the seat of arbitration shall be at Hyderabad.*

9. *The cost of arbitration shall be borne as per the award of the Arbitrator. Subject to the arbitration in terms of Clause above, the Courts at Hyderabad, Telangana State shall have exclusive jurisdiction over any matter arising out of or in connection with this Contract.*

10. *The award given by the arbitrator is binding on both parties.*

11. *This Agreement shall be governed by, interpreted and construed in accordance with laws of India applicable therein, other than rules governing conflicts of laws. The parties irrevocably attorn to the jurisdiction of the court of Hyderabad.*

A5. GAIL (India) Limited[5]

6.0 DISPUTE RESOLUTION AND ARBITRATION SECTION

6.1 CONCILIATION

GAIL (India) Limited has framed the Conciliation Rules 2010 in conformity with Part – III of the Arbitration and Conciliation Act 1996 as amended from time to time for speedier, cost effective and amicable settlement of disputes through conciliation. All issue(s)/dispute(s) arising under the Contract, which cannot be mutually resolved within a reasonable time, may be referred for

[5] Arbitration Agreements: GAIL (India) Limited, General Conditions of Contract for Procurement of Proprietary/ OEM- Services, Section VI, p. 18-19

conciliation in accordance with GAIL Conciliation Rules 2010 as amended from time to time A copy of the said rules have been made available on GAIL's web site i.e www.gailonline.com.

Where invitation for Conciliation has been accepted by the other party, the Parties shall attempt to settle such dispute(s) amicably under Part-III of the Arbitration and Conciliation Act, 1996 and GAIL (India) Limited Conciliation Rules, 2010. It would be only after exhausting the option of Conciliation as an Alternate Dispute Resolution Mechanism that the Parties hereto shall invoke Arbitration Clause. For the purpose of this clause, the option of 'Conciliation' shall be deemed to have been exhausted, even in case of rejection of 'Conciliation' by any of the Parties.

6.2 ARBITRATION

All issue(s)/dispute(s) excluding the matters that have been specified as excepted matters and listed at clause no. 6.2.6 and which cannot be resolved through Conciliation, such issue(s)/dispute(s) shall be referred to arbitration for adjudication by Sole Arbitrator.

The party invoking the Arbitration shall have the option to either opt for Ad-hoc Arbitration as provided at Clause 6.2.1 below or Institutionalized Arbitration as provided at Clause 2.2 below, the remaining clauses from 6.2.3 to 6.2.7 shall apply to both Ad-hoc and Institutional Arbitration:-

6.2.1 On invocation of the Arbitration clause by either party, GAIL shall suggest a panel of three independent and distinguished persons (Retd Supreme Court & High Court Judges only) to the other party from the Panel of Arbitrators maintained by 'Delhi International Arbitration Centre (DIAC) to select any one among them to act as the Sole Arbitrator. In the event of failure of the other party to select the Sole Arbitrator within 30 days from the receipt of the communication

from GAIL suggesting the panel of arbitrators, the right of selection of the sole arbitrator by the other party shall stand forfeited and GAIL shall appoint the Sole Arbitrator from the suggested panel of three Arbitrators for adjudication of dispute(s). The decision of GAIL on the appointment of the sole arbitrator shall be final and binding on the other party. The fees payable to Sole Arbitrator shall be governed by the fee Schedule of "Delhi International Arbitration Centre'.

OR

6.2.2 *If a dispute arises out of or in connection with this contract, the party invoking the Arbitration shall submit that dispute to any one of the Arbitral Institutions i.e ICADR/ICA/DIAC/SFCA and that dispute shall be adjudicated in accordance with their respective Arbitration Rules. The matter shall be adjudicated by a Sole Arbitrator who shall necessarily be a Retd Supreme Court/High Court Judge to be appointed/nominated by the respective institution. The cost/expenses pertaining to the said Arbitration shall also be governed in accordance with the Rules of the respective Arbitral Institution. The decision of the party invoking the Arbitration for reference of dispute to a specific Arbitral institution for adjudication of that dispute shall be final and binding on both the parties and shall not be subject to any change thereafter. The institution once selected at the time of invocation of dispute shall remain unchanged.*

6.2.3 *The cost of arbitration proceedings shall be shared equally by the parties.*

6.2.4 The Arbitration proceedings shall be in English language and the seat, venue and place of Arbitration shall be New Delhi, India only.

6.2.5 Subject to the above, the provisions of Arbitration & Conciliation Act 1996 and any amendment thereof shall be applicable. All matter relating to this Contract and arising out of invocation of Arbitration clause are subject to the exclusive jurisdiction of the Court(s) situated at New Delhi.

6.2.6 List of Excepted matters:

a) Dispute(s)/issue(s) involving claims below Rs 25 lakhs and above Rs 25 crores.

b) Dispute(s)/issue(s) relating to indulgence of Service Provider/ Contractor/ Vendor/ Bidder in corrupt/ fraudulent/ collusive/ coercive practices and/ or the same is under investigation by CBI or Vigilance or any other investigating agency or Government.

c) Dispute(s)/issue(s) wherein the decision of Engineer-In-Charge/owner/GAIL has been made final and binding in terms of the Contract.

6.2.7. Disputes involving claims below Rs 25 Lakhs and above Rs. 25 crores:- Parties mutually agree that dispute(s)/issue(s) involving claims below Rs 25 Lakhs and above Rs 25 crores shall not be subject matter of Arbitration and are subject to the exclusive jurisdiction of the Court(s) situated at New Delhi.

6.3. GOVERNING LAW AND JURISDICTION:

The Contract shall be governed by and construed in accordance with the laws in force in India. The Parties hereby submit to the exclusive jurisdiction of the Courts situated at New Delhi for adjudication of disputes, injunctive reliefs, actions and proceedings, if any, arising out of this Contract.

6.4. DISPUTES BETWEEN CPSE'S / GOVERNMENT DEPARTMENT'S/ ORGANIZATIONS

Subject to conciliation as provided above, in the event of any dispute or difference relating to the interpretation and application of the provisions of commercial contract(s) between Central Public Sector Enterprises (CPSEs/ Port Trusts inter se and also between CPSEs and Government Departments /Organizations (excluding disputes concerning Railways, Income Tax, Customs & Excise Departments), such dispute or difference shall be taken up by either party for resolution through AMRCD as mentioned in OPE OM No. 4(1)/2013-DPE(GM)/FTS-1835 dated 22-05- 2018.

Any party aggrieved with the decision of the Committee at the First level (tier) may prefer an appeal before the Cabinet Secretary at the Second level (tier) within 15 days from the date of receipt of decision of the Committee at First level, through it's administrative Ministry/Department, whose decision will be final and binding on all concerned.

***6.5 CONTINUANCE OF THE CONTRACT**:*

Notwithstanding the fact that settlement of dispute(s) (if any) may be pending, the parties hereto shall continue to be governed by and perform the Services in accordance with the provisions under this Contract.

A6. GAIL (India) Limited[6]

30. DISPUTE RESOLUTION MECHANISM

30.1 Conciliation

GAIL (India) Limited has framed the Conciliation Rules 2010 in conformity with Part – III of the Arbitration and Conciliation Act 1996 as amended from time to time for speedier, cost effective and amicable settlement of disputes through conciliation. All issue(s)/dispute(s) arising under the Contract, which cannot be mutually resolved within a reasonable time, may be referred for conciliation in accordance with GAIL Conciliation Rules 2010 as amended from time to time. A copy of the said rules have been made available on GAIL's web site i.e. www.gailonline.com. Where invitation for Conciliation has been accepted by the other party, the Parties shall attempt to settle such dispute(s) amicably under Part-III of the Arbitration and Conciliation Act, 1996 and GAIL (India) Limited Conciliation Rules, 2010. It would be only after exhausting the option of Conciliation as an Alternate Dispute Resolution Mechanism that the Parties hereto shall invoke Arbitration Clause. For the purpose of this clause, the option of 'Conciliation' shall be deemed to have been exhausted, even in case of rejection of 'Conciliation' by any of the Parties.

30.2 Arbitration

All issue(s)/dispute(s) excluding the matters that have been specified as excepted matters and listed at clause no. 30.2.6 and which cannot be resolved through Conciliation, such issue(s)/dispute(s) shall be referred to arbitration for adjudication by Sole Arbitrator. The party invoking the Arbitration shall have the option to either opt for Ad-hoc Arbitration as provided at Clause 30.2.1 below or

[6] Arbitration Agreements: GAIL (India) Limited, General Conditions of Contract [Rev.1] for Procurement of Goods, April 2022, p.32-35

Institutionalized Arbitration as provided at Clause 30.2.2 below, the remaining clauses from 30.2.3 to 30.2.7 shall apply to both Ad-hoc and Institutional Arbitration:-

30.2.1 On invocation of the Arbitration clause by either party, GAIL shall suggest a panel of three independent and distinguished persons (Retd Supreme Court & High Court Judges only) to the other party from the Panel of Arbitrators maintained by 'Delhi International Arbitration Centre (DIAC) to select any one among them to act as the Sole Arbitrator. In the event of failure of the other party to select the Sole Arbitrator within 30 days from the receipt of the communication from GAIL suggesting the panel of arbitrators, the right of selection of the sole arbitrator by the other party shall stand forfeited and GAIL shall appoint the Sole Arbitrator from the suggested panel of three Arbitrators for adjudication of dispute(s). The decision of GAIL on the appointment of the sole arbitrator shall be final and binding on the other party. The fees payable to Sole Arbitrator shall be governed by the fee Schedule of "Delhi International Arbitration Centre'.

OR

30.2.2 If a dispute arises out of or in connection with this contract, the party invoking the Arbitration shall submit that dispute to any one of the Arbitral Institutions i.e. ICADR/ICA/DIAC/SFCA and that dispute shall be adjudicated in accordance with their respective Arbitration Rules. The matter shall be adjudicated by a Sole Arbitrator who shall necessarily be a Retd. Supreme Court/High Court Judge to be appointed/nominated by the respective institution. The cost/expenses pertaining to the said Arbitration shall also be governed in accordance with the Rules of the respective Arbitral Institution. The decision of the party invoking the Arbitration for reference of dispute to a

specific Arbitral institution for adjudication of that dispute shall be final and binding on both the parties and shall not be subject to any change thereafter. The institution once selected at the time of invocation of dispute shall remain unchanged.

30.2.3 The cost of arbitration proceedings shall be shared equally by the parties.

30.2.4 The Arbitration proceedings shall be in English language and the seat, venue and place of Arbitration shall be New Delhi, India only.

30.2.5 Subject to the above, the provisions of Arbitration & Conciliation Act 1996 and any amendment thereof shall be applicable. All matter relating to this Contract and arising out of invocation of Arbitration clause are subject to the exclusive jurisdiction of the Court(s) situated at New Delhi.

30.2.6 List of Excepted matters:

(i) Dispute(s)/issue(s) involving claims below Rs 25 lakhs and above Rs 25 crores.

(ii) Dispute(s)/issue(s) relating to indulgence of Supplier/Vendor/Bidder in corrupt / fraudulent /collusive / coercive practices and/or the same is under investigation by CBI or Vigilance or any other investigating agency or Government.

(iii) Dispute(s)/issue(s) wherein the decision of Engineer-In-Charge/owner/GAIL has been made final and binding in terms of the Contract.

30.2.7 Disputes involving claims below Rs 25 Lakhs and above Rs. 25 crores:-Parties mutually agree that dispute(s)/issue(s) involving claims below Rs 25 Lakhs and above Rs 25 crores shall not be subject matter of Arbitration

and are subject to the exclusive jurisdiction of the Court(s) situated at New Delhi.

30.3 Governing Law and Jurisdiction:

The Contract shall be governed by and construed in accordance with the laws in force in India. The Parties hereby submit to the exclusive jurisdiction of the Courts situated at New Delhi for adjudication of disputes, injunctive reliefs, actions and proceedings, if any, arising out of this Contract.

30.4 Disputes between CPSE's/Government Department's/ Organizations

Subject to conciliation as provided above, in the event of any dispute (other than those related to taxation matters) or difference relating to the interpretation and application of the provisions of commercial contract(s) between Central Public Sector Enterprises (CPSEs/ Port Trusts) inter se and also between CPSEs and Government Departments /Organizations), such dispute or difference shall be taken up by either party for resolution only through AMRCD as mentioned in OPE OM No. 4(1)/2013-DPE(GM)/FTS-1835 dated 22-05-2018.

Any party aggrieved with the decision of the Committee at the First level (tier) may prefer an appeal before the Cabinet Secretary at the Second level (tier) within 15 days from the date of receipt of decision of the Committee at First level, through it's administrative Ministry/Department, whose decision will be final and binding on all concerned.

The above provisions mentioned at clause no. 30.1 to 30.4 shall supersede provisions relating to Conciliation, Arbitration, Governing Law & Jurisdiction and Disputes between CPSE's/ Government Department's/ Organizations mentioned elsewhere in tender document.

30.5 Continuance of the Contract:

Notwithstanding the fact that settlement of dispute(s) (if any) may be pending, the parties hereto shall continue to be governed by and perform the work in accordance with the provisions under this Contract and no payment due or payable to the Supplier shall be withheld on account of such proceedings.

30.6 Non-Applicability of Arbitration Clause in Case of Banning of Vendors/ Suppliers / Bidders indulged in Fraudulent/ Coercive Practices

Notwithstanding anything contained contrary in GCC or elsewhere in the Purchase Order, in case it is found that the Bidder/ Supplier indulged in fraudulent/ coercive practices at the time of bidding, during execution of the Contract and/or on other grounds as mentioned in GAIL's "Procedure for action in case Corrupt/ Fraudulent/ Collusive/Coercive Practices" (Appendix-I), the Bidder/Supplier shall be banned (in terms of aforesaid procedure) from the date of issuance of such order by GAIL (India) Ltd., to such Bidder/Supplier.

The Bidder /Supplier understands and agrees that in such cases where Bidder /Supplier has been banned (in terms of aforesaid procedure) from the date of issuance of such order by GAIL, such decision of GAIL shall be final and binding on the Bidder /Supplier and the 'Arbitration Clause' mentioned in the GCC or elsewhere in the Purchase Order shall not be applicable for any consequential issue /dispute arising in the matter.

A7. NTPC Limited[7]

6.0 SETTLEMENT OF DISPUTES

6.1 Mutual Consultation

If any dispute of any kind whatsoever shall arise between the Employer and the Contractor in connection with or arising out of the Contract, including without prejudice to the generality of the foregoing, any question regarding its existence, validity or termination, or the execution of the Facilities, whether during the progress of the Facilities or after their completion and whether before or after the termination, abandonment or breach of the Contract, the parties shall seek to resolve any such dispute or difference by mutual consultation. If the parties fail to resolve such a dispute or difference by mutual consultation, then the dispute may be settled through Expert Settlement Council / Arbitration / other remedies available under the applicable laws.

6.2 Resolution of Dispute through Expert Settlement Council

If the parties fail to resolve such a dispute or difference by mutual consultation, the dispute if the parties agree, may be referred to Conciliation in cases involving disputed amount up to Rs 250 crores, which is to be arrived at considering the claim and counter claim of the parties to the dispute.

6.2.1 Invitation for Conciliation:

6.2.1.1 A party shall notify the other party in writing about such a dispute it wishes to refer for Conciliation within a period of 30 days from the date of raising of the dispute in case of failure to resolve the same through mutual consultation. Such Invitation for Conciliation shall contain sufficient information as to the dispute to enable the other

[7] Arbitration Agreements: NTPC Limited, Bidding Documents for Procurement of 0.2 MMT of Imported Coal on for Power Station Basis for NTPC Lara Power Plant, Vol. II, p.7-16

party to be fully informed as to the nature of the dispute, amount of the monetary claim, if any, and apparent cause of action.

6.2.1.2 Upon acceptance of the invitation to conciliate, the other party shall submit its counter claim, if any, within a period of 30 days from the date of the invitation to conciliate. If the other party rejects the invitation or disputed amount exceeds Rs 250 crores, there will be no Conciliation proceedings. There shall be no Conciliation where claim amount is only up to Rs 5 lakhs.

6.2.1.3 If the party initiating Conciliation does not receive a reply within thirty days from the date on which it sends the invitation, or within such other period of time as specified in the invitation, it shall treat this as a rejection of the invitation to conciliate from the other party.

6.2.2 Conciliation:

6.2.2.1 Where Invitation for conciliation has been furnished under GCC sub clause 6.2.1, the parties shall attempt to settle such dispute through Expert Settlement Council (ESC) which shall be constituted by CMD, NTPC.

6.2.2.2 ESC will be formed from experts comprising three members from the panel of conciliators maintained by NTPC. However, there will be single member ESC for disputes involving claim and counter claim (if any) up to Rs. 1 crore. CMD will have authority to reconstitute an ESC to fill any vacancy.

6.2.2.3 The eligible persons for consideration for empanelment in the panel of conciliators shall be amongst Retired Civil Servants of Govt. of India not below the rank of Additional Secretary, Retired Judges, Retired Directors/ Chairman of any Maharatna / Navratna company in India other than NTPC Ltd, Retired Independent Directors who have served on the Board of any Maharatna / Navratna company in India other than NTPC Ltd and Independent experts in their respective fields preferably registered with the

Indian Council of Arbitration or Delhi International Arbitration Centre or Federation of Indian Chambers of Commerce and Industry or SCOPE Arbitration Forum.

6.2.3 Proceedings before ESC:

6.2.3.1 The claimant shall submit its statement of claims along with relevant documents to ESC members, and to the party(s) indicated in the appointment letter within 30 days of the issue of the appointment letter. The respondent shall file its reply and counter claim (if any) within 30 days of the receipt of the statement of claims. Parties may file their rejoinder/additional documents, if any in support of their claim/counterclaim within next 15 days. No documents shall be allowed thereafter, except with the permission of ESC.

6.2.3.2 The parties shall file their claim and counterclaim in the following format

a. Chronology of the dispute

b. Brief of the contract

c. Brief history of the dispute

d. Issues

Sl. No.	***Description of Claims/ Counter claims***	***Amount (in foreign currency/INR)***	***Relevant Contract Clause***

e. Details of Claim(s)/Counter Claim(s)

f. Basis/Ground of claim(s)/counter claim(s) (along with relevant clause of contract

Statement of claims shall be restricted to maximum limit of 20 pages.

6.2.3.3 In case of 3 members ESC, 2 members will constitute a valid quorum and the meeting can take place to proceed in the matter after seeking consent from the member who is not available. However, ESC recommendations will be signed by all the members.

6.2.3.4 The parties shall be represented by their in house employees. No party shall be allowed to bring any advocate or outside consultant/advisor/agent to contest on their behalf. Ex-officers of NTPC who have handled the subject matter in any capacity shall not be allowed to attend and present the case before ESC on behalf of contractor. However, ex-employees of parties may represent their respective organizations. Parties shall not claim any interest on claims/counter-claims from the date of notice invoking Conciliation till execution of settlement agreement, if so arrived. In case, parties are unable to reach a settlement, no interest shall be claimed by either party for the period from the date of notice invoking Conciliation till the date of ESC recommendations and 30 days thereafter in any further proceeding.

6.2.3.5 ESC will conclude its proceedings in maximum 10 meetings, and give its recommendations within 90 days of its first meeting. ESC will give its recommendations to both the parties recommending possible terms of settlement. CMD, NTPC may extend the time/number of meetings, in exceptional cases, if ESC requests for the same with sufficient reasons.

6.2.3.6 Depending upon the location of ESC members and the parties, the venue of the ESC meeting shall be either Delhi/Mumbai/Kolkata/Chennai or any other city whichever is most economical from the point of view of travel and stay etc. All the

expenditure incurred in ESC proceedings shall be shared by the parties in equal proportion.

6.2.4 Fees & Facilities to the Members of the ESC

The cost of conciliation proceedings including but not limited to fees for Conciliator, Airfare, Local transport, Accommodation, cost towards conference facility etc shall be as provided herein below:

Sl. No.	***Fees/ Facility***	***Entitlement***
1	*Fees*	*As paid to NTPC Independent Directors [Presently Rs. 20,000 per meeting]. In addition each conciliator to be paid Rs.10,000 for attending meeting to authenticate the settlement agreement. – max. of Rs. 2,10,000 per case per Conciliator.*
2	*Secretarial expenses*	*Rs. 10,000 lump sum (to 1 member only)*
3	*Transportation in the city of the meeting*	*Car as per entitlement or Rs. 2,000 per day*
4	*Venue for meeting*	*NTPC conference rooms*
Facilities to be provided to the out-stationed member		
5	*Travel from the city of residence to the city of meeting*	*As per entitlement of Independent Directors. Executive class air tickets/ first class AC train tickets/ Luxury car/ reimbursement of actual fare. However, entitlement of air travel by Business class shall be subject to austerity measures, if any, ordered by Govt of India.*
6	*Transport to and fro airport/ railway station in the city of residence*	*Car as per entitlement or Rs. 3,000*
7	*Stay for out stationed members*	*As per entitlement of Independent Directors.*
8	*Transport in the city of meeting*	*Car as per entitlement or Rs. 2000 per day*

Aforesaid fees is subject to revision by NTPC from time to time and subject to government guidelines on austerity measures, if any. All the expenditure incurred in the ESC proceedings shall be shared by the parties in equal proportions. The Parties shall maintain the account of expenditure and present to the other for the purpose of sharing on conclusion of the ESC proceedings.

6.2.5 *If decision of NTPC is acceptable to the contractor, a Settlement Agreement under section 73 of the Arbitration and Conciliation Act 1996 will be signed within 15 days of contractor's acceptance and same shall be authenticated by all the ESC members. Parties are free to terminate conciliation proceedings at any stage as provided under the Arbitration and Conciliation Act 1996.*

6.2.6 *The parties shall keep confidential all matters relating to the conciliation proceedings. Parties shall not rely upon them as evidence in arbitration proceedings or court proceedings.*

6.3 Arbitration

6.3.1 *If the process of mutual consultation and/or ESC fails to arrive at a settlement between the parties as mentioned at GCC Sub-Clauses 6.1 & 6.2 above, Employer or the Contractor may, within Thirty (30) days of such failure, give notice to the other party, with a copy for information to the ESC (as applicable), of its intention to commence arbitration, as hereinafter provided, as to the matter in dispute, and no arbitration in respect of this matter may be commenced unless such notice is given. The mechanism of settling the disputes through arbitration shall be applicable only in cases where the disputed amount (i.e. total amount of Claims excluding claims of interest) does not exceed Rs. 25 crores. In case the disputed amount exceeds Rs. 25 Crores, the parties shall be within their rights to take recourse to remedies as may be available to them under the applicable laws other than Arbitration after prior intimation to the other party. There shall be no arbitration where the claim amount is only up to Rs. 5 lakhs.*

The parties at the time of invocation of arbitration shall submit all the details of the claims and the counter claims including the Heads/Sub-heads of the Claims/Counter-Claims and the documents relied upon by the parties for their respective claims and counterclaims. The parties shall not file any documents/details of the claims and counter-claims thereafter.

The claims and the counter claims raised by the parties at the time of invocation of the arbitration shall be final and binding on the parties and no further change shall be allowed in the same at any stage during arbitration under any circumstances whatsoever.

The parties to the contract shall invoke arbitration within Six months from the date of completion of the Facilities under the contract or the termination of the contract as the case may be and the parties shall not invoke arbitration later on after expiry of the said period of six months. The parties shall not invoke arbitration other than in the case of completion of the Facilities or the termination of the contract as mentioned above.

Notwithstanding the above, in case of disputes with Indian Contractor who is a Central Government Department /Enterprise /organisation or a State Level Public Enterprise (SLPE), the aforesaid limit of Rs 25 crores shall not be applicable and arbitration proceeding may be commenced irrespective of the amount involved in dispute if the dispute could not be resolved through Conciliation as brought out at GCC Sub Clause 6.2 above.

6.3.2 *Any dispute in respect of which a notice of intention to commence arbitration has been given, in accordance with Sub-Clause 6.3.1 above, shall be finally settled by arbitration.*

6.3.3 *Any dispute raised by a party to arbitration shall be adjudicated by a Sole Arbitrator appointed by CMD, NTPC from the List of empanelled Arbitrators of NTPC in the following manner:-*

a) *A party willing to commence arbitration proceeding shall invoke Arbitration Clause by giving 60 days notice to the other party.*

b *If the Arbitrator so appointed dies, resigns, becomes incapacitated or withdraws for any reason from the proceedings, it shall be lawful for CMD, NTPC to appoint another person in his place in the same manner as aforesaid. Such person shall proceed with the reference from the stage where his predecessor had left.*

c) *It is agreed between the parties that the Arbitration proceedings shall be conducted as per the provisions of Fast Track Procedure as provided under section 29B of the Arbitration and Conciliation Act, 1996 as amended.*

d) *Arbitrator shall be paid fees at the following rates:*

Amount of Claims and Counter Claims (excluding interest)	***Lump sum fees (including fees for study of pleadings, case material, writing of the award, secretarial charges etc.) payable to each arbitrator (to be shared equally by the parties)***
Up to Rs.50 Lakhs	*Rs. 10,000/- per meeting subject to a ceiling of Rs. 1,00,000/-.*
Above Rs.50 lakhs to Rs.1 Crore	*Rs.1,35,000/- plus Rs.1,800/- per lakh or a part thereof subject to a ceiling of Rs.2,25,000/-.*
Above Rs. 1 Crore and up to Rs.5 Crore	*Rs.2,25,000/- plus Rs.33,750/- per crore or a part thereof subject to a ceiling of Rs.3,60,000/-.*
Above Rs.5 Crore and up to Rs.10 Crore	*Rs. 3,60,000/- plus Rs.22,500/- per crore or a part thereof subject to a ceiling of Rs.4,72,500/-.*
Above Rs. 10 Crore	*Rs. 4,72,500/- plus Rs.18,000/- per crore or part thereof subject to a ceiling of Rs. 10,00,000/-.*

If the claim is in foreign currency, the SBI Bills Selling Exchange rate prevailing on the date of claim shall be used for the purpose of converting the claim in Indian Rupee which may be used for determining the arbitration fee as brought out above.

e) If after commencement of the Arbitration proceedings, the parties agree to settle the dispute mutually or refer the dispute to Conciliation, the arbitrator shall put the proceedings in abeyance until such period as requested by the parties. Where the proceedings are put in abeyance or terminated on account of mutual settlement of dispute by the parties, the fees payable to the arbitrator shall be determined as under:

(i) 40% of the fees if the Pleadings are complete.

(ii) 60% of the fees if the Hearing has commenced.

(iii) 80% of the fees if the Hearing is concluded but the Award is yet to be passed.

f) Each party shall pay its share of arbitrator's fees in stages as under:

(i) 40 % of the fees on Completion of Pleadings.

(ii) 40% of the fees on Conclusion of the Final Hearing.

(iii) 20% at the time when arbitrator notifies the date of final award.

g) The Claimant shall be responsible for making all necessary arrangements for the travel/ stay of the Arbitrator including venue of arbitration, hearings. The parties shall share the expenses for the same equally.

h) The Arbitration shall be held at Delhi only.

i) The Arbitrator shall give reasoned and speaking award and it shall be final and binding on the parties.

j) Subject to the aforesaid conditions, provisions of the Arbitration and Conciliation Act, 1996 and any statutory modifications or re-enactment thereof shall apply to the arbitration proceedings under this clause.

6.34 In case the Indian Contractor is a Central Government Department/Enterprise/organisation or a State Level Public Enterprise (SLPE), the dispute arising between the Employer and the Contractor shall be referred for resolution to the Permanent Machinery of Arbitrators (PMA) of the Department of Public Enterprises, Government of India as per Office Memorandum No. 4(1) 2011-DPE(PMA)-GL dated 12.06.2013 issued by Government of India, Ministry of Heavy Industries and Public Enterprises, Department of Public Enterprises and its further modifications and amendments.

6.4 Notwithstanding any reference to the Adjudicator or arbitration herein,

(a) the parties shall continue to perform their respective obligations under the Contract unless they otherwise agree

(b) the Owner shall pay the Contractor any monies due to the Contractor.

A8. ONGC Energy Centre Trust[8]

22.0 RESOLUTION OF DISPUTES THROUGH CONCILIATION BY OECT (Not applicable in cases valuing less than Rs 5 Lakhs)

[8] Arbitration Agreements: ONGC Energy Centre Trust Agreement for Undertaking Collaborative R&D project

In any dispute, difference, question or disagreement arises between the parties hereto or their respective representatives or assignees, in connection with construction, meaning, operation, effect, interpretation of the AGREEMENT or breach thereof which parties are unable to settle mutually, the same may first be referred to conciliation through Outside Expert Committee ("OEC") to be constituted by DG, OECT as provided hereunder:

22.1. The party desirous of resorting to conciliation shall send a notice of 30(thirty) days to the other party of its intention of referring the dispute for resolution through OEC. The notice invoking conciliation shall specify all the points of disputes with details of the amount claimed to be referred to OEC and the party concerned shall not raise any new issue thereafter.

22.2. DG, OECT shall nominate three outside experts, one each from financial /commercial, Technical and Legal fields from the Panel of outside Experts maintained by ONGC who shall together be referred to as OEC (Outside Expert Committee).

22.3. Parties shall not claim any interest on claims/counterclaims from the date of notice invoking conciliation till execution of settlement agreement, if so arrived at. In case, parties are unable to reach a settlement, no interest shall be claimed by either party for the period from the date of notice invoking conciliation till the date of OEC recommendations in any further proceedings.

22.4. The Proceedings of the OEC shall be broadly governed by Part III of the Arbitration and Conciliation ACT, 1996 including any modifications thereof.

22.5. OEC shall hear both the Parties and recommend possible terms of settlement between the Parties. The recommendations of the OEC shall be non-binding and the Parties may decide to accept or not to accept the same. Parties shall be at liberty to accept the OEC recommendation with any modification they may deem fit.

22.6. Where recommendations are acceptable to both the parties, a settlement agreement will be drawn up in terms of the OEC recommendations or with such modifications as may be agreed upon by the Parties. The settlement agreement shall be signed by both the Parties and authenticated by all the OEC members either in person or through circulation. This settlement agreement shall have the same legal status and effect as that of an arbitration award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under Section 30 of the Arbitration and Conciliation Act, 1996.

22.7. The Parties shall keep confidential all matters relating to the conciliation proceedings. Confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

22.8. The Parties shall not rely upon or introduce as evidence in any further arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings,

i. Views expressed or suggestion made by the other party in respect of a possible settlement of the dispute;

ii. Admissions made by the other party in the course of the OEC proceedings;

iii. Proposal made by the OEC;

iv. The fact that the other party had indicated his willingness to accept a proposal for the settlement made by the OEC.

22.9. The parties shall present their case before OEC only through their in-house executives. Neither party shall be represented by a lawyer unless OEC specifically desires that some issue of legal nature is in dispute that needs to be clarified /interpreted by a lawyer.

22.10. OEC members shall be entitled for the following fees and facilities (As amended from time to time):

Sr. No.	***Fees/Facility***	***Entitlement***	***To be paid by***
1	*Fees*	*Rs. 10,000 per meeting subject to maximum of Rs. 1,00,000 for the whole case. In addition, one OEC number chosen by OEC shall be paid an additional amount of Rs. 10,000 towards secretarial expenses in writing minutes/OEC recommendations.*	*Claimant*
2	*Additional Fee for attending meeting to authenticate the settlement agreement*	*Rs. 10,000/-.*	*Claimant*
3	*Transportation in the city of meeting*	*Luxury car or Rs. 1,500 per day.*	*Claimant*
4	*Venue for meeting*	*OECT conference rooms/Hotels.*	*OECT*
Facilities to be Provided to the Out-stationed member			
5	*Travel From the city of residence to the city of meeting*	*Business class air ticket/ first class train tickets/ Luxury car/ reimbursement of actual fare. However, entitlement of air travel by Business class shall be subject to austerity measures, if any, ordered by Govt of India.*	*Claimant*
6	*Transport to and fro airport/ railway station in the city of residence*	*Luxury car or Rs.2,000/-.*	*Claimant*
7	*Stay for out stationed member*	*5 star Hotel.*	*OECT*

8	*Transport in the city of meeting*	*Luxury car or Rs. 1,500 per day.*	*Claimant*

22.11. All the expenditure incurred in the OEC proceedings shall be shared by the parties in equal proportion. The Parties shall maintain account of expenditure and present to the other for the purpose of sharing on conclusion of the OEC proceedings.

22.12. If the parties are not able to resolve the dispute through OEC or do not opt for conciliation through OEC, the party may invoke arbitration clause as provided in the AGREEMENT.

23.0 ARBITRATION

Except as otherwise provided elsewhere in the AGREEMENT, if any dispute, difference, question or disagreement arises between the parties hereto or their respective representatives or assignees, in connection with construction, meaning, operation, effect, interpretation of the AGREEMENT or breach thereof which parties are unable to settle mutually, the same shall be referred to Arbitration as provided hereunder:

23.1. A party wishing to commence arbitration proceeding shall invoke Arbitration Clause by giving 60 days notice to the other parties. The notice invoking arbitration shall specify all the points of disputes with details of the amount claimed to be referred to arbitration at the time of invocation of arbitration and not thereafter. If the claim is in foreign currency, the claimant shall indicate its value in Indian Rupee for the purpose of constitution of the arbitral tribunal.

23.2. The number of the arbitrators and the appointing authority will be as under:

Claim amount (excluding claim for interest and counter claim, if any)	***Number of arbitrator***	***Appointing Authority***
Up to Rs 5 crore	*Sole Arbitrator*	*OECT*
Above Rs 5 crore	*3 Arbitrators*	*One arbitrator by each party and the 3rd arbitrator, who shall be the presiding arbitrator, by the two arbitrators.*

23.3. The parties agree that they shall appoint only those persons as arbitrators who accept the conditions of this arbitration clause. No person shall be appointed as arbitrator or presiding arbitrator who does not accept the conditions of this arbitration clause.

23.4. Parties agree that there will be no objection if the Arbitrator appointed holds equity shares of OECT and/or is a retired officer of OECT / any PSU. However, neither party shall appoint its serving employee as arbitrator.

23.5. If any of the Arbitrators so appointed dies, resigns, becomes incapacitated or withdraws for any reason from the proceedings, it shall be lawful for the concerned party/arbitrators to appoint another person in his place in the same manner as aforesaid. Such person shall proceed with the reference from the stage where his predecessor had left if both parties consent for the same; otherwise, he shall precedede novo.

23.6. Parties agree that neither party shall be entitled for any pre-reference or pendente-lite interest on its claims. Parties agree that any claim for such interest made by any party shall be void.

23.7. The arbitral tribunal shall make and publish the award within time stipulated as under:

Amount of Claims and Counter Claims (excluding interest)	***Period for making and publishing of the award (counted from the date of first meeting of the arbitrators):***
Up to Rs 5 Crore	*Within 8 months*
Above Rs 5 Crore	*Within 12 months*

The above time limit can be extended by the arbitrator, for reasons to be recorded in writing, with the consent of the parties.

23.8. Arbitrators shall be paid fees at the following rates (as amended from time to time):

Amount of Claims and Counter Claims (excluding interest)	***Lump sum fees (including fees for study of pleadings, case material, writing of the award, secretarial charges etc.) payable to each arbitrator (to be shared equally by the parties)***
Up to Rs 50 lacks	*Rs 7,500/- per meeting subject to a ceiling of Rs 75,000/-*
Above Rs 50 lac to Rs 1 crore	*Rs 90,000/- plus Rs 1,200/- per lac or a part there of subject to a ceiling of Rs 1,50,000/-*
Above Rs 1 Crore and up to Rs 5 Crores	*Rs 1,50,000/- plus Rs 22,500- per crore or a part there of subject to a ceiling of Rs 2,40,000*
Above Rs 5 Crores and up to Rs 10 Crores	*Rs 2,40,000/- plus Rs 15,000/- per crore or a part there of subject to a ceiling of Rs 3,15,000/-*
Above Rs 10 crores	*Rs 3,15,000/- plus Rs 12000/- per crore or part thereof subject to a ceiling of Rs 10,00,000/-*

For the disputes above Rs 50 Lakhs, the Arbitrators shall be entitled to an additional amount @ 20% of the fee payable as per the above fee structure.

23.9. If after commencement of the Arbitration proceedings, the parties agree to settle the dispute mutually or refer the dispute to conciliation, the arbitrators shall put the proceedings in abeyance

until such period as requested by the parties. Where the proceedings are put in abeyance or terminated on account of mutual settlement of dispute by the parties, the fees payable to the arbitrators shall be determined as under:

(i) 25% of the fees if the claimant has not submitted statement of claim.

(ii) 50% of the fees if the award is pending

23.10. Each party shall pay its share of arbitrator's fees in stages as under:

(i) 25% of the fees on filing of reply to the statement of claims.

(ii) 25% of the fees on completion of evidence.

(iii) Balance 50% at the time when award is given to the parties.

23.11. Each party shall be responsible to make arrangements for the travel and stay etc of the arbitrator appointed by it. Claimant shall also be responsible for making arrangements for travel I stay arrangements for the Presiding Arbitrator and the expenses incurred shall be shared equally by the parties.

In case of sole arbitrator, OECT shall make all necessary arrangements for his travel stay and the expenses incurred shall be shared equally by the parties.

23.12. The Arbitration shall be held at the place from where the AGREEMENT has been awarded i.e. Delhi. However, parties to the AGREEMENT can agree for a different place for the convenience of all concerned.

23.13. The Arbitrator(s) shall give reasoned and speaking award and it shall be final and binding on the parties

23.14. Subject to aforesaid, provisions of the Arbitration and Conciliation Act, 1996 and any statutory modifications or re-enactment thereof shall apply to the arbitration proceedings under this clause.

A9. Shareholders' Agreement dated 9 Oct. 2015 between a Russian Company and Bhopal based entrepreneur[9]

31. Disputes and Pre-arbitration consultation

In case of any difference of opinion or dispute or difficulty or problem in relation to operation of this Agreement or in interpretation of any of the clauses herein, the matter will be discussed personally by AB and AR in a friendly and cordial atmosphere at a meeting first in Russia and if that proves inconclusive at a meeting in India.

32. Arbitration

If the discussions between AB and AR fail to resolve the matter or if they fail to meet for any reasons whatsoever, the dispute will be referred to an Arbitration Panel consisting of three Arbitrators. One Arbitrator will be appointed by AB. The other Arbitrator will be appointed by AR. The third Arbitrator will be chosen by the two arbitrators by mutual consent. The third arbitrator so chosen will be the Chairman of the Arbitral Tribunal. Arbitration will be in English language. Each party will bear his own costs and the costs related to the Chairman of the Arbitral Tribunal will be shared between the two parties. The Arbitration Panel will hold meetings alternately at India and Russia or as the parties may mutually decide.

33. Court

Neither party will approach any court unless the Arbitrators have considered the dispute and have made arbitral award. This Agreement will be considered to have been signed at the country where the JV Company has been incorporated and the courts at the

[9] Arbitration Agreements: Shareholders' Agreement dated 9 October 2015 between a Russian Company and Bhopal based entrepreneur

said country will have jurisdiction in respect of all matters related to or arising out of this Agreement.

34. Law Applicable

This Agreement and all matters arising from it will be governed by the laws of the country where the JV Company has been incorporated.

A10. Strategic Partnership Agreement dated 2016 between a Bhopal based MSME and a Russian company[10]

14.1 In the event of any dispute or controversy regarding the application, interpretation, enforceability, validity or performance of this Agreement or matters arising there from or relating thereto, the authorized representatives of the two Parties shall meet in person at least twice to try to discuss and resolve the dispute or controversy in an amicable manner. The Party which wishes to start the process of amicable settlement under this sub-clause will send a Notice to the other Party. The Party receiving the Notice will choose the place of the first meeting and the Party sending the Notice will choose the place of the second meeting.

14.2 In case the two authorized representatives fail to resolve the matter or fail to meet twice over a period of twelve (12) weeks from the date of Notice under sub-clause 14.3, then either Party may serve a Notice of Arbitration requiring that such dispute be submitted to and be determined by arbitration. The Panel of Arbitration shall consist of three arbitrators. Each Party shall appoint one (1) arbitrator. The two (2) arbitrators so appointed by the parties shall appoint a Chairman who will be the third Arbitrator. Each Party will bear the

[10] Arbitration Agreements: Strategic Partnership Agreement dated 2016 between a Bhopal based MSME and a Russian company.

costs of the arbitrator appointed by it, while the costs of the Chairman will be shared equally by the two parties. The arbitration shall be conducted in accordance with the provisions of UNCITRAL Rules of Arbitration. The first meeting of the Panel of Arbitration will be at the place chosen by the Party receiving the Notice of Arbitration and the second meeting will be at the place chosen by the Party serving the Notice of Arbitration. Third and all odd-numbered meetings of the Panel will be held at the place of the first meeting. Fourth and all even-numbered meetings of the Panel will be held at the place of the second meeting. The seat of arbitration shall thus alternate between places chosen by the two Parties. Panel of Arbitration may decide to hold meetings by video conferencing and such meetings will not be counted for the purpose of deciding numbering of meetings (for the purpose of deciding even / odd). The language of arbitration shall be English.

14.3 *For the purpose of sub-clause 14.3 and 14.4, First Party may choose either Cheboksary or Moscow in Russia and Second Party may choose either Bhopal or New Delhi in India.*

14.4 *The Agreement shall be interpreted, governed and construed in accordance with the usual norms and practices of international trade and cooperation.*

14.5 *Neither Party will approach a court unless the matter has been referred to arbitration as provided under sub-clause 14.3 and the Panel of Arbitrators has given its decision on the matter.*

A11. Shareholders' Agreement dated March 2019 between an Indian-owned Singapore Company and a Guyana Company[11]

F11. Disputes and pre-arbitration

In case of any difference of opinion or dispute or difficulty or problem in relation to operation of this Agreement or in interpretation of any of the clauses herein, the matter will be discussed personally by Mr. VV and Mr. RP in a friendly and cordial atmosphere at a meeting first at Guyana and then at India. Neither Party will approach an Arbitration Panel or a Court unless the two meetings as mentioned above have been held and have proved inconclusive.

Any decision(s) taken by Mr. VV and Mr. RP by mutual consent and duly confirmed by signing on the minutes of the meeting will be final and binding on the Parties as well as the JV Company.

F12. Arbitration

If the discussions at the pre-arbitration meetings between the persons named above fail to resolve the matter or if for any reasons whatsoever they fail to meet twice during a period of six (6) months from the date of notice for pre-arbitration meeting served by any Party, either Party may serve a Notice of Arbitration requiring that such dispute be submitted to and be determined by arbitration.

The Panel of Arbitration shall consist of three arbitrators. Each Party shall appoint one (1) arbitrator. The two (2) arbitrators so appointed by the Parties shall appoint a Chairman who will be the third Arbitrator. Each Party will bear the costs of the arbitrator

[11] Arbitration Agreements: Shareholders' Agreement dated March 2019 between an Indian-owned Singapore Company and a Guyana Company

appointed by it, while the costs of the Chairman will be shared equally by the two Parties.

The arbitration shall be conducted in accordance with the provisions of UNCITRAL Rules of Arbitration. The first meeting of the Panel of Arbitration will be at the place chosen by the Party receiving the Notice of Arbitration and the second meeting will be at the place chosen by the Party serving the Notice of Arbitration. Third and all odd-numbered meetings of the Panel will be held at the place of the first meeting. Fourth and all even-numbered meetings of the Panel will be held at the place of the second meeting. The seat of arbitration shall thus alternate between places chosen by the two Parties. Panel of Arbitration may decide to hold meetings by video conferencing and such meetings will not be counted for the purpose of deciding numbering of meetings (for the purpose of deciding even / odd). The language of arbitration shall be English.

F13. Courts

Neither Party will approach any court unless the Arbitrators have considered the dispute and have made arbitral award. Courts at Guyana will have jurisdiction in respect of all matters related to or arising out of this Agreement.

A12. Shareholders' Agreement dated February 2014 between a British citizen and an Indian citizen[12]

28. Disputes and Pre-arbitration consultation

In case of any difference of opinion or dispute or difficulty or problem in relation to operation of this Agreement or in interpretation of any of the clauses herein, the matter will be

[12] Arbitration Agreements: Shareholders' Agreement dated February 2014 between a British citizen and an Indian citizen

discussed personally by the two JV Partners in a friendly and cordial atmosphere at a meeting first in Goa, India and if that proves inconclusive at a meeting in London, United Kingdom.

29. Arbitration

If the discussions between the JV Partners fail to resolve the matter or if they fail to meet for any reasons whatsoever, the dispute will be referred to an Arbitration Panel consisting of three Arbitrators. One Arbitrator will be appointed by DGT. The other Arbitrator will be appointed by RMS. The third Arbitrator will be chosen by the two arbitrators by mutual consent. The third arbitrator so chosen will be the Chairman of the Arbitral Tribunal. Arbitration will be in English language. Seat of arbitration proceedings will be at London, United Kingdom. Arbitration will be governed by Arbitration Act, 1996 (1996, Chapter 23) of the United Kingdom. Each JV partner will bear his own costs and the costs related to the Chairman of the Arbitral Tribunal will be shared between the two JV Partners.

30. Court

Neither party will approach any court unless the Arbitrators have considered the dispute and have made arbitral award. This Agreement will be considered to have been signed at London, United Kingdom. Courts at London, United Kingdom will have jurisdiction in respect of all matters related to or arising out of this Agreement.

31. Law Applicable

Notwithstanding the fact that the JV Company and shares of the JV Company will be governed by the laws of India, this Agreement and all matters arising from it will be governed by the laws of the United Kingdom of Great Britain.

A13. Shareholders' Agreement dated May 2017 among Israeli Company, British citizen and an Indian citizen[13]

I9. Applicable Law

Notwithstanding the fact that GCC and shares of GCC are governed by the laws of India, this Agreement and all matters arising from it shall be governed by laws of Israel.

I11. Disputes and pre-arbitration

In case of any difference of opinion or dispute or difficulty or problem in relation to operation of this Agreement or in interpretation of any of the clauses herein, the matter will be discussed personally by the Parties (or at least three of the Parties) in a friendly and cordial atmosphere at a meeting at Palolem, Goa, India. Neither Party will approach an Arbitration Panel or a Court unless the meeting as mentioned above has been held and has proved inconclusive. Any such meeting will be held under the supervision of Mr. AC, Advocate or, if he is not available, of a nominee of Chairman of Israeli Chamber of Certified Public Accountants.

Any decision taken by the Parties present at the above meeting by mutual consent and duly confirmed by signing on the minutes of the meeting will be final and binding on the Parties as well as GCC.

I12. Arbitration

If the discussions between the Parties at the pre-arbitration meeting as provided above fail to resolve the matter or if they fail to meet for any reasons whatsoever during a period of three (3) months from the date of notice for pre-arbitration meeting served by any Party,

[13] Arbitration Agreements: Shareholders' Agreement dated May 2017 among Israeli Company, British citizen and an Indian citizen

the dispute will be referred to an Arbitration Panel consisting of three Arbitrators. One Arbitrator will be appointed by the Party serving the Notice for Arbitration. The other Arbitrator will be appointed by rest of the Parties. The third Arbitrator will be chosen by the two arbitrators by mutual consent. The third arbitrator so chosen will be the Chairman of the Arbitral Tribunal. Arbitration will be in English language. Seat of arbitration proceedings will be at Goa, India. Arbitration will be governed by UNCITRAL Arbitration Rules as in force at the time. The Party / Parties appointing the Arbitrator will bear the costs related to its appointee and the costs related to the Chairman of the Arbitral Tribunal will be shared equally between the Party serving the Notice of Arbitration on one hand and the other Parties on the other hand.

I13. Notice of Arbitration

Either Party to this Agreement may give a notice for appointing an arbitrator to the other Parties giving a reference of its pre-arbitration notice, stating that a dispute exists and that pre-arbitration discussions have failed to resolve the dispute.

I14. Courts

Neither party will approach any court unless the Arbitrators have considered the dispute and have made arbitral award. Courts at Tel Aviv, Israel will have jurisdiction in respect of all matters related to or arising out of this Agreement.

A14. Shareholders' Agreement dated 2022 among two Indian citizens and a Poland Company[14]

22 GOVERNING LAW AND DISPUTE RESOLUTION

[14] Arbitration Agreements: Shareholders' Agreement dated 2022 among two Indian citizens and a Poland Company

22.1 This Agreement shall be governed by and construed in accordance with the laws of India without regard to applicable conflict of laws principles.

*22.2 In the event of a dispute, difference, controversy or claim arising out of or in connection with or relating to any of the matters set out in this Agreement, including any dispute regarding its existence, validity, interpretation or breach ("**Dispute**"), DP and the senior executives of VO shall discuss in good faith to resolve the Dispute. In case the Dispute is not settled within 30 (thirty) days, either Party may refer the Dispute to arbitration in accordance with Clause 22.3.*

*22.3 All Disputes that have not been satisfactorily resolved under Clause 22.1 above shall be referred to arbitration. Such arbitration shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof for the time being in force and shall be administered by the Singapore International Arbitration Centre ("**SIAC**") in accordance with the Arbitration Rules of Singapore International Arbitration Centre ("**SIAC Rules**") for the time being in force which rules are deemed to be incorporated by reference into this Clause. This Agreement and the rights and obligations of the Parties contained in this Agreement shall remain in full force and effect pending issuance of the award in such arbitration proceedings, which award, if appropriate, shall determine whether and when any termination of this Agreement shall become effective.*

22.4 There shall be 3 (three) arbitrators to be appointed in accordance with the SIAC Rules as given below, all of whom shall be fluent in English.

22.5 The party referring the Dispute shall appoint 1 (one) arbitrator and the other party shall appoint 1 (one) arbitrator. The third presiding arbitrator shall be appointed by the 2 (two) appointed arbitrators. If either of the parties fails to appoint an arbitrator and/or if the

appointed arbitrators fail to appoint a third arbitrator then the arbitrator shall be appointed in accordance with the SIAC Rules.

22.6 The arbitrator(s) will not have power to alter, amend, or add to the provisions of the Agreement.

22.7 The exclusive seat, or legal place, of arbitration shall be Bengaluru. The language to be used in the arbitral proceedings shall be English. The arbitral award(s) rendered shall be made in writing, will be a reasoned award(s) and shall be final and binding upon the Parties. The Parties agree to carry out the award without delay. Judgment upon the award rendered in an appropriate forum for enforcement, and to the extent permissible by Applicable Law, the parties unconditionally waive their rights to challenge, set aside or appeal against the award rendered by the arbitration panel. To the extent permissible under Applicable Law, the Parties agree to submit to the jurisdiction of the courts of Bengaluru, and no other courts in India, to seek interim relief.

22.8 Costs

The costs and expenses of the arbitration, including, without limitation, the fees of the arbitration and the Arbitrator, shall be borne equally by each Party to the dispute or claim and each Party shall pay its own fees, disbursements and other charges of its counsel, except as may be determined by the Arbitrator. The Arbitrator would have the power to award interest on any sum awarded pursuant to the arbitration proceedings and such sum would carry interest, if awarded, until the actual payment of such amounts.

22.9 Final and Binding

Subject to applicable Law, any award made by the Arbitrator shall be final and binding on each of the Parties that were parties to the dispute.

A15. Shareholders' Agreement dated June 2016 among Russian citizens and Indian citizens[15]

41. Disputes and Pre-arbitration consultation

In case of any difference of opinion or dispute or difficulty or problem in relation to operation of this Agreement or in interpretation of any of the clauses herein, the matter will be discussed personally by AA and AL in a friendly and cordial atmosphere at a meeting first in Bhopal, India and if that proves inconclusive at a meeting in Samara, Russia. Neither Party will approach an Arbitration Panel or a Court unless the two meetings as mentioned above have been held and have proved inconclusive. Any decision taken by AA and AL by mutual consent and duly confirmed by signing on the minutes of the meeting will be final and binding on the JV Partners as well as the JV Company.

42. Arbitration

If the discussions between AA and AL fail to resolve the matter or if they fail to meet for any reasons whatsoever, the dispute will be referred to an Arbitration Panel consisting of three Arbitrators. One Arbitrator will be appointed by EG. The other Arbitrator will be appointed by ACF. The third Arbitrator will be chosen by the two arbitrators by mutual consent. The third arbitrator so chosen will be the Chairman of the Arbitral Tribunal. Arbitration will be in English language. Seat of arbitration proceedings will be at Dubai, United Arab Emirates. Arbitration will be governed by UNCITRAL Arbitration Rules as in force at the time. Each JV Partner will bear his own costs and the costs related to the Chairman of the Arbitral Tribunal will be shared between the two JV Partners.

[15] Arbitration Agreements: Shareholders' Agreement dated June 2016 among Russian citizens and Indian citizens

43. Notice for Arbitration

Either Party to this Agreement may give a notice for appointing an arbitrator to the other stating that a dispute exists and that discussions between AA and AL have failed to resolve the dispute.

44. Court

Neither party will approach any court unless the Arbitrators have considered the dispute and have made arbitral award. Courts at Bhopal, India will have jurisdiction in respect of all matters related to or arising out of this Agreement.

45. Law Applicable

Notwithstanding the fact that the JV Company and shares of the JV Company will be governed by the laws of India, this Agreement and all matters arising from it shall be governed by UNIDROIT Principles of international Commercial Contracts (2010) and, with respect to issues not covered by such Principles, by generally accepted principles of international commercial law.

Appendix B
Select Arbitration Clauses in Institutional Agreements in International Agreements in India

The arbitration clauses / agreements given herein below are either extracted from reported judgements of Supreme Court / High Courts or are taken from websites of arbitration institutions in India. In one case, reliance is placed on agreement shared in confidence by a law firm. In such a case, care has been taken to hide the identity of the concerned parties.

B1. Ocenadale, Atlas and Kotak[1]

This contract is made under the terms and conditions effective at date of the Grain and Food Trade Association Ltd. London Contract No. 15 which is hereby made a part of this contract... both buyers and sellers hereby acknowledge familiarity with the text of the GAFTA contract and agree to be bound by its terms and conditions.

27. ARBITRATION -

(a) Any dispute arising out of or under this contract shall be settled by arbitration in London in accordance with the Arbitration Rules of the Grain and Food Trade Association Limited, No. 125 such Rules forming

[1] Domestic Court Judgements: Atlas Export Industries v. Kotak Company, 1999

part of this contract and of which both parties hereto shall be deemed to be cognisant.

(b) Neither party hereto, nor any persons; claiming under either of them, shall bring any such dispute until such dispute shall first have been heard and determined by the arbitrators, umpire or Board of Appeal, as the case may be, in accordance with the Arbitration Rules and it is expressly agreed and declared that the obtaining of the award from the arbitration, umpire or Board of Appeal, as the case may be, shall be a condition precedent to the right of either party hereto or of any person claiming under either of them to bring any action or other legal proceedings against the other of them in respect of any such dispute.

B2. Agreement dated July 2017 between Rwanda Government entity and an Indian Company[2]

Article 7: Governing Law

This Contract shall be governed by and construed in accordance with the laws of the Republic of Rwanda.

The Parties have further agreed that if the provisions of this Contract are inconsistent with the effective laws of the Republic of Rwanda, the inconsistent provision shall be amended and brought in conformity with the law.

Invalidity of one or more provision or articles of this Contract shall not invalidate any other provisions or the Contract as a whole. If a provision is found to be invalid or contravenes national legislation, the parties will agree on amendment of the provision and in the case of disagreement, the matter shall be referred to the Minister of Justice/ Attorney General for

[2] Arbitration Agreements: Agreement dated July 2017 between Rwanda Education Board and an Indian Company

legal opinion. In case the matter is not resolved, it shall be submitted to the competent courts of Rwanda for an equitable solution".

Article 8: Settlement of Disputes

i. Amicable solution:

Any dispute or differences between the parties arising out of this Contract shall in the first instance be settled amicably by submitting such a dispute to a panel of senior representatives of the Parties to consider and resolve the Dispute. Each senior representative serving on such panel shall have full authority to settle the Dispute.

ii. Arbitration:

a. If the dispute cannot be amicably settled by the parties, the matter shall be referred to and finally resolved by arbitration in accordance with the Rules of Kigali International Arbitration Centre (KIAC).

b. The number of arbitrators to the proceedings shall be three appointed in accordance with the rules. The Procuring Entity and the Sole supplier, each can each select one arbitrator and third person shall be common.

c. The seat of arbitration shall be in Rwanda

d. The language of arbitration shall be English

e. The award rendered by the arbitrator(s) shall be final and binding and shall be enforced by any Court of competent jurisdiction. The party seeking enforcement shall be entitled to an award of all costs incurred including legal fees to be paid by the party against whom enforcement is ordered.

B3. Construction Industry Arbitration Council[3]

MODEL CLAUSE / AGREEMENT

A poorly-drafted arbitration clause or poorly-drafted governing law clause can undermine the smooth progress of an arbitration. They can often be the cause of a dispute by themselves, in addition to the substantive dispute between the parties.

Parties to domestic and international transactions should always include a well-drafted arbitration clause and a well-drafted governing law clause.

The governing law clause applies to the contract as a whole, but the arbitration clause deals specifically with the arbitration aspect. The two sets of clauses are usually included in different parts of the contract, although often in close proximity to each other.

We encourage you to consider using the model clauses provided in this section, as they are applicable, in your contracts.

If there is no arbitration clause in the contract, the parties can agree to CIAC arbitration by adopting the recommended arbitration agreement.

MODEL CLAUSE / AGREEMENT - GOVERNING LAW CLAUSE

The governing law clause should be drafted under legal advice. The following are simple model clauses:

- *Where the place of arbitration is New Delhi or any other city in India: - Where the place of arbitration is New Delhi or any other city in India: - "This contract is governed by the laws of India."*
- *Where the place of arbitration is Singapore: - "This contract is governed by the laws of Singapore."*

[3] Model Clauses / Agreements: Construction Industry Arbitration Council, CIAC, India

MODEL CLAUSE / AGREEMENT - RECOMMENDED ARBITRATION AGREEMENT

Parties to an existing dispute who have not included an arbitration clause in their underlying contract may agree to refer the dispute to CIAC for arbitration under CIAC Arbitration Rules in the following terms:

We, _____, the undersigned, hereby agree that all disputes and differences arising under, out of, or in connection with the following contract:

[Brief description of the contract under which the disputes have arisen or may arise]

be referred to and finally resolved by arbitration in [New Delhi/Singapore] in accordance with the Arbitration Rules of the Construction Industry Arbitration Council ("CIAC Arbitration Rules") for the time being in force at the commencement of the arbitration."*

The Tribunal shall consist of _____ arbitrator(s) to be appointed by the Chairman of the Executive Committee of the Construction Industry Arbitration Council.*

** Choose as appropriate - If the matter is domestic (between Indian parties) then New Delhi or any other place in India can be chosen. If the matter is international (between an Indian party and foreign party or between two foreign parties) then Singapore is to be chosen.*

Parties may add:

The Tribunal shall consist of _____ arbitrator(s) to be appointed by the Chairman of the Executive Committee of the Construction Industry Arbitration Council.*

The language of the arbitration shall be English.

** State an odd number. Either state one, or state three.*

This Agreement has been signed this the _____ day of _____ 201__ at _____ by:

1. _____ for and on behalf of _____ (Name and Address of the Party to be given)

2. _____ for and on behalf of _____ (Name and Address of the Party to be given)

B4. Council for National and International Commercial Arbitration [4]

MODEL GENERAL ARBITRATION CLAUSE

Any and all controversy(ies) / dispute(s) / difference(s)/ claim(s) / claim(s) in tort arising out of or in connection with or in relation to this contract, including its existence, validity or termination, shall be referred to and finally resolved by arbitration of sole Arbitrator nominated by the Council for National and International Commercial Arbitration (CNICA), having its registered office at Unit No.412, 'Raheja Towers', Alpha Wing, 4th Floor, Door No:113-134, Anna Salai, Chennai 600 002, India, and Arbitration Rules of CNICA shall prevail.

It is further agreed that such arbitration shall be conducted in accordance with the procedure set out in the Arbitration Rules of CNICA.

The award so rendered shall be final and binding on the parties. The language shall be English, and the venue shall be at _____ (City).

**Note: Add the following for international contracts.*

**The governing law of the contract shall be substantive law of _____ (Country).*

[4] Model Clauses / Agreements: Council for National and International Commercial Arbitration, CNICA, India

MODEL EXPEDITED ARBITRATION CLAUSE

Any and all controversy(ies) / dispute(s) / difference(s)/ claim(s) / claim(s) in tort arising out of or in connection with or in relation to this contract, including its existence, validity or termination, shall be referred to and finally resolved by arbitration of sole Arbitrator nominated by the Council for National and International Commercial Arbitration (CNICA), having its registered office at Unit No.412, 'Raheja Tower', Alpha Wing, 4th Floor, Door No:113-134, Anna Salai, Chennai 600 002, India, and Arbitration Rules of CNICA shall prevail.

It is further agreed that such arbitration shall be conducted in accordance with the expedited procedure set out in the Arbitration Rules of CNICA.

The award so rendered shall be final and binding on the parties. The language shall be English, and the venue shall be at _____ (City).

**Note: Add the following for international contracts.*

**The governing law of the contract shall be substantive law of _____ (Country).*

MODEL EMERGENCY ARBITRATION CLAUSE

Any and all controversy(ies) / dispute(s) / difference(s)/ claim(s) / claim(s) in tort arising out of or in connection with or in relation to this contract, including its existence, validity or termination, shall be referred to and finally resolved by arbitration of sole Arbitrator nominated by the Council for National and International Commercial Arbitration (CNICA), having its registered office at Unit No.412, 'Raheja Tower', Alpha Wing, 4th Floor, Door No:113-134, Anna Salai, Chennai 600 002, India, and Arbitration Rules of CNICA shall prevail.

It is further agreed that such arbitration shall be conducted in accordance with the emergency procedure set out in the Arbitration Rules of CNICA.

The award so rendered shall be final and binding on the parties. The language shall be English, and the venue shall be at _____ (City).

**Note: Add the following for international contracts.*

** The governing law of the contract shall be substantive law of _____ (Country).*

B5. Indian Institute of Arbitration & Mediation [5]

Suggested Arbitration Clause#

Any dispute, difference or controversy arising out of or in connection with this contract, including any question regarding its existence, operation, termination, validity or breach thereof shall be referred to and finally resolved by arbitration as per the Arbitration & Conciliation Act, 1996 and shall be conducted by the Indian Institute of Arbitration & Mediation, in accordance with their Arbitration Rules ("IIAM Arbitration Rules") for the time being in force.

Suggested Med-Arb Clause

Any dispute, difference or controversy arising out of or in connection with this contract, including any question regarding to its existence, validity or termination, shall first be referred to mediation at the Indian Institute of Arbitration & Mediation (IIAM) and in accordance with its then current Mediation Rules. If the mediation is abandoned by the mediator or is otherwise concluded without the dispute or difference being resolved, then such dispute or difference shall be referred to and determined by arbitration by IIAM in accordance with its Arbitration Rules and in accordance with the Arbitration Act.

[5] Model Clauses / Agreements: Indian Institute of Arbitration & Mediation, IIAM, India

Suggested Arb-Med-Arb Clause

Any dispute, difference or controversy arising out of or in connection with this contract, including any question regarding its existence, operation, termination, validity or breach thereof shall be referred to and finally resolved by arbitration as per the Arbitration Act, and shall be conducted by the Indian Institute of Arbitration & Mediation, in accordance with their Arbitration Rules ("IIAM Arbitration Rules") for the time being in force.

It is further agreed that following the commencement of arbitration, the parties will attempt in good faith to resolve such dispute, difference or controversy through mediation, as per the IIAM Arb-Med-Arb Procedure for the time being in force. Any settlement reached in the course of mediation shall be referred to the arbitral tribunal appointed by IIAM and may be made a consent award on agreed terms.

B6. Indian Council of Arbitration [6]

ICA ARBITRATION CLAUSE

The Indian Council of Arbitration recommends to all parties desirous of making reference to arbitration by the Indian Council of Arbitration, the use of the following arbitration clause in writing in their contracts:

"Any dispute or difference whatsoever arising between the parties out of or relating to the construction, meaning, scope, operation or effect of this contract or the validity or the breach thereof shall be settled by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration and the award made in pursuance thereof shall be binding on the parties."

[6] Model Clauses / Agreements: Indian Council of Arbitration, ICA

B7. IDAC India [7]

MODEL ARBITRATION AGREEMENT

All disputes arising from or in connection to this contract, including any question regarding its existence, validity or termination, shall be finally settled by arbitration to be administered by the International and Domestic Arbitration Centre, India (IDAC India - Vadodara) in accordance with the IDAC India Rules for the time being in force, without recourse to the ordinary courts of law.

The Tribunal shall consist of one/three arbitrator/s and shall be seated at Vadodara. The Arbitration Proceedings will be held at Vadodara or any other place mutually decided by parties. The language of the arbitration shall be English. The Procedural and substantive law applicable to the dispute is Indian Law.

EXPEDITED PROCEDURE MODEL CLAUSE

All dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be finally settled by arbitration to be administered by the International and Domestic Arbitration Centre, India (IDAC India) in accordance with the IDAC India Rules for the time being in force, without recourse to the ordinary courts of law. IDAC India's rules are deemed to be incorporated by reference in this clause.

The parties agree that any arbitration commenced pursuant to this clause shall be conducted in accordance with the Expedited Procedure set out in Article 14.1 B. of the IDAC Rules. The Tribunal shall consist of one arbitrator under the expedited procedure and shall be seated at Vadodara. The Arbitration Proceedings will be held at Vadodara or any other place mutually decided by parties. The language of the arbitration shall be

[7] Model Clauses / Agreements: International and Domestic Arbitration Centre India, IDAC

English. The Procedural and substantive law applicable to the dispute is Indian Law.

B8. Mumbai Centre for International Arbitration[8]

MCIA model clause

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in accordance with the Arbitration Rules of the Mumbai Centre for International Arbitration ("MCIA Rules"), which rules are deemed to be incorporated by reference in this clause.

The seat of the arbitration shall be _____.

The Tribunal shall consist of [one/three] arbitrator(s).

The language of the arbitration shall be _____.

The law governing this arbitration agreement shall be _____.

The law governing the contract shall be_____.

Expedited Procedure model clause

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Mumbai in accordance with the Arbitration Rules of the Mumbai Centre for International Arbitration ("MCIA Rules"), which rules are deemed to be incorporated by reference in this clause.

[8] Model Clauses / Agreements: Mumbai Centre for International Arbitration, MIAC

The parties agree that any arbitration commenced pursuant to this clause shall be conducted in accordance with the Expedited Procedure set out in Rule 12.3 of the MCIA Rules.

The seat of the arbitration shall be _____.

The Tribunal shall consist of one arbitrator.

The language of the arbitration shall be _____

The law governing this arbitration agreement shall be _____.

The law governing the contract shall be_____.

B9. Nani Palkhivala Arbitration Centre[9]

Model Arbitration Clause :

Disputes may be referred to NPAC, Chennai through a procedure administered by the Centre in two ways:

1. *By insertion of a clause in a contract providing for the reference of all disputes in relation to or arising out of that contract between the parties.*

2. *By a separate agreement providing for the reference of an existing dispute to NPAC for arbitration in accordance with its rules.*

Clause to be included in the contracts to be entered for Institutional Arbitration:

Any claim, dispute or difference relating to or arising out of this agreement shall be referred to the arbitration of the Nani Palkhivala Arbitration Centre currently functioning at New No. 22, Karpagambal Nagar, Mylapore, Chennai-600004, which will appoint the Sole Arbitrator and

[9] Model Clauses / Agreements: Nani Palkhivala Arbitration Centre, NPAC

will conduct the Arbitration in accordance with its rules for conduct of Arbitration proceedings then in force and applicable to the proceedings.

If the parties desire to appoint three arbitrators, then while each of the parties shall appoint one Arbitrator, the Centre will appoint the third arbitrator who shall act as the Presiding Arbitrator. Such arbitration shall be the sole and exclusive remedy between the parties with respect to all such disputes. The arbitration shall take place in Chennai, Tamil Nadu and the proceedings shall be in English. The Arbitration Award shall be final and binding on the parties.

B10. The International Arbitration and Mediation Centre (IAMC)[10]

IAMC Model Clauses

Model Clause For Arbitration

In the event of any dispute arising out of or in connection with the present contract, including any question regarding its existence, validity or termination, the parties shall refer the same for arbitration to be finally resolved under the administration of International Arbitration and Mediation Centre ("IAMC") in accordance with the Arbitration Rules of International Arbitration and Mediation Centre ("IAMC Rules") for the time being in force. The seat of Arbitration shall be _____. The Tribunal shall consist of one or more arbitrators appointed in accordance with the said Rules. The language of the arbitration proceedings shall be English. The law governing the arbitration agreement shall be _____. The law governing the contract shall be _____.

[10] Model Clauses / Agreements: International Arbitration and Mediation Centre (IAMC), India

Model Clause for Med-Arb

In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to conciliation (also referred to as Mediation) under the IAMC Mediation Rules. Such reference shall be by way of a notice in writing, which shall also be deemed to be a notice for the purpose of commencement of arbitration. If the dispute is not settled pursuant to the said Rules within 45 days following the filing of a Request for Mediation or within such further period as the parties may agree in writing, such dispute shall thereafter be referred to arbitration and finally resolved under the IAMC Arbitration Rules. For the avoidance of doubt, it is clarified that:

a) all disputes that fall within the scope of arbitration agreement may be resolved in such arbitration; and

b) even during the pendency of conciliation, parties may seek interim relief or Emergency Measures under the Emergency Arbitrator Provisions in the IAMC Arbitration Rules.

Model Clause for Arb-Med–Arb

In the event of any dispute arising out of or in connection with the present contract, including any question regarding its existence, validity or termination, the parties shall first refer the same for arbitration to be finally resolved under the administration of International Arbitration and Mediation Centre ("IAMC") in accordance with the Arbitration Rules of International Arbitration and Mediation Centre ("IAMC Rules") for the time being in force. The seat of Arbitration shall be _____. The Tribunal shall consist of one or more arbitrators appointed in accordance with the said Rules. The language of the arbitration proceedings shall be English. The law governing the arbitration agreement shall be _____. The law governing the contract shall be _____.

The parties further agree that following the commencement of arbitration, they will attempt in good faith to resolve the Dispute through mediation at International Arbitration and Mediation Centre ("IAMC"), in accordance with the IAMC Arb-Med-Arb Protocol for the time being in force. Any settlement arrived in respect of some or all their disputes in the course of mediation shall be referred to the arbitral tribunal appointed by IAMC and may be recorded as an arbitration award (interim or final, as the case may be) on agreed terms.

Appendix C
Select Arbitration Clauses in Global Arbitration Centres

The arbitration clauses / agreements given herein below are taken from websites of various arbitration institutions outside India.

C1. Singapore International Arbitration Centre [1]

SIAC Model Clause

(Revised as of 12 January 2023)

In drawing up international contracts, we recommend that parties include the following arbitration clause:

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre ("SIAC") in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force, which rules are deemed to be incorporated by reference in this clause.

*The seat of the arbitration shall be [Singapore].**

*The Tribunal shall consist of _____** arbitrator(s).*

[1] Model Clauses / Agreements: Singapore International Arbitration Centre (SIAC), Singapore

The language of the arbitration shall be _____.

*[In respect of any court proceedings in Singapore commenced under the International Arbitration Act 1994 in relation to the arbitration, the parties agree (a) to commence such proceedings before the Singapore International Commercial Court ("the SICC"); and (b) in any event, that such proceedings shall be heard and adjudicated by the SICC.]****

APPLICABLE LAW

Parties should also include an applicable law clause. The following is recommended:

*This contract is governed by the laws of _____.*****

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* *Parties should specify the seat of arbitration of their choice. If the parties wish to select an alternative seat to Singapore, please replace "[Singapore]" with the city and country of choice (e.g., "[City, Country]").*

** *State an odd number. Either state one, or state three.*

*** *The inclusion of this sentence is recommended if the arbitration commenced to resolve the dispute will be/is an international commercial arbitration, and Singapore is chosen as the seat of arbitration.*

**** *State the country or jurisdiction.*

The Singapore Arb-Med-Arb Clause

Arb-Med-Arb is a process where a dispute is first referred to arbitration before mediation is attempted. If parties are able to settle their dispute through mediation, their mediated settlement may be recorded as a consent award. The consent award is generally accepted as an arbitral award, and, subject to any local legislation and/or requirements, is

generally enforceable in approximately 150 countries under the New York Convention. If parties are unable to settle their dispute through mediation, they may continue with the arbitration proceedings.

Parties wishing to take advantage of this tiered dispute resolution mechanism as administered by SIAC and Singapore International Mediation Centre ("SIMC"), may consider incorporating the following Arb-Med-Arb Clause in their contracts:

SIAC-SIMC Arb-Med-Arb Model Clause ("Arb-Med-Arb Clause")

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre ("SIAC") in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force, which rules are deemed to be incorporated by reference in this clause.

*The seat of the arbitration shall be [Singapore].**

*The Tribunal shall consist of _____** arbitrator(s).*

The language of the arbitration shall be _____.

The parties further agree that following the commencement of arbitration, they will attempt in good faith to resolve the Dispute through mediation at the Singapore International Mediation Centre ("SIMC"), in accordance with the SIAC-SIMC Arb-Med-Arb Protocol for the time being in force. Any settlement reached in the course of the mediation shall be referred to the arbitral tribunal appointed by SIAC and may be made a consent award on agreed terms.

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* *Parties should specify the seat of arbitration of their choice. If the parties wish to select an alternative seat to Singapore, please replace "[Singapore]" with the city and country of choice (e.g., "[City, Country]").*

** *State an odd number. Either state one, or state three.*

EXPEDITED PROCEDURE MODEL CLAUSE

In drawing up international contracts, we recommend that parties include the following arbitration clause:

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre ("SIAC") in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force, which rules are deemed to be incorporated by reference in this clause.

The parties agree that any arbitration commenced pursuant to this clause shall be conducted in accordance with the Expedited Procedure set out in Rule 5.2 of the SIAC Rules.

*The seat of the arbitration shall be [Singapore].**

The Tribunal shall consist of one arbitrator.

The language of the arbitration shall be _____.

APPLICABLE LAW

Parties should also include an applicable law clause. The following is recommended:

*This contract is governed by the laws of _____.***

---

* *Parties should specify the seat of arbitration of their choice. If the parties wish to select an alternative seat to Singapore, please replace "[Singapore]" with the city and country of choice (e.g., "[City, Country]").*

** *State the country or jurisdiction.*

C2. London Court of International Arbitration[2]

Future disputes

For contracting parties who wish to have future disputes referred to arbitration under the LCIA Rules, the following clause is recommended. Words/spaces in square brackets should be deleted/completed as appropriate.

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

The number of arbitrators shall be [one/three].

The seat, or legal place, of arbitration shall be [City and/or Country].

The language to be used in the arbitral proceedings shall be [ ].

The governing law of the contract shall be the substantive law of [ ].

C3. Permanent Court of Arbitration[3]

Model arbitration clause for contracts

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the PCA Arbitration Rules 2012.

Model arbitration clause for treaties and other agreements

[2] Model Clauses / Agreements: London Court of International Arbitration (LCIA), London
[3] Model Clauses / Agreements: Permanent Court of Arbitration (PCA), The Hague, The Netherlands

Any dispute, controversy or claim arising out of or in relation to this [agreement] [treaty], or the existence, interpretation, application, breach, termination, or invalidity thereof, shall be settled by arbitration in accordance with the PCA Arbitration Rules 2012.

Note — Parties should consider adding:

(a) The number of arbitrators shall be … (one, three, or five);

(b) The place of arbitration shall be … (town and country);

(c) The language to be used in the arbitral proceedings shall be … .

Possible waiver statement

Note — If the parties wish to exclude recourse against the arbitral award that may be available under the applicable law, they may consider adding a provision to that effect as suggested below, considering, however, that the effectiveness and conditions of such an exclusion depend on the applicable law.

Waiver: The parties hereby waive their right to any form of recourse against an award to any court or other competent authority, insofar as such waiver can validly be made under the applicable law.

C4. International Centre for Dispute Resolution[4]

ICDR Standard Arbitration Clause

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules.

[4] Model Clauses / Agreements: International Centre for Dispute Resolution (ICDR)

ICDR Standard Concurrent Arbitration-Mediation Clause

Any controversy or claim arising out of or related to this contract, or a breach thereof, shall be resolved by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules. Once the demand for arbitration is initiated, the parties agree to attempt to settle any controversy or claim arising out of or relating to this contract or a breach thereof by mediation administered by the International Centre for Dispute Resolution under its International Mediation Rules. Mediation will proceed concurrently with arbitration and shall not be a condition precedent to any stage of the arbitration process.

ICDR Standard Mediation-Arbitration Step Clause

In the event of any controversy or claim arising out of or relating to this contract, or the breach thereof, the parties hereto agree first to try and settle the dispute by mediation, administered by the International Centre for Dispute Resolution under its Mediation Rules. If settlement is not reached within 60 days after service of a written demand for mediation, any unresolved controversy or claim arising out of or relating to this contract shall be settled by arbitration in accordance with the International Arbitration Rules of the International Centre for Dispute Resolution.

C5. Swiss Arbitration[5]

Any dispute, controversy, or claim arising out of, or in relation to, this contract, including regarding the validity, invalidity, breach or termination thereof, shall be resolved by arbitration in accordance with the Swiss Rules of International Arbitration of the Swiss Arbitration Centre in

[5] Model Clauses / Agreements: Swiss Arbitration Centre, Switzerland

force on the date on which the Notice of Arbitration is submitted in accordance with those Rules.

The number of arbitrators shall be one;

The seat of the arbitration shall be … (name of city in Switzerland, unless the parties agree on a city in another country);

The arbitral proceedings shall be conducted in English.

The Expedited Procedure shall apply.

Notwithstanding the above, the parties may agree at any time to submit the dispute to mediation in accordance with the Swiss Rules of Commercial Mediation of the Swiss Chambers' Arbitration Institution.

Customize the Model Arbitration Clause by adding any, or all, of the four option:

i. Award in 6 months

The Expedited Procedure of the Swiss Rules of International Arbitration will apply (Article 42). The award is rendered in 6 months by a sole arbitrator.

ii. Award on the basis of documentary evidence only

The dispute will be decided on the basis of documentary evidence only. The parties agree not to hold a hearing for witnesses or oral arguments and instead agree to submit all evidence in documentary form. This aims to save time and costs.

iii. Faster response time for the Respondent's answer

The Respondent will be granted 15 days to submit an Answer to the Notice of Arbitration, instead of the standard 30 days. In principle, any counterclaim or set-off defence shall also be raised with the Answer to the Notice of Arbitration. It is important to note that a full Statement of Claim

and Statement of Defence can be filed after the arbitral tribunal is constituted.

iv. Faster constitution of the arbitral tribunal

All time limits related to the designation of an arbitrator are reduced to 15 days instead of the standard 30 days. For cases in which the dispute is referred to a sole arbitrator, the parties will be granted 15 days to jointly designate the sole arbitrator. For cases in which the dispute is referred to a three-member arbitral tribunal, time limits of 30 days will be reduced to 15 days.

Tip: The seat of arbitration is left open and needs to be filled in. In addition, even though each customized clause automatically provides for one arbitrator and English as the language, the parties are free to modify the language and the number of arbitrators to "three" or "one or three".

C6. Vienna International Arbitral Centre[6]

VIAC Model Arbitration Clause including Arb-Med-Arb

All disputes or claims arising out of or in connection with this contract, including disputes relating to its validity, breach, termination or nullity, shall be finally settled under the Rules of Arbitration (Vienna Rules) of the Vienna International Arbitral Centre (VIAC) of the Austrian Federal Economic Chamber by one or three arbitrators appointed in accordance with the said Rules.

Parties may wish to stipulate the following in the arbitration clause:

(1) the number of arbitrators (one or three) (Article 17 Vienna Rules);

[6] Model Clauses / Agreements: Vienna International Arbitral Centre (VIAC), Austria

(2) the language(s) to be used in the arbitral proceedings (Article 26 Vienna Rules);

(3) the substantive law applicable to the contractual relationship, the substantive law applicable to the arbitration agreement (Article 27 Vienna Rules), and the rules applicable to the proceedings (Article 28 Vienna Rules);

(4) the applicability of the provisions on expedited proceedings (Article 45 Vienna Rules);

(5) the scope of the arbitrators' confidentiality (Article 16 paragraph 2 Vienna Rules) and its extension regarding parties, representatives and experts.

(7) If the parties wish to conduct Arb-Med-Arb proceedings, the following addition to the model arbitration clause should be included:

Furthermore, the parties agree to jointly consider, after due initiation of the arbitration, to conduct proceedings in accordance with the Mediation Rules of the Vienna International Arbitral Centre (VIAC) of the Austrian Federal Economic Chamber (Vienna Mediation Rules). Settlements that are generated in such proceedings shall be referred to the arbitral tribunal appointed in the arbitration. The arbitral tribunal may render an award on agreed terms reflecting the content of the settlement (Article 37 paragraph 1 Vienna Rules).

Model Clause for VIAC as Appointing Authority

It is recommended that parties wishing to select VIAC as appointing authority pursuant to Annex 4 insert the following wording in their arbitration / mediation clause:

The Vienna International Arbitral Centre (VIAC) of the Austrian Federal Economic Chamber shall act as appointing authority in accordance with Annex 4 to the VIAC Rules of Arbitration and Mediation.

Model Clause for VIAC as Administering Authority

It is recommended that parties wishing to select VIAC as administering authority pursuant to Annex 5 insert the following wording in their arbitration / mediation clause:

The Vienna International Arbitral Centre (VIAC) of the Austrian Federal Economic Chamber shall act as administering authority in accordance with Annex 5 to the VIAC Rules of Arbitration and Mediation.

C7. Hong Kong International Arbitration Centre[7]

Arbitration under the HKIAC Administered Arbitration Rules

Parties to a contract who wish to have any future disputes referred to arbitration under the HKIAC Administered Arbitration Rules may insert in the contract an arbitration clause in the following form:

> *"Any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non- contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.*

[7] Model Clauses / Agreements: Hong Kong International Arbitration Centre (HKIAC)

*The law of this arbitration clause shall be ... (Hong Kong law). **

The seat of arbitration shall be ... (Hong Kong).

*The number of arbitrators shall be ... (one or three). The arbitration proceedings shall be conducted in ... (insert language)." ***

Note:

* *Optional. This provision should be included particularly where the law of the substantive contract and the law of the seat are different. The law of the arbitration clause potentially governs matters including the formation, existence, scope, validity, legality, interpretation, termination, effects and enforceability of the arbitration clause and identities of the parties to the arbitration clause. It does not replace the law governing the substantive contract.*

** *Optional*

Arbitration administered by HKIAC under the UNCITRAL Rules

Parties to a contract who wish to have any future disputes referred to arbitration administered by the HKIAC under the UNCITRAL Rules may insert in the contract an arbitration clause in the following form:

"Any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the UNCITRAL Arbitration Rules in force when the Notice of Arbitration is submitted, as modified by the HKIAC Procedures for the

Administration of Arbitration under the UNCITRAL Arbitration Rules.

*The law of this arbitration clause shall be ... (Hong Kong law). **

The place of arbitration shall be ... (Hong Kong).

*The number of arbitrators shall be ... (one or three). The arbitration proceedings shall be conducted in ... (insert language)." ***

Note:

* *Optional. This provision should be included particularly where the law of the substantive contract and the law of the seat are different. The law of the arbitration clause potentially governs matters including the formation, existence, scope, validity, legality, interpretation, termination, effects and enforceability of the arbitration clause and identities of the parties to the arbitration clause. It does not replace the law governing the substantive contract.*

** *Optional*

Ad hoc arbitration under the UNCITRAL Rules

Parties to a contract who wish to have any future disputes referred to arbitration under the UNCITRAL Rules may insert in the contract an arbitration clause in the following form:

"Any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved

by arbitration under the UNCITRAL Arbitration Rules in force when the Notice of Arbitration is submitted.

*The law of this arbitration clause shall be ... (Hong Kong law). **

The appointing authority shall be ... (Hong Kong International Arbitration Centre).

The place of arbitration shall be ... (Hong Kong).

*The number of arbitrators shall be ... (one or three). The arbitration proceedings shall be conducted in ... (insert language)." ***

Note:

* *Optional. This provision should be included particularly where the law of the substantive contract and the law of the seat are different. The law of the arbitration clause potentially governs matters including the formation, existence, scope, validity, legality, interpretation, termination, effects and enforceability of the arbitration clause and identities of the parties to the arbitration clause. It does not replace the law governing the substantive contract.*

** *Optional*

Domestic Arbitration under the HKIAC Domestic Arbitration Rules

Parties to a contract who wish to have any future disputes referred to arbitration under the Domestic Arbitration Rules of the HKIAC may insert in the contract an arbitration clause in the following form:

"Any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof

or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration pursuant to the HKIAC Domestic Arbitration Rules in force when the Notice of Arbitration is submitted.

*The law of this arbitration clause shall be … (Hong Kong law). **

The seat of arbitration shall be … (Hong Kong).

*The number of arbitrators shall be … (one or three). The arbitration proceedings shall be conducted in … (insert language)." ***

Note:

* *Optional. This provision should be included particularly where the law of the substantive contract and the law of the seat are different. The law of the arbitration clause potentially governs matters including the formation, existence, scope, validity, legality, interpretation, termination, effects and enforceability of the arbitration clause and identities of the parties to the arbitration clause. It does not replace the law governing the substantive contract.*

** *Optional*

C8. Dubai International Arbitration Centre[8]

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to the Dubai International Arbitration Centre and finally resolved by arbitration under the DIAC Arbitration Rules in force on the date of the submission of the request for arbitration ("the Rules"), which Rules are

[8] Model Clauses / Agreements: Dubai International Arbitration Centre (DIAC), UAE

deemed to be incorporated by reference into this clause. The number of arbitrators, to be appointed in accordance with the Rules, shall be [*]. The legal seat of the arbitration shall be [**] and the language of the arbitration shall be [***].

**one or three*

***the city and/or country, which procedural laws the parties wish to apply to the arbitration proceedings and be supplementary to the Rules*

**** the language, in which the parties wish the arbitration proceedings to be conducted and any award to be issued*

C9. WIPO Arbitration and Mediation Center[9]

Future Disputes: WIPO Arbitration Clause

Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be referred to and finally determined by arbitration in accordance with the WIPO Arbitration Rules. The arbitral tribunal shall consist of [a sole arbitrator] [three arbitrators]. The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute, controversy or claim shall be decided in accordance with the law of [specify jurisdiction].

Future Disputes: WIPO Expedited Arbitration Clause

Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims,

[9] Model Clauses / Agreements: WIPO Arbitration and Mediation Center, Switzerland

shall be referred to and finally determined by arbitration in accordance with the WIPO Expedited Arbitration Rules. The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute, controversy or claim shall be decided in accordance with the law of [specify jurisdiction].

Future Disputes: WIPO Expert Determination Clause

Any dispute or difference between the parties arising under, out of or relating to [describe scope of the matter referred to expert determination] under this contract and any subsequent amendments of this contract shall be referred to expert determination in accordance with the WIPO Expert Determination Rules. The determination made by the expert shall [not] be binding upon the parties. The language to be used in the expert determination shall be [specify language].

C10. Asia Pacific Centre for Arbitration & Mediation[10]

Suggested Arbitration Clause

Any dispute, difference or controversy arising out of, or in connection with this contract, including any question regarding its existence, operation, termination, validity or breach thereof shall be referred to and finally resolved by arbitration as per the applicable arbitration law of the seat of arbitration and shall be conducted by the Asia-Pacific Centre for Arbitration & Mediation ("APCAM"), in accordance with their Arbitration Rules ("APCAM Arbitration Rules") for the time being in force.

Suggested Med-Arb Clause

Any dispute, difference or controversy arising out of, or in connection with this contract shall first be referred to mediation at the Asia-Pacific Centre for Arbitration & Mediation ("APCAM") and in accordance with its

[10] Model Clauses / Agreements: Asia Pacific Centre for Arbitration & Mediation (APCAM)

applicable Mediation Rules ("APCAM Mediation Rules"). If the mediation is abandoned by the mediator or is otherwise concluded without the dispute or difference being resolved, then such dispute, difference or controversy shall be referred to and determined by arbitration as per the applicable arbitration law of the seat of arbitration by APCAM in accordance with its Arbitration Rules.

Suggested Arb-Med-Arb Clause

Any dispute, difference or controversy arising out of, or in connection with this contract, including any question regarding its existence, operation, termination, validity or breach thereof shall be referred to and finally resolved by arbitration as per the applicable arbitration law of the seat of arbitration and shall be conducted by the Asia-Pacific Centre for Arbitration & Mediation ("APCAM"), in accordance with their Arbitration Rules ("APCAM Arbitration Rules") for the time being in force.

It is further agreed that following the commencement of arbitration, the parties will attempt in good faith to resolve such dispute, difference or controversy through mediation, as per the APCAM Arb-Med-Arb Procedure for the time being in force. Any settlement reached in the course of mediation shall be referred to the arbitral tribunal appointed by APCAM and may be made a consent award on agreed terms.

** The parties may consider adding —*

- *The number of arbitrators;*
- *The seat and venue of arbitration;*
- *The law applicable for arbitration;*
- *The language of arbitration.*

Bibliography

Laws (India)[1]

1. The Arbitration and Conciliation (Amendment) Act, 2021 (Act No. 3 of 2021)
2. The Arbitration and Conciliation (Amendment) Act, 2019 (Act No. 33 of 2019)
3. The Arbitration and Conciliation (Amendment) Act, 2015 (Act No. 3 of 2016)
4. The Arbitration and Conciliation Act, 1996 (Act No. 26 of 1996)
5. The Foreign Awards (Recognition and Enforcement) Act, 1961 (Act No. 45 of 1961)
6. The Advocates Act, 1961 (Act No. 25 of 1961)
7. The Hindu Marriage Act, 1955 (Act No. 25 of 1955)
8. The Constitution of India, 1950
9. The Arbitration (Protocol and Convention) Act, 1937 (Act No. 6 of 1937)
10. Code of Civil Procedure, 1908 (Act No. 5 of 1908)
11. The Indian Arbitration Act, 1899 (Act No. 9 of 1899)
12. The Indian Contract Act, 1872 (Act No. 9 of 1872)

Laws and Rules (International)[2]

1. UNCITRAL, *Expedited Arbitration Rules*, 2021 available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral_ear-e_website.pdf
2. GAFTA, *Arbitration Rules No. 125*, (September 1, 2020), available at https://www.gafta.com/write/MediaUploads/Contracts/2020/Sept%202020/125_2020.pdf
3. GAFTA, *Expedited Arbitration Procedure Rules No. 126*, (November 1, 2018), available at https://www.gafta.com/write/MediaUploads/Contracts/2018/126_2018.pdf
4. UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013), *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, 2014, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf
5. UNCITRAL, *UNCITRAL Arbitration Rules, as revised in 2010*, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules-revised-2010-e.pdf

[1]Arranged chronologically with the latest on top.
[2]Arranged chronologically with the latest on top.

6. UNCITRAL, *United Nations Convention on Contracts for the International Sale of Goods, 2010*, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09951_e_ebook.pdf

7. UNIDROIT, *UNIDROIT Principles of International Commercial Contracts 2010*; available at https://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf

8. Arbitration Act 1996, United Kingdom (1996 Chapter 23)

9. UNCITRAL, *UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as adopted in 2006*; available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf

10. UNCITRAL, *UNCITRAL Arbitration Rules - General Assembly Resolution 31/98*, (December 15, 1976), available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules.pdf

11. United Nations, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 1958, Available at https://www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf

12. Geneva Convention 1927, *Convention on the Execution of Foreign Arbitral Awards* (September 26, 1927) available at https://www.trans-lex.org/511400/pdf/

Books[3]

1. E. Gaillard, J. Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, Kluwer Law International (1999)

2. Gary B. Born, *International Arbitration: Law and Practice*, (October 2012), available at https://edisciplinas.usp.br/pluginfile.php/5593092/mod_folder/content/0/Gary-Born-Intl-Arbitration-2012.pdf?forcedownload=1

3. Michael Hwang S.C., *Selected Essays on International Arbitration*, (2013), available at https://www.transnational-dispute-management.com/news.asp?key=503

4. P.C. Markanda (Dr.), Naresh Markanda & Rajesh Markanda, *Law relating to Arbitration and Conciliation*, (9th ed.,2016).

Reports (India)[4]

1. Rajya Sabha, Parliament of India, *The Mediation Bill, 2021*, Report no. 117 (Volume 1 – Report) (July 2022), available at https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/ReportFile/18/164/117_2022_7_17.pdf

2. The NITI Aayog Expert Committee on ODR, *Designing the Future of Dispute Resolution - The ODR Policy Plan for India*, (October 2021), available at https://www.niti.gov.in/sites/default/files/2021-11/odr-report-29-11-2021.pdf

[3] Arranged alphabetically.

[4] Arranged chronologically with the latest on top.

3. Report of the High Level Committee to *Review the Institutionalisation of Arbitration Mechanism in India*, (July 30, 2017) available at https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf

4. Law Commission of India, Supplementary to Report No. 246 on Amendments to the Arbitration and Conciliation Act 1996, *"Public Policy" – Developments post Report No. 246*, (February 6, 2015), available at https://lawcommissionofindia.nic.in/reports/Supplementary_to_Report_No._246.pdf

5. Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996*, Report No. 246, (August 5, 2014), available at https://lawcommissionofindia.nic.in/reports/report246.pdf

6. Ministry of Law and Justice, Government of India, *Proposed Amendments to the Arbitration and Conciliation Act, 1996 – a Consultation Paper*, 2010 available at https://www.manupatrafast.com/pers/Personalized.aspx

7. Rajya Sabha, Parliament of India, *Ninth Report on The Arbitration And Conciliation (Amendment) Bill, 2003*, (August 2005), available at https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/ReportFile/18/18/9_2016_6_11.pdf

8. Law Commission of India, *the Arbitration and Conciliation (Amendment) Bill, 2001*, Report No. 176, (September 12, 2001), available at https://lawcommissionofindia.nic.in/arb.pdf

9. Statement of Objects and Reasons in the Arbitration and Conciliation Bill, 1995

Articles and Studies[5]

1. Aceris Law LLC, *Drafting an Arbitration Clause in 2021 –Recommendations*, (January 10, 2021), available at https://www.acerislaw.com/drafting-an-arbitration-clause-in-2021-recommendations/

2. Ahmed Mohd Khurshid Almutawa, *Challenges to the Enforcement of Foreign Arbitral Awards in the States of the Gulf Cooperation Council,* (March 2014), Doctor of Philosophy Thesis submitted to the University of Portsmouth School of Law, available at https://researchportal.port.ac.uk/en/studentTheses/challenges-to-the-enforcement-of-foreign-arbitral-awards-in-the-s

3. Anil Chawla Law Associates LLP, *Guide for Arbitration Clause in International Agreements in India*, June 2021, available at https://indialegalhelp.com/files/guidearbitrationclause.pdf

4. Apoorva Dixit, *Foreign Arbitral Award: Problems & Challenges of its Implementation & Enforcement - A Critical Study with Special Reference to India*, (2019), Doctor of Philosophy Thesis submitted to the Jagran Lakecity University, Bhopal, available at http://hdl.handle.net/10603/278483

5. Christopher Drahozal, *Do Parties Adopt Model Arbitration Clauses from Arbitral Institutions?* (December 24, 2018), available at http://arbitrationblog.kluwerarbitration.com/2018/12/24/do-parties-adopt-model-arbitration-clauses-from-arbitral-institutions/

6. CT Bar Institute, Inc., *How to Draft an Effective Arbitration Clause*, (September 2, 2020) available at https://www.ctbar.org/docs/default-source/education/materials/2020-2021-cle-materials/sad200902-arbitration-final-materials.pdf

[5]Arranged alphabetically.

7. Herbert Smith Freehills, *India Related Commercial Contracts Dispute Resolution and Governing Law Clauses*, (6th ed., August 2017), available at https://sites-herbertsmithfreehills.vuturevx.com/33/14520/landing-pages/2756e-india-dr-guide-d09.pdf?sid=blankform

8. Herbert Smith, *Dispute resolution and governing law clauses in India-related commercial contracts*, (2011), available at https://hsfnotes.com/wp-content/uploads/sites/4/2011/04/2011-Dispute-resolution-and-governing-clauses-in-India-related-commercial-contracts.pdf

9. ICC White Paper, *Seat and the Law of Arbitration*, available at https://www.iccindiaonline.org/ICC-India-Arbitration-White-Paper.pdf

10. International Journal of Law Management & Humanities, *The Future of International Commercial Arbitration in India*, (2022), available at https://doij.org/10.10000/IJLMH.113399

11. Jared L. Hubbard and Malgorzata Mrózek, *Why international arbitration clauses should be in contracts*, (August 26, 2019), available at https://newenglandbizlawupdate.com/2019/08/26/why-international-arbitration-clauses-should-be-in-contracts/

12. Josh Underwood and Joseph Harrington, *Drafting arbitration clauses: the may vs. shall debate* (May 1, 2016), available at https://www.ashurst.com/en/news-and-insights/legal-updates/drafting-arbitration-clauses-the-may-vs-shall-debate/

13. Julián Bordacahar, Dirk Pulkowski, *UNCITRAL, Expedited!* (July 14, 2021), available at http://arbitrationblog.kluwerarbitration.com/2021/07/14/uncitral-expedited/

14. Julian Nyarko, *We'll See You in . . . Court! The Lack of Arbitration Clauses in International Commercial Contracts*, (December 4, 2018), available at https://ssrn.com/abstract=3031976

15. Krishna Sarma Corporate Law Group, India Momota Oinam Angshuman Kaushik, CDDRL, Working Papers, *Development and Practice of Arbitration in India –Has it Evolved as an Effective Legal Institution*, number 103 (October 2009), available at https://fsi-live.s3.us-west-1.amazonaws.com/s3fs-public/No_103_Sarma_India_Arbitration_India_509.pdf

16. Kluwer Arbitration Blog, *Incorporation of Arbitration Clauses by Reference: Recent Developments in Dubai*, (August 13, 2021), available at http://arbitrationblog.kluwerarbitration.com/2021/08/13/incorporation-of-arbitration-clauses-by-reference-recent-developments-in-dubai/

17. Latham & Watkins, *Guide to International Arbitration*, (May, 2014), available at https://www.lw.com/admin/Upload/Documents/Guide-to-International-Arbitration-May-2014.pdf

18. Luis Alfonso Gómez Domínguez, *Causes and Consequences of Faulty Arbitration Clauses*, Estud. Socio-Juríd., Bogotá (Colombia), 9(2): 111-141, (September 17, 2007), available at http://www.scielo.org.co/pdf/esju/v9n2/v9n2a5.pdf

19. Markus A. Petsche, *Punitive Damages in International Commercial Arbitration: Much Ado about Nothing?* Arbitration International, The Journal of the London Court of International Arbitration, Volume 29 Number 1, ISSN: 09570411, (2013) available at https://www.sorbonne-assas-ils.org/wp-content/uploads/2015/07/2013-Punitive-Damages-Much_-Ado-about-Nothing.pdf.

20. Mohammad A. Aladaseen, *The arbitrability of international online consumer disputes*, (September 2015), Doctor of Philosophy Thesis submitted to the University of Bangor, available at https://research.bangor.ac.uk/portal/en/theses/the-arbitrability-of-international-online-consumer-disputes(ff23a03c-8130-489e-ae96-c78358a97408).html

21. Nahal Allahhi, *the Optimization of Court Involvement in International Commercial Arbitration*, (2016), Doctor of Philosophy Thesis submitted to the University of Manchester, available at https://www.research.manchester.ac.uk/portal/files/54588209/FULL_TEXT.PDF

22. New York Law Journal, *Drafting an Arbitration Agreement in 2022: The Arbitrator's Perspective,* (January 28, 2022) available at https://www.law.com/newyorklawjournal/2022/01/28/drafting-an-arbitration-agreement-in-2022-the-arbitrators-perspective/?slreturn=20220201024851

23. New York Law Journal, *Drafting an Arbitration Agreement in 2022: 2021 – Considerations*, (December 10, 2021) available at https://www.law.com/newyorklawjournal/2021/12/10/drafting-an-arbitration-agreement-in-2022-2021-considerations/?slreturn=20220201024849

24. New York Law Journal, *Drafting an Arbitration Agreement in 2022: The Drafter's Perspective*, (January 14, 2022), available at https://www.law.com/newyorklawjournal/2022/01/14/drafting-an-arbitration-agreement-in-2022-the-drafters-perspective/

25. Nigel Blackaby, Constantine Partasides, Alan Redfern, J. Martin H. Hunter, *An Overview of International Arbitration* in Nigel Blackaby , Constantine Partasides , et al., Redfern and Hunter on International Arbitration, (Oxford University Press 2009) pp. 1 - 83 available at https://www.international-arbitration-attorney.com/wp-content/uploads/Overview-of-International-Arbitration.pdf

26. Nishith Desai Associates, *International Commercial Arbitration, Law and Recent Developments in India,* (August 2022), available at https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/International_Commercial_Arbitration.pdf

27. Paul McMahon, *Nature of Arbitration*, available at http://mcmahonsolicitors.ie/nature-of-arbitration/

28. Prasenjit Kundu, *International Commercial Arbitration: Challenges and Prospects with Special Reference to India*, (2017), Doctor of Philosophy Thesis submitted to Dr. Ram Manohar Lohiya National Law University, Lucknow, available at http://hdl.handle.net/10603/200686

29. Prashant S. Desai Dr., *Arbitration Clause and International Contracts: An Analysis* available at https://articles.manupatra.com/article-details/Arbitration-Clause-and-International-Contracts-An-Analysis

30. Rishabh Jogani, *Incorporation of Arbitration Clauses by Reference: Recent Developments in Dubai*, (August 13, 2021), available at http://arbitrationblog.kluwerarbitration.com/2021/08/13/incorporationof-arbitration-clauses-by-reference-recentdevelopments-in-dubai/

31. Rumana Islam, *Autonomy of the Arbitration Clause and Invalid Contracts: All is Fair in Arbitration?* Jahangirnagar University Journal of Law, Vol. V, 2017, available at https://www.researchgate.net/publication/319967051

32. SCC Online Blog, *Exploring the Use of UNCITRAL's Arbitration Rules and Materials in Indian Ad Hoc Arbitrations*, (October 30, 2021), 2021 SCC OnLine Blog Exp 81, available at https://www.scconline.com/blog/post/2021/10/30/exploring-the-use-of-uncitrals-arbitration-rules-and-materials-in-indian-ad-hoc-arbitrations/

33. Skadden, Arps, Slate, Meagher & Flom LLP, *Standard Arbitration Clauses for the AAA and ICDR*, (November 2015) available at https://www.skadden.com/-/media/files/publications/2015/10/lit_arbsupp15_draftingnotes.pdf

34. S. Ravi Shankar, Advocate on Record – Supreme Court of India, *Arbitration Agreement (Domestic and International Arbitrations*), available at https://www.lawsenate.com/publications/articles/arbitration-agreement-domestic-international.pdf

35. Sumeet Kachwaha, *'The Arbitration Law of India: A Critical Analysis'*, Asian International Arbitration Journal, (© Singapore International Arbitration Centre (in co-operation with Kluwer Law International); Kluwer Law International 2005, Volume 1 Issue 2) pp. 105 – 126, *available at* https://www.mondaq.com/pdf/1165690.pdf

36. Sunday A. Fagbemi, *The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?* AJOL Vol. 6: 1: 2015, available at http://dx.doi.org/10.4314/jsdlp.v6i1.10

37. Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DePaul L. Rev. 335 (2007), available at: https://via.library.depaul.edu/law-review/vol56/iss2/7

38. UNCTAD, *Course on Dispute Settlement - Module 5.2. International Commercial Arbitration: The Arbitration Agreement* (November 6, 2005), available at https://unctad.org/system/files/official-document/edmmisc232add39_en.pdf

39. Vatsala Chauhan, *Arbitration in India: The Process and the Problems with a Special Focus on International Commercial Arbitration*, (July 1, 2020). available at SSRN: https://ssrn.com/abstract=3713559 or http://dx.doi.org/10.2139/ssrn.3713559

40. Vasudha Tamrakar and Garima Tiwari, National Law Institute University, *Ad Hoc and Institutional Arbitration*, available at https://www.legalserviceindia.com/article/l64-Ad-Hoc-and-Institutional-Arbitration.html#:~:text=In%20ad%20hoc%20arbitration%2C%20parties,negotiating%20a%20reduction%20in%20fees.

41. World Intellectual Property Organization, *What is Arbitration?* available at https://www.wipo.int/amc/en/arbitration/what-is-arb.html#:~:text=Arbitration%20is%20a%20procedure%20in,instead%20of%20going%20to%20court

42. Yousuf M. Al-Sellili, *the Relationship between the Kuwaiti National Court and Commercial Arbitration*, (August 2003), Doctor of Philosophy Thesis submitted to the Faculty of Law and Financial Studies, University of Glasgow, available at http://theses.gla.ac.uk/id/eprint/71413

Speeches[6]

1. Alexis Mourre, President, ICC International Court of Arbitration, Inaugural Session on National Initiative Towards Strengthening Arbitration in India, Government of India, New Delhi (October 21, 2016) available at https://iccwbo.org/media-wall/news-speeches/alexis-mourres-speech-inaugural-session-national-initiative-towards-strengthening-arbitration-india-event/

2. Carrie Lam Mrs, Chief Executive, Hong Kong Special Administrative Region Government at International Dispute Resolution Conference 2019 (April 17, 2019) available at https://www.info.gov.hk/gia/general/201904/17/P2019041700390.htm

3. S.A.Bobde, Chief Justice of India, International Conference on Arbitration in the Era of Globalisation, Indian Council of Arbitration & Federation of Indian Chambers of

[6] Arranged alphabetically.

Commerce and Industry (February 8, 2020) available at https://www.livelaw.in/pdf_upload/pdf_upload-369996.pdf

4. Sundaresh Menon, Chief Justice, Keynote Address, Chartered Institute of Arbitrators International Arbitration Conference Penang, (August 22, 2013) available at https://singaporeinternationalarbitration.files.wordpress.com/2013/08/130822-some-cautionary-notes-for-an-age-of-opportunity-1.pdf

5. Patricia O'Brien, Legal Counsel and Under-Secretary-General for Legal Affairs, UN, Keynote Speech, The Mauritius International Arbitration Conference (December 10, 2012) available at https://legal.un.org/ola/media/info_from_lc/Keynote%20Speech%20-%20Mauritius%20International%20Arbitration%20Conference.pdf

Guidelines[7]

1. Australian Centre for Internal Commercial Arbitration, *ACICA Model Arbitration Clause,* available at https://acica.org.au/acica-model-arbitration-clause/

2. Construction Industry Arbitration Council, *Model Clause / Agreement - Arbitration Clause*, available at http://www.ciac.in/model_arbitration.html

3. Council for National and International Commercial Arbitration, *Model Arbitration Clauses*, available at https://www.cnica.org/clause

4. Geneva Protocol on *Arbitration Clauses*, (September 24, 1923), available at file:///C:/Users/a/Downloads/OtherTreaties%201923-genevaprotocol.pdf

5. Hong Kong International Arbitration Centre, *Model Clauses*, available at https://www.hkiac.org/arbitration/model-clauses

6. ICDR *Canada, Guide to Drafting Dispute Resolution Clauses*, available at https://www.adr.org/sites/default/files/document_repository/ICDR%20Canada%20Clause-Drafting%20Guide%20-%20English.pdf

7. ICDR, *Guide to Drafting International Dispute Resolution Clauses*, available at https://www.icdr.org/sites/default/files/document_repository/ICDR_Guide_Drafting_Clauses.pdf

8. India International & Domestic Arbitration Centre, *IDAC India's Domestic Arbitration Rules – 2020*, available at https://idacindia.org/wp-content/uploads/2021/12/1.IDAC-India-Domestic-Arbitration-Rules_compressed.pdf

9. India International & Domestic Arbitration Centre, *IDAC India's International Arbitration Rules – 2020*, available at https://idacindia.org/wp-content/uploads/2021/12/2.-IDAC-India-International-Arbitration-Rules.pdf

10. Indian Council of Arbitration, *ICA Commercial Arbitration, Conciliation & Maritime Arbitration Clauses*, available at https://www.icaindia.co.in/ICAARBITRATIONCLAUSE.pdf

11. Indian Institute of Arbitration & Mediation, *IIAM Arbitration & Mediation Clause* available at https://www.arbitrationindia.com/clause.html

12. International Bar Association, United Kingdom, *IBA Guidelines on Conflict of Interest in International Arbitration*, (adopted on October 23, 2014; updated on August 10, 2015), available at https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918

[7]Arranged alphabetically.

13. International Bar Association, United Kingdom, *IBA Guidelines for Drafting International Arbitration Clauses*, (October 10, 2007), available at https://www.ibanet.org/MediaHandler?id=D94438EB-2ED5-4CEA-9722-7A0C9281F2F2#:~:text=Guideline%201%3A%20The%20parties%20should,rules%20as%20a%20starting%20point.

14. International Centre for Dispute Resolution, *ICDR Standard Arbitration Clause*, available at https://www.icdr.org/clauses

15. International Chamber of Commerce, *Standard ICC Arbitration Clause*, available at https://iccwbo.org/dispute-resolution-services/arbitration/arbitration-clause/

16. London Court of International Arbitration, *Recommended Clauses*, available at https://www.lcia.org/Dispute_Resolution_Services/LCIA_Recommended_Clauses.aspx

17. Permanent Court of Arbitration, *Model Clauses and Submission Agreements,* available at *https://pca-cpa.org/model-clauses-and-submission-agreements/*

18. Singapore International Arbitration Centre, *SIAC Model Clause*, available at https://siac.org.sg/model-clauses/siac-model-clause#:~:text=Any%20dispute%20arising%20out%20of,the%20Arbitration%20Rules%20of%20the

19. Stockholm Chamber of Commerce*, Model Clauses*, available at https://sccinstitute.com/our-services/model-clauses/

20. Swiss Arbitration Centre, *Model Arbitration Clause*, available at https://www.swissarbitration.org/centre/arbitration/arbitration-clauses/#:~:text=Any%20dispute%2C%20controversy%2C%20or%20claim,force%20on%20the%20date%20on

21. The International Centre for Alternative Dispute Resolution, *Model Arbitration Clause*, available at https://icadr.ap.nic.in/

22. Vienna International Arbitral Centre, *VIAC Model Arbitration Clause including Arb-Med-Arb,* available at https://www.viac.eu/en/investment-arbitration/content/viac-rules-of-investment-arbitration-and-mediation-2021-viac-model-arbitration-clause-including-arb-med-arb

Domestic Court Judgements[8]

1. Atlas Export Industries v. Kotak Company, MANU 1999 SC 0538.

2. Babanrao Rajaram Pund v. Samarth Builders & Developers and Ors., MANU 2022 SC 1113.

3. BBR (India) Private Limited v. S.P. Singla Constructions Private Limited, MANU 2022 SC 0668.

4. BGS SGS Soma JV v. NHPC Ltd., MANU 2019 SC 1715.

5. Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc., MANU 2016 SC 0090.

6. Bharat Aluminium and Ors. v. Kaiser Aluminium Technical Service Inc. and Ors., MANU 2012 SC 0722.

7. Bhatia International vs. Bulk Trading S.A. and Anr., MANU 2002 SC 0185.

[8] Arranged alphabetically.

8. Bihar State Mineral Dev. Corpn. and Ors. v. Encon Builders (I) Pvt. Ltd., MANU 2003 SC 0611.
9. Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. and Ors., MANU 2011 SC 0533.
10. Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV), MANU 2019 SC 1758.
11. Centrotrade Minerals and Metals Inc. v. Hindustan Copper Ltd., MANU 2020 SC 0464.
12. Centrotrade Minerals and Metal Inc. v. Hindustan Copper Ltd., MANU 2016 SC 1609.
13. Gemini Bay Transcription Pvt. Ltd. v. Integrated Sales Service Ltd. and Ors., MANU 2021 SC 0517.
14. Guru Nanak Foundation v. Rattan Singh and Sons, MANU 1981 SC 0001.
15. HRD Corporation (Marcus Oil and Chemical Division) v. GAIL (India) Limited (Formerly Gas Authority of India Ltd.), MANU 2017 SC 1066.
16. Jagdish Chander v. Ramesh Chander and Ors., MANU 2007 SC 7338.
17. K.K. Modi v. K.N. Modi and Ors., MANU 1998 SC 0092.
18. Konkan Railway Corpn. Ltd. and Ors. v. Mehul Construction Co., MANU 2000 SC 0523.
19. Mahanadi Coalfields Ltd. and Ors. v. IVRCL AMR Joint Venture, MANU 2022 SC 0958.
20. M.M.T.C. Limited v. Sterlite Industries (India) Ltd., MANU 1996 SC 1298.
21. Narayan Prasad Lohia v. Nikunj Kumar Lohia and Ors., MANU 2002 SC 0114.
22. National Thermal Power Corporation v. The Singer Company and Others, MANU 1993 SC 0146.
23. Oil and Natural Gas Corporation Ltd. v. Afcons Gunanusa JV, MANU 2022 SC 1075.
24. Oil and Natural Gas Corporation Ltd. v. Discovery Enterprises Pvt. Ltd. and Ors., MANU 2022 SC 0554.
25. Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan and Ors., MANU 1999 SC 0359.
26. Pasl Wind Solutions Private Limited v. GE Power Conversion India Private Limited, MANU 2021 SC 0295.
27. R.M. Investment and Trading Co. Pvt. Ltd. v. Boeing Co. and Ors., MANU 1994 SC 0246.
28. Roger Shashoua and Ors. v. Mukesh Sharma and Ors., MANU 2017 SC 0753.
29. Rukmanibai Gupta v. Collector Jabalpur and Ors., MANU 1980 SC 0002.
30. Sumitomo Heavy Industries Ltd. v. ONGC Ltd. and Ors., MANU 1998 SC 0834.
31. TDM Infrastructure Private Limited v. UE Development India Private Limited, MANU 2008 SC 2263.
32. The Union of India v. Kishorilal Gupta and Bros., MANU 1959 SC 0180.
33. Union of India v. Om Vajrakaya Construction Company, MANU 2021 DE 3619.
34. Vidya Drolia and Others v. Durga Trading Corporation, SCC OnLine 2019 SC 358.
35. Vimal Kishor Shah and Ors. v. Jayesh Dinesh Shah and Ors., MANU 2016 SC 0913.
36. Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Limited, MANU 2017 SC 0162.

International Court Judgements[9]

1. Roger Shashoua and Ors. v. Mukesh Sharma, 2009 EWHC 957 (Comm).

Arbitration Agreements[10]

1. Agreement between Rwanda Education Board and an Indian Company, (July 2017).
2. Bharti Airtel Limited, *Reference Interconnection Offer* available at https://assets.airtel.in/static-assets/cms/Bharti_Airtel_Reference_Interconnection_Offer_25022020.pdf
3. Bharat Heavy Electricals Limited, *Agreement* available at https://bhel.com/sites/default/files/agreement-format--1604397882.pdf
4. GAIL (India) Limited, *General Conditions of Contract for Procurement of Proprietary/ OEM- Services (Rev.0)* available at https://www.gailonline.com/pdf/gcc/GCCSERVICESOEMEnglish.pdf
5. GAIL (India) Limited, *General Conditions of Contract [Rev.1] for Procurement of Goods,* Document Control No. GAIL/C&P/GCC-Goods-0004/Rev1 (April 2022) available at https://gailonline.com/pdf/gcc/GCC-GoodsRev1.pdf
6. NHAI, *Model Concession Agreement*, (October 2017) available at https://morth.nic.in/sites/default/files/tot.pdf https://morth.nic.in/sites/default/files/tot.pdf institutional
7. NTPC Limited, *Bidding Documents for Procurement of 0.2 MMT of Imported Coal on for Power Station Basis for NTPC Lara Power Plant, (International Competitive Bidding)* Volume– I, II, III & IV, Bidding document no. : CS-0011-010(18)-9 (April 26, 2022) available at https://ntpctender.ntpc.co.in/Uploads/cor_24322_1_1.pdf
8. ONGC Energy Centre Trust *Agreement for Undertaking Collaborative R&D project available at* https://ongcindia.com/documents/77751/1767704/oecdraftagreement.pdf
9. Shareholders' Agreement between a British citizen and an Indian citizen (February 2014).
10. Shareholders' Agreement among two Indian citizens and a Poland Company, (2022).
11. Shareholders' Agreement between an Indian-owned Singapore Company and a Guyana Company, (March 2019).
12. Shareholders' Agreement among Israeli Company, British citizen and an Indian citizen (May 2017).
13. Shareholders' Agreement among Russian citizens and Indian citizens (June 2016).
14. Shareholders' Agreement, between a Russian Company and Bhopal based entrepreneur (October 9, 2015).
15. Strategic Partnership Agreement between a Bhopal based MSME and a Russian company, (2016).

[9] Arranged alphabetically.
[10] Arranged alphabetically.

Model Clauses / Agreements[11]

1. Asia Pacific Centre for Arbitration & Mediation (APCAM), New Delhi, India, available at https://apcam.asia/our_services/adr-clause/
2. Construction Industry Arbitration Council (CIAC), New Delhi, India, available at http://www.ciac.in
3. Council for National and International Commercial Arbitration (CNICA), Chennai, India, available at http://www.cnica.org/
4. Dubai International Arbitration Centre (DIAC), Dubai, United Arab Emirates, available at https://www.diac.com/en/adr-services/arbitration/arbitration-model-clause/
5. Hong Kong International Arbitration Centre (HKIAC), available at http://www.hkiac.org/arbitration/model-clauses#Arbitration%20under%20the%20HKIAC%20Administered%20Arbitration%20Rules
6. International Arbitration and Mediation Centre (IAMC), Hyderabad, India https://iamch.org.in/arbitration/model-clause
7. Indian Council of Arbitration (ICA), New Delhi, India, available at https://www.icaindia.co.in/ICAARBITRATIONCLAUSE.pdf
8. Indian Institute of Arbitration & Mediation available (IIAM), Ernakulam, Kerala, India, available at http://www.arbitrationindia.org/ and https://www.arbitrationindia.com/pdf/form_oa1.pdf
9. International Centre for Dispute Resolution (ICDR), a division of American Arbitration Association (AAA), New York, United States of America, available at https://www.icdr.org/clauses
10. International and Domestic Arbitration Centre, Vodadara, India (IDAC India), available at https://idacindia.org/wp-content/uploads/2021/12/1.IDAC-India-Domestic-Arbitration-Rules_compressed.pdf
11. London Court of International Arbitration, (LCIA), London, UK, available at https://www.lcia.org/Dispute_Resolution_Services/LCIA_Recommended_Clauses.aspx
12. Mumbai Centre for International Arbitration (MCIA), Mumbai, India available at https://mcia.org.in/mcia-rules/model-clauses/
13. Nani Palkhivala Arbitration Centre (NPAC), Chennai, India, available at https://nparbitration.in/arbitration.php?rule=model
14. Permanent Court of Arbitration (PCA), The Hague, The Netherlands, available at https://docs.pca-cpa.org/2015/11/PCA-Arbitration-Rules-2012.pdf
15. Singapore International Arbitration Centre (SIAC), Singapore, available at https://siac.org.sg/siac-model-clauses
16. Swiss Arbitration Centre, Geneva, Switzerland, available at https://www.swissarbitration.org/centre/arbitration/arbitration-clauses/
17. Vienna International Arbitral Centre (VIAC), Vienna, Austria available at https://www.viac.eu/en/arbitration/arbitration-clause-vienna-rules-2021
18. World Intellectual Property Organization (WIPO) Arbitration and Mediation Center, Geneva, Switzerland, available at https://www.wipo.int/amc/en/clauses/arbitration/

[11] Arranged alphabetically.

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