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ARBITRATION CLAUSES IN COMMERCIAL CONTRACTS: DRAFTING DEFECTS AND THEIR IMPACT ON DISPUTE RESOLUTION IN INDIA

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Abstract

Over the last two decades, arbitration has become the preferred dispute resolution mechanism for commercial parties because it offers greater procedural flexibility, confidentiality and party control than conventional court litigation. The Arbitration and Conciliation Act, 1996¹ (hereinafter “the Act”) was enacted to provide a framework for arbitration and conciliation in India, in line with the UNCITRAL Model Law on International Commercial Arbitration,² and to establish India as a hub for international commercial arbitration. Despite the favorable legislative environment and arbitration-friendly judicial environment, commercial disputes still end up in courts due to poorly drafted arbitration agreements. Lack of clarity on the seat of arbitration, issues with jurisdiction, defective appointment procedures, and lack of clarity on applicable arbitration rules are some of the issues that often lead to judicial intervention prior to arbitration proceedings commencing, defeating the very purpose of arbitration. Courts often refer to such arbitration clauses as “pathological arbitration clauses” – arbitration clauses that create more problems than solutions, defeating the policy of having commercial disputes be decided by private dispute settlement mechanisms.

This article aims to discuss the importance of properly drafting arbitration clauses in commercial contracts. The article will analyze the statutory framework, discuss the frequently encountered drafting issues, and examine arbitration-related case law. In this article, I will argue that proper drafting of arbitration clauses is of paramount importance to expedite resolution of commercial disputes and reduce judicial intervention. A properly drafted arbitration clause will contribute to efficient dispute resolution and enable parties to exercise

¹ Arbitration and Conciliation Act, 1996.

² UNCITRAL Model Law on International Commercial Arbitration, 1985 (amended 2006).

their autonomy in dispute resolution decision-making.

Keywords: Arbitration; Commercial Contracts; Arbitration Clause; Drafting; Party Autonomy; Commercial Disputes.

Introduction

Commercial dealings today call for a more sophisticated contractual regime than ever before. With domestic and international trade booming by the day, dispute resolution mechanisms have become integral to business operations. Litigation being a very time consuming, procedural and expensive process, arbitration has emerged as the favored alternative to litigation. Arbitration is faster, confidential, flexible, expert-determined, and binding.

The effectiveness of arbitration depends to a large extent on the arbitration clause. The arbitration clause contains all the necessary details which determine whether disputes will be referable to arbitration, the process to be followed by the arbitral tribunal, appointment of arbitrators, seat and venue of arbitration and applicable law among other things. There are numerous commercial contracts which lack appropriate arbitration clauses. In most cases the parties to the contracts rely on arbitration clauses used in other agreements without making the required alterations based on specific needs of the transaction or applicable law. As a result, there are several disputes on the validity, scope and applicability of arbitration clauses before any substantive issues in the contracts are considered.

Indian courts are flooded with arbitration related disputes where arbitration agreements were not properly drafted.

The Indian courts have had to grapple with the interpretation of arbitration clauses which do not provide sufficient detail, resulting in delays and expense before the arbitration process can commence. Courts in India were required to decide on applicability of Sections 8 and 11 of the Arbitration and Conciliation Act, 1996 which relate to situations where arbitration agreements exist or not, the seat of arbitration, appointment of arbitrators and interpretation of arbitration clauses.

A detailed analysis of arbitration clauses is very critical especially in the light of recent amendments to the Arbitration and Conciliation Act, 1996 which were made in 2015, 2019 and 2021 to wean India away from the pro-litigation culture, promote institutional arbitration, fast track arbitration awards and make India a global dispute resolution hub. Unless the provisions of arbitration clauses are properly drafted, the objectives of the amended act will not be achieved. This paper will discuss aspects of law relating to arbitration agreements and

arbitration clauses, arbitration agreements and examine the validity and scope of arbitration clauses as interpreted by the Indian courts. The paper will also highlight some of the drafting issues in arbitration clauses and suggest some solutions.

Legal Framework Governing Arbitration Clauses in India

The legal framework for arbitration in India is the Arbitration and Conciliation Act, 1996, which repealed the Arbitration Act, 1940. The said Act follows the model law of UNCITRAL on international commercial arbitration and aims at reducing the judicial intervention in arbitration to a minimum as well as promoting parties' autonomy.

The most crucial section of the Arbitration and Conciliation Act, 1996 is section 7, which describes an arbitration agreement as an agreement between parties to submit to arbitration any disputes which have arisen or may arise between them. An arbitration agreement is a contract, which is governed by the general law of contract. It is essential that arbitration agreements are in writing and specify the disputes to be settled by arbitration, which implies that arbitration is a voluntary process. In accordance with section 7, one of the most important principles of arbitration that is reflected in the Arbitration and Conciliation Act, 1996 is the principle of consent. Under the principle of consent, arbitration is only possible with the consent of the parties, which means that the parties cannot be forced to arbitrate and that Indian courts are extremely cautious not to interfere in arbitration proceedings.³

Moreover, in accordance with section 8, any judicial authority which hears an action in which arbitration agreement was not performed must order the parties to arbitrate. Another principle that is reflected in the Arbitration and Conciliation Act, 1996 and is related to the principle of consent is the principle of minimal judicial intervention. In accordance with this principle, judicial intervention in arbitration must be limited to that is necessary.⁴

In accordance with section 11, if the arbitration agreement does not stipulate how the arbitrator/s must be appointed or if the parties cannot come to an agreement on the appointment of the arbitrator/s, the Supreme Court as well as the High Courts have jurisdiction over the appointment of arbitrators. The 2015 amendment to the Arbitration and Conciliation Act, 1996 made significant changes to section 11, significantly limiting the jurisdiction of courts over arbitration. Nevertheless, the Indian courts still retain certain jurisdiction over arbitration, which implies that in cases when courts have arbitration-related issues, they would still

³ Arbitration and Conciliation Act, 1996, § 7.

⁴ Arbitration and Conciliation Act, 1996, § 8.

intervene in order to ensure the validity of the arbitration agreement.⁵

One of the most crucial sections of the Arbitration and Conciliation Act, 1996 is section 16, which stipulates that arbitral tribunals have jurisdiction over disputes relating to their own jurisdiction. This means that the arbitration proceedings are not subject to the judicial review at any stage, which implies that Indian arbitration legislation follows the Kompetenz-Kompetenz principle as well as significantly limits the judicial intervention in arbitration.⁶

Finally, according to section 20 of the Arbitration and Conciliation Act, 1996, the parties involved are free to choose the seat of arbitration as they see fit. It is of paramount importance that the parties clearly state the arbitration seat in order for jurisdiction issues to be resolved during arbitration proceedings, since it is the seat which determines the competent courts as well as the law which governs arbitration. The failure to make it clear where the arbitration proceedings are to take place would result in disputes over arbitration jurisdiction between the parties.⁷

Thus, the Arbitration and Conciliation Act, 1996 reflects two core principles of arbitration: the principle of the parties' autonomy and the principle of minimal judicial intervention. In accordance with the principle of the parties' autonomy, the parties to an arbitration agreement can choose the appropriate dispute resolution mechanism. Moreover, according to the principle of minimal judicial intervention, which is supported by section 5 of the Arbitration and Conciliation Act, 1996, the judicial intervention in arbitration proceedings must be limited to the minimum.

Even though the recent amendments to the Arbitration and Conciliation Act, 1996 support institutional arbitration, speed up arbitration proceedings and promote commercial confidence in arbitration as a reliable dispute resolution mechanism, disputes stemming from arbitration agreements can arise regardless of legislation.

Essential Elements of an Effective Arbitration Clause

A properly drafted arbitration clause leaves no room for argument. Here are some key points that should be included in every commercial arbitration agreement.

First and foremost, the arbitration clause must exhibit an unequivocal intent from both parties to arbitrate. By using language such as "shall be referred to arbitration," both parties can be certain that their dispute will be resolved by an arbitrator. In contrast, language such as "may

⁵ Arbitration and Conciliation Act, 1996, § 11.

⁶ Arbitration and Conciliation Act, 1996, § 16

⁷ Arbitration and Conciliation Act, 1996, § 20.

refer disputes to arbitration” creates ambiguity as to whether the parties intended to arbitrate. Secondly, it is imperative that the arbitration clause clearly define the disputes that are subject to arbitration. To achieve this, use language such as “all disputes arising out of or in connection with this agreement.”

Thirdly, the arbitration clause must stipulate the seat of arbitration. The seat of arbitration is the place where the arbitration proceedings are held, thus also determining what law governs arbitration proceedings. Seat of arbitration is also linked to which courts have jurisdiction over the arbitration. If the seat of arbitration is not specified, disagreements over which country’s laws should govern the proceedings or which courts should rule on procedural issues are highly likely.

Fourthly, the arbitration clause should only list a venue if the parties plan on holding oral hearings in a specific location other than the seat of arbitration. Many arbitration clauses conflate the difference between the seat and the venue, which can lead to expensive litigation. Another key point that needs specification in an arbitration agreement is the appointment process. The arbitration clause must state the number of arbitrators that should constitute the panel, how the appointed arbitrators should act, how they should be hired, when they should be appointed, and who has the authority to appoint them in the event of disagreement.

Commercial arbitration agreements should also specify the law that governs the arbitration, language, confidentiality, and whether the arbitration will be administered by an organization such as the Mumbai Centre for International Arbitration, SIAC, or ICC or ad-hoc.

An arbitration agreement that anticipates disputes before they arise empowers the parties involved to make enforceable decisions. As such, drafting an arbitration clause for business contracts requires due diligence.

Judicial Interpretation of Defective Arbitration Clauses

Indian Courts have significantly contributed to arbitration law through a wide range of litigation and the balanced interpretation of arbitration clauses in line with the legislative intent to promote arbitration while maintaining the will of the contracting parties. In general, Indian Courts adopt a proactive approach in favor of arbitration agreements while simultaneously recognizing the impossibility of arbitration in the absence of mutual consent.

1. Jagdish Chander v. Ramesh Chander 2007 5 SCC 719

This judgment is classic in nature and is often cited as an authoritative text on arbitration law. According to the arbitration agreement, any dispute between the parties had to be submitted to

arbitration upon mutual consent. The Supreme Court ruled that the language of the arbitration clause did not obligate the parties to engage in arbitration; instead, it just outlined the conditions under which arbitration could take place.

An arbitration agreement must contain clear language about the parties' intent to refer to arbitration. A mere mention of arbitration and consultation is not sufficient to satisfy Section 7 of the Arbitration and Conciliation Act, according to the Court. Therefore, when creating arbitration agreements, it is critical to use unequivocal language.⁸

2. *Enercon (India) Ltd. v. Enercon GmbH* 2014 5 SCC 1

The arbitration clause in this dispute contained various inconsistencies in terms of jurisdiction, among other things. However, rather than declaring the agreement invalid, the Court interpreted it in a commercially reasonable manner. The Supreme Court emphasized that commercial contracts should be construed in a way that allows for arbitration in the event of a dispute.

The Court ruled that even if there are some inconsistencies in an arbitration agreement, the arbitration clause should be enforced if it is evident from the contract's language that the parties intended to submit the dispute to arbitration.⁹

3. *Duro Felguera S.A. v. Gangavaram Port Ltd.* 2017 9 SCC 729

The Supreme Court provided clarification on the scope of judicial review of Section 11(6) of the Arbitration and Conciliation Act, 1996, as amended by the 2015 Amendment Act.

When appointing arbitrators, Courts are required to restrict their jurisdiction to determining whether an arbitration agreement exists and should therefore uphold arbitration. Additionally, it was ruled that when considering applications under Section 11(6), Courts are not permitted to assess the validity of the underlying disputes.

This ruling reflects India's pro-arbitration bias while also minimizing judicial intervention in arbitration proceedings.¹⁰

4. *BGS SGS Soma JV v. NHPC Ltd.* 2020 4 SCC 234

This judgment was delivered in relation to the differences between the seat and venue of arbitration. According to the Supreme Court, if the arbitration agreement designates a particular location as the venue, and this designation does not appear to contradict the intentions of the

⁸ *Jagdish Chander v. Ramesh Chander*, (2007) 5 SCC 719.

⁹ *Enercon (India) Ltd. v. Enercon GmbH*, (2014) 5 SCC 1.

¹⁰ *Duro Felguera S.A. v. Gangavaram Port Ltd.*, (2017) 9 SCC 729

parties, the venue may also be regarded as the seat.

This case's significance resides in its contribution to the interpretation of Seat vs Venue doctrine and its assistance in clarifying the ambiguity around the terms "seat" and "venue" of arbitration.¹¹

5. *Mankastu Impex Pvt. Ltd. v. Airvisual Ltd.* 2020 5 SCC 399

This dispute dealt with the interpretation of an arbitration clause containing inadequate differentiation between governing law and the seat of arbitration. According to the Court, the seat of arbitration determines the supervisory jurisdiction over the arbitration proceedings. Therefore, it is critical to identify the seat of arbitration by analyzing the entire agreement. The language of the arbitration clause and the evidence presented are critical in determining whether the seat of arbitration has been specified.¹²

6. *Vidya Drolia v. Durga Trading Corporation* 2021 2 SCC 1

In this notable judgment, the Supreme Court once again demonstrated its pro-arbitration bias. According to the ruling, while construing arbitration agreements, judicial authorities must adopt a liberal outlook so that arbitration proceedings may take place unless it is found that there is no arbitration agreement or that the disputes are non-arbitrable in nature.¹³

To conclude, based on the Supreme Court's recent judgments, it may be asserted that Indian Courts advocate for arbitration as a means of alternative dispute resolution and tend to side with the principle of party autonomy. However, as long as the arbitration agreements are not properly worded, judicial intervention will always be required, which contradicts the initial idea of limited judicial intervention in arbitration proceedings. It's worth noting that even in the most optimistic scenario, a badly worded arbitration agreement might result in jurisdictional disagreements, which would undoubtedly lead to additional expenses and time being invested in litigation.

Practical Drafting Guidelines for Arbitration Clauses

A well-drafted arbitration clause is critical in order to obtain quick and expeditious resolution of disputes in the manner desired by the parties involved. Since it lays the very foundation for dispute resolution, it needs to be drafted with caution and circumspection. With this objective

¹¹ *BGS SGS Soma JV v. NHPC Ltd.*, (2020) 4 SCC 234

¹² *Mankastu Impex Pvt. Ltd. v. Airvisual Ltd.*, (2020) 5 SCC 399

¹³ *Vidya Darolia v. Durga Trading Corp.*, (2021) 2 SCC 1.

in mind, I have listed the following do's and don't of arbitration clauses based mainly on the Arbitration and Conciliation Act 1996 and related case law.

First and foremost, the arbitration clause should be in mandatory terms, i.e., using the language "shall". Avoid using expressions such as "may", as you may unintentionally render arbitration agreement optional to the parties.

Secondly, the scope of disputes for arbitration should also be drafted in broad terms. You would not want a party to come to court arguing that a dispute does not fall within the scope of arbitration. Therefore, it is always better to use formulae such as "all disputes relating to this agreement" which encompasses all manner of disputes in comparison to "disputes referring to the terms and conditions of this agreement".

Thirdly, parties must explicitly state the seat(arbitral venue) to avoid disputes over which country's laws govern the arbitration process. Remember that it is the law of the seat that governs the jurisdiction and procedure of arbitration. The venue where hearings are to be held must be specifically mentioned, if different from the seat.

Fourthly, you must lay down procedures for constituting the arbitral tribunal in order to avoid the need for judicial intervention under Section 11 of Arbitration and Conciliation Act 1996. Therefore, you must specifically state the number of arbitrators, their qualifications if any, time limit for their appointment, and who has the authority to appoint them in case of disagreements between the parties. A detailed procedure will help avoid the problem altogether.¹⁴

One of the most crucial decisions when drafting an arbitration clause is deciding between institutional arbitration and ad hoc arbitration. It is always better to specifically mention the arbitral institution that would administer the arbitration, along with the rules governing the arbitration process in case either party wants to do so. If you want to go with institutional arbitration, you must specifically name the institution. It is better to specifically lay down the Rules of, say, Mumbai centre for international arbitration (MCIA) or Singapore International Arbitration Centre (SIAC) rather than just mentioning the name of the institution.¹⁵

You must also explicitly specify the law governing the contract, arbitration agreement, arbitration proceedings etc., if it is different from the law of the seat.¹⁶

Confidentiality, language of arbitration proceedings, allocation of costs of arbitration and timeframe for concluding arbitration are some of the other matters that may be worth mentioning depending on the needs and demands of the situation.

¹⁴ Arbitration and Conciliation Act, 1996, § 11.

¹⁵ Gary B. Born, *International Commercial Arbitration* (3 ed. 2021).

¹⁶ O.P. Malhotra & Indu Malhotra, *The Law and Practice of Arbitration and Conciliation* (4th ed. 2014).

Critical Analysis

The growing popularity of arbitration is indeed reflective of the pro-arbitration policy in India, not merely through legislative measures such as the Arbitration and Conciliation (Amendment) Acts, 2015, 2019, and 2021, which sought to de-jurisprudentialize arbitration, but also through the pro-arbitration stance of the higher judiciary. Even then, the effectiveness of arbitration mostly depends on the art of contract drafting.¹⁷

One of the most prevalent issues in arbitration practice, especially in commercial arbitration, has been the use of boilerplate arbitration clauses by businesses. The clauses are often cut-and-pasted from prior agreements with no regard for the applicable law, venue, arbitration seat, and appointment procedures of arbitrators. This defeats the very essence of arbitration, resulting in jurisdictional disputes instead of expedited dispute resolution.¹⁸

It is a known fact that most courts take a pragmatic view of arbitration clauses, as showcased by the *Enercon (India) Ltd. v. Enercon GmbH* ruling and subsequent similar rulings. In this case, the Supreme Court took a broad view of the arbitration agreement, finding that it had arbitrability on a commercial law issue despite the arbitration clause being vague. Courts across the country are increasingly taking a broad view of arbitration clauses to give effect to the parties' intentions to arbitrate. However, a court cannot rewrite the arbitration agreement for the parties, as highlighted by *Jagdish Chander v. Ramesh Chander*. The arbitration agreement must satisfy the basic conditions of an enforceable contract. Therefore, the arbitration clause is not a self-executing document that comes into existence merely because arbitration is generally a favored method of dispute resolution.

Another common issue in arbitration has been the difference between the seat and venue of arbitration. The *BGS SGS Soma Joint Venture v. NHPC Ltd. and Mankastu Impex Pvt. Ltd. v. Airvisual Ltd.* rulings demonstrate how the courts have interpreted this issue. Nevertheless, it is a matter of contract drafting, which could be easily avoided if the arbitration agreements were properly drafted.

The current wave of economic reforms and the liberalization of trade and investment has led to a rise in complex commercial contracts, including those relating to infrastructure, technology transfer, joint ventures, mergers, and acquisitions. All of these require arbitration agreements that go beyond the basic issues of law and venue. Therefore, if India is to position itself as a global business hub and a preferred arbitral seat, its lawyers need to learn and practice the art of contract drafting.

¹⁷ Arbitration and Conciliation (Amendment) Acts, 2015, 2019 & 2021.

¹⁸ Avtar Singh, *Law of Arbitration and Conciliation*.

By way of conclusion, it may be said that arbitration is effective not because of statutes but because of well-drafted arbitration agreements that reduce disputes about the arbitration process itself. The best arbitration proceedings always start with a well- drafted arbitration clause.

Conclusion

Arbitration has become a preferred method of dispute resolution in India. The Arbitration and Conciliation Act, 1996, along with pro-arbitration judicial reforms and legislative developments, has created a conducive environment for party autonomy. However, the success of arbitration continues to be largely dependent on the quality of the arbitration clause in the commercial contracts.

The present article highlights the fact that the flawed arbitration clauses are the single biggest reason for disputes in commercial arbitration, as highlighted by the frequent challenges to arbitration agreements in the courts. Arbitration clauses that are ambiguous, silent on the seat of arbitration, inconsistent on the issues of jurisdiction, or vague on the law governing the arbitration often lead to avoidable litigation. Even though Indian courts have generally been pro-arbitration in their approach and have upheld arbitration agreements, even in the face of challenges, arbitration clauses should be carefully drafted.

While drafting arbitration clauses is not the most exciting task for a commercial lawyer, it is a critical exercise. A well-drafted arbitration clause reduces transaction costs, promotes commercial certainty, and ensures smooth dispute resolution. In a country that aspires to be a global arbitration hub, the need to improve the drafting standards of arbitration agreements is as important as legislative and judicial reforms to promote arbitration. A well-drafted arbitration clause protects the interests of the parties and promotes arbitration as a viable dispute-resolution mechanism. Thus, the future of commercial arbitration in India depends as much on lawyers as it does on lawmakers.¹⁹

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