Guide

For

Arbitration Clause

in International Agreements in India

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Anil Chawla Law Associates LLP

Business Lawyers, Strategic Advisors and Insolvency Professionals

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Notes:

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This Guide is an academic exercise. It does not offer any advice or suggestion to any individual or firm or company.

Preface

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.

International arbitration is classified into two types – (a) international investment arbitration dealing with disputes between an investor and a government (b) international commercial arbitration dealing with disputes between business entities of different countries.

Our two Guides (one version for foreigners http://indialegalhelp.com/files/faqtreatydisputesindia.pdf and the other for Indians http://indialegalhelp.com/files/faqtreatydisputesindians.pdf) on international investment arbitration have been well-received across the world. International investment arbitration has its roots in bilateral treaty signed by two countries to protect investments. On the other hand, international commercial arbitration is rooted in the agreement between two (or more) business entities of different countries.

It is for the business entities to provide in their agreement dispute resolution by arbitration. We know from our experience in the field of drafting international agreements that arbitration clause in an agreement is rarely given much attention at the time of preparation of the agreement. But when relations turn sour, the first clause to be read is the arbitration clause.

This Guide on arbitration clause is intended to help Indian businesses understand the various options available while writing arbitration clause in an international commercial agreement whether the agreement be a joint venture agreement or a technology transfer agreement or a technical collaboration agreement or a supply contract or a franchising agreement or a marketing agreement or any other type of agreement.

We have covered in the Guide international as well as domestic arbitration even though the coverage of domestic arbitration is limited to help the readers understand the field. The Guide may be useful for entrepreneurs as well as business executives negotiating international agreements.

We, Anil Chawla Law Associates LLP, specialize in adding value to businesses. This Guide is a part of our ongoing passion and commitment to help businesses across the globe grow, prosper and create sustainable value.

Anil Chawla
Senior Partner
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Glossary

CHF	Swiss Franc
Curial Law	Law applicable to arbitration proceedings
EUR	Euro
HKD	Hong Kong Dollar
ICA	International Commercial Arbitration
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
LCIA	London Court of International Arbitration
SGD	Singapore Dollar
The Act	The Arbitration and Conciliation Act, 1996 (Act No. 26 of 1996) of India
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	The International Institute for the Unification of Private Law
USD	US Dollar

Part A

Essentials of Arbitration Law

A1. Introduction – key issues

Arbitration is a legal way to resolve disputes without going to courts. Most international commercial agreements have a clause providing for arbitration in case of disputes.

Many business executives and owners tend to think that arbitration clause is something standard that does not need to be negotiated or discussed. Nothing can be farther from truth. It is advisable to devote due attention to the clause when the contract is being negotiated.

Arbitration clause in an international commercial agreement includes many key decisions on which the parties to the agreement agree mutually. Parties need to decide on applicable law, rules of arbitration, place of arbitration, number of arbitrators, qualification of arbitrators, language of arbitration, etc. Discussion on the key points to be decided as part of arbitration clause is given below.

Law

The most important issue relates to choice of law. Parties to an international agreement need to decide three laws – (a) the law that will govern the contract or the Agreement (b) law for the arbitration agreement and (c) the law controlling conduct of arbitration. This was summed up by Honourable Supreme Court in Bharat Aluminium Company vs. Kaiser Aluminium Technical Services Inc. (Decided on 28 January 2016; MANU/SC/0090/2016) 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 above choice of three laws had earlier been expanded to four by some judges. Honourable Supreme Court in Sumitomo Heavy Industries Ltd. vs. ONGC Ltd. and Ors. (Decided on 4th December 1997; MANU/SC/0834/1998) quoted an English case law, as follows, to explain the four laws relevant to any agreement.

(1) The proper law of the underlying contract, i.e. the law governing the contract which creates the substantive rights and obligations of the parties out of which the dispute has arisen.

(2) The proper law of the arbitration agreement, i.e. the law governing rights and obligations of the parties arising from their agreement to arbitrate and, in particular, their obligation to submit their disputes to arbitration and to honour an award. This includes inter alia questions as to the validity of the arbitration agreement, the validity of the notice of arbitration, the Constitution of the tribunal and the question whether an award lies within the jurisdiction of the arbitrator.

(3) The proper law of the reference, i.e. the law governing the contract which regulates the individual reference to arbitration. This is an agreement subsidiary to but separate from the arbitration agreement itself, coming into effect by the giving of a notice of arbitration from which point a new set of mutual obligations in relation to the conduct of the reference arise upon lines canvassed in the Bremer Vulcan Schiffbau and Maschinenfabrik v. South India Shipping Corporation (1981) 1 Lloyd's Rep. 253 at p. 263 and developed by Mr. Justice Mustill (as he then was) in Black Clawson International Ltd. v. Paperwork Waldhof-Aschaffenburg A.G. (1981) 2 Lloyd's Rep. 446. That law governs the question whether by reason of subsequent circumstance the parties have been discharged (whether by repudiation or frustration) from their obligation to continue with the reference of the individual dispute, while leaving intact the continuous agreement to refer future disputes pursuant to the arbitration agreement.

(4) The curial law, i.e. the law governing the arbitration proceedings themselves, the manner in which the reference is to be conducted. It governs the procedural powers and duties of the arbitrators, questions of evidence and the determination of the proper law of the contract.

> In respect of many arbitrations, the applicable law will be the same in all four cases. (1) will usually be decisive as to (2), in the absence of an express contrary choice; (2) and (3) will very rarely differ. However, as to (4), it is not uncommon to encounter the incidence of a different curial law in cases where the parties have made an express choice for arbitration (frequently in London) in a jurisdiction divorced from the jurisdiction with which the contract in (1) has most real connection.

For example, in an agreement between an Indian company and a Singapore company the Agreement may provide as follows:

a) Agreement will be governed by Indian law.

b) Arbitration will be conducted in London and will be governed by UK law related to arbitration.

c) Arbitration proceedings will be conducted as per UNCITRAL Rules related to Arbitration.

Place – Seat and Venue

Parties to an Agreement are free to decide the seat or place of arbitration. Legally speaking, seat of arbitration is not just a geographical decision. When parties decide on a certain place as the seat of arbitration, they decide to submit their arbitration to judicial supervision of the courts under whom the seat falls. So, if the seat of arbitration is Singapore, courts at Singapore will supervise and control the arbitration.

Seat has to be differentiated from venue of arbitration. Once the seat is decided, proceedings of arbitration may be held at various places. For example, in an agreement, the seat (or place) of arbitration was mentioned as Mumbai. One of the arbitrators was from Kolkata, one from Delhi and one from Chennai. The three arbitrators decided that meetings of Arbitration Panel will be held by rotation at Kolkata, Delhi and Chennai. This decision of the arbitrators is perfectly legal. Despite arbitration proceedings being held at three different cities and no proceedings being held at Mumbai, the seat of arbitration will continue to be at Mumbai. Courts at Mumbai will have jurisdiction over the arbitration proceedings.

Often arbitration proceedings may be held by video conferencing. Even in such a case, the seat of arbitration will remain as specified in the arbitration agreement.

The following extract from Bharat Aluminium and Ors. etc. etc. vs. Kaiser Aluminium Technical Service Inc. and Ors. etc. etc. (Supreme Court; Decided on 6 September 2012; MANU/SC/0722/2012) explains the difference between seat and venue very well.

> 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.
>
> **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.

To sum up, seat (or place) of arbitration is decided by the parties to an agreement in the arbitration clause. Seat is the centre of gravity of the arbitration proceedings. Seat determines the courts that will supervise the arbitration proceedings. Venue is decided by the arbitrators based on their convenience. There may be more than one venue, but there will be only one seat of arbitration as provided in the agreement.

It is interesting to mention here about Pasl Wind Solutions Private Limited vs. GE Power Conversion India Private Limited (Supreme Court; Decided on 20 April 2021; MANU/SC/0295/2021). In the said case two Indian companies decided that the arbitration will be held at Zurich, Switzerland. Subsequently, the hearings of the Arbitration Tribunal were held at Mumbai to reduce costs. The following extracts from the judgment of Honourable Supreme Court make the position clear:

7. Clause 6 of the settlement agreement extracted above would show that arbitration is to be resolved "in Zurich" in accordance with the Rules of Conciliation and Arbitration of the ICC. In similar circumstances, in Mankastu Impex (P) Ltd. v.

As per this clause, Zurich was therefore determined to be the juridical seat of arbitration between the parties.

8. At the Case Management Conference held on 28.06.2018, the learned arbitrator specifically decided:

> **3.** The venue of the hearing shall be Mumbai, India. The seat of the arbitration of course remains Zurich, Switzerland. I am grateful to the Respondent for offering to assist with the organisation of the hearing in
>
> India. The consequence of holding the hearing in Mumbai will of course be dealt with in the Award on costs, depending on the outcome. The Tribunal is of the view that it is cost efficient to hold the hearing in India where the parties are based, the Respondent's five witnesses are based, where Respondent's legal team are based and Claimant's co-counsel is based. This means that the Claimant's lead counsel, the Claimant's sole witness and the sole arbitrator must travel to India. ...

This arrangement has been accepted by both parties. Even in the final award dated 18.04.2019, the learned arbitrator held:

> **82.** For the reasons set out above, the Tribunal therefore has held in Procedural Order No. 3 and hereby finds that the arbitration Clause in the Settlement Agreement is valid and proceeds to apply the Swiss Act because the seat of the Arbitration is Zurich, Switzerland.

Another interesting case in this regard is Union of India vs. Hardy Exploration and Production (India) Inc. (Supreme Court; Decided on 25 September 2018; MANU/SC/1046/2018). In the said matter, the arbitration agreement provided the venue to be Kuala Lumpur. The agreement was silent on the seat of arbitration. Relevant extract from the agreement reads as follows:

33.12 The venue of conciliation or arbitration proceedings pursuant to this Article unless the parties otherwise agree, shall be Kuala Lumpur and shall be conducted in English language. Insofar as practicable the parties shall continue to implement the terms of this contract notwithstanding the initiation of arbitration proceedings and any pending claim or dispute.

The Arbitration Tribunal also did not decide the seat of the arbitration proceedings. Honourable Supreme Court decided that India was the seat of arbitration proceedings and not Kuala Lumpur, and hence Indian courts had jurisdiction in the matter. Relevant extracts are as follows:

> **33.** The word 'determination' has to be contextually determined. When a 'place' is agreed upon, it gets the status of seat which means the juridical seat. We have already noted that the terms 'place' and 'seat' are used interchangeably. When only the term 'place' is stated or mentioned and no other condition is postulated, it is equivalent to 'seat' and that finalises the facet of jurisdiction. But if a condition precedent is attached to the term 'place', the said condition has to be satisfied so that the place can become equivalent to seat. In the instant case, as there are two distinct and disjunct riders, either of them have to be satisfied to become a place. As is evident, there is no agreement. As far as determination is concerned, there has been no determination. In ***Ashok Leyland Limited and State of T.N. and Anr.***
>
> The said test clearly means that the expression of determination signifies an expressive opinion. In the instant case, there has been no adjudication and expression of an opinion. Thus, the word 'place' cannot be used as seat. To elaborate, a venue can become a seat if something else is added to it as a concomitant. But a place unlike seat, at least as is seen in the contract, can become a seat if one of the conditions precedent is satisfied. It does not ipso facto assume the status of seat. Thus understood, Kuala Lumpur is not the seat or place of arbitration and the interchangeable use will not apply in *stricto sensu*.

The above case underlines the importance of drafting the arbitration clause carefully and specifying the seat (not venue; may be seat and venue both, but never venue alone) clearly in the clause.

Number of Arbitrators

Number of arbitrators must always be odd. Single or solo arbitrator is possible, if the parties agree. It is a common practice to have three (3) arbitrators with one each appointed by the two parties and the third called Presiding Arbitrator or by some other name, appointed by the two arbitrators.

Even number of arbitrators is not permitted in most legal systems. So, 2 or 4 arbitrators should not be chosen.

In case parties have not agreed on the number of arbitrators in the arbitration clause, it will be presumed that the number of arbitrators will be three under UNCITRAL Rules. Article 7(1) of UNCITRAL Rules states the same.

Number of arbitrators

Article 7

1. If the parties have not previously agreed on the number of arbitrators, and if within 30 days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.

If the arbitration is under the Act, section 10 of the Act which states that if number of arbitrators is not specified, it will be presumed that there will be a solo arbitrator.

Section 10 - Number of arbitrators

(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.

Procedure for Appointment of Arbitrators

Parties to an agreement should provide procedure for appointment of arbitrators in the arbitration clause. Procedure can either be ad-hoc or institutional. Under ad-hoc arbitration, each party is free to nominate an arbitrator (in case of a panel of three arbitrators) or the two parties jointly decide a solo arbitrator. If the arbitration is institutional, the right to appoint arbitrator may be delegated to the institution. A mix system is also adopted wherein each party is free to nominate an arbitrator from the panel of arbitrators provided by arbitration institution.

It often happens that claimant party appoints its nominee arbitrator while respondent party sleeps over it and does not appoint an arbitrator. Solution to this problem can either be provided in the arbitration clause or may be sought in the law / rules that apply to the arbitration process. UNCITRAL Rules provide as under in case of solo arbitrator:

Article 8

1. If the parties have agreed that a sole arbitrator is to be appointed and if within 30 days after receipt by all other parties of a proposal for the appointment of a sole arbitrator the parties have not reached agreement thereon, a sole arbitrator shall, at the request of a party, be appointed by the appointing authority.

In case of a panel of three arbitrators, the relevant article under UNCITRAL Rules reads as follows:

Article 9

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal.

2. If within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator it has appointed, the first party may request the appointing authority to appoint the second arbitrator.

3. If within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by the appointing authority in the same way as a sole arbitrator would be appointed under article 8.

The above articles mention "Appointing Authority". We shall discuss the same below.

Appointing Authority

Appointing authority, as the term shows, is the authority responsible for appointing of arbitrators. In institutional arbitration, the parties may decide to give the power of arbitration completely to the institution responsible for arbitration. In such a case, the arbitration institution becomes the appointing authority.

When the power / duty to appoint arbitrator(s) rests with each party, the role of appointing authority becomes relevant if a party fails to appoint its nominee arbitrators. Arbitration clause of the agreement may provide for some arbitration institution to act as appointing authority in case of failure of a party to nominate an arbitrator or in case the two arbitrators fail to agree on the Presiding Arbitrator.

If the arbitration clause does not provide for an appointing authority, concerned law / rules apply. Relevant article under UNCITRAL Rules reads as follows:

> *Article 6*
>
> 1. Unless the parties have already agreed on the choice of an appointing authority, a party may at any time propose the name or names of one or more institutions or persons, including the Secretary-General of the Permanent Court of Arbitration at The Hague (hereinafter called the "PCA"), one of whom would serve as appointing authority.
>
> 2. If all parties have not agreed on the choice of an appointing authority within 30 days after a proposal made in accordance with paragraph 1 has been received by all other parties, any party may request the Secretary-General of the PCA to designate the appointing authority.

It may be mentioned here that in case Part I of Arbitration and Conciliation Act, 1996 of India applies, the appointing authority is the relevant court. Relevant portion of section 11 of the Act is reproduced as follows:

> (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].

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree 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].

For the purpose of section 11 of Arbitration and Conciliation Act, 1996 of India, Supreme Court is the relevant court for any international commercial arbitration and High Court is the appointing authority for all domestic arbitrations.

It is worth clarifying at this point that in case the parties have agreed to an appointing authority in the arbitration clause of an international commercial arbitration, the Honourable Supreme Court will act only if the appointing authority fails to do its duty. Court does not interfere with the mutually agreed will of the parties. Role of the court comes into picture only when the procedure agreed by the parties is not followed by either party or by the mutually agreed appointing authority.

Let us look at an example. The following arbitration clause appears in an international commercial agreement in India between two parties, A and B – one of whom is a foreign entity:

> In case of a dispute, the matter will be referred to an arbitration panel consisting of one nominee of each party and a Presiding Arbitrator appointed mutually by the two arbitrators. Arbitration will be held at London. Arbitration proceedings will be conducted as per UNCITRAL Rules. In case either party fails to appoint its nominee arbitrator or if the two arbitrators fail to agree on a Presiding Arbitrator within 30 days of the start of the process, the matter will be referred to London Court of International Arbitration who will then appoint the arbitrator or Presiding Arbitrator, as the case may be, within fifteen days of the reference to LCIA.

In the above case, A issues the Notice of arbitration and appoints an arbitrator; B fails to appoint an arbitrator – A cannot go to Supreme Court asking the court to appoint an arbitrator on behalf of B. A will have to first approach LCIA. If LCIA also fails to appoint an arbitrator, A has the option of approaching Supreme Court of India (if Part I of India's arbitration law applies).

Qualification of Arbitrators

An arbitrator must be neutral, impartial and independent of both the parties even though the arbitrator is appointed by a party. This is a well-accepted principle that has now also been included in the arbitration law of India. UNCITRAL Rules state as follows:

> *Article 11*
>
> When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances.

International Bar Association Guidelines on Conflict of Interest in International Arbitration state as follows:

> **(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.

In view of the above it is not necessary to state in the arbitration clause that the arbitrator shall be impartial or independent or neutral. However, care needs to be taken to avoid violating the above principles.

It was customary in India in many government purchase contracts till a few years ago that a senior officer of the concerned government department was mentioned as a Sole Arbitrator in the agreement. Even large private companies used to execute agreements with their suppliers and trade partners specifying a senior company official as the Sole Arbitrator. Such arbitration clauses are no longer legal. The following is a classic example of an old standard clause from Channel Partner Agreement of a large company (whose name has been blurred out). Such a clause is no longer legal under the arbitration law of India.

In the event of any dispute, difference or question between the Parties hereto relating to or concerning or arising out of this Agreement, the same shall be referred to the arbitration by a sole arbitrator appointed by the Head of the Circle or Managing Director of [redacted] or such person duly nominated by either of them and whose decision shall be final and binding on the Parties.

It is worthwhile to discuss here Honourable Supreme Court's decision in the matter of Voestalpine Schienen GmbH vs. Delhi Metro Rail Corporation Limited. (Decided on 10th February 2017; MANU/SC/0162/2017). The following is an extract of the arbitration clause from the agreement between the two parties:

ARBITRATION & RESOLUTION of DISPUTES.

The Arbitration and Conciliation Act, 1996 of India shall be-applicable. Purchaser and the supplier shall make every necessary effort to resolve amicably by direct and informal negotiation any disagreement or dispute arising between them under or in connection with contract.

Arbitration: If the efforts to resolve all or any of the disputes through conciliation fails, then such, disputes or differences, whatsoever arising between the parties, arising but of touching or relating to supply/manufacture, measuring operation or effect of the Contract or the breach thereof shall be referred to Arbitration, in accordance with the following provisions:

(a) Matters to be arbitrated upon shall be referred to a sole Arbitrator where the total value of claims does not exceed Rs. 1.5 million. Beyond the claim limit of Rs. 1.5 million. Beyond the claim limit of Rs. 1.5 million, there shall be three Arbitrators. **For this purpose the Purchaser will make out a panel of engineers with the requisite qualifications and professional experience. This panel will be of serving or retired engineers "Government Departments or of Public Sector Undertakings;**

(b) For the disputes to be decided by a sole Arbitrator, a 'list of three engineers taken the aforesaid panel will be sent to the supplier by the Purchaser from which the

supplier will choose one;

(c) For the disputes to be decided by three Arbitrators, the Purchaser will make out a list of five engineers from the aforesaid panel. The supplier and Purchaser shall choose one Arbitrator each, and the two so chosen shall choose the third Arbitrator from the said list, who shall act as the presiding Arbitrator;

The petitioner approached the Honourable Supreme Court of India alleging that a panel consisting of only serving or retired government engineers is not likely to be impartial. The plea was rejected by the Honourable Supreme Court citing reasons as follows:

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.

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.

The above view was confirmed by the Honourable Supreme Court in its judgment in Central Organisation for Railway Electrification vs. ECI-SPIC-SMO-MCML (JV). (Decided on 17 December 2019; MANU/SC/1758/2019).

The above judgment makes it clear that the concept of independence and impartiality has to be understood in context of the applicable law and relevant provisions of well-accepted international law. One cannot read into law more than what is written there.

This makes the job of legal professional advising on the arbitration clause a difficult one. Often the other party will like to introduce qualifications that will allow the other party to get arbitrators favorable to him. For example, a clause saying that the arbitrator will be a member of the American Association of xxxx will clearly favor the American party and will lead to a disadvantage for the Indian party on the other side of the table. Such a clause may be well within the limits of law. Hence, the Indian party will need to resist the clause at the time of negotiation of the arbitration clause.

International commercial agreements often provide that the presiding arbitrator will be from a neutral country. This is desirable if the value of contract is high and the dispute is likely to involve significantly large amount.

Language

Language is important in international arbitration. English is an accepted language of business globally, but if the arbitration clause does not specify the language of arbitration, a party may insist on a language other than English. This is likely to be the case if the agreement is in two languages. For example, all agreements between Indian companies and Russian companies are both in English and Russian. If the agreement does not have a clause declaring the English version to be official, Russian party may insist on the arbitration proceedings to be carried out in Russian.

It is advised that language of arbitration must be stated in explicit terms without any ambiguity. In case the arbitration clause fails to mention the language of arbitration, the arbitration panel will decide the language of proceedings. Relevant article from UNCITRAL Rules reads 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.

Appeal / Two stage arbitration

The arbitration clause may provide an appeal procedure without the need to go to court. The first arbitration may be by a solo arbitrator. If either party is dissatisfied with the award of the solo arbitrator, the party may issue a Notice of Arbitration initiating the process for setting up a three-member arbitration panel which will consider the decision by the solo arbitrator and give a final award.

In an agreement between Centrotrade Minerals and Metal Inc. and Hindustan Copper Ltd. the arbitration clause read as follows:

14. Arbitration-All disputes or differences whatsoever arising between the parties out of, or relating to, the construction, meaning and operation or effect of the contract or the breach thereof shall be settled by arbitration in India through the arbitration panel of the Indian Council of Arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration.

If either party is in disagreement with the arbitration result in India, either party will have the right to appeal to a second arbitration in London, UK in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce in effect on the date hereof and the result of this second arbitration will be binding on both the parties. Judgment upon the award may be entered in any court in jurisdiction.

In the above agreement, the first arbitration was through the panel of Indian Council of Arbitration (ICA). Appeal to the award of the ICA panel was to be made to a panel of International Chamber of Commerce at London.

Honourable Supreme Court of India was asked to deliberate on the legality of the two-step arbitration process in Centrotrade Minerals and Metal Inc. vs. Hindustan Copper Ltd. (Decided on 15 Dec 2016; MANU/SC/1609/2016). The decision of the Honourable Supreme Court is summed up in the following paragraphs:

40. Be that as it may, the legal position as we understand it is that the parties to an arbitration agreement have the autonomy to decide not only on the procedural law to be followed but also the substantive law. The choice of jurisdiction is left to the contracting parties. In the present case, the parties have agreed on a two tier arbitration system through Clause 14 of the agreement and Clause 16 of the agreement provides for the construction of the contract as a contract made in accordance with the laws of India. We see nothing wrong in either of the two clauses mutually agreed upon by the parties.

44. For the present we are concerned only with the fundamental or public policy of India. Even assuming the broad delineation of the fundamental policy of India as stated in ***Associate Builders*** we do not find anything fundamentally objectionable in the parties preferring and accepting the two-tier arbitration system. The parties to the contract have not by-passed any mandatory provision of the A&C Act and were aware, or at least ought to have been aware that they could have agreed upon the finality of an award given by the arbitration panel of the Indian Council of Arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration. Yet they voluntarily and deliberately chose to agree upon a second or appellate arbitration in London, UK in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. There is nothing in the A&C Act that prohibits the contracting parties from agreeing upon a second instance or appellate arbitration-either explicitly or implicitly. No such prohibition or mandate can be read into the A&C Act except by an unreasonable and awkward misconstruction and by straining its language to a vanishing point. We are not concerned with the reason why the parties (including HCL) agreed to a second instance arbitration-the fact is that they did and are bound by the agreement entered into by them. HCL cannot wriggle out of a solemn commitment made by it voluntarily, deliberately and with eyes wide open.

It may be added here that the two-stage arbitration process is extremely rare and should be adopted only if there are strong reasons for it. A two-stage arbitration process will not eliminate the judicial appeal process.

Costs

Apportioning costs between the disputing parties is always an issue that needs to be decided. Internationally, the principle is that the unsuccessful party pays all the costs. This is stated in UNCITRAL Rules as follows:

> *Article 42*
>
> 1. The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
>
> 2. The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs.

The above principle has now been adapted by Indian arbitration law through insertion of section 31A into the Act.

Notwithstanding the above principle, it is advisable that the agreement between parties provides for bearing of costs.

There are, generally, two approaches to costs allocation, namely:

(1) Pay your own way ("**PYOWA**") whereby the parties share the costs of the proceedings and bear their own legal costs;

(2) Loser pays or also called "costs follow the event" approach ("**CFTEA**") under which the losing party bears the costs of the proceedings and the legal costs of the winning party. In case the winning party has lost on some procedural events or a number of its claims, the tribunal will make an adjustment downwards in proportion to the relative success of the parties (costs follow the event *pro rata*).

At the stage of negotiating the arbitration agreement, the parties may decide one of the above two. However, the arbitration panel will not be bound by the arbitration clause in this respect since section 31A of the Act as well as UNCITRAL Rules give complete authority to the arbitrators in this regard without any reference to the agreement between the parties.

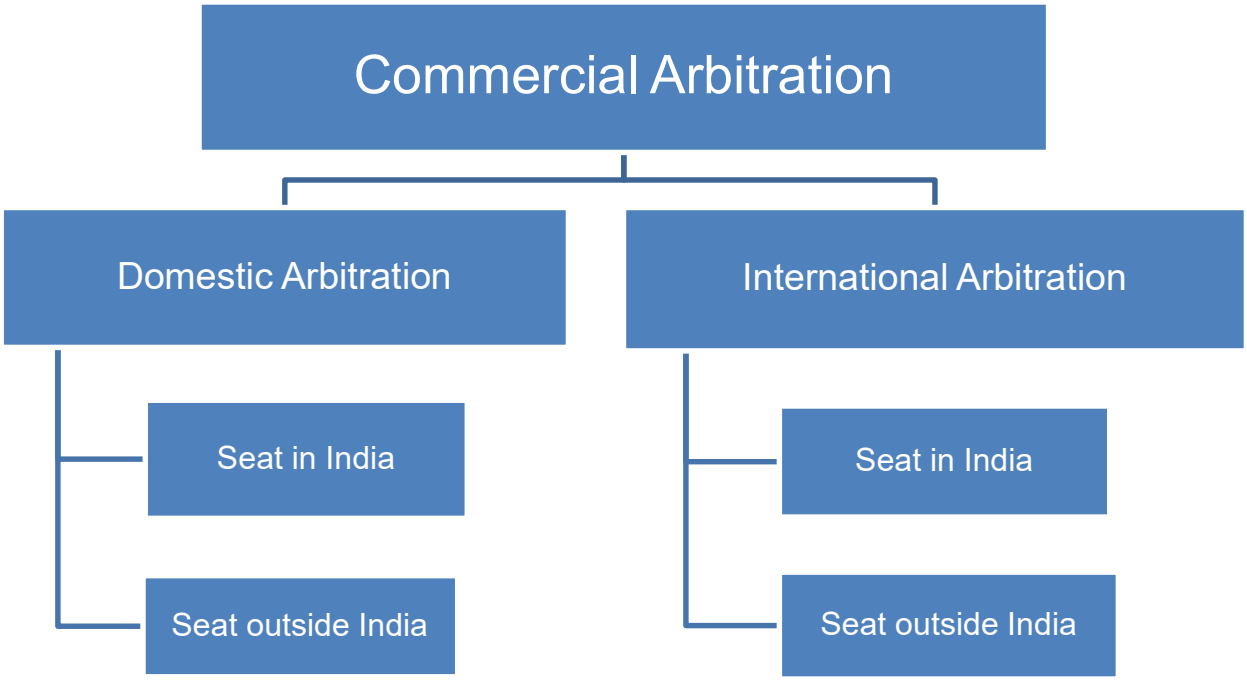
The key issue to be decided by the parties at the time of negotiating the agreement is therefore not final allocation of costs, but spending money on day-to-day basis as arbitration proceeds. It is advisable that the arbitration clause provides for PYOWA in this respect while leaving the issue of final allocation of costs to the arbitrators.

For example, in case of a three-member arbitration panel, arbitration clause may provide as follows – "*Each party will bear the costs of its nominee arbitrator and costs of the Presiding Arbitrator will be shared equally between the parties. The costs of administration of arbitration will be shared equally. This is not reflective of the allocation of costs, which will be done by the arbitration panel in its final award*".

A2. Types of commercial arbitration

Commercial arbitration relates to resolving disputes arising from commercial relationships between two business entities. Investment arbitration, in contrast, is concerned with dispute between a business entity or investor on one hand and a state (country) on the other. Investment arbitration has its roots in bilateral or multilateral treaties between countries. Commercial arbitration is rooted in the agreement between two business entities.

Commercial arbitration can be classified into two categories – domestic and international. As per Indian law, domestic arbitration is when both parties are Indian. Commercial arbitration is international when one or both the parties are not Indian.



Domestic Arbitration

As mentioned earlier, domestic arbitration refers to arbitration of disputes where both parties are Indian nationals or Indian entities. “International commercial arbitration”, has been defined under sub-section 2(f) of the Act. Domestic arbitration is not defined under the Act. We presume that an arbitration that is not international is domestic. Hence, the understanding that both parties in domestic arbitration ought to be Indian.

Domestic arbitration may be held within India or may also be held outside India. When it is held in India (or in legal terms when the place / seat of arbitration is in India), Part I of the Act applies.

So, two Indian companies may agree to settle their disputes by arbitration seat in Singapore. In such a case, Part I of the Act will not apply to the arbitration proceedings. This will remain the case even if all the meetings of the arbitration proceedings are held in India and all arbitrators are Indian. Since Singapore is a reciprocating country, the award made by the Arbitration Panel with seat in Singapore will be enforced in India as a foreign award under Part II of the Act.

Classic case with regards to two domestic entities entering into an agreement in India providing for foreign arbitration is Atlas Export Industries vs. Kotak Company (Supreme Court; Decided on 1 Sept 1999; MANU/SC/0538/1999). The parties had entered into an agreement which had the following clause:

> 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.

The relevant portion of GAFTA contract read as follows:

> "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 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.

It was argued before the courts in India that the contract was in violation of section 23 and 28 of Indian Contract Act. Section 23 relates to a contract being opposed to public policy while section 28 relates to restraint on legal proceedings. Section 28 reads as follows:

Section 28 - Agreements in restraint of legal proceedings void

[1][Every agreement,-

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

(b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to the extent.]

Exception 1.- Saving of contract to refer to arbitration dispute that may arise.- This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Honourable Supreme Court rejected the argument that the contract was opposed to public policy and also ruled that the agreement is covered by Exception 1 provided under section 28 of Indian Contract Act. Relevant extract from the judgment reads as follows:

11. The case at hand is clearly covered by Exception 1 to Section 28. Right of the parties to have recourse to legal action is not excluded by the agreement. The parties are only required to have their dispute/s adjudicated by having the same referred to arbitration. Merely because the arbitrators are situated in a foreign country cannot by itself be enough to nullify the arbitration agreement when the parties have with their eyes open willingly entered into the agreement. Moreover, in the case at hand the parties have willingly initiated the arbitration proceedings on the disputes having arisen between them. They have appointed arbitrators, participated in arbitration proceedings and suffered an award. The plea raised before us was not raised either before or during arbitration proceedings, nor before the learned Single Judge of the High Court in the objections filed before him, nor in the Letters Patent Appeal filed before the Division Bench. Such a plea is not available to be raised by the appellant Atlas before this Court for the first time.

So, the arbitration related to dispute between Atlas Export Industries and Kotak Company (both Indian entities) was a domestic arbitration held outside India, while the award of the arbitrators was a foreign award.

The difference between domestic and international award came up once again for detailed discussion in the following case Pasl Wind Solutions Private Limited vs. GE Power Conversion India Private Limited.

MANU/SC/0295/2021

IN THE SUPREME COURT OF INDIA

Civil Appeal No. 1647 of 2021 (Arising out of SLP (Civil) No. 3936 of 2021)

Decided On: 20.04.2021

Appellants: **Pasl Wind Solutions Private Limited**
Vs.
Respondent: **GE Power Conversion India Private Limited**

In the said case, both parties were Indian and the seat of arbitration was Zurich, Switzerland. So, the arbitration was domestic but the arbitration award was foreign award.

The following excerpts from the judgment make the position clear:

> "international", deal with pre-award situation. The term "international award" does not occur in Part I at all. Therefore, it would appear that the term "domestic award" means an award made in India whether in a purely domestic context i.e. domestically rendered award in a domestic arbitration or in the international context i.e. domestically rendered award in an international arbitration. Both the types of awards are liable to be challenged Under Section 34 and are enforceable Under Section 36 of the Arbitration Act, 1996. Therefore, it seems clear that the object of Section 2(7) is to distinguish the domestic award covered under Part I of the Arbitration Act, 1996 from the "foreign award" covered under Part II of the aforesaid Act; and not to distinguish the "domestic award" from an "international award" rendered in India. In other words, the provision highlights, if anything, a clear distinction between Part I and Part II as being applicable in completely different fields and with no overlapping provisions.
>
> **21.** Under Section 44 of the Arbitration Act, a foreign award is defined as meaning an arbitral award on differences between persons arising out of legal relationships considered as commercial under the law in force in India, in pursuance of an agreement in writing for arbitration to which the New York Convention applies, and in one of such territories as the Central Government, by notification, declares to be territories to which the said Convention applies. Thus, what is necessary for an award to be designated as a foreign award Under Section 44 are four ingredients:
>
> (i) the dispute must be considered to be a commercial dispute under the law in force in India,
>
> (ii) it must be made in pursuance of an agreement in writing for arbitration,
>
> (iii) it must be disputes that arise between "persons" (without regard to their nationality, residence, or domicile), and
>
> (iv) the arbitration must be conducted in a country which is a signatory to the New York Convention.

To sum up, there can be a domestic award in international arbitration (when one of the parties is not Indian) if the seat of arbitration is in India. The same way, there can be a foreign award in domestic arbitration (as in the above case of Pasl Wind) since the seat of arbitration is located outside India. Notably, in the Pasl case, the seat of arbitration was Zurich but the venue was Mumbai. As discussed earlier, the venue is irrelevant for deciding the legal status of the award.

In this Guide, we have tried to cover the aspects of domestic arbitration to the extent they relate to a seat outside India (since domestic arbitration held in India is outside our scope).

International Commercial Arbitration

The term International Commercial Arbitration has been defined under Section 2(f) of the Act as:

(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

(iii) [***][2] 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;

Noticeably, the key factor for an arbitration to be classified as "international commercial arbitration" is that at least one of the parties should be a foreign national / resident or foreign company or foreign controlled association of persons or foreign government. Commercial disputes involving anyone or more of the following person(s) will lead to international commercial arbitration:

a) Indian citizen (passport-holder) living outside India

b) Citizen of any country other than India

c) Company incorporated outside India (even when the company is owned wholly by Indian resident citizens)

d) A NGO whose central management and control is exercised from outside India (even when the controlling office located outside India is operated wholly by Indian citizens)

e) A foreign government

The dispute must be of commercial nature though it need not arise out of a contract.

Seat of arbitration may be in India or outside depending on the agreement between the parties.

Indian arbitration law has developed to the extent to allow disputes between two non-Indian persons / entities in India. This opens the possibilities of India emerging as the center of third country arbitration. The day may not be far when a dispute between a company of, say, Mozambique and another company of, say, Singapore will be resolved by arbitration in India. Of course, the arbitration institutions and professionals of India will need to grow to cater to emerge as a seat of global arbitration.

A3. Format of arbitration agreement

Any agreement that provides for parties to the agreement to settle their disputes by arbitration is called an arbitration agreement. The agreement need not be a formal agreement. The agreement may even be reached by way of email correspondence. Section 7 of the Act defines Arbitration Agreement as follows:

Section 7 - 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 [1][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.

Noticeably, there is no prescribed format for either an arbitration clause contained in an agreement or a separate arbitration agreement.

The relationship between parties ought to be a defined legal relationship. It need not however be a contractual relationship.

The mutual agreement to refer disputes to arbitration should be “in writing”. The expression “in writing” has been defined in sub-section 7(4) of the Act to include almost every type of communication other than oral under the scope of the expression.

For example, two parties A and B had an agreement which did not have any clause about arbitration. As the relations turned sour, A sent an email proposing that their disputes should be resolved by arbitration. B replied to the email saying that he was agreeable to the reference of dispute to arbitration. Neither A's email nor B's email had any details about the key details of arbitration procedure. Nevertheless, A and B have agreed to an Arbitration Agreement which will be interpreted and enforced in accordance with the applicable law of the Agreement.

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 Standard Form Agreement (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.

In this Guide we are only examining the arbitration agreement which is incorporated as part of an agreement or in other words arbitration clause in an agreement.

A4. Ad hoc vs. institutional arbitration

Arbitration can be either ad hoc or institutional depending on the decision of the parties in the arbitration clause.

In case of institutional arbitration, the following key decisions are critical:

a) **Venue** – An arbitration institution provides basic infrastructure like conference room. Parties may decide to use the infrastructure provided by the institution either with the other facilities or without other facilities.

b) **Panel of Arbitrators** – Parties may decide to appoint arbitrators from the panel of arbitrators provided by the arbitration institution. In this case the choice is restricted to the panel provided by the institution.

c) **Appointing Authority** – The chosen arbitration institution may be asked to appoint the arbitrators in the first place or in case of failure of either party to appoint its nominee arbitrator. In case of three-member panel, two arbitrators are generally required to appoint a Presiding Arbitrator. If they fail to appoint a Presiding Arbitrator, the arbitration institution may be asked to act as appointing authority.

d) **Administration of Arbitration** – Arbitration proceedings need administrative support like sending of notices, preparation of award. The administrative services may be provided by the arbitration institution. In case that is not preferred, the parties may agree to either appoint a junior legal professional as Secretary of the Arbitration Panel or may ask the Presiding Officer to use his own office for administrative support.

e) **Rules of Arbitration** – The Parties may agree to accept the arbitration institution's rules for arbitration or may choose some other rules. For example, it is possible to have arbitration conducted at London Court of international Arbitration using UNCITRAL Rules.

Clearly, if an arbitration institution is used for each of the above, the arbitration will be called as institutional arbitration. On the other hand, if arbitration institution is not used for any of the above, the arbitration will be ad hoc arbitration. Often, reliance on institution will be for one or two or more of the above. In such a case, the arbitration is partly ad hoc and partly institutional.

The following table gives a comparison of ad-hoc and institutional arbitration.

Parameter	Ad-hoc Arbitration	Institutional Arbitration
Administration	Low efficiency	High efficiency
Reputation	Depends on individual arbitrators	High depending on institution
Costs	Less expensive	More expensive
Control	Completely by parties	Professionally by the Institution
Flexibility	More flexible	Less flexible
Supervision	No supervision	By the Institution
Remuneration of Arbitrators	Depends on individual arbitrators	Decided by Institution

The above comparison is based on a broad understanding of the two types of arbitration. It is worthwhile to optimize costs, efficiency, etc. by choosing arbitration process that is partly ad hoc and partly institutional.

A5. Avoiding arbitration by pre-arbitration

Arbitration is not cheap and international commercial arbitration is certainly not so. Even after arbitration, there is the big issue of getting the arbitration order executed. Often the process of execution of arbitration order is a long-drawn legal process.

It makes sense to avoid arbitration the same way as one avoids litigation. Even if one feels that the opposite party is being less than fair, it is better to swallow one's ego and arrive at an amicable settlement in the long-term interests of business. The underlying philosophy is that time and money are too precious to be wasted in arbitration or litigation.

If one believes in the above philosophy of trying for amicable settlement and avoiding wasteful unproductive expenditure on legal processes, it is necessary to incorporate this philosophy in the agreement well before any dispute has raised its ugly head.

It has been our experience that in an interaction between two business organizations, there are many persons involved from both sides. Some bad behavior from one or two individuals leads to spoiling of organizational relations. These persons do not have the big macro picture or overall organizational interests in their mind. Generally, they are career driven petty-minded officials who are more interested in saving their own backs instead of caring for organizational interests. At times like these, a meeting between the owners / Chairmen of the two organizations can be very useful. The owners / Chairmen have the ability to rise above all the petty politicking that might have gone on in the past. They are mostly entrepreneurs who are willing to swallow some pride for protecting business interests.

We, Anil Chawla Law Associates LLP, always advise our clients to include a pre-arbitration clause in any international or domestic agreement. The clause essentially says that the top persons of the two parties will have at least two meetings before a notice of arbitration is issued. In international agreements, we provide for two meetings – one in the town of each party. We tell our clients that even if you eventually decide to fight it out through arbitration, please have two dinners together with some good wine or beer. Giving friendship a chance is always worth the effort. Most of our clients appreciate our advice especially after they have a look at the probable costs of arbitration and associated legal processes.

Recommended Model Pre-Arbitration Clauses

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. XX and Mr. YY in a friendly and cordial atmosphere at a meeting first in ……., India and if that proves inconclusive at a meeting in ……., …….. 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 Mr. XX and Mr. YY 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.

OR

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.

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 the above sub-clause, then either Party may serve a Notice of Arbitration requiring that such dispute be submitted to and be determined by arbitration.

OR

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 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. Anil Chawla, Advocate or, if he is not available, of a nominee of Chairman of XXXX Chamber of XXXXXX.

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.

Part B

Model Arbitration Clauses for Ad-hoc Arbitration

B1. Domestic arbitration in India

It is the most common form of arbitration in India which takes place between two Indian Parties. The jurisdiction is of Indian law as well as Indian courts. In such arbitration, Part I of the Act is applicable and therefore the arbitral proceedings are also governed by Indian law. Key points to be considered for such type of arbitration are as follows:

Law governing Agreement	Has to be necessarily Indian law.
Law for arbitration	The Act
Curial Law	Need not be specified as the arbitration is under provisions of the Act.
Seat & venue of arbitration	Seat to be at a place within India. For the sake of convenience, meetings / proceedings may be held alternately at the respective cities of the parties.
Number of Arbitrators	Three is almost the norm.
Appointment of Arbitrator	Each party to appoint one arbitrator. The two arbitrators to select the Presiding Arbitrator.
Appointing Authority	Need not be specified since section 11 of the Act provides the powers to High Court.
Qualification of Arbitrators	If some technical knowledge is required, advisable to specify.
Language	English unless both parties are comfortable with some other language.
Appeal	Not recommended
Costs	During the proceedings each party bears its own. Cost Allocation – By the Arbitration Panel in award.

An illustrative example of the relevant clauses for an agreement providing for arbitration at Mumbai, Maharashtra is as follows:

Applicable Law	This Agreement will be interpreted and will be subject to the laws of India and of the state of Maharashtra.
Arbitration	In case of any dispute(s) arising from this Agreement or related or connected to this Agreement, the dispute(s) will be referred to an arbitration panel consisting of three arbitrators. Each Party will appoint one arbitrator and the arbitrators so appointed will choose a Presiding Arbitrator. Seat of arbitration will be Mumbai. However, the Arbitration Panel will be free to hold proceedings at such venues as may be convenient. Arbitration will be subject to the Arbitration and Conciliation Act, 1996 as amended from time to time. Language of arbitration will be English. During the proceedings, each Party will bear the costs of the arbitrator appointed by it, while all other costs including the ones related to the Presiding Arbitrator and administration of arbitration (as recommended by the Presiding Arbitrator) will be shared equally by the Parties. Final decision about allocation of costs will be made by the Arbitration Panel as part of its award.
Notice of Arbitration	A Party who wishes to initiate arbitration will serve a Notice of Arbitration on the other Party. The Notice of Arbitration will mention the demand that the dispute be referred to arbitration and will also specify the nature and description of the claim.
Courts	Neither party will approach a court unless the arbitration panel has deliberated on the matter and given its award. Courts at Mumbai will have jurisdiction in respect of all matters arising from this Agreement.

In the above case if the parties wish to have a Solo Arbitrator, the recommended clauses are as follows:

Applicable Law	This Agreement will be interpreted and will be subject to the laws of India and of the state of Maharashtra.
Arbitration	In case of any dispute(s) arising from this Agreement or related or connected to this Agreement, the dispute(s) will be referred to a single arbitrator chosen by the Parties with mutual consent. Seat of arbitration will be Mumbai. Arbitration will be subject to the Arbitration and

	Conciliation Act, 1996 as amended from time to time. Language of arbitration will be English. During the proceedings, the costs will be shared equally by the Parties. Final decision about allocation of costs will be made by the Sole Arbitrator as part of his / her award.
Notice of Arbitration	A Party who wishes to initiate arbitration will serve a Notice of Arbitration on the other Party. The Notice of Arbitration will mention the demand that the dispute be referred to arbitration and will also specify the nature and description of the claim.
Courts	Neither Party will approach a court unless the Sole Arbitrator has deliberated on the matter and given his / her award. Courts at Mumbai will have jurisdiction in respect of all matters arising from this Agreement.

Some optional clauses which may be included are as follows:

Arbitrator's Qualification	A person appointed as Arbitrator or as Presiding Arbitrator should be well versed in technical matters of the type that this Agreement relates to.
Fast Track Procedure	Arbitration Panel shall adopt the Fast Track Procedure provided in section 29B(3) of Arbitration and Conciliation Act, 1996.
Reasons for Award	The Arbitration Panel need not give any reasons for its award. OR The Sole Arbitrator need not give any reasons for his / her award.
Appeal against Decision of Sole Arbitrator	In case either Party is not satisfied with the award of the Sole Arbitrator, the Party will serve a Notice to the other Party asking for a three-member Arbitration Panel to be constituted to reexamine the dispute(s) referred earlier to the Sole Arbitrator and also the award of the Sole Arbitrator. Such a Notice will be sent within thirty (30) days of the Sole Arbitrator's award becoming known to the concerned Party. In the Notice, the Party serving the Notice will convey name of the arbitrator appointed by it. The Party receiving the Notice will appoint the other Arbitrator. The two Arbitrators so appointed will choose a

Presiding Arbitrator. Seat of arbitration will be Mumbai. However, the Arbitration Panel will be free to hold proceedings at such venues as may be convenient. Arbitration will be subject to the Arbitration and Conciliation Act, 1996 as amended from time to time. Language of arbitration will be English. During the proceedings, each Party will bear the costs of the arbitrator appointed by it, while all other costs including the ones related to the Presiding Arbitrator and administration of arbitration (as recommended by the Presiding Arbitrator) will be shared equally by the Parties. Final decision about allocation of costs will be made by the Arbitration Panel as part of its award. Neither Party will approach a court unless the Arbitration Panel has deliberated on the matter and given its award.

B2. Domestic arbitration outside India

Domestic arbitration outside India is an unusual situation. If both parties to the agreement are Indian, there have to be compelling reasons for the parties to choose arbitration outside India. Typically, if one of the parties is a wholly owned Indian subsidiary of a foreign company, the subsidiary / foreign parent may not be comfortable with Indian laws, Indian arbitration as well as Indian courts. In such a case the only feasible option may be to go for third country arbitration. Key points to be observed in this regard are as follows:

Law governing Agreement	Has to be necessarily Indian law.
Law for arbitration	Parties are free to choose. If Indian law is not chosen, please take care to mention that Part I of the Act will NOT apply.
Curial Law	UNCITRAL Rules / ICSID Rules are two common options.
Seat & venue of arbitration	A neutral location may be chosen. The country where the foreign parent is located will put the other party at a disadvantage and should hence be avoided by the other party. Often the seat is decided in the agreement while the Tribunal is given freedom to decide the venues.
Number of Arbitrators	Three is almost the norm.
Appointment of Arbitrator	Each party to appoint one arbitrator. The two arbitrators to select the Presiding Arbitrator.
Appointing Authority	Need not be specified since the chosen Curial Law will often have a provision.
Qualification of Arbitrators	If some technical knowledge is required, it is advisable to specify.
Language	English unless both parties are comfortable with some other language.

Appeal	Not recommended
Costs	During the proceedings each party bears its own. Cost Allocation – By the Arbitration Panel in award.

An illustrative example of the relevant clauses is as follows:

Applicable Law	This Agreement will be interpreted and will be subject to the laws of India except for arbitration which will be governed as given below.
Arbitration	In case of any dispute(s) arising from this Agreement or related or connected to this Agreement, the dispute(s) will be referred to an arbitration panel consisting of three arbitrators. Each Party will appoint one arbitrator and the arbitrators so appointed will choose a Presiding Arbitrator. Seat of arbitration will be Singapore. However, the Tribunal will be free to choose the venues as per mutual convenience. Arbitration will be conducted under the laws applicable to arbitration in Singapore and will be subject to UNCITRAL Rules to the extent applicable and not in conflict with the laws of Singapore. Arbitrators as well as the Presiding Arbitrator should be well versed in technical matters of the type that this Agreement relates to. Part I of the Arbitration and Conciliation Act, 1996 of India will not apply to the arbitration proceedings. Language of arbitration will be English. During the proceedings, each Party will bear the costs of the arbitrator appointed by it, while all other costs including the ones related to the Presiding Arbitrator and administration of arbitration (as recommended by the Presiding Arbitrator) will be shared equally by the Parties. Final decision about allocation of costs will be made by the Arbitration Panel as part of its award.
Notice of Arbitration	A Party who wishes to initiate arbitration will serve a Notice of Arbitration on the other Party. The Notice of Arbitration will mention the demand that the dispute be referred to arbitration and will also specify the nature and description of the claim.
Courts	Neither Party will approach a court unless the arbitration panel has deliberated on the matter and given its award. Courts at ……. India will have jurisdiction in respect of enforcement of the award and any other matters arising from this Agreement.

B3. International commercial arbitration in India

As mentioned earlier, international commercial arbitration (as defined under Indian law) arises in an agreement when at least one of the parties is a foreign entity or is an association controlled by foreigners. In this chapter we are considering a situation of international commercial arbitration when parties are willing to accept arbitration in India.

In case of international commercial arbitration, the parties have the right to choose the law governing the agreement. The following extract from Honourable Supreme Court's decision in National Thermal Power Corporation vs. The Singer Company and Others (Decided on 7 May 1992; MANU/SC/0146/1993) makes the position clear.

> **24.** The parties have the freedom to choose the law governing an international commercial arbitration agreement. They may choose the substantive law governing the arbitration agreement as well as the procedural law governing the conduct of the arbitration. Such choice is exercised either expressly or by implication. Where there is no express choice of the law governing the contract as a whole, or the arbitration agreement in particular, there is, in the absence of any contrary indication, a presumption that the parties have intended that the proper law of the contract as well as the law governing the arbitration agreement are the same as the law of the country in which the arbitration is agreed to be held. On the other hand, where the proper law of the contract is expressly chosen by the parties, as in the present case, such law must, in the absence of an unmistakable intention to the contrary, govern the arbitration agreement which, though collateral or ancillary to the main contract, is nevertheless a part of such contract.

The above right to choose law has been restricted by Honourable Supreme Court in its judgment in Bhatia International vs. Bulk Trading S.A. and Anr. (Decided on 13 March 2002; MANU/SC/0185/2002). Relevant extract reads as follows:

> **32.** To conclude we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsory apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply.

Based on the above decision it can be said that the parties to an agreement do not have the option of rejecting applicability of Part I of the Act to international commercial arbitrations held in India. In other words, Part I of the Act is compulsory for all arbitrations held in India.

Interestingly, while the arbitration law will be Part I of the Indian arbitration law, the parties remain free to choose the law which will govern the agreement. The substantive law governing the agreement will be as chosen by the parties.

Let us consider an agreement between an Indian company and a British company. There are six options that the parties may choose:

a) This Agreement shall be governed by Indian law. **OR**

b) This Agreement shall be governed by the law of United Kingdom of Great Britain and Northern Ireland. **OR**

c) This Agreement shall be governed by the UNIDROIT Principles of International Commercial Contracts (2016). **OR**

d) This Agreement shall be governed by the UNIDROIT Principles of International Commercial Contracts (2016) and, with respect to issues not covered by such Principles, by generally accepted principles of international commercial law. **OR**

e) This Agreement shall be governed by the UNIDROIT Principles of International Commercial Contracts (2016) and, with respect to issues not covered by such Principles, by the law of India. **OR**

f) This Agreement shall be governed by the UNIDROIT Principles of International Commercial Contracts (2016) and, with respect to issues not covered by such Principles, by the law of United Kingdom of Great Britain and Northern Ireland.

A few words about UNIDROIT will be appropriate at this point. The International Institute for the Unification of Private Law (UNIDROIT) is an independent inter-governmental Organisation with its seat in the Villa Aldobrandini in Rome. Its purpose is to study needs and methods for modernising, harmonising and coordinating private and in particular commercial law as between States and groups

of States and to formulate uniform law instruments, principles and rules to achieve those objectives.

UNIDROIT PRINCIPLES

OF INTERNATIONAL COMMERCIAL CONTRACTS

2016

PREAMBLE

(Purpose of the Principles)

These Principles set forth general rules for international commercial contracts.

They shall be applied when the parties have agreed that their contract be governed by them.(*)

They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like.

They may be applied when the parties have not chosen any law to govern their contract.

They may be used to interpret or supplement international uniform law instruments.

They may be used to interpret or supplement domestic law.

They may serve as a model for national and international legislators.

In conclusion, it can be said as follows about the three laws concerning international arbitration in India:

i) Substantive law can be one of the six options given above.

ii) Arbitration Law has to be necessarily Part I of the Act of India.

iii) Curial Law – Parties may choose any or may not choose a curial law.

Key points to be observed in regard to international commercial arbitration in India are as follows:

Law governing Agreement	One of the six options given above.
Law for arbitration	Part I of Arbitration and Conciliation Act, 1996 will apply.
Curial Law	UNCITRAL Rules / ICSID Rules are two common options.
Seat & venue of arbitration	Specify the seat as some specific city / state of India. The venue can be left to the convenience of the Arbitration Panel.
Number of Arbitrators	Three is almost the norm.
Appointment of Arbitrator	Each party to appoint one arbitrator. The two arbitrators to select the Presiding Arbitrator.
Appointing Authority	Need not be specified since the Act has a provision for Supreme Court of India to act as Appointing Authority.
Qualification of Arbitrators	If some technical knowledge is required, it is advisable to specify.
Language	English unless both parties are comfortable with some other language.
Appeal	Not recommended
Costs	During the proceedings each party bears its own.

	Cost Allocation – By the Arbitration Panel in award.

An illustrative example of the relevant clauses as regards an agreement between an Indian company and a German company with seat of arbitration at Mumbai is as follows:

Applicable Law	This Agreement shall be governed by the UNIDROIT Principles of International Commercial Contracts (2016) and, with respect to issues not covered by such Principles, by generally accepted principles of international commercial law.
Arbitration	In case of any dispute(s) arising from this Agreement or related to this Agreement, the matter will be referred to an arbitration panel consisting of three arbitrators. Each Party will appoint one arbitrator and the arbitrators so appointed will choose a Presiding Arbitrator. Seat of arbitration will be Mumbai. However, the Tribunal will be free to choose the venues as per mutual convenience. Arbitration will be conducted under the Arbitration and Conciliation Act, 1996 of India (the Act) and will be subject to UNCITRAL Rules to the extent applicable and not in conflict with the Act. Arbitrators as well as the Presiding Arbitrators should be well versed in the technical matters of the type that this Agreement relates to. Language of arbitration will be English. During the proceedings, each Party will bear the costs of the arbitrator appointed by it, while all other costs including the ones related to the Presiding Arbitrator and administration of arbitration (as recommended by the Presiding Arbitrator) will be shared equally by the Parties. Final decision about allocation of costs will be made by the Arbitration Panel as part of its award.
Notice of Arbitration	A Party who wishes to initiate arbitration will serve a Notice of Arbitration on the other Party. The Notice of Arbitration will mention the demand that the dispute be referred to arbitration and will also specify the nature and description of the claim.
Courts	Neither Party will approach a court unless the arbitration panel has deliberated on the matter and given its award. Courts at Mumbai, India will have jurisdiction in respect of all matters arising from this Agreement.

B4. International comm. arbitration outside India

International commercial arbitration (ICA) outside India differs from ICA inside India in one key aspect – In case of ICA inside India application of Part I of the Act is compulsory, while it is **optional in case of ICA outside India**.

Sub-section 2(2) of the Act, which reads as follows, defines the law as it applies to ICA outside India.

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

[3][Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) 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 expression "Provided that subject to an agreement to the contrary," gives the option to exclude the applicability of Part I of the Act. In case the arbitration agreement does not exclude application of Part I of the Act, sections 9, 27 and 37(1)(a) and 37(3) will apply even for international arbitrations held outside India. Relevant sections / sub-sections can be briefly summed up as follows:

Section 9 – It relates to interim measures by an Indian court. Application under section 9 can be made either before or after start of proceedings. Once the proceedings have started, the court will interfere only if the arbitration tribunal is not in a position to provide interim relief.

Section 27 – It relates to Indian court providing assistance in taking evidence.

Section 37(1)(a) and 37(3) – The sub-sections read as follows:

(1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:-

[1][(a) refusing to refer the parties to arbitration under section 8;

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or taken away any right to appeal to the Supreme Court.

The above sections relate to the powers of Indian courts to grant interim relief, to assist with the proceedings and to refer the parties to arbitration.

It is for the parties to an agreement to decide whether they wish to grant these powers to an Indian court or to the courts of the country where the arbitration proceedings are proposed to be held. Most international lawyers recommend that unless there are strong reasons against it, courts at the seat of arbitration proceedings should have all powers. In other words, it is advisable to keep Indian courts out of the picture if arbitration is being held in a country other than India.

In conclusion, it can be said as follows about the three laws concerning international arbitration outside India:

i) Substantive law can be one of the six options given in the previous chapter.

ii) Arbitration Law should be the law of the country where arbitration is proposed to be held. It is advisable to mention that Part I of the Act of India {particularly sections 9, 27, 37(1)(a) and 37(3)} will not apply.

iii) Curial Law – Parties may choose any or may not choose a curial law.

Key points to be observed in regard to international commercial arbitration outside India are as follows:

Law governing Agreement	One of the six options given in the previous chapter about international arbitration in India.
Law for arbitration	Arbitration law of the seat of arbitration to apply. Part I of Arbitration and Conciliation Act, 1996 will NOT apply.
Curial Law	UNCITRAL Rules / ICSID Rules are two common options.
Seat & venue of arbitration	Specify the seat as some specific city outside India. The venue can be left to the convenience of the Arbitration Panel.
Number of Arbitrators	Three is almost the norm.
Appointment of Arbitrator	Each party to appoint one arbitrator. The two arbitrators to select the Presiding Arbitrator.

Appointing Authority	May be left to the Curial Law.
Qualification of Arbitrators	If some technical knowledge is required, it is advisable to specify.
Language	English unless both parties are comfortable with some other language.
Appeal	Not recommended
Costs	During the proceedings each party bears its own. Cost Allocation – By the Arbitration Panel in award.

An illustrative example of the relevant clauses as regards an agreement between an Indian company and a Russian company with seat of arbitration at Singapore is as follows:

Applicable Law	This Agreement shall be governed by the UNIDROIT Principles of International Commercial Contracts (2016) and, with respect to issues not covered by such Principles, by generally accepted principles of international commercial law.
Arbitration	In case of any dispute(s) arising from this Agreement or related to this Agreement, the matter will be referred to an arbitration panel consisting of three arbitrators. Each Party will appoint one arbitrator and the arbitrators so appointed will choose a Presiding Arbitrator. Seat of arbitration will be Singapore. However, the Tribunal will be free to choose the venues as per mutual convenience. Arbitration will be conducted under the laws governing arbitration in Singapore and will be subject to UNCITRAL Rules to the extent applicable and not in conflict with the laws of Singapore. Arbitrators as well as the Presiding Arbitrators should be well versed in the technical matters of the type that this Agreement relates to. Language of arbitration will be English. During the proceedings, each Party will bear the costs of the arbitrator appointed by it, while all other costs including the ones related to the Presiding Arbitrator and administration of arbitration (as recommended by the Presiding Arbitrator) will be shared equally by the Parties. Final decision about allocation of costs will be made by the Arbitration Panel as part of its award.

Notice of Arbitration	A Party who wishes to initiate arbitration will serve a Notice of Arbitration on the other Party. The Notice of Arbitration will mention the demand that the dispute be referred to arbitration and will also specify the nature and description of the claim.
Courts	Neither Party will approach a court unless the arbitration panel has deliberated on the matter and given its award. Courts at Singapore will have jurisdiction in respect of all matters arising from this Agreement.

Part C

Some Arbitration Institutions in India and Their Recommended Arbitration Clauses

All the institutions mentioned in this Part deal with domestic as well as international arbitration. However, we have considered their domestic arbitration in this Part since that is, generally speaking, their primary activity.

The information is collated from the respective websites. No claims are made about its correctness or accuracy or completeness.

C1. Construction Industry Arbitration Council

Jointly established by Construction Industry Development Council & Singapore International Arbitration Centre

Contact Details

Address	801 (8th Floor), Hemkunt Chambers, 89, Nehru Place, New Delhi - 110019
Contact No.	91-11-41619840 - 41
Email Id	ciacjune2006@gmail.com, ciacevents20@gmail.com
Website	http://www.ciac.in

Recommended Model Arbitration Clause

All and 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 [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, which rules are deemed to be incorporated by reference in this clause.

* 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

C2. Council for National and International Commercial Arbitration

Contact Details

Address	New No.90, Old No.73, "Orient Chambers" 4th Floor, Armenian Street, Chennai - 600 001, Tamil Nadu
Contact No.	91- 4442119005 / 9003881818
Email Id	cnica@cnica.org
Website	http://www.cnica.org/

Recommended Model 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).

C3. Indian Chamber of Commerce Council of Arbitration

Contact Details

Address	ICC Towers, 4, India Exchange Place, Kolkata - 700001
Contact No.	91-33-22534200
Email Id	ceo@indianchamber.net
Website	https://www.indianchamber.org/

Recommended Model Arbitration Clause

Not provided on the website

C4. Indian Institute of Arbitration & Mediation

Contact Details

Address	G-254, Panampilly Nagar, Cochin, Kerala - 682036
Contact No.	91 (484) 4017731 / 4865101
Email Id	cochin@arbitrationindia.com
Website	http://www.arbitrationindia.org/

Recommended Model 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.** **OR**

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. *

^ In the case of domestic arbitration in India. For international arbitration, the parties may specify the law applicable as per the seat of arbitration.

The parties may wish to add the following also in the dispute resolution clause —

* The Place of mediation shall be (city and/or country).

** The number of arbitrators shall be (one or three). The seat/ venue of arbitration shall be (city and/or country).

[Seat would denote the jurisdictional place and venue the physical place]. The language of the arbitration shall be (language).

C5. Indian Council of Arbitration

INDIAN COUNCIL OF ARBITRATION
Undisputed Leader in Dispute Resolution

Contact Details

Address	Room 112, 1st Floor Federation House, Tansen Marg, New Delhi 110001
Contact No.	91-011-23719102, 23350087, 23319849, 23319760
Email Id	ica@ficci.com
Website	http://www.icaindia.co.in/

Recommended Model Arbitration Clause

"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".

C6. International and Domestic Arbitration Centre India

Contact Details

Address	1008, Ocean, Sarabhai Road, Near Genda Circle, Vadodara - 390023
Contact No.	+91 99245 05054 0265-2355054 / 55
Email Id	office@idacindia.org
Website	http://www.idacindia.org/

Recommended Model Arbitration Clause

IDAC India's Domestic Arbitration Rules

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.

Any dispute or difference whatsoever arising between the parties out of or relating to the construction, meaning, scope, operation or effect of this agreement or the validity or the breach thereof shall be settled by arbitration in accordance with the Rules of International

Commercial Arbitration of the IDAC India read with Uncitral Arbitration Rules and the award made in pursuance thereof shall be final and binding on the parties.

Note: Parties may consider to add the following:—

(a) The appointing authority shall be Indian International & Domestic Arbitration Centre;

(b) The number of arbitrators shall be ... (one or three);

(c) The place of arbitration shall be ... (town or country);

(d) The language(s) to be used in the arbitral proceedings shall be ...

Part D

Some Arbitration Institutions outside India and Their Recommended Arbitration Clauses

D1. Permanent Court of Arbitration

Contact Details

Address	Peace Palace, Carnegieplein 2 2517 KJ The Hague The Netherlands
Contact No.	+31 70 302 4165
Email Id	bureau@pca-cpa.org
Website	https://pca-cpa.org/en/home/

Recommended Model Arbitration Clause

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.

The number of arbitrators shall be [one, three or five].

The place of arbitration shall be [town and country].

The language to be used in the arbitral proceedings shall be [ ].

D2. London Court of International Arbitration

Contact Details

Address	1 Paternoster Lane London, EC4M 7BQ
Contact No.	44 (0) 20 7936 6200
Email Id	enquiries@lcia.org
Website	http://www.lcia.org/

Recommended Model 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 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 [ ].

D3. International Chamber of Commerce

Contact Details

Address	33-43 avenue du Président Wilson, 75116 Paris, France
Contact No.	33 (0) 1 49 53 28 28
Email Id	icc@iccwbo.org
Website	https://iccwbo.org/

Recommended Model Arbitration Clause

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

Parties are free to adapt the clause to their particular circumstances. For instance, they may wish to stipulate the number of arbitrators given that the ICC Arbitration Rules contain a presumption in favour of a sole arbitrator. Also, it may be desirable for them to stipulate the place and language of the arbitration and the law applicable to the merits. The ICC Arbitration Rules do not limit the parties' free choice of the place and language of the arbitration or the law governing the contract.

If the parties wish to exclude any recourse to the Emergency Arbitrator Provisions, they must expressly opt out by adding the following wording to the clause above:

The Emergency Arbitrator Provisions shall not apply.

The ICC Arbitration Rules provide for use of an expedited procedure in lower-value cases. If parties wish to exclude the application of the Expedited Procedure Provisions, they must expressly opt out by adding the following wording to the clause above:

The Expedited Procedure Provisions shall not apply.

Parties wishing to avail themselves of the expedited procedure in higher-value cases should expressly opt in by adding the following wording to the clause above:

The parties agree, pursuant to Article 30(2)(b) of the Rules of Arbitration of the International Chamber of Commerce, that the Expedited Procedure Rules shall apply irrespective of the amount in dispute.

If parties wish the ceiling for the application of the Expedited Procedure Rules to be higher than that specified in those Rules, the following wording should be added to the clause above:

The parties agree, pursuant to Article 30(2)(b) of the Rules of Arbitration of the International Chamber of Commerce, that the Expedited Procedure Rules shall apply, provided the amount in dispute does not exceed US$ [specify amount] at the time of the communication referred to in Article 1(3) of the Expedited Procedure Rules.

D4. International Centre for Dispute Resolution

Contact Details

Address	ICDR/American Arbitration Association, Headquarter 120 Broadway, Floor 21, New York, NY 10271
Contact No.	+1-212.716.5800
Email Id	HysonT@adr.org
Website	https://www.icdr.org/

Recommended Model 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.

The parties should consider adding:

• The number of arbitrators shall be (one or three);

• The place of arbitration shall be [city, (province or state), country];

• The language(s) of the arbitration shall be ___.

D5. Swiss Arbitration

Contact Details

Address	Boulevard du Théâtre 4 1204 Geneva Switzerland
Contact No.	+41 22 310 74 30
Email Id	asa@swissarbitration.org centre@swissarbitration.org
Website	www.swissarbitration.org

Recommended Model Arbitration Clause

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 force on the date on which the Notice of Arbitration is submitted in accordance with those Rules.

The number of arbitrators shall be… ("one"," three", "one or three");

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… (insert desired language).

D6. Vienna International Arbitral Centre

VIAC || Vienna International Arbitral Centre

Contact Details

Address	Wiedner Hauptstraße 63, 1045 Vienna, Austria
Contact No.	+43 (0)5 90 900 4398
Email Id	office@viac.eu
Website	http://www.viac.eu/en/

Recommended Model Arbitration Clause

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 of the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna (Vienna Rules) by one or three arbitrators appointed in accordance with the said Rules.

Possible supplementary agreements:

(1) The provisions on expedited proceedings are applicable;

(2) The substantive law of ..... shall be applicable;*)

(3) The language to be used in the arbitral proceedings shall be ..... .

*) In this context, consideration may be given to the possible application or exclusion of the United Nations Convention on Contracts for the International Sale of Goods, 1980.

D7. Stockholm Chamber of Commerce

ARBITRATION INSTITUTE
OF THE STOCKHOLM CHAMBER OF COMMERCE

Contact Details

Address	Brunnsgatan 2, SE-111 38 Stockholm, Sweden
Contact No.	+46 8 555 100 00
Email Id	arbitration@chamber.se
Website	https://sccinstitute.com/

Recommended Model Arbitration Clause

Any dispute, controversy or claim arising out of or in connection with this contract, or the breach, termination or invalidity thereof, shall be finally settled by arbitration in accordance with the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

Recommended additions:

The arbitral tribunal shall be composed of three arbitrators/a sole arbitrator.

The seat of arbitration shall be […].

The language to be used in the arbitral proceedings shall be […].

This contract shall be governed by the substantive law of […].

D8. Singapore International Arbitration Centre

Contact Details

Address	32 Maxwell Road, #03-01, Maxwell Chambers Suites, Singapore 069120
Contact No.	+65 6713 9777
Email Id	corpcomms@siac.org.sg
Website	http://siac.org.sg/

Recommended Model 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).

The language of the arbitration shall be _____.

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 an odd number. Either state one, or state three.*

**** State the country or jurisdiction.*

D9. Hong Kong International Arbitration Centre

Contact Details

Address	38th Floor Two Exchange Square, 8 Connaught Place, Central, Hong Kong
Contact No.	(852) 2525-2381
Email Id	adr@hkiac.org; arbitration@hkiac.org
Website	http://www.hkiac.org/

Recommended Model Arbitration Clause

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.

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). **

* 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

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International Commercial Arbitration

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We take an entrepreneur's perspective. We think the way you do.

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Anil Chawla Law Associates LLP

MF-104, Ajay Tower, E5/1 (Commercial), Arera Colony, Bhopal – 462 016 (MP) INDIA

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