ARBITRATION AGREEMENT

TOPICS COVERED

- *Essentials of arbitration agreement*
- *Model form of arbitration agreement*
- *Concept of group companies doctrine*
- *Important Caselaws*

Contents of arbitration agreement

An effective arbitration agreement should:

➢Contain a clear and unambiguous agreement to refer the dispute between the parties to arbitration. This is crucial, because it is the agreement of the parties to refer their dispute to arbitration which ousts the court's jurisdiction over the merits of the dispute and provides the arbitral tribunal with the power to determine the dispute. Generally, the arbitration clause should be drafted broadly to include all disputes that may arise out of, or in connection with, a contract to avoid uncertainty as to whether a particular dispute has properly been referred to arbitration (the exception to this is if there is a good reason to carve out certain disputes from the scope of the arbitration clause).

➢Nominate the legal place, or juridical seat, of the arbitration. The legal place, or seat, of the arbitration determines which national court has supervisory jurisdiction over the arbitration. In selecting the legal place of the arbitration, parties should choose an arbitration friendly jurisdiction whose courts are likely to be supportive of the arbitral process and lend assistance when called upon to do so.

•*Choose between an institutional or ad hoc arbitration* and nominate the arbitral institution which is to administer the arbitration (if that is what is agreed). This is important if the parties want to have their arbitration administered by an institution, as opposed to the arbitration proceeding on an ad hoc basis.
•*Nominate the rules that are to apply to the arbitration*. An agreed set of rules will provide the procedural framework for the arbitration proceedings. The rules will assist both the parties and the arbitral tribunal with the efficient conduct of the arbitration. If the parties have nominated a particular institution to administer their arbitration, they should select the rules of that particular institution. If the parties have elected ad hoc arbitration, they should consider selecting a set of rules purpose built for ad hoc proceedings (such as the UNCITRAL Arbitration Rules).
•*Nominate the language of the arbitration*. This provides certainty and eliminates any delay if the parties are in disagreement on this when the dispute arises.

•Nominate the number of arbitrators (usually one or three). Again, this provides certainty and eliminates the potential for delay when the dispute arises. Furthermore, different sets of arbitral rules contain different default positions if the parties are unable to agree on the number of arbitrators for their arbitration.

•Describe the process for the appointment of the arbitrator or arbitrators. Institutional rules (along with ad hoc rules such as the UNCITRAL Arbitration Rules) typically provide for the mechanism for the appointment of the arbitrator, or arbitrators, in default of agreement. If the parties agree with the process prescribed in the agreed set of rules, there is no need to set out that process separately in the arbitration clause (a reference to the rules is sufficient). However, if the parties wish to depart from the prescribed process, they will need to set this out in the arbitration clause. In the case of ad hoc proceedings, parties should also designate an appointing authority in their arbitration clause.

APPOINTMENT OF ARBITRATOR

TOPICS COVERED

- Process of appointment
- Disclosures by arbitrator
- Important judicial decisions

Appointment by whom and requirements

- Appointment shall be made, upon request of a party, by the Supreme Court or any person or institution designated by such Court, in the case of an International Commercial arbitration or by High Court or any person or institution designated by such Court, in case of a domestic arbitration
- Before the appointment of arbitrator is made, the concerned Court or the person or institution designated by such Court is required to seek a disclosure in writing from the prospective arbitrator in terms of Section 12(1) of the Act and also give due regard to any qualifications required for the arbitrator by the agreement of the parties and the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.
- In an International Commercial Arbitration, an arbitrator of a nationality other than the nationalities of the parties may be appointed where the parties belong to different nationalities.

Disclosure requirements

- Express disclosure on (a) circumstances which are likely to give rise to justifiable doubts regarding his independence or impartiality; or (b) grounds which may affect his ability to complete the arbitration within 12 (twelve) months.
- The purpose of this provision is to secure the appointment of an unbiased and impartial arbitrator.
- Fifth Schedule to the Act (Annexure-A) contains a list of grounds giving rise to justifiable doubts as to the independence or impartiality of an arbitrator.
- The Seventh Schedule (Annexure-B) lays the grounds which make a person ineligible to be appointed as an arbitrator.
- A person who is ineligible to act as an arbitrator also cannot appoint an arbitrator; and
- The court has the power to intervene under Section 11 unless the appointment on the face of it is valid, and the court is satisfied with respect to the same.

Important decisions

- TRF Ltd vs Energo Engineering Projects Ltd (2017)
- Perkins Eastman Architects DPC & Ors vs HRCC (India) Ltd (2019)
- Central Organisation for Railway Electrification vs. M/S ECI-SPIC-SMO-MCML ()
- Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd.
- SMS Ltd. v. Rail Vikas Nigam Ltd. ("SMS") (delivered on 14 January 2020)

Important resources

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Maake
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Grazie
Obrigado
Asante
Terma Kasih
Matondo
THANK
Merci
Kiitos
Dank je
YOU
Cam on ban
Obrigado
Multumesc
Spasibo
Chokrane
Spasibo
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