

Arbitration Agreements In India – An Overview

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Arbitration law in India and international commercial arbitration in India, as concepts have flourished over the last few decades and are a few of the best alternative ways to resolve disputes in an amicable manner. Arbitration is a quasi-judicial and cost-effective means of settlement of disputes between parties outside of elaborate court procedures.

An arbitration agreement is a contractual obligation between two parties where they agree to settle disputes without taking the litigation route. It contains clauses like the place, seat, venue, parties and procedure of arbitration.

The statutory definition of an Arbitration Agreement is given under Sections 2(b) and Section 7 of the Arbitration and conciliation Act of 1996^[1] and is defined as follows:

2. “(b) “arbitration agreement” means an agreement referred to in section 7;

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

[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.”

What are the different forms of arbitration agreements in India?

As per section 7 of the Act, the parties have the freedom to form the agreement in several ways as below:

- By an arbitration clause- most often in commercial arbitration in India, a contract consists of an arbitration clause as a protectionist clause which states the party's intent to settle any disputes arising out of the contract to be resolved by the arbitration mechanism.
- By incorporating a clause- By the virtue of the Doctrine of Kompetenz-Kompetenz, an arbitration clause which is a part of a separate contract can also be considered an arbitration agreement. Section 7(5) of the Act, it provides that when an agreement refers to any agreement containing an arbitration clause, it will be considered as an arbitration agreement providing the same is in writing and when it is drafted with the intent of incorporating it as a clause in the contract.
- By communication- In precedence set by invoking provisions 7(b) and (c) in cases like Galaxy Infra an engineering[2], MurarjiSavla[3] and S. N Prasad[4] communication by letters or telecommunication also signifies the intention of parties to refer to arbitration as a form of the arbitration agreement.

How to draft an effective arbitration agreement?

By virtue of the judgements of Jagdish Chander v. Ramesh Chander[5] and KK Modi v. K.N. Modi[6] the Supreme Court of India has laid down the validity and principles of an arbitration agreement.

The principle laid down in the judgment regarding the arbitration agreement are

1. It must be in writing,
2. The agreement to settle the dispute in a private tribunal is mutual,
3. The private tribunal has the power to adjudicate disputes without bias and by following the principles of natural justice,
4. The parties agree to be bound by the arbitral tribunal's decision,
5. The parties must refer the dispute to a private tribunal with no prior reservations,
6. The parties must have mutual agreement reflecting from the maxim "consensus ad idem",
7. The clauses of the agreement must raise an obligation of performance,
8. The clauses of the agreement do not exclude the essentials of separability, severability, autonomy or any other essentials of the agreement.

Arbitration law in India and international commercial arbitration in India are most effective when the agreement is drafted whilst being mindful of the inclusion of certain clauses. It may be important to have the following clauses to make the arbitration mechanism easier. KSK being one of the leading Arbitration law firms in India, helps and assists in preparing such effective arbitration agreement since years of its practice has led to an expert team being deployed for such purposes

Number of arbitrators- Sec 10 of the Act provides for the appointment of arbitrators at the discretion of the parties. However, the number of arbitrators must be odd and it is also necessary to select arbitrators who would not show any sort of bias. The number of arbitrators determines the cost of the arbitral proceeding.

Procedure for appointment- Arbitration law in India provides for the procedure for the appointment of arbitrators under section 11 of the Act. This states that the parties must agree to the appointment procedure and must

in the absence of a sole arbitrator, choose one arbitrator each. Subsequently, the two arbitrators would choose a presiding third arbitrator. Language of proceeding- In cases of international commercial arbitration in India, the agreement usually deems smartest to have a prescribed language in which the proceeding takes place in order to avoid any future issues in the proceeding.

Seat and Venue of the arbitration- Arbitration law in India has evolved over the years and through precedents set by cases like the BALCO [7] and the BGS Soma [8], the importance of the differentiation and specific mention of the seat and venue have been highlighted. The venue signifies the place where the proceeding is held, whereas the seat is where the cause of action rises. The mechanism of commercial arbitration in India also lays down certain principles and doctrines regarding the seat and venue.

Institutional arbitration- The procedures and clauses are set and agreed to in a specialized institution which appoints the arbitrator by themselves. This is a pre-defined means of carrying out arbitral proceedings.

Conclusion

KSK, being one of the best in fields Arbitration law firms in India, has set up a diligent team that helps in the statutory incorporation of this very important arbitration clause. The team assists in drafting effective agreements which are mutually agreed upon by both contracting parties with utmost care.

FAQs

Is an unsigned arbitration agreement enforceable?

The Supreme Court, in its precedents like the Jugal Kishore Svapn Construction, ruled that an arbitration agreement must be in writing even though it need not be signed in the case. The Court noted that Section 7(4) of the Act could not be strictly implemented and interpreted to indicate that an arbitration agreement must be executed in every circumstance. Additionally, the court has stated that even though the agreement is not signed, the prerequisite of the agreement to be in writing must be duly fulfilled and agreed upon mutually. Thus, it can be said that even an unsigned agreement is enforceable.

Does Stamp Act apply to arbitration?

Section 35 of the Indian Stamps Act requires the payment of stamp duty on instruments which are admitted for evidence submission, registration and authentication of any such persons. In Tea Estates Private Limited[12], the Supreme Court held that the Doctrine of severability does not apply to an unstamped instrument which contains the arbitration clause since the arbitration agreement is also a very crucial part of the instrument and cannot be enforced unless the stamp duty and penalty is duly paid.

What makes an arbitration agreement valid in India?

Sec. 37 of the Indian Contract Act, 1972 states that an arbitration agreement which is a contract, shall remain valid as long as the underlying clauses of the clauses are abided with and the contract has not been assigned to a third party.

[1] https://www.indiacode.nic.in/bitstream/123456789/1978/1/AAA1996_26.pdf

[2] Pravin Electricals Pvt. Ltd vs Galaxy Infra And Engineering Pvt. ... on 8 March, 2021

[3] (1998) 1 GLR 778

[4] S.N. Prasad vs The Executive Engineer on 7 October, 2015

[5] *Jagdish Chander v. Ramesh Chander*

[6] *K.K. Modi vs K.N. Modi &Ors* on 4 February, 1998

[7] *Bharat Aluminium Co vs Kaiser Aluminium Technical ...* on 6 September, 2012

[8] (2020) 4 SCC 234.

[9] 1955 SCR (2) 857

[10] 127 (2006) DLT 80