

Drafting an Arbitration Agreement: An Indian Litigation Perspective

Listening to the speakers at a seminar on recent developments in arbitration law in India, it struck me that drafting arbitration agreements with an Indian counter party has become less about reflecting the intention of the parties and more about reflecting the state of the Indian judicial precedents and statutory amendments. This has become important to mitigate protracted litigation in India when enforcing, or resisting a challenge to, an award. To that end, some elements should be borne in mind:

An arbitration agreement to be valid must be in writing. While it is acceptable to identify a court which may have jurisdiction in respect of the underlying contract – these clauses have been used to challenge the very existence of a binding arbitration agreement. It is, therefore, advisable to specify that jurisdiction is conferred on a court subject to the parties resolving their disputes under the arbitration agreement.

Unless there is a particular reason to choose an *ad hoc* tribunal, specify an arbitral institution to administer the arbitration to provide procedural clarity to the arbitral process including appointment of arbitrators and ongoing administrative assistance. *Ad hoc* arbitrations in India tend to follow Indian court practice and procedures, unfamiliar and oftentimes burdensome in an international context.

Discovering the intended choice of parties as to the venue and seat of the arbitration contributes significantly to the time and costs associated with the dispute resolution process, when it is not explicit in the arbitration agreement. Eschew vague language and specify a “seat” explicitly if the intention is to have a seat outside India, especially where the governing law of the underlying contract is Indian law. The actual enforcement of awards can be delayed for years while the issue of “seat” is separately resolved and appealed. Recent rulings of the Indian courts have unsettled the generally settled rules for identifying the seat of an arbitration and, for that reason, defining the seat (and, separately, the venue) of the arbitration precisely will save time and cost and allow parties to focus on a final determination of the actual dispute.

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