

Procedures

Arbitration Agreement

Arbitration is a form of alternative dispute resolution ('ADR') where parties decide to settle a dispute outside the court without filing a lawsuit. One or more arbitrators are appointed who make a decision and render an arbitral award, which is legally binding and can be enforced in court of law.

Background and objectives

An arbitral award is like the judgment of a court reached after hearing arguments from both sides. Similar to a case in the court, parties may be represented by lawyers. It is either picked as a dispute resolution mechanism by a mutual decision by parties by signing an arbitration agreement or by a Court's order to that effect.

Arbitration as a dispute resolution mechanism is preferred over litigation for the following reasons:



Arbitration offers flexibility and autonomy for parties to determine the methodology, time, place and format of the proceedings.



Arbitration offers confidentiality as the final resolution reached remains between the parties.



Parties can mutually choose an arbitrator and appoint someone with extensive subject-matter expertise.

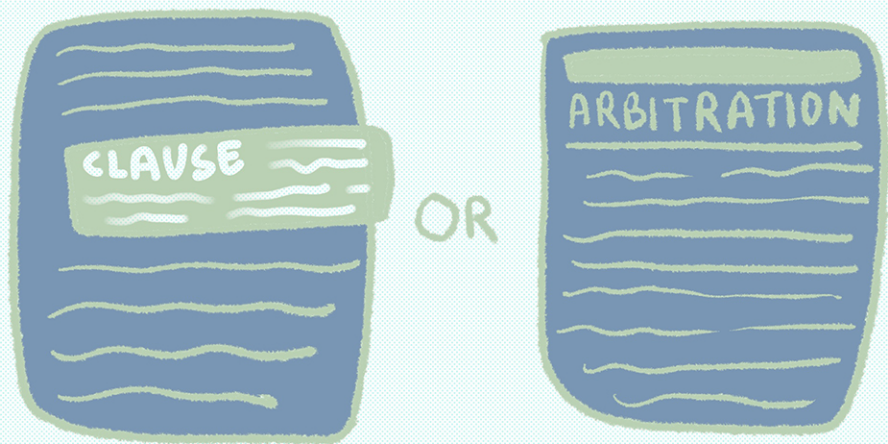
Where and how to use an arbitration agreement:

Every civil or commercial dispute can be referred to arbitration. Disputes which involve offences concerning the larger public, fraud or public money are usually barred from being referred to arbitration. This can involve criminal, matrimonial, guardianship, insolvency, and intellectual property matters.



Where and how to use an arbitration agreement:

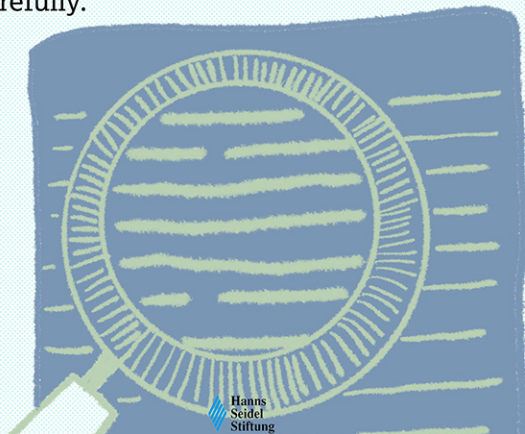
An arbitration agreement can either be in the form of a clause in a contract (called the 'dispute resolution clause') or can be a separate agreement. Arbitration agreements are common in international commercial disputes and equally common as dispute resolution clauses in smaller contracts between individual parties.



Where and how to use an arbitration agreement:

In India, arbitrations are governed by the Arbitration and Conciliation Act, 1996. Section 7 of the Act defines Arbitration agreement as “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.”

Since the usual rules of procedure and evidence do not apply in arbitration, it is important that one peruses and drafts an arbitration agreement carefully.



6 Key ingredients of an arbitration agreement:

1 It must arise out of mutual consent of parties



2 There must be a defined legal relationship which may or may not be contractual

3 It may be a clause in the contract or a separate agreement to this effect

4 It must be in writing

5 The subject matter must be arbitrable¹

6 The agreement must be signed by both parties

¹ Certain disputes such as disputes arising out of criminal offences, matrimonial disputes, guardianship matters, insolvency and winding up, eviction matters cannot be non-arbitrable.

Best Practices for drafting an arbitration agreement:

An arbitration agreement should carry clear and mandatory language; use words such as 'MUST' OR 'SHALL' INSTEAD OF 'MAY' OR 'MIGHT':

The agreement should cover widest possible ambit of disputes by using terms such as all disputes 'ARISING OUT OF', 'IN CONNECTION WITH' OR 'RELATING TO':

The agreement should be clear on whether parties are opting for an AD-HOC ARBITRATION OR AN INSTITUTIONAL ARBITRATION
An ad-hoc arbitration lets parties choose arbitrators as well as the rules and procedures that will govern the arbitration while institutional arbitration is deciding to refer the dispute to an institution such as the International Chamber of Commerce or London Court of International Arbitration

IN INTERNATIONAL DISPUTES

parties should decide the seat of arbitration, which is the place where the arbitration will take place.

**One example is opting for the UNCITRAL Arbitration Rules.*



Best Practices for drafting an arbitration agreement:

In international disputes, parties should decide the **SEAT OF ARBITRATION** which is the place where the arbitration will take place.

Parties Should Determine the **NUMBER OF ARBITRATORS**

This selection has an impact on the costs, duration and quality of arbitration

Agreements should carry **CONFIDENTIALITY OBLIGATIONS**

to determine what can and cannot be disclosed.

Parties should decide terms of **COSTS AND FEES**

that will be incurred including payment for arbitrators. Parties can also provide for the arbitrators to decide allocation of costs.

FINALITY OF THE ARBITRATION should be clearly mentioned.

If the parties do not choose a set of arbitration rules, it is important to state in the arbitration agreement that the award is final and not subject to recourse.

FAQ



1) Are arbitration awards legally recognized?

A) Yes. The Arbitration and Conciliation Act, 1996 recognizes arbitral awards as valid and enforceable.



2) Is a lawyer needed in arbitration?

A) While it is not mandatory, it is advised to be represented by a lawyer since the process can be adversarial.

FAQ



3) Who are arbitrators?

A) Arbitrators are independent and neutral persons appointed to settle a dispute. The 1996 Act provides for certain criteria to be fulfilled to be appointed an arbitrator in India.

4) Are international arbitral awards enforceable in India?

A) Yes. A petition for enforcement can be filed. Section 48 of the 1996 Act provides for the conditions under which foreign awards may be enforced.