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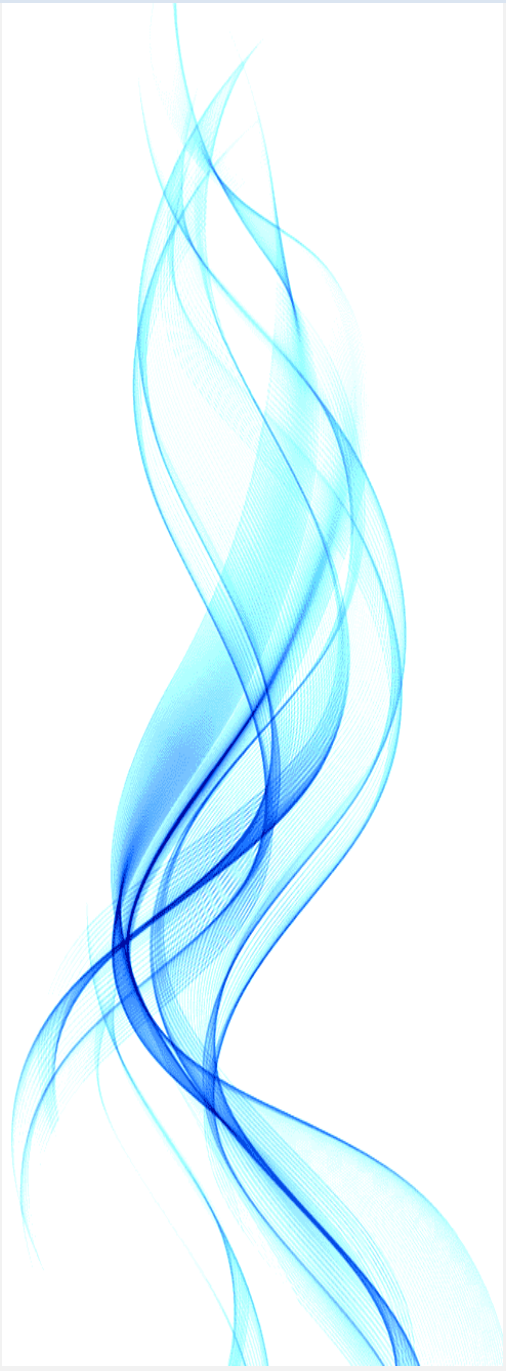

# Drafting Arbitration Agreement: Dos and Don'ts.

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**ISSUE:**

The contents of arbitration agreements have been subject matter of numerous litigations and lack of clarity therein has been the cause of the same. Such litigation substantiality delays the arbitral proceeding and increases the time of dispute resolution. The contents and the language of arbitration agreements determine 'Seat of Arbitration', applicable 'Law of Arbitration' and 'Substantial Law' governing the dispute. As the choice of the parties is the kernel of arbitration, there have been recurring disputes and then litigations to ascertain as to what the contents of the arbitration agreement refer to as the choice of the parties in respect of 'Seat of Arbitration', applicable 'law governing arbitration agreement & conduct of arbitral proceeding' and 'law governing the dispute'. Clarity in the language of an arbitration agreement is important as, in case of dispute, the courts have the contents of agreement only to infer the intent and choice of the parties. This task becomes difficult, when the parties are at dispute and accordingly more susceptible to disagreement. The task becomes further difficult and results into further uncertainty when the contents of the arbitration agreement have undesirable omissions and additions, which make the choice and intention of the parties inconspicuous. This leaves the courts with no option but to hypothesize which sometimes may not be in line of the intended choice of the parties and to the benefit of levanters. Since the 'seat of arbitration' has emerged as the only factor to determine as to which court will exercise administrative and supervisory jurisdiction over the arbitration and what would be the law governing the conduct of the arbitration, the drafting of the arbitration agreement requires more skilful efforts to give accurate effect to the choice of the parties. Therefore, to understand the situational requirements I have taken some, often discussed, cases of English High Courts and Indian Supreme Court and their final view on the terms of the agreements, as case study, to suggest some dos and don'ts of drafting an arbitration agreement.

**Arbitration Clauses and their judicial interpretation:**

| **ENGLISH CASE-1** |
|---|
| *Naviera Amazonica Peruana S.A. vs. Compania Internacional De Seguros Del Peru*, [1987] EWCA Civ J1110-6. |
| **ARBITRATION AGREEMENT** |
| There is no reproduction of the terms of the agreement in the judgment but there is reference of the same on basis of working translation. The court's observations in this regards are reproduced:<br>"6. There is no need to refer to the terms of the policy. Apart from identifying and describing the four ships and stating the original premiums, the policy merely incorporated the text of the American and other Institute clauses by reference. Of the printed "General Conditions" it is only necessary to refer to the following. First, Article 1 provided that in the event of any conflict between the printed and typed stipulations, the latter were to prevail. Secondly, Article 31 provided:<br>"Whatever the domicile of the Insured, in the event of judicial dispute he accepts, from now on, the jurisdiction and competence of the City of Lima, without any reservation of any nature." |

7. One then comes to the terms of the typed indorsement. Paragraph 1(1) provided that "the English clauses shall prevail over the General Conditions printed in the policy". This must have been a reference to the English text of the American and other Institute clauses incorporated in the cover and is of no direct relevance for present purposes. Paragraph 2 provided that certain parts of the General Conditions (which did not include Articles 1 and 31) should be without effect and is equally irrelevant. The Spanish wording of paragraph 3 was: "Las Liquidaciones de Averia se realizaran en Londres". The judge thought that this meant that general average settlements were to take place in London. I think that it may refer to the settlement of claims under the policy. However, for present purposes the correct translation is again irrelevant. One then comes to the crucial words:

   "Arbitraje bajo las Condiciones y Leyes de Londres".

8. The working translation was "Arbitration under the conditions and laws of London".

9. "Conditions" is obviously not an idiomatic translation. But in the context of "laws" it must have been intended to refer to the procedural rules in force in London. Indeed, as explained hereafter, there is a sound legal distinction between substance and procedure even in this context. The judge interpreted this provision as follows:

   "The clause, in my view, provides that the obligation to arbitrate shall be governed by English law; also, probably, that the procedural law of any arbitration shall be English law."

Following are the relevant factors to be noted from the terms of the arbitration agreement:

| | | |
|---|---|---|
| 1. | Place of Arbitration: | Not Mentioned |
| 2. | Law governing arbitration agreement and its performance: | "Arbitration under the conditions and laws of London" |
| 3. | Law governing conduct of Arbitration: | |
| 4. | Law governing dispute: | Not mentioned |
| 5. | Jurisdiction of Court | In the event of judicial dispute he accepts, from now on, the jurisdiction and competence of the City of Lima, without any reservation of any nature. |

Decision of the Court:

1. The curial or procedural law of arbitration, the *Lex Fori,* is the law of the place of the 'Seat of Arbitration'. The courts which are competent to control or assist the arbitration are courts exercising jurisdiction at place where seat situates.
2. Forum of any arbitration which might arise under the policy (agreement) was London since the arbitration clause provided, in effect, that the law in force in London was to be Procedural Law of any such Arbitration.
3. Under the policy, the seat of arbitration should be London.

**Remarks:** The decision of the parties to have arbitration *under the conditions and laws of London* weighed heavily in holding that the 'Seat of Arbitration' is at London despite London being not chosen as seat of arbitration, in explicit terms.

## ENGLISH CASE-2

C vs. D, [2007] EWCA Civ 1282

### ARBITRATION AGREEMENT

"(o) Arbitration

Any dispute arising under this Policy shall be finally and fully determined in London, England under the provisions of the English Arbitration Act of 1950 as amended …

If the party … notified of a desire for arbitration shall fail or refuse to nominate the second arbitrator … the party who first served notice of a desire to arbitrate will … apply to a judge of the High Court of England for the appointment of a second arbitrator … In the event of the failure of the first two arbitrators to agree on a third arbitrator … any of the parties may … apply to a judge of the High Court of England for the appointment of a third arbitrator ….

The Board shall, within ninety (90) calendar days following the conclusion of the hearing, render its decision on the matter or matters in controversy in writing … In case the Board fails to reach a unanimous decision, the decision of the majority of the members of the Board shall be deemed to be the decision of the Board and the same shall be final and binding on the parties thereto, and such decision shall be a complete defence to any attempted appeal or litigation of such decision in the absence of fraud or collusion."

(Condition (y) is then a Service of Suit clause pursuant to which the insurer agrees (1) that, if it does not pay any amount claimed to be due under the policy, it will submit to any court of competent jurisdiction in the United States and (2) that process may be served in New Jersey.)

"(q) Governing Law and Interpretation

This policy shall be governed by and construed in accordance with the internal laws of the State of New York, except insofar as such laws may prohibit payment in respect of punitive damages hereunder and except insofar as such laws pertain to regulation by the Insurance Department of the State of New York of insurers doing insurance business or issuance or delivery of policies of insurance within the State of New York; provided, however that the provisions, stipulations, exclusions and conditions of the policy are to be construed in an even-handed fashion as between the Insured and the Company; without limitation, where the language of this policy is deemed to be ambiguous or otherwise unclear, the issue shall be resolved in the manner most consistent with the relevant provisions, stipulations, exclusions and conditions [without regard to authorship of the language, without any presumption or arbitrary interpretation or construction in favour of either the Insured or the Company and without reference to parol evidence]."

8… Applicable Law

(a) Pursuant to Article V(q) of the Agreement, the law governing the insurance policy is the law of the State of New York, USA.

(b) Pursuant to Article V(o) of the Agreement, the juridical seat of the arbitration is London, UK. Accordingly the law governing the arbitration itself [lex arbitri] is the English Arbitration Act 1996, as amended and supplemented, regardless of whether meetings and hearings take place elsewhere in the interest of saving costs or convenience."

Following are the relevant factors to be noted from the terms of the arbitration agreement:

| | | |
|---|---|---|
| 1. | Place of Arbitration: | London |
| 2. | Law governing arbitration agreement and its performance: | Performance through High Court of England |
| 3. | Law governing conduct of Arbitration: | The English Arbitration Act of 1950 |
| 4. | Law governing dispute: | The internal laws of the State of New York |
| 5. | Jurisdiction of Court | i. The High Court of England for the appointment of Second and third arbitrator.<br>ii. If it does not pay any amount claimed to be due under the policy, it will submit to any court of competent jurisdiction in the United States and (2) that process may be served in New Jersey.) |

Decision of the Court: The seat of arbitration was London and therefore, the award cannot be challenged in New York merely because the law governing the agreement is the Law of New York. The substantive law governing the contract can be the law other than the law governing the arbitration agreement and the curial law/*lex fori*. Though it is rare but the choice of 'law related to arbitration agreement and its performance' may be different from the curial law or law of related to conduct of arbitration *(lex fori)*.

## ENGLISH CASE-3

Braes of Doune Wind Farm (Scotland) Limited vs Alfred Mcalpine Business Services Limited., [2008] EWHC 426 (TCC)

## ARBITRATION AGREEMENT

The material clauses of the EPC Contract were:

"1.4.1. The Contract shall be governed by and construed in accordance with the laws of England and Wales and, subject to Clause 20.2 [Dispute Resolution], the Parties agree that the courts of England and Wales have exclusive jurisdiction to settle any dispute arising out of or in connection with the Contract.

20.2.2. (a) …any dispute or difference between the Parties to this Agreement arising out of or in connection with this Agreement shall be referred to arbitration.

(b) Any reference to arbitration shall be to a single arbitrator…and conducted in accordance with the Construction Industry Model Arbitration Rules February 1998 Edition, subject to this Clause

(Arbitration Procedure)…

(c) This arbitration agreement is subject to English Law and the seat of the arbitration shall be Glasgow, Scotland. Any such reference to arbitration shall be deemed to be a reference to arbitration within the meaning of the Arbitration Act 1996 or any statutory re-enactment."

Following are the relevant factors to be noted from the terms of the arbitration agreement:

| | | |
|---|---|---|
| 1. | Place of Arbitration: | The seat of the arbitration shall be Glasgow, Scotland |
| 2. | Law governing arbitration agreement and its performance: | Subject to English Law |
| 3. | Law governing conduct of Arbitration: | The English Law (Any such reference to arbitration shall be deemed to be a reference to arbitration within the meaning of the Arbitration Act 1996 or any statutory re-enactment) |
| 4. | Law governing dispute: | The Contract shall be governed by and construed in accordance with the laws of England and Wales and, subject to Clause 20.2 [Dispute Resolution], |
| 5. | Jurisdiction of Court | The Parties agree that the courts of England and Wales have exclusive jurisdiction to settle any dispute arising out of or in connection with the Contract. |

Decision: Despite Glasgow, Scotland being explicitly mentioned as the seat of the arbitration, the court decided to the contrary holding England as the 'Seat of Arbitration for the following consideration:

i. Clause 1.6 of the Construction Industry Model Arbitration Rules February 1998 (CIMAR) provides that it applied where: (b) the seat of the arbitration is in England and Wales or Northern Ireland.

ii. In substance, the parties agreed that the law of England would juridically control the arbitration.

iii. Clause 1.4.1 is consistent with Clause 20.2.2 (c) which confirms that the arbitration agreement is subject to English Law and that the "reference" is "deemed to be a reference to arbitration within the meaning of the Arbitration Act 1996".

iv. Express agreement of the parties that the "seat" of arbitration was to be Glasgow, Scotland relate to the place in which the parties agreed that the hearings should take place. However, by all the other references the parties were agreeing that the curial law or law which governed the arbitral proceedings was that of England and Wales.

**INDIAN CASE-1**
**(International commercial Arbitration**
**Mentioned Venue: London)**

*Bharat Aluminium Co. vs. Kaiser Aluminium Technical Services Inc.*, (2016) 4 SCC 126 applying a constitution bench judgment reported under same title as (2012) 9 SCC 552.

**ARBITRATION AGREEMENT**

1. The agreement contained an arbitration clause for resolution of disputes arising out of the contract. The arbitration clause contained in Articles 17 and 22 was as under :

   "Article 17.1 – Any dispute or claim arising out of or relating to this Agreement shall be in the first instance, endeavour to be settled amicably by negotiation between the parties hereto and failing which the same will be settled by arbitration pursuant to the English Arbitration Law and subsequent amendments thereto.

   Article 17.2 – The arbitration proceedings shall be carried out by two Arbitrators one appointed by BALCO and one by KATSI chosen freely and without any bias. The court of Arbitration shall be held wholly in London, England and shall use English language in the proceeding. The findings and award of the Court of Arbitration shall be final and binding upon the parties.

   Article 22 – Governing Law – This agreement will be governed by the prevailing law of India and in case of Arbitration, the English law shall apply."

Following are the relevant factors to be noted from the terms of the arbitration agreement:

| | | |
|---|---|---|
| 1. | Place of Arbitration: | The court of Arbitration shall be held wholly in London, England. |
| 2. | Law governing Arbitration agreement and its performance. | The English Arbitration Law and subsequent amendments thereto. |
| 2. | Law governing conduct of Arbitration: | In case of Arbitration, the English law shall apply |
| 3. | Law governing dispute: | Indian Law. |
| 4. | Jurisdiction of Court | Not mentioned. |

Decision of the Court: Indian law was the choice of parties to govern the Contract. English law was proper law governing the arbitration agreement and the conduct of arbitration. Therefore the seat of arbitration was London and part- I of the Arbitration and Conciliation Act, 1996 of Indian Law was not applicable.

**INDIAN CASE-2**
**(International commercial Arbitration**
**Mentioned Venue: London)**

*Enercon (India) Ltd vs. Enercon Gmbh*, (2014) 5 SCC 1

**ARBITRATION AGREEMENT**

"17 GOVERNING LAW 17.1 This Agreement and any dispute of claims arising out of or in connection with its subject matter are governed by and construed in accordance with the Law of India.

18. DISPUTES AND ARBITRATION 18.1 All disputes, controversies or differences which may arise between the Parties in respect of this Agreement including without limitation to the validity, interpretation, construction performance and enforcement or alleged breach of this Agreement, the Parties shall, in the first instance, attempt to resolve such dispute, controversy or difference through mutual consultation. If the dispute, controversy or difference is not resolved through mutual consultation within 30 days after commencement of discussions or such longer period as the Parties may agree in writing, any Party may refer dispute(s), controversy(ies) or difference(s) for resolution to an arbitral tribunal to consist of three (3) arbitrators, of who one will be appointed by each of the Licensor and the Licensee and the arbitrator appointed by Licensor shall also act as the presiding arbitrator.

18.2 * * * 18.3 A proceedings in such arbitration shall be conducted in English. The venue of the arbitration proceedings shall be in London. The arbitrators may (but shall not be obliged to) award costs and reasonable expenses (including reasonable fees of counsel) to the Party (ies) that substantially prevail on merit. The provisions of the Indian Arbitration and Conciliation Act, 1996 shall apply.

Following are the relevant factors to be noted from the terms of the arbitration agreement:

| | | |
|---|---|---|
| 1. | Place of Arbitration: | The venue of the arbitration proceedings shall be in London. |
| 2. | Law governing Arbitration Agreement and its performance. | The provisions of Indian Arbitration and Conciliation Act, 1996 shall apply. |
| 3. | Law governing conduct of Arbitration: | |
| 4. | Law governing dispute: | This Agreement and any dispute of claims arising out of or in connection with its subject matter are governed by and construed in accordance with the Law of India. |
| 5. | Jurisdiction of Court | Not mentioned. |

Decision of the Court: London is merely venue of the Arbitration. Seat of Arbitration is India as all the three laws i.e. law governing the contract, law governing arbitration agreement and law of arbitration/ curial law are Indian Laws.

**INDIAN CASE-3**
**(International commercial Arbitration**
**Mentioned Venue: Kuala Lumpur)**

*Union of India vs. Hardy Exploration and Production (India) Inc.*, (2019) 13 SCC 472.

**ARBITRATION AGREEMENT**

Having addressed the reference, we shall advert to the arbitration clause to delineate on whether it ousts the jurisdiction of the courts in India. Article 32 of the arbitration agreement reads as follows:-

"32.1 This Contract shall be governed and interpreted in accordance with the laws of India.

32.2 Nothing in this Contract shall entitle the Contractor to exercise the rights, privileges and powers conferred upon it by this Contract in a manner which will contravene the laws of India."

26. Article 33 deals with "Sole expert, conciliation and arbitrator". Article 33.9 and 33.12 read thus:-

"33.9 Arbitration proceedings shall be conducted in accordance with the UNICITRAL Model Law on International Commercial Arbitration of 1985 except that in the event of any conflict between the rules and the provisions of this Article 33, the provisions of this Article 33 shall govern.

xxx xxx xxx 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." [Emphasis supplied]

Following are the relevant factors to be noted from the terms of the arbitration agreement:

| | | |
|---|---|---|
| 1. | Place of Arbitration: | The venue of conciliation or arbitration proceedings pursuant to this Article unless the parties otherwise agree, shall be Kuala Lumpur. |
| 2. | Law governing Arbitration Agreement and its performance. | Not mentioned. |
| 3. | Law governing conduct of the Arbitration: | |
| 4. | Law governing dispute: | This Contract shall be governed and interpreted in accordance with the laws of India. |
| 5. | Jurisdiction of Court | Not mentioned. |

Decision of the Court: Kuala Lumpur is not the seat or place of arbitration. It is merely venue of arbitration. Therefore application of Part-I of Indian Arbitration and Conciliation Act, 1996 is not excluded.

**INDIAN CASE-4**
**(International commercial Arbitration:**
**Venue Mentioned: New Delhi/Faridabad)**

*BGS SGS Soma JV vs. NHPC Ltd.*, (2019) 17 SCALE 369.

**ARBITRATION AGREEMENT**

Clause 67.3 reads as follows:
"Any dispute in respect of which the Employer and the Contractor have failed to reach at an amicable settlement pursuant to Sub-Clause 67.1, shall be finally settled by arbitration as set forth below. The Arbitral Tribunal shall have full power to open up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer.

(i) A dispute with an Indian Contractor shall be finally settled in accordance with the Indian Arbitration and Conciliation Act, 1996, or any statutory amendment thereof. The arbitral tribunal shall consist of 3 arbitrators, one each to be appointed by the Employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the Parties and shall act as Presiding arbitrator. In case of failure of the two arbitrators, appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding arbitrator shall be appointed by the President of the Institution of Engineers (India). For the purposes of this Sub-Clause, the term "Indian Contractor" means a contractor who is registered in India and is a juridic person created under Indian law as well as a joint venture between such a contractor and a Foreign Contractor.

(ii) In the case of a dispute with a Foreign Contractor, the dispute shall be finally settled in accordance with the provisions of the Indian Arbitration and Conciliation Act, 1996 and read with UNCITRAL Arbitration Rules. The arbitral tribunal shall consist of three Arbitrators, one each to be appointed by the Employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the Parties and shall act as Presiding arbitrator. In case of failure of the two arbitrators appointed by the parties to reach a consensus within a period of 30 days from their appointment on the Presiding Arbitrator to be appointed subsequently, the Presiding arbitrator shall be appointed by the President of the Institution of Engineers (India). For the purposes of this Clause 67, the term "Foreign Contractor" means a contractor who is not registered in India and is not a juridic person created under Indian Law. In case of any contradiction between Indian Arbitration and Conciliation Act, 1996 and UNCI-TRAL Arbitration Rules, the provisions in the Indian Arbitration and Conciliation Act, 1996 shall prevail.

(iii) Arbitration may be commenced prior to or after completion of the Works, provided that the obligations of the Employers, the Engineer, and the Contractor shall not be altered by reason of the arbitration being conducted during the progress of the Works.

xxx xxx xxx

(v) If one of the parties fail to appoint its arbitrator in pursuance of sub-clause (i) and (ii) above, within 30 days after receipt of the notice of the appointment of its arbitrator by the other party, then

the President of the Institution of Engineers (India), both in cases of foreign contractors as well as Indian Contractors, shall appoint the arbitrator. A certified copy of the order of the President of Institution of Engineers (India), making such an appointment shall be furnished to each of the parties.

(vi) Arbitration Proceedings shall be held at New Delhi/Faridabad, India and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English.

(vii) The decision of the majority of arbitrators shall be final and binding upon both parties. The cost and expenses of Arbitration shall be borne in such a manner as determined by the arbitral tribunal. However, the expenses incurred by each party in connection with the preparation, presentation etc. of its proceedings as also the fees and expenses paid to the arbitrator appointed by such party on its behalf shall be borne by each party itself."

Following are the relevant factors to be noted from the terms of the arbitration agreement:

| | | |
|---|---|---|
| 1. | Place of Arbitration: | New Delhi/ Faridabad |
| 2. | Law governing Arbitration Agreement and its performance. | In case of failure of the parties to appoint arbitrator the President of the Institution of Engineers (India), shall appoint the arbitrator. |
| 2. | Law governing conduct of Arbitration: | The dispute shall be finally settled in accordance with the provisions of the Indian Arbitration and Conciliation Act, 1996 |
| 3. | Law governing dispute: | Not mentioned. |
| 4. | Jurisdiction of Court | Not mentioned. |

Decision of the court: New Delhi and Faridabad were designated as the 'Seat of Arbitration'. However, since the arbitral proceedings were conducted at New Delhi and the award was signed at New Delhi, New Delhi was held to be chosen as the 'Seat of Arbitration' by the parties. Therefore, the courts in New Delhi were held to have exclusive jurisdiction over the arbitration and not the courts in Faridabad.

## INDIAN CASE-5
**(International commercial Arbitration**
**Venue Mentioned: Hong Kong**

*Mankastu Impex Private Ltd. vs. Airvisual Ltd.*, judgment dated 05.03.2020 in Arbitration Petition No. 32 of 2018.

**ARBITRATION AGREEMENT**

In the present case, Clause 17 of the MoU is a relevant clause governing the law and dispute resolution. Clause 17 reads as under:-

17. Governing Law and Dispute Resolution 17.1 This MoU is governed by the laws of India, without regard to its conflicts of laws provisions and courts at New Delhi shall have the jurisdiction.

17.2 Any dispute, controversy, difference or claim arising out of or relating to this MoU, 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 in Hong Kong.

The place of arbitration shall be Hong Kong.

The number of arbitrators shall be one. The arbitration proceedings shall be conducted in English language.

Following are the relevant factors to be noted from the terms of the arbitration agreement:

| | | |
|---|---|---|
| 1. | Place of Arbitration: | The place of arbitration shall be Hong Kong. |
| 2. | Law governing Arbitration Agreement and its performance. | Any dispute, controversy, difference or claim arising out of or relating to this MoU, 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 in Hong Kong. |
| 3. | Law governing conduct of Arbitration: | |
| 4. | Law governing dispute: | This MoU is governed by the laws of India. |
| 5. | Jurisdiction of Court | Courts at New Delhi. |

Decision of the Court: Substantive laws governing substantive contract are laws of India. The word in clause 17.2 that the 'arbitration administered in Hong Kong' is indicia that the seat of arbitration is at Hong Kong. Once parties have chosen Hong Kong as the place of arbitration and to be administered there, the laws of Hong Kong would govern the arbitration. Indian Courts have no jurisdiction for appointment of arbitration.

The words in Clause 17.1 "without regard to its conflicts of laws provisions and courts at New Delhi shall have the jurisdiction" do not take away or dilute the intention of the parties in Clause 17.2 that the arbitration be administered in Hong Kong. The words in Clause 17.1 do not suggest that the seat of arbitration is in New Delhi.

## ANALYSIS

From the analysis of various arbitration clauses, which have been subject matter of litigations and judicial interpretation thereof, it is obvious that the parties to an arbitration agreement have choices to make *inter alia* in regard of:

i. Geographical place of arbitral proceedings.
ii. The Geographical place of arbitral proceedings to be treated as 'venue of arbitration' or the 'Juridical Seat of Arbitration'.
iii. Substantive Law governing the rights and liabilities of the parties under the agreement i.e. governing the contract. (this choice is available in case of international commercial arbitration only)
iv. Strength and manner of constitution of the arbitral tribunal.
v. Law governing Arbitration Agreement and its performance.
vi. Law governing conduct of Arbitral proceedings and its supervision, which includes challenge of the award.

However, unskilfully and ambiguously drafted clauses of arbitration agreement have resulted in confusion and consequent protracted litigation. Therefore to avoid confusion and contradictions I propose following 'Dos and Don'ts' while drafting Arbitration agreements.

**THE 'DOs AND DON'Ts'**

**DOs:**

1. Mention a place as designated 'Seat of Arbitration', choice of applicable law governing the substantial contract (in case of International Commercial Arbitration only) and law only of the place of the 'Seat of Arbitration' as the designated law governing arbitration agreement and its performance and curial law or law governing conduct of the arbitration in as clear terms as possible. If the choice of curial law is different from the one of the place of arbitration, there is likelihood of confusion being created about the 'seat of arbitration'.

2. Mention only one 'place of Arbitration'. The named place should the place desired as the 'Juridical Seat of Arbitration'. It means, the courts of that place only will have administrative and supervisory jurisdiction over the Arbitration and law of that place shall be the law governing the arbitration. The choice of the place of arbitration should be made keeping in view the fact that it has two unavoidable consequences i.e. the courts of that place will automatically get exclusive jurisdiction to administer and supervise the arbitration and the law of that place only will have automatic applications in regard of the arbitration.

3. To avoid confusion or to give more clarity to the choice of place of arbitration as the 'Juridical Seat of Arbitration', mention law of that place only as the law governing arbitration contract and performance thereof and law governing conduct of the arbitral proceedings, despite these being automatic fallout of the choice of 'Seat'. Though applicability of law of the place of 'Seat of Arbitration' is automatic to consequence of selection of 'Seat of Arbitration' but Judicial decisions have shown that the mere mentioning of 'Place/Seat of Arbitration' is not

enough in itself for determination of a place as the 'Juridical Seat of Arbitration'. The choice of applicable law and jurisdiction of court are stronger indicia of selection of that place as 'Juridical Seat of Arbitration'

4. In case of international commercial arbitration, clearly mention the law which the parties want to govern their substantial contract or their rights and liability. If the parties have different choice of law governing their rights and liabilities in the contract on the one hand and that of law governing the arbitration agreement and its proceedings on the other, the language of the arbitration clauses should specifically and clearly reflect the same.

5. If the parties chose the arbitration under any Supranational Rules (institutionalized arbitration) they should select the ordinary place of arbitration of that organization as the 'Juridical Seat of Arbitration' and law of that place as the governing law of arbitration to avoid confusion. They can mention the courts of that place to have jurisdiction, which otherwise gain jurisdiction because of the reason that the 'seat of arbitration' situates under its jurisdiction.

6. In case of international commercial arbitration under any Supranational Rules, the law governing the substantial contract or the law under which rights and liability of the parties to the dispute is to be determined must be mentioned to avoid confusion.

**DON'Ts:**

1. Do not mention multiple places in the arbitration agreement. Mentioning of multiple places as either 'venue' or 'seat' of arbitration in the agreement may cause confusion about the 'Juridical Seat of Arbitration'. Mentioning of any place other than the intended 'Juridical Seat of Arbitration' is unnecessary because there is no restriction for the Arbitral tribunal to hold arbitral proceeding at a place other than the designated place of arbitration even if the agreement does not mention it.

2. Do not mention law of a place other than the chosen place/seat of arbitration to be applicable law in respect of the arbitration agreement or the arbitral proceeding or its supervision.

3. Do not mention jurisdiction of the courts of a place other than that of the 'seat of arbitration'. Even mentioning of jurisdiction of the courts of a place of the 'seat of arbitration is not required as it is automatic fallout of the choice of the 'Seat of Arbitration' but if it is so mentioned it strengthens the *indicia* that the place is 'seat of arbitration'.

4. Do not mention anything which is not required to reflect the choice of the party in regard of the factors mentioned in ANALYSIS, hereinabove and any other factor of special choice of the parties.

5. Do not choose different laws governing arbitration contract and its performance on the one hand and conduct of the arbitral proceeding (*Lex Fori*) on the other.

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