DRAFTING DEFECTS IN ARBITRATION CLAUSES IN INDIA: A CRITICAL ANALYSIS OF JUDICIAL TRENDS

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ABSTRACT

The current paper is a critical review of the issue of flawed writing of arbitration clauses in India and how this affects the effectiveness of dispute resolution. Section 7 of the Arbitration and Conciliation Act, 1996 recognises arbitral proceedings as being based on arbitration clauses. Nevertheless, even with an increased use of arbitration in trade agreements, the way in which commercial contracts are written still poses severe procedural and jurisdictional problems. The paper points out such malpractices of drafting as the use of ambiguous words (such as the word may rather than the word shall), pathological clauses, no indication of how arbitrators should be appointed, and contradictory seat and jurisdiction provisions. Such flaws usually contribute to the early litigation, delays, and higher expenses, hence undermining the intention behind arbitration as a quick and efficient alternative to court litigation.

The paper also examines the current judicial trends in India in the form of some of the latest case laws in India, which include Vidya Drolia v. Durga Trading Corporation, Duro Felguera v. Gangavaram Port Ltd., and Garware Wall Ropes Ltd. v. Coastal Marine Constructions. It points to the move towards a pro-arbitration stance, where the courts are becoming more open to letting arbitration run despite insignificant flaws. Nonetheless, the study also notes that there is still inconsistency in the judicial interpretation, thus, resulting in uncertainty and unpredictability. Through analyzing the conflict between the autonomy of parties and judicial interference, the paper has made the argument that the high degree of judicial interpretation can destroy the contractual intent of parties. It concludes that the need to minimise disputes requires better drafting, the application of model clauses and proper legal scrutiny. Finally, the paper provides a focus on the fact that arbitration in India cannot be effective without judicial support, as well as without clear and efficient arbitration clauses.

1. Introduction

Arbitration is one of the fast-developing processes of resolving disputes in India, particularly over commercial affairs. [5] The institutional data confirms this increase by 1,290 % in 10 years; according to the Delhi International Arbitration Centre (DIAC), arbitration cases have risen since 2013. As of 2023, the number of arbitration cases has grown from 528 cases in 2013 to 7,358 cases in 2023. [1] According to the Mumbai Centre for International Arbitration (MCIA), new arbitration references increased by 48 % in 2024 relative to 2023, which reflects a growing trend towards institutional arbitration mechanisms in India. [2] Although there are reforms, India still has weak contract enforcement with rankings of 163rd (186th in 2020) and an average resolution period of 1, 445 days, still showing inefficiencies in dispute resolution. [3] Recent academic studies point out that pre-hearing issues regarding the validity and enforceability of arbitration contracts are becoming more influential in arbitration processes and submissions, and that pre-hearing matters must undergo judicial review before the filing of an arbitration. [4] Also, arbitration statistics show the increasing complexities of arbitration procedures, with more than 60 % of arbitration users in 2023-2024 polls requiring more procedural clarity and transparency, especially in the drafting and proceedings. [6] This is indicative of the increased significance of specific arbitration clauses in providing efficiency.

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[1] Bhavana Chandak Dhoundiyal, *Global Models and India's Arbitration Reform: Towards a Specialised Arbitration Division*, RGNUL Student Research Review (Apr. 27, 2025), https://www.rsrr.in/post/global-models-and-india-s-arbitration-reform-towards-a-specialised-arbitration-division.

[2] *MCIA's Annual Report Reveals a Transformational Year for Institutional Arbitration in India*, Pinsent Masons (Feb. 6, 2025), https://www.pinsentmasons.com/out-law/news/mcia-annual-report-2025.

[3] Department of Legal Affairs, *Acts, Rules & Policies*, Ministry of Law & Justice, Government of India, https://legalaffairs.gov.in/acts-rules-policies.

[4] Department of Justice. *Ease of Doing Business Rankings.* Government of India. https://dashboard.doj.gov.in/eodb/.

[5] Akash Gupta et al., *Setting the Boundaries for the Use of AI in Indian Arbitration*, MDPI Eng. Proc. 2025, at 39, https://www.mdpi.com/2673-4591/107/1/39.

[6] Sanjana Reddy Jeeri & Vinita Singh, *Soft Law, Hard Justice: Regulating Artificial Intelligence in Arbitration*, Contemp. Asia Arb. J. (2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5038334.

Moreover, the statistics of the global negotiation reveal that the use of arbitration has grown significantly, and in 2024, 831 new cases were registered under ICC Arbitration Rules, with the parties representing 136 jurisdictions, which reflects the growing use of arbitration and the necessity to write the clauses correctly. [7] The purpose of this paper is to critically evaluate the typical flaws of drafting arbitration clauses in India and assess how the Indian courts have reacted to these deficiencies via the development of judicial trends. Therefore, although arbitration is growing at a high rate, the prevalence of flawed provisions still creates jurisdictional conflicts and delays in the first stage of arbitration.

2. Concept of Arbitration Clauses in India

An adjudication section is a clause in a bond where parties concur that any dispute would be settled by arbitration rather than the courts. In India, arbitration is all about consent; that is, the authority of the arbitral tribunal is within the depth of the existence of a valid arbitration agreement. The jurisdiction of arbitration in India is affected by the agreement of the parties alone, and drafting of the clause on arbitration is of utmost importance in India. [8] Section 7 provides that an arbitration agreement should meet particular statutory requirements. It has to be in written form, and it has to explicitly indicate that parties accept subjecting disputes to arbitration. Notably, Section 7(4) accepts three legitimate types of agreements:

(1) a signed document,

(2) communication by letter or electronic means, and

(3) exchange of statements of claim and defense of which the agreement is not disavowed. [9]

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[7] *ICC Dispute Resolution Statistics 2024*, Int'l Chamber of Commerce (2025), 2024-Statistics_ICC_Dispute-Resolution_992-1.pdf

[8] A. K. Singhal, *Arbitration Mechanism in India for Dispute Resolution Between the Parties: A Study* (2025), https://www.researchgate.net/publication/393687457

[9] *The Arbitration and Conciliation Act, 1996*, § 7(4) (India). a1996-26.pdf

These legal requirements indicate that the law of arbitration in India is very organised. Even the latest court rulings in 2024 have once again confirmed that the absence of a written and explicit agreement renders arbitration inadmissible, and thus, claims are dismissed at the preliminary level.[10] The most essential element of an arbitration clause is the clear intention of the parties to arbitrate disputes. Academic studies emphasise that unclear wording, such as the use of "may" instead of "shall", can make the clause optional and legally ineffective. [11] A clear procedural framework, i.e. how one appoints arbitrators, where arbitration will take place, and the rules that will govern it, is another condition. According to the latest MDPI studies (2025), the recent advances in increasing the complexity of arbitration processes have pushed the importance of clarity and precision in the drafting of contract terms more than ever before in order to prevent procedural disputes. Arbitration clauses should therefore be written accurately. [12] Arbitration being purely agreement-based, any small faults in drafting may result in challenges to validity, time wastage, or even breed further stalling of arbitration.

3. Common Drafting Defects in Arbitration Clauses

Arbitration clauses include drafting defects as one of the prominent factors that contribute to delays and disagreements in an arbitration proceeding. Such issues have been brought into the limelight due to the increased use of arbitration worldwide. As an example, the International Chamber of Commerce (ICC) documented 831 new arbitration cases in 2024 with 2,392 parties in 136 jurisdictions, indicating the further complexity of arbitration and the necessity of precise writing.[13]

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[10] *Neilan Int'l Co. Ltd. v. Powerica Ltd.*, Bombay High Court, 2024, https://indiankanoon.org/.

[11] Varsha Singh, *Arbitration Agreement and Its Construction: An Analytical Study*, Legal Research Development (2024), https://lrdjournal.com/index.php/lrd/article/view/117.

[12] Akash Gupta et al., *Setting the Boundaries for the Use of AI in Indian Arbitration*, MDPI Eng. Proc. 2025, https://www.mdpi.com/2673-4591/107/1/39.

[13] *ICC Dispute Resolution Statistics 2024*, Int'l Chamber of Com. (2025), 2024-Statistics_ICC_Dispute-Resolution_992-1.pdf

3.1 Ambiguity in Clause Language

The ambiguity occurs when an arbitration clause is written in a way that is ambiguous and vague. This normally occurs where parties consider non-binding terminologies, such as may refer disputes to arbitration rather than the strict terminologies, such as shall refer disputes. This kind of wording leaves one confused on the issue of whether arbitration is mandatory. According to recent legal studies (2024), the ambiguity in arbitration clauses often leads to pre-trial court proceedings on the establishment of the existence of a valid contract, which postpones arbitration and increases its cost. It is a more severe problem in international arbitration. [14] With more than 136 jurisdictions registered in ICC arbitration cases in 2024, ambiguity may cause the proceedings to be interpreted differently in various legal systems. [13] That is why it is vital that the drafting is clear enough so that the arbitration process can start without any judicial interruption.

3.2 Pathological Clauses

The pathological clauses are arbitration clauses that cannot be applied internally to themselves or in practice. Such clauses can have some contradictory provisions in that they refer the disputes to arbitration but do not outline the rules or procedure to be used. Empirical studies clarify that such clauses tend to create a deadlock in the procedures, where the arbitration process cannot be carried out without the court taking up the matter. [15] An example of such clauses is where a clause can state it is arbitrated, but offer conflicting ways of appointing arbitrators, so the process cannot be used. The prevalence of complex contracts has increased the number of such drafting defects in many more commercial transactions and high-value transactions in particular, which are now affected by the effect of the pathological clauses on delay and inefficiency. [16]

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[14] Sanjana Reddy Jeeri & Vinita Singh, *Soft Law, Hard Justice: Regulating Artificial Intelligence in Arbitration* (2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5038334.

[15] A. K. Singhal, *Arbitration Mechanism in India for Dispute Resolution* (2025), https://www.researchgate.net/publication/393687457.

[16] Akash Gupta et al., *Setting the Boundaries for the Use of AI in Indian Arbitration*, 107 Eng. Proc. 39 (MDPI 2025), https://www.mdpi.com/2673-4591/107/1/39.

3.3 Errors in Appointment Procedure

The other typical flaw in arbitration clauses is mistakes in the appointment of arbitrators. These mistakes are made when the clause fails to state much on how the arbitrators are to be appointed, or when a party has too much power in the way it is done. Under these circumstances, parties have to turn to courts in accordance with Section 11 of the Negotiation and Reconciliation Act, 1996, which results in delays at the first tier. The Law Commission of India has identified that the judiciary's role in the appointment process also adds to the postponement in the negotiation process. [17] With the increase in the use of arbitration, institutional data reflects an increase in the number of negotiation filings. Indicatively, however, institutional arbitration courts report an annual consistent rise in cases, underscoring the importance of clear procedural guidelines within arbitration provisions. [13] Ineffectual drafting in appointment procedures directly escalates court intervention and postpones resolution of the dispute.

3.4 Jurisdictional Conflicts

Jurisdictional issues occur when the arbitration provisions of the contracts have incomplete or contradictory components concerning the seat, venue or the law that should govern the arbitration. As an illustration, a clause can mention several locations, and it is not clear which court has jurisdiction. Such defects normally result in lawsuits on the decision on the seat of negotiation, which is a significant legal principle. Jurisdictional issues are one of the most litigated matters in arbitration, particularly in contracts between multiple jurisdictions. [18] Due to hundreds of international parties under ICC-related arbitration, proper definitions of jurisdiction are critical in its definition.

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[17] Law Commission of India, *Report No. 246: Amendments to the Arbitration and Conciliation Act, 1996* ¶ 22 (Aug. 2014), 2022081615.pdf

[18] Sanjana Reddy Jeeri & Vinita Singh, *Soft Law, Hard Justice: Regulating Artificial Intelligence in Arbitration* (2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5038334.

4. Judicial Approach Towards Defective Arbitration Clauses in India

The Indian court system has also embraced a more pro-arbitration stance, particularly in situations where defective arbitration clauses are concerned. This would act to minimise litigation and encourage arbitration as an effective dispute resolution mechanism. The increasing significance of this method can be seen in the use of arbitration rules, with 831 cases registered in the ICC Arbitration Rules in 2024, with 2,392 parties and the use of arbitration worldwide, although the attitude of the judges towards flawed clauses is not always consistent. [19] However, in Vidya Drolia v., the case Durga Trading Corporation v. the Supreme Court presented the so-called prima facie test, restricting the jurisdiction over the judicial review on the referral stage of the case. [20] The case is important as it minimises unnecessary court intervention and allows the arbitration to go on, despite the minor defects in the clause.

However, the ruling has been criticised for allowing judicial discretion because courts continue to rule on what will be considered a valid prima facie agreement. This brings about uncertainty and unequal application in cases. In a similar case, Duro Felguera S.A. v. Gangavaram Port Ltd., the Court held under clause 11 that it may only look at the presence of an negotiation contract, but in reality, the courts have sometimes exceeded this limit, indirectly causing delays. This is a symptom of a lack of judicial intent and reality in the application of the law, especially in situations that deal with a vague or ill-constructed clause. [21] The Supreme Court at first took a very rigid position in Garware Wall Ropes Ltd. v. Coastal Marine Constructions, stating that a non-stamped contract could not be relied upon. [22] This ruling was unpopular since it failed to allow arbitration on grounds of technicality, which is inconsistent with the pro-arbitration principle. Though subsequent cases have considered such flaws to be remedial, the change points to judicial inconsistency that influences arbitration agreement predictability. [20]

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[19] *ICC Dispute Resolution Statistics 2024*, Int'l Chamber of Com. (2025), 2024-Statistics_ICC_Dispute-Resolution_992-1.pdf

[20] *Vidya Drolia v. Durga Trading Corpn.*, (2021) 2 SCC 1, https://indiankanoon.org/doc/121987320/.

[21] *Duro Felguera, S.A. v. Gangavaram Port Ltd.*, (2017) 9 SCC 729. M/S Duro Felguera S.A vs M/S. Gangavaram Port Limited on 10 October, 2017

[22] *Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd.*, (2019) 9 SCC 209. Garware Wall Ropers Ltd. vs Coastal Marine Constructions ... on 10 April, 2019

The other key doctrine used by courts is the doctrine of kompetenz-kompetenz, which enables arbitral tribunals to make decisions concerning the jurisdiction of the tribunal. The doctrine minimises judicial meddling and promotes efficiency. Recent scholarly studies (2024) affirm the effectiveness of restricting the role of courts in enhancing arbitration results and curtailing the delays in the process, but in India, the courts continue to intervene in initial stages, especially when dealing with flawed clauses, which undermines the efficacy of the doctrine in its entirety. [21]

Hence, although the Indian judiciary has gone a long way in encouraging arbitration, its stand with regard to flawed arbitration clauses is largely not consistent. The courts tend to prefer arbitration and have a broad interpretation, but further judicial intervention and inconsistencies in interpretation bring confusion. [22] This is the finality of compromises on the effectiveness of arbitration, particularly where there are poorly drawn clauses.

5. Critical Analysis of Judicial Trends

This has seen Indian courts becoming more pro-arbitration conscious; however, there is a question: are the courts going too soft on upholding flawed arbitration provisions? This has become a relevant issue since arbitration is increasingly becoming popular across the world. As the 831 arbitration cases registered under ICC Rules in 2024 with 2,392 parties and 136 jurisdictions demonstrate, judicial leniency contributes to ensuring the rising popularity of arbitration and the decrease in the number of pointless litigations. [24] The courts tend to apply flawed provisions liberally, rather than striking them down. [25] This approach enhances efficiency because courts are allowed to resolve disputes through arbitration, which is not accompanied by the procedural delays which in India require approximately 1,445 days on average. [26]

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[23] Sanjana Reddy Jeeri & Vinita Singh, *Soft Law, Hard Justice: Regulating Artificial Intelligence in Arbitration* (2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5038334.

[24] *ICC Dispute Resolution Statistics 2024*, Int'l Chamber of Com. (2025), 2024-Statistics_ICC_Dispute-Resolution_992-1.pdf

[25] Akash Gupta et al., *Setting the Boundaries for the Use of AI in Indian Arbitration*, 107 Eng. Proc. 39 (MDPI 2025), https://www.mdpi.com/2673-4591/107/1/39.

[26] Department of Justice. *Ease of Doing Business Rankings.* Government of India. https://dashboard.doj.gov.in/eodb/.

Courts not only interpret and can actually rewrite faulty clauses in certain instances, notably when it is not clear which important components of the contract, like procedure or even jurisdiction. This judicial intervention undermines the fact that arbitration is founded on party consent, and this creates an element of uncertainty since parties do not know how courts will interpret unclear clauses. [27] The central difficulty is to decide between the autonomy of the party and judicial intervention. Arbitration is founded on the parties' agreement, and overreaching in court matters may jeopardise this concept. Simultaneously, courts step in to avoid the failure of arbitration because of technical flaws. Recent developments in the arbitration agreements have complicated the balance, resulting in uneven judicial results in India. [28] Hence, the judicial trend in India favours arbitration, but the study creates a paradox. On one hand, leniency makes sure that minor drafting errors do not result in the defeat of arbitration. Conversely, overinterpretation decreases certainty and predictability. To balance the efficiency and party autonomy, there is a need to have a consistent judicial approach.

6. Suggestions and Recommendations

In order to minimise the conflicts arising out of flawed arbitration clauses, there should be transparent and uniform drafting practices. First, the parties need to apply clear and concise language in arbitration clauses. With 831 ICC cases in 2024, according to 2,392 parties, clarity in the drafting of arbitration clauses has become central to efficient dispute resolution. [29] It is advisable to avoid ambiguity by avoiding the use of vague terms like may in place of shall to avoid preliminary litigation. One of the essential causes of delays in the first phase of arbitration is ambiguous phrasing. [30]

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[27] Sanjana Reddy Jeeri & Vinita Singh, *Soft Law, Hard Justice: Regulating Artificial Intelligence in Arbitration* (2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5038334.

[28] Prathamesh Santosh Kulkarni, *Legal Analysis of the Role of the Arbitration Clause in Contract*, 4 J. Legal Rsch. & Juridical Sci. 2310 (2025), https://jlrjs.com/wp-content/uploads/2025/09/220.-Prathamesh-Kulkarni.pdf.

[29] *ICC Dispute Resolution Statistics 2024*, Int'l Chamber of Commerce (2025), 2024-Statistics_ICC_Dispute-Resolution_992-1.pdf

[30] Akash Gupta et al., *Setting the Boundaries for the Use of AI in Indian Arbitration*, 107 Eng. Proc. 39 (MDPI 2025), https://www.mdpi.com/2673-4591/107/1/39.

Second, parties must embrace the model arbitration clauses that are being offered by institutions like the ICC or other centres of arbitration. Such provisions are aimed at minimising uncertainty in procedures as well as making them enforceable. Institutional arbitration has been on the rise, which means that it is more dependent on structured and well-written clauses. [29]

Third, the contracts are supposed to be subjected to legal scrutiny. Such research-based analysis (2024) indicates that reviewing a draft at an early stage of its development will help to detect flaws in the draft and prevent the need to address them in court later. [31] In India, it is particularly crucial not to avoid structural issues at the drafting stage, as it may require about 1,445 days on the court agenda. Lastly, there is a necessity to enhance awareness of businesses and professionals. The absence of legal knowledge is the cause of many drafting flaws. As commercial contracts get more complex, it becomes significant to raise legal understanding to prevent any arbitration failures. [33] Hence, the incorporation of clarity, application of model clauses, legal vetting and enhanced awareness can go a long way to curb disagreements that come as a result of flawed provisions in arbitration clauses.

7. Conclusion

Arbitration has become a notable mode of dispute management in India, particularly in business cases. The rising significance is indicated by trends in the international arena since, in 2024, the number of arbitration cases registered under ICC Rules was 831, with 2,392 cases involving 136 jurisdictions, indicating the great importance of the drafting of arbitration clauses. This paper has indicated that failure to have proper arbitration clauses, such as ambiguities, lack of procedures, and conflicts of jurisdictions, is a key factor at the first level of arbitration. Judicial intervention

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[31] Sanjana Reddy Jeeri & Vinita Singh, *Soft Law, Hard Justice: Regulating Artificial Intelligence in Arbitration* (2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5038334.

[32] Department of Justice. *Ease of Doing Business Rankings.* Government of India. https://dashboard.doj.gov.in/eodb/.

[33] M.S. Yadav & S. Sharma, *Enforcing International Arbitral Awards in India: Challenges and Judicial Trends Under the Arbitration and Conciliation Act*, 10 Indian J. L. & Legal Rsch. (2024), https://ijlrs.com/papers/vol-10-issue-4/3.pdf.

due to such defects tends to lengthen and make the process expensive. In India, where courts take an average of 1,445 days to settle disputes, this issue gets even more pronounced, with courts decreasing the efficiency benefit of arbitration.

The courts have been instrumental in handling the said problems by adopting a pro-arbitration stance. The courts have started giving broad interpretations of clauses and permitting arbitration to continue even with the existence of minor defects. Despite the fact that this method encourages arbitration, it brings its own troubles. Unreasonable judicial interpretation can lead to decreased certainty and undermine the concept of party autonomy. Hence, a moderate treatment is necessary. Courts must be supportive of arbitration, but must not go into the mode of recreating flawed clauses. Parties should also make sure that they draft clearly and precisely to reduce disagreements. To sum it up, the future of arbitration in India will be determined not only by the judicial support but also by better drafting and the law. The reinforcement of the two will aid in making arbitration a very effective and credible means of resolving disputes.

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