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THE LEGALITY AND EFFECTIVENESS OF MANDATORY ARBITRATION CLAUSES IN EMPLOYMENT CONTRACTS.

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ABSTRACT:

The Alternate Dispute Resolution process is getting more popular in today day's world for a more efficient resolution of disputes that can arise in different walks of life. Alternate Dispute Resolution (ADR) creates a forum for resolving disputes without the interference of the Court in the matter. It is also a fast process as compared to the cases which are registered in the court. Arbitration is one process included in ADR. In arbitration, the parties agree that in case of dispute, either of the parties will approach the court in regards to the dispute but will resolve the dispute by including a neutral person in the dispute and will allow the third person to evaluate the case and decide the result for the dispute. For such arbitration, the parties need to include a such arbitration clause in the agreement signed by all the parties to the agreement or can be mutually agreed by all the parties in case of dispute to carry out the resolution for such dispute with the help of an arbitrator. But will it be a good decision the inclusion of such an arbitrator clause in the employment agreement? There may be many advantages and disadvantages to the inclusion of such clauses. The advantages would be mostly in favour of the employer and the employee would be generally at a disadvantage. Such a clause in an employment agreement can be effectively dealt with by the employee by stating the conditions and by insertion of a clause obtaining a declaration from the arbitrator of its neutrality in the case before refereeing such case to a particular arbitrator.¹

Analysis:**GENERAL CLAUSE OF AN EMPLOYMENT AGREEMENT?:**

Let us now first analyse the general clause that is there in any employment agreement. They will generally include the clause that would benefit the employer in all parts there is no option

¹ ROMA, E. A., n.d. *Digital commons.wcl*.

<https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1318&context=jgspl>

left for the employee who is in dare need of a job to agree to such clauses in the agreement Some of the clauses that are included are.

Parties: Both employer and employee are generally the parties to the employment agreement and it is signed by both of them.

Location of the employment: The agreement will also include the workplace of the employee where he or she needs to perform his work and provide employment services to the employer.

Effective date: The agreement includes the effective date on which such employment agreement is effective and binds both parties to the contract.

Timings and Working Hours: The agreement clearly stated the pre-decided Job timing of the employee that needs to be devoted by the employee in an organization and working hours of work.

Job Status of the Employee: It will be included the position for which the employee is hired in the organization. It includes the Description of the job that is needed to be performed by the employee.

Legal Policy: This included the leaves that will be paid and are allowed to employees by the employer and also the public holiday will be allowed to the employee.

Probationary Period: This included the time that the employee needed before joining the organization after winding up and handing over his previous job work to his previous employer. This period cannot exceed 3 months.

Compensation for Job Post: The remuneration that the organization will pay the employee for the job post and employment services provided by him to the organization.

Notice Period: This includes the notice period that is needed to be given by the employee in case he is resigning from the post and the period during which the employer needs to inform the employee in case he is terminated the employer from the post.

Duration: This clause will include the minimum duration for which the employment agreement will be binding on both parties.

Termination: This clause included the right of both parties to terminate the said agreement at any point in time with prior notice to the other party to the agreement.

Confidentiality of Information: This clause includes that none of the parties to the contract will disclose confidential information of the organization to a third person or in any case other than any requirement by a court of law.

Jurisdiction: This clause will include the jurisdiction which will be referred to in case of dispute between the parties to the agreement.

Arbitration: This clause is generally in favour of the employer. This clause states that either of the parties can approach the court in case of dispute but will resolve the case with an arbitration process. In general, the arbitrator is appointed by the employer and will most probably favour the employer only in which case the employee will be at a disadvantage.²

WHAT IS THE MANDATORY ARBITRATION CLAUSE? :

Mandatory as it meaning means compulsory or anything will be made a compulsion or binding on someone. Arbitration Clauses as a mandatory clause in every agreement are on a trend as such clauses reduced the cost, time, and efforts of all the parties to the contract. Such clauses are mandatory for both parties to resolve the dispute by arbitration only.

The clause states that none of the parties to the contract can approach the court for trial but instead resolve the matter through the arbitration process.

Such clauses are in huge demand and are found in almost every agreement made in today's world. Such a clause is even found in the terms and conditions of any website or any contract which are accepted online by the majority of people. The clause exists in our terms of the agreement as part of each and every contract. Most such arbitration clauses even restricted parties to appeal to the court against the arbitral award passed in the matter which disables the party from appealing and will have to accept the arbitral award even though they have an objection to the award. Such clauses are governed by the Arbitration and Conciliation Act, of 1996. The arbitral award in the dispute is also passed in accordance with the same Act.³ Such

³ Vidhisastras Advocates & Solicitors\ Read this before entering into an agreement containing a Mandatory Arbitration Clause\vidhisastras.com\ (May. 06, 2023, 9:29 PM), <https://vidhisastras.com/read-this-before-entering-into-an-agreement-containing-a-mandatory-arbitration-clause>.

Clauses in employment agreements restrict the employer as well as the employee to approach the court in case of dispute and allow to settle the case through arbitration process by appointing an arbitrator only.

WHAT IS THE OBJECTIVE OF SUCH A CLAUSE?

The Objectives of such a clause of using mandatory clause of arbitration can be as per two sides of a coin depending upon the situation and circumstances of each case.

- **Best Alternative for avoiding going to trials:**

The Best side of an arbitration clause is that it prevented the parties of the contract to visit trials or courts if any dispute arises between the parties. It helps to save a lot of time, effort, and money for parties to the contract. Mostly the general court proceeding takes around a year to complete a proceeding or even a greater time than that which result in a lot of time and money wastage of parties to the contract.

- **Waving off Right to Appeal:**

The second side of an arbitration clause in the agreement is that the parties have to agree with the arbitral award that is passed by the arbitrator because the clause inclusion gives rise to a waiver of right by either of the parties to the agreement to appeal to higher courts against the decision taken in an arbitration proceeding. This gives a right to the employer to appoint an arbitrator of his choice and get the arbitral award in his favour which will result in the loss of the right of an employee to fight for his rights.

Most of us are not aware of such mandatory clauses and give consent on a day-to-day contract that we entered. All must be accepting the terms and conditions before installing software on a PC or a laptop such terms and conditions included such mandatory clauses which are accepted by all in order to avail of the services offered by them. Another example is all must be excessing to online services like Zomato, Swiggy, Flipkart, Dominos, Etc accepting the terms and conditions of such apps for delivery also includes such mandate clauses for arbitration which are accepted by all without reading it though.⁴

⁴ Vidhisastras Advocates, *Supra* note 04, at 03.

WHEN ARE SUCH CLAUSES USED?

The Clause can be used in two stages:

1. Pre- Dispute stage (at the time of signing the contract)

In the pre-dispute stage, this generally happened at the time of signing the contract. When either of the party to the contract is anticipating that there are chances of dispute in the employment contract and they don't want to take any type of risk of filing a case of dispute in a court of law.⁵ They can include such an arbitration clause in the contract at the pre-dispute stage itself which will safeguard their right to resolve the dispute if occur with the arbitration process only.

2. Post-Dispute Stage (after the dispute has occurred)

In the post-dispute stage, the dispute has occurred between the employer and employee and after which both mutually agreed to enter into an agreement that confirms that the dispute will be resolved only by arbitration process and neither of the parties will approach the court for the dispute.⁶

IS AN UNSIGNED ARBITRATION AGREEMENT ENFORCEABLE BY LAW?

The Supreme Court, in its precedents like the (Svapn Constructions vs Idpl Employees Cooperative Group, December 2005), has stated that an arbitration agreement must be in writing even though it must not be signed by either of the parties. The Court has stated that section 7(4) of the Arbitration and Conciliation Act,1996 should not be strictly interpreted to indicate that the 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.⁷

WHAT MIGHT BE THE INGREDIENTS OF SUCH CLAUSES?

⁵ Drafting Dispute Resolution Clauses A Practical Guide\
https://www.adr.org/sites/default/files/document_repository/Drafting%20Dispute%20Resolution%20Clauses%20A%20Practical%20Guide.pdf Last Visited 06\04\2023.

⁶ Vidhisastras Advocates, Supra note 04, at 04.

⁷ *Svapn Constructions vs Idpl Employees Cooperative Group* .

The compulsory ingredients of the Mandatory Arbitration clause such as:

- **Reference to be made to Arbitration:**

The mere use of the word mandatory arbitration in any contract cannot serve the purpose of the contract there should be a consensus between both parties of the contract regarding the arbitration clause and should be made effective at the time of dispute arising between the parties.

- **The number of Arbitrator and name of Arbitrator:**

The Employee and Employer can decide the number of Arbitrator and can also decide the Arbitrator also in the prior agreement itself. So, there will be no loss of time in case of dispute and there would be no scope of dominating employer to the employee for the dispute or established interest of arbitrator in the company so that the arbitral award is in the favour of the employer.

- **A number of Seating and venue of Arbitration:**

The Employee and Employer can also decide the number of Seating for the dispute and venue which would be available after consulting the decided arbitrator. Such a decision will help the parties to know the expenses which will be incurred in case of a dispute gets resolved through the arbitration process.

- **Type of Arbitration:**

This clause includes which type of Arbitration should be referred to in case of a dispute. The type of Arbitration may be ad-hoc arbitration or institutional Arbitration. Therefore, the parties should be cleared above type of arbitrator will be appointed in case of a dispute arises.⁸

- **Governing Laws:**

The arbitration will be governed by the Arbitration and Conciliation Act, of 1996.

- **Exclusive Jurisdiction**

It is necessary and best practice to mention the exclusive jurisdiction that would be in charge in case a dispute happens between the parties to the contract.⁹

WHAT IS THE JURISPRUDENCE OF SUCH CLAUSES?

⁸ Vidhisastras Advocates & Solicitors\ Read this before entering into an agreement containing a Mandatory Arbitration Clause\vidhisastras.com\ (May. 06, 2023, 9:29 PM), <https://vidhisastras.com/read-this-before-entering-into-an-agreement-containing-a-mandatory-arbitration-clause>.

⁹ Svan, *Supra* note 06, at 06.

Technically, we can say that there is no difference between the general arbitration clause and mandatory clause of arbitration unless there would be a consensus between the parties to the contract i.e., employer and employee.¹⁰ But such mandatory arbitration would affect the employee's rights on a large scale as an employer would be always in a dominating position over the employee as they pay the employee for the job. The legality and effectiveness of mandatory arbitration clauses in employment contracts have always been debatable as the clause restricts the rights of the employee prima facie but can also be challenged if the employee wants to be.

CONCLUSION:

From the research, we can conclude that the mandatory arbitration clause in employment agreements will always has been debatable. But such a clause in commercial agreements is a must for dispute resolution.¹¹ But the same can be protected by the employee by adding the condition of a number of arbitrators to be appointed, obtaining a declaration from arbitration of lack of interest in any of the parties to the dispute while taking the arbitration which can ensure that the employer cannot influence the arbitrator and get the arbitral award in its favour.



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¹⁰ Vidhisastras Advocates, *supra* note 07, at 06.