

COMPOSITION AND FUNCTIONING OF ARBITRAL TRIBUNALS: A COMPREHENSIVE OVERVIEW

N Vasudhaa*

INTRODUCTION

The saviour from the time-consuming and expensive court procedures is arbitration which led to a more effective, less formal, and speedy resolution of disputes. According to the biblical theory, to settle the discourse between the two women, claiming to be the mother of the baby boy for which King Solomon became the first arbitrator. In India, the concept evolved during Panchayati Raj and gained recognition in the late nineteenth century. The Indian Arbitration Act of 1899, which was earlier confined, to the presidential states, became the primary legislation for avoiding procedural claptrap. Black's law dictionary defines arbitration as "*The submission for determination of disputed matter to private unofficial persons selected in the manner provided by law or agreement.*" It is an outside court settlement involving an independent third person who resolves a dispute between parties amicably. However, the concept of arbitration is still unexplored. The examination of composition, qualification and appointment of arbitrators as well as their powers and responsibilities during the arbitration process, is yet to be looked into. This Article deals with these concepts while scrutinising them through landmark cases.

COMPOSITION OF TRIBUNAL

Section 10¹, speaks about the number of arbitrators of the arbitral tribunal. It states that parties have the discretion to determine the number of arbitrators, which has to be an odd number and not an even number. In the event of a failure in the determination of the arbitrators, a sole arbitrator has to be appointed.

The arbitrator should comply with the basic principles of arbitration, such as impartiality, fairness, and providing a reasonable opportunity and fair means for the resolution of disputes as per the UNCITRAL rules. The Arbitration Council of India helps promote amicable settlement between parties to avoid lengthy court procedures. The council comprises a

*LLB, THIRD YEAR, KLE LAW COLLEGE.

¹ Arbitration and Conciliation Act (1996) India, Sec.10

chairperson, an eminent arbitration practitioner, an academician with experience in arbitration, and government appointees. The chairperson could either be a judge of the Apex Court, High Court, chief justice of the High Court or an eminent person with expert knowledge.

QUALIFICATION OF THE ARBITRATORS

The act does not mention the qualifications for the appointment of an arbitrator. Any individual can qualify to become an arbitrator who has attained the age of majority, that is, 18 years and is of sound mind. The arbitrator must possess adequate knowledge and experience in order to identify the issues and resolve the disputes. A person from a non-legal background can become an arbitrator allowing parties to choose individuals from any field as per the requirement to render a fair and unbiased award.

APPOINTMENT OF THE ARBITRATORS

Section 11², deals with the appointment of arbitrators, allowing a person of any nationality to be an arbitrator unless an agreement between the parties exists, if the parties are of different nationalities, the third or sole arbitrator must bear a nationality other than the nationalities of the parties. They can choose any procedure for appointment wherein each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator. If the party or the arbitrators fail to determine the third arbitrator within thirty days from receipt of request or date of appointment, then the supreme court or high court, upon request of the parties, will appoint one. In circumstances under which parties fail to decide upon a procedure of determination of a sole arbitrator or the parties fail to perform the functions entrusted, the Supreme Court or high court is to provide an alternative through an arbitral institution.

While following the decision, an arbitrator's qualifications, 'contents of disclosure' and; other considerations should be adhered to by the arbitral institution. Only the arbitral institution of the Supreme Court can look into international commercial arbitration matters, wherein the parties shall determine the fee. The high court looks into cases of civil court within its territorial jurisdiction. The Arbitral Institution, as per Schedule 4 of the act, will decide the fee and manner of payment. Judicial power is not delegated by the Supreme Court or the High Court when they confer a designation. The first request will be competent in case of multiple requests and shall be disposed of within 30 days of receipt of service notice by the opposite party.

² Arbitration and Conciliation Act (1996) India, Sec. 11

In the case of *Laxmi Continental Construction vs. State of U.P. Anr*³, the chief engineer, was appointed as the sole arbitrator for a construction dispute as per the agreement of the parties and was not associated with the construction business. He disposed of the matter within one month as per the orders of the Civil Judge. The arbitrator attained superannuation age and retired during

the pendency of the dispute. The issues were whether the retired chief engineer could continue as the arbitrator and whether the disposal of the case amounts to misconduct. The Apex Court, while deciding the matter, stated that the sole arbitrator will continue his authority even after retirement as he is still empowered and qualified to declare the award as per the agreement. With regard to the disposal of the matter, as the arbitrator acted on the direction of the civil judge, it was held that it would not lead to misconduct.

The case of *Indian Drugs & Pharmaceuticals Ltd. v. Indo Swiss S. Gem Mfg. Co. Ltd.*⁴ stated that when the agreement requires the dispute to be referred to an arbitrator by the Chairman and Managing Director of IPDL (the appellant), then a retired High Court Judge can't be appointed as an arbitrator by the court.

In *ICICI Ltd. v. East Coast Boat Builders & Engineers Ltd*⁵, The appointed arbitrators couldn't agree on the same name for the third arbitrator. Hence the petitioner filed an application to the court and prayed for the appointment of the third arbitrator, as mentioned u/s 11 of the act, and the same was accepted by the court.

POWERS & RESPONSIBILITIES

The Arbitration Conciliation Act of 1996 grants various powers and responsibilities to the arbitrator to determine the arbitral award.

An Arbitrator, at his discretion, might administer oath; to the parties and witnesses and could even send interrogatories if he feels it is necessary. There is no explicit provision mentioned in the act regarding this power.

³ *Laxmi Continental Construction v. State of U.P. and Anr.*, 2021 SCC OnLine SC 750.

⁴ *Indian Drugs & Pharmaceuticals Ltd. v. Indo Swiss S. Gem Mfg. Co. Ltd.*, AIR 543, 1996 SCC (1) 54.

⁵ *ICICI Ltd. v. East Coast Boat Builders & Engineers Ltd.*, (1998) 9 SCC 728.

However, it is implied to the fact, that he acts as a quasi-judicial authority during the arbitration proceedings.

Section 17⁶, the arbitral tribunal has the power to order interim measures such as - providing appropriate security or order either party to take any interim measure of protection.

Section 25⁷, Arbitrator has the power to proceed ex-parte under three conditions, which are as follows-

When the claimant violates Section 23(1), failing to communicate his statement of claim, the arbitral tribunal shall terminate the proceedings.

When the respondent violates sec 23(1), failing to communicate his statement of claim, the arbitral tribunal shall continue the proceeding without giving the claimant the opportunity to admit this failure as an allegation.

When either party fails to produce evidence, or documents or appear for the hearing, the arbitral tribunal shall continue the proceeding and grant an award as per the evidence available.

Section 26⁸, provides the arbitral tribunal with the power to appoint an expert in a proceeding to act as amicus curiae to the court. This gives the parties a chance to question the expert and to present expert evidence in favour of their arguments.

Section 12⁹ and Section 18¹⁰, when read together state that, in an arbitration proceeding, an arbitrator should be independent and impartial. An arbitrator can only be challenged in case of doubts about his/her impartiality and independence or when there is a lack of expected qualification.

In the case, *Steel Authority of India Ltd v. British Marine Plc.*¹¹, the court held that the arbitrator must disclose the said facts which might appear as partiality.

⁶ Arbitration and Conciliation Act (1996) India, Sec. 17

⁷ Arbitration and Conciliation Act (1996) India, Sec.25

⁸ Arbitration and Conciliation Act (1996) India, Sec.26

⁹ Arbitration and Conciliation Act (1996) India, Sec.12

¹⁰ Arbitration and Conciliation Act (1996) India, Sec.18

¹¹ *Steel Authority of India Ltd v. British Marine Plc.* 2016 SCC OnLine Del 5599

Section 20¹², parties can agree on the place and time of arbitration, and if there is a failure, the arbitral tribunal may decide on their behalf.

Section 19¹³, mentions that the procedure to be followed will be decided by the parties in the agreement and the tribunal is not bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872) and can conduct its own proceedings with regard to admission and evaluation of evidence.

Section 33¹⁴ allows the arbitrator to correct the error and interpret the arbitral award passed within the stipulated time, that is thirty days. Either party can give notice to others and request the arbitrator to correct or interpret the award passed. The court can correct the error and interpret the arbitral award suo moto within the time period of thirty days from the date of passing the award.

EXPENDITURES RELATED TO ARBITRAL TRIBUNAL

Section 31A¹⁵ of the act determines all the expenditures in relation to the arbitral tribunal.

In the arbitration or court proceedings, it is the discretion of the arbitral tribunal or the court to determine the expenses:

Whether one party has to pay the costs to another; The amount of these costs; and by when such costs have to be paid.

Costs here include: Expenses and fees of arbitrators, courts, and witnesses; Legal fees and expenses; Administrative fees of the arbitration supervising institution; Any other expenses related to the arbitration or court proceedings and the arbitral award.

Order for payment of costs by court or arbitral tribunal is that usually the expenditure of the successful party is borne by the unsuccessful party and the same can be changed in certain scenarios wherein a different order is made by the court or arbitral tribunal given that the reasons should be recorded in writing.

¹² Arbitration and Conciliation Act (1996) India, Sec.20

¹³ Arbitration and Conciliation Act (1996) India, Sec.19

¹⁴ Arbitration and Conciliation Act (1996) India, Sec.33

¹⁵ Arbitration and Conciliation Act (1996) India, Sec.31A

The arbitral tribunal or the court while determining the costs will consider the conduct of the parties, if a party was partially successful, if a party had made a frivolous counterclaim causing delays, if a reasonable settlement offer was made by one of the parties and the same was refused by the other.

The arbitral tribunal or court may order, types of costs order such as a party to pay a proportion of another party's order, a specific amount of another party's costs, costs from or until a certain date only, costs incurred prior to the proceedings, costs for particular steps in the proceedings, costs for a distinct part of the proceedings, costs for a distinct part of the proceedings.

Agreements on costs stating that a party will pay the whole or part of the arbitration costs are valid only if made after the dispute has arisen.

CONCLUSION

All in all, arbitration as a structured alternative to the traditional litigation system contributes to a cost-effective and faster resolution process. The arbitration proceedings are carried out by the arbitral tribunal on the basis of the arbitration clause of the agreement as per the Arbitration and Conciliation Act of 1996. The composition and the functioning of the arbitral tribunal are significant in ensuring that the arbitration process stays reliable and credible for the parties to consider as an option so as to avoid the adversarial dispute resolution process. Arbitration is a dispute resolution procedure, wherein the parties by agreement submit their disputes to the arbitral tribunal who in turn decide the binding arbitral award. This process of dispute resolution takes place outside the court. Each and every step in arbitration has to be taken in accordance with and at the request of the parties. The flexibility in the number and selection of arbitrators, as well as the latitude given to parties in choosing arbitrators with specific expertise, ensures that the arbitration process can be tailored to the particular needs of the dispute. The arbitral tribunal acting as a Quasi-judicial authority has to follow the principles of Natural Justice that is Audi Alteram Partem and Nemo Judex In Causa Sua, which includes providing notice to parties in case of Ex Parte proceeding, providing parties a chance to be heard etc. The arbitral tribunal has the sole duty to make awards and effectively resolve the dispute. It is free to select which party has to pay the cost, who is entitled to the cost and also the determination of the amount. The comprehensive overview of the composition and functioning of arbitral tribunals highlights the robustness of the arbitration framework in India. By providing a clear, structured, and fair process for resolving disputes, arbitration serves as a valuable tool for

parties seeking an alternative to conventional litigation. As arbitration continues to evolve, it will undoubtedly play an increasingly significant role in the global landscape of dispute resolution.

