

# APPOINTMENT, QUALIFICATIONS AND NEED FOR IMPARTING TRAINING TO ARBITRATORS

BY:  
P.C. Markanda,  
SENIOR ADVOCATE  
and  
Naresh Markanda  
Rajesh Markanda  
ADVOCATES

## NEED FOR IMPARTING TRAINING TO ARBITRATORS

Instead of getting the disputes resolved through Courts, the parties prefer to get these resolved in arbitration. It is presumed by the parties that the arbitral tribunal appointed by them shall be fair in its approach and shall be capable of doing justice between the parties. The question is: Has this result been achieved? There is a mixed response. Some are satisfied, others are not. Then the question arises: How to make the system effective so as to instill confidence in those who have entered into an arbitration agreement? Though there can be no fool-proof system but still efforts need to be made in this direction. In this connection, the following points are pertinent for consideration:

### 1. No departure from agreed procedure

Arbitration and Conciliation Act, 1996 (Act, for short), unlike Arbitration Act, 1940 (since repealed) is a party-dominated Act. Parties' will is supreme. But rarely, it is followed by the arbitrators. They look to their convenience. To avoid incurring wrath of the arbitrator, the parties meekly (and sometimes grudgingly) succumb to the wishes of the arbitrator. This gives rise to simmering discontent in the parties. Sometimes, the situation flares up.

### 2. To observe principles of natural justice

Natural justice is nothing but fair play in action. Arbitrators are under an obligation to follow what is fair. They cannot and must not insist on the rigid application of the Code of Civil Procedure (CPC for short) and the Evidence Act. However, principles thereof are applicable. In practice, retired Judges of the Supreme Court and High Court insist on strict application of CPC and the Evidence Act. Technical arbitrators being not

aware of CPC and the Evidence Act naturally follow the course of natural justice. But sometimes the technical arbitrators also insist on CPC and the Evidence Act when so insisted to do so by the lawyers.

### 3. Arbitrator must not take it personal when authority challenged

In some cases a party to the agreement challenges the jurisdiction of the arbitrator. This is his statutory right. Arbitrators should not mind it though most of them make it personal. Section 12 of the Act provides grounds for challenge; section 13 provides for challenge procedure; and section 16 provides for competence of arbitral tribunal to rule on its own jurisdiction. It is the bounden duty of the arbitrators to carefully hear the parties and then give decision thereon. Technical arbitrators particularly, feel offended. They get biased against the party challenging his jurisdiction. Resultantly, this bias, in most of the cases, is reflected in the arbitral award. Who suffers ultimately? Naturally, the party which challenges the jurisdiction of the arbitrator.

English Arbitration Act, 1996, however, makes a departure from the Indian law. English law does not provide for any formal challenge procedure in respect of the nomination or appointment of an arbitrator. So far there is no reported case over the last over 11 years where any arbitrator has accepted the challenge. Can it, therefore, not be said that the aforesaid provisions of the Act have not served the purpose for which it had been enacted.

### 4. No Challenge to jurisdiction of arbitrator lies when parties acquiesce

If a party wishes to challenge the authority of a arbitrator, it must do so within 15 days of his becoming aware of the Constitution of the arbitral tribunal or after becoming aware of circumstances like lack of qualification and/or when arbitrator lacks confidence of the party challenging on account of doubts as to his independency or impartiality. There can be no doubt that an arbitrator must not be guilty of an act for which he may have to defend himself in future. It is also equally true that if the arbitrator does have a vested interest he should recuse himself from the arbitration.

What happens if there is delay on the part of a party to challenge the jurisdiction of the arbitrator? According to Section 4, that party loses the right to challenge it subsequently. A party cannot blow hot and cold in the same breath. A party after having accepted an arbitrator and after having appeared before him, till the award has been made cannot be heard to say that the arbitrator lacked jurisdiction.

In State of Rajasthan vs Nav Bharat Const. Co. (AIR 2005 SC 2795) it was held that when the State without protest submitted to the jurisdiction of the arbitrator and participated in the proceedings, the State was estopped on the doctrine of acquiescence and waiver from raising objection to the competence of the substituted arbitrator and validity of arbitration proceedings by taking course to clause 23 on the basis of which initial reference was made to the Chief Engineer. Likewise in Prasun Roy vs Calcutta metropolitan Development Authority (AIR 1988 SC 205) it was held that where though a party is aware from the beginning that by reason of some disability, the matter is legally incapable of being submitted to arbitration, participates in arbitration proceedings without protest and then when he sees that the award has gone against him, comes forward to challenge the proceedings, the same cannot be allowed.

## Appointment:

Arbitration clause providing procedure – Party's to act accordingly.

Pre-conditions for invoking arbitration clause have to be exhausted before invoking arbitration clause – Case law when pre-qualifications not followed.

Section 11 – Invocation of – When

Changes in law – Konkan – 1, Konkan –2 and SBP Const.

Datar Switchgears

Procedure of appointment where no agreed procedure in agreement and party's fail to agree:

Number of arbitrators where number not given in agreement – Section 10

## Qualifications

Arbitration clause if provides – Necessary to follow

Court appointment – Section 11(8)

SC judgment – judge should not be appointed where clause provides for appointment of engineer.

Challenge on qualification – procedure to be followed – CATO p. 1 – 2

Whether a party appointing arbitrator or one who has acquiesced in his appointment is estopped from challenging his appointment :

No estoppel – party can still challenge, however, Sections 12 provides time limit.

Section 4 provides for waiver.

When party knowingly puts up an unqualified arbitrator or appoints an arbitrator knowing that there is no arbitration clause – Nav Bharat Case and Hot & Cold case.

### Need for Training:

Role to be played by institutions like ICA, IITA, IEI etc. – Seminars, written tests etc.

To ensure fairness / decisiveness. Arbitrator should be decisive and not arbitrary.

He should be aware of his power and duties – Training would make him aware:

PCM Book  
Bernstein – pp. 94 – 98

### Procedure to be followed in arbitration:

PCM – Book  
Bernstein – pp. 90 – 94

“Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well tuned cymbal. It is no grace to a judge first to find that which he might have heard in due time from the Bar or to show quickness of conceit in cutting off evidence or counsel too short; or to prevent information by questions, even though pertinent.” FRANCIS BACON in Essay of Judicature.

### Challenges – How to deal with them:

Not to take them personally.

Finality of decision – Section 13(5) and 16(5) – Departure from UNCITRAL – Therefore, even more necessary that arbitrator’s should be properly trained to deal with the challenges.

### Challenges under Sections 12 and 13

Bias – What is?

Closeness of arbitrator to one party or to the nature of dispute:

Course of action to be followed when one party / advocate offers hospitality to arbitrator.

Bernstein – pp. 81 to 89.

Course to be followed in the event of a charged atmosphere prevailing in arbitrations:

First, it should not be allowed to get charged – arbitrator should be seen to be taking sides. If parties are at loggerheads – need to calm them down and act as an umpire/referee.

If charges leveled are too personal and strong – Whether an arbitrator should resign – He should strike a balance between the rights of the party not in default and his personal dignity.

### Challenges under Section 16

No arbitration clause – Arbitration to be discontinued – however, subject to Nav Bharat case.

SBP Const. – If court appoints then no challenge under section 16.

Procedure not followed for appointment.

A party increases claims or amount of claims – Mc Dermott vs. Burns.

### Fee – Fixation of:

If Institutional norms applicable – Arbitrator cannot demand anything more. If he feels that he cannot work with the fee that has been fixed, he should not accept appointment.

If parties have fixed fees by an agreement – Arbitrator is bound.

If fees not fixed – to be fixed in consultation with parties. Section 31.

Factors to be kept in mind when fixing fees.

Whether fee should be charged for adjourned hearings?

Procedure when one party fails to pay / refuses to pay.

### Venue – fixation of:

If fixed by agreement – bound.

Factors to be taken into consideration while determining venue.

2007(1) Arb LR 252 (Del) (FB)

Making arbitration ..... forum of arbitration.

AIR 1989 SC 1263

We should ... to have been done.