



Commencement of Maritime Arbitration Proceedings

KEYWORDS

Arbitration, Conciliation, Disputes, Notice, Differences, Proceedings, Awards, Foreign Awards, Enforcement, Parties, Language, Hearing and written proceedings, Place of Arbitration, Court Assistance in taking Evidence, etc.

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ABSTRACT At the outset, it is not always correct to say that the issues could only be settled in Courts. Arbitration is an alternate remedy to solve the matters by amicable way. In this method, parties are free to choose their arbitrators and place of arbitration. Arbitration law covers Domestic Arbitration, International Commercial Arbitration and Enforcement of Foreign Awards. It also covers the law relating to Conciliation and for matters connected therewith and incidental thereto. The law of arbitration in India, at present, substantially contained in three enactments, namely – the Arbitration Act, 1940; the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961. Since these laws become outdated, United Nations Commission on International Trade Law has adopted the UNCITRAL Model Law on International Commercial Arbitration 1985. Later, under the Constitutional provisions, India has adopted Arbitration and Conciliation Act, 1996. Since then disputant parties are finding difficulties in initiating the arbitral proceedings and appointing arbitrators. In this article author has liberty to explain the initiation of proceeding before the arbitrators at arbitration forum and who can be a good arbitrator for solving disputes. It is procedural law that is required to appreciate to solve the dispute before Arbitrators under the provision of Arbitration and Conciliation Act, 1996. Hence, the above titled article has enlightened the procedure to move before proper authority to solve differences under the Act of 1996.

DISPUTE AND DIFFERENCES-WHEN ARISE

It is self-evident that one cannot have arbitration without a dispute. The Hon'ble Supreme Court in Inder Singh Rekhi's Case¹ has held that there should be dispute and there can only be a dispute when a claim is asserted by one party and denied by the other on whatever grounds. Mere failure or inaction to pay does not lead to the inference of the existence of dispute. Disputes entails a positive element and assertion of denying, not merely inaction to accede to a claim or a request.

It essentially means that a claim has to be asserted by one party to an arbitration agreement and denied by the other party. What happens when there is no express denial? Is there no dispute? This was answered by the Hon'ble Supreme Court in the McDermott International Case² as under-

Paragraph 117 of the judgment runs as, "In Major (Retd) Inder Singh Rekhi v. Delhi Development Authority, where-upon Mr. Mitra placed strong reliance, an award made under the old Act was an issue. A dispute has arisen whether there was a claim and denial or repudiation thereof." In this context, it was held in Para 4:

"There should be dispute and there can only be a dispute when a claim is asserted by one party and denied by the other on whatever grounds. Mere failure or inaction to pay does not lead to the inference of the existence of dispute. Disputes entails a positive element and assertion of denying, not merely inaction to accede to a claim or a request. Whether in a particular case a dispute has arisen or not has to be found out from the facts and circumstances of the case."

In Paragraph 118. "There is no dispute about the afore-

mentioned principle but the same would not mean that in every case the claim must be followed by a denial. If a matter is referred to any arbitrator within a reasonable time, the party invoking the arbitration clause may proceed on the basis that the other party to the contract has denied or disputed his claim or is not otherwise interested in referring the dispute to the arbitrator."

HOW TO INITIATE ARBITRATION PROCEEDINGS?

Commencement of Arbitral Proceeding—unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a **request** for that dispute to be referred to arbitration is received by the respondent³.

NOTICE TO INVOKE ARBITRATION-

An English judgment considered the issue of a notice to invoke arbitration⁴:

"In order to commence the arbitration, there must, I think, be a notice in writing served by one party on the other party. This notice must contain a requirement. It must require the other party to do one or other of two things; either (1) 'to appoint an arbitrator' or (2) 'to agree to the appointment of an arbitrator'. So in any case a simple notice in writing requiring the difference to be submitted to arbitration is deemed to be a commencement of the arbitration."

Commonsense requires that the notice invoking arbitration should make it clear that the dispute has arisen and same is referred to arbitration. There is no specific format prescribed under the Act for making a reference to arbitration. In this regards Delhi High Court has held⁵:

"It may further be mentioned Section 21 does not require

that request should be made expressly in writing. This was a request by conduct of the parties and it has to be understood in that manner. Had it been essential that request should be in writing to the petitioner, then the word 'written' should have found place in section 21 before the word 'request'."

The mandatory nature of the provisions of Section 21 was also considered by the Hon'ble Delhi High Court which observed in another judgment⁶:

"The question really is not so much whether the requirement under section 21 of the Act is mandatory or not. This court is of the view that such a requirement is indeed mandatory for without the notice of invocation being received by the respondent no arbitral proceeding can commence."

In the same judgment the Court went on to observe that if the invocation to arbitration is not proper, it is for the arbitrator to look into the matter to avoid interference by the civil courts.

An English judgment considered the issue of a notice to invoke arbitration⁷ as in the following method-

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In short, a simple notice in writing requiring the difference to be submitted to arbitration is deemed to be a commencement of the arbitration.

Having regards to the content of the notice to invoke arbitral proceeding, there are different opinions by different courts. By reading the judgments of the courts ultimately finality is that there is no prescribed format for the notice of invoking arbitration. One should however be careful in drafting the notice not to exclude any part of the claim and comply with the conditions that may be prescribed in the arbitration agreement⁸. Notice may be given by parties either in person or through an advocate on record.

PROCEDURE FOR APPOINTMENT OF ARBITRATORS

The Arbitral Tribunal in arbitration is appointed by choice of the litigants. An arbitral tribunal can consist of any number of members provided that the number is an odd number and not an even number⁹. One would have thought this provision is straightforward and non-derogable. The Hon'ble Supreme Court however held otherwise¹⁰.

"... we are unable to accept the submission that Section 10 is a non-derogable provision. In our view Section 10 has to be read along with Section 16 and is, therefore, a derogable provision.

... even if parties provide for appointment of only two arbitrators, that does not mean that the agreement becomes invalid. Under Section 11(3) the two arbitrators should then appoint a third arbitrator who shall act as the presiding arbitrator. Such an appointment should preferably be made at the beginning. However, we see no reason, why the two arbitrators cannot appoint a third arbitrator at a later stage i.e. if and when they differ. This would ensure that on a difference of opinion the arbitration proceedings are not frustrated. But if the two arbitrators agree and give a common

award there is no frustration of the proceedings."

Section 11 of the Act provides that a person of any nationality can be an arbitrator. There are no specific qualifications for being an arbitrator. The parties are free to agree to any procedure for appointment of an arbitrator. Failing any agreement between the parties in case of arbitration with 3 arbitrators, each party may appoint one arbitrator each and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

In the event of failure to appoint a sole arbitrator or failure to appoint a presiding arbitrator within 30 days such arbitrator upon a request made a party, can be appointed by the Chief Justice of the High Court or any person or institution designated by him. In the case of international commercial arbitration the appointment is made by the Chief Justice of India. If more than one request is made to the Chief Justices of different High Courts, then the matter will be decided by the Chief Justice to whom the request has been first made.

There has been much controversy on the nature of the power exercised by the Chief Justice under Section 11 of the Act.

REFERENCE TO ARBITRATION IN PENDING LITIGATION

It is pertinent to note that section 8 of the Act deals with the courts power to refer parties to arbitration in a pending litigation. I am of the opinion that reproduction of the section at this juncture is necessary to understand literal meaning of powers of the court. Section 8 is reproduced as under-

"Section 8¹¹. Power to refer parties to arbitration where there is an arbitration agreement.- (1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration. (2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof. (3) notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, arbitration may be commenced or continued and an arbitral award made."

Simplification of this section is as court has power to refer parties to arbitration where there is an arbitration agreement between them in original contract. Suit is pending before the court and waiting for further motion, can refer to

(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Despite that an application has been made and that the issue is pending before the judicial authority, arbitration may be commenced or continued and an arbitral award made.

APPOINTMENT OF ARBITRATORS

It is provided that any person can be an arbitrator who is competent and expert in the area of dispute. There is no specific qualification to be an arbitrator. Most arbitration agreement entered into before any disputes have arisen and as such can be drafted keeping in mind any peculiarities of the contract that can reasonably be expected to arise if there was to be dispute.

An important aspect that can be finalized at the stage of drafting the arbitration agreement is deciding on the qualifications or expertise of the person or persons who are to be appointed as arbitrators.

In most of the cases, it has been found that the retired judges and/ or lawyers are appointed arbitrators as question of law and question of facts almost always arise in contractual disputes, involving corporate bodies. It is not necessary that the person who has legal background will be an arbitrator. There may be persons with certain technical expertise who can also effectively resolve disputes. For example, in a dispute arising from a Marine Engineering Contract, there may be question of fact, evidence, etc., of a highly technical nature, which may not be easily understood by a person without the requisite sailing experiences and relevant qualifications. So in such circumstances, the Chief Engineer Officer could be an expert in that area to resolve the dispute.

Another aspect that should weigh with the parties while selecting an arbitrator is that person's ability to identify and deal with tactics being adopted to delay the arbitration proceedings. Tactics are common, when matter comes to litigation in India. Adjournment over adjournment, date over date is common practice in proceedings. Ultimately, it goes without saying that parties should take care to ensure that the integrity of the person or persons appointed must be point blank doubt.

PLACE OF ARBITRATION

A conjoint reading of section 2(6) and section 20 of the Arbitration and Conciliation Act, 1996 leads to the conclusion that in the event parties do not agree with regard to the place of arbitration, though they were free to determine the same, then they had the right to authorize any person including an institution for deciding the venue of the arbitration and such decision would not partake the character of adjudication of a dispute arising out of the agreement, so as to clothe it with the character of an award¹².

Section 20 : " (1) parties are free to agree on the place of arbitration. (2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties. (3) Notwithstanding sub-section (1) or sub-section (2), the Tribunal may, unless otherwise agreed by the parties, meet any place it considers appropriate for constitution among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other properties".

Herein, the intention to allow parties to decide this issue is made clear in sub-section (1). Parties have the freedom to decide the place of arbitration. A distinction between, what is called 'seat' of arbitration and the "place" where business of arbitration can be transacted, is necessary to be noted. This distinction becomes relevant and significant in international arbitration for applying the substantive

laws and procedural laws: e.g., arbitration held in London between an American Corporation and Japanese Corporation, will be subject to rules of procedure applicable to arbitration in England, while dispute may be adjudicated by applying substantive laws of Japan or America, as agreed by the parties or determined by the arbitral tribunal. "Seat" also gives jurisdiction to the courts, if any of the parties desire intervention of the court. Place can be anywhere as is made it clear in sub-section (3). In the illustration given herein, actual meetings of arbitration could be held in India, Singapore or any other place. That is permissible and, yet, would not affect the issue of seat of arbitration.

INSTITUTIONAL ARBITRATION:

When parties refer disputes to arbitration by appointing arbitrators directly or through the intervention of the Courts, the same are referred to as ad hoc arbitrations. The arbitrators or the parties to the dispute have to agree to their own rules of fees and procedure, which are not constant. Similarly the parties have to make their own arrangements for conducting the arbitration like venues, etc.

There are many institutions, which offer arbitration facilities like the Indian Council of Arbitration or the Indian Merchants Chambers Court of Arbitration.

The advantages of institutional arbitrations include access to various experienced and committed professionals. The fees of the arbitrators have been fixed which makes the arbitrations economical. The institutions also have their own rules, which prevent delay. It is maxim in laws as 'Delay defeat equity'.

CONCLUSION

Arbitrators with good reputations tend to have extremely busy schedules and may be unable to devote the time needed. This also an aspect that needs to be kept in mind if parties are keen to have their disputes resolved as quickly as possible and also in a cost effective manner.

The traditional mode of dispute resolution in civilized society is the civil courts. However, over the years the huge backlog of cases that has accumulated in courts has led to a virtual denial of justice. The main aim of speedy justice has been completely lost. If an aggrieved party apply to the court to arrest a vessel at Mumbai port, meanwhile the application for arrest is ordered, the ship left the jetty, due to long court procedure. Arbitration is an alternate mode of dispute resolution has gained in prominence substantially. It is easy to appoint arbitrators and expedite the matter to arrest the vessel before leaving the jetty. In shipping industries, once ship left the port, it will become very difficult to arrest her in open seas as the coastal state has no jurisdiction over the high seas.

Hence, the Act permits parties to refer their disputes to Arbitral Tribunals of their choice. The role of the court also sought to be minimized. All it happens in the interest of achieving the stated objective of speedy disposal of disputes. The most vital part of arbitration is the selection of the arbitrator. Select a man of integrity, a man of reasonable intelligence, a man with time enough to deal with the matter with integrity, intelligence and industrious.

- 1 MAJOR (RETD) INDER SINGH REKHI V. DELHI DEVELOPMENT AUTHORITY, (1998)2 SCC 338, AT P. 340.
- 2 MCDERMOTT INTERNATIONAL INC. V. BURN STANDARD CO. LTD., (2006) 11 SCC 181, AT PAGE 226.

- 3 SECTION 21, "THE ARBITRATION AND CONCILIATION ACT, 1996".
- 4 NEA AGREX S.A. V. BALTIC SHIPPING CO. LTD. (1976) Q.B. 933.
- 5 ABB ABL LTD. V. CEMENT CORPORATION OF INDIA, (1999) 78 DLT 132, AT PARA 10.
- 6 OVAL INVESTMENTS PVT. LTD. V. INDIABULLS FINANCIAL SERVICES 2010 (3) RAJ 32 (DEL.).
- 7 NEA AGREX S.A. V. BALTIC SHIPPING CO. LTD. (1976) Q.B. 933
- 8 SEE INDIAN ALUMINIUM CABLES LTD. VS. HARAYANA STATE ELECTRICITY BOARD & OTHERS, 1996 (5) SCALE 768; VEENA SETH V. SETH INDUSTRIES LTD., 2011 (2) RAJ 194 (BOM) AT PARAGRAPH 17.
- 9 Section 10 of the Arbitration and Conciliation Act, 1996.
- 10 Narayan Prasad Lohia, (2002) 3 SCC 572, Para16&17 at p. 584
- 11 ARBITRATION AND CONCILIATION ACT, 1996.
- 12 SANSHIN CHEMICALS INDUSTRY V. ORIENTAL CARBONS & CHEMICALS, AIR 2001 S.C 1219.