

Unit 4

COMPOSITION OF ARBITRAL TRIBUNAL: section 10-15 of THE ARBITRATION AND CONCILIATION ACT, 1996 deals with it

10. Number of arbitrators. –

(1) The parties are free to determine the number of arbitrators, provided that such number shall not be an even number.

(2) Failing the determination referred to in sub-section (1), the arbitral tribunal shall consist of a sole arbitrator.

The Stock Exchange, Mumbai vs Vinay Bubna & Others on 4 February, 1999 in this case contention raised before the learned Single Judge was that the constitution of Arbitral Tribunal is contrary to the provisions of section 10 of the Arbitration Act, 1996. The Award passed by the Arbitral Tribunal consisting of an even number of arbitrators as provided under the bye-laws would be valid and the same will not be rendered void by virtue of the provisions of section 10 of 1996 Act

Vinay Bubna vs Yogesh Mehta & Others on 7 September, 1998

Whether an Arbitral Tribunal having even number of members constituted under the Bye-laws framed by the Bombay Stock Exchange under the Securities Contracts (Regulation) Act, 1956 is in contravention of the provisions of section 10 of the Arbitration Act, 1996?

(b) Whether the constitution of such Arbitration Tribunal is saved by section 2(4) of the Arbitration Act 1996?

(c) Whether such an award is liable to be set aside under section 34(2)(a)(v) of the Arbitration Act, 1996?

Held that it is only those provisions of the Act from which the parties can derogate that could be saved. The other mandatory provision cannot be waived. While considering the expression "under" what is saved is the provisions for Arbitration. Does this mean that every procedural requirement in those bye-laws pertaining to arbitration are also saved. In my opinion the answer is again no. What would be saved at the highest would be the provisions which are saved by the Act and the Rules and the provisions from which the parties can derogate. Bye-laws cannot over ride the statutory provisions. In the instant case section 10 of the Act, once it is so held it is clear that those provisions pertaining to arbitration agreement which are under any enactment or Rules are saved. They cannot be said to be inconsistent to prevail over the provisions of the Arbitration Act, 1996. The composition of the arbitral tribunal will be governed by the provisions of section 10 of the Arbitration Act, 1996.

Also refer to case laws:

Enercon (India) Ltd And Ors vs Enercon Gmbh And Anr on 14 February, 2014

Sumitomo Corporation vs Cdc Financial Services ... on 22 February, 2008

Jindal Exports Ltd. vs Fuerst Day Lawson on 21 April, 2010

11 Appointment of arbitrators. —

(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in sub-section (3) applies and—

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(6) Where, under an appointment procedure agreed upon by the parties,—

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justice or the person or institution designated by him is final.

(8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to—

(a) any qualifications required of the arbitrator by the agreement of the parties; and

(b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

(9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

(10) The Chief Justice may make such scheme¹ as he may deem appropriate for dealing with matters entrusted by sub-section (4) or sub-section (5) or sub-section (6) to him.

(11) Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justices of different High Courts or their designates, the Chief Justice or his designate to whom the request has been first made under the relevant sub-section shall alone be competent to decide on the request.

(12) (a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration, the reference to “Chief Justice” in those sub-sections shall be construed as a reference to the “Chief Justice of India”.

(b) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to “Chief Justice” in those sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situate and, where the High Court itself is the Court referred to in that clause, to the Chief Justice of that High Court.

Gujarat Urja Vikash Nigam Ltd vs Essar Power Ltd on 13 March, 2008

Held Section 86(1)(f) is a special provision and hence will override the general provision in Section 11 of the Arbitration and Conciliation Act, 1996 for arbitration of disputes between the licensee and generating companies. It is well settled that the special law overrides the general law. Hence, in our opinion, Section 11 of the Arbitration and Conciliation Act, 1996 has no application to the question who can adjudicate/arbitrate disputes between licensees and generating companies, and only Section 86(1)(f) shall apply in such a situation.

Jagdish Chander v. Ramesh Chander, [2007 (5) SCC 719], wherein while dealing with the provisions and scope of Sections 7, 8 and 11 of the Arbitration and Conciliation Act, 1996, with reference to Section 89 of the Code of Civil Procedure, this Court held that the existence of an arbitration agreement, as defined under Section 7 of the above Act, is a condition precedent for exercise of power for appointment of the Arbitrator/Arbitral Tribunal, under Section 11 of the aforesaid Act. Mr. Tripathy pointed out that while arriving at such

conclusion, this Court laid down certain tests to decide as to what would constitute an arbitration agreement, namely, (i) that the intention of the parties to enter into an arbitration agreement would have to be gathered from the terms of the Agreement; (ii) that even if the words "arbitration" and "arbitrator" are not used in a clause relating to settlement of disputes with reference to the process of such agreement or with reference to the private tribunal which is to adjudicate upon the disputes, it does not detract from the clause being an arbitration agreement if it has the attributes and elements of an arbitration agreement. Conversely, the mere use of the words `arbitration' or `arbitrator" in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration.

Also refer to:

T.N.Generation & Distbn. Corpn ... vs Ppn Power Gen.Co.Pvt.Ltd on 4 April, 2014

S.B.P. & Co vs Patel Engineering Ltd. & Anr on 26 October, 2005

12. Grounds for challenge. -

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if-

(a) Circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) He does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Refer to:

Wellington Associates Ltd. vs Mr. Kirit Mehta on 4 April, 2000

Bharat Sanchar Nigam Ltd.& Anr vs Motorola India Pvt.Ltd on 15 September, 2008

Mrs. Hafizun Begum vs Md. Ikram Heque And Ors on 24 July, 2007

13. Challenge procedure. –

(1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.

(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.

(3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.

(5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34.

(6) Where an arbitral award is set aside on an application made under subsection (5), the court may decide as to whether the arbitrator who is challenged is entitled to any fees.

Refer to case laws:

Jabalpur Cable Network Pvt. Ltd. vs E.S.P.N. Software India Pvt. Ltd. ... on 13 March, 1999

West Bengal State Electricity ... vs Calcutta Electric Supply Corpn. ... on 4 December, 2001