

THE NATURE OF "EVIDENCE" IN ARBITRAL PROCEEDING

Overview

In an arbitral proceeding, the appointment of the arbitrators is done by the parties to the dispute; however that does not amount to a situation where arbitrators act as the agents of the parties; rather they act judicially. The Madras High Court in *Socete Aninmina Lucchesse Oil v Gorakhrum Gokalchand* [AIR 1964 Mad 532] has held that Arbitrators are bound to come together and act judicially as Arbitrators conforming to the principles of natural justice. Now, if arbitrators are bound to act judicially, are they really bound by the technical rules of evidence in arbitral proceedings?

It is well settled by statutory provisions that the arbitrator is not bound by the technical rules of procedure which the courts normally observe. This is clearly stipulated under section 19 of the Arbitration and Conciliation Act, 1996 (The Act) which provides that arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (CPC) and the Indian Evidence Act, 1872 (IEA). Moreover, it also allows the parties to the dispute to frame the procedure to be followed in the arbitral proceedings.

Further, by virtue of section 19(4) of The Act, the admissibility, relevance and materiality of evidence are matters which are within the exclusive jurisdiction of the arbitral tribunal unless otherwise agreed by the parties. Therefore, the law contemplated under section 19(4) of The Act imposes a duty on the arbitral tribunal to determine the admissibility and weight of evidence of the documents adduced by both the parties. In *Hindustan Shipyard Limited vs Essar Oil Limited* [2005 (1) ALD 421] the Allahabad High Court opined that where the parties have not agreed to any specific procedure, the arbitral tribunal has to follow the statutory procedure, which means it has to weigh the entire evidence on record properly and come to a just conclusion within the parameters of the dispute.

Principles applicable in Arbitral Proceedings

An arbitral tribunal is independent of restrictions imposed by the adjective law; however, it is bound to follow the fundamental principles of natural justice and in that event, must not disregard the rules of evidence which are based on such principles. It was held by the Apex Court, in *Mallikarjun v Gulbarga University* [2003 (3) ARBLR 579 SC], that for the purposes of constituting a valid arbitration agreement. Certain principles which are based on natural justice are not necessary to be expressed in arbitration agreement as violation of such principles would result

in unjust and unfair procedure adopted by the arbitration tribunal.

Now, if the arbitral tribunal is bound by fundamental principles of natural justice, Section 91 and 92 of IEA shall apply to the arbitral proceedings. In *Bengal Jute Mills Co. Ltd. vs Lal chand Dugar* [AIR1963 Cal 405], the Calcutta High Court has held that the principles embodied under sections 91 and 92 of IEA lay down the principles of natural justice and an arbitral tribunal is bound to follow such principles even though it is not bound by the IEA. These rules of evidence are sometimes thought to be based on the 'best evidence' principle.

The rule of evidence contained under section 91 of IEA is regarded as the cardinal rule of evidence, not one of technicality but of substance. It stipulates the rule that oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing. The reason behind this rule is that the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement. Further, section 92 of IEA debars, from working into oral evidence, once the contract is executed in writing except as provided in the provisos thereof.

It is worthwhile to look at some common kinds of evidence in arbitral proceedings:

- Extrinsic Evidence: Extrinsic evidence is external, outside evidence or evidence that is not properly before the court, jury, or other determining body such as agreement between parties to the dispute. Extrinsic evidence is always necessary in the interpretation of a written instrument; in determining the meaning and intention of the parties who executed or relied upon it. Recently, the Bombay High Court in *Enercon (India) Ltd. vs Enercon GmbH* has opined it is well settled that even if there is any uncertainty or ambiguity in the contents of arbitration agreement, it can be corrected by relying upon extrinsic evidence. Also, the Apex Court in *Associated Engineering vs. Govt. of Andhra Pradesh* [1991 SCR (2) 924] opined that extrinsic evidence is admissible in cases where jurisdictional error is committed by an arbitral tribunal. The dispute as to jurisdiction is a matter which is outside the award or outside whatever may be said about it in the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence.
- Expert Evidence: Section 26 of The Act empowers the arbitral tribunal to appoint one or more experts and take their reports on certain issues. In *Girdhari Lal v Kameshwar Prasad* [AIR 1989 All 210], it was stated by the court that even though the provisions of Sec. 45 of the Evidence Act may not be applicable in the literal sense in an arbitral proceeding but the pith and substance of the principles contained therein about obtaining the opinion of the persons especially skilled in science or art are the relevant factors. Normally the expert has to give his opinion before the arbitrator or the court and he must be allowed to be examined and cross-examined by the respective parties.

- Fresh Evidence: On the validity of the arbitral tribunal receiving fresh evidence after the conclusion of the proceedings but before the passing of arbitral award, Russel on Arbitration, Twenty-First Edition (1997) has the following to say (in chapter 8 Paragraph 38): *“There would be an irregularity if the tribunal receives and acts on fresh evidence obtained after the proceedings have closed, but prior to the award, without giving the parties an opportunity to be heard on it.”* Moreover, in *MMTC vs Vicnivass Agency, T.P.S. Ponkumaran and Mr. Justice P.N. Nag (Retd.), Sole Arbitrator* [(2009) 1 MLJ199], the Madurai Bench of Madras High Court stated that an arbitral tribunal is not a civil court and hence would become *functus officio* after the award. It can resume the proceedings only by virtue of an order passed by a court. The proceedings arising out of a challenge to an arbitration award before a court cannot also be equated to an appeal under Order XLI of the Code of Civil Procedure so as to invoke Rule 27 of Order XLI. Therefore under normal circumstances, it is not possible to allow a party to rely upon an evidence which he caught hold of after the conclusion of the arbitral proceedings.

Conclusion

After perusal of the rules of evidence under the IEA and laws stipulated in The Act, it is essential to analyze the setting aside of an arbitral award on the ground of insufficiency of evidence. In this context, the extract of judgment of Calcutta High Court in *West Bengal Industrial Infra-Structure Development Corp. vs Star Engineering Co.* [AIR 1987 Cal 126] has been produced below:

“Arbitrator is the sole Judge of the law and of the facts. If he had taken the decision on the basis of whatever evidence was on record and had allowed the claim, his award cannot be challenged on the basis of inadequacy or inadmissibility or impropriety of evidence, particularly when both the parties had the full opportunity to argue their respective cases and adduce evidence. Total absence of evidence or arbitrator's failure to take into consideration a very material document on record or admission of the parties in arriving at the finding are however good grounds for challenging the proceeding for legal misconduct of the arbitrator.”

Also, it has been held by the Bombay High Court in *Rasiklal Rathilal vs Fancy Corporation* [2007(3) Bom CR 603] that once the Court comes to a conclusion that documents are required for adjudication of the issues, it may issue direction or pass such an order to produce the original documents before the Arbitral Tribunal. An arbitral award is often challenged on the ground of insufficiency of evidence. The insufficiency of evidence to reach the finality of award must be distinguished with complete absence of evidence in reasoning of the award. As section 19 of The Act mandates the inapplicability of IEA and CPC, the arbitral award must be valid until and unless it violates the fundamental principles of natural justice. Non-applicability of technical rules of evidence is one of the fundamental reasons behind invoking arbitration by the parties to the dispute. An arbitral award should not be set aside

on the ground of insufficiency or inadequacy of evidence as in ordinary parlance the appraisal of evidence in an arbitral proceeding is not the matter which a court looks into while setting aside an award.

The Securities and Exchange Board of India (Issue and Listing of Debt Securities) Regulations, 2008

The said amendment has replaced the existing 'Schedule I' with a new one ("New Schedule"). Where the issuer has disclosed the intention to seek listing of debt securities issued on private placement basis, the issuer shall forward the listing application along with the disclosures specified in the New Schedule to the recognized stock exchange within fifteen days from the date of allotment of such debt securities. Further, an issuer making a private placement of debt securities and seeking listing thereof on a recognized stock exchange may file a Shelf Disclosure Document containing disclosures as provided in the New Schedule, without the requirement of filing disclosure document, while making subsequent private placement of debt securities for a period of 180 days from the date of filing of the shelf disclosure document.

» [Source](#)

SEBI amendments: (Issue of Capital and Disclosure Requirements) Regulations, 2009 ("Regulations")

SEBI has vide its notifications dated October 12, 2012, carried out certain amendments to the abovementioned Regulation adding to the conditions for public issue and right issue, requiring that the amount for general corporate purposes (the term 'general corporate purposes' has been duly defined by the notification to mean such identified purposes for which no specific amount is allocated or any amount so specified towards General Corporate Purpose or any such purpose by whatever name called, in the draft offer document filed with SEBI), as mentioned in objects of the issue in the draft offer document filed with the Board, shall not exceed twenty five per cent of the amount raised by the issuer by issuance of specified securities.

The average market capitalization of public shareholding of the issuer to qualify for the Fast Track Issue (non-applicability of sub-regulations (1), (2) and (3) of regulation 6 and regulations 7 and 8 of the Regulations) has been brought down to rupees three thousand crore from rupees five thousand crore. Amongst other significant amendments carried out, Schedule XIV and Schedule XV of the Regulations have been replaced with new ones.

» [Source](#)

International Contribution

Document: Breaking the policy stasis

With the impact of recent reforms in India taking time to have an impact and inflation still giving the authorities a headache, Hiren Rawal, Senior Private Banker at ABN AMRO Jersey, looks ahead cautiously to 2013...

» [download document \[pdf, 350 KB\]](#)

News 10 @ a glance

CCI gives approval to proposed JSW Steel-JSW Ispat merger

The CCI has approved the proposed merger of JSW Ispat Steel Ltd. And JSW Steel Ltd., a deal that would create the country's second largest steel producer, vide an order dated 25th October 2012 saying that the combination is "not likely to have an appreciable adverse effect on competition in India"

Notice to Central Government in PepsiCo appeal challenging PFA

The Supreme Court, on 2nd November, issued notice to the central government on a petition filed by PepsiCo India Holdings Pvt. Ltd. challenging the government's decision to include packaged drinking water within the definition of 'food' under the Prevention of Food Adulteration (PFA) Act. The central government had under the 2000 notification restricted manufacture, sale or exhibition for sale of packaged drinking water except under the Bureau of Indian Standard Certification mark.

Government initiates penal

action against 53 mills for not giving data

The government has taken penal action against 53 mills for not furnishing details online about sugar production, dispatches and stock position of the 2011-12 season to the Food Ministry. For better management of sugar sector, the government made online updation of sugar related information operational from last year. Mills were asked to update details regularly.

India and UK amend pact on avoidance of double taxation

India and the UK have signed a Protocol amending the Convention on avoidance of double taxation to streamline the provisions on partnerships and dividends as well as information flow between tax authorities of the two countries. Now, benefits of the Convention would also be available to partners of the UK partnerships to the extent income of UK partnership are taxed in their hands. Further, the withholding taxes on the dividends would be 10% or 15% and would be equally applicable in UK and in India.

Extension of ban on export of edible oils till further orders

Export of edible oils was initially prohibited for a period of one year with effect from 17.03.2008 vide Notification No. 85 dated

17.03.2008 which was extended from time to time. Now the ban on export of edible oil is extended till further orders. In addition, export of edible oils in branded consumer packs of upto 5 Kgs with ceiling of 20,000 tons is permitted for the 12 month period ending on 30.09.2013. Such exports can take place only through Custom EDI Ports. Further, the export of fish oil is free as per Notification No. 60 dated 20.11.2008.

Insider Trading charges against the ex-director of Ranbaxy

The Securities Appellate Tribunal (SAT) has upheld insider trading charges against VK Kaul, a former independent director of Ranbaxy, and his wife Bala Kaul, accusing them of insider trading. The Securities and Exchange Board of India (Sebi) had alleged that VK Kaul, who knew in advance that Ranbaxy's arm Solrex is going to buy shares of Orchid Chemicals, traded on behalf of his wife ahead of the transaction. While Kaul has been fined Rs 50 lakh, his wife Bala Kaul has been handed a fine of Rs 10 lakh, Sebi said in two separate orders.

Winding petition deserve to be dismissed If debt itself is disputed

The High Court of Gujarat in the case *Asim Pharmachem Industries v. Nilsin Ultrachem Ltd.* held that, if the debt is a disputed debt and the

defence is substantial one, order of winding up should not be passed.

Goa Government to provide Rs 1k monthly assistance to married women and 1 Lakh to every girl above 18

The Griha Aadhar scheme, launched by the Chief Minister Manohar parrikar, will provide financial assistance of 1,000 per month to women to run the household. This scheme is formulated keeping in mind the middle, lower-middle and poor sections of society as India's food inflation is expected to remain high. He also launched Ladli Laxmi Scheme in which. It aims to prevent female foeticide in the state. Under this scheme, girls who are 18 years and above would be provided with Rs. 1 Lakh for their marriage. This scheme is for those girls who lie between the age group of 18-40 years.

Ban on Goa mining will continue: Supreme Court

The Supreme Court ruled that the ban on mining activities will continue and it also banned the transportation of iron and manganese ore mined illegally in the state. The PIL filed by an NGO added that all the 90 mines in the state were functioning without the mandatory permission from the National Board of Wild Life (NBWL) and 33 of these mines were within 1.5 kms of the wildlife sanctuaries,

well within the eco-sensitive zone notified by the NBWL.

Govt. decides to pay subsidies to poor in cash

The government is preparing to directly transfer cash to the bank accounts of millions of poor people who often become victims of fraud and theft in the government distribution system covering social welfare programs. The Prime Minister handed over the government's unique identity number card for the purpose to a villager at a symbolic function in Rajasthan. Though no time limit has been set for covering all the 28 states, the government already has started pilot projects for the electronic transfer of money in eight states.