



A & A LAW CORP.

POWER OF COLLABORATION

A house of like minded professionals from
various specialised fields
offering expert solutions

APPOINTMENT OF THE ARBITRATOR

MAY 2020 ARTICLE-03

By: Adv. Vivek Aggarwal

Activities we're great at:

- ▶ ARBITRATION
- ▶ BANKRUPTCY & INSOLVENCY
- ▶ MERGER & ACQUISITIONS
- ▶ CORPORATE ADVISORY
- ▶ CORPORATE LITIGATION
- DUE DILIGENCE ◀
- LABOUR & EMPLOYMENT ◀
- REAL ESTATE ◀
- TAXATION LITIGATION ◀
- INTELLECTUAL PROPERT RIGHTS ◀

APPOINTMENT OF THE ARBITRATOR

The process of arbitration as a medium of dispute resolution has gained currency amongst people all over the globe as it promises to be a speedy and more effective way of resolving dispute. Arbitration may be defined as "the process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (the arbitral tribunal) instead of by a court of law". The Arbitration process in its true essence gives a lot of liberty to the parties for choosing various aspects of the dispute resolution processes making them feel more involved in the process, which along with the element of negotiation, subsequently results into a more favourable outcome.

However, the ground realities were far from the ideal scenario discussed above and this statute, in its original form, has its own fair share of issues which led to bizarre number of interpretations by the Indian Courts. One such issue revolved around the 'Appointment of Arbitrators'.

In Arbitration process, the parties do get the liberty of choosing the Arbitrator, or laying out the procedure of appointment of the arbitrator in case of dispute, in the Arbitration Clause or the Arbitration Agreement.



The provisions for the appointment of the arbitrator are elaborated under Section 10 and Section 11 of the Arbitration and Conciliation Act.

Section 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**.

Section 11 Appointment of arbitrators—

(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 Supreme Court



or, as the case may be, **the High Court** or any person or institution designated by such Court.

(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** the Supreme Court or, as the case may be, the **High Court** or any person or institution designated by such Court.

Some other points regarding the appointment of the arbitrator:

- 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 Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court, to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

- The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.

- The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.

- A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court is final and no appeal including Letters Patent Appeal shall lie against such decision.

- The Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court, before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of section 12, and have due regard to— (a) any qualifications required for the arbitrator by the agreement of the parties;

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

- In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Supreme Court or the person or institution designated by that Court may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.
- Where more than one request has been made, the High Courts or their designates, the High Court or its designate to whom the request has been first made, under the relevant sub-section shall alone be competent to decide on the request.

It was held by the Court in *Industrial Fabrications - Karnataka Pvt. Ltd. v. Indian Oil Corporation Limited*, (2003) 3 Arb. LR 289 (Bombay) "1. The Chief Justice or his designate even if the authority or institution named does not nominate the Arbitrator which is required to be done or to constitute the Arbitral Tribunal, will ordinarily direct the authority or institution to nominate the Arbitrator and effectively constitute the Arbitral Tribunal. This is more so in



the case of public bodies and Corporation, where failure on the part of an official holding howsoever a high post, shall not result in that body being saddled with an arbitral Tribunal not in terms of the contract it entered into or was entered on its behalf.

2. It is only in the event, for some good reason that the Arbitrator cannot be named or, the Tribunal constituted in terms of the contract, shall the Chief Justice or designate nominate the Arbitrator or constitute the Arbitral Tribunal beyond the terms of the Contract".

Qualification of arbitrators:

The arbitration agreement executed by the parties is given huge importance. Thus, an agreed procedure for appointing the arbitrators is to be given more weightage compared to other mode for appointment of an arbitrator. A clause in the agreement providing for settling the dispute by arbitration through arbitrators with certain qualifications is adhered to by the courts. However, in such a case, the appointment can be challenged by a party on the ground that he does not possess the qualification as agreed by the parties in the Arbitration clause or the arbitration agreement which can brought before the court within 15 days after becoming aware of the very circumstance.



Therefore, a wide of scope liberty is given to the parties in respect choosing the arbitrator. One has to be careful about that as the arbitration landscape in the country has been progressively made more arbitration centric.

Issue of Unilateral Appointment of the Arbitrator:

This issue relates to the arbitration clause or the agreement where the sole power to appoint the arbitrator rested in only one party which rendered the interest of a party in appointment of the arbitrator in vain. This even opened the scope for biasness in the arbitration proceedings.

Finally this issue settled in *Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd* the court held that “[n]aturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence (emphasis supplied) of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) and recognised by the decision of this Court in TRF Limited.”

Similarly in *Arvind Kumar Jain v. Union of India* the Court held that “the respondent could not pressure the petitioner to agree to furnish a waiver under S.12(5) of the Act to appoint a sole arbitrator of the respondent’s choice.”



Therefore the landmark case goes a long way in establishing the principle of equality in arbitration process and improving the arbitration ecosystem in the country.

Disclaimer

The information contained herein is of general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavour to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue in the future. No one should act on such information without appropriate professional advice after the thorough examination of particular situation.

The document is meant for private circulation only.



A & A LAW CORP.

KEY TEAM



CA. Mukesh Aggarwal
(Senior Advisor)



Adv. Vivek Aggarwal
(Senior Partner)



CS. Kumkum Gupta
(Senior Partner)



Adv. Ritika Sharma
(Senior Associate)



CA. Sachin Singhal
(Advisor)



CA. Divya Madan
(Advisor)



CA. Vinit Agarwal
(Advisor)



CA. Arun Bhargav
(Advisor)

OUR SYNERGISTIC NETWORK



KSMC & ASSOCIATES
Chartered Accountants

www.ksmc.in



ACROPOLIS
Acropolis Advisory Pvt. Ltd.
www.acroadvisory.in

ABOUT US

A&A Law Corp is a full service law firm where lawyers, company secretaries, chartered accountants and other various legal experts works together as a team with a determination and focussed approach, providing spectrum of services and giving one stop solution for every business need and requirements.

We at A&A Law Corp believe in interpreting Law in its most reasonable way and applying legal principles to advance the cause of our clients. Each team member of A&A Law Firm is committed to the practice of Law equipped with an in-depth research on the subject and all its manifestations. As a team we are pledged to the oath of ensuring deliverables of foremost level with consummate proficiency and efficiency.



www.aalawcorp.com



Email: aalawcorp@gmail.com

CONTACT US

Registered Office

G-5, Vikas House, 34/1,
East Punjabi Bagh,
New Delhi-110026

T: 011-41440483, 42440483

Delhi Branch Office

E-16/391, Sector-8, Rohini,
Delhi - 110085

T: 011- 47506498

M: +91 9811770164

Singapore Office

10, Anson Road,
International Plaza, #33-13,
Singapore - 079903

T: +65 62243466

M: +65 83141339

