

23<sup>rd</sup> FEBRUARY 2022

## SERIES ON EVIDENCE ACT: ISSUE 6

# THE PROCEDURE OF EVIDENCE-APPLICABILITY TO ARBITRATION

### INTRODUCTION

1. Arbitration, as a means and manner of dispute resolution mechanism is conducted by an independent forum which is constituted on the basis of the terms and conditions of the arbitration agreement entered into between the parties.

2. Party autonomy is one of the most lucrative characteristics under this form of dispute resolution mechanism.

3. The arbitrator/arbitral tribunal is bound by the terms of such agreement and the procedure of arbitration is defined within the limits of the same with minimal court interference.

#### **B. The evidence procedure in arbitration**

1. Section 19 of the Arbitration and Conciliation Act, 1996 (**A&C Act**) provides for the determination of rules of procedure, in clear express terms.

2. It states that the arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (**CPC**) or the Indian Evidence Act, 1872 (**Indian Evidence Act**).

3. The A&C Act, under section 19, also provides freedom to the parties to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

4. Further, the tribunal has been bestowed with the power to determine the admissibility, relevance, materiality and weight of any evidence. In *N.P.C.C. Limited vs. Jyoti Sarup Mittal Engineers*, Contractors & Builders 2006 SCC OnLine Del 1496, the court held that the technical procedures of evidence shall not apply to arbitration.

5. In *Hindustan Shipyard Limited vs. Essar Oil Limited 2004 SCC OnLine AP 745*, the court clarified that when the terms of the arbitration procedure have not been agreed between the parties, the arbitral tribunal must resort to statutory procedure and the discretion as to the decision of relevancy and admissibility of the evidence has been granted to the tribunal under section 19 of the A&C Act. (The decision has been reversed by the Supreme Court in *(2015) 10 SCC 642 (Essar Oil Limited vs. Hindustan Shipyard Limited)*, but on a different proposition.)

6. Although the rules of evidence do not apply in the

case of arbitration, it is mandatory for the tribunal to adhere to the principles of natural justice. The courts have time and again stressed on the duty of the tribunal to conform to the principles of natural justice.

7. In *Maharashtra State Electricity Board vs. Datar Switchgear Ltd. (2002) SCC Online Bom 983*, the court interpreted the provisions of section 19 and held that rather than being a prohibition, these words encourage the Arbitral Tribunal to draw “sustenance from the fundamental principles underlying the Civil Procedure Code or Evidence Act...” These are words of amplitude and not of restriction.

8. The Bombay High Court in *Pradyuman Kumar Sharma vs. Jaysagar M. Sancheti 2013 SCC OnLine Bom 453* went to the extent of saying that “even though the arbitrator is not bound by CPC or the Evidence Act, the principles of CPC and the Evidence Act are applicable to even arbitration proceedings.”

#### **C. Production and relevance of documents**

1. The A&C Act speak of the production of documents by the parties to arbitration under various provisions. The Act also provides for the production of documents which shall be relied upon by the arbitral tribunal in the process of settlement of disputes and making of the award.

2. For instance, section 23 of the A&C Act provides that the parties may submit all relevant documents or other evidence along with their statements of claim or defence.

3. Section 24 empowers the tribunal to decide whether oral hearing should be conducted in the matter for presentation of evidence or the dispute may be adjudicated on the basis of the documents and other materials relied on by the parties. Such power is available to the tribunal unless the parties have agreed otherwise.

4. As discussed above, the discretion as to the questions of admissibility and relevance of the documents solely lie with the arbitral tribunal.

#### **D. Third party documents**

1. The A&C Act, under section 25 states that the arbitrator may make the award on the basis of the evidence before it when either of the parties fails to produce doc-



**Neha Maniktala**

Associate, MCO Legals

BBA, LLB,

Symbiosis Law School, Noida

#### **Expertise:**

Corporate/Commercial Arbitration

✉ [neha.m@mcolegals.co.in](mailto:neha.m@mcolegals.co.in)



**Shivangi Pathak**

Research Partner

B.A., LLB (Hons),

Calcutta University

umentary evidence or appear at oral hearing before it when directed to do so or otherwise.

2. Read with section 25, section 27 grants further powers to the tribunal in matters of evidence.

3. Section 27 provides that the arbitral tribunal or any party with the consent of the arbitral tribunal may apply to the court for assistance in matters of taking evidence.

4. The words “any person” to be heard as witness under section 27(2)(c) have been interpreted to mean any person being either of the parties as well as any third party.

5. In *Delta Distillers Ltd. vs. United Spirits Limited 2013 SCC OnLine SC 881*, the Supreme Court held that the arbitrator holds the power to call both parties as well as non-parties to arbitration as a witness and such power has not been affected by virtue of incorporation of the new words “any person” under the A&C Act of 1996 as contrasted with the Arbitration Act of 1940.

6. Additionally, the court in *Silor Associates vs. Bharat Heavy Electricals Limited 2014 SCC OnLine Del 3407* the court held that the tribunal is empowered to direct the parties to produce the necessary documents without taking assistance from the court under Section 27 of the Arbitration and Conciliation Act, 1996.

7. In such applications, the courts may apply the procedures of the CPC and Indian Evidence Act. *Rasiklal Ratilal vs. fancy Corporation Ltd.* it was held that courts may apply the same process to issue summons to witnesses in these cases as it does to issue summons in suits before it. It was further held that the court’s assistance as contemplated under section of the A&C Act is only limited to directing the parties to produce documents or other material evidence and not to giving a hearing to such witness.

#### **E. The issue of confidentiality**

1. In matters of production and discovery of documents, applications are seldom disallowed.

2. The defence mostly arising in such matters relate to confidentiality.

3. The courts and the arbitrators are barred from directing the production or disclosure of documents which have been statutorily described as being confidential.

4. In allowing such application, the courts or the arbitrators put the relevancy and necessity test to use, i.e., determining whether or not the production of such documents is relevant and necessary.

#### **F. Conclusion**

1. A consolidated reading of the A&C Act within the scope and purview of the rules of evidence provide a clear picture on the basic fundamentals that are adopted in such procedure:

a. The parties to arbitration have the right to devise the method of evidence through an arbitration agreement.

b. The arbitral tribunal shall be bound by the arbitration agreement.

c. The arbitral tribunal, irrespective of whether the Indian Evidence Act applies to the procedure or not, shall act within the parameters of principles of natural justice.

2. In as far as third-party documents are concerned, the tribunal may take the assistance of the court for the process of production and discovery.

3. The discretion as to relevance and admissibility of documentary evidence is also the sole power of the arbitral tribunal.