



Law of Arbitration

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2nd November 2011

Week VIII

CONTENTS

- Qualifications
- Duties
- Grounds for Challenging
- Immunity
- Revocation of Authority

QUALIFICATIONS

- ✓ **Can be of any nationality and need not be legally trained**
- ✓ **No statutory requirement or restriction under the AA 2005.**
- ✓ **parties are free to choose an arbitrator, who is competent to act and does not suffer from any disability.**
- ✓ **disabilities may include lunacy or physical disabilities.**
- ✓ **persons who have special qualifications may be appointed**
- ✓ **May specify from a particular country**
- ✓ **Eg: judge, advocates and solicitors, retired government officers, chartered accountants.**

Specific Qualification

- The parties may agree upon certain qualifications
- May be expressly specified in the arbitration clause or agreement
- Should define and state clearly the required qualifications in the AA such as, medical negligence, commodity trade, construction and etc

Absence of Specific Qualification in AA

- *Continental Grain Co v China Petroleum Technology & Development* [1998]
- The applicant had a mistaken impression. The arbitrator was not legally qualified.
- In the absence of any express agreement as to the qualifications of an arbitrator, there is no basis for terminating the mandate of an arbitrator who does not possess the qualifications anticipated by one of the parties.

Lack of Qualifications

- *Jungheimm Hopkins & Co v Foukelmann* [1909] 2 KB 948
 - The proceedings and award are void. The arbitrator was required to be a member of the trade association
- *Rahcassi Shipping Co SA V Blue Star Line Ltd* [1969] 1QB 173
 - The award of a lawyer umpire was void as the agreement stipulated that the umpire was to be a commercial man and not a lawyer.

ARBITRATOR'S QUALIFICATIONS AAA

- **CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS**
- **General Qualifications**
- **Essential personal qualifications of an arbitrator include honesty, integrity, impartiality and general competence**
- **An arbitrator must demonstrate ability to exercise these personal qualities faithfully and with good judgment, both in procedural matters and in substantive decisions.**
 - a. Selection by mutual agreement of the parties or direct designation by an administrative agency are the effective methods of appraisal of this combination of an individual's
 - potential and performance, rather than the fact of placement on a roster of an administrative agency or membership in a professional association of arbitrators.
- **An arbitrator must be as ready to rule for one party as for the other on each issue, either in a single case or in a group of cases.**

Compromise by an arbitrator for

 - **the sake of attempting to achieve personal acceptability is unprofessional.**

Specific Qualifications AAA

- **When an arbitrator decides that a case requires specialized knowledge beyond the arbitrator's competence, the arbitrator must decline appointment, withdraw, or request technical assistance.**
 - a. An arbitrator may be qualified generally but not for specialized assignments. Some types of incentive, work standard, job evaluation, welfare program, pension, or insurance cases may require specialized knowledge, experience or competence. Arbitration of contract terms also may require distinctive background and experience.
 - b. Effective appraisal by an administrative agency or by an arbitrator of the need for special qualifications requires that both parties make known the special nature of the case prior to appointment of the arbitrator.

Attributes of an Arbitrator

- Positive: 1. Participation or membership in a trade association. 2. Experienced in arbitrating on disputes. 3. Practical experience as a commercial person.
- Negative: 1. has interest in the goods or in the transaction. 2. conflict of interest

Functions of the Arbitrator

- To resolve in a judicial manner every dispute or difference that has been referred to him by the parties to an arbitration agreement on the basis of the evidence and submission.
- Under a legal duty to perform his duties with due care.
- Derives from the AA and the Arbit Act 2005
- Legal duties as well as moral and ethical

Duties of An Arbitrator

- **i) Uphold the principle of natural justice**
 - **Audi alteram partem**
 - **Fairly**
 - **Judicially**
- **Ii) He should decide only disputes submitted to him**
- **iii) He should comply with the terms of submission.**
- **Iv) He should decide according to law**

Principles of natural justice

- S.20: Fairly
- ✓ should not favour one party over the other.
- ✓ must not hear one party to the dispute or witness in the absence of another, except in such few cases where it is so provided.
- ✓ he must not receive information from one side which was not disclosed to the other party.
- ✓ Equal treatment.
- ✓ Reasonable opportunity to present their case.

Principles of natural justice

- **Judicially**
 - ✓ **must observe the fundamental rules which govern proceedings.**
 - ✓ **must follow the rules of administration of justice- misconduct/breach of his duty.**
 - ✓ **Must not only free from bias but there must not be even an appearance bias.**
- ***Turner v. Builders Federal [1988] 2 MLJ 502***
 - “...an arbitrator must always act judicially with a detached mind and with patience. He must not take an adversarial role and his response must be always measured and circumspect”

Comply with the terms of submission

- **He should comply with the terms of submission.**
- ✓ **Where the submission states his power and duties, he should abide by them.**
- **Eg: Inspection of certain premise within a certain period of time**

According to law

- **He should decide according to law, and not solely on what he considers fair and reasonable under circumstances**

Duty to Disclose

- Independence and impartiality.
- The arbitrator has the duty to disclose any circumstances likely to give rise to justifiable doubt to his independence, impartiality and neutrality.
- Non-disclosure may vitiate the appointment and invalidate the proceedings and the resulting award.

Duty to Act with Diligence

- He is obliged to perform his duties without unnecessary delay.
- With due diligence
- To complete within reasonable time
- KLRCA: Time limit of six months from the receipt of the Respondent's statement of defence for the arbitral tribunal to render its final award.-This may be extended with the consent of the parties.

Duty to Decide all Issues and Make the Award

- Should keep detailed notes but under no duty to supply copies of his notes
- To consider all the matters and issues in dispute
- To make an award in accordance with the term of submission.
- Decision-making not delegable: *Delegatus non potest delegare*

Duty to keep confidentiality

- Confidentiality is a key advantage
- To keep the subject matter confidential except when required by the law.
- Parties and arbitrator owe duties of confidentiality to each other

Immunity of Arbitrators

- Issues: whether the parties have the right to sue the arbitrator for failure to perform his duties within a reasonable standard of conduct and competence? Answer: No
- Acting in their judicial capacity: Immune from liability in negligence.
- Reasons:. 1. the need for independence 2. to avoid threats to judicial decision making 3. the avoidance of the rehearing of actions

IMMUNITY

S.47

This section provides statutory immunity for the arbitral tribunal which will be a defence to all causes of action. However, such immunity can only be used in the discharge of the arbitral function and not in bad faith.

Immunity to Arbitral Institutions

- ✓ S.48
- ✓ This section extends the immunity to arbitral institutions in the discharge of their function to appoint or nominate an arbitrator
- Normally the arbitration rules of the various appointing authorities have inserted provision assuring immunity to the arbitral institution.

Revocation of Authority

- The authority of the arbitrator is revocable.
- Expressed in the agreement: Revocable
- Absence of revocation: Revocable by leave of the High Court

Grounds for Challenging

- **S.14: Arbitrator has to disclose any circumstances likely to give rise to justifiable doubts to his impartiality or independence. Arbitrators can be challenged on two grounds:**
 - i) circumstances which give rise to justifiable doubts as to arbitrators impartiality or independence**
 - ii) Arbitrator does not fully possess qualifications agreed to by the parties**

Impartiality or Independence

Impartiality or independence

- ✓ Arbitrators are expected to perform duties impartially and without bias
- ✓ Honest + deliver a totally impartial decision
- *Turner v. Builders Federal* [1988] 2 MLJ 502
 - “...an arbitrator must always act judicially with a detached mind and with patience. He must not take an adversarial role and his response must be always measured and circumspect”
- ✓ an arbitrator must always be detached + rule only when necessary + after hearing the parties
- ✓ Must not make any premature utterances

Circumstances in Which Leave May be Given

- Extreme remedy. Only used in unusual cases.
- 1. Misconduct
- 2. Actual or apparent bias
- 3. Deficiencies in arbitrator's capability or performance
- 4. Justice of the case

Misconduct?

- ✓ Serious and irreparable misconduct
- ✓ a sort of mishandling which is likely to amount to some substantial miscarriage of justice
- ✓ Occurs when he fails to observe the major portion of evidence /consider the question of law raised before him
- it also amounts to misconduct if he appears to have favoured one of the parties and failure to follow the rule of natural justice

- ✓ ***Tan Tong Meng Co Ltd v. Artic Builders & Co Ltd [1986] 2 MLJ 241***
- ✓ **Termination of a building contract-
issue: whether the arbitrator
misconduct himself by failing to
observe the rule of natural justice –
arbitrator refused to provide copies of
his notes to one of the parties in the
arbitration- no issue of misconduct**

Misconduct

- Circumstances which may lead to misconduct
 1. Arbitrator failed to decide all matters referred to him
 - *Pearl Hill Sdn Bhd v. Trikkon Construction Sdn Bhd [1984] 2 CLJ 191- Serious and irreparable misconduct*
 2. Arbitrator decided issues which were not submitted to him
 - ✓ arbitrator must decide neither more nor less than the dispute submitted to him

Misconduct

- 3. Where the award was improperly obtained

Eg: where there is special r'ship btw one party or his arbitrators

- 4. Arbitrator has accepted bribes from the parties in the arbitration

- *Turner v Stevenage Borough Council* [1997]
ADRLJ 409

An arbitrator who had sought an interim payment from both parties was not guilty of wrongful conduct.

- 5. Arbitrator receives hospitality from one of the party + with intention of influencing the arbitrator

Misconduct

6. Arbitration was conducted in breach of the principle of natural justice

Eg: audi alteram partem principle

7. An interested party allow himself to be appointed as an arbitrator

Actual or Apparent Bias

- Bias- predisposition to decide for or against one party without proper regard to the true merits of the dispute.
- The award which is the result of such bias may be set aside.
- Lord Hewart CJ in *R v Sussex Justice ex parte McCarthy* “of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done.
- Interest directly related to the SM.
- Eg strong personal animosity towards a party
 - *Catalina (Owners) Norma (Owners)* [1938] 61 Ll L Rep 360
 - The ct removed an arbitrator –Arbitrator made an allegation tt portuguese people are liars.

Deficiencies in Arbitrator's Capability

- Deficiencies in capability or performance
- If he does not have any special qualities predicated.
- Removal of the arbitrator is an alternative remedy.

Justice of the Case

- Where justice requires that the proceedings should be halted, temporarily or permanently, and no other method of doing so is available to the court.
- Order of removal: If the arbitration would be of no use and injunction might not be enough.

FAILURE OR IMPOSSIBILITY TO ACT

✓ S. 16

The arbitrator's legal or physical inability to perform his functions could be the reasons for terminating his mandate.