

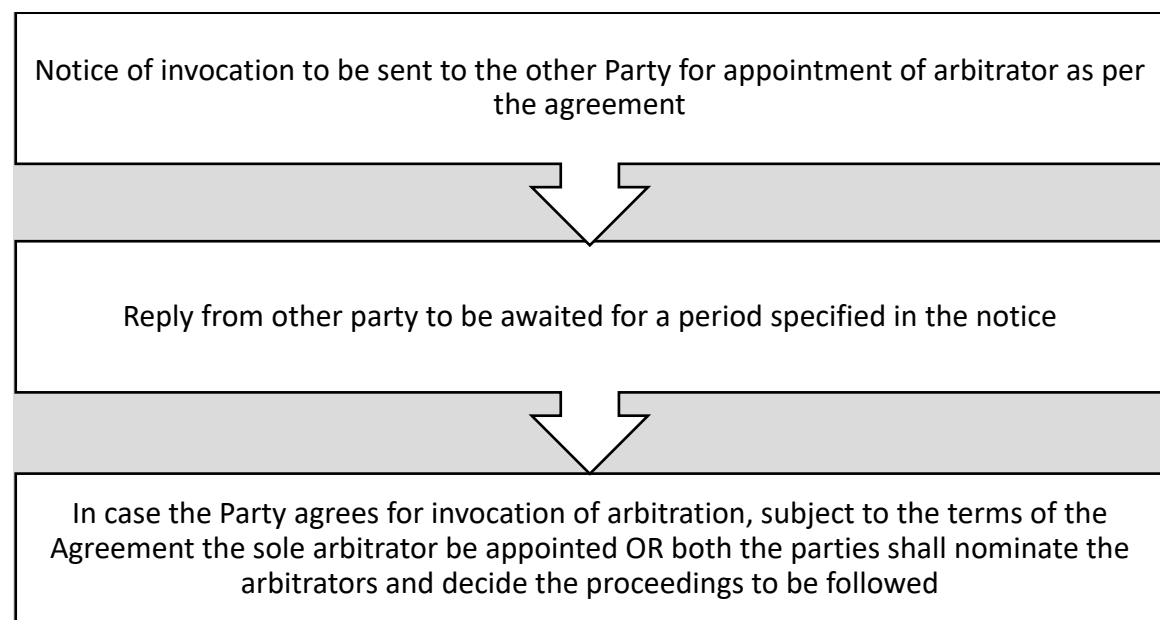
APPOINTMENT OF ARBITRATOR¹

1. INTRODUCTION:

Arbitration has become a common mode of dispute resolution amongst private parties and an arbitration clause has become the norm in most contracts. The appointment of arbitrator is more specifically described in Section 11 of the Arbitration and Conciliation Act, 1996 (“Act”). Parties to the contract are free to agree on:

- Governing law of contract;
- Provisions for the conduct of arbitration;
- Exclusions from the purview of arbitration, unless the effect of such exclusion results in performance of an unlawful act, an agreement, which is otherwise legal, cannot be held to be void and is binding between the parties.²

For the arbitration clause to be effective, parties should agree to an appropriate arbitration reference in clear unequivocal terms in the agreement. Even if the parties have not executed the agreement but the arbitration clause is present in the final accepted draft, then the courts have directed parties to arbitration ³



¹ The article reflects the general work of the authors and the views expressed are personal. No reader should act on any statement contained herein without seeking detailed professional advice.

² Indian Oil corporation Limited v/s NCC Limited, CIVIL APPEAL NO. 341 to 345 OF 2022

³ Lets Engineering & Technology vs Manoj Das on 4 January, 2013[1]decided by the Delhi High Court in Arbitration Petition 250 of 2012

2. WHO CAN BE AN ARBITRATOR?

A person of any nationality can be an arbitrator unless otherwise agreed by the Parties. However, to ensure that the arbitrators are unbiased, the Seventh Schedule, was introduced by the Arbitration and Conciliation (Amendment) Act, 2015, that specified certain restrictions basis the proposed arbitrator's relationship with the parties or counsel. If the proposed arbitrator falls under any of the categories given in the Seventh Schedule, for instance, the proposed arbitrator-

- is the consultant, employee, or an advisor or has any other past or present business relationship with a party
- has close family relationship with one of the parties
- represents any law firm or a lawyer
- is a manager, director or part of the management in an affiliate of one of the parties.
- has financial interest in one of the parties and/ or its affiliates

then the proposed arbitrator cannot be appointed.

3. HOW MANY ARBITRATORS CAN BE APPOINTED?

- Sole Arbitrator: A sole arbitrator can be appointed mutually by the Parties.
- Panel of Arbitrators: Parties may agree for an arbitration with three arbitrators, and generally provide that each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator⁴.
- Even arbitrators: The Act provides that arbitrators to be appointed shall be of odd number.⁵ However, the provision for number of arbitrators was challenged in the case of **Narayan Prasad Lohia v/s Nikunj Kumar Lohia & Ors**⁶, wherein the Parties had appointed two arbitrators for settling a family dispute and all the parties participated in the arbitral proceedings and on 6th October, 1996 an Award was passed by the said appointed arbitrators. However, on 22nd December, 1997 an application was filed to set aside the award on the ground that the Arbitration was

⁴ Section 11 (3)

⁵ Section 10

⁶ AIR2002SC 1139

conducted by two Arbitrators whereas under the Act, there cannot be even number of arbitrators. Upholding the award, the full bench of the Supreme Court held that, the Parties had waived the right to challenge an arbitral award and the arbitral proceedings had taken place as per the mutual consent of the Parties. Even though Section 34 of the Act allows parties to challenge the award, the Court held that, “*So long as the arbitral tribunal or the arbitral procedure are in accordance with the agreement of the parties, Section 34 of the Arbitration and Conciliation Act, 1996 does not permit challenge to an award merely on the ground that the composition of the arbitral tribunal was in conflict with the provision of the Part I of the Act.*”

4. WHO CAN APPOINT AN ARBITRATOR?

- i. Appointment by Parties: The Parties to the dispute can appoint the arbitrator and are free to agree on a procedure for appointment of arbitrator.
- ii. Appointment by the Court: In case a party fails to appoint an arbitrator as per section 11 (3) read with section 11 (4) within 30 days from the receipt of request to do so from the other party or 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 other person or institution designated by him⁷. While appointing the arbitrator, all aspects of the arbitration dispute are kept open as per Section 16(1) of the Act and the doctrine of *kompetenz kompetenz*⁸.

5. DETERMINATION OF FEES:

For the purpose of determination of the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal, the High Court may frame such rules as may be necessary, after taking into consideration the rates specified in the Fourth Schedule of the Act⁹. In the event, if the arbitral tribunal is a sole arbitrator, such arbitrator shall be

⁷ Section 11 (4)

⁸ Kompetenz-kompetenz is the jurisdictional principle to empower an adjudicating body to exercise on the issues on its own jurisdiction submitted before it, i.e., it can decide on the pleas challenging its own jurisdiction submitted before it.

⁹ Section 11 (14)

entitled to an additional amount of twenty-five per cent on the fee payable as per the table set out in the Fourth Schedule of the Act.

6. APPLICABILITY OF LIMITATION PERIOD:

Another important question arises as to whether limitation period is applicable while appointing an arbitrator. The answer to this question would be yes. The arbitrator may be appointed considering the period of limitation as prescribed under Article 137 of the first schedule of the Limitation Act, 1963. This was more specifically explained by the Hon'ble Supreme Court in **Bharat Sanchar Nigam Limited vs M/S Nortel Networks India Pvt Ltd**¹⁰.

In the abovesaid case, BSNL via a tender had invited bids for work related to GSM based cellular mobile network and the tender was awarded to M/s Nortel Networks India Pvt. Ltd. However, after completion of the works under the purchase order, BSNL deducted an amount of Rs.99,70,93,031/- towards liquidated damages and other levies. Nortel vide letter dated 13.05.2014 raised a claim for payment of the said amount which was rejected by BSNL, vide letter dated 04.08.2014.

The question of limitation period being applicable in this case arose when Nortel invoked the arbitration clause and requested for appointment of an independent arbitrator vide letter dated 29.04.2020. It was contended that the dispute of withholding the aforesaid amounts, would fall within the ambit of arbitrable disputes under the agreement. BSNL contended that since the case was closed in 2014 when the deductions were made in the final bill, the request for appointment of arbitrator cannot be accepted and entertained. After a round of litigation in this matter before Kerala High Court, the Supreme court in this matter and the Supreme Court held that:

- a) *The period of limitation for filing an application under Section 11 would be governed by Article 137 of the First Schedule of the Limitation Act, 1963. The period of limitation will begin to run from the date when there is failure to appoint the arbitrator. It has been suggested that the Parliament may consider amending Section 11 of the 1996 Act to provide a period of limitation for filing an application under this provision, which is in consonance with the object of expeditious disposal of arbitration proceedings;*

¹⁰ Civil Appeal Nos. 843-844 of 2021

b) *In rare and exceptional cases, where the claims are ex facie time barred, and it is manifest that there is no subsisting dispute, the Court may refuse to make the reference.*

After this decision on the law point, Nortel approached the Patna High Court again and the Patna High Court appointed an arbitrator while keeping all the contentions open (including the contention related to limitation) and held that it could not be pointed out as to how the dispute is not subsisting and/or is ex facie time-barred, for there is no material on record to establish such fact. ¹¹

7. CONCLUSION:

The main purpose of the Section is to safeguard against any difficulty in constituting the arbitral tribunal to not hamper the commencement of Arbitral proceedings. The legislature and judiciary have taken many steps to make the process fast, flexible and expeditious. However, the Parties should also take due precaution to deliberate and include an unambiguous arbitration clause rather than including a generic provision. Common errors in the arbitration clause that may cause inconvenience while settling the dispute can be inconsistency in the venue of arbitration and jurisdiction, mentioning foreign arbitration rules when both the parties are based in India etc.

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¹¹ Request Case No. 62 of 2021