
Excepted Matters and Powers of Arbitrators

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Normally parties choose arbitration as the dispute resolution mechanism to resolve all their disputes arising out of or relating to a contract. In such a situation, arbitrator has unlimited scope to decide all the issues raised by the parties. It is advisable to have such arbitration clauses in the contract to have a single and effective dispute resolution mechanism. But in certain contracts, parties choose to exclude certain items from the purview of Arbitration. That means parties specifically exclude some aspects of the breaches or violations of the contractual provisions from the scope of the arbitration clause, agreed by the parties. We wish to examine the impact of those excluded items over the jurisdiction of the arbitrators and the remedies available to the parties.

It is well settled law that arbitrators are creatures of the contract between the parties. The concept of supremacy of parties in arbitration provides unlimited powers to the parties to agreement to customize and draft an arbitration clause, as per their requirements. While drafting arbitration clauses, parties normally are expected to specify the number of arbitrators, seat of arbitration, applicable laws, appointment procedure of arbitrators, language of arbitration, name of the administering arbitral institution etc., But parties also can specify the qualifications of the Arbitrators, procedure of arbitration, excluded items if any etc., For example, parties may decide to have Qualified Engineers with a minimum of 10 years of experience as the qualification for the arbitrators. In some cases, parties may like to choose to waive off their rights to have oral hearings and state that the arbitrator shall decide based on the documents and pleadings of the parties. In some cases, parties may specifically choose the expedited procedure specified in S.29B of the Arbitration and Conciliation Act,1996 so that the arbitration comes to an end within six months.

In some contracts, parties choose to put certain items as exclusions for consideration for damages by the arbitrator. For example, awarding of interest, delay in handing over of the site, change of law, escalation of material prices etc., In such a situation question arises, when such items are excluded how arbitrators should handle those issues and whether parties become remediless for those breaches. The settled law is that, aggrieved parties of a contract who suffered a loss because of the breach committed by the other party, has its remedies either before an arbitrator or before a court of law. If it is an open arbitration agreement, all claims raised by the parties can be decided by the arbitrator. In case of exclusions, then the aggrieved party must approach the appropriate court and seek a relief from the court and hence the aggrieved party never become remediless under Indian law.

In cases, where the contract excludes certain aspects from the purview of the arbitral tribunal the settled law is, arbitrator being a creature of the contract he cannot go beyond the scope allocated by the parties. That means, if an agreement excludes certain items expressly from

the scope of Arbitration, the parties have agreed to limit the scope of the arbitrator. In such a situation, if arbitrator ignores the said limitation and decides an excluded item, it may amount to exceeding of the jurisdiction. In such a situation, court might set aside the part or even full award, if the award is challenged. The Supreme Court of India in Harsha Constructions case¹ held that since the arbitrator exceeded its jurisdiction by deciding a non arbitrable issue, that part of the award is bad in law and should be set aside.

But at the same time if the said exclusion is not a limitation imposed on the arbitral tribunal and if it is a limitation imposed on one of the parties, it does not bind the arbitrator. For example, in Bharat Drilling case² there was an exclusion clause which is reproduced below:

“1.21.1 Payments for any additional items of work shall be given by clause 11 of PWD Form F2 of the Contract

1.21.2 No claim for idle labour, idle machinery etc., on any account will be entertained

1.21.3 No claim shall be entertained for business loss or any such loss”

The Court upheld the award of damages arose out of the above said clauses on the ground that the above said clauses prohibit only the department and not the arbitrator and hence the award was within the jurisdiction and sustainable. A similar view relating to contract prohibiting Commissioner from agreeing for pendentlite interest was held to be not binding on the Arbitrator by the Supreme Court in the case of Board of Trustees for the Port of Calcutta³, since the prohibition was not for the arbitrator. An Arbitrator cannot disregard to contract and award anything excess of authority⁴. Hence the consistent view of Courts in India is that Arbitrator being a creature of the Contract, excluded items are beyond his jurisdiction and dealing with those excluded items, is a mis-conduct of the Arbitrator.

¹ Harsha Constructions Vs union of India (2014) 9 SCC 246

² Bharat Drilling Foundation Treatment Private Limited Vs State of Jharkand & others (2009)16 SCC705

³ Board of Trustees For the Port of Calcutta Vs Engineers -DE -Space- Age (1996) 1SCC 516

⁴ Associated Engineering Co Vs Govt.of AP (1991) 4 SCC93