ONLINE OPEN ACCESS PEER-REVIEWED LAW JOURNAL

ISSN: 2582-7952

LEX BONA FIDE

VOLUME 1: ISSUE IV

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Website: www.lexbonafide.com

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With this thought, we hereby present to you

LEX BONA FIDE: LAW JOURNAL

COLLECTION OF EVIDENCE IN ARBITRAL PROCEEDINGS

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ABSTRACT

Arbitration is a method to resolve disputes between parties by a neutral third party who makes the final decision which stands legally binding to all the parties. Since the Arbitral proceedings are not governed by the Indian Evidence Act, it is important to determine how the tribunal records the evidence. The article focuses on the principles applicable to an Arbitration proceeding to form a legally binding agreement and the essential types of evidence. The article also discusses the methods of collecting evidence along with the problems faced by the Arbitral Tribunal during evidence collection and the involvement of the judiciary in the Arbitral proceedings while dealing with the production of evidence.

INTRODUCTION

The intrinsic nature of Arbitration is to settle a dispute between parties by a third person(s) appointed by the parties having a legally binding decision upon them without the involvement of court[1]. Arbitrators are required to work following the principles of natural justice by acting judicially[2]. However, the arbitration proceedings are not governed by the technical rules of evidence as applied by the courts[3]. The Indian Evidence Act is not applicable on arbitration proceedings[4] and the Arbitral tribunal as per S.19 of the Arbitration and Conciliation Act, 1996 which is acquired from Article 19 of UNCITRAL Model Law on International Commercial Arbitration, is prohibited to take into consideration the provisions of Civil Procedure Code, 1908 and Evidence Act, 1872[5].
Further, it gives the Arbitral Tribunal the authority to determine the admissibility, significance, materiality, and weight of any evidence[6], along with the agreement of the parties on the procedure of arbitration[7]. The recording of evidence in arbitration is similar to the one in civil proceedings.

PRINCIPLE APPLICABLE

An arbitral tribunal is not obligated by the substantive law's constraints; nonetheless, to form a legally binding arbitration agreement, it must adhere to fundamental norms of natural justice and, in that case, ought not to violate the rules of evidence-based on those principles[8]. Many natural justice principles do not need to be reflected in arbitration agreements because their breach would lead

to the arbitration tribunal adopting an unreasonable and unequal practice.
In case, Sections 91 and 92 of the Indian Evidence Act, 1872are applicable to arbitral proceedings then the arbitral tribunal stands obligated by the underlying principles of natural justice. The High Court of Calcutta ruled that the natural justice principles are defined by Sections 91 and 92 of the Indian Evidence Act, 1872 and that an arbitral tribunal must obey them even if it is not constrained by the IEA[9]. All such evidence rules are often perceived to be founded on the concept of "best evidence."
The core concept of evidence is the rule of evidence outlined in Section 91 of the Indian Evidence Act, 1872, not because of its complexity but because of its content. It establishes the principle that oral evidence cannot be used to replace documented evidence of any contract entered into by the parties. The explanation for this rule would be that the parties themselves implicitly regard the document as the only source and sufficient proof of any agreement between them. Furthermore, Section 92 of the Indian Evidence Act, 1872 forbids the use of oral evidence unless the contract is signed in writing, except as noted in the contract clauses.

KINDS OF EVIDENCE IN ARBITRAL PROCEEDINGS

It is necessary to examine some of the most essential types of evidence in arbitral proceedings:

Extrinsic Evidence: An exogenous, outer evidence or evidence which is not adequately before the courtroom, jury, or other governing entity, like an arrangement between the parties to the proceedings, is known as extrinsic evidence. The extrinsic proof is often required when interpreting a written document, to determine the contextual relevance and intent of the parties who produced or confided on the same.
The Bombay High Court in the case of Enercon (India) Ltd. vs EnerconGmbh[10] believed that if the terms of the arbitration agreement are vague or inconsistent, extrinsic evidence may be used to interpret them. When an arbitral tribunal makes a jurisdictional mistake, extrinsic evidence would be admissible[11]. The jurisdictional conflict is a concern that is beyond the scope of the award, or whatever might be said regarding the award to be passed. Under such circumstances, the uncertainty with relation to the award can be settled by accepting the extrinsic evidence.

Expert Evidence: As per Section 26 of the Indian Evidence Act, 1872 the arbitral tribunal has been given the authority to select one or more experts and have them submit reports on specific problems. Although the provisions of Section 45 of the Indian Evidence Act, 1872 would not be relevant in an arbitral proceeding in the technical sense, the pith and substance of the laws found thereby concerning acquiring the input of individuals particularly specialized in science or art are significant considerations[12]. Generally, the expert is expected to give his testimony in front of an arbitrator or the courtroom, and he has to be permitted to

be cross-examined by the corresponding parties to the dispute.

Fresh Evidence: On the legality of the arbitral tribunal obtaining fresh evidence following the proceedings have concluded but before the granting of the arbitral award, it would be improper if the tribunal received and acted on fresh evidence collected until the proceedings have concluded but before the award, not allowing the parties a chance to be heard[13]. Since an arbitral tribunal is not considered to be a civil court, therefore it will progress towards being functus officio after the award is made[14]. It can only continue the hearings with the aid of a court order. An appeal under Order XLI of the Code of Civil Procedure to enforce Rule 27 of Order XLI cannot be correlated to proceedings resulting from a question to an arbitration award in the court. As a consequence, it is not necessary to permit a party to depend solely on facts collected after the end of the arbitral proceedings in usual conditions.

Methods Of Recording Evidence In Arbitration:
There are two methods to record the evidence in an arbitration proceeding: (1) Admission and denial of documents by parties and (2) Witness evidence or statements.
Admission and denial of documents by the parties process wherein an arbitration proceeding both parties have to submit documents, those documents once received needs to be admitted or denied *vis-à-vis* the opposite party having received that those documents a list is to be prepared[15]. The arbitrator decides on the substantial question of the production of a particular document and it is binding on the parties[16]. The final call is of the arbitrator upon the quality and quantity of the evidence to be produced[17]
Similar to the provisions of CPC[18], in the arbitration proceedings the parties do not have the right to produce the documents at a subsequent stage of the proceedings applying the principles of natural justice to avoid any biasness[19]. The arbitrator will refuse the admissibility of such documents which the party fails to prove despite the questions raised by the other party[20]. Therefore, it is the sole decision of the tribunal to either admit or deny the documents produced during the arbitral proceedings[21].

1. **Witness evidence or statements**

Apart from the documentary evidence, the arbitral tribunal takes into account the witness statements which is allowed by an application to the court[22]. A witness can be questioned by the arbitrator by relying on the other documents produced as evidence. When one of the parties to the dispute cross-examines the witness of the other party, the arbitrator decides to consider the same as admissible or not[23].
The extent to which the parties will be allowed to re-examine depends on the documents and statements of the cross-examination. It is at the discretion of the arbitrator to examine whether the re-examination is necessary or not[24]

Problems faced during evidence collection
It is pertinent to note that *prima facie* the intention of the drafters is evident by not

giving any powers to the arbitral tribunal to regulate the production of evidence and restricting the same. Either on the request of the parties to the dispute or the arbitration tribunal ex-officer may file an application in the court for the production of evidence[25]. Therefore, it creates a limitation on the jurisdiction of the arbitral tribunal to the sole questions of quality and quantity of evidence[26]. If a party, person or any authority is at fault then the tribunal has no remedy available.

To resolve disputes, arbitration is the most efficient method but its inclination or applicability on certain specific disputes must be contemplated. Further, if a person does not produce any evidence despite the direction of the tribunal, then the tribunal is not competent to force such production and irresistibly approaching the court for a possible course of action, thereby stalling the production and leaving the tribunal vulnerable[27]. Moreover, an arbitral award is sometimes made even when the tribunal does not have enough evidence to support the same as it relies on principles of natural justice and the award cannot be set aside on these matters[28]

CONCLUSION

Since the Indian Evidence Act does not apply to the arbitration proceedings, the tribunal works on the principles of natural justice. The arbitrator is the sole judge to decide on the admissibility, relevancy and quality of the evidence whether it be the documents or the witness statements, to be produced at any stage of the arbitration proceedings. The problem of evidence collection in the arbitral proceedings affects the arbitral award and the decision of the arbitral tribunal stands firm.

However, the jurisdiction of the arbitral tribunal is limited in the case of production of evidence as it has to file an application to the court of law for producing documents as evidence. Therefore, to obtain evidence-primarily it becomes convenient to have the support of the court of law and the tribunal or the parties have to rely on the court time and again to produce evidence.

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