

## The Contractual Biography of an Arbitrator: Is an Arbitrator bound to decide as per the Terms of the Contract?

written by Rhea Susan Verghese | June 30, 2020



### Powers of an Arbitrator Concerning the Terms of a Contract

#### The Male, Pale and Stale of a Contract

It was a Monday in 2014 on April 7, when at the ICCA Miami Conference<sup>[1]</sup>, the prudent audience seated raised a question, "Who are arbitrators?" A huge chunk agreed with calling them 'Male, Pale and Stale'. The reason being, that the world of Arbitration is an arbitrary alpha-male dominated scenario where most of them have greyed over the many years thereby crushing young upcoming bidders.

It is very necessary to understand who arbitrators are, to further comprehend if they are actually required to abide by the *terms of a contract* like every other advocate, litigator or jury. Attorneys are bracketed as those who compete more directly for business and follow something like the terms of a contract in verbatim, while arbitrators are those who directly or indirectly depend on other arbitral specialists for business.<sup>[2]</sup> There has been a huge debate as to whether arbitrators are bound to decide as per the terms of the contractor or not.

The International Bar Association ("IBA") developed the code of ethics for the first time in 1987 and it was called the IBA Rules. The IBA and its rules together make up for the IBA Code ("Code"). This code is voluntary and required to be followed by every arbitrator and party applicable to if incorporated into an arbitration agreement.<sup>[3]</sup> An Indian landmark judgment<sup>[4]</sup> reiterated something on similar terms. The courts held that as per section 28<sup>[5]</sup> of the Arbitration Act, 1996 ("Act"), the arbitrator is bound to resolve as per the terms of the contract.

In 2015, an amendment was brought to section 28(3) which sort of made adherence of the terms of the contract a part and parcel of an arbitrator's duty, unlike the unamended section which forced such adherence mandatorily. With this amendment, the question of powers arose which debated whether or not an arbitrator by the virtue of such amendment was gifted more or less on the power line. Also, the IBA regardless of its name does not pass members and cannot reprimand them on any ground for non-compliance.<sup>[6]</sup>

#### The Domestic Exegesis of Section 28(3) of the Act

The amendment of Section 28(3) now emphasized the aspect of arbitrators having to *"take into account the terms of the contract and trade usage*

*applicable to the transaction".* Now, this in clear terms meant an impending doom on the account of rendering justice. The scope to negotiate on the terms of the contract for a party entering into an agreement with the government/PSU's is very limited.

This would eventually lead to one party exploitation and an unfair outdo on the very basic aspect of an equal bargain on power and fair opportunity. To get the better of this congruity, the Law Commission of India passed its 246<sup>th</sup> report which reiterated "*The amendment to section 28(3) has similarly been proposed solely in order to remove the basis for the decision of the Supreme Court in ONGC vs. Saw Pipes Ltd, (2003) 5 SCC 705 – and in order that any contravention of a term of the contract by the tribunal should not ipso jure result in rendering the award becoming capable of being set aside.*"

The better understanding of this report was reflected in a Delhi High Court case[7] where the arbitrator had not acted in obliviousness of the terms of the contracts but had interpreted the terms of the contract to reach a precise conclusion. The archetype modification from 'in accordance with' to 'take into account' has brought about certain flexibility to the tribunal which balances the debatable facet on the power line.

Souq of Arbitrators or Souq of Lemons

The great know-how into the arbitrary land of Dispute Resolution suggests that 'Barbers and Taxidermists' are more regulated than arbitrators.[8] This has always been the controversial side of dispute resolution of whether arbitrators are bound to decide on the terms of the contract. A peek into the outside world reflects a completely different scenario. Since times immemorial, arbitrators in order to render an equitable decision would disregard the very base of the terms of the contract and were aided by the "ex aequo et bono," and the principles of Lex Mercatoria.[9]

One would wonder, why 'Market of Lemons' in this context? In arbitration slang, the word 'lemon' connotes a car that is found to be defective only after purchase.[10] Arbitrators functioned like lemons who secretly disregarded the legal traditions of decision making. This was largely the scenario outside but now arbitration agreements are drafted with great precision where arbitrators need to have to take into account the terms of the contract to reach an equitable decision, making them a rightful marketplace of arbitrators. The contemporary practice of arbitration stands reformed from those of the yester-year times. However, the recent advances sometimes do still map this terrain in a way where we still are more or less a no man's land.

- 
- [1] [http://arbitrationblog.kluwerarbitration.com/category/icca-miami-2014/?doing\\_wp\\_cron=1592628598.2149810791015625000000](http://arbitrationblog.kluwerarbitration.com/category/icca-miami-2014/?doing_wp_cron=1592628598.2149810791015625000000), Archives of 2014 ICCA Miami Conference
  - [2] Yves Dezalay & Bryant G. Garth, Dealing in Virtue: International Commercial Arbitration and The Construction of a Transnational Legal Order 18-21 (1996)
  - [3] See Hans Smit, A-National Arbitration, 63 TUL. L. REV. 629, 631 (1989) (proposing language by which ethical codes can be incorporated in the arbitration agreement/ term of contract)
  - [4] *Mahanagar Telephone Nigam Limited v. M/s Haryana Telecom Ltd.* [Judgment dated March 14, 2020 in OMP 1113/2012]
  - [5] Section 28(3), "In all cases, the arbitral tribunal shall decide in

accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction”.

- [\[6\]](#) James H. Carter, Introductory Note, 26 I.L.M. 583 (providing an introduction to the International
- Bar Association’s Guidelines for International Arbitrators)
- [\[7\]](#) Astonfield Renewables Pvt. Ltd. & Anr. vs. Ravinder Raina [2018 SCC OnLine Del 6665]
- [\[8\]](#) Richard C. Reuben, Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice, 47 UCLA L. REv. 949, 1013 (2000)
- [\[9\]](#) Supra Note 2
- [\[10\]](#) Term was coined by George Akerlof in 1970 in his noble prize-winning article “The Market for “Lemons”: Quality Uncertainty and the Market Mechanism”

Contributed By - [Rhea Susan Verghese](#)

Designation - Associate

[King Stubb & Kasiva,](#)

Advocates & Attorneys

[Click Here to Get in Touch](#)

[New Delhi](#) | [Mumbai](#) | [Bangalore](#) | [Chennai](#) | [Hyderabad](#) | [Kochi](#)

Tel: [+91 11 41032969](#) | Email: [info@ksandk.com](#)