**TOPIC: CHALLENGE TO THE ARBITRATOR**

Arbitration is a private forum and is most often criticised on the grounds that it imbibes an informal and family like atmosphere and therefore appears to be gentler way to resolve disputes. One such issue that arbitration faces is the issue of independence and impartiality of the arbitrator. The International fora regarding the topic is generally covered by the soft law laid in this matter. The International Institutions such as the ICC, SIAC, HKIAC, SCC, AAA, LCIA generally follow the soft rules such as the IBA Guidelines on disclosure by the arbitrator.

The article deals with the various legislative, statutory recourse propounded by the parliament in this matter. It also lays down the various judicial pronouncements surrounding the issue as well. It basically seeks to cover the Indian perspective of the issue.

***GROUNDS FOR CHALLENGE:-***

Section 12 of the Arbitration & Conciliation Act, 1996 (herein after called the Act) lays the foundation for the challenge to the arbitrator. **Section 12(1) of the Act** mandates an appointed arbitrator to provide a disclosure in a written form, in which he is required to point out the various circumstances which may give rise to suspicions to his independence or impartiality. An Arbitrator is the judge in his own case in this respect. Further clauses to the sections provide specifications of the disclosure. **Section 12 (1) (a)** prescribes that the arbitrator should disclose if he has any direct, indirect, past or present relationship to the parties, or if he has any financial, business, professional or any other kind of interest in the subject-matter of the dispute.

The other clause i.e. **Section 12(1)(b)** similarly points to any circumstances that would affect an arbitrator’s capacity to devote enough time to finish the arbitration within twelve months.

Further, **the Fifth Schedule of the Act** specifies the various relations which provide a chance to doubt:-

* Arbitrator’s relationship with parties or counsel
* Arbitrator’s relationship to the dispute
* Arbitrator’s interest in the dispute
* Arbitrator’s past involvement with the dispute
* Relationship of co-arbitrator’s
* Relationship of the arbitrator with parties and others in the dispute
* Other Circumstances

If the real life scenario, the parties generally challenge an arbitrator after the case falls within the meaning of the above listed headers. These headings cover many scenarios to ensure maximum impartiality. But, none of these headings provides for an immediate bar to the appointment of an arbitrator. **Section 12(2)** reinforces sub-section 1, by stating that unless a written disclosure has already been given, an appointed arbitrator should disclose any conflict of interest as soon as possible.

The actual grounds for challenge under this section are **illustrated under Section 12(3)**. An arbitrator may be challenged on the following grounds:-

* Justifiable doubts
* Lack of qualifications

A party to the dispute which appoints an arbitrator may challenge such appointment for reasons he becomes aware only after the appointment.

Further Section 12(5) mentions **the Seventh Schedule**. The schedule presents a list of categories which act as a bar to appointment as an arbitrator. However, this bar can be waived by the parties by an agreement in writing. The bars are as following:-

* Arbitrator’s relationship with the parties or counsel
* Relation of Arbitrator to the dispute
* Arbitrator’s interest in the dispute.

This issue has been discussed by the Hon’ble Court in various cases. Voestalpine Schienen v. Delhi Metro Rail Corporation[[1]](#footnote-2) was the first case adjudicated by the Supreme Court after the 2015 amendment was passed. The DMRC, a public sector undertaking, had entered into a contract with M/s Voestalpine. The arbitration clause was invoked and as per the contract, DMRC was to make a list of arbitrators consisting of serving or retired engineers with requisite qualifications and professional experience. These engineers were to be from ‘government departments or public sector undertakings’. Furthermore, DMRC and Voestalpine were to choose one arbitrator each from this list and both of these arbitrators shall choose the third arbitrator from the same list. The provision was challenged. It was held that only because of the fact that the suggested arbitrators were former or current government employees they won’t be automatically disqualified from being arbitrators. If they didn’t have any relation to any of the parties, they were not barred under Section 12(5). The Court directed DMRC to delete the clauses from SCC and GCC and asked it to constitute a broader panel.

Further in the case of DBM Geotechnics v. Bharat Petroleum Ltd, there was a clause that the Director of Marketing (DM) was to be the sole arbitrator or he was to appoint another person as an arbitrator. The Court held that in spite of the fact that the DM was barred from presiding as the arbitrator, he could still nominate someone else as the presiding arbitrator.

In TRF Ltd v. Energo Engineering Projects[[2]](#footnote-3), the Supreme Court analyzed the clause under GTCPO which mentioned the MD as the sole arbitrator or any of his nominees. It arrived at the conclusion that if a person is ineligible to be appointed as an Arbitrator, he is also debarred from being the Appointing Authority to appoint an Arbitrator. The most recent case is a judgment delivered by the Delhi HC in West Haryana vs. National Highway Authority of India, O.M.P. (T) (COMM.) 28/2017, has held that a person who has advised the Respondent or acted as its Consultant cannot be an Arbitrator on behalf of such party.

Pre-amendment, there was no bar on any category of person from being appointed as arbitrator and parties could (and often would) sign arbitration agreements that provided for one of their employees to be appointed as arbitrator.[[3]](#footnote-4) There is no straight jacket formula to ascertain the independence and impartiality of the arbitrator. It is a case specific answer.

1. Arbitration Petition (Civil) No. 50 of 2016 [↑](#footnote-ref-2)
2. 2017 SCC OnLine SC 692 [↑](#footnote-ref-3)
3. http://arbitrationblog.kluwerarbitration.com/2017/11/14/independence-impartiality-arbitrators-yet/ [↑](#footnote-ref-4)