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Independence and Impartiality of an Arbitrator

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ABSTRACT

The use of Arbitration proceedings as a tool for alternate dispute resolution has witnessed a rise over the years, and the same can be determined through the emergence of Online Dispute Resolution during the COVID-19 wave, though its future application still remains in question. There are several concerns that arise to either a party or a judicial forum while transferring or proceeding with a case through arbitration; however, the sole purpose of arbitration and its outcome merely depends upon the Arbitrator. It is the Arbitrator upon whose shoulders the finality and the satisfaction of the parties and the court is reliant; therefore, for him to be professional is of utmost importance. While being professional, the fact that the Arbitrator needs to act neutral while being impartial and independent is a concern that comes into existence. This paper deals with the importance of the independence and impartiality of an Arbitrator and how this factor acts as a sole player in determining an outcome of a case. Further, the paper deals with the legislations, National and International Rules, Regulations and Guidelines that cite the importance of the same within themselves, along with a set of court pronouncements. Furthermore, the factors that may either determine or affect the behaviour of an Arbitrator while being independent and impartial through the worldview are also dealt with in this paper.

Keywords: Arbitration, Arbitration and Conciliation Act, Independence, Impartiality, Appointment, Neutrality, Legislation, Proceeding, Justice, Biasness.

I. INTRODUCTION

In today's world, disputes are filed before appropriate forums on a daily basis. Some may file before either the Apex Court, Lower Courts, District Courts, or Tribunals or may prefer Alternative Dispute Mechanisms. Alternate Dispute Methods, also referred to as "ADR Methods", are the ones that are away from the form of the judiciary; it is a room setting where one may be successful in maintaining their privacy. Such forms of methods are namely; Mediation, Negotiation, Arbitration and Conciliation. ADR methods enjoy significant advantages such as lower costs, greater flexibility of the process, higher confidentiality, greater likelihood of settlement, choice of forum, and choice of solutions etc.; having said that, one of

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the most popular, widely recognised and practised forms of ADR is Arbitration.²

As stated herein above, ‘Arbitration’ is a leading method for resolving disputes arising from commercial agreements and other domestic and international relationships.³ The practice of arbitration has developed so as to allow parties from different legal and cultural backgrounds to resolve their domestic and / or cross-border disputes, generally away from litigation. In India, most of the arbitrations are ad hoc, and we are slowly moving towards Institutional Arbitrations. The Government has taken certain steps to make India a hub of arbitration. The Arbitration and Conciliation (Amendment) Act, 2019, which was based on the recommendations of the B.N. Srikrishna Committee Report, aimed to institutionalise Arbitration in India.⁴

II. ARBITRATION: THE INDIAN REGIME

Arbitration Law in India has always been trending since its inception in 1940. The present-date arbitration law is a formation of several promulgations and ordinances passed by the government of India to meet the economic reforms taking place in the country from time to time.⁵ The legislation dealing with the said subject matter as of date is The Arbitration and Conciliation Act, 1996 (hereinafter referred to as “The Act”). Initially, arbitration was regulated by the Arbitration Act 1889, to which certain changes were made that led to the emergence of Arbitration Act, 1940. Thereafter, there were a number of suggested changes to the act, and upon amending the same, the said Act of 1996 was brought into force. Recently, a replacement was also brought to the Arbitration and Conciliation (Amendment) Ordinance, 2020, through the Arbitration and Conciliation (Amendment) Bill, 2021. However, the said Act, 1996 covers both sides of arbitration, namely domestic arbitration as well as international arbitration and also includes provision for conciliation proceedings. While going through the said enactments, it shall not be wrong to suggest that the said amendments pertaining to arbitration law have always been brought with a view to making the said ADR method more friendly and preferable. However, there is still the existence of grey areas in the said act, which are yet to be addressed. Though, such grey areas may not always find a solution through legislative content upon the same. One such issue is the role of the Arbitrator in being ‘Impartial and Independent’. This

² Gupta Vibhor, “*Arbitration: India: Perspective*”, 18 May 2020, Khurana and Khurana, <https://www.mondaq.com/india/arbitration-dispute-resolution/935374/arbitration-a-perspective>, [Last Visited: 06/11/2022 at 14:54]

³ Rajarao Vidya, Patel Darshan, “*Corporate Attitudes & Practices towards Arbitration in India*”, PWC, PricewaterhouseCoopers, PWC, <https://www.pwc.in/assets/pdfs/publications/2013/corporate-attributes-and-practices-towards-arbitration-in-india.pdf> [Last Visited: 06/11/2022 at 12:41]

⁴ Khan Tariq, “*Making India a Hub of Arbitration: Bridging the Gap Between Myth and Reality*”, 17 February 2021, 2021 SCC OnLine Blog Exp 10, SCC Online, <https://www.sconline.com/blog/post/2021/02/17/making-india-a-hub-of-arbitration-bridging-the-gap-between-myth-and-reality/> [Last Visited: 06/11/2022 at 14:59]

⁵ Gupta Vibhor, “*Arbitration: India: Perspective*”, 18 May 2020, Khurana and Khurana, <https://www.mondaq.com/india/arbitration-dispute-resolution/935374/arbitration-a-perspective>, [Last Visited: 06/11/2022 at 14:54]

research paper shall address the issue of impartiality and independence of arbitrators in detail herein below.

III. ROLE OF THE ARBITRATOR AND RELATED ISSUES

The major reason for arbitration is one of the most preferred forms of dispute resolution is the parties being at their free will to choose their Arbitrator. This right to the parties has been provided under Section 11 of the Arbitration and Conciliation Act, 1996. The relevant part of the said section is detailed herein below for the purpose of reference;

“11. Appointment of arbitrators.—

(1) A person of any nationality may be an arbitrator unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator, who shall act as the presiding arbitrator.

(4) If the appointment procedure in sub-section (3) applies and— (a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or (b) 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 Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court];

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by [the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court].

(6) Where, under an appointment procedure agreed upon by the parties,— (a) a party fails to act as required under that procedure; or (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request 1 [the Supreme

Court or, as the case may be, the High Court or any person or institution designated by such Court] to take the necessary measure unless the agreement on the appointment procedure provides other means for securing the appointment. 2 [(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement. (6B) The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section, shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.]

(7) A decision on a matter entrusted by sub-section (4) or sub-section (5), or sub-section (6) to 3 [the Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court is final, and no appeal including Letters Patent Appeal shall lie against such decision”⁶

However, what bothers is the fact whether an arbitrator would be fit to act in its position of settling a dispute neutrally or not. The grounds for the challenge of the appointment of an arbitrator have been laid down under the act of 1996 in Section 12. The said section shall be explained later in this paper. Further, the paper shall aim to further discover one of such grounds, which is the role and need of having an impartial and independent Arbitrator.

IV. NEED FOR AN IMPARTIAL AND INDEPENDENT ARBITRATOR

A person being impartial and acting in an independent manner is an enactment that merely depends upon his morality. For one to act good in an environment is based upon his conscious and no other factor. However, what if a person being in a position to decide a dispute between parties acts partially. Such an act being performed would hinder the purpose of allowing another to decide a dispute because of him/her having hidden disputes in the issue at hand. To understand the concept, we shall first understand the meaning of the words ‘impartial’ and ‘independence’.

The word ‘impartial’ means when a person does not act in a partial or biased manner or in a manner that treats or affects all equally, whereas⁷ ‘independence’ means ‘ the quality or state of being independent’.⁸ In layman language, it can be understood that the impartiality of a

⁶ Section 11, Arbitration and Conciliation Act, 1996

⁷ Merriam Webster, Legal Dictionary, 1828

⁸ *Ibid*

person depends upon his views/ opinions or the mental state of a person.

V. INFLUENTIAL FACTORS THAT CAN DETERMINE THE NEUTRALITY OF AN ARBITRATOR

The arbitration proceedings, judicial or quasi-judicial proceedings, suffers from bias at times. The term bias can be understood as being inclined or prejudiced towards a particular person, party or group. In the case of arbitration which is widely used as a fast way to settle disputes between the parties, if the arbitrator is biased towards a particular party to the dispute, then the whole concept of easy and fast dispute resolution fails as the party so affected by the biasness will not get the proper justice and also the justice provided will be against the principles of natural justice. To tackle this problem, certain factors have to be kept in mind while appointing an arbitrator.

- (a) Firstly, the appointed Arbitrator should not have any relationship with either of the parties to the dispute or their representative counsels.
- (b) Secondly, the arbitrator should not have any relationship towards the subject matter of the dispute of the case at hand.
- (c) Thirdly, the arbitrator should not have any form of direct or indirect interest in the dispute.
- (d) Fourthly, the arbitrator should not have a relationship with the other arbitrators if there is more than 1 in number.

These are some of the factors which shall be considered while appointing the arbitrator to ensure his neutrality. The idea of lack of bias or neutrality is connected to the nationality of the arbitrator, and, in such cases, parties from various nationalities will require the directing arbitrator to have a different nationality. This is reflected, for example, in the Stockholm chamber of commerce arbitration rules, where article 16.8 requires the arbitrator to be of an alternate nationality “unless the parties have agreed differently or if otherwise deemed appropriate by the SCC Institute”.⁹

VI. POINTS OF RELATABILITY BETWEEN THE INDEPENDENCE & IMPARTIALITY OF AN ARBITRATOR AND AN OUTCOME OF THE ARBITRATION PROCEEDING

If the arbitrator appointed in an arbitration proceeding lacks independence and impartiality, then in such cases, there are very probable chances that it may constitute a ground to challenge

⁹ SCC Rules, Article 16.8,

the appointment of the arbitrator per se and also the award decided by the arbitrator. The very breach of this basic requirement at any stage of the arbitration proceedings shall affect the legal structure of the arbitration proceedings. In case the arbitrator appointed lacks neutrality, independence and impartiality, then in such cases, the very basic principle of natural justice fails, and the justice so provided is of no use. Also, the principle of alternate dispute resolution on which the process of arbitration is based fails, and with it, the purpose of arbitration fails too. This brings back the parties to the dispute to the very same footing on which they were before the start of the arbitration proceedings.

VII. INTERNATIONAL LEGISLATION ADDRESSING THE SUBJECT MATTER AT HAND

The provisions relevant to the subject matter that allow an individual or a party to the dispute to ensure the appointment of an Arbitrator who is Impartial and independent of any form of influence at the International level are as follows;

Article 17.6 of the Stockholm Chamber of Commerce Arbitration Rules¹⁰ specifies that an Arbitrator should be of a different Nationality.

Similarly, ICC arbitration rules provide that.

*“Where the Court is to appoint the sole arbitrator or the president of the arbitral tribunal, such sole arbitrator or president of the arbitral tribunal shall be of a nationality other than those of the parties. However, in suitable circumstances and provided that none of the parties objects within the time limit fixed by the Secretariat, the sole arbitrator or the president of the arbitral tribunal may be chosen from a country of which any of the parties is a national.”*¹¹

Comparatively, it can be stated that UNCITRAL¹² provides a more clear picture. Article 10(1)¹³ of UNCITRAL states that the absence of impartiality and independence of an Arbitrator can become a ground for the removal of an Arbitrator.

Through the above readings, it shall be determined that the requirement of an Arbitrator to be independent and impartial is emphasised in every possible sphere. Though none of the regulations clear out upon the understanding of the two terms, however, its need is important in order to determine a positive outcome of a dispute. It shall not be out of place to mention

¹⁰ Article 17(6) states that *“If the parties are of different nationalities, the sole arbitrator or the Chairperson of the Arbitral Tribunal shall be of a different nationality than the parties, unless the parties have agreed otherwise or the Board otherwise deems it appropriate.”*

¹¹ Article 13(5) of ICC Rules of Arbitration, 2021

¹² United Nations Commission on International Trade Law (UNCITRAL)

¹³ Article 10(1) *“Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrators impartiality or independence.”*

herein that the two terminologies in themselves are subjective; hence, more than the need for a legislature upon the two, open-mindedness and being aware of circumstances is what an Arbitrator should imbibe in himself.

VIII. NATIONAL LEGISLATION PERTAINING TO THE ISSUE OF IMPARTIALITY AND INDEPENDENCE OF AN ARBITRATOR

The legislation applicable within the jurisdiction of the Indian Territory pertaining to the subject of 'Arbitration' is the Arbitration and Conciliation Act 1996. Section 12¹⁴ of the Act relates specifically to the disclosure required by an Arbitrator regarding his impartiality. As stated in the section, as and when a person who is capable of acting in the capacity of an Arbitrator, on being approached, needs to disclose in writing whether or not there is the existence of any form of direct or indirect relationship with the parties, the representing counsel, subject-matter and any hidden interest in the outcome of arbitration, whether financial, professional, business or any other form, that may tentatively or below the sea give rise to any form of justifiable doubt as to his/her independence & impartiality. The existence of such a provision is important as it affects the ability of an Arbitrator to be appointed or not. The disclosure of the aforementioned information is required to be made by such a person as per the form prescribed under the Sixth Schedule of the Act. Hence, the onus is upon the arbitrator to make true and correct disclosure. It is only thereafter that it is determined whether any such circumstances exist or whether it falls under any of the grounds enshrined in the Fifth Schedule or Seventh Schedule of the Act.

¹⁴ Section 12. Grounds for challenge.—

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,— (a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and (b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1.— The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2.— The disclosure shall be made by such person in the form specified in the Sixth Schedule.

(3) An arbitrator may be challenged only if— (a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or (b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator: Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.

The Arbitrator, if found to be falling under Schedule Seven, the ineligibility goes to the root of his appointment. The Apex Court made it clear through its judicial pronouncements that Section 12(5) of the Act read with the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes "ineligible" to act as arbitrator.¹⁵

IX. CONCLUSION

The impartiality and independence of an Arbitration are addressed in various International Legislations specified in this paper as well the National Legislation, namely "The Arbitration and Conciliation Act, 1996". The same shows the importance and need of an Arbitrator to act independently and impartially in an arbitral proceeding because the absence of the same would result in injustice. However, no matter the number of rules and regulations that pertain to the subject matter, the fact of being 'impartial' and 'independent' is dependent upon one's mental state, and it is the moral ground of an individual to act in a fair and just manner.

¹⁵ HRD Corporation vs. GAIL (India) Limited [MANU/SC/1066/2017]