Subject Name: Arbitration
Topic Name: Disclosures, Challenges, and Ineligibility

Table of Content:-

DISCLOSURES, CHALLENGES, AND INELIGIBILITY

The appointment procedure outlined in the 1996 Arbitration Act is built on the foundation of fairness. The Act incorporates a range of preemptive and corrective mechanisms to address concerns regarding the independence and impartiality of arbitrators. Section 12 of the Act delineates these mechanisms into three categories: disclosures, challenges, and ineligibility.

Section 13 of the Act outlines the procedure for challenging an arbitrator, while the Fifth Schedule and Seventh Schedule respectively specify the circumstances under which disclosures must be made and when an arbitrator is deemed ineligible. These provisions collectively serve to uphold the integrity and fairness of the arbitration process.

Disclosures by Arbitrators

Content of Disclosure

Under the 1996 Regime, prospective arbitrators were required by Section 12(1) of the 1996 Arbitration Act to disclose in writing any circumstances likely to raise justifiable doubts as to their independence or impartiality. However, the Act did not offer guidance on what circumstances might lead to such doubts, resulting in uncertainty and litigation, particularly regarding the appointment of employees from public sector undertakings in relevant arbitrations.

The 2015 Regime addressed this issue by specifying the circumstances warranting disclosure, such as past or present relationships with the parties or the subject matter in dispute, whether financial, business, professional, or otherwise. Additionally, the Fifth Schedule, inspired by the IBA Guidelines on Conflict of Interests, was introduced to provide an illustrative guide of such circumstances.

Prospective arbitrators are also required to disclose circumstances likely to affect their ability to devote sufficient time to the arbitration and complete it within 12 months. This incorporation of the IBA Guidelines into the 1996 Arbitration Act aims to align Indian arbitration practices with international standards.

Timing of Disclosures

Section 12(1) of the 1996 Arbitration Act mandates prospective arbitrators to make disclosures when approached to act as arbitrators, preventing the appointment of unsuitable candidates. This duty to disclose continues throughout the arbitration process, requiring arbitrators to disclose any relevant circumstances that arise after their appointment without delay.

Failure to Disclose

Although the duty to disclose is mandatory, the Act does not specify the consequences of failing to disclose. While Section 12(3) does not allow a challenge to be based solely on non-disclosure, challenges can be made if circumstances arise that raise doubts about an arbitrator's independence, impartiality, or qualifications. In some cases, the failure to disclose certain information may itself raise doubts about the arbitrator's impartiality or independence, leading to challenges being accepted by the courts.

Challenges to Arbitrators

Grounds of Challenge

According to Section 12(3) of the 1996 Arbitration Act, an arbitrator may be challenged if circumstances exist that raise justifiable doubts about their independence, impartiality, or if they do not possess the qualifications agreed upon by the parties. The concept of "justifiable doubts" is interpreted from the perspective of the concerned party, rather than the arbitrator themselves.

Two contentious grounds for challenging arbitrators in India have been the appointment of employees of one party or their affiliates as arbitrators and the relationship between arbitrators and counsel representing the parties. While detailed guidelines on these grounds are provided in the Fifth and Seventh Schedules under the 2015 Regime, courts have relied on them even though they are not directly applicable to challenges.

Challenge Procedure

Under the 1996, 2015, and 2019 Regimes, parties have the autonomy to agree on a challenge procedure. If there is no such agreement, the challenging party must submit a written challenge to the arbitral tribunal within 15 days of becoming aware of the circumstances warranting the challenge. The tribunal, including the challenged arbitrator, decides on the challenge unless the challenged arbitrator recuses themselves or the other party agrees to the challenge.

If the challenge is unsuccessful, the tribunal continues the arbitration, and the challenging party can apply to the court for setting aside the award. This procedure differs from the Model Law, which allows a party to request a court to decide on a challenge within 15 days of the tribunal's rejection of the challenge.

Ineligibility of Arbitrators

In the 2015 Amendment to the 1996 Arbitration Act, a mechanism for rendering arbitrators ineligible for appointment was introduced to strengthen the Act's commitment to the independence and impartiality of arbitrators.

Section 12(5) of the Act states that individuals whose relationship with the parties, counsel, or subject matter of the dispute falls under any of the categories specified in the Seventh Schedule are ineligible to be appointed as arbitrators, regardless of any prior agreement to the contrary.

The Seventh Schedule lists 19 circumstances that render an arbitrator unable to perform their functions. These circumstances are inspired by the Red List of the IBA Guidelines. However, parties have the right to waive these categories of ineligibility through an express agreement subsequent to the dispute.

While the Act does not provide a specific procedure for challenging the ineligibility of an arbitrator, parties have made applications under Section 11 of the Act to argue that an individual is ineligible and to request the court to make a new appointment. This extends the scope of Section 11 beyond appointment to determining questions of ineligibility.

Similarly, parties have used Section 14 of the Act to request courts to terminate the mandate of arbitrators falling under the circumstances listed in the Seventh Schedule. This provides an alternative to challenges made before the tribunal under Section 12(3) and Section 13 of the Act, allowing parties to approach courts instead.

Termination of Mandate and Substitution

Under the 1996 Regime, which continues under the 2015 and 2019 Regimes, Section 14 of the 1996 Arbitration Act provides grounds for terminating the mandate of an arbitrator. This can occur due to incapability to act, withdrawal from office, or by agreement of the parties.

Section 15 of the 1996 Arbitration Act governs the substitution of an arbitrator. Unless the parties agree otherwise, a substitute arbitrator will be appointed following the same procedure as the original appointment. The Supreme Court has interpreted these provisions purposely and has directly appointed arbitrators when it deemed it necessary in the parties' interests.

In cases of substitution, any previous hearings may be repeated at the discretion of the newly constituted tribunal, unless otherwise agreed by the parties. Additionally, an order or ruling made by the tribunal prior to the substitution of one of its members is not invalid solely because of the substitution, unless otherwise agreed by the parties.