UNIT - I & II

Composition & Jurisdiction of Arbitral Tribunal

SUBJECT - Alternative Dispute Resolution

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ARBITRAL TRIBUNAL

- **DEFINITION**
- **COMPOSITION**
- **APPOINTMENT**
- **JURISDICTION**
- **DUTIES AND LIABILITIES OF ARBITRATOR**
- **TERMINATION**

Definition-

Arbitral Tribunal - According to Section 2(1)(d) - Arbitral tribunal" means a sole arbitrator or a panel of arbitrators.

COMPOSITION

Section 10 - NUMBER OF ARBITRATORS - There is no restrictions on number, qualification or characteristics of arbitrators. However, the tribunal must comprise an uneven number of arbitrators. If the parties want more than one arbitrator, they will have to expressly provide so in the agreement otherwise reference is to be a sole arbitrator appointed with the consent of the parties.

APPOINTMENT OF ARBITRATORS

1. Parties are free to agree upon any procedure to appoint the arbitrator. [Section 11(2)]
2. Where the procedure for appointment of an arbitrator has been agreed upon by the parties, the court's role is to only implement that procedure.
3. The parties have agreed upon an arbitrator or have already named an arbitrator in the arbitration agreement - he is to be appointed.

4. If the panel is to consist of 3 arbitrators, the parties shall appoint one arbitrator each and the two appointed arbitrators shall appoint the third arbitrator, who shall act as a presiding arbitrator in the proceedings. [Section 11(3)]
5. When the agreement does not name any arbitrator and parties fail to agree upon the procedure or name of arbitrator, then only the court gets the power of appointment.

It shall be in the following cases -

In case of Sole arbitrator - [Section 11(5)]

When the parties fail to agree upon the arbitrator within 30 days of request to do so.

In case of Panel of arbitrators -

- When a party fails to appoint an arbitrator within 30 days of receipt of request to do so by the other party [Section 11(4)(a)]
- When the two appointed arbitrators fail to appoint the third arbitrator within 30 days from their appointment [Section 11(4)(b)]

Failure to follow the procedure - (No time limit of 30 days)

- Where the parties have agreed upon a procedure to appoint the arbitrator and both or either party fails to act according to the procedure.
- When the two appointed arbitrators fail to follow the procedure to appoint the third arbitrator

Failure of institution - (no time limit of 30 days)

Where the person or institution designated by the parties for appointment of arbitrator fails to act.

INTERVENTION BY HIGH COURT OR SUPREME COURT

Conditions in case of intervention -

- In case of International Commercial Arbitration - SC has the power. In case of Domestic Arbitration - HC within whose limits the cause of action arises has the power.

- Where more than one request has been made to the Court, the first request is to be the sole basis of decision. [r.w. Section 11(11)]
- While exercising the power under this provision the appropriate court needs to take into consideration the qualifications required under the agreement and other considerations for assuring the appointment of an independent and impartial arbitrator. [r.w. Section 11(8) & Section 12]
- In case of ICA, the SC or his designated authority may appoint the arbitrator of nationality other than the nationality of parties where parties belong to different nationalities. [r.w. Section 11(9)]
- The proceedings before the court are of summary nature. Wider examination of matter is not warranted.
- Order u/s 11 involves self-adjudication on jurisdiction since it determines the rights of the parties with finality. The court determining appointment under Sec 11(6) of the Act has to look at following points-
    i. Whether the party making the motion has approached the right high court or not i.e. territorial jurisdiction
    ii. Whether there is valid arbitration agreement as given u/s 7.
    iii. Whether the person requesting appointment is party to dispute or not.
    iv. Whether the claim is within limitation period (3 years) or time barred.

But, the court cannot go into the arbitrability of the matter.

In **SBP & Co. v. Patel Engineering Ltd. And Another [2005 8 SCC 618]**

The SC has HELD as follows (7 judges bench) -

- ✓ The power exercised by the Chief Justice of the High Court or the Chief Justice of India (now SC) under Section 11(6) of the Act is not an administrative power. It is a judicial power.
- ✓ The Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicated in the judgment. These will be, his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live

claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators.

- ✓ Since it is a judicial order, an appeal will lie against the order passed by the Chief Justice of the High Court or by the designated Judge of that Court only under Article 136 of the Constitution to the Supreme Court.
- ✓ No appeal shall lie against an order of the Chief Justice of India or a Judge of the Supreme Court designated by him while entertaining an application under Section 11(6) of the Act.
- ✓ Where an Arbitral Tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the Arbitral Tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.

CHALLENGING MANDATE OF ARBITRATOR

[Section (12 and 13)]

The Arbitration & Conciliation Act does not contemplate removal of arbitrator by the court but either by the parties themselves or the Arbitration Tribunal.

When a person has been approached for appointment as an arbitrator, he has to **disclose** in **writing** any circumstances which may show –

- ✓ Any relationship with or interest in any of the parties.
- ✓ Any relation to subject matter of the dispute like financial, business professional or any kind.
- ✓ Any grounds which may cast any justifiable doubts as to his independence or impartiality.
- ✓ Any grounds which are likely to affect his ability to devote sufficient time to arbitration and ability to complete the work within 12 months.
- ✓ If he lacks qualifications required by the parties.

The duty to disclose any such interest continues after his appointment and throughout the arbitral proceedings. [r.w. Section 12(2)]

However, a party can challenge his own arbitrator only for reasons of which the party became aware after the appointment has been made. If any circumstances arise subsequently, the parties have to be informed in writing. [r.w. Section 12(4)]

Explanation 1 - The applicable grounds have been stated in 5th schedule.
Explanation 2 - The disclosure has to be made in the form specified in 6th schedule.

If the categories specified in 7th schedule are applicable, he becomes ineligible for appointment and no contract opposing the same can be entered into between the parties before the dispute. However, after the dispute arises the parties may waive the application of the schedule by a written agreement.

While the Fifth Schedule [r.w. Section 12(1)(a)] lists the various instances giving rise to "*justifiable doubts as to the independence and impartiality*" of an arbitrator, the Seventh Schedule [r.w. Section 12(5)] of the Arbitration and Conciliation Act relates to instances which directly result in the "*ineligibility*" of a person from being appointed as an arbitrator unless the parties had expressly waived the applicability of the provision in writing after the agreement was entered into. The arbitrators would have to make disclosures of their independence and impartiality as per the entries in the 5th Schedule, which would otherwise be unknown to the parties. Based on such disclosures, eligibility would be determined under the Seventh Schedule read with Section 12(5) of the Act.

For Example –

Appointment of past employees of a company which is party to dispute as arbitrator will be covered by 5th Schedule i.e. the arbitrator in this case will have to disclose the past association before appointment and if he doesn't, his mandate can be challenged. However, appointment of serving employee of a company which is party to dispute as arbitrator will be covered by 7th Schedule and he is de jure ineligible to be appointed as an arbitrator in the arbitration clause. However, after the dispute has arisen, this condition may be mutually waived by the parties in writing.

The distinction is done considering former employees are seen as neither related to a party as employees, consultants or advisors, nor do they have any other past or present business relationship with the party, as required under Entry 1 of the Seventh Schedule.

Procedure for challenging an Arbitrator:

- Section 13(1) of the Act provides liberty to the parties to agree on a procedure for challenging an arbitrator.
- Section 13(2) - **If there is no agreement on the point or the parties have failed to agree, then the procedure to be followed is that the party wishing to present the challenge** shall, within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware that circumstances exist that give rise to justifiable doubts as to his independence or impartiality or he does not possess the qualifications agreed to by the parties, send a written statement of the reasons for the challenge to the arbitral tribunal.
- Section 13(3) - The arbitral tribunal is required to decide on the challenge, if the arbitrator does not withdraw from his office or the other party does not agree to the challenge. It is so because the Arbitration agreement like any other contract can be revoked only with the consent of both the parties. Failing such revocation, the arbitrator gets an irrevocable authority to proceed with the matter even if one of the parties refuses to submit to arbitration.
- Section 13(4) - In case of failure of challenge, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.
- Section 13(5) - Where such an award is made, the party challenging the arbitrator may make an application for setting aside such an award in accordance with Section 34 of the Act.
- Section 13(6) - If the award is set aside on such an application, the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.
- The appropriate court for the purpose of exercising this power is the court in whose jurisdiction the contract was executed or the work was performed.

- An application for termination would lie before the Principal Civil Court of Original Jurisdiction and not before the Supreme Court, even if the arbitrator was appointed under Section 11.

TERMINATION OF MANDATE OF ARBITRATOR

Section 14(1) of the Act provides that the mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if-

- ✓ He becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and In this case only, the parties may apply to the court for terminating the mandate. Not on the remaining grounds.
- ✓ He withdraws from his office or the parties agree to the termination of his mandate.

Section 15 provides additional circumstances under which the mandate of an arbitrator shall terminate. These include-

- ✓ Where the arbitrator withdraws from office for any reason; or
- ✓ By or pursuant to agreement of the parties.

It is further provided that where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed. The same rules shall be followed in appointing a substitute arbitrator which was applicable to the appointment of the arbitrator being replaced. Where an arbitrator is replaced, any hearing previously held may be repeated at the discretion of the arbitral tribunal, unless otherwise agreed by the parties. However, it is provided that an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator shall not be invalid solely because there has been a change in the composition of the arbitral tribunal, unless otherwise agreed by the parties.

SUMMARY OF CHALLENGING &TERMINATION OF ARBITRATORS

[(Section (12 to 15)]

An arbitrator can be removed only in the following circumstances:

- A challenge is made on the ground that there are justifiable doubts as to his independence or impartiality or
- If he does not possess the qualification agreed by the parties (Section 13 of the Act).

  In both these cases a challenge must be made to the arbitral tribunal. If the challenge is successful, the mandate of arbitrator would be terminated. If the challenge is not successful, the arbitral tribunal must continue with the arbitral proceedings and render its award, which can then be challenged.
- The other provision for removing an arbitrator is if he becomes de jure or de facto unable to perform his functions or fails to act without undue delay. In these circumstances, a party can apply to the court to decide on the termination of the mandate (Section 14).
- The arbitrator also stands removed if he withdraws from office.

Where can the mandate be challenged?

The appropriate court for challenging mandate of arbitrator is the court in whose jurisdiction the contract was executed or work was performed. Sec 2(e) defines court which is referred to u/s 14.

JURISDICTION OF ARBITRAL TRIBUNAL

The Act provides that the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. The arbitration agreement shall be deemed to be independent of the contract containing the arbitration clause, and invalidity of the contract shall not render the arbitration agreement void. Hence, the arbitrators shall have jurisdiction even if the contract in which the arbitration agreement is contained is vitiated by fraud and/or any other legal infirmity. Further, any objection as to jurisdiction of the arbitrators should be raised by as party at the first instance, i.e., either prior to or along with the filing of the statement of defence. If the plea of jurisdiction is rejected, the arbitrators can proceed with the arbitration and make the arbitral award. Any party aggrieved by such an award may apply for having it set aside under Section

34 of the Act. Hence, the scheme is that, in the first instance, the objections are to be taken up by the arbitral tribunal and in the event of an adverse order; it is open to the aggrieved party to challenge the award.

Thus, **Section 16** empowers Arbitral Tribunal to decide -

1. The question as to its jurisdiction
2. The objection as to existence or validity of arbitration agreement

For this purpose an arbitration clause in a contract shall be treated as an arbitration agreement independent of the contract. If the AT holds the contract null and void it will not result in the automatic invalidity of arbitration clause.

The objection must be filed before or along with the statement of claim. The question of jurisdiction has to be treated as a preliminary issue.

The objection can be regarding the fact that the AT has no jurisdiction at all or that it is entertaining some matter beyond its jurisdiction.

REMEDIES -

1. When an award has been made after the rejection of the objections, the aggrieved party may make an application under Section 34 to set aside the award on the ground that objection was wrongly challenged.
2. The decision of the Arbitral Tribunal on its jurisdiction is not an award. It is an order which may culminate in closure of the proceedings and in that event an appeal lies u/s 37. If it does not terminate the proceedings, the order can be challenged when award itself is challenged.

Note- Add DoS and Kompetenz.