

REMOVAL OF ARBITRATOR(S)

Section 12(3) of the Arbitration and Conciliation (Amendment) Act, 2015 states the circumstances in which an arbitrator may be challenged. These include circumstances that give rise to justifiable doubts as to his independence or impartiality or he does not possess the qualifications agreed to by the parties.

However, a party who has appointed an arbitrator or participated in the appointment of an arbitrator is allowed to challenge such an arbitrator only for reasons of which he becomes aware after the appointment has been made.¹

Fifth Schedule to the Act (Annexure-A) contains a list of grounds giving rise to justifiable doubts as to the independence or impartiality of an arbitrator. Seventh Schedule to the Act discussed below lists the grounds which make a person ineligible to be appointed as an arbitrator. Section 12(5) provides that if a person's relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule, such a person shall be ineligible to be appointed as an arbitrator, irrespective of any prior agreement to the contrary. However, the parties may, subsequent to disputes having arisen between them, waive the applicability to this provision by an express agreement in writing.

Procedure for challenging an arbitrator:

Section 13 of the Act provides liberty to the parties to agree on a procedure for challenging an arbitrator. However, if the parties are unable to reach an agreement for the said purpose, a party who intends to challenge an arbitrator shall, within fifteen 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. 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. In case of failure of challenge, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award. 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 and 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.

Termination of mandate of an arbitrator and substitution of arbitrator:

Further, Section 14 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
- 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.

¹ Section 12(4) of the Arbitration and Conciliation(Amendment) Act, 2015

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 were 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.

THE SEVENTH SCHEDULE [See section 12 (5)]

Arbitrator's relationship with the parties or counsel

1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.
2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.
3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.
4. The arbitrator is a lawyer in the same law firm which is representing one of the parties.
5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.
6. The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.
7. The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.
8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.
9. The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.
10. A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.
11. The arbitrator is a legal representative of an entity that is a party in the arbitration.
12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.
13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.

14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.

Relationship of the arbitrator to the dispute

15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.

16. The arbitrator has previous involvement in the case.

Arbitrator's direct or indirect interest in the dispute

17. The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.

18. A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

19. The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.

Explanation 1.—The term “close family member” refers to a spouse, sibling, child, parent or life partner.

Explanation 2.—The term “affiliate” encompasses all companies in one group of companies including the parent company.

Explanation 3.—For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialised pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the rules set out above.’.



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