Are we still looking for committed than competent Arbitrators?

Arbitration can be protected only by neutral and committed arbitrators but unfortunately none of us want to engage/ nominate an arbitrator who declares that he/she would be neutral always. Due to shortage of work, Arbitrators require canvas for their opportunities. The requirement of neutrality is more important in arbitrations because the appeal against an award is not a full-fledged appeal and it is just a restricted appeal and hence the award is almost final. The foundation of Arbitration lies in the supremacy of parties to decide the Arbitration procedure, appointment of Arbitrators, qualifications of Arbitrators, Place of Arbitration etc., In a litigation parties cannot choose either the judge or his experience or his qualification but in an arbitration parties are empowered to choose the type of Arbitrator they require in advance while entering an arbitration agreement. Hence the Major difference between a Court litigation and an arbitration is the power of the parties to decide its arbitrators.

Hence, globally in case of a sole arbitrator, he is jointly chosen by parties or appointed by a neutral institution or court is in practice. In case of a tribunal, each party gets an opportunity to nominate one arbitrator each and both the arbitrators jointly appoint the chairman of the tribunal. Such an arrangement gives parties confidence on the panel that is going to decide the disputes between them. The above said systems are followed every where but still many parties do not have the required level of confidence on the arbitral tribunal since in many cases their right to appoint their nominee either get diluted or restricted in such a way that the party gets frustrated and become non-co-operative, right from the beginning.

In India, the courts have consistently upheld the conferred right of a party to appoint a Sole arbitrator in its own case. While examining such Arbitration agreements, Courts decide keeping in mind the interest of the Public-Sector Undertakings and Governments and uphold such agreements. 2015 Arbitration and conciliation (Amendment) Act brought in a lot of changes to ensure real transparency and to curtail arbitrators who ignore their conflict of interest in the matter and decide the matter. The said amendment was excessively progressive and incorporated the IBA guidelines on conflict of interest in commercial

arbitration into the Act. The said Amendment imposed a mandatory duty on each arbitrator to keep on declaring their availability and conflict of interest throughout the proceedings till the completion.

The above said Amendment generated a lot of enthusiasm among the arbitration community, when it brought in S.12(5) and Schedules V, VII & VII since they promised a promising future for arbitration in this country. The Said schedules prohibited certain category of persons from getting considered to be an arbitrator because of their relationship with either of the parties or the counsels. The said mandate brought under section 12(5) required the arbitrator to declare and disclose any relationship with the parties and the counsels appearing for parties. Schedule V, is a list of relationships describing justifiable doubts for arbitrators for making the declaring under the format provided under Schedule VI. Moreover, the relationship mentioned in schedule V does not disqualify the arbitrator from getting appointed. But if an arbitrator is covered under any of the relationships mentioned in Schedule VII, then he is disqualified to be appointed as the arbitrator in a particular case. If any person falls under any of the relationships mentioned in Schedule VII then parties may approach the respective High Court under S.14 of the Act and pray for removal of that arbitrator. If any body falls under the category of Schedule V, then the party having justifiable doubts about the impartiality and independence of the arbitrator shall file an application under S.13 before the arbitral tribunal challenging the continuance as arbitrator. If the said arbitrator after hearing the application recuse himself after the application, then a new arbitrator shall be appointed following the procedure provided in the Act. But if the said application is rejected then the aggrieved party will have the liberty to raise bias as an additional ground while challenging the award under S.34 of the Act.

But, unfortunately Parties are still finding ways to overcome those provisions by looking for committed Arbitrators. Arbitration agreements empowering one party to appoint the sole arbitrator is increasing. After DMRC Judgment of Supreme Court all PSUs and Government Departments are preparing the so called broad based panel to restrict the choice of the opposite party, to choose their nominee. Even after such efforts by PSUs appointing persons who are indirectly connected to them, the awards given against PSUs and Government are increasing in a big way. If the panels are prepared based on their domain

knowledge and exposure, that may end up in good results. It is also important to note that high value arbitration awards are passed so casually without understanding even the basics of a sustainable award. Arbitration community of our country should realize that time has come that we should look for professional and competent arbitrators, who can deliver fair and sustainable awards.

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