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Legitimacy of Arbitral Appointments in India

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Independence and impartiality of arbitrators are the hallmarks of arbitration. The amendments to the Arbitration and Conciliation Act 1996 (**"Act"**) in 2015, which adopted the international best practices from the International Bar Association Guidelines on Conflict of Interest ("**IBA Guidelines**"), aimed to bolster not only the neutrality of arbitrators, but also the perception of neutrality.

This article attempts to explore and analyze these changes along with the Indian Supreme Court ruling in *HRD Corporation v GAIL (Civil Appeal No. 11126 of 2017)*, a landmark case dealing with issues of arbitral conflicts.

Legislative Framework

Pre-amendment

Prior to the amendment, Section 12(3) of the Arbitration and Conciliation Act 1996 provided that:

> "(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.
>
> (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."

Post-amendment

The Arbitration and Conciliation (Amendment) Act 2015 ("**Amendment Act**") further explained the circumstances under which such arbitral appointments may be challenged. Section 12(1) of the Arbitration and Conciliation Act 1996 was replaced with the following section:

> "(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 their ability to complete the entire arbitration within a period of twelve months."

The Amendment Act also inserted a new Fifth Schedule, which lists the grounds and circumstances that would give rise to justifiable doubts as to the independence or impartiality of an arbitrator. Additionally, Section 12(5) of the Arbitration and Conciliation Act was inserted:

> "(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."

Analysis of the Post-Amendment Framework

Distinguishing "ineligibility" from "justifiable doubts as to independence and impartiality" of an arbitrator

While the Fifth Schedule (read with 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 (read with 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.

Appointment of employees of an arbitrating party as arbitrators

Courts in India have distinguished between serving and past officials of an organization, relying on Entry 1 of the Seventh Schedule for the former and Entries 2, 5, 9 and 12 of the Fifth Schedule for the latter. While the former would be *de jure* ineligible[1)], the latter would not.[2)] 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.[3)]

This pertains to cases where technical expertise of such retired officials is sought, involving niche disputes. An appointment of a former employee may be subsequently challenged if certain situations arise, such as revelation of the involvement of the appointee with the project under

dispute.[4)]

The Indian Supreme Court recently reiterated the law by stating that, although prior to the Amendment Act the arbitrator being a current employee of any of the parties was *ipso facto* not a ground for disqualification, pursuant to the Amendment Act, such appointments would be illegal.[5)]

Appointment of practising counsels (including those briefed by lawyers of either party) as arbitrators

In a recent judgment of the Bombay High Court,[6)] it was affirmed that a counsel's acceptance of a brief from an attorney or law firm for a different client or for an unrelated matter does not amount to automatic disqualification or ineligibility to being an arbitrator in an arbitration in which the same attorney or law firm is acting. Under the Fifth and Seventh Schedules of the Act, for a connection to cause disqualification, there must be a sufficiently proximate relationship between the arbitrator-counsel and the litigant specifically.[7)]

Following the statutory amendments described above, the disputes before the Indian courts have primarily revolved around the appointment of former or serving employees as arbitrators, and whether there were "*justifiable doubts as to independence and impartiality*" and "*ineligibility*" of arbitrators. The Act does not lay down any conditions to identify the "circumstances" which may give rise to "justifiable doubts". Thus, the threshold for disqualification of arbitrators continues to be highly subjective, even though the Schedules of the Act intended otherwise. In a recent judgment of *HRD Corporation v GAIL*, the Indian Supreme Court dealt with the appointment of former judges as arbitrators, who may be associated in previous disputes involving one or more parties to the arbitration.

HRD Corporation v. GAIL (Civil Appeal No. 11126 of 2017)

Overview of facts

The parties entered an agreement on April 1, 1999 for the supply of wax. Subsequently, disputes arose between the parties on the pricing and withholding of products. HRD Corporation ("**Appellant**") invoked the arbitration clause, initiating a total of four arbitrations on the above issues.

Arbitration No.	Relevant period	Arbitrators
1.	2004-2007	Justice A.B. Rohatgi (presiding arbitrator), Justice J.K. Mehra and Justice N.N. Goswamy
2.	2007-2010	Same as above
3.	2010-2013	Justice T.S. Doabia, Justice A.B. Rohatgi replaced by Justice S.S. Chadha and Justice J.K. Mehra
4.	2016-2019	Justice K. Ramamoorthy replaced by Justice Mukul Mudgal (nominated by Appellant) Justice T.S. Doabia (nominated by Respondent) Justice T.S. Doabia and Justice K. Ramamoorthy appointed Justice K.K. Lahoti

The present dispute arises from the fourth arbitration. Two applications were filed by the Appellant

under Sections 12(3), 12(5), 13 and 14 of the Act read with the International Centre for Alternative Dispute Resolution Rules 1999, seeking termination of Justice T.S. Doabia and Justice K.K. Lahoti due to an alleged prior association. The challenge was on the grounds that Justice Lahoti had previously given an opinion on a legal issue between GAIL and another public-sector undertaking in the year 2014; whereas Justice Doabia had previously rendered an award between the same parties in an earlier arbitration concerning the same disputes, but for an earlier period. These allegations were rejected by the arbitral tribunal.

While deciding the case, the Indian Supreme Court scrutinized the Schedules of the Act through an itemized comparison between the Fifth Schedule of the Act and the IBA Guidelines.

On the existence of justifiable doubts as to independence and impartiality, the Indian Supreme Court held that a broad common-sensical approach was to be adopted.

Regarding the Seventh Schedule of the Act, the Supreme Court held as follows:

Entries 1 and 2 of Seventh Schedule

Entries 1 and 2 refer to circumstances where the arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party; and where the arbitrator represents or advises one of the parties or an affiliate of one of the parties.

Justice Lahoti was neither a serving employee nor a consultant nor an advisor to the party. He had only given a professional opinion (not emanating from any business relationship) to the Respondent which was unrelated to the present dispute. Therefore, disqualification under Entry 1 did not arise.

Furthermore, Entry 2 was inapplicable since it concerns "*current*" representation or advice rendered to the Respondent, which was inapplicable in this case.

With respect to Justice Doabia's appointment, it was held that the appointment of a person as an arbitrator is not equivalent to a "*business relationship*."

Entries 8, 15 and 16 of Seventh Schedule

Entries 8, 15 and 16 refer to circumstances where 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, where 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, and where the arbitrator has previous involvement in the case.

These entries were held to be inapplicable in the present case as no advice was rendered by Justice Lahoti to the Respondent on a regular basis.

Entry 15 was similarly inapplicable, because the Indian Supreme Court found that no legal advice or expert opinion was provided on the dispute in hand. Justice Lahoti's legal opinion which was given way back in 2014 was in relation to another issue. Similarly, in Justice Doabia's case, it was held that an award rendered by an arbitrator in a previous arbitration cannot be read as a grant of a legal opinion under this Entry.

Lastly, "*previous involvement in the case*" under Entry 16 was read as referring to previous involvement in the "present dispute", rather than merely the same agreement. Consequently, despite Justice Doabia having previously been an arbitrator between the same parties, he would not be rendered ineligible under Entry 16.

Identical entries in the Fifth and Seventh Schedules

With respect to the presence of the same Entries 1 to 19 in both Schedules, the Indian Supreme Court explained that arbitrators would have to make disclosures of their independence and impartiality as per the entries in the Fifth 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.

Conclusion

With the avid usage of extrinsic aids to interpretation e.g. the IBA Guidelines, 246th Indian Law Commission Report etc. and intrinsic aids like the headings in the Schedules, the Indian Supreme Court sought to decipher the exact meaning and intention of the relevant entries in the Schedules and adopt a purposive interpretation of the provisions. However, this exercise was limited to the extent of the contentions raised and referred to by the parties. It is yet to be seen whether the Indian courts would continue to upkeep the spirit of these amendments, especially that of the Schedules, in the years to come.

References

?1 *West Haryana Highways Projects Pvt. Ltd. v National Highways Authority of India* (2017) 242 DLT 44; *Orissa Concrete and Allied Industries Limited* 2017 SCC OnLine Chh 904

?2 *M/s. Voestalpine Schienen GMBH v Delhi Metro Rail Corporation Limited* (2017) 4 SCC 665

?3 *Reliance Infrastructure Ltd. v Haryana Power Generation Corporation Ltd* Arbitration Case No. 166 of 2016 (O&M), decided on 27 October 2016 ("*Reliance Infrastructure v HPGCL*")

?4 *Afcons Infrastructure Ltd. v Rail Vikas Nigam Limited* 2017 SCC OnLine Del 8675

?5 *Aravalli Power Company Ltd. v Era Infra Engineering Ltd* Civil Appeal No. 16727-16728 of 2017

?6 *Sheetal Maruti Kurundwade v Metal Power Analytical Pvt Ltd & Ors* (2017) 3 AIR Bom R 68

?7 *Sheetal Maruti Kurundwade v Metal Power Analytical Pvt Ltd & Ors* (2017) 3 AIR Bom R 68

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