

# LAW & POLICY UPDATE

## DISPUTE RESOLUTION & ARBITRATION



### Arbitral Bias

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#### Introduction to Arbitration

In the recent years, Arbitration has emerged as the most popular alternate dispute resolution mechanism. Two of the major advantages of referring disputes to arbitrations are: (i) proceedings are conducted in a time bound manner and (ii) an Arbitral Award/Order (**Award**) can be enforced in the same manner as an Order passed by a competent Court. Like most, if not all, judicial and quasi-judicial proceedings, arbitral proceedings suffer from bias. The Oxford Dictionary defines bias as inclination or prejudice for or against one person or group, especially in a way considered to be unfair. One of the most important principles of natural justice is to have trials/ proceedings, be it judicial or quasi-judicial, conducted in a fair and just manner. In addition to the same, an Arbitrator/ Arbitral Tribunal (Arbitrator) is required to maintain impartiality towards the parties and not act in a manner which furthers the interest of only one party. The role/duty of an arbitrator is such that he is required to act strictly in the interest of justice.

While bias against a party may be based on external motivating factors, inherent bias is something that needs to be dealt with and inspected more closely. Inherent bias is something which may affect a sole arbitrator or a member of an arbitral tribunal or the entire tribunal. As discussed below, a member of an arbitral tribunal who is biased can actively/subconsciously end up coloring the views of another member of the tribunal. Therefore, in no way or manner can it be said that appointing an arbitral tribunal instead of a sole arbitrator guarantees an unbiased outcome. It is simply another safeguard to avoid the effects of operation of bias and not a fool-proof method to entirely avoid it.

#### Endeavour to achieve fairness

The Arbitration and Conciliation Act, 1996 (**Act**) permits the appointment of an arbitrator to be challenged if there arise any circumstances which give rise to justifiable doubts as to his independence/impartiality<sup>1</sup>. Intriguingly, the Act did not contain any provisions/checks to make sure that an arbitrator, who had been appointed to adjudicate upon the disputes between parties was not biased. In order to, inter alia, achieve more fairness and transparency in arbitral proceedings, certain amendments were introduced to the Act in 2015 (**Amendment Act**), whereby safeguards were brought into being in order to minimize the operation of biases, which are set out below:

- Sub-section (1) of Section 12 has been amended to the extent to now mandate an arbitrator to provide the parties with a disclosure, in writing, as to there being in existence, any direct/indirect, past/present relationship that he may have shared with any of the parties to the dispute. The nature of the relationship shared between either parties and the arbitrator can be of any kind 'which is likely to give rise to justifiable doubts as to his independence or impartiality'. The grounds/circumstances which give rise to justifiable doubts as to the independence/impartiality of an arbitrator has been set out in the fifth schedule to the Act. These ground/circumstances may be in nature of:
  - Arbitrator's relationship with the parties or counsel
  - Relationship of the arbitrator to the dispute

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<sup>1</sup> Section 12(3) of the Act

- Arbitrator's direct or indirect interest in the dispute
- Previous services for one of the parties or other involvement in the case
- Relationship between an arbitrator and another arbitrator or counsel etc.
- Further, Section 12(5) read with the Seventh Schedule to the Act renders certain categories of person(s) ineligible from being appointed as an arbitrator, irrespective of there being a prior agreement between the parties. Circumstances which may give rise to such ineligibility includes (but is not limited to):
  - When the arbitrator has a significant financial interest in one of the parties or the outcome of the case
  - When 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
  - When the arbitrator or a close family member<sup>2</sup> 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
- Section 14 of the Act has been amended to include the provisions which allows the substitution of another arbitrator upon termination of the arbitrator's mandate.

### Independence or impartiality of an Arbitrator

It is vital that the attributes of independence and impartiality are maintained by an arbitrator at all times. Both these attributes may not be mutually exclusive i.e. an arbitrator can be independent yet not be impartial and vice versa. Independence of an arbitrator can be ascertained by the parties at the beginning of the arbitral proceedings itself taking into consideration the statement of disclosures which will have to be made by the proposed arbitrator in accordance with the provisions of Section 12(1)(b) read with the sixth schedule of the Act. Whereas impartiality, or the lack of it, can come to light during the pendency of the arbitral proceedings.

### Distinction between actual bias and apparent bias

The UK Court of Appeals has quite tersely explained the distinction between actual and apparent bias in *Director General of Fair Trading v. The Proprietary Association of Great Britain*<sup>3</sup> which is set out below:

- "The phrase 'actual bias' has not been used with great precision and has been applied to the situation:
  - Where a Judge has been influenced by partiality or prejudice in reaching his decision
  - Where it has been demonstrated that a Judge is actually prejudiced in favor of or against a party.
 'Apparent bias' describes the situation where circumstances exist which give rise to a reasonable apprehension that the Judge may have been, or may be, biased."

### Bias/perception of bias and its impact on the Amendment Act

Unfortunately, prior to the Amendment Act, especially in government/public-sector contracts, a current or an ex-officer of the contracting government agency/organization would usually be named as the arbitrator. This practice is prima facie violative of one of the basic principles of natural justice i.e. *nemo iudex in causa sua*<sup>4</sup>. Although, the Courts views in the said matter have been varying, to an extent.

The Supreme Court has in a number of cases like *Union of India v. M.P. Gupta*<sup>5</sup> and *Ace Pipeline Contract v. Bharat Petroleum*<sup>6</sup>, taken the view that in contracts with a government entity, the practice of incorporating a named arbitrator who is an employee of the corporation is not ipso facto a ground to raise a presumption of bias, or partiality, or lack of independence on his part.

On the other hand, in the matter of *Union of India v. Singh Builders Syndicate*<sup>7</sup>, the Supreme Court opined that generally a named arbitrator ignites resistance from the other party, which leads to disputes. Thus, it was suggested that government agencies phase out such arbitration clauses from their future contracts, as the Act emphasizes on independence and impartiality to exhibited by an arbitrator; this will in turn promote professionalism. Further in the case of *BSNL v. Motorola India*<sup>8</sup>, the Apex Court held that it cannot allow clauses to take effect in which the other signatory to the contract, the first one being a government agency, is made to agree that it would not object to the appointment of a government servant as an arbitrator.

<sup>2</sup> "close family member" means spouse, sibling, child, parent or life partner.

<sup>3</sup> Court of Appeal (Civil Division), United Kingdom dated 21.12.2000 in Case No. C/2000/3582

<sup>4</sup> *nemo iudex in causa sua* means no one can be a judge in his own cause.

<sup>5</sup> (2004) 8 SCC 504

<sup>6</sup> (2007) 10 SCC 504

<sup>7</sup> 2009 ALL SCR 1025

<sup>8</sup> (2008) 7 SCC 431

Thus, it is clear from the above that when a named arbitrator in an Agreement, is also a current/ex-employee of an entity, who is one of the signatories to the said Agreement, gives rise to an apprehension of bias.

Subsequently, the 246th Law Commission Report of India, which was issued in 2014, inter alia stated that impartiality and independence of arbitrators are critical and cannot be discarded. The Commission also recognized the fact that the problem with the Act is that it did not provide any formula to identify circumstances which create 'justifiable doubts'. In order to address the issue of impartiality which would in turn allow proper functioning of the arbitral process, the commission suggested comprehensive amendments to Sections 11, 12 and 14 of the Act, which suggestions led to the formulation of the Amendment Act.

### Interplay of bias in arbitration and unilateral appointment of an arbitrator

Courts have in many cases held that, what needs to be seen is the circumstances in a particular matter should give rise to a justifiable apprehension of bias; there need not be actual bias. In the matter of *HRD Corporation Ltd.*<sup>9</sup>, the Supreme Court ruled that the existence of circumstances falling within the seventh schedule immediately renders a person ineligible to act as an arbitrator and a challenge against the items in the said schedule may be raised directly in Court. In the case of a challenge against an item under fifth schedule, the same is not permissible before the Court until and unless an award is passed by the arbitrator since Section 13 of the Act only allows the parties to raise the issues of independence and impartiality before the arbitrator.

Another interesting point of debate which arose was that can a person who has been disqualified to act as an arbitrator under Section 12(5) of the Amendment Act read with the seventh schedule, nominate another person to act as one. The Bombay High Court in *DBM Geotechnics & Constructions Pvt Ltd v. Bharat Petroleum Corporation Ltd.*<sup>10</sup> held that the right of a person who has been disqualified to act as arbitrator under the Amendment Act, is not lost when it comes to nominating an alternate arbitrator. In the matter of *TRF Ltd v. Energo Engineering Projects Ltd*<sup>11</sup>, it was held that a court can be approached to plead the statutory disqualification of an arbitrator under the Act and that it is not necessary to approach the arbitrator for obtaining such a relief. The Supreme Court differed with the view of the Bombay High Court in *DBM Geotechnics* (supra) holding that when a named arbitrator nominated under a contract is also responsible for appointment of an alternate arbitrator, he would lose his authority to nominate an arbitrator, if he is disqualified as per the Amendment Act. However, in *D.K. Gupta & Anr. v. Renu Munjal*<sup>12</sup>, the Delhi High Court distinguished the facts in *TRF* (supra) and held that there exists no bar under the Act which restrains a party to appoint an arbitrator.

In *Reliance Industries Ltd. v. Union of India*<sup>13</sup>, the Supreme Court has held that it is important to ensure that no doubts are cast on the neutrality, impartially and independence of the arbitrator. In international arbitration, the surest method of ensuring at least the appearance of neutrality would be to appoint the sole or the third arbitrator from a nationality other than the parties to the arbitration.

In one of its latest judgments, the Supreme Court tackled the issue of appointment of an arbitrator by one of the parties or their officers and employees<sup>14</sup>. The Supreme Court stated that there were two categories of cases. The first category comprises of cases where the managing director is himself named as the arbitrator and also has the power to appoint any other person as an arbitrator. The second category is one where a managing director is merely empowered to appoint an arbitrator but does not act as an arbitrator himself. The Supreme Court was of the view that the invalidity plagued both these categories. Further, the Supreme Court was conscious of the fact that the arbitration clause was different in *TRF* (supra) i.e. the Chief Managing Director of the Respondent company i.e. HSCC (India) Ltd. (CMD) was not authorized to arbitrate himself, but only had the power to appoint/nominate the sole arbitrator. Nonetheless, the Supreme Court held that the logic behind *TRF* (supra) would apply, and the appointment of an arbitrator by the CMD would be invalid.

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<sup>9</sup> *HRD Corporation (Marcus Oil and Chemical Division) Vs. Gail (India) Limited - Civil Appeal No. 11126 of 2017*

<sup>10</sup> 2017 (5) ABR 674

<sup>11</sup> (2017) 8 SCC 377

<sup>12</sup> 2017 SCC OnLine Del 12385

<sup>13</sup> Arbitration Petition No. 27 of 2013

<sup>14</sup> *Perkins Eastman Architects DPC Vs. HSCC (India) Limited [2019 (9) SCC OnLine SC 1517]*

## The Exception

In *Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd.*<sup>15</sup> the Supreme Court faced a situation, in which, according to the arbitration clause in the Agreement, the Delhi Metro Rail Corporation (**DMRC**) was entitled to constitute a panel of arbitrators, of their choice and thereafter propose limited names from that panel, when a dispute arose. Only after the same was done, could Voestalpine Schienen GmbH (**Voestalpine**) select its nominee from the limited list. Voestalpine challenged the said arbitration clause on the ground that the panels' constituents were solely determined by the DMRC and that such a mechanism for appointment would raise doubts over the impartiality of the arbitrator. The Supreme Court struck down the procedure originally contained in the arbitration clause, on the basis that it gave an extremely limited choice to Voestalpine and created room for suspicion that the DMRC would select its own favorites. However, the selection of an arbitrator from a wider panel/list of thirty-one potential arbitrators was upheld.

## Bias amongst the member/s of a tribunal

In a constitution bench judgment of the Supreme Court in *A.K Kraipak v. Union of India*<sup>16</sup>, which pertained to bias amongst a member of the selection board ultimately affecting the ultimate validity of the final decision, it was remarked that "the real question is not whether he was biased. It is difficult to prove the state of mind of a person. Therefore, what we have to see is whether there is reasonable ground for believing that he was likely to have been biased. We agree with the learned Attorney General that a mere suspicion of bias is not sufficient. There must be a reasonable likelihood of bias. In deciding the question of bias, we have to take into consideration human probabilities and ordinary course of human conduct." Further, the Supreme Court also rejected the contention of the other members of the board that their decision would remain unchanged irrespective of the participation of the biased member stating that "...In a group deliberation each member of the group is bound to influence the others, more so, if the member concerned is a person with special knowledge. Bias is likely to operate in a subtle manner. It is no wonder that the other members of the selection board are unaware of the extent to which his opinion influenced their conclusions."

Further, reliance was placed on A.K Kraipak (supra) by the Delhi High court in *Lanco-Rani (JV) v. National Highways Authority of India Ltd.*<sup>17</sup>, where an award was challenged under Section 34 of the Act on the ground that one of the arbitrators' who had participated in the proceedings that eventually concluded in a unanimous award, was demonstrated to have an undisclosed relationship with the party, which had prevailed on the merits. It was held that held even if one of the members of the arbitral tribunal has compromised the essential requirement of fairness by failing to disclose the circumstances which would give rise to justifiable doubts as to the independence and impartiality, the award passed by the arbitral tribunal would get vitiated.

## No room for even a perception of bias by an arbitrator

In *Vinod Bhaiyalal Jain v. Wadhvani Parmeshwari Cold Storage Pvt. Ltd.*<sup>18</sup>, the Supreme Court set aside an award on ascertaining that there was a perception of bias being exhibited by the arbitrator who had passed an award in the matter. Setting aside the Order passed by Bombay High Court, the Supreme Court remarked that not even the slightest apprehension for bias should be given room, especially in arbitration where the very basis is that the parties to the same get an opportunity of nominating an arbitrator of their choice in whom they have trust and faith unlike in the normal course of litigation where they do not have such choice.

## Conclusion

As stated hereinabove, it is of utmost importance that an arbitrator maintains independence and impartiality at all times; lack of which threatens the entire foundation of the justice delivery system through the means of arbitration. Inherent bias in unilateral appointment of arbitrator/s must be statutorily recognized and done away with. India must build a strong arbitration friendly environment instilling stronger anti-bias laws. Needless to state that like the judiciary, arbitration is a means to achieve justice and it is therefore exceedingly important that arbitral proceedings are not corrupted by factors like bias on part of the arbitrator.

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<sup>15</sup> (2017) 4 SCC 665

<sup>16</sup> A.I.R. 1970 S.C. 150

<sup>17</sup> O.M.P. 199/2008

<sup>18</sup> Civil Appeal No. 6960 of 2011

