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Analysis of Arbitrator Independence in India in Light of Arbitration and Conciliation (Amendment) Act, 2015

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I. Introduction

Arbitration is defined in *Halsbury Laws of England* as "a process used by agreement of the parties to resolve disputes. In arbitration, disputes are resolved, with binding effect, by a person or persons acting in a judicial manner in private, rather than by a national court of law that would have jurisdiction but for the agreement of the parties to exclude it. The decision of the arbitral tribunal is usually called an award."[2]

It is a kind of Alternate Dispute Resolution which aims at providing speedy justice to the issues raised by the concerned parties. It focuses on providing an effectual and methodical alternative to the conventional method of dispute resolution through intervention of judicial institutions including Courts and Tribunals.[3] With rapid development and globalization, the number of commercial issues has also increased. Thus, seeking justice through litigation is a time consuming, expensive and tiresome process. The same can be seen from data which states that around 40 million cases are pending in Courts across India.[4] In India and in other countries, the trend has now shifted whereby parties (whether private or public) prefer to have an arbitration clause in a contract through which they agree to resolve their issues outside the Court by appointing an independent arbitrator through the process of arbitration.

The Bombay High Court in "*Jivaji Raja v. Khimjii Poonja & Company"*[5] observed that "arbitration is the reference of dispute or difference between two or more parties to a person chosen by the parties or appointed under statutory authority, for determination of the same."[6]

The statute dealing with Arbitration laws in India is Arbitration and Conciliation Act, 1996 which found its basis in the United Nations Commission on International Trade Law

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[2] II HALSBURY'S LAWS OF ENGLAND, cl. 1201 (2008).
[3] World Intellectual Property Organization (December 17, 2020, 11:00 PM), https://www.wipo.int/amc/en/arbitration/what-is-arb.html#:~:text=Arbitration%20is%20a%20procedure%20in,instead%20of%20going%20to%20court.
[4] BQ Desk, India's Pending Court Cases on the Rise: In Charts, QUINT (December 17, 2020, 11:10 PM), https://www.bloombergquint.com/law-and-policy/indias-pending-court-cases-on-the-rise-in-charts#:~:text=overburdened%20judicial%20system.-,India%20now%20has%20almost%204%20crore%20pending%20cases%20spanning%20the,1%2C%202020.
[5] AIR Bom 476 (1934).
[6] Id.

(*hereinafter* UNCITRAL) model law of 1985[7] and UNICITRAL Conciliation rules of 1980[8]. It was amended in 2015 and hence the statute is now named as Arbitration and Conciliation Amendment Act, 2015 (*hereinafter* principal Act).

Of the main principles of International Arbitration Law, one of the main principles is the independence and impartiality of auditors, which is an area of frequent debates and overall concern. [9] An independent arbitrator is absolutely necessary so that the parties to the contract which are at a dispute may not have any upper hand and so that both the parties are at an equal state and their claims and grievances can be heard through an impartial perspective. The arbitrator can also give an independent ruling because of the power vested in him by law. Importance to arbitrator's independence has also been recognized in India, through an amendment in the Arbitration and Conciliation Act, 1996. The principal Act which was an amendment to the 1996 Act, was enacted as a method to deal with cases where arbitrator independence is compromised, especially through amendments to Sections 11[10] and 12[11] of the 1996 Act. Independency of arbitrators has been dealt by the Indian Courts in many cases but the Court's opinion has been wavering across these cases. The question as to whether or not the Court can interfere in certain cases has been dealt in a rather subjective manner by the Courts, therefore leading to lack of clarity on the matter.

This article deals with the aforementioned provisions and their impact on arbitrator independence in India. It also deals with differing judicial interpretations of arbitrator independence and also analyses cases where these very discrepancies were questioned. Based on analysis of the law, the amendments and its judicial interpretations, suggestive conclusions have accordingly been provided.

II. Overview of the Law

After examination of the Arbitration Act of 1940, the Law Commission of India analysed certain shortcomings. The Act of 1940 only covers domestic matters, though it is considered as the good piece of legislation, it became outdated and inappropriate.[12] In order to overcome

[7] UNCITRAL Model law of International Commercial Arbitration, 1985 (December 17, 2020, 11:30 PM), https://uncitral.un.org/.
[8] *Id*.
[9] Shivani Khandekar & Divyansh Singh, *Independence and Impartiality of Arbitrators: Are We There Yet?*, KLUWER ARBITRATION BLOG (Nov. 14, 2017), http://arbitrationblog.kluwerarbitration.com/2017/11/14/independence-impartiality-arbitrators-yet/
[10] The Arbitration and Conciliation (Amendment) Act 2015 § 6.
[11] The Arbitration and Conciliation (Amendment) Act 2015 § 8.
[12] Statement of Objects and Reasons, The Arbitration and Conciliation Act, 1996.

the issues pointed out by the Law Commission in the 1940 Act, the Arbitration and Conciliation Act, 1996 was enacted and subsequently enforced. The Court in the case of *Furest Day Lawson ltd v. Jindal Exports Ltd.* clarified that both the legislations should be treated separately.[13]

The Law Commission of India put forth its suggestions regarding the shortcomings of the 1996 Act and accordingly suggested a few amendments in its 246th Report. In course of time various grey areas were found by the Law Commission which if get filled then may impart confidence in the Indian Arbitration System.[14] In accordance with the suggestions made, the Union Cabinet approved the Arbitration and Conciliation (Amendment) Bill, 2015.

A good number of amendments were made in the Act of 1996. In this paper, the focus will be on the amendments made in Section 11 and Section 12 of the Arbitration and Conciliation Act, 1996.

Section 11 of the principal Act deals with the appointment of arbitrators, a key amendment in which was that the clause "the Chief Justice or any person or institution designated by him"[15] was substituted by "the Supreme Court or, as the case may be, the High Court or any person or institution designated by such court"[16]. Section 11(6) of the same Act deals with the provisions dealing with the appointment of an arbitrator in the case a party fails to appoint an arbitrator or the appointed arbitrator fails to reach the level of expectation or a person fails to perform any function entrusted on him by either or both parties. After an amendment, two subsections were added after subsection 6 *viz.* 6A and 6B.

Section 6A states that "the Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or (5) or (6), shall, notwithstanding any judgement, decree, or order of any Court, confine to the examination of the existence of an arbitration agreement."[17]

Section 6B states that "The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of Judicial power by the Supreme Court or the High Court."[18]

[13] 8 SCC 333 (2011).
[14] Sahil Kanuga & Vyapak Desai, *A New Innings For Arbitration in India -Overhaul Suggested for The Arbitration & Conciliation Act, 1996,* MONDAQ (December 17, 2020, 12:30 AM).
[15] The Arbitration and Conciliation Act 1996 § 11.
[16] The Arbitration and Conciliation (Amendment) Act 2015 § 11.
[17] The Arbitration and Conciliation (Amendment) Act 2015 § 11(6A).
[18] The Arbitration and Conciliation (Amendment) Act 2015 § 11(6B).

Similarly, section 12 of the principal Act which states the grounds for the challenge also was amended. Subsection (1) of the principal Act got replaced with the amended one which includes the explanations and the requirements which are to be fulfilled by the auditor in writing, prior to the commencement of the arbitral proceedings. Post amendment, Section 12(1) reads "When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances, 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 kinds, which is likely to give rise to justifiable doubts as to his independence or impartiality; and which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months". [19] Two explanations are given to the subsection as follows:

"Explanation 1. The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2. The disclosure shall be made by such person in the form specified in the Sixth Schedule."[20]

Along with this, one more subsection was added to section 12 i.e. 12(5) which states that "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."[21]

Amendments made in the principal Act leads to a wide range of interpretations made by the competent courts of law.

III. The Amendments

The amendments were made to the Arbitration and Conciliation Act of 1996, with the aim of removing the grey areas and to build the confidence of all stakeholders including individuals and institutions over arbitration process. All the amendments which were made in the principal

[19] The Arbitration and Conciliation (Amendment) Act 2015 § 12(1).
[20] *Id.*
[21] The Arbitration and Conciliation (Amendment) Act 2015 § 12(5).

Act had one or the other reason. Amendments to section 11 and 12 of the principal Act are considered to be the most crucial, keeping in mind the role of appointment of arbitrators and grounds for challenge.

Subsections (4), (5) & (6) of Section 11 of the principal Act states that if a situation is such that the arbitrator is supposed to be appointed by the court of law then that can be done either by Chief Justice or any other body or person designated by him. The issue with this clause was that there are a lot of cases pending in the court of law and are rapidly increasing year after year and if in the case of failure of parties to appoint an arbitrator, Chief Justice has to spend time to appoint the same then it will increase the burden on the judicial system. Keeping this in mind, the Law Commission suggested to include High Courts as well as the Supreme Court as a whole in the relevant provisions. Transfer of the power of appointment to the mentioned courts will decrease the burden of the Chief justices as well as make the procedure quicker, as the parties can seek the same from any Judge of the High Court or Supreme Court. Hence the amended sections contain the same provision as suggested by the law commission.

After amendment two subsections were added in section 11(6) of the Arbitration Act i.e. 6A and 6B. The basis of these additions lies in the judicial decisions passed by the court of law. Prior to the 2015 amendment, the court was of a different opinion with respect to cases related to Section 11(6). The difference can be seen from the judicial decisions passed by the court. In "*Konkan Railway Corporation Limited v. Rani Construction Private Limited"*[22], the Court held that while appointing an arbitrator, the Chief Justice or his designate was not acting as a Judicial authority[23] where as in the case of "*SBP & Co. v. Patel Engineering"*[24], it was held that "the powers exercised by the court in handling an application under Section 11 were judicial powers and not merely administrative powers."[25] This issue got resolved with the introduction of the amendment as after it, the Court now shall presume that there exists a valid arbitration contract and under 11(6A) and they are only required to determine the existence of an arbitration.[26]

Similarly, section 12 of the principal Act does not specifically mention what all relations can create the doubt of independence and impartiality of the arbitrator. In light of the same, one more subsection was added to uphold independency and neutrality to the maximum. The basis

[22] AIR SC 778(2002).
[23] Id.
[24] AIR 2006 SC 450 (2002).
[25] Id.
[26] *Duro Felguera S A* v. *Gangavaram Port Limited, AIR 2017 SC 5070.; Mayavti Trading Private Limited*. v. *Pradyuat Deb Burman, AIR 2019 SC 4284.*

of this amendment can be found in the principles of natural justice[27] and the concept of neutrality of arbitrators. Prior to the amendment, Section 12(3) of the act stated "an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or if he does not possess the qualifications agreed to by the parties."[28]. The terms circumstances and justifiable doubts were not specifically explained in the Act. The limitation of the Section has been tested in various case laws like *Ace Pipeline Contract Pvt. Ltd v. Bharat Petroleum*[29], *Union of India v. MP Gupta*[30], *Executive Engineer, Irrigation Division, Puri v. Gangaram Chhapolia*[31] etc. where the Court held that government contracts (where a government official hold the position of arbitrator) are valid and enforceable. It can be concluded from these judgements that when the question of balance between procedural fairness and binding nature of contract pops up, the apex Court seems to be tilted towards the latter.

Independency and neutrality form the crux of arbitration[32]. It should not be negatively affected at any stage of the process, especially during the formation of the Arbitral Tribunal. In order to make sure that the arbitration process be devoid of any kind of bias, the amendment was made to the said provision. According to the principles of natural justice, no one can be the judge in his own case and to ensure adherence to the same, the list of relations which may create doubt of bias or partiality in the mind of the common man has been inserted in the principal act.[33]

Hence, in this way, amendments to section 11 and 12 evolved and necessary changes thus, made by the legislature in the concerned sections.

IV. Judicial Interpretations

Judicial interpretation is of key significance to check and elaborate on the meaning of the law framed by the legislature. The Court of law interprets a particular provision and gives the best possible meaning to it and hence either narrows or broadens the scope of a particular provision.

[27] *Nemo judex in causa sua* (No man shall be a judge in his own case); *audi alteram partem* (Both parties have right to be heard).
[28] The Arbitration and Conciliation Act 1996 § 12(3).
[29] 5 SCC 304 (2007).
[30] 10 SCC 504(2004).
[31] 3 SCC 627 (1984).
[32] AIR SC 939 (2017).
[33] Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996,* 246th Report, 2015.

The Courts have given a wide range of interpretation to section 11(6) of the Arbitration and Conciliation Act prior to the amendment. It has given different interpretations to the same provisions in different cases.

In "*Ace Pipeline Contract Pvt Ltd. v. Bharat Petroleum"*[34], the Court held that an arbitrator should be appointed keeping in mind the provisions laid down in the contract duly accepted by the parties. It also held that more stress should be given on the qualifications and the specifications mentioned in the contract and deviations from contractual clauses should be in exceptional cases only.[35]

Similar opinion was given in the case of *Walter Bau Ag v. Municipal Corporation of Greater Mumbai*, where as per the contract, International Centre for Alternative Dispute Resolution in India (ICADR) was supposed to send the panel of arbitrators to the party who fails to appoint one from its side within thirty days of the notice issued by the opposite party. In this case, Respondent appointed an Independent Arbitrator against the provisions laid down in the contract and the Court held that the appointment of the Arbitrator is not valid since it is against the provisions laid down in the contract.[36]

Yet another different opinion was given by the court in the case of "*Indian Oil Corp. Ltd v. Raja Transport Pvt. Ltd."*[37], whereby for the first time, the Court held that while appointing an arbitrator under Section 11(6) the Court must look into the contract but if the situation is such that it gives rise to justifiable doubts as to independency and impartiality of the Arbitrator, the Court, for the reasons to be recorded, can ignore the contract and can appoint someone else.[38]

Similar opinion was laid down by the court in the case of *North Eastern Railway v. Triple Engineering Works*[39], where the court relied on the above stated judgement and on the judgement in "*Union of India v. Singh Builders"*[40] where the appointment of the arbitrator, contrary to the provisions of the contract was held to be valid and enforceable.[41]

After the amendment in Section 12 of the Arbitration and Conciliation Act, Section 12(1) was replaced by a modified version where the statute also explained what all relations may create

[34] *Supra* note 21.
[35] Id.
[36] 3 SCC 800 (2015).
[37] 8 SCC 520 (2009).
[38] Id.
[39] AIR SC 3506 (2014).
[40] 4 SCC 523 (2009).
[41] Id.

justifiable doubt regarding the independency and impartiality of the arbitrator. Along with this, the addition of subsection 5 to Section 12 of the principal Act which provides power to the Court to appoint the arbitrator against the norms set down by the parties while making the arbitration contract have changed the judicial opinion about the appointment of an arbitrator under section 11(6) of the act.

The distinction between the opinion of the Court in various cases on the same provisions was put forth in the case of "*Aravali Power Company Pvt. Ltd. v. Era Infra Engineering Ltd*."[42] where the Court contemplated upon the position/difference of judicial opinion in cases governed by the unamended act of 1996 and in cases governed by the amended 1996 act. Following are the paraphrased opinions and decision of the Court in the case:

i. There is no *ipso facto* basis for raising doubt on ground that the arbitrator is an employee of either contracting parties unless such person either controls or is directly subordinate to the officer with respect to subject matter of dispute.
ii. "Chief Justice or designates can only exercise power under Section 11(6) when a cause of action for invoking jurisdiction under clauses (a), (b) or (c) of subsection (6) of Section 11 of 1996 Act arises.
iii. The Chief Justice or his designate while exercising power Under subsection (6) of Section 11 shall endeavour to give effect to appointment procedure prescribed in the arbitration clause.
iv. Chief Justice may appoint different arbitrator in cases where justifiable doubts arise regarding independence or impartiality; or when appointment of arbitrator is made without regard to contractual provisions."[43]
v. Where as in the later, "If the arbitration Clause finds foul with the amended provisions, the appointment of the Arbitrator even if apparently in conformity with the arbitration Clause in the agreement, would be illegal and thus the Court would be within its powers to appoint such arbitrator(s) as may be permissible."[44]

In *TRF Ltd. v. Energo Engineering Projects Ltd*., the Court broadened the scope of Section 12(3) of the arbitration act, which states "an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or if he does not

[42] AIR SC 4450 (2017).
[43] Id.
[44] Id.

possess the qualifications agreed to by the parties."[45] The Court while considering the legal maxim *Qui facit per alium facit per se,* held that once the member becomes ineligible to act as an arbitrator by the operation of law, he/she cannot nominate someone else as an arbitrator. Even if a contract permits the prohibited person to nominate someone else, the Court under section 12(5) can hold such nomination as invalid or ineligible.[46]

After the amendment, the Court emphasized much more on the principles of independency and impartiality. It stated in the case of "*Lite Bite Foods Pvt. Ltd. v. Airport Authority of India"*[47] that the principle of independency and impartiality "must be understood with that even more fundamental principle of natural justice, the rule against bias."[48] The essence of independency and neutrality was seen for the first time in the case of "*Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd."*[49], where the court specifically quoted the 246th report of the law commission of India and said that the crux of arbitration is independency and impartiality. It also established that the choice to nominate an arbitrator has been provided to both the parties concerned and there should be broad band of choices available to the party who has to elect only then it will be considered as the balanced, independent and impartial procedure of appointment of an arbitrator.[50]

The court in the case of "*Lite Bite Foods Pvt. Ltd. v. Airport Authority of India"*[51] laid down the legal principles involved in the appointment of an arbitrator under section 11(6) of the Act and it states:

> "(a) An officer or employee of one party cannot be the arbitrator or, upon eligibility, the person empowered to appoint an arbitrator. This is the TRF Ltd. category or rule.
>
> (b) Where the arbitration clause provides for nomination by each side, and for the appointment of an umpire by the two nominee arbitrators, of a person from a panel: (i) that panel cannot be hand-picked by one side; and (ii) it must be broad-based and inclusive, not narrowly tailored to persons from a particular category. The opponent and the two nominee arbitrators must have the plenitude of choice. This is the rule

[45] Supra note 20.
[46] AIR SC 3889 (2017).
[47] MANU/MH/3423/2019.
[48] Id.
[49] Supra note 24.
[50] Id.
[51] Supra note 35.

in *Voestalpine Schienen*. Conceivably, a broad-based panel commonly agreed in the contract by both sides would serve the purpose.

(c) A clause that confers on one party's employee the sole right to appoint an arbitrator, though that employee is himself not to the arbitrator, is also not valid, and this is a logical and inescapable extension of the TRF Ltd. doctrine. It makes no difference whether this power is to be exercised by choosing from a panel or otherwise. This is the rule in Eastman Perkins."[52]

The principles thus deduced by the Court are solely based on the independency, impartiality, neutrality, fairness and transparency even in the process of selection of an arbitrator. Hence, it can be seen from the various case laws that the Courts tried to simplify a process of selection of an arbitrator under section 11(6) of the Arbitration and Conciliation (Amendment) Act, 2015. But the diverged opinion was given by the apex court in the latest judgement of "*Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML"*[53], where it held that the High Court was wrong in appointing the arbitrator against the provisions laid down in the contract duly signed by the both parties and said that the appointment of arbitrators is to take place in compliance with the terms of the contract.[54] It is hence evident from the cases discussed above that the court of law has varied interpretations of the amendment made in section 11 and 12 of the principal act.

Conclusion

A reading of the mentioned judicial pronouncements and the principal Act indicate that arbitrator independence still has a long way to go to be properly recognized in India, both by legislative and judicial organs. However, the principal Act has definitely taken a step forward in recognition of the same. An independent auditor is important not only for the disputes of the parties to be resolved in compliance with principles of natural justice, but also for reducing the number of cases in already overburdened Indian Courts. In this regard, the legislative provisions or its interpretations should be modified to reflect that intervention by the Court should only be made necessary when it is clear that one contracting party has an edge over the other party or if there was any unfairness in the process of selecting an arbitrator. The appointment by the Court should be made notwithstanding the clauses in contract dealing with

[52] Id.
[53] 2020 (1) ALT 70.
[54] Id.

the subject matter. In cases where a justifiable doubt exists or there is irregularity in the selection process therefore, intervention by the Court can be mandated provided the Court has the power to override contractual provisions.