Dispute Resolution Hotline

December 13, 2016

P&H HIGH COURT: NO BAR IN SCHEDULE VII UNDER THE ARBITRATION AND CONCILIATION ACT 1996 AGAINST FORMER EMPLOYEES FROM BEING APPOINTED AS ARBITRATORS

- Conflict of interest illustrations in the Vth Schedule provide examples of situations that must be disclosed by an arbitrator. Such situations do not amount to disqualification unless there actually exist justifiable doubts as to independence and impartiality of the arbitrator concerned.
- Conflict of interest situations listed in the VIIth Schedule disqualify an arbitrator or make him ineligible for appointment.
- The illustration, "The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a part", listed in both the Schedules, indicates a conflict of interest only if the arbitrator is *currently* an employee, consultant, advisor or has any other business relationship. The only past relationships covered are "any other business relationships".

INTRODUCTION

The 2015 amendments to the Indian Arbitration & Conciliation Act, 1996 ("**Amendment Act**" or "**2015 Amendments**"), introduced the Vth Schedule as a guiding tool for clarifying circumstances which would give rise to justifiable doubts as to the independence or impartiality of arbitrators where disclosures would have to be made by the arbitrator to the parties. Additionally, the VIIth Schedule was introduced laying down instances that would render certain appointments invalid, irrespective of prior agreements to the contrary by the parties, vesting de jure inability on the arbitrator. This list was aimed at situations which were obvious violations of the principles of natural justice (that no person can be his or her own judge). Neither disclosures nor prior agreements between parties can be sufficient cures in such circumstances, and party autonomy could not be allowed to be exercised in violation of such principles.

Independence and impartiality of arbitrators has always been a highly subjective issue. In the context of serving employees, courts were of the opinion that appointment of employees of government departments as arbitrators would be valid provided they are not involved in the contract in question and that this reasoning may be inapplicable where non-state entities are involved.[1] However, the 2015 amendments list the appointment of employees as a conflict of interest situation requiring disclosure and also leading to ineligibility for appointment. The new provisions addressing appointment of employees (past and present) of either party as arbitrators were addressed by the Punjab & Haryana High Court ("**Court**"), in the case of *Reliance Infrastructure Ltd.* ("**Petitioner**") v. *Haryana Power Generation Corporation Ltd.*[2] ("**Respondent**"), which laid down that ex-employees are not barred from being appointed as arbitrators.

FACTS AND ARGUMENTS ADVANCED

The case relates to an application under Section 11(5) of the Arbitration and Conciliation Act 1996 ("**Act**") for the appointment of a sole arbitrator pursuant to disputes that arose between the parties. The Respondent appointed the former Chief Secretary of Haryana as per the terms and conditions of the contract, and expressly conveyed that the arbitrator appointed was "Ex-Chief Secretary, Haryana." Such an appointment was disputed by the Petitioner as being void vide Section 12(1)(a)[3] read with Schedules V (item 1)[4] and VI of the Act, due to non-disclosure by the arbitrator, along with Section 12(5)[5] read with Schedule VII (item 1)[6]. It was contended by the Petitioner that the nature of relationship requiring disclosure may be direct or indirect, past or present and, it may be in relation to parties or the subject matter in dispute.

JUDGMENT

Former employees are not barred from being appointed as arbitrators

The Court found that a reading of item 1 of the above-mentioned Schedules reflects a clear division between "a person who is, at the time of employment, an employee, consultant or advisor…" and "or has *any other* past or present business relationship with a party". The use of "any other" refers to a relationship other than that of a serving employee, consultant or advisor. The Court therefore found that the ex-Chief Secretary cannot be brought within the ambit of Item 1 since he/she is not a serving an employee, consultant, advisor (owing to retirement) and has no business relationship (since there could not be a presumed business relationship between the ex-Chief Secretary and the Respondent). Thus, merely by virtue of a past engagement, a former employee (in this case, the ex-Chief Secretary), consultant or advisor would not be barred from being an arbitrator.

Research Papers

Mergers & Acquisitions
July 11, 2025

New Age of Franchising
June 20, 2025

Life Sciences 2025
June 11, 2025

Research Articles

2025 Watchlist: Life Sciences Sector India
April 04, 2025

Re-Evaluating Press Note 3 Of 2020: Should India's Land Borders Still Define Foreign Investment Boundaries?
February 04, 2025

INDIA 2025: The Emerging Powerhouse for Private Equity and M&A Deals
January 15, 2025

Audio

CCI's Deal Value Test
February 22, 2025

Securities Market Regulator's Continued Quest Against "Unfiltered" Financial Advice
December 18, 2024

Digital Lending - Part 1 - What's New with NBFC P2Ps
November 19, 2024

NDA Connect

Connect with us at events, conferences and seminars.

NDA Hotline

Click here to view Hotline archives.

Video

Reimagining CSR: From Grant Giving to Blended Finance & Outcome Based Funding
June 16, 2025

Courts vs Bankruptcy code: The

Additionally, the court found that mere pension and post-retirement benefits would not prevent appointment of former employees as arbitrators since these benefits are not conferred as favours and the nature of relationship (extent of control etc.) considerably varies from regular employment.

Necessary disclosures were made in the given case

The Court drew the distinction between Sections 12(1)(a) and 12(5) by pointing out that the former requires disclosures to be made when there actually exist justifiable doubts as to independence and impartiality (wherein the arbitrator's appointment may be challenged under Section 12(3)), while the latter stipulates conditions which render a person ineligible to be appointed as arbitrator.

The Court found that the requirement of disclosure prescribed in Section 12(1)(a) is fulfilled even if such disclosure is only made to the nominating party and not to all parties. The disclosures to all parties, can be made upon appointment and not necessarily at the time of nomination.[7] This is in light of the fact that a nomination need not result in an appointment of an arbitrator. Furthermore, the Court found that such disclosures need not be made if the past employment is such that it does not give rise to "justifiable doubts as to independence and impartiality" as per the discretion of the arbitrator, so nominated.

In addition to the above, the Court clarified that even disclosures leading to justifiable doubts as to independence and impartiality made to parties after appointment does not render the appointment void. This is because the party aggrieved can initiate challenge proceedings, after appointment, in order to ascertain any connection between the nominee arbitrator and the contract in dispute.

Furthermore, addressing the contention that the disclosure was not made in accordance with the format contained in the VIth Schedule, the court found that an adequate disclosure was made at the time of appointment of Ms. Promilla Issar which clarified the former position of the nominated arbitrator as "Ex Chief Secretary, State of Haryana". Apart from the contention for the need of a disclosure, there was no allegation of Ms. Promilla Issar having any prejudicial relationship or interest with the party. Thus, the court opined that it could not be assumed that such a disclosure made by the party would lead to an automatic inference of "justifiable doubts as to independence and impartiality. Hence, an adequate disclosure is said to have been in this case.

Consequently, it was not mandatory to make disclosures under the format given in the VIth Schedule (which does not require any certificate in the negative that no circumstances exists which give rise to "justifiable doubts as to independence and impartiality").

Disclosure by Court Appointed Arbitrators

The Court also addressed cases of judicial appointments of arbitrators under Section 11 of the Act. The court found that in cases where, disclosures are found to be necessary prior to appointment of an arbitrator,[8] and if an order for appointment is made without seeking a disclosure, such an order can be reviewed and the concerned party can seek a *de novo* hearing of the petition under Section 11. However, upon subsequent discovery of the ineligibility of the arbitrator, such an appointment can be challenged under Section 13 or 16 (and not Section 11).

ANALYSIS

This judgment provides various clarifications in relation to the Conflicts of Interest provisions contained in the 2015 amendments. The Indian Arbitration & Conciliation Act is the only arbitration statute in the world to have adopted the lists contained in the IBA Guidelines on Conflicts of Interest in International Arbitration. However, the ambiguities in the drafting had led to several questions on the way the provisions would be implemented.

The present judgment is significant because it modifies international practice relating to disclosures. It is interesting to see that the court found that the duty of a potential arbitrator approached by a party to disclose conflicts of interest is only to the party seeking to nominate him, until actual appointment. Such an interpretation will lead to the stalling of arbitrations since parties will more often than not refuse to continue arbitration proceedings unless challenge applications are decided. Yet another unfortunate finding of this judgment is that of the arbitrator's duty to disclose a circumstance listed in the Vth schedule only if, in the discretion of the arbitrator, it leads to justifiable doubts as to his independence and impartiality. The inadequacy of information provided to the parties will also be a cause for more challenge proceedings filed as dilatory tactics.

The IBA Guidelines[9] and the recommendations of the 246th Law Commission[10] to include these Schedules were aimed at ensuring that parties need to be informed of such controversial circumstances. In relation to cases listed in the Vth Schedule, parties should be allowed to consider potential impact and may choose to waive such conflict of interest. However, in the event of conflicts listed in the VIIth Schedule, the arbitrator loses eligibility for appointment. If such a disclosure is only made post appointment, and challenge proceedings under Section 13 are the appropriate remedy, the interests of the opposite party will be adversely affected.

The question of whether an arbitral tribunal consisting of former employees of one of the parties was previously brought before the Delhi High Court in *Assignia-Vil ("Petitioner") JV v Rail Vikas Nigam Ltd.*[11] *In this case, the Delhi High Court, in a dispute where an Arbitral Tribunal was already constituted, constituted a second arbitral tribunal for subsequent disputes arising out of the same contract after 23 October 2015. The court found that a second Arbitral Tribunal was necessary because the First Arbitral Tribunal consisted of existing and retired employees of one of the parties, and would therefore "definitely give rise to justifiable doubt[s] as to his independence and impartiality." The court further found that a party is entitled to the appointment of an independent and impartial tribunal, and allowing such a situation would defeat the purpose of the 2015 Amendments.*

However, this judgment of the High Court of Punjab and Haryana approves the appointment of former employees of an organization as arbitrators. However, it is important to note that this is not a blanket finding. The Hon'ble High Court has qualified its ruling and allowed the appointment of a former employee **only** when no business relationship exists and no justifiable doubts as to his/her impartiality exist or have been raised by the party aggrieved. Therefore, while the employer-employee relationship has not been perceived as *prima facie* prejudicial, as per the approach of the Delhi High Court, it has been found that a party challenging such a tribunal would have to raise contentions in

JSW-Bhushan Saga
June 04, 2025

Vyapak Desai speaking on the danger of deepfakes | Legally Speaking with Tarun Nangia | NewsX
April 01, 2025

relation to the justifiable doubts to the independence and impartiality of such an Arbitral Tribunal which would cause the aggrieved party prejudice.

It is pertinent to note that the High Court of Punjab and Haryana has chosen to rely strictly on a textual interpretation of the statute instead of its legislative purpose. With India taking significant strides towards the strengthening of arbitration and enforcement in India, such a textual interpretation breaks away from the intention of the legislators.

With this in mind, the intention of the 2015 amendments in Section 12 read with the Vth, VIth and VIIth Schedules should be read in the interest of avoidance of conflict of interests and any kind of consequent prejudice to the arbitration, irrespective of whether the named arbitrator is a past or present employee. This has to be done with by striking an appropriate balance between party autonomy and, procedural fairness and principles of natural justice.

– Shweta Sahu, Niyati Gandhi & Vyapak Desai
You can direct your queries or comments to the authors

[1] *Indian Oil Corp. Ltd. v. Raja Transport (P) Ltd.* (2009) 8 SCC 520. The court added that the designation of the employee to be appointed as arbitrator would also be relevant for ensuring that the arbitrator does not hold a position that can be easily influenced by either party.

[2] Arbitration Case No. 166 of 2016 (O&M), decided on 27 October 2016 (High Court of Punjab and Haryana)

[3] Arbitration and Conciliation Act 1996, s 12(1)(a): "*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..."

[4] "*The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.*"

[5] Arbitration and Conciliation Act 1996, s 12(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*"

[6] "*The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.*"

[7] See Arbitration and Conciliation Act 1996, s 12(2): "*An arbitrator 'from the time of his appointment' and throughout the arbitral proceedings, shall, without delay, disclose to the parties...*"

[8] Arbitration and Conciliation Act 1996, s 11(8)

[9] 'IBA Guidelines on Con□icts of Interest in International Arbitration' (Adopted by resolution of the IBA Council on Thursday 23 October 2014) <www.ibanet.org/Document/Default.aspx?DocumentUid=e2fe5e72-eb14-4bba-b10d-d33dafee8918> accessed 29 November 2016

[10] Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996* (Law Commission Report No. 246, 2014) <http://lawcommissionofindia.nic.in/reports/Report246.pdf> accessed 10 March 2016

[11] Arb Petn No. 677/2015 (Delhi High Court)