

## LEGAL ALERT

# Government Appointed Arbitrator: Law of Bias

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It has been a common norm that Government while contracting resorts to arbitration agreements wherein Government nominated persons are majorly given the role to adjudicate as arbitrators. Inclusion of such arbitrators has been looked with an apprehension of bias in the recent past. The present article focuses on the Law of bias, highlighting the test of bias particularly in case of Government nominated arbitrators.

### Law of Bias:

The Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "1996 Act") supplants the Arbitration Act, 1940.<sup>1</sup> It is seeded on the UNCITRAL Model Law for International Commercial Arbitration<sup>2</sup>, which was drafted in 1985 after years of deliberation on a system of uniform code for harmoniously dealing with arbitration on international scale.<sup>3</sup> UNCITRAL Model Law for International Commercial Arbitration, 1985 which forms part and parcel of Part I of the 1996 Act provides for the grounds on which an arbitrator can be challenged under Article 12. It particularly stipulates independence and impartiality of arbitrator as grounds for challenging the arbitrators, besides qualification of the arbitrators as agreed to by the parties.

<sup>1</sup> See generally, Section 85, Arbitration and Conciliation Act, 1996.

<sup>2</sup> See generally, Preamble, Arbitration and Conciliation Act, 1996.

<sup>3</sup> Howard M. Holtzmann and Joseph E. Nuehaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration*, 1989.

Section 12<sup>4</sup> of the 1996 Act is a copy of the Model Law. Article 13 of the Model Law is similar to Section 13<sup>5</sup> of the 1996 Act in as much as it provides the procedure for challenging the arbitrator. Article 13 states that the Courts can intervene if the challenge to an arbitrator gets rejected by the arbitral tribunal. However, the 1996 Act does not provide any such remedy to approach the Courts in such cases. Section 13 does not empower the Court to interfere with the findings on the arbitral tribunal on its own independence and impartiality. It only prescribes recourse under section 34 of the 1996 Act after the award has been made by the tribunal.<sup>6</sup> A perusal of Section 34 of the 1996 Act provides that it is only under the consideration of public policy that an award be challenged after it is made under section 13(4).

### Test of Bias

Bias is to be adjudged from the perspective of a reasonable intelligent man and its determination can differ on case to case basis.<sup>7</sup> Catena of cases has held that there must be real likelihood of bias and not merely a suspicion of bias.<sup>8</sup> The standard of proof to prove bias is based on availability of

<sup>4</sup> See generally, Section 12, Arbitration and Conciliation Act, 1996.

<sup>5</sup> See generally, Section 13, Arbitration and Conciliation Act, 1996.

<sup>6</sup> See generally, Section 13(5), Arbitration and Conciliation Act, 1996.

<sup>7</sup> Halsbury's Law of England, 4<sup>th</sup> Edition, vol.2, p. 282, para 551.

<sup>8</sup> *Mineral Development Ltd. v. State of Bihar*, AIR 1960 SC 468.

cogent evidence.<sup>9</sup> Mere imagination of a ground cannot be an excuse for apprehending bias.<sup>10</sup> Though it is difficult to prove actual bias, if proved, actual bias would lead to an automatic disqualification. Actual bias denotes an arbitrator who allows a decision to be influenced by partiality or prejudice and thereby deprives the litigant of the fundamental right to a fair trial by an impartial tribunal.<sup>11</sup>

### Government Appointed Arbitrators: Real Likelihood of Bias

The 1996 Act casts a duty on the Courts to appoint arbitrators who are impartial and independent in their demeanour if the parties fail in the appointment of arbitrators.<sup>12</sup> Such being the case, the Apex Court has held that in appointing an arbitrator it can deviate from the mandate of the arbitration agreement.

Earlier, the Apex Court has not dithered to hold that if the named arbitrator is a government employee, it is not ipso facto a ground to raise presumption of bias.<sup>13</sup> The Apex Court in various decisions including *Union of India v. M.P. Gupta*<sup>14</sup> and *Ace Pipeline Contract v. Bharat Petroleum*<sup>15</sup> has taken the view that in contracts with a Government corporation/statutory body/Government company, 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.

<sup>9</sup> *Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant*, (2001) 1 SCC 182.

<sup>10</sup> *Ladli Construction Company Pvt. Ltd. v. Punjab Police Housing Corporation Ltd. and ors.*, (2012) 4 SCC 609.

<sup>11</sup> *Mineral Development v. Encon Builders (I)(P) Ltd.*, (2003) 7 SCC 418.

<sup>12</sup> See generally, Section 11(8), Arbitration and Conciliation Act, 1996.

<sup>13</sup> *Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd.*, (2009) 8 SCC 520.

<sup>14</sup> (2004) 10 SCC 504.

<sup>15</sup> (2007) 5 SCC 304.

Deviating from the stand taken formerly, the Apex Court in the case of *Denel Proprietary Ltd. v. Bharat Electronics Ltd. and anr.*<sup>16</sup> held where arbitrator named in the clause is Managing Director of a party, he may not be in a position to act independently and so cannot be appointed by the Courts, even if that implies deviation from the terms of the arbitration agreement. The Apex Court in this case placed reliance on para 45 of *Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd.*, wherein it was held that “ignoring the named arbitrator/arbitral tribunal and nominating an independent arbitrator shall be the exception to the rule, to be resorted for valid reasons”. This stand was again reiterated in the case of *Bipromasz Bipron Trading Sa v. Bharat Electronics Ltd.*<sup>17</sup>, wherein the Apex Court held that “Court can deviate from agreed procedure where there is reasonable apprehension of bias”.

The legal position discussed above was again reiterated in the case of *Denel Proprietary Ltd. v. Govt. of India, Ministry of Defence*<sup>18</sup>, wherein the Apex Court again sat to adjudicate on the issue that whether the appointment of Government nominated arbitrator leads to apprehension of bias. The Apex Court held that “it is true that in normal circumstances while exercising jurisdiction under Section 11(6), the Court would adhere to the terms of the agreement as closely as possible. But if the circumstances warrant, the Chief Justice or the nominee of the Chief Justice is not debarred from appointing an independent arbitrator other than the named arbitrator”. The Apex Court, thereafter, appointed an independent arbitrator by holding that “I have examined the facts pleaded in this case. I am of the opinion that in the peculiar facts and circumstances of this case, it would be necessary and advisable to

<sup>16</sup> (2010) 6 SCC 394 (This case was fought by Rajani, Singhanian and Partners).

<sup>17</sup> (2012) 6 SCC 384.

<sup>18</sup> (2012) 2 SCC 759 (This case was fought by Rajani, Singhanian and Partners).

appoint an independent arbitrator. In this case, the contract is with Ministry of Defence. The arbitrator Mr. Satyanarayana has been nominated by DGOF, who is bound to accept the directions issued by the Union of India. Mr. Satyanarayana is an employee within the same organization. The attitude of the Respondents towards the proceeding is not indicative of an impartial approach. In fact, the mandate of the earlier arbitrator was terminated on the material produced before the Court, which indicated that the arbitrator was biased in favour of the Union of India. In the present case also, Mr. Naphade has made a reference to various notices issued by the arbitrator, none of which were received by the Petitioner within time. Therefore, the Petitioner was effectively denied the opportunity to present his case before the Sole Arbitrator. Therefore, the apprehensions of the Petitioner can not be said to be without any basis”.

Taking a note on the aspect that majorly government contracts provide for selection of an arbitrator from amongst the employees, the Apex Court in the case of *Union of India v. M/S Singh Builders Syndicate*,<sup>19</sup> advised that the government and statutory bodies should try to phase out arbitration clauses which name employees as arbitrators.

### **Conclusion:**

It is evident from the case laws that Government nominated arbitrators in Government contracts are seen with an apprehension of bias. Therefore, the Court has rightly objected to their appointment so that the dispensation of justice in the arbitration process can become a reality. In two such cases, where our firm was representing a foreign supplier, we got an independent arbitrator appointed from the Supreme Court on the ground that Government nominated arbitrators may not be in a position to act

independently and so cannot be appointed by the Courts, even if that implies deviation from the terms of the arbitration agreement. The cases dealt by our firm have paved the way for mooted amendments in the Arbitration and Conciliation Act, 1996. In fact, in the proposed amendments to the Arbitration and Conciliation Act, 1996, the Law Commission while appreciating the stance taken by Courts has observed that “The concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent adjudicators for resolution of disputes. In fact, when the party appointing an adjudicator is the State, the duty to appoint an impartial and independent adjudicator is that much more onerous – and the right to natural justice cannot be said to have been waived only on the basis of a “prior” agreement between the parties at the time of the contract and before arising of the disputes”.



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<sup>19</sup> (2009) 4 SCC 523.