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A TAKE ON THE GROWING CHALLENGE OF REPEAT APPOINTMENTS OF ARBITRATORS

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Abstract

In recent times, the face of adjudication in commercial disputes has changed with the introduction of alternative modes of dispute resolution. Arbitration has become favorable to businesses owing to its timely disposal of matters and various other benefits. An arbitrator is held in the same pedestal with a judge. Therefore, this paper attempts to ignite a serious discussion on conflict of interest issues that usually arise in an arbitration proceeding. Undoubtedly, the appointment of arbitrator plays a pivotal role in order to safeguard the integrity of the proceedings. The paper focuses majorly upon the practice of repeat appointments of the arbitrator. The paper analyses the provisions of domestic as well as the international standards which sets forth parameters to objectively identify the bias or prejudice, which an arbitrator may carry with him in specific matters. With this premise, the significant issue raised in the paper is the effectiveness of these legal remedies. Have they become merely a matter of procedural formality or are followed in true letter and spirit? In this regard, the author has analysed a recent judgment of the Bombay High Court to draw a comparison from other jurisdictions. The paper also discusses the feasibility of disclosures done by the arbitrators in the current Indian practices. It is clearly outlined that the disclosure norms are on the verge of becoming mere redundant formalities, if serious steps are not taken. The duty of the arbitrator to stand above prejudice cannot be emphasized enough to maintain the sanctity of an arbitration proceeding. In this paper, procedural as well as substantive changes in the current Indian legal framework is

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recommended with a special emphasis supplied to observe adherence to the international standards.

I. INTRODUCTION

The Cour de Cassation, France, in a judgement long back in 1972, *Consorty Ury* v. *S. A. Das Galeries Lafayette*[1], complacently stated,

"*an independent mind is indispensable in the exercise of the judicial power, whatever the source of that power may be, and it is one of the essential qualities of an arbitrator*"

Quoting this premise in the judgement of *Voestalpine Schienen GmbH* v. *DMRC Limited*[2] (*"**Voestalpine Schienen**"),* the Hon'ble Supreme Court of India, observed that "*20. The independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings and the rule against bias is one of the fundamental principles of natural justice which applies to all judicial and quasi-judicial proceedings……Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties…*"

It may be noted that the terms "independence" and "impartiality" though used inter-changeably, are not synonyms. The Court in Voestalpine Schienen case went on to discuss the distinction between independence and impartiality. It says that "*22. Independence and impartiality are two different concepts. An arbitrator may be independent and yet, lack impartiality, or vice versa. Impartiality, as is well accepted, is a more subjective concept as compared to independence. Independence, which is more an objective concept, may, thus, be more straightforwardly ascertained by the parties at the outset of the arbitration proceedings in light of the circumstances disclosed by the arbitrator, while partially will more likely surface during the arbitration proceedings.*"

[1] 13-4-1972, JCP, Pt. II, No. 17189 (1972).
[2] (2017) 4 SCC 665.

However, a paradigm shift from hallmarking the significance of independence and impartiality of arbitrators can be seen in recent years, where recently in the case of HRD Corporation v. GAIL India Limited[3] *("**HRD Corporation**")*, the Hon'ble Supreme Court, ironically, dismissed an appeal which challenged the appointment of an arbitrator. The Apex Court observed that merely because the arbitrator gave a legal opinion in one instance to one of the parties, in a different subject matter , will not make him ineligible from appointment under the Arbitration and Conciliation Act, 1996 ("**Arbitration Act/the Act**") as amended by the Arbitration and Conciliation (Amendment) Act, 2015 ("**Amendment Act**").

The court also noted the difference between the Fifth and Seventh Schedules to the Act which, were freshly introduced under the Amendment Act, which was substantially influenced by International Bar Association Guidelines on Conflicts of Interest in International Arbitration, 2014 ("**IBA Guidelines**").[4] The apex court observed that vide the Amendment Act, a *dichotomy* is made between the persons who become "ineligible" under Seventh Schedule of the Arbitration Act, to be appointed as arbitrators and on the other hand, persons about whom justifiable doubts exist as to their independence or impartiality under the grounds stated in the Fifth Schedule of the Act. More significant distinction between the two Schedules lies in the fact that in case of ineligibility under Seventh Schedule, an application can be filed under Section 14(2) of the Act to the courts to decide on the termination of arbitrators' mandate and as opposed to this, when the grounds stated in the Fifth Schedule is disclosed, such doubts of impartiality have to be determined by the Arbitral Tribunal under Section 13 of the Act. Indeed, *HRD Corporation* confirms that it is not a cake walk to prove a judge's lack of impartiality and

[3] (2018) 12 SCC 471.
[4] *See* ¶23 *supra* note 2; ¶ 14 *supra* note 3.

independence. However, it declared the fact that India stands ready and open to adapting international standards in arbitration proceedings, whether domestic or otherwise.

Bias is the conspicuous ultimate caprice that humans by nature possess. Eventually, this bias creeps into our decision-making and conduct. It is critical to the integrity of any adjudication mechanism that the adjudicator is both impartial and seen to be impartial. No relaxation can be afforded in an arbitration process as well. Arbitrators must stand above such propensity in order to preserve the parties' faith in them. Owing to its necessity and significance in an adjudication mechanism, there are certain legal requirements prescribed in national statutes across the globe to make the system of adjudication more transparent and believable for the general public. Further, the UNCITRAL Model Law on International Commercial Arbitration ["**UNCITRAL Arbitration Model Law**"] has determined impartiality and independence as fundamental criterion to challenge the appointment of an arbitrator.[5] For any arbitration process, the impartiality and independence is a cardinal necessity recognized in almost all jurisdictions. That said, can an arbitrator truly be independent and impartial when she has been re-appointed by one of the parties?

Some critics have argued that arbitrators usually favor their appointing party in a self-interest effort to increase the likelihood of future appointments.[6] This matter needs more attention and sensitivity around international as well as domestic arbitrations. Highest ethical standards must be attached to the conduct of arbitrators from the stage of appointment to the passing of an arbitral award. The failure to fully understand and address the

[5] *See*, Article 12, Grounds for challenge, Chapter III- Composition of Arbitral Tribunal, UNCITRAL Model Law on International Commercial Arbitration, UN document A/40/17, annex I).

[6] Catherine Rogers, *The Politics of International Investment Arbitration,* 12 Santa Clara J. Int'l L 223, 226 (2014).

issue of repeat appointments may be owing to various reasons. There may be less research and discussion about the same, or because the practice has become so widespread that it is latently going unnoticed without anyone paying heed towards it. The mandate of making disclosures may be faulty and have merely become a routine process. Another factor may simply be that the appointments are going unreported/falsely reported, hence circumventing the law.

It is also worth noting here that the theory of party autonomy has acquired much acceptance vide the UNCITRAL Arbitration Model Law and even the Indian Arbitration Act has inherently granted flexibility of party autonomy. The Indian judiciary has also time and again reiterated the validity of this theory as discussed in the *Bharat Aluminium Co. (BALCO)* v. *Kaiser Aluminimum Technical Service Inc.,*[7] wherein the parties were free to decide the neutral place of arbitration and the courts at such places would have supervisory jurisdiction over the arbitration. More recently, the apex court in the case of *BGS SGS SOMA JV* v. *NHPC*[8] has put much emphasis on the intention of the parties when designating the venue of arbitration, which shall mean to depict the "seat" of arbitration, unless expressed contrary. Therefore, the component of party autonomy is omnipresent in every aspect of arbitration but where should a line be drawn to maintain the sanctity of the arbitration proceedings. It attracts importance and discussion, when the theory of part autonomy questions the fundamental premise of conducting impartial and independent arbitration when parties take unto their peril to appoint as arbitrator, whosoever they wish. Can the law be permitted to be made too permissive so as to allow the parties to evade the fundamental principles and make appointments at their whims and fancies.

[7] (2012) 9 SCC 552.
[8] Civil Appeal 9307/9308/9309 of 2019.

II. What is Repeat Appointment?

In loose terms, repeat appointment may simply mean appointment of one arbitrator in multiple arbitration processes. But if we dig deeper into the possible definition of repeat appointments for our purpose here, it can be divided into two categories. First, the appointment of an arbitrator repeatedly by the same party or counsel in multiple matters irrespective of the subject matter. And second, the appointment of an arbitrator for a subject matter on which she has previously given a legal opinion on or adjudicated either with the involvement of the same parties or other parties. For the second classification, a subdivision is where the arbitrator has previously given an award/opinion to the same appointing party or another party.

There may be more possible categories of repeat appointments coming into knowledge when an in-depth research is undertaken by analyzing and witnessing practical instances.

III. IBA Guidelines on Repeat Appointments:

IBA Guidelines[9] was adopted by the resolution of IBA Council on 23rd October 2014. The IBA Guidelines have gained wide acceptance within the international arbitration community. As per the Report on the reception of the IBA Arbitration Soft Law Products[10], arbitrators commonly use the IBA Guidelines when making decisions about prospective appointments and disclosures. Likewise, parties and their counsel frequently consider the Guidelines in assessing the impartiality and independence of arbitrators. Arbitral institutions and courts also often consult the IBA Guidelines in considering challenges to

[9] See IBA Guidelines on Conflict of interest in International Arbitration 2014, ISBN: 978-0-948711-36-7.

[10] Report on the reception of the IBA arbitration soft law products dated September 2016, IBA Arbitration Guidelines and Rules Subcommittee, International Bar Association.

arbitrators.[11] That said, in the absence of a specific reference, the IBA Guidelines are not binding in the course of appointing or challenging arbitrators. The IBA Guidelines do not bind the court, but they can be of assistance and it is valuable and appropriate to examine them least as a check.[12] It supplies a guiding hand to the stakeholders involved in the arbitration and though not authoritative, is taken seriously in the arbitration arena. In India, the 246th Law Commission Report[13] ["**Commission**"] proposed incorporation of the Fifth Schedule which draws its color from the IBA Guidelines to determine circumstances raising justifiable doubts about the impartiality or independence of the arbitrator.

The Supreme Court of Colombia in the case of *Tampico Beverages Inc.* v. *Productos Naturales de la Sabana S. A. Alqueria*[14] turned an eye towards the IBA Guidelines when it was served with the question wherein the arbitrator failed to disclose that he/she had served as counsel in a case where the current counsel engaged by the party was the arbitrator. The Colombian Supreme Court acknowledged that this instance does violate the domestic law of Colombia but as per international public policy represented by the IBA Guidelines, such non-disclosure does not demonstrate lack of independence or impartiality on the part of the arbitrator.

The IBA Guidelines have categorized 3 lists[15] viz., Orange, Green and Red List which is further classified as waivable Red List and

[11] Margaret Moses, The Role of the IBA Guidelines on Conflicts of Interest in Arbitrator Challenges, Kluwer Arbitration Blog, (Oct. 7, 2019, 4:05 PM), available at http://arbitrationblog.kluwerarbitration.com/2017/11/23/role-iba-guidelines-conflicts-interest-arbitrator-challenges/.
[12] W Ltd. v. M SDN BHD, (2016) EWHC 422 (Comm).
[13] D.O. No.6(3)238/2012-LC(LS) dated 5th August 2014, Law Commission of India, Report No. 246, Amendments to the Arbitration and Conciliation Act, 1996, Government of India.
[14] SC9909-2017: Case No – 11001-02-03-000-2014-01927-00.
[15] *See* also Part II: Practical Application of the General Standards Red List, Orange List and Green List of the IBA Guidelines on Conflict of interest in International Arbitration 2014, ISBN: 978-0-948711-36-7.

non-waivable Red List [collectively referred to as "**the Lists"**] to address situations that may create justifiable doubts or conflict in respect of a prospective arbitrator. The Lists are designed and given color as per their seriousness and disclosure requirements. The Lists are meant to be non-exhaustive; mainly because one cannot devise an objective and straight-jacketed formula to cover all possible situations where an arbitrator may be conflicted.

The Red List consists of waivable and non-waivable components. The non-waivable Red List details specific situations which may give rise to justifiable doubts as to the arbitrator's impartiality and independence. The non-waivable Red List is influenced by the common law principle of *Nemo judex in causa sua* and is based on the close relationship or association of the arbitrator with the parties and institutions involved, the counsel of the subject matter of the arbitration proceedings. If circumstances envisaged under the non-waivable Red List exist, any waiver by a party or any agreement to have such a person serve as an arbitrator, shall be regarded as invalid.[16] The test put forth is an objective one from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances.[17] The waivable Red List, as the name suggests, can be waived by the parties by expressly stating their willingness to appoint that person despite the existence of a conflict. This list covers situations that are serious but not that severe. Hence, the parties are given choice to make the best decision for their matter. Here, the party autonomy and the desire to have only impartial and independent arbitrators must be balanced. Persons with a serious conflict of interest as identified in the waivable Red List may serve as arbitrators only if

[16] Part – I: General Standards Regarding Impartiality, Independence and Disclosure, IBA Guidelines, ¶ 4(b).
[17] Explanation (b) to General Standard (2) Conflicts of interest, Part – I: General Standards Regarding Impartiality, Independence and Disclosure, IBA Guidelines.

the parties make fully informed and explicit waivers.[18] The Green List on the other hand, lists down situations where no conflict of interest will exist from an objective point of view, hence there are no disclosure requirements to be met by the arbitrator.

The List for authors' purpose of discussion in this paper is the Orange List. The Orange list specifies situations which may give rise to justifiable doubts about the impartiality or independence of the arbitrator and as a consequence, the arbitrator is obliged to disclose such situations. Clause 3.1.3 reads as follows:

"The arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties."

An exception is where it may be a practice or custom to appoint arbitrators from a specialized pool of arbitrators like in matters of maritime, sports or commodities arbitration, no disclosure of the fact that the arbitrator in the past 3 years has been appointed as arbitrator on two or more such occasions by one of parties, is needed.[19] The reason for such exception may be because some areas of law are so intricate and technical that not every person will be able to come to an informed decision and hence an experienced person in that regard will be best suited. This exception is significant, but a check must be kept for minimizing abuse. Will any or all matters may be considered technical even if they are remotely technical? Will matters of cheque bouncing or debt recovery also be deemed to require a specialized pool of arbitrators? Where does this end? We shall see an answer for it in the discussion below.

IV. Position in India

[18] Explanation (c) to General Standard (4) Waiver by the Parties, Part – I: General Standards Regarding Impartiality, Independence and Disclosure, IBA Guidelines.

[19] *See* ¶ 3.1.3, IBA Guidelines on Conflict of interest in International Arbitration 2014, ISBN: 978-0-948711-36-7.

The Arbitration Act, as amended in 2016, has substantially incorporated the recommendations made by the Commission. The Commission recommended that arbitrators be required to make prior disclosures of all possible conflicts which may prejudice the underlying arbitration. The Commission also recommend that the Fifth Schedule will serve as a "guide" to determine the existence of any justifiable doubts about the independence and impartiality of the proposed arbitrator Further, in regard to the Seventh Schedule, the proposed arbitrator shall become "ineligible" and *de jure* be deemed to be unable to perform he functions of an arbitrator. The Commission's recommendation of the Fifth and Seventh Schedules are almost entirely inspired from the IBA Guidelines.[20]Most of the recommendations given by the Commission were welcomed and put into force by way of the Amendments.

On specific issues of repeat appointment of arbitrators in various forms and manner, be it on the subject-matter or parties involved, Indian courts have given various judicial pronouncements which are discussed below. Prior to the 2015 Amendments, in *BSNL* v. *Motorola India Private Limited*[21], the Apex Court observed that the officer of the Appellants (CGM, Kerela circle) had already taken a decision that the appellants were right in imposing the liquidated damages upon the respondent (the very issue in dispute). Therefore, such officers, cannot become an arbitrator in the present case as it would not satisfy the test of impartiality and independence as required under Section 12.

In one instance[22], where one of the parties went on to appoint the arbitrator as consultant in his organization, the Supreme Court

[20] *See* ¶ 59 and Note to the Amendment of Section 12, Chapter – III D.O. No.6(3)238/2012-LC(LS) dated 5th August 2014, Law Commission of India, Report No. 246, Amendments to the Arbitration and Conciliation Act, 1996, Government of India.
[21] (2009) 2 SCC 337.
[22] V. K. Dewan & Co. v. Delhi Jal Board (2010) 15 SCC 717.

held that the appellant had reasonable grounds for entertaining a feeling that the arbitrator might be biased against it whether true or not in fact.

Pursuant to the Amendments, Section 12 of the Act makes it mandatory for every proposed arbitrator to make disclosures in accordance with the Sixth Schedule the existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts about his independence or impartiality. Disclosure does not imply the existence of a conflict of interest; nor should it by itself result either in a disqualification of the arbitrator, or in a presumption regarding disqualification.[23] The purpose of the disclosure is to inform the parties of a situation that they may wish to explore further in order to determine whether objectively – that is, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances – there are justifiable doubts as to the arbitrator's impartiality or independence. If the conclusion is that there are no justifiable doubts, the arbitrator can act.[24]

A. DISCLOSURE REQUIREMENT

The disclosure requirement as per Sixth Schedule of the Act requires the arbitrator to disclose the following details:

(a) Name

(b) Contact details

(c) Prior experience (including experience with arbitrations)

(d) Number of ongoing arbitrations

(e) Circumstances disclosing any past or present relationship with or interest in any of the parties or in relation to the subject-matter in

[23] Sociedad General de Aguas de Barcelona S. A. v. Argentina, ICISID Case No. ARB/03/17.

[24] Part II: Practical Application of the General Standards; Para 4, IBA Guidelines on Conflict of interest in International Arbitration 2014, ISBN: 978-0-948711-36-7.

dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to your independence or impartiality (list out)

(f) Circumstances which are likely to affect your ability to devote sufficient time to the arbitration and in particular your ability to finish the entire arbitration within twelve months (list out)

Under Section 12(1) of the Act, the appointed arbitrator must disclose, in writing, to the parties, the particulars and details of the existence of any relation/interest in any party or in relation to the subject matter in dispute, which are likely to give rise to justifiable doubts as to his independence or impartiality and is likely to affect his ability to devote sufficient time and complete the arbitration within the prescribed time.[25]

Section 12(2) imposes a continuous obligation of disclosure on the arbitrator as and when circumstances demand. Section 12(3) enumerates the conditions upon which an arbitrator may be challenged.[26] Section 12(4) states that a party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made. Lastly, Section 12(5) provides for 'ineligibility' in appointment when a proposed arbitrator shares a relationship, with the parties or counsel or the subject matter of the dispute, falling within the Seventh Schedule. But the proviso to Section 12(5) states that the parties may, subsequent to the disputes having arisen between them, waive the applicability of Section 12(5) by an express agreement in writing.

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[25] Arbitration and Conciliation Act, 1996, Section 12(1)(b) specifies "12 (Twelve) months".

[26] Arbitration and Conciliation Act, 1996, Section 12(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

The apex court in the HRD Corporation case, has observed that "*11. Under Section 12, it is clear that when a person is approached in connection with his possible appointment as an arbitrator, he has to make a disclosure in writing, in which he must state the existence of any direct or indirect present or past relationship or interest in any of the parties or in relation to the subject-matter in dispute, which is likely to give justifiable doubts as to disclose whether he can devote sufficient time to the arbitration, in particular be able to complete the entire arbitration within a period of 12 months. Such disclosure is to be made in a form specified in the Fifth Schedule being a guide in determining whether such circumstances exist…*"

The Fifth Schedule enumerates certain relationships, the existence of which may give rise to justifiable doubts as to the independence and impartiality of an arbitrator. The scope and difference between the Fifth and Seventh Schedules were precisely demarcated by the Supreme Court in *HRD Corporation*.[27] The apex court observed that vide Section 12(5) read with the Seventh Schedule of the Act, if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes "ineligible" to act as arbitrator. The proposed arbitrator become ineligible to proceed further therefore an application may be filed under Section 14(2) to the Court to decide on the termination of the arbitrator's mandate. On the other hand, if the challenge to the appointment of an arbitrator is based on the ground(s) specified under Fifth Schedule of the Act, such doubts as to the independence or impartiality have to be determined as a matter of fact in the facts if the particular challenge by the Arbitral Tribunal under Section 13 of the Act. If the arbitral tribunal decides that there are no justifiable doubts as to the independence or impartiality of the arbitrator, the arbitral tribunal shall continue with the proceedings and make an award. It is only after the award is made that the party may make an application to set aside the award under Section 34 of the Act.

[27] (2018) 12 SCC 471.

The issue of repeat appointments of the arbitrators has also been dealt with in the Fifth Schedule. The Fifth Schedule lists 34 grounds which may raise justifiable doubts about the independence and impartiality of the arbitrator. In particular, Entry 22 covers an "*arbitrator [who] has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.*".

B. RECENT JUDGMENTS AFTER *HRD CORPORATION*

In *Sawarmal Gadodia* v. *Tata Capital Financial Services Limited,*[28] the Bombay High Court was required to decide a challenge to five awards passed by the sole arbitrator who was appointed by the Respondent. The High Court found that the aforesaid sole arbitrator had been previously appointed as an arbitrator in 252 matters where the Respondent was a party. The High Court also found that the Respondent has time and again appointed same arbitrators in more than 100 matters and up to 2278 matters.[29] While the Respondent had been paying the Arbitrator a fixed fee of Rs. 1000/- for each arbitration through its advocates, the Petitioner was directed in the impugned awards to an amount of Rs. 5000/- towards arbitrator's fees.

The High Court stated that the disclosure filed by the arbitrator under Section 12 of the Act was incorrectly done by hiding the true numbers and stating that he was part of only 'approximately 8' ongoing arbitration proceedings. The court very literally applied the provision under Section 12 along with the grounds specified in the Fifth Schedule in determining whether the circumstances exist, which gives rise to justifiable doubts about the independence or impartiality of the arbitrator.

[28] 2019 (4) ABR 652.
[29] *Ibid,*¶ 6.7.

Relying on entry 22 from the Fifth Schedule, the High Court observed[30] as follows:

"*It is therefore clear beyond any doubt, that if an arbitrator has been appointed within the past three years as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties, he is bound to disclose this fact in his disclosure, because the same constitutes a ground giving rise to justifiable doubts as to the independence or impartiality of the arbitrator*".

The Respondent attempted to direct the High Court's attention to Explanation 3 to the Fifth Schedule, which reads as follows:

Explanation 3. — For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialised pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the rules set out above.

The arbitrator too, had sought to shelter himself under the explanation above. He stated in his disclosure under the head "*prior experience (including experience with arbitrations)"* that "*Due to the nature of the claims/disputes and most of the matters are conducted ex-parte due to absence of Respondent/s. Therefore, it is the common practice amongst the banks and financial institutions to draw arbitrators from a specialized pool." (emphasis supplied)* The High Court rightly pointed out that the matter in hand was not of such nature which necessitates drawing of arbitrators from specialized pool. In fact, the matter is of a simple dispute of loan default.

In light of the above findings and observations, the High Court concluded that the irregularities in the disclosure was not acceptable. Every proposed arbitrator is supposed to specify in the disclosure the exact number of the ongoing arbitrations before him, and not an 'approximate number'. An arbitrator is bound to make the necessary disclosure in the event of him

[30] *Ibid,* ¶ 7.

having been appointed as an arbitrator on two or more occasions by one of the parties, within the past three years. The High Court did not pass any adverse directions against the guilty since the Respondent provided an undertaking on affidavit to ensure that such appointments are not repeated by the Respondent.

The High Court's judgement in *Sawarlal* will far reaching ramifications on an array of disputes where respondents have adopted the practice of re-appointing the same arbitrator(s). Such practices are more prevalent in sectors which face a very high volume of recurrent disputes, such as financing transaction. The High Court has rightly emphasized on the continuous duty of the arbitrators to disclose any potential information which may jeopardize the arbitration.

That said, it is worrisome that the Arbitration Act remains completely silent on the implications, penal or otherwise, where a party or arbitrator are in such gross breach of their respective duties and obligations under the Arbitration Act. The Act does not prescribe any specific interlocutory remedy against a biased arbitrator during the course of the proceedings and the parties have to wait till the award is passed. However, the judgement did rightly stress upon the arbitrator's duty of disclosure which has to be done in a true, precise and strict fashion. It should not be taken as a mere procedural hassle to be done casually. The information given in the disclosure substantiates that the arbitration proceedings will not be biased, which enables the parties to rightly determine if any justifiable doubts of impartiality exist against the arbitration tribunal.

The whole fundamental premise of the arbitration rests upon an unbiased and impartial arbitrator. These duties protect the legitimacy of the arbitration tribunal and ultimately the arbitration award. Conversely, if ethical standards are not taken with due magnitude the whole system will collapse and lose its essence and credibility.

Slowly and steadily the arbitral mode of dispute settlement is making an entry into the Indian adjudication system, and practices like this will in no time make it redundant and corrupt. It's not anyway implied that such problems and misuse exists in India only, but are indeed prevalent in other jurisdictions. This is one of the reasons why the IBA Guidelines provides a list of instances which may possibly be referred to determine the position of arbitrator in an international arbitration.

V. Position in other jurisdictions

The IBA Guidelines have been taken in high regard in various other jurisdictions as well. (unnecessary). In *Cofely Ltd. V. Anthony Bingham and Knowles*[31], one Mr. Bingham was appointed as a sole arbitrator in a commercial dispute. It appears that one of the parties to the arbitration had been appointing him repeatedly in several such matters. The counterparty, Cofely Limited, sought removal of the arbitrator pursuant to section 24(1)(a) of the UK Arbitration Act, 1996 which reads as follows:

*"**Section 21. Power of court to remove arbitrator.***

(1) A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds:

(a) that circumstances exist that give rise to justifiable doubts as to his impartiality;

…"

(Emphasis Supplied)

[31] (2016) EWHC 240 (Comm).

The counterparty also relied on Entries 3.1.3[32] and 3.1.5[33] of the Orange list of the Guidelines. The United Kingdom High Court of Justice court did not hesitate to borrow from the IBA Guidelines in order to discuss the eligibility of the arbitrator. It was also put on record that 25% of the arbitrator's income over the past three years was derived from cases involving the appointing party. Further, it was also submitted that the appointing party has been influencing appointments by putting across the lists of potential appointees or blacklisted appointees. The court took note of the figures put forth wherein it was shown that over the last three years 18% of the arbitrator's appointments and 25% of his income is derived from cases involving the appointing party and further the blacklisting of arbitrators is also a matter of significance because the arbitrator's conduct may lead him to fall out of favour and be placed on the blacklist and that shall be important for anyone whose appointments and income are dependent on such appointing party. Therefore, the court held that the arbitrator shall be removed on grounds of existence of apparent bias.

But contrary stands have been taken in some later judgements. In the case of *Halliburton Company v. Chubb Bermuda Insurance Ltd.*[34], wherein an arbitrator was appointed for deciding the issue on fire insurance liability claim in relation to BP Oil Spill in the Gulf of Mexico on 20th April 2010. The arbitrator disclosed that he had been previously appointed by one of the parties (Chubb) involved in the arbitration. Meanwhile, Chubb appointed him as an arbitrator in other arbitration matter involving insurance liability claim. This fact was not disclosed to Halliburton and when the same came to the knowledge of Halliburton, they reminded the

[32] The arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties.
[33] The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration involving one of the parties, or an affiliate of one of the parties.
[34] (2018) EWCA Civ 817.

arbitrator of his continuing obligation of disclosure. To this, the arbitrator stated that the said duty did not occur to him at the time of the appointment. The UK Court of Appeal referred to the IBA Guidelines for repeated appointments and put emphasis on the significance of making disclosures of facts and circumstances, which would lead a fair-minded and informed observer aware of the facts, to conclude that there was a real possibility of biasness, but went on to hold that the non-disclosure was mere "innocent oversight"[35] and if such non-disclosed facts does not give rise to justifiable doubts as to the arbitrator's impartiality cannot justify an inference of apparent bias. However, the arbitrator in the present case could have disclosed the appointments, as a matter of good practice. The court observed that mere fact that an arbitrator accepts overlapping appointments concerning the same subject matter involving a common party does not in itself give rise to an appearance of bias.

It is evident that IBA Guidelines has earned its place in International Commercial Arbitration. However, a question may be raised on two distinct judicial approach that is being taken by the courts. The first approach places heavy reliance on the Guidelines but on the other hand, it is merely used as a guide, a point of reference and a means of simply reinforcing judicial reasoning.

In the case of *Universal Compression* v. *Bolivarian Republic of Venezuela*[36], the tribunal rejected the challenge based on repeat appointment by the same party or law firm, noting that there were no objective facts to suggest that her independence or impartiality would be manifestly impacted by the multiple appointments. The tribunal went on to say that her appointment to more than 20 cases indicate that she is not dependent economically or otherwise upon the respondents for her appointments in these cases. Does

[35] (2018) EWCA Civ 817 ¶ 91.
[36] ICSID Case No ARB/10/09 dated 20th May 2011.

this case show that if an arbitrator has become dependent upon appointment by his appointer, an arbitrator's ability to judge independently can be questioned? In the case of *OPIC Karimum Corporation v. Bolivarian Republic of Venezuela*[37] ["***OPIC Corporation***"], the court while deciding on the claim of financial dependence of the arbitrator upon the appointing party, observed that the arbitrator in question had independent income sources unrelated to the fees derived from his appointment in the arbitration in question. The party should have established such dependence by adducing significant and cogent evidence to substantiate the arbitrator's dependence on the income earned from the present arbitration. It can be safely inferred here that a complete financial dependability may certainly raise serious doubts about the ability of the arbitrator to act impartial and the same can be a relevant factor to be considered while judging his disability. Financial connectivity should be precisely balanced by the courts when deciding the challenge to any appointment of an arbitrator. For decision-makers cannot be impartial if they stand to gain from the very decision taken by them.[38]

It is interesting to note that the courts have given opposing views in relation to the multiple appointment of arbitrator. In this regard, the case of *Tidewater Inc. v. Bolivarian Republic of Venezuela*[39] ["**Tidewater Inc.**"] can be discussed. In Tidewater Inc., the challenge to the arbitrator's appointment was made based on the ground of multiple appointment of the arbitrator by the same party. The arbitrators in Tidewater Inc. observed that multiple appointments as arbitrator by the same party in unrelated cases are a neutral factor in considerations relevant to a challenge. On the other hand, the arbitrators in the case of OPIC Corporation while dealing with the similar issue of multiple appointment of

[37] ICSID Case No ARB/10/14 dated 5th May 2011.
[38] See City of Tshwane Metropolitan Municipality vs. Link Africa (Pty) Ltd and others, (2015) ZACC 29, ¶71.
[39] ICSID Case No ARB/10/5 dated 23rd December 2010

arbitrator, dismissed the view of the Tidewater Inc. and observed that "*47….multiple appointments as arbitrator by a party or its counsel constitute a consideration that must be carefully considered in the context of a challenge…..multiple appointments of an arbitrator are an objective indication of the view of the [arties and their counsel that the outcome of the dispute is more likely to be successful with the multiple appointee as a member of the tribunal than would otherwise be the case.*", and went on to rule that multiple appointments of an arbitrator by a party or its counsel is a factor which may lead to the conclusion that it is manifest that the arbitrator cannot be relied upon to exercise independent judgement.

The above quoted judgements indicate that there exist multiple views in different jurisdictions when dealing with the question of repeat appointments of arbitrator. However, the fact of existence of financial connectivity cannot be ignored without merit, as observed by Flaux J in the case of A v. B[40] that the fact that an arbitrator is regularly appointed or nominated by the same party/legal representative may be relevant to the issue of apparent bias, particularly if it raises questions of material financial dependence. With growing global commercialization, there is an urgent need to streamline these varied opinions and bring them into parity with international standards and especially in the matters of international commercial arbitration. As already stated, the use of the IBA Guidelines to decide these issues can go a long way in coming to a consensus.

VI. Recommendations

In light of the above discussion, for the purpose of disclosers and declarations made in form prescribed under Sixth Schedule of the Act, it can be argued that the requirements under Sixth Schedule are inadequate and unclear. The disclosure of prior experience should undoubtedly cover the overall experience of the arbitrator.

[40] *See* (2011) 2 Lloyds Rep 591, ¶ 62.

There seems to be no problem with this clause. Further, the next clause (d) covers the number of ongoing arbitrations, which shall mean to cover all the arbitration matters that the arbitrator is involved in as on date. The use of words like "approximately", "around" and similar should be strictly avoided. This disclosure could have been more specific by giving an exact figure of ongoing matters with the same parties and a figure of ongoing matters with other parties/matters because such declaration will determine the dependency of an arbitrator upon any of the party. This can be viewed from another perspective as well, say, if the proposed arbitrator is not much involved with any other arbitration at the time of appointment, or say is practically without any work in hand, he/she may give favorable judgements to land more matters with the existing party and keep the engine running.

The next clause (e) is the crucial one, this is where the arbitrator is obliged to disclose of any past or present engagement or involvement with 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/her independence or impartiality. These engagements may be of varied nature and degree. This is where the test of objectivity wherein the analysis shall be made from a fair-minded and informed observer approach and the same shall be applied and accordingly the declarations should be made.

The nature of involvement for our purpose here may be classified into two categories,

(i) Based on subject matter; and

(ii) Based on relation to the party or counsel of the party or the appointing Institution involved.

A. SUBJECT MATTER

This may give rise to various events of an arbitrators' involvement such as a previous opinion disseminated/published on the

subject-matter, a previous order/ruling, a legal opinion given on the matter and so on and so forth. This however will depend on facts and circumstances of individual cases. In the case of *Urbaser SA* v. *The Argentine Republic*[41], the challenge to the appointment of the appointed arbitrator was made on the ground that the arbitrator's publications as a legal scholar on two questions were relevant to the arbitration and therefore vide the opinions expressed in the said publications, the arbitrator had prejudged the essential element of the conflict. Dismissing the claim of the Argentina Republic, the arbitral members held that that scholarly opinions expressed by the arbitrator in his publications will not hamper the ability of the arbitrator to take full account of the facts, circumstances and arguments presented by the parties in the present proceedings and accordingly decide the matter. It was further observed that if this challenge be accepted that nearly all arbitrators who have ever expressed an opinion on an item specific to certain issue would be at risk of a challenge which ultimately may paralyze the whole process.

On a contrasting note, in the case of *Perenco Ecuador Limited* v. *Republic of Ecuador and Petroecuador*[42], wherein the challenge was made on the ground of opinions expressed in an interview by the arbitrator, the Permanent Court of Arbitration observed that from the point of view of a reasonable third person having knowledge of the relevant facts, the comments made by the arbitrator in an interview constitute circumstances that give rise to justifiable doubts as to the arbitrator's impartiality or independence, even though he has not prejudged the issue.

Therefore, what follows from the above discussion is clear, that there is no set legal position identified or a straight-jacket formula adopted by courts in various jurisdictions to determine the connectivity of the arbitrator with the subject matter of the

[41] ICSID Case No. ARB/07/26 dated 12th August 2010.
[42] PCA Case No. IR-2009/1 dated 8th December 2009.

dispute. It can only be determined based on the facts and circumstances arising in particular situation by adopting the "third-person" test.

B. RELATION TO THE PARTY/COUNSEL OF THE PARTY

To determine such interest and involvement is indeed not easy, but a fair minded and informed observer approach shall be taken to determine the independence and impartiality of an arbitrator. The England and Wales Court of Appeal (Civil Division) in the case of *Halliburton Company* v. *Chubb Bermuda Insurance Limited*[43], wherein a challenge to the appointment of an arbitrator was made on the grounds of taking appointment in same or overlapping subject matter involving a common party, the court interpreted Section 24(1)(a) of the UK Arbitration Act, 1996 which empowers the court to remove an arbitrator if circumstances exist that give rise to justifiable doubts as to his impartiality, and observed the following

"*39. Section 24 has been held to reflect the common law test for apparent bias, namely whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.*

40. This is an objective test and is not be confused with the approach of the person who has brought the complaint. It involves taking a balanced and detached approach, having taken the trouble to be informed of all matters that are relevant…"

The relation to the party/counsel of the party may be sub-classified into two classes, (a) personal nature or (b) financial nature. Any other similar involvement may be incidental or ancillary to these sub-categories. The personal relation of the arbitrator shall straight forward be culminated making the

[43] (2018) 1 WLR 3361 : (2018) EWCA Civ 817 (Pending Appeal).

arbitrator ineligible. But a financial relationship may not directly make an arbitrator ineligible.[44]

Professionals practicing in the same field usually work together in different positions on different circumstances. Will all or any of those financial relationships affect the independence of an arbitration? To bring out answers to these questions, courts may have to broadly interpret the provisions of Fifth and Seventh Schedule and attempt to carve out all such possibilities that may tamper the sanctity of an arbitral proceeding; perhaps in the same manner as the Bombay High Court in Sawarmal Gadodia.

VII. Conclusion

The whole discussion above can be concluded with the words of Solomon J, in *Liebenberg and Others* v. *Brakpan Liquor Licensing Board and Another.*[45]

"*Every person who undertakes to administer justice, whether he is a legal officer or is only for the occasion engaged in the work of deciding the rights of others, is disqualified if he has a bias which interferes with his impartiality, or if there are circumstances affecting him that might reasonably create a suspicion that he is not impartial…. The impartiality after which the courts strain may often in practice be unrealized without detection, but the idea cannot be abandoned without irreparable injury to the standard hitherto applied in the administration of justice…*"

From the above discussions, it is evident that the disclosure requirements by the arbitrator cannot be undermined and must be taken as a priority to determine the legitimacy of the arbitration tribunal. A supreme duty rests upon the shoulder of an arbitrator who must abide by certain ethical standards while dispensing his duty, from the time of disclosure up till making of an arbitral award. The arbitration proceeding shall not suffer from any bias

[44] OPIC Karimum Corporation v. Bolivarian Republic of Venezuela, ICSID Case No ARB/10/14 dated 5th May 2011.
[45] 1994 WLD 52 (Liebenberg) at 54-5.

and prejudice which may hamper a party's right to justice. Based on the above analysis, it is hereby recommended that the legislature should take steps to fill the vacuum in arbitration law, including consequences of duty of breach, interim remedy during the proceedings etc. The question that arises here is should the arbitrator be held personally liable for any disparities in the disclosure done by him?

The referred judgement delivered by the Bombay High Court is a welcoming move and may help to highlight the seriousness and sensitivity attached to the issue. The reiterated reference to IBA guidelines brings India in consonance with International Standards be it in domestic or international arbitration. As far as disclosure requirements are concerned, it should be taken seriously by the arbitrators and as well as the parties. It may seem like a procedural practice, but it may affect a judicial process substantively. False or untrue disclosures may alter the course of an arbitral proceedings negatively and obstruct dispensation of justice. The duty to preserve the sanctity of a judicial proceeding shall be the supreme duty of an adjudicator. The law should not fall short of remedy to an individual.