# Dispute Resolution Hotline

April 09, 2018

## INDIA: CONFLICT OF INTEREST IN ARBITRATOR APPOINTMENT

**This article was originally published in:**

**International Arbitration Law Review (Int. A.L.R. 2018, 21(1), N1-N3)**

- Legislation: Arbitration and Conciliation Act 1996 (India) s.14, Sch.5, Sch.7
- Case: HRD Corp (Marcus Oil and Chemical Division) v Gail (India) Ltd (formerly Gas Authority of India Ltd) unreported 2017 (Sup Ct (Ind))

### *INT. A.L.R. N-1 INTRODUCTION

The Indian arbitration law underwent a complete overhaul in 2015/16. Various important amendments were made to the Arbitration and Conciliation Act 1996 (the Act). One such amendment was the incorporation of the Red and Orange List of the International Bar Association Guidelines on Conflicts of Interest in International Arbitration 2014 (IBA Guidelines) as part of the Act.

Recently, the Supreme Court of India in the case of HRD Corporation (Marcus Oil and Chemical Divisions) v GAIL (India) Limited, considered a challenge to appointment of a party nominated arbitrator and the chair. This case reflects how India has adopted the IBA Guidelines and interpretation of certain grounds as stated in the Red and Orange list by the Supreme Court of India.

The case reflects the application of the test of whether a reasonable third person having knowledge of the facts and circumstances would reach the conclusion that there is a likelihood that the arbitrator may be influenced. The Supreme Court has affirmed that this test requires one to take a broad commonsensical approach.

### FACTS

GAIL (India) Limited (GAIL) entered into a contract with HRD Corporation (Marcus Oil and Chemical Division) (HRD) on 1 April 1999 (the Agreement) for supply of wax generated at GAIL's plant for a period of 20 years. A similar dispute arose between the parties on various occasions and consequently HRD invoked the arbitration clause in the Agreement at various times. In total, four separate arbitrations took place.

The present case before the Supreme Court concerned the Fourth Arbitration. Justice Lahoti's (Chair) appointment was challenged on the following grounds:

Items 20[1] (3.1.1 of the Orange List of IBA Guidelines) and 22[2] (3.1.3 of the Orange List of the IBA Guidelines) of the Fifth Schedule to the Act were applicable thereby giving rise to justifiable doubts as to his independence and impartiality;

Items 1[3] (corresponds with 1.1 of non-waivable Red List of IBA Guidelines), 8[4] (2.3.7 of waivable Red List of IBA Guidelines), and 15[5] (2.1.1 of waivable Red List of IBA Guidelines) of the Seventh Schedule to the Act were applicable thereby making him ineligible to act as arbitrator.

If Appointment of Justice Doabia is bad then the appointment of Justice Lahoti is also bad as an ineligible arbitrator (Justice Doabia) cannot appoint another arbitrator.

Justice Doabia's appointment was challenged on the ground: ***Int. A.L.R. N-2***

that items 1[6],15[7],16[8] (corresponds with 2.1.2 of waivable Red List of IBA Guidelines) of the Seventh Schedule were applicable thereby making him ineligible to act as arbitrator.

### HELD

The Supreme Court highlighted the difference in the role of the Fifth Schedule and Seventh Schedule to the Act. The Supreme Court referred to the 246th Report of the Law Commission of India (the Report). As per the report, the Fifth Schedule is intended to contain a broader list for disclosures (i.e. circumstances provided under the Red and Orange list) to be made by the arbitrator at the time of appointment. On the other hand, the Seventh Schedule incorporates a smaller sub-set covering egregious situations (i.e. circumstances provided under the Red list) which automatically render the arbitrator ineligible for appointment.

It observed that where a challenge is based on the circumstances identified under the Fifth schedule, the issue i.e. whether there are justifiable doubts as to the arbitrator's independence and impartiality, should be separately determined given the facts of the case. On the other hand, the occurrence of circumstance provided under the

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Seventh Schedule itself renders a person ineligible to be appointed as the arbitrator. It further held that while a challenge based on the grounds mentioned in Seventh Schedule can be made directly to the court, the appointment of an arbitrator based on circumstances under the Fifth Schedule can be questioned only post the award, i.e. at the setting aside stage. Accordingly, the Supreme Court held that any challenge on the basis of Fifth Schedule against appointment of the two arbitrators could not be considered at the given stage (i.e. pre-award).

Importantly, the Court held that since the Fifth and Seventh Schedules owe their origins to the IBA Guidelines, they should be construed considering general principles contained therein, i.e. (i) every arbitrator shall be impartial/independent at the time of his/her appointment; (ii) doubts with respect to the appointment are justifiable only if a third party would reach a conclusion that an arbitrator is likely to be influenced by factors other than the merits of the case. Accordingly, it requires a fair construction of words used in the schedules neither tending to enlarge or restrict them unduly. It was against this backdrop that the court considered the matters listed in the Seventh Schedule and the underlying facts.

Justice Lahoti had earlier issued a legal opinion to GAIL in another dispute and he was also an arbitrator in another matter involving GAIL. This was the basis of HRD's challenge to his appointment. However, the Court dismissed the challenge and held that:

Item 1[9]: It deals with business relationships and not professional relationship. Also, it involves a degree of regularity or continuity in relationship. Giving one-off legal opinion as a retired judge is not tantamount to a business relationship between the parties such as to fall within the circumstance under Item 1.

Item 8[10]: No regular advice was provided and thus the situation is not as provided under item 8.

Item 15[11]: Item 15 is not applicable as the legal opinion was not in relation to the dispute in the arbitration.

HRD's challenge to the appointment of Justice Doabia was primarily on the ground that he had previously rendered an award in the third arbitration. Therefore, he is hit by item 16 of the Seventh Schedule which entails that ***Int. A.L.R. N-3*** arbitrator should not have previous involvement in the case. The Court held that: (i) the arbitrator's previous involvement in the case meant involvement in some other capacity and not as an arbitrator; (ii) previous involvement must be in the very dispute in arbitration where he is appointed as an arbitrator and not a different dispute/arbitration; and (iii) any other interpretation would render Item 24 of the Fifth Schedule largely ineffective. Accordingly, as

Justice Doabia was acting in capacity of an arbitrator and that the involvement in Third Arbitration would constitute involvement in a different case, the facts would not fall within the circumstance provided under Item 16 of the Seventh Schedule.

## COMMENT

Section 14 of the Act prescribes that the mandate of the arbitrator shall terminate if he becomes de jure or de facto unable to perform his functions. It further allows a party to approach the court to decide on such termination. The Law Commission in its Report had recommended that the following explanation (the Proposed Explanation) be added to Section 14:

"Where an arbitrator whose relationship with the parties, Counsel or the subject matter of the dispute falls under one of the categories set out in the [Seventh] Schedule, such an arbitrator shall be deemed to be 'de jure unable to perform his functions'."

However, the said explanation to s.14 was not part of the amendments to the Act. This non-inclusion of the explanation allowed parties to question whether the grounds listed in the Seventh Schedule could be basis for termination of the arbitrator's mandate under s.14 of the Act. The present judgment has now settled this issue. By virtue of this judgment, the Proposed Explanation now forms part of the law as the court has adopted the interpretation of s.14 which was being put forth through the explanation.

Interestingly, the Indian Supreme Court construed items of the Schedules on the touchstone of general principles of IBA Guidelines which do not form a part of the statute. The judgment thus reflects the pragmatic approach being adopted by the Indian courts while dealing with challenges to the appointment of the arbitrator. It further reaffirms that the threshold for upholding a challenge to the arbitrator appointment as stipulated in the IBA Guidelines would be applicable in India.

– Ashish Kabra & Mohammad Kamran
You can direct your queries or comments to the authors

1. "20. The arbitrator has within the past three years served as counsel for one of the parties or an affiliate of one of the parties or has previously advised or been consulted by the party or an affiliate of the party making the appointment in an unrelated matter, but the arbitrator and the party or the affiliate of the party have no ongoing relationship."
2. "22. 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."
3. "1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party."
4. "8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom."
5. "15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties."
6. See fn.3 above.
7. See fn.4 above.
8. "16. The arbitrator has previous involvement in the case."
9. See fn.3 above.
10. See fn.4 above.
11. See fn.5 above.



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