DOES SECTION 12 OF THE ARBITRATION AND CONCILIATION ACT, 1996, ADEQUATELY SAFEGUARD ARBITRATOR NEUTRALITY IN INDIA? A CRITICAL STUDY OF THE FIFTH AND SEVENTH SCHEDULES.

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ABSTRACT

Arbitration is an Alternative Dispute Resolution (ADR) mechanism that involves settling disputes outside the courts by a neutral third party, called the arbitrator. An arbitrator needs to be neutral to ensure the fair and just resolution of disputes. Section 12 of the Arbitration and Conciliation Act, 1996 ensures that arbitrators are Independent and impartial. The 2015 Amendment of the Act made Section 12 more robust by introducing the Fifth and the Seventh Schedule. While the Fifth Schedule marks the circumstances that can give rise to "justifiable doubts", the Seventh Schedule, read with Section 12(5), clearly prescribes categories of ineligible persons to act as arbitrators, enhancing confidence in the Indian Arbitration Laws.[1] This article examines whether these statutory provisions effectively safeguard justice and neutrality or whether a gap remains in practise. It examines statutory provisions along with judicial precedents to assess the practical effectiveness. The article argues that although the statutes provide for theoretical safeguards, in practise their effectiveness is limited because of gaps such as enforcement and procedural complexities, and the existence of unilateral appointment clauses for appointing an arbitrator.

Keywords: Arbitrator Neutrality, Section 12 of the Arbitration and Conciliation Act, 1996, 2015 Amendment of the Arbitration and Conciliation Act, 1996, Practical Effectiveness.

[1] Arbitration and Conciliation Act, 1996

1. Introduction

Arbitration is a faster way of resolving disputes between parties by a neutral person appointed by them, called an arbitrator, by avoiding the tedious and time-consuming procedural technicalities of a civil court. It is an emerging way of dispute settlement; however, its legitimacy does not solely depend on efficiency but also on the neutrality of the adjudicating person. An impartial arbitrator ensures impartial and fair decision-making, upholding the credibility of this mechanism.

The Arbitration and Conciliation Act, 1996 is a statute that deals with laws relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards. Section 12 of this Act ensures the neutrality of arbitrators by making it compulsory for them to disclose any relevant information that can lead to potential biases.[2] The 2015 Amendment of this Act strengthened this by introducing the Fifth and the Seventh Schedules.

In ***HRD Corporation v. GAIL (India) Ltd.***[3] the Supreme Court has clarified the clear distinction between the Fifth and Seventh Schedules, which refer to circumstances creating justifiable doubts and such that state clear ineligibility as to appointment.

Neutrality is the foundation of ADR, ensuring a fair and unbiased decision-making process that fosters mutual respect and acceptable resolutions and, at the same time, establishes trust and credibility in our judicial system. Unilateral clauses are a major problem; such clauses create a perception of structural bias, especially in cases where the appointing party has a direct interest in the dispute. In the recent ***Perkins Eastman Architects DPC v. HSCC (India) Ltd.***[4], the Supreme Court has said that a party interested in the dispute cannot unilaterally appoint a sole arbitrator, as such a mechanism undermines neutrality and equality in the arbitral process. The challenges to an arbitrator's neutrality can lead to delays in the proceedings, can affect cost, speed, flexibility and finality of decisions, all of which are central to arbitration.

Despite the statutory provisions and judicial precedents, the practical effectiveness of the neutrality of the arbitrator is still questionable. This article assesses whether Indian arbitration law has succeeded in translating neutrality from a formal legal ideal into a practical and

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[2] Arbitration and Conciliation Act, 1996

[3] HRD Corporation (Marcus Oil & Chemical Division v. GAIL (India) Limited (formerly Gas Authority of India Ltd.) (2018) 12 SCC 471

[4] Arbitration Application No.32 of 2019 Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd.

enforceable standard.

2. Statutory framework under section 12 and the 2015 amendment.

Section 12 of the Arbitration and Conciliation Act, 1996 is the most important provision that deals with the independence of arbitrators and prevents the existence of bias during adjudication. It requires an arbitrator to disclose in writing any past or present ties to the parties, lawyers, or a case that can create doubts as to the independence of the arbitrator, and any circumstance affecting their ability to devote sufficient time and complete the arbitration within 12 months.[5] The Fifth Schedule serves as a guide to determine whether such a circumstance can create doubts that are justifiable or not.[6] It is a constant duty of disclosure and not a one-time affair; it exists at any point where any such doubt arises. Under this section, an arbitrator may be challenged if there are justifiable doubts regarding neutrality or if they do not possess the required qualifications as agreed upon by the parties. Under section 12(5), a person who falls under any category as mentioned in the Seventh Schedule becomes automatically ineligible to act as an arbitrator in that specific matter.[7] The 2015 amendment made section 12 a more robust provision by introducing the Fifth and the Seventh Schedules and Section 12(5).

Fifth Schedule contains the list of circumstances that may give rise to justifiable doubts as to the arbitrator's neutrality and impartiality. It serves as a guide for disclosure under section 12(1). It does not automatically disqualify the arbitrator. It covers relationships with the parties or their affiliates, such as being a consultant, advisor, business or financial relationship with them or being an employee or with the party’s counsel, professional associations, representations, or working in the same organisation, any personal interest in the dispute, any prior involvement in such dispute, and any other circumstances affecting the neutrality of the arbitrator.[8]

Seventh Schedule depicts the circumstances in which a person is automatically disqualified to act as an arbitrator in a particular dispute between specific parties. Unlike the Fifth Schedule, it does not merely create doubts, but displays clear ineligibility criteria; it covers employment or business relationship with a party, such as being an employee, advisor, consultant or having any other such type of relationship, any significant financial interest in the dispute, having any

[5] Section 12 Arbitration and Conciliation Act, 1996
[6] Arbitration and Conciliation Act, 1996
[7] Section 12(5) Arbitration and Conciliation Act, 1996, 2015 Amendment
[8] Arbitration and Conciliation Act, 1996, 2015 Amendment (5th Schedule)

significant personal interest in the dispute, sharing a close relationship with any of the counsel, any direct involvement in the dispute, any other such relationships that create a clear conflict of interest and compromise the arbitrator's neutrality.[9]

Thus, while Section 12 and the 2015 amendment form the foundation of the statutory provisions to safeguard independence and impartiality, the practical effectiveness still remains in question. The next section examines judicial precedents to assess how these provisions operate in practice.

3. Judicial interpretation of section 12 and the Schedules.

Statutory provisions and frameworks become meaningful and gain legal validity when interpreted by the courts; hence, this section deals exclusively with the interpretation of these provisions by the judiciary.

In **HRD Corporation v. GAIL (India) Ltd.[10],** GAIL invited tenders for the exclusive supply of wax, and HRD Corporation won the contract in 1999. Later, disputes arose when HRD alleged that GAIL wrongfully withheld wax supplies, so HRD invoked arbitration under the agreement. In the challenged proceedings, HRD objected to the appointment/continuance of the arbitrators, arguing that their prior roles and relationships attracted the disqualification provisions in the Arbitration and Conciliation Act. It is one of the most important precedents in which the Hon'ble Supreme Court clarified that the Fifth Schedule and the Seventh Schedule are not interchangeable. The Fifth Schedule deals with justifiable doubts, whereas the Seventh Schedule is concerned with absolute ineligibility. This determines whether a concern regarding bias may merely justify disclosure and challenge, or if it automatically bars the arbitrator from being appointed.

In **Bharat Broadband Network Ltd. v. United Telecoms Ltd.[11] ,** Bharat Broadband Network Ltd. (BBNL) floated a tender in 2013 for a project involving supply, installation and maintenance of solar power equipment. United Telecoms emerged as the successful bidder, and BBNL issued an advance purchase order containing an arbitration clause. Later, disputes arose, and United Telecoms invoked arbitration and asked BBNL to appoint an independent

[9] Arbitration and Conciliation Act, 1996, 2015 Amendment (7th Schedule)
[10] HRD Corporation v. GAIL (India) Ltd., (2018) 12 SCC 471
[11] Bharat Broadband Network Ltd. v. United Telecoms Ltd., (2019) 5 SCC 755.

arbitrator, and so was appointed, but BBNL later challenged the appointment on the ground that the appointment mechanism was hit by Section 12(5) of the Arbitration and Conciliation Act, 1996, because the named appointing authority was itself ineligible. The Supreme Court accepted this argument and held that once a person is found to be ineligible under Section 12(5) read with the Seventh Schedule, the mandate terminates by the operation of law.

In the **Perkins Eastman Architects DPC V. HSCC (India) Ltd.[12],** the Hon'ble Supreme Court addressed the question if a party interested in the dispute can unilaterally appoint a sole arbitrator under the arbitration clause. The issue arose from a contract that empowered the managing director of HSCC to appoint the sole arbitrator. The Supreme Court accepted the contention of the Applicant that such a contract leads to undermining the neutrality of the decision.

These cases show how the Indian arbitration law has become stricter and provides more practical protection of arbitrator neutrality. They support the argument that Section 12 is important, but the effectiveness depends on judicial enforcement and fair appointment mechanisms.

4. **Critical analysis of the Statutory and Judicial safeguards.**

Although Section 12 and the judicial precedents provide a strong legal foundation, their practical adequacy remains open to question. Section 12 promotes transparency, the Fifth Schedule helps early identification of doubts, and the Seventh Schedule provides clear ineligibility conditions; however, there are gaps in practicality, and this section addresses those gaps. The burden of disclosure rests with the arbitrator itself; this is an issue that should be addressed.

The Fifth Schedule only works on identifying the justifiable doubts; it does not automatically remove a conflicted arbitrator. It may still allow an arbitrator to such dispute to adjudicate if the conflict is not serious enough. There is no rigid prohibition on the appointment under this schedule.

The enforcement of Section 12 depends on how seriously parties and courts enforce it. The rules are strict, and state clear ineligibility in appointment, but the parties may try to bypass

[12] Perkins Eastman Architects DPC V. HSCC (India) Ltd., AIR 2020 SC 59

them by adopting manipulative measures in the drafting of documents.

Challenges can slow down the process and cause delay, overcoming which was the main purpose of this ADR mechanism. Parties often spend more time discussing/challenging the appointment of arbitrators rather than addressing the actual issue that arose out of the dispute. This severely affects the cost, speed, and finality. So the framework can create delays that arbitration is meant to avoid.

Hence, the law is theoretically strong, and the courts have improved its effect, but the practical neutrality still depends on better disclosure, stricter appointment mechanisms, and less party control and interference.

5. Reform suggestions and way forward

To make Section 12 a truly effective safeguard of arbitrator neutrality, Indian arbitration law must move beyond formalities and adopt more substantive institutional and procedural reforms. Courts must continue to apply the provisions so that ineligible persons are kept out of the process. Written waiver should remain narrow, as it protects the autonomy of the parties without hampering the neutrality and transparency

The use of institutional arbitration must be encouraged, as it provides fixed rules and services, unlike ad hoc arbitration, which is run purely by private parties. This would make arbitration more efficient, fair, and credible.

The norms related to disclosure must be made stricter and clearer, and the arbitrator must disclose more specific information about prior and current relationships, personal and professional links and business or financial connections.

The Unilateral appointment clauses should be prohibited; clauses that allow such appointment create structural bias, even if actual bias is not proven. Courts have repeatedly found such clauses problematic because they hinder equality and fairness. A neutral appointment mechanism must be compulsory, especially when one side has greater bargaining power.

6. Conclusion

The article examines whether Section 12 adequately safeguards the neutrality of the arbitrators in India; it focuses on the Fifth and Seventh Schedules and the Judicial Interpretation of these statutory provisions. Section 12 requires the disclosure by the arbitrator of the circumstances creating doubts about independence and impartiality. Fifth Schedule helps identify the situations that can give rise to justifiable doubts. Seventh Schedule, read with Section 12(5), marks clear ineligibility situations of appointment. HRD Corporation case clearly depicted the difference between the two schedules. Bharat Broadband Network Ltd case strengthened Section 12(5) by insisting on express written waiver. Perkins Eastman Architects case struck down unilateral appointments by an interested party.

Hence, institutional arbitration, clearer disclosure norms and stricter unilateral appointments are needed to attain neutrality and justice in decision-making. Neutrality must be more than a statutory promise and must be visible in practice.