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# FROM DOUBT TO DECISION: RETHINKING BIAS IN CHALLENGE PROCEEDINGS

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## Introduction

Natural justice forms the bedrock of all judicial and quasi-judicial processes, including arbitration.[1] *Nemo judex in causa sua* or Rule against bias is a cornerstone principle of natural justice[2] and this principle finds its voice in Section 12 of the Arbitration and Conciliation Act, 1996 ["**1996 Act**"].[3] Section 12 of the 1996 Act sets out the test of neutrality for an arbitrator and envisages two scenarios, viz. ineligibility and presence of justifiable doubts. In the first scenario, a person is 'ineligible' de jure to be appointed as an arbitrator if their relationship to the parties, counsel or the subject matter falls under any category specified in the Seventh Schedule of the 1996 Act, and a party can apply to the Court under Section 14 of the 1996 Act to decide on the termination of their appointment.[4] In the second scenario, when there are circumstances giving rise to justifiable doubts about the independence or impartiality of the person appointed as the arbitrator, a party can challenge the appointment of the arbitrator under Section 13 of the 1996 Act.[5] Unlike Section 14, a challenge under Section 13 is decided not by a Court but by the arbitrator herself, whose neutrality is called under scrutiny. Whether justifiable doubts arise is a matter of fact and the grounds stated in the Fifth Schedule of the 1996 Act serve as a guide to such determination.[6] Despite the grounds in the Fifth Schedule largely coinciding with the grounds in the Seventh Schedule, the 1996 Act mandates a different course for a challenge under the former shutting recourse to a Court. When a challenge under Section 13 is rejected, the arbitrator is ordained to continue with the arbitral proceeding and only when the final award has been passed, the

[1] *Voestalpine Schienen GmbH v Delhi Metro Rail Corp. Ltd.* [2017] 4 SCC 665.
[2] *P.D. Dinakaran (1) v Judges Inquiry Committee* [2011] 8 SCC 380.
[3] The Arbitration and Conciliation Act 1996, s 12.
[4] The Arbitration and Conciliation Act 1996, s 14.
[5] The Arbitration and Conciliation Act 1996, s 13.
[6] *HRD Corp. v GAIL (India) Ltd.* [2018] 12 SCC 471.

apprehensive party becomes eligible to make an application before a Court for setting aside the award in accordance with Section 34 of the 1996 Act.[7] This makes the arbitrator a judge of their own cause and forces an apprehensive and unwilling party to continue with the arbitration, rendering an application under Section 34 seemingly inevitable. In 2023, the Ministry of Law and Justice constituted an Expert Committee ["**EC**"] to suggest reforms to the 1996 Act.[8] The key recommendations of the EC included, inter alia, providing for an immediate appeal to a Court against an order that rejects the challenge under Section 13.[9] Against this backdrop, we examine the contemporary regime, to highlight the deficiencies and examine the EC's recommendation thereto.

**Threading the Legislative Intent**

To understand the intent behind the extant legislative scheme, it would be germane to refer to the genesis of the 1996 Act. Prior to the 1996 Act, the Arbitration Act, 1940 ["**1940 Act**"] was the principal legislation governing domestic arbitration. However, the 1940 Act drew heavy criticism because it espoused an overly intrusive role of the Courts, thereby leading to protracted arbitral proceedings. The Parliament, to eliminate this mischief and, in a bid to inspire commercial confidence, enacted the 1996 Act in line with the UNCITRAL Model Law on International Commercial Arbitration, 1985 ["**Model Law**"].[10]

Marking a radical departure, the 1996 Act ushered in a novel jurisprudence domestically. References to the 1940 Act while interpreting and construing the 1996 Act were dropped in favour of the Model Law to avoid 'misconstruction'.[11] The Statement of Objects and Reasons of the Arbitration and Conciliation Bill, 1995 expressly demanded 'minimisation of the supervisory role of Courts'. This demand was recognised in Section 5 of the 1996 Act,[12] which while borrowing the principle of limited judicial intervention from Article 5 of the Model Law,[13] went a step further and framed this principle in the language of a non-obstante clause.[14] Similarly, other sections of

[7] The Arbitration and Conciliation Act 1996, s 34.
[8]Ministry of Law and Justice, 'Notice Inviting Comments from Stakeholders' <https://legalaffairs.gov.in/sites/default/files/Notice_inviting_comments_from_stakeholders.pdf> accessed 24 October 2024.
[9] Rajesh Kumar, 'Expert Committee On Arbitration Law Proposes Complete Overhaul Of Arbitration And Conciliation Act, 1996' (*Live Law*, 5 March 2024) <https://www.livelaw.in/arbitration-cases/expert-committee-on-arbitration-law-proposes-complete-overhaul-of-arbitration-and-conciliation-act-1996-251306> accessed 24 October 2024.
[10] *Konkan Railway Corp. Ltd. v Mehul Construction Co.*, [2000] 7 SCC 201.
[11] *Sundaram Finance Ltd. v NEPC India Ltd.*, [1999] 2 SCC 479.
[12] *Union of India v Popular Construction Co.*, [2001] 8 SCC 470.
[13] United Nations Commission on International Trade Law, Model Law on International Commercial Arbitration 1985, art 5.
[14] The Arbitration and Conciliation Act 1996, s 5.

the 1996 Act, including Section 13, were not imported *in toto* but underwent a process of legislative redrafting to serve this objective.[15] The considerations that drove the legislature to abandon the 1940 Act, and refer to the Model Law also compelled it to recast the latter and craft the 1996 Act. In this process, minimal judicial intervention came to serve as a foundational precept.

In this context, Section 13 of the Act makes a departure from the Model Law because Article 13(3) of the Model Law provides for an immediate right to appeal to the Court or to the 'Appropriate Authority' under the law if a plea of bias is rejected by the arbitral tribunal. The difference between Section 13 of the 1996 Act and Article 13 of the Model Law should be understood not only as procedural but also as jurisprudential. Omission should be given due weight as it becomes imperative in gathering the intent behind a statute.[16] Hence, the absence of an appeal in Section 13 is a mere prong in the advanced policy of minimal judicial intervention.

The constitutionality of Section 13 was upheld by both the Karnataka High Court[17] and the Delhi High Court.[18] In their judgements, the Karnataka High Court dealt with two contentions, viz. the arbitrator sitting over their own case and the absence of appeal from a decision thereof while the Delhi High Court largely limited itself to the second contention. On the first contention, the Karnataka High Court supplies a twofold justification. First, it draws a parallel with the English Arbitration Act, 1996 ["**English Act**"] wherein the Courts decide a plea of bias. It reasons that an arbitrator under the English Act is impleaded as a party before the Court and is given an effective right to dislodge the allegations of bias and the 1996 Act is different only inasmuch as it directly permits the arbitrator to dislodge such allegations themselves. Second, it reasons that being a judge over one's own case does not *ipso facto* cause prejudice. It quotes contempt proceedings and the principle of *kompetenz-kompetenz* under the 1996 Act as illustrations in support. On the second contention, both the Courts expound similar opinions, holding that an appeal under section 13 is not omitted but merely deferred in the form of Section 34 and such deferment is necessary to ensure speedy disposal. This view is tied to Karnataka High Court's first justification because if an arbitrator decides the allegations in a prejudiced manner, the aggrieved party can always approach the Court via a deferred appeal under section 34.

**Labyrinth of the Challenge Regime**

[15] Gourab Banerji, 'Judicial Intervention in Arbitral Awards: A Practitioner's Thoughts' [2009] National Law School of India Review 39.
[16] *Progressive Career Academy (P) Ltd. v FIIT Jee Ltd.*, [2011] SCC OnLine Del 2271.
[17] *R.K. Agrawal v B.P.K. Johri*, [1999] SCC OnLine Kar 469.
[18] *Bharat Heavy Electricals Ltd. v C.N. Garg*, [2000] SCC OnLine Del 773.

At first blush, an argument premised on speedy resolution by avoiding minimal intervention may appear apposite but at its core lies a faulty framing. The legislature has juxtaposed minimal intervention and an appeal against the plea of bias as zero-sum choices, resulting in an artificial dichotomy, unfounded in the Model Law. The current challenge mechanism might be viable when the grounds for challenge surface later stage or at post-award stage but the proceedings for setting aside an arbitral award under Section 34 cannot be considered as an appropriate substitution for an appeal process under Section 13. First, there is no express provision in Section 34 mentioning 'bias' as a ground or indicating as such. The Courts, through judicial pronouncement, have read partiality as a ground under Section 34(2)(b)(ii).[19] Pertinently, this ground is available for vitiating an arbitral award in entirety and naturally serves a different purpose than an appeal against an order of rejection of a plea of bias. Section 34 is a narrowly drawn provision to ensure that the Courts do not sit on an appeal over the merits of the award.[20] Second, the proceedings under Section 34 are of summary in nature,[21] distinguishable from an appeal.[22] The threshold for adducing additional documents is pivoted on absolute necessity[23] and the Court's power to re-appreciate the evidence and facts is circumscribed,[24] thereby posing evidentiary difficulties. Third, a recourse to Section 34 entails completion of the arbitral proceedings, which forces an unwilling party to spend resources in continuing the arbitral procedure without completely satisfying themselves of fair play in the decision of the Arbitral Tribunal and therefore undermines party autonomy. This is in teeth of the principle that justice should not only be done, but also manifestly seen to be done. It infringes upon the procedural sanctity as the rudiments of arbitration involves it offering resolution, not only expeditiously but also through a neutral and impartial person.[25]

Furthermore, a plea of bias cannot be treated on the same footing as a contempt proceeding or a challenge of jurisdiction. A contempt proceeding generally deals with overt acts which are tangible and easier to discern,[26] unlike bias, which is more subtle and suffused. Moreover, contempt powers are used sparingly with an appeal being vested with the contemnor under the 'Contempt of Courts Act, 1971', thereby underscoring procedural safeguards.[27] Similarly, a proceeding by the arbitral tribunal determining its own jurisdiction is patently different from a plea of bias. In making a

[19] *Avitel Post Studioz Ltd. v HSBC PI Holdings (Mauritius) Ltd.* [2024] 7 SCC 197; *State of M.P. v Vayam Technologies Ltd.* [2014] SCC OnLine MP 5358.
[20] *PSA SICAL Terminals (P) Ltd. v Board of Trustees of V.O. Chidambranar Port Trust Tuticorin* [2021] SCC OnLine SC 508.
[21] *Canara Nidhi Ltd. v M. Shashikala* [2019] 9 SCC 462.
[22] *NHAI v M. Hakeem* [2021] 9 SCC 1.
[23] *Alpine Housing Development Corp. (P) Ltd. v Ashok S. Dhariwal* [2023] SCC OnLine SC 55.
[24] *Associate Builders v DDA* [2015] 3 SCC 49.
[25] *Era International v Aditya Birla Global Trading India (P) Ltd.* [2024] SCC OnLine Bom 835.
[26] *Balwantbhai Somabhai Bhandari v Hiralal Somabhai* [2023] SCC OnLine SC 1139.
[27] The Contempt of Courts Act 1971, s 19.

jurisdictional enquiry, the tribunal is uninfluenced from bias. The arbitrator acts fairly, whereas in a challenge under Section 13, a biased arbitrator is likely to depart from the standards of even-handed justice. Hence, Section 13, which is designed to weed out bias, hands over the reins to the perpetrator of bias to do the needful. It is not gainsaid that not all arbitrators are biased, but biased arbitrators may manage to shield themselves because the 1996 Act conflates minimal role of the Courts to no role when it comes to disputes in relation to the Vth Schedule.

The V Schedule and VII Schedule are based on the 'IBA Guidelines on Conflict of Interest' ["**IBA Guidelines**"] Orange List and Red List respectively. While the critique on IBA Guidelines in India remains sparse, there is copious criticism internationally on account of, inter alia, the arbitrary need of disclosures, excessive similitude of situations across the lists, opaque demarcation of Lists (one may say that a situation can be in either of the lists) and inadequate addressing of situations where the arbitrator's office may have dealt with the parties or their affiliates. The courts in India have conceded to the extortionate similarity of the two Schedules on the premise that certain instances exist wherein a disclosure becomes imperative but they need not be regarded as so severe as to go to the root of appointment.[28] This draws a stark contrast from the stance that independence and impartiality are procedural hallmarks of arbitration.[29] Thus, the parties are being restricted from an immediate relief based on an artificial distinction between the two Schedules.

**Juxtaposing Challenge in India and Beyond**

Internationally, deliberations regarding the necessity for uniformity in international commercial arbitration have predated the Model Law. Early Reports of the General Assembly cited, inter alia, ECAFE, UNIDROIT and IBRD Convention prevalent then to trigger discourses upon a unanimous Model Law.[30] They recognised that an institutional method of challenging an arbitrator, i.e., the authority responsible for appointing arbitrators, would facilitate the challenge by designating another member or a Special Committee to decide on the appeal to rejection of challenge by the arbitrator.[31] Further deliberations regarding the challenge procedure continued to sporadically spring up even until the final stages of drafting Model Law, for example suggestions that the challenged arbitrator in a tribunal should not sit in the challenge proceedings or that the

[28] *HRD Corp. v GAIL (India) Ltd.* [2018] 12 SCC 471.
[29] *Voestalpine Schienen GmbH v Delhi Metro Rail Corp. Ltd.* [2017] 4 SCC 665.
[30] UNGA 'Report of the Secretary-General (1969) UN Doc A/CN. 9/21 <https://documents.un.org/doc/undoc/gen/nl6/900/31/pdf/nl690031.pdf> accessed 24 October 2024, pg 30 onwards.
[31] UNGA 'Recommendations Concerning Administrative Services Provided in Arbitrations Under the UNCITRAL Arbitration Rules' UN GAOR 15th Session A/CN.9/222 <https://documents.un.org/doc/undoc/gen/v82/261/79/pdf/v8226179.pdf pg 7//> accessed 24 October 2024.

challenged arbitrator should not be allowed to withdraw from his office voluntarily as the progress made within proceedings may turn futile at the expense of time and money.[32]

Another pertinent observation made at the time of enacting the Model Law was that in a scenario where the challenge is not visibly made on a frivolous ground, the parties may explore to negate the final adjudication by a court.[33] This alternative, along with the mandate of Section 5,[34] perhaps influenced the challenge mechanism in the 1996 Act. The 176th Law Commission Report initially rejected the idea of an immediate appeal on the possibility of an overwhelming scope of abuse by employing dilatory tactics.[35] But the EC has disapproved the Law Commission's stance by recommending an immediate appeal under Section 37 of the 1996 Act. Therefore, the challenge mechanism under Section 13 in the Indian landscape has come full circle, from restraining timely judicial supervision over challenge to inevitably adopting the idea encapsulated in Model Law.

**Conclusion: Catalysing Change**

The EC's recommendation will bring the 1996 Act in conformity with the Model Law approach. However, the EC is silent about whether to replace the word "*shall*" with "*may*" in Section 13(4) of the 1996 Act as the tribunal may halt proceedings to save costs pending challenge. Several other suggestions by the EC, including standardisation of the time limit for filing an appeal, expanding the definition of "*affiliate*" as outlined in the Fifth Schedule and a comprehensive revision of the Sixth Schedule to detail the grounds that might make a person incapable to be appointed as an arbitrator are noteworthy. However, it is essential to look beyond the IBA Guidelines to enforce more stringent norms of disclosure. An overdependence on these guidelines, which have faced significant international criticism may hinder India's progress towards becoming a leading hub for arbitration.

An appeal to the decision on challenge will only augment the credibility of arbitrators' transparency and ensure that the courts do not merely supervise over a procedure that stands vitiated at the threshold. Section 18 of the Arbitration Act mandates that the parties to an arbitration agreement are treated equally. As recently clarified by the Supreme Court, Section 18 is applicable at all stages

[32] UNGA 'Summary Records for 313th Meeting on the UNCITRAL Model Law on International Commercial Arbitration' UN GAOR A/CN. 9/263 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/313meeting-e.pdf //> accessed 24 October 2024, pg 4 Onwards.
[33] UNCITRAL, 'Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration' (18th Session, UN GAOR, A/CN.9/264) 32.
[34] The Arbitration and Conciliation Act 1996, s 5.
[35] Law Commission of India, Report No 176: The Arbitration and conciliation (Amendment) Bill, 2002 (Law Comm No 16, 2001).

of the arbitration proceedings,[36] including when a plea of bias is taken. Despite Section 18's non-derogable mandate,[37] in a scenario where an arbitrator decides a plea of bias in a partisan manner, the provision in itself is insufficient to deal with such a situation because it lacks teeth. An appeal, in such circumstances, comes to the rescue. Consistent with how the Indian jurisprudence vis-a-vis bias has developed in arbitration law, an appellant need not to establish that the arbitrator lacks independence or impartiality beyond a reasonable doubt but merely needs to demonstrate that a reasonable person, who has the knowledge of the relevant facts and circumstances, would conclude that there are possible doubts as to an arbitrator's independence or impartiality, or in other words, it is likely that the arbitrator may be influenced by factors other than the merits of the case in reaching their decision.[38] This effectively means that while hearing an appeal, a Court need not to conclusively satisfy itself of bias but only whether there is a real possibility of bias, thereby harmonising the objective of expeditious resolution with an appeal under the Arbitration Act.

Moreover, referring the challenge decision to an appeal renders the scope of judicial scrutiny narrower because the Courts have the benefit of a reasoned order from the tribunal before them and this reasoned order may additionally serve as a material to draw bias from. Thus, instances of countries deviating from the procedure as under Model Law are rare, for example, the English Law mandates that a challenge against the tribunal is made to a court at first instance after the parties have exhausted any remedy agreed upon for such challenges.[39] While this approach is somewhat aligned with institutional arbitration practices and conserves time, it enhances the scope of judicial inquiry. Additionally, there is an enhanced risk of such cases languishing in the courts' docket thereby impeding the arbitration procedure.

The reliance placed on courts is a testament to the entrenched confidence individuals have in the Indian judicial framework. To foster a similar magnitude of trust in arbitration, significant reforms are the need of the hour. The recent report of the EC has highlighted the urgent need to reform the existing arbitration framework by identifying procedural fallacies and placing central the parties' interests. Courts must assume a proactive role at crucial stages of arbitration such that the process is not vitiated and eventually piling up the court's docket. Limited yet effective Judicial intervention is viewed as acceptable if done for effectuating not obstructing Arbitration. Lastly,

[36] *Central Organisation for Railway Electrification v ECI SPIC SMO MCML (JV) A Joint Venture Co.* [2024] SCC OnLine SC 3219.
[37] *Union of India v Vedanta Ltd.* [2020] 10 SCC 1.
[38] *Central Organisation for Railway Electrification v ECI SPIC SMO MCML (JV) A Joint Venture Co.* [2024] SCC OnLine SC 3219.
[39] The Arbitration and Conciliation Act 1996, s 24.

enhancing arbitration in India necessitates comprehensive reforms and a collective commitment to upholding rudiments of fairness and equity.