CODIFICATION OF ARBITRATOR'S DUTY OF DISCLOSURE: LESSONS FROM THE INDIAN EXPERIENCE

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Abstract: *A recent consultation paper by the U.K. Law Commission has opined that U.K. arbitration law must consider codifying the duty of disclosure. On the other hand, countries like India already prescribe a set of circumstances that are required to be disclosed by an arbitrator to prevent any possible bias. This paper analyses the statutory codification of the duty of disclosure in India and opines as to how the Indian experience can be used as a road map by countries like the U.K. for codification of this duty.*

I. INTRODUCTION: WHY CODIFICATION?

Impartiality and neutrality of an arbitrator is one of the most important issues in arbitration law across the globe.[1] In this respect, certain countries like India statutorily prescribe a set of circumstances that are required to be disclosed by an arbitrator to prevent any possible bias.[2] On the other hand, countries like the United Kingdom ('**U.K.**') do not have a codified set of circumstances that impose a mandatory duty of disclosure upon the arbitrator, thereby leaving the discretion with the arbitrators to disclose or not to disclose a particular fact to the parties.

Recently, a consultation paper by the U.K. Law Commission[3] on the review of working of the U.K. Arbitration Act, 1996 ('**U.K. Arbitration Act**') has opined that U.K. arbitration law must also consider codifying the duty of disclosure.[4] Such a proposal has rekindled the debate as to whether codification of an arbitrator's duty of disclosure is warranted or not. This is because technically, there can be no thumb rule as to which circumstances can be considered to give 'justifiable doubts' to the impartiality of an arbitrator under all situations and the same need to be determined on a case-to-case basis.

In this respect, the I.B.A. Guidelines on Conflicts of Interest in International Arbitration[5] ('**I.B.A. Conflict Guidelines**') have emerged as the most preferred set of guidelines prescribing the set of circumstances that need to be disclosed by an arbitrator. Nevertheless,

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[1] *Voestalpine Schienen GmbH v Delhi Metro Rail Corporation Ltd* (2017) 4 SCC 665 [20] (Supreme Court).

[2] The Arbitration and Conciliation Act 1996 (India), schs 5 and 7.

[3] UK Law Commission, *Review of the Arbitration Act 1996 – A consultation paper* (Law Com CP No 257, 2022).

[4] ibid, para 3.46.

[5] International Bar Association, 'IBA Guidelines on Conflicts of Interest in International Arbitration' (*International Bar Association*, 23 October 2014) < https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918> accessed 26 December 2022.

critics of codification may argue that the parties can always agree to the said guidelines by agreement and the said guidelines need not be statutorily codified.[6] In response, it can be opined that codification of disclosure standards may be necessary at least in jurisdictions that do not have a sophisticated arbitration law or do not have a consistent jurisprudence regarding duty of disclosure. In such jurisdictions, the parties may not have sufficient knowledge or expertise to agree to the I.B.A. Conflict Guidelines by way of agreement. Furthermore, codification of a minimum standard of disclosure may help in improving the independence and impartiality of the arbitrators.

Thus, this paper proceeds on the premises that statutory codification of duty of disclosure is preferable if not necessary in light of the Indian experience. This paper aims to analyse the statutory codification of duty of disclosure in India and opines as to how the Indian experience can be used as a road map by countries like U.K. for codification of duty of disclosure. This paper largely follows a doctrinal methodology but limited references to U.K. law have also been made throughout this paper to draw comparison between Indian and U.K. law and how the latter can benefit from the Indian experience.[7]. Furthermore, based upon such evolution and the author's personal experience, the author opines that the logical implication of the same is that the standards of independence and impartiality of an arbitrator have improved under Indian law and consequently, how other jurisdictions can benefit from the Indian experience.

Furthermore, it must be noted that though I.B.A. Conflict Guidelines[8] have faced their own set of criticisms,[9] this paper has advocated the adoption of the same primarily due to two reasons. Firstly, to establish a minimum standard of independence and impartiality in a jurisdiction; and secondly, because such guidelines can be modified to suit the socio-economic culture of a country.

In summary, this paper is divided into four parts. Part I of this paper lays down a brief background of the research question and lays down the research premises for the present paper. Part II of this paper lays down the historical background that led to the codification of duty of

[6] Anushka Mittal, 'Can a Party Challenge the Application of the IBA Guidelines on Conflict of Interest?' (*Kluwer Arbitration Blog*, 22 February 2018) <https://arbitrationblog.kluwerarbitration.com/2018/02/22/can-party-challenge-application-iba-guidelines-conflict-interest/> accessed 15 February 2023.

[7] It is also pertinent to mention herein that though an empirical study on this subject would also be beneficial, the author has adopted a doctrinal methodology to undertake an in-depth study of the evolution of the duty of disclosure under Indian law and the legislative intent behind it.

[8] International Bar Association (n 5).

[9] *See*, Masood Ahmed, 'Judicial Approaches to the IBA Guidelines on Conflicts of Interest in International Arbitration' (2017) 28 European Business Law Review 649.

disclosure in India based on the I.B.A. Conflict Guidelines. Part III of this paper compares the Indian duty of disclosure and I.B.A. Conflict Guidelines in light of contemporary jurisprudence. This part of the paper also critically analyses the duty of disclosure and aims to answer whether codification of duty of disclosure is exhaustive or only illustrative in Indian law. Lastly, Part IV of this paper analyses the findings arrived in Part II and Part III of this paper and opines as to what lessons can be learnt by countries like U.K. from the Indian experience in case it decides to codify the duty of disclosure.

II. HISTORICAL BACKGROUND TO THE CODIFICATION OF DUTY OF DISCLOSURE IN INDIA

A. Position Prior to the 2015 Amendment

Indian arbitration law is governed by the Arbitration and Conciliation Act, 1996 ('**Act**'). The original Act did not provide for any express circumstances that had to be disclosed by an arbitrator that gave 'justifiable doubts' to his independence and impartiality. Section 12(1) of the original Act[10] imposed only a general duty on the arbitrator to disclose 'any circumstances' that may give rise to 'justifiable doubts' as to his independence and impartiality.

Interestingly, the present position in the U.K. Arbitration Act is very similar to the afore-stated position of Indian law. In this respect, there is no express provision in the U.K. Arbitration Act mandating a duty of disclosure on the arbitrator to disclose any specific set of circumstances. However, such a duty of disclosure has been interpreted by the U.K. courts from the arbitrator's general duty to act fairly and impartially as enshrined in Section 33(1)(a) of the U.K. Arbitration Act[11] as held in *Halliburton v. Chubb*.[12] On the other hand, Section 24(1)(a) of the U.K. Arbitration Act[13] gives the power to the court to remove an arbitrator where circumstances exist that give 'justifiable doubts' to the independence and impartiality of the arbitrator. Thus, a combined reading of Sections 33(1)(a)[14] and 24(1)(a) of the U.K. Arbitration Act[15] reveals that the arbitrator has a duty to disclose all circumstances that may give rise to 'justifiable doubts' as to his independence and impartiality.

[10] The Arbitration and Conciliation Act 1996 (India), s 12(1) (unamended).
[11] The Arbitration Act 1996 (UK), s 33(1)(a).
[12] [2020] UKSC 48 [76]-[78] (UK Supreme Court).
[13] The Arbitration Act 1996 (UK), s 24(1)(a).
[14] The Arbitration Act 1996 (UK), s 33(1)(a).
[15] The Arbitration Act 1996 (UK), s 24(1)(a).

It is pertinent to mention herein that the common standard of 'justifiable doubts' as seen in Section 12(1) of the Act[16] and Section 24(1)(a) of the U.K. Arbitration Act[17] flows from the fact that both Indian law and U.K. law are based on UNCITRAL Model Law on Arbitration[18] which in the first instance has established the 'justifiable doubts' threshold.

Therefore, it is due to the aforementioned commonalities between the un-amended Indian law and the contemporary U.K. law that any amendments made under the Indian law (as discussed below) and their consequential effect can be applied easily incorporated into U.K. law or any other jurisdiction having similar jurisprudence.

Due to the lack of any guiding principle as to what circumstances would constitute giving rise to 'justifiable doubts', the determination of such circumstances was left to the discretion of the arbitrator under Section 13 of the Act[19] under Indian law. Moreover, such a challenge had to be raised before the arbitrator within fifteen days of becoming aware of such circumstances that may give rise to justifiable doubts to the independence and impartiality of the arbitrator.[20] Furthermore, the improper exercise of such a discretion or incorrect rejection of such a challenge under Section 13 of the Act[21] could be examined by the courts only under Section 34 of the Act[22] i.e. at the post-award stage when the aggrieved party raises the same as a ground for setting aside of the award.[23] Interestingly, the position regarding the said examination is not the same under U.K. law. As per U.K. law, any circumstances giving rise to 'justifiable doubts' to independence and impartiality of the arbitrator has to be tested before the court under Section 24(1)(a) of the U.K. Arbitration Act.[24] Furthermore, such a right may be lost if the objection is not raised promptly as provided under Section 73(1) of the U.K. Arbitration Act.[25] Lastly, for any facts that come to the knowledge of the party at the final stage of the arbitration or after pronouncement of award, then such facts constitute a ground for challenging the award under Section 68(2)(a) of the U.K. Arbitration Act.[26]

[16] The Arbitration and Conciliation Act 1996 (India), s 12(1).
[17] The Arbitration Act 1996 (UK), s 24(1)(a).
[18] UNCITRAL Model Law on International Commercial Arbitration 1985 (as amended in 2006).
[19] The Arbitration and Conciliation Act 1996 (India), s 13.
[20] The Arbitration and Conciliation Act 1996 (India), s 13(2).
[21] The Arbitration and Conciliation Act 1996 (India), s 13(5).
[22] The Arbitration and Conciliation Act 1996 (India), s 34.
[23] The Arbitration and Conciliation Act 1996 (India), s 34(2)(a)(v).
[24] The Arbitration Act 1996 (UK), s 24(1)(a).
[25] The Arbitration Act 1996 (UK), s 73(1).
[26] The Arbitration Act 1996 (UK), s 68(2)(a).

At this juncture, it is pertinent to mention herein that in determining such 'justifiable doubts' the Indian courts could have also made a reference to the I.B.A. Conflict Guidelines[27] as a soft law or persuasive source of law.[28] However, it was generally seen that at the contemporaneous time, Indian courts have been less inclined to refer to soft law sources whilst deciding a question of law which is the reason why the I.B.A. Conflict Guidelines[29] hardly find any mention in any reported case law of the Indian Supreme Court or the High Courts.

Consequently, a common consensus arose amongst the Indian courts regarding certain circumstances that need to be disclosed by the arbitrator such as a direct pecuniary gain from one of the parties.[30] On the other hand, there was a confusion regarding certain circumstances as to whether the same give rise to 'justifiable doubts' to independence and impartiality of the arbitrator. One such instance was appointment of serving employees of one of the parties to the arbitral proceedings as an arbitrator. This question came before the Law Commission of India ('**Law Commission**') in its 176th Report.[31] The Law Commission resolved this question by opining that in case of private parties, such appointment may be absolutely prohibited whereas in case of a government party, there cannot be an absolute bar but the discretion to decide such an objection may be left to the arbitral tribunal (which would be subsequently examined by the courts at the post award stage).[32] The reason for the said distinction was that the Law Commission felt that private parties had greater control over their employees rather than public sector employees.[33] It is relevant to mention here that the amendments suggested by the Law Commission never saw the light of the day, however, this instance shows as to how the concept of 'justifiable doubts' created discourse in the Indian arbitral landscape.

Furthermore, due to the afore-stated vagueness of the term 'justifiable doubts', the Law Commission in its 176th Report suggested amendments to Section 12 of the Act[34] wherein the arbitrator was required to disclose all past and present relationship with the parties and their counsel, having direct and indirect business and/or financial interest, etc. that may give rise to

[27] International Bar Association (n 5).
[28] *See*, *HRD Corporation v GAIL (India) Ltd* (2018) 12 SCC 471 (Supreme Court); *Mcleod Russel India Ltd v Aditya Birla Finance Limited* (AP No 106 of 2020 decided on 14 February 2023) (Calcutta High Court).
[29] ibid.
[30] *See*, *Mohan Govind Chitale v Nirmala Anand Deodhar* (2008) SCC Online Bom 1712 [10] (Bombay High Court).
[31] Law Commission of India, *Report on The Arbitration And Conciliation (Amendment) Bill* (Law Com CP No 176, 2001).
[32] ibid 62-64.
[33] ibid 62.
[34] The Arbitration and Conciliation Act 1996 (India), s 12(1) (unamended).

justifiable doubts to the independence and impartiality of the arbitrator.[35] However, these amendments also never the saw the light of the day and consequently, the jurisprudence regarding the same remained ambiguous.

B. Position Subsequent to the 2015 Amendment

In 2014, the Law Commission undertook a complete review of the Act and suggested major amendments to the Act including amendments to the standard of disclosure in its 246th Report.[36]

The Law Commission opined that a minimum standard of disclosure needs to be provided in the Indian arbitration law as procedural fairness is one of the hallmark features of any judicial proceedings. The Law Commission further opined that party autonomy cannot be permitted to completely disregard this minimum standard of independence and impartiality.[37]

Consequently, the Law Commission suggested incorporation of Fifth and Seventh Schedules in the Act[38] that were largely based on the orange and red lists of the I.B.A. Conflict Guidelines[39] respectively. Furthermore, the newly inserted proviso to Section 12(5) of the Act[40] provided that even the grounds specified under the Seventh Schedule of the Act[41] (based on the Red List of the I.B.A. Conflict Guidelines[42]) could be waived by the parties by way of a written agreement subsequent to arising of the disputes between the parties. These changes were enacted and were brought into force by way of the Arbitration and Conciliation (Amendment) Act, 2015.[43]

The said change in the Indian arbitral regime was interpreted by the Supreme Court in *HRD Corporation* v. *GAIL (India) Ltd.*[44] In the said case, the court opined that in case a ground under the Seventh Schedule of the Act is made out and there is no written waiver, the arbitrator *de jure* (i.e., by operation of law) becomes ineligible to act as an arbitrator and Section 14(1)(a)[45]

[35] Law Commission of India (n 32) 91.
[36] Law Commission of India, *Report on Amendments to the Arbitration and Conciliation Act* (Law Com CP No 246, 2014).
[37] ibid 29-30.
[38] The Arbitration and Conciliation Act 1996 (India), schs 5 and 7.
[39] International Bar Association (n 5).
[40] The Arbitration and Conciliation Act 1996 (India), s 12(5).
[41] The Arbitration and Conciliation Act 1996 (India), sch 7.
[42] International Bar Association (n 5).
[43] The Arbitration and Conciliation (Amendment) Act 2015 (India).
[44] *HRD Corporation* (n 29).
[45] The Arbitration and Conciliation Act 1996 (India), s 14(1)(a).

of the Act is attracted.[46] Furthermore, it was held that when a ground under the Fifth Schedule[47] of the Act was made out, the parties were required to raise the same under Section 13 of the Act[48] before the arbitrator and in case of failure, challenge the same at the post-award stage under Section 34 of the Act.[49]

In context of Section 14 of the Act[50], the Supreme Court in *Bharat Broadband Network Ltd.* v. *United Telecoms Ltd.*,[51] has held that where the appointment of an arbitrator is hit by Section 12(5) of the Act,[52] such appointment is void ab initio and the party can directly approach the court for appointment of a substitute arbitrator.[53] The said position of law as interpreted by the Indian courts implied that the parties need not wait for the culmination of the arbitration proceedings to challenge the appointment of arbitrator where there were 'justifiable doubts' to his independence and impartiality as enumerated in the Seventh Schedule[54] and the same could be challenged during the subsistence of the arbitral proceedings thereby saving time and money.

Another key point of difference that needs to be noted is that while the time limit for preferring a challenge under Section 13 of the Act is fifteen days from the date a party became aware of circumstances giving justifiable doubts to the independence and impartiality of the arbitrator,[55] no such specific time period has been provided for preferring an application under Section 14[56] of the Act read with Section 12(5) of the Act.[57] This is because since these circumstances are very serious in nature they can be raised before the court at any time during the subsistence of the arbitration proceedings. In fact the Bombay High Court in the recent case of *Naresh Kanayalal Rajwani* v. *Kotak Mahindra Bank Ltd.*,[58] has also held that such grounds can also be raised at the post award stage. The court opined that since the circumstances provided in the Seventh Schedule[59] can only be waived by an express agreement in writing, mere participation in the arbitration proceedings does not waive such an objection as the said proceedings are

[46] *HRD Corporation* (n 29) [12].
[47] The Arbitration and Conciliation Act 1996 (India), sch 5.
[48] The Arbitration and Conciliation Act 1996 (India), s 13.
[49] *HRD Corp*oration (n 29) [12].
[50] The Arbitration and Conciliation Act 1996 (India), s 14.
[51] (2019) 5 SCC 755 (Supreme Court).
[52] The Arbitration and Conciliation Act 1996 (India), s 12(5).
[53] *Bharat Broadband Network Ltd v United Telecoms Ltd* (2019) 5 SCC 755 [17] (Supreme Court).
[54] The Arbitration and Conciliation Act 1996 (India), sch 7.
[55] The Arbitration and Conciliation Act 1996, s 13(2).
[56] The Arbitration and Conciliation Act 1996, s 14,
[57] The Arbitration and Conciliation Act 1996, s 12(5).
[58] (2022) SCC Online Bom 6204 (Bombay High Court).
[59] The Arbitration and Conciliation Act 1996 (India), sch 7.

vitiated from its very beginning.[60] Thus, such a challenge can be made at any stage of the arbitral proceedings or even at the post award stage as opposed to the fifteen day time limit provided under Section 13 of the Act[61] provided that the said objections are in the nature of 'serious' justifiable doubts as provided in the Seventh Schedule of the Act.[62]

From the aforesaid discussion, it is evident that the said amendments have brought in much needed certainty in the disclosure standard in India by clearly crystallizing the minimum standard of disclosure and grounds for challenging the mandate of the arbitrator. Moreover, the absence of any specific time limit for preferring an application under Section 14 of the Act[63] read with Section 12(5) of the Act[64] and the fact that such challenges can also be raised for the first time at the post-award stage also shows that the Indian courts have advocated for maintaining at least a minimum standard of independence and impartiality in the Indian arbitral landscape.

Thus, in summary, it can be stated that as intended, the said amendments have improved the neutrality and impartiality of arbitrators in India by prescribing a minimum standard of independence as interpreted by the Supreme Court in *HRD Corporation.* v. *GAIL (India) Ltd.*[65] which continues to be followed to date.

III. DISSECTING THE DISCLOSURE SCHEME UNDER INDIAN LAW

The afore-stated discussion has shown that ever since the codification of the duty of disclosure, standards of neutrality and impartiality of an arbitrator in the Indian arbitral landscape can be maintained in a much better way than what was prevalent in the pre-2015 regime. Therefore, this part of the paper aims to dissect the disclosure requirement under Indian law and it also comments upon certain entries in the Fifth and the Seventh Schedule of the Act[66] with their corresponding entries in the I.B.A. Conflict Guidelines[67] to illustrate the differences between the two. Furthermore, this part also enquires as to whether such differences have been made consciously to suit the Indian landscape or whether the same is attributable to faulty drafting. According to the author, the said discussion assumes importance for two reasons. Firstly, it

[60] *Naresh Kanayalal Rajwani v Kotak Mahindra Bank Ltd* (2022) SCC Online Bom 6204 [19], [23] (Bombay High Court).
[61] The Arbitration and Conciliation Act 1996 (India), s 13.
[62] The Arbitration and Conciliation Act 1996 (India), sch 7.
[63] The Arbitration and Conciliation Act 1996 (India), s 14.
[64] The Arbitration and Conciliation Act 1996 (India), s 12(5).
[65] *HRD Corporation* (n 29).
[66] The Arbitration and Conciliation Act 1996 (India), schs 5 and 7.
[67] International Bar Association (n 5).

gives insights as to how a soft law can be tweaked to suit the country's arbitral regime and what factors need to be considered while tweaking the said guidelines. Moreover, this paper does not suggest any specific suggestions regarding modification of any soft law qua U.K. or any other jurisdiction and rather only gives an indication as to what factors need to be considered while tweaking the said guidelines. Secondly, by understanding the various stages and requirement of disclosure under Indian law throws light on the utility of the same and furthers the author's argument as to why other jurisdictions should consider adopting the Indian disclosure model.

A. I.B.A. Conflict Guidelines v. Indian Law

At the outset, it must be noted that in contrast to the I.B.A. Conflict Guidelines[68], there is no non-waivable red list in Indian law. This means that even the most serious circumstances that give rise to 'justifiable doubts' to the independence and impartiality of the arbitrator can be waived by the parties. The reason for such a distinction is that Indian law gives utmost importance and priority to the concept of party autonomy and hence, it provides that any justifiable doubts can be waived by the parties. In this context, the decision as to whether the legislature of a jurisdiction wants to leave the discretion to waive off the non-waivable red list with the parties or not would depend upon the sophistication of the parties in a jurisdiction and the public policy of the jurisdiction.

Another key difference to be noted is that unlike the I.B.A. Conflict Guidelines,[69] item nos. 1-19 of the Seventh Schedule of the Act[70] are repeated in the Fifth Schedule of the Act.[71] In this respect, the Supreme Court has held that the reason for such overlapping is so that these circumstances are disclosed by the arbitrator as no party would come to know of these circumstances unless and until the same are disclosed by the arbitrator.[72] In other words, the Supreme Court implied that the arbitrator has a specific duty to disclose all circumstances as enumerated in the Fifth Schedule of the Act.[73] Hence, it was imperative that the serious grounds as provided in the Seventh Schedule[74] are also provided in the Fifth Schedule of the Act.[75] Furthermore, the said distinction also reveals the scheme of disclosure under the Act. The

[68] ibid.
[69] ibid.
[70] The Arbitration and Conciliation Act 1996 (India), sch 7.
[71] The Arbitration and Conciliation Act 1996 (India), sch 5.
[72] *HRD Corporation* (n 29) [17].
[73] The Arbitration and Conciliation Act 1996 (India), sch 5.
[74] The Arbitration and Conciliation Act 1996 (India), sch 7.
[75] The Arbitration and Conciliation Act 1996 (India), sch 5.

circumstances provided in the Fifth Schedule[76] need to be mandatorily disclosed and the entries provided in the Seventh Schedule[77] are a subset of the entries provided in the Fifth Schedule[78] whereas the lists provided in the I.B.A. Conflict Guidelines[79] are independent and mutually exclusive in nature.

Now moving to an entry by entry comparison, it is pertinent to mention herein that the Supreme Court in *HRD Corporation v. GAIL (India) Ltd*[80] listed a table giving an entry-by-entry comparison of the Fifth Schedule[81] with the corresponding entries of the I.B.A. Conflict Guidelines.[82]

The first difference that may be noted is that in comparison to entry 1.2 of the non-waivable red list, there is absence of the phrase 'personal interest' from the Fifth Schedule[83] and the latter only provides for financial or economic interest. Interestingly, the model disclosure form as provided in the Sixth Schedule of the Act[84] provides that the arbitrator is supposed to disclose all '*…financial, business, professional or other kind*' of relationship with the parties. This raises the question as to why all such relationships need to be disclosed when the act only provides for financial interest and not personal interest. Although this issue has never come up before the Indian courts, it may be opined that such an omission is intentional as any case of personal interest would be covered by Section 13 of the Act[85] and would have to be determined by the arbitrator. In other words, the legislature did not consider 'personal interest' of the arbitrator to be a serious doubt to the independent and impartiality of the arbitrator and hence, the said phrase does not find mention in the said Schedules.

Another difference that may be noted is with respect to entry no. 12 of the Fifth Schedule[86] and entry 1.2 of the non-waivable list. It appears that the former does not include the term '*…or an entity that has a direct economic interest in the award to be rendered in the arbitration*'. This omission would technically imply that the disclosure requirement under entry no. 12 applies only qua the relationship of the arbitrator with the parties and not any of its affiliates or group

[76] The Arbitration and Conciliation Act 1996 (India), sch 5.
[77] The Arbitration and Conciliation Act 1996 (India), sch 7.
[78] The Arbitration and Conciliation Act 1996 (India), sch 5.
[79] International Bar Association (n 5).
[80] *HRD Corporation* (n 29).
[81] The Arbitration and Conciliation Act 1996 (India), sch 5.
[82] International Bar Association (n 5).
[83] The Arbitration and Conciliation Act 1996 (India), sch 5.
[84] The Arbitration and Conciliation Act 1996 (India), sch 6.
[85] The Arbitration and Conciliation Act 1996 (India), s 13.
[86] The Arbitration and Conciliation Act 1996 (India), sch 5.

companies. Though this issue has not reached the Indian courts, it appears that the said omission is inadvertent and not intentional. In this respect, the Indian courts have undertaken a cumulative reading of entry no. 1 and 12[87] to exclude any person from acting as an arbitrator who has any direct or indirect past or present relationship with the parties to arbitration.[88] At the same time, the courts have also limited the ambit of 'past or present relationship' to a reasonable extent so as to not exclude retired employees from acting as arbitrators. The rationale behind such an interpretation is that in case an expansive definition is given to 'past or present relationship', no person who has had a remote financial relationship with a party in the past, would ever be able to act as an arbitrator and the same cannot be the intent of the legislature.[89] Lastly, to determine the impact of an arbitrator's past or present relationship with a party on his independence and neutrality, the courts have narrowed down on the fact as to whether such past or present relationship has the ability to exert a controlling influence of the party to arbitration.[90] Thus, any economic interest of the arbitrator with any associated entity of a party would be relevant only if by virtue of such interest, such an entity can exert a controlling influence on the arbitral proceedings.

The next point of difference is entry 9 of the Fifth schedule[91] and entry 2.3.8 of the waivable red list. The former does not encompass the disclosure in case of a close family relationship with one of the counsels representing the parties in the arbitration. The reason for this omission is unclear, however, in the opinion of this author, the reason for the same may be the nature of the Indian arbitration landscape and the Indian legal bar. In India, retired judges usually act as arbitrators and hence, it is common to see that the arbitrators may have some family relationship with one of the counsels in the arbitration. Hence, by excluding such a disclosure requirement, the legislature might have avoided opening of a Pandora's box and flooding of litigations before the courts. However, it must also be noted here that the aforesaid observation is a mere speculation and the legislature might very well consider amending this entry to bring it at par with the corresponding entry in the waivable red list.

[87] *Alternative for India Development v State of Jharkhand* (2016) SCC Online Jhar 2358 [4] (Jharkhand High Court).
[88] *Voestalpine Schienen GmbH* (n 1) [25] (Supreme Court); *Prakash Chand Pradhan v Union of India* (2019) SCC Online Sikk 124 [22] (Sikkim High Court); *Victory Oil Gram Udyog Association v Managing Director* (2018) SCC Online HP 3396 [13] (Himachal Pradesh High Court).
[89] *Voestalpine Schienen GmbH* (n 89) [23].
[90] *Hindustan Construction Co Ltd v Ircon International Ltd* (2016) SCC Online Del 6073 [15] (Delhi High Court).
[91] The Arbitration and Conciliation Act 1996 (India), sch 5.

A related point from the aforesaid difference is that the definition of 'close family member' as defined in the Schedules[92] is limited in scope as compared to the definition provided in the I.B.A. Conflict Guidelines.[93] This is because the former does not include the phrase '*... in addition to any other family member with whom a close relationship exists*'. In this respect, the Delhi High Court has strictly interpreted the definition of 'close family member' and has held that it is not the intent of the Act to render a distant relative ineligible to act as an arbitrator.[94] In this author's opinion, the expansive definition of the I.B.A. Conflict Guidelines[95] has been formulated keeping in mind the different socio-cultural factors that are prevalent across different parts of the globe. However, the Indian draftsman has curtailed the said definition and incorporated the same into Indian law taking into account the socio-cultural dynamics of the country.

It is further apparent that the Fifth Schedule[96] does not have any entry corresponding to entry 3.2 of the Orange list pertaining to 'current Services for one of the parties'. Again, there is no reported case wherein a challenge had been mounted wherein the arbitrator's law firm was involved in the manner provided under entry 3.2 of the orange list. However, the Telangana High Court seemed to have come across a case which, in this author's opinion, would squarely fall within the ambit of entry 3.2.1 of the orange list. In the case of *V. Balakrishnan* v. *Capital First Limited,*[97] the question before the court was whether non-disclosure by the arbitrator that he was partner of the law firm that had drafted the legal notice for the Claimant for the same arbitration disqualifies him as an arbitrator. The court simply held that such an appointment was ex-facie invalid and hence, any award passed by such arbitrator was not valid.[98] Now, one may argue that this instance fell within the ambit of entry 6 of the Fifth schedule[99] and hence, such an arbitrator was ex-facie barred under the Seventh Schedule[100] to act as an arbitrator. However, the question herein would be whether drafting of a legal notice by the law firm of the arbitrator would qualify as involvement in the arbitration to attract entry 6 of the Fifth schedule.[101] In this author's opinion, the answer would be negative. This is because even as per Indian law, an arbitration is deemed to have commenced after the notice invoking arbitration

[92] The Arbitration and Conciliation Act 1996 (India), schs 5 and 7.
[93] International Bar Association (n 5).
[94] *Himanshu Shekhar v Prabhat Shekhar* (2022) SCC Online Del 1651 [34]-[37] (Delhi High Court).
[95] International Bar Association (n 5).
[96] The Arbitration and Conciliation Act 1996 (India), sch 5.
[97] (2019) SCC Online TS 1290 (Telangana High Court).
[98] ibid [53]-[57].
[99] The Arbitration and Conciliation Act 1996 (India), sch 5.
[100] The Arbitration and Conciliation Act 1996 (India), sch 7.
[101] The Arbitration and Conciliation Act 1996 (India), sch 5.

is received by the receiving party.[102] Thus, entry 6 of the Fifth Schedule[103] would only encompass involvement of arbitrator's law firm after sending the legal notice invoking arbitration and not prior to that. However, with that being said it appears that the Telangana High Court seems to have taken a contrary view and has taken an expansive view of entry 6 of the Fifth Schedule[104] thus overlooking the distinction between entry 2.3.5 of the waivable red list and entry 3.2.1 of the orange list. Thus, it may be opined that perhaps the observation of the Telangana High Court is reflective of the legislative intent and perhaps this is the reason as to why the legislature has omitted entry 3.2 of the orange list altogether and not included the same in the Act.

Similarly, the Fifth Schedule[105] does not have any entry corresponding to entry 3.3.2, 3.3.6, 3.3.7 and 3.3.9 of the orange list. These entries in essence pertain to the relationship between the arbitrator and the counsel. In the Indian context, the author terms these entries pertaining to professional independence of the arbitrator. In other words, the personal friendship or enmity of the arbitrator and the counsel should not affect the professional independence of the arbitrator. In this respect, the Bombay High Court in *Sheetal Maruti Kurundwade* v. *Metal Power Analytical (I) Pvt. Ltd.*,[106] has advocated for a very high threshold to establish a doubt on the professional independence of the arbitrator. In the said case, the question was whether a counsel who holds briefs from the law firm representing one of the parties in the arbitration for a separate client is statutorily disqualified to act as an arbitrator. The court answered the said question in the negative and held that when an advocate holds a brief on behalf of another attorney, he does not represent the said attorney but the client of the said attorney.[107] The court further held that the scheme of the Act is that the arbitrator is required to disclose its relationship with the parties and hence, the disclosure and disqualification requirement cannot be expanded to include the arbitrator holding a brief for a separate third party from the counsel of the party to the arbitration.[108] The said ratio would imply that at least under the Indian law, courts and parties consider the personal relationship of the arbitrators and the counsel as immaterial. Hence, it is due to the said higher threshold to challenge the professional

[102] The Arbitration and Conciliation Act 1996 (India), s 21.
[103] The Arbitration and Conciliation Act 1996 (India), sch 5.
[104] The Arbitration and Conciliation Act 1996 (India), sch 5.
[105] The Arbitration and Conciliation Act 1996 (India), sch 5.
[106] (2017) SCC Online Bom 251 (Bombay High Court).
[107] ibid [19].
[108] ibid [22].

independence of the arbitrator, no corresponding entries in the Act have been incorporated by the legislature that are at par with to entry 3.3.2, 3.3.6, 3.3.7 and 3.3.9 of the orange list.

The next point of difference is that the Fifth Schedule[109] does not have any entry corresponding to entry 3.4.3, 3.4.4, 3.4.5 and 3.5.2 of the orange list. The said entries pertain to close friendship or enmity of the arbitrator with the party or wherein the arbitrator is a former judge, he/she has adjudicated a significant case involving one of the parties or he has publicly advocated his position on the case. In this respect, as per the professional experience of the author, it has been noted that sitting and retired judges are given utmost respect by the bar and the general populace in India and the judges are seen on a higher pedestal who are not swayed from such personal feelings. Thus, in light of this socio-legal culture prevalent in India and the fact that majority of arbitrators in India are retired judges, it is apt to see as to why the legislature omitted such entries from the Act.

Lastly, it may be noted that there is no schedule in the Act that is corresponding to the green list. This is because, the legislature did not intend to create an exemption list of circumstances which would under all circumstances not raise 'justifiable doubts' on the independence and impartiality of the arbitrator. In this respect, one may make a reference to entry 4.3.2 of the green list which provides that the arbitrator and the counsel have acted as arbitrators in one of the matters previously. In the Indian context, considering the amicable relations between the arbitrators and the legal fraternity, such a situation may give rise to 'justifiable doubts' in certain cases. Therefore, had the legislature incorporated the green list in the Act such a situation would have been outside the purview of Section 12[110] and 13[111] of the Act. Thus, it appears that it is for this reason that the legislature did not incorporate the green list into the Act.

Thus, it may be stated that whilst the Indian courts have almost never dwelled upon the difference between the provisions of the I.B.A. Conflict Guidelines[112] and the Schedules[113] under the Act, it is evident that the legislature has carefully modified the disclosure lists to suit the Indian socio-legal environment. It has at times adopted an expansive interpretation of the entries provided in the Fifth Schedule[114] and sometimes adopted a restrictive interpretation as

[109] The Arbitration and Conciliation Act 1996 (India), sch 5.
[110] The Arbitration and Conciliation Act 1996 (India), s 12.
[111] The Arbitration and Conciliation Act 1996 (India), s 13.
[112] International Bar Association (n 5).
[113] The Arbitration and Conciliation Act 1996 (India), schs 5 and 7.
[114] The Arbitration and Conciliation Act 1996 (India), sch 5.

seen above. While on one hand, it may be desirable that certain amendments be carried out in the Schedules of the Act to bring the same at par with the I.B.A. Conflict Guidelines,[115] the contemporary landscape is more or less apt keeping in mind the socio-legal background of the country.

B. Residuary Disclosure Requirement under Indian law

After dissecting the standard of disclosure under the Schedules,[116] the next question which arises for consideration is whether the disclosure requirement as provided under the Schedules[117] is exhaustive or not. In other words, the question herein is whether the arbitrator is required to disclose any other facts/circumstances apart from the ones provided under the Schedules.[118] This question becomes all the more pertinent as it was seen in the preceding section of this paper that the mandatory disclosure requirement is restricted to the circumstances enumerated under the Fifth Schedule of the Act.[119]

To address this question, one may make a recourse to the recent case of *Union of India* v. *M/s APS Structures Pvt Ltd*.[120] In the said case, the Delhi High Court has held that any other grounds apart from the ones provided in Section 12(5) of the Act[121] read with the Seventh Schedule of the Act[122] have to be raised before the arbitrator under Section 13 of the Act.[123] Interestingly, in the present case, the Petitioner had preferred an application under Section 14 of the Act[124] as it was alleged that the arbitrator had made an improper and untrue disclosure. However, the court held that even the question of improper disclosure has to be dealt by the arbitrator under Section 13 of the Act[125] as no ground under Section 12(5) of the Act[126] had been made out.[127] Thus, this case law opens a window beyond the Seventh Schedule[128] and allows the challenging party to raise the issue of improper disclosure before the arbitrator under Section 13 of the Act.[129]

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[115] International Bar Association (n 5).
[116] The Arbitration and Conciliation Act 1996 (India), schs 5 and 7.
[117] The Arbitration and Conciliation Act 1996 (India), schs 5 and 7.
[118] The Arbitration and Conciliation Act 1996 (India), schs 5 and 7.
[119] The Arbitration and Conciliation Act 1996 (India), sch 5.
[120] (2022) SCC Online Del 79 (Delhi High Court).
[121] The Arbitration and Conciliation Act 1996 (India), s 12(5).
[122] The Arbitration and Conciliation Act 1996 (India), sch 7.
[123] The Arbitration and Conciliation Act 1996 (India), s 13.
[124] The Arbitration and Conciliation Act 1996 (India), s 14.
[125] The Arbitration and Conciliation Act 1996 (India), s 13.
[126] The Arbitration and Conciliation Act 1996 (India), s 12(5).
[127] *APS Structures (P) Ltd* (n 121) [9].
[128] The Arbitration and Conciliation Act 1996 (India), sch 7.
[129] The Arbitration and Conciliation Act 1996 (India), s 13.

The Punjab and Haryana High Court in the case of *Reliance Infrastructure Ltd.* v. *Haryana Power Generation Corporation. Ltd.*,[130] has also seemed to have answered this question conclusively. The court in the said case opined that the disclosure requirement under Section 12(1) of the Act[131] is much broader than the circumstances enumerated under Section 12(5) of the Act.[132] In fact, the court went further to opine that it is not possible to exhaustively enumerate such circumstances and the same has been determined on a case-to-case basis.[133]

Again, the Bombay High Court in *Maharashtra State Electricity Transmission Co. Ltd.* v. *Kalpataru Power Transmission Ltd.*,[134] has held that the arbitrators need to disclose the slightest of interest they have in a dispute and non-disclosure of the same may lead to setting aside of the arbitral award.[135]

It must be further noted that as per Explanation 1 to Section 12(1)(b) of the Act,[136] the grounds stated in the Fifth Schedule[137] only 'guide' the arbitrator in determining whether 'justifiable doubts' exist to the independence and impartiality of the arbitrator. Moreover, as noted above, the intent behind codifying the duty of disclosure was to lay down a minimum standard of independence and impartiality and the intent was not to limit the disclosure standard to the two Schedules. In this respect, India follows the real likelihood of bias test which is similar to the apparent bias test as prevalent in the U.K.[138] In summary, the likelihood of bias means that a particular set of circumstances may not give rise to actual bias on the part of the arbitrator but may create an apprehension or a likelihood in the mind of a reasonable man that the arbitrator may be biased. Thus, the scheme of the Act as provided under Section 12(1) of the Act[139] as interpreted by the courts above, includes disclosure of any circumstances that may give rise to justifiable doubts to the independence and impartiality of the arbitrator and the grounds enumerated in the Fifth Schedule[140] are only a guide and not an exhaustive list.

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[130] (2016) SCC Online P&H 19680 (Punjab and Haryana High Court).
[131] The Arbitration and Conciliation Act 1996 (India), s 12(1).
[132] The Arbitration and Conciliation Act 1996 (India), s 12(5).
[133] *Reliance Infrastructure Ltd v Haryana Power Generation Corporation Ltd* (2016) SCC Online P&H 19680 [9]-[11] (Punjab and Haryana High Court).
[134] 2020 (1) ABR 45 (Bombay High Court).
[135] ibid [67]-[68].
[136] The Arbitration and Conciliation Act 1996 (India), s 12(1)(b).
[137] The Arbitration and Conciliation Act 1996 (India), sch 5.
[138] *See generally*, *Voestalpine Schienen GmbH* (n 1).
[139] The Arbitration and Conciliation Act 1996 (India), s 12(1).
[140] The Arbitration and Conciliation Act 1996 (India), sch 5.

Furthermore, special attention may be paid to the judgment of the Gujarat High Court in *Pallav Vimalbhai Shah* v. *Kalpesh Sumatibhai Shah*.[141] In this case, it has been held that appointment of an arbitrator without making the requisite disclosure is non-est and without following the mandatory procedure under the Act.[142] The court further held that in absence of disclosure, the case would be neither covered by Section 13 nor Section 14 of the Act as the arbitrator has been appointed without following the mandatory procedure.[143] Thus, in such circumstances, the party may approach the court under Section 11 of the Act.

The above scheme of the Act would reveal a three-tier disclosure scheme under the Indian arbitration law. Firstly, the arbitrator is required to disclose any and all circumstances that may give rise to justifiable doubts to his independence and impartiality under Section 12(1) of the Act. Failure to give the said disclosure would render the appointment non-est and in non-compliance with the provisions of the Act. Secondly, the arbitrator is mandatorily required to disclose all facts mentioned under the Fifth Schedule of the Act and any other facts which may not be enumerated in the Fifth Schedule but may give rise to justifiable doubts to his independence and impartiality under the Act. In fact, the entries omitted from the I.B.A. Conflict Guidelines[144] may also be raised under Section 13 of the Act.[145] Such objection is then required to be decided by the arbitrator as per the procedure prescribed under Section 13 of the Act[146] which can subsequently be tested by the courts under Section 34 of the Act.[147] Lastly, in case a ground is made out under the Seventh Schedule of the Act,[148] the parties may either waive it by way of an express written agreement or may approach the court under Section 14 of the Act[149] or under Section 34 of the Act,[150] as the case may be.

IV. CONCLUSION: LESSONS LEARNT

The aforementioned discussion proved the hypothesis of this paper that codification of duty of disclosure is indeed in the interest of any jurisdiction willing to enact a robust arbitration law. The Indian experience with codification of duty of disclosure has revealed that the contemporary position of U.K. law is *pari materia* to the position of Indian law as prevalent

[141] O/IAAP/15/2017 (Unreported 04 August 2017) (Gujarat High Court).
[142] ibid [36]-[38].
[143] ibid [40].
[144] International Bar Association (n 5).
[145] The Arbitration and Conciliation Act 1996 (India), s 13.
[146] The Arbitration and Conciliation Act 1996 (India), s 13.
[147] The Arbitration and Conciliation Act 1996 (India), s 34.
[148] The Arbitration and Conciliation Act 1996 (India), sch 7.
[149] The Arbitration and Conciliation Act 1996 (India), s 14.
[150] The Arbitration and Conciliation Act 1996 (India), s 34.

prior to the enactment of the Arbitration and Conciliation (Amendment) Act, 2015.[151] Furthermore, after the enactment of the Arbitration and Conciliation (Amendment) Act, 2015,[152] more serious challenges have been incorporated into the Seventh Schedule of the Act[153] giving the parties an option to straight away approach the court under Section 14 of the Act[154] rather than awaiting the outcome of the arbitration and then challenging the biased award under Section 34 of the Act.[155]

A deeper dive into the codified disclosure requirement as compared with the I.B.A. Conflict Guidelines[156] has revealed that India has tailor made its disclosure requirements to suit the socio-legal culture prevalent in the Indian bar and the Indian arbitral landscape. Furthermore, an analysis of the contemporary jurisprudence has also revealed that India has created a three-tier disclosure requirement and has only codified the minimum standard of disclosure to maintain a bare minimum standard of independence and impartiality amongst the arbitrators.

Therefore, it is suggested that taking a cue from the Indian experience, countries like the U.K. may also consider codifying the duty of disclosure and implementing a three-tier disclosure requirement as provided under the Indian law. Moreover, jurisdictions may also consider tailoring the I.B.A. Conflict Guidelines[157] keeping in mind the socio-legal background of their respective jurisdictions whilst codifying the duty of disclosure. This modification of the I.B.A. Conflict Guidelines also assumes importance particularly with reference to U.K. as the U.K. courts have in the past, identified flaws with the I.B.A. Conflict Guidelines.[158] Lastly, the most important lesson that legislature of any jurisdiction must keep in mind in case it hesitates on codifying the duty of disclosure is that it will be only codifying a bare minimum duty of disclosure as has been done in India and not the entire disclosure standard (which is virtually impossible). The residual duty of disclosure would have to be tested by the courts and the arbitrators on a case to case basis and the codification of a minimum standard of disclosure would help in maintaining a minimum standard of transparency, independence and impartiality of the arbitral tribunal.

[151] The Arbitration and Conciliation (Amendment) Act 2015 (India).
[152] The Arbitration and Conciliation (Amendment) Act 2015 (India).
[153] The Arbitration and Conciliation Act 1996 (India), sch 7.
[154] The Arbitration and Conciliation Act 1996 (India), s 14.
[155] The Arbitration and Conciliation Act 1996 (India), s 34.
[156] International Bar Association (n 5).
[157] ibid.
[158] *W Ltd v M SDN BHD* [2016] EWHC 422 (Comm) [34] (England and Wales High Court).