THE APPEARANCE OF JUSTICE: INDEPENDENCE AND IMPARTIALITY OF ARBITRATORS UNDER INDIAN AND CANADIAN LAW

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Abstract

This article explores the topic of independence and impartiality of arbitrators from Indian and Canadian perspectives. The authors compare and contrast the law on this issue in both countries along with international arbitration standards. A review of the law in India and Canada illustrates that the legal positions of both countries on conflicts of interest in arbitration are, today, largely consonant with international standards, such as the UNCITRAL Model Law and the IBA Guidelines on Conflicts of Interest in International Arbitration. Canada's legal position is relatively settled. As such, the provisions of domestic law in Canada govern conflicts of interest in arbitration with significant deference by courts to the choice of the parties and the arbitrators they appoint. Conversely, the law in India continues to develop. Courts played a significantly larger role, until recently, in reviewing the appointment process of arbitrators to ensure that arbitrators were impartial and independent. Notwithstanding these differences, it is clear from Canadian and Indian legislations and jurisprudence that ensuring arbitral independence and impartiality remains vital.

I. Introduction

This article explores and considers the question of the independence and impartiality of arbitrators from Indian and Canadian perspectives, and compares and contrasts the state of the law on this issue in both countries with the arbitration standards adopted internationally.

A review of the law in India and Canada clearly illustrates that both countries firmly believe and follow the old adage "*not only must Justice be done; it must also be seen to be done*".[1] In Canada, the law on this issue mirrors the international arbitration standards and is relatively settled. As such, Canadian courts give significant deference to the choice of the parties and the arbitrators that they appoint in accordance with the provisions of domestic law. By contrast, in India the law is still developing. Prior to 2015, the Indian courts had extraordinary powers to intervene in the appointment process to ensure that arbitrators appointed by the parties were impartial and independent. There were recent amendments on this issue in 2015, which have brought domestic Indian law in line with international arbitration standards, but the jurisprudence is still not fully developed.

This article explores the following:

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[1] R v. Sussex Justices, Ex parte McCarthy, [1924] 1 KB 256, [1923] All. E.R. Rep. 233 (Eng.).

1. International Rules on Conflict of Interest and the UNCITRAL Model Law and Rules on Arbitration;
2. Canadian Legal Position on Conflicts of Interest in Arbitration; and
3. Indian Legal Position on Conflicts of Interest in Arbitration.

II. International Rules on Conflicts of Interest

The duty of arbitrators to remain independent and impartial is codified in the national arbitration statutes and institutional regimes of most countries.[2] Independence is generally understood as requiring the arbitrator to have no stake or ostensible conflict with the parties to the proceedings or the sum that may be awarded. Impartiality, on the other hand, is understood to require the arbitrator to accord equal opportunity to each of the parties to present their case. Under both national statutes and most institutional rules, an arbitrator may be rejected or challenged because they do not maintain the requisite independence or impartiality.[3] Likewise, an award granted by an arbitrator that lacks the requisite independence or impartiality may be annulled or denied recognition.[4]

These two essential prerequisites are accepted without reservation amongst arbitration practitioners, but are not easy to implement with the necessary rigor.[5] While there is general coherence among national laws and institutional rules governing the arbitrator's independence and impartiality, there is nevertheless some divergence between the interpretation and the content of the arbitrator's obligations. As a result, several international standards have developed to establish some uniformity in the way that arbitrators are appointed and how they adjudicate.

A. UNCITRAL Model Law and Rules

The United Nations Commission on International Trade Law ["**UNCITRAL**"] adopted its Model Law on International Commercial Arbitration [the "**Model Law**"] in 1985, later amended in 2006.[6] The Model Law was designed to serve as a template that states could adopt while fashioning their own arbitration legislations. Many common and civil law jurisdictions, including both Canada and India, have replicated the Model Law's provision on independence and impartiality in their own legislations.[7] Article 12(2) of the Model Law provides:

An arbitrator may be challenged only if circumstances exist that that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.[8]

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2 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1988 (2d ed., 2014).
3 *Id.* at 1762.
4 *Id.*
5 Antonio Crivellaro, *Does the Arbitrators' Failure to Disclose Conflicts of Interest Fatally Lead to Annulment of the Award? The Approach of the European State Courts,* 4(1) The Arb. Brief 122 (2014).
6 U.N. Comm. on Int'l. Trade Law, UNCITRAL Model Law on International Commercial Arbitration, 1985 U.N.G.A. Res 40/72 (Dec. 11, 1985), as amended by U.N.G.A. Res 61/33 (Dec. 18, 2006) UN Doc A/RES/61/33 [*hereinafter* "Model Law"].
7 BORN, *supra* note 2, at 1773-1774.
8 Model Law, *supra* note 6, art. 12(2).

Article 12(2) of the Model Law imposes an objective standard in the form of "*justifiable doubts*" in assessing an arbitrator's impartiality or independence. The "justifiable" qualifier imputes a reference to the perspective of a disinterested, reasonable person, as opposed to the perspective of one of the parties or the arbitrator.[9] The inquiry into the character of an arbitrator's partiality and dependence generally focuses on any predisposition in favour of or against a particular party by virtue only of its identity. Predispositions resulting from general legal or judicial issues, or generalized, philosophical biases will not be sufficient to disqualify an arbitrator.[10]

B. Institutional Rules

A number of leading arbitration institutions have established their own set of rules to govern the procedure of arbitration cases submitted to them.

Along with the Model Law, which is directed at national governments to implement as part of their domestic arbitration legislation, UNCITRAL has developed the UNCITRAL Arbitration Rules [the "**UNCITRAL Rules**"], directed at the contracting parties themselves. The UNCITRAL Rules may be incorporated by the parties into their commercial agreement or selected to govern the conduct of the arbitration once a dispute arises. The impartiality and independence provision in the UNCITRAL Rules parallels almost word-for-word Article 12(2) of the Model Law.[11]

The International Chamber of Commerce ["**ICC**"] created its own set of arbitration rules for cases submitted to the International Court of Arbitration of the ICC. The most recent revision to the ICC's Rules of Arbitration [the "**ICC Rules**"], which came into effect on January 1, 2012, provides that "every arbitrator must be and remain impartial and independent of the parties involved in the arbitration" (Article 11).

Other institutions also provide rules on conflict of interests that follow similar formulations to the UNCITRAL Rules and ICC Rules.[12]

C. IBA Guidelines on Conflicts of Interest in International Arbitration

i. Creation and Structure of the 2004 IBA Guidelines

In 2002, the International Bar Association ["**IBA**"] formed a working group to look at issues relating to conflict of interests in international commercial arbitration. The final draft of the 'Guidelines on Conflicts of Interest in International Arbitration' [the "**IBA Guidelines**"] was adopted by the IBA in 2004 and was later revised in 2014. The IBA Guidelines have no legal effect and "*do not override any applicable national law or arbitral rules chosen by the parties*".[13] The stated

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9 BORN, *supra* note 2, at 1780.

10 *Id.* at 1782-1783.

11 U.N. Comm. on Int'l. Trade Law, UNCITRAL Arbitration Rules, art. 12(2), (2013), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf. ("Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.").

12 BORN, *supra* note 2, at 1830, n.1062.

13 INT'L. BAR ASSOC., IBA Guidelines on Conflicts of Interest in International Arbitration, ¶ 6, at 3 (2014) [*hereinafter* "IBA Guidelines"].

goal of the IBA Guidelines is to mitigate the insufficient clarity and uniformity in the standards for disclosures, obligations and challenges.[14]

The IBA Guidelines are separated into two parts. Part I sets out a series of seven standards of independence and disclosure governing the appointment and conduct of an arbitrator. Part II sets out three lists of potential conflicts that may arise. These conflicts are categorized into prohibited relationships and connections (the "Red List", comprised of both waivable and non-waivable conflicts), permitted relationships and connections (the "Green List") and other relationships and connections that must be disclosed and that may give rise to a prohibited conflict, depending on the facts (the "Orange List").

The general principle is set out in General Standard 1:

Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated.

General Standard 2 sets out the objective standard of "justifiable doubts as to the arbitrator's impartiality or independence" for the disqualification of an arbitrator. This tracks the standard for the disqualification of an arbitrator imposed in the Model Law under Article 12(1). The IBA Guidelines even make express reference to the Model Law's interpretation of "justifiable doubts" in the accompanying explanation to General Standard 2(b).[15]

The standard for an arbitrator's disclosure obligations under the IBA Guidelines, however, differs from the standard imposed by the Model Law. General Standard 3(a) uses a subjective standard – viewed "*in the eyes of the parties*" – and omits the "*justifiable*" qualifier from "*doubts*".[16]

The subsequent IBA Guidelines standards impose obligations on the arbitrator as well as the parties to disclose potential conflicts of interest. The parties have a duty to inform the arbitrator and other parties, as well as the arbitration institution or any other appointing authority "about any direct or indirect relationship between it (or another company of the same group of companies) and the arbitrator" before or during the proceeding.[17] The parties must make reasonable inquiries into publically available information.[18] The arbitrator must disclose potential conflicts of interest following the same standards and procedures as the parties.[19] They are also under an obligation to make reasonable enquiries.[20] Further, the parties are also entitled to waive any potential conflicts upon the arbitrator's disclosure.[21]

ii. International Reception of the 2004 IBA Guidelines

Since the IBA Guidelines' creation, their reception by national courts has been decidedly mixed. Some courts have chosen to take them into account in their adjudication, without going so far as

14 *Id.* at 1, ¶ 3.
15 *Id.* General Standard 2(b), Explanation to General Standard 2, ¶ (b).
16 *Id.* General Standard (3)(a) ("If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence […]").
17 *Id.* General Standard 7(a), 7(b).
18 *Id.* General Standard 7(c).
19 *Id.* General Standard 3.
20 *Id.* General Standard 7(d).
21 *Id.* General Standard 4.

to give them any binding effect. A U.S. District Court in New York considered the IBA Guidelines in vacating an arbitral award.[22] The Swedish Supreme Court relied on the IBA Guidelines in overturning a Court of Appeals decision to uphold an arbitral award.[23] Courts in Switzerland, Belgium and Germany are also among those that have taken the IBA Guidelines into account.[24]

Other countries have regarded the IBA Guidelines only as persuasive tools and have refrained from assigning them any weight whatsoever. The English High Court declined to consider the IBA Guidelines in a decision not to remove the arbitrator and set aside the award. It held that "*if, applying the common law test, there is no apparent or unconscious bias, the Guidelines cannot alter that conclusion*".[25] A court in Austria has also refused to apply the IBA Guidelines.[26] A Dutch court and a U.S. District Court in Florida did not address the IBA Guidelines in their decisions regarding the independence and impartiality of arbitrators in those respective cases, in spite of the parties' reliance on IBA Guidelines.[27]

iii. The 2014 Revisions to the IBA Guidelines

In 2014, the IBA revised its Guidelines to expand the scope of their application. A significant amendment addressed the effectiveness of advance waivers by arbitrators in relation to any possible future conflict of interests. The new provision clarifies that an advance waiver does not discharge the arbitrator of their on-going duty of disclosure.[28] The revisions also extended the application of the IBA Guidelines to arbitral secretaries. Assistants to an arbitrator, an arbitral tribunal or the individual members of an arbitral tribunal are now under the same duty of independence and impartiality as the arbitrator themselves.[29] Third-party funders and insurers who have a "*direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration*" have also been expressly included in the IBA Guidelines.[30]

The IBA Guidelines sought to address the growing size of law firms and the resulting prevalence of arbitrators who have ties to, or continue to practise in a law firm. Arbitrators are now required to "bear the identity" of his or her law firm.[31] However, the IBA Guidelines elaborate that each

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22 Applied Indus. Materials Corp. v. Ovalar Makine Ticaret VeSanayi, A.S., No. 05-CV-10540 (S.D.N.Y. June 28, 2006); Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132 (2d Cir., 2007).

23 Nytt Juridisk Arkiv [NJA] [Supreme Court] 2007-11-19 T2448-06 (Swed.), *available at* http://www.arbitration.sccinstitute.com/Views/Pages/GetFile.ashx?portalId=89&cat=95788&docId=1083436&propId=1578; *see also* IBA Conflicts Committee, *The IBA Guidelines on Conflicts of Interest in International Arbitration: The First Five Years, 2004-2009*, 4(5) Disp. Res. Int'l. 5, 13-15 [*hereinafter* "The First Five Years"].

24 *See,* Tribunale Federale [TF] [Federal Tribunal] June 10, 2010, DECISIONI DEL TRIBUNALE FEDERALE SWIZZERO [DTF] 4A_458/2009 (Switz.); Coursd'Appel [CA] [Court of Appeal] Bruxelles, Oct. 29, 2007, Case No. R.G. 2007/AR/70 (Belg.); Oberlandesgericht [OLG] [Higher Regional Court of Frankfurt am Main] Oct. 4, 2007, RECHTSPRECHUNG DER OBERLANDESGERICHTE IN ZIVILSACHEN [OLGZ] Case No. 26 Sch 8/07 (Ger.).

25 A v. B, 2011 WL 2748602 (English High Ct.), ¶ 73; *but see* Sierra Fishing Co v. Farran, 2015 EWHC (Comm) 140, ¶ 58.

26 Handelsgericht Wien [HG] [Vienna Commercial Court] July 24, 2007, HANDELSRECHTLICHE ENTSCHEIDUNGEN [HS] Case No. 16 Nc 2/07w. *See also*, The First Five Years, *supra* note 23, at 5.

27 Rechtbank's-Gravenhage [RB] [District Court of The Hague] Oct. 18, 2004, Challenge No. 13/2004, Petition No. HA/RK/2004.667; HSN Capital LLC (USA) v. Productora y Comercializador de Televisión SA de CV (Mexico), 2006 WL 1876941 (US Dist. Ct., M.D. Fla.). *See also* The First Five Years, *supra* note 23, at 12-13.

28 IBA Guidelines, *supra* note 13, General Standard 3(b).

29 *Id.* General Standard 5(b).

30 *Id.* General Standard 6(b).

31 *Id.* General Standard 6(a).

case must be considered independently based on factual circumstances such as the activities of the law firm and the arbitrator's relationship to the firm.[32] The last significant amendment imposed an obligation on the parties to inform the tribunal, the arbitral institution and the other parties to the dispute of the identity of the counsel and any known relationships to the arbitrator.[33]

While certain countries have continued to take the IBA Guidelines into account since their revision, the effectiveness of the 2014 IBA Guidelines has been called into question.[34] The English High Court considered the IBA Guidelines in *W Limited* v. *M SDN BHD* in a decision to dismiss a challenge a challenge to an arbitral award.[35] Justice Knowles asserted that the case was to be decided under English law.[36] Yet, because of the international dimension of the arbitration, the judge believed that the IBA Guidelines ought to be examined, especially given that the claimant had relied on them.[37] Justice Knowles, however, ultimately declined to apply the IBA Guidelines, noting several weaknesses in their drafting. In particular, he opined that the reliance on the lists of potential conflicts in Part II undermined a focus on case-specific judgment.[38] Nevertheless, the same court derived assistance from the examples provided in Part II of the IBA Guidelines in a 2015 decision to remove an arbitrator due to justifiable doubts as to his impartiality.[39]

III. Canadian Legal Position on Conflict of Interests

A. Legislative History

Prior to the adoption of any modern statutes regarding arbitration, the Supreme Court of Canada dealt with the issue of conflict of interests in arbitrations in *Szilard* v. *Szasz*.[40] Justice Rand stressed the necessity for arbitrators to act with "*as free, independent and impartial minds as the circumstances permit*".[41] The standard applied by the Court was "*the probability or the reasoned suspicion of biased appraisal and judgment*".[42] This standard was an objective one, from the view of a "*fair minded person*".[43] Therefore, a business relationship between the arbitrator and the respondent in *Szilard*, despite the absence of evidence establishing actual bias, was sufficient to disentitle the arbitrator from being an independent and impartial adjudicator.

Following the creation of the Model Law in 1985, Canada became the first country in 1987 to adopt legislation based on the Model Law through separate statutes in each of its provinces.[44]

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32 *Id.*

33 *Id.* General Standard 7(b).

34 *See* Chartered Institute of Arbitrators, *Weaknesses in the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration* (May 6, 2016), *available at* http://www.ciarb.org/news/ciarb-news/news-detail/das-news/2016/05/05/weaknesses-in-the-2014-iba-guidelines-on-conflicts-of-interest-in-international-arbitration.

35 W Limited v. M SDN BHD, 2016 EWHC 422 (Comm.) (Eng. High Ct.).

36 *Id.* ¶ 44.

37 *Id.*

38 *Id.* ¶¶ 34-41.

39 Sierra Fishing Co. v Farran, 2015 EWHC (Comm.) 140, ¶ 58.

40 Szilard v. Szasz, [1955] S.C.R. 3 (Can.).

41 *Id.* ¶ 2.

42 *Id.* ¶ 16.

43 *Id.* ¶ 2.

44 Randy A. Pepper, *Why Arbitrate?: Ontario's Recent Experience with Commercial Arbitration,* 36.4 Osgoode Hall L. J. 811 (1998).

Quebec is an exception as it had simply incorporated a set of legal rules governing arbitration into its Civil Code. Provincial arbitration legislation, again with the exception of Quebec, comprises two discrete statutes governing both domestic and international arbitration. For example, Ontario has enacted the *Arbitration Act* (for domestic arbitrations) and the *International Commercial Arbitration Act* (for international arbitrations).[45]

The provincial statutes governing international arbitration have expressly adopted the Model Law. International arbitration statutes in provinces such as Ontario, Alberta and Saskatchewan include the Model Law as a schedule and expressly state that the Model Law applies within the province.[46]

In domestic arbitration legislation, the provisions governing the independence and impartiality of arbitrators are different that the formulation used in Article 12(2) of the Model Law. For instance, the domestic arbitration statutes of Ontario, Manitoba, New Brunswick and Saskatchewan provide that "*an arbitrator shall be independent of the parties and shall act impartially*".[47] An arbitrator must disclose any circumstances he or she is aware which may give rise to a reasonable apprehension of bias and may be challenged where circumstances exist that may give rise to a reasonable apprehension of bias.[48]

B. Different Standards for Domestic and International Arbitrations

The different formulations for the conflict of interest provisions under the Model Law and IBA Guidelines and how they may differ from the domestic arbitration statutes have created a lack of clarity when it comes to their application. This ambiguity depends on whether the differences are merely semantic or whether they maintain different standards.

On its face, the standard of 'reasonable apprehension of bias' in the domestic arbitration statutes appears to diverge from the Model Law and IBA Guidelines' standard of 'justifiable doubts'. 'Justifiable doubts', according to the IBA Guidelines, entails an objective appraisal as to whether "*there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision*" (emphasis added).[49] The words 'likelihood' and 'doubts' indicate that more than the mere existence of influencing factors besides the merits of the case is necessary. The wording of the conflict of interest provisions in the domestic arbitration statutes suggests a lower standard than a 'likelihood' of bias or 'doubts' of impartiality and independence. A 'reasonable apprehension of bias' suggests that the existence of *any* such circumstance is impermissible.

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45 Arbitration Act, S.O. 1991, c. 17 (Can. Ont.) [*hereinafter* "Ontario Arbitration Act"]; International Commercial Arbitration Act, R.S.O. 1990, c. I.9 (Can. Ont.) [*hereinafter* "Ontario Int'l. Arbitration Act"].

46 Ontario Int'l. Arbitration Act, § 2 (Can.); International Commercial Arbitration Act, R.S.A. 2000, c. I-5, § 4 (Can. Alta.); International Commercial Arbitration Act, S.S. 1988-89, c. I-10.2, § 3 (Can. Sask.).

47 Ontario Arbitration Act, § 11(1) (Can.); Arbitration Act (Can. Man.), S.M. 1997, c. 4, § 11(1); Arbitration Act (Can. N.B.), R.S.N.B. 2014, c. 100 § 11(1); Arbitration Act, 1992 (Can. Sask.), S.S. 1992, c. A-24.1 § 12(1).

48 Ontario Arbitration Act, §§ 11(2), 13(1) (Can.).

49 IBA Guidelines, *supra* note 13, General Standard 2(c).

The application of the 'reasonable apprehension of bias' standard is exhibited in several Canadian cases. In *Stardust Enterprises* v. *Rubin's Realty Ltd.*, the New Brunswick Court of Queen's Bench held:[50]

An arbitrator should not act if circumstances exist that may give rise to a reasonable apprehension that he is biased […] They cannot act if they can be seen to be subject to such influence that to a fair-minded and informed person would raise a reasonable doubt that the nominee possesses an impartial attitude to which each party is entitled.

This proposition suggests that the existence of a reasonable apprehension of bias is cause for the removal of the arbitrator. On the facts of the case, the Court found that there was indeed a reasonable apprehension of bias on the part of the nominated arbitrator and he was removed by the Court from the matter.[51] The view in *Stardust* was echoed in *Revenue Properties Co.* v. *Victoria University*, where the Ontario Divisional Court held:[52]

The case law generally accepts the proposition that it is probably a jurisdictional error for a tribunal or any member of it, to put itself in a position where there would be a reasonable apprehension which reasonably well informed persons could properly have of a biased appraisal and judgment of the issues.

However, a more recent judicial discussion of the 'reasonable apprehension of bias' standard in arbitration appears to equate it with the 'justifiable doubts' standard. In *A.T. Kearney Ltd.* v. *Harrison*, the test was elaborated as "*whether a reasonable and right-minded person, informed of all the circumstances, viewing the matter realistically and practically, and having thought the matter through, would conclude that it was more likely than not that [the arbitrator] would not decide fairly*" (emphasis added).[53] This formulation appears to be consistent with the IBA Guidelines' articulation of a "*likelihood that the arbitrator may be influenced by factors other than the merits of the case*" (emphasis added).[54] In *A.T. Kearny*, the judge ultimately decided to dismiss the application seeking removal of the arbitrator on the basis that he "*could not conclude that it was probable that [the arbitrator] would not decide fairly*" (emphasis added).[55]

C. Arbitrators Held to a Different Standard than Judges

Canadian case law has presented conflicting views as to whether arbitrators should be held to the same standards of impartiality and independence as judges. In *Ridout and Maybee LLP* v. *Johnston*, the court answered this question in the affirmative and held that the 'reasonable apprehension of bias' test "*[applied] to arbitrators in the same manner as it applies to courts*".[56] However, the more recent case of *Telesat Canada* v. *Boeing Satellite Systems International Inc.*[57] differs from this position. In *Telesat*, the judge distinguished between judges and arbitrators by cautioning that "*case law as to*

50 Stardust Enterprises v. Rubin's Realty Ltd., [1999] N.B.J. No. 369 [N.B.Q.B.], ¶ 4.
51 *Id.* ¶¶ 15-16.
52 Revenue Properties Co. v. Victoria University, (1993) 62 O.A.C. 35 (Can. Ont. Div. Ct.), ¶ 22.
53 A.T. Kearney Ltd. v. Harrison, [2003] O.J. No. 438 (Can. Ont. S.C.), ¶ 6.
54 IBA Guidelines, *supra* note 13, General Standard 2(c).
55 A.T. Kearney, *supra* note 53, ¶ 14.
56 Ridout & Maybee LLP v. Johnston, [2005] O.J. No. 1188 (Can. Ont. S.C.), ¶ 32.
57 Telesat Canada v. Boeing Satellite Systems International Inc., 2010 ONSC 4023 (Can. Ont. S.C.).

removal of a judge has to be considered carefully as the circumstances of a judge in Ontario [*are*] *quite different from that of an arbitrator*".[58] In explaining this conclusion, he noted that:[59]

Arbitrators often are members of a law firm with all the commercial considerations associated within that environment. That is dramatically different than a salaried member of the judiciary who is neither carrying on business nor financially associated with or dependent upon his or her fellow judges.

Professor Gary Born shares this view in his writing about international commercial arbitration from a global perspective. For the sake of practical implementation, assessing arbitrators' relationships and potential for bias must be at a different standard than judges:[60]

More fundamentally, forbidding arbitrators from having past or existing professional and social contacts with the parties and their counsel, in the same manner that might apply to national court judges, would risk impairing one of the basic characteristics of the arbitral process.

D. Party-Appointed Arbitrators

Canadian courts have adopted a stance towards party-appointed arbitrators that is consistent with international consensus. In arbitral panels composed of party-appointed members, those partisan arbitrators are held to the same standard of impartiality and independence as individual, neutral arbitrators. The Ontario Divisional Court held in *Revenue Properties Co.* v. *Victoria University*:[61]

The reported decisions in Canada have required the same degree of impartiality for each member of a tripartite panel, notwithstanding the fact that two of the panel are nominated by the parties whose dispute is to be arbitrated. The nominees are not to adjudicate as representatives of the parties who nominated them notwithstanding the fact that there may be a professional ongoing relationship between the nominators and the nominees. Mr. Justice Roach in Bradley v. Canadian General Electric (1957), O.R. 316 (C.A.) addressed the issue of impartiality which courts in Canada have appeared to consistently followed.

At page 331 Mr. Justice Roach wrote:

I have heard it said that the nominees of management and labour on the Board 'represent' one or the other. This may be an appropriate time to say they represent neither.

As members of the Board they are independent of both […] there can be no gradation of independence.

All arbitrators are subject to similar disclosure or disqualification standards. Further, once a panel is fully constituted, a party-appointed arbitrator may not have *ex parte* communication with the party which appointed them.[62] In contrast, the American legal position considers party-appointed arbitrators as "non-neutral" arbitrators. Their role is closer to a representative of the party: they

58 *Id.* ¶ 126.
59 *Id.* ¶ 130.
60 BORN, *supra* note 2, 1790.
61 Revenue Properties Co. v. Victoria University, (1993) 62 O.A.C. 35 (Can. Ont. Div. Ct.), ¶¶ 29-30.
62 J. KENNETH MCEWAN & LUDMILA BARBARA HERBST, COMMERCIAL ARBITRATION IN CANADA: A GUIDE TO DOMESTIC AND INTERNATIONAL ARBITRATIONS, ch 4:50.10 (2015); *see also,* Waterloo (Regional Municipality) v. Elgin Construction, [2001] O.J. No. 4368 (Ont. S.C.), ¶ 20 ("contact [between a party and the nominee arbitrator] should be limited prior to the appointment of the nominee and effectively non-existent after such appointment."); Kitchener (City) v. G.M. Gest Group Ltd., [2003] O.J. No. 4038 (Ont. S.C.).

are presumed to be predisposed to the appointing party and may communicate with them throughout the arbitration process. Nevertheless, they are still required to exercise independent judgment in their ultimate adjudication.[63]

E. Application of the IBA Guidelines in Canadian Jurisprudence

To date, the 2014 IBA Guidelines have been considered in only one Canadian case. In *Jacob Securities Inc.* v. *Typhoon Capital B.V.*, the Ontario Superior Court dismissed an application to set aside an arbitral award on the grounds that the arbitrator was biased.[64] The arbitration centred on a claim by the applicant that it was entitled to compensation from the respondent for having introduced them to a source of financing, Northland Power Inc. and Northland Capital Inc. [collectively, "**Northland**"], for one of their wind-energy projects. The arbitrator was an experienced litigator and former partner of a Canadian law firm that had acted for Northland. The arbitrator had disclosed that he had no previous dealings with the parties or their principals. The arbitrator, however, did not perform a conflict search with his former firm. After the arbitrator dismissed the applicant's claim, the applicant allegedly became aware of the relationship between the arbitrator's former law firm and Northland, and challenged the arbitral award.

As part of its argument, the applicant relied on General Standard 6(a) of the IBA Guidelines which stipulates that an arbitrator must "bear the identity" of his or her law firm.[65] In addition, the applicant argued that the arbitrator failed to comply with the IBA Guidelines' disclosure requirement in General Standard 3.[66] The judge referred to the IBA Guidelines, noting that they "*are widely recognised as an authoritative source of information as to how the international arbitration community may regard particular fact situations in reasonable apprehension of bias cases*".[67] He pointed to two situations prescribed in the IBA Guidelines' Non-Waivable Red List: where the arbitrator is a legal representative or employee of a party to the arbitration and where the arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom.[68]

In *Jacob Securities*, the judge relied on the IBA Guidelines in arriving at his conclusion that there was no reasonable apprehension of bias. The judge distinguished the facts of *Jacob Securities* from the situations in the Non-Waivable Red List, noting that the arbitrator did not work on any matters involving Northland while he was at his former firm and that he had no knowledge of the relationship between his former firm and Northland.[69] The judge also relied on other Canadian case law to support his conclusion that the arbitrator's connection with Northland was too remote.[70] The judge adopted the IBA Guidelines' disclosure requirement relating to the arbitrator. He accepted the general proposition concerning disclosure referred to in Article 12 of the Model Law and established jurisprudence.

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63 *Id.*
64 Jacob Securities Inc. v. Typhoon Capital B.V., 2016 ONSC 604 (Can. Ont. S.C.).
65 *Id.* ¶ 20.
66 *Id.* ¶¶ 53-54.
67 *Id.* ¶ 41.
68 *Id.* ¶ 42.
69 *Id.* ¶ 43.
70 *Id.* ¶¶ 44-49.

The Canadian legal position with regards to the 2014 IBA Guidelines is therefore somewhat equivocal. While the judge in *Jacob Securities* referred to the IBA Guidelines as an authoritative source, there is no express statement in his decision that he relied on the IBA Guidelines in coming to his conclusion. It remains to be seen whether Canadian courts assume a more wholehearted approach to the IBA Guidelines by expressly relying on them in their rulings of arbitral independence and impartiality, or whether they eschew them in a more concrete manner in favour of an already-developed, and largely similar, jurisprudence.

IV. Indian Legal Position on Conflicts of Interests

A. Legislative History and Jurisprudence

In 1996, India adopted new arbitration legislation, the Arbitration and Conciliation Act [the "**1996 Act**"], based on the UNCITRAL Model Law. However, until recently, the 1996 Act did not impose any positive disclosure obligations on an arbitrator to ensure that impartiality and independence of his award were maintained. Further, the 1996 Act did not have specific instances and grounds on which an arbitrator could be rendered ineligible. As a result, the courts took an active role in the process of appointing an arbitrator and had far-reaching powers to ensure that impartiality and independence were maintained in arbitral adjudication. The issue of rendering an arbitrator *ipso facto* ineligible came up before the Supreme Court of India on various occasions. In *Union of India* v. *M.P. Gupta*[71] and *Ace Pipeline Contract* v. *Bharat Petroleum*[72] the Supreme Court of India found that, in the arbitration of disputes concerning government contracts, the appointment of an arbitrator who is also an employee of the contracting corporation does not *ipso facto* create a presumption of bias, partiality or lack of independence on the arbitrator's part.

This raised significant concerns for foreign corporations looking to do business in India, especially in areas where they had to partner with the government. Most government contract only provide for selection of an arbitrator from amongst the contracting corporation's employees. In light of this practice, the Supreme Court of India, in *Union of India* v. *M/S Singh Builders Syndicate*, recommended that the government should phase out arbitration clauses that nominate an employee as the arbitrator.[73]

This decision saw a marked change in the way the courts started addressing this issue and whether a reasonable apprehension of bias exists in such circumstances. In *Denel (Proprietary Limited)* v. *Govt. of India, Ministry of Defence*, there was a contract between the government and various parties which stipulated that all disputes would be referred to arbitration before a single specified government official.[74] When a dispute concerning the contract arose and an amicable settlement failed, the contractual dispute resolution mechanism was initiated. The claimant Denel petitioned to have the arbitrator (the employee of the government, which was also a party to the arbitration) removed due to a reasonable apprehension of bias. The District Court ordered the arbitrator to be removed and when the parties failed to appoint a new arbitrator, the Supreme Court exercised its powers under section 11(6) of the 1996 Act to appoint an arbitrator. The

71 Union of India v. M.P. Gupta, (2004) 10 S.C.C. 504 (India).
72 Ace Pipeline Contract v. Bharat Petroleum, (2007) 5 S.C.C. 304 (India).
73 Union of India v. M/S Singh Builders Syndicate, (2009) 4 S.C.C. 523 (India).
74 Denel (Proprietary Limited) v. Govt. of India, Ministry of Defence, (2012) 2 S.C.C. 759 (India).

Court found that it was entitled to ignore the procedure under the contract designating who shall be appointed arbitrator and, instead, nominated its own independent arbitrator. While the Court asserted that appointing an arbitrator contrary to the terms of a contract is an exception to the rule, *Denel* nevertheless displays Indian courts' emphasis on enforcing independence and impartiality in arbitration.

In *Shakti Bhog Foods Ltd.* v. *Kola Shipping Ltd and Anr.*, the High Court of Delhi addressed the issue of an arbitrator who had failed to disclose that he had previously served as a co-arbitrator in a related dispute involving the respondent.[75] The respondent argued that the prior arbitration was irrelevant to the adjudication of the current proceeding.[76] The Delhi High Court referred to the IBA Guidelines and identified the facts of the case with a situation listed under the 'Orange List' of situations requiring disclosure in Part II under the IBA Guidelines.[77] The judge set aside the arbitral award on the basis that the arbitrator's failure to disclose his prior connection to the respondent gave rise to justifiable doubts as to his independence and impartiality.[78]

In light of this developing jurisprudence and to clarify the legislation, the government issued the Arbitration and Conciliation (Amendment) Ordinance, 2015 to amend certain provisions of the *1996 Act*. The Arbitration and Conciliation (Amendment) Bill, 2015 [the "**Amendment Bill**"] was then introduced in both houses of Parliament to replace the Arbitration and Conciliation (Amendment) Ordinance, 2015. This Amendment Bill became part of the 1996 Act after receiving the President's assent on October 23, 2015.

B. The 2015 Reforms to the 1996 Act

The 2015 amendments brought the 1996 Act in line with international arbitration rules and standards. For the purposes of this article, the most relevant amendments were made to Sections 11 and 12 of the 1996 Act, which deal with the appointment of an arbitrator and grounds for challenging an appointment of the arbitrator respectively.

Section 12 of the 1996 Act was amended to add language which imposes a positive obligation on arbitrators to disclose, at the time of appointment, any circumstances likely to give rise to justifiable doubts as to their independence or impartiality. It introduces significantly greater clarity and detail on the circumstances affecting the neutrality of arbitrators. The amendments to Section 12 notably include the addition of two schedules: (i) The Fifth Schedule; and (ii) The Seventh Schedule. The Fifth Schedule lists 34 grounds which can give rise to justifiable doubts as to the independence or impartiality of arbitrators. The Seventh Schedule lists 19 circumstances which render a person ineligible from acting as an arbitrator.[79]

Some of the instances which can render an arbitrator ineligible are if he is an employee, consultant, advisor or has any other past or present business relationship with the party or an affiliate of the party to the dispute; or the arbitrator is a manager, director or part of the management, or has a similar controlling influence over the parties to the dispute; or if the

75 Shakti Bhog Foods Ltd. v. Kola Shipping Ltd &Anr.,193 (2012) D.L.T. 421 (India).
76 *Id.* ¶ 75.
77 *Id.* ¶ 83.
78 *Id.* ¶ 85.
79 Arbitration and Conciliation (Amendment) Act, 2015, No. 3, Acts of Parliament, 2016 (India).

arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself. Although parties may waive any conflicts that result in ineligibility under the Seventh Schedule, they may do so only after a dispute has arisen and by written agreement.

The amendments to Section 12 of the 1996 Act are supported by amendments to Section 11, which now requires the courts to dispose of all applications and challenges to the appointment of an arbitrator within 60 days.

These amendments constitute a significant development and change in the law to ensure independence and impartiality of arbitrators. These amendments appear to have been influenced by the IBA Guidelines as the situations described in both the schedules mirror those set out in Part II of the IBA Guidelines and bring the Indian law on this issue in line with the Canadian law and the international standards.

C. Arbitrators held to the Same Standard as Judges

Contrary to the Canadian law, the test applied by Indian courts to determine 'justifiable doubts' regarding an arbitrator's independence and impartiality is the same test applied to judges. This test is derived from the House of Lords' decision in *Porter* v. *Magill*, which held that a decision should be set aside on account of bias where a "*fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*".[80]

In *Kumaon Mandal Vikas Nigam Ltd.* v. *Girja Shankar Pant*,[81] the Supreme Court of India held that the determination of bias should be decided on the particular facts and circumstances of each case. The Court asserted that where there was a real danger of bias, the administrative action of the case ought to be set aside. The standard of proof to prove bias is based on availability of cogent evidence. Mere imagination of a ground cannot be an excuse for apprehending bias.[82] Though it is difficult to prove actual bias, if proved, actual bias would lead to an automatic disqualification. Actual bias exists in cases where an arbitrator has a vested interest in the case and allows a decision to be influenced by partiality or prejudice and thereby deprives the litigant of the fundamental right to a fair trial by an impartial tribunal.[83]

D. Expected Impact of the 2015 Amendments

The 2015 amendments will have a significant impact on arbitrations, especially arbitrations involving the government as they will likely reverse a judicial trend that permitted employees of the government to sit as arbitrators in disputes involving the government. Further, these changes to the 1996 Act are in line with international best practices, and the two schedules (referred to above) have been modelled on the 2014 IBA Guidelines. These amendments are likely to increase the confidence of foreign investors looking to invest in India and give them comfort that the dispute resolution mechanisms and procedures in India are in line with other foreign

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80 Porter v. Magill, [2002] H.R.L.R. 16, [2002] 1 All E.R. 465 (U.K. H.L.) ¶ 103.

81 Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant, (2001) 1 S.C.C. 182 (India).

82 Ladli Construction Company Pvt. Ltd. v. Punjab Police Housing Corporation Ltd. and Ors. (2012) 4 S.C.C. 609 (India).

83 Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd., (2009) 8 S.C.C. 520 (India).

jurisdictions and that arbitration in India can be relied upon as a mechanism to efficiently resolve commercial disputes.

Further, the amendments seek to clarify ambiguity in the law and reduce the intervention of the Courts. It will be interesting to witness how the judiciary adopts and applies these changes in 1996 Act, as the credibility of an arbitration mechanism of any country depends on the recognition of the legislation by the judiciary.

V. Conclusion

Independence and impartiality form an integral part of any adjudicatory system. The law of both countries recognizes that it is important to ensure that no doubts can be cast on the neutrality, impartiality and independence of the arbitrator or the arbitral tribunal. The law on this issue in both the countries is now in consonance with international standards.

Canada and India have modelled their respective arbitration legislation after the Model Law and have thus adopted similar standards and obligations with respect to arbitral neutrality, impartiality and independence. In light of recent jurisprudence in Canada and the legislative changes in India, both countries today recognize equivalent standards for challenging an arbitrator's appointment on account of bias. These standards – a "reasonable apprehension of bias" in Canada and "justifiable doubts" in India – are also consistent with international norms of arbitral impartiality and independence represented in the Model Law and IBA Guidelines. In addition, both countries have imposed positive disclosure obligations on arbitrators. Before the acceptance of and during an arbitrator's appointment, the arbitrator must disclose any circumstances likely to give rise to a reasonable apprehension of bias (in Canada) or justifiable doubts as to their independence or impartiality (in India).

More broadly, Canadian and Indian legislatures and courts have tended towards embracing international consensus and uniformity in many respects with regard to the independence of impartiality of arbitrators. Canada was the first country to adopt the Model Law for its own legislation and Canadian courts have followed the international consensus in their view of party-appointed arbitrators. India, for its part, has demonstrated what could be construed as a tacit endorsement of the IBA Guidelines by creating schedules in the 1996 Act along the same lines as the IBA Guidelines.

The main difference between the laws in the two jurisdictions lies in the manner in which the government, corporations and the Courts in both jurisdictions have dealt with the issue of independence and impartiality of arbitrators. In India, where until recently the law on this issue lacked clarity and certainty, the Government had relied upon the interventionist nature of the Courts to provide comfort and transparency to investors and businesses. In Canada, the Courts have taken a more hands off approach. Both the statute and judicial policy in Canada are in favour of promoting commercial independence of the parties.

While the complexities of potential conflicts of interests should not be underestimated, at this stage, both countries are legally well equipped and positioned to be leading jurisdictions for international arbitration.