



भारत संचार निगम लिमिटेड

(भारत सरकार का उपक्रम)

BHARAT SANCHAR NIGAM LIMITED

(A Govt. of India Enterprise)

Company's Secretariat and Legal Department

No. BSNL/Sectt/54-2/2010

Dated: 06/04/2016

Subject: Arbitration and Conciliation (Amendment) Act, 2015 – regarding implications thereof in the matters related to appointment of arbitrators.

1. Introduction.

1.1 The Arbitration and Conciliation (Amendment) Act, 2015 has been notified vide Gazette Notification dated January 1st 2016, effective from 23rd October, 2015. Nothing contained in the Amendment Act shall apply to the arbitral proceedings commenced before the commencement of the Amendment Act but it shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.

1.2 Main implications of the said Amendment Act in the matter related to appointment of arbitrators are indicated in the following paragraphs.

2. Appointment of arbitrators.

2.1 Section 12 of the Principal Act dealing with 'Grounds of Challenge' in respect of appointment of an arbitrator has been amended. Salient features of the said amendments are as under:-

- When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose (in the form prescribed in the Sixth Schedule) in writing any circumstances, such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality.
- Fifth Schedule has been inserted in the Principal Act and the grounds as stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.
- Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator, Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.

2.2 The amendments in Section 12 as indicated above, inter-alia, imply that –

- (a) Any person falling in categories specified in the **Seventh Schedule** (copy enclosed at annexure-1), including a current employee, manager, director or any person who is part of the management is not eligible to be appointed as arbitrator.

- (b) Appointment of any person falling in any of the categories specified in the **Fifth Schedule** (copy enclosed at annexure-2) give rise to justifiable doubts as to the independence or impartiality of an arbitrator. This includes, inter-alia, persons who have been associated within the past three years with a party or an affiliate of one of the parties in a professional capacity, such as a former employee. This also includes the arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.
- (c) Before appointing any person as arbitrator, a declaration in writing from him has to be obtained in the form specified in the **Sixth Schedule** (copy enclosed at annexure-3) in terms of section 12 (1).

3. Arbitration Clause.

3.1 With regard to already signed/ existing contracts, existing Arbitration clause for sole arbitrator can be invoked in case the parties waive, subsequent to disputes having arisen between them, the applicability of sub-section (5) of section 12 by an express agreement in writing.

3.2 In view the provisions of section 12 discussed above, an employee is not eligible to act as arbitrator. He can at best act as an agreed authority to appoint an arbitrator e.g. CMD/CGM. Accordingly, the following arbitration clause is suggested for substituting the existing clause in general hereafter:-

Except as otherwise provided elsewhere in the contract, In the event of any disputes, controversy, or differences arising out of or relating to this agreement, or the breach, termination or invalidity thereof between the parties, such party or parties shall make a request to the other party or parties to amicably settle such differences or disputes and parties shall thereupon make every effort to settle the same amicably within a period of 60 (sixty) days from the date of making of such request.

Where parties are unable to settle the disputes through conciliation, the same shall be referred to the authority in BSNL (CMD/CGM/GMTD, as the case may be) for referral of such disputes to a sole arbitrator (chosen from the name(s) provided by BSNL), to be mutually decided by the parties, as per the provisions of the Arbitration and Conciliation Act, 1996, any amendment thereof, and any notification issued or rules made thereunder from time to time.

The venue of the arbitration proceeding shall be New Delhi/or Circle/SSA HQ (as the case may be).

3.3 In the cases of arbitral panel having three arbitrators, or in the cases of international arbitration and arbitration through PMA, the existing clauses may be continued.

4. Cost of Arbitration.

4.1 Prior to the amendment, the parties could agree for fees of the arbitrators in terms of provisions of sub-section (8) of section 31. The same has now been substituted and the regime for Cost of the Arbitration is now provisioned in newly inserted Section 31A which, *inter-alia*, provides



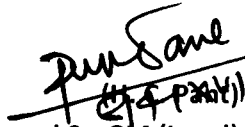
that, (a) the Court or arbitral tribunal shall have the discretion to determine costs (which includes the fees and expenses of the arbitrators) in relation to any arbitration proceeding; and (b) the general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party. Further, sub-section (14) of section 11 empowers High Court to frame rules for the purpose of determination of the fees of the arbitral Tribunal after taking into consideration the model fee specified in the Fourth Schedule. Further, explanation to this sub-section allows the parties to agree for determination of fees as per the rules of an arbitral institution. As High Court is yet to frame such rules, at present there is no clarity as to the fee for arbitrators and it appears that the same shall be governed by the provisions of section 31A.

5. Conclusion.

5.1 All units concerned with appointment of arbitrators, should ensure that provisions of amended Act (refer para 2), particularly section 12 read with Schedules V, VI and VII are strictly adhered to while appointing arbitrators.

5.2 All concerned units are advised that the arbitration clause where there is provision for sole arbitrator in all existing/ future agreements may be amended on case to case basis on the lines as suggested in para 3.2 above, subject to what is stated in para 3.1 and para 3.3.

6. This issues with the approval of Chairman and Managing Director.


Company Secretary and Sr. GM (Legal)

To
All the CGMs
All PGMs/Senior GMs/GMs of BSNL Corporate Office.

Copy for information to:
CMD/Director (HR)/ Director (Fin)/ Director (CFA)/ Director (CM)/ Director (ENT)/ ED (CA)/ ED (NB)/
ED (CN)/ CVO.

SEVENTH SCHEDULE

[See section 12(5)]

Arbitrator's relationship with the parties or counsel

1. *The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.*
2. *The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.*
3. *The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.*
4. *The arbitrator is a lawyer in the same law firm which is representing one of the parties.*
5. *The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.*
6. *The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.*
7. *The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.*
8. *The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.*
9. *The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.*
10. *A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.*
11. *The arbitrator is a legal representative of an entity that is a party in the arbitration.*
12. *The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.*
13. *The arbitrator has a significant financial interest in one of the parties or the outcome of the case.*
14. *The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.*

Relationship of the arbitrator to the dispute

15. *The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.*
16. *The arbitrator has previous involvement in the case.*

Arbitrator's direct or indirect interest in the dispute

17. *The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.*
18. *A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.*
19. *The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.*

Explanation 1.— The term "close family member" refers to a spouse, sibling, child, parent or life partner.

Explanation 2.— The term "affiliate" encompasses all companies in one group of companies including the parent company.

Explanation 3.— For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialised pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the rules set out above.]

Sch. V

ARBITRATION AND CONCILIATION ACT, 1996

FIFTH SCHEDULE

[See section 12(1)(b)]

The following grounds give rise to justifiable doubts as to the independence or impartiality of arbitrators :

Arbitrator's relationship with the parties or counsel

1. *The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.*
2. *The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.*
3. *The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.*
4. *The arbitrator is a lawyer in the same law firm which is representing one of the parties.*
5. *The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.*
6. *The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.*
7. *The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.*
8. *The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.*
9. *The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.*
10. *A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.*
11. *The arbitrator is a legal representative of an entity that is a party in the arbitration.*
12. *The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.*
13. *The arbitrator has a significant financial interest in one of the parties or the outcome of the case.*
14. *The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.*

Relationship of the arbitrator to the dispute

15. *The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.*
16. *The arbitrator has previous involvement in the case.*

Arbitrator's direct or indirect interest in the dispute

17. *The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.*
18. *A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.*
19. *The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.*

Previous services for one of the parties or other involvement in the case

20. *The arbitrator has within the past three years served as counsel for one of the parties or an affiliate of one of the parties or has previously advised or been consulted by the party or an affiliate of the party making the appointment in an unrelated matter, but the arbitrator and the party or the affiliate of the party have no ongoing relationship.*
21. *The arbitrator has within the past three years served as counsel against one of the parties or an affiliate of one of the parties in an unrelated matter.*
22. *The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.*
23. *The arbitrator's law firm has within the past three years acted for one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator.*
24. *The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties.*

Relationship between an arbitrator and another arbitrator or counsel.

25. *The arbitrator and another arbitrator are lawyers in the same law firm.*
26. *The arbitrator was within the past three years a partner of, or otherwise affiliated with, another arbitrator or any of the counsel in the same arbitration.*
27. *A lawyer in the arbitrator's law firm is an arbitrator in another dispute involving the same party or parties or an affiliate of one of the parties.*
28. *A close family member of the arbitrator is a partner or employee of the law firm representing one of the parties, but is not assisting with the dispute.*
29. *The arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm.*

Relationship between arbitrator and party and others involved in the arbitration

30. *The arbitrator's law firm is currently acting adverse to one of the parties or an affiliate of one of the parties.*

31. *The arbitrator had been associated within the past three years with a party or an affiliate of one of the parties in a professional capacity, such as a former employee or partner.*

Other circumstances

32. *The arbitrator holds shares, either directly or indirectly, which by reason of number or denomination constitute a material holding in one of the parties or an affiliate of one of the parties that is publicly listed.*
33. *The arbitrator holds a position in an arbitration institution with appointing authority over the dispute.*
34. *The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties, where the affiliate is not directly involved in the matters in dispute in the arbitration.*

Explanation 1.—*The term "close family member" refers to a spouse, sibling, child, parent or life partner.*

Explanation 2.—*The term "affiliate" encompasses all companies in one group of companies including the parent company.*

Explanation 3.—*For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialised pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the rules set out above.*

SIXTH SCHEDULE

[See section 12(1)(b)]

Name :

Contact details :

Prior experience (including experience with arbitrations):

Number of on-going arbitrations:

Circumstances disclosing any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to your independence or impartiality (list out):

Circumstances which are likely to affect your ability to devote sufficient time to the arbitration and in particular your ability to finish the entire arbitration within twelve months (list out).