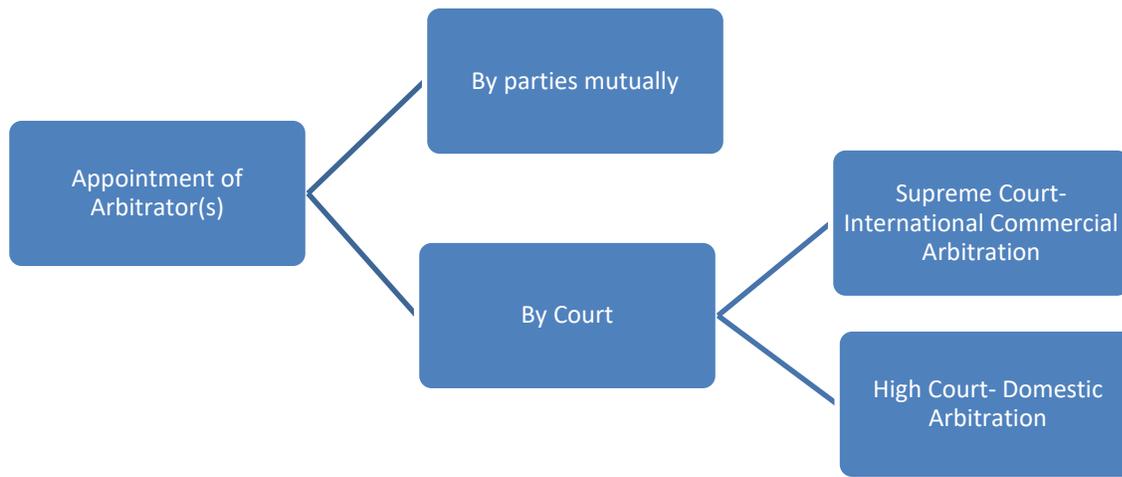


## SELECTION AND APPOINTMENT OF ARBITRATOR(S)



The Arbitration and Conciliation (Amendment) Act, 2015 grants the liberty to the parties to appoint an arbitrator mutually.

The Act provides that the parties are free to determine the number of arbitrators, provided that such number shall not be an even number. However, if the parties fail to do so, the arbitral tribunal shall consist of a sole arbitrator.<sup>1</sup>

The procedure in relation to appointment of arbitrator(s) is provided under Section 11 of the Act. A person of any nationality may be an arbitrator, unless otherwise agreed by the parties. The aforesaid section also deals with the contingency wherein the parties fail to appoint an arbitrator mutually. In such a situation, the appointment shall be made, upon request of a party, by the Supreme Court or any person or institution designated by such Court, in the case of an International Commercial arbitration or by High Court or any person or institution designated by such Court, in case of a domestic arbitration.

Before the appointment of arbitrator is made, the concerned Court or the person or institution designated by such Court is required to seek a disclosure in writing from the prospective arbitrator in terms of Section 12(1) of the Act and also give due regard to any qualifications required for the arbitrator by the agreement of the parties and the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

It may be noted that under Section 12(1) of the Act, an obligation has been cast upon the prospective arbitrator to make an express disclosure on (a) circumstances which are likely to give

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<sup>1</sup> Section 10 of the 2015 Act.

rise to justifiable doubts regarding his independence or impartiality; or (b) grounds which may affect his ability to complete the arbitration within 12 (twelve) months.

The purpose of this provision is to secure the appointment of an unbiased and impartial arbitrator.

Fifth Schedule to the Act discussed below contains a list of grounds giving rise to justifiable doubts as to the independence or impartiality of an arbitrator. The Seventh Schedule (Annexure-B) lays the grounds which make a person ineligible to be appointed as an arbitrator.

The Act provides that in an International Commercial Arbitration, an arbitrator of a nationality other than the nationalities of the parties may be appointed where the parties belong to different nationalities.

Expeditious disposal of application for appointment of an arbitrator(s) is emphasized by the Act and an endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.

#### **THE 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 service 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.