Unilateral Appointment of Arbitrators: The Judicial Approach in India

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Introduction

Justice must not only be done but also must be seen to be done. The maxim *nemo judex in causa sua* is a closely related principle that means no one can be a judge in his own cause). It can regrettably be argued that, prior to the year 2015, this principle was not strictly adhered to in India particularly in cases of arbitrations arising from contracts involving a dominant party.

It is a common practise for a dominant party to draft advantageous clauses in a contract. One such clause is that which vests with the dominant party the unilateral rights to appoint the sole or presiding arbitrator. The dominant party may even unilaterally appoint one of its key employees to function as sole arbitrator. Or the contract may vest with a senior employee of the dominant party, such as the Managing Director, to nominate a sole arbitrator. Or the contract may require that the arbitrator be appointed from a panel, maintained, curated, and supervised by the dominant party.

It is not uncommon for the non-dominant party to acquiesce to one-sided clauses for fear of losing out on business and due to lack of bargaining power. Naturally, such lopsided clauses cast reasonable aspersions on the impartiality and independence of arbitrators appointed to adjudicate on the dispute. Until 2015, arbitration laws in India did not permit setting aside the appointment of an arbitrator merely on the apprehension of bias or prejudice. The courts required sufficient

evidence to establish bias and even unilateral appointment of employees as arbitrators did not by itself establish prejudice. Pertinently, the government and the many public sector enterprises owned by the government were the biggest beneficiaries.

Things changed in the year 2015 when the Indian Parliament proceeded to amend the 1996 Act[1] and to incorporate several elements of the IBA[2] standards of independence and impartiality.

Key elements reinforcing the principle of *nemo judex in causa sua*

The 2015 amendment[3] introduced a new clause under section 12 that relates to grounds for challenging the appointment of an arbitrator. It also inserted two schedules, namely the Fifth Schedule and the Seventh Schedule to the 1996 Act. The Fifth Schedule enumerates conditions, which when met would cast justifiable doubt as to the independence and / or impartiality of the arbitrator but would not necessarily disqualify the arbitrator. The Seventh Schedule enumerates conditions, which when met would *ipso facto* lead to de jure termination of the arbitrator.

Judicial Position after the amendments

The judicial approach has been to foster a healthy arbitration environment and to create a conducive arbitration culture in the country. The Supreme Court has approached the issue by harmoniously constructing the provisions of section 12(5), the Fifth Schedule and the Seventh Schedule of the amended 1996 Act to bring into its fold several other evolving situations concerning the appointment of arbitrator.

[1] Arbitration & Conciliation Act, 1996

[2] International Bar Association

[3] Arbitration & Conciliation (Amendment) Act, 2015

In the *TRF*[4] judgement, the Supreme Court found it inconceivable in law that a person who is statutorily ineligible to act as an arbitrator could also have the power to nominate an arbitrator. Thus, the Managing Director of a litigating party is not only statutorily barred from acting as the sole arbitrator but is also statutorily barred from nominating / appointing as the sole arbitrator. For a brief while, various High Courts carved out exceptions to the *TRF* principle. But the *TRF* principle was eventually upheld in two Supreme Court decisions, i.e., *BBN*[5] and *Perkins*[6].

As a consequence of *TRF* and *Perkins*, the current position of law is that there are only two modes of appointment of an arbitrator – either by consent of parties or by the order of a Court. The *Perkins* decision particularly mandates that there must be neutrality throughout the dispute resolution process, which must be free from all justifiable doubt.

The decisions in *TRF* and *Perkins* successfully countenanced the unilateral power of a party to nominate or appoint a sole arbitrator. But the rigor of law came to be averted by dominant contracting parties by requiring that the sole arbitrator be appointed by consent from a panel that was maintained, curated and supervised by it. Such stipulations are common in contracts entered into by statutory bodies, governmental agencies and public sector undertakings. The appointment clauses stipulate that the presiding and/or sole arbitrator be selected from a panel of retired and senior officials of government departments.

[4] *TRF Ltd. v. Energo Engg. Projects Ltd.,* (2017) 8 SCC377

[5] *Bharat Broadband Network Ltd. v. United Telecoms Ltd.,* (2019) 5 SCC 755

[6] *Perkins Eastman Architects DPC v. HSCC (India) Ltd.,* 2019 SCC OnLine SC 1517

The legal validity of such procedures was scrutinised by the Supreme Court in three cases, namely, *Voestalpine*[7], *CORE*[8] and *JZDUSS*[9]. In *Voestalpine*, the Court did not find any bias in the appointment of arbitrators from a panel of retired government servants provided the same was broad based. In *CORE*, the court deviated from the *Voestalpine* principle and allowed the nomination of arbitrators from a narrowly tailored panel that consisted of persons interested in the outcome. The decision in *CORE* has, however, been referred to a Constitution Bench for fresh consideration.[10] In *JZDUSS*, the Supreme Court stressed that ensuring neutrality of arbitrators is the object and intent of section 12(5) read with the Seventh Schedule. It relied upon decisions in *TRF*, *Perkins*, *BBN* and *Voestalpine* to hold that a party cannot insist on the appointment of an arbitrator when the appointment itself is hit by the statutory bar under Section 12(5) read with the Seventh Schedule to the Act. It may, therefore, be argued that the *Voestalpine* principle continues to occupy field.

Conclusion

It follows that the judicial approach to arbitration has been extremely sensitive to the changed realities of the global business environment. Neutrality must be maintained throughout the dispute resolution process, which must itself be free from all justifiable doubt. Any person having an interest in the outcome of the dispute cannot be appointed as an arbitrator to the dispute. No party can exercise unilateral authority to nominate or appoint a sole arbitrator or the presiding arbitrator.

[7] *Voestalpine Schienen GmbH v. DMRC,* (2017) 4 SCC 665

[8] *Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV),* (2020) 14 SCC 712

[9] *Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. v. Ajay Sales & Suppliers,* 2021 SCC OnLine 730

[10] *Union of India v. Tantia Constructions Ltd.,* (2021) SCC OnLine SC 271

Progressive judicial interpretations to section 12(5), the Fifth Schedule and the Seventh Schedule to the amended 1996 Act have brought the arbitration practice in India at par with international standards. The exercise of power by Indian courts to set discard clauses in arbitration agreements that cast justifiable doubts on independence of arbitrator is deeply encouraging.

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