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- AN EVALUATION OF THE PROCESS OF APPOINTMENT OF ARBITRATORS FROM A 'BROAD BASED PANEL'

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Introduction

Arbitration is an ever-evolving arena. The Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) ("**Arbitration Amendment Act, 2015**") had introduced substantial changes to the provisions of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act, 1996**"). Many vexed questions regarding interpretation of several provisions of the Arbitration Amendment Act, 2015 have arisen, some of which have subsequently been settled and/or clarified by various judgments of the High Courts and the Supreme Court of India. Some issues, however, continue to harbour controversies, like that of the appointment of arbitrators.

This paper endeavors to analyse *firstly*, the degree of fairness which the parties are required to adopt with regard to the procedure for appointment of arbitrators in government contracts in light of the current legal scenario established by Indian courts. *Secondly*, whether the current norms established by the courts for appointment of arbitrators in government contracts can be regarded as cogent? And *lastly*, understanding the duty incumbent upon the courts to create a conducive environment for arbitration of disputes arising out of government contracts.

The Journey thus Far

As far as the present legal scenario regarding appointment of arbitrators in government contracts are concerned, it will be interesting to note the development of precedents. The Supreme Court's decision in *TRF Limited vs. Energo Engineering* Projects Limited ("**TRF Limited**"),[1] opened up more chambers of controversy than the issues it had put to rest. The court held that once the identity of a managing director of a company, being a party to an arbitration proceeding, as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated, thereby extending the scope of Entries, 1, 5 and 12 of the Seventh Schedule to attract the disqualification, which provides that the proposed Arbitrator should not be an employee of one of the parties to the arbitration.

The Supreme Court *vide* the judgment of *Perkins Eastman Architects DPC & ors. vs. HSCC (India) Ltd* ("**Perkins Eastman**"),[2] while clarifying the *TRF Limited (supra)* legacy eloquently established that arbitration clauses which provide exclusive power to one party to appoint a sole arbitrator cannot be the norm of the day anymore and principles of impartiality and absence of bias in arbitration proceedings should be of paramount consideration.

The aforesaid principle established by *Perkins Eastman (supra)* also resonates in the recent judgment delivered by the Delhi High Court in the case of *Proddatur Cable TV Digi Services vs. SITI Cable Network Limited* ("**Proddatur**"),[3] wherein the court while placing reliance on the *ratio* of *Perkins Eastman (supra)* held that even a 'company' acting through its Board of Directors will have an interest in the outcome of the dispute and thus, the arbitration clause which envisaged the appointment of a sole arbitrator by the 'company', would be rendered unworkable. The court further opined that the underlying principle of party autonomy in an arbitration clause, cannot be permitted to override the principles of impartiality and fairness in arbitration proceedings.

However, a situation where both parties to an arbitration agreement are provided with the option to nominate their respective arbitrators, the same would be treated differently. The rationale behind the same is that, an advantage which one party may derive by nominating an arbitrator of its choice would get counter-balanced with the equal power provided to the other party. The court drew the distinction with respect to cases where only one party has a right to appoint a sole arbitrator and stated that such choices will always have an element of exclusivity in determining or charting the course for dispute resolution and thus, a person who has an interest in the outcome or decision of

[1] (2017) 8 SCC 377. Decided on 03.07.2017.
[2] Arbitration Application Nos. 32, 34 and 35 of 2019. Decided on 26.11.2019.
[3] O.M.P. (T) (COMM.) 109 of 2019. Decided on 20.01.2020.

the dispute, must not have the power to appoint a sole arbitrator.

It is to be noted that *Perkins Eastman (supra)* despite initiating discussions, did not deal with a situation where an arbitrator is chosen from a panel appointed unilaterally by one of the parties to arbitration.

A Snapshot of Other Jurisdictions

The jurisprudence in foreign jurisdictions is also not significantly different when it comes to ensuring equality of opportunity of parties in constituting the arbitral tribunal. The principle of equality of parties or the principle of equal treatment in the designation of parties was first enunciated by the French Cour de Cassation case of *Sociétés BKMI et Siemens v. Société Dutco* ("**Dutco**").[4] In this case, the court set aside an arbitral award rendered in a three-party dispute where each of the two respondents asserted the right to appoint their own arbitrator, rather than make a joint appointment. Though the respondents eventually made a joint nomination under protest, the court set aside the award on the basis that, the appointment procedure violated the respondents' right to equal treatment because it granted the claimant greater influence in the constitution of the arbitral tribunal than each of the respondent. The Cour de Cassation further went onto hold that the "*equality of the parties in the appointment of arbitrators is a matter of public policy which can be waived only after the disputes has arisen*".[5] The position of law thus underwent a noticeable change post Dutco which consequently led to major alterations in the rules formulated by prominent arbitral institutions, including the International Chambers of Commerce ("**ICC**") and London Court of International Arbitration ("**LCIA**") pertaining to constitution of arbitral tribunals by the parties.

The aforesaid prevailing rule of law is also manifest from the decisions rendered by U.S. Courts which have time and again refused to enforce appointment procedures in employment disputes which permits one party (in most cases, the employer itself) to dictate the list from which the arbitral tribunal could be constituted.[6]

Establishing a New Norm pertaining to Appointment of Arbitrators

The Supreme Court in *Voestapline Schinen GmbH vs. Delhi Metro Rail Corporation Limited*,[7] ("**DMRC case**") dealt with the question of choosing an arbitrator from a panel selected by a party, for the first time. For the purposes of understanding the rationale of the decision, it may be useful to delve into the facts of the case in brief.

In this matter, the procedure for constitution of the arbitral tribunal came up for consideration by the court. The procedure envisaged that upon invocation of the arbitration clause, the respondent shall forward names of five persons from the panel of arbitrators maintained by the respondent. Thereafter, both the petitioner and the respondent, will have to choose its nominee arbitrator from the said panel. Two such chosen arbitrators will, thereafter, choose the third arbitrator from the said panel, to act as the presiding arbitrator. This procedure of constitution of the arbitral tribunal was not acceptable to the petitioner owing to the fact that the panel prepared by the respondent comprised of serving or retired engineers of the respondent company and government departments or public sector undertakings and they purportedly did not qualify as independent arbitrators in the light of the ineligibility norms provided under Section 12(5) read with Seventh Schedule to the Arbitration Act, 1996.

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[4] ASA Bulletin 10(2) (1992), 295. Decided on 17.01.1992.
[5] *Id.* at 297.
[6] *Murray v. United Food & Commercial Workers Int'l Union*, 289 F.3d 297, 303 (4th Cir. 2002); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999).
[7] Arbitration Petition (Civil) No. 50 of 2016. Decided on 10.02.2017.

The Supreme Court struck down the aforesaid procedure holding that it is imperative that a panel should be '*broad based*' in nature. The court also prescribed the category of persons who can form a part of the panel in addition to serving or retired engineers of government departments and public sector undertakings. As per the court, such persons included engineers of prominence and high repute from the private sector and also, persons with legal background like judges and lawyers of repute. Further, while concluding, the Supreme Court directed formation of a panel comprising 31 arbitrators. It would, however, be pertinent to mention that the Supreme Court vide the said judgment, did not prescribe a specific number of arbitrators who are mandatorily required to be included in a panel so it may be called '*broad based*'.

It is however, pertinent to mention, that although the *DMRC case (supra)* discussed the issue of constructive bias with regard to a situation where a party is given the exclusive power to create a panel of arbitrators, the Supreme Court failed to lay down any specific guideline to address it and anticipated that the rule of creating a '*broad based panel*' established by it, would sufficiently address any controversy that may arise in connection to it. Whether or not such rule clarifies the position or confuses it has been analysed in the following portion on this paper.

Clarifying Pre-established Principles?

The opportunity to test the principle of a '*broad based panel*' enunciated by the *DMRC case (supra)* on the whetstone of the principles of equality, presented itself before a Full Bench of the Supreme Court in the case of *Central Organisation for Railway Electrification vs. ECI-SPIC-SMO-MCML(JV)* ("**Central Organisation case**").[8]

Here, the dispute amongst the parties arose in respect of an arbitration clause which stipulated that the arbitral tribunal shall comprise of a panel of three retired railway officers not below the rank of 'senior administrative officer' as arbitrators. For this purpose, the petitioner (Railway) would send a panel of at least four names of retired railway officers. On receipt of the panel of four names, the respondent (contractor), would suggest to the general manager of the petitioner, at least two names out of the panel for appointment as the respondent`s nominee and the general manager shall appoint at least one out of them as the respondent`s nominee. Further, the General Manager would also be simultaneously required to appoint the balance number of arbitrators from the arbitrators remaining in the panel or from *'outside the panel*'.

In respect of the general manager's authority to appoint arbitrators, the issue before the Apex Court was similar to one dealt in *TRF Limited (supra)* i.e. when a named arbitrator had become ineligible by the operation of law to be appointed as an arbitrator, could he be eligible to nominate an arbitrator?

The Court after analyzing the law laid down in *TRF Limted (supra)* and *Perkins Eastmans (supra),* held that in this matter the right of the general manager to appoint arbitrators is counter-balanced by the respondent's power to choose any two from out of the four names, one of whom would be appointed as the respondent's nominee. The court, therefore, held that the general manager does not become ineligible to appoint arbitrators and the *ratio* laid down in the case of *TRF Limited* is not applicable in the instant case.

Despite heavily relying upon the *DMRC case (supra)* for the purposes of upholding appointment of ex-employees of an organisation as members of the arbitration panel, the Supreme Court in *Central Organisation case (supra)* did not make any reference to creation of a '*broad based panel*' of arbitrators while dealing with the issue of ineligibility of the general manager to appoint a nominee. Moreover, it is pertinent to note that the panel in the *Central Organisation case* (*supra*) comprised only 'four' arbitrators which is in stark contrast to the principle of a '*broad based panel*' of at least 31 names, as enunciated by the Supreme Court in the *DMRC case (supra)*.

[8] Civil Appeal Nos. 9486-9487 of 2019 (Arising out of SLP (C) Nos. 24173-74 of 2019). Decided on 17.12.2019.

Further, notably the Supreme Court in the *DMRC case (supra)* had expressly carved out the '*adverse consequences*' that might manifest if a unilateral discretion is vested with a single party to create a panel of arbitrators including the limited choice where the managing director has to select the presiding arbitrator out of the two nominated arbitrators. In *Central Organisation case* (*supra*), the General Manager was required to appoint the remaining arbitrators from the arbitrators left on the panel, or from '*outside the panel*'. There is no discussion in *Central Organisation case* (*supra*) pertaining to what constituted '*outside the panel*'. It is unclear if the court meant '*outside the panel*' to indicate any arbitrator (which would be a unilateral decision, and hence fall foul of *Perkins Eastman*), or a panel of arbitrators qualifying to be a '*broad based panel*'? If the answer is a broad based panel that would automatically raise the question that whether an arbitration agreement could be interpreted so liberally? The court has certainly failed to address these potent questions in the *Central Organisation case* (*supra*).

Additionally, it is *ex-facie* evident from the facts of the *Central Organisation case* (*supra*) that the General Manager of the petitioner was vested with the power to complete the process of constituting the arbitral tribunal by also indicating the 'presiding officer' from amongst the two such appointed arbitrators. This is distinct from the *DMRC case (supra),* where the arbitrators would indicate a presiding arbitrator amongst themselves.

In light of the aforesaid, it may be argued that the decision of the court holding that the authority exercised by the general manager would not fall foul of the principles in *TRF Limited (supra)* judgment, cannot be regarded as fully acceptable. *TRF Limited (supra)* prohibited a nominee of a '*managing director*' or any person who is a '*part of the management*' to be appointed as an arbitrator. The general manager therefore, being vested with the authority to appoint the presiding arbitrator in the *Central Organisation case* (*supra*) from the remaining list of arbitrators or those who are from '*outside the panel*' cannot be protected by the principle clarified by the court in *Perkins Eastman (supra)* since, for the purposes of appointing the presiding arbitrator to constitute the arbitral tribunal, the sole discretion vested exclusively with the general manager of the petitioner and there was no counter-balancing opportunity vested with the respondent. Thus, insofar as the appointment of the 'presiding arbitrator' for the arbitral tribunal is concerned, the same should have ideally fallen short of the standard laid down in *TRF Limited (supra)*, and subsequently clarified by *Perkins Eastman (supra)*.

Defining the Contours of the DMRC Case

Though the *Central Organisation case (supra)* partially ignored the principles established by the *DMRC case (supra)*, applying the concept of '*adverse consequences*' enunciated by the *DMRC case (supra)*, the Delhi High Court in the case of *Afcons Insfrastructure Ltd. vs. Rail Vikas Nigam Limited* ("**Afcons Infrastructure**"),[9] disregarded the procedure for appointment of arbitrators enumerated under clause 17.3 (ii) of the General Conditions of Contract (GCC) between the parties. The said procedure prescribed that the employer (respondent) would forward a panel of 5 (five) names to the contractor (petitioner) for confirming any one name from the panel to be appointed as one of the arbitrators. The employer had the power to decide upon the second arbitrator, out of the remaining 4 names in the panel and thereafter, the presiding arbitrator would be appointed by two such appointed arbitrators. The said clause also provided that in case the two arbitrators are not being able to agree upon the presiding arbitrator; on request of either of the parties, the managing director of the respondent, can appoint the presiding arbitrator. The rationale for the decision of the Court was based on, *inter-alia*, on the following:

a) The said clause would limit the choice of the party to select one out of the five persons suggested by the other party as mentioned in the *DMRC case (supra)*.
b) Since the respondent (RVNL) had suggested names of its former employees for appointment of an arbitrator, all such persons had a past relationship (however remote)

[9] ARB. P. No. 21 of 2017. Decided on 29.05.2017.

with the respondent (RVNL/Railways). Such relationship may not strictly fall within the rigour of Section 12(5) read with the Seventh Schedule to the Arbitration Act, 1996, but undeniably, the same does give rise to apprehensions of bias, (whether justifiable or not), in the minds of the other party. Thus, it undermines the confidence of the parties in the arbitral process.

Although the *Afcons Infrastrucure (supra)* judgment purported to expand the applicability of the *DMRC case (supra)*, it also placed an *innuendo* by holding that appointment of ex-employees of a particular party might create an apprehension of bias in the minds of the other party which may have an overall impact on the element of fairness in the arbitration proceedings. Whether or not this may be regarded as a reasonable limitation to the principle established by the court in the *DMRC case (supra)* is a question that begs consideration. The Fifth and the Seventh Schedule of the Arbitration Act, 1996 disqualifies arbitrators having past or present business relationships with one of the parties from being appointed to an arbitral tribunal constituted to resolve disputes between such parties. However, former employees are not disqualified to act as arbitrators. The Supreme Court of India had the occasion to consider the issue in *The Government of Haryana PWD Haryana (B and R) Branch v. M/s G.F. Toll Road Pvt. Ltd. & Ors.,*[10] where it was held that only present employees are disqualified under the Entry 1 of the Fifth Schedule which is *pari materia* with Entry 1 of the Seventh Schedule of the Act. It was held that "*any other past or present business relationship*" refers to a relationship other than that of an employee, consultant, or advisor. Given that there is a gradual movement in the judicial precedents from "*circumstances that give rise to justifiable doubts as to independence or impartiality exist*" to an *"apprehension of bias"* in the arbitrator, it may be interesting to see if there is a purposive interpretation of the provision by a court of law, or an amendment of the statute to disqualify former employees as arbitrators in the near future.

A similar question arose for consideration before the Delhi High Court in the case of *Simplex Infrastructure Ltd. vs. Rail Vikas Nigam Limited* ["**Simplex Infrastructure**"],[11] with regard to Clause 17.3.(ii) of the General Conditions of Contract (GCC) between the parties, as in *Afcons Infrastructure (supra)*.The petitioner thus, contended that the said procedure cannot be adopted in the light of the judgment rendered by the courts in the *DMRC case (supra)* and *Afcons Infrastructure (supra)*.

The Delhi High Court taking a note of the position of law already enumerated by the Supreme Court in the *DMRC case (supra)* held that, the aforesaid manner of appointment of arbitrators as per the said clause is no longer valid and the respondent must *broad base* its panel of arbitrators by including names of engineers of prominence and high repute from the private sector, persons with legal background like judges and lawyers of repute; people having knowledge and expertise in accountancy. The court also observed that the list of 26 (twenty-six) panel arbitrators prepared by the respondent comprised mostly of retired officials from the railways or other companies which falls under the umbrella of Indian Railways like IRCON/CRIS and only 9 (nine) of them were persons who were not connected with railways or any other railway organisations/companies. The court thus, held the same to be contrary to the spirit of *ratio* laid down in the case of *Afcons Infrastructure (supra)*.

The Delhi High Court, whilst relying upon *DMRC case (supra),* also made it imperative for the party vested with the responsibility of creating the panel of arbitrators to include persons from diverse professions to pass the test of a '*broad based panel*' of arbitrators. However, the Delhi High Court, like its predecessors on the issue, did not give any direction pertaining to the appropriate number of arbitrators for the purposes of comprising such a '*broad based panel*'.

The occasion to answer the aforesaid question pertaining to as to what can be regarded as an appropriate number of arbitrators to be categorized as '*broad based*' arose before the Delhi High

[10] *Reliance Infrastructure Limited v. Haryana Power Generation Corporation,* [2016 (6) ARBLR 480 (P&H), decided on 27.10. 2016 (High Court of Punjab and Haryana)].
[11] Arb. P. No. 519 of 2018. Decided on 11.12.2018.

Court in the case of *SMS Ltd. vs. Rail Vikas Nigam Limited* ("**SMS Ltd**"),[12] wherein it had to adjudicate upon the disputes between the parties regarding choosing a list of arbitrators from a '*broad based panel of proposed arbitrators*'. The said broad based panel comprised 37 (thirty-seven) arbitrators. The petitioners objected to the same since the names which were suggested by the respondent were mostly retired officers of either railway services or SPVs/PSUs/organisations of the railways. Moreover, only 8 (eight) names which were suggested by the respondent in the said panel, seemed to have no association with the Railway Ministry but were former government employees of organisations like NHPC, CPWD etc.

The Delhi High Court while placing reliance on *Simplex Infrastructure (supra)* and the *DMRC case (supra)* held that the said '*broad based panel of proposed arbitrators*' did not satisfy the concept of neutrality of arbitrators and hence, such a panel of 37 arbitrators cannot be regarded as '*broad based*' in nature.

Thus, the case of *SMS Ltd. (supra)*, established that even a panel of 37 members cannot be regarded to be as enough for the purposes of passing the test of a '*broad based panel*'. Such an interpretation therefore, possibly warrants that the test of a '*broad based panel*' is not dependent upon the number of arbitrators but, upon the diversity in the expertise of the professionals comprising a panel which renders such a panel to be '*broad based*' in nature. However, unless the law in this regard is clearly laid down, what future possibly holds is a series of experiments with panels permuting and combining numbers, expertise and vocations of arbitrators to pass some unwritten test. Such prospect does not look too exciting.

Conclusion

The Supreme Court in the *DMRC case (supra)* had observed that time has come to send positive signals to the international business community, in order to create a healthy arbitration environment and conducive arbitration culture in India. The said observation by the court was in consonance with that of the Law Commission, which in its report,[13] had stated that the duty becomes more onerous in government contracts, where one of the parties to the dispute is the government or public sector undertakings itself and the authority to appoint the arbitrator rests with it.

The Supreme Court's resolve to create a conducive environment for impartial, fair and unbiased arbitrations to thrive in India is necessary to be followed in its true letter and spirit, especially, with regard to not providing exclusive powers to one party to prepare a panel of arbitrators. After all, it is warranted that both parties should have an equal opportunity to prepare the list of arbitrators for the panel to eliminate any notion of bias in the appointment of arbitrators.

As the current scenario reflects that the arbitration agreements between the parties continue to provide power to only one party to prepare the list of arbitrators, which in government contracts is the government itself, it may be advisable for government authorities to renegotiate the arbitration clauses/agreements providing for unilateral appointment of arbitrators and provide the other party with equal rights and opportunity in appointment of arbitrators.

This paper has been written by Pooja Chakrabarti (Partner) and Kunal Dey (Associate).

[12] Arb. P. 167 of 2019. Decided on 14.01.2020.
[13] Law Commission of India Report No. 246 dated August, 2004.

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