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The Legality of Unequal Arbitrator Appointment Powers in India: The Clarity, the Mist

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The issue of unilateral appointment of a sole arbitrator by a party has been in the spotlight since the Supreme Court of India's ("SC") decision in *Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd. ("Perkins")* on 26 November 2019. This case largely puts the issue to rest by rendering unilateral sole arbitrator appointments invalid by virtue of the 2015 amendments to the Indian Arbitration and Conciliation Act ("Act") arbitration law as discussed under the third heading below.

Relaying the *TRF's* Baton

Perkins has taken the baton from *TRF Ltd. v. Energo Engineering ("TRF")* to clarify the SC's stance on the appointment of a sole arbitrator. In *TRF*, the SC invalidated an arbitration clause that allowed the appointment of the Managing Director of one party, or his nominee, as the sole arbitrator. The SC struck down the clause stating that, once a party to a dispute had become ineligible by operation of law (see the third heading below) to act as a sole arbitrator, its power to appoint another in its place must also cease. It did, however, state that this analogy applied to the appointment of a sole arbitrator only, and did not apply when both the parties could appoint one arbitrator each for a three-member tribunal. The SC followed this approach in Perkins where the arbitration clause provided that only the respondent could appoint a sole arbitrator. *Perkins* may indeed lead to an influx of litigation because of the invalidity of such arbitration clauses. However, it is a step in the right direction as it would serve the arbitration ecosystem in India well in the long term by bringing an end to the practice of drafting unequal arbitration agreements.

The Domino Effect

In less than two months after *Perkins,* the Delhi High Court (HC) delivered (on 20 January 2020) a judgement on similar lines in *Proddatur Cable TV Digi Services v. SITI Cable Network Limited ("Proddatur").* The HC held that while party autonomy is an

underlying principle in an arbitration agreement, the procedure laid down in the arbitration clause cannot be permitted to override considerations of impartiality and fairness in arbitration proceedings. The HC squarely relied on *Perkins* for arriving at this conclusion.

Similarly, in *Arvind Kumar Jain v. Union of India* (delivered on 4 February 2020) the Delhi HC held that the respondent could not pressure the petitioner to agree to furnish a waiver under S.12(5) of the Act to appoint a sole arbitrator of the respondent's choice.

It is a welcome trend set by *TRF* and strengthened by *Perkins* to invalidate unequal arbitration agreements where only one party is able to appoint a sole arbitrator. It is not the debate whether or not the sole arbitrator appointed by one of the parties is actually biased or partial. The premise that one of the parties has the exclusive right to appoint an arbitrator of its choice without any regard to the opposite party is by itself unfair. Thus, even if a unilaterally appointed sole arbitrator has the best of the intentions, a court would still invalidate her appointment and appoint another arbitrator. It is only reasonable for a court to not venture into the arbitrator's integrity as it would consume time and further delay the arbitration.

Syncing the Indian Law with the International Norm

The SC in TRF grounded its reasoning on the 2015 amendments to the Act – more specifically S.12(5). Under S.12(5) of the Act, a person covered by the Seventh Schedule shall be ineligible to be appointed as an arbitrator.

Similarly, *Perkins stated that "*[n]aturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the **essence** (emphasis supplied) of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) and recognised by the decision of this Court in TRF Limited." This highlights the spirit behind the judgment.

This stance was long due and syncs India with the international understanding of this issue better known as the principle of equality. The principle of equality or equal treatment of the parties in the constitution of the arbitral tribunal means that the parties must have the possibility of participating in the constitution of the arbitral tribunal on equal terms.[1)] It may be considered as part of the broader principle of equality of the parties. The equality of the parties is in turn part of transnational procedural public policy.[2)] The general consequence of this principle is that parties may jointly choose a sole or presiding arbitrator, but none of the parties can make that choice alone. As far as party-appointed arbitrators are concerned, the principle requires that parties each have the possibility of making a unilateral appointment. Thus, the principle of equality is a universal limit to the freedom of the parties with regard to the appointment of arbitrators.[3)] Indeed, there are circumstances where a party may waive its right to equality which are not relevant to this discussion.

Dutco is a landmark French case on the principle of equality. Although *Dutco* was in the context of a multi-party arbitration it is relevant in this context. In *Dutco* two defendants had to jointly nominate an arbitrator. They challenged this composition in the Paris Court of Appeal which saw no issue with the appointment procedure that had been standard then. However, the Cour de Cassation reversed the ruling and held that the equality of the parties in the appointment of arbitrators is a matter of public policy that can be waived only after the dispute has arisen.

In other countries such as Germany (1034 of the Code of Civil Procedure), Netherlands (1028 of Dutch Code of Civil Procedure) and Spain (Article 15 of Act on Arbitration), the principle of equality in appointing an arbitrator is enshrined in their laws. Thus, the disadvantaged party may request the domestic court to nullify the privilege of the opposite party.

Therefore, the SC's interpretation of S.12(5) and the Seventh Schedule in *TRF* and *Perkins* aligns India with the global consensus on the issue.

Quasi-unilateral Appointments

While the law on unilateral appointment of sole arbitrators appears to be settled, grey areas remain on the appointment of a tribunal (whether of a sole arbitrator or three arbitrators) where a party is only allowed to choose an arbitrator from a panel unilaterally prepared by the opposite party.

In *Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd. (DMRC) ("Voestalpine")* the SC was faced with a situation where the arbitration clause entitled only the respondent to make a panel of arbitrators upon the dispute and then propose limited names from that panel. The petitioner could thereafter select its nominee from the limited list. The petitioner challenged the arbitration clause stating that the choices in the panel were determined solely by the other party and that such a mechanism for appointment would raise questions over the neutrality of the arbitrator. While the SC held that the choice of five arbitrators was too small a number for the petitioner to make a choice from (and therefore struck it down), it held that thirty-one was a good number. The SC also stressed on the need for a broad-based panel. The good intentions of the SC are reflected in the judgment. However, there are issues with the judgement: Firstly, there is no clarity on what number of names on a panel is appropriate for it to be not struck down. Secondly, there is no clarity on what constitutes a "broad-based panel". Thirdly, such a panel that is formed only by one party is troublesome, more so when a panel is formed once the dispute has arisen. A party entitled to form such a panel post-dispute will have the exclusive benefit of appointing candidates after conducting due diligence on the candidates' perceived disposition towards the matter. Thus, the principle of equality in the appointment of an arbitrator is compromised.

SMS Ltd. v. Rail Vikas Nigam Ltd. ("SMS") (delivered on 14 January 2020) is another case that highlights the need for clarity on the legality of an exclusive right of one party over panel selection. In *SMS*, the respondent provided the petitioner a panel of

thirty-seven candidates to choose its nominee from. Only eight of the thirty-seven candidates were not employed before by the respondent in some capacity. The Delhi HC relied on *Voestalpine* and *Perkins* to hold that the panel did not satisfy the test of neutrality of arbitrators, and consequently allowed the petitioner's appointment of its nominee outside of the panel. Likewise, it appointed an arbitrator for the respondent.

While *Perkins* discusses *Voestalpine* in the context of independence and impartiality of an arbitrator, it stops there. It does not discuss it in the context of such appointments where a party could only appoint an arbitrator from the names proposed by the other party. If the SC is confronted with this issue again, it should seize the opportunity to reconsider the legality of such panels that give one party more influence over the other in the appointment of a tribunal. It would be a waste of judicial time if courts were to analyze the validity of such panels on a case to case basis. It would serve the Indian arbitration landscape better if the practice of such unequal panel formation is put to an end. The principle of equality mandates that exclusive right of panel selection by only one party is invalid.

References

↑1 Éric Loquin, 'À la recherche du principe de l'égalité des parties dans le droit de l'arbitrage', Gazette du Palais, 29 June – 1 July 2008, p. 5. As quoted in Chapter 3: The Right to Make a Unilateral Appointment', in Alfonso Gomez-Acebo, Party-Appointed Arbitrators in International Commercial Arbitration, Kluwer Law International. pp. 39 – 68.

↑2 Catherine Kessedjian, 'Transnational Public Policy', in *International Arbitration 2006: Back to Basics?*, ICCA Congress Series (Montreal 2006), Vol. 13, A. J. van den Berg (ed.), Kluwer Law International, 2007, p. 867. As quoted ibid.

↑3 See Lalive, *Le choix de l'arbitre*, p. 356, as quoted ibid.

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