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Ineligible Arbitrator Also Ineligible to Nominate Arbitrator: Indian Supreme Court – Does the Judgment Open Pandora's Box?

Pranav Rai · Wednesday, October 18th, 2017 · YIAG

This post critically examines the recent Supreme Court judgment in TRF Limited vs. Energo Engineering Private Limited where the court held that a person who is ineligible to be appointed as an arbitrator cannot even nominate an arbitrator. This judgment was in the context of a unilateral arbitration clause ("**unilateral clause**") in which one party had control over the appointment of the arbitrator.

The arbitration clause here provided that, any dispute connected to the agreement is to be referred to sole arbitration of one party's (Respondent's) Managing Director (subsequently referred to as "**official**" for apposite appreciation) or his nominee. The official was ineligible to be appointed an arbitrator here in view of the Seventh Schedule (taken and adapted from the Red List of IBA Guidelines and *inter alia* prescribing ineligibility criteria for a party's official being appointed arbitrator) of the arbitration statute ("**Act**") and this ineligibility was not even contested between the parties.

The question before the court was whether such official was also ineligible to nominate an arbitrator. Relying on the maxim *qui facit per alium facit per se* ("**the Principle**"), i.e., what one does through another is done by oneself, or as elaborated by court, what cannot be done directly may not be done indirectly by engaging another outside the prohibited area, the court concluded in the affirmative.

Albeit the case settles the law on such unilateral clauses, I would argue that it raises issues with respect to unilateral clauses in general causing confusion and uncertainty.

General legal principle prevailed over legislative intent. The Act, which is based on UNCITRAL Model Law and also underwent extensive amendments in 2015 to address several

issues that plagued the arbitration regime in India, nowhere suggests a legislative intent to make an arbitrator's appointment/nomination dependent upon his appointer's/nominator's eligibility. Sufficient ineligibility criteria for arbitrator were already provided in the Act. For example, to protect against violation of natural justice (that an interested person cannot be an adjudicator), the Act *inter alia* provided for Fifth Schedule (taken and adapted from the Red and Orange List of IBA Guidelines) and Seventh Schedule. With a self-sufficient Act (at least with respect to arbitrator's ineligibility) and absence of any legislative intent to add additional ineligibility criteria, the rationale for applying the Principle to arbitrator appointment/nomination is not entirely clear.

In support of the judgment, it can be contended that there was not much occasion for the court to consider the true legislative intent or the sufficiency of the arbitrator ineligibility grounds present in the Act. Since, a) the court applied a general legal principle, so the legislative intent for the Act and the arbitration principles are not relevant in this context; b) neutrality of arbitrator was not even an issue here and the court clarified that it was never its concern that the nominated arbitrator (a retired judge) would not be independent or impartial; and c) its only concern was the legal issue that it was inconceivable that a statutorily ineligible person can nominate a person, so adequacy of the ineligibility grounds in the Act are also not relevant.

The court should have considered the legislative intent regarding the objectives of alternate dispute resolution and principles of party autonomy, the sanctity of arbitration agreement and arbitrator neutrality, and then should have weighed them against any wrong likely to happen if the Principle is not applied here. It is also my argument that since arbitrator neutrality was not a concern here and the appellant was raising the ineligibility argument only as a legal point, the Principle should be applicable only if it can be applied consistently for all other arbitrator appointments (unilateral and mutual). But as has been discussed below, application of the Principle on all kind of arbitrator appointments would result in unintended consequences which makes it all the more important for the court to have considered the legislative intent here before selectively applying the Principle.

Why should the Principle not apply to mutual appointments? The judgment does not clarify why the Principle is not applicable to mutual appointments, where, a) each party appoints its own arbitrator; or b) parties mutually appoint a sole arbitrator, since even in these cases appointments will effectively be made by the (ineligible) official of each party (presuming that the parties are body corporate and thus can only act through its officials). The court distinguished the present unilateral clause from the situation in point a), stating that in such cases authority to nominate cannot be questioned, but it did not expressly distinguish it from point b). Notwithstanding this, it is apparent that the court did not intend to apply the Principle in case of mutual appointments for the obvious (but insufficient) reason that if the Principle is applied even to those cases, then the arbitration mechanism will not be able to function.

The reason for such selective application of the Principle to the present unilateral clause, but not to mutual appointment clauses, may have been the arbitrator's neutrality aspect (as it would arguably be questionable in the case of unilateral clauses). But since arbitrator neutrality was not a concern

for the court here, it is not entirely clear what this selective application of the Principle achieves in this case.

Uncertainty on how far the Principle can be stretched in other unilateral clauses. This was an "either/or" case in which the unilateral clause provided either the official will be the arbitrator, or he can nominate the arbitrator. So, the court had to first consider whether he was eligible to be an arbitrator. Only after this was determined (or in this case agreed by the parties) did the court conclude that ineligibility to be an arbitrator also means ineligibility to nominate one.

It is unclear what the fate is for unilateral clauses that give the official only a power to nominate/appoint (and not be a named arbitrator), as in such event the court will not get an opportunity to decide the official's ineligibility. Will the courts still apply the Principle in such other unilateral clauses by using the Principle itself as a rationale for its application? In other words, can the courts say that it is immaterial whether or not the official was also a named arbitrator, and that the Principle should be applied even to such cases? Otherwise, it would be akin to allowing the official to do the same thing indirectly what he is not allowed to do directly. Logically, the answer should be "no," because stretching the Principle so far would mean that all unilateral appointment clauses (or at least the unilateral appointment part therein) are invalid. Nevertheless, a question mark remains on the fate of such other unilateral clauses since there is no clear line drawn by the court on how far the Principle can be stretched vis-à-vis unilateral clauses.

No heed to Competence-Competence doctrine. While authorities were cited by Respondent to establish that authority of arbitration can be challenged only before the arbitrator, the court distinguished them on facts and relied upon another authority postulating that an appointment which is *ex facie* invalid cannot be raised before the arbitrator. On this basis, the court noted that it is incorrect to say that the arbitration proceedings once initiated cannot be interfered with by the courts while exercising its powers in relation to the appointment of an arbitrator and that a statutory disqualification (such as the one in present case) can be raised before the court.

Setting up of such precedence may result in undesirable consequences for the whole arbitration system. Encouraged by this ruling, several arbitration appointments under unilateral clauses may now be challenged in courts by the party that did not have a say in the appointment and matters that were intended to be arbitrated will now be litigated. Also, the High Courts may rely on this judgment and entertain such challenge applications and determine the eligibility of the appointed arbitrators themselves at the cost of Competence-Competence doctrine.

Conclusion. This judgment effectively adds one more ineligibility criterion to the already loaded Seventh Schedule, despite the fact that such criterion is not at all related to arbitrator's neutrality. Uncertainty regarding enforceability of unilateral clauses (other than the one in the present case) will likely increase and the party challenging unilateral clauses will be armed with one more ground of challenge in the form of the Principle, until the court clarifies the limits to which the Principle can be stretched. A quicker and foolproof solution can be by way of a much-needed

legislative intervention clarifying the position on unilateral arbitration clauses.

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