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# Independence and Impartiality of Arbitrators: Are We There Yet?

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It is a fundamental principle in international arbitration that every arbitrator must be and remain independent and impartial of the parties and the dispute

The issue of arbitrator independence, impartiality and neutrality has been a frequent source of contention in India. It is particularly rampant in disputes arising out of contracts executed before the amendment of the Arbitration and Conciliation Act, 1996 ('the Act'). Pre-amendment, there was no bar on any category of person from being appointed as arbitrator and parties could (and often would) sign arbitration agreements that provided for one of their employees to be appointed as arbitrator. Contracts with government agencies, in particular, were rife with arbitration agreements specifying one of their own as arbitrator. The 2015 amendments to the Act, which came into effect on 23.10.2015, have been pro neutrality, independence and impartiality with the addition of Section 12(5) that renders any person who falls within any of the categories in Schedule 7 of the Act ineligible to act as arbitrator and Schedule 5 that lists grounds which shall guide in determining whether there exist justifiable doubts as to the independence or impartiality of an arbitrator. However, given that these amendments are only applicable prospectively, many disputes currently in the courts are governed by the pre-amendment Act.

One such recent dispute viz. *Aravali Power Company Pvt. Ltd. v. M/s. Era Infra Engineering Ltd.*[1] was decided by the Supreme Court recently wherein the Apex Court has, relying on its previous decisions in *Indian Oil Corporation Ltd. and Others v. Raja Transport Private Ltd.*[2] and *Northern Railway Administration, Ministry of Railway, New Delhi v. Patel Engineering Company Ltd.*[3], upheld the eligibility of the CEO of the appellant company to arbitrate the dispute. With the current trend of pro arbitration judgments by the Indian Courts, this *prima facie* appears to be a set-back and contrary to the principle of arbitrator neutrality. However, in order to understand and critique the judgment in Aravali (supra) properly, it is important to take a look the factual matrix.

Aravali Power Company Pvt. Ltd. ('the Appellant') awarded a contract for the construction of a permanent township package for the Indira Gandhi Super Thermal Power Plant to M/s Era Infra Engineering('the Respondent'). A contract consisting of General Conditions of Contract (GCC) and Special Conditions of Contract (SCC)was signed between the parties. Clause 56 of the GCC stipulated arbitration between the parties and specified that any dispute would be referred to the sole arbitration of the project in-charge.

The scheduled date of completion of work was 19.05.2011. However, the progress of the work was quite slow and the Appellant cancelled remaining work. Aggrieved by such cancellation, arbitration was invoked by the Respondent on 29.07.2015 with the notice being received by the Appellant shortly thereafter, thus making the pre-amendment Act applicable to the proceedings. It is pertinent to note that in the letter invoking arbitration, the Respondent, on the basis of *nemo judex in causa sua,* suggested that a retired judge of the High Court be appointed as Sole Arbitrator or a panel of independent arbitrators be made available to choose from.

The Appellant, however, placing reliance on Clause 56 of the GCC, declined the Respondent's request and proceeded to appoint its own Chief Executive Officer as the Sole Arbitrator on 19.08.2015. The first arbitration hearing was fixed on 07.10.2015 and was attended by both parties. As per the record of the proceedings, no objection was raised by the Respondent regarding the constitution of the Arbitral Tribunal.

In fact, it was only after the amendment of the Act that the Respondent sought to challenge the appointment of the Arbitrator on 12.01.2016. This challenge was rejected by the Arbitral Tribunal on the ground that the Respondent had already participated in the arbitration proceedings without contesting the constitution of the Arbitral Tribunal. Aggrieved by the order of the Arbitral Tribunal, the Respondent approached the High Court of Delhi under Section 14 of the Arbitration Act seeking termination of mandate of the Arbitrator and under Section 11(6) for the appointment of an independent Arbitral Tribunal. The Appellant contended that the petition under Section 14 of the 1996 Act was not maintainable as the Arbitrator was appointed as per the terms of the Arbitration Agreement and the Respondent took no steps to contest such appointment in the manner prescribed under the pre-amendment Act.

The High Court allowed the applications under Sections 14 and 11(6) and set aside the appointment of the Arbitrator and further directed the Appellant to provide a panel of three independent arbitrators for the Respondent to choose from. This was done keeping in mind the objective of the 2015 amendment and the underlying principle of impartiality, independence and neutrality. Aggrieved by this order of the High Court, the Appellant approached the Supreme Court of India.

The Supreme Court set aside the High Court's decision on the following grounds:

- The appointment of the arbitrator was not invalid or unenforceable as a result of his being an employee of one of the parties as per the provisions of the pre-amendment Act, which was admittedly applicable to this case. Reliance was placed on the observations of the Supreme Court in the case of *Indian Oil Corporation Ltd. and Ors. v. Raja Transport Pvt. Ltd.*[4] in this regard.
- As per the law laid down in *Northern Railway Administration, Ministry of Railway, New Delhi V. Patel Engineering Co. Ltd.*[5] and the provisions of the pre-amendment act, the terms of the arbitration agreement ought to be adhered to/given effect as closely as possible and jurisdiction of the court under Section 11(6) would arise only if the conditions specified in clauses (a),(b) and (c) of Section 11(6) are satisfied.
- The Respondent did not contend that the provisions of Section 12 in its unamended form stood violated nor did it challenge the constitution of the Arbitral Tribunal within the prescribed time frame as per the provisions under Section 13 of the Act. Further, the Respondent participated in the arbitration proceedings.

This judgment is technically sound to the extent that under the old Arbitration Act of 1996, the

Respondent only had recourse to Sections 12 and 13 after constitution of the Arbitral Tribunal and failed to take advantage of the same within the prescribed time limit.

Section 12 provided that an arbitrator may only be challenged on the following two grounds:

- the existence of circumstances that give rise to justifiable doubts as to his independence or impartiality, or
- he does not possess qualifications agreed to by the parties.

Section 12 further provided that a party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Section 13 provided the challenge procedure and stated that any challenge to an arbitrator must be brought within 15 days of becoming aware of the constitution of the arbitral tribunal or 15 days after becoming aware of any circumstance referred to in Section 12. However, failure to make such challenge within the specified time period may be tantamount to deemed waiver under Section 4 of the Arbitration Act.

Further, the Court can be approached by way of a Section 14 petition to terminate the mandate of an arbitrator only in the following circumstances:

- if he becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay; and
- he withdraws from his office or the parties agree to the termination of his mandate.

In the present case, the Arbitrator was neither *de jure* nor *de facto* unable to perform his functions since, under the pre-amendment act there was no bar to an employee being appointed as arbitrator. In fact, in the Case of *Indian Oil Corporation (supra)*, the Indian Supreme Court had held that being an employee of a party to an arbitration did not ipso facto raise a presumption that the arbitrator was biased, partial or lacked independence.

However, there are certain issues that remain unaddressed by this decision. To begin with, there is no clarity on the issue of maintainability of the petitions filed by the Respondent under Section 11(6) and 14 of the Act. The Supreme Court has held that no petition under Section 11(6) would lie unless the conditions specified in Clauses (a), (b) and (c) of the Section are satisfied. There is, however, no clear discussion on the Section 11(6) application not being maintainable after the arbitral tribunal enters upon reference.

The case of *Northern Railway Administration (supra)* was limited to the scope and ambit of Section 11(6) with respect to the appointment procedure in the arbitration agreement. There was no discussion on the stage of filing the Section 11 application and whether such an application could be filed after a tribunal has entered upon reference. Given the recent judgments of the Supreme Court in *TRF v. Energo Engineering Projects*[6] and in *HRD Corporation (Marcus Oil and Chemical Division) v. GAIL(India) Ltd.*[7], there needs to be greater clarity on the maintainability of a Section 11 application after constitution of an arbitral tribunal. This is especially in light of the fact that *kompetenz-kompetenz* and minimal interference of the courts are fundamental principles of international commercial arbitration.

In addition, greater clarity might have been required on the issue of the Section 14 application not being maintainable as the Arbitrator was neither *de jure* nor *de facto* unable to perform his functions under the pre-amendment Act. It is only after the amendment, as stated in the case of *HRD (supra)*, that an employee-arbitrator is *de jure* unable to perform his functions as a result of his ineligibility under Section 12(5) and thus, lacks the jurisdiction to adjudicate his own competence.

Finally, coming to the issue of neutrality, it can be contended that after the amendment of the Act, the approach of the Courts must change to keep disputes in consonance with the basic object of the amendments and the fundamental principles of international arbitration despite the procedures prescribed in the old Act.

The choice of the persons who compose the arbitral tribunal is vital and often the most decisive step in an arbitration. It has rightly been said that arbitration is only as good as the arbitrators[8)]. The Supreme Court may have to reconsider its stand in the case of *Indian Oil Corporation* (supra) and *Aravali* (supra). It is only then that India will truly be recognized as a pro-arbitration jurisdiction.

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References

**?1** Civil Appeal Nos. 12627-12628 of 2017

**?2** (2009) 8 SCC 520

**?3, ?5** (2008) 10 SCC 240

**?4** (2009)8 SCC 520

**?6** 2017 SCC OnLine SC 692

**?7** Civil Appeal No. 11126 of 2017

**?8** Lalive, ‘Mélanges en l’honneur de Nicolas Valticos’ in Droit et Justice (1989), 289