Kluwer Arbitration Blog

Can You Have Your Cake and Eat It Too? Unilateral Appointments in Indian Arbitration

Prerona Banerjee (Khaitan & Co) · Wednesday, August 11th, 2021

This blog has previously discussed the illegality of unilateral appointments of sole arbitrators in India. However, a good beginning is only half the battle won. Before one dwells further, it is important to gauge the Indian position on unilateral appointments. ***First***, as stated in TRF Ltd. v. Energo Engineering ("**TRF**"), if the nominated arbitrator is barred from presiding such arbitration under Section 12(5) read with Schedule 7 of the Arbitration and Conciliation Act, 1996 ("**Act**"), by extension of his inability, his nomination for a replacement is invalid under the law. The invalidity stems from the fact that such an arbitrator would have an interest in the outcome of the proceedings and his nomination could be biased. ***Second***, as upheld in Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd. ("**Perkins**"), even if the person authorised to nominate is not an arbitrator himself, his interest in the outcome of the dispute would invalidate an appointment made by him. Essentially, both judgments bar one party from having the exclusive power to appoint the arbitrators.

Be that as it may, several arbitration agreements now stipulate an alternative that is equally lopsided but does not *prima facie* fall afoul of the grounds stated in Schedule 7 or the *ratio decidendi* of TRF and Perkins. Such arbitration agreements allow one party originally disqualified to directly nominate an arbitrator (because of his interest in the dispute) to provide an exhaustive list of names from which the other party would have to select an arbitrator. In December 2020, the Supreme Court of India ("**SC**") in Railway Electrification vs. M/s ECI-SPIC-SMO-MCML (JV) ("**Railway Electrification**") ruled on the validity of such appointments. Can such a guise of autonomy be enough or does the current jurisprudence bar any and all appointments where the power of appointments is not evenly balanced? Expanding on the issues dealt with by the SC, this post aims to critically examine the judgment and its reasoning.

Facts and Judgment

In this case, the Railway Board ("**Board**") invoked the arbitration agreement they had signed with the contractor. The contractor did not comply with the terms of the appointment in the arbitration clause and petitioned the High Court ("**HC**") seeking the appointment of an arbitrator. To put things into perspective, the arbitration agreement in their contract empowered the General Manager ("**GM**") of the Board to identify a roster of four serving railway electrification officers from which the contractor could nominate candidates for a sole arbitrator. The contractor would be required to

nominate two candidates from this panel and thereafter, the GM would be bound to pick at least one of the nominees to act as an arbitrator. Further, the clause entitled the GM to appoint the remaining arbitrators and indicate the Presiding Officer. The contractor argued that the contract does not make way for the appointment of a neutral arbitrator while the Board argued that the arbitrator was to be appointed as per the terms of their contract. The HC rejected the Board's argument and exercised its right to appoint an arbitrator. Aggrieved, the Board challenged the appointment before the SC.

The SC overturned the HC's decision and held that the power of the Board to nominate members was counter-balanced by the power of the contractor to select two names from the suggested panel. The SC also noted its decision in Perkins, which stated that*"…where both the parties could nominate respective arbitrators of their choice…whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party…"* The SC countered the contractor's reference to TRF by stating that the judgment had noted that *"…when there are two parties, one may nominate an arbitrator and the other may appoint another. That is altogether a different situation."* and thus, remained inapplicable in this case.

Analysis

An arbitrator essentially acts as a judge when it comes to arbitration proceedings. Due to the nature of his role as an adjudicator, it is important that he remains independent of both parties, and thereby, thoroughly impartial. As per 12(5) of the Act, any person whose relationship falls under categories stipulated in Schedule 7 of the Act is legally disentitled from being appointed as an arbitrator. Schedule 7 prohibits an employee, consultant, or advisor to one of the parties from acting as an arbitrator. Thus, the GM of the Board, who has been empowered to select a panel of arbitrators by the Board, is himself disqualified from acting as an arbitrator under Section 12(5) of the Act.

At this juncture, it is important to refer to the SC's judgment in Pratapchand Nopaji v. Kotrike Venkata Setty & Sons which upheld the validity of the maxim '*qui facit per alium facit per se*' in the Indian context. In other words, the SC upheld that it is impermissible in law for one to do through others what one is statutorily ineligible to do himself. Therefore, as an extension of the GM's incapacity under Section 12(5) of the Act to act as arbitrator, any appointment under his control is tainted with illegality. This is rational because the GM is an interested party, and hence, his ability to unilaterally dictate the composition of the panel essentially results in one party completely charting the course of the dispute resolution process. However, in the aforementioned case, the SC held that the GM's power was countervailed by the contractor's right to pick two arbitrators from the panel selected by the former. In the author's opinion, the right to pick from a list curated by someone who has an interest in the outcome of the dispute is merely Hobson's choice. The fact that not even one of the arbitrators on the panel could be outside the scope of the Board's influence raises serious concerns over the possibility of bias and the fairness in the procedure and outcome of the proceedings.

Furthermore, the reliance on excerpts from TRF and Perkins to justify the appointments was devoid of context. In TRF, the SC held that when both parties have the right to nominate their respective arbitrators, the same was unmistakably different from unilateral appointments.

Thereafter, in Perkins, the SC adduced a reason to its conclusion in TRF. The SC said that the rationale behind the same was that the party's powers to nominate an arbitrator could be counter-balanced by the other party's power to do the same. Objectively, both propositions envisage a situation where both parties have an equal bargaining ground with each having the power to appoint arbitrators independently of the other. By contrast, in Railway Electrification both the parties are not placed equally in the selection process, nor could the contractor elect its respective arbitrator without the Board's influence. It is inconceivable to think that the Board's power to elect its own arbitrators, elect the President of the tribunal, and also to curate the panel of arbitrators could be counteracted merely by the contractor's right to pick an arbitrator from the roster. Thus, the propositions put forth in TRF and Perkins deal with a different scenario and cannot be used to justify the lopsided allocation of power where one party can only pick from a panel of arbitrators proposed by the other. Conflating the two is unfounded and falls wide off the mark.

Having said that, it is important to review such conclusions against the touchstone of party autonomy. When the arbitration agreement tilts in favour of one of the parties, the issue boils down to the thin line between procedural impropriety and party autonomy. In this regard, one can refer to the 246th Law Commission Report for clarity. The Report provides: "*the principles of impartiality and independence cannot be discarded at any stage of the proceedings, specifically at the stage of constitution of the Arbitral Tribunal, it would be incongruous to say that party autonomy can be exercised in complete disregard of these principles — even if the same has been agreed prior to the disputes having arisen between the parties.*" Thus, party autonomy reigns supreme when it comes to arbitration, however, this power cannot be exercised at the expense of basic considerations of impartiality and independence. In sum, an arbitration agreement cannot make way for a proceeding that prescribes a semblance of a fair procedure regardless of it being biased and against the principles of natural justice.

Concluding Remarks

In December 2020, the SC's faulty reasoning in Railway Electrification found support in the Delhi High Court ("DHC") judgment of M/s Iworld Business Solutions Private Limited vs M/s Delhi Metro Rail Corporation Limited as the DHC deemed that the appointment of an arbitrator selected through an exhaustive roster forwarded by one party to the other was legal. The principal civil court held that by no stretch of the imagination could the impartiality of such a panel be brought to question. However, if Indian courts continue to allow such appointments where one party is allowed to exercise an exclusive right to panel selection, the Indian arbitration landscape will be severely affected. No sensible/reasonable law should allow such blatant violations of independence and impartiality. In fact, courts in India are bound by Section 18 of the Act which mandates equal treatment of both parties and stipulates that both parties should be given full opportunity to present their case. Thus, if one party is allowed to take advantage of such loopholes in the law and circumvent the limitations placed by Schedule 7, the entire objective of Section 18 is defeated.

The Railway Electrification case is currently under consideration and the Hon'ble Chief Justice of the SC has been requested to constitute a larger bench to probe into the correctness the judgment. In order to nip such unequal panel formation in the bud, the SC needs to assess the correctness of Railway Electrification at the earliest.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

This entry was posted on Wednesday, August 11th, 2021 at 8:00 am and is filed under Appointment of arbitrators, Arbitration Agreement, Arbitration clause, India
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.