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Unilateral Appointment of Arbitrator(s) – The Changing Paradigm

Arbitrator(s) is a private and disinterested person selected and appointed with reference to a mutually agreed procedure of appointment for friendly determination of disputes and differences. Under Section 11(2) of the Arbitration and Conciliation Act, 1996 (“the Act”) parties are free to agree on a procedure for appointment of the arbitrator(s).

However, the foundation of an agreed procedure for appointment giving exclusive right to a party to appoint arbitrator(s) of its choice without any regard to the opposite party is arbitrary and unfair. Thus, even if the unilaterally appointed arbitrator(s) has the best of the intentions, it always creates uncertainty and mistrust regarding the independence and impartiality of unilaterally appointed of arbitrator(s) under an agreed procedure for appointment.

“*Nemo Judex in causa sua*” no one can be a judge in his own case is one of the fundamental principle of laws of natural justice.

To address this uncertainty and mistrust regarding the independence and impartiality of unilaterally appointed of arbitrator(s), the legislature brought crucial amendments vide Arbitration and Conciliation (Amendment) Act, 2015 with regard to the grounds of challenge of arbitrators under Section 12 of the Act. Two separate schedules were introduced to the Act. Fifth Schedule

provides for grounds as to whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an Arbitrator and Seventh Schedule lays down the categories of persons who are ineligible to be appointed as arbitrators.

The Hon’ble Supreme Court in the matter of TRF v. Energo Engineering Projects Ltd., (2017) 9 SCC 377 introduced a new category of ineligibility in appointment of an Arbitrator. The Hon’ble Supreme Court held that a person designated as Arbitrator, who himself is ineligible under the Act to be appointed as Arbitrator, cannot nominate another person to act as an Arbitrator. This judgment limits the applicability of the said principle of ineligibility only to clauses /instances where the named ineligible Arbitrator nominate another person to act as an Arbitrator on his behalf.

However, in the said judgment, the Hon’ble Supreme Court clarified that the amending provision under the Act did not take away the right of a party to nominate an Arbitrator, otherwise the legislature could have amended other provisions.

Subsequent to the TRF judgment, the clauses similar to the TRF have been held by the courts to be invalid. The Hon’ble Supreme Court in the matter of Bharat Boardband Network Ltd. v. United Telecoms Ltd. (2019) 5 SCC 755 held that if a person ineligible in terms of the Section 12(5) of the Act, in such a case, Section 14(1)(a) of the Act gets attracted inasmuch as the Arbitrator becomes, as a matter of law (i.e. de jure), unable to perform his function under Section 12(5) of the Act, being ineligible to be

appointed as an Arbitrator. The mandate of the Arbitrator automatically terminates, and he shall then be substituted by another arbitrator under Section 14(1) of the Act.

However, the uncertainty and mistrust regarding the independence and impartiality of unilaterally appointed of arbitrator(s) still remained because an employee of a party who is not named as an Arbitrator still has the power to nominate and appoint an Arbitrator.

The Hon'ble Supreme Court in the matter of Perkins Eastman Architects DPC v. HSCC (India) Ltd., 2019(6) ARBLR 132(SC) largely settled the issue of uncertainty and mistrust regarding the independence and impartiality of unilaterally appointed of arbitrator(s). The Hon'ble Court held that:

"..... a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator.... But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, 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 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."

In view of the Perkins judgment, all the Arbitration clauses providing for appointment of sole arbitrator by one of the parties, would not be valid any more. Following the precedent laid down by the Hon'ble Supreme Court, the Hon'ble High Court of Delhi in the matter of Proddatur Cable TV Digi Services v. SITI Cable Network Limited [O.M.P. (T) (COMM.) 109/2019] held that the unilateral appointment of arbitrator by an authority interested in the outcome or the decision of

the dispute is impermissible in law. The Court further held that party autonomy is an underlying principle in an arbitration agreement, the procedure laid down in the arbitration clause cannot be permitted to override the considerations of impartiality and fairness in the arbitration proceedings.

The Perkins judgment 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 equal right to participate in the constitution of the arbitral tribunal on equal terms.

However, a three-judge Bench of the Hon'ble Supreme Court in the matter of Central Organisation for Railway Electrification v. M/s ECI-SPIC-SMO-MCML (JV) a Joint Venture Company, Civil Appeal No. 9486-9487/2019 held that *"37.... Since the respondent has been given the power to select two names from out of the four names of the panel, the power of the appellant nominating its arbitrator gets counter-balanced by the power of choice given to the respondent. Thus the power of the General Manager to nominate the arbitrator is counter-balanced by the power of the respondent to select any of the two nominees from out of the four names suggested from the panel of the retired officers...."* The Supreme Court allowed one party to unilaterally nominate Arbitrators on the ground that the other side can choose any of the nominees out of the names suggested by the party. This judgment defeats the logical deduction of the TRF judgment and Perkins judgment.

Hence, the legal proposition, as it stands today is that unilateral appointment of arbitrators remains invalid in terms of Perkins Judgment, but unilateral selection of panel of arbitrators from which the other side can choose an Arbitrator, is valid in terms of Central Organisation judgment.

The law in relation to the uncertainty and mistrust regarding the independence and impartiality of unilaterally appointed of

arbitrator(s) is still evolving. It will be interesting to see how the law develops in settling the issue of uncertainty and mistrust regarding the independence and impartiality of unilaterally appointed of arbitrator(s).

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