DISPUTE RESOLUTIONS

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Message to the Readers

Eminent senior counsel Mr. Fali S Nariman has authored an interesting book on the law of arbitration. The book titled "**Harmony amidst disharmony"** is in two parts, but only the first volume has presently been released by the publishing house Hay House.

One fundamental point that Mr. Fali Nariman makes in the book is his warning against any proclivity to interpret the provisions of the Arbitration and Conciliation Act, 1996 in light of the judgments rendered under the 1940 Act. He further goes on to caution that while interpreting and applying the 1996 Act, no provision in Part I *(Sections 2 to 43)* can be made applicable to Part II *(New York Convention awards)* of the Act. He then observes that, even though the principle of non-intervention is the corner stone of the Arbitration and Conciliation Act 1996, on a perusal of the judgments delivered by Indian courts it is found that the rule largely has been observed only in breach. Fourth, he observes that in matters relating to arbitrability of disputes, there has been a discernible trend in India for courts to narrow the range of disputes to be submitted for arbitration. Fifth, he bemoans the fact that there have been some amendments to the 1996 Act that have created more confusion than clarity.

It is interesting to note from his narrative that, in 2002, the law declared by the bench of three judges of the Supreme Court of India in ***Bhatia International vs. Bulk Trading*** was that provisions of Part I *(Sections 2 to 43)* could also be invoked in respect of international arbitrations that were dealt with in Section 44 to 52, especially because of the omission of the word "only" in Section 2 (2) of the 1996 Act.

This wrong decision in the ***Bhatia International*** ultimately came to be overruled by a Constitution Bench of five judges in ***Bharat Aluminium Co. (Balco) vs. Kaiser Aluminium (2012) (SCC 552)***. However, the last para of the judgment in ***Bharat Aluminium Co***., held as follows:

"*197. This Judgment in Bharat International (Supra) was rendered by the Court on 13th March 2002. Since then the aforesaid judgment has been followed by all the High Court as well as by this Court on numerous occasions. In fact, the judgement in Venture Global Engineering (Supra) has been rendered on 10th January 2008 in terms of the decision in Bhatia International (Supra). Thus, in order to complete justice, we hereby order, that the law now declared by this court shall apply prospectively, to all arbitration agreements executed hereafter*".

This drives home the importance of care and caution that is required to be observed in judicial interpretation, especially of new and emerging legislations that seek to make a break from the past and set a new course.

After one goes through the first volume of "Harmony amidst disharmony" one is left in eager anticipation of the second volume.

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Director, NPAC

THE SECOND-LADDER CONFLICTS WITH CONFIDENTIALITY: AN ANALYSIS OF SECTION 42A OF THE ARBITRATION AND CONCILIATION ACT, 1996

(The following extract is an abridged version of the prize winning entry for the Satya Hegde Essay Competition, provided by the author)

The appeal of confidentiality in arbitral proceedings is closely linked to the widely accepted idea of arbitration being a measure of 'private' dispute resolution. However, the close alignment of principles between the two does not automatically result in a robust scheme of protection of confidentiality in arbitral proceedings. In the context of India, Section 42A of the Arbitration and Conciliation Act, 2019 ("**Section 42A**") recognizes the obligation of the arbitrator, arbitral institution and the parties to the arbitration agreement to maintain confidentiality of all arbitral proceedings. Amongst the multitude of avenues either explicit or implicit for protection of confidentiality, the preference for a statutory enactment indicates a legislative preference for greater certainty over legal obligations and consequences. Unfortunately, Section 42A fails the benchmark it has set for itself. The blanket obligation prefaced by a non-obstante clause to uphold confidentiality for "all arbitral proceedings" places the obligation in conflict with other provisions governing arbitral proceedings without prescribing any guidance for resolving such conflict. Given the intense subjectivity involved, the absence of criteria for balancing of competing interest exposes every determination concerning confidentiality onto court-based litigation. Amidst the multiplicity of governing laws, the key towards protection of confidentiality in arbitral proceedings is insistence on harmonized integration and balancing of competing interests in the place of binary prescriptions. A robust scheme of confidentiality in arbitral proceedings must not only inform the relevant parties about the extent of their obligation but it must also attempt to provide a framework for reasoned deliberation and determination.

PRIZE WINNERS OF SATYA HEGDE ESSAY COMPETITION

I PRIZE

Ankur Mishra
Dr. Ram Manohar Lohiya National Law University, Lucknow

II PRIZE

Yashwanth
National Law University, Jodhpur

III PRIZE

Satvik Khatri
National Law School of India University, Bangalore

APPOINTMENT OF ARBITRATORS & UNILATERAL ARBITRATION CLAUSES: THE DEBATE CONTINUES

Introduction

The stage of appointment of arbitrator(s) and constitution of an arbitral tribunal is one of the most important steps in the dispute adjudication process by way of arbitration. The role of an arbitral tribunal as a substitute for courts involves a great sense of responsibility as the process aims to juxtapose party autonomy with justice dispensation. Independence and impartiality is of paramount importance for any adjudicating authority, and an arbitral tribunal is no exception. This aspect of inspiring confidence in the minds of the parties is pivotal in promoting arbitration as a preferred mode of dispute resolution. Unfortunately, that has not been the ground reality with parties (mostly having a better contractual bargaining power) attempting to influence and chart the course of the dispute resolution process. One such power commonly abused and misused is the power to unilaterally appoint an arbitrator or limit the choice of the other party and exercising influence/ control by incorporating clauses which make a mockery of the principle of *"consensus ad idem"*.

It is in this background that the present article briefly discusses the jurisprudence that has evolved in this regard, particularly post the 2015 Amendment to the Arbitration and Conciliation Act, 1996, which emphasized the importance of having independent and impartial arbitral tribunals. The legislative framework surrounding the aforesaid subject has evolved from the Arbitration Act, 1940 to the Arbitration and Conciliation Act, 1996 and through the 2015 and 2019 Amendments, with the object of promoting independence and impartiality and reduced judicial interference in arbitration proceedings. The judiciary has also complimented the legislative changes by taking a pro-active approach in promoting this legislative intent.

- ***Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Limited***[1]

The Hon'ble Supreme Court, in this case, ordered the deletion of a clause which vested in one party the right to constitute a panel comprising of limited number of persons out of whom the arbitrator was to be appointed. It further directed the party to constitute a broad-based panel, so that there is no misapprehension in the mind of the other party that principle of impartiality and independence would be discarded at any stage of the proceedings, especially at the stage of constitution of the arbitral tribunal.

Immense stress was laid on the independence and impartiality of an arbitrator. It was held that these two attributes of an arbitrator, are the hallmarks of any arbitration proceeding.

The Court highlighted that ***"Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial."***

While on one hand, the Court ordered the deletion of the clause granting autonomy to one party in the appointment of the arbitrator, yet, on the other hand, the Court introduced a panel (although broad-based but still restricted) for selection of arbitrator(s), which defeats the very purpose of balancing the interests of both the parties. The power to constitute the panel still rested with one of the parties.

This constricted the autonomy of the other party. However, the Judgement cannot be undervalued as it was the first attempt by the Court towards bringing about a fair selection procedure in the appointment of arbitrator(s). Notably, much water has flowed since this judgement. The power to constitute the panel still rested with one of the parties. This constricted the autonomy of the other party. However, the Judgement cannot be undervalued as it was the first attempt by the Court towards bringing about a fair selection procedure in the appointment of arbitrator(s). Notably, much water has flowed since this judgement.

- ***TRF Limited v. Energo Projects Limited***[2]

This decision of the Hon'ble Supreme Court examined the scope of Section 12(5) read with Schedules V and VII of the 2015 amendments.

The arbitration agreement provided a scheme for appointment of the arbitrator in case of any dispute between the parties. The matter was to be referred to the named arbitrator (who was also the Managing Director of the party to the dispute), who was conferred an additional power to appoint any other person of his choice as an arbitrator.

The named arbitrator's appointment, in light of Section 12(5) read with Schedules V and VII was held invalid. The provision categorically lays down that if a person whose relationship with the parties or the counsel or the subject matter of dispute falls under any of the categories specified in the VII Schedule, s/he shall be ineligible to be appointed as an arbitrator.

The named arbitrator fell under items 1, 5 and 12 of the VII Schedule and hence was ineligible. His power to nominate another arbitrator in his place is also gone, on the basis of the maxim; *"Qui facit per alium facit per se" ("that which cannot be done directly may not be done indirectly")*.

The Supreme Court held that: *"It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated."*

- ***Government of Haryana, PWD Haryana (B and R) Branch v. M/S G.F Toll Road Pvt. Ltd. & Ors.***[3]

In this case, the Hon'ble Apex Court allowed the appointment of an arbitrator who was in the employment of the party to the dispute 10 years ago. The Court validated the appointment of the arbitrator by stating that merely because the arbitrator is an ex-employee of the party to the dispute, it does not bar his qualification as an arbitrator, it is important to apply the test of fairness and relied on the following test:

"The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be."

In light of the above test, the allegation of bias as contended by the other party was regarded as untenable. The case was governed by the pre-amended 1996 Act.

The Apex Court also went on to discuss the scope of Entry 1 to the V Schedule inserted via 2015 Act. It stated that ***"the words "is an" indicates that the person so nominated is only disqualified if he/she is a present/current employee, consultant, or advisor of one of the parties…***

The word "other" used in Entry 1, would indicate a relationship other than an employee, consultant or an advisor. The word "other" cannot be used to widen the scope of the entry to include past/former employees."

The Court while emphasizing impartiality and independence as the hallmarks of an arbitrator, went a step back by allowing the appointment of an ex-employee of the party, which gives rise to justifiable doubts as to its neutrality and independence. In the view of the authors, it is advisable to take a conservative approach rather than to leave any likelihood of bias. There must not remain even a reasonable apprehension of bias, and a clause that seeks to include a past employee as an arbitrator does away with the objective of the Act, as, in such cases, the consideration of time factor is subjective and amenable to interpretations.

- ***Perkins Eastman Architects DPC &Anr. v. HSCC (India) Ltd.***[4]

In one of its most welcomed judgements, the Hon'ble Apex Court reiterated that a clause conferring upon a party the right to appoint an arbitrator while depriving the other party of the same is nothing but invalid. The Court held that "***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."***

This decision is an extension of the ***TRF judgment***. In the ***TRF case***, the agreement clause provided for the appointment of a named arbitrator and subsequent appointment by him of another person. The appointment of arbitrator in this case was held invalid as the named arbitrator was the Managing Director of the party to the dispute and his appointment was hit by Section 12(5) read with V and VII Schedule of the Act. The appointment was invalid owing to the interest of the arbitrator in the outcome of the dispute. Similar situation has arisen in the instant case, where instead of a named arbitrator appointing another person, the clause empowers only one of the parties to the arbitration agreement to appoint the sole arbitrator. The Court has in lucid terms held that, any person, having a substantial interest in the outcome of the dispute, shall have no authority to appoint the sole arbitrator.

- ***Lite Bite Foods Private Limited v. Airports Authority of India***[5]

In this case, the Hon'ble High Court of Bombay has elaborated upon the issue in hand at great length by relying on all the decisions mentioned above and summarized the legal principles flowing from it. The three principles are:

> *i An officer or employee of one party cannot be the arbitrator or, upon eligibility, the person empowered to appoint an arbitrator.* ***This is the TRF Ltd category or rule.***
>
> *ii. Where the arbitration clause provides for nomination by each side, and for the appointment of an umpire by the two nominee arbitrators, of a person from a panel: (i) that panel cannot be hand-picked by one side; and (ii) it must be broad-based and inclusive, not narrowly tailored to persons from a particular category. The opponent and the two nominee arbitrators must have the plenitude of choice.* ***This is the rule in Voestalpine Schienen.*** *Conceivably, a broad-based panel commonly agreed in the contract by both sides would serve the purpose.*
>
> *iii. A clause that confers on one party's employee the sole right to appoint an arbitrator, though that employee is himself not to the arbitrator, is also not valid, and this is a logical and inescapable extension of the TRF Ltd doctrine. It makes no difference whether this power is to be exercised by choosing from a panel or otherwise.*

This is the rule in Eastman Per kins. The guiding principle is neutrality, independence, fairness and transparency even in the arbitral-forum selection process.

- ***Central Organisation for Railway Electrification v. M/S ECI-SPIC-SMO-MCML (JV)***[6]

In the instant case, the scheme of appointment of arbitrator was such that a panel constituting 4 persons was to be constituted, it gave Party A, the power to nominate a number of arbitrators, out of which the Party B would then appoint at least one of them as Party A's contractor. Rest of the arbitrators were to be chosen by Party B.

The Hon'ble Supreme Court, stated that the principle in ***TRF Energo*** is not applicable and set aside the impugned order of the Allahabad HC on the ground that the power of Party B is counter-balanced by the power of the Party A to select two nominees from the panel. It also ruled that when the GCC and the agreement expressly provide for the appointment scheme, the HC could not have appointed a sole arbitrator.

While quoting the ***Perkins judgment***, the Court relied on the position in which one party nominates and the other party appoints the arbitrator, it agreed with the observation of the Court wherein it stated that such authority of appointment cannot be questioned. It was based on the simple reasoning that whatever advantage one party would derive by nominating an arbitrator of its choice would get counter balanced by the other party's power to appoint.

In our opinion such an appointment restricts the right of a party to the dispute to have a bias-free outcome. It restricts the choice of one of the parties to the dispute, as it gives the other party an unfair advantage of unilaterally constituting the panel. The element of bias will always be there even when the other party has the right to choose the names out of such a panel, hence, their rights cannot be counterbalanced.

- ***Proddatur Cable TV* v. *SITI Cable Network Limited***[7]

The Hon'ble High Court of Delhi, concurred with the ***Perkins decision*** and stated that independence and impartiality are hallmarks of any arbitral proceeding and that the aforesaid decision will have retrospective application. The Court referring to ***TRF***, laid down that a company, acting through its director, cannot be distinguished from an individual in appointing an arbitrator. Just as the ***TRF judgement*** did not allow one party to the dispute (an individual) to unilaterally appoint an arbitrator, similarly the Court, in this case, disallowed the existence of a clause that let a party to the dispute (herein, a company) unilaterally appoint an arbitrator.

Conclusion

The increasing dependency in adjudication of commercial disputes by arbitration has placed a greater responsibility on the courts to give sanctity to the institution by promoting independence and impartiality in the appointment of arbitrators. The ***GF Toll*** judgement is one such case where the Supreme Court took a different view as compared to the approach of the Supreme Court in its earlier judgements post the 2015 Amendment regime. However, the latest ***Central Organisation judgment*** is a major set-back as it has yet again opened the debate as regards validity and enforceability of unilateral arbitration clauses and appointment of arbitrators, which to some extent was answered in the ***Perkins*** judgement.

The counterbalancing factors indicated by the Supreme Court in the ***Central Organisation judgment*** possibly could not have been sufficient to outweigh the disadvantage the party was already into by firstly, having to choose 2 arbitrators out of a limited panel of 4 arbitrators given by an authority (who would be hit by the ***TRF Ltd*** rule) and secondly, the same authority appointing the arbitrator on behalf of the other party while retaining the liberty to appoint the remaining members of the arbitral tribunal from the balance 3 members of the panel or beyond. Possibly, the impugned judgment of the Allahabad High Court appointing a sole arbitrator as against the prescribed appointment scheme would have been a better approach. Alternatively, the ***Voestalpine*** rule could have been applied by allowing the parties to choose from a broad-based panel.

Be that as it may, in our view, in order to demonstrate India as an arbitration-friendly jurisdiction, it is high time that we move away from obsolete and outdated arbitration clauses which give one party an unfair and undue advantage over the other. Let there be a level playing field for parties to have their disputes adjudicated in arbitration proceedings efficiently on the strength of their respective merits.

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[1](2017) 4 SCC 665.
[2](2017) 8 SCC 377
[3](2019) 3 SCC 505
[4]*Locabail Ltd. v. Bayfield Properties*, 2000 (1) All ER 65 11
[5]2019 SCC OnLine SC 1517
[6]2019 SCC OnLine Bom 5163
[7]Civil Appeal No. 9486-9487 of 2019

[viii]O.M.P. (T) (COMM.) 109/2019

NANI PALKHIVALA CENTENARY CELEBRATIONS

The Palkhivala Foundation has been conducting various events to mark the birth centenary of Nani Palkhivala. On 19th January, 2020, the Palkhivala Foundation hosted the 'Nani Palkhivala Centenary Celebrations' in Chennai where a book containing selected speeches from the Palkhivala Memorial Lectures delivered between 2003 and 2019 was released by Ms. Nirmala Sitharaman, Hon'ble Minister of Finance and Corporate Affairs.

Ms. Nirmala Sitharaman also delivered the Centenary Celebrations Lecture on 'Road Map to US$ 5 Trillion Economy'. In her candid speech, she stated that the guiding principle of the government had been *"Sarkar ka abhaav na hona chahiye, prabhav hona chahiye aur dhabhaav nahi hona chahiye" ("There should be neither inadequacy nor pressure of the Government; the Government should facilitate by consulting").* She said that this 'mantra' was behind the Government's impetus on disinvestment.

She highlighted the importance of digitization of the Indian economy and spoke about curbing corruption by reducing circulation of hard currency. She stressed on the significance of a technology driven economy for improving the ease of doing business and emphasized on her intent to decriminalize laws relating to corporate and bankruptcy.

In her speech which was delivered less than a fortnight before the 2020 Union Budget, the Hon'ble Minister also recollected how inspiring Nani Palkhivala's budget speeches were.

The Nani Palkhivala Centenary Celebrations saw wide participation including from the legal fraternity, Indian bureaucracy and industry entrepreneurs and was received well by all.

Ms. Nirmala Sitharaman, Hon'ble Minister of Finance and Corporate Affairs, with some Directors of NPAC, after release of the book

Hon'ble Minister Ms. Nirmala Sitharaman addressing the audience during the candid Q&A Session

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