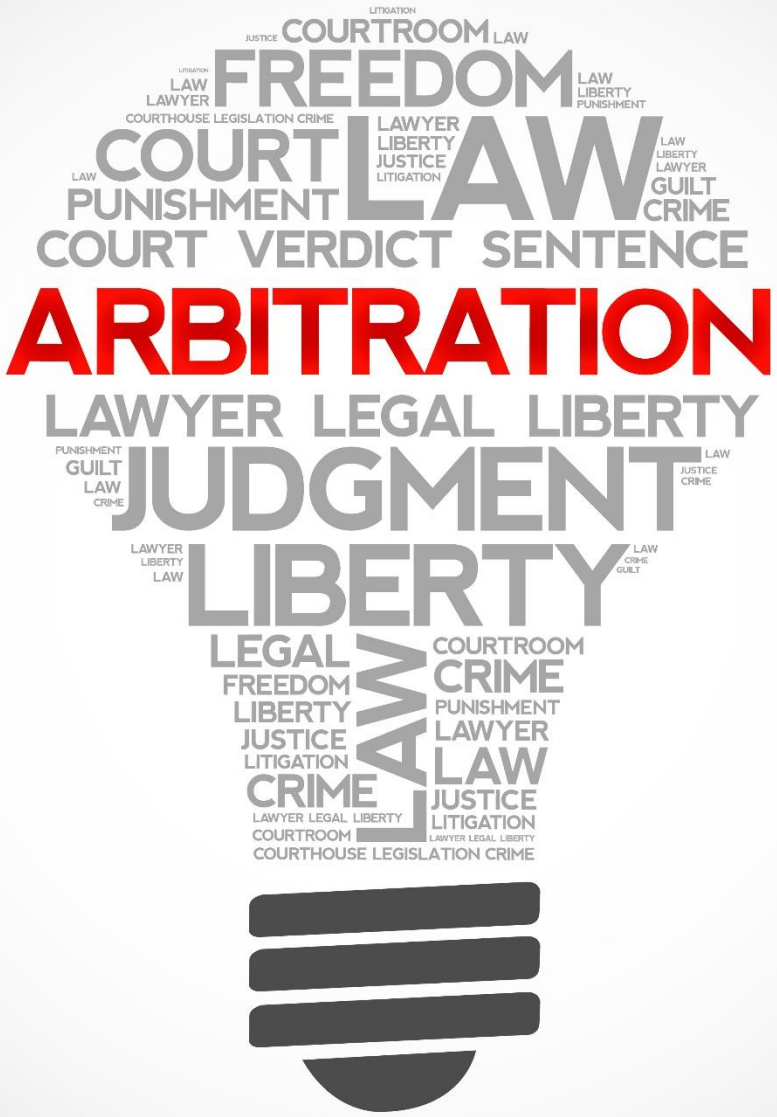

ELP Arbitration Weekly Alert

April 30, 2019

Tech Mahindra Ltd. v. Tata Communications Transformation Services Ltd.[1]

BACKGROUND

The maintainability of an application under section 11 of the Arbitration and Conciliation Act, 1996 (**the Act**), for the appointment of an arbitrator (**Application**) was challenged before the Bombay High Court (**Court**) on the ground that the provisions of the Act would be inapplicable as the arbitration agreement provided for the appointment procedure to be in accordance with the UNCITRAL Rules.

While the applicant submitted that the designation of the Court as the appointing authority was in accordance with the UNCITRAL Rules, the respondent contended that the Court did not qualify as the

[1] Commercial Arbitration Application No. 67 of 2019, High Court of Judicature at Bombay

"*appointing authority*" for the appointment of the arbitrator under the UNCITRAL Rules. The issue which arose for consideration before the Court was whether it could be designated as the "*appointing authority*" for the appointment of the arbitrator in the present factual matrix.

FACTS

1. The arbitration agreement contained in a Long Form Procurement Agreement dated 2 September 2015 (**Contract**) between Tech Mahindra Ltd. (**Applicant**) and Tata Communications Transformation Services Ltd. (**Respondent**) provided as follows:

   ""….In such event: (1) the Parties shall appoint a sole arbitrator, who shall be knowledgeable in the field of communications and fluent in English; if an arbitrator is not jointly appointed within thirty (30) days after the reference to arbitration, the arbitrator shall be appointed in accordance with UNCITRAL rules; (2) the place of arbitration shall be Mumbai, India……."

2. Disputes arose between the parties and through its Notice of Arbitration dated 3 December 2018 (**Notice of Arbitration**), the Applicant invoked the arbitration agreement in the Contract and proposed its nominee for the appointment of the sole arbitrator. By a letter dated 31 December 2018 (**Response**), the Respondent did not concur with the nominee mentioned in the Notice of Arbitration and proposed another nominee for appointment as the sole arbitrator.

3. In view of the disagreement between the parties vis-a-vis the appointment of an arbitrator, under a letter dated 4 January 2019, the Applicant proposed to designate the Bombay High Court as the appointing authority under Article 4[2] read with Article 6[3] of the UNCITRAL Rules and section 11 of the Act for the appointment of a sole arbitrator. The Respondent did not respond to the said letter and hence the Applicant moved the Bombay High Court for appointment of the arbitral tribunal.

SUBMISSIONS AND FINDINGS

Respondent had the opportunity to designate an "appointing authority" at the time of filing its Response to the Notice of Arbitration

4. Perusing the factual matrix, the Applicant submitted that when the Respondent did not concur with the nominee mentioned in the Notice of Arbitration and proposed another nominee as the sole arbitrator through its Response, Article 4 of the UNCITRAL Rules kicked in- in as much as the Respondent could make a proposal to designate an "appointing authority" as referred to in Article 6 of the UNCITRAL Rules. Pertinently, the Respondent did not propose any such designation in its Response. In the circumstances,

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[2] *"Response to the notice of arbitration*
Article 4
…2. The response to the notice of arbitration may also include:
… (b) A proposal for the designation of an appointing authority referred to in article 6, paragraph 1; (c) A proposal for the appointment of a sole arbitrator referred to in article 8, paragraph 1; (d) Notification of the appointment of an arbitrator referred to in article 9 or 10; .." [Emphasis Supplied]

[3] *"Designating and appointing authorities*
Article 6
1. Unless the parties have already agreed on the choice of an appointing authority, a party may at any time propose the name or names of one or more institutions or persons, including the Secretary General of the Permanent Court of Arbitration at The Hague (hereinafter called the "PCA"), one of whom would serve as appointing authority.
2. If all parties have not agreed on the choice of an appointing authority within 30 days after a proposal made in accordance with paragraph 1 has been received by all other parties, any party may request the Secretary General of the PCA to designate the appointing authority." [Emphasis Supplied]

under a letter dated 4 January 2019, the Applicant proposed to designate the Court as the appointing authority for the appointment of a sole arbitrator.

5. Upon examining the factual matrix, the Court held that (i) the Notice of Arbitration was in accordance with the arbitration agreement and Article 3 of the UNCITRAL Rules and the Response was in terms of Article 4 of the UNCITRAL Rules; (ii) the Respondent did not exercise the option available under Article 4 to propose the designation of an appointing authority; and (iii) therefore, the Applicant rightly acted upon the procedure under Article 6 through its letter dated 4 January 2019 and appointed the Court as the appointing authority.

The Court can be the "appointing authority" in terms of the UNCITRAL Rules and the arbitration agreement

6. The Applicant further stated it had followed the UNCITRAL Rules and designated the Court as an appointing authority in terms thereof. Resisting this submission, the Respondent submitted that the appropriate appointing authority under the UNCITRAL Rules was the Secretary General of the Permanent Court of Arbitration at the Hague (**Secretary General**).

7. Referring to paragraph 1 of Article 6 of the UNCITRAL Rules, the Court clarified that in the absence of an agreement on the choice of an appointing authority, a party may at any time propose the name(s) of one or more institutions or persons, *"including"* the Secretary General and "*one of whom"* would act as an appointing authority. Laying emphasis on the words "*including"*, the Court held that parties have a choice to propose the name(s) of institutions or persons including but not limited to the Secretary General. The Court recognized that the principles of party autonomy were embedded in paragraph 1 of Article 6 and rejected the contention of the Respondent that the Secretary-General is the only appointing authority under the UNCITRAL Rules.

Respondent did not object to the Court being the "appointing authority" under the UNCITRAL Rules till the Application was filed

8. The Applicant further submitted that till the filing of the affidavit-in-reply to the Application, the Respondent never raised an objection to the UNCITRAL Rules not being followed by the Applicant. Relying upon Article 30 of the UNCITRAL Rules read with section 4 of the Act which provides the waiver of right to object, the Applicant submitted that the Respondent has lost its right to challenge the maintainability of the Application.

9. The Respondent submitted that its silence does not amount to waiver and it was only when the Applicant would take steps under Article 6 of the UNCITRAL Rules would the occasion to object arise. The Respondent submitted that there was no previous occasion for the Respondent to raise objections till the Application was filed before the Court.

10. The Court perused paragraph 2 of Article 6 of the UNCITRAL Rules which provides that any party may request the Secretary-General to designate an appointing authority if the parties "*have not agreed*" on the appointing authority proposed in terms of paragraph 1 of Article 6 above. The Court observed that the precondition for the said provision to kick-in was if parties "*have not agreed*" to the choice of an appointing authority within 30 days after a proposal is made under paragraph 1 of Article 6 and not otherwise. The Court held that the since the Respondent never objected to the Applicant designating the Court as the appointing authority, the present facts did not fall within the scope of paragraph 2 of Article 6.

The Application is maintainable under section 11 of the Act

11. The Respondent relied upon *Antrix Corporation*[4], and *Iron & Steel*[5], and submitted that the Applicant ought to approach authorities under the UNCITRAL Rules for the appointment of the sole arbitrator and not the Court by way of an Application under the Act. Distinguishing *Antrix Corporation* and *Iron Steel,* the Court held that in the said cases despite the parties having agreed to resolve the disputes in accordance with ICC Rules and Rules of Arbitration of the Indian Council of Arbitration respectively, the applicants therein had erroneously filed applications under section 11 of the Act. Therefore, the Supreme Court had held that the applications under section 11 of the Act were not maintainable. Distinguishing the facts, the Court held that in the present case "*the agreement itself provides that the Court can be designated as an appointing authority as specifically provided under Article 6(1)".*

CONCLUSION AND ANALYSIS

Based on the above findings, the Court held that the Application was maintainable and appointed a Ld. Sole Arbitrator. In the interest of time, the Court directed the parties to appear before the arbitrator within 20 days from the date of its order.

The fact that the Respondent did not reply to the letter dated 4 January 2019 under which the Court was proposed as the "*appointing authority*" by the Applicant weighed in on the Court - the Court held that it was not a case wherein parties "*have not agreed*" to the Court as the appointing authority as the Respondent never raised an objection. Therefore, the Court held that paragraph 2 of Article 6 of the UNCITRAL Rules would not come into play. In the circumstances, the Court has inferred that the silence of the Respondent amounted to a waiver of its right to object to the Court being designated as the appointing authority.

[4] *Antrix Corporation Limited v. Devas Multimedia Private Limited,* (2014) 11 SCC 560
[5] *Iron & Steel Co. Ltd. v. Tiwari Road Lines,* (2007) 5 SCC 703