ELP Arbitration Alert

PERSONS INTERESTED IN THE OUTCOME OF THE DECISION OF THE DISPUTE MUST NOT HAVE POWER TO APPOINT SOLE ARBITRATOR

Perkins Eastman Architects DPC and Another v. HSCC (INDIA) LTD.[1] (Perkins Eastman)

Background

In *TRF Limited v. Energo Engineering Projects Limited*[2] ***(TRF)***, in the context of a post-2015 amendment arbitration where the Managing Director (**MD**) of a party was named as the arbitrator and also additionally endowed with the unilateral power to appoint any other person as an arbitrator, it was held by the Supreme Court (**SC**) that a person himself ineligible to act as an arbitrator will be precluded from appointing another as an arbitrator.

In *Perkins Eastman*, the SC was called upon to analyze and rule upon arbitration clauses which unlike to the clause contained in *TRF,* did not name the MD of a party as an arbitrator but ***only*** vested the MD of a party to unilaterally appoint an arbitrator of his choice.

Factual Matrix

HSCC (India) Ltd. **(Respondent)** issued a request for proposal **(RFP)** on 15.07.2016 for appointment of Design Consultants for comprehensive architectural planning and designing works for the proposed All India Institute of Medical Sciences at Guntur, Andhra Pradesh **(the Project)**. In response to the RFP, a consortium of Perkins Eastman Architects DCP and Edifice Consultants Private Limited **(Applicant)** submitted its bid on 28.09.2016. Subsequently, a contract dated 22.05.2017 was entered into between the Applicant and the Respondent **(Contract)**. Clause 24 of the Contract contained the arbitration clause **(Arbitration Clause)**. The relevant portion of the Arbitration Clause read as under:

[1] Arbitration Application No. 32 of 2019.
[2] (2017) 8 SCC 377.

> ***"24.0 DISPUTE RESOLUTION***
> *24.1…*
>
> *(ii) Except where the decision has become final. Binding and conclusive in terms of sub-Para (i) above disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the CMD HSCC within 30 days from the receipt of request from the Design Consultant. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason, whatsoever another sole arbitrator shall be appointed in the manner aforesaid. …It is also a term of this contract that no person shall other than a person appointed by such CMD, HSCC as aforesaid should act as arbitrator..."*

On 20.02.2019, a termination letter was issued by the Respondent to the Applicant. Through its notice of arbitration dated 11.04.2019 **(Notice of Arbitration)**, the Applicant invoked the Arbitration Clause raising a claim of INR 20.95 crores against the Respondent.

As the Respondent was non-cooperative, by a letter dated 28.06.2019, the CMD of the Respondent was called upon to appoint a sole arbitrator within 30 days in terms of the Arbitration Clause. After the 30 day period had expired under Section 11, Major General K.T Garia was appointed as the sole arbitrator by the Respondent through a letter dated 30.07.2019.
Aggrieved by the same, the Applicant moved an application **(Application)** under Section 11(6) read with Section 11(12)(a) of the Arbitration and Conciliation Act, 1996 **(the Act)** before the SC for the appointment of sole arbitrator**.**

Contentions before the Court

The Applicant contended that the CMD would be interested in the outcome of the dispute and hence, an appointment by the Court should be made to maintain the prerequisite of impartiality.

The Respondent contested the same.

Issues

In light of the above contentions raised by the respective parties, the SC was called upon to answer whether a case had been made out for exercising powers to appoint an arbitrator.

Findings

Relying upon *TRF,* the SC held that the essence of the Arbitration and Conciliation (Amendment) Act, 2015 was that a person having an interest in the outcome or decision of the dispute must not have the power to appoint the sole arbitrator. The SC further held that where only one party had the right to appoint a sole arbitrator, such party's choice will always have an element of exclusivity in determining or charting out the course of dispute resolution. Hence the SC read *TRF* to imply that the ratio therein was not simply restricted to cases where one party's MD was both a named arbitrator and had the power to appoint an arbitrator, but also extended to cases where such MD was only vested with the unilateral right to appoint an arbitrator.

The SC compared the power vested in a party to unilaterally appoint a sole arbitrator to the powers vested in both the parties to appoint their respective arbitrators in the case of a three member tribunal. In the case of a three member tribunal, where each party has the power to appoint one arbitrator, whatever advantage a party derived by nominating an arbitrator of its choice, such advantage would get counter balanced by the equal power vested with the other party.

Further reliance was also placed by the SC on its decisions in *Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd*[3], *Voestalpine Schienen Gmbh v. Delhi Metro Rail Corpn. Ltd.*[4] and *Bharat Broadband Limited v. United Telecoms Limited*[5] to elaborate upon the importance of independent and impartial arbitrators in order to create a healthy arbitration environment and conducive arbitration culture.

[3] (2009) 8 SCC 520.
[4] (2017) 4 SCC 665.
[5] (2019) 5 SCC 755

Conclusion & Analysis

Based on the above findings, the SC annulled the effect of the letter dated 30.07.2019 of Chief General Manager of the Respondent appointing Major General K.T Garia as the sole arbitrator. Notably, the SC clearly stated that it's decision in no way reflected upon the appointed arbitrator's competence and standing. The SC further exercised its power under Section 11(6) of the Act and appointed Dr. Justice A.K Sikri (Retd.) as the sole arbitrator.

The Bombay High Court in *Lite Bite Foods Pvt. Ltd. v. Airports Authority of India*[6] has further clarified that the ratio in *Perkins Eastman* lays down that the law pertaining to bias is no longer restricted to the question of the independence and impartiality of the arbitrator but also takes into ambit the broader question, i.e. whether the arbitral tribunal appointment procedure is itself one sided. The Bombay High Court further stated its understanding of the ratio in *Perkins Eastman – "…you cannot have an impartial arbitration free from all justifiable doubt if the manner in which the arbitral tribunal is constituted itself is beset by justifiable doubt."*

Arbitration clauses granting unilateral appointment rights have been held to be valid in various jurisdictions. However, in India, owing to the unique circumstances, more particularly those which prevail in Public Sector contracts there has been a crying need to address this issue. While purists may argue that the decision of *Perkins Eastman* goes against the grain of party autonomy, however, the contra argument is that a purge is necessary to address the ills of unilateral appointments in India, especially where such appointments are often muddled in opaque processes. In this background the decision comes as a huge relief to many who suffer arbitrator bias, both covert and otherwise, and can do precious little to challenge the status quo.

[6] Commercial Arbitration Application No. 495 of 2019, Bombay High Court, decided on 4 December 2019