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FAIR AND SQUARE

Resolution rests on impartial arbitrators

Companies, especially public undertakings, must desist from unilateral appointment of arbitrators to save time and cost for everyone

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One of the fundamental elements of arbitration is the impartiality and independence of an arbitrator. The requirement of impartiality follows from the principles of natural law and equity, which hold that no one can act as a judge in their own cause. The selection and appointment of arbitrators under Indian law is founded on the principle of party autonomy and the mutual decision of the parties at dispute.

Lawmakers have constantly stressed the need to bolster the independence of arbitrators. The Law Commission of India moved to protect the integrity of arbitrations in India by ensuring that arbitrators are 'neutral', 'impartial', and 'unbiased'. It recommended a host of amendments to the Arbitration and Conciliation Act, 1996, to disqualify any person whose relationship with either of the parties may attribute bias for appointment as an arbitrator.

First, the commission proposed disclosures, at the stage of appointment of an arbitrator, of relationship or interest of any kind that may raise justifiable doubts over the arbitrator's independence. Second, it proposed to set out the parameters, based on International Bar Association (IBA) guidelines, that would disqualify a person for appointment as arbitrator.

In 2015, on the recommendation of the commission, Section 12 of the Arbitration Act was amended, and the Seventh Schedule was added to provide for neutrality of arbitrators. Subsequently, unilateral appointment of arbitrators became illegal under the Indian arbitral regime.

Despite the law against unilateral appointment of arbitrators, in several matters, especially involving public undertakings, an arbitrator's appointment may become a contentious issue even before the primary dispute may be adjudicated upon. Several commercial agreements in India still provide for unilateral appointment of arbitrators. Further, many government undertakings continue with the practice of providing for dispute resolution through senior bureaucrats or arbitrators nominated by them. These practices have led to several vital judgements on the illegality of unilateral appointment of arbitrators.

JUDICIAL TRENDS

The Supreme Court of India, in Voestalpine Schienen GMVH vs DMRC, opined that the principles of impartiality and independence could not be discarded at any stage of arbitral proceedings and, more specifically, at the stage of constituting the arbitral tribunal. It further observed that a sensible law could not permit the appointment of an arbitrator who is himself a party to the dispute or who is employed by one of the parties.

In TRF Ltd vs Energo Engineering Projects Ltd, the apex court rendered a detailed decision on the implications of the 2015 amendment of the Arbitration Act. The issue before the court was whether a person who was ineligible to be an arbitrator could nominate another as an arbitrator. The Supreme Court opined that they cannot, based on the principle that what cannot be done directly under law cannot also be done indirectly. The Supreme Court further clarified that since unilateral appointment goes to the very root of the matter, anything that falls from it will be invalid. Simply put, once the foundation collapses, the superstructure is bound to collapse. A similar case — Bharat Broadband Network vs United Telecoms — involving unilateral appointments came up before the Supreme Court, which clarified that the only way to reverse the illegality of a unilateral appointment of arbitrator is by having a party waive its right to nominate an arbitrator in writing.

The Supreme Court has from time to time rendered similar decisions — such as in Perkinds Eastman Architects DPC vs HSCC, and HARSAC vs Pan India Consultants Pvt Ltd — where it clarified that a party's employees, chairman, director, or government officials (in case of public undertakings) were ineligible to become arbitrator.

THE WAY FORWARD

The tendency to defend unilateral appointments and needlessly drag arbitration proceedings must be opposed as it defeats the objective of arbitration. As held by several judicial pronouncements, the efficacy of arbitration, as an alternative dispute resolution mechanism, rests on the premise that disputes would be adjudicated by independent and impartial arbitrators.

It is high time companies, especially public service undertakings, reviewed their standard dispute resolution clauses to eliminate the provisions for unilateral appointments. This would allow not only parties to save time and cost but also arbitral tribunals to exercise their wisdom and render binding decisions.

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