Dispute Resolution Hotline

July 21, 2017

CURTAIN CALLS OF DISQUALIFIED ARBITRATORS

- **An arbitrator, disqualified by operation of law, can neither preside over proceedings nor nominate another arbitrator**
- **A Court can entertain an application for statutory disqualification of an arbitrator**

INTRODUCTION

The Supreme Court ("**Court**") in a recent judgment, TRF Ltd ("**Appellant**") v Energo Engineering Projects Ltd ("**Respondent**"), ruled that a court can be approached to plead the statutory disqualification of an arbitrator under the provisions of the Arbitration and Conciliation Act, 1996 ("**Act**") and that it is not necessary to approach the arbitrator for obtaining such a relief. Further, the Court held that when the designated arbitrator nominated under a contract is also responsible for appointment of an alternate arbitrator, he/she would lose his/her authority to preside and/or nominate an arbitrator, if he/she stands disqualified under the amended provisions of the Act.

ISSUES

1. If a person authorized under a contract to act as an arbitrator becomes ineligible by operation of law, whether he would be eligible to nominate another person to act as an arbitrator?
2. Whether a plea seeking statutory disqualification of a nominated arbitrator can be raised under Section 11(6) of the Act?

FACTS

The Respondent is engaged in the business of procuring equipment for installation in thermal power plants. The Respondent had issued a purchase order ("**PO**") in favor of the Appellant and received certain bank guarantees from the Appellant to secure performance of the PO. Certain disputes arose between the parties and the Appellant invoked arbitration on December 28, 2015. The Appellant had objected to the procedure for appointment of an arbitrator provided under the PO and sought an appointment *de hors* the specific terms of the PO. The Respondent rejected this contention of the Appellant and appointed an arbitrator by way of its letter dated January 27, 2016.

Thereafter, the Appellant filed an application under Section 11(5) read with 11(6) of the Act for appointment of an arbitrator under Section 11(2) of the Act.

The High Court stated that if a party to a dispute had been validly conferred with the right to appoint an arbitrator under the old Act then the same was not usurped by application of the amended Act. The High Court further stated that the amended Act provided for a detailed list of ineligibility criteria of arbitrators under the Seventh Schedule to the Act, none of which mentioned that the right to appoint an arbitrator under the old Act would be subsumed by the application of the amended Act.

JUDGMENT

Clause 33 of the PO provided for the resolution of disputes. It stated that if a dispute could not be settled by negotiation, it would be determined under the Act, as amended. Therefore, the amended provisions of the Act would be applicable to the arbitration proceedings. Further, it stated that a dispute or reference between the parties would be referred to sole arbitration of the Managing Director of the Respondent or his nominee.

The Court referred to section 12(5) of the Act and stated 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 Seventh Schedule he would be ineligible to be appointed as an arbitrator. With the exceptions being (i) parties can waive the applicability of the sub-section; (ii) the said waiver can only be provided after the dispute has arisen between the parties; and (iii) such waiver must be by an express agreement in writing. Thereafter, the Court applied the same standard to the aforementioned dispute resolution clause and concluded that the Managing Director of the Respondent had become ineligible by operation of law to act as an arbitrator in any dispute arising between the parties under the PO.

The Court thereafter referred to a gamut of Supreme Court judgments to hold that in certain circumstances the judiciary has exercised its discretionary jurisdiction to nullify the appointment of an arbitrator made by one of the parties to the dispute as the concerned party had failed to adhere to the procedure or mechanism provided for appointment of an arbitrator under the arbitration agreement, resulting in an *ex facie* contravention of the inherent facet of the arbitration agreement.

The Court also referred to the Supreme Court judgments of ***SBP & Co. v. Patel Engineering Ltd***[1] and ***Arasmeta***

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Captive Power Company Private Limited and another v. Lafarge India Private Limited[2] and stated that the designated Judge who is in possession of an application for appointment of an arbitrator, can at the initial stage, (1) adjudicate upon his own jurisdiction to entertain the matter, (2) scrutinize the existence of any condition precedent for the exercise of his power and (3) examine any possible disqualification of a proposed arbitrator. Thereby, ruling that the Court had the necessary jurisdiction to entertain a plea seeking statutory disqualification of a nominated arbitrator under Section 11(6) of the Act.

Thereafter, the Court deliberated on whether the Managing Director of the Respondent, after becoming ineligible by operation of law, could still be eligible to nominate an arbitrator. The Court made a distinction between a situation where the person nominating the arbitrator is different from the person acting as the arbitrator and where the person nominating also acts as the arbitrator. In the first scenario the parties authority to nominate their respective arbitrators cannot be questioned, the only valid objection can be in respect of procedural compliance and eligibility of the arbitrator under the provisions of the Act. But, in the second scenario which is the present case the nomination of an arbitrator by an ineligible arbitrator would tantamount to the arbitration proceeding being carried out the ineligible arbitrator himself. Ineligibility strikes at the root of the power to arbitrate or to nominate a person to preside over the arbitration proceeding.

ANALYSIS

There has been some conflicting judicial discourse on the amended provisions of the Act which dealt with appointment of an arbitrator. The present Supreme Court decision will settle the existing conundrum and provide some clarity to parties who are currently in the middle of arbitration proceedings or are contemplating initiating arbitration. The decision conclusively interprets the amended law to provide us clarity on the following issue:

- If an existing/present/future contract nominates a particular person to act as an arbitrator and also authorizes him to nominate another to preside over an arbitration proceeding instead of himself, then the person loses his right to preside *as well as* nominate, if he becomes ineligible due to the amended provisions of appointment of an arbitrator in the amended Act.
- One does not necessarily have to approach an arbitrator to seek statutory disqualification of an arbitrator and the same can be entertained by a Court as well.

Therefore, in all contracts where an employee of one of the parties has been nominated as an arbitrator as well as the appointing authority, and the employee falls within the scope of the disqualifications provided under the amended Act, he/she would be not only barred from acting as an arbitrator but also to nominate another in his/her stead. Therefore, in such a scenario the parties would have to agree on a mutually consensual choice of arbitrator or request the Court to assist in appointment of the arbitrator.

– Arjun Gupta & Moazzam Khan
You can direct your queries or comments to the authors

[1](2005) 8 SCC 618
[2] (2013) 15 SCC 414

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