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AN END OF IN-HOUSE ARBITRATOR APPOINTMENT CUSTOM- AN ANALYSIS OF SECTION 11 OF THE ARBITRATION ACT

INTRODUCTION

'Nemo iudex in causa sua' this maxim means that 'no person should be a judge in his own cause' and it is a cardinal principle of natural justice. The Arbitration and Conciliation (Amendment) Act, 2015 (for short "2015 Amendment") and the Arbitration and Conciliation (Amendment) Act, 2019 (for short "2019 Amendment") grant the liberty to the parties to appoint an arbitrator mutually.

It provides that the parties may determine the number of arbitrators, and if failed then the arbitral tribunal shall consist of a sole arbitrator. Section 11 of the 2015 Amendment, deals with the procedure concerning the appointment of arbitrator(s), and a person of any nationality may be an arbitrator; however, the consent of the parties is necessary. It must be noted that the consensus between the parties is the essence of the arbitration process.

Position before the Amendment

The Arbitration and Conciliation Act, 1996 (for short "Act, 1996") allowed one of the parties to the arbitration agreement to unilaterally appoint a sole arbitrator, and it also provided that such an arbitrator could even be its employee or his nominee.

This was against the principle of the natural justice *'Nemo iudex in causa sua'* and hence the need for an amendment to this provision was felt.

In Indian Oil Corporation v. Raja Transport (P) Ltd. (2009) 8 SCC 520- The Supreme Court held that the Act, 1996 per se does not bar the appointment of an employee of a party as a sole arbitrator and the independence or impartiality of the arbitrator cannot be challenged.

Amendment to the Act, 1996

Considering some issues about the pendency of cases and for achieving the objective to have a sound legal framework, the Indian Govt. has proposed amendments to the Act in 2015 and 2019.

The Schedule VII of the Act, 1996, pointed out the appointment of an arbitrator having a relationship with any of the parties or counsel, or where the arbitrator has a direct or indirect interest in the dispute should be barred. The arbitrator may be an employee, advisor, consultant, of any of the parties to the arbitration or part of the management who influences disputes considered to be unfair.

2015 Amendment applies prospectively only

The 2015 Amendment applies prospectively to the Arbitration and Conciliation Act, and has been held in many cases, some are mentioned below-

a) *In Board of Control for Cricket v. Kochi Cricket Pvt. Ltd. & Ors. (2018) 6 SCC 287-* It was held by the Court that the provisions of the 2015 Amendment, cannot have a retrospective operation in the arbitral proceedings that have already been commenced unless and until it is agreed by the parties mutually.

b) *In SP Singla Constructions Pvt. Ltd. v. State of Himachal Pradesh, Civil Appeal Nos. 11824-11825 of 2018* – The Supreme Court stated that if an employee arbitrator has been appointed (according to the arbitration agreement) before 2015 Amendment, then a party cannot approach the Court u/s 11(6) to seek the appointment of an independent arbitrator. The Courtfurther clarified that any challenge about the arbitrator's appointment ought to be raised before the arbitrator himself.

c) *Assignia-Vil v. Rail Vikas Nigam Ltd. Arb. P. No. 677/2015-* In this case, the in-house appointment of arbitrators was discussed and the Court stated that it should be discouraged unless the parties to the dispute have mutually consented. The Delhi High Court ruled that a party to an arbitration cannot nominate its serving or retired officer as its nominee arbitrator. clause provides otherwise, to ensure fairness in action and to translate the legislative mandate into reality, it is necessary to appoint an independent arbitrator.

d) *Era Infra Engineering Ltd. v. Aravali Power Company Pvt. Ltd. Arb. P. 136/2016-* In this case, the question arose regarding the arbitration invoked before the 2015 Amendment. The Court clarified that the appointment of the in-house sole arbitrator who is the CEO of the respondent be avoided and it would be appropriate that an independent sole Arbitrator should be appointed.

e) *In M/s Control Systems v. M.P. Micro and Small Enterprise Facilitation Council & Ors., WP. No.2312/2017-* The Court held that it is clear that the aspect of neutrality and impartiality is a necessary facet, which needs to be seen in cases of statutory

Tannishtha Singh

Legal Head, MCO Legals
LLB (Hons.),
ILS Law College,
Pune

Expertise:

Litigation & Corporate/
Commercial Arbitration

tannishtha.s@mcolegals.co.in

Shivangi Dubey

Research Partner

Master's in Business Laws,
Amity University, Noida

Arbitration. Even if the arbitration clause provides otherwise, to ensure fairness in action and to translate the legislative mandate into reality, it is necessary to appoint an independent arbitrator.

264th Law Commission

The 2015 and 2019 Amendments made under the Act for Section 11 and 12 are substantially similar to the recommendations provided by the Law Commission in 246th Law Commission Report.

The sole purpose behind the amendment is to maintain the independence and neutrality of the arbitrator and to ensure the speedy disposal of the matters without providing undue advantages by having in-house arbitrators.

Latest judgments after the 2019 Amendment

a. *In Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd.2019 SCC OnLine SC 1517*- The issue of appointing sole arbitrator unilaterally held to be invalid after the 2015 Amendment. It clarified that a clause empowering a nominee of the Chief General Manager of HSCC to act as the sole arbitrator is invalid. The Court observed that 'if the interest that a party has in the outcome of the dispute is taken to be the basis for the possibility of bias it will always be present.

b. *In Bharat Broadband Network Limited v. United Telecoms Ltd. (2019) 5 SCC 755*- The Supreme Court allowed the application filed under Section 11(6) and 11(12)(a) of the 2019 Amendment Act, and removed the Sole Arbitrator appointed by the Respondent and appointed another Sole Arbitrator in his place.

c. *In Central Organization for Railway Electrification v. ECI-SPIC-SMO-MCML (JV),2020(1) ALT 70*- The Supreme Court held that the power to nominate the arbitrator by one party is counter-balanced by the power of the other party to select its nominee Arbitrator from the panel suggested by the Railways.

d. *In Haryana Space Application Centre (HARSA) v. Pan India Consultants, Civil Appeal Nos. 131 OF 2021*- The Supreme Court Bench observed that the Principal Secretary's appointment, as the arbitrator of HARSA, was invalid u/s 12(5) of the 2019 Amendment Act, r/w the VII Schedule. It provides that any person or counsel who has an existing relationship with the parties shall be ineligible to be appointed as an arbitrator. Section 12(5) of the Amendment Act, 2019 r/w VII Schedule is a mandatory and non-derogable provision of the Act. Hence, the Principal Secretary is ineligible to be appointed as an arbitrator since he has a controlling influence on the Appellant Company as it is a nodal agency of Haryana.

Conclusion

The various decisions of the Courts as discussed above may be interpreted to lead to the following conclusions-

a. 2015 Amendment does not apply retrospectively to arbitration proceedings commenced before it coming into force unless the parties otherwise agree.

b. The developments in the law of arbitration are converging to make the process fairer, efficient, and progressive.

c. After the 2015 and 2019 Amendments, the parties cannot choose an 'interested party' as an arbitrator. If done so, then it would lead to failure of appointment procedure which would give the right to another party to approach the Court under Section 11 of the Act for appointment of the unbiased and qualified arbitrator.