Update

30 January 2020, Thursday

Panel of arbitrators must be broad based under the Voestalpine principle (Delhi High Court)

by Editor

SMS Ltd. v. Rail Vikas Nigam Limited

Court: Delhi High Court | **Case Number**: ARB.P. 167/2019 | **Citation**: 2020 SCC OnLine Del 77 | **Bench**: V Kameswar Rao J | **Date**: 14 January 2020

The arbitration clause in the contract between the parties provided, among others, that:

a. The tribunal shall consist of three arbitrators.
b. Rail Vikas Nigam will forward a panel of five names, and SMS Ltd. will pick one to be its nominee arbitrator. Rail Vikas Nigam will decide its nominee arbitrator out of the remaining four names.
c. The two nominee arbitrators shall choose the third arbitrator. If the two arbitrators failed to do so, the Managing Director of Rail Vikas Nigam should appoint the presiding arbitrator.

When a dispute arose, SMS Ltd. made its nomination and called upon Rail Vikas Nigam to make the nomination. In response, Rail Vikas Nigam sent a panel of thirty-seven names for SMS Ltd. to choose from. SMS Ltd. objected to those names and applied to the court under Section 11 of the Arbitration and Conciliation Act ("ACA"), praying for the appointment of a nominee arbitrator on behalf of Rail Vikas Nigam or in the alternative, appointment of a sole independent arbitrator.

Allowing the application and appointing a sole arbitrator on behalf of Rail Vikas Nigam, Kameswar Rao J held:

a. There is no dispute that only eight members out of the thirty-seven in the panel are officers retired from organizations other than or connected with Railways.
b. The Supreme Court in *Voestalpine Schienen GMBP* v*. DMRC*, (2017) 4 SCC 665, held that to instill confidence in the mind of the other party, it is imperative that apart from serving or retired engineers of the government departments and public sector undertakings, engineers of prominence and high reputation from the private sector should also be included. Likewise, the panel should comprise persons with a legal background like judges and lawyers of repute as not all the disputes need to be technical in nature.
c. In *Simplex Infrastructures Ltd.* v*. Rail Vidyut Nigam Ltd.*, 2018 SCC OnLine

Del 13122, a co-ordinate bench appointed a nominee arbitrator on behalf of Rail Vidyut Nigam, noting that in the panel of twenty-six names,[1] [1] Rail Vidyut Nigam initially wanted Simplex to choose from five names. Then, in its reply it forwarded a panel of twenty-six names. The court found that there was no person with legal background or background of accounting. The court noted that in spite of repeated judgements of the High Court relying on the judgement of the Supreme Court in *Voestalpine*, Rail Vidyut Nigam had blatantly refused to comprehensively broad-base its panel. Show More only nine were not connected with the Railways. It must, therefore, follow that the panel of thirty-seven names given in this case also does not satisfy the concept of neutrality as it is not broad-based.

d. (Rejecting the argument that there was no cause of action) When the arbitration clause itself is invalid, SMS Ltd. was well within its right to approach the court.
e. (Rejecting the argument that the court should have due regard, under Section 11(8) ACA, to the qualifications requirement set out in the arbitration clause)[2] [2] The arbitration clause set out minimum qualifications and experience, namely, one retired railway officer of a particular rank from the Indian Railways Accounts Service having experience in financial matters related to construction contracts; one technical member having an engineering degree, etc. The argument was raised citing *Northern Railways Administration, Ministry of Railways v. Patel Engineering Company Limited*, (2008) 10 SCC 240. Show More Officers retired from Railways or PSUs related to Railways, even though possessing the qualifications, do not meet the neutrality requirement (in this case). Further, persons having similar qualifications in engineering are available in the private sector too.
f. A person who is a retired government employee will not automatically fall within the ambit of Entry 1 of the Fifth and Seventh Schedule of the ACA. But it does not mean that the panel should only consist of the retired officers– it must be broad-based.
g. (Rejecting plea, based on *HRD Corporation* v*. GAIL*, (2018) 12 SCC 471 ("*HRD* "),[3] [3] RF Nariman & Sanjay Kishan Kaul JJ, decided on 31 August 2017 Show More that if an arbitrator falls under the Fifth or Seventh Schedule of the ACA, the remedy is under Sections 12, 13 and 14 ACA) The argument is without merit in view of the fact that the arbitration clause is itself invalid. Further, even in *HRD*, the court held that if an arbitrator falls in the Seventh Schedule, he becomes ineligible to act and *de jure* unable to perform his functions. To determine ineligibility, it is not necessary to go to the arbitral tribunal. An application under Section 14(2) ACA can be filed.
h. In *Perkins Eastman*, 2019 SCC OnLine SC 1517, the Supreme Court has held that if there are justifiable doubts as to the independence and impartiality of the person nominated, and if other circumstances warrant the appointment of an independent arbitrator by ignoring the procedure prescribed, such an appointment can be made by the court.

Categories: Appointment of Arbitrators | Broad Based Panel | Fifth Schedule | Independence and Impartiality of Arbitrator | Neutrality of Arbitrator | Party Appointed Arbitrator | Section 12 ACA | Section 14 ACA | Section 15 ACA | Seventh Schedule | Voestalpine