Appointment of arbitrators in multi-party arbitration—when will post-Dutco reforms come to India?

Blog by Umang Bhat Nair

Published on 14 October 2020

A. *ACSA Global* v. *GVK Airport*—a test case for appointment in multiple-respondents scenario

In June this year (2020), it was reported that in *ACSA Global Limited* v. *GVK Airport Holdings Limited and* others,[1] the Supreme Court of India would be considering the issue of the appointment of arbitrators in a multi-party arbitration. Limited facts available in the public domain reveal that to form the panel, the claimant appointed one arbitrator and asked the respondents to nominate one on all of their behalf jointly. One of the respondents made the appointment. However, another respondent disagreed and has petitioned the court, it appears, challenging the unilateral appointment with a request that the court appoints an arbitrator on behalf of all the respondents.

How are issues of party autonomy, party equality and fairness involved here? How does the Arbitration and Conciliation Act, 1996 ("ACA") address them? How are they addressed elsewhere? Is there a problem, and if so, what are the possible solutions? This blog highlights and discusses these aspects.

B. Party autonomy, fairness, and party equality apply at the stage of selection of the tribunal

"It is elementary that no arbitration is any better than the arbitral tribunal"[2] and, therefore, the selection of the arbitral tribunal is possibly the most critical step in an arbitration. The concepts of party autonomy, party equality and fairness apply in a significant measure at this stage.

In India, these issues have been sharply brought into focus even in some classic bi-partite arbitration scenarios. For example, in *Voestalpine,*[3] one party's right to select its arbitrator was restricted to a narrow panel of names maintained by the other party (an instrumentality of the State). Emphasising that independence and impartiality are the "hallmarks of any arbitration proceedings," the Supreme Court ruled that the panel must be broad-based.[4] In *Perkins,*[5] one party had the unilateral right to select the sole arbitrator. The Supreme Court invalidated the clause. These and other decisions following them[6] are rooted in ensuring fairness and party-

[1] Arbitration Petition (Civil) No. 14 of 2020.
[2] Gary Born, Intranational Commercial Arbitration, 1641 (2 ed., Wolters Kluwer, 2014).
[3] *Voestalpine Schienen GMBH* v. *Delhi Metro Rail Corpn. Ltd.*, (2017) 4 SCC 665.
[4] *Ibid*, paragraph 29 ("Keeping in view the spirit of the amended provision and in order to instil confidence in the mind of the other party, it is imperative that panel should be broad-based. Apart from serving or retired engineers of government departments and public sector undertakings, engineers of prominence and high repute from the private sector should also be included. Likewise, the panel should comprise of persons with a legal background like Judges and lawyers of repute as it is not necessary that all disputes that arise, would be of technical nature").
[5] *Perkins Eastman Architects DPC* v. *HSCC (India) Ltd.*, (2019) SCC OnLine 1517.
[6] See, e.g., *Prodattur Cable TV Digi Services* v. *Siti Cable Network Ltd.*, 2020 SCC OnLine 350 Del.

equality[7] over party autonomy and are in line with the internationally well-recognised principle[8] of maintaining party equality in the appointment of arbitrator(s) stage.

Some legislative developments preceded *Perkins*. In 2014 came the celebrated 246th Report of the Law Commission of India that made several recommendations on the selection of arbitrators. In particular, the Report discussed the "neutrality"[9] of arbitrators and gave its recommendations to increase confidence in an independent and impartial adjudication of the dispute. In view of the Law Commission Report, fairness trumps party autonomy. Several of the recommendations were adopted in 2015. They are reflected, among others, in the amendment to Section 12 ACA, and introduction of the Fifth and the Seventh Schedule to the ACA.

C. Applying autonomy, equality and fairness in a multiple-party situation like *ACSA*

C1. The question

Applying fairness and equality over party autonomy may not have been conceptually difficult in either *Perkins* or *Voestalpine*. But consider an *ACSA*-like scenario where several respondents are unable to agree on a joint nomination or another variant of the situation where the respondents have conflicting interests.[10] Even worse, what if one of the respondent's interests are more aligned with the claimant or claimants?

The question in such circumstances is how to constitute the tribunal in a manner that enforces the parties' agreements and, at the same time, respects equality and fairness.[11]

As will be seen below, the question is particularly relevant in an ad-hoc arbitration under the ACA.

C2. The question came to be highlighted in and after *Dutco*

In *Dutco*,[12] the top court of France annulled an award where two respondents were instructed by the ICC (whose rules applied to the arbitration) to make a nomination jointly. They had done so under protest, only to apply later to have the award set aside. In its very "terse" decision, the Court of Cassation concluded that "the principle of equality of the parties in the appointment of arbitrators is a matter of public policy and can be waived only after a dispute has arisen."

Dutco led the arbitral institutions—-the ICC, the LCIA[13] and SIAC[14] and several others –to add to their rules the mechanism of appointing arbitrators in a multiple parties scenario. Finetuned over time, for instance, the

---

[7] That is why the court distinguished the situation wherein a bipartite arbitration both parties have the equal right to appoint their nominees. See, SCC para 21 of *Perkins*.

[8] See, Alfonso Gomez-Acebo, *Party Appointed Arbitrators in International Commercial Arbitration*, Chapter 3, page 46, para 3-26 (Kluwer Law International, 2016).

[9] The expression neutrality was used in the Report to describe independence and impartiality. Sikri J, in his judgment in *Voestalpine,* explains these three different concepts.

[10] As a matter of practicality, multiple claimants are not likely to have conflicting interests because they chose to be the claimants in the first place.

[11] Ricardo Ugarte and Thomas Bevilacqua, *Ensuring Party Equality in the Process of Designating Arbitrators in Multiparty Arbitration: An Update on the Governing Provisions*, 27(1) Journal of International Arbitration 9, 10 (2010).

[12] *BKMI Industrienlagen GmbH & Siemens AG* v. *Dutco Construction*, Yearbook Commercial Arbitration, Vol. XVIII, 140 (Kluwer Law International, 1993).

[13] Maxi Scherer, Lisa Richman, *et al.*, *Arbitrating under the 2014 LCIA Rules: A User's Guide*, 131 (Kluwer Law International, 2015).

[14] Choong, Mangan, Lingard, *A Guide to the SIAC Arbitration Rules*, 143 (2nd ed., Oxford University Press, 2018).

ICC Rules now provide that where multiple respondents or claimants are unable to agree to a method for the constitution of the arbitral tribunal, the ICC Court may appoint each member of the arbitral tribunal and shall designate one of them to act as president.

Therefore, there is no cause for concern if parties have chosen an arbitral institution, the rules of which already cover the multi-party situation.

C3. The Indian position

It comes as a surprise that the Indian legislature has not turned its attention to the problem. The 246th Report of the Law Commission also missed it. Similar to the pre-*Dutco* ICC Rules, Section 11 (3) ACA, which deals with court's assistance in appointment of a three-member tribunal, provides that "*each party* shall appoint one arbitrator, and the *two* appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator."

This is how Section 11 (3) ACA was originally enacted following Article 11 of the Model Law. Neither the Model Law nor Section 11 ACA appears to address a multiparty situation.

However, it should be pointed that, like other institutional rules, the rules of the homegrown Mumbai Centre for International Arbitration ("MCIA") provide that in the absence of a joint nomination by either side, the entire tribunal will be selected by the MCIA council.

D. Is there currently a solution?

Is there a solution within the framework of the current ACA, within the limits of interpretation and without violating party-equality, when multiple respondents cannot agree on any name?

Again, consider the scenario identified above in Section C1 involving a claimant and two or more respondents in an *ad hoc* 3-member tribunal arbitration. The claimant makes an appointment, but the respondents cannot agree on a joint nomination. What would be the court's response if, in this scenario, (i) the aggrieved respondent approaches the court for the appointment of an arbitrator on behalf of the respondents; or (ii) requests the court to constitute the entire tribunal.

In my view, despite the language of Section 11 ACA, there are sufficient interpretive tools available for the court to grant both reliefs.

If the respondents have not agreed but are willing to have a nomination made on their behalf by the court, the court can treat them as one "party."[15] Though Section 11 (3) ACA says that in an arbitration with three arbitrators, "each party shall appoint one arbitrator", Section 11 (2) gives the parties the freedom to "agree on a procedure for appointing the arbitrator or arbitrators." These provisions can and should be read to mean that multiple parties have the freedom to make a joint nomination. This will be a purposive reading of the expression "party" in Section 11.[16]

[15] Bernard Hanotiau, *Party Appointed Arbitrators in International Commercial Arbitration Vol. 2*, 372, para 902 (2nd ed., Kluwer Law International, 2020).
[16] See *Shailesh Dhairyawan* v. *Mohan Balkrishna Lulla*, (2016) 3 SCC 619, paras 31-33.

If the respondents have not agreed, but one of them has nonetheless made an appointment, it is still open for the court on the same logic to make an appointment on behalf of the respondents ignoring the unilateral appointment.

Now, there may be a situation where the relief sought is the appointment of the entire tribunal. This will likely be in a fact situation where it is alleged that one of the respondent's interests are more aligned with the claimant(s). The solution to this tricky situation lies in *Perkins*. The basic reasoning in *Perkins*, it should be recalled, was that appointment by one party of a sole arbitrator violates equality. This was said to not be the case in the appointment of a three-member tribunal where the right of one party to appoint was counterbalanced by the right of the other party to appoint its nominee. Thus, the clause which afforded one party the right to appoint a sole arbitrator was struck down.

Perkins was decided in the context of appointing a sole arbitrator. The Supreme Court observed that questions of procedural unfairness at the appointment stage did not permeate to the realm of three-member tribunals where both sides could nominate arbitrators of their *choice*. This was because any advantage a party may derive by nominating its arbitrator of choice would be 'counterbalanced' by an equal power with the other party.

It may be argued that even a joint nomination on behalf of the respondents does not afford equal opportunity in the appointment process, thus violating party equality and, therefore, requiring that the court replaces the entire tribunal. This will preclude any one party from having a greater influence in the composition.

In the long run, the legislature should consider making amendments to the ACA to address appointment concerns arising from multiparty arbitration agreements. The legislature may draw inspiration from foreign arbitration laws that offer plausible solutions.[17] Singapore's Ministry of Law has recently passed[18] amendments to their International Arbitration laws to regulate tribunal appointments in multiparty situations.[19] India would be wise to review the existing international jurisprudence on this issue and make the required amendments.

[17] S. 1034(2), German Code of Civil Procedure; Art. 1028, Dutch Code of Civil Procedure.

[18] Cara Wong, Amendments passed to boost international arbitration framework, Singapore Law Watch (Oct. 07, 2020, 11:02 PM), https://www.singaporelawwatch.sg/Headlines/amendments-passed-to-boost-international-arbitration-framework.

[19] Ministry of Law, Singapore, Enhancing the Regime for International Arbitration through the International Arbitration (Amendment) Bill, (Sep. 09, 12:08 PM), https://www.mlaw.gov.sg/news/press-releases/international-arbitration-amendment-bill.