Unilateral right of appointing sole arbitrator not valid under the Perkins rule even if the right was not with any individual but the "company" (Delhi High Court)

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M/s. OMCON Infrastructure Pvt. Ltd. v. Indiabulls Investment Advisors Ltd

Court: Delhi High Court | **Case Number**: OMP (T) (Comm) 35 /2020 | **Citation**: Not available | **Bench**: Rekha Palli J | **Date**: 01 September 2020

Applying the *Perkins* rule, the Delhi High Court has ruled that a unilateral right to select a sole member tribunal will be invalid and it does not matter if the company and not any individual has that right. The court terminated the mandate of the arbitrator appointed under such a clause.

Section A below discussed the case and the reasoning, and Section B briefly gives a context to the legal position for a reader who is new to the topic.

A. The case

Indiabulls was the marketing representative of OMCON under an agreement. The dispute resolution clause provided that any disputes between the parties shall be referred to a sole arbitrator. It further provided that the sole arbitrator shall be "*nominated/appointed by the Company only*" (that is, Indiabulls) without recourse to an alternative mode of appointment.
Some disputes arose, and Indiabulls appointed a sole arbitrator in Jun 2019. OMCON informed that it would not accept the appointment and it did not appear before the arbitrator on two dates. In January 2020, OMCON applied under Section 12 ACA before the arbitrator challenging his jurisdiction. It argued that the appointment was contrary to Supreme Court's judgment in *Perkins Eastman Architects DPC & another* v. *HSCC India Ltd.,* 2019 SCC Online SC 1517.

The arbitrator upheld his jurisdiction saying that delay and laches barred the application, and *Perkins* did not apply where the authority to nominate the arbitrator was vested in a company and not a person.

Now OMCON applied to the High Court under Sections 14 and 15 for termination of the mandate of the arbitrator and his substitution[1]

Justice Rekha Palli allowed the application: –

(a) First, she said that there was "no hesitation in holding that the unilateral appointment … cannot be sustained". The ratio of Perkins "cannot be read in such a narrow manner." When

[1] *Bharat Broadband* makes it clear that a Seventh Schedule ineligibility attracts automatic disqualification. If there is a controversy as to the ineligibility, the matter has to go the Court under Section 14 and not before the arbitrator challenging his independence and impartiality. A challenge lies before the arbitrator when the Fifth Schedule applies. Under the *TRF* and *Perkins* rule, an interested party would be ineligible to appoint an arbitrator because of the Seventh Schedule. Even though some items of the schedules are identical, for example, Item 1 of the Fifth Schedule and Item 7 of the Seventh Schedule, it will be reasonable to assume that it was not necessary to first make a challenge to the jurisdiction of the arbitrator. An application to terminate the mandate could have been filed straightway.

in *Perkins*, the Managing Director of a party was held ineligible to appoint a sole arbitrator, the company itself would also be barred.

(b) Then she referred to *Proddatur Cable TV Digi Services* v. *Siti Cable Network Limited,* 2020 SCC OnLine Del 350, where a co-ordinate bench (of Jyoti Singh J) had dealt with a similar clause. Palli J simply extracted paragraphs 25 to 27 from Proddatur. In those passages, Singh J had concluded that Perkins would directly hit a clause conferring on the company a right to appoint a sole arbitrator because a company acts through its board of directors who would have an interest in the outcome of the dispute. Read our Update on Proddatur here.

(c) Palli J then rejected the argument of delay by noting that the objection was conveyed even before the arbitrator held his first sitting.

B. The law relating to the appointment of sole arbitrator

B1. The Seventh Schedule ineligibility— *TRF* and *Perkins*

See Chapter 1 of our Yearbook 2019 at https://www.nfral.in/wp-content/uploads/2020/03/NFRAL-Yearbook-2019.pdf for a lengthier discussion on the concept and the 2019 cases.

The Seventh Schedule sets out a bucket of prohibited relationships. Section 12 (5) ACA provides notwithstanding any prior agreement to the contrary, if any item of the Seventh Schedule applies, the prospective arbitrator is ineligible or, if already appointed, her mandate automatically terminates. This situation is called *de jure* inability of the arbitrator. It is only if there is a controversy concerning the *de jure* inability, a party may apply to the Court under Section 14 ACA for termination of the mandate. [*see Bharat Broadband Network Limited* v. *United Telecoms,* (2019) 5 SCC 755 *for a discussion on the issue*]

In *TRF Limited* v. *Energo Engineering Limited,* (2017) 8 SCC 377 *("**TRF**"),* the arbitration clause provided that any dispute "shall be referred to sole arbitration of the Managing Director of buyer or his nominee". By the time this matter was heard, the 2015 Amendments were in place.

Given the amended provisions, for example, items 1, 5 and 12 of the Seventh Schedule), it was common ground that the Managing Director, an employee of a party to the dispute, was disqualified to himself act as an arbitrator. The question was if he could nonetheless nominate another person? The court held: "once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator."

In *Perkins Eastman Architects DPC* v. *HSCC (India) Ltd.,* 2019 SCC OnLine SC 1517 taking forward the principle of *TRF*, the Supreme Court had ruled that a party (or any official of the party) or anyone having an interest in the dispute cannot unilaterally appoint a sole arbitrator. The court said that naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That, the court added, is the essence of the amendments brought in by the 2015 Amendments and recognized by *TRF case.*

Read our Update on *Perkins* also discussing the *TRF* reasoning here.

B2. *TRF* and *Perkins* distinguished in *CORE*

One of the reasons in *Perkins* reasoning was that where both parties have a right to appoint, whatever advantage a party may derive by nominating an arbitrator of its choice would get counterbalanced by equal

power with the other party. But, where only one party has a right to appoint a sole arbitrator, the choice will always have an element of exclusivity.

This counterbalancing principle was applied by a three-judge bench of the Supreme Court in *Central Organisation for Railway Electrification* v. *ECI-SPIC-SMO_MCML (JV)*, 2019 SCC OnLine SC 1635 to refuse the application of *Perkins* in a situation where the General Manager had the right to participate in the appointment of a three-member tribunal.

To know more about the decision and reasoning in *CORE*, and the matters it did not consider read our Update here.

Proddatur (which Singh J applied in OMCON) had distinguished *CORE*.