Clause restricting the choice of one party to select the sole arbitrator from a panel of three names is okay. *Voestalpine* (2-judge bench SC) cannot be relied on because of CORE (3-judge bench SC). Passages in *Voestalpine* about broad-based panel were merely suggestions (Delhi High Court)

Update by Editor

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Iworld Business Solutions Private Limited v. Delhi Metro Rail Corporation Limited

Court: Delhi High Court | **Case Number**: OMP (T) Comm. 71 of 2020 | **Citation**: MANU/DE/20193/2020 | **Bench**: C Hari Shankar J | **Date**: 04 December 2020

Applying the decision of the Supreme Court in *CORE* (cited below), a single-judge bench of the Delhi High Court has upheld a clause that limited the choice of selection of the sole arbitrator from a panel of three names. The court ruled that the passages in *Voestalpine* (cited below) about broad-based panel were just suggestions.

Decisions on the appointment of arbitrators are quite interesting because a lot has happened in the last four years. Before discussing the Update, a bit of a context first to understand *Voestalpine* and *CORE*.

For a lengthier discussion on the concept and the 2019 cases more, you can see Chapter 1 of our Yearbook 2019 here.

A. The context

The 2015 Amendments disqualify an employee, consultant, advisor, or someone who has any other past or current business relationship.[1]

The February 2017 *Voestalpine case*[2] began the post-2015 "jurisprudence" on independence and impartiality. Coincidentally, the respondent Delhi Metro Rail Corporation (DMRC) was also a party respondent in *TRF*.

DMRC's contract had several standard terms. It also maintained a panel of "serving or retired engineers of government departments or public sector undertakings". In case of a dispute, DMRC would forward to the other party a list of five names. The other party had to select its arbitrator from that list; DMRC would choose one, and the two would choose the third. This mechanism was challenged.

Some of the court's observations and conclusions were: -

(a) The concept that courts are bound to appoint arbitrators by strictly following the agreement had eroded even pre-2015 Amendments in the face of the concept of independence and impartiality. (see paragraphs 19, 20).

[1] See Section 12 (5) and the Seventh Schedule of the ACA. Also, see the Fifth Schedule.
[2] *Voestalpine Schienen GMBH* v. *Delhi Metro Rail Corporation Limited*, (2017) 4 SCC 665.

(b) The 2015 Amendments "puts an embargo" on an employee to act as an arbitrator, but not a person who retired from the government or other statutory corporation or a public sector undertaking and had no connection with DMRC (the party in dispute) (paragraph 26).

(c) Since DMRC has now forwarded the list of all 31 persons on its panel, this not a fit case for the court to appoint the tribunal (para 27).

(d) But, the procedure for the appointment is bad. Picking five names not only restricts the other party's choice, "suspicion is created" that DMRC may have picked favourites. The two chosen names also have a restricted choice to appoint the third; they should be given full freedom (paragraph 28).

(e) Also, DMRC cannot restrict the panel to serving or retired government officials. It must be broad-based to include engineers of prominence and repute from the private sector, lawyers, judges. We direct that DMRC shall prepare a broad-based panel in two months (paragraph 29).

Voestalpine has been followed in many cases. See, for example our update on a case here.

The 2017 *TRF case*[3] disqualified an employee from even appointing an arbitrator. It was a case of a sole arbitrator. The 2019 *Perkins case*[4] extended the *TRF* principle. The Supreme Court ruled that a party (or any official of the party) or anyone interested in the dispute cannot unilaterally appoint a sole arbitrator. The *CORE* case—also in 2019—distinguished *TRF* and *Perkins*. The case involved a three-member tribunal. CORE had sent a panel of four names to the other party. CORE's General Manager had the right to participate in the appointment of a three-member tribunal.[5]

One of *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 had a right to appoint a sole arbitrator, like in *Perkins*, the choice will always have an element of exclusivity (and hence bad in law).

This counterbalancing principle was applied to refuse the application of *Perkins*, saying that since the power was counter-balanced, the General Manager could make the nomination.

To know more about the decision and reasoning in *CORE*, read our Update here.

B. The Iworld case

B1. DMRC had to send a panel of three names

The arbitration clause in the agreement between DMRC and Iworld provided that a dispute of a value under INR 5000000 (fifty lakhs) was to go before a sole arbitrator; those above had to go to a three-member tribunal. Though the initial part of the arbitration clause said that any dispute "shall be referred

[3] *TRF Limited* v. *Energo Engineering Limited*, (2017) 8 SCC 377, 3-judge bench, Supreme Court of India.
[4] *Perkins Eastman Architects DPC and another* v. *HSCC (India) Ltd.*, 2019 SCC OnLine SC 1517, 2-judge bench, Supreme Court of India.
[5] *Central Organisation For Railways Electrification* v. *ECI-SPIC-SMO-MCML (JV)*, 2019 SCC OnLine SC 1635. The clause had several categories that applied depending on whether Section 12 (5) ACA had been waived, and also the value of the claim. The Railways had to send a panel of names to the contractor. The contractor had to choose at least two names, from which one was to be appointed by the General Manager, Railways as the contractor's nominee. The General Manager was to appoint the remaining two from the panel or outside it, including the presiding arbitrator.

to Arbitrator(s) appointed by Director, DMRC", the mechanism of appointment was via a panel as follows:

(a) In the case of the sole arbitrator: DMRC would send a panel of three names to Iworld.[6] The names could include DMRC officers. Iworld had to select one name who would be the arbitrator.

(b) In the case of a three-member tribunal: DMRC would send a panel of five names to Iworld. The names could include DMRC officers. Iworld had to choose one name. DMRC would choose another. Both nominees would choose the third arbitrator but from the panel.

B2. Iworld applied to the court for the appointment and asserted that the mechanism in the agreement was unenforceable

A dispute arose of a value of below fifty lakhs INR (sole arbitrator). Iworld sent a notice of arbitration also nominating a lawyer as the arbitrator. Iworld asserted that the arbitration clause giving a right to DMRC to nominate the sole arbitrator was illegal and unenforceable in view of the decisions in *Bharat Broadband*[7], *Perkins* and *Proddatur*[8]. In response to the notice, DMRC sent a panel of three names—all former Additional District and Sessions Judges, thus not any DMRC employees (serving ones, or even retired). Iworld applied for the appointment of an arbitrator by the court.[9] It is not explicitly clear what Iworld's challenge was, or in what fashion the argument proceeded in the court. It appears that the application was premised on the *Perkins* decision.[10] Its argument apparently was "DMRC could not be allowed to nominate arbitrators"[11]. When DMRC pointed to *CORE*, Iworld responded by relying on *Voestalpine*.

C. The court's decision

Harishankar J dismissed the petition.

C1. The *CORE* decision applies

First, he noted in detail what the CORE decision was. He reproduced paragraphs 24-27 from *CORE*[12] the effect of which was that retired employees could act as arbitrators and there was no problem if the arbitrators were chosen from a panel of retired employees. He also "additionally" reproduced paragraphs 37 and 38 of *CORE*[13] , the effect of which is that (i) selection of parties' arbitrators from a

[6] This was an agreement of 07 June 2016, prior to *Voestalpine*.
[7] *Bharat Broadband Network Limited* v. *United Telecoms Limited*, (2019) 5 SCC 755.
[8] *Proddatur Cable TV Digi Services* v. *SITI Cable Network Limited*, 2020 SCC OnLine Del 350. A decision of the Delhi High Court by Jyoti Singh J. She ruled that a party-appointed sole arbitrator was ineligible in view of the *Perkins* decision. She also distinguished *CORE* on the ground that it concerned a three-member tribunal where both parties had a level playing field in the matter of appointment.
[9] The judgment does not note what the application was for. It can be deduced from the operative part of the decision of the court, and also an intermediate order of 25 November 2020 available on the Delhi High Court's website.
[10] Noted in the order of 25 November 2020.
[11] See para 7 of the decision. In other words, the argument appears to be that DMRC could not limit Iworld's choice to three arbitrators.
[12] The paragraph numbering is from the version of the judgment available on the Supreme Court's website here. Paragraphs 23 to 27 of CORE discuss the question if retired railways employees were eligible for appointment as arbitrators under Section 12 (5) read with Schedule VII ACA.
[13] Supreme Court website's version, see fn above.

panel of names made by one party was okay; and (ii) if the agreement specifically provided for the appointment of arbitrators from out of a panel, the appointment should be in terms of the agreement.[14]

C2. *CORE* trumps *Voestalpine*

Second, he noted that in view of *CORE,* Iworld turned to the decision in *Voestalpine*. But he said that Iworld could not— "as such, on the face of it" — rely on *Voestalpine* "which would derogate from the law laid down in [CORE]" because *Voestalpine* was a decision by a 2-judge bench, while *CORE* by a 3-judge bench that had also considered *Voestalpine*.

C3. Applicability of *Voestalpine*—its observations about broad-based panel were suggestions and reference to a large panel (of 31 names) observations. Anyway, the observations support DMRC

Third, he discussed the applicability of *Voestalpine* in particular 27[15] which Iworld had cited. It is not made clear in the judgment what exact argument was made. This creates some problem in giving a proper explanation or context to the reader. In effect, it was said that:

(a) Paragraph 27 of *Voestalpine* was in the nature of observations. But observations of the Supreme Court "are entitled, in the hierarchical court system in this country, to high precedential value and cannot be ignored".

(b) The court's observations about making the choice broad-based and exhaustive were "by way of a suggestion."[16]

(c) Significantly, in paragraph 28, the court noted that the panel maintained by the DMRC ought to have been broad-based, including judges and lawyers.

(d) The panel forwarded by DMRC here has former judges. So, thus *Voestalpine* "would seem to militate against, rather than support, the stand adopted by [Iworld].

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[14] *CORE* considered both categories of serving and retired employees. The former category in cases where Section 12 (5) ACA had been waived, and the latter when there was no waiver.

[15] Iworld, Para 27 ("As already noted above, DMRC has now forwarded the list of all 31 persons on its panel thereby giving a very wide choice to the petitioner to nominate its arbitrator. They are not the employees or ex-employees or in any way related to DMRC. In any case, the persons who are ultimately picked up as arbitrators will have to disclose their interest in terms of amended provisions of Section 12 of the Act. We, therefore, do not find it to be a fit case for exercising our jurisdiction to appoint and constitute the Arbitral Tribunal").

[16] Iworld, para 24 ("In para 27, the Supreme Court has observed that even where a number of persons were empanelled, the DMRC was conferred the discretion to pick any five persons out of the panel and forward their names to the other side, who had to select one as its nominee. Even while so observing, the Supreme Court noted that this practice had been done away with, in the case before it. The DMRC was also required to nominate its arbitrator from the same list, and the two arbitrators so nominated had to pick the third arbitrator also from the same list, i.e. from the remaining three persons. Where there was an exhaustive panel with the DMRC, the Supreme Court observed that it may not have been justified to limit the choice, to the opposite party, to choose one out of five names handpicked by the DMRC from its panel. Where such handpicking took place, the Supreme Court observed that a suspicion could arise, regarding the impartiality of the person picked by the DMRC out of its panel. As such, it was opined, by way of a suggestion, that the clauses 9.2(b)(c) in the Special Conditions of Contract, which permitted for such an arrangement, needed to be deleted, and the opposite party ought to have been extended the choice to select the arbitrator out of the entire panel maintained by the DRMC. Similarly, it was opined that the two arbitrators, so appointed, ought also to have been permitted the liberty to appoint the third arbitrator from the entire panel of arbitrators maintained by the DMRC").

C4. Conclusion

Then, lastly, he said that "the issue stands squarely covered by [CORE]", and that the impartiality of the suggested names was not in doubt and directed Iworld to select one name as the sole arbitrator.