Chapter 01

APPOINTMENT, CHALLENGE, AND SUBSTITUTION OF ARBITRATORS

INTRODUCTION

It is cliched and yet bears repetition that party autonomy is central to most aspects of arbitration. Arguably, the selection of arbitrators is one of them. Parties are free to choose their arbitrators or how they will be selected. But this autonomy is not absolute. It comes with restrictions, and it is now naturally assumed that an arbitrator must be independent and impartial.[1]Why must that be so? Well, 'justice' depends on it. Only that judge who treats parties equally is perceived as capable of giving each party its due.[2]

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[1] There is a good amount of literature on the meaning and relationship among independence, impartiality and neutrality. Many authors consider them linked but distinct concepts. *See, e.g.*, N. Blackaby *et. al.* (eds.), *Redfern and Hunter on International Arbitration*, pg. 267-268 (5th ed. 2009) ("It is generally considered that 'dependence' is concerned exclusively with questions arising out of the relationship between an arbitrator and one of the parties, whether financial or otherwise. This is considered to be susceptible to an objective test, because it has nothing to do with an arbitrator's (or prospective arbitrator's) state of mind. By contrast the concept of 'impartiality' is considered to be connected with actual or apparent bias of an arbitrator – either in favour of one of the parties or in relation to the issues in dispute. Impartiality is thus a subjective and more abstract concept than independence, in that it involves primarily a state of mind. The same distinction can be found in Black's Law Dictionary, which defines 'impartial' as 'unbiased, disinterested', and 'independent' as 'not subject to the control or influence of another'.); Diego M. Papayannis, *Independence, impartiality and neutrality in legal adjudication*, http://journals. openedititon.org/revus/3546, ("The duty of independence consists of resisting any pressure from any of the parties, or third parties, involved in the dispute. The duty of impartiality, however, imposes on the adjudicator a duty to apply her reasoning while leaving aside all prejudices and interests attached to the object of the litigation – and, where necessary stepping aside. Finally, the duty of neutrality requires the adjudicator to adopt the point of view of the law in her reasoning and her decision regarding the case. All three duties are necessary for the law to fulfil its role as a neutral device for social interaction"). "Neutrality" also relates to nationality. However, it has been used by some to denote independence and impartiality also. *See*, e.g., *Voestalpine Schienen GmbH* v. *Delhi Metro Rail Corpn. Ltd.*, (2017) 4 SCC 665.

[2] *See, e.g.*, *Lockabail* v. *Bayfield Properties*, [1999] EWCA Civ 3004 ("All legal arbiters are bound to apply the law as they understand it to the facts of individual cases as they find them. They must do so without fear or favour, affection or ill-will, that is, without partiality or prejudice. Justice is portrayed as blind not because she ignores the facts and circumstances of individual cases but because she shuts her eyes to all considerations extraneous to the particular case").

Many cases in 2019 on the appointment of arbitrators involve issues of independence and impartiality. By and large, they deal with situations where there was an identity between an arbitrator and a party (e.g., the arbitrator being a current or former employee of a party).

Let us first briefly see how independence and impartiality figure in the ACA.

(A) THE GENERAL TEST UNDER MODEL LAW, AND THE ACA WHEN ENACTED IN 1996

The UNCITRAL Model Law was adopted in 1985. Independence and impartiality were introduced via Article 12[3] by mainly providing for two things. Firstly, it required a person who is approached for appointment as an arbitrator to disclose any circumstances likely to give rise to justifiable doubts as to his independence and impartiality. Secondly, it provided that an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his independence or impartiality.

But the Model Law neither defined nor contained any understanding as to the standard to be applied when testing independence and impartiality.

If Article 12 appears to contain too general a test, it was meant to be so. The test was introduced "in keeping with the policy of setting forth general tests rather than detailed criteria."[4] It was thought that a general test might

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[3] Article 12—Grounds for challenge:
1. When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.
2. An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

[4] Howard M. Holtzmann & Joesph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration, Legislative History and Commentary*, pg. 388-389, Kluwer Law International (2015).

be appropriate for a model law since they were likely to be more widely accepted than any single set of specific criteria. It was also thought that the "formulation covers many, but probably not all, of the specific reasons currently set forth in national laws."

The ACA was modeled on the Model Law when it was enacted in 1996. Section 12 ACA provided the same general formula (circumstances giving rise to justifiable doubts as to independence and impartiality) without containing any definition or elaboration. It read as follows: -

12. Grounds for challenge. —

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if—

(a) Circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) He does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

A reference to Section 11 (8) ACA will also figure in the 2019 cases. When the ACA was enacted, this sub-section required that the Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to (a) any qualifications required of the arbitrator by the agreement of the parties; and (b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

(B) APPLICATION OF INDEPENDENCE AND IMPARTIALITY IN INDIA (BEFORE 2015 AMENDMENTS)

If a test is general, judges have discretion (not to say they do not have otherwise). How was the discretion exercised and the issues of independence and impartiality arising under the ACA resolved in the Indian courts before the 2015 Amendments?

Rather than examining the prodigious volume of case laws (impossible here), let us accept what the 246th Report of the Law Commission of India noted.[5] This report had considered the law of arbitration and suggested, among a host of amendments, "large-scale amendments … to address this fundamental issue of neutrality of arbitrators".[6]

1. An employee of a Party as Arbitrator

The Report tells us that the Indian Supreme Court has tested the issue of independence and impartiality in the context of contracts with State entities, which specify as arbitrator a person associated with that entity.[7]

Then, after citing to a host of cases, the Report notes in paragraph 56 that those cases settled, with minor exceptions, the principle that a serving employee could be an arbitrator. It said, "the balance between procedural fairness and binding nature of … contracts, appears to have been tilted in favour of the latter by the Supreme Court". It found that the "position of law is far from satisfactory" for "a sensible law cannot, for instance, permit appointment of an arbitrator who is himself a party to the dispute, or who is employed by (or similarly dependent on) one party, even if this is what the parties agreed."

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5 A body constituted by the Government of India to recommend legislative reforms. *See* http://lawcommissionofindia.nic.in/reports/Report246.pdf.

6 Paragraphs 53 to 60 of the report.

7 This is a reference to State within the meaning of Article 12 of the Constitution of India and local or other authorities which are considered State instrumentalities.

This was a comment on the court's interpretation of independence and impartiality since statutory law--Section 12 ACA—did require that those two 'values' (independence & impartiality) be present. It was for the court to determine their content or determine in what circumstance they were absent.

Why was an employee of a party considered independent and impartial? Because that *relationship* was not considered problematic. For instance, in *Indian Oil Corporation Ltd.* v. *Raja Transport (P) Ltd.*, (2009) 8 SCC 520, an often-cited 2-judge bench decision of the Supreme Court, speaking for the court, Raveendran J said that "the fact that the named arbitrator is an employee of one of the parties is not *ipso facto* a ground to raise a presumption of bias or partiality or lack of independence." The reason he gave was that in the absence of any specific evidence, you could not doubt one's independence and impartiality if he had nothing to do with the contractor was not a direct subordinate of a person whose decision was the subject matter of the dispute.

He, however, drew a distinction "where the person named as the arbitrator is an employee of a company or body or individual other than the State and its instrumentalities". He said, in that case, the "position may be different" and gave an example where a Director of a private company is named arbitrator. He said "there may be a valid and reasonable apprehension of bias in view of his position and interest, and he may be unsuitable to act as an arbitrator in an arbitration involving his company" and "if any circumstance exists to create a reasonable apprehension about the impartiality or independence of the agreed or named arbitrator, then the court has the discretion not to appoint such a person."

He then described a "ground reality": "contractors in their anxiety to secure contracts from Government/statutory bodies/public sector undertakings, agree to arbitration clauses providing for employee arbitrators. But when subsequently disputes arise, they baulk at the idea of arbitration by such employee arbitrators and tend to litigate to secure an "independent" arbitrator." He suggested that "it will be appropriate if Governments/statutory authorities/public sector undertaking reconsider their policy providing for arbitration by employee arbitrators in deference to the specific provisions of

the new Act [referring to the ACA of 1996, pre-2015 Amendments, as opposed to the 1940 statute] reiterating the need for independence and impartiality in arbitrators. A general shift may in future be necessary for understanding the word "independent" as referring to someone not connected with either party. That may improve the credibility of arbitration as an alternative dispute resolution process."

Raveendran J's response, it clearly appears, was conscious of the problem but not yet ready to seize it fully. Also, he considered a logic that a government department has too many people, and an employee who is not directly involved in the dispute would be able to exercise his neutral judgment free from any external influence.

As we noted, however, the Law Commission considered the state of the law on the issue insensible.

(C) THE 2015 AMENDMENTS

The amendments came on 23 October 2015 *via* an Ordinance followed by an 'Act.'[8] Now:

1. There was an introduction of the Fifth Schedule. It contains a list of circumstances and relationships termed as "grounds." These grounds are "guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator." Therefore, if any of the grounds under the Fifth Schedule applies, the arbitrator can be challenged. Often, the challenging party will require to establish the arbitrator' ineligibility with evidence.
2. The Seventh Schedule was also introduced. It sets forth categories of relationships. Any person whose relationship, with the parties or counsel or the subject matter, falls under any of the categories "shall be ineligible to be appointed as an arbitrator." This is the rule of automatic

[8] The Arbitration and Conciliation (Amendment) Act, 2015; Act 3 of 2016 dated 31 December 2015 published in the Gazette of India (Extraordinary) on 01 January 2016 (Part II, Section 1, Number 3). This enactment "shall be deemed to have come into force on the 23rd October 2015".

disqualification or *de jure* ineligibility. But the proviso to that section provides that the ineligibility can be "waived by an agreement in writing."

Let us now see what do the schedules lay down on identity between an arbitrator and a party?

1. An employee of a Party as Arbitrator: A Ground Both for Challenge and Ineligibility

Items 1 and 5 of the Fifth and Seventh Schedule are relevant. Under Item 1 of the Fifth Schedule, it is a ground of challenge, and under Item 1 of the Seventh Schedule, it is an automatic disqualification if "the arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party."

Under Item 5 of the Fifth Schedule, it is a ground of challenge if "the arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration."

2. Former Employee Within the Past Three Years: A Ground for Challenge

Item 31 of the Fifth Schedule relates to a former employee "who has been associated within the past three years with a party or an affiliate of one of the parties, in a professional capacity, such as a former employee or partner."

Why should an employee be disqualified from acting as an arbitrator? There may be several reasons. The first is the principle that no one can be a judge in his cause. In an employer-employee relationship, irrespective of any proof of actual bias or prejudice, the law presumes that the employee cannot have the impartiality or independence necessary to judge. It is not possible to investigate the mind of the arbitrator, so the law does not take any risk. It automatically disqualifies that relationship. Then again, on the same principle, when an employee is an arbitrator, the law views the agreement as one in which the party itself is the arbitrator. How can someone identified with a party also be the judge? "Apart from outraging public policy, such an

agreement is illusory; for while in form it provides for arbitration, in substance it yields the power to an adverse party to decide disputes under the contract."[9]

(D) TWO DECISIONS AFTER 2015 AMENDMENTS AND BEFORE 2018: VOESTALPINE AND TRF

Many cases of 2019 involve a discussion of *Voestalpine Schienen GmbH* v. *Delhi Metro Rail Corpn. Ltd.*, (2017) 4 SCC 665 ("*Voestalpine*") and *TRF Limited* v. *Energo Engineering Limited*, (2017) 8 SCC 377 ("*TRF*").

TRF was a 3-judge bench decision of the Supreme Court (Dipak Misra, A.M. Khanwilkar, and Mohan M. Shantanagoudar JJ) where the arbitration agreement (of 2014) provided that any dispute "shall be referred to sole arbitration of the Managing Director of buyer or his nominee."

When the court heard the case, given the 2015 Amendments, it was common ground that the Managing Director was disqualified to act as an arbitrator. But, could he nominate another person? The court said he could not. "Once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator." Speaking for the court, Misra J gave a metaphor of a building and said when the infrastructure collapses, the superstructure is bound to collapse. Also, there cannot be a building without a plinth.

He distinguished appointment of a sole arbitrator from appointment by parties of their respective nominees, he said. There is a subtle distinction, he added. Though he did not elaborate what that subtle distinction was, he said, "in this regard our attention has been drawn to" a few authorities. These were cases from administrative law, where considering some statutes on tenancy and land laws, the Supreme Court had concluded that an order passed by a delegate is, for certain purposes, an order passed by the one who delegated.[10]

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[9] *In Matter of Cross Brown Company*, (1957) 4 A.D.2d 501 [167 N.Y.S.2d 573]

[10] *See,* e.g. *Roop Chand* v. *State of Punjab*, 1963 Supp (1) SCR 539, a 5-judge bench decision which was referred by Misra J. This involved the government's power to decide an appeal,

The court emphasized that it was not concerned with impartiality but with the authority of the Managing Director. However, it did weigh with the court that a decision by the nominee is by the one who nominates.

As we will see in *Perkins* (cited *infra*), the Supreme Court considered the *TRF* principle to say that a party or anyone interested can never select the sole arbitral tribunal.

Voestalpine also requires a brief mention. The arbitration was to be by a three-member tribunal. They were to be chosen from a list of five prepared by Delhi Metro—one each by the parties and the chair by the two. In the list that Delhi Metro prepared, all were retired or serving employees of other government organizations. Were they disqualified? The court said no. The reason was that they were neither employees of Delhi Metro nor its consultant or advisor. But the court held that the panel must be broad-based.

(E) THE CASE LAW IN 2019

1. Appointment of Former Employee

In January 2019, a two-judge bench of the Supreme Court (Abhay Manohar Sapre and Indu Malhotra JJ) in *Haryana* v. *GF Toll Road* decided that the arbitrator, a former employee of the State of Haryana, ten years ago was not disqualified. This case involved the law before 2015 because the 2015 Amendments were held inapplicable. The argument run, relying on *TRF*,

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which could under the statute be delegated to an officer. The question was whether an order deciding an appeal is an order of the officer of the government? The court referred to the source of the power and noted the power can, therefore, be exercised only in terms of the statute and not otherwise. "It would follow that an order made in exercise of that power will be the order of the Government for no one else has the right under the statute to exercise the power. No doubt the Act enables the Government to delegate its power but such a power when delegated remains the power of the Government, for the Government can only delegate the power given to it by the statute and cannot create an independent power in the officer. When the delegate exercises the power, he does so for the Government". The court also referred to an English authority and relied on the principle of agency (citing to Wills J. in *Huth* v. *Clarke,* LR (1890) 25 QBD 391 "the word delegate means little more than an agent") ("An agent of course exercises no powers of his own but only the powers of his principal").

was since "the nominee arbitrator was a retired employee of the appellant State … there may be justifiable doubts to his independence and impartiality to act as an arbitrator".

To show a lack of independence or impartiality, GF Toll asserted reasonable apprehension of bias. Malhotra J tested that argument and relied on the English Court of Appeal's decision in *Locabail (U.K.) Ltd.* v. *Bayfield Properties Ltd.*, 2000 QB 451[11], which had observed that "the greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be." She also cited another Court of Appeal decision in *Porter* v. *Magill* (2002) 2 AC 357, where, in his separate opinion, Lord Hope of Craighead discussed the test of bias formulated in the English courts. Lord Hope articulated the test as: "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."[12]

Then stepping into the shoes of a fair-minded and informed observer Malhotra J concluded that "the fact that the arbitrator was in the employment of the State of Haryana over 10 years ago, would make the allegation of bias clearly untenable".

Malhotra J then justified the decision from the standpoint of the 2015 Amendments too. She considered the identically worded Entry I of the Fifth and Seventh Schedules ("The arbitrator *is an* employee, consultant, advisor or has *any other past or present business relationship* with a party") and held that the expression "*is an* ..." refers only to a current employee. She then interpreted the expression "any other past or present business relationship" as referring to a relationship *other* than of an employee, consultant, or advisor.

Now, after the 2015 Amendments, an employee of a party is automatically disqualified. Lack of independence or impartiality is presumed.

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[11] Referred in the judgment as a decision of the House of Lords.

[12] Following the Court of Appeal decision in *In re Medicaments and Related Classes of Goods* (No 2) [2001] 1 WLR 700.

2. Enforcing the Agreement (Pre-2015 Statute)

In the chapter, we discuss four decisions of the Supreme Court, i.e., *Rajasthan Small Industries*, *Parmar Construction*, *Pradeep Vinod*, and *CORE* (all cited later)[13], all of which involved a tribunal comprising of either serving and officials retired from the employment of one of the parties. In each of these, the court enforced the agreement of the parties rejecting arguments based on independence and impartiality. In all except *CORE*, the 2015 Amendments were held inapplicable.

In *Rajasthan Small Industries Corporation Limited* v. *Ganesh Containers Movers Syndicate*, (2019) 3 SCC 282, which arose under the pre-amended law, a 2-judge bench of the Supreme Court (R. Banumathi and Indira Banerjee JJ) allowed the Managing Director of the appellant, the arbitrator specified under the agreement whose mandate was terminated by the High Court, to arbitrate. The court asked if the arbitrator had become ineligible under Section 12 after the amendment, but concluded that the amendments did not apply (because the arbitration commenced in 2009). The court also said there was no material to show that the arbitrator had not acted independently or impartially. It also relied on *Indian Oil* (see section B1 above) where Raveendran J had concluded that "the legislative intent is that the parties should abide by the terms of the arbitration agreement."

Union of India v. *Parmar Construction Company,* 2019 SCC OnLine SC 442 was a bunch of petitions for appointment of arbitrator, where the court authorized arbitration under the contractual mechanism in which the tribunal was to consist of a mix of serving and retired Railways officers.

[13] *Geo Miller & Co. Pvt. Ltd.* v *Rajasthan Vidyut Utpadan Nigam Ltd.*, 2019 SCC OnLine SC 1137, a 3-judge bench decision in September 2019, also involved an application for appointment. Here the Chairman of the respondent electricity board had the power to decide the dispute himself or appoint another person to arbitrate. It does not appear that any argument as to impartiality and independence was raised. The issue in focus was limitation to file an application under Section 11 ACA. It is discussed under the chapter Time Limitations.

The standard General Conditions of Contract, which applied to each case, gave the General Manager of Railways the power to appoint two arbitrators, including the presiding arbitrator in the following manner:

(i) The tribunal was to consist of three serving railways officers or two serving railway officers *plus* one retired officer.

(ii) The Railways had to send a panel of names to the contractor.

(iii) 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.

(iv) The General Manager was then to appoint the remaining two arbitrators from the panel or outside, also indicating the presiding arbitrator.

The court considered the question of applicability of the 2015 Amendments but held, following *Aravali Power Company Private Limited* v. *Era Infrastructure Engineering Limited,* (2017) 15 SCC 32 that they did not apply. The agreement was upheld because "emphasis should always be on the terms of the arbitration agreement to be adhered to or given effect as closely as possible."

It said where impartiality was in doubt an independent arbitrator could be appointed under Section 11(6) (pre-2015 Amendments) but "in the present batch of appeals, independence and impartiality of the arbitrator has never been doubted."

Parmar was followed by a 3-judge bench of the Supreme Court in *Union of India* v. *Pradeep Vinod Construction Company*, 2019 SCC Online SC 1467 (R. Banumathi, A.S. Bopanna and Hrishikesh Roy JJ) which too concerned a contract awarded by Railways. The 2015 Amendments were held inapplicable, and speaking for the court, Banumathi J emphasized on the procedure set out in Contract and lack of evidence as to independence and impartiality.

It will follow from these judgments---the court's emphasis on the terms of the agreement and lack of evidence supporting the claim of dependence and partiality—that the court perceived the contract as binding and not leaving a choice. These decisions follow the rule stated by Raveendran J.

In these cases, the court wanted evidence of a lack of independence and impartiality. Did the court have choices? Could the court, for example, have ascribed content to 'independence' and 'impartiality' relying on the Fifth and Seventh Schedule? Even if they were inapplicable, were these new norms or something which already inhered in those terms?

These matters were not examined. It also does not appear that the court addressed concerns that are contained in principle "no one can be a judge in his own cause." The court also did not examine the effect of Section 12 (5), which "wipes out" all prior contrary agreements if the Seventh Schedule applies.

CORE is discussed below after *Perkins*.

3. One Party Choosing the Sole Member Tribunal Not Allowed

Easily, *Perkins* is one of the most recognized judgments of 2019. In *Perkins,* too*,* just like in *TRF*, the tribunal was to be of a sole arbitrator. While in *TRF*, a party's Managing Director or his nominee was to act as the sole arbitrator in *Perkin*s, the Chairman & Managing Director of a party had the right to appoint/nominate one.

The court said it was a logical deduction from *TRF* that a person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. The court noted that this was the essence of the 2015 Amendments and recognized by the *TRF case*.

The basis was that if an employee of a party is the arbitrator, his interest in the outcome is apparent. He would not be independent or impartial. How can then a person appointed by that interested person be independent or impartial? In other words, while a lack of independence and impartiality of an employee is presumed as a matter of law, *Perkins* extended that presumption to someone, no matter who, who is appointed by that interested party.

In this discussion, the academic reader will perhaps be interested in three decisions of the Delhi High Court. All involved the question like in *Perkins* but had oppositely answered them.

In *D. K. Gupta and another* v. *Renu Munjal*, 2017 SCC OnLine Del 12385, Yogesh Khanna J, sitting singly, considered an arbitration clause that gave

one party the "choice" to appoint an arbitrator. This clause, the court said, had a "striking difference" with the *TRF case*. The court concluded that no bar under the ACA restrained a party from appointing a sole arbitrator.

In *Bhayana Builders* v. *Oriental Structural Engineers Pvt. Ltd.*, 2018 SCC OnLine Del 7634, Naveen Chawla J had a similar case before him. The Managing Director of one party had appointed the sole arbitrator following the agreement. The mandate was challenged on the ground that the clause was no longer enforceable after *TRF*. Chawla J noted *D. K. Gupta's* judgment but said he would write his own because it was argued that *D. K. Gupta* erroneously relied on *TRF's* passage where only what the judge in the preceding court had said was set out.

Chawla J gave nine reasons to conclude that the *TRF* principle cannot be extended to suggest that an agreement vesting one party a right to select a sole member tribunal directly was unenforceable. Among those, he held that the right of one party to select the tribunal directly has been in existence and upheld for a long time. He also held that an arbitrator is not the agent of the party appointing him.

In the end, Chawla J added a cautionary note. He said that, while upholding right of a party to appoint a sole arbitrator if so agreed, " I must emphasize that the burden on ensuring that the person so appointed shall not fall foul of any of the provisions of the Fifth or Seventh Schedule of the Act will be even higher and open to a greater scrutiny. The spirit behind the amendment to the Act shall always have to be kept in mind while appointing the Arbitrator or considering any challenge thereto. The Arbitrator so appointed should also remain alive to the great responsibility being vested on him due to such appointment and must not even leave an iota of doubt on his neutrality or impartiality."

In August 2019, Sanjeev Narula J decided a similar matter in *Kadimi International Pvt. Ltd.* v. *Emaar MGF Land Limited*, 2019 SCC OnLine Del 9857. He referred to both *D.K Gupta* and *Bhayana Builders* and the fact that *Bhayana Builders* is in a challenge before the Supreme Court in SLP No. 7161-7162/2018 (where arbitration proceedings have been stayed) but considered that ratio of *Bhayana Builders* had not been unsettled. Narula J also rejected the argument that the

arbitration clause was unfair and unreasonable and was between the parties not having equal bargaining powers. Among others, he relied on Section 11 (6A) under which only the question of the existence of arbitration agreement was to be examined. He also cited to *Parmar* and noted that if parties had willingly agreed to confer rights to one, it must be upheld.

He said, "no doubt, Courts have now consistently proceeded to appoint an independent Arbitrator in situations where the arbitration clause is in conflict with the amended Arbitration Act. However, the unilateral right of party to appoint an Arbitrator has not been done away with. By way of Amendment Act of 2015, the legislature has not denuded or extinguished a contracting party's right to make an appointment. Only, the appointment of a person who is ineligible to be an Arbitrator under Section 12 (5) read with Schedule VII of the Act has been held to be void and the objections regarding terms of contract being unfair or unreasonable would have to be gone into during the course of Arbitration. In *TRF Ltd.* (supra), the observations of the Court holding that the Managing Director to be ineligible to act as the Sole Arbitrator, has to be appreciated in the context of the arbitration clause therein. The judgment of Supreme Court in *TRF Ltd.* (supra) cannot be stretched or expanded so as to include such clauses that purely confer the right of appointment to one of the contracting parties".

4. Principles Summarised and Followed

G.S. Patel J of the Bombay High Court summarised in *Lite Bite (cited infra)* the principles from *TRF*, *Voestalpine,* and *Perkins*. G.S. Kulkarni J applied those Supreme Court cases in *ITD Cementation (cited infra)*.

5. Perkins Distinguished and Agreement Followed

Within less than a month from *Perkins*, in *CORE,* a 3-judge bench of the Supreme Court again followed the contractual mechanism of appointment of an arbitral tribunal. In *CORE*, the Supreme Court distinguished *TRF* and *Perkins* and allowed the arbitration by a panel of serving and retired employees.

The discussion on *CORE* later in this Chapter sets out in detail the arbitration clause, the matters raised, and the reasoning of the court.

CORE has been distinguished, and *Perkins* applied in *Proddatur Cable TV Digi Services* v. *Siti Cable Network Limited.*, (2020) SCC OnLine Del 350, a Delhi High Court decision by Jyoti Singh J.

6. Nature of the Seventh-Schedule Ineligibility. Prior Agreements Wiped Out. Waivable Only by an Express Agreement in Writing after Dispute Arises.

On 08 April 2019, the Supreme Court heard arguments in *Bharat Broadband Network Ltd.* (BBNL) v. *United Telecoms Ltd.*, (2019) 5 SCC 755 (R.F. Nariman and Vineet Saran JJ). The judgment was delivered on 16 April 2019.

The case raised "an interesting question as to the interpretation of" Section 12(5) ACA.

The agreement in the case conferred on the Chairman & Managing Director of BBNL the right to appoint an arbitrator. The CMD appointed one Mr. K.H. Khan in January 2017. In July 2017, the judgment in the *TRF case* was delivered, holding that a person who was ineligible to act as an arbitrator could not even appoint another.

BBNL now wanted its nominee, sole arbitrator, to step down. It communicated to him that the TRF principle was a declaration of what the law already was, and therefore, earlier appointments were not saved. The request was rejected. BBNL's petition in the High Court was also rejected on the ground that the objection had been waived under the proviso to Section 12 (5) ACA.

R.F Nariman J authoring the judgment in the Supreme Court neatly summarised the "scheme of Sections 12, 13 and 14" as well as the disclosure and challenge procedure. He gave effect to the *non-obstante* text of Section 12 (5) ACA ("notwithstanding any prior agreement to the contrary …") and held that any prior agreement to the contrary is wiped out the moment any person whose relationship with the parties or counsel or the subject-matter of the dispute falls under the Seventh Schedule. He considered the nature of waiver under the proviso of Section (5) ACA and concluded that it must be one expressed in writing with specific reference to the arbitrator.

7. Termination of Mandate

In *Jayesh* (cited *infra*), the mandate terminated when extension was not granted.