IMPERMISSIBILITY OF HEDGING: RESERVING THE RIGHT TO CHALLENGE UNILATERAL APPOINTMENT OF AN ARBITRATOR UNDER SECTION 34 OF THE A&C ACT, 1996

Advocate Obhirup Ghosh, Senior Associate, AKS Partners Delhi

ABSTRACT

Should a Party be allowed to challenge an arbitral award under Section 34 of the Arbitration and Conciliation Act, 1996 on the ground that the arbitrator was appointed unilaterally, even though the aggrieved party participated in the arbitration without protest, while being aware of such unilateral appointment? If the party is allowed to do so, then it may become a modus operandi for parties to reserve its right to challenge a unilateral appointment and decide whether to raise this challenge before the Court on the basis of whether the award has been given in its favour or against it. This may lead to a situation wherein the parties are allowed to legally hedge its chances of succeeding in an arbitration. The present article analyses whether such reservation of right should be deemed acceptable.

I. INTRODUCTION

The jurisprudence of unilateral appointment of an arbitrator has come a long way since the Supreme Court interpreted the Scope of the amended Section 12(5)[1] of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as **"the Act"**) in *TRF Ltd. v. Energo Engineering Projects Ltd*[2]., wherein it was held that ineligibility of a person to be an arbitrator strikes at the root of his power to appoint a nominee to arbitrate. The Court relied on the maxim – *Qui facet alium facet per se* – What one does through another is done by oneself. Therefore, a party cannot unilaterally appoint an arbitrator by virtue of the Seventh Schedule of the Act.

The reader must now imagine a conceivable situation, wherein a party, knows a unilateral appointment if an arbitrator has been made and somehow this point of unilateral appointment has skipped the knowledge of the opposite party and the arbitrator as well. Thereafter, the arbitration is conducted smoothly, while the party maintains silence about the unilateral appointment. The award is delivered by the arbitrator against the party and thereafter, the party challenges the award on the ground that the arbitrator was *de-jure* ineligible to act as an arbitrator.

In such a scenario, whether the challenge to the award has merit? Should the party be allowed to seek setting aside of an award under Section 34 of the Act on the ground of *de-jure* ineligibility of the arbitrator when the party participated in the entire arbitration process without challenging the *de-jure* ineligibility before the arbitrator? This question may be answered by a larger bench of Supreme Court to which the judgment passed in *BBNL v. United Telecoms Network*[3]has been referred to.[4]

This present article tries to consider this question while comparing the law laid down by the Indian Courts and Singapore Court of Appeal.

II. LAW LAID DOWN BY THE INDIAN COURTS

There have been numerous judgments of the Supreme Court that follow the line of reasoning in *TRF Ltd. (Supra)*, however, the judgment in *BBNL (supra)*, is interesting, as in the facts of

[1]Amended w.e.f. 23.10.2015 vide the Arbitration and Conciliation (Amendment) Act, 2015.
[2] (2017) 8 SCC 377
[3] (2019) 5 SCC 755
[4] Order dated 08.07.2024 passed in FAO (OS) (COMM) 172/2023 pending before the Delhi High Court; Also see, Order dated 16.08.2022 passed in SLP (C) No. 9462/2022 pending before the Supreme Court

the case the party which unilaterally appointed the arbitrator, itself challenged the appointment. The Supreme Court ruled in favour of the appointing party. The Court interpreted that under Section 12(5) of the Act, *"express agreement in writing"* is the only way in which the ineligibility of the person by virtue of the Seventh Schedule can be waived off by the Parties. The reader must note an interesting point in the fact of the case, that is the appointing party as soon as it came to know about the *de-jure* ineligibility, had raised the issue of lack of jurisdiction before the arbitrator.

There are two recent judgments of the Delhi High Court namely, *Telecommunications Consultants India Ltd. v. Shivaa Trading*[5] and *Airports Authority of India v. TDI International India Pvt. Ltd.*[6], wherein the Court has set aside the awards delivered by the Tribunal on a challenge made by the appointing party itself on the ground that the arbitrator was *de-jure* ineligible on account of being unilaterally appointed. While doing so, the Court has relied upon *BBNL (supra).*

III. DIVERGENT VIEW OF THE COURT

There has been a divergent view of the Court in a recent case namely *Arjun Mall Retail Holding Pvt. Ltd. and Others v. Gunocen Inc.*[7] wherein the Court observed that the challenge to the unilateral appointment of an arbitrator should be raised at the earliest point of time. If without raising a challenge to the appointment, the party proceeded to participate in the arbitration, then challenge under Section 34 of the Act should be dismissed by the Court as the party waited till the award was delivered against it.

It must be noted that the judgment in *Arjun Mall (supra)* had been passed by a Division Bench of the High Court, however it being in contradictory to an earlier Division Bench judgment[8]of the High Court, the Single Judge Bench of the High Court in *TDI International (supra)* chose not to follow *Arjun Mall (supra)*. However, a challenge to the judgment in Arjun Mall (supra) was rejected by the Supreme Court[9] and the question of law has been left open.

[5] 2024 SCC OnLine Del 2937
[6] 2024 SCC OnLine Del 4016
[7] 2024 SCC OnLine Del 428
[8] 2023 SCC OnLine Del 37
[9] SLP No. 12978-12979/2024

Another interesting aspect is that in a recent judgment in *Allied-Dynamic Joint Venture v. Ircon International Ltd.*[10] pertaining to a challenge to the arbitral award under Section 34 of the Act on the ground of unilateral appointment, wherein the subject arbitration proceeding commenced before the amendment of the Act in 2015. The Court rejected such challenge on the ground that the aggrieved party did not raise the ground before the tribunal and the aggrieved party's conduct of participating in the proceeding amounted to waiver under Section 4 of the Act. The Court relied upon the judgment of the Supreme Court in *Aravali Power Co. (P) Ltd. v. Era Infra Engg. Ltd.*[11]wherein the Supreme Court held that unilateral appointment of an arbitrator prior to the 2015 amendment of the Act would not itself render the appointment to be invalid or unenforceable.

However, the scope of what constitutes as 'waiver' under Section 4 of the Act has changed post the 2015 amendment of the Act. The next section of the article analyses the scope.

IV. WHAT IS NOT A WAIVER UNDER SECTION 12(5) OF THE ACT?

The various High Courts of the Country have applied the reasoning of the Supreme Court in TRF and BBNL judgments in many cases. The Delhi High Court in the case of *Man Industries (India) Ltd. V. IOCL*[12]*,* has exhaustively summarised the instance that so not fall under the definition of "express agreement in writing" i.e., does not count as a waiver under Section 12(5) of the Act, which are as follows:

i. Participation by a party in the arbitration proceeding without raising any challenge to the appointment of the arbitrator.[13]

ii. Filing of an application seeking extension of mandate of the arbitrator under Section 29(A) of the Act.[14]

iii. Filing of applications, affidavit of evidence etc. before the arbitrator.[15]

[10]2024 SCC OnLine Del 228
[11] (2017) 15 SCC 32
[12] 2023 SCC OnLine Del 3537
[13] See Footnote No. 12
[14] MS Bridge Building Construction Co. Put. Ltd. v. BHEL, 2023 SCC OnLine Del 242
[15] JMC Projects (India) Ltd. V. Insure Pvt. Ltd., 2020 SCC OnLine Del 1950

iv. Recording of a consent order by the Arbitrator.[16]

Therefore, it may be summarised by the reader that the scope of what count as a waiver under Section 12(5) of the Act is extremely narrow and it may be seen that active participation by a party in the arbitration proceedings, agitating its claims on merits, does not bar the party from raising a jurisdictional challenge to the eligibility of the arbitrator under a Section 34 of the Act.

Therefore, it clearly emerges from the above referred decisions of the Court and *Allied-Dynamic (supra)* that the 2015 amendment of the Act provides the cut-off date prior to which participation by a party in the arbitration proceeding without protest would amount to a waiver under Section 4 of the Act. However, after the said cut-off date, such conduct of participation without protest will not amount to a waiver.

V. RESERVING THE RIGHT TO CHALLENGE THE UNILATERAL APPOINTMENT

It may appear to be an incongruous situation wherein the party has hedged its bets by not raising the point of *de-jure* ineligibility before the arbitrator but reserving its right to raise it later before the Court in the event the party is not satisfied with the award. *Man Industries (supra)* based on a conjoint reading of *Lion Engineering Consultants v. State of MP*[17]and *Hindustan Zinc Ltd. V. Ajmer Vidyut Vitran Nigam Ltd.*[18]has held that the jurisdictional challenge on the point of unilateral appointment of an arbitrator can be raised orally even if the ground was not originally raised in the Section 34 Petition, in other words, the party does not require an amendment of the challenge petition. It must be noted that this Single Bench decision in Man Industries (supra) has been challenged before the Division Bench of the Delhi High Court which is pending adjudication.[19]

Once such a challenge made at the stage of Section 34 proceedings, the application of Section 12(5) read with Section 14(1)(a) is triggered. The Courts no longer have to check whether any

[16] Smash Leisure Ltd. V. Ambience Commercial Developers (P) Ltd., 2023 SCC OnLine Del 3537
[17] (2018) 16 SCC 758
[18] (2019) 17 SCC 82
[19] See Footnote No. 4

of the grounds under Section 34 of the Act are made out. This can be seen from the operative part of the judgments referred above.[20]

Whether such conduct of the party to reserve its right to challenge the arbitral award on the ground of ineligibility of the arbitrator is apposite or acceptable? The next section deals with the genesis of the concept of hedging while trying to trace the answer to this question.

VI. THE ENGLISH PREQUEL OF CONCEPT OF HEDGING

One of the earliest English cases about arbitrator's bias or conflict of interest is that of *A.S.M. Shipping Ltd. Of India v. TTMI Ltd. Of England.*[21]In the facts of this case, a party had challenged the appointment of an arbitrator on the ground of arbitrator's bias as the arbitrator had been involved as an advocate in another case wherein certain serious allegations were made against the party's principal witness. Another allegation against the arbitrator in the case was that the arbitrator had 'close connections' with the solicitor of the opposite party. The allegations were made known to the arbitrator; however, the arbitrator did not recuse itself and the proceedings continued. Thereafter, certain interlocutory applications pertaining to security and costs were decided against the challenging party. The principal challenge of the party was that the arbitrator should have recused himself when the party raised its protest before the tribunal.

The Court's in its decision, analysed the point of waiver on two aspects – If the right to object to the appointment of the arbitrary was waived through conduct by participating in the arbitration, then does that waiver apply to the (interim) award or does it apply to the entire arbitration proceeding which is pending wherein the arbitrator can continue its mandate? The Court held that once the party continued to participate in the arbitration proceeding after the refusal by the arbitrator to recuse, the party had waived its right to object to the appointment. It was also held that the aggrieved party should have approached the Court under Section 24 of the English Arbitration Act, 1996, for the Court to excessive its power to remove an arbitrator. However, as the party failed to do so, it was not acceptable to set aside the interim awards after the party participated in the arbitration proceeding. The Court observed as under:

[20] See footnotes Nos. 13-16
[21] [2005] EWHC 2238

> *"It is unacceptable to write making further objections after the hearing was concluded. X QC had made his decision not to recuse himself, rightly or wrongly, at the beginning of the third day. Owners were faced with a straight choice: come to the court and complain and seek his removal as a decision maker or let the matter drop. They could not get themselves into a position whereby if the award was in their favour they would drop their objection but make it in the event that the award went against them. A 'heads we win and tails you lose' position is not permissible in law as section 73 makes clear. The threat of objection cannot be held over the head of the tribunal until they make their decision and could be seen as an attempt to put unfair and undue pressure upon them."*
>
> *[emphasis added]*

The Court in this case described the concept of hedging while not assigning the said term to the conduct of the party. Rather, this term was used by the Singapore Court of Appeal in the case of China Machine New Energy Corporation v. Jaguar Energy Guatemala LLC.[22] The concept of hedging as discussed in this case and other judgments of the Courts of Singapore are discussed in the next section.

VII. THE CONCEPT OF HEDGING AS LAID DOWN BY THE SINGAPORE COURT OF APPEAL

In *China Machine (supra)*, the Court used the concept of hedging to describe a party's conduct while challenging an arbitrator award before the Court. In the facts of this case, the aggrieved party had not raised the ground of challenge that the Tribunal's alleged mismanagement of the procedure of the arbitration had led to the prospects of a fair trial being lost. The Court relied upon the case of *ASM Shipping (supra)* and held that if aggrieved party participated in the arbitration proceedings without raising an objection before the tribunal about the trial being conducted unfairly or of arbitrator's bias, then the party is estopped from doing so after the party waited for the award to be made and then decided to raise such challenge as the award has been made against it. In other words, the aggrieved party must intimate the tribunal at an appropriate stage or time if it has any objections with respect to the arbitration proceedings.

[22] [2020] SGCA 12

Further, the aggrieved party must also suspend its participation in the arbitration proceedings until the breach complained has been rectified or has at least been considered by the opposite party and the tribunal. The aggrieved party cannot merely reserve its right to raise a challenge after the award has been delivered against it. The Court thus, observed that *"the requirement of a fair process avails both parties in the arbitration and to countenance such hedging would be fundamentally unfair to the process itself, to the tribunal and to the other party."*[23]

In a recent judgment,[24]the Court followed the reasoning laid down in China Machine (supra) on hedging and observed that Hedging against an adverse result is impermissible as the aggrieved party did not raise an objection against the conduct of arbitration proceeding at the material time before the tribunal, rather the party was ready and willing to let the award be delivered by the Tribunal.

The judgment of the Singapore Court of Appeal is in line with most common law jurisdictions, wherein the concept of waiver subsumes that a party must not wait to raise a challenge to the ineligibility of the arbitrator till after the award is passed.[25] The reader has already noticed the position in England & Wales in the preceding section. It must be noted that even the well-established institutional rules similarly provide that any objection to a tribunal's jurisdiction must be raised as soon as possible, but in any event not after filing of the statement of defence.[26]

VIII. CONCLUSION

In the event the reserving of right to challenge the award on ground of *de-jure* ineligibility is deemed acceptable, then there will be a cascading effect on the enforcement proceedings as well which gets stalled or reversed. This has a consequential effect on the Court's time and resources as well.

Presently, when the legislature and the judiciary is focusing on making India the hub of international arbitration, the stakeholders may endeavour to follow the principles propounded by already well-established hubs of international arbitration, such as Singapore. The adoption of the Singapore Court of Appeal's concept of hedging by parties within the jurisprudence of

[23] See Footnote No. 22; Para 170
[24] DBL v. DBM, [2024] SGCA 19
[25] Redfern and Hunter on International Arbitration (Sixth Edition), 6th edition (© Kluwer LawInternational; Oxford University Press 2015) pp. 278-279
[26] James Collin's, James Glaysher, Peter Petkov, Lilit Nagapetyan and Mukami Kuria, Jurisdictional Challenges, The Guide to Challenging and Enforcing Arbitration Awards, 3rd Edn., Global Arbitration Review

unilateral appointment of arbitrator in India would lead to parity with respect to enforcement of arbitral awards.

There may be merit in the judgment of *Arjun Mall (supra)* which reiterates the settled law that the scope of challenge under Section 34 of the Act is extremely narrow. If the parties are allowed to reserve the right to challenge the award under Section 34 of the Act on the ground of unilateral appointment of arbitrator after taking part in the arbitration without protest, then it may give the party the ammunition to ambush the opposite party at a belated stage, before the Court.

If the concept of hedging is read into the concept of waiver by the Courts in India, it will save the time and cost of the parties, tribunal and the Courts, which is ultimately the aim of arbitration as an alternative dispute resolution mechanism.