

The whamming rationality jinxed by reality: Case analysis of Perkins Eastman architects DPC & ANR. V. HSCC (India) LTD

Mukul Katyal^{1*}, Apoorv Gupta²

¹ Third year LL.B. (Hons.) Student of Amity Law School, Noida, Uttar Pradesh, India

² Fourth year B.A., LL.B. (Hons.) Student of ICFAI Law School, IFHE, Hyderabad, India

Abstract

Arbitration is a method wherein a third party is appointed for adjudication of the matter between the concerned parties. Thus, preserving the sanctity of the judicial process becomes crucial. Arbitration cannot gain confidence in the minds of the parties to the dispute without having system to ensure impartiality and independence of arbitrators. In India, even today adhoc arbitration is preferred by the parties. Due to this, the responsibility of appointing of arbitrators is either on the shoulders of High Courts or one of the parties. Over the years, various situations have arisen, putting courts in dilemma to decide between upholding party autonomy or the principles of natural justice. To cajole the confidence of the parties a common man, the arbitration system provided in the Procedural law of a country should provide sufficient checks and balances in order to ensure that arbitration is an impartial dispute resolution system. However, as party autonomy is the cornerstone of arbitration, courts have been hesitant in interfering with party autonomy. A similar conundrum was faced by the Indian Judiciary in the leading case of Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd. The present paper aims to analyse this case and to highlight the ratio decidendi of the case.

Keywords: whamming, present, decidendi, Eastman

1. Introduction

A catena of judgments have been passed by various High Courts as well as the Supreme Court relating to the jurisprudence on appointment of an arbitrator. Yet, the law on appointment of an arbitrator still has a lot of grey area. The Courts have time and again made efforts to remove this grey area. One such recent attempt, which has set a new benchmark, is the decision of the Supreme Court in the case of Perkins Eastman Architects DPC and Ors. v. HSCC (India) Ltd ^[1].

In India, even today adhoc arbitration is preferred by the parties. Due to this, the responsibility of appointing of arbitrators is either on the shoulders of High Courts or one of the parties. Over the years, various situations have arisen, putting courts in dilemma to decide between upholding party autonomy or the principles of natural justice. For arbitration clauses allowing only one party to appoint the sole arbitrator, the Supreme Court observed that the appointing party's choice will always have an element of exclusivity in determining or charting the course of dispute resolution. Such unilateral appointments were held to be invalid since the appointing party would certainly be interested in the outcome of the dispute.

The Supreme Court in order to ensure that the arbitrators are not biased, has interpreted Section 11 ^[2] and the Schedules to the Arbitration and Conciliation Act, 1996, as amended by the Arbitration and Conciliation (Amendment) Act, 2015, with the sole objective to enunciate that a person who is disqualified from acting as an "Arbitrator" is also disqualified to appoint an "Arbitrator".

Pursuant to the above said decision, several sole arbitrators appointed by one party to the arbitration agreement have resigned either on their own or at the instance of the other party to the agreement in view of the said decision which

has created a flutter in various ongoing arbitration proceedings in the country. Further, we understand that petitions have been filed under Section 14 ^[3] and Section 15 ^[4] of the Act seeking termination of mandate of arbitrators appointed by one of the parties to an arbitration agreement even in ongoing arbitrations.

In TRF Limited v. Energo Engineering Projects Limited ^[5], in the context of a post-2015 amendment arbitration where the Managing Director of a party was named as the arbitrator and also additionally endowed with the unilateral power to appoint any other person as an arbitrator, it was held by the Supreme Court that a person himself ineligible to act as an arbitrator will be precluded from appointing another as an arbitrator.

In Perkins Eastman, the SC was called upon to analyse and rule upon arbitration clauses which unlike to the clause contained in TRF case, did not name the Managing Director of a party as an arbitrator but only vested the Managing Director of a party to unilaterally appoint an arbitrator of his choice.

2. Manifestation of Quintessence: Factual Background of the Case

The Respondent in the present case i.e. HSCC, was an executing agency under the Ministry of Health and Family Welfare. Under the flagship program of the ministry by the name of Pradhan Mantri Swasthya Suraksha Yojana (PMSSY), which was aimed at correcting the imbalances in the availability of affordable healthcare facilities in the different parts of the country in general, as well as developing the necessary infrastructure for sustaining quality medical education in the under-served States in particular.

For the abovementioned purpose, the agency had sought a

comprehensive architectural design and a plan for the works which were to be kick-started under the program by the government agency. A request was thereby, dispatched. The request sought applicants which were desirous of taking up the project as well as doing the necessary auxiliary activities to be carried out under the program such as, preparation of working level drawings of all the buildings and structures and other such specifications.

After the message was dispatched inviting applicants, two principal applicants out of the wide cohort were selected, namely – Perkins Eastman Architects DPC and Edifice Consultants Private Ltd.

Upon shortlisting the applicants, the agency issued a letter of intent dated 31.01.2017. Upon finalization of the applicants, the considerations for the project was ascertained to be around 15.63 Crores and the contract was drawn up by the respecting parties and entered into on 22.05.2017. Upon the perusal of the contract it seems necessary to point out the relevant portions of certain clauses which shall contextualize the present case report and will surmise the decision in a better way ^[6]:

“24.1 Except as otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, design, drawings and instructions herein before mentioned and as to the quality of services rendered for the works or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, design, drawings, specifications estimates instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof thereof shall be dealt with as mentioned hereinafter:

If the Design Consultant considers any work demanded of him to be outside the requirements of the contract or disputes on any drawings, record or decision given in writing by HSCC on any matter in connection with arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request CGM, HSCC in writing for written instruction or decision. There upon, the CGM, HSCC shall give his written instructions or decision within a period of one month from the receipt of the Design Consultant's letter. If the CGM, HSCC fails to give his instructions or decision in writing within the aforesaid period or if the Design Consultant(s) is dissatisfied with the instructions or decision of the CGM, HSCC, the Design Consultants(s) may, within 15 days of the receipt of decision, appeal to the Director (Engg.) HSCC who shall offer an opportunity to the Design Consultant to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Director (Engg.), HSCC shall give his decision within 30 days of receipt of Design Consultant's appeal. If the Design Consultant is dissatisfied with the decision, the Design Consultant shall within a period of 30 days from receipt of this decision, give notice to the CMD, HSCC for appointment of arbitrator failing which the said decision shall be final, binding and conclusive and not referable to adjudication by the arbitrator.

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the

rejection by the CMD, HSCC of the appeal. It is also a term of this contract that no person other than a person appointed by such CMD, HSCC as aforesaid should act as arbitrator.

‘The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.’

The abovementioned paragraphs are crucial to the understanding of the case as it pertains to the dispute resolution clause.

However, post the signing of the contract i.e. six days after, to be precise, a letter was drawn up by the respondent which was dated 26.5.2017 in which the respondent company alleged that right from the initial stages of this endeavor, the applicant company has deliberately resolved to disrupt the ongoing project and has been uncooperative to an unprofessional degree.

Subsequently, tired of the repeated handling of the project which the respondent saw as falling short on the contractual obligations set up for the project, a termination notice was issued by the respondent on 11.01.2019.

The letter was then issued on 20.02.2019. Finally, on 11.04.2019, the applicants made use of the dispute resolution clause which has been relayed in the aforementioned passages as the dispute which had been flaring up was ascertained to be worth around 20.95 Crores. As mentioned in the dispute resolution clause it was expected by the applicants that a decision be taken with respect to the respective notice pertaining to clause 24 within one month within the terms as expressed within the clause.

However, the respondent company replied on 10.05.2019 that a reply to the notice shall be sent within thirty days.

The applicants went on to file an appeal and to avail the procedural apparatus as laid out in the dispute resolution clause. However, there was a sheer failure on part of the designated authority i.e. Director (Engineering) to discharge his obligations under the contract associated with the project. Consequently, under a letter dated 28.06.19, where the Chief Managing Director was called to invoke his authority under the relevant clause and to appoint a sole arbitrator as his obligations dictate him to do so. However, as in the previous case the CGM also failed to discharge his/her obligations. Upon the exhaustion of the thirty-day time period as stipulated in the contract, a sole arbitrator was appointed – although by the Chief General Manager where purportedly, an individual named K.T Gajria had been appointed.

Upon examining the relevant facts which have been summarized in the preceding paragraphs the applicants took legal offense with respect to a number of procedural irregularities partaken into by the respondents whilst dealing with the affair which are enumerated succinctly hereinafter in the following submissions they made:

1. That they had duly complied with the procedure and had invoked the dispute clause in the correct manner
2. That under the contract it was the Chairman as well as the Managing Director who were the only competent authorities for appointing the sole arbitrator.
3. That the Chief General Manager of the respondent was wrongfully acting when he appointed the sole arbitrator.

4. That the appointment was made beyond the period stipulated in the contract
5. That, even if such a stipulation may be inferred, an arbitrator shall be impartial and neutral.

3. In Close Proximity with the Case: The Legal Tour

The procedural history of the does not warrant much remarks. The civil original jurisdiction of the apex court had been invoked under Section 11(6) read with Section 11(12)(a) ^[7] of the Arbitration and Conciliation Act as the principle issue in the case involved the appointment of an arbitrator and the involvement of a foreign enterprise.

A petition was filed under Section 11 ^[8] of the Arbitration and Conciliation Act before the Supreme Court of India, seeking the appointment of a sole arbitrator by the consortium as mentioned above (Perkins Eastman Architects DPC and Edifice Consultants private limited).

One of the most fundamental requirement for the appointment of an arbitrator is that the process shall never be impinged by any degree of partisanship or bias. The selection criteria shall be marked by pure neutrality and fairness. Section 11 of the act lays down in a detailed manner, the appointment of arbitrators and its various contours. At the same time, it bestows on the court the power to examine the credibility of such appointments thus infusing a scope of judicial inquiry and review and further empowers the apex to appoint sole arbitrators. The reason why this provision is of vital importance is that it holds a vast significance on the appointment proceedings and has consequences on both domestic as well as international arbitrations.

Furthermore, Section 11(12)(a) ^[9] of the Act read with Section 11(6) lays down that such an application for the appointment of an arbitrator before the Supreme Court is maintainable only on the condition that the arbitration in question is an international commercial arbitration. Therefore, whenever deciding the maintainability of such applications the court has to get down to the brass tacks with respect to whether the case before them is in the nature of an international commercial arbitration or not. It is also important to note in the present matrix that scope of Section 2(1)(f)(iii) ^[10] which defines 'international commercial arbitration' is another pivotal part of the case is inclusive of the parameters which define an international commercial arbitration.

Section 2(1)(f) of the Arbitrations and Conciliation Act defines international commercial arbitration wherein a legal relationship is set up in place which is absolutely commercial in nature and where either of the parties is a foreign national or a resident, or is a foreign body corporate or is a company, association or body of individuals whose central management or control is in foreign hands.

Therefore, as per Indian law, even of the seat of arbitration is in India, if even one of the parties is ascertained to be a foreign entity, the said dispute shall be pertaining to international commercial arbitration and would be governed by part I of the act unless the said arbitration is held outside India.

The Amending Act of 2016 had omitted the word 'a company' from the parameters covered under the definition and the consequences of such a removal has restricted the purview which the definition earlier had as it is now restricted merely to a body of individuals or associate whose central management and control is exercised in any country

other than India.

The key takeaway being, that as long as a company is incorporated in India the central management and control would become a redundant consideration in so far as ascertaining whether a particular dispute is lying within the contours of 'international commercial arbitration' or not. India follows the doctrine of precedents and it has always been considered that a particular judgment has to be considered in the context of the issues which arose before it. The same conclusion was held by the Supreme Court ruling in TDM Infrastructure Pvt. Ltd v. U.E Development India Pvt. Ltd. ^[11], wherein it was TDM infrastructure which had foreign control as per the facts of the case. However, the apex court was not impressed by the contention of the petitioner which claimed which claimed that the central control and management of the corporate in question wrested in Malaysia and that would bring it within the purview of international commercial arbitration as provided under Section 2(1)(f)(iii) ^[12]. The court held that the nationality of the parties is a crucial determinative factor in the characterization of an agreement as an international commercial arbitration and therefore it is provision (ii) and not (iii) which must be taken into consideration and therefore refuge to foreign law cannot be taken if both the parties are incorporated in India:

Determination of nationality of the parties plays a crucial role in the matter of appointment of an arbitrator. A company incorporated in India can only have Indian nationality for the purpose of the Act. It cannot be said that a company incorporated in India does not have an Indian nationality. Hence, where both parties have Indian nationalities, then the arbitration between such parties cannot be said to be an international commercial arbitration.

The judgement as well as the amendment behind has had its fair share of critiques and reflections which are questioning whether these recent developments are limiting the very scope that the act sought to uphold and that is party autonomy.

Setting aside any uneven power dynamics, if two parties with Indian incorporation have sought to willingly derogate from the application of Indian law, can the Supreme court then substitute its own judicial wisdom and direct the parties to not have such a derogation is something which is not unambiguously clear. Moreover, the recent developments have always seemingly aimed at making transforming India into an arbitration hub for domestic and international disputes. However, these pronouncements do little to enhance those very objectives. It is doubtful to many observers if more foreign entities would be pre-disposed to form commercial engagements in India if more pronouncements like these become the norm. It has therefore been observed:

"Any foreign party, as a kind of company in this case, would think twice before conducting business with an Indian Company as the arbitration clause would then get subject to Indian Courts even if the place of functioning and management of the company is different. Also, the benefit of an international commercial arbitration lies in the fact that the arbitration can take place in a neutral country and can be enforced against the parties in the countries where the particular party has its assets and management."

Therefore, there is a lot of interplay between different factors when it comes to the adjudication of these disputes

as has been explained above and further analysis shall be made on these aspects with respect to the present case.

4. The two Sides of the Coin: Submissions by the Counsels

Heads: Submission from the Applicant's Side

The first and foremost contention on part of the applicant attacked the inability of the respondents to carry out the obligations which had been set out in clause 24 and such a failure of discharge should allow the applicants to move the Supreme Court and seek an appointment of arbitrator in consonance with section 11^[13] of the Arbitration and Conciliation Act.

The next submission attacked the partiality which was conspicuous in the appointment process which was followed by the respondent. As per Clause 24 of the agreement which had been entered into by the parties, the discretion to appoint such an arbitrator was given to the Chairman and the Managing Director. The decision seemed to have been taken by Chief General Manager which itself reeks of procedural impropriety. Furthermore, even after such an appointment was made by the Chairman and the Managing Director, such an appointment would be made by a partisan party. It is natural that a Chairman or Managing Director would be interested in the outcome of such a dispute and should therefore have nothing to do with appointment process as it would spoil the pre-requisite requirement of an absence of bias and impartiality and that the independence of an arbitrator is paramount.

Moreover, in order to maintain that the present situation falls under International Commercial Arbitration they placed reliance on the precedent of Larsen and Toubro Limited SCOMI Engineering BHD v. Mumbai Metropolitan Region Development Authority^[14].

It was further submitted that the applicants, in this case represented a consortium. A consortium where there is one lead member i.e. Applicant No. 1 Eastman Perkins. The relevant recital and the Clause of the Agreement were as under:

"1. WHEREAS all the Parties agree that Perkins Eastman will be the focal point for the agreement and interaction with the client."

"9. Perkins Eastman and M/s. Edifice Consultants are jointly and severally responsible for the execution of the project."

"Hereby designate Perkins Eastman Architects DPC being one of the members of the Consortium, as the Lead Member of the Consortium, to do on behalf of the Consortium, all or any of the acts, deeds of things necessary or incidental to the Consortium's Application/Bid for the Project."

Applicant No.1, is an architectural company which has its headquarters in New York, and logically requirements under Section 2(1)(f) of the Act are satisfied and the arbitration in the present context can be wholly said to be 'international commercial arbitration'.

Tails: Submissions from the Respondent's Side

The counsel for the respondent countered the submissions while maintaining that no case has to be made out in the present scenario. The submissions by the respondent attacked the two basic submissions made with respect to the independence and impartiality of the arbitrator so appointed as well as whether the parameters of the case warrant the court to hold that the present agreement would be covered

under the ambit of an international commercial arbitration.

The contention of the applicant with respect to the appointment was made on two counts:

1. The 30-day period as stipulated in the contract was not abided by.
2. The appointment was made by the Chief General Manager and not the Chairman or the Managing Director.

The respondent argued that on the first count, that since the appointment date stipulated had expired (28.06.2019), therefore the appointment was made on the next available working day i.e. (30.06.2019).

Secondly, the respondent maintained a technical argument that the decision to appoint the arbitrator was made by Chairman and the Managing Director but the message of appointment was conveyed by Chief General Manager. Therefore, there has been no procedural impropriety as alleged by the applicants.

With respect to the Applicant No. 1 being the lead member of the consortium, the respondents argued that although it has not been disputed that Applicant No.1 has been shown to be a lead member of the consortium. However, attention should also be drawn to clause 9 of the agreement (mentioned above) wherein it has been maintained that both the applicants shall be 'jointly and severally' liable for any liability that arise out of such an agreement. Therefore, it was contended that since the liability has been decided to be borne by both the parties together, it cannot be said that one party has any sort of lead over the other.

5. Judicious Reflection on Judicial Reform: The Judgement

The court had drawn up two principle issues on which the adjudication was to be done:

1. Whether the arbitration in the present case would be an International Commercial Arbitration or not? In case it is not, then this Court cannot deal with the application under Section 11(6) read with Section 11(12) (a) of the Act.
2. Whether the apex court shall be justified in exercising its own power in appointing a sole arbitrator in the present case?

With respect to the first issue, the court examined the case law of Larsen Toubro Limited SCOMI Engineering BHD which had a factual situation which was similar to the present case. The only distinguishing factor was that in the Larsen case the lead company was Indian.

The precedent mentioned had made pertinent points about the consortiums of applicants where one company was positioned as a lead and the court therefore deconstructed the precedent with respect to the case at hand. The relevant portions of the judgement which made the court the adjudicate were as follows:

"Section 2(1)(f)(iii) of the Act refers to two different sets of persons: an "association" as distinct and separate from a "body of individuals". For example, under Section 2(31) of the Income Tax Act, 1961, "person" is defined as including, under sub clause (v), an association of persons, or body of individuals, whether incorporated or not. It is in this sense, that an association is referred to in Section 2(1) (f)(iii) which would therefore include a consortium consisting of two or more bodies corporate, at least one of whom is a

body corporate incorporated in a country other than India.”
“The Indian company is the lead partner, and that the Supervisory Board constituted under the consortium agreement makes it clear that the lead partner really has the determining voice in that it appoints the Chairman of the said Board (undoubtedly, with the consent of other members). Consortium’s office is in Wadala, Mumbai as also that the lead member shall lead the arbitration proceedings, would all point to the fact that the central management and control of this Consortium appears to be exercised in India and not in any foreign nation.”

Based on the aforementioned averments the court adjudicated that the lead partner in the consortium is usually a determining factor for ascertaining the nationality of the party and therefore, in this case the arbitration was not held to be under the category of international commercial arbitration.

Also, it is clear upon the perusal of Section 2(I)(f) ^[15] that it is speaking about three distinct categories and that after the amendment had omitted the words ‘a company or’ the legislative intent has clearly and unambiguously demonstrated that it wants the association of members and a body of individuals to be distinct from each other as the connotation in which ‘person’ has been used in the present context has to be borrowed from the definition that is given under the Income Tax Act and therefore would render it a distinct category in itself.

Having determined that the lead partner had its office registered in New York, it was held by the court that the present case is well within bounds of ‘international commercial arbitration’. Then came the second issue, which pertained to court’s power to exercise with respect to the appointment of an arbitrator. The court had to discuss two sub-issues within this issue. Firstly, it had to address whether the expiration of the stipulated time period is an omission of such gravity that the court’s jurisdiction would have to be called in. Secondly, the court had to deal with the issue of the decision with respect to authority which was responsible for the appointment of the sole arbitrator.

Firstly, the court did not pay much heed to the fact that the stipulated time period had expired and as per the facts of the case the relevant exercise of power by had been carried out on the first working day and therefore the said infraction was not thought to be so grave as to invite the jurisdiction of the court under Section 11 ^[16].

Secondly, for the issue pertaining to Chairman and Managing Director had some grounds for intervention. For deciding this issue, the court went into detail examining the holdings in the case laws of *Walter Bau G* and *TRF Limited*.

In *TRF Limited*, the Supreme Court bench considered two similar issues which were regarding the appointment of arbitrator by the Managing Director and whether the Supreme Court could be called into the picture while appointing an arbitrator and whether any such appointment made by the Managing Director could be described as a valid one. After the 2016 amendment had come into force which brought forth the Fifth and Seventh Schedules into the Arbitration Act. The significance of such new categories was that all the new categories which would have been infused in the list would then be deemed to be parties which would be directly interested in the outcome of the dispute. Such an interest would thus defeat the test of impartiality

and independence which should be seen as being of paramount importance in the appointment of an arbitrator. In this case however, the Managing Director was himself selected as an arbitrator and therefore, being an interested party was logically disqualified from such a position.

“The submission to the effect that since the Managing Director of the respondent has become ineligible to act as an arbitrator subsequent to the amendment in the Act, he could also not have nominated any other person as arbitrator is absolutely unsustainable, for the Fifth and the Seventh Schedules fundamentally guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence and impartiality of the arbitrator. To elaborate, if any person whose relationship with the parties or the counsel or the subject-matter of dispute falls under any of the categories specified in the Seventh Schedule, he is ineligible to be appointed as an arbitrator but not otherwise.”

But what if an arbitrator is being selected by a party which would otherwise be disqualified on account of being an interested party themselves. Could the argument around the fifth and seventh schedule be extended to include anyone who is selected by the interested party as well?

The court held that the answer is a yes. Reliance was placed on the logic that anyone who is disqualified by virtue of being in relationship with the parties in such a way that bias may seep into the procedure then such a party would be by extension of such a nomination should also be disqualified from carrying such a nomination:

“There is no doubt and cannot be, for the language employed in the Seventh Schedule, the Managing Director of the Corporation has become ineligible by operation of law. It is the stand of the learned Senior Counsel for the appellant that once the Managing Director becomes ineligible, he also becomes ineligible to nominate.”

The court went on to hold that in no way is such a ruling meant to disrespect or question the integrity of any arbiter and that this is merely a principle developed to prevent even a tiny chance of bias from entering into the situation. The independence and impartiality of an arbitrator is paramount and no stone should be left unturned in order to ensure such independence and impartiality. Such an arbitrator shall not have any voice in deciding any dispute between the parties.

However, a contention could have arisen that such a stipulation had been mutually agreed by the parties themselves and they shall be free to tailor the appointment procedure to their own mutual agreement. The court however paid no heed to such a contention and laid out that given the circumstances, if a particular situation dictates that the court shall derogate from the written stipulation the court is well within its rights to interfere in the sole appointment of an arbitrator and it may ignore whatever stipulation which was entered into:

“If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else.”

Therefore, justifiable doubts on the independence or impartiality of an arbitrator shall have precedence over any party autonomy in such a situation.

6. Analysis and Conclusion

The case law has pertinent implications on the relationship between ensuring procedural fairness on one hand and the deployment of party autonomy on the other hand. The court has held in a clear-cut fashion that in any conflict between the two elements the former shall have precedence and the latter will have to take a backseat.

It doesn't matter if the parties to the dispute have decided amongst themselves about going through with a certain procedure however, the extent to which the court has always felt to substitute its own wisdom in such a manner has been questionable for some and has been a moot point for others.

This brings forth an oft-talked about the issue of party autonomy in arbitration proceedings which must be upheld at all costs. The arbitration and conciliation act had been brought in by the legislature to ensure party autonomy and to save the parties for resorting to the courts for every commercial transaction thereby creating an effective alternative dispute resolution mechanism.

It may be possible that in the long run it would have a significant impact on contractual terms in which parties have lopsided power dynamics. For example, governments contracts and tenders have often been criticized for having one sided stipulations and dispute mechanisms which they get away with because of the power dynamics. However, one must also determine the clear level to which court's interference as delineated under Section 11 must be stopped and where does judicial overreach begin in such a matter.

If a court's intervention to decided merely on the satisfaction of circumstances which the courts deem fit then it is not an unreasonable suspicion that there is a huge chance and judicial overreach and overstepping out of the confines kept in place by the law itself. The delicate balance between ensuring procedural fairness and ensuring party autonomy was discussed in the case law of Bharat Broadband Network Limited wherein the court had considered disregarding party autonomy in favor of procedural fairness. Para 57 of the judgement noted:

"It would be incongruous to say that party autonomy can be exercised in complete disregard of these principles — even if the same has been agreed prior to the disputes having arisen between the parties. There are certain minimum levels of independence and impartiality that should be required of the arbitral process regardless of the parties' apparent agreement. 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."

Therefore, the courts hesitation in accepting party autonomy is based on the sole justification that not even a whiff independence and partiality shall be compromised when talking about party autonomy in arbitration.

The rule against bias is one of the hallmarks of effective arbitration and if one party is disqualified for having been deemed as an interested party any party nominated by such a party shall be disqualified by such extension of logic that such a nomination is still within the connection of the interested party.

"Independence and impartiality are two different concepts. An arbitrator may be independent and yet, lack impartiality, or vice versa. Impartiality, as is well accepted, is a more subjective concept as compared to independence. Independence, which is more an objective concept, may,

thus, be more straightforwardly ascertained by the parties at the outset of the arbitration proceedings in light of the circumstances disclosed by the arbitrator, while partiality will more likely surface during the arbitration proceedings."

Therefore, while it is appreciated that courts could use such an intervention to rectify any lopsided power relations in contractual relationships it is also reality that such a ruling is likely to disrupt the arbitration landscape in India. The decision has rendered it a complete impossibility for parties to appoint a sole arbitrator as the confines of what is on the face of it fair and completely impartial are still not clearly defined and are still moot points in such litigious disputes.

Moreover, the court should also be wary of justifying its each and every decision based on the TRF case as the said case law had ruled on the stage of appointment whereas the arbitration act talks about the arbitrator himself to be impartial, independent and fair. Therefore, the requirement is thrust on the arbitrator and not on the person appointing such an arbitrator. Also, the broad language used in the judgement virtually makes every case a sole arbitrator appointment to come under such a scrutiny which is also not fair. So many contracts in this country have unilateral appointment of arbitrators and it would a huge overhaul if the court were to rope in every such scenario within the ratio laid in TRF as well as Perkins. Therefore, independent institutions would have to step up and take on the mantle of appointing sole arbitrators.

Thus, it can be concluded that the courts want to make the arbitration scenario in India to be of premium quality and ensure fairness and independence it should also tread carefully and contextually and not tamper with the contextual realities of arbitration overzealously.

References

1. Ibid.
2. Section 11: Appointment of arbitrators — A person of any nationality may be an arbitrator, unless otherwise agreed by the parties. Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator. If the appointment procedure in sub-section (3) applies and— a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him. Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him. Where, under an appointment procedure agreed upon by the parties, a party fails to act as required under that procedure; or the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or a person, including an

- institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment. A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justice or the person or institution designated by him is final. The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to—any qualifications required of the arbitrator by the agreement of the parties; and other considerations as are likely to secure the appointment of an independent and impartial arbitrator. In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities. The Chief Justice may make such scheme as he may deem appropriate for dealing with matters entrusted by sub-section (4) or sub-section (5) or sub-section (6) to him. Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justices of different High Courts or their designates, the Chief Justice or his designate to whom the request has been first made under the relevant sub-section shall alone be competent to decide on the request. (a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration, the reference to “Chief Justice” in those sub-sections shall be construed as a reference to the “Chief Justice of India”. (b) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to “Chief Justice” in those sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situate and, where the High Court itself is the Court referred to in that clause, to the Chief Justice of that High Court.
3. Section 14: Failure or impossibility to act —The mandate of an arbitrator shall terminate if —he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and he withdraws from his office or the parties agree to the termination of his mandate. If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate. If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.
 4. Section 15: Termination of mandate and substitution of arbitrator —In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate—where he withdraws from office for any reason; or by or pursuant to agreement of the parties. Where the mandate of an arbitrator terminates,

a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced. Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal. Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.

5. 8 SCC 377, 2017.
6. Supra 1.
7. Supra 3.
8. Supra 3.
9. Supra 3.
10. Section 2(1)(f) “international commercial arbitration” means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is— an individual who is a national of, or habitually resident in, any country other than India; or (ii) a body corporate which is incorporated in any country other than India; or (iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or (iv) the Government of a foreign country;
11. (2008) 14 SCC 271.
12. Supra 11.
13. Supra 3.
14. 2018 SCC OnLine SC 1910.
15. Supra 11.
16. Supra 3.