

ORDER

OCD-12

IN THE HIGH COURT AT CALCUTTA
COMMERCIAL DIVISION
ORIGINAL SIDE

AP-COM/556/2025
G4S SECURE SOLUTIONS (INDIA) PRIVATE LIMITED
VS
FORUM PROJECTS HOLDINGS PRIVATE LIMITED

BEFORE:

The Hon'ble JUSTICE SHAMPA SARKAR

Date: 29th July, 2025.

Appearance:

Mr. Arjun Samanta, Advocate
Ms. A. Sarswat, Advocate
Mr. Ankit Chatterjee, Advocate.
... for petitioner.

1. Despite service, none appears on behalf of the respondent.
2. This is an application for appointment of an arbitrator in terms of clause 14 of the Work Order for Security Services, entered into between the parties. The same is in the nature of an agreement and valid from August 1, 2022 to July 31, 2024. It appears that both the parties invoked arbitration in view of the disputes between them.
3. The petitioner was required to provide security services at the premises of the respondent, situated at Technopolis Building, BP-4, Sector-V, Kolkata – 7000916. While the petitioner contends that its legitimate dues under the said work order/agreement has not been paid by the respondent, the respondent contended in the notice invoking arbitration that disputes and differences arose because the petitioner had not fulfilled the obligations

under the work order. Both parties have claims against each other and the disputes are live.

4. Clause 12 of the said work order/agreement provides that disputes or difference between the parties in relation to the work order shall be referred to the sole arbitrator to be appointed by Forum. It also provides that the petitioner should confirm that the petitioner would not have any objection to such appointment if the arbitrator is an employee or an attorney or an advocate of Forum. The clause further provides that reference and the proceeding would be in terms of the Arbitration and Conciliation Act, 1996. The language will be English and Courts of Kolkata will have exclusive jurisdiction.

5. Clause 14 is the primary arbitration clause, which is quoted below:-

“14. Arbitration & Jurisdiction : IN THE EVENT OF ANY DISCREPANCY OR DISPUTE ARISING DURING THE TENURE OF THE WORK, IT MAY BE FIRST AMICABLY SETTLED MUTUALLY BY BOTH THE PARTIES OTHERWISE IT SHALL BE REFERRED TO ARBITRATION BEFORE THE SOLE ARBITRATOR APPOINTED BY THE PARTIES IN ACCORDANCE WITH THE PROVISIONS OF THE ARBITRATION AND CONCILIATION ACT 1996 AND RULES MADE THEREUNDER. ALL ARBITRATION PROCEEDINGS SHALL BE SUBJECT TO JURISDICTION OF KOLKATA COURT. This Contract is governed by the laws of the Republic of India and shall be subject to the exclusive jurisdiction of the courts at Kolkata.”

6. This Court finds that although clause 12 provides for unilateral appointment by Forum, the said clause is no longer workable, in view of

the judicial pronouncements with regard to impermissibility of unilateral appointment of an arbitrator by one of the parties to the agreement. The said law has been enunciated by the Hon'ble Apex Court through various judgments. It has been held that when a party reserves a right to appoint an arbitrator and chooses its own officer or consultant or person as the arbitrator, the principle of party autonomy will stand abrogated and the provision of equal participation of the parties under Section 18 of the said Act will be violated. Reference is made to the decisions of ***Perkins Eastman Architects DPC and Another v. HSCC (India) Ltd.*** reported in **2019 SCC OnLine SC 1517** and ***Central Organisation for Railway Electrification vs. ECI SPIC SMO MCML (JV) A joint Venture Company*** reported in **2024 SCC OnLine SC 3219**.

7. The Hon'ble Apex Court in ***Central Organization for Railway Electrification (supra)***, held thus:-

“73. The 2015 amendment has introduced concrete standards of impartiality and independence of arbitrators. One of the facets of impartiality is procedural impartiality. Procedural impartiality implies that the rules constitutive of the decision-making process must favour neither party to the dispute or favour or inhibit both parties equally. Further, a procedurally impartial adjudication entails equal participation of parties in all aspects of adjudication for the process to approach legitimacy. Participation in the adjudicatory process is meaningless for a party against whom the arbitrator is already prejudiced. Equal participation of parties in the process of appointment of arbitrators ensures that both sides have

an equal say in the establishment of a genuinely independent and impartial arbitral process.

74. Under Sections 12(1) and 12(5), the Arbitration Act recognises certain mandatory standards of independent and impartial tribunals. The parties have to challenge the independence or impartiality of the arbitrator or arbitrators in terms of Section 12(3) before the same arbitral tribunal under Section 13. If the tribunal rejects the challenge, it has to continue with the arbitral proceedings and make an award. Such an award can always be challenged under Section 34. However, considerable time and expenses are incurred by the parties by the time the award is set aside by the courts. Equal participation of parties at the stage of the appointment of arbitrators can thus obviate later challenges to arbitrators.

75. Independence and impartiality of arbitral proceedings and equality of parties are concomitant principles. The independence and impartiality of arbitral proceedings can be effectively enforced only if the parties can participate equally at all stages of an arbitral process. Therefore, the principle of equal treatment of parties applies at all stages of arbitral proceedings, including the stage of the appointment of arbitrators.

* * *

124. The doctrine of bias as evolved in English and Indian law emphasizes independence and impartiality in the process of adjudication to inspire the confidence of the public in the adjudicatory processes. Although Section 12 deals with the quality of independence and impartiality inherent in the arbitrators, the provision's emphasis is to ensure an independent and impartial arbitral process.

* * *

169. In view of the above discussion, we conclude that:

- a. The principle of equal treatment of parties applies at all stages of arbitration proceedings, including the stage of appointment of arbitrators ;
- b. The Arbitration Act does not prohibit PSUs from empanelling potential arbitrators. However, an arbitration clause cannot mandate the other party to select its arbitrator from the panel curated by PSUs;
- c. A clause that allows one party to unilaterally appoint a sole arbitrator gives rise to justifiable doubts as to the independence and impartiality of the arbitrator. Further, such a unilateral clause is exclusive and hinders equal participation of the other party in the appointment process of arbitrators;
- d. In the appointment of a three-member panel, mandating the other party to select its arbitrator from a curated panel of potential arbitrators is against the principle of equal treatment of parties. In this situation, there is no effective counterbalance because parties do not participate equally in the process of appointing arbitrators. The process of appointing arbitrators in CORE (supra) is unequal and prejudiced in favour of the Railways;
- e. Unilateral appointment clauses in public-private contracts are violative of Article 14 of the Constitution ;
- f. The principle of express waiver contained under the proviso to Section 12(5) also applies to situations where the parties seek to waive the allegation of bias against an arbitrator appointed unilaterally by one of the parties. After the disputes have arisen, the parties can determine whether there is a necessity to waive the nemo judex rule;”

8. In ***Perkins Eastman (supra)***, the Hon’ble Apex Court held thus :-

...“**20.** We thus have two categories of cases. The first, similar to the one dealt with in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd.,

(2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself but is empowered or authorised to appoint any other person of his choice or discretion as an arbitrator. If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in TRF Ltd. [TRF Ltd. v. EnergoEngg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an arbitrator.

21. But, in our view that has to be the logical deduction from TRF Ltd. [TRF Ltd. v. EnergoEngg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] Para 50 of the decision shows that this Court was concerned with the issue, “whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator” The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter-balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments

brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) and recognised by the decision of this Court in TRF Ltd. [TRF Ltd. v. EnergoEngg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72]

...

24. In Voestalpine [VoestalpineSchienen GmbH v. DMRC, (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607] , this Court dealt with independence and impartiality of the arbitrator as under : (SCC pp. 687-88 & 690-91, paras 20 to 22 & 30)

“20. Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applied to all judicial and quasi-judicial proceedings. It is for this reason that notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration. The genesis behind this rational is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties. Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial. The United Kingdom Supreme Court has beautifully highlighted this aspect in Hashwani v. Jivraj [Hashwani v. Jivraj, (2011) 1 WLR 1872 : 2011 UKSC 40] in the following words : (WLR p. 1889, para 45)

‘45. ... the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties.’

21. Similarly, Cour de Cassation, France, in a judgment delivered in 1972 in Consorts Ury [Fouchard, Gaillard, Goldman on International Commercial Arbitration, 562 [Emmanuel Gaillard & John Savage (Eds.) 1999] {quoting Cour de cassation [Cass.] [Supreme Court for judicial matters] Consorts Ury v. S.A. des Galeries Lafayette, Cass.2e civ., 13-4-1972, JCP, Pt. II, No. 17189 (1972) (France)}.], underlined that:

‘an independent mind is indispensable in the exercise of judicial power, whatever the source of that power may be, and it is one of the essential qualities of an arbitrator’.

22. 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.

30. Time has come to send positive signals to the international business community, in order to create healthy arbitration environment and conducive arbitration culture in this country. Further, as highlighted by the Law Commission also in its report, duty becomes more onerous in government contracts, where one of the parties to the dispute is the Government or public sector undertaking itself and the authority to appoint the arbitrator rests with it. In the instant case also, though choice is given by DMRC to the opposite party but it is limited to choose an arbitrator from the panel prepared by DMRC. It, therefore, becomes imperative to have a much broadbased panel, so that there is no misapprehension that principle of impartiality and independence would be discarded at any stage of the proceedings, specially at the stage of constitution of the Arbitral Tribunal. We, therefore, direct that DMRC shall prepare a broadbased panel on the aforesaid lines, within a period of two months from today...”

9. Under such circumstances, clause 14 becomes the primary arbitration clause. By a letter dated January 20, 2025, the respondent invoked arbitration by referring to clause 14 and not clause 12. As the respondent did not take steps for appointment, the petitioner also invoked the arbitration by a letter dated February 8, 2025.
10. In the above circumstances, this Court deems it fit to refer the dispute to arbitration, without expressing any view with regard to the legality or

legitimacy of the claims of either of the parties. All issues with regard to admissibility of the claims, limitation etc. are left open to be decided by the learned arbitrator. Both parties are at liberty agitate all their points before the learned arbitrator.

11. This Court appoints Mr. Sourajit Dasgupta (Mobile: 8697542775), Advocate, Bar Library Club, 2nd Floor, High Court at Calcutta, as an arbitrator, to arbitrate upon the disputes between the parties. This appointment is subject to compliance of Section 12 of the Arbitration and Conciliation Act, 1996. The learned Arbitrator shall fix his remuneration as per the Schedule of the Arbitration and Conciliation Act, 1996.

12. The application is disposed of.

(SHAMPA SARKAR, J.)