

# SAMVĀD: PARTNERS

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## **UPDATE: SUPREME COURT RULES ON ONE-SIDED ARBITRATION CLAUSES**

The issue of party-appointed sole arbitrators was recently discussed by the Supreme Court of India in *Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd.*<sup>1</sup>. The key question before the Court was - whether a person having an interest or connection with the case can appoint an arbitrator?

### **Background Facts**

In this case, a contract was entered into between Perkins Eastman (“**Applicant**”) and Hospital Services Consultancy Co. Ltd. (“**HSCC**”) for preparation of an architectural design in relation to the upcoming AIIMS at Guntur, Andhra Pradesh. The arbitration clause therein provided for appointment of a sole arbitrator by the Chief Managing Director (“**CMD**”) of HSCC.

Disputes arose between the parties, and the Applicant called upon the CMD of HSCC to appoint a sole arbitrator. Two days after the timeline stipulated under the arbitration clause elapsed, the Chief General Manager of HSCC communicated the appointment of a sole arbitrator. Contesting the appointment, the Applicant approached the Supreme Court seeking appointment of an impartial and independent arbitrator.

### **Key Finding: Impartiality and Independence of an Arbitrator**

The Court held that the CMD could not have appointed the sole arbitrator. It relied heavily on a three-judge bench decision of the Supreme Court in *TRF Limited v. Energo Engineering Projects Ltd.*<sup>2</sup> *TRF* was concerned with a clause that empowered the Managing Director (“**MD**”) of a company to either act as an arbitrator or nominate an arbitrator. The MD nominated an arbitrator, whose appointment was challenged by the Applicant. The Supreme Court in *TRF* held that since the MD was barred from acting as the arbitrator, he could not have exercised power to appoint an arbitrator.

In *Perkins Eastman*, the Court was cognizant that the arbitration clause was different from that in *TRF* i.e. the CMD was not authorized to arbitrate herself, but only had the power to appoint/nominate the sole arbitrator. Nevertheless, the Court held that the logic of *TRF* would apply, and the appointment by the CMD would be invalid. This was because the reason for ineligibility was the connection of the appointing authority with the dispute itself i.e. the interest that she would have in the outcome of the decision – in this case, by virtue of being CMD of one of the parties. This connection or ineligibility would remain irrespective of whether the CMD acted as arbitrator herself, or only had the power to appoint arbitrators. The Court noted that the ineligibility not only strikes at the root of a person’s power to act as an arbitrator, but also at the

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<sup>1</sup> Judgment delivered on 26.11.2019 in Arbitration Application No. 32 of 2019

<sup>2</sup> (2017) 8 SCC 377

power to appoint an arbitrator.

In the course of this discussion, the Court distinguished the facts of this case with a scenario where both parties appoint arbitrators of their choice. The Court reasoned that in such a scenario, *whatever advantage a party may derive by nominating an arbitrator of its choice would be counter-balanced by equal power with the other party.*

The Supreme Court concluded its discussion on the issue stating that if there are justifiable doubts as to the independence and impartiality of the person nominated, and if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed under the arbitration agreement, such appointment can be made by the Court.

**SAMVAD Comment:** *This judgement is likely to have an impact on a large number of contracts & arbitration clauses, where one party is given the power to appoint the arbitrator(s). Such one-sided clauses are quite common in many government contracts. Though the decision may cause significant disruption in the short run, in the long run it is likely to provide benefits in the form a more robust & impartial Indian arbitration eco-system.*

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***\*This is an update for general information purposes only and does not constitute legal advice. Please contact us if you require further clarifications on this subject.***



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