



## ERGO

*Analysing developments impacting business*

### SUPREME COURT UPHOLDS PARTY AUTONOMY IN APPOINTMENT OF ARBITRATORS

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In the arbitration regime, party autonomy has gained much recognition. When drafting an arbitration agreement, parties are free to choose ad hoc or institutional arbitration, governing law, seat and venue of arbitration, number of arbitrators (odd number), their qualifications and other matters relevant to the procedure to be followed. The ability of parties to determine the procedure to be followed in appointing an arbitrator is a key manifestation of party autonomy. The UNCITRAL Model Law (Model Law) has adopted this principle of party autonomy in as much as it provides that parties are free to agree on the procedure to be followed in conducting the proceedings. Arbitrations in India are governed by the Arbitration and Conciliation Act, 1996 (based on the Model Law) which also envisages party autonomy.

In the recent years, courts in India have taken pro-arbitration stands and have accorded primary importance to party autonomy. This is also true for a recent judgment of the Supreme Court in the case of *State Trading Corporation of India Vs Jindal Steel and Power Limited and Ors.* (Civil Appeal No 2747 of 2020) in which the Supreme Court has clarified that once the parties have agreed to follow a particular mechanism to settle their disputes, including the procedure for appointment of an arbitrator, it is incorrect for courts to overlook the same and to *suo moto* appoint an arbitrator.

In the said case, disputes arose out of an agreement between the State Trading Corporation of India (Appellant) and Jindal Steel and Power Limited (Respondent) for supply of steel rails by the Respondent to Iranian Islamic Republic Railways (RAI). The agreement provided for a mechanism for resolution of disputes under the aegis of the Indian Council of Arbitration and Rules.

The Respondent approached the Single Bench of the Delhi High Court (Single Bench) under Section 9 of the Arbitration and Conciliation Act, 1996 to injunct the Appellant from invoking the performance guarantees furnished by the Respondent in favour of the Appellant. Accordingly, certain reliefs *qua* the performance bank guarantees were granted by the Single Bench. This order of the Single Bench came to be challenged by the Appellant before the Division Bench of the Delhi High Court (Division Bench). It is in this appeal before the Division Bench that the court *suo moto* appointed a retired Delhi High Court Judge as the arbitrator.

Thereafter, an appeal was filed by the Appellant before the Supreme Court challenging the order passed by the Division Bench on the ground that the agreement between the parties provided for a mechanism to resolve disputes arising therefrom. Thus, the *suo moto* appointment of an arbitrator by the Division Bench was contrary to such an agreement.

Relying on the principle of party autonomy in arbitration, the Supreme Court held that in an agreement containing an arbitration clause, where parties have chosen to follow a particular mechanism to settle their dispute, and in this case in accordance with the Indian Council of Arbitration and the Rules, courts ought not to interfere with such agreed mechanism. Accordingly, it was held that the Division Bench was not right in *suo moto* appointing an arbitrator and the order was set aside.

## CONCLUSION

The principle of party autonomy is an internationally recognized norm in arbitration, and this is one of the primary reasons, amongst many others, why parties these days choose arbitration over traditional litigation as the preferred mechanism to resolve their disputes in commercial matters. In arbitration, parties can tailor and define a mechanism that suits their needs. Having said that, the mechanism adopted must adhere to the rules of law and public policy. Once courts are satisfied that such mechanism is not violative of the rules of law, it ought to honour the same and allow the parties to proceed in that regard with least interference possible. Thus, in the present case also, the Division Bench of the Delhi High Court ought to not have interfered in the process of appointing an arbitrator when the parties had clearly agreed upon a valid mechanism for the same.

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