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Panel Paradox: A Closer Look at Arbitrator Appointments from Interested Party Panels

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Introduction

The appointment of an arbitrator, the linchpin of the initiation of an arbitral process, plays a pivotal role in ensuring the fairness and impartiality of proceedings. However, recent developments in the arbitration landscape vis-à-vis appointment of arbitrators from party-centric panels, have raised questions on upholding of such principles of independence and impartiality.

The judgment in *Central Organisation for Railway Electrification* v. *ECI-SPIC-SMO-MCML (JV)* (*CORE case*)[1] brought party-centric panels into spotlight. The arbitration clause in question, specified a distinctive mechanism for the appointment of arbitrators, providing that arbit[illegible]e selected from a panel comprising exclusively of 4 retired Railway employ[illegible]n inherently designed to ensure a nuanced understanding of the railway industry. Adding a layer of complexity, the respondent was vested with the authority to nominate a substantial majority, specifically ⅔rd of the Arbitral Tribunal. This conferred upon the respondent a

considerable influence in shaping the composition of the Tribunal. Furthermore, the petitioner's right to nominate an arbitrator was subjected to the crucial condition of obtaining approval from the respondent, reinforcing an element of control wielded by the respondent throughout the arbitration process.

The Court upheld the clause and observed that such a nomination from the panel provided a unique counterbalancing mechanism wherein one party holds the power to draw the panel, while the other party holds the power to nominate from that panel, thereby creating a delicate equilibrium.

However, two Coordinate Benches[2] of the Supreme Court have doubted the correctness of the judgment in *CORE case*[3] which is currently pending consideration before a Constitution Bench headed by the Chief Justice of India. The hearing before the Constitution Bench was postponed, to await the report from the Expert Committee constituted by the Union Government to scrutinise the functioning of the current arbitration system in India and propose potential amendments to the Arbitration and Conciliation Act, 1996 (A&C Act).[4]

Now, the Expert Committee has submitted the report, proposing an amendment to Section 11, by adding two new sub-sections (2-A) and (2-B) aimed to ensure equal rights for parties in the appointment of arbitrators. The proposed amendment suggests that when arbitrators are to be appointed from a panel unilaterally prepared by one party, it should not have the exclusive right to insist that the other party appoints its arbitrator from that panel only. Any failure to mutually appoint the arbitrator would trigger Section 11(6) of the A&C Act. Additionally, the Committee suggests that appointments made as per the *CORE case*[5] would only be valid if, subsequent to the arising of the dispute, the parties expressly waive the applicability of this sub-section.[6]

In this article, we delve into the heart of the matter, dissecting the implications of the *CORE* [7] judgment and its impact on the arbitration landscape. We contend that the judgment in the *CORE case*[8] is, in fact, a flawed analysis of the set principles of arbitration. The notion that for an appointment to be valid, the panel of arbitrators must be broad, is a viewpoint that resonates deeply with the ideals of justice.

The article sheds light on the issues that were not considered in the *CORE case*[9], including the need for broadness and diversity of the panel, the authority granted to the party responsible for forming the panel to confirm appointments, and lastly, the prerogative to nominate the majority of tribunal members to argue that this judgment does not lay d t position of law.

Requirement of a broad panel

For the appointment of the Arbitral Tribunal from a panel maintained by one of the parties to be deemed valid, it is imperative that the panel encompasses a substantial number of names. The inclusivity of the panel is crucial, ensuring it is not unduly limited, thereby safeguarding the opposing party's right to make nominations without undue constraints. The following judicial precedents further underscore the significance of this requirement in maintaining a fair and unbiased arbitral process.

The requirement of having a broad panel of arbitrators was emphasised by the Supreme Court in *Voestalpine Schienen Gmbh* v. *DMRC Ltd.*[10], wherein the Supreme Court held that in situations where the arbitrator is to be appointed from a panel maintained by one of the parties, it should not be a narrow/restrictive panel and its members should not be limited to a particular category. It held that a panel should reflect diversity by having members from diverse backgrounds. It upheld a panel consisting of 31 people from different backgrounds as a broad panel.

Further clarifications as to what constitutes a broad panel have been provided by a long line of judgments by various High Courts of the country.

In *Afcons Infrastructure Ltd.* v. *Rail Vikas Nigam Ltd.*[11], the Delhi High Court declared a panel consisting of 5 former employees of Railways as violative of Section 12(5) of the A&C Act. It held that the panel was not broad as it offered merely 5 names, moreover, the choice was restricted to former employees of the party drawing the panel. The Court held that though the former employees may not fall exactly within the rubric of Section 12(5) r/w the Seventh Schedule but constituting such a panel would give rise to apprehensions in the minds of the other party.

In *L&T Ltd.* v. *Rail Vikas Nigam Ltd.*[12], the Delhi High Court held that a panel maintained by the respondent for nomination of the arbitrator was invalid on the ground that it contained merely 5 names of the retired employees of the Indian Railways. The Court held such a limited selection casts doubt on the neutrality of the arbitrators.

This view has been followed by the Delhi High Court in subsequent judgments wherein several Coordinate Benches have held that nomination from a limited panel consisting of 3-5 arbitrators is hit by the *Voestalpine case*[13] for want of broadness and diversity.[14]

The Bombay High Court in *Lite Bite Foods (P) Ltd.* v. *AAI*[15], held that a party cannot handpick the members of the panel when the arbitrators are to be appointed from such a panel. It observed that such a panel should be inclusive and diverse. It held that the judgment in *Perkins Eastman Architects DPC* v. *HSCC (India) Ltd.*[16] would apply to a situation where a limited p

In *ITD Cementation India Ltd.* v. *Konkan Railway Corpn. Ltd.*[17], the Bombay High Court held that a panel consisting of 4 names is not a broad panel. It held that the choice of a party to nominate

its arbitrator cannot be restricted to such a limited panel.

In *Simplex Infrastructure Ltd.* v. *SBI*[18], the Madras High Court invalidated an arbitration clause that allowed nomination from a narrow panel of 3 arbitrators prepared by the respondent. It held that such a panel would be hit by the ratio in the *Perkins case*[19].

The Gujarat High Court in *JV China Civil Engg. Construction Corpn.* v. *GMRC Ltd.*[20], held that a panel consisting of 5 arbitrators cannot be acted upon and the petitioner cannot be forced to make a nomination from such a limited panel.

In *Senbo Engg. Ltd.* v. *Union of India*[21], the panel of arbitrators provided by the respondent consisted merely of 4 persons who were its ex-employees. The Jharkhand High Court held that such a panel and practice of nomination of the arbitrator falls foul of Section 12(5) of the A&C Act as well as the directions given by the Supreme Court from time to time.

In *Consortium of Autometers Alliance Ltd.* v. *DMRC*[22], the Delhi High Court held that a panel consisting of 51 names with 26 being the retired Judges, 22 public sector engineers, and 3 public sector accountants satisfies the criteria of a broad panel as none of the persons on the panel shared any relationship with the respondent. The Court held that merely because lawyers are not on the panel, the same cannot be considered to be non-diverse and violative of the *Voestalpine case*[23] directives.

In *S.P. Singla Constructions (P) Ltd.* v. *DMRC Ltd.*[24], the Delhi High Court was called upon to decide the validity of a panel of arbitrators maintained and offered by the respondent. The Court held that the panel was prepared in accordance with the directions given by the Supreme Court in the *Voestalpine case*[25] as it consisted of 62 names who are experts in their respective fields.

Are numbers enough? The question of diversity of the panel

Another essential test to determine the validity of the panel is to test it on the anvil of diversity. There can be a situation where the panel may have the requisite number of persons to be considered as broad, however, the same would not make it valid unless it is equally inclusive and diverse. The following legal precedents shed light on this requirement.

In *Afcons Infrastructure Ltd.* v. *Konkan Railway Corpn. Ltd.*[26], the Bombay High Court reiterated the importance of having a diverse and broad panel in cases of appointment of the arbitrator from a panel maintained by one of the parties. In this case, the panel consisted of 31 names, however, all of them were former or retired Indian Railway employees. Fu t observed that these Gazetted Officers who were on the panel would receive y benefits from theGM of the respondent. Accordingly, the Court held that such a panel, though consisting of 31 names, is in the teeth of the judgment of the Supreme Court in the *Voestalpine case*[27]. It was observed that when such a panel is prepared, it must be ensured that the panel

should have people from diverse fields such as lawyers, accountants, engineers and other field experts.

In *Simplex Infrastructures Ltd.* v. *Rail Vikas Nigam Ltd.* [28], the Delhi High Court examined the validity of a panel of arbitrators consisting of 26 members. It was observed that only 9 of those members were not related to the respondent. Furthermore, the panel included none from legal and accountancy backgrounds. The Court held that merely having more members on the panel does not fulfil the requirement of a broad-based panel as required to save it from the vires of Section 12(5).

In *SMS Ltd.* v. *Rail Vikas Nigam Ltd.*[29], the Delhi High Court held that a panel consisting of 37 names of arbitrators would constitute a broad and diverse panel when only 8 members in the panel were not related to the respondent Railways or the public sector undertakings (PSUs) connected with the Railways. It was held that such a panel does not satisfy the concept of neutrality of arbitrators.

In *Bernard Ingenieure ZT-Gmbh* v. *Ircon International Ltd.*[30], the respondent handed over a list to the High Court consisting of 20 names, however, the same was held to be a narrow panel as most of the names it contained were ex-employees of the Indian Railways. Additionally, the panel lacked diversity as only the people with engineering backgrounds were included.

An examination of these rulings underscores the essential criterion for a valid panel — neutrality and diversity. A credible panel should comprise individuals from varied backgrounds, ensuring their independence from any affiliations with the involved parties.

Can a party appoint the majority of the Arbitral Tribunal?

The third limb of requirements for a party-centric panel to be considered valid is the equality of the power given to the parties in appointing the members of the Tribunal. It is not uncommon to come across arbitration clauses, wherein the employer is given the power to nominate the presiding arbitrator as well. The following judgments offer a perspective on the legality of such stipulations.

This question fell for consideration before the Delhi High Court in *CMM Infraprojects Ltd.* v. *Ircon International Ltd.*[31] The Court held that when a broad-based panel is prepared and both the parties have equal power in terms of the appointment of the arbitrator, the courts would give effect to such a clause, however, if it empowers a party to appoint ⅔rd of the Arbitral Tribunal, the same would impinge upon the concept of party autonomy. It w… …y the High Court that this argument was not raised and considered in the *CORE case*.

In *Pankaj Mittal* v. *Union of India*[33], the Delhi High Court held that a party cannot be allowed to nominate/appoint ⅔rd[rd] strength of the Arbitral Tribunal as it militates against the principle of neutrality of the arbitrators and tilts the scales in favour of a party in the appointment process.

In *Margo Networks (P) Ltd.* v. *Railtel Corpn. of India Ltd.*[34], the Delhi High Court held that the judgment of the Supreme Court in the *CORE case*[35] did not consider the issue of appointment of the majority of the Tribunal by a party. It held that the counterbalancing is disturbed when a party is given the right to nominate ⅔rd[rd] of the Arbitral Tribunal. This view has been followed by another Coordinate Bench in the recent judgment of *Taleda Square (P) Ltd.* v. *Rail Land Development Authority*[36], wherein the Court held that the power to appoint majority members of the Tribunal disturbs counterbalancing.

In the *Afcons Infrastructure Ltd. case*[37], the Bombay High Court held that an arbitration clause that empowers a party to appoint the presiding arbitrator falls foul of the mandate of Section 11(3) of the A&C Act. It was held that the nominees for both parties should appoint the presiding arbitrator.

In the *Lite Bite Foods (P) Ltd. case*[38], the Bombay High Court held that in a situation where the Arbitral Tribunal consisting of three arbitrators is to be appointed from a panel, both the parties should have the right to make one nomination and the power to appoint the third/presiding arbitrator should not be with any party but both the nominees.

In *ITD Cementation India Ltd. case*[39], the Bombay High Court held that a party cannot have the right to appoint ⅔rd[rd] of the Arbitral Tribunal. It held that the presiding arbitrator has to be necessarily appointed by nominee arbitrators for both parties. It held that such a condition tilts the balance in favour of one party.

In the *Afcons Infrastructure Ltd. case*[40], the Bombay High Court was dealing with a situation where the Managing Director was given the power to appoint the presiding arbitrator, from the narrow panel curated by the respondent. The Court held that such a stipulation militates against the principles of autonomy, neutrality, and impartiality of the Tribunal. These rulings stress a balanced tribunal composition, that no party should dominate nominations. When choosing from a panel, equal nomination authority for both parties is vital. The presiding arbitrator should be appointed through mutual agreement between the parties' nominees, fostering a fair and impartial arbitration process.

Can the nomination by one party be subject to approval from the oth

Another important facet that was not a part of the discussion in the *CORE case*[41],is the legality of the power accorded to the maker of the panel to confirm the nomination made by the other party. To ensure the validity of appointing an Arbitral Tribunal from a party-maintained panel,

the arbitration clause must not confer ultimate confirmation authority to the party maintaining the panel. Such a provision undermines the principle of counterbalancing.

In *Steelman Telecom Ltd.* v. *POWERGRID*[42], the Delhi High Court dealt with a situation wherein the panel prepared by the respondent consisted of retired Supreme Court, High Court and District Court Judges, engineers, civil servants, financial experts, etc. but the arbitration clause empowered the respondent with the power to confirm the nomination made by the petitioner. The Court held that the panel prepared by the respondent is diverse and broad-based, however, the same cannot be given effect as the condition empowering the respondent to accord confirmation is invalid and vitiates counterbalancing. It was held that this power of confirmation conferred on the party drawing up the panel disturbs the equilibrium.

In the *CMM Infraprojects Ltd. case*[43], the Delhi High Court held that no effective counterbalancing is achieved when the petitioner is required to choose two names out of which the respondent can appoint anyone as its nominee arbitrator. The Court held that the right of the petitioner to choose its nominee arbitrator cannot be made subject to the seal of approval from the respondent.

This view was reiterated in the *Pankaj Mittal case*[44], wherein the Court held that the nomination made by the petitioner would be final and not subject to any seal of approval by the respondent to achieve counterbalancing.

Conclusion

In conclusion, the analysis of the Supreme Court judgment in the *CORE case*[45] reveals significant gaps that merit urgent reconsideration. The issues surrounding the composition of the panel, specifically its broadness and diversity, as well as the concentration of power in one party to appoint the majority of tribunal members and affirm nominations, were not considered by the Supreme Court.

The authors have proposed a comprehensive four-fold test, encompassing broadness, genuine diversity beyond mere numerical representation, absence of unilateral appointment power, and the exclusion of any party's authority to affirm appointments, to be applied to appointment from party-oriented panels.

In the interest of fostering a robust and equitable arbitration system, characterised by transparent panel selection and procedural fairness, the reconsideration of CORE becomes not just a legal imperative but a pivotal step towards upholding the principles o e process. The legal landscape awaits a decisive course correction to ensur d efficacy and legitimacy of arbitration proceedings.

Given the gravity of these concerns and their potential impact on the integrity of arbitration proceedings, it is imperative that the Constitution Bench of the Supreme Court seizes this opportunity for rectification. Alternatively, the Government, guided by the recommendations of the Expert Committee, may also consider implementing the suggested changes through an amendment to the Act.

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1. (2020) 14 SCC 712.
2. *Union of India* v. *Tantia Construction Ltd.*, 2021 SCC OnLine SC 271 and *JSW Steel Ltd.* v. *South Western Railway*, 2022 SCC OnLine SC 1973.
3. (2020) 14 SCC 712.
4. *Central Organisation for Railway Electrification* v. *ECI-SPIC-SMO-MCML (JV)*, 2023 SCC OnLine SC 855.
5. (2020) 14 SCC 712.
6. Dr T.K. Vishwanathan Committee, Examine the Working of the Arbitration Law and Recommend Reforms in the Arbitration and Conciliation Act, 1996 (07-02-2024).
7. (2020) 14 SCC 712.
8. (2020) 14 SCC 712.
9. (2020) 14 SCC 712.
10. (2017) 4 SCC 665.
11. 2017 SCC OnLine Del 8675.
12. 2018 SCC OnLine Del 9176.
13. (2017) 4 SCC 665.
14. *Pradeep Vinod Construction Co.* v. *Union of India*, 2023 SCC OnLine Del 179; *Gangotri Enterprises* v. *Railways*, 2022 SCC OnLine Del 3556; *Taleda Square (P) Ltd.* v. *Rail Land Development Authority*, 2023 SCC OnLine Del 6321; *L&T Hydrocarbon Engg. Ltd.* v. *Indian Oil Corpn. Ltd.*, 2022 SCC OnLine Del 3587; *NCCL-Premvo (JV)* v. *Rail Vikas Nigam Ltd.*, 2018 SCC OnLine Del 11926; *BVSR-KVR (JV)* v. *Rail Vikas Nigam Ltd.*, 2020 SCC OnLine De… *Engg. Works* v. *Railways*, 2023 SCC OnLine Del 7574.
15. 2019 SCC OnLine Bom 5163.
16. (2020) 20 SCC 760.

17. 2019 SCC OnLine Bom 5349.
18. 2023 SCC OnLine Mad 1598.
19. (2020) 20 SCC 760.
20. Order dated 17-01-2020 in Petn. Under Arbitration Act No. 119 of 2019.
21. 2017 SCC OnLine Jhar 4209.
22. 2021 SCC OnLine Del 4042.
23. (2017) 4 SCC 665.
24. 2017 SCC OnLine Del 10689.
25. (2017) 4 SCC 665.
26. 2020 SCC OnLine Bom 681.
27. (2017) 4 SCC 665.
28. 2018 SCC OnLine Del 13122.
29. (2020) 1 HCC (Del) 304 : 2020 SCC OnLine Del 77.
30. 2018 SCC OnLine Del 7941.
31. 2021 SCC OnLine Del 5656.
32. (2020) 14 SCC 712.
33. 2021 SCC OnLine Del 5712.
34. 2023 SCC OnLine Del 3906.
35. (2020) 14 SCC 712.
36. 2023 SCC OnLine Del 6321.
37. 2020 SCC OnLine Bom 681
38. 2019 SCC OnLine Bom 5163.
39. 2019 SCC OnLine Bom 5349.
40. 2020 SCC OnLine Bom 681.
41. (2020) 14 SCC 712.
42. 2023 SCC OnLine Del 4849.
43. 2021 SCC OnLine Del 5656.
44. 2021 SCC OnLine Del 5712.
45. (2020) 14 SCC 712.

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