

Construction Arbitration Newsletter

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Construction Arbitration Law Firm

- **'Back-to-back' basis contract** - while 'back-to-back' contracts often stipulate that a sub-contractor's payment is contingent upon the principal Employer's payment to the Contractor, this condition is enforceable only during the course of the contract - where the sub-contract is executed on 'back-to-back' basis, the sub-contractor's bills cannot be withheld by the Contractor until the same were paid by the Employer - once the parties are in a dispute, in relation to the bills claimed by the sub-contractor, the Contractor cannot defer payments in perpetuity on the ground of the pendency of certification, when it has not otherwise disputed the correctness of the bills.
- Interpretation of a 'pay-when-paid' clause - sub-contract on 'back-to-back' basis providing that specifically providing the obligation of the principal Contractor to pay to the sub-contractor on the actual receipt of payment from the Employer - obligation to release payments is linked to the actual inflow of funds from the principal Employer - not open to the sub-contractor to challenge the provision.

*[Kingston Enterprises v. NBCC (India) Ltd. - Delhi High Court
- Decided on 16.10.2024]*



- **Contractor forced to select its arbitrator from the panel of arbitrators prepared by the Employer - list of arbitrators forming part of the panel is exclusively prepared by the Employer - arbitration clause providing that the Contractor has to mandatorily select its arbitrator from a panel maintained by the Employer - such an arbitration clause is against the principle of equal treatment.**
- **Panel of arbitrators - panel of three retired Railway officers as arbitrator - Railways to send a panel of at least four names of retired railway officer(s) empanelled to work as Railway arbitrator - Contractor to suggest to General Manager of the Railways at least two names out of the panel for appointment as Contractor's nominee - General Manager shall appoint at least one out of them as the Contractor's nominee - General Manager also to appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the "presiding arbitrator" from amongst the three arbitrators so appointed - such an appointment clause is likely to give rise to justifiable doubts as to the independence and impartiality of arbitrators - fact that the General Manager is nominating the presiding arbitrator gives rise to a reasonable doubt about the independence and impartiality of the entire arbitration proceeding.**
- **Unilateral appointment by the Employer - no prohibition on Public Sector Units (PSUs) from empanelling potential arbitrators - an arbitration clause cannot mandate the other party to select its arbitrator from the panel curated by PSUs - PSUs can give a choice to the other party to select its arbitrators from the curated list provided the other party expressly waives its objection - unilateral appointment clauses in public-private contracts are violative of Article 14 of the Constitution of India for being arbitrary in addition to being violative of the equality principle under the Arbitration Act.**

[Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV) A Joint Venture Company - Supreme Court - Decided on 8.11.2024]



**Kingston Enterprises v. NBCC (India) Ltd. - Delhi High Court -
Decided on 16.10.2024**

The principal Employer invited tenders for construction of additional pre-fab structures for providing accommodation (6 officers block, 26 AC block & 120 men's barrack). The sub-contractor entered into an agreement with the principal Contractor to execute the construction works under a back-to-back contract, wherein principal Contractor retained primary responsibility for the execution of the work while engaging sub-contractors for on-ground execution. The sub-contractor felt aggrieved that despite fulfilling their contractual obligations and completing the work to the satisfaction of principal Contractor, the payments due under the sub-contract were withheld. The Court observed that payment clause stipulated in the General Conditions of Contract (GCC) of the sub-contract provided that the sub-contractor shall become entitled to payment only after principal Contractor has received the corresponding payments from the Employer for the work done by the sub-contractor. Further, the sub-contractor had willingly entered into the agreement, fully aware of the payment terms stipulated in the 'pay-when-paid' clause, and had accepted the payment terms with full knowledge of its implications. The binding nature of the 'pay-when-paid' clause connotes that the sub-contractor must wait until the principal Employer has fulfilled its payment obligations to the principal Contractor.



Challenge to the arbitration clause prescribed by the Central Organisation for Railway Electrification (CORE) in its contract. The Court dealt with the arbitration clause which provided that the three-member tribunal would be constituted by the Railways suggesting at least four names of retired railway officers and the Contractor would select two names out of the panel for appointment as their arbitrator. The General Manager (of the Railways) would thereafter, choose at least one person out of the two to be appointed as the Contractor's arbitrator and proceed to appoint the balance arbitrators from the panel or outside the panel and also indicate the presiding arbitrator. The Court observed that an arbitrator-appointment clause is likely to give rise to justifiable doubts as to the independence and impartiality of arbitrators since the Contractor is restricted to choosing its arbitrator from the panel of four arbitrators nominated by the party who is a party to the dispute and the Contractor's choice is further constrained because it is made subject to the decision of the General Manager who will choose one among the two persons suggested by the party. The Court observed that law does not prohibit parties to an arbitration agreement from maintaining a curated panel of potential arbitrators. However, if the PSUs make it mandatory for other parties to select their nominees from the curated panel of arbitrators, the very factor that the PSU is choosing only a certain number of persons as potential arbitrators and not others will raise a reasonable doubt in the mind of a fair-minded person. The PSUs may conceivably have nominated a person on the panel of potential arbitrators because they have a certain predisposition in favour of the former. This doubt is reinforced when the other party is given no choice but to select its arbitrator from the curated panel. The PSUs can give a choice to the other party to select its arbitrators from the curated list provided the other party expressly waives its objection. Since the activities of the government have a public element, it is incumbent upon the government to ensure that it enters into a contract with the public without adopting any unfair or unreasonable procedure. The Court concluded that a unilateral appointment clauses in public-private contracts are violative of Article 14 of the Constitution of India for being arbitrary in addition to being violative of the equality principle under the Arbitration Act. The validity of the arbitration clause providing for the procedure for appointment of arbitrators should be left to be decided by the arbitral tribunal in view of the doctrine of competence-competence.



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