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Navigating the Labyrinth: Indian Courts on One-Way Arbitration Clauses

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The primary purpose of an arbitration clause is to represent the parties' common agreement to resolve disputes arising out of their contractual relationship by arbitration. One-way arbitration clauses, however, serve this primary purpose while giving only one party the right to *commence* arbitration proceedings. Consequently, the other party only has the option of approaching a domestic court to pursue a claim.

In countries like India, banks and other financial institutions that engage in lending and trading activities on an international scale take on a high litigation risk. To dilute this risk and maintain profitability, they deny the benefits of opting for arbitration to their borrowers in an attempt to ensure that only legitimate claims against them are made before domestic courts. At the same time, they reduce the cost and risk involved in pursuing claims in different jurisdictions for themselves by compelling both parties to arbitrate only if *they* choose to initiate it. The clause's ability to dilute the bank/financial institution's litigation risk has been responsible for its growing popularity.

Despite this growing popularity, the enforceability of such clauses has been a matter of great controversy around the world, with courts in different countries taking divergent positions. In India, however, no clear stance can be culled out of conflicting judgments rendered by different High Courts.

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The Development of the English Position

The first reported judgment in England on the enforceability of one-way arbitration clauses is *Baron v. Suderland Corporation* 1966 (1) All ER 555, rendered in 1966. Here, the Court held that *"mutuality"* was necessary for a valid arbitration agreement, and defined it to mean that all parties to an agreement should have *"equal procedural rights."* Since one-way clauses gave only one party the right to commence proceedings, the court held that the clause gave the parties unequal procedural rights and was, therefore, void. In 1985, this position was reiterated in *Tote Bookmakers v. Development and Property Holding* [1985] 2 WLR 603.

A year after *Tote,* however, the position was changed in *Pittalis v. Sherefettin* [1986] 1 QB 868. Here, the court held that a one-way arbitration clause is a consequence of the nature of the commercial relationship between the parties, and would satisfy the mutuality requirement laid down in *Baron* as long as both parties were aware of and had freely consented to it. Consequently, such clauses continue to be enforceable in England today.

Enforceability in India

The Calcutta High Court has consistently upheld one-way arbitration clauses. In *Kedarnath Atmaram v. Kesoram Cotton Mill,* 1949 SCC OnLine 382 it first used the *"prior knowledge and consent of both parties"* requirement to find that one-way clauses would be valid as long as this condition was met. In 2002, the Court's decision in *S&D Securities v. Union of India*, 2005 124 CompCas 340 traced the development of English law in this regard and finally relied on the reasoning in *Pittalis* to uphold their validity. The Calcutta High Court's position is, therefore, consistent with the current position in most common law countries, as observed in the Singapore High Court's recent decision in *Dyna-Jet Pte Ltd v. Wilson Taylor Asia Pacific Pte Ltd.* [2016] SGHC 23.

Unenforceability in India

The only other Indian High Court that has decided upon the enforceability of such clauses is the Delhi High Court, which has adopted the opposite view. In *Bhartia Cutler Hammer Ltd. v. AVN Tubes,* 1995 (23) DRJ 672, the court first decided upon this matter, holding that the apparent inequality in rights given to parties under the clause would render it void.

Most recently, in *Lucent Technologies v. ICICI Bank*, MANU/DE/2717/2009 the Delhi High Court succinctly clarified its position. The court found, *first,* that such a clause would amount to an agreement in restraint of legal proceedings since it restricted the rights of only one party to seek an alternative form of dispute resolution (arbitration). On this basis, the Court held that the clause was void under the Indian Contract Act. The court then overlooked *Pittalis* and relied instead on *Tote* in holding that a one-way clause would, in any case, violate the *"mutuality"* requirement of a valid arbitration clause.

The argument for uniform enforceability in India

Notwithstanding the Delhi High Court's finding to the contrary, I would argue that the uniform Indian position should be that such clauses are enforceable since they fulfill the two broad conditions of a valid clause – fair terms and free consent from all parties to it.

First, one-way arbitration clauses are a consequence of the high litigation risk that financial institutions face. However, while the right to commence an arbitration reflects this risk, the terms of the arbitration itself are in no way tilted in favour of the financial institutions. This means that the fairness of a potential verdict is not affected at all.

Furthermore, the Delhi High Court's decision that such a clause amounts to an agreement in restraint of legal proceedings in *Lucent* is unfounded. The right to commence an arbitration is merely a contractual right, which can be distributed in an unbalanced manner between the parties as long as the parties to the contract consent to it. In any case, the unbalanced distribution of this right does not leave any party without a remedy in case of a breach, since the right to pursue a claim before a domestic court remains untouched.

Second, on procedural fairness. Here, the requirement of *"prior knowledge and consent"* laid down by the Calcutta High Court and contemporary English courts is of importance. This means that no blanket assumption of procedural unfairness can be made in such cases – the court must instead analyse this on a case-to-case basis. Thus, a one-way arbitration clause would be struck down on procedural grounds only if it can be established that there was a gross inequity of bargaining power that vitiated consent to the clause *in that particular case*. *See* Central Inland Water Transport Corporation v. Brojo Nath Ganguly, 1986 SCR (2) 278 for a discussion on procedural unconscionability of contracts in Indian law. As long as both parties to the clause validly consent to it, however, it should be enforced.

Conclusion

As noted above, no consensus has been arrived at on the enforceability of one-way arbitration clauses around the world. India has seen two High Courts consistently adopt opposite viewpoints on this issue. In the absence of a conclusive judgment from India's Supreme Court or any legislative direction specific to one-way arbitration clauses, this confusion will persist. Thus, while it is possible to argue that such clauses should be uniformly enforceable across India, it is prudent for financial institutions to avoid the use of such clauses in India for now.

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