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The End of the Unilateral Appointment Saga in India: Party Equality v. Party Autonomy—A Tale of Two Equals

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The subject of unilateral appointment of arbitrators arising from the Supreme Court of India's ("**Court**") three-judge bench decision in *Central Organization for Railway Electrification v. ECI SPIC SMO MCML (JV)* ("**CORE I**"), which held that one party's power to unilaterally appoint an arbitrator was counterbalanced by a choice provided to the counter party to choose from a panel of arbitrators, has been the subject of serious debate (*see* here, here, here, and here).

The Court's ruling in *CORE I* created a "conundrum" (discussed here) in terms of the mechanisms to appoint arbitrators resulting in several Indian High Courts either endorsing or differing from the principles laid down in *CORE I*.

Some authors have argued in favour of unilateral appointments on the ground that party autonomy must take primacy over other principles of arbitration. Whereas, others have criticized *CORE I* on the ground that the principle of party equality cannot be demoted to contractually agreed mechanisms to appoint arbitrators. Evidently, the debate on unilateral appointments has divided stakeholders on fundamental principles of arbitration *viz.* party autonomy and party equality.

In what appears to be the end of the saga on unilateral appointments, a Constitutional Bench, comprising five judges, in *Central Organization for Railway Electrification v. ECI SPIC SMO MCML (JV)* ("**CORE II**") has overruled its prior decision in *CORE I* and settled the contemporary debate on unilateral appointments in India.

The Conflict

The Court has been divided in its ruling on unilateral appointments prior to *CORE II*. In *Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd.* ("**Voestalpine**"), the Court struck down a unilaterally appointed panel of arbitrators on the ground that it provided excessive discretion in the appointment process to one party. However, the Court held that there was no embargo to appoint retired employees as arbitrators merely on the ground that they served the government or other Public Sector Undertakings ("**PSUs**").

In *TRF Ltd v. Energo Engineering Projects Ltd.* ("**TRF**"), the managing director of the buyer or his nominee was to preside as the sole arbitrator over any dispute. The Court struck down this arrangement, relying upon the doctrine of *qui facit alium facit per se*, and ruling that an ineligible

person could not appoint an arbitrator. Similarly, in *Perkins Eastman Architects DPC v. HSCC (India) Ltd.* ("**Perkins**"), the Court struck down the unilateral appointment of a sole arbitrator on the ground that an interested party could not chart out the course of the proceedings by having the power to appoint an arbitrator.

The Court's divided opinion culminated in *CORE I*, which upheld the arrangement of a public-private contract for the formation of a three-member tribunal from a PSU's unilaterally curated panel. The arrangement allowed the private party to select one arbitrator from the panel, whereas the PSU was to appoint the remaining arbitrators. The Court held that the power afforded to the PSU was counter-balanced by the private party's right to nominate one arbitrator, and consequently affirmed the arrangement.

A three-judge bench in *Union of India v. Tantia Constructions Ltd prima facie* disagreed with the Court's ruling in *CORE I*, and referred the matter to a five-judge bench of the Court.

CORE II Judgement

CORE II examined several principles of arbitration *viz.* party autonomy, independence and impartiality of arbitrators, equality of parties, the *nemo judex* rule and the doctrine of bias, and applied them in the context of unilateral appointments in public-private contracts and private contracts distinctly.

Majority Decision

Former Chief Justice of India Dhananjaya Y. Chandrachud, writing for himself and Justices. J.B. Pardiwala and Manoj Misra ("**Majority**"), held that although parties could decide the manner of arbitrator appointments under Section 11 of the Arbitration and Conciliation Act, 1996 ("**Act**"), such procedure would be subject to the requirements of independence and impartiality under Section 12 of the Act. The Majority observed that the Act balanced the *nemo judex* rule and party autonomy.

The Majority acknowledged that the challenge to an arbitrator's appointment could be expressly waived under Section 12[1)]

Section 12(5) of the Arbitration Act allows parties to waive, by express agreement, any objections they may have to an arbitrator's appointment. of the Act and United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985, depending on the necessity of parties. However, such an express waiver could only be made after a dispute arose between the parties. Consequently, it found that the doctrine of necessity, in exceptional circumstances, would yield to the *nemo judex* rule.

In arriving at its decision, the Majority interestingly noted that arbitration proceedings, being *quasi*-judicial in nature, were bound by the principles of equality under Article 14 of the Constitution of India ("**Constitution**") read with Section 18 of the Act. Article 14 of the Constitution guarantees individuals with the right of equality before law and equal protection of laws. Section 18 of the Act prescribes that parties are to be treated with equality and must be provided with a full opportunity to present their case. However, a plain reading of Section 18

indicates that it relates to the conduct of arbitral proceedings, *i.e.*, after the constitution of an arbitral tribunal, and not before.

The Majority, considering the above provisions, held that proceedings would be prejudicial to one party without formal equality even at the stage of arbitrator appointments. As such, the *nemo judex* rule and principles of natural justice, an intrinsic part of the right to equality under Article 14 of the Constitution were to be observed at the stage of arbitrator appointments as arbitration was a *quasi*-judicial process.

The Majority accordingly held that unilateral appointment clauses were contrary to the right of equal participation of parties under Section 18 of the Act, including the *nemo judex* rule and principles of natural justice. It further held that private-public contracts intrinsically contained an element of public interest and public policy. Acknowledging that although arbitration law is an autonomous law in itself, since the activities of the government have an element of "public interest," private-public contracts must adhere to the principles of equality enumerated under Article 14 of the Constitution. Consequently, these contracts should observe the right to equality under Article 14 of the Constitution in arbitration proceedings.

By holding that the right to equality under Section 18 of the Act applies even to the appointment of the arbitral tribunal, the Majority went beyond the plain reading of Section 18. Noting the state's obligation to observe constitutional principles, namely, equality and fairness, the Majority held that Article 14 would be a guiding force in appointing arbitrators under private-public contracts. In conclusion, the Majority reaffirmed its decisions in *Perkins* and *TRF* and prospectively overruled its decision in *Voestalpine* and *CORE I*.

Minority Decisions

Justices Hrishikesh Roy and Pamidighantam Sri Narasimha differed with the Majority and authored separate and dissenting opinions. Justice Roy agreed with the Majority on the ground that Section 18 of the Act was to be observed at all stages of arbitral proceedings. However, he disagreed with the Majority's application of constitutional principles on the ground that such principles could not imported into the Act. Justice Roy further held that unilateral appointment clauses were not *per se* barred under the Act, as Section 12(5) allowed parties to waive any right to challenge to an appointment on the grounds of independence and impartiality.

Justice Narasimha differed with the Majority and Justice Roy, and held that Section 18 did not apply to the appointment of arbitrators as the provision would only come into effect after an arbitrator has been appointed. He, however, concurred with Justice Roy that unilateral appointment clauses were not *per se* barred by the Act. He noted that parties had the option to challenge such clauses as being in violation of the Indian Contract Act, 1872 and the provisions of the Act. He also agreed with Justice Roy that any challenge to an arbitrator's appointment could only be restricted to the grounds enumerated under the Act, and not on the grounds of constitutional or administrative principles.

Conclusion

CORE II demystifies the conundrum created by *CORE I* by balancing the principle of party autonomy and party equality, and recognizing the unfair bargaining power the State and its

instrumentalities hold in private-public contracts. The decision leaves no room for ambiguity in the appointment of arbitrator, by holding that a tribunal's independence and impartiality cannot be demoted to parties' agreed upon procedure for the unilateral appointment of arbitrators.

CORE II's import of constitutional and administrative principles to arbitration law places a higher burden on parties to ensure that appointment procedures are fair. In doing so, it leaves the door slightly ajar for a party to challenge a tribunal's actions on constitutional law grounds insofar as Article 14 of the Constitution could potentially apply to (i) interpreting other provisions of the Act when the State is a party or (ii) the State and its instrumentalities at the stage of contract drafting and performance of obligations.

CORE II holds that the principle of party equality will apply even at the stage of appointment of arbitrators. The Court's reasoning appears to highlight the principle of party equality as the decisive rubber stamp, sanctioning any agreed mechanism to conduct arbitral proceedings which operates within the contours of legitimacy prescribed under the Act. In a move which inspires parties to redress their disputes through arbitration, *CORE II* takes one small step in India's endeavour to becoming a preferred arbitration hub.

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References

?1 Section 12 prescribes the grounds to challenge an arbitrator's appointment. It incorporates Schedules V and VII of the Act as possible grounds to disqualify an Arbitrator. Schedules V & VII of the Act bear a similarity to the International Bar Association's Guidelines on Conflict of Interest in International Arbitration. Orange and Red Lists respectively.
Section 12(5) of the Arbitration Act allows parties to waive, by express agreement, any objections they may have to an arbitrator's appointment.

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