Kluwer Arbitration Blog

From Bias to Balance: Indian Supreme Court's Stand on Unilateral Arbitrator Appointments

Anjali Anchayil (JSA, Advocates & Solicitors) and Aiman Singh Kler · Thursday, February 27th, 2025

A five-judge Bench ("Constitution Bench") of the Supreme Court of India ("SC") recently delivered a landmark judgment in ***Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV)*** ("CORE-II"), on the validity of unilateral appointment clauses. The SC held that such clauses cast justifiable doubts on the independence and impartiality of arbitral tribunals.

The judgment addresses various questions arising from the SC's earlier rulings, including ***TRF Limited v. Energo Engineering Projects Limited*** ("TRF"), ***Perkins Eastman Architects DPC v. HSCC (India) Limited*** ("Perkins") and ***Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV)*** ("CORE–I") (discussed here, here and here).

This post analyses the Constitution Bench's judgment in *CORE-II* and discusses whether it has put all controversies pertaining to unilateral appointment clauses to rest.

Majority Judgment in CORE-II

The judgment of the majority of the SC ("Majority Judgment"), authored by the former Chief Justice D.Y. Chandrachud, addresses three critical issues: (i) the validity of arbitration clauses that allow one party to unilaterally appoint a sole arbitrator or control the appointment through a curated panel; (ii) the applicability of the principle of equal treatment of parties to arbitrator appointments; and (iii) whether unilateral arbitrator appointment clauses in public-private contracts violate Article 14 (right to equality) of the Indian Constitution ("Constitution").

The Majority Judgment is based on a reading of three provisions of the Indian Arbitration and Conciliation Act, 1996 ("Act") – (i) Section 12 (grounds for challenge to arbitrators); (ii) Section 18 (equal treatment of parties); and (iii) Section 11 (appointment of arbitrators).

The majority noted that while party autonomy is a fundamental tenet of the Act, it is subject to other mandatory requirements such as impartiality and independence of the arbitrators, equality and fairness.

The majority was of the view that following the Arbitration and Conciliation (Amendment) Act, 2015, there are stricter standards for impartiality and independence under Section 12(5) read with the Seventh Schedule of the Act (incorporating the Red List in the IBA Guidelines on Conflicts of

Interest in International Arbitration 2014). Section 12(5) overrides any pre-existing agreements regarding arbitrator appointments, and parties can only waive its applicability after the dispute has arisen. This approach safeguards "real and genuine party autonomy" by empowering parties to make informed decisions post-dispute.

The majority then extended the principle of equal treatment in Section 18 of the Act as a broad principle to be complied with by parties even at the stage of arbitrator appointments. It was held that unilateral arbitrator appointments undermine this principle, tilting the balance in favour of the appointing party. In case of sole arbitrators, the appointing party's influence raises legitimate concerns of bias. Similarly, where arbitration clauses provide for one party to choose its nominees from a panel curated by the other party, impartiality and independence is curtailed.

In case of public-private contracts involving government entities, unilateral appointment clauses would also violate the non-arbitrariness standard in Article 14 of the Constitution. While public sector undertakings may maintain panels for administrative convenience, mandating the selection of arbitrators exclusively from such panels infringes the *nemo judex* rule.

The Dissenting Opinions

The dissenting opinions of Justices Hrishikesh Roy and P.S. Narasimha disagree with the Majority Judgment on: (i) the validity of unilateral appointment clauses; and (ii) the import of constitutional and administrative law principles pertaining to equality into arbitration law.

On (i), the dissenting judges opined that not all unilateral appointment clauses are inherently void, since the Act does not explicitly prohibit such appointments. If the arbitrator was otherwise eligible i.e. not conflicted under the provisions of the Act, such an appointment would be valid, even if done under a unilateral appointment clause. To hold otherwise would go against party autonomy.

Justice Narasimha's reasoning was based on the distinction between the arbitrator's obligation to act with objectivity and impartiality and the parties' obligations to constitute an independent and impartial arbitral tribunal. He held that Section 18 pertains to the arbitrator's obligations, and therefore, cannot be extended as a general equality principle to give parties' equal opportunity in the constitution of the tribunal.

Justice Roy, however, extended Section 18 to all stages, including arbitrator appointments. Instead, he relied on the distinction between "ineligibility" under Section 12 and "unilateral appointments". He noted that the basis for the decisions in ***Voestalpine Schienen GmbH v. Delhi Metro Railway Corporation Limited***, *TRF* and *Perkins* was the arbitrator's ineligibility for appointment, and they do not per se prohibit unilateral appointments.

Both judges also cautioned against judicial intervention during appointment of arbitrators under Section 11 of the Act. Justice Narasimha noted that the court's discretion under Section 11(8) to ensure the constitution of an independent and impartial arbitral tribunal is not to be construed as a blanket ban on unilateral appointments. Instead, courts should consider the validity of a unilateral appointment clause only when an application under Sections 11(6), 14 (arbitrator's failure or impossibility to act) or 34 (setting aside arbitral awards) is before it, and not void unilateral appointments "as an advanced ruling". Justice Roy notes that the Act contains adequate provisions (Sections 12-15) to address any concerns regarding impartiality or independence of arbitrators, and

the court should intervene under Section 11(6) only when there is "a complete lack of consensus".

On (ii), both observed that the parties' obligation to constitute an independent and impartial arbitral tribunal should be founded in arbitration law rather than constitutional and administrative law principles. This would be consistent with the principles of party autonomy and minimal judicial intervention.

Impact of the Judgment

Both the Majority Judgment and the dissenting opinions consider the balance between ensuring arbitral independence and impartiality and upholding principles of party autonomy and minimal judicial intervention. They acknowledge that the Act does not prohibit unilateral appointments. But by extending the fundamental principles underlying Sections 11, 12 and 18, the Majority Judgment finds sources for equality and procedural fairness in arbitral appointments in existing provisions of the Act.

The majority held that party autonomy is to be circumscribed to ensure arbitral independence and impartiality. In contrast, the dissenting opinions found that Section 12 of the Act acts as sufficient check on unilateral appointments, with the waiver requirement in Section 12(5) giving due regard to party autonomy. While this is a more nuanced position, the Majority Judgment provides a simpler approach to dealing with unilateral arbitral appointments – and one that could avoid situations where parties raise issues of bias to scuttle arbitral proceedings midway.

The majority's approach is also consistent with other jurisdictions internationally. Section 5 of the Federal Arbitration Act (United States) emphasises adherence to the appointment procedure agreed upon by the parties. US courts have, however, invoked the doctrine of unconscionability to invalidate arbitration agreements deemed unfair or oppressive. Similarly, arbitration legislations and judicial pronouncements in jurisdictions such as the Netherlands, Germany and Spain, explicitly protect against unequal arbitrator appointments by permitting court intervention where one party is disadvantaged, or by mandating equal treatment in arbitrator selection.

The majority has given prospective applicability to its directions pertaining to three-member arbitral tribunals to avoid disruption to completed and ongoing arbitration proceedings. While this is pragmatic, the judgment's impact on unilateral appointments of sole arbitrators is less clear. The Majority Judgment holds *TRF* and *Perkins* to be covering the law pertaining to such appointments. But even after these decisions, Indian High Courts have set aside awards passed by unilaterally appointed sole arbitrators, whereas others have upheld unilateral appointments where the sole arbitrator was otherwise eligible under Section 12 read with the Seventh Schedule (see here). Parties may rely on the *CORE-II* judgment to raise new objections in pending challenges to arbitral awards or contest the appointment of the sole arbitrator in ongoing arbitration proceedings.

The majority leaves other issues unresolved. While it identified unilateral appointment clauses as exclusionary and contrary to the principle of equality, it stopped short of declaring them void. Instead, the Majority Judgment permits parties to waive objections to bias after the dispute has arisen. Similarly, in public-private contracts, such clauses are held to be violative of Article 14 of the Constitution but remain subject to waiver. The question then is, are unilateral appointment clauses void, or voidable? The Majority Judgment does not provide a clear answer.

Similarly, the majority notes that at the Section 11 stage, courts should only consider the existence of the arbitration agreement, leaving questions of validity – including the appointment procedure – to the arbitral tribunal. Parties would have approached the court under Section 11(6) for failure of their agreed appointment procedure, including in cases involving unilateral appointments. If the court defers the issue of validity of the clause to the arbitral tribunal, it offers little recourse to the parties who would then have to raise the challenge before the arbitral tribunal. Instead, courts must necessarily consider the validity of such clauses and appoint arbitrators accordingly.

The cautionary observations in the dissenting opinions against importing constitutional law principles into arbitration are well-founded, as they could later be used to justify judicial intervention at other stages of the arbitration. One needs to only consider the judgment in *Lombardi Engineering v. Uttarakhand Jal Vidyut Nigam Limited* where the arbitration clause was invalidated on the basis of arbitrariness under Article 14.

The judgment follows the release of the Guidelines for Arbitration and Mediation in Contracts of Domestic Public Procurement by the Department of Expenditure, Ministry of Finance, in June 2024, signaling the Indian government's shift away from arbitration. The judgment's findings on arbitration clauses involving unilateral appointments or selections from a curated panel, may reinforce this shift. Ultimately state-owned entities must recognise the public interest in fostering a fair and transparent process in all procedural aspects of arbitration.

Conclusion

CORE-II strikes a critical balance between party autonomy and procedural fairness and transparency in arbitral tribunal composition, further harmonising India's arbitration framework with global standards. However, unresolved questions, such as the voidability of unilateral appointment clauses and procedural safeguards around waivers, underscore the need for continuous refinement. Addressing these gaps will be essential to augment India's credibility as a pro-arbitration jurisdiction.

This entry was posted on Thursday, February 27th, 2025 at 8:12 am and is filed under Appointment of arbitrators, India
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.