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Unilateral Appointment of Arbitrators: An Analysis of the CORE II Decision

Aziz Umar

B.A LL.B, Faculty of Law, Jamia Millia Islamia University, New Delhi

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Abstract

The issue of the Unilateral Appointment of Arbitrators becomes the matter the sparks deliberations among the Indian legal community and especially among the stakeholders of Arbitration jurisprudence. The Hon'ble Supreme Court in Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV)1, (CORE II pronounce the inadmissibility of unilateral appointment of Arbitrators. This decision can revolutionize the Indian Arbitration Jurisprudence by balancing party autonomy and the principle of equal treatment of parties in Arbitral proceedings. The Article highlights the recent Supreme Court Judgment under CORE II in light of Arbitration & Conciliation Act, 1996 by illustrating the statute key provision under Section 4, 12(5) and 18. The Article also illuminates on the need of balancing party autonomy with that of mandatory provisions and principle of natural Justice. The Article also sheds light on the evolution of the idea of fairness in the Arbitration proceedings through references to landmark judgments such as Voestalpine Schiener GmbH v. Delhi Metro Rail Cooperation Ltd., TRF Ltd v. Energo Engineering Projects Ltd, Perkins Eastman Architects DPC v. HSCC (India) Ltd., with others. The Article concluded by providing a critical analysis of CORE II Judgements and its possible implications on the Arbitration Jurisprudence in India.

Keywords: *Unilateral Appointment, Party Autonomy, Equal Treatment, Mandatory Provisions, Bias Doctrine, Public Private Contracts.*

Introduction

The problem of appointing Independent and Impartial Arbitrators has become a core issue in enforcing and ensuring a free and fair arbitration procedure. Moreover, Unilateral appointments of arbitrators, especially from panels created by Government PSUs, threaten the fairness of arbitration proceedings. The other important and interesting thing is the change we encounter in approaches before and after the 2015 Amendment.

The Supreme Court, before the enactment of the Arbitration and Conciliation (Amendment) 2015, generally upheld the unilateral appointment clauses in arbitration agreements, emphasising party autonomy as fundamental to any Arbitration Procedures. The 2015 Amendment addressed these concerns by tightening the standard for arbitrator appointments to align with international norms. However, this Amendment does not address the problem of appointment of Arbitrators in Public-Private contracts where an individual or entity with an interest in the dispute can act as an arbitrator. This challenges the sanctity of Arbitral proceedings. This article critically examines this issue in light of the Arbitration and Conciliation Act, 1996, relevant judicial precedents, and the recent decision of the Hon'ble Supreme Court.

An Analysis of the Verdict on CORE II:

I. Overview:

Recently, 5 Judge Bench of the Apex Court Central Organisation for ***Railway Electrification v. ECI SPIC SMO MCML (JV)1, (CORE II)***[1] tried to address the major setback in Indian Arbitration Jurisprudence, i.e. Unilateral appointments of Arbitrators which was challenging the impartiality and Independence in Arbitral proceedings.

The following issues were framed for the determination of the Supreme Court in CORE II11:

(i) Is an appointment process that allows a party who has an interest in the dispute to unilaterally appoint a sole arbitrator, or curate a panel of arbitrators and mandate that the other party select their arbitrator from the panel is valid in law?

(ii) Does the principle of equal treatment of parties apply at the stage of the appointment of arbitrators?

Whether an appointment process in a public-private contract which allows a government entity to unilaterally appoint a sole arbitrator or majority of the arbitrators of the Arbitral Tribunal is violative of Article 14 of the Constitution?

[1] 2024 SCC OnLine SC 3219.

II. Principles Enshrined under Arbitration Act

Mandatory Provisions:

1. Section 4 of Arbitration & Conciliation Act,1996 [2] highlights the right of either party to waive or derogate the procedure of their Arbitral proceedings. Meanwhile, it also differentiates between non-mandatory and Mandatory provisions.

2. Section 4 of Arbitration & Conciliation Act,1996 [3] taking inspiration from the principles established in Modal Law makes distinctions between Mandatory and Non-Mandatory Provisions and states that Mandatory provisions cannot be waived by any of the parties to Arbitral procedure. [4]

3. However, Arbitration & Conciliation Act,1996 does not provides list of provisions which cannot be waived by the Arbitrators. The reason is that they believe in General phenomena in determining the ineligibility of the Appointment of an Arbitrator rather than specifically prescribing the list.

4. Moreover, it is also argued that the unilateral appointment of Arbitrator is against and a violation one of the most important mandatory provisions enshrine in Section 18 of Arbitration & Conciliation Act,1996 i.e. principle of equal treatment of parties. [5]

Party Autonomy

1. The concept of party autonomy is defined under the Arbitration & Conciliation Act,1996, which states that parties to the Arbitration agreement encounter any dispute can redress it through mutually determined procedure by both the party.

2. Although parties inevitably have full freedom to decide their Arbitral procedure, the 246th law commission reports explicitly mention that party autonomy shall not override the principle of impartiality and fairness in Arbitral procedure. [6]

3. However, there are various provisions in the Arbitration & Conciliation Act, 1996, which vividly enshrines the principle of party autonomy such as Section 10 which powers party to dispute to determine the numbers of Arbitrators and Section 11(2) which provide autonomy to both the party to decide on the Arbitral procedure. [7]

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[2] Arbitration and Conciliation Act, No. 26 of 1996, § 4 (India).
[3] Id. § 4
[4] U.N. Comm'n on Int'l Trade L., UNCITRAL Model Law on International Commercial Arbitration, U.N. Doc. A/40/17, annex I (1985).
[5] Arbitration and Conciliation Act, No. 18 of 1996, § 28 (India).
[6] Law Comm'n of India, Report No. 246, Amendments to the Arbitration and Conciliation Act, 1996 (2014).00:51 AM
[7] Arbitration and Conciliation Act, No. 26 of 1996, § 11(2) (India).

Doctrine of Bias

1. The Hon'ble court taking reference from the case of A.K. Kraipak v. Union of India[8] where it was held that in order to determine the biasness in the process of appointment there shall be reasonable ground for believing that that appointment is likely to be partial most probably due to personal advantage of appointer.

2. The Court while specifically determining the applicability of doctrine of Bias in context of appointment of Arbitrator states that that Arbitrator will not explicitly disqualified if it fall under the purview of seventh schedule of Arbitration & Conciliation Act,1996 but either party having justifiable doubt in appointment procedure or Arbitrator impartiality and independence not need demonstrate this but only have to proof reasonable or possible doubt on Arbitrator impartiality and independence.

Principle of Equality in Arbitral Proceedings

1. Section 18 of Arbitration & Conciliation Act,1996[9] clearly states that the Arbitral tribunal shall treat all parties equally and also give them equal opportunity, complying with the principle of Natural justice. The Court, by relying on the case of Union of India v. Vendata Ltd.[10] Hon'ble Justice Malhotra strongly advocated that the principle of equal treatment of parties is one of the most significant mandatory provisions enshrined under statute on which the entire structure of Arbitration law is based.

2. The court also held that the idea that parties shall be treated equally is not merely applicable to arbitral tribunal but also can be applied at all stages of Arbitral proceedings, including in case of appointment of Arbitrators. The main reason for this decision was that it is both morally and legally unethical for any court of law to recognize or enforce any unfair and biased agreement, even if by the free will of both the parties.

III. Evolution of the Principle of Fair Proceedings in Arbitral Proceedings:

248th Law Commission Report:

The 248th Law Commission Report[11] in 2014 was entrusted with the work of revisiting the provisions of the Arbitration Act and thereby observed several inadequacies in the Functioning of the Act, especially in the appointment process of arbitrators. After the Law Commission submitted

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[8] A.K. Kraipak v. Union of India, (1969) 2 S.C.C. 262 (India).
[9] Supra note 1, at §18
[10] Union of India v. Vedanta Ltd., (2020) 10 S.C.C. 1 (India)
[11] Supra note 6 at 248th law commission

this report, consequently, the Government bought the 2015 amendment in this Act, which brought several reforms, including a crucial amendment in Chapter III of part 1 of the Act, which deals with the Appointment of Arbitrators.

Recommendations of the T.K. Viswanathan Expert Committee

1. The Government of India in June 2023 contested one 15 members panels headed by Former Legal secretory T.K Vishwanathan and 14 other expert to review the intricacies present in the Arbitration Conciliation Act,1996. [12]

2. The Expert Committee, after analysing the judicial developments, recommended that, notwithstanding any agreement to the contrary, the appointment of arbitrators should require the consent of both parties. To preserve party autonomy, the Expert Committee recommended that this requirement may only be waived by the parties by an express agreement, after disputes having arisen between them.

3. The committee advocated an urgent need to make a statutory body for the purpose of Appointment of Arbitrators to ensure the independence of the institution. And also highlights the need to minimise the Court's interventions at the very first stage of the appointment

4. However, Expert Committee in the Draft Amendment Bill,2024[13] have contributed to a lack of consensus, underscoring the need for clear guidance on balancing party autonomy, with the principles of fairness in arbitrator appointments — a gap that the Supreme Court's decision in *CORE* eeks to address.

IV. Judicial Trends:

1. Voestalpine Schiener GmbH v. Delhi Metro Rail Cooperation Ltd.

In this case, the issue raised before the Two Judge Bench was whether the panel of Arbitrator prepared by Defendant Cooperation has violated Section 12 of the Arbitration & Conciliation Act,1996. The Court in this case, held that Section 12(5) read Seventh Schedule of the Act does not prohibit explicitly or implicitly to Retired employee of government for serving as an employee in the arbitration unless there must be presence of the possibility that appointed Arbitrator can act partially or discriminately while serving in Tribunal. The Court also stated that merely a slight likelihood of Bias from the Arbitrator of a highly qualified and experienced person cannot make

[12] Report of the Expert Comm. Members on Arbitration Law, at [page number] (2024), https://www.livelaw.in/pdf_upload/report-of-the-expert-committee-members-on-arbitration-law-2-526205.pdf.
[13] Ministry of Law & Just., Gov't of India, 2024 Draft Arbitration Amendment Bill, at [page number] (2024), https://www.scobserver.in/wp-content/uploads/2025/02/2024-Draft-Arbitration-Amendment-Bill.pdf

him an Arbitrator. The court, by advocating the creation of a Broad-based panel, implicitly allowed any party to curate the panel of Arbitrators and mandate another party to choose from them only.[14]

2. TRF Ltd v. Energo Engineering Projects Ltd

The important principle established in this case was that the Court held that a person who becomes ineligible to be appointed as an arbitrator cannot nominate any other individual as an Arbitrator. The rationale given by the Court while delivering judgment was that it would be false and unethical in Law that a person who is not eligible to become an Arbitrator nominate another person as sole Arbitrator. [15]

3. Perkins Eastman Architects DPC v. HSCC (India) Ltd. (2019)

The court first held that any person who has an interest in the dispute or in the outcome of the dispute, explicitly or implicitly, cannot unilaterally appoint the core arbitrator at any circumstances. Secondly, the Court held that when any agreement or contract has in Arbitration clause, both the parties have given autonomy to appoint or nominate their own Arbitrators in case of dispute. These are completely different situations and there cannot be any question on the same, and it is completely lawful.[16]

4. Central Organization for Railway Electrification v. ECI-SPIC-SMO-MCML (JV) A joint Venture Company (2019) CORE-I

The Court, while examining the first issue, relied on what was held in Voestalpine, i.e. that section 12(5) does not in any way restrict the appointment of a retired Government employee as an Arbitrator if it fulfils all qualifications of a good Arbitrator.

However, while examining the second issue the Court held that the precedent laid down in the TRF and Penkins case cannot apply in this case that although General manager impacted explicitly impacted by the outcome of dispute but is ineligible to become the Arbitrator but eligible to appoint the arbitrator because this power of general manager is counterbalanced by the choices provided to other party to choose Arbitrator from the list of the panel thus General manager shell appoint one out of the contractor nominee. [17]

5. Union Of India v. Tantia Construction Limited

[14] Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd., (2017) 4 S.C.C. 665 (India).
[15] TRF Ltd. v. Energo Eng'g Projects Ltd., (2017) 8 S.C.C. 377 (India).
[16] Perkins Eastman Architects DPC v. HSCC (India) Ltd., (2019) SCC OnLine SC 1517 (India).
[17] Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV) A Joint Venture Company, (2020) 14 S.C.C. 712 (India)

Court in this case interestingly disagree with the Core-I Judgment for the simple reason that as per the court According to Section 12(5) or seventh schedule of the Act if any person becomes ineligible to act as an Arbitrator due to his/her interest in outcome of dispute also debars from appointing any arbitrator to any nominee from the panel. This case compelled to review this provision again and thus become reason of constitutional bench in the present case.[18]

V. Court Ruling in CORE II

1. The Supreme Court emphasized the Principle of Equality of treatment among both the parties, especially in appointing the impartial Arbitrators.

2. The Apex Court held that the Appointment of the Sole Arbitrator by only one party underestimated the Fairness in the Arbitral proceedings and can also enhance the chance of partiality and Biasness and challenge the Institution transparency.

3. Court recognises that the Party autonomy as essential ingredient of Arbitration proceedings but cannot be bought for the cost of partiality and biasness established as the consequences of appointment of sole Arbitrator merely by one party. [19]

4. The Court also held that PSUs may form a panel of Arbitrators but cannot compel the other party to choose from that particular panel.

Divergent Views:

1. Hon’ble Justice Narasimha, giving a minority judgment, held that Section 18 (deals with equal treatment of parties) shall not apply at the stage of appointing the Arbitrator panel. However, it only puts an obligation for Arbitral tribunal to treat each party equally.

2. On the other hand, Justice Roy, delivering majority judgment, held that the principle of equality is ingrained in the Arbitration procedure and thus applies even at the stage of the appointment of Arbitrators. The objective behind this decision is to ensure impartiality and fairness.[20]

Conclusion

[18] Union of India v. Tantia Constr. Ltd., (2021) 3 S.C.C. 548 (India)
[19] Supreme Court on Unilateral Appointment of Arbitrator & Independence, SCC Online Blog (Nov. 14, 2024), https://www.scconline.com/blog/post/2024/11/14/supreme-court-unilateral-appointment-arbitrator-independence/.
[20] Revisiting Unilateral Arbitrator Appointments: The Supreme Court’s New Stance on Fairness and Equality, Cyril Amarchand Mangaldas Blog (Nov. 2024), https://disputeresolution.cyrilamarchandblogs.com/2024/11/revisiting-unilateral-arbitrator-appointments-the-supreme-courts-new-stance-on-fairness-and-equality/.

From the comprehensive analysis of the CORE II Judgment of Supreme Court it can concluded that maintaining the Transparency and Accountability in Arbitral proceeding is very important to ensure the fair delivery of Justice to both the disputed parties. The unilateral appointment of an Arbitrator by one party can challenge the sacredness of Justice delivery agency. The Judgment even though recognizing the party autonomy essence of an Arbitral proceedings but meanwhile advocated to ensure its balance in fairness and equal treatment of either of the parties. Therefore, this judgment of Hon'ble court should be welcomed by all stakeholder. However, at the same time there is the urgent need to enact this principle enshrined in the judgment in the form statute to ensure its implementation in the best possible manner.

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