November 2024

Constitution Bench of Hon'ble Supreme Court of India holds that unilateral curation of arbitral tribunals is invalid

On November 8, 2024, a 5 (five) judge bench of Hon'ble Supreme Court of India ("**Supreme Court**"), consisting of Justice Dr. D.Y. Chandrachud, Justice Hrishikesh Roy, Justice P.S. Narasimha, Justice J.B. Pardiwala and Justice Manoj Misra, delivered their judgment in the matter of ***Central Organisation for Railway Electrification vs. M/s ECI-SPIC-SMO-MCML (JV) A Joint Venture Company***[1], holding, *inter alia*, appointment of arbitrators from a unilaterally curated panel, as bad in law. However, this judgment will apply prospectively, as far as the appointments of 3 (three) member arbitral tribunals are concerned.

Brief facts

This judgment arose out of reference after a 3 (three) judges' bench in *Union of India vs. Tantia Constructions Limited*[2] ("**Tantia**") *prima facie* disagreed with the judgment of another 3 (three) judges bench[3] ("**CORE 3J**"), and hence, requested Hon'ble Chief Justice to constitute a larger bench.

In CORE 3J, the arbitration clause provided for an arbitral tribunal as a panel of 3 (three) retired railway officers. The Railways were to suggest 4 (four) names to the contractor, out of which the contractor could choose 2 (two), after which the general manager of Railways would appoint at least 1 (one) out of those 2 (two) as the contractor's nominee on the arbitral tribunal and appoint the remaining arbitrators unilaterally. The Supreme Court observed that the Railways' right to form the arbitral tribunal was 'counterbalanced' by the contractor's power to choose 2 (two) out of the 4 (four) names suggested by the Railways, one of which will be appointed to the arbitral tribunal and hence upheld the arbitration clause.

In Tantia, the Supreme Court disagreed with the above conclusion on the ground that the appointments could not be valid when the appointing authority itself was incapacitated of referring the matter to arbitration. While the Supreme Court in Tantia does not say so in as many words, it appears that such perceived incapacitation would arise due to the principle against unilateral appointment of arbitrators enunciated in judgments such as *TRF Ltd vs. Energo Engineering Projects Ltd.*[4] ("**TRF**") and *Perkins Eastman Architects DPC vs. HSCC (India) Ltd.*[5] ("**Perkins**"). The said principle says that when a person is ineligible to appoint an arbitrator or be an arbitrator, such as a person having an interest in the dispute, cannot nominate another person as an arbitrator.

[1] Civil Appeal Nos. 9486-9487 of 2019
[2] 2021 SCC OnLine SC 271
[3] *Central Organisation for Railway Electrification vs. M/s ECI-SPIC-SMO-MCML (JV) A Joint Venture Company,* (2020) 14 SCC 712
[4] (2017) 8 SCC 377
[5] (2020) 20 SCC 760

Issues

1. Whether an appointment process which 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?
2. Whether the principle of equal treatment of parties applies at the stage of the appointment of arbitrators?
3. 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 of India ("**Constitution**")?

Findings of the Supreme Court

The Supreme Court answered the issues as follows:

For ***Issue (1)***, the Supreme Court with a 3:2 majority held:

1. in case of sole arbitrators, Supreme Court agreed with TRF and Perkins, to hold that the unilateral appointment hinders equal participation of parties; and
2. in case of curating a panel of 3 (three) arbitrators, the Supreme Court held that mandating the other party to select an arbitrator from a unilaterally pre-decided list also violates equal treatment of parties. However, observing that this position of law will disturb innumerable commercial bargains, the Supreme Court prospectively overruled earlier judgments[6] which held in favour of unilateral curation of arbitral tribunals. Hence, the present judgment is only prospectively applicable to the appointments of 3 (three) member arbitral tribunals.

Before concluding on this issue, the Supreme Court did acknowledge an exception in the form of an 'express waiver' under Section 12(5) of Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"), after the disputes have arisen. Such express waiver at the time of executing the agreement would not fall under the above exception.

Justice Roy dissented to observe that unilateral appointment of arbitrators is permissible, since there is a distinction between 'ineligible' and 'unilateral' appointments, wherein only the former is invalid as per the Seventh Schedule to Arbitration Act. Justice Narsimha also dissented to hold that instead of *a priori* declaration that arbitration agreements with unilateral appointments are invalid, a court can examine the issue of impartiality and independence of an arbitral tribunal while deciding an application under Section 11 or 14 or 34 of Arbitration Act, in light of the principle of party autonomy.

For ***Issue (2)***, the Supreme Court with a 4:1 majority, held that the principle of equal treatment of parties applies at all stages of the arbitration, including the stage of appointment of arbitrators.

Justice Narsimha dissented to hold that the said principle applies during the conduct of arbitral proceedings and not at the stage of appointment.

For ***Issue (3)***, the Supreme Court, with a 3:2 majority, held that unilateral clauses in public-private contracts are violative of Article 14 of Constitution, for being arbitrary. The Supreme Court reasoned that an arbitral tribunal as a quasi-judicial body was subject to inherent principles of equality and fairness.

Justice Roy dissented to observe that public law principles should not be imported into arbitration, since the obligations of fair treatment should be grounded in Arbitration Act. Justice Narsimha dissented to observe that it is not necessary to apply public law principles of Constitution, as the duty to constitute an independent and impartial tribunal can be sufficiently sourced from the Arbitration Act and the Indian Contract Act, 1872.

[6] *Voestalpine Schienen GmbH vs. Delhi Metro Rail Corporation Ltd.*, [2017] 1 SCR 798; *Central Organisation for Railway Electrification vs. M/s ECI-SPIC-SMO-MCML (JV) A Joint Venture Company*, (2020) 14 SCC 712.

Conclusion

In light of the ruling by the majority led by Justice Chandrachud, it is clear that the principle of equality of parties applies even at the stage of appointment of arbitrators. According to the majority, unilateral appointments are bad in law not only because they breach the principles of equality under the Arbitration Act but also because they are violative of the Constitution (public-private contracts). This judgment reaffirms the position laid down by the Supreme court in TRF and Perkins. It also holds that in the case of appointment of a 3 (three) member panel, mandating 1 (one) party to select its arbitrator from a curated panel of potential arbitrators is against the principle of equal treatment of parties and a party cannot be mandated to select from a unilaterally curated panel. This law relating to unilaterally curated panels, however, became applicable from November 8, 2024.

This judgment is landmark since it clarifies the position of law applicable on unilateral curation of arbitral tribunals with 3 (three) members. The Supreme Court also accommodated the principle of party autonomy and allowed for obtaining an express waiver after the disputes have arisen, from the other party in case it is asked to choose from a unilaterally curated list of arbitrators.

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