Levelling the Playing Field: Supreme Court Decides on Unilateral Appointment of Arbitrators

INTRODUCTION

On November 8, 2024, a five-judge bench of the Supreme Court of India considered the issue of unilateral appointment of arbitrators and selection of arbitrators from a panel of arbitrators curated by Indian public sector undertakings ("**PSUs**"), and delivered its judgment in *Central Organisation for Railway Electrification* v. *ECI SPIC SMO MCML (JV)* ("**Decision**").

PSUs and other state-owned enterprises in India have historically stipulated in their commercial contracts that arbitrators must be chosen from a panel or list pre-determined by the PSU. Such arbitrators can sometimes be serving or retired employees of the PSU in question or of other PSUs, government departments or organizations affiliated with the Government. State-owned enterprises, often, have a greater bargaining power than private parties and this stipulation has led to the troubling consequences of (i) private parties having little autonomy in the choice of arbitrators in public-private contracts, and (ii) a perception that disputes arising out of such contracts may be decided by arbitrators whose independence is potentially questionable.

A party's freedom to nominate an arbitrator of its choosing is a cornerstone principle of arbitration and is one of the pillars of the UNCITRAL Model Law, from which India's Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") draws heavily. The practice of presenting a party with a *fait accompli* as to choice of arbitrator has been the subject of criticism and conflicting court rulings in India.

The Supreme Court has now resolved the controversy and ruled that unilateral appointments of arbitrators, including in the public-private contracts, are invalid. In this note, we discuss the key findings of the Decision and analyze the challenges which may arise following the Decision.

KEY FINDINGS

Limitations on party autonomy

The Supreme Court recognizes that the principle of party autonomy is fundamental to the constitution of an arbitral tribunal, and is reflected in Section 10 and Section 11 of the Arbitration Act. The Supreme Court also recognizes that party autonomy is limited by Section 12 (independence and impartiality of arbitral proceedings) and Section 18 (equal treatment of parties) of the Arbitration Act, and in case of a conflict, the mandatory provisions of the Arbitration Act prevail over any agreement between the parties as to procedure of appointment of arbitrators.

Equality at the stage of appointment of arbitrators

The Supreme Court holds that the independence and impartiality of arbitral proceedings can be effectively enforced only if parties participate equally at all stages of an arbitration, including at the stage of appointment of arbitrators. The Decision emphasizes that in the absence of formal equality at the stage of appointment of arbitrators, parties may not have an equal say in the appointment of an unbiased arbitral tribunal. Equal treatment of parties at the stage of appointment of an arbitrator ensures impartiality during the arbitral proceedings.

Unilateral appointment of a sole arbitrators violates constitutional principles of equality

Procedural equality is a necessary concomitant to an impartial adjudicatory process. The Decision holds that the unilateral appointment of an arbitrator by a person having a financial interest in the outcome of the arbitral proceedings will give rise to justifiable doubts on the independence and impartiality of the arbitrator. In this regard, the Decision confirms previous decisions of the Supreme Court in *TRF Limited* v. *Energo Engineering Projects Limited* and *Perkins Eastman Architects DPC* v. *HSCC (India) Limited*, which dealt with unilateral appointment of arbitrators.

Unilateral appointment of arbitrators in public-private contracts

The Decision notes that the Arbitration Act does not treat private and State parties (such as PSUs) differently, and that the State has to ensure that its contracts with private parties do not involve unfair or unreasonable procedures, including one-sided procedures for appointment of arbitrators. According to the Supreme Court, unilateral appointment of arbitrators violates the mandate of treating parties equally both under Article 14 of the Constitution of India and Section 18 of the Arbitration Act.

The Decision also deprecates the practice of PSUs insisting that the private party select an arbitrator from a panel of potential arbitrators curated by that PSU or by the State and

views this practice as casting doubt as to the arbitrator's independence. Accordingly, the Decision holds clauses that require parties to select arbitrators from a fixed panel to be invalid. Curated panels can be offered as a choice to private parties, provided the party choosing expressly waives the issue of bias in accordance with Section 12(5) of the Arbitration Act, which permits a party to waive the applicability of the provision by an express agreement in writing after the dispute has arisen (as opposed to at the time of entering into the contract).

In conclusion, the Decision holds that:

1. An arbitration clause allowing a party to unilaterally appoint a sole arbitrator excludes the other party from equal participation in the process of appointment of arbitrators.

2. An arbitration clause in a public-private contract which mandates unilateral appointments of arbitrators violates Article 14 of the Constitution of India (which requires the State and its entities to act fairly even in their contractual obligations);

3. An arbitration clause requiring a party to select its arbitrator only from a curated panel of arbitrators violates the principle of equality;

4. PSUs are not prohibited from curating a panel of arbitrators. However, an arbitration clause cannot mandate that the other party selects its arbitrator from the panel curated by the PSU;

5. Parties can waive the allegation of bias against an arbitrator unilaterally appointed by one of the parties provided the waiver is by an express agreement in writing *after* the dispute has arisen; and

6. The Decision applies prospectively to three-member tribunals.

POTENTIAL FUTURE CHALLENGES

The Decision brings much-needed clarity on the issue of unilateral appointments of arbitrators, a vexed topic, which has seen conflicting court decisions. The Decision seeks to balance party autonomy with the equal treatment of parties not only in the arbitration process, but in terms of contract formation and negotiation, particularly between public and private entities, where the bargaining power is often skewed in favor of the public entity.

However, there are certain challenges which may be faced in the future.

- As set out above, the Decision applies prospectively to the appointment of three-member tribunals. However, the distinction created by the Decision (i.e., of applying prospectively from the date the Supreme Court pronounced its decision) is artificial,

and there may be cases where although the tribunal was appointed from a curated panel shortly prior to the Decision, no proceedings have commenced before such a tribunal. This is an example of a situation in which we may expect applications to the High Courts or the Supreme Court to invalidate such arbitration proceedings and to reappoint tribunal members in compliance with the Decision.

- The Decision comes on the heels of the Guidelines for Arbitration and Mediation in Contracts of Domestic Public Procurement issued by the Department of Expenditure, Ministry of Finance, Government of India ("**GOI Guidelines**") in June 2024, which signals a shift in the Government of India's preference for using arbitration as a method of dispute resolution. The GOI Guidelines state that the Government of India's "*actual experience*" in using arbitration has been "*unsatisfactory*" and recommends that arbitration should not be "*routinely or automatically*" chosen as a dispute resolution mechanism in procurement contracts. In view of the invalidity of appointment procedures in arbitration clauses mandating (i) unilateral appointment of arbitrators; or (ii) appointment of an arbitrator by the other party from a curated panel, the Decision may add one more reason for state-owned entities to turn away from arbitration as a preferred method of dispute resolution in public-private contracts. However, the Decision addresses a significant concern surrounding the impartiality of arbitral tribunals adjudicating disputes involving state owned entities. Sooner, rather than later, these entities must acknowledge that there is a public interest in the existence of a fair adjudicatory process and this is a desirable objective which deserves their support.

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