APPOINTMENT OF ARBITRATORS: INTERPLAY BETWEEN PARTY AUTONOMY AND PRINCIPLE OF EQUALITY

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The Constitution Bench of the Supreme Court of India recently delivered a landmark judgment in the case of Central Organisation for Railway Electrification v. ECL-SPIC-SMO-MCML ("CORE 2024, case"), holding that the unilateral appointment of arbitrators or curating a panel of arbitrators and mandating the other party to select their arbitrator from the panel is impermissible. Clauses allowing unilateral arbitrator appointments in public-private contracts violate the principle of equal treatment of parties enshrined in the Arbitration and Conciliation Act, 1996 ('the Arbitration Act'). This decision highlights the judiciary's commitment to upholding the principles of impartiality and fairness in arbitration, especially in cases involving public-private contracts.

Background

The case arose from a contract between the Central Organisation for Railway Electrification ('CORE'), a part of Indian Railways, and the joint venture ECL-SPIC-SMO-MCML ('JV'). The arbitrator appointment clause in the contract provided that one of the parties curated a panel of arbitrators and mandated the other party to select their arbitrator from the panel. The three-member tribunal was to be constituted in the following manner: (i) CORE would suggest at least four names of retired railway officers; (ii) the JV would select two names out of the panel for appointment as their arbitrator; (iii) General Manager of CORE would thereafter choose at least one person out of the two to be appointed as the JV's arbitrator; and (iv) General Manager of CORE would proceed to appoint the balance arbitrators from the panel or outside the panel and also indicate the presiding arbitrator.

When disputes emerged, the JV invoked arbitration under the contract and requested CORE to appoint an arbitral tribunal to resolve the disputes. In response, CORE sent a list comprising names of Railway Electrification Officers of JA Grade to set up the arbitral tribunal. CORE later sent another list comprising the names of four retired railway officers, calling upon the JV to select any two arbitrators for the constitution of the arbitral tribunal. The JV did not respond and approached the Allahabad High Court under Section 11 of the Arbitration Act, seeking the appointment of a sole arbitrator. The JV argued that a neutral arbitrator could not be appointed based on the procedure provided in the contract, therefore it had no choice but to take recourse to the provisions of law for the appointment of an arbitrator.

Decision of Allahabad High Court

The High Court appointed an arbitrator, dehors the procedure for appointment provided in the arbitration agreement and accepted the JV's argument that the panel of arbitrators appointed by CORE comprised retired railway officers who were ineligible to be arbitrators. The High Court held that its power to appoint an arbitrator was independent of the arbitral agreement.

CORE challenged the appointment of a sole arbitrator by the Allahabad High Court by way of a special leave petition.

Decision of the Supreme Court (3-Judge Bench): CORE 2019 Case

The Hon'ble Supreme Court held that the High Court was not justified in appointing an independent arbitrator without resorting to the procedure for appointment prescribed in the contract. The Supreme Court relied on the decision in *Voestalpine Schienen GmbH v. DMRC Ltd. (2017*)[1] to hold that Section 12(5) of the Arbitration Act does not bar former employees from being appointed as arbitrators. Furthermore, the Court opined that the General Manager's right to form the arbitral tribunal was balanced by JV's right to choose any two out of the four proposed names, from which the General Manager had to appoint at least one as the JV's nominee arbitrator.

In a subsequent decision in *Union of India v. M/s Tantia Constructions Ltd. (2021)*[2]*,* another 3-Judge Bench of the Supreme Court, dealing with a similar issue, disagreed with the decision in the CORE 2019 case. Consequently, the matter in Tantia Constructions was referred to a larger bench to examine the correctness of the view taken in the CORE 2019 case.

Decision of the Constitution Bench: CORE 2024 Case

The reference to the Constitution Bench raised important issues regarding the interplay between party autonomy and impartiality of the arbitral tribunal. The three crucial issues decided by the Bench:

i. Whether an appointment process which allows a party who has interest in the dispute to unilaterally appoint a sole arbitrator or curate a panel of arbitrators and mandate the other party to select their arbitrator from the panel is valid in law.
ii. Whether the principle of equal treatment of parties applies at the stage of appointment of arbitrators.
iii. Whether an appointment process in public-private contracts that allows a government entity to unilaterally appoint a sole arbitrator, or the majority of the arbitrators violates the parties' right to equality.

The Constitution Bench disagreed with the decision of the 3-Judge Bench in the CORE 2019 case, holding that unilateral appointment of arbitrators or curating a panel of arbitrators and mandating the other party to select their arbitrator from the panel restricts the freedom to appoint an arbitrator of choice. This restriction violates the principle of equal treatment of parties provided in the Arbitration Act. The Bench categorically held that the principle of equal

[1] (2017) 4 SCC 665
[2] 2021 SCC Online SC 271

treatment applies at all stages of arbitration proceedings, including the appointment of arbitrators.

The Court upheld the principles established in *TRF Ltd. v. Energo Engineering Projects Ltd*. (2017)[3] and *Perkins Eastman Architects DPC v. HSCC (India) Ltd. (2019*)[4] where it was held that persons with an interest in the dispute should not have the power to unilaterally appoint arbitrators. It is therefore settled that a person who is ineligible to be appointed as an arbitrator does not have the power to nominate another person as an arbitrator.

Regarding unilateral appointments in public-private contracts, the Hon'ble Constitution Bench held that such clauses fail to ensure the minimum level of integrity required in quasi-judicial functions, such as arbitration. These clauses violate the nemo judex rule, which forms part of India's public policy in arbitration, and are thus violative of Article 14 of the Indian constitution.

Key Observations of the Supreme Court

1. Equal treatment of parties at the stage of appointment of an arbitrator ensures impartiality during the arbitral proceedings. A clause that allows one party to unilaterally appoint a sole arbitrator restricts equal participation of the other party in the appointment process of arbitrators.

2. The Arbitration Act does not prohibit parties to an arbitration agreement from maintaining a curated panel of potential arbitrators. However, the difficulty arises when the public sector undertakings make it mandatory for other parties to select their nominees from the curated panel of arbitrators.

3. The public sector undertakings ('PSUs')are not prohibited from empanelling potential arbitrators. However, an arbitration clause cannot mandate the other party to select its arbitrator from the panel curated by them. The PSUs can give a choice to the other party to select its arbitrators from the curated list provided the other party expressly waives the applicability of the nemo judex rule i.e. "no one should be a judge in their own cause".

4. The nemo judex rule is applicable where arbitrator's conduct or circumstances give rise to an apprehension of bias. The determination of bias does not depend upon actual proof of bias but whether there is a real possibility of bias based on the facts and circumstances.

5. The principle of express waiver also applies to situations where the parties seek to waive the allegation of bias against an arbitrator appointed unilaterally by one of the parties. After the disputes have arisen, the parties can determine whether there is a necessity to waive the nemo judex rule, reinforcing the principles of party autonomy in the arbitrator appointment process.

[3] (2017) 7 SCR 409
[4] (2019) 17 SCR 275

6. The law laid down in the present judgment is prospectively applicable to the appointment of arbitrators made after the date of the judgement so that ongoing arbitration proceedings are not disturbed.

Conclusion

The judgment has far-reaching implications for the practice of arbitration in India, particularly in public-sector contracts where the risk of bias in arbitrator appointments has been a longstanding issue. The judgement strengthens the requirement of impartiality, ensuring that parties cannot unilaterally appoint arbitrators who may have a conflict of interest. It reinforces the statutory mandate for neutrality and independence in arbitration. This judgement marks a significant step toward a more robust and fair arbitration framework in India, ensuring that the arbitration process remains unbiased and in line with principles of equality, fairness and natural justice.