



ENFORCEABILITY OF ARBITRATION CLAUSES WHICH PROVIDE UNILATERAL APPOINTMENT PROCEDURES

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The Division Bench of the Delhi High Court recently reaffirmed the view previously taken by a Single Judge that a unilateral appointment mechanism in an arbitration agreement by itself would not nullify the entire agreement, and it is only the offending portion which is unenforceable.

Earlier, the Supreme Court in *TRF Ltd. v. Energo Engineering Projects Ltd.*¹ and *Perkins Eastman Architects DPC & Ors. v. HSCC Ltd.*² had observed that an arbitration agreement providing a unilateral mechanism for appointment conflicts with the essential requirements of independence and impartiality expected of an arbitrator. Nevertheless, it was also observed that an arbitrator can be appointed under section 11 of the Arbitration and Conciliation Act, 1996, ("Act"), upholding the validity of the arbitration agreement *per se* between the parties, *de hors* the agreed appointment procedure.

However, courts started encountering cases where a party resisting arbitration would contend that the disputes cannot be referred to arbitration *at all*, when the procedure for appointment of arbitrator was a unilateral one.

An example of such a case is *S K Engineering and Construction Company India v. Bharat Heavy Electricals Ltd.*³ The Delhi High Court while deciding an application under section 11(6) of the Act came across a situation wherein the respondent argued that as per contract, no person other than a person appointed by its Head should act as arbitrator, and if for any reason that is not possible, the matter is not to be referred to arbitration at all. Basis that it was further contended that since the Head of the respondent was no longer able to make such an appointment, it was effectively a withdrawal of the consent to arbitrate. Additionally, the respondent argued that this unique position was neither illegal nor severable and should be enforced as agreed by the parties.

The Single Judge by relying on previous decisions of other co-ordinate benches of the Delhi High Court held that merely because the mechanism of appointment of the arbitrator is void and has been rendered invalid, that will not *ipso facto* lead to the same fate for entire arbitration clause. The court further highlighted that the process for appointment of an arbitrator is clearly distinct and separable from the core agreement to refer disputes to arbitration. It will only be the invalid portion of the arbitration clause that will be rendered void.

In August 2025, the aforesaid issue was brought to test before the Division Bench of the Delhi High Court in ***M/S Intec Capital Ltd. V. Frontline Retail India Pvt. Ltd. & Ors.***⁴ The Division Bench re-iterated the view of the Single Bench, and rightly so.

In *Intec*, the arbitration clause that was agreed between the parties provided for appointment of a sole arbitrator from amongst those listed in a certain Schedule, and further specified that no separate consent of the parties would be required for the appointment. An award was passed by the unilaterally appointed sole arbitrator.

However, the said award was not executed, owing to the subsequent amendments in the Act and the Supreme Court's decisions in *TRF* and *Perkins* (Supra). The award holder withdrew the execution proceedings and issued a fresh notice under section 21 of the Act. When the respondent failed to respond, the award holder filed a petition under section 9 of the Act, seeking interim reliefs, which was however dismissed by the Commercial Court on the ground that the arbitration clause was void.

On appeal, the Division Bench reversed the said decision and held that even though unilateral appointment is impermissible, the arbitration clause is not affected and remains valid. The Division Bench further observed that an arbitration clause that provides for unilateral appointment of the arbitrator does not render the dispute non-arbitrable. The parties' intention to resolve disputes through arbitration remains, and this intention is recognized within the framework of party autonomy and the arbitration system.

In conclusion, the consistent approach of the Delhi High Court, reaffirmed by both the Single and the Division Benches, makes it clear that while a unilateral appointment mechanism in an arbitration clause would be unenforceable, the overall agreement to arbitrate would survive. This approach upholds the core principle of party autonomy and ensures that disputes remain arbitrable, thereby preserving the choice of arbitration as a dispute resolution mechanism.

Footnotes

1. [1] 2017 8 SCC 377.

2. (2020) 20 SCC 760.

3. ARB.P. 738/2023.

4. FAO (COMM) 129/2025