

A STEP TOO FAR? A COMMENT ON THE INDIAN SUPREME COURT'S JUDGMENT IN 'CORE II'

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On 8 November 2024, a Constitution Bench of the Supreme Court of India ["**Court**"] issued a judgment in *Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV)*¹ ["**CORE II**"] holding, by a majority of 3-2, that arbitration agreements providing for unilateral appointment of arbitrators or mandatory selection of arbitrators from a panel curated by one party, are illegal and invalid ["**Majority Decision**"]. The judgment followed a series of conflicting decisions of the Court on the issue, triggered by the 2015 amendment to the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"] which amended Section 11(8) and inserted Section 12(5) along with the Fifth and Seventh Schedules on disqualification and ineligibility of arbitrators, into the Arbitration Act.

This case comment will *first*, examine the clash between the conclusions of the majority and minority decisions, and *second*, critically analyse the reasoning of the Majority Decision.

I. *IPSO FACTO* INVALIDITY OF UNILATERAL APPOINTMENT CLAUSES

The Majority Decision found that arbitration clauses which provide for either, (i) unilateral appointment of a sole arbitrator by one party, or (ii) mandatory selection of a nominee to a three-member tribunal from a list of arbitrators collated by the one party [collectively referred to as "**Unilateral Appointment Clauses**" for brevity] violate the principles of independence and impartiality of arbitrators and equal treatment of parties. The Majority Decision held that both these principles were 'mandatory' and constituted a restriction to party autonomy.²

The Majority Decision reasoned that when the composition of the tribunal is controlled solely or largely by a person who has a financial interest in the outcome of the dispute, it would objectively give rise to "the real possibility of bias".³ The Majority Decision, therefore, concluded that equality

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¹ *Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV)*, 2024 SCC Online SC 3219.

² Majority Decision, ¶¶ 31, 64, 81.

³ Majority Decision, ¶¶ 128-133.

of parties in the process of appointment of arbitrators was a pre-requisite to ensure the independence and impartiality of a tribunal, and both were “concomitant principles” applicable to arbitration.⁴ On this basis, the Majority Decision also concluded that Unilateral Appointment Clauses are against the ‘public policy’ of India as defined under Section 34 of the Arbitration Act.⁵

However, in order to “*balance the autonomy of parties and the principles of an independent and impartial arbitral tribunal*”, the Majority Decision ruled that parties may expressly agree upon a unilateral appointment procedure after a dispute had arisen, in terms of the proviso to Section 12(5)⁶ of the Arbitration Act.⁷ In the interest of limiting the disruption to completed and on-going arbitrations, the Majority Decision ruled that the Court’s judgment would apply prospectively to subsequent appointments of three-member tribunals.⁸ As for sole arbitrators, the Majority Decision found that prospective application was not required because in prior judgments, the Supreme Court’s had already declared Unilateral Appointment Clauses invalid in the context of sole arbitrators.⁹

The two minority opinions rendered by Justice Roy and Justice Narasimha [collectively, “**Minority Opinions**”], agreed with the Majority Decision regarding the mandatory nature of the principles of equality of parties and impartiality and independence of the arbitral tribunal, under the Arbitration Act. The primary disagreement of the Minority Opinions was with the majority’s declaration that all Unilateral Appointment Clauses were invalid *ipso facto*. Instead, the Minority Opinions advocated for scrutiny of Unilateral Appointment Clauses by the Court or relevant

⁴ Majority Decision, ¶¶ 73-75.

⁵ Majority Decision, ¶¶ 157-163.

⁶ Arbitration Act, Sec. 12(5):

“Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.”

⁷ Majority Decision, ¶¶ 121-123.

⁸ Majority Decision, ¶¶ 166-168.

⁹ Majority Decision, ¶ 168, citing *TRF Ltd v. Energo Engineering Projects Ltd*, [2017] 7 SCR 409; *Perkins Eastman Architects DPC v. HSCC (India) Ltd*, [2019] 17 SCR 275.

appointing authority on a case-by-case basis when dealing with a request for appointment of arbitrators, as they were empowered to do under Section 11(8)¹⁰ of the Arbitration Act.¹¹

The Minority Opinions argued for greater judicial restraint and deference to party autonomy. They took note of Section 11(6A) of the Arbitration Act, which limits the scope of judicial review at the appointment stage to an “*examination of the existence of an arbitration agreement*”.¹² Accordingly, the Opinions stated that intervention by the appointing authority should be limited to cases where parties are either in disagreement regarding the validity of a Unilateral Appointment Clause, or have concerns regarding the independence and impartiality of arbitrators appointed through a unilateral/one-sided appointment procedure.¹³ The Opinions also considered that Section 11(8) and Section 12 of the Arbitration Act provided adequate safeguards to ensure the constitution of an impartial and independent tribunal.¹⁴

In addition, the Minority Opinions relied upon the fact that the Arbitration Act itself did not provide for an absolute prohibition against Unilateral Appointment Clauses, indicating that the legislative intent was not to do so.¹⁵ It is relevant in this regard that the Majority Decision also acknowledged, albeit indirectly, that the Arbitration Act did not contain any such absolute prohibition. The Majority Decision noted that an initial draft of Article 11 of the Model Law (on which Section 11 of the Arbitration Act is based) which provided explicitly for such an absolute prohibition,¹⁶ was not included in the final draft for the following reasons:

¹⁰ Arbitration Act, Sec. 11(8):

“The Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court, before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of section 12, and have due regard to—

(a) any qualifications required for the arbitrator by the agreement of the parties; and

(b) the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.”

¹¹ Minority Opinions by Roy J., ¶¶ 38-41, 43(b); Narasimha J., ¶¶ 54.4-54.5.

¹² Arbitration Act, Sec. 11(6A):

“(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.”

¹³ Minority Opinions by Roy J., ¶¶ 38-41; Narasimha J., ¶¶ 30-33.

¹⁴ Minority Opinions by Roy J., ¶¶ 27-32, 42; Narasimha J., ¶¶ 30-32, 40.

¹⁵ Minority Opinions by Roy J., ¶ 28, 33; Narasimha J., ¶ 33.

¹⁶ Majority Decision, ¶ 39.

“The prevailing view, however, was to delete paragraph (2) since (a) there was no real need for such a rule in view of the fact that the few instances aimed at could appropriately be dealt with by other provisions of the model law (e.g., on challenge of arbitrator or setting aside of award); (b) the wording was too vague and could thus lead to controversy or dilatory tactics and, above all, to a misinterpretation which could endanger well-established and recognised appointment practices; (c) the legal sanction, in particular the idea of partial invalidity, was not sufficiently clear. The Working Group, after deliberation, decided to delete paragraph (2). That decision, however, should not be understood as condoning practices where one party had a clearly greater influence on the appointment without good reasons.”¹⁷

Unfortunately, however, the Majority Decision did not ultimately address the question of (absence of) legislative intent to impose a blanket prohibition on Unilateral Appointment Clauses.

II. THE MAJORITY’S REASONING

It is difficult to disagree, in the author’s opinion, with the conclusion of the Majority Decision that Unilateral Appointment Clauses, by their very design, give rise to justifiable doubts regarding the independence and impartiality of a tribunal. Further, as set out in the next concluding Section, the author agrees with the policy-based justification for the Majority Decision. However, the author finds the rest of the Majority Decision’s reasoning lacking, on the following counts.

The Majority Decision identified equality of parties in appointment of arbitrators as a necessary underlying principle for independence and impartiality of a tribunal under Section 12 of the Arbitration Act.¹⁸ However, it additionally based its finding of equality being a mandatory principle, on (i) Section 18 of the Arbitration Act (“*Equal treatment of parties*”), and (ii) Article 14 of the Constitution of India [“**Constitution**”] which enshrines the fundamental right to equality available to all persons vis-à-vis the State.¹⁹

¹⁷ Majority Decision, ¶ 40.

¹⁸ Majority Decision, ¶¶ 73-75.

¹⁹ Majority Decision, ¶¶ 67-69.

In respect of the first, the Majority Decision interpreted Section 18 on the basis mainly of the “understanding” of the Working Group on the UNCITRAL Model Law on International Commercial Arbitration [“**UNCITRAL Model Law**”] that the principle of equality under Article 18 of the Model Law was not restricted to the conduct of the arbitral proceedings and would also apply to the process of composition of the arbitral tribunal.²⁰ However, the Majority Decision did not analyse any potential hurdles to such a conclusion - neither in the scheme of the Arbitration Act (since Section 18 was within a separate chapter governing the ‘Conduct of arbitral proceedings’) nor in the language of Section 18 itself, which imposes the obligation of equal treatment on the arbitral tribunal and not the parties themselves.²¹

On the second aspect, *i.e.*, the application of Article 14 of the Constitution to arbitration, both Minority Opinions disagreed with the Majority Decision mainly on the grounds that this may introduce another avenue to restrict party autonomy in arbitration and is unnecessary when the same principles are present under the Arbitration Act.²² However, the author notes that the Court has applied Article 14 in the context of arbitration in previous decisions and held that party autonomy, at least as far as contracts involving the State were concerned, was limited by the Constitution in addition to the Arbitration Act.²³ Further, in the limited context of contracts involving the State, it is not clear why the application of Article 14 would further limit party autonomy any more than the principle of equality already under the Arbitration Act.

Having said that, it is doubtful whether it was necessary for the Majority Decision to rely on these two aspects to arrive at its conclusion, as it had already (and more convincingly) located the principle of equality in appointment of arbitrators in the mandatory provisions of Section 11(8) and Section 12 of the Arbitration Act.

On the other hand, the Majority Decision did not provide any significant analysis to justify the extension of the post-dispute waiver under Section 12(5) of the Arbitration Act to Unilateral

²⁰ Majority Decision, ¶ 55.

²¹ See Minority Opinion by Narasimha J., ¶ 54.3.

²² See Minority Opinions by Roy J., ¶¶ 3-4; Narasimha J., ¶ 54.2.

²³ *Lombardi Engineering Limited v. Uttarakhand Jal Vidyut Nigam Limited*, [2023] 13 SCR 943, ¶¶ 80, 83; *ICOMM Tele Ltd. v. Punjab State Water Supply and Sewerage Board*, (2019) 4 SCC 401 [11], ¶¶ 23, 27.

Appointment Clauses. The proviso to Section 12(5) allows for such a waiver by parties only in respect of factors identified under the Seventh Schedule which lead to an arbitrator becoming *de jure* ineligible (akin to the Red List under the IBA Guidelines on Conflicts of Interest in International Arbitration) - an entirely separate issue from the procedure for appointment of arbitrators leading to doubts regarding their independence and impartiality. One may assume that, having already connected the appointment process under Section 11(8) with the principle of independence and impartiality Section 12(5) while invalidating Unilateral Appointment Clauses, the Majority Decision found it appropriate to also extend the exception under the Section 12(5) proviso to equality of parties in the appointment process, in deference to party autonomy. However, no such reasoning is apparent from the Decision itself.

Further, the Majority Decision did not engage with contrary arguments regarding the purported practicality of Unilateral Appointment Clauses in certain industries or circumstances. Justice Narasimha's Opinion noted, just as put forth by the Government of India, that such clauses are the norm in certain sectors involving high-volume, low-value disputes such as insurance claims, where appointing arbitrators with consent of parties in each individual case may not be feasible.²⁴ The potential legitimacy of Unilateral Appointment Clauses in such cases or lack thereof, was, however, not considered in the Majority Decision.

III. CONCLUSION

In view of the above, it appears that the Majority Decision in CORE II adopted a policy-oriented, purposive approach to invalidate Unilateral Appointment Clauses. The principles identified in the judgment find resonance across jurisdictions, many of which frown upon, if not invalidate, unilateral / unbalanced procedures for appointment of arbitrators under an arbitration agreement.²⁵ Further, despite the blanket declaration of invalidity of Unilateral Appointment Clauses, the Majority Decision left open an avenue for expression of party autonomy by extending the application of the post-dispute waiver under Section 12(5) to such cases. Accordingly, despite certain gaps in reasoning (as set out in the previous section of this Comment), the Majority

²⁴ Majority Decision, ¶ 16(i); Minority Opinion by Narasimha J., ¶ 54.5.

²⁵ Majority Decision, ¶¶ 68, 149-154; Minority Opinion by Narasimha J., ¶¶ 46-53.

Decision provides a balance between the integrity of arbitration by ensuring a neutral and fair adjudication, and the '*grundnorm*' of party autonomy.

In the author's opinion, the reasons against a blanket prohibition cited in the Minority Opinions – that such clauses may be suitable or necessary in certain sectors or circumstances – do not exclude or account for the possibility of abuse of unilateral appointments in such cases. For instance, while Unilateral Appointment Clauses may be useful in high-volume, low-value arbitrations, the imbalance of power between parties may also be higher and the influence of the bank or insurance company on the arbitrators may be significant. Therefore, the need to ensure that parties have access to an unbiased tribunal must prevail over the efficiency of the appointment process.

Further, nullification of Unilateral Appointment Clauses may encourage parties in such sectors to opt for institutional arbitration / appointments by a neutral appointing authority as an alternative, thereby facilitating both, fairness and efficiency, in the appointment process. Resorting to institutional arbitration would also address the concern regarding feasibility of individual appointments in sectors with high-volume, low-value arbitrations.