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Unilateral Appointments Of Arbitrators: A Comparative Study Between Singapore And India

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ABSTRACT

The issue of party autonomy in Arbitration has always been a burning issue in respect of Arbitrator Appointments. The arbitrator appointments in particular requires a balancing with the other cornerstone of arbitration which is neutrality because party autonomy is essential to arbitration in essence as opposed to not being able to choose your judge, parties can agree to choose an arbitration panel that decides disputes between them in advance by voluntary agreements and, that agreement should generally be respected that is the principle of Party Autonomy. But what if the parties makes a Faustian pact for instance, what if they agree that one of the parties itself will Arbitrate the dispute or an employee of one of the parties or a relative of them so the question lies here is that to what extent are we willing to take the concept of Party Autonomy and at some point it hits the wall of Neutrality which is essential to any process of Dispute Resolution. Therefor the issue in any jurisdiction where Arbitration is practiced is with that how you balance party autonomy against Neutrality. The other reason one has to balance is that in many cases party autonomy is apparent but illusory. Where sometimes the provision for selecting an Arbitration Panel is take it or leave it provision and that is not the product of real genuine party autonomy so, that is the second reason why we are concerned about preserving the neutrality in the appointment of Arbitrators. The main reason of comparing these two countries that how long of a gap we have even in a small matter like appointment of an Arbitrator in India we still have a long way to go.

KEYWORDS- PARTY AUTONOMY, NEUTRALITY, APPOINTMENT, ARBITRATORS

INTRODUCTION

Party autonomy is a foundation of international arbitration, allows disputing parties the liberty to form the arbitral process, containing the acute aspect of arbitrator appointments. This principle certifies that parties can choose arbitrators who associate with their preferences, nurturing trust and legality in arbitral process. The arbitration keeps growing as a desired method of dispute resolution worldwide, so the application of party autonomy in arbitrator appointment vary throughout jurisdictions, inclined by legal frameworks, judicial attitudes, and institutional practices. This paper carry out a comparative study of party autonomy in arbitrator appointments in Singapore and India, two insignificant arbitration hubs of Asia with distinct legal traditions and growing landscapes. In Singapore, the arbitration command is praised for its robust support of party autonomy, supported by a pro-arbitration judiciary and a legal framework aligned with the UNICITRAL model Law. Party autonomy is the foundation of international arbitration giving parties the freedom to modify proceedings to their specific requirements.³ Singapore's devotion to this principle is

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³ Georg Born, International Commercial Arbitration (3d ed. 2021).

apparent in its nominal judicial intervention and bendable institutional rules, such as those of SIAC give preference to party choice in arbitration selection. On the contrary, India's arbitration framework, while enduring major reforms gives a very complex picture. The Arbitration and Conciliation Act, 1996, as amended in 2015 and 2019, looks for to equalise party autonomy with defences to ensure impartiality and independence of arbitrators. The main challenge lies in coordinating party autonomy with the demand to avoid bias and maintain public trust in arbitration.⁴ The Indian judiciary played a vital role in determining the balance, sometimes limiting party autonomy to support fairness, as seen in cases like TRF v. Energo.⁵ This paper tries to look into the different approach of India and Singapore in terms of unilateral appointments of arbitration and explores the interplay between statutory provisions, judicial interpretations, and institutional rules. The focus of this paper is to examine these two jurisdictions to highlight the best practice and potential area to reform contributing to the wider discloser on enhancing arbitration frameworks. For those who are not familiar with international arbitration sometimes express their surprise about the level of participation of the parties in the selection process, and in this context, they suspect the introduction of corruption factor into the independence of arbitrators.⁶ The methodology of this paper comparative study on the Indian and Singapore laws and policies derived national and international reports, books, scholarly paper, and Newspaper articles among other sources.

UNILATERAL APPOINTMENTS OF ARBITRATOR IN INDIA

In India, the problem is nowhere more acute than in the concept of unilateral appointments of sole arbitrators. Now sole arbitrators are present in in a large number of appointment provisions in contracts in India and in a large number of those, it is a unilateral appointment by one of the parties. Often times is the case that where the government is a party to a contract or public sector organization, the provision in standard form front contracts is for unilateral appointment by the government agency, which then doesn't give full confidence to people who look to enter into these contracts to actually go ahead with the transaction facing a possible arbitration governed by someone appointed by the government agency, which inhibits investment and confidence in the arbitration process. In light of that, the Law Commission in its 246 report lamented the sacrifice of neutrality at the altar of party autonomy and prescribed recommended amendments to the Arbitration Act, which were implemented in 2015⁷. In essence, what they set out is that there will be minimum standards for neutrality of arbitrators, which will render even arbitrators appointed unilaterally as sole arbitrators to be ineligible if they fall foul of those minimum standards set out in the 7th Schedule, drawn from the International Bar Association (IBA) guidelines.⁸ The problem here is that as the amendments that emerged in 2015 from these recommendations, they clearly, disqualify arbitrators and not appointing authorities. The consequence being that where you have an appointing authority that is one of the parties to the arbitration, then it can appoint an arbitrator, which though the arbitrator does not strictly fall foul, is not an employee, but maybe a retired employee or in some other way related to that party that does not fall strictly foul. However, because the party appointing has an interest in the outcome and decision in the arbitration, there is a lack of confidence in the process as a result of the unilateral appointment that the amendments did not address. These then came up in a number of decisions of the Supreme Court where this issue came to light and, which is TRF very interesting case, the provision was that managing director of the of the entity would be the arbitrator feeling which he would appoint his nominee to arbitrate on his behalf.⁹ That was the provision that was agreed to in so-called party autonomy. Now the counterparty raised that this would render the arbitrator ineligible under Schedule 7.¹⁰ Because he was a current employee of one of the parties to the arbitration. The question really before the court was if the MD was ineligible under the Arbitration Act, could he nominate then somebody to arbitrate on his behalf. The Arbitration and Conciliation (Amendment) Act, 2015, responded to these concerns by introducing Section 12(5) and the Fifth and Seventh Schedules, which establish mandatory disclosures and grounds for arbitrator ineligibility. The ratio of what followed of the judgment that held that he could not nominate someone to arbitrate on his behalf is really that one does what one does through another. The court very much looked at it as and not an appointment by the party, but an appointment by an arbitrator who was himself ineligible and therefore

⁴ Sundaresh Menon, Chief Justice, Sup. Ct. of Sing., The Role of the National Courts of the Seat in International Arbitration, Speech at the Chartered Institute of Arbitrators, Singapore (2016).

⁵ TRF Ltd. v. Energo Engineering Projects Ltd., (2017) 8 SCC 377.

⁶ Johan Tufte-Kristensen, The Unilateral Appointment of Co-Arbitrators, 32 Arb. Int'l 483, 483–501 (2016).

⁷ Law Comm'n of India, 246th Report on Amendments to the Arbitration and Conciliation Act, 1996 (2014).

⁸ Int'l Bar Ass'n, IBA Guidelines on Conflicts of Interest in International Arbitration (2014).

⁹ TRF Ltd. v. Energo Engineering Projects Ltd., (2017) 8 SCC 377.

¹⁰ Schedule 7, Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).

directly falling foul of the Schedule 7 prohibition against current employees being arbitrators.¹¹ It is true that the decision contrast this with a three-member panel where each party appoints one and then they together appoint the presiding arbitrator. Some have interpreted this to mean that it stands for a larger principle that if the appointing authority falls foul of Schedule 7, it cannot appoint a sole arbitrator unilaterally. The contrast that Justice Mishra was drawing was between a party appointing a nominee arbitrator and a party appointing its own employee as the arbitrator who appoints his nominee. It is in that context that the judgment is passed. Similarly, in *Perkins Eastman Architects DPC v. HSCC (India) Ltd.*, the Court invalidated unilateral appointment clauses, arguing that they inherently violate the principle of equal treatment.¹² These decisions reflect a judicial commitment to prioritizing neutrality, particularly in contracts marked by unequal bargaining power. However, the absence of clear statutory guidelines on appointing authorities continues to create ambiguity, allowing parties to exploit loopholes by appointing arbitrators with subtle connections.¹³ Moreover, the reliance on ad hoc arbitration in India, coupled with limited institutional oversight, exacerbates delays and inconsistencies, undermining the efficiency of the arbitral process.¹⁴ In the similar case, *Central Organization for Railway Vs ECI-SPIC-SMO-MCML* where the Supreme Court mentioned that merely being a retired employee of the organization does not necessarily be bias while being arbitrator for the party. Supreme Court decided to the contractor should be given the full freedom to nominate an arbitrator from the panel and the court mentioned the panel should be broad-based that should have people from different fields and experiences.¹⁵

UNILATERAL APPOINTMENTS OF ARBITRATOR IN SINGAPORE

Singapore's Arbitration game governed by two main statues, The arbitration Act 2001(AA) and the International Arbitration Act 1994, which adopted by the UNICITRAL model Law on International Commercial Arbitration,¹⁶ a model that give priority to the party autonomy with maintaining the procedural integrity. The important principle is that in party autonomy which allows the parties to tailor their dispute in resolution process. Section 4(1) of the AA and Section 9A of IAA permits the parties to agree on the procedure for appointing arbitrators that include unilateral appointments if specified in the arbitration agreement.¹⁷ Party Autonomy is a key feature of habituation. It is dependable whether it is right or the parties or not, but it is a key feature. When you look at surveys of council of users, which have been made notably by Queen Mary, it is an essential feature in their eyes, the ability to participate in the process to select the Co-arbitrator, possibly the chair.¹⁸ Therefore, the merits of that system is, it is for the users. It is still viewed as essential and it is found in the most obstruction rules and the SIAC rules. There is a right for the parties to nominate their pro arbitrator and they can really subject to independence and a partiality. They can really nominate whomever they want and that is their freedom. The only safeguard to that stage would be the statement of independence and impartiality by the sectorized arbitrator. The fact most rules, including SIAC rules would provide the party's nominate an arbitrator. Then that nomination has to be confirmed. The institution has to appoint the nominee. Therefore, there is a stage, which can be a safety net to screen the nominee. In most cases, the parties actually agree otherwise to keep a role even in the appointment of the chair. The default provision point in the SIAC rules is for the chair, the appointment will be made by the institution, by the SIAC unless the parties agree otherwise. Again, it is whatever they are able to agree. However, maybe the parties themselves designate nominate the chair or it may be which is more common. The Co arbitrators are going to nominate the chairs but then each Co arbitrator will be able to discuss the candidates with the party appointing him. That has to be agreed with the parties because it would be a next party communication with a nominee. It can be also having a list procedure where the parties could forward names. The message is as even for the chair, the preference of the parties is to have some control. Less than four core arbitrators above about who that person is going to be. In addition, that is something also to keep in mind when drafting the arbitration agreement because for the chair, most rules would say like, unless the party agree otherwise, the institution, as if the default appointing authority would make the appointment. So something to include in the arbitration agreement if the parties wish to keep a role, not to leave it entirely to

¹¹ Ibid

¹² *Perkins Eastman Architects DPC v. HSCC (India) Ltd.*, Old. No. 32/2019 (India).

¹³ Ahan Gadkari, *Single-Party Arbitrator Nomination as a Ground of Annulment in India*, 33 *Am. Rev. Int'l Arb.* 1 (2022).

¹⁴ *Arbitration Law in India*, iPleaders (Aug. 9, 2024), <https://blog.ipleaders.in/arbitration-law-india/>.

¹⁵ *Central Organization for Railway Vs ECI-SPIC-SMO-MCML*, 8 November 2024.

¹⁶ U.N. Comm'n on Int'l Trade L., *UNCITRAL Model Law on International Commercial Arbitration* (1985).

¹⁷ *Arbitration Act 2001* (Cap 10, 2020 Rev Ed Sing) 4(1); *International Arbitration Act 1994* (Cap 143A, 2020 Rev Ed Sing) 9A.

¹⁸ *Queen Mary Univ. of London & White & Case, 2021 International Arbitration Survey* (2021).

the institution. Now after the advantages are can be more perceived than actual because you may choose to appoint someone because the person has the expertise. So this is a sensitive area for that topic. However, even in commercial arbitrations the Co arbitrator of the losing party as 95% are found like writes descending opinions. Singapore's judiciary reinforces this framework through a policy of minimal interference. In *Anupam Mittal v. Westbridge Ventures II Investment Holdings*, the Singapore Court of Appeal upheld the parties' choice of governing law for the arbitration agreement, emphasizing the need to give effect to their intentions.¹⁹

COMPARATIVE ANALYSIS

The arbitration framework of both countries reflect different aspect of legal traditions in making the priority of balancing the party autonomy and neutrality. Singapore's approach is way better than India's and that is something we should learn fast in upcoming years because in this fast word we do not want to be seem irrelevant. Singapore's regime is characterised by a deep commitment to party autonomy, underpinned by a pro-arbitration judiciary and a robust institutional framework led by the SIAC. The SIAC make sure that Arbitrators appointment align with international standards of impartiality without unduly restricting party choice. This approach increases effectiveness, consistency, and making Singapore a favoured seat for international commercial arbitration. India, in comparison, adopts a more secured approach, prioritizing neutrality to address historical concerns about biased appointments, particularly in government contracts. The Indian Arbitration and Conciliation Act, 1996, and the Amendment Act of 2019 provided various safeguards and solutions to tackle the issue smoothly and effectively. Prior to the 2015 Amendments, there were no restrictions and no effective to curb the problem. Even an employee or a consultant of the parties specifically Government Department Undertakings could also act as an arbitrator for any of the parties and it was termed to be valid unless certain facts or circumstances specified any unreasonable doubts regarding the biased or unfair decision rendered by the arbitrator. However, in order to a fair and justifiable process, the Arbitration Amendment Act, 2015 provided several conditions for the appointment of an arbitrator and set criteria for ineligibility for the appointment of arbitrators. The Arbitration Act specifically mentioned that employees, consultants, advisors of the parties could not be an arbitrator for neither of the parties. Thus, it disqualifies the employee of the organization to act as an arbitrator in its dispute to ensure adherence to the principles of neutrality.²⁰ Now the Singapore tackle with these issues differently and currently winning.

CONCLUSION

The comparative approach of this paper in unilateral appointments of arbitrators in Singapore and India reveals a broad range of methods in balancing autonomy and neutrality. Where the Singapore is more flexible and recommend minimal judicial intervention and institutional oversight makes an efficient and internationally respected arbitration ecosystem. India, on the other hand highlights safeguards against bias, compelled by its historical context and judicial activism, but with that, India faces challenges in efficiency and intuitional development. By adopting complementary reforms such as institutional arbitration in India and statutory standards in Singapore both jurisdictions can enhance their arbitration frameworks, contributing to the global evolution of arbitration as a trusted and equitable mechanism for dispute resolution. The deviation in the approaches of both countries are broader in tension for international arbitration the trade-off amongst flexibility and fairness. Singapore's model shows that flexibility, when supported by strong institute ions, can enhance efficiency without sacrificing neutrality. India's structure, while giving importance to fairness, and focuses the challenges of over resilience on judicial oversight in a system still maturing institutionally. Both jurisdictions stand to benefit from corresponding reforms. For India, nurturing institutional arbitration concluded increased investment in arbitration centres and capacity building for arbitrators could rationalise processes while maintaining robust safeguards. Singapore on the other hand, could develop its framework by presenting statutory standards to further regulate unilateral appointments, confirming availability and fairness for less-resourced parties. These improvements are not

¹⁹ *Anupam Mittal v. Westbridge Ventures II Inv. Holdings*, [2023] SGCA 1 (Sing.).

²⁰ Subhasree Pati, *Unilateral Appointment of Arbitrators: An Invalid Action*, VIA Mediation Ctr. (2020), <https://viamediationcentre.org/readnews/NzQ4/UNILATERAL-APPOINTMENT-OF-ARBITRATORS-AN-INVALID-ACTION>.

purely domestic distresses but contribute to the global evolution of arbitration. As cross-border dispute grow, consistent best practices becomes critical. Singapore’s effectiveness and India’s prominence on impartiality offer valuable lessons for each other and for the international community. By focussing their respective shortcomings, both jurisdictions can reinforce their arbitration’s role as a trusted, equitable, and efficient mechanism for dispute resolution. A concentrated approach, where jurisdictions learn from each other’s merits, will be key to proceeding arbitration’s global standards, ensuring it remains responsive to the needs of assorted parties while upholding the principles of autonomy, neutrality, and fairness.

