

Unilateral Arbitration Clause and Arbitrator Appointments

written by Krusch Antony | February 10, 2020



Unbalanced

and unilateral option clauses in contract with arbitration as a dispute resolution clause, gives one party a one-way right to designate a sole arbitrator or to refer a specific disagreement to one institution. The presence of such clauses in an agreement can be highly beneficial to the party with the right to designate a sole arbitrator. When a dispute arises, such a party would be able to select the sole arbitrator of its choice or can choose the forum which is most favorable in a given circumstance. In some jurisdictions, the courts have shown a negative attitude towards such clauses and even rendered them invalid on grounds of 'morality', 'good faith', 'fairness' and 'unconscionability'.

The appointment

of sole arbitrators in India is governed by the Indian Arbitration & Conciliation Act, 1996 ("Act"). Section 11(2) of the Act empowers the disputants to determine the procedure for appointing the arbitrator or arbitrators.

This article

endeavors to reconnoitre the unilateral clause validation in Indian and global context.

Unilateral Arbitration option clause in a contract-
Common Law Countries

The English

Court's decision in the case of *Pittalis v. Shorefetti*^[1] was regarding a one-sided option arbitration clause in a

lease deed and the element of mutuality was interpreted. The clause conferring

a right upon the tenant to refer the dispute to an independent surveyor was, in

fact, bilateral as both the sides had accepted the agreement. The fact that only one of the disputants had such a right was irrelevant. It was further held

that there was no lack of mutuality in the clause as well.

In the case

of *Jivraj*

v Hashwan[2],

the dispute arose out of an arbitration

clause affirming and prescribing the qualities of an arbitrator as "shall be respected member of the Ismaili community and holders of high office within the

community". The arbitral clause with a mandated prescription as to the abilities of an arbitrator based on a community was challenged as it violates the Employment Equality (Religion and Belief) Regulations 2003.

The Supreme

Court, United Kingdom highlighted that "*the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between*

the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties." and found that the appointment was not *ultravires* to English Law.

The

Singapore Court of Appeal reaffirmed the Singapore High Court's decision to uphold

the validity of a one-way Arbitration option clause, and align the position with English Courts in *Wilson Taylor*

Asia Pacific Pte Ltd v. Dyna-Jet Pte Ltd[3] with regards to the validation of one-way arbitration clause.

Similarly, United

States courts appear to have evolved in tandem to that of the United Kingdom; away

from the "mutuality doctrine". Unilateral arbitration clauses are now considered an appropriate exercise of the parties' autonomy with regard to the

mode of resolving their disputes, which is entitled to full effect, save where

unconscionable under applicable law. U.S. courts are also upholding arrangements by permitting one party to commence an arbitration, as in the case

of *M.A.*

Mortenson Co. v. Saunders Concrete Co., Inc., [4]

Unilateral arbitration clause in a contract- Civil Law Countries

The French

Cour de cassation, in the judgement dated September 26, 2012, in *X v Banque Privée Edmond de Rothschild Europe*[5], held that a unilateral option clause is void

for creating a 'potestative condition' contrary to the French law. A condition

made in a contract, the fulfillment of which is entirely in the control of one

of the parties to the contract and the optional clause or a unilateral clause which is in control of a party to appoint a sole arbitrator, is thereby void. The presidium of the Supreme Commercial Court of Russia in the case of *Russian Telephone Company* ("RTC") v *Sony Ericsson Communication Rus* ("Sony Ericsson"), held that an arbitration clause that gave one of the parties the additional, unilateral option of referring arbitration disputes is invalid according to the Russian law.

Unilateral Arbitration option clause in a contract-
in Hybrid Legal System of India

India is a hybrid legal system country with an amalgamation of civil and common law. The same has been inherited from the colonial era, now moving towards a civil law system or for a hybrid licit system approach is the unsettled position, today.

The prerequisite and relevance of a mutual arbitration clause in an agreement, and for an opportunity for a bilateral invocation was originally examined by Delhi High Court in *Bhartia Cutler Hammer v. AVN Tubes*[6]. Subsequently, in *Emmsons International Ltd v.*

Metal Distributors UK & Anr[7], Delhi Highcourt opined that such type of absolute restriction, with a unilateral arbitration clause, is clearly in

contravention to the provisions of Section 28 of the Indian Contract Act, besides it being against the public policy.

In *Trf Ltd Energo Engineering Projects Ltd*[8], Supreme Court held that an arbitrator

who also has the authority to nominate another arbitrator on becoming ineligible will lose its authority to appoint an arbitrator, and the ratio of the TRF Ltd. case would apply to all arbitrations which commenced on or after the Arbitration and Conciliation (Amendment) Act, 2015. The Court findings are based on the

authority or the power of the managing director to appoint sole arbitrators. The arbitrator becomes 'ineligible' under certain conditions as mentioned in Section 12(5) of the Act. The Court further observed that "*Needless to say, once the infrastructure collapses, the superstructure is bound to collapse.*

One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to

nominate someone else as an arbitrator is obliterated". Subsequently, the eligibility of an arbitrator was considered by Delhi High Court in *D. K Gupta v. Renu Manjulal*[9] where the appointment of the arbitrator was accepted by the respondent who even proceeded to file the Statement of Claim before such arbitrator. Both the parties waived the applicability of Section 12(5) of the Act with regard to the eligibility norms specified

in the Seventh Schedule of the Act for appointment of an arbitrator.

Thereby, the parties acting in tandem with

arbitral clause, and after naming an arbitrator and accepting the same, it amounts to the compliance of the mandate under Sec 12(5) of the Act. Further, facts are dissimilar to TRF, no case for termination of the mandate of Sole Arbitrator was proved, and the appointment was confirmed, and the court concluded that the initiation of Arbitration was based on law and facts involved, and distinct from the issues raised in TRF.

The Supreme

Court of India in *Bharat Broadband Network Limited v. United Telecoms Limited*^[10] upheld its own decision in TRF and held that the appointment of an arbitrator by a person ineligible to be appointed as an arbitrator cannot

be allowed. The Supreme Court terminated the mandate of the Arbitrator, finding ineligibility under Sec 12(5) of the Act

and seventh schedule thereof. The

Supreme Court further mandated, with a direction to the High Court, to substitute the arbitrator with the consent of the parties.

In *Perkins Eastman Architecture Dpc V. HSCC*

(India) Ltd^[11]

("Perkins case"),

HSCC appointed a sole arbitrator to adjudicate the disputes in terms of a unilateral arbitral clause, and in an application, by Perkins, u/s 11(11)(b) r/w

11(12) (a) of the Act. Supreme Court, relying on TRF Ltd judgement, held

that "*case where only one party has a*

right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course of arbitration and therefore

the person who has an interest in the outcome or decision of the dispute must not have the power to appoint the sole arbitrator".

Way Forward: Neutral and Independent Sole

Arbitrators Panel

Unilateral arbitration

clause with no choice for arbitration selection and arbitration management is being discussed by in-house and law firms in the backdrop of case laws. In *Sawarmal*

Gadodia vs Tata Capital Finance Services Ltd^[12],

in a petition filed u/s 34 of the Act,

as amended, questioning the arbitration appointments in violation of sec 12 and

6th Schedule. The High Court of Bombay held that the essentials of

the Act have been violated, wherein an arbitrator has been appointed by the same party more than two times over three years period, which gives rise to his/ her impartiality. In this case, the

respondent appointed arbitrator through a law firm, in 252 matters, Bombay High

court set aside all the four cases which were considered, and all the four matters were referred to a new arbitrator to decide each dispute

independently

of each other.

In *Voestalpine Schienen GmbH v. Delhi Metro Rail*

Corporation Ltd[13], an arbitration agreement with a clause to appoint an arbitrator from the panel maintained by Delhi Metro Rail Corporation Ltd ("DMRC") was questioned. Voestalpine denied to appoint an arbitrator and filed a petition stating that the panel empaneled were retired officers from government or Public Sector Undertakings, as they are ineligible to act as arbitrators. Finally, the Supreme Court of India held that arbitrators empaneled were neither serving nor served DMRC in the past, and were qualified arbitrators; and directed the petitioners to nominate any person from the entire panel to choose as their arbitrator.

In Proddatur Cable TV Digi Services v. SITI Cable Network Limited[14],

the Delhi Court, based on the Perkins Eastman case, also ruled on the eligibility of a 'company', acting through its Board of Directors, in unilaterally appointing a sole arbitrator. The respondent argued that the Perkins case should not be considered in this case as the managing director was held to be ineligible and as a party interested in the dispute whereas, in the instant case, the board of directors of a company, who are legally authorised by the company in accordance to the Memorandum of Association and Articles of Association dealt with appointment. The Court held that the company acting through its board of directors (or any other person) would suffer the ineligibility under Section 12(5) read with Schedule VII of the Act.

Conclusion- Unilateral Arbitration Clause

To sum it

all up, where national courts in common law jurisdictions countries like England, Singapore and USA have upheld the validity of unilateral dispute resolution clauses, the recent decisions of the highest courts of civil law jurisdictions in Russia and France have gone in the opposite direction of invalidating unilateral option clauses, whereas India being a hybrid legal system, is opting both. Moreover, recent court rulings are more in favor of the civil law system. However, the party autonomy is respected if the parties were given a wider choice of arbitrators with neutral credibility by appointing arbitrators through independent institutions rather than through unilateral board of directors, or through company officials, and entrusting the management of arbitration to neutral institutions, instead of law firms or through in-house counsels. The way forward for Indian arbitration is by upholding the right to a fair and equal opportunity, according to Sec 12(5) read with Schedule VII of the Act, and in harmony with the latest Supreme court and High court judgements.

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- [\[1\]](#) Pittali v. Shorefett (1986) 1QB 868).
 - [\[2\]](#) Jivraj v Hashwan([2011] UKSC 40).
 - [\[3\]](#) Wilson Taylor Asia Pacific Pte Ltd v. Dyna-Jet Pte Ltd ([2017] SGCA 32).
 - [\[4\]](#) M.A. Mortenson Co. v. Saunders Concrete Co., Inc., 676 F.3d 1153, 1158 (8th Cir. 2012).
 - [\[5\]](#) X v Banque Privée Edmond de Rothschild Europe, Cass. Civ. (1ère).
 - [\[6\]](#) Bhartia Cutler Hammer v. AVN Tubes (1995 (33) DRJ 672).
 - [\[7\]](#) Emmsons International Ltd v. Metal Distributors UK & Anr 72005 (80) DRJ 256).
 - [\[8\]](#) Trf Ltd Energo Engineering Projects Ltd. [(2017) 8 SCC 377].
 - [\[9\]](#) D. K Gupta v. Renu Manjulal (2017) SCC online Del 12385
 - [\[10\]](#) Bharat Broadband Network Limited v. United Telecoms Limited (decided on April 16, 2019).
 - [\[11\]](#) Perkins Eastman Architecture Dpc V. HSCC (India) Ltd112019 (Arbitration Application No. 32/2019).
 - [\[12\]](#) Sawarmal Gadodia vs Tata Capital Finance Services Ltd on 7 May, 2019, High Court of Bombay, Arbitration Petition No 560, 561, 562, 563 of 2019)
 - [\[13\]](#) Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd (2017) 4 SCC 665.
 - [\[14\]](#) 14 Proddatur Cable TV Digi Services v. SITI Cable Network Limited order dated 20-01-2020, in D.M.P (T) 109 / 2019 in IA 17896 /2019.

Contributed By - Krusch Antony

Designation - Partner- Arbitration

[King Stubb & Kasiva,](#)

Advocates & Attorneys

[Click Here to Get in Touch](#)

[New Delhi](#) | [Mumbai](#) | [Bangalore](#) | [Chennai](#) | [Hyderabad](#) | Kochi

Tel: [+91 11 41032969](tel:+911141032969) | Email: info@ksandk.com