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UNILATERAL CLAUSE IN ARBITRATION AGREEMENT: WHERE IT STANDS IN INDIA?

"For an arbitrator goes by equity a case. A judge goes by law, and arbitration was invented with the express purpose of securing full power for equity"

~ Aristotle

Abstract

Dispute Resolution in India has a long history which dates back to colonial era. India has always tried to adopt an alternative mechanism of dispute resolution and build a parallel system to the conventional ways of solving a conflict. However, with the change in time and complexing of the developing nation a lot has changed. Arbitration and Conciliation Act, 1996 that was enforced has undergone many amendments to make it more efficient. In recent times question of interpretation of arbitration agreements has arisen before the courts especially when they deal with one sided power are vested between the disputing parties. This does not only change the balance of power between the parties but also lead to partially, unfairness and biasness. Indian courts and legislature have time and again upheld the principles of equality and fairness while enforcing and applying any law. Therefore, in different cases courts have struck down such clauses which provide such power to one of the parties in the matter. In this

paper an attempt has been made to explain the meaning of unilateral clauses, its impact on resolution mechanism in India and recent developments that happened regarding the same.

Keywords: *Arbitration, Unilateral Clause, Indian Judiciary, Arbitration and Conciliation Act*

Introduction

With the rise of the corporate sector and increase in complexity of business transactions arbitration has become one of the popular ways of alternative dispute resolution (ADR) than the conventional methods of litigation. In recent times we have seen parties opting for arbitration than choosing the intervention of a court of law as arbitration provides for a higher level of party autonomy and flexible procedures than the court system of dispute resolution. India over the years has seen a consistent increase in pendency of cases and slow disposal of the same which attributes to parties choosing ADR as means of solving their conflicts. Arbitration is governed by Arbitration and Conciliation Act, 1996. Even before the independence arbitration as a method of dispute resolution was prevalent in the nation but due to the inefficiency, delay in delivering awards, and higher court intervention the 1940 Act was amended, and finally 1996 Act came into force which was further amended from time to time considering the requirements of the cases. The statement and object of reasons as given for the 1996 Act said that the same had 'become outdated' and there was a need to have an Act 'more responsive to contemporary requirements[1]. 1996 Act is based on United Nations Commission on International Trade Law Model Law on International Commercial Arbitration. Arbitration is a method by which a third party is appointed to adjudicate the dispute among the two disputed parties. By doing so there is less chance of bias and sanctity of the judicial process is maintained. Apart from party autonomy and flexible procedure arbitration is a process that allows cost efficiency, higher confidentiality, greater chances of settlement, and speedy dispute resolution. Because of the above-stated reasons arbitration has become one of the popular methods of ADR. The choice for dispute resolution between parties can be done through adding an arbitration clause in the contract or a separate document can be made for the same. Therefore, it is clear that the essence of arbitration lies in party autonomy and flexible

[1] Sumeet Kachwaha, 'The Arbitration Law Of India: A Critical Analysis' [2005] <https://kaplegal.com/upload/pdf/arbitration-law-india-critical-analysis.pdf> accessed 12th July 2021

procedure. Courts in India in different cases have dealt with the position of party autonomy in arbitration. One such topic of debate is Unilateral Arbitration Clause in the arbitration agreements or otherwise. This is a highly debated and complicated issue in the field of commercial arbitration.

What is a 'Unilateral Arbitration Clause'?

A one-sided, unbalanced, and unilateral arbitration clause in the contract provides one way right to appoint the sole arbitrator or to refer the dispute to a certain institution[2]. The unilateral arbitration clause is inclined towards one party in the dispute as it gives entire power to one party to choose the sole arbitrator and the forum to which the dispute shall be referred. This can be beneficial to one party as it gets to choose the sole arbitrator as well as institution to resolve the dispute which could be beneficial to such party. The origin of such clauses arises from the hold of power between the parties to the dispute. The parties with greater bargaining power and economically stronger than the other are to decide solely appointment of the arbitrator and forum[3]. Section 11(2) of the Arbitration and Conciliation Act, 1996 states that parties are free to decide the procedure for appointment of arbitrators[4]. However, in many cases and instances court has rejected the validity of such a clause based on a lack of morality, fairness, and good faith.

Where does the Validity of Unilateral Arbitration Clauses stand in foreign countries?

Several foreign countries stand on a different footing concerning the validity of the Unilateral Clause. This can be divided based on acceptance or rejection given to such clauses given by different jurisdictions.

1. **Valid:** Courts in common law countries like UK, Italy, Spain have accepted such clauses as valid and not violative on any basis. Many precedents are evidence of such acceptance.

[2] Krusch Antony, 'India: One-way Arbitration Clause and Arbitrator Appointments' (Mondaq, 11 February 2020) <https://www.mondaq.com/india/arbitration-dispute-resolution/891960/one-way-arbitration-clause-and-arbitrator-appointments> accessed 13th July 2021

[3] http://www.legalserviceindia.com/legal/article-3612-unilateral-arbitration-clause-to-be-or-not-to-be-that-is-the-question-.html

[4] Arbitration and Conciliation Act, 1996, s 11(3)

- In case of Pittalis v. Sherefettin[5] the English court accepted the unilateral clause as valid by rejecting the absence of mutuality as arbitration agreement allows the clauses to be bilateral from its formation. In the present case, the unilateral arbitration clause was part of a lease deed. Court also observed that the fact that the only party has an option to choose is irrelevant as the agreement was accepted by both parties. The same position was confirmed by Barclays Bank plc v. Ente Nazionale di Previdenza[6]
- Court of Singapore has also upheld the validity of the unilateral clauses in the decision given in the case of Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd[7]. The court through its judgment has cleared that the arbitration agreements where one party is given the power to arbitrate the dispute is a valid agreement and adding to the list of common law and civil law jurisdictions who have accepted the same. Further, the Singapore court has shown its intentions to give full effect to the commercial agreements between the parties as per their wishes[8].

2. **Valid with some conditions:** Even though various countries have open-heartedly accepted the validity of one-sided arbitration clause. However, some jurisdictions have put forth some conditions to call such clauses valid.
    - In Poland, the courts do not intervene when the arbitration clauses are governed by foreign law. However, if such a clause is governed by Polish law, then the courts have invalidated such clauses based on a lack of equality between the parties. Polish Code of Civil Procedure renders these clauses violative of the principle of equality. But these clauses will be ineffective only for the clauses governed by the Polish laws and not by foreign laws[9].
    - Even the English Courts in some instances have hinted about the latent restrictions while allowing the validity of the unilateral clauses. For instance, in

[5] Pittalis v. Sherefettin [1986] 1 QB 868
[6] Barclays Bank plc v. Ente Nazionale di Previdenza [2015] EHWC 2857 (Comm)
[7] Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd [2016] SGHC 23
[8] Alastair Henderson, Emmanuel Chua 'Singapore Court confirms validity of clauses providing for unilateral right to arbitration' (Herbert Smith Freehills, 11 November 2016) <https://hsfnotes.com/arbitration/2016/11/11/singapore-court-confirms-validity-of-clauses-providing-for-unilateral-right-to-arbitration/> accessed 15th July 2021
[9] 'One-way Dispute Resolution clauses under Polish law' (Allen & Overy, 12 December 2012) <https://www.allenovery.com/en-gb/global/news-and-insights/european-finance-litigation-review/central-europe/poland>

the case of NB Three Shipping Ltd. v. Harebell shipping Ltd[10] the court said the if the choosing **party** has chosen one of the options i.e., arbitration or litigation then or led the other party to believe so, the other option will close. The choosing party will not be able to exercise the other option. A similar position is held by the French while applying the validity of the one-sided clause. Earlier the French courts upheld the validity of such clauses without any restrictions in the case of Société Edmond Coignet v. COMIT[11]. The court in the present case said that the common intention of the parties to give advantage to others is clear from the agreement clause and its conclusion. However, later this decision was criticized, and in the case of Société eBizcuss.com v Apple[12]. Here, the Court upheld an asymmetrical dispute resolution clause on the basis that, contrary to Danne v. Credit Suisse[13] and Rothschild, it satisfied the legal certainty and predictability requirements[14].

3. **Totally held Invalid:** Countries like Bulgaria, China, Russia absolutely denies the validity of one-sided clause based on grounds of morality, good faith, and fairness.
    - Courts in the US have taken the same approach of unconstitutionality to invalidate the asymmetrical clauses. In the case of Armendariz v. Foundation Health Psychcare Services, Inc[15] the court said that any contract or agreement that has an unequal power of bargain between the parties such as contract or agreement will not be enforceable. The court of Montana has held the same position in various cases[16]. However, the position of unilateral clauses is not uniform throughout the US jurisdictions.
    - The Russian Supreme Court has held the unilateral clauses as violative of the principle of equality. The same position was held in the case of Russian

[10] NB Three Shipping Ltd. v. Harebell shipping Ltd [2004] EWHC 2001 (Comm)
[11] Société Edmond Coignet v. COMIT Bull [1990] I No 273, 193
[12] Société eBizcuss.com v Apple [2015]
[13] Danne v. Credit Suisse [2015] (Case 13-27) 264
[14] Kim André Qvale , 'Asymmetrical Dispute Resolution Clauses and Their Validity in France and England' (Revue des Juristes de Sciences Po, 13 January 2020) <https://www.revuedesjuristesdesciencespo.com/index.php/2020/01/13/asymmetrical-dispute-resolution-clauses-and-their-validity-in-france-and-england/> accessed
[15] Armendariz v. Foundation Health Psychcare Services [2000] Inc 24 Cal. 4th 83, 6 P.3d 669
[16] Philip Clifford and Oliver Browne, 'Avoiding Pitfalls in Drafting and Using Unilateral Option Clauses' [2013]

Telephone Company v. Sony Ericsson[17], but the same was further cleared and changed in future cases.

- In Bulgaria, the court took the same approach as the US Supreme Court. The Supreme Court of Bulgaria declared the unilateral clauses void on the grounds of morality and good faith and the basis of Article 26 of the Bulgarian and Obligations and Contracts Act.[18]

Position of Unilateral Arbitration Clauses in India

India has completely changed the face of dispute resolution. After enacting Arbitration and Conciliation Act in 1996 a lot has been changed. However, the position of unilateral or one-sided clauses in arbitration cases is unclear until very recently. There are not many judgments clarifying the scope and applicability of the Unilateral Arbitration Clauses. However, in recent years Delhi High Court has tried to clear the position of a one-sided clause in India.

A. Delhi High Court Judgements on Unilateral Clauses

1. **Bhartia Cutler Hammer v. AVN Tubes[19]:** In the present case Delhi High Court observed that the parties did not have an exclusive right to begin the arbitration proceedings unilaterally. Notwithstanding the parties' express consent, such an agreement with a unilateral clause will not be a valid agreement. Therefore, there was an absolute restriction on such clauses as they violated Section 28 of the Indian Contract Act[20].
2. **Emmsons International Ltd. v. Metal Distributors[21]:** In this case, also Delhi High Court took the same stand as in the case of Bhartia Cutler Hammer v. AVN Tubes. But in this case, the reasons given by the court were different than what was given in the previous case. Here, the court observed that the one-sided clauses in an arbitration agreement are not only violative of section 28 of the Indian Contract Act but also against the public policy of India which promotes equality and fairness. The same stand

[17] Russian Telephone Company v. Sony Ericsson [2012] Rus LLC
[18] Deyan Draguiev, 'Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability' [2014]

[19] Bhartia Cutler Hammer v. AVN Tubes [1995] (33) DRJ 672
[20] Indian Contract Act, 1972
[21] Emmsons International Ltd. v. Metal Distributors [2005] (80) DRJ 256

was taken in the case of **Lucent Technology v. ICICI Bank**[22] on the same grounds as the above-mentioned cases.

3. **Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.**[23]**:** In this, the Delhi High Court took a different approach from its previous judgments. In the present case, the court observed that the unilateral option clause is valid. However, the impact of this decision on the position of the court is unclear, as the clause was upheld not under Indian law, but applicable under English law[24].
4. **Perkins Eastman Architecture Dpc V. HSCC (India) Ltd.**[25] **Or Perkins Case:** This can be called the landmark judgment deciding a clear stand on the unilateral option clause in the arbitration agreements. In the present case respondent appointed a sole arbitrator to arbitrate between the disputed parties. The sole arbitrator was appointed accordingly with section 11(2) of the Arbitration and Conciliation Act[26]. The Apex Court has held that where a managing director is an arbitrator and also an appointing authority for the same there can be implied interest in the outcome of the dispute in both the cases[27]. Therefore, the appointment of and by such a managing director will be invalid. In an agreement where one of the parties appoints the sole arbitrator for adjudication such agreement is not a valid arbitration agreement, thereby absolutely disentitling the parties to appoint the sole arbitrator. However, there has been a lot of criticism of this decision given by the Apex Court on basis of violation of section 11 of the 1996 Act and judicial interference in legislative intent[28].

Conclusion

Arbitration, conciliation, and mediation are the emerging fields of dispute resolution. In recent years both the legislature and judiciary have together done efforts to make the way for dispute resolution more efficient and flexible. However, there is not much done to interpret the position

[22] Lucent Technology v. ICICI Bank [2009] SCC OnLine Del 3213
[23] Fuerst Day Lawson Ltd. v. Jindal Exports Ltd. [2009] MANU/DE/3204/2009
[24] Nishanth Vasanth, Rishabh Raheja, 'Examining the Validity of Unilateral Option Clauses in India: A Brief Overview' (Kluwer Arbitration Blog, 20 October 2017) <http://arbitrationblog.kluwerarbitration.com/2017/10/20/examining-validity-unilateral-option-clauses-india-brief-overview/> accessed 17th July 2021
[25] Judgment delivered on 26.11.2019 in Arbitration Application No. 32 of 2019
[26] Arbitration and Conciliation Act, 1996 , s 11(2)
[27] R. Sudhinder, Nikhil Kumar Singh and Pierre Uppal, 'PERKINS - A CRITICAL ANALYSIS' (Argus & Partners, Advocates & Solicitors, 2 May 2020) <https://www.argus-p.com/papers-publications/thought-paper/perkins-a-critical-analysis/>
[28] Ibid

of unilateral clauses, sole party autonomy, and appointment of arbitrators. Countries like UK, Italy, USA have validated the unilateral clauses in some way or the other on grounds of mutuality and party autonomy. But in the recent judgments of the Supreme Court in the case of TRF[29] and Perkins Case has made it clear that so party can solely appoint an arbitrator which is done in pursuance of unilateral clauses. However, these decisions together take away the party autonomy in arbitration cases which is the cornerstone of Alternative Dispute Resolution. These judgments in the future still have a scope of being overturned for making the arbitration agreements more party-friendly. The essence of arbitration is flexibility, party autonomy and less intervention of courts into the matter, such decisions by the courts effects the very essence of the dispute resolution method making it difficult for the parties to choose it as a preferable mode of justice delivery mechanism. The matters which are of commercial nature held by different companies can get effected by such decisions as they cannot put so much time and effort into conflicts. From the view point of commercial arbitration Indian judiciary can take up more steps in the future to make arbitration more preferable option.

[29] TRF Limited v. Energo Engineering Projects Limited, [2017] AIR SC 3889