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Unilateral Arbitration Clause in India: A Grey Area

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ABSTRACT

Arbitration clause is the essence of any arbitration agreement, as it provides for the arrangement and the process for conducting arbitration, sometimes arbitration clauses might confer more power to one of the parties to the agreement, in terms of appointment of arbitrator, initiating arbitration, choosing the seat or the venue for the arbitration, etc. Thus, it is important to decide, whether such clauses are valid or not.

Ergo, this article aims at providing a clarity regarding the validity of such "Unilateral Arbitration Clauses" in the Indian legal system. The author will additionally be analysing the judgements of various High Courts and shall be discussing its relevance in the status quo.

I. INTRODUCTION

Since the advent of globalisation and industrialisation in India, the need for an efficient Alternative Dispute Resolution (ADR) mechanism has been pivotal. In the status quo, Foreign investors and MNCs highly rely on the efficiency of such ADR mechanism of country in which they invest, because an efficient mechanism paves the way for speedy relief.

The Arbitration and Conciliation act 1996 (Arbitration act), has been subjected to plethora of amendments and Judicial rulings since its inception to make it free from the egregious jangles of red tapism and obnoxious delays.

Thus, to achieve the abovementioned feats, it is important to give parties the necessary autonomy and the freedom to choose upon the desired arrangements coupled with free consent of both the parties.

When parties to a contract have a dispute resolution clause (or an arbitration clause), in usual discourse both the parties have the right to initiate arbitration by the virtue of Section 8 of the Arbitration act appoint an arbitrator in accordance with Section 11 of the arbitration act. This type of clause is termed a symmetric arbitration clause.

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But in the case where only one of the parties have the right to invoke the arbitration or the right to appoint arbitrators is termed as "Unilateral arbitration Clause". This article shall deal with the former issue, where one party has the right to invoke arbitration.

The path of unilateral arbitration clause has not been subjected to any interpretations by the Supreme Court of India (Supreme Court) yet, but there are judgements by various High Courts about the validity of such unilateral arbitration clause and that shall be discussed in the article.

II. INTERPRETATIONS BY HIGH COURTS

High Courts have time and now given diversified and contradictory opinions on the validity of the unilateral arbitration clause. But there have been various contradictory ratios and obiter dictas by the High courts, the Hon'ble Supreme Court has still not provided any interpretation on the same. Even the Arbitration act fails to provide an express provision regarding the validity of unilateral arbitration clauses.

(A) Cases in which the Courts have recognised the validity of unilateral arbitration clauses.

To begin with, in India the first interpretation was given in the year 1950 by the Hon'ble Calcutta High Court (Calcutta High court) in the judgement of Kedarnath Atmaram[2]It was observed, that if the agreement provides the option to either of the parties to invoke arbitration, it does not amount to the agreement being invalid. Here the Calcutta High Court upheld the validity of the unilateral arbitration clause. Since both, the parties had given their advanced consent and had agreed to it, gives no reason to declare it as invalid. The same reason was followed by the hon'ble Delhi High Court in the case of Bharat engineering[3], in this case, there was an agreement between the government railways and a contractor, according to the agreement only the contractor had the right to invoke arbitration, a dispute arose between the party in connection with some payment, the contractor invoked arbitration as per the agreement, but when the railways wanted to push their counter claims in arbitration the question that arose in front of the Delhi High Court was when the right to invoke arbitration vested with one party was correct or not. Here the Delhi High Court relied on the principle of "mutuality", this principle shall be discussed in depth in the later part of the article, the aforementioned principle was expounded in the English judgement of Baron vs Sunderland[4], the principle states that the there has to be a mutual consent of both the parties while making

[2] Kedarnath Atmaram v. Kesoram Cotton Mills Ltd, (1950), ILR 1 Calcutta 550 (13)
[3] Union of India v. Bharat Engineering Corporation, 1977, ILR, 2 Del 57.
[4] Baron v. Sunderland Corporation, 1966, All England Report, (1) 349 (351).

and agreement, drawing its inspiration from this principle the Delhi High Court stated that the if the parties have readily given their consent to the agreement, and the party with right to initiate the proceedings, exercises its right then there is nothing inherently wrong with the agreement. In Both the judgments the High Court held that the arbitration agreement was valid and was in accordance with Section 2(a) of the Arbitration Act 1940. In the case of New India Assurance[5], the Calcutta High Court upheld the validity of unilateral arbitration clause, the court relied on the judgement of Bharat Engineering[6]. The most recent judgement of Castrol India[7], the hon'ble Madras High Court (Madras High Court) observed that the arbitration clause is not bound to have an element of mutuality in it.

Therefore, it is first important to understand the concept of mutuality, which was expounded in the Pittalis[8] judgement, which explicitly upheld the validity of unilateral arbitration clauses. The mutuality principle puts both the parties to an equal pedestal, it acts as a *quid pro quo*. The Pittalis judgement categorically stated that the unilateral arbitration clauses cannot be nullified on the grounds of mutuality only because one of the parties has the right to invoke arbitration, the parties have mutually consented to such arrangements and the parties ought to adhere to it.

The unilateral agreement between the parties which confer right to one of the parties invoke the clause, it cannot be termed to be invalid per se, because both the parties have agreed to that arrangement and given their consent. The same reasoning was adopted in the case of NB Three Shipping[9]

(B) Cases wherein the courts have refused to recognize the validity of unilateral arbitration clauses

All the cases wherein it was declared that unilateral arbitration clauses were invalid were pronounced by the Delhi High Court, in the case of Bharatia Cutler[10]Here the arbitration agreement under Arbitration act 1940, vested the power to invoke arbitration to the defendant. The court here referred to the concept of mutuality from the English case of Baron v Sunderland[11], here it is interesting to note that, in this judgement court provided its own and a different interpretation of mutuality, in the case of Bharat Engineering[12], the court stated that mutuality kicks in once the election has been made here in this case the court stated that since

[5] New India Assurance Co. Ltd. v. Central Bank of India and Ors., 1985, AIR Cal 76,
[6] Union of India v. Bharat Engineering Corporation, 1977, ILR, 2 Del 57
[7] Castrol India Ltd. v. Apex Tooling Solutions, 2015, 1 LW 961 (DB).
[8] Pittalis and Others v. Sherefettin ,1986, 1 QB 868
[9] NB Three Shipping Ltd v. Harebell Shipping Ltd ,2005, 1 Lloyd's Rep.509.
[10] Bhartia Cutler Hammer v. AVN Tubes, 1995, (33) DRJ 672
[11] Baron v. Sunderland Corporation, All England Report 1966, (1) 349 (351).
[12] Union of India v. Bharat Engineering Corporation, 1977, ILR, 2 Del 57

the arbitration agreement does not confer the right to invoke arbitration to both the parties, therefore the agreement is not valid. The court additionally clarified that giving prior consent for such a clause would not make it a valid clause, but failed to provide any reasoning.

The matter was soon appealed from a single judge bench to a division bench which upheld the judgement passed by the single bench of the high court.

A new perspective was adopted in the case of Emmsons International[13], here the validity of an arbitration clause in a supply contract was challenged. The Delhi High Court here held that the clause that conferred only one party with the right to initiate arbitration is violative of Section 28 of the Indian Contract act 1872 (Contract act)[14]. Section 28 of the Contract Act states that agreements in restraints of legal proceedings are void. Here since the clause did not allow one of the parties to recourse to a legal proceeding, hence it violates Section 28 of the Contract act. Additionally, the court also held that these clauses are against the public policies of India and non- enforceable.

In the year 2009, the most recent judgement, in the case of Lucent technologies[15], in this case the dispute resolution clause stated that in an event of an dispute, the defendant had the right to initiate proceeding in any dispute resolution forum. The bank during the dispute referred the case to arbitration. Here the Delhi High court held that since the clause specifically did no mention the forum, the clause was invalidated on the grounds of it being uncertain. The court also held that if an arbitration clause with a unilateral right of reference is illegal is given effect, one party's right to legal proceedings would stand infringed.

III. CONCLUSION

The interpretations and the analysis of the courts were based on the merits of the specific matters, in certain cases it is premature to form an affirmative opinion on the validity of a clause that confers right to invoke arbitration coupled with a reasoning that both the parties have mutually agreed to it, but in a situation where the parties are not on the equal level or where one party can explicitly strong arm the other party because of the nature and the circumstances of the agreement or because of the status quo of the parties, thus the weaker party will certainly without any protest or hue and cry will ratify the agreement, which is unjust. Hence the weaker party will have to agree on such arrangement which vests power to initiate Arbitration with the stronger party, even if the weaker party was not in favour of such agreement.

[13] Emmsons International Ltd. v. Metal Distributors, 2005, (80) DRJ 256.
[14] ibid
[15] Lucent Technology v. ICICI Bank, 2009, SCC OnLine Del 3213

On the other hand, invalidating the validity of such clauses on the grounds of it restraining the right to initiate legal proceeding (Section 28 of The Indian Contract Act 1872), such reasoning is flawed because such clauses do not restrain either of the parties to initiate legal proceedings in any way, matter of fact, Arbitration agreements are an exception to the aforementioned provision.

Ergo, Unilateral arbitration clauses cannot be prima facie termed to be as valid or invalid, but based on the merits and facts relating to the matter the courts can come to a conclusion. The High Courts have provided for fair and equitable interpretation on the matters pertaining to such clauses, but in few cases the courts failed to recognize or challenge the Ratios and interpretation given by their own courts decades ago pertaining to the same question of law. Thus, in the end it can be said that unilateral arbitration clause is still an unchartered territory in India because the Apex court is yet to take any stand on this.

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