

Stuck in Time and Law: Arbitral Appointments and the Post-CORE Conundrum in India

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The question of the validity of unilateral arbitral appointments in the Indian scenario has risen above the surface yet again. The Delhi High Court recently, in **Margo Networks Pvt. Ltd. and Another v Railtel Corporation of India Ltd** (“Margo”), reiterated the conflict in the existing legal position and the need for finality on this issue. The Kluwer Arbitration Blog has adequately traced the genesis of the legal controversy till 2021 in its previous articles (available [here](#) and [here](#)).

While the current piece inherits this descriptive ambition and briefly revisits the origins of the issue at hand, it probes how the legal uncertainty has unfolded lately and analyses the urgency for clarity on unilateral arbitral appointments, the power of ineligible persons to appoint arbitrators, and finally its impact on independence and impartiality in arbitral proceedings. All these issues are currently being deliberated by the Centre-appointed Expert Committee.

Revisiting the Past: Key Rulings That Set the Stage

The subject matter has already been dealt with by the Supreme Court of India (“Supreme Court”) and several High Courts over the years. First, in the case of **Voestalpine Schienen GmbH v Delhi Metro Rail Corporation Ltd** (“Voestalpine”), a scheme of arbitral appointment providing parties the option to choose their nominees from a panel of five former government employees was prepared. This was struck down for (i) failing to counter-balance the heightened discretion of one of the parties in the appointment process; and (ii) being restrictive and not sufficiently broad-based in composition, thus, potentially raising justifiable doubts on the appointment procedure. These twin-fold tests constituted the jurisprudential fountainhead for the subsequent pronouncements.

In **TRF Limited v Energo Engineering Projects Ltd** (“TRF”), also discussed [here](#), settlement of dispute through a Sole Arbitrator appointed by the Managing Director or his nominee of one of the parties, was deemed to fit squarely in the pigeonhole of ineligibility, created under **Section 12(5)** read with **Schedule VII** of the Arbitration and Conciliation Act, 1996 (“Act”) pertaining to conflict of interest and the degree of prohibited relationships. This was followed in **Perkins Eastman Architects DPS and Another v HSCC (India) Ltd** (“Perkins”), with the Supreme Court bolstering the position in *TRF* by reaching an identical conclusion regarding ineligibility by operation of law.

Then came the point of deflection in **Central Organisation for Railway Electrification v ECI-SPIC-SMO-MCML (JV)** (“CORE”). In this ruling, CORE’s general manager was vested with the power to form a panel comprising exclusively of four (current and former Railway officials). While ECI could select any two as its nominees, the general manager at CORE was empowered to select one arbitrator from the two nominees selected by ECI and appoint the remaining two arbitrators. The Supreme Court relying on the tests in *Voestalpine* held that (i) the power of the general manager to nominate remaining arbitrators was counter-balanced by the discretion of the opposite party to

select nominees, and (ii) the former was not ineligible to appoint an arbitrator, notwithstanding his relationship to and interest in CORE's cause and outcome of the case.

Most recently, a coordinate bench of the Supreme Court in ***Union of India v M/s Tania Constructions Limited*** took cognisance of this warped interpretation in *CORE* and referred the question to a larger bench to conclusively adjudicate upon the power of an ineligible person to unilaterally appoint arbitrator or the lack thereof.

Where Are We Today: Post *CORE* saga Continues

Unilateral appointment procedures in the underlying contract continue to be challenged before different fora. One such challenge recently manifested before the Delhi High Court in *Margo*, a Section 11 petition seeking the constitution of an independent arbitral panel to adjudicate a dispute, arising out of a request for proposal issued by a public sector undertaking of the Indian Railways. The procedure in question mirrored the appointment procedure in *CORE*. The only difference was that by way of practice, the Railway Authority maintained a panel of ten persons comprising its former employees. Such a procedure was argued to be contrary to the law laid down in *Voestalpine* since it was unilateral, one-sided, and restrictive. Per contra, the Railway Authority strenuously relied upon *CORE* and contended that the arbitral tribunal ought to be constituted in accordance with the contract *stricto sensu*.

The Delhi High Court expressed its skepticism over the correctness of the reasoning in *CORE* and its constraint to be nevertheless bound by it till its operation is stayed. On the other hand, it quickly distanced itself from the applicability of the judgement by observing that it did not need *CORE* to answer the specific questions before it. *CORE* cannot be an authority for adjudication of aspects which were not addressed in the case in the first place. Two such aspects included *first*, (i) the need for the panel prepared by either party to be broad-based and the consequences that ensue when it is not; and *second*, (ii) the need for counter-balancing the scope of discretion of the parties in proposing and choosing from the panel, especially when one party can effectively appoint two-third members of the tribunal. Invoking the *Voestalpine* tests, the Delhi High Court held that the panel comprising of ten retired railway employees was restrictive and not broad-based. An arrangement where one party chose an arbitrator from a panel prepared by the other and remaining two-third arbitrators were appointed by the other party, did not provide for any form of counterbalancing. Thus, the appointment procedure in the impugned clause was invalidated.

Margo is not the only case where the post-*CORE* dilemma has seised the Court's imagination. The Delhi High Court few days ago in ***Kotak Mahindra Bank Limited v Narendra Kumar Prajapati*** ("Kotak") denied enforcement of an arbitral award passed by a unilaterally appointed Tribunal. The Bombay High Court in ***Hanuman Motors Pvt. Ltd. and Another v M/s Tata Motors Finance Ltd*** ("Hanuman Motors"), held that unilateral arbitral appointments were hit by Section 12(5) read with Schedule VII of the Act, which vitiated the entire arbitral proceedings and set aside the award. Contrarily, the dilemma has also encouraged some courts to appreciate *CORE* and reapply its reasoning whenever gaps appear. Earlier this year, the Calcutta High Court in ***McLeod Russel v Aditya Birla Finance Limited*** upheld the unilateral arbitral appointment since *first*, the sole

arbitrator appointed was not a specific officer or employee of one of the parties such as the managing director or general manager and had no interest in the outcome of the case; and *second*, the party did not have the right to act as the arbitrator and only appointed one independently. These facts of differences with *TRF* and *Perkins* were utilised to justify the reliance on *CORE*.

The Future: *When Will the Mist Clear?*

The post-*CORE* conundrum in the past two years has exposed some inherent issues in arbitral appointments that require deeper consideration. As has also been argued in a **prior post**, the situation demands putting an end to this unequal panel formation at the earliest. Unresolved ambiguities in law and conflict in jurisprudence cannot support India's ambition of becoming a global arbitration hub. These ambitions find a reflection in the recent Expert Committee set up by the government, led by the former Law Secretary, **TK Vishwanathan** to suggest timely reforms in arbitration laws. The lawful and valid appointment of the arbitral tribunal forms the cornerstone of the commencement of arbitration proceedings. **Another post** previously and also rightly highlighted that independence and impartiality of the arbitrator are hallmarks of arbitration. Unilateral appointment of the arbitral tribunal could nullify and render the arbitration proceedings infructuous altogether. *Kotak* and *Hanuman Motors* are examples where bias in unilateral arbitral appointment struck at the root of arbitration proceedings leading to the awards ultimately being set aside.

Additionally, party autonomy, equality, and even commercial wisdom, discourage deference to the rationale in *CORE*. Last but not least, with respect to the current landscape in India, as also seen in *Margo*, majority of arbitrations involve government entities, and procedures for arbitral appointments find their genesis in non-negotiated documents such as request for proposals and tender documents. Such unilateral arbitral appointment procedures tip the balance unequally in favour of the government. Given the legal environment in India, parties should revisit the drawing board and amend their standard form contracts to avoid such hurdles in future. This will diminish the possibility of a challenge and help save time and costs and restore the disturbed balance in the bargaining power of the parties.

The Supreme Court has constituted a five-judge bench to demystify the question of unilateral arbitral appointment, power of courts to deviate from the agreed procedure and the power of an ineligible person to appoint an arbitrator. The proceedings in *Margo* could possibly be viewed as a precursor to the arguments that may be presented. While the matter was heard in the second week of July, the Government has categorically **submitted** that this issue falls within the remit of the newly constituted Committee and post recommendations, modification of the legislation may be considered. The time for change has kicked in, and hopefully, this will spell an end to the controversy!

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*This [piece](#) was originally published on the *Kluwer Arbitration Blog*.*