

# Party autonomy: The soul of arbitration

In a landmark judgment delivered in November 2024, a Constitution Bench of the Supreme Court of India examined the validity of arbitration clauses that allow a party to the dispute to unilaterally appoint the arbitrator(s). The Court held that such clauses undermine the principles of equal participation in the appointment process, thereby compromising the independence and impartiality of the arbitrators. It found these clauses to be in violation of the provisions of the Arbitration and Conciliation Act, 1996, the Indian Contract Act, 1872, and Article 14 of the Constitution of India.

The Court reaffirmed the principle of party autonomy in arbitration. It, however, underscored that such autonomy must be exercised on an equal footing, with both parties having a meaningful participation in the arbitrator appointment process. Any imbalance, where one party has disproportionate control, risks undermining the arbitrator's independence and impartiality. Thus, party autonomy and the arbitrator's independence and impartiality are foundational pillars of arbitration that must coexist harmoniously. Neither principle can be subordinated to the other. Both are essential for achieving the best outcomes for the parties while preserving the integrity and fairness of the arbitration process.

The parties submit in-personam disputes to arbitration. Such disputes and their resolution typically have no broader impact on the external world. Therefore, the parties are free to tailor the arbitration proceedings to meet their specific needs and preferences. This inherent flexibility motivates the parties to seek resolution through arbitration over litigation in courts. The arbitration laws across jurisdictions uphold party autonomy as a cornerstone of the arbitration framework. Party autonomy encompasses various elements, including the choice of governing law, the seat of arbitration, the language of proceedings, the fee of the arbitrators, the selection of arbitrators, the procedures of their appointment and removal, and almost every other aspect of the arbitration process. Among these elements, the choice of arbitrator

is often the most contentious and nuanced. At its simplest, it allows the disputing parties to directly appoint an arbitrator or designate one in advance, should a dispute arise. At its most intricate, it may involve setting out a detailed process for selecting arbitrator(s), encompassing aspects such as the composition of the tribunal, the qualifications, expertise, and nationality of the arbitrators. The process may even stipulate the role of parties in the appointment, such as requiring one party to choose an arbitrator from a panel proposed by the other.

Arbitration is an adversarial process. It relies on the parties to present facts and evidence before the arbitral tribunal for a decision. In such a process, formal equality is necessary to secure legitimate and fair outcomes, fostering a level playing field between parties.

The law, therefore, mandates equal treatment of the parties to the dispute in an arbitration proceeding. This equality extends to every procedural aspect, including the appointment of arbitrators. Ensuring equal participation in the appointment process allows both sides to have a say in establishing a truly independent and impartial arbitral process.

Party autonomy works well in scenarios where the parties to dispute possess comparable bargaining power. It falters in situations marked by

unequal power dynamics, which has the potential to impinge the independence and impartiality of the arbitrator, and fairness of the arbitral procedure. In such cases, the stronger party typically imposes its preferences on the weaker party, effectively undermining the voluntary nature of the agreement.

While the weaker party may ostensibly "agree" to such terms, this consent is often driven more by necessity than by genuine choice. Rejecting the terms could mean losing the opportunity altogether, leaving the weaker party with no realistic alternatives. In such cases, the stronger party effectively imposes its will, exploiting the imbalance to secure an unfair advantage. To address this, the law explicitly upholds party autonomy: The autonomy of one party must not infringe upon or undermine the autonomy of the other.

The issue of party autonomy often arises when an arbitrator is appointed by a third party, such as a court, an online dispute resolution platform, or an arbitral institution. These appointments are typically made on a random basis from a pre-approved pool of arbitrators, which may not be publicly disclosed. This approach resembles the court system, where judges are assigned to a case without input from the disputing parties or the consent of the judges. While this approach promotes impartiality, it limits party autonomy in choosing their arbitrators. Moreover, it can be disadvantageous in scenarios where the parties value specific expertise, cultural alignment, or the perceived neutrality of the arbitrator.

Party autonomy in arbitration necessitates a publicly accessible list of qualified arbitrators who possess the requisite expertise and uphold the highest standards of conduct. The list should include brief profiles of arbitrators along with their track record, enabling parties to make informed decisions, and effectively exercise their autonomy. The selected arbitrator should be willing to take up the dispute for arbitration at market-determined fees, ensuring accessibility and fairness. However, where parties fail to appoint an arbitrator, the arbitral institution should step in to make appointments on their behalf, based on pre-determined and transparent fee schedules. This would balance the party autonomy with an impartial and efficient arbitration process.

Arbitrators must possess the necessary competence for their role, and their conduct must be beyond reproach to build trust among stakeholders. Statutes governing mediation and arbitration in India provide for systems for accreditation and de-accreditation to ensure these standards. Initially, practitioners with diverse expertise should be accredited to build a robust talent pool. Over time, the arbitration ecosystem must develop dedicated specialists, attracting young talent to sustain the quality and availability of arbitration services. Efforts should also be made to promote arbitration as a rewarding career path for students at the 10+2 level, fostering a future generation of skilled arbitration professionals.

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