
CASE ANALYSIS: THE PERILS AND PITFALLS OF UNILATERAL APPOINTMENT OF ARBITRATORS IN INDIA

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Introduction

The issue of unilateral appointment of arbitrators has been a longstanding subject of debate in India. The practice of unilaterally appointing the arbitrator entails that one party to a dispute retains the exclusive right to appoint or nominate an arbitrator. While the Arbitration and Conciliation Act, 1996¹, does not explicitly prohibit such appointments, the Supreme Court has clarified that such clauses must be carefully drafted to ensure the independence and impartiality of the arbitrator.

The Supreme Court's Constitution Bench recently delivered a much-awaited judgment dealing with the arbitration clauses that deals with the unilateral appointment of the Arbitrators by Public Sector Undertakings (PSUs) in the case of *Central Organisation for Railway Electrification v. M/s ECI SPIC SMO MCML (JV)*². The majority opinion, authored by **Chief Justice D.Y. Chandrachud**, along with **Justices J.B. Pardiwala** and **Manoj Mishra**, outlines the Court's decision. **Justices Hrishikesh Roy** and **P.S. Narasimha** authored their partially dissenting and concurring opinions. The ruling underscores the principle of equality and fairness in arbitration proceedings, with significant implications for future arbitration clauses in public-private contract.

On the one hand, the principle of party autonomy is central to the arbitration process, permitting unilateral appointments where the parties consent to such an arrangement. On the other hand, the requirements of impartiality, fairness, and transparency are compromised when unilateral appointments are permitted without adequate safeguards. This article critically examines the legal status of unilateral arbitrator appointments under Indian law in three legs. Firstly, it

¹ Arbitration and Conciliation Act, No. 26 of 1996, India Code (1996), available at <https://www.indiacode.nic.in/bitstream/123456789/1978/3/a1996-26.pdf>.

² Central Organisation for Railway Electrification v. ECI-SPIC-SMOMCML (JV) 2024 INSC 857

explores the key amendments introduced by the 2015 Amendment to enhance the independence and impartiality of arbitrators. Secondly, it analyzes the judicial developments surrounding unilateral appointments, categorizing relevant case law to assess the evolving legal stance on this issue. Finally, the article concludes by advocating for the invalidation of unilateral appointments, in order to safeguard the integrity of the arbitration process and ensure a more balanced and equitable framework.

Arbitration and Conciliation (Amendment) Act, 2015

Before delving into the judicial perspective on the issue of unilateral arbitrator appointments, it is crucial to understand the statutory framework that governs this practice. The *Arbitration and Conciliation (Amendment) Act, 2015*³ introduced the *Fifth* and *Seventh* Schedules to the Arbitration and Conciliation Act, 1996 (the "Act"), which were influenced by the *International Bar Association (IBA) Guidelines*⁴ on Conflict of Interest in International Arbitration, specifically the Orange List and Red List.

Section 12(1)⁵ of the Act requires individuals approached for arbitration appointments to disclose any relationship or interest with the parties or the subject matter of the dispute that could raise reasonable doubts about their independence or impartiality. Explanation 1 directs that the grounds outlined in the Fifth Schedule should be consulted when assessing potential conflicts of interest. Additionally, Section 12(5)⁶ prohibits certain individuals from being appointed as arbitrators, referring to the Seventh Schedule, which outlines the categories of ineligible persons.

The inclusion of these two schedules highlights the need to evaluate potential bias when an arbitrator is appointed by an interested party, either directly or through an appointing authority.

Background (Tracing the Judicial stance)

The Law Commission of India in its 246th Report highlighted the importance of balancing party

³ Arbitration and Conciliation Act, No. 26 of 1996, India Code, available at <https://lawmin.gov.in/sites/default/files/ArbitrationandConciliation.pdf>.

⁴ International Bar Association, IBA Guidelines on Conflict of Interest in International Arbitration (2014), available at <https://www.ibanet.org/MediaHandler?id=e2fe5e72-cb14-4bba-b10d-d33dafce8918>.

⁵ Arbitration and Conciliation Act, No. 26 of 1996, § 12, India Code (1996), available at https://www.indiacode.nic.in/show-data?actid=AC_CEN_3_46_00004_199626_1517807323919&orderno=13

⁶ *id*

autonomy with the principles of impartiality and independence in arbitrator appointments. The Commission emphasized that while parties should have a degree of control over the appointment process, this autonomy should not compromise the fairness of the arbitration proceedings. The evolving judicial interpretation of arbitration clauses that allow unilateral appointments is discussed herein.

- ***TRF Ltd. v Energo Engineering Ltd.***⁷

- The Supreme Court held that a party ineligible to act as an arbitrator under Section 12(5) of the Arbitration Act cannot appoint an arbitrator, emphasizing that such an appointment would violate the principles of independence and impartiality, ensuring that arbitrators remain neutral and free from conflicts of interest.

- ***Perkins Eastman Architects DPC v HSCC (India) Ltd.***⁸

The Court emphasized that party autonomy in appointing arbitrators must be balanced with the equal treatment principle under Section 18. It ruled that unilateral appointment provisions violate the principle of fairness and impartiality, as they allow one party undue control over the selection process.

- ***Voestalpine Gmbh v Delhi Metro Rail Corporation***⁹ (*'Voestalpine'*)

- The Court allowed public sector undertakings (PSUs) to use a panel of arbitrators but stressed that no party should have exclusive control over the appointment process, as this could lead to an apprehension of bias and undermine impartiality in the arbitration.

- ***Central Organisation for Railway Electrification v M/s ECI- SPIC- SMO- MCML (JV)***¹⁰

- The Supreme Court held that unilateral appointment of arbitrators violates the equal treatment principle under Section 18 of the Arbitration Act. The Court emphasized the need for impartiality and independence in the arbitrator selection process. It reinforced Sections 12(5) and 18 to ensure fairness, particularly in public sector contracts.

⁷ TRF Ltd. v Energo Engineering Ltd [(2017) 8 SCC 377]

⁸ Perkins Eastman Architects DPC v HSCC (India) Ltd. AIR 2020 SUPREME COURT 59

⁹ Voestalpine Gmbh v Delhi Metro Rail Corporation (2017) 4 SCC 665

¹⁰ Central Organisation for Railway Electrification v M/s ECI- SPIC- SMO- MCML (JV) (2020) 14 SCC 712

- ***Lite Bite Foods Pvt. Ltd. V Airports Authority of India***¹¹
- The Court ruled that arbitration clauses allowing one party to select arbitrators from a pre-approved list violate the principles of impartiality and fairness, stressing that such provisions cannot override the statutory requirements for independent arbitrators.
- ***Proddatur Cabe TV Digi Services v SITI Cable Network Limited***¹²
- The Court reinforced that allowing one party to select arbitrators from a curated panel creates an apprehension of bias, violating the independence and impartiality required by the Arbitration Act. It emphasized the need for both parties to be equally involved in the process.
- ***Iworld Business Solutions v. Delhi Metro Rail Corporation***¹³
- The Supreme Court reaffirmed that party autonomy in appointing arbitrators must comply with the independence and impartiality requirements of the Arbitration Act, ruling that unilateral appointment clauses violate the equal treatment principle and could lead to bias.

Facts

The case at hand involved a contractual dispute between the Central Organisation for Railway Electrification (CORE) and a Joint Venture Company concerning the arbitration clause in their agreement. Under this clause, the Railways retained control over the selection of arbitrators by providing a limited panel of retired railway officers. CORE's procedure required the Joint Venture to select arbitrators exclusively from this pre-determined panel, raising significant concerns regarding the impartiality and independence of the arbitration process.

This issue was addressed in ***Central Organisation for Railway Electrification v. ECI-SPIC-SMOMCML (JV)***¹⁴ (hereinafter referred to as "CORE"), where the Supreme Court ruled that *Section 12(5)*¹⁵ of the Arbitration and Conciliation Act, 1996 (the "Arbitration Act") does not prohibit the appointment of former employees as arbitrators. The Court also considered the

¹¹ Lite Bite Foods Pvt. Ltd. V Airports Authority of India 2020 SCC OnLine Ker 4736

¹² Proddatur Cabe TV Digi Services v SITI Cable Network Limited (2017) 8 SCC 377

¹³ Iworld Business Solutions v. Delhi Metro Rail Corporation AIRONLINE 2020 DEL 1598

¹⁴ Central Organisation for Railway Electrification v. ECI-SPIC-SMOMCML (JV) (2020) 14 SCC 712

¹⁵ Arbitration and Conciliation Act, No. 26 of 1996, § 12, India Code (1996), available at https://www.indiacode.nic.in/show-data?actid=AC_CEN_3_46_00004_199626_1517807323919&orderno=13

validity of a General Manager's authority to appoint arbitrators and upheld the arbitration clause, noting that the respondent retained the right to nominate two arbitrators, which was deemed sufficient to maintain balance in the appointment process.

Subsequently, in *Union of India v. Tania Constructions Limited*¹⁶ ("*Tania Constructions*"), a three-judge bench led by Justice R.F. Nariman raised questions about the decision in CORE, particularly regarding the legitimacy of appointments made by an incapacitated appointing authority. This bench referred the matter to the Chief Justice for the constitution of a larger bench to reconsider the issue. In a subsequent case, *JSW Steel Ltd. v. South Western Railway*¹⁷, another three-judge bench, headed by then Chief Justice U.U. Lalit, also referred the matter to a larger bench for further adjudication.

The following issues arose for consideration before the constitution bench:

Issues

- Whether a process that permits a party with *an interest in the dispute* to unilaterally appoint a sole arbitrator, or to establish a panel of arbitrators from which the opposing party is required to select its arbitrator, is legally valid.
- Whether the *principle of equal treatment* of the parties is applicable at the stage of arbitrator appointment.
- Whether an appointment process in a public-private contract, whereby a government entity has the authority to unilaterally appoint a sole arbitrator or the majority of the members of the arbitral tribunal, contravenes *Article 14* of the Constitution of India.

Arguments

Arguments from the side of Appellant

The Appellant (Union) raised the following key arguments:

1. *Party Autonomy and Section 11(2)*: The appellant argued that Section 11(2) of the

¹⁶ Union of India v. Tania Constructions Limited ("*Tania Constructions*") 2021 SCC OnLine SC 271

¹⁷ JSW Steel Ltd. v. South Western Railway (2020) 20 SCC 760

Arbitration Act permits a party to propose a panel of arbitrators from which the opposing party may select its nominee. The appellant emphasized the distinction between the "appointment" of an arbitrator and the role of "acting" as an arbitrator. It was contended that the Act does not specifically prohibit an ineligible party from proposing or enlisting arbitrators, provided the nominated arbitrator meets the criteria outlined in the Seventh Schedule.

2. *Ineligibility under Section 12*: The appellant further contended that Section 12 addresses actual ineligibility, not presumed ineligibility. Therefore, the appellant argued that the principle of equality under Section 18 of the Act pertains only to the proceedings, not the appointment stage, and thus does not preclude a party from proposing a panel of arbitrators.
3. *Judicial Precedents and TRF*: In response to prior judicial precedents, the appellant relied on the Voestalpine decision, which upheld the right of public sector entities to maintain a panel of arbitrators. The appellant distinguished TRF Ltd. v. Energo Engineering Projects Ltd. on the grounds that it focused on the ineligibility of an arbitrator, not the permissibility of unilateral appointments under an arbitration clause.
4. *Unilateral Appointment and Delegation of Power*: The appellant argued that the appointment of an arbitrator under an arbitration agreement is not a delegation of power but rather an act within the bounds of the arbitration agreement. The appellant thus sought to uphold the autonomy of the parties to agree on a procedure for arbitrator selection.

Argument from the side of Respondent

The counsel for the Respondent presented the following key arguments:

1. *Balancing Party Autonomy with Mandatory Statutory Provisions*: The respondent's counsel contended that while party autonomy is a fundamental principle of arbitration, it must be exercised in compliance with the mandatory provisions of the Arbitration Act, particularly Sections 12(5) and 18. Section 12(5) ensures the independence and impartiality of the arbitrator, while Section 18 mandates the equal treatment of parties at all stages of arbitration, including the appointment of the arbitral tribunal. The

respondent argued that unilateral control over arbitrator appointments, particularly by one party, undermines these statutory principles and creates a legitimate apprehension of bias, thereby compromising the fairness of the arbitration process.

2. *Unilateral Appointments and Violation of Fairness:* The respondent further emphasized that unilateral control over arbitrator selection contravenes the principles of independence and equal treatment enshrined in Sections 12(5) and 18. A clause granting one party the exclusive right to appoint a sole arbitrator or form a panel from which the opposing party must choose creates a reasonable suspicion of bias, undermining the integrity of the arbitral process. The respondent drew upon TRF and Perkins Eastman Architects DPC v. HSCC (India) Ltd., asserting that Section 12(5) effectively prohibits an ineligible person from nominating arbitrators, reinforcing the view that unilateral control over the selection process is inherently flawed.
3. *The Requirement for Equal Treatment in Appointments:* The respondent argued that unilateral appointment clauses violate the equal treatment principle under Section 18, which governs the fairness of the arbitration process at the constitution stage of the tribunal. While Voestalpine permitted the creation of a broad-based panel, the Court noted that the restriction on the opposing party's selection still compromised the principle of equality. Thus, the respondent contended that unilateral appointments, particularly from pre-curated panels controlled by one party, breach the requirement for equal treatment.
4. *Independence and Impartiality Concerns:* The respondent also invoked the doctrine of impartiality and independence under Section 12(5), arguing that when one party controls the tribunal composition, this raises justifiable doubts about the independence and impartiality of the arbitrators. Such doubts are sufficient to invoke judicial intervention to preserve the fairness of the arbitration process, as the potential for bias is a clear concern when the tribunal is curated by one party.

Judgment

- Majority Opinion

Majority Opinion was delivered by Chief Justice D.Y. Chandrachud, along with Justices

J.B. Pardiwala and Manoj Mishra, extensively focused on ensuring fairness, impartiality, and equality in the arbitrator appointment process, particularly in the context of Public Sector Undertakings (PSUs) and public-private arbitration. The majority's key principles are aligned with the notion that arbitration clauses in public sector contracts should uphold the integrity of the process, while also respecting statutory safeguards under the Arbitration and Conciliation Act, 1996. Majority Opinion emphasised on the following principles:

The Court emphasized the *equal treatment principle* enshrined in *Section 18* of the Arbitration Act, which mandates that all parties must be treated equally at every stage of the arbitration process, including the appointment of arbitrators. The majority held that any clause granting one party the exclusive right to unilaterally appoint an arbitrator, or to select an arbitrator from a pre-determined panel curated by one party, is inherently problematic as it creates an imbalance in the process. This approach risks compromising the independence and impartiality of the arbitrator, leading to concerns of bias. As noted in earlier cases such as *TRF Ltd. v. Energo Engineering Ltd.* and *Perkins Eastman Architects DPC v. HSCC (India) Ltd.*, an ineligible person cannot appoint an arbitrator, as such appointments undermine the fairness of the process.

The Court further reinforced the application of *Section 12(5)* of the Arbitration Act, which provides a safeguard against the appointment of ineligible or biased arbitrators. This provision is supplemented by the *Seventh Schedule*, which outlines circumstances under which an arbitrator may be deemed ineligible, particularly where there are doubts about their independence or impartiality. The majority held that unilateral appointment clauses that allow one party to exercise exclusive control over the arbitrator selection process violate the principles of impartiality and independence protected under *Sections 12(5)* and *18* of the Arbitration Act.

The Court also highlighted that unilateral appointment clauses violate the constitutional right to equality under *Article 14* of the Indian Constitution, which guarantees that all parties have an equal opportunity before the law. By permitting one party to control the selection of arbitrators, such clauses undermine the fairness and impartiality of the arbitral process, creating an imbalance that is constitutionally impermissible.

Addressing the *waiver of bias allegations*, the majority clarified that the proviso to *Section 12(5)* of the Arbitration Act allows a party to *waive the right to challenge an arbitrator's*

impartiality, but such a waiver must be express and written, and can only occur after the dispute has arisen. This ensures that any waiver is voluntary and not coerced, preserving the fairness of the process.

In terms of prospective application, the Court ruled that the legal principles established in this judgment will govern future arbitration appointments, particularly those involving *three-member panels selected from panels* curated by Public Sector Undertakings (PSUs). The Court directed that such appointments must be made in accordance with the principles of equal treatment, impartiality, and independence, as mandated by the Arbitration Act.

- **Dissenting Opinion**

Justices Hrishikesh Roy and P.S. Narasimha authored their partially dissenting and concurring opinions.

Justice Hrishikesh Roy, in his partial dissenting opinion, agreed with the Chief Justice that Section 18 of the Arbitration Act mandates equal treatment of parties during all stages of arbitration, including the appointment of arbitrators. However, he disagreed with the application of constitutional principles to enforce this equality in the arbitration process. He clarified that unilateral appointments are not inherently impermissible and stressed the distinction between 'ineligibility' and 'unilateral' appointments. Referring to the TRF case, he noted that it dealt with the issue of ineligibility, not the permissibility of unilateral appointments, and argued that not all unilateral appointments should be automatically invalidated by the courts. Justice Roy emphasized that Section 18 applies to the entire arbitration process, including the appointment stage, but the Arbitration Act does not provide special treatment for the government in arbitration. He concluded that unilateral appointments are permissible under the Act as long as the arbitrator is eligible under the Seventh Schedule. Judicial intervention under Section 11(6) should only occur if parties fail to reach an agreement, and the court must appoint an independent arbitrator under Section 11(8), read with Sections 12 and 18. He emphasized that the assessment of arbitrator independence and impartiality should be grounded in the statutory framework and not be influenced by constitutional principles.

Justice P.S. Narasimha, in his partial dissent, raised concerns about invoking Section 18 to enforce equality during arbitrator appointments, as the responsibility for ensuring

equality lies with the arbitral tribunal, not the parties. He cautioned against prematurely declaring unilateral appointment clauses void, stressing that a mere relationship between an arbitrator and the appointing party does not inherently compromise the arbitrator's independence. Justice Narasimha argued that arbitration balances party autonomy with the statutory requirement to form an independent and impartial tribunal. He noted that while party autonomy allows freedom in selecting arbitrators and determining procedures, the tribunal must remain independent once arbitration is initiated. He emphasized that the principles of impartiality and independence are grounded in the Contract Act and the Arbitration Act, and should be applied judicially, without invoking constitutional or public law principles. He concluded that unilateral appointment clauses that undermine independence should be scrutinized on a case-by-case basis, not voided automatically.

Analysis

The recent Supreme Court judgment on the appointment of arbitrators articulates a nuanced approach to balancing party autonomy in arbitration with the fundamental principles of fairness and impartiality. The ruling has significant implications, particularly in public-private arbitration agreements, where government entities often have substantial control over the appointment process. The Court emphasized that while party autonomy is a central tenet of arbitration, it must not override the statutory principles of equality and impartiality, especially in cases where one party holds exclusive control over the appointment of arbitrators. The Court reinforced that the appointment process must ensure equality of treatment, aligning with the constitutional mandate under Article 14 of the Indian Constitution, which guarantees equality before the law.

In scrutinizing arbitration clauses that confer unilateral control to one party, typically a public-sector entity, the Court addressed concerns that such clauses could lead to bias, especially when the appointing party curates a panel from which the opposing party must select an arbitrator. The judgment clarifies that while the appointment of retired government employees as arbitrators is not prohibited, the exclusive selection of a majority of arbitrators from such a panel raises legitimate concerns regarding the independence and impartiality of the tribunal. By applying Section 18 of the Arbitration and Conciliation Act, 1996, which mandates equal treatment of the parties throughout the arbitration process, the Court invalidated clauses that allowed for such unilateral appointments, asserting that such provisions are inherently biased

and violate the principles of fairness.

The judgment is prospective in nature, meaning it will apply to arbitrations initiated after the ruling, but will not affect ongoing proceedings. This decision may push parties towards institutional arbitration, given its emphasis on ensuring fairness in the appointment process. However, the ruling has sparked concerns that the imposition of constitutional principles, particularly Article 14, could deter public sector undertakings (PSUs) from using arbitration as a dispute resolution mechanism, particularly in high-value contracts. Critics, including dissenting opinions, argue that the application of public law principles in the arbitration context is excessive, as the Arbitration Act already provides sufficient safeguards, including the provisions of Sections 12(5) and Section 18, to ensure impartiality and independence. The dissent cautions against the blanket invalidation of arbitration clauses containing unilateral appointment provisions, advocating for a case-by-case analysis to avoid unintended consequences.

In conclusion, the judgment marks a critical shift towards strengthening the impartiality and fairness of the arbitration process in India, particularly in public contracts. While it aligns with constitutional principles, the ruling underscores the importance of maintaining a balance between party autonomy and the need for an independent, impartial tribunal, which could have a lasting impact on arbitration practices in the country.