

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed

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CHOOSE THY JUDGE: PARTY AUTONOMY AND SELECTION OF ARBITRATORS

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ABSTRACT

The Arbitration and Conciliation Act 1996 (the Act) is the governing statute on arbitration in India. Over the decades, developments in the law have led to progress in the interpretation of the said Act. Unilateral appointment of arbitrators has continued to engender legal and practical difficulties. While conflicting judgments previously left the law unsettled, the Supreme Court's 2024 Constitution Bench decision conclusively resolved the validity of unilateral appointments. This paper examines the history and development of the present law with respect to unilateral appointment of arbitrators and the ratio decidendi of the Hon'ble Courts. It further demonstrates the judiciary's firm attitude towards attempts by the parties to override the settled judgments and exploit loopholes. "An agreement for arbitration is the very foundation on which the jurisdiction of the arbitrators to act rests, and where that is not in existence, at the time when they enter on their duties, the proceedings must be held to be wholly without jurisdiction."¹ This principle reflects the foundational role of consent in arbitral proceedings. As Indian jurisprudence has developed, courts have shown greater insistence on neutrality and impartiality in the appointment process. This paper traces that development and evaluates its implications for the validity of unilateral appointment clauses.

HISTORICAL EVOLUTION: THE PRE 2015 LANDSCAPE

The structural equilibrium of the Arbitration Act is contingent upon an impartial and non-partisan arbitrator. Hence, for the Act to be an effective statute it is imperative that the word 'neutral' be given a strict and accurate interpretation. The Arbitration Act, one can argue, is still in its formative stage. Over the last few decades, the Act has witnessed several statutory amendments and massive developments with new interpretations and dimensions overhauling the earlier laws and guidelines on which the Act was essentially based.

¹ *Waverly Jute Mills Co. v. Raymon & Co. (India) Pvt. Ltd.*, (1963) 3 S.C.R. 203 (India), quoted in *Dharma Prathishthanam v. Madhok Constr. Pvt. Ltd.*, (2004) 8 S.C.C. 562 (India).

Prior to the enactment of the Arbitration Act, 1996, the whole arbitration regime in India was governed by three statutes namely- The Arbitration Act, 1940, the Foreign Awards (Recognition and Enforcement) Act, 1961 and the Arbitration (Protocol and Convention) Act, 1937. After liberalisation of the economy in the year 1991, it was considered that an efficient system of alternative resolution of disputes is a pre-requisite to attract and sustain foreign investment.² With a view to eradicate all the prevailing lacunae of the alternative dispute redressal system, the Arbitration and Conciliation Act 1996 was enacted to cover domestic arbitrations, enforcement of foreign awards and conciliation.³

Appointment of unilateral arbitrators had long remained a persistent challenge under the Act. Prior to the amendment, parties had the power to unilaterally appoint arbitrators to adjudicate the disputes. A direct encroachment into the decision making authority such as this rendered the entire justice dispensation system useless, leading to unreasonable favoring and inclinations towards a particular party. Party autonomy could not be allowed to an extent where it overshadows the rights of the other party and the fairness of the proceeding itself is brought to question. Recognizing these concerns, the Law Commission of India, in its 246th Report, recommended significant reforms, which ultimately culminated in the Arbitration and Conciliation (Amendment) Act, 2015.

Before we understand the suggestions made in the Law Commission Report to amend the Act, it would be prudent to first ascertain the law on unilateral appointments, as it existed prior to the amendment of the Act.⁴ At the outset, it would be crucial to note that the Act, prior to its amendment, did not have strict guidelines and/or parameters to ascertain impartiality and independence of arbitrators.⁵

- (i) Section 11(2) provided parties with the autonomy to agree on a procedure for appointment of arbitrators.⁶
- (ii) Section 11(6) provided that where a party fails to act as required under the procedure prescribed, the Chief Justice or any person or institution designated by him was

²Seuj Bikash, *The Law Commission Report on Amendments to Arbitration and Conciliation Act*, iLeaders (Dec. 14, 2016), <https://blog.ipleaders.in/law-commission-report-amendments-arbitration-conciliation-act/> (last visited June 6, 2026).

³ *Id.*

⁴ Bhumika Indulia, *To Appoint or Not to Appoint: A Critical Study of Unilateral Appointment of Arbitrators under the Arbitration Act, 1996*, SCC Online Blog (Mar. 14, 2022), <https://www.sconline.com/blog/post/2022/03/14/a-critical-study-of-unilateral-appointment-of-arbitrators-under-the-arbitration-act-1996/> (last visited June 6, 2026).

⁵ *Id.*

⁶ *Id.*

- empowered to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.⁷
- (iii) Section 11(8) conferred upon the Chief Justice of India the discretion to appoint an arbitrator, having due regard to (a) any qualifications required of the arbitrator by agreement between the parties; and (b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator.⁸
 - (iv) Section 12(1) enjoined upon the arbitrator the duty to disclose in writing any circumstance which may give rise to justifiable doubts concerning his appointment.⁹
 - (v) Section 12(3) allowed the appointment of an arbitrator to be challenged if there were justifiable doubts regarding his independence and/or he did not meet the prescribed qualifications as agreed to between the parties.¹⁰
 - (vi) Section 18 additionally required the arbitrator to treat every party to the dispute on equal terms and without bias.¹¹

Evidently therefore, the Act, prior to its amendment did not enumerate specific circumstances and/or situations that could disqualify the appointment of an arbitrator. Mere apprehension of bias and/or prejudice was not sufficient grounds to set aside the appointment of the arbitrator unless such apprehensions were premised on real and sufficient evidence to establish bias.¹²

JUDICIAL PARADIGM SHIFT: FROM *TRF* TO *PERKINS*

With the introduction of the new regime and the 2015 Amendment, the position regarding the illegality of unilateral appointment of arbitrators has only gotten clearer and stricter.¹³ In *TRF Ltd. v. Energo Engg. Projects Ltd.*, (2017) 8 SCC 377, the Supreme Court discussed the implications of the introduction of Section 12(5) and Schedule 7 in the Arbitration Act.¹⁴ The issue before the Supreme Court was whether a person upon becoming ineligible to preside as

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Vasanth Rajasekaran, *The Conundrum Surrounding the Unilateral Appointment of Arbitrators and its Implications on the Enforceability of Arbitral Awards – An Analysis*, SCC Online Blog (June 2, 2023), <https://www.scconline.com/blog/post/2023/06/02/the-conundrum-surrounding-the-unilateral-appointment-of-arbitrators-and-its-implications-on-the-enforceability-of-arbitral-awards-an-analysis/> (last visited June 6, 2026).

¹⁴ *Id.*

an arbitrator, on account of the provisions contained in Section 12(5) read with Schedule 7, could still be permitted to nominate another person as an arbitrator.¹⁵

It was held- “54. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that a person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as a sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated.”¹⁶ As would be seen above, the Supreme Court while deciding the matter in *TRF Ltd.* observed that once the infrastructure collapses, the superstructure is bound to collapse, hinting that anything that fell out of the illegal and unilateral appointment of an arbitrator is mired with illegality.¹⁷ In simpler terms, when the root is bad, the fruit is also bad.

Perkins Eastman Architects DPC v. HSCC (India) Ltd., (2020) 20 SCC 760 (*Perkins*) moved on the very rationale of *TRF Ltd.*. In *Perkins*, the CMD was supposed to appoint an arbitrator, and not act as one, unlike *TRF*.¹⁸ Though the arbitration clauses in both the cases were different, the Supreme Court held that interested persons to a dispute, (such as an MD or CEO) would not only be ineligible to act as an arbitrator but also be forbidden from appointing an arbitrator to adjudicate the dispute.¹⁹ As long as one of the parties to a dispute has a unilateral right to appoint an arbitrator, such a clause ought to be set aside irrespective of whether such an arbitrator is disqualified under the Fifth Schedule or the Seventh Schedule.²⁰ Thus, a person who is ineligible to be an arbitrator cannot also appoint an arbitrator. “*Perkins* extended the ineligibility criteria to two categories i.e. ineligibility to act and ineligibility to appoint.”²¹

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Perkins Eastman Architects DPC v. HSCC (India) Ltd.*, 2019 SCC OnLine SC 1517; *TRF Ltd. v. Energo Engg. Projects Ltd.*, (2017) 8 SCC 377.

¹⁹ *Perkins Eastman Architects DPC v. HSCC (India) Ltd.*, 2019 SCC OnLine SC 1517; see also Bhumika Indulia, *To Appoint or Not to Appoint: A Critical Study of Unilateral Appointment of Arbitrators under the Arbitration Act, 1996*, SCC Online Blog (Mar. 14, 2022), <https://www.sconline.com/blog/> (last visited June 7, 2026).

²⁰ Soham Banerjee & Salona Mittal, *Unilateral Appointment of Arbitrators and the Inherent Lack of Jurisdiction: Assessing the Procedure for Challenging Biased Appointments*, SCC Online Blog (Feb. 14, 2022), <https://www.sconline.com/blog/post/2022/02/14/unilateral-appointment-of-arbitrators-and-the-inherent-lack-of-jurisdiction-assessing-the-procedure-for-challenging-biased-appointments/> (last visited June 7, 2026).

²¹ *Id.*

The ratio of Perkins was succinctly explained in the Bombay High Court's decision in *Lite Bite Foods (P) Ltd. v. Airports Authority of India*, where the Court held that post TRF and Perkins, there are only two modes of appointment of an arbitrator – the arbitrator may be appointed by consent of the parties or alternately, there must be an order of the Court appointing an arbitrator. It was held that, “There is simply no third option”.²²

PSUs AND PANEL ARBITRATIONS

In an earlier landmark ruling of *Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd.*, the Supreme Court held that prior government service does not by itself disqualify a person from serving as an arbitrator, provided there is no relevant connection or conflict of interest with the appointing party.²³

Most recently, in *Central Organisation for Railway Electrification v. M/s ECI SPIC SMO MCML (JV)*, the Hon'ble Supreme Court in 2024 settled the controversy and invalidated the unilateral appointment of arbitrators. As summarized by SCC Online, “the principle of equality of parties applies at all stages of arbitration proceedings... The Court opined that PSUs are not prohibited from empaneling potential arbitrators, however, the other party cannot be mandated to select its arbitrator from the panel curated by PSUs.”²⁴ “Unilateral appointment clauses in a public-private contract fail to provide the minimum level of integrity required in authorities performing quasi-judicial functions such as arbitral tribunals. Therefore, a unilateral appointment clause is against the principle of arbitration, that is, impartial resolution of disputes between parties. It also violates the *nemo iudex* rule which constitutes the public policy of India in the context of arbitration.”²⁵ In this case, among several questions one of the questions was: Whether the appointment of retired railway officers as arbitrators was valid? Relying upon *Voestalpine v. DMRC* the Court held- Section 12(5) does not bar former employees from being appointed as arbitrators.²⁶ These judgements shaped the legal framework governing PSU-

²² *Lite Bite Foods (P) Ltd. v. Airports Auth. of India*, 2019 SCC OnLine Bom 5163; see also Soham Banerjee & Salona Mittal, *supra* note 19.

²³ *Voestalpine Schienen GmbH v. Delhi Metro Rail Corp. Ltd.*, (2017) 4 SCC 665.

²⁴ SCC Online Blog Editorial Team, *Unilateral appointment of arbitrator in public-private contracts violative of Article 14: SC*, SCC Online Blog (Nov. 8, 2024), <https://www.sconline.com/blog/post/2024/11/08/unilateral-appointment-arbitrator-public-private-contracts-violate-article-14-supreme-court/> (last visited June 11, 2026), see also Arbitration and Conciliation Act, 1996.

²⁵ *Cent. Org. for Ry. Electrification v. M/s ECI SPIC SMO MCML (JV)*, 2024 SCC OnLine SC 3219, ¶ 163.

²⁶ *Supreme Court Crystallises Law on Independence and Impartiality of Arbitrators in Indian Law: Analysis of Verdict in CORE II*, SCC Online Blog (Nov. 14, 2024), <https://www.sconline.com/blog/post/2024/11/14/supreme-court-crystallises-law-on-independence-and-impartiality-of-arbitrators-in-indian-law-analysis-of-verdict-in-core-ii/> (last visited June 11, 2026).

appointed arbitrators.

RECENT FRONTIERS: MORATORIUMS AND EXPRESS WAIVERS

In *Ballarpur Industries Ltd. v. SG Enterprises & Ors.*, O.M.P. (T) (COMM.) 40/2024, decided on 16 May 2025, the Delhi High Court terminated the mandate of a Sole Arbitrator appointed unilaterally by the Respondents during the pendency of a moratorium under the Insolvency and Bankruptcy Code, 2016 (“IBC”). The judgment reiterates the invalidity of unilateral arbitrator appointments and underscores the statutory embargo on arbitral proceedings during moratorium under Section 14 of the IBC.²⁷

The Supreme Court while examining *Bhadra International (India) Pvt. Ltd. v. Airports Authority of India* (Jan. 2026) placed emphasis on three major points.

- i. The principle of equal treatment of parties provided in Section 18 of the Act, 1996, applies not only to the arbitral proceedings but also to the procedure for appointment of arbitrators. Equal treatment of the parties entails that the parties must have an equal say in the constitution of the arbitral tribunal.
- ii. Sub-section (5) of section 12 provides that any person whose relationship with the parties or counsel, or the dispute, whether direct or indirect, falls within any of the categories specified in the Seventh Schedule would be ineligible to be appointed as an arbitrator. Since the ineligibility stems from the operation of law, not only is a person having an interest in the dispute or its outcome ineligible to act as an arbitrator, but appointment by such a person would be ex facie invalid.
- iii. The words “an express agreement in writing” in the proviso to Section 12(5) means that the right to object to the appointment of an ineligible arbitrator cannot be taken away by mere implication. The agreement referred to in the proviso must be a clear, unequivocal written agreement.²⁸

Once again conforming to *Bhadra International*, the Supreme Court in *Engineering Projects India Limited v. Allied Construction* (March, 2026) held that waiver involves a conscious decision to abandon the existing legal right and can be made only by a person fully aware of

²⁷*Ballarpur Indus. Ltd. v. SG Enters. & Ors.*, O.M.P. (T) (COMM.) 40/2024 (Delhi H.C. May 16, 2025); see also Mahendra Bhavsar & Co., *Unilateral Arbitrator Appointment Invalid Under Arbitration Law*, (last visited June 10, 2026), <https://mahendrabhavsar.com/>.

²⁸*Bhadra Int'l (India) (P) Ltd. v. Airports Auth. of India*, (S.C. Jan. 5, 2026), ¶ 123(i)–(iii).

such right. A legal right cannot be taken away by implications. The waiver has to be an unequivocal expression and it cannot be lost sight of that by such waiver the restriction imposed by Section 12(5) of the Act is sought to be overcome.²⁹

CONCLUSION

It is reassuring that the Hon'ble Supreme Court remains the guardian of the law. The Constitution is the grundnorm, and all legislation in India is bound to follow it. Fairness, Equity, Equality – have to be the *ratio decidendi* of every contestation. Justice should not only be done, but also seem to be done; and one can confidently rely on the Hon'ble Courts to uphold that standard.

In conclusion, it can be said that Indian jurisprudence has established that illegality of an arbitrator's appointment goes to the root of the matter and anything arising out of such appointment is *non est*. Any arbitral award made in contravention of Section 12(5) of the Arbitration Act is therefore a nullity and cannot be enforced. Such awards may be challenged under Section 34 and, where appropriate, resisted at the stage of execution or enforcement under Section 36. Until the statutory framework reaches absolute clarity, the appointment process should be dictated by principle, not strategic advantages.

²⁹ *Eng'g Projects (India) Ltd. v. Allied Constr.*, (2026) ibclaw.in 1901 HC.