INDEPENDENCE AND IMPARTIALITY OF ARBITRAL TRIBUNALS: LEGALITY OF UNILATERAL APPOINTMENTS

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Abstract

*An independent and impartial arbitral tribunal is one of the cornerstones of arbitration law. Apropos of this, the unilateral appointment of arbitrators raises a reasonable apprehension of partiality and bias, resulting in a collapse of the arbitral process. This article will attempt to analyse the law of asymmetrical clauses present in arbitration agreements, thus questioning the unfettered right of a party to appoint arbitrators solely. This article shall compare the principles of contractual laws qua the principle of equity, through legislative intent and judicial interpretations of unequal clauses. Further, the contemporary developments under the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"], along with the significant judicial pronouncements on the issue of unilateral appointment of arbitrators shall also be critically examined. The article shall also examine the ambiguity and the conflict created by divergent decisions of the courts, while discussing the international jurisprudence on this issue. This article concludes by proposing to achieve a system of 'faceless tribunals', through the advancement of arbitral institutions and the use of artificial intelligence in the appointment of arbitral tribunals, which can reduce the presumption of partiality.*

I. Introduction

It is a settled principle of curial law that arbitration is a creature of contract, and the parties are bound by the terms of the arbitration agreement as prescribed in the contract. The procedure of appointment of arbitrators is a primary and essential part of the entire arbitral process. While such procedure in arbitration agreements usually allows each party to choose a co-arbitrator to constitute the tribunal, there are instances wherein the agreement may provide an unfettered right of appointment to only one party.

The Arbitration and Conciliation Act, 1996[1] ["**1996 Act**"] is bound by the universal principles of natural justice, which embody the maxim of *nemo judex in causa sua* (no one can be a judge in their own cause).[2] Impartiality of the adjudicator is one of the most fundamental tenets of any dispute resolution mechanism. Naturally, a person who has an interest in the outcome or decision of the dispute must not have the sole power to appoint arbitrators.[3]

The appointment clause in an arbitration agreement can either provide for appointment of arbitrators through mutual consent where both parties have an equal right to nominate one

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1 Arbitration and Conciliation Act, No. 26 of 1996 (India) [*hereinafter* "1996 Act"].

2 Supreme Court Advocates-on-Record Ass'n & Anr. v. Union of India, (2016) 5 SCC 808, ¶¶ 10–11 (India).

3 Shivani Khandekar & Divyansh Singh, *Independence and Impartiality of Arbitrators: Are We There Yet?*, KLUWER ARB. BLOG (Nov. 14, 2017), *available at* http://arbitrationblog.kluwerarbitration.com/2017/11/14/independence-impartiality-arbitrators-yet/.

arbitrator each of their choice or through a unilateral appointment where only one party has the sole and exclusive right to appoint the arbitrator(s) of its choice. The latter form of appointments unequivocally creates doubt regarding the independence and impartiality of the person appointed as the arbitrator, arguably violating the principles of natural justice. According to Russell, an arbitrator is "*neither more nor less than a private judge of a private court. An arbitrator derives its powers wholly from the private law of contract and accordingly the nature and exercise of these powers must not be contrary to the proper law of the contract or the public policy, bearing in mind that the paramount public policy is that freedom of contract is not lightly to be interfered with*".[4]

The author, through this article, focuses on the independence and impartiality of the arbitral process, and in particular, addresses the legal consequences of arbitration clauses containing unilateral appointment of arbitrators. This article is divided into four parts. The following part, i.e. Part II, deals with the legislative intent on the subject matter of the article while traversing through various statutes which deal with impartiality in the arbitral process and unequal arbitration clauses. Part III deals with the national and international judicial developments on the subject and the dilemma that surrounds it. Part IV discusses the different measures and solutions adopted by international arbitration institutions. The author, in Part IV(C) of this article, proposes the use of artificial intelligence in the arbitral process to achieve a system of 'faceless tribunals'. In Part V, the author concludes by pointing out the urgent need for the legislature and/or the judiciary to step in to settle the controversial dispute of unilateral appointment of arbitrators.

II. Legislative intent to preserve the independence and impartiality of arbitral tribunals

The tests of independence and impartiality of an arbitral tribunal are governed by the respective substantive and procedural laws; even then, the concepts of independence and impartiality can co-exist. Alan Redfern and Martin Hunter in their book Law and Practice of International Commercial Arbitration noted that there is a point of view in considering the two terms as being the "*opposite side of the same coin*".[5] Independence, on one side, refers to the arbitrator's relationship with one of the parties; impartiality, on the other side, "*is considered to be connected with an actual or apparent bias of an arbitrator either in favour of one of the parties or in relation to the issues in dispute*".[6] The two terms are "*usually joined together as a term of art*".[7] Apropos of this, the essence of an arbitral process lies in the independence of an arbitral tribunal's relationship with the parties, the power to adopt its own procedures and the absence of intervention from courts during the adjudication of the dispute. Further, the need for an impartial arbitral tribunal precedes the want of independence, as there can be instances where an adjudication process is procedurally not absolutely independent, albeit it is required to be mandatorily impartial.

Indian laws and international laws do not explicitly define the procedures to determine the independence and impartiality of an arbitral tribunal. However, various national and international jurisdictions have developed systems of checks and balances to maintain the independence and

4 DAVID ST. JOHN SUTTON, JUDITH GILL QC & MATTHEW GEARING QC, RUSSELL ON ARBITRATION 104 (20th ed. 1982).

5 ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 201 (4th ed. 2004).

6 *Id.*

7 *Id.*

impartiality of an arbitral tribunal, which are the fundamental safeguards for the parties during the adjudication of disputes.

A. Historical analysis

Prior to the promulgation of the 1996 Act, the law on arbitration in India was substantially contained in three enactments, namely the Arbitration and Conciliation Act, 1940 ["**1940 Act**"];[8] the Arbitration (Protocol and Convention) Act, 1937;[9] and the Foreign Awards (Recognition and Enforcement) Act, 1961.[10]

The position under the erstwhile 1940 Act was that a party could commence proceedings in court by moving an application under Section 20 for the appointment of an arbitrator.[11] Further, Section 11 of the 1940 Act contained a judicial safeguard through which the court was given the power to remove an arbitrator in certain circumstances, including in cases of partiality or bias either during the pendency of arbitration proceedings or after its conclusion.[12]

The new 1996 Act is based on the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ["**Model Law**"].[13] In the face of the necessitude of time, the Law Commission of India proposed amendments thereto to be more responsive to the contemporary exigencies and to attract foreign businesses and investors towards India in the changing economic scenario.

The Model Law had sought to maintain absolute independence and impartiality of the arbitrator.[14] Article 12(1) of the Model Law provides for special features which include an arbitrator's commitment towards independence and impartiality.[15] Article 13(1) and (2) of the Model Law,[16] read with Article 12, provide for a challenge to an arbitrator on the ground of "*justifiable doubts as to her impartiality or independence*" and for an opportunity to the arbitrator to either withdraw her name as the arbitrator or otherwise to decide on the challenge.[17] Further, Article 13(3) of the Model Law provides the party failing in its challenge before the arbitral

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8 Arbitration Act, No. 10 of 1940 (India) [*hereinafter* "1940 Act"].

9 Arbitration (Protocol and Convention) Act, No. 6 of 1937 (India).

10 Foreign Awards (Recognition and Enforcement) Act, No. 45 of 1961 (India).

11 1940 Act, No. 10 of 1940, § 20 (India).

12 *Id.* § 11 reads as under:
"Power to Court to remove arbitrators or umpire in certain circumstances:
(1) The Court may, on the application of any party to a reference, remove an arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award.
(2) The Court may remove an arbitrator or umpire who has misconducted himself or the proceedings.
(3) Where an arbitrator or umpire is removed under this section, he shall not be entitled to receive any remuneration in respect of his services.
(4) For the purposes of this section the expression "proceeding with the reference" includes, in a case where reference to the umpire becomes necessary, giving notice of that fact to the parties and to the umpire."

13 United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (Dec. 11, 1985), as amended by G.A Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006) [*hereinafter* "Model Law"].

14 Koorosh H. Ameli, *Impartiality and Independence of International Arbitrators*, 27-28 REVUE DE RECHERCHE JURIDIQUE 89–109 (1999); *see also* HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 478 (1989).

15 Model Law, *supra* note 13, art. 12(1).

16 Model Law, *supra* note 13, art. 13(1)–(2).

17 Hasmukhlal H. Doshi & Anr. v. J. M.L. Pendse & Ors., 2000 SCC OnLine Bom 242, ¶¶ 9, 11 (India).

tribunal with an additional remedy before the court or the other authority specified in Article 6.[18] Such safeguards ensure that the principles of natural justice are followed while maintaining party autonomy.

The Statement of Objects and Reasons appended to the Bill that was proposed for the 1996 Act stated that the general law of arbitration contained in the 1940 Act had become out-dated.[19] Section 11 of the 1940 Act, as mentioned earlier, provided courts as the only forum for making an application for the removal of an arbitrator.[20] Thus, when the 1996 Act came into force repealing the 1940 Act, Section 13 of the 1996 Act[21] omitted the judicial safeguard provided in Section 11 of 1940 Act, redefining the challenge procedure, and in effect, curbing the Model Law provision for adopting the erstwhile course altogether.

Therefore, in this regard, the legislature through the enactment of the 1996 Act took a significant departure from the Model Law and the 1940 Act.

B. The 1996 Act and its amendments

The legislature, through the 1996 Act, placed a few safeguards to preserve the independence and impartiality of arbitrators. Even before the amendments to the 1996 Act, it has been a valid ground under Section 12(3)(a) of the 1996 Act to challenge the appointment of the arbitral tribunal if circumstances exist that give rise to justifiable doubts as to its independence or impartiality.[22] However, as discussed earlier, this challenge can only be before the constituted arbitral tribunal, with no right of appeal before the courts.

The 246th Law Commission Report ["**Report**"],[23] *inter alia*, proposed changes to promote the neutrality of arbitrators to maintain the independence and impartiality of the arbitral process. The Report led to the enactment of the Arbitration and Conciliation (Amendment) Act, 2015 ["**2015 Amendment Act**"],[24] which radically changed the landscape of the appointment of arbitrators, amongst other things. Section 11(8) of the 1996 Act now provides that the court while appointing an arbitrator may obtain a disclosure in writing from the prospective arbitrator in terms of Section 12(1) of the 1996 Act, with regard to any qualifications required by the parties and other considerations which are likely to secure the appointment of an independent and impartial arbitrator.

The 2015 Amendment Act has thus widened the grounds of challenge to the composition of the arbitral tribunal under Section 12 of the 1996 Act by providing that a person may be challenged as an arbitrator if such person fails to make necessary disclosures when approached in connection to their appointment as an arbitrator. Therefore, the person must categorically state her (direct or indirect) existing or past relationship with any of the parties in relation to the

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18 Model Law, *supra* note 13, art. 13(3); Sunil Gupta, *No Power to Remove a Biased Arbitrator Under: The New Arbitration Act of India*, 2000(3) SCC J. 1 (2000).

19 Sundaram Fin. Ltd. v. NEPC India Ltd., AIR 1999 SC 565, ¶ 8 (India).

20 1940 Act, No. 10 of 1940, § 11 (India).

21 1996 Act, No. 26 of 1996, § 13 (India).

22 *Id.* § 12(3)(a) ("An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his independence or impartiality").

23 Law Commission of India, Report No. 246 – Amendments to the Arbitration and Conciliation Act, 1996, at 46–49 (2014), *available at* http://lawcommissionofindia.nic.in/reports/Report246.pdf.

24 Arbitration and Conciliation (Amendment) Act, 2015, No. 3 of 2016 (India) [*hereinafter* "2015 Amendment Act"].

subject matter of the dispute. The relationship can be financial, business related, professional, or of any other nature which may give rise to justifiable doubts about the arbitrator's independence and impartiality.[25]

The legislature, by way of the 2015 Amendment Act, adopted the international practices of the IBA Guidelines on Conflict of Interest ["**IBA Guidelines**"].[26] The IBA Guidelines enumerate examples of possible conflicts of interests, which are divided into three lists, namely, the Red List, which is further divided into waivable and non-waivable lists, the Orange List, and the Green List.[27] Following the IBA Guidelines, the legislature introduced an exhaustive mechanism of checks and balances in the form of introduction of three schedules, namely, the fifth, sixth, and seventh schedules in the 1996 Act.

These schedules are briefly described as under:

- The Fifth Schedule guides in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator;
- The Sixth Schedule specifies the form for disclosure to be made by the arbitrator; and
- The Seventh Schedule specifies the categories of persons who shall be ineligible to be appointed as arbitrators.

Therefore, by virtue of the 2015 Amendment Act, the legislature attempted to maintain the independence and impartiality of an arbitrator appointed by the parties, specifically by inserting exclusion categories for persons to be appointed as arbitrators.

III. The dilemma surrounding unilateral appointment of arbitrators

A. Proactive role of the judiciary

The amendments brought in by the 2015 Amendment Act reflect the sanguine approach of the legislature to maintain the independence and impartiality of arbitral tribunals. However, this step cannot be termed as a comprehensive approach towards ensuring absolute impartiality. Thus, the courts while dealing with petitions under Section 11 or Section 14 of the 1996 Act are often faced with various impediments.

It is trite to say that if one party is allowed to appoint the arbitral tribunal unilaterally, that party will always be at an advantageous position in comparison to the other party, which may lead to a potentially partial set up of the arbitration proceedings.

Further, Section 25 of the 1996 Act allows an arbitral tribunal to enter reference and adjudicate the disputes ex parte in case of default of either party to appear or communicate their respective statements without sufficient cause.[28] However, where one party has an unfettered right to

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25 Shweta Sahu, Moazzam Khan & Payal Chatterjee, *Legitimacy of Arbitral Appointments in India*, KLUWER ARB. BLOG (Nov. 3, 2018), *available at* http://arbitrationblog.kluwerarbitration.com/2018/11/03/legitimacy-arbitral-appointments-india/; *see also* 2015 Amendment Act, No. 3 of 2016, § 8 (India).

26 HRD Corp. v. GAIL (India) Ltd., (2018) 12 SCC 471 (India).

27 Khaled Moyeed, Clare Montgomery & Neal Pal, *A Guide to the IBA's Revised Guidelines on Conflicts of Interest,* KLUWER ARB. BLOG (Jan. 29, 2015), *available at* http://arbitrationblog.kluwerarbitration.com/2015/01/29/a-guide-to-the-ibas-revised-guidelines-on-conflicts-of-interest/?doing_wp_cron=1596221860.2151229381561279296875.

28 1996 Act, No. 26 of 1996, § 25 (India).

appoint arbitrators of its choice as per the mutually agreed terms of the arbitration agreement, an ex parte adjudication by the arbitral tribunal so constituted may gravely prejudice the rights of the other party.

In the recent landmark judgment in the case of *Perkins Eastman Architects DPC* v. *HSCC (India) Ltd.* ["**Perkins Eastman**"],[29] the Supreme Court of India discussed the unsettled issue of the validity of unilateral appointment of arbitrators. The Supreme Court declared the unilateral arbitrator appointments to be invalid in the light of the 2015 Amendment Act, and thus held as follows:

> "*The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator.*"[30]

In the *Perkins Eastman* case, a contract was entered into between the parties, which contained an elaborate 'Dispute Resolution' clause. The clause provided, *inter alia*, that any dispute or difference shall be referred to arbitration before a "*sole arbitrator appointed by the Chief Managing Director*" of the Respondent. The Supreme Court relied heavily on its previous decision rendered by a full bench in *TRF Limited* v. *Energo Engineering Projects Ltd.* ["**TRF Limited**"],[31] which had held the unilateral appointment of the Managing Director of one party, or his nominee, as an arbitrator to be invalid.

The Supreme Court in *TRF Limited*, while quashing the clause, placed reliance on the doctrine of agency i.e. *qui facit per alium facit per se* (she who acts through another does the act herself).[32] The Supreme Court further rightly held that once an appointee had become ineligible to act as an arbitrator, its unrestricted power to appoint a nominee also ceases.[33] The rationale of the Court in setting aside the appointment clause was drawn from the fact that the Managing Director, having interest in the dispute, represented the interests of one party, thus making him ineligible to be appointed as an arbitrator, or to even appoint a nominee as an arbitrator.

Similarly, this issue was looked into by the Delhi High Court in *Proddatur Cable TV Digi Services* v. *SITI Cables Network Ltd.* ["**Proddatur Cable**"].[34] The Petitioner in this case had challenged the power of the Respondent to unilaterally appoint the arbitrator as provided under the arbitration agreement. The Delhi High Court, relying on the decision in Perkins Eastman, held that a person

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29 Perkins Eastman Architects DPC & Ors. v. HSCC (India) Ltd., 2019 SCC OnLine SC 1517 (India) [*hereinafter* "Perkins Eastman"].

30 *Id.* ¶ 21.

31 TRF Limited v. Energo Eng'g Projects Ltd., (2017) 8 SCC 377 (India).

32 *See* Firm of Pratapchand Nopaji v. Firm of Kotrike Venkata Setty & Sons & Ors., (1975) 2 SCC 208, ¶¶ 8, 9 (India); *see also* Walter Bau AG, Legal Successor, of the Original Contractor, Dyckerhoff & Widmann A.G. v. Municipal Corp. of Greater Mumbai, (2015) 3 SCC 800, ¶¶ 9, 10 (India).

33 Puneet Vyas, *Unilateral Appointment: Continued Dilemma Initiated by TRF*, SSRN (Dec. 13, 2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3486689.

34 Proddatur Cable TV Digi Servs. v. SITI Cables Network Ltd., 2020 SCC OnLine Del 350 (India).

having an interest in the outcome of the dispute cannot unilaterally appoint a sole arbitrator.[35] Thus, the Court declared that the mandate of the appointed arbitrator had terminated de jure and appointed a new arbitrator.[36]

Therefore, on the one hand, the judgment in *TRF Limited* merely settled the proposition of law that a disqualified or ineligible person cannot appoint a nominee as an arbitrator, leaving the question of unilateral appointment of third-party arbitrators unanswered. On the other hand, the judgment in *Perkins Eastman* failed to occupy the field in regard to unilateral and asymmetrical clauses in an arbitration agreement, leaving scope for further interpretation, as will be discussed in Part III(G) below.

B. Determination of bias under the 1996 Act

As the contractual laws are private in nature, unequally placed parties are bound by any unequal terms of the contract, unless such terms are specifically barred by law.[37] There being no explicit restrictions on one party to unilaterally appoint the arbitral tribunal under the provisions of the 1996 Act, such unilateral clauses are considered binding on the parties.

However, the character of the clause for the appointment of an arbitrator in an arbitration agreement should ideally be bilateral, not unilateral. Both parties to the dispute must be given an opportunity to equally and fairly select an arbitrator. An asymmetrical clause containing waiver of one party against a particular right raises serious doubts over the nature of the relationship of the contracting parties. The issue of legality and validity of asymmetrical clauses often stems from the unequal bargaining power between the parties in the absence of equality and fairness in their relationship.

As mentioned earlier, Section 12 (as amended by the 2015 Amendment Act) sets out the grounds under which the appointment of an arbitrator can be challenged. Section 13(3) states that if there is a challenge to the appointment of an arbitrator, the arbitral tribunal must decide the challenge. Bias has been defined as a "*preconceived opinion, or a predisposition or predetermination to decide a case or an issue in a particular manner*".[38] Under Section 12(1) and 12(2) of the 1996 Act, an arbitrator is bound to disclose circumstances which may give rise to justifiable doubts about her impartiality or independence. These disclosures are important for the parties to assess whether an arbitrator is biased and thus incapable of providing an impartial and independent adjudication of the dispute concerned. Failing such disclosure, a challenge can lie under Section 12(3) of the 1996 Act. Pursuant to a challenge, the arbitrator can either withdraw as an arbitrator or the other party may agree to the challenge thereby terminating the appointment.[39] If neither happens, the tribunal decides the challenge.

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35 *Id.* ¶ 23.

36 *Id.* ¶ 28.

37 Nishanth Vasanth & Rishabh Raheja, *Examining the Validity of Unilateral Option Clauses in India: A Brief Overview*, KLUWER ARB. BLOG (Oct. 20, 2017), *available at* http://arbitrationblog.kluwerarbitration.com/2017/10/20/examining-validity-unilateral-option-clauses-india-brief-overview/?doing_wp_cron=1597326578.4179279804229736328125.

38 State of West Bengal & Ors. v. Shivananda Pathak & Ors., (1998) 5 SCC 513 (India); *see also* Manak Lal v. Prem Chand, AIR 1957 SC 425 (India).

39 1996 Act, No. 26 of 1996, § 13 (India).

It can certainly be inferred that the arbitrators will not be willing to accept the challenge as such doubts on their impartiality and/or independence directly relate to their integrity. The 1996 Act is thus superficial in this regard, and by allowing the tribunal to decide the challenge to an arbitrator sitting on that tribunal itself, gravely prejudices the parties during an arbitration proceeding.

It is pertinent to note that the parties to a dispute may also expressly waive the right to challenge an arbitrator upon becoming aware of the circumstances of possible bias.[40] There can also be a circumstance under which a party may move the court to terminate the mandate of an arbitrator under Section 14 of the 1996 Act for failure or impossibility of the arbitrator to act, through which the court may be in a position to examine the real possibility of bias.[41] However, from a bare perusal of Section 14, it cannot be said that the courts can strike down a clause for the unilateral appointment of an arbitrator on grounds of impartiality – which can only be challenged at the post-award stage in a petition under Section 34 of the 1996 Act.[42]

Therefore, such an eventuality of unilaterally appointing an arbitrator will result in irreversible consequences and, eventually, the failure to maintain independence and impartiality – a situation neither statutorily conceived nor countenanced.[43]

C. Equity versus non-intervention

Where a petition is filed under Section 11 of the 1996 Act, particularly in cases where the challenge is against the unfettered power of one party to appoint an arbitrator and the court intervenes by setting aside the appointment clause and adopting its own procedure for appointment of the arbitrator, it fails to comply with the provisions of the non-obstante clause enshrined under Section 5 of the 1996 Act.[44] The quintessence of an arbitration agreement is that the parties are supposed to be directed to arbitration, abiding by the terms and clauses of that arbitration agreement. The Chief Justice or his designate are to act purely in an administrative capacity while deciding a petition under Section 11 of the 1996 Act.[45]

This must be read in light of the principle of *kompetenz-kompetenz*[46] and Article 5 of the Model Law which place emphasis on minimal interference of the courts. The excessive intervention of courts in arbitration cases is a situation of judicial overreach which goes against the tenets of arbitral law. Such judicial overreach also defeats the purpose of maintaining party autonomy in arbitration.

However, on the other hand, to meet the ends of justice, the intervention of the court is extremely essential in cases where one party's right can prejudice and bind the other party by

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40 1996 Act, No. 26 of 1996, proviso to § 12(5) (India); Bharat Broadband Network Ltd. v. United Telecoms Ltd., (2019) 5 SCC 755 ¶¶ 15, 20 (India) [*hereinafter* "Bharat Broadband"].

41 West Haryana Highways Projects Pvt. Ltd. v. National Highway Authority of India, 2017 SCC OnLine Del 8378, ¶¶ 24, 28 (India).

42 State of Arunachal Pradesh v. Subhash Projects & Mktg. Ltd. & Anr., 2006 SCC OnLine Gau 57, ¶ 32 (India) [*hereinafter* "Subhash Projects"].

43 *Id.*

44 1996 Act, No. 26 of 1996, § 5 (India) ("Extent of judicial intervention: Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.").

45 Konkan Ry. Corp. Ltd. v. Rani Constr. Pvt. Ltd., (2002) 2 SCC 388, ¶¶ 22–23 (India).

46 Khandekar & Singh, *supra* note 3.

virtue of unequal bargaining power positions. Such abuse of power cannot be allowed, especially in judicial and quasi-judicial forums which are governed by the principle of equity. Arbitration clauses containing unilateral modes of appointment of arbitrators can result in a partial and biased adjudication of disputes. Thus, the courts must exercise their powers to set aside such clauses, and thereby adopt their own procedures of appointment.

For instance, the Supreme Court while hearing a petition filed by a State government under Section 11 of the 1996 Act, in *State of Bihar* v. *Brahmaputra Infrastructure Ltd.* ["**Brahmaputra Infra**"],[47] dealt with a provision which afforded unilateral powers to the government in regard to the tenure of the members of an arbitral tribunal.[48] The Court, while relying on the doctrine of pleasure, held that a provision which deals with the tenure of the Chairman and other members of the arbitration tribunal at the pleasure of the Government is inconsistent with the constitutional scheme, particularly Article 14 of the Constitution of India, 1950.[49] The Court observed that if the party to the dispute terminates the service of such member, it would directly interfere with the impartiality and independence expected from such member. The Supreme Court also struck down the provision of the State legislation on the basis of it being manifestly arbitrary and contrary to the rule of law. This doctrine of manifest arbitrariness has been discussed by the Supreme Court in the case of *Shayara Bano* v. *Union of India,*[50] wherein it remarked that a provision of law would be manifestly arbitrary if it lacked a clear determinative principle or encapsulated a capricious or irrational measure.

The Patna High Court has extensively followed the rationale of *Brahmaputra Infra* in petitions filed under its writ jurisdiction, or under Section 11 of the 1996 Act. This was done in the cases of *Rajesh Singh* v. *State of Bihar,*[51] *Priyanshu Kumar Ranjan* v. *The Bihar State Food and Civil Supplies Corporation Limited,*[52] *Sarvesh Security Services Pvt. Ltd.* v. *Office of the Principal Chief Conservation of Forest,*[53] *Bhaibhaw Construction Pvt. Ltd.* v. *State of Bihar,*[54] *BLG Construction Services Pvt. Ltd.* v. *State of Bihar,*[55] *Bhaibhaw Construction Pvt. Ltd.* v. *State of Bihar,*[56] *M/s. Arjun Engicon Pvt. Ltd.* v. *State of Bihar,*[57] *Kamladitya Construction Pvt. Ltd.* v. *State of Bihar,*[58] and *Hindustan Steelworks Constructions Ltd.*

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47 State of Bihar v. Brahmaputra Infrastructure Ltd., (2018) 17 SCC 444 (India) [*hereinafter* "Brahmaputra Infrastructure"].

48 Bihar Public Works Contracts Arbitration Tribunal Act, Act No. 21 of 2008, § 4(3)(b) (India).

49 Brahmaputra Infrastructure, (2018) 17 SCC 444, ¶ 7 (India).

50 Shayara Bano v. Union of India, (2017) 9 SCC 1, ¶ 101 (India).

51 Rajesh Singh v. State of Bihar, Civ. Writ Jurisdiction, Case No. 192 of 2020 (decided by the Patna High Court on Feb. 20, 2020) (India).

52 Priyanshu Kumar Ranjan v. Bihar State Food & Civil Supplies Corp. Ltd., Request Case No. 19 of 2020 (decided by the Patna High Court on Feb. 26, 2020) (India).

53 Sarvesh Sec. Servs. Pvt. Ltd. v. Off. of Principal Chief Conservator of Forest, Request Case No. 9 of 2020 (decided by the Patna High Court on Feb. 26, 2020) (India).

54 Bhaibhaw Constr. Pvt. Ltd. v. State of Bihar, Request Case No. 8 of 2020 (decided by the Patna High Court on Feb. 26, 2020) (India).

55 BLG Constr. Servs. Pvt. Ltd. v. State of Bihar, Request Case No. 5 of 2020 (decided by the Patna High Court on Feb. 26, 2020) (India).

56 Bhaibhaw Constr. Pvt. Ltd. v. State of Bihar, Request Case No. 1 of 2020 (decided by the Patna High Court on Feb. 26, 2020) (India).

57 M/s. Arjun Engicon Pvt. Ltd. v. State of Bihar, Request Case No. 182 of 2019 (decided by the Patna High Court on Feb. 26, 2020) (India).

58 Kamladitya Constr. Pvt. Ltd. v. State of Bihar, Request Case No. 178 of 2019 (decided by the Patna High Court on Feb. 26, 2020) (India).

v. *Union of India*.[59] The Patna High Court, in these matters, has consistently appointed neutral arbitrators and set aside the asymmetrical clauses which gave unfettered powers to government agencies in the appointment process. Therefore, the benefits of *Brahmaputra Infra* have resulted in a level playing field in the state of Bihar, which indicates the proactive approach of the judiciary to side with the principle of equity in cases of unequal arbitration clauses.

Further, in *Northern Railway Administration* v. *Patel Engineering Company Limited*,[60] the Supreme Court held that although Section 11 of the 1996 Act emphasises on adherence to the terms of the arbitration agreement, the court need not uniformly follow the same. Instead, the court must pay due regard to the qualifications stipulated in the agreement for the persons to be appointed as arbitrators. The Bombay High Court in the case of *Siddhi Real Estate Developers* v. *Metro Cash*[61] has similarly held that:

> "*[T]he courts should as far as possible preserve the sanctity of party autonomy and defer to the appointment procedure agreed to between the parties whilst at the same time retaining a discretion to appoint such arbitrators as may be deemed fit to 'meet the end of justice'… It may also be that an order to follow the appointment procedure is likely to result in a 'stalemate' or otherwise 'the interests of justice may require that the appointment procedure ought not to be followed'. In all such cases, the courts are not powerless to ignore the appointment procedure and appoint an independent tribunal outside the appointment procedure.*"[62]

Therefore, it can be inferred that the judiciary has adopted a proactive role to curb the practice of unilateral appointment of arbitrators by intervening at the time of reference to maintain the independence and impartiality of the arbitration proceedings, thus siding with the principle of equity over the laws of non-intervention.

D. Principle of party autonomy in contractual laws

The freedom to enter into a contract and to determine the terms of that contract is the essence of party autonomy, which is a non-intrusive right, unless the specific condition is explicitly barred by law. Consequently, parties have the right to mutually agree over the terms of appointment of an arbitrator in a dispute resolution clause. Party autonomy gives the parties the freedom to choose the method of appointment of an arbitrator, seat, or venue of the arbitration, applicable laws, and procedure.[63] Moreover, Section 19(2) of the 1996 Act permits the parties to adopt any procedure to be followed for the arbitration proceedings. [64]

The issue of maintaining a balance between the principle of party autonomy and the principle of equity, while dealing with clauses relating to unilateral appointment of arbitrators, has troubled courts ever since. Accordingly, the legislature through the 2015 Amendment Act has created

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59 Hindustan Steelworks Constr. Ltd. v. Union of India, Request Case No. 169 of 2019 (decided by the Patna High Court on Feb. 26, 2020) (India).

60 N. Ry. Admin. v. Patel Eng'g Co. Ltd., (2008) 10 SCC 240 (India).

61 Siddhi Real Estate Developers v. Metro Cash & Carry India Pvt. Ltd. & Anr., 2014 SCC OnLine Bom 623 (India).

62 *Id.* ¶ 8.

63 SIMON GREENBERG, CHRISTOPHER KEE & J. ROMESH WEERAMANTRY, INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA PACIFIC PERSPECTIVE 305 (2011).

64 1996 Act, No. 26 of 1996, § 19(2) (India) ("Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.").

safeguards to ensure that the appointed arbitrator is impartial, particularly through the Fifth and the Seventh Schedules of the 1996 Act.

The Supreme Court's reasoning in the decision of *Perkins Eastman* and *TRF Limited* was to maintain impartiality in arbitral proceedings by restricting one party's right to solely appoint an arbitrator. Although this reasoning pierced through the principle of party autonomy, it rightly upheld the principles of equity and fairness. By appointing a sole arbitrator and quashing the unilaterally appointed arbitral tribunal, both the parties are put on the same pedestal, which leads to an impartial adjudication of the dispute and thus a fair trial.

The issue of invalidity of unilateral appointment of an arbitrator was also dealt with by a single-judge bench of the Delhi High Court in *Bhartia Cutler Hammer Ltd.* v. *AVN Tubes Ltd.*,[65] which throws valuable light on the issue of party autonomy and asymmetrical clauses. The Court observed that the arbitration agreement gave a right of reference to arbitration and appointment of an arbitrator to only one party and the decision of the arbitrator so appointed was made final and binding on both parties. The Court held that such agreement is unilateral and lacks mutuality of contract and as such, was not enforceable in a court of law.[66] This judgment was later affirmed by a Division Bench of the Delhi High Court.[67]

An issue that can be derived from the above judgment is whether such a condition in the arbitration agreement is a valid condition capable of enforcement under the Indian laws, or the same is hit by Section 28 of the Indian Contract Act, 1872.[68] Section 28 of the Indian Contract Act, 1872 provides that agreements in restraint of legal proceedings will be void. [69]

The Delhi High Court, while setting aside a unilateral clause of an arbitration agreement in the case of *Emmsons International Ltd.* v. *Metal Distributors (UK) & Ors.*,[70] observed that "*such type of absolute restriction is clearly hit by the provisions of Section 28 of the Contract Act besides it being against the public policy*".[71]

Therefore, the challenge against the unilateral appointment of arbitral tribunals is mainly on the count that such appointments are against the morality, conscionability, and validity of arbitration agreements. The task of the courts is to maintain a tryst between equity and private laws while dealing with such unequal clauses. This dilemma, in turn, gives more power and reasons to courts to intervene in confidential disputes between the parties casting a shadow over the effectiveness of arbitration as an alternative dispute resolution mechanism. Hence, there is a pressing need to nip these unilateral appointment clauses in the bud to stop a potential problem even before it develops.

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65 Bhartia Cutler Hammer Ltd. v. AVN Tubes Ltd., 1991 SCC OnLine Del 322 (India).

66 *Id.* ¶ 5.

67 A.V.N. Tubes Ltd. v. Bhartia Cutler Hammer Ltd., 1992 SCC OnLine Del 81 (India).

68 Vasnth & Raheja, *supra* note 37.

69 Indian Contract Act, No. 9 of 1872, § 28 (India) ("Agreements in restraint of legal proceedings, void- Every agreement, (a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, (b) by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, or (c) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in (d) respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent.").

70 Emmsons Int'l Ltd. v. Metal Distrib. (U.K.) & Ors., 2005 SCC OnLine Del 17 (India).

71 *Id.* ¶ 15.

E. Contracts between private parties and governmental authorities – selection of arbitrators from fixed panels

Private parties, especially individuals, have a lesser scope of negotiation while entering into a contract with a governmental entity or a public sector undertaking. It is also standard practice for governmental entities to include general conditions of contract which emphasise their dominant position.[72] These contracts, which contain rigid and archaic general conditions, are called 'standard form contracts'. When private parties succeed in the tender process, they often enter into such contracts without protest against the presence of any 'standard' asymmetrical clauses.

Consequently, the terms of an arbitration agreement which form part of the general conditions of these dotted line contracts, are often not negotiated by private parties.[73] As such, asymmetrical and unequal clauses are missed in the fine print of these standard form contracts. Therefore, courts across jurisdictions have strictly ruled against such unreasonable and unilateral clauses and have observed that "*it is settled law that if a contract or a clause in a contract is found unreasonable or unfair or irrational one must look to the relative bargaining power of the contracting parties*".[74]

Similarly, the procedure for appointment of an arbitrator by the dominating party either unilaterally or from a panel is often a non-negotiable term in a standard form contract. Once a dispute arises, these entities appoint arbitrators from a panel of their retired officers as per the terms of the arbitration agreement. These arbitration agreements are also commonly used by public entities or by banking, finance, and insurance sectors.

The clauses for unilateral appointment of an arbitrator not only elucidate the colourable nature of the arbitration agreement but are also in the teeth of the doctrine of *contra proferentem* in contracts. The doctrine of *contra proferentem* states that any clause considered to be biased or ambiguous should be interpreted against the interests of the party that created, introduced, or requested that such a clause be included.[75]

Such a threat to the independence and impartiality of the arbitral tribunal has been dealt with by the Indian courts with two divergent views and reasoning. One limb of the decisions takes a proactive role in striking down such unilateral appointment clauses and provides similar reasoning as rendered by the Supreme Court in *Perkins Eastman* and *TRF Limited.*

For instance, the Supreme Court in *Bharat Sanchar Nigam Limited* v. *Motorola India Pvt Ltd.*[76] held that as the Petitioner-Department which was entitled to appoint an arbitrator as per the arbitration agreement was the one which had imposed liquidated damages on the Respondent-

72 Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 95 HARV. L. REV. 1174 (1983).
73 Superintendence Co. of India Pvt. Ltd v. Sh. Krishan Murgai, (1981) 2 SCC 246 (India).
74 Life Ins. Corp. of India v. Consumer Educ. & Res. Ctr., (1995) 5 SCC 482, ¶ 47 (India); *see also* Central Inland Transp. Corp. Ltd. v. Brojo Nath, 1986 AIR 1571 (India); *see also* Gillespie Bros. & Co. Ltd. v. Roy Bowles Transp. Ltd. [1973] 1 Lloyd's Rep. 10 (Eng.).
75 Bank of India v. K. Mohan Das, 2009 (5) SCC 313, ¶ 47 (India).
76 Bharat Sanchar Nigam Ltd. v. Motorola India Pvt. Ltd., (2009) 2 SCC 337 (India).

Contractor, allowing the same party to appoint the arbitrator would defeat the principles of natural justice.[77]

The Jammu and Kashmir High Court in *Tramboo Joinery Mills Pvt. Ltd.* v. *Commissioner/Secretary to Govt. & Ors.*[78] and the Gauhati High Court in *Panihati Rubber Limited* v. *The Principal Chief Engineer, Northeast Frontier Railway*[79] have recently taken a more proactive role by quashing the unilateral appointment of the arbitrators and appointing neutral arbitrators in their place, while observing that the courts have a right to appoint independent and impartial arbitrators from a list other than the one mentioned in the arbitration agreement.[80]

However, the other limb of decisions provides reasoning that party autonomy is the norm in arbitration laws and judicial intervention an exception. The mutually agreed terms for the appointment procedure cannot be interfered with by the courts. Moreover, the eligibility of the panel unilaterally selected by one party will go through the eligibility test set out under the provisions of Section 12 of the 1996 Act.

The Supreme Court in 2017, in the case of *Voestalpine Schienen GmbH* v. *Delhi Metro Rail Corporation Ltd.* ["**Voestalpine Schienen**"],[81] was posed with an issue regarding the appointment of an arbitral tribunal, where one party (private contractor) was forced to choose limited names from a panel which was unilaterally selected by the other party (a government entity). The Petitioner-Contractor challenged the arbitration clause on the ground that the panel was selected solely by the Respondent-Department, which would lead to impartiality of the arbitral tribunal. The Supreme Court observed that the parties have to abide by the mutually agreed terms of the contract. Interestingly, on merits, the Court declared the choices in the panel to be too small a number and stressed on the need for a broad-based panel. The Court, even though with an intention to "*send positive signals to the international business community, in order to create healthy arbitration environment and conducive arbitration culture in this country*,"[82] failed in considering that even with a broad-based panel, the candidates unilaterally selected for the panel by the Respondent-Department might still be compromised during the arbitral proceedings.

Thus, the inclusion of unequal clauses in an arbitration agreement, specifically pertaining to unilateral appointment of arbitrators, should be read against the party that inserted such a biased clause, and the courts should intervene by appointing a neutral arbitral tribunal. This exercise will dilute the unfettered powers of the dominant party, leading to the independent and impartial adjudication of disputes.

F. International jurisprudence

Article 12(2) of the Model Law states that "*an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence*". If a challenge against an arbitrator is

77 *Id.* ¶ 16.
78 Tramboo Joinery Mills Pvt. Ltd. v. Comm'r/Sec'y to Gov't & Ors., 2014 SCC OnLine J&K 55 (India) [*hereinafter* "Tramboo Joinery"].
79 Panihati Rubber Ltd. v. Principal Chief Eng'r Northeast Frontier Ry., 2016 SCC OnLine Gau 69 (India).
80 Tramboo Joinery, 2014 SCC OnLine J&K 55, ¶ 47 (India).
81 Voestalpine Schienen GmbH v. Delhi Metro Rail Corp. Ltd., (2017) 4 SCC 665 (India).
82 *Id.* ¶ 30.

successful, the arbitral tribunal will be reconstituted in accordance with the rules governing the arbitration proceedings.

The United States Supreme Court in the much-celebrated case of *Commonwealth Coatings Corp*. v. *Continental Casualty Co.*,[83] regarding the importance of independence and impartiality of arbitrators, held that:

> "*[W]e should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.*"[84]

Similar to the Indian statutory laws for arbitration, a number of international statutes also do not explicitly define the standards for the impartiality and independence of arbitrators, particularly in reference to unilateral appointment of arbitrators. In international commercial arbitrations, the issue regarding equal treatment of parties during the arbitration process has been a controversial and hence an extremely contentious topic.

In the case of *Societes BKMI et Siemens* v. *Societe Ducto*,[85] the Paris Court of Appeal upheld a clause where the right to appoint the arbitral tribunal was with the Defendants, prejudicing the Claimant. However, the French Court of Cassation overturned the decision of the Paris Court of Appeal and held that:

> "*In light of Articles 1502 para. 2, and 1504 of the New Code of Civil Procedure and Article 6 of the Civil Code; Whereas the principle of the parties being equal in appointing arbitrators falls under public policy; which can only be waived only after the dispute has arisen.*"[86]

The French Court of Cassation, in the case of *X* v. *Banque Privee Edmond de Rothschild Europe*,[87] held that a unilateral option clause is void for creating a *potestative* condition, which is contrary to the French law. A *potestative* condition is that which makes the execution or performance of the agreement to depend on a condition precedent, which is entirely in the power of one of the contracting parties.[88] Such unfair conditions and terms go against the ethos of contractual laws as well.

Similarly, the Presidium of the highest arbitration court of the Russian Federation, in the case of *Russian Telephone Company* v. *Sony Ericsson Mobile Communications Rus,*[89] held that such unilateral option clauses in an arbitration agreement are invalid and unenforceable, due to them being

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83 Commonw. Coatings Corp. v. Cont'l Casualty Co., 393 U.S. 145 (1968) (U.S.).

84 *Id.* ¶ 3.

85 Cour de cassation [Cass.] [supreme court for judicial matters] 1e. civ., Jan. 7, 1992, Bull. civ. I, No. 2 (Fr.).

86 *Id.* ¶ 6.

87 Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Sept. 26, 2012, Bull. civ. I, No. 983 (Fr.).

88 Vernon V. Palmer & Andre L. Pauche, *A Review of the Louisiana Law on Potestative Conditions*, 47 TUL. L. REV. 284 (1973).

89 Postanovlenie Prezidiuma VAS RF ot 19 iyun 2012 g. No. 1831/12 [Ruling of the Presidium of the Highest Arbitration Court of the Russian Federation of June 19, 2012, No. 1831/12] (Russ.).

fundamentally unequal.[90] The Court also held that one-sided option clause violated the principle of procedural equality of the parties.

On the other hand, in *Wilson Taylor Asia Pacific Pte Ltd* v. *Dyna-Jet Pte Ltd,*[91] while upholding the validity of a one-way arbitration option clause, the Singapore Court of Appeal observed that if there exists a valid arbitration agreement between the parties and the said arbitration agreement is not null and void, inoperative, or incapable of being performed, then the courts cannot set aside such one-way option clauses. Likewise, U.S. courts have considered the unilateral clauses in an arbitration agreement to be in line with the principle of party autonomy.[92]

Therefore, in comparison to international courts, the Indian courts through the decisions rendered in *Perkins Eastman* and *TRF Limited*, amongst others, have projected a proactive and a much more dynamic approach towards dealing with unequal and unilateral clauses in an arbitration agreement, by intervening and setting aside asymmetrical arbitration clauses and by adopting own procedures for appointment of arbitrators.

G. Developments post-Perkins Eastman – conflicting outcomes

The decision rendered by the Supreme Court in *Perkins Eastman* in 2019 was a step forward towards achieving independence and impartiality in arbitration proceedings. However, the decision has a few limitations and reservations attached to it, which makes the law of appointment of arbitral tribunals vulnerable.

The Supreme Court, while declaring the arbitration clause invalid on the basis of reasonable apprehension of bias, quashed the entire arbitration proceedings along with the award. This implies that the applicability of a future decision like *Perkins Eastman* would also be retrospective, and as such, similar decisions would apply in cases where the arbitral tribunal has entered reference and also where the award has already been published. The Supreme Court erred in even specifying the category of cases which deserve to be exempted from this straitjacket formula, as will be discussed below.

While dealing with the applicability of Perkins Eastman, the Delhi High Court in *Proddatur Cable* referred to a decision of the Supreme Court in *Bharat Broadband Network Limited* v. *United Telecoms Limited* ["**Bharat Broadband**"] to decide the fate of pending arbitrations.[93] In the case of B*harat Broadband*, the Supreme Court held that as soon as any court adjudicates on the issue of the mandate of an arbitrator, Section 14 of the 1996 Act will operate, thus leading to the termination of the mandate de jure.[94]

There exist situations where one party may have consented to the unilateral appointment of an arbitrator, either by formal consent or by an act of acquiescence, for instance, where the non-appointing party without protest participated in the arbitral proceeding by filing their response or

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90 Cole Rabinowitz, *Fate of the Unilateral Option Clause Finally Decided in Russia*, N.Y.U. J. INT'L L. POL. (Apr. 10, 2013), *available at* https://www.nyujilp.org/fate-of-the-unilateral-option-clause-finally-decided-in-russia/.

91 Wilson Taylor Asia Pacific Pte Ltd. v. Dyna-Jet Pte Ltd. [2017] SGCA 32 (Sing.).

92 M.A. Mortenson Co. v. Saunders Concrete Co., Inc., 676 F.3d 1153, 1158 (8th Cir. 2012) (U.S.).

93 Bharat Broadband, (2019) 5 SCC 755 (India).

94 *Id.* ¶ 17; *see also* Naval Sharma & Saurajay Nanda, *Arbitrations by Unilaterally Appointed Arbitrators: In Jeopardy?*, MONDAQ (Mar. 19, 2020), *available at* https://www.mondaq.com/india/arbitration-dispute%20resolution/904892/arbitrations-by-unilaterally-appointed-arbitrators-in-jeopardy.

claims. There can also be a situation where the non-appointing party had failed to resist the appointment at the constitution of the tribunal, but questioned the unilateral appointment when it challenged the award in a petition filed under Section 34 of the 1996 Act. However, such challenges would be barred by virtue of the doctrine of estoppel, which means that a non-appointing party is estopped from challenging the appointment of the arbitrator later, once it has accepted the arbitral tribunal's jurisdiction and competency by participating in the arbitration proceedings without coercion or misrepresentation.[95]

In light of these limitations, Indian courts soon started distinguishing the *Perkins Eastman* decision on merits. The full bench of the Supreme Court in the case of *Central Organisation for Railways Electrification* v. *M/s. ECI-SPIC-SMO-MCML (JV)* ["**Central Organisation for Railway**"],[96] held contrary to the reasoning of the judgments in the cases of *TRF Limited* and *Perkins Eastman*. The Court upheld the mutually agreed asymmetrical procedure for appointment of an arbitrator. This decision was in line with the reasoning rendered by the Supreme Court in *Voestalpine Schienen*. The Court, however, directed the Petitioner-Department to send a 'fresh' panel of four retired railway officers, and the Respondent-Contractor was asked to select the arbitral tribunal from the said panel.[97] The Supreme Court while allowing the appeal of the Railway Department, quashed the High Court's appointment of a sole arbitrator.

While the *Central Organisation for Railway*, one can say, is a clear case of deviation from *Perkins Eastman*, further signs of such deviation could also be gathered during the course of a recent matter in the case of *Subha Gopalakrishnan* v. *M/s. Karismaa Foundations Pvt. Ltd.*[98] ["**Subha Gopalakrishnan**"].[99] The case concerned unilateral appointment of an arbitrator by the Respondent Company, which was made as per the arbitration agreement. The Petitioner relying on the decision in *Perkins Eastman* sought intervention of the Court to invalidate the mandate of the arbitrator, even though the arbitration proceedings were initiated and the Petitioner had started active participation in the arbitration hearings. The Madras High Court rejected the Section 11 petition filed by the Petitioner on the ground that the sole arbitrator[100] – before whom the Petitioner had also submitted herself by participating in the proceedings – had already entered reference. The Madras High Court relied on the proposition of law that when the arbitral tribunal has entered reference with respect to the dispute between the parties, constitution of another arbitral tribunal in respect of those same issues, would be without jurisdiction.[101] Aggrieved by the decision of the High Court, the Petitioner approached the Supreme Court.

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95 New India Assurance Co. v. Dalmiya Iron & Steel Co. Ltd., 1964 SCC OnLine Cal 34, ¶ 10 (India).

96 Central Org. for Rys. Electrification v. M/s. ECI-SPIC-SMO-MCML (JV), 2019 SCC OnLine SC 1635 (India).

97 *Id.* ¶ 40.

98 Subha Gopalakrishnan v. M/s. Karismaa Founds. Pvt. Ltd., SLP(C) No. 30404 of 2019 (decided by the Supreme Court on Jan. 8, 2020) (India) [*hereinafter* "Subha Gopalakrishnan"].

99 It is pertinent to state here that the author represented the Respondent Company (M/s Karismaa Foundations Pvt. Ltd.) in the case of *Subha Gopalakrishnan* before the Supreme Court. Reluctance of the Bench to apply the rationale of *Perkins Eastman* could be inferred from the fact that the Court allowed the petitioner to withdraw its petition. We as lawyers perceived this as dilution of the stance taken by the Supreme Court on the issue of unilateral appointment of arbitrators in *Perkins Eastman* and also as our success in making it possible for the Respondent to continue with the arbitration.

100 Mrs. Subha Gopalakrishnan v. M/s. Karismaa Founds. Pvt. Ltd. & Ors., O.P. No. 711 of 2017 (decided by the Madras High Court on Sept. 6, 2019) (India).

101 *See* Antrix Corp. Ltd. v. Devas Multimedia Pvt. Ltd., (2014) 11 SCC 560 (India); *see also* Som Datt Builders Pvt. Ltd. v. State of Punjab & Ors., 2005 SCC OnLine P&H 891 (India).

However, the matter resulted in what can be called *in limine* disposal, since the Petitioner decided to withdraw its petition with the permission of the Supreme Court.

Before the Petitioner could withdraw its petition, three main arguments were raised by the author on behalf of the Respondent Company before the Supreme Court: *first*, that the Petitioner had already participated in the arbitral proceedings, hence is estopped to challenge the appointment of the arbitrator. *Second*, the rationale of *Perkins Eastman* should not be made applicable to the pending arbitration proceedings where both parties have participated in arbitral hearings, without protest. *Third*, the finding of *Perkins Eastman* could be distinguished on merits, on the basis of the type of the appointment clauses present in the arbitration agreements. However, due to withdrawal of the petition, *Subha Gopalakirshna* became a missed opportunity for clear and further deliberation on the rationale of *Perkins Eastman* by the apex court.[102] However, it can be argued that the very fact that the Petitioner decided to withdraw and the apex court allowed it, is a clear enough sign that rationale of *Perkins Eastman* needs reconsideration.[103]

Further, in the cases of *SMS Ltd.* v. *Rail Vikas Nigam Limited* ["**SMS Ltd.**"][104] and *BVSR-KVR (Joint Ventures)* v. *Rail Vikas Nigam Limited* ["**BVSR-KVR**"],[105] where the appointment procedures in the respective arbitration agreements were similar to the one present in *Central Organisation for Railway*, the Delhi High Court chose to rely on the ratio of *Perkins Eastman* instead and thereby appointed an independent sole arbitrator by declaring the unilateral appointment clause to be invalid and biased.

The Delhi High Court, in *SMS Ltd.* and *BVSR-KVR*, relied on the decision of a concurrent bench in *Assignia-VIL-JV* v. *Rail Vikas Nigam Limited*,[106] wherein the Delhi High Court had held that the Respondent-Department could not appoint its retired or serving employees as arbitrators, as it would defeat the very purpose of the 2015 Amendment Act. The Court found that it was duty bound to secure the appointment and to remove any justifiable doubts as to the independence and impartiality of the arbitrator, and therefore, appointed a neutral arbitral tribunal of three arbitrators.

Therefore, different courts have interpreted the judgments of *Perkins Eastman* and *Central Organisation for Railway* as per their own understanding of the rationale of these judgments. The courts have either distinguished these decisions on merits or have relied upon them mechanically without close examination. This has resulted in conflicting decisions, which are treated as precedents for the issue involving unilateral appointments creating further uncertainty on the issue.

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102 A.K. Awasthi, *Stare Decisis and Supreme Court*, 30 JUD. TRAINING & RES. INST. J. 77–81 (Dec. 2008).

103 The author opines that, even though the author was successful in defending the rights of the Respondent in the case of *Subha Gopalakrishnan* before the Supreme Court, the Court's *in limine* disposal consequently led to a further dilution of the issue of unilateral appointment of arbitrators in India.

104 SMS Ltd. v. Rail Vikas Nigam Ltd., 2020 SCC OnLine Del 77 (India).

105 BVSR-KVR (Joint Ventures) v. Rail Vikas Nigam Ltd., 2020 SCC OnLine Del 456 (India).

106 Assignia-VIL-JV v. Rail Vikas Nigam Ltd., 2016 SCC OnLine Del 2567 (India).

IV. The way forward

A. Taking away the absolute immunity of arbitrators

As the cases of professional misconduct by arbitrators increased,[107] the questions against arbitral immunity arose. The blanket immunity granted to arbitrators shields them from perceived misconduct.[108] In an arbitration process, proving the bias of the arbitral tribunal post-reference is extremely difficult. However, in a case where bias is proved against the arbitrator the only solution is to remove the arbitrator and appoint a new one. There needs to be penal and tortious consequences against persons who attempt to violate the independence and impartiality of an arbitral process.

This can be done by taking away the absolute immunity granted to arbitrators and imposing sanctions on them in cases of gross misconduct. The unilateral appointment of an arbitral tribunal gives rise to the presumption of bias towards the party who solely appointed the arbitral tribunal. Thus, unilateral appointment prima facie raises doubts against the independence and impartiality of the arbitration process. Mere removal of a biased arbitrator will not put an end on the dominant party's attempt to appoint a favourable arbitral tribunal.

Further, the remedies adopted by Indian courts against a partial arbitrator are mostly limited to the removal of such arbitrator. The courts in these circumstances have, however, also set aside the arbitration proceedings and the award in the past. During the process of biased unilateral appointment and subsequent removal by the courts, the prejudiced party suffers irreparable loss of time and money. Thus, in cases of grave partiality and bias, the prejudiced party should be entitled to monetary damages from the offending arbitrator and the erring party. This will act as a deterrent against the arbitrators who recklessly abuse their powers.

B. System of 'faceless tribunals'

Independence, fairness, impartiality, and neutrality are the indispensable qualities of an arbitrator.[109] The reasonable apprehension of partiality and bias is understood to be more in cases of unilateral appointments than in neutral appointments. There is a dire need to have access to new institutional arbitration centres, as the number of commercial arbitration cases increase. Such mechanisms will bring in more transparency in the appointment process which, in turn, will ensure the independence and impartiality of the arbitral tribunal.

In this regard, the Government of India in 2017 constituted a ten-member High Level Committee ["**High Level Committee**"] to review the institutionalisation of arbitration mechanism and suggest reforms thereto.[110] The High Level Committee noted that the 2015 Amendment Act created undue hardship for its users, for instance, by the delays in the

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[107] Susan D. Franck, *The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity*, 20 N.Y.L SCH. J. INT'L & COMP. L. 1 (2000).

[108] Prathima R. Appaji, *Arbitral Immunity: Justification and Scope in Arbitration Institutions*, 1(1) INDIAN J. ARB. L. 63–74 (July 2012), *available* at http://www.ijal.in/sites/default/files/IJAL%20Volume%201_Issue%201_Prathima%20Appaji.pdf.

[109] Subhash Projects, 2006 SCC OnLine Gau 57, ¶ 29 (India); *see also* Yashwith Constr. (P) Ltd. v. Simplex Concrete Piles India Ltd., 2008 SCC OnLine AP 826, ¶ 12 (India).

[110] Government of India, Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (July 30, 2017), *available at* http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf.

arbitration process caused by the extensive involvement of the courts.[111] Thereby, the High Level Committee report suggested amendments to the 1996 Act specifically aimed at promoting institutional arbitration in India, citing examples of the appointment mechanisms in Singapore, Hong Kong and the United Kingdom. Furthermore, the suggestions included, *inter alia*, setting up of an autonomous body styled by the Arbitration Promotion Council of India ["**APCI**"], having representatives from all stakeholders for grading arbitral institutions in India. The APCI, in turn, will recognize professional institutes providing for training and accreditation of arbitrators.

Considering the recommendations of the High Level Committee, the legislature through the Arbitration and Conciliation (Amendment) Act, 2019 ["**2019 Amendment Act**"] inserted 'Part IA – Arbitration Council of India'.[112] The Arbitration Council of India is required to grade the arbitral institutions and arbitrators and provide accreditation, amongst other things.[113] These steps are meant to bring about a paradigm shift from the current perception of partiality of arbitral tribunals and delay in resolution of commercial disputes in India to it being viewed as an investor-friendly destination, which will ensure the independence and impartiality of arbitral tribunals without the involvement of courts.

Encouraging and promoting the use of arbitral institutions will create a system of faceless tribunals by removing the option of selecting the arbitrator. The term 'faceless tribunals' envisages a process where arbitral institutions will have specialised persons on board, and through a system of randomised selection, the arbitral tribunal will be constituted by the institution without the involvement of the parties. The arbitrators selected will then be scrutinised on the basis of Section 12 and the Fifth and the Seventh Schedules of the 1996 Act, as amended and inserted by the 2015 Amendment Act respectively.

The 2019 Amendment Act, *inter alia*, amended Section 11 of the 1996 Act, empowering the Supreme Court and the high courts to designate arbitral institutions for the process of appointment of arbitrators.[114] Prior to this amendment also, the Supreme Court,[115] in a pro-arbitration move, had instructed the Mumbai Centre for International Arbitration to appoint an arbitrator in an international dispute, in exercise of its powers under Section 11 of the 1996 Act

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111 Mridul Godha & Kartikey M., *The New-Found Emphasis on Institutional Arbitration in India*, KLUWER ARB. BLOG (Jan. 7, 2018), *available at* http://arbitrationblog.kluwerarbitration.com/2018/01/07/uncitral-technical-notes-online-dispute-resolution-paper-tiger-game-changer/?doing_wp_cron=1597346999.8069019317626953125000.

112 Arbitration and Conciliation (Amendment) Act, 2019, No. 33 of 2019 (India) [*hereinafter* "2019 Amendment Act"].

113 *Id.* § 10; 1996 Act, No. 26 of 1996, § 43D (India).

114 2019 Amendment Act, Act No. 33 of 2019, § 3 (India) amended § 11 of the 1996 Act. Section 3 reads as follows:
"In section 11 of the principal Act,–
(i) after sub-section (3), the following sub-section shall be inserted, namely:—
'(3A) The Supreme Court and the High Court shall have the power to designate, arbitral institutions, from time to time, which have been graded by the Council under section 43-I.'".

115 Sun Pharm. Indus. Ltd., Mumbai v. M/s Falma Organics Ltd. Nigeria, 2017 SCC OnLine SC 1200, ¶ 3 (India).

(as amended by the 2015 Amendment Act).[116] This decision marked the first time that a court invoked Section 11 to designate an institution to assist with the appointment of an arbitrator.[117]

Such references to neutral institutions will ensure that appointments are impartial and curb the unfettered right of parties to unilaterally appoint arbitrators.

C. Use of artificial intelligence for appointment of arbitrators

The use of the phenomenal advancements in information technology has not yet affected the world of arbitration. With the rise of commercial arbitrations across the globe between internationally placed parties, there is a need for arbitral institutions to put technology at the forefront with an aim to reduce the workload and assist the parties in the arbitration process.

Artificial Intelligence ["**AI**"] is now a reality. The arbitration institutions should start investing in software with built-in AI features, for every aspect related to the arbitration process. Around the world, various law firms have started using AI as a method of determining effective case strategies, research and case outcomes.[118] AI can also be used by the arbitral institutions for effectively organising and storing the pleadings and document of the parties, while maintaining complete confidentiality.

Most importantly, AI can be used for selection of arbitrators from a pool of empanelled persons. This feature can first select a list of persons from the pool who possess specialisation in the field of that particular dispute and then filter persons who are statutorily exempted from being arbitrators in relation to a specific set of parties. This will ensure that a system of faceless tribunal is achieved which, therefore, will maintain absolute independence and impartiality of arbitral tribunals.

V. Conclusion

The quintessence of an arbitration process is to maintain the independence and impartiality of the arbitral tribunal. Unilateral clauses in arbitration agreements result in reasonable apprehension of partiality and bias. The pristine rule of adjudicative ethics rests on the premise that the arbitral tribunal permitted by the law to try cases and controversies must not only be unbiased, but must also avoid even the appearances of bias.[119] It is, therefore, extremely crucial to ensure that the arbitration process follows the highest standards of impartiality. The author thus suggests that the process of appointment of the arbitral tribunal must incorporate the system of faceless tribunals by embracing the use of AI in the selection process.

The lack of clarity arising from the silence of statutory law on the issue of unilateral appointments of arbitrators has led to grave uncertainty. Further, as no singular decision of the Supreme Court occupies the field in this regard, it has resulted in conflicting decisions of the

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[116] Ayushi Singhal, *Appointment of Arbitrators in India – Finally Courts Divest Some Power*, KLUWER ARB. BLOG (Sept. 5, 2019), *available at* http://arbitrationblog.kluwerarbitration.com/2017/09/05/appointment-arbitrators-india-finally-courts-divest-power/?doing_wp_cron=1597346249.0300669670104980468750.

[117] Nicholas Peacock, Donny Surtani & Kritika Venugopal, *MCIA Recognised by the Supreme Court of India as an Appointing Institution*, HSF NOTES (Aug. 3, 2017), *available at* https://hsfnotes.com/arbitration/2017/08/03/mcia-recognised-by-the-supreme-court-of-india-as-an-appointing-institution/.

[118] Alberto Acevedo Rehbein, *Artificial intelligence in international arbitration: from the legal prediction to the awards issued by robots*, GARRIGUES NEWSL. (Feb. 2, 2019), *available at* https://www.garrigues.com/en_GB/new/artificial-intelligence-international-arbitration-legal-prediction-awards-issued-robots.

[119] Subhash Projects, 2006 SCC OnLine Gau 57 (India).

Supreme Court and various high courts. This ambiguity and conflict in decisions questions the legality of the appointments of arbitral tribunals by courts. This uncertainty is in the teeth of the legislative intent of maintaining the independence and impartiality of an arbitrator.

Therefore, it is imperative upon the legislature to step in to settle the debate and/or for the courts to seize the opportunity to revisit and settle the law on unilateral clauses in arbitration agreements. The much-awaited conclusion to this dispute should definitely uphold the fundamental tenets of arbitration and contractual laws by putting an end to such unequal and unilateral appointments.