2024 INSC 857

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal Nos. 9486-9487 of 2019

Central Organisation for Railway Electrification …Appellant

Versus

M/s ECI SPIC SMO MCML (JV) A Joint Venture Company …Respondents

With
Special Leave Petition (C) No.15936 of 2020

With
Special Leave Petition (C) No.6125 of 2021

With
Special Leave Petition (C) No.9462 of 2022

With
Special Leave Petition (C) No.21131 of 2023

With
Diary No.7086 of 2024

And With
Diary No.13670 of 2024

J U D G M E N T

Dr Dhananjaya Y Chandrachud, CJI

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A. Background

1. In the present batch of appeals, this Court has to decide the contours defining the independence and impartiality of arbitral tribunals under the Arbitration and Conciliation Act 1996.[1] The Arbitration Act allows parties to agree on a procedure for appointment of arbitrators. The sanctity inhering in the arbitration agreement underscores the autonomy of parties to settle their disputes by arbitrators of their choice. However, the Arbitration Act subjects party autonomy to certain mandatory principles such as the equality of parties, independence and impartiality of the tribunal, and fairness of the arbitral procedure. The reference to the Constitution Bench raises important issues of the interplay between party autonomy and independence and impartiality of the arbitral tribunal.

i. Background to the reference

2. The Law Commission of India in its 246th Report opined that party autonomy cannot be stretched to disregard the principles of impartiality and independence of the arbitral process, specifically at the stage of constituting of an arbitral tribunal.[2] Hence, the Law Commission suggested automatic

[1] "Arbitration Act"

[2] Law Commission of India, Amendments to the Arbitration and Conciliation Act 1996, Report No. 246 (August 2014). [The relevant observation reads:
"57. The balance between procedural fairness and binding nature of these contracts, appears to have been tilted in favour of the latter by the Supreme Court, and the Commission believes the present position of law is far from satisfactory. Since the principles of impartiality and independence cannot be discarded at any stage of the proceedings, specifically at the stage of constitution of the arbitral tribunal, it would be incongruous to say that party autonomy can be exercised in complete disregard of these principles – even if the same has been agreed prior to the disputes having arisen between the parties. There are certain minimum levels of independence and impartiality that should be required of the arbitral process regardless of the parties' apparent agreement. A sensible law cannot, for instance, permit appointment of an arbitrator

disqualification of persons whose relationship with the parties falls under any of the categories specified by law. Following upon the recommendations of the Law Commission, Parliament enacted the Arbitration and Conciliation (Amendment) Act 2015[3] to incorporate Section 12(5)[4]. Section 12(5) renders a person whose relationship with the parties falls under any of the categories specified under the Seventh Schedule ineligible for appointment. Given the 2015 amendment, parties filed applications under Section 11(6) urging the invalidation of appointment procedures which gave one party dominance in appointing arbitrators.

3. In **Voestalpine Schienen GmbH** v. **Delhi Metro Rail Corporation Ltd**.,[5] the arbitration clause required the Delhi Metro Rail Corporation[6] to prepare a panel of engineers comprising of serving or retired engineers of government departments or public sector undertakings. The clause further stated that matters where the total value was below Rupees 1.5 million should be referred to sole arbitrators, and those exceeding the amount shall

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who is himself a party to the dispute, or who is employed by (or similarly dependent on) one party, even if this is what the parties agreed. The Commission hastens to add that Mr. PK Malhotra, the ex officio member of the Law Commission suggested having an exception for the State, and allow State parties to appoint employee arbitrators. The Commission is of the opinion that, on this issue, there cannot be any distinction between State and non-State parties. The concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent adjudicators for resolution of disputes. In fact, when the party appointing an adjudicator is the State, the duty to appoint an impartial and independent adjudicator is that much more onerous – and the right to natural justice cannot be said to have been waived only on the basis of a "prior" agreement between the parties at the time of the contract and before arising of the disputes."]

[3] "2015 amendment"

[4] Section 12(5), Arbitration Act. [It reads:
"(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:
Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."]

[5] [2017] 1 SCR 798

[6] "DMRC"

be arbitrated before a panel of three arbitrators. The relevant clause for disputes to be decided by three arbitrators was thus:

> "(c) For the disputes to be decided by three Arbitrators, the Purchaser will make out a list of five engineers from the aforesaid panel. The supplier and Purchaser shall choose one Arbitrator each, and the two so chosen shall choose the third Arbitrator from the said list, who shall act as the presiding Arbitrator."

4. The issue before a two-Judge Bench of this Court was whether the panel of arbitrators prepared by DMRC violated Section 12 of the Arbitration Act. This Court emphasized that an arbitrator appointed in terms of the agreement between the parties must be independent of the parties. Further, this Court held that Section 12(5) read with the Seventh Schedule does not put an embargo on retired government employees from serving as arbitrators. It held that "[b]ias or even real likelihood of bias cannot be attributed to such highly qualified and experienced persons, simply on the ground that they served the Central Government or PSUs."[7]

5. The Court held that the arbitration clause had the following adverse consequences: (i) the choice given by DMRC to the other party was limited; and (ii) the discretion given to DMRC to curate a panel of five persons gave

[7] Voestalpine (supra) [25]. [It reads:
"26. It cannot be said that simply because the person is a retired officer who retired from the government or other statutory corporation or public sector undertaking and had no connection with DMRC (the party in dispute), he would be treated as ineligible to act as an arbitrator. Had this been the intention of the legislature, the Seventh Schedule would have covered such persons as well. Bias or even real likelihood of bias cannot be attributed to such highly qualified and experienced persons, simply on the ground that they served the Central Government or PSUs, even when they had no connection with DMRC. The very reason for empanelling these persons is to ensure that technical aspects of the dispute are suitably resolved by utilising their expertise when they act as arbitrators. It may also be mentioned herein that the Law Commission had proposed the incorporation of the Schedule which was drawn from the red and orange list of IBA guidelines on conflict of interest in international arbitration with the observation that the same would be treated as the guide "to determine whether circumstances exist which give rise to such justifiable doubts". Such persons do not get covered by red or orange list of IBA guidelines either."]

rise to the suspicion that it "may have picked up its own favourites." To remedy the situation, it was held that a choice must be given to both parties to nominate any person from the entire panel of arbitrators. Further, this Court observed that in case of a government contract where the authority to appoint an arbitrator rests with a government entity, there is an imperative to have a "broad based panel"[8] to instil confidence in the mind of the other party and secure the principle of independence and impartiality at the stage of the constitution of the arbitral tribunal.[9]

6. In **TRF Ltd** v. **Energo Engineering Projects Ltd**,[10] the purchase order issued by the respondent to the appellant contained an arbitration clause that stated that any dispute or difference between the parties in connection with the agreement shall be referred "to sole arbitration of the Managing Director of Buyer or **his nominee**." After a dispute arose between the parties about the encashment of the bank guarantee, the Managing Director of the respondent appointed a former judge of this Court as the sole arbitrator in terms of the arbitration clause. The issue before the Bench of three Judges

[8] Voestalpine (supra) [28]. ["28. […] Keeping in view the spirit of the amended provision and in order to instil confidence in the mind of the other party, it is imperative that panel should be broadbased. Apart from serving or retired engineers of government departments and public sector undertakings, engineers of prominence and high repute from private sector should also be included. Likewise panel should comprise of persons with legal background like Judges and lawyers of repute as it is not necessary that all disputes that arise, would be of technical nature. There can be disputes involving purely or substantially legal issues, that too, complicated in nature. Likewise, some disputes may have the dimension of accountancy, etc. Therefore, it would also be appropriate to include persons from this field as well.]

[9] Voestalpine (supra) [30] ["30. Time has come to send positive signals to the international business community, in order to create healthy arbitration environment and conducive arbitration culture in this country. Further, as highlighted by the Law Commission also in its report, duty becomes more onerous in government contracts, where one of the parties to the dispute is the Government or public sector undertaking itself and the authority to appoint the arbitrator rests with it. In the instant case also, though choice is given by DMRC to the opposite party but it is limited to choose an arbitrator from the panel prepared by DMRC. It, therefore, becomes imperative to have a much broadbased panel, so that there is no misapprehension that principle of impartiality and independence would be discarded at any stage of the proceedings, specially at the stage of constitution of the Arbitral Tribunal. We, therefore, direct that DMRC shall prepare a broadbased panel on the aforesaid lines, within a period of two months from today."]

[10] [2017] 7 SCR 409

was whether the Managing Director was eligible to nominate a sole arbitrator because of Section 12(5) of the Arbitration Act. The Court distinguished the situation where both the parties appoint their arbitrators from a situation where a person ineligible to be appointed as an arbitrator nominates a sole arbitrator:

> "53. […] when there are two parties, one may nominate an arbitrator and the other may appoint another. That is altogether a different situation. If there is a clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstance can be called in question is the procedural compliance and the eligibility of **their** arbitrator depending upon the norms provided under the Act and the Schedules appended thereto. But, here is a case where the Managing Director is the "named sole arbitrator" and he has also been conferred with the power to nominate one who can be the arbitrator in his place. Thus, there is subtle distinction."

7. The Court relied on the maxim *qui facit per alium facit per se* (what one does through another is done by oneself)[11] to hold that a person who becomes ineligible to be appointed as an arbitrator cannot nominate another person as an arbitrator:

> "57. […] **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 person who is statutorily ineligible can nominate a person.** …**once the identity of the Managing Director as the sole arbitrator is lost,**

[11] As applied by this Court in Pratapchand Nopaji v. Kotrike Venkata Setty, (1975) 2 SCC 208 [9]

> **the power to nominate someone else as an arbitrator is obliterated...**"
>
> (emphasis supplied)

8. In **Perkins Eastman Architects DPC** v. **HSCC (India) Ltd**.,[12] the arbitration clause stipulated that disputes or differences between the parties to the contract "shall be referred for adjudication through arbitration by a **sole arbitrator appointed by the CMD HSCC** within 30 days from the receipt of request from the Design Consultant." The Bench of two Judges held that the test to determine the possibility of bias is directly relatable to the interest the person appointing an arbitrator has in the outcome of the dispute. The Court held that a person having an interest in the dispute "cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator."[13]

9. **TRF** (supra) and **Perkins** (supra) both dealt with a situation where a person who was rendered ineligible in terms of Section 12(5) was making an appointment of a sole arbitrator. Consequently, **Perkins** (supra) relied on **TRF** (supra) to observe that a person who has an interest in the dispute or its outcome should not have the power to unilaterally appoint a sole arbitrator:

> "16. […] The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. **The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its**

[12] [2019] 17 SCR 275
[13] Perkins (supra) [16]

> **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.** That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) and recognised by the decision of this Court in *TRF Ltd.*"
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> (emphasis supplied)

10. In **Central Organisation for Railway Electrification** v. **ECI-SPIC-SMO-MCML (JV) A Joint Venture Company**,[14] the arbitration was to be held following Clause 64(3)(b) of the General Conditions of Contract. The clause reads thus:

> "64. (3)(*b*) Appointment of arbitrator where applicability of Section 12(5) of the A&C Act has not been waived off
>
> The Arbitral Tribunal shall consist of a panel of three retired railway officers retired not below the rank of SAO officer, as the arbitrator. For this purpose, the Railways will send a panel of at least four names of retired railway officer(s) empanelled to work as railway arbitrator indicating their retirement date to the contractor within 60 days from the day when a written and valid demand for arbitrators is received by the GM.
>
> Contractor will be asked to suggest to General Manager at least two names out of the panel for appointment as contractor's nominee within 30 days

[14] [2019] 16 SCR 1234 ["CORE"]

> from the date of dispatch of the request by the Railways. The General Manager shall appoint at least one out of them as the contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the "presiding arbitrator" from amongst the three arbitrators so appointed. The GM shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of contract's nominees. While nominating the arbitrators, it will be necessary to ensure that one of them has served in the Accounts Department."

11. The first relevant issue before the Bench of three Judges was whether the appointment of retired railway officers as arbitrators was valid, given Section 12(5) read with the Seventh Schedule. The Court relied on **Voestalpine** (supra) to observe that Section 12(5) does not bar former employees of parties from being appointed as arbitrator. The other issue was whether the General Manager could appoint arbitrators. The Court held that the law laid down in **TRF** (supra) and **Perkins** (supra) was not applicable because "the right of the General Manager in formation of Arbitral Tribunal is counter-balanced by respondent's power to choose any two from out of the four names and the General Manager shall appoint at least one out of them as the contractor's nominee." The Court upheld the validity of the arbitration clause and directed the constitution of the arbitral tribunal in terms of the agreement.

ii. The reference

12. In **Union of India** v. **Tantia Constructions Limited**,[15] a three Judge Bench *prima facie* disagreed with **CORE** (supra), observing:

> "**1.** … on the facts of this case, the judgment of the High Court cannot be faulted with (sic). Accordingly, the Special Leave Petition is dismissed. **However, reliance has been placed upon a recent three-Judge Bench decision of this Court delivered on 17.12.2019 in *Central Organisation for Railway Electrification* v. *ECI-SPIC-SMO-MCML (JV) A Joint Venture Company*, 2019 SCC OnLine SC 1635. We have perused the aforesaid judgment and *prima facie* disagree with it for the basic reason that once the appointing authority itself is incapacitated from referring the matter to arbitration, it does not then follow that notwithstanding this yet appointments may be valid depending on the facts of the case**.
>
> **2.** We therefore request the Hon'ble Chief Justice to constitute a larger Bench to look into the correctness of this judgment."
>
> (emphasis supplied)

13. When the reference came up on 12 July 2023, Mr R Venkataramani, the Attorney General for India, submitted that the Union Government had constituted an Expert Committee on Arbitration Law[16] (chaired by Dr T K Viswanathan) to reconsider the provisions of the Arbitration Act. It was further submitted that the issues that have been raised in the present reference would fall within the broad remit of the Expert Committee. On 17 January 2024, the Constitution Bench provided three months to the Union Government to evaluate the recommendations of the Expert Committee.

[15] 2021 SCC OnLine SC 271.
[16] "Expert Committee"

The Court was informed on 16 April 2024 that the government had not taken any decision on the recommendations of the Expert Committee. The Constitution Bench decided to take up the reference for final hearing.

B. Issues

14. The following issues fall for the determination of this Court:

a. Whether an appointment process which allows a party who has an interest in the dispute to unilaterally appoint a sole arbitrator, or curate a panel of arbitrators and mandate that the other party select their arbitrator from the panel is valid in law;

b. Whether the principle of equal treatment of parties applies at the stage of the appointment of arbitrators; and

c. Whether an appointment process in a public-private contract which allows a government entity to unilaterally appoint a sole arbitrator or majority of the arbitrators of the arbitral tribunal is violative of Article 14 of the Constitution.

C. Submissions

15. Mr Gourab Banerji, Mr Neeraj Kishan Kaul and Mr S Ravi Shankar, senior counsel, and Mr Rohan Talwar, Mr George Poothan Poothicote and Mr Anirurdh Krishnan, counsel, made the following submissions:

a. Party autonomy is subject to the mandatory provisions of the Arbitration Act such as Section 18 (equal treatment of parties) and Section 12(5) (independence and impartiality of the arbitration proceedings). A panel of

potential arbitrators unilaterally controlled by one party suffers from a lack of independence and impartiality;

b. An arbitration clause that gives one party the power to appoint a sole arbitrator will give rise to a reasonable apprehension of bias concerning the independence and impartiality of the tribunal. The test to determine the existence of reasonable apprehension of bias is that of a reasonable third person;

c. Section 12(5) overrides an arbitration agreement because of the non obstante clause. Although the statute does not specifically bar an ineligible person from appointing an arbitrator, **TRF** (supra) and **Perkins** (supra) rightly held that an ineligible person could not appoint an arbitrator or curate a panel of arbitrators. The thread running through **TRF** (supra) and **Perkins** (supra) is that if a person has an interest in the outcome of the dispute, such person should not have any role in the process of appointing an arbitrator, including curation of a panel of potential arbitrators;

d. **TRF** (supra) and **Perkins** (supra) only carved out an exception for situations where both parties are permitted to appoint an arbitrator of their choice;

e. A unilaterally appointed panel is contrary to the principle of equal treatment of parties enshrined under Section 18, which is a mandatory provision. Although Section 18 is part of Chapter V dealing with the conduct of arbitral proceedings, it also applies at the stage of the constitution of arbitral tribunals. A lack of mutuality in the appointment process is a violation of Section 18 because it gives an unfair advantage to one party;

f. In **Lombardi Engineering Limited** v. **Uttarakhand Jal Vidyut Nigam Limited**,[17] this Court held that arbitration agreements must conform with the Constitution. An arbitration clause authorizing one party to unilaterally appoint an arbitrator or curate a panel of arbitrators is unconscionable and violative of Article 14. Section 23 of the Indian Contract Act 1872[18] also prohibits unconscionable contracts;

g. In **Voestalpine** (supra), this Court directed the constitution of a broad-based panel of arbitrators. However, the constitution of such a panel restricts the choice of the other party and falls foul of the requirement of equality and impartiality; and

h. **CORE** (supra) does not consider **Voestalpine** (supra), Section 11(8), and the principle of an independence and impartiality under Section 12. Further, the counter-balancing test evolved in **Perkins** (supra) is only applicable in situations where both parties have an **equal** and **unfettered** choice in appointing their arbitrators. It does not apply to situations where one party's choice of arbitrators is restricted to a pre-selected list by the other party; and

i. The prohibition on a person ineligible under Section 12(5) from nominating an arbitrator or a panel of arbitrators can be traced to Section 18. Further, if the panel of arbitrators is curated and controlled by one party, it gives rise to "justifiable doubts" as to the independence and impartiality of the arbitrator under Section 12.

[17] [2023] 13 SCR 943
[18] "Contract Act"

16. Mr Tushar Mehta, Solicitor General of India, Mr K M Nataraj, Additional Solicitor General of India, Mr Arvind Kamath, Additional Solicitor General of India, Mr Mahesh Jethmalani, Ms Madhavi Divan, Mr Guru Krishna Kumar, Mr Anand Padmanabhan, Mr Naresh Kaushik, Mr Nakul Dewan, Mr P V Dinesh, senior counsel, and Mr Shashank Garg, counsel, made the following submissions:

a. The principle of party autonomy is ingrained in the entire architecture of the Arbitration Act. Section 11(2) allows the parties to agree on a procedure for appointing arbitrators. The procedure contemplated under Section 11(2) can include one party preparing a panel of arbitrators and giving a choice to the other party to select its nominee from the panel;

b. The duty of the Supreme Court or the High Court to appoint an independent and impartial arbitrator under Section 11(8) arises only in situations contemplated under Sections 11(4), 11(5), and 11(6) where parties fail to abide by the agreed procedure. The provision does not hinder the right of the parties to agree on a procedure for appointment of arbitrators under Section 11(2);

c. The action of “appointing” or “enlisting” a person as an arbitrator is distinct from “acting” as an arbitrator. Section 12(5) expressly prohibits a person who is ineligible in terms of the Seventh Schedule from being appointed as an arbitrator. However, the Arbitration Act does not expressly prohibit such an ineligible person from appointing an arbitrator or enlisting a panel of potential arbitrators;

d. The Arbitration Act does not recognize any presumed ineligibility concerning arbitrators. The ineligibility must be real and actual according to Section 12;

e. The equality of treatment under Section 18 does not refer to *inter se* equality between the parties at the stage of agreeing upon a procedure for appointing an arbitrator. Section 18 mandates the arbitral tribunal to treat the parties with equality and give them a full opportunity to present their case. Further, Section 18 only applies after the composition of the arbitral tribunal during the conduct of arbitral proceedings;

f. The Arbitration Act provides adequate statutory safeguards for securing the independence and impartiality of arbitrators. These safeguards include: (i) Section 12(5) read the Seventh Schedule; (ii) mandatory disclosure under Sections 12(1) read with the Fifth Schedule; (iii) challenge procedures under Sections 13 and 14; and (iv) judicial review of the decision of an arbitrator under Section 34;

g. **Voestalpine** (supra) has upheld the maintenance of a panel of potential arbitrators by public sector undertakings. It correctly laid down the broad-based principle for the operation of a panel of arbitrators. Further, it did not bar former employees of the parties to the arbitration agreement from serving as arbitrators;

h. **TRF** (supra) erred by relying on the maxim *qui facit per alium facit per se* which is usually applied in the context of delegation of authority. The act of appointing or nominating an arbitrator under an arbitration clause is not an act of delegation of the appointing authority's power. Rather, the arbitrator

exercises an independent power of adjudication within the limits laid down by the pertinent arbitration agreement and the Arbitration Act; and

i. Non-banking financial companies[19] include arbitration clauses in the standard form contracts entered into with the borrowers. Since the nature of the dispute generally involves default in payment by the borrowers, the arbitration clause allows the NBFCs to appoint an arbitrator. Nevertheless, the arbitrator has to satisfy the criteria laid down under Section 12.

D. Principles underpinning the Arbitration Act

17. Our courts have jurisdiction to try all suits of a civil nature except where cognizance is expressly or impliedly barred.[20] Section 28 of the Contract Act bars any agreement that prohibits parties from enforcing their rights under contract by usual legal proceedings in ordinary tribunals. However, the provision makes an exception to a contract by which two or more persons agree to refer the disputes that may arise between them in respect of any subject or class of subjects to arbitration.[21] Thus, parties can contract out of

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[19] "NBFCs"

[20] Section 9, Code of Civil Procedure 1908. [It reads:
"9. Courts to try all civil suits unless barred – The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred."]

[21] Section 28, Indian Contract Act 1872. [It reads:
"28. 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, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or
(b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in 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.
Exception 1 – Saving of contract to refer to arbitration dispute that may arise – This section shall not render illegal a contract, by which two or more person agree that any dispute which may arise between them in respect of any subject or class of subjects to arbitration, and that only the amount awarded is such arbitration shall be recoverable in respect of the dispute so referred.
Exception 2 – Saving of contract to refer questions that have already arisen – Nor shall this section render illegal any contract in writing, by which two or more person agree to refer to arbitration any question between

the traditional justice dispensing mechanism to refer their disputes to arbitration.

18. The Arbitration Act consolidates and amends the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards. It brings the domestic arbitration law in consonance with the UNCITRAL Model Law on International Commercial Arbitration 1985.[22] One of the main objectives of the Arbitration Act is to make provision for an arbitral procedure that is fair, efficient and capable of meeting the needs of the specific arbitration.

19. Article 2A of the Model Law enunciates the following principles to interpret the provisions of national arbitration laws: (i) regard for the arbitration law's international origin; (ii) the need to promote uniformity in its application; and (iii) observance of good faith. It further provides that issues not expressly settled under the arbitration law are to be settled in conformity with the "general principles" on which the law is based.[23]

20. The principles of interpretation suggested by the Model Law require courts to assume a global perspective consistent with the prevailing practice in courts of other jurisdictions and arbitral tribunals.[24] The Model Law

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them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

[22] "Model Law"

[23] Article 2A, Arbitration Act. [It reads:
"Article 2A International origin and general principles
(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.
(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based."]

[24] Ilias Bantekas, 'International Origin and General Principles' in UNCITRAL Model Law on International Commercial Arbitration: A Commentary (Cambridge University Press, 2020) 44.

encourages resort to "general principles" to fill the gaps in the national arbitration laws.[25] The term "general principles" is intended to refer to principles widely accepted by legal systems.[26] The above principles of interpretation will also apply when interpreting the provisions of the Arbitration Act.

i. Party autonomy

21. Section 7 defines an arbitration agreement to mean an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. The arbitration agreement records the consent of the parties to submit their disputes to arbitration.[27] Arbitration is premised on a consensual agreement to submit disputes to (a) a decision-maker chosen by or for the parties; (b) to render a binding resolution of the dispute following adjudicatory procedures which afford the parties an opportunity to be heard. The right to arbitrate is a private right of the parties to adjudicate *in personam* disputes.

22. The basis of any arbitration is the freedom of the parties to agree to submit their disputes to an individual or to a panel of individuals whose judgment they are prepared to trust and obey. Party autonomy is fundamental to international commercial arbitration because it allows the parties to design the arbitration proceedings to suit their needs and commercial reality. Party

[25] Ibid, at 48
[26] Gary Born (supra) 2971; Emmanuel Gaillard, Legal Theory of International Arbitration' (Brill, 2010) 55
[27] Cox and Kings Ltd v. SAP India Pvt Ltd, 2023 INSC 1051 [60]

autonomy has been described by this Court as the "brooding and guiding spirit"[28] and "backbone"[29] of arbitrations. The principle of minimum judicial interference supplements the autonomy of parties by prohibiting courts from interfering in arbitral proceedings unless mandated by the law.[30] This principle respects the autonomy of the parties to mutually chart the course of the arbitral proceedings.

23. The Arbitration Act has given pre-eminence to party autonomy throughout the arbitral process. The Arbitration Act has used phrases such as "unless otherwise agreed by the parties"[31], "failing any agreement"[32], "the parties are free to agree"[33], "failing such agreement"[34], and "unless the agreement on the appointment procedure provides other means"[35] to recognise the autonomy of parties to determine the arbitral proceedings. The use of the above phrases also indicates that an arbitrator is bound by the procedures agreed upon between the parties.[36]

24. Some of the relevant provisions of the Arbitration Act which reflect the principle of party autonomy are encapsulated below:

a. Section 10 allows parties the freedom to decide the number of arbitrators;

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[28] Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2016) 4 SCC 126 [5]
[29] Centrotrade Minerals & Metals Inc v. Hindustan Copper Ltd., (2017) 2 SCC 228 [38]
[30] Section 5, Arbitration Act. [It reads:
"5. 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."]
[31] Sections 3, 11(1), 14(2), 15(3), 15(4), 20(3), 21, 23(3), 24(1), 26, 29(1), 31(7a), 33(4), Arbitration Act
[32] Sections 11(3), 11(5), 13(2), 19(3), 20(2), 22(2), Arbitration Act
[33] Sections, 11(2), 13(1), 19(2), 20(1), 22(1), Arbitration Act
[34] Section 34(2)(a)(v), Arbitration Act
[35] Section 11(6), Arbitration Act
[36] N S Nayak and Sons v. State of Goa, (2003) 6 SCC 56 [14]; Sree Kamatchi Amman Constructions v. Railways, (2010) 8 SCC 767 [19]

b. Section 11(2) allows parties the freedom to agree on a procedure for appointing the arbitrator or arbitrators;

c. The Proviso to Section 12(5) allows parties to waive the applicability of the provision by an express agreement in writing after the dispute has arisen; and

d. Section 14 allows parties to mutually terminate the mandate of an arbitrator.

25. Additionally, the parties are free to agree on the procedures to be followed by the arbitral tribunal,[37] the place of arbitration,[38] the date of commencement of arbitral proceedings,[39] the language to be used in the arbitral proceedings,[40] procedure for hearings and written proceedings,[41] consequence of a default by a party,[42] appointment of experts[43], and the manner of decision making by the arbitral tribunal.[44] Thus, the Arbitration Act recognises and enforces mutual commercial bargains and understanding between the parties at all stages of the arbitration proceedings. However, the autonomy of the parties under the Arbitration Act is not without limits. It is limited by certain mandatory provisions of the Arbitration Act.

ii. Mandatory provisions

[37] Section 19, Arbitration Act
[38] Section 20, Arbitration Act
[39] Section 21, Arbitration Act
[40] Section 22, Arbitration Act
[41] Section 24, Arbitration Act
[42] Section 25, Arbitration Act
[43] Section 26, Arbitration Act
[44] Section 29, Arbitration Act

26. Part I of the Arbitration Act applies where the place of arbitration is in India.[45] Section 4 deals with a waiver of the right of a party to object in the following terms:

> "4. Waiver of right to object. – A party who knows that –
>
> (a) any provision of this Part from which the parties may derogate, or
>
> (b) any requirement under the arbitration agreement,
>
> has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object."

27. Section 4 is a deeming provision.[46] It deems that a party has waived its right to object if it proceeds with the arbitration without stating its objection to non-compliance of any provisions from which the parties may derogate or of any requirement under the arbitration agreement.[47] Importantly, Section 4 distinguishes between derogable (non-mandatory) and mandatory provisions.[48]

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[45] Section 2(2), Arbitration Act
[46] Shree Subhlaxmi Fabrics (P) Ltd. v. Chand Mal Baradia, (2005) 10 SCC 704 [9]
[47] BSNL v. Motorola India (P) Ltd., (2002) SCC 337. ["39. Pursuance to Section 4 of the Arbitration and Conciliation Act, 1996, a party which knows that a requirement under the arbitration agreement has not been complied with and still proceeds with the arbitration without raising an objection, as soon as possible, waived their right to object."]
[48] A/CN.9/246 (44)

28. Section 4 is based on Article 4 of the Model Law.[49] The purpose of incorporating Section 4 is to inform the arbitrators of the principle of waiver.[50] Peter Binder suggests that Article 4 aims to prohibit the adoption of delay tactics by parties and contribute to the fluency of the proceedings.[51] A party to arbitration has a right to object to any non-compliance with procedural requirements. Section 4 implies a waiver of this right under certain conditions based on the principle of waiver or estoppel.[52] The procedural default at issue must be stipulated either in the arbitration agreement or a non-mandatory provision under Part I of the Arbitration Act. If the arbitration agreement is silent on a procedural point, the provisions of the Arbitration Act take effect. According to Section 4, a party cannot insist on compliance with non-mandatory provisions of the Arbitration Act if it fails to make a timely objection.[53] Section 4 of the Arbitration Act necessarily implies that parties cannot proceed with arbitration in derogation of a mandatory provision.

29. The initial draft of Article 4 of the Model Law did not make an exception for mandatory provisions. Therefore, suggestions were made to "soften" the provision by limiting "the waiver rule to non-compliance with non-mandatory provisions."[54] Further, a proposal was also made to include a list of

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[49] Article 4, Model Law [It reads:
"A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object."]
[50] Howard Holtzmann and Joseph Neuhaus, A Guide to the UNCITRAL Model Law on International Commercial Arbitration 196
[51] Peter Binder, International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdiction (2nd edn, 2005) 49
[52] A/CN.9/264 (17)
[53] Howard Holtzmann and Joseph Neuhaus, A Guide to the UNCITRAL Model Law on International Commercial Arbitration (Kluwer Law) 197
[54] A/CN.9/245 [178]

mandatory provisions under the Model Law. It was suggested that such a list "would make it unnecessary to include in the non-mandatory provisions such wording as "unless otherwise agreed by the parties."[55] The Secretariat considered it unnecessary to include a list of mandatory provisions given the overall scheme of the Model Law.[56] It was also of the opinion that mandatory provisions could be discerned from the content of such provisions.

30. Holtzmann and Neuhaus give the following examples of mandatory provisions under the Model Law:

> "Examples of provisions that appear to be mandatory and therefore cannot be waived under Article 4 are the following: the requirement that the arbitration agreement be in writing (Article 7(2)); the requirement that the parties be treated with equality and that each party be given a full opportunity of presenting his case (Article 18); the requirement that a party be given notice of any hearing and be sent any materials supplied to the arbitral tribunal by the other party (Article 24(2), (3)); the requirement that an award – including an award on agreement terms – be in writing, that it state its date and place, and that it be delivered to the parties (Article 30(2), 31(1), (3), (4))"[57]

[55] Composite draft text of a model law on international commercial arbitration: some comments and suggestions for consideration, A/CN.9/WG.II/WP.50

[56] Composite draft text of a model law on international commercial arbitration: some comments and suggestions for consideration: note by the secretariat (A/CN.9/WG.II/WP.50) [The secretariat gave the following reasons for not providing a list of mandatory provisions in the Model Law itself: "Firstly, a considerable number of provisions are obviously by their content of a mandatory nature. Secondly, there are a number of provisions granting freedom to the parties, accompanied by suppletive rules failing agreement by the parties; here the question of mandatory nature seems to be a philosophical one and equally redundant. Thirdly, with respect to some draft articles only a part of the provisions (e.g. a time limit) is non-mandatory. Fourthly, in respect of some of the provisions already decided to be non-mandatory, the Working Group was of the view that this should, for the sake of emphasis, be expressed in the individual provision, despite the general listing in article 3. Fifthly, it is suggested that, in addition to the provisions already decided to be non-mandatory and drafted accordingly, […] there are only few further provisions which may be regarded as non-mandatory and, if so, could be easily marked as such by adding the words "unless otherwise agreed by the parties;"]

[57] Holtzmann and Neuhaus (supra) 198

31. The above extract suggests that an arbitration agreement entered into by the parties is subject to certain well-defined and mandatory legal principles. For instance, Section 34(2)(a)(v) allows for refusal of enforcement of arbitral awards if the composition of the arbitral tribunal or arbitral procedure was not following the agreement of the parties unless such agreement conflicts with the mandatory provisions of the law.[58] The composition of the arbitral tribunal or the arbitral procedure must not only be in accordance with the agreement of the parties but also be consistent with the mandatory standards laid down under the Arbitration Act.[59] In case of a conflict, mandatory provisions of the Arbitration Act prevail over the arbitration agreement between the parties.[60]

32. Under the Arbitration Act, the mandatory provisions must be deduced from their content. For instance, the use of the phrase "unless otherwise agreed by the parties" is an indicator of the fact that the provision is derogable because it gives priority to the agreement of the parties. In contrast, the use of the word "shall" in a provision is an indicator that the legislature intended to give it a mandatory effect. However, the use of "shall" is not the sole indicator to determine the mandatory nature of a provision. The provision

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[58] Section 34(2)(a)(v), Arbitration Act. [It reads:
"(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or failing, such agreement, was not in accordance with this Part."]

[59] Report of the United Nations Commission on International Trade Law on the work of its eighteenth session (3-21 June 1985) Supplement No. 17 (A/40/17) [290]. [The report states:
"290. As regards the standards set forth in the subparagraph, it was understood that priority was accorded to the agreement of the parties. However, where the agreement was in conflict with a mandatory provision of "this Law" or where the parties had not made an agreement on the procedural point at issue, the provisions of "this Law", whether mandatory or not, provided the standards against which the composition of the arbitral tribunal and the arbitral procedure were to be measured."]

[60] A/CN.9/246, para 135

must be interpreted by having regard to its text and the context to determine its nature.[61]

33. As opposed to the Indian approach, the UK Arbitration Act 1996 lists the mandatory provisions under Schedule I.[62] In this context, Section 4 provides that the mandatory provisions have effect notwithstanding any agreement to the contrary.[63] It further provides that the non-mandatory provisions allow the parties to make their arrangements by agreement. Lord Mustill and Stewart Boyd term Section 4 as one of the 'four pillars' of the UK Arbitration Act.[64] They observe that the provision is one of the instances indicating the influence of the state on the internal law of arbitration.[65]

iii. Appointment of arbitrators

34. Section 10 provides that "parties are free to determine the number of arbitrators, provided that such number shall not be an even number."[66] If

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[61] State of UP v. Babu Ram Upadhya, (1961) 2 SCR 679 [29]; Raza Buland Sugar Co. Ltd. v. Municipal Board, 1964 SCC OnLine SC 119 [8]

[62] Schedule I, UK Arbitration Act 1996. [Section 33 which imposes a legal duty on the tribunal to act fairly and impartially is one of the mandatory provisions under the UK legislation.]

[63] Section 4, UK Arbitration Act. [It reads:
"4. Mandatory and non-mandatory provision.
(1) The mandatory provisions of this Part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary.
(2) The other provisions of this Part (the "non-mandatory provisions") allow the parties to make their own arrangements by agreement by provide rules which apply in the absence of such agreement.
(3) The parties may make such arrangements by agreeing to the implication of institutional rules or providing any other means by which a matter may be decided.
(4) It is immaterial whether or not the law applicable to the parties' agreement is the law of England and Wales or, as the case may be, Northern Ireland.
(5) The choice of law other than the law of England and Wales or Northern Ireland as the applicable law in respect of a matter provided for by a non-mandatory provision of this Part is equivalent to an agreement making provision about that matter.
For this purpose an applicable law determined in accordance with the parties' agreement, or which is objectively determined in the absence of any express or implied choice, shall be treated as chosen by the parties."]

[64] Lord Mustill and Stewart Boyd, Commercial Arbitration (2nd edn, Butterworths 2001) 23.

[65] Ibid, at 57.

[66] Section 10, Arbitration Act. [It reads:
"10. Number of arbitrators – (1) The parties are free to determine the number of arbitrators, provided that such number shall not be an even number.
(2) Failing the determination referred to in sub-section (1), the arbitral tribunal shall consist of sole arbitrator."]

parties fail to determine the number of arbitrators, the arbitral tribunal shall consist of a sole arbitrator. Section 11 pertains to the appointment of arbitrators. Section 11(2) provides that subject to Section 11(6), parties "are free to agree on a **procedure for appointing** the arbitrator or arbitrators." Section 11 provides recourse to the following contingencies if the parties fail to adhere to the agreed procedure for the appointment of an arbitrator or arbitrators:

> "(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator;
>
> (4) If the appointment procedure in sub-section (3) applies and –
>
> (a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or
>
> (b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment,
>
> The appointment shall be made, on an application of a party, by the Supreme Court or, as the case may be, by the High Court or any person or institution designated by such Court.
>
> (5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court.
>
> (6) Where, under an appointment procedure agreed upon by the parties, -

> (a) a party fails to act as required under that procedure; or
>
> (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
>
> (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,
>
> A party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court to take necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment."

35. In terms of the legislative scheme in Section 11, parties are free to agree on a procedure for appointing the arbitrator or arbitrators. The procedure for appointment agreed by the parties is subject to the power of the Supreme Court or the High Courts under Section 11(6) to appoint an arbitrator in cases where the parties do not agree on a procedure or if the parties or the arbitrator fail to act following the agreed procedure. Thus, Section 11(6) allows judicial involvement as a default mechanism and not as an independent basis for choosing the arbitrators irrespective of the parties' agreement. Further, parties can invoke Sections 11(3), 11(4) or 11(5), as the case may be, only upon the failure of the agreed procedure for appointment of arbitrators.

36. Party autonomy is the governing feature of the constitution of the arbitral tribunal.[67] The process of selecting a tribunal allows parties to choose

[67] UNCITRAL, 2012 Digest of Case Law on the Model Law on International Commercial Arbitration (2012) 59

arbitrators with peculiar experience or expertise.[68] Parties are free to agree either on a specified individual or individuals as arbitrators or on a procedure for the selection of arbitrators. Most international arbitration statutes give primacy to the agreement of parties for the constitution of the arbitral tribunal.[69] The genesis of this international consensus could be traced to the Geneva Protocol on Arbitration Clauses 1923 which stated that the "arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place."[70]

37. When appointing an arbitrator under Section 11, the appointing authority has to ensure the appointment of independent and impartial arbitrators in terms of Section 11(8):

> "(8) The Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of section 12, and have due regard to –
>
> (a) any qualifications required for the arbitrator by the agreement of the parties; and
>
> (b) the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator."

[68] Gary Born (supra) 1807
[69] Fouchard, Gaillard and Goldman on International Commercial Arbitration (Emmanuel Gaillard and John Savage, eds. 1999) 453.
[70] Article 2, Protocol on Arbitration Clauses signed on 24 September 1923

38. Section 11(8) requires an appointing authority to have due regard to the qualifications required for the arbitrator as agreed by the parties. For instance, if the agreement only allows a professional of a particular class such as a chartered accountant to serve as an arbitrator, the appointing court should normally abide by this requirement. However, while appointing an arbitrator following the agreed qualifications, the appointing court must also have due regard for considerations that are likely to secure an independent and impartial tribunal. Section 11(8) imposes a duty on the appointing court to ensure the appointment of an independent and impartial arbitrator.

39. Section 11 is based on Article 11 of the Model Law. The draft text of the Model Law contained a provision which invalidated an arbitration agreement if it accorded a predominant position or unfair advantage to one party in the appointment of the arbitrator. The provision is extracted below:

> "An arbitration agreement is invalid [if] [to the extent that] it accords one of the parties a [predominant position] [manifestly unfair advantage] with regard to the appointment of arbitrators."[71]

40. The Working Group decided to delete the above paragraph from the draft article based on the following reasoning:

> "90. The prevailing view, however, was to delete paragraph (2) since (a) there was no real need for such a rule in view of the fact that the few instances aimed at could appropriately be dealt with by other provisions of the model law (e.g., on challenge of arbitrator or setting aside of award); (b) the wording was too vague and could thus lead to controversy or

[71] A/CN.9/233 [17]

> dilatory tactics and, above all, to a misinterpretation which could endanger well-established and recognised appointment practices; (c) the legal sanction, in particular the idea of partial invalidity, was not sufficiently clear.
>
> 91. The Working Group, after deliberation, decided to delete paragraph (2). **That decision, however, should not be understood as condoning practices where one party had a clearly greater influence on the appointment without good reasons**."[72]
>
> (emphasis supplied)

41. The Working Group noted that other provisions in the Model Law such as Article 12 (challenge to an arbitrator) and Article 34 (setting aside of an arbitral award) implicitly restrict the autonomy of parties to appoint arbitrators.[73] Thus, an arbitrator may be subject to challenge if the agreed procedure for appointment by the parties fails to adhere to the standards of independence and impartiality prescribed under Section 12. Gary Born also opines that the autonomy of parties to select arbitrators is generally subject to certain limitations, including mandatory requirements of equality and due process, impartiality and independence, and capacity requirements.[74]

iv. Independence and impartiality of arbitrators

42. Section 12 provides the grounds to challenge the appointment of arbitrators.[75] Section 12(1) mandates that a person who has been

[72] ibid
[73] Shahla Ali and Odysseas G Repousis, 'Appointment of Arbitrators' in UNCITRAL Model Law on International Commercial Arbitration (Ilian Bantekas, et al eds, 2020)
[74] Gary Born, International Commercial Arbitration (3rd edn.,) 1783; Also *see* Michael Pryles, 'Limits to Party Autonomy in Arbitral Procedure' (2007) 24(3) Journal of International Arbitration 327-339.
[75] Section 12, Arbitration Act. [It reads:

approached to be appointed as an arbitrator must disclose in writing any circumstances that are likely to give rise to "justifiable doubts as to his independence or impartiality." The Fifth Schedule to the Arbitration Act specifies circumstances that give rise to justifiable doubts as to the independence or impartiality of arbitrators. Section 12(1) also mandates an arbitrator to disclose in writing any circumstances that are likely to affect the ability to devote sufficient time to the arbitration and in particular the ability to complete the entire arbitration within twelve months. The duty of disclosure is a continuing duty. Section 12(3) provides that an arbitrator may be challenged only if: (i) circumstances exist that give rise to justifiable doubts as to independence or impartiality; or (ii) the arbitrator does not possess the qualifications agreed to by the parties.

43. Before the 2015 amendment, this Court generally upheld arbitrator appointment clauses which gave one party "unfettered discretion" to appoint

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(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,—
(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and
(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.
Explanation 1.—The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.
Explanation 2.—The disclosure shall be made by such person in the form specified in the Sixth Schedule.]
(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.
(3) An arbitrator may be challenged only if—
(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality; or
(b) he does not possess the qualifications agreed to by the parties.
(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.
(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:
Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.]

a sole arbitrator.[76] It was also held that there was no bar under the Arbitration Act for an employee of a government or Public Sector Undertaking[77], which is a party to an arbitration agreement, to act as an arbitrator.[78] However, it was observed that there could be justifiable apprehension about the independence or impartiality of an employee arbitrator who was the "controlling or dealing authority" regarding the subject contract or if the arbitrator was a direct subordinate to the officer whose decision was the subject-matter of the dispute.[79] The Court suggested phasing out arbitration clauses providing for the appointment of serving officers as arbitrators to "encourage professionalism in arbitration."[80]

44. The 2015 amendment mandates arbitrators to make disclosures before their appointment in terms of the categories specified under the Fifth Schedule. The Fifth Schedule prescribes thirty-four categories that give rise to justifiable doubts as to the independence or impartiality of arbitrators.

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[76] Datar Switchgears Ltd. v. Tata Finance Ltd., (2000) 8 SCC 151 [23] ["23. When parties have entered into a contract and settled on a procedure, due importance has to be given to such procedure. Even though rigor of the doctrine of "freedom of contract" has been whittled down by various labour and social welfare legislation, still the court has to respect the terms of the contract entered into by parties and endeavour to give importance and effect to it. When the party has not disputed the arbitration clause, normally he is bound by it and obliged to comply with the procedure laid down under the said clause."];

[77] "PSUs"

[78] Indian Oil Corporation Ltd. v. Raja Transport (P) Ltd., (2009) 8 SCC 520 [30]

[79] Raja Transport (supra) [34]; Denel (Proprietary) Ltd. v. Bharat Electronics Ltd., (2010) 6 SCC 394 [21]; Bipromasz Birpron Trading Sa v. Bharat Electronics Ltd., (2012) 6 SCC 384 [50]

[80] Union of India v. Singh Builders Syndicate, (2009) 4 SCC 523 [25]. ["25. We find that a provision for serving officers of one party being appointed as arbitrator(s) brings out considerable resistance from the other party, when disputes arise. Having regard to the emphasis on independence and impartiality in the new Act, Government, statutory authorities and government companies should think of phasing out arbitration clauses providing for serving officers and encourage professionalism in arbitration."]; *See* North Eastern Railway v. Tripple Engg. Works, (2014) 9 SCC 288 [8]; Union of India v. UP State Bridge Corporation Ltd., (2015) 2 SCC 52 [20] ["20. Therefore, where the Government assumes the authority and power to itself, in one-sided arbitration clause, to appoint the arbitrators in the case of disputes, it should be more vigilant and more responsible in choosing the arbitrators who are in a position to conduct the arbitral proceedings in an efficient manner, without compromising with their other duties. Time has come when the appointing authorities have to take call on such aspects failing which (as in the instant case), Courts are not powerless to remedy such situations by springing into action and exercising their powers as contained in Section 11 of the Act to constitute an Arbitral Tribunal, so that interest of the other side is equally protected."]

These categories are classified as follows: (i) the relationship of the arbitrator with the parties or counsel; (ii) the relationship of the arbitrator to the dispute; (iii) the arbitrator's direct or indirect interest in the dispute; (iv) previous services rendered by the arbitrator to one of the parties or other involvement in the case; (v) relationship between an arbitrator and another arbitrator or counsel; (vi) relationship between arbitrator and party and others involved in the arbitration, and (vii) and other circumstances.

45. The 2015 amendment has incorporated Section 12(5) to provide for ineligibility of a person to be appointed as an arbitrator whose relationship with the parties or counsel or the subject matter of the dispute falls under any of the categories specified in the Seventh Schedule. Section 12(5) reads thus:

> "(5) **Notwithstanding any prior agreement to the contrary**, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:
>
> Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."

46. The Seventh Schedule to the Arbitration Act divides the specified categories based on three factors: (i) arbitrator's relationship with the parties or counsel; (ii) the relationship of the arbitrator to the dispute; and (iii) arbitrator's direct or indirect interest in the dispute. The categories that are relevant for the present reference are as follows:

> "1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.
>
> 5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration."

47. Section 12(5) overrides any prior procedure for appointing the arbitrators agreed upon between the parties under Section 11(2) due to the non obstante clause. However, the proviso to Section 12(5) allows parties to waive the applicability of that provision after the dispute has arisen. The proviso secures "real and genuine party autonomy" by allowing parties to waive the applicability of Section 12(5).[81]

48. Section 12(5) does not prescribe a method to challenge the appointment of an ineligible person. Section 14 deals with the termination of the mandate of an arbitrator who is unable to perform their functions.[82] A person who is ineligible to be appointed as an arbitrator in terms of Section 12(5) becomes

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[81] Law Commission of India (supra) ["60. The Commission, however, feels that real and genuine party autonomy must be respected, and, in certain situations, parties should be allowed to waive even the categories of ineligibility as set in the proposed Fifth Schedule. This could be in situations of family arbitrations or other arbitrations where a person commands the blind faith and trust of the parties to the dispute, despite the existence of objective "justifiable doubts" regarding his independence and impartiality. To deal with such situations, the Commission has proposed the proviso to section 12 (5), where parties may, subsequent to disputes having arisen between them, waive the applicability of the proposed section 12 (5) by an express agreement in writing. In all other cases, the general rule in the proposed section 12 (5) must be followed."]

[82] Section 14, Arbitration Act. [It reads:
"14. Failure or impossibility to act – (1) The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if –
(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and
(b) he withdraws from his office or the parties agree to the termination of his mandate.
(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.
(3) If, under this section or sub-section of (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12"]

de jure unable to perform functions according to Section 14. Resultantly, the mandate of such an ineligible person gets automatically terminated and they are liable to be substituted by another arbitrator under Section 14.[83]

49. The disclosure requirement helps prevent the appointment of an unacceptable candidate.[84] The duty of disclosure is a continuing requirement to: (i) provide the information to any party who did not obtain it before the arbitrator's appointment; and (ii) secure information about circumstances that only arise at a later stage of the arbitral proceedings, that is, new business affiliations or share acquisitions.[85]

50. During the drafting of Article 12 of the Model Law, proposals were mooted to provide specific circumstances or grounds for challenging the appointment of arbitrators. The Secretariat noted that instead of prescribing a list of all the possible grounds of challenge, an alternative would be to prescribe "a general formula such as "circumstances giving rise to justifiable doubts as to the arbitrator's impartiality or independence.""[86] The Working Group did not set forth any comprehensive understanding of the meaning of the standard for challenge included under Article 12.[87] It acknowledged that the general formula is exhaustive and will include most of the grounds of

[83] Bharat Broadband Network Ltd. v. United Telecoms Ltd., (2019) 5 SCC 755 [17] ["17. The scheme of Sections 12, 13 and 14, therefore, is that where an arbitrator makes a disclosure in writing which is likely to give justifiable doubts as to his independence or impartiality, the appointment of such arbitrator may be challenged under Sections 12(1) to 12(4) read with Section 13. However, where such person becomes "ineligible" to be appointed as an arbitrator, there is no question of challenge to such arbitrator, before such arbitrator. In such a case i.e. a case which falls under Section 12(5), Section 14(1)(a) of the Act gets attracted inasmuch as the arbitrator becomes, as a matter of law (i.e. de jure), unable to perform his functions under Section 12(5), being ineligible to be appointed as an arbitrator. This being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator under Section 14(1) itself."]
[84] A/CN.9/264, page 30
[85] Ibid.
[86] Report of the Secretary-General: possible features of a model law on international commercial arbitration, A/CN.9/207, [65].
[87] Holtzmann and Neuhaus (supra) 388

challenge set forth under national laws.[88] According to the Working Group, the grounds of challenge under national law applicable to judges, such as a financial interest or previous involvement in the subject matter or a certain relation to one of the parties, could apply to arbitrators.[89]

51. Section 13 prescribes the procedure for challenging an arbitrator in terms of Section 12(3).[90] Section 13(1) provides that the parties are free to agree on a procedure for challenging an arbitrator. If the parties fail to agree on a procedure, the arbitral tribunal shall decide on the challenge. In case the challenge to the arbitrator is not successful, the arbitral tribunal shall continue with the arbitral proceedings and make an arbitral award. A party may later make an application for setting aside such an arbitral award under Section 34.

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[88] A/CN.9/264, page 31. [It reads:
"4. Paragraph (2), like article 10(1) of the UNCITRAL Arbitration Rules, adopts a general formula for the grounds on which an arbitrator may be challenged. This seems preferable to listing all possible connections and other relevant situations. As indicated by the word "only", the grounds for challenge referred to here are exhaustive. Although reliance on any specific reason listed in a national law (often applicable to judges and arbitrators alike) is precluded, it is submitted that it would be difficult to find any such reason which would not be covered by the general formula."]

[89] Report of the Secretary-General: possible features of a model law on international commercial arbitration, A/CN.9/207, [65]

[90] Section 13, Arbitration Act. [It reads:
"13. Challenge procedure – (1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.
(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in sub-section (3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.
(3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.
(4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.
(5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34.
(6) Where an arbitral award is set aside on an application made under sub-section (5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees."]

v. Equality in the arbitral proceedings

52. Chapter V of the Arbitration Act deals with the 'conduct of arbitral proceedings.' Section 18 provides that the parties "shall be treated with equality and each party shall be given a full opportunity to present his case." Section 18 establishes two principles: equal treatment of the parties and a right to a fair hearing. This provision has been referred to as the "due process clause of arbitration."[91]

53. Section 18 is based on Article 18 of the Model Law. Article 18 was initially paragraph 3 of Article 19 dealing with the freedom of parties to determine the rules of procedure. It was later formed into a separate article considering its overall importance. The Working Group stated that the freedom of parties is subject to mandatory provisions including the then paragraph 3 of Article 19:

> "3. The freedom of the parties is subject only to the provisions of the model law, that is, to its mandatory provisions. **The most fundamental of such provisions, from which the parties may not derogate, is the one contained in paragraph (3**). Other such provisions concerning the conduct of the proceedings or the making of the award are contained in articles 23(1), 24(2)-(4), 27, 30(2), 31(1), (3), (4), 32 and 33(1), (2), (4), (5)."
>
> (emphasis supplied)

[91] Holtzmann and Neuhaus (supra) 550.

54. Ultimately, paragraph 3 of Article 19 was placed in a separate article in the form of Article 18. This was meant to distinguish two distinct issues: party autonomy to determine rules of procedure and fairness of arbitral proceedings.[92] Moreover, the separation was meant to emphasise the importance of procedural fairness over the autonomy of parties to determine procedural rules.

55. Article 18 constitutes a fundamental principle that is "applicable to the entire arbitral proceedings."[93] The Working Group has also stated that the principles of equality and fairness "should be observed not only by the arbitral tribunal but also by the parties when laying down any rules of procedure."[94] It was the understanding of the Working Group that the principle of equality of parties applies to arbitral proceedings in general, including aspects such as the composition of arbitral tribunal.[95] Article 18 also operates as a limitation on Article 19 which provides broad autonomy to both the parties and, in the absence of an arbitration agreement, to the arbitral tribunal when determining the procedure to be followed in conducting the arbitral proceedings.[96] It imposes a duty on the arbitral tribunal to ensure fairness in the arbitral process.

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[92] Ilias Bantekas, Equal Treatment of Parties in Ilias Bantekas, et al (eds) UNCITRAL Model Law on International Commercial Arbitration (2020, CUP) 524

[93] Report of the United Nations Commission on International Trade Law on the work of its eighteenth session (3-21 June 1985) Supplement No. 17 (A/40/17) [176].

[94] A/CN.9/246 [62]

[95] Holtzmann and Neuhaus (supra) 552. [It was observed by the Secretariat that: "It had always been the understanding of the Working Group … that the fundamental principle enunciated in article 19(3) [Article 18 in the final text] would apply to arbitral proceedings in general; it would thus govern all provisions in chapter V and other aspects, such as the composition of the arbitral tribunal, not directly regulated therein."]

[96] Holtzmann and Neuhaus (supra) 551

vi. Public-private arbitration

56. Private law is a part of common law which involves relationships between individuals by way of contract or tort.[97] The demands of the modern market economy require the State to contract out certain public tasks to private entities. The procurement of goods and services is among the most common forms of government contracting with private providers.[98] Indian law does not provide a special regime governing contracts by public authorities. Generally, the resolution of disputes arising out of the contractual terms of a public-private contract is subject to ordinary civil law remedies.[99] Arbitration is one of the preferred private dispute resolution mechanisms adopted in public-private contracts.

57. An arbitration involving a company owned or controlled by government would likely involve public interest, considering the impact of an arbitral award on public finances. However, the Arbitration Act does not make a distinction between public-private arbitrations and private arbitrations. This lack of differentiation also extends to other aspects of arbitration including appointment of arbitrators, conduct of arbitration proceedings, and setting aside and enforcement of arbitral awards.[100] Since the grounds for setting aside an arbitral award have been narrowly framed, the thrust of this privately ordered legal system is on the decision made by the arbitral tribunal. Moreover, the Arbitration Act mandates the arbitration proceedings

[97] K K Saksena v. International Commission on Irrigation & Drainage, (2015) 4 SCC 670 [43]
[98] Jody Freeman, 'The Contracting State' (2000) 28(1) Florida State University Law Review 155
[99] Subodh Kumar Singh Rathour v. Chief Executive Officer, 2024 SCC OnLine SC 1682
[100] Stavros Brekoulakis and Margaret Devaney, 'Public-private arbitration and the public interest under English law' (2017) 80(1) Modern Law Review 22, 30.

to be conducted following two main principles: (i) equality of parties; and (ii) independence and impartiality of arbitral proceedings.

58. In **Pam Developments Private Limited** v. **State of West Bengal**[101], the arbitrator made an award in favour of the contractor. When the contractor sought to enforce the award, the State government obtained a stay by relying on Order XXVII Rule 8-A of the Code of Civil Procedure 1908.[102] This Court held that since the Arbitration Act is a self-contained code, the provisions of the CPC "will apply only insofar as the same are not inconsistent with the spirit and provisions of the Arbitration Act." Noting that no special treatment can be given to the government under the Arbitration Act, the Court observed:

> "**26.** Arbitration proceedings are essentially alternate dispute redressal system meant for early/quick resolution of disputes and in case a money decree — award as passed by the arbitrator against the Government is allowed to be automatically stayed, the very purpose of quick resolution of dispute through arbitration would be defeated as the decree-holder would be fully deprived of the fruits of the award on mere filing of objection under Section 34 of the Arbitration Act. **The Arbitration Act is a special Act which provides for quick resolution of disputes between the parties and Section 18 of the Act makes it clear that the parties shall be treated with equality. Once the Act mandates so, there cannot be any special treatment given to the Government as a party. As such, under the scheme of the Arbitration Act, no distinction is made nor any differential treatment is to be given to the Government, while considering an application for grant of stay of a money decree in proceedings under Section 34 of the Arbitration Act.** As we have already mentioned above, the reference to CPC in Section 36 of the Arbitration Act is only to guide the court as to what conditions can be imposed, and the same have to be consistent with the provisions of the Arbitration Act."
>
> (emphasis supplied)

[101] (2019) 8 SCC 112
[102] "CPC"

Therefore, the Arbitration Act does not provide different or special treatment to the government in arbitrations by or against the government.[103]

E. The principle of equality applies at the stage of appointment of arbitrators

i. Arbitration as a quasi-judicial function

59. According to well-established legal principles, an act of a statutory authority will be a quasi-judicial if: (i) the authority is empowered under a statute; (ii) the mandate is to decide disputes arising out of a claim made by one party which is opposed by another party; and (iii) the body which decides has to determine the rights of contesting parties who are opposed to each other.[104] A quasi-judicial function is required to be exercised judicially, that is, following the principles of natural justice because of its impact on the rights of persons affected.[105] In **Jaswant Sugar Mills Ltd**. v**. Lakshmi Chand**,[106] a Constitution Bench has identified the following criteria to determine whether an act is judicial:

> "(*1*) it is in substance a determination upon investigation of a question by the application

[103] Pam Developments Pvt Ltd (supra) [27-28] ["**28**. Section 36 of the Arbitration Act also does not provide for any special treatment to the Government while dealing with grant of stay in an application under proceedings of Section 34 of the Arbitration Act. Keeping the aforesaid in consideration and also the provisions of Section 18 providing for equal treatment of parties, it would, in our view, make it clear that there is no exceptional treatment to be given to the Government while considering the application for stay under Section 36 filed by the Government in proceedings under Section 34 of the Arbitration Act."]
[104] Province of Bombay v. Khushaldas Advani, 1950 SCC 551. [Justice S R Das (as the learned Chief Justice then was) observed: 80.1.(i) that if a statute empowers an authority, not being a court in the ordinary sense, to decide disputes arising out of a claim made by one party under the statute which claim is opposed by another party and [to] determine the respective rights of the contesting parties who are opposed to each other, there is a lis and prima facie and in the absence of anything in the statute to the contrary it is the duty of the authority to act judicially and the decision of the authority is a quasi-judicial act;
[105] Airports Economic Regulatory Authority of India v. Delhi International Airport Limited, 2024 INSC 792 [37]
[106] 1962 SCC OnLine SC 20 [13]

> objective standards to facts found in the light of pre-existing legal rules;
>
> (*2*) it declares rights or imposes upon parties obligations affecting their civil rights; and
>
> (*3*) that the investigation is subject to certain procedural attributes contemplating an opportunity of presenting its case to a party, ascertainment of facts by means of evidence if a dispute be on questions of fact, and if the dispute be on question of law on the presentation of legal argument, and a decision resulting in the disposal of the matter on findings based upon those questions of law and fact."

60. An arbitrator's relationship with parties is contractual. The rights and obligations of an arbitrator are principally the result of the contractual relations with the parties.[107] However, the position under common law is that the rights and duties of an arbitrator are derived from a conjunction of contract and quasi-judicial status granted by national laws. In **Norjarl** v. **Hyundai Heavy Industries**, Lord Browne-Wilkinson observed that it is impossible to distinguish contractual matters from those of quasi-judicial status.[108] Similarly, in **ONGC** v. **Afcons Gunanusa JV**, this Court recognized that the rights and duties of arbitrators flow from: (i) the national laws governing arbitration which give a quasi-judicial status to arbitrators wheres they have to act as impartial adjudicators; and (ii) the arbitrator's contract with the parties which governs many aspects of the arbitrator-party

[107] Gary Born (supra) 2111

[108] K/S Norjarl A/S v. Hyundai Heavy Industries Co. Ltd., [1992] QB 863 [Lord Browne-Wilkinson in his opinion observed that it is "impossible to divorce the contractual and status considerations: in truth the arbitrator's rights and duties flow from the conjunction of those two elements."]

relationship including remuneration, confidentiality, and timelines for completion of arbitral proceedings.[109]

61. An arbitral tribunal performs a quasi-judicial function because it substantially determines the rights and liabilities of competing parties through adjudicative means.[110] The tribunal is generally required to arrive at decisions or awards based on procedural and substantive law. The Arbitration Act allows flexibility to parties to select the procedural and substantive law to be followed by the arbitral tribunal. During the arbitration process, the arbitral tribunal generally meets at a place agreed upon by the parties, considers the statement of claim and defence, conducts oral hearings, and may appoint experts. Thus, arbitral tribunals act judicially to adjudicate the rights of parties.

62. The Arbitration Act is a self-contained code.[111] The legal framework contained under the Arbitration Act and the Contract Act recognises and enforces the contractual intention of parties to entrust an arbitral tribunal with the authority to settle their disputes. Section 8 of the Arbitration Act mandates judicial authorities to refer parties to arbitration where there is an arbitration agreement. The other provisions of the Arbitration Act are also geared towards ensuring minimal judicial interference[112] in arbitral

[109] ONGC Ltd. v. Afcons Gunanusa JV, (2024) 4 SCC 481 [102]
[110] Srei Infrastructure Finance Ltd. v. Tuff Drilling Private Limited, (2018) 11 SCC 470 [14]
[111] In re Interplay between Arbitration Agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899, 2023 INSC 1066 [85]
[112] Section 5, Arbitration Act

proceedings and recognizing the competence of the arbitral tribunals to rule on their jurisdiction.[113]

63. Although the Arbitration Act recognizes the autonomy of parties to decide on all aspects of arbitration, it also lays down a procedural framework to regulate the composition of the arbitral tribunal and conduct of arbitral proceedings. The incorporation of Section 12(5) is a recognition of the well-established principle that quasi-judicial proceedings should be conducted consistent with the principles of natural justice. Section 18 serves as a guide for arbitral tribunals to follow the principles of equality and fairness during the conduct of arbitral proceedings. Thus, the Arbitration Act requires the arbitral tribunals to act judicially in determining disputes between parties.[114]

64. Since arbitral proceedings have "trappings of a court", the law requires arbitral tribunals to act objectively and "exercise their discretion in a judicial manner, without caprice, and according to the general principles of law and rules of natural justice."[115] An arbitral award can be set aside if the composition of the arbitral tribunal or the arbitral procedure violates the mandatory provisions of the Arbitration Act, including Sections 12 and 18. Thus, the Arbitration Act emphasizes that the substance of the law cannot be divorced from the procedure.

[113] Section 16, Arbitration Act
[114] Engineering Mazdoor Sabha v. Hind Cycles Ltd., 1962 SCC OnLine SC 134 [5]; Dewan Singh v. Champat Singh, (1969) 3 SCC 447 [9]
[115] Grindlays Bank Ltd. v. Central Govt. Industrial Tribunal, 1980 Supp SCC 420 [8]

65. Section 31 mandates that an award made by an arbitrator shall be in writing and signed by all members of the arbitral tribunal.[116] The provision further provides that an arbitral award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given. This provision is consistent with the principle that a quasi-judicial authority must generally record its reasons in support of the order it makes.[117] Further, the decision rendered by an arbitral tribunal is binding and enforceable "in the same manner as if it were a decree of the court."[118]

66. Arbitral tribunals serve as effective alternatives to traditional justice dispensing mechanisms. The purpose of arbitral tribunals is to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, and a peace-maker instead of a stirrer up of strife.[119] Arbitral tribunals can inspire confidence in their adjudicatory process by conducting fair and impartial hearings and providing sufficient and cogent reasons for their decisions.[120] Given the adjudicatory functions

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[116] Section 31, Arbitration Act

[117] Siemens Engg. & Mfg. Co. of India Ltd. v. Union of India, (1976) 2 SCC 981.

[118] Section 36, Arbitration Act. [It reads:
36. Enforcement (1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the court."]

[119] Redfern and Hunter on International Arbitration (7th edition, 2022) 3

[120] Siemens Engg. (supra) [6]. [6. […] If courts of law are to be replaced by administrative authorities and tribunals, as indeed, in some kinds of cases, with the proliferation of Administrative Law, they may have to be so replaced, it is essential that administrative authorities and tribunals should accord fair and proper hearing to the persons sought to be affected by their orders and give sufficiently clear and explicit reasons in support of the orders made by them. Then alone administrative authorities and tribunals exercising quasi-judicial function will be able to justify their existence and carry credibility with the people by inspiring confidence in the adjudicatory process. The rule requiring reasons to be given in support of an order is, like the principle of audi alteram partem, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law.]

performed by arbitral tribunals, the decisions which emanate from them must be grounded in a process that is independent and impartial.

ii. Equality applies at the stage of appointment of arbitrators

67. Section 18 contains the principle of natural justice to give full opportunity to parties to present their case.[121] In **Union of India** v. **Vedanta Ltd**., Justice Indu Malhotra, writing for a three Judge Bench, observed that the "[f]air and equal treatment of the parties is a non-derogable and mandatory provision, on which the entire edifice of the alternate dispute resolution mechanism is based."[122] The purpose of Section 18 is to give the arbitral process a semblance of judicial proceedings by infusing the principles of equality and fairness.[123] The theoretical basis for this understanding stems from the fact that arbitrators are authorities vested with powers to resolve disputes under the law.[124]

68. The first part of Section 18 provides that "parties shall be treated with equality." The broad nature of the prescription has to be complied with not only by arbitral tribunals, but also by parties while giving expression to party autonomy. The principle has to be followed in all procedural contexts of arbitral proceedings, including the stage of appointment of arbitrators.[125] According to Peter Binder, the principle of equal treatment of parties "means that no party may be given preference in the arbitrator-selection process

[121] Associate Builders v. DDA, (2015) 3 SCC 49 [30]; Srei Infrastructure Finance Ltd. v. Tuff Drilling (P) Ltd., (2018) 11 SCC 470 [16];
[122] (2020) 10 SCC 1 [121]
[123] Mustill and Boyd (supra) 58
[124] Ilias Bantekas, 'Equal treatment of parties in International Commercial Arbitration' (2020) 69(4) International & Comparative Law Quarterly 991, 992.
[125] Fouchard Gaillard Goldman on International Commercial Arbitration (Kluwer Law International, 1999) 465

regardless of how strong its bargaining power may be."[126] Countries such as Germany,[127] the Netherlands,[128] Spain,[129] and Estonia[130] allow the party that has been disadvantaged by an asymmetric appointment clause to request courts to appoint an arbitrator or arbitrators. The underlying principle is that the courts should not recognise and enforce agreements that are unfair and biased.

69. In **Indian Oil Corporation Ltd.** v. **Raja Transport (P) Ltd**.,[131] the arbitration clause provided that any disputes arising between the parties shall be referred to the "sole arbitration of the Director, Marketing of the Corporation or of some officer of the Corporation who may be nominated by the Director, Marketing." It was contended that an arbitration clause which allows one party to nominate its officer as the sole arbitrator is against the principle of

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[126] Peter Binder, International Commercial Arbitration and Conciliations in UNCITRAL Model Law Jurisdictions (2nd edn, Sweet and Maxwell 2005) 109

[127] Section 1034(2) of the German Code of Civil Procedure 1877. [It reads:
"Section 1034 – Composition of the arbitral tribunal
(1) The parties are free to agree on the number of arbitrators. Absent such agreement, the number of arbitrators is three.
(2) If the arbitration agreement grants preponderant rights to one party with regard to the composition of the arbitral tribunal, thus placing the other party at a disadvantage, the latter party may request that the court appoint the arbitrator or arbitrators in derogation from the appointment or appointments already made or in derogation from the appointment procedure agreed. The application is to be made no later than the expiry of two weeks after the party has become aware of the composition of the arbitral tribunal. Section 1032(3) applies accordingly."]

[128] Article 1028(1) of the Dutch Code of Civil Procedure, 2003. [It reads:
"If the arbitration agreement gives one of the parties a privileged position with regard to the appointment of the arbitrator or arbitrators, the other party may, despite the method of appointment laid down in that agreement, request the Provisional Relief Judge of the District Court within one month after the commencement of the arbitration to appoint the arbitrator or arbitrators. The other party shall be given an opportunity to be heard. The provisions of Article 1027(4) shall apply accordingly."]

[129] Article 15(2), Spanish Arbitration Act 2003. [It reads:
"Article 15: Appointment of arbitrators
2. The parties are able to freely agree on the procedure for the appointment of the arbitrators, provided that there is no violation of the principle of equal treatment."]

[130] Section 721(2), Estonian Code of Civil Procedure. [It reads:
"(2) If an arbitral agreement gives one of the parties, in the formation of an arbitral tribunal, an economic or other advantage over the other party which is materially damaging to the other party, such party may request that the court appoint one arbitrator or several arbitrators differently from the appointment which already took place of from the rules of appointment agreed upon earlier."]

[131] (2009) 3 SCC (Civ) 460

independence and impartiality contained in Sections 11(8), 12, and 18. A two-Judge Bench of this Court rejected this contention by holding that Sections 11, 12, and 18 do not prohibit an employee of either of the parties from acting as an arbitrator:

> "**32.** Section 18 requires the arbitrator to treat the parties with equality (that is to say without bias) and give each party full opportunity to present his case. Nothing in Sections 11, 12, 18 or other provisions of the Act suggests that any provision in an arbitration agreement, naming the arbitrator will be invalid if such named arbitrator is an employee of one of the parties to the arbitration agreement."

Raja Transport (supra) was delivered before the 2015 amendment. Section 12(5) now renders an employee of either of the parties ineligible for being appointed as an arbitrator.

70. The concept of equality under Article 14 enshrines the principle of equality of treatment. The basic principle underlying Article 14 is that the law must operate equally on all persons under like circumstances.[132] The implication of equal treatment in the context of judicial adjudication is that "all litigants similarly situated are entitled to avail themselves of the same procedural rights for relief, and for defence with like protection and without discrimination."[133] In **Union of India** v. **Madras Bar Association**,[134] a Constitution Bench held that the right to equality before the law and equal protection of laws guaranteed by Article 14 of the Constitution includes a right to have a person's rights adjudicated by a forum which exercises

[132] M Nagaraj v. Union of India, (2006) 8 SCC 212 [106]
[133] Shree Meenakshi Mills Ltd. v. A V Visvanatha Sastri, (1954) 2 SCC 497 [6]
[134] (2010) 11 SCC 1 [102]

judicial power impartially and independently. Thus, the constitutional norm of procedural equality is a necessary concomitant to a fair and impartial adjudicatory process.

71. Arbitration is an adversarial system. It relies on the parties to produce facts and evidence before the arbitral tribunal to render a decision. Procedural equality is generally considered to contain the following indicia: (i) equal capability of parties to produce facts and legal arguments; (ii) equal opportunities to parties to present their case; and (iii) neutrality of the adjudicator.[135] In an adversarial process, formal equality is important because it helps secure legitimate adjudicative outcomes and create a level playing field between parties.[136]

72. The defining characteristic of arbitration law (particularly ad hoc arbitration) is that it allows freedom to the parties to select their arbitrators. This is unlike domestic courts or tribunals where the parties have to litigate their claims before a pre-selected and randomly allocated Bench of judges. Section 11(2) of the Arbitration Act allows parties to agree on a procedure for appointing the arbitrators. The "procedure" contemplated under Section 11(2) is a set of actions which parties undertake in their endeavour to appoint arbitrators to adjudicate their dispute independently and impartially. Without formal equality at the stage of appointment of arbitrators, a party

[135] Jerry L Mashaw, 'The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v Eldridge: Three Factors in Search of a Theory of Value' (1976) 44(28) University of Chicago Law Review 29, 52. [Professor Mashaw states that "insofar as adjudicatory procedure is perceived to be adversarial and dispute resolving, the degree to which procedures facilitate equal opportunities for the adversaries to influence the decision may be the most important criterion by which fairness is evaluated."]
[136] William B Rubenstein, 'The Concept of Equality in Civil Procedure' (2001-2002) 23 Cardozo Law Review 1865, 1890.

may not have an equal say in facilitating the appointment of an unbiased arbitral tribunal. In a quasi-judicial process such as arbitration, the appointment of an independent and impartial arbitrator ensures procedural equality between parties during the arbitral proceedings. This is also recognised under Section 11(8) which requires the appointing authority to appoint independent and impartial arbitrators.

73. The 2015 amendment has introduced concrete standards of impartiality and independence of arbitrators. One of the facets of impartiality is procedural impartiality. Procedural impartiality implies that the rules constitutive of the decision-making process must favour neither party to the dispute or favour or inhibit both parties equally.[137] Further, a procedurally impartial adjudication entails equal participation of parties in all aspects of adjudication for the process to approach legitimacy.[138] Participation in the adjudicatory process is meaningless for a party against whom the arbitrator is already prejudiced.[139] Equal participation of parties in the process of appointment of arbitrators ensures that both sides have an equal say in the establishment of a genuinely independent and impartial arbitral process.

74. Under Sections 12(1) and 12(5), the Arbitration Act recognises certain mandatory standards of independent and impartial tribunals. The parties

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[137] William Lucy, The Possibility of Impartiality (2005) 25(1) Oxford Journal of Legal Studies 3, 11
[138] Ibid, at 22.
[139] Lon Fueller, 'The Forms and Limits of Adjudication' (1978) 92(2) Harvard Law Review 353, 364. [Professor Fueller states: "…whole analysis will derive from one simple proposition, namely, that the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for decision in his favor. Whatever heightens the significance of this participation lifts the adjudication towards its optimum expression. Whatever destroys the meaning of that participation destroys the integrity of adjudication itself. Thus, participation through reasoned argument loses its meaning if the arbiter of the dispute is inaccessible to reason because he is insane, has been bribed, or is hopelessly prejudiced."]

have to challenge the independence or impartiality of the arbitrator or arbitrators in terms of Section 12(3) before the same arbitral tribunal under Section 13.[140] If the tribunal rejects the challenge, it has to continue with the arbitral proceedings and make an award. Such an award can always be challenged under Section 34. However, considerable time and expenses are incurred by the parties by the time the award is set aside by the courts. Equal participation of parties at the stage of the appointment of arbitrators can thus obviate later challenges to arbitrators.

75. Independence and impartiality of arbitral proceedings and equality of parties are concomitant principles. The independence and impartiality of arbitral proceedings can be effectively enforced only if the parties can participate equally at all stages of an arbitral process. Therefore, the principle of equal treatment of parties applies at all stages of arbitral proceedings, including the stage of the appointment of arbitrators.

F. Nemo judex rule and the doctrine of bias

76. The principles of natural justice principally consist of two rules: (i) no one shall be a judge in their own cause (*nemo judex in causa sua*); and (ii) no decision shall be given against a party without affording a reasonable opportunity of being heard.[141] Adherence to the principles of natural justice is a facet of procedural fairness. A decision made by the State to the

[140] Chennai Metro Rail Ltd. v. Transtonnelstroy Afcons (JV), (2024) 6 SCC 211 [33]
[141] Express Newspaper (P) Ltd. v. Union of India, 1958 SCC OnLine SC 23 [95]; A K Kraipak v. Union of India, (1969) 2 SCC 262 [20]; Mohinder Singh Gill v. Chief Election Commissioner, (1978) 1 SCC 405 [52]; Swadeshi Cotton Mills v. Union of India, (1981) 1 SCC 664 [27]

prejudice of a person must be after following the basic rules of justice and fair play.[142] The principles of natural justice are applied because administrative or quasi-judicial proceedings can abridge or take away rights.[143] Application of the principles of natural justice prevents miscarriage of justice.[144] Natural justice has both an intrinsic and an instrumental function. The intrinsic function values natural justice as an end in itself. It values natural justice as an essential feature of fairness. In its instrumental element, natural justice is viewed as a means to achieving just outcomes.

77. The principle of nemo judex is based on the precept that justice should not only be done but manifestly and undoubtedly be seen to be done.[145] The principle of nemo judex applies to judicial, quasi-judicial, and administrative proceedings.[146] An adjudicator should be disinterested and unbiased.[147] A bias is a predisposition to decide for or against one party, without proper regard to the true merits of the dispute.[148]

i. Principles of natural justice

78. Article 14 of the Constitution provides that the State shall not deny to any person equality before the law or equal protection of the laws within the territory of India. Article 14 is founded on a sound public policy to secure to all persons, citizens or non-citizens, the equality of status and opportunity.[149]

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[142] State of Orissa v. Binapani Dei, 1967 SCC OnLine SC 15 [9]
[143] Union of India v. K P Joseph, (1973) 1 SCC 194 [10]
[144] A K Kraipak (supra) [20]
[145] The King v. Sussex Justices, [1924] 1 KB 256
[146] J Mohapatra & Co. v. State of Orissa, (1984) 4 SCC 103 [9]
[147] A K Roy v. Union of India, (1982) 1 SCC 271 [97];
[148] Government of TN v. Munuswamy Mudaliar, 1988 Supp SCC 651 [12]
[149] Basheshar Nath v. CIT, 1958 SCC OnLine SC 7; In Re Special Courts Bill, 1978; (1979) 1 SCC 380 [72]. ["72. […] (1) The first part of Article 14, which was adopted from the Irish Constitution, is a declaration of equality of the civil rights of all persons within the territories of India. It enshrines a basic principle of

One of the dimensions of the equality jurisprudence evolved by this Court is that arbitrariness is antithetical to equality.[150] State action must be based on principles of fairness and equality of treatment.[151] Article 14 strikes at arbitrary actions and ensures fairness and equality of treatment.[152] Violation of the principles of natural justice results in arbitrariness.[153] The principle of reasonableness is an essential element of equality.[154] Resultantly, a procedure contemplated under Article 21 must be just, fair, and non-arbitrary. This Court has recognized that the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme.[155]

79. In **Union of India** v. **Tulsiram Patel**,[156] a Constitution Bench of this Court observed that violation of the principles of natural justice results in arbitrariness:

> "**95.** The principles of natural justice have thus come to be recognized as being a part of the guarantee contained in Article 14 because of the new and dynamic interpretation given by this Court to the concept of equality which is the subject-matter of that article. Shortly put, the syllogism runs thus: violation of a rule of natural justice results in arbitrariness which is the same as discrimination; where discrimination is the result of State action, it is a violation of Article 14: therefore, a violation of a principle of natural justice by a State action is a violation of Article 14. Article 14, however, is not the sole repository of the principles of natural justice. What it does is to guarantee that any law or State

republicanism. The second part, which is a corollary of the first and is based on the last clause of the first section of the Fourteenth Amendment of the American Constitution, enjoins that equal protection shall be secured to all such persons in the enjoyment of their rights and liberties without discrimination of favouritism. It is a pledge of the protection of equal laws, that is, laws that operate alike on all persons under like circumstances."]

[150] State of Andhra Pradesh v. Nalla Raja Reddy, 1967 SCC OnLine SC 85 [24]
[151] E P Royappa v. State of Tamil Nadu, (1974) 4 SCC 3 [85]
[152] Maneka Gandhi v. Union of India, (1978) 1 SCC 248 [7]
[153] Satyavir Singh v. Union of India, (1958) 4 SCC 252 [26]
[154] Maneka Gandhi (supra) [7]
[155] Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722 [16]
[156] (1985) 3 SCC 398

> action violating them will be struck down. The principles of natural justice, however, apply not only to legislation and State action but also where any tribunal, authority or body of men, not coming within the definition of State in Article 12, is charged with the duty of deciding a matter. In such a case, the principles of natural justice require that it must decide such matter fairly and impartially."

80. Article 14 is an important facet of administrative, judicial and quasi-judicial decision-making in India and demands fair play in action.[157] The object of observing the principles of natural justice is to ensure that "every person whose rights are going to be affected by the proposed action gets a fair hearing."[158] The non-observance of natural justice is itself a prejudice to any person who has been denied justice depending upon the facts and circumstances of each case.[159] The principle of procedural fairness is rooted in the principles of the rule of law and good governance.[160] In **Madhyamam Broadcasting Limited** v. **Union of India**,[161] this Court held that the requirement of procedural fairness "holds an inherent value in itself." It was further observed:

> "42. Inherent value in fair procedure: Fair procedure is not only a means to the end of achieving a fair outcome but is an end it itself. Fair procedure induces equality in the proceedings. The proceedings 'seem' to be and are seen to be fair."

81. We recognize that arbitration is a private dispute settlement mechanism. Yet, it is statutorily subject to the principles of equality and fairness contained

[157] K L Tripathi v. State Bank of India, (1984) 1 SCC 43 [32]
[158] Bank of Patiala v. S K Sharma, (1996) 3 SCC 364 [29]
[159] S L Kapoor v. Jagmohan, (1980) 4 SCC 379 [24]
[160] Dharampal Satyapal Ltd. v. CCE, (2015) 8 SCC 519 [26]
[161] 2023 SCC OnLine SC 366 [53]

under the Arbitration Act. Section 18 of the Arbitration Act mandates the equal treatment of parties and fairness in arbitral proceedings as a mandatory principle governing the conduct of arbitration. Thus, the resolution of disputes arising in a private contractual relationship is subject to certain inherent principles which a quasi-judicial body like an arbitral tribunal is required to adhere to. Resolution of private disputes following the minimum statutory standards of equality and fairness is essential not only in the interest of justice, but also to uphold the integrity of arbitration in India.

ii. Doctrine of bias

82. In **A K Kraipak** v. **Union of India**,[162] the Central Government constituted a Special Selection Board for selecting officers to the Indian Forest Service in the senior scale and junior scale from the serving officers of the Forest department of the State of Jammu and Kashmir. One of the members of the selection board was the officiating Chief Conservator of Forests of Jammu and Kashmir. However, the Chief Conservator was also one of the candidates in contention for the posts in the Indian Forest Service. Although the Chief Conservator was not present when his name was considered for selection by the board, he was present and participated in the deliberations when the names of other candidates were being considered.

83. The Constitution Bench held that the real question was not whether the Chief Conservator was biased, but whether there was a reasonable ground for believing that he was likely to have been biased. It was observed that a

[162] (1969) 2 SCC 262

reasonable likelihood of bias has to be determined by taking into consideration human probabilities and the ordinary course of human conduct.[163] It was observed that the Chief Conservator had an interest in keeping his rivals out and securing the position for himself. Further, it was held that the other members of the selection board would have been influenced by the Chief Conservator's opinion about other candidates. Resultantly, this Court struck down the entire selection made by the board.

84. In **J Mohapatra** v. **State of Orissa**,[164] the State government had constituted a committee to select books for general reading to be kept in school and college libraries. For the years 1980 to 1982, the committee selected and purchased books in a prescribed manner. The list of books prepared by the committee was challenged before the High Court. One of the grounds of challenge was that some of the members of the committee were themselves authors of books that were selected and purchased. The High Court rejected the challenge on two grounds: (i) the decision of the committee was subject to the approval of the State government; and (ii) the role played by an individual member of the committee was insignificant and could not have influenced the decision of the committee.

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[163] A K Kraipak (supra) [15]. [15. […] But then the very fact that he was a member of the selection board must have had its own impact on the decision of the selection board. Further admittedly he participated in the deliberations of the selection board when the claims of his rivals particularly that of Basu was considered. He was also party to the preparation of the list of selected candidates in order of preference. At every stage of his participation in the deliberations of the selection board there was a conflict between his interest and duty. Under those circumstances it is difficult to believe that he could have been impartial. The real question is not whether he was biased. It is difficult to prove the state of mind of a person. Therefore what we have to see is whether there is reasonable ground for believing that he was likely to have been biased. We agree with the learned Attorney General that a mere suspicion of bias is not sufficient. There must be a reasonable likelihood of bias. In deciding the question of bias we have to take into consideration human probabilities and ordinary course of human conduct. It was in the interest of Naqishbund to keep out his rivals in order to secure his position from further challenge. Naturally he was also interested in safeguarding his position while preparing the list of selected candidates.]

[164] (1984) 4 SCC 103

85. This Court observed that a person who has written a book that is submitted for selection has an interest in the matter of selection. It was further observed that there is a direct correlation between the selection of books by the committee and an increase in sales of the books. The increased sales resulted in increased royalties for the authors. Therefore, it was held that an author benefits financially if their book is selected by the committee. This Court further disagreed with the finding of the High Court that the author-member had an insignificant role in the book selection process, by observing:

> "11. […] to say that such author-member is only one of the members of the Assessment Sub-Committee is to overlook the fact that the author-member can subtly influence the minds of the other members against selecting books by other authors in preference to his own. It can also be that books by some of the other members may also have been submitted for selection and there can be between them a quid pro quo or, in other words, you see that my book is selected and in return I will do the same for you. In either case, when a book of an author-member comes up for consideration, the other members would feel themselves embarrassed in frankly discussing its merits. Such author-member may also be a person holding a high official position whom the other members may not want to displease. It can be that the other members may not be influenced by the fact that the book which they are considering for approval was written by one of their members. Whether they were so influenced or not is, however, a matter impossible to determine. **It is not, therefore, the actual bias in favour of the author-member that is material but the possibility of such bias."**
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> (emphasis supplied)

86. In **J Mohapatra** (supra), it was observed that a decision-maker who is prejudiced can possibly influence the decision of the authority in tangible and intangible ways. This Court recognized that the doctrine of necessity serves as an exception to the *nemo judex* rule. An adjudicator, who is subject to disqualification on the ground of bias or interest in the matter which he has to decide, may be required to adjudicate in three situations: (i) if there is no other person who is competent or authorized to adjudicate; (ii) if a quorum cannot be formed without him; or (iii) if no other competent tribunal can be constituted.

87. In **Ashok Kumar Yadav** v. **State of Haryana**,[165] some members of the selection committee of the Haryana Public Service Commission were related to the candidates who appeared for the viva voce examination. Although the members did not participate when their relatives were being interviewed, they participated in the interviews of other candidates. The court observed that the test "is not that the decision is actually tainted with bias, but that the circumstances are such as to create a reasonable apprehension in the mind of others that there is a likelihood of bias affecting the decision." The Court observed that the *nemo judex* rule extends to all cases where an independent mind has to be applied to arrive at a fair and just decision between rival claims of parties. However, the court resorted to the doctrine of necessity to hold that the decision of the state Public Service Commission, being a constitutional authority, was not vitiated.[166]

[165] (1985) 4 SCC 417

[166] Ashok Kumar Yadav (supra) [18]. [18. We do not think that the principle which requires that a member of a Selection Committee whose close relative is appearing for selection should decline to become a member

88. The principle governing the doctrine of bias is that a member of a judicial body with a predisposition in favour of or against any party to a dispute or whose position in relation to the subject matter or a disputing party is such that a lack of impartiality would be assumed to exist should not be a part of a tribunal composed to decide the dispute.[167] This principle is applicable to authorities who have to act judicially in deciding rights and liabilities and bodies discharging quasi-judicial functions. A quasi-judicial authority empowered to decide a dispute between opposing parties "must be one without bias towards one side or the other in the dispute."[168] A member of a tribunal which is called upon to try issues in judicial or quasi-judicial proceedings must act impartially, objectively, and without bias.[169]

iii. Test of real likelihood of bias

a. Automatic disqualification

89. Bias is generally classified under three heads: (i) legal interest, which means a judge is "in such a position that a bias must be assumed"; (ii) pecuniary interest; and (iii) personal bias.[170] A pecuniary or proprietary interest, however small, automatically disqualifies a person.[171] A person who has an

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of the Selection Committee or withdraw from it leaving it to the appointing authority to nominate another person in his place, need be applied in case of a constitutional authority like the Public Service Commission, whether Central or State. If a member of a Public Service Commission were to withdraw altogether from the selection process on the ground that a close relative of his is appearing for selection, no other person save a member can be substituted in his place. And it may sometimes happen that no other member is available to take the place of such member and the functioning of the Public Service Commission may be affected.]

[167] Gullapalli Nageswara Rao v. State of A P, 1959 SCC OnLine SC 53 [6]; relied in Mineral Development Ltd. v. State of Bihar, 1959 SCC OnLine SC 49 [10]

[168] Gullapalli Nageswara Rao v. A P State Road Transport Corporation, 1958 SCC OnLine SC 49 [30]

[169] Manak Lal v. Dr. Prem Chand Sighvi, 1957 SCC OnLine SC 10

[170] G Sarana v. University of Lucknow, (1976) 3 SCC 585 [12]; Union of India v. B N Jha, (2003) 4 SCC 531 [28]

[171] R v. Rand, (1866) LR 1 QB 230, 232. [Blackburn J. observed that "[t]here is no doubt that any direct pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter."]; R v. Camborne Justices, ex parte Pearce, [1955] 1 QB 41.

interest in the outcome of an issue that is to be resolved would be acting as a judge in their own cause.[172] The question is not whether a judge has some link with parties involved in a cause before the judge but whether the outcome of that cause could realistically affect the judge's interest.[173] This principle has been authoritatively stated by the House of Lords in **Dimes** v. **Grand Junction Canal**.[174] In that case, the Lord Chancellor decreed in favour of a canal company in which he held substantial shares. The House of Lords observed that the principle that no person should be judge in their own cause "is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest."[175].

90. In **R** v. **Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 2)**,[176] the House of Lords held that the former head of Chile was not immune from extradition to Spain for trial of alleged crimes against humanity. Lord Hoffman was one of the five members who agreed with the majority. During the hearings, Amnesty International,[177] a human rights body, intervened and participated in the proceedings. It came to light after the judgment that Lord Hoffman was a director and chairman of Amnesty International Charity Limited,[178] which was wholly owned and

[172] Dimes v. The Proprietors of the Grand Junction Canal, (1852) 3 HLC 759; Locabail (UK) Ltd. v. Bayfield Properties Ltd, [1999] EWCA Civ 3004
[173] Locabail (supra) [8]
[174] (1852) 3 HL Cas 759
[175] Dimes (supra) 793. [Lord Campbell observed: "No one can suppose that Lord Cottenham [Lord Chancellor] could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not confined to a cause in which he is a party, but applies to a cause in which he has an interest."]
[176] [1999] UKHL 1
[177] "AI"
[178] "AICL"

controlled by AI. Resultantly, the House of Lords set aside its previous decision and directed a rehearing of the matter.

91. Lord Browne-Wilkinson observed that AI and AICL were all "parts of an entity or movement" working in different fields to establish that Pinochet was not immune from extradition as a former head of State. This interest of the organizations was termed as a non-pecuniary interest to achieve a particular result. The rationale of automatic disqualification was held to extend to situations where a judge's decision will lead to the promotion of a cause in which the judge is involved with one of the parties.[179] **In re Pinochet** (supra) extended automatic disqualification to situations where a judge has an interest in the cause, which is being promoted by one of the parties to the case.

b. Real likelihood of bias

92. The *nemo judex* rule may be applicable where a judge's conduct or circumstances give rise to an apprehension of bias. In such situations, the judge does not have a financial or cause-based interest in the outcome of the dispute but provides benefit to a party by failing to be neutral and

[179] In re Pinochet (supra) [Lord Browne-Wilkinson held: "My Lords, in my judgment, although the cases have all dealt with automatic disqualification on the grounds of pecuniary interest, there is no good reason in principle for so limiting automatic disqualification. The rationale of the whole rule is that a man cannot be a judge in his own cause. In civil litigation the matters in issue will normally have an economic impact; therefore a judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case. But if, as in the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a judge applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties. Thus in my opinion if Lord Hoffmann had been a member of AI he would have been automatically disqualified because of his non-pecuniary interest in establishing that Senator Pinochet was not entitled to immunity."]; Lord Hutton, in his concurring opinion observed: "I am of opinion that there could be cases where the interest of the judge in the subject matter of the proceedings arising from his strong commitment to some cause or belief or his association with a person or body involved in the proceedings could shake public confidence in the administration of justice as much as a shareholding (which might be small) in a public company involved in the litigation."]

impartial. The determination of bias does not depend upon actual proof of bias but whether there is a real possibility of bias based on the facts and circumstances.

93. In **R** v. **Sussex Justices**,[180] the applicant was charged with the offence of dangerous driving, which involved a collision with another vehicle. The prosecution brought a case against the applicant before the Magistrate's court. Simultaneously, the driver of the other vehicle also instituted civil proceedings against the applicant. The solicitor hired by the other driver in civil proceedings was also acting as the Magistrate's clerk in the criminal proceedings. At the conclusion of the evidence before the Magistrate, the acting clerk retired with the judges to their chambers. The Magistrate convicted the applicant without consulting the clerk. In appeal, the Divisional Court quashed the conviction. Lord Hewart CJ held that the clerk's involvement in the civil proceedings made him unfit in the circumstances to serve as clerk to the Magistrate in the criminal matter. Lord Hewart CJ observed that the question depended not upon what actually was done but upon what might appear to be done and the judicial proceedings will be vitiated if there is "even a suspicion that there has been improper interference with the course of justice."

94. Over the course of time, the English courts have preferred the test of real likelihood to determine bias. In **R** v. **Barnsley Licencing Justices**,[181] Devlin LJ observed that "real likelihood" depends on the impression that the court

[180] [1924] 1 KB 256
[181] (1960) 2 Q.B. 187

gets from the circumstances in which the justices were sitting. However, in **Metropolitan Properties Company** v. **Lannon**,[182] Lord Denning expressed the test of the real likelihood of bias as being whether a reasonable person would think it "likely or probable" that a judge or member of a tribunal was biased.

95. In **Regina** v. **Gough**,[183] the House of Lords observed that the probability standard laid down by Lord Denning in **Metropolitan Properties** (supra) was "too rigorous a test." It reconciled the real likelihood of bias test by grounding it in terms of possibility rather than the probability of bias. Therefore, it restated the test in terms of the real danger of bias:

> "[…] having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or having regarded with favour), or disfavour, the case of a party to the issue under consideration by him."

The House of Lords observed that the court "personifies the reasonable man" to ascertain the relevant circumstances from the available evidence. The real danger of the bias test was criticized by courts in other jurisdictions such as

[182] [1968] EWCA Civ 5 [Lord Denning observed: "It brings home this point: in considering whether there was a real likelihood of bias, the Court does not look at the mind of the Justice himself or at the mind of the Chairman of the Tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit."]
[183] [1993] UKHL 1

Australia and South Africa for emphasising the court's view of the circumstances rather than the public perception of the bias.[184]

96. In **Locabail (UK) Ltd**. v. **Bayfield Properties Ltd**.,[185] the Court of Appeal observed that the test of real danger of bias could reach the same results as the test of real possibility of bias since the court is taken to personify the reasonable man. It further listed a few circumstances which might give rise to real danger of bias:

> "By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; **or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case;** or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind; or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him."
>
> (emphasis supplied)

[184] Webb v. The Queen, (1994) 181 CLR 41.
[185] [1999] EWCA Civ 3004 [25]

97. In **re Medicaments and Related Classes of Goods (No. 2)**,[186] the Court of Appeal made a "modest adjustment" to the real danger of bias test laid down in **Gough** (supra) by holding that the court must determine whether the circumstances "would lead a fair-minded and informed observer to conclude that there was **a real possibility, or a real danger, the two being the same**, that the tribunal was biased." In **Porter** v. **Magill**,[187] the House of Lords approved the adjustment made to the real danger of bias test. Lord Craighead stated the bias test thus:

> "103. […] The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

98. The shift in the bias test in the UK has "at its core the need for the confidence which must be inspired by the courts in a democratic society."[188] In **Lawal** v. **Northern Spirit Limited**,[189] Lord Bingham observed that a "fair-minded and informed observer"[190] will adopt a balanced approach and as "a reasonable

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[186] [2001] 1 WLR 700
[187] [2002] 2 AC 357
[188] Lawal v. Northern Spirit Limited, [2003] UKHL 25 [14]
[189] Northern Spirit Limited (supra) [14]
[190] In Helow v. Secretary of State, [2008] UKHL 62. [Lord Hope of Craighead observed:
"2. The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in Johnson v Johnson (2000) 201 CLR 488, 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. The "real possibility" test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.
3. Then there is the attribute that the observer is "informed". It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment."]

member of the public is neither complacent nor unduly sensitive or suspicious." The above discussion shows that the bias test has undergone significant development in the UK over the last four decades. The current bias test in the UK is the real possibility of a bias test.

99. The real likelihood of bias test has also been applied by the UK Supreme Court in the case of arbitral bias. In **Haliburton Company** v. **Chubb Bermuda Insurance Ltd.**,[191] the issue before the UK Supreme Court was whether or not the UK Arbitration Act imposed a legal obligation on arbitrators to disclose facts and circumstances known to the arbitrator which would give rise to justifiable doubts as to their impartiality. Although the UK Arbitration Act does not expressly impose a duty of disclosure on arbitrators or potential arbitrators, the UK Supreme Court read the general duty under Section 33 of the legislation. Section 33 requires an arbitrator to act fairly and impartially in conducting arbitral proceedings.[192] It was held that the statutory duty of fairness and impartiality "gives rise to an implied term in the contract between the arbitrator and the parties" to make that disclosure. Hence, it was held a legal obligation to disclose is encompassed within the

[191] [2020] UKSC 48 [52]
[192] UK Arbitration Act, 1996. [It reads:
"33. General duty of the tribunal –
(1) The tribunal shall –
(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.
(2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it."]

statutory obligation of fairness unless the parties have expressly or implicitly waived their right to disclosure.[193]

100. Recently, the UK Law Commission suggested that the ruling in **Haliburton** (supra) has limitations because: (i) an arbitrator may not owe a duty of disclosure to parties who may not have signed the arbitration agreement (non-signatory parties); and (ii) a contract of appointment cannot create a duty of disclosure before the appointment of the arbitrator.[194] Therefore, the UK Law Commission has recommended codification of the duty of disclosure to ensure that the duty applies at the pre-appointment stage.[195] There are two important distinctions between the position of law in India and the UK: First, the UK Arbitration Act does not require an arbitrator to be completely independent of the parties;[196] and second, Section 12 of the Indian Arbitration Act already imposes a mandatory duty of disclosure on potential arbitrators.

101. Other jurisdictions also apply a real possibility of bias or reasonable apprehension of bias test to determine judicial and arbitral bias. Article 6 of

[193] Haliburton (supra) [78]. ["78. Unless there is a disclosure, the parties may often be unaware of matters which could give rise to justifiable doubts about an arbitrator's impartiality and entitle them to a remedy from the court under section 24 of the 1996 Act. Those remedies are necessary in the public interest. A legal obligation to disclose such matters is encompassed within the statutory obligation of fairness. It is also essential corollary of the statutory obligation of impartiality: an arbitrator who knowingly fails to act in a way which fairness requires to the potential detriment of a party is guilty of partiality. Unless the parties have expressly or implicitly waived their right to disclosure, such disclosure is not just a question of best practice but is a matter of legal obligation."]

[194] UK Law Commission, Review of the Arbitration Act 1996: Final report and Bill, Law Com No. 413 (2023) 19

[195] ibid

[196] UK Law Commission (supra) [The Law Commission observed: "3.18 We continue to think that complete independence is not possible. This is so especially where arbitrators are drawn from a small pool with specialist expertise, or where they are expected to have immersive experience in a particular area of activity. Any duty of independence might involve defining a required level of independence, which in turn would be impossible, or it might involve defining independence in terms of impartiality after all, which we note is the approach of some foreign legislation."]

the European Convention on Human Rights states that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" in the determination of their civil rights and obligations. The European Court of Human Rights[197] determines the existence of impartiality for Article 6 by applying (i) a subjective test which considers whether the judge holds any personal prejudice or bias in a given case; and (ii) an objective test to ascertain whether the tribunal's composition offers significant guarantees to exclude any legitimate doubt in respect of its impartiality.[198]

102. In the vast majority of cases, the ECtHR has focused on the objective test, which requires the court to determine "whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his or her impartiality."[199] The objective test takes into consideration hierarchical and other links between a judge and the parties to the proceedings. The ECtHR's approach, therefore, emphasizes determining "whether the relationship in question is of such a nature and degrees as to indicate a lack of impartiality on the part of the tribunal."[200] The real possibility of bias test as evolved by the English courts is in alignment with the bias test evolved by the ECHR.[201] The ECtHR has held that an arbitration agreement does not constitute a waiver of the fair procedure guarantees

[197] "ECtHR"
[198] Nicholas v. Cyprus, Application No. 63246/10 [49]
[199] Morice v. France, Application No. 29369/10
[200] Micallef v. Malta, Application No. 17056/06; Morice (supra) [77];
[201] *See* William Wade and Christopher Forsyth, Administrative Law (12th edn, Oxford University Press) 371

contained in Article 6, particularly the right to have disputes settled by an independent and impartial tribunal.[202]

iv. Indian approach to the bias test

103. This Court has consistently adopted the real likelihood test to determine bias.[203] In **Manak Lal** v. **Dr. Prem Chand Singhvi**,[204] Justice P B Gajendragadkar (as the learned Chief Justice then was) observed that the test to determine bias is whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision. In **S Parthasarathi** v. **State of AP**,[205] Justice KK Mathew observed that the test of likelihood of bias is based on the reasonable apprehension of a reasonable man fully cognizant of the facts. The learned Judge further observed that the question of whether the real likelihood of bias exists is to be determined on the probabilities to be inferred from the objective circumstances by a court or based on impressions that might reasonably be left on the minds of the aggrieved party or the public at large.[206] The legal development under English law about the real danger of bias test was also accepted by this Court.

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[202] BEG S.P.A. v. Italy, Application No. 5312/11 (20 May 2021)
[203] Rattan Lal Sharma v. Managing Committee, Dr. Hari Ram (Co-Education) Higher Secondary School, (1993) 4 SCC 10 [11]
[204] 1957 SCC OnLine SC 10 [4]
[205] (1974) 3 SCC 459 [14]
[206] S Parthasarathi (supra) [16]. [It was observed: "16. The tests of "real likelihood" and "reasonable suspicion" are really inconsistent with each other. We think that the reviewing authority must make a determination on the basis of the whole evidence before it, whether a reasonable man would in the circumstances infer that there is real likelihood of bias. The Court must look at the impression which other people have. This follows from the principle that justice must not only be done but seen to be done. If right minded persons would think that there is real likelihood of bias on the part of an inquiring officer, he must not conduct the enquiry; nevertheless, there must be a real likelihood of bias. Surmise or conjecture would not be enough. There must exist circumstances from which reasonable men would think it probable or likely that the inquiring officer will be prejudiced against the delinquent. The Court will not inquire whether he was really prejudiced. If a

104. In **Kumaon Mandal Vikas Nigam Ltd**. v. **Girja Shankar Pant**,[207] this Court observed that the real danger of bias is essentially based on deciding bias based on the facts and circumstances of the individual case.[208] In **M P Special Police Establishment** v. **State of M P**,[209] a Constitution Bench referred with approval to **Kumaon Mandal Vikas Nigam Ltd**. (supra).

105. Subsequently, the decision in **P D Dinakaran** v. **Judges Inquiry Committee**,[210] traced the evolution of the bias test under Indian jurisprudence to state the following principles:

> "71. […] To disqualify a person from adjudicating on the ground of interest in the subject-matter of lis, the test of real likelihood of the bias is to be applied. **In other words, one has to enquire as to whether there is real danger of bias on the part of the person against whom such apprehension is expressed in the sense that he might favour or disfavour a party. In each case, the court has to consider whether a fair-minded and informed person, having considered all the facts would reasonably apprehend that the Judge would not act impartially**. To put it differently, the test would be whether a reasonably intelligent man fully apprised of all the facts would have a serious apprehension of bias."
>
> (emphasis supplied)

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reasonable man would think on the basis of the existing circumstances that he is likely to be prejudiced, that is sufficient to quash the decision."]

[207] (2001) 1 SCC 182

[208] Kumaon Mandal Vikas Nigam (supra) [35] ["35. The test, therefore, is as to whether a mere apprehension of bias or there being a real danger of bias and it is on this score that the surrounding circumstances must and ought to be collated and necessary conclusion drawn therefrom — in the event however the conclusion is otherwise inescapable that there is existing a real danger of bias, the administrative action cannot be sustained: If on the other hand, the allegations pertaining to bias is rather fanciful and otherwise to avoid a particular court, Tribunal or authority, question of declaring them to be unsustainable would not arise. The requirement is availability of positive and cogent evidence and it is in this context that we do record our concurrence with the view expressed by the Court of Appeal in Locabail case."]

[209] (2004) 8 SCC 788 [14. […] The question in such cases would not be whether they would be biased. The question would be whether there is reasonable ground for believing that there is likelihood of apparent bias. Actual bias only would lead to automatic disqualification where the decision-maker is shown to have an interest in the outcome of the case. The principle of real likelihood of bias has now taken a tilt to "real danger of bias" and "suspicion of bias".]

[210] (2011) 8 SCC 380

106. In **Supreme Court Advocates-on-Record Association** v. **Union of India**,[211] Justice J Chelameswar, writing for himself and Justice A K Goel, summarized the following principles of the bias test in India:

> "**25.1.** If a Judge has a financial interest in the outcome of a case, he is automatically disqualified from hearing the case.
>
> **25.2.** In cases where the interest of the Judge in the case is other than financial, then the disqualification is not automatic but an enquiry is required whether the existence of such an interest disqualifies the Judge tested in the light of either on the principle of "real danger" or "reasonable apprehension" of bias.
>
> **25.3.** The *Pinochet case* added a new category i.e. that the Judge is automatically disqualified from hearing a case where the Judge is interested in a cause which is being promoted by one of the parties to the case."

107. Although there have been vacillations about the test in England, the Indian courts have been largely consistent in their approach by applying the test of real likelihood of bias or reasonable apprehension of bias. Recently, the court has used the real danger of bias test. However, the above discussion shows that there is no significant difference between the real danger of bias test and the real possibility of bias test if the question of bias is inferred from the perspective of a reasonable or fair-minded person.

108. This Court has consistently applied the test of real likelihood of bias to determine arbitrator bias. In **HRD Corporation** v. **GAIL (India)**,[212] the

[211] (2016) 5 SCC 808 [25]
[212] (2018) 12 SCC 471 [20]

Court explained the application of the real likelihood of bias test to determine the issue of arbitrator bias thus:

> "20. […] As has been pointed out by us hereinabove, the items contained in the Schedules owe their origin to the IBA Guidelines, which are to be construed in the light of the general principles contained therein—that every arbitrator shall be impartial and independent of the parties at the time of accepting his/her appointment. **Doubts as to the above are only justifiable if a reasonable third person having knowledge of the relevant facts and circumstances would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case in reaching his or her decision.** This test requires taking a broad commonsensical approach to the items stated in the Fifth and Seventh Schedules. This approach would, therefore, require a fair construction of the words used therein, neither tending to enlarge or restrict them unduly."
>
> (emphasis supplied)

109. In **Government of Haryana** v. **GF Toll Road Private Ltd**.,[213] the Court had to decide whether a retired government employee could be appointed as an arbitrator by the state government. Justice Indu Malhotra, writing for the two-Judge Bench, observed that the test to be applied for bias is whether the circumstances are such as would lead a fair-minded and informed person to conclude that the arbitrator was in fact biased. It was held that the Arbitration Act does not disqualify a former employee from acting as an arbitrator, provided there are no justifiable doubts as to their independence and impartiality.[214] Thus, in India, the sanctity and integrity of

[213] (2019) 3 SCC 505

[214] GF Tolls Road Private Ltd. (supra) [23] ["23. An arbitrator who has "any other" past or present "business relationship" with the party is also disqualified. The word "other" used in Entry 1, would indicate a relationship

the arbitral process are held to the same standard of bias as that applicable to judicial authorities.

v. Bias and doctrine of necessity in the context of the Arbitration Act

110. In comparison to other jurisdictions, the Arbitration Act has adopted a different approach to deal with the issue of arbitrator bias. Through the 2015 amendment, the Arbitration Act provides an extensive list of circumstances which may give rise to justifiable doubts as to an arbitrator's independence or impartiality. The enumeration of categories under the Fifth and Seventh Schedules is inspired by the Orange and Red List of the IBA Guidelines on Conflicts of Interest in International Arbitration.[215] In **HRD Corporation** (supra) this Court observed that the categories listed under the Fifth and Seventh Schedules must be construed by taking a "broad commonsensical approach" without restricting or enlarging the words.

111. Section 12 of the Arbitration Act places a duty on a person who is approached for appointment as an arbitrator to disclose in writing any direct or indirect circumstances such as: (i) the existence of any direct or indirect past or present relationship with any of the parties; (ii) interest in any of the parties; or (iii) interest in relation to the subject-matter in dispute, whether financial, business, professional, or other kind. The disclosure of circumstances made by an arbitrator is a procedural safeguard which allows the parties to assess whether disqualification of the arbitrator is required for

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other than an employee, consultant or an advisor. The word "other" cannot be used to widen the scope of the entry to include past/former employees."]

[215] IBA Guidelines on Conflicts of Interest in International Arbitration (25 May 2024) available at: https://www.ibanet.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-2024

a case.[216] Disclosure allows an arbitrator to overcome an appearance of bias. The parties may challenge the appointment of an arbitrator if the circumstances give rise to "justifiable doubts" as to their independence or impartiality.

112. In **Voestalpine** (supra), this Court explained the distinction between independence and impartiality thus:

> "**22.** Independence and impartiality are two different concepts. An arbitrator may be independent and yet, lack impartiality, or vice versa. Impartiality, as is well accepted, is a more subjective concept as compared to independence. Independence, which is more an objective concept, may, thus, be more straightforwardly ascertained by the parties at the outset of the arbitration proceedings in light of the circumstances disclosed by the arbitrator, while partiality will more likely surface during the arbitration proceedings."

113. The fundamental premise of arbitration is the impartial resolution of disputes between parties according to the arbitration agreement.[217] Unlike a judge, an arbitrator is generally engaged in occupations and professions before, during, and after the arbitral proceedings. The arbitrators may also have had prior commercial or professional contacts and relationships with either of the parties to the dispute. In such circumstances, arbitration law has evolved safeguards and mechanisms to ensure the independence and impartiality of the arbitral procedure. The independence of an arbitrator is

[216] Koulis v. Cyprus, Application No. 48781/12. ["63. Given the importance of appearances, however, when such a situation (which can give rise to a suggestion or appearance of bias) arises, that situation should be disclosed at the outset of the proceedings and an assessment should be made, taking into account the various factors involved in order to determine whether disqualification is actually necessitated in the case. This is an important procedural safeguard which is necessary in order to provide adequate guarantees in respect of both objective and subjective impartiality."]
[217] Jivraj v. Hashwani, [2011] UKSC 40 [45]

generally considered with respect to the relationships or links between the arbitrator and one of the parties, whether financial, professional, employment or personal.[218] The independence of an arbitrator can be deduced objectively because the dependence arises from the relationship between an arbitrator and one of the parties, or somebody closely connected with one of the parties.[219] In comparison, the existence of impartiality is inferred from facts and circumstances surrounding an arbitrator's exercise of quasi-judicial functions.[220]

114. An arbitrator will not be automatically disqualified in situations where the relationship of an arbitrator with parties does not fall under the categories mentioned under the Seventh Schedule. Yet, either of the parties may have "justifiable doubts" about the independence or impartiality of the arbitrator. The party challenging the appointment of an arbitrator does not need to demonstrate that the arbitrator lacks independence or impartiality. It only needs to show that there are possible "doubts" as to an arbitrator's independence or impartiality.[221] The purpose behind incorporating the word "justifiable" under Section 12 was to establish an objective standard for impartiality and independence.[222] Resultantly, the possibility of "doubts"

[218] Redfern and Hunter (supra) 226
[219] Article 3, IBA Rules of Ethics for International Arbitrator 1987
[220] Peter Binder (supra) 117
[221] Gary Born (supra) 1911, 1912. [Gary Born suggests that: "Statutory (and judicial) references to the "risks" or "possibility" of partiality are preferable to formulations including "doubt" or "suspicion." The latter phrases connote a subjective inquiry, as well as a flavor of speculation, which are misleading. The better approach is instead to consider what objective risk (or possibility) of unacceptable partiality exists."]
[222] David Caron and Lee Caplan, The UNCITRAL Arbitration Rules: A Commentary (2nd edn, Oxford University Press, 2013) 208

must be “real” in the sense that they should be derived from the objective circumstances disclosed by an arbitrator.

115. The consideration of possible “doubts” must be undertaken from the perspective of a “fair-minded and informed person” rather than the subjective views of the parties or the arbitrators. According to Gary Born, the standard of proof adopted under Article 12 of the Model Law is relatively low to ensure “the integrity of the arbitral tribunal and arbitral process, particularly given the extremely limited review available for substantive or procedural errors by the arbitrators.”[223] The issue of arbitrator bias is to be resolved by applying the test of the real likelihood of bias in the given facts and circumstances.

116. Section 12(5) automatically disqualifies any person whose relationship with the parties or counsel or subject matter of the dispute falls under any of the categories mentioned under the Seventh Schedule. The categories listed in the Seventh Schedule in essence denote situations where an arbitrator might have a pecuniary, proprietary, or cause-based interest in the arbitration. For instance, employees of either of the parties are barred from acting as an arbitrator because they have an immediate financial and cause-based interest in the arbitration. If such an employee is appointed as an arbitrator, they would be sitting as a judge in their cause because they have a pecuniary interest in the outcome of the case.

[223] Garn Born (supra) 1912

117. In **Voestalpine** (supra), this Court observed that an individual who had previously served the government, a public sector corporation or a statutory corporation but had no connection to the party in dispute could not be held to be ineligible for appointment as an arbitrator. The Court observed:

> "**25.** It cannot be said that simply because the person is a retired officer who retired from the government or other statutory corporation or public sector undertaking and had no connection with DMRC (the party in dispute), he would be treated as ineligible to act as an arbitrator. Had this been the intention of the legislature, the Seventh Schedule would have covered such persons as well. Bias or even real likelihood of bias cannot be attributed to such highly qualified and experienced persons, simply on the ground that they served the Central Government or PSUs, even when they had no connection with DMRC. The very reason for empanelling these persons is to ensure that technical aspects of the dispute are suitably resolved by utilising their expertise when they act as arbitrators. It may also be mentioned herein that the Law Commission had proposed the incorporation of the Schedule which was drawn from the red and orange list of IBA guidelines on conflict of interest in international arbitration with the observation that the same would be treated as the guide "to determine whether circumstances exist which give rise to such justifiable doubts". Such persons do not get covered by red or orange list of IBA guidelines either."

The Court refers to the fact that the individual had no connection with DMRC, the party in dispute, at two places in the above extract. Hence, the fact that he had previously been employed with government or a corporation controlled by government (but not DMRC which was the disputant) was held not to render the individual ineligible.

118. In **G F Toll Road** (supra), the arbitration contract between the State government and the contractor allowed for the constitution of a three-

member arbitral tribunal "of whom each party shall select one and the third arbitrator shall be appointed under the Rules of Arbitration of the Indian Council of Arbitration." After disputes arose between the parties, the State government appointed a retired Engineer-in-Chief as their arbitrator. The contractor and the Indian Council of Arbitration[224] challenged the appointment of the State's arbitrator on the ground that he was a former employee of the State government. The issue before this Court was whether Section 12(5) read with the Seventh Schedule disqualifies a former employee from being appointed as an arbitrator.

119. Justice Indu Malhotra, writing for the Bench of two judges, held that the apprehension of bias against the State's arbitrator was unjustified because: (i) the arbitrator was employed by the State over ten years ago; (ii) the use of the expression "is an" under Entry 1 of the Seventh Schedule indicates that an arbitrator is disqualified only if they are current employees of one of the parties; and (iii) the expression "other" under the said entry indicates a relationship other than an employee. It was observed that the expression "other" cannot "be used to widen the scope of the entry to include past/former employees."[225]

120. The categories mentioned under the Seventh Schedule are such that it is difficult to distinguish the interests of an arbitrator from those of a party to which an arbitrator is connected. In such cases, the issue is whether the outcome of the arbitration will realistically affect the arbitrator's interests. The

[224] "ICA"
[225] G F Toll Road (supra) [23]

law prioritises the objective criterion of independence over the subjective criterion of impartiality. Once it is established that an arbitrator falls under any of the categories mentioned in the Seventh Schedule, they are automatically disqualified without any investigation into whether or not there is any real likelihood of bias. Since the ineligibility envisaged under Section 12(5) goes to the root of the appointment, an application may be filed under Section 14(2) of the Arbitration Act to the court to decide on the termination of the arbitrator's mandate.[226]

121. An objection to the bias of an adjudicator can be waived.[227] A waiver is an intentional relinquishment of a right by a party or an agreement not to assert a right.[228] The Arbitration Act allows parties to waive the application of Section 12(5) by an express agreement after the disputes have arisen. However, the waiver is subject to two factors. First, the parties can only waive the applicability of Section 12(5) after the dispute has arisen. This allows parties to determine whether they will be required or necessitated to draw upon the services of specific individuals as arbitrators to decide upon specific issues. To this effect, Explanation 3 to the Seventh Schedule recognizes that certain kinds of arbitration such as maritime or commodities arbitration may require the parties to draw upon a small, specialized pool.[229] The second requirement of the proviso to Section 12(5) is that parties must

[226] HRD Corporation v. GAIL (India) Ltd., (2018) 12 SCC 471 [12]
[227] Supreme Court Advocates-on-Record Association (supra) [30]
[228] State of Punjab v. Davinder Pal Singh Bhullar, (2011) 14 SCC 770 [41]
[229] "Explanation 3 – For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialized pool. If in such field it is the custom and practice for parties frequently to appoint the same arbitrator in difference cases, this is a relevant fact to be taken into account while applying the rules set out above."]

consciously abandon their existing legal right through an express agreement. Thus, the Arbitration Act reinforces the autonomy of parties by allowing them to override the limitations of independence and impartiality by an express agreement in that regard.

122. The proviso to Section 12(5) is a reflection of the common law doctrine of necessity. The *nemo judex* rule is subject to the doctrine of necessity and yields to it.[230] The doctrine of necessity allows an adjudicator who may be disqualified because of their interest in the matter to continue to adjudicate because of the necessity of the circumstances.[231] The proviso to Section 12(5) allows parties to exercise their autonomy to determine if there is a necessity to waive the applicability of the ineligibility prescribed under Section 12(5). Thus, common law principles and doctrines are adjusted to subserve the fundamental principles of arbitration by giving priority to the autonomy of parties.

123. In **Bharat Broadband Network Ltd.** (supra), this Court held that the proviso to Section 12(5) requires an express agreement in writing, that is, an agreement made in words as opposed to an agreement that can be inferred by conduct.[232] It was explained that such an agreement must be made by both parties with full knowledge of the fact that although a particular person is ineligible to be appointed as an arbitrator, the parties still have full faith and confidence in them to continue as an arbitrator.[233] The principle of

[230] Tulsiram Patel (supra) [101]; Swadeshi Cotton Mills v. Union of India, (1981) 1 SCC 664 [44]
[231] Charan Lal Sahu v. Union of India, (1990) 1 SCC 613 [105]
[232] Bharat Broadband Network Ltd. (supra) [20]
[233] Bharat Broadband Network Ltd. (supra) [20] [This Court observed: "20. […] It is thus necessary that there be an "express" agreement in writing. This agreement must be an agreement by which both parties, with full

express waiver contained under the proviso to Section 12(5) also applies to situations where the parties seek to waive the allegation of bias against an arbitrator appointed unilaterally by one of the parties. After the disputes have arisen, the parties can determine whether there is a necessity to waive the *nemo judex* rule. This balances the autonomy of parties and the principles of an independent and impartial arbitral tribunal.

vi. Unilateral appointment of arbitrators is violative of the equality clause under Section 18

124. The doctrine of bias as evolved in English and Indian law emphasizes independence and impartiality in the process of adjudication to inspire the confidence of the public in the adjudicatory processes. Although Section 12 deals with the quality of independence and impartiality inherent in the arbitrators, the provision's emphasis is to ensure an independent and impartial arbitral process.

125. Fali Nariman, distinguished lawyer and erudite jurist, in an article on 'Standards of Behaviour of Arbitrators',[234] opined that the level of probity expected of arbitrators is no less, and perhaps more stringent than what is expected of judges:

> "Though litigation is compulsory and arbitration is consensual, both are judicial processes of an adversarial character. That is why arbitration has always been regarded as quasi-judicial. Standards of behaviour expected of arbitrators – with reference to their impartiality and their independence – are no less stringent than that demanded of judges; in fact,

knowledge of the fact that Shri Khan is ineligible to be appointed as an arbitrator, still go ahead and say that they have full faith and confidence in him to continue as such."]

[234] Fali Nariman, 'Standards of Behaviour of Arbitrators' (1988) 4(4) Arbitration International 311, 312.

> arbitrators are expected to behave a shade better since judges are institutionally insulated by the established court-system, their judgments being also subjected to the corrective scrutiny of an appeal."

126. The agreement on the number of arbitrators is a matter of party autonomy. However, the choice of arbitrators has a direct effect on the conduct of arbitral proceedings. In commercial cases, the choice of the number of arbitrators is usually between one and three. The parties select the number of arbitrators by considering factors such as the needs of a particular dispute, costs, and efficiency.[235] In case parties cannot agree upon the number of arbitrators, national arbitration legislation specifies the number of arbitrators to be appointed. For instance, Article 10(2) of the Model Law provides that if the parties fail to determine the number of arbitrators, three arbitrators will be appointed.[236] Interestingly, the Arbitration Act departs from the Model Law by providing that the arbitral tribunal shall consist of a sole arbitrator if parties fail to determine the number of arbitrators.[237]

127. Reference of disputes to a sole arbitrator has various advantages, including easy arrangements of meetings or hearings, reduced expenses since the parties will only have to bear the expense of one arbitrator, and

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[235] Redfern and Hunter (supra) 210
[236] Article 10(2), Model Law. [It reads:
"Article 10. Number of arbitrators
(1) The parties are free to determine the number of arbitrators.
(2) Failing such determination, the number of arbitrators shall be three."]
[237] Section 10, Arbitration Act [It reads:
"10. Number of arbitrators – (1) The parties are free to determine the number of arbitrators, provided that such number shall not be an even number.
(2) Failing the determination referred to in sub-section (1), the arbitral tribunal shall consist of a sole arbitrator."]

speedy decision-making.[238] In the case of the appointment of a sole arbitrator, the decision-making vests in the hands of one person. This poses a greater risk of bias against the weaker party, especially if the arbitrator is unilaterally appointed by the other party.

128. If a person having a financial interest in the outcome of the arbitral proceedings unilaterally nominates a sole arbitrator, it is bound to give rise to justifiable doubts on the independence and impartiality of the arbitrator. The possibility of bias by the arbitrator is real because the person who has an interest in the subject matter of the dispute can chart out the course of the entire arbitration proceeding by unilaterally appointing a sole arbitrator. A party may select a particular person to be appointed as a sole arbitrator because of a *quid pro quo* arrangement between them. Moreover, the fact that the sole arbitrator owes the appointment to one party may make it difficult to decide against that party for fear of displeasure. It is not possible to determine whether the sole arbitrator will be prejudiced, but the circumstances of the appointment give rise to the real possibility of bias.

129. Equal treatment of parties at the stage of appointment of an arbitrator ensures impartiality during the arbitral proceedings. A clause that allows one party to unilaterally appoint a sole arbitrator is exclusive and hinders equal participation of the other party in the appointment process of arbitrators. Further, arbitration is a quasi-judicial and adjudicative process where both parties ought to be treated equally and given an equal

[238] Redfern and Hunter (supra) 211

opportunity to persuade the decision-maker of the merits of the case. An arbitral process where one party or its proxy has the power to unilaterally decide who will adjudicate on a dispute is fundamentally contrary to the adjudicatory function of arbitral tribunals.[239]

130. In comparison, a three-member arbitral tribunal usually allows each party to nominate one arbitrator of **their** choice, with the third arbitrator being appointed either by the two party-appointed arbitrators or by agreement of parties.[240] The fact that both parties nominate their respective arbitrators gives them "a sense of investment in the arbitral tribunal."[241] A three-member arbitral tribunal also enhances the quality of the adjudicative deliberations and ensures compliance with due process.[242] According to Gary Born, the major advantage of a three-member tribunal is that the parties can participate in the selection of the tribunal to the maximum extent possible.[243]

131. In a three-member tribunal, each of the parties seeks to appoint a co-arbitrator. However, the third arbitrator is usually appointed by a process which allows equal participation of both parties in the appointment process. The equal participation of parties enables the appointment of an independent and impartial third arbitrator. Hence, any perceived tilt of an arbitrator in favour of the party which nominated that arbitrator is offset by the appointment of the third arbitrator in the course of a deliberative process involving both the arbitrators or as envisaged in the agreement between

[239] Gary Born (supra) 1952
[240] Ibid, 211
[241] Ibid.
[242] Gary Born (supra) 1794
[243] Ibid, at 1796.

parties. **Perkins** (supra) rightly observed 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.[244] This counter-balancing will ideally apply only in situations where the arbitrators are appointed by the parties in the exercise of their genuine party autonomy. **TRF** (supra) and **Perkins** (supra) have been relied upon by this Court on numerous occasions, including in **Glock Asia-Pacific Limited** v. **Union of India**[245] and **Lombardi Engg Ltd**. v. **Uttarakhand Jal Vidyut Nigam Ltd**.[246]

132. In **Voestalpine** (supra) and **CORE** (supra), one of the parties curated a panel of arbitrators and mandated the other party to select their arbitrator from the panel. Since the curation of the list is exclusively undertaken by one party, the other party is effectively excluded from the process of curating the panel from which exclusively, the appointment of an arbitrator is to be made. The other party has to mandatorily select its arbitrator from a curated panel, restricting their freedom to appoint an arbitrator of their choice. This is against the principle of equal treatment contained under Section 18. In this situation, there is no effective counter-balance because both parties do not participate equally in the process of appointing arbitrators. The party curating the panel can restrict the choice of the party only to a person who is on the panel selected by the other party and to no other person.

133. Many PSUs are regularly involved in arbitration disputes and constantly need the services of arbitrators. Such institutions often maintain

[244] Perkins (supra) [16]
[245] (2023) 8 SCC 226 [20]
[246] (2024) 4 SCC 341 [85]

a pool of potential arbitrators with the sole object of having a ready pool of qualified professionals who have committed their time and consented to act as arbitrators for fixed fees. The Arbitration Act does not prohibit parties to an arbitration agreement from maintaining a curated panel of potential arbitrators. However, the problem arises when the PSUs make it mandatory for other parties to select their nominees from the curated panel of arbitrators. When a PSU exercises its discretion to curate a panel, the very factor that the PSU is choosing only a certain number of persons as potential arbitrators and not others will raise a reasonable doubt in the mind of a fair-minded person. The PSUs may conceivably have nominated a person on the panel of potential arbitrators because they have a certain predisposition in favour of the former. This doubt is reinforced when the other party is given no choice but to select its arbitrator from the curated panel.

134. In **CORE** (supra), the three-member tribunal was sought to be constituted in the following manner: (i) the Railways would suggest at least four names of retired railway officers; (ii) the contractor would select two names out of the panel for appointment as their arbitrator; (iii) The General Manager (of the Railways) would thereafter choose at least one person out of the two to be appointed as the contractor's arbitrator; and (iv) The General Manager would proceed to appoint the balance arbitrators from the panel or outside the panel and also indicate the presiding arbitrator.

135. Such an arbitrator-appointment clause is likely to give rise to justifiable doubts as to the independence and impartiality of arbitrators for two reasons: (i) the contractor is restricted to choosing its arbitrator from

the panel of four arbitrators nominated by the party who is a disputant; and (ii) the contractor's choice is further constrained because it is made subject to the decision of the General Manager who will choose one among the two persons suggested by the party. Since the contractor has to select its arbitrator from a curated panel, the arbitration clause does not allow the contractor equal participation in the appointment of their arbitrator. Moreover, the clause allows the General Manager to appoint the balance arbitrators from either the panel or outside the panel. Thus, the process of appointing the arbitrators is unequal because the General Manager can go beyond the panel of four potential arbitrators, while the contractor is bound by the names enlisted in the panel.

136. In a three-member tribunal, the independence and impartiality of a third or presiding arbitrator are prerequisites to the integrity of the arbitral proceedings. In **CORE** (supra), the arbitration clause allowed the General Manager to unilaterally nominate the presiding officer out of the panel of three arbitrators. The clause does not countenance any participation from the contractor in the process of appointing or nominating the presiding officer. Thus, the process of appointing and nominating the presiding officer is unequal and prejudiced in favour of the Railways. The fact that the General Manager is nominating the presiding officer gives rise to a reasonable doubt about the independence and impartiality of the entire arbitration proceedings.

137. Given the above discussion, it needs reiteration that the Arbitration Act does not prohibit PSUs from empanelling potential arbitrators. However,

an arbitration clause cannot mandate the other party to select its arbitrator from the panel curated by PSUs. The PSUs can give a choice to the other party to select its arbitrators from the curated list provided the other party expressly waives the applicability of the *nemo judex* rule.

G. Public-private contracts and public policy

138. An arbitration is a creature of contract between the parties. An arbitration agreement must meet the criteria laid down under Section 7, in addition to satisfying the principles of contract law prescribed under the Contract Act to be considered valid.[247] According to the Contract Act, a promisor makes a proposal when they signify to the promisee their willingness to do or abstain from doing anything, to obtain the assent of the promisee to such act or abstinence. The proposal is said to be accepted when the promisee signifies their assent. A proposal becomes a promise upon acceptance. Every promise and every set of promises, forming the consideration[248] for each other, is an agreement. An agreement enforceable by law is a contract.

i. Unconscionability under the Contract Act

139. The Contract Act accounts for unconscionability under Section 16 relating to undue influence. It provides that a contract induced by undue influence is unconscionable. A contract is induced by undue influence where the relations subsisting between the parties are such that one of the parties

[247] *See* Cox and Kings [63].
[248] Section 2(d) defines consideration as follows: ["(d) When, at the desire of the promisor, the promise or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise;"]

is in a position to dominate the will of the other and uses that position to obtain an unfair advantage.[249] A contract induced by undue influence is voidable at the option of the party whose consent was caused by undue influence.[250] Illustration (c) to Section 16 pertains to an unconscionable bargain:

> "(c) A, being in debt to B, the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was induced by undue influence."

140. Section 23 pertains to unlawful consideration or object of an agreement:

> "23. What considerations and objects are lawful, and what not – The consideration or object of an agreement is lawful, unless –
>
> it is forbidden by law; or
>
> is of such a nature that if permitted, it would defeat the provisions of any law; or

[249] Section 16, Contract Act. [It reads:
"16. "Undue Influence" defined – (1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.
(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another –
(a) where he hold a real or apparent authority over the other or where he stands in a fiduciary relation to the other; or
(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affect by reason of age, illness, or mental or bodily distress.
(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.
Nothing in this sub-section shall affect the provision of Section 111 of the Indian Evidence Act, 1871 (I of 1872)."]

[250] Section 19A, Contract Act.

> is fraudulent; or
>
> involves or implies injury to the person or property of another; or
>
> the Court regards it as immoral, or opposed to public policy."

141. Although the Contract Act does not define the expression "public policy", it has generally been defined as a principle of judicial legislation or interpretation founded on the current needs of the community.[251] Section 23 codified the common law position that "all contracts and agreements which have as their object anything contrary to principles of sound policy are void."[252] The prevalent view in the nineteenth century was that the doctrine of public policy should be governed by precedent and courts should refrain from inventing new heads of public policy. The purpose behind limiting the grounds of public policy was to respect the freedom of contract of parties, which was also considered as a paramount policy in common law.[253] Under the common law, a contract for marriage brokerage, creation of a perpetuity, in restraint of trade, gaming or wagering, or assisting the King's enemies were unlawful and opposed to public policy.[254]

142. This Court has adopted a flexible approach to the application of the doctrine of public policy to contracts. In **Gherulal Parakh** v. **Mahadeodas Maiya**,[255] this Court had to decide on the validity of a wagering contract

[251] Percy H Winfield, 'Public Policy in the English Common Law' (1928) 42(1) Harvard Law Review 76, 92.
[252] Stephen Waddams, Principle and Policy in Contract Law (Cambridge University Press, 2011) 152.
[253] Ibid, at 158
[254] Janson v. Driefontein Consolidated Mines, Limited, [1902] 2 AC 484
[255] 1959 SCC OnLine SC 4

under Section 23 of the Contract Act. The three-Judge Bench observed that public policy is a branch of common law and can be applied in clear and incontestable cases of harm to the public. It was further observed that the doctrine could be invoked by evolving "a new head under exceptional circumstances of a changing world." The court must determine public policy by considering the welfare of society and the social consequences of the rule propounded, especially in light of the factual evidence available to its probable result.[256] In **Delhi Transport Corporation** v. **DTC Mazdoor Congress**,[257] this Court held that courts can rely upon the Constitution as a source of public policy. In his concurring opinion, Justice Ramaswamy observed:

> "**292.** From this perspective, it must be held that in the absence of specific head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest invent new public policy and declare such practice or rules that are derogatory to the Constitution to be opposed to public policy. The rules which stem from the public policy must of necessity be laid to further the progress of the society in particular when social change is to bring about an egalitarian social order through rule of law. In deciding a case which may not be covered by authority courts have before them the beacon light of the trinity of the Constitution and the play of legal light and shade must lead on the path of justice, social, economic and political. Lacking precedent, the court can always be guided by that light and the guidance thus shed by the trinity of our Constitution."

[256] Murlidhar Aggarwal v. State of UP, (1974) 2 SCC 472 [32]
[257] 1991 Supp (1) SCC 600

143. In **Central Inland Water Transport Corporation** v. **Brojo Nath Ganguly**,[258] this Court had to decide on the validity of Rule 9 of Central Inland Water Transport Corporation Ltd Service Discipline and Appeal Rules 1979 which empowered the corporation to terminate the employment of its permanent employees with three months' notice. These rules constituted part of the contract of employment between the Corporation and its employees. The issue before this Court was whether Rule 9 was void under Section 23 of the Contract Act for being opposed to public policy. It was held that the court could refuse to enforce an unfair and unreasonable clause in a contract entered into between parties who are not equal in bargaining power:

> "89. […] The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and the equal protection of the laws. The principle deducible from the above discussions on this part of the case is in consonance with right and reason, intended to secure social and economic justice and conforms to the mandate of the great equality clause in Article 14. This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position

[258] (1986) 3 SCC 156

> in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. **This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction.** In today's complex world of giant corporations with their vast infrastructural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its own facts and circumstances."
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> (emphasis supplied)

144. The Court held that Rule 9(i) was void under Section 23 of the Contract Act for being opposed to public policy. The principle of unconscionability cannot be applied to contracts where: (i) the bargaining power of the contracting parties is equal or almost equal;[259] and (ii) both parties are businessmen and the contract is a commercial transaction. This

[259] *See* Indian Bank v. Blue Jaggers Estates Ltd., (2010) 8 SCC 129 [23] ["23. It must be remembered that the respondents were not in a position of disadvantage vis-à-vis the appellant. If they so wanted, the respondents could have declined to avail loan and other financial facilities made available by the appellant. However, the fact of the matter is that they had signed the agreement with open eyes and agreed to abide by the terms on which the loan, etc. was offered by the appellant. Therefore, the doctrine of unconscionable contract cannot be invoked for frustrating the action initiated by the appellant for recovery of its dues."]; ICOMM Tele Ltd. v. Punjab State Water Supply and Sewerage Board, (2019) 4 SCC 401 [11].

Court has held that the doctrine of unequal bargaining of parties does not generally apply to arbitration agreements, which are in the nature of commercial contracts.[260] However, the principles of non-arbitrariness continue to apply in situations where a government instrumentality enters into a contract with a private party.

145. The government has the freedom to enter into contracts with private parties. However, the award of governmental contracts is subject to the exercise of judicial review to prevent arbitrariness or favouritism.[261] The government has to abide by the principles laid down under Article 14 while awarding contracts.[262] In **Food Corporation of India** v. **Kamdhenu Cattle Feed Industries**,[263] this Court held that in the "contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet." It was further observed that since a public authority possesses powers only to use them for the public good, they have a duty to act fairly and "to adopt a procedure which is 'fair play in action'."[264]

146. In **Tata Cellular** v. **Union of India**,[265] this Court held that contractual decisions of government and its instrumentalities "must be free from

[260] S K Jain v. State of Haryana, (2009) 4 SCC 357 [8] ["8. It is to be noted that the plea relating to unequal bargaining power was made with great emphasis based on certain observations made by this Court in Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly [(1986) 3 SCC 156 : 1986 SCC (L&S) 429 : (1986) 1 ATC 103] . The said decision does not in any way assist the appellant, because at para 89 it has been clearly stated that the concept of unequal bargaining power has no application in case of commercial contracts."]
[261] Mahabir Auto Stores v. Indian Oil Corporation, (1990) 3 SCC 752 [12]; Directorate of Education v. Educomp Datamatics Ltd., (2004) 4 SCC 19 [9]
[262] Tata Cellular v. Union of India, (1994) 6 SCC 651 [70]; Air India Ltd. v. Cochin International Airport Ltd., (2000) 2 SCC 617 [7]
[263] (1993) 1 SCC 71 [7]
[264] Kamdhenu Cattle Feed Industries (supra) [7]
[265] (1994) 6 SCC 651 [94]

arbitrariness not affected by bias or actuated by mala fides." In a public-private contract, the state must act fairly, justly, and reasonably.[266] When a state acts contrary to the public good or public interest, it acts contrary to Article 14.[267]

147. In **ICOMM Tele Ltd**. v. **Punjab State Water Supply and Sewerage Board**,[268] this Court had to adjudicate on the validity of a pre-deposit arbitral clause in a public-private contract. According to the pre-deposit clause, a party invoking arbitration was required to furnish a "deposit-at-call" for ten percent of the amount claimed. To determine the validity of the clause from the viewpoint of arbitrariness, this Court held that a contractual clause would be arbitrary "which would be unfair and unjust and which no reasonable man would agree to."[269] This Court termed the pre-deposit clause to be violative of Article 14 for being excessive and disproportionate. Importantly, the Court held that the pre-deposit requirement was contrary to the object of arbitration because it served as a deterrent for a party to invoke arbitration.[270] The pre-deposit clause was termed arbitrary for defeating the purpose of arbitration.

148. In **Lombardi** (supra), a decision of a three-Judge Bench of this Court, a term of contract mandated "the party initiating the arbitration claim […] to deposit 7% of the arbitration claim in the shape of fixed deposit receipt as

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[266] ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd., (2004) 3 SCC 553 [23]
[267] ABL International (supra) [53]. ["53. From the above, it is clear that when an instrumentality of the State acts contrary to public good and public interest, unfairly, unjustly and unreasonably, in its contractual, constitutional or statutory obligations, it really acts contrary to the constitutional guarantee found in Article 14 of the Constitution."]
[268] (2019) 4 SCC 401
[269] ICOMM Tele (supra) [23]
[270] ICOMM Tele (supra) [27] ["**27**. Deterring a party to an arbitration from invoking this alternative dispute resolution process by a pre-deposit of 10 per cent would discourage arbitration, contrary to the object of de-clogging the court system, and would render the arbitral process ineffective and expensive."]

security deposit" in a public-private arbitration agreement. This Court observed that an arbitration agreement has to comply with the "operation of law", which includes the *grundnorm*. It was observed that the layers of *grundnorm* in the context of an arbitration agreement include (i) the Constitution of India; (ii) the Arbitration Act and any other Central and State law; and (iii) the arbitration agreement entered into by the parties under Section 7 of the Arbitration Act.[271] Further, this Court observed that party autonomy "cannot be stretched to an extent where it violates the fundamental rights under the Constitution."[272] It was concluded that the pre-deposit clause violated Article 14 of the Constitution.

ii. US jurisprudence on unconscionability of arbitration agreements

149. Section 2 of the Federal Arbitration Act provides that an agreement in writing to submit to arbitration an existing controversy arising out of a contract shall be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[273] The US Supreme Court has held that issues concerning validity, irrevocability, and enforceability of arbitration agreements will be decided with reference

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[271] Lombardi (supra) [80]

[272] Lombardi (supra) [83] ["83. The concept of "party autonomy" as pressed into service by the respondent cannot be stretched to an extent where it violates the fundamental rights under the Constitution. For an arbitration clause to be legally binding it has to be in consonance with the "operation of law" which includes the Grundnorm i.e. the Constitution. It is the rule of law which is supreme and forms parts of the basic structure. The argument canvassed on behalf of the respondent that the petitioner having consented to the pre-deposit clause at the time of execution of the agreement, cannot turn around and tell the Court in a Section 11(6) petition that the same is arbitrary and falling foul of Article 14 of the Constitution is without any merit."]

[273] Section 2, Federal Arbitration Act. [It reads:
A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

to the state law grounds such as fraud, duress, and unconscionability.[274] The doctrine of unconscionability has been codified by the Uniform Commercial Code and is now a part of American contract law. Section 2-302 of the Uniform Commercial Code allows courts to refuse enforcement of unconscionable contracts or limit the application of an unconscionable clause to avoid any unconscionable result.[275]

150. The doctrine of unconscionability has roots in equity. An unconscionable contract "is a contract which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept on the other."[276] Unconscionability has also been defined to include: (i) an absence of meaningful choice on the part of one of the parties; and (ii) unreasonable contractual terms favourable to one party.[277] The unconscionability doctrine seeks to balance the freedom of contract with the values of protecting the weaker parties from imposition and oppression.[278]

151. Unconscionability focuses on abuses relating to the contract formation process (procedural unconscionability) and the substantive terms of the contract (substantive unconscionability).[279] In determining procedural

[274] Perry v. Thomas, 482 US 483 (1987); Doctor's Associates Inc v. Casarotto, 517 US 681 (1996).
[275] Section 2-302, Uniform Commercial Code. [It reads:
(1) If the court as a matter of law finds the contractor or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination."]
[276] Hume v. United States, 132 US 406 (1889)
[277] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D C Cir. 1965)
[278] S M Waddams, 'Unconscionability in Contracts' (1976) 39(4) Modern Law Review 369, 369.
[279] John A Spanogle, 'Analyzing Unconscionability Problems' (1969) 117(7) University of Pennsylvania Law Review 931, 932.

unconscionability, the court is concerned with factors such as the relative bargaining power of the parties and whether the parties had a meaningful choice. Substantive unconscionability is geared towards pitting the substance of the contractual terms against the legitimate interests of the parties and considerations of public policy.[280]

152. US courts have consistently held that an arbitration agreement which provides for the unilateral formation of a panel of arbitrators by one of the parties is inherently inequitable and unconscionable.[281] The reason is that a unilateral arbitrator selection clause is inimical to the principle of arbitration, that is, the resolution of disputes through a fair and impartial tribunal. It has been held that an arbitration agreement that allows one of the parties to unilaterally control the arbitral tribunal conflicts with the "fundamental notions of fairness"[282] and does not meet the "minimum levels of integrity which we must demand of a contractually structured substitute for judicial proceedings."[283] The US courts have emphasised the importance of equality in the appointment process as a means to secure fairness in the arbitration proceedings.[284]

153. In **Hooters of Am. Inc.** v. **Phillips**,[285] the US Court of Appeals for the Fourth Circuit had to determine the validity of an arbitration agreement for employment-related disputes. The arbitration agreement provided for the

[280] Arthur Allen Leff, 'Unconscionability and the Code-Emperor's New Clause' (1967) 115(4) University of Pennsylvania Law Review 485, 487.
[281] Board of Education of Berkely County v. W Harley Miller Inc, 236 S.E.2d 439 (1977)
[282] Ditto v. Remax Preferred Props, 861 P.2d 1000, 1004; Harold Allen's Mobile Home Factory Outlet Inc v. Butler, 825 So.2d 779, 783 (Ala 2002)
[283] Graham v. Scissor Tail Inc, 28 Cal 3d 807
[284] Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith Inc, 995 F.Supp 190, 208 (D. Mass 1998)
[285] 173 F.3d 933

formation of a three-member arbitral tribunal. The employer and employee select their arbitrators, who in turn select the third arbitrator. However, the employee's arbitrator and the third arbitrator were selected from a list of arbitrators created exclusively by the employer. The Court observed that the arbitration agreement gave Hooters "control over the entire panel and places no limits whatsoever on whom Hooters can put on the list." It was further observed:

> "Under the rules, Hooters is free to devise lists of partial arbitrators who have existing relationships, financial or familial, with Hooters and its management. In fact, the rules do not even prohibit Hooters from placing its managers themselves on the list. Further, nothing in the rules restricts Hooters from punishing arbitrators who rule against the company by removing them from the list. Given the unrestricted control that one party (Hooters) has over the panel, the selection of an impartial decisionmaker would be a surprising result."

The Court noted that arbitration is a system where disputes between parties are resolved by an impartial third party and allowing one party to control the arbitral tribunal was against the principles of arbitration.[286]

154. In **McMullen** v. **Meijer**,[287] the issue before the US Court of Appeals for the Sixth Circuit was whether the arbitration agreement provided the employee "an effective substitute for the judicial forum". The agreement allowed the employer to unilaterally select a pool of at least five potential arbitrators. The employer and employee were required to mutually select a sole arbitrator from that pool of arbitrators by alternatively striking names

[286] Hooters of Am Inc (supra) 939
[287] 355 F.3d 485, 493

until only one remained. The Court held that the process of selection of the arbitrator prevented the arbitration from being an effective substitute for a judicial forum because: (i) the employer exercised unilateral control over the entire panel; (ii) the arbitrator selection procedure allowed the employer to create a symbiotic relationship with its arbitrators, which promulgated bias; and (iii) the arbitrator selection procedure inherently lacked fairness and neutrality.

iii. Public-private contracts and public policy of arbitration

155. Although arbitration law is an autonomous legal field,[288] it functions within the boundaries prescribed by the state. For instance, adjudication of certain proceedings is reserved by the legislature exclusively for the courts as a matter of public policy.[289] The non-arbitrable proceedings generally include disputes relating to rights and liabilities that give rise to or arise out of criminal offences, matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody, and guardianship matters.[290] The safeguards of public policy ensure that arbitration proceedings, which are effective substitutes for civil courts, are conducted within a framework in the broader public interest.[291]

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[288] Cox and Kings (supra) [95]
[289] Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 [35]; A Ayyasamy v. A Paramasivam, (2016) 10 SCC 386 [38]; Vidya Drolia v. Durga Trading Corporation, (2021) 2 SCC 1 [76]
[290] Booz Allen & Hamilton Inc. (supra) [36]. [36. The well-recognised examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding-up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.]
[291] Redfern and Hunter (supra) 552

156. Section 34 of the Arbitration Act specifies the grounds for setting aside an arbitral award. The grounds are separated into two categories: (i) Section 34(2)(a) contains those grounds that have to be proved by the parties; and (ii) Section 34(2)(b) contains grounds that a court has to examine *ex officio*. The challenge of arbitral awards on ex officio grounds is "of fundamental importance to the institution of arbitration as a whole."[292]

157. Section 34(2)(b) specifically provides that an arbitral award may be set aside if the court finds that the arbitral award conflicts with the public policy of India. The provision further clarifies "public policy of India" to only mean that: (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; (ii) it is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice.

158. This Court has construed the expression "public policy of India" appearing under Section 34 to mean the "fundamental policy of Indian law".[293] The concept of "fundamental policy of Indian law" has been held to cover compliance with statutes and judicial precedents, adopting a judicial approach, and compliance with the principles of natural justice.[294] In **OPG Power Generation Private Limited** v. **Enexio Power Cooling Solutions India Private Limited**,[295] this Court explained the concept of "fundamental policy of Indian law" thus:

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[292] Peter Binder (supra) 274
[293] Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 [34]; NHAI v. P Nagaraju, (2022) 15 SCC 1 [39]
[294] MMTC v. Vedanta Ltd., (2019) 4 SCC 163 [11];
[295] 2024 SCC OnLine SC 2600

> "The expression "in contravention with the fundamental policy of Indian law" by use of the word 'fundamental' before the phrase 'policy of Indian law' makes the expression narrower in its application than the phrase "in contravention with the policy of Indian law", which means mere contravention of law is not enough to make an award vulnerable. To bring the contravention within the fold of fundamental policy of Indian law, the award must contravene all or any of such fundamental principles that provide a basis for administration of justice and enforcement of law in this country. Without intending to exhaustively enumerate instances of such contravention, by way of illustration, it could be said that (a) violation of the principles of natural justice; (b) disregarding orders of superior courts in India or the binding effect of the judgment of a superior court; and (c) violating law of India linked to public good or public interest, are considered contravention of the fundamental policy of Indian law."

159. In **Avitel Post Studioz Ltd**. v. **HSBC PI Holdings (Mauritius) Ltd**.,[296] this Court held that the most basic notions of morality and justice under the concept of "public policy" will include bias.

160. The provisions of the statute, including Section 34, highlight the important role played by the Indian legal system in recognising and enforcing arbitral awards. It is one such instance where the Indian courts exercise a measure of control over the private arbitral process.[297] This control over the arbitral process ensures that the arbitral awards are made by following certain minimum standards of due process and justice.[298] Thus, the courts must ensure that the arbitral awards are consistent with the fundamental policy of Indian law such as compliance with the principles of

[296] (2024) 7 SCC 197 [34]
[297] Redfern and Hunter (supra) 58
[298] Ibid.

natural justice. As a corollary, Section 34 places a responsibility on the arbitral tribunals to ensure that the arbitral proceedings are consistent with the fundamental policy of Indian law.[299]

161. By agreeing to arbitrate in a public-private contract, the government or its companies agree to settle their disputes with private contractors through arbitration. Since the activities of the government have a public element, it is incumbent upon the government to ensure that it enters into a contract with the public without adopting any unfair or unreasonable procedure.[300] Every action of a public authority or a person acting in the public interest or any act that gives rise to a public element must be based on principles of fairness and non-arbitrariness.[301] Therefore, government agencies have to consider the principles of equality and non-arbitrariness when crafting arbitration procedures, including the procedure for the appointment of arbitrators. The terms of the arbitration agreement must

[299] Vidya Drolia v. Durga Trading Corporation, (2021) 2 SCC 1 [70] ["70. Arbitrators, like the courts, are equally bound to resolve and decide disputes in accordance with the public policy of the law. Possibility of failure to abide by public policy consideration in a legislation, which otherwise does not expressly or by necessary implication exclude arbitration, cannot form the basis to overwrite and nullify the arbitration agreement. This would be contrary to and defeat the legislative intent reflected in the public policy objective behind the Arbitration Act. Arbitration has considerable advantages as it gives freedom to the parties to choose an arbitrator of their choice, and it is informal, flexible and quick. Simplicity, informality and expedition are hallmarks of arbitration. Arbitrators are required to be impartial and independent, adhere to natural justice, and follow a fair and just procedure. Arbitrators are normally experts in the subject and perform their tasks by referring to facts, evidence, and relevant case law."]

[300] Eurasian Equipment & Chemicals Ltd. v. State of West Bengal, (1975) 1 SCC 70 [17]; Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489 [12] [12. It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesse including award of jobs, contracts, quotas, licences, etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.]

[301] LIC v. Consumer Education & Research Centre, (1995) 5 SCC 482 [23]

meet the minimum standards of equality and fairness. In a public-private contract, the government and its instrumentalities must ensure that the arbitral process contemplated by the contract is also fair to the other party to avoid arbitrariness.

162. The possibility of bias is real in situations where an arbitration clause allows a government company to unilaterally appoint a sole arbitrator or control the majority of the arbitrators. Since the government has control over the arbitral tribunal, it can chart the course of the arbitration proceedings to the prejudice of the other party. Resultantly, unilateral appointment clauses fail to provide an effective substitute for judicial proceedings in India. Further, a unilateral appointment clause is inherently exclusionary and violates the principle of equal treatment of parties and procedural equality.

163. 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 judex* rule which constitutes the public policy of India in the context of arbitration. Therefore, unilateral appointment clauses in public-private contracts are violative of Article 14 of the Constitution for being arbitrary in addition to being violative of the equality principle under the Arbitration Act.

H. Necessity of maintaining the principle of minimum judicial interference

164. **In re Interplay Between Arbitration Agreements under Arbitration and Conciliation Act 1996 and the Stamp Act 1899**,[302] a seven judge Bench of this Court emphasized the importance of minimal judicial interference by the courts at the Section 11 stage. This Court held that the scope of the proeceeding under Section 11 must be confined to the existence of an arbitration agreement. The Court further observed:

> "**165.** The legislature confined the scope of reference under Section 11(6-A) to the examination of the existence of an arbitration agreement. The use of the term "examination" in itself connotes that the scope of the power is limited to a prima facie determination. Since the Arbitration Act is a self-contained code, the requirement of "existence" of an arbitration agreement draws effect from Section 7 of the Arbitration Act. In *Duro Felguera* [*Duro Felguera, S.A.* v. *Gangavaram Port Ltd.*, (2017) 9 SCC 729: (2017) 4 SCC (Civ) 764], this Court held that the Referral Courts only need to consider one aspect to determine the existence of an arbitration agreement — whether the underlying contract contains an arbitration agreement which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement. **Therefore, the scope of examination under Section 11(6-A) should be confined to the existence of an arbitration agreement on the basis of Section 7. Similarly, the validity of an arbitration agreement, in view of Section 7, should be restricted to the requirement of formal validity such as the requirement that the agreement be in writing. This interpretation also gives true effect to the doctrine of competence-competence by leaving the issue of substantive existence and validity of an arbitration agreement to be decided by Arbitral Tribunal under Section 16**.

[302] 2023 INSC 1066

> **166.** The burden of proving the existence of arbitration agreement generally lies on the party seeking to rely on such agreement. In jurisdictions such as India, which accept the doctrine of competence-competence, only prima facie proof of the existence of an arbitration agreement must be adduced before the Referral Court. The Referral Court is not the appropriate forum to conduct a mini-trial by allowing the parties to adduce the evidence in regard to the existence or validity of an arbitration agreement. The determination of the existence and validity of an arbitration agreement on the basis of evidence ought to be left to the Arbitral Tribunal. This position of law can also be gauged from the plain language of the statute.
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> **167.** Section 11(6-A) uses the expression "examination of the existence of an arbitration agreement". The purport of using the word "examination" connotes that the legislature intends that the Referral Court has to inspect or scrutinise the dealings between the parties for the existence of an arbitration agreement. **Moreover, the expression "examination" does not connote or imply a laborious or contested inquiry. On the other hand, Section 16 provides that the Arbitral Tribunal can "rule" on its jurisdiction, including the existence and validity of an arbitration agreement. A "ruling" connotes adjudication of disputes after admitting evidence from the parties. Therefore, it is evident that the Referral Court is only required to examine the existence of arbitration agreements, whereas the Arbitral Tribunal ought to rule on its jurisdiction, including the issues pertaining to the existence and validity of an arbitration agreement**."
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> (emphasis supplied)

The Constitution Bench held that the nature of objections to the jurisdiction of an arbitral tribunal on the basis that stamp duty has not been paid or is

inadequate cannot be decided on a prima facie basis.[303] Hence, it was observed that objections of such a kind will require a detailed consideration of evidence and submissions and a finding as to the law as well as the facts.

165. At the Section 11 stage, a referral court only has to determine the existence of arbitration agreement. The validity of the arbitration clause providing for the procedure for appointment of arbitrators will require the referral court to enter into a detailed consideration of evidence and render a finding as to law and facts. This issue should be left to be decided by the arbitral tribunal in view of the doctrine of competence-competence. The arbitral tribunal is competent to rule on its jurisdiction, including the issue of validity of the arbitration clause for violating the equality principle under the Arbitration Act.

I. Prospective Overruling

166. A decision of this Court has retrospective effect unless expressly given a prospective effect. Commercial relations are structured on the basis of law. A change in law may have the effect of distorting established rights and commercial bargains between parties.[304] To avoid large-scale social and economic disruption, this Court can exercise its discretionary jurisdiction under Article 142 to give prospective effect to its decisions.[305] The application of the doctrine of prospective overruling results in the application of the law declared by this Court to cases arising in future.[306] In **Mineral**

[303] In re Interplay between Arbitration Agreements under Arbitration and Conciliation Act 1996 and Stamp Act 1899 (supra) [196]
[304] Somaiya Organics (India) Ltd. v. State of UP, (2001) 5 SCC 519 [46]
[305] Belsund Sugar Co. Ltd. v. State of Bihar, (1999) 9 SCC 620 [112]
[306] Sarwan Kumar v. Madan Lal Aggarwal, (2003) 4 SCC 147 [15]

Area Development Authority v. **Steel Authority of India**,[307] eight Judges of this Court held that the doctrine of prospective overruling is applied to bring about a smooth transition of the operation of law without unduly affecting the rights of people who acted upon the overruled law.

167. In Bharat Aluminium Company v. Kaiser Aluminium Technical Services,[308] a Constitution Bench of this Court prospectively overruled Bhatia International v. Bulk Trading S A[309] observing:

> "**197.** The judgment in *Bhatia International* [(2002) 4 SCC 105] was rendered by this Court on 13-3-2002. Since then, the aforesaid judgment has been followed by all the High Courts as well as by this Court on numerous occasions. In fact, the judgment in *Venture Global Engg.* [(2008) 4 SCC 190] has been rendered on 10-1-2008 in terms of the ratio of the decision in *Bhatia International* [(2002) 4 SCC 105]. Thus, in order to do complete justice, we hereby order, that the law now declared by this Court shall apply prospectively, to all the arbitration agreements executed hereafter."

168. In the present reference, we have upheld the decisions of this Court in **TRF** (supra) and **Perkins** (supra) which dealt with situations dealing with sole arbitrators. Thus, **TRF** (supra) and **Perkins** (supra) have held the field for years now. However, we have disagreed with **Voestalpine** (supra) and **CORE** (supra) which dealt with the appointment of a three-member arbitral tribunal. We are aware of the fact that giving retrospective effect to the law

[307] 2024 SCC OnLine SC 1974
[308] (2012) 9 SCC 552
[309] (2002) 4 SCC 105

laid down in the present case may possibly lead to the nullification of innumerable completed and ongoing arbitration proceedings involving three-member tribunals. This will disturb the commercial bargains entered into by both the government and private entities. Therefore, we hold that the law laid down in the present reference will apply prospectively to arbitrator appointments to be made after the date of this judgment. This direction only applies to three-member tribunals.

J. Conclusion

169. In view of the above discussion, we conclude that:

a. The principle of equal treatment of parties applies at all stages of arbitration proceedings, including the stage of appointment of arbitrators;

b. The Arbitration Act does not prohibit PSUs from empanelling potential arbitrators. However, an arbitration clause cannot mandate the other party to select its arbitrator from the panel curated by PSUs;

c. A clause that allows one party to unilaterally appoint a sole arbitrator gives rise to justifiable doubts as to the independence and impartiality of the arbitrator. Further, such a unilateral clause is exclusive and hinders equal participation of the other party in the appointment process of arbitrators;

d. In the appointment of a three-member panel, mandating the other party to select its arbitrator from a curated panel of potential arbitrators is against the principle of equal treatment of parties. In this situation, there is no effective counterbalance because parties do not participate equally in the process of appointing arbitrators. The process of appointing arbitrators in **CORE** (supra) is unequal and prejudiced in favour of the Railways;

e. Unilateral appointment clauses in public-private contracts are violative of Article 14 of the Constitution;

f. The principle of express waiver contained under the proviso to Section 12(5) also applies to situations where the parties seek to waive the allegation of bias against an arbitrator appointed unilaterally by one of the parties. After the disputes have arisen, the parties can determine whether there is a necessity to waive the *nemo judex* rule; and

g. The law laid down in the present reference will apply prospectively to arbitrator appointments to be made after the date of this judgment. This direction applies to three-member tribunals.

170. The reference is answered in the above terms.

171. Pending application(s), if any, shall stand disposed of.

……CJI
[Dr Dhananjaya Y Chandrachud]

……J
[J B Pardiwala]

……J
[Manoj Misra]

New Delhi;
November 08, 2024.

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL Nos. 9486-9487 of 2019

CENTRAL ORGANISATION FOR
RAILWAY ELECTRIFICATION …APPELLANT(S)

VERSUS

M/S ECI SPIC SMO MCML (JV)
A JOINT VENTURE COMPANY …RESPONDENT(S)

WITH

SLP(C) No. 15936 of 2020

SLP(C) No. 6125 of 2021

SLP(C) No. 9462 of 2022

SLP(C) No. 21131 of 2023

Diary No. 7086 of 2024

Diary No. 13670 of 2024

J U D G M E N T

Hrishikesh Roy, J.

1. I have read the scholarly judgment of the learned Chief Justice DY Chandrachud and also the erudite one authored by brother Justice PS Narasimha.

2. I am in agreement with the view of the learned Chief Justice that the principle of equality under Section 18 of the *Arbitration and Conciliation Act,1996*(for short 'Arbitration Act') applies at all stages of the proceedings including the stage of appointment of arbitrators. His judgment offers a thorough examination (in Part D) of the mandatory provisions within the Model Law and the Arbitration Act, which underscores the applicability of the equality principle and the same is not reiterated here for the sake of brevity. It is also correct to say that the *Arbitration Act* does not provide special or different treatment to government or government undertakings involved in arbitration.

3. Nonetheless, it is not possible for me to agree with the view canvassed that the principles of constitutional law can be invoked to reinforce the equality doctrine in the realm of arbitration. On this aspect, Justice Narasimha has rightly opined that public law principles evolved in Constitutional and Administrative law, should not generally be imported to arbitration law.

4. Anchoring the principle of equality amongst the arbitrating parties from the framework of the Arbitration Act, rather than invoking constitutional and administrative law principles, in my opinion, will not only preserve impartiality in the appointment of

arbitrator but will also ensure party autonomy. It is also imperative to observe that Courts should exercise judicial restraint at the threshold stage of appointing an arbitrator. This will then safeguard the core principles of equality, party autonomy, and minimal judicial intervention in the arbitration domain.

5. The notion that Alternative Dispute Resolution offers 'rough justice' rather than true justice, is no more in vogue although some scepticism towards arbitration was earlier noticed, across various jurisdictions[1]. Trusting the arbitral process is essential and we must dispel the notion that arbitration provides 'second-hand justice'. To lend credibility to the arbitral process, statutory procedural safeguards promoting basic fairness must be given full play. A key factor in establishing arbitration's legitimacy lies in ensuring independence and impartiality at all stages of the arbitral process. At the same time, excessive judicial intervention must be avoided. By striking this balance between procedural protections and judicial restraint, we can reinforce arbitration's role as an autonomous system capable of delivering justice on par with traditional courts.

[1] Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer 2014)

Scope of Judicial Interference

6. The principle of minimal judicial intervention in the arbitral process is an integral element of the Indian arbitration law. The relevant part of the Statement of Objects and Reasons of the Arbitration Act is extracted below to press home this aspect:

> "(i) to comprehensively cover international commercial arbitration and conciliation as also domestic arbitration and conciliation;
> (ii) to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration;
> (iii)to provide that the arbitral tribunal gives reasons for its arbitral award;
> (iv)to ensure that the arbitral tribunal remains within the limits of its jurisdiction;
> **(v) to minimise** the **supervisory role of courts** in the arbitral process;
> (vi)to permit an arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes;
> (vii) to provide that every final arbitral award is enforced in the same manner as if it were a decree of the court;
> (viii) to provide that a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal; and
> (ix) to provide that, for purposes of enforcement of foreign awards, every arbitral award made in a country to which one of the two International Conventions relating to foreign arbitral awards to which India is a party applies, will be treated as a foreign award."
>
> [emphasis supplied]

7. Article 5 of the UNCITRAL Model Law(for short 'Model law') and Section 5 of the Arbitration Act is extracted below:

> " **Article 5.** Extent of Court intervention- In matters governed by this Law, no court shall intervene except where so provided in this Law."
> "**Section 5.** 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."

8. The Statement of Objects and Reasons of the Arbitration Act read along with Section 5 of the Act makes it clear that the legislative intent behind the Arbitration Act was to, *inter alia,* minimise the intervention of the Courts and provide for timely resolution of disputes. It is also crucial to note that the Parliament in Section 5, made a significant departure from Article 5 of Model law by adding a non-obstante clause, 'Notwithstanding anything contained in any other law', emphasizing that the Courts should exercise restraint and other laws should not be made the basis for court's intervention with the agreed arbitral process.

9. Section 11 deals with 'Appointment of Arbitrator'. Section 11(2) provides that subject to Section 11(6), parties are 'free to agree on a procedure for appointing the arbitrator or arbitrators'.

At this stage, the language in Section 11(6) of the Arbitration Act needs to be noticed which reads thus:

> "(6) Where, under an appointment procedure agreed upon by the parties,—
>
> (a) a party **fails to act** as required under that procedure; or (b) the parties, or the two appointed arbitrators, **fail to reach** an agreement expected of them under that procedure; or
>
> (c) a person, including an institution**, fails to perform** any function entrusted to him or it under that procedure"

10. The consideration to be given to the agreed procedure is also clear from Section 11(8) of the Arbitration Act:

> [11(8) The Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court, before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of section 12, **and have due regard to**—
> (a) any qualifications required for the arbitrator by
>
> the **agreement of the parties**; and
>
> (b) **the contents of the disclosure and other considerations** as are likely to secure the appointment of an independent and impartial arbitrator.]
>
> [emphasis supplied]

11. In ad-hoc arbitration, the parties have the option to choose the arbitrator as per the procedure agreed between parties. It is only when 'a party fails to act as required under that procedure' as contemplated in Section 11(6) of the Act that the court's intervention is expected. However, the term "fail(ure) to act"

should not be interpreted to allow Courts to intervene particularly at the Section 11 stage. It is also essential to bear in mind that under Section 11(8) the Court, 'shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of section 12', thereby underscoring the importance of impartiality and independence in the appointment of arbitrators. Therefore, essential safeguards are also provided under Section 11 for the appointment of arbitrator.

12. In the context of Article 11, UNCITRAL Digest of Case Law on the Model Law on International Commercial Arbitration[2] provides as under:

> "20. Securing an independent and impartial tribunal was said in one case to be the major objective that ought to be pursued by the court or competent authority intervening on the basis of article 11, while in another case it was said to be the paramount consideration. It has also been explicitly identified as an important consideration in several other cases."

13. The Commentary on Article 11 by Howard M. Holtzmann and Joseph E. Neuhaus[3] provides:

[2] UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration

[3] Howard M. Holtzmann and Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration*, at 479 (Kluwer 1989)

> "….. the working group cited as examples two articles that give rise to such restrictions: Article 12 concerning grounds for challenging arbitrators and Article 34 concerning court's power to set aside arbitral awards. Thus, for example, if the procedure agreed on results in an arbitral tribunal that fails to meet the standard of impartiality and independence established by Article 12 the arbitrator would be subjected to challenge. ….The working group considered at some length adding to Article 11 an explicit on the parties' freedom to determine the procedures for selection of arbitrators. The provision would have stated that a procedure agreed upon by the parties would be invalid if or to the extent that it gave one party a 'predominant position' or in the words of an alternate draft a 'manifestly unfair advantage' with regard to the appointment of arbitrators. This provision was later deleted because (1)the problem did not arise frequently; (2)other provisions of the law such as Article 12 and 34, could be used to address the problem and (3) the wording was regarded as too vague and thus could lead to dilatory tactics and potentially invalidation of 'well-established and recognized appointment practices"

14. The court's role in ensuring an arbitrator's impartiality and independence is indeed essential. However, this duty, as is clear from above, must be grounded in Section 12 of the Arbitration Act which provides adequate standards for dealing with potential conflicts or biases. By setting specific parameters for impartiality, Section 12 effectively limits arbitrary or unjustified challenges while still safeguarding the fairness of arbitration.

15. If the criteria for fairness, impartiality, or independence are not clearly defined, a party may challenge the appointment of

an arbitrator on the ground that the procedure is "manifestly unfair" or that the other party holds a "predominant position." In such cases, a party looking to delay proceedings could file baseless objections against appointments, leading to unnecessary judicial intervention and thereby delaying arbitration until these challenges are resolved. This tactic can effectively halt the arbitration process, leading to avoidable delays in resolution- a problem exacerbated by the broader issue of judicial backlog in India.

16. Section 11(6A) was inserted in the Arbitration Act through the 2015 Amendment:

> " 11(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, **confine to the examination** of the **existence** of an arbitration agreement."
>
> [emphasis supplied]

17. The language in Section 11(6A) read with Section 5 of the Arbitration Act, and an interpretation focusing on the legislative intent informs us about the narrow scope for court's scrutiny under Section 11(6A), at the stage of appointment of arbitrators,.

18. In *Mayavati Trading (P) Ltd. v. Pradyuat Deb Burman*[4], a three-Judge Bench of this Court affirmed the reasoning in *Duro Felguera, S.A. v. Gangavaram Port Ltd*[5]. by observing that the examination under Section 11(6A) is "confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense." It was also held that the position of law prior to the 2015 Amendment Act, as set forth by the decisions of this Court in *SBP & Co. v Patel Engineering*[6] and *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd*[7], which widened the scope of judicial intervention, are legislatively overruled.

19. In the concurring opinion in *A.Ayyasamy vs A. Paramasivam*[8], it was observed as under:

> "53. The Arbitration and Conciliation Act, 1996, should in my view be interpreted so as to bring in line the principles underlying its interpretation in a manner that is consistent with prevailing approaches in the common law world. Jurisprudence in India must evolve towards strengthening the institutional efficacy of arbitration. **Deference to a forum chosen by parties** as a complete remedy for resolving all their claims is but part of that evolution**. Minimising the intervention of courts** is again a recognition of the same principle."
>
> [emphasis supplied]

[4] (2019) 8 SCC 714
[5] (2017) 9 SCC 729
[6] (2005) 8 SCC 618
[7] (2009) 1 SCC 267
[8] (2016) 10 SCC 386

20. In the significant decision on the *Interplay Between Arbitration Agreements under A&C Act, 1996 & Stamp Act, 1899*[9], 7 judges of this Court had emphasized on the minimal supervisory roles of Court in arbitral process:

> " 81. One of the main objectives behind the enactment of the Arbitration Act was to minimize the supervisory role of courts in the arbitral process by confining it only to the circumstances stipulated by the legislature. For instance, Section 16 of the Arbitration Act provides that the arbitral tribunal may rule on its own jurisdiction "including ruling on any objection with respect to the existence or validity of the arbitration agreement." The effect of Section 16, bearing in view the principle of minimum judicial interference, is that judicial authorities cannot intervene in matters dealing with the jurisdiction of the arbitral tribunal. Although Sections 8 and 11 allow courts to refer parties to arbitration or appoint arbitrators, Section 5 limits the courts from dealing with substantive objections pertaining to the existence and validity of arbitration agreements at the referral or appointment stage. A referral court at Section 8 or Section 11 stage can only enter into a prima facie determination. The legislative mandate of 1prima facie determination ensures that the referral courts do not trammel the arbitral tribunal's authority to rule on its own jurisdiction."

21. While reiterating on the limited scrutiny of courts at the stage of initiating the arbitral process, the 7-judge bench also emphasized that while Section 16 deals with both 'existence' and

[9] (2024) 6 SCC 1

'validity', Section 11 deals only with 'existence' of the arbitration agreement.

22. In view of the above authoritative pronouncement by the 7-Judge bench, critical scrutiny at the Section 11 stage would be antithetical to the objective of the Arbitration Act and this will also impinge on the principle of party autonomy. As we have noted earlier, Section 11(8) itself provides for the requirement of disclosure under Section 12 and therefore importing principles of constitutional law to justify intervention at the Section 11 stage, would surely defeat the very objective of the Arbitration Act. This will also be a departure from the expected norm of minimal judicial intervention.

Unilateral Appointments- Whether Permissible?

23. One of the core issues to be considered here is whether unilateral appointment of arbitrators is permissible. While such appointments were a norm and approved by Courts prior to the 2015 Amendment[10], the legal terrain has been altered with the changed provisions.

[10] Executive Engineer, Irrigation Division, Puri v. Gangaram Chhapolia, [1984] 3 SCC 627; Secretary to Government Transport Department, Madras v. Munusamy Mudaliar, [1988] (Supp) SCC 651; International Authority of India v. K.D. Bali and Anr, [1988] 2 SCC 360

24. Significantly, the 246th Report of the Law Commission addressed the issue of party autonomy and the independence and impartiality of arbitrators in the following words:

> "the principles of impartiality and independence cannot be discarded at any stage of the proceedings, specifically at the stage of constitution of the Arbitral Tribunal, it would be incongruous to say that party autonomy can be exercised in complete disregard of these principles — even if the same has been agreed prior to the disputes having arisen between the parties."

25. The Law Commission report also made the following critical observation:

> "60. The Commission, however, feels that real and genuine party autonomy must be respected, and, in certain situations, **parties should be allowed to waive even the categories of ineligibility** as set in the proposed Fifth Schedule. This could be in situations of family arbitrations or other arbitrations where a person commands the blind faith and trust of the parties to the dispute, despite the existence of objective "justifiable doubts" regarding his independence and impartiality. To deal with such situations, the Commission has proposed the proviso to section 12 (5), where parties may, subsequent to disputes having arisen between them, waive the applicability of the proposed section 12 (5) by an express agreement in writing. In all other cases, the general rule in the proposed section 12 (5) must be followed. In the event the High Court is approached in connection with appointment of an arbitrator, the Commission has proposed seeking the disclosure in terms of section 12 (1). and in which

> context the High Court or the designate is to have "due regard" to the contents of such disclosure in appointing the arbitrator."
>
> [emphasis supplied]

26. The Law Commission also significantly noted that if the appointing authority is the State, it is even more essential to have an independent and impartial tribunal. Weighing the observations of the 246th Report of the Law commission, India has formally incorporated the International Bar Association(IBA) Guidelines into its statutory framework, introducing a comprehensive system of checks and balances[11].

27. Section 12 of the Arbitration Act provides a mechanism to address issues, if any, that may arise pertaining to impartiality of arbitrators. An amendment was carried out in Section 12 and significantly, the Fifth and Seventh Schedule were adopted in the Arbitration Act which provides a statutory reference point to determine independence and eligibility. Section 12(5) reads as under:

> [(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

[11] HRD Corporation (Marcus Oil and Chemical Division) v. GAIL (India) Ltd., (2018) 12 SCC 471

> Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this subsection by an express agreement in writing.]"

28. The Fifth Schedule adopts the Orange List from the IBA Guidelines on Conflicts of Interest in International Arbitration(for short 'IBA Guidelines') requiring arbitrators to disclose any circumstances that might reasonably affect their impartiality, including relationships with the parties, counsel, or subject matter of the dispute. The Sixth Schedule specifies the requirement of disclosure to be made by an arbitrator. The Seventh Schedule incorporates the 'Red List' of the IBA Guidelines, outlining scenarios of relationship conflict that would result in de jure ineligibility of the arbitrator. Therefore, the interpretation that all unilateral appointments are automatically nullified under Section 12(5) of the Act, would go way beyond the legislative intent of the Arbitration Act. If the Legislature had intended such a rigid restriction, there would be no need for the proviso to Section 12(5), which explicitly permits parties to waive this requirement through an agreement in writing. This again underscores the emphasis on party autonomy, in the arbitral process.

29. Section 13 outlines the challenge to the procedure in respect of grounds under Section 12(3). Section 13(1) states that parties are free to agree on a procedure to challenge an arbitrator. Section 13(2) provides as under:

> "13(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal."

Section 13(4) next states that if a challenge to an arbitrator under 13(1) or 13(2) is not successful; the tribunal shall continue with the proceedings.

30. Section 14 is titled 'Failure or impossibility to Act'. It provides for the *termination* of an arbitrator's mandate if he, de facto or de jure, becomes unable to perform his functions or for other reasons, fails to act without undue delay. Unless agreed otherwise, one can apply to 'Court' to decide on the termination of a mandate. It is crucial to note that the term 'Court' herein is not the Section 11 Court.

31. Section 15 is titled 'Termination of mandate and Substitution of Arbitrator'. Section 15(1) states that in addition to the circumstances mentioned in Section 13 and 14, the

mandate of an arbitrator shall terminate when he withdraws from office for any reason, or by (or pursuant to) an agreement of the parties. Section 31 provides for the form and contents of the arbitral award. Section 32 provides for the termination of the arbitrator's mandate, either by delivery of a final award or any of the circumstances mentioned in Section 32(2) such as withdrawal of the claim by the claimant, agreement between parties to terminate proceedings, or continuation of proceedings having become unnecessary or impossible.

32. What follows from the above is that if the Arbitrator has any relationship with any of the parties that raises a reasonable apprehension of bias, such an arbitrator can anyway be *de jure* barred under Sections 12 and 14, read with the Fifth and the Seventh Schedules of the Arbitration Act. Post-appointment also, a challenge can be made under Section 13(2) of the Arbitration Act against appointment. It is also possible to finally set aside an award for procedural violations, under Section 34(2)(iii) or 34(2)(v) of the Arbitration Act.

33. Importantly, the Arbitration Act does not per se prohibit unilateral appointment of arbitrators. If those nominated in the panel fit into the limiting factors, underscored in Section 12(5) read with the Fifth and Seventh Schedule of the Act, the same

will not upset the level playing field to be provided to the arbitrating parties. The 2015 Amendment, addressed specific concerns regarding fairness, potential advantage to one party as well as independence and impartiality of an unilaterally appointed arbitrator under the IBA Guidelines. An eligible arbitrator, not otherwise disqualified under Schedule VII of the Act, can be appointed unilaterally, and courts should refrain from imposing their own opinion countermanding the clear intent of the parties. The statutory safeguards, under the Arbitration Act provide a checklist and a counterbalance and thereby rule out inequality for the arbitrating parties.

34. The judgments in *Voestalpine Schienen GmbH v. Delhi Metro Rail Corpn. Ltd*[12] (for short 'Voestalpine'), *TRF Ltd. v. Energo Engg. Projects Ltd*[13] (for short 'TRF'), *Perkins Eastman Architects DPC v. HSCC (India) Ltd*[14].(for short 'Perkins'), and *Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV)*[15], (for short 'CORE') have been discussed in detail in the respective judgments of my learned Brothers and therefore, only

[12] 2017) 4 SCC 665
[13] (2017) 8 SCC 377
[14] (2020) 20 SCC 760
[15] (2020) 14 SCC 712

references to the said decisions to support the present opinion are being made.

35. In *Voestalpine*(supra), the issue before the bench of two judges was whether the panel of arbitrators prepared by DMRC violated Section 12 of the Arbitration Act. It was held that Section 12(5) read with the Seventh Schedule does not bar retired government employees, from serving as arbitrators. It however held that in the case of a government contract where the authority to appoint arbitrators rests with a government entity, it is imperative to have a 'broad-based' panel to secure the principle of impartiality and independence of the Arbitrator. It is relevant to note that the basis on which such a panel was upheld in *Voestalpine*(supra) was that the persons who have been nominated are subject to the rigours of Section 12.

36. In *Perkins* (supra), the question before the 3-judge bench was whether the Managing Director of the Respondent, who is ineligible to be appointed as an arbitrator under Section 12(5) read with Seventh Schedule, can nominate the sole arbitrator. Therefore, the Court was only concerned with the authority or power of the Managing Director and cannot be understood to conclude that unilateral appointments are impermissible. The

distinction between 'ineligibility' and 'unilateral' appointments must be borne in mind.

37. Similarly, the question before the Court in *TRF(supra)* was in the context of the ineligibility of the arbitrator and should not be interpreted as conclusively deciding on the impermissibility of unilateral appointments.

38. In *CORE*(supra), the three-judge bench endorsed an arbitration clause that provided for current and former employees of one party to be appointed by the other party by asserting that such an appointment was balanced by an equal power of selection granted to the other party. As already noted by Justice Narasimha, the Court relied on *Union of India Vs. Parmar Construction Company*[16] and *Union of India vs. Pradeep Vinod Construction Company*[17]but did not consider that these cases interpreted clause 34 of the General Conditions of Contract (GCC), prior to the 2015 amendment. The prescription for a broad- based panel as set out in *Voestalpine*(supra) was also not noted. The issue with the arbitration clause in *CORE(supra)* is that it exemplifies a situation where there may be an imbalance of bargaining power, particularly in contracts involving public

[16] (2019) 15 SCC 682
[17] (2020) 2 SCC 464

sector undertakings or large private corporations. In such cases, one party may wield disproportionate influence over the selection of the arbitrator, undermining the fairness of the arbitration process. This imbalance of power makes it imperative that the appointment process be scrutinized carefully to uphold the principle of equality, as laid down in Section 18 of the Arbitration Act. Therefore, the Court erred in refusing to exercise its power under Section 11(6) to appoint an arbitrator, in such a case of complete lack of consensus between the parties.

39. Concerns about the presumed bias of an arbitrator nominated by the claimant must also be tested against the objective standard of independence and impartiality, provided under the Seventh Schedule of the Arbitration Act. The appointment of arbitrators must scrupulously be made through the consent of the parties. The recourse to Section 11 must not be readily inferred in view of the remedies contained in Sections 12, 13, 14 and 15 of the Act. In any case, the scrutiny on whether to intervene has to be on a case-to-case basis.

40. Arbitration without party autonomy prevailing, will be like a redressal mechanism, without spirit. Liberty for the parties opting for Arbitration without equality being enshrined from the stage of inception to conclusion would be like a soulless process.

The Arbitration Act as discussed earlier provides for adequate guard rails to ensure that the arbitrator(s) to be appointed are capable of independently discharging their responsibilities. The Sixth and Seventh Schedule requires the proposed arbitrator(s) to disclose any circumstances that might reasonably affect their impartiality, including relationship with the parties, the counsel or the subject matter of the dispute. In this scenario, since parties opt for the arbitration route to avoid redressal in Court, minimal judicial intervention should be the norm.

41. In my view, all unilateral appointments must not be declared void by way of a declaration of this Court. The 2015 Amendment in Section 12(5) itself provides for a specific waiver i.e. (a) an express consent in writing and (b)the consent must be obtained after the dispute has arisen. Therefore, it is abundantly clear that an agreement between the parties(provided it satisfies the specific waiver requirements under Section 12(5)) can effectively cure any concerns about impartiality or independence in such cases.

42. Adequate safeguards are provided within the Arbitration Act to ensure a level playing field as discussed in the preceding paragraphs and therefore to answer the question in this reference, a search within the provisions of the Arbitration Act

should first be made. In my view, the obligations of fair treatment should be grounded in the Arbitration Act rather than in the principles of Constitutional or administrative law. The choice of the parties in the agreement should not be disregarded without compelling reasons, through judicial intervention especially when the Arbitration Act provides clear remedies under Sections 12, 13, 14, and 15 of the Arbitration Act. It is only when there is a complete lack of consensus between the parties that the Court's interference under Section 11 could be justified.

43. Flowing from the above discussion, the following are the conclusions :-

a) Section 18 applies to all stages of arbitration including the stage of appointment of an arbitrator. The Arbitration Act does not provide for any special treatment to the government irrespective of whether the arbitration is by or against the government.

b) Unilateral appointment of Arbitrators is permissible as per the legislative scheme of the Arbitration Act. There is a distinction between 'ineligibility' and 'unilateral' appointment of arbitrators. As long as an arbitrator nominated by a party is eligible under the Seventh Schedule of the Act, the appointment (unilateral or otherwise), should

be permissible. It is only in cases of a complete lack of consensus that the court should exercise its power under Section 11(6) of the Arbitration Act to appoint an independent and impartial arbitrator as per Section 11(8) read with Section 12 and 18 of the Arbitration Act. At the appointment stage, the scope of judicial intervention is otherwise extremely narrow.

c) The independence and impartiality of the arbitrator must be examined within the statutory framework of the Arbitration Act, particularly Section 18 read with 12(5). Public Law constitutional principles should not be imported to arbitration proceedings particularly at the threshold stage of Section 11.

.....J
[HRISHIKESH ROY]

NEW DELHI;
NOVEMBER 08, 2024

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal Nos. 9486-9487 of 2019

Central Organisation for Railway Electrification ....Appellant(s)

Versus

M/s ECI SPIC SMO MCML (JV) A Joint Venture Company ...Respondent(s)

With

Special Leave Petition (C) No. 15936 of 2020

With

Special Leave Petition (C) No. 6125 of 2021

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With

Diary No.7086 of 2024

And With

Diary No.13670 of 2024

J U D G M E N T

PAMIDIGHANTAM SRI NARASIMHA, J.

Contents

A. Introduction

1. The issue before us is whether the appointment process under an arbitration agreement, which allows a party who has an interest in the dispute to unilaterally appoint a sole arbitrator or curate a panel of arbitrators and mandate that the other party select their arbitrator from the panel, is valid in law. Prior to the 2015 Amendment to Section 12 of the Arbitration and Conciliation Act, 1996[1], courts permitted such unilateral constitution of arbitral tribunals by one party. However, post amendment, judgments oscillated between negative and conditional affirmations. This Constitution Bench is called upon to clarify the correct position, essential for dispelling uncertainty. The argument against such an appointment process is based on Sections 12(5) and 18 of the Act, as well as on public law considerations such as equal treatment of parties under Article 14, unfair and unreasonable procedure, and non-arbitrariness.

2. I have considered it necessary to locate the obligations of the parties to constitute an independent and impartial arbitral tribunal within the Indian Contract Act, 1872,[2] and the Arbitration Act, and not to apply public law principles evolved in constitutional and administrative laws. This is to ensure party autonomy, coupled with minimal judicial intervention, a foundational principle of dispute resolution through arbitration. When parties choose arbitration over Court proceedings as an exception under Section 28 of the Contract Act, they are under a duty to constitute an independent and impartial tribunal as an effective substitute, failing which the arbitration agreement will be void as opposed to public policy under Section 23 of the Contract Act. This obligation is the Second Principle that governs arbitration. Whether the agreement is compliant with the duty to constitute an independent and impartial

[1] Hereinafter “the Act” or “Arbitration Act”.
[2] Hereinafter “the Contract Act”.

tribunal and not opposed to the public policy effecting access to justice is always determined by the Court. This is the third principle. There is a clear statutory incorporation of these three principles in the Contract Act and the Arbitration Act. I believe that enduring answers to the questions before this Constitution Bench will lie in the balance between these principles.

2.1 Enquiry into disputes relating to legality and propriety of a contractual clause enabling unilateral appointment of arbitral tribunal arises when an application under Section 11(6) for appointment or under Section 14 of the Arbitration Act for substitution are brought before the Court. It is at this stage that the Court will examine the arbitration clause to ensure independence and impartiality. It will be impermissible for the court to intervene at a stage prior to that, to declare agreements to be void as an advanced ruling. This is to ensure party autonomy, particularly when the Arbitration Act itself enables parties to waive certain mandatory provisions such as Section 12(5) of the Arbitration Act.

B. Access to Justice

3. Access to justice constitutes the very foundation of democratic governance, serving as the linchpin of a fair and equitable society. Our Constitution, in its wisdom, establishes a comprehensive judicial architecture, encompassing the Supreme Court, the High Courts, and subordinate courts as public law and ordinary civil/criminal remedies to safeguard this inalienable right. Furthermore, specialised tribunals and commissions are constituted to adjudicate specific disputes, leveraging expertise and facilitating expeditious resolution, thereby guaranteeing swift and effective justice to all. It is imperative that these judicial remedies are effective. In fact, *effectiveness of judicial remedies* is a constitutional mission, and it is always a *work in progress* for the

Supreme Court to ensure that the remedies are impartial, readily accessible, financially viable, swiftly administered, and comprehensively tailored.

4. Beyond the realm of public law and ordinary civil/criminal remedies, as indicated herein above, parties to a dispute may elect to resolve their differences through mutually agreed procedures, crystallised in the form of contractual agreements. It is permissible in law to have such alternative dispute resolution mechanisms through contract. Section 28 of the Contract Act protects these alternative dispute resolution agreements through arbitration between contesting parties, fostering an environment conducive to expeditious and amicable dispute resolution.

C. Arbitration as Substitute Dispute Resolution

5. The Arbitration and Conciliation Act, 1996 provides a simple, efficient, cost-effective, confidential, and a fair dispute resolution remedy by empowering the parties to choose their arbitrators and also the procedure for conduct of the arbitral proceedings. Recognising party autonomy, Section 5[3] of the Act restrains judicial authorities from intervening with the arbitral remedy except as provided in the Act. The mandate of Section 5 is reflected in a number of judicial decisions of this Court, enabling easy access to arbitration by merely examining the existence of an arbitration agreement between the parties, and at the same time refraining from interfering with the arbitral award on grounds other than manifest arbitrariness or against public policy.[4]

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[3] Section 5 of the Act reads:

> "*5. 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*."

[4] *Vidya Drolia v. Durga Trading Corporation*, (2021) 2 SCC 1; *M/s Arif Azim Co. Ltd. v. M/s Aptech Ltd.*, (2024) 5 SCC 313; *SBI General Insurance Co Ltd v. Krish Spinning*, 2024 SCC OnLine SC 1754 on minimal judicial intervention.

6. *Two inviolable values of Arbitration, party autonomy and an independent and impartial Arbitral Tribunal:* Two important values are inviolable for arbitration to be a viable, effective, and at the same time, credible alternative dispute resolution remedy; they co-exist in the duality of freedom and duty. They are the freedom to contract, constitute, and channel arbitration proceedings, i.e., party autonomy on the one hand, and the duty towards constituting an independent and impartial arbitral tribunal on the other. These values are independent, yet interdependent for a credible and effective dispute resolution.[5]

7. With this introduction, I will now examine the following issues in detail;

(i) Party autonomy, as recognised and incorporated in the scheme of the Act;

(ii) Constituting an independent and impartial arbitral tribunal, which obligation of parties is distinct from the duty of the arbitrator to be unbiased and neutral;

(iii) The obligation of the parties is founded on contract and public policy considerations, without which agreements are void and unenforceable in law;

(iv) Apart from the obligations on the parties, the Contract Act and Arbitration Act empower the courts to ensure constitution of an independent and impartial arbitral tribunal;

(v) The determination as to whether an arbitral tribunal is independent and objective is examined by the court only when it takes up an application under Section 11(6) or Section 14 of the Arbitration Act.

[5] These are also recognised as fundamental principles of arbitration law. See *Centrotrade Minerals & Metals Inc v. Hindustan Copper Ltd.*, (2006) 11 SCC 245; *Union of India v. Uttar Pradesh Bridge Corporation Limited*, (2015) 2 SCC 52.

D. Party autonomy

8. Arbitration is an *agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them*, as provided under Section 7(1) of the Act. Party autonomy is a product of freedom to contract and recognises the freedom of parties to determine the terms of contract. It is said to be the "*brooding and guiding spirit in arbitration*" and the "*grund norm*" of arbitration.[6] Party autonomy is ingrained as a fundamental principle in the Act. The freedom to enter into such an agreement belongs to the parties[7] and this will also include the freedom to determine the law governing the arbitration agreement.[8]

8.1 *Second*, parties are free to determine composition of the arbitral tribunal, such as the number of arbitrators[9], the nationality of the arbitrator[10], the procedure for appointment[11], the grounds of challenge, including waiver of challenge[12], the procedure for challenging an appointed arbitrator[13], terminate the mandate of an arbitrator[14], and even the consequences of substitution of arbitrator[15].

8.2 *Third*, the parties have the autonomy to determine the conduct of arbitral proceedings, the procedure to be followed by the arbitral tribunal in the conduct of proceedings[16], the place of arbitration[17], the date of commencement of arbitral proceedings[18], the language to be used in the arbitral proceedings[19], the time for

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[6] *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*, (2016) 4 SCC 126.
[7] *Cox and Kings v. SAP India Pvt Ltd*, (2024) 4 SCC 1, para 180.
[8] *Bharat Aluminium Co.* (supra).
[9] Section 10 of the Act, provided that it is not even number.
[10] Section 11(1).
[11] Section 11 (2), subject to Section 11(6).
[12] Section 12, including 12(5) proviso.
[13] Section 13(1), subject to Section 13(4)
[14] Section 15(1)(b).
[15] Section 15(3) and 15(4).
[16] Section 19(2).
[17] Section 20(1).
[18] Section 21.
[19] Section 22(1).

submitting statements of claim and defence[20], including amendments[21], whether the arbitral tribunal will conduct oral hearings or proceed on the basis of documents and other material[22], in cases of default by a party to communicate statement of claim or defence, or failure to appear at an oral hearing or produce documentary evidence[23], and regarding the appointment of experts by the arbitral tribunal[24].

8.3 *Fourth*, the parties to the arbitration agreement have the freedom to determine the procedure as well as the termination of arbitral proceedings. This will include the determination of the rules applicable for the resolution of the dispute[25], whether the decision will be made by a majority of the members in an arbitral tribunal with more than one arbitrator[26], extension of time limit for the completion of proceedings[27], fast track procedures[28], grant of *pendente lite* and pre-reference interest[29], and whether the arbitral tribunal can make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the award[30].

8.4 *Fifth*, the parties can challenge and/or apply for the enforcement of the award. Chapter VII and Chapter VIII set out the recourse available to parties after the arbitral award, for it to be set aside by the courts[31], the finality and enforceability of the award[32], appeals[33], and miscellaneous provisions[34].

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[20] Section 23(1).
[21] Section 23(3).
[22] Section 24(1).
[23] Section 25.
[24] Section 26.
[25] Section 28.
[26] Section 29.
[27] Section 29A(2).
[28] Section 29B.
[29] Section 31(7)(a).
[30] Section 33(4).
[31] Section 34.
[32] Sections 35 and 36.
[33] Section 37.
[34] Sections 38 to 43.

E. Obligations of parties to the Arbitration Agreement to constitute an independent and an impartial Arbitral Tribunal

9. I will now examine the principles that impinge upon the freedom to contract and limit of party autonomy. Before that, a necessary distinction needs to be drawn for clarity and certainty.

9.1 *Distinct duties of Arbitrators and Arbitrating Parties*. There are two distinct obligations. The first is the obligation of the parties to the agreement, and the second is the neutrality and objectivity that an arbitrator must maintain. The obligations on the parties to the arbitration agreement to constitute an independent and impartial arbitral tribunal is distinct from the objectivity and impartiality that an arbitrator(s) must himself maintain. The foundation of the former is within the statutory framework, coupled with certain public policy considerations. The latter is simply the duty to act judicially, it is not superimposed by any statute or public policy, but arises because of the very nature of the calling, i.e., to judge what is right and what is wrong. Though the constitution of the arbitral tribunal is inextricably connected to the agreement between the parties, core duties of the arbitrator(s) in deciding the case is independent of the contract. The Arbitration Act provisions grounds to challenge appointment of an arbitrator at various stages, including after making of the award. The issue with which we are concerned is not about the arbitrator or the award of the arbitral tribunal, but about the legality of the contractual arbitration clause that enables one of the parties to unilaterally constitute the arbitral tribunal. Clarity about the issue arising for consideration is necessary to focus on the right questions that we must ask.

10. Therefore, to understand the question relating to the legality of the contractual clause, we must get to the first principles that govern arbitration agreements, which in turn takes us to the first principles of law of contract.

11. *Freedom of Contract and its limitations under Contract Act*. The foundation of the law of contract is in the freedom to contract and its enforceability in law. Sections 2(a), (b), and (d), of the Contract Act define 'proposal', 'promise' and 'consideration', and reflect the autonomy of the parties declaring the terms and conditions and reciprocal promises. Section 2(e) provides that "Every promise and every set of promises, forming the consideration for each other, is an agreement". Agreements are contracts if they are made by the free consent of parties[35], and free consent[36] exists when it is not caused by coercion[37], undue influence[38], fraud[39] and misrepresentation[40]. Furthermore, agreements attain the status of contracts only if they are made for lawful consideration and with a lawful object.[41] The consideration or object of an agreement is lawful only when it is not opposed to public policy. It is here that the duty and obligation of the Court arises as it is the exclusive province of the Court to decide if an agreement is in consonance with public policy or not. This position is clear from the text of Sections 10 and 23 of the Contract Act, which are extracted hereinbelow for ready reference;

> *"**10. What agreements are contracts**.—All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.*
>
> *Nothing herein contained shall affect any law in force in India and not hereby expressly repealed by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents."*

[35] Section 10 of the Contract Act
[36] Section 14 of the Contract Act.
[37] Section 15 of the Contract Act
[38] Section 16 of the Contract Act
[39] Section 17 of the Contract Act
[40] Section 18 of the Contract Act
[41] Section 23 of the Contract Act.

> *"**23. What considerations and objects are lawful, and what not.**—The consideration or object of an agreement is lawful, unless—*
> *it is forbidden by law; or*
> *is of such a nature that if permitted, it would defeat the provisions of any law; or*
> *is fraudulent; or*
> *involves or implies injury to the person or property of another; or*
> *the Court regards it as immoral, or opposed to public policy.*
> *In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."*

12. *Public Policy Consideration to Constitute an Independent Tribunal.* Under the Contract Act, public policy considerations limit contractual freedom to the extent of declaring an agreement void when the court regards it as opposed to public policy.[42] The power of determining the meaning and scope of public policy is of the court.[43]

13. The public policy principle has been interpreted to mean that parties to a contract cannot agree to terms or to an object which have the tendency to harm the public good and public interest.[44] The freedom of contract is restricted by taking into account the protection and promotion of public welfare, and the larger interest of the community, which must be beyond the parties contracting freedom.[45] Courts in India have relied on and applied the public policy principle in the following broad categories of cases: i) where the object is injurious to good government in domestic and foreign affairs; ii) whose object interferes with the proper administration of justice; iii) whose

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[42] Section 23 of the Contract Act.
[43] *Indian Financial Association of Seventh Day Adventists v. M.A. Unneerikutty*, (2006) 6 SCC 351, para 17.
[44] *Gherulal Parekh v. Mahadeodas Maiya*, (1959) Supp 2 SCR 406, para 23; *Central Inland Water Transport Corpn Ltd v. Brojo Nath Ganguly*, (1986) 3 SCC 156, para 92; *Rattan Chand Hira Chand v. Askar Nawaz Jung*, (1991) 3 SCC 67, para 17; *Indian Financial Association of Seventh Day Adventists* (supra), para 19; *Assistant General Manager v. Radhey Shyam Pandey*, (2020) 6 SCCC 438, para 72.
[45] Pollock and Mulla, *The Indian Contract and Specific Relief Acts*, vol 1 (14th edn, Lexis Nexis 2013), 524.

object is injurious to marriage and which promotes sexual immorality; and iv) agreements in restraint of trade.[46]

14. *The limits of public policy considerations for commercial transactions and inapplicability of unconscionability.* One of the most significant instances wherein our courts have travelled beyond the above categories of public policy restrictions on contractual freedom is in the case of ***Central Inland Water Transport v. Brojo Nath Ganguly***[47] where Court expounded on 'unconscionability' as a facet of public policy. This ground is particularly relevant for our analysis as Mr. Banerji has pointed out several US cases wherein arbitration agreements that allow one party to control the pool of potential arbitrators were held to be unconscionable. Therefore, it is necessary to set out the contours of unconscionability under Indian contract law.

15. Through the doctrine of unconscionability, this Court in *Brojo Nath Ganguly* (supra) introduced inequality of bargaining power as a ground to refuse enforcement of unreasonable and unfair contracts that shock the conscience of the court. It has envisaged for this principle to apply in cases where the weaker party does not exercise meaningful choice and must agree to a standard form of contract.[48] However, the Court has also circumscribed the applicability of unconscionability and held that it will not apply when parties have equal or almost equal bargaining power, such as in commercial transactions and contracts between businessmen.[49] The inapplicability of 'unconscionability' to commercial contracts has been reiterated by this Court in the

[46] ibid, 524-566; *P. Rathinam v. Union of India*, (1994) 3 SCC 394, para 93.
[47] (1986) 3 SCC 156
[48] *Brojo Nath Ganguly* (supra), paras 89, 92-93.
[49] ibid, para 89.

context of arbitration agreements.[50] In view of the settled position, I cannot accept the submissions of Mr. Banerji on this issue.

16. *Section 28 of the Contract Act and Access to Justice*. Access to justice is a constitutional principle. It provides remedies for redressal of grievances arising out of violation of rights and dereliction of duties. The remedies through ordinary civil courts and tribunals comprise credibility, efficiency, objectivity, expeditious disposal, comprehensiveness as well as financial viability. Prohibiting restraint from accessing these remedies is a public policy.

17. Section 28 of the Contract Act secures access to justice by declaring that agreements in restraint of public law remedies are void. Section 28 is extracted hereinbelow for ready reference;

> "***28. 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, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or*
> *(b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to the extent.*
> *Exception 1.—**Saving of contract to refer to arbitration dispute that may arise.—**This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.*

[50] *S.K. Jain v. State of Haryana*, (2009) 4 SCC 357, para 8; *ICOMM Tele Limited v. Punjab State Water Supply and Sewerage Board*, (2019) 4 SCC 401, paras 13-14.

> *Exception 2.—**Saving of contract to refer questions that have already arisen.—**Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration*."

Limitations on agreements which restrain access is necessary to secure the constitutional mandate of justice to all by providing access to public law and ordinary civil/criminal remedies from being void. Exceptions 1 and 2 to Section 28 are arbitration agreements and enable substituted dispute resolution, fostering an environment conducive to expeditious and amicable resolution.

18. Access to justice, as provided through ordinary courts and tribunals, can be substituted through other systems and forums. As the substitution is only a replacement of the forum, the essentiality of remedy such as credibility, efficiency, etc. must continue to inhere in the substituted forum as well. In public law remedies, this issue was considered when administrative tribunals were constituted for the first time to substitute ordinary remedies. It was upheld subject to the condition that the tribunals are worthy successors, meaning that they must have the necessary credibility, efficiency and other features that are integral to judicial remedy.

19. Similarly, arbitration being a substituted remedy contracted by the parties, it must also comprise the basic features of a judicious remedy, the most important being an independent and impartial decision-making forum.

20. The question whether the substituted forum continues to inhere the essentiality of a remedy, in order to be compliant with the larger principle of access to justice, is for the court to examine. The Arbitration Act incorporates this principle of public policy

in Sections 11, 12 as well as Section 34. It is in this context that I will now proceed to examine Section 12 of the Act.

F. Section 12, subsequent to 2015 Amendment

21. After the amendment, Section 12 of the Act reads:

> "***12. Grounds for challenge.***—*(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,—*
> *(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and*
> *(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.*
> *Explanation1.—The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.*
> *Explanation 2.—The disclosure shall be made by such person in the form specified in the Sixth Schedule.*
> *(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.*
> *(3) An arbitrator may be challenged only if—*
> *(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or*
> *(b) he does not possess the qualifications agreed to by the parties.*
> *(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.*

(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."

22. *Two categories of challenge under Section 12.* The effect of the 2015 Amendment is that there are now two separate categories for the parties to challenge the appointment of an arbitrator. First, a challenge under Section 12(3) to an appointed arbitrator based on justifiable doubts regarding his independence and impartiality, by using the procedure under Section 13. While Section 12(3) itself remains unamended, the insertion of Explanation 1 in Section 12(1), read with the Fifth Schedule, now enlists the circumstances that give rise to justifiable doubts as to an arbitrator's independence and impartiality. The Fifth Schedule contains 34 entries that have been adopted from the Red and Orange Lists of the IBA Guidelines. A written disclosure on these grounds must be made in the form provided in the Sixth Schedule.[51]

22.1 The second category is under Section 12(5) which declares certain persons to be 'ineligible' to be appointed as arbitrators. These ineligibilities are enlisted in the Seventh Schedule. The provision itself stipulates that such ineligibility is notwithstanding any prior agreement to the contrary. In these situations, the ineligibility of the person to act as an arbitrator is a matter of law and goes to the root of their appointment[52]. As they are *de jure* unable to perform their function, their mandate automatically terminates under Section 14(1)(a), and the appointment need not be

[51] *HRD Corporation (Marcus Oil and Chemical Division) v. GAIL (India) Ltd.*, (2018) 12 SCC 471, paras 11-12; *Chennai Metro Rail Ltd v. Transtonnelstroy Afcons (JV)*, (2024) 6 SCC 211, para 25.
[52] *Bharat Broadband Network Limited* v. *United Telecoms Limited,* (2019) 5 SCC 755.

challenged before the arbitral tribunal under Section 13. The parties can apply to the court under Section 14(2) for a decision on the termination of the arbitrator's mandate and appointment of a substituted arbitrator.[53] The only way for parties to by-pass such ineligibility, as provided in the proviso, is to enter into an express agreement in writing, subsequent to the disputes having arisen, to waive the applicability of Section 12(5).[54]

23. The difference between these categories is important to bear in mind. In the former situation, there is no bar to the appointment itself, but the appointment may later be challenged before the arbitral tribunal. On the other hand, in the latter situation, the Act places an express bar on the appointment of certain 'ineligible' persons as arbitrators, notwithstanding any prior agreement to the contrary. Their appointment is invalid from the very beginning, and in the application before the court under Section 14, the only question is whether the arbitrator falls under one of the categories of the Seventh Schedule and whether there is an agreement waiving the applicability of Section 12(5) in accordance with the proviso.[55]

24. At this stage, it may be relevant to note that the entries of the Seventh Schedule are common with the first 19 entries of the Fifth Schedule. This Court in *HRD v. GAIL* (supra) has noted that the purpose of such overlapping entries is to ensure that the disclosure under the Sixth Schedule encompasses disclosure on entries contained in the Seventh Schedule. Otherwise, the parties will be put at a disadvantageous position as they will not have access to such information.[56] Since this is the purpose of identical entries, it follows that if any of the entries in the Seventh Schedule applies, then the consequence under Section 12(5), rather than Section 12(1) read with Section 12(3), will ensue.

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[53] ibid, paras 15-17; *HRD Corporation* (supra), paras 11-12; *Chennai Metro Rail* (supra), para 26.
[54] ibid.
[55] *Chennai Metro Rail* (supra), paras 29-33.
[56] *HRD* (supra), para 17.

25. *Public policy consideration in Section 12(5).* The neutrality, independence, impartiality, integrity, and objectivity of an arbitral tribunal are matters of public policy, and the validity of arbitration agreements must be tested against this touchstone. The object and purpose of Section 12(5) is to secure the independence and impartiality of the arbitral tribunal by placing a restriction on the choice of the parties in appointing certain persons as arbitrators, who are declared as “ineligible” under the Seventh Schedule. Section 12 is therefore a statutory incorporation of the public policy principle of access to justice that I have delineated hereinabove, and the Fifth and Seventh Schedules enlist the situations when the appointment of certain persons could and would conflict with the independence of the tribunal. The courts can examine whether an appointment procedure accords or violates this provision. Therefore, the court will be guided by Section 12 of the Act, read with the Fifth and Seventh Schedules, to determine whether arbitration agreements providing for unilateral appointments and panel appointments are opposed to the public policy duty on the parties to appoint an independent tribunal.

26. The next important question is the stage at which the court will exercise its power and jurisdiction to examine whether the arbitration agreement is in consonance with Section 12 and the broad public policy principle of constitution of an independent and impartial tribunal. I will now consider this question.

G. Power of the Court to Constitute an Independent Tribunal and the stage at which the power is exercised

27. Power of the Court to ensure that the agreement is not only independent and impartial but also seems independent and impartial.

27.1 When a party to the arbitration agreement alleges that the core principle of the remedy is compromised in the procedure prescribed under the agreement by filing an

application under Section 11(6), it is at this stage that the court will examine it. The provisions of Section 12, coupled with the Fifth and Seventh Schedules, will come to the aid of the court in coming to the conclusion on whether the arbitral tribunal maintains the sanctity of a credible remedy.

28. *Section 11(8):* Section 11(8) of the Arbitration Act recognises the power of the court to appoint an arbitrator de hors the arbitration agreement to secure the independence and impartiality of the arbitral tribunal, and consequently to ensure that public policy is protected. Sections 11(6) and 11(8) reads:

> "***11. Appointment of arbitrators –***
>
> *…*
>
> *(6) Where, under an appointment procedure agreed upon by the parties,—*
>
> *(a) a party fails to act as required under that procedure; or*
>
> *(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or*
>
> *(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,*
>
> *a party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.*
>
> ***
>
> *(8) The Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court, before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of section 12, and have due regard to—*
>
> *(a) any qualifications required for the arbitrator by the agreement of the parties; and*
>
> *(b) the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.*"

29. Section 11(8) comes into play when the court is required to secure the appointment of the arbitrator on an application by the parties under sub-sections (4), (5), or (6). We are concerned with sub-section (6) here, as it applies when the parties have determined an appointment procedure but it fails due to the failure of one of the parties, the appointed arbitrators, or the entrusted arbitral institution. In such cases, the court will appoint the arbitrator upon an application from the parties, and while doing so, it *shall have due regard to* the qualifications required of the arbitrator by the agreement and *other consideration as are likely to secure the appointment of an independent and impartial arbitrator*, as provided under sub-section (8).

30. While the general rule is that the court may adhere to the appointment procedure in the agreement in view of party autonomy, it is not bound by this procedure.[57] Rather, Section 11(8) allows the Court to weigh other considerations regarding the qualifications of the arbitrator under the agreement, or to secure the independence and impartiality of the arbitrator, and in that light, appoint a person as an arbitrator by deviating from the procedure in the agreement.[58] When "*there is material to create a reasonable apprehension that the person mentioned in the arbitration agreement as the arbitrator is not likely to act independently or impartially… then the Chief Justice or his designate may, after recording reasons for not following the agreed procedure for referring the dispute to the named arbitrator, appoint an independent arbitrator in accordance with Section 11(8) of the Act.*"[59]

31. In such an *exceptional* situation, the court can deviate from the appointment procedure provided in the agreement *on the basis of material* that indicates that the

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[57] *Indian Oil Corporation v. Raja Transport Pvt Ltd*, (2009) 8 SCC 520, para 45; *North Eastern Railway v. Tripple Engineering Works*, (2014) 9 SCC 288, paras 5-8.
[58] *Northern Railway Administration, Ministry of Railway, New Delhi v. Patel Engineering Company*, (2008) 10 SCC 240, paras 12-14; *North Eastern Railway* (supra), paras 5-8.
[59] *Indian Oil Corporation* (supra), para 45. Also see *Ace Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd.,* (2007) 5 SCC 304, para 20; *Uttar Pradesh State Bridge Corporation* (supra), para 16.

named arbitrator is not likely to act independently or impartially. It must also *record the reasons* for the same.[60] The following principles laid down in *Indian Oil Corporation* (supra) summarise the position:

> *"48. In the light of the above discussion, the scope of Section 11 of the Act containing the scheme of appointment of arbitrators may be summarised thus:*
>
> *…*
>
> *(vi) The Chief Justice or his designate while exercising power under sub-section (6) of Section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause.*
>
> *(vii) If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else.*"

32. Therefore, the power of the court to ensure the appointment of a neutral tribunal is not restricted to Section 12(5). Rather, Section 12(5) guides the court when it examines whether an arbitration agreement violates public policy of constituting an independent and impartial tribunal. In such cases, the court will not adhere to the procedure to the agreement, as the same becomes unenforceable, and will proceed to appoint an independent arbitrator. Further, Section 11(8) reifies and concretises the power of the court as it enables the court to undertake an examination on a case-to-

[60] See *Denel (Proprietary) Limited v. Bharat Electronics Limited*, (2010) 6 SCC 394; *Bipromasz Bipron Trading SA v. Bharat Electronics Ltd.*, (2012) 6 SCC 384; *Denel (Proprietary) Limited v. Ministry of Defence*, (2012) 2 SCC 759 as examples of cases where the named arbitrator was not appointed on the basis of material that raised justifiable doubts regarding his independence and impartiality. Also see *Rajasthan Small Industries Corporation Limited* (supra), para 22 as an example for a case where the Court upheld the appointment of the named arbitrator as there was no material to show that a party has reason to believe that the arbitrator had not acted independently or impartially.

case basis, based on the material and the evidence in each case, whether the independence or impartiality of the arbitrator is compromised.

33. What must be noted is that the court exercises the discretion under Section 11(8) while adjudicating on the facts in each case. However, the provision does not, in any manner, impose a blanket prohibition that is justifiable on a public policy consideration against unilateral appointments or appointments from a panel maintained by one party. All it does is that it leaves it open for the parties to the agreement to apply to the court if there are concerns regarding the neutrality or objectivity of arbitrators appointed through the agreed upon procedure. The court will then examine the facts, circumstances, material, and evidence in every application before it, to determine whether a case is made out to appoint an arbitrator de hors the agreement, but such ruling will be specific to that case rather than a declaration prohibiting such agreements altogether.

34. Assertions that a person's freedom to contract is grounded only in common law and statute, are ostensible at best. The freedom of speech and expression engrafted in Article 19(1)(a) of the Constitution and significantly, the freedom to carry on occupation, trade and business Article 19(1)(g) read with the constitutional right to property under Article 300A, do provide a substantial foundation for a constitutional basis for the '*freedom to contract*'. The statutory framework governing contract laws, statutory restrictions on what contracts are lawful, what contracts are void and what considerations are lawful do have significant constitutional moorings. Sections 23 to 30 of the Contract Act reflect constitutional colours, when they declare that agreements in restraint of trade, agreements in restraint of legal proceedings, agreements restraining marriage etc are void. Similarly, this Court has employed constitutional

tools from Part III and Part IV of the Constitution to breathe fresh life into the term "*public policy"* in the context of Section 23 of the Contract Act.[61]

35. This constitutional re-conceptualisation of contract law is not without relevance in the case. The freedom to contract out of traditional court based remedies and to opt for arbitral remedies is informed and regulated by constitutional considerations. To this end, what subject matters are arbitrable and how remedies are to be designed within the universe of arbitration, are informed not only by considerations of freedom to contract, but also a larger constitutional responsibility to provide access to justice. 'Party autonomy' encapsulated within a larger freedom to contract must tempered with a person's right to access justice and corresponding duty on the State to provide access to justice.

36. Access to justice in this context is not a mere avenue for dispute redressal. It means access to timely, efficacious, and equitable system for dispute resolution. Arbitration though is often referred to as an *alternative* form of dispute resolution, it has, in practice evolved into a substituted form of dispute resolution. Therefore, arbitral remedies too must withstand constitutional scrutiny and provide access to arbitral tribunals that are not just independent and impartial, but also seem independent and impartial. In this scheme, it matters not whether the tribunal and its composition is decided by the State, PSUs, other State actors, or private entities. The underlying principle is that when party autonomy is exercised to appoint members to the arbitral tribunal, members who are so appointed are not just independent, but must also seem to be independent.

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[61] *Brojo Nath Ganguly* (supra); *Delhi Transport Corporation v. DTC Mazdoor Congress*, (1991) Supp (1) SCC 600.

37. This constitutional concern for access to justice which is not only in fact unbiased and fair, but also seems and appears unbiased and fair, is far more relevant to people who do not at present find place in the arbitration universe that is predominantly populated by big businesses, the mega-affluent contractors, and the millionaires. Access to justice, and by implication effective arbitral remedies are equally relevant for "*the common man, for the poor and the humble, for those who have businesses at stake, for the "butcher, the baker and the candlestick maker*"".[62]

H. Precedents of this Court on Section 12(5) after its amendment

38. The substantial argument before us is that a unilateral or panel-based appointment process is invalid under Section 12(5) read with the Seventh Schedule. I will now deal with the case-law on Section 12(5), to examine how this Court has interpreted this provision and the public policy consideration to declare certain kinds of arbitration agreements as being violative of Section 12(5). For the sake of brevity and focus, the principles and main holding of each judgment may be stated as follows:

I. First, it is important to note that Section 12(5) of the Act is a mandatory and non-derogable provision, which overrides the arbitration agreement between the parties that prescribes a person who is ineligible to act as an arbitrator. However, the proviso enables parties to waive its applicability through an express agreement in writing between them, subsequent to the dispute.[63]

II. In *Voestalpine*[64], a division bench of this Court upheld the validity of an arbitration agreement that mandates appointment of arbitrators from a panel maintained by the Delhi Metro Rail Corporation (DMRC). The Court held that a

[62] *Bidi Supply Co v. Union of India*, 1956 SCR 267.
[63] *Haryana Space Application Centre v. Pan India Consultants Private Limited*, (2021) 3 SCC 103, para 18.
[64] *Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation*, (2017) 4 SCC 665.

panel comprising serving or retired engineers of government departments or PSUs does not fall foul of the Fifth or Seventh Schedule as they do not have any connection with DMRC and bias or real likelihood of bias cannot be attributed to such highly qualified and experienced persons.[65] Rather, the purpose of empanelling them is due to their technical expertise.[66] Nevertheless, the Court held that to inspire confidence in the panel, DMRC must not further limit Voestalpine's choice from the panel to a list of 5 persons prepared by it. Voestalpine and the two appointed arbitrators must have full freedom to make their choice from the entire panel.[67] Further, the Court also observed that the panel must be broad-based and comprise members of other professions and expertise such as engineers from the private sector, judges, lawyers, accountants, etc.[68]

III. In *TRF Limited*,[69] a three-judge bench of this Court considered the validity of an arbitration clause which provided that the Managing Director of the respondent would act as the arbitrator or nominate the sole arbitrator. The issue before the Court was whether the Managing Director, who is ineligible to act as an arbitrator under Section 12(5) read with the Seventh Schedule, can nominate the sole arbitrator.[70] The Court answered this question in the negative by relying on various judgments on delegation of authority and the maxim "*qui facit per alium facit per se*" (what one does through another is done by oneself).[71] Thus, the Court extended the ineligibility to act as an arbitrator under

[65] ibid, paras 24 and 25.
[66] ibid, para 26.
[67] ibid, paras 27 and 28.
[68] ibid, paras 29 and 30.
[69] *TRF Limited v. Energo Engineering Projects Limited*, (2017) 8 SCC 377.
[70] ibid, paras 50, 53.
[71] ibid, paras 50-54.

Section 12(5) to also include the ineligibility to appoint the sole arbitrator. However, while doing so, it did not test whether the nominee arbitrator is himself ineligible under Section 12(5), nor did it source its decision in any other provision of the statute that restricts the authority of a person who is ineligible to be an arbitrator to appoint the arbitrator. Further, no reasonable apprehension or justifiable doubt was raised regarding the nominated arbitrator's independence and impartiality to warrant an appointment by the court de hors the arbitration agreement under Section 11(8) of the Act.

IV. Subsequently, in *Perkins*,[72] the Court interpreted and relied on the ruling in *TRF* (supra) while considering an arbitration agreement where the Chairman and Managing Director (CMD) of the respondent could appoint the sole arbitrator. It held that even if the arbitration agreement does not provide for the CMD to act as an arbitrator, as was the case in *TRF* (supra), he remains incompetent to nominate the arbitrator, which stems from his interest in the outcome of dispute, thereby creating a possibility of bias.[73] The Court held that the ineligibility to appoint is a result of operation of law, as a person who is ineligible to act as an arbitrator must not have an exclusive role in charting the course of dispute resolution by appointing the arbitrator.[74] However, in cases where both parties can nominate an arbitrator of their choice, the advantage to any one party would get counter-balanced.[75] The problems in the reasoning in *TRF* (supra), i.e., the absence of a statutory source for ineligibility to appoint, and justifiable doubts regarding the nominated arbitrator's independence and impartiality to warrant

[72] *Perkins Eastman Architects DPC v. HSCC (India) Limited*, (2020) 20 SCC 760.
[73] ibid, para 20.
[74] ibid, para 21.
[75] ibid.

a court appointment de hors the agreement, are not addressed even in *Perkins* (supra).

V. A three-judge bench in *CORE*[76] interpreted the arbitration clause 64(3)(b) of the GCC in railway contracts, which provides for appointment of a three-member arbitral tribunal from a panel of retired officers maintained by the Railways. The General Manager, Railways would send a list of at least four names, from which the other party must suggest at least two names as its nominee. The General Manager would then appoint one of these two persons as the contractor's nominee, and appoint the balance arbitrators, including the presiding arbitrator, from within or outside the panel. The Court held that appointment of arbitrators must be as per the arbitration agreement,[77] and that appointment from a panel of retired officers is not prohibited under Section 12(5) of the Act.[78] It held that the rulings in *TRF* (supra) and *Perkins* (supra) will not apply to the present case as the advantage accruing to the Railways through appointing their arbitrator is counter-balanced by the contractor's right to choose two names from the list, out of which the General Manager will appoint at least one of them as the contractor's nominee.[79] There are three noteworthy aspects of this reasoning: *first*, that the Court relies on *Parmar Construction* (supra) and *Pradeep Vinod Construction* (supra) while ruling on adherence to the appointment procedure in the agreement, but does not consider that these cases interpreted Clause 64 of the GCC prior to the amendment in law and the arbitration clause pursuant

[76] *Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV)*, (2020) 14 SCC 712. Hereinafter referred to as "*CORE*".
[77] ibid, para 22. The Court relied on *Union of India v. Parmar Construction Company*, (2019) 15 SCC 682 and *Union of India v. Pradeep Vinod Construction Co*, (2020) 2 SCC 464.
[78] ibid, para 26. The Court relied on *Voestalpine* (supra) and *Govt. of Haryana PWD Haryana (B and R) Branch v. G.F. Toll Road (P) Ltd*, (2019) 3 SCC 505.
[79] ibid, paras 37-38.

to the 2015 Amendment. *Second*, the Court does not deal with the prescriptions for a panel-based appointment that were set out in *Voestalpine* (supra) – that the other party must have freedom to make its choice from the complete panel rather than a limited list, and that the panel must be broad-based. The panel in *CORE* (supra) does not meet these criteria, but has been upheld by the Court. Further, *CORE* (supra) does not overrule or doubt *TRF* (supra) and *Perkins* (supra), but only differentiates its facts and in fact, relies on the counter-balancing exception set out in these judgments.

VI. In *Glock Asia-Pacific Limited v. Union of India*[80], the Court appointed an independent arbitrator under Section 11 as the arbitration agreement provided for a person ineligible under Section 12(5) read with clause 1 of the Seventh Schedule to act as the arbitrator. Subsequently, in *Lombardi Engineering Limited v. Uttarakhand Jal Vidyut Nigam Limited*[81], the Court cited and followed *Perkins* (supra) to appoint an independent arbitrator, as the arbitration agreement therein was similar to that in *Perkins* (supra).

39. This Court has also interpreted entries of the Fifth and Seventh Schedules of the Act, and has set out their contours in various cases. The following principles can be culled out from the judgments:

I. In *HRD v. GAIL* (supra), this Court held that a broad commonsensical approach must be adopted while interpreting the entries of the Schedules, such that they are not unduly enlarged or restricted.[82] It rejected the submission that an expansive view must be taken to remove even the remotest likelihood of bias

[80] (2023) 8 SCC 226.
[81] (2024) 4 SCC 341, see paras 85-91.
[82] *HRD v. GAIL* (supra), para 20.

since the grounds for challenge of an award have been narrowed after the 2015 Amendment.[83] Rather, it held that since the entries in these Schedules are based on the Red and Orange Lists of the IBA Guidelines, they must be interpreted as per the principles contained in these Guidelines. The standard to be adopted is that a reasonable third person who has knowledge of the relevant facts and circumstances would conclude that there is a likelihood of the arbitrator being influenced by factors other than the merits of the dispute.[84]

II. In *Jaipur Zila Dugdh Utpadak Sahkari Sangh v. Ajay Sales & Suppliers*[85] and in *Ellora Paper Mills v. State of M.P.*[86], this Court has held that the purpose of Section 12(5) and the Seventh Schedule is to ensure the neutrality, independence, and impartiality of the arbitral tribunal.[87] Further, in *Jaipur Zila* (supra), the Court held that the Seventh Schedule must be read as a whole, considering its object and purpose.[88]

III. This Court in *Chennai Metro Rail Ltd.* (supra) rejected a challenge to the arbitrator's eligibility under Section 12(5) on a ground that is not enumerated in the Seventh Schedule. Once the Parliament has devised a statutory scheme prescribing the *de jure* ineligibility of certain persons to act as an arbitrator, the Court must not deviate and add to these grounds, as it would create uncertainty in the arbitration process.[89]

40. After reviewing prior precedents and in view of what I have held about party autonomy, it can be said that the 2015 Amendment to Section 12, specifically the

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[83] ibid.
[84] ibid.
[85] (2021) 17 SCC 248.
[86] (2022) 3 SCC 1.
[87] *Jaipur Zila Dugdh* (supra), para 14.
[88] ibid, paras 16-17.
[89] *Chennai Metro Rail* (supra), para 41.

insertion of Section 12(5) and the Seventh Schedule, incorporates the overarching public policy consideration that binds the contracting parties to constitute an independent and an impartial arbitral tribunal as a credible and an effective substitute to ordinary courts and tribunals established to provide access to justice. In furtherance of this objective, the court will not be bound by the procedure for constitution of the arbitral tribunal in the arbitration agreement.

I. International Perspective

41. Having noted the perspective of this Court on the duty of the parties to appoint an independent tribunal after the 2015 Amendment, and before concluding, it is necessary to examine the international perspective on the issue. I must caveat that consideration of foreign laws and judgments of foreign jurisdiction do not have a direct bearing on the interpretation of our laws. At the most they grant us a perspective and nothing more. Further I will demonstrate that there is no single, universal standard on this issue; rather, each country has taken a different stance based on its own laws, policies, legal culture, and dispute resolution framework. Consequently, there is no uniform application or consistency in legal principles on this matter. Therefore, while foreign laws and precedents may provide insights, they should be referenced cautiously, acknowledging that differences in context may make direct reliance inappropriate.

42. *Legislative framework of certain foreign jurisdictions*. Internationally, party autonomy is highly valued in appointing arbitrators and composing arbitral tribunals. For example, the New York Convention[90] (Article V(1)(d)) permits refusal of award recognition if the tribunal's composition deviates from party agreement, underscoring

[90] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

the primacy of party autonomy. The UNCITRAL Model Law also upholds party autonomy as a core principle in tribunal composition. Similarly, Section 5[91] of Federal Arbitration Act of US accords primacy to appointment procedure as agreed to between the parties. The arbitration agreement must be in accordance with Section 2 which requires the same to be, "*valid, irrevocable, and enforceable, save upon such grounds as exists at law or in equity for the revocation of any contract.*" This has been used by US courts to source 'unconscionability' as a ground to test the validity of an arbitration agreement.[92]

43. Article 2 of Geneva Protocol on Arbitration Clauses[93] provides that "*the constitution of arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.*" Article 1028 of Code of Civil Procedure, Netherlands provides that in case the arbitration agreement gives one of the parties to the dispute a *privileged position* in appointing arbitrators, then, the other party may, despite the agreement, request the relevant court to appoint an arbitrator. Similarly, Section 1034 of German Code of Civil Procedure stipulates that if in the arbitration agreement, one of the parties has a *preponderant right* in so far as composition of the arbitral tribunal is concerned, thereby putting the other party at a *disadvantage*, then such latter party can request the court to appoint an arbitrator in

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[91] Section 5, Federal Arbitration Act. It reads as:

> Section 5. Appointment of arbitrators or umpire
> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

[92] *Perry v. Thomas*, 482 US 483 (1987); *Harold Allen's Mobile Home Factory Outlet, Inc. v. Butler,* 825 So.2d 779,783-85 (Ala. 2002)

[93] Geneva Protocol on Arbitration Clauses, Sept. 24, 1923, 27 L.N.T.S. 158.

derogation of the appointment procedure agreed upon. Article 15(2) of Spanish Arbitration Act, 2003, though enables the parties to freely agree on the procedure for the appointment of arbitrator, makes the same subject to an obligation to ensure that *there is no violation of principle of equal treatment*.

44. The Estonian Code of Civil Procedure, vide Section 721 also in similar terms provides that if in the arbitration agreement, one party has been given *economic or other advantage* in the formation of an arbitral tribunal which is *materially damaging* to the other party, such party may make a request to the court for the appointment.

45. Article 3, Annexure 1 of 'European Convention Providing a Uniform Law on Arbitration' states that an arbitration agreement is invalid if it gives one party a *privileged position* in matters of appointment.

46. The analysis of foreign legislations shows that while party autonomy is recognised in appointment and composition of an arbitral tribunals, certain national laws explicitly prohibit unilateral appointments that disadvantage one party. Where legislatures saw it fit to ban such appointments, they have done so explicitly, embedding unilaterality as a vitiating factor in the statute, not leaving it to judicial interpretation. This legislative clarity ensures that unilaterality is a codified breach of an arbitral tribunal's integrity, removing any ambiguity or scope for discretionary judgment.

47. *Judicial pronouncements of certain foreign jurisdictions.* Judicial pronouncements across jurisdictions have adopted differing views. Gary Born[94] has surveyed numerous foreign precedents in this regard and has referred to decisions of the Swiss Federal Tribunal[95] and Paris Cour d'Appel[96] (Paris Appellate Court), which

[94] Born (supra), 1878.
[95] *Judgement of 26 November 2002,* DFT 4P_129/2002.
[96] *Philipp Bros. v. Icco*, 1990 Rev. 880,883; *Raffineries de Petrole d'Homs et de Banias v. Chambre de Commerce Internationale*, 1985 Recv. Arb. 141,146

hold that the composition of the arbitral tribunal is a matter of party autonomy and the appointment, removal, and replacement of arbitrators must be as per the agreement. The Court of Cassation (France), in one of its decisions[97], has upheld an arbitration agreement where one party provides a list of potential arbitrators from which the other party must choose an arbitrator.

48. However, at the same time, there are pronouncements which frown upon unilaterality in matters of appointment of arbitrator/arbitral tribunal. For instance, in one Swiss decision[98], it has been held:

> "*The Federal Tribunal…has developed principles, under which conditions an arbitral tribunal sufficiently safeguards impartial and independent adjudication. The most important of these principles….is that no party may have a preponderant influence on the appointment of the tribunal.*"
>
> (emphasis supplied)

49. American Courts have also dealt with this issue. Despite there being no express statutory proscription against unilaterality in matters of appointment, in one of its decisions, the Massachusetts District Court remarked that "*both the parties to a dispute must have an equal right to participate in the appointment process.*"[99] Similarly, in another case,[100] the Supreme Court of Alabama invalidated an arbitration agreement as being unconscionable for the reason that it excluded one party from the appointment process. Further, in *Hooters of America, Inc. v. Phillips*[101], the arbitration clause was held to be against rules of neutrality and the award refused enforcement because one party was given exclusive control over the panel of potential arbitrators from which the other party could select its nominee arbitrator. It was observed that:

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[97] *Judgment of 31 January, 2002*, 2003:2 Cahiers de l'Arbitrage 303.
[98] *Judgement of 11 November 1981,* DFT 107 Ia 155,158 (Swiss Fed. Trib.).
[99] *Rosenberg v. Merril Lynch, Pierce, Fennner & Smith, Inc.* 995 F.Supp. 190,208.
[100] *Harold Allen's Mobile Home Factory Outlet, Inc. v. Butler,* 825 So.2d 779,783-85 (Ala. 2002)
[101] 39 F. Supp. 2d 582 (D.S.C. 1998).

"In this case, the challenge goes to the validity of the arbitration agreement itself. Hooters materially breached the arbitration agreement by promulgating rules so egregiously unfair as to constitute a complete default of its contractual obligation to draft arbitration rules and to do so in good faith. Hooters and Phillips agreed to settle any disputes between them not in a judicial forum, but in another neutral forum -- arbitration. Their agreement provided that Hooters was responsible for setting up such a forum by promulgating arbitration rules and procedures. To this end, Hooters instituted a set of rules in July 1996. The Hooters rules when taken as a whole, however, are so one-sided that their only possible purpose is to undermine the neutrality of the proceeding."

Further, on the question of unilateral composition of panel, the court remarked:

"*The Hooters rules also provide a mechanism for selecting a panel of three arbitrators that is crafted to ensure a biased decisionmaker. Rule 8. The employee and Hooters each select an arbitrator, and the two arbitrators in turn select a third. Good enough, except that the employee's arbitrator and the third arbitrator must be selected from a list of arbitrators created exclusively by Hooters. This gives Hooters control over the entire panel and places no limits whatsoever on whom Hooters can put on the list. Under the rules, Hooters is free to devise lists of partial arbitrators who have existing relationships, financial or familial, with Hooters and its management. In fact, the rules do not even prohibit Hooters from placing its managers themselves on the list. Further, nothing in the rules restricts Hooters from punishing arbitrators who rule against the company by removing them from the list. Given the unrestricted control that one party (Hooters) has over the panel, the selection of an impartial decisionmaker would be a surprising result."*

50. Similarly, in *Murray v. United Food and Commercial Workers Union*[102], the District Court of Maryland held the arbitration agreement to be unconscionable because the arbitrator was selected from a list of potential arbitrators curated by one

[102] 289 F.3d 297 (4th Cir.2002).

of the parties to the dispute. In doing so, the court observed that, "*Although an arbitration agreement will not be invalidated for failure to "replicate the judicial forum", we again refuse to enforce an agreement so utterly lacking in the rudiments of even-handedness.*" This line of reasoning continues in *McMullen v. Meijer, Inc.*[103] where the agreement granted one party unilateral control over the pool of potential arbitrators. There, the court noted that, "*when the process used to select the arbitrator is fundamentally unfair, as in this case, the arbitral forum is not an effective substitute for a judicial forum, and there is no need to present separate evidence of bias or corruption*."

51. The importance of composition of a just and proper arbitral tribunal was also highlighted by the Supreme Court of West Virginia in *Board of Education of Berkley County v. W. Harley Miller, Inc.*[104] There, the disputes were to be settled pursuant to a standard arbitration provision contained in the construction contract with the Board which provided that disputes shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association. While the clause did not give one party unilateral control over the pool of arbitrators, the Court nonetheless discussed the issue of unilaterality in matters of appointment and reasoned that:

> "*A functional analysis of the West Virginia cases which do not favor arbitration demonstrates that this Court would not countenance an arbitration provision by which the parties agree that all disputes will be arbitrated by a panel chosen exclusively by one of the parties. This is the classic rabbits and foxes situation, with the foxes stacking the arbitration panel in their favor. Such a contract provision is inherently inequitable and*

[103] 355 F.3d 485 (6th Cir. 2004).
[104] *Board of Ed. v. W. Harley Miller, Inc.*, 160 W. Va. 473, 236 S.E.2d 439 (W. Va. 1977).

unconscionable because in a way it nullifies all the other provisions of the contract."

(emphasis supplied)

52. In a case decided by the England and Wales Court of Appeal in *Sumukan Ltd. v. Commonwealth Secretariat*[105], the award passed by the arbitrator was set aside on the ground that one of the parties to the dispute was not consulted in the appointment of arbitrator. It was observed:

"*Furthermore if the arbitrators were to be selected from a Panel, and if there was a procedure for the appointment of the Panel aimed at guarding against any apparent lack of independence, it seems to me right that a substantial failure to comply with that procedure should have an effect on the jurisdiction of the tribunal itself.*"

53. The comparative analysis of judicial pronouncements across jurisdictions reveals that, while party autonomy is often respected in the appointment of arbitrators, courts are also wary of provisions granting one-sided control over the arbitral panel. Rulings from the U.S., Switzerland, France, and the UK highlight differing views on this matter. This diversity in views across jurisdictions reinforces the need for caution in relying on foreign precedents or laws.

J. On the opinion of the Hon'ble CJI

54. I have had the benefit of the exhaustive and erudite judgment of the Hon'ble Chief Justice Dr. D.Y. Chandrachud. I have already given reasons for my decision. I find it necessary to indicate certain issues about the perspective and the final conclusion.

[105] [2007] EWCA 1148.

54.1 At the outset, I reiterate the necessary distinction between the duty of the parties to arbitration agreement to constitute an independent arbitral tribunal and the duty of the arbitrator to act judicially. In this case, we are concerned with the former and not about the duty of the arbitrator.

54.2 Holding that an arbitral tribunal has the “trappings of a court” as it determines the competing rights and liabilities of parties through an ‘adjudicatory process’, and therefore it must act judicially has the problems of introducing public law principles in contractual dispute resolution. This formulation has engendered the application of principles of procedural equality, equal treatment under Article 14, fairness, non-arbitrariness, justice, reasonableness, impartiality and bias, all of which have been subsequently invoked in the judgment as core values. I tried to locate the obligations of contracting parties to the arbitration agreement within the province of contract law and public policy considerations therein. This approach, I believe, is better suited for the determination of disputes in arbitration law, as it balances and protects the twin values of party autonomy through judicial restraint, and the duty the parties to constitute an independent arbitral tribunal without compromising any one in favour of the other.

54.3 There is a certain difficulty in invoking Section 18 of the Act and applying it as an equality principle mandating equal opportunity to both the contracting parties at the time of constituting the arbitral tribunal. Section 18 is the obligation of the arbitrator in conduct of arbitral proceedings. I have already highlighted the important distinction between the duty of the arbitrator to act judicially and the obligations of the parties to constitute an independent arbitral tribunal. That apart, the text and the context of Section 18 as is evident from the scheme of the Act eschews application of Section 18 at the time of appointment. This is clear through two factors: first, through the

placement of Section 18 in Chapter V, on ‘Conduct of arbitral proceedings’, which comes after Chapter III on ‘Composition of arbitral tribunal’; and second, through the wording of Section 18, which makes it clear that the obligation to treat the parties with equality is on the arbitral tribunal, rather than the parties to the arbitration agreement. The later portion of Section 18, which mandates that “each party shall be given a full opportunity to present his case”, further fortifies this view.

54.4 The doctrine of *bias* and the contours of the test of *real likelihood of bias* have been discussed through various significant decisions of this Court rendered in the context of administrative and constitutional law. Considering that the issue before us is the legality of a procedure in the arbitration clause, I find it difficult to apply the doctrine of bias or real likelihood of bias at this stage. The real issue is about the imbalance caused due to unilateral power of one of the parties to the contract to constitute the arbitral tribunal. Composition of the arbitral tribunal is part of party autonomy but there is always the power, coupled with duty, of the court to ensure that procedure under the arbitration clause enables constitution of an independent arbitral tribunal. This scrutiny or enquiry by the court is at the stage of considering the application under Section 11. I am of the opinion that we cannot, as an advance ruling, give a declaration that all arbitration clauses enabling unilateral appointments are null and void at this stage.

54.5 I am of the opinion that *a priori* declaration that arbitration agreements that prescribe unilateral appointment procedures are invalid can lead to many problems in the day-to-day working of arbitral remedies. Particularly for institutions involving multiple transactions such as insurance claims, credit card defaults, etc. involving large number of cases but each claim may be of small sum. Our declaration of law substantially covers domestic arbitration, it will not be confined to high and

international commercial arbitration. There could also be situations where the unilateral constitution of the panel of arbitrators could have credible members with respect to which no one can have an objection. Rather than declaring that all such agreements are void, it would be better to strengthen the remedial mechanisms available under the Act. This way, the choice of the parties is not completely ignored, and impartiality and independence of the arbitral tribunal is also ensured through close scrutiny by courts on a case-to-case basis. In any event, as indicated earlier, the enquiry about the arbitration clause will be at the stage of Section 11.

55. I consider it necessary to note that mere existence of some relationship with the appointing authority does not inherently undermine autonomy. For instance, senior officers always serve as appellate authorities, and their objectivity is not compromised due to their employment. The solution is in the remedies and certainty in law. System of governances must evolve and recognize the capability in handling distinct professional duties. It is said that the key difference between humans and other beings lies in their ability to think independently and even against our own interests. While it is important to acknowledge potential conflicts of interest, it does not mean that the system must bend backward to cater to unending suspicion and doubt. A balance must be struck between ensuring confidence in the system and fostering a healthy culture of independence and objective in functioning. If we focus solely on identifying and disqualifying individuals for perceived conflicts, the process becomes an endless cycle of mistrust.

K. Conclusion

56. With these findings and observations, I summarise my conclusions as follows:

I. Dispute resolution through arbitration encompasses two independent yet interdependent principles: contractual freedom as party autonomy and statutory obligation as duty to constitute an independent arbitral tribunal.

II. Party autonomy in making of an arbitration agreement is an essential feature of arbitration. It commences with choosing the members of the arbitral tribunal, extends to the procedure that would apply for its conduct, and concludes with the method by which an award could be challenged before a court. It is thus a brooding and guiding spirit of arbitration. Party autonomy is sufficiently incorporated in the Arbitration Act, along with a restraint on judicial intervention.

III. The moment parties choose arbitration over ordinary civil proceedings for dispute resolution, their duty to establish an independent and impartial tribunal arises. The substitution of arbitration in place of civil courts as an exception under Section 28 of the Contract Act is only for a forum and not for contracting out of the most essential feature of a dispute resolution, i.e., independence and impartiality must exist in every forum. This essential feature is the inviolable public policy consideration under Section 23 of the Contract Act from which the parties cannot opt out. Arbitration agreements which are not compliant of this public policy consideration are void under Section 23 of the Contract Act. Thus, there is a statutory incorporation of duties of the parties to the arbitration agreement.

IV. If an arbitration agreement is considered by the court as not enabling constitution of an independent and impartial tribunal, any submission that the said agreement is a binding contract, or it is in exercise of party

autonomy is not tenable as such an agreement will be against public policy and as such not an enforceable contract.

V. In view of the statutory incorporation of these duties, it is not necessary to apply public law principles evolved in constitutional and administrative laws. Sourcing these duty obligations from Contract Act and Arbitration Act is important to maintain the integrity of the party autonomy and restraint of judicial institutions.

VI. The power to ensure that the arbitration agreement is compliant of the public policy requirement of establishing an independent and impartial tribunal is always of the Court. This principle is recognised and statutorily incorporated in the Contract Act and the Arbitration Act. It is the duty of the court to ensure that the arbitration agreement inspires confidence and it will enable establishment of an independent and impartial arbitral tribunal.

VII. Neither public policy considerations under the Contract Act or the Arbitration Act restrain the parties to the arbitration from maintaining a panel of arbitrators in any manner. However, arbitration agreements enabling one of the parties to unilaterally constitute arbitral tribunal do not inspire confidence of independence and may violate the public policy requirement of constituting an independent and impartial tribunal. The court will, therefore, scrutinise the agreement and hold them to be invalid if it considers it appropriate.

VIII. The occasion for the court to examine the constitution of the independent and impartial tribunal under the arbitration clause will arise when one of the parties makes an application under Sections 11, 14 or 34. It is not permissible for the court to give an advance declaration that all such

agreements which enable one of the parties to unilaterally constitute the arbitral tribunal would be void per se. No two agreements are the same and it is necessary for the court to examine the text and context of the agreement.

IX. All applications pending before the courts challenging the unilateral appointment clauses will be disposed of applying the test as to whether such a clause enables establishment of an independent and impartial tribunal.

.....J.
[PAMIDIGHANTAM SRI NARASIMHA]

November 08, 2024
New Delhi.