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APEX COURT RULING ON UNILATERAL ARBITRATOR APPOINTMENTS: ENSURING NEUTRALITY IN INDIAN ARBITRATION

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FACTS

1. The case revolved around a contractual dispute arising from a construction contract awarded by the Union of India **(COFRE)** to a private company **(JV)** for work valued at ₹165.67 crores.
2. The said contract, dated 20.09.2010, contained an arbitration clause under **Clause 64 of the General Conditions of Contract (G.C.C.)**, which was subsequently modified by the Railways through a notification dated 16.11.2016 following the enactment of the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter the "**Act**").
3. The modification stipulated that disputes would only be resolved by a three-member arbitral tribunal comprising either serving Railway officers or a mix of serving and retired officers, provided that the parties waive the applicability of **Section 12(5)** of the Act.
4. The work could **not be completed** by the respondent company **within the stipulated time**, resulting in the **issue of termination notices** by the Railways on 18.10.2017 and 27.10.2017. The contract was subsequently terminated on 01.11.2017 with forfeiture of security deposit.
5. The respondent **challenged the termination**, but the **court dismissed it**, directing the respondent to **invoke arbitration**. Thereafter, on 27.07.2018, the respondent invoked arbitration, claiming ₹73.35 crores and requesting the appointment of arbitrators.
6. In response, **COFRE sent two separate panels** for the selection of arbitrators:
   a) A panel of **four currently serving Railway officers** (as per Clause 64(3)(a)(ii), subject to waiver of Section 12(5)).
   b) After the refusal by the respondent to waive Section 12(5), the second panel of **four retired Railway officers** (under Clause 64(3)(b)).
7. Instead of making a selection from the provided option, **the respondent** opted to **filed a petition** in accordance to **Section 11(6)** of the Act before the Allahabad High Court, requesting for the appointment of an independent sole arbitrator, by stating that the Railways' panel-based system violated **Section 12(5)**. The High Court granted relief and appointed a retired High Court judge arbitrator (03.01.2019), thus overruling the G.C.C.'s mechanism.
8. Aggrieved by the decision, the appellant appealed to the Apex Court, which upheld the appointment process by CORE, rejecting ECI's reliance on *TRF Ltd. (2017)*, where it was held that an **ineligible arbitrator cannot nominate another**. However, in *Tantia Constructions (2021)*, the Court disagreed with ECI-SPIC, **prompting a request for a larger Bench review**. Similarly, in *JSW Steel (2022)*, the **Court reaffirmed the need for a larger Bench** to reassess the issue.

Hence, the present appeal.

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ISSUES INVOLVED

1. Whether an appointment process that gives one side, with a vested interest in the dispute, sole authority to appoint a single arbitrator or pre-select a panel while limiting the opposing party's choice to that panel is legally valid.
2. Whether the fundamental principle of ensuring equal treatment of parties extends to the stage of arbitrator selection and appointment.
3. Whether, in public-private contracts, a procedure that enables a government entity to unilaterally appoint either the sole arbitrator or a majority of the tribunal members contravenes Article 14 of the Constitution by violating principles of fairness and non-arbitrariness

RULES APPLICABLE

A. **Section 7:** It defines an arbitration agreement as an agreement in writing where the parties agree to submit present or future disputes to arbitration in connection with a defined legal relation arising either out of statute or out of other forms. This may be a separate agreement or maybe subsumed under an arbitration clause in a particular contract. An agreement is "in writing" where it is signed, exchanged in letters, telegrams, telex, or by electronic communication between the parties, or referred to in pleadings without objection. Additionally, if a writing expressly states that the document refers to a contract that contains an arbitration clause, such clause is thereby incorporated into the contract and made enforceable.[1074]

B. **Section 11(6):** It provides for a situation when the established procedure for appointing arbitrators fails. It states that any affected party may apply to the Apex Court, High Court, or any designated authority, unless the agreement itself provides for another mechanism to resolve deadlocks, when the concerned party fails to act, parties or appointed arbitrators act but fail to reach consensus on all appointed arbitrators, or an institution or person charged with the appointment fails to perform its duty.[1075]

C. **Section 12(5):** The clause states that notwithstanding any agreement to the contrary with respect to any party, an individual associated with either party, such as their extra-legal representatives, or the subject matter of the dispute, as defined in Schedule Seven, shall not be eligible for appointment as an arbitrator.[1076]

Proviso: However, this ineligibility may be waived if both parties explicitly consent in writing after the dispute has arisen, permitting the individual to act as an arbitrator.

CONTENTION OF THE APPELLANT

1. The **principle of party autonomy**[1077] is one of the building blocks of the Act which when read with **Section 11(2)**[1078] permits parties to determine their own procedure for appointing arbitrators. This includes allowing one party to propose a panel from which the other may choose. This principle reinforces the contractual freedom as a fundamental feature of arbitration.
2. The Apex Court or High Court's role in appointing arbitrators under **Section 11(8)**[1079] arises only when parties fail to follow the agreed procedure as per **Sections 11(4)**[1080], **11(5)**[1081], and **11(6)**[1082]. This provision does not restrict parties

[1074] Arbitration and Conciliation Act, 1996, § 7, No. 26, Acts of Parliament, 1996 (India).

[1075] *Id.* § 11(6)
[1076] *Id.* § 12(5)
[1077] P. Jain, *Party Autonomy or the Choice of Seat: The Essence of Arbitration*, SCC ONLINE (Apr. 9, 2025, 9:29 PM), https://shorturl.at/oD3lz.
[1078] *Id.* § 11(2)
[1079] *Id.* § 11(8)
[1080] *Id.* § 11(4)
[1081] *Id.* § 11(5)
[1082] *Id.* § 11(6)

from mutually agreeing on an appointment process under Section 11(2).

3. The act of appointing or enlisting arbitrators is distinct from serving as one. While Section 12(5) bars ineligible individuals under the Seventh Schedule from acting as arbitrators, it does not explicitly prohibit them from curating a panel. The Act **does not assume ineligibility**; it must be specifically established under Section 12.
4. Equal treatment under **Section 18**[1083] applies to arbitral proceedings, not to the process of agreeing on an appointment mechanism. It ensures that once a tribunal is constituted, both parties are treated fairly and given equal opportunities to present their case.
5. The Act provides sufficient safeguards for impartiality, including Section 12(5) read with the Seventh Schedule, **mandatory disclosures** under **Section 12(1)**[1084], and **judicial review** under **Section 34**[1085]. Voestalpine upheld the use of arbitrator panels by public entities, recognizing their validity.
6. ***TRF***[1086] misapplied the maxim '***qui facit per alium facit per se'*** in the context of arbitration. **Appointment of arbitrators** is not a delegation of authority but an independent contractual act. Non-banking financial companies routinely include arbitration clauses in loan agreements, but appointed arbitrators must still meet Section 12's criteria.

CONTENTIONS OF RESPONDENT

1. Party autonomy in arbitration is subject to mandatory provisions like Section 18 (equal treatment) and Section 12(5) (independence and impartiality). A panel controlled by one party lacks **neutrality**, violating these principles. An arbitration clause granting one party sole authority to appoint an arbitrator creates a **reasonable apprehension of bias**, assessed from a reasonable third party's perspective.
2. **Section 12(5)** overrides arbitration agreements through its non obstante clause. While it does not explicitly prohibit an ineligible person from appointing arbitrators, ***TRF Ltd.***[1087] and ***Perkins***[1088] clarified that individuals with a stake in the dispute's outcome should not influence arbitrator selection. These rulings provide an exception only when both parties have equal rights to appoint arbitrators. Unilateral appointments, however, undermine fairness and impartiality.
3. A curated panel contradicts the equal treatment mandate of Section 18, which applies at the tribunal's constitution stage. Lack of mutual involvement gives an unfair advantage to one party. ***Lombardi Engineering v. Uttarakhand Jal Vidyut Nigam***[1089] reaffirmed that arbitration agreements must align with constitutional principles. Unilateral appointments violate **Article 14**[1090] and are prohibited under **Section 23**[1091] of the Contract Act.
4. The ***Voestalpine***[1092] ruling supported broad-based arbitrator panels, but restricting one party's selection to a pre-approved list disrupts equality. CORE failed to consider this, overlooking Section 11(8) and the independence requirement under Section 12. Section 12(5) prohibits ineligible persons from appointing arbitrators, ensuring fairness. If one party dominates the selection process, it creates justifiable doubts regarding independence and

[1083] *Id* § 18
[1084] *Id* § 12(1)
[1085] *Id* § 34
[1086] Trf Ltd v. Energo Engineering Projects Ltd, (2017) 9 SCC 377.
[1087] *Ibid.*
[1088] Perkins Eastman Architects DPC & Anr. v. HSCC (India) Limited, (2019) 4 CURCC 315.
[1089] 2023 INSC 976.
[1090] INDIAN CONSTI art. 14
[1091] The Indian Contract Act, 1872, § 23, No. 9, Acts of Parliament, 1872 (India).
[1092] Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd., (2017)4 SCC 665.

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impartiality, violating arbitration's fundamental principles.

JUDGMENT

CJI Dr. DY Chandrachud ruled that the **principle of equality applies to all arbitration stages**, including the appointment of arbitrators. While public sector undertakings (**PSUs**) can maintain a panel, they cannot force the other party to choose from it. **Unilateral appointment** clauses **violate arbitration's core principle of impartiality and the nemo judex rule**. The Court held that requiring one side to select arbitrators out of a curated list is unequal and lacks a real counterbalance, making the system in CORE (supra) biased in favor of the Railways. Such clauses were deemed unconstitutional under Article 14, with the ruling applicable prospectively to three-member tribunals.

Justice Roy agreed that **equal treatment applies from the start to the end of arbitration**, including arbitrator appointments. However, he opposed applying **constitutional law principles to arbitration law**. He warned against **invalidating all unilateral appointments**, as **Section 12(5) of the Arbitration Act allows waiver through express written consent after a dispute arises**. He emphasized that **courts should not override party agreements without strong reasons** and should intervene **only when parties fail to agree** under Section 11.

Justice Narasimha emphasized that arbitration rests on **party autonomy and the duty to ensure an independent tribunal**. He held that **arbitration agreements must comply with public policy under Section 23 of the Contract Act**, making non-compliant agreements void. He rejected the need to **invoke constitutional law** since the Arbitration and Contract Acts **already ensure fairness**. Courts, he concluded, must **ensure arbitration agreements inspire confidence and maintain neutrality**.

The present dispute revolves around contentious issue of unilateral arbitrator appointments and their validity under the Act. The Apex Court's ruling builds upon earlier precedents such as ***TRF Ltd. v. Energo Engg. Projects Ltd.***, ***Voestalpine Schienen GmbH v. Delhi Metro Rail Corpn. Ltd.***, and ***Perkins Eastman Architects DPC v. HSCC (India) Ltd.***, reinforcing the principle that arbitration clauses allowing one party to unilaterally appoint an arbitrator undermine fairness and impartiality.

EVOLUTION OF JUDICIAL PRECEDENTS ON UNILATERAL APPOINTMENTS

The *TRF Ltd.* case established that **an individual who is disqualified as per Section 12(5)** of the Act (due to conflicts of interest, such as a Managing Director involved in the dispute) **cannot nominate an arbitrator**, as such delegation would still carry inherent bias. This principle was further solidified in *Perkins Eastman*, where the Court held that vesting appointment powers in an interested party (such as a Managing Director or Chairman) violates fundamental tenets of neutrality.

In *Voestalpine*, the Court introduced the concept of a "**broad-based**" panel, requiring that arbitrators be selected from a diverse pool rather than a restricted list favoring one party. However, the present judgment goes further by invalidating even curated panels if they impose mandatory selection, thereby limiting the other party's choice.

NULLIFICATION OF UNILATERAL APPOINTMENTS: BALANCING PARTY AUTONOMY AND FAIRNESS

The Constitutional Bench in the present case unequivocally ruled that unilateral appointment clauses in public-private contracts are inherently exclusionary and violate:

a) Section 18 of the Act, which mandates equal treatment of parties.
b) Article 14 of the Constitution, as they create an imbalance in procedural fairness.

Justice Chandrachud's reasoning stressed that giving one party, particularly a government agency, control over arbitrator selection raises legitimate doubts regarding impartiality. The Court ruled, therefore, that parties may structure arbitration agreements as they

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choose, but that choice cannot decide over the statute's protection against bias.

In a partial disagreement with the decision, Justice Hrishikesh Roy raised the issue regarding excessive intrusion by the judiciary into party autonomy. According to him, where parties voluntarily agree to be bound by a mechanism of unilateral appointment, no court should interfere, unless the mechanism itself induced statutory disqualifications under Section 12(5). The dissent illustrates the dilemma between freedom to contract and due process requirements.

The Doctrine of Bias and Natural Justice

The Court reaffirmed the nemo judex in causa sua principle—no one should be a judge in their own cause. It applied the "**real likelihood of bias**" test, ruling that even the **appearance of partiality** (such as a PSU appointing its own employee as arbitrator) **renders the process unfair**.

The judgment also referenced the **IBA Guidelines on Conflicts of Interest**[1093], which classify certain relationships (e.g., employment ties) as automatic disqualifications. While the Act permits post-dispute waivers[1094], the Court clarified that pre-dispute agreements forcing one-sided appointments cannot circumvent impartiality requirements.

Public-Private Contracts and Unconscionability

The Court examined arbitration clauses in government contracts, noting that PSUs often impose restrictive panels dominated by retired employees. While expertise justifies including such individuals, **compelling the other party to choose from a pre-selected list was deemed unconscionable**.

The ruling aligns with *Lombardi case,* where the Court struck down clauses imposing onerous preconditions (like mandatory deposits) as violative of Article 14. Similarly, the present judgment holds that forced adherence to a unilateral panel undermines public policy under Section 34(2)(b) of the Act.

Author's Viewpoint & Conclusion

The ruling of the Supreme Court is a big step in trying **to balance justice in arbitration with the demands of the practicable commercial resolution of disputes**. Since arbitration thrives on predictability in its very nature, especially in long-term contracts and public-private partnerships, the judgment would allow for fairness to still prevail without unnecessarily disrupting any existing arbitration-forum mechanisms.

Furthermore, by addressing the **future applicability** of its decision, the court has intentionally sought to reduce the chances of jeopardizing any ongoing proceedings or nullifying past arbitral awards. In addition, a retroactive application may have cast doubt on the enforceability of awards, thereby **resulting in contractual instability** and the **undermining of investor confidence**.

Legal practitioners and commercial enterprises are expected to **reassess arbitration clauses** in light of this ruling, particularly those **affording unilateral appointment of arbitrators** by government entities. The decision will likely induce some refinements in the standard agreements concerning PSUs so as **to ensure greater neutrality of tribunal composition**. The Court has **not specifically** prevented the appointment of retired government officials as arbitrators, **but** it has practically annulled clauses that permit PSUs to appoint a majority of tribunal members unilaterally from their own panels. As a result, **ensuring neutrality and fairness in the arbitrator appointment process** has become even more essential.

One key consequence of the ruling is the **potential change towards institutional arbitration**, as parties are generally looking for more fair and structured dispute resolution techniques. The **extreme restrictions** placed on public sector undertakings may act as a **disincentive against the very choice of**

[1093] IBA, https://shorturl.at/4vq1Q (last visited Apr. 9, 2025).
[1094] *Supra* note 1 at §12(5) proviso

arbitration. We have seen that a few companies, **Oil India Limited** and **ONGC**, perhaps **expressing their discomfort with arbitration**[1095], in sync with the Ministry of Finance's 2024 directives[1096], which gives rise to the fear that arbitration may see diminished service in its public contracts. This sets up far-reaching consequences, especially in view of the **government being the largest litigant in India**.[1097]

While the ruling **majority focuses more on constitutional principles** to be **applied in relation to appointment of arbitrators**, their dissenting counterparts caution against an excesses in intervention by the Court. Already inducting provisions in the Arbitration Act, the Contract Act, and then throwing out such clauses indiscriminately could be indeterminate. The effects of such decisions would only be known over time concerning the arbitration framework of India.

This ruling states a very potent change to India's arbitration structure, especially with respect to public-private contracts, in strengthening **fairness and impartiality** of arbiter selection. By doing away with biased modes of selection, this ruling ensures that Indian arbitration is now aligned to the global best practices that would also provide a level playing field for the private sectors. But its **impacts are twofold** – increasing the credibility of the arbitration process while causing a potential upheaval in the established contract norms, difficult in the enforcement of contracts, and subsequently increasing judicial intervention. The **present dilemma** is to **safeguard neutrality in arbiter selection** while **upholding the speediness of arbitration** with a view to **keeping the Indian dispute resolution system investor-friendly** and **commercially viable** over the long haul.

[1095] ECONOMIC TIMES, *Supreme Court irked over ONGC's approach to arbitration, asks AG to resolve* (Apr. 9, 2025, 8:00 PM), https://shorturl.at/rC5GZ.
[1096] CAM, https://shorturl.at/YVjZq (last visited Apr. 9, 2025).
[1097] NDTV, *At Nearly 50% Cases, Chief Justice Of India Terms Governments As Biggest Litigants* (Apr. 9, 2025, 8:10 PM), https://shorturl.at/aOOW8.