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FOREWORD

– Mr. Darius J. Khambata[1]

I am delighted to see this fifth edition of the Indian Arbitration Law Review. I have previously bemoaned the lack of good legal writing in India. Hence I am enthused by the high standard of scholarship of the articles.

We live in an era where India is finally being accorded its rightful place on the world stage, both in international affairs as well as one of the world's largest and fastest growing economies. This is but part of a natural progression of the growth and vibrancy of the Indian economy over the last three decades. It all started from the economic revolution of 1991. That revolution was not only one of finance and economics. It was also one of the mind. India set itself on a path of competitiveness and improvement in standards across all fields of human development. Restructuring the very way in which it worked as a nation, monumental changes were introduced in India in technology, education, governance and the very fabric of society. Hundreds of millions of people have been lifted above the poverty line and the tears of so many have been wiped from their eyes subserving the dream of Mahatma Gandhi. Yet the task is far from complete. The beckoning goal is one of an India that is libertarian, entrepreneurial and egalitarian, free from the shackles of discrimination, poverty and inequality.

Sustaining a free economy in the long run will inevitably require not only continued reform to unburden it of excessive regulation, but also the creation of a vibrant and diverse market place of thoughts, ideas and expression. India's goals are anchored upon the idea of India aspired to by our founding fathers who fought for our freedom and the dreams which are reposed in the Constitution of India.

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1. LLM (Harvard); Mr. Khambata is a Senior Advocate, Supreme Court of India; former Advocate General of Maharashtra; former Additional Solicitor General of India; former Vice-President, LCIA Court; and member, SIAC Court.

With a growing economy inevitably comes growing commercial litigation. It is clear that Indian Courts, overburdened as they are with massive social, service and administrative law litigation, will not find the resources nor the time, to resolve the exponential increase in commercial disputes. Hence the emergence of arbitration in India as the preferred means of commercial dispute resolution.

Arbitration in India stands on a cusp. No doubt we have moved far from the Arbitration Act 1940 which had caused the Supreme Court to lament that the state of Indian arbitration had made "…. lawyers laugh and legal philosophers weep….". The Arbitration and Commercial Act 1996, particularly after its major amendments in 2015, is now an effective instrument to facilitate speedy and fair arbitration, party autonomy and effective enforcement of awards.

Where do we go from here? The Covid pandemic and the subsequent resurgence of our economy bring into sharper focus the challenges to arbitration in the years to come. But challenges often underpin opportunities. The areas to focus on in the future can be categorised under four heads: Technology, Cost, Efficiency and Accessibility.

To tap into the advantages that arbitration enjoys over traditional litigation in Court, technology can be a game changer. In that sense the compulsions of the pandemic must be seen as an opportunity rather than a calamity. Virtual hearings are here to stay and can become the default model. It is trite that physical hearing offers advantages that are irreplaceable in terms of eye-contact, immediacy of response and greater concentration. But increasingly these are luxuries in a world where speedy and cost effective arbitration is the need of the hour. I look forward therefore to a University or arbitral institution developing and publishing a detailed virtual hearing protocol both for interlocutory as well as for evidentiary and closing hearings. I would also welcome the wide spread use of real time transcription in arbitration. I call it the conscience keeper of arbitration since it provides an accurate and complete record of every word that is uttered during the hearing. Consequently every participant is more careful of what is said. Transcription vastly improves the accuracy and integrity of the process.

The second, and an area of concern, is cost. Clients will have more constraints in their financial capacity and will demand greater mileage from their Rupee of spending. It is for lawyers to make that possible. Here too technology can provide a solution. Fewer physical gatherings and greater virtual functioning is the order of the day.

But that is not all. Efficiency of practice is now the imperative. The elephant in the room is the manner in which, generally speaking, arbitration has been practised in India. An aspiration that India became a popular seat for international commercial arbitration will require an overhauling of the way we lawyers practice arbitration. Strict time limits for pleadings and argument, memorialisation of pleadings (by including citation of legal authorities) detailed yet page limited opening written submissions, strictly no "ambushing" of opponents and chess clock time sharing. The idea of marshalling and disclosing your whole case in detail by reference to documents, evidence and law, prior to the evidentiary hearing is anathema to most Indian lawyers. Yet it is the most efficient manner for a lawyer to structure his/her argument, prune it of the inessential and capture the attention of the Tribunal. It also focusses the core issues that differentiate the respective cases. Both sides will have notice of the points and cases they will have to meet. I was once asked, in a seminar, whether such a course of action was "wise". The young student who did so was extremely sceptical of my suggestion and I don't think was convinced when I tried to explain the advantages of a more transparent way of arguing a case. In the years to come I hope that more lawyers and students will be persuaded to restructure their practice and orient it to greater reliance on the written, rather than the oral, word.

Finally, accessibility. This is not only geographical but also social and cultural. An arbitration and its procedures must be transparent and easy to understand for arbitrants. We must encourage diversity not only of arbitrators but also of lawyers. It is possible to do so without impairing merit or party autonomy. Diversity can range across gender, caste, culture and language.

We must lead by example and not insist on setting better standards only in tandem with our opponents. Arbitration has boundless strengths; it

can be cheap where litigation is expensive; swift where Courts are slow; innovative where litigation is bound by procedure and simple where litigation is technical and complex.

India has several advantages that should have made it a popular international seat of arbitration: an intellectual, innovative, and independent judiciary, a strong and experienced commercial Bar for which English is the lingua franca, a long tradition of recorded common law judgements and increasingly good infrastructural support. Yet to an extent these advantages have been squandered.

We must collectively ensure that the practice of arbitration in India is raised to the highest standards. That is why legal writing and intellectual curiosity, encouraged by law reviews such as the Indian Arbitration Law Review of the National University of Law Institute of Bhopal are so important.

The future of India is ours to seek. Change will come, perhaps not from my generation but from young and aspirational Indians who dream of a golden future. It will come from seats of learning such as the National Law Institute University Bhopal.

I truly believe that, given the vibrancy of our court driven jurisprudence, the strong impetus being given to arbitration by the Government and the evident talent of our young lawyers and graduates, India will evolve into an international arbitration power house.

PATRON'S NOTE

-Mr. Prashant Mishra

I am writing to express my sincere appreciation and gratitude for the excellent work that the entire team has put into producing the 5th volume of the Indian Arbitration Law Review. I am also thrilled to see the level of scholarship and critical analysis on display in this edition.

If arbitration is to work as intended, it needs robust critique, and scholars need robust platforms where their critique would be heard. The IALR is such a platform created to contribute in shaping the direction of arbitration's future, and I am delighted to see that it continues to play an important role in promoting academic excellence in arbitration. The articles published in the IALR provide insightful analysis focusing particularly on the importance of transparency, accountability, and party autonomy, to enrich the reader's understanding of arbitration law and practice.

As a patron of the IALR, I am committed to supporting the continued growth and development of this vital publication. Once again, congratulations to the writers, editors, and team of the IALR on another outstanding issue.

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BOARD OF ADVISORS

Mr. Ben Olbourne is a barrister at 39 Essex Chambers and provides advisory and advocacy services across a broad range of international commercial disputes, in England and other jurisdictions, in relation to both court and arbitration proceedings. He has been recommended in the leading global, regional and UK directories since 2013 for commercial, international arbitration, construction and infrastructure, energy, oil & gas, commodities and shipping.

Mr. Davinder Singh, SC is the Chairman of the Board of Directors of Singapore International Arbitration Centre and the Executive Chairman of Davinder Singh Chambers LLC. His legal experience spans almost four decades and he was in the first batch of Senior Counsel appointed by the Singapore Supreme Court in 1997. He is the only litigator in Singapore to be ranked by Chambers & Partners as a "Star Individual" for eleven consecutive years, from 2011 to 2021, and was the first lawyer in Asia-Pacific to be inducted into the "Hall of Fame" at Benchmark Litigation's 2019 Asia-Pacific Awards.

Mr. Gary Born is the chair of the International Arbitration Practice Group at Wilmer Cutler Pickering Hale and Dorr LLP. He is widely regarded as the world's preeminent authority on international commercial arbitration and international litigation. He has been ranked for more than 20 years as one of the world's leading international arbitration advocates and the leading arbitration practitioner in London.

Prof. (Dr.) Stefan Kröll is an internationally renowned arbitrator with experience of more than 85 arbitrations in all areas of national and international business law, including the involvement of state parties. He combines his practice as an arbitrator with extensive academic activities as Professor for International Dispute Resolution at Bucerius Law School and Director of its Center for International Dispute Resolution.

Prof. (Dr.) V. Vijayakumar has over 40 years of teaching experience, and has previously served as the Registrar of the National Law School of India University, Bengaluru; Vice-Chancellor of the Tamil Nadu Dr. Ambedkar Law University, Chennai; and President of the Consortium of National Law Universities. He is presently the Vice-Chancellor of the National Law Institute University, Bhopal.

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Editorial Note

—Aadya Bansal & Navya Saxena

The Indian Arbitration Law Review (IALR) was instituted with the aim of encouraging scholarship and research in the field of arbitration law in India. To further this vision, the editorial board of IALR has, since its inception in 2018, strived to publish the most illuminating submissions received for the periodical. We are indebted to Mr. Udyan Arya Srivastava, Mr. Prabal De, Mr. Pranjal Agarwal, and Mr. Syamantak Sen, the Editor-in-Chief of the previous volumes, and their colleagues, for their efforts in helping the Journal reach new heights with each successive volume. We are also thankful to Mr. Prashant Mishra, our Patron, for whose guidance and support towards the Journal we are eternally grateful.

We are supported in our editorial endeavour by some of the most esteemed legal luminaries in the Indian as well as international arbitration landscape, as our Board of Advisors. The invaluable inputs and direction offered by these internationally recognized jurists, practitioners, and academicians, from around the world have consistently benefitted us and our predecessors immensely. We are also sincerely grateful to Mr. Darius Khambata, for taking time out from his busy schedule to author the foreword for this volume.

Arbitration is a dynamic subject that continues to evolve and adapt to the changing contours of international commercial transactions. In the past years, significant developments and landmark changes have occurred in the field of arbitration, which have had a profound impact on its practice. For instance, in India, the recent Amazon v. Future Retail case has reaffirmed the country's pro-arbitration stance, while the Hindustan Construction Company v. Union of India case has improved the efficiency of arbitration proceedings. Furthermore, foreign lawyers and law firms can now practise international arbitration matters in India per the recently notified Bar Council of India Rules, thus taking another

step towards making India a hub of international commercial arbitration. These developments demonstrate India's growing commitment to the development of a modern and efficient arbitration regime and paint an optimistic view of the arbitration landscape moving forward. Globally, the pandemic has accelerated the shift towards virtual arbitration hearings, with institutions such as the ICC adapting by launching new virtual platforms to facilitate proceedings. These recent cases and changes underscore the importance of staying up-to-date with developments in the field of arbitration, and demonstrate the ongoing evolution of arbitration as a dynamic and essential mechanism for the resolution of international commercial disputes.

The authors in this edition have critically analysed various contemporary issues. The Amazon judgment, as referenced above, has been carefully evaluated by the authors in "*An Emergency Arbitrator is an Arbitrator.... Is There A Need For Statutory Recognition Post-Amazon*?", wherein they have a discerningly for analysed the aftereffects of the judgment on Indian arbitration. Further, the unanswered query of whether emergency arbitration is viable and efficacious in India has been thoroughly examined by the authors in "*Emergency Arbitrations in India: Viability and Enforceability*". Next, in "*The India-Brazil BIT: Step forward, Two Steps Back*", the authors have engaged in a harm-versus-benefit assessment of the India-Brazil BIT and presented a well-reasoned critique of the treaty. Additionally, in "*Reconceptualising Consent in Arbitration Agreements - Chloro Controls Revisited*", the author has devised potential ways to remedy the deviation from arbitration's consent based approach, by the Supreme Court in the Chloro Controls case. Further, in "*Ensuring Fairness in Appointment of Arbitrators: Journey So Far*", the author posits that the challenging procedure of arbitrator is rife with subjectivity of the courts and presents an in-depth analysis of Section 12(5) of the Arbitration and Conciliation Act, 1996.

On top of that, in "*The ICSID Amendments: Analysing the Changes to the Arbitration Rules and what They Entail for Capital Importers and Developing Countries*", the author has delved into the recent amendments to the ICSID Rules and juxtaposed them with ICSID's historic bias

towards developed countries. Furthermore, in "*Revisiting Third-Party Funding – An Analysis of the New ICSID Arbitration Rules*", the authors have thoroughly scrutinised Rule 14 and Rule 53, pertaining to disclosure and security for cost respectively. Next, in "*Disclosures in Third Party Funding in Arbitration: An Indian Perspective*", the author conducts a comprehensive cross jurisdictional analysis of disclosure obligations and puts forth his preferred approach to the same.

Thus, as evidenced, multiple facets of these developments of import have been thoroughly investigated and comprehensively analysed by the authors in the present volume. The diverse form of academic writings that constitute the Journal ensure that it is able to chart the vast expanse of the field of arbitration, providing a meaningful insight into the field to the reader. In navigating through the pieces that explain the intricacies that underpin this area of law, the dedication and unrelenting hard work put in by the members of the Peer Review Board must not go amiss. Furthermore, the student editorial board of the IALR has worked tirelessly to sift through the overwhelming number of submissions and finalise a collection of articles written by seasoned authors, well versed in arbitration law. With this, we present to you the fifth volume of Indian Arbitration Law Review. We look forward to receiving feedback for this volume from our readers.

ENSURING FAIRNESS IN APPOINTMENT OF ARBITRATORS: JOURNEY SO FAR

—Sameer Jain and Anu Sura

(Mr. Sameer Jain is the founder and managing partner at PSL Advocates and Solicitors. Ms. Anu Sura is a counsel at PSL Advocates and Solicitors)

ABSTRACT

*The Indian arbitration space has shown a great deal of progress in making the arbitration procedure fair as well as efficacious through legislative reforms. The Arbitration and Conciliation (Amendment) Act, 2015 brought in several reforms to the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "**the Act**"), including crucial amendments to Chapter III of Part I of the Act, which deals with "appointment of arbitrators". Fifth and seventh schedules have been introduced to objectively assess the independence and impartiality of arbitrators. However, a perusal of the judicial decisions post the 2015 Amendment, most notably in Perkins Eastman, Central Organization Railway Electrification, and most recently in Tantia Construction reveal that the there is a fair amount of subjectivity shown by courts in interpreting the rigor of section 12(5) of the Act read with the seventh schedule. Through this article, we seek to trace the legislative journey and shift in judicial trends vis-à-vis "appointment of arbitrators", and ascertain whether the legal position as it stands today, is sufficient to ensure fairness in appointment process.*

1. INTRODUCTION

Neutrality of arbitrators i.e. their independence and impartiality is *sine qua non* to ensure adherence to principles of natural justice.[1] For a dispute resolution process to be effective, the parties ought to have confidence in the judges or arbitrators adjudicating their disputes. The questions of independence and impartiality assume special importance in the context of arbitrations, where parties themselves appoint the adjudicators of their

1. Law Commission of India, *Amendments to the Arbitration & Conciliation Act, 1996* (Report No. 246, 2014) para 53; Voestalpine Schienen GmbH v. Delhi Metro Rail Corpn. Ltd. (2017) 4 SCC 665.

disputes. The traditional court system ensures neutrality through numerous institutional and procedural safeguards. However,the Indian arbitration space, in a bid to uphold "*binding nature of contracts*" and "*party autonomy*", for the longest time ignored the unfairness in appointment procedures, particularly arising out of contracts with State entities providing for a unilateral right of appointment in their favour. In the absence of any objective criteria to ascertain independence and impartiality, clauses naming a particular person/ designation (associated with the State entity) as arbitrator(s), clauses naming or appointing a serving employee as an arbitrator were considered to be valid and binding under the (now repealed) Arbitration and Conciliation Act, 1940[2] (hereinafter referred to as the "**1940 Act**"), and subsequently under the Arbitration and Conciliation Act, 1996(hereinafter referred to as "**the Act**").[3]

The 20th Law Commission, in 2014, was entrusted with the task of reviewing the provisions of the Act in view of the several inadequacies observed in the functioning of the Act. The Law Commission submitted its Report on 'Amendment to the Arbitration and Conciliation Act, 1996' (hereinafter referred to as the "**246th Report**"), on the basis of which the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to the "**2015 Amendment**") was passed. The 2015 Amendment brought in several reforms to the Act, including crucial amendments to Chapter III of the Part I of the Act, which deals with "appointment of arbitrators". Through this article, we seek to trace the legislative journey and shift in judicial trends *vis-à-vis* the appointment of arbitrators, and ascertain whether the legal position as it stands today, is sufficient to ensure fairness in appointment process. We begin by reviewing the position pre-2015 Amendments and the Law Commission's recommendations in its 246th Report (**Section B**). The subsequent section will be dedicated to the normative framework as it stands today (**Section C**), followed by an overview of the judicial trends post the 2015 Amendment (**Sections D and E**).

2. Executive Engineer v. Gangaram Chhapolia (1984) 3 SCC 627; Govt. of T.N. v Munusamy Mudaliar 1988 Supp SCC 651; International Airports Authority of India v. K.D. Bali (1988) 2 SCC 360; S. Rajan v. State of Kerala (1992) 3 SCC 608; Indian Drugs & Pharmaceuticals Ltd. v. Indo-Swiss Synthetics Germ Mfg Co. Ltd. (1996) 1 SCC 54.
3. Union of India v. M. P. Gupta (2004) 10 SCC 504; ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd. (2007) 5 SCC 304.

2. PARTY AUTONOMY V/S PROCEDURAL FAIRNESS: POSITION PRE-2015 AMENDMENT

The fact that one of the parties' own employee could act as an arbitrator seems overtly unfair and against the principles of natural justice, specially the principle of: *Nemo judex in causa sua ("no one should be a judge in their own cause").* However the Indian arbitration space is replete with cases where such clauses were upheld as valid and enforceable, until the 2015 Amendment.[4] The normative framework, as it stood prior to the 2015 Amendment, did not provide for any explicit disqualification or criteria to judge the independence or impartiality of arbitrators. The lacuna was exploited by most parties in better bargaining power to thrust their own choice of arbitrator on the other party.

The judiciary consistently upheld the validity of such clauses, on the basis of "party autonomy", without factoring in the unequal bargaining power of parties and boilerplate nature of contracts.[5] The only exception carved out in such cases was that if the arbitrator was the controlling or dealing authority in regard to the subject of the contract, or a direct subordinate to the officer whose decision was the subject matter of the dispute, such an appointment was held as invalid in terms of Section 12 of the Act by virtue of the decision of the Hon'ble Supreme Court in *Indian Oil Corpn. Ltd.* v. *Raja Transport (P) Ltd.*[6] However, as rightly observed in the 246th Law Commission of India's Report:[7] this exception was simply "***not enough***".[8] Given the constraints of judicial activism in a field occupied by legislation, the legislative lacuna surrounding the issue had to be addressed.

4. *Ibid.*
5. Executive Engineer v. Gangaram Chhapolia (1984) 3 SCC 627; Govt. of T.N. v. Munusamy Mudaliar 1988 Supp SCC 651; International Airports Authority of India v. K. D. Bali (1988) 2 SCC 360; S. Rajan v. State of Kerala (1992) 3 SCC 608; Indian Drugs & Pharmaceuticals Ltd. v. Indo-Swiss Synthetics Germ Mfg. Co. Ltd. (1996) 1 SCC 54; Union of India v. M.P. Gupta (2004) 10 SCC 504; ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd. (2007) 5 SCC 304.
6. (2009) 8 SCC 520; See Denel Pty. Ltd. v. Ministry of Defence (2012) 2 SCC 759 : AIR 2012 SC 817; and Bipromasz Bipron Trading SA v. Bharat Electronics Ltd. (2012) 6 SCC 384.
7. Law Commission of India, *Amendments to the Arbitration & Conciliation Act, 1996* (Report No. 246, 2014).
8. *Id*., para 56.

3. LAW COMMISSION'S 246TH REPORT

The 246th Report of the Law Commission which recommended several crucial amendments to the Act, and expressed its dissatisfaction with the judicial position *vis-à-vis* the appointment of arbitrators as it stood then. The Commission noted that in a bid to uphold "party autonomy" or binding nature of contracts, the aspect of "procedural fairness" was being lost sight of. The Commission emphasised on maintaining "*minimum levels of independence and impartiality*" regardless of parties' prior agreement under the arbitration clause. Contrary to the view expressed by the Supreme Court while upholding the appointment of arbitrator related to one of the parties, The Commission observed that the right to natural justice cannot be waived merely based on a prior agreement at the time of formation of contract but before the dispute have arisen between the parties. The Commission also noted that if the appointing authority is the State itself, then the duty to appoint an impartial and independent arbitrator is much more onerous.[9]

The Law Commission then proposed several critical amendments to Sections 11, 12, and 14 of the Act. The recommendations paved way for introduction of "*de jure*" ineligibility of arbitrators in case the relationship of the arbitrator with any of the parties or counsel or subject matter of the dispute fell within the categories specified in the schedule, as opposed to a mere "*de facto*" disqualification as provided under Section 12(3) of the unamended act. In other words, the Law Commission recommended introduction of certain categories of relationship between the arbitrator and the party, counsel or subject matter, which would render such arbitrator *de jure* ineligible by the operation of law. The Commission recommended introduction of the Red and Orange lists of the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration ("hereinafter referred to as "**IBA Guidelines**"), to serve as a "guide" to determine whether circumstances exist which give rise to such justifiable doubts as to the independence and impartiality of the arbitrator.

4. 2015 AMENDMENTS AND THE CURRENT NORMATIVE FRAMEWORK

Following the Law Commission's recommendations, the Act was accordingly amended in 2015 through the 2015 Amendment. Sections 11, 12 and 14 of the act were specifically amended to ensure fairness in

9. *Id*., para 57.

appointment procedure. Some salient features of the amendments impacting the independence and impartiality of arbitrators are as follows:

a. **Disclosure:** The amended Section 12 of the Act now requires an arbitrator to give **specific** disclosures when she/he is approached for appointment, regarding existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts regarding their independence or impartiality. Disclosure is required to be made in terms of form provided in the Sixth Schedule.[10]

b. **Incorporation of Fifth and Seventh schedules:** The amendment incorporated certain criteria to assess whether justifiable doubts exist regarding the independence or impartiality of an arbitrator based on the Red and Orange lists of the IBA Guidelines.

   i. **Fifth Schedule**: The Fifth schedule read with Section 12(1)(b) acts as guideline to ascertains whether circumstances giving rise to justifiable doubts as to the independence or impartiality of arbitrators exist. It is based on the Orange List of the IBA Guidelines, and lists down less serious circumstances, which constitute "*de facto*" ineligibility. The situations mentioned under the fifth schedule broadly cover the following:

- Arbitrator's relationship with the parties or the counsel.
- Relationship of arbitrator with the dispute.
- Arbitrator's direct or indirect interest in the dispute.
- Previous services for one of the parties or other involvement in the case.
- Relationship between an arbitrator or another arbitrator or counsel.
- Relationship between arbitrator and party and others involved in the arbitration.

   ii. **Seventh Schedule:** It incorporates disqualification categories akin to the Red List of the IBA Guidelines, which lead to *de jure* inability to act as an arbitrator. The disqualification stems out of the arbitrator's relationship with the parties, or the counsels or her direct or indirect interest in the dispute. If the case falls within any of the categories specified in the Seventh Schedule,

10. Arbitration and Conciliation Act 1996, s. 12(1)(*b*).

such an appointment is invalid by the operation of law and the arbitrator's mandate stands terminated under Section 14(1)(a) of the Act. This disqualification operates notwithstanding any *prior* agreement to the contrary.[11]

So, while the disclosure is required with respect to a broader list of categories set out in the Fifth Schedule, the *ineligibility* to be appointed as an arbitrator and the consequent *de jure* inability to so act follows from a smaller and more serious sub-set of situations as set out in the Seventh Schedule.

c. Waiver: Section 12 (5) now carries a clause that allows waiver of applicability of Section 12 (5). However, such a waiver can only be: *subsequent* to the dispute having arisen; and by an express agreement in writing (as opposed to deemed waiver by conduct as stipulated under Section 4 of the Act) of the parties. Courts have been strict to interpret the condition of '*agreement in writing'* to ensure fairness in appointments and the conduct of arbitration.[12]

d. Forum of Challenge: If the appointment clause or appointment falls foul of the Fifth Schedule, the challenge lies before the arbitral tribunal under Section 13(2) read with Section 12(3) of the Act. If such a challenge is unsuccessful, the decision is non-appealable.[13] The only recourse available to the aggrieved party in such a scenario is to file an application for setting aside the award under Section 34 of the Act on this ground.[14] On the other hand, if the appointed arbitrator is *ineligible* in terms of Seventh Schedule, s/he would lack inherent jurisdiction to proceed any further, and hence an application for termination of mandate may be filed under Section 14(2) of the Act, *directly* before the court.[15] If the appointment clause itself suffers from the ill of *de jure* ineligibility, the parties may approach the court under Section 11 of the Act, and seek an appointment by the court.[16]

11. Arbitration and Conciliation Act 1996, s. 12(5).
12. See Bharat Broadband Network Ltd. v United Telecoms Ltd. (2019) 5 SCC 755.
13. Arbitration and Conciliation Act 1996, s. 13(3).
14. Arbitration and Conciliation Act 1996, s. 13(5).
15. HRD Corpn. v. GAIL (India) Ltd. (2018) 12 SCC 471; Bharat Broadband Network Ltd. v. United Telecoms Ltd. (2019) 5 SCC 755; Government of Haryana PWD Haryana (B and R) Branch v. G.F. Toll Road (P) Ltd. (2019) 3 SCC 505.
16. TRF Ltd. v. Energo Engg. Projects Ltd. (2017) 8 SCC 377.

e. Applicability: In terms of Section 26 of the 2015 Amendment,[17] the amended provisions are only applicable to arbitrations which commenced post the 2015 Amendment coming into effect, i.e. on or after 23 October, 2015, unless the parties agree otherwise.[18] The date of the arbitration agreement is immaterial.

5. SHIFT IN JUDICIAL TREND: THE CURIOUS CASE OF UNILATERAL APPOINTMENTS

The 2015 Amendment paved the way for a shift in judicial trend (in contrast to what has been discussed in Section B above), and equipped the parties with effective recourse to challenge the unfair appointment procedures in their arbitration agreements. Further, the specific disclosure requirements and the categories of grounds and disqualifications given under the Fifth and Seventh schedules enabled an *objective* test for independence and impartiality of potential arbitrators. As a result of the 2015 Amendment, the parties can now no longer appoint their existing employees, consultants or advisors as arbitrators. However, the *de jure* disqualification does not cover former or retired employees who have retired beyond three years of their nomination, and who may still be appointed as arbitrators.[19]

What is interesting to note is that post-2015 Amendment, the inquiry in judicial decisions has not merely been limited to "who may be appointed" but also been extended to"who may appoint". Unilateral appointment clauses, which give the power of nomination or appointment of an arbitrator to only one of the parties, have since been constantly under judicial scanner. Though the Seventh Schedule provides the criteria for ineligibility of the "appointed arbitrator", the listed grounds do not apply to the "appointing authority". So, there is no direct bar on unilateral appointments under the Act. In other words, if the appointed arbitrator does not otherwise fall under any of the disqualifications specified under the Seventh Schedule, a strict and narrow interpretation of the provisions of the Act would lead to the conclusion that such an appointment is valid even if the arbitrator

17. *26. **Act not to apply to pending arbitral proceedings** - Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.*
18. Aravali Power Co. (P) Ltd. v. Era Infrastructure Engg. Ltd. (2017) 15 SCC 32; Union of India v. Parmar Construction Co. AIR 2019 SC 5522.
19. Voestalpine Schienen Gmbh v. Delhi Metro Rail Corpn. Ltd. (2017) 4 SCC 665; State of Haryana v. G.F. Toll Road (P) Ltd. (2019) 3 SCC 505.

is unilaterally appointed by one of the parties. Several High Courts even post the 2015 Amendment continued to hold this view,[20] until the Supreme Court's ruling in *TRF Ltd.* v. *Energo Engg. Projects Ltd.*[21] ("**TRF Ltd. Case**") in 2017, which finally led to the decision in *Perkins Eastman Architects DPC* v. *HSCC (India) Ltd.*[22] ("***Perkins Eastman Case***"). These are discussed next.

In the context of unilateral appointments, the judicial decisions post-2015 Amendment dealt with three broad categories of appointment clauses:

i. Appointment of disqualified person or nominee of disqualified person as the sole arbitrator ("**TRF Category**"); and

ii. Appointment of nominee of one of the parties as the sole arbitrator; and

iii. Appointment of arbitrator(s) only from the panel maintained or proposed by one of the parties

The first significant decision that dealt with this issue was the *TRF Ltd.* Case. A three-judge bench of the Supreme Court was seized of a matter where the arbitration clause stipulated arbitration before the Managing Director ("**MD**") or a nominee of the MD of EEPL. The Court relied on the principle embedded in the maxim *Qui Facit Per Alium Facit Per Se* (What one does through another is done by oneself)[23] to hold that once the arbitrator (the MD in this case) becomes ineligible by operation of law under Section 12(5) of the Act as amended by the 2015 amendment, his power to nominate someone else is also lost.

The ruling in *TRF Ltd. Case* was followed by the Supreme Court in *Bharat Broadband Network Ltd.* v. *United Telecoms Ltd.*[24] (*the* "**BBNL Case**"), where the arbitration agreement had a similar appointment clause as in the *TRF Ltd. Case*. Curiously, in the *BBNL Case*, the appointment was challenged by the party who had itself nominated the arbitrator, in light of the ruling in *TRF Ltd. Case*. An argument was raised that the party was estopped from challenging the appointment owing to its conduct of going

20. Divyendu Bose v South Eastern Rly. 2018 SCC OnLine Cal 13253; C.P. Rama Rao v. National Highways Authority of India 2017 SCC OnLine Del 9029.
21. (2017) 8 SCC 377.
22. (2020) 20 SCC 760 : 2019 SCC Online SC 1517.
23. See Firm of Pratapchand Nopaji v. Firm of Kotrike Venkata Setty & Sons (1975) 2 SCC 208.
24. (2019) 5 SCC 755.

ahead with the appointment. The Court held that since the appointment was *void ab initio* owing to the arbitrator's *de jure* ineligibility, there was no question of estoppel by conduct, and thus, the appointment was set aside. The Court also emphasised that a waiver of the applicability of Section 12(5) can only be done through an *express agreement in writing* and cannot be an implied waiver as envisaged under Section 4 of the Act.

Both, the *TRF Case* and the *BBNL Case*, dealt with the category of arbitration clauses where the disqualified party had twin capacities: that of an "arbitrator" and the "appointing authority". The courts continued to draw a distinction between the "*TRF category*" of clauses from the clauses where there was no such "twin capacity"[25] and kept upholding unilateral right of appointment of a sole arbitrator until the law was settled by a two-judge bench of the Supreme Court in *Perkins Eastman Case.*

A. *Perkins Eastman*: One Step Forward

The appointment clause in the *Perkins Eastman Case*[26] stipulated arbitration by a person nominated by the Managing Director of one of the parties (the MD here had only one capacity: that of the "appointing authority"). The Supreme Court analysed the ratio in the *TRF Case* and noted that the MD therein was found ineligible owing to the interest he would have in the outcome of the dispute. The Court further noted that if the interest in the outcome of the dispute is taken to be the basis for the possibility of bias, then it will always be present if one of the parties is given a unilateral right of appointing a sole arbitrator. The Supreme Court thus held that"***the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator***".[27]

Hence, the Supreme Court in *Perkins Eastman Case* conclusively ruled that arbitration agreements that grant the right of "*unilateral appointment of sole arbitrator*" to one of the parties, are invalid. However, the judgement in *Perkins Case* was closely followed by a three-judge bench decision of the Supreme Court in *Central Organisation for Railway Electrification* v. *ECI-SPIC-SMO-MCML (JV)*[28] ("**Central Organisation Case**"), which

25. Worlds Window Infrastructure and Logistics (P) Ltd. v. Central Warehousing Corpn. 2018 SCC Online Del 10600; Kadimi International (P) Ltd. v. Emaar MGF Land Ltd. 2019 SCC OnLine Del 9857 : (2019) 4 ArbLR 233; Sriram Electrical Works v. Power Grid Corpn. of India Ltd. 2019 SCC Online Del 9778.
26. Perkins Eastman Architects Dpc v. HSCC (India) Ltd. 2019 SCC OnLine SC 1517.
27. *Id*., para 21.
28. (2020) 14 SCC 712.

has effectively given parties a route to *indirectly* enforce unilateral appointments. The Court in *Central Organisation Case* held valid the appointment of arbitrators out of a panel unilaterally suggested by the one of the parties.

B. *Central Organisation for Railway Electrification*: Two Steps Back

Before delving into the facts and decision rendered in the *Central Organization Case*, it will be apposite to first refer to the Supreme Court's ruling in *Voestalpine Schienen GmbH* v. *Delhi Metro Rail Corpn. Ltd.*[29] ("**Voestalpine Case**"). The arbitration clause in this case envisaged a three-member tribunal, who were to be nominated from the panel of 31 arbitrators maintained by Delhi Metro Rail Corporation Ltd ("**DMRC**") consisting of ex-Government and Railway employees. Under the appointment clause, DMRC was empowered to shortlist five names from the panel and the parties were to nominate one arbitrator each from such list, and such nominated arbitrators were to nominate the presiding arbitrator. Pertinently, DMRC forwarded the entire list to the petitioner/counter party, *excluding* the serving and retired officers of DMRC for nomination. However, the petitioner challenged the clause as being in violation of Section 12(5) of the Act. The Court opined that the discretion given to DMRC to shortlist five persons from the panel gave very limited choice to the petitioner and further left room for the suspicion that DMRC may pick its own favourites, and thus suggested deletion of the said clause. The Court, after noting that if DMRC had given a wider list to the petitioner, which excluded the serving and retired employees of DMRC, upheld the procedure of selection from the wider list so provided. The Court in this case also emphasised on the need for "***broad based panels***", consisting of people from various fields, both technical and legal.

We now turn to the *Central Organisation Case*. Here, the arbitration clause contemplated appointment of three arbitrators by Indian Railways from a panel comprising of four of its retired employees. The other party was given an option to select two out those four names; and the MD of Indian Railways was empowered to choose the nominee of the other party from the two shortlisted names. The MD also had the power to appoint the rest of the two arbitrators from the recommended panel, or outside it. The Court, after discussing the law laid down in *Voestalpine Case* and

29. (2017) 4 SCC 665.

Perkins Eastman upheld the validity of the appointment clause. The court expressed the opinion that Indian Railways had given a "*wide option*" to the counter party by proposing four of its retired employees as nominees. The court further held that the power of the MD to nominate the arbitrator is counter-balanced by the power of the counter party to select any of the two nominees from out of the four names suggested from the panel of the retired officers.

This observation by the Court appears to be in face of the rationale of *Voestalpine Case*, where the Court invalidated the appointment clause (which restricted the choice of arbitrators from merely five names out of an entire panel of thirty-one. Further, the Court in *Voestalpine Case* specifically noted that the proposed list did not have retired employees from DMRC, which was not the case in *Central Organisation Case*, where all the four names in the proposed list were retired employees of Indian Railway.

More importantly, the Court in *Central Organisation Case*, seems to have completely misread the rationale in *TRF Ltd.* and *Perkins Eastman*. The courts in *TRF Ltd* and *Perkins Eastman* had expressed the opinion that the situation where both parties nominate their respective arbitrators, their authority to nominate cannot be questioned,[30] as any advantage that a party may derive from nominating an arbitrator of its choice would be counterbalanced by equal power by the other party.[31]

The Court in *Central Organization* failed to appreciate that, the court in *Central Organization* failed to appreciate that, the court in *TRF Ltd.* and *Perkins Eastman* was referring to a situation where parties could **nominate respective arbitrators of their choice** and that it would get counter-balanced by equal power with the other party; and not a situation where the panel out which nomination is to be made, is controlled by only one of the two parties. In the latter situation, the advantage does not get counter balanced. Applying the *TRF Ltd.* and *Perkins Eastman* logic, if a party having interest in the outcome of the dispute or an ineligible person does not have the unilateral right to appoint the sole arbitrator, by the same logic, such a party should not have the right to unilaterally decide on the panel out of which the arbitrator is finally appointed.

30. TRF Ltd. v. Energo Engg. Projects Ltd. (2017) 8 SCC 377, para 50.
31. *Supra* note 26 para 20.

The decision in *Central Organization Case* is not merely contradictory to *Perkins Eastman* with respect to unilateral appointments, but has also diluted the principle of neutrality of panels discussed in the *Voestalpine Case,* where the Court had ruled against giving *limited options* to the other party while making appointments from a panel, and had further recommended the parties, particularly PSU's and government authorities, to maintain "*broad based*" panels.

In context of appointments from panel maintained by one of the parties, the decision by a single judge of Delhi High Court in ***Larson & Turbo Construction Ltd.* v. *Public Works Department***[32] is worth discussing. The arbitration clause in this case contemplated the appointment of a sole arbitrator from a panel of arbitrators maintained by PWD, and accordingly a retired director of PWD was appointed as the sole arbitrator. The judgement in this case seems to have been reserved before *Perkins Eastman Case*, and hence no reliance has been placed on it to strike down the unilateral appointment. The High Court in this case, noted that the appointed arbitrator was otherwise qualified under the Seventh Schedule. However, the Court looked into the *procedure of empanelment* of arbitrators by the PWC to ascertain their independence and impartiality. Under the empanelment procedure, certain conditions for empanelment were specified by the PWD, such as:

> *'That the applicant has not appeared for private party and against the government interest before any Arbitrator of PWD/CPWD or DDA'.*
>
> *'The Officer to be empanelled should not have taken any commercial employment and have not appeared before any Arbitrator for CPWD/PWD Delhi or DDA in favour of any party and against the Government'.*

The Court after taking note of the conditions observed that the empanelled persons were required to display a certain kind of trait or attributes that are antithetical to the appointment of an impartial and an independent arbitrator, and terminated the mandate under of the arbitrator under Section 14(1)(a) of the Act. This case is another example of purposive interpretation of the Act.

32. 2020 SCC OnLine Del 33.

6. TANTIA CONSTRUCTION: THE REMEDIAL STEP?

The conundrum arising out of the decision in *Central Organization Case* did not escape the Supreme Court's attention for long. In a similarly placed case, a three-judge bench of the Supreme Court in *Union of India* v. *Tantia Constructions Ltd. ("**Tantia Construction Case**")* prima facie disagreed with the view taken in *Central Organisation Case* and sought reference of the said decision to a larger bench.[33] The position as it stands today is that the larger bench is yet to be constituted and thus, the decision in *Central Organisation Case* still holds the field. In view of the divergence of opinions, while some courts are still deciding similarly placed matters on the basis of decision in *Central Organisation,*[34] others have proceeded to appoint independent arbitrators,[35] in view of the order passed in *Tantia Construction Case*. The order in *Tantia Construction Case* has further been relied upon by parties to obtain interim stay on arbitral awards where the tribunal comprised of arbitrators appointed from a unilaterally decided panel.[36]

7. CONCLUSION

The Indian arbitration space has shown a great deal of progress in making the arbitration procedure fair as well as efficacious through legislative reforms. The criteria under the Fifth and Seventh Schedules have brought in a fair amount of objectivity in judging the independence and impartiality of arbitrators. Most of the PSUs and government authorities have amended the dispute resolution clauses in their contracts to do away with clauses that prescribed appointment of their existing employees, consultants or advisors as arbitrators. In a country like India, where ad-hoc arbitrations are a norm, these reforms are a welcome step in ensuring confidence of parties in the arbitral process. To bring about long term and systematic changes, institutionalized arbitration in India needs to be encouraged and strengthened. Further, judicial decisions post-2015 Amendment reveal that the there is a fair amount of subjectivity shown by Indian courts in interpreting Section 12(5) of the Act read with the Seventh Schedule in a

33. 2021 SCC OnLine SC 271.
34. Iworld Business Solutions (P) Ltd. v. Delhi Metro Rail Corpn. Ltd. 2021 SCC Online Del 2730.
35. Singh Associates v. Union of India 2022 SCC OnLine Del 3419; Proddatur Cable TV Digi Services v. Siti Cable Network Ltd. 2020 SCC OnLine Del 350 : (2020) 267 DLT 51.
36. JSW Steel Ltd. v. South Western Railway Order dated 16.08.2022 passed in SLP (c) No. 9462/ 2022.

purposeful manner. The contradictory position arising out decisions in *TRF Case and Perkins Eastman Case,* on one hand, and *Central Organisation Case*, on the other, has rightly been referred to a larger bench. In the meanwhile, parties, especially PSUs and government authorities, should voluntarily do away with unilateral arbitrator appointment clauses—or at least strive to maintain "*broad based*" panels, with people from diverse backgrounds acting as arbitrators. This would be in line with the spirit of Supreme Court's ruling in *Voestapaline Case* and maintain overall fairness in the process of arbitration.[37] In other words, the appointment process must be such that: "*Justice must not only be done, but must also be seen to be done*".[38]

37. *See* L&T Hydrocarbon Engg. Ltd. v. Indian Oil Corpn. Ltd. 2022/DHC/004531.
38. Lord Hewart CJ, R. v. Sussex Justices [1924] 1 KB 256.