ASYMMETRICAL CLAUSES, UNILATERAL APPOINTMENTS AND BILATERAL REFERENCES: RETHINKING THE STANDARD FOR COURT INTERVENTION

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Abstract

There has been a lot of discussion and praise for the judgements of the Hon'ble Supreme Court of India in TRF Ltd. v. Energo Engineering Product ["TRF"] and Perkins Eastman Architects DPC v. HSCC ["Perkins"]. While their contribution towards ensuring the independence and impartiality of arbitrators is laudable, the cases have been subsequently misapplied to invalidate unilateral appointments. Unfortunately, the courts have mixed three entirely different concepts, i.e., asymmetrical clauses, unilateral appointments and bilateral references. This confusion has in turn led to excessive court intervention, akin to court confirmation and substitution of sole arbitrator appointments. The Courts have not paid adequate attention to Section 4 and 5 of the Arbitration and Conciliation Act, 1996 ["the Act"] and have interfered in sole arbitration appointments under the misguided notion of ensuring independence and impartiality by appointing judges from a limited pool of arbitrators.

This Article adopts the position, that concerns over independence and impartiality have already been addressed by an objective test under Schedule VII of the Act with the incorporation of the IBA Guidelines. After critically examining the judgements of various courts, it is argued that unilateral appointments are valid and have not been held to be void. An eligible arbitrator who is not barred under Schedule VII of the Act can be appointed unilaterally and the courts should not substitute their own mind in place of the will of the parties. It is ultimately argued that the power under Section 11 of the Act needs to be reconciled with Sections 4 and 5 of the Act in light of the intent behind The United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ["Model Law"] provisions. This reconciliation can be achieved with the suggested objective standard which would respect party autonomy as well as ensure fair and equitable treatment of the parties.

I. Introduction

One of the key advantages of arbitration is expert adjudication of the dispute between parties.[1] A pre-requisite to achieve expert adjudication is to grant freedom to the parties to nominate and mutually agree upon a person with the necessary qualifications and experience to appreciate the nuances of the commercial realities and the contract between the parties.[2] This freedom to choose

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1 Stephen K. Huber, *The Role of Arbitrator: Conflict of Interest*, 28 FORDHAM URB. L. J. 915, 917 (2001).

2 Gary Born, *Principle of Judicial Non-Interference in International Arbitral Proceedings,* 30 U. PA. J. INT'L L. 999 (2009); Thomas E. Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, 36 VAND. J. TRANSNAT'L L. 1189 (2003).

an arbitrator is akin to '*freedom of contract*' in the sense that the freedom is not absolute.[3] Public policy requires that the arbitrator chosen by mutual consent of the parties is fit for adjudication and that the appointment procedure is fair to both parties.[4] It should be clarified that this '*fitness*' of the arbitrator is not a requirement under the Model Law, and the parties' consent is to be given utmost regard.[5] However, in all jurisdictions, the law will step in to protect a party (a) if the consent is either not free or gives an unfair advantage to one party, i.e., unilateral appointments, (b) the party did not know what it was consenting to, i.e., lack of disclosures or (c) if such consent has led to the appointment of a person who is unfit for adjudication, i.e., a person ineligible to be appointed as an arbitrator. In all other instances, the will of the parties is respected and given utmost priority.[6]

No arbitration statute prescribes a qualification requirement, as no requirement is contained under the Model Law.[7] India experimented with a qualification criterion by introducing the Eighth Schedule,[8] but had to repeal it,[9] since it led to a license requirement,[10] and effectively barred foreign arbitrators.[11] Most arbitration institutions, therefore, appoint arbitrators who have acquired some accreditation,[12] and decide which arbitrator is most suitable for the nature of the dispute between the parties. In ad-hoc arbitration, the choice of the most suitable arbitrator is left to the parties to be determined in accordance with the procedure agreed upon by the parties and due regard is given to Section 11(1) of the Act. Only in the eventuality that "*a party fails to act as required under that procedure*" as contemplated in Section 11(6) of the Act, is the court expected to intervene. However, the term "*failure to act*" cannot trigger a court intervention in all circumstances. The courts ought to read this "*failure to act*" in light of Section 4(b), which provides for a waiver, and Section 5 of the Act, which mandates minimal court intervention. Moreover, this intervention does not, and should

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3 Ashutosh Ray & Ketul Hansraj, *The Legality of Unequal Arbitrator Appointment Powers in India: The Clarity, the Mist*, KLUWER ARBITRATION BLOG (Mar. 03, 2020), *available at* https://arbitrationblog.kluwerarbitration.com/2020/03/03/the-legality-of-unequal-arbitrator-appointment-powers-in-india-the-clarity-the-mist/.

4 Perkins Eastman Architects DPC v. HSCC (India) Ltd., (2020) 20 SCC 760, ¶ 23 [*hereinafter* "Perkins"]; Cour de Cassation [Cass.] [supreme court for judicial matters], Jan. 07, 1992, No. 89-18.708, Siemens AG and BKMI Industrienlagen GmbH v. Dutco Consortium Constr. Co. (Fr.); Lord Steyn, *England: The Independence and/or Impartiality of Arbitrators in International Commercial Arbitration*, *in* INTERNATIONAL CHAMBER OF COMMERCE, INDEPENDENCE OF ARBITRATORS: 2007 SPECIAL SUPPLEMENT 91, 95 (2008).

5 United Nations Comm'n on Int'l Trade Law, Model Law on International Commercial Arbitration, G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (Dec. 11, 1985), art. 11(5), as amended by G.A Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006).

6 Rithu Krishna B R, *Indian Parties Choosing Foreign Seat of Arbitration – Party Autonomy and Public Policy,* 4(2) INT'L J. L. MGMT. HUM. 782, 786 (2021); Sunday A. Fagbemi, *The doctrine of party autonomy in international commercial arbitration: myth or reality?,* 6(1) J. SUSTAINABLE DEV. L. AND POL'Y 223, 245 (2015).

7 Commonwealth Secretanat, *Explanatory Document on the UNCITRAL Model Law on International Commercial Arbitration*, UNCITRAL (1991), *available at* https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/model-law-arbitration-commonwealth.pdf.

8 The Arbitration and Conciliation (Amendment) Act, 2019, No. 33, Acts of Parliament, 2019, § 43J (India).

9 The Arbitration and Conciliation (Amendment) Ordinance, 2020, No. 14, Acts of Parliament, 2020 (India).

10 Ajar Rab, *Accreditation of Arbitrators in India: A New License Requirement?,* KLUWER ARBITRATION BLOG (Oct. 11, 2019), *available at* https://arbitrationblog.kluwerarbitration.com/2018/10/11/accreditation-of-arbitrators-in-india-a-new-license-requirement/.

11 Ajar Rab & Ankit Singh, *2019 Amendment to Arbitration Law: Foreign Arbitrators in Indian Seated Arbitrations*, INDIACORPLAW (Sept. 5, 2020), *available at* https://indiacorplaw.in/2020/09/2019-amendment-to-arbitration-law-foreign-arbitrators-in-indian-seated-arbitrations.html.

12 Justice B.N. Srikrishna, Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017) [*hereinafter* "Justice Srikrishna"].

not, mean a substitution of the will of the parties by the supervising court. To prevent this uncalled-for court intervention, there ought to be an appropriate standard for court intervention.

As a first step, the court ought to respect the choice of the parties unless the arbitrator nominated suffers from a lack of (a) independence and impartiality or (b) disqualification. No response to the arbitration notice, or a simple objection to the proposed arbitrator without any reasons cannot be considered as a failure to achieve consensus. If a party knowingly waives its right to nominate an arbitrator or to oppose the candidature of an arbitrator, then the language of Section 4 to the effect that "*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 ought to be binding*"[13] should be given effect. Otherwise, court intervention in such cases incentivises guerrilla tactics to deliberately delay the arbitral process.[14]

At present, the standard for court intervention, inter alia, is occupied by a few judgments such as *Perkins*, *TRF* and *Bharat Broadband Network Limited* v. *United Telecom Limited*[15] ["**Bharat Broadband**"] ["**Ineligibility Cases**"]. While these judgements arrived at the correct conclusions in their peculiar facts, the willingness of courts to intervene at every instance on misplaced considerations of impartiality and fairness,[16] is killing party autonomy and expert adjudication in Indian arbitration.

It is argued that the current jurisprudence based on the *Ineligibility Cases* confuses three distinct concepts, i.e., (a) asymmetrical clauses, (b) unilateral appointments, and (c) a bilateral reference. The Ineligibility Cases addressed the limited issue of whether a person ineligible to be an arbitrator by virtue of his relationship can nominate another arbitrator.[17] However, these *Ineligibility Cases* have been given an expansive application. They have been praised for striking down "*unilateral appointments*" in India,[18] based on an isolated reading of a concluding line in *Perkins* that "*a person who has an interest in the outcome of the dispute cannot have the power to appoint a sole arbitrator*".[19] Such an interpretation goes against the express legislative intent to provide a system of checks and balances by statutorily incorporating the IBA Guidelines on Conflicts of Interest in International Arbitration ["**IBA Guidelines**"] by the Arbitration and Conciliation (Amendment) Act, 2015 ["**2015 Amendment**"]. If this line is read without context, it signals a death knell for party autonomy.[20] Applying this rationale, no party should ever have the right to nominate an arbitrator. Only the courts should appoint all arbitrators. Unfortunately, this is becoming increasingly true.

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13 The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996, § 4 (India).

14 JAN PAULSSON, THE IDEA OF ARBITRATION (2013).

15 Perkins; TRF Ltd v. Energo Engineering Product, (2017) 8 SCC 377 [*hereinafter* "TRF"]; Bharat Broadband Network Limited v. United Telecom Limited (2019) 5 SCC 755 [*hereinafter* "Bharat Broadband"]; *See also*, Voestalpine Schienen GmBH v. Delhi Metro Rail Corporation (2017) 4 SCC 665 [*hereinafter* "Voestalpine"]; Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML(JV), (2020) 14 SCC 712; Bhayana Builders Pvt Ltd v. Oriental Structural Engineers, 2018 SCC OnLine Del 7634 [*hereinafter* "Bhayana Builders"]; Poddatur Cable TV Digi Services v. SITI Cable Network Limited, 2020 SCC OnLine Del 350 [*hereinafter* "Poddatur"].

16 Proddatur, ¶ 31; Hong Lin-Yu et al., *Independence, Impartiality, and Immunity of Arbitrators: US and English Perspective,* 52(4) INT'L AND COMP. L. Q. 935, 935-967 (2013).

17 Perkins, ¶ 18; TRF, ¶ 7.1; Bharat Broadband, ¶¶ 13 & 18.

18 BORN, *supra* note 2; Bhumika Indulia, *To Appoint or Not to Appoint : A Critical Study of Unilateral Appointment of Arbitrators under the Arbitration Act, 1996*, SCC ONLINE BLOG (Mar. 14, 2022), *available at* https://www.scconline.com/blog/post/2022/03/14/a-critical-study-of-unilateral-appointment-of-arbitrators-under-the-arbitration-act-1996/.

19 Perkins, ¶ 21.

20 Poddatur, ¶ 24.

Courts have started exercising jurisdiction in all cases of appointments without due regard to minimal intervention under Section 5 of the Act.

Invariably, "*arbitrators are usually nominated from a pool of person and include retired Supreme Court and High Court Judges who are known in the circuit*" ["**Limited Pool**"].[21] This Limited Pool rarely has subject matter specialists,[22] and completely subverts expert adjudication, which is one of the key strengths of arbitration as a dispute resolution mechanism.[23]

Therefore, Part II of this Article attempts to draw clear lines between asymmetrical clauses, unilateral appointments, and bilateral references. Part III of the Article critically examines the current jurisprudence based on the Ineligibility Cases and discusses the lack of clarity on the issue of unilateral appointments in India. Part IV addresses the problems that arise by misapplying the Ineligibility Cases to bilateral references and how courts subvert the goal of minimal court intervention. Part V attempts to find a standard for court intervention in arbitrator appointments. Part VI concludes with the urgent need to address and rethink the current jurisprudence on sole arbitrator appointment to bolster arbitration in India.

II. Distinguishing Asymmetrical Clauses, Unilateral Appointments and Bilateral References

There have been many views praising the Ineligibility Cases.[24] Unarguably, the Ineligibility Cases further independence and impartiality in arbitration proceedings.[25] However, the Ineligibility Cases and their subsequent application by courts do not adequately distinguish between an asymmetrical clause, a unilateral appointment of a sole arbitrator and a bilateral reference. In the absence of clarity between these concepts, there is bound to be confusion and misapplication of the Ineligibility Cases.

A. Asymmetrical Clauses

An asymmetrical clause is one where only one of the parties to the arbitration agreement has the right to invoke arbitration, while the other can only approach a court of law.[26] For example, only

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21 McLeod Russel India Limited v. Aditya Birla Finance Limited, A.P. No. 106 of 2020, ¶ 45 [*hereinafter* "McLeod Russel"].

22 Legality of the Unilateral Appointment of an Arbitrator India, 3, 8 CT. UNCOURT 27 (2021).

23 Charles O'Neil, *Arbitration from a Commercial Client's Perspective*, 75(1) INT'L J. OF ARB., MED. & DISP. MGMT. 71, 71-75 (2009).

24 BORN, *supra* note 3; Shamik Sanjanwala, *Unilateral Appointment of Arbitrators: Unfairness and Unequal Treatment of the Parties*, (2022) 3 SCC J-32.

25 Jaffae Alkhayer & Ashlesha Dash, *Grounds of the Challenge of Arbitrators: The Difference between Independence and Impartiality*, 5 INT'L J.L. MGMT. & HUMAN. 1857, 1857-1864 (2022).

26 Raluca Papadima, *The Uncertain Fate of Asymmetrical Dispute Resolution Clauses in Arbitration around the Globe: To Be or Not to Be*, 90(3) MISS. L. J. 541, 542-543 (2021); Peter Ashford, *Is an Asymmetric Disputes Clause Valid and Enforceable?*, 86(3) INT'L J. OF ARB., MED. & DISPUTE MGMT. 347, 347-364 (2020).

the employer may refer disputes to arbitration.[27] There is an asymmetry in the arbitration agreement itself and the right to invoke arbitration.[28] Hence, the term '*asymmetrical clauses*'.[29]

B. Unilateral Appointments

On the other hand, in unilateral appointments, both parties can invoke arbitration under the arbitration agreement, but only one party has the right to nominate an arbitrator. For example, the arbitrator will be nominated by the investor.[30] This unilateral right of only one party to nominate and consequently appoint the sole arbitrator is called a '*unilateral appointment*'.[31] It is vital to note that neither the Model Law nor the Act bars unilateral appointments.[32]

The asymmetry in unilateral appointments is the lack of consent of both parties in the choice of arbitrator. In a certain sense, a unilateral appointment can be a subset of an asymmetrical clause only to the extent that it promotes an asymmetry between the parties resulting in the violation of

a cardinal principle of arbitration, i.e., equal treatment of parties.[33] Though equal treatment applies during the arbitration proceedings, it has been extended to procedural fairness during the constitution of the tribunal as well.[34] However, the extension of procedural fairness to issues before the first hearing of an arbitral tribunal ought to be governed by a regime similar to the *'freedom of contract*', i.e., to respect the choice of parties unless there are compelling reasons otherwise.[35] For example, unequal bargaining power[36] or the contract is barred by law or opposed to public policy.[37] Thus, some common law jurisdictions such as England,[38] Singapore,[39] and the United States[40]

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27 D. Draguiev, *Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability*, 31 J. OF INT. ARB. 19, 19-25 (2014); Lauren D. Miller, *Is the Unilateral Jurisdiction Clause No Longer an Option: Examining Courts' Justifications for Upholding or Invalidating Asymmetrical or Unilateral Jurisdiction Clauses*, 51 TEX. INT'L L. J. 321 (2016); *See* NB Three Shipping v. Harebell Shipping Ltd., 2004 EWHC 2001, ¶ 47.10; Debenture Trust Corp Plc v. Elektrim Finance BV, [2005] 1 All ER (Comm.) 476, ¶ 3; Wilson Taylor Asia Pacific Pte Ltd v. Dyna-Jet Pte Ltd., [2017] SGCA 32, ¶¶ 4 & 9.

28 McLeod Russel, ¶¶ 43-45; *See,* Jane Willems, *The Arbitrator's Jurisdiction at Risk: The Case of Hybrid and Asymmetrical Arbitration Agreements, in* THE POWERS AND DUTIES OF AN ARBITRATOR: LIBER AMICORUM 410-416 (Patricia Louise Shaughnessy & Sherlin Tung eds., 2017).

29 *Supra* note 25; Ajar Rab, *Appointment of Sole Arbitrator: Can a Modified Asymmetrical Arbitration Clause Avoid Court Appointment?*, KLUWER ARBITRATION BLOG (Jan. 08, 2020), *available at* https://arbitrationblog.kluwerarbitration.com/2020/01/08/appointment-of-sole-arbitrator-can-a-modified-asymmetrical-arbitration-clause-avoid-court-appointment/.

30 McLeod Russel, ¶ 43.

31 Kanika Goel, *Appointment of a Sole Arbitrator: Analysis of Perkins Eastman*, 2(4) LEXFORTI L. J. 94 (2021).

32 Charles N. Brower & Charles B. Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded*, 29(1) ARB. INT'L 7, 7-44 (2013).

33 United Nations Comm'n on Int'l Trade Law, Model Law on International Commercial Arbitration, G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (Dec. 11, 1985), art. 18, as amended by G.A Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006); The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996, § 18 (India).

34 Ilias Bantekas, *Equal Treatment of Parties in International Commercial Arbitration*, 69(4) INT'L & COMP. L. Q. 991, 991-1011 (2020).

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

36 Pioneer Urban Land & Infrastructure Ltd. v. Geetu Gidwani Verma, (2019) 5 SCC 725, ¶ 6; Life Insurance Corporation. of India v. Consumer Educ. & Res. Ctr., (1995) 5 SCC 482, ¶ 47 (India); *See also,* Central Inland Transport Corporation Ltd. v. Brojo Nath, 1986 AIR 1571, ¶ 89.

37 Emmsons International Ltd. v. Metal Distributor (U.K.) & Ors., 2005 SCC OnLine Del 17, ¶ 15.

38 Pittalis v. Sherefettin, [1986] QB 868, at 889; Heyman v. Darwins Ltd., [1942] A.C. 356, at 370; NB Three Shipping v. Harebell Shipping Ltd., [2004] EWHC 2001 (Comm.), ¶ 11.

39 Wilson Taylor Asia Pacific Pte Ltd. v. Dyna-Jet Pte Ltd., [2017] SGCA 32, ¶¶ 23-24.

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

continue to uphold unilateral appointments,[41] respecting the freedom of contract and the will of the parties.

On the other hand, in civil law countries, there is a clear distinction between an asymmetrical clause and unilateral appointments. For example, Section 1034 (2) of the German Code of Civil Procedure, 1877 states that "*If the arbitration agreement provides for one party to be more strongly represented in the composition of the arbitral tribunal, and this places the other party at a disadvantage, the latter may file a petition*….,"[42] and get an arbitrator appointed through the court. Similarly, Article 1028 (1) of the Dutch Code of Civil Procedure, 2003 states, "*If by agreement or otherwise one party is given a privileged position with regard to appointment of the arbitrator or arbitrators*."[43]

In a similar vein, Article 15(2) of the Spanish Arbitration Act, 2003 provides a generic mandate that "*[T]the parties are able to freely agree on the procedure for the appointment of the arbitrators, provided there is no violation of the principle of equal treatment.*"[44] Thus, what is contemplated by civil law jurisdictions is equal treatment or a privileged position resulting in one party controlling the entire arbitral process to the disadvantage of the other party. A unilateral right to appoint an arbitrator is, therefore, inherently unfair,[45] or fundamentally unequal,[46] as a person with interest in the outcome or decision of the dispute must not have the *sole* power to appoint the arbitrator.[47] This fairness requirement is the rationale for striking down unilateral appointments.

Thus, equality of the parties is part of transnational procedural public policy,[48] and to that extent, the Ineligibility Cases uphold the appropriate standard by disallowing unilateral appointments. Only one party having the right to nominate an arbitrator would invariably entitle one party to a certain advantage and also operate as a unilateral condition precedent,[49] making the clause unfair. For example, a department which had imposed liquidated damages on the contractor was to appoint the arbitrator unilaterally.[50] This advantage of one party is balanced in a three-member tribunal as both parties have the right to nominate an arbitrator of their choice.[51] However, as is with most cases, the Ineligibility Cases have misapplied this rationale of equal treatment and extended it to a bilateral reference.

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41 Udian Sharma, Independence and Impartiality of Arbitral Tribunals: Legality of Unilateral Appointments, 9(1) INDIAN J. ARB. L. 121 (2020).

42 ZIVILPROZESSORDNUNG [ZPO] [Code of Civil Procedure], § 1034(2) (Ger.).

43 Art. 1028(1), RV [Code of Civil Procedure] (Neth.).

44 The Arbitration Act, 2003, No. 60/2003, art. 15(2) (Spain).

45 McLeod Russel, ¶ 3.

46 Cole Rabinowitz, *Fate of the UnilateralOption Clause Finally Dedded in Russia*, N.Y.U. J. INT'L L. POL. (Mar. 10, 2023), *available at* https://www.nyujilp.org/fate-of-the-unilateral-option-clause-finally-decided-in-russia/.

47 Shivani Khandekar & Divyansh Singh, *Independence and Impartiality of Arbitrators: Are We There Yet?*, KLUWER ARB. BLOG (Nov. 14, 2023), *available at* https://arbitrationblog.kluwerarbitration.com/2017/11/14/independence-impartiality-arbitrators-yet/.

48 *Supra* note 22, at 4.

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

50 Bharat Sanchar Nigam Ltd. v. Motorola India Pvt. Ltd., (2009) 2 SCC 337 (India), ¶ 16.

51 Wendy J. Miles, *Practical Issues for Appointment of Arbitrators Lawyer vs Non-Lawyer and Sole Arbitrator vs Panel of Three (or More)* 20(3) J. INT'L ARB. 219, 219-232 (2003).

C. Bilateral Reference

A '*bilateral reference*' is where both parties have the right to mutually appoint a sole arbitrator.[52] The concerns over unequal treatment or the unilateral right of a party to appoint an arbitrator do not arise in the case of a bilateral reference. It must be clarified that the term '*bilateral reference*' is not used in international jurisprudence but is being used in this Article only to distinguish unilateral appointments. It is important to note that there is no asymmetry in a bilateral reference under the arbitration agreement or in the right to nominate an arbitrator. The asymmetry, if any, will arise in the procedure to be followed when mutually appointing the sole arbitrator.

D. Distinguishing Unilateral Appointments, Waiver and No Consensus

To appreciate the procedural asymmetry and to reconcile the Ineligibility Cases, it is necessary to take a hypothetical example. For instance, the claimant, Cars Co. wants to bring a claim against the respondent, a tyre manufacturing unit, Tyre Co. for providing defective tyres. Cars Co. sends a notice of arbitration to Tyre Co. and nominates Ms. Sharma as an arbitrator. The notice contains Ms. Sharma's (a) CV, (b) her consent, and (c) her declaration of independence and impartiality. Four different approaches are now available to the Tyre Co. (respondent) on the receipt of the arbitration notice:

(a) Give no reply to the arbitration notice within the contemplated 30 days provided under Section 11(4)(a) of the Act. ["**No Response**"]

(b) Object to the nomination of Ms. Sharma without substantiating the reasons for the objection, i.e., an objection for objection's sake. ["**Objection Simpliciter**"]

(c) Nominate another arbitrator in place of Ms. Sharma.

(d) Raise objections to Ms. Sharma's candidature on qualifications, or lack of independence and impartiality.

*(c) and (d) are collectively referred to as ["**No Consensus**"].

From a consent perspective, there is no distinction between No Response, Objection Simpliciter, and No Consensus in each of the four scenarios as the fulcrum of arbitration, i.e., consent, is missing in all instances. Hence, the nomination of Ms. Sharma is unsustainable in law, and the court should step in to appoint a sole arbitrator as all these instances fall within the ambit of Section 11(6) of the Act. However, courts must distinguish instances of No Response and Objection Simpliciter from those of No Consensus based on the scheme of the Act and the Model Law.

E. The Power of Court Appointments

Section 11(1) of the Act gives the right to parties to appoint an arbitrator of their choice. Section 11(4)(a) of the Act provides that if there is an agreement between the parties as contemplated under Section 11(1) of the Act, and "*a party fails to appoint an arbitrator within thirty days from the receipt*

[52] Baron v. Sunderland Corporation [1965] 2 QB 56-66, at 64.

of a request to do so from the other party," then the power of the court under Section 11(6) of the Act is triggered.

It is imperative to note that the language used in Section 11(4)(a) of the Act, casts a burden on the party in receipt of the arbitration notice to nominate an arbitrator. The burden is not on the claimant but on the respondent. Therefore, Section 11(4)(a) of the Act has to be read to mean "*if the respondent fails to appoint an arbitrator within 30 days from the receipt of a request to do so from the claimant*". However, in practice, the claimant usually proposes a name, i.e., Ms. Sharma, and the respondent can exercise one of the four options mentioned above. Thus, the language of "*failure to act under that procedure*" in Section 11(6) of the Act refers to the procedure under Section 11(1). The respondent exploits the language of Section 11(4)(a), forcing the claimant to approach the court under Section 11(6) of the Act.

F. Incentivising Guerrilla Tactics

It is a given fact that once a dispute arises, parties seldom agree on anything, let alone the choice of arbitrator.[53] For this reason, an arbitration agreement is drafted in advance during commercial negotiations as parties are more likely to be agreeable with each other.[54] Moreover, there is a strategic advantage in delaying the appointment of an arbitrator if one party is the one being sued.[55] The claimant is forced to approach the court to appoint an arbitrator increasing the chances of a settlement since the court appointment would result in delay.[56] A court appointment may take six months to two years,[57] or sometimes even more. Therefore, the respondent in an arbitration hearing is tempted to derail the process of appointing the sole arbitrator,[58] to cause prejudice to the claimant.

In effect, despite having agreed to a procedure, the respondent who duly signed the arbitration agreement deliberately breaches the arbitration agreement to the detriment of the claimant, and the court approves of such conduct.[59] Not only does this approval violate fundamental notions of clean hands,[60] but it also runs afoul of the provisions for waiver and minimal court intervention provided under the Act.

On the contrary, there is a presumption that the arbitrator proposed by the claimant would be one whom the claimant could influence or likely to rule in favour of the claimant.[61] The *Ineligibility Cases* have further fueled this fear. However, parties and courts have lost sight of the system of checks and balances introduced by the 2015 Amendment.[62]

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53 Sarah Rudolph Cole, *Arbitrator Diversity: Can It Be Achieved?*, 98(3) WASH. UNIV. L. REV. 965 (2021).

54 AJAR RAB, DRAFTING OF CONTRACTS: BASIC PRINCIPLES ch. 9 (2022); Prashant S. Desai, *Arbitration Clause and International Contracts: An Analysis,* MANUPATRA (Mar. 03, 2022), *available at* https://articles.manupatra.com/article-details/Arbitration-Clause-and-International-Contracts-An-Analysis.

55 Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141(6) UNIV. PA. L. REV. 2169, 2169-2259 (1993).

56 *Supra* note 22, at 3

57 *Supra* note 22, at 3.

58 *Supra* note 55, at 2194.

59 Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63 (2010).

60 Caroline Le Moullec, *The Clean Hands Doctrine: A Tool for Accountability of Investor Conduct and Inadmissibility of Investment Claims*, 84(1) INT'L J. OF ARB., MEDIATION AND DISPUTE MGMT. 13, 13-37 (2018).

61 *Supra* note 25.

62 HRD Corporation (Marcus Oil and Chemical Division) v. GAIL (India) Ltd., (2018) 12 SCC 471, ¶ 14.

After the 2015 Amendment, the concerns of fairness, one party deriving advantage or independence and impartiality of a unilaterally appointed arbitrator have been duly addressed by an objective test of circumstances provided under the IBA Guidelines.[63] Therefore, to apply notions of unilateral appointments across the world in the Indian context is incorrect in view of the express legislative intent after the 2015 Amendment.

III. Current jurisprudence on Sole Arbitrator Appointments

Before the enactment of the 2015 Amendment, unilateral appointments were not only a norm but also sanctioned by courts.[64] The only exception was that a person controlling or dealing with the subject matter of the dispute could not be appointed as an arbitrator.[65] It was understood and accepted that the managing director of a public sector undertaking would have the unilateral right to nominate an arbitrator.[66]

Subsequently, the 246th Report of the Law Commission ["**Law Commission Report**"] addressed the delicate issue of party autonomy and the independence and impartiality of arbitrators.[67] The Law Commission Report observed that the right to natural justice could not be waived based on an arbitration agreement,[68] and the duty to appoint independent and impartial arbitrators was even more onerous on courts.[69] Thus, each party should have a right to (a) consent to the appointment of an arbitrator and (b) that the arbitrator should be independent and impartial ["**Twin Test**"].

To satisfy this Twin Test, India took the laudable step of statutorily incorporating the IBA Guidelines and introducing an exhaustive mechanism of checks and balances.[70] This led to the adoption of the Fifth, Sixth and Seventh Schedule. The Fifth Schedule adopted the Orange List of the IBA Guidelines mandating disclosures arising from the arbitrator's relationship with the parties, counsel, or subject matter of the dispute.[71] The Sixth Schedule specified the form for disclosure to be made by an arbitrator. The Seventh Schedule adopted the Red List of the IBA Guidelines incorporating a relationship-conflict provision,[72] which would lead to a de jure ineligibility of an arbitrator.[73]

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63 *Id.* at 63, ¶ 14; Voestalpine, ¶ 23.

64 Puneet Vyas, *Unilateral Appointment: Continued Dilemma Initiated by TRF* (June 18, 2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3486689; Executive Engineer, Irrigation Division, Puri v. Gangaram Chhapolia, [1984] 3 SCC 627, ¶ 9; 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; S.Rajan v. State of Kerala, [1992] 3 SCC 608; M/s. Indian Drugs & Pharmaceuticals v. M/s. Indo-Swiss Synthetics Germ Manufacturing Co. Ltd., 1996 (1) SCC 54; Union of India v. M.P. Gupta, [2004] 10 SCC 504; Ace Pipeline Contract Pvt. Ltd. v. Bharat Petroleum Corporation Ltd., [2007] 5 SCC 304.

65 Indian Oil Corporation Ltd. v. Raja Transport (P) Ltd., [2009] 8 SCC 520, ¶ 34; *See* Denel Propreitory Ltd. v. Govt. of India, Ministry of Defence, AIR 2012 SC 817; Bipromasz Bipron Trading SA v. Bharat Electronics Ltd., [2012] 6 SCC 384.

66 TRF, ¶ 49.

67 Law Commission of India, Report on the Amendments to the Arbitration and Conciliation Act, 1996, No. 264/2014 (Aug. 2014).

68 *Supra* note 66, ¶ 57.

69 Voestalpine, at 681.

70 *Supra* note 41, at 125.

71 McLeod Russel, ¶ 32.

72 McLeod Russel, ¶ 32.

73 International Bar Association, *IBA Guidelines on Conflicts of Interest in International Arbitration* (October 23, 2014).

It is vital to note that, unlike the Red List of the IBA Guidelines, India adopted an approach similar to French Courts,[74] and provided the option to waive the ineligibility of an arbitrator in writing after the dispute has arisen.[75] The two requirements for such a waiver would be (a) an express consent in writing and (b) such consent is obtained after the dispute has arisen.[76] Thus, the 2015 Amendment gave a right to the parties to waive all relationship-based conflicts. Hence, any arbitrator appointment cannot be void ab initio since an agreement by the parties may cure it. However, the current jurisprudence based on the *Ineligibility Cases* considers such appointment void ab initio.[77] Therefore, it is necessary to first examine some of the landmark cases applicable to the issue of the appointment of a sole arbitrator.

A. The judgement in *TRF*

In brief, the arbitration agreement in *TRF* (which was entered into before the 2015 Amendment) provided that the sole arbitrator will be the managing director or his nominee. After the 2015 Amendment, the managing director or his nominee would fall in Entry 12 of the Seventh Schedule, which contemplates a situation where "*the arbitrator is a manager, director or part of the management or has a controlling influence in one of the parties*." Consequently, the Court rightly held the arbitrator to be ineligible as the independence and impartiality of such an arbitrator would be circumspect, and the arbitral proceedings would not be fair.

The Court duly noted the possibility of waiver and the priority to be accorded to the *'freedom of contract'* of the parties.[78] However, since the facts in *TRF* arose from a standard form contract of a public sector undertaking, and there was, in fact, no waiver by the parties, the Court terminated the arbitrator's mandate. It then addressed the second limb of the arbitration agreement, which permitted the managing director "*or his nominee*" to nominate an arbitrator. The Court did not permit the nominee of the managing director to be the arbitrator on the sound premise of the doctrine of agency, i.e., *qui facit per alium facit per se* (she who acts through another does the act herself).[79] Thus, permitting the nominee to be the arbitrator would indirectly compromise the independence and impartiality of the arbitrator.

At this point, it is critical to highlight that the judgement in *TRF* addressed the issue of appointment of an arbitrator being hit by the Seventh Schedule without an express waiver by parties. More importantly, it pertained to the question of the choice of arbitrator i.e., who can be the arbitrator as per eligibility requirement, not whether one can party unilaterally choose an arbitrator.

The three-judge bench in *TRF* clarified that:

> *"At the cost of repetition, we may state that 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*

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74 Cour de cassation [Cass.] [supreme court for judicial matters] le. civ., Jan. 7, 1992, Bull. civ. I, No. 2 (Fr.)
75 The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996, § 12(5) (India).
76 Bharat Broadband, ¶¶ 17 & 20.
77 McLeod Russel, ¶ 32.
78 TRF, ¶ 21.
79 *See* Firm of Pratapchand Nopaji v. Firm of Kotrike Venkata Setty & Sons & Ors., (1975) 2 SCC 208, ¶¶ 8-9; *See also* Walter Ban AG, Legal Successor, of the Original Contractor, Dyckerhoff & Widmann A.G. v. Municipal Corp. of Greater Mumbai, (2015) 3 SCC 800, ¶¶ 9-10.

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."[80]

Therefore, the Court in *TRF* was clear in making a distinction between the right of a party to nominate an arbitrator of choice and respecting the freedom of contract. The Court's role was limited to procedural compliance and checking the eligibility of the arbitrator under the Act. The caveat of the Court while pronouncing the judgement in *TRF* was clear, i.e., *"We are only concerned with the authority or power of the Managing Director."*[81] Thus, the Court was concerned with the "*twin capacity*" of the arbitrator.[82] The Court never contemplated striking down a unilateral appointment or appointing an arbitrator when there is No Response or an Objection Simpliciter.

B. The judgement in *Perkins*

Subsequently, a two-judge bench of the Supreme Court in *Perkins* affirmed the decision in *TRF*. In this case, the Chief Managing Director was to nominate an arbitrator.[83] Hence, the issue in *Perkins* was not whether an ineligible arbitrator or his nominee could be an arbitrator but whether a person ineligible to be appointed as an arbitrator could nominate another person. Therefore, in *Perkins*, the court distinguished two categories of cases.[84] One where the managing director is himself the arbitrator, along with additional power to appoint any other person. Second, where the Managing Director is not to act as the arbitrator but required to nominate an arbitrator. It is only the second category which may fall within the definition of a unilateral appointment. However, the entire discussion in *Perkins* revolves around the issue of nomination by an ineligible person and not the unilateral choice of one party while nominating the arbitrator.

The Court expressly cautions that it is only addressing "*all cases having clauses similar to that with which we are presently concerned.*"[85] Therefore, while *TRF* applies to the first category of cases discussed in *Perkins*, the judgment in *Perkins* applies to the second category. One may therefore argue that the judgement of *Perkins*, and not *TRF*, strikes down unilateral appointments.

C. The misapplication of *TRF* and *Perkins*

Both *TRF* and *Perkins* never directly addressed unilateral appointments of third parties[86] eligible under the Act. Yet, the judgements of *TRF* and *Perkins* are being applied to the effect that the Supreme Court took away the right to appoint sole arbitrators by one party to the arbitration agreement.[87]

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80 TRF, ¶ 50.
81 TRF, ¶ 54.
82 Worlds Window Infrastructure and Logistics Pvt. Ltd. v. Central Warehousing Corporation, [2018] SCC Online Del 1060; Kadimi International Pvt. Ltd. v. Emaar MGF Land Limited, [2019] (4) ArbLR 233 [*hereinafter* "Kadimi"]; Sriram Electrical Works v. Power Grid Corporation of India Ltd., [2019] SCC Online Del 977, ¶¶ 6-7 [*hereinafter* "Sriram Electrical"].
83 Perkins, ¶ 28.
84 Perkins, ¶ 20.
85 Perkins, ¶ 20.
86 *Supra* note 41, at 127.
87 Proddatur, ¶ 23; *Supra* note 22, at 4.

The interpretation accorded to the *Ineligibility Cases* has been to render such appointments void ab initio, holding that an arbitrator was de jure unfit to exercise her functions as an arbitrator due to the ineligibility.[88] The courts have often not given due consideration to the express legislative intent permitting parties to waive the ineligibilities of arbitrators.[89]

More importantly, the *Ineligibility Cases* never directly addressed the issue of unilateral appointments. The focus of these cases was more on the ineligibility of the arbitrator, instead of the unilateral choice of one of the parties. Though one may argue that indirectly the effect is the same,[90] such reasoning goes beyond the express caveats given by the courts in *TRF* and *Perkins*.

It is also noteworthy that the courts unequivocally expressed that nomination by parties would only be scrutinised on procedure and eligibility under the Act.[91] Therefore, in principle, a party may unilaterally nominate an arbitrator as long as the arbitrator meets the requirements under the Act, i.e., the Seventh Schedule. Though the courts observed that a unilateral right would be unfair,[92] it was not on the premise that a party would always have an interest in the dispute.[93] Instead, the courts specifically noted that a unilateral appointment would give the nominating party an advantage.[94] Unfortunately, the courts did not go beyond that observation and never examined the issue of a unilateral advantage post the introduction of the Seventh Schedule of the Act. Thus, the issue of an '*eligible arbitrator*' being appointed *unilaterally* by a party was left open for good reason.

D. No bar on Unilateral Appointments of an Eligible Arbitrator

The courts did not venture into unilateral appointments as courts did not need to strike down unilateral appointments after the 2015 Amendment. The advantage to a party, if any, is now subject to checks and balances under the Act. Thus, other courts have rightly distinguished the Ineligibility Cases and upheld unilateral appointments as long as the arbitrator appointed does not fall within the Seventh Schedule.[95] In DBM Geotechnics & Constructions Pvt. Ltd. v. Bharat Petroleum Corporation Ltd.,[96] the Bombay High Court not only upheld unilateral nomination by a party but also stated that an ineligible arbitrator "....is not stripped of all his nominating power. He must exercise that power in the manner that the law requires, i.e., by appointing an independent and neutral Arbitrator." Similarly referring to TRF, in Bhayana Builders Pvt. Ltd. v. Oriental Structural Engineers,[97] the court held that "The judgment of the Supreme Court, in my opinion, cannot be read to say that even if the parties agree that one of the parties to the Agreement shall appoint an Arbitrator, the said power has been taken away and such Agreement should be rendered void due to Section 12(5) of the Act."

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88 Bharat Broadband, ¶¶ 15-16.
89 McLeod Russel, ¶ 50.
90 *Supra* note 41, at 126.
91 TRF, ¶ 50.
92 Zenith Fire Services (India) Private Limited v. Charmi Sales, 2013 SCC OnLine Bom 23, ¶ 16; Proddatur, ¶ 24.
93 As incorrectly interpreted in Proddatur, ¶ 23.
94 Perkins, ¶ 21; PSP Projects Limited v. Bhiwandi Nizampur City Municipal Corp., 2023 SCC OnLine Bom 230, ¶ 27.
95 Kadimi; Bhayana Builders, ¶ 32. D.K. Gupta v. Renu Munjal, 2017 SCC OnLine Del 12385, ¶ 8 [*hereinafter* "D.K. Gupta"]; Sriram Electrical, ¶ 9.
96 DBM Geotechnics & Constructions Pvt. Ltd. v. Bharat Petroleum Corporation Ltd, 2017 SCC OnLine Bom 2401, ¶ 21.
97 Bhayana Builders, ¶ 32.

Further, to create a balance between party autonomy and fairness, courts carved out exceptions to TRF and Perkins by supporting broad-based panel of arbitrators[98] offered by only one party.[99] In effect, courts have unequivocally given sanctity to unilateral appointments as long as an option to choose has been given to the other party. Thus, no bar under the Act exists that restrains a party from unilaterally appointing an arbitrator of its choice.[100] The only restriction is contained in the Seventh Schedule.[101] To say that the TRF and Perkins struck down unilateral appointments may be a misstatement, as such a power has not been ousted.[102] More importantly, whether a panel is permissible is also pending before a larger bench.[103] Therefore, TRF and Perkins cannot be interpreted to hold that unilateral appointments are invalid in India.

IV. Reconciling Party Autonomy, Waiver, and Court Intervention

Despite the express caution of the Supreme Court in *TRF* and *Perkins*, as per prevailing jurisprudence, the only option left to a party is to approach the court when there is a unilateral appointment,[104] or there is no consensus between the parties.[105] While one may accept the implication that a unilateral appointment would be unfair and contrary to public policy,[106] applying the *TRF* and *Perkins* ratio to instances of No Response or Objection Simpliciter goes against the express caveats of the Supreme Court.

The lines that "*a party to the agreement would be disentitled to make any appointment of an arbitrator on its own*",[107] must be read in the context of the initial scope of enquiry before the court and not in isolation. *TRF* and *Perkins* deal with the issue of nomination by a person who is ineligible to be an arbitrator herself.[108] The Court never even embarked on the enquiry, let alone hold that a party has no right to appoint an arbitrator when there is No Response or Objection Simpliciter. It must be emphasised here that such a nomination would not amount to a unilateral appointment but a bilateral reference. Both parties have the right to mutually decide the arbitrator, except that one party waives its right to reply or object to the nomination of the arbitrator without stating any reasons.

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98 Voestalpine, ¶ 30.

99 Central Organisation for Railways Electrification v. M/s. ECI-SPIC-SMO-MCML (JV), 2019 SCC OnLine SC 1635 (India), ¶ 27.

100 D.K. Gupta, ¶ 8; Kadimi, ¶ 20.

101 Bharat Broadband, ¶ 15; McLeod Russel India Limited v. Aditya Birla Finance Limited, A.P. No. 106 of 2020.

102 Amit George & Bharath Rayadurgam, *NPAC's Arbitration Review: Unilateral Appointment of a Sole Arbitrator: Exceptions to the Judgment in Perkins Eastman Architects DPC*, BAR AND BENCH (June 16, 2020), *available at* https://www.barandbench.com/columns/unilateral-appointment-of-a-sole-arbitrator-exceptions-to-the-judgment-in-perkins-eastman-architects-dpc.

103 Union of India v. Tantia Constructions Ltd., 2021 SCC OnLine SC 271.

104 Proddatur, ¶ 26; Bhartia Cutler Hammer Ltd. v. AVN Tubes Ltd., 1991 SCC OnLine Del 322, ¶ 5, *upheld by* the Division Bench in A.V.N. Tubes Ltd. v. Bhartia Cutler Hammer Ltd., 1992 SCC OnLine Del 81; SMS Ltd. v. Rail Vikas Nigam Ltd., 2020 SCC OnLine Del 77; BVSR-KVR (Joint Ventures) v. Rail Vikas Nigam Ltd., 2020 SCC OnLine Del 456; Assignia-VIL-JV v. Rail Vikas Nigam Ltd., 2016 SCC OnLine Del 2567.

105 *Supra* note 22, at 4.

106 Nishanth Vasanth & Rishabh Raheja, *Examining the Validiy of Unilateral Option Clauses in India: A Brief Overview*, KLUWER ARBITRATION BLOG (Oct. 20, 2017), *available at* http://arbitrationblog.luwerarbitration.com/2017/10/20/examining-validity-unilateral-option-clauses-ndia-briefoverview/?doing_wp_cron 1597326578.4179279804229736328125.

107 Perkins, ¶ 20.

108 Kadimi, ¶ 9.

Such application of *TRF* and *Perkins* is not only ill-founded but also strikes at arbitration's core principles. A party will always have an interest in the dispute,[109] and one of the core foundations of party autonomy is to exercise the right to nominate an arbitrator of its choice, subject to the other side's consent.[110] Appointment of an arbitrator and illegality resulting from the lack of consent has no relation with the ineligibility of the arbitrator under law.[111] A distinction must be made between (a) a party cannot unilaterally appoint an arbitrator and (b) a party cannot appoint an arbitrator under any circumstances, i.e., the right of a party to nominate an arbitrator is extinguished after the 2015 Amendment.[112] To hold that a party cannot nominate an arbitrator[113] as per law is not only incorrect, but the effect is a default rule of court appointments in all cases ["**Default Rule**"]. The implementation of the *Default Rule* could never have been the intention of the legislature as the *Default Rule* will rob parties of the right to choose an arbitrator. Thus, courts ought to reconcile the *Ineligibility Cases* with Sections 4 and 5 of the Act.

A. Waiver

Section 4 of the Act is based on Article 4 of the Model Law and it states:

> "*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.*"

Since the words of Article 4 of the Model Law have been adopted verbatim in Section 4 of the Act, the reference to Article 4 of the Model Law and Section 4 of the Act is made interchangeably in this part.

The Working Group's preliminary discussions do not contain any meaningful discussion on Article 4 of the Model Law.[114] Only at the Sixth Session was a draft article modelled on Article 30 of the United Nations Commission on International Trade Law Arbitration Rules, 1976 ["**UNCITRAL Arbitration Rules**"] introduced.[115] Unlike, Article 30 of the UNCITRAL Arbitration Rules, Article 4 introduces a time-limit test for an objection. Thus, two distinct tests are mentioned in Article 4 of the Model Law, i.e., (a) if a party proceeds without objection to non-compliance, or (b) if a party does not object within the time provided.

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109 Perkins, ¶ 20.

110 FAGBEMI, *supra* note 6.

111 Priknit Retails Ltd. v. Aneja Agencies 2013 SCC OnLine Del 534, ¶ 24(c) [*hereinafter* "Prinkit Retails"].

112 Kadimi, ¶ 10.

113 Proddatur, ¶ 28.

114 Ilias Bantekas, *Waiver of Right to Object*, *in* UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: A COMMENTARY 71 (Ilias Bantekas, Pietro Ortolani, Shahla Ali, Manuel A. Gomez & Michael Polkinghorne eds., 2020).

115 Redrafted Articles I–XII on Scope of Application, General Provisions, Arbitration Agreement and the Courts and Composition of Arbitral Tribunal, UN Doc. A/CN.9/ WG.II/WP.45 (1983), reprinted in (1984) XV UNCITRAL YB 183, 185. Id., fn. 12, referring further to suggestions made in UN Doc. A/CN.9/233 (n. 5), ¶¶ 66, 188.

A brief look at the drafting history of Article 4 of the Model Law suggests that all nations were not in consonance with the interpretation and application of Article 4 to arbitration proceedings.[116] While Cyprus favoured a restricted application to non-mandatory provisions, India and Sweden believed that the waiver contemplated under Article 4 of the Model Law should not be restricted to only non-mandatory provisions.[117]

The broad consensus amongst working group members was that timelines should be left to party autonomy or the law applicable to the arbitral proceedings.[118]

However, the Working Group was adamant that non-compliance with provisions which a party knew should not be permitted to be a ground for setting aside the award or refusal at the stage of enforcement.[119] Therefore, fairness or equal treatment principles will not be violated if a party knowingly or negligently does not exercise a right within the time provided under the Act.

One can discern from the text of the Model Law and the Act as to which provisions were intended to be non-mandatory. For example, the mandate of Section 18 of the Act to treat parties equally and give an equal opportunity of hearing is non-derogable.[120] Such a derogation would be null and void.[121] On the other hand, requirements of time limits such as Section 13(2) of the Act would be non-mandatory provisions. If a party fails to challenge an arbitration within 15 days of becoming aware of a conflict, the party is precluded from challenging such an arbitrator.[122] A similar rationale should be applied to Section 11(4)(a) of the Act. Article 4 of the Model Law was also intended to cover requirements arising from the arbitration agreement,[123] and encompasses all those situations following the triggering of the arbitration clause.[124] This implies that a party is precluded from challenging the violation of a non-mandatory provision based on estoppel,[125] waiver (especially by conduct) and bad faith.[126]

Waiver "*is the abandonment of a right, and thus is a defence against its subsequent enforcement*",[127] or conduct that extinguishes the claim.[128] Bad faith is based on equitable considerations of a party misleading

116 G.A. XVIII, U.N. Doc. A/5515, at 15.

117 Analytical Compilation of Comments by Governments and International Organizations on the Draft of a Model Law on International Commercial Arbitration, Report by the Secretary-General, UN Doc. A/CN.9/263 (19 March 1985), at 16.

118 *Supra* note 114, at 72.

119 Composite Draft Text of a Model Law on International Commercial Arbitration: Some Comments and Suggestions for Consideration: Note by the Secretariat, UN Doc. A/CN.9/WG.II/WP.50 (1984), ¶ 11; *See also*, to the same effect, Rep. of the S.C., at 17, UN Doc. A/CN.9/264 (1985).

120 FAGBEMI, *supra* note 6.

121 FAGBEMI, *supra* note 6, at 223.

122 *Supra* note 114, at 72-73.

123 *Supra* note 114, at 72-73.

124 *Supra* note 114, at 73.

125 *See* LOUKAS A. MISTELIS, CONCISE INTERNATIONAL ARBITRATION 593 (2010).

126 *See* Rep. of the S.C., at 17, UN Doc. A/CN.9/264 (1985).

127 JMC Projects (India) Ltd. v. Indure Private Limited, 2020 SCC OnLine Del 1950, ¶¶ 34-35; Kalparaj Dharamshri & Anr. v. Kotak Investment Advisor's Limited, (2021) 10 SCC 401; Mademsetty Satyanarayana v. G. Yelloji Rao, AIR 1965 SC 1405, ¶ 12; Dawson's Bank Ltd. v. Nippon Menkwa Kabushiki Kaisha, MANU/PR/0024/1935, ¶ 16. *See* CLOUT Case 1656, Assam Co. India Ltd v. Canoro Resources Ltd (2014) BCSC 370.

128 *See* International Standard Electric Corp. v. Bridas Sociedad Anonima Petrolera Industrial Y Comercial, 745 F. Supp. 172 (S.D.N.Y. 1990); Swiss Federal Supreme Court, Case Nos. 4A_348/2009 & 4A_69/2009; Spanish Supreme Court (TS) judgment in Union Générale de Cinéma SA v. XYZ Desarrollos SA, XXXII Y.B. COM. ARB. 525 (2007).

the other party or deliberately breaching the arbitration agreement.[129] While the Model Law is silent on the precise nature of Article 4, it recognises that states may adopt Article 4 based on existing principles under domestic law or enact the waiver on an autonomous principle.[130] Like most other Model Law jurisdictions, the current text of Section 4 of the Act encompasses the autonomous version since it does not refer to domestic law principles. Under an autonomous interpretation, good faith, estoppel and knowledge are universally recognised.

i. Good Faith

Civil law jurisdictions recognise enforcement of contracts based on good faith i.e., *pacta sunt servanda.*[131] This good faith requirement has been extended to the arbitration agreement as well.[132] Even India has impliedly affirmed the good faith requirement after the amendment to the Specific Relief Act, 1963 in 2018.[133] Even other common law countries have recognised good faith as the '*organising principle'* of the common law.[134]

Universally, the principle of good faith is recognised by all procedural laws, general international law, soft law instruments, rules of arbitration institutes,[135] and the Vienna Convention on the Law of Treaties, 1969.[136] The International Court of Justice recognises good faith as a fundamental principle of legal obligations,[137] including procedural obligations.[138]

In this context, reference should be made to Article 11.1 of the ALI/UNIDROIT Principles of Transnational Civil Procedure, which provides that "*the parties and their lawyers must conduct themselves in good faith in dealing with the court and the other parties.*"[139] Similarly, Article 9(7) of the IBA Rules on the Taking of Evidence in International Arbitration grants the tribunal power to consider a party's failure to conduct itself in good faith.[140]

ii. Estoppel

The Supreme Court has repeatedly taken the view that a failure to object estops a party from objecting at the time of a setting aside application.[141] A failure to object is considered a tacit

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129 Amy J. Schmitz, *Confronting ADR Agreements' Contract/no-Contract Conundrum with Good Faith*, 56 DEPAUL L. REV. 55 (2006).

130 *Supra* note 114, at 76.

131 United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671, art. 7.

132 Simon Weber & Julie Martinez, *Good Faith in International Arbitration: Comparative Approaches in ICC Awards*, The ICC (2020) 2 ICC INT'L CT. ARB. BULL. 112, 112-122 (2020); Duarte G. Henriques, *The role of good faith in arbitration: are arbitrators and arbitral institutions bound to act in good faith?*, 33(3) ASA BULL. 514, 514-532, (2015).

133 Ajar Rab, *Comparing Specific Performance Under The Specific Relief (Amendment) Act 2018 With The Cisg And The Unidroit Principles: The Problems Of The "Un-Common Law" In India*, 7 NLSIU Bus. L. Rev. 71, 71 - 98 (2021).

134 MSC Mediterranean Shipping Co. v. Cottonex Anstalt, [2015] EWHC 283, following the judgment of the Canadian Supreme Court in Bhasin v. Hrynew, 2014 SCC 71; *Supra* note 114, at 77.

135 *Supra* note 114, at 77.

136 Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969

137 Nuclear Tests case (Australia v. France), (1974) ICJ REP. 253, 268

138 *Supra* note 114, at 77.

139 ALI/UNIDROIT Principles of Transnational Civil Procedure 2004, art. 11.1.

140 IBA Rules on the Taking of Evidence in International Arbitration, art. 9(7).

141 G. Engineers Pvt. Ltd v. Calcutta Improvement Trust, AIR 2002 SC 766, ¶ 9; *See also*, Narayan Prasad Lohia v. Nikunj Kumar Lohia, (2002) AIR 1139; BSNL v. Motorola India Pvt. Ltd., 2008 (7) SCC 431; SN Malhotra & Sons v. Airport Authority of India, 149 (2008) DLT 757 (DB).

waiver,[142] or an unequivocal and conscious abandonment of rights of which it had full knowledge.[143] In *Bharat Broadband*, the Court made a distinction between waiver under Section 4 of the Act and waiver as contemplated under Section 12(5), stating that in the latter, the waiver has to be an "*express agreement in writing*".[144] The Court impliedly affirmed that the waiver in Section 4 of the Act could be implied based on conduct.

iii. Knowledge

To establish a waiver, some degree of knowledge is required. In the Seventh Session of the Working Group, the phrase "*ought to have known*" was proposed to be included but was eventually left out to uphold the standard of actual knowledge and not deemed knowledge.[145] However, negligence-based standards should not be ruled out.[146] For example, challenges to jurisdiction should be made at the first instance, i.e., without undue delay under Articles 8 or 16 of the Model Law.

Therefore, if the respondent fails to act in accordance with the arbitration agreement and there is No Response or an Objection Simpliciter, a party ought to be precluded from challenging the nomination of an arbitrator by the claimant. The ineligibility of an arbitrator under the Seventh Schedule ought to be raised in response to the nomination of an arbitrator unless the challenging party becomes aware of the conflict only after the arbitrator's appointment.[147] The court must evaluate the conduct of a party in a fair and appropriate manner.[148] Thus, the reference to 'time-limits' under Section 4 of the Act should be applied to Section 11(4)(a) to amount to a waiver.[149] Courts should refrain from intervening in cases of a waiver, unless contemplated under Section 5 of the Act.

B. Minimal Court Intervention

Jan Paulsson,[150] states that "the original concept that legitimates arbitration is that of an arbitrator in whom both parties have confidence". One way to ensure confidence in the arbitrator is to provide a transparent regime of checks and balances. As previously stated, these checks and balances were statutorily incorporated after the 2015 Amendment. A party is given several chances

142 See CLOUT Case 1158, decided by the Zaragoza Provincial High Court (section 5), which discusses a tacit waiver.

143 Telestat Canada v. Juch-Tech, 2012 ONSC 2785 (Can.).

144 Bharat Broadband, ¶ 15; Ellora Paper Mills Ltd. v. State of Madhya Pradesh, (2022) 3 SCC 1, ¶ 19; *See* Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. v. Ajay Sales & Supplies, (2021) 17 SCC 248; JMC Projects (India) Ltd. v. Indure Private Limited, (2020) SCC OnLine Del 1950; BW Businessworld Media Pvt. Ltd. v. Indian Railway Catering and Tourism Corporation Limited, 2022 SCC OnLine Del 226.

145 *Supra* note 114, at 80.

146 *Supra* note 114, at 80; *See*, Carpatsky Petroleum Corp. (Carpatsky II) case, decided by the Svea Court of Appeals, RH 2013:30.

147 Atlantic Industries Ltd v. SNC-Lavalin Constructors (Pacific) Ltd., (2017) BCSC 1263, ¶ 23.

148 See Klaus Peter Berger and Thomas Arntz, *Good Faith as a General Organizing Principle of Common Law*, 32 ARB. INTL 167, 168 (2016).

149 Cour de Cassation [Cass.] [supreme court for judicial matters], Jan. 26, 2016, No. 15-12.363, Fibre Excellence v. Tembec SAS, the French Supreme Court dismissed an application to set aside an award rendered by a truncated tribunal because the claimant had failed to submit within the eight-day time frame imposed by the ICC Arbitration Rules its comments regarding the continuation of the proceedings without one of the arbitrators.

150 Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25(2) ICSID REV. – FOREIGN INV. L.J. 339, 339-355 (2010).

throughout the arbitral process to raise objections on any unfair advantage, relationship-based conflict, or violation of procedure. In brief, the respondent may:

1. Oppose the person nominated by a party in the arbitration notice and raise grounds of ineligibility under the Seventh Schedule.

2. Challenge the arbitrator under Section 13(2) of the Act during the proceedings at any time for ineligibility or subsequent knowledge of conflict post-disclosure by the arbitrator.[151]

3. Seek termination of the mandate of the arbitrator under Section 14 of the Act for de jure or de facto ineligibility.[152]

4. Seek setting aside of the award for procedural violations under Section 34(2)(iii) or 34(2)(v) of the Act.[153]

5. Resist enforcement for violation of public policy, especially on the grounds of corruption or fraud.[154]

i. Fairness & Advantage

The first objection usually raised when considering unilateral appointments is fairness, and the second is an advantage. In No Objection or Objection Simpliciter cases, the fairness requirement cannot be complained of since a party chooses No Response or Objection Simpliciter after signing the arbitration agreement. Thus, a party ought to be estopped from claiming otherwise once it makes a deliberate or negligent choice after receipt of the arbitration notice.

Therefore, the first prong of the Twin Test contemplated by the Law Commission Report for adherence with natural justice ought to be read in light of Section 4 of the Act. A respondent cannot be permitted to deliberately derail the procedure agreed upon under Section 11(1) of the Act when by conduct, the respondent has chosen not to respond to the arbitration notice. Similarly, an objection only for objection's sake is a frivolous and unjust objection.[155] No Response or Objection Simpliciter cannot be held to be violative of the fairness test. If the respondent voluntarily or negligently permits the appointment of an arbitrator by the claimant, the law cannot rescue such a recalcitrant party.[156] It is incumbent on the respondent to respond under the duty of good faith to perform under the arbitration agreement.[157]

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151 The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996, § 12(3)(a) (India); *Supra* note 41, p. 124.

152 *Supra* note 41, at 124.

153 The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996, § 34 (India).

154 Vijay Karia vs Prysmian Cavi E Sistemi Srl, (2020) SCC Online SC 177, ¶ 59.

155 Urban Improvement Trust, Bikaner v. Mohan Lal, (2010) 1 SCC 512, ¶¶ 5- 6; Union of India v. Pushkar Paints, 2023 SCC OnLine Del 685, ¶ 30; Trimax IT Infrastructure and Services Ltd v. Delhi Transport Corporation, 2021 SCC OnLine Del 3830; TK Aggarwal v. Tara Chand, 2005 81 DRJ 567; Hindustan Construction Corporation. Ltd. v. Delhi Development Authority, 2006 (87) 191; Nav Nirman Engineering v. Vivekanand Mahila College, 2009 SCC OnLine Del 999.

156 D.K. Gupta, ¶ 12; Lite Bite Foods Pvt. Ltd. v. Airports Authority of India, 2019 SCC OnLine Bom 5163, ¶ 21.

157 Indranil Deshmukh & Samhita Mehra, *Good Faith Negotiations and Mediation: A Missed Opportunity So Far*, CYRIL AMARCHAND MANGALDAS (Nov. 28, 2019), *available at* https://corporate.cyrilamarchandblogs.com/2019/11/good-faith-negotiations-mediation-missed-opportunity-so-far/#_ftn11; Duarte G. Henriques, *The role of good faith in arbitration: are arbitrators and arbitral institutions bound to act in good faith?*, 33(3) ASA BULL. 514, 514-532 (2015).

The correct approach, in line with Section 5 of the Act, is that a court should terminate an arbitrator's appointment only when the arbitrator's appointment is hit by the Seventh Schedule and not otherwise.[158] Reading *TRF*, *Perkins*, *Central Organisation for Railway Electrification* v. *ECI-SPIC-SMO-MCML(JV)* ["**Central Organisation**"], and *Voestalpine Schienen GmBH* v. *Delhi Metro Rail Corporation* ["**Voestalpine**"] together leads to an inevitable conclusion that as long as the party has the option to counterbalance any advantage that a party derives from nominating an arbitrator, courts should not intervene.[159] Arbitrators derive their powers from private contract law, and freedom of contract should not be lightly interfered with as it is part of public policy.[160] Thus, if the clause is fair as per substantive contract law, the courts should not strike it down and substitute their own view.[161]

Most arbitration statutes do not contain a qualification requirement for arbitrators to promote party autonomy and give parties the flexibility to appoint an arbitrator who they believe is best suited to decide their dispute. The only exception to party autonomy is the consideration of public policy, i.e., arbitrators' independence and impartiality and, consequently, eligibility.

ii. Independence and Impartiality

The second prong of the Twin Test requires that the arbitrator appointed be independent and impartial. The presumption that an arbitrator nominated by the claimant would favour the claimant,[162] or be biased has duly been addressed with the statutory incorporation of the IBA Guidelines. Any concerns about the presumed bias of an arbitrator nominated by the claimant will be tested by courts and parties against an objective standard of independence and impartiality provided under the Seventh Schedule. Thus, the respondent must raise any alleged ineligibility of a nominated arbitrator in response to the arbitration notice. When there is an opportunity to object, but a party does not object, the nomination ought to be confirmed. The party must be deemed to have waived all such objections,[163] except those arising in law, i.e. unless the arbitrator nominated is ineligible and the parties have not waived the ineligibility.

Even if there is No Response, nothing prevents the respondent from appearing before the arbitrator and raising a challenge as contemplated in Section 13(2) of the Act raising the ineligibility. Any reasonable arbitrator would withdraw for the sake of their reputation,[164] and the award would in all likelihood, be set aside under Section 34 of the Act.

If the arbitrator does not withdraw, the challenging party can seek termination of the arbitrator's mandate under Section 14 of the Act. Unfortunately, the courts have exercised power under Section 11(6) read with Section 14 of the Act even though the court's jurisdiction under Section 11 is very distinct from that provided under Section 14 of the Act.

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158 Divyendu Bose v. South Eastern Railway, A.P. No. 1075 of 2017 [this case also mentions Fifth Schedule along with Seventh Schedule]; C P Rama Rao v. National Highways Authority of India, ARB. P. 345/2017, ¶ 11.

159 TRF, ¶ 50; Perkins, ¶ 20; Central Organisation for Railways, ¶ 19; Voestalpine, ¶ 26.

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

161 Union of India and Others v. Uttar Pradesh State Bridge Corporation Limited, (2015) 2 SCC 52, ¶ 13.

162 *Supra* note 41, at 125.

163 Quippo Construction Equipment Limited v. Janardan Nirman Private Limited, (2020) 18 SCC 277, ¶ 24.

164 *Supra* note 33; Ajar Rab, *Immunity of Arbitrators: time for the Model Law to take a stand*, INT. ARB. L. R. 31.

iii. Termination of the Arbitrator's Mandate

Exercising power under Section 11(6) of the Act in instances of No Response or Objection Simpliciter amounts to, in a certain sense, the substitution of party autonomy with judicial discretion. Such substitution goes beyond the scope of minimum court intervention.[165] It effectively means that a nomination in a bilateral reference is always subject to court confirmation under Section 11(6) of the Act, which goes against the objective of introducing Article 5 of the Model Law. One of the circumstances that necessitated the introduction of Article 5 of the Model Law was restraining court confirmations of party-nominated arbitrators.[166] Therefore, the exercise of the power under Section 11(6) of the Act goes against the mandate of Section 5 of the Act.

The report of the 18th Session of the United Nations General Assembly specifically notes the objection of the Soviet Union that a court is not necessarily the most appropriate organ to appoint an arbitrator as compared to a chamber of commerce. Moreover, judicial procedure is not the most appropriate for appointing an arbitrator.[167]

Nonetheless, the courts have incorrectly exercised their power under Section 14 of the Act to terminate an arbitrator's mandate and substitute another arbitrator.[168] First and foremost, the court does not have the power under Section 11 of the Act to terminate the mandate of an arbitrator, even if it is a unilateral appointment. The appropriate remedy is to seek termination of the mandate under Section 14(1)(a) of the Act on the ground that the arbitrator is de jure or de facto unable to perform her functions.[169] More importantly, this application is to be made to the supervising court under Section 2(1)(e) of the Act, not the court under Section 11 of the Act.[170] The High Court and the Supreme Court have only been granted administrative jurisdiction under Section 11 of the Act,[171] limited to examining the prima facie validity of the arbitration agreement.[172] Granting the court under Section 2(1)(e) of the Act the power of termination or substitution, but reserving the power of appointment only to the High Court and Supreme Court is another bottleneck in arbitration proceedings in India but beyond the scope of this Article.

The other remedy is challenging the award under Section 34 of the Act.[173] Therefore, the court is bound by the express wordings of the Act, which prescribes the scheme for interference.[174] Section 14 of the Act contemplates termination of the mandate when an arbitrator is incapable of performing her work or the mandate assigned to the arbitrator cannot otherwise be completed, i.e., a de jure ineligibility.[175] Therefore, only in such cases can a substitute arbitrator be appointed when exercising the power under Sections 14 and 15 of the Act.[176] Once a tribunal has entered

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165 *Supra* note 22, at 4.
166 Gerold Herrmann, The UNCITRAL Model Law -its background, salient features and purposes, at 15.
167 G.A. XVIII, U.N. Doc. A/5515, 3rd Committee: 1252nd meeting, Nov. 04, 1963.
168 Bharat Broadband, ¶ 17.
169 Swadesh Kumar Agarwal v. Dinesh Kumar Agarwal, (2022) 10 SCC 235, ¶ 21, [*hereinafter* "Swadesh Agarwal"].
170 *Id.* at 170.
171 The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996, § 2(1)(e) (India); Konkan Railway Corporation Ltd. v. Rani Constr. Pvt. Ltd., (2002) 2 SCC 388, ¶¶ 22-23.
172 Vidya Drolia v. Durga Trading Corporation, AIR (2019) SC 3498.
173 State of Arunachal Pradesh v. Subhash Projects & Mktg. Ltd. & Anr., 2006 SCC OnLine Gan 57, ¶ 32.
174 Prinkit Retails, ¶ 24(c).
175 HRD Corporation (Marcus Oil and Chemical Division) v. GAIL (India) Ltd., (2018) 12 SCC 471, ¶ 12, [*hereinafter* "HRD Corporation"].
176 Prinkit Retails, ¶ 26.

reference, constituting another tribunal would be without jurisdiction.[177] Thus, the appropriate remedy to challenge the arbitrator is already contained in the statutory scheme[178] under Sections 12, 13, 14 and 15 of the Act and recourse to Section 11 is neither warranted nor contemplated under Section 5 of the Act.[179]

iv. Excessive Court Intervention

However, courts have exercised power under Section 11(6) of the Act to "*meet the ends of justice*" if the appointment procedure provided in the arbitration agreement is likely to result in a "*stalemate*" or the interests of justice require that courts should not follow the arbitration procedure provided in the arbitration agreement.[180] Unfortunately, the "*ends of justice*" have resulted in a substitution of the will of the parties. Considerations of expert adjudication or technical qualifications have also been ignored to favour the Limited Pool of arbitrators.[181]

Courts, in their zeal to appoint arbitrators from the Limited Pool, often create jurisdictional errors in complete subversion of the mandate of minimal court intervention enshrined in Section 5 of the Act. The High-Level Committee set up in 2017 to review the institutionalisation of arbitration categorically noted the excessive intervention by courts after the 2015 Amendment.[182] The Law Commission noted that courts must respect party autonomy, and even in cases of an arbitration falling within the Seventh Schedule, parties should be allowed to waive the ineligibility.[183] Therefore, the judicial overreach to usurp jurisdiction and appoint arbitrators is contrary to the goal of minimum intervention and completely disregards party autonomy,[184] especially in No Response and Objection Simpliciter cases. Even under the Arbitration Council of India proposed by the High-Level Committee, arbitrators will be appointed based on Section 11 read with the Fifth and Seventh Schedules of the Act. Therefore, as long as the nomination by one party meets these fundamental checks provided under the Act,[185] the court should not intervene.

V. A New Standard

In 'No Response' and 'Objection Simpliciter' cases, the courts must be guided by fairness and equitable treatment principles. A recalcitrant party should not be permitted to benefit from guerrilla tactics causing delay and prejudice to the claimant.

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177 Mrs. Subha Gopalakrishnan v. M/s. Karismaa Founds. Pvt. Ltd. & Ors., O.P. No. 711 of 2017 (India); *See* Antrix Corp. Ltd. v. Devas Multimedia Pvt. Ltd., (2014) 11 SCC 560 (India); *See* also Som Datt Builders Pvt. Ltd. v. State of Punjab & Ors., 2005 SCC OnLine P&H 891 (India).

178 HRD Corporation, ¶ 10.

179 Swadesh Agarwal, *supra* note 169.

180 Siddhi Real Estate Developers v. Metro Cash & Carry India Pvt. Ltd. & Anr., 2014 SCC OnLine Bom 623 (India), ¶ 8.

181 Tramboo Joinery Mills Pvt. Ltd. v. Comm'r/Sec'y to Government & Ors., 2014 SCC OnLine J&K 55, ¶ 19; Panihati Rubber Ltd. v. Principal Chief Engineer Northeast Frontier Railway, 2016 SCC OnLine Gau 69, ¶¶ 9, 13.

182 *Supra note* 12, at 20; Mridul Godha & Kartikey M., *The New-Found Emphasis on Institutional Arbitration in India*, KLUWER ARBITRATION BLOG (Jan. 07, 2018), *available at* http://arbitrationblog.kluwerarbitration.com/2018/01/07/uncitral-technical-notes-online-disputeresolution-paper-tiger-game-changer/?doing-wp-cron-1597346999.8069019317626953125000.

183 Law Commission of India, Report on the Amendments to the Arbitration and Conciliation Act, 1996, No. 264/2014, at 60 (Aug. 2014).

184 *Supra* note 41, at 128.

185 Larson & Turbo Ltd. v. PWD, ARB. P. No. 529 of 2018 & I.A. Nos. 9704, 9723 of 2018, O.M.P. (T) (COMM.). No. 58 of 2018, ¶¶ 23, 25.

In this context, the power of default appointments is recognised under the English Arbitration Act, 1996 ["**EAA**"][186]. Section 17 of the EAA provides:

> *"17. Power in case of default to appoint sole arbitrator.*
>
> *(1) Unless the parties otherwise agree, where each of two parties to an arbitration agreement is to appoint an arbitrator and one party ("the party in default") refuses to do so, or fails to do so within the time specified, the other party, having duly appointed his arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.*
>
> *(2) If the party in default does not within 7 clear days of that notice being given—*
>
> *(a)make the required appointment, and*
>
> *(b) notify the other party that he has done so,*
>
> *the other party may appoint his arbitrator as sole arbitrator whose award shall be binding on both parties as if he had been so appointed by agreement.*
>
> *(3) Where a sole arbitrator has been appointed under subsection (2), the party in default may (upon notice to the appointing party) apply to the court which may set aside the appointment."*

Even though Section 17 of the EAA deals with appointments in a three-member tribunal, it lays down an express road map for court intervention which can serve as guiding criteria for court intervention in India. Firstly, Section 17 of the EAA distinguishes instances of No Consensus from those of No Objection and Objection Simpliciter. The phrase "*refuses to do so*" would clearly include instances of an Objection Simpliciter where the party objecting to the nomination of an arbitrator is simply refusing to appoint the arbitrator. Similarly, the phrase "*or fails to do so within the time specified*" recognised the waiver of a right by the party who gives No Response to nomination by the claimant. Section 17 of the EAA goes a step further to recognise the nomination as a duly appointed arbitrator after waiver.

Further, Section 17(3) of the EAA provides recourse to a party to have the appointment set aside by a court. Therefore, the logic of Section 17 of the EAA is clear. First, the parties should appoint an arbitrator as per the arbitration agreement. If one party refuses to appoint or does not do so within the prescribed time, the other party may appoint an arbitrator. The court will then determine if an arbitrator's appointment should be set aside if an application is made.

The priority of party autonomy is unequivocal in Section 17 of the EAA. Similarly, the delicate line between respecting party autonomy and court intervention on account of public policy concerns is also clearly provided. In India, the public policy requirement of independence and impartiality is now statutorily provided under the Seventh Schedule. Hence, there is no requirement for a provision similar to Section 17(3) of the EAA. As mentioned above, there are various checks and balances under the Act, and a party has several remedies to challenge an appointment, including a request to terminate the arbitrator's mandate.

[186] It should be noted that the English Arbitration Act is not based on the Model Law.

Thus, to give full effect to the mandate of *'minimal court intervention*', recognise the priority of jurisdiction of the arbitral tribunal, and at the same time maintain the public policy, the courts should adopt a similar standard for court intervention. A possible criterion may be:

The court must first resort to the procedure provided in the arbitration agreement.[187]

If the parties willingly conferred the right only on one party to appoint an arbitrator, the appointment should be upheld as long as the arbitrator nominated does not fall within the Seventh Schedule.[188]

1. If a party does not respond to the nomination of an arbitrator within 30 days or raises an objection without reason, the court should not interfere in the nomination by one party as long as the arbitrator nominated does not fall within the Seventh Schedule.

2. It is only in cases of a 'stalemate' or No Consensus between the parties that the court should exercise power under Section 11(6) of the Act.

3. If an ineligible arbitrator is appointed, remedies, as contained under Sections 13, 14 and 15 of the Act, should be resorted to by the challenging party.

Court appointments should be made when there is No Consensus. Even in such cases, the court must focus on the qualification of the arbitrator to be appointed[189] and their expertise in arbitration as well the subject matter of the dispute. The presumption that the Limited Pool[190] is best suited for arbitration is misplaced and defeats the goal of expert adjudication in arbitration.[191]

VI. Conclusion

Arbitration in India has always been subject to criticism for excessive court intervention in arbitration.[192] While majority of the criticism has come on account of the slow enforcement and the aspect of courts re-examining merits at the stage of setting aside, not much attention has been paid to excessive court intervention in arbitrator appointments. Though it can be argued that the Model Law does not clarify the exact restraint to be exercised by courts when appointing arbitrators, a more careful look at the drafting history of Article 4 and 5 of the Model Law suggests otherwise.

Article 5 of the Model Law was inserted to ensure that the appointment by parties is not subject to confirmation by the court. The Model Law provided an entire mechanism for parties to challenge the arbitrator and have the arbitrator's mandate terminated if a challenged arbitrator refuses to withdraw. Therefore, court intervention was intended to be the last resort, not the first.

187 Union of India v. Parmar Construction, 2019 SCC OnLine SC 442, ¶ 41.
188 Kadimi, ¶ 20.
189 Northern Railway. Admin. v. Patel Engineering Co. Ltd., (2008) 10 SCC 240, ¶ 12.
190 Bhumika Indulia, *In India, the Arbitration movement has to grow, and people must have faith to participate in this movement, Former CJI NV Ramana*, LIVELAW (Feb. 16, 2023) *available at* https://www.scconline.com/blog/post/2023/02/16/arbitration-movement-has-to-grow-and-people-must-have-faith-to-participate-in-this-movement-former-cji-nv-ramana
191 Benoit Le Bars, *Recent Developments in International Energy Dispute Arbitration,* 32(5) J. INT'L ARB. 543, 543-549 (2015).
192 Gourab Banerji, *Judicial Intervention in Arbitral Awards: A Practitioner's Thoughts*, 21(2) NAT'L L. SCH. INDIA REV. 39, 39-53 (2009).

However, the current jurisprudence in India indirectly leads to court confirmation of sole arbitrators.

Courts have often blurred the lines between asymmetrical clauses, unilateral appointments and the rights of parties to a bilateral reference. This has led to an incorrect interpretation that a party should not be allowed to nominate an arbitrator since it will always have an interest in the outcome of the dispute. Neither was such an interpretation intended by the Ineligibility Cases, nor could the courts have intended for such an application as it would mean the death of party autonomy and expert adjudication in arbitration. The *Ineligibility Cases* were only concerned with ineligible arbitrators and their right of nomination. The courts never ventured into any analysis of unilateral appointments of eligible arbitrators. A critical look at the current jurisprudence, therefore, suggests that unilateral appointments are not invalid under Indian law after the 2015 Amendment.

Thus, courts need to distinguish between '*ineligible arbitrators*' and 'elgibile 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 deemed to be confirmed, unless there is No Consensus. The unintended effect of the *Ineligibility Cases* has been to challenge every sole arbitrator appointment, even though the arbitrator is not per se ineligible under the Act. This unnecessary challenge has led to excessive court intervention and derailed the efficiency of the arbitral process. Courts have not paid enough attention to the objective test of conflict of interest based on the IBA guidelines and the statutory scheme for challenge of an ineligible arbitrator introduced by the 2015 Amendment.

Thus, courts should reconcile the mandate of minimal court intervention in Section 5 of the Act, with waiver under Section 4 of the Act and distinguish cases on No Objection and Objection Simplicter from those of No Consensus. A better standard to apply would be one similar to Section 17 of the EAA. Courts should refrain from substituting arbitrators from the Limited Pool based on an incorrect reading of Section 11(6) and 14 of the Act when there has been neglect or refusal to appoint a party, as long as the arbitrator appointed by the other party is not ineligible under the Seventh Schedule. Unless the courts reconcile Section 11, with Sections 4 and 5 of the Act, arbitrators from the *Limited Pool* will continue to make arbitration an 'exclusive club' at the cost of party autonomy and expert adjudication.