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APPOINTMENT OF ARBITRATORS: GRADUAL DEVELOPMENTS IN LITIGATION

Arushi Shekhar*, Dhruv Srivastava**

ABSTRACT

Arbitration amongst other things is premised on party autonomy, one of the basic pillars of this mechanism. Parties have the liberty of deciding the procedure for appointment of Arbitrators, which is considered paramount to that effect. If the parties fail to adhere to the procedure laid down as per them in the agreement, then the aggrieved party has the discretion of moving to the courts for the appointment of Arbitrators. The said matter is dealt under Section 11 of the Arbitration & Conciliation Act, 1996, which has been adopted by the legislature from the UNCITRAL Model Law put forth by United Nations. The competency of appointing an Arbitrator had been initially bestowed upon the Chief Justices. Albeit the law decrees the court to precipitate the appointment of Arbitrators, the Indian Courts however do a deep dive into the matrix for the said appointment. It's common knowledge that our judiciary is overburdened with plethora of cases. ADR mechanism provides a way out for the judiciary and hitherto provides for speedy justice for the parties involved in Arbitration. This paper illuminate upon the interpretation and development of the concept of Appointment of Arbitrator in Section 11 in relation to the nature of power exercised; independence and impartiality; time limit under sec. 11 and the two major amendments in 2015 and 2019, with the role of judiciary and their influence in helping the development of the silent facts in landmark judgments in that regard.

Keywords: *Arbitration, Appointment of Arbitrators, Arbitration & Conciliation Act, 1996, UNCITRAL Model Law, Section 11.*

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INTRODUCTION

According to Black's Law dictionary 9th Edition[1], Arbitration is "a method of dispute resolution involving one or more neutral third parties who are usu. agreed to by the disputing parties and whose decision is binding". It "means any arbitration whether or not administered by permanent arbitral institution."[2]"Arbitration is a reference to the decisions of one or more persons either with or without an umpire, a particular matter in difference between the parties"[3] **"**The great advantage of arbitration is that it combines strength with flexibility. Strength because it yields enforceable decisions, and is backed by a judicial framework which, in the last resort, can call upon the coercive powers of the State. Flexible because it allows the contestants to choose procedures which fit the nature of the dispute and the business context in which it occurs."[4] The Arbitration & Conciliation Act, 1996[5]***("The Arbitration Act, 1996")*** is the law of the land when it comes to ADR mechanism in India. It's divided into three parts. The first part is the UNCITRAL Model Law on International Commercial Arbitration[6] ***("Model Law")*** adaptation molded into something better suited for domestic arbitration in the country. Part II deals with enforcement of foreign award in lieu of two international conventions to which India is a signatory: New York Convention[7] & Geneva Convention[8]. Part III deals with conciliation.

Section 11[9] of The Arbitration Act, 1996 defines Appointment of Arbitrator. This sections recourse is taken by the aggrieved party when the other party in dispute fails to appoint an arbitrator or to follow the procedure mentioned in their agreement on appointment of an Arbitrator and approaches the court of respective jurisdiction for the appointment; the Supreme Court in the matters of International Commercial Arbitration and the High Court the in matters of Domestic Arbitration were given the power of appointment. The said section has been adopted by the legislature of the country from the Model Law which was prepared by United

[1] GARNER BRYAN, BLACK'S LAW DICTIONARY, 119 (THOMPSON WEST, NEW YORK, 9TH ed, (2009)
[2] Arbitration and Conciliation Act, 1996, S.2(1)(a), No.26, Acts of Parliament, 1996 (India).
[3] Collins v. Collins, 1858 28 LJ CH 184: 53 ER 916.
[4] Lord Mustill, Foreword to D Mark Cato, Arbitration Practice and Procedure. 2nd ed., 1997" in OP Malhotra and Indu Malhotra, "The Law and Practise of Arbitration and Conciliation, xxxvii (2nd ed., Lexis-Nexis-Butterworths, New Delhi, 2006) .
[5] Arbitration and Conciliation Act, 1996, No.26, Acts of Parliament, 1996 (India).
[6] United Nations Commission on International Trade Law, Model Law on International Commercial Arbitration, 1985, UN Doc. A/40/17.
[7] Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York).
[8] Convention on the Execution of Foreign Arbitral Awards, 1927 (Geneva).
[9] Arbitration and Conciliation Act, 1996, S.11, No.26, Acts of Parliament, 1996 (India).

Nations Commission on International Trade Law ***("UNCITRAL")*** on June 21, 1985. The Arbitration Act, 1996 was adopted by the Indian legislation after being passed by the both houses and it received the Presidents assent on 16th August, 1996. It came into force on 22nd August, 1996. Despite the fact that this act was adopted from Model Law, the legislature put its own spin to certain facets to make the act better suited for domestic arbitrations in India. One of those spin was put on Section 11 which deviated from Article 11[10] of the Model Law. One major distinction between the aforementioned section and article was that the Art. 11 empower the courts for an appointment of Arbitrator whereas in Sec. 11, the Chief Justices of Supreme Court and High court were empowered as per their provided jurisdiction in the act. Following the adoption of Model Law, Arbitration has picked up in the country. Just like any other newly implemented law, judicial interpretation was required to better interpret the discrepancies in the act. There have been quite a few important decisions by the courts of respective jurisdiction. Ingenious deductions were made by the learned justices who in turn have provided with clarity in relation to an appointment of an Arbitrator. Relatively, grey areas are found in every literal interpretation of law; layman reading of the terms will often lead to dissenting opinion between people, which in turn will lead to disputes. This is where the role of judiciary comes into picture. The Supreme Court ***("SC")*** and High Courts ***("HC")*** Even though Arbitration is infamously coined as outside the court proceeding, but judiciary and courts are inherent part of any law process, albeit in our country, India or world-wide. Judiciary's role is to prevent abuse of law and inherently provided fundamental rights of an aggrieved person or party. This research paper will explain the important aspects of appointment of arbitrator with the help of developments traced via landmark judgments. It will start with the explanation of grounds which were available in the Arbitration Act, 1996 prior to the Arbitration & Conciliation Amendment Act, 2015[11] ***("2015 Amendment Act")***. It will then subsequently move on to explain the nature of function exercised under sec. 11; Independence and impartiality of Arbitrator; time limit for approaching the court under sec. 11. The paper will also highlight the major amendments undertaken by the legislature, namely in 2015 and 2019[12] in relation to sec. 11 with a conclusion to end the paper.

[10] Model Law on International Commercial Arbitration, 1985, UN Doc. A/40/17, Art. 11.
[11] The Arbitration and Conciliation Amendment Act, 2015 (3 of 2016) (India).
[12] The Arbitration and Conciliation Amendment Act, 2019 (33 of 2019) (India).

DEVELOPMENT OF THE CONCEPT OF APPOINTMENT OF ARBITRATORS IN INDIA:

The parties are free to choose on the procedure for the appointment of Arbitrator[13]. The element of Party autonomy is one the bedrocks of ADR Mechanisms. The wordings Sec. 11(2)[14] clearly mention that the parties while contracting are free to choose the method for appointment of Arbitrator. The said section also governs and provides a failsafe apropos parties' failure to appoint the number of Arbitrator specified in the clause or a separate arbitration agreement. Initially in the case of a deadlock, parties were supposed to approach the Chief Justice of Supreme Court in cases of International commercial Arbitration and Respective Chief Justices of High Court before the Arbitration & Conciliation Amendment Act, 2015 **("*Amendment Act, 2015*").** There have been three most adjudicated topics in sec. 11:

- Nature of Function exercised;
- Independence and impartiality; and
- Time limit provided for approaching the courts.

a) FUNCTION OF CHIEF JUSTICE(S) UNDER SEC. 11: ADMINISTRATIVE OR JUDICIAL?

The dilemma of the nature of the function exercised by the Chief Justice or any person designated by the chief justice in relation to the appointment of Arbitrator(s) has been put forth in front of the Supreme Court of India a number of times. This dilemma posed a question specifically in relation to Article 136[15] which provides for Special Leave Petition **("SLP").** The question posed was whether an SLP under Art. 136 would lie against the Chief Justices order. Art. 136 provides for a remedy against judicial orders and not administrative orders. This question was dealt in a landmark judgment of this court in *Konkan Railway Corpn. Ltd & Ors vs M/S. Mehul Construction Co* [16]*("Konkan Case").* A three judge's bench presided over the matter. The majority judgment was delivered by Justice Pattanaik. The court in this case held *"The nature of the function performed by the Chief Justice being essentially to aid the Constitution of the Arbitration Tribunal immediately and the legislature having consciously*

[13] Arbitration and Conciliation Act, 1996, S.11(2), No.26, Acts of Parliament, 1996 (India).
[14] *Id.*
[15] The Constitution of India, art. 136 (India).
[16] AIR 2000 SC 2821.

chosen to confer the power on the Chief Justice and not a Court, it is apparent that the order passed by the Chief Justice or his nominee is an administrative order"[17]

A bare-bones contrast was drawn up in this judgment between the Arbitration Act of 1940[18] ***("The 1940 Act")*** and the Arbitration Act, 1996. It was observed that the intention of the legislature was to minimize courts intervention vis-à-vis arbitral process and it was not the legislative resolve for every judicial order to be perused and be the substance of judicial intervention. In conclusion the nature of the function of the Chief justice was held to be an administrative function in nature and not a judicial function.

The SC in the case of *Sundaram Finance Ltd. V NEPC India Ltd*[19], mentioned in *Konkan case,* dealt with the question posed to them under Sec.9[20] of the Arbitration Act, 1996, held that the court has the jurisdiction to pass the interim order under the aforementioned section, prior to the commencement of the arbitration proceedings and even before the appointment of an Arbitrator is undertaken. An analysis was drawn in between the 1940 Act and the Arbitration Act, 1996 in the said case, henceforth, it was observed id est the appointment of Arbitrator under Sec. 11 does not requires the Courts intervention to pass an order for the said appointment. In *Ador Samia Private Ltd. vs. Peekay Holding Ltd and others*[21], The SC held that the power exercised by Chief Justice of respective High Courts or his designate pursuant to an application under Sec. 11(6)[22]of the Arbitration Act, 1996 is an action undertaken in their administrative capacity and shall not be construed to be an act of judicial nature which can later be up for the scrutiny under the remedy provided for in Art. 136 of the Constitution of India ***("COI")*** and that such appeal against that order would not lie.

The validity of the judgment and the question of law put forth in *Konkan case* was referred to a constitution bench of the SC in the case of *Konkan Railway Corporation Case v Rani Construction Pvt. Ltd* ***("Konkan Railway Case")***[23], it was observed in this case that for an order to subject of a special leave appeal under Art. 136 shall be an adjudicatory order of a court or tribunal established in law and should have been passed by a State authority under its discharge of state duties for securing justice for its people[24]. The SC upheld the decision in

[17] *Id* at 5.
[18] Arbitration Act, 1940 (India).
[19] AIR 1999 SC 565.
[20] Arbitration and Conciliation Act, 1996, S.9, No.26, Acts of Parliament, 1996 (India).
[21] AIR 1999 SC 3246.
[22]Arbitration and Conciliation Act, 1996, S.11(6), No.26, Acts of Parliament, 1996 (India).
[23] AIR 2002 SC 778.
[24] *Id* at 16.

Konkan Case and concluded that the *order of the Chief Justice or his designate under Section 11 nominating an arbitrator is not an adjudicatory order and the Chief Justice of his designate is not a tribunal. Such an order cannot properly be made the subject of a petition for special leave to appeal under Article 136.*[25]

A clear cut distinction was drawn in between Sec. 11 of the Arbitration Act, 1996 and Art. 11 of the Model Law which empowered the court to appoint an arbitrator in lieu of failure of appointment by the parties, whereas Sec. 11 empowered Chief Justices and the person, institution, tribunal he so designates.. Hence, the distinction led to conclude the power of Chief Justice to be administrative rather than judicial in nature which was affirmed by the SC in the two Konkan Judgments. The aforementioned opinion of the SC in *Konkan Case* and *Konkan Railway Case* was overruled in the landmark case in *SBP & Co. vs Patel Enginerring and Another* [26]***("SBP & Co Case")*** and the function so exercised by the Chief Justice or his designate was held to be a judicial function, open to special leave appeal filed under Art. 136 of the COI. The SC delved into the matter in detail in this case, diving deep into the thought of function exercised by Chief Justice under Sec 11. There remained some unanswered aspect vis-à-vis the function being an administrative function. The SC corrected and elucidated the discrepancies which remained unresolved and unanswered. The seven judges' bench passed the judgment with a 6:1 ratio; they subsequently corrected the earlier opined decisions of the SC. The SC elucidated the matter of just what a Chief Justice is to do when approached with an application under Sec 11 of the Arbitration Act, 1996. They are listed as below:

- Power to rule on the jurisdiction aspect; whether the party has approached the right court.
- Power to check whether an arbitration agreement exists between the parties.
- Power to check if the party approaching the court under sec. 11 is a party to the said agreement.
- Power to check the validity of the claim; whether the claim in question is a dead claim or a long-barred claim
- Power to see if the parties have satisfied their mutual rights by dissolving their relationship by completing the transaction.

[25] *Id* at 23.
[26] AIR 2006 SC 450

Inter alia, the following conclusion was drawn up by SC viz. provided down below[27]:

(i) The power exercised by the Chief Justice of the High Court or the Chief Justice of India is a judicial power and not administrative in nature

(ii) The power under 11(6) can only be delegated to a subordinate judge of the High Court and Supreme Court in their respective jurisdiction.

(iii) The power conferred to subordinate judge would be the power so conferred by the Statute.

(iv) The Chief Justice or designate judge has the power explained above and is free to seek an opinion in appointing an arbitrator under sec. 11(8) from an institution; though the order has to be that of the Chief Justice or designated judge.

(v) High Court or Supreme Court to not intervene with the matter once an arbitral tribunal is formed and arbitration proceeding commenced unless it's a petition under sec 34 or 37 after the award has been passed.

(vi) An appeal under Art. 136 shall lie against an order of the Chief Justice.

(vii) There shall be no appeal against an order of the Chief Justice of India or a subordinate designated SC Judge under sec 11(6).

(viii) Once an arbitral tribunal has been constituted without an application under sec 11(6), the tribunal shall rule on its jurisdiction as empowered under sec. 16.

The SC finally had illuminated on the mystery surrounding vis-à-vis the nature of function of a Chief Justice. The grounds were now provided on which a Chief Justice could delve into. This put a dead stop to a host of disputes which would have arisen between the parties. Since, the function now being a judiciary function and certain grounds had been explicitly mentioned; the scope for future parties' disputes prior to commencement of arbitral proceedings had significantly been reduced. The only remedy which now remained available to the parties was the recourse provided under Sec. 34[28]of the Arbitration Act, 1996. This limited the courts intervention until an arbitral award was passed by the arbitral tribunal or the sole arbitrator. In case the Chief Justice errs in law, the parties had the remedy under Art. 136 of the COI.

[27] *Id* at 47.
[28] Arbitration and Conciliation Act, 1996, S.34, No.26, Acts of Parliament, 1996 (India).

The SC in the case of *National Insurance Co Ltd v M/s Boghara Polyfab Pvt. Ltd*[29] identified and classified the possible precursory issues which might arise under a sec. 11 application under the Arbitration Act, 1996 into three categories[30]:

- The mandatory issues –
    a) Jurisdictional issue: whether the party approached the pertinent High Court.
    b) Arbitration Agreement: Whether an arbitration agreement exits and if the party approaching the court is a party to the said agreement.
- The optional issues –
    a) Validity of claim: whether the claim is a dead (long-barred) claim or a live subsisting claim.
    b) Mutual satisfaction of obligations: whether the parties have satisfied their contractual obligation to each by undertaking a financial transaction without remonstrance.
- The issues to be left at the tribunals perusal -
    a) Validity of claim in lieu of the arbitration clause: If the claim actually is in consonance with the terms specified under the arbitration clause.
    b) Merits or any claim appertaining to the arbitration at hand.

The first and second issues are to be dealt by Chief Justice or his designate, whereas the third is for arbitral tribunals' perusal.

The SC in *Indowind Energy ltd v Wescare (I) Ltd*[31] probed into the scope of the inspection by the Chief Justice or his designate into the arbitration agreement. SC in this case held that the scrutiny of the arbitration agreement should be axiomatically be moderated to the query to see if an arbitration agreement actually exists in the middle of the parties and should not be branched out to the inspection of the rights & obligations and the specific performance of the parties

Hence, the stance taken by the court in *SBP & Co*[32] has gone a long way in assisting and avoiding the parties' disputes which would hamper the principles and the object of the Arbitration Act, 1996. The merry-go-round was finally put to an end with a decisive judgment. The power which was epitomized as an administrative function was in toto held to be a judicial

[29] AIR 2009 SC 170.
[30] *Id* at 22.
[31] AIR 2010 SC 1793
[32] *SBP & Co*, n. 24.

power which would lead to exemplify the scope of judicial intervention was extensive and not as limited as one would have thought. ."Function of the Chief Justice or Designate Judge in consideration of the application under section 11 is judicial and such application has to be dealt with in its entirety by either Chief Justice or the Designate Judge".[33] In layman terms, a Chief Justice or his designate while entertaining an application under sec. 11 is free to conduct an elaborate trial while determining the validity of an arbitration agreement as object to leaving the final discernment to the tribunal or the arbitrator.

This position went on until the 2015 Amendment Act was brought on by the legislature. The 2015 Amendment Act substituted the words chief justice with Supreme Court and High Courts, putting an end to a long debate over the nature of the function exercised by the Chief Justices.

b) INDEPENDENCE AND IMPARTIALITY OF AN ARBITRATOR:

Sec. 11(8)[34] expressly provides for the arbitral intuitions so designated for the purpose of appointment to seek a written disclosure from the sole arbitrator or arbitrators in consonance of sec. 12(1)[35]. Through constant evolution, the arbitral institutions are now required to overlook certain important aspects which has brought in via Arbitration and Conciliation Amendment Act, 2019 ***("2019 Amendment Act").*** Prior position was for Chief Justice to examine such appointment and later it was the courts or their respective designate. The importance of agreement was quite stressed upon under the arbitration act; the parties have the liberty to decide on the name and procedure of the appointment of an arbitrator.[36] The primal reasoning for appointment of an arbitrator is for an impartial resolution of the disputes.[37]"An independent mind is indispensable in the exercise of judicial power, whatever the source of that power may be, and it is one of the essential qualities of an arbitrator."[38]The courts are supposed to protect unfair bias towards the aggrieved party. An arbitrator who has adjudged the matter of a party in a different capacity or at some other point in time cannot be appointed as an arbitrator, even if the party so desire, that would be said to against the principles of arbitration. "Exercise of discretion for appointment of arbitrator even after forfeiture of right is improper"[39].

[33] *Hindustan Copper Ltd. vs. Monarch Gold Mining Co. Ltd.,* (2012) 10 SCALE 168.
[34] Arbitration and Conciliation Act, 1996, S.11(8), No.26, Acts of Parliament, 1996 (India).
[35] Arbitration and Conciliation Act, 1996, S.12(1), No.26, Acts of Parliament, 1996 (India).
[36] Arbitration and Conciliation Act, 1996, S.11(2), No.26, Acts of Parliament, 1996 (India).
[37]Hashwani v. Jivraj, (2011) 1 WLR 1872, 2011 UKSC 40.
[38] Consorts Ury v S.A. des Galeries Lafayette, Cass. 2e civ., 13-4-1972, JCP, Pt. II, No. 17189 1972 France.
[39] Suri Constructions vs. State of Rajasthan, AIR 2006 Raj. 53.

The SC in *Northern Railway Administration, Ministry of Railway, N. Delhi vs. P.E.C. Ltd.*[40], observed and held that the appointment of an arbitrator mentioned in the arbitration agreement is not a must and such appointment are to be done in consonance with the requirement specified under sec. 11(8). However the SC, in *Bharat Sanchar Nigam Ltd. vs. Dhanurdhar Champatira*[41], slightly deviated from its previous position in *Northern Railway* and held that adherence to the appointment procedure is not a must, however the inherent twin requirements of 11(8) must be respected.[42]

In the case of *Union of India and others vs. Uttar Pradesh State Bridge Corporation Ltd*[43], The SC has considered and protected the principle of independence and impartiality of an arbitrator in case of disputes with Government Corporation and has taken a step forward in saying that the courts can go beyond the scope of arbitration agreement in appointing an arbitrator and safeguarding the interest of the non-government party by upholding independence and impartiality. Courts are not powerless less to undo the situation where Government undertakes the appointment of an arbitrator[44]. "Even if an arbitrator is specified in arbitration agreement, if circumstances so warrant, Chief Justice or designated court can appoint an independent arbitrator".[45] The said decision clearly stipulates and efficaciously protects a party and its virtue in arbitration.

There were significantly lesser grounds to question an arbitrator's independence and impartiality pre-2015. However, various additions were made to sec. 12 along with a fifth schedule[46] post-2015 which talks about the grounds that would give reasons to doubt the impartiality and the independence of an arbitrator. Sec. 12(5) was also added[47]:

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

Post-2015 amendment a distinction has been drawn between ex-employees and current employees. The latter are *de jure* ineligible to be appointed as arbitrators.[48]The SC in *TRF ltd*

[40] Northern Railway Administration, Ministry of Railway, N. Delhi vs. P.E.C. Ltd., AIR 2009 SC 839.
[41] Bharat Sanchar Nigam Ltd. vs. Dhanurdhar Champatiray, AIR 2010 SC 330.
[42] *Id* at13.
[43] (2015) 2 SCC 52.
[44] *Id* at 21.
[45] Union of India vs. BESCO Ltd., AIR 2017 SC 1628.
[46] Arbitration and Conciliation Act, 1996, fifth schedule, No.26, Acts of Parliament, 1996 (India).
[47] Arbitration and Conciliation Act, 1996, S.12(5), No.26, Acts of Parliament, 1996 (India).
[48] *West Haryana Highways Projects Pvt. Ltd. v National Highways Authority of India* (2017) 242 DLT 44; *Orissa*

vs Energo Engg. Projects Ltd.[49]***("TRF Case")***,* while dealing with the question of law whether a Managing Partner who is ineligible to act as an arbitrator can appoint a substitute arbitrator in his place held that the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator has become ineligible as per prescription contained in Sec. 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person."[50]

In *Voestalpine Schienen GMBH vs Delhi Metro Rail Corpn. Ltd,*[51]*("**Voestalpine**")*SC dealt with the question of independence and impartiality vis-à-vis Government contracts and disputes and held that choice should be provided from a broad based panel so there is no misapprehension that principle of impartiality and independence would be discarded at any stage of the proceeding, specially at the constitution of the Arbitral Tribunal[52].

"Independence and impartiality of the arbitrator are the hallmark of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applied to all judicial and quasi-judicial proceedings. It is for this reason that notwithstanding the fact that the relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration."[53]"Independence and impartiality are two different concepts. An arbitrator may be independent and yet, lack impartiality, or vice versa. Impartiality, as is well accepted, is a more subjective concept as compared to independence. Independence, which is more objective concept, may, thus, be more straightforwardly ascertained by the parties at the outset of the arbitration proceedings in light of the circumstances disclosed by the arbitrator, while partiality will more likely surface during the arbitration proceedings".[54]If all ex-employees of government sector, public undertaking etc are barred from appointment as an arbitrator where their expertise lies, "then no person who had earlier worked in any capacity with the Central Government or other autonomous or public sector undertakings, would be ineligible to act as an arbitrator even when he is not even

Concrete and Allied Industries Limited 2017 SCC OnLine Chh 904.
[49] AIR 2017 SC 3889.
[50] *Id* at 57.
[51] AIR 2017 SC 939.
[52] *Id* at 30.
[53] *Id* at 20.
[54] *Id at* 22.

remotely connected with the party in question"[55]."Had this been the intention of the legislature, the Seventh Schedule would have covered such persons as well."[56] "There are certain minimum levels of independence and impartiality that should be required of the arbitral process regardless of the parties' apparent agreement. A sensible law cannot, for instance, permit appointment of an arbitrator who is himself a party to the dispute, or who is employed by (or similarly dependent on) one party, even if this is what the parties agreed. The concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent adjudicators for resolution of disputes."[57]"An appointment of an arbitrator made by a person ineligible to act as an arbitrator himself is null and void"[58]

The SC in *Perkins Eastman*[59]dealt with the question of appointment of sole arbitrator by a party in dispute. It was observed, "Where both the parties could nominate respective arbitrators of their choice were found to be a completely different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. But, in a case where only one party has the right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome of the decision of the dispute must not have the power to appoint a sole arbitrator"[60]The appointment of the sole arbitrator in this case by the respondent was set aside and the court exercising its power under sec. 11(6) appointed a sole arbitrator.

An arbitration agreement specifying appointment of arbitrator is an essential procedural clause. There have been many instances in which appointment of an arbitrator not in consonance with the procedure specified in the agreement have been held null & void. Such an instance was brought up in the *Railway Electrification Case*[61], where the Allahabad HC erred in law by going beyond the explicit wordings of the arbitration agreement by appointing a sole arbitrator in place of a panel of three arbitrators by drawing the wrong reasoning of no neutral arbitrator being provided to the party. The SC corrected the HC judgment and held, "When the agreement specifically provides for appointment of Arbitral Tribunal consisting of three arbitrators from

[55] *Id* at 24.
[56] *Id at* 26.
[57]Law Commission Report, No. 246,
[58] Bharti Broadband Network Limited vs United Telecom Limited, (2019) 5 SCC 755
[59] Perkins Eastman Architects DPC vs HSCC (India) Ltd, AIR 2020 SC 59
[60] *Id* at 16.
[61]Central Organization for Railway Electrification vs. M/s ECI-SPIC-SMO-MCML (JV), 2019 SCC Online SC 1635.

out of the panel serving or retired Railway Officers, the appointment of arbitrators should be in terms of the agreements as agreed by the parties."[62]

Delhi HC in a recent judgment of *Proddatur*[63], dealt with the question whether a company run by a board of directors is impartial in appointing an arbitrator and independent from the dispute between parties held that a director is an inherent part of a board and shall refrain from indulging in situation where a vested interest, either directly or indirectly might arise. Hitherto, the ineligibility under sec. 12(5) shall apply to a company run by a Board.[64]

An arbitrator is supposed to maintain independence and impartiality."The genesis behind this rationale is that even when the Arbitrator is appointed under the contract and by the parties thereto, he is independent of the parties. Functions and duties require him to rise above the partisan interest of the parties and no to further the interest of any particular party".[65]

c) TIME LIMIT FOR APPROACHMENT WITH AN APPLICATION UNDER SEC. 11:

Sec 11(6) governs the scenarios where a dispute arises pursuant to an agreement between the parties for the appointment of arbitrator and henceforth fails to do so. Where no such requirement has been provided, sec. 11 (3), (4) and (5)[66] would be referred to. Now, sub sections (3), (4) and (5) provide for a 30 day period for the appointment of arbitrator from the date of the request of the party vis-à-vis the dispute, 11(6) has not exclusively mentioned any timeframe for the parties to adhere to which would lead to the conclusion that parties do not forfeit their right of appointment, if they fail to appoint under 30 days of the notification."Under section 11, there is no provision fixing any time limit except sub-section (5) which provides the time limit of 30 days from the receipt of the request from the party for appointment of an arbitrator. Under sub-section (6) no such time limit has been fixed. It is required under the procedure; a party may request the Chief Justice or any person on institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment"[67]. In *Datar Switchgears*[68], The SC entertained the question of appointment under sec. 11(6). The following was observed by the court:

[62] *Id* at 38.
[63] Proddatur Cable TV DIGI Services vs. SITI Cable Network Limited, 267 (2020) DLT51.
[64] *Id* at 25.
[65] *Id* at 28.
[66] Arbitration and Conciliation Act, 1996, S.11(3), (4), (5), No.26, Acts of Parliament, 1996 (India).
[67] Ansal Properties & Industries Ltd. vs. Himachal Pradesh State Electricity Board., AIR 1997 Arb LR 11.
[68] Data Switchgears Ltd. v. Tata Finance Ltd., (2000) 8 SCC 151.

- If an appointment is not undertaken by the party as per the demand of the opposite party within 30 days of such demand, the right does not extinguished pursuant to lapse of provided time until the opposite party movies to court under sec. 11(6).
- If an appointment is made post 30 day period but before the application under sec. 11(6), the said appointment will be *ex-facie* valid.
- Due regards and respect is to be given to the wordings of the agreement and procedure mentioned hitherto.

The aforementioned view was upheld in *Punj Lloyd*[69]. In the case of *Ace Pipeline*[70], dealing with the case of department lethargy in appointing an arbitrator, it was observed and held by the SC that the instances of department lethargy is well renowned, where the designated institute fails to appoint an arbitrator. When such a situation presents itself, the courts are empowered to issue the writ of mandamus. There might be instances where the institute mentioned in the agreement fails to appoint an arbitrator, in those cases the writ can be issued by the courts having jurisdiction over the matter. "Court should normally adhere to the terms of arbitration clause and appoint the arbitrator/arbitrators named therein except in exceptional cases for reasons to be recorded or where both parties agree for common name."[71]

In lieu of extinguishment of the right of appointing an arbitrator, "once a minimum 30 days period has expired and petition under section 11 is filed, the appointing authority looses the right to make an appointment of arbitrator. "[72]

After *Datar Switchgears*[73], a mode of flexibility was provided to the parties. They had the liberty of appointing an arbitrator even after the lapse of the 30 days period mentioned in other provisions of sec. 11 but, before the aggrieved party moves to the court under sec. 11(6). The SC in *Antrix*[74] and *Pricol*[75]had held that the remedy under sec 11(6) stands exhausted once the arbitrator is appointed. The remedy in those cases would lie under other provisions of the Arbitration Act, 1996.

Keeping the flexibility in mind, the SC in *Walter Bau*[76]held "unless the appointment of the arbitrator is ex facie valid and such appointment satisfies the Court exercising jurisdiction

[69] Punj Lloyd Ltd vs. Petronet MHB Ltd, (2006) 2 SCC 638.
[70] Ace Pipeline Contract Pvt. Ltd. vs. Bharat Petroleum Corporation Ltd., AIR 2007 SC 1764
[71] *Id* at20
[72] Bharat Sanchar Nigam Ltd. vs. Motorola India Pvt. Ltd., 2008 (3) Arb. LR 531.
[73] *Data Switchgears*, n.68.
[74] Antrix Corpn. Ltd. vs. Devas Multimedia (P) Ltd., (2014) 11 SCC 560.
[75] Pricol Ltd. Johnson Controls Enterprise Ltd., (2015) 4 SCC 177.
[76] Walter Bau AG vs. Municipal Corporation of Greater Mumbai, (2015) 3 SCC 800.

under Section 11(6) of the Arbitration Act, acceptance of such appointment as a fait accompli to debar the jurisdiction under Section 11(6) cannot be countenanced in law."[77]

This decision was also followed in *TRF Case*[78] and *Perkins Eastman*[79], where the SC had to decide the application put in front of them under sec. 11(6) as the appointment of the arbitrator had already taken place. The application was entertained in both the cases.

KEY AMENDMENT HIGHLIGHTS IN RELATION TO SEC. 11:

a) *Arbitration and Conciliation Amendment Act, 2015:*

"*Amendment to Section 11 (Appointment of Arbitrators* : In so far as section 11, "appointment of arbitrators" is concerned, the new law makes it incumbent upon the Supreme Court or the High Court or person designated by them to dispute of the application for appointment of arbitrators within 60 days from the date of service of notice on the opposite party.

As per the new Act, the expression 'Chief Justice of India' and 'Chief Justice of High Court' used in earlier provision have been replaced with Supreme Court or as the case may be, High Court, respectively. The decision made by the Supreme Court or the High Court or person designated by them have been made final and only an appeal to Supreme Court by way of Special Leave Petition can lie from such an order for appointment of arbitrator. The new law also attempts to fix limits on the fee payable to the arbitrator and empowers the high court to frame such rule as may be necessary considering the rates specified in Fourth Schedule."[80]

b) *Arbitration and Conciliation Amendment Act, 2019:*

"Appointment of Arbitrators under Section 11: The Amendment Act empowers the Supreme Court (in the case of an international commercial arbitration) and the High Court (in cases other than international commercial arbitration) to designate arbitral institutions for the purpose of appointment of arbitrators. Such arbitral institutions will be graded by the Arbitration Council of India (discussed below). Where a graded arbitral institution is not available, the Chief Justice

[77] *Id* at 9.
[78] *TRF Ltd*, n 49.
[79] *Perkins Eastman*, n 59.
[80] Vikas Goel, P.V. Prabhat, *"Highlights of Amendment to the Arbitration and Conciliation Act 1996 via Abitration Ordinance 2015"* (last visited Jun 4. 2020) https://www.mondaq.com/india/arbitration-dispute-resolution/448666/highlights-of-amendment-to-the-arbitration-and-conciliation-act-1996-via-arbitration-ordinance-2015

of the concerned High Court may maintain a panel of arbitrators for discharging the functions and duties of the arbitral institution.

In the absence of a procedure to appoint an arbitrator or failure of such procedure under the agreement, the appointment will be made by the arbitral institution designated by the Supreme Court or the High Court, as the case may be. The application for appointment of an arbitrator will be disposed of by the arbitral institution within a period of thirty days from the date of service of notice on the opposite party. The arbitral institution will determine the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal subject to the rates specified in the Fourth Schedule to the Act."[81]

The aforementioned amendments have brought much needed significant positivity apropos arbitration. The said steps have been taken in lieu of turning into India into a future arbitration hub.

[81] AZB & Partners, *"The Arbitration and Conciliation (Amendment) Act, 2019 – Key Highlights"*, (last visited Jun 4. 2020) https://www.mondaq.com/india/arbitration-dispute-resolution/840292/the-arbitration-and-conciliation-amendment-act-2019-key-highlights

CONCLUSION

The nature, time limit and independence have been constant topics of debate surrounding appointment of Arbitrator. The nature of function exercised has been put to bed with the position laid down in SBP and later on completely vitiated by the 2015 Amendment and the time limit has been thoroughly propounded upon. However the concept pertaining to independence and impartiality are still highly contested. The SC had finally elucidated on the fact by taking the correct interpretation from *Voestalpine* in *Perkins Eastman* which at the time was seen to have finally put an ease to the confusion only to see a drawback in the ratio of *Railway Electrification*. The ruckus surrounding Unilateral appointment is now clear as day with the ratio laid down in *TRF Ltd, Voestalpine* and *Perkins* but grey areas pertaining to the independence and impartiality in appointment via a panel still exists, which shall lead to further adjudication of the aforementioned concept by the judiciary who shall yet again interpret.