NO MORE ESCAPE CLAUSES: FINALITY, NEUTRALITY, AND THE TRANSFORMATION OF INDIAN ARBITRATION

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Introduction

The evolution of Indian arbitration has been characterized by a persistent and often contentious struggle between the principles of party autonomy and the necessity of judicial oversight. In the decades following the enactment of the Arbitration and Conciliation Act, 1996,[1] the role of the Indian judiciary has transitioned from that of a "helicopter parent,"[2] prone to frequent and substantive intervention, to that of a "guardian angel," intended to facilitate and protect the integrity of the process without stifling its inherent efficiency. This transformation has been propelled by significant legislative milestones, most notably the amendments of 2015, 2019, and 2021, which aimed to curtail judicial interference and establish India as a global hub for international commercial dispute resolution.[3] Despite these efforts, the practical application of the law often reveals a stark dichotomy, while arbitration is celebrated in conferences as a paradigm of commercial wisdom, it is frequently treated as a foe in practice, with parties exploiting every procedural avenue to delay proceedings or manipulate outcomes.[4]

The landmark judgment in *Hindustan Construction Company Ltd vs Bihar Rajya Pul Nirman Nigam Limited* represents a critical juncture in this legal trajectory.[5] The case primarily addresses three interrelated pillars of arbitral jurisprudence, the finality and non-reviewability of appointment orders passed under Section 11,[6] the doctrine of severability as applied to "negative covenants" that seek to foreclose arbitration through procedural failures, and the complex interplay between deemed waivers under Section 4 and the mandatory, non-derogable

[1] Arbitration and Conciliation Act, 1996, No. 26 of 1996, Acts of Parliament, 1996.
[2] Hindustan Construction Co. Ltd. v. Bihar Rajya Pul Nirman Nigam Ltd. & Ors., 2025 INSC 1400.
[3] International Arbitration and Mediation, Press Information Bureau (Ministry of Law & Justice, Govt. of India), Dec. 13, 2024, https://www.pib.gov.in/PressReleasePage.aspx?PRID=2084223&reg=3&lang=2.
[4] R. Manicka Vinayagam & M. Arul Simi, *Procedural Delay in Arbitration – Issues and Challenges*, 8 *Int'l J. Multidisciplinary Rsch. & Analysis* 5077 (Sept. 14, 2025), https://ijmra.in/v8i9/18.php.
[5] Hindustan Construction Co. Ltd. v. Bihar Rajya Pul Nirman Nigam Ltd. & Ors., 2025 INSC 1400.
[6] Arbitration and Conciliation Act, 1996, § 11, No. 26 of 1996 (India).

ineligibility criteria under Section 12(5).[7] At its heart, the ruling reinforces the "self-contained code" nature of the Arbitration Act,[8] ensuring that once the judicial gateway of Section 11 has been traversed, the process is insulated from retrospective sabotage by the same court that initiated it. This analysis explores the historical legal landscape that necessitated this intervention, the specific nuances of the 2025 ruling, and its profound implications for the infrastructure sector and the broader constitutional standard expected of state instrumentalities in India.

The Historical Landscape- Evolution of Challenges and Waivers under Sections 12, 4, and 29A Before the 2025 decision in *Hindustan Construction Company*,[9] the Indian arbitral regime operated within a framework that had been significantly tightened by the 2015 Amendment Act[10] but remained subject to interpretative inconsistencies across various High Courts. The core of this controversy centred on how and when a party relinquishes its right to challenge an arbitrator's appointment or the tribunal's jurisdiction.

The Rise of Mandatory Neutrality and the Rigours of Section 12(5)

Prior to 2015, the grounds for challenging an arbitrator were largely confined to "justifiable doubts" regarding independence and impartiality.[11] The 2015 Amendment introduced Section 12(5) read with the Seventh Schedule, marking a definitive shift toward a regime of "mandatory ineligibility."[12] Under this provision, individuals having specified relationships with the parties, such as employees, consultants, or advisors, are statutorily ineligible to act as arbitrators, regardless of any prior agreement.

The jurisprudence surrounding Section 12(5) was solidified through a series of landmark Supreme Court decisions. In *TRF Ltd v Energo Engineering Projects Ltd*,[13] the Court laid down the "structural logic" of ineligibility, once a person becomes statutorily ineligible to act as an arbitrator (for instance, the Managing Director of a party), that person also loses the power to

[7] Arbitration and Conciliation Act, 1996, § 12(5), No. 26 of 1996 (India).
[8] Supreme Court Shuts Door on Non-Signatories in Arbitration, *Mondaq* (Sept. 8, 2025), https://www.mondaq.com/india/arbitration-dispute-resolution/1674888/strangers-at-the-gate-supreme-court-shuts-door-on-non-signatories-in-arbitration.
[9] Supra,
[10] Arbitration and Conciliation (Amendment) Act, 2015, No. 3 of 2016 (India).
[11] *he Bias of an Arbitrator: Is the Remedy Under Section 14 Foreclosed?*, *LiveLaw* (May 12, 2023), https://www.livelaw.in/articles/the-bias-of-an-arbitrator-is-the-remedy-under-section-14-foreclosed-228574.
[12] Supra, Arbitration and Conciliation (Amendment) Act, 2015, No. 3 of 2016 (India).
[13] TRF Ltd. v. Energo Engineering Projects Ltd., (2017) 8 SCC 377 (India) (Supreme Court of India).

nominate any other person to act in that capacity. This principle was further expanded in *Perkins Eastman Architects DPC v HSCC (India) Ltd*,[14] which held that a party with a vested interest in the outcome of a dispute cannot have the unilateral power to appoint a sole arbitrator, as such an arrangement inherently biases the "charting of the course" of the resolution. The Court in *Bharat Broadband Network Ltd v United Telecoms Ltd*[15] clarified that such ineligibility results in a *de jure* inability to perform functions under Section 14(1)(a), rendering the appointment void ab initio. Crucially, the Court established that this ineligibility can only be waived through an "express agreement in writing" executed *subsequent* to the disputes having arisen, thereby excluding any notion of implied waiver or waiver by conduct.

The Doctrine of Deemed Waiver under Section 4

While Section 12(5) protects structural neutrality, Section 4 of the Act[16] governs procedural discipline by embodying the principle of "deemed waiver." It stipulates that a party who knows of a non-compliance with a derogable provision or an arbitral requirement but continues to participate without timely objection is deemed to have waived its right to object. Historically, the Supreme Court in *Narayan Prasad Lohia v Nikunj Kumar Lohia*[17] interpreted Section 4 alongside Section 10 (which mandates an odd number of arbitrators), holding that even a breach of Section 10 is derogable and can be waived if not challenged at the outset.

The tension pre-2025 lay in the boundary between these two sections. High Courts often struggled to determine whether active participation in proceedings, such as filing statements of defence or attending dozens of hearings, could constitute a waiver of the right to challenge an appointment procedure that fell foul of *TRF* or *Perkins* but did not explicitly trigger the Seventh Schedule. Decisions like *Ellora Paper Mills Ltd v State of Madhya Pradesh* reinforced that mere participation could never cure a Section 12(5) ineligibility, but the status of other procedural challenges remained a fertile ground for tactical litigation.[18]

The Disciplinary Ambiguities of Section 29A

Section 29A[19] was introduced in 2015 to solve the problem of interminable arbitrations by

[14] Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd., 2019 SCC OnLine SC 1517 (India).
[15] Bharat Broadband Network Ltd. v. United Telecoms Ltd., (2019) 5 SCC 755 (India).
[16] Arbitration and Conciliation Act, 1996, § 4, No. 26 of 1996 (India).
[17] Narayan Prasad Lohia vs Nikunj Kumar Lohia & Ors, 2002 (3) SCC 572.
[18] *Ellora Paper Mills Ltd. v. State of Madhya Pradesh*, (2022) 3 S.C.C. 1 (India).
[19] Arbitration and Conciliation Act, No. 26 of 1996, § 29A, *amended by* Arbitration and Conciliation

imposing a 12-month time limit for the rendering of an award. While the parties could extend this by 6 months by mutual consent, any further extension required court intervention. Before the *HCC* decision, a "jurisdictional puzzle"[20] existed regarding which court had the power to grant such extensions, the High Court that appointed the arbitrator under Section 11, or the "Court" as defined in Section 2(1)(e)[21] (the principal civil court).[22]

Furthermore, the legal community was divided on whether a joint application for an extension under Section 29A constituted a "higher degree of consent" that could act as a waiver of prior jurisdictional objections.[23] Some High Courts, notably Calcutta in *Rohan Builders v Berger Paints*, took a restrictive view, suggesting that once a mandate terminated by efflux of time, it could not be revived, potentially rendering awards passed after the deadline a nullity.[24] This produced a scenario where parties would participate in extension proceedings while simultaneously reserving a right to challenge the tribunal's mandate later if the outcome was unfavourable.[25]

The change

The Supreme Court's decision in *Hindustan Construction* represents a doctrinally significant consolidation of India's pro-arbitration jurisprudence, particularly in relation to the finality of Section 11 appointments and the survivability of arbitration agreements despite defective appointment mechanisms. The dispute arose from a bridge construction contract over the River Sone in Bihar. Arbitration had already taken place once under the same agreement, demonstrating that the parties themselves understood the contract as containing a functioning arbitral framework. When a subsequent dispute arose, the Patna High Court appointed a sole arbitrator in August 2021 under Section 11(6). The arbitral process progressed extensively, the parties participated in over seventy hearings, cooperated in procedural scheduling, and jointly sought three extensions of the arbitrator's mandate under Section 29A. This long participation indicated not only acceptance of the tribunal's jurisdiction but also reliance on the arbitral process as the chosen dispute resolution forum. Yet at the stage of final arguments, the respondent State PSU sought to reopen the very foundation of the proceedings by filing a

(Amendment) Act, No. 3 of 2016 (India).
[20] *Jagdeep Chowgule v. Sheela Chowgule*, 2026 INSC 92 (India).
[21] Arbitration and Conciliation Act, No. 26 of 1996, § 2(1)(e) (India).
[22] *Chief Engineer (NH) PWD (Roads) v. BSC & C and C JV*, (2024) 8 S.C.C. 421 (India).
[23] *Bharat Broadband Network Ltd. v. United Telecoms Ltd.*, (2019) 5 S.C.C. 755 (India).
[24] *Rohan Builders (India) Pvt. Ltd. v. Berger Paints India Ltd.*, 2024 SCC OnLine SC 2492 (India).
[25] *ATC Telecom Infrastructure Pvt. Ltd. v. Bharat Sanchar Nigam Ltd.*, 2023 SCC OnLine Del 7135 (India).

review petition against the original appointment order. The High Court allowed this review and dismissed the Section 11 request in December 2024, effectively collapsing years of arbitral effort.

The Supreme Court treated this development not as a routine procedural error but as a structural threat to the stability of arbitration in India. It held unequivocally that High Courts lack jurisdiction to review or recall orders passed under Section 11(6). The Court's reasoning was grounded in the architecture of the Arbitration and Conciliation Act itself. The Act, it emphasized, is designed as a *self-contained code* aimed at reducing judicial interference and accelerating dispute resolution. Within such a framework, judicial powers must be read restrictively, if the statute does not expressly authorize a procedural step, courts should presume that the legislature intended to exclude it. Allowing review of Section 11 orders would introduce uncertainty at the very threshold of arbitration, permitting parties to derail proceedings after substantial progress had been made. Accordingly, once a court appoints an arbitrator, it becomes *functus officio* with respect to that function. The appointment stage is exhausted, and the matter passes into the arbitral domain.

The Court further addressed the argument that constitutional powers under Articles 226 or 227[26] could be used to reopen such orders. It rejected this contention, clarifying that supervisory jurisdiction cannot be employed to circumvent the statutory scheme of the Arbitration Act. Permitting such intervention would undermine the legislative policy of minimal court interference and would resurrect the expansive judicial scrutiny that the 2015 amendments were intended to curtail. In this sense, the judgment recalibrates the legacy of *SBP & Co v Patel Engineering*.[27] While *SBP* had characterized the Section 11 power as judicial and allowed substantial examination at the appointment stage, the insertion of Section 11(6-A)[28] in 2015 deliberately narrowed that role to a prima facie inquiry into the existence of an arbitration agreement. The 2025 ruling entrenches this post-amendment approach by treating Section 11 as a limited gateway function rather than a continuing supervisory jurisdiction. The court's task ends once an arbitrator is validly appointed, thereafter, jurisdictional challenges must be addressed within the arbitral framework itself, typically under Section 16.

[26] INDIA CONST. arts. 226, 227.
[27] *SBP & Co. v. Patel Eng'g Ltd.*, (2005) 8 S.C.C. 618 (India).
[28] Arbitration and Conciliation Act, No. 26 of 1996, § 11(6-A), *amended by* Arbitration and Conciliation (Amendment) Act, No. 3 of 2016 (India).

The second major pillar of the judgment concerns the treatment of contractual clauses that effectively permit one party to frustrate arbitration altogether. Clause 25 of the contract provided that if the Managing Director did not appoint an arbitrator, "*there shall be no arbitration at all*." The respondent argued that this created a contingent arbitration agreement, because unilateral appointments by interested officials had been invalidated by precedents such as *TRF Ltd* and *Perkins Eastman*, the specified method of appointment had become legally unenforceable, and therefore the arbitration clause itself stood extinguished. The Supreme Court rejected this reasoning as conceptually flawed and normatively dangerous. It characterized such provisions as "negative covenants" or "nuclear veto" clauses, because they allow a dominant contracting party, frequently the State, to neutralize arbitration simply by refusing to act.[29]

The Court applied the doctrine of severability to dismantle this argument. It emphasized that an arbitration clause contains two analytically distinct elements, the substantive agreement to arbitrate disputes, and the procedural machinery for constituting the tribunal. While the latter may become invalid due to statutory reform or judicial interpretation, the former represents the core contractual intention. Unless the parties clearly intended arbitration to exist only in the precise procedural form specified, defects in the appointment mechanism should not destroy the agreement itself. In the present case, the history of prior arbitration under the same contract, along with the parties' prolonged participation in the new proceedings, demonstrated that the intention to arbitrate was genuine and continuing. Therefore, the failure of the contractual appointment method could not be treated as extinguishing the arbitration clause.

The Court also grounded its reasoning in statutory and constitutional principles. It held that clauses making arbitration contingent on the unilateral will of one party undermine the equality requirement embedded in Section 18 of the Arbitration Act,[30] which mandates equal treatment of parties. Where the State is a contracting party, such clauses may additionally violate Article 14[31] by creating arbitrary and unfair dispute-resolution structures. By framing the issue in both statutory and constitutional terms, the Court signalled that arbitration agreements cannot be structured in ways that allow public authorities to retain ultimate control over whether disputes will be adjudicated at all.

[29] *Lombardi Eng'g Ltd. v. Uttarakhand Jal Vidyut Nigam Ltd.*, 2023 SCC OnLine SC 1422 (India).
[30] Arbitration and Conciliation Act, No. 26 of 1996, § 18 (India).
[31] INDIA CONST. arts. 14.

Having rejected the negative covenant, the Court clarified the positive function of Section 11(6). The provision does not merely empower courts to fill a procedural vacancy, it authorizes them to ensure that the parties' agreement to arbitrate remains effective. Where the contractual appointment process fails or becomes legally invalid, the court must step in to appoint an independent arbitrator so as to preserve the arbitral forum. This approach treats Section 11 as a curative mechanism that safeguards the enforceability of arbitration agreements rather than a narrow technical step dependent on flawless contractual drafting.

Taken together, the decision performs a systemic stabilizing role for Indian arbitration law. It ensures finality at the appointment stage by preventing courts from revisiting Section 11 orders once the tribunal is constituted. Simultaneously, it protects arbitration agreements from being nullified by procedural defects or strategically designed veto clauses. The ruling therefore strengthens the credibility of arbitration in government contracts, limits opportunistic litigation tactics, and reinforces the legislative commitment to minimal judicial intervention. By aligning procedural certainty with substantive fairness, the judgment deepens India's transition toward a mature, autonomy-respecting arbitration regime in which courts act as facilitators rather than overseers of the arbitral process.

Clarifying the Interplay of Sections 4, 12(5), and 29A

The Supreme Court in *Hindustan Construction Company case* also undertook a careful doctrinal clarification of how waiver operates within the Arbitration and Conciliation Act, particularly through the interaction of Sections 4, 12(5), and 29A. The judgment is important because prior case law had often blurred the boundary between objections that go to the inherent legitimacy of the tribunal and those that merely concern procedural irregularities. The Court resolved this confusion by articulating a two-tier framework that distinguishes between non-waivable structural defects and waivable procedural objections.

At the first level are objections grounded in Section 12(5) read with the Seventh Schedule, which deal with structural ineligibility of the arbitrator. These disqualifications relate to circumstances that fundamentally compromise the tribunal's neutrality, such as an arbitrator being an employee, consultant, or otherwise financially or administratively linked to a party. The Court treated such defects as jurisdictional in the strict sense, if a tribunal is constituted in violation of Section 12(5), it lacks inherent authority to adjudicate. Proceedings before such a tribunal are therefore *coram non judice*. Because these defects strike at the legitimacy of the

forum itself, they cannot be waived by conduct, silence, or even by positive participation in the proceedings. The Court emphasized that applications under Section 29A for extension of the tribunal's mandate, or continued participation in hearings, do not validate an inherently ineligible arbitrator. Consequently, a Section 12(5) objection can be raised at any stage, before the tribunal, during proceedings, or even post-award in a challenge under Section 34, because the defect concerns the existence of lawful adjudicatory authority rather than procedural fairness.

The second level comprises objections falling within Section 4 of the Act, which embodies the principle of "deemed waiver for derogable provisions." This category includes defects in the appointment procedure, contractual inconsistencies, or concerns relating to independence that do not fall within the Seventh Schedule's automatic disqualifications. These issues do not destroy the tribunal's jurisdiction but merely affect the regularity of its constitution. The Court held that such objections must be raised promptly, otherwise, they are deemed waived once a party knowingly participates in the proceedings. In the *HCC dispute*, the arbitrator appointed by the court was a retired judge and therefore did not suffer from any Seventh Schedule disqualification. The respondent's objection was directed not at the arbitrator's eligibility but at the contractual clause governing appointment. The Court therefore treated the challenge as belonging to the second tier. Because the respondent had filed pleadings, attended more than seventy sittings, and jointly sought extensions of the mandate under Section 29A, its conduct amounted to a conscious and unequivocal waiver under Section 4. Having accepted the tribunal and invoked its jurisdiction for years, the respondent could not later disown the process at the final stage of arguments.

By drawing this distinction, the Supreme Court prevented Section 12(5) from being deployed as a universal escape route from arbitration. The judgment makes clear that only defects going to the tribunal's inherent legitimacy remain perpetually open to challenge; all other objections are subject to the discipline of waiver. This clarification strengthens procedural certainty in arbitration by ensuring that parties cannot strategically remain silent during proceedings and later invoke technical irregularities to nullify an award. At the same time, the framework preserves the strict non-waivability of structural bias, thereby maintaining the foundational requirement of impartial adjudication.

Impact of the Case on Arbitration and Relevant Commercial Sectors

I. Impact on Arbitration Law (Core Field)

The judgment fundamentally restructures three doctrinal zones of arbitration law, judicial intervention, tribunal validity, and procedural waiver.

First, on judicial intervention, the ruling settles that a Section 11 order is final and non-reviewable. This shifts the post-2015 jurisprudence from ambiguity to certainty. Earlier, after *SBP & Co v Patel Engineering*, Section 11 was treated as a judicial function capable of wider scrutiny. Subsequent rulings such as *Duro Felguera v Gangavaram Port* and *Mayavati Trading v Pradyuat Deb Burman*[32] narrowed the inquiry to a prima facie existence test, but did not fully address whether the appointing court could later revisit its own order. The Hindustan decision closes this gap by holding that once appointment is made, the court becomes *functus officio*. This reinforces arbitration as a self-contained statutory mechanism insulated from iterative judicial interference, aligning Indian law with the *Kompetenz-Kompetenz* framework under Section 16.

Second, the case restructures the doctrine of invalid appointment clauses. Building upon *TRF Ltd v Energo Engineering*, *Perkins Eastman v HSCC*, and *Bharat Broadband v United Telecoms*, the Court confirms that unilateral appointment systems incompatible with neutrality cannot destroy the arbitration agreement itself. By severing such "negative covenants," the Court treats the arbitration clause as the substantive contract and the appointment method as ancillary. This strengthens separability beyond its traditional use in preserving clauses after contract termination (as seen in *Heyman v Darwins*),[33] and instead deploys it to neutralise structurally unfair procedural clauses.

Third, the ruling refines the *doctrine of waiver*. Indian arbitration previously struggled to distinguish between non-waivable jurisdictional defects and waivable procedural irregularities. While *Narayan Prasad Lohia v Nikunj Kumar Lohia* allowed waiver through conduct, later neutrality cases created confusion about whether participation could cure appointment defects. Hindustan clarifies that structural ineligibility under Section 12(5) remains non-waivable, but procedural objections fall within Section 4. This doctrinal separation prevents parties from

[32] *Duro Felguera, S.A. v. Gangavaram Port Ltd.*, (2017) 9 S.C.C. 729 (India).
[33] *Heyman v. Darwins Ltd.* [1942] AC 356 (HL).

weaponising neutrality challenges late in proceedings, while preserving safeguards against biased tribunals.

II. Impact on Constitutional Law

The Hindustan ruling marks a decisive step in the constitutionalisation of dispute-resolution mechanisms in state contracts. Indian constitutional jurisprudence has long recognised that when the State enters into contracts, it does not shed its public law character. Beginning with *Shrilekha Vidyarthi v State of UP*,[34] the Supreme Court established that contractual dealings of the State remain subject to Article 14, and cannot be arbitrary even when they appear in private law form. Later, *ABL International v Export Credit Guarantee Corporation*[35] confirmed that contractual disputes involving state entities can attract writ jurisdiction where arbitrariness or unfairness is demonstrated.

The Hindustan judgment extends this line of reasoning from contract performance to contractual dispute-resolution design itself. By treating unilateral appointment mechanisms or arbitration-defeating clauses as constitutionally suspect, the Court implicitly recognises that procedural fairness is part of equality jurisprudence. This development resonates with the broader doctrine that fair procedure is a facet of Article 14, as articulated in *Maneka Gandhi v Union of India*.[36] In effect, the Court suggests that a dispute resolution clause that structurally favours the State may amount to procedural arbitrariness even before any adjudication begins.

This has two long-term doctrinal consequences. First, it redefines arbitration clauses in government contracts as public law instruments rather than purely consensual private arrangements. Second, it integrates neutrality and equality of arms into constitutional scrutiny, meaning that future challenges to state arbitration clauses may increasingly be framed not as contractual invalidity but as violations of constitutional fairness. The judgment therefore embeds arbitration design within the constitutional obligation of the State to act reasonably, transparently, and non-arbitrarily.

III. Impact on Contract Law

From a contract law perspective, the ruling subtly but significantly recalibrates the relationship

[34] *Kumari Shrilekha Vidyarthi v. State of U.P.*, 1990 INSC 294 (India).
[35] *ABL Int'l Ltd. v. Exp. Credit Guarantee Corp. of India Ltd.*, (2004) 3 S.C.C. 553 (India).
[36] *Maneka Gandhi v. Union of India*, (1978) 1 S.C.C. 248 (India).

between party autonomy, severability, and commercial purpose.

Traditional Indian contract doctrine places strong weight on the literal enforcement of agreed terms, subject to limited doctrines such as coercion, undue influence, or public policy. However, cases such as *Central Inland Water Transport v Brojo Nath Ganguly*[37] demonstrated that where bargaining power is heavily unequal, courts may invalidate clauses that are unconscionable or oppressive. Hindustan extends this protective logic from substantive contractual obligations to procedural contractual design, especially where one party controls the dispute mechanism.

The Court's severance of arbitration-defeating clauses reflects a purposive interpretive approach rooted in commercial efficacy. Rather than asking what the parties literally drafted, the Court asks what the dispute-resolution clause was meant to achieve. This aligns with interpretive principles seen in *Nabha Power Ltd v Punjab State Power Corporation*,[38] where the Supreme Court emphasised that commercial contracts must be interpreted in a manner that preserves business purpose and avoids absurdity. Under this approach, a clause allowing one party to extinguish arbitration is treated as contrary to the contract's functional objective and therefore removable.

The doctrinal shift here is subtle but important, arbitration clauses are no longer interpreted as ordinary procedural terms but as structural contractual commitments to adjudicative neutrality. This elevates dispute-resolution provisions to a quasi-foundational status within contracts. The effect is to limit the ability of dominant parties, particularly public bodies, to rely on literal drafting to defeat adjudication.

IV. Impact on Administrative Law

Within administrative law, the ruling strengthens the principle that state contracting power must conform to standards of fairness, reasonableness, and non-self-serving design.

Indian administrative jurisprudence has consistently held that the State cannot exercise contractual powers arbitrarily. In *Tata Cellular v Union of India*,[39] the Supreme Court recognised that government contracts are subject to judicial review for arbitrariness,

[37] *Cent. Inland Water Transp. Corp. v. Brojo Nath Ganguly*, (1986) 3 S.C.C. 156 (India).
[38] *Nabha Power Ltd. v. Punjab State Power Corp. Ltd.*, (2018) 11 S.C.C. 508 (India).
[39] *Tata Cellular v. Union of India*, (1994) 6 S.C.C. 651 (India).

irrationality, and mala fides. Later cases such as *Reliance Energy Ltd v Maharashtra State Road Development Corporation*[40] emphasised that fairness in tender and contractual processes is part of Article 14 compliance.

Hindustan extends this reasoning to the structural architecture of dispute resolution clauses themselves. By rejecting provisions that allow the State to effectively control the adjudicatory forum or extinguish arbitration through its own inaction, the Court treats such clauses as exercises of administrative power rather than mere contractual stipulations. This is doctrinally significant because it implies that drafting an arbitration clause is itself an administrative decision subject to public law norms.

The ruling therefore deepens the doctrine of the State as a "*model litigant*".[41] This concept, previously invoked mainly in litigation conduct, now expands into contractual drafting. Government bodies must ensure that dispute-resolution clauses are neutral, workable, and non-manipulative. Failure to do so may not merely render the clause void but could expose the administrative action to constitutional scrutiny. The judgment thus transforms arbitration clause drafting into a matter of administrative legality, not contractual convenience.

V. Impact on Civil Procedure and Judicial Process

The decision also reinforces core principles of procedural law, particularly the doctrines of *functus officio*,[42] *finality of jurisdictional determinations*, [43]*and prevention of procedural abuse*.[44]

Indian procedural law has long recognised that once a court performs a statutory adjudicatory function, it cannot revisit the matter unless expressly authorised. This principle appears across contexts, including execution proceedings, review jurisdiction, and statutory tribunals. By holding that a court cannot review its own Section 11 appointment order, the Supreme Court extends this logic into arbitration referral jurisprudence.

This development also strengthens the doctrine that courts must avoid piecemeal adjudication

[40] *Reliance Energy Ltd. v. Maharashtra State Road Development Corp. Ltd.*, (2007) 8 S.C.C. 1 (India).
[41] *Urban Improvement Trust, Bikaner v. Mohan Lal*, (2010) 1 S.C.C. 512 (India).
[42] *State of Punjab v. Davinder Pal Singh Bhullar*, (2011) 14 S.C.C. 770 (India).
[43] *In Re: Interplay Between Arbitration Clauses in Stampid and Unstamped Instruments*, 2023 SCC OnLine SC 1666 (India).
[44] *K.K. Modi v. K.N. Modi*, (1998) 3 S.C.C. 573 (India).

of jurisdictional questions.[45] Instead of allowing repeated challenges at different stages, the ruling forces parties to raise objections promptly or defer them to post-award challenges under Section 34. This mirrors procedural principles in civil litigation that discourage interlocutory fragmentation and promote final resolution of disputes.

The broader procedural consequence is a reduction in satellite litigation around arbitration. By closing the door on review-based derailment of arbitral proceedings, the Court aligns arbitration practice with the civil procedural objective of efficiency and finality. This contributes not only to arbitration stability but to judicial economy more generally, reducing duplicative proceedings and preserving court resources.

Evaluation of Rights Protection

The impact of the Hindustan ruling on the protection of substantive rights is largely positive, particularly in the context of public contracts and long-term infrastructure disputes. One of the most important effects of the decision is the protection it affords to contractors and private parties dealing with state entities. In many government contracts, arbitration clauses were drafted in a way that appeared to offer dispute resolution but effectively allowed the State to frustrate arbitration through unilateral appointment mechanisms or conditional clauses. By rejecting such provisions and allowing courts to preserve arbitration despite procedural defects, the judgment prevents the use of what were effectively "trap clauses"[46] that created an illusion of neutral adjudication while retaining ultimate control in the hands of the State. This strengthens the enforceability of dispute resolution rights and reduces the structural imbalance that often characterises public procurement contracts.

The ruling also contributes to greater investor confidence, particularly in sectors dependent on state concessions or infrastructure projects. International investors and lenders often assess the reliability of dispute resolution mechanisms before committing capital. Earlier uncertainty about whether arbitration could be derailed by technical objections or defective appointment clauses created significant legal risk. By clarifying that arbitration will survive such defects and by preventing repeated judicial reconsideration of appointments, the Court enhances predictability and aligns Indian arbitration practice more closely with international expectations of stability and neutrality. This improves the credibility of Indian contracts in

[45] *Deep Indus. Ltd. v. ONGC*, 2019 INSC 1319 (India).
[46] *TRF Ltd. v. Energo Eng'g Projects Ltd.*, (2017) 8 S.C.C. 377 (India).

cross-border commercial contexts and supports the broader objective of making India an arbitration-friendly jurisdiction.

From the standpoint of procedural justice, the decision reinforces efficiency and finality in dispute resolution. By preventing Section 11 from becoming a "revolving door" through which parties repeatedly challenge tribunal constitution, the Court preserves the central purpose of arbitration, the timely and definitive resolution of disputes outside the ordinary court system.[47] This reduces incentives for tactical litigation and protects the time and resources invested in ongoing proceedings. In practical terms, it ensures that arbitration cannot be strategically stalled once it has begun, thereby strengthening the functional value of the process.

That said, the judgment does raise a principled concern regarding party autonomy. Critics may argue that by severing clauses that conditioned arbitration on a particular appointment method, the Court effectively compels arbitration even where one party had expressly limited its consent. From a purely contractual perspective, this could be seen as diluting the freedom of parties to structure their dispute resolution mechanisms as they wish. However, the Court's reasoning reflects a broader legal principle, autonomy in public contracts cannot extend to arrangements that undermine fairness or allow one party to control adjudication. In this sense, the decision does not reject autonomy but distinguishes between genuine contractual choice and clauses that operate as instruments of arbitrary power. Particularly where the State is involved, the Constitution requires that contractual mechanisms conform to standards of equality and reasonableness. The ruling therefore recalibrates autonomy rather than negating it, ensuring that the right to arbitrate remains meaningful rather than illusory.

Overall, the judgment strengthens rights protection by ensuring that arbitration clauses function as genuine mechanisms of dispute resolution rather than procedural tools of avoidance. It reinforces fairness, predictability, and procedural integrity, while carefully balancing contractual freedom against the need for neutral adjudication. In doing so, it enhances both the practical enforceability of contractual rights and the legitimacy of arbitration as a system of dispute resolution in India.

Comparison with Global Jurisdictions

The position emerging from the Hindustan Construction Company ruling places Indian

[47] *SBP & Co. v. Patel Eng'g Ltd.*, (2005) 8 S.C.C. 618 (India).

arbitration within the mainstream of global pro-arbitration jurisdictions, yet with a distinctive constitutional overlay that differentiates it from purely commercial arbitration regimes. While India shares core commitments with Singapore and the United Kingdom, particularly separability and limited judicial interference, the judgment introduces a stronger normative emphasis on neutrality and equality, especially where state entities are involved. The comparison therefore reveals not convergence alone, but a shift toward a hybrid model combining contractual autonomy with constitutional procedural safeguards.

Singapore- Model Law Orthodoxy and Functional Court Support

Singapore's arbitration regime operates squarely within the UNCITRAL Model Law framework,[48] incorporated through the International Arbitration Act. The doctrine of separability is not merely interpretive but jurisdictional, embedded in Article 16(1) of the Model Law, which provides that an arbitration clause "*shall be treated as an agreement independent of the other terms of the contract.*" Singapore courts have repeatedly emphasised that this rule exists to prevent parties from escaping arbitration through collateral attacks on the main contract. In *BCY v BCZ*,[49] the High Court treated the arbitration agreement as possessing a distinct governing law and juridical existence, thereby reinforcing the idea that separability is essential to jurisdictional stability.

The Indian position after Hindustan mirrors this in preserving the arbitration clause despite defects in the appointment mechanism, yet the justification differs in jurisprudential foundation. Singapore courts emphasise the protection of party intention and the commercial expectation that disputes will be resolved in the chosen forum. The Indian Supreme Court, by contrast, grounds preservation of arbitration not only in intent but in statutory policy, specifically the legislative objective of minimal judicial interference embodied in Section 5 of the Arbitration Act. By treating appointment defects as curable rather than destructive, the Court effectively reads separability as a rule that safeguards the statutory scheme of arbitration itself.

Singapore also retains a calibrated supervisory jurisdiction. Under Model Law Articles 6 and 16, courts may determine jurisdictional issues or appoint arbitrators where the mechanism fails,

[48] U.N. Comm'n on Int'l Trade Law, UNCITRAL Model Law on International Commercial Arbitration, U.N. Doc. A/40/17, Annex I (June 21, 1985), *amended by* U.N. Doc. A/61/17, Annex I (July 7, 2006).
[49] *BCY v. BCZ*, [2016] SGHC 249 (Sing.).

ensuring arbitration remains operational. This role is understood as *supportive intervention* rather than review. The Hindustan judgment aligns with this philosophy in refusing to allow procedural failure to defeat arbitration, but it goes further by holding that once the court has appointed an arbitrator under Section 11, it cannot revisit that decision. In this respect, India now adopts a stricter finality rule than Singapore, transforming the referral stage into a one-time jurisdictional threshold rather than an ongoing supervisory relationship.

United Kingdom's Contractual Separability and Deference to Party Design

English arbitration law rests on a different doctrinal foundation. Section 7 of the Arbitration Act 1996 codifies separability, stating that the arbitration agreement shall be treated as a distinct agreement from the underlying contract. The common law cases *Heyman v Darwins*[50] and *Harbour Assurance v Kansa*[51] established that the arbitration clause survives termination, frustration, or invalidity of the substantive contract unless the clause itself is directly impeached.

However, English jurisprudence treats separability primarily as a device to enforce contractual intent rather than to regulate procedural fairness. Courts ask whether the parties agreed to arbitrate, not whether the mechanism of arbitration is structurally balanced. Consequently, English law has historically tolerated asymmetrical appointment provisions or unilateral procedural rights so long as they were clearly agreed and do not produce actual bias contrary to natural justice. The legitimacy of the arbitral process is assessed ex post through standards of impartiality rather than *ex ante* through structural equality.

The Indian Supreme Court's reasoning in Hindustan departs from this contractual orthodoxy. By severing clauses that allow one party to disable arbitration entirely, the Court moves beyond enforcing party intent to preserving the adjudicative function itself. The reliance on severance principles, analogous to the "*blue pencil*"[52] doctrine recognised in Indian contract jurisprudence, demonstrates that Indian courts are willing to modify contractual dispute-resolution architecture where it undermines neutral adjudication. English courts, in contrast, are reluctant to restructure clauses unless illegality or impossibility is demonstrated, reflecting

[50] *Heyman v. Darwins Ltd.* [1942] AC 356 (HL).
[51] *Harbour Assurance Co. (UK) Ltd. v. Kansa Gen. Int'l Ins. Co. Ltd.* [1993] QB 701 (CA).
[52] *Shin Satellite Pub. Co. Ltd. v. Jain Studios Ltd.*, (2006) 2 S.C.C. 628.

a stronger commitment to *pacta sunt servanda.*

Thus, while both jurisdictions recognise separability, English law uses it to protect contractual autonomy, whereas Indian law increasingly uses it to protect the availability of adjudication as a legal institution.

Unilateral Appointment Clauses and Structural Neutrality

The divergence becomes sharper when examining unilateral appointment powers. In India, the jurisprudence beginning with *TRF Ltd*, continuing through *Perkins*, and reinforced in Hindustan establishes that a party with a direct interest in the dispute cannot control the constitution of the tribunal. This rule is grounded in the principle that adjudication must be independent not merely in outcome but in structure. Hindustan extends this reasoning by holding that even if such a clause exists, it cannot be used to extinguish arbitration altogether; the court must instead appoint a neutral tribunal to preserve the process.

English courts do not adopt such a categorical structural test. Their focus remains on whether the procedure results in actual unfairness. As long as the tribunal ultimately satisfies the test of impartiality, asymmetrical appointment rights may survive scrutiny. This reflects a procedural rather than structural conception of neutrality.

Singapore again occupies an intermediate position. Its courts prioritise neutrality but usually address defective appointment mechanisms by stepping in to appoint arbitrators rather than by invalidating the clause's design. The emphasis is pragmatic, arbitration must function, and courts intervene only to ensure functionality. Indian law now shares this pragmatic impulse but couples it with a stronger normative rule against structural imbalance, particularly where public entities are involved.

Evaluation of the Overall Change

The Hindustan Construction Company judgment represents a major consolidation of Indian arbitration law because it resolves a long-standing tension between *judicial control and arbitral autonomy*. For years, Indian courts struggled to decide how much supervision they should exercise over arbitration. Earlier cases like *SBP & Co v Patel Engineering* treated the appointment power under Section 11 as a full judicial function, which opened the door for repeated challenges and court involvement at multiple stages. Later decisions such as *Duro*

Felguera and *Mayavati Trading*[53] tried to restrict the court's role to a preliminary check of whether an arbitration agreement exists. Hindustan completes that shift by holding that once the court appoints an arbitrator, it cannot revisit the order. This gives real effect to Section 5 of the Arbitration Act, which says courts should intervene as little as possible.

In practical terms, this change matters most in large commercial disputes, especially infrastructure and EPC contracts. In many such disputes, parties would participate in arbitration for years and then challenge the appointment of the arbitrator when the award looked likely to go against them. Studies of Indian arbitration practice have often pointed to this pattern as one reason why arbitration in India was seen as slow and court-heavy. By closing this route of mid-stream disruption, the judgment improves procedural certainty and reduces incentives for tactical litigation. This directly supports the objective behind the 2015 amendments, which aimed to make India a more arbitration-friendly jurisdiction.

The judgment also deepens the principle of structural neutrality in arbitration, which the Supreme Court had begun developing in *TRF Ltd*. Those cases held that a party interested in the outcome of the dispute cannot control the appointment of the arbitrator. Hindustan goes further by holding that even if a contract contains such a clause, it cannot be used to eliminate arbitration altogether. Instead, the court must step in and appoint a neutral arbitrator. This reflects a broader legal principle, adjudication must not only be impartial in practice but also appear structurally fair. The idea echoes the natural justice maxim that no one should be a judge in their own cause. In effect, arbitration in India is now treated less as a purely private arrangement and more as a regulated dispute-resolution process that must meet minimum fairness standards.

This shift becomes even more important where the State is a contracting party. Indian constitutional law has long held that government contracts must satisfy Article 14 standards of fairness and non-arbitrariness, as seen in *Shrilekha Vidyarthi* and *ABL International*. Hindustan extends that logic to dispute resolution clauses themselves. If the State designs a mechanism that allows it to control or frustrate adjudication, the clause may be struck down or modified. This strengthens the doctrine that the State must act as a model litigant and cannot structure contracts to gain procedural advantage. In real-world terms, this is likely to influence how arbitration clauses are drafted in public works contracts, concession agreements, and public

[53] *Duro Felguera, S.A. v. Gangavaram Port Ltd.*, (2017) 9 S.C.C. 729.

procurement frameworks.

When compared internationally, India's position now falls between established models but also develops a distinctive approach. English arbitration law strongly emphasises party autonomy and generally enforces clauses as written unless there is clear unfairness or illegality. Singapore, following the UNCITRAL Model Law, focuses on keeping arbitration functional by allowing courts to assist where necessary but not to control the process. India now combines these approaches but adds an extra layer, fairness in arbitration clauses, especially in public contracts, is treated as a legal requirement rather than merely a matter of contractual choice. This gives Indian arbitration a more normative foundation than purely contractual systems.

Overall, the change is largely beneficial. It strengthens finality, reduces procedural gamesmanship, and increases confidence in arbitration as a reliable method of dispute resolution. This is particularly important for sectors that depend on long-term projects and public investment. At the same time, the judgment is not perfect. Making Section 11 orders completely final may, in rare cases, prevent early correction of genuine jurisdictional mistakes, which could then surface later in Section 34 challenges. There is also a transitional risk, contracts drafted under older unilateral appointment models may now be litigated to test their validity.

Even with these concerns, the decision represents a significant step forward. It aligns Indian arbitration more closely with global expectations of neutrality and efficiency while adapting those principles to India's constitutional framework and public contracting realities. In that sense, the judgment does not merely refine arbitration doctrine, it signals a maturation of India's dispute-resolution system toward greater stability, fairness, and credibility.

Suggestions for Future Refinement

While the Hindustan judgment significantly stabilises Indian arbitration, its long-term effectiveness will depend on whether the surrounding legal and institutional framework evolves to support it. One area where improvement would be valuable is the absence of statutory codification of the finality of Section 11 appointment orders. The Supreme Court has clarified that once an arbitrator is appointed, the court becomes functus officio, but because this rule is judge-made rather than expressly written into the statute, different High Courts may still attempt to reopen appointment issues in exceptional circumstances. A legislative amendment

explicitly stating that Section 11 orders are not subject to review except for clerical corrections would remove this ambiguity. Such codification would not be unusual; the UNCITRAL Model Law treats court involvement in appointment as a facilitative step rather than an ongoing supervisory role, and jurisdictions like Singapore similarly treat court appointments as final once made. Indian procedural law already recognises comparable finality in other contexts, such as limited referral determinations under Section 8, so extending this logic to Section 11 would simply align the statutory framework with existing practice.

Another area requiring reform concerns the persistent problem of defective appointment clauses in government contracts. The Hindustan case demonstrates that litigation over unilateral or unclear appointment mechanisms can consume years before the arbitration even begins. One practical solution would be to require institutional arbitration in government contracts above a certain financial threshold. Institutional rules automatically provide neutral appointment procedures, disclosure obligations, and administrative supervision, which reduces disputes about tribunal constitution. This approach is already widely used internationally; Singapore frequently relies on institutional arbitration in public projects, and major infrastructure contracts in the United Kingdom commonly designate recognised arbitral institutions. India has already taken steps in this direction through model arbitration clauses and the creation of the Arbitration Council of India. Making institutional arbitration mandatory for large public contracts would not be a theoretical reform but an extension of existing policy tools, and it would give concrete effect to the neutrality concerns highlighted in cases such as *Perkins Eastman* and Hindustan.

A further refinement could involve clearer statutory guidance on how courts should cure defective appointment mechanisms. At present, the Supreme Court has indicated that courts may step in to appoint neutral arbitrators when contractual mechanisms fail, but the Act does not expressly explain the scope of this curative power. Explicitly recognising such authority would bring Indian law closer to the approach of the UNCITRAL Model Law, which allows courts to appoint arbitrators where agreed procedures break down. It would also mirror the logic already present in Section 11 itself, which empowers courts to intervene when parties fail to constitute the tribunal. Clarifying that this intervention extends to structurally biased or inoperative clauses would reduce uncertainty in drafting and minimise litigation over whether arbitration survives procedural defects.

Finally, greater encouragement of institutional oversight and standardised drafting in public contracts could reduce many of the problems exposed by the Hindustan litigation. Government procurement frameworks already use standard tender conditions and model clauses in areas such as dispute boards and performance guarantees. Extending this standardisation to arbitration clauses, for example, by requiring neutral appointment mechanisms, fixed timelines, and institutional administration, would align dispute resolution design with the constitutional expectation that the State act fairly in contractual dealings. Such reforms would not introduce new principles but would operationalise the fairness standards already recognised in cases like *Shrilekha Vidyarthi* and *ABL International*.

Taken together, these improvements would not alter the doctrinal direction set by the Hindustan judgment but would strengthen its practical impact. By codifying finality, promoting institutional arbitration, clarifying curative powers, and standardising public-sector clauses, India could ensure that the gains in neutrality and efficiency produced by the judgment translate into a more predictable and credible arbitration system in practice.

Conclusion

The decision in Hindustan Construction Company marks a turning point in the evolution of Indian arbitration. It moves the law beyond the earlier phase in which arbitration, though formally encouraged, remained vulnerable to procedural disruption and judicial re-entry. By affirming the finality of Section 11 appointments, reinforcing the separability of the arbitration agreement, and clarifying the limits of waiver and neutrality challenges, the Supreme Court has strengthened arbitration as a stable adjudicatory mechanism rather than a fragile contractual option. The judgment thus realigns Indian practice with the legislative objective of minimal judicial intervention while also embedding fairness as a foundational requirement of the arbitral process.

Viewed comparatively, the ruling positions India within the mainstream of modern arbitration jurisdictions while developing a distinctive approach of its own. Like Singapore, it emphasises the functional preservation of arbitration; like English law, it respects party intention; yet it goes further by recognising that in certain contexts, especially public contracts, arbitration clauses must also satisfy standards of procedural fairness consistent with constitutional values. This hybrid model reflects a maturing arbitration system that seeks not only efficiency and autonomy but also legitimacy and neutrality.

The real significance of the judgment lies not only in the doctrines it clarifies but in the direction it sets for future reform. If supported by legislative clarification, wider use of institutional arbitration, and more careful drafting of public-sector contracts, the principles articulated in Hindustan have the potential to transform arbitration in India from a frequently contested procedural route into a predictable and credible dispute-resolution framework. In that sense, the case does not represent the end of reform but the consolidation of its foundations. It signals that arbitration in India is entering a phase in which finality, fairness, and efficiency are no longer competing values but mutually reinforcing pillars of the system.