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Working paper

How courts choose arbitrators

Evidence from the Bombay and Madras High Courts

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October 13, 2026

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Abstract

A court hearing a section 11 application decides whether an arbitrator should be appointed, and then who it should be. Indian arbitration law has developed considerable doctrine on the first question and very little on the second. The Act regulates several attributes of a person already under consideration and says nothing about how candidates are produced, whether alternatives are weighed, or what the court should record about the choice. This article examines the reported and retrievable section 11 orders of the Bombay and Madras High Courts from 2016 to 2024, a corpus of 372 orders naming 387 appointments among 201 individuals, with 36 semi-structured interviews. It reads orders as evidence of observable appointment practice, while distinguishing what the orders record from considerations (such as professional knowledge, informal inquiries, party suggestions) that may occur outside the published record. Retired judges took 63.3% of named appointments. The court named the individual in 84.7% of orders; 13.4% recorded both parties' agreement to the person appointed. Only 4.8% of orders recorded any reason for choosing the person appointed, and 1.6% a reason specific to that person; none compared candidates. Bombay directed a section 12 disclosure in 115 of 123 orders and Madras in four of 249. Of 387 named appointments, 186 went to someone the same court had already appointed.

Where courts continue to appoint, publishing periodic aggregate data on section 11 appointments would make a public function observable over time without constraining any individual choice.

[*]We are grateful to Dr. Renuka Sane for comments on earlier drafts. All errors remain our own.

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1 Introduction

A court hearing an application under section 11 of the Arbitration and Conciliation Act 1996 ("the Act") must answer two questions. Should an arbitrator be appointed? If so, who should it be? Indian arbitration law has paid far more attention to the first than to the second.

The Act regulates several attributes of the person appointed. Section 11(8) requires due regard to agreed qualifications, independence and impartiality; section 12 governs disclosure and ineligibility; and section 11(14) addresses fees. But these provisions largely assume that a candidate is already before the court. They say little about how candidates enter consideration, whether alternatives are weighed, or why one eligible person is preferred over another. That creates an observability problem. Judges may rely on professional knowledge, party suggestions, registry inputs or informal inquiries that never appear in the order. Section 11(8) does not require that reasoning to be recorded. The published order can therefore show who was appointed and which procedural steps were recorded, but it cannot necessarily reveal how the choice was made.

This article examines the reported and retrievable section 11 orders of the Bombay and Madras High Courts between 2016 and 2024. The corpus contains 372 orders, 387 named appointments and 201 unique appointees, coded for appointment route, professional background, recorded reasons, disclosure practice, fee treatment and the distribution of appointments within each court. It is supplemented by 36 semi-structured interviews with participants familiar with judicial and institutional appointment practice. The two courts were chosen because earlier attempts to learn about their appointment practice through the Right to Information Act yielded little (Part 3), because each had a section 11 docket that could be coded in full rather than sampled, and because their published practices differed in ways visible on the face of the orders.

The orders show a largely court-driven process. Retired judges received 63.3% of named appointments. Orders rarely recorded why the person appointed was chosen: 4.8% gave any reason, and none compared candidates. Disclosure practice differed sharply between the two courts, and repeat appointments were substantial. The study does not treat these patterns as evidence of neglect or favouritism. Rather, they show both what appointment orders can reveal and what they cannot: the record permits analysis of who is appointed and what procedures are recorded, but rarely permits verification of why a particular candidate was preferred.

The article makes two contributions. First, it treats arbitrator selection as a distinct and comparatively neglected part of section 11. Second, it provides an order-level account of selection in the Bombay and Madras High Courts. The analysis distinguishes requirements that ordinarily leave a documentary trace from the largely internal inquiry under section 11(8), and examines who is appointed, what orders record about reasons, disclosure and fees, and how appointments are distributed across the pool.

The study is limited to two High Courts and to reported and retrievable orders. Such orders may over-represent contested or more fully reasoned decisions. Where one judgment disposed of several petitions, each petition is counted as an order; the article reports judgment-level counts alongside order-level ones where the difference matters. The study also has no comparable dataset of institutional appointments and therefore cannot establish that institutional appointment is more transparent in practice. The evidence nevertheless points to two narrower policy considerations. Courts could publish periodic aggregate information on section 11 appointments, making the exercise of the function observable over time without constraining individual choices. Where parties choose an arbitral institution when contracting, candidate selection, conflicts and fee administration would sit with an organisation that performs these tasks repeatedly and retains information across cases.

The article proceeds as follows. Part 2 sets out the statutory framework, including the amendments that have not commenced. Part 3 reviews the existing literature, and Part 4 describes the data and methods. Part 5 reports the findings, Part 6 considers what they can and cannot support, and Part 7 concludes.

2 The statutory framework

The study focuses on the question who the arbitrator should be. The law on that question is thin, and what there is attaches to the attributes of a person already in view. This Part sets out what the Act requires of that person, what it says about the court that chooses them, and what it leaves to practice.

2.1 Provisions governing appointment

The court's role is residual. Section 11(2) leaves the parties free to agree how their tribunal is to be constituted. Failing agreement, section 11(3) gives a three-member tribunal in which each party appoints one arbitrator and the two appointees choose the presiding arbitrator. The court steps in when the agreed appointment process fails. Section 11(4)

applies where a party does not appoint within thirty days or the two party-appointed arbitrators cannot agree on the third; section 11(5) where the parties cannot agree on a sole arbitrator; and section 11(6) where an agreed procedure otherwise fails. Section 11(12) then divides the work, sending international commercial arbitrations to the Supreme Court and everything else to the relevant High Court.[1] A High Court's section 11 caseload is therefore domestic by operation of the statute.

Disclosure. Before it appoints anyone, the court must seek a written disclosure from the prospective arbitrator in the terms set by section 12(1).

The disclosure has two limbs.

The first covers relationships: any past or present connection with a party, with counsel or with the subject matter, direct or indirect, financial, business or professional, that is likely to raise justifiable doubts about independence or impartiality. The thirty-four categories in the Fifth Schedule guide that judgment.

The second limb covers capacity: anything likely to affect the arbitrator's ability to give the reference sufficient time, and in particular to complete it within twelve months. That period echoes the mandate in section 29A, which runs for twelve months from the completion of pleadings.

The Sixth Schedule prescribes the form of the disclosure, and section 12(2) makes the duty a continuing one.

Two features of this scheme matter for what follows.

The first is sequence. Section 11(8) places the disclosure before appointment. Assuming that naming the arbitrator constitutes the appointment, an order directing disclosure only afterwards reverses that statutory sequence. How often the orders follow that pattern is reported in § 5.4.

The second is that the two limbs are enforced differently. A relationship that raises justifiable doubts can be challenged under section 12(3). A heavy existing caseload cannot: the grounds there are confined to independence, impartiality and want of agreed qualifications. Once the appointment is made, the parties have no objection built on capacity, and the court's

[1] Arbitration and Conciliation Act 1996, ss 11(2)–(6), 11(12)(a). Section 11(9), which allows an arbitrator of a nationality other than those of the parties to be appointed in an international commercial arbitration, is exercised by the Supreme Court and so falls outside a High Court's section 11 docket.

remaining powers reach the problem only after delay has occurred, through section 14(1)(a) or a reduction of fees under section 29A(4). The capacity disclosure can prevent delay at one moment only, which is before the appointment, and that is where section 11(8) puts it.

Ineligibility. Section 12(5) operates notwithstanding any prior agreement. A person falling within any of the nineteen categories in the Seventh Schedule is ineligible, and the only escape is an express agreement in writing made after the disputes have arisen. Ineligibility of this kind is a legal incapacity, so it goes to the court under section 14(1)(a) rather than through the challenge procedure in section 13. The first nineteen entries of the Fifth Schedule reproduce the Seventh; the remaining fifteen require disclosure and disqualify no one.

Due regard and qualifications. Section 11(8) requires the court to have due regard to any qualifications the parties agreed and to considerations likely to secure an independent and impartial arbitrator. The provision prescribes no form for that exercise and requires nothing to be written down. Beyond qualifications the parties themselves agree, the Act currently prescribes none. How that came about is explained in § 2.2.

Candidate generation. Nothing in the Act governs the steps before a name reaches the court. It prescribes no method for producing candidates, requires no roster, obliges no court to consider a second name or to compare two, and calls for no record of appointment history. Sections 11(10) and 82 allow High Courts to frame schemes and rules for arbitration, and several have. Those instruments address the mechanics of the application and the administration of the reference, and they supply no basis for preferring one eligible person to another. Section 11(6B) confirms that designating a person or institution to perform the appointment function is not a delegation of judicial power, and section 11(13) asks the court to endeavour to dispose of the application within sixty days.[2]

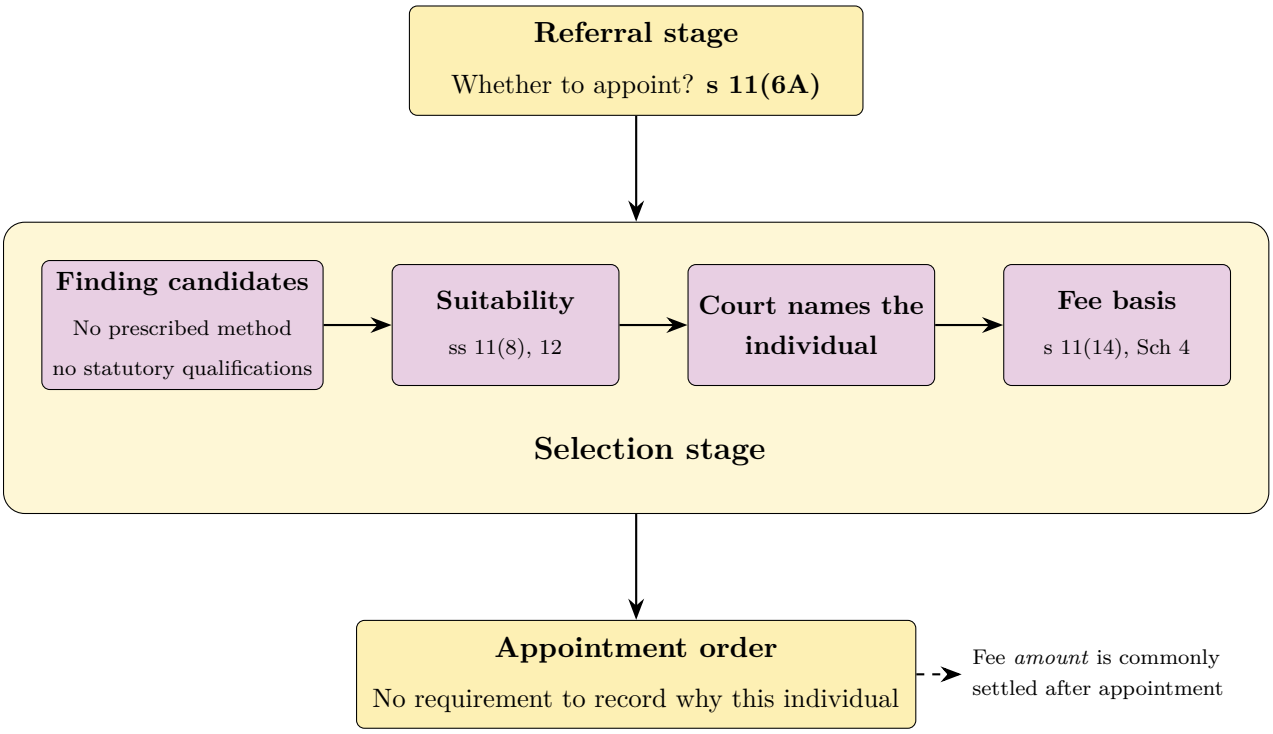
Fees. Remuneration is settled after the person has been chosen. Section 11(14) permits a High Court to frame rules for determining fees, having regard to the rates in the Fourth Schedule. The Schedule does not apply of its own force. In *ONGC v Afcons Gunanusa JV* the Supreme Court held that arbitrators cannot unilaterally fix their own fees, that fees should be settled at the outset between the parties and the tribunal, that the ceiling in the Fourth Schedule attaches to the whole of each arbitrator's fee rather than to the tribunal's aggregate, that the sum in dispute is taken separately for the claim and the counter-claim,

[2] Arbitration and Conciliation Act 1996, ss 11(6B), 11(10), 11(13), 82.

and that the Schedule does not govern international commercial arbitration. The Court also directed every High Court to frame rules under section 11(14), which is why court rules rather than the Schedule itself are the instrument most section 11 orders invoke (§ 5.5).[3]

Figure 1 summarises the sequence, and Table 1 sets out which of these obligations ordinarily leaves a mark on the face of an order.

Figure 1 The appointment sequence under section 11.



[3]Arbitration and Conciliation Act 1996, s 11(14), sch 4; *Oil and Natural Gas Corporation Ltd v Afcons Gunanusa JV* [2022] 10 SCR 660.

Table 1 Provisions relevant to a section 11 appointment

Provision	**What it requires**	**Does compliance ordinarily leave a trace in the order?**
Section 11(8)(a)–(b), section 12(1), Sixth Schedule	Written disclosure by the prospective arbitrator, covering independence, impartiality and availability	Yes. A direction, or its absence, is visible
Section 12(5), Seventh Schedule	Exclusion of persons within the statutory ineligibility categories, subject to express written waiver after disputes arise	Only where the issue is raised or addressed
Section 11(8)(a)–(b)	Due regard to agreed qualifications and other considerations likely to secure an independent and impartial arbitrator	No. No statement of reasons is prescribed
Section 11(14), Fourth Schedule	A basis for determining fees, through court rules, party agreement or institutional arrangements	Usually, though the basis may sit outside the order
Section 43J	Qualifications, experience and accreditation norms, to be specified by regulations	No. No regulations have been made
Sections 11(10) and 82	Power to frame schemes and rules for arbitration at the High Court level	Indirectly, where an order invokes them
No express provision	Candidate generation, comparison between candidates, and reasons for preferring one	No express requirement

The statute is therefore detailed about the person once that person is in view, and close to silent about how they got there.

2.2 The amendments that did not commence

Parliament has twice legislated on the questions this Part leaves open, and on both occasions the change has yet to take effect.

The Arbitration and Conciliation (Amendment) Act 2019 would have moved the appointment function out of the courts. Section 3 of that Act rewrote section 11: a new section 11(3A) em-

powered the Supreme Court and the High Courts to designate arbitral institutions, graded by the Arbitration Council of India, to perform the function courts exercise under section 11(6), and the same section omitted sections 11(6A) and 11(7).[4]

That amendment to section 11 has not been brought into force. The notification of 30 August 2019 commenced sections 1, 4 to 9, 11 to 13 and 15 of the Amendment Act; section 3 was not among them.[5] Sections 11(6A) and 11(7) therefore remain on the statute book, and the Supreme Court has confirmed that section 11(6A) continues in force because its omission has not been notified.[6]

The Council itself has a statutory existence and no members. Section 10 of the 2019 Act, which inserted Part IA and sections 43A to 43M, was brought into force on 12 October 2023. The Government told Parliament in February 2026 that the Council had still not been constituted.[7] No arbitral institution has therefore been graded, which would leave section 11(3A) without anything to designate even if it were notified.

The qualifications regime has followed the same path to the same place. The 2019 Act inserted section 43J, which tied the qualifications, experience and accreditation norms for arbitrators to a new Eighth Schedule. That Schedule drew wide criticism, in particular for appearing to shut out foreign-qualified practitioners, and the Arbitration and Conciliation (Amendment) Act 2021 omitted it and substituted a section 43J under which those matters are to be specified by regulations.[8] The regulations are the Council's to make. With no Council there are no regulations, and the Eighth Schedule was repealed before it ever operated.

Indian law at present prescribes no positive qualification or accreditation criteria for arbitrators at all. Eligibility is defined mainly in two ways: statutory disqualifications under section 12(5) and the Seventh Schedule, and contractual (qualifications agreed by the parties) under section 11(8)(a). The composition of the pool of appointees, examined in § 5.2, is therefore an outcome against which no statutory standard can be measured.

[4] Arbitration and Conciliation (Amendment) Act 2019 (Act 33 of 2019), s 3.

[5] Ministry of Law and Justice (Department of Legal Affairs), Notification SO 3154(E), Gazette of India, Extraordinary, pt II, sec 3(ii) (30 August 2019).

[6] *Motilal Oswal Financial Services Ltd v Santosh Cordeiro* 2026 INSC 5, [2026] 1 SCR 1, [14]–[17].

[7] Ministry of Law and Justice (Department of Legal Affairs), Notification SO 4486(E), Gazette of India, Extraordinary, pt II, sec 3(ii) (12 October 2023); Ministry of Law and Justice (Department of Legal Affairs), 'Arbitration Council of India' (Lok Sabha Unstarred Question No 1223, 6 February 2026) ⟨https://sansad.in/getFile/loksabhaquestions/annex/187/AU1223_4eBX84.pdf?source=pqals⟩ accessed 25 September 2026.

[8] Arbitration and Conciliation (Amendment) Act 2021 (Act 3 of 2021), ss 3–4.

A further round of reform has been proposed and not enacted. The expert committee chaired by Dr T.K. Viswanathan reported in February 2024, and a draft Arbitration and Conciliation (Amendment) Bill was published for consultation in October 2024. It has not been introduced in either House.[9] Courts continue to appoint under the pre-2019 text.

The provisions therefore differ in their observability. Disclosure directions and fee bases commonly leave a documentary trace; candidate generation, comparative selection and the considerations underlying section 11(8) usually do not. The empirical analysis below is confined accordingly to what the published record can establish.

3 Literature review

The only empirical study of judicial arbitrator appointment in India is Srinivasan's 2014 work, based on requests under the Right to Information Act 2005 to the Supreme Court and fifteen randomly selected High Courts. Ten High Courts replied, producing responses from eleven authorities; five did not.[10] Srinivasan asked whether courts maintained lists of persons eligible for appointment under section 11, how candidates were nominated, whether eligibility criteria existed and who prescribed them, and whether prospective arbitrators were consulted before appointment. At the time, the appointing authority was the Chief Justice or his designate, following *SBP & Co v Patel Engineering*.[11]

Srinivasan's central concern was the structure of the appointment process. He argued that judicial appointment had become heavily concentrated among retired judges, that other qualified professionals were largely excluded, and that the process lacked transparency. He did not argue that retired judges were unsuitable arbitrators; his criticism was directed at the process through which appointments were made.[12]

The responses showed little uniformity across courts. Kerala and Calcutta reported maintaining lists; the Supreme Court, Delhi, Gujarat and Madras said they did not, while the information officers of five courts did not know. Kerala's 2010 empanelment notification pre-

[9] *Report of the Expert Committee to Examine the Working of the Arbitration Law and Recommend Reforms in the Arbitration and Conciliation Act 1996* (2024); Ministry of Law and Justice (Department of Legal Affairs), Draft Arbitration and Conciliation (Amendment) Bill 2024 (18 October 2024) ⟨https://legalaffairs.gov.in/⟩ accessed 25 September 2026.

[10] Badrinath Srinivasan, 'Appointment of Arbitrators by the Designate under the Arbitration and Conciliation Act: A Critique' (2014) 49(18) Economic and Political Weekly 59, 59–60. The Orissa, Meghalaya, Rajasthan, Karnataka and Andhra Pradesh High Courts did not reply.

[11] *SBP & Co v Patel Engineering Ltd* (2005) 3 Arb LR 285 (SC); Srinivasan (n 10) 59.

[12] Srinivasan (n 10) 65.

scribed a minimum age of forty-five, fifteen years of professional experience and income-tax assessee status, while retired judges of that court appeared to be empanelled by default.[13] Calcutta prescribed no comparable criteria: retired High Court and Supreme Court judges were automatically eligible, a separate list covered retired district-cadre judges, and an unfinished list covered advocates willing to arbitrate. Courts that answered questions about nomination generally referred to schemes under section 11(10) or rules under section 82, but those instruments did not explain why one eligible person would be preferred over another. None of the six courts answering on the merits reported obtaining a prospective arbitrator's consent before appointment. Kerala alone reported appointing non-lawyers, including a chartered accountant and a company secretary.

Contemporary surveys revealed no settled professional preference. A 2011 survey found that 68% of respondents preferred subject-matter experts to retired judges. A 2013 survey found that 68% preferred retired judges, even as respondents reported a shortage of arbitrators familiar with their industries.[14]

The responses from Bombay and Madras are especially relevant to this study. Bombay declined the RTI request, relying among other things on the exemption in its rules for information relating to judicial functions and on the view that a query about the method of appointment was not "information" within the meaning of the Act. Madras replied that appointments were made by the Chief Justice, whose office had discretion to appoint arbitrators from among retired judges.[15] Neither response revealed how a particular candidate entered consideration or why that candidate was selected.

This points to a limitation of the RTI method rather than of Srinivasan's study. An administrative response can show whether a court reports maintaining a list or following a formal scheme. It cannot show whether that list was actually used, who was appointed in particular cases, how candidates entered consideration, or whether appointments accumulated among a small group over time. A court may maintain a list yet draw repeatedly from only part of it. Conversely, the absence of a reported list does not reveal what process operated instead.[16] These questions require evidence from appointment orders themselves.

The statutory framework also changed after Srinivasan's study. The 2015 amendment

[13] Srinivasan (n 10) 63, citing High Court of Kerala, Notification No D1-82665/08 (28 September 2010).

[14] Srinivasan (n 10) 61–62, citing Ernst & Young, *Changing Face of Arbitration in India* (2011); PricewaterhouseCoopers, *Corporate Attitudes and Practices towards Arbitration in India* (2013).

[15] Srinivasan (n 10) 62, 64.

[16] Srinivasan (n 10) 61 infers from the absence of a reported list that the appointing authority possessed unbounded discretion.

adopted some of the safeguards he had proposed. He had recommended that registries record arbitrators' qualifications, expertise and fees; that appointment pools extend beyond judges and advocates to technical experts and accountants; that courts consider the nature of the dispute and the expertise it required; and that prospective arbitrators give prior consent together with declarations of independence, impartiality and availability. The disclosure requirement was enacted. Section 11(8) now requires a written disclosure before appointment; the Sixth Schedule requires information on prior experience, ongoing arbitrations and circumstances affecting timely completion; and section 11(14), read with the Fourth Schedule, addresses fees.[17] No comparable requirement was introduced for recording qualifications and expertise across the appointment pool, or for explaining why one eligible candidate was preferred over another. Srinivasan's findings therefore remain relevant to the selection gap, but cannot establish how courts have handled statutory obligations introduced after his study.

The remaining literature addresses the design of the appointment framework more than the operation of selection itself. The expert committee chaired by Dr T.K. Viswanathan, the arbitral institutions that jointly urged delegation of the section 11 power in September 2023, and recent work on fee bargaining and structural oversight each propose reforms to particular features of the system.[18] *ONGC v Afcons Gunanusa JV*, the principal authority on fees, concerns how arbitral fees are fixed rather than what appointment orders record about their basis.[19] What remains largely unexamined is the selection function in operation: who courts appoint, what they record about the choice, and how appointments are distributed across the pool.

4 Data and methods

This article draws on a coded corpus of section 11 appointment orders and 36 semi-structured interviews. The orders establish what the courts recorded. The interviews supply context and perception, not proof of what occurred in any particular case.

[17] Arbitration and Conciliation Act 1996, ss 11(8), 11(14), schs 4 and 6.

[18] *Expert Committee Report* (n 9); Letter from Hemant Gupta, Arvind Datar and Madhukeshwar Desai to the Chief Justice of India concerning designation of arbitral institutions under s 11 of the Arbitration and Conciliation Act 1996 (12 September 2023); Prashant Narang and Vishnu Suresh, 'The Blind Spot in Indian Arbitration: Fees, Power, and Structural Oversights' (*The Leap Blog*, 27 February 2025) ⟨https://blog.theleapjournal.org/2025/02/the-blind-spot-in-indian-arbitration.html⟩ accessed 8 August 2026.

[19] *ONGC* (n 3).

4.1 Case selection

The corpus covers section 11 orders of the Bombay and Madras High Courts disposed of between 2016 and 2024. The period begins after the 2015 amendment introduced section 11(6A) and the current disclosure and fee provisions, so that every order in the corpus was made under the same statutory framework.

The two courts were selected for three reasons. First, each is a court for which the administrative route is known to have failed. As Part 3 records, Bombay declined Srinivasan's request for information about its appointment practice, and Madras answered it in a single sentence describing unstructured discretion to appoint from among retired judges. Whatever can now be learned about appointment in these two courts must be learned from the orders themselves. Second, each has a section 11 docket large enough to be informative but small enough to be coded in full, so the study proceeds by attempted census of the reported and retrievable orders rather than by sampling. Third, their published practices differ in ways visible on the face of the orders, most obviously in the treatment of section 12 disclosure, which allows the study to compare two practices rather than describe one. Delhi was excluded on the second ground: its docket over the same period would have required sampling, and a sample of unreasoned orders raises selection problems of its own.

4.2 The order corpus

Orders were collected from SCC Online and Manupatra, deduplicated, and screened for section 11 disposals within the study period. A disposal was included if it appointed an arbitrator, confirmed a candidate the parties had agreed upon, referred the matter to an institution, or refused the application. Interlocutory orders and duplicates were excluded. The resulting corpus was then frozen and all coding performed against that fixed set.

Different questions in Part 5 take different denominators. A question about what a court documented (whether it recorded a reason, directed a disclosure, or identified a fee basis) is a question about an order. A question about who was appointed, or about how appointments are distributed, is a question about a named individual, and a single order may name more than one. Table 2 sets out the units used and the questions each serves.

Table 2 Units of analysis used in the study.

Unit	Definition	Used for
Order	A disposed section 11 application	Reasons, disclosure, fees
Judgment	A single decided order file, which may dispose of several petitions	Robustness of order-level counts (Tables 4 and 6; § 5.6)
Appointment row	Each appointment-relevant disposition, incl. unresolved referrals	Reconciling counts
Named appointment	A specific individual named	Professional background, concentration numerator
Unique appointee	Distinct individual, counted once	Concentration denominator

Table 3 gives the counts on which every figure in Part 5 rests. Two features of it should be noted. Appointment rows exceed orders because a single disposal may contain more than one appointment-relevant disposition. Named appointments in turn fall short of appointment rows by two, both in Madras, because two orders terminated an existing tribunal's mandate and directed reconstitution without naming a replacement; each is an appointment-relevant disposition that names no one.

Table 3 Corpus denominators by court.

	BHC	MHC	Pooled
Orders	123	249	372
Judgments	105	203	308
Appointment rows	133	256	389
Named appointments	133	254	387
Unique appointees	78	123	201

Every figure in Part 5 states its denominator explicitly.

4.3 Coding

- *Appointment method*: direct appointment, party-agreed, referral, refusal.
- *Reasons*: no reason recorded; party agreement to the named individual; category-level reason; individual-level reason; comparative reason; or no replacement named.

- *Professional background*: seven categories, collapsible into four — retired judges (distinguishing former Supreme Court, High Court and District Court judges), advocates and senior advocates, technically qualified persons, and former bureaucrats or senior government officials. "Technically qualified persons" covers appointees whose stated qualification is in a field other than law, such as engineering or accountancy.
- *Section 12 directions*: coded for the presence of a direction and, for orders containing one, for its timing relative to the naming of the appointee: sought before naming, directed after naming, or fused with naming in a single clause.
- *Fee basis*: coded as multi-response binary indicators (Fourth Schedule / High Court rules / party agreement / arbitrator-to-determine / no basis stated).
- *Concentration*: appointments-per-appointee, top-1/5/10 shares, effective number of appointees.

4.4 Interviews

The order corpus was supplemented by 36 interviews across five categories (counsel, retired judges, public-sector officials, technically qualified arbitrators, institutional administrators), purposely recruited. Annexure A describes each interviewee by code and role.

Interviews explain and contextualise the order corpus; they are not proof of what occurred in any case and do not establish any individual's motive. Dissenting accounts (e.g., judges who reportedly do check availability) are reported alongside majority patterns, not discarded.

Reliability and robustness. A primary coder coded the full corpus; a second reviewed it, with disagreements resolved by discussion.

4.5 Limitations

The study has several limitations. First, it is limited to orders reported and retrievable through SCC Online and Manupatra. These databases may overrepresent contested or more fully reasoned orders and underrepresent short, unreasoned disposals. If so, then the reasoning-documentation gap is likely to be understated.

Second, the orders cannot reveal inquiries or considerations that occurred outside the published record. But an absence of recorded reasoning does not establish an absence of deliberation. Orders were screened for signals of party consent, stated reasons and procedural triggers, and a screen of that kind would not detect a reference to where a name came from. References to a panel of arbitrators (§ 5.1) were therefore identified by a separate text search

of all orders.

Third, the study does not contain a comparable documentary dataset of institutional appointments. Institutional practices are therefore reflected only through interview accounts and cannot be evaluated on the same empirical basis as judicial appointments.

Fourth, the study covers only the Bombay and Madras High Courts. Its findings should not be generalised to other High Courts without further evidence. Distributional patterns, including repeat appointments and concentration, are descriptive and do not establish motive, favouritism, or any other causal explanation.

5 Findings

The findings below report observable features of the orders and descriptive patterns in appointments, using the coding described in Part 4.

5.1 Appointment route

The published orders point to a court-driven process. In 50 of 372 orders (13.4%), the order records the parties' agreement to the named individual; in 35 of these the name came from the parties themselves, in four the court proposed a name to which both sides consented, and in eleven the order records consent without saying who put the name forward. These 50 orders come from 30 judgments, and one Madras judgment alone accounts for 16 of them. In 315 orders (84.7%) the court named someone itself, accounting for 332 of the corpus's 387 named appointments. In five more it confirmed one party's nominee without recording the other side's agreement, and two orders terminated an existing tribunal's mandate and directed reconstitution without naming a replacement.

Table 4 classifies each order by who put the named arbitrator forward, and gives the orders, judgments and named appointments for each route. Consent to arbitration itself, to a sole arbitrator, to a category of arbitrator such as "a former Judge of this Court", or to the court making the choice is not counted as party agreement, because it leaves the choice of individual to the court.

Table 4 Recorded appointment route, by count and share of orders.

Recorded appointment route	Orders	Share of orders	Judgments	Named appointments
Court-named; no party agreement recorded	315	84.7%	272	332
Party agreement to the named individual recorded	50	13.4%	30	50
Named individual put forward by the parties	35	9.4%	19	35
Proposed by the court; both parties consented	4	1.1%	4	4
Consent recorded; source of the name not stated	11	3.0%	7	11
One party's nominee confirmed; other party's agreement not recorded	5	1.3%	4	5
Reconstitution directed; no new individual named	2	0.5%	2	0
Total	**372**	**100.0%**	**308**	**387**

Note: A judgment is a single decided order file. One common judgment can dispose of several petitions, each counted here as a separate order. In orders constituting a multi-member tribunal, the route follows the member(s) the court itself selected; party-side nominees confirmed alongside a court-selected member are not counted separately. Shares may not sum to 100.0% because of rounding.

The table separates orders that record party agreement from those that do not, without ruling out informal consultation, acquiescence, or an unrecorded institutional process behind the scenes.

No order in the corpus recorded a completed list procedure, in which parties ranked several candidates, or a completed institutional referral, in which the court handed selection to an arbitral institution. Direct judicial naming was, in short, the practice, though the published order may not capture every step that preceded it.

In one Bombay order, from the Nagpur Bench, the court asked both counsel to suggest a name and, when they could not agree, appointed a former judge from "the panel of arbitrators maintained by this Court".[20]

5.2 Professional background of appointees

Retired judges received 245 (63.3%) of named appointments. Advocates and senior advocates got 131 (33.9%). Technically qualified persons (six appointments, 1.6%) and former

[20]Khatu Shyam Traders v Western Coalfield Ltd, Misc Civil Application (Arbn) No 90 of 2022 (Bom HC, Nagpur Bench, 7 January 2023) [20]–[21]

bureaucrats or senior officials (five, 1.3%) barely feature.

The two courts differ in degree, not in kind. Retired judges received 54.9% of Bombay's appointments and 67.7% of Madras's; advocates took 40.6% in Bombay against 30.3% in Madras. Non-legal appointees were rare everywhere. Table 5 gives the professional background of the 387 named appointments, by court.

Table 5 Professional background of named appointees, by court.

Professional background	**Bombay: n (%)**	**Madras: n (%)**	**Pooled: n (%)**
Retired judges	73 (54.9%)	172 (67.7%)	245 (63.3%)
Advocates and senior advocates	54 (40.6%)	77 (30.3%)	131 (33.9%)
Technically qualified persons	4 (3.0%)	2 (0.8%)	6 (1.6%)
Former bureaucrats or senior government officials	2 (1.5%)	3 (1.2%)	5 (1.3%)
Total named appointments	**133 (100.0%)**	**254 (100.0%)**	**387 (100.0%)**

Note: Background is coded from the status stated in the appointing order, not the appointee's current status. Shares may not sum to 100.0% because of rounding.

Within the retired-judges category, former High Court judges received 194 appointments, against 30 for former District Court judges and 21 for former Supreme Court judges.

The orders rarely say enough to show whether professional background reflects dispute-specific expertise, availability, party preference, a roster, familiarity, or something else entirely.

5.3 Recorded basis for the choice

Table 6 reports what, if anything, the order recorded as the basis for choosing the person appointed. The party-agreed category is kept separate from both the reasoned and the unreasoned orders, since it records agreement between the parties rather than the court's own evaluation. Of the 372 orders, 302 (81.2%) recorded no reason for the choice of individual. Fifty orders (13.4%) recorded that the parties had agreed to the named individual. Only 18 orders (4.8%) recorded any reason bearing on the choice: 12 named the type of person the court wanted, and six gave a ground tied to the person actually appointed. No order explained why the person appointed was preferred over another candidate. Two orders (0.5%) terminated an existing tribunal's mandate and directed reconstitution without naming a replacement, and are reported separately.

Table 6 Recorded basis for the choice of appointee, by court.

Recorded explanation	Bombay: n (%)	Madras: n (%)	Pooled: n (%)	Judgments
No reason recorded for the choice of individual	103 (83.7%)	199 (79.9%)	302 (81.2%)	258
of which: replacement of an earlier arbitrator recorded	*6 (4.9%)*	*31 (12.4%)*	*37 (9.9%)*	*31*
of which: common arbitrator for linked matters stated	*0 (0%)*	*13 (5.2%)*	*13 (3.5%)*	*5*
Party agreement to the named individual recorded	15 (12.2%)	35 (14.1%)	50 (13.4%)	30
Reasons recorded for the appointee	5 (4.1%)	13 (5.2%)	18 (4.8%)	18
Category-level (type of person stated)	5 (4.1%)	7 (2.8%)	12 (3.2%)	12
Individual-level (ground tied to this person)	0 (0%)	6 (2.4%)	6 (1.6%)	6
Comparative (preferred over other candidates)	0 (0%)	0 (0%)	0 (0%)	0
No replacement named	0 (0%)	2 (0.8%)	2 (0.5%)	2
Total	**123 (100.0%)**	**249 (100.0%)**	**372 (100.0%)**	**308**

Note: "Party agreement" follows Table 4 and is not assessed as reasoned or unreasoned. "No reason recorded" includes the five orders confirming one party's nominee. An order that explains only why an appointment was needed (an earlier arbitrator recused, withdrew, died or had the mandate terminated, or an award was set aside) is counted as giving no reason for the choice of individual; so is an order that explains only why one arbitrator is appointed across linked petitions or contracts. Where an order records more than one basis, the highest level is counted. Italicised rows are subsets of the row above them. Judgments counts decided order files (see Table 4). Shares may not sum to 100.0% because of rounding.

Three kinds of statement recur in the orders but are not counted as reasons for the choice, because none of them bears on who was chosen:

- *Procedural trigger*: "the Arbitrator appointed recused himself"; the mandate of the prior arbitrator "stands terminated". This explains why an appointment was needed, not why this person was appointed. Such a trigger is recorded in 37 of the 302 unreasoned orders.
- *Eligibility recital*: "no objection is raised to the eligibility, competence or impartiality of Mr. [X]". This records the absence of a disqualification, not a reason to prefer this candidate over any other unobjectionable one.
- *Batch convenience*: "it may be both efficient and cost effective to have a common arbitrator" across four similar contracts; the "same sole Arbitrator is appointed in all 9 matters taking into account operational convenience and also to avoid possible anomalies / conflict in awards". This explains why one arbitrator was used across

linked petitions, not why that arbitrator was chosen. Such a statement appears in 13 of the unreasoned orders.

Within the 18 orders that do give a reason, the reasoning is thin. Most of it describes a category, not a person:

- *Category recital*: "I am inclined to appoint an Arbitrator who would be a retired Judge of this Court"; "it would be appropriate to appoint a legal expert". This names a class of eligible person, not a basis for preferring the individual appointed.
- *Category suitability*: a retired judge appointed in place of railway employees, to "bring to bear the gravitas" the dispute required; a technically qualified member appointed because the disputes were "necessarily involving technical matters". This attributes a quality to a whole category of appointee, without saying why this individual supplies it better than another member of the same category.
- *Individual-level grounds (six orders)*: the contract's requirement of "a qualified advocate with at least 20 years experience"; the need for "a sole Arbitrator based in Puducherry"; and, in the remaining cases, continuity, as where the same arbitrator was appointed because the parties in a connected matter "would typically qualify as group companies".[21]

Across nearly all of these orders, the stated basis is compatible with any number of eligible candidates and does not distinguish the person named from anyone else who could satisfy the same description. Even the individual-level grounds are thin. A qualification threshold or a location narrows the field without selecting from it. Keeping the same arbitrator across related cases may be cheaper or keep rulings consistent, but that justifies convenience; it says nothing about why that person, rather than anyone else, was right for the dispute in the first place. The 4.8% figure is therefore a generous upper bound on orders recording a reason bearing on the choice. On the stricter measure, only six orders (1.6%) recorded a ground tied to the individual appointed, and none compared candidates.

5.4 Section 12 disclosure

Table 7 sets out the disclosure directions recorded in the orders and, for those containing a direction, its timing relative to the naming of the appointee. Bombay directed disclosure in

[21] Two of the six are borderline. In one, a Madurai advocate was named on a Madurai-based request, but the order never states the link. In the other, the order notes that the same arbitrator had been appointed in a related matter without saying that this was why. Coding both as unreasoned would reduce the individual-level count to four (1.1%).

115 of 123 orders (93.5%). Madras did so in four of 249 (1.6%). In Bombay, only four orders sought disclosure before naming the appointee. In 107, disclosure came after naming. Four more fused naming and disclosure into a single clause, leaving the sequence unclear. All four Madras directions followed naming as well.

Table 7 Section 12 disclosure directions recorded in the orders, by court.

Recorded disclosure treatment	**Bombay: n (%)**	**Madras: n (%)**	**Pooled: n (%)**
Disclosure direction recorded	115 (93.5%)	4 (1.6%)	119 (32.0%)
Sought before naming	4 (3.3%)	0 (0.0%)	4 (1.1%)
Directed after naming	107 (87.0%)	4 (1.6%)	111 (29.8%)
Naming and disclosure fused	4 (3.3%)	0 (0.0%)	4 (1.1%)
No disclosure direction recorded	8 (6.5%)	245 (98.4%)	253 (68.0%)
Total orders	**123 (100.0%)**	**249 (100.0%)**	**372 (100.0%)**

Note: Percentages are of all orders in the column. Indented rows are subsets of "Disclosure direction recorded". The pooled figure is a weighted blend of two very different court practices and should not be read as a typical rate.

The coding does not establish whether naming the arbitrator constituted the completed appointment or only a nomination conditional on a satisfactory disclosure. Many Bombay orders describe the person named as the "prospective" or "proposed" arbitrator and require the disclosure to be filed before the reference is entered upon, which is consistent with the second reading. Nor does the absence of a disclosure direction in the order establish that no disclosure was obtained elsewhere.

5.5 Fee basis

High Court rules were the most common basis, appearing in 190 orders (51.1%). In 85 orders (22.8%) the order left the fee to the arbitrator; in 76 of these it named no other basis. The Fourth Schedule featured in 44 orders (11.8%), and a specific party agreement in 12 (3.2%). No order recorded the court fixing a fee itself. Fifty-nine orders (15.9%) gave no fee basis at all. Table 8 reports the fee bases the orders invoked. The indicators are multi-response, so the columns sum to more than 100%.

Table 8 Fee-setting basis recorded in the orders, by court.

Fee basis recorded	Bombay: n (%)	Madras: n (%)	Pooled: n (%)
High Court rules	68 (55.3%)	122 (49.0%)	190 (51.1%)
Fourth Schedule	11 (8.9%)	33 (13.3%)	44 (11.8%)
Party agreement	1 (0.8%)	11 (4.4%)	12 (3.2%)
Arbitrator to determine fee	8 (6.5%)	77 (30.9%)	85 (22.8%)
Court fixes fee	0 (0.0%)	0 (0.0%)	0 (0.0%)
No basis recorded	41 (33.3%)	18 (7.2%)	59 (15.9%)
Orders	**123**	**249**	**372**

Note: Percentages are of orders in the column. Because an order could cite more than one fee basis, the bases were coded as separate binary indicators rather than mutually exclusive categories, producing 390 fee-basis entries across 372 orders; 18 orders cite more than one basis. Percentages may therefore sum to more than 100%.

Bombay left more orders silent on fees altogether (33.3%) than Madras (7.2%). Madras, meanwhile, was far more willing to leave the fee to the arbitrator: 77 orders (30.9%) against Bombay's eight (6.5%).

An order's silence on fees does not mean the arbitration proceeded without one. A High Court rule, party agreement, or later arrangement may simply have gone unrecited.

5.6 Distribution of appointments

Bombay's 133 named appointments were distributed among 78 unique appointees, and Madras's 254 named appointments among 123. No individual appears in both courts' lists. In Bombay, 55 appointments were "repeat-excess" (appointments beyond each appointee's first appearance in the corpus), of which 29 (52.7%) arose from the same judge appointing the same person more than once, and 26 (47.3%) from the same appointee receiving appointments from different judges. In Madras, 131 appointments were repeat-excess, of which 97 (74.0%) were same-judge repeats and 34 (26.0%) cross-judge repeats. Table 9 reports how appointments were distributed within each court's pool. No pooled column is given, for the reason set out in the note below the table.

Table 9 Appointment concentration and repeat appointments, by court.

Measure	Bombay	Madras
Named appointments	133	254
Unique appointees	78	123
Repeat-excess appointments	55	131
Same-judge repeat-excess	29	97
Cross-judge repeat-excess	26	34
Same-judge share of repeat-excess	52.7%	74.0%
Top-one appointment share	5.3%	7.9%
Top-five appointment share	19.5%	23.6%
Top-ten appointment share	31.6%	34.3%
Counting each appointee once per judgment		
Appointments	113	208
Repeat-excess appointments	35	85
Same-judge repeat-excess	9	51
Cross-judge repeat-excess	26	34
Same-judge share of repeat-excess	25.7%	60.0%

Note: The lower panel counts an appointee once for each judgment in which they were named, so a common judgment appointing the same person across several petitions contributes one appointment rather than several. No pooled column is reported. Merging the two courts' appointment lists adds the second court's full docket to the denominator without adding a matching share of that court's own busiest appointees to the merged group, because the individuals who dominate each court's own ranking are, since no one appears in both lists, always different people. The pooled number would be misleading if read as evidence that judicial appointment, considered as a whole, is less concentrated than either court's individual practice.

In Madras, the busiest appointee received 20 of the court's 254 named appointments (7.9%); the five most frequently appointed Madras appointees together received 23.6%, and the ten most frequently appointed 34.3%. In Bombay, the busiest appointee received 7 of the court's 133 named appointments (5.3%); the five most frequently appointed received 19.5%, and the ten most frequently appointed 31.6%.

Common judgments affect the repeat figures in both courts. Where one judgment disposed of several petitions and named the same person in each, every petition after the first counts as a same-judge repeat; one Madras judgment alone contributes 15. Counting each appointee once per judgment leaves cross-judge repeats unchanged but reduces same-judge repeats from 29 to 9 in Bombay and from 97 to 51 in Madras. Same-judge repetition therefore remains the larger share of repeat appointment in Madras (60.0%) on either measure, while in Bombay it falls to about a quarter.

No provision requires equal distribution or caps repeat appointments. But because the or-

ders rarely record candidate-specific information, they cannot say whether repetition reflects expertise, availability, preference, roster design, or something else.

6 Discussion

This Part considers what the observed patterns can support, focusing on differences between the two courts, concentration in appointments, fee treatment, and the implications for institutional appointment.

6.1 Reading the two-court contrast

The two courts produced very different public records. Bombay directed a section 12 disclosure in 115 of 123 orders; Madras in four of 249. Bombay left the fee basis unstated in a third of its orders; Madras left the fee to the arbitrator in almost a third. Bombay appointed advocates in 40.6% of named appointments against Madras's 30.3%.

What these differences reveal about practice is harder to say. Bombay's disclosure direction may reflect a substantive practice in which appointment remains conditional until disclosure is received, or a standard drafting convention. The sequencing supports the second possibility: only four Bombay orders sought disclosure before naming, while 107 directed it afterwards. One participant criticised precisely this sequence, describing the court as naming the arbitrator, disposing of the application, and leaving the disclosure to reach only the parties; the same participant recalled a court told at the hearing that a proposed appointee already had 56 ongoing arbitrations, and confirming the appointment regardless (AIR4_6).[22]

Practice outside the record is no more uniform. One arbitrator received nine court appointments in two months with no prior contact from judge or registry (AIR2_6a); another said judges usually telephone first, which makes refusal awkward (PEL11_10).

Two conclusions follow. Section 11 appointment does not produce a uniform public record, so inferences from one court's orders do not carry to the other. Bombay's 93.5% may reflect actual scrutiny, a standard drafting practice, or both. The published orders cannot tell us which.

One participant familiar with Bombay practice said section 11 assignments change every three to six months, so that while the sitting judge may know an arbitrator's workload, a

[22]Interviews are cited in the text by the interviewee's code followed by a passage reference, so that AIR4_6 refers to a passage from the interview with AIR-4. Annexure A describes each interviewee.

successor generally will not know what a predecessor did (CM2_15). The same participant said the Bombay High Court has a panel of arbitrators, and one Bombay order records appointment from a panel "maintained by this Court" (§ 5.1). Neither indicates that the panel carries information about appointees' existing workload.

6.2 Concentration and the market it produces

Retired judges received 63.3% of named appointments, former High Court judges taking 194 of that group's 245. Advocates received 33.9%. Technically qualified persons received six appointments across both courts over nine years, and former bureaucrats five. Repetition was substantial: 186 of 387 named appointments came after an appointee's first appearance, and in Madras 74.0% of these arose from the same judge appointing the same person more than once. The busiest Madras appointee received 20 of that court's 254 named appointments.

The Act sets no ceiling on repeat appointment and requires no equal distribution. The distribution is descriptive; what produced it is the harder question, and the interviews suggest several answers operating together.

The first is status and risk aversion. Participants described a preference for retired judges as reducing perceived challenge risk and insulating the appointing party from later criticism (AIR1_2; ODR1_4b), with a government officer gaining a ready answer if the outcome is questioned (AIR2_2b). Several described an informal hierarchy tracking claim value, the largest disputes going to retired Supreme Court judges and smaller matters to advocates or district judges (AIR2_24; GEL5_5b; ODR1_5). A former High Court judge doubted this tracks competence, describing an "aura" around retired Supreme Court judges that may itself shape demand (RJA1_3).

The second is professional reputation. Judges often know which former judges handled commercial work and how they were regarded on the bench (PEL8_10; PEL7_4b), and years of deciding disputes may itself make an arbitrator more efficient (CM2_7a). Repetition can therefore carry accumulated information about competence.

The difficulty is that professional knowledge and professional familiarity look alike from outside. Some participants described appointments flowing through relationships between serving and retired judges, including reciprocal expectations among them (AIR4_9c; AIR2_2c). These accounts cannot establish that any appointment in the corpus arose that way. They show why one observed pattern supports very different explanations.

Supply may reinforce the pattern rather than merely explain it. Few senior advocates arbitrate full-time and few mid-career practitioners build arbitration as a primary practice (PEL12_2b; PEL11_4a). Entry is circular: institutions decline empanelment for want of prior arbitral experience, which only appointment supplies (PEL12_2b). High-value work compounds this, since a party facing a former Chief Justice will match rather than risk a mismatch (PEL11_6). Technical professionals are appointed mainly when counsel press for it (TA1_10), and judges may hesitate over someone wholly unknown to them, making familiarity a proxy for reliability (GEL4_9b). A thin alternative pool explains the return to familiar names; repeated reliance on those names helps keep the pool thin.

That is the institutional problem. Appointment confers valuable, reputation-building work, yet the public record contains little candidate-specific information and no published appointment history. The record cannot show whether repetition reflects competence, thin supply, familiarity or relational advantage. The ambiguity attaches to the system, not to any appointee.

6.3 A recorded fee basis is not a price

Fees are among the more visible parts of the appointment record. High Court rules appeared in 51.1% of orders, the Fourth Schedule in 11.8%, and a party agreement in 3.2%. In 22.8% the order left the fee to the arbitrator, and 15.9% recorded no basis at all. No order recorded the court fixing a fee itself.

These figures show which framework the order invoked, not what was eventually paid. The two courts left the price open in different ways: Bombay recorded no basis in 33.3% of orders against Madras's 7.2%, while Madras expressly left the fee to the arbitrator in 30.9% against Bombay's 6.5%. Either way the price is settled after appointment, between an arbitrator the court has selected and parties who did not select them. Participants described that negotiation as uneven — counsel rarely question a proposed fee for fear of antagonising the tribunal that will decide the case (PEL10_1a), and once the court has appointed, a party has little influence over what is proposed (CM1_6a).

How far the Fourth Schedule constrains this was disputed. One counsel said most court appointments now follow Schedule rates, with excessive fees costing an arbitrator future work (PEL7_10). Others said the Schedule is rarely followed in high-value matters, where arbitrators propose their own structure (PEL12_2a), and that it is close to obsolete for senior arbitrators who decline institutional work at those rates (RJA2_3). Participants described

sitting fees of ₹5 lakh, and a three-member tribunal charging ₹7 lakh each for a two-hour sitting (PEL10_5; PEL11_3b). These establish that departures occur, not how often.

Because the Schedule ties fees to the amount in dispute, it produces modest figures in modest matters. Participants described retired High Court judges declining low-value appointments on that basis, leaving them to advocates and retired district judges (GEL1_5; GEL1_7), and retired judges with fewer matters being readier to accept Schedule rates (AIR2_6b). The claim-value hierarchy in § 6.2 is therefore not only a matter of prestige; it is partly a fee gradient, and the statute supplies it. The constraint binds at the modest end of the market and is displaced at the high-value end — that is, least where the pool is most concentrated.

Fees may also bear on entry and on conduct after appointment. One counsel contrasted a mid-career practitioner charging ₹2 lakh, with a career's reputation at stake, against a far higher-charging retiree (PEL11_4); another described a tribunal requiring a jointly sought adjournment to be made at a paid hearing (PEL11_3c). These are participants' assessments, and the orders can test neither, recording neither sittings nor amounts charged.

6.4 Institutions and the information problem

No order in the corpus recorded a completed referral in which an institution itself selected the arbitrator. Participants nonetheless described partial forms: a court naming the arbitrator and then placing the arbitration under institutional rules (AIR2_5), fuller referrals in other High Courts with direct selection retained for larger matters (AIR4_9b), and, in Bombay, no ordinary practice of referral at all (CM2_5a).

The evidence does not support a claim that institutions appoint better. Several participants described institutions reproducing the patterns examined here — bodies headed by former judicial officers appointing former colleagues (GLO2_1b), appointing committees themselves staffed by judicial officers on deputation (AIR2_4), and panels reluctant to appoint non-lawyers (TA2_3; TA1_7). Others described administrative failures, including long delays in notifying arbitrators and weak post-award management (RJA2_2e; GEL5_7).

An institution can hold information across cases. How many matters an arbitrator already has, how often the same person has been appointed, whether a conflict has appeared before, what was charged last time — each requires records that outlive the individual case. A section 11 application is a discrete disposal before a judge whose roster rotates; an institution administers a continuing caseload. Participants described that capability in operation: a list procedure drawing on a long case history (AIR1_5), selection by subject matter and,

internationally, nationality (AIR1_4b), an internal restriction on repeat appointment with diversity monitoring and case-manager feedback (AIR4_9a), oversight of timelines backed by removal from panels (PEL1_5; PEL10_1b), and published appointment figures showing retired judges in a small share of cases (AIR2_10b).

These are accounts of organisational capability, not evidence of performance; the study has no institutional dataset to set against the court corpus, and institutional participants have an interest in the recommendation, as one acknowledged (AIR2_21). Such procedures can also be avoided: one institution reserved appointment of the presiding arbitrator to itself after observing arbitrators appointing one another, and referrals were believed to fall afterwards (AIR2_11).

The argument is therefore an argument from design rather than virtue, and it shapes the recommendation. The strongest case is for parties to choose the institution, appointment method and fee framework when contracting (CM1_6b), rather than for courts to delegate to institutions they sponsor. Where courts continue to appoint, the same problem points to a simpler step: not reproducing an institution inside the registry, but publishing periodic aggregate data on who was appointed, how often, and by which route.

7 Conclusion

The court itself chose the arbitrator in 84.7% of orders, and the parties' agreement to the person appointed was recorded in 13.4%. Retired judges received nearly two-thirds of named appointments. Only 4.8% of orders recorded any reason for choosing the person appointed, and none compared that person with another candidate. Disclosure practice diverged sharply between the two courts: Bombay directed a section 12 disclosure in 93.5% of its orders, almost always after naming the arbitrator, and Madras in 1.6%. Of 387 named appointments, 186 went to someone the same court had already appointed; in Madras, most of these came from the same judge, however the repeats are counted. The result is a public record in which legitimate repetition cannot readily be distinguished from relationship-based allocation, because the information needed to test those competing explanations is not available. That limit falls on appointees too: an arbitrator appointed twenty times on merit has no published record capable of showing it.

Participants' accounts suggest two features that may sustain the pattern. Appointment is how an arbitrator becomes visible, and visibility is what makes appointment likely, so the shortage of alternatives offered to explain retired-judge predominance may be partly

produced by it. And the Fourth Schedule, tying fees to quantum, binds at the modest end of the market and is displaced at the high-value end — least constraining where the pool is most concentrated.

None of this justifies converting section 11 into an elaborate selection regime. But identifying candidates, checking conflicts, confirming availability and settling fees all require information that persists across cases, and a section 11 application is a discrete disposal before a judge whose roster, in Bombay at least, changes every few months. That is an argument from institutional design, not institutional virtue, and it favours institutional appointment chosen by the parties when they contract over delegation to institutions the courts themselves sponsor. Where courts continue to appoint, High Courts could publish periodic figures on appointment numbers, professional background, unique appointees, repeat appointments and concentration, all of which can be compiled from the orders themselves. That would constrain no individual appointment. It would make a public function observable, and let the competing explanations in this article be tested rather than asserted.

Annexure A

Table 10 describes the 36 interviewees by code and role. In the text, each interview is cited by the interviewee's code followed by a passage reference: AIR4_6, for example, refers to a passage from the interview with AIR-4.

Table 10 Description of the interviewees.

Code	Role
AIR-1	Registrar/Secretary of an arbitral institution.
AIR-2	Registrar of an arbitral institution. Experienced as an ad hoc arbitrator and lawyer.
AIR-3	Member, SAROD — private contractor who has engaged with NHAI for 20 plus years.
AIR-4	Member, DIAC — senior lawyer and ad hoc arbitrator based in Delhi with experience over 10 years.
CM-1	Report Committee Member; also senior bureaucrat.
CM-2	Member of Committee that has prepared report on arbitration; lawyer with less than 10 years of experience.
GEL-1	External counsel for government entities, with over 5 years of experience. Works in NCR region and Uttar Pradesh.
GEL-2	External counsel for government entities, with over 5 years of experience. Works in NCR region.
GEL-3	External counsel for government entities, with over 10 years of experience. Works in NCR region.
GEL-4	Counsel for government entities with experience of more than 10 years before various arbitral tribunals in ad hoc and institutional arbitrations, with a special focus and expertise in disputes arising out of infrastructure contracts. Also appointed as arbitrator by institutions and HC. Works in NCR region.
GEL-5	External counsel for government entities, with over 10 years of experience. Works in NCR region.
GLO-1	Law officer of a PSU with over 10 years of experience.
GLO-2	Law officer of a PSU with over 10 years of experience.
IHC-1	Senior in-house counsel of a private company. Works in NCR region.
IHC-2	Director General of NHBF, former Chief General Manager at NHAI.
ODR-1	Representative of an ODR platform.
PEL-1	Counsel for private parties against government entities, with over 10 years of experience and experience dealing with international arbitration institutions. Works in NCR region.
PEL-2	Counsel for private parties against government entities, with over 5 years of experience. Also an IICA-certified mediator. Works in NCR region.
PEL-3	Counsel for private parties against government entities, with less than 5 years of experience. Works in NCR region.
PEL-4	Counsel for private parties against government entities, with over 10 years of experience and experience dealing with international arbitration institutions. Works in NCR region.

Continued on next page

Table 10 continued from previous page

Code	Role
PEL-5	Counsel for private parties against government entities and occasional representation of PSUs, with over 10 years of experience and experience dealing with international arbitration institutions and domestic ad hoc arbitrations. Works in NCR region.
PEL-6	Counsel for private parties against government entities, with over 10 years of experience and experience dealing with domestic ad hoc arbitrations and a few institutional arbitrations. Has experience in the post-award court proceedings. Works in NCR.
PEL-7	Counsel for private parties against government entities, with over 10 years of experience and experience dealing with domestic ad hoc arbitrations and a few institutional arbitrations. Has experience in the post-award court proceedings. Works in NCR.
PEL-8	Counsel for private parties against government entities, with over 10 years of experience and experience dealing with domestic ad hoc arbitrations and a few institutional arbitrations. Has experience in the post-award court proceedings. Works in Bangalore.
PEL-9	AoR at SC, with experience of handling ad hoc arbitrations.
PEL-10	Counsel for private parties against government entities, with over 10 years of experience and experience dealing with domestic ad hoc arbitrations and a few institutional arbitrations. Has experience in the post-award court proceedings. Works in Mumbai.
PEL-11	Counsel for private parties with over 10 years of experience and experience dealing with international arbitration institutions. Works in NCR region. Also has been an ad hoc arbitrator.
PEL-12	Counsel for private parties with over 10 years of experience and experience dealing with international arbitration institutions. Works in Kolkata.
RJA-1	Former HC judge — post-retirement has been arbitrator for ad hoc arbitrations.
RJA-2	Former HC judge — post-retirement has been arbitrator for both ad hoc and institutional arbitrations.
RJA-3	Former HC judge — post-retirement has been arbitrator for both ad hoc and institutional arbitrations.
RJA-4	Former HC judge — post-retirement has been arbitrator for both ad hoc and institutional arbitrations. Also was in the governing body of an arbitral institution.
RJA-5	Former HC judge — post-retirement has been arbitrator for both ad hoc and institutional arbitrations.
TA-1	Technical arbitrator with experience of over 40 arbitrations. Also has experience in giving expert opinion in arbitrations. Has been appointed by domestic and international institutions and in ad hoc arbitrations.
TA-2	Technical arbitrator with less than a year of experience.
TA-3	Technical arbitrator with 10 years of experience (ad hoc arbitration) — former official at PSU.