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State as a Party in ADR: Unilateral Appointment Clauses and the Erosion of Neutrality in India

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Abstract

Alternative Dispute Resolution (ADR), particularly arbitration, was introduced in India as a faster, cheaper, and less adversarial substitute for litigation. However, when the State or its instrumentalities are parties, standard-form government contracts frequently reserve unilateral power to appoint the arbitrator or ADR chair. Such clauses convert ADR from a neutral dispute resolution mechanism into a tool of outcome control. The Arbitration and Conciliation (Amendment) Act, 2015 sought to correct this structural bias by inserting Section 12(5) and the Seventh Schedule, which make serving government employees and interested appointing authorities ineligible to act as arbitrators. Yet because the amendment has been held to be non-retrospective, a two-tier system of justice has emerged. Post-2015 contracts benefit from stricter neutrality norms, while pre-2015 contracts remain vulnerable to State-appointed employee arbitrators. Drawing on Indian case law and legislative history, this paper argues that the State's repeat-player advantage and old contractual clauses continue to undermine the legitimacy of ADR. The paper concludes that justice appears biased depending on who the parties are, and recommends institutional and legislative reforms to restore neutrality.

Keywords: ADR, arbitration, neutrality, State contracts, Section 12(5), Seventh Schedule, unilateral appointment, repeat players, non-retrospectivity.

1. Introduction: ADR, Arbitration and the Indian State

Alternative Dispute Resolution is an umbrella term for methods used to resolve disputes outside traditional court litigation. It includes arbitration, conciliation, mediation, negotiation, and Lok Adalat. Among these, arbitration is the most formal and binding ADR mechanism. In arbitration, parties refer their dispute to a private neutral or a panel of neutrals, who render a decision called an arbitral award. The award is generally final and enforceable like a court decree. Arbitration is premised on party autonomy, procedural flexibility, speed, and the impartiality of the arbitrator.

In India, arbitration has a long statutory history. The first modern legislation was the Indian Arbitration Act, 1899, based on the English Arbitration Act, 1889. It was followed by the Arbitration Act, 1940, which was widely criticised for excessive judicial intervention and delays. The present law is the Arbitration and Conciliation Act, 1996, which was enacted to align Indian arbitration law with the UNCITRAL Model Law on International Commercial Arbitration. The 1996 Act sought to reduce judicial interference, expedite proceedings, and create a credible alternative to the overburdened civil courts.

The Indian government has used arbitration clauses in contracts for public works, supply, and infrastructure for over a century. Standard-form documents such as the Railways General Conditions of Contract, Central Public Works Department (CPWD) conditions, Military Engineering Services (MES) conditions, and later NHAI and Ministry of Defence contracts have long contained arbitration clauses. These clauses, however, often gave the government the power to appoint serving government officers as arbitrators. The assumption was that government engineers and officers could combine technical expertise with adjudicatory functions. But this assumption overlooked a basic principle: an arbitrator must be independent and impartial.

Over time, private contractors and suppliers began to challenge these clauses. They argued that a government officer acting as arbitrator in a dispute against the same government could not be truly impartial. The Supreme Court of India gradually recognised this danger, culminating in the Arbitration and Conciliation (Amendment) Act, 2015. The amendment inserted Section 12(5) and the Seventh Schedule, which rendered serving government employees and interested appointing authorities ineligible to act as arbitrators. Yet the problem has not disappeared. Many old contracts still contain biased clauses. Government departments continue to draft new clauses that push the boundaries of neutrality. The result is that ADR, which was meant to eliminate judicial delay, has sometimes become a tool to control outcomes.

This paper examines how unilateral appointment clauses in State contracts have tampered with the purpose of ADR in India. It traces the pre-2015 position, the legislative intervention of 2015, and the post-2015 judicial response. It argues that the non-retrospective application of the amendment has created two types of justice: one for contracts signed before 23 October 2015, and another for contracts signed after. It concludes that the State, as a repeat player, continues to enjoy structural advantages that undermine the neutrality of ADR.

2. The Principle of Neutrality in Arbitration

Neutrality is the foundational principle of arbitration. An arbitrator must be independent and impartial. This means that the arbitrator must not be interested in the outcome of the dispute, must not be connected with either party, and must not have any personal, financial, or professional relationship that could create a reasonable apprehension of bias. Neutrality is not merely a procedural formality; it is the moral and legal basis of arbitration. Without neutrality, arbitration becomes a private court controlled by one party.

The Arbitration and Conciliation Act, 1996 expressly codifies this principle in Section 12. Section 12(1) states:

"*When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances, (a) such as existence either direct or indirect of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and (b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months*."

Section 12(2) allows a challenge to an arbitrator if circumstances exist that give rise to justifiable doubts about his independence or impartiality. Section 18 further provides:

"*The parties shall be treated with equality and each party shall be given a full opportunity to present his case*."

These provisions reflect the requirement of a fair hearing under natural justice. An arbitrator who is appointed by one party alone, especially when that party is the State and the arbitrator is a State employee, may not satisfy the requirement of impartiality. Even if the individual arbitrator acts honestly, the appointment mechanism itself creates a reasonable apprehension of bias. Justice must not only be done but must also be seen to be done.

Before 2015, the Act did not expressly bar a serving government officer from acting as an arbitrator in a government dispute. The courts had to decide on a case-by-case basis whether there was a real likelihood of bias. This created uncertainty. The Law Commission of India, in its Report No. 246, noted that the absence of objective categories of ineligibility weakened the neutrality guarantee. The Commission recommended that the Act be amended to provide clear disqualifications. This recommendation led to Section 12(5) and the Seventh Schedule.

The 2015 amendment was therefore a direct legislative response to the problem of unilateral appointment and the erosion of neutrality in government contracts. It sought to ensure that arbitration remains a genuinely impartial process, especially where the State is a party.

. State Standard-Form Contracts and Control over ADR

A standard-form contract is a contract drafted by one party, usually a large organisation, and offered to the other party on a take-it-or-leave-it basis. The weaker party has little or no opportunity to negotiate the terms. In public procurement, the State drafts standard-form contracts and invites private contractors, suppliers, and service providers to bid. The successful bidder must accept the terms, including the arbitration clause, without meaningful negotiation.

Government bodies such as Indian Railways, CPWD, MES, NHAI, State Public Works Departments, and public sector undertakings use standard-form contracts. These contracts often contain clauses that:

- Appoint a serving government officer, such as a Chief Engineer, Additional General Manager, or Managing Director, as the sole arbitrator;
- Empower a government officer to appoint the arbitrator;
- Restrict the choice of arbitrator to a panel prepared by the government department;
- Allow the government to appoint the presiding arbitrator in a three-member tribunal;
- Require the arbitrator to be a government officer or retired government officer.

These clauses give the State dual control. First, the State is a party to the dispute. Second, the State controls who will decide the dispute. The private party is placed in a position where it must argue its case before an arbitrator who may be an employee of the same department that is opposing the claim. The arbitrator’s career, postings, promotions, and pension may be influenced by the government. Even if there is no actual bias, there is a strong appearance of bias.

The control is not limited to appointment. The State can also influence the arbitral process through administrative channels. For example, a serving government officer appointed as arbitrator may require permission to devote time to the arbitration. The government may grant or withhold such permission. It may also assign the officer other work, causing delays. The government may control the fee payable to the arbitrator. In some contracts, the arbitrator is paid a nominal fee set by the government. This creates further dependence.

The result is that ADR ceases to be a neutral alternative. It becomes a part of the government’s administrative machinery. The private party may feel that it has not really escaped litigation but has merely moved from a court to a government-controlled tribunal. This perception undermines the confidence of contractors, suppliers, investors, and citizens in the fairness of ADR.

4. Pre-2015 Position: Institutionalized State Control

Before the 2015 amendment, the legal position was broadly favourable to government unilateral appointment clauses. Courts often upheld such clauses on the ground that a government officer can act fairly and that the contractor had voluntarily accepted the clause. This approach ignored the inequality of bargaining power between the State and private contractors.

Two cases illustrate the pre-2015 position.

4.1 Indian Oil Corporation Ltd. v. Raja Transport (P) Ltd.

The contract between Indian Oil Corporation (IOC) and Raja Transport contained an arbitration clause empowering the Chairman and Managing Director of IOC to appoint a sole arbitrator. A dispute arose, and Raja Transport approached the court under Section 11(6) of the Arbitration and Conciliation Act, 1996, seeking the appointment of an independent arbitrator. The High Court appointed an arbitrator, but IOC challenged this.

The Supreme Court held that the court should not interfere with the appointment mechanism agreed by the parties unless the named authority fails to act. The Court observed that the possibility of bias was not enough to displace the agreed clause. It stated that the party challenging the appointment must show a real likelihood of bias, not merely an apprehension. The Court restored the clause and allowed the CMD to appoint an arbitrator.

This case is significant because it shows how the pre-2015 judiciary deferred to government unilateral appointment clauses. Even though the clause gave one party-IOC-the sole power to appoint the arbitrator, the Court upheld it. This effectively institutionalised State control over arbitration. The case is often cited to demonstrate the old approach that the 2015 amendment sought to correct.

4.2 Union of India v. Singh Builders Syndicate

A dispute arose under a contract with the Railways. The arbitration clause provided for appointment of a serving railway officer as arbitrator. The contractor objected to the appointment, arguing that a departmental officer could not be impartial.

The Supreme Court expressed strong disapproval of the practice of appointing serving government officers as arbitrators. It noted that such clauses create an impression of bias and defeat the object of arbitration. However, the case was decided before the 2015 amendment, and the Court was constrained by the existing statutory framework. It nevertheless recommended that government departments formulate broad-based panels of arbitrators and avoid insisting on their own employees.

This case is important because it shows that even before the 2015 amendment, the Supreme Court had begun to recognise the structural bias in government arbitration clauses. It did not go as far as the later amendment, but it laid the groundwork for legislative reform.

The pre-2015 position thus allowed a situation where the State was effectively a judge in its own cause. The arbitrator was often an employee of the State, subject to the State's administrative control. The private party had no realistic way to challenge this. The result was that ADR, which was meant to be neutral, became a unilateral process controlled by the stronger party.

5. The 2015 Amendment: Section 12(5) and the Seventh Schedule

The Arbitration and Conciliation (Amendment) Act, 2015 was a watershed. It was based on the recommendations of the Law Commission of India in its Report No. 246. The Commission observed that unilateral appointment clauses in government contracts were a major source of bias. It recommended that the Act be amended to make certain categories of persons ineligible to act as arbitrators.

The amendment inserted Section 12(5), which states:

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

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."

The Seventh Schedule lists categories that make a person ineligible. These include:

- Being an employee, consultant, advisor, or having any past or present business relationship with a party;
- Having a financial interest in the subject matter of the dispute;
- Having a close family relationship with a party or its counsel;
- Having served as the party's counsel or expert in the dispute.

Thus, a serving government officer is now clearly ineligible to act as an arbitrator in a dispute to which the same government is a party. The proviso permits a waiver only after the dispute has arisen and only by express written agreement. This is crucial because it prevents a pre-dispute clause from operating as an advance waiver. The waiver must be voluntary, informed, and post-dispute.

The amendment also introduced other changes relevant to neutrality. Section 11, which deals with appointment of arbitrators, was amended to restrict judicial discretion and to encourage institutional arbitration. The amendment also introduced time limits for completion of arbitration. But the most important change for this paper is Section 12(5) and the Seventh Schedule. They directly address the problem of unilateral State appointment.

The 2015 amendment was a legislative recognition that neutrality cannot be sacrificed on the altar of party autonomy. Party autonomy means that parties can choose their arbitrator, but it does not mean that one party can impose a biased arbitrator on the other. The amendment attempted to restore the balance.

6. Post-2015 Judicial Response: Reasserting Neutrality

After the 2015 amendment, Indian courts have repeatedly struck down unilateral appointment clauses in government contracts. The following cases illustrate the judicial reassertion of neutrality.

6.1 Perkins Eastman Architects DPC v. HSCC (India) Ltd.

Perkins Eastman, an architectural firm, entered into a contract with HSCC (India) Ltd., a government company. The arbitration clause empowered the Chairman and Managing Director of HSCC to appoint a sole arbitrator. A dispute arose, and the CMD appointed an arbitrator.

The Supreme Court held that a person who is himself interested in the outcome of the dispute, or who is an employee of a party, cannot appoint an arbitrator. The Court observed that the appointing authority must be independent. The clause was held to be invalid. The Court appointed an independent arbitrator.

This case is a landmark. It established that unilateral appointment by a State-owned entity violates the neutrality principle. The judgement is directly relevant because it recognises that State control over appointment creates a reasonable apprehension of bias. It also clarified that the 2015 amendment applies to the appointment process, not merely to the final award.

6.2 Bharat Broadband Network Ltd. v. United Telecoms Ltd.

United Telecoms had a contract with Bharat Broadband Network Ltd. (BBNL), a government company. The arbitration clause empowered the CMD of BBNL to appoint the arbitrator. After a dispute, the CMD appointed an arbitrator.

The Supreme Court held that the CMD of BBNL was an employee of a party and therefore ineligible under Section 12(5) and the Seventh Schedule. The appointment was set aside. The Court clarified that the proviso to Section 12(5) requires express written consent after the dispute has arisen, which was absent here.This case shows that a State entity cannot rely on a pre-dispute unilateral clause. The judgement reinforces that post-2015 contracts must comply with the neutrality framework.

6.3 TRF Ltd. v. Energo Engineering Projects Ltd.

The arbitration clause named the Managing Director of Energo Engineering as the sole arbitrator. The MD became ineligible under Section 12(5) after the 2015 amendment.

The Supreme Court held that when the named arbitrator is himself ineligible, he cannot even nominate another arbitrator. The Court reasoned that an ineligible person cannot perform any function related to the arbitration. Therefore, the power to nominate also fails.

This judgement prevents the State from indirectly controlling the process through an ineligible appointing authority. It closes a major loophole that allowed a biased authority to appoint a seemingly independent arbitrator. The principle applies equally to government contracts where the appointing authority is a government officer.

6.4 Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV)

A railway public sector undertaking appointed its own officer as arbitrator in a contract dispute.

The Supreme Court set aside the appointment. The Court reiterated that unilateral appointment by a PSU violates Section 12(5). The clause was held to be invalid, and an independent arbitrator was appointed.

The case shows that even railway PSUs, which were historically protected, cannot continue with employee-arbitrators after the 2015 amendment.

6.5 Haryana Space Application Centre v. Pan India Consultants Pvt. Ltd.

Haryana Space Application Centre, a State entity, appointed its own employee as arbitrator.

The Supreme Court held that the appointment was invalid. The Court appointed an independent arbitrator. The judgement emphasised that the State cannot act as a judge in its own cause.

This case reinforces that State entities must follow the neutrality requirement and cannot use their institutional position to control arbitration.

6.6 Glock Asia-Pacific Ltd. v. Union of India

A Ministry of Home Affairs contract contained a clause allowing the Secretary of the Ministry to appoint a sole arbitrator. Glock challenged the clause.

The Delhi High Court struck down the clause. The Court held that a Secretary who is part of the Union of India cannot appoint an arbitrator in a dispute to which the Union is a party. Such a clause gives the government an unfair unilateral advantage.

This is a recent example of a court applying Section 12(5) to invalidate a government appointment clause. It shows that the problem persists even after 2015 because government departments continue to draft such clauses.

6.7 Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd.

DMRC maintained a panel of 31 arbitrators, mostly serving or retired government engineers. The contractor challenged the narrow composition of the panel.

The Supreme Court held that a panel consisting only of government engineers creates a reasonable apprehension of bias. The Court directed that the panel be broad-based and include persons from various fields such as law, finance, and commerce. The panel must be genuinely independent.

This case shows that even a panel-based appointment can be biased if the State controls the composition. The State can still influence outcomes by choosing who is on the panel and then requiring the private party to select from that limited list.

These post-2015 cases demonstrate a strong judicial trend towards restoring neutrality. However, they also reveal that the problem is not fully resolved. Government departments continue to use clauses that attempt to maintain control. Moreover, the non-retrospective application of the 2015 amendment has created a significant gap.

7. Non-Retrospectivity and Two Types of Justice

Although the 2015 amendment strengthened neutrality, courts have held that it is not retrospective. This means that contracts entered into before 23 October 2015 continue to be governed by the old law. This has created two classes of contracts and two types of justice.

7.1 Union of India v. Pradeep Vinod Construction Co.

The contract was entered into in 2007. The arbitration clause allowed a gazetted railway officer to act as the sole arbitrator. The contractor challenged the appointment of a serving railway officer.

The Supreme Court held that the 2015 amendment was prospective. Therefore, Section 12(5) and the Seventh Schedule did not apply to contracts executed before the amendment came into force. The old clause remained valid, and the railway officer could act as arbitrator.

This judgement creates a two-tier system. A private party with a post-2015 contract can challenge a government-appointed employee arbitrator. But a party with a pre-2015 contract cannot. The result is that similarly placed parties receive different levels of neutrality based on the date of the contract.

The non-retrospective approach is legally defensible under the general principle that statutes operate prospectively unless expressly made retrospective. However, it produces an arbitrary distinction. A contractor who signed a contract in 2014 and faces a dispute in 2023 is still subject to the old biased clause. Another contractor who signed in 2016 gets the benefit of the 2015 amendment. The difference is not based on any principle of justice but on the accident of timing.

Moreover, the State continues to rely on old clauses in long-duration infrastructure contracts. Many pre-2015 contracts have long performance periods and disputes arise years later. Thus, the old regime may continue for another decade or more. The neutrality promise of the 2015 amendment is therefore unevenly realized.

This creates a situation where justice appears to depend on the date of the contract. A private party who signed before 2015 may be compelled to accept a serving government officer as arbitrator. A similarly situated party who signed after 2015 can challenge the same clause. The outcome of the dispute, or at least the fairness of the process, may depend on when the contract was signed. This is not a coherent rule of law; it is an arbitrary temporal distinction that undermines the equality principle.

8. Continued Structural Bias: Repeat Players and Panels

Even under post-2015 contracts, the State finds ways to maintain control. One method is the use of a panel of arbitrators prepared by the State entity. In Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd., the Supreme Court examined such a panel and held that a narrow panel of government engineers creates a reasonable apprehension of bias. The Court directed that the panel be broad-based. But even a broad-based panel may not eliminate the deeper problem: the repeat-player advantage.

The State is a repeat player in arbitration. A government department is involved in hundreds of arbitrations every year. It knows the arbitrators, their past awards, their predispositions, and their expectations. It can maintain panels, circulate favourable names, and manage relationships with arbitrators over time. A private contractor, by contrast, is usually a one-time participant. Even if the contractor can choose one arbitrator from a panel, the government's institutional knowledge gives it a practical advantage.

This imbalance is not fully cured by the 2015 amendment. The amendment addresses formal ineligibility but not the informal influence that comes from repeat interactions. The State can still create an environment where arbitrators know that awarding against the government may reduce their chances of future appointments. An arbitrator who repeatedly rules against the government may find that he is not included in future panels. An arbitrator who rules in favour of the government may be appointed again. This creates an incentive structure that is inconsistent with neutrality.

The issue of repeat players is not unique to India, but it is particularly acute in public contracts. The State has the resources, the institutional memory, and the contractual power to influence the arbitration process. Private parties lack these advantages. The result is that even a formally neutral appointment mechanism may produce outcomes that are biased in practice.

The Supreme Court has not yet addressed the repeat-player problem directly. It has focused on formal ineligibility under Section 12(5). But the problem is structural. It requires institutional reforms such as mandatory institutional arbitration, independent appointment authorities, and broader panels. Without such reforms, the State will continue to enjoy an informal advantage.

9. Recent Incidents and Emerging Practice

Recent Indian cases indicate that the problem of unilateral clauses is not over. Government departments continue to insert biased clauses in new tenders. Courts are repeatedly called upon to strike down such clauses.

For example, in Glock Asia-Pacific Ltd. v. Union of India, the Delhi High Court in 2023 struck down a Ministry of Home Affairs clause. The clause allowed the Secretary to appoint a sole arbitrator. The Court observed that such clauses give the government an unfair advantage and violate the neutrality requirement.

Similarly, in Haryana Space Application Centre v. Pan India Consultants Pvt. Ltd., the Supreme Court in 2021 appointed an independent arbitrator after invalidating a State entity's choice of its own employee.

There are also professional reports and commentaries that many government contracts still contain old-style clauses. Indian Railways, CPWD, and State PWDs often use standard forms that have not been updated in line with the 2015 amendment. Some departments simply continue with pre-2015 formats, forcing private parties to accept biased clauses or lose the contract.

This practice shows a deeper institutional resistance. The State has an incentive to maintain control over ADR. Arbitration is not merely a dispute resolution method; it is also a site where liability, money, and reputational interests are decided. The State, like any party, wants to win. But unlike private parties, it can use its legislative and contractual power to tilt the process.

The continued use of unilateral clauses suggests that the 2015 amendment has not been fully implemented in government contracting practice. There is a gap between the law and administrative behaviour. Courts can only react when a dispute arises. They cannot proactively prevent government departments from drafting biased clauses. The solution lies in executive action and institutional reform.

10. Justice Appears Biased Depending on the Parties

The central thesis of this paper is that unilateral appointment clauses make justice appear biased depending on who the parties are. When the State is a party, the process may be structurally tilted in its favour. When both parties are private, such unilateral clauses are less common, and courts scrutinise them more easily.

This differential treatment undermines the rule of law. A private party facing the government may feel that ADR is not a genuine alternative to litigation but merely another forum controlled by the government. The perception of bias is as damaging as actual bias. If contractors, suppliers, and citizens lose faith in ADR, they will avoid it or challenge awards repeatedly, thereby defeating the purpose of ADR.

The Supreme Court has recognised this in several cases. In Perkins Eastman, the Court noted that the appointing authority must be independent. In Voestalpine, the Court required a broad-based panel. These judgements reflect the principle that neutrality is not a luxury but a necessity.

Yet the law remains inconsistent. The non-retrospective application of the 2015 amendment means that a party who signed a contract in 2014 can still be forced to accept a serving government officer as arbitrator. A party who signed in 2016 gets a neutral tribunal. This is not a principled distinction. It is an accident of time. It creates two types of justice: one for old contracts and one for new contracts.

Moreover, even in post-2015 contracts, the State can use the proviso to Section 12(5). If a dispute arises, the State can pressure the private party to sign an express written waiver allowing a government officer to act as arbitrator. In practice, a small contractor may be financially desperate and may agree to the waiver to get a faster resolution. The proviso, though well-intentioned, can be misused.

The result is that the neutrality of ADR in India is fragile. It depends on the date of the contract, the bargaining power of the parties, and the willingness of courts to intervene. Justice appears biased when the State is a party because the State can often choose its own judge.

11. Recommendations

To restore the neutrality and credibility of ADR where the State is a party, the following reforms are needed:

11.1 Legislative Clarity on Retrospectivity

Parliament should clarify whether the 2015 amendment applies to all arbitrations commenced after the amendment, regardless of the contract date. A prospective application based on the date of arbitration initiation would avoid the two-tier system created by Pradeep Vinod Construction Co. If the amendment is not made retrospective, a separate provision should allow courts to replace biased arbitrators even in pre-2015 contracts when there is a reasonable apprehension of bias.

11.2 Mandatory Institutional Arbitration

Government contracts should be required to use neutral institutional arbitration mechanisms such as the Indian Council of Arbitration, the Delhi International Arbitration Centre, or the Mumbai Centre for International Arbitration. Institutional rules generally provide for independent appointment mechanisms. The State should not be allowed to appoint its own employees or create its own panels.

11.3 Model Arbitration Clauses

The central government should issue model arbitration clauses that comply with Section 12(5) and the Seventh Schedule. These model clauses should be made mandatory for all government departments and PSUs. Departments should not be free to use outdated standard forms. The model clauses should provide for appointment by independent institutions or by a neutral third party.

11.4 Post-Dispute Waiver Safeguards

The proviso to Section 12(5) should be amended to prevent coercive waivers. A waiver should be valid only if both parties are represented by counsel and the waiver is recorded before a court or an independent authority. This would protect small contractors from being pressured to accept a biased arbitrator.

11.5 Broader Panels

If the State maintains a panel, the panel must be genuinely broad-based, including retired judges, lawyers, engineers, accountants, and experts from the private sector. The panel should be prepared in consultation with neutral bodies, not unilaterally by the State. The panel should be reviewed periodically to ensure independence.

11.6 Judicial Vigilance

Courts should continue to scrutinise unilateral appointment clauses. Even in pre-2015 contracts, courts can invoke the general principle of natural justice to replace an arbitrator where there is a real likelihood of bias. The judiciary should not allow technical arguments about prospectivity to defeat the fundamental right to a fair hearing.

11.7 Training and Awareness

Government departments should be trained on the importance of neutrality in arbitration. Procurement officials should understand that biased clauses delay projects, increase litigation, and harm the credibility of the State. The Ministry of Finance and the Department of Legal Affairs should issue guidelines to all public authorities.

12. Conclusion

ADR was meant to be a neutral, efficient and fair method of resolving disputes. In India, however, the State’s use of standard-form contracts with unilateral appointment clauses has undermined this promise. By reserving the power to appoint the arbitrator or ADR chair, the State effectively controls the process and creates a reasonable apprehension of bias.

The 2015 amendment was a significant step forward. Section 12(5) and the Seventh Schedule made it difficult for the State to appoint serving government officers as arbitrators. Judicial decisions such as Perkins Eastman, Bharat Broadband, TRF, and Glock Asia-Pacific have reinforced these protections. Yet the non-retrospective application of the amendment has created two types of justice. Pre-2015 contracts still allow State-appointed employee arbitrators, while post-2015 contracts benefit from stricter neutrality norms.

The result is that justice appears biased depending on who the parties are. A private party facing the government may still find itself before an arbitrator appointed by the government. The State, as a repeat player, retains structural advantages that the law has not fully eliminated. The continued use of outdated clauses in government tenders shows that legislative reform alone is not enough. Institutional and administrative changes are equally necessary.

If ADR is to fulfil its purpose, it must be perceived as fair. The State cannot be allowed to be a judge in its own cause. The reforms suggested in this paper, especially mandatory institutional arbitration and clear legislative standards, are necessary to restore the credibility of ADR in India. Until then, the promise of ADR as a neutral alternative to litigation remains incomplete.

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