Souvenir

INDIAN INSTITUTION OF TECHNICAL ARBITRATORS

ECONOMISE ★ EXPEDITE ★ EXPERTISE

5th International Conference

CONSTRUCTION ARBITRATION

The Indian and International Perspective

Vigyan Bhawan, New Delhi

May 19-20, 2023

Indian Institution of Technical Arbitrators, Delhi State Centre

IBC Building, KamaKoti Marg, Sector 6, R. K. Puram, New Delhi- 110022

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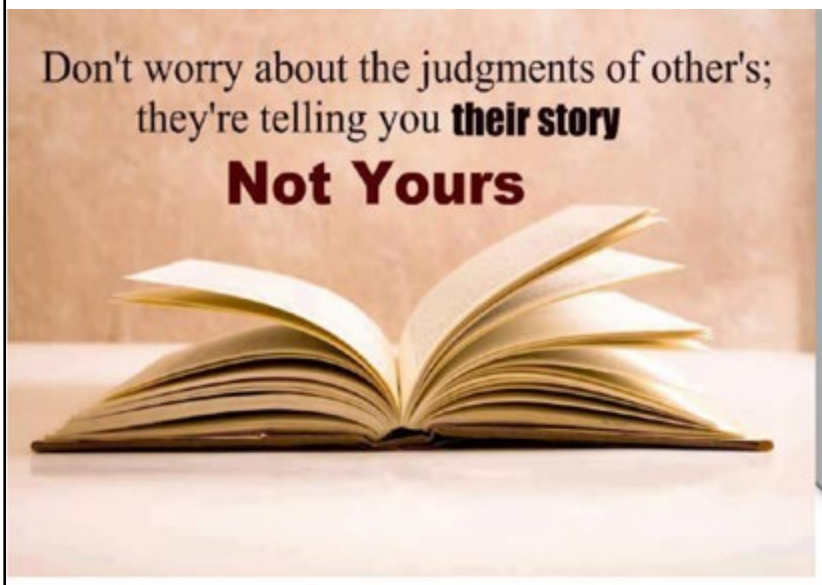

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5th International Conference
on
‘Construction Arbitration’
“The Indian and International Perspective”

May,19-20, 2023

Vigyan Bhawan, New Delhi

Indian Institution of Technical Arbitrators

Delhi State Centre

1st Floor, IBC Building, Sector-6, R.K Puram, Kama Koti Marg, New Delhi-110022

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अजय कुमार सिंह
राष्ट्रपति के प्रेस सचिव
Ajay Kumar Singh
Press Secretary to the President

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MESSAGE

The President of India, Smt. Droupadi Murmu, is happy to know that the Indian Institution of Technical Arbitrators is organising an International Conference on 'Construction Arbitrators—The Indian and International Perspective' on May 19-20, 2023 at Vigyan Bhawan, New Delhi.

The President extends her warm greetings and felicitations to all those associated with the Indian Institution of Technical Arbitrators, the Participants and sends her best wishes for the success of the Conference.

Press Secretary to the President

New Delhi
May 12, 2023

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Dr Justice D Y Chandrachud
Chief Justice of India

Message

I am glad to learn that the Indian Institute of Technical Arbitration ("IIT Arb"), Delhi State Centre is organizing the fifth international conference on the theme 'Construction Arbitration-The Indian and International perspective'.

India's construction industry is considered the economic engine of the country, building the nation brick by brick. It has experienced significant growth, driven by increasing investment and the government's focus on infrastructure development. With the growth of the Indian construction industry, disputes and conflicts related to it are expected to rise. The complexities involved in such disputes arising out of equally detailed and complex contracts can hardly be overstated. In an industry, where time is often of the essence construction arbitration is seen as a faster and more efficient alternative. Owing to their unique nature, the requirement of expert arbitrators who are easily able to comprehend the technicality and legal issues involved, is inevitable.

The IIT Arb by providing a common platform to arbitrators, architects, developers, engineers of all disciplines, and other stakeholders is providing the necessary impetus in facilitating construction arbitration, and helping it become a mainstay of the sector. The conference is a testament to IIT Arb's commitment to excellence and its passion for advancing the field of arbitration.

I wish all the success to the organizers, participants and delegates of the conference. I am confident that the conference will provide a valuable forum for sharing knowledge, exchanging ideas, building relationships among professionals in the field, and increasing cooperation across boundaries.

Thanks

Dhananjaya Chandrachud

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किरेन रीजीजू
KIREN RIJUJU

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भारत सरकार
MINISTER
LAW AND JUSTICE
GOVERNMENT OF INDIA

सत्यमेव जयते

आज़ादी का अमृत महोत्सव

MESSAGE

I am pleased to learn that the Indian Institution of Technical Arbitrators is organizing a two-day international conference on 'Construction arbitrations - The Indian and International Perspective' with the objective to promote arbitration as a speedy and cost-effective means of resolving contractual disputes and to increase awareness of its advantages as a dispute resolution mechanism.

The Government of India, under the leadership of Hon'ble Prime Minister Narendra-Modi ji, is committed to deliver speedy and affordable justice to its citizens. Arbitration, as a form of Alternative Dispute Resolution (ADR), presents an excellent opportunity to achieve this goal. The recent amendments to the Arbitration and Conciliation Act and the establishment of the India International Arbitration Centre represents significant progress towards establishing India as a hub of arbitration.

It is heartening to know that IITarb is playing a vital role in advancing the vision of Prime Minister Shri Narendra Modi Ji to promote arbitration as a key pillar of alternative dispute resolution. IITarb is also taking a special initiative to raise awareness about the benefits of arbitration in technical areas such as the Infrastructure and Construction sectors. I firmly believe that this conference will be a milestone in promoting arbitration as a preferred mode of dispute resolution in the country.

It was my earnest desire to attend the event, however owing to my important prior commitment it is not possible for me to be amongst you.

I congratulate the entire team of IITarb for their special endeavour and extend my best wishes for a very successful and fruitful conference.

(Kiren Rijiju)

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भारत सरकार

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Housing and Urban Affairs; and
Petroleum and Natural Gas
Government of India

MESSAGE

I am happy to know that the Indian Institution of Technical Arbitrators (IITArb) is organizing a two-day international conference on 'Construction Arbitration - The Indian and International Perspective' on May 19-20, 2023 at Vigyan Bhawan, New Delhi.

Arbitration has come to be known as a quick and cost-effective tool for resolution of contractual disputes. It is commendable that IITArb, a professional body of engineers and architects, has been conducting various-conferences and training programmes on. various aspects of arbitration.

I hope the conference would be, of high/technical and educational value to participants and would also be of relevance and of interest to various engineering departments of central and state governments, PWDs, PSUs, private organizations dealing in engineering contracts.

I wish IITArb the best in all its future endeavours.

(Hardeep S Puri)

New Delhi

10th May, 2023

Office:- Room No. 104-C, Nirman Bhawan, New Delhi-110011; Phone: 011-23061166, 23061162, 23062089 (Fax)

5th International Conference On Construction Arbitration

Inaugural Function

19th May 2023, Vigyan Bhawan, New Delhi

Chief Guest	Sh. Gajendra Singh Shekhawat Hon'ble Minister, Jal Shakti Govt. of India	
Guest of Honour	Sh. Shailendra Sharma Director General, CPWD	
Presiding Officer	Sh. K.N. Agrawal President, IITArb.	

Valedictory Function

20th May 2023, Vigyan Bhawan, New Delhi

Chief Guest	Hon'ble Justice (Retd.) Mr. Hemant Gupta Chairman, India International Arbitration Centre	
Guest of Honour	Lt. General Arvind Walia Engineer-in-Chief, M.E.S.	
Presiding Officer	Shri G. Karthikeyan Head Forensic Delay Analysis & Risk Management, L&T	

FOREWORD

The IITArb was incorporated in the year 2003 with its headquarters at Chennai and State Centres have since come up at Bengaluru, Chennai, Delhi, Hyderabad, Kolkata, Mumbai and Thiruvananthapuram. The IITArb is a non-profit professional body of Engineers and Architects devoted to the popularization of arbitration as a speedy and cost-effective method for resolution of contractual disputes especially in the construction sector. The construction contracts are much prone to disputes and any attempt for the speedy resolution of such disputes would go a long way in the infrastructure development of the country. Institutional arbitration can play a very important role in that direction and IITArb is committed for the same.

The Indian Institution of Technical Arbitrators (IITArb), Delhi State Centre has taken the lead in organising this conference after about a 3 years period of global distress caused by the COVID19 pandemic. Such conferences had earlier been organised by IITArb, at New Delhi in 2012, 2014, and 2017; and at Chennai in the years 2016 and 2018. The topic for this Conference has aptly been chosen as "Construction Arbitration" and is being supported by several leading organisations in this field.

I am sure the Conference will provide a very good platform for exchange of views and fostering fellowship of engineers as well as non-engineers in the field of dispute management through Arbitration and Conciliation, which attracts experts from Law as well as from the relevant engineering domain. The IITArb can legitimately take pride in its core strength of engineering/trade expertise in achieving the goal of efficient Arbitration process.

I sincerely hope and wish that the deliberations during the Conference would be very useful to the Arbitration professionals. I take this opportunity to thank all the members of Technical Committee for bringing up this very nice compendium of Papers.

K. N. Agrawal
President, IITArb

PREFACE

The two-day symposium organised by Delhi State Centre of Indian Institution of Technical Arbitrators at Vigyan Bhawan on May 19 & 20, 2023, spread over seven technical sessions with about 25 speakers from India and abroad, shall exhaustively discuss various aspects of law and practice of Construction Arbitration in India and internationally. This souvenir publishes the articles of the panellists and other authors; and I hope would be of interest and useful to the participants and readers. The papers are put in sequence as per the technical sessions. A few papers by the authors covering other important aspects are also published.

The domestic construction arbitration market in India is very large and deserves better professional standards in arbitration. Despite legislative intent to reform the arbitration regime in India and amendments to the arbitration law in quick succession in 2015 and again in 2019, the growth of credible institutional mechanism to administer arbitration is somehow lacking. The ad-hoc as well as institutional arbitration and the parties in India need to engage better professionally trained arbitrators and arbitration lawyers and arbitration in India cannot remain a post- retirement and after court hours vocation. It is imperative for the parties to engage professional claim managers in pre-arbitral stage to have proper claim management and documentation. Experts, including industry specialists, should have due role in arbitration. The evidentiary proceedings need to be more efficient and need based; and need not follow the court process, nevertheless meet the standards required in adjudicatory process.

Huge money is blocked in disputes in construction sectors. Absence of statutory adjudication, makes arbitration the sole remedy in construction contracts, but not efficacious enough to give timely relief. The pre-arbitral settlement process has turned to be not effective. S.31(7)(a) of the A & C Act, 1996 has been given expansive meaning by the Supreme Court, barring pre-award interest in the agreement, to disallow even claim of damages as interest. If substantial time lapses before award in arbitration, this deprives legitimate compensation to the award creditor for money blocked and acts as disincentive to engage in negotiation and waste time. Absence of law in India against unfair contract terms, despite recommendation by the Law Commission in its 199th report in 2006, has put the jurisprudence and construction of such exclusionary provisions in contract, in a flux in India.

The commercial courts, introduced by legislation in 2015, lack physical infrastructure and the requisite number of judges. Despite plethora of governmental schemes to destress the construction sector, poor contract enforcement and delay in enforcement of arbitral awards has caused liquidity crisis and even insolvency in construction sector. Construction companies need financial muscle to withstand the time taken in entire process of dispute resolution till recovery of payment.

To improve the construction arbitration regime in India, construction law should be part of undergraduate and post graduate curriculum in our universities and academic churning on the subject. Necessary measures need to be undertaken to develop a professional pool of arbitrators, arbitration lawyers, experts, tribunal secretaries etc. The arbitral institutions and arbitrators in ad-hoc arbitration may be encouraged to adopt construction arbitration-specific rules to enhance efficiency of arbitration process.

Standardization of the contract forms and avoidance of unfair bespoke conditions to create im-

balance in risk allocation should be encouraged as a matter of policy by government and PSU organizations. Construction contracts should be more participative and collaborative in approach with the risks allocated where it should be and seen as less adversarial. This will help delivery and reduce disputes. Arbitration should instil trust of the parties, who might have legitimate concern on its outcome. There is need of more consistent judicial precedents in construction law and arbitration.

The appointment of arbitrators remains a contentious issue even post amendment to the arbitration law in 2015. There need to be a more open & transparent, but merit-based approach, while ensuring party autonomy in selection of arbitrators. The pool of arbitrators, now engaged in construction arbitration, needs diversification. The attempt by various government organisations and PSU's to resort to close restrictive panels has been an obstructive approach in selection of arbitrators and as a result, appointment of arbitrators in India regularly lands up in High Courts in domestic arbitration, which almost invariably appoint retd judges as arbitrators, may it be any type of arbitration. The amendment in law to transfer power to appoint arbitrators to arbitral institutions from the High Courts and the Supreme Court, has not been implemented by the Government. This must happen along with development of credible arbitral institutions, to ensure neutral and intellectually robust tribunal. The government organizations need to accept institutional arbitration as a mode of dispute resolution.

Writing of arbitral award requires skill and cannot be presumed. The arbitrators need to be trained on award writing. An ill-drafted award is likely to face challenge in court and if set aside, frustrate the entire arbitral process.

The conference discusses all these and many more issues in much detail. I thank each panellist and author, who have responded to my request despite their hectic schedule. I especially thank Mr. P R Seshadri, past President IITArb for his help in getting foreign authors and Mr Krishna Kant, Chairman Delhi State Centre, for his unflinching faith on me as Convenor Technical Committee and giving free hand in selecting the topics and the deciding the sessions as well as the panellists and the authors. Mr. Kunwar Chandresh, member Technical Committee was much helpful whenever I requested him for support. Vartika, Associate at my arbitration law chamber, was a constant companion during the last few months and has taken considerable pain in helping me and I am grateful to her.

Wish you all the best and hope you enjoy the conference.

13 May '2023

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Past Chairman, Delhi State Centre, IITArb

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Delhi State Centre

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ACKNOWLEDGEMENT

Indian Institution of Technical Arbitrators, Delhi State Centre acknowledges with gratitude and high appreciation the assistance rendered by the following organizations in organizing the

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Indian Institution of Technical Arbitrators

Delhi State Centre

5th International Conference on

Construction Arbitration,

The Indian and International Perspective

May,19-20, 2023, *Vigyan Bhawan, New Delhi*

PROGRAMME

DAY 0NE- 19.05.2023 (FRIDAY)	
0900 – 1130	**REGISTRATION**
1030 – 1115	**INAUGURAL FUNCTION**
1115 – 1145	**HIGH TEA**
TECHNICAL SESSION – I	
1145 – 1315	**An overview of Construction Arbitration Practices & Arbitration Rules in India and Internationally- the Way Ahead** **Panel Discussion:** 1. Ganesh Chandra Kabi, FCIArb, Head, Kabi and Associates-**"A Perspective of Law & Practices of Construction Arbitration in India"** 2. Vandana Bhatt- Project Administration Consultant -**"Construction Law and Contract Administration"** 3. Kunwar Chandresh, FCIArb, LLM(HKU), Construction Lawyer and Arbitrator- **"Specific Rules for Construction Arbitration and Dispute Resolution: Requirement and Comparative Analysis"** 4. Mohana Dilip Potdukhe, Jt. Secretary SCL (India) – **Perspective on Construction Arbitration in India**
1315 – 1400	**LUNCH**
TECHNICAL SESSION – II	
1400 – 1530	**Dealing with Standard Form Contracts & Contracts with Bespoke Conditions- both with Indian and International Perspective** **Panel Discussion:** 1. Er. Venkataraghavan Ramadurai (Dubai) FCIArb, LLM Construction Law (UK)- **"Extent of liability of structural consultant in a contract without limitation on liability" (Moderator)** 2. Gaurishankar Dubey- Arbitrator, Mediator & Approved Valuer- **"Dispute in EPC Contracts"** 3. Brigadier Amit Kathpalia (Retd.) – Consultant, Trainer Professor – "**Payment delays in Indian construction contracts- contractual causes and remedies"** 4. Gracious Timothy Dunna, Advocate- **"Unfair Outcomes of General v/s Particular Conditions: Jeopardizing the Commercial Value of Standard Forms"**

1530- 1545	**TEA**
	TECHNICAL SESSION – III
1545 – 1700	**Claims, claim documentation, delay and quantum analysis** **Panel Discussion:** 1. Shouryendu Ray, Advocate- Partners Nora Chambers – **"An Overview of Claims in Construction Disputes" (Moderator)** 2. Sumit Rai, Advocate 3. Rajat Singla- Director at Masin UAE **"Delay and Quantum Experts In Construction Dispute Resolution"** 4. Himanshu Batra, Associate Director- Masin

DAY TWO- 20.05.2023 (SATURDAY)	
0930 – 1100	**REGISTRATION**
	TECHNICAL SESSION – IV
1000 - 1130	**Drafting of Arbitration Clauses, Appointment of Arbitrator/s, Interim Measures & Emergency Arbitration** **Panel Discussion:** 1. Mr. Hasit Seth, Advocate (**Moderator**) 2. Dr. Amit George, Advocate 3. Mr. Garv Malhotra, Advocate- Partner at Skywards Law- **"Guiding lights and red flags: Key focus-areas for arbitration clauses in construction contracts and international best practices"** 4. Er. Rajesh Banga- Chief Engineer, CPWD-Varanasi- **"A continued saga regarding appointment of arbitrators in India post amendment and judicial precedents"**
1130 - 1145	**TEA**
	TECHNICAL SESSION – V
1145 - 1315	**Evidentiary Proceedings in Construction Arbitration (I)** **Panel Discussion:** 1. Ratan K Singh, FCIArb., Sr Advocate- **(Moderator)** 2. Anand Juddoo, FCIArb, Mauritius- **"Taking evidence in international arbitration: Balancing due process and efficiency"** 3. Tejas Karia, Advocate, FCIArb, Partner, Shardul Amarchand Mangaldas & Co. 4. Saurav Aggarwal-Advocate 5. Ravi Shankar, Advocate- Managing Partner, Law Senate **"Evidence Procedure, Production of Documents and Electronic Records In Arbitration Proceedings"** 6. Ajay J Nandalike-Advocate

1315 - 1400	**LUNCH**
	TECHNICAL SESSION – VI
1400 - 1445	**Evidentiary proceedings in Construction Arbitration (II)** **[Panel as in TS V]**
	TECHNICAL SESSION – VII
1445-1600	**Arbitral Awards: International Drafting Standards & Practices and Challenge & Enforcement in India post 2015** **Panel Discussion:** 1. Hon'ble Justice Talwant Singh 2. Anish Wadia, C.Arb- Chartered Arbitrator, Accredited Mediator and Adjudicator **(Moderator)** 3. Datuk Professor Sundra Rajoo, President AIADR, Kuala Lumpur- **"Writing of an Arbitral Award- Standards and Practices"** 4. Kunal Vajani, Joint Managing Partner at Fox & Mandal- **"Challenge and Enforcement of Arbitral Awards in India post amendment 2015"**
1600 - 1700	**VALEDICTORY FUNCTION**
1700	**HIGH TEA**

A Perspective of Law & Practice of Construction Arbitration in India

G C Kabi FCIArb[1]

ABSTRACT

This article gives a perspective of construction arbitration regime in India vis-à-vis other developed common law jurisdictions and identifies issues that need to be addressed in India, for arbitration to become an effective dispute resolution mechanism in construction and engineering contracts. The author discusses the prevailing practice of construction arbitration in India and highlights the scope for improvement the way arbitration is conducted. For this purpose, among other measures, the author discusses the need of special law for construction contracts, standardization of contract documents and fairness in contract terms. At the end suggestion is made for the way ahead.

Introduction

Construction arbitrations are generally fact-intensive, documents heavy, technically complex and nuanced. The documents in engineering contracts are usually layered and exhaustive, further incorporating technical specifications by reference. In addition, certain terms may necessarily be implied in such contracts. Finding factual causation of multiple events involving overlapping sequences of interdependent events over a long period of time makes construction arbitration complex.

Similar terms may have different connotations in two contracts and may not be construed in exactly the same manner. The contextual nature of construction contracts makes each arbitration unique. A contract for hill road construction at high altitude & low temperature with landslide conditions and limited working season in a year; an underwater construction in a river like Brahmaputra with high water current; a building in a busy city center with traffic restrictions; may mean different things for the same language used in a standard document. The proponents of pure and strict textual interpretation of contracts may fail the real bargain between the parties. The conduct of the parties may also become relevant in understanding the intention of the parties.

India has a very large domestic construction arbitration market. Though, the law and practice of domestic construction arbitration in India follows the pattern in other developed common law jurisdictions, the current practices in India lack sophistication, in using international good practices. Whereas, arbitration in India requires more specialized treatment, this is primarily due to the non-engagement of professional arbitrators, experts, and counsels in construction arbitration, along with poor contract administration, contract & claim management.

Dispute Resolution in construction contracts - India and Other jurisdictions

Certain distinctions are-

1. **Absence of statutory adjudication in India:** Most common law jurisdictions have enacted statutory adjudication for construction disputes with the basic policy rubric *'pay now argue later'.* This works as an effective interim mechanism of instantly binding decisions on disputes and ensures cash flow to the contractor. This has reduced the incidence of domestic arbitration by wide margins in such jurisdictions, though final adjudication is permissible in arbitration or in court. India has enacted no such law for the security of payment. Whereas the employer makes provision in the contract for recovery of its claims from the dues payable to the contractor, the contractor has to agitate its claims either in arbitration or commercial courts; neither is very efficacious to grant instant relief. Disputes derail the project, as the entire construction industry in India reels under the liquidity crisis. The existing system of *'work now, arbitrate later'* has seen inflated claims and more adversarial arbitration.
2. **Non-availability of emergency arbitration:** The contractual DRB/DAB are not effective in India for lack of compliance and enforceability and the arbitration statute

1 *Mr. G C Kabi is an experienced Arbitrator and Arbitration Counsel.*

does not provide for emergency arbitration (despite the law commission recommending it)[2]. This, together with the absence of statutory adjudication, makes interim quick binding decisions impossible. Indian courts, however, are inclined to enforce the emergency arbitration decisions, adopted by parties through institutional rules.

3. **No specialized construction courts:** There are no specialized construction courts in India, like the Technology and Construction Court (TCC) in the UK. This has not helped growth of a consistent and coherent construction law in India. The delay in enforcement of arbitral awards due to backlog of cases in courts, remains a major concern and is one of the reasons that makes arbitration less attractive, but with no other better alternative to it.

4. **No Construction law curriculum in universities:** Due to lack of specialized and structured construction law education in India, there is no academic churning in this field of law related to engineering and construction contracts. The practice of construction law in India is not supported by enough academic rigor; and only by practice, by a few who are competent to apply such principles and concepts in construction arbitration.

5. **No construction contracts related specific statutes:** Unlike in many other common law jurisdictions, India does not have construction contract specific statutes; for example, the statutes in England for defective premises, third-party rights, latent defects, unfair contracts terms and the Contracts Act, 2009 (based on HGCRA, 1996 & Rules 1998) etc. Construction law has evolved due to close interplay among the standard form contracts, judicial decisions, and statutory development in England and other common law jurisdictions. In India, the general substantive law of contract is contained primarily in the Indian Contract Act,1872 (ICA), along with the common law principles. Whereas ICA does not purport to contain the entire law of contract, the common law remedy may not be adequate to deal with specific construction disputes; for example, absence of any common law right of contractor to suspend work in case of delay or non-payment of on account payments, when the contract confers no such right or prohibits so (Housing Grants Act in England provides such right superseding any contractual stipulation prohibiting suspension by the contractor for non-payment of an account payment). In such a situation, though one often takes shelter under the provisions related to reciprocal obligations in sections 51 to 54 of ICA, this might not apply in case of a partial breach of contract. Section 54 would operate only in repudiatory breach and not in partial breach of contract. Construction law derived from judicial authorities provides different treatments and remedies in partial and total breach of contract. Such principles do apply in India. The innocent party treating it repudiatory if the beach is partial, may run the risk of committing wrongful repudiation of the contract.

6. **Multiple standard forms of contracts:** The use of multiple standard forms of contracts with bespoke conditions, makes application of judicial precedents uncertain in India. This is in addition to inconsistency in judicial pronouncements on the same or similar terms of contracts. Moreover, the interpretation of the contract itself may be disputed. Supreme Court of India in M K Abraham & Co v State of Kerala & Anr[3] observed that it is a nightmare to understand public works contracts and that such contracts are fertile grounds of disputes.

7. **No legislation against unfair terms:** Unfair and even unconscionable terms in commercial contracts are not illegal per se in India and may be enforceable, in absence of any law in India on unfair terms of contracts[4]. The theory of fundamental breach (which lost much of its use in England after the coming of the Unfair Contract Terms Act, 1977), remains very useful in India, restricting the effect of such unconscionable terms, in the absence of

2 *https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081615.pdf*

3 *(2009) 7 SCC 636*

4 *The 199th Law Commission Report on Unfair (Procedural & Substantive) Terms in Contract in August 2006, which proposed checks on unfair procedure and terms of contracts, has not been enacted*

legislation.

8. **Lack of institutional arbitration:** Though there are mushrooming of arbitral institutions in India, they generally lack the desired standard. There is no guarantee that the arbitrators empaneled in such institutions possess the knowledge, skill and proficiency to act as an arbitrator. In India, the profession as arbitrator is primarily a post-retirement vocation. The quality of arbitration vastly depends on the quality of arbitrator. Arbitrators do require formal education and training in arbitration law and practice and the applicable substantive law, in addition to domain knowledge.
9. **Absence of construction arbitration bar:** There is a dire need of a pool of professionally trained construction arbitration lawyers along with professional arbitrators. Specialist arbitration lawyers, who can deal with construction arbitration, are very few in number and there is a generalist approach to construction arbitration in India at present.
10. **Less use of industry experts:** Construction arbitration does require the help of industry experts in complex technical matters. They are much less in use in India and lack the professional skill required to present before a tribunal.

The practice of construction arbitration in India

In addition, some of the issues and practices in construction arbitration are discussed as under-

1. **Interpretation of exclusionary clauses:** Exclusionary clauses are quite prevalent in India, sometimes the breach vitiating the entire commercial bargain and at the teeth of the substantive law. Sub-section 3 of section 28 of the Arbitration & Conciliation Act,1996 (the Act), requires the arbitrator to take into account the terms of the contract in deciding every dispute. At the same time, the arbitrator (for India seated domestic arbitration) has a duty and mandate to decide the disputes as per the substantive law in force in India (as per s.28 (1) (a) of the Act).

It is submitted, the terms of the contract are to be construed, not in conflict to the commercial bargain and substantive law, unless it is an agreed risk undertaken, as a part and parcel of the commercial bargain. This requires a finding in every case w.r.to scope of the exclusion or limitation clause, and such clauses must not be given expansive meaning. If the terms of the contract are clear and in effect ousts the entire remedy in damages for any extent of breach, the same may be held to be hit by the substantive law in force in India. It is pertinent that, unlike the English common law, the liability in damages for breach is codified in India in ICA and has a public policy aspect, though the ICA itself is in the nature of private legislation.

2. **Issues related to extension of time:** Most standard forms of contracts in India have evolved over time on similar lines, following the evolution of the extension of time provisions in standard construction contracts in England. Care is taken to have a provision for extension of time, extra works/ variations, least the liquidated damages clause becomes inoperable. The short open-ended provisions for the grant of fair and reasonable extension of time in the 1980's, are now replaced by an elaborate list of delay events, along with a residual provision. Care is also taken to have an express provision for extension of time for delay caused by the employer, not relying upon the construction of the words *'beyond the control of the contractor'* for employer caused delays. In some contracts, there is an effort to define the *force majeure* events, somewhat elaborately. Whereas, following the standard forms in England, serving notice by the contractor is made condition precedent to be eligible for extension of time, the provision for grant of time by the employer even without any application by the contractor is also retained, which makes such notice not a condition precedent to get extension of time. Since prevention principle is codified in ICA, and is not merely a principle of common law (as in England), condition precedent clauses may face statutory obstacles. The breach that a party commits by not serving a notice in time may not entitle the other

party preventing performance to claim liquidated damages, denying extension of time for its own delays. In some contracts, the power of determination is retained with the employer; whereas in others, power is given to the 'Engineer'. The question arises whether the employer being itself a party, can decide on its own breach. There are judgments making such decisions to be in violation of the principles of natural justice and hence void. Similarly, when the 'Engineer' happens to be a regular employee of the employer or part of the PMC (as found in many contracts), one can justifiably doubt credibility or sanctity of determination by the Engineer.

3. **Liquidated damages:** Disputes regarding liquidated damages regularly come before arbitrators. The power to put liquidated damages for delay and determination of extension of time, are closely linked. The extension of time clause is seldom operated properly, which makes the imposition of liquidated damages unsustainable. In some contracts, while the extension of time is arbitrable, the quantum of levy is excepted from arbitration. Question is raised regarding the propriety of levy of liquidated damages in arbitration, if not the quantum. The law of liquidated damages and penalty contained in section 74 of ICA and the requirement of proving the factum of loss has been interpreted by the Supreme Court and differs from the law in England. It has also been held in India that loss must be proved if it can be proved, in every case, may it be liquidated or unliquidated damages. Penalty clauses are not invalidated in India except that the loss must be proved and damages are generally restricted to a lower reasonable amount. In public utility services, it may not be possible to prove loss and liquidated damages allowed without the rigor of proving the quantum of loss. The trend, even in such cases by the courts, is to restrict the amount to a reasonable amount (and it appears a little arbitrarily), by treating the total amount specified as a penalty. Liquidated damages, as such, cannot be allowed as 'sum due' by treating the same as 'agreed sum' in the contract and the general principle of award of damages applies. The recent refinement of penalty provision in England, enlarging the scope of enforcing such clauses (***Cavendish Square Holding BV v Talal El Makdessi***[5]) has yet not been judicially referred in India. This may also not be required or recommended in India, considering the scheme of s.74 of ICA for award of reasonable compensation in every case, may it be liquidated damages or penalty.

4. **Variation:** Variation claims involve technical & factual aspects as well as interpretation of the contracts. What constitutes variation i.e., its admissibility, may be in question. The type and nature of the bargain, the contract and the risks undertaken are relevant in this regard. In an item/percentage rate contract, an item not included in BOQ (and specifically not undertaken by the contractor at no extra cost) should qualify as variation. Hence, variation is essentially for work done within the scope of the contract. The employer is not entitled to impose variation order outside the scope of the contract and the contractor is not bound to execute such orders. Refusal to carry out such an order beyond the scope of the contractor would not generally constitute a breach of contract by the contractor. For dispute in rates only when variation is permissible, the contractor cannot refuse to carry out variation. On the other hand, in an EPC or Design-build contract, variation generally requires an order beyond the scope or design criteria; and hence disputes are generally on admissibility of variation. Change from the tender design need not necessarily constitute variation, depending on the provision in the contract. Huge claims of variation are made based on soil conditions, as the data discovered during post-contract soil investigation may vary from that provided by the employer at the tender stage, with a disclaimer. In EPC contracts, it is submitted, the contractor would generally undertake this risk. The problem arises in case of concealment or misrepresentation of existing data by the employer or when

5 *[2015] UKSC 67. The principle laid down in English law in this case has not been followed in Singapore.*

there is inadequate time provided at the tender stage or non-availability of access to the site during tendering to explore the sub-soil conditions, or there is a change of site with material impact or employer insisting for design considering liquefaction not otherwise required per the soil parameters and the applicable design codes, etc. When there is provision for cost compensation for unforeseen physical conditions, the issue would be determining the threshold of what constitutes *'unforeseen'* by a prudent contractor at the time of tendering.

Determining the quantum or price payable for variation may become more complex than the admissibility of variation. A typical example would be when the employer is responsible for a major change in scope of work in an EPC contract; in the absence of an applicable pricing mechanism for variation in the contract; the determination of price of work done, might become complicated. This is further aggravated if delay-related price rise is also claimed in the same dispute and the variation is executed over a period of time. A similar situation arises in using hybrid bespoke contracts, where the engineering is done by the employer but the payment is made at stages or on area basis i.e., without a firm measurable BOQ and there is wholesale change in the design. It is suggested, the payment quantum meruit may be the way out without a pricing mechanism under the contract.

5. **Delay Analysis:** In domestic construction arbitration, professional forensic analysis for delay is much less in practice in India as compared to many other jurisdictions. The degree to which factual causation is established is far short of what actually is required or desirable. There is adhocism in approach in this regard. Inadequacy of data or records maintained by the parties due to poor contract management makes forensic analysis vulnerable on facts; and the facts supplied by the party to the expert may be presumptive (and not authentic) and not based on contemporaneous records. The result is recreated programs in delay analysis in the absence of a proper baseline or updated programs, on the basis of unreliable supporting documents.

6. **Conduct of the parties:** The parties while relying on the terms of the contract are often found to have not acted in accordance with the contract. This creates difficulty in applying the terms of the contract strictly during arbitration including claims of waiver. The procedural requirements may or may not be mandatory and the standard of proof is high for applying waiver. The law mandates the arbitrator to take into account the terms of the contract in every case for the substantive issues and the procedural requirement may be intertwined with the substantive right in the contract.There are many FIDIC based contract documents with the Engineer having the power of determination under sub-clause 3.5, where the Engineer is required to consult the Employer and the Contractor, and the Engineer is in breach of such obligation while making such determination without due consultation with the parties.

7. **The Preliminary issues:** Jurisdictional objections are very common in construction arbitration in India. These arise primarily on the plea of 'excepted matters', 'no-claim undertakings' obtained by the employer for grant of extension of time, 'full and final settlement or 'no-due certificate' obtained while processing the final bill etc. In addition to adopting guerrilla tactics by the employer in the appointment of arbitrators, these objections take a certain time and effort to be settled by the AT. The tribunal may have to decide these preliminary issues under section 16 of the Act, in the beginning of the proceedings. If substantial issues of facts or evidence are necessary, such decisions may be deferred. No-claim or full and final settlement discharge undertakings are primarily findings of facts, often argued by the counsels with a plethora of case laws. Issue of limitation, often raised as a preliminary and jurisdictional issue, the decision on which has been held to be an award and not an order. In case claims or arbitration are clearly barred by limitation, it may be possible and even desirable to

decide the same at the outset; otherwise, this must be decided at some stage later. It is submitted, the pleadings may not be delayed awaiting such decisions in view of the statutory timeline of six months fixed for completion of pleadings.

8. **Framing issues:** Issues need not be framed in every arbitration, unless it is useful and imparts efficiency to the arbitral process. However, if the issues cannot be culled out clearly from the pleadings, it is better to frame the issues, to streamline the evidentiary proceedings, oral submissions and decision making by the tribunal. Bifurcation, i.e., deciding liability first and quantum later, has advantage of avoiding evidentiary proceedings if the liability is not upheld. However, this requires skillful handling and careful drafting of the issues, without infringing on subsequent issues while adjudicating the first issue on liability, as the parties have not yet led evidence or made submissions on later issues. Bifurcation of issues is rarely practiced in construction arbitration in India. In case of bifurcation, the decision on the first issue shall be an interim award and challengeable under s.34 of the Act and the limitation starts running for challenge to the same from the date of receipt of the decision by the party on the issue.

9. **The procedure:** The procedure in construction arbitration varies depending upon the matters under consideration and in practice based on the composition of the tribunal. There has been a gradual recognition that arbitration proceedings are not to be made like court proceedings. Despite the time limit provided in the statute, domestic arbitrations in India are far less disciplined compared to international commercial arbitration, in the manner in which evidentiary proceedings are dragged in open-ended manner and adjournments are sought by the parties and counsels routinely and with little justification. The absence of fear and rarity of costs imposed on parties, the unpreparedness of arbitrators at the time the issues are framed or even at the time of substantial hearings, makes arbitration casual in India. Along with a few busy arbitrators handling most arbitration matters, counsels prefer post-court hour hearings.

10. **The evidence:** The quantum of loss is to be evidenced for claiming damages. The courts in India are more circumspect in recent times, not to uphold award of damages by the tribunals that are without proper evidence. For example, loss of profit for wrongful de-scoping would require some evidence of what the party claiming would have earned, if there were no de-scoping and this cannot be awarded on notional percentage basis. Similarly, the delay related on-site expenses are to be evidenced and cannot be allowed on notional contractual percentage basis. Secondary data and electronic evidence, as under the Indian Evidence Act, is now often used to prove the accounting data, to avoid producing enormous volume of documents before the tribunal. Various formulae for claim of head office overheads, are sometimes used wrongly to claim on-site and machinery expenses. Though, there is no embargo on use of these formulae for head office related expenses, the underlying facts used in such formulae are required to be evidenced. Loss of business opportunity has a high threshold of evidentiary requirement and is seldom met and hence not generally allowed.

11. **The supervisory role of the courts:** Indian courts, in the recent past, have shown a lot more pro-arbitration trends and reasoned awards are rarely disturbed by the courts. Legitimizing arbitration as an alternative to the court for commercial dispute resolution, requires arbitration process and arbitral awards to be more robust and lawful. Time consumed in courts, however, remains a deterrent, particularly in challenge and enforcement of arbitral awards. Since the employers insist on close panel of arbitrators, in most cases there is failure to appoint the arbitrator/s as per the agreed procedure and the appointment of arbitrator/s is done by High Court (Supreme Court in case of international commercial arbitration). The amendment in arbitration law in India to transfer the power to arbitral institutions to appoint arbitrators, is not yet implemented. At the same time, this requires a robust institutional mechanism

to administer arbitration.

The way ahead

The practice of construction arbitration in India needs better professional standard, including the engagement of qualified & experienced arbitrators, the specialized arbitration lawyers, claim management experts etc. The arbitral tribunals should be neutral and intellectually robust, supervised by credible institutions. This requires setting of arbitral institutions with necessary systems and infrastructure.

Construction law needs academic recognition in India with an inter-disciplinary approach. There is need for construction contracts specific special legislation and structured quality training programs for the existing pool of arbitration professionals and arbitrators dealing with construction arbitration.

The major adversary in arbitration, the government departments and PSUs should adopt fair standard forms contracts with balanced risk allocation to make construction contracts collaborative. These institutions should wholeheartedly embrace the reforms in arbitration regime.

Enactment of statutory adjudication system and enforcing the same properly would help reduce time taken in binding decisions in disputes, help project delivery and reduce arbitration.

CONSTRUCTION LAW AND CONTRACT ADMINISTRATION

- Dr. Vandana Bhatt[1]

Introduction

India, being a developing country, has a large sum of money invested in infrastructure. In present scenario, more and more infrastructure works are in the pipeline which needs utmost attention to avoid its failure in terms of differences and disputes. The size of the projects is huge. With development of technology as well nature of award of work by way of EPC, BOT, BOOT, etc., projects are of complex nature for which we need to administer the project through its contract in a highly professional manner in terms of Trade practice and Construction Law. We are aware that the construction industry does not have standard contract documents. Each Employer has their own documents. **Even if standard contract documents like FIDIC or so are used, they are modified to the convenience of the Employer by introducing COPA**. Most construction contracts are heavily loaded with liability on Contractor, thus risk is shifted onto the Contractor. Such one-sided contract documents require special attention to manage them so that in the end, risk can be taken care of without severe loss/damage to the parties involved in it. Managing contracts is different from managing the work and this requires special knowledge and training to handle the risk loaded on the contract and manage the claims/ disputes which are inevitable in most of the contracts.

To avoid stress, one needs to administer the contract in a manner so as to overcome the scenario of unhealthy litigation. It is essential to have Contract Administrators to understand and interpret the contract. **To administer the contracts, a person specialized in technology, as well as Law (specifically contract law & construction law), is required. These hybrid professionals are called Techno-legal consultants**. Service of such professionals acts as first-aid for immediate relief and saves the organization from fatal situations either by avoiding unhealthy litigation or protect the interest of the parties by developing contemporaneous records by way of evidence.

Stages of Contract Administration

The contract administration mainly comprises of **Three stages**: **Pre-Bid stage, Acceptance of Work Order, and Execution stage**. These three stages of contract administration play an important role at the time of resolution of disputes, where contemporaneous records are made available as evidence to arrive at an amicable settlement or to protect the interest of the party if the dispute enters litigation. In India, we are yet to see specialized legal professionals in Construction Law. Regular Lawyers or Engineers alone cannot yield fruitful results. Contractors will require a person well-versed in Technology and Law related to Industry.

The Need

The need for a hybrid professional, i.e. Techno-legal is well appreciated by reputed educational institutes like IIT Bombay which have introduced curriculums like 'Engineering Law' at their UG level. Similar subjects have been introduced at the PG level by University of Mumbai. Similarly, NICMAR has a course that deals with law related to contracts. In this course, a basic concept of construction law and related topics are introduced to make aware the upcoming technocrats about the use and applicability of law as first-aid.

At present, it is a growing trend in the construction industry to employ an Engineer with basic knowledge of contract administration and law. Such engineers are given responsibility to look after contract administration in managing the risks of complex projects, interpreting contracts in case of ambiguities, and studying the minor nuances which helps to prove and price claims at the same time ensuring the party doesn't waive off their rights.

In this context of law related to Construction, there are many aspects, each one of which re-

1. *Dr. Vandana Bhatt, is an Arbitrator and has done M.E. Construction Management from Mumbai University. She has MBA in Construction Law and holds Contract Law from Harvard University, USA*

quires in-depth study. Construction Law necessitates studying the following major aspects.

1. Courts and Time
2. Courts and Contracts
3. Unfair Terms in Contract
4. Foundations and Law
5. Breach of Contract
6. Arbitration clause
7. Some of the aspects are discussed here below.

Courts & Time:

Courts are clogged with numerous issues. There are no specialised technology courts in India. Commercial courts are overburdened as well.

The mounting arrears in the courts, inordinate delays in the administration of justice besides the high cost of litigation has today put up question marks in the mind of people in the efficacy of the existing judicial system. The District Courts, High Courts, and Supreme Court all together have a backlog of cases running into more than 20 million.

It is often seen that a person who initiates litigation arising out of contractual issues; his children and sometimes grandchildren end up pursuing the case. Such is the situation of delay in litigation. This is true of courts in most countries. Expeditious disposals are an exception. If a matter goes in for an appeal, it could take another several years before you are heard. Parties resort to Court to deny justice to their opponents. The tragic truth is that Govt. agencies use litigation as a tool to disadvantage the industry.

It is this delay tactic that has encouraged several Govt. agencies in rejecting Arbitration as a process of resolution of disputes. It gives the bureaucracy two advantages *viz.*

- No result implying adverse comments on their performance would be available in their lifetime.
- Settlement outside court can be encashed to their advantage.

In this context, "Courts and Time" is an important aspect of Construction Law in helping decide the parties to go for Arbitration.

Mumbai (Bombay) is considered as the commercial capital of the country. To meet the needs of power, a multipurpose project for Irrigation and Power generation called Koyna Project was launched in the early 50s. One of the components was to construct a tail-race channel downstream of the Powerhouse, wherein the Contractors were Mckenzies Ltd. Certain disputes arose between Mckenzies Ltd. and the Govt. The dispute in respect of an appointment of Arbitrator as per terms of Contract went to court.

The litigation started in 1970 and finally, the Bombay High Court[2] passed the order of reference to Arbitrators 22 years later in 1992. Parties could have gone to Supreme Court under any pretext, and it could have meant another five to ten years to decide the issue.

Project Engineers, a small-sized contracting firm built a Ground Water tank in 1986/87 to have some minor disputes adjudicated by Arbitrators, invoked Arbitration clause, and proceeded after repeated notices to appoint an Arbitrator from the owners' panel of Arbitrators. The owners who were a Govt. agency went to the District Court in 1988 and lost the case. They went for an appeal where they lost too. They came back to District Court with another application. After a year they moved an amendment petition before the District Court. The issue of amendment to plaint remained pending for six years. In sheer frustration, the owner of the firm who was a graduate in law and Engineering, appeared before the Court to end the controversy of amendment to petition. The hearing on the petition began in 1995 and finally the District Court gave a verdict upholding the appointment of Arbitrator. Under Indian Law of Arbitration, no appeal lies in a matter related to appointment of Arbitrator. However, should a party feel miscarriage of justice, under Indian Constitutions it can invoke "writ jurisdiction" of High Court or Supreme Court. In this matter of appointment of Arbitrator, which District Court disposed after 8 years, the Govt. had invoked writ jurisdiction of High Court which took 20 years before it was disposed off[3]. In several other parts of India, the situation is worse.

2 *Suit no. is 78 of 1971, BHC*
3 *Writ Petition No. 378 of 1996, BHC*

There are thousands of contract disputes pending for decades in Indian Courts. No effective efforts to make the judiciary Time-effective" has been seen.

Courts and Contracts

General:

Apart from the usual long 10 to 20 years in pursuing the litigation, the outcome often is not in sync with the commercial bargain. The Construction litigation in courts could start with a suit for damages arising out of breach of contract where the process of Arbitration is not provided in the contract or may come as a challenge to Arbitration award or other matters related to Arbitration. In case of suits for damages, the courts face more challenges than in matters related to Arbitration.

Having referred to the aforementioned two cases related to the aspect of time, a few cases here below are cited on how courts may interpret construction disputes.

The 'Rock & Sock' judgment:

Popularly known in Construction fraternity as 'Rock & Sock' judgment, the Supreme Court of India did not find it proper to correct a typographical error in a Contract where the "Excavation in Rock" was mistakenly typed as "Excavation in Sock".

The brief details of the case are as follows :

- ***S.A.Jais & Co. and Ors. Vs. The Gujarat Electricity Board*[4],**

Case in short: Construction Contract - Interpretation - Relevant term of contract speaking of "excavation for tank in any soil, murram, sock, etc." - word "sock" was not intended by parties to mean "rock" - It cannot be regarded as item covered by contract or to be paid for at contract rate for excavation - Higher rate of payment awarded accordingly for rock-cutting. Need of Construction Law to deal with this case was absent. No one argued what parties understood while entering the contract. If parties are ad-idem interpretation of ROCK and SOCK not necessary. Court's role was to interpret not to fix additional cost for which provision in the contract exist. Court proceeded with deciding the rates.

Unfair Terms in Contract

"The courts will set aside a contract, or a transfer of property. When the parties have not met on equal terms, when the one is so strong in bargaining power and the other so weak that, as a matter of common fairness, it is not right that the strong should be allowed to push the weak to the wall.....One who is in extreme need may knowingly consent to a most improvident solely to relieve the strains in which he finds himself".

These words of Lord Denning[5] have been approvingly quoted by our Supreme Court in **AIR 1986 SC 1571.** Do we have these lofty words to help us to get out of the clutches of Contracts of Adhesion"?

Developed countries accept principle of 'freedom of contract' but the interpretation is not as atrocious as the one made by Indian courts. There ought to be exceptions to this "freedom" that Public bodies use to have contracts that are shamelessly "one-sided". Section 102(3) of Uniform Commercial Code of USA provides that *"the parties cannot insert clauses which defeat the obligations of "Good Faith, Diligence, Reasonableness and Care".*

The unconscionable provisions have one more element i.e., the contract is one of Adhesion type, resulting in ***"Take it or Leave it"***. In India, once a Contractor puts his signature on the dotted lines, it becomes *"consensus-ad-idem"* i.e., meeting of minds.

In **(1995) 5 SCC 482**, the Supreme Court has given us a ray of hope in a case that decided to identify an unconscionable contract. Although as early as in *1974* Lord Denning, M.R stated that unreasonable clauses in the Contract would be applied to the standard form of contract where there was inequality of bargaining power. In that famous judgement[6], Lord Denning had said that the ***one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other.***

The Supreme Court has approvingly quoted Prof. Todd of Harvard University in his *"Contracts of Adhesion"* wherein he says that *"**if a term is bizarre or oppressive it should be inferred that the party would not knowingly***

4 *AIR 1988 SC – 254*
5 *Lloyds Bank Ltd. Vs. Bundy - (1974)3 ALL ER 757*
6 *(1974) 3 All ER 757)*

have signed."

We also read excellently encouraging words from the Supreme Court.

"It is, therefore, the settled law that if a contract or a clause in a contract is found unreasonable or unfair or irrational, one must look to the relative bargaining power of the contracting parties. In dotted line contracts, there would be no occasion for a weaker party to bargain or to assume to have equal bargaining power".[7]

However, there are a few bright spots. In ***Union of India Vs Graphic Industries*[8]*,*** Writ Jurisdiction for payment due in contract was accepted.

Dire need to Speak Aloud

Before the Construction Industry is completely wrecked, it must move the demand to bring about legislation on the lines of ***"Unfair Terms of Contract Act – 1977"*** of UK or have a chapter included contract Act along lines of ***"Unconscionability"*** in US- UCC. Courts must be 'police' prepared to refuse to enforce 'Unconscionable Terms.' So, let us speak louder ..... we shall be heard.

I end by referring to a provision in German Civil Code Sec. 138 -

"*Contract could be* ***void*** *whereby a person profiting from distress, irresponsibility or experience of another..."*

Quoting words of American Judge. In E.C.Erust Inc. Vs Manhattans Construction Co. of Texas.

"Gentleman, this is the case which should be settled between the parties trained in this field, ***you are far better position to adjust your differences*** *than those untrained in these related fields. As an illustration, I who had no training whatsoever in engineering, had to determine whether or not the emergency generator system proposed to be furnished ..... met the specifications when experts couldn't agree."*

Apart from specializing in Construction Law, it is equally important understand the Trade practice for handling various ***Change in Scope, Delay in execution*** and most important to have knowledge of ***rights and responsibilities*** arising from the Contract that we handle day in and day out. We need to know what a contract is by understanding how to interpret the same with respect to trade practice more and less with respect to Law. We also need to learn how our actions and conduct during the execution of the project will be interpreted under Law, as most construction projects today end up in litigation.

Conclusion

A professional who can administer Contracts with knowledge of Construction Law helps in developing business and making the organization profitable. **With simplified templates and standard forms, one can resolve disputes in a win-win manner.** With the growing technology and availability of various software tools, it is further simplified to achieve successful contract administration which helps in mitigating risks and increasing the profitability of the organization.

For practicing engineers in Construction Industry, I say that they must get themselves acquainted with Construction Law to safeguard the organization and safeguard themselves too with the increasing interference from other Govt. agencies creating unrest. The role of other agencies should not expand to interference in the administrative decisions of the Contractors until and unless they see *prima facie* fraud in it.

For ease of understanding this area of Techno-legal, I tried to pen down in a simple language area required to be learned by the Technocrats.

7 (1995) 5 SCC 482 - Para 47
8 (1994)5 SCC 398

Specific Rules for Construction Arbitration and Dispute Resolution: Requirement and Comparative Analysis

Kunwar Chandresh, FCIArb, LLM (HKU)[1]

ABSTRACT

Construction Arbitration requires its procedure to be capable of handling voluminous documents, a discovery process, numerous witnesses, experts and multiple parties along with adherence to time and due process. Moreover, there may be different kinds of disputes involved in construction requiring certain degrees of evidence and fact examination. Hence, rules of arbitration for construction Arbitration should be framed keeping in mind the typical nature of construction disputes, so that parties may be satisfied that their case is dealt with all precision during the entire process of arbitration.[2]

Introduction

The first question that arises is whether we really require separate Rules of Arbitration for Construction Arbitration or whether would it be reasonable to make certain opt-in insertion(s) in the existing common institutional Rules to accommodate the specific need for construction Arbitration. The American Arbitration Association (hereinafter referred to as AAA), came out with separate Rules for construction Arbitration and Mediation Procedure, which included some specific provisions addressing large and complex construction disputes. Construction industry disputes vary widely from other industries and construction disputes are required to be addressed with their specific needs. Some other institutions have also made Rules to accommodate the requirements of Construction Arbitration like the International Chamber of Commerce Arbitration Rules 2017 (ICC Rules); the Singapore International Arbitration Centre Rules 2016 (SIAC Rules); the HKIAC Administered Arbitration Rules 2018 (HKIAC Rules 2018); Indian Institution of Technical Arbitrators Arbitration Centre Rules 2020 (IITAAC Arbitration Rules 2020); Delhi International Arbitration Centre Arbitration Proceeding Rules 2018 (DIAC Rules 2018) and Mumbai Centre for International Arbitration Rules 2017 (MCIA Rules 2017). Hence, general Rules of Arbitration are either required to have specific provisions for constriction Arbitration or separate Rules for Construction Arbitration may be adopted.

Specific Rules for Construction Arbitration: Requirements

I. Selection of Arbitrator(s)

Disputing Parties search for a good, neutral and experienced arbitrator to resolve disputes. Arbitration in construction disputes, whether during the execution of work or after completion of the work, usually involves huge money and commercial repercussions. Hence, Rules on the selection process of Arbitrator(s) is required to encourage the parties to agree upon a method for the selection of Arbitrator(s).

Construction Arbitration requires dealing with technical and sometimes very complex issues involving huge amounts, where even a slight misunderstanding or lapse may cause serious harm to any party. Hence, if a panel of Arbitrators for Construction disputes is made, it should categorically mention the experience and expertise of the listed Arbitrators, so that the party should be well aware of the Arbitrator, who has dealt with similar issues either as an expert or as an Arbitrator. Parties should be given wide discretion to choose either from the panel maintained by the Institution/Department or from outside the panel.[3]

AAA maintains a "National Construction Panel" of individuals competent to hear and decide disputes administered under the construction industry arbitration rules. *"The AAA considers for appointment to the Construction Industry Panel persons recommended by the National*

1. *Kunwar Chandresh is a construction lawyer and arbitrator based in India.*
2. *This article is confined to Arbitration Process and does not include the Dispute Boards or Conciliation or Mediation process.*
3. *AAA Construction Rules R-14 and R-15*

Construction Dispute Resolution Committee, regional advisory committees and customers. These individuals are qualified to serve by virtue of their experience in the construction field. The majority of these neutrals are actively engaged in the construction industry with attorney neutrals generally devoting at least half of their practice to construction matters."[4]

II. Specific Procedural Requirements

1. **Effective planning of dispute resolution process-** As a whole, the arbitration process is required to be planned when there are voluminous documents, a discovery process, numerous witnesses, experts and multiple parties involved in order to adhere to time and due process. The AAA provides for organizing 'Administrative Conference' on request of any party with the purpose *".....to organize and expedite the arbitration, explore administrative details, establish an efficient means of selecting an arbitrator, ascertain the parties' preferred arbitrator qualifications and to consider mediation as a dispute with solution option and to address other appropriate concerns of the parties, including but not limited to joinder of parties, consolidation of related cases, changes to claims and the possibility of proceedings through the submission of documents only....."*[5].

2. **Fast-Track Arbitration-** Parties may, on mutual consent, apply for the Fast Track Procedures or through document submissions. This is preferable for the disputes raised during the execution of the work, when parties may be interested to have a fast resolution of disputes. Sometimes, fast-track arbitration is opted by the party for speedy disposal of issues.

3. **Use of Technology-** Parties may be given the option for On-line submission of pleadings and online hearings if it suits to parties and Arbitrator(s). As Construction Arbitration involves voluminous documents and involvement of experts (sometimes), it becomes easy and process becomes fast when it is done virtually. However, witness cross-examination is required to be done face to face as far as possible but the same should not be made mandatory and should be left to Arbitrator(s) and the parties to decide. Apart from the hearing, technology can be used for fact and evidence appreciation and there are many tools and techniques available for the same, as this article is not about those aspects, the same is not detailed here.

4. **Filling requirements**- It should be kept in organised manner with a specific list of Do's and Don'ts keeping in mind the submissions of a series of voluminous documents annexures and exhibits. However, if the Tribunal really requires to adopt some other way, it should be left to the Parties and Arbitral Tribunal to decide on a case to case basis.

5. **Change of claim/counter-claims amount-** As the disputes in Construction Arbitration are quantified as claims/counter-claims, which involves large and lengthy calculations, excel sheets and tables etc. and there are fair chances that some factor or parameters are left or calculation mistakes occur due to paucity of time to submit Statement of claims. In such a situation, modification of claims/counter-claims' amount should be allowed with some quick and easy procedure. Also, the parties are allowed to inform the Tribunal and correct the same, if such miscalculation is observed anytime during the hearing by the party or raised by the Arbitrator(s).

6. **Preliminary hearing and case management-** The same purpose should further be addressed during the preliminary hearing as planned initially at Administrative Conference by way of submission by the parties and may be adopted by the Tribunal. It would be better if a list is provided in the rules itself as to how and what is to be addressed, discussed and decided, in standard format covering the specific requirement of Construction Arbitration, during the preliminary hearing.[6]

7. **Joinder and Consolidation-** Apart from the above, Construction Arbitration Rules should have specific provisions for joinder

4 *AAA Construction Rules under heading "The National Construction Panel" pg. 9.*
5 *AAA Construction Rules R-11*
6 *AAA Construction Rules R-11*

and Consolidation. In construction work, multiple parties are involved for example contractor, sub-contractor, linked supplier, consultant, architects, testing laboratory, quality inspectors, manufacturer etc.[7] and in case of cost and time overrun all the involved are affected. As has been observed in different construction disputes that the affected party(s) also try to join the dispute resolution process or Arbitration process. To reduce the multiple Arbitration, the provision of Consolidation and Joinder should be provided in the Rules for Construction Arbitration.[8]

8. **Rules on taking evidence-** It should be made clear (if any standard, IBA Rules or Prague Rules is not adopted) with some discretion to the Arbitrator, who is the best judge of the quality and materiality and relevance of any evidence. The AAA provides *"…. When deemed appropriate, the arbitrator may also allow for the presentation of evidence by alternative means including video conferencing, internet communication, telephonic conferences and means other than in-person presentation. Such alternative means must still afford a full of opportunity for all the parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and when involving witnesses, provide an opportunity for cross-examination."*[9]

9. **Discovery-** Discovery of documents is a unique feature in construction arbitration and sometimes it requires a lot of time and effort to discover documents, which goes in volumes and volumes of documents to be placed before the arbitrator, if relied by the parties. The arbitration rules out to provide to the extent possible an efficient and an effective way of discovery of the documents. It has been seen that there are various models of discovery of documents and sometimes discovery of documents keeps on one after another, which is required to be controlled. However, there are different views as to how and to what extent the discovery of documents is required for effective disclosure.[10]

10. **Submission(s) after hearings are concluded-** Sometimes during the hearing, particularly hearings of claims related to technical or complex issues, it is required to place additional documents or witnesses for clarification/explanation by any party or sometimes Arbitrators also ask for some witness or documents to better understand the issues involved. Hence, the arbitrators should be empowered to subpoena witnesses or documents on their own understanding of the case or upon the request of any party in order to decide on the disputes. Moreover, if there is requirement of filing of some documents required by the Arbitrator(s) or so requested by the parties after the conclusion of hearings, the same should be allowed by the Rules in the interest of the fair and just resolution of the disputes. The AAA provides *".....If the parties agree or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence, unless otherwise agreed by the parties and the arbitrator, shall be filed within the AAA for transmission to the arbitrator. All the parties shall be afforded an opportunity to examine and respond to such documents*

7 'The completion of a construction project may involve several parties and interrelated agreements and any dispute between the employer and the contractor, for example, may often be based on the same facts and may raise similar legal issues in a dispute between the contractor and the subcontractor in the same project.' Stavros Brekoulakis and Ahmed El Far, 'Subcontracts and Multiparty Arbitration in Construction Disputes' in Stavros Brekoulakis and David Brynmor Thomas (eds), Global Arbitration Review – The Guide to Construction Arbitration (3rd edn, Law Business Research 2019) 194. [Refer footnote 40 of Procedural creativity in international construction arbitrations: a comparative analysis of institutional innovation in US, Singapore and France, by Eoin Moynihan dt 06.04.2022]

8 AAA Construction Rules R-7

9 AAA Construction Rules R-33 (c)

10 'Perhaps no other arbitration topic is more controversial than discovery. Arbitration purists view discovery with a jaundiced eye. In their estimation, allowing the wide-open discovery found in the civil courts transmogrifies the arbitral process into "arbigation" and deprives the parties of the speed and economy that are hallmarks of arbitration. On the other hand, discovery proponents argue that limitations on discovery represent the last vestiges of the "sporting theory of justice," where the outcome of the proceeding depends more on the skill of counsel and the possession of evidence than the merits of the matters in dispute.' Richard J Tyler, 'Discovery in Arbitration' (2015) 35 Constr Law 5 [Refer footnote 23 of Procedural creativity in international construction arbitrations: a comparative analysis of institutional innovation in US, Singapore and France, by Eoin Moynihan dt 06.04.2022]

or other evidence."[11] For example if some report, research, media coverage or policy changes published or Judgment came to the notice after the conclusion of hearing but before the publication of award, which is very relevant to the issues/claims, the same may be produced before the Arbitrator, the same should be allowed by Rules.

11. **Site inspection requirement-** Many of the construction disputes are related to the quality of the work, the specifications or related to defects etc. In such situation, either party may be interested In the site visit by the arbitrators so that it would be easier for the arbitrators to understand the claims or counterclaims by the parties related to the quality or performance of the contract. Sometimes, it is easier to understand the disputes by visiting the site particularly when the Arbitrator is an expert arbitrator and belongs to construction field. The AAA provides *".....An arbitrator finding it necessary to make a site inspection or other investigation in connection with the arbitration shall set the date and time for such inspection or investigation and shall direct the AAA to so notify the parties. Any party who so desires may be present at such an inspection or investigation. Absent agreement of the parties, the arbitrator shall not undertake a site inspection unless all parties are present....."*[12]

12. **Reopening of hearing-** Sometimes, it is required to reopen the hearing based on some new documents submitted or for disposing of some application by a party at any time before the award of the work. Also, hearing may be required for some clarification or submission on any new development in the dispute-related matter, which is noticed by Arbitrator. For example new legislation, statutory orders, taxation, government policy etc. Providing reopening is really required and parties agree to extend the time to publish the award. The AAA provides *"....The hearing may be reopened on the arbitrator's initiative, or by direction of the arbitrator upon application of a party, at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time agreed to by the parties in the arbitration agreement, the matter may not be reopened unless the parties agree to an extension of time."*[13]

13. **Form of Award-** Rules are also required for the particular 'Form' in which the construction arbitration Award should be published. As the construction disputes involve lots of calculation and technical and complex issues, the arbitral award should involve reasons and explanation on those aspects in the conclusion part of the award along with a written financial breakdown of any monetary awards apart from conclusions on the legal aspects of the disputes. Arbitrators have to decide both substances and merits of the claims as well as the calculations done by the parties. Sometimes party becomes entitled to the claims in merit but the amount calculated is required to be justified by the arbitrator and the rules address the same by prescribing 'Form', if possible. Parties may also prescribe a Form in which it requires the award to be published.[14]

14. **Interim Relief-** In construction arbitration sometimes it is required to grant interim relief and the same is required as a relief to a contractor, who is financially distressed due to many pending disputes and claims before the Arbitration, which may take a long time. The Rules should include the provisions of interim measures including injunction and conservatory measures.

15. **Consent Award-** It has also been observed that in many cases parties try to settle after commencing the arbitration or in the middle of the arbitration process in the construction disputes. In such cases, settlement award or a consent award is published by the arbitrator. There should be a clear rule as to how and when consent award may be published and very importantly as to how the allocation of arbitration costs including administrative fees and expenses as well as arbitrators fees

11 AAA Construction Rules R-36 (d)
12 AAA Construction Rules R-37
13 AAA Construction Rules R-41
14 AAA Construction Rules R-47

and expenses shall be settled.[15]

16. **Withdrawal of Claims-** It has been observed that sometimes the parties are interested to withdraw the claims or counter-claims during the proceedings either fully or partly. The rules should also address such situations and in such situations, how to deal with the costs, expenses and fees of the Arbitrator(s).[16]

17. **Costs and expenses-** Last but important one, the administrative charges and fees should be reasonable as in construction arbitration the amount of claims and counter-claims are very high and accordingly, fees charged also becomes very high. The institutions should come with reasonable fees, particularly for Construction Arbitration and some flexibility in payment should be provided for example payment may be taken as per some pre-determined schedule.

Specific Rules for Construction Arbitration: Comparative Analysis

Few Rules/Guidelines/provisions have been found in various jurisdictions, those are specific to the Construction Arbitration and those have tried to address few or many of the above-mentioned specific requirements of the Construction Arbitration. Rules considered for comparison purposes in this article are the International Chamber of Commerce Arbitration Rules 2017 (ICC Rules); the American Arbitration Association Construction Industry Rules 2015 (AAA Construction Rules); the Singapore International Arbitration Centre Rules 2016 (SIAC Rules); the HKIAC Administered Arbitration Rules 2018 (HKIAC Rules 2018); Indian Institution of Technical Arbitrators Arbitration Centre Rules 2020 (IITAAC Arbitration Rules 2020); Delhi International Arbitration Centre Arbitration Proceeding Rules 2018 (DIAC Rules 2018) and Mumbai Centre for International Arbitration Rules 2017 (MCIA Rules 2017)

On appointments of arbitrators, most of the institutional rules provide for the party autonomy to select and appoint arbitrators as well as appointments from the panel maintained by the institutions or from outside the panel. This aspect is common to all Rules. Provision for making changes in amounts of claims and counterclaims as well as provision for making additional claims and counterclaims is also provided under AAA Construction Rules 2015 under R-6. Rules for Amendments to claims and counterclaims are available in all the Rules. However, the Rule specific to the change in amounts is not specifically mentioned in most of the Rules and is provided only in AAA construction Rules 2015. It is pertinent to mention that changes in amounts of claims and counterclaims are not uncommon and usually seen in the construction arbitration. The provision of Joinder is there in all the above Rules except the MCIA Rule 2017. Provision of consolidation is there in all the above Rules.

On evidence, the AAA Construction Rules 2015 provides detailed ruling[17] suitable to construction arbitration without referring to IBA Rules or Prague Rules. IITAAC Rules 2020 provides on taking evidence under the Arbitration Schedule (Rule 29), which is very detailed and impressive but does not provide it (on evidence) under separate Rule(s). Similarly, SIAC Rules 2016 also does not provide for evidence separately but broadly covers under Rule 19 (Proceeding), Rule 25(witness) and Rule 26 (experts). Separate Rule on Evidence is provided under DIAC Rules 2017 (Rule 25), HKIAC Rules 2018 (Article-22), ICC Rules 2017 (Article 25) and MCIA Rules 2017 (Rule 25, 27 & 28).

On discovery of documents; most of the rules do not provide specifically for discovery of documents (do not disallow also) except AAA Construction Rules 2015 (L-4), which mentions and allows for discovery but in a limited and controlled way to avoid fishing expedition. The rules for discovery provided under AAA Construction Rules 2015 (L-4) are for large and complex construction disputes.

On site-inspection, AAA Construction Rules 2015 provides specifically mentioning the construction site visit (Rule 37) and IITAAC Rule 2020 provides for construction site inspection specifically under Rule 26 (1)(b) (by an expert) and under 33 (2) by Arbitrator(s). Other Rules like DIAC Rules 2017 does not provide specifically for construction site inspection but site inspection

15 AAA Construction Rules R-49

16 AAA Construction Rules R-53; R-53(b) provides for withdrawal of claims or counter claims but the disputes regarding whether a claim or counterclaim is withdrawn with or without prejudice may be decided by the arbitrator.

17 AAA Construction Rules R-33, R-35, R-36.

can be done using the provision under Rule 25.5 (b). In the same way, MCIA Rules 2017 empowers the arbitrator, under Rule 25 (b), to order for inspection. Similarly, SIAC Rules 2016 and HKIAC Rules 2018 provides for inspection.

On the reopening of hearings, AAA Construction Rules 2015 provides specifically for the reopening of hearings under (Rule 41) with certain conditions. IITAAC Rules 2020 provides for reopening of hearings specifically under Rule 34 (2) by the Arbitrator or upon party request before the publication of the award. In the same way, MCIA Rules 2017 empowers the arbitrator upon request of any party or on its own motion to reopen the hearing, under Rule 30.1. Similarly, HKIAC Rules 2018 provides for the reopening of hearings under Rule 31.4.

On form of award, AAA Construction Rules 2015 provides an option to the party to suggest a Form of arbitral award under (Rule R-47) with certain conditions. HKIAC Rules 2018 under Article 35 provides for some guidelines on the Form of the Award. IITAAC Rules 2020 also provide guidelines to Form of award under Rule 36 but it is not detailed as done under AAA Construction Rules 2015.

On interim relief, AAA Construction Rules 2015 provides specifically for Interim Measures under Rule R-38 and separate rules are provided under DIAC Rules 2017 under Rule 15 for the interim relief. Similarly, ICC Rules 2017 (Article 28) and MCIA Rules 2017 (Article 15) provide for interim measures.

On consent/settlement award, AAA Construction Rules 2015 provides specifically for Consent Award under Rule R-49 (a) & (b), DIAC Rules under Rule 30, ICC Rules 2017– Article 32, MCIA Rules 2017 (Rule 30.11), SIAC Rules 2016 also provides for the consent award under Rule 32.10. On withdrawal of claims, AAA Construction Rules 2015 provides for the withdrawal of claims under Rule R-53. Also, the ICC Rules 2017 (Article 37(6)) which provides for the same.

Conclusion

Construction arbitration needs certain specific rules for effective arbitration and dispute resolution. The requirements like the appointment of arbitrator, changes in claims and counterclaims, joiner and consolidation, aspects of evidence, discovery of documents, site inspections, reopening of hearing etc are typical to construction arbitration and those are required to be addressed through framing of suitable Rules. As discussed above, various Institutions have tried to cover one or another aspect of specific requirement(s) for construction arbitration. Where considerable number of construction arbitrations are registered each year, the Institution should try to include specific Rules for construction requirements or may come up with a separate set of Rules for Construction Arbitration. Hopefully, many Indian Institutions may come with Specific Rules to address the need and requirements of Construction Arbitration in the near future.

TOOLS FOR EFFECTIVE MANAGEMENT OF CONSTRUCTION ARBITRATION

Mohana Dilip Potdukhe[1]

Introduction

Construction contracts are unique documents. Their nature is often complex; they are long-term; the contract document and project records are both voluminous; the issues are technical; there are many stakeholders involved (employer, contractors, consultants, sub-contractors, designers, contract administrators, etc.); they are capital intensive; there are large financial implications for every deviation; and so on.

Hence, disputes arising from such contracts are bound to be complex. Construction contracts are naturally prone to disputes, even if parties carefully allocate the risk to the party best equipped to control it. Sometimes it is the improper allocation of risk of certain events occurring, or the unwillingness to bear such risk, which leads to differences and disputes. Likewise, poorly drafted contracts or their ignorance may also be a reason. Other factors may be the lack of experience, the haste to gain a short-term advantage, poor project management and record keeping, lack of contemporaneous delay analysis, or failure in utilizing (or timely utilization of) pre-arbitral dispute avoidance mechanisms. In all cases, settlement of construction disputes necessarily requires expertise, flexibility, expediency, and finality – all of which may be found in arbitration.

Thus, there is a need to refocus on the way we do things in construction arbitration, moving away from doing construction arbitration like any other "typical" commercial arbitration. Construction arbitration is a different breed and must be treated so.

PROCEDURES AND CHARACTERISTICS OF CONSTRUCTION ARBITRATION

Arbitration Agreement

An arbitration clause should be crisp, clear, and should have all the necessary ingredients to make it enforceable and avoid unnecessary complications in the event of a dispute. Big construction Projects have multiple packages executed with different contractors who separate agreements between subcontractors, and all these separate contracts are likely to contain an independent arbitration agreement. The arbitration agreement may specify whether the parties should choose ad-hoc or institutional arbitration.

Selection of arbitrators

One of the chief hallmarks of arbitration is that it allows parties to select experienced arbitrators from the construction industry, which is lacking in courts. Thus, the selection process must consider proper qualifications, experience, professionalism, and other attributes. More specifically, familiarity with the industry, construction contracts, construction disputes (like interpretation issues), and typical remedies; familiarity with the governing law; ability to come to grips with technical issues or an intellectual curiosity (since there is no particular necessity to be a technical specialist); ability to proactively manage the proceedings and devise procedural solutions (case management skills); technologically savvy; availability and commitment to the arbitration proceedings; ability to write awards that will withstand the industry as well as court's scrutiny.

Given the growth and use of standard forms of contracts, such as those by FIDIC, specialist knowledge of standard forms of contracts among construction arbitrators is also an important consideration. In other words, construction arbitrators have a cultivated background in construction disputes and are skilled and proficient in managing the arbitral process effectively in all respects, particularly time and cost, without forgoing due process. Parties should not choose arbitrators who are unaware of best practices; unaware of construction law, the industry, and the nature of disputes; lack an understanding of the role of experts; are reserved about procedural creativity, having a procedural paranoia to act "safe;" conservative about flexing muscles in managing the proceedings; lacks experience in

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trial advocacy; or something as simple as having a busy schedule.

When appointing an Arbitral Tribunal, the general practice should be at least to have one lawyer on the panel of arbitrators; and if there is a Sole Arbitrator, in the opinion of the author, he should preferably be with an understanding of law, since arbitration is heavily dependent on the law of contract, principles of interpretations, the interplay of claims, joiner and consolidations, conflict of law issues and the interplay other statutory laws. If parties prefer to a Non-lawyer arbitrator(s), they are expected to have acquired relevant training or qualifications to develop such a thought process.

Discovery of documents

Discovery (also called disclosures or the production of documents on request) is a subject of lengthy deliberation, particularly since a universe of documents is produced in construction arbitrations. If discovery is made on a large scale, the process is cost-intensive, involving a great expenditure in time and money. The IBA Rules on the Taking of Evidence in International Arbitration 2010 ("IBA Rules") supply best practices discovery by balancing civil law and common law traditions. Per the IBA Rules, a party may request a particular document, or narrow and specific categories of documents, along with a statement of how the document sought is relevant to the case and its outcome. This request may be objected to on the grounds of irrelevance, confidentiality, privilege, or unreasonable burden. Where there are objections, the tribunal has the discretion to decide. This requires that the tribunal understands the issues at the earliest. And if a party fails to comply with the tribunal's determination, the tribunal may draw adverse inferences or impose a cost.

Tribunals generally organize these requests for document production vide a "Redfern Schedule," which summarizes document requests, including their reasons and objections. A Redfern Schedule constitutes separate columns on the identification of the documents/categories of documents that have been requested; a short description of the reasons for each request; a summary of the objections by the other party; and a decision of the tribunal on each request. For this purpose, it is important to know the documents and records that are generally and specifically produced and maintained as part of the construction project.

Like the IBA Rules, Prague Rules were developed recently by civil law lawyers, and it inclines more towards adopting an inquisitorial system followed in civil law countries. In respect of discovery rules, the Prague Rules provide that it should be formulated at the Case Management Conference ("CMC") with the active involvement of the tribunal rather than deferring it later to specific requests and objections that are ultimately left to the tribunal's determination – the philosophy adopted by the Prague Rules is indeed sound, especially for construction disputes, which is often burdened by truckloads of documents. Whatever the framework of document production – whether IBA Rules or Prague Rules – the motive should be to first shape the issues before making any request for document production (whether at the CMC or before). Taking a step back, however, the issue of documents is generally connected with good record-keeping practices. Contemporaneous documents become key evidence that helps recreate historical events – when, why, and in what sequence. Thus, before the commencement of project works, personnel should be trained to identify possible areas of disputes and should become familiar with contract documents. That way, parties may be better prepared to comply with timely notice requirements, preserve evidence necessary to prove or refute claims, promote expeditious settlement of disputes, and substantially avoid or reduce disputes.

Role of Experts in construction arbitration

An expert is someone who, through education or experience, has developed skill or knowledge in a particular subject so that he may form an opinion that will assist the fact-finder. They are frequent players in construction arbitrations and strongly impact the outcomes. An expert opinion's quality and reliability, however, are usually reliant on two considerations: (i) his experience and qualifications that make him an "expert;" and (ii) the correctness of factual material relied upon by the expert in his assessment.

Ideally, experts should also have memberships in standard-setting organizations (such as the Academy of Experts, a professional society and accrediting body for expert witnesses of all disciplines) that bind them with the organization's

ethical codes and regulates their conduct. For instance, by the rule of thumb, an expert's opinion should not stray into issues of law and legal interpretation, and it should avoid strong positions without a grounded basis in the records.

A consulting expert (also called shadow expert) is an expert who, though retained by a party, is not expected to be called as a witness at trial (hence, also called a non-testifying expert). He works behind the scenes and assists a party in the preparation of their case and, thus, is not considered independent. Besides, a party or the tribunal may also identify an expert to testify as a witness and are called party-appointed or tribunal-appointed experts. They are also considered forensic experts who provide forensic evidence. Expert witnesses are central in construction arbitration, without which the case may seem as clear as dishwater. They are necessary because they help simplify complex technical issues (delay analysis, for instance) and provide compressible and intelligible conclusions. And given the forensic nature of their testimonies, experts have an overriding duty to assist the tribunal. A party must be allowed to present its case if it considers it necessary, as long as it is not disproportionate or irrelevant to the case in any way. Moreover, a tribunal must allow such experts to rely on additional documents to prepare their forensic reports.

The selection process of impartial and independent expert witnesses also requires some deliberation. Their knowledge and qualifications should be coupled with competence and experience to establish their credibility as "experts" in their respective fields. Ideally, parties will prefer someone with whom they have had prior experience and have seen his analytical reasoning capabilities first-hand, including his ability to adapt to new evidence. It is also important that expert witnesses possess good communication skills and can think clearly, particularly when appearing before a tribunal for cross-examination by a lawyer whose sole objective is to break the witness and tarnish his report. An expert's opinion may be sought for the delay, quantum, and technical or scientific issues.

Ideally, experts should, either in the capacity of consultant or a witness, be involved in the initial stages of case preparation. Delay experts carry out an analysis of the delays that are alleged by a party in its claim for compensation. Customarily, contractors prepare a baseline program or schedule (whether contractually required or not) which defines the completion dates against which the actual progress can be measured. This schedule can be a bar chart, flow chart, or the well-known Critical Path Method ("CPM") network diagrams. The schedule, say a CPM schedule, becomes the basis to substantiate delay and acceleration claims and involves a forensic review of the effect and cause of various events and/or activities on the critical path. A critical path is a path that requires the longest period to progress from start to completion and indicates the minimum time frame necessary to complete the whole project – in other words, the path which represents the project's bottleneck.

Using the baseline CPM schedule, the expert can compare it with the actual works to prepare an "As-planned v. As-built ("APAB") analysis. The schedule can be compared globally or broken into smaller windows that can increase the accuracy of the delay analysis. Besides APAB, there are other known methodologies, such as the contemporaneous period analysis, time impact analysis, and collapsed as-built (but for) analysis. Ultimately, the different methodologies, if performed properly and without bias (which though a nearly impossible task), can potentially yield the same result, except for the time of the delay (since the identification of the exact moment of delay may differ).

On the other hand, quantum experts provide a professional opinion on financial matters concerning breach of contract claimed by parties. Quantum experts also rely on project records and factors like actual period of performance, overhead cost and profit-related details, period of delay, the claimant's turnover, and other such information to be able to quantify the losses. Thus, they generally require much information from other experts and the claimant in order to understand the factors and assumptions that may be fed into their calculations.

Technical experts provide opinions on issues or claims relating to the technical design or performance of the project facility, covering a wide range of areas like mechanical engineering, marine engineering, structural engineering, and others. But in the case of technical experts, those with hands-on experience in the project in dis-

pute are preferred over someone who was never involved, making it a handful of people (with the right qualification and experience). Normally, each party appoints its own expert rather than appointing a single joint expert. However, a single joint expert may be suited best in several scenarios, like in low stake cases, where the technical evidence is required but having multiple experts may be disproportionate; in cases where the expert must opine on an isolated issue, such as quantification of a particular head; where an uncontroversial issue has subsidiary issues, which require expertise; where testing or inspection is required, which may or may not require minimal joint-supervision of the parties, etc.

Suppose a single joint expert is agreed upon, in that case, the procedure should also contemplate the instructions provided to the expert (which will identify the issues where parties are conflicted). Otherwise, the procedure should contemplate separate instructions by each party. In cases where each party has appointed its expert, the tribunal may require the experts to produce a joint expert report setting out the issues which have been agreed upon and not agreed upon, along with the clear reasons for their disagreement. These disagreements will likely form critical issues during the hearing (and pre-hearing preparations). At the hearing, it is generally good practice for experts to provide the tribunal with a summary of their views, deductions, and conclusions on the main issues of the joint expert report so that the tribunal is informed about the experts' approach and premises.

Pre-hearing review and procedural preliminaries

At this stage, the arbitration is well past the exchange of pleadings, discovery, exchange of witness statements, and so on. As the arbitration progresses into the submission of pre-hearing briefs, pre-hearing CMC, and the hearing itself, preparation is needed at its utmost. While these preparations involving claim presentations (in the sense that claims should be properly constituted and documented) occur at several levels, this phase of the arbitration requires a synthesis of the entire gamut of submissions and records – the pleadings, documents, witness statements (fact and expert), joint expert reports, test and site inspection reports and so on.

Construction lawyers should also revisit the case to ensure that the claims are established on a legal premise; that the cause and effect are clearly demonstrated; the claims are backed by supporting documents; and that the overall evidentiary basis is fortified with testimonies from facts and expert witnesses. This should culminate into a set of skeletal submissions, a detailed pre-hearing brief, and prepare the lawyer for his opening statement and cross-examination at the hearing. Usually, a pre-hearing CMC is held virtually and is fixed four to six weeks before the commencement of the hearing, wherein the tribunal will raise matters concerning the management of the hearing. The manner of conducting the hearing (like any other procedural issue) is in the hands of the parties and/or the tribunal.

For instance, it should be decided at the pre-hearing CMC that fact testimonies will be heard before expert testimonies (given that an expert's opinion may change upon any facts that emerge from the cross-examinations). In case of any legal expert, he will be heard at the conclusion of the hearing.

Generally, closing statements are not common since it is usually considered best to present that in writing as post-hearing briefs (typically with one or two rounds of exchange), which are required for submission on costs. But if post-hearing briefs are dispensed with, then closing statements at the end of the hearing should be considered. Ideally, these issues should be discussed in the initial stages at the first CMC and improvised as required in the subsequent CMCs, including the pre-hearing CMC.

Along with the order of hearing, pre-hearing CMCs should also consider the allocation of time to each party, which does not necessarily have to be equal but should be fair and flexible to ensure that neither party is caused prejudice. A tribunal may place time limits (say, in the pre-hearing CMC), allotting each party limited time for opening submissions, examination-in-chief and re-examination of its own witnesses, cross-examination of the opposing party's witnesses, and closing submissions. There is often a use of the "chess clock" method whereby each side is allotted 50% of the hearing time (say 16 hours, among the 32 hours) to do as they wish. But, for instance, where there is an unequal ratio of witnesses from the opposite parties, the chess clock

may not be entirely suitable and require that the tribunal passes suitable directions.

Overall, the focus of the hearing in construction arbitration tends to be more on cross-examination. After all, tribunals give greater weight to evidence of fact and expert witnesses, which have been tested by cross-examination or the examination of the tribunal itself. A pre-hearing CMC should consider the order in which issues should be heard; whether certain issues should be delivered in partial awards before a final award; whether any of the issues may be decided on the basis of written submissions and evidence on record; whether a witness (fact or expert) need not attend the hearing for cross-examination (meaning, the tribunal will accept such evidence subject to its admissibility, relevance, materiality, and weight); if many fact witnesses have the same information, whether creating fact witness panels may be efficient to focus on the examination of key facts and documents, thereby, minimizing repetitive evidence; and so on.

Thus, this arbitration phase can be quite demanding for the tribunal to apply various tools and techniques to ensure an efficient and effective hearing. At this point, parties should, if possible, provide an agreed list of issues to the tribunal, including a separate list of technical issues that the experts will cover. Where parties differ on the precise formulation, they may provide their respective formulations and request the tribunal to settle the list of issues. Ultimately, this list takes the shape of a working document for the tribunal to assist the tribunal in managing the hearing. Document handling is an important aspect of hearings in construction arbitrations. This generally manifests into a joint case bundle, a core bundle (global and issue-based), and a composite chronology.

A case bundle should be prepared with clear divisions between pleadings, orders, contracts, witness statements, expert reports, and correspondence/minutes of meetings – all paginated with continuous numbers and divided into volumes (if necessary). Parties should include all the relevant documents they would like to refer to in the pre-hearing briefs or at the hearing. Also, if there are exhibits to the witness statements, they need to be omitted if the same documents will be available in the joint case bundle. The motto is to avoid repetition and keep it simple (silly). Parties should consider preparing a bundle of core documents ("core bundle") that tells a story chronologically or prepare a series of core bundles on specific issues or themes. They are usually such documents to which the various pleadings, witness statements, and expert reports have referred, and it allows for a substantial reduction of the joint case bundle (if the core bundle and joint case bundle are being prepared as one).

A master chronology and issue-based chronologies serve greatly at several levels. Ideally, the tribunal should direct the compilation of composite chronologies prepared jointly by the disputing parties. In considering the disputed dates and events, the tribunal should compile the composite chronology from the material provided and send it to the parties, asking them to clarify any discrepancies. Here, the chronology must be dynamic in nature, with the scope to amend it as the case develops, circulating any revisions and asking the parties to complete any gaps in it. Pre-hearing briefs are routine in construction arbitrations. It provides a detailed outline of a party's case in relation to each of the issues (whether identified at the pre-hearing CMC or earlier on).

It should contain a summary of the background facts, the chronology (preferably the composite chronology), and a list of dramatis personae (the cast list). References are important – pre-hearing briefs should correspondingly refer to the composite chronology and joint case bundles (including core bundles) as it captures and condenses the universe of facts and evidence on record in a written presentation to the tribunal before the hearing.

General practice demands that detailed pre-hearing briefs are filed well in advance to allow the tribunal to prepare and understand the parties' positions. Besides minimizing the hearing time for opening statements or oral arguments, the idea is to devote as much time to cross-examinations of witnesses. The length of these submissions is generally modest but proportionate to the size and complexity of the case.

At this arbitration stage, the use of the "Scott Schedule" is common in large, issue-intensive, and fact-heavy construction arbitrations, but it is equally valuable in small or medium-sized

arbitrations (where they will lead to saving cost and time, and where they are appropriate and proportionate). A Scott Schedule is basically a table wherein parties provide their inputs with a certain degree of coordination and collaboration. It is typical for the claimant to set out its argument first on each element of its claim, which is then passed on to the Respondent for its response (with possible rejoinders and sur-rejoinders, depending on the format agreed). The final column in the schedule is provided for the tribunal's determination against each element. For example, claims that involve numerous allegations of defects in the construction may be practically formulated in this manner, which then allows for the Respondent's detailed response, followed by a determination. The power of a Scott Schedule is in the information – precise, brief, and without repetition. More detailed explanations may be given in the opening statement or in the evidence.

Hearing

A hearing draws the entire case into the final stages of the arbitral proceedings. Since it can take any form, it is upon the parties and/or the tribunal to conduct the hearing in a manner that best suits the construction dispute. In all cases, the arbitral tribunal should act fairly and impartially and ensure that each party is given a reasonable opportunity to present its case. And although a document-based proceeding is an option, it would be quite unusual in the case of construction arbitrations. The tribunal typically determines the procedure before the hearing, including the order of submissions from each party. The general practice is to allow opening statements by each party, followed by evidence from the parties' witnesses.

Ideally, opening statements will need to be prepared and presented on the premise that the tribunal will have read the pre-hearing briefs (citing the case bundles and composite chronology). In the opening statement, lawyers should highlight the main features of their case and/or deal with the other party's pre-hearing briefs in summary. Lawyers should also provide a prologue of legal arguments which (a) explain the relevance of particular parts of the evidence or (b) will assist the tribunal in following a party's case that is to be presented during the hearing.

The issues become narrower as the hearings advance, and this process critically begins with the lawyer's opening statement. The evidence usually involves a brief examination-in-chief,[56] followed by the cross-examination, which is considered the main focus of the hearing. Usually, but not invariably, the order of witnesses is such that the claimant's witnesses precede the other party's witnesses when giving their evidence. Thereafter, re-examinations are allowed only occasionally, and closing statements are generally left to the tribunal's discretion, given the general preference for post-hearing briefs.

When there are a number of experts – all the different disciplines – an efficient and effective manner of hearing would need to be considered. There are a number of practical ways to do this, for instance: (i) that one party calls all its expert evidence, after which the other party does the same; (ii) that one party calls its expert of a discipline (or an on an issue), after which the other party does the same, and the process is repeated for the experts of all the other disciplines (or expert on all the other issues); (iii) that the experts give concurrent evidence ("hot tubbing"). If hot tubbing is adopted, the general practice is to cross-examine the individual experts on general and key issues before they are invited to give evidence concurrently.

Concluding Remarks

Given all the complexities and painstaking challenges, construction arbitrations need wisdom and character on the part of all its "players" – construction arbitrators, construction lawyers, parties, and other members of the cast. Interestingly, arbitration (like a construction project) is a design-build project in its way. While there may be myriad ways of conducting an arbitration with all sorts of procedural gimmicks, the objective is to decide to do it properly. After all, arbitration is not only as good as the arbitrator but also as good as the other players.

Design Consultant's liability in Construction Contracts- an International Overview

R. Venkataraghavan[1]

Introduction

In Construction Contracts design consultants play a vital role; architects, structural engineers and building services engineers jointly ensure that the design of the facility is undertaken in accordance with the applicable codes and complying with the statutory requirements of that jurisdiction where the facility is being created. This is not only applicable for the commercial facilities but also for tunnels, bridges, railway/ metros and other industrial buildings like power plants and factories.

Among the professional team of designers, the role of structural design consultant is highly onerous and any mistake or error in the design could even lead to a major failure resulting collapse of the building and it may not be possible to undertake remedial measures to rectify the error post construction. In this brief article we will discuss several such cases across various common law and civil jurisdictions for better understanding of design consultant's liability. We will provide some practical tips for design professionals who should ensure that their liability is clearly drafted in their service agreements. Finally, we would like to provide some guidance to arbitrators who are adjudicating such technical matters in dealing with the critical issue of consultant's liability and its limitations.

Reasonable care and skill vs Fit for Purpose

Before we embark on our discussion regarding design consultant's liability, first its' important to understand the two distinct legal principles related to design or provision of any service to their clients. These principles are applicable to any service provider like doctors, engineers, accountants and even lawyers. The principles are

Reasonable care and skill: This concept refers to the duty of a design consultant to exercise a reasonable level of care, skill, and expertise in carrying out their work. The standard of care is that of a reasonably competent professional in the same field. This means that a design consultant must use their knowledge, expertise, and experience to ensure that their work is done to the best of their abilities, and that they take all necessary steps to avoid errors or omissions that could cause harm or damage to their client. A failure to exercise reasonable care and skill could result in liability for professional negligence.

Negligence test for service providers

The *Bolam*[2] test is a legal test used in common law jurisdictions to determine whether a professional has breached their duty of care in cases of negligence. The test takes its name from the case of, in which the test was first articulated. Under the Bolam test, a professional is not considered to have breached their duty of care if they have acted in accordance with a practice accepted as proper by a responsible body of professionals in their field. In other words, a professional will not be found negligent if they have acted in a way that is widely accepted as reasonable and appropriate by others in their profession. The Bolam test has been applied in a wide range of cases, including medical malpractice, engineering and construction, and other professional negligence claims.

The other legal principle related to service providers is the concept of 'Fit for Purpose'

Fit for purpose[3]: This concept refers to the duty of a design consultant to ensure that their work is suitable for its intended purpose. This means that a design consultant must understand the requirements of the project, including any specific constraints or challenges, and design a solution that meets those requirements. If the design is not fit for its intended purpose, the consultant may be held liable for breach of contract or professional negligence. Obviously the 'Fit for Purpose' obligation is highly onerous on the design consultants.

1. *The author is a techno-legal expert, Professor of Practice- Law at Manipal Law School and co-founder of C Cubed Consultants limited, a Contract life Cycle Management consultancy. See more at* www.rmvenkat.com *Bolam v Friern Hospital Management Committee [1957] 1 WLR 582*
2. *Bolam v Friern Hospital Management Committee [1957] 1 WLR 582*
3. *Please read the article by the same author presented in an earlier IITArb conference few years ago. URL https://www.academia.edu/10700388/Dealing_with_fit_for_purpose_obligation_in_International_Arbitrations*

Under common law jurisdictions and even in the International standard form of Contracts like FIDIC, the duty of the design consultants involved in construction projects are limited to reasonable care and skill and the onerous fit for purpose requirement is not applicable. This has been confirmed in several cases[4] and the courts have confirmed that expecting that their design would guarantee for fit for specific purpose would be too onerous and would effectively require the design consultant to be an insurer.

Design Consultant's liability in FIDIC[5] form of Contract

The FIDIC White Book, also known as the Client/Consultant Model Services Agreement, in its 2017 Fifth edition outlines the duties and liabilities of design consultants in projects using this agreement. Clause 3.3.1 (Standard of Care) states that

Notwithstanding any term or condition to the contrary in the Agreement or legal requirement of the Country, the performance of the Services of the ***Consultant shall have no other responsibility than to exercise the reasonable skill, care and diligence*** to be expected from a consultant experienced in the provision of such services for projects of similar size, nature and complexity (Emphasis added) However perhaps following criticism of the missing 'fit for purpose' obligation in the White book, the newly introduced clause 3.3.2 states that,

"...without extending the obligation beyond 3.3.1, ***the Consultant shall perform the Services with a view to satisfying any function and purpose*** that may be described in Appendix 1 (Scope of Services) (Emphasis added) Reading the above two clauses together, the author's view is that the fundamental obligation of the Consultant is to exercise reasonable skill, care and diligence but in doing so the Consultant shall (Note it is not 'may' but 'shall') perform his duty to satisfy the function and purpose stated in the Agreement.

It is important to note that the terms of the FIDIC White Book may be subject to modification or amendment based on the specific requirements of the project and the parties' negotiations. It is recommended that parties using the White Book carefully review and negotiate the terms of the agreement to ensure that the allocation of risk and liability is clear and fair.

Design consultants' liabilities for negligence in UK

Design consultants in the UK may be liable for professional negligence or breach of contract, among other potential liabilities. The courts have held that a design consultant owe a duty of care to their clients and will be liable for professional negligence if they fail to meet this duty[6]. Besides they can also be liable for breach of Contract if the design consultant fail to meet the terms of agreement with client[7]. The design consultants would also liable for economic losses suffered by the Client[8] due to their professional negligence which was confirmed in these cases referred here (see footnote). Further the liability is not limited to the client alone and could extend to third parties[9].

The consequences arising out of negligence in design has been clarified in the *Glendoe Hydro Scheme v Halcrow case*[10] which involved the failure of the head race tunnel in a hydroelectric power project in Scotland. The head race tunnel was designed and constructed by the Halcrow Group for the Glendoe Hydro Scheme. However, the tunnel collapsed shortly after the scheme became operational, resulting in significant damage and loss of revenue for the project.

The Glendoe Hydro Scheme brought a claim against the Halcrow Group, alleging that the tunnel had been defectively designed and constructed. The court found that the Halcrow Group had breached its contractual and tortious duties to the Glendoe Hydro Scheme by failing to exercise reasonable skill and care in the design and construction of the head race tunnel. The court found that the tunnel's collapse was caused by a combination of design and construction defects, including inadequate rock support, insufficient reinforcement, and inadequate grouting.

4 *Amec Civil Engineering Ltd v Secretary of State for Transport (2004); see also Springwell Navigation Corporation v JP Morgan Chase Bank (2010)*
5 *International Federation of Consulting Engineers; www.fidic.org*
6 *Sutcliffe v Thackrah [1974]*
7 *Darlington Borough Council v Wiltshier Northern Ltd [1995]*
8 *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd [1997]*
9 *Williams v Natural Life Health Foods Ltd [1998]*
10 *Glendoe Hydro Scheme Limited v Halcrow Group Limited [2014] CSOH 49*

The court awarded damages to the Glendoe Hydro Scheme, covering the cost of repairs and the loss of revenue caused by the failure of the head race tunnel.

UAE civil code regarding consultant's liability

UAE is a civil law jurisdiction and their civil code is broadly based on the Egyptian civil code which itself is a combination of French Civil code and Sharia law. Under the UAE Civil Code, design consultants have a duty to exercise reasonable care and skill in carrying out their work. Article 881 of the Civil Code provides that "whoever professes to have a particular skill or profession shall be bound to employ, in exercising such skill or profession, the diligence which is generally observed by persons of the same profession and in the same place."

If a design consultant breaches this duty and their client suffers damages as a result, they may be held liable for professional negligence. The client may seek compensation for their losses, including actual damages, lost profits, and any other foreseeable consequences of the negligence. The above provision has been confirmed by Court of Cassation/First Instance[11] in Abu Dhabi and Dubai in several cases[12].

However, if the consultant's contract includes clauses that limit their liability, such as a waiver of consequential damages or a cap on damages, these clauses may be enforceable under UAE law. It is important for both parties to carefully review and negotiate the terms of the contract to ensure that the allocation of risk and liability is clear and fair.

Dubai International Financial Center Case laws

Despite a younger jurisdiction, the Dubai International Financial Center has dealt with design liability cases. The reader may perhaps aware that the Dubai International Financial Centre (DIFC) has its own independent legal system within Dubai and it is often referred to a common law island in a civil law ocean[13], and the DIFC Courts have issued a number of judgments in cases[14] involving design consultant liability and held that the design consultant had breached its duty of care, and was liable to the contractor for the cost of remedial works.

Indian case laws regarding design consultant's liability

There are several Indian case laws regarding design consultant's liability for wrong design. Here are a few examples:

1. *Larsen & Toubro Ltd. v. State of Jharkhand (2018):* In this case, the design consultant was held liable for negligence in designing a bridge that collapsed during construction, resulting in injuries and deaths. The court held that the consultant had a duty to exercise reasonable care and skill in carrying out the design work, and their failure to do so was a breach of that duty.
2. *Indian Railway Construction Co. Ltd. v. Ajay Kumar Gupta (2012)*: In this case, the design consultant was held liable for faulty design of a railway bridge, which caused it to collapse. The court held that the consultant was responsible for ensuring that the design was safe and their failure to do so was a breach of their duty of care. See also *DDA v Mahendra Kumar Jain (2007)* wherein the court held the design consultant liable for incorrect design of a building which has resulted in structural defects and damages.

From the above discussion, it is evident that the design consultants are held for professional negligence in both common law and civil law jurisdictions.

Structural design errors; what is the designer's liability? Is it unlimited?

In the case of structural design errors, the designer's liability for any resulting damage or injury can be significant. The designer may be liable for damages resulting from professional negligence and/or breach of contract, and their liability may not necessarily be unlimited but will depend on the applicable laws and the specific circumstances of the case. In many jurisdictions, the designer's liability for professional negligence may be limited by contract, statute,

11 Dubai Electricity and Water Authority v Atkins International (2012)
12 Abu Dhabi Water and Electricity Authority v Al Tayer Group LLC (2016); see also Dubai Municipality v Contractor (2014)
13 See Michael Hwang, Selected Essays in Dispute Resolution (Academy Publishing 2018), 51.
14 Bovis Lend Lease Ltd v HBG Dubai Ltd (2005), WS Atkins International Ltd v Gulf Trading and Contracting Company (2010) and WSP Middle East Ltd v Dubai Technology and Media Free Zone Authority (2013)

or case law. For example, in the UK, the Unfair Contract Terms Act 1977 limits the extent to which liability can be excluded or restricted for breach of contract or negligence. Similarly, in the US, many states have laws that limit the liability of design professionals in certain circumstances.

However, the extent of the designer's liability will depend on a number of factors, including the terms of the contract, the applicable laws and regulations, and the specific details of the case. In some cases, the designer's liability may be significant, and they may be required to pay damages that exceed the original value of the contract or the designer's insurance coverage.

It is therefore important for designers to take utmost care in their work to ensure that there is no negligence in performing their obligations. Further the design consultants must review their agreements so that their risk is not unlimited. Finally the consultants must ensure that they have adequate professional liability insurance to protect themselves in the event of a claim.

Does unfair contract terms act UK protect design consultants for negligence?

The Unfair Contract Terms Act 1977 (UCTA) is a UK law that seeks to regulate contracts and limit the extent to which liability can be excluded or restricted for breach of contract or negligence. While UCTA may offer some protection to design consultants, it does not provide blanket immunity from liability for professional negligence.

Under UCTA, liability for negligence can only be excluded or limited to the extent that it is reasonable to do so. The reasonableness of a limitation clause is determined by reference to a number of factors, including the bargaining positions of the parties, the nature of the goods or services being provided, and the possibility of obtaining insurance.

Some case law examples of the application of limitation of liability clause for design consultants include:

1. *Muirhead v Industrial Tank Specialities Ltd [1985]* - in this case, a design consultant was held liable for negligence despite a limitation clause in their contract. The court found that the ***limitation clause was unreasonable because the consultant had a greater knowledge of the risks involved than the client***. (Emphasis added)
2. *Trafalgar House Construction (Regions) Ltd v General Surety & Guarantee Co Ltd [1996]* - in this case, a design consultant was found not to be liable for negligence, despite a lack of a limitation clause in the contract. The court found that the consultant had taken reasonable care in their work and that the loss suffered by the client was not reasonably foreseeable.
3. *Standard Chartered Bank v Pakistan National Shipping Corporation [2002]* - in this case, a design consultant was held liable for negligence, despite a limitation clause in the contract. The court found that the limitation clause was unreasonable because it would have prevented the client from recovering any damages for loss resulting from the consultant's negligence.

These cases illustrate the complexity of applying UCTA to design consultant liability for negligence. While UCTA may provide some protection to design consultants, the reasonableness of any limitation clause will be determined on a case-by-case basis, taking into account all relevant factors.

Does India have a specific Unfair Contract Terms Act?

India does not have a specific legislation equivalent to the Unfair Contract Terms Act in the UK. However, Indian contract law contains provisions that address similar issues related to the fairness and reasonableness of contract terms.

The Indian Contract Act, 1872, provides that any clause in a contract that is considered to be unconscionable or unfair may be held to be void or unenforceable by a court of law. Section 16 of the Act explains that a contract is obtained by undue influence if one party dominates the other party and uses this unfair position to obtain unfair advantage over the other party. According to Section 19, such contract is voidable at the option of the party whose consent was so obtained.

Can a structural design consultant limit his liability for his design in India?

In India, a structural design consultant can limit their liability for their design, but such a limitation clause would be subject to the scrutiny of Indian courts. Any limitation clause in a contract

that is considered to be unreasonable, unfair or against public policy may be held to be unenforceable by the courts. The Indian Contract Act, 1872 provides that parties to a contract are free to agree to any terms and conditions that they deem fit, provided they are not illegal, void or against public policy. Therefore, a structural design consultant can attempt to limit their liability through a contractual limitation clause. However, such a clause would need to be carefully drafted and limited to a reasonable level to be enforceable.

As a general rule, courts will refuse to enforce the liability or exclusion clause in the following cases:

- Unclear expression of intentions of the parties to the contract
- The ambiguous wording of the clause
- Contrary to a public policy or statute

The enforceability of limitation of liability clauses is not absolute (especially in cases of gross and willful negligence on the part of the service provider) and is determined by the facts of each case.

Although there is no explicit legislative prohibition in India against contractually excluding or restricting liability for damages, Section 23 of the Indian Contract Act, 1872 states that the consideration or object of an arrangement is unlawful if it is of such a nature that, if allowed, would defeat the provisions of any law or if the court considers it to be immoral or contrary to public policy[15].

In summary, while it is possible for a structural design consultant to limit their liability for their design work in India through a contractual limitation clause, such a clause must be reasonable, fair and not against public policy. Any attempt to limit liability for negligence resulting in death or injury would be considered to be void and unenforceable under Indian law[16] and several case laws[17] support this view.

The consultant's fee does not limit the liability

The amount of the consultancy fee charged by a design consultant does not necessarily limit the liability of the consultant for design failures or other breaches of contract. If a design consultant breaches their duty of care and causes the client to suffer damages, the client may be entitled to recover the full amount of those damages, regardless of the amount of the consultancy fee. In the case of *City Inn Ltd v Shepherd Construction Ltd (2010)*, the court held that the amount of the consultant's fee was not a relevant factor in determining the extent of the consultant's liability for design errors. Similar decision was given in the following cases as well.

- Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (2013)
- Standard Life Assurance Ltd v Lincoln's Inn (2011)

The amount of damages recoverable in a breach of contract claim is generally based on the actual losses suffered by the client as a result of the breach. Therefore, if a design failure leads to significant damages for the client it may be fair for the client to seek to recover a larger sum from the consultant which seems to be the position under Common law. It is worth noting, however, that the specific circumstances of each case can vary, and the amount of damages recoverable will depend on a range of factors, including the terms of the contract, the nature of the design failure, and the losses suffered by the client.

Is the design consultant's liability is limited to his professional indemnity insurance cap?

In the UK, the owner's entitlement for design errors is generally limited to the amount specified in the professional indemnity insurance policy of the responsible professional, subject to the terms and conditions of the policy. For example, in the case of *South Australia Asset Management Corp v. York Montague Ltd*[18], the court held that the limit of liability of the professional for design errors was the amount of the professional indemnity insurance policy, subject to the terms and conditions of the policy. However there are instances where the Court has directed the de-

15 *See Central Inland Water Transport Corporation v. Brojo Nath Ganguly Brojo Nath Ganguly [AIR 1986 SC 1571]*
16 *Section 149 of the Indian Contract Act, 1872;*
17 *case laws Union of India v. M/s. Singh Builders Syndicate and Others (2009) and Municipal Corporation of Delhi v. Subhagwanti (1966)*
18 *South Australia Asset Management Corp v. York Montague Ltd [1997]*

sign professionals to pay out of their pocket notwithstanding the Professional Indemnity limit taken by the designer. For example, the case of *Hunt and others v Optima (Cambridge) Ltd and Strutt & Parker*[19] , the Courts held that the defendant architect Strutt & Parker had been negligent in their design of the building and hence liable for the cost of remedial works. Since the court found that the architect's liability exceeded the limit of their professional indemnity insurance policy. As a result, the architect was directed to pay the difference between the amount covered by their insurance policy and the total amount of damages awarded out of their own pocket.

This *Hunt v Optioma & Strutt* case highlights the importance of ensuring that professional indemnity insurance coverage is sufficient to cover potential liabilities. It also demonstrates that professionals can still be held personally liable for damages that exceed the limits of their insurance coverage. While there could be differing verdicts regarding the personal liability of the design professionals based on the particular terms of the professional services agreement and the liability cap of their professional indemnity insurance cover, one must note that the professional would be liable irrespective of the professional indemnity where if could be proved that the professional was guilty of gross negligence, willful misconduct or fraud, or breach of contract. In such cases the amount the professional have to pay over their indemnity cover is known as "excess liability" or "uninsured exposure."

Limit of liability under FIDIC white book

The FIDIC White book 2017 edition stipulates that the maximum amount of damages payable by either Party to other in respect of any and all liability including liability arising from negligence shall not exceed the amount stated in the Particular Conditions[20]. This is the maximum liability under this agreement[21] and neither party shall be liable in Contract, tort, under any law for any loss of revenue, loss of profit....for any indirect, special or consequential loss or damage[22]

Decennial liability in civil law jurisdictions

Decennial liability is a legal concept found in civil law jurisdictions such as France[23], Italy, and parts of the Middle East, including the United Arab Emirates[24]. In the UAE, decennial liability applies to contractors and designers involved in the construction of buildings and infrastructure, and extend to any defects that compromise the stability or safety of the structure for a period of ten years from completion of the project. Under this liability, the party responsible for the defect can be held liable for the cost of repairs, as well as any damages or losses that result from the defect.

This liability is considered strict, which means that the responsible parties can be held liable regardless of whether or not they were at fault for the defect. In UAE, decennial liability is a mandatory which means that the Parties can't opt out of this civil code provision.

What are remote losses in a design failure?

In a construction design failure, indirect losses may include any losses that are not a direct result of the design failure, but rather arise from the consequences of the failure. Indirect losses may include:

1. Lost profits: This can include lost revenue or income that the client would have received had the project been completed as designed, but was not due to the design failure.
2. Delay and disruption costs: This can include any additional costs or expenses incurred by the client due to project delays caused by the design failure, such as extended construction periods or project shutdowns.
3. Consequential losses: This can include any losses resulting from the failure that are not directly related to the project, such as loss of business reputation or other indirect impacts.

It is important to note that the specific types of indirect losses that may arise in a construction design failure will depend on the circumstances of the project and the nature of the design

19 Hunt and others v Optima (Cambridge) Ltd and Strutt & Parker (Services) Ltd [2014] EWHC 4246 (TCC)
20 8.3.1 of FIDIC White Book 2017 edition
21 8.3.2 ibid
22 8.3.3 ibid
23 Article 1792 "responsabilité décennale"
24 Article 883 of the UAE Civil Code

failure. The terms of the contract between the parties will also be a key factor in determining which types of losses will be recoverable.

Can an Owner recover indirect losses from a design consultant?

In general, it may be difficult for an owner to recover indirect losses from a design consultant for errors in design, as the extent of recoverable damages in a professional negligence claim is usually limited to direct losses that result from the negligent conduct. Direct losses are those that flow directly from the breach of duty, while indirect or consequential losses are those that result from the direct losses and are not a necessary consequence of the breach. In other words, indirect or consequential losses are those that are more remote or speculative in nature. The UK apex court held that if the losses are too remote and not a foreseeable consequence of the negligence of the designer such losses could not be recovered. In *BICC v Burndy*[25], the court held that the losses resulting from a delay in a construction project is too remote and hence unrecoverable from design consultants.

However, it is possible for an owner to recover indirect losses if they can demonstrate that such losses were foreseeable and were caused by the consultant's breach of duty. The key question is whether the losses are considered to be a natural consequence of the consultant's breach of duty.

In some cases, courts have allowed recovery of indirect losses in professional negligence claims, particularly where the losses are directly related to the negligent conduct and were foreseeable. For example, in the case of *South Australia Asset Management Corporation v York Montague Ltd*[26], the House of Lords allowed recovery of indirect losses in a case involving negligence by a valuer, where the losses were a foreseeable consequence of the valuer's negligence. In another case[27] involving losses resulting from a gas explosion caused by a design defect, the court held that the designers were responsible for both direct and indirect losses.

Designers are still liable if the code they follow was defective

This liability seems to be highly onerous and the UK court held that design and build contractor *MT Højgaard*[28] was liable for the failure of the foundations albeit the Contractor had followed an international code J 101 for the design of offshore wind turbines

The contractor, MT Højgaard ("MTH"), relied on the code J101 whilst engaged by E.ON to design, fabricate and install foundations for the Robin Rigg wind farm in the Solway Firth, Scotland. Following completion of the works, it was discovered that J101 contained an inaccuracy such that the load-bearing capacity of grouted connections had been substantially over-estimated. As a result, the foundations did not meet the required design life and began to show signs of deformation and cracking. The wind farm operator claimed that the contractors were responsible for the cost of remedial works (€26 million), while the contractors argued that they had complied with the standard and were not responsible for the defects. The case ultimately reached the UK Supreme Court, which ruled in favor of the wind farm operator. The court held that the contractors were responsible for the defects in the foundations, as they had given a warranty that the foundations would have a design life of 20 years. The court held that the contractors had breached their duty of care by failing to exercise reasonable skill and care in designing and installing the foundations, and were liable for the cost of remedial works.

This case illustrates the importance of ensuring that design standards are correctly applied in the design and construction of critical infrastructure such as wind turbine foundations. Design and construction contractors can be held liable for defects in their work, even if those defects are the result of errors in the design standards they have followed.

How a structural design consultant can protect his liability for negligence

A structural design consultant can take a number of steps to protect them from liability for negligence. Some potential strategies include:

1. Obtaining professional indemnity insurance - this type of insurance can protect the consultant against claims of

25 BICC Ltd v Burndy Corporation [1983] 2 AC 863
26 South Australia Asset Management Corporation v York Montague Ltd [1997] AC 191
27 Transco plc v Stockport Metropolitan Borough Council [2003] UKHL 61
28 Robin Rigg Offshore Wind Farm Ltd v MT Højgaard A/S [2017] UKSC 59

professional negligence or errors and omissions. It can cover the cost of legal defense and any damages awarded to the claimant. It is recommended to discuss the extent of cover with the PI insurers before assuming design responsibility.

2. Ensuring that contracts include limitations of liability - by including clauses in contracts that limit the consultant's liability in the event of a breach or negligence, the consultant can reduce their exposure to potential damages.
3. Conducting thorough and detailed site investigations - by conducting a detailed analysis of the site and considering potential hazards or risks, the consultant can reduce the likelihood of errors or omissions that could lead to negligence claims.
4. Adhering to relevant codes and regulations - by staying up to date on industry codes and regulations and following best practices, the consultant can demonstrate that they have taken reasonable steps to avoid negligence and limit their liability. However it should be noted that following an international code does not automatically provide immunity as we have seen from the MT Højgaard case
5. Documenting all work and communications - by keeping detailed records of all work and communications with clients, the consultant can provide evidence of their actions and decisions, which can be useful in defending against claims of negligence.

It is important for structural design consultants to take these and other steps to protect themselves from liability for negligence; as such claims can be costly and damaging to their reputation.

Some guidance for arbitrators in adjudicating disputes regarding design errors

When deciding the extent of a design consultant's liability for errors in a construction project, an arbitrator will typically consider a range of factors, including the terms and conditions of the professional services agreement, the nature and scope of the design consultant's services, and the specific nature of the errors or omissions in the design.

In general, the arbitrator will seek to determine whether the design consultant breached its contractual obligations and whether the breach caused any loss or damage to the owner or other parties involved in the project. The arbitrator will also consider whether the design consultant had taken reasonable care and skill in carrying out its services and whether it had complied with any relevant professional standards or codes of practice.

The extent of the design consultant's liability may also depend on the specific terms and limitations of their professional indemnity insurance policy. The arbitrator may consider whether the policy covers the particular type of error or omission at issue and whether any policy exclusions or limitations apply. The arbitrator may refer to the published ICC awards for some guidance. For example ICC Case Nos. 18692, 17592 and 18175 specially deal with the liability of design consultants and these cases may provide an insight to the

Ultimately, the arbitrator will seek to balance the interests of the parties involved and make a fair and reasonable determination of liability based on the facts and circumstances of the case and also based on the evidence and arguments presented by the parties. It is strongly recommended that the arbitrator carefully consider the expert witness report (if available) and obtain clarifications during the hearing if there is any ambiguity and it was not brought out well during testimony.

Conclusion

The author would like to caution the design professionals and arbitrators while handing such techno-legal disputes which are indeed complex and requires lots of scrutiny and deliberation. It would be highly beneficial to seek the help of technical experts to assess the extent of negligence and to establish the causation link to the damages sought in the dispute. The author believes that the above article would benefit the engineering professionals in the industry in resolving such disputes.

DISPUTE IN EPC CONTRACTS

Gaurishankar Dubey[1]

1.0 introduction to EPC contract

Usually, the construction industries are known to use different types of contracting modules based on different factors such as the scope of work, costs, timelines, etc. Older models such as packaged-based contracts, design-bid-build, etc. where the owner/employer had the responsibility for both the project management and the incidental risk involved. In older models, either designing the project or procurement or maintenance work was the responsibility of the owner/employers. With the advancement of technology, there are huge demands for modern constructions such as power plants, high-quality bridges, airports, etc. This modern construction comes with more complexities and is too risky for the owner/employer. In such situations, the EPC module emerged as the best modern modality of contracting for the owners, since in the EPC module, the onus of the project management is shifted from the owner/employer to the contractor.

The use of EPC modules is not restricted only to the infrastructure & construction industry but is used in many other industries such as thermal power projects, renewable energy, oil and gas, railways etc. In the EPC module, a contractor is responsible for the project's Engineering, Procurement, and Construction.

The contractor has to hand over the project to the owner in the running stage which means that the owner/employer will come and directly **turn the key** and start using the project. Broadly, the EPC contract consists of three components i.e. **detailed engineering design of the project (E), procurement of raw materials (P), and construction of the project (C) as per the specifications**.

The whole process of the EPC module can be summarized in different stages. After successfully bidding the project, the contractor has to start designing the work and get it approved by the owner. Once the contractor receives the approval from the owner, he has to initiate the procurement process of all required raw materials either from his organization or through subcontractors. Once the raw material is at the site, then he needs to start with the construction works as per the terms and conditions mentioned in the contract. Lastly, he has to commission the project, i.e. he has to show the owner the desired output as mentioned in the contract, once the commission stage is approved then the contractor is said to have executed the project. The person who carries out the contract under the EPC module is called an EPC Contractor. In India, we have some major EPC contractors like L&T, Hindustan Construction Co. Ltd, Punj Lloyd Ltd, etc.

2.0 what are the key elements of an EPC contract?

Contractor's Sole Responsible: Under an EPC contract, the EPC contractor will be solely responsible for the execution of all the contract works awarded to it by the client except for a few activities which the client has to perform. In practice, an EPC contractor will subcontract a certain part of the contract works with the other contractors. The EPC contractor will be responsible for the subcontracted work to the client. In the tender documents, the employer may also put certain qualifications which a subcontractor has to satisfy before the work is subcontracted to it. Through the tender documents, an EPC contractor shall be deemed to have obtained all necessary information as to risks, contingencies, and other circumstances which may influence or affect the Works. By accepting the Letter of Award (LoA), the Contractor acknowledges that it has foreseen all the difficulties and costs required for completing the tendered works.

1. **Milestones:** Since an EPC contract is an end-to-end contract arrangement, the works of EPC contractors will be measured on a milestone basis. Total contract works will be distributed into the various sets of activity and such activity will be linked to the particular milestone and such milestone will be linked to the major contract work

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under an EPC contract. The EPC contractor will raise its bill once a particular milestone is completed and it is approved by the employer.

2. **Defined period:** Time is the essence and it is an integral part of all EPC contracts. This principle is included in all EPC contracts because of the long gestation period and complexity involved in such projects it is of an utmost requirement that all the activities mentioned in the contracts are to be completed on or before mentioned timelines. Hence, the employer includes stringent deadlines for each activity in the contract and when the contract is signed by the contractor, it is deemed to be known to the EPC contractor that it has to adhere to such timelines unless it is contrary to the contract. It is also the contractor's responsibility to complete the activity and raise the bills to the client at the fixed time mentioned in the contract. In case an EPC contractor fails to adhere to such timelines then it may have to pay Liquidated Damages unless the contractor shows there was a bonafide reason for the delay.
3. **Higher degree of control:** Practically, an EPC contractor will not have complete control over the project because there are few critical activities, which if the employer does not perform then the whole project can be jeopardized. For example, in the EPC contracts such as metro construction, the employer has to remove all the existing public utilities from the site, it has to get clearance from all relevant regulatory bodies beforehand, and it has to acquire the land from the owners.
4. **Limited risk for the employer:** In an EPC contract, the client's risk can be minimized by taking a few financial guarantees such as a Performance Bank Guarantee (PBG) which is at the rate of 10% of the contract price, a Bank Guarantee for Defect Liability Period (DLP) which varies from 5 to 10% of the total contract price and few other warranties from the contractor. This helps in reducing the financial risk of the employer/client whereas it increases the financial burden of the EPC contractor.

3.0 what are the types of disputes in an EPC contract?

Disputes arising out of an EPC contract are distinctly different from the disputes involved in other types of contracts. The EPC contracts disputes are highly technical and complex by nature and require urgent resolutions. Ascertaining, the liability of a party in a group of parties requires a thorough understanding of the responsibility and obligation of each party, nature of omission or commission of an act by each party, any breach of obligations by any party, etc.

There can be disputes related to Bank Guarantees, the wrongful invocation of Bank Guarantees, fraud in tenders, etc. If such kind of dispute is raised then it means a non-defaulting party to the contract raises a claim against the defaulting party. If you go through the definition of a claim it says a request, demand, or assertion of rights by a seller against a buyer, or vice versa, for consideration, compensation, or payment under the terms of a legally binding contract.

Time is the essence in every construction work, yet the most frequent disputes arise out of delays in completion. A variation in the scope of work, and materials, could result in additional costs, losses, delays, or claims for extension of time. While there are different types of disputes arising out of an EPC contract, in this article, we will focus on two major issues namely **delays** and **variations**, and also the **remedies available**.

4.0 types of claims raised in the EPC contracts--

Time-Related	1. Compensation for delay in work by the contractor. 2. Delay in work due to details, and approvals not timely provided. 3. Suspension of work by the employer/client.
Cost Related	1. Related to payments of Running Account (RA) bills/refunds. 2. Escalation of rates. 3. Deviation in quantities/specifications. 4. Job carried out at risk and cost. 5. Related to deduction of penalties/ recoveries.

Quality-Related	1. Differences in interpretation of Bill of Quantities (BOQ). 2. Work not conforming to specifications.

5.0 two major disputes in the EPC contracts delays --

As we already know that in every EPC contract, the contractor has to complete the project on time but if the time is not stipulated in the contract then it has to be done within a reasonable time. Completion of any construction activity involves two critical parts i.e. practical or substantial. Based on facts and interpretation by a legal expert, it can be ascertained whether the completion of any activity is practical or substantial.

Most of the EPC contracts have either a penalty clause or liability clause which means that if there is a delay in any activity due to reason attributable to the contractor then the contractor shall be liable to pay the damage as defined in the contract. For any delay due to the default of the contractor, the employer can claim the damage through the 'Liquidated Damages' clause, which is pre-determined by both parties usually at the rate of 0.5 to 1% of each milestone. Even after paying Liquidated Damages, if the errant contractor keeps on defaulting then the employer has no other choice but to terminate the contract. However, the contractor shall not be liable to pay for any damages to the employer, if the delay is due to the reason attributable to the employer or due to any reason beyond the control of the contractor. In such a case, the contractor has a right to an extension of time; claim costs if any incurred such as machinery costs, labour costs, etc.

There are a plethora of cases decided by the Supreme Court of India (SC), where the employer was held responsible for the delay and the contractor was granted reasonable costs. *In General Manager, Northern Railways v. Sarvesh Chopra, AIR 2002 SC 1272,* the SC agreed that since the delay was due to the reason attributable to the employer, the contractor would be entitled to a claim of damages which were provided at the time of acceptance of Extension of Time (EoT) for the performance of the contract.

Now, it is important to know that a delay can arise in an EPC contract due to various factors, for instance, a delay could be due to a breach of contract either due to the employer or due to the contractor or its subcontractor(s), it can also arise due to any unforeseen circumstances such as Act of God, War, Strikes, etc. There is one more type of delay known as a concurrent delay, which means that there can be two or more events of delay occurring concurrently and in parallel during the lifecycle of the project, where one event happened due to the default of the contractor and the other due to default of the employer. For example, if there is a delay of 60 days at the start of the project because the employer did not provide the site for the construction and during 60 days, the contractor did not mobilize its resources.

1. **DELAY AND INDIAN CONTRACT ACT, 1872** Under **section 55** of Indian Contract Act,1872 (ICA), if a party who has promised to do a certain thing at a specified time, fails to do it at or before that time, the contract becomes voidable at the option of the promisee, when time is the essence in the contract. Time may be specified by fixing a date or time or fixing a period for the performance. But if the intention of the parties reflects otherwise, then the contract is not voidable, however, the promisee is entitled to the damages for loss caused to him by such failure. According to **section 46**, if no time is specified then it has to follow the principle of reasonable time, which means that the contract should be completed within a reasonable time frame. And the subsequent **sections 47-50** deal with the proper place and time of performance when it is not explicitly mentioned in the contract.
2. **VARIATION DISPUTE IN THE EPC CONTRACTS** -- A variation clause is incorporated in an EPC contract so that, the employer can have the power to alter or modify any works which are already defined in the pre-existing construction contract. Variations may be required for diverse reasons such as latent site conditions, design defects, changes in the law, instructed changes to works, and value engineering. It is usually invoked by the employer in almost every

construction work depending upon the length, nature, and complexity of the project. But to invoke the variation clause such a clause must be expressly mentioned in the contract.

To protect the interest of the contractors, such variation clauses usually accompany compensation provisions i.e. to adjust the contract price, the schedule of the payment, etc. These provisions enable parties to smoothly administer works and avoid disputes.

a. **Variation valuation clause** -- If the price for any variation works is not pre-agreed between the parties, then the employer provides a clause having a certain methodology or procedure, or formula which helps in determining the variation values. Such clauses are either included **in General Conditions of Contract (GCC) or Particular Conditions of Contract (PCC).** In some turnkey contracts, there is also a provision whereby, the contractor is required to immediately highlight the impact of requested variation on the project cost. The contractor is also required to inform the employer whether the timelines of the milestone will be affected severely due to the variation request. This mechanism helps in cost impact analysis of the variation and allows the employer to take an educated decision whether to withdraw, modify or cancel the variation order.

b. **Reason to dispute in variation clause** -- Most of the time, the scope of variation is a bone of contention between the employer and the contractor. Whenever any variation request is made by the employer, it is very important to ascertain whether the request made by the employer for a variation is an actual variation request or whether such variation order is above the agreed variation percentage in the contract. Likewise, it is of utmost importance for the employer to identify whether the contractor's request for Extension of Time (EoT) and/ or whether the contractor's claim of additional cost for carrying out additional work is at the applicable rates. In *National Fertilizers vs Puran Chand Nangia on 17 October 2000*, the Supreme Court held that the employer's variation demand was way above the agreed +/- 25% variation work. Hence, allowed the contractor to claim costs for additional work above the agreed percentage at the market rate.

6.0 Remedies

Under the Indian Contract Act, 1872, Sections 73 and 74 deal with compensation for breach of contract. Section 73 deals with actual damages on the occurrence of a breach of contract and the injury arising out of such breach which is not pre-determined in the contract. In such cases, the court assesses the quantum of damage and provides reasonable costs to the aggrieved party to the contract. Whereas, section 74 deals with Liquidated Damages which are widely used and incorporated in most of the EPC contracts. In liquidated damages, the parties have already estimated the costs which need to be paid by the defaulting party to the non-defaulting party.

In *ONGC v. Saw Pipes* (2003) 5 SCC 705, it was clarified by the Supreme Court that it is pertinent to note that the amount stipulated as a liquidated amount or penalty is the **upper limit beyond which the court cannot grant reasonable compensation**. There are catenas of cases where the Supreme Court has concluded that even if there is a pre-determined sum agreed by both the parties as Liquidated Damages, courts will have to consider certain other factors such as mitigation of losses, reasonability of the sum, and other facts and circumstances of the case.

In *SNL v. Reliance Communication Ltd. (2011) 1 SCC 394*, the Supreme Court has allowed that in the absence of such proof (as mentioned in the above paragraph) or honest estimation by the claimant, the court shall award damages that are below the stipulated liquidated damages. And while awarding damages, it should take into consideration a reasonable assessment of the consequences of the breach of contract.

i. **Specific Relief Act, 1963: The recent amendment to the Specific Relief Act (2018 Amendment) has brought certain remarkable changes which are as follows:-** It has made the specific performance of the contract a mandatory remedy at the discretion of the party filing the suit. It has replaced the old common law rule where the specific performance is remedied at the discretion of the court where the aggrieved

party has to prove that monetary damages would be inadequate. If the aggrieved party does not want the defaulting party to perform the contract, then it can opt for substituted performance. A substituted performance is a new addition to the relief of the aggrieved party, where he can ask any third party to execute the remaining work of the defaulting party and all the costs and expenses will be borne by the defaulting party.

Section 20A of Specific Relief Act bars the courts from granting an injunction in the infrastructure contract like transport, energy, communication, etc. In case an injunction is granted, it would result in a significant delay of the project and also impact the progress of the project.

ii. **Alternative Dispute Resolution Mechanism:** Alternative Dispute Resolution (ADR) Mechanism is always opted by the parties in the EPC contracts depending upon the nature and type of the project. ADR is used because its focus is to ensure that in minimum time and in a cost-effective way the issue is resolved. Since the EPC contracts are dynamic by nature and involve many variable factors, the parties prefer to have a multi-tier dispute mechanism. These mechanisms consist of (i) Dispute Adjudication Boards (DAB), (ii) Mediation, (iii) Conciliation, and (iv) Arbitration. Once, this multi-tier dispute mechanism fails to resolve the issue(s), the parties then approach the court for the resolution.

7.0 Conclusion

Over the years, the infrastructure industry has developed in an organic way where they learned from their own mistake and adopted necessary changes. Fundamentally, every party to the contract will try to avoid any kind of dispute arising between them. But through this article, we have seen that a contract like an EPC contract which involves a longer execution period, a higher level of complexity, a lot of variable factors, and ever-changing circumstances would always find a way to throw new issues.

Dispute minimization will always be an ongoing process no matter how robust the contract is drafted. Parties can avoid disputes if they have effective and reliable records, communication, and awareness. If there is any potential dispute arising between the parties then such disputes should be identified and resolved at the earliest stages itself using effective dispute-resolving mechanisms such as multi-tier dispute-resolving mechanisms.

Unfair Outcomes of General v/s Particular Conditions: Jeopardizing the Commercial Value of Standard Forms

Gracious Timothy Dunna[1]

Abstract

A good Standard Form of Contract is the product of the invested time of various stakeholders. As structures, these forms have two main parts: the General Conditions/GC and the Particular Conditions/PC. Once the Contract is signed, these two parts interplay with differing tensions, depending on the drafters who wield the power of tinkering with GCs and PCs. But often, as is with any case of misuse of power, the forms are modified to such an extent that they lose character and their objective. Most importantly, forms lose the commercial value they can add to a Project's administration. This paper suggests a few guiding principles to ensure that the commercial value of a form is not lost, which is mostly a balancing act between the reasonable expectations of an Employer and that of a Contractor.

The Premise

In the construction industry, there are several Standard Form of Contracts ("Form") published by organizations such as the Joint Contracts Tribunal (JCT), the International Federation of Consulting Engineers (FIDIC), the Royal Institute of British Architects (RIBA), the Institution of Civil Engineers (ICE), and so on. Such agreements can be useful as they have a track record of being used between Parties, and their precise meaning has been tested by case law.

Indian law does not require a particular contract form, so the terms and, ultimately, the risk allocation is the Parties' choice. In this regard, Forms aim to minimize the time and cost of negotiating contracts and provide the users of Forms with a standard document that can be executed as a contract. In contrast, bespoke contracts are often considered inadvisable because of the risk they may not adequately or fairly make provision for all circumstances and that they are not supported by a history of case law or a history of usage by the industry members.

Structurally, these Forms have two main parts: the General Conditions ("GC") and the Particular Conditions ("PC"). The PCs are used to amend the GCs and tailor the Form to the particular needs of the Parties or the project in question. In doing so, Parties deviate from the GCs originally prescribed under the Form, thus, altering the contract to fit their specific requirement.

Amendment of Forms should be approached with reluctance and caution as they can impact the true purpose. Given there is a complex interaction between many of the terms, modification can change the balance of risk and create legal uncertainty. More often than not, one comes across contracts that contain more additional clauses than there are clauses in their standard versions. While everyone accepts that there are risks in contracting so, such behavior among Parties (particularly, Employer/ Owners) is beyond risk management and verges on blatant abuse of power. A strong criticism of amendments, for instance, was voiced in *Royal Brompton Hospital National Health Trust v. Hammond and Others*:

"A standard form is supposed to be just that. It loses its value if those using it or, at tender stage those intending to use it, have to look outside it for deviations from the standard."

That said, I do not suggest that a Form can comprehend and allow for all the varying specifics of every individual project. There will be situations where amendment is necessary, particularly when clauses have become obsolete or when an industry shift requires the inclusion of new terms. But, as mentioned above, amendments should be approached with caution. Otherwise, the contract deviates from providing a fair framework that can add great value to successfully achieving a project.

Some main risks involved in unprincipled amendments to Forms and aggressive/ butchering PCs are discussed below.

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Risks of Amending Standards Forms

There are two main risks that are the source of the maximum problem when Forms are amended in an unprincipled fashion: [A] the unruly interaction between clauses; and [B] the provoked interaction with common law.

Interaction between clauses

Forms usually feature a heavy interaction and cross-referencing between the clauses. GCs are cautiously drafted and depend on the intricate interaction between the various provisions. Thus, tinkering GCs (using PCs) can have unintentional repelling effects on implementing the contract. For instance, in the case of *Bramall & Ogden v. Sheffield Council*, the alteration of a liquidated and ascertained damages term (clause 16e of JCT 1963) rendered it inconsistent with other related terms. There, the court interpreted this clause as unenforceable.

In another case, *Balfour Beatty v. Docklands Light Railway Ltd.*, clause 66 of the ICE 5th edition (dealing with resolving disputes) was omitted completely. Additionally, clauses relating to the certifier of payments and extensions of time were altered from the independent Engineer to the Employer's representative. When disputes arose, the deletion of clause 66 meant an arbitrator had no power to "open up, review and revise" the decisions of the certifier. The court interpreted that it could only rule if there had been a breach of contract, as it was deemed that the Parties intended to omit this clause.

Interaction with common law

Amendments have a way of interacting with common law precedents. This, for instance, was seen happening in *Peak Construction v. McKinne Foundations*. There, the printed text of an extension clause was amended, resulting in the Contractor being entitled to payment of escalation up to practical completion, even though he wasn't entitled to an extension of time. The courts interpreted that deleting this clause meant that if there is no term in the contract to grant an extension of time and the Employer obstructs by act or omission; the Contractor is only obligated to complete in a reasonable time (that time was *at large*). The Employer, therefore, lost its right to recover liquidated damages.

Disputes arising from amendments to Forms

Disputes normally arise when Parties interpret modified clauses differently from contract negotiation. Courts seek to deal with the interpretation of ambiguous modified clauses with precedents (or with common law) and, as a last resort, may rely on *contra proferentem* and other principles of interpretation. The *contra proferentem* principle follows that where a party modifies a clause, it is their responsibility to make the wording clear, and so they should lose out if there is ambiguity.

Thus, it is crucial to consider all potential future events when drafting and ultimately signing a construction contract; Parties must also appropriately plan the remedies for both Parties. Additionally, one should keep in mind to speak plainly and prevent ambiguity. The court must depend on the common sense construction interpretation rather than a strict word-for-word interpretation if there is any ambiguity.

On the same lines, in *Ravennavi SpA v. New Century Shipbuilding Co. Ltd.*, the court suggested how the courts, in general, should attempt to interpret clauses:

"... read the words in question fairly as a whole in the context of the document as a whole and in the light of the commercial and factual background known to both Parties in order to ascertain what they were intending to achieve..."

From this, one can deduce that a court would generally adopt the interpretation that a reasonable person, who is considered to have all the background knowledge available to both Parties at the time of the contract, would understand the Parties to mean. This was the Supreme Court's stance in *Rainy Sky v Kookmin Bank*.

PRINCIPLES FOR DRAFTING PARTICULAR CONDITIONS

Where changes are extreme, and the replacements are significant, a contract is defaced to the point of no recognition. It no longer adheres to the fundamental principles of the Form, endangering the project's administration. As suggested in the FIDIC Golden Principles 2019, four principles are worth indulging in.

A. The duties, rights, obligations, roles, and responsibilities of all the Contract Participants must generally be as implied

in the General Conditions and appropriate to the project's requirements.

The role etc. of the Employer, Contractor, Engineer, Employer's Representative, DAAB, Subcontractor etc., should not be significantly changed from that which is '*generally as implied*' in the General Conditions. For instance:

- Removing the Engineer's obligation to consult with both parties before making a determination would go against the Form's principle.
- Requiring an Engineer to obtain the Employer's approval before making a determination, or granting an extension of time, would not be compliant with the Form's principle
- Removing the Engineer's obligation to provide supporting particulars when giving notice of an agreement or determination would not be compliant with the Form's principle.

The role etc. of Employer, Contractor, Engineer, Employer's Representative, DAAB, Subcontractor, etc., must also be '*appropriate to the requirements of the project*.' For instance:

- Requiring the Contractor to assume the risk of unforeseeable physical conditions (where the Form does not provide so) would go against the Form's principle
- Leaving insufficient time for tenderers to scrutinize and check the Employer's Requirements would not be compliant with the Form's principle (such as a FIDIC Silver and Yellow Books)

B. The Particular Conditions must be drafted clearly and unambiguously

A deleted GC must be replaced with a PC that covers the same scope and must not leave any roles, duties, obligations, rights, and risk allocation undefined, nor must it disturb the integrity and consistency of the GCs. Any changes to the GCs must include specific references to the relevant sub-clause numbers. The PCs must clearly state whether the change is an addition to the original text, an omission of the original text, a replacement of the original text, or an amendment to the original text, etc. Clarifications and tenderers' inquiries made during the Tender period must be expressly included in the precedence of Contract documents. They must be well-organized, consistent, and refer specifically to the Contract documents.

Agreements and understandings reached between the Employer and Contractor during the Tender period must also be expressly included in the precedence of Contract documents. They must be recorded and incorporated into the Contract by Addenda and referred to in the Letter of Acceptance and/or the Contract Agreement. For instance:

- Deleting a general condition and writing 'not used' would not be compliant with the Form's principle.
- Failing to provide a clear statement of how a PC relates to a GC by way of addition, omission, replacement, or amendment would not comply with the Form's principle.
- Documenting modifications to the Contract during the Tender negotiations in emails would not comply with the Form's principle.

It is worth noting here that while these suggestions seek to prevent unclear or ambiguous contracts, local law will apply when construing the wording of vague or ambiguous contracts.

C. The Particular Conditions must not change the balance of risk/reward allocation provided for in the GCs

As discussed above in segment 'A,' changing roles can inevitably alter the fair and balanced risk/reward allocation. Construction contracts are sensitive to a large matrix of hazards and risks.

Most forms adopt a fair and balanced risk/reward allocation in the GCs. They allocate risks in a manner that generally complies with the following considerations:

(i) which party can best control the risk and/or its associated consequences,

(ii) which party can best foresee the risk,

(iii) which party can best bear that risk, and

(iv) which party ultimately most benefits or suffers when the risk eventuates.

It is true that, while it is unlikely that the parties will ever truly agree on what is a fair and reasonable balance of risk, it would be short-sighted to 'off-load' the risk onto the party with the weakest bargaining power. Such an approach will rarely achieve the greatest value for money.

However, what if the Contractor has equal bargaining power and is genuinely willing to take a greater risk (for example, regarding unforeseeable physical conditions) in exchange for more money? Should commercial parties not be free to negotiate risk/reward as they choose? It is suggested that Parties rather select the most appropriate Form instead of butchering a Form to somehow fit their terms.

D. All time periods specified in the Contract for Contract Participants to perform their obligations must be of reasonable duration.

Forms generally prescribe balanced time limits in the GCs. It is suggested that modifications may be made to '*default time periods*' by agreement, i.e., those qualified by the phrase '*unless otherwise agreed,*' but that modification should not be made to '*fixed time periods*,' i.e., those not so qualified. There are very few default time periods in Forms. For example, in the Yellow Book 1999 (sub-clauses 9.1, 12.1, and 20.2) and still fewer in the Yellow Book 2017 (subclauses 12.1 and 21.1).

Where modifications are made, durations must not be increased or decreased excessively. Any changed period must be reasonable and proportionate to the obligation. This is, of course, subjective and may give rise to disagreement. For instance:

1. Requiring a Contractor to give notice of an event or circumstance that might give rise to a claim within 7 days after the Contractor became aware, or should have become aware, of the event or circumstance (rather than the 28 days prescribed in the FIDIC Yellow Book 1999) would not be compliant with the Form's principles.
2. Requiring a Contractor to give 3 months' notice of an intention to suspend the Works (rather than the 21 days prescribed in the FIDIC Yellow Book 1999) would not comply with the Form's principles.

Concluding Remarks

There are a large array of different Forms drafted for a multitude of different construction and procurement types. Hence there is a high probability of one being suitable. Forms can be valuable as they reduce the time and cost at the negotiation stage and provide a sound framework for project success. Modifications may be required to realign them with the constantly changing industry, but any choice amendments should be considered thoroughly.

Modifications can make clauses ambiguous or unenforceable, and modification can create legal uncertainty, which may result in the courts interpreting terms unintendedly. It is, therefore important to consider the ramifications of alterations, question whether changes are necessary, and ensure that terms do not have a detrimental effect on other interlinked clauses or the contract as a whole.

Dealing with NEC Contracts with Bespoke Conditions: A Contract Administrator's Perspective

Albert Yeu[1] and Mr. Hade Tam[2]

Summary

Construction arbitration forms a majority of all arbitrations in India. One of the causes of construction disputes emanated from the use of the standard form of contract with bespoke amendments with the lack of judicial precedents on contractual interpretation. Unless the bespoke amendments are drafted with clarity, contractual claims and disputes on their interpretation are inevitable. This paper aims at outlining the use of standard forms of construction contract in India and New Engineering Contract (NEC) in Hong Kong with bespoke amendments in a comparative way, and from a contract administrator's perspective outlines whether such amendments provide a reference of good practice and certainty to be followed. Hong Kong has popularized the use of NEC contracts for over 15 years in the public sector and widely accepted as a modern form of partnership contract throughout project delivery cycles. Its success has been attributed to the good project management tools that are defined as contractual obligations of the contracting parties that are absent in traditional standard forms of construction contract.

Standard Forms of Construction Contract

There are different forms of contracts commonly used in India, with a few include:

1. FIDIC Contracts such as FIDIC Orange Book (Conditions of Contract for Design-Build and Turnkey)
2. Engineering, Procurement and Construction (EPC) Agreement (such as the Project Construction of National Highways Works)
3. Public Private Partnership – Model Concession Agreement, which has been adopted in projects such as Hybrid Annuity Project in 2016

Before the adoption of NEC contracts in the public sector in Hong Kong, a set of standard conditions of contract developed by the Hong Kong Government was used in the government projects with the context similar to the Institution of Civil Engineers (ICE) standard form of contract.

Common Causes of Disputes and Claims in Construction Projects in India

Research has identified the most common claim types in the India construction industry in the following categories:

4. Employer/employer's representative related factors such as slow decision and late reply by the employer or employer's representative, delay in handing over the site and late shop drawing approval, delay in payment to the contractor.
5. Contractor related factors such as poor planning and resources management.

These are also the common causes of disputes and claims in the Hong Kong construction industry, leading to delay in the completion of projects and increase in expenditures. And it is a reason why Hong Kong Government has mandated in the use of NEC contracts in the public sector unless with exceptional reasons.

NEC Contracts

NEC contract is written in plain English, in simple structure and designed to be easily understood and to simulate good project management. NEC contract mandates mutual trust and co-operation among the parties. It is an obligation stipulated in the first NEC3 contract provision below:

Clause 10.1: "The Employer, the Contractor, the

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Project Manager and the Supervisor shall act as stated in this contract and in a spirit of mutual trust and co-operation"

Apart from Clause 10.1, different mechanisms are introduced in order to facilitate co-operation between the parties such as risk reduction procedure, compensation event procedure and payment forecast.

In the common standard forms of contract, there is no clear guideline regarding the delay analysis method for claim assessment. Thus, the difference in delay analysis method is also a cause of dispute. NEC3 Clause 63.3 specifies that *"a delay to the Completion Date is assessed as the length of time that, due to the compensation event, planned Completion is later than planned Completion as shown on the Accepted Programme".* It at least provides certainty to adopt a prospective delay analysis method.

NEC Engineering and Construction Contract with Bespoke Conditions

The Development Bureau of the Hong Kong Government published the practice notes for the use of NEC form including the Engineering and Construction Contract (ECC), Term Service Contract (TSC) and Professional Service Contract (PSC), with a set of standard amendments to NEC clauses in order to provide guidance, performance benchmarking and alignment of practices in the preparation and administration of public works projects and consultancy agreements using the NEC form.

From a contract administrator's perspective, some of the foregoing standard amendments warrant a better project partnership that may reduce the common causes of disputes and claims in the Indian construction industry.

Dealing with Delay due to Action by the Employer and Employer's Representative

Time is always important and controversial in a construction contract. The contractor is responsible to complete the works within the specified period of time. In the common standard forms of construction contract in India, the employer or employer's Representative are required to act or carry out certain tasks within a particular time frame, such as:

- Provision of access/right of way
- Review and provide comments to design drawings/architectural design
- Review and comment on maintenance manual/quality assurance plan/methodology
- Comment on the proposed insurance
- Comment on the engagement of sub-contractor/safety consultant
- Determine if the proposal of "Change of Scope" is accepted by the Authority
- Issue Payment Certificate and make payment to the Contractor
- Issue retention money/final payment
- Seek further clarification from the Contractor for the extension of time (EOT) claims and issue EOT assessment to the Contractor
- Compensate the concessionaire of all direct loss due to Authority's default

Other than the foregoing tasks, there are other communications which the employer is required to provide necessary response and/or decision under the contract, for example:

- Reply to request for information (regarding the outstanding design information)
- Providing assistance to the coordination/resolving disputes among interfacing parties, interfacing projects, other government department
- Clarification of requirements in the contract, ambiguities or discrepancies between the contract documents and/or as-built drawings
- Provide decision about whether to comply with the additional requirement from/ updated in-house rules of maintenance departments and/or utilities undertakers
- Providing assistance to the design comments received from other government departments, such as Fire Service Department and Water Supplies Department
- Providing decision about what kind of follow-up action required for the public

complaint received

For these communications, there is no time limit for the employer or employer's representative to respond. Taking the response to a request for information as an example, the contractor can specify the expected reply date in the letter and mention the late reply by the employer or employer's Representative may give rise to delay to the completion date. In default of a timely reply, the contractor may serve a notice of claim to the employer and submit documents to prove the merits of his case so as to recover the time loss. Worse still, some contract provisions expressly prohibit EOT claims arisen from the employer's delay. For example, in Public Private Partnership, pursuant to Cl. 12.7.1(d), the contractor can claim an EOT due to any delay caused by or attribute to the Authority, but it does not include the review time by the Authority. This kind of contract construction results in more disputes between contracting parties.

In NEC Contracts, a *period for reply* is stipulated for every communication requiring the project manager to reply under ECC Clause 13.3. Communication is defined as below:

"Each instruction, certificate, submission, proposal, record, acceptance, notification, reply and other communication which this contract requires is communicated in a form which can be read, copied and record."

The *period for reply* is generally 3 (three) weeks and it has effect when the communication is received by the recipient at the last address specified in the contract. The project manager and the contractor may extend the *period for reply* by agreement before the reply due date. Therefore, it allows flexibility to manage those issues with higher complexity that need more time to discuss and resolve. It will be a compensation event if the project manager does not reply to a communication from the contractor within the period required by the contract. Thus, the project manager is obliged to reply to a communication within the time limit, or to decide if an extension is required.

In the standard amendments of NEC clauses, given that a confirmation shall be sought from the employer before the project manager giving an instruction or taking other action which may commit the employer to an increase or a decrease in the contract sum by a certain amount, the *period for reply* is increased to 6 (six) weeks for those events that the estimate value exceeds that specified amount. In the event that more time is required for certain type of submission, such as contractor's design, the contract drafter may modify the *period of reply* to suit the project needs. With the provision of *period for reply*, either the project manager or the contractor knows how long the other side needs to review a communication and will not be afraid that their request falls on the deaf ears.

Dealing with Delay due to Late Handing Over of Site

In the event that some matters may affect the cost and time of completion, e.g. delay in site possession, NEC contract provides a risk management tool under NEC3 ECC Clause 16.1, which says that *"the Contractor and the Project Manager give an early warning by notifying the other as soon as either becomes aware of any matter which could*

Increase the total of the Prices,

Delay Completion,

Delay meeting a key date or

Impair the performance of the works in use."

The early warning matters will be recorded in a Risk Register and discussed in risk reduction meetings, where those attending the meetings shall cooperate to

make and consider proposals for how the effect of the register risks can be avoided or reduced,

seek solutions that will bring advantage to all those who will be affected,

decide on the actions which will be taken and who, in accordance with the contract, will take them.

If the decision involves any change to the contract, the project manager shall instruct the changes at the same time as he/she issues the updated risk register. The early warning mechanism warrants speedy management of risks and formalization of project manager's instruction arising from risk management solutions. However, there is no sanction provided if the project manager does not instruct the change accordingly. The inclusion of deemed instructions in bespoke amendments may safeguard the con-

tractor's position and perform according to the deemed instruction.

Dealing with Late Payment to the Contractor

Late payment is referred to payment with differences in value between the contracting parties. Payment under NEC contract is made by either priced activity schedule, bills of quantities or Defined Cost under competitive market prices. In the standard amendments of NEC clauses, the contractor shall comply with the requirements on subcontracting to ensure transparency of procurement procedure and to prevent collusive bidding. The contractor is obliged to invite adequate numbers of tenderers to bid for the works in order to control work expenditures with competitive prices. This avoids dispute in the assessment of compensation events when Defined Cost is considered.

Payment under a compensation event can only be certified in the payment to the contractor upon acceptance of the full cost by either acceptance of the contractor's quotation or by the project manager's own assessment. In a complex compensation event where EOT and prolongation costs are involved, it is very difficult to assess the full time and cost effect of the compensation event in a short time limit. An amended condition to mandate partial implementation of a compensation event is beneficial to ease the contractor's cashflow.

Dealing with Delay due to Poor Planning and Management by the Contractor

Delay caused by the contractor is another common cause of dispute in a construction project, especially when the project is running close to its completion date. Programme is a useful administrative tool to monitor the planning and progress of the contractor. It also forms the basis for EOT analysis. However, in a large-scale project with long duration, the information provided in the programme may not be comprehensive and detailed enough for acceptance by the project manager, thus affecting it's function in progress monitoring and EOT assessment.

With reference to the EPC Agreement for Construction and National Highway Works, the contractor shall submit to the Authority and the Authority Engineer a programme for the works for review and consent and the programme shall include the following details:

The order in which the Contractor intends to carry out the Works, including the anticipated timing of design and stages of Works;

The period for review for design and drawings;

The sequence and timing of inspections and tests;

The particulars for the pre-construction reviews and for any other submissions, approval and consents.

The contractor is only required to submit a revised programme whenever the previous programme is inconsistent with actual progress. FIDIC contract has the similar requirement in programme submission. However, the programme submitted under FIDIC contract to the employer's representative is for information only and the revised programme is only required to be submitted when it is instructed by the employer's representative.

The NEC contract also specifies various information to be provided in programme, which inter alia includes programme float, time risk allowance, the time required to meet the health and safety requirements and the procedure set out in the contract. Besides, the contractor shall also incorporate the access date of the site, the date of acceptance to the design submission of method statement by the project manager, the information from other parties, such as agreed handover date by interfacing parties and the access date of utilities undertakers.

The NEC programme is of paramount importance for the following reasons:

6. The contractor has to submit the first programme to the project manager to show the information which the contract requires, otherwise one quarter of the interim payment is retained until the contractor has submitted the first programme.
7. The contractor is then required to submit revised programmes to the project manager at no longer than the interval stated in the contract with the actual progress achieved on each operation and its effect upon the timing of the remaining works. A living and well prepared programme provides a useful tool for the project manager to monitor

the contractor's construction progress, to provide reliable data to check against the reasonableness of the contractor's planning of remaining works and a baseline for delay analysis under a compensation event.

8. The contractor's delay mitigation plan to deal with its own delays in the revised programme is important in the assessment of compensation events. The project manager can evaluate the proposed delay mitigation plan and make use of the revised programme to monitor if the contractor can catch up with its own delay.

In view of the above, NEC contract provides an environment and framework for users to make use of the programme, and thus it can:

- provide the project manager an updated contractor's planning to monitor the construction progress.
- provide the contractor a formal record to reserve his programme float.
- provide a reliable baseline in the method of EOT analysis.
- provide an up-to-date basis to both parties to discuss and identify the potential risk to the completion of project.

In a complex project, however, it is difficult for the contractor to develop a comprehensive programme for all parts of the works for approval. With the lack of an accepted programme, the contractor ends up in stalemate when preparing quotations for compensation events. The same applies to the project manager making its own assessment of a compensation event. Other difficulties faced by contract administers include:

1. The programme adopted for EOT assessment has been approved for a long time and thus the information and the contractor's planning in it is not up-to-date. Although some contractor's updated planning is available in the subsequence programme submissions, given that they are not accepted programme, they can only be adopted for the EOT analysis in exceptional situations.
2. When there is a dispute in the EOT entitlement between the contractor and project manager, the contractor disregards the project manager's assessment and extends the planned completion as per his own initiatives, which is far beyond the contractual extended completion date. Such contractor's programme planning is not appropriate for progress monitoring or delay analysis.

In view of the foregoing difficulties, an amended condition with partial acceptance of programme is recommended to provide programme baseline as far as possible in EOT assessment.

Conclusions

From the contract administrator's perspective, the use of NEC contracts with carefully drafted bespoke amendments provides good project management tools with enhancement in the following matters:

- Adjustment of 'period for reply' to suit project needs
- Provision of deemed instruction upon conclusion of risk reduction measures to be carried out by the contractor
- Inclusion of mandatory subletting procedures to provide certainty in obtaining competitive market prices for compensation event assessment and payment to the contractor
- Allowance of partial implementation of complex compensation events to safeguard contractors' cashflow
- Allowance of partial acceptance of contractors' programme to timely implement delay mitigation measures and provide accuracy in compensation event assessment

The foregoing amended conditions with standardization are encouraged to avoid uncertainty in contract interpretation and to provide judicial precedents in a long term. On the other hand, they enhance efficiency in project management to reduce claims and disputes under standard forms of contract.

AN OVERVIEW OF CLAIMS IN CONSTRUCTION DISPUTES

Shouryendu Ray[1] & Neelu Mohan[2]

This paper briefly sets out a non-exhaustive list of claims and counterclaims that may raised by a claimant or opposing party in an arbitration and touches on the topic of alternate remedies besides monetary claims.

Introduction

A claim is typically understood as a demand made by a party for money, property or a legal remedy over which one asserts a right.[3] Money claims in the field of construction arbitration are dependent on the party making the demand i.e., whether it is the contractor or the employer making the claim. Claims (including counterclaims) may be classified under two broad heads: (1) claims for breach of contract (i.e., when a party to the contract violates the terms thereof), and (2) claims made under or pursuant to the terms of the contract (i.e., when the contract itself provides for such claims, for example, for extension of time or unpaid invoices).[4] These are discussed in detail below.

SECTION I: CLAIMS FOR BREACH OF CONTRACT

Claims for breach of contract are based on established principles of contractual law, including causation, remoteness of damage and mitigation of loss. These claims available to a party under contractual principles and based on common law and equity, and are in addition to, and not in substitution of claims under the contract.[5] In short, the availability of claims under the contract (i.e., the second category of claims, dealt with in the next section) would not preclude the right of a party to claims under this first category.

The question that then arises is the standard of proof required to be established by a party for claiming breach of contract. Under Indian law, this right is governed by Section 73 of the Indian Contract Act, 1872 and is declaratory of the common law of damages. A party who has suffered as a result of a breach of contract can claim *"from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it."*

Contractor Default

In construction and building contracts, the ordinary measure of damages is the cost of reinstatement – i.e., the cost of getting the work done through an alternate contractor. In *Dhulipudi Namayya v. Union of India,* adopting the common law principles for quantifying damages, the Andhra Pradesh High Court held:[6]

"The rule applicable for determining the amount of damages for the breach of a contract to perform a specified work is that the damages are to be "assessed at the pecuniary amount of the difference between the state of the plaintiff upon the breach of the contract and what it would have been if the contract had been performed and not the sum which it would cost to perform the contract, though in particular cases the result of either mode of calculation may be the same." See Wigsell v. School for Indigent Blind, (1882) 8 QBD 357 (N). It is therefore clear that the measure of compensation is the in-

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3. *Blacks Law Dictionary, 10th edition, Bryan A Garner (Ed.)*
4. *Financial Recovery and Causation, Keating on Construction Contracts, 11th Edn., Para 9-001*
5. *Gilbert-Ash (Northern) Ltd., v. Modern Engineering (Bristol) Ltd., [1974] A.C. 689*
6. *Dhulipudi Namayya v. The Union of India, AIR 1958 AP 533*

creased cost of the work to the plaintiff on account of having got it done by another contractor." (Emphasis supplied)

This principle has also been subsequently affirmed by the Supreme Court of India in *M.D., Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd.*[7]

In certain cases, damages may also be assessed on the basis of diminution in value. The leading treatise on the Indian law of Contract, *Pollock & Mulla*, quantifies diminution in value as the difference between the market value of the defendants' performance in its defective or incomplete state, and market value of the performance it had been properly performed.[8]

However, jurisprudence in the field of construction contracts tends to favour the cost of reinstatement as the applicable standard of damages, unless it is disproportionate or unreasonable.[9] This, being measured by the cost of having the structure built by some other contractor, is not only easier to quantify, it may also be more definite and less speculative.

Employer Default

Where the breach is attributable to the employer, the contractor is entitled to damages for loss of profit – which, viewed from a different prism may also be considered as the cost of business opportunity loss – and would be dependent on the facts of each case and the proof of loss.[10] This is in addition to the other damages under the terms of the contract (which is discussed below). In *A.T.Brij Paul v. State of Gujarat*,[11] the Supreme Court held:

> *"10....What would be the measure of profit would depend upon facts and circumstances of each case. But that there shall be a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages if the other party to the contract is guilty of breach of contract cannot be gainsaid. In this case we have the additional reason for rejecting the contention that for the same type of work, the work site being in the vicinity of each other and for identical type of work between the same parties, a Division Bench of the same High Court has accepted 15% of the value of the balance of the works contract would not be an unreasonable measure of damages for loss of profit. We are therefore, of the opinion that the High Court was in error in wholly rejecting the claim under this head.*
>
> *11. Now if it is well-established that the respondent was guilty of breach of contract in as much as the recession of contract by the respondent is held to be unjustified, and the plaintiff-contractor had executed a part of the works contract, the contractor would be entitled to and circumstances of the case between the same parties and for the same type of work at 15% of the value of the remaining parts of the work contract, the damages for loss of profit can be measured."*

Parties may also rely on contractual clauses of liquidated damages in cases of breach. However, it is relevant to note that provisions setting out a fixed sum as liquidated damages for the breach of a contract would not automatically entitle the claimant to that fixed sum – the claimant would have to show to the court that he suffered loss and the damages awarded would be commensurate to such injury. In this regard, Indian law departs from English law. Indian courts have held that the sum stipulated as liquidated damages is only the upper threshold that may be claimed, but the actual award would depend on the loss suffered. In *Union of India v. Raman Iron Foundry and Ors*,[12] the Supreme Court of India in unequivocal terms held:

"The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty, and according to this principle, even if there is a stipulation by way of liquidated damages, a party complaining of breach of contract can recover only reasonable compensation for the injury sustained by him,

7 *M.D., Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd., (2004) 8 SCC 619, Para 125-134*
8 *Pollock & Mulla, the Indian Contract Act and Specific Relief Acts, 15th Edition, Volume 2, Pg. 1161*
9 *Ruxley Electronics and Construction Ltd v. Forsyth [1996] A.C. 344 HL at 366*
10 *A.T. Brij Paul Singh and Ors. v. State of Gujarat, AIR 1984 SC 1703, affirmed in Dwaraka Das v. State of Madhya Pradesh and Anr, AIR 1999 SC 1031*
11 *Ibid.*
12 *Union of India (UOI) v. Raman Iron Foundry and Ors., (1974) 2 SCC 231*

the stipulated amount being merely the outside limit. It, therefore makes no difference in the present case that the claim of the appellant is for liquidated damages. It stands on the same footing as a claim for unliquidated damages." (Emphasis supplied)

SECTION II: CLAIMS MADE UNDER THE TERMS OF THE CONTRACT

Claims made under the terms of contract in building, engineering and construction contracts typically fall into the categories set-out below:

(a) Unpaid amounts under invoices;
(b) Losses and expenses arising out of extension of time due to delay or disruption;
(c) Additional works or variations;
(d) Defective works; and
(e) Claims for payment under the doctrine of quantum meruit.

(a) Unpaid amounts under invoices

The obligation of the employer to pay the contractor for works done is, quite naturally, fundamental.[13] While the non-payment of a single tranche or amount at a specified date would not necessarily constitute a repudiatory breach, the consistent failure of the employer to not pay amounts would entitle the contract to terminate the contract and make a claim for unpaid amounts. The employer could also have a right to set-off amounts towards defective works against invoices. This would be dependent on the construction of the terms of the contract and other contractual stipulations.

For a matter to be litigated or contested through arbitration, there has to be a 'dispute' – in other words, the claim being put forth has to be denied and disputed by the other side. Considering the nature of unpaid invoices, more often than not, they would be undisputed. Under such circumstances, the contractor would have the following modes of recovery. Upon default in payment, if the invoiced amount is above the threshold prescribed by the Insolvency and Bankruptcy Code (which, at present is Rupees One Crore), the contractor may serve a demand notice under Section 8 of the IBC and petition to initiate corporate insolvency resolution process against the employer, should the invoice remain pending 10 days thereafter and if there is no pending dispute between the parties. Another quick option for recovery that is available to the contractor for admitted liabilities is that of a summary suit.

(b) Losses and expenses arising out of extension of time

Generally, all construction contracts provide for a date of completion. In its absence, it presumed that the work ought to be completed with a reasonable period of time.

In order for a contractor to claim losses arising out of the extension of time, the contractor would necessarily have to establish that the extension of time was due to reasons attributable to the employer, or to sources other than the contractor. The employer's entitlement to losses and expenses would also depend on contractual clauses which would set out the consequences of delay and provide for the fulfilment of certain contractual requirements, including notice requirements in order to make a claim for losses under this head.

The most commonly claimed losses under this head include[14]:

i. Prolongation costs (which may include a claim for head office overheads);
ii. Finance charges;
iii. Loss of profits;
iv. General disruption in the form of additional labour, plant and material costs;
v. Wasted management time; and
vi. Cost of collating the claim.

(c) Variation claims

Construction contracts typically provide for detailed clauses entitling the employer to vary the work prior to the contract completion date, subject to the fulfilment of certain conditions. Should these conditions be complied with, the variation of works would not constitute a breach of contract automatically entitling the contractor to damages. However, the contractor would be entitled to additional payment as a result of the variation. A few examples of variations that may entitle the contractor to additional compensation is set out below:

1. Changes to the design – Design drawings submitted during the tender process are subject to further specifications during

13 Hudson's Building and Engineering Contracts, 14th Ed., Paragraph 3-078
14 "Claims arising under a construction contract", Practical Law UK Practice Note Overview 1-381-0129

the execution of the contract. While the employer would typically have the right to provide comments to the drawings, any variation which would result in a change to the base design would entitle to damages in the form of additional payment.

2. Late instructions – All instructions, nominations, plans and designs are required to be provided at a reasonable time. As set out in the leading treatise, *Keatings on Construction Contracts – "What is reasonable depends upon the express terms of the contract and all the circumstances. It is suggested that the prime consideration is that instructions should be given at such times and in such manner as not to hinder or prevent the contractor from performing its duties under the contract."* Mere non-adherence to requests for instructions by the contractor would not constitute a breach and the contractor's entitlement to damages would depend on when the instructions were actually required for the completion of the project.

(d) Defective Work

Defects in the completion of works would entitle to the employer to damages. While the nature of a defect is set out in the contract, it is usually understood as a *"... anything which renders the plant... unfit for the use for which it is intended, when used in a reasonable way and with reasonable care."*[15]

Defects may be of two kinds – patent defects and latent defects. While the former is visible on inspection at the contract completion date, the latter manifests or becomes evident to the employer at during a stage after completion. Most standard form contracts provide for a "defects liability period", during which the contract is contractor is contractually obligated to return to the site and cure the defect, at its own cost. During this period, the employer typically holds on to the security deposit which is only returned on the completion of the contractually stipulated period.

One question arises that commonly arises is whether the contractor is absolved of all responsibility on the expiry of the defects liability period. Arguably, the employer would still be entitled to claim damages for defective work such as poor workmanship, use of sub-standard materials and negligent design for any discoveries made after the expiry of the defects liability period under the common law of damages.16 However, this would also be fact dependent exercise. In *Municipal Corporation of Greater Mumbai v. Hindustan Construction Company Ltd.*, the Bombay High Court has upheld an arbitral award where a claim for damages for defects discovered after the defects liability period was made on the basis that the contractor was issued an unconditional defects liability certificate upona joint inspection.17

(e) Claims under the doctrine of quantum meruit

These claims made towards reasonable costs incurred in the fulfilment of the works and supply of materials are only maintainable in cases where the contract does not provide for an agreed sum.[18] These claims commonly arise where parties have commenced the works without agreeing on the price of the contract, or have agreed for a reasonable sum to be claimed.

CLAIMS OTHER THAN DAMAGES

Prior to its amendment in 2018, the Specific Relief Act, 1963 expressly provided that suits *"for the enforcement of a contract for the construction of any building or the execution of any other work on land"* was not capable of specific performance.[19] A simpliciter reading would mean therefore that an employer cannot bring action against the contractor demanding that contracted-for works be completed; as a sequitur, the only available remedy to the employer would be to seek damages. This statutory embargo has however been interpreted by the Supreme Court of India in *Sushil Kumar Agarwal v. Meenakshi Sadhu and Others*[20] to not preclude the relief of specific performance if the plaintiff is able to establish that:

15 *Yarmouth v. France*, (1887) LR 19 QBD 647
16 *Adams v Richardson & Starling Ltd., [1969] 1 W.L.R 1645, CA*
17 *Municipal Corporation of Greater Mumbai v. Hindustan Construction Company Ltd.*, 2010 SCC OnLine Bom 1848
18 *Alopi Parshad & Sons, Ltd v. The Union of India, AIR 1960 SC 588*
19 *Section 14(3)(c), Specific Relief Act, 1963*

"24.4.1. the work of construction should be described in the contract in a sufficiently precise manner in order for the court to determine the exact nature of the building or work;

24.4.2. the plaintiff must have a substantial interest in the performance of the contract and the interest should be of such a nature that compensation in money for non-performance of the contract is not an adequate relief; and

24.4.3. the defendant should have, by virtue of the agreement, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed..."

Now, with the Amendment coming into force, an employer may seek specific performance of a contract, even if it can be said that damages would serve as adequate remedy. This highlights a more pro-contract enforcement approach in the legislation. Given the express removal of the phraseology of Section 14(3)(c) of the said Act through the 2018 Amendment, which has now limited the discretion of the courts to decline the relief of specific performance to only four situations, one of which includes a situation where the performance of which involves the performance of a continuous duty which the court cannot supervise,[21] it may be argued that the relief of specific performance is available in cases involving construction contracts, should the exceptions set-out in Section 14 not be triggered.

20. Sushil Kumar Agarwal v. Meenakshi Sadhu and Others, (2019) 2 SCC 241

21. Section 14(b), Specific Relief Act, 1963

DELAY AND QUANTUM EXPERTS IN CONSTRUCTION DISPUTE RESOLUTION

By RAJAT SINGLA[1]

The resolution of many disputes referred to international commercial arbitration frequently involves deciding complex technical issues which may require specific knowledge or experience. Guideline 7, International Arbitration Practice Guideline, Chartered Institute of Arbitrators

Several disciplines in the construction industry employ the services of experts. Specific to the construction industry, everyone has heard of Subject Matter Experts (SMEs) who provide their expert opinion on varied areas like technical matters, design matters, site construction methods and many more. Nowadays, even contract management experts have become prevalent, but one dimension remains neglected: '*Lost Time*'. Scheduling Experts are different from the experts who can provide their expertise on the *Lost Time* aspect. No construction project can be called a success unless it completes on time. And money follows time since Time is Money. If a construction project lags in time, it loses money.

As per the latest annual report published by the Ministry of Statistics and Programme Implementation - In India, as of 1 December 2021, there were 1679 central sector infrastructure projects on ministries' monitoring. Out of 1679, 541 projects are running behind time with a time-overrun ranging from 1 month to 324 months. The original cost of these 541 projects was USD 111 billion, however now the anticipated cost has risen to USD 148 billion, which is an enormous 34% increase in cost. The first and foremost reason listed in this report for the cost-overrun is Time-overrun.

Each major or mega construction project requires peculiar skills for monitoring, scheduling, contract administration, and claims management. The skillful personnel have multiple qualifications and vast experience in similar domains & projects, yet the projects lag in time and consequently lose money. It is because of the mere fact that the skills required to assess the *Lost Time* are not deployed during the construction phase, especially in India. Nobody wants to bear the responsibility of the time overrun and the consequent associated monetary damages. This leads to a dispute between the parties since the money involved is enormous.

The money involved (in the form of monetary claims) in construction disputes is humongous, and the prime reason for this is the time overrun. So, to resolve the construction dispute in an arbitration or court the first and foremost question remains, '*Who is responsible for the delay?*'.

To find an answer to the above question, it is paramount to find '*What caused the delay?*'. This involves a forensic approach to investigating the actual causes of delay. Here the delay experts come into the picture. The delay experts are specialized in these forensic techniques to assist the court and tribunal in finding the causes of delay. Then the culpability for such causes of delay can be dictated through contract and law.

The Indian Evidence Act, 1872 recognizes the Experts and their opinion as:

> *"Opinions of experts - When the Court has to form an opinion upon a point of foreign law or of science or art, or as to the identity of handwriting [or finger impressions], the opinions upon that point of persons specially skilled in such foreign law, science or art, [or in questions as to the identity of handwriting] [or finger impressions] are relevant facts. Such persons are called experts."*

As per the Merriam-Webster dictionary, the term "science" is defined as something (such as a sport or technique) that may be studied or learned like systematized knowledge. The Experts' opinions are usually based on established scientific principles, the prevailing industry practices and the contract conditions pertaining to the respective project. The construction sequence of activities is one such scientific principle, and the time associated with these construction sequences is another.

In a construction project, there can be numerous reasons for the delay, but not all cause delay

1. *Director at MASIN U.A.E*

to the Project. The delays that cause delays to the Project are called critical delays, while those which do not are called non-critical delays. Identification of critical delays and assessment of their impact is a complex process. In the Indian scenario, this is even more complex, as the scheduling and monitoring practices are not followed ardently, and are mere formalities.

The Forensic Delay and Quantum Experts come to the rescue to undertake this complex process. Several recommended practices guide the Experts in deploying the methods and reaching a logical conclusion that reflects common sense. A few recommended practices include the Delay and Disruption Protocol – 2nd Edition February 2017 by the Society of Construction Law, UK ('*SCL Protocol*'), and the AACE International Recommended Practice No. 29R-03 – Forensic Schedule Analysis.

For example, the SCL protocol lists down several methodologies to conduct forensic delay analysis, such as (a) Impacted As-Planned Analysis (b) Time Impact Analysis (c) Time Slice Window Analysis (d) As-Planned versus As-Built Windows Analysis (e) Retrospective Longest Path Analysis (f) Collapsed As-Built Analysis (g) Project wide retrospective as-planned versus as-built analysis (i.e. not in windows) (h) Time chainage analysis (i) Line of balance analysis (j) resource curve analysis, and (k) Earned value analysis. Similarly, SCL lays down recommendations to calculate the claims associated with the delay and disruption in the project.

The Experts employ these techniques considering the project particulars, tribunal directions, dispute, and common sense. In an adversarial process, the parties present their best position by deploying any means. This leads to presenting expansive data and facts in front of the tribunal/court to decide upon matters of delay and quantum. Experts make this easy by segregating *grains from the chaff* and presenting an opinion that is rational, sensible and help the tribunal to conclude.

The Experts can be appointed by the parties or the court/tribunal in the dispute resolution process. In the adversarial process, the parties appoint their experts while the tribunal-appointed experts appear far less frequently in practice. The Experts can be employed by the parties at both pre-dispute and post-dispute stages; however, *the sooner the better*. The Experts dive deep into the documents and records, do the investigation, and apply forensic techniques to provide their opinion on the matters of delay and cost claims. In construction arbitrations, the Expert process includes:

a. Preparation of main reports dealing with the issues of delay and cost claims
b. Replying to their counterparts' main reports
c. Preparation of joint reports, identifying the issues of agreement and disagreement
d. Providing oral testimonies in the form of cross-examination in hearings

Sometimes, in the hearings, experts are often asked to present their opinion in the form of a short presentation of their report. Witness conferencing is another process usually employed by the tribunals to examine the experts on the same issue concurrently. There are several regulatory frameworks for the Expert Process, such as Article 25(2) of the 2021 ICC Arbitration Rules, Articles 27(2) & 29 of the 2013 UNCITRAL Arbitration Rules, Articles 20(1) & 21 of the 2020 LCIA Arbitration Rules, Article 33(1) of the 2017 SCC Arbitration Rules, IBA Rules on Evidence, Practice Guideline for Party-Appointed and Tribunal-Appointed Experts by CIArb, etc.

India is eyeing to become the third largest economy in the world and the construction sector will be a significant contributor. Resultantly, massive investment in the Indian construction & infrastructure sector is taking place. Disputes are unavoidable where transactions are involved, so what matters most is the efficient resolution of the disputes. India has become a breeding ground for construction disputes and the overload of the Indian judiciary is a wider known fact. Thus, Alternative Dispute Resolution (ADR) procedures are becoming prominent in the resolution of construction disputes.

India should welcome this opportunity of becoming an efficient place for ADR. In this process, the Delay and Quantum Experts can be of great help. They can guide the parties and the tribunal to 'Where to focus' and 'Where to look'.

Guiding lights and red flags: Key focus-areas for arbitration clauses in construction contracts and international best practices

-Garv Malhotra[1]

Introduction

1. The agreement to resolve disputes through arbitration – the 'arbitration agreement' is the bedrock of the whole arbitration process. It is the nucleus of the dispute resolution mechanism and is premised on *ex-ante* consent of parties foreseeing potential disputes down the line. A well-drafted arbitration agreement lays the foundation of effective dispute resolution between the parties.[2] If the arbitration agreement (often codified as a clause in a larger agreement or set of agreements), is clear and straightforward; substantial time and costs can be saved by the disputing parties. The same is especially true for the construction and projects sector, involving voluminous transactions, with the possibility of various disputes.[3]

2. A typical construction project involves a large number of processes and elements that have to come together in a timely and synchronised fashion to enable smooth completion of the project. These include tasks like design, manufacture, procurement, transportation of materials, erection of the equipment etc. It also involves a number of engineering processes like mechanical, electrical, electronics, information technology (IT), automation etc. which require specialised personnel with technical know-how. Moreover, processes like quality control, acceptance tests, inspections and commissioning are crucial in bringing the project to a satisfactory conclusion. Though the processes may be well-defined, extraneous uncertainties will always derange the project by bringing an element of risk.[4]

3. Since the end of the World Wars, the world has consistently seen a massive push towards infrastructure development. This is evident from the ever-changing global landscape being dotted with a myriad of large projects that serve billions of people every year ranging from airports, expressways, dams, electricity networks and so on. India is no exception. To support these projects, the Government of India, in 2021, decided to create a USD 2.5 billion financial support institution, the National Bank for Financing Infrastructure and Development.[5] Various initiatives by the Indian government like the *Bharatmala Project*, *Pradhan Mantri Gram Sadak Yojana, Deen Dayal Upadhayaya Gram Jyoti Yojana, Udaan Scheme;* allowing 100% foreign direct investment (FDI) in the construction sector; the high-speed rail networks; smart-cities initiative etc. have given further impetus to the rapid pace of infrastructure development in India.

4. By nature, construction projects are naturally prone to disputes, even if the parties carefully allocate the risks to the

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1. *Partner, Skywards Law, New Delhi. The author is deeply grateful for the help of his colleagues Mr. Eshan A. Chaturvedi, Mr. Arijit Sanyal, Mr. Rishi Raj Mukherjee, Ms. Arundhati Kale and Ms. Harleen Kaur Rait for their help. The mistakes are the author's own. This article is confined to Arbitration Process and does not include the Dispute Boards or Conciliation or Mediation process.*
2. *Amazu A. Asouzu, p. 1, African States and the Enforcement of Arbitral Awards: Some Key Issues, William W. Park (ed), Arbitration International, Oxford University Press 1999, Volume 15 Issue 1, p. 1.*
3. *Paul Darling KC, Agreements to Arbitrate Disputes in Construction Contracts, Global Arbitration Review (Apr. 8, 2023, 10:45 PM) https://globalarbitrationreview.com/guide/the-guide-construction-arbitration/fourth-edition/article/agreements-arbitrate-disputes-in-construction-contracts.*
4. *Joseph Grynbaum, P.E.'s quote as cited in Ratan Singh and Gracious Timothy Dunna, Construction Arbitration: Peculiarities in Principles and Practice, at p 148 in Yashraj Samant and Chirag Balayan's Specialised Arbitration, Thomson Reuters.*
5. *Karan Sethi, Building a Sustainable Future, Invest India (Apr. 9, 2023 8:27 PM), https://www.investindia.gov.in/sector/construction.*
6. *Arcadis, Global Construction Disputes Report 8 (2019)*

party best equipped to handle it.[6] The Indian construction industry usually sees more claims than other industry. Moreover, the claims often include a number of issue-based sub-claims which are each mini-trials in themselves and require independent adjudication. In construction projects that are highly technical, large in size and spread over a long period; variations to the original technical specifications, cost-overruns and delays are commonplace. Given the technical nature of many of these disputes and complex issues of attribution of liability, resolution often takes long because the issues have to be understood by lawyers, explained to arbitrator(s) and then decided upon by the tribunal. These can lead to major disruptions in completion of projects for the employer, liquidity issues for the contractor and opportunity costs for all parties involved. The COVID-19 pandemic (a *force majeure* event as per most construction contracts) has further increased disruptions in schedules and supply chains leading to a major increase in conflicts relating to timely completion and liquidity. As such, sound drafting of arbitration clauses should be prioritised by all stakeholders to ensure that the myriad of conflicts that arise in a project may be resolved efficiently.

II. Drafting Tailor-Made Dispute Resolution Clauses for the Construction Industry

5. Arbitration clauses are often touted as 'midnight clauses'[7] i.e. 11th hour afterthought insertions by transactional lawyers *after* the substantive clauses relating to rights and obligations are concluded. At times, improperly drafted arbitration clauses are silent on multiple issues for instance on applicable law, juridical seat of arbitration or rules applicable to the procedure.[8] These can turn out to be costly omissions at a later stage and may even lead to the arbitration clause being adjudged as 'pathological' which is a term of art in arbitration meaning a clause that is void, inoperable or incapable of being performed. This issue can become further complicated when there are multiple parties to the contract and multiple stakeholders interested in the outcome of the dispute. As a result of the same, it is in the interest of parties to address issues such as the seat, applicable law, rules governing evidence and procedural rules etc. at the very outset.

6. The arbitration agreement between the parties, while often featuring as a clause in the 'main contract', is considered an independent contract.[9] Such clauses usually do not go into the details of the procedure of settling disputes.[10] They only create a general obligation to arbitrate; identify the parties; broadly identify the subject matter of dispute (existing or foreseeable) and connect the arbitration to a legal system.

7. In India, a large number of specialised disputes are observed in the construction sector between employers, contractors, sub-contracts, vendors, the government and other stakeholders. Most of these disputes can best be adjudicated through arbitration because the alternative would be to litigate before courts, an approach that often takes much longer.

8. This article aims to address a few important elements that drafters of contracts may consider while negotiating and settling arbitration clauses, especially in complex construction, projects and technology contracts. It is also suggested that in matters where there is little room for negotiation, the contractors can at the outset verify these elements to ensure that a workable mechanism for dispute resolution exists and understand their rights/exposure in the

7 *Blackaby Nigel, Constantine Partasides, Redfern & Hunter on International Arbitration (6th edn., Kluwer Law International, Oxford University Press 2015) 2.03.*

8 *Edwin T.C. Fai, Nakul Dewan, Drafting Arbitration Agreements with 'Consolidation' in Mind? Asian International Arbitration Journal, Kluwer Law International 2009, Volume 5 Issue 1, p. 71.*

9 *Professor Pierre Mayer articulates this beautifully by stating that a contract containing an arbitration clause is essentially a single 'instrumentum' containing two 'negotia'. See P Mayer, 'Limits of Severability of Arbitration Clause' in Albert Jan van den Berg (ed), ICCA Congress Series No 9 (Kluwer International 1999) 261-2*

10 *J F Poudret and S Besson, Comparative Law of International Arbitration (London, Sweet & Maxwell 2007) at page 130 of their treatise call them 'white clauses', i.e. clauses which express the parties' will to arbitrate but do not lend any assistance on procedural and logistical issues.*

event of disputes.

9. Considering the nature of complex transactions and multi-party disputes in construction contracts, it is important for the arbitration agreement drafters to consider and clearly define a few crucial things. These are:

   a. The scope of the arbitration agreement

   b. The seat of arbitration

   c. The number and manner of appoin ment of arbitrator(s)

   d. The parties to the arbitration agreement

10. Additionally, there are other considerations which parties should reflect upon while drafting their arbitration agreements such as using institutional rules to govern their arbitration; qualifications of arbitrators, if any etc.[11] However, in practice, parties often fail to clearly set out the scope and other key details in the arbitration agreement, leading to avoidable issues when the arbitration actually commences. Moreover, most large public-infrastructure projects in India are carried out by inviting contractors to bid for a Project through a competitive bidding process. They generally respond to a tender invitation with their bids, which once accepted (both technically and commercially) lead to a contract being signed on the terms dictated in the Notice of Award. The rights and obligations are often defined by 'General Conditions of Contract' ("**GCC**") models that are used by PSUs for all contracts of a particular genre and further governed by the Special Conditions ("**SCC**"). Most of these contracts are on a 'take-it-or-leave-it' basis, with little or no room for negotiation by the contractor bidding for the project. Such contracts are often one-sided and tilt heavily in the employer's favour. As such, the interplay between these documents becomes an area of much confusion and dispute with arbitrators often interpreting the terms strictly unless unconscionable on the face of it.

11. An example from personal experience is a case where in an arbitration against a state public sector undertaking (PSU), the GCC was subject to the SCC (like is usually the case). However, the SCC were in two parts (contained in two separate document), both set of SCCs conflicted with each other and also with the GCC. As such, issues like this could be eliminated by having a finalised dispute settlement clause that articulates a single set of applicable terms in case a dispute arose in that particular contract.

A. Defining the scope of the arbitration agreement

12. The 'scope' of the arbitration agreement refers to the nature and type of disputes that can be resolved within the ambit of a particular arbitration agreement. Given that the primary objective of an arbitration agreement is to oust the default jurisdiction of courts over the dispute, a broadly drafted arbitration agreement can enable the parties to refer virtually *all* disputes relating to a particular transaction to final adjudication before an arbitral tribunal. This may include issues beyond the *simpliciter* determination of contractual rights and obligations of the parties, like the formation and validity of the arbitration agreement and can even include claims relating to tortious liability.

13. Though the nature of dispute which may arise in relation to a contract cannot be predicted[12], it should not stop the parties from drafting a broad arbitration clause. Additionally, to maximise the scope of the agreement, the parties should consider having a clause wide enough to include disputes arising both 'out of the contract' as well as those which arise 'in connection to it'. In this regard, noted arbitrator and author Gary Born suggests that "*it is generally desirable to begin with a descriptive preamble*"[13] as it sets the background and tone for the clause and allows the parties to submit a variety of disputes to arbitration, as and when they arise. A preamble may assist the parties and arbitrator to understand the outer limits of the parties' consent to arbitration, without having to waste substantial time and costs in

11 Gary B. Born, International Arbitration and Forum Selection Agreements: Drafting and Enforcing Drafting (6th edn. Kluwer Law International 2021) p. 36.

12 Richard Kreindler, Practical Issues in Drafting International Arbitration Clauses, The International Journal of Arbitration, Mediation and Dispute Management, Kluwer Law International 1997, Volume 63 Issue 1, p. 47,

13 Supra note 11 at 38.

argumentation. However, parties should be mindful of the subject matter of the dispute they are referring to arbitration[14], as there may be claims which are not arbitrable either as per Indian or foreign law (as the seat may be).

14. As good practice, it is suggested that the final dispute resolution clause should be clearly defined (with specific applicable clauses of the GCC and SCC) to avoid confusion.

Choosing the type of arbitration: Institutional v *ad hoc*

15. At the time of drafting arbitration agreements, parties may face a choice with regards to selecting the type of arbitration for resolving their disputes i.e., institutional or *ad-hoc* arbitration. Parties may have different considerations for opting either of the above. For instance, if costs are an important consideration for the parties, they may opt for ad-hoc arbitration as it is considered to be relatively less expensive than institutional arbitration.[15]

16. However, parties who prefer to have a more organised and timely procedure would generally opt for institutional arbitration, as it would allow the parties to seek the institution's assistance, for instance, in appointing arbitrators, which can otherwise take a longer period and additional litigation costs. In matters that are administered through an institution, the parties often have to worry less about dilatory tactics as the institution ensures that the arbitration runs on an auto-pilot mode even if one party acts obstructionist or employs guerrilla tactics. Moreover, the institution can ensure the timely completion of arbitration and smooth execution of other administrative functions like payment of fees and management of documents and communication. The global practice consistently leans towards usage of institutional arbitration in complex matters. Even the FIDIC Rules (which are commonplace in international construction contract and discussed later in this article) designate the International Chamber of Commerce (ICC) as the administering institution in their rules.

Seat of arbitration

17. One of the most important aspects of an arbitration agreement is the choice of the seat of arbitration. The seat determines the legal framework and the relevant supervisory courts for the arbitration proceedings. However, drafting an arbitration clause that clearly and effectively specifies the seat of arbitration can pose several challenges for the parties. Some of the issues that may arise are the use of ambiguous or inconsistent terms to describe the seat of arbitration, such as "venue", "place", "location", or "forum", which may create confusion or conflict between the parties and the arbitral tribunal.

18. The selection of a seat (which is a juridical concept) is different from the physical location where the hearings or meetings take place, which may raise practical difficulties or legal uncertainties regarding the applicable procedural laws and rules. This distinction has now been put to rest in Indian law by the recent decision of the Supreme Court in *BGS SGS SOMA JV v. NHPC*[16] and various other cases.

19. The courts at the seat of arbitration have specific powers at designated junctures, e.g. at the annulment stage, to test the validity of the arbitration awards and to set-aside the award on grounds such as lack of a valid agreement, ignorance of due process, etc.[17]

20. A good seat of arbitration must have multiple attributes including access to legal and logistical infrastructure (for when the supportive or supervisory jurisdiction of the seat courts are invoked), stable set of mandatory arbitration rules (i.e. fundamental and non-derogable rules of a jurisdiction[18]) for instance those relating to arbitrability and equality of parties) and availability of quality legal professional assistance.

21. As good practice, it is suggested that the seat

14 *Supra note 11 at 48.*
15 *Supra note 11 at 66.*
16 *(2020) 4 SCC 234.*
17 *Garv Malhotra, 3 Ind. Arb. L. Rev. 1 (2021); The Goldfish Model of Arbitration: An 'out-of-Bowl' Approach to Demystifying Procedural Laws in Commercial Arbitration.*
18 *Supra note 17.*

of arbitration be as specific as possible to avoid procedural disputes and jurisdictional conflicts. For instance, in an arbitration seated in New Delhi (which has eight districts with their independent courts), the parties may consider designating a particular district (e.g. South West District) to avoid confusion in the event a party wishes to approach the court for interim measures prior to the constitution of the tribunal.

D. Choice of law

22. The choice of law clause determines the substantive law that governs the rights and obligations of the parties under the contract, while the arbitration clause determines the procedural law that governs the resolution of disputes arising from the contract. The Supreme Court of India in the case of *Reliance Industries v. Union of India*[19] recognised that three sets of laws may apply to any given arbitration: 1) the proper law of the contract; 2) the proper law of the arbitration agreement; and 3) the proper law of the conduct of the arbitration.

23. The choice of law clause (also known as governing law) and the arbitration clause may refer to different laws, but they should not be contradictory or incompatible. It is usually the case that the multiple laws that apply in an arbitration are in fact the law of the same jurisdiction. However, if the arbitration clause specifies a seat of arbitration that has a different law from the choice of law clause, then there may be conflicts or gaps between the two laws, such as on matters of evidence, interim relief, or even on conflicts of public policy. Therefore, when drafting arbitration clause in respect of choice of law clauses, it is important to carefully consider the implications and consequences of each choice and to ensure that they are compatible and consistent with each other. It is also advisable to consult with legal experts in the relevant jurisdiction(s) to avoid any potential surprises. A well-drafted arbitration clause and choice of law clause can help to avoid unnecessary disputes and ensure a smooth and efficient arbitration process.

24. Usually when parties are from the same jurisdiction (like cases of domestic arbitration), the default law applicable to them is the most obvious and efficient choice. However, in matters where the parties or the transaction involve multiple jurisdictions, a neutral choice of law can ensure that neither party is at a relative disadvantage. It is often seen that parties prefer to choose neutral laws like English Law or Singapore Law in matters which have no connection to these jurisdictions.

E. Additional considerations and suggestions for drafting of arbitration agreements

25. The first key consideration for arbitration clauses is the binding reference to arbitration. The arbitration clause must demonstrate a common choice of the parties to elect the remedy of arbitration and be bound by the outcome. Any agreement simply to have the option of referring a dispute to arbitration (inchoate clauses) can lead to uncertainty as to whether the parties intended for arbitration to be mandatory – for example, 'any dispute of whatever nature ... *may* be referred to arbitration.[20]

26. Based on the specific nature and complexity of the transaction, the parties may consider adding some additional elements in their arbitration agreement for efficient adjudication. These include issues like pre-arbitration mediation, the procedure for appointment of arbitrators, determining and dividing the cost of the arbitration, mechanism for interim measures, mechanism for consolidation of related contract disputes or emergency arbitration.

27. One element that cannot be emphasised enough is mediation. A properly done mediation can often help bring the parties to the same page and understand each other's perspective. Very often mediation can help fully or partially resolve the dispute. It is

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19 (2014) 7 SCC 603.

20 Paul Darling KC, Agreements to Arbitrate Disputes in Construction Contracts, Global Arbitration Review (Apr. 12, 2023, 7:46 PM), https://globalarbitrationreview.com/guide/the-guide-construction-arbitration/fourth-edition/article/agreements-arbitrate-disputes-in-construction-contracts#footnote-013-backlink.

suggested that the obligation to attempt mediation should be incorporated within the contract from an early stage.

28. It may also be useful to consider a tiered-mechanism based on the pecuniary amount in dispute. For instance, for disputes less than 10 crores the parties may choose a sole arbitrator whereas they may prefer a three-member tribunal in matters over the agreed pecuniary limit.

29. For drafting of arbitration agreements, it is either suggested to consult an expert disputes lawyer on designing a tailor-made arbitration clause fit for the particular transaction/entity; or to simply use the tried and tested model arbitration clauses published by leading arbitration institutions. Creative drafting can often lead to avoidable and expensive complications.

III. International Best Practices in Resolving Construction Disputes

30. The international practice of arbitration often differs in some key aspects from the Indian-style of arbitration practice. While the Indian style of practice has evolved based on the specific conditions of the jurisdiction, some key elements from the global international practice may be adopted or adapted to the Indian scenario to make arbitration proceedings more efficient.

A. FIDIC models

31. FIDIC (*International Federation of Consulting Engineers*) is bound to be one of the most leading, well accepted and matured forms of contract management which has sustained a historic performance for over more than half a century.[21] FIDIC provides template contracts which can be adopted or adapted for a particular project. FIDIC has templates which are commonly referred to as the Red book (for Construction contracts); the Yellow Book (for the design and building of Plants); the Silver Book (for EPC contracts) etc.

32. FIDIC contracts are generally considered more balanced in the relative rights of the employer and the contractor. Unlike unilateral rights of employers to insist on timelines that are common in construction contracts in India, the FIDIC system empowers the contractor with rights to reduce or stop work and even terminate the contract when payments are delayed. They are even entitled to compound interest. The balancing of interests of the parties is in the general interest of the project.

33. The use of FIDIC contracts uniformly in all government and private construction contracts can help bring uniformity in practice and jurisprudence. Given the time-tested clarity of the provisions, it can also help reduce the time usually spent on interpreting novel provisions in contracts.

B. Dispute avoidance and amicable resolution

34. It is a good international practice to implement sound record-keeping and contract management systems in order to ensure reduce the possibilities and scope of conflict and aid in efficient resolution. The emphasis on dispute-avoidance seen in European countries and Asian jurisdictions like Hong Kong and Singapore is much more than is the common in India.

35. Various mechanism have evolved to reduce the scope of the dispute in a project and make the arbitration process easier. These are often used conjunctly in a multi-tiered system which can have many advantages like:

a. it saves the parties the expense of an arbitration if the dispute is settled with high-level talks or negotiations;

b. it acts as a 'second opportunity' for both the parties and their advisers to re-evaluate the expense of an arbitration with regard to outcome and the net profit or goodwill of the business;

c. it helps to preserve long-term relationships between employers, contractors, engineers and other professionals, and does not jeopardise future business opportunities; and

21 *Dr. S.B. Sawant, Construction Arbitration: Delays, Disputes, Resolutions; Taxmann (2020) at p 50.*

d. it reduces the aggregate number of issues to be resolved in an actual arbitration. Through negotiation or early meditation, frivolous or trivial claims can be settled or written off at the outset.[22]

C. Dispute settlement boards

36. Dispute Settlement Boards or Dispute Adjudication Boards ("**DSB**") act as an alternative (or a pre-step) to arbitration or litigation in the construction sector.[23]Generally the decisions of the DSB are not binding. DSBs allow the parties to reserve some claims to be resolved before it while maintaining the flexibility of the entire process, as it is a creature of contract.[24] Parties to a construction contract may consider adding a DSB clause, while considering the scope and the extent to which the board can recommend solutions to the parties.[25]

37. Further, since DSBs are creature of contract, parties have the discretion to incorporate the institutional rules they plan to refer their dispute to. DSBs can be effective, as parties may opt for submitting their dispute to a DSB once it arises, and there might be a possibility of the dispute being resolved early, rather than going through the entire arbitration or litigation process.

38. There has been a growing trend of using DSBs in construction contracts in India. This has been specifically observed in the area of defence contracts. However, the efficacy, neutrality and conclusiveness of DSB's decisions are contentious as these bodies are sometimes seen as self-serving mechanisms controlled by the employers.

D. Statutory adjudication

39. International practice has also witnessed the involvement of statutory adjudication to resolve construction disputes of smaller value. Statutory adjudication was formally introduced for the first time in England[26] under the Housing Grants, Construction and Regeneration Act 1996, wherein rules were established to enable parties to request pending payment. Subsequently, Singapore, Malaysia, Ireland etc. enacted similar legislations.

40. A look at the model adopted in Singapore[27] shows a parallel adjudication structure which is a dedicated body responsible for examining claims and maintaining a directory of adjudicators. Moreover, to provide for transparency and equal opportunity for both parties, either party can file for a review.[28] Such systems can assist in resolving smaller-value disputes without incurring the costs of a full arbitration.

E. Post-dispute cooperation between parties

41. Mature cooperation between the parties and their counsel can go a long way in reducing the time and costs involved in an arbitration. If the parties start the arbitration on an appropriate and cooperative note, they can make joint-proposals to the Tribunal.

42. Parties can agree on an additional protocol on procedure to efficiently and effectively resolve the disputes between them. An example of this could be a submission agreement after the dispute has arisen but before the constitution of the tribunal, the parties agree on certain mechanisms to increase the efficiency of the process. These rare agreements are usually an outcome of good faith negotiations and have to be carefully tailor-made for the parties. The parties could then agree on a post-dispute mechanism beyond or in addition to the agreement. For instance, agreeing to

22 Supra note 20.

23 Lindy Patterson KC, Nicholas Higgs, Dispute Boards, Global Arbitration Review (Apr. 9, 2023, 3:24 PM) https://globalarbitrationreview.com/guide/the-guide-construction-arbitration/fourth-edition/article/dispute-boards.

24 Id.

25 Albert Bates, R. Zachary Torres-Fowler, Dispute Boards: A Different Approach to Dispute Resolution, Comparative Law Yearbook of International Business 41a: International Mediation, Kluwer Law International 2020, pp. 239-40.

26 Steven Cannon, Iain Black, Statutory Adjudication, Eversheds Sutherland (Apr. 13, 2023, 9:32 AM), https://www.eversheds-sutherland.com/documents/services/construction/04020%20-%20Construction%20Article%20-%20December_V7.pdf .

27 See Singapore's Building and Construction Industry Security of Payment Act, 2005

28 Regulatory Info, What is the SOP Act?, Building and Construction Authority (Apr. 9, 2023, 3:34 PM), https://www1.bca.gov.sg/regulatory-info/security-of-payment/building-and-construction-industry-security-of-payment-act .

mediation as a pre-arbitral step; or agreeing to reduce the total number of arbitrators from 3 to 1.

F. Mediation

43. The use of mediation is highly underrated in the field of construction disputes. The old adage that an "*ounce of mediation is worth a pound of arbitration and a ton of litigation*" holds good on most occasions in the context of construction disputes. [29]

44. While mediation often fails to resolve large construction disputes, it often helps understand the other side's perspective and reduce the conflicting egos of the parties involved. Moreover, given the large number of sub-claims under various heads in a typical construction dispute; mediation can often help reduce the total scope of the dispute while finding mutually-acceptable solutions to some of the disputed issues. For this, it is essential that both parties participate in the mediation with the right attitude of compromising their stated positions. The choice of skilled mediator(s) also becomes pivotal to the process.

G. Use of technology

45. Modern technology can help a lot in reducing the time, effort and costs involved in arbitration through innovative assistance. One key area where technology is making life of arbitration lawyers easier and driving down costs is in the review of large volumes of project documents. Software like *Relativity*, *Contractbook*, *Intelex* etc. are enabling faster and more efficient review and management of a large number of documents which are common in construction projects. In essence the software analyses all the physical and digital documents in a particular project; de-duplicates the documents; organise the documents (in multiple styles and organisational systems) and present the full documentary record in a convenient visual format for ease of reference. Moreover, these software are collaborative and enable multiple members of the team to work on them simultaneously. In the author's personal experience, the use of such AI-based document-review technologies can reduce the time-spent in reviewing and analysing documents by up to 60% thus leading to substantial savings in the time-costs spent by lawyers. However, the extremely high cost of this technology itself reduces the number cases where their deployment is viable.

46. Given the exponential rate of growth of AI in the present era, it is likely that the costs of accessing such technologies will reduce substantially in the coming years enabling a marked increase in the efficiency of arbitrators. It is even possible that parties agree to limit their document discoveries to a document-pool that has been pre-filtered by an AI-model based on agreed upon keywords and variables thereby substantially reducing the document set for the arbitration.

IV. CONCLUSION

47. In sum, arbitration in the construction sector is complicated because of the myriad of variables and unforeseeable exigencies. The industry is highly prone to disputes and conflicts. The involvement of a large number of stakeholders, related-entities and beneficiaries can further complicate the resolution process leading to substantial time spent and costs incurred. There are even cases where the arbitration takes longer than the project itself.

48. To streamline the process and increase efficiency, the drafters of arbitration agreements should either follow model-templates or seek expert advice on the same. Certain crucial factors such as those highlighted in this article should be given careful attention. Their consequences must be understood to get a fair idea of the process as well as the parties' exposure. This can help save substantial time, effort, opportunity costs and resources.

49. Taking a leaf out of the international best practices can also help enhance the efficiency of the process and streamline the mechanism to ensure greater effectiveness and reduce costs for clients.

29 *Supra note 4.*

Who shall be the Umpire? (*And the conflict begins..)*

Rajesh Banga[1]

***Abstract**:*

India is conscious and is working hard to enhance its image as a barrier-free destination for doing business. The need for effective and hassle-free arbitration mechanisms to resolve commercial disputes can no more be divorced from the subject of "ease of doing business". The agencies of the Govt. are upgrading themselves and these shall have to set themselves as torchbearers in establishing practices that are respected by law- both at domestic and international level. The appointment of an arbitration tribunal is very critical and perhaps the most debatable subject in the journey. This paper is an attempt to go through the present practices adopted by executing agencies in our country in the backdrop of expectations from the law; particularly after the 2015 amendments in the Arbitration and Conciliation Act, 1996 (A&C Act).

I. Introduction:

Choosing an Umpire is critically important in any game or contest. This requirement gets more significant when the game is being played not in front of the public but in a closed-door environment. The concern would gain further importance in a backdrop where there is little scope to challenge the decision of the Umpire. The game of arbitration is somehow in this category.

We know that an Arbitrator is a private judge chosen by two parties to determine their disputes. The proceedings are though visible to the two contesting parties but the process is not under the glare of public vision. Further, the law on arbitration leaves a limited space for a party if it chooses to challenge the decision of the Arbitrator before the law.

I am not criticizing this set of laws or this datum situation; for the business world in any Country surely requires a mechanism for expeditious resolution of commercial disputes and that is not feasible unless we have a strong institution of the Arbitration Tribunal. The only point I am highlighting is that the need to choose an independent, impartial and competent Umpire is much more in arbitration than in any other contest. The need is even more significant as compared to a Judge delivering public justice, for the following two reasons:

(a). A public judge is bound by far more restrictions of law while adjudicating the case as compared to an Arbitrator. The law allows a higher degree of flexibility in the landscape of arbitration.

(b). The decision given by a public judge is subject to the rigors of appeal before the next judicial authority whereas there are very limited grounds on which one can seek to set aside the arbitral award.

It is thus not difficult to guess why the question – ***'Who shall be the arbitrator'*** becomes the first and perhaps the most significant hinge of controversy. Both parties would naturally tend to appoint an Umpire whom they perceive as favorable to their business interests. More often than not, they would not agree on a person and would tend to position their respective candidates to wear the premier hat.

The story is not just relevant to the deal between two private players and rather acquires a formidable form where one of the disputing parties is the Union of India or its entity. We know that Government agencies while engaging in development and welfare schemes, step in as a very big player on the canvas of contractual conflicts and litigations. To begin with, one would assume that the Govt. agencies, being organs of the State, would be complying with extant law, in letter and spirit. Through this study, we shall tend to discuss whether the mechanism adopted meets the expectations of the law or does it require some corrective measures. We shall make some conclusions after studying the statutory provisions of the A&C Act and the lessons endowed by Hon'ble Supreme Court judgments (post-2015 amendments).

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II. Essence from Statutory provisions

A conjoint study of s.11 and s.12 in the A&C Act would reveal that the legislature intended to provide unchecked freedom to parties to choose their own Umpire with no restrictions even on qualifications/ expertise of the arbitrator. The only concern which the Statute expressed was that the chosen person shall be independent and impartial. Though the objective was codified in the 1996 Act, there was no tangible measure or scale as to how exactly we test whether a person qualifies against such requirements. This shortcoming was arrested by A&C Amendment Act 2015 when it listed (in schedule V) the type of relationships with parties/ disputes which would be said to induce justifiable doubts in the minds of the parties as to the independence or impartiality of the arbitrator. The amendments also made it mandatory for the Arbitrator to disclose such relationships. Not only that, there is another schedule i.e. seventh Schedule which lays down those particular relationships which make a person instantly ineligible. We may make a limited conclusion here that by the 2015 amendments, the arbitration law has taken a major stride to achieve the ever-known objective that the Umpire being chosen is to be independent and impartial.

The A&C (Amendment) Act 2019 has been enacted by the Parliament of India in Aug'19 and a major part of the amendments is yet to come into force. Once fully implemented, the direction of the journey shall be towards institutional arbitration. Even after such implementation, the appointment made by parties dictated by an agreed procedure in the arbitration clause would still be in control of the parties and thus the present paper is still very relevant even in the post-2019 amendment scenario.

III. Supreme Court judgments (post-2015)

In the past 6-7 years, the parties did get into disputes over the thread as to 'who shall be their Umpire' in the backdrop of 2015 amendments in arbitration law. The apex Court has clarified the finer nuances of law relating to the subject in the process of pronouncing the judgments.

1. ***HRD Corporation (Marcus Oil and Chemical Division) v. Gail (India) Limited.***[2] **:** The important extracts are as under:

"After the 2016 Amendment Act, a dichotomy is made by the Act between persons who become ineligible to be appointed as arbitrators, and persons about whom justifiable doubts exist as to their independence or impartiality."

"As opposed to this, in a challenge where grounds stated in the Fifth Schedule are disclosed, which give rise to justifiable doubts as to the arbitrators independence or impartiality, such doubts as to independence or impartiality have to be determined as a matter of fact in the facts of the particular challenge by the Arbitral Tribunal under Section 13.

Lesson drawn: The mere fact that the arbitrator indicts 5th schedule may induce reasonable doubts in the minds of parties as to his independence and impartiality but such doubts alone do not make such person 'ineligible'. At best, this gives liberty to the party to make an application under s.13 before the arbitrator itself. The party shall have to wait till the arbitral proceedings are completed before adopting any recourse to file an application under s.34 if it so chooses. The provisions are intended primarily to promote the fundamental idea of minimal judicial intervention in arbitration and to let the idea of arbitration succeed.

2. ***TRF Limited v. Energo Engineering Projects Ltd.***[3] **:** The important extracts are as under:

By our analysis, we are obligated to conclude that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse.

Lesson drawn: Even if the arbitration agreement made by parties stipulates that an employee of one party shall act or nominate the arbitrator, such person being ineligible himself, cannot appoint any other person as arbitrator.

2 *SLP (C) No. 20679 of 2017 (Judgment dt. 31 August 2017)*
3 *(2017) 8 SCC 377 (Judgment dt. 3 July 2017)*

3. ***Union of India vs Parmar Construction Co.***[4] **:** The important extracts are as under:

"It is also pointed out that while appointing an arbitrator in terms of sub–section (8) of Section 11, the Court has to give due regard to any qualification required for the arbitrator by the agreement of the parties and other considerations as are likely to secure the appointment of an independent and impartial arbitrator."

Lesson drawn: The Hon'ble SC held that if the arbitration clause explicitly stipulates the requisite qualifications of the Arbitrator, the Court while exercising powers under s.11, should endeavor to appoint such person who fits in that prescription. The Court needs to respect the agreed qualifications/expertise of the Arbitrator.

4. **Perkins Eastman Architects DPC & Anr. v. HSCC (India) Limited**[5]: The important extracts are as under:

"Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015"

"Further, as highlighted by the Law Commission also in its report, duty becomes more onerous in government contracts, where one of the parties to the dispute is the Government or public sector undertaking itself and the authority to appoint the arbitrator rests with it."

Lesson drawn: Even if the parties while entering into a contract agreed that the employee of one of the parties would appoint the arbitrator, the said employee would be deemed to be having an interest in the outcome of the case and is thus not entitled to unilaterally appoint the arbitrator. This judgment put a big question mark on the appointments that were routinely being made unilaterally by the Govt. departments.

5. ***Central Organisation for Railway Electrification V. ECI-SPIC-SMO-MCML (JV)***[6] **:** The important extracts are as under:

"Thus, the power of the General Manager to nominate the arbitrator is counter-balanced by the power of the respondent to select any of the two nominees from out of the four names suggested from the panel of the retired officers."

Lesson drawn: If the arbitration agreement is such that it offers a reasonable degree of choice to the other party in the selection of an arbitrator, the appointment made by the Employer party is likely to be respected by the Courts. In other words, the overall process should demonstrate that it is the two parties and not just one party who has chosen the arbitration tribunal. At this juncture, with due respect to the apex Court, I pose a simple question here:

If A asks B to choose one amongst 5 members (who all happen to belong to a group attached to A), can it be said that B has been offered any choice?

The question gains relevance when we know that in – *"Arvind Techno Glove Civil JV vs DMRC",* the Delhi HC (in March 23) did not accept any of 5 names listed unilaterally from the panel by DMRC and rather appointed a retired Justice as the sole independent Arbitrator despite the defence given by DMRC relying on *Central Organisation* (SC judgment).

IV. Present practices in Govt. Organisations

The tender process is on the principle *"Take it or leave it"* as the bidder does not have any freedom to negotiate the terms and conditions written in the bid document. Further, the arbitration clause in standard bid documents is not drafted in a manner that would facilitate a consensual appointment of arbitrator. The other party i.e. contractor is provided a limited choice or say in choosing the arbitrator from a panel constituted unilaterally by the department comprising retired Govt engineers, mostly from the same organization. Further, even if this panel is considerably large (of say 80 persons), the arbitration clause would be such that the public authority in charge would unilaterally shortlist 5 names (out of these 80 names) and would expect the contractor to choose one from this very sub-list of 5 names. So by design (of the arbitration clause), it is generally the public authority that is still tending to control the selection.

In cases where the parties fail in appointing the

4 *2019 SCC OnLine SC 442 (Judgment dt. 29 March, 2019)*
5 *2019 SCC OnLine SC 1517 (Judgment dt. 26 November 2019)*
6 *2019 SCC OnLine SC 1467 (Judgment dt. 17 December 2019)*

arbitrator as per procedure written in the arbitration clause and a party approaches the Court under s.11 of the A&C Act, in most cases the Hon'ble Court generally does not respect such unilateral attempt of one party trying somehow to retain the power to select the arbitrator. The Court, in such cases, then tends to appoint a retired Judge as the arbitrator.

In summation, the impression that one gets is that each department or discipline is comfortable in choosing its discipline/ fraternity person as arbitrator. When this power is in the hands of a department, it chooses a person from its fraternity and in case this power shifts to Judiciary under s.11, even the judiciary tends to choose a retired Judge, sometimes without respecting the agreed professional requisites as laid in an arbitration agreement. Perhaps we all shy away from respecting other professionals/ experts due to the fear of the unknown and tend to appoint a person of our trade.

Doesn't the law expect just the contrary from us?

V. Conclusions and suggestions:

(a). Consensual choice: The arbitration agreements need to be drafted by employers in a manner that allows a reasonable degree of choice to the other party in a post-dispute scenario while choosing the arbitrator.

(b). Panel of arbitrators from a wide spectrum of professionals: Most Govt entities are having a panel that primarily has its ex-employees. Many such ex-employees hit 5th schedule. The departments should have a panel of arbitrators drawn from a wide spectrum of organizations and industries at large and not from their cadre alone. Further, having made such a panel unilaterally, Is the employer party left with any rationale to shortlist any further from this list? Won't we be shifting to the better side of the law if the other party is offered wide and complete choice & expertise available on the panel?

The critics could disagree with me and argue that the balance of power would then shift to the contractor party but I struggle to answer as to what stops the employer party to exercise all due diligence while evaluating a person before accrediting him or her a position on the panel of arbitrators.

'Accrediting a person today with an honorable position; and then not respecting the same accreditation tomorrow, finds little rationale.

(c). Prescribing requisite qualifications/ experience of the arbitrator in arbitration clause: In most cases, the arbitration agreements are silent on the aspect of requisite qualifications and experience of an arbitrator. This practice entitles unchecked contours while appointing an arbitrator. The business processes these days are quite complex and it is beneficial to the parties if the chosen person has some domain knowledge and expertise. Thus, parties while drafting the arbitration clause should exert to specify the requisite qualifications and experience of the proposed arbitrator. The Hon'ble SC in the matter *UoI v. Parmar Const. Co.* has clarified that while dealing with s.11 applications, even the Court shall have to respect such agreed requisites.

(Note– The views are personal and do not reflect the views of any organization or institution.)

Taking Evidence in International Arbitration: Balancing Due Process and Efficiency

Anand Juddoo[1]

Abstract

Improving the evidence taking in international arbitration, discovering alternative cost and time efficient procedures, is crucial to maintain and increase efficiency of the arbitration process. Reflecting the civil law approach, the Rules on the Efficient Conduct of Proceedings in International Arbitration (also known as the "Prague Rules") envision an inquisitorial arbitral tribunal playing a more active role in managing proceedings, including active involvement in examination of witnesses and document production. The Prague Rules, a soft law instrument, offer an alternative to the widely used - IBA Rules on the Taking of Evidence in International Arbitration (commonly referred to as "IBA Rules of Evidence"). This article aims to explore the differences between the two sets of evidentiary rules – the IBA Rules of Evidence and the Prague Rules, with a particular focus on the tribunal's powers to limit or restrict the discovery and document production, as well as its' powers to guide examination of witnesses and proactively control and manage the process.

Keywords: international commercial arbitration, evidence, IBA Rules, Prague Rules.

Introduction

This year marks the fifth anniversary of the introduction of the Rules on the Efficient Conduct of Proceedings in International Arbitration, commonly known as the "Prague Rules"[2]. The Prague Rules was introduced in 2018 as an alternative to the widely accepted and used IBA Rules on the Taking of Evidence in International Arbitration (the "IBA Rules of Evidence")[3], which some practitioners argue tend to have a strong leaning towards common law approach and practices, incorporating such common traits as extensive disclosure procedures and lengthy cross-examination of witnesses[4].

Arbitration is often described as an informal process, which may lack the procedural and evidentiary standards of a formal trial. As pointed out in one case, "submission of disputes to arbitration always encounter an accumulation of procedural and evidentiary shortcuts that would in case of abuse frustrate counsel in a formal trial"[5]. The common illustration of the relative "informality" of the arbitration process is the absence of the rules of evidence, which play such a dominant role in litigation.

In the case of international commercial arbitration, that invariably involves participation of both common and civil law trained professionals, the issue of presentation of evidence becomes even more pertinent. Civil law-trained practitioners are more familiar with so-called "inquisitorial" approach, where the judge is vested with a proactive role in managing the dispute to trial and there is limited, or no, disclosure exercise. In contrast, in common law juris-

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2. *The Prague Rules on the Efficient Conduct of Proceedings in International Arbitration. May be found online at www.praguerules.com.*
3. *IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules of Evidence") (29 May 2010), www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx. The IBA Rules are a set of evidentiary guidelines prepared by the Arbitration Committee of the International Bar Association.*
4. *Henriques, Duarte G. "The Prague Rules: Competitor, Alternative or Addition to the IBA Rules on the Taking of Evidence in International Arbitration?" ASA Bulletin, vol. 36, no. 2, 2018. P. 351.*
5. *Forsythe Int'l, S.A. v. Gibbs Oil Co. of Texas, 915 F.2d 1017, 1022 (5th Cir. 1990).*

dictions, the role of a judge is very much that of umpire in a contest, not the seeker of truth[6]. The well-established rule that a judge cannot obtain evidence independently of the parties or even require the parties to produce evidence still remains good law[7].

The International Bar Association (IBA) sought to close the gap between both legal traditions and to remedy uncertainty about how evidence should be gathered in international commercial arbitration by introducing the first version of the IBA Rules of Evidence back in 1983. The IBA Rules of Evidence aimed to reconcile the differences between then existing national laws and to harmonize divergent national traditions and practices[8]. The IBA Rules of Evidence survived several revisions to reflect the most current practices with the ultimate goal of increasing certainty and predictability to an even greater extent[9], today it has become one of the most widely accepted and used soft law instruments among international arbitration practitioners.

As stated in the foreword of the IBA Rules of Evidence, the rules were introduced "... to provide an efficient, economical and fair process for the taking of evidence in international arbitration"[10], however, dissatisfaction among various stakeholders continued to surface. The White & Case/ Queen Mary University of London 2018 International Arbitration Survey revealed that high cost and lack of speed ranked as the first and fourth worst characteristics, respectively, of international commercial arbitration[11]. Many argued that arbitration procedure mimics court proceedings when it comes to evidence presentation, whereby parties engage in vast and often costly disclosure exercises[12]. In addition, some practitioners raised concerns that international commercial arbitration suffered from a deep-rooted, fundamental legitimacy and efficiency crisis, since it is increasingly perceived as being too expensive and inefficient[13].

In response to this growing dissatisfaction with the IBA Rules, the Prague Rules were introduced in 2018 as an alternative. Unlike the IBA Rules, the Prague Rules are derived from the civil law perspective, which tend to adopt an "inquisitorial" approach where the tribunal is vested with a more proactive role in managing the dispute[14]. It is interesting to note that an earlier version of the Prague Rules was entitled "Inquisitorial Rules on the Taking of Evidence in International Arbitration."[15]

The Prague Rules, according to its drafters, incorporate a comprehensive set of provisions on evidentiary matters in arbitration that would be more familiar to civil law trained practitioners.[16] The idea behind the Prague Rules was to empower arbitral tribunals with greater control of proceedings leading to a more expeditious and cost-effective resolution of disputes.[17]

6. *Air Canada v Secretary of State for Trade [1983] 2 AC 394, 438.*
7. *Sorabji, John. English Civil Justice after the Woolf and Jackson Reforms. Cambridge University Press, 2014, pp.138-139.*
8. *Karrer, Pierre A. "Internationalization of Civil Procedure – Beyond the IBA Rules of Evidence." Reflections on the International Practice of Law: Liber Amicorum for the 35th Anniversary of Bar & Karrer, edited by Nedim Peter Vogt, Helbing & Lichtenhahn, 2004, p. 130.*
9. *Kaufmann-Kohler, Gabrielle. "Soft Law in International Arbitration: Codification and Normativity." Journal of International Dispute Settlement, vol. 1, no. 2, 2010, p. 7.*
10. *IBA Rules on the Taking of Evidence in International Arbitration (IBA Rules of Evidence), art. 9, May 29, 2010, https://www.ibanet.org/Document/Default.aspx?DocumentUid=55FAA6F9-25E0-47C9-9AAF-45B1B7E693CD.*
11. *White & Case LLP and Queen Mary University of London 2018 International Arbitration Survey: The Evolution of International Arbitration (9 May 2018), https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-18.pdf.*
12. *Seidenberg, Steven. "International Arbitration Loses Its Grip: Are U.S. Lawyers to Blame?" A.B.A. Journal, vol. 96, no. 9, 2010, p. 50.*
13. *Henriques, Duarte G. "The Prague Rules: Competitor, Alternative or Addition to the IBA Rules on the Taking of Evidence in International Arbitration?" ASA Bulletin, 2018, p. 351.*
14. *Kabir Duggal and Rekha Rangachari, 'A Challenger Approaches: An Assessment of the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration' (2020) 37 Journal of International Arbitration, pp. 27-48.*
15. *Sessler, A., & Stein, M. (2019). The Prague Rules: Problem Detected, But Imperfectly Solved. Alternatives to High Cost Litigation, 37, 67.*
16. *Iwona Galka, "Prague Rules vs. IBA Rules: A New Approach to the Conduct of the Proceedings in International Arbitration," Journal of International Arbitration, vol. 36, no. 3, 2019, p. 369.*
17. *Jakob Ragnwaldh, "The Prague Rules – A Commentary," Arbitration International, vol. 35, no. 1, 2019, p. 95.*

In this brief note, the authors outline the main procedural innovations, proposed changes introduced in the Prague Rules, and aim to discuss their value in promoting efficiency and effectiveness in the arbitral process, with a main focus on the rules on examination of witnesses and document production.

I. Examination of Witnesses - Where the Difference Lies

Arbitral tribunals, as well as other stakeholders involved in the process, hold varying views on the role and importance of witness evidence and the extent to which it should be allowed in the arbitration process. Unlike other dispute resolution methods, international commercial arbitration does not mandate a rigid format to present evidence, offering the flexibility to develop a framework that best suits the parties' specific dispute.

Article 4 of the IBA Rules of Evidence provides a detailed explanation of the standards for witness testimony, as well as describes the procedure for the participation of witnesses at the hearing. The fact witnesses presenting for the parties are required to appear to give testimony at the evidentiary hearings, failing which, unless a valid reason is provided, the arbitral tribunal will disregard their witness statements.

Whilst the Prague Rules also do not exclude the participation of witnesses *per se*, the rules give the leading role and greater discretion to the tribunal to decide which witnesses are to be called for examination during the hearing and allows the exclusion of witnesses which the arbitral tribunal might consider irrelevant, immaterial or unreasonably burdensome for the resolution of the dispute. Another striking difference is that the Prague Rules explicitly provide that the tribunal may take a more active role by suggesting which witnesses should testify if they deem that their statements may be helpful for the tribunal in resolving the dispute.

Under Article 8 of the IBA Rules of Evidence, the parties, rather than the tribunal, decide on the number of witnesses that will appear at the hearing. On the contrary, Rule 5.2 and 5.3 of the Prague Rules provide arbitrators with the power to limit the number of witnesses. The tribunal decides on what witnesses should be called for examination after hearing the other party's position. The Prague Rules enshrine an altogether different mechanism whereby the tribunal adopts a pro-active role at the early stage of the proceedings: the parties must indicate the witnesses on whose testimony they intend to rely, and the factual circumstances in respect of which the relevant person can testify as early as possible (in the request for arbitration and the response to the request for arbitration, and the tribunal should include the deadline for the statement of witnesses in the procedural schedule). This approach seeks to streamline the evidence-gathering process, and arguably promote efficiency and reduce costs. However, some critics might argue that the use of written statements may limit the ability of the arbitral tribunal to assess the credibility and demeanor of the witness, which can be an important factor in determining the ultimate outcome of a case.

Under both sets of rules, the tribunal have ultimate control over evidentiary hearings, and, among other things, could limit the number of questions to witnesses and make adverse inferences.[18] More importantly, the Prague Rules explicitly provide that the examination at the hearing is conducted under the direction and control of the arbitral tribunal, without any specific reference to the cross-examination of witnesses. Another novelty is the introduction of a rule under Article 5.5 of the Prague Rules, which provides that any delay in the filing of a written witness statement after hearing the parties, the tribunal may decide not to call a factual witness to testify at the hearing, retaining the authority to give evidential value to a written witness statement, as it deems appropriate, thus, the tribunal can rely on a written testimony, without giving the other party the opportunity to hear and cross-examine the witness.

One might argue that the rationale and the purpose for granting the tribunal with wider powers is to prevent abuse by the parties of their procedural rights when in some cases parties call for witnesses who, as an example, simply repeat the testimony of other witnesses on the same issue. As one prominent arbitrator has written, "...the common arbitration practice often admits costly immaterial and/or prejudicial evidence...The arbitrators do that out of a desire to appear to

18 Article 5 and 6 of the Prague Rules. Article 5,6, 8.2, 9.5, 9.6 of the IBA Rules of Evidence.

be fair and ... [thereby they become unfair by receiving prejudicial evidence or making parties spend effort and money responding to immaterial evidence]...".[19]

In many cases such criticism is undoubtedly well-founded. At the same time, may in some cases criticisms of this sort overtook some of the premises of arbitration? The opportunity to present evidence that is not particularly relevant or even particularly reliable by the normal standards of evidence rules may nevertheless provide arbitrators with an insight into the "total" situation of the parties, that is not afforded by a narrower scope of inquiry.

The above does not mean that the exercising of wide powers granted to the tribunal should lead to abuse of powers. Arbitrators are still obliged to ensure that the parties are provided with an equal opportunity to present their case, as such the tribunal must be fully convinced of the worthlessness of calling witnesses in order to deny the party such an opportunity.

It is interesting to note that the Prague Rules tend to avoid witness examination,[20] which incidentally is the main difference in comparison to the IBA Rules of evidence and endorses a dispute resolution on a document-only basis.[21] Cross-examination has become routine in international arbitration proceedings to the extent that it is argued that it has gained wide acceptance over time as a "standard practice".[22] In general, the object of cross examination is to impeach the accuracy, credibility and general value of the evidence given. Arbitral tribunals have sustained that the evidence of a witness who has been cross-examined may carry greater weight than the evidence of a witness who has not since it is a "powerful tool for getting to the truth of the matter. The value of this method of ascertaining the truth lies in the personal contact between the witness, who has no idea of what questions may be asked to him, and the personality of the advocate who puts the questions to him."[23] However, it is important to remember that the effectiveness of cross-examination depends on the advocate's skill, the witness's honesty, and the tribunal's ability to evaluate evidence. While cross-examination is a commonly used tool in international commercial arbitration, it should be employed judiciously and with due consideration to its limitations.

Cross-examination is the hallmark of the common law system, a right to cross-examine a witness or expert generally does not exist in the civilian tradition of civil procedure.[24] The civil law style process tends to be conducted primarily in writing, and the concept of a highly concentrated "trial" with cross-examinations of witnesses in the common-law sense is not emphasized.[25] Common law and civil law don't only differ with regards to how the testimony of a witness is presented, but also with regard to the weight such testimony is given. While common law seems to rely more heavily on oral testimony, civil law tends to place greater value on documentary evidence[26]. As a result, oral testimony is considered less persuasive in civil law proceedings than it is in common law proceedings.

The Prague Rules do not prevent a party from cross-examining its opponent's witnesses. Under Article 5.7, if a party insists on calling the other party's witness, the tribunal should do so unless if it considers the testimony to be unnecessary, or if the witness statement has already been submitted. On the contrary, Article 4 of the IBA Rules of Evidence on the Taking of Evidence requires the fact witness to appear for testimony at the evidence hearing. If a witness fails to appear without a valid reason, their witness statement will be disregarded.

II. Document Production in Civil Law and Common Law Traditions: A Controversial

19 Arnold & Hubert, Focus Points in Arbitration Practice 51-52 (1992), quoted in Alan Scott Rau & Edward Sherman, Tradition and Innovation in International Arbitration Procedure, 30 Tex.Int'l L.J. 89, 95, 101 (1995).

20 Article 5.6. of the Prague Rules.

21 Article 4 of IBA Rules of Evidence.

22 Kent, Rachael D. "An Introduction to Cross-Examining Witnesses in International Arbitration." Transnational Dispute Management, vol. 3, no. 2, 2006, p.1.

23 Sir John Mortimer, Q.C., "The Value of Cross-Examination," Journal of the Law Society of Scotland, vol. 21, no. 2, 1976, pp. 62-63.

24 Rubinstein, Herbert, "International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions Perspective", 5 Chicago Journal of International Law 305 (2004).

25 Apple, J.G. and Deyling, R.P. A Primer on the Civil-Law System. Federal Judicial Center, 1995, p. 27.

26 Elsing Siegfried and Townsend John, "Bridging the Common Law Civil Law divide in Arbitration", Arbitration International, Vol. 18, No. 1, March 2002, p. 63.

Topic in International Commercial Arbitration?

In most civil law countries, documentary evidence bears the highest probative value, in contrast with the common law tradition, which is leaned more towards the orally rendered evidence.[27] The main principle of the evidentiary process in the common law tradition as it promotes the equality of arms and fair trial principles by revealing all relevant documents necessary to consider the case in its entirety[28]. The civil law tradition is focused on the efficiency of the proceedings rather than extensive search for truth. Bearing this in mind, the aim of document production in civil law tradition is to obtain the evidence at the disposal of the other party to support the facts alleged by the requesting party and consequently discharge its burden of proof.

Document production is fairly controversial topic in international commercial arbitration: some practitioners consider the document production as "an essential element of justice", whereas others argue that it is "a waste of time and money"[29]. The common feature of modern arbitration is that "arbitration hearings are now often preceded by extensive discovery, including requests for voluminous document production and depositions."[30]

The admissibility threshold of the evidence rendered during the mostly pre-trial stage in most cases used to be so low ("reasonably calculated to lead to the discovery of admissible evidence")[31] that the process has turned into a "fishing expedition", a term given for seeking documents which goes beyond the allowable limits.[32] Criticism from civil law practitioners soon emerged accusing the common law style discovery to be a "time-consuming, wasteful, expensive, intrusive and often misused" regime,[33] and more and more often warning from using the technique in international arbitration.[34]

Under Article 4.3. of the IBA Rules of Evidence, a party may request a specific document or a "narrow and specific requested category of documents". Based on this provision, parties commonly exchange requests for broadly described categories of documents, as they are not able to indicate the exact document they are looking for. Further, another common approach is to request the other party to produce all the e-mails that match specific search criteria. It must be noted, however, the IBA Rules of Evidence grant the arbitral tribunal the power to deny a request if it lacks sufficient relevance to the case or materiality to its outcome, or if it involves an unreasonable burden to produce the requested evidence.[35]

The IBA Rules of Evidence provide detailed instruction concerning how parties and arbitral tribunals should manage the disclosure of the following three broad document categories: (1) documents upon which a party wishes to rely and are in the party's possession, (2) documents that a party wants to use as evidence but are in the possession of the opposing party or a third party, and (3) documents that neither party wants to use as evidence but that the arbitral tribunal believes are relevant and material to the dispute.

For the purposes of this paper, the most interesting is the second category (documents upon which a party wishes to rely but cannot do so because an opposing party is in possession of the relevant documents): the IBA Rules of Evidence permit a party to petition the arbitral tribunal to order the disclosure of those documents that

27 Waincymer, Jeffrey. Procedure and Evidence in International Arbitration. 1st ed., Kluwer Law International, 2012, p. 826.

28 Michael H. Pryles, The Law and Practice of International Arbitration, 3rd ed., Juris Publishing, 2008, p. 338.

29 Baysal, P. & Çevik, B.K. (2018). Document Production in International Arbitration: The Good or the Evil? Kluwer Arbitration Blog. Retrieved from https://arbitrationblog.kluwerarbitration.com/2018/12/09/document-production-in-international-arbitration-the-good-or-the-evil/.

30 Nick Boyle, Richard Olderman. Securing the Benefits of Arbitration: Thoughtful Drafting of Arbitration Clauses. Corporate Accountability Report, 2016, pp. 1-3.

31 Waincymer Jeffrey. Procedure and Evidence in International Arbitration. 1st ed. Alphen aan den Rijn: Kluwer Law International, 2012, p. 682.

32 Blanke G. Document Production in International Arbitration: From Civil and Common Law Dichotomy to Operational Synergies // Arbitration: The International Journal of Arbitration, Mediation and Dispute Management. 2017. Vol. 83. Issue 4, pp. 425–426.

33 Smit Robert H. Towards Greater Efficiency in Document Production before Arbitral Tribunals – A North American Viewpoint. In: Special Supplement 2006: Document Production in International Arbitration. ICC International Court of Arbitration Bulletin [online]. 2006, p. 94.

34 Beerbower John E. International Arbitration: Do We Need U.S.-Style Discovery? Dispute Resolution Journal, 2010, vol. 65, no. 2, p. 142.

35 Article 3.3(c) of IBA Rules of Evidence.

are "relevant and material" to the party's case.[36] Under the IBA Rules of Evidence, the requesting party first sets out the documents or categories of documents that it wishes the opposing party to disclose in accordance with a series of requirements under Article 3.3. The opposing party then has the opportunity to object to the requests based on one of grounds set out in Article 9.2 of the IBA Rules of Evidence. If, after these exchanges, the parties cannot agree on the disclosure, the tribunal will subsequently rule on the propriety of the disclosure request. As such, the tribunal cannot order the disclosure of documents unless the requested documents are relevant to a party's arguments and, more importantly, material to the outcome of the dispute.

On the contrary, Article 4.2 of the Prague Rules contains a different approach outlined in Article 4.2, which suggests that document production, including e-discovery, should generally be avoided, whilst all key documents shall be provided in pleadings. There is not a complete bar to any document production as the subsequent article does provide for parties to "request certain documents": a party may request the tribunal to order the other party to produce only specific documents which (i) are relevant and material to the outcome of the case, (ii) are not in the public domain; and (iii) are in the possession of the other party.

It must be noted that the limitations imposed by the Prague Rules must not be interpreted as a complete disposal of document production,[37] as total restriction of the parties' ability to request or introduce documents is not equal to control of the documents by the tribunal. Still, the prohibition of certain production methods, such as e-discovery, restrains the amount and types of documents that parties are able to request and must produce.

Concluding remarks

The differences in legal traditions and cultures can influence the expectations and preferences of parties and practitioners regarding the conduct of arbitration proceedings, including the handling of evidence. This has led to a growing demand for more tailored and efficient procedures that can better accommodate the needs and expectations of the parties, particularly those from civil law jurisdictions who may prefer a more inquisitorial approach to evidence. As it has been discussed in this note, many practitioners, especially civil law-trained in particular, have felt frustration with the status quo of the evidentiary processes of international commercial arbitration, premised primarily on the IBA Rules of Evidence,[38] for various reasons discussed above. It is true that the parties to an international arbitration will often come to the dispute with different expectations as regards the evidentiary process derived from the rules and procedures adopted in their home jurisdictions.

Like any other set of best practice standards or soft law, the new Prague Rules are no panacea to the problem of the existing dissatisfaction of the process and underlying procedures, including presentation of evidence. As with most issues arising in international arbitration, the decision regarding the most suitable standard for presentation of evidence, i.e. whether the cross-examination or e-discovery should be allowed, depends primarily on the circumstances of the case.

Both the IBA Rules of Evidence and the Prague Rules aim at improving the efficiency of arbitration proceedings. The Prague Rules offers yet another option to the participants, an alternative option to frame the dispute resolution process in the most suitable way.

Importantly, the Prague Rules prompt a discussion on which procedural approach will be most appropriate for a particular dispute. The tribunals and parties should take a benefit of a more flexible, suitable approach to the organization of arbitration proceedings in their specific case, leading to increased efficiency.

36 Article 2.3(a) of IBA Rules of Evidence.

37 Duggal, Kabir A.N. & Rangachari, Rekha. 'A Challenger Approaches: An Assessment of the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration'. Journal of International Arbitration 37, no. 1 (2020), p. 40.

38 Klaus Peter Berger & J. Ole Jensen, Due Process Paranoia and the Procedural Judgment Rule: A Safe Harbour for Procedural Management Decisions by International Arbitrators, 32(3) Arb. Int'l 415 (2016).

Evidence Procedure, Production Of Documents And Electronic Records In Arbitration Proceedings

S Ravi Shankar[1]

The most important feature of the arbitration process is the simplified procedure to be followed in the arbitration proceedings unlike the complicated procedures provided in the Code of Civil Procedure and the Evidence Act. Hence, Section 19 of the Arbitration and Conciliation Act 1996 specifically excludes the applicability of Code of Civil Procedure,1908 and the Evidence Act, 1872 to the arbitration proceedings. Even though the Evidence act is not applicable in the arbitration process, the spirit of the Evidence Act is followed to ensure that the process is resulting in a legally sustainable arbitration award. The endeavour of the author is to deal with the important challenges faced by the parties in formulating a legally sustainable arbitration evidence process and production of documentary evidence including electronic records.

Establishing an evidence Process

The act[2] does not provide for a process for dealing with the evidence aspect of arbitration and also the Arbitrators are not bound by the Evidence Act,1972. S.18 of the Act, only mandates the arbitrator to ensure equal and full opportunities to both parties to prove their case. However, this does not imply that the arbitrators are not bound by the rules of evidence and fundamental principles of natural justice. As per the settled law the parties or free to agree on the full procedure to be followed by the arbitral tribunal[3] and if the parties are not able to finalise a procedure the arbitrator shall finalise the same. Even though the Act does not provide for the procedure to be followed by the arbitrators, the arbitrators are bound to apply the principles of natural justice[4]. In Soceite Aninmina Lucchesse Oil case[5], Madras High Court held that the Arbitrators are bound to act judicially, confirming the principles of natural justice. In the case of institutional arbitration, the institutional rules provide for the evidence procedure to be followed by the arbitrator and the parties while conducting arbitrations under those rules. Hence, in the case of ad hoc arbitrations the evidence process can be finalized by the parties jointly or by the arbitrator and in case of institutional arbitration the rules of the arbitration institution have to be followed.

Normally evidence process includes production of documents, admission denial of documents, proving the denied documents by way of oral witness, discovery and disclosure of documents, examination of fact witnesses, examination of expert witnesses, cross-examination of oral witnesses, etc., The above-said components of the witness process can be modified by the parties with mutual consent or can be decided by the arbitrator without giving any party additional advantage in the process. For example, many arbitration clauses do not permit the examination of witnesses and in those kinds of arbitrations, the evidence process is limited to documents filed by the parties only. The basic requirement of the evidence process is that both the parties shall be given equal and full opportunities to prove their case. In addition to parties producing witnesses and evidence, the arbitrator has the power to seek certain evidence that in the opinion of the arbitrator, will help the arbitrator to ensure substantive justice. But arbitrators should exercise that power cautiously and for some legitimate cause and not as a matter of routine.

Production of Documentary Evidence in Arbitration

Normally the claimant should produce all the documents relied on by the claimant to prove its case along with the pleadings in the stage of the statement of claim (SOC). The respondent shall produce all the documents relied on by the respondent along with the pleadings in this stage of statement of defence (SOD) and counter

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2 *Arbitration and Conciliation Act,1996*
3 *Hindustan Shipyard Limited Vs Essar Oil Limited and others (2005) 1ALT 264*
4 *Vinayak Vishnu Sahasrabudhe Vs B.G.Garde and others AIR 1959 Good 39*
5 *Soceite Aninmina Lucchesse Oil Vs Gorakhram Gokalchand AIR 1964 Mad 532*

claim. It is also necessary that the reason for producing a document should be specifically stated in the pleadings. In India, we follow a system of rejoinder to the statement of claim in which the additional contentions taken by the respondent in the statement of defence are responded. At that stage, also, the claimant gets an opportunity to file certain documents in support of the contentions raised in the rejoinder and the reply to counter-claim. Finally, the counter Claimant files a rejoinder to its counter-claim and files certain documents. In some cases, parties bring new contentions and facts in the rejoinder stage. In such a situation, the tribunal may allow the parties to file additional rejoinders along with some documents. But the arbitral tribunal should try to avoid such a prolonged process of filing documents because it delays the arbitration process and also creates confusion.

Admission and Denial of Documents

The parties are allowed to file an affidavit admitting and denying the documents filed by the opposite party. If certain documents are denied by one party, the other party may produce the original document to prove the existence of such documentary evidence or examine an oral witness to prove the denied document. The purpose of admission denial is to make clear the documents admitted by both parties and the documents not admitted by any of the parties. If any oral witness is examined by a party to prove certain documents, the opposite party gets an opportunity to cross-examine the oral witness. After cross-examination, the arbitral tribunal can decide whether the document can be admitted or not.

Production of Electronic Records

In this modern and technical era all communications are done by email and even contracts are signed electronically and hence, most of the documents are electronic records relied on by the parties. In the year 2000 various amendments were brought in IT Act and Evidence Act to regulate and create a framework for the production of electronic records in the Court of Law which includes arbitration proceedings. Electronic records *"means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche"*[6]. Electronic records produced for the inspection of the court are called documentary evidence and Section 65(B)(2) provides that the electronic records shall be considered, as documents if-

A. Computer output is produced during a period when the computer was regularly used to store or process information for regular activities by a person with the lawful control over the computer.

B. During the same period, Information contained in electronic records or data derived from the other source that is included in an electronic record was regularly fed into the computer from which computer output is produced

C. during the same period the computer was working correctly and if not then electronic records and it's content are not affected

D. the information contained in the electronic record reproduces or is derived from Such information Fed into the computer in the ordinary course of the said activities.

The ways to make an Electronic Record Admissible before a Court of Law or an Arbitral Tribunal:

In the evidence process, only after this stage of admissibility of a particular evidence, genuineness, veracity or relatability is seen by the court or the arbitral tribunal and hence admissibility of an electronic record is the first stage in the process. Hence let us see the ways in which an electronic record can be made as admissible evidence before a court or an arbitrator. The law provides for two ways of producing electronic records which are as follows:

1. **Primary Evidence (without 65 (B) Certificate)**: If a party can produce the original electronic record before the arbitral tribunal, it is primary evidence, then there is no requirement under law to comply with section 65 (B) of the Indian Evidence Act 1872 and the same is admissible by the tribunal.

6 *S 2(1) (t), The Information Technology Act,2000*

For example, the production of a laptop computer that was used to send a particular email through a witness who used the said laptop going to the witness box as a witness.

2. **Secondary Evidence (with 65 (B) Certificate)**: Any electronic record which is an output of a computer or a technical device where the original is saved, for example copy in a pen drive, printout, CDs etc are called secondary evidences. To make such secondary evidence admissible before a court of law or an arbitrator, compliance to section 65 (B) of the Indian Evidence Act 1872, filing a certificate by the owner or in whose possession and usage that device was, is necessary.

In the field of arbitration, we use a lot of electronic records including emails, electronic bank statements, electronic account statements, Bank Account Statements, Certificates issued by Chartered Accountants, Auto-generated electronic reports, software reports, scanned documents etc., because the entire communication between the corporate parties happens electronically. In such a situation the reliance of the parties on electronic records to prove their case is increasing day by day. Hence the legislature has come forward to accept the reality and has recognised electronic records as admissible documents before a court of law, provided they fulfil certain conditions. These conditions are necessary to avoid any manipulated and fabricated documents brought on record by the parties.

It is also important to note that the original electronic record also can be produced by a party in arbitration by producing the computer or laptop or computer tablet or mobile phone in which the electronic record was initially stored by stepping into the witness box and proving that it was owned by him or operated by him, in which case there is no requirement of filing a certificate under S.65(B). But it is not possible when the computer happens to be a part of a "computer system" or "computer network" and it becomes impossible to physically bring such system or network to the court, then the only means of providing the information contained in such electronic record can be in accordance with section 65 (B) (1) together with the requisite certificate under section 65 B(4).

Law relating to the 65(B) Certificate: The law is well settled by the law and the Supreme Court of India relating to is certificate issued under section 65 (B) of the Evidence Act, 1872 which can be summarised as follows:

(a) The certificate issuing person should state in the certificate identifying the electronic record, a statement describing how the electronic record was produced, details of the device that produced the electronic record, subject matter of the certificate to the best of the ability and knowledge of the person issuing it, should be signed by a person who is having official possession of that device or the management of the devise. (Section 65(B))

(b) If the original electronic record is produced in the court, there is no requirement of filing a certificate under S.65(B)

(c) The requirement of issuance of a certificate under S.65(B) is not procedural in nature. The certificate under S.65(B) of the Act is pre-requisite for admitting an electronic record as a document and it cannot be supplemented by an oral evidence later[7] as laid down in Anvar .P.A. Case[8]

(d) Section 45A of Indian Evidence Act,1872 and 79A of Information Technology Act jointly provide that whenever a question of genuineness of Electronic record arises, it can be verified by an examiner of electronic evidence who is appointed by the Central Government.

(e) If a certificate under Section 65(B) could not be obtained as the person or authority concerned refuses to share it, the summons could be sent by a court of law directing the person or the authority to produce it.

7 *Arjun Panditrao Khotkar Vs Kailash Kushanrao (2020) & SCC 1*
8 *Anvar P.V.(2024) 10 SCC 473*

WRITING OF AN ARBITRAL AWARD: STANDARDS AND PRACTICES

Datuk Sundra Rajoo[1]

INTRODUCTION

An arbitral award marks the end of the arbitral tribunal's authority and settles all claimsbetween the parties.[2] It is final and binding between the parties unless there is an express contrary provision in the arbitration submissions, it is an interim award, or there is any recourse that an aggrieved party may have under a statute or agreementto arbitrate.[3]

Arbitral awards have a unique status under international law as they can be enforcedinternationally by foreign courts using the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").[4]

Signatories to the New York Convention observe the principal objective of the New York Convention to provide uniform procedures for the recognition and enforcement of arbitral awards in one Convention State which had been made in another Convention State.

Given its special status under international law, the writing of an arbitral award is a critical step.

This paper focuses on the two common practical approaches to writing an arbitral award: the preliminary drafting exercise of pre-hearing matters; and the drafting of substantive parts of the arbitral award after the hearing.

WRITING THE PRE-HEARING MATTERS

Drafting an award takes time. A lot of work could be done while the arbitration proceedings are still ongoing. The process of drafting the arbitral award is a matter of personal predilection. The factors influencing the drafting of the arbitral award include the personal preferences of an arbitrator or the tribunal members, the complexity of issues, time limit, etc.

Nevertheless, it is a good practice for arbitrators to start drafting the pre-hearing matters before the hearing. The Practice Guidelines by the Chartered Institute of Arbitrators ("CIArb") provide that:

> *"It is good practice to start preparing and regularly update as the arbitration develops the narrative paragraphs of an award at an early stage so as to set out the basic information including the names and addresses of the arbitrators, the parties and their representatives, the chronology of the facts, the respective positions of the parties and any agreed matters. The award should describe the process by which the arbitrators have been appointed and basis for their jurisdiction to resolve the dispute. It should also contain a brief procedural history of the main stages in the arbitration, referring to preliminary conferences, exchanges of documents, hearing and post-hearing exchanges. The purpose of this is to enable the reader, such as a judge called upon to enforce the award, to see how the arbitrators came to have the authority to issue an award and understand whether the procedure followed was in accordance with the agreement of the parties, including any arbitration rules and/or the lex arbitri"*[5]

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2 *Article 32(1) of the UNCITRAL Model Law on International Commercial Arbitration states that "The arbitral proceedings are terminated by the final award…".*

3 *Middlemiss and Gould (a firm) v Hartlepool Corpn [1972] 1 WLR 1643, pp. 1647 – 1648; Arbitration Act, ss. 34, 48; English Arbitration Act, 1996, s. 58(2). See: Centrotrade Minerals and Metals Inc. v Hindustan Copper Ltd. (2017) 2 SCC 228.*

4 *Datuk Professor Sundra Rajoo, The Relevance of Arbitration in Resolving Disputes [2021] 1 MLJ ccxiv.*

5 *Chartered Institute of Arbitrators, International Arbitration Practice Guideline, Drafting Arbitral Awards, Part I – General, p. 13.*

> One of the key themes that emerge from drafting an award before the hearing is to preserve sufficient uninterrupted time to focus on substantive issues after the hearing.It may also refresh the arbitrators' memory ahead of the hearing and to keep track of the issues at each stage of the proceedings.

Given the importance of time management in the arbitration proceedings, in practice,the arbitrators could commence with the drafting of the non-substance part of the award in advance of the hearing.

(i). Formalities of the Arbitral Award

The arbitral tribunal may decide the formalities of the arbitral award at the early stageof the arbitration proceedings. However, the structure, content and requirements of anarbitral award may depend on the arbitral tribunal and applicable laws and rules.

The international arbitration conventions do not generally provide mandatory formal requirements for an arbitral award.[6]

The New York Convention imposes an implied written requirement for an arbitral award as Article IV(1) provides as follow:

> *"1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:*

a). The duly authenticated original award or a duly certified copy thereof;

b). The original agreement referred to in article II or a duly certified copythereof."

The formality requirements under the national law on domestic award may not apply to foreign awards unless the arbitration agreement expressly states so or when the parties advise the arbitral tribunal of such requirements.[7]

Therefore, it is essential for the arbitral tribunal to determine the required formalities for the arbitral award based on the applicable laws and rules.[8]

There are several international arbitration rules and arbitration statutes that provide guidelines as to the formal requirements of an arbitral award. Generally, the most common requirements of an arbitral award are as follows:

1) It shall be in writing and signed by the arbitral tribunal,[9]

2) It shall contain reasons upon which it is based,[10] and

3) It shall state its date and the seat of the arbitration.[11]

Some national laws impose mandatory requirements as to the formality of an arbitral award. For example, the Indian Stamp Act 1899 provides that an award is required to be affixed with appropriately valued stamp paper if the seat of arbitration is in India;[12] the Swedish Arbitration Act 1999 provides that the award must contain clear instructions as to what must be done by a party who wants to challenge the award;[13] the Arbitration (Scotland) Act 2010 provides that an

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6 Gary B. Born, International Commercial Arbitration, Vol. 2, 3rd edition, Kluwer Law International,Wolters Kluwer 2021, p. 3281.

7 Lawrence W. Newman, Richard D. Hill, The Leading Arbitrators' Guide to International Arbitration,2nd edn, Juris 2008, p. 500.

8 Chartered Institute of Arbitrators, Drafting Arbitral Awards Part I- General, art. 4:Arbitrators should comply with any requirements as to form and content set out in the arbitration agreement, including any arbitration rules and/ or the lex arbitri.

9 Arbitration and Conciliation Act, 1996, s. 31(1); English Arbitration Act, 1996, s. 52(3); UNCITRAL Model Law on International Commercial Arbitration, 1985, art. 31(1); SIAC Rules, 2016, r. 32.4; UNCITRAL Arbitration rules, 2013, arts. 34(2), 34(4); LCIA Arbitration Rules, 2020, art. 26.2; ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), rr. 47(1), 47(2); India: General Electric Co. v. Renusagar Power Co. Ltd., XV Y.B. Com. Arb. 259,262(2007)

10 Arbitration and Conciliation Act, 1996, s. 31(3); English Arbitration Act, 1996, s. 52(4); UNCITRAL Model Law on International Commercial Arbitration, 1985, art. 31(2); SIAC Rules, 2016, r. 32.4; UNCITRAL Arbitration Rules, 2013, art. 34(3); ICC Rules of Arbitration, 2017, art. 32(2); LCIAArbitration Rules, 2020, art. 26.2; ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), r. 47(1)(i).

11 Arbitration and Conciliation Act, 1996, s. 31(4); English Arbitration Act, 1996, s. 52(5); UNCITRAL Model Law on International Commercial Arbitration, 1985, art. 31(3); UNCITRAL Arbitration Rules, 2013, art. 34(4); ICC Rules of Arbitration, 2017, art. 32(3); LCIA Arbitration Rules, 2020, art. 26.2; ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), r. 47(1)(e).

12 Indian Stamp Act, 1899, s. 35; Sundra Rajoo, Law, Practice and Procedure of Arbitration in India,2021, Thomson Reuters, p. 1027.

13 Section 36 of Swedish Arbitration Act 1999.

award should state whether any previous provisional or part award has been made (and the extent to which any previous provisional award is superseded or confirmed).[14]

There are various checklists that are available to assist arbitrators in the drafting process. For example, the UNCITRAL Model Law on International Commercial Arbitration ("UNCITRAL Model Law"), the CIArb's checklist, the International Chamber of Commerce ("ICC") checklist, and the Asian International Arbitration Centre ("AIAC")'s checklist. The requirements under various institutional arbitration rules and relevant case laws intend to help drafting an award which is consistent with the applicable laws and rules.

(a). UNCITRAL Model Law

The UNCITRAL Model Law, has been adopted in 85 States and a total of 118 jurisdictions.[15] Akin to Section 31 of the Indian Arbitration and Conciliation Act 1996 ("1996 Act")[16], Article 31 of the UNICITRAL Model Law[17] sets out the form and contentrequirement of the award, as below:[18]

Be in writing

Written requirement of an award is important to serve as evidence of the outcome of the arbitration. It is necessary for parties to understand the basis for the award. Furthermore, a written award is important for the enforceability under the New York

Convention, as the enforcement of arbitral award under the New York Convention requires the original copy of the award. This would also provide a record of the arbitration that can be used in the event of anychallenges to the award. Without a written record, it may be difficult to reconstruct whathappened during the arbitration and to assess whether there were any procedural irregularities or other issues that could affect the validity of the award.

Be signed by the arbitrator(s)

The award is to be signed by the arbitrator. When there are more than one arbitrator, the award has to be signed by the majority of the arbitrators provided that the reasonfor any omitted signature is stated.

Contained reasons

The award has to contain reasons, unless the parties agreed otherwise.

The reasoning is important to provide transparency and clarity of the award. It providesthe rationale for the conclusions in the award. Examples of reasoning includes the facts, the applicable law, and how it reaches the conclusion.

State the date of the award

The date of the award is important to allow the parties to estimate the time limits underdomestic law for lodging set-aside application or other claims against the award. It also marks the date whether the arbitrators complied with the time limits set out in theapplicable institutional rules.

There may be registration or filing requirements for awards that are time-sensitive. Forexample, in India, Article 137 of Schedule 1 of the Limitation Act 1963 provides that the limitation period for the enforcement of foreign award will be 3 years

14 *Rule 51, Schedule 1 of Arbitration (Scotland) Act 2010.*

15 *'UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in2006' (United Nations Commission On International TradeLaw,) <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status> accessed 22 March 2023*

16 *Arbitration and Conciliation Act, 1996 s. 31*

17 *Article 31 of UNICITRAL Model Law provides that:*

"(1) the award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all membersof the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreedthat no reasons are to be given or the award is an award on agreed terms under article 30.

(3) The award shall state its date and the place of arbitration as determined in accordance witharticle 20(1). The award shall be deemed to have been made at that place.

(4) After the award is made, a copy signed by the arbitrators in accordance with paragraph(1)of this article shall be delivered to each party."

18 *Ilias Bantekas and others, UNCITRAL Model Law on International Commercial Arbitration- ACommentary , Cambridge University Press, 2020*

from which the right to apply accrues[19]. On the other hand, Article 8(1)(d) of the Limitation Law ofLagos State (Nigeria) stipulates a six-year limitation period for foreign awards which commences from the date the cause of action was accrued.

The date of award may also determine the applicable substantive and procedural lawas determined in the submission agreement.

State the place of the arbitration

The arbitral tribunal shall also state the place of the arbitration. The place of arbitrationis a crucial element as it clarifies the legal framework and procedural rules that governthe arbitration. The place of arbitration may impact the enforceability of the award.

The criteria outlined in the Model Law have had a significant impact on the drafting ofarbitral awards in the field of international arbitration. Countries such as India, Malaysia, the United Kingdom and Singapore have incorporated the principles set outin the Model Law in their domestic laws.

For instance, in India, the Arbitration and Conciliation Act of 1940 ("1940 Act") was amended in 1996 becoming the Arbitration and Conciliation Act of 1996 ("1996 Act") to incorporate the principles of the Model Law.

In the 1940 Act, it only required the arbitral award to be in writing and signed. After theincorporation of UNCITRAL Model Law in 1996, it provides for a certain form of awardto be complied with if there were no prior agreement between the parties, which is theaward shall be written, signed, reasoned and state the date and place of the award. This requirement was then made mandatory in the 2021 amendments to the 1996 Act.[20]

Similarly, in Malaysia, the Arbitration Act 2005 ("2005 Act") that repealed the prior Arbitration Act 1952 was modelled on the UNCITRAL Model Law. Prior to theamendment, the only requirement for the drafting of arbitral award is for the award to be final and binding.[21] The 2005 Act much like Part II of Indian 1996 Act, also provides for the recognition and enforcement of foreign arbitral award in accordance with the New York Convention.

In the United Kingdom, the Arbitration Act 1979 ("1979 Act") did not specify any form for the writing of arbitral award but requires the award to be reasoned for it to be enforced in the High Court. The Arbitration Act 1996 was then introduced to repeal the1979 Act.

The United Kingdom incorporated the principles of the UNCITRAL Model Law in the 1996 Act. [22]It adopted the UNCITRAL Model Law principles regarding the requirements for the validity of arbitral award, including the need to state the reasonsfor the award, and provides for the enforcement of a foreign arbitral award.

Several international institutions, such as CIArb, the ICC and the AIAC develop variouspractice notes, guidelines and checklists to ensure consistency and clarity in the awardwriting.

(b). Chartered Institute of Arbitrators ("CIArb")The CIArb Practical Guideline [23] on drafting an arbitral award provided a general overview of the structure of an award as follows[24]:

1. Awards should be in a format and layout which aids the communication of the arbitrators' decision and invites reading;
2. May be written as a flowing narrative dealing with the evidence as it arises naturally in the sequence of things or where there are many different issues, on an issue-by-issue basis, dealing with the evidence and argument applicable to each issue separately;

19 Limitation Act 1963, Article 137, Schedule

20 Hitesh, 'Evolution of The Arbitration Law In India' (Legal Service India E- Journal) <https://www.legalserviceindia.com/legal/article-4145-evolution-of-the-arbitration-law-in- india.html> accessed 22 March 2023

21 Article 17 of the Arbitration Act 1952

22 Louis Peacock-Young and James Coen, 'Twenty five years of the English Arbitration Act 1996: background, successes, and possible areas for reform' (STEWARTS, 6 April 2022) <https://www.stewartslaw.com/news/the-english-arbitration-act-1996-background-successes- and-possible-areas-for-reform/> accessed 22 March 2023

23 Tim Hardy, Andrew Burr, Bennar Balkaya, Ciaran Fahy, Jo Delaney, Karen Akinci, Lawrence W. Newman, Michael Cover, Mohamed S. Abdel Wahab, Murray Armes, Nicholas Gould, Richard Tan, Shawn Conway, Sundra Rajoo, ex officio, Wolf Von Kumberg, ex officio

24 'Drafting Arbitral Awards Part I _ General' 2021] International Arbitration Practice Guideline pp. 2-3 [25] 'Drafting Arbitral Awards Part I _ General' 2021] International Arbitration Practice Guideline, pp. 10-11

3. Arbitrator should consider using short sentences;
4. Arbitrator should use numbered paragraphs;
5. Award should include informative headings and sub-headings;
6. Table of contents for lengthy awards;
7. Avoid technical or legalistic expressions and should be written in plain and simple language; and
8. Should not attach extensive documents to the award and/or refer to documents attached to the award.

Article 10 of the guidelines[25] lays out additional requirement to the arbitral award. They include names and addresses of the arbitral tribunal, the parties and their legal representatives; the terms of the arbitration agreement between the parties; a summary of the facts and procedure including how the dispute arose; a summary of the issues and the respective positions of the parties; an analysis of the arbitrators' findings as to the facts and application of the law to these facts; and operative part containing the decision(s).

CIArb's commentary further sets out the practice of writing an arbitral award as follows:

1. Start preparing and regularly update as the arbitration develops the narrative paragraphs of an award at an early stage so as to set out the basic information;
2. The award should describe the process by which the arbitrators have been appointed and basis for their jurisdiction to resolve the dispute; Should contain a brief procedural history of the main stages in the arbitration, referring to the preliminary conferences, exchanges of documents, hearing and post-hearing exchanges;
3. The award should clearly identify and present in a logical order the issues which need to be decided. They are often phrased as questions which can be found in the parties' submission;
4. Request the parties to provide a list, preferably agreed between them, and or ask them to comment on the list prepared by the arbitrators in order to make sure that all of the disputed issues have been included and that all matters fall within the arbitrators' jurisdiction;
5. Include a description of all claims and counterclaims, if any. This can be done by way of paraphrasing the relevant sections from the request for arbitration or the submissions made by the parties;
6. The award should conclude with a section, known as the operative or dispositive part, setting out the arbitrators' decision and orders issue by issue. This section should be short and clearly separated from the rest of the award; and
7. Operative part of an award should be drafted using mandatory language that requires compliance from parties, such as 'we award', 'we direct', 'we order' or the equivalent. In case of non-monetary award, 'we declare'.

(c). International Chamber of Commerce ("ICC")

The ICC Arbitration Rules 2021 provides that the award is to be reasoned, stating the place of arbitration and date of award rendered.

The ICC also provide an award checklist[26] which is divided into 7 categories:

1. The General Formalities;
2. Identification of Parties, their representative and the arbitrators;
3. Arbitration and choice-of-law agreement;
4. History of the arbitral proceedings;
5. Jurisdiction;
6. Cost of the arbitration; and
7. Dispositive section, place of arbitration, date and signature.

The ICC Award Checklist provides guidance on the formalities such as the type of awards, the

25 Drafting Arbitral Awards Part I _ General' 2021] International Arbitration Practice Guideline, pp. 10-11
26 'ICC Award Checklist ' [(1998 - 2012 - 2017 - 2021 Rules)] -(2021) ICC International Court OfArbitration

inclusion of table of contents, numbering of the paragraphs, stating the date of the award, and identifying the parties, representatives and arbitrators.

ICC provides guidance in elaborating the history of the arbitral proceedings which includes the summary of procedural steps to date; date of the case management conference; place of arbitration; description of the constitution of the arbitral award; reference to the parties' agreement on an alternative method of nominating or appointing the president of the arbitral tribunal.

In relation to the dispositive part of the award, it provides that the award shall deal with all of the issues and parties' claim, which should be stated clearly and precisely somewhere in the award and compared to the terms of reference, including the parties' most recent requests for relief, and decides nothing more than those issues and claims.On another note, one of the features of the ICC arbitration is that the ICC court has the right to modify the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance.[27]

(d). Asian International Arbitration Centre ("AIAC")

The AIAC, one of the earliest ADR institutions in Asia, was formed under the auspicesof the Asian African Legal Consultative Organization ("AALCO"), an international organization comprising 47-member states from across the region.

The AIAC released its revised AIAC Arbitration 2021 Rules ("2021 Rules") consolidating the provisions of the UNCITRAL Arbitration Rules 2013 and its previous2018 Rules.

Rule 33 of the 2021 Rules provides that the award to be in writing, stating the reasonsfor which the award is based upon, and be signed by the arbitral tribunal either physically or electronically, be dated and stating the seat of arbitration.

Rule 34 of the 2021 Rules sets out the scope of the review process by the Director ofAIAC. The Director has the power to draw the attention of the arbitral tribunal to any irregularities that may arise from the draft form of the award. They include the deficiencies in the procedural history, general content issues, and any clerical, typographical, or computational errors.[28]

Likewise, the AIAC provides a checklist for drafting an arbitral award [29]which is dividedinto seven (7) categories, as follows:

1. Overview
   The overview sections includes general information such as page and paragraph numbering, definition and consistency of abbreviations and the typeof award, (i.e. Interim, Partial, Final Award, Consent Award, Emergency Awardor Award on Costs or Interest).[30]
2. The Details
   This includes details and identification of the Parties, their Representatives, andthe tribunal.
3. Arbitration agreement and applicable laws
   This section includes a reproduction of either the arbitration agreement or submission agreement in full or an excerpt, identify the parties and/or signatories to the arbitration agreement or submission agreement and an indication of the applicable substantive and procedural laws.
4. History of the arbitral proceedings
   The sub-sections under the history of the arbitral proceeding includes the summary of documents exchange and procedural steps, indication of decisionsmade by the Director on matters such as fast track request [31] , challenge requests[32], joinder request[33] and consolidation request[34], etc. as well as other procedural indications.
5. Content of the award
   As for the main body of the award, the AIAC recommends the inclusion of information

27 Article 34, ICC Arbitration Rules 2021

28 Asian International Arbitration Centre (Malaysia), Commentary to the AIAC Arbitration Rules 2021,2022

29 See 'Part II – Drafting of a Final Arbitral Award' of its 'Recommended Good Practices For The ConductOf Arbitration Proceedings And Drafting Of Awards In Arbitrations Administered Under The AIAC Arbitration Rules 2021'

(Source: https://admin.aiac.world/uploads/ckupload/ckupload_20210907104327_21.pdf)

30 AIAC Rules 2021, Rule 2.4

31 AIAC Rules 2021, Rule 8.3

32 AIAC Rules 2021, Rule 11.9

33 AIAC Rules 2021, Rule 21.1 and Rule 21.6

34 AIAC Rules 2021, Rule 22.2

on objections raised, decisions, time limits and considerations.

6. Costs of arbitration
   Under this section, the arbitral tribunal may include the details on the fee agreement entered between the parties and the tribunal, setting out all costs incurred throughout proceedings, the calculation of costs and interest.

7. Dispositive section of the award
   This section may include the dispositive part addressing all orders including those made on jurisdiction (if applicable), to address all the issues and parties' claim, the signatures of the arbitral tribunal, to indicate the date of the award and set of the award.

The AIAC is currently in the process of reviewing the 2021 Rules and its applicability.

(ii). Procedural History

Once the background of the arbitration proceedings has been set out, the next sectionof the arbitral award could include the procedural issues that arose up to the hearing stage.

The arbitrator could constantly update the procedural history, such as the commencement of arbitration, the agreed dates of the whole proceedings, the applications made by the parties and the arbitral tribunal's determination on these applications, the details on the pleadings and evidence submitted by the parties and the extension of time applications made by the parties and the arbitral tribunal's decision for each procedural steps.

(iii). Summary of Parties' Positions

It is a good practice to include all issues of fact and law that have been referred to thearbitration in an arbitral award[35].

It is, therefore useful to start drafting a summary of the parties' positions, including thedetails, the responsibility of each arbitrator for a three-party arbitral tribunal and the sequence of the issues.

For example, arbitrators could review the parties' arguments, the documents supporting such arguments, and tabulate each issue on the arguments from both parties together with the page references for the documents.

The drafting of the chronology and the relief sought are some of the examples that canbe prepared prior to hearing.

It is also a good practice to avoid paraphrasing the parties' position to avoid improvingor changing the parties' pleadings. It is important to resist the temptation to rewrite a party's position to avoid resulting in inaccuracies.

(iv). Previous Awards

If there has been a prior award, the arbitrator could draft all the previous awards in thearbitration proceedings, and whether there is any need to repeat any points in the subsequent or final award.

In this context, the arbitrator could identify the types of the arbitral award such as whether it is an interim award, partial award, agreed award, etc., the observations made in each case, and the determination made.

(v). Identify any Change of Counsel or Arbitrator

If there is any change of counsel or arbitrator during the course of proceedings, it couldbe recorded as and when it occurs to ensure that all the details are noted in the arbitralaward.

(vi). Changes to Request for Relief

If there are any amendments of pleadings or any changes to the request for relief, it would be a good practice to set out the chronological events, the parties' applicationsand the arbitral tribunal's determination.

(vii). Special Circumstances

Special circumstances may arise during the drafting process. For example, the non- participation of a party. In practice, parties to the arbitration agreement might fail or refuse to respond to a notice of arbitration. There could be a scenario where a party initially took part in the arbitration proceedings but ceases to participate at a crucial time[36].

Most arbitration legislations and rules allow

35 *Nigel Blackaby, Constantine Partasides, Alan Redfern, and Martin Hunter, Redfern and Hunter on International Arbitration, 6th edn, Oxford University Press 2015, para. 9.152; Indu Malhotra,Commentary on the Law of Arbitration, Vol. 1, 4th edn, Wolters Kluwer 2020, p. 790.*

36 *Russell Thirgood, The Non-Responsive Respondent: Taking an Arbitration Forward and How, Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, Volume 85, Issue 1 (2019) pp. 65 – 67*

the hearing to continue in the absence ofthe respondent[37]. For example, Article 25 of the UNCITRAL Model Law, similar to Section 25(b) of the Indian 1996 Act, provides as follows:

> *"the respondent fails to communicate his statement of defence ... the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations."*

CIArb published guidance on "Party Non-Participation" for tribunals. [38]The CIArb guideline provides that the arbitral tribunal should satisfy that all parties are notified ofthe proceedings.

The decisions made in the final award have to clearly set out that due process is served to all parties. They include sufficient notices have been given to them, the tribunal has informed the non-participate party that the proceeding would continue despite that the party chooses not to participate, and that the party has been urged toparticipate in the proceedings.

To avoid potential challenges to the arbitral award, the arbitral tribunal may set out clearly the due process taken throughout the arbitration proceedings.

(viii). Challenges to Jurisdiction

The arbitrator could commence the drafting on the information on any preliminary objection raised, including on jurisdiction and the decisions rendered by the arbitral tribunal.

The above are some of the areas of the arbitral award could be drafted pre-hearing.

WRITING THE AWARD AFTER THE HEARING

It would be ideal if the deliberation process and drafting process commenced immediately after the taking of evidence and to note the findings on the differences between the parties.

i. Structure of the Tribunal's Reasoning

The arbitral tribunal's analysis, findings, and reasoning on the substantive issues usually comprise a substantial proportion of the arbitral award.

The arbitrators could also decide on the structure of the operative parts of the arbitralaward. Below are some non-exhaustive pointers for consideration when writing an award after the hearing.

The basic sequence for this part would consist of the basis of jurisdiction of the arbitraltribunal, a list of issues dealt with in the arbitration proceedings, conclusion on liability and quantum, and any interest or costs implications.

It may be prudent to list all the claims, counterclaims, set-offs, and defenses to avoid judicial scrutiny on potential shortcomings of the arbitral award. The preliminary issuescould be dealt with first before the substantive part. This may be useful to ensure thatthe sequence of the arbitral award is logical and coherent.

Examples of preliminary issues are the jurisdiction challenges, the validity of the contract and validity of termination.

It could follow with discussing the issues, which may be dealt with sequentially. The arbitral award should deal with all the essential issues to ensure that the right to be heard is effectively safeguarded[39]. For example, it could start with the parties' positionand arguments, followed by the tribunal's reasoning.

It is a good practice to include references to documents, authorities and witness statements to ensure that the reader of the arbitral award can comprehend the awardeasily.

An example of the basic sequence of the substantive part of the award is as follows:[40]

(a) a numbered list of issues;

(b) common ground or undisputed facts;

(c) any preemptive questions such as the validity of the contract or termination ofcontract;

(d) analysis of the submissions and evidence which may include the finding of facts,application of the laws to the facts and the decisions;

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37 For example in the respective arbitration Acts of Australia, UK, US, Singapore, Hong Kong, Malaysia,Philippines, India, Germany, Italy and France (among others)

38 Chartered Institute Of Arbitrators, 'International Arbitration Practice Guideline - Party Non- Participation'

39 TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd [2013] SGHC 186 [2013] 4 SLR972, paras 77 to 78

40 Ray Turner, Arbitration Awards: A Practical Approach, 2005, Blackwell Publishing Ltd, p. 44

(e) the counterclaims and set-offs; and

(f) summary of the decisions.

For completeness, the award should clearly allocate the arbitral tribunal's determination on interest claims and costs.

The arbitral award may finished off by stating the law of the seat of the arbitration, anddealing with all the requirements imposed by the law. It must also contain, as noted above, the dispositive part of the arbitral tribunal's award for the Tribunal to set out itsdecisions.

Finally, the award must be signed and dated.

(ii). Dissenting Opinions

In an ideal situation, the deliberation process aims to reach a unanimous award or to have a majority decision. Whilst a unanimous award is desirable, it is not always achievable.

Dissenting opinions are inevitable but they are relatively rare occurrences. Accordingto the ICC statistics in 2020, there were 16% of the awards rendered by the majority.[41] All the majority awards were accompanied by a dissenting opinion.

It is, therefore, common for an arbitrator with a dissenting opinion to include his view in the arbitral award. In the end, the arbitral award could conclude and state that this view has been considered but was not adopted.

Having said so, serious efforts and attempts could be made to reach a consensus between the arbitrators. The dissenting opinion could be provided to the majority so as such opinion may be examined and possibly be reconciled with the majority opinions.[42]

However, challenging an arbitral award based on dissenting opinions is not new. It provides ammunition for the challenge of an arbitral award. There are generally threetypes of dissenting opinions[43] the good dissent is the dissent that is restrained to issues which concern the merits of the arbitration or jurisdiction of the tribunal; the baddissent uses inappropriate language for an arbitration environment;[44] the ugly dissentis the one who "attack the way in which the arbitration itself was conducted".[45]

The ugly dissent may constitute a ground to annul an arbitral award as it could refer to irregularities in the arbitration proceedings. For example, Article V(1)(b) of the 1958New York Convention provides as follows:

> *" Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: ...*
>
> *(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case..."*

The dissenting arbitrator in **F Ltd v M Ltd**[46] criticized that finding, stating that there was no basis for it, and that the admission was not a point that had been advanced atany time by either party. The Court held as follows:

a). "(a) The existence of a dissenting opinion on a point of law or fact, arising in connection with an issue that has been pleaded or dealt with by the parties in argument, will be irrelevant to any application under s 68. The decision of the arbitral tribunal on such a point, albeit by a majority rather than unanimously, could not be challenged for serious irregularity in such circumstances.

b). A comment or observation in a dissenting opinion, to the effect that an important point has been decided by the majority without reference to the parties, will be a factor to which the court will attach weight in dealing with an application under s 68. Depending on the circumstances, such an observation may have considerable weight, although it is unlikely that it could, on its own, prove determinative.

41 *Source: https://nyiac.org/wp-content/uploads/2021/09/ICC-Dispute-Resolution-2020-Statistics.pdf*
42 *Christer Söderlund, Dissenting opinions and why they should be tolerated, 2019, Arbitration Journalby the Arbitration Association.*
43 *Alan Redfern, The 2003 Freshfields -Lecture Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly, 2004, Arbitration International, Volume 20, pp. 223–242.* 44 *Ibid, p. 228*
44 *Ibid, p. 228*
45 *Ibid, p. 229*
46 *[2009] EWHC 275 (TCC); [2009] 2 All ER (Comm) 519*

c). In circumstances where an argument raised by the dissenting arbitrator hasplainly been considered and rejected by the majority, even if it is an argument that the parties did not themselves raise, it may be difficult to say—even if there was a serious irregularity—that there was also a substantial injustice. Regardless of how it arose, the argument will have been considered and rejected by the majority."[47]

As such, in the context of the English Arbitration Act 1996, a dissenting opinion does not raise a presumption of serious irregularity in the arbitration proceedings. However,the party may still misuse the ugly dissents as the ammunition to challenge the arbitral award.

Article 3(3) of the CIArb Practice Guidelines on Drafting Arbitral Awards provides the following guidelines:

> *"An arbitrator may issue a dissenting or separate opinion to explain a disagreement with the outcome and/or the reasoning of the majority, as long as it is not prohibited under the arbitration agreement, including any arbitration rules and/or the lex arbitri. Dissenting or separate opinions should be carefully drafted to avoid any appearance of bias"[48].*

Paragraph 3 of the comments to Article 3 above provides as follows:

> *"a) An arbitrator may wish to make an individual separate opinion expressing disagreement with the reasoning and/or the conclusions of the majority. There is no required form in which dissenting or concurring opinions should be made.They may be annexed to the final award or included in the award itself; however,they do not have any legal effect and they do not form part of an award.*
>
> *b) It is good practice for an arbitrator to issue a written draft of any separate opinion for consideration by the other arbitrators before any award is made. Theseparate opinion should not disclose any details of the deliberations. It should be clearly identified as the personal opinion of its author; it should be limited toexplaining the basis of the opinion; and it should not raise any new argumentsthat the arbitrator failed to raise at the deliberations.*

As such, it may be prudent for the dissenting arbitrator to adhere to its conduct when a separate opinion is desire to be included in the arbitral award.

Further, at any time before the arbitral award is rendered[49], the proceedings may be reopened depending on the arbitral rules[50], at the request of the arbitral tribunal or at the request of the party.

CONCLUSION

The drafting of the arbitral awards remains an area within the discretion of the arbitral tribunal so long as it complies with the mandatory requirements of the law and the parties' agreement.

Nevertheless, the standards and practices of arbitral award writing has evolved significantly over time. In the past, arbitral awards were often brief and focused solely on the outcome of the case. This is because there was little guidance on the writing ofarbitral award before the introduction of the UNCITRAL Model Law and the New York Convention only implied the writing and signing requirements.

The increasing importance of international arbitration as a means of resolving disputeshas led to a greater emphasis on the quality and clarity of arbitral awards. A greater consistency and clarity in the writing of awards would help to promote greater predictability and certainty in the outcome of arbitration proceedings.

To conclude, the practice of arbitral award writing has come a long way from its earlydays. Nevertheless, there should be room for different approaches in the future too.

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47 Ibid, para [16]

48 Source: https://www.ciarb.org/media/4206/drafting-arbitral-awards-part-i-_-general-2021.pdf

49 New York Court of Appeals in Re Joan Hansen & Co v. Everlast World's Boxing Headquarters Corp.,2009 NY Slip Op 07328 (2009), held that arbitration cannot be re-opened post award

50 For example, ICSID Arbitration Rule 38(2); AIAC Arbitration Rules 2021, Rule 32.5

Challenge And Enforcement of Arbitral Awards in India Post Amendment in 2015

Kunal Vajani[1]

1. Introduction

1.1. Arbitration has emerged as an alternative dispute resolution mechanism in India, owing to its efficiency, flexibility and confidentiality. The Arbitration and Conciliation Act, 1996 (**"Arbitration Act"**) provides for the legal framework for arbitration in India. The Arbitration Act one hand recognizes the finality and enforceability of arbitral awards as well as on the other hand provides for their challenge.

1.2. Section 34 of the Arbitration Act is based on Article 34 of the UNCITRAL Model Law with minor modifications. The procedure for challenging an arbitral award is encapsulated under Section 34 of the Arbitration Act. The Arbitration Act does not contain any provisions for challenge to an arbitral award passed in an arbitration seated outside India, therefore, Section 34 of the Arbitration Act applies only to those arbitral awards passed in arbitral proceedings seated in India.[2] It is immaterial if the arbitration is an international or a domestic arbitration.[3]

1.3. The 2015 Arbitration and Conciliation Amendment Act (**"2015 Amendment"**) brought many changes to then existing system of challenges and enforcement of arbitral awards. These changes were to fast-track arbitration proceedings and enforce pending arbitral awards. The 2019 Arbitration and Conciliation Amendment Act (**"2019 Amendment"**) clarified the changes made in the 2015 amendment and made some additional changes to then existing arbitration regime.

2. Constitutional Validity of Section 34 Of The Arbitration Act

2.1. The Constitutional validity of Section 34 of the Arbitraion Act was challenged before the Hon'ble Delhi High Court in the case of ***TPI India vs. Union of India***[4] on the basis the grounds mentioned under Section 34 of the Arbitration Act do not provide for an appeal or challenge on the merits of the arbitral award, thus, there is not even one forum of appeal against the arbitral award and against the power of judicial review which forms a part of the basic structure of the Constitution of India.

2.2. The Hon'ble Delhi High Court whilst replying upon ***Babar Ali vs. Union of India***[5] wherein the Hon'ble Supreme Court of India upheld the validity of the entire Arbitration Act, upheld the constitutional validity of Section 34 of the Act and held that the parties out of their own free will agree to submit their dispute to arbitration fully aware of the limitations imposed by Section 34 of the Arbitration Act. Further, it held also that it is permissible for parliament to provide for certain grounds on which an arbitral award can be challenged and not on any other. It held that if the Courts were allowed to re-examine the arbitral award on its merit, the entire purpose of speedy justice would become otiose.

2.3. In ***Dyna Technologies Pvt. Ltd. vs. Crompton Greaves Ltd.***[6] The Hon'ble Supreme Court of India observed that Section 34 of the Act has a different methodology, and it cannot be considered as a typical Appellate jurisdiction. Section 34 demands respect to the finality of the arbitral ruling and the party autonomy in having chosen to get their issues resolved through alternate forum of arbitration which would be thwarted if the Courts were to accept the challenge to the arbitral rulings on factual issues in a regular manner. The arbitral award being supported by reasons, does not call for any interference.

3. Competent Court for Entertaining Applications Under Section 34 Of The Arbi-

1. *Joint Managing Partner – Fox & Mandal, Solicitors & Advocates, Court Member [India] – Icc International Court Of Arbitration*
2. *Noy Vallesina Engineering SPA vs. Jindal Drugs Limited reported in (2021) 1 SCC 382*
3. *PASL Wind Solutions vs. GE Power Conversion India Pvt Ltd. reported in (2021) 7 SCC 1*
4. *(2001) 2 AD (Del) 21*
5. *(2000) 2 SCC 178*
6. *(2019) 20 SCC 1*

tration Act

3.1. Section 2(e) of the Arbitration Act provides for the definition of the Court. It provides that the Court for the purpose of domestic arbitration shall be the Principal Civil Court of original jurisdiction and High Court for international commercial arbitrations that exercises jurisdiction over the subject matter of arbitration as if the same had been the subject matter of the suit.

3.2. However, Section 2(e) of the Arbitration Act is a derogable provision, and principle of party autonomy which forms the bedrock of the 1996 Act empowers the parties with the right to confer jurisdiction on a Court in a different place. This is done by the designating the seat of the arbitration. Designation of the seat of arbitration is akin to conferring exclusive jurisdiction. The Court which exercises jurisdiction over the seat of the arbitration is the Court competent to entertain the application under Section 34 of the Arbitration Act.[7]

4. Limitation for Filing an Application Under Section 34 of The Arbitration Act

4.1. Section 34(3) of the Arbitration Act provides for period of limitation for moving an application challenging the arbitral award. It provides for a three-month period, from the date on which the applicant had received the arbitral award, to challenge the arbitral award. The proviso to Section 34(3) confers the discretion on the Court to allow the application within a further period of thirty days but not thereafter. Therefore, an application must ordinarily be filed within three months, however, the Court may extend this period by another 30 days on sufficient cause being shown.

4.2. **When does the period of limitation commences?**

4.2.1 The period of limitation for filing an application under Section 34(1) of the Arbitration Act begins on the date of the on which final award is validly delivered to the applicant.[8] The arbitral award must only be delivered to the party to the dispute and any delivery to the advocate of the party is not an effective delivery to commence the period of limitation.[9]

4.2.2 Similarly, the delivery of the draft arbitral award to identify any computation, clerical or typographical errors cannot be taken would not commence the period of limitation as it only commences when the draft arbitral award is approved and duly signed by the arbitrator(s) making it in terms of Section 31(1)&(4) of the Arbitration Act.[10] Therefore, the period of limitation would only commences when the signed copy of the final award is duly delivered to the party/ applicant and not before.

4.3. **Section 5 of Limitation Act vis-à-vis Section 34 of the Arbitration Act**

4.3.1 Another important issue that has been subject matter of a lot of judicial decisions is the application of Section 5 of Limitation Act that provides for condonation of delay to an application made under Section 34 of the Arbitration Act.

4.3.2 The Hon'ble Supreme Court of India in its decision in ***Simplex Infrastructure vs. Union of India***[11] held that

7 *BGS SGS Soma JV vs. NHPC Ltd. reported in (2020) 4 SCC 234*
8 *Union of India vs. Tecco Trichy Engineers & Contractors reported in (2005) 4 SCC 239*
9 *Benarsi Krishna Committee vs. Karmyogi Shelters Pvt. Ltd. reported in (2012) 9 SCC 496*
10 *Dakshin Haryana Bijli Vitran Nigam Ltd. vs. Navigant Technologies Pvt. Ltd. reported in (2021) 7 SCC 657*
11 *(2019) 2 SCC 455; see also State of Himachal Pradesh & Anr. vs. M/s Himachal Techno Engineers & Anr. reported in (2010) 12 SCC 210*

Section 5 of the Limitation Act does not apply to an application filed under Section 34 of the Arbitration Act. Further, it was also observed that the use of the words 'but not thereafter' in the proviso to Section 34(3) of the Arbitration Act indicates that the legislature did not intend to extend the period of limitation beyond the period already given under the Arbitration Act.

5. Grounds For Challenging an Arbitral Award

5.1 Section 34(2) of the Arbitration Act provides for an exhaustive list of limited grounds / narrow conspectus to annul an arbitral award. The Courts can interfere with an arbitral award only when it falls within the rubrics of this Section and not on any other ground. The Section uses the word 'only', thereby signifying the exhaustive nature of the grounds mentioned therein. In India the Courts have adopted a pro-arbitration approach in interpreting Section 34 of the Arbitration Act.

5.2 Incapacity of the Party

5.2.1 Section 34(2)(a)(i) of the Arbitration Act provides that an arbitral award can be set aside if the applicant can, on the basis of the arbitral record, prove that it was under some legal incapacity. The Hon'ble Delhi High Court in ***Delhi Jal Board vs. Reliable Diesel Eng Pvt. Ltd***[12] held that incapacity as referred to under Section 34(2)(a)(i) of the Arbitration Act relates to issues such as mental incapacity, minority and other similar circumstances. Thus, from the judicial interpretation of Section 34(2)(a)(i) it can be inferred that incapacity referred to therein pertains to the actual capacity of a party to enter into a valid, subsisting and binding arbitration agreement.

5.3. Invalidity of the Arbitration Agreement

5.3.1 Arbitration is the creature of the contract, and the arbitral tribunal derives its jurisdiction from the agreement itself, thus, the invalidity of the agreement would result in the consequent arbitral award itself being non-existent in the eyes of the law.[13]

5.3.2 Section 34(2)(a)(ii) of the Arbitration Act provides for setting aside of the arbitral award if the applicant proves that the arbitration agreement is not valid in law.

5.3.3 The Hon'ble Delhi High Court in ***Harjinder Pal vs. Harmesh Kumar,***[14] held that an arbitration clause that is unilaterally embedded into the agreement at the back of one of the parties would not be a valid arbitration agreement and accordingly set aside the consequent arbitral award. An arbitral award made pursuant to an arbitration agreement in an un-concluded contract is not valid in law.[15]

5.3.4 Similarly, an arbitration clause reproduced in a very small font at the bottom of an invoice is not valid in law and the arbitral award passed on reference pursuant to such clause is not valid in law.[16]

5.3.5 Recently, the Constitution Bench (3-2 Majority) of the Hon'ble Supreme Court of India has in ***N. N. Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd. And Ors.***[17] held that an arbitration clause is not enforceable in law if the agreement

12 *(2005) 3 Arb LR 602*
13 *Union of India vs. A.L. Ralia Ram, reported in AIR 1963 SC 1685; Basant Lal vs. Surendra Prasad reported in AIR 1957 Pat 417*
14 *2009 SCC OnLine Del 157*
15 *Union of India vs. Rail Udyog reported in 2000 SCC OnLine Del 336*
16 *Parmeet Singh Chatwal vs. Ashwani Sahani reported in 2020 SCC OnLine Del 1881*
17 *2023 SCC Online SC 495*

is unstamped or insufficiently stamped.

5.4. No notice of arbitration and failure of a party to present its case

5.4.1 Section 21 of the Arbitration Act provides that the arbitration commences on the date on which the notice of arbitration is given. This provision of the Arbitration Act has been subject matter of several judicial decisions. The Courts have unanimously held this requirement to be a mandatory requirement and any arbitration commenced without the compliance of the same is not valid.[18]

5.4.2 Similarly, the principle of audi alteram partem demands the right to present its case being given to every party to a dispute. This principle is embodied under Sections 18, 24 and 34(2)(a)(iii) of the Arbitration Act. Each party has a right to present its own case and to know the case of the opposing party.[19] Denial of a party of its right to cross-examine a witness in absence of any agreement to the contrary results in a party being denied the right to present its case and the arbitral award would fall within the rubric of Section 34(2)(a)(iii) of the Arbitration Act.[20]

5.4.3 The Hon'ble Supreme Court of India in the case of ***Sohan Lal Gupta vs. Asha Devi Gupta***[21] elucidated the following aspects that together constitute a reasonable opportunity to present a case:-

(a) each party must have notice that the hearing is to take place;

(b) each party must have a reasonable opportunity to be present at the hearing, together with his advisers and witnesses;

(c) each party must have the opportunity to be present throughout the hearing;

(d) each party must have a reasonable opportunity to present evidence and argument in support of his own case;

(e) each party must have a reasonable opportunity to test his opponent's case by cross-examining his witnesses, presenting rebutting evidence and addressing oral argument; and

(f) the hearing must, unless the contrary is expressly agreed, be the occasion on which the parties present the whole of their evidence and argument.

5.5. Arbitral Award beyond the scope of arbitration agreement or terms of the reference

5.5.1 Section 34(2)(a)(iv) of the Arbitration Act provides that an arbitral award may be set aside if it is beyond the scope of reference or submission to arbitration. An arbitrator is bound by the terms of reference and his jurisdiction is confined only to those disputes that forms part of the terms of reference.

5.5.2 An arbitral award would be liable to be set aside if the tribunal has travelled beyond his jurisdiction and decided against or beyond the parameters that the parties have created for it.[22] The tribunal would not have to decide a claim/issue if the parties in their contract have

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18 Alupro Building Systems Pvt. Ltd vs. Ozone Overseas Pvt. Ltd. reported in 2017 SCC OnLine Del 7228; Dulal Poddar vs. Executive Engineer, Dona Canal Division reported in (2004) 1 SCC 73; West Bengal Power Development Corporation Limited vs. Sical Mining Limited, A.P. No. 555 of 2022

19 Networth Stock Broking Ltd. vs. Subhasis Panda reported in 2009 SCC OnLine Bom 1680

20 Nazim H. Kazi vs. Konkan Mercantile Co-operative Bank Ltd. reported in 2013 SCC OnLine Bom 209

21 (2003) 7 SCC 492

22 Regency Hotels Private Limited vs. Cherish Investments Private Limited and Ors. reported in 2008 (4) ARBLR 301(Bom)

kept such a thing beyond the scope of the arbitration clause.[23] A decision by the arbitral tribunal on the excepted matters would be liable to be set aside under this Section.[24]

5.6. **Non-Arbitrable Dispute**

5.6.1 Section 34(2)(b)(i) of the Arbitration Act provides for setting aside of an arbitration if the subject matter of the dispute was not capable of settlement under the law for the time being in force. Section 2(3) of the Arbitration Act provides that the part-I of the Arbitration Act shall not affect any other law by virtue of which certain disputes may not be submitted to arbitration.

5.6.2 The Hon'ble Supreme Court of India in its judgment in ***Booz Allen vs. SBI Home Finance***[25] tried to prepare an illustrative list of such disputes. It held that adjudication of certain categories of disputes is reserved for public fora as a matter of public policy. It held that generally all the disputes concerning rights in personam are arbitrable while disputes touching upon rights in person are to be decided by the Courts, however, the subordinate rights in personal arising out of rights in rem would be amenable to arbitration. The Hon'ble Apex Court held that the well-recognised examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding-up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes. It was also emphasised that generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to subordinate rights in personam arising from rights in rem have always been considered to be arbitrable.

5.6.3 Further, in a recent judgment the Hon'ble Supreme Court of India (three-judge bench) in ***Vidya Drolia vs. Durga Trading Corporation***[26] laid down the following four-fold test to determine the arbitrability of the subject matter of the dispute:-

(a) when cause of action and subject-matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem;

(b) when cause of action and subject-matter of the dispute affects third-party rights; have erga omnes effect; require centralised adjudication, and mutual adjudication would not be appropriate and enforceable;

(c) when cause of action and subject-matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable; and

23 *West Bengal State Warehousing Corporation and Ors. vs. Sushil Kumar Kayan and Ors. reported in (2002) 5 SCC 679*
24 *J.G. Engineers Pvt. Ltd. vs. Union of India (UOI) and Ors. reported in (2011) 5 SCC 758; Mitra Guha Builders (India) Company vs. Oil and Natural Gas Corporation Limited reported in (2020) 3 SCC 222*
25 *(2011) 5 SCC 532*
26 *(2021) 1 SCC 1*

(d) when the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

5.7. Public Policy: The Unruly Horse

5.7.1 An arbitral award which is contrary to the public policy of India is liable to be set aside. Public policy, often described as an 'unruly horse', has evolved over the years through interpretations in multiple decisions.

5.7.2 The Hon'ble Supreme Court of India has laid down a narrow interpretation of the term 'public policy of India' in the case of ***Renusagar Power Co Ltd. vs. General Electric Co***.[27] The grounds for setting aside an arbitral award being contrary to the public policy included:-

(a) fundamental policy of India; or

(b) the interest of India; or

(c) justice or morality.[28]

5.7.3 In ***ONGC Ltd. vs. Saw Pipes Ltd.***,[29] the Hon'ble Apex Court widened the scope of public policy. It held that while deciding a Section 34, the court is required to give wider interpretation to the term public policy. Moreover, it held that an arbitral award could be set aside for being ***patently in violation*** of statutory provisions as the same would not be in public interest and likely to adversely affect the administration of justice.

5.7.4 Certain suggestions to the Arbitration Act were recommended by the 246th Report of the Law Commission of India to ensure that the grounds under Section 34 of the Arbitration Act, particularly the ground of 'public policy of India', are narrowly construed. However, the Hon'ble Supreme Court of India further expanded the scope of 'public policy' in ***ONGC Ltd. vs. Western GECO Ltd***.[30] In this judgment, the three-judge bench after considering the judgment in Saw Pipes case, noted that the judgment was silent on the meaning of 'fundamental policy of Indian law.' The court interpreted the 'fundamental policy of Indian law' and laid down three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the same. The first being the 'judicial approach', the second being the 'principles of natural justice', and the last being that 'every decision must be based on some rationale' and not be perverse and irrational. This judgment expanded the scope of 'public policy' under Section 34 of the Arbitration Act.

5.7.5 Later, in ***Associate Builders vs. Delhi Development Authority***,[31] the Hon'ble Apex Court while interpreting public policy again, held that an arbitral award can be challenged on the said grounds and can be set aside if, under the ground of justice, the 'award' would be such that it would shock the conscience of the court. Further, an arbitral award against morality was considered to be something that was against the mores of the day that would shock the conscience of the court.

5.7.6 The Supplementary Report to the 246th Report was issued by the Law Commission of India on 6th February, 2015. It highlighted the negative impact of Western Geco (supra), and reiterated the rec-

27 *Renusagar Power Co Ltd. vd. General Electric Co. reported in 1994 Supp (1) SCC 644*

28 *Venture Global Engg. vs. Satyam Computers Services Ltd. reported in (2008) 4 SCC 190; Delhi Development Authority vs. R.S. Sharma and Co. reported in (2008) 13 SCC 80; Security Printing and Minting Corporation of India Ltd. vs. Gandhi Industrial Corporation reported in (2007) 13 SCC 236*

29 *ONGC Ltd. vs. Saw Pipes Ltd. reported in (2003) 5 SCC 705*

30 *ONGC Ltd. vs. Western GECO Ltd. reported in AIR 2015 SC 363*

31 *Associate Builders vs. Delhi Development Authority reported in AIR 2015 SC 620*

ommendations made in the 246th Report. Subsequently, the 2015 Amendment significantly amended the Arbitration Act (based on the Law Commission's 246th Report)[32] to reduce court intervention in arbitration.

5.7.7 The 2015 Amendment narrowed the scope for setting aside arbitral awards. In particular, the scope of 'public policy', as provided for in Section 34, was narrowed so that arbitral awards can be set aside, only if they:-

(a) were induced or affected by fraud or corruption;

(b) contravene the 'fundamental policy of Indian law'; or

(c) conflict with the 'most basic notions of morality or justice'.

5.7.8 Interestingly, in the post-2015 Amendment era, the Hon'ble Supreme Court of India, in ***Ssangyong Engineering and Construction Company Limited vs. National Highways Authority of India***[33], clarified the following:-

(a) the scope of the 'public policy' ground for setting aside an arbitral award as amended by the 2015 Amendment;

(b) affirms the prospective applicability of the 2015 Amendment; and

(c) adopts a peculiar approach towards upholing minority arbitral awards.

5.7.9 It reiterated that public policy of India now means the 'fundamental policy of Indian law', as explained in Associate Builders (supra) (i.e., the Renusagar understanding of 'fundamental policy of Indian law' applies). This means that the law set out in Saw Pipes (supra) and Western Geco (supra) no longer applies. The arbitral award would be set aside on the ground of public policy of India only if it is:-

(a) contrary to the fundamental policy of Indian law, as explained in Associate Builders; or

(b) against the basic notions of justice or morality, as explained in Associate Builders.

5.7.10 The Supreme Court of India has in ***TRF Ltd. vs. Energo Engg. Projects Ltd.***[34] and ***Perkins Eastman Architects DPC vs. HSCC (India) Ltd.***[35] held that an arbitral award rendered by a unilaterally appointed arbitrator is liable to be set aside on the ground of violation of the fundamental policy of Indian law, because a person who is statutorily ineligible to act as an arbitrator is also de jure ineligible to unilaterally / exclusively appoint an arbitrator. Further, the three judge Bench of the Hon'ble Apex Court in ***Hindustan Zinc Ltd. vs. Ajmer Vidyut Vitran Nigam Ltd.***[36] has held that an arbitral award based on a unilateral appointment would be *non est* in law.

5.7.11 Pleading of the parties, nature of transaction between the parties and nature of the statute would be relevant for the court to determine if the arbitral award falls within the rubric of Public Policy.[37] An arbitral award cannot be set aside merely on this ground for erroneous application of the law or by reappreciation of evidence by courts.[38]

5.8. **Patent Illegality**

32 *Law Commission of India, Report No. 246, Amendments to the Arbitration and Conciliation Act, 1996 (August 2014)*
33 *(2019) 15 SCC 131*
34 *(2017) 8 SCC 377*
35 *(2020) 20 SCC 760*
36 *(2019) 17 SCC 82*
37 *McDermott International Inc. vs. Burn Standard Co. Ltd. reported in (2006) 11 SCC 181*
38 *Delhi Airport Metro Express Pvt. Ltd. vs. Delhi Metro Rail Corporation Ltd. reported in 2021 SCC OnLine SC 695*

5.8.1 Section 34(2A) provides that an arbitral award in a purely domestic arbitration, can be set aside for being patently illegal. In ***Patel Engineering Ltd. vs. North Eastern Electric Power Corpn. Ltd.***,[39] the Hon'ble Supreme Court of India relied on Ssangyong (supra) and Associate Builders (supra), observing that the arbitral award is patently illegal if it is found to be perverse or so irrational that no reasonable would have arrived at the same or construction of the contract in an unfair or unreasonable manner, or if the view of the arbitrator is not a possible view. Such an arbitral award, which was contrary to the terms of the contract, would be open to interference by the Court under Section 34(2)(b)(ii) as being patently illegal and being opposed to the public policy of India.[40]

5.8.2 In such a case, interference on the ground of 'patent illegality' is permissible only if an illegality goes to the root of the matter; and a public policy violation should be as inequitable and perverse so as to shock the conscience of the court.[41] In other words, to hold an arbitral award to be opposed to public policy, the patent illegality should go to the very root of the matter and is not just a trivial illegality.[42]Any arbitral award passed in beyond the claims of the parties or in violation of their contract would be considered patently illegal and therefore liable to be set aside.[43]

5.8.3 In ***PSA Sical Terminals Pvt. Ltd. v Board of Trustees of VO Chidambranar Port Trust Tuticorin***,[44] the Hon'ble Supreme Court of India held that an arbitral award that ignores vital evidence while arriving at a conclusion or one that rewrites the contract is liable to be set aside on the ground of patent illegality under Section 34. The Delhi High Court in ***Tarun Gupta vs. First Global Stcok Broking***,[45] held that an arbitral award passed by the arbitrator without taking into consideration vital documents, would be set aside under Section 34 of the Arbitration Act.

5.8.4 Sub-Section 2A was inserted to Section 34 of the Arbitration by the 2015 Amendment, states that an arbitral award may be set aside 'if the Court finds that the arbitral award is vitiated by patent illegality appearing on the face of the arbitral award.' The ground of patent illegality is not available in International Commercial Arbitrations. The Hon'ble Supreme Court of India in its latest judgment has laid down the following conditions on the basis of which an arbitral award can be set aside as patently illegal:-

(a) if the arbitral award is perverse in nature; or

(b) arbitrator's decision is irrational beyond the reasoning of a rational person; or

(c) if the contract is constructed in an unfair and unreasonable manner; or

(d) view of the arbitrator is not an acceptable one.[46]

5.8.5 In SsangYong (supra) the Hon'ble Supreme Court of India also clarified that Courts can only interfere where the arbitrator has given no reason for the arbitral Award, as it would amount to patent illegality. However, where the findings

39 *Patel Engineering Ltd. vs. North Eastern Electric Power Corpn. Ltd. reported in 2020 SCC OnLine SC 466*
40 *Hindustan Zinc Ltd. vs. Friends Coal Carbonization reported in (2006) 4 SCC 445*
41 *McDermott International Inc. vs. Burn Standard Co. Ltd. reported in (2006) 11 SCC 181*
42 *J.G Engineers (P) Ltd. vs. Union of India reported in (2011) 5 SCC 758*
43 *Id*
44 *PSA Sical Terminals Pvt. Ltd. vs. Board of Trustees of VO Chidambranar Port Trust Tuticorin reported in 2021 SCC OnLine SC 508*
45 *Tarun Gupta vs. First Global Stcok Broking reported in 2018 SCC OnLine Del 12943*
46 *Patel Engineering Ltd. vs. North Eastern Electric Power Corporation Ltd. reported in 2020 SCC OnLine SC 466*

of the arbitrator are based upon even little evidence, it will be held as valid. It was also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the arbitral award.

5.8.6 Further, the three judge Bench of the Hon'ble Apex Court in ***National Highway Authority of India vs. M. Hakeem***[47] held that interference with the conclusions of fact and law is not permissible in either Section 34 or Section 37 of the Act. Only when the determination is ex-facie, perverse or in conflict with the provisions of the Contract, can the Court's interference be justified.

5.8.7 The Hon'ble Delhi High Court has in ***LG Electronic India Pvt. Ltd. v. Dinesh Kalra***[48] whilst placing reliance on Associate Builders (supra) and MTNL v. Fujitshu India Private Limited[49] held that it is not conceivable to re-examine the facts to arrive at a different decision in the absence of any valid permissible ground under Section 34(2) of the Act.

5.8.8 Recently, in ***Megha Enterprises & Ors. v. Haldiram Snacks Pvt. Ltd.***[50] the Hon'ble Delhi High Court held that the scope of examination of an arbitral award under Section 34 of the Act is extremely limited. It is trite law that this Court would not undertake the exercise of re-appreciation of evidence on the ground of patent illegality. The evaluation of evidence by the Arbitral Tribunal may be erroneous and perhaps the Court may have taken a different view but that is not the scope of examination under Section 34 of the Act and therefore, the Court cannot interfere with the arbitral award merely on the ground that it does not concur with the inference drawn by the Arbitral Tribunal from the evidence led by the parties.

5.9. **Can the Court exercising powers under Section 34 uphold the minority award?**

5.9.1 The power under Section 34 of the Arbitration Act is limited to setting aside of an arbitral award, however, the Hon'ble Supreme Court of India in its judgment in ***Ssangyong Engineering and Construction Company Ltd. vs. National Highways Authority of India***[51] upheld the minority award while setting aside the majority award. The Court invoked the powers under Article 142 of the Constitution and held that mandating the parties to undergo another round of arbitration would cause considerable delay which will defeat the purpose of the Arbitration Act.

5.9.2 However, since no power like Article 142 is available with the lower Courts including the High Courts, it will be difficult to apply this judgment to all the minority awards and the parties would ultimately have to undergo a fresh round of arbitration.

5.10. **Can the Court exercising powers under Section 34 of the Arbitration modify an arbitral award?**

5.10.1 The position of law with regard to the power of the Court exercising power under Section 34 of the Arbitration Act to modify an arbitral award is no more res integra. The Hon'ble Supreme Court of India in a line of judgments has held

47 (2021) 9 SCC 1
48
49 2015 (2) ARBLR 332 (Delhi)
50 2021 SCC OnLine Del 2641
51 (2019) 15 SCC 131

that the Court cannot modify an arbitral award.[52] The Hon'ble Supreme Court of India held that conferring the Courts with the power to modify the arbitral award would amount to crossing the Lakshman Rekha.[53]

5.10.2 The High Court of Delhi in its recent judgment in ***Amazing Research Laboratories vs. Krishna Pharma***[54] distinguished between partial setting aside of an arbitral award and modification of an arbitral award. It held that while modification of an arbitral award is not permissible, however, the Court has the power to partially set aside an arbitral award and retain the remaining arbitral award and it is not necessary that the Court has to set aside the entire arbitral award and that it may sever the illegal portion of the arbitral award and retain the remaining portion of the arbitral award.

5.11. The scope of power under Section 34(4) of the Act

5.11.1 Section 34(4) confers the discretionary power on the Court to adjourn the challenge petition at the request of any party to allow the arbitral tribunal to resume the arbitral proceedings and remove the ground of setting aside of the arbitral award. However, the scope if this power is very narrow and the Court can only exercise this power to allow the tribunal to remove any curable defect,[55] the recourse to Section 34(4) can be taken to fill the gaps in the reasoning of the arbitral award, however, it would not be available when the arbitral award is delivered without any reasons at all.[56] Similarly, the aid of this section would not be available when the tribunal has failed to give its finding on a contentious issue between the parties.[57]

5.11.2 The High Court of Delhi in its recent judgment in ***Inox Air Products Pvt Ltd vs. Air Liquide North India Pvt Ltd***[58] held that recourse to Section 34(4) would not be available and the Court would not stall the challenge proceedings when the arbitral tribunal failed to consider material evidence. Thus, it can be seen that this power is very limited and is to be used sparingly and only to allow the tribunal to remove minor and curable defects in the arbitral award, it cannot be a routine exercise for the Court.

5.12. Challenging an arbitral award under Article 226 of the Indian Constitution

5.12.1 The Arbitration Act is a complete code in itself and any challenge to the arbitral award can only be by way of an application under Section 34 of the Arbitration Act and not by way of writs, the intervention by the High Courts by exercising their writ jurisdiction is not permissible under the Arbitration Act.[59] However, the High Court of Orrisa in its recent judgment observed that an arbitral award under the MSMED Act passed without hearing a party on the point of limitation can be set aside by the High Court under Article 226. The Court ruled that directing such a party to challenge the arbitral award under Section 34 would not be the correct recourse as it will have to mandatorily deposit 75% of the awarded amount in

52 *National Highways vs. M. Hakeem reported in 2021 SCC OnLine SC 473; NHAI vs. P. Nagaraju, SLP(C) No. 19775 of 2021*
53 *Id*
54 *O.M.P. (Comm.) 376 of 2023*
55 *Kinnari Mullick and Anr. vs. Ghanshyam Das Damani reported in (2018) 11 SCC 328*
56 *Eptisa Servicios De Ingenieria SL vs. Ajmer City Limited, S.B. Civil Writ Petition No.13488/2019*
57 *I Pay Clearing Services vs. ICICI Bank Limited, SLP (C) No. 24278 of 2019*
58 *O.M.P. (COMM) No. 212 of 2018*
59 *SBP & Co. vs. Patel Engineering reported in (2005) 8 SCC 618*

terms of Section 19 of the MSMED Act.[60]

6. Enforcement Of the Arbitral award

6.1 Section 36 of the Arbitration Act provides for enforcement of arbitral awards arising out of arbitrations seated in India. After the completion of an arbitration proceeding, the arbitral tribunal/sole arbitrator passes an arbitral award. Once the arbitral award is passed, the parties may raise objections to set aside the arbitral award under Section 34 of the Arbitration Act. However, if the court finds out that the grounds for setting aside the arbitral award are not made out, the arbitral award becomes final and binding on the parties. Once the arbitral award is final and binding on both the parties, arbitral award is to be enforced. In other words, the party in whose favour the arbitral award is passed i.e., the arbitral award holder may approach the court for enforcement of the arbitral award as a deemed decree of the court under Section 36 of the Arbitration Act. The executing court has no jurisdiction to substitute an arbitral award or make amendments to it. Further, it cannot modify an arbitral award, its jurisdiction is limited to the enforcement of an arbitral award.[61]

6.2. The Act provides for the enforcement of both domestic and foreign arbitral awards in India.

6.3 **Enforcement of domestic arbitral awards**

Domestic arbitral awards are enforceable in India in the same manner as a decree of a court. The party seeking enforcement of the award can file an execution petition before the appropriate court, which will then enforce the award as if it were a decree of the court. The grounds for challenging the enforcement of domestic awards are limited and include such grounds as the existence of an arbitration agreement, the validity of the award, and public policy considerations.

6.4 **Enforcement of Foreign Arbitral Awards**

Foreign arbitral awards are enforceable in India under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which India is a signatory. A party seeking enforcement of a foreign award must file an application before the appropriate court, which will then examine whether the award meets the requirements for enforcement under the Convention.

6.5 The grounds for refusing the enforcement of foreign arbitral awards in India are limited and include such grounds as the existence of an arbitration agreement, the validity of the award under the law of the country where it was made, and the public policy of India.

6.6 Prior to 2015 Amendment, the challenge to an arbitral award under Section 36 would mean an automatic stay on the arbitral award. However, after the 2015 Amendment a party needs to move a separate application for a stay on the execution of the arbitral award. In Sundaram Finance Limited vs. Abdul Samad and Anr.[62], Hon'ble Supreme Court of India held that there would be no automatic stay on the enforcement of the arbitral award.

7. Court for the purpose of Section 36 of the Arbitration Act

7.1 According to Section 36 of the Arbitration Act, an arbitral award is considered a decree of court and must be enforced in accordance with the Code of Civil Proce-

60 M/s Bajaj Electricals Ltd. vs. Micro Small and Enterprises Facilitation and Anr. W.P.(C) No. 7216 of 2020
61 ARSS Infrastructure Projects Ltd. vs. Calcutta Haldia Port Road Company Ltd. reported in 2018 SCC OnLine Del 10689
62 Sundaram Finance Limited vs. Abdul Samad and Anr reported in (2018) 3 SCC 622

dure, 1908. Section 38 of the Code of Civil Procedure, 1908 states that a decree can be executed by the court which passed it or the court to which it is sent for execution. Section 2(1)(e) of the Arbitration Act specifies that the court in which an application for enforcement of the arbitral award can be filed is the one where the award debtor resides or has assets/property.

7.2 Various Indian high courts have interpreted these provisions in different ways. The Madhya Pradesh High Court in ***Computer Sciences Corporation India (P) Ltd. vs. Harishchandra Lodwal***[63] held that the court which has jurisdiction under the arbitration proceedings will have jurisdiction to decide on the execution petition as well. The High Court of Bombay in ***Eskay Engineers vs. Bharat Sanchar Nigam Ltd***[64] held that the court where a Section 34 application is filed would be the court for the purpose of Section 36.

7.3 In ***I.C.D.S Limited vs. Mangala Builders Pvt. Ltd***[65] the Karnataka High Court held that the court where an application for enforcement of the arbitral award can be filed is the one which can entertain a suit with regards to the subject matter of the arbitration as provided under Section 2(1)(e) of the Arbitration Act.

7.4 In ***L&T Finance Ltd. vs. Abhishek Talwar***[66] the High Court of Bombay observed that the court for the purpose of enforcement of the arbitral award is the court within whose jurisdiction the arbitral award is passed.

7.5 In ***Daelim Industrial Co. Ltd. vs. Numaligarh Refinery Ltd***[67] the Delhi High Court observed that the court responsible for execution of a decree is the one within whose territorial jurisdiction the award-debtor resides or has his properties / assets located. In other words, for execution / enforcement of the arbitral award, the agreement restricting the jurisdiction to one court will not be applicable. The decision of the Delhi High Court in Daelim has been followed by the High Courts of Madras,[68] Allahabad[69] and Punjab and Haryana[70] to hold that the court in which execution petition is filed, shall not insist on getting the same filed in the court having the jurisdiction over the arbitral proceedings, thereafter getting the decree transferred to it for the purpose of execution.

7.6 The position of law has been settled in a judgment delivered by the Hon'ble Supreme Court of India in ***Sunderam Finance Limited vs. Abdul Samad and Anr***[71] which affirmed the view taken in the aforesaid Delhi High Court judgment. The Hon'ble Supreme Court of India observed that Section 36 clearly states that an arbitral award is required to be executed in the same manner as it was a decree given by a Civil Court [as per the provisions of the CPC, 1908]. The Hon'ble Supreme Court of India reiterated that the arbitral award itself is not a decree although the procedure of enforcement is the same. Therefore, there is no requirement of obtaining a transfer of decree from the court having jurisdiction over the arbitral tribunal. The enforcement of the arbitral award can be

63 AIR 2006 MP 34
64 (2009) 5 Mah LJ 565
65 2001 SCC OnLine Kar 153
66 2015 SCC OnLine Bom 1489
67 2009 (3) Arb LR 524
68 Kotak Mahindra vs. Sivakama Sundari, S. Narayana S.B. Murthy, MANU/TN/3588/2011
69 GE Money Financial Services Ltd. vs. Mohd. Azaz reported in 2013 SCC OnLine All 13365
70 Indusind Bank Ltd. vs. Bhullar Transport Company, MANU/PH/2896/2012
71 AIR 2018 SC 965

initiated by filing an execution petition anywhere in India where such decree can be executed. The Court further held that Sections 38 and 39 of the CPC, 1908, has no application to the execution of an arbitral award. Moreover, it held that Section 42 of the Arbitration Act, has no application after the termination of the arbitral proceedings. The Court held that the Arbitration Act, transcends all the territorial boundaries.

7.7 However, a larger bench of the Hon'ble Supreme Court of India in ***West Bengal vs. Associated Contractors***,[72] held that Section 42 applies to all the applications filed before, during and after the arbitral proceedings. Thus, the judgment in Sunderam Finance created some confusion apropos the application of Section 42 after the termination of arbitral proceedings under Section 32 of the Arbitration Act.

7.8 This controversy has been answered by the Calcutta High Court in ***BLA Projects Pvt. Ltd. vs. Asansol Durgapur Development Authority***.[73] The Court held that the issue of Section 36 in respect of Section 42 never fell for consideration before the Hon'ble Supreme Court of India in Associated Builders. It further held that the executing court derives its power not from Section 36 but from Order 21 of the CPC, 1908, and an execution application is not an application under Part I as provided under Section 42. Therefore, Section 42 has no application to Section 36(1) application.

7.9 The High Court of Bombay in ***Gemini Bay Transcription Pvt. Ltd. vs. Integrated Sales Services Limited***[74] held that Section 42 of the Arbitration Act only applies to application stemming from the arbitration agreement, which includes Sections 9, 34, 36(2), 36(3) of the Arbitration Act among others and since Section 36(1) of the Arbitration Act does not use the word 'application', Section 42 has no application to an enforcement petition.

7.10 In recent years, Indian courts have shown a strong commitment to enforcing both domestic and foreign arbitral awards in a timely and efficient manner. This has helped to enhance the credibility of arbitration as a dispute resolution mechanism in India and increase confidence among foreign investors and businesses.

8. Concluding Remarks

8.1 In conclusion, the challenge and enforcement of arbitral awards in India has undergone significant changes in recent years. The introduction of the 2015 Amendment has brought about several reforms aimed at making the arbitration process in India more efficient and effective. The 2015 Amendment has also introduced provisions for the speedy disposal of arbitration proceedings and the enforcement of arbitral awards.

8.2 However, despite these reforms, challenges in the enforcement of arbitral awards in India still exist. In recent years, Indian courts have shown a strong commitment to enforcing arbitral awards, both domestic and international, in a timely and efficient manner. The Indian judiciary has been criticized for being slow in the enforcement of arbitral awards, leading to delays and increased costs for parties involved in arbitration proceedings. Furthermore, there have been instances of judicial interference in the arbitration process, which has resulted in the loss of credibility of the arbitration process in India.

8.3 To address these issues, the Indian gov-

72 *West Bengal vs. Associated Contractors reported in (2015) 1 SCC 32*
73 *2019 SCC OnLine Cal 1868*
74 *2018 SCC OnLine Bom 255*

ernment and judiciary need to work together to ensure that the arbitration process in India is efficient, effective, and credible. This can be achieved by ensuring that the judiciary provides timely and efficient support to the arbitration process, and by promoting the use of alternative dispute resolution mechanisms such as arbitration and mediation. Additionally, the government can encourage foreign investment by providing a more favourable regulatory environment for arbitration in India.

Liquidated Damages in Indian Construction Industry: A Critical Analysis

Hasit Seth[1]

Introduction

1. Damages are a compensation to a non-breaching contracting party when the other contract party breaches its contractual obligations. A breach of contract without any loss is still entitled to nominal damages. While the courts, before granting damages, do require precision in calculation of losses arising from a breach of contract, they also recognise situations where losses may not be precisely quantifiable. The control over damages that courts can grant for a breach of contract is through the principles of causation, mitigation and remoteness.

2. Yet, apart from general damages that are determined after the breach of a contract, a category of damages that can be pre-decided by the parties are "liquidated damages". Despite the freedom of contract doctrine, the common law courts have been reluctant to grant liquidated damages. From the English law's distinction of genuine pre-estimate of damages versus penalties to the interpretations of S.74[2] of Indian Contract Act, 1872's, the policy rationale is clear: grant of liquidated damages needs special analysis by the courts.

3. This paper critically examines the state of law of liquidated damages in India. In particular, the paper examines proof requirements for liquidated damages. Liquidated damages clauses are frequently used in construction contracts. This paper also examines how the practice of construction contracts and dispute resolution treats liquidated damages. Further, it expresses suggestions for a stable interpretation of S.74.

History & Design of S.74's Liquidated Damages

4. S.74 specifies the legal rule for liquidated damages. Liquidated damages apply in two distinct situations: (i) a sum named in the contract that is to be paid upon a breach ("**Sum Named"** prong), or (ii) the contract contains any stipulation by way of penalty ("**Penalty**" prong). In either of these cases, the non-breaching party is entitled to a reasonable compensation that does not exceed either the sum in the Sum Named prong or the Penalty prong. In either of the prongs, the non-breaching party is entitled to compensation , "(S.74) ...*whether or not actual damage or loss is proved to have been caused*" by the breach.

5. There are two explanations to the S.74: (i) an increased interest rate from date of default may be a stipulation by way of penalty, and (ii) a party contracting with the government is not undertaking a public duty or promising an act of public interest. There is one exception to S.74 concerning bonds given as a part of public law, e.g., bail bonds, recognizance bonds, bonds ordered to given to government. The exception states when undertakings in such bonds are breached; the breaching person shall be liable for the whole sum mentioned in such bonds. Further, S.74 has seven illustrations (a) to (g), of which (d) to (g) were added by the 1899 amendment and they concern with penalties. While the illustration (c) also concerns a penalty, but that's an example of a liability concerning public law that is covered by the exception to S.74.

6. S.74 was amended in 1899. The pre-1899 amendment made no distinction between the Sum Named prong and the Penalty prong. The leading case, *Kailash Nath*[3] quotes the pre-1899 amendment and post-amendment versions of S.74 (*See* paragraphs 31 and 32). Possibly, the earliest scholarly commentary on S.74 is from the 1st edition of Pollock & Mulla's *Indian Contract Act*. As the 1st edition is dated 1905, the S.74 commentary does cover the 1899 amendment. Since those early times, the problems associated with liquidated damages are familiar ones. As the

1 *Hasit Seth is an arbitrator and an independent counsel based in the Bombay High Court*
2 *References to all sections are to the sections of the Indian Contract Act, 1872.*
3 *Kailash Nath Associates v. DDA, (2015) 4 SCC 136*

Pollock & Mulla's 1st edition states:

> *"Penalty and liquidated damages.— This section boldly cuts the most troublesome knot in the Common Law doctrine of damages. By the Common Law parties may name a penal sum as due and payable on a breach of contract, that sum being, according to the true intention of the parties, only a maximum of damages. In that case the real damages, and no more, are recoverable. On the other hand, they may by consent assess a fixed measure of damages, liquidated damages as they are called, to avoid the difficulty that must often be found in setting a pecuniary value on obligations not referable, on the face of them, to any commercial standard. So far this looks very well. The trouble is that even now the Courts have not arrived a clear or certain rules for deciding to which of these two classes a given stipulation for a penal or seemingly penal sum belongs. The only thing that is quite certain is that the use of the words "penalty" or " liquidated damages " is not decisive; and that even the addition of negative words purporting to exclude the other alternative, for example " as liquidated damages and not as a penalty", will not make it so."* (pages 267-268; emphasis supplied).

7. These are two mutually opposed ideas: (i) letting parties decide damages at the time of contracting, and (ii) restricting what damages courts can grant for claims based on pre-decided damages. The root of this duality is in common law's caution against forfeiture that invited equitable reliefs, and fundamental unfairness that a large sum is payable for a breach of a previous obligation to pay a smaller sum.

8. Early cases under S.74 concerned interest related stipulations. The principle that sum named as liquidated damages is the upper limit of compensation under S.74 is well established. But below that limit, the Court can award "reasonable compensation" as liquidated damages.

9. A range of cases with liquidated damages issue involve forfeiture of earnest money deposit. Obviously, the Sum Named prong of S.74 is inapplicable to earnest money forfeitures. Hence, question in earnest money forfeiture cases is whether the stipulation of a forfeiture is a penalty that can be enforced or not[4]. As in recent decades, India is building much infrastructure, the construction contracts have frequently raised liquidated damages issues. But the case law currently available is predominantly focussed on earnest money issues.

Current Indian Law of Liquidated Damages

9. Current interpretation of S.74's liquidated damages follows the formulation set by the Supreme Court's two judge bench in the *Kailash Nath* decision[5]. It has now become a lighthouse for all kinds of liquidated damages cases. Remarkably, *Kailash Nath* decision is a case of forfeiture of earnest money deposit. In the *Kailash Nath* decision, Delhi Development Authority ("DDA") had forfeited part payment deposited as earnest money for an auctioned plot where the balance sum was pending. Thereafter, DDA reauctioned the same plot for a large profit.

10. The framework to determine liquidated set by *Kailash Nath* decision is as below:

    a. Non-breaching party is entitled to a reasonable compensation of a sum named as liquidated damages only if the court finds that the sum named is a genuine pre-estimate fixed by the parties.

    b. In other cases, where there is a named sum in the contract, only reasonable compensation with the named sum being a maximum limit of compensation can be granted.

    c. When the amount fixed is a penalty, only

4 *Fateh Chand v. Balkishan Dass, (1964) 1 SCR 515 : AIR 1963 SC 1405*
5 *Kailash Nath, supra.*

reasonable compensation up to a maximum limit of such specified penalty amount can be granted.

d. In both cases (2) and (3) above, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.

e. Reasonable compensation will be as per S.73's damages principles.

f. Liquidated damages require loss as a necessity. It can be claimed by Plaintiff or Defendant and may be a sum paid or payable in future.

g. If it is possible to prove actual damage or loss, then such loss must be proved. Only if the loss is difficult or impossible to prove, then if the liquidated amount is a genuine pre-estimate, then it can be awarded. (Referring to S.74's language : *"whether or not actual damage or loss is proved to have been caused thereby*")

The High Bar Set by *Kailash Nath v. DDA*

11. One clear theme underlined by the *Kailash Nath* decision is that liquidated damages are not a very different kind of damages. Liquidated damages' distinct feature is that they are set by the Parties and included in the contract terms. While regular damages are an assessment by a court of reasonable compensation based on the proven loss. The courts have accepted that parties can agree upon liquidated damages at the time of contracting, but when a court is called upon to grant such damages under S.74, the courts will impose a regime similar in many aspects to the grant of ordinary damages under S.73 after a breach of the contract.

12. The *Kailash Nath* decision puts a heavy burden on a litigant to obtain liquidated damages. The party (could be plaintiff or defendant) that claims liquidated damages first has the burden of proving that the liquidated damages were a genuine pre-estimate of damages. If the courts find that the agreed liquidated damages were a genuine pre-estimate of damages then it can grant such damages as per the contract terms. But it is not possible in many business situations that the damages can be precisely measured in advance and genuinely agreed by all parties as a predicted loss upon a future breach. Usually, cases where such genuine estimate of a future damages can be set and proved easily are pricing estimates in commodities (e.g., cotton or crude oil) sale-purchase contracts that operate in a very price transparent market. But in many business situations, transactions concern bespoke goods or services which may not have an easily discovered price that can be set as a genuine pre-estimate of damages.
If in case the court finds that either the sum set in the contract is not a genuine pre-estimate or it is a penalty then only a reasonable compensation proved as a loss under S.73 like any other damages upon breach can be granted. The loss needs to be proved if it can be proved. And only as an exception when the sum named in the contract cannot be proved then if such loss is a genuine pre-estimate it can granted. As plain it is, the evidentiary requirements of either proving a loss or establishing that it is a genuine estimate never goes away in a liquidated damages claim.

13. While earlier cases like *ONGC Ltd. v. Saw Pipes Ltd.*[6] seem to clearly uphold the S.74's language of "*whether or not actual damage or loss is proved to have been caused thereby*" in these terms:

h. *"64. ... If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him. Bur-*

6 *ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705*

den is on the other party to lead evidence for proving that no loss is likely to occur by such breach."

14. While *Kailash Nath* decision in its paragraph 37 quotes the above para 64 of the *ONGC v. Saw Pipes* but later on it does not deal with the aspect of proof of actual loss on the basis of *ONGC v. Saw Pipes*. This is surprising given both are two judge bench decisions. The *Kailash Nath* decision straight away gives a ruling in these terms:

i. "43.6. The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded".

15. It's submitted with great respect that to require proof of actual damage or loss in each case of liquidated damages (with exception being where such proof is difficult or impossible) is against the language of S.74, which specifically dispenses with the requirement of proof of actual loss in these terms, *"whether or not actual damage or loss is proved to have been caused thereby"*. Hence, the most logical reading of S.74 including *Kailash Nath* decision is that proof of actual loss can be dispensed when the liquidated damages in the contract are a genuine pre-estimate of losses as agreed upon by the contracting parties.

16. The author submits that the starting point for interpreting a liquidated damages clause cannot be that if losses can be proved they must be proved on lines of S.73's ordinary damages. Rather the starting point should be that if a court determines a sum named as liquidated damages to be a genuine pre-estimate, then proof of loss should be optional upon a plain reading of S.74. This view is also supported by Justice R.F.Nariman who wrote the judgment in *Kailash Nath* in his own later judgment *MTNL v. Tata Communications*[7] without requiring actual proof of losses applied S.74 and relying on *Kailash Nath* noted that:

j. "13. As has been correctly held by the impugned judgment [Tata Communications Ltd. v. MTNL, 2018 SCC OnLine Tdsat 210] , a maximum of 12% can be levied as liquidated damages under the contract, which sum would amount to a sum of INR 25 lakhs. Since this clause governs the relations between the parties, obviously, a higher figure, contractually speaking, cannot be awarded as liquidated damages, which are to be considered as final and not challengeable by the supplier. This being the case, the appellant can claim only this sum. Anything claimed above this sum would have to be refunded to the respondent."

17. Further in a recent case of *Desh Raj*[8], the Supreme Court has applied *Kailash Nath* in the similar approach,

k. "41. In our considered opinion, Section 74 of the Contract Act primarily pertains to the grant of compensation or damages when a contract has been broken and the amount of such compensation or damages payable in the event of breach of the contract, is stipulated in the contract itself. In other words, all pre-estimated amounts which are specified to be paid on account of breach by any party under a contract are covered by Section 74 of the Contract Act as noted by this Court in Kailash Nath Associates v. DDA [Kailash Nath Associates v. DDA, (2015) 4 SCC 136, para 43.7 : (2015) 2 SCC (Civ) 502] . In Fateh Chand [Fateh Chand v. Balkishan Dass, (1964) 1 SCR 515 : AIR 1963 SC 1405] , the Constitution Bench ruled that Section 74 dispenses with proof of "actual loss or damage" and attracts intervention by courts where the pre-esti-

7 *MTNL v. Tata Communications Ltd., (2019) 5 SCC 341*
8 *Desh Raj v. Rohtash Singh, (2023) 3 SCC 714*

mated amount is "penal" in nature."

18. The very next paragraph 42 in *Desh Raj* is a quote of para 64 of the *ONGC v. Saw Pipes* case. This seems to indicate that it is possible to dispense with actual proof under S.74 when contractual terms provide a genuine pre-estimate of damages. The Court's then said in *Desh Raj* that,

    l. "43. Hence, in a scenario where the contractual terms clearly provide the factum of the pre-estimated amount being in the nature of "earnest money", the onus to prove that the same was "penal" in nature squarely lies on the party seeking refund of the same. Failure to discharge such burden would treat any pre-estimated amount stipulated in the contract as a "genuine pre-estimate of loss".

Construction and Liquidated Damages

19. Construction contracts frequently use liquidated damages clauses. These are typically used by the employers to penalise the contractors for delays or other minor violations of contractual criteria. Liquidated damages contract clauses are used to penalise contractors for failing to meet deadlines, completion of planned work, incomplete work and other such contract criteria. Employers contractual control over a contractor's work is usually via Extensions of Time (EOTs) with or without liquidated damages. Without such liquidated damages clauses, the alternative may only be to terminate the contract. But employers would rather put small penalties on the contractor that would force or motivate them to finish the project rather than terminate the project.

20. Difficulties arise when these liquidated damages in construction contracts are claimed in arbitrations or suits. Some of these problems are described next:

a. Not often does an employer go to court *only* to recover liquidated damages. For example, an employer is unlikely to have the project continuing yet will file a suit or arbitration (as applicable) to only recover liquidated damages. The employers generally deduct liquidated damages as penalties from the running bills or final payments. It is the contractor who then claims the amount deducted as liquidated damages as a wrongful deduction. This puts the evidentiary burden on the contractor initially to prove that the liquidated damages were not a genuine pre-estimate of losses. This is not an easy burden to discharge since it needs proof of "non-genuineness" of liquidated damages that the parties had actually contracted. It may need opinion evidence of construction experts who are most familiar with what is a "genuine" pre-estimate of loss for which a liquidated damages sum was fairly included in the contract. Additionally, parties will have to lead evidence to prove what they intended to be a genuine pre-estimate of damages as liquidated damages.

b. Hence, typically when a contractor claims that the liquidated damages were incorrectly imposed, usually the contract has already been breached. It is immaterial for present discussion about which rival claim of breach may be ultimately upheld. The damages claim in a suit or arbitration will cover general damages for various reasons (S.73) and also a claim that liquidated damages are to be recovered being incorrectly imposed. Hence, in pressing its claims, the contractor apart from proving loss from a breach of a contract (S.74) also has to lead evidence to establish that imposition of liquidated damages was improper because: (i) the pre-estimated amount was not a genuine estimate, or (ii) at least, the amount deducted is not reasonably related to the actual loss.

c. It is possible that the employer claims or counter-claims liquidated damages in situations where they have not yet been deducted already. A common example is a Design-Finance- Build-Operate-Transfer (DBFOT) project. Here, as the contractor has financed the project through debt or own resources, the employer has had no opportunity to deduct any liquidated damages. Here, the employer then has the burden to prove that the liquidated damages

as claimed are a genuine pre-estimate, or at least the sum actually claimed, whether a penalty or not, is a reasonable sum of damages based on proven loss.

d. The difficulty of proving losses in relation to liquidated damages is very hard in practice. For example, a construction contract may impose Rs.100,000 per day as liquidated damages for delay from a due date up to a limit of 10% of contract value. Such Rs.100,000 will need to be justified as a genuine pre-estimate of losses. Further, to not risk such the liquidated damages imposed as a non-genuine pre-estimate of loss or damage, a claimant will seek to prove actual loss incurred to seek compensation of ₹ 100,000 per day of delay. Such loss may be very hard to prove in practice. This is the situation in many public projects, an instance of which is the Supreme Court decision in *Construction & Design Services*[9] where the court noted the difficulty of assessing losses in many situations:

   i. *"17. Applying the above principle [quoting para 64 of the ONGC Ltd. v. Saw Pipes Ltd[10]] to the present case, it could certainly be presumed that delay in executing the work resulted in loss for which the respondent was entitled to reasonable compensation. Evidence of precise amount of loss may not be possible but in the absence of any evidence by the party committing breach that no loss was suffered by the party complaining of breach, the court has to proceed on guesswork as to the quantum of compensation to be allowed in the given circumstances. Since the respondent also could have led evidence to show the extent of higher amount paid for the work got done or produce any other specific material but it did not do so, we are of the view that it will be fair to award half of the amount claimed as reasonable compensation."*

A Need for A Balanced Interpretation of S.74

21. Hence, the author hopes that the courts in construction cases when they are applying S.74 to liquidated damages clauses in construction contracts, as a starting point, they will dispense with the proof of actual losses in cases where the liquidated damages are a genuine pre-estimate of losses for causes like delay, etc. Further, whether the estimate is genuine or not as per contract terms executed by expert parties, the courts may wish to consider the liquidated damages clauses as genuine if there is an overall cap or a limit put to them which is usually around 10 per cent of the contract value. Else proof of whether the pre-estimate of losses in liquidated damages was genuine or not may itself require detailed proof from industry experts and parties in each case. But not all liquidated clauses are similar is a fact of life in construction industry in India where bespoke contracts are preferred. Hence, in cases where the courts interpret a particular liquidated damages contract clause, despite an overall 10 per cent cap or limit on liquidated damages, as not being a genuine pre-estimate of losses but have a sum named, whether it be considered a penalty or not, then the courts may require in line with the past precedents that losses have to be proved as any other loss under S.73.

9 *Construction & Design Services v. DDA, (2015) 14 SCC 263*
10 *Supra, ONGC Ltd. v. Saw Pipes Ltd.*

Complexities in Appointment of Arbitrators in Construction Contracts

Ajay Nandalike[1]

ABSTRACT

*This article specifically focuses on how these issues are reflecting in the appointment of the Arbitrator by the Court under Section 11 of the Arbitration and Conciliation Act ('***the Act***'). The practical realities concerning no claim certificate, limitation, multiple claims, pre-arbitral procedure and excepted matters are discussed and the approach of the Court under Section 11 of the Act in respect of these matters is analysed in this article.*

1. Construction Contracts have certain peculiar clauses such as pre-dispute resolution procedures, excepted matters, no due / no claim certificates, multiple contracts and the clauses which require one to raise the dispute at the earliest point in time failing which the dispute becomes non-arbitrable. These clauses present challenges to the arbitration process which may result in multiplicity of proceedings, loss of right to arbitrate etc.
2. It is typical for Owners / Employers to seek a 'no due' certificate before releasing final payments under the Contract. This is sought so as to prevent a Contractor from raising any disputes at a later stage. It is difficult for a Contractor to raise disputes when the Work is still going on as the Employer may create hurdles in functioning. If a Contractor raises a claim after furnishing such a no due certificate, it is argued that there is 'discharge and accord' and hence no arbitral dispute survives.
3. There are Construction projects which get stretched beyond a decade wherein it is unfeasible to raise disputes at the initial stage. This may require multiple invocation of arbitration clauses and constitution of multiple tribunals. This may also be the case in long term contracts. The question that arises is whether the claims are barred by application of the principle of Order 2 Rule 2 of the Code of Civil Procedure. The principle requires you to specifically seek leave of the Court to raise other disputes at a later point in time. Unless such a leave is granted by the Court, any subsequent suit would be barred. There is also the issue of the claim being barred under the law of limitation.
4. The initiation of arbitration proceedings is by the appointment of the Arbitrator. The appointment of Arbitrator is governed by Section 11 of the A&C Act. The Act provides for appointment of Arbitrator if either the parties do not agree for appointment or if the procedure provided under the clause were to fail. The questions to be considered for the purpose of the appointment was left open to the Courts.
5. The scope of Section 11 was initially held to be administrative in nature. However, the scope of Section 11 changed in ***SBP vs. Patel Engineering***[2] wherein it was held to be judicial in nature. Over a period of time, the scope of adjudication in a petition for appointment of arbitrators was enlarged resulting in issues such as limitation, arbitrability, the existence of live disputes, res-judicata being agitated, and findings being delivered on these issues by the High Court.
6. The consequence of this judgment was that the findings of the High Court under Section 11 would necessarily bind the Arbitral Tribunals as they are judicial orders or even worse would render the adjudication of such issues totally unnecessary. One must bear in mind here that the High Court is interpreting the documents filed by the parties which may be limited in nature and not encompass of the full nature of the evidence which may be available to either party. Further, the High Court is also deprived of oral evidence and cross-examination of the parties when

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2. *(2005) 8 SCC 618*

it comes to identification of these facts.

7. The Supreme Court felt that it was necessary to bring a sense of discipline into the scope of adjudication in Section 11 and accordingly in ***National Insurance Co. Ltd v Boghara Polyfab (P) Ltd***[3] proceeded to categorize the issues that 'must' be addressed, 'may' be addressed and 'cannot/ must not' be addressed in Section 11 proceedings as under:

    a. The must adjudicate aspect only considered 2 aspects – first being territorial jurisdiction of the High Court to hear the matter and second as to whether there is any valid arbitration agreement and parties to the dispute are parties to that arbitration agreement.

    b. The 'may adjudicate' aspect was complicated and included the concept of 'live claim' i.e. essentially is it barred by time and as to whether there was full accord and satisfaction and 'no claim' certificate.

    c. Certain aspects which were supposed to be excluded from the ambit of examination of High Court under Section 11 of the Act which included excepted matters, arbitrability and on merits of the matter.

8. However, this judgment only muddied the waters as High Courts across the country started getting into detailed examination of all claims which resulted in Section 11 proceedings being stretched out to 3 or 4 years rendering the arbitrations to be a totally inefficacious remedy.

9. The insertion of Section 11 (6A) to the Act by way of the 2015 Amendment to the Act whereby the scope of examination in Section 11 proceedings was proposed to be restricted to the 'examination of existence of the arbitration agreement' brought in another interesting line of judgments.

10. In ***Duro Felguera, S.A. vs. Gangavaram Port Limited***[4] wherein issues relating to multiple arbitration agreements, joinder etc. was all considered, the Supreme Court interpreted section 11 (6A) of the Act in its literal sense to hold that the courts are required to only identify the existence of the arbitration agreement, and having done so, the agreement is to be given effect to. No other issue can be considered or should be considered by the courts in view of the insertion of Section 11(6A).

11. This position in law was amplified by the Supreme Court in ***Mayavati Trading Pvt. Ltd. v. Pradyuat Deb Burman***[5] which held that ***Bolgara Polyfab*** and ***SBP & Co*** were legislatively overruled by the 2015 amendment. This judgment specifically overruled two judgments of the Supreme Court which dealt with 'no-claim certificates' viz. Antique Trading and ONGC vs. ANS on the ground that it was legislatively overruled and the question of accord and satisfaction has been left open to the Arbitrator to decide.

12. The reason why the issue of 'no claim' cannot be decided perfunctorily without consideration of the totality of the facts is the reality in Construction Contracts. In fact, this has been recognized by the Courts. In ***NTPC vs. Reshmi Constructions***[6], the Supreme Court said that every case must be judged on its own facts. The Courts cannot shut its eyes to the practical reality that contractors face pressures from banks and financial institutions which compel them to sign no claim certificates to receive the balance payment. This was reinforced in ***R.L. Kalathia vs. State of Gujarat***[7], where the Supreme Court held that no claim certificates are not an absolute bar to make further claims.

13. In this context, if one were to examine the subsequent line of judgments and most

3 *(2009) 1 SCC 267*
4 *(2017) 9 SCC 729*
5 *(2019) 8 SCC 714*
6 *(2004) 2 SCC 663*
7 *(2011) 2 SCC 400*

recently in ***NTPC Ltd vs. SPML Infra Ltd***[8], the Supreme Court has completely diluted the position taking into consideration the judgment of ***Vidya Drolia***[9]. The Supreme Court also referred to ***BSNL Ltd vs. Nortel Networks Ltd***[10] where it was held that the claims barred by time cannot be referred to arbitration.

14. The facts of the particular case was that the Contractor had entered into a Settlement Agreement after litigation and specifically agreed to withdraw the writ petition and also not make any other claims. In lieu of the same, the Employer also withdrew some of its claims. The Supreme Court in ***NTPC vs. SPMPL Infra Ltd*** has culled out certain principles for consideration by the Courts while deciding an application under Section 11 of the Act as under:

    (i) The primary inquiry is about the existence and validity of an arbitration agreement which includes an inquiry as to whether the parties to the agreement and the applicant's privity to the said agreement which require a 'thorough examination by the referral court'.

    (ii) The secondary inquiry is in respect of non-arbitrability wherein the courts have to examine whether the assertion on arbitrability is bona-fide or not.

    (iii) The prima facie scrutiny of the facts must lead to a clear conclusion that there is not a vestige of doubt that the claim is non-arbitrable. On the other hand, even if there is a slightest doubt, the matter must be referred to arbitration.

    (iv) The limited scrutiny through the 'eye of the needle' is necessary and compelling as it is intertwined with the duty of the referral court to protect the parties from being forced to arbitrate when the matter is demonstrably non-arbitrable. It is to prevent wastage of public and private resources.

15. The Supreme Court held that it can look into the questions of arbitrability to the limited extent and evolved the 'eye of the needle' test. The rationale was that the Courts cannot shut their eyes to the fact that there are time barred claims or non-arbitrable claims which will only result in waste of resources in litigation. The Supreme Court in ***NTPC vs. SPML Infra Ltd*** has taken a view which at first glance appears balanced but its application by the High Courts and subsequent Supreme Court decisions will determine whether it is ousting genuine claims or preventing unnecessary litigation. This becomes particularly relevant in the peculiar circumstances in Construction law.

16. A strict interpretation of no claim certificates at the Section 11 stage is problematic. The difficulty in imposing of this hard and fast rule in relation to no claim certificates is that it is an extremely fact specific issue and one must look at the totality of the circumstances while examining whether the no claim certificate can be an absolute bar. It is a known fact that any correspondence written by the Contractor will create working difficulties and the Employer may create hurdles to coerce the Contractor. So, a Contractor may not write letters in those times and may claim later on. If one looks only at the correspondences, it would simply appear that the Contractor is being opportunistic. But a Court under Section 11 is only looking at the documents and arriving at a conclusion. This will stifle legitimate claims by non-suiting the Contractors. Hence, it is extremely necessary to adopt a very liberal approach when it comes to no claim certificates.

17. Even in the aspect of limitation and Notified claims, one must be aware of the realities of a Construction Contracts. The procedure will require that the Contractor must raise a claim at the earliest point in time. The

8 *(2023) SCC Online 389*
9 *(2021) 2 SCC 1*
10 *(2021) 5 SCC 738*

argument of the Employer is that if the Claim is not raised at that time, then it would be barred by time. But a Contractor cannot raise a claim during the working of the Contract as the Employer would hold the upper hand in those situations. The standard practice is to raise the disputes after the Final Bill is raised.

18. In ***Indian Oil Corporation Ltd. vs. NCC Ltd.***[11], the appointment of arbitrator by the Delhi High Court was quashed by the Supreme Court on the ground that the claims were not Notified in accordance with the Contractual procedure and that the Court under Section 11 has complete powers to decide whether or not a particular issue comes within excepted matters or not. The Court referred only those disputes which were notified by the General Manager as a dispute to arbitration.

19. Insofar as limitation is concerned, the Supreme Court has made it clear in ***BSNL vs. Nortel Networks Ltd*** that if a claim is ex-facie barred by time, the Court will not refer the matter to arbitration. The complications in Construction arbitration is that the first claim may arise in the first month and other claims may arise at a later point in time. However, it would not be possible to raise multiple disputes on the same cause of action. In ***Tantia Constructions***[12], the Supreme Court recently held that multiple arbitrations in the same Contract would not be permissible. Given this situation, one must creatively make claims and invoke arbitration at the last possible instance or even amend the claim in the arbitration.

20. Excepted matters shall not be referred to arbitration is a settled position of law. The rationale of excepted matters in Construction Contracts is to reduce litigation but excluding certain aspects from arbitration. This compels the Contractor to claim parallel remedies before Court and Arbitration. Often, it is the same set of correspondences and factual matrix which will result in multiplicity of litigation, possible contradictory stances. The only possible solution is to file a commercial suit raising all claims including the excepted matters. If the cause of action cannot be split up, then the Section 8 application to refer the suit to arbitration would not be maintainable.

21. The pre-arbitral procedure mandated under law has also created complexities which some High Courts holding it to be mandatory and the referral and subsequent award also being set aside and a few High Courts have held that they stood waived by conduct. The pre-arbitral procedure typically comprises of meeting of high-level executives of Owner and Contractor or mediation / conciliation at the next level. In some situations, it may require the Contractor to notify the claims in a particular manner which if the Contractor fails to do, then the Contract infers waiver of the claim.

22. Whether the courts require to take a hyper-technical approach and uphold the letter of the Contract is the million-dollar question that requires to be answered. The very concept of arbitration is that the Arbitrator is created by the Contract and cannot exceed the scope of the Contract. If the Contract is creating multiple remedies or procedure for Notified Claims, then it is necessary to have a proper strategy to deal with these issues. But if a Contract is creating multiplicity of litigations or is patently unfair to one side, then it would be necessary for the courts to step in.

23. A strict contractual approach at the stage of appointment of arbitrator may not be the best approach as it may result in genuine disputes being thrown out without a fair trial. If the Court appointing the arbitrator is of the prima facie view that the claims are not arbitrable for any reason whatsoever, the best approach would be to direct the Claimant to pay security for costs which would need to be deposited at the beginning of the arbitration and would include

11 (2023)2SCC539
12 2022 LiveLaw (SC) 624

reasonable costs for preparation of the matter, attorney fees and arbitration costs. This would be deposited with the Tribunal and the Tribunal may at its discretion direct payment of the same to the winning party immediately upon passing orders either under Section 16 of the Act or as an award.

24. The intention of the Courts is to prevent needless expenditure and wastage of resources. However, this must not prevent genuine disputes from being entertained. In the peculiar situation concerning construction disputes, it would be appropriate to consider security for costs instead of peremptorily adjudicating on these issues where there are complicated questions or facts involved.

A Case Study indicating How the Dispute is Created

Dr. S. B. Saraswat[1]

The case study is majorly focused on the theme - "The disputes go beyond resolution due to a hard stand taken by the employers to not consider the genuine hardships/sufferings of contractors, and then blaming the contractors for the employer's inefficiencies and incapacities, causing losses to the contractor."

This case study describes how disputes arise in a large EPC project with no solution for as long as 10 years, and no relief granted to the contractors.

The project:

The EPC contract of mechanical and electrical jobs in one of the plants of a company was to be completed in "twelve" months by the consortium of contractors in a place where existing facilities were old and non-serviceable. These were to be removed by the employer, as part of the scope of the contract. Civil jobs of the project were also within the scope of the employer. Also, handling equipment like electric-operated overhead crane and rail track for wagon movement was within the scope of the employer.

The employer: One of the plants of a large Indian company.

The contractors: A consortium of two contractors consisting of a technology provider with limited suppliers from European countries and the other, a major construction partner with major Indian equipment & fabricated supplies for the project.

1.1 Scope of the Contractors

Consortium contractors – EPC scope covers design, engineering, supply, construction, commissioning and performance of the project, except the civil jobs and equipment handling.

1.2 Scope of the Employer

To undertake the clearing of old facilities from the project site and give a clear space to the contractors to start the job.

The employer retained the total civil jobs in its scope, including the construction of building for housing the project and project equipment. Civil construction was the first job to be started, to be followed with the contractors' jobs which were majorly mechanical, electrical and instrumentation/automation jobs.

1.3 Disputes in this project

This project landed in dispute right in the beginning as the employer could remove old machinery/equipment from the place where the project was to be started by the contractors. This activity of the employer took a very long time (more than one and half years while the total schedule of the project was only 12 months). Thus, the project remained a non-starter right from the beginning. Also, the employer was to start the civil jobs as per the scope of work, which was their first job in that project area, adjacent to the existing facilities to be removed. It is a very serious observation that the employer placed the contract on the consortium of contractors for the project, but the contract of the building to house the project equipment and civil jobs was not finalized.

This contract by the employer for building and civil construction underwent a long delay, and the employer's civil contractors were waiting to finish the civil jobs. The building contract was finalized much later (after three years of delay). But the civil contractor did not start the job, thereby causing more delays. In fact, the civil job awardee contractor ran away from the building project. This resulted in the non-start of the project again. The main consortium contractors who had organized the mobilization of manpower and construction equipment and other resources remained idle without any work resulting in losses in the project right from the beginning. By the time the employer final-

1. *Dr. S. B. Saraswat is an Arbitrator & Mediator.*

ized the contractor for a second time for the construction of the civil project and building, the scheduled delivery period of the project had already crossed over four years of delay. The employer extended the contract with the condition that LD for delay will be levied on the consortium contractors.

This extension of the contract with LD was a total violation of the contract, which was to effect further loss of the consortium contractors. The issue was taken up by the contractors with the employer who was not ready at all to re-do the imposition of LD on the contractors. This finally forced one of the contractors of the consortium to revoke the arbitration clause, and the project progress was at standstill even after 10 years. It is worth mentioning that in spite of all contract violations and official orders of the employer to levy the LD, the contractors finished the mechanical completion of the project but are still awaiting payments. The project is still not completed, and all erected equipment have now become junk.

1.4 The issues of dispute and facilitating factors

Based on the analysis of this case study, the following issues emerged in the execution of this project which are worth mentioning:

There were disputes created by the employer towards the contractor due to the employer's non-performance of their part of job execution.

The behaviour of the employer in the above case study can never be acceptable to any contractor. The employer did not accept his faults and non-performance. Instead, the employer has held that the contractor was responsible for delays and declared the LD imposition.

Junking a project due to a dispute and not getting the production by delaying a project for more than 10 years is not only a loss to the employer but a national crime for which the responsible must be taught lessons and reminded that they have no right to continue as project personnel.

In these kinds of contracts, the contractor is not empowered and does not have the right to terminate the contract, and therefore continues to be harassed and financially penalized. There should be an investigation, and such non-performed projects should be highlighted at national and international levels so that other project personnel learn not to repeat similar incidents.

1.5 Moral of the story and lesson learnt from the Case Study

This case belongs to a contract between a large company as the employer and a consortium of contractors who were determined to complete the job as per the project schedule. But huge injustice has been done by the employer towards the contractors who have suffered heavy financial losses right from the beginning. The employer has not compensated them for the idle period, which was exclusively due to reasons attributable to the employer who had not paid many bills including the price variation costs as per the contract conditions. On top of it, LD was levied on the contractors. The employer's actions are not only unjust but also constitute a breach of contract.

In this process, not only have the contractors lost heavily, but there is a huge opportunity loss and a direct loss to the employer due to no production from the project. This kind of project management by the employer is a bad example and needs corrective action so as not to be repeated in future. The project is not commissioned yet in the last 10 years against the project schedule of 12 months. Action should be taken against the responsible persons for such a colossal lapse.

The project machinery has become junk, and

nobody knows when this project will be finally commissioned, and when the disputes will be resolved. Who is responsible for such outcomes in the project? Will responsible persons be identified and penal actions be taken against them so that not only they, but others also do not repeat this kind of debacle? Such acts are a crime against the nation and public at large who are paying taxes to build such projects.

"This case study demonstrates a very bad example of project execution which should not be repeated in future."

Law Relating to Limitation in Construction Disputes

K D Arcot

Abstract

One of the main purposes of arbitration is to resolve commercial disputes within a reasonable time. In order to ensure resolution of disputes within a reasonable time, it is also necessary to initiate disputes within a prescribed time schedule. Limitation Act 1963 provides for required time schedule to be followed. These time schedules are statutory requirements. Non-adherence to this time schedule will mean that the party has lost its opportunity to agitate further to get the disputes settled through Arbitration route. Purpose of limitation is not to keep disputes lingering for ages to come. There must be a definite start date by which disputes are brought to the negotiation table or seek solutions through statutory means.

Introduction

Section 21 of Arbitration & Conciliation Act 1996 (A&C Act) and further amended in 2015 and 2019 stipulates the date of commencement of arbitration proceedings. Section 43 further stipulates that Limitation Act 1963 shall apply to arbitration as it applies to proceedings in court.

A close reading of the two sections reveals that limitation period for commencement of arbitration is deemed to commence on the date on which reference is made under section 21 of the Act. Limitation Act 1963 Part II under article 137 which is applicable to construction disputes provides for a time of three years for initiating disputes for resolution. According to this section, a claim is to be raised from the date when the right to register the claim accrues. No right will accrue until there is a clear and unequivocal denial of the right by the respondent. The existence of a dispute is fundamentally essential for a dispute to be arbitrated upon.

When once the time has begun to run no subsequent disability or inability stops it except under special circumstances like COVID-19 pandemic or under section 5 of Limitation Act. Construction Industry is a complex industry. By its very nature, Construction is prone to variations. Vagaries of weather, unpredictable market conditions, variation in soil conditions, changes in scope lob-sided risk sharing clauses, and above all long duration of construction activities all germinate into claims, some contractual and some non-contractual. Claims if not addressed at early stages fructify into disputes.

Disputes arise when there is a **firm assertion** of claims by one party and a **firm denial** of the claim by the other party. There is a thin line of distinction between what is firm assertion and firm denial, especially in contracts of long duration. In most cases finality of claim and rejection of the same meet only in the final bill. Many contracts stipulate that Running account bills are only "on-account bills". Hence only in the final bill disputes are finally quantified

As per section 23 (2A) of A&C Act (amended), Respondent, in support of his case may also submit a counter-claim or plead a set-off which shall be adjudicated upon by the arbitral tribunal, if such counter-claim or set-off falls within the scope of arbitration agreement

At this stage, it is necessary to clarify what is a set-off claim and what is a counter-claim. It is normal practice for a defendant to raise counter-claims in their statement of defence (SOD).

Some of these valid claims are qualified and quantified by the defendant during the course of the works but have not invoked arbitration. Many a times, the respondent in reply to Claimant's notice for arbitration also indicates their list of claims. Instead of now invoking a separate arbitration, these claims can be admitted for which the cause of action is on the same date as on date of invocation of arbitration by the claimant. Such claims are treated as **set-off** claims. These are used to eliminate or reduce the claims of the claimant

There may be many other claims raised by the Respondent for the first time in its SOD. These claims are more of an afterthought purely to act

as a counterblast to claimant's claim. Depending on the wording of the arbitration clause in the contract, such claims are at first required to be analyzed from a limitation point of view before going into the merits of the same. Cause of action of such counter-claims is as on date of submission of counter-claim *viz*. date of SOD.

Delhi High Court has once again emphasized that in view of section 28(b) of Contract Act, a party cannot be permitted to restrict the period of limitation by agreement, as prescribed in Limitation Act 1963.

Why Limitation?

Just as there is a finality to construction period by way of admission of final bill, similarly there should be a finality to all disputes, settled one way or the other. Three objectives of enactment of Limitation Act are:-

1. there must be a quietus and a lid put on the filing of litigation and resolving disputes by a particular period
2. due to long passage of time, vital evidence which would be the defense of the other party is bound to get lost or misplaced
3. Issues cannot be left simmering for next generation to resolve

As the Latin legal maxim goes ***Vigilantibus non-dormientibus jura subveniunt*** *i.e.* the laws aid the vigilant and not those who slumber. Therefore, seeking adjudication of claims preferred after a long time would cause more injustice than justice. Limitation Act prescribes a time period of 3 years for invocation of claims /counter-claims. Claims registered beyond 3 years from the date of cause of action are summarily rejected. Limitation Act, 1963 was enacted to specify limitation periods for various types of contracts /transactions, etc. Considering long duration of construction period and frequency of disputes arising, disputes are simmering; some lasting till the end of the construction period beyond. Cause of action gets blurred with passage of time making it difficult to identify start date of limitation of period of any dispute.

From the above, it is clear that analysis of applicability of limitation in construction disputes is a blend of facts and law.

Limitation Act, 1963

Some of main provisions of Limitation Act as applicable to construction industry are briefly enumerated below-

Description of Suit	Period of limitation	Time from which period begins to run
For the price of work done by the plaintiff for the defendant at his request where no time has been fixed for payment	Three years	When the work is done
For compensation for breach of a promise to do anything at a specified time or upon happening of a specified contingency	Three years	When the time specified arrive or contingency happens
For compensation for breach of any contract express or implied not herein specially provided for	Three years	When the contract is broken or (or where there are successive breaches) when the breach in respect of which the suit is instituted occurs (where the breach is continuing) when it ceases
Any other application for which no period of limitation is provided elsewhere in this division	Three years	When the right to apply accrues

In an extremely unforeseen case, the Hon'ble Supreme Court has *suo motu* extended the limitation period as a one-time exercise when exigencies such as global spike in COVID cases occurred.

To better understand the interface and interaction of disputes with Limitation Act, some of the salient features of Limitation Act are reproduced below. The Limitation Act, 1963 applies to Arbitration as much as it applies to court proceed-

ings. The Limitation statute only bars the remedy but not the dispute proper. Section 28(b) of Contract Act may be referred to.

Some of the important sections of Limitation Act as applicable to construction are as below:

i. Section 3 - Bar of Limitation

Every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed **although limitation has not been set up as a defence.**

ii. Section 3 (2 b)

Any claim by way of set-off, or a counter-claim, shall be treated as a separate suit and shall be deemed to have been instituted:-

i] in the case of set-off, on the same date as the suit in which the set-off is pleaded

ii] in the case of counter-claim, on the date on which the counter-claim is made

iii. Section 5 - Extension of prescribed period in certain cases

iv. Section 12 - Exclusion of time spent in legal proceedings

Explanation:- In excluding the time required for obtaining the consent or sanction of the Govt. or any other authority, the date on which the application was made for obtaining the consent or sanction and the date of receipt of an order of the Govt. or other authority shall both be counted.

v. Section 18:- Effect of acknowledgment in writing

A fresh period of limitation shall be compounded from the time when the acknowledgment was signed (Though this section pertains to property matters, it is nevertheless also applicable to construction, especially in turn key contracts).

vi. Section 19:- Effect of payment on account of debt or of interest on legacy

vii. Section 22:- Continuing breaches and tort

In the case of a continuing breach of contract, a fresh period of limitation begins to run at every moment of the time during which the breach continues.

As indicated earlier, applicability or rejection of Disputes on grounds of limitation is a mixed (or vexed?) question of facts and law. Facts are as per records generated by the parties read with contractual provisions. Law is as enumerated above. It is obvious that facts will vary from contract to contract and documents submitted to support the same. No two facts will be the same. There is no one cap that fits all. Each of the disputes will have to be analysed from basic grass root level to establish the date of cause of action. In many cases analyzing conduct of the parties during execution also throws up many startling facts.

Judicial Analysis

Most of the limitation disputes have gone through the portals of the Hon'ble High Courts and Hon'ble Supreme Court. Courts have also dealt with issues pertaining to Set-off and Counter-Claims, as well as limitation issues pertaining to Section 34. A study of some of them will give a clearer picture of the judicial analysis of the applicability of laws of Limitation to Construction Contracts.

1. *State of Goa Vs. Praveen Enterprises* - [SLP (C) No. 15337 of 2009]

Summary of judgment at para 32

(a) When section 11 of the Arbitration Act is invoked, Chief Justice is not required to draw up a list of disputes to be referred to the Arbitrator.

(b) Arbitrator has jurisdiction to entertain claims and counter-claims if the arbitration clause of the contract provides for arbitration of **all disputes** even if counter-claims are not raised earlier by the respondent. However, registering all counter-claims in their defense statement is a must.

(c) If the arbitration clause in the agreement provides for only specific issues to be arbitrator, the arbitrator is bound to look

into these specific issues.

2. *BSNL Vs. Nortel Networks India Pvt. Ltd.* – [Civil Appeal Nos. 843-844 of 2021]

PARA 5

"Period of limitation for filing a petition seeking appointment of an Arbitrator cannot be confused or conflated with a period of limitation applicable to the substantive claims relating to underlying commercial agreement."

PARA 6

"Even though a lot of time was spent on negotiations, the Hon Division bench observed that unilaterally issuing communications for negotiations and seeking settlement on the claims shall not extend the period of limitation."

PARA 39

"The present case is a case of dead wood /no subsisting dispute since the cause of action arose on 4-08-2014 when the claims were rejected by BSNL, Nortel did not take any action even after BSNL rejected their claims on 4-08-2014.

The period of limitation for issuing notice of arbitration would not get extended by mere exchange of letters or mere settlement discussions.

Section 5 of limitation AC does not exclude the time taken on account of settlement discussions.

Section 9 of Limitation Act makes it clear that "once the time has began to run, no subsequent disability or inability to institute a suit or make an application stops it.

In the present case, the notice invoking arbitration was issued 5½ years after the rejection of claims on 4-08-2014. Consequently, the notice invoking arbitration is ex facie time-barred, and the disputes between the parties cannot be referred to arbitration in the facts of this case."

3. Major (Retd) Inder Singh Rekhi Vs. Delhi Development Authority – [1988 AIR 1007,1988 SCR (3) 351]

Question arose as to when such a dispute arose.

- Work was completed in 1980. And therefore the appellant became entitled to payment from that date and cause of action under article 137 arose from that date. The final bill was not prepared.
- It is true that a party cannot postpone the accrual of the cause of action by writing reminders but where the bill had not been finally prepared, the claim made by the claimant is accrual of a cause of action.
- A cause of action, therefore, arises only after the final bill is prepared.
- Appellant registered claims on 28-02-1983. Arbitration notice was given on January 1086 which is within 3 years.
- Judgment and order of High Court set aside.

4. *Adicon Infrastructure Pvt Ltd Vs. Delhi Development Authority*

- Facts of the case

  Final bill was submitted on 27-07-2013. No payment was made even after prolonged discussions. After a series of reminders and discussions, an Arbitration notice issued on 19-06-022, and the matter then came up before the court on 5-02-2022. On 20-07-2022 Respondent released some payment. Respondent further stated that Notice for arbitration was issued 7 years later and hence time-barred.

- Conclusion by Hon'ble Justice Yashwant Varma

  Instant case clearly represents what Vidya Drolia referred to as "dead wood" and claims which are ex facie time-barred. Petition stands dismissed.

5. Geo Miller & Co. Pvt. Ltd. Vs Chairman, Rajasthan Vidut Utpadan Nigam Ltd. - [SC Appeal No. 967 of 2010]

- Summary of Award

Respondent had placed 3 work orders on the ap-

pellant on 7-10-1979, 4-04-1980, and 3-05-1985. All 3 work orders had a common arbitration clause. Works were completed and final bills were submitted on 8-02-1983 (for 2 bills) and 10-08-1989 for the 3rd bill. Limitation period ends on 8-02-1986 and 10-08-1992 but negotiations were going for amicable settlement of disputes till 1997. Thereafter a Settlement Committee was formed at the instance of the Respondent to resolve the disputes. This was also a failure. On 17/18-12-1999, Respondent released some amount against one work order. As further payments were not forthcoming, Appellant sent a letter dated 22-11-2002 requesting the respondent to appoint an arbitrator. As respondent failed, Appellant approached court U/S 11 of A&C Act. Respondent replied that since final bills were raised in 1983 the request for appointing an arbitrator was time barred. High Court after going through the whole case rejected the Appellants request for appointment of an arbitrator on limitation grounds.

- Matter before this Supreme court

After going through the history of the case including reference to various court judgments Hon'ble judges concluded that the case is time-barred.

- Conclusion of the judges is summarized below -

Further, the Hon'ble judges added:-

While the parties may be genuinely conducting negations over a prolonged period and when the negations failed they should produce all documents pertaining to settlement efforts before the court. The court would then ascertain from these records when the negotiations failed and thereby fix when breakpoint occurred and establish the date of cause of action.

In a commercial dispute mere failure to respond by one party does not give rise to cause of action, the appellant must reassert their claims by way of a final letter. Failure to reply to this letter by the respondent will be treated as a denial of the claims giving rise to a dispute and therefore establishing a cause of action for reference to arbitration.

6. *Voltas Ltd Vs. Rolta India Ltd.* – [Civil Appeal No. 2073 of 2014]

This is a lengthy award traversing all judgments from Arbitrator's award to final decision by Supreme Court. The main disputes pertain to the admissibility of claims and counter-claims.

To summarise, para 26 of judgment is reproduced below -

PARA 26

"We are absolutely conscious that a judgment is not to be read as a statute but to understand the correct ratio stated in the case.

If the counter-claim filed after the prescribed period of limitation before the arbitrator is saved in entirety solely on the ground that a party had vaguely stated that it would be claiming liquidated damages, it would not attract the conceptual exception carved out in Praveen Enterprise. In fact, it would be contrary to the law laid down not only in the said case but also to the basic principle that a time-barred clause cannot be asserted after the period of limitation."

Please not that above case laws are just a summary of a few disputes pertaining to a Limitation period. To get a full import of these decisions by the Hon'ble Judges it is advisable that one must download and study the full judgments.

Power of Arbitrator to Award Pre-Award Interest

Vartika Singhania[1] & Shashwat Kabi[2]

"Interest is not awarded as punishment against a wrongdoer for withholding payments which should have been made. It is awarded because it is only just that the person who has been deprived of the use of the money due to him should be paid interest on that money for the period during which he was deprived of its enjoyment.[3]"

INTRODUCTION

Interest is defined as the return or compensation for the use or retention by one person of a sum of money belonging to or owned by any reason to another.[4] The fundamentals behind the award of interest are that the creditor deserves to be compensated for being deprived of money that should rightfully have been tendered to it. The Claim of interest is made, mostly, in all arbitration matters, and forms part of an important claim. The power of the arbitrator to award interest has always been in question, since the Arbitration Act,1940 (hereinafter- '1940 Act'). This article tries to highlight the changes made in the Arbitration and Conciliation Act, 1996 (hereinafter 'the Act'), which presently governs the domestic and international commercial arbitration held in India. The article also tries to analyse the scope of s.31(7)(a) of the Act.

TYPES OF INTEREST

The claim of interest is categorised under three different kinds, depending upon the period for which the claim is made i.e., pre-reference, *pendente-lite,* and post-award.

- Pre-reference interest: This period refers to the interest that has accrued from the date of the arising of the cause of action to the date of the institution of the arbitration.
- *Pendente-lite* interest: The period refers to the interest that accrues from the date of the institution of the arbitration till the date of making the arbitral award.
- Post-lite interest: This refers to the interest which accrues from the date of the award to the date of actual payment.

THE 1940 ACT

The Arbitration Act,1940 did not contain any provision regarding the power of the Arbitral Tribunal (hereinafter 'AT') to award interest and under section 29 provided that the court could award interest post-decree.

> *"29. Interest on awards. Where and in so far is an award is for the payment of money the Court may in the decree order interest, from the date of the decree at such rate as the Court deems reasonable, to be paid on the principal sum as adjudged by the award and confirmed by the decree."*

The 1940 Act, however, did not prohibit the Arbitrator from awarding interest for the pre-reference, *pendente lite*, or post-award period. The constitution bench of Supreme Court *Secretary Irrigation Department, Government of Orissa and Others v. G.C. Roy*[5], (hereinafter '*GC Roy*') after considering the question of arbitrator's jurisdiction in awarding interest *pendente lite,* stated that in a situation where the contract does not provide for the grant of such interest nor does it prohibit such grant, or the contract is silent as to the award of interest, the arbitrator has the power to award interest *pendent lite*.

Further, in *Dhenkanal Minor Irrigation Division, Orissa & Ors. v. N.C. Budharaj*,[6] (hereinafter '*NC Budharaj*'), the constitution bench of the Supreme Court considered the question of award of interest for the pre-reference period. *NC Budharaj* heavily relied on the judgment of *GC Roy* and held that the arbitrator has the power to award pre-reference award as long as there is nothing in the arbitration agreement to ex-

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2. Shashwat is a final year student pursuing BBA LLB from OP Jindal Global University
3. *Lord Wilberforce in General Tyre and Rubber Co. v Firestone Tyre and Rubber Co. Ltd [1975] 2 All ER 173*
4. *32 Halsbury's Laws of England, para 106 (4th Ed., 1980)*
5. *(1992) 1 SCC 508*
6. *(2001) 2 SCC 721*

clude the authority of an arbitrator to entertain a claim for pre-reference interest.

GC Roy and *NC Budharaj* are considered landmark cases under the 1940 Act. Under the 1940 Act, thus in the absence of a provision regarding the award of interest in the contract, the arbitrator had the power to award interest along with the principal amount, as it was considered an implied term of the contract.

The Arbitration and Conciliation Act, 1996

Section 31-

"(7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole, or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

1[(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two percent. higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.

Explanation. —The expression "current rate of interest" shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978 (14 of 1978).]"

The power to the AT to award pre-award interest (pre-reference and *pendente-lite)* is governed by s.31(7)(a) and post-award interest under s.31(7)(b) of the Act. S.31(7)(a) itself makes it clear that the power is subject to agreement between the parties. The parties can either agree to an award of interest at a pre-defined percentage or put a complete bar on the award of interest or remain silent with respect to award of interest. The power conferred to the AT under s.31 (7) to award pre-award interest only applies when there is no agreement between the parties in respect of award of interest.

The use of the words "*the arbitral tribunal may include in the sum for which the award is made interest*" indicates that the Act provides for the inclusion of the pre-award interest in the sum awarded in the award itself and further, the words "*on the whole or any part of the money*" make it clear that the arbitral tribunal has discretionary powers to award interest on either the whole or any part of the money

JUDICIAL TRENDS

i. Sayeed Ahmed & Co v State of UP & Ors[7]

The case of Sayeed Ahmed & Co v State of UP & Ors had the following provision in the contract-

"No claim for interest or damages will be entertained by the Government with respect to any money or balance which may be lying with the Government or any become due owing to any dispute...."

The court noted that, unlike the 1940 Act, the 1996 Act has a specific provision that deals with the award of interest by the Arbitrator. Further, the difference between pre-reference interest and pendente lite interest had been done away with within s.31(7) of the new provision. The court held that earlier judgments like that of G.C. Roy, (supra) wherein it was held that the Arbitrator had the power to award *pendente lite* interest despite the prohibition clause, can no longer apply under the new provision as s.31(7)(a) expressly limits the scope of the Arbitrator's power to agreement of the parties.

ii. Sri. Chittaranjan Maity v Union of India[8]

One of the questions which came for consideration before the Supreme Court, in this case, was whether the arbitral tribunal was right in awarding interest on delayed payments in favour of the applicant despite a clause in the contract that disallowed a claim of interest. The clause read as:

7 *(2009) 12 SCC 26*
8 *(2017) 9 SCC 611*

Clause 16(2) – No interest will be payable upon the earnest money or the security deposit or amounts payable to the contractor under the contract, but government securities deposit in terms of sub-clause (1) of this clause will be re-payable (with) interest accrued thereon.

The court relying on *Sayeed Ahmed (supra)* amongst other decisions, held that when parties to a contract agree upon 'no interest to be paid to one party', then the parties are bound by such clauses, and claims related to interest cannot be prayed before any forum. The court opined that the awarded amount is categorized as the losses determined in the course of the arbitration and not as a payment due under the terms of a contract. The party is entitled to claim the amount not as compensation for damages but for the money which was rightfully owed to him.

iii. Raveechee and Co. v Union of India 9

The Arbitrator awarded the appellant *pendente lite* interest @12% of the award for damages. Union of India, aggrieved by the decision of the Arbitrator, approached the High Court, and the *pendente lite* interest awarded by the Arbitrator was set aside. The appellant then approached the Supreme Court and contested that Clause 16(3) of the contract allowed for award of *pendente lite* interest. The clause reads as follows:

"No interest will be payable upon the earnest money and security deposit or amount payable to the contractor under the contract, but government securities deposited in terms of sub-clause (1) of this clause shall be payable."

The appellant contended that the above-mentioned clause barred interest on earnest money, security deposit, and the amount payable to the contract, not the *pendente lite* interest, while the respondent contended that the clause barred the award of *pendente lite* interest. The Apex Court held that earnest money, security deposit, or amount payable to the contractor doesn't belong to the respondent. The amount was supposed to be refunded or forfeited as per the performance of the contract and did as such not deprive the respondent of the use of money. Therefore, no interest could be granted. The court concluded that the interest granted to the appellant by the Arbitrator did not fall under any of the three heads mentioned above. Thus, *pendente lite* interest could be granted despite the presence of clause 16(3).

The judgments of the Hon'ble Apex Court in the *M/s Raveechee & Co. v. Union of India*, (hereinafter '*Raveechee*') and *Chittaranjan Maity v. Union of India*, (hereinafter '*Maity*'), deals with similar clauses. In *Maity's* case, the court interpreted s.31 (7) of the Arbitration Act, wherein interest award is made subject to the terms of the contract between the parties. Clause 16 (2) of the GCC barring the award of interest would prevail over the arbitrator's power to award interest. The parties agreed that interest will not be payable under the contract barring AT to award *pendente lite interest* in this case. The court in *Raveechee's case* held that the General Conditions of Contract clause expressly barred interest payable upon earnest money, security deposits or amount payable to the contractor under the terms of the contract. A distinction was made by the court between liabilities to pay interest on the determination of unascertained damages in the course of dispute and liability to interest as per terms of the contract. Court further held that bar to award interest on the amount payable under the contract would not be sufficient to deny interest *pendente lite* as it would depend upon several factors such as phraseology used in the language of the contract, nature of claim, and dispute referred to the tribunal.

Raveechee follows the path that AT has the power to do justice to the parties irrespective of the terms of the contract, whereas *Maity* follows that arbitrators are creatures of the contract and are bound to follow the express terms of the contract. *Though these two judgments deal with the same contractual provision which created a bar on the payment of interest, the reasoning is based on different parameters. The Raveechee case was decided in 2018 and was based on the 1940 Act.*

The Supreme Court in the case of *Ambika Construction V. Union of India*[10] opined that "*We also make it clear that the bar to award interest on delayed payment by itself will not be readily inferred as express bar to award interest pendente lite by the Arbitral Tribunal, as ouster of power*

9 *(2018)7 SCC 664*
10 *(2016) 6 SCC 36: (2016) 3 SCC (Civ) 36: 2016 SCC OnLine SC 256*

of the arbitrator has to be considered on various relevant aspects referred to in the decisions of this Court, it would be for the Division Bench to consider the case on merits."

iv. Vedanta Limited v. Shenzhen Shandong Nuclear Power Construction Company Ltd (2018)11

This Judgment deals with international commercial arbitration having a seat in India. The question before the court was whether the Arbitrator had the power to award *pendente lite* interest in case of International Commercial Arbitration seated in India. The court held that Arbitrator can award *pendente lite* interest as per s.31(7)(a) as long as the contract does not explicitly bar such action.

v. Garg Builders v. Bharat Heavy Electricals Ltd. (2021):12

In the present case, the contract between the parties contained a clause prohibiting award of interest. It reads as follows:

"Clause 17: No interest shall be payable by BHEL on Earnest money Deposit, Security Deposit or on any amount due to the contractor."

The question before the Court was whether the Arbitrator had the power to award *pendente lite* interest where the contract expressly barred payment of interest. The appellant relied on *Raveechee (supra)* and *Ambika Constructions*[13] case and contended that Clause 17 of the contract did not bar payment of *pendente lite* interest. The court rejected the contention of the appellant and held that both *Raveechee* and *Ambika Constructions* were not applicable to the present case as they pertained to the old provision in 1940 Act. Further, s.31(7)(a) of the 1996 Act is clear and bars payment of pre-award interest when such restriction is embodied in the contract.

Award of pre-reference period interest and scope of section 31(7)(a) under 1996 Act:

Under the English common law there is nothing for award of interest for delayed or withheld amount, interest can be claimed only either as provided in the contract or as per any statute or can be claimed as damages. If the contract provides for interest, the same shall be binding. For interest as damages, loss is to be proved by the party claiming interest. In India, the Interest Act 1978 provides for interest subject to notice given, claiming interest (under section 3 of the Interest Act). The 1996 Act is a special legislation and s.31(7)(a) empowers the tribunal (unless otherwise agreed by the parties) to award pre-award interest. The difference between the pre-reference and pendent lite period, as considered under the 1940 Act has been done away with and s.31(7)(a) of the 1996 Act provides "*between the date on which the cause of action arose and the date on which the award is made*". In other words, both these types of interest have been clubbed together as one category ("**pre-award interest**").

The Supreme Court in *State of Haryana v. S.L. Arora & Co*[14] has held that *"the Act does away with the distinction and differentiation among the four interest-bearing periods, that is, pre-reference period, pendente lite period, post-award period and post-decree period. Though a dividing line has been maintained between pre-award and post-award periods, the interest-bearing period can now be a single continuous period the outer limits being the date on which the cause of action arose and the date of payment, subject to however to the discretion of the Arbitral Tribunal to restrict the interest to such period as it deems fit."*

S.31(7)(a) of the 1996 Act, in fact, vests a residuary power on the Arbitrator to include interest on the awarded sum for the pre-award period from the date of cause of action; which power can be ousted by the parties by agreement. So, the question arises, whether a distinct claim of interest as damages should be considered as interest included by the tribunal on the awarded

11 *(2019) 11 SCC 465*
12 *(2022)11 SCC 697*
13 *Ambika Construction V. Union of India (2016) 6 SCC 36 : (2016) 3 SCC (Civ) 36 : 2016 SCC OnLine SC 256*
14 *(2010) 3 SCC 690*

sum while making the award? It is submitted that such a claim of interest is not envisaged within the scope of s.31(7)(a) and hence does not fall under the mischief of s.31(7)(a). The contention of the authors is also supported by the fact that interest claimed as damages would require a higher degree of proof than a prayer of interest under s.31(7)(a) of the 1996 Act, which the tribunal decides after arriving at the money award on other claims. However, the Supreme Court in various judgments (as discussed above) has given an expansive scope to s.31(7)(a) to include all types of claims of interest.

It is submitted that the prohibition in the arbitration clause to make pre-award interest, should be confined to AT's power to include interest for the pre-award period in the sum award and not the claim of interest as damages. Such prohibition in the contract should be considered as an exclusion provision or 'no damage clause' and should be given similar treatment as any other no-damage clause, that is subject to the construction of the contract and not a statutory bar to award any interest in the pre-award period. Needless to say, reading s.31(7)(a) in an expansive way to bar any claim of interest in the pre-award period would also be unconscionable, considering the time period when money is blocked till the award is made, when for reasons not attributable to the party claiming interest. Considering the law settled by the Hon'ble Supreme Court, a party cannot claim interest, if the contract prohibits so, even by serving notice under the Interest Act, 1978. In construction disputes, it is practically not feasible to invoke multiple arbitrations every time money is blocked. Barring interest as damages cannot be the purpose of s.31(7)(a) of the 1996 Act. It is suggested, the Parliament should make appropriate clarificatory amendments to the law regarding award of interest in arbitration.

Conclusion

The cost of capital is very high in construction industry. Interest should be allowed for blocked capital, either to cater to the inflationary trend or as compensation for loss suffered. In case the contract prohibits claim of interest, it should be a matter of construction of contract and what the parties actually contemplated at the time of entering into the contract. Prohibiting interest for the entire period of dispute resolution is a retrograde step and aggravates the financial stress in the construction sector. The law must be amended regarding award of interest in arbitration to protect the party entitled to money with a proper compensatory mechanism.

PROFILE

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G C Kabi acts as an independent Arbitrator and has made more than 175 arbitral awards as sole arbitrator. He is a Fellow of Chartered Institute of Arbitrators UK, he heads Delhi based arbitration law chamber "Kabi and Associates". An advocate and a Chartered Engineer, he acts as an arbitration lawyer and specializes in construction arbitration. He holds a postgraduate diploma (regular course) in ADR with distinction from NALSAR Univ. of Law besides his Masters diploma in business administration and graduation in Civil Engineering. Formerly, he worked as Chief Engineer, CPWD and as Arbitrator in the Ministry of Housing & Urban Affairs, Govt. of India, prior to taking VRS from the government service.

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Kunwar Chandresh is a construction lawyer and arbitrator based in India. He has a background in engineering and has worked for several notable organizations in the field, including NBCC, POWERGRID, NTPC, and CPWD. After resigning from CPWD, he is now a construction arbitration lawyer and an Advocate practicing in the High Court of Delhi and the Supreme Court of India. He represents party both national and international disputes in the construction industry and is Empanelled as an arbitrator with the China International Economic and Trade Arbitration Commission (CIETAC). He is a fellow of Chartered Institute of Arbitrators, UK.

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Gauri Shankar Dubey is a Chartered Engineer, Empaneled / Practicing Arbitrator, Mediator & Approved Valuer. Authored/ Awarded around two dozen Arbitration Awards. He has Served SAIL for 37 years and retired as Executive Director in 2010. He did PGD in ADR & Human Rights, International Humanitarian & Refugee Laws, post-retirement during 2013&2014. He is Fellow/ Member of one and a half dozen various Professional Bodies. He is also visiting /Guest Faculty Member in GNCTD, CIAC, DDA & ITI Ltd and has published one and a half dozen Papers on Mediation, Arbitration, ODR, Building Materials like use of Engineered Sand in place of Natural Sand, Environment, Green Buildings, Water Management, etc. He is actively involved with the Rotary Movement working for the cause of Humanity.

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Shashwat, a BBA LLB from OP Jindal Global University, has interned with various advocates practicing before the Hon'ble High Court of Delhi and arbitral tribunals. He has assisted his seniors in preparing statements of claims, defence and other related applications in arbitration. He is soon joining a law chamber at Delhi with primary practice area in litigation before the Hon'ble Supreme Court and Delhi High Court. He has keen interest in constitutional and criminal law & jurisprudence and would like to focus in these areas of practice.

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Neelu is an advocate with a practice focused on commercial litigation and arbitration. She appears regularly before arbitral tribunals under SIAC, ICC, and LCIA rules. As an Advocate-on-Record registered with the Hon'ble Supreme Court of India, she is in a select group of attorneys qualified to file matters before the Indian Supreme Court. She holds an LLM from Columbia Law School.

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Sumit Rai is an Independent Counsel with over 15 years experience in commercial disputes, particularly international arbitration. He has special expertise in handling multi-jurisdictional disputes and provides strategic advice to clients in dispute management. He completed Masters from MIDS Geneva and writes regularly in peer reviewed journals. Until 2016, he was a partner at a leading Mumbai firm, where he headed the arbitration practice – which was ranked as one of the 100 best international arbitration practices in the world by Global Arbitration Review

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Rajat Singla is a Contracts Management professional with over 8 years of overall experience in support of Construction Dispute resolution, Claims management, Contracts administration, Risk assessment, and Quantity Surveying domains.

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Hasit Seth is an arbitrator and an independent counsel in the Bombay High Court. He is a dual-qualified lawyer in New York and India with a technical degree in computer science. His practice areas are construction, commercial, and intellectual property laws disputes and contracts

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Ratan K. Singh is a Senior Advocate based in New Delhi and is also an International Member of Keating Chambers, London. With about 25 years of experience, he has a heavyweight practice in India, as well as internationally, with specialties in construction, engineering, infrastructure, mining, joint venture, franchisee, sale of goods and general commercial and civil disputes.

Mr. Singh has also received hundreds of arbitral appointments as chairman, co-arbitrator and sole arbitrator and has represented parties in complex, high-value domestic and international arbitrations.

Mr. Singh is Founder and Chairman of India branch of Society of Construction Law–UK and Director of India branch of Chartered Institute of Arbitrators–UK, apart from being in the apex body of various institutions. Ratan also has several publications to his name, including a chapter on "Construction Arbitration: Peculiarities in Principle and Practice" in Emerging Trends in International Arbitration (Sweet & Maxwell) and a Handbook on Arbitration Practice and Procedure (forthcoming).

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Anand Juddoo is an International Independent Arbitrator, Dispute Board Member with over 20 years' experience, specialising in the resolution of international construction and engineering disputes, with extensive experience. He is also legally qualified and holds an LL.B and LL.M. He represents both international contractors, and employers and has been involved in projects in various jurisdictions undertaking advocacy as necessary in both DAB and arbitration proceedings.

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Justice Singh joined Delhi Bar in 1986 and practiced as a litigation lawyer at High Court and District Courts of Delhi till April, 2000. His practice areas were Corporate Law, Family Law, Civil and Criminal Law. He joined Delhi Higher Judicial Service in May, 2000 as Additional District and Sessions Judge. He was appointed as District and Sessions Judge (Headquarters), Tis Hazari Courts, Delhi on 1st May, 2017 and served there till 26th May, 2019. He was elevated as a permanent Judge of the High Court of Delhi on 27th May, 2019.

He made contribution in the computerization of District Courts in Delhi. Recognizing Justice Singh's interest in IT, his services were requisitioned by Hon'ble Supreme Court of India as Member – Judicial of E-Committee in the year 2013. This Committee was entrusted with responsibility to computerize more than 14,000 Courts all over India, which it completed in record time. He was also member of the Software team responsible for development of National CIS (Case Information System) for all District Courts in India in collaboration with NIC, Pune.

He has also authored/edited books like District Courts Case Management Manual for Judges, District Courts User's Manual for Lawyers & Litigants, Annual Reports of Delhi District Courts and has also written articles on ICT in Delhi District Courts, Cyber Law & Information Technology and Recent Trends in Use of Information Technology in Judiciary.

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He is the youngest ever individual in the world to be accredited as a Chartered Arbitrator (C.Arb) in CIArb's over 100-year history. He is a recipient of numerous accolades in the field of International ADR including being ranked by Who's Who Legal in Arbitration 2021, 2022 and 2023 as "one of the most recommended arbitrators" who "is precise and diligent, very considerate on the impartiality and due process" and whose "experience includes acting under the ICC Rules in disputes involving parties spanning across EMEA and APAC".

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DATUK
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Dr. S. B. Saraswat is an Arbitrator & Mediator. He is p*resently working as Managing Director / Global E-Auction (P) Ltd. He has formerly worked as MD / Danieli Corus India Private Limited, Director / SCM & Projects, Global Steel, Europe and Joint Director (MM), / Steel Authority of India Ltd.*

IR. ALBERT YEU

Ir. Albert Yeu is a chartered civil engineer and chartered surveyor with extensive experience in civil engineering infrastructure projects in Hong Kong. He is experienced with NEC contracts and a practicing construction adjudicator in the UK, Malaysia, Australia, Canada and Hong Kong. He is currently a senior resident engineer at AECOM

HADES TAM

Hades Tam is a chartered quantity surveyor with a bachelor's degree in LLB from University of London. He has extensive experience in both civil engineering infrastructure projects and building projects in Hong Kong. He was an assistant QS manager in a local contractor and currently is a resident quantity surveyor at AECOM.

K. D. ARCOT

K D Arcot is a graduate of 1957 batch from Karnataka University. Mr. Arcot joined M/s Engineers India Ltd New Delhi a Premier consulting organization under Ministry of Petroleum and Natural gas. During 25 years of service in this organization served as site in charge in 3 refinery projects, and 4 petrochemical project. After retirement worked as a contract management consultant and as DAB member and as an arbitrator in more than 38 cases in various capacities. He is a Fellow Member of IITArb and is enrolled in the arbitral panel of Institute of Engineers (I) Ltd, Indian Council of Arbitration, Singapore India Arbitral Council, Construction Industry Development Council, Nani Palkhivalla Arbitration Centre, Madras Chamber of Commerce.

VARTIKA SINGHANIA

Vartika is an advocate registered with the Bar Council of Delhi. She is presently working as a legal associate at Kabi & Associates-Law Chambers, New Delhi. She graduated her law school in May 2021 and started her journey in the field of dispute resolution and since then she has been practicing Construction Arbitration & Settlements. She deals with different forms of construction contracts, claim preparing, claim documentation & contract management. She represents clients before the Tribunals and also assists senior counsels during the proceedings including assistance during the cross-examination. Vartika also acts as Tribunal Secretary.

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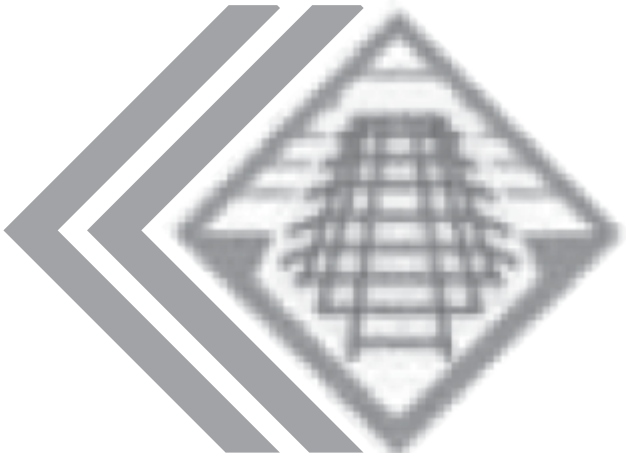

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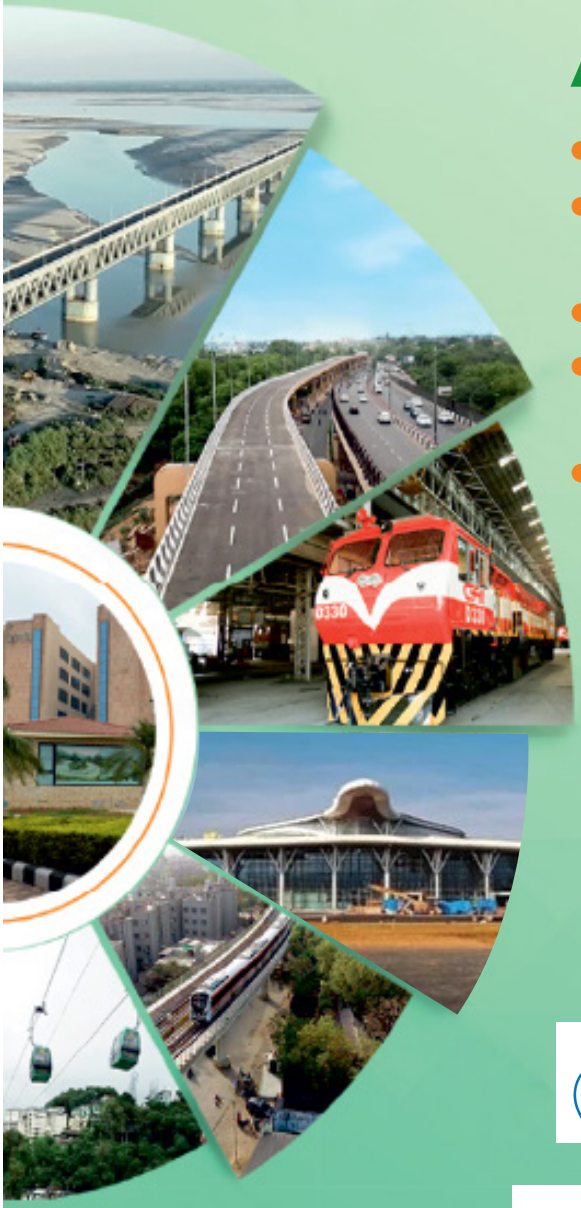

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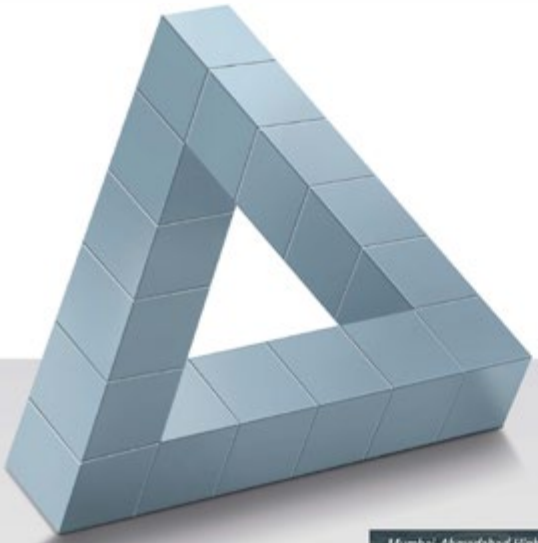
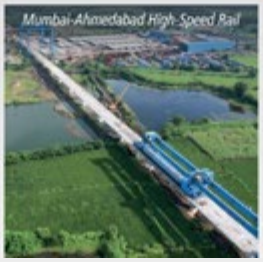
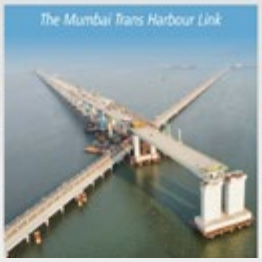
Every breakthrough, was once a challenge







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Website: www.iitarb.org, E-mail: iitarb2003@gmail.com

APPLICATION FOR MEMBERSHIP

Passport Size Photograph

1.0 Name (in Block Letters, Surname first) :

2.0 Date of Birth and Age :

3.0 Address :

Office	Residence	Phone / Fax / E-mail
		Office Residence Mobile
PIN:	PIN:	E-mail

Note: E-mail may be written legibly in BLOCK CAPITALS.

4.0 Educational Qualifications: (Starting from Degree/Diploma or Equivalent, furnish details of all post graduate degrees or equivalent)

S.No.	**Degree/Diploma or Equivalent	Year of Passing	University / Institution

** Enclose self-attested copies of Degree/Diploma

5.0 Career Profile

S.No.	Name of Organisation	Position Held	Period	
			From	To

6.0 Arbitration Experience (for Fellow Members & Members)
(Furnish details of a maximum of three most recent Arbitrations)

S.No.	Parties to the Dispute		Claim Amount (Rs. in Lakhs)	Month & Year of Publishing the Award
	Claimant	Respondent		
1				
2				
3				

7.0 Category of Membership applied for (please tick the appropriate box):

Fellow Member	**Member**	**Associate Member**

I agree to abide by the Bye Laws, Rules and Regulations and Code of Conduct of the Indian Institution ofTechnical Arbitrators, as they stand now and as may be amended from time to time.

Date: Signature

Eligibility Criteria:

Fellow Members: Degree or Equivalent in any branch of Engineering/Architecture Minimum of 20 years Professional Experience including 5 years' Experience in the field of Contract Management or Arbitration after graduation

Members :Degree or Equivalent in any branch of Engineering Architecture or Equivalent or AMIE with minimum of 10 years Professional Experience after graduation. Diploma in any branch of Engineering with minimum of 20 years Professional Experience shall also be eligible.

Associate Members: Degree or Equivalent in any branch of Engineering / Architecture with minimum of 5 years Professional Experience after graduation / 10 years Professional Experience for Diploma holders

Fee: The following Fees Structure will come into effect from 1st October 2021 (Life Membership only)

Fellow: Rs. 8,000/- Fees + Rs. 500/- Entrance Fee. + Rs.1,530/- (18% GST) = Rs.10,030/-
Member: Rs. 6,000/- Fees + Rs. 500/- Entrance Fee. + Rs.1,170/- (18% GST) = Rs.7,670/-
Associate Member: Rs. 3,000/- Fees + Rs. 500/- Entrance Fee. + Rs.630/- (18% GST) =Rs.4,130/-

(Cheque/DD may be drawn in favour of Indian Institution of Technical Arbitrators, payable at Chennai; NEFT Payment may be made directly to Indian Bank SB Account No:428009917, R.K.Salai Branch, Mylapore, Chennai, IFSC Code: IDIB000D035)

SUPPORTERS: From personal knowledge of the applicant and in consideration of his/her qualifications as stated, I recommend him/her as being in every way a fit and proper person to be admitted to the Institution as Fellow / Member.

S.No.	Name in Capitals	Membership No.	Name of the Institution {IITArb., IE(I), IRC, IBC, IOV}	Signature (preferably in English with date)
1		F-		
2		F-		

(For Office Use Only)

Details of Cash / Cheque /DD received: Cheque / DD No. & date_____ Bank _____
Amount Rs._____Receipt No. & Date _____.

Approved for admission: Fellow / Member / Associate Member, Roll No. allotted:

Secretary General **President**

Note: For becoming a Fellow Member / Member, recommendation of two fellow Members of any of the organizations i.e. IITArb.,Indian Buildings Congress, Indian Road Congress, Institution of Engineers (India) or Institution of Valuers will be required indicating their name of institution, name of the recommender and membership number.

INDIAN INSTITUITION OF TECHNICAL ARBITRATORS

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Web site: www.iitarb.org, E-mail: iitarb2003@gmail.com

APPLICATION FOR INSTITUTIONAL MEMBERSHIP

We desire to become an Institutional Member of the Indian Institution of Technical Arbitrators. If admitted, we agree to abide by the provisions of the Memorandum, Rules, Regulations & Byelaws of the Institution in force now or as may be amended from time to time.

We give below our particulars-

1. Name of Organisation :……

2. Address:……
   ……
   Phones:…….……Fax :……..E-mail: …….....

3. Nature & Field of Activities of the Organisation
   1. ……..
   2. ……..
   3. ……..

4. Annual Turnover : Rs. .....crores

5. Amount Remitted :

Entrance fee	:	Rs. 500/-
One time membership fee	:	Rs. 25,000/-
Total	**:**	**Rs. 25,500/- + Rs.4,590/- (18% GST) = Rs.30,090/-**

6. Cheque/DD No……Dated ……on ……Bank….....Branch

7. Our representative/Nominee is :

   Name : …….
   Designation : …….
   Qualification : …….
   Nationality : …….

(Date) **(Signature)**

(Cheque/DD should be drawn in favour of "Indian Institution of Technical Arbitrators," payable at Chennai).
Optional : A brief write-up on the Organisation applying for Membership may be enclosed.

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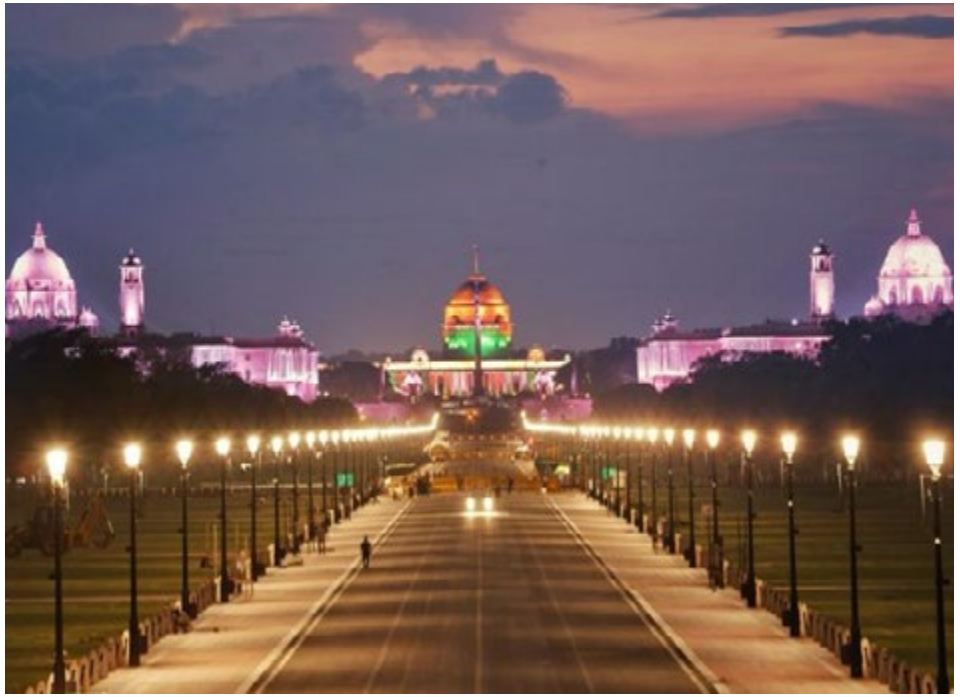

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