Journal of Corporate Governance and International Business Law
Volume 1, Issue 1
(January-June)
www.stmjournals.com

Arbitration in Construction Industry

Law, Musaib Khan*
Research Scholars, KIIT School of Law, KIIT University, Bhubaneswar, Odisha, India

Abstract
The construction projects' volume is growing rapidly all around the globe majorly in countries like India, China and US. This industry is contributing much towards the GDP of the country because this industry is linked with other industries involving people with various skills. In this article, I have laid my emphasis on the benefits of arbitration over litigation since the need of the hour is the speedy disposal of the cases. None of the nations can afford the cases related to the construction industry become stagnant since it would lead to a stagnant economy. The reasons and causes for the disputes are numerous. In India, arbitration is governed by the act of 1996 which is known as arbitration and conciliation act and was modified in 2005. This amendment led to a remarkable development in the adjudication of construction associated issues. An Arbitration Centre has been set up by collusion between the Construction Industry Development Council, India (CIDC) and Singapore International Arbitration Centre (SIAC), "The Construction Industry Arbitration Council", came along with an objective to implement an institutional machinery to resolve issues associated to construction and infrastructure. A recent evolvement by the Cabinet Committee on economic affairs regarding approval of certain initiatives by the NITI Aayog has been welcomed. Lastly, a comparative study of states like US and UK shows us the growing inclination towards arbitration for resolving a construction dispute. Every nation looks towards developing its nation and that can never be achieved with a stagnant or declining GDP and this problem can only be resolved by speedy and efficient disposal of construction disputes.

***Keywords**: Construction projects, Price Waterhouse Coopers, social infrastructure, project management*

****Author for Correspondence*** E-mail: law.kumar88@yahoo.com

INTRODUCTION

Arbitration in Construction Industry

The Price Waterhouse Coopers (PwC) has sponsored a new report namely Global Construction 2030 which calculates that by 2030, the aggregate of construction output will grow to $15.5 trillion by 85% worldwide, including three countries China, USA, and India, dominating the approach and computing for 57% of all global growth [1]. It is expected that by 2030, the construction market of India will increase twice as rapid as china by bringing a new engine for global growth in emerging markets. India's urban citizenry is expected to grow by astonishing 165 million, and it is predicted that by 2030, Delhi will become the world's second largest city with 10.4 million people [2]. The construction sector of the country has played a big role in nation's GDP by contributing around 8% to it (at constant prices) in past years to 3.85 lacs crore (7.9% of the total GDP) in 2010–11 from 284798 crore (8% of the total GDP) in 2006–07 [3]. It predicts that market size of this industry in the twelfth plan period demonstrate that the accumulated output of the industry is likely to increase 52.31 lacs crores from 7.67 lacs crores 2012–2013 to 13.59 lacs crores 2016–2017. The above -mentioned amount exhibits that the construction industry of India is cardinal barometer of growth and advancing as it creates job contingency and increases production holding power in the country. This sector is more labor-intensive than capital intensive and in addition to it, indirect jobs give employment to more than 35 million people. The construction has noticeably played a very significant role in the development of nations but since every action has a reaction, this industry has been witnessing commercial disputes as well. The construction projects nowadays have become very complex [4]. They include a hierarchy of people and a numerous number of individuals involving with different skills and expertise. The activity of so many numbers of individuals is more likely to cause the inevitability of certain disputes and disagreements since it involves trade in various trades and professions. Construction industry is the second largest employer in India and is also growing at rapid rate internationally [5]. A study of the 1174 projects at the end of September 2016 displays that 333 projects were going later than the time schedule. The delivering of these projects ranges from 1–261 months. The postponed cost in the deferred projects has resulted 20.95% increase in original cost. The predictable cost for all deferred projects together is Rs. 6,47,487.80 crore [6]. Thus, it can be reasonably presumed that time overrun would lead to conflict and which shall ultimately lead to disputes. Thus, it is vitally important and exigent to elucidate the quandary in order to resolve the construction related disputes efficiently and economically.

There are basically two modes for adjudicating any dispute namely: (a) litigation in the courts of justice, and (b) arbitration. In construction related issues, the two most common methods used are DRBs and arbitration. Always there is arbitration clause in all construction contracts. It is necessary that all high rated fund contracts should have DRBs clause which the World Bank has made it mandatory. This method of resolving disputes has gained popularity and in India, arbitration is essentially used in place of civil litigation because civil litigation is a time taking process and it takes years to solve the matters. Arbitrations got improvement when India followed a modern pro-arbitration statute in January 1996, based on the Model Law [7]. The most favored mode of dispute resolution in the construction industry is arbitration for three paramount reasons: (a) abundance of time; (b) secrecy; and (c) domination over the process of dispute resolution [8]. After agriculture, construction is the second largest economic activity. Construction industry can be divided into three parts: Infrastructure, Industrial and Real Estate. The usefulness of this industry cannot build up as construction projects are the cutting verge of expansion and maintain industrial and social infrastructure [9]. Zestful application depends broadly on carrying out the basic tasks in a right order and utilizes the resources to the best return. All measures like land acquiring, financing position, law and order issues should be taken care of, earlier before commencing the project to abstain problems at later stage. Many assignments go through inadequacies in assignment formulation and implementation, popular to time and cost overwhelm, and disturb the growth of assignment. In addition, inappropriate organization due to absence of coordination, conversation, and effective administration result in disputes and harms the overall development. To avoid problems, a study should be done in the beginning of the project in all aspects and a detailed procedure is to be adopted related to the projects [10].

There can be several disputes occurring in the construction industry. They can be: a) construction related causes of dispute; b) fiscal/budgeting matters of disputes; c) administration linked matters of disputes; and d) liability linked matters of disputes [11]. The factors contributing to a dispute can be many, namely, fault in layout, imperfect details, improper settlement produces such as contract informality/applicant or consumer contracting methods, bid development errors such as estimating error payment and budget, performance, delay and time, lack of quality, lack of administration process, misunderstandings between client, contractor, owner etc., unpredictability, impractical assumption of individuals involved in legal action, distinct bond paper wrong medium of transfer of information, communication gap between the project participants, absence of team energy, failure of parties to deal expeditiously with the alterations, unexpected results, bid review regarding contracting officers, faulty negotiation procedure of contracting officers, knowledge of local statues of contracting officers, scheduling of contracting officers, change order of assignment administration process, reward before plan analysis of project management procedure, pre-construction discussion operation, proceedings of management procedure, quality guarantee of project management procedure, faulty scheduling of site management process, improper project management procedures, lack of quality control etc. [12].

The overall economy has built such a situation where the construction firms are bound to offer projects at or below minimum profit levels. And meanwhile, the proprietors are demanding the contractors to put the complex projects without mentioning the information on contract papers. Because of which, the individual contractors have more burden to build sophisticated projects with restricted capital resources and with diminished quality. And after all this, it is obvious that number of issues or disputes will be more and will increase rapidly at an increasing rate [13].

The process of arbitration being private, informal, quick, less expensive and the procedure being less formal as compared to litigation along with the process of arbitration even has a limited evidence process as compared to the complex litigation process makes it preferable when it comes down to choose between the two processes. With an objective of contributing institutional machinery for verdict settlement of construction and infrastructure associated problems, the Construction Industry Development Council, India (CIDC), in collusion with the Singapore International Arbitration Centre (SIAC), has set up an arbitration centre in India called the Construction Industry Arbitration Council (CIAC). CIAC is a certified society which has its headquarters in New Delhi. Dr. APJ Abdul Kalam the Hon'ble president of India inaugurated the council on 15th November 2006 [14]**.** Arbitration under the authority of the CIAC will have the following elements:

Acceleration

CIAC Arbitration Rules bring strict timelines for appointment of arbitrators and for rendering of the award. The arbitrators have to give the decision within 45 days from close of hearing.

Experienced Arbitrators

The jury or board shall consist of experts from the construction industry as well as the legal fraternity. They shall have gone through official drill before joining the jury. At present, approx. 140 arbitrators have been given formal training and approved in arbitration workshop conducted in India and Singapore and have been admitted to the board or jury.

Rigid Code of Ethics for Arbitrators

Arbitrators appointed are recalled in each project, of the rigid Code of Ethics under which they are to conduct the arbitration. An arbitrator is chosen to a specific case only after possibility and clash of interest analysis are made.

Clear Administration of Arbitrator's Fees

To help the parties know their economical exposure to the costs of arbitration, CIAC can only charge parties based on a circulated scale of fees.

Supervise the Break through or Development of the Case

The Secretariat of CIAC will supervise the development of the case throughout the arbitration.

Organize Skills or Aptitude and Assistance for Hearing

The Secretariat should be able to organize rooms for arbitration hearings. The Secretariat would also be able to organize print, rewarding and understanding services. Phonic and video recording facilities can also be organized [15].

The CIAA Model Arbitration provision states that "Each and every conflict originating from it or in relation contract, containing several queries in respect to its presence, legality or discontinuation, will be point out together, and lastly clear up by adjudication in [New Delhi or any other place in India]* in conformity with the Adjudication Guideline of the Construction Industry Arbitration Association ("CIAA Arbitration Rules") as affecting the present dawning of the arbitration, that fundamentals are assumed to be assimilated by allusion in this clause" [16]. When the issue is within the country (between Indian parties); then New Delhi or any place in India will be selected. If the issue is global (between an Indian party and foreign party or between two foreign parties); then Singapore will be selected [17]. In India, there is an all-inclusive legal scheme to conduct arbitrations i.e. Arbitration and Conciliation Act, 1956 to conduct arbitrations irrespective of whoever the party maybe, a domestic or a foreign element. Before the 2016 modification to the Arbitration Act earlier this year, in construction agreement for big assignments, especially with public sector undertakings (PSUs), the holder contributes to jurisdiction in arbitration affairs. The PSUs generally apply this command through one-sided adjudication provisions in the agreement. Under the Arbitration Act, individuals are free to comply on the method for the appointment of the arbitral tribunal [18]. In the case of ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corporation Ltd. [19], the arbitration agreement read: "Any dispute or difference of any nature whatsoever [or] any claim, cross-claim, counterclaim or set-off of the Corporation against the vendor or regarding any right, liability, act, omission or account of any of the parties hereto arising out of or in relation to this agreement shall be referred to the sole arbitration of the Director (Marketing) of the Corporation or of some officer of the Corporation who may be nominated by the Director (Marketing) [20]. Based on this, the arbitration agreements with PSUs would provide that the managing director or employee of one of the parties to the dispute would be the arbitrator.

The courts of India prior to this amendment had time to time upheld the validity of such clauses. In the case of Indian Oil Corporation Ltd. & Ors. Vs. Raja Transport Pvt. Ltd. [21] which was reaffirmed in the case of Denel (Proprietary Limited) Vs. Bharat Electronics Ltd. & Anr [22], it was held that the fact that the named arbitrator is an employee of one of the parties is not *ipso facto* a ground to raise a presumption of bias or partiality or lack of independence on his part. There can however be a justifiable apprehension about the independence or impartiality of an employee arbitrator, if such person was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other Department) to the officer whose decision is the subject-matter of the dispute. Thus, heads of departments and directors, not associated with a contract could have been appointed as arbitrators. This has been held in a number of decisions of the Court; inter alia, Ladli Construction Co. (P) Ltd. Vs. Punjab Police Housing Corporation Ltd. [23], Secy. to Govt., Transport Dept. Vs. Munuswamy Mudaliar [24], S. Rajan Vs. State of Kerala [25].

However this position has undergone a significant change with the 2016 amendment to the Arbitration Act (amended Arbitration Act), which, *inter alia*, provides that notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule (of the amended Arbitration Act) shall be ineligible to be appointed as an arbitrator [26]. Thus, by virtue of the Seventh Schedule, employees, consultants, advisor, managers, directors or other persons who are part of the management of a party to the dispute are disqualified to be appointed as an arbitrator irrespective of what the arbitration agreement may provide [27]. The Delhi High Court in a recent landmark judgment has confirmed this position.

Though this position has undergone a drastic change with the introduction of the 2016 amendment which provides that notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule (of the amended Arbitration Act) shall be ineligible to be appointed as an arbitrator [28].

Arbitration is perhaps the most commonly used mechanism for settlement of technical disputes in a construction project. It is a quasi-judicial process to the extent that legal protocol is largely observed, and it is important that the arbitrator, who basically acts as a judge, understands legal procedures. In India, the Arbitration and Conciliation Act, 1996, provides the legal framework for the arbitration process. In principle, collection and interpretation of evidence, examination and cross-examination of witnesses, etc., are some examples of essentially legal matters, which an arbitrator needs to have a sound understanding of. However, a basic belief in principles of natural justice and a practical approach are a hallmark of a successful arbitrator. He should be able to guide and provide a direction to the proceedings, which could be quite tough, especially when the parties to the dispute are represented by professional lawyers. In fact, the law has now added a new dimension to the arbitration process by empowering the arbitrators to conciliate and help the parties in arriving at a fair compromise or an equitable settlement of the case before him. As far as the number of arbitrators is concerned, much like the judicial system, technical disputes can also be resolved by single arbitrators, or a panel of several arbitrators, and though the parties are free to determine the number of arbitrators, it should be ensured that the number is odd, so that a situation of a tie in a verdict, acquired constitution of a bench of arbitrator is completed when one adjudicator is elected by contractor and the holder, and all of them select a 3rd assistant adjudicator [29]. The greater cautious preparation cannot constantly avoid problems and this track is the final chance to solve an issue, earlier addressed to an irrevocable adjustment [30]. The disputes in the construction projects in India are of utmost concern since they are directly related to the development of the country. A sufficient assertion administration method is necessary to assure that each judicial petition originating is handled with in a method that is equal to exclusively muddled party.

A recent development was the approval of series of initiatives by the Cabinet Council on budgetary proceedings control by the Prime Minister Shri Narendra Modi on 31st August, 2016 with an intention of reviving the construction sector in India. The proposal focusing ahead including the NITI Aayog and was authorized by the Cabinet Committee about fiscal events was the payment of 75% concerning the arbitrary decision via security report, contrary to limit without charge investment firm assurance the issues in which the arbitrary decision is pending. This report may remain worn for the repayment of bank loans and to meet the requirements of an ongoing construction project. This measure would certainly stimulate the development process in the construction industry. Administration agencies and PSUs have also been advised to shift issues under arbitration to the amended Arbitration Act which has an accelerated proceeding, with the permit of the builder. In the distant future, other methods are also under consideration, along with changes to tender papers and model obligation, and expanded use of conciliation. NITI will also inspect the thought of compose "entreaty to take out funds" financed by private sector investors, while the Department of Financial Services will inspect a suitable scheme for addressing stressed bank loans in the construction sector [31]. The shift comes in the scrim of the commitment to have a lump of short-term and long-term enterprise to address the issues that weaken the construction sector. The construction sector is a supreme contributor to productive activity computing for about 8% of GDP. In the latest years, the construction sector has been impaired by the large number of assignments which got hedge during the period of quiescence between 2011 and 2014. The banking sector also has a large hazard, inquiry have shown that a key factor behind the misfortune facing the construction sector is the pendency of claims from Government bodies. An amount of Rs. 70,000 crores is tied up in arbitration. Over 85% of the claims raised against Government bodies are still pending of which 11% are pending with the Government agencies, 64% with arbitrators and 8.5% with courts. The average settlement time for claims is predicted at more than seven years [32]. The construction sector has been facing several claiming highest to downfall in overall advancement and success.

Dispute Review Boards (DRB) administer the construction industry with a mechanism to help construction assignments to anticipate and shaft potential construction issues before they occur, to provide advisory opinions on questionable or disputed matters, and to administer an alternate dispute resolution method to settle any disputes that cannot be settled between the parties to the construction contract. DRBs are presently used all around the world in the construction of roads, railroads, tunnels, dams, bridges and other supreme construction assignments. It is only in recent years that the DRB has been used in the construction of large commercial buildings such as manufacturing facilities, shopping centres, hotels, etc. Because the construction industry has seen the many benefits, DRBs are now being used for the construction of small commercial projects and large residential houses. If the DRB is empowered with the ability to render final and binding decisions upon the parties to the construction project, the project is virtually guaranteed to continue with a minimum amount of lost time and money that would normally be encountered when arbitration or litigation is required to settle disputes.

CDRS recommends the DRB having the authority to make final and binding decisions, which is reflected in the following information: [33]

COMPARATIVE ANALYSIS

United Kingdom

Hamish Lal, construction partner at Akin Gump Strauss Hauer & Feld, convey advice that while statutory adjudication and the presence of the Technology and Construction Court (TCC) has made arbitration reduced common on UK assignments, the use of arbitration on international assignments has expanded notably [34]. The ADR banner has been progressively suitable and may be used to characterize three different alterations. First, the advancing of a new professional group seeking to institutionalize party supported negotiations. These new professional groups are chiefly non-lawyers who advocate the use of mediation or conciliation in dispute resolution. The second different alteration could be described as the lawyers' counter attack or the rearrangement of litigation practice. This alteration may include such things as the "mini-trial" which seeks to ensure that lawyers are included as part of the mediation process. Lastly, the courts have entered the ADR arena by endeavor to regulate the alley way to trial and also by offering court append ADR [35].

Respondents perceive negotiation as the most effective dispute resolution method in terms of time, costs, satisfaction, minimization of further disputes, etc. Second, respondents considered that they were mostly able to answer the questions relating to negotiation, hardly noticeable less confident in the areas of arbitration and litigation, and especially unsure about mediation measure, adept determination and adjudication [36]. This apparently indicated the growing scope of arbitration and other ADR methods in UK for the adjudication of industry connected problems.

United States

There are two basic processes to resolute disputes in the United States legal system i.e., a) litigation in the court system, and b) arbitration before a neutral person or panel, chosen by the parties to hear and actuate the issues. Recently, more and more construction disputes are being surrendered to arbitration, where the arbitrators are often more usual with the construction methods and construction related problems, than judges. In United States, the public policy has been refined very actively which is favoring arbitration [37]. Florida courts have ruled that arbitration is the favored means of dispute resolution as an alternative to litigation [38]. Any argument or brief arising out of or connection to the agreement or breach thereof, shall be determined by arbitration in conformance with the Construction Industry Arbitration Rules of the American Arbitration Association, including judgment upon the decision rendered by the adjudicator or arbitrators may be enrolled in any Court having supervision [39].

CONCLUSION

The construction industry, not only in India but all around the globe, is the major contributor towards the overall development of the nation since it involves and employs workers pertaining to various knowledge and skills. It marginally contributes towards the growth of GDP of a country. Since construction being a very vital industry and involves a huge investment of money in it, a country cannot afford much delay in the adjudication of cases related to construction disputes. In the 21st century, the construction related disputes are needed to be resolved at the earliest otherwise it may lead to stagnant construction projects along with the declining economy of the country and the bank flooded with the recovering of loan amount. The slow and cumbersome process of litigation in the courts imposes a big threat to the speedy disposal of the cases in the construction industry due to which the countries are resorting to alternative methods of resolving the disputes. A detailed analysis of the Indian scenario along with the comparative study of United Kingdom and United States even shows us the shifting of the culture of resolving the disputes towards arbitration and mediation and other ADR methods. This is majorly happening because of the speedy, efficient, cost and time effective and less formal process of the ADR methods. A very effective feature of the Arbitration Act is that the arbitrator can encourage settlement of the dispute between the parties during any stage of the arbitration [40]. If the parties reach a settlement and so desire, the terms of such settlement can be recorded in an award of the tribunal [41]. This technique has become popular the world over and is utilized as a helpful tool for dispute resolution.

Thus, arbitration is very helpful in resolving complex construction disputes and it is a vital decision which can reduce the time and cost of such long prevailing disputes and can determine a dispute in a much better way.

REFERENCES

1. Price Waterhouse Coopers. Global Construction 2030: A Global Forecast for the Construction Industry to 2030.
2. Twelfth Five Year Plan (2012–2017) Economic Sectors. Vol. II. Chapter 19: Other Priority Sectors.
3. Ibid.
4. http://www.centroesteroveneto.com/pdf/Osservatorio%20Mercati/India/Ricerche%20di%20Mercato/2009/-construction%20Sector.pdf.
5. Construction Industry Development Council. Country Report India. *21st Asia Construct Conference*, Tokyo, Japan. 24–25 Nov 2016.
6. Annual Report, 2016-17. Contribution of Different Sectors to Gross Value Added in 2015–16. Government of India Ministry of Statistics and Programme Implementation.
7. Sumeet Kachwaha. *ADR in Construction India*. IBA International Construction Projects Committee.
8. Sudip Mullick (Partner), Yigal Gabriel (Associate Partner) Niharika Dhall (Associate with the Construction Law and Disputes Practice at Khaitan & Co.). *Dispute Resolution in the Construction Industry.*
9. C.A. Adukia Rajkumar S. *Benefits of Institutional Arbitration and their role in Construction Industry.* Available at: *http://www.caaa.in/image/arbitration2011.pdf*
10. Ibid.
11. A Review on Causes of Disputes in Construction Industry, *Mohit Dujari, Sumit Gupta, International Journal of Advanced Research in Engineering, Science and Management*. Vol. 7, issue 1, pg. 42-46
12. Ibid.
13. Ibid 8.
14. http://www.cidc.in/new/activities1a.html
15. http://www.ciac.in/about_us.html
16. Ibid.
17. Ibid.
18. Section 11(2) of the Arbitration and the Conciliation Act, 1956.
19. Bharat Petroleum Corporation Ltd and Ace Pipeline Contracts Private Ltd (2007) 5 SCC 304.
20. Ibid.
21. (2009) 8 SCC 520 Indian Oil Corporation Ltd. &Ors. Vs. Raja Transport Pvt. Ltd.
22. Arbitration Petition No. 16 OF 2009, Supreme Court of India.
23. Ladli Construction Co. (P) Ltd v. Punjab Police Housing Corporation Ltd (2012) 4 SCC 609.
24. Secy. to Govt., Transport Deptt v. Munuswamy Mudaliar 1988 Supp SCC 651.
25. S. Rajan v. State of Kerala (1992) 3 SCC 608.
26. Section 12(5) of the amended Arbitration Act.
27. Rule 1 & 12 of the Seventh Schedule of the amended Arbitration Act.
28. Section 12(5). The Arbitration and Conciliation (Amendment) Act. 2015.
29. Chaitanya Khekale, Nityanand Futane. Management of Claims and Disputes in Construction Industry. *International Journal of Science and Research (IJSR).* 2013; 4(5): 848–856p.
30. Ibid
31. Press Information Bureau, Government of India. Cabinet Committee on Economic Affairs (CCEA), 31-August-2016.

32. Ibid.
33. http://www.constructiondisputes-cdrs.com/creative_dispute_resolution_proc.html.
34. http://www.hardwicklegal.com/the-evolving-role-of-arbitration-in-construction-disputes/
35. Alternative Dispute Resolution in the UK Industry. *14th Annual ARCOM Conference*, University of Reading. Association of Researchers in Construction Management. 9–11 Sep 1998; 2: 428–37p.
36. Ibid.
37. Lapidus v. Arlen Beach Condominium Association, 394 So.2d 1102 (Fla. 3rd DCA 1981).
38. Roe v. Amica Mutual Insurance Company, 533 So.2d 279 (Fla. 1988)
39. Sobel Stuart H. *Arbitration in the Construction Industry*. Mar 1996.
40. Section 30(1) of the amended Arbitration Act.
41. Section 30(2) of the amended Arbitration Act.

Cite this Article
Musaib Khan. Arbitration in Construction Industry. *Journal of Corporate Governance and International Business Law. June* 2018; 1(1): 40–47p.