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Suggesting improvements in the arbitration and conciliation act 1996 considering the Indian construction industry

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ABSTRACT

The Arbitration is the submission for a determination of disputed matters to private unofficial persons selected in a manner provided by Law or Agreement. The Arbitration is governed under the Arbitration and Conciliation Act 1996. The present arbitration system in India is still plagued with many loopholes and shortcomings and the quality of arbitration has not adequately developed as a quick and cost-effective mechanism for resolution of disputes. It is necessary to remove the difficulties and lacunas in the Arbitration Act and in practice to make it effective, inexpensive and speedy. In many parts of India, rapid development in infrastructure has meant an increased number of disputes and caseloads for already overburdened courts. Arbitrations conducted in India are mostly ad hoc. The advantages of institutional arbitration over ad hoc arbitration in India need no emphasis and the wide prevalence of ad hoc arbitration has its ramifications in affecting speedy and cost-effectiveness of the arbitration process. This study makes an attempt to study the Arbitration and Conciliation Act of 1996 with the help of five case studies and try to identify the shortcomings of this act. Also, an attempt is made to suggest some remedies in the regard of improving the arbitration practices followed in India.

Keywords— *Cost effective, Delay, Court intervention, Institutional arbitration, Fast track arbitration, Training, Professional*

1. INTRODUCTION

The number and complexity of contract disputes have increased dramatically in recent years. At the same time, the delays and costs associated with litigation have become more significant. This section provides an overview of dispute resolution methods commonly used. The increasing trend to alternative methods of resolving disputes suggests a considerable dissatisfaction with the traditional litigation process, at least in certain types of construction cases. However, it must be emphasized that litigation is sometimes, although not always, still the best solution to the parties' problems.

Arbitration practice has lagged behind. The present arbitration system in India is still plagued with many loopholes and shortcomings, and the quality of arbitration has not adequately developed as a quick and cost-effective mechanism for the resolution of commercial disputes. Arbitration may suffer delay for a number of reasons. There is no restriction on completion of arbitration proceedings.

Arbitrations conducted in India are mostly ad hoc. The advantages of institutional arbitration over ad hoc arbitration in India need no emphasis and the wide prevalence of ad hoc arbitration has its ramifications in affecting speedy and cost-effectiveness of the arbitration process. Arbitration is generally considered cheaper over traditional litigation and is one of the reasons for parties to resort to it. However, the ground realities show that arbitration in India, particularly ad hoc arbitration, is becoming quite expensive vis-a-vis traditional litigation.

2. OBJECTIVES

- To study the Arbitration and Conciliation Act 1996 with respect to the Indian Construction Industry.
- To study the current practices followed for the arbitration process in the Indian construction industry with the help of 5 case studies.
- To recommend generalized, specific and mandatory sections which are well capable of meeting the needs of the construction-specific arbitration.
- To suggest some practices for improving the quality of arbitration so that mechanism becomes quick, cost-effective and minimizes the supervisory role of the court in the arbitral process.

3. METHODOLOGY

3.1 Different methods of dispute resolution

As the cost of the project, quality of its execution and timely completion are most important issues to the owner, the challenge before the owner and the contractor is to resolve disputes as quickly as possible in a way acceptable to the parties to the contract with minimum deterioration of the relationship. It is therefore of paramount importance that parties prescribed to the meaningful procedure to deal with the disputes. In seeking a method for resolving disputes, a full analysis of cost, time and risks should be undertaken. Most prevailing methods are listed below:

(a) Amicable Settlement through Alternative Dispute Resolution (ADR) Techniques
  a. Direct Negotiation
  b. Mediation
  c. Conciliation

(b) Arbitration

(c) Litigation

3.2 Claims in the construction industry

During the execution of a project, several issues arise that cannot be resolved among project participants. Such issues typically involve contractor requesting for either time extension or reimbursement of an additional cost, or sometimes both. Such requests by the contractor are referred to a claim. If the owner accedes to the claim of the contractor and grants him an extension of time or reimbursement of additional cost, or both, the issue is sorted out. However, if the owner does not agree to the claim put out by the contractor and there are differences in the interpretations, the issue takes the form of a dispute. Claims are becoming an inevitable and unavoidable burden in modern projects involving new technologies, specifications and high expectations from the owner. The claim mentioned above can also be put up by the owner. It is, therefore, imperative for all the parties to be fully acquainted with the procedures and systems, including a resource to certain preventive actions as found necessary and required. Construction claims are found in almost every construction project. They are the seeking of consideration or change by one of the parties involved in the construction process. They have significant effect to project cost and time. A survey done in Western Canada found that the large majority of claims involved some delay and in many cases delay exceeded the original contract duration by over 100%. Other research works done in the United States and in Thailand showed similar results that the average cost growth causing by claims was about 7% of the original contract value.

4. CASE STUDY

Executive Engineer, Provincial vs. Kirmach Coop. L & C Society Kirmach on 13 August 2015

Executive Engineer, Provincial Division No. 2, PWD (B&R) Branch, Kurukshetra. Appellant Vs. The Kirmach Co-operative L&C Society Kirmach and another...Respondents

1. Brief facts of the case are that respondent No.1 was allotted work for construction of link road between Durala to Adhoni falling in Kurukshetra district. Respondent No.1 submitted the tender. He was required to complete the entire work within three months. But the same was not done. Therefore, as per condition No.2 of the agreement, a compensation of Rs.38, 000/- was levied upon respondent No.1. As respondent No.1 did not start the work, therefore, work was re-allotted to one Raj Kumar contractor at the risk and cost of respondent No.1 and same was got completed after incurring extra expenses of Rs.2,10,730/-. Thus the said money was claimed. Both the said claims were declined by Arbitrator.
2. Learned Additional District Judge came to the conclusion that the award is well reasoned and has been passed after hearing the parties. It was further held that there is nothing on record to show that the award is in conflict with the public policy of India. Before the Arbitrator, two claims were made by the present petitioner. One was that recovery of Rs.38,000/- imposed as per clause 2 of the agreement for not completing the work within the stipulated time period of three months and the second claim was for Rs.2,10,730/- on account of work got done from another contractor at the risk and cost of respondent No.1.
3. A perusal of award shows that the Arbitrator has passed a reasoned award. He has given the following reasoning while declining claim No.1:- "This work was allotted on 29th August 1996 and the action under clause-2 was taken on 3.10.1997 i.e. After 13 months whereas the stipulated time permitted to High Court Chandigarh complete the work was only 3 months. After expiry of stipulated period 3 months, neither the contractual society nor the department has got extended time for completion of the work implying thereby that the agreement remained inoperative and not in force. So action taken by the claimant Executive Engineer clause-2 of the agreement is held invalid and hence the compensation levied there under is illegal. I, therefore award nil in favour of the claimant.
4. For declining claim No.2, following reasoning is given:- "This claim is on account of extra amount spent by the claimant on completing the work at the risk and cost of the society after taking under clause-3 of the agreement vide Executive Engineer memo No.2727/CB dated 11.5.2000 after 42 months of the expiry of the time of 3 months for which the agreement was drawn between the two parties. Since the agreement was not in force there can be no action against any party. I am, therefore, of the opinion that the action by the claimant is illegal and thus the claim against the respondent society is baseless and not valid. I, therefore, award nil against the claim in favour of the claimant."

5. RESULT

The above-noted operative portion of the award shows that the Arbitrator has applied his mind. He has given sufficient reasoning in favour of the conclusion drawn by him. Therefore, the learned Additional District Judge was justified in not interfering in the award under Section 34 of the Arbitration and Conciliation Act, 1996. The order passed by the learned Additional District Judge is perfectly in accordance with law. No public policy has been violated. Objections under Section 34 of the Arbitration and Conciliation Act, 1996 are not to be dealt as if it is a regular appeal on merits. Certain grounds have been provided in the Act on which the award could be challenged. There is nothing illegal in the award. Hence, the present appeal stands dismissed.

6. CONCLUSION

- A valid arbitration clause is of supreme importance because it not only determines the jurisdiction of the tribunal but also ousts the jurisdiction of the national courts. Therefore the drafting of an arbitration clause, which serves as a foundation for arbitration is very essential.
- Arbitration is a field which is growing impressively. With the growth of trade in domestic as well as international scenario and potential growth of trade in our country, it is imminent that arbitration must be a very professional and efficient mode of settlement of disputes.
- Arbitration procedure should be fair, efficient and capable of meeting the needs of the specific arbitration.
- Arbitration should be completed within the specified time and should not be delayed unnecessarily. Parties that cooperate and focus on having a smooth and efficient arbitration procedure can avoid delays and reduce the costs considerably.
- Success depends on the much needed change in the mindset of users and also on the quality of neutrals. Arbitrators must be truly independent, fair and skilful keeping a close and strict watch on the time schedule and cost factor.

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