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Studying the arbitration and conciliation act 1996 considering the Indian construction industry

Thombare Tukaram Damodar

Tatyasaheb Kore Institute of Engineering and Technology, Warananagar, Maharashtra

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 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 regard to improving the arbitration practices followed in India.

Keywords—*Delay, Court intervention, Cost-effective, 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 resolution of commercial disputes. Arbitration may suffer delay for a number of reasons. There is no restriction on the 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.

The construction project is an important element of any country's infrastructure and industrial growth. As part of the process of standardization and improving efficiency in the construction sector, harmonized bidding conditions and regular bidding documents for domestic construction contracts have been developed and distributed to all Government agencies and public sector organizations as guidelines [6]. There is a necessity for proper dispute resolution mechanism in the construction division. A considerable amount of money is locked up due to disputes between contractors and clients, leading to cost and time overruns.

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.
- 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 the mechanism becomes quick, cost-effective and minimizes the supervisory role of the court in the arbitral process.

3. METHODOLOGY

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, full analysis of cost, time and risks should be undertaken. Most prevailing methods are listed below:

1. Amicable Settlement through Alternative Dispute Resolution (ADR) Techniques
   a. Direct Negotiation
   b. Mediation
   c. Conciliation
2. Arbitration
3. Litigation

3.1 Conciliation

In a general sense conciliation also means any third party assisted ADR approach. Its distinguishing feature from mediation is that a conciliator himself draws up and proposes a solution that represents what in is his opinion is a fair and reasonable compromise of the dispute after having discussed the case in detail with the parties. The conciliator does not give any judgment but persuades parties to come to a settlement. He may assist them by helping to establish communication, clarifying misconceptions, dealing with strong concerns and emotions and build the mutual trust required for co-operative problem-solving. This is thus a process, by which the resolution of the dispute is achieved by compromise or voluntary agreement.

3.2 Arbitration

As a concept of arbitration it is essentially a settlement of disputes between parties by somebody, be it a person, an individual or a group of persons or an institution on whom the contesting parties repose confidence. Arbitration more or less resembles conventional litigation in which a 'Neutral Third Party' decides the issue on merits after hearing the arguments of both the sides. Reference to arbitration can be made only when a dispute arises between the parties to the arbitration agreement. His decision is final and binding and is enforceable by the courts.

4. CLAIMS IN 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 as 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, as explained in fig.1.1 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 a 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.

4.1 Types of Construction Claims

There are a number of ways to classify construction claims. They may be classified by the related parties, rights claimed, legal basis, and characteristics of claims. By determining their relevant legal bases, construction claims can be divided into three categories:

4.1.1 Contractual Claim: Contractual claims are the claims that fall within the specific clauses of the contract. In well-accepted standard contracts, there are a lot of provisions which entitle both the contractors and the employers to claim for the appropriate compensation such as ground conditions, valuation, variations, late issue of information, and delay in inspecting finished work.

4.1.2 Extra-contractual Claim: This type of claims has no specific grounds within contract but results from a breach of contract that may be expressed or implied, i.e. the extra work incurred as a result of defective material supplied by the client.

4.1.3 Ex-Gratia Claim: Ex-gratia claims are the claims that there is no ground existing in the contract or the law, but the contractor believes that he has the rights on the moral grounds, e.g. additional costs incurred as a result of rapidly increased prices.

4.1.4 Extension of Time Claim: Each construction contract clearly stipulates the date (or period) for the contractor to complete work. The purpose of specifying a date of completion is to facilitate claims for damages by the Employer for any delays created by the contractor in performing their work. The date for completing the project will be specified, either in the tender documents or otherwise agreed to by the contractor before the contract is awarded. In the case of no specific date for completion being mentioned in the contract, the law implies that the contractor must complete work within a reasonable time. If the contractor fails to complete the project within the stipulated period or within the reasonable time, and the delays are proven to be caused by the contractor, the employer is entitled to Liquidate and Ascertained Damages (LAD), in order to recover their damages from the contractor. This will be in the form of a charge, which can be based on a daily, weekly, or monthly amount.

5. CONCLUSION

- The persons who wish to act as arbitrators must undergo some training and up gradation through professional development programmes. Legal proficiency and relevant judicial rulings too familiar with current developments may also be attained through regularly attending such professional development programmes. This is a must. Time has come when standards of arbitration and purity in the conduct of arbitration proceedings must be raised. Training may be of short duration but nevertheless, it must be imparted. However, it is stated that certain categories of persons like retired Judges or those who have conducted a large number of arbitrations without being accused of being partisan or whose awards have invariably been upheld by the Courts, could be exempted from in-house training.
- Creating a class of arbitrators whose credibility cannot be questioned. If arbitrators are too busy then they can conduct it, not otherwise.
- The court should as far as possible proceed to give an opportunity for resolution of disputes through arbitration rather than by judicial adjudication.
- Inspite of the numerous advantages of institutional advantages of Institutional arbitration over ad hoc arbitration, there is currently an overwhelming tendency in India to resort to ad hoc arbitration mechanism. Instead of ad hoc arbitration, institutional arbitration should be preferred and actively promoting referral to institutional arbitration by the judiciary and providing requisite legislative sanctions to facilitate the same.

- There should be Fast-track arbitration which specifies the number of days for which each session should continue, the time schedule and the number of hours for which proceedings have to be conducted on each day, the time schedule for filing of pleadings, recording of evidence and submission of arguments.
- 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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