OPTIMIZATION OF CONFLICTS IN ENGINEERING PROJECTS ARBITRATION IN INDIA

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Abstract : Works contract arbitration in modern times is an efficacious alternative dispute resolution technique in project community vis-à-vis conventional mechanism of court litigation. Knowledge and exposure to effective arbitral practices could be a very effective tool in redressal of disputes that generally arise between different stakeholders in projects. We examine the current status of litigations due to conflicts in contract pending at courts and explore the use of Works contract arbitration to develop a low cost and effective dispute resolution settlement mechanism. We argue that arbitration mechanism at present is not used effectively in Indian companies for disputes resolution. It is an imperative on part of policy makers to work a practical and effective incentive mechanism for use and application of arbitration in place of present routine court litigation. Professionals associated with the project can play a creative and strategic role in promoting use of Works contract arbitration in dispute resolution**.**

Index Terms - Works contract Arbitration, Alternative Dispute Resolution, Court Litigation

I INTRODUCTION

Every project is subject to variety of disputes whether intentional or unintentional and financial and other implications of such disputes vary from one company to another company depending upon the facts and circumstances of each case. Disputes could be defined, classified and interpreted from different perspectives for different stakeholders including shareholders, suppliers, workmen, customers and so on. Give the rapid development in India the caseloads for already overburdened courts have increase manifold leading to notoriously slow adjudication of Works contract disputes. Routine court litigations have been posing a serious threat to free decision-making in the projects since they cause uncertainty of dispute settlement because of inherent nature of longtivity in the settlement process. There is now a widespread recognition and acceptance of Works contract arbitration as a tool for resolving disputes among various stakeholders in the project vis-à-vis routine court litigation. Arbitration is a method of settlement of disputes by way of an alternative to the normal judicial method, which is activated by instituting legal proceedings in court of law. Out of various forms of alternative dispute resolution (ADR) including conciliation, mediation and negotiation, arbitration has emerged as one of the most dominant and widely accepted form of ADR. Works contract arbitration has widely been recognized in different parts of project world as a means of dispute resolution particularly from 1980s and 1990s (Lavin, 2009). Firms in global commerce routinely agree to submit their disputes to private arbitral panels, and states routinely require firms to honor their agreements (Movensian, 2008). The concept of Works contract arbitration is not so new and has been used since centuries in different civilizations. It is this concept of “Panch Parmeswar” (meaning, decision of five learned persons when dispute referred to them, is equal to decision of God), which has been widely accepted and applied since ages in Indian traditional life. Even in ancient Rome and Greek civilizations, arbitration was prevalent since sixth Century B.C. Pound (1959) states that Roman law does not prohibit submission of disputes relating contracts to the decision of the persons and since the rules exists to their effect and enforcement (Paranjape, 2006). Similar evidence can be found even in Colonial India under the Bengal regulations of 1772 that provides the parties to refer the disputes relating accounts to arbitration. Given the Industrialization and rapid growth of economies in the last few decades, the need and urgency of fast and effective dispute resolution mechanism has been strongly felt. The present volume of project has led corporations to rethink about the application of Works contract arbitration in sorting out disputes in

contracts because of the facts that project decision-making could be prompt when there is absolute clarity in the mind of stakeholders about the dispute resolution mechanism in case of problem, if any.
This is particularly true in context of fast developing economies where legal systems are still lethargic, ineffective and costly due to various reasons. The prime legislation that deals with the arbitration and conciliation procedures is *Arbitration & Conciliation Act of1996 in India.* Under this Act, complete power has been
conferred on the Arbitral Tribunal constituted under the provisions of the Act. This Act proceeds on the basis of law adopted by United Nations Commission on International Trade Law (UNICITRAL). It provide for transparent, flexible, speedy and effective mechanism for resolution of disputes among the parties to the agreement. This Act of 1996 is to promote settlement of disputes outside of court in an efficient manner for mutual benefit serving convenience to all disputing parties. Therefore, role and interference of the courts in the process of arbitration has been kept at minimum. Since, the arbitration is related to Works contract activities, The Supreme Court of India (All India Reporter, 1961) observed that activities such as exchange of commodities for money or other commodities, carriage of persons and goods by road, rail, air or waterways, contracts, banking, insurance, transactions in stock exchange, supply of energy, postal and telegraphic services etc. may be called as Works contract intercourse within the meaning of Article 301 of the Constitution which relates to freedom of trade, commerce and intercourse. This paper examines the present status of conflicts management in Works contract organizations, highlights the importance of conflicts optimization mechanism under the Arbitration & Conciliation Act of 1996 and attempts to establish it (the Act) as a superior alternative to the disputes handling through conventional litigation mechanism through Court of law.

II. ENGINEERING PROJECTS ARBITRATION - AN EMERGING DISCIPLINE

The emergence of number of institutions both national and international, in field of arbitration has resulted into various structural measures toalign dispute management, strategic planning and development of appropriate teams to handle arbitrational issues in different project environments and industries. In India, Arbitration and Conciliation Act, 1996 (hereinafter referred as "Act") vest powers to judicial authority to refer parties to arbitration where there is an arbitration agreement.
Section 8 (1) of the Act provides that a judicial authoritybefore which an action is brought in a matter, which issubject of an arbitration agreement, shall, if a party soapplies not later than when submitting his first statement onthe substance of the dispute, refer the parties to arbitration. The existence of a statutory mechanism thus, puts pressure on Works contract arbitration mechanism leading to a situation of dilemma for project enterprises to undertake Works contract arbitration in a serious and effective manner for project disputes resolution. Globalization of economy in general and maturity in legal system in particular are also facilitating an integrated view of the dispute management through arbitral process. As a result, many professionally managed enterprises are using arbitration as a proactive tool
to add value, rather than a defensive measure to minimize the negative impact of disputes in the court of law. This in turn helps the top management to exercise greater control over the project operations, enhances organizational capabilities
and project decision making in an effective manner. As a measure of corporate governance, boards of companies are ensuring that there should be well-defined
arbitration policy in place while undertaking high value contracts. This is particularly of paramount significance in infrastructure projects involving huge capital investments. Stakeholders are concerned about the growth of project
performance in a hassle free and dispute free manner. Despite of this realization only few companies in its real intent have fully realized the importance of the concept of Works contract arbitration. There are large number of companies especially government owned enterprises who have adopted arbitration as an effective tool for their disputes resolution. Dispute Management is responsibility of every key person in the organization irrespective of nomenclatures.

III. CONVENTIONAL METHODS OF DISPUTE REDRESSAL

The conventional court mechanism has been widely criticised by researchers and practitioners (Venugopal, 2007). Venkatachaliah (2000) report that Indian courts have failed to meet the expectations of the masses for various reasons – (a) outdated and age old laws particularly relating to project environment, (b) bureaucratic hassle in appointment of judges resulting into lacs of vacancies in the judicial positions across the country, (c) lack of complete infrastructure in terms of staff, proper court accommodations, office equipments, libraries, (c) inadequate court procedures and rules, (d) outdated, cumbersome, inflexible and technical procedures under civil laws and (d) lack of expertise to handle technical and Works contract matters. In a very leading case of Supreme Court of India remarks- "Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led to the Arbitration Act, 1940". Indian Arbitration Act 1940 was introduced to address the issues, which cannot be sorted out effectively in a time bound manner by the routine court procedures. However, there were serious lapses in the enactment since the way in which the proceedings under the Act are conducted and without an exception challenged in Courts, has made lawyer laugh and legal philosopher weep (AIR,

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IV. WORKS CONTRACT ARBITRATION VS. COURT LITIGATION

We argue that the biggest advantage of sorting out disputes through Arbitration over Court litigation is its Neutrality and Mutuality. This may be in respect of – (a)

Place of arbitration, (b) Language to be used, (c) Procedure or Rule to be applied, (d) Nationality of Arbitration (in case of international Works contract arbitration), (e) Legal representation, (f) Appointment of Arbitrators as per requirement of the nature of dispute, (g) Element of confidentiality. Arbitration costs incurred by the concerned parties include the arbitrator's fees, rent for arbitration venues, administrative/clerical expenses, and professional fees for the representatives of the parties and witnesses. Though these costs differ significantly between ad hoc and institutional arbitrations, yet the critics indicate an exploration of and effective mechanism for case presentation to arbitrators. International Chamber of Commerce study shows that costs that went to a final award in 2003 and 2004 include the largest part of the total cost of ICC arbitration proceedings incurred by the parties in presenting their cases (www.iccwbo.org). The cost borne by the parties to present their cases was 82% of the total cost apart from arbitrators' fees and expenses and administrative expenses of ICC representing 16% and 2% respectively. Itfollows that if the overall cost of the arbitral proceedings isto be minimized, special emphasis need to be placed onsteps aimed at reducing the costs connected with theparties' presenting of their cases. In ad hoc arbitration fees of the arbitrators are not regulated, but decided by the arbitral tribunal with the consent of the parties consisting of high profile arbitrators such as retired Supreme Court and High Court judges, charging higher fees. The costs are especially high in case of large companies where the parties decide the venue. This challenges the usefulness of arbitration over court litigation.

V. ADHOC AND INSTITUTIONAL ARBITRATION

An arbitration procedure may either be adhoc arbitration or institutional arbitration. Ad hoc arbitration is usually considered more flexible, cost and time effective and more tailor-made to the parties' need, but it also suffers from a lack of clear procedure and administration. In addition, the intent to build up an ad hoc arbitration bears the risk of drafting inoperative arbitral clauses and an award rendered under ad hoc

proceedings may fail recognition and enforcement because of mistakes slipped in the procedure. Parties may choose ad hoc arbitration thinking that they will be able to conduct their arbitration faster, as it suits them better and with less expense or because they fear of the existence of a bias in an institution in favor of the other party.

VI. ENGINEERING CONTRACT ARBITRATION - IMPERATIVES

Works contract arbitration adoption and implementation require structural changes in the existing framework. Malhotra (2009) advocates the constitution of Dispute
Resolution Boards incorporated by the express consent of the employer and the contractor to monitor and scrutinize the execution of the construction project at various stages of completion. Arbitration award requires a control through well-defined public policy (Rao, 2008). Works contract arbitration requires an active support from judicial mechanism and their scale of intervention should be clearly
laid down. Even in case of international Works contract arbitration it is accepted that arbitration needs the support of national courts to be effective (Daniel, 2010).
Fast track arbitration is also required in case of disputes such as infringement of patents, copyrights, trademarks, destruction of evidence, activities in violation of patent, trademark laws, construction disputes in time-bound projects,
licensing contracts etc.
In case of Indian firms, it is a dire necessity to recognize Alternative Dispute Resolution (ADR) through Works contract arbitration as a subtle tool in effective management of project enterprises. This essentially requires developing and
maintaining expertise of this kind with the growth of project. Also, such kind of strategic role in an organization shall be assigned to senior management person who is well versed with the nature of that project and in-depth knowledge of the legal frame prevalent in conventional type of litigation mechanism and arbitration mechanism.

VII. CONCLUSION AND REMARKS

It can be seen that adoption of Works contract arbitration route by Indian projects in true sprit is a long way to go. In order to develop this culture extensive training on Works contract arbitration to people involved in management of the project enterprises is required particularly in developing countries like India. Different chambers of commerce and institutions involved in imparting arbitration as a part of their curriculum. Besides project enterprises shall also take help of these universities and institutions in conducting courses on Works contract arbitration for their enterprises. This process will strengthen not only corporate governance but will also make project decision making robust. The present arbitration system in India is still has loopholes and the quality of arbitration has not adequately developed as a quick and costeffective mechanism for resolution of Works contract disputes. The concerned channels like arbitrators, judges and lawyers should make efforts to change general attitude of people towards arbitration.Government shall also work out more incentives for resolution of disputes bymeans of arbitration. Whereas,ecovery suit is filed in court requires deposit of court fees ascertain percentage of claim amount, which can be avoided ifarbitration is initiated. Government shall realize withoutfailure that use of arbitration can help in reducing the burdenof litigation on judiciary. The government shoulddisseminate knowledge of the benefits of alternate disputeresolution mechanisms to foster growth of an internationalarbitration culture amongst lawyers, judges and nationalcourts. Judiciary in India is under scathing attack for thependency of millions of cases in different courts due towhich as a result Legal system has become subject ofmockery. Position does not seem to be any way better inmost of developingeconomies. It shall also be appreciatedthat Works contract arbitration must be perceived an implemented in strategic way rather than as a routine

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