Contract Disputes- Resolution Scenario in India

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Abstract: **It is well acknowledged that construction contracts are inherently ridden with disputes because of adversarial relationship among the parties involved. Construction is second largest industry in our country. Recently India is emerging as the fastest growing economy under the leadership of honorable Prime minister Shri Narendra Modi. Along with it increases the number of construction and industrial contracts and parallely, the magnitude of construction disputes. Advanced economies/ countries have put in place multilayered efficient systems to address the quantum of disputes, their commercial activities generates, in a timely manner so that the claim escalation is minimized. Our legal system is already burdened with number of cases before it, and has earned a not so endearing reputation (on the front of time) for judging commercial disputes. This paper tries to present some aspects of arbitration and litigation scenario related to resolution of contractual disputes in India.**

I.INTRODUCTION

Construction contracts present a complex relationship among the parties; client, Architect, consultant, contractor, sub contractors, contract administrator so on, involved in it. Even though all of them are aiming at completion of project within budget and schedule, are motivated by benefits/ profits they get out of the project. Construction contracts represent adversarial relationship among these parties. Time and cost overruns have become ubiquitous features of construction industry (Love et al., 2006). Even though there is no statistics about construction related civil suites, majority of the construction industry leaders feel that they are on the increase (Tucker M P., 2005). One may wonder as to what is the reason construction industry is so confrontational and highly prone to disputes. The very nature of construction projects spanning over large time durations over which personnel, economy, technology etc changes lends itself for disputes. It is certain that no construction project will be completed as envisaged/ planned at the time of contracting. Changes are a way of life in construction industry. These changes to original plan are the bones of contention among the parties. Changes are the main source of disputes in construction industry.

Changes are additions to or omissions from original contract. It may be change in duration, quantum of work, quality of work, a particular process etc. Many of the changes in a construction project are minor and sorted out by representatives of client and contractors at the field. When a change is affecting the agreed cost and time for which it is unclear who is to bear the cost, a claim arises. If there is disagreement from other party over claim of one party, then claim leads to dispute. If these disputes are not resolved efficiently and especially in a timely manner the cost of claim escalates and may jeopardize the whole project. However it is also to be noted that claims are not the only source of disputes. Misrepresentation, misinterpretation, differing site conditions, weather, strikes, poor communication etc are also responsible for disputes.

Whatever the reason a dispute is disagreement among parties over assuming responsibility, in terms of cost and time, for varying conditions over those agreed in the contract. And it is a common feature in construction industry. Such being the normal condition, construction industry has evolved a host of methods viz. mediation, negotiation, arbitration, alternate dispute resolution to resolve those disputes. After going through any or all of these resolution methods if dispute still persists then it will end up in litigation. Recently India is emerging as the fastest growing economy under the leadership of honorable Prime Minister Shri Narendra Modi. Unprecedented magnitude of foreign investment is being made in Indian economy. Emphasis is made on improving infrastructure. Along with it increases the number of construction and industrial contracts, and in parallel, the magnitude of construction disputes. According to a Construction Industry development council's 2001 survey amount locked up because of construction disputes in India was over 540,000 million rupees (The economic times, April 10, 2008). Foreign investors feel that India is not an arbitration friendly regime (Sherina Petit and Mathew Townsend., 2013). The laws related to arbitration in India are not in tune with the businesses and those of economically advanced countries. Even after the Arbitration and Conciliation Act of 1996, which is deemed progressive and based on UNCITRAL model law (Sarma K et al., 2009) several judgments, in the matter of arbitration, of Indian courts have put the foreign investors on the back foot related to investment in India.

II.ARBITRATION

Arbitration is widely viewed as an alternate dispute resolution method which is effective, efficient, fast and cheaper. Most of the business and legal community abroad and in India hails it as a "cure all" for commercial disputes. Commercial disputes are very complex. Experts are required to discern them. Judiciary does not have experts on various industries; it is abundant with legal experts. If judiciary has to decipher a commercial dispute and give verdict, it takes a long time, as it has to fallow cumbersome procedure codes and take the testimony of experts. Also courts all over the world are burdened with overload. As such even judiciary is favoring arbitration over commercial disputes rather than itself trying to solve the commercial disputes. It has become a norm of the law, all over the world, to encourage, or even in some cases mandating contracting parties to include arbitration clause. Such is the image of the arbitration in the eyes of all.Arbitration in its pure form is applicable for disputes between two parties only. Arbitration is possible between parties who agreed for resolving their disputes through it. If they have not agreed to resolve their disputes by arbitration then resolution is possible through litigation. Normally arbitration award is binding on both parties unless otherwise contracting parties have excluded themselves from it. Now Indian law have made the arbitration award binding and allow appeal on very few grounds viz. party was under some incapacity of the party, the arbitration agreement is not valid under the governing law, a party was not given proper notice of the arbitrator or on the arbitral proceedings, the award deals with a dispute not contemplated by or failing within the terms of submissions to arbitration or it contains decisions beyond the scope of the submission, the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, the subject matter of the dispute is not capable of settlement by arbitration and arbitral award is in conflict with the public policy of India. In a recent survey (PricewaterhouseCoopers., 2013) as high as 95% respondents (representing businesses) indicate using arbitration in recent past. Arbitration is lauded for its speed, flexibility, confidentiality, finality and proficiency and even professed to "arbitrate – Don't Litigate" (Namrata Shah and Niyati Gandhi., 2011). While this is the orientation and inclination of Indian professionals and academicians towards the arbitration, they also bring forth their dissatisfaction over arbitration and its limitations. The same (PricewaterhouseCoopers., 2013) survey also gives out that some 68% respondents used litigation to settle disputes in recent past. It is a considerable percentage given the preference of arbitration and complexity of litigation. Also 68% of the same group of respondents prefers retired Judges as arbitrators. This fact forensically analysed may lead to the conclusion that disputing parties have faith in judges but not in the time consuming court procedures.

Although arbitration is frequently preferred to litigation, it becomes no longer applicable when the matter is connected with many parties who are not parties to the arbitration (Chandana Jayalath., 2009). This is in the arbitration law and nature of contracts (exclusivity and privacy) does not allow arbitration between many parties. A dispute involving more than two parties has to be taken to litigation or any other mode of redress. In a construction dispute over poor quality of finished product client have a dispute with both consultant and contractor, but for the nature of arbitration he has to pursue it separately with each of them or litigate in a court holding both of them as respondents in a single case.Cost effectiveness of the arbitration process is also questioned by some researchers especially in the case of institutionalized arbitration (Namrata Shah and Niyati Gandhi., 2011). Even in USA the cost of court litigation have been proved to be far less than arbitration costs for similar cases (Linclon T and Arkush D., 2008). In British Columbia the legal recourse to resolve a dispute is costlier than arbitration (Urquhart G.A., 2009). Many of the advantages claimed for arbitration seems to be varying with geographic location and the variant of arbitration choosen. At least in India, parties have managed to delay the execution of arbitral award or the process of the arbitration itself on the grounds allowed in the Arbitration and Conciliation Act 1996. A study shows these cases are innumerable and delay was ranging from 2 years to 10 years when a party goes to court or compel other party to go to court for getting appointment of arbitrator or to get the award of arbitration executed (Vasundhara Patil, 2014). The aggrieved party in the process of arbitration tries to delay justice to the opponent by these tactics. In many Departmental contract's arbitration clauses a senior officer (Suptd. Engineer or higher level) of the same department is made as an arbitrator which is against the tenets of natural justice, as he belongs to one party. If he is the arbitrator from department side and contractor can appoint his own arbitrator it is justifiable. As it is an agreed contractual term between the parties, later even courts are unwilling to interfere. Some departmental contracts vests final and binding power of deciding an issue with an officer of higher rank in the department and assumes that the decisions taken using these power are "excepted matters" not open to arbitration and legal scrutiny. However a judgment of supreme court a rejected this plea and has treated it as an administrative power vested in the person to reduce the disputes and it is not a quasi judicial power (Iyer and satyanarayana., 2002)

Arbitration is said to be private judiciary or Parallel judiciary. It even enjoys the finality of award that is not reposed on lower judiciary. Even though there is overall enthusiasm regarding arbitration the findings of Public Citizen of United States of America is startling. It debates a host of issue related pre-dispute binding mandatory arbitration. It reveals poor winning rates of individuals against corporate in pre-dispute binding mandatory arbitration.

It also brings out less average awards in arbitration for individuals than in litigation in courts. It even brings out the fact that corporate give business to arbitration institutions and one can notice traces gains to corporate entities in arbitration awards. Arbitration institutes (Providers of arbitration) promulgate their business saying "Little discovery. Very little – if any, discovery and pre-hearing maneuvering" which in itself scuttle the chances of weaker party. With the zeal and earnest of resolving the commercial disputes, with the seeming assumption courts are not effective in dealing with them; the concept of arbitration is created. It is accorded almost equal status as judiciary with the twin goals of timely & efficient resolution and lessening the burden of courts. This institution of arbitration can only thrive if it works impartially with integrity. Arbitrators sit in place of judges. However they are in many ways free to act. They are not answerable to any. Their award is unquestionable. They need not give reasons for their decisions. This unchecked freedom combined with the commercial contexts may lead to untoward consequences. It can be observed from several judgments of courts on appeals over arbitral awards that arbitrators exceed their jurisdiction, while making awards, operating with the premise of norms of industry, even though it is contradicting the contract provisions (Case – AIR 1997 Supreme Court 980 – Civil Appeal No. 808 of 1997)
Scrutiny of many judgments in general suggests pursuance of perfection both about contractual terms and legality while the arbitration awards seem superficial disposal of matter.

III.CONCLUSIONS

We can draw following conclusions in the light of the above facts. The disputing parties enter in to arbitration with the idea it is as integral and impartial as judiciary, the law related to arbitration should ensure it. Arbitrators turning a blind eye to the contract clauses while arbitrating should be controlled. Such behavior of arbitrators destroys the faith in arbitration. There should be explicit procedures in the law to enforce the agreed parties to arbitration to enter into arbitration, instead of a careless or spoiler party sitting careless and delaying the arbitration process. Amendments to the law should address the problem of stakeholders in arbitration derailing it by misutilising the very advantages of the arbitration viz. confidentiality, speed, cost effectiveness and expertise of the industry. We should also think on the lines of establishing construction and technology courts on the lines of UK, Australia and Malaysia to overcome limitations of arbitration.

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