Importance of Arbitration & Settlement of Disputes in Infrastructure Project - A CaseStudy

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Abstract- The significant increase in the role of construction industry in the development of nations. But over the last few decades has been accompanied by a considerable increase in the number of commercial disputes as well. Every industry is subject to variety of disputes, whether intentional or domestic. Financial and other implications of such disputes vary from one company to another company depending upon the facts and circumstances of each case. Alternative dispute resolution mechanisms also including arbitration, have become more important for operating businesses in India. This paper is a brief overview of the legal and procedural landscape of arbitration from its commencement to its conclusion and thereafter. It will also review some of the advantages of arbitration over other dispute resolving techniques.

Keywords —Arbitration, Act 1996, Conciliation, Infrastructure, Law, Litigation.

I. INTRODUCTION

1. HISTORY OF ARBITRATION

The origin of arbitration is lost in hoary past of human civilization. There is reference to arbitration in ancient India and also among Greeks, Romans and Chinese. Hindu civilization expressly encouraged the settlement of difference by tribunals chosen by the parties themselves-tribunals whose decision is to be accepted as final and conclusive between the parties. Apart from the courts establishment by the king there were other tribunals recognized in the ancient texts and digest of Hindu law. The smritis refer, in particular to three types of popular courts (Puga, sreni nad kula) and speaks the authority of these agencies to decide law suits.

There were then panchayats in mediaeval India. The panchayats were territorial such as village panchayats and sectarian such as panchayats of different castes and creeds. The panchayats were held in great veneration. The panchas were regarded as panch parameshwar, before whom none dared to speak falsehood. The panchayat proceeded in informal way untrammeled by technicalities of procedure and law of evidence. The simple and informal system of arbitration through the panchayats, though useful, was ineffective to deal with complexities arising out of advancement in social and economic spheres. Traces of panchayats can still be found among schedule tribes and backward classes, where they exercise considerable influence in many social and caste questions.

After the advent of British Rule in India, regulations were framed in the presidencies of Bengal, Madras and Mumbai. Those regulations also provided for arbitration, though their provisions were not uniform, nor were they drawn very elaborately.

In 1834, Lord William Bentinck became the first governor general of India and the legislative council of India came to be established. The council's first enactment to regulate the procedure of civil courts was passed as act VIII of 1859. Section 312 to 327 of that act dealt with arbitration in pending suit as well as arbitration without intervention of the court. That act was repealed by Act X of 1877, which made no change in the law relating to arbitration. The code of civil procedure was again revised in 1882, which repeated the same provision about references of arbitration with or without the invention of the court. There was yet no provision for reference of future dispute to arbitration. Then, Indian arbitration act 1899 of the model of English Arbitration Act 1899 was passed, which was applicable to presidency towns and was later on extended to a few more commercial towns. The second schedule of the code of civil procedure 1908 contained similar provision about arbitration, which applied to the rest of the country. A need was felt that the provisions of arbitration should be transferred into a comprehensive and separate act. This led to the enactment of Indian arbitration act 1940. This act repealed the arbitration act 1899, and section 89, 104, clauses (a) to (f) and second schedule of code of civil procedure 1908. This act of 1940 as its preamble showed consolidated and amended the law relating to arbitration in British India.

The United Nations Commissions on International trade law adopted the UNCITRAL Model law on international commercial arbitration in 1985 and UNCITRAL conciliation rules in 1980. These model law and rules were recommended by the general assembly of the United Nations to all the countries for adoption in their own laws.

So, the arbitration and conciliation act 1996 came to be passed on 16th August 1996, taking into account UNCITRAL model law and rules and also vastly making amendment in the law relating to domestic arbitration contained in 1940 act. The 1996 act repealed the arbitration act 1940, the arbitration act 1937 and foreign awards act

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1961.

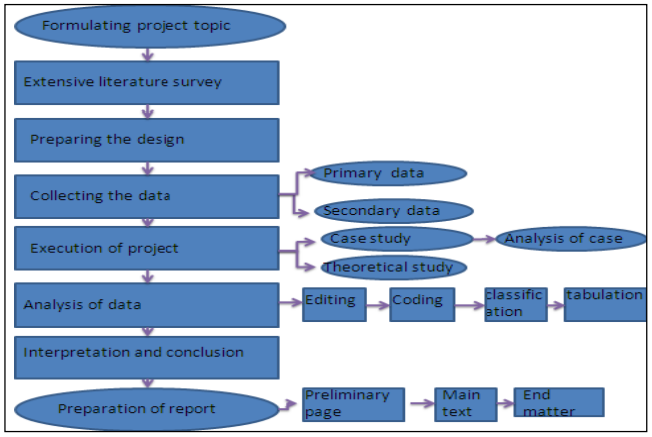
2. OBJECTIVE OF THE STUDY

This study is being carried out in order to study and understand why the shortcomings are cropping up in arbitration procedure and how to overcome these handicaps.

3. SCOPE OF THE STUDY

- To study the General Arbitration, Arbitration in ConstructionCompanies.
- Study of ADR Mechanisms.
- To Analyze case study of an Infrastructure project subjectedto Arbitration

4. METHODOLOGY



5. REVIEW OF LITERATURE

The arbitration and conciliation act 1996 has revolutionized the law of arbitration in India. Prior to 1996, the Indian arbitration act 1940 which was the law governingmost arbitrations empowered courts to supervise arbitral process in many respects. The courts could in appropriate cases decline to refer the matters to arbitration; determine arbitrator's jurisdiction; revoke his appointment; set aside or modify his award; and examine the award before allowing it to be enforced

The arbitration and conciliation act 1996 has changed the law substantially. The UNCITRAL model law is the basis for the act. The UNCITRAL model law was a model law prepared by the United Nations commission on international trade law designed to promote international trade and commerce.

Most nations accept that excessive regulation of dispute resolution hinders international trade; but they also accept the need for some form of regulation. There is no unanimity about what constitutes excessive and what constitutes proper regulation.

II. THE INDIAN LAW

Law prior to the arbitration and conciliation act 1996 prior to 1996, the Indian arbitration act 1940 was the most important legislation governing the law of arbitration. In addition there were other legislations that dealt with recognition and enforcement of foreign awards.

The Indian arbitration act 1940 enabled the parties to choose their arbitrator and stepped in to appoint him only either where the procedure agreed upon did not exist or where it failed. After the appointment the arbitrator could choose his procedure and make his award within 4 months after entering on the reference. If extension of time were required the court would have to allow it.

The court retained control over the arbitral process by having power to determine the jurisdiction of the arbitrator. The court could remove an arbitrator or revokes his appointment. After the award the court could remit modify or set aside the award.

1. CAUSES FOR CHANGE OF THE LAW

The Indian arbitration act 1940 has stood for 56 years before it was repealed. It was taken up for consideration for review twice by the law commission once in 1978 and the next in 1987. In practice it was found that the awards were often challenged in courts and it took a long time in courts to resolve the issues. Although most of the time the challenges to the award did not succeed, the time that the courts took to decide the case defeated the object of arbitration which was and is that it should be quick cheap andadaptable.

The problem thus was that the calendars of the courts were crowded and not that there was any serious defect in the Indian arbitration act 1940.

By 1991 India has changed its economic policy frame work so as to attract international investment. The international businessmen concerned with international business were wary of the delays in the Indian courts and wanted a dispute resolution system that quickly resolved thedisputes.

The result was that the entire case law carefully built for over half a century has become irrelevant. Although the object of those who made the law was to bring the law of arbitration in tune with the rest of the developed world, the sudden change in the system of administration relating to that law has led to complications in interpretation from which we are still not free.

2. IMPORTANT FEATURES OF THE 1996 ACT

The arbitration and conciliation act 1996 is designed to support party autonomy and minimization of court intervention. The act is divided into four parts: part I deals with arbitrations to be held in India and leads to making of a domestic award. It is based on the UNCITRAL modellaw- in fact it is in many ways a copy of it.

10 chapters are divided in-

Chapter 1 bears the title 'general provision' Chapter 2 bears the title 'arbitration agreement'

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Chapter 3 bears the title 'composition of arbitral tribunal'
Chapter 4 bears the title 'jurisdiction of arbitral tribunal'
Chapter 5 bears the title 'conduct of arbitral proceedings'
Chapter 6 bears the title 'making of arbitral award and termination of proceedings'

Chapter 7 bears the title 'recourse against arbitral award'
Chapter 8 bears the title 'finality and enforcement of arbitralawards'

Chapter 9 bears the title 'appeals'

Chapter 10 bears the title 'miscellaneous'

Part ii, part iii, part iv of the arbitration and conciliation act 1996 deal with recognition and enforcement of foreign awards, conciliation and supplemental provisions

In addition to the above certain enactments such as the electricity (supply) act 1948, the telegraph act 1885 etc. contain arbitration clauses.

III. THE ENGLISH LAW-

1. LAW PRIOR TO THE ENGLISH ARBITRATION ACT 1996-

Prior to the (English) Arbitration Act, 1996, arbitration law was contained in the Arbitration Acts of 1950,1975 and 1979. The Arbitration Act of 1975 limited the discretion of the High Court to stay any action brought in breach of an arbitration agreement, which was not a domestic arbitration agreement. The 1975 Act also provided for recognition and enforcement of foreign awards, something which India had already enacted way back in 1961. The 1979 Act gave the High Court a new appellate jurisdiction limited to determining a question of law arising in the course of the reference and to hearing an appeal on a question of law arising out of an award provided that certain conditions were fulfilled.

The 1950 Act contained many provisions similar to the Indian Arbitration Act, 1940. An important difference between the two enactments is to be found in s. 24 (1) of the English Act, which provided that a party could apply for revoking the appointment of an arbitrator, although it had agreed in advance for his appointment knowing that such arbitrator, byvirtue of his relationship with the other party, would not be impartial.

2. CAUSES FOR CHANGE OF THE LAW

After the formulation of the UNCITRAL Model Law in 1985, the British Government established a Departmental Advisory Committee on Arbitration Law (DAC) first under the chairmanship of Lord Justice Mustill and later of Lord Saville. These committees recommended against adopting the UNCITRAL Model Law on International Commercial Arbitration. However 'very close regard was paid to the model law in the formulation of the draft Bill which finally led to the(English) Arbitration act 1996.

3. KEY CHANGES IN ARBITRATION & CONCILIATION ACT 1996 by ACI in 2019-

The most significant change introduced by the 2019 Act is the establishment of an independent body, the Arbitration Council of India "The **Council"**. The Chairperson of the Council will be either a judge of the Supreme Court, or a judge or chief justice of the High Court or an eminent person with expert knowledge and experience of arbitration. Other members of the Council will *inter alia*, include eminent arbitration practitioners with knowledge of institutional arbitration, eminent academicians and the Secretary to the Government of India in the Department of Legal Affairs.

The Council is tasked with promotion and encouragement of arbitration, mediation, conciliation and other alternative dispute resolution mechanisms. The Council will also be responsible for maintaining uniform professional standards in respect of matters related to arbitration. With the stated goal of improving the quality of institutional arbitration in country, the Council will also be responsible for grading arbitralinstitutions on the basis of criteria such as quality and calibre of arbitrators and performance and compliance with time limits for completion of arbitral proceedings.

The 2019 Act also prescribes qualification requirements for accreditation of arbitrators in India. Further, the Council will review the grading of arbitrators and hold training and courses in collaboration with law firms.

Confidentiality: The 2019 Act places the onus of confidentiality of arbitral proceedings on the arbitrator, the arbitral institution and the parties. The 2019 Act however provides that confidentiality obligations will not apply where disclosure of an arbitral award is necessary for implementation and enforcement of award.

Protection for arbitrators: The 2019 Act seeks to offer additional comfort and protection to arbitrators and provides that no suit or legal proceedings can be brought against an arbitrator for anything which is done in good faith.

Time limits for pleadings and awards: The 1996 Act (as amended in 2015) required arbitral tribunals to make their awards within a period of 12 months for all arbitration proceedings. The 2019 Act removes this restriction for international commercial arbitrations and provides that the tribunals "*must endeavour*" to complete international arbitration matters within 12 months. For domestic arbitrations, the 2019 Act imposes new time limits in relation to statements of claim and defence and provides that both should be completed within six months from the date the arbitrator receives the notice of appointment.

Appointment of arbitrators: Under the 1996 Act, the procedure for appointment of arbitrators in case of disagreement between parties often led to delays in the arbitral process. The 2019 Act empowers the Supreme Court and the High Courts to designate arbitral institutions (accredited by the Council) for the appointment of

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arbitrators. This is intended to result in speedy appointment of arbitrators. In case no accredited institutions are available in the relevant jurisdiction, the High Court will maintain a panel of arbitrators to perform the functions of the arbitral institutions.

Restrictions on setting aside an award: Previously under the Section 34(2) (a) of the 1996 Act, an award made in India could be set aside on limited grounds (such as incapacity of parties, invalidity of arbitration agreement, lack of proper notice of arbitration, where tribunal acts outside the scope of its jurisdictions etc.) on the basis of the proof furnished by parties. The 2019 Act restricts the scope of interference by the Indian courts by stating that in an application to set aside an award, the courts can only rely on the materials furnished before the relevant arbitral tribunal.

III. ARBITRATION

A story goes that long ago there was an elderly gentleman who used to parade outside the law courts in Strand wearing a battered top hat and a billboard bearing the words "Don t litigate - Arbitrate". He was regarded as a nutcase and avoided by members of the bar His story was simple. He had been the beneficiary of a disputed will. He had been offered the chance of arbitration about it, but advised by his solicitor, he had declined. Before any decision had been arrived at in the courts, all litigations ground to a halt. The entire estate had been expended on lawyer's fees; neither he nor his opponents got anything. The lawyers carved it up between them. So people thought there must be a better way of settling disputes than this. And the answer was - ARBITRATION."

What is arbitration"" and "Who is an arbitrator[1]" are question which although of immense importance, are not capable of simple answer. To add to that difficulty. The word is currently misused to apply to two procedures which are not arbitrations in that they lack at least one essential element of true arbitration. The first is the use of the word in relation to labour disputes. It is commonly used by politicians and the press to describe the reference to a third party by employers and trade unions of a labour dispute. That, procedure is not true arbitration. Since neither party intends the so-called award by, he so-called arbitrator should in any wav be binding on them.

The word -Arbitration ' means the reference of the matter in dispute to the judgment of a person(s) selected by the parties. It refers to proceedings held pursuant to a submission it is a method of setting a dispute in a quasi-judicial manner it is a method of determining, but not qualifying the rights of the parties.

Arbitration is the most common & accepted mode of resolving the disputes arising out of the civil engineering contracts. Arbitration means a arrangement for investigation & determination of a matter/matters of difference between contending parties by one or more unofficial persons chosen by the parties. The dispute is not submitted for decision to the ordinary public courts out to a domestic tribunal.

An 'Arbitrator' is a private extraordinary judge between parties, chosen by their mutual consent/as per the arrangement settled by them/through the court of law to settle the disputes between them. The 'Arbitrators' are so called because they have arbitratory powers & as long as they observe the submission and keep within the boundary of law, their awards are definite for which no appeal will lie except on the grounds given in section 30 of the Arbitration Act 1940.

IV. WHY ARBITRATION IS PREFERRED TOLITIGATION

The commercial community the construction industry and landlords have long preferred arbitration to litigation. Their reasons for their preference are summarized below

1) Expertise: an arbitrator is normally selected for his expert knowledge of a particular trade whereas, apart from the official referees high court judges deal with such a wide range of cases that theypossess little expertise except by accident

Privacy: cases in the court are conducted in public and inquisitive journalists / trade competitors cannot be excluded except in the most exceptional circumstances. At an arbitration hearing nobody except the parties is entitled to be present and nobody else can be without the consent of both the parties and the arbitrator.

Convenience: an arbitrator normally arranges for a hearing, if one is necessary at a time and place to suit the convenience of the parties. In litigation the case is listed to suit the convenience of the court.

Expedition: whether the dispute is resolved without delay by arbitration depends entirely upon the quality of the arbitrator some arbitrators may prove dilatory and allow one of the parties to be dilatory. But if the arbitrator is competent he can bring matters to a hearing quickly. The arbitrator has ample powers to speed up the process and the fact that these powers are infrequently used tends to reflect on the arbitrator and not on the arbitration process.

Cost: there is a saving of expense but not always. It should not be forgotten that the parties to the arbitration have to pay for the room in which the hearing takes place and the fee of the arbitrator whereas apart from the court fee the parties do not pay for the court /services of the judge.

Advocacy: the right to appear for parties in the high court is limited to barristers/lawyers. At arbitration anyone can appear for the parties.

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V. ALTERNATIVE DISPUTE RESOLUTION

The 1996 Act is a new and bold initiative for resolving disputes without resort to litigation in courts by promoting ADR systems. The international trend is towards adoption of ADR and the arbitration is perceived as a less preferred procedure with its contentious and adversarial proceedings being less conductive to promotion of goodwill between the parties. In ADR methods, the parties can arrive at a settlement which is result of consensus rather than imposition since it is the parties themselves which take a decision to either accept or reject the final settlement.

The Conciliator or mediator is thus neither an arbitrator nor a judge but only a facilitator. Both in litigation as well as arbitration (which also mostly culminates into litigation), the parties in their obsession or desire to win tendto become adversaries and with the involved and long processes aided by all their advocates and decision not forecast able, more often than not severe their relationships permanently, On the other hand in ADR the relations are more harmonious since evolution of any solution is not necessarily bound by the contract and the acceptance is original. Someone has aptly compared these two and processes as proceedings before a divorce judge and consultations with a lion's marriage counsellor. There is a spectrum of ADR processes coming up internationally in relation to construction industry ranging from informal discussion to formal adjudication. Some of these are described hereunder.

1. TYPES OF ADR-

- Conciliation
- Mediation
- Dispute Review Board
- Adjudicator
- Technical Advisory Committee (TAC) or Panel of Experts(POE)
- Referee
- Dispute Advisor and Facilitator

VI. DOMESTIC ARBITRATION

The term "Domestic Arbitration" denotes arbitration which takes place in India, when the subjectmatter of the contract, the merits of the dispute and the procedure for arbitration are all governed by Indian law or when the cause of action for the dispute has arisen wholly in India or where the parties are otherwise subject to Indian jurisdiction.

1. INTRODUCTION-

India took an active part in the formulation of the Model Law and also the Conciliation rules. The advantage of these rules is that they are the product of consensus amongst countries which follow both common law and civil law systems. Though the UNCITRAL Rules were conceived in the context of international commercial disputes, there is no reason why they cannot form the basis for domestic arbitration and conciliation.

A Working Group Meeting of Law Ministers, representatives of FICCI, ASSOCHAM, CII, ICA, Indian Society of Arbitrators and eminent lawyers Specializing in the field of Arbitration was held in Mumbai, in which there was a general agreement that the Indian Law relating to Arbitration be consolidated in a single enactment and that should be based on the UNCITRAL Model Law on International Commercial Arbitration and UNCITRAL Conciliation Rules.

"The Arbitration and Conciliation Bill, 1995" was introduced in the Indian Parliament on 8th May 1995. The Arbitration and Conciliation Ordinance 1996, No.8 Of 1996 was promulgated by the President on 16th January 1996. In exercise of the Power conferred by Subsection (3) of Section 1 of the ordinance, the Central Government by Gazette Notification issued on 24th January 1996, appointed the 25th January, 1996 as the date on which the Ordinance came into force. This Ordinance was promulgated a second time on 26th March 1996 and for a third time on 21st June 1996. The Ordinance was replaced by this Act which received the assent of the President and given effect from 22nd August, 1996, videos Notification published in the Gazette of India, Extraordinary, Part II, and Sec 3(i) dated 22nd August 1996.

2. THE MAIN OBJECTIVES OF THE BILLARE AS UNDER:

- To comprehensively cover international and commercial arbitration and conciliation as also domestic arbitration and conciliation.
- To make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration.
- To provide that the arbitral tribunal gives reasons forits arbitral award.
- To ensure that the arbitral tribunal remains within the limits of its jurisdiction.
- To minimize the supervisory role of courts in the arbitralprocess.
- To permit an arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes.
- To provide that every final arbitral award is enforced inthe same manner as if it was a decree to court.
- To provide that a settlement agreement reached

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by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal

- To provide that for purpose of enforcement of foreign awards, every arbitral award made in country to which one of the two International Conventions relating to foreign arbitral awards to which India is a party applies will be treatedas a foreign award.

Major thrust and legislative intent of the new Arbitration and Conciliation Act, 1996 is to reduce excessive judicial intervention due to which the earlier Arbitration Act, 1940 suffered serious infirmities. Section 8(1) of the New Act, therefore, makes it mandatory duty for the judicial authority i.e. court to stay legal proceedings if started, where the subject matter has been referred to an arbitral tribunal. Similar provisions are made in connection with the New York and Geneva Conventions under Section 44 and 54 of the Act respectively.

VII- INTERNATIONAL ARBITRATION

International Arbitration" has a foreign ingredient. Arbitration becomes "International" when at least one of the parties involved is resident or domiciled, outside India or the subject matter of the dispute is abroad. The law applicable to an arbitration proceeding may be the Indian law or a foreign law, depending on the terms of the contract in this regard andthe rules of conflict of laws.

1. NEED FOR INTERNATIONALARBITRATION

The growth of international trade is bound to give rise to international disputes, which transcend national frontiers and geographical boundaries. For the resolution of such disputes the preference to international arbitration vis-a-vis litigation in national courts is natural because of arbitration being preferred to litigation in courts and the foreign element being preferred in the international arbitration to the domestic element in the national courts. This is also because there is no international court to deal with international commercial disputes.

In situations of this kind, recourse to international arbitration in a convenient and neutral forum is generally seen as more acceptable than recourse to the courts as a way of solving any dispute, which cannot be settled by negotiation

The rationale and purpose of international arbitration should be to provide a convenient, neutral, fair, expeditious and efficacious- forum for resolving disputes relating to international commerce. Basic features, which are uniform in the legal framework for resolution of international commercial disputes, can be broken down into three stages:

(i) Jurisdiction;

(ii) Choice of law; and

(iii) The recognition and enforcement of judgments and awards.

The trend towards growing judicial intervention that tends to interfere with arbitral autonomy, as also finality is a significant factor to be kept in view. The need is to reconcile and harmonize arbitral autonomy and finality with judicial review of the arbitral process. National laws differ on this issue. United Nations Commission on International Trade Law (UNCITRAL) Model Law attempts to promote harmony [a]nd uniformity in this sphere. The aim is to ensure arbitral autonomy coupled with neutrality or impartiality in the arbitral process by the composition of the arbitral by competent and impartial members that ensures equality between the parties and full opportunity to them to present their case. The UN Commission on International Trade Law has adopted the UNCIT Model Law on International Commercial Arbitration in 1985.

2. INTERNATIONAL ARBITRATINGAGENCIES

As the need for international commercial arbitration arose, many agencies dealing with such issues came up. Some of the prominent ones are listed below:

- International Chamber Of Commerce (ICC)
- London Court of International Arbitration (LCIA)
- Singapore International Arbitration Centre (SIAC)
- American Arbitration Association (AAA)

The source of authority of the international arbitral tribunal is the agreement of the parties and not the mandate of the State. The choice of the law applicable is also determined by the provision in the arbitration agreement. With the increased arbitral autonomy the requirement of reasons for the award is greater. Apart from transparency in the arbitral process, it also acts as an inherent check on the arbitrators and discloses to the party the basis of the award and the logical process by which the conclusion was reached by the arbitrators. The presence of reasons also regulates the scope of judicial supervision.

Informality of the arbitral process permits relaxation from strict rules of evidence and it reduces costs and delay that are often unavoidable in litigation. However observance of basic principles of natural justice cannot be dispensed with.

Appropriate provisions for enforcement of award are essential to impart efficacy international arbitration.

These are some of the significant and basic features of international arbitration the UNCITRAL Model Law aims

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at achieving these objectives by incorpon principles of universal application in the field of international commercial arbiter; for resolution of such disputes.

VIII- CASE STUDY

PROJECT DETAIL: -

Project: Government educational institute (aided by theWorld Bank)

Location: Rural Maharashtra

Parties in dispute: Maharashtra government and civil contractor

ARBITRAL TRIBUNAL:

Joint arbitrators were SR Hosalkar (appointed by contractor), A retired official from PWD (appointed by government). The presiding arbitrator was a former generalmanager of the Railways.

REPRESENTATION:

The state government was represented by an advocate whilethe contractor was represented by a techno-legal counsel.

DURATION: 18 months

DATE OF AWARD: May 2002

SUMMARY OF THE PROJECT:-

The Maharashtra government decided to build a polytechnicinstitute, a project aided by the World Bank, in a rural part of

the state. The work was awarded to a contractor in June 1996. The project was to be executed within 18 months. However, it was only completed in March 1998. While the project was in progress, disagreements over several issues cropped up and the contractor raised various claims that were not accepted by the government.

THE DISPUTE

The differences revolved around the following major factors:

- Issue of work order .
- Duration of maintenance period.
- Extension of performance bank guarantee.
- Payment and recovery of mobilization advance.
- Payment of bills.
- Recovery of retention money.
- Issue of drawings and other details.

The contractor raised various claims against the above while the work was in progress and again on completion of work. The government, however, rejected the claims and the contractor invoked arbitration in July 1999, appointing SR Hosalkar as arbitrator. The government appointed a retired official from the Public Works Department as its arbitrator and a former general manager of the Railways was chosen as the presiding arbitrator. The arbitral tribunal held 21 meetings with the parties in dispute between September 1999 and April 2002. After studying and analyzing the pleadings, documentary evidence, verbal arguments presented by both parties and based on its own observations during site visit, the arbitration panel unanimously arrived at the award in May 2002.

CLAIMS AND COUNTER CLAIMS:-

The contractor (claimant) submitted 21 (17 primary and four additional) claims including compensation for idling of resources and machineries owing to delayed work order; extra expenses incurred and losses suffered for extending performance bank guarantees; compensation for losses suffered owing to early recovery of mobilization advance; compensation and interest on compensation for delayed payments; pre-arbitration interest and pendent lite and future interest. The government (respondent) raised four counter claims including misappropriation of mobilisation advance by contractor and liquidated damages for delayed handing over of the completed project.

THE VERDICT

Of the 21 claims put forward by the contractor, one had become redundant, six were rejected and 14 were accepted, some partially and some totally with changes in claim amount and interest rate. All the counter claims of the respondent were rejected. Some claims and counter claims with the arbitral tribunal's verdict are briefly enumerated below:

CONTRACTOR'S CLAIMS

Compensation for idling of resources and machineries for one month owing to delay in issue of work order by respondent: The contractor was instructed in April 1996 to make preliminary arrangements and be ready to commence work immediately after receipt of work order which was issued only in June 1996. The tribunal rejected the claim as the contractor was allowed to do some work in the intervening period including collection of materials.

For extra expenses incurred for extending performance bank guarantee (PBG) as desired by respondent for 24 additional months: The contractor submitted PBG valid for 18 months (up to October 31, 1997), the period in which the project was to be completed. However, the respondent asked it to extend the guarantee up to October 31, 1999, as according to it, it had to be kept valid for 24 calendar months beyond the project completion date. The contractor extended the PBG but informed the respondent that the extra financial liability would have to be borne by it as the tender documents did not specify any maintenance period. However, the contractor on its own had accounted a liability

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period of 12 months. The respondent maintained that though the appendix to the form of bid was not part of the original tender documents, it had sent the same to the contractor subsequently in April 1996, which cited the maintenance period as two years. The tribunal awarded the claim partially. Acceptance of the contractor's tender by the government constituted a valid and binding contract between the parties. Subsequent issue of appendix stating 24 months as maintenance period could not be part of the contract. Signing of formal agreement on stamp paper later mentioning therein the "bid and appendix thereto" could not be cons-trued as relating to appendix indicating 24 months maintenance period, as there were many other appendices in original tender submitted by the contractor. Hence the respondent was liable to compensate the claimant for expenses incurred for extending PBG. However, as the contractor had admitted to having already taken into consideration the cost effect of 12 months maintenance while working out his quotation, it admitted a claim for additional 12 months only.

For extra expenses incurred owing to extension of some bank guarantees against mobilization advance and compensation for losses suffered owing to early recovery of three instalments of mobilization advance: The contractor maintained that the respondent was to pay mobilization advance soon after submission of bank guarantee in May 1996. However, the advance was paid only in October 1996. Further, the respondent did not recover the advance in 11 equal instalments as agreed. But their delay in payment of bills resulted in delay in recovery owing to which some bank guarantees had to be extended. Recovery of the advance in eight instalments and by double instalments on three occasions resulted in losses. The respondent maintained that mobilization advance was to be recovered in two instalments while it did it in seven instalments, which proved advantageous to the contractor. The bank guarantee was extended willingly by the contractor for its own benefit. Further, as it submitted 11 bank guarantees instead of one as originally contemplated, it was compelled to effect recovery in multiples. The tribunal allowed the claim, saying the respondent did delay payment of mobilization advance and initial and intermediate bills. According to the contract, the advance was to be recovered in equal instalments so that the entire advance was recovered either when 80 per cent of work was completed or 75 per cent of the initial contract period had expired, whichever was earlier. The respondent who committed breach of contract by delaying payment of the advance could not insist on recovering the same completely within 75 per cent of the original contract period and transfer the consequences of its wrongdoing on to the contractor. The respondent never objected to the contractor giving 11 bank guarantees initially. The contractor had tried to mitigate possible losses by giving multiple guarantees instead of one large guarantee where the costs would have been higher.

Towards compensation for delayed payments of bills to be paid within 30 days of submission of bills: The respondent maintained it paid the bills within 60 days of submission and the delay was because of procedural hold- ups. Further, the delay was only for the first three bills and thereafter payments were made at regular intervals. The contract did not provide for payment of any interest. The tribunal allowed the claim, saying the respondent's contention that it had 60 days to pay after submission did not hold well in the absence of particulars to prove the date of actual certification of bills by its architects. The contractor had given due notice to the respondent of its intention to claim compensation by way of interest at 24 per cent per annum. However, it considered compensation for delayed payment of the bill at 18 per cent per annum reasonable. Compensation for losses suffered for extending bank guarantees towards 50 per cent retention money: According to the contractor, on receiving the completion certificate from the government architect in July 1998 it asked for release of 50 per cent retention amount as per contract terms. It also complied with the respondent's request for extension of bank guarantee towards 50 per cent retention money on the assurance that 50 per cent cash retention money would be refunded to it and the balance on expiry of the maintenance period. Instead of releasing the 50 per cent cash retention, the respondent returned the extended bank guarantee in December 1998 and continued to retain 50 per cent cash retention amount. The respondent maintained that the contract did not specify that the balance 50 per cent cash retention money would be refunded on lodging a bank guarantee amount. As the period of maintenance was 24 months after completion of work, the contractor had given a bank guarantee for 50 per cent retention money on its own volition. The tribunal accepted the claim as conversion of 50 per cent cash retention amount into bank guarantee was provided for in the contract. Having received the bank guarantee for 50 per cent retention amount for the extended period, the respondent ought to have released it instead of returning the bank guarantee after keeping it for five months.

Compensation for prolonging overheads, establishment, etc., for extended period of contract from December 1997 to March 1998: The contractor said the delay was caused owing to delayed release of drawings and other details and delayed decision on obtaining permanent electric and water connection and delay in payments. The respondent maintained that a large amount of work was still to be completed by the contractor on the stipulated date of completion and therefore it gave an extension of time. Expenses incurred on overheads, etc., were covered in the bills paid for work done in the extended period. The tribunal allowed the claim saying the respondent issued detailed drawings very late. It ought to have given all drawings and details within a reasonable period from the date of the work order. It also delayed mobilization advance, payment of intermediate bills and delayed documentation for obtaining electric and water connection. The contractor worked out his costs in the tender offer based on a completion period of

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18 months. When the contract period was extended, it affected the continued deployment of For liquidated damages: According to the respondent, it had granted extension time only up to January 1998. Yet the contractor handed over completed work after a considerable delay in October 1998. The contractor maintained that the respondent's architect had certified completion of work on March 31, 1998. The delay occurred not on account of any failures on its part but because the respondent failed to take over the project despite several notices from April to September 1998. Further, the respondent produced no evidence of loss suffered. The tribunal rejected the claim saying the respondent did not take over the project despite the contractor's repeated notices. Hence there was no justifiable ground for the respondent to levy liquidated damages. Further the respondent never gave notice to the claimant of its intention to levy liquidated damages at the time of securing extended performance of work under the contract.

ARBITRATION CALENDAR

various components and elements of arrangements and hence he must be compensated.

Date	
July 7, 1999	Contractor invoked arbitration and appointed arbitrator
August 6, 1999	Respondent appointed arbitrator
August 18, 1999	Presiding arbitrator appointed
September 10, 1999	Preliminary meeting of tribunal
April 25, 2002	(Total meetings held: 21) Last meeting held
May 8, 2002	Award given

RESPONDENT'S COUNTER

Misappropriation of mobilization advance: The respondent held that the contractor had spent only part of the money on new purchases of construction plant and had therefore misappropriated funds. Thus it claimed interest at 18 per cent per annum on the balance amount and an equal amount for cheating the government. The claimant maintained that in December 1996, it submitted a letter with the particulars of expenses incurred on mobilization of various materials including acquisition of construction plant. The respondent had not produced any evidence to show that it had refuted the contents of this letter. The tribunal rejected the claim as the contractor had used the mobilization advance solely for the project and according to the terms of contract, which however did not specify what materials could not be acquired with the mobilization advance. Also, the contractor had repaid the advance totally well before the due date.

SADANAND R. HOSALKAR

The details of this case have been provided by Sadanand R Hosalkar, one of the arbitrators in this case. Hosalkar has been an arbitrator for over two decades and has handled around 75 cases. A civil engineering graduate from Pune Engineering College, Hosalkar worked with Bhabha

Atomic Research Centre (BARC) for 21 years and retired as chief engineer. During this period he was on deputation at the Department of Atomic Energy and was project engineer for two prestigious projects: the Variable Energy Cyclotron Centre project, Kolkata, and Nehru Centre in Mumbai. After opting for voluntary retirement from BARC, he established his own consultancy firm. Since, he has handled several projects including the YB Chavan Centre and Siddhivinayak temple in Mumbai, CIDCO's mass housing project at Koparkhairane and the ONGC staff quarters in Panvel.

DURATION OF ARBITRATION

As there is no time limit specified in the present Arbitration Act of 1996, cases go on for years. One of my own case related to a municipal tunnel for water supply lasted for five years with 100 meetings! Arbitration proceedings take long as advocates representing the parties are often busy with their cases in courts. Arbitrators' convenience also has to be considered. Sometimes even nomination of arbitrators is delayed. Even if one party nominates, the other may delay the process. If the latter doesnot appoint one within the time frame specified (normally 30 days or as specified in the contract), the other party has to go to court. If there is no time limit mentioned in the contract, the party has to give a notice to the dissenting party saying that if it does not appoint the arbitrator within a specified date, it will go to court. Again if there is a dispute on appointing the presiding arbitrator, the parties will have to go to court. If presented, oral evidence is also time-consuming as witnesses have to be available. Sometimes they do not turn up at all in which case a warrant would have to be issued. This can only be done by the court, which means more time lost. I feel a time limit should be stipulated – perhaps 15 to 18 months for speedy processing of cases.

CAUSES OF DISPUTE:-

time. Variation is a major cause for dispute – it could be in design, technical specification, and quantity, type of items or even location. And each variation adds to the costs and disagreement. Disputes are a little higher in the public sector and more in housing colonies, as they often do not pay the contractor for extra items.

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AVOIDING ARBITRATION AND LITIGATIONS

Before disputes are aggravated, the parties should sit across the table and settle them at the initial stage. Even the arbitral procedure, though not as costly as court litigation, is expensive as it involves arbitration fees, counsels' fees, time costs, documentation, etc. The minimum cost would be around Rs 15 to 20 lakh for each party. Arbitrators' fees in India are paid on the basis of number of sessions held, each session generally lasting for two to two and half hours. The fee per session per arbitrator could range from Rs 15,000 to Rs 1 lakh depending on who the arbitrators are. Retired judges of the Supreme Court charge the highest. To facilitate early settlement of disputes, a new practice has been in vogue for three to four years. Some companies, including government agencies, have constituted a Dispute Review Board with one representative from each party and a neutral third person. They meet at regular intervals to check if there are any disputes and resolve them.

IX- CONCLUSION

Arbitration is a practical mode of settlement of construction dispute and still remains less expensive as compared to litigation in the court.

- In order to make this system, purposeful, the arbitrators selected should be men of high integrity, professionally competent, having fair knowledge of arbitration system and well conversant with the business in which the dispute lies.
- The parties must be honest in projecting their claim and counter claim and should produce all facts/information/ documents along with their submissions.

These include delay or non-payment of bill, refusal to pay for extra work done, termination of contract, encashment of bank guarantee, or drawings or specifications not given on.

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Paper:-

- Paper from seminar on dispute resolution and role of consultant- 15- Mar- 2003 organized by International council of consultant in Delhi.

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