INSTITUTIONAL ARBITRATION vis-à-vis INFRASTRUCTURE PROJECTS

Rachi Singh[*] *& Apoorva Singh*[**]

INTRODUCTION

Alternative Dispute Resolution[1] Mechanism has emerged as one of the most significant way of dispute settlement in the past few decades. This is because of the various benefits offered by the ADR mechanism such as quick disposal of disputes, cost effectiveness, simplicity in procedure, convenience in choosing the venue of dispute settlement etc.

The Arbitration and Conciliation Act, 1996 emphasizes on two methods of alternate dispute settlement i.e. Arbitration and Conciliation. Arbitration is a method for settling disputes privately, but its decisions are enforceable by law. Arbitration offers greater flexibility, prompt settlement of national and international private disputes and restricted channels of appeal than litigation.[2]

Arbitration can be conducted in two ways, Institutional and Ad hoc. Parties are entitled to choose the form of arbitration, which they deem appropriate in the facts and circumstances of their dispute. An ad hoc arbitration is not administered by an institution and therefore the parties are supposed to govern all aspects of the arbitration like the number of arbitrators, manner of their appointment, procedure for conducting the arbitration, etc. whereas in an institutional arbitration, the parties only designate an institution to administer the arbitration by incorporating a provision with respect to that in the arbitration clause of the contract. The parties then submit their disputes to the institution that administers and chooses the arbitral process as per the rules of that particular institution.

ADVANTAGES OF INSTITUTIONAL ARBITRATION OVER AD HOC ARBITRATION

- Since pre-established rules and procedure are available in case of Institutional Arbitration, parties and their lawyers don't have to invest time and effort in determining the procedure and rules of arbitration. The parties only have to choose the institution and once it is done, they can incorporate draft clause of that institution into their contract.
- The arbitration clause of the institutions are drafted by the experts and are revised periodically which ensures that the latest developments in arbitration practices are duly incorporated.

[*] *Asst. Professor* @ Amity University Haryana, Gurugram

[**] *Asst. Professor* @ Amity University Chhatisgarh, Raipur

[1] Hereinafter referred as ADR

[2] Rajkumar Adukia, *Benefits of Institutional Arbitration and their role in Construction Industry*, Available at: http://www.caaa.in/image/arbitration2011.pdf (Accessed on: November 1, 2018)

- In Institutional Arbitration, the arbitrators are selected by the parties from the panel of arbitrators of the institution. The panel consists of expert arbitrators from various fields having special knowledge in their field. Selecting arbitrators from panel ensures that the arbitrators appointed by the parties possess requisite knowledge and expertise and thus result in quick and effective disposal of dispute. On the other hand, in Ad hoc arbitration, the arbitrators are appointed by the parties according to their will and faith and not on the basis of qualification and expertise which might result in appointment of incompetent arbitrators and ultimately in ineffective and delayed disposal of dispute.
- There is continuous monitoring in institutional arbitration to make sure that disputes are resolved in timely manner unlike ad hoc arbitration.
- Another important merit of institutional arbitration is that most of the institutions provide aid of the trained staff who assist in resolving any doubts and deadlocks without knocking the door of the court. On the other hand, in ad hoc arbitration, the parties have to move to the court to resolve deadlocks and thus result in delay in completion of proceedings.[3]
- In addition to administration, certain arbitral institutions, like the International Chamber of Commerce (ICC), and the International Court of Arbitration (ICC Court) in Paris, scrutinize an award before it is published to the parties, thus ensuring that the reasoning and content of the award deal with all claims and counterclaims made by the parties and that the principles of due process have been adhered to throughout the course of the proceedings.[4]
- Most of the institutions have the mechanism for determining the remuneration of the arbitrators and thus save the parties and the arbitrators from the discomfort of discussing and fixing remuneration. The major advantage of existence of such mechanism is that it allows the arbitrators to focus on the substance of the dispute rather than discussing remuneration with the parties.

REASONS FOR DISPUTES IN INFRASTRUCTURAL PROJECTS

Construction sector is one of the pioneer sectors in any developing economy like India. This sector has shown such a growth in recent past that now it is second largest employer of manpower in the country and nearly half of the planned expenditures are spend on construction and infrastructure.[5]

Generally construction can be classified into three categories, Infrastructural, Industrial and Real Estate. Infrastructure includes construction projects in railways, roadways, irrigation, power etc.

[3] Sundra Rajoo, *Institutional and Ad hoc Arbitrations: Advantages and Disadvantages*, Available at: http://sundrarajoo.com/wp-content/uploads/2016/01/Institutional-and-Ad-hoc-Arbitrations-Advantages-Disadvantages-by-Sundra-Rajoo.pdf (Accessed on: November 2,2018)

[4] *Ibid*

[5] *Supra note 1*

Infrastructure and construction projects are complex in nature. The capital investment is high, gestation period is long, multiple stakeholders are involved, involves a suite of intricate contracts and detailed requirements to address design, procurement, construction, installation, and commissioning, as well as the operation of the project. The contracts usually do not define the roles and responsibilities of the parties clearly.

Since thousands of different activities occur at any one time while a project is built, even on the best managed projects, problems arise and delays occur. Therefore these projects are prone to disputes and litigation specially relating to delays, liquidated damages, price escalation etc.

Time is of essence in construction industry because for every day of delay, the contractor incurs additional overhead and running costs, while the employer sees the date on which it begins to earn a return on his investment deferred, and as each party's financial position deteriorates, the gap between them grows.[6]

Moreover, the construction firms are required to bid for projects at minimum possible price which puts them in a situation where they are supposed to execute intricate projects with limited capital and low quality material. Under these situations, it is not surprising that disputes arise on various issues and also at alarming rate.

Infrastructural disputes also involve a lot of factual complexity. Unlike other sectors, small and discrete questions pertaining to promise made or existence of particular situation responsible for breach of contract etc. lead to disputes between the parties.

Construction cases require an extensive unravelling of the facts and it is essential to have a dispute mechanism which allows the decision maker to properly understand what was happening at any given time in a project where hundreds of activities may be proceeding simultaneously over a period of years.[7]

NEED FOR INSTITUTIONAL ARBITRATION IN INFRASTRUCTURAL PROJECTS

India has been ranked 35th among 160 countries based on a worldwide survey of stakeholders on the ground providing feedback on the logistics "friendliness" of the countries in which they operate and those with which they trade.[8] This indicates that most of the countries wish to have trade relations with India and the trend shows that the sectors in which the countries wish to invest include infrastructural projects involving highways, bridges, dams etc.

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[6] *A Global Perspective on Arbitrating Construction and Infrastructure*, Available at: https://www.herbertsmithfreehills.com/latest-thinking/a-global-perspective-on-arbitrating-construction-and-infrastructure (Accessed on: November 3, 2018)

[7] *Ibid*

[8] *India jumps 19 places in World Bank's Logistics Performance Index,* World Bank's Logistics Performance Index, Available at: http://pib.nic.in/newsite/PrintRelease.aspx?relid=149385 (Accessed on: November 3, 2018)

The infrastructure sector in India witnessed 33 deals in FY 2016-17 involving US$ 3.49 billion as against US$ 2.98 billion raised across 31 deals in FY 2015-16, with the majority of deals led by power, roads and renewable sectors, as per investment bank Equirus Capital. It is observed that most of these projects end up in disputes involving crores and it wouldn't be wrong to say that India is rising as a hub for International Commercial Arbitrations.[9]

Infrastructural projects have emerged as one the major sectors where arbitration is welcomed. The peculiar kind of disputes involved in infrastructural projects requires quick settlement without the getting involved in the tedious court proceedings.

Most of the arbitration in construction and infrastructure sector are ad hoc in nature as against institutional arbitration globally. In India, there are a few prominent domestic institutions which conduct institutional arbitration such as the Indian Council of Arbitration (ICA), the International Centre for Alternative Dispute Resolution (ICADR), the Construction Industry Arbitration Council, etc. However, so far, only a few cases have been handled by these institutions. Many Indian companies approach foreign arbitration centres such as the Singapore International Arbitration Centre (SIAC) and the London Court of International Arbitration (LCIA), leading to a loss of arbitration business opportunity for India. At present, Indian parties account for around 30 per cent of the arbitration cases handled by the SIAC and LCIA.[10]

Advantages of institutional arbitration have already been discussed and these advantages become all the more important when it comes to construction and infrastructure sector. Since the institutions have pre-established rules and expert arbitrators, the speed and the accuracy of dispute resolution is well maintained.

The availability of contemporaneous documentation, such as construction programmes, as well as correspondence is paramount. If the parties decide to go to court for dispute resolution then the production of required documents become a relevant issue. This is because, while some countries have rules for requiring production of such documents from the other party, many countries do not have such rules.[11] This lack of a disclosure process in court pushes parties to use arbitration where a tribunal, even under the rules of most local institutions[12], will have the power to order the exchange of relevant documents.

Factual witnesses are also very important as they can provide an account of what was happening on site during critical periods of the project. Again, regional expectations differ

[9] Anviti Bhadouria, *Institutional Arbitration As Remedy For Future Infrastructure Disputes?*, Available at: www.legaleraonline.com/articles/institutional-arbitration-as-remedy-for-future-infrastructure-disputes (Accessed on: November 5, 2018)

[10] *New policy initiative to fast track arbitration in infrastructure*, Available at: https://indianinfrastructure.com/2017/03/04/speedy-resolution/ (Accessed on: October 22, 2018)

[11] Countries like Qatar, UAE etc.

[12] For instance, Article 27.3 of the Dubai International Arbitration Centre Rules provides: "At any time during the arbitration, the Tribunal may, at the request of a party or on its own motion, order a party to produce such documents or other evidence within such a period of time as the Tribunal considers necessary or appropriate and may order a party to make available to the Tribunal or to an expert appointed by it or to the other party any property in its possession or control for inspection or testing."

and this can cause considerable difficulties in administering the process in some of the key markets for construction cases.[13] These differences in court rules could be avoided by adopting institutional arbitration in place of court proceedings. The pre-established rules regarding evidences and availability of expert arbitrators would ensure that arbitration proceeds without delay.

Construction projects are complex in nature, so are the disputes involved in construction projects. Therefore the need of expert evidence from engineers, programming experts or quantum experts relating to the extent and causes of delay, how much additional cost the contractor is entitled to recover, whether the works comply with the specification or why the works are not performing as they should arises. Most of the arbitration institutions allow the parties to appoint such experts to assist their counsels to make the tribunal understand their claim and assess the damages in a better way. On the other hand, courts of many countries offer the facility of appointing independent expert, which may come as a surprise to where parties are used to each side appointing their own independent expert and moreover can be fundamental to a party's presentation of its case, and to what type of arbitrator is the right fit for the dispute.

EXISTING SITUATION OF INSTITUTIONAL ARBITRATION IN INFRASTRUCTURAL PROJECT IN INDIA

While multiple foreign investors have been investing in India, there have been considerably less investors opting for India as a seat for Arbitration. Therefore efforts are to be made to show that our country is not just investment friendly but also arbitration friendly. This is evident from the Law Commission's report which has emphasized on promotion of institutional arbitration in India and has mentioned in its recommendation, *"The spread of institutional arbitration however, is minimal in India and has unfortunately not really kick-started. In this context, the Act is Institutional arbitration agnostic – meaning thereby, it neither promotes nor discourages parties to consider institutional arbitration."*[14]

In India, there are a few prominent domestic institutions which conduct institutional arbitration such as the Indian Council of Arbitration (ICA), the International Centre for Alternative Dispute Resolution (ICDAR), the Construction Industry Arbitration Council, etc. However, so far, only a few cases have been handled by these institutions. Many Indian companies approach foreign arbitration centres such as the Singapore International Arbitration Centre (SIAC) and the London Court of International Arbitration (LCIA), leading to a loss of arbitration business opportunity for India. At present, Indian parties account for around 30 per cent of the arbitration cases handled by the SIAC and LCIA.[15]

With a view to providing an institutional mechanism for resolution of construction and infrastructure related disputes, the Construction Industry Development Council, India (CIDC)

[13] *Supra note 5*

[14] *Report No. 246 Amendments to the Arbitration and Conciliation Act 1996*, Available at:,http://lawcommissionofindia.nic.in/reports/report246.pdf (Accessed on: October 23,2018)

[15] *Supra note 9*

in cooperation with the Singapore International Arbitration Centre (SIAC) has set up an Arbitration Centre in India called the Construction Industry Arbitration Council (CIAC).[16]

This Centre has pre-determined rules relating to time period within which claim is to be filed, time period within which reply is to be filed, time period within which Arbitrator is to be appointed, rules relating to Award etc. Moreover, the panel of arbitrators consists of professionals from the construction industry as well as the legal fraternity.

Other efforts for promotion of institutional arbitration includes setting up of first international arbitration Centre in Mumbai in October 2016 called Mumbai Centre for Institutional Arbitration (MCIA). This institution is an attempt to combine and bring forth the experience of some of the best minds in Indian Arbitration (including the Managing Partners of several Major Law Firms as well as eminent jurists such as Mr. Harish Salve and Mr. Fali. S. Nariman) with the help of experienced practitioners in the ICC and the SIAC.

Some distinguishing features of MCIA include arbitral rules drawn on the latest innovations in international arbitration best practice and also in harmony to the Indian market, scrutiny of awards by the MCIA to ensure that the award is sound and therefore less likely to be challenged in Indian courts, presence of a dedicated secretariat which facilitates the efficient, flexible, cost-effective and impartial administration of arbitration proceedings, world-class premises specifically designed for the conduct of arbitration hearings equipped with dedicated hearing rooms, break-out rooms and transcription facilities.[17]

Hence it is evident that existing arrangement for institutional arbitration in infrastructural sector is limited and there is a need of establishing more and more institutions for arbitration and establishing institutions meant specially for conducting arbitration to resolve disputes arising in construction and infrastructural sector.

ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2015

The Arbitration and Conciliation (Amendment) Act, 2015 came into effect on October 23, 2015, repealing the old Arbitration and Conciliation Act, 1996 with the aim to make arbitration the preferred mode of settlement of commercial disputes in India by making it viable and cost-effective, and make the country a hub for international commercial arbitration.

The Amended Act provides for faster timelines to make the arbitration process more effective. The arbitral tribunal is to hold oral hearings for evidence and oral argument on day-to-day basis and not grant any adjournments unless sufficient cause is made out.[18]

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[16] *Supra note 1*

[17] Rajesh Begur and Priyesh Sharma, *An Overview Of India's First Institutional Mechanism: Mumbai Centre Of International Arbitration* (MCIA), Available at: , www.mondaq.com/india/x/538594/Arbitration+Dispute+Resolution/An+Overview+Of+Indias+First+Institutional+Mechanism+Mumbai+Centre+Of+International+Arbitration+MCIA (Accessed on: October 24,2018)

[18] Proviso to Section 24 of Arbitration and Conciliation (Amendment) Act, 2015

The Act permits arbitral award to be made within 12 months from the date of reference, though parties may, by consent, extend the period for another six months.[19] The mandate of the arbitrator is to terminate the proceedings if the timelines are not adhered to, unless the time is extended by the court.[20] However, there is no time period fixed for approaching the court seeking extension of time which may again contribute to delays. Further, while extending the time for making the award, if the court finds that the delay was attributable to the arbitral tribunal, it may order reduction in the arbitrator's fee by not exceeding 5% (five percent) for each month of such delay.[21]

In an arbitration regime that was plagued with delays and costs, this is a good development. The fixed timelines for the completion of arbitration proceedings are expected to ensure that construction and infrastructure projects are not left in a limbo for indefinite periods of time. This will also help infrastructure companies get loans from banks, which is currently curtailed because of the fear of the loans turning non-performing/bad due to delays in project execution.[22]

The new Act also provides for an option to the parties to agree on a fast track mechanism under which the award will have to be made within a period of 6 (six) months from the date the arbitrator(s) receiving written notice of appointment.[23] However, the parties would be forced to go court to seek extensions of time to complete the arbitrations, which is an undesirable situation in a court system burdened with huge pendency of cases.

Moreover, the provision requiring reduction in fees paid to the arbitrator in case of delay would avoid the delay on the part of the arbitrator which is again a good step and of great importance in case of construction and infrastructure sector.

THE NEW DELHI INTERNATIONAL ARBITRATION CENTRE BILL, 2018: AN ANALYSIS

Minister of State for Law and Justice, Mr. P.P. Choudhary introduced the New Delhi International Arbitration Centre Bill, 2018 on January 5, 2018 in the Lok Sabha. The objective of the Bill is to inspire confidence and credibility among the litigants of commercial dispute.

The Bill seeks to establish New Delhi International Arbitration Centre (the "NDIAC") to conduct arbitration, mediation and conciliation proceedings. The main function of NDIAC is to conduct arbitration and conciliation in a timely, professional and cost effective manner and to promote study and research in the field of alternative dispute resolution. The NDIAC will revamp the procedural framework and governance structure that was previously in place under the ICADR. The Bill seeks to transfer the existing ICADR to the central government. Upon notification by the central government, all the rights, title, and interest in the ICADR

[19] Section 29A(1) of Arbitration and Conciliation (Amendment) Act, 2015
[20] Section 29A (4) of Arbitration and Conciliation (Amendment) Act, 2015
[21] Proviso to Section 29A(4) of Arbitration and Conciliation (Amendment) Act, 2015
[22] *Supra note 9*
[23] Section 29B of Arbitration and Conciliation (Amendment) Act, 2015

will be transferred to the NDIAC. Since NDIAC will be established pursuant to the notification by the Central Government it will be exempted from other requirements like to maintain number of minimum shareholders and directors which other body corporates established under the Companies Act, 2013 has to maintain

NDIAC will be a body corporate, it will have perpetual succession and a common seal that will permit it to acquire and transfer property, and enter into contracts in its own name. It is different from the ICADR and ICA that are registered as a society under the Societies Registration Act, 1860.

NDIAC has been proposed to be declared an institute of national importance by the Bill. The Central Government has for the first time proposed to declare an Arbitral Institution as an institute of national importance meaning thereby that NDIAC will have autonomy in financial, administrative and academic activities.

In order to give all the financial assistance to NDIAC to promote research and study, organize conferences and seminars to make everyone aware about alternative dispute resolution, the Central Government has proposed to make contribution to the funds of NDIAC every year.

With respect to organizational structure, the Bill seeks to establish NDIAC consisting of seven members only that will be appointed by the Central Government, unlike ICADR that consisted of 47 members and MCIA consisting of 17 members. Thereby expediting the decision making process. Lack of coordination among so many members causes delay in the decision making process of arbitration institutions.

However there are certain ambiguities in the Bill, like Central Government has been given huge power with respect to appointing members of NDIAC and their removal. In fact Central Government is the sole appointing authority. Moreover, Central Government is also a periodic contributor to its funds. Investors adopting alternate dispute resolution to settle their disputes will have apprehensions because of the proactive role played by the Government especially in cases where opposite party are a public sector undertaking.

Further, the Bill only addresses the administrative issues in relation to NDIAC. It remains to be seen how the procedural framework concerning the settlement of disputes is laid. In order to present NDIAC as a preferred arbitration institute, it must have separate provisions such as consolidation of arbitrations, emergency arbitrators, immunity to arbitrators and confidentiality of information that were not envisaged under the ICADR Rules must be incorporated in the NDIAC procedural framework.[24]

CONCLUSION

Arbitration has been a long used method of dispute settlement in India. However most of the arbitration in the construction and infrastructure sectors are ad hoc in nature, as against institutional arbitration globally. As we have already seen very few cases are being handled

[24] Binsy Susan, Neha Sharma, *New Delhi International Arbitration Centre: building India into a Global Arbitration Hub*, Available at: http://arbitrationblog.kluwerarbitration.com/2018/05/04/new-delhi-international-arbitration-centre-building-india-global-arbitration-hub/ (Accessed on: November 5, 2018)

by prominent domestic institutions in India. Many Indian companies approach foreign arbitration centres, leading to a loss of arbitration business opportunity for India.

In the last few years, several measures have been initiated like establishing of first international arbitration centre in Mumbai in October 2016 and the proposed New Delhi International Arbitration Centre Bill, 2018 to make India a hub of Global Arbitration. The Bill, establishing NDIAC with an organised governance structure, will replace the outdated ICADR and lay a strong foundation in the institutional arbitration setup of India. Moreover there is also a proposal to establish the Arbitration Council of India which will grade the arbitral institutions in India. This review will certainly in still confidence among the investors especially with respect to NDIAC.

However it is also important that the Parliament must remove all the ambiguities associated with New Delhi International Arbitration Centre Bill, 2018. A transparent process should be adopted with respect to appointment and removal of members of NDIAC. In order to gain investors' confidence, the Central Government involvement must be phased out.

Most importantly it is important in India the arbitration institutions should be independent, efficient and transparent. It is also highly desirable that a pool of professional arbitrators, who are competent, technically sound and specialized in their field to be appointed as arbitrators instead of retired judges as arbitrators, cases move at a slow pace like happen in the judicial settlement. Moreover, they charge exorbitant fee.

It is also desirable to use technology in order to reduce time and improve efficiency in the process of arbitration. Technologies such as e-filing, online dispute resolution and videoconferencing need to be put to extensive use in the process of arbitration.

Lastly, the recent reforms are certainly a step in the right direction to strengthen the arbitration procedure in India. In order to make India a global hub for international arbitration, it is essential to make sure that the process is transparent and less time consuming. For this, institutional arbitration, minimization of judicial interference and adherence to time lines will play a key role in making the process user friendly and cost effective.