Construction Dispute Management in India
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National Infrastructure Pipeline

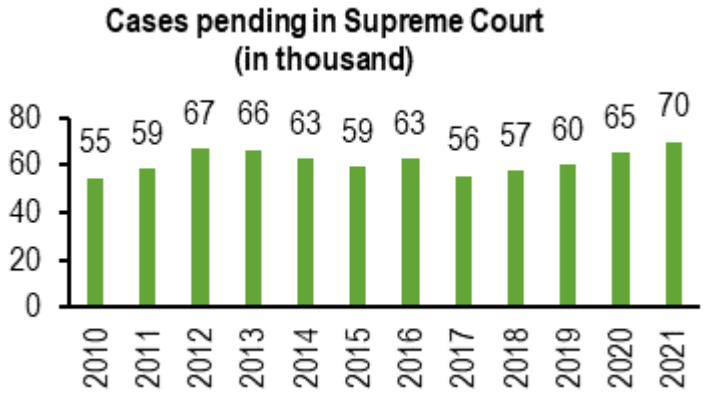
Budgeted Expenditure 2020-2025 – US $ 1.6 trillion

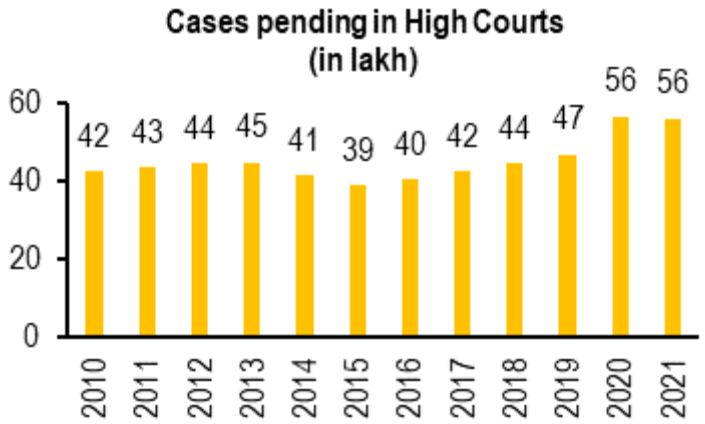
World Bank Ranking of India

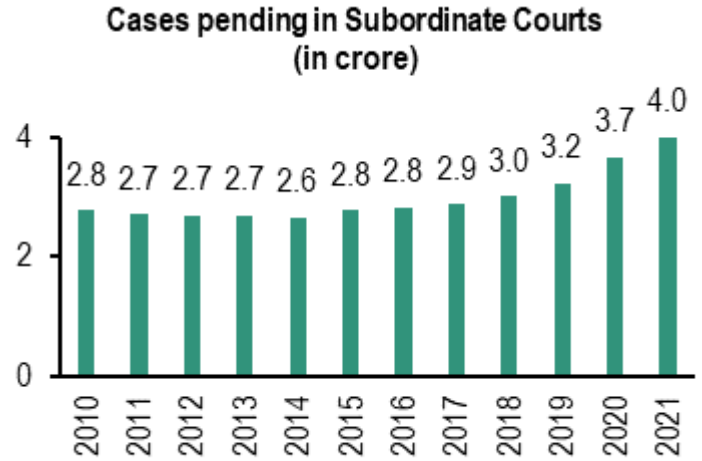
Topic	Ranking 2014	Ranking 2023
Logistics Performance Index	44	38
International Shipment	44	22
Ease of Doing Business	142	63
Getting Construction permits	52	20
Trading Across Borders	80	68
Resolving Insolvency	108	52
Enforcing Contracts	163	163

Legal System

Litigation- Indian courts are clogged with 50 million pending cases.







Niti Aayog report reflects that on an average it takes 1420 days in India for dispute resolution and 2508 days to implement arbitration award through litigation.

Average settlement of a construction dispute in India takes 7.5 year

INDIAN SCENERIO:DATA FROM MOSPI

YEAR	TOTAL NO OF PROJECTS	ORIGINAL COST (CR)	ANTICIPATED COST (CR)	COST OVERRUN	NO OF PROJECTS WITH TIME OVERRUN	RG OF TIME OVERRUN AND AVG
2021-22	1263	15,53,683.89	17,49,482.56	12.6%	297	3.55-122.78 AVG- 77.35
2020-21	1184	14,46,253.04	16,16,457,73	12%	333	5.89-122.78 AVG-97.66
2019-20	782	10,20,779.25	12,22,545.86	19.77%	215	1-261 AVG- 86.88
2018-19	750	9,47,912.88	11,25,673.75	18.75%	382	1-247 AVG- 41.60
2017-18	749	9,46,087.60	11,28,566.37	23.3%	255	1-240 AVG- 54.85
2016-17	578	8,05,756	9,39,053.50	16.5%	295	1-216 AVG- 51.03
2015-16	584	6,90,826.40	8,28,755.50	20%	276	1-213AVG- 47.26
2014-15	572	5,92,196.97	7,14,713.86	20.70%	299	1-255 AVG- 50.87

COMMON REASONS FOR DELAYS AND COST OVERRUNS AS PER MOSPI

- LAND ACQUISITION
- FOREST CLEARANCE
- INFRASTRUCTURE SP
- PROJECT FINANCING
- DELAYS IN DESIGN
- CHNAGES IN SCOPE
- DELAYS IN TENDERING
- CONTRACTUAL ISSUES
- GEOTECHNICAL SURPRISES
- PRE-COMISSIONING ISSUES

MOSPI Data

What is missing in the data?

Cost of disputes

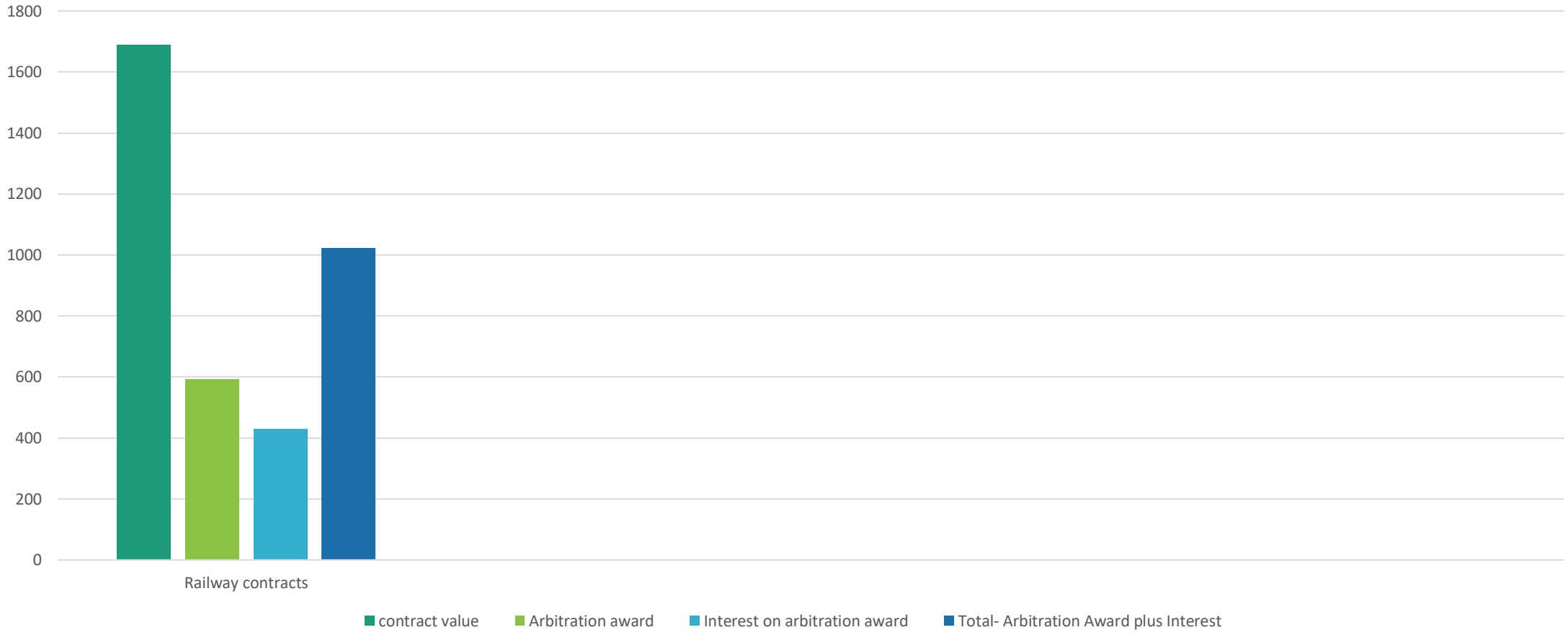
- Claims
- Interest
- Project Delay and Cost overrun
- Arbitration and Litigation costs
- Time Value of Money

COMMENTS AND INFERENCES ON MOSPI DATA

- DOES NOT REFLECT COST OVERRUN DUE TO IMPLEMENTATION OF ARBITRAL AND LITIGATION AWARDS SINCE THESE ARE IMPLEMENTED AFTER MANY YEARS

- SAMPLE STUDY OF 89 RAILWAY ARBITRAL AWARDS IN OPEN DOMAIN:
  - AVG 43% OF ORIGINAL CONTRACT VALUE HAD TO BE PAID BY RAILWAYS
  - INTEREST COMPONENT FORMED MAJOR PORTION OF 79% AWARDS- DUE TO DELAY IN DISPUTE RESOLUTION
  - ALL ARBITRAL AWARDS WERE CONTESTED BY RAILWAYS AND/OR CONTRACTOR THROUGH LITIGATION
  - AVG TIME FOR IMPLEMENTATON OF MAJOR COMPONENT OF AWARD – 7-8 YRS

COST IMPLICATIONS OF DISPUTES IN CONSTRUCTION PROJECTS IN INDIAN PUBLIC SECTOR



ARCADIS GLOBAL CONSTRUCTION DISPUTE REPORT

YEAR	GLOBAL AVERAGE VALUE OF DISPUTE(US $ MN)	Average Dispute Length	NO 1 REASON FOR DISPUTE
2022	52.6	15.4 months	Poorly drafted or incomplete and unsubstantiated claims
2021	54.26	13.4 months	Owner/contractor/subcontractor failing to understand and/or comply with its contractual obligations
2020	30.7	15 months	Poorly drafted or incomplete or un substantiated claims
2019	33.0	17 months	Owner/contractor/subcontractor failing to understand and/or comply with contractual obligations
2018	43.4	14.8 months	Failure to properly administer the contract
2017	42.8	14 months	Failure to properly administer the contract
2016	51	15.5	Failure to properly administer the contract

India- NHAI

Disputed Claims Value- US$ 12 Bn

Average Length – 8 years

Estimated delayed payment of contractors held up in Public Sector Infrastructure Projects– US$ 36 Bn

Own Research:Delayed Payments

Types	RII
Final Account	1
Variations and extra items	2
Release of retention money	3
Interim Payments	4
Advance Payments	5

Own Research : Delayed Payments

Causes	RII
Lack of clear unambiguous provisions in ICA 1872 and Common Laws to ensure timely payments and balanced contracts	1
Imbalanced contract conditions skewed in favor of payer	2
Lack of adequate provisions in contracts to ensure timely payments and penalties for delayed payments	3
Poor understanding and knowledge of contractual provisions	4
Lack of adequate provisions in contract on pricing methodology and payment of variations	5
Poor implementation and non-compliance by stakeholders	6
Lack of contractual right of contractor/subcontractor to suspend performance in case of delayed payments	7
Force majeure/exceptional events	8
Lack of default acceptance /rejection clause in contracts in case of delayed decisions	9
Cash flow problems of payer	10
Lack of trust among stakeholders	11
Dispute over quality of works	12
Industry culture	13
Poor maintenance of records	14

Own Research : Delayed Payments

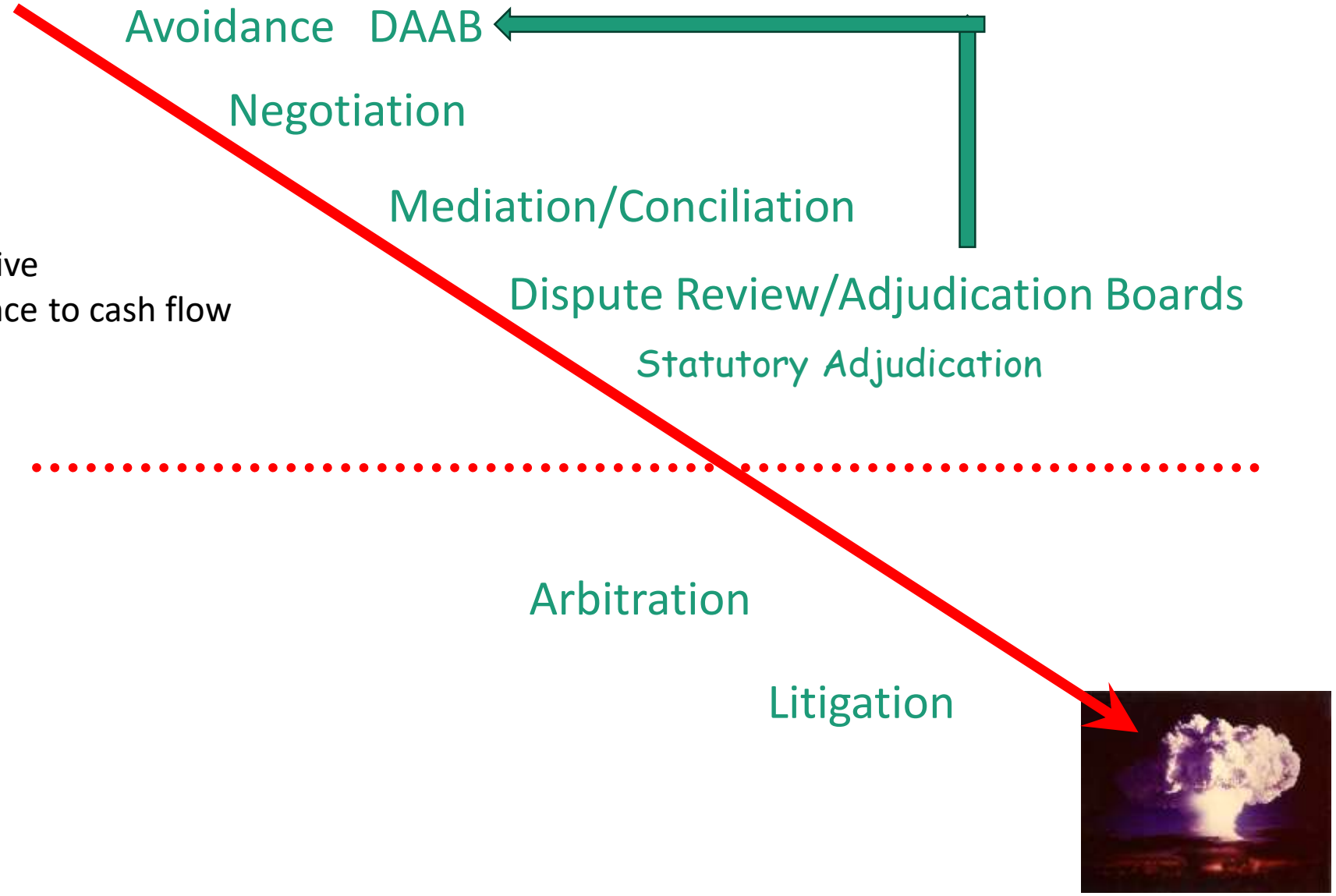
Causes	RII
Personality Issues	15
Delays in Legal system	16
Mistakes in Invoices	17
Lack of effective, binding , impartial, fair and fast dispute resolution mechanisms during execution of work	18
Acceptance of delays in payment by contractors and subcontractors due to imbalance of power	19
Pay if paid and pay when paid clauses in Indian contracts	20
Lack of knowledge and implementation of best practices of making programme, carrying out delay analysis, calculating additional costs etc	21
Easy entry and exit of players in industry without professionalism	22
Poor procurement and tendering procedures leading to incorrect selection of contractors and consultants	23
Change in laws /regulations during execution of projects	24
Too many variations during execution	25
Unethical practices and corruption	26
Lack of accountability of payer	27
Lack of standard from of contract in industry	28

Own Research : Delayed Payments

Causes	RII
Use of inappropriate type of contract	29
Too much power with payer	30
Too much bureaucracy and vigilance	31
Change in political system /higher mgmt	32
Fluctuations in overall market and eco conditions	33
Bankruptcy and insolvency of payer	34
Change in appointments dealing with payments	35

In The Descending Arrow of Escalation Summary – The Descending Arrow of Escalation

- Fast
- Less Expensive
- No hinderance to cash flow



ADR in India

Solution 1 – Arbitration

- New Arbitration and Conciliation Act enacted in 1996,
- Based on UNCITRAL Model Laws and Rules
- Dealt with
  - Domestic Arbitration
  - International Arbitration
  - Enforcement of Foreign Award
- Party Autonomy
- Arbitral Award enforceable as decree of court
- Minimal interference by Court
  - Public Policy
    - Fraud, Corruption, basic notions of morality and justice, in contravention with fundamental policy of Indian law (e.g.- No reasoning given behind the award)
  - Blatant illegality
  - Incapacity
  - Non-validity of Arbitration Agreement
  - Procedural flaws- Party not given notice of Arbitrator Appt/ Arbitral proceedings .unable to present case
  - Dispute not falling within scope of arbitration
- Court can only set aside award/parts of award and not go into merits

ADR in India

Solution 1 – Arbitration

> "It is possible that with the same evidence the Court might have arrived at different conclusion than the Arbitrator(who had also ruled that Time was not of Essence and Rescindment was incorrect) , that , by itself cannot be a ground for setting aside the award of Arbitrator as long as the Arbitrator had given logical reasoning for the award and unless there was violation of principles of Natural Justice"

- Time limit for appointing arbitrator
- Procedures
- Interim reliefs
- Time frame for completion – 12 + 6 months

2016 Amdt

- Fourth Schedule Fees of Arbitrator
- Fifth, Sixth and Seventh Schedules- Impartiality and Neutrality of the Arbitrator

2019 Amdt

- Est of ACI and move towards institutional arbitration

Issues with Arbitration

Challenges

- 90% cases get challenged in Courts – delayed by 5-6 years
- Competency of Arbitrators – no separate specialization in Construction Arbitration
- High Fees
- "Excepted Matters" in Indian contracts – outside purview of arbitration
- Awards , though with reasoning , are not the best standards esp in Construction Disputes.

Example – Concurrent Delay
IRCON INTL LTD VS CR SON BUILDERS AND DEVELOPERS – DELHI HC FEB 2020
"This is a case which is neither black nor white as the claimant and respondent are both responsible for delay in completion. It is difficult to apportion exact amount of delay on part of each of them and I assess half the delay on part of each of them"

AMBIKA CONSTRUCTION VS UOI –MUMBAI HC-2011
25 Months Delay – Concurrent Overlapping Delays
Judgement- Both Parties Responsible For 12.5 Months Delay

UOI v. C AND C Construction:2022- 60:40 split of delay.

Issues with Arbitration

- Lack of training of Arbitrators in handling Construction disputes in which interpretation is different – eg-Time is of Essence
- Many Public Sector Indian Contracts allowed arbitration only after practical completion.
- Issue of bias of Arbitrators in Arbitrator Tribunal – Arbitrator suspected to favor party which appointed him.
- Arbitrators often accused of prolonging proceedings since payment on per hearing basis
- Payment on basis of claims made (0.5%) , hence inflated claims resulted in huge payments due to arbitrators

Arbitration, while somewhat reducing the burden of Courts, did not achieve :

- Fast Dispute resolution
- Quality of Arbitral Awards
- Trust of parties in getting a good quality award

Solution 2 : DRB

- Three member panel
- To decide disputes during currency of contract in time bound manner (90 days)

Not successful

- DRB members were appointed from panel comprising of ex officials of the Employer
- Not interim binding - hence parties invariably refused to comply

FIDIC DABs

- Standing DABs viewed as infructuous expenditure and hence rarely appointed

Solution 3: Commercial Courts Act 2015

The Act allows state governments and high courts to designate courts at the high court and district court levels as commercial courts to hear commercial matters above a certain pecuniary value (initially determined to be a minimum of INR 10 Mn and later reduced to a minimum of Rs 300,00). Once designated as commercial courts, these courts were required to follow special procedural rules and management

- At District level and in all High Courts
- Jurisdiction to try all suits and applications relating to a commercial dispute of a Specified Value arising out of the entire territory of the State over which it has been vested territorial jurisdiction. All suits and applications relating to commercial disputes of a Specified Value filed in a High Court having ordinary original civil jurisdiction shall be heard and disposed of by the Commercial Division of that High Court.
- Hearing of Arbitration appeals

Commercial Courts Act

- Pre-Institution Mediation and Settlement— A suit, which does not contemplate any urgent interim relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation in accordance with such manner and procedure as may be prescribed by rules made by the Central Government.
- Time limit for completion of pre-litigation mediation- 3 months + 2 months
- Appeal to Commercial Appellate Division of High Court within 60 days.
- Expeditious disposal of appeals.—The [Commercial Appellate Court and the Commercial Appellate Division] shall endeavour to dispose of appeals filed before it within a period of six months from the date of filing of such appeal.

Commercial Courts Act

Not too successful due to poor implementation

- **Number of such courts being designated is not commensurate to the actual volume of commercial litigation that takes place in the jurisdictions**
- **Very low disposal rates of case- One of the factors that contribute to the lack of capacity of these courts is the additional workload that judges, designated under the Act, have to undertake.**
- **Lack of separate infrastructure**

Innovative Measures

Improving Cash Flow

Party can take 75 % of Arbitration award on submission of BGB

- Not v successful since BGBs carry more interest in India and contractor has to keep renewing BGB for 5-6 years while award is under challenge in courts

Innovative Measures

Conciliation and Settlement Committees

- Set up at ministry level
- Comprising of senior persons of high integrity and competence

Unique model

- Time bound – 6 months
- Voluntary
- Informal – not bound by procedures
- Success based fees of Conciliators
- 50- 50% cost sharing
- If settlement achieved ,Contractor will be paid within 30 days

Innovative Measures

Currently set up by three ministries

- Shipping (for ports)
- MORTH
- Power

Quite successful

Disputes

Vivad Se Vishwas Scheme 2

- The scheme will apply to disputes where one of the parties is either the Government of India or an organisation detailed below:

  a)to all Autonomous Bodies of the Government of India;

  b)to public sector banks and public sector financial institutions;

  c)to all Central Public Sector Enterprises;

  d)to Union Territories, National Capital Territory of Delhi and all agencies/ undertakings thereof; and

  e)to all organizations, where Central Government like Metro Corporations, where Government of India has shareholding of 50%; however, these bodies can opt out of the scheme at their discretion, with approval of the Board of Directors

- Only disputes involving procuring entities where the claim for proceedings (either to Court or for Arbitration or Conciliation) were submitted by the contractor on or before 30.09.2022 and Arbitral Tribunal/ Committee for Conciliation etc. for the specific case has been already notified by the procuring entity shall be eligible for settlement through this scheme. It is clarified that even in these cases, counter claims submitted by the procuring entity upto 31.12.2022 will be considered

Disputes

Vivad Se Vishwas Scheme 2

Sl. No.	Status of dispute	Settlement Amount
(a)	Court Order passed. Award with net amount payable to the contractor. Note: i. Case may or may not be under further appeal. ii. Court order will include the cases where the parties have approached the courts directly or approached the court subsequent to arbitral award	80% of the net "Amount awarded by the court. Note: 1. In case, court has directed 'X' to be paid to contractor and 'Y' to be paid to procuring entity by the contractor, then the amount payable in such will be 80% of X-Y. 2.In case court upheld the Arbitral Award, fully or partially, as the case may be, interest as stipulated in the Arbitral award will also be included till the date of the court order in "Amount awarded by court." 3.In case no payment is made or only partial payment is made within 30 days of the date of award by the court, additional simple interest at the rate of 6% per annum will be payable for time period beyond such 30 days till date of acceptance of claim under the scheme by the procuring entity. It is further clarified that such 6% interest will be paid only on 80% of the net amount awarded by the court minus payments already made

Disputes

Vivad Se Vishwas Scheme 2

Sl. No.	Status of dispute	Settlement Amount
(b)	Arbitral Award passed. Award with net amount payable to the contractor. Note: Case may or may not be under appeal before a Court.	60% of the amount awarded by the Arbitral Tribunal. The award amount shall include any interest awarded by the tribunal till the date of award. Note: However, in case there is delay in payment of the award amount, interest will be payable at simple interest of 6% per annum for the award amount not paid.
(c)	On-going litigation (Either in Court where no arbitration was done; OR before Arbitral Tribunal OR ongoing conciliation including dispute resolution board (DRB) etc.) Note: (i) Disputes arising out of contracts in which physical activity has been stopped (i.e. either 100% physical progress achieved or no further physical progress against the same contract is anticipated) shall only be eligible for settlement. (ii) Terminated contracts will also be eligible. (iii)The decision of the procuring entity shall be final in this regard	30% of the net claim amount (i.e. claims by the contractors minus counter-claim by the procuring entity) excluding interest of either of the party. Not Approved in Final

Disputes

Vivad Se Vishwas Scheme 2

Sl. No.	Status of dispute	Settlement Amount
(d)	On-going litigation (Either in Court where no arbitration was done; OR before Arbitral Tribunal OR ongoing conciliation) Note: Disputes arising out of contracts in which physical activity is ongoing.	20% of the net claim amount (i.e. claims by the contractors minus counter-claim by the procuring entity) excluding interest of either of the party. Not approved in Final

- Government e-Marketplace (GeM) shall provide an online portal for the purpose of settlement through this scheme.
- Net claim amount will be calculated by considering all claims/ disputes in the particular contract.
- In case of ongoing contracts under para 8(c) and 8(d) all disputes in a particular contract where contractor has submitted claims upto 30.09. 2022 are to be considered together.
- Each contract will be dealt separately for the purpose of this scheme.
- Time available for contractor to respond to the offer shall be 30 (thirty) calendar days only (Calendar day ending at midnight). There shall be no option for any relaxation, including claims of GeM portal not working on last day, etc.
- If contractor agrees, a settlement shall be digitally signed by both the parties. The settlement agreement shall have the same meaning and consequence as the settlement agreement consequent to successful conciliation as per The Arbitration and Conciliation Act, 1996. The settlement agreement shall clearly state that even though the dispute is finally settled, the settlement does not decide on any issue, either of law or of fact, under dispute. Further, it should be clearly stated and implied from the settlement agreement that as a process of settlement the parties shall withdraw all litigation/ arbitral proceeding/ conciliation proceeding pending on this dispute(s), willingly, without duress and after fully understanding the consequences.

Disputes

Vivad Se Vishwas Scheme 2

- The contractor will be given 30 days to file application for withdrawal of the case before the court/ Arbitral Tribunal etc. as the case may be. However, only after contractor uploads the supporting document that court/ Arbitral Tribunal has permitted to withdraw the case, the payments will be made by the procuring entities.
- If the contractor does not accept the offer: the ongoing litigation/ conciliation process may continue.
- In case where the total claim amount (claim and counter-claim amount added together) exceeds Rs 500 crore, the procuring entities will have an option not to accept the settlement request of the contractor. However, wherever it is decided not to accept the request for settlement from the contractor, the reasons for the same shall be recorded on file by the procuring entities and approval of the Secretary concerned in case of Ministries/ Departments or Chief Executive Officer in case of CPSEs etc shall be obtained

Mediation Act 2023

Pre- Litigation Mediation

- With consent of both parties- irrespective of existence of any mediation agreement
- By Institutionally Registered mediators

Post – Litigation Mediation

- If courts find matters capable of mutual settlement , may refer parties to mediation irrespective of their consent

Mediation Act 2023

- Party autonomy for selection of mediator.
- Foreign mediators allowed
- To be conducted within territorial jurisdiction of dispute
- Not bound by Code of Civil Procedure of Indian Evidence Actr
- Time bound – 120 days + 60 days
- Settlement Agreement to be enforced as Court Decree
- Ltd grounds of challenging award- Fraud, Corruption, Impersonation, Dispute not fit for mediation as per First Schedule

Mediation Act 2023

- Provision of Online mediation
- Est of Mediation Council of India
- Provision for Community Mediation

Success for construction disputes yet to be seen

DRM Lacking in India

Interim binding Fast Dispute Resolution Mechanisms during currency of contract – either as contractual mechanism (FIDIC DAAB) or Legislation (Statutory Adjudication)

Construction law/ Construction Contract Act(CCA)/ Security of payment(SOP) Act-Dispute Resolution Clause

Act	Dispute Right (Adjudication)
HGCRA 1996 UK	Right to refer any payment related dispute to adjudication anytime during the currency of contract. Interim binding adjudication decision within 28 days.
CCA 2002 NZ	Same as UK Act
Western Australia Construction Contract Act (CCA) 2004	Right to refer any payment related dispute to adjudication anytime during the currency of contract. Interim binding adjudication decision within 10 business days.
Singapore Building and Construction Industry Security of Payment Act 2004	Adjudication decision within 14 days.
Construction lien Act 2017 Ontario	Adjudication decision within 30 days.
Construction Industry payment and Adjudication Act 2012 - Malaysia	Adjudication decision within 45 working days.

Dispute Avoidance

Indian Contract Act 1872

Chapters

- Chapter I -Of the communication, acceptance and revocation of proposals
- Chapter II - Of contracts, violable contracts and void agreements
- Chapter III -Of contingent contracts
- Chapter IV -Of the performance of contracts which must be performed
- Chapter V -Of certain relations resembling those created by contract
- Chapter VI -Of the consequences of breach of contract
- Chapter VIII -Of indemnity and guarantee
- Chapter IX -Of bailment
- Chapter X -Agency, Appointment and authority of agents
- Chapter XI -Of partnership

Dispute Avoidance

Dispute Avoidance

Tendering and Selection of Contractors

- Selection of MEAT/ BVA
- Having regulations to reject /modify unrealistic tender- ABLB guidelines of WB/Kuwait Tendering law for Public tenders

Having an Equitable Contract

- Adopting a standard contract like FIDIC,NEC
- Selection of Right Project Delivery Mode and Contract
- Partnership Contracting
- Enacting Construction Law

Good Contract Management

- Specialised competency in construction contract management
- DAAB

Dispute Avoidance

Tendering and Selection of Contractors

- Public Sector –
  - Open single stage two envelope bidding ,
  - PQC plus L1 .
  - Few PSUs also resort to Reverse Auction after L1
  - Now QCBS permitted (30:70)

- Private Sector
  - Selective bidding from empanelled contractors
  - PQC plus L1

- No Mechanism of rejecting ABLB

- No mechanism to prevent Front End Loading or do Price Balancing

Making Contract Balanced

- Selection of Appropriate Contracting Strategy
- Adopting Standard Form of Contract – FIDIC,NEC
- Partnership/Relationship Contracting
- Enacting Construction Laws

Types of Contracts

Lump sum contract

Unit Rate contract

D-B-B

%age contracts

Cost plus contracts

D-B: EPC

EPCM

ECI

ALLIANCE CONTRACTING

INTEGRATED PROJECT DELIVERY

COLLABORATIVE CONTRACTING

REQMT OF MODERN FAIR CONTRACT(NEC)

- FAIR DEALING WITH ALL PARTIES(NEC CONDITIONS AND TIMELY PAYMENTS TO SUBCONTRACTORS AND SUPPLIERS)
- TEAM WORK AND WIN- WIN SOLUTIONS
  - EARLY WARNING
  - RISK REDUCTION MEETINGS
  - RISK REGISTER
- INTEGRATED PACKAGE OF DOCUMENTS
  - FIDIC – RAINBOW SUITE – RED, YELLOW, SILVER ,EMERALD, WHITE
  - NEC – 22 DOCUMENTS
  - JCT- 56 DOCUMENTS
- SIMPLE LANGUAGE AND GUIDANCE NOTES
- ROLE SEPERATION
  - CONTRACT ADMINISTRATOR
  - PROJECT MANAGER
  - ADJUDICATOR/DAAB
- RISK ALLOCATION
- VARIATIONS- PRICED IN ADVANCE

REQMT OF MODERN FAIR CONTRACT(NEC)

- MECHANISM OF ASSESSING INTERIM PAYMENTS
- TIMELY PAYMENTS
  - INTEREST ON DELAYED PAYMENTS
  - SUSPENSION FOR NON/DELAYED PAYMENT BEYOND CERTAIN LIMIT
- TRUST FUND- PROJECT BANK ACCOUNT
  - CONTRACTOR , SUPPLIERS, SUBCONTRACTORS VENDORS AS BENFICIARIES
  - THROUGH EXECUTION OF TRUST DEED AND JOINING DEED
- SPEEDY DISPUTE RESOLUTION- STATUTORY ADJUDICATION, DAAB
  - INTERIM BUT BINDING
  - TEMPORARY FINALITY
  - PAY NOW ARGUE LATER
- INCENTIVES
  - PERFORMANCE
  - VALUE ENGG
  - COST SHARING
  - NEC OPTIONS – TARGET PRICING
- ADVANCE PAYMENTS

Dispute Avoidance

Having an Equitable Contract : India

- Each Employer has its own bespoke contract form
- FIDIC contracts gen distorted.
- Situation in some Govt depts (Highways , CPWD) improved considerably in terms of having balanced contracts

Indian Contracts V FIDIC

Comparison of General Conditions of Contract of International and Indian Agencies

Clause	FIDIC Red Book	CPWD	MES
Delayed issue of drawings	Contractor entitled to additional costs plus profit and extension of time (EOT)if he has given timely notices and justification	No entitlement to contractor except EOT.	No entitlement to contractor except EOT.
Delayed access to site	-do-	-do-	-do-
Engineer's Determination of Contractor's claims	- Within 42 days of receipt - Deemed rejection if not done within 42 days	-No laid down time limit - No deemed provisions	-No laid down time limit -No deemed provisions
Unforeseen Physical conditions	Investigation and Decision by Engineer within 7 days	No time limit	No time limit

Comparison of General Conditions of Contract of International and Indian Agencies

Clause	FIDIC	CPWD	MES
Payment to subcontractors	Clause for Engineer to ask for evidence	No clause for monitoring payment to subcontractors	No clause for monitoring payment to subcontractor
Time limit for determination of cost and EOT by Engineer	42 days after receipt of proposal with details from contractor	No time limit	No time limit
Delayed payment	Contractor entitled to financing charges compounded monthly @ Bank PLR plus 3%	Contractor entitled to simple interest @ 7.5% compounded yearly	No entitlement to contractor

Comparison of General Conditions of Contract of International and Indian Agencies

Clause	FIDIC	CPWD	MES
Settlement of Final Account	"Agreed" amount to be paid within 28 days	No concept of segregation of "Agreed" and "Disputed" amount. Entire Final bill often delayed by years due to disputed amount	No concept of segregation of "Agreed" and "Disputed" amount. Entire Final bill often delayed by years due to disputed amount
Right of suspension by contractor	Right of contractor to suspend work due to delay in payment, non-Payment and non-implementation of decision of Dispute Avoidance and Adjudication Board (DAAB)	No Right of contractor to suspend work for any reason whatsoever.	No Right of contractor to suspend work for any reason whatsoever.

Comparison of General Conditions of Contract of International and Indian Agencies

Clause	FIDIC	CPWD	MES
Right of termination by contractor	Right of contractor to terminate work due to delay in payment, non-Payment and non-implementation of decision of Dispute Avoidance and Adjudication Board (DAAB) and entitlement of Contract to additional costs, loss of profit and damages	Only if work cannot commence within 1/8th of stipulated time of completion for reasons beyond control of contractor. No compensation to contractor	No Right of termination to contractor
Notice of claim /EOT by the contractor	Deemed acceptance by Engineer if reply no given within timeframe specified in contract	-No deemed provision - No time limit for reply by Engineer	- No deemed provision - No time limit for reply by Engineer
Time Bar on Claims	Time bar for Notice, Detailed Claim, DAAB and Arbitration- based on contract	No Time bar-only legal time bar based on Law of limitation	No Time Bar -only legal time bar based on Law of limitation-

Minus points of Indian Contracts/ICA

- No provision to make contract equitable. Inequities in contract in terms of:
  - Suspension Rights of Contractor
  - Payment of interest on delayed payment
  - Loss of Profit
  - Employer's Risk Events
  - Timelines
- No standard form of contract.
- No interim binding Fast Dispute Resolution
- Time bar clauses only for
  - Notice of EOT- 15 days
  - Termination of Contract by contractor- 15 days
  - Notice for Force majeure- 10 days
  - Time bar clauses legally void (?)

Indian Contract Act Section 28

“any agreement that prevents or restricts an aggrieved party from seeking remedy in a relevant court or tribunal in the case of a breach of contract is null and void”.

Time Bar : Indian Contracts

- Chandigarh Construction Co. v State Of Punjab on 14 Feb,2020-SCI-The contractor had to submit details of claim for extra work by 10th of every month failing which it was deemed that the contractor has waived his right to the claim. Since the claim was not included in the monthly statement, it was not admitted by the Engineer. This was upheld the first appellate court and High Court who set aside the award of the arbitrator. The SCI ruled that such condition precedent cannot be considered as a statutory limitation or bar for the claim and it only prescribes a method. Though the Clause indicates that if such claim is not made, it would amount to waiver, in a circumstance where the claim is ultimately put forth for adjudication, if the adjudicating authority is satisfied that the actual work had been done and the contractor was entitled to the extra amount, it would not be just and proper to deny such claim only on the ground that it had not been indicated strictly in the manner as provided in the contract.
- M/S Ajay Deep Construction vs Maharashtra State Police 29 June, 2021 Bombay High Court-A contractual clause such as condition No.9 in the present case, which stipulates the time and manner within which the contractor has to intimate the employer about extra or additional work, has never been considered as a statutory limitation or bar for a claim for extra/ additional work. Once it is established that the work has indeed been done, payment for it cannot be denied on a technical ground such as non-intimation according to the stipulation.

However, both these cases pertain to variations wherein the quantum and cost was not disputed.

PLUS POINTS OF INDIAN CONTRACTS

- PAYMENT TERMS – 10 /28 days
- TIME BAR BASED ON LAW OF LIMITIATION ?
- GRANT OF EOT EVEN IF APPLICATION IS NOT MADE BY CONTRACTOR
- MOST CONTRACTS (EVEN FIXED PRICE EPC CONTRACTS) HAVE ESCALATION / PRICE VARIATION CLAUSES BASED ON GOVT PUBLISHED INDICES ON QUARTERLY BASIS
- PAYMENT TO ENGINEER- 50% SHARING BETWEEN EMPLOYER AND CONTRACTOR
- QUANTIFICATION OF ADDITIONAL COSTS BASED ON SIMPLE FORMULAS /THUMB RULE CALCUALTIONS – LESS BURDEN OF PROOF ON CONTRACTORS
- CONCURRENT DELAY HANDLING INCLUDED IN GCC- MALMAISON / CYDEN HOMES APPROACH

Time Bar : Common Law

Is this Time Bar (Timely Notice as a Condition Precedent) desirable?

Under common law the aspect of timely notice as condition precedent is enforced and has found favor("Contractual terms requiring a contractor to give prompt notice of delay serve a valuable purpose; such notice enables matters to be investigated while they are still current. Furthermore, such notice sometimes gives the employer the opportunity to withdraw instructions when the financial consequences become apparent."-Justice Jackson-Multiplex Construction v Honeywell Control Systems)

However, the aspect of time barring of claims due to late notice has to be construed liberally and not rigidly against the contractor. ("no reason why this clause should be construed strictly against the Contractor and can see reason why it should be construed reasonably broadly, given its serious effect on what could otherwise be good claims for instance for breach of contract by the Employer; Under sub cl 8.4 of FIDIC -The Contractor shall be entitled subject to Sub-Clause 20.1… to an extension of the Time for Completion if and to the extent that the completion for the purposes of Sub-Clause 10.1…is or will be delayed by any of the following causes… does not imply whichever is the earliest ; the extension of time could be claimed either when it was clear that there will be delay (a prospective delay) or alternatively when the delay has at least started to be incurred (a retrospective delay)- Justice Akenhead - Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar)

Conditions precedent highlight Good practices but there needs to be a mandatory provision of "reasonableness"(for example the time given for giving a notice should be reasonable)

Conclusion

- Situation Improving in terms of Contract Conditions and Dispute Resolution …but still long way to go…

Major Voids

- Interim Binding Fast Dispute Resolution
- Construction Law/SoP Act
- Capacity Building in Construction Contracts

QUESTIONS AND DISCUSSIONS?

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