Construction Dispute Management in India
Amit Kathpalia
National Infrastructure Pipeline

Budgeted Expenditure 2020-2025 – US $ 1.6 trillion
## World Bank Ranking of India

<table>
<thead>
<tr>
<th>Topic</th>
<th>Ranking 2014</th>
<th>Ranking 2023</th>
</tr>
</thead>
<tbody>
<tr>
<td>Logistics Performance Index</td>
<td>44</td>
<td>38</td>
</tr>
<tr>
<td>International Shipment</td>
<td>44</td>
<td>22</td>
</tr>
<tr>
<td>Ease of Doing Business</td>
<td>142</td>
<td>63</td>
</tr>
<tr>
<td>Getting Construction permits</td>
<td>52</td>
<td>20</td>
</tr>
<tr>
<td>Trading Across Borders</td>
<td>80</td>
<td>68</td>
</tr>
<tr>
<td>Resolving Insolvency</td>
<td>108</td>
<td>52</td>
</tr>
<tr>
<td>Enforcing Contracts</td>
<td>163</td>
<td>163</td>
</tr>
</tbody>
</table>
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 Scenario: Data from MOSPI

<table>
<thead>
<tr>
<th>YEAR</th>
<th>TOTAL NO OF PROJECTS</th>
<th>ORIGINAL COST (CR)</th>
<th>ANTICIPATED COST (CR)</th>
<th>COST OVERRUN</th>
<th>NO OF PROJECTS WITH TIME OVERRUN</th>
<th>RG OF TIME OVERRUN AND AVG</th>
</tr>
</thead>
<tbody>
<tr>
<td>2021-22</td>
<td>1263</td>
<td>15,53,683.89</td>
<td>17,49,482.56</td>
<td>12.6%</td>
<td>297</td>
<td>3.55-122.78 AVG- 77.35</td>
</tr>
<tr>
<td>2020-21</td>
<td>1184</td>
<td>14,46,253.04</td>
<td>16,16,457.73</td>
<td>12%</td>
<td>333</td>
<td>5.89-122.78 AVG-97.66</td>
</tr>
<tr>
<td>2019-20</td>
<td>782</td>
<td>10,20,779.25</td>
<td>12,22,545.86</td>
<td>19.77%</td>
<td>215</td>
<td>1-261 AVG- 86.88</td>
</tr>
<tr>
<td>2018-19</td>
<td>750</td>
<td>9,47,912.88</td>
<td>11,25,673.75</td>
<td>18.75%</td>
<td>382</td>
<td>1-247 AVG- 41.60</td>
</tr>
<tr>
<td>2017-18</td>
<td>749</td>
<td>9,46,087.60</td>
<td>11,28,566.37</td>
<td>23.3%</td>
<td>255</td>
<td>1-240 AVG- 54.85</td>
</tr>
<tr>
<td>2016-17</td>
<td>578</td>
<td>8,05,756</td>
<td>9,39,053.50</td>
<td>16.5%</td>
<td>295</td>
<td>1-216 AVG- 51.03</td>
</tr>
<tr>
<td>2015-16</td>
<td>584</td>
<td>6,90,826.40</td>
<td>8,28,755.50</td>
<td>20%</td>
<td>276</td>
<td>1-213 AVG-47.26</td>
</tr>
<tr>
<td>2014-15</td>
<td>572</td>
<td>5,92,196.97</td>
<td>7,14,713.86</td>
<td>20.70%</td>
<td>299</td>
<td>1-255 AVG- 50.87</td>
</tr>
</tbody>
</table>
COMMON REASONS FOR DELAYS AND COST OVERRUNS AS PER MOSPI

- LAND ACQUISITION
- FOREST CLEARANCE
- INFRASTRUCTURE SP
- PROJECT FINANCING
- DELAYS IN DESIGN
- CHANGES 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 IMPLEMENTATION OF MAJOR COMPONENT OF AWARD – 7-8 YRS
COST IMPLICATIONS OF DISPUTES IN CONSTRUCTION PROJECTS IN INDIAN PUBLIC SECTOR

Railway contracts

- Contract value
- Arbitration award
- Interest on arbitration award
- Total - Arbitration Award plus Interest
## ARCADIS GLOBAL CONSTRUCTION DISPUTE REPORT

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

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

<table>
<thead>
<tr>
<th>Types</th>
<th>RII</th>
</tr>
</thead>
<tbody>
<tr>
<td>Final Account</td>
<td>1</td>
</tr>
<tr>
<td>Variations and extra items</td>
<td>2</td>
</tr>
<tr>
<td>Release of retention money</td>
<td>3</td>
</tr>
<tr>
<td>Interim Payments</td>
<td>4</td>
</tr>
<tr>
<td>Advance Payments</td>
<td>5</td>
</tr>
</tbody>
</table>
## Own Research: Delayed Payments

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

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

<table>
<thead>
<tr>
<th>Causes</th>
<th>RII</th>
</tr>
</thead>
<tbody>
<tr>
<td>Use of inappropriate type of contract</td>
<td>29</td>
</tr>
<tr>
<td>Too much power with payer</td>
<td>30</td>
</tr>
<tr>
<td>Too much bureaucracy and vigilance</td>
<td>31</td>
</tr>
<tr>
<td>Change in political system /higher mgmt</td>
<td>32</td>
</tr>
<tr>
<td>Fluctuations in overall market and eco conditions</td>
<td>33</td>
</tr>
<tr>
<td>Bankruptcy and insolvency of payer</td>
<td>34</td>
</tr>
<tr>
<td>Change in appointments dealing with payments</td>
<td>35</td>
</tr>
</tbody>
</table>
In The Descending Arrow of Escalation Summary – The Descending Arrow of Escalation

- Avoidance
- Negotiation
- Mediation/Conciliation
- Dispute Review/Adjudication Boards
- Statutory Adjudication
- Arbitration
- Litigation

- Fast
- Less Expensive
- No hinderance to cash flow
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
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

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 very 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**

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

<table>
<thead>
<tr>
<th>Sl. No.</th>
<th>Status of dispute</th>
<th>Settlement Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>(b)</td>
<td>Arbitral Award passed. Award with net amount payable to the contractor. Note: Case may or may not be under appeal before a Court.</td>
<td>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.</td>
</tr>
<tr>
<td>(c)</td>
<td>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</td>
<td>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</td>
</tr>
</tbody>
</table>
### Vivad Se Vishwas Scheme 2

<table>
<thead>
<tr>
<th>Sl. No.</th>
<th>Status of dispute</th>
<th>Settlement Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>(d)</td>
<td>On-going litigation (Either in Court where no arbitration was done; OR before Arbitral Tribunal OR ongoing conciliation)</td>
<td>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</td>
</tr>
</tbody>
</table>

- 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 Act
• 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)
## Dispute Resolution Clause

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

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
- D-B-B
- %age contracts
- Cost plus contracts
- D-B: EPC
- EPCM
- ALLIANCE CONTRACTING
- INTEGRATED PROJECT DELIVERY
- COLLABORATIVE CONTRACTING
REQMT OF MODERN FAIR CONTRACT (NEC)

• FAIR DEALINGS 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 BENEFICIARIES
  • 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

<table>
<thead>
<tr>
<th>Clause</th>
<th>FIDIC Red Book</th>
<th>CPWD</th>
<th>MES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Delayed issue of drawings</td>
<td>Contractor entitled to additional costs plus profit and extension of time (EOT) if he has given timely notices and justification</td>
<td>No entitlement to contractor except EOT.</td>
<td>No entitlement to contractor except EOT.</td>
</tr>
<tr>
<td>Delayed access to site</td>
<td>-do-</td>
<td>-do-</td>
<td>-do-</td>
</tr>
<tr>
<td>Engineer’s Determination of</td>
<td>- Within 42 days of receipt</td>
<td>-No laid down time limit</td>
<td>-No laid down time limit</td>
</tr>
<tr>
<td>Contractor’s claims</td>
<td>- Deemed rejection if not done within 42 days</td>
<td>- No deemed provisions</td>
<td>- No deemed provisions</td>
</tr>
<tr>
<td>Unforeseen Physical conditions</td>
<td>Investigation and Decision by Engineer within 7 days</td>
<td>No time limit</td>
<td>No time limit</td>
</tr>
<tr>
<td>Clause</td>
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<td>CPWD</td>
<td>MES</td>
</tr>
<tr>
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<td>------------------------------------------</td>
</tr>
<tr>
<td>Payment to subcontractors</td>
<td>Clause for Engineer to ask for evidence</td>
<td>No clause for monitoring payment to subcontractors</td>
<td>No clause for monitoring payment to subcontractor</td>
</tr>
<tr>
<td>Time limit for determination of cost and EOT by Engineer</td>
<td>42 days after receipt of proposal with details from contractor</td>
<td>No time limit</td>
<td>No time limit</td>
</tr>
<tr>
<td>Delayed payment</td>
<td>Contractor entitled to financing charges compounded monthly @ Bank PLR plus 3%</td>
<td>Contractor entitled to simple interest @ 7.5% compounded yearly</td>
<td>No entitlement to contractor</td>
</tr>
</tbody>
</table>
## Comparison of General Conditions of Contract of International and Indian Agencies

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</tr>
</thead>
<tbody>
<tr>
<td>Settlement of Final Account</td>
<td>“Agreed” amount to be paid within 28 days</td>
<td>No concept of segregation of “Agreed” and “Disputed” amount. Entire Final bill often delayed by years due to disputed amount</td>
<td>No concept of segregation of “Agreed” and “Disputed” amount. Entire Final bill often delayed by years due to disputed amount</td>
</tr>
<tr>
<td>Right of suspension by contractor</td>
<td>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)</td>
<td>No Right of contractor to suspend work for any reason whatsoever.</td>
<td>No Right of contractor to suspend work for any reason whatsoever.</td>
</tr>
<tr>
<td>Clause</td>
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<tr>
<td>---------------------------------</td>
<td>----------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>Right of termination by contractor</strong></td>
<td>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</td>
<td>Only if work cannot commence within 1/8th of stipulated time of completion for reasons beyond control of contractor. No compensation to contractor</td>
<td>No Right of termination to contractor</td>
</tr>
<tr>
<td><strong>Notice of claim /EOT by the contractor</strong></td>
<td>Deemed acceptance by Engineer if reply no given within timeframe specified in contract</td>
<td>- No deemed provision for reply by Engineer</td>
<td>- No deemed provision for reply by Engineer</td>
</tr>
<tr>
<td><strong>Time Bar on Claims</strong></td>
<td>Time bar for Notice, Detailed Claim, DAAB and Arbitration- based on contract</td>
<td>No Time bar-only legal time bar based on Law of limitation</td>
<td>No Time Bar -only legal time bar based on Law of limitation</td>
</tr>
</tbody>
</table>
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 LIMITATION ?**
- **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**
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?

Amit Kathpalia, MRICS, FICCP, Sr PE

Email- amitakdk@gmail.com/amitkathpalia1002@gmail.com
Mob: 95601272927