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Arbitration in Construction Industry: An Overview

A. A. Gulghane[1], Prof P. V. Khandve[2]
[1,2]*Department of civil engineering, Prof Ram Meghe College of Engineering and Management /Sant Gadge Baba Amravati University, India*

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

Keywords: *About five key words in alphabetical order, separated by comma.*

I. Introduction

The Construction projects now a day are very complex. They require the participation of numerous individuals with a wide range of education and skills. With so many participants employed in numerous trades and professions, some disagreements and disputes are inevitable. Construction/infrastructure is one of the fastest growing sectors of the world economy, and lots of money is spent in construction related disputes. In India also, rapid globalization and the resulting increase in industrial competition has led to an increase in commercial disputes. At the same time however, the rate of industrial growth, modernization, and improvement of socio-economic circumstances has in many instances outpaced the rate of growth of dispute resolution mechanisms. Arbitration has been used for centuries by merchants as a means of dispute resolution. There is now a widespread recognition and acceptance of commercial arbitration as a tool for resolving disputes. Arbitration is a method of settlement of disputes by way of an alternative to the normal judicial method, which is activated by instituting legal proceedings in court of law. Out of various forms of alternative dispute resolution (ADR) including conciliation, mediation and negotiation, arbitration has emerged as one of the most dominant and widely accepted form of ADR. Arbitration proceedings in India are conducted under the Arbitration and Conciliation Act 1996 (the Act). The main arbitration bodies in India are the Indian council of arbitration, the international Centre for alternative dispute resolution, the Bombay chamber of commerce, and the Indian merchants' chamber. Each organization has its own set of arbitration rules.

II. History Of Arbitration In India

Arbitration has a long history in India. In ancient times, people often submitted most of their disputes to a group of wise men of a community called the Panchayat. Modern arbitration law in India was created by the Bengal Regulations in 1772, during the British rule. Until 1996, the law governing arbitration in India consisted mainly of three statutes. First was the 1937 Arbitration (Protocol and Convention) Act second was the 1940 Indian Arbitration Act, and the third was 1961 Foreign Awards (Recognition and Enforcement) Act. The 1940 Act was the general law governing arbitration in India. This act was along the lines of the English Arbitration Act of 1934. The 1937 and the 1961 Acts were designed to enforce foreign arbitral awards. In an effort to modernize the outdated 1940 Act the government enacted the Arbitration and Conciliation Act, 1996 (the 1996 Act). The 1996 Act is a comprehensive piece of legislation modeled on the lines of the UNCITRAL Model Law. This Act repealed all the three previous statutes. The 1996 Act covers both domestic arbitration and international commercial arbitration. The Arbitration Act, 1940, only dealt with domestic arbitration. Intervention of the court was required in all the three stages of arbitration i.e. prior to the reference of the dispute to the arbitral tribunal, during the proceedings before the arbitral tribunal and after the award was passed by the arbitral tribunal under the 1940 Act. The 1996 Act repealed the 1940 Act, as the act was not able to provide an effective and expeditious dispute resolution framework. The Government of India enacted the

1996 Act by an ordinance and then extended its life by another ordinance, before Parliament eventually passed it without reference to a Parliamentary Committee a standard practice for important enactments.

III. Arbitration Agreement For Construction Industry

It has been said that arbitration is a form of dispute resolution and it is therefore a pre-requisite for arbitration to proceed that the parties must consent to refer their dispute to arbitration. Such consent is called the arbitration agreement. Arbitration agreements, like most agreements, can be either oral or written. However, if arbitration were to come under the purview of the 1996 Act, the arbitration agreement must be in writing. An arbitration agreement does not need to be a separate and distinct agreement from the main agreement between the parties, it can be in the form of a single clause within the main contract itself in fact in most standard forms of construction contracts this is the case. Arbitration agreement consisting of a documents signed by the both parties, an exchange of letters, telegrams or other means of telecommunication. This provides a record of the agreement or an exchange of statements of claim and defense in which the existence of the agreement is alleged by one party and not denied by the other. There reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

IV. Appointment And Removal Of Arbitral Tribunal

The arbitrators which determine the outcome of the dispute are called the arbitral tribunal. Arbitral tribunals composition can be varying enormously it may be with a sole arbitrator sitting, two or more arbitrators, and various other combinations as per the agreement. An arbitrator may be appointed by the parties themselves, by an independent third party, or by the Court. Sometime an arbitration agreement specifies the qualification of an arbitrator and unless such a qualification is waived by the parties, the appointment of an arbitrator who does not meet the qualification will not be valid appointment. The parties are free to determine the number of arbitrators for arbitration proceedings but providing that numbers of arbitrators shall not be an even number. A person of any nationality may be an arbitrator. For appointing the arbitrator or arbitrators the parties are free to agree on a selection procedure. In arbitration with panel of three arbitrators each party has power to appoint one arbitrator, and the two appointed arbitrators by the parties according to the agreed procedure shall appoint the third arbitrator according to the selected procedure who shall act as the head arbitrator. If any party fails to appoint an arbitrator irrespective to any circumstances either it can be sole or panel within thirty days from the receipt of a request to do so from the other party or the two appointed arbitrators fail to agree on the third arbitrator for the proceeding within thirty days from the date of their appointment. The final appointment of the arbitrator shall be made, upon request of a party, by Chief Justice or any person or institution designated by him. Where in the case of appointment of sole or third arbitrator in an international commercial arbitration cases, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities. In the three situations where the appointed arbitrator refuses to act, or is incapable of acting, or dies the High Court shall have the power to make appointment or substitute or replacement arbitrator.

V. Removal Of Arbitrators And Termination Of Mandate

The Court has the power to remove an arbitrator, or has his authority revoked, if the arbitrator has misconducted himself or has misconducted the proceedings. Further, with respect to an award which has been published by the arbitrator, the award may be set aside if the arbitrator has been found to have committed misconduct the proceedings. In addition to the circumstances the mandate of an arbitrator shall be terminated when arbitrator himself withdraws from office for any conditional or unconditional reason, or following to agreement of the parties. Where the mandate of an arbitrator terminates for any reason a substitute arbitrator is appointed according to the rules that were applicable to the appointment of the arbitrator being replaced agreed by parties. The mandate of an arbitrator shall terminate if he unable to perform his functions or for other reasons fails to act without undue delay or he withdraws from his office or the parties agree to the termination of his mandate. If a controversy remains constant any of the grounds a party may apply to the court to decide on the termination of the mandate. It would be difficult to categorize all instances that amount to misconduct within the meaning of arbitration law. Certain obvious instances of misconduct include bias or partiality, failure to decide all issues, acceptance of bribes, or other forms of inducement, improper delegation of duties and other.

VI. Grounds For Challenge

An arbitrator may be challenged only if there are some circumstances that give rise to certain justifiable doubts as to his independence or impartiality, or it the selected arbitrator does not possess the required qualifications agreed to by the parties. A challenge should be made within 15 days of the petitioner becoming aware of the constitution of the arbitral tribunal or aware of the circumstances furnishing grounds for challenge. Further, it is the arbitral tribunal which shall decide on the challenge subjected to the parties agreement. In the case if challenge by the party or parties is not successful the tribunal shall continue with the arbitral proceedings and render the award, which can then be challenged by an aggrieved party at that stage.

VII. Conduct Of Arbitral Proceedings

Following are the step of arbitral proceedings

Equal treatment for the parties-The parties involved in shall be treated with equality and each party must be given a full and fair opportunity to present his case in front of arbitrator so that decision making on any issue should be done with impartiality.

Determination of rules of procedure-The arbitral tribunal shall not be bound by the Code of Civil Procedure. As per this part both the parties are free to agree on any of the procedure to be followed by the arbitral tribunal in conducting its proceedings. The arbitral tribunal may, as per this part, conduct the arbitral proceedings as per the manner it considers appropriate.

Place of arbitration-The parties are free to agree on any of the places for arbitration. As per the convenience of the parties the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case. Considering appropriate for consultation among its members the arbitral tribunal may meet at any place.

Commencement to the arbitral proceedings- The arbitral proceedings in respect of a particular dispute begins on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

Language-The parties are free to agree upon the language or languages to be used in the arbitral proceedings. The arbitral tribunal shall also determine the language or languages to be used in the arbitral proceedings. The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages.

Statements of claim and defenses- Within the period of time agreed upon by the parties or determined by the arbitral tribunal the claimant shall state the facts supporting his claim the points at issue and the relief or remedy sought and the respondent shall state his defense in respect of these particulars. The parties must submit with their statements with all documents they consider being relevant to the case or may add a reference to the documents or other evidence.

Hearings and written proceedings- The arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for or an argument, or whether the proceedings shall be conducted on the basis of documents and other materials. For any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of documents, goods or other property the parties must be given sufficient advance notice of it. All related documents, important statements or other relevant information supplied to, or applications made to the arbitral tribunal relevant to the case by one party must be transparently communicated to the other party.

Default of a party - The claimant fails to communicate his statement of claim in accordance the arbitral tribunal shall terminate the proceedings. If the respondent fails to communicate his statement of defense the arbitral tribunal shall continue the proceedings without treating that failure in itself as an admission of the alienations by the claimant. And if the party fails to appear a tan oral hearing or to produce documentary evidence the arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it.

VIII. Arbitral Award And Termination Of Proceedings

In arbitral proceedings with more than one arbitrator i.e. in arbitrator panel any decision of the arbitral tribunal regarding the award shall be made by a majority of all its members present in the panel. An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal. Unless until the parties have agreed that no reasons are to be given for the relevant case, or the award is an arbitral award on a-reed terms the arbitral award must state the reasons upon which it is based. The arbitral award shall state its date and the place of arbitration as determined and the award shall be deemed to have been made at that place. After the arbitral award is made, a signed copy of the award must be delivered to each party by any means. At any time during the arbitral proceedings the arbitral tribunal may make an interim arbitral award on any of the matter with respect to which it may make a final arbitral award. The arbitral tribunal may include in the sum for which the award is made interest can be added at such rate as it deems reasonable on the whole or any part of the money decided by arbitrator or the whole or any part of the period whichever is appropriate between the date on which the cause of action arose and the date on which the award is made where and in so far as an arbitral award is for the payment of money. The mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings. Within thirty days from the receipt of the arbitral award party with proper notice to the other party may request the arbitral tribunal to correct any of the computation errors or any of the clerical errors or any other errors of a similar nature which is encountered. The award which is made shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it was an order of the court.

IX. Advantages Of Arbitration

i. Arbitration awards are binding and enforceable.
ii. Arbitration is a decision-making process in which arbitrators make orders. Although every case is different, most arbitration will work their way through the same steps.
iii. Arbitration is not burdened by the backlog of cases in the courts which results in faster resolution of the disputes referred to litigation.
iv. Faster hearing and less paperwork mean lower costs in comparison to litigation.
v. Arbitration is a flexible process which permits parties to organize procedures, and schedule hearings and deadlines to meet their objectives and convenience.
vi. Arbitral hearings are held in private settings and are attended only by those designate by the parties and their counsel.
vii. A great benefit of arbitration is that the parties can select their arbitrators with the necessary special expertise

X. Conclusion

Arbitration as an alternate dispute resolution method in construction industry is powerful and effective tool. Construction is a combination of complex activities arising the clashes and differing goals between various parties and members of the consultant team. Thus to effectively and transparently resolve such clashes the party choose to have arbitration. Arbitration is a systematic approach to resolve the dispute. As arbitration is flexible process both parties to a construction dispute benefit greatly when arbitration is used. Factor to consider is that fact that arbitrators usually have areas in which they specialize in. Thus, they are going to have an excellent understanding of the subject. However, if at all possible, why not at least try to solve differences in a more cost effective and timely manner under terms which the parties agree rather than have decided for them. If alternate dispute resolution does not work, then litigation can be pursued.

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