Arbitration Clauses in Government Infrastructure Contracts

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In our country, everyday there are many announcements about new launch of infrastructure projects on either BOT basis or Annuity basis or EPC basis etc., But most of them end up in arbitrations due to delay in completion or termination or escalation issues or violation of state support agreements etc., Even though these types of contracts look like FIDIC contracts, in fact these are altered by the employers to protect the interest of employers at any cost. Some contracts go to the extent of saying that the contractor does not have any right to claim any damages or interest, for a breach committed by employer and some arbitration agreements are drafted to be advantageous to the employer alone. In this article, we are going to examine the arbitration agreements in use today in the field of infrastructure and the impact of the recent judgments in interpreting them.

Arbitration clause is a separable contract, which not only records the intention of parties to resort to arbitration in case of disputes but also spells out the procedure agreed by the parties regarding appointment of arbitrator, qualifications of the arbitrators, number of arbitrators, seat of arbitration, language of arbitration etc., Hence parties should carefully negotiate the arbitration clauses and finalize the same, so that the arbitration clause does not put one party into any disadvantage at the time of arbitration. But in most of the infrastructure either Government or a Statutory body or a Public Sector under taking is the employer. In such cases, the employer select the contractor by way of a tender process in which the bidder will have the right only to vary the Financials and certain technical aspects. None of the contractors has at any point of time, has any right to negotiate the general terms of the tender which include the arbitration clauses. Hence, if a party wishes to bid for the contract, it is left with no other option except to accept the same as it is.

In such a situation, many Government contracts provided powers of appointing an arbitrator to the employer and employer had powers to appoint even its own staff as arbitrators. These clauses were also upheld by Supreme Court on the ground that it is an agreement between the parties. Thanks to Government of India which incorporated “IBA Rules on conflict of interest in International Arbitration” into the 2015 Amendments and prohibited certain relationships from getting appointed as arbitrators. Hence, the employers appointing its own staff came to an end. Supreme Court of India it is Judgment, held that if a party is prohibited to become an arbitrator it is prohibited from nominating/appointing another sole arbitrator also. This judgment bought back more hope to the arbitrating parties since it pushed the arbitration scenario of India to next level, in the aspect of impartiality and independence.

One of the Government employer Delhi Metro rail Corporation (DMRC) has an arbitration clause which provided about 30 Retired engineers most of them retired from Railway department as the panel of arbitrators. The clause provided that if any of the contractor wanted to opt for an arbitration, DMRC would prepare a five member panel from the above

panel and both the parties will select one each from that panel and both the arbitrators will again select the presiding arbitrator from the same panel. The said clause came to be challenged in a case and Supreme Court examined the said clause in **Voestalpine Schienen GMBH Vs Delhi Metro Rail Corporation Ltd (2017) 4 SCC 665** and partially upheld the clause. In the said Judgment, Supreme Court directed DMRC to expand the panel by making it broad based by including some Judges, Chartered Accountants and Engineers / bureaucrats from other departments. Further it diluted the said clause and allowed the parties to select one from the whole panel instead of selecting one from the five suggested by DMRC. Even though the said judgment has helped the contractors to come out of that five-member panel it has not really helped the arbitration system to ensure complete impartiality and independence of arbitrators.

Following the above said example of DMRC and the Voestalpine Schienn Judgment of Supreme Court, Delhi High Court gave a similar direction to IRCON (Indian Railway Construction Company limited) while dealing with a case Afcon Infrastructure Limited Vs IRCON international Limited (2017) SCC Online Del 10049, directing IRCON to create a broad based panel of arbitrators involving Judges, Lawyers, Chartered Accountants etc., Hence the said direction of the Supreme Court, has again brought back two challenges to independence and impartiality concept of Arbitration which include the power to appoint an arbitrator with one of the parties to the contract and ability for Government and its Institutions insist for restricted panel selected by them to arbitrate the disputes arising out of the contract.

Comments of the Author: An arbitration system can be said to ensure the impartiality and independence of the arbitrators only when it fully recognize the concept of "Party autonomy" in arbitration. Any restriction on Party autonomy that too in selecting the nominee of one party, is a serious curtailment of the right of a party, who gives its right to approach the court of law. That too in Indian context, Government contracts are negotiable only to the extent of financials and the general conditions announced by the Government should be accepted as it is. The continuous endeavor of the arbitration community should be to find the breaching party, impact of that breach and compensate the injured. We also should wait and see what is going to be the view of the Court, when such a proposal is put forth by private sector also. Let us hope for a better tomorrow.