Effective Handling of Construction & Infrastructure Arbitrations in India

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In India Construction and infrastructure arbitrations are increasing day by day because of the increased infrastructure related activities by the Government and Private sector. But it considered to be one of the types of arbitrations which consume excess time because of the complex nature. In my opinion, it is not at all true because construction arbitrations also can be concluded within a reasonable time, if they are planned well. The true reasons for the delay in getting the final awards in construction arbitrations are contributed by parties including the claimant and lawyers which start from the stage of drafting the arbitration clause till the final arguments. The endeavour of this article to expose the real reasons and to make everybody understand that even large size construction arbitrations can be managed in such a way that they get concluded within a reasonable time.

Arbitration Clause: Arbitration is a private commercial dispute resolution mechanism. In arbitration frame work parties have the supremacy, to decide the procedure of the arbitration, arise out of a contract between parties. Hence while drafting the main contract, parties should draft an arbitration clause which specifically excludes all the possible delays and ensure timely conclusion. The parties also in the interest of speedy conclusion, should come forward to waive off certain rights like oral examination of witnesses and incorporate the same in the arbitration clause itself. This point is very important because the one party can bring in many witnesses or continue the cross examination of witnesses for many days and delay the whole process of arbitration. In construction and infrastructure arbitrations, the use of oral witnesses and the weightage given to them by the arbitrators is very low. Hence the parties instead of following the templates for drafting arbitration clauses, they should effectively draft the clause, keeping in mind the nature of the project.

Avoiding Three Arbitrator Panel: In a construction/ infrastructure contract, parties normally go for arbitration clauses with a three-member tribunal. One arbitrator will be appointed by each of the parties and the chairman shall be chosen by

both of them. The parties should realise the fact that once three-member panel is selected by the parties, the cost of arbitration increases up by a minimum of three times and the time consumption also increases proportionately because, the tribunal has to keep the hearings on the dates which are suitable to all the three arbitrators as well as the parties. Normally the clauses which provides for a panel of three arbitrators gives right of parties to appoint/ nominate one arbitrator and both of the arbitrators will choose the third one. In such cases the appointment of arbitrators itself takes away more than 6 months' time. In high value contracts parties can go for two or more options of different sub-clauses on the basis of the dispute amount, one providing a sole-arbitrator and the other providing a three-member arbitration panel. These days finding dates of popular arbitrators is difficult and hence having a clause with a single arbitrator will surely help to expedite the conclusion of the arbitration.

Choosing Institutional Arbitration: There are many professionally managed institutional arbitration centres in India, which help the parties to conclude the arbitration within a reasonable time by closely monitoring and managing the proceedings. ***(For example IDAC India, which is an arbitral Institution based out of Vadodara offers not only world class infrastructure but also timely conclusion of arbitrations)*** For doing so parties should choose an arbitral institution and incorporate its name and address in the arbitration clause itself, with a consent to acceptance of the rules of the arbitral institution. But even today many parties do not specifically incorporate, the name and details of an arbitral institution and get referred to ad-hoc arbitrations. Choosing an Ad-hoc arbitration not only delays the conclusion of the proceedings because the control over adjournments and hearings in long intervals but also makes it very expensive. Normally in ad-hoc arbitrations, the arbitrators decide both their fee as well as the hearing dates.

Engage Full Time Arbitration Lawyers and Appoint Full Time Arbitrators: Even though in India arbitration has become the most preferred mechanism in resolving commercial disputes, many lawyers and arbitrators treat arbitration like a weekend activity. Hence they insist for Saturday hearings, don't stick to dates, seek adjournments often and delay the arbitration proceedings. If parties choose lawyers who are full time arbitration lawyers than choosing part-time arbitration lawyers, then the delay can be reduced substantially. In the same way part time arbitrators also contribute to the delay of the proceedings. Hence one of the most important reasons for the delay in construction arbitrations can be avoided if the part- time arbitration lawyers and part- time arbitrators are not engaged by parties.

Saturday Hearings: Many lawyers and arbitrators handle arbitration only on Saturdays because of the non-availability of time for lawyers and arbitrators in week days. This is an anti-arbitration practice which requires to be discouraged by the parties. Parties should not agree for Saturday hearings and insist for week day hearings from the beginning of the proceedings to avoid delay in arbitration matters.

Preparation & Filing of The Claim: The claimants are the parties who initiate arbitration proceedings since they are an aggrieved by the other party. In such a situation they should always try to complete the arbitration proceedings faster. But it is unfortunate in India, that most of the claimants seek for long time for preparing and filing the claim statement, on the first pre-arbitration hearing after the appointment of arbitrators. In many countries claimant sends the claim along with the notice for arbitration. The claimant is well aware that arbitration will start and hence they should be ready with their claim petition and supporting documents on the first hearing itself and file the same on the very same day. Such a pro-active act of the claimant will save a minimum of three months' time.

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Document Management & Infrastructure Contract: Normally in a construction & infrastructure contracts the damages are claimed by parties on the basis of delays attributable to the other party, variations to the main contract, quality of the executed work etc., These issues can be effectively proved from the emails exchanged and other communications. Hence the parties should start collecting all communications, indexed date wise right from the beginning of the negotiation, which will be of great help in the later stage. Some infrastructure companies always mark all copies of the mails to one dedicated email ID for each project they handle, which help them to take out all the communications without a big search for documents. A claimant which has a properly managed documents need not delay the process by fling the documents in a later stage of the arbitration (along with chief examination of witnesses) and all documents filed in support of the claim petition must be filed either in claim stage or latest in the rejoinder stage, not later than that. Filing of all the supporting documents along with the claim will help the opposite party to respond effectively and consequentially arbitrator will understand the matter better. Hence normally arbitrators also give more weightage to the documents brought on record in the starting of the case.

Selected Filing of Documents: In construction and infrastructure arbitrations parties normally dump huge number of documents, knowingly many of them are not necessary to either prove or disprove the claims and counter claims raised by the parties. For example, all the plan drawings, approvals of those drawings, shop drawings, cash vouchers, registers maintained in the work front, bills, copies of sub-contracts, copy of the main contract etc., are brought on record. Parties should file only documents which are relevant to the claim and counter claim and file the other documents required by the other party, if ordered by the tribunal.

Examination of Neutral Technical Witnesses: If arbitrators are from non-technical back ground, they can appoint technical witnesses and rely on their opinion

to pass awards. But they should appoint a neutral technical/ expert witness rather than relying on the party appointed expert witnesses, who need not be neutral. Moreover, examination and cross examination of party appointed witnesses take longer time than a neutral witness. It is important that a neutral expert witness is independent and reliable than a party appointed expert witness.

Cross Examination by Parties: The importance cross examination of witnesses in construction and infrastructure disputes are very limited, because facts are proved through documents only. In construction arbitrations cross examination are done on the issues which are stated in the affidavit by way of evidence filed by that particular witness. In addition, cross examination can be used to disprove certain claims, counter claims and allegations of the party examining that witness. But the relevance of such cross examinations have come down in a big way because arbitrators give more weightage to documents than oral witnesses. Hence the arbitrators should discourage lengthy cross examination of witnesses in order to conclude the construction arbitrations with in time.

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