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Consequence of Removal of Arbitration Clause from Engineering Contracts-A Discussion

Dr. Pronoy RoyChowdhury PhD (Engg.) MIE CEngg(I)
email-pronoyrc@gmail.com
Executive Engineer
Public Health Engineering Dept. Govt.of WB

Abstract:- The arbitration clause which was an integral part of the Engineering Contract in India is presently a matter of considerable debate. This is because of the obvious reason that there are many instances where abuse of the arbitration clause in the Engineering contract has been made. There is an well-established legal system in India and any plaintiff who is a party to Engineering contract can bring a suit to a court of law if he feels that injustice has been performed and contractual clauses has not been adhered to. The legal system is very formal and substantial time is consumed before the issue is settled through the intervention of the court of law. As time being the essence of contract, especially engineering contract where delayed decision for contractual dispute resolution may actually affect infrastructural development and overall wellbeing of the citizen of the country, alternative dispute resolution system through an arbitral mechanism is preferable practise. However some long drawn and costly arbitration proceedings for dispute resolution of Engineering contract has become one of the major reason for discouraging arbitration in engineering contracts. To facilitate arbitration, an arbitration agreement should executed between the contracting parties. The agreement is generally in the form of an arbitration clause in the Engineering contract. But various Government and Semi Government Engineering departments who invite tenders for large Engineering projects has either done with the arbitration clause by introducing departmental dispute resolution committee or have issued conditional arbitration clause fixing financial ceiling of tender amount for taking arbitration proceedings. In this article it is proposed to discuss the consequences which shall fall due to discouraging or removal of arbitration clause from engineering contracts.

1. Introduction

The first major mile stone in the professional Engineering field of India was the formation of the largest professional body of Engineers called the Institution of Engineers (India) (IEI) way back in 1921, which was subsequently incorporated by a Royal charter issued by the British crown in 1935, granted by King George –V. The institution was formed with the intention “to promote and advance the science, practice and business of Engineering in all its branches in India”. As per provisions of clause no. 2(i) of the Royal Charter reads “to arrange and promote the adoption of equitable forms of contracts and other documents used in the Engineering

and settlement of disputes by arbitration and to act as or nominate arbitrators and umpires on such terms and in such cases as may seem expedient". The Royal charter awarded to the IEI the only Engineering institution of the Indian Engineers even before independence of India clearly reflected the intention of the Indian engineering community to resolve matters of disputes arising in Engineering Contract through process of arbitration rather than going to the Civil court for disposal of the issue. It is beyond doubt that the rationale for adopting arbitration process for resolving disputes relating to Engineering contracts provides a cheap and quick final settlement of the dispute of civil nature without direct intervention of the court. Building and Engineering contracts usually involve various technical points which can be speedily resolved by appointing competent and experienced arbitrators who have Engineering background and have retired from higher capacity such as that of Superintending Engineer or Chief Engineer of various works department of Government. Arbitration proceedings also have the added advantage of privacy and a less formal atmosphere then a Court of Law. The efficacy of arbitration provision over the general legal procedure may be categorised into (i) less time consuming (ii) less costly than proceeding through law courts (iii) more convenient method of disposal of disputes in Engineering Contracts. Time being the essence of Contract, if the contract is delayed due to dispute between client and the contractor or the client and the consultant, then the progress of the Engineering project is adversely affected. Arbitration here acts as an effective vehicle for delivery of speedy, effective and less formal form of dispute resolution mechanism. But it is often reported that the effective instrument of alternative dispute resolution, is not effectively applied and arbitration proceedings takes long time to conclude sometimes even for years together making it costly and frustrating the very objective for adopting arbitration for dispute resolution. It is also observed that certain arbitration minded contractors has the sole purpose to misuse the provisions of arbitration agreement in the contract document to extract more financial benefit from the client (often Government client) without actually executing the desired performance embodied within the engineering contract in terms of work specification. Such incidents have raised much questions about the actual benefits obtained out of arbitration. But inspite of some stray incidents of misuse of arbitration provision the overall benefit of arbitration in dispute resolution in engineering contract is manifold and cannot be undermined in any way.

2. Suitability of Arbitration for Engineering Contracts

(i) The procedure of a Civil suit in a Court of law is very formal (guided by provisions of Civil Procedure Code 1908 with amendment 2002). Every fact will have to be pleaded in the

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plaint or the written statement. This makes the written statement very voluminous. However there are certain obvious facts in Engineering which need not be specifically stated. For example reinforced concrete work cannot be cast without shuttering or reinforcement. Again excavation below the ground cannot be done without dewatering arrangement. But even these obvious facts are required to be clearly stated in the statement of facts. This would require a proper and effective co-ordination between the Engineer and the advocate while preparing the legal document. Any omission of terminology in the written statement shall provide benefit to the unscrupulous and litigious document. Thus the case may be lost merely due to weakness of technical representation in written statement. However if the arbitrator is from Engineering background obvious technical facts may not be required to be stated explicitly as the individual is well acquainted with the technicalities due to wide experience in the concerned field.

(ii) During arbitration the time and place of sitting is habitually settled through mutual consent. The civil court will not permit such freedom. Thus if a Superintending Engineer failed to attend the court for oral evidence because the Chief Engineer had called for an urgent meeting the court may take “adverse presumption”. The honourable Court may interpret that had the Superintending Engineer appeared before the Court the evidence may not have gone in favour of the Government or the Government official is not co-operating with the Court in the matter of the legal proceedings. Thus the court may issue a punishment order against the Government official. But such problems could be avoided in case of an arbitration.

(iii) If there is provision for arbitration in an engineering contract it shall be possible to argue about various issues before an experienced Engineer arbitrator in a relatively informal ambience.

(iv) In many of the Engineering contracts related matters if the disputes are directly brought to the honourable Court sometimes there are possibilities that miscarriage of justice may happen due to want of proper interpretation of technical terminologies. In such case it is the honourable Justice may invite the opinion of a technical expert. Thus the judgement is much influenced by the conclusion drawn by the technical expert. Engineering is a practical subject, the interpretation given by a technical expert would actually be limited to the expertise of the individual in the particular field of Engineering. It is often difficult to obtain an expert with exact technical knowhow. Such as it is well known that in deep excavation it is required to provide earth retaining structure to prevent the caving in of the deep excavation. Earth retaining structure may be of various forms, such as sheet pile,

brick retaining wall, Cantilever retaining wall, Reinforced Concrete diaphragm wall etc. Now the type of the retaining wall to be provided at the site depends on the design consideration and nature of the site. An expert may be experienced with deep excavation, but the technology used for execution of sheet pile work is quite different from that required for the work of diaphragm wall. Although the basic function of both this type of earth retaining structure is the same but the utility of the particular type of construction is site specific. Hence the expert testimony of an individual having experience with sheet pile wall construction may not be at all useful it the work actually requires diaphragm wall construction. However if the arbitrator is a civil engineer himself with wide experience and professional knowledge then it would not be difficult for him to enquire into the exact technicalities of the Engineering work to be executed. The stated example highlights the efficiency and beauty of the arbitration process for efficient dispute resolution in engineering contracts.

3. Implication of Removal of Arbitration Clause

Any valid Engineering contract in India should be defined as per provisions of the Indian Contract Act 1872. As per section 28 of the Indian Contract act any contract agreement to be valid should not contain any restrictive clause or provision which shall prevent any party involved in the agreement from suing the other party if the party feels that he has been deprived as per provisions of the agreement. Removal of arbitration clause in a way restricts the parties involved in the contract agreement to avail the instrument of dispute resolution through arbitration. Time being the essence of any engineering contract long drawn trials at the court in many cases virtually hampers the progress of the Engineering projects.

4. Modification in Arbitration Provision in Government Contracts

Understanding the fact that the arbitration clause in the tender documents of Engineering works, especially in Government departments has been misused many a times by ligation minded contractors, authorities of many works department of the Government across the country has decided to cause removal of the clause or have placed restriction in tenders before taking recourse to arbitration. We may state as an example the standard bid document of the Kerala PWD [1] for works of value above Rs. 5.0 Crores, which under clause no. 79.1 reads “Arbitration shall not be a means of settlement of any dispute or claim out of this contract. All disputes and differences arising out of the contract may be resolved through discussion between the employer and the

contractor within the preview of the contract agreement. If such discussions are not fruitful the disputes shall be settled only by the civil court in whose jurisdiction the work covered by the contract is situated or in whose jurisdiction the contract was entered into in case the work extended to the jurisdiction of more than one court". The above paragraph clearly indicated that the Kerala PWD has totally done with the arbitration clause in tender documents.

The CPWD in the clause number 25 of the contract agreement provides for settlement of contractual dispute through arbitration. But clause 25 of CPWD contract agreement [2] provides for conditional arbitration. As per provision the aggrieved contractor/agency should first approach the Superintending Engineer of the concerned Circle for redressing the dispute. If the Superintending Engineer fails to give decision within 15 days from receipt of the prayer concerned the contractor should now approach the Chief Engineer concerned who shall give decision within 30 days of receipt of the prayer, failing which the contractor may appeal to the dispute redressal committee for redressal of the dispute. If the dispute redressal committee fails to give decision then the aggrieved party may within a period of 30 days give notice to the Chief Engineer for appointment of arbitrator in the prescribed form. Thus the terms of contract clearly indicates that the aggrieved contractor should exhaust the entire mechanism of settlement of claims/disputes prior to invoking arbitration. Hence in other words arbitration is critically observed.

In the similar line the Maharastra PWD [3] vide section 3, clause number 24 of the standard bidding document requires for referring the contractual dispute to the departmental dispute review expert within 14 days of notification of the Engineer's decision, if such decision appears to be wrongly taken as per provisions of the contract agreement. The Departmental review expert in this case has been defined as the Superintending Engineer of the Circle whose decision shall be binding. However if the aggrieved contractor is unhappy with decision given by the Superintending Engineer, the contractor may appeal to the Chief Engineer within thirty days. If the contractor is not satisfied with the order passed by the Chief Engineer, he may again appeal within 30 days of receipt of such order to the Secretary of PWD. If he is convinced prima facie that there is substance in the claim of the contractor and that the claim rejected by the Superintending Engineer and The Chief Engineer is not frivolous the matter shall be put upto the standing committee of the Government for suitable decision. For works of value above Rs 5.0 Crores the procedure for arbitration shall be as per Government rules and procedure drawn up by the law and judiciary department of Government of Maharastra regarding "Institutional Arbitration Policy".

In the state of Bihar[4], arbitration for engineering contracts are under the preview of the Bihar Public works contracts dispute arbitration tribunal Act

2008. The act provides for the constitution of a tribunal to arbitrate into disputes arising from works contracts to which the state Government or public sector undertaking is a party. The tribunal was formed in the interest of expeditious dispute resolution for speedy execution of projects. The tribunal consisted of a Chairman and such number of members who may be appointed by the State Government. The Chairman should be a judge of the High court or a District Judge with atleast 5 years of experience. The member should be or have been either a secretary to the Government of Bihar for atleast 3 years or Engineer-in-Chief or Chief Engineer for atleast 2 years of Superintending Engineer for atleast 3 years. The tenure of Chairman and members are renewed after every 3 years. The tribunal is vested with the powers of a civil court.

As per provisions of notification no. 558/SPW dated 13/12/2011[5] the PWD West Bengal has omitted the arbitration clause i.e clause no. 25 from the tender forms of contract. The Government in the said notification indicated that “Whereas the matter of dispensing with the resolution, through arbitration, of disputes arising out of the contracts entered into by this department with the contractors for the purpose of carrying out execution of public works has been under active consideration of the Government for some time past in order to get rid of the complicacies being encountered in the process;

Now, therefore the Governor after careful consideration of the matter is pleased hereby to say that there shall henceforth be no provision for arbitration for resolution of disputes that may arise out of the contracts to be entered into by this department with the contractors for the purpose of carrying out execution of Public Works and hence the West Bengal Form no. 2911/2911(i)/2911(ii) shall stand amended in the following manner:-

Clause 25 of the Conditions of Contract of the West Bengal Form No. 2911/2911(i)/2911(ii) shall be omitted”. The tender forms have been subsequently modified in PWD WB[6] by formation of dispute redressal committee vide provisions of Government G.O.No.8182-F(y) dated 26/9/2012 of the Finance Department. The clause number 25 reads “Except where otherwise provided in the contract. All questions and disputes relating to the meaning of specifications, designs, drawings and instructions, herein before mentioned and as to the quality of workmanship of materials used on the work or as to any other question, claim, right, matter or thing whatsoever, in any way arising out of relating to contracts, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works, or the executions or failure to execute the same, whether arising during the progress of the work, or after the completion or abandonment thereof shall be dealt with as mentioned hereinafter: If the contractor considers any work demanded of him/her to be outside the requirement of the contract, or disputes any drawing , record or decision given in writing the

Engineer-in-charge or any matter in connection with or arising out of the contract or carrying out of the work to be unacceptable, he/she shall promptly within 15 days request the chairman of the Departmental dispute redressal committee formed by the Government, in written for written instruction or decision. Thereupon, the Dispute redressal committee shall give its written instruction or decision within a period of three months from the date of receipt of the contractor's letter. Above provisions will be applicable irrespective of the value of the works to which the dispute may relate. " The Dispute redressal committee in the works department shall be constituted with the following officials as members:-

(i) Additional Chief Secretary/ Principal secretary/ Secretary of the Department concerned as Chairman,
(ii) Engineer-in-Chief/Chief Engineer or any officer of the equivalent rank of the Department as member,
(iii) One designated Chief Engineer/Engineer of the Department to be nominated by the Department as Member Secretary and Convenor,
(iv) One representative of the Finance Department of the Government not below the rank of Joint Secretary or Financial advisor in Case of works department as member.

This clause has been introduced by replacing the previous version of the clause 25 which runs as, "Except where otherwise provided in the contract. All questions and disputes relating to the meaning of specifications, designs, drawings and instructions, herein before mentioned and as to the quality of workmanship of materials used on the work or as to any other question, claim, right, matter or thing whatsoever, in any way arising out of relating to contracts, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works, or the executions or failure to execute the same, whether arising during the progress of the work, or after the completion or abandonment thereof shall be referred to the sole arbitration of the Chief Engineer of the department. Should the Chief Engineer be for any reason unwilling or unable to act as such arbitrator, such questions and disputes shall be referred to an arbitrator to be appointed by the Chief Engineer. The award of the arbitrator shall be final conclusive and binding on all the parties to this contract. The award shall be a speaking one, i.e the arbitrator shall recite facts and reasons arising in support of the award after discussing fully the claims and conditions of the parties." The above clause was valid only for works of value above Rs 100 Lakhs.

5. Amendment to arbitration and conciliation act 1996

The Arbitration and Conciliation act 1996 which is the principal act has been recently amended recently twice once in 2015 and again in 2019. The amendment act has brought various significant changes to the 1996

act. The amendment act seeks to establish and incorporate under section 43A[7] Arbitration Council of India. The council has been defined as a body corporate having perpetual succession and common seal. The council shall be established by the Central Government through notification in the official gazette.

As defined under clause 43C(i) (a)[7] the council shall consist of a chairperson who has been a Judge of the Supreme Court of India, Chief Justice of a High Court or a Judge of the High court or an eminent person having specialized knowledge in the administration of arbitration. A member who shall be an eminent practitioner of arbitration and an eminent academician having experience in research and teaching of arbitration and alternative dispute resolution system. The Chairperson shall be appointed by the Central Government in consultation with the Chief justice of India. The member shall be nominated by the Central Government. An eminent academician shall be appointed by the Central Government in consultation with the Chairperson. Beside this there shall be ex-office members from the Ministry of law and Justice, Ministry of Finance department of Expenditure not below the rank of joint Secretary, and one part time member from recognised body of commerce and industry on rotational basis to be chosen by the Central Government. The Chief Executive Officer shall be the ex-officio Member Secretary. The Chairperson, Member of the council shall hold office for a term of three years only.

The duty of the council as defined under section 43D(1)[7] shall be to promote and encourage arbitration, mediation and conciliation or other alternative dispute resolution mechanism .the council shall also frame policy and guideline for establishment of professional standard for arbitration. The duties of the Arbitration Council of India (refer section 43 D(2)[7]) includes the following:-

- Framing policy for grading of arbitration institutions;
- Recognition of professional institutions for accreditation of arbitrators;
- To promote institutional arbitration;
- To hold training, workshops and courses in arbitration in collaboration with law firms and institutes;
- To conduct examinations on various subjects related to arbitration;
- To make recommendations to the Central Government in the matters of arbitration; and several such other important functions.

The 1996 version of the Act specifies that the minimum required qualification of a person to be an arbitrator should be one who is competent to contract provided that the person should be of sound mind and shall not have any relationship with the parties involved in arbitration. However the amendment act specifically indicates and binds the

qualification of the arbitrators. As per provisions of section 43J [7] of the amendment act the qualification, experience and norms for accreditation of arbitrators are mentioned under the eight schedule. The person shall not be qualified as an arbitrator unless he is an advocate or Chartered accountant or Cost Accountant or Company Secretary with ten years of experience or an Officer of Indian legal service or Government officer working in Government or Autonomous body or Public Sector Undertaking or at Senior level managerial position with ten years of experience with Law degree or Government officer working in Government or Autonomous body or Public Sector Undertaking or at Senior level managerial position with ten years of experience with Engineering degree or self-employed or an officer having administrative experience in Central or State Government. Above all the Arbitrator should have general reputation as an honourable individual with integrity and impartiality.

Model fee for the arbitrator depending on the money value of the claim which has risen the dispute has also been fixed in the amendment Act of 2015 as per provisions laid down in the fourth schedule[8] of the act.

6. Conclusion

Arbitration is a powerful methodology of alternative dispute resolution without the direct involvement of Civil Court of law. But certain incidents of long drawn and expensive arbitration process especially in Engineering contracts has led many government bodies to drop the arbitration clause or adopt conditional arbitration. Now in engineering contracts arbitration process is being replaced by empowered departmental dispute resolution committees. Finally when all the channels of dispute resolution committee are closed the aggrieved contractor has no other means left but to take recourse to the Civil Court for dispute resolution through formal trial as per civil procedure code, which is formal and hence time taking. However realising the obvious difficulties the Indian legislature has amended the principal act for good. The new amendments in the principal act of 1996 shall go a long way to encourage the process of adopting arbitration for speedy disposal of disputes in engineering contracts.

7. References

[1] Standard Bid Document for e-Tendering (for works costing above Rs. 5 Crores) of the Kerala PWD, (2017), pp 82.

[2] General Conditions of Contract, Central Public Works Department, Government of India (2011),pp 60, 61.

[3] Standard Bidding Document, Procurement of Civil Works, Part-I, Maharashtra PWD, (2017), pp 35.

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[4] Bihar Public Works Contracts Disputes Arbitration Tribunal Act, (2008), sec- 3, part-2.

[5] Notification No. 558/SPW dated 13/12/2011, of the Principal Secretary, P.W Dept. Govt. of WB.

[6] Government order related to, modification of clause relating to settlement of disputes under the conditions of contract, .No.8182-F(y) dated 26/9/2012 of the Finance Department, Govt. of WB.

[7] The arbitration and conciliation (amendment) act, (2019), PRT-IA, pp 4, 5, 7, 8 & 11.