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CONSTRUCTION ARBITRATION IN THE MAZE OF PROJECT DELAYS AND TIME EXTENSIONS

AUTHOR(S)

Shree Dwivedi
IV Year, Student at Symbiosis Law School Noida

Shreya Mishra
IV Year, Student at Symbiosis Law School Noida

Introduction

Construction business is one of the highest drivers of the Indian Economy. The significance of the Construction Industry is evident from the Foreign Direct Investment ["**FDI**"] inflows in the construction sector including infrastructure activities which have increased in the last two years from $1861 million to $2402 million.[59] Attracting a major portion of Government expenditure, the Construction Industry gives birth to complex legal issues which is further aggravated by extreme technicalities.

Construction Contracts are primary instruments that govern the execution of the projects as well as the relationship between the parties involved. In simple terms a contract negotiated between parties for construction of a particular asset such as roads, bridges, buildings, ships etc. is a construction contract.[60] There are a multitude of documents and parties involved in a single Construction Project, wherein the employer is usually the principal, and the contractor and subcontractor are engaged by the principal. The construction contract law is the application of general principles of the Indian Contract Act ["**ICA**"] to a specific situation.[61] A contract is the backbone of any dispute and the same ought to be drafted in a way which provides a mechanism for the resolution of such disputes. In India, the most commonly used mechanism is Arbitration.

[59] Department for Promotion of Industry and Internal Trade, *Fact Sheet on Foreign Direct Investment (FDI) Inflow;* <https://dpiit.gov.in/sites/default/files/FDI_Factsheet_September_2023.pdf> accessed 20 January 2024.
[60] Accounting Standard (AS) 7
[61] Chitty J and Beale HG, *Chitty on Contracts* (35th edn, Sweet & Maxwell, Thomson Reuters 2023).

A construction contract lays down the specific timelines to complete the construction project. When these timelines are not met or the manner of performance is not in accordance with the provisions of ICA, it results in a breach of contract. Delay on the part of the contractor is one of the prominent causes of dispute that arises when there is an obligation on the contractor to complete the construction project at a fixed date.[62] However, the same can be remedied once the breach is established.[63]

This paper delves into the intricate web of project delays, claims of liquidated damages and grants of extension of time. Furthermore, it explores the status of non-signatories in construction arbitration and emphasizes the delays caused due to the role of expert advisory in arbitration proceedings.

Navigating Construction Delays

In the intricacies of construction projects, delay stems out as a ubiquitous challenge. Certain delays can be attributed to the employer, while others are attributed to the contractor. When the delay is caused by the contractor, the contract typically contains a mechanism to assess the Liquidated Damages ["**LD**"]. On the other hand, the delay can be traced back to the employer, which includes but is not limited to, delay in site possession,[64] appointment of key personnel, delay in issuing of drawings,[65] instruction and material[66] or due to insufficient funding.[67]

Interplay between 'Project Delays', 'Grant of Extension of Time' and 'Liquidated Damages'

The breach of contract can be remedied by claiming LD in accordance with Section 74 of ICA if the amount is pre-estimated into the contract.[68] The nature of a contract plays a vital role in determining the applicability of the LD clause if it establishes that 'time is the essence of contract.' In the case of *Hind Construction Contractors v State of Maharashtra*,[69] ["**Hind Construction**"] the contractor was unable to complete the work within the timeframe mentioned in the contract and thereby sought an extension of time. The contention of the employer was that time being the

[62] The Indian Contract Act 1872, s 55
[63] *Indian Oil Corporation vs Llyod Steel Industries Ltd.* 2007(4) Arb LR 84, 2008(1) Arb LR 170 (Del).
[64] *National Highways Authority of India v NCC-KNR* 2013 SCC OnLine Del 600, *Wells v Army & Navy Co-operative Society* [1902] 86 L.T. 764 (U.K.).
[65] *Krishna Bhagya Jala Nigam Ltd. vs G. Harishchandra Reddy* (2007)2 SCC 720.
[66] *Union of India v Indian Proofing & General Industries* 1998 (Supp) Arb LR 181, 1998(3) RAJ 281 (Del).
[67] *Hyderabad Municipal Corporation Vs M. Krishnaswami Mudaliar* AIR 1985 SC 607.
[68] *Fateh Chand v Balkishan Das* AIR 1963 SC 1405.
[69] *Hind Construction Contractors v State of Maharashtra* (1979) 2 SCC 70.

essence of the agreement, an extension could not be granted. Finally, the employer used the performance guarantee to terminate the agreement and withheld the payment of the contractor.

The court observed that to determine the validity of the termination, it is important to ascertain the intention of the parties. The contract explicitly contained clause 2 wherein it was mentioned that the time was the essence of the contract. But the court decided to examine two more clauses, the LD clause, which levied the damages for delay caused by the contractor weekly, and the extension of time clause. The court did not plainly read that time was of the essence but went on to interpret the other clauses as well. On reading all the three clauses, the Court observed that the presence of a time extension clause nullifies the time being the essence of the contract. Thus, the apex court laid down two conditions to determine if time is the essence of contract: the first is the presence of a time extension clause, and the second is the LD clause for the delay. However, the court might have overreached by not strictly interpreting the bare text of clause 2 of the contract. Examining other provisions becomes crucial for determining the true intentions of the parties only in cases where the plain text of the contract is ambiguous.[70]

At the same time, it is pertinent to note that the mere presence of a time extension clause and allowing an extension to complete the project does not always render time as the essence of the contract.[71] The same principle was extended in the case of *Arson Enterprises*[72] wherein there was no explicit mention of 'time being the essence' of contract, but the court, by interpreting the termination clause and extension of time clause, said that time is not the essence of the contract. The ratio in both cases was the same, however, in the Arson Enterprises Case the Supreme Court did not deviate from reading the plain text of the contract. The Hon'ble Court,[73] while interpreting Section 55[74] as well as deciding the issue of levy of LD, held that a delay clause and an extension of time clause in the same contract were contradictory in nature, thus making time irrelevant to the contract.

There is confusion when the employer claims damages on the basis of 'time is the essence' despite the fact that time was not originally stipulated in the contract, raising the question of whether time is the essence of the contract.

[70] *Abdulla Ahmed v. Animendra Kissen Mitter.* AIR 1950 SC 15.
[71] *ONGC Ltd. v Saw Pipes Ltd.* (2003) 5 SCC 705.
[72] *Arosan Enterprises Ltd. v Union of India*, (1999) 9 SCC 449.
[73] *McDermott International Inc. v Burn Standard Co. Ltd.*(2006) 11 SCC 181.
[74] Indian Contract Act 1872, s 55

Employers cannot cancel contracts under Section 55[75] if not performed by the original date but are not obligated to extend indefinitely.[76] Indian courts allow employers to issue notice after the original time period expires, specifying a new completion date.[77] The notice must be clear[78] and terms agreed upon by both parties thereby making unilateral extensions invalid.[79]

The situation where the delay caused by the employer ultimately leads to an overall delay in the completion of the project raises the question of whether the contractor can claim a reduction in the LD levied. It is a well-settled fact of law that the amount levied as LD is reduced if the delay is also caused by the employer. LD can be claimed up to the amount for which the contractor is liable.[80]

Beyond the Signature: The Position of Non-Signatories in Construction Arbitration

The next question that perplexes the construction industry is what happens when a subcontractor suffers the consequences of the delay caused in the construction project due to any of the parties involved.

Before 2015, under the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"] only the signatories were bound by the contract. Over time, the position of non-signatories has changed dramatically. The original position did not allow non-signatories to be a party to the arbitral dispute in domestic[81] as well as international[82] arbitration. However, in *Chloro Controls India (P) Ltd. v Severn Trent Water Purification Inc.*,[83] ["**Chloro Controls**"] the court took a broader interpretation and held that even non-signatories could be parties to an arbitration dispute. The court gave four factors to consider:

1. Whether there exists direct relation with the party who actually signed the agreement.
2. A direct subject matter similarity between the parties,
3. The combined nature of the terms of the contract.
4. Whether it would be justifiable to include such non-signatory parties.

[75] ibid. 4
[76] *N. Sundareswaran v Sri Krishna Ref.* AIR 1977 Mad. 109.
[77] *Mulla Badruddin v Master Tufail Ahmed* 1960 SCC OnLine MP 170.
[78] *Tandra Venkata Subrahmanayam v Vegesana Viswanadharaju* 1967 SCC OnLine AP 7 [7].
[79] *Claude-Lila Parulekar v Sakal Papers* (P) Ltd. (2005) 11 SCC 73.
[80] *Kailash Nath v NDMC* ILR (2002) 1 Delhi 441 [5], [11]-[6].
[81] *Sukanya Holdings Pvt. Ltd. v Jayesh H Pandya* AIR 2003 SC 2252.
[82] *Sumitomo Corpn. v CDC Financial Services (Mauritius) Ltd.* (2008) 4 SCC 9.
[83] *Chloro Controls India (P) Ltd. v Severn Trent Water Purification Inc.* (2013) 1 SCC 641.

This case discussed the Group of Companies Doctrine ["**GOCD**"], which is the idea of 'claiming through or under,' as stated in Sections 8[84] and 45[85] of the Arbitration Act. Thus, allowing non-signatories to approach the tribunal. But in the Judgement of *Cox and Kings v SAP*,[86] ["**Cox and Kings**"] the court held that the Chloro case is incorrect to the extent that 'non-signatories' could be included by interpreting the phrase 'party claiming through or under' which is typically intended to involve successor-in-interest of a party in a derivative manner. Thus, the law established through this case was that arbitration agreements can bind non-signatories in accordance with GOCD.

The Indian Arbitration Act allows non-signatories to refer a matter to arbitration and be bound by an arbitral award if they meet the requirements of Section 35 of the Act,[87] which defines parties and persons claiming under them. This was made clear by the court in the case of *Cheran Properties Ltd. v. Kasturi and Sons Ltd.*[88] ["**Cheran Properties**"] This shows that Indian courts have accepted arbitral verdicts against non-signatories and acknowledged their right to participate in an arbitral proceeding.

The issue is whether arbitration agreements can be extended to subcontractors who are the non-signatories to the agreement. The bare perusal of the provision makes it quite clear that a non-signatory, through an application, can initiate the arbitration. But a non-signatory can only be allowed to the arbitration proceeding if the original parties as well as the non-signatories agree.[89] The *onus probandi* on the non-signatory increases to show that there is a direct consequence of the arbitration upon them.[90]

Globally, the doctrine is one of the well-recognized methods through which non-signatories usually become a party to the dispute. In France, the case of *Dow Chemical v. Isover Saint Gobain,*[91] ["**Dow Chemicals**"] provided that if the parties had a common intention, then the arbitration agreement could be extended to non-signatories. Whereas, the English law has taken a restrictive approach in implementing the GOCD.[92] In the USA, although the GOCD is explicitly accepted, it has used different consensual as well as non-consensual doctrines to bind non-signatories to the agreement.[93]

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[84] The Indian Arbitration and Conciliation Act, 1996, s 8
[85] The Indian Arbitration and Conciliation Act 1996, s 45
[86] *Cox and Kings v SAP* (2022) 8 SCC 1.
[87] The Indian Arbitration and Conciliation Act 1996, s 35
[88] *Cheran Prop. Ltd. v Kasuri and Sons Ltd.* (2018) 16 SCC 413
[89] *Chloro Controls India (P) Ltd. v Severn Trent Water Purification Inc.* (2013) 1 SCC 64.
[90] ibid. [143]-[158].
[91] *Dow Chemical v Isover Saint Gobain*, ICC Award No. 4131, YCA 1984, at 131.
[92] *Peterson Farms INC v C & M Farming Limited* [2004] EWHC 121 (Comm).
[93] *American Fuel Corp v Utah Energy Development Co, Inc*, 122 F.3d 130.

In the Indian context, It is not possible for a subcontractor who is not a signatory to the arbitration agreement between the main contractor and the employer to initiate arbitration proceedings against the employer for losses incurred as a result of that employer's conduct. The subcontractor's claim against the main contractor, and vice versa, will be governed by the subcontractor's 'Subcontract Agreement.' In *Mcdermott International Inc vs Burn Standard Co. Ltd.,*[94] a subcontractor claimed damages under the arbitration clause of the subcontract due to delays by the main contractor. The main contractor was held liable for compensating the subcontractor. Thus, if the subcontractor causes delays, the main contractor can seek indemnification, depending on the sub-contractual terms. In India, arbitration between the employer and subcontractor is not mandatory. It depends on the consent of both parties.

Recently in 2023, the Constitutional bench has held that the GOCD must be incorporated in the Indian arbitration jurisprudence considering it is quite important to determine the intention of the parties while entering into complex agreements.[95]

From Delayed Projects to Prolonged Arbitration: Role of Expert-Advisory in Construction Arbitration

The construction industry is prone to delays, and in order to establish those delays, parties need to supplement the same with evidence. This is where the need for expert evidence arises. It is primarily due to *Folkes v. Chadd,*[96] that expert witnesses were introduced into construction and engineering disputes. Mr. Smeaton's expertise in harbors and construction demonstrated the importance of expert opinions based on factual understanding in this case, which established the first rules regarding the admissibility of opinion evidence. During the trial, the court recognized that expert opinions with solid factual foundations were valuable for determining complex issues, such as the cause of harbor decay.

The construction contracts, which include a variety of complex issues such as claims for extension of time or interpretation of the terms such as 'general industry standards or financial evaluation of disruptions and delays,[97] expert evidence is essentially required to provide clarifications with respect to the majority of these technically complicated points. It is also advisable for the parties to engage an Expert at the early stages of arbitration to save time and present their case in a more

[94] *Mcdermott International Inc vs Burn Standard Co. Ltd,* (2006) 11 SCC 181.
[95] *Cox & Kings Ltd. v SAP India (P) Ltd.* 2023 SCC OnLine SC 1634.
[96] *Folkes v Chadd* 99 E.R. 589.
[97] Horne R and Mullen J, 'The Expert Witness in Construction' [2013] John Wiley & Sons, 51.

conducive manner.[98] Furthermore, it is a well-settled principle in both domestic[99] and international[100] arbitration that the opinion of an Expert is just advisory in nature, therefore the tribunal is not bound by such evidence.

The next essential question is: How are these experts appointed? There are primarily two ways to appoint an expert: tribunal-appointed experts and party-appointed experts however, such appointment is subject to the law of the determined seat.[101] Additionally, if the parties expressly agree to submit themselves to an institutional arbitration, then the expert appointments are subject to the procedure prescribed by such institution. For instance, Article 29 of the UNCITRAL Arbitration Rules specifically mentions tribunal-appointed experts,[102] while Article 27(2) of the same rules refers to party-appointed experts.[103] A comprehensive approach is provided by the ICC Rules, which address parties' appointed experts in Article 25(3),[104] while tribunal-appointed experts are addressed in Article 25(4)[105] under the broader category of 'Establishing the Facts of the Case.'

Expert evidence is further classified into the following three categories:[106]

- Technical Expertise provides a specialized area of knowledge where the lacks knowledge.
- Legal expertise assists the tribunal pertaining to relevant laws.
- Expertise in 'Delay, Disruption and Quantum' helps in filtering the facts crucial to evaluate claims.

Pitfalls of Expert Evidence

The concept of evidence expert was introduced to save time and help the tribunal to understand the parties' point of view in a better way, however, the process often leads to delayed arbitral proceedings. Some of the essential problems are discussed below:[107]

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[98] 'Strategic Considerations after a Dispute Has Arisen' (*Global Arbitration Review*) <https://globalarbitrationreview.com/guide/the-guide-ip-arbitration/second-edition/article/strategic-considerations-after-dispute-has-arisen> accessed 20 January 2024.
[99] *Malay Kumar Ganguly v/s Dr. Sukumar Mukherjee* (2006) 6 SCC 269.
[100] *UK Queens Bench Division UMS Holding Ltd and others Vs Great Station properties SA and another* (2018)Bus LR 650.
[101] United Nations Commission on International Trade Law, 'Model Law on International Commercial Arbitration' (1985, with amendments adopted in 2006) arts 19, 26; International Chamber of Commerce, 'Arbitration Rules' (2017) arts 25(3), 25(4).
[102] UNCITRAL Arbitration Rules 2014, art 29
[103] UNCITRAL Arbitration Rules 2014., art 27
[104] ICC Arbitration Rules 2017 art 25(3)
[105] ICC Arbitration Rules 2017 art 25(4)
[106] Nigel Blackaby and Alex Wilbraham,'Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration' (2016) 31 ICSID Review 655, 660.
[107] Mirna Monla, 'Testing the Reliability of Expert Evidence in International Arbitration' (2022) 16 Disp Resol Int'l 169.

- Bias in Party Appointed Experts

It is the primary duty of the expert to testify truthfully over the duty they owe to the party that appointed them.[108] Most of the party-appointed experts are biased towards the party which appointed them which ultimately leads to the appointment of a new expert by the tribunal. This attracts an additional cost which could have been avoided if the expert was appointed by the tribunal since the beginning.[109] Furthermore, as the party-appointed experts act as a partisan advocate towards their appointers, a lack of confidence is prone to be formed between the parties. Since the appointment of the experts is from a limited pool of people, the same people tend to get appointed again and again by the same party which causes the experts to be biased towards the same people in order to maintain the steady appointment and income.

- Divergent Approaches in Expert Reports

There are instances where the tribunal's corresponding experts utilize different database and methods to construe their reports.[110] There is a flawed assumption that experts form their reports on the basis of objective facts which leads to the same conclusion. Cases where multiple experts are forming reports on the same issue mostly end with conflicting opinions. The reliance of experts on a diverse array of methods is a pivotal issue pertaining to delay and disruption experts, as well as other experts in fields with different methods to analyze the data.

- Asymmetric Deployment of Experts and the Rising Peril of Over-Reliance

One party may wish to present expert evidence on a specific topic when the other party does not think it is necessary, or one party may have called many experts on a certain topic, whereas the other party may only appoint one expert. In many cases, parties attempt to bolster their arguments by using expert evidence, believing that the number of experts they call increases the strength of their arguments. The arbitral process is often degraded by excessive and unnecessary reliance on expert evidence, which ultimately delays the proceedings.

Charting The Course Ahead

In construction disputes, particularly those involving small amounts, pursuing arbitration may not be economically justified, leading contractors to forgo their entitlements under contract agreements. This disproportionately affects construction contractors, and to address this issue, it is recommended to establish a single joint expert for construction contract agreements specified

[108] ICC digital library <https://library.iccwbo.org/content/dr/COMMISSION_REPORTS/CR 0041.htm?l1=Commission+Reports> accessed on 20 Jan 2024.
[109] Paul Friedland and Stavros Brekoulakis, '2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process' (Survey, 2012) 29.
[110] Paul Friedland and Stavros Brekoulakis, '2018 International Arbitration Survey: The Evolution of International Arbitration' (Survey, 2018) 33.

in the arbitration clause. This expert, appointed jointly by both parties or ordered by the tribunal, aims to provide objective and professional opinions, potentially saving costs and time. The same was affirmed in the Judgement of *Chun Wo Building Construction Ltd v Metta Resources Ltd,* ["**Chun Wo**"] wherein the Judge emphasized the abundance of expert witnesses, suggesting that employing a single joint expert for each discipline could have halved their number. This approach would lead to a shorter trial, earlier hearing, faster resolution, and substantial cost savings.[111] The use of a single joint expert is particularly advocated for smaller cases, where the traditional adversarial approach involving individual party-appointed experts could be prohibitively expensive.[112]

When multiple expert witnesses and contentious issues are involved in an arbitration, the technique of witness conferencing is highly beneficial. Through witness conferencing, which has roots in common law courts, experts are able to address opposing views directly, thus promoting efficiency, cost-effectiveness, and focused resolutions. As outlined by institutions like the Chartered Institute of Arbitrators, expert witness conferencing guidelines and procedures enhance the process and ensure a just, quick, and cost-effective outcome[113]. With this methodology, expert partisanship is reduced and meaningful discussions are promoted, which contributes to positive outcomes in international arbitration.

Assisting the tribunal in determining the objective truth are the functions of tribunal-appointed experts in civil law jurisdictions. The use of party-appointed experts in arbitration remains prevalent; however, tribunal-appointed experts are increasingly being sought to alleviate some of the issues observed with their party-appointed counterparts. By removing financial incentives, tribunal-appointed experts are perceived to reduce bias; however, they may also limit parties' autonomy and put the tribunal at risk of over-relying on expert opinions[114]. Despite possible disadvantages, tribunal-appointed experts offer an alternative means of resolving disputes, emphasizing impartiality and speeding up the process.

Conclusion

A construction dispute involves intricate and multiple interactions between timelines, liquidated damages, and arbitration mechanisms. As a result, construction arbitrations are complicated by the issue of whether time is an essential component of the contract and the subsequent implications

[111] *Chun Wo Building Construction Ltd vs Metta Resources Ltd* [2016] HKCFI 1357.
[112] *Quarmby Electrical Ltd v Trant (t/a Trant Construction)* [2005] EWHC 608 (TCC).
[113] Chartered Institute of Arbitrators, 'Guidelines for Witness Conferencing in International Arbitration' (April 2019) 11.
[114] Klaus Sachs and Nils Schmidt-Ahrendts, 'Protocol on Expert Teaming: A New Approach to Expert Evidence', (ICCA Congress Series No 15, Kluwer Law International, 2011) 135, 141.

for claims and terminations. The evolving position of non-signatories in arbitration agreements, expands the scope of participation in arbitration proceedings. There are still challenges, however, especially regarding subcontractors' rights and the need for explicit agreements between parties.

Construction arbitration also possesses opportunities as well as pitfalls due to the indispensable role of expert evidence. Although the opinions of experts play a crucial role in comprehending intricate technical matters, biases and diverse methodologies among experts appointed by parties might present difficulties. The effectiveness of arbitration processes may be hampered by the possible over-reliance on expert testimony and the unequal appointment of experts.

In order to streamline the arbitration process, single joint experts, witness conferences, and the careful use of tribunal-appointed experts are recommended. Through these measures, construction arbitration can be made more efficient, costs can be reduced, and impartiality can be promoted. As the construction industry continues to burgeon, addressing these challenges becomes imperative for fostering fair and expeditious dispute resolution, ultimately contributing to the sustained growth of this vital sector in the Indian economy.