

STUDY ON CONTRACTUAL CLAIMS AND STAKEHOLDER'S DISPUTE LEADING TO ARBITRATION IN CONSTRUCTION INDUSTRY

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Abstract: The construction industry worldwide is about to grow approximately 85% by 2030 to 15.5 trillion with India, China and US accounts for up to 57% of the increase in total growth among one of the major contributors for India's GDP and expecting to be the engine for overall development. Time is money and the delay in any construction project distresses time and hence money, which is must for any economy. The timely completion of construction projects is well-thought to be one of the most imperative factors bringing to various project success, as well as the safety and the quality. Disputes have become a prevalent feature in Indian construction industry. If the resolutions of disputes are not done quickly they can escalate the project causing schedule delays which lead to claims and that require litigation proceedings for resolution and destroy business relationships. It is very important to understand the root cause of disputes as early as possible so that disputes can be resolved in an optimum time. This paper deals with the issues that construction professional should address while countering claims and how arbitration is used as a dispute resolution mechanism in Indian construction projects.

Keywords: Construction Industry, contractual claims, disputes, arbitration

Introduction: A great saying by a great man, "An ounce of mediation is worth a pound of arbitration and a ton of litigation!"- Joseph Grynbaum. Disputes and arbitration has seen a melodramatic rise in past decade or so. Most of the projects due to numerous reasons encounter time overrun which is directly proportional to the cost. The terms conflict, claim and dispute are frequently used interchangeably, but their significances are very different.[1]

Conflict: It is the serious agreement and disagreement about something important (Collins, 1995). Willmot and Hocker (1998),provided a comprehensive definition of conflict as "an expressed struggle between at least two independent parties who perceive incompatible goals, scarce resources, and interference from other achieving those goals".

Claim: Its for the assertion of a right to money, property or remedy (Powell- Smith and Stephenson, 1993). (1994) explained a claim as "a request for compensation for damages incures by any party to a contract".

Dispute: "any contract question or controversy that must be settled beyond the jobsite management" (Diekmann and Girard, 1995).

Dhaval M. Parikh & G. J. Joshi (October 2013),carried out the analysis to find the disputes and claims effect on the overall performance of contract timelines. As supposed, it wasfound that almost all contracts were running late and stipulated period of completion was surpassed by a decent period. The delays up to 200% of the original period of completion were also observed in some cases. [2]

An EOT claim is an indication of documents, that is to be put forward by the contractor in order to substitute the reason for the delay in the project,

claiming additional time for completion of the project. Where claims, disputes arise between both the parties i.e. contractor and employer, it often happens that settlement cannot be the negotiation. Rather than have the matter to be brought before the courts, the parties often prefer that the question should be decided by an arbitrator who is the expert of the building or the civil engineering industry. [4]

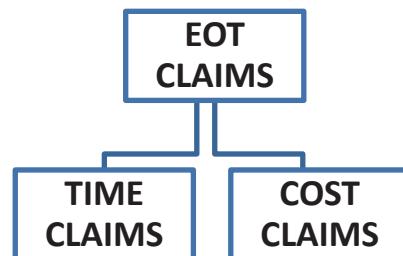


Fig. 1: Classification of EOT claims

Under the Act, Arbitration and Conciliation Act 1996, the Arbitral Tribunal can decide the questions of its own jurisdiction and also objections with respect to the existence and validity of the arbitration agreement. Section 16(1) confers upon the arbitral tribunal not only a competence to rule on its own jurisdiction but also to rule on any objections with respect ton the objection or validity of the arbitration agreement qua that of the contract.[3]

There are two ways to resolve the disputes through adjudication –arbitration or the litigation proceedings at courtThe most preferred way for the resolution is the arbitrations for the three essential reasons: (a) confidentiality (b) efficiency of time (c) control over in the process of dispute resolution.[5]

Evolving Challenges and Intrusions for Construction Industry:[6]

Ambiguities at various instances: This challenge for the Construction industry is the resolution of ambiguities in respect to the characters of the various stakeholders in construction projects. Ambiguities leading to extensive disputes and work stoppage are caused due to loosely framed contract conditions. These ambiguities result in the escalation of project cost because of time overruns which lest the country in the detrimental condition the need for model contract conditions has been felt in this context leading to sincere efforts from various quarters

Risks and Uncertainties: The sector of construction is prone to risks from uncertainties in market scenario, demand variations, prize oscillations, labour requirements, political interventions, judiciary dictums and policy environment. Hence it's very indispensible to identify various political risks, assess the scale and impact and articulates suitable strategies for tiding over the possibilities.

Dispute resolution and arbitrations: The major source for time and cost overrun in construction industry is dispute and hence there is a necessity for Alternate Dispute Resolution Mechanisms and the essential clauses united in the contract documents to avoid the delays and interruption of projects and bypass the long winding legal process.

Intellectual Property Rights: According to the GATT agreement and the world trade organisation, patenting and intellectual property rights in construction sector has not received adequate attention. This can result into a major risk for the developing nation as many global patent holders may demand royalty in accordance with innovative technology and tools related to the planning and construction process that results into increased construction cost and international disputes.

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Claim: It is for the assertion of a right to money, property or remedy (Powell- Smith and Stephenson, 1993). Likewise, Semple et al. (1994) defined a claim as "a request for compensation for damages incurred by any party to a contract".

Dispute: It is any contract question or controversy that must be settled beyond the job management (Diekmann and Girard, 1995).

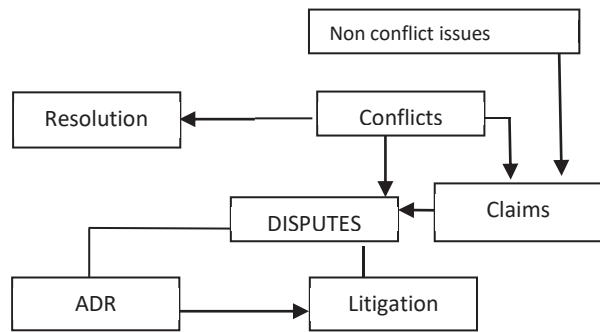


Fig. 2: Conflicts, Claims and Disputes

Source: adapted from Kumaraswamy,1997

Problems generally contains variations in work, site conditions encountered, partial changes in quantities, loss due to natural disasters, re-inspection and approval, possession prior to completion, escalation of price, currency fluctuation effect, ambiguity in specifications and drawings.

Claims in Construction Industry:



Fig. 3 Claims in industry

Source: SigitasMitkus and Tomas Mitkus/ Procedia-Social and Behavioural Sciences 110 (2014) 777-786

Several issues are arises during the execution that are commonly involves that the contractor requesting for time extension or reimbursement of a supplemental cost, or sometimes both. However, if the claim put out by contractor is does not agree by the owner. Thus, the differences in the interpretations and the issue are taken in the form of a Dispute, as explained in fig.3 Claims are becoming an inescapable and unpreventable burden in contemporary projects involving new technologies, specifications and high expectations from the owner.

Types of Construction Claims [7]: It mainly contains claims due to delay, price increment claims, variation in work order claims, claims due to extra item and variation, deferent site condition claims, claims due to damage, claims due to lose in profit

Causes of claims [7]: It mainly contains delay in supply of drawings and materials; loss due to extra overheads on account of extension of time limit; change in work scope; improper bid increases the

Contractual Problems in Construction Industry

cost of materials and fuels; changes in plans; specification during construction in project; etc.

Causes of Disputes [8]: This mainly contains co-ordination, delays, design, quality and workmanship, site condition, variation, tender. Claims Management [9] The claim management process has been explained from the perspective of a contractor:Claim Identification, claim Notification, claim Substantiation, analysis of time and cost impacts of the change, pricing of the change, negotiation of the claim, and decision of Engineer/Owner.

Case Study: Indian infrastructure investment in general and specifically highway construction in particular have seen variation increase in the recent times. It has brought a paradigm shift in the way of working of the highway construction industry with an increased pressure over the stakeholders, namely the employees, the contractor and the consultants for high quality and timely project delivery. This paper deals with the arbitration case of National Highways Authority of India Vs. Hindustan Construction Co Ltd.[10]

Introduction of the case:

1. All the disputes are filed under Section 34 of the arbitration & conciliation Act, 1996 by the NHAI is to an award dated 30th December 2014 passed by AT.
2. NHAI entered into CA on 26th Feb. 2005 with Respondent HCC for construction of the Chennai bypass phase II (Connecting NH-4 and NH-5) and widening of Chennai bypass I (Connecting NH-45, and NH-4) for a contract price of Rs. 404,97,93,145.00 which has to be carried out in 30 months.
3. The dispute referred to the AT for adjudication were dispute nos. 6,7,8,9 comprising:-Presiding arbitrator Mr.D.Shree Rama Murthy, Nominee Arbitrator of HCC: Mr. P Shridharan, Nominee Arbitrator of NHAI: Mr. Pawan Sharma

Disputes: Dispute No. 6: This dispute pertains to quantity of item no 7.04(f) M-25 grade concrete and 7.04(g) under which the HYSD steel had exceeded by more than 25% which was set out in BOQ. The cost of an additional quantity of work in the BOQ was exceeded by 1% of the contract value and as per clause 52 of GCC/CoPA of the contract, the rates of these items were to be revised. Engineer had determined the BOQ that was accepted by HCC but later engineer revised the varied quantities by adopting new rates and declared previous rates as provisional and stated that the final rates would be after the determination of the NHAI that led HCC to approach DRB, where DRB accepted the NHAI's stand and recommended that the new rates fixed would not become final in the absence of NHAI. This again invoked HCC for arbitration, where the decision is taken in favor of HCC stating that the

engineer was duty bounded to take prior approval of NHAI before determining the rates.

Dispute No. 7: It is concerned with the rates determined by the engineer in relation to some orders were initially the once agreed to by HCC but were subsequently reversed by the engineer. The main issue was with regards with the percentage overheads adopted while deriving new rates were agreed to be about 16.5% between engineer and HCC and it was reduced to 8% by the engineer which was also the main cause of dispute between both the competent parties.

Dispute No. 8: It pertains to canal crossing at suitable location of project area at the request of PWD. The main issue was whether the rate were to be the ones determined by the engineer or the ones claimed by HCC. The value of the contract work excluded the cost of work on items, for which the rates were fixed under variation clause 51 and 52, but it was not originally anticipated, new rates had to be fixed.

Dispute No. 9: It pertains to the Method of calculation of the price adjustment. Issues framed by AT:

- a. What was the correct method of determination of price adjustment?
- b. Whether HCC's method of determining the percentage components by applying the factum of 0.85 in the price adjustment formulae was justified in terms of the provisions of the contract? There was no provision in the CA which stipulated that the rate after the application of rebate was to be used as base value. The BOQ was on the quoted bids not on the quoted rates.

Solutions:

Dispute No. 6: The court finds no legal error in the AT interpreting clause 70.3 of the CoPA as entitling the HCC to Rs.28,17,06/- as balance amount due towards varied works for items 7.04(f) (i) and (g). The award of interest @ 10% and if the said amount was not paid within 90 days, 15% from the date of award till the date of payment also suffers for no legal infirmity.

Dispute No. 7: There is no chance to vary the rates where once engineer has fixed rate with the consult of HCC, As per Clause 52.1 of the GCC.

Dispute No. 8: The AT has analyzed the various provisions of the contract and determined the correctness of the rates as claimed by HCC and was in its favour.

For Dispute No. 9: Court found that a detailed analysis had been undertaken of the relevant clause of the contract. Clause no 14.4 stipulated that the rates and prices quoted by the bidder were subject to adjustment during performance of the contract in accordance with clause 70 of the CoPA. 85% of the value of work done by the contractor was subjected

to price adjustment and 0.85 factum was to be applied while calculating the escalation for each of the components. The AT found that NHAI was liable to pay Rs 14,75,78,143 with simple interest @ 10%. Clause 70.1 stated that the amount payable to the contractor and valued at base rates and prices (IPCs) pursuant to clause 60.1 shall be adjusted in respect of rise or fall in the indexed cost for labour, contractor's equipment, etc.

Judgement: Finally court has found that there is no interfere in the impugned majority award of the AT and court dismissed the petition with cost of Rs. 10,000/- which has to pay by NHAI to HCC within four weeks.

Recommendations and Conclusions:

Dispute No. 6: The engineer should have fixed appropriate rate based on his opinion and notified contractor with a copy to employer. Till this process gets completed, the engineer should have adopted the provisional rate. Also, the BOQ calculated was not much appropriate because of which quantity of items varied. The proper estimation of quantity could have done to minimize the escalation in quantities and hence the claims.

Dispute No. 7: The engineer should have done prior evaluation and should not have changed the overhead that was once agreed by HCC. Also, there might be a less experienced engineer or improper study of contract documents and drawings. If he'd have done it properly then chances of disputes and claims would have minimized.

Dispute No. 8: PWD had given the proper estimated quantity and the rates for the canal work. New item rates had to be fixed because they had used the

variation clause 51 and 52. Item rates for the canal work had not given by the PWD. If they would have given the proper item rates disputes would not have occurred.

Dispute No. 9: There would have been a proper provision in the CA which stipulated that the rate after the application of rebate was to be used as base value and the BOQ should have taken on the quoted rates to minimize the claims and hence occurrence of disputes.

Conclusion: The critical study undertaken in this research work covers various definitions of conflicts & disputes. Construction projects are big budget accomplishments. It is very difficult or it is impossible, to completely escape from construction conflicts but it can be curtailed to bring many rewards, such as reducing contractual problems, establishing alternative dispute resolution mechanisms etc. In construction projects, an active and cooperative project team head, contractor, and consultant can reduce the effects of large complex problems. The key factor is to try to stimulate all parties to unite rather than compete on projects.

Abbreviation

EOT	-Extension of Time
GATT	-General Agreement on Tariff and Trade
BOQ	-Bill of Quantity
NHAI	-National highway authority of India
CA	-Contract Agreement
HCC	-Hindustan construction Co. Ltd
DRB	-Disputes Redressal Board
PWD	-Public Work Department
AT	-Arbitral Tribunal
CoPA	-Conditions of Particular Application

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