

Multi-Party Arbitration and Consolidated Arbitration: Legality of The Concept in India

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Abstract

With a sudden boost in the infrastructure and construction industry, there is an evident increase in global competitiveness and challenges associated with the construction of developmental projects. With the increasing pace of infrastructural development in India, the industry faces new and emerging challenges related to national and international project development, with the most prominent being dispute resolution challenges. The federal and international construction contracts are increasingly becoming complex and intertwined to balance the risk allocation and rights and liabilities associated thereof. In an attempt to do so, the parties to a project, including the employer, contractor, and sub-contractors, are faced with the challenge of navigating and resolving the dispute efficiently and promptly.

The Arbitral Tribunal/Arbitrators have increasingly refereed multi-party arbitration and consolidated arbitration to encounter and speedily resolve such dispute resolution challenges. However, with increasing acceptance and implementation of multi-part and consolidated arbitration in construction-related disputes, no concrete legislation or guidelines within the current legislative framework pose another challenge towards its reliability and competitiveness in the present scenario. The article highlights the increasing reliability and occurrence of the concept of multi-party and consolidated arbitration in India, thereby examining the current framework that governs the same and represents an urgent need for a legislative framework to govern the same.

Keywords: *Infrastructure & Construction Industry, Construction Contracts, Multi-Party & Consolidated Arbitration, Arbitral Tribunal & Arbitrator, Dispute Resolution.*

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Introduction

The construction and infrastructure sector of any country is well known for its involvement in enhancing the economy. For developing countries like India, this sector, thus, has a vital role to play in supporting the per capita growth and ultimately driving the gross domestic product. In view of such an integral role, it has been essential for the industry to continue to adapt to the various advancements taking place at a global level, in order to decrease the expenditure and thereby increasing the income of the nation. Furthermore, it has been incumbent on the industry to tackle a number of challenges, whether in terms of litigation or owing to its potential of significantly adding to climate change.

The current infrastructure is evaluated on a completely different scale as compared to the previous developments due to a whole shift within the indicators stipulating the manner of implementation and the procedures involved in development of projects. It has also witnessed new trends and development globally, to be able to tackle the challenges posed thereof. The recent trends in the construction sector are largely based upon the derived principles, sustainable developmental goals and the various policies and guidelines which are issued by various national and international organizations on a time-to-time basis.

For India, amongst the other issues being faced by the construction and infrastructure industry, litigation and the associated pendency has held a substantial pedestal. It is undoubted that infrastructure projects hold high stakes and require the investment of great capital. In fact, with the popularity and need of public-private partnership projects in developing countries like India, many construction and infrastructure projects hold a place of national importance. In such situations, involvement of the project in complicated arbitration matters, may lead to a further loss to the public exchequer. Thus, in such situations, it may be requisite for the industry to adapt to the various global trends existing in the area, which may help in the mitigation of risks associated with the project, thereby aiding in the avoidance of litigation.

An Overview of Challenges faced within the Construction/Infrastructure Projects

A construction/infrastructure project generally contains a large number of parties including contractors and sub-contractors, the role of whom are inter-webbed in relation to a project, wherein such relationships are usually covered by a range of agreements. With such a high amount of interrelated rights and liabilities involved, these projects usually encounter frequent disputes and issues which require cost-efficient and speedy dispute resolution mechanisms, which help the parties in resolving their issues in a timely manner, thereby foregoing any loss to the project revenue.

International construction contracts are increasingly becoming complex and twisted in an attempt to safeguard the rights of all the interested parties and stakeholders. With the impossibility to undertake the wide scope of every contract by a single contractor, contractors usually resort to sub-contractors for managing a part/section of the prescribed scope of work such as local sub-contractors for providing requisite assistance. With increasing complexity and dependability, the legal relations between the primary parties and sub-contractors becomes

intermingled and result into complex legal issues and disputes during project development stage. Additionally, the varied country-specific legislative framework and no unified international legislation for governing international construction contracts pose another hurdle towards resolution of any disputes, which consequently result into the loss of manpower, money and timeframes.

Modern day construction and infrastructure disputes projects involve several parties and sub-contractors that derive their rights and liabilities from the primary agreement. Even though, the employer and sub-contractor are not directly accountable to one another, both the parties are capable of claiming losses in the situation of breach by either of the party, if it directly affects the other party. With the indirect formation of such complex work arrangements, the “2017 FIDIC Conditions of Contract” specifically deals with the rights and liabilities of employer, contractors and sub-contractors in regard to their complex dependency and relationships that are involved within the contractual arrangement and provides detailed safeguards and methods to resolve the same.

Multi-Party Arbitration and Consolidated Arbitration, and its legality in India

With several international global trends witnessed within the International Construction Law such as Land and Environment, Social and Governance (ESG) concern, automated techniques and technologies, FIDIC time-bar clauses, and the Building Information Modelling (BIM), one of the popularly adopted trend in India is that of multi-party arbitration. This form of arbitration is widely used in resolution within the International Construction Law due to the complexity and severability of parties and related objectives, rights and liabilities of parties involved thereof.

Through this method, if a breach occurs on part of a sub-contractor, the authority which suffers loss can file a claim against such sub-contractor instead of the concessionaire. Such severability of liabilities thus, helps in increasing the efficiency of arbitration.

On the other hand, in multi-party arbitration settings, the Arbitrator/Arbitral Tribunal allows the parties and claimants to have consolidated arbitration proceedings for claiming relief in case of interrelated disputes and parties arising out a single construction/infrastructure project before a common Arbitrator/Arbitral Tribunal. This method enables all the parties, including the employer, contractor and sub-contractors to ensure timely and streamlined recovery towards posed claims. Multi-party arbitrations also ensure that the awards passed in case of different issues posed before different Arbitrators/Arbitral Tribunals do not provide contradictory results thereby further affecting the credibility of claims made by other parties.

The term consolidation in an arbitration proceeding is defined as “a procedural device which denotes the process whereby two or more claims are united into one single procedure concerning all parties and all disputes,”¹ and helps provide an effective dispute resolution resort for ensuring cost-effectiveness, timely recovery and speedy resolution. Multi-party arbitration

¹ OECD “International Investment Perspectives Consolidation of Claims A Promising Avenue for Investment Arbitration?” (2006).

in common Indian parlance is referred to as consolidated arbitration. The Arbitrators, Arbitral Tribunals as well as the Indian Judiciary have repeatedly supported the practice of consolidated arbitration proceedings and actively promote the same to avoid repetition and overlapping of arbitral proceedings in case of a common project/subject matter.

A Brief Analysis on the Existing Judgments passed by Indian Courts

The Hon'ble Supreme Court in an appeal filed against the judgment of High Court in **P.R. Shah, Shares & Stock Brokers (P.) Ltd. vs. B.H.H. Securities Private Limited and Ors**² observed that

“If A has two separate agreements, one with B and another with C with regard to the same claim, and A has a claim jointly and severally against B and C, held, A can held joint arbitration against B and C. Denial of single arbitration against B and C on the ground that arbitration agreements B and C are different, would lead to multiplicity of proceedings, conflicting decisions and cause injustice”.

The Hon'ble High Court of Delhi in a recent judgment of **Jaiprakash Associates Ltd. vs. Micro and Small Enterprises Facilitation Council & Anr.**³, affirmed the judgment of **Gammon India Ltd. & Anr. vs. National Highways Authority of India**⁴ and held that

“in case of multiple disputes arising out of the same or interlinked contracts, endeavour should be made that all such separate claims and disputes are adjudicated upon by the same Arbitral Tribunal so as to avoid multiplicity of proceedings and confusion”

The Hon'ble Supreme Court has read the principle of multi-party arbitration/consolidated arbitration within the sphere of Section 11 of the Arbitration and Conciliation Act, 1996. In the case of **Chloro Controls India Pvt. Ltd. vs. Severn Trent Water Purification Inc.**⁵ wherein the Hon'ble Supreme Court held that a consolidated arbitration proceeding can be allowed for cases on the request of parties where:

1. A single economic transaction is involved.
2. Contracts that include a main contract and an ancillary contract.
3. When the doctrine of “group of companies” can be used.

However, the Court also found one exception to the above-stated rule in **Duro Felguera, S.A. vs. Gangavaram Port Ltd.**⁶, wherein the Court held that even though the multiple parties and contracts were interrelated they cannot be adjudicated by a single Arbitrator/Arbitral Tribunal as one of the matter was a domestic arbitration while other was an international commercial arbitration that must be adjudicated separately.

² P.R. Shah, Shares & Stock Brokers (P.) Ltd. vs. B.H.H. Securities Private Limited and Others (2012) 1 SCC 594

³ Jaiprakash Associates Ltd. vs. Micro and Small Enterprises Facilitation Council & Anr., LPA 565/2023

⁴ Gammon India Ltd. & Anr. vs. National Highways Authority of India, 2020 SCC OnLine Del 659

⁵ Chloro Controls India Pvt. Ltd. vs. Severn Trent Water Purification Inc., (2013)1SCC 641

⁶ Duro Felguera, S.A. vs. Gangavaram Port Ltd., (2017) 9 SCC 729

In the case of **Libra Automotives Pvt. Ltd vs. BMW India Pvt. Ltd.**⁷, the Hon'ble High Court of Delhi clarified that the 'overlapping disputes' between the parties that have incurred due to interrelated agreements cannot be the sole ground for the Court or parties to apply for consolidated arbitration proceedings for different arbitration clauses provided within different arbitration agreements.

In one another contractual dispute pertaining to development of a construction project in **Zonal General Manager, IRCON Int Ltd. vs. Vinay Heavy Equipments**⁸ wherein the Hon'ble Bench of Supreme Court dwelled within the intricate relationship formed between the Employer, Contractor and Sub-Contractor to ascertain whether two distinct but interrelated arbitration proceedings can be consolidated to be adjudged by a single Arbitrator/Arbitral Tribunal. The Court provided that,

“In the absence of covenant in the main contract to the contrary, the rules in relation to privity of contract will mean that the jural relationship between the employer and the main contractor on the one hand and between the sub-contractor and the main contractor on the other will be quite distinct and separate”.

The Hon'ble High Court of Delhi in one of the other judgment in **Laxmi Civil Engineering Services Ltd. & Ors. vs. GAIL (INDIA) LTD.**⁹ also dealt with a similar issue pertaining to interpretation and treatment of contracts can be constructed or adjudged within a single arbitration proceeding. The Court held that the since there was no direct arbitration agreement between the Employer and the Sub-Contractor, the Employer cannot be compelled to participate in arbitration proceedings facilitated by the Sub-Contractor.

Conclusion

Reflecting upon the outlook of Indian Judiciary to the practice of multi-party arbitration, it is assumed that the practice is yet to gain recognition as compared to consolidated arbitration that has been expressly preferred by Arbitrators/Arbitral Tribunals to ensure compliance and avoid redundancy in overlapping awards pertaining to related matters. However, to provide further clarity upon the practice, it is pertinent to include the same within the legislative framework of India that will subsequently enhance the faith of public in the speedy resolution process and will help the construction and infrastructure sector to ensure speedy recovery and resolution, and will further aid Contractors, Employers and Sub-Contractors to ensure timely project development.

⁷ Libra Automotives Pvt. Ltd vs. BMW India Pvt. Ltd., ARB.P.163/2019

⁸ Zonal General Manager, IRCON Int Ltd. vs. Vinay Heavy Equipments

⁹ Laxmi Civil Engineering Services Ltd. & Ors. vs. GAIL (INDIA) LTD., ARB.P. 175/2020