

A New Approach in Adjudication of Delay and Disruption Claims in Construction Arbitration in India

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Engineering, Procurement and Construction Contracts, by their unique nature related to the construction industry, multitude of parties and factors, unforeseen circumstances, market risks, weather, regulatory issues etc. often result in disputes related to the performance of the contract. Very often, the claims are fault based, in the sense that the basis of the claim is often a default or a breach by the other party.

These issues arise during the execution of the contract but are not often highlighted till the conclusion of the contract at least, in the Indian context. This is because escalation of issues during the period of performance of the contract results in disagreements and stand offs which may disrupt the project. This is why the disputes are raised at the time of final settlement of accounts. More often than not, the claims are inflated in order to compel the other side to settle at a higher amount. After the conclusion of the project, there is often no incentive for either party to back down or reduce the quantum of claim and arrive at a settlement. As a consequence, disputes often escalate into litigations in such situations.

Most construction contracts mandate arbitration because of the high value of the claims often raised, voluminous documentation and the specialized nature of the industry which may require expert adjudication. The arbitrations are often, time consuming and prohibitively expensive as the evidence is a plethora of paperwork without clear indication or connectivity to causation or quantification. Correspondences exchanged between the parties often form the bulk of evidence - to discern and identify facts relevant to the claim is a time consuming process. This results in a prolonged adjudicatory process.

One of the major reasons for prolongation of adjudicatory process is due to the fact that the parties are leading evidence on both causation / liability and quantification / quantum simultaneously. The evidence for causation for the claim would involve establishing the contractual basis / liability for the claim. The quantification would involve evidence which would establish the quantum of the claim under each head. For instance, if a contractor were to

raise a claim on idling charges and loss of profit due to delay in handing over revised drawings, delay in handing over possession of site, and change in scope resulting in additional work, then he will be simultaneously leading evidence on causation/liability as well as quantum in respect of three heads of claim.

It is important to note that questions on the quantum of losses usually follow questions on liability in the normal course of events. Unless there is contractual liability to pay, any evidence on quantum is unnecessary. This paper aims at using an illustrative construction arbitration scenario and this paper proposes an alternative approach to adjudication of claims by suggesting that the trial be split into two parties, one to establish the contractual liability to pay and only if such a liability is established, lead evidence on quantum of such liability. For the purpose of simplicity, the focus will mostly be on claims relating to delay and disruption and also Extension of Time claims by the Contractor coupled with Levy of Liquidated Damages claim by the Owner.

Construction Contracts are typically time bound projects. Any delay will entail levy of Liquidated Damages ('LD') by the Owner on a contractually stipulated basis. The Contractor is entitled to apply for Extension of Time ('EoT') on the ground that the delay was not caused due to Contractor's fault but due to the Owner's fault or that there were disruptions in the work due to Force Majeure events or due to Owner's defaults. When there is a delay or disruption, it often results in increased costs to the Contractor and Owner in terms of establishment cost, labour cost and other miscellaneous claims that may arise in a given factual scenario.

Delay events are essentially delays by the owners in handing over site or drawings or instructions, modification of drawings etc. or delays by the Contractor in completing any portion of the work. Disruption events relate to interferences, disturbances, interruptions, or hindrances that may occur during the contract period. Both delays and disruptions result in the non-adherence to the construction schedule.

Upon occurrence of a delay or a disruption event, the concerned party is required to issue a written notice bringing such a delay or disruption to the notice of the other party. The Owner has to then decide on the responsibility for the delay and on the grant of an EoT. However, in many cases, no definitive decisions or claims are made during the contract period as it may result in stoppage of work or stand offs or result in difficult working conditions due to hostile attitude of the parties. More often than not, these situations are accompanied by a plethora of correspondences disclaiming, limiting or denying liability or responsibility on various facets of the issues. As a result of this, in many cases, claims are raised only at the end of the contract and not as and when they arise; compounding not only the issues but also the huge amount of paperwork.

Consider this in the context of the following illustration.

ABC, a power generation company appointed XYZ Corp a EPC Contractor for the purpose of construction of a thermal power plant on a turnkey basis under a Construction Contract.

The key terms of the Construction Contract were broadly:

- (i) Construction to be completed within 2 years from the date of hand over of Site failing which LD was to be imposed at the rate of Rs.1 lakh per day.
- (ii) ABC was to hand over the Site from the Project Commencement Date.
- (iii) XYZ Corp was required to handle security arrangements and towards that end, build a boundary wall to prevent any kind of security breach.
- (iv) ABC was required to facilitate with Governmental Authorities in the event of any such requirement.
- (v) XYZ Corp was also required to build an access road at its cost for the purpose of connecting to the highway for smooth transmission of supplies. The land for the access road was acquired by the Government and given on lease to ABC for the duration of the Project.
- (vi) ABC was required to arrange for electricity.

The following issues were faced during the Contract Period

- a. The villagers in the surrounding area created frequent disruptions by way of strikes, hartals etc. at the Project Site and XYZ Corp was unable to construct a proper access road or a boundary wall.
- b. Three of XYZ Corp's technical consultants who were Pakistani citizens were unable to get visa and it took XYZ Corp sometime to arrange for alternative consultants.

- c. The villager's disruption and also visa issues were brought to ABC's notice and its intervention was sought for, but ABC did not respond to the same.
- d. ABC was unable to arrange for electricity but agreed to pay XYZ Corp to purchase electricity.
- e. The resultant situation was a delay of 8 months in completion of the Project.

The issues that relate to causation / liability are:

1. Whether disruption caused by the villagers of surrounding land was due to the fault of ABC's improper acquisition process OR XYZ Corp's failure to take sufficient safety and security measures as mandated under the Construction Contract.
2. Whether ABC was required to facilitate the grant of visa to XYZ Corp's technical personnel by liaising with the Governmental Authorities or in the alternative, whether XYZ Corp was required to take sufficient steps to arrange for alternative technical personnel given the foreign policy of India.
3. Whether XYZ Corp is entitled for EoT or is ABC entitled to levy LD for the delay.

The issues that would relate to quantum are:

1. What is the total number of days of delay resulting from the disruption of villagers?
2. What is the total loss suffered by XYZ Corp as a consequence of the delay?
3. What is the total number of days of delay resulting from denial of the visa to XYZ Corp's technical team of personnel?
4. What is the total loss that was caused to XYZ Corp as a consequence of the delay?
5. Whether XYZ Corp is entitled to EoT, and if so, for how many days?
6. Is ABC entitled to levy LD and to what extent?

Let us examine the kind of evidence that needs to be produced for each of these sets of issues. The issues relating to causation or liability require a two-fold analysis. One relates to tracing the liability under the contract and the second relates to understanding the cause of the liability. This would require the interpretation of the Construction Contract and correspondences exchanged between the parties for the purpose of examining if such a claim is permissible under the Construction Contract and invoked correctly in the facts of the case. In certain cases, external evidence may also be required such as weather reports, newspaper publications and other such documents which may assist in attracting the applicabil-

XYZ raised the following claims:	ABC responded as under:
<ul style="list-style-type: none"> i. Due to improper land acquisition process and insufficiency of compensation paid by ABC, the villagers were protesting and this resulted in disruption. Further, ABC did not facilitate with Police Authorities in order to prevent the disruption. Hence, ABC is liable for compensation to XYZ Corp for losses caused due to such disruption including increased labour cost and other misc. expenses. ii. ABC also did not facilitate Governmental approvals and visa process for XYZ Corp's technical staff resulting in delay. iii. XYZ Corp arranged for generators for the electricity resulting in a claim for purchase of diesel generators and also diesel which is to the account of ABC as agreed post signing of the Contract. iv. XYZ Corp is entitled for EoT as the delay was entirely caused due to ABC's defaults or alternatively due to force majeure conditions. 	<ul style="list-style-type: none"> i. The entire disruption from the villagers arose as a consequence of XYZ Corp not taking sufficient measures for security including building boundary walls, recruiting sufficient security men. ii. Matters relating to visa are governed by Indian policy and XYZ Corp was required to exercise a reasonable degree of care to understand the same before engaging technical personnel from countries like Pakistan and also that XYZ Corp ought to have made alternative arrangements earlier. iii. ABC only agreed to pay the cost of electricity on the basis that XYZ Corp would purchase it from outside. XYZ Corp is not entitled for cost of generator and diesel as it was required to incur least possible expenses for procurement of electricity. iv. ABC is entitled to levy LD as the delay was entirely caused due to defaults on part of XYZ Corp.

The potential claims and contentions of both parties may be summed up as follows:

ity of force majeure clauses.

In the present case, XYZ Corp may need to utilize correspondences exchanged, third party information etc. in order to prove the disruptions to the construction schedule by the villagers. XYZ Corp would additionally need to prove that reasons for the said disruption were solely due to improper land acquisition process and insufficient compensation paid to the villagers which are attributable to ABC. ABC may need to lead evidence on how a construction of a boundary wall and adequate security arrangements would have prevented such disruptions. Insofar as the issue on visa is concerned, XYZ Corp has to lead evidence on the interpretation of the contractual clause relating to Governmental Assistance and also on India's visa policy and how it was not a reasonably unforeseeable event.

Evidence on quantum requires a data driven analysis to establish dates on which the delays/ disruptions occurred, how the delays / disruptions impacted the construction schedule viz. critical path analysis, the means and mode of calculating the economic impact of such delays or disruptions i.e. the losses suffered by the concerned party.

Ordinarily, evidence on quantum of losses incurred would involve production of record books, daily register or daily progress reports, entry and exit registers, construction schedules, weather reports, comparative data, price indices, evidence on various factual aspects, cor-

respondences exchanged between the parties and other evidence for proof of facts etc. Towards this end, the parties may also depose subject matter experts who are well versed in industry practices in order to substantiate the methods adopted by the parties in calculating of quantum of loss suffered, and as proof of global claims such as idle charges, loss of profits etc.

The evidence required for establishing causation / liability is therefore different from the evidence required for establishing quantum. It is therefore possible to lead evidence on both aspects separately. The legal issues involved are also different and severable.

However, when there is a combined trial, there are several cost and time overruns. In a single trial, the parties have to simultaneously lead evidence on causation / liability and on the quantum of losses suffered. In order to substantiate huge claims, voluminous correspondences and other evidences may be produced without clearly distinguishing their probative value. The examination of witnesses including expert witnesses on quantum requires detailed preparation and cross-examination of these witnesses often take considerable time as well. More often than not, the evidence on quantum and causation (liability) are not segregated in the correspondences or the evidence of the parties. The arguments on both issues together will necessarily involve additional time and effort. The Tribunal is then left with the unenviable task of adjudicating both quantum and causation (liability).

The adjudication on all issues of quantum would be totally unnecessary if the Tribunal comes to a conclusion that the liability of the Owner is legally unsustainable in respect of certain claims. Hence, a separate trial on both issues may actually lead to greater clarity and understanding thus aid the passing of a more reasoned award.

Keeping this in mind, the practice followed in most International Arbitrations, is to split up the trial into two parts. The first trial will involve establishment of liability under the Contract for the claims. Arguments are then heard and the Tribunal passes an arbitral award. This would be a 'partial award' as it only deals with half the dispute which relates to liability or causation, the other part being quantum of claims. The award so rendered is on the merits of the liability and would hold as to what claims would require evidence on quantum and what claims are dismissed.

In the illustration above mentioned, the Tribunal could make a partial award as under:

The Arbitral Tribunal passes the following partial award on causation:

- I. The Tribunal holds that ABC is not responsible for delays caused due to disruptions by the villagers. However, the same being a force majeure event, XYZ Corp is entitled to for Extension of Time but not entitled to any compensation for the same.
- II. The Tribunal holds that ABC is not in any manner liable for any delay caused due to visa issues for XYZ Corp's technical consultants and XYZ Corp is not entitled to EoT on that ground.
- III. The Tribunal holds that XYZ Corp is required to lead evidence on actual quantum of money spent on generation of electricity and ABC is entitled to lead evidence to rebut the same.
- IV. ABC is entitled to levy Liquidated Damages on XYZ Corp for delay in the completion of the Project. Both parties to lead evidence on the same. However, while quantifying the delay, the time lost due to disruptions by villagers is to be excluded.

The net consequence of this situation is that the parties are not required to lead voluminous evidence on quantification of claim relating to losses caused due to disruptions by villagers, no requirement to lead evidence on quantum of delay caused due to non-grant of visa for XYZ Corp's technical personnel, no requirement to lead evidence on quantum of losses under this head. This reduces the evidentiary burden on the parties and adjudicatory burden on the Tribunal.

It is necessary to examine the legal status of such a partial award under the Indian law. The partial award will be considered as an 'interim arbitral award' under the Arbitration and Conciliation Act, 1996 ('A&C Act'). 'Interim arbitral award' or 'interim award' is not specifically defined under the A & C Act. However, the definition of "arbitral award" in Section 2(1)(c) includes an interim award. Section 31 (6) provides that the Tribunal may make an interim arbitral award on any matter with respect to which it may make a final arbitral award. Therefore, by virtue of Section 31 (6), it is possible for parties to request for an interim arbitral award. This interim arbitral award can be on causation or liability based issues.

The difficulty that arises when an interim award on causation is passed is that such an award also qualifies as an award for the purpose of Section 34 of the A & C Act i.e. an application may be made for setting aside the award before a Civil Court. The time period for the challenge of the award is 90 days from the date of receipt of the award with a possible extension of another 30 days. If the award is not challenged within this time, it becomes final and binding. In such circumstances, expecting a final award on quantum to be passed within a short duration so as to enable the parties to challenge the combined arbitral award within the total available time period of 120 days is unrealistic. This is because detailed evidence on quantification may be required and parties may need some time to prepare for trial. In any event, it would result in denial of justice to the aggrieved party as they would have lesser time to challenge it.

Obviously, any person who is aggrieved by the interim award is entitled to the challenge the same under Section 34 of the A&C Act ('Section 34 Petition'). By virtue of the 2015 Amendment to the A & C Act, Section 34 Petitions have to be decided within a time period of one year. The time period does not however apply to any appeals filed under Section 37 of the A & C Act against the order passed in a Section 34 Petition. Given this, it can be safely assumed that the matter may not reach a conclusion within a period of one year.

The question that requires to be answered then is - what happens to the main arbitration during the pendency of the Section 34 Petition before the Court.

There are two options available to a party, one is to file an application for stay of the arbitral proceedings till the Section 34 Petition is decided, or in the alternative continue the arbitral proceedings pending adjudication of the Section 34 Petition.

Both choices present unhappy consequences. If one were to seek stay of the arbitration proceedings, the arbi-

tration has to be adjourned sine die and restarted subsequent to the decision in the Section 34 Petition. Section 34 Petition may have one of two possible results, the first being that the Court may find no grounds to interfere under Section 34 or alternatively may find grounds to interfere and set aside the award and remand the matter back to arbitration. As and when the Arbitration proceedings are restarted subsequent to the decision in the Section 34 Petition, the process of accumulating the documents and the witnesses so also reconstituting the Arbitral Tribunal will take some time and effort.

For a claimant whose heads of claims may have been restricted by the interim arbitral award, it would make better sense to ensure that the final arbitral award is not passed. This is because a final arbitral award would be restricted to quantum of claims which have been permitted, thus reduces the total amount that a successful claimant may receive.

If the interim award is left unchallenged, there will be very limited grounds to challenge the final arbitral award which is passed consequent to the interim award. It would mean that the affected party will not be able to challenge the interim award on liability and it would stand accepted by both parties.

It is however possible to argue that if the Tribunal does not 'sign' the arbitral award or if the party does not 'receive' the arbitral award, the period of limitation would not commence under Section 34(3) of the A & C Act.¹ This argument is made on the strength of Section 31(5) of the A & C Act which requires a signed copy of the award to be made available to both parties. Hence, one could possibly defer the filing of the Section 34 Petition till the final award is passed. However, this is an extremely risky proposition to advance inasmuch as non-delivery of a signed copy could be construed as misconduct on part of the Tribunal unless it has been previously agreed between the parties.

Given the challenges and complexities in the interim arbitral award system and the law in India, this paper proposes another system.

The Arbitral Tribunal can pass an "Evidentiary Order" which basically directs the parties to lead evidence only on certain aspects of their claim, thus implicitly deciding the claim. The reasons for allowing evidence on only certain aspects of their claim will be covered in the final arbitral award that is passed. This reduces the adjudicatory burden on the Arbitral Tribunal. In the facts of the illustration as indicated above, the Arbitral Tribunal can pass the following Evidentiary Order:

Evidentiary Order:

The Arbitral Tribunal hereby directs the parties to lead evidence on the following:

- I. XYZ Corp to lead evidence on the total cost incurred in the procurement of electricity and ABC to lead evidence on what efforts could have been expended by XYZ Corp for purchase of electricity at a lower cost.
- II. ABC to lead evidence on the total number of days of delay for which LD is to be levied.

A perusal of the above Order would show that the Tribunal has implicitly rejected the claims of XYZ Corp by stating that XYZ Corp is not entitled to lead evidence on any delay caused due to lack of visa or disruption by villagers to dispute the total number of days of delay as claimed by ABC.

The next query that arises related to the source of power for the Arbitral Tribunal to pass such orders. One may examine Section 19 of the A & C Act in this regard. Section 19(1) provides absolute discretion to the Tribunal to determine its own procedure. Section 19(2) provides that the parties may agree upon such procedure as they deem fit and in the absence of such agreement, Section 19(3) provides discretion to the Tribunal to determine its own procedure. Section 19(4) provides that the Tribunal has the power to determine the admissibility, relevance, materiality and weight of any evidence.

The Tribunal can thus pass an order under Section 19(4) on what is the evidence that it considers material for the purpose of passing an arbitral award. Civil Courts also rule on admissibility of individual documents in terms of the provisions of the Indian Evidence Act. This is at the stage of evidence i.e. when the documents are produced. However, the Tribunal is pre-empting this situation by holding a trial on liability and based on its findings, it is deciding as to what evidence it requires to adjudicate on quantum even before the stage of evidence. This finding is not the admissibility of individual documents but on the nature of the claim itself.

Therefore, the question that arises is whether it is a procedural order or a substantive order. If it is a substantive order, is it possible to pass such an order under Section 19(4) of the A & C Act. If the order is procedural but with the substantive effect i.e. impeding the rights of the parties in some way, it is possible to construe it to be an adjudicatory order, therefore, it is possible to argue that it is an interim arbitral award. However, if no reasons are given and if there is only a direction as to the type of evidence to be led, it is difficult for any court to presume that it is an interim arbitral award.

The Arbitral Tribunal has the power to determine its own procedure under Section 19(4) which procedure however, is amenable to challenge or dispute by the parties. Therefore, if the parties agree at the very beginning of the arbitration that the Tribunal can pass a procedural order restricting the scope of evidence in the manner as stated above, the procedure cannot be disputed later on. The Arbitral Tribunal can record an order to this effect as a procedural order at the beginning of the arbitration to pre-empt any issues later on. An illustrative order is provided for this purpose:

The parties have agreed and requested the Arbitral Tribunal to split the adjudication into two trials. One trial regarding proof of liability and causation and the second trial regarding quantum. Based on this request by the parties, the Arbitral Tribunal shall allow both parties to lead evidence on liability and causation first and thereafter hear parties on the said issues. The Arbitral Tribunal shall then pass an Evidentiary Order directing the parties to lead evidence on such aspects of quantum as it deems necessary. The Arbitral Tribunal shall give elaborate reasons for passing the Evidentiary Order in the Arbitral Award that it renders in the dispute and the parties shall be entitled to challenge the Arbitral Award only at that point in time and not any time earlier.

This system has benefits in adjudication of delay and disruption claims for the following reasons:

- (i) The evidence in relation to delay and disruption claims is capable of being split up into liability and quantum issues. The liability issues will deal with the broader issues relating to contract and conduct and the quantum issues are restricted to quantification. It clarifies, simplifies and staggers a complex construction claims arbitration into two smaller parts thus placing lesser burden on the Tribunal, parties and their counsel in terms of preparation of evidence, cross-examination and arguments.
- (ii) Once the liability is established, it is possible for the parties to negotiate and arrive at a settlement on quantum as it gives parties a realistic assessment of their claims. The standard practice of contractors is to inflate the claims and there is no incentive for the owners to accede to such claims. If an interim arbitral award or an Evidentiary Order is issued, it allows parties to have a bird's eye view of the potential final arbitral award, the possibilities of challenging such an award and also create more opportunities for settlement than a standard arbitration.
- (iii) It is possible for the Civil Court to remand the matter back on specific issues in the event it finds any patent illegality. For instance, if the Civil Court finds that the finding on liability in respect of one head of claim is incorrect, it can pass an order to that effect and

remand the matter back to the Tribunal on that specific aspect. The Tribunal can then record evidence on quantum in respect of that head and pass a modified award. The power to do so is available under Section 34(2)(a)(iv) read with sub-section (4) of the A & C Act. The situation would be entirely different if there was a composite award which were intrinsically connected with each other..

- (iv) The grounds for challenge of an arbitral award are restricted under Section 34(2) and sub-section (2A) of the A & C Act. The possibility of challenge of an arbitral award under these provisions would be extremely limited inasmuch as the award on quantum would mostly relate to appreciation of evidence on record i.e. pure issues of fact. Hence, the possibility of judicial interference in respect of such awards would be minimal.

The easier approach, one might say is to hear evidence on all issues and then make a combined decision on the matter. However, it does consume time and effort to do so. Given the time directive imposed under the 2015 Amendment to the A & C Act², entertaining voluminous evidence may be time consuming and not in the best interest of time, efforts and cost. Moreover, when all issues are decided in one shot, there is far more uncertainty and parties would rather attempt fate and reap complete benefits than give up their claims for apparently no reason.

Given the challenge our burgeoning legal system faces with its pendency and a three tier appeals viz. District Court, High Court and Supreme Court, arbitration must be considered as a mode of resolving disputes rather than adjudicating them. In most international arbitrations, this system is accepted and parties do not normally appeal or challenge arbitral awards unless there are serious procedural lapses or legal errors. If it is considered as a mode of dispute resolution, then an interim arbitral award or an Evidentiary Direction is really a pathfinder for the parties, an advisory opinion of sorts, which incentivises parties to resolve their disputes by rationalizing their claims.

Mr. Fali Nariman, in his article, "Ten Steps to Salvage Arbitration in India"³ talks about the crying need for Indians to develop l'esprit d'arbitrage – loosely translated as the spirit of arbitration, i.e. one must learn to respect arbitral awards and not challenge them for the sake of challenging it and prolonging the proceedings. By creating effective mechanisms for proper adjudication, we can ensure that the right to challenge an arbitral award be used in a meaningful and reasonable manner. This approach, one hopes would be considered as a step in that direction.

Foot Note

¹See the decision of the Bombay High Court in E-Square Leisure Pvt. Ltd., Pune vs. K.K Dani Consultants and Engineers Pvt. Ltd., Pune 2013 SCC OnLine Bom 183 : (2013) 3 Mah LJ 24 : (2013) 2 Bom CR 689

²See Section 34(6) of the A & C Act

³Fali S Nariman, Ten Steps to Salvage Arbitration in India: The First LCIA-India Arbitration Lecture, Volume 27, Issue 2, Arbitration International (2011)



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