

## ARBITRATING CONSTRUCTION DISPUTES IN INDIA

*Written by Anand Kumar Maurya*

*5th year BBA-LLB(Hons.) Student, Chandigarh University, India*

DOI: 10.55662/JADR.2023.2302

---

### ABSTRACT

The construction industry is expected to be one of the main drivers of global economic growth. It covers a wide range of activities related to complex infrastructure projects, engineering works, commercial and residential constructions, development projects, and more. The construction industry has important links with other sectors, so its impact on GDP and economic development far exceeds the direct contribution of construction activities. Hence, it is clear that construction is proving to be one of the fastest-growing industries not only globally but also in India. Given such a highly technical and complex industry, it is reasonable to infer that disputes arising from construction activities will also require distinct expertise and an in-depth understanding of the surrounding issues. One of the top ten industries in India generating the most foreign direct investment is construction (infrastructure). The Global Infrastructure Construction Market was estimated to be worth USD 2,242.3 billion in 2021 and is projected to increase to USD 3,267.3 billion by 2027, growing at a 6.48% CAGR during the forecast period<sup>i</sup>

An overview of construction contracts, contract types, and problems associated with construction contracts is given in this research article. The rights of the parties, their potential remedies, and the process for resolving conflicts when they arise in the construction industry are also covered. The primary emphasis of this article is arbitration as an efficient way of alternative dispute resolution and the necessity of efficient case management strategies in arbitration to facilitate effective and timely dispute resolution of construction disagreements.

**Keywords:** Infrastructure Sector, Construction Dispute, Contractual Matters, Arbitrability, Dispute Resolution.

## INTRODUCTION

One of the key forces of global economic growth is the infrastructure sector. This is especially true for India, where this sector significantly contributes to GDP. India has a significant construction industry; it is the nation's second-largest industry after agriculture. In addition, it accounts for 9% of India's GDP and is the country's second-largest employment and receiver of foreign direct investment. By 2025<sup>ii</sup>, India is expected to overtake China as the third-largest building market in the world. This sector includes a number of subsectors, including the construction of homes and businesses, engineering work, and development and infrastructure projects. According to PriceWaterCoopers' Global Construction 2030 research, China, the United States, and India will lead the way and account for 57% of all global growth, with the total value of construction production expected to increase by 85% to USD 15.5 trillion by 2030<sup>iii</sup>.

The construction sector is rife with intricacies and technicalities, so it is essential that any conflicts resulting from such activities connected to the industry be handled by professionals who have specific experience in the area and are skilled at comprehending such complications. Moreover, foreign direct investment in the construction industry can provide a new setting for conflicts with the State or one of its organs (government disputes). Due to changes in the political or legal framework of the State, regulatory or administrative State actions that could affect foreign investment, expropriation of foreign investment, etc., serious issues could arise regarding the breach of the legitimate expectations of the foreign investor in the construction sector.

The aforementioned particular confluence of elements necessitates a highly specialized understanding of the problems facing the construction industry and the rights and remedies available to parties engaged in construction disputes. In this research article, key elements of construction contracts are succinctly explained with a focus on those that are crucial in disputes. We will briefly describe construction contracts and the different challenges that frequently result from these contracts. I'll also make an effort to clarify how arbitration functions effectively as a dispute resolution method in construction conflicts.

## CONSTRUCTION CONTRACT

The term "construction" can refer to any type of structure or assembly, although it is typically only used to describe the production of, or the completion of work on, immovable property. Depending on the technical details of the contract, this might comprise both construction and engineering work. Engineering works refer to any type of construction that isn't static, while a building denotes a structure meant for habitation. Construction with connection to other types of property, such as a construction contract is any contract entered into specifically for the construction of an asset or a group of assets that are closely interconnected or interdependent in terms of their design, technology, and function, as well as their ultimate use or purpose, according to the Accounting Standard (AS) 7<sup>iv</sup>.

A building contract entails several parties like the supplier, subcontractor, project management consultant, and employer just a few examples. The owner or principal is often the employer, and the contractor is responsible for designing and/or constructing. With a subcontract, the subcontractor is employed by either the employer or the contractor. Construction work is managed by a project management consultant. Materials or equipment are provided by a provider. Moreover, the design team may work independently.

In addition to having a primary focus on construction, including design, quality, and timelines, a construction contract should establish a strict framework outlining participants' obligations, allocating risks, recognizing parties' rights in law and equity as appropriate, and offering mechanisms for timely and efficient dispute resolution.

There are no additional rules or principles that apply when parties engage in a specific construction contract that governs how their agreement should be interpreted. Construction contract law is the application of conventional contract law concepts to a specific situation. So, it is crucial to comprehend the context in which a certain construction contract term is being attempted to be construed. Hence, it's crucial to determine if a legal contract has been created as a first step.

## **NATURE OF THE CONTRACT**

Construction contract creation is the subject of the majority of disagreements. This is due to the numerous conversations, proposals, counteroffers, tenders, advance bank guarantees, and associated paperwork that frequently accompany a building contract.

Parties may have a tendency to start working before a contract is actually executed. If one party fails to acknowledge work done by the other in advance, the performing party will be forced to incur costs and lose the value of the work done. On the other hand, a party might anticipate that work will start before it really does, but the performing party might not think that a contract is actually in place. In such a situation, the employer may anticipate the completion of certain work and have a claim for delays, if any, or non-completion of work, even if the performing party may not even be aware that a valid, binding contract exists then conflicts result from this.

The main criterion for establishing whether a contract is genuine or whether one has been created that is binding on the parties, is to apply the traditional offer and acceptance rules of contract law. For instance, it will be crucial to ascertain if a clear, unequivocal intention to be legally bound by the contract can be extrapolated from the contract if work has already started before signing a formal contract. Any reliance on ambiguous language in the tender documents or on a party's understanding without adequate supporting evidence would not be sufficient to prove the formation of a legally binding contract. Testing whether key clauses are present in the construction contract is another method. Legal experts carefully examine which clauses are ambiguous, show a clear aim, or are a crucial term.

Construction contracts, as indicated above, deal with complicated concerns and procedures and involve a number of parties. Clearly, such contracts lead to disputes of many types. Construction contract disputes can start right after a contract is formed, over the question of whether the contract is even a valid one or not.

## **LEGAL PROVISIONS RELATED TO CONSTRUCTION DISPUTES**

Construction contracts in India are governed by the Contract Act, 1872<sup>y</sup>, which outlines essential elements for all contracts. The Act also provides for claims for liquidated damages in

case of breach, with provisions for payment of damages by defaulting parties. The Specific Relief Act, 1963<sup>vi</sup> allows parties to enforce contract performance, with Section 10 mandating court enforcement if a party breaches its obligations. The Commercial Courts Act, 2015<sup>vii</sup>, enables the creation of commercial divisions in high courts and district courts. Employers and contractors must comply with labor laws, including the Industrial Disputes Act, 1947<sup>viii</sup>, and federal laws like the Contract Labour (Regulation and Abolition) Act, 1970<sup>ix</sup>, and the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979<sup>x</sup>.

Compensation for laborers is also regulated by the Workmen's Compensation Act, 1923<sup>xi</sup>, and the Minimum Wages Act, 1948<sup>xii</sup>. Tax is deductible at source, and works contracts are treated as services under the 12% to 18% tax bracket since the introduction of goods and services tax (GST). Social security laws, such as the Employees' Compensation Act, 2009, Employees' State Insurance Act, 1961<sup>xiii</sup>, the Payment of Gratuity Act, 1972<sup>xiv</sup>, and the Employees' Provident Fund Act, 1952<sup>xv</sup>, apply to all employers and contractors hiring laborers or workmen in the construction industry.

## **SPECIFIC DOCUMENTATION IN THE INFRASTRUCTURE CONTRACT**

1. **Drawings:** They provide a thorough description of the construction work that will be done.
2. **Specifications:** A thorough explanation of the planned works' specifications, added to the designs to show the extent and caliber of the job.
3. **Bills of Quantities:** This document includes an indicative list of the amounts of materials needed for construction, which also permits contract pricing.
4. **Terms of Contract:** These conditions include important clauses addressing performance and the interaction of the parties. It also outlines the parties' obligations and addresses risk allocation.
5. **Employer's Requirements:** It outlines the volume and caliber of work that must be completed. The paper embodies what the employer anticipates from the contractor.

6. **Performance Requirements:** This document outlines the output and performance that the contractor is required to provide in relation to the construction project.  
Example: The ultimate generation capacity of the power plant, for instance, might be specified here in the context of a power plant building project.
7. **Accountability:** This makes it easier to assign responsibilities to either side for delivering information and crucial facts that are relevant to construction.
  - a. For instance, the employer may be required to give soil testing information as part of a building contract for an oil refinery, upon which the contractor bases the start of construction operations.
8. **The Conflict Adjudication Agreement:** It specifies how disputes will be resolved in accordance with the contract.

## **DISPUTES ARISING OUT OF CONSTRUCTION CONTRACT**

Moreover, disagreements could occur over-interpreting crucial clauses in the contract or incoherent clauses in the deal's supporting documents. The contract may give rise to problems relating to bank guarantees and the conditional/unconditional nature of such guarantees, or certain conflicts emerge from fraud in tenders that attract penal penalties.

The next step is to ascertain the reliefs that may be demanded under the law after a dispute has arisen, the problem has been diagnosed, and the risk has been allocated. But substantive disagreements are the ones that come up the most frequently. For instance, a building contractor's time provision must be followed exactly, but disputes about completion delays are common. Additional substantive problems include, among others, non-rectification of flaws, unlawful termination, modifications and extensions of time, and violation of the contract.

The three main remedies accessible to non-recalcitrant of parties are the specific performance of the contract, damages, and injunctions. The law of torts also permits the emergence of liability in a contract breach.

## MAJOR CONTRACTUAL ISSUES PERTAINING TO A CONSTRUCTION AGREEMENT

### 1. The employer's right to modify the requirements of the task and its exclusions.

The employer/engineer-in-charge can make changes to the work, which the contractor can demand additional payment for, but must not significantly change the contract and be within the contractor's capacity to perform.

### 2. Contracts are omitted, and employers are free to handle things themselves or assign contracts.

Employers may omit work from a construction contract, but it must not deprive the contractor of his fair share of work on purpose. Employers cannot omit the work on a non-bonafide basis.

### 3. Extensions to the float period and time.

The float in a plan will be dealt with on the basis of 'first come first serve', but the presence of the float may mean that the contractor cannot request an extension of the time limit. This does not prevent the contractor from claiming loss or expenses due to modifications.

### 4. Time limit for claiming rights against either party.

The Limitation Act, 1963 limits the time limit for bringing judicial proceedings and filing claims before the arbitral tribunal to three years from the date of occurrence of either breach or cause of action.

### 5. Uncertainty of change in the law.

Construction contracts often include clauses regarding unanticipated changes in the legislation, which can be justified by giving the contractor more time. According to Section 64A of the Sales of Goods Act of 1930<sup>xvi</sup>, if a tax is increased, decreased, or a new tax is imposed on goods after the contract has been completed, the seller is entitled to an additional sum equal to the contract price, and the buyer is responsible for paying the higher sum. If the tax is decreased, the buyer will be allowed to subtract that amount from the agreed-upon price, and the seller will be responsible for paying the buyer that amount.

### 6. Resolution of uncertainty in the contract.

The rule of literal interpretation, harmonized construction, will be applied giving effect to the intent of the parties, and exercising interpretations that favor the business efficacy of the contract should be applied to resolve any ambiguity in terms.

**7. Claims from third parties.**

The “privity of contract” doctrine grants rights and obligations only to the parties to a contract. In construction law, a contractor cannot be subjected to claims from third parties but may be subjected to claims under tort law for negligence.

**8. Different regulatory bodies for enforcement.**

The construction industry is highly regulated, but lacks a single regulatory body. Multiple bodies regulate various aspects at both central and state levels, such as waste management, employment matters, and taxation of works contracts. Different bodies may intervene depending on the type of project, such as highway construction, where the regulations of the National Highway Authority of India<sup>xvii</sup> and the Ministry of Road Transport and Highways<sup>xviii</sup> are crucial.

## **JUSTIFICATIONS FOR ARBITRATING CONSTRUCTION DISPUTES**

Due to the global scope of the projects, the parties would typically seek to avoid using regional judicial systems that they are unfamiliar with. Instead, they want a system where enforcement is more definite and viewed as unbiased. Construction disputes involving several parties and multiple contracts are particularly frequent since major projects often entail a complicated web of interconnected contracts. For instance, concerns raised by a disagreement between a contractor and an owner and a contractor and a subcontractor may be identical. Multi-party and multi-contract conflicts are increasingly taken into account by arbitration procedures. The parties could, however, have various strategies and goals.

While a contractor might want to involve the owner and its subcontractor in a dispute, for instance, to recover liquidated damages assessed by an employer against the subcontractor who the contractor believes was ultimately responsible for the delay, the owner might not want to invest additional time and resources in involving a third party for whom the contractor has already taken responsibility and will not want to have to defend claims from numerous parties.



The parties should, therefore, give this possibility significant thought when they design the contract. If consolidation and joinder are favored, the parties should make sure that each contract has an arbitration provision that is in accordance with their prior agreement.

“Arbitration is a private, confidential process, which is another important consideration. Parties might not want to flaunt their unclean clothes in front of others”.

It is also tempting to have the option to guarantee that the tribunal has construction knowledge since parties can engage with arbitrators who have considerable industry experience. With the possible notable exception of the Technology and Building Court in England and Wales, local courts may frequently lack specialized knowledge in the building industry. In fact, the ICC Report on Construction Arbitration in 2019 expressly urges that the panel be composed of individuals who have firsthand knowledge of how an international arbitration of a construction dispute is conducted from beginning to end<sup>xix</sup>.

## **CONCLUSION**

The progression of the data shown above demonstrates that arbitration is the most practical method for successfully resolving construction conflicts. Given the complexity of construction disputes, parties concerned can gain the most from choosing arbitration as their method of conflict resolution. By giving the parties the freedom to choose their preferred arbitral tribunal and to appoint qualified experts who are familiar with the intricacies of a construction project and/or specialize in delay claims, this mode simplifies the procedural aspects of dispute resolution for the parties because the tribunal is well-equipped to handle all types of construction disputes.

## ENDNOTES

- <sup>i</sup> Infrastructure Construction Market - Growth, Trends, Covid-19 Impact, And Forecasts (2023 - 2028), <https://www.mordorintelligence.com/industry-reports/infrastructure-sector>, Accessed on 3<sup>rd</sup> April 2023.
- <sup>ii</sup> Navigating Construction dispute in India, <https://www.whitecase.com/insight-our-thinking/navigating-through-construction-disputes-india>, Accessed on 4<sup>th</sup> April.
- <sup>iii</sup> Global Construction 2030, <https://www.pwc.com/tr/en/hizmetlerimiz/altyapi-yatirimlari/yayinlar/pwc-global-construction-2030.html>, Accessed on 4<sup>th</sup> April.
- <sup>iv</sup> Accounting Standard (AS)7, [https://www.mca.gov.in/Ministry/notification/pdf/AS\\_7.pdf](https://www.mca.gov.in/Ministry/notification/pdf/AS_7.pdf)
- <sup>v</sup> <https://iddashboard.legislative.gov.in/actsofparliamentfromtheyear/indian-contract-act-1872>
- <sup>vi</sup> <https://iddashboard.legislative.gov.in/actsofparliamentfromtheyear/specific-relief-act-1963>
- <sup>vii</sup> <https://iddashboard.legislative.gov.in/actsofparliamentfromtheyear/commercial-courts-act-2015>
- <sup>viii</sup> <https://labour.delhi.gov.in/labour/industrial-disputes-act>
- <sup>ix</sup> <https://labour.delhi.gov.in/labour/contractor-labour-regulation-abolition-act-1970-0>
- <sup>x</sup> <https://clc.gov.in/>
- <sup>xi</sup> <https://labour.gov.in/sites/default/files/theworkmenact19231.pdf>
- <sup>xii</sup> <https://clc.gov.in/clc/sites/default/files/MinimumWagesact.pdf>
- <sup>xiii</sup> <https://www.esic.nic.in/Tender/ESIAct1948Amendedupto010610.pdf>
- <sup>xiv</sup> <https://clc.gov.in/>
- <sup>xv</sup> [https://www.epfindia.gov.in/site\\_docs/PDFs/Downloads\\_PDFs/EPFScheme.pdf](https://www.epfindia.gov.in/site_docs/PDFs/Downloads_PDFs/EPFScheme.pdf)
- <sup>xvi</sup> In contracts of sale, amount of increased or decreased taxes to be added or deducted.
- 64A. (1) Unless a different intention appears from the terms of the contract, in the event of any tax of the nature described in sub-section (2) being imposed, increased, decreased or remitted in respect of any goods after the making of any contract for the sale or purchase of such goods without stipulation as to the payment of tax where tax was not chargeable at the time of the making of the contract, or for the sale or purchase of such goods tax-paid where tax was chargeable at that time,—
- (2) The provisions of sub-section (1) apply to the following taxes, namely :—
- (a) any duty of customs or excise on goods;
- (b) any tax on the sale or purchase of goods.
- <sup>xvii</sup> National Highway Authority of India Act 1958, [https://www.epfindia.gov.in/site\\_docs/PDFs/Downloads\\_PDFs/EPFScheme.pdf](https://www.epfindia.gov.in/site_docs/PDFs/Downloads_PDFs/EPFScheme.pdf)
- <sup>xviii</sup> <https://morth.nic.in/>
- <sup>xix</sup> Construction Industry Arbitrations: Recommended Tools and Techniques for Effective Management of Arbitrations, ICC Commission on Arbitration & ADR, [https://library.iccwbo.org/content/dr/COMMISSION\\_REPORTS/CR\\_0057.htm](https://library.iccwbo.org/content/dr/COMMISSION_REPORTS/CR_0057.htm), Accessed on 21st July 2023.