



Effectively managing and resolving disputes in the construction sector

A primer for the procurement and legal teams

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Forensic



Introduction

On the World Bank's Ease of Doing Business Index, India's improved ranking of 77 in 2018 (up from 100 in 2017 in a group of 190 countries) conceals one of the biggest pain points for international investors. The country has shown significant improvement on sub-parameters, such as ease to start a business, get credit, seek construction permits, and trade across borders. However, the 'ability to enforce contracts'¹ remains one of the biggest issues, wherein the country continues to exhibit dismal performance.² In this aspect, the country's ranking improved by just a point to 163 from 164 on the index.³ According to the World Bank's Ease of Doing Business Index, it takes about four years (1,445 days) to resolve a dispute in India with expenses reaching up to 31% of the claim value. This can be a significant hurdle for certain sectors, such as infrastructure, real estate, and construction, which see a large number of disputes. These sectors account for the largest proportion of the commercial disputes in the country. In light of this, companies in these sectors should have robust mitigation strategies covering appropriate contractual safeguards, internal process controls and documentation, and strong contract management. These companies should also consider alternative dispute resolution (ADR) mechanisms.

In this document, we share some insights on challenges faced in managing commercial disputes in the construction industry.

#1

What makes the infrastructure/construction sector susceptible to disputes?



The infrastructure/construction sector is characterised by a multi-layered contract structure with a large number of stakeholders. These stakeholders need to work together to execute projects within budgeted time and costs. The interdependencies created as a result of this structure, along with the requirement to comply with government regulations and obtain various permits/clearances, make it difficult for Indian companies to execute construction projects within budgeted time and costs. Poor preparation/planning, inadequate technical studies (before commencing construction), volatile market conditions can also make the task more difficult. Such a scenario necessitates a continuous oversight on costs.

We have come across many contracts where requirements are not specified with scope variation clauses either being vague or providing minimal scope for price variations. This often results in multiple rounds of discussions and negotiations, leading to litigations/arbitrations sometimes. In such cases, we have seen disputes such as (i) a delay in clearances from regulators/government bodies; (ii) non-performance of secondary obligations; (iii) changes in scope; (iv) changes in design and/or specifications; (v) increase in costs; and (vi) delays related to land acquisition/transfer.

¹ Measures the time and cost for resolving a commercial dispute through a local first-instance court, and the quality of judicial processes index, evaluating whether each economy has adopted a series of good practices that promote quality and efficiency in the court system measure

² <https://www.doingbusiness.org/content/dam/doingBusiness/country/i/india/IND.pdf>

³ <https://economictimes.indiatimes.com/news/economy/indicators/ease-of-doing-business-india-jumps-23-notches-now-at-rank-77/articleshow/66445814.cms?from=mdr>

#2

What are the emerging trends in the dispute resolution space?



We have observed an increasing reliance on ADR mechanisms in the wake of time and cost considerations involved in litigation. We understand that globally dispute adjudication boards for construction projects have been successful in amicably resolving most disputes and grievances. Businesses are opting for ADRs ranging from informal negotiations/settlements to more formal mediation/arbitration. The choice of dispute resolution mechanism may also be strategic, depending on the intent and stakes involved. Many times a respondent may be keen to pursue litigation mainly to delay the resolution process.

On the business side, we see more standardisation of contracts, in particular, the adoption of the FIDIC framework⁴ and inclusion of dispute resolution clauses referring to sequential adoption of ADRs (from settlement to mediation to arbitration).

#3

How can one mitigate dispute risk(s) at the pre-contract stage?



We have often seen that poor planning or project preparation is the main reason for delays and ultimately disputes in most projects. In contracts, one size does not fit all. Organisations can start with a pre-contract protocol of exchange of information. Setting out expectations will help the parties in designing definitive and agreeable terms. It is essential to undertake due diligence for the contracting party, perform feasibility study of the project, chart out a detailed construction plan, and indulge in pre-contract negotiation(s) regarding the resolution mechanism. ADR mechanisms will be adopted in case of foreseen delays/force majeure. The adaptation of general conditions of FIDIC can also help minimise disputes relating to standard issues in construction projects.

#4

What safeguards can be put in place during the construction/operational phase of a project?



Continuous 'monitoring' throughout a contract's lifecycle can assist in the timely detection of malpractices/fraud and appropriate record keeping. Factors such as technology and economic/regulatory changes, and internal issues (such as a change in business plan) can have an impact on the effective implementation of a project. This exposes the project to scope creep (failure to manage or control change in scope), which can often lead to a dispute. However, scope change can be managed by capturing the scope change matrix, conducting an impact analysis, and updating the plan to include new objectives. Other project monitoring mechanisms, such as deployment of external consultants (to monitor progress), use of construction software, and maintenance of site diary/record keeping (preferably in an electronic format), can also be used. These mechanisms can improve stakeholder management, increase transparency, and enhance the ability to measure performance.

⁴ Prescribed by the International Federation of Consulting Engineers

#5

Is ADR the future of dispute resolution?



Indian laws on ADR mandate that an arbitral award must be passed within 12 months, making the ADR process less time consuming and limiting the award's scope. However, these laws will be challenged under Section 34 of the Arbitration and Conciliation Act 1996. Over the past few years, many legislative and executive changes have been brought to integrate India with international institutions and deliver effective solutions through ADR. These changes are bringing in some global best practices into the Indian ecosystem that include creating institutional bodies, such as New Delhi International Arbitration Centre and Mumbai International Arbitration Centre for framework-based arbitrations. In addition, there are plans to set up Arbitration Council of India as a nodal agency to promote uniform standards, etc.

#6

How can parties effectively use the dispute management ecosystem?



In construction projects, time is of utmost importance and a slight delay can have significant cost repercussions. Traditionally, the speed of dispute resolution has been slow and the cost of disputes tend to be high. The cost mainly depends on both the parties' willingness to solve the core issue. The parties should try to keep the scope of the resolution process limited. It is important to effectively use the dispute management ecosystem—ranging from consultation with experts (legal/technical to assess the merits of the dispute/claim) to use of technology (forensic technology for the detection of malpractices/evidence gathering)—early on in the process to determine the optimal dispute resolution strategy, and save time and cost. With the growing popularity of online dispute resolution, the use of technology is increasingly becoming prominent in ensuring speedier resolution using portal-based video conferencing/electronic chat or asynchronous forms of communication such as email.

#7

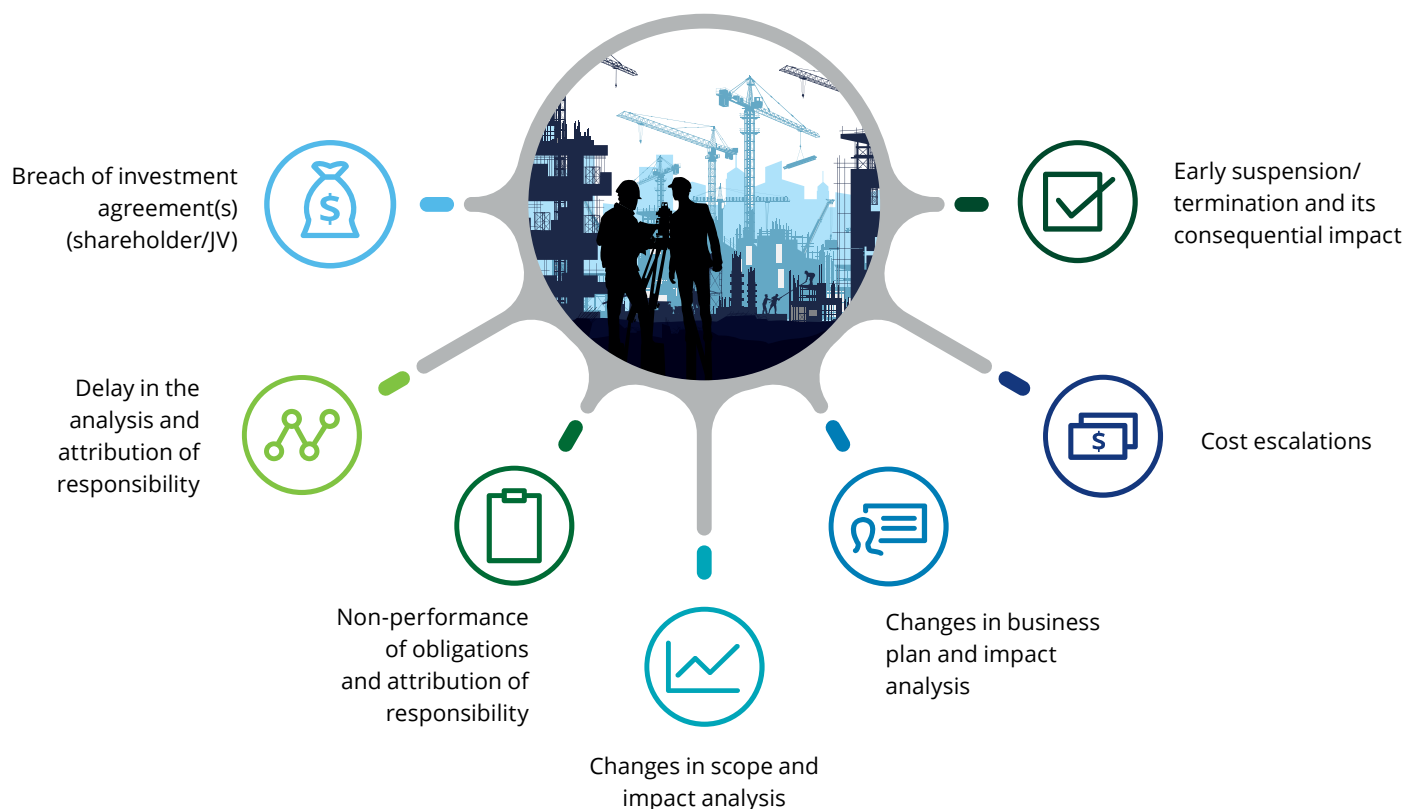
Are there any benefits of appointing experts for dispute resolution?



Given the increasingly technical nature of issues (such as valuation, design, specification, and performance) over which parties tend to land up in disputes, the appointment of expert(s) is becoming commonplace. Independent assessment by experts with the relevant expertise and experience, can provide valuable assistance in the settlement of disputes in both the ADR and non-ADR situations. Arbitration mechanisms allow for the appointment and cross-examination of experts, thereby lending credibility to the assessment undertaken. In addition, the provision for submission of joint expert report(s) can help in narrowing the areas of dispute and thereby, allowing faster resolution. Experts can also help assess the claim's merits, and identify strong and weak arguments to determine the appropriate resolution strategy. In addition, the parties involved can benefit from the inputs provided by experts even at the negotiation/mediation stage.

About Deloitte's dispute support practice

Deloitte's dispute support practice works closely with leading infrastructure organisations across geographies to assist them manage disputes effectively through expert services, including gathering of evidence in a legally tenable manner in relation to various issues, such as:



We can provide an independent expert report on the above mentioned aspects. The report will offer the quantification of the financial impact/damages that the client may have suffered. We have also been appointed to assess the damage report of the other-side experts in multiple matters.

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