

# Effective Management and Dispute Resolution in the Construction Sector

■ Amit Bansal, Shruti Gupta & Adrija Sengupta

**O**ver the past few years, India has shown significant improvement on parameters such as the ease to conduct business, getting credit, seeking construction permits, and conducting trade across borders. India's rank has improved from 77 to 63 in World Bank's Ease of Doing Business report. Over the last 6 years, India's ranking has improved 79 places from 142nd in 2014 to 63rd in 2019, a record for any major economy.<sup>1</sup>

However, the ability to enforce contracts remains one of the biggest issues in India, wherein the country continues to exhibit dismal performance. According to the World Bank's Ease of Doing Business Index, it takes about four years (1,445 days)<sup>2</sup> to resolve a dispute in India with expenses reaching up to 31% of the claim value<sup>3</sup>.

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

## WHAT MAKES THE CONSTRUCTION SECTOR DISPUTE PRONE?

The construction sector is characterised by a multi-layered contract structure with a large

number of stakeholders working together. The interdependencies created as a result of this structure, along with the requirement to comply with government regulations and obtain various permits gives rise to certain inherent challenges impacting outcomes in the sector - for both Principals and Contractors - across the project lifecycle. Some of these challenges are listed below.

- Lack of rigour in project planning – Often aspects such as feasibility, technical studies, and detailed implementation framework are not clearly defined upfront prior to engaging in a contract
- Inequitable allocation of commercial risk between the parties i.e. a large burden of commercial risk is placed on a party that is not best suited to assume it.
- Aggressive bidding by contractors to obtain the contract without adequately factoring the potential risks
- Limited definition of standard contract terms and prevalence of ambiguous clauses
- Lack of continuous monitoring of project progress which can make it challenging to address risks in a timely manner.



**Amit** is a Partner with Deloitte India's Forensic practice in India with close to 2.5 decades of experience covering credit assessments, business strategy, commercial contracts, investment banking, PE investments, forensic investigations, commercial disputes and anti-trust matters. At Deloitte, he leads the Dispute and Litigation Advisory Services wherein he has worked on over 50 commercial dispute engagements requiring expert intervention in computation of claims, expert assessment of counter-claims, forensic audit of financial statements, termination of commercial contracts and gathering of evidence in litigation matters. He has worked on some large and complex commercial disputes cutting across sectors, predominantly in infrastructure, construction, real estate and mines and minerals sectors. The report in some of these engagements has been submitted in domestic arbitrations/ litigations/ mediations as well as international arbitrations/ mediations.

Some of the above challenges can result in typical actions of delay, scope creep, violation of payment terms in construction projects, finally resulting in a dispute.

## ADDRESSING CONSTRUCTION SECTOR DISPUTES

The objective of a business partnership is to ensure that value is created for stakeholders and society. Construction sector businesses tend to have a magnified impact on stakeholders and the community, should projects be poorly managed. To prevent such instances from occurring, organisations can consider the following measures.

### A) MITIGATE DISPUTE RISKS AT THE PRE-CONTRACT STAGE

Organisations can start with a pre-contract protocol of exchange of

information around the project. Setting expectations right will help the parties in designing definitive and agreeable terms.

As part of the pre-contract negotiations, it is essential to undertake due diligence for the contracting party, perform feasibility study of the project, chart out a detailed construction plan, and also discuss resolution mechanisms, should a dispute arise. These can include alternative dispute resolution (ADR) mechanisms in case of foreseen delays/force majeure.

We have observed an increasing reliance on Alternative Dispute Resolution (ADR) mechanisms in the wake of time and cost considerations involved in litigation. Businesses are opting for ADRs ranging from informal negotiations or settlements to more formal mediation or arbitration.





**Shruti** is an Associate Director with Deloitte India's Forensic practice in India with close to a decade of experience focused on economic analyses relating to antitrust issues (competition), economic regulation, and damage estimation across industries including financial services, telecommunications, energy, steel, automobiles, aviation, transport and real estate. At Deloitte, Shruti focusses on Antitrust Practice and Dispute & Litigation Support Services. Shruti is an Economist with MSc in Finance and Economics from London School of Economics (LSE), and Bachelors in Economics from Shri Ram College of Commerce (SRCC).

The choice of dispute resolution mechanism may also be strategic, depending on the intent and stakes involved.

Lastly, it is important to execute a clearly defined contract, preferably with appropriate allocation of commercial risks

**B) PRECAUTIONS TO CONSIDER DURING THE CONSTRUCTION OR OPERATIONAL PHASE OF A PROJECT**

Continuous monitoring throughout a contract's lifecycle can assist in the timely detection of malpractices or fraud and encourage appropriate record keeping. Factors such as technology and economic or 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 a change in scope. 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 or record keeping, can also be used to improve stakeholder management, increase transparency, and enhance the ability to measure performance.

**C) EFFECTIVELY USING THE DISPUTE RESOLUTION ECOSYSTEM**

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 effectively use the dispute management ecosystem—ranging from consultation with experts (legal/technical to assess the merits of the dispute or claim) to use of technology (forensic technology for the detection of malpractices or evidence gathering)—early on in the process to determine the optimal dispute resolution strategy, and save time, and cost.



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 experts is becoming common place.

Independent assessment by experts with the relevant expertise and experience, can provide valuable assistance in the settlement of disputes - in both 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 reports can help in narrowing the areas of dispute and thereby, allowing faster resolution.

An interesting development is the expected increase in use of mediation to resolve commercial disputes. The recent amendment to the Commercial Courts Act prescribes that a suit that does not contemplate any urgent relief shall not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation.

India has set an ambitious goal of becoming a USD 5 Trillion economy by 2024. One of the focus areas identified by the Prime Minister in enabling this growth is the construction and infrastructure sector. Development of large scale infrastructure and well executed construction projects can help the country meet those objectives and set benchmarks for future development activity. The role of strong project management and clear dispute resolution mechanisms can no longer be discounted.



**Adrija** is an Associate Director with the Forensic & Dispute practice of Deloitte India with close to a decade of professional work experience. At Deloitte, Adrija primarily focusses on performing economic damage quantification in litigation and arbitration of commercial disputes. She has extensive experience in preparation of Expert Reports and Counter-Claim Assessments in the context of Premature Contract Termination, Breach of Contracts, Construction Contracts Dispute, Analysis of Delays caused in Infrastructure Projects, Valuation in Shareholder and Joint venture disputes etc. Adrija holds a Masters in Financial Economics from University of Oxford and a Bachelors in Economics from St. Stephen's College Delhi.